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Environmental Watchdogs Take a Bite Out of Chilean Foreign Investment: Mandatory Environmental Impact Statements May Affect Foreign Investment in Chile

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Environmental Watchdogs Take A Bite Out Of Chilean Foreign Investment: Mandatory Environmental Impact Statements May Affect Foreign Investment In Chile

Jennifer Anne Scott*

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I. INTRODUCTION

Environmental policy tends to take a back seat to economic policy in developing nations.¹ Such is the case with Chile, a country focused on developing its economy and emerging as a stable nation well-respected in the international community.² However, neglect of the environment can persist only so long before citizens stand up and take action to protect their health, welfare and surroundings.³ Chile, a third world nation devout with pollution, has suddenly emerged into the modern environmental arena. Recently, Chilean citizens prevented a mega-forestry project proposing to harvest their native forests. Despite the government's concentration on modernizing the economy, these citizens persevered and even took their case all the way to the Chilean Supreme Court.

This Comment examines the recent Chilean Supreme Court Decision⁴ and the subsequent environmental legislation making foreign investment and development much more difficult in Chile.⁵ Part II of this comment discusses the economic, environmental and legal background of Chile. Understanding Chile's past treatment of foreign investors enables the reader to speculate about the future treatment and impact on foreign investment as a result of the recent Supreme Court decision. Part III sets out the case and explains the Chilean Supreme Court's reasoning. Part IV discusses the impact of the decision on foreign investment. Part V concludes this Comment with some anticipated implications of the Supreme Court decision. In order to understand the fundamentals of the case and the implications of the decision, this Comment sets forth the necessary economic, environmental and legal backgrounds.

1. See Joseph G. Block & Andrew R. Herrup, *Symposium NAFTA at Age One: A Blueprint for Hemispheric Integration? I. The Environment Side Agreement: Addressing Environmental Concerns Regarding Chilean Accession to NAFTA*, 10 CONN. J. INT'L L. 221 (1995) (establishing that Chile's unregulated growth resulted in environmental problems for the nation).

2. See generally *id.* at 246 (describing Chile's substantial natural resource management problems in light of its economical reliance on the exportation of raw goods).

3. *Id.*

4. RENACE (the National Ecology Action Network), *Defensores del Bosque Chileno, Instituto de Ecología Política and Coprique, Senator Horvath, Senator Díaz, Deputy Girardi, and Deputy Navarro v. CONAMA and COREMA*, Decision Mar. 19, 1997 by the Third Courtroom of the Supreme Court of Chile, Santiago, Chile [hereinafter CONAMA decision] (the nation of Chile is behind in publishing its Supreme Court decisions and thus decisions are published up to July of 1996, however, there is a translated copy of this decision on file with *The Transnational Lawyer*) (translated copy of the case obtained from Savia International, Ltd. a subsidiary of Trillium Corporation).

5. See generally Array of 'Green' Headaches for Chile, *New Environmental Rules Are Put to the Test*, LATIN AMERICA REGIONAL REPORTS: SOUTHERN CONE (May 20, 1997) [hereinafter Array].

II. BACKGROUND

A. Economic Background

Chile's economy has been the driving factor controlling its environmental legislation.⁶ As a developing nation, Chile manifested a desire to improve its economy by encouraging foreign investment through government subsidies and tax credits.⁷ However, such promotion of foreign investment took place without any regard for environmental protections or concerns of resource exploitation.⁸

1. Chilean Economy

Chile maintains a strong and booming economy, surpassing its Latin American neighbors.⁹ A generous endowment of natural resources provides the foundation for the Chilean economy.¹⁰ Structurally, the economy is based largely on natural resources,¹¹ such as mining, forestry,¹² fishing, and agriculture.¹³ Predominately

6. See generally Scott C. Lacunza, *From Dictatorship to Democracy: Environmental Reform in Chile*, 19 HASTINGS INT'L & COMP. L. REV. 539, 542 (1996) (posing the notion that by focusing primarily on rapid economic development, Chile neglected its environment in numerous ways).

7. *Id.*

8. See generally Lacunza, *supra* note 6, at 547 (theorizing that the push for economic growth and openness of the free market system displaced any motivation for effective environmental regulation during the bulk of the Pinochet years, resulting in Chile's lax enforcement of existing environmental laws). Furthermore, Chile's economic focus began in the 1970s, whereas environmental legislation was not drafted until 1994. *Id.*

9. See John Otis, *Forestry in Chile at Glance*, (Jan. 1997) <<http://www.atamericas.com/pages/forglan.htm#Trillium>> (copy on file with *The Transnational Lawyer*) [hereinafter *Forestry in Chile*] (depicting that Chile's GDP growth averages 4% per year). With a population of 13.5 million inhabitants, Chile's small economy has a gross domestic product (GDP) of approximately 40 billion dollars. *Id.*; see also Roberto Zahler, *The Background, Rationale, and Success of Chilean Economic Policy* 16 LOY. L. A. INT'L & COMP. L.J. 275, 277 (1994) (reporting that Chile's GDP per capita is about 3,000 dollars); see also John H. Christy, *Opportunity: Chile Has the Strongest Economy in Latin America, But You'd Never Know It From the Stock Market. Do Bargains Lurk?* FORBES 374 (vol. 159, No. 8) (Apr. 21, 1997).

10. See generally *Forestry in Chile*, *supra* note 9 (noting that Chile has a total of 75.7 million hectares of forest, 12% of which is managed as commercial timber). Chile produces 2% of the world's pulp in an industry in which no one country produces more than 6%. *Id.*

11. Lacunza, *supra* note 6, at 546-47. See generally Sandra Orihuela, *Latin America: A New Era For Mining Investment*, 30 INT'L LAW. 31, 44 (1996) (declaring that Chile currently supplies approximately 35% of the western world's copper production).

12. Lacunza, *supra* note 6, at 546-47. See generally *Forestry in Chile*, *supra* note 9 (asserting that between 1975 and 1994, the Chilean forestry was a key growth area, boasting an average growth rate of 6.4% per year and increasing the size of the industry by a total of 57%). Saw wood and pulp are the chief forest products and account for 65.5% of total production in the industry. *Id.*

13. Lacunza, *supra* note 6, at 546-47. See Block & Herrup, *supra* note 1, at 253 n.176; see also Don Podesta, *South Americans Bank on NAFTA; Trade Pact's Passage Viewed as Crucial of U.S.* WASH. POST, Nov. 13, 1993, at A20 (quoting Wilfredo Marcelo of the Institute of Political Ecology).

relying on the exportation of raw, un-processed goods,¹⁴ Chile's economy remains primitive.¹⁵ In contrast, the exportation of manufactured goods provides increased value to a nation's economy, because such goods create jobs requiring people to process the goods.¹⁶ Thereby, the economy as a whole prospers from the exportation of manufactured goods rather than raw materials.¹⁷

Chile's free market model encouraged the exploitation of its natural resources¹⁸ and discouraged governmental interference.¹⁹ The industries involved with exploiting natural resources are crucial to the Chilean economy, such that pressure to minimize environmental impacts is not very influential.²⁰ One of the major industries facing the dangers of exploitation in Chile is the timber industry.²¹ The Chilean forestry industry, now the second largest export industry, generated over US\$1.2 billion in exports in 1993.²² However, with dwindling forestry resources and no plans for reforestation,²³ Chile's heavy dependence on exploitation of natural resources creates many environmental and economic problems.²⁴ Aware of its limited economy, the Chilean government attempts to strengthen its economy by enticing foreign investors to its resource-rich nation.²⁵

14. See *Foreign Trade News Archives* <<http://www.gekkonet.com/CHIPtrade/trade.htm>> (visited Jan. 26, 1998) (last updated May 1997) (copy on file with *The Transnational Lawyer*) [hereinafter *Trade News*] (relating that minerals and ores accounted for close to half of the 1995 exports). Furthermore, food and agricultural products made up more than one-quarter of the total 1995 exports. *Id.* Forest products comprised over fourteen percent of all 1995 exports. *Id.*

15. See generally Block & Herrup, *supra* note 1, at 246 (claiming that Chile faces substantial natural resource management questions because its economy is heavily weighted toward extractive industries); see also Zahler, *supra* note 9, at 278; see also *Chile: Overview of Recent Macroeconomic Performance and Trends* Chronicle of Latin America Economic Affairs (Sept. 21, 1995) [hereinafter *Chile Overview*] (illustrating Chile's continued dependency on primary exports).

16. *Id.*

17. *Id.*

18. Lacunza, *supra* note 6, at 547. See generally Beth Ann Bivona, *Regional Report: What Price Are We Willing to Pay For Our Environment?*, 5 DET. C.L. J. INT. L. & PRAC. 161, 172 (1996) (relating that according to the Chile Ecology Action Network, 75% of the production forests have been destroyed, and more than half of the protected forests have been cleared).

19. See Lacunza, *supra* note 6, at 543 (explaining that on September 11, 1973 General Augusto Pinochet Ugarte, commander in chief of the Chilean army, overthrew Chile's constitutional government and seized power through a bloody coup d'état). Pinochet was a staunch laissez-faire capitalist, who concentrated on rapid economic growth at all costs. *Id.* at 544. Pinochet eliminated price controls, reduced tariffs across the board, privatized most of the state-owned enterprises, lowered taxes, liberalized investment rules, and reduced trade barriers. *Id.*

20. Block & Herrup, *supra* note 1, at 253.

21. *Id.*

22. *Id.* See David Pilling, *The Chips are Down*, FIN. TIMES, Aug. 24, 1994, at 10.

23. See NEW WEBSTER'S COLLEGIATE DICTIONARY 990 (9th ed. 1991) (defining reforestation as the action of planting need seeds or young saplings to replace the trees cut down).

24. Block & Herrup, *supra* note 1, at 253.

25. See generally Roger Turner, *Chile: A Unique Paradigm in Latin America*, BUSINESS AMERICA (Vol. 118, No. 4, ISSN: 0190-6275) (Apr. 1, 1997) (discussing Chile's economic growth in terms of increased foreign investment).

2. Chilean Foreign Investment

Chile's economic stability and impressive fourteen year consecutive economic growth provides encouragement for foreign investment in Chile.²⁶ As a nation with few environmental restrictions and an advantageous tax system, Chile is an ideal destination for foreign investors.²⁷ Chile's steady economic growth and non-discriminatory attitude towards foreign investment established reliability in the international community.²⁸ In relation to other countries, Chile receives some of the largest amounts of foreign investment, despite its past legislation.²⁹ Until recently, foreign capital had to stay in Chile for at least three years before it could be remitted³⁰ abroad.³¹ Today, however, remittance³² is permitted after one year and capital can be repatriated³³ in twenty-four hours.³⁴ The ability to repatriate profits appeals to investors, who would like to receive their earnings quickly.³⁵ Moreover, the repatriation of profits encourages foreign investment because an investor's gain is not required to remain in Chile.³⁶ Consequently, Chile has the highest credit rating of any Latin American nation, which ultimately entices foreign investors.³⁷

26. See generally *id.* (setting forth that Chile has average annual GDP growth in excess of 6% since 1985, with 7.2% in 1996). The largest portion of the new investment in 1996 was in the services sector, consisting of 51%, followed by an increase of 19% in mining, and 18% in the industrial sector. *Id.* In fact, in 1996 there was a 51% increase in foreign investment compared to the 1995 levels. *Id.*; see also Zahler, *supra* note 9, at 279 (declaring that in 1994, foreign investment in Chile made up approximately 4% of its GDP, which is a very high rate on a worldwide basis); see also *Foreign Investment Jumps 51%*, SOUTH AM. RPT., (Apr. 1, 1997) (Vol. 2, No. 8) (declaring that the government's Foreign Investment Committee reported that foreign investment in Chile came to US\$4.578 billion, up 51% from 1995 figures). The main reason for the increase was Decree Law No. 600, which made foreign investment easier. *Id.*; see also *Chile: Economy Grows By Over 8% In Third Quarter*, SOUTH AM. BUS. INFORMATION, (Nov. 25, 1997) (stating that foreign investment in the third quarter grew by 15.4% far exceeding the 9.4% growth of the second quarter). According to the Central Bank, 1997 was another prosperous year for Chile with third quarter economic activity growing by 8.1%, which resulted in an average growth rate of 6%, even higher than the predicted growth rates. *Id.*

27. See *Chile Overview*, *supra* note 15 (expressing that Finance Minister Eduardo Aninat emphasized that Chile has recently been rated as one of the emerging market economies with the least risk for foreign investors). In July 1995, Standard & Poor's, a major Wall Street risk analysis firm, upped Chile's rating from "Triple B plus" (BBB+) to "Single A minus" (A-), placing Chile in first place among all Latin American countries rated. *Id.*

28. Zahler, *supra* note 9, at 279.

29. *Id.* at 282.

30. See *infra* note 32 (providing the definition of remittance).

31. Zahler, *supra* note 9, at 283.

32. See BLACK'S LAW DICTIONARY 1294 (6th ed. 1990) (defining "remittance" as money sent by one person to another, whether in specie, bill of exchange, check or otherwise); see also Zahler, *supra* note 9, at 279 (establishing that remittance refers to sending Chilean money out of Chile and into other foreign nations).

33. See BLACK'S LAW DICTIONARY 1294 (6th ed. 1990) (defining "repatriation" as the return of profits from foreign investments to the investor's country).

34. Zahler, *supra* note 9, at 283.

35. See generally *id.* (addressing the process of profit remittance in Chile).

36. *Id.*

37. Turner, *supra* note 25.

B. Environmental Background

International developers invest in nations with strong stable economies and a political agenda that fosters their proposed development.³⁸ Historically, Chile's lenient policy towards environmental protection, in addition to its strong economy, established an ideal location for foreign investors and developers.³⁹ Such traits have enticed United States based firms wishing to escape the harsh environmental laws of their nation.⁴⁰ However, in light of depleting resources and increased air⁴¹ and water pollution,⁴² Chile was forced to restructure its environmental agenda.⁴³ Bearing in mind such environmental progress, it is necessary to examine the development of these environmental laws and how these new tough regulations will affect current and future business ventures in Chile.⁴⁴

1. Chile's Evolving Environmental Policy: From Pinochet to Present

As a developing nation, Chile's initial concern was improving its economy.⁴⁵ Policies, such as environmental protection, were too expensive for such a poor nation, and thus were not considered by the government.⁴⁶ The quest for international recognition and a booming economy overshadowed concerns for impacts on the environment and detriment to Chile's natural resources.⁴⁷ As the government passed hands, attention toward environmental concerns grew despite the govern-

38. See generally Zahler, *supra* note 9, at 275 (considering the background of Chile's economic policy).

39. See generally *Trade News*, *supra* note 14 (dealing with foreign investment in Chile).

40. Lacunza, *supra* note 6, at 542. See Block & Herrup, *supra* note 1, at 221 (asserting that the United State's environmental regulations are more stringent then regulations found in Chile). In order to enter into trade agreements with the U.S., Chile must restructure its environmental policies. *Id.*

41. See Block & Herrup, *supra* note 1, at 249-50 (describing Santiago's air pollution as among the worst in the world and so severe that many citizens wear gas masks). In fact, Santiago pollution meters regularly register "critical" or "dangerous." *Id.*

42. See *id.* at 251 (stating that the copper and mining industries contribute heavily to water pollution in Chile). In 1993, Chile's Health Ministry declared water contamination as the country's leading health problem. *Id.* In fact, bioaccumulation of mercury and cadmium and other contaminants in seafood may threaten one of Chile's export industries. *Id.*

43. See *id.* at 246 (establishing that Chile is making substantial efforts to identify and redress its environmental problems). Steps toward environmental protectionism stem from Chile's desire to join NAFTA, which is an issue out of the scope of this comment. *Id.*

44. See generally *id.* (explaining Chile's motivation to remedy its environmental problems comes from its desire to ensure free trade with the United States).

45. See Lacunza, *supra* note 6, at 547.

46. See Steven G. Fishbach, *The Quiet Revolution: Trade and Investment Liberalization in Chile and Jamaica*, 48 ADMIN. L. REV. 527, 542 (1996) (reporting that after the Pinochet regime and in light of a democratic government, foreign investment continued and today Chile is arguably the most economically developed country in Latin America).

47. See Orihuela, *supra* note 11, at 47.

ment's goal to boost foreign investment.⁴⁸ During the Pinochet era, the rapid economic development overlooked the environment.⁴⁹

Despite the prosperous economy, unregulated growth saddled the country with serious environmental problems, including severe air pollution,⁵⁰ extensive deforestation, and widespread water contamination.⁵¹ As described by the post-military government, Chile's economic growth transpired at the expense of the environment. Additionally, Chile cannot sustain such growth in the context of dwindling natural resources. In light of the nature of the Chilean economy, which is heavily weighted toward extractive industries, Chile faces substantial natural resource management questions.⁵²

2. The Importance of Maintaining the Environment—Sustainable Development

In an attempt to address the problems associated with its unbridled growth, the Chilean government created the National Environmental Commission (CONAMA)⁵³ and the decentralized Regional Environmental Commission (COREMA).⁵⁴ These agencies were formed to design an environmental policy that coordinates ongoing ideas from business, academic, and public sectors.⁵⁵ The mission statement of these two commissions calls for what has been termed "sustainable development."⁵⁶

48. See generally CHILE LAW DIGEST REVISER, MARTINDALE-HUBBELL INTERNATIONAL LAW DICTIONARY 5 (defining foreign investment as any investment made with freely-convertible foreign exchange; new and used foreign capital goods; various forms of capitalized technology and credits related to foreign investment).

49. See Block & Herrup, *supra* note 1, at 243, 255.

50. See *id.* at 250 (discussing the severity of the air pollution problem in Chile).

51. Lacunza, *supra* note 6, at 542; see Block & Herrup, *supra* note 1, at 250 (describing the extent of the water pollution problem in Chile).

52. See Block & Herrup, *supra* note 1, at 246 (explaining that Chile's economy, particularly its export industries, depends heavily on exploitation of its natural resources). Environmental groups estimate that 90% of Chile's exports come from natural resources. *Id.* Exploitation of these resources causes many environmental problems, however the industries involved are so important to the Chilean economy, pressure to minimize environmental impacts are not as strong as in other areas. *Id.*

53. See Carol Heitnam, *Chile-Environmental Consulting Services*, 1995 NAT. TRADE DATA BANK, MARKET RPTS., at 12 (Nov. 21, 1995) (setting forth that the Comision Nacional de Medio Ambiente (CONAMA) was created on June 5, 1990, as the governmental policy coordinating agency). CONAMA's mandate is to develop a unified environmental legislative and administrative system, to coordinate and provide advice to the ministries that regulate and enforce and whose areas of responsibility touch on environmental matters, and to supervise a national environmental plan of action to make sure it all works. *Id.*

54. COREMA is the regional equivalent of CONAMA.

55. Otis, *supra* note 9.

56. *Id.* See Roger W. Findley, *Legal and Economic Incentives for the Sustainable Use of Rainforests*, 32 TEX. INT'L L.J. 17, 19-20 (1997).

The Sustainable Chile program is an initiative between ecological organizations, academics, and social leaders.⁵⁷ This program exists to encourage the social, political and economic transformation in Chile, from the current development model to one which is oriented towards sustainability.⁵⁸

In as early as 1994, the Environmental Framework Law provided a definition of sustainable development.⁵⁹ It is a process of sustained and equitable improvement of the quality of life which must be founded in appropriate measures of conservation and protection of the environment without jeopardizing the expectations of the future generations.⁶⁰ This definition, provided by Chilean law, accentuates the need to apply appropriate measures of conservation⁶¹ and protection of the environment to create a suitable foundation for the sustainable development of Chile's natural resources.⁶² According to Chilean law, to satisfy the objectives of sustainable development⁶³ the government must allow for the regenerative capacity of the resource, achieve an improvement of the environment and prevent the possible deterioration of the environment.⁶⁴

C. Legal Background

Chile's legislation also contributes to attracting foreign investors.⁶⁵ Two primary legal mechanisms exist for actual foreign investment in Chile: the Foreign Investment Statute⁶⁶ and Chapter XIV of the Central Bank's Compendium of Foreign Exchange Rules.⁶⁷ However, in 1994 the Chilean legislature created an

57. *Sustainable Chile*, CHIPER, Environmental Reports Library Home Page (Oct. 6, 1997) <<http://www.chiper.cl/library/020.html>> (copy on file with *The Transnational Lawyer*).

58. *Id.*

59. Pedro Fernandez Biterlich, *In the Wake of the Failure of the Second Earth Summit: How to Define Sustainable Development in Chile?* CHIPER, Environmental Reports Library Home Page (July 7, 1997) <<http://www.chiper.cl/library/009.html>> (copy on file with *The Transnational Lawyer*) (Author Pedro Fernandez Biterlich is a Consultant in Environmental Law and also the former President of CODEFF).

60. *Id.*

61. *Id.* See La Ley Bases del Medio Ambiente (Basic Law on the Environment) No. 19,300, enacted March 9, 1994, arts. 2 and 41 [hereinafter EFL]. Conservationist actions are acceptable that permit the inclusion of uses, rational exploitation and restoration in some cases, of the components of the environment whose goal is to assure the permanence, regenerative capacity and associated biodiversity of the ecosystem. *Id.*

62. *Id.*

63. See generally *id.* (discussing that sustainable development provides for the use of resources in a permanent form without compromising the expectations of future societies).

64. *Id.*

65. See Turner, *supra* note 25.

66. See Foreign Investment Law, Decreto Ley 600 (Decree 600), enacted July 11, 1974, (amended) Mar. 1993 [hereinafter DL 600]; see also Orihuela, *supra* note 11, at 45.

67. See Orihuela, *supra* note 11, at 45; see also Turner, *supra* note 25.

Environmental Framework Law to provide for the protection of the environmental and natural resources of the nation.⁶⁸

1. Chilean Investment Law

Chile's economy and legislation are designed to foster foreign investment.⁶⁹ Furthermore, the process of investing in Chile furthers the nation's economic agenda.⁷⁰ The most important foreign investment mechanism utilized is the Foreign Investment Statute. This statute provides for the formation of a contract between the foreign investor and the Chilean State.⁷¹

As a means of attracting foreign investment, the Foreign Investment Statute contains numerous inducements.⁷² First, investment is authorized by a contract between the Chilean state and the investor.⁷³ This contract specifies the rights and duties of each party and represents the obligation of the Chilean state upon which legal relief may be sought.⁷⁴ An important characteristic of such contract is that it cannot be modified unilaterally and therefore the investor is fully assured the terms will remain stable.⁷⁵ This contract provision is designed to protect the foreign investor against subsequent changes in the law which might affect the terms under which the investment was made.⁷⁶

The Foreign Investment Statute, via such contracts, addresses the right to choose tax invariability of ten years.⁷⁷ Pursuant to the statute, the investor may opt to include in the investment contract a tax provision locking in for a ten, and in some cases twenty, year period a prescribed income tax treatment for the invest-

68. See EFL, *supra* note 61; see also Block & Herrup, *supra* note 1, at 262 (illustrating that environmental framework laws set out basic legal principles starting with declarations of policy and goals, followed by procedural principles for environmental decision making). EFL consists of 93 articles, grouped into six larger titles, and ten transitional articles. *Id.* According to the United Nations Environment Programme, framework laws are broader in scope than environmental laws in the United States because framework laws do not create specific regulations. *Id.* Framework laws organize and focus preexisting legislation. *Id.* The EFL is a compromise, reflecting concerns of both environmental groups and business organizations. *Id.*

69. *Id.* Leon Larrain and Stuart Palmer, *Chile Struggles to be a Center For International Investment*, 4 J. INT'L TAX'N 499 (Nov. 1993).

70. See Lacunza, *supra* note 6, at 544-45 (implying that liberalized investment rules allowed businesses to operate unfettered and contributed to attracting US\$6 billion in foreign investment from 1985 to 1996).

71. Orihuela, *supra* note 11, at 46.

72. *World Bank Report on Chilean Debt Conversion, with Chilean Rules on Investments With Foreign Debt Instruments and Provision in a Debt Restructuring Agreement For Such Investments*, 26 INT'L LEGAL MATERIALS Number 3, 819, 831 (May 1987) [hereinafter *World Bank Report*].

73. *Id.*

74. Orihuela, *supra* note 11, at 46.

75. Francisco Javier, *Proceedings of the Seventh Annual Conference on Legal Aspects of Doing Business in Latin America: Adapting to a Changing Legal Environment*, 9 FLA. J. INT'L L. 1, 59 (1994).

76. *World Bank Report*, *supra* note 72, at 831.

77. Orihuela, *supra* note 11, at 46; *Chile Investment Climate Statement for 1997*, International Market Insight Reports, (Thur., June 5, 1997) [hereinafter *Chile Investment*].

ment.⁷⁸ Foreign investors can opt for either national tax⁷⁹ treatment or a guaranteed rate⁸⁰ for the first ten years of an investment.⁸¹ Chilean tax laws also encourage foreign investment.⁸² Foreign investors and local businesses are treated equally, but foreign investors can take advantage of fixed-rate tax options⁸³ to limit liability from future adverse tax changes.⁸⁴ The desirability and flexibility of Chilean foreign investment and tax laws contribute to Chile's increasing foreign investment levels.⁸⁵

Secondly, the statute provides for a nondiscriminatory treatment provision within the national industry.⁸⁶ Chile's Constitution establishes basic principles on which foreign investors may rely, such as guaranteeing uniformity in application of law to both Chileans and foreigners,⁸⁷ and prohibiting discrimination.⁸⁸ The investor is assured of non-discriminatory treatment in legal and regulatory provisions affecting investment activities in Chile.⁸⁹ Therefore, foreign investors and developers have an additional incentive to invest knowing that foreign corporations will be treated no differently than resident corporations.⁹⁰

Thirdly, in addition to both the choice of tax and the nondiscriminatory provisions, the Foreign Investment Statute provides for the right to repatriate capital after three years subject to its previous sale or liquidation.⁹¹ Pursuant to recent amendments to the Foreign Investment Statute, the three year wait to repatriate capital has been reduced to just one year.⁹² Although, Chile attempts to keep capital

78. *World Bank Report*, *supra* note 72, at 832.

79. *See Chile Investment*, *supra* note 77 (discussing that foreign investors may choose to have their profits taxed at the rate that applies to local firms, the national tax rate, which is currently 35% on fully-distributed firms). Unfortunately, Chile and the United States have no tax treaty, so U.S. investors' income may be taxed in both nations. *Id.* However, the IRS typically grants credits for taxes paid in Chile. *Id.*

80. *See id.* (explaining that it is currently set at 42%).

81. *Id.*

82. Larrain & Palmer, *supra* note 69, at 499. *See* Edward A. Fallone, *Latin American Laws Regulating Foreign Investment*, SB04 ALI-ABA-American Bar Assoc. Continuing Legal Education (July 8, 1996) (foreign direct investment involves the ownership and control of the enterprise); *see also* Turner, *supra* note 25 (explaining that Chile has the highest credit rating of any Latin America nation). This continues to attract foreign investors to Chile. *Id.*

83. *See generally* Peter D. Byrne, *Foreign Tax Problems of US Companies Doing Business in Latin America*, 50 U. MIAMI L. REV. 483, 489 (1996) (discussing that Chile imposes a 15% tax rate on corporate earnings and subjects dividends to personal income rates of up to 45%). A credit for tax paid at the corporate level is allowed. *Id.* The bulk of Chilean tax is deferred until distribution. *Id.*

84. Larrain & Palmer, *supra* note 69, at 499.

85. *See* Lacunza, *supra* note 6, at 545-46; *see generally* Turner, *supra* note 25 (noting that Chile's economic growth results from increased foreign investment).

86. *See* Lacunza, *supra* note 6, at 545-46; *see also* Orihuela, *supra* note 11, at 46.

87. *Constitucion Politica De la Republica* [hereinafter *Constitution*] [CPE] Decreto Supremo No. 1.150, DE 1980 art.19. *See* Orihuela, *supra* note 12, at 46 (referring to non-Chileans as 'foreigners').

88. *See* *Constitution*, *supra* note 87, arts. 19, 22, and 98; *see also* Orihuela, *supra* note 11, at 46.

89. *World Bank Report*, *supra* note 72, at 832.

90. *See* Orihuela, *supra* note 11, at 46; *see also* *Chile Investment*, *supra* note 84.

91. *See* Orihuela, *supra* note 11, at 46; *see also* *Chile Investment*, *supra* note 84.

92. *World Bank Report*, *supra* note 72, at 831.

within its boundaries, it allows capital to leave the country after just one year.⁹³ An investor recognizes that his capital will return to his country and thus has a greater incentive to invest in Chile.⁹⁴

Finally, the Foreign Investment Statute addresses the right to remit profits.⁹⁵ Restrictions on remittance rights are limited to a twenty-four hour prohibition on profits.⁹⁶ Chapter XIX of Banco Central de Chile's Compendium of Rules on International Exchange enables a holder of foreign currency of Chilean debtors to convert such paper into Chilean enterprises and permits.⁹⁷ The ability to acquire earnings within a day assures the return of profits to an investor's country, thus motivating non-Chileans to invest in Chile.⁹⁸

Because foreign investors are offered favorable terms regarding taxation, expatriation of profits, legal protection, and respect for property rights, Chile has attracted US\$6 billion in foreign investment since 1985.⁹⁹ Chile's agenda has focused on economic growth until the twentieth century, when air and water pollution threatens the health and welfare of its citizens and depleting natural resources threatens the continued economic prosperity.¹⁰⁰

2. Environmental Framework Law of 1994

Although the nation has enacted more than two thousand environmental laws, until 1994 no organized framework for environmental administration or regulation existed. Chile enacted the most comprehensive environmental protection measure in the country's history, the Environmental Framework Law (EFL) of 1994,¹⁰¹ in order to provide stability and unity to the administration.¹⁰² The EFL sets out basic legal principles, but does not attempt to codify all relevant statutory provisions, nor

93. See generally *id.* (providing that the Chilean government encourages foreign invest by imposing legislation allowing for the repatriation of capital within three years).

94. *Id.*

95. See Orihuela, *supra* note 11, at 46; see also *Chile Investment*, *supra* note 77.

96. *World Bank Report*, *supra* note 72, at 831.

97. See *id.* at 830 (depicting that the remittance rights provided under Chapter XIX may be an added incentive, and some Chilean residents may avail themselves of Chapter XIX procedures, perhaps utilizing shell companies). Therefore, the approval procedures of Banco Central attempt to investigate the extent to which Chapter XIX investors are indeed foreign. *Id.*

98. See generally Zahler, *supra* note 9, at 282 (setting forth profit remittance procedures in Chile).

99. See Lacunza, *supra* note 6, at 545-46; see also Turner, *supra* note 25 (noting for example that in 1996, there was a 46 percent increase in foreign direct investment, compared to 1995 levels). The largest portion of this new investment, 54% was in the services sector, followed by an increase of 19% in mining and 18% in the industrial section. *Id.*

100. See generally Block & Herrup, *supra* note 1, at 249-50 (illustrating the dangerous pollution levels in Chile).

101. EFL, *supra* note 61. See Felipe Paez, Note, *Environmental Framework Laws in Latin America*, 13 PACE ENVTL. L. REV. 625, 632-46 (1996).

102. Paez, *supra* note 101, at 632-46.

does it create specific regulations.¹⁰³ Nevertheless, the EFL accomplishes three expansive objectives in Chile: (1) it implements a formal system of review of environmental impacts of proposed projects; (2) it redefines the role of CONAMA¹⁰⁴ and establishes regional environmental authorities; and (3) it allows for citizens suits to be filed against all polluters, including the government.¹⁰⁵

The EFL establishes a system of environmental impact review, which applies to significant investment projects. A study of environmental impact must be prepared for any activity that could pose a risk to public health, have a significant adverse effect on renewable natural resources, lifestyles, customs, or tourism, or have other specified adverse impacts.¹⁰⁶ Requiring environmental impact statements (EIS) for any activity deemed a potential danger to health, tourism, or natural resources is quite expansive.¹⁰⁷ Thus, an EIS may be required for any proposed development activity in Chile.¹⁰⁸ The creation of EISs are both timely and expensive, serving as a potential deterrent for investment in Chile.¹⁰⁹ The enactment and enforcement of such a potentially powerful law can have great effects on the economic development of Chile.¹¹⁰ CONAMA created the EFL¹¹¹ in order to organize Chile's existing environmental laws.¹¹² Most importantly, this new law changed the procedures of reviewing the industrial effects on the environment.¹¹³ The Framework assigned responsibility for administration of the evaluation system to the relevant Regional Commission on the Environment (COREMA)¹¹⁴ for matters affecting only one region, and to the National Commission on the Environment

103. See Block & Herrup, *supra* note 1, at 262 (setting forth the relative purposes of Environmental Framework laws).

104. See Heitnam, *supra* note 53, at 12 (defining CONAMA as the National Environmental Commission).

105. Karrin Ranta, Comment, *Balancing Hardrock Mining and the Environment: The Chilean Model*, 6 COLO. J. INT'L ENVTL. L. & POL'Y 423, 433 (1995). See Block & Herrup, *supra* note 1, at 263.

106. Paul J. Schlauch & Lawrence J. Jensen, *Chilean Environmental Framework Law*, 7 COLO. J. INT'L ENVTL. L. & POL'Y 319 (1996). See EFL, *supra* note 61, tit. II, para. 2, art. 11(a)-(f); see also Paez, *supra* note 101, at 634 n.63 (defining the criteria for the EIS as (a) a risk to health; (b) adverse effects on renewable natural resources; (c) resettlement of communities, or any other alteration of peoples' lifestyles and customs; (d) proximity to towns, protected areas, or resources that may be affected, considering the environmental value of the areas in which the project or activity is to be implemented; (e) significant alteration of scenic or tourist values, measured in terms of magnitude and duration; or (f) alteration of monuments).

107. See Paez, *supra* note 101, at 634 (detailing the criteria for an EIS); see also EFL, *supra* note 61, tit. II, para. 2, arts. 8, 10(a)-(r) (defining EIS).

108. *Id.*

109. See Schlauch & Jensen, *supra* note 106, at 329 (speculating that the EFL's EIS requirement may have an effect on business in Chile).

110. Paez, *supra* note 101, at 634.

111. EFL, *supra* note 68. See Ranta, *supra* note 105, at 423 n.80.

112. Ranta, *supra* note 105, at 432.

113. *Id.*

114. See Schlauch & Jensen, *supra* note 106, at 320 n.2 (explaining that the country of Chile is divided up into several regions and thus to administer environmental laws, the Framework provided for the creation of regional agencies to enforce the laws and evaluate the environmental impact studies). The COREMAs are the regional branches of the agency, known as CONAMA. *Id.*

(CONAMA)¹¹⁵ for activities effecting more than one region.¹¹⁶ CONAMA is responsible for proposing environmental policies for the government, administering the system of environmental impact review, and coordinating the process of developing environmental quality standards.¹¹⁷

EISs are not mandatory for all operations, but are becoming increasingly necessary as both industry and environmental concerns grow. The EFL mandates an EIS prior to approval of timber operations in certain situations: forestry development or exploitation projects; in fragile soils or lands covered by native forests; and cellulose, paper pulp and paper industries, chip plants, plants for working wood, and sawmills, all of an industrial size.¹¹⁸ Furthermore, an EIS must consider the following: "(1) description of the project;¹¹⁹ (2) base line data; (3) detailed description of effects, characteristics or circumstances that give rise to a need for an EIS; (4) a forecast of environmental impact of the project, including eventual risks;¹²⁰ (5) steps that will be taken to minimize the adverse effects of the project and restoring actions that will be performed, when pertinent; (6) a follow-up plan of the relevant environmental variables that give rise to the EIS; and (7) a plan for fulfillment of applicable environmental legislation."¹²¹

Under this new system of environmental review and regulation, an EIS is required for proposed projects that may cause an environmental impact and major projects,¹²² including mines and smelters, wastewater treatment plants, reclamation projects, and tailing ponds.¹²³

Pursuant to Article XI of the EFL, an EIS, as opposed to a declaration, must be submitted if the project: (1) poses a risk to human health; (2) may have a significant adverse effect on the quantity or quality of renewable natural resources; (3) involves the re-settlement of human communities or alteration of their lifestyles or customs; (4) may significantly alter the land-scape or value of an area for tourism; (5) may adversely affect population, resources, or protected areas; or (6) may cause

115. See *id.* (setting forth that CONAMA was established in 1990 and operates on a decentralized basis, subject to supervision of the President of the Republic through the Secretariat General of the Ministry of the Presidency). This agency is administered by an executive director and controlled by its executive council. *Id.*

116. *Id.* at 320.

117. *Id.* at 320 n.2. See EFL, *supra* note 61, art. LXXI; see also Heitnam, *supra* note 53, at 12.

118. *Id.* See EFL, *supra* note 61, tit. II, para. 2, art. 10(m).

119. See Schlauch & Jensen, *supra* note 106, at 320 (setting forth that an EIS must describe in detail the characteristics of the proposed activity or project); EFL, *supra* note 61, arts. I, II, and XIII.

120. See Schlauch & Jensen, *supra* note 106, at 320 (explaining that an EIS must analyze and evaluate its environmental impacts and potential risks); see also EFL, *supra* note 61, arts. II and XIII.

121. *Id.* See EFL, *supra* note 61, tit. II, para. 2, art. 12(a)-(g); see also Paez, *supra* note 101, at 634 n.64.

122. See Schlauch & Jensen, *supra* note 106, at 322 n.3; see also EFL, *supra* note 61, art. X (describing projects and activities such as airports, highways, ports, regional development plans, mining activities, oil and gas pipelines, industrial plants, activities in national parks, reserves, monuments, or other protected areas and the manufacturing, transporting, storing, disposing of, or recycling of toxic, radioactive, or dangerous substances are subject to environmental impact review).

123. Ranta, *supra* note 105, at 433.

alteration of monuments, places of archeological, anthropological, or historical value, or places of cultural significance.¹²⁴

Based upon legislation in effect at the time of the project, proposed projects falling into a "risk" category, such that they could negatively effect the environment, had to prepare and submit an EIS. Prior to the adoption of the EFL, many companies were already completing voluntary EISs so as to help speed up CONAMA's approval process.

After a completed study or declaration was submitted to either COREMA or CONAMA, the agency had 120 days to review any studies and sixty days to review any declarations. Once approved, COREMA or CONAMA, may require any other state organization to issue the necessary permits or determinations. This complex approval process, coupled with problems inherent in the environmental evaluation system, gave rise to the dispute between environmental groups and the governmental agencies responsible for approving EISs.¹²⁵

Finally, the EFL established citizens suits, allowing citizens and environmental groups to use the courts to challenge polluters.¹²⁶ As long as the citizen can prove that the proposed project may have adverse impacts, the developer would be required to halt his project until an EIS is compiled and approved by CONAMA or COREMA.¹²⁷ This law provided environmentalists with a powerful tool to prevent projects detrimental to the environment.¹²⁸

III. THE CASE: *RENANCE V. CONAMA*

On October 6, 1993 CONAMA established guidelines to evaluate EISs submitted to the agency.¹²⁹ These guidelines were created in response to complaints that the draft EFL¹³⁰ neglected to specify what procedures to follow when reviewing EISs.¹³¹ Since 1993, CONAMA and COREMA have approved numerous projects and subsequently approved an EIS submitted by a United States Forestry Company

124. EFL, *supra* note 61, art. XI. See Ranta, *supra* note 105, at 433; see also Schlauch & Jensen, *supra* note 106, at 322 n.3.

125. *Verdict in the Trillium Case to be Postponed Until March* <<http://www.atamericas.com/pages/news/970131/tril.htm>> (Jan. 31, 1997) (translated version from El Diario) (copy on file with *The Transnational Lawyer*) [hereinafter *Verdict*].

126. See Block & Herrup, *supra* note 1, at 263 (describing EFL's creation of citizen suits).

127. See generally EFL, *supra* note 61 (discussing the conditions under which an EIS must be filed).

128. See generally Block & Herrup, *supra* note 1, at 263 (outlining the provisions of the EFL).

129. *CONOMA Creates Guidelines to Evaluate Environmental Impact Studies*, ENVIRONMENT WATCH LATIN AMERICA CUTTER INFORMATION, Nov. 1, 1993 [hereinafter ENVIRONMENT WATCH].

130. As of October 1993, Chile's Environmental Law Framework was only in draft form, awaiting enactment as legislation.

131. ENVIRONMENT WATCH, *supra* note 129.

proposing to develop Chile's Tierra del Fuego.¹³² As provided in the EFL, environmental groups, along with Chilean legislators,¹³³ brought suit against the government for approving an illegal EIS.¹³⁴

This suit pertains to an administrative decision handed down by both CONAMA and COREMA approving an EIS.¹³⁵ Although the central issue of the case involves Trillium's Rio Condor Project, Trillium was not a party to the suit.¹³⁶ The parties to the lawsuit were Chilean legislators¹³⁷ and environmental groups, such as RENACE,¹³⁸ who sued the governmental agencies, CONAMA and COREMA, for approving a project which would be detrimental to the Chilean environment.¹³⁹ Environmentalists argue that CONAMA and COREMA did not have any legal authority to approve the EIS because there were no regulations setting forth approval guidelines.¹⁴⁰ However, defendants, CONAMA and COREMA, argue that they have legal authority pursuant to a Presidential Order.¹⁴¹ The dispute focuses on the lack of environmental regulations and does not pertain to the virtues or deficiencies of the Rio Condor Project.¹⁴² The decision pronounced by the Third Courtroom of the Supreme Court of Chile dated March 19, 1997, with 3 votes in favor and 2 against, declared illegal and arbitrary the resolutions from the COREMA XII Region and CONAMA in respect to the Rio Condor Forestry Project.¹⁴³

132. *Environmentalists Achieve Legal Decision to Stop Forestry Mega-Project CHIPER*, Environmental Reports Library <<http://linux.soc.uu.se/mapuche/fakta/bosqu02.html>> (Apr. 28, 1997) (copy on file with *The Transnational Lawyer*) [hereinafter *Environmentalists Achieve*].

133. Senators Horvath and Diaz and Deputies Girardi and Navarro.

134. *Environmentalists Achieve*, *supra* note 132.

135. Telephone interview with Karen Cohn, an employee of Savia International, Ltd., which is a subsidiary of Trillium Corporation (Oct. 22, 1997).

136. *Environmentalists Achieve*, *supra* note 132. See Valparaiso, March 19, 1997 House of Representatives, Chile; Deputy Ivan De la Maza M., President of the Comision de Recursos Naturales, Bienes Nacionales y Medio Ambiente (Commission for Natural Resources, National Assets and Environment) [hereinafter Valparaiso].

137. Senator Horvath, Senator Diaz, Deputy Girardi, and Deputy Navarro.

138. See generally RENACE, Red Nacional de Accion Ecologica, Chilean Environmental Groups Home Page <<http://www.chiper.cl/renace/>> (visited Oct. 27, 1997) (copy on file with *The Transnational Lawyer*) (defining RENACE as the National Ecology Action Network, a network of 140 Chilean citizen organizations working in Latin America for the protection of the environment and quality of life).

139. See *Environmentalists Achieve*, *supra* note 132.

140. See CONAMA decision, *supra* note 4 (laying out the arguments of the parties and providing the Chilean Supreme Court's decision); see also *Environmentalists Achieve*, *supra* note 132.

141. See CONAMA decision, *supra* note 4 (providing defendant's arguments and the Supreme Court's treatment of such arguments).

142. See Valparaiso, *supra* note 136 (explaining that "the mentioned decision was not directly given on the Rio Condor project, regarding its virtues, deficiencies, measures for the preservation of species or management plans but has legally objected to the application of law No. 19,300 on 'Bases del Medio Ambiente,' by contending that its article 1st transitory expresses that the System of Environmental Assessment, regulated in Title II of the mentioned body of law, will come in effect once the regulation referred to in article 13 of same is published in the 'Diario Oficial'").

143. *Id.*

A. Facts

In 1994, Forestal Trillium, Ltd.,¹⁴⁴ a Washington State, U.S.-based corporation, proposed plans to harvest native hardwood forests in the island of Tierra del Fuego located in the extreme south of Chile.¹⁴⁵ In 1993, Trillium invested US\$250 million in Chile by purchasing 258,000 hectares on the island of Tierra del Fuego.¹⁴⁶ Trillium received enormous support and encouragement from the Chilean government.¹⁴⁷ In fact, the government sold the property to Trillium for US\$48 per hectare,¹⁴⁸ which was significantly lower than the market value of approximately US\$117 per hectare.¹⁴⁹ Additionally, government subsidies in the form of tax rebates and exemptions would provide Trillium with 55 billion pesos over the next 20 years.¹⁵⁰ However, despite the government's endorsement, environmental groups opposed Trillium's proposed logging plan.¹⁵¹

1. Trillium's Proposed Rio Condor Project

Trillium planned to log one of the most remote places on the planet in a manner so as to potentially set a new environmental standard for the world. With a purchase price of US\$42 million for 825,000 acres, Trillium can afford to try good forestry. Despite approval already granted, Trillium refrained from logging and voluntarily invited public scrutiny of their timber operation.¹⁵² In furtherance of Trillium's dedication to the environment, they voluntarily submitted an EIS, in spite of Chile's lack of comprehensive environmental laws or regulations.

Included in the voluntary EIS was a description of the project, which consisted of the exploitation of largely virgin lands, construction of hundreds of miles of

144. See Bill Dietrich, *Chile's Tierra Del Fuego: Harvest With Care*, THE SEATTLE TIMES (Sunday, January 26, 1997) (noting that Trillium is a United States corporation based in Bellingham, Washington). David Syre, Chairman of Trillium corporation, bought his timber empire in Tierra del Fuego on a weekend, based on a telephone call two of his foresters placed from Punta Arenas, Chile. *Id.*

145. See generally *Selected Environmental Events in the Western Hemisphere*, 1995, 7 COLO. J. OF INT'L & ENVTL. L. & POL'Y 225, 230 (1996) [hereinafter *Environmental Events*] (explaining that Tierra del Fuego's forests consist primarily of the lenga, a slow-growing beech tree that needs 120 years to reach maturity and great size); see also *Chilean Native Forests Dwindle as Debate Rages* WORLDWIDE FOREST/BIODIVERSITY CAMPAIGN NEWS, Home Page (Apr. 17, 1996) (© Reuters; Porvenir, Chile) <<http://forests.org/gopher/samerica/childeba.txt>> (copy on file with *The Transnational Lawyer*) [hereinafter *Native Forests*].

146. See Dietrich, *supra* note 144; see also *Environmental Events*, *supra* note 145, at 230.

147. *Environmentalists Achieve*, *supra* note 132.

148. See *Environmental Events*, *supra* note 145, at 230 (maintaining that this figure is based on a price per acre, in which Trillium bought a total of 825,000 acres at approximately US\$48-51 per acre); see also Dietrich, *supra* note 144.

149. *Environmentalists Achieve*, *supra* note 132.

150. *Id.*

151. *Id.* See *Trillium Project Tests Legislation* CHIP News Home Page <<http://www.chip.cl/news/1997/2/26/n1.html>> (Feb. 26, 1996) (translated in English from the Chilean newspaper, LA EPOCA) (copy on file with *The Transnational Lawyer*) [hereinafter *Trillium Project*].

152. See generally *id.* (claiming that Trillium praised their project as being beneficial to the environment).

logging road, extraction of millions of trees, and the erection of a large lumber mill.¹⁵³ Considering that the vast exportation of raw materials dominates Chile's economy, construction of a lumber mill enabling the exportation of finished products could be an enormous improvement for the Chilean economy.¹⁵⁴ The project expected to export the lenga's reddish brown hardwood in the form of furniture, doorjambs, and finished wood.¹⁵⁵ The production of finished products is just one benefit, the development of a primitive portion of the nation, coupled with the creation of approximately 800 jobs for Chilean citizens further adds to the desirability of the Trillium Project.¹⁵⁶

Trillium employed the services of Claudio Donoso, an Austrian University researcher and one of Chile's best-known forest ecologists, to join with a commission of 100 of Chile's leading scientists to produce an EIS.¹⁵⁷ Trillium directed the commission to comprise a plan that would allow the harvesting of 350,000 acres of the forest while at the same time limiting damage to the ecosystem.¹⁵⁸ The commission's plan provided that Trillium will "shelter cut"¹⁵⁹ to maintain thirty percent of the forest in age, type, and distribution.¹⁶⁰ Research comprised by the commission showed the selective cutting would allow the lenga to naturally reseed and would provide more sunlight to the grove and thereby quicken growth of the new trees.¹⁶¹ In furtherance of its commitment to ecologically sound practices, Trillium pledged to implement a permanent monitoring system and to stop harvesting if the lenga do not regenerate.¹⁶²

In addition to the submission of an EIS, Trillium continued its pursuit of environmental protectionism by subscribing to the Green Certificate system. Trillium planned to capitalize on the demand for environmentally sound products, by placing a green seal on the wood to indicate that it was harvested in an ecological manner. By deciding to pursue a Green Certificate from international environmental organizations, Trillium invited environmental scrutiny to a project in so remote a location only its few inhabitants were concerned about it. Chilean law clearly states that CONAMA and COREMA have the power to approve

153. *Id.*

154. *See generally id.* (discussing the benefits of the proposed Trillium project).

155. *See generally id.* (Syre planned to make products out of the beautiful lenga wood rather than wood chips as was the plan by the previous owner of the acres).

156. *See generally id.* (setting forth the positive aspects of Trillium's proposed forestry project in Chile); *see also Environmental Events*, *supra* note 145, at 230 (discussing the proposed Trillium project).

157. *Environmental Events*, *supra* note 145, at 230.

158. *See id.* (claiming that in spite of Donoso's preference to preserve Chile's remaining forests, he saw the commission's plan as a compromise between banning all logging and leaving timber companies unregulated).

159. *See id.* at 230 (defining shelter cut as selectively cutting trees in a manner so as to provide a beneficial setting for regrowth of new saplings).

160. *Id.*; *see also Native Forests*, *supra* note 145 (explaining Chilean forestry).

161. *Environmental Events*, *supra* note 145, at 230. *But see generally Native Forests*, *supra* note 145 (suggesting that no one really knows how the lenga ecosystem works and thus more research needs to be done before the forest can be harvested safely).

162. *See Environmental Events*, *supra* note 145.

projects, and should consider political, social, and environmental factors.¹⁶³ In fact, Trillium announced environmental practices that go beyond the requirements of Chilean law.¹⁶⁴

2. *Proceedings Regarding Trillium's Voluntary EIS*

On April 3, 1996, the Regional Environmental Commission, COREMA Region XII, approved Trillium's Project.¹⁶⁵ This decision contradicted important studies that recommended the project not be undertaken for technical reasons.¹⁶⁶ The COREMA Region XII Technical Committee, made up of fourteen government professionals, along with appointees from the National Environmental Commission, CONAMA, wrote a 26-page report.¹⁶⁷ This report contained over six pages relating to positive environmental aspects, however eighteen pages of the report criticized the project based upon technical shortcomings related to lenga exploitation.¹⁶⁸ This report also stated that Trillium provided an EIS which included an insufficient inventory of existing trees "which is the basis for an environmental evaluation of a project."¹⁶⁹ The report found serious problems with the EIS harvest simulation model because it did not specify a plan to preserve the original biodiversity and it lacked data on tree growth and regeneration cycles.¹⁷⁰ Since the lenga trees require 120 years to reach maturity, any study complied over the course of a couple years cannot accurately depict the regeneration and regrowth of these valuable trees.¹⁷¹ The Technical Committee concluded the restoration, mitigation and monitoring measures were not adequate, thereby sufficient elements to approve the viability of the Rio Condor Project did not exist.¹⁷²

3. *Environmental Opposition to Trillium's Project*

From the onset, environmental groups were cynical about the Rio Condor Project because of Trillium's past record of forestry practices in the United

163. See Otis, *supra* note 9 (quoting Ron Packard, Trillium's General Manager, who said that the company has a very strong defense). Furthermore, Packard believes the environmental claims against the study are invalid since the ecological analysis done for the Rio Condor project is more than has ever been done before in Chile. *Id.*

164. *Trillium Project*, *supra* note 151.

165. *Environmentalists Achieve*, *supra* note 132.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.*

171. See *Environmentalists Achieve*, *supra* note 132 (explaining that the study done over 18 years was not adequate according to environmental groups who argued the lenga requires hundreds of years to mature).

172. *Id.*

States.¹⁷³ Environmental groups were already concerned with forestry projects because 80% of Chile's 17.5 million acres of native forests are owned by private entities such as Trillium.¹⁷⁴ Focusing on the ancient pristine forests of Tierra del Fuego, environmentalists were skeptical of the proposed sustainable development plan.¹⁷⁵ Ecologists argued that more research about the lenga forest ecosystem needs to be complied before sustainable development can take place.¹⁷⁶ Furthermore, the difficulty of enforcing legislation in such an inaccessible location as Tierra del Fuego also contributed to skeptical attitude towards the project.¹⁷⁷

Environmental groups, along with four legislators, appealed the COREMA decision permitting the development of Tierra del Fuego.¹⁷⁸ Strong opposition for the project arose because Trillium could not guarantee a sustainable exploitation of Chile's native forests.¹⁷⁹ Opponents of the project argued that COREMA ignored findings by its own technical team¹⁸⁰ concluding the Rio Condor Project was not environmentally sustainable.¹⁸¹ The Technical Committee of COREMA listed twenty points in Trillium's EIS as inadequate.¹⁸² The report from the Technical Committee found serious problems with the EIS' harvest simulation model, such that it did not specify how the original forest biodiversity would be conserved.¹⁸³ Moreover, the Technical Committee concluded that the data on tree growth within regeneration cycles was lacking because it was based on limited experiments and thus was irrelevant to extensive forestry projects such as Rio Condor.¹⁸⁴

Environmental groups argued that CONAMA and COREMA violated the EFL by arbitrarily endorsing the Rio Condor Project without adequately studying pos-

173. See *Trillium Project*, *supra* note 151 (depicting the French National Forests Office and Argentine environmentalist, Jorge Morello, production of technical studies that supported arguments against the Rio Condor project).

174. See generally *Native Forests*, *supra* note 145 (illustrating environmental concern for Chile's depleting resources).

175. See generally *id.* (quoting Manuel Baquedano, director of the Political Ecology Institute in Santiago, Chile, who fears that exploitation of Tierra del Fuego could one day leave the area like central Chile, where decades of logging has reduced the once vast stands of redwood and larch to isolated pockets).

176. See generally *id.* (suggesting that the current research pertaining to lenga forests is inadequate).

177. *Trillium Project*, *supra* note 151.

178. *Trillium Appeal Rejected* FORESTRY NEWS 1996, CHIP Home Page <http://www.gekkonet.com/CHIPtrade/nws_FR6.htm> (visited Jan. 26, 1998) (translated news from EL MERCURIO and EL DIARIO, Chilean newspapers) (copy on file with *The Transnational Lawyer*) [hereinafter *Trillium Appeal*].

179. *Id.*

180. See *Environmentalists Achieve*, *supra* note 132 (explaining that the technical committee is comprised of fourteen government professionals representing different agencies and differing areas of expertise). The twenty-six page report was written by the technical committee together with local appointees from CONAMA. *Id.*

181. *Trillium Appeal*, *supra* note 178; *Trillium Project*, *supra* note 151.

182. *Trillium Project*, *supra* note 151. But see *Environmentalists Achieve*, *supra* note 132 (stating that the report contained six and a half pages related to "positive environmental aspects" of a general nature, the report also contained eighteen pages of criticism concerning technical shortcomings of the project related to lenga exploitation).

183. *Environmentalists Achieve*, *supra* note 132.

184. *Id.*

sible adverse impacts.¹⁸⁵ The report from CONAMA's Technical Committee concluded that the EIS did not establish a system to weigh the extraction impacts, nor did it allow for impact mitigation.¹⁸⁶ A Chilean newspaper, *La Nacion*, that published the Technical Committee's conclusions, proved to be a key document for opponents of COREMA's approval of the EIS for the Rio Condor forestry project.¹⁸⁷

4. CONAMA and COREMA's Defense

In response to the suit brought by environmentalists, CONAMA and COREMA argue that appellants did not have standing to sue and that they had authority to approve of EISs pursuant to a Presidential Order.¹⁸⁸ Defendants assert appellants¹⁸⁹ lacked standing because they were not residents of the island of Tierra del Fuego and therefore did not demonstrate a legitimate interest in preventing the proposed Rio Condor Project.¹⁹⁰ The conflicts between environmentalists wishing to prevent the project and the government wanting to encourage investment and development led to the battle over the approval of Trillium's EIS.¹⁹¹

B. Procedural History

In February 1995, COREMA¹⁹² approved Trillium's first EIS.¹⁹³ On May 8, 1996, the National Ecology Action Network (RENANCE) and three member organizations: Defensores del Bosque Chileno, Instituto de Ecologia Politica and Coprique, together with the Deputies Girardi and Navarro filed legal suit called a Resource Protection to stop the project.¹⁹⁴ On May 9, 1996 the Court accepted the petition, thereby halting the project pending a judgment, but the Resource

185. *Chilean Supreme Court Rejects Controversial Trillium Logging Project* CIEL Home Page, <<http://www.econet.apc.org/ciel/trillium.html>> (Mar. 21, 1997) (copy on file with *The Transnational Lawyer*) [hereinafter *Chilean Supreme Court*].

186. *Environmentalists Achieve*, *supra* note 132.

187. *Id.*

188. *See generally* CONAMA decision, *supra* note 4 (laying out the defense put forth by CONAMA and COREMA).

189. *Id.* Senator Horavth, Senator Diaz, Deputy Girardi, and Deputy Navarro. *Id.*

190. *See* CONAMA decision, *supra* note 4, Dissenting opinion's 6th and 7th points, at p. 8 of the translated version of the decision (setting forth the dissenting opinion provided by the Minister Mr. Osvaldo Faundez and the Member Lawyer Mr. Manuel Daniel). The dissent claims that "appellants, congressmen domiciled at the National Congress, Valparaiso, and other persons who give as their domicile the city of Punta Arenas . . . do not demonstrate in what way they have been affected, because in reality they do it indeterminately, in the interest of the community, thus lacking active legitimization to ask for the legal protection they request." *Id.*

191. *See generally id.* (discussing the Chilean Supreme Court's treatment of the arguments from the environmental groups and from CONAMA and COREMA).

192. Region XI Environmental Commission (COREMA).

193. *Environmentalists Achieve*, *supra* note 132.

194. *Id.*

Protection was denied.¹⁹⁵ The denial of the Resource Protection motivated Senators Horvath and Diaz, together with Deputies Girardi and Navarro, to present yet another Resource Protection against CONAMA.¹⁹⁶ The rejection of this second suit prompted environmental groups to appeal to the Chilean Supreme Court.¹⁹⁷

Later in 1996, CONAMA approved Trillium's EIS, which prompted opponents to file suit in October 1996 arguing the approval was illegal.¹⁹⁸ Environmental groups and pro-environment deputies requested a writ of protection¹⁹⁹ to prevent Trillium from continuing with its Rio Condor Project in Tierra del Fuego.²⁰⁰ In May of 1996, the Puntas Arenas Court of Appeals temporarily halted the project after the Pro-Defense for the Environment Movement, along with several environmental groups, filed a protective action against the court.²⁰¹ Subsequently, the First Branch of the Santiago Court of Appeals unanimously rejected the opposition's appeal for an injunction reasoning that CONAMA approved the project pursuant to certain requirements utilizing various studies and plans to mitigate environmental impacts.²⁰² Although the writ was denied, the court granted a motion for an injunction, pending the Chilean Supreme Court decision.²⁰³ Finally, in March of 1997, the Chilean Supreme Court ruled against Trillium's first EIS.²⁰⁴

Upon looking at the translated text of the case, no previous cases were mentioned. In fact, this case is the first case of its kind to reach the Chilean Supreme Court.²⁰⁵ Rarely in Chile have cases pertaining to the environment ever reached the Supreme Court.²⁰⁶

C. Decision

By a 3-2 vote, the Supreme Court held the project approval by COREMA and CONAMA was illegal because, due to a lack of regulations, legislation covering

195. *Id.*

196. *Id.* See *Trillium Appeal*, *supra* note 178.

197. *Environmentalists Achieve*, *supra* note 132.

198. See *Supreme Court Sinks Trillium Project: Rules Government Must Establish EIS Regulations* (Mar. 20, 1997) <http://www.gekkonet.com/CHIPtrade/news_FR71.htm> (translated news from EL MERCURIO) (copy on file with *The Transnational Lawyer*) [hereinafter *Supreme Court Sinks*] (declaring that because of Trillium's proposed project, environmental groups have sparked opposition to development in Chile).

199. *Id.*

200. *Id.*

201. *Otis*, *supra* note 9.

202. *Supreme Court Sinks*, *supra* note 198. See *Trillium Appeal*, *supra* note 178 (outlining the procedural history of the CONAMA decision).

203. *Supreme Court Sinks*, *supra* note 198.

204. See *Trillium Submits Second EIS for Condor Project* (Aug. 27, 1997) <http://www.gekkonet.com/CHIPtrade/news_FR72.htm> (translated news from EL MERCURIO and EL DIARIO, Chilean newspapers) (copy on file with *The Transnational Lawyer*) [hereinafter *Trillium Submits*] (stating Trillium has submitted a second EIS to COREMA).

205. See *Environmentalists Achieve*, *supra* note 132.

206. *Id.*

EISs was not applicable.²⁰⁷ The Court stated the approval was arbitrary and contradicted all the technical recommendations, and furthermore, the information presented in the EIS was insufficient to make a decision on the sustainability of the project because the continued existence of the forestry resource was not affirmed.²⁰⁸ In fact, the majority held that CONAMA and COREMA, by approving the Rio Condor Project, infringed articles 6 and 7 of the Constitution of the Republic which established that state institutions must subject their action to the Constitution and to the rules prescribed according to it.²⁰⁹ The majority rejected appellant's²¹⁰ argument that the Presidential Order, issued on September 30, 1993, established regulations referring to those who voluntarily submit an EIS.²¹¹ The court found that environmental authorities cannot dictate the viability of a project without established regulations.²¹² Despite the existence of the Framework which defines EISs, the government had not created norms for such procedures.²¹³

As a landmark decision in the environmental arena, the majority held that in actions involving environmental protection, the general appeal for protection requires the action be illegal, arbitrary, and lack reasonable grounds.²¹⁴ The court relied upon principles found in the Constitution and in EFL in order to conclude that all persons have the collective public right to the community as a whole, thereby satisfying the standing requirement.²¹⁵ Reasoning that the Constitution applies to "all persons," the Court concluded that all Chilean citizens have the right to be protected and the right to appeal for such protection.²¹⁶ Essentially, this decision

207. *Id.* See CONAMA decision, *supra* note 4, at the 6th point of the majority opinion (holding that as previously state, Law 19,300 regarding the EISs is not in effect and, by not being so, the appealed institution could not issue the resolution contested by these means, basing itself on antecedents that, for now, are not contemplated in the law, and by doing do, it is evident that it incurred an illegal act).

208. *Environmentalists Achieve*, *supra* note 132.

209. See CONAMA decision, *supra* note 4, at the 6th point of the majority opinion (holding also that these institutions must act validly within their competence and in the manner prescribed by law and, any act contravening these articles is null and will impose the responsibilities and sanction which the law establishes); Constitution, *supra* note 87, arts. 6 and 7.

210. CONAMA and COREMA are appellants in this Supreme Court case.

211. See CONAMA decision, *supra* note 4, at the 7th point of the majority opinion (noting that "it is known that only through law or other legal norms, decree or regulation, can specific restrictions or condition be established for the exercise of determined rights or freedoms, but under no circumstances through a Presidential Order").

212. See *Supreme Court Sinks*, *supra* note 198 (declaring that because of Trillium's proposed project, environmental groups have sparked opposition to development in Chile); see also CONAMA decision, *supra* note 5, at 6th point of the majority (holding that "as previously state, Law 19,300 regarding the EISs is not in effect and, by not being so, the appealed institution could not issue the resolution contested by these means, basing itself on antecedents that, for now, are not contemplated in the law, and by doing do, it is evident that it incurred an illegal act").

213. *Supreme Court Sinks*, *supra* note 198.

214. See CONAMA decision, *supra* note 4, at 8th point of the majority opinion (determining, according to the 9th point of the decision, that the resolution contested by these means of protection is both illegal and arbitrary).

215. See *id.* at 12th and 13th points of the majority opinion (providing that "the right to live in a pollution-free environment, pursuant to Art. 19, No. 8 of the Constitution, is a human right with constitutional standing, which acts with a dual nature: a public subjective right and a collective public right").

216. *Id.*

creates citizen suits in cases where the protection of the environment is at issue.²¹⁷ According to the opinion, appellants have the right to push for preservation of nature and the conservation of the environmental heritage, an activity no longer limited to those living close to the projects.²¹⁸

Besides the three votes in favor of striking down CONAMA's and COREMA's approval, two dissenting votes believed the appealed decision must be confirmed and the approval of the EIS upheld.²¹⁹ The dissent agrees with CONAMA and COREMA that appellants lacked standing to sue.²²⁰ According to the dissent, in order to file an appeal for protection the appellants must be a "specific damaged individual" acting in the legitimate exercise of his right.²²¹ Furthermore, dissenters claim that although the approval may satisfy the illegality requirement, it cannot be considered arbitrary.²²² CONAMA's and COREMA's approval of Trillium's EIS was not arbitrary because the public institutions made a rational, researched decision.²²³ According to the dissent, a erroneous decision is not synonymous with an arbitrary decision.²²⁴

In short, the Chilean Supreme Court held the approval of Trillium's EIS by CONAMA and COREMA was both arbitrary and illegal because these public institutions did not have any legal guidelines to follow for determining approval.²²⁵

IV. LEGAL RAMIFICATIONS

The conflict between environmental groups and development appears to have been resolved as a result of the recent *CONAMA* decision.²²⁶ Environmental watchdogs were given a great deal of power with this decision and resulting legislation that codified citizen suits.²²⁷ The major implication of this case was the

217. *Id.*

218. *Id.*

219. See generally *CONAMA* decision, *supra* note 4 (providing the dissenting opinion and its rationale).

220. *Id.*

221. *Id.* at 7th point of the dissenting opinion.

222. See generally *id.* at the 5th point of dissenting opinion (indicating that the aggravating act must be both illegal and arbitrary pursuant to article 20 of the Chilean Constitution). "In the opinion of the dissenting parties, there is no question of attributing arbitrariness to the objected resolution, as it has not been an act which comes from mere whim or irrationality; on the contrary, although mistaken, it has been dictated after a procedure fundamentally based on what the laws has contemplated and which must be applied in due course." *Id.*; see also Constitution, *supra* note 87, art. 20.

223. See *CONAMA* decision, *supra* note 4.

224. *Id.*

225. See generally *id.* (rejecting CONAMA's and COREMA's approval of Trillium's EIS).

226. See generally *id.* (holding that CONAMA and COREMA had no authority to approve of voluntary EIS). As a result, the Chilean legislature amended its laws so as to provide for mandatory EISs. *Id.*; see also Valparaíso, *supra* note 136.

227. See *CONAMA* decision, *supra* note 4; see also Valparaíso, *supra* note 136.

revision of Chile's Environmental Framework Law.²²⁸ As a result of this decision, the Chilean parliament amended the existing law so as to provide for mandatory EISs.²²⁹ The law will provide strict technical criteria for determining whether major industrial projects are environmentally viable.²³⁰ However, this decision and resulting law may scare off foreign investors.²³¹ Foreign markets increasingly demand strict, functional environmental regulations, thus unclear and unpredictable legislation may deter foreign investment.²³² Requiring mandatory EISs may affect the future of foreign investment in Chile.²³³

A. *Implication of Environmental Groups as Watchdogs*

As a result of the Supreme Court ruling, citizen suits may become a powerful tool in the political arena.²³⁴ The *CONAMA* case was a landmark decision on various levels.²³⁵ Prior to this decision, only those directly affected by projects were able to make an effective claim.²³⁶ Because Chilean environmental groups were successfully able to obtain an injunction against a logging project, the decision provides environmental groups with a great deal of political power.²³⁷ Relying on the reasoning of the court, the premise for citizen suits is that the environment is the heritage of all citizens.²³⁸ The Supreme Court reinforced the constitutional provision guaranteeing the citizens of Chile the right to live in a pollution free environment.²³⁹ Essentially, as a result of this decision, businesses may be more reluctant to invest in Chile knowing that environmental groups not directly impacted by the project might be able to stop the project.²⁴⁰ Consequently, environmentalists have already served notice that they will use this decision to challenge another U.S. project in

228. See generally Valparaíso, *supra* note 136 (explaining that the House of Representatives amended the laws as a result of the *CONAMA* decision).

229. *Id.* See *Government reaches Agreement on EIS: System: Regulatory Bill Will be Sent to Congress by Monday* (Mar. 25, 1997) <http://www.gekkonet.com/CHIPtrade/nws_EV71.htm> (copy on file with *The Transnational Lawyer*) [hereinafter *Regulatory Bill*] (reporting on the legislation mandating EISs).

230. Valparaíso, *supra* note 136. See *Regulatory Bill*, *supra* note 229.

231. *Regulatory Bill*, *supra* note 229.

232. *Id.*

233. See generally *id.* (implying that mandatory EISs could serve as a deterrent to foreign investment in Chile because of the time, effort and money needed to compile such a document).

234. See Heather Walsh, *Court Ruling Prompts Ecology Regulations*. EARTH TIMES NEWS SERVICE. (May 11, 1997) <http://earthtimes.org/may/americaschilecourtrulingmay11_97.htm> (copy on file with *The Transnational Lawyer*) (interpreting the decision such that outsiders, not just those party to the suit, may affect litigation).

235. See generally *CONAMA* decision, *supra* note 4.

236. See Walsh, *supra* note 234 (quoting Fernando Dognac, an environmental lawyer who won the Trillium case, who said the ruling gives citizens the right to file an injunction against a project when the government does not fulfil its obligations to protect the environment).

237. *Id.*

238. *Id.* See Array, *supra* note 5.

239. See Walsh, *supra* note 234; see also Constitution, *supra* note 87, art. 19.

240. See Array, *supra* note 5 (reporting that the business community is up in arms about the new environmental regulations).

Santiago.²⁴¹ By giving every Chilean citizen the ability to bring suit to halt projects affecting the environment, the Chilean government created a powerful watchdog to act as a check on the government and possibly as a deterrent to foreign investment.²⁴²

B. New Legislation Passed

As a result of the decision, the legislature imposed environmental regulations.²⁴³ In light of the constitutional right to live in a pollution-free environment,²⁴⁴ the government imposed legislation making foreign investment and development much more difficult in Chile.²⁴⁵ Members of the House of Representatives are displeased with the effects of this decision and have created regulations so as to prevent future damage to Chile's credibility and security with its international commitments.²⁴⁶ Foreign investors want to invest in a nation knowing that its policies and laws are predictable.²⁴⁷ Resulting from the recent Supreme Court decision, Chile passed legislation mandating EISs²⁴⁸ for all development projects.²⁴⁹

Mandatory EISs may potentially deter investors.²⁵⁰ The process of compiling an EIS requires a great deal of time, effort and money.²⁵¹ Total investment in

241. *See id.* (suggesting that environmentalists in Chile plan to use citizen suits as a mean to challenge more projects, such as a US\$1 billion forestry project and power plant in Santiago).

242. *See generally* Walsh, *supra* note 234 (implying that business and industry are fuming over the ruling which undermines the credibility of the government).

243. Valparaiso, *supra* note 136.

244. Constitution, *supra* note 87.

245. *See generally* Array, *supra* note 5 (discussing Chile's new environmental legislation and its impact on the economy).

246. *See* Valparaiso, *supra* note 136 (stating that "under these circumstances and as made clear in a systematic manner...by the members from the (Commission for Natural Resources, National Assets and Environment) and from the House of Representatives, it is an unavoidable duty that the (General Comptrollership of the Republic) and the CONAMA definitely resolve any difference which was produced in respect to the approval of the corresponding regulation, so as to resolve situations as the one set forth in respect to the Rio Condor project, which naturally we do not share and would not like to have repeated, due to the damage it caused to the credibility and security which, without a doubt, has damaged the government's credibility in all of its international commitments"). More so considering the great efforts carried out to ensure reasonable balance between growth, equity and sustainability. *Id.*

247. *See id.* (suggesting that investment in any nation is risky, but even more so when the nation does not have a uniform legal system providing security and stability to investors).

248. EFL, *supra* note 68, at tit. II, para. 2, art. 8, 10(a)-(r) (defining EIS).

249. *Id.* *See* Paez, *supra* note 101, at 633 n.60 (describing the list of projects or activities subject to the Environmental Impact Assessment System as including water supply and storage systems, power lines and their substations, electric power plants capable of producing an output greater than three megawatts, nuclear reactors, land, water and air transportation terminals, development projects, mining operations, carbon fuel facilities, manufacturing facilities, agro-industry facilities, forestry development sites, hydrobiological projects, hazardous materials handling operations, sanitation projects, park/reserve projects, and operations dealing with the application of chemicals).

250. *See Regulatory Bill*, *supra* note 229 (discussing the effects of a mandatory environmental assessment system).

251. *Id.*

compiling EISs to date exceeds US\$19 billion.²⁵² The companies proposing the development are responsible for financing the EIS.²⁵³ Therefore the requirement of an EIS increases the cost of investing in Chile.²⁵⁴ Foreign investment may decrease in Chile because of investors not wanting to commit the time and money to comply with the mandatory EIS law.²⁵⁵

According to Article 14 of the Civil Code, Chilean law is binding on all inhabitants of the Republic including aliens.²⁵⁶ Therefore foreign corporations need not be citizens of Chile in order to be subject to Chilean law.²⁵⁷ A corporation formed abroad is recognized such that the corporation can sue and be sued in Chile.²⁵⁸ However, in order to engage in active business, the corporation must establish a branch in Chile.²⁵⁹ Therefore, by law foreign corporations developing in Chile are required to submit an EIS in compliance with Chilean legislation.²⁶⁰

C. *How Protecting the Environment Will Effect Foreign Investment*

In 1996, the Chilean government took steps to provide for the preservation of the environment and natural resources of the country, against the competing interest of foreign investment.²⁶¹ In 1994, the Central Bank of Chile, encouraged by the World Bank²⁶² began to develop balance sheets, also known as "green" accounts to document the rate the country's reserves of forests, minerals and fish were being depleted and to estimate the environmental costs of such depletion.²⁶³ Given the primitive methods of forest management prevalent in Chile,²⁶⁴ these studies indicated that no trees suitable for logging would exist in twenty-five to thirty years.²⁶⁵ A major disincentive to the conservation of rainforests was the traditional

252. *See id.* (noting that EISs are costly and these costs are incurred by the companies proposing the project).

253. *Id.*

254. *See generally id.* (implying that investors must pay for the development and must finance the environmental study and EIS).

255. *Id.*

256. *See* Albert S. Golbert and Yenny Nun, *Latin American Laws and Institutions* (1982) at 415; *see also* *Regulatory Bill*, *supra* note 229.

257. Golbert & Nun, *supra* note 256, at 415.

258. *Id.* at 433.

259. *Id.*

260. *Id.* at 415.

261. Findley, *supra* note 56, at 19.

262. *See id.* (declaring that the World Bank offered soft loans to promote environmental planning).

263. *Id.*

264. *See id.* at 17 (theorizing that Chile's method of forest management involved wholesale cutting and burning without reforestation); *see also* WEBSTER'S NEW COLLEGIATE DICTIONARY 990 (9th ed. 1991) (defining reforestation as the action of renewing forest cover by planting seeds or young trees).

265. *See* Findley, *supra* note 56, at 19 n.16 (claiming that in response to the studies predicting the depletion of the Chilean forests, Chile's forestry industry questioned the Central Bank's methods and figures, as well as questioned the credentials of the economist who headed the environmental accounting unit). As a result of the industry's vigorous questioning, the lead economist resigned and the Central Bank's directors vacillated their commitment to the continuation of the unit. *Id.*; *see also* *Chile: Forest Fire*, THE ECONOMIST, 37 (Feb 3, 1996)

system of national income and asset accounts used to compute national gross domestic product (GDP) and to measure the success of national governments and their economic policies.²⁶⁶ Therefore, developing nations such as Chile tend to be more concerned with a high GDP rather than protecting the environment.²⁶⁷

In fact, local politicians tend to respond favorably to development interests seeking to exploit rainforests.²⁶⁸ Strong, urban Environmental Non-Governmental Organizations (ENGO) primarily have political influence with the national government. Thus, rainforest conversation remains primarily within the province of national elites rather than of local residents.²⁶⁹ Such is true with the CONAMA decision, where the environmental groups sued the Chilean Government, most specifically CONAMA, and effectuated a repeal of the approval of Trillium's logging project.²⁷⁰ The Supreme Court ruling has thrown into question the legality of over a hundred other projects approved by CONAMA before the new regulation came into being.²⁷¹ By striking down CONAMA's approval of the EIS, the Chilean Supreme Court essentially undermined its own legislative authority.²⁷² In 1996 alone, CONAMA approved US\$3.4 billion in new projects.²⁷³ Under the perspective of the Supreme Court's resolution, EISs which have been carried out or are to be carried out, would have no validity while the corresponding regulation is not enacted.²⁷⁴ This decision produced a sort of deadlock of various projects, even though developers complied with the demands established by law.²⁷⁵ By undermining its own legislative and administrative authority, this Supreme Court decision

[hereinafter *Forest Fire*] (depicting Chile's current forestry resources).

266. See Findley, *supra* note 56, at 21 (reporting that the model balance sheet in the United Nations System of National Accounts (SNA), which the Chilean Central Bank recently employed, recognizes biodiversity and minerals as economic assets to be included in a nation's capital stock, however the SNA income and product accounts do not). Ironically, low-income countries which are typically most dependant on natural resources for employment, revenues, and foreign exchange earning, are instructed to use a national accounting system that ignores their principal assets. *Id.*

267. See generally *id.* (implying that Chile's focus has centered on the economy rather than the environment).

268. Findley, *supra* note 56, at 21. But see CONAMA decision, *supra* note 4 (indicating that four legislators brought this environmental protection suit against the government).

269. *Id.* at 22.

270. See generally CONAMA decision, *supra* note 4.

271. Walsh, *supra* note 234. See *Régulatory Bill*, *supra* note 229 (stating that between 1990 and the end of January 1997, 171 projects in various industries have submitted to the environmental evaluation system); see also *Array*, *supra* note 5 (explaining that the decision raised questions about the legality of CONAMA's approval procedures and opened the door for judicial reviews of scores of other projects approved by CONAMA). An examination into this issue is beyond the scope of this comment. However, it is worthwhile to mention that in light of undermining CONAMA's authority, foreign investors may be deterred from investing in Chile because of the lack of uniformity and stability in the application of environmental laws, most specifically the environmental evaluation system. *Id.*

272. See generally *Supreme Court Sinks*, *supra* note 198 (indicating that because the Chilean Supreme Court found CONAMA and COREMA devoid of legal authority to approve, the Court undermined the power of the government that created these institutions for the purpose of environmental protection and regulation).

273. *Id.*

274. Valparaiso, *supra* note 136.

275. *Id.*

may discourage foreign investment because investors want the security of knowing the agency they are dealing with and the procedures they are following have legal significance.²⁷⁶

The major interpretation of this Supreme Court ruling allows litigation not only by those who are directly affected by projects, but also by outsiders.²⁷⁷ According to the Chilean Constitution which guarantees a fundamental right to live in a pollution free environment,²⁷⁸ Chilean citizens have the power to challenge projects adversely affecting the environment under this recent Supreme Court decision.²⁷⁹ The ramifications of such power may be that environmental concerns can potentially outweigh the nation's desire to encourage foreign investment.²⁸⁰ Businesses in Chile are angry over this decision giving citizens the right to file an injunction against a project saying it undermines the credibility of the government and creates "an atmosphere of incredulity on the part of the private sector."²⁸¹

The decision subverts the environmental policies which favor the current government and the enormous impact it can produce in the institutional order has not been determined.²⁸² The day after the decision was handed down, Trillium Corporation gave a statement that it invested in Chile for its political and economic stability and for its interest in establishing clear guidelines to protect the environment as well as an unrestricted respect for private property.²⁸³ "Nonetheless, we find ourselves ensnared in a legal dispute . . . investors and the environment are left unprotected."²⁸⁴ The very essence of why corporations have ventured into Chile has now been destroyed with this decision and subsequent legislation.²⁸⁵ The business community is irate about the new environmental regulations and this decision may create a loss of credibility in the eyes of foreign investors.²⁸⁶ Other potential foreign investors may express Trillium's same sentiment. Corporations may learn from this event and refrain from investing or developing in Chile.²⁸⁷

276. See generally *CONAMA* decision, *supra* note 4 (holding that the decisions of the administrative agencies decisions were illegal because they had no legislative authority to make such decisions).

277. Walsh, *supra* note 234.

278. Constitution, *supra* note 87, art. 19, § 8.

279. *CONAMA* decision, *supra* note 4.

280. Walsh, *supra* note 234.

281. See *id.* (quoting Pedro Lizana, President of Sofofa, the manufacturing association); see also Array, *supra* note 5.

282. Valparaíso, *supra* note 136.

283. Walsh, *supra* note 234.

284. *Id.*

285. *Id.*

286. Array, *supra* note 5.

287. See generally *Supreme Court Sinks*, *supra* note 198 (stating that Trillium invested in Chile because of a solid economy and constitutional framework). In light of the attack on Chile's environmental process, more people may review their investments and projects more heavily than before such discontent. *Id.*; see also *Government Worries Trillium Decision Bad For Investment* (Mar. 21, 1997) <http://www.gekkonet.com/CHIPtrade/news_FR71.htm> (translated news from EL MERCURIO and LA EPOCA, Chilean newspapers) (copy on file with *The Transnational Lawyer*) [hereinafter *Government Worries*] (arguing that the Chilean Supreme Court decision siding

Chile's insertion into international markets may be adversely affected as this decision discourages the participation of investors in important areas of production.²⁸⁸

Furthermore, while potential future investors may hesitate before investing in Chile, the Supreme Court decision also discourages environmentally viable projects. The decision to approve Trillium's EIS was mistaken because the EIS was not fully researched.²⁸⁹ However, the proposed Rio Condor Project was not completely an anti-environment project.²⁹⁰ In fact, Trillium was planning to implement an innovative sustainable development plan.²⁹¹ Even Chilean officials admit this decision provides disincentives to those who comply with environmental procedures.²⁹²

On March 27, 1997 Vivianne Blanlot, executive director of CONAMA, has suggested to their regional counterparts, COREMA, that they suspend all decisions on pending EISs in light of the recent Supreme Court decision.²⁹³ The Supreme Court decision severely damaged CONAMA's reputation. According to Robert Manne, President of Bayside, Trillium's parent company, the verdict undermines the environmental evaluation system, making CONAMA and COREMA virtually non-existent.²⁹⁴

Both Silva Vera, governor of Chile's Region XII, and Chile's President Eduardo Frei have given their approval for the continuation to Trillium's Rio Condor Project.²⁹⁵ Trillium executives are expected to re-release their original EIS to COREMA who will have 120 days to reach a decision.²⁹⁶ According to Trillium executive, Robert Manne, the Rio Condor Project would employ nearly 10% of the total workforce in Tierra del Fuego and would enable Chile to be the world's leader in environmentally conscious, forest land management.²⁹⁷

against forestry company Trillium could be a disincentive for companies to invest in environmentally sustainable projects).

288. Valparaiso, *supra* note 136.

289. See CONAMA decision, *supra* note 4 (regarding the restoration plan and sustainability of harvesting the lenga forest).

290. *Id.*

291. See Dietrich, *supra* note 144.

292. See *Government Worries*, *supra* note 287 (referring to Trillium's submission of a voluntary EIS prior to the enactment of mandatory EIS).

293. CONAMA Decides to Suspend All EIS Decisions, Headline News@ Americas (Mar. 27, 1997) <<http://www.atamericas.com/pages/news/970326/cor.htm>> (copy on file with *The Transnational Lawyer*) [hereinafter CONAMA Decides].

294. See *Government Worries*, *supra* note 287 (explaining that Trillium had devoted a year to making forest management plans as though CONAMA existed, however if CONAMA had any authority its approval would not have been overturned by the Supreme Court).

295. *Government Backs Trillium Project*, Headline News@ Americas (Apr. 7, 1997) <<http://www.atamericas.com/pages/news/970407/tril98.htm>> (copy on file with *The Transnational Lawyer*) [hereinafter *Government Backs*].

296. *Id.*

297. *Id.*

V. CONCLUSION

The CONAMA decision may significantly impact the future foreign investment in Chile.²⁹⁸ Chile's dedication to the environment and preservation of natural resources may be a model for other South American countries to follow.²⁹⁹ Such strict environmental protections may discourage present foreign investors from continuing to invest and develop in Chile, thereby damaging the Chilean economy.³⁰⁰ Additionally, protective measures may deter future foreign investments because investors might not want to partake in the costly and timely EIS process.³⁰¹

Chile, once a developing nation hungry for foreign investment, is now, in light of the recent Supreme Court decision, on the brink of potentially discouraging foreign investors.³⁰² Based upon the recent Supreme Court decision, repealing approval of a massive logging project, Chile's priorities may have shifted from encouraging foreign investment above all else towards a more sustainable model of economic development.³⁰³ Although Chile is a developing nation and not yet wealthy enough to put environmental concerns in the forefront of development, the trend appears to slant in such a direction.

Looking at the specifics of the logging project, it can be deduced that Chile will heavily weigh the environmental impacts against business developments in the future.³⁰⁴ To illustrate, Tierra del Fuego was a remote area with little vegetation and according to Trillium the impacts appeared to be slight.³⁰⁵ Despite the benefits to the nation, the government with pressure from environmental groups, repealed approval of the project. Not only did the Supreme Court make such a decision, but this decision was the basis for subsequent legislation making EISs mandatory.³⁰⁶

Although in the past, EISs were submitted prior to project approval, the creation of strict regulations, coupled with the great deal of attention environmental impacts now have in Chile, may decrease desirability of Chile as an ideal destination for investment.³⁰⁷ Tougher environmental laws are generally viewed by businessmen

298. See Valparaiso, *supra* note 136 (declaring that the enormous impact has not been diminished and Chile's insertion into international markets may be affected because this decision discourages the participation of investors).

299. See generally Arturo C. Porzecanski, *Is Chile Still a Model for Latin America?* LATIN AM. L. & BUS. RPT. vol. 5, no. 8 (Aug. 31, 1997) (stating that before Chile can be admitted into NAFTA it must rework and strengthen its environmental regulations, but this issue is outside the scope of this comment).

300. Valparaiso, *supra* note 136.

301. See generally *Regulatory Bill*, *supra* note 229 (noting that the legislation mandating EISs may adversely affect foreign investment because it will be more costly to invest in Chile by having to prepare an EIS).

302. See CONAMA decision, *supra* note 4.

303. See generally *id.* (implying that environmentalists can halt proposed projects in Chile).

304. See *id.* (striking down a multi-million dollar forestry project based upon a technicality in the EIS submitted). The CONAMA case demonstrates an environmental victory over development within Chile. *Id.*

305. *Trillium Project*, *supra* note 151.

306. See CONAMA decision, *supra* note 4.

307. *Array*, *supra* note 5.

as a way to stunt continued economic success.³⁰⁸ In fact, environmental regulations are infamously known for their ability to impede trade, decrease investment opportunities, and create large expenses for the manufacturer.³⁰⁹ Foreign investors may be reluctant to invest in projects that may be tied up in the courts for years over battle with environmentalists.³¹⁰ The previous speedy system of approval of foreign investments may also be hindered with the submission of lengthy EISs, which take a great deal of time to research and compile. Consequently, companies like Trillium may no longer be able to afford to take a risk on projects in the nation of Chile and thus foreign investment in Chile may decrease.³¹¹

308. See Bivona, *supra* note 18, at 172; see also *Chile: Environmental Issues One Hurdle Slowing Chilean Entry Into NAFTA*, BNA INTERNATIONAL ENVIRONMENTAL DAILY (Sept. 25, 1995) at d3 [hereinafter *Environmental Issues*] (describing environmental laws as a hurdle to free trade).

309. See Bivona, *supra* note 18, at 172; see also Christine Buff, *NAFTA Meets NEPA: Trade and The Environment in the 1990s* 34 NAT. RESC. J. 179, 183 (1994).

310. See Bivona, *supra* note 18, at 172; see also *Environmental Issues*, *supra* note 308, at d3.

311. Dietrich, *supra* note 144.

