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A CASE OF SUSTAINABLE DEVELOPMENT: THE RIVER GOD AND THE FOREST AT THE END OF THE WORLD

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The Gordian Knot in sustainable development is determining what it means, which has prompted a flurry of scholarship on definitions and standards. Meanwhile, on the ground, the notion of sustainable development is being hammered out in site-specific cases that, too, will shape its destiny. These are hard cases. The practice of unsustainable development is as long as human history and it will die fighting, if it dies at all.

The litmus test for this case-based approach is found in countries that are trying to raise their standards of living and are not swimming in options. One need look no farther than the United States to appreciate the gravitational pull of short-term profit, no matter how catastrophic its consequences. How much more difficult the choice, then, for the two countries of this study, Greece and Chile, with projects that, at first, seemed too good to be true. They were following the models of Europe and the United States in water and forest development. They had winners on the table. Until the sustainability question arose.

In the early 1990s, when these projects came forward, Greece and Chile had little precedent for questioning government decisions on environmental grounds of any kind, much less notions of sustainability. Both countries were emerging from military dictatorships that had kept civil freedoms and the judiciary on a very short leash. Each had a protean environmental review process, but no clue as to how it would fare in a court of law. And so these sagas began without any premonition of how they would end up, or where they would end up, and how many times they would have to go there. In the case of Greece, the Acheloos project went to the nation's high court on three separate occasions, with yet a fourth decision pending at the time of this writing. In Chile, the Trillium proposal reached the Supreme Court only twice, but its outcome turned directly on sustainability, jolting a country dedicated to free-market decision making as an article of faith. Whether, in turn, these judicial decisions are themselves sustainable only time will tell.

What follows, then, are legal histories of two test cases in sustainable development. They were seminal cases in their home countries, on the order of *Scenic*

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Hudson[1] and *Calvert Cliffs*[2] in the American experience. They were controversial cases, involving people on both sides who were convinced that they were doing the right thing for themselves and the environment. They are worth understanding for their impact on the unique resources at stake and the emerging jurisprudence of comparative environmental law. They are also worth understanding for the reflected light they cast back to the United States, which launched modern environmental law nearly half a century ago and has yet, after all these years, to commit to living in sustainable ways.

I. ACHELOOS[3]

"[T]he wild Acheloos may finally be put to good use[!]"[4]

Engineering News Register

A.

Acheloos was the god of rivers, and his waters fed the Kingdom of Calydon.[5] The ruler of Calydon had a beautiful daughter named Deianira, whom Acheloos courted for his wife.[6] Unfortunately for the river god, Deianira had also captured the attention of Hercules, the celebrated hero and sociopath, who was also on the market for a wife having killed his first one[7] or depending on the version, killed their children, blamed his wife, and then gave her to a stranger.[8] Faced, then, with a stiff challenge for Deianira's hand, Acheloos tried to reason with Hercules, pointing out that, as a native of Calydon, he would meet favor with Deianira's father.[9] He also insisted on some deference, being a god, but his arguments were unavailing.[10] "'My hand is better than my tongue" Hercules replied. You may conquer me in words, but not in a fair fight.'"[11] Acheloos prepared himself for a battle that he sensed was hopeless by transforming himself into a bull, but Hercules tore one of the horns from his head and beat him back to his river bed, where he since remained, wounded for eternity.[12] Now Greece is back to finish the job.

The Acheloos today is the longest river in Greece and easily its most beautiful, rising in a beech grove high in the Pindos Mountains and running nearly two hundred miles to the sea.[13] The Greek government has been trying to drain the Acheloos for the

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1. *Scenic Hudson Preservation Conf. v. Fed. Power Commn*, 407 U.S. 926 (1972).

2. *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Commn*, 449 F.2d 1109 (1971).

3. There are two common spellings for the Acheloos River—Acheloos and Achelous. This article uses the "Acheloos" variation.

4. Carol Reed, *Greece Bids Huge Irrigation Complex: Six Joint Ventures Are Expected to Compete for Project and Arrange Financing*, 221 ENR 59, 60 (Aug. 18, 1988).

5. Rex Warner, *The Stories of the Greeks* 102–04 (Farrar, Straus & Giroux 1976). The account of the struggle between Acheloos and Hercules that follows is taken from this source.

6. *Id.*

7. *Id.* at 102.

8. *Id.*

9. *Id.* at 103.

10. Warner, *supra* n. 5, at 102–03.

11. *Id.* at 103.

12. *Id.* at 104.

13. Ioannis Karakostas & Ioannis Vassilopoulos, *Environmental Law in Greece* 9 (Kluwer Law Intl. 1999) (identifying the Acheloos as the second largest river, at 220 km); Kimon Hadjibiros, *The River Acheloos*

last 25 years and send it to Thessaly.[14] It would have succeeded long before, but for the intervention of environmental law. More particularly, the intervention of a Greek court that turned itself into the most pro-active environmental judiciary in all of Europe, if not the world.

The Acheloos litigation has questioned the reach of judicial authority, political authority and yet a third authority, the European Union, itself a work in progress. We have a triangle here, and no one yet knows which corner will have the ultimate say.

B.

Thessaly, a perennial power in the Greek world, spreads north of Athens and east of the Pindos range.[15] Athens might govern the country but the plains of Thessaly have fed it, watered by a river of their own, the Pineios, and lakes of every size.[16] Agriculture on this scale led to wealth and independence, enabling the region to take its own lead throughout history, siding with Persia on some occasions and with Athens on others, and later to rule itself as a separate barony until the Ottomans moved south and made Greece their own.[17] The economic and political power of this region is perhaps the only rational explanation for the government's love affair with the Acheloos project today. At bottom, it takes the river from a poor region on the other side of the Pindos Mountains to the east and Thessaly, where the money lies.

The notion is not new. It was first conceived of in the 1920s by an ambitious engineer from, not surprisingly, Thessaly, who, after advanced training in the Soviet Union, went on to become dean of the National Technical University in Athens.[18] Intended to waken the "'sleeping giant'"[19] of the Thessaly plain, the dream lay dormant until the close of World War II brought the possibility of massive, Soviet-style public works.[20] Instead, a numbing series of revolutions, civil wars and coups got in the way,[21] retarding the mega-project fever. Then in the early 1980s, as stability returned, the Acheloos proposal was dusted off and became a centerpiece of the government's development program.[22] At anywhere from $1.4 to $6.5 billion, depending on who is counting, it would be the most expensive project in the country's history.[23]

Diversion Scheme (Mar. 15, 2006) (available at http://www.itia.ntua.gr/~kimon/ACHELOOS_KH.doc).

14. Hadjibiros, *supra* n. 13 ("The Acheloos diversion project was technically defined in 1983.").

15. Encyclopædia Britannica, *Thessaly*, http://search.eb.com/eb/article-9072106 (accessed Mar. 9, 2009).

16. *Id. See also Groundwater and Ecosystems* 238 (Alper Baba, Ken W.F. Howard & Orhan Gunduz eds., Springer 2006) ("[Thessaly] has the highest percentage of flat land in Greece.").

17. Encyclopædia Britannica, *supra* n. 15.

18. Hadjibiros, *supra* n. 13; Maria Kagkelidou, *White Elephant Made of Cotton*, Athens News A07 (July 8, 2005).

19. Hadjibiros, *supra* n. 13.

20. *Id.*

21. Encyclopædia Britannica, *Greece, History of*, http://search.eb.com/eb/article-26433 (accessed Mar. 9, 2009). Germany invaded and occupied Greece in 1940. When it retreated in 1944 civil war broke out between royalist (Greece was a monarchy at the time) and anarchist resistance groups, ending around 1949. In 1956 a military coup against King Paul failed. In 1964, King Paul died, and the government descended into chaos, and new coalitions began taking hold. In 1967, a Greek military coup succeeded, followed by a failed counter-coup. A military junta ruled until 1974 when a parliamentary government was installed. *Id.*

22. Theodota Nantsou, *The Case of the Acheloos River Diversion* (unpublished ms.) (copy on file with the World Wide Fund for Nature Greece).

23. Reed, *supra* n. 4, at 59 (estimating the total overall cost in 1988 dollars at 1.8 billion). For a critique of

The engineering was simple and ambitious. It called for four separate dams on the Acheloos River, two tunnels taking it through the Pindos Mountains, and a long canal delivering it to the Thessaly plains.[24] The target was also straightforward. It would help grow cotton, a crop that drinks water like desert camels.[25] More than 90% of the project water was for agriculture, and more than 90% of that for cotton.[26] At last, an engineering journal enthused in 1988, the wild Acheloos would be put to good use.[27] To the engineering mind everywhere, water in rivers is waste.

The enthusiasm of the construction community was matched by the cotton farmers of Thessaly, for whom cotton growing was made profitable by law.[28] Europe's agricultural policy guaranteed cotton prices and paid big premiums for increased production, while its regional development program funded big irrigation works throughout the region.[29] The best part for the cotton growers was that it was free.[30] Getting this much for nothing nurtures a feeling of entitlement in the agricultural mind, a "Testament" in the words of one Greek commentator.[31] In this view, the Acheloos project simply executed a promise that had been created by practice and, now, by the need for new water.

The old water was running out. Thessaly farmers had taken their own sources down to the bone. They had so polluted the Pineios River that it was, in some stretches, unusable; in other reaches, for months of the year, it no longer existed at all.[32] They drained lakes and wetlands that stored millions of gallons of rainwater in order to put a few more hectares into production.[33] They drilled so many water wells that they were pumping their aquifers dry.[34] Cotton is a thirsty crop, but, by the late 1980s, an arid

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this figure as being too low, see *The Diversion of the Acheloos River: Background and General Elements*, http://www.agrinio.net/perivallon/enaxel11.html (Dec. 20, 1996) (citing *The Economist* for fair $6.5 billion figure, saying that Greek projects routinely came in at 3–6 times more than projected cost) [hereinafter *Background and General Elements*].

24. Reed, *supra* n. 4, at 60; Nantsou, *supra* n. 22, at 2.

25. Kagkelidou, *supra* n. 18; *Acheloos River Diversion Scheme, Greece*, http://www.water-technology.net/projects/acheloos/ (accessed Mar. 9, 2009).

26. Dimos P. Anastasiou, *Adagio Country Report: Greece* (Mar. 13, 2008) (available at http://www.adagio-eu.org/documents/2nd_Meeting/07_Greece_D_Anastasiou_Sofia.pdf (Greek Ministry of Agriculture finding that "(87%) of water consumed is used in irrigation"); K. Kosmidou-Dimitropoulou, *Cotton Production in Greece*, Hellenic Cotton Bd. Research Dept.—Athens 45 (modified Oct. 23, 2002) (available at http://ressources.ciheam.org/om/pdf/s14/CI011829.pdf) (stating that the Hellenic Cotton Board Research estimates that "[a]lmost all cotton area is irrigated and only a very small percentage, ranging 3–6%, is grown under dry land conditions").

27. Reed, *supra* n. 4, at 60.

28. World Wildlife Fund, *Pipedreams? Interbasin Water Transfers and Water Shortages* 17–18, (June 2007) (available at http://assets.wwf.es/downloads/pipedreams_ibts_final_report_27_june_2007_1.pdf).

29. John Psaropoulos, *The Water Wars*, Athens News A99 (Aug. 5, 2005).

30. Paul Brown, *Greek Dam Project Drains EC's Funds Leaving Poor High and Dry; The Community Is Helping to Pay for New Dams and a Tunnel on the Acheloos River to Carry Water away from Three Dams for Which It Also Footed Most of the Bill*, Guardian (London) 35 (June 26, 1993).

31. John Psaropoulos, *The Water Wars*, Athens News A02 (Mar. 30, 2001).

32. *Background and General Elements*, *supra* n. 23. "For decades the work of draining lakes went on in Thessaly without moderation. . . . [W]ith the result that the most important hygrobiotope in Europe after the Danube delta was completely lost, together with a considerable fish production (a thousand tons annually, employing 1,300 fishermen)." *Id.*

33. *See* Psaropoulos, *supra* n. 29.

34. *Id.*; *The Diversion of the Acheloos River: The Last Study (August 1995)*, http://www.agrinio.net/perivallon/enaxel21.html) (Dec. 20, 1996) [hereinafter *Last Study*].

country whose soils had been abused for more than two thousand years had become the fifth largest exporter of cotton in the world. The cotton growers of Greece had also become the most heavily subsidized farmers in the world,[35] a prize for which there is no small competition. And the cotton growers of Greece came from Thessaly.

Of course, there were people and other living things on the *other* side of the Pindos Mountains who were already using the Acheloos. In fact, they depended on it, but they were not Thessaly, and in the late 1980s, as the first Acheloos construction bids were sent out, they seemed as immaterial as a distant wind.

C.

The Byzantine monastery of Saint George at Myrophyllo rests in a high mountain pass west of the Pindos mountains, opposite Thessaly.[36] Dating back to the 11th century, it holds a special place in Greek hearts. Its secret passages sheltered the Friends of Greece, the premiere resistance movement against the advancing Ottoman Empire and an inspiration for the 1820 revolution when the Greeks took back the country. The walls of monastery were covered in colorful, free-flowing frescoes, except that, in 1993, they were about to be buried in murky water behind the Messohora dam, phase one of the Acheloos project. The village of Myrophyllo would be inundated as well. Georgios Rapti, the mayor of the town, had not been consulted on the project. "'No one has come here to explain,'" he said. "'It is our farmland, our walnut trees, our history and heritage, and eventually our homes on the hillside that will go.'"[37]

They were not alone. Entire mountain towns would be eliminated from the steep slopes and narrow valleys on the west slope of the Pineios, their houses made of flat stones piled up on each other like tidy stacks of books, their alleys roofed by vines whose stems were the width of a man's leg and shaded generations in their time.[38] In a country better known for island beaches and the great sprawl of Athens, these mountain ecosystems were jewels in the sky, the source of cold running water, anadramous trout, and snow. The streams are crossed on old stone bridges that go back to the time of Rome. With curved arches and elegantly simple patterns, they are about as close to fine cabinetry as one can get with stone. This where the Acheloos rises. They too would be drowned.

Farther down, the Acheloos spreads onto its own agricultural plain[39] and then descends to the Ionian Sea in a fan, fresh water meeting salt, the most fecund nursery in the world.[40] The Acheloos delta is protected, or at least intended to be protected, by international treaties and European directives on water, wild birds, and natural habitats.[41]

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35. Kagkelidou, *supra* n. 18.

36. Brown, *supra* n. 30 (describing the possibility of a monastery being submerged by reservoir waters).

37. *Id.*

38. *See id.* The description of the towns, homes, and stone bridges is from the author's personal observation (July 2003).

39. This information comes from author's personal observation during a visit to the Acheloos in July 2003; *see also Background and General Elements*, *supra* n. 23 (stating irrigated agriculture is equally important to Western Greece, contributing 45% of the region's average income, as compared to only 22% in Thessaly).

40. *See* Nantsou, *supra* n. 22, at 1.

41. *Id.*; *see also* Council Directive 85/337/EEC, 1985 O.J. (L 175) 40 (available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31985L0337:EN:HTML); Council Directive

A dozen species in the area are at risk of extinction.[42] The European Commission has sued Greece several times for its failure to carry out these directives,[43] one suit in particular complaining of its lack of planning for this delta complex,[44] and in the summer of 2007, the Commission filed two additional cases against a country that apparently has no heart for this kind of work.[45] Instead, Greece ramped up on the Acheloos project, which would turn the delta to salt.[46]

Granted, as the saying goes, you cannot make an omelet without breaking eggs. Even Myrophyllo's mayor, facing the loss of his town and his people, conceded as much. "'We would not stand in the way of progress if it was for the good of Greece, he said, "but all we know is that it is to grow more tobacco and cotton to be ploughed back into the ground and make farmers rich."'[47] This was the other problem with the Acheloos project. By any measuring stick, it was a dog.

To begin with, it was a dog with two heads, depending on where it was being shown. By the late 1980s, the European community was beginning to have second thoughts about supporting crops like cotton that were grown in such abundance that it was also paying farmers not to grow them.[48] Seeing the handwriting on the wall, Greece presented Acheloos as an electric power project, instead, in order to qualify for

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79/409/EEC, 1979 O.J. (L 103) 1 (available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:1979:103:0001:005:EN:HTML), as amended, by Commission Directive 97/49/EC, 1997 O.J. (L 223) 9 (available at http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!DocNumber&lg=en&type_doc=Directive&an_doc=1997&nu_doc=49); and Council Directive 92/43/EEC, 1992 O.J. (L 206) 7 (available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31992L0043:EN:HTML).

42. *See* Hadjibiros, *supra* n. 13; Nantsou, *supra* n. 22, at 3.

43. *E.g.* Case C-166/04, Commn. v. Hellenic Republic (Oct. 27, 2005) (unpublished) (copy on file with author) [hereinafter Acheloos I] (documenting the failure to take measures to protect Messolongi Lagoon).

44. Case C-334/04, Commn. v. Hellenic Republic, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62004J0334:EN:HTML (Oct. 25, 2007) [hereinafter Acheloos II] (manifestly insufficient classification of special protection areas for the purposes of Article 4(1) and (2) of Council Directive 79/409/EEC, 1979 O.J. (L 103) 1, 3 , as amended by Council Directive 97/49/EC, 1997 O.J. (L 223) 9).

45. Press Release, Europa, *Greece: Commission Pursues Legal Action over Infringements of EU Environmental Legislation* (Mar. 22, 2007) (available at http://europa.eu/rapid/pressReleasesAction.do?reference=IP/07/394&format=HTML&aged=0&language=EN&guiLanguage=en) (announcing Commission will pursue legal action against Greece over breaches of three EU laws to protect the environment and public health); Case C-264/07, Commn. v. Hellenic Republic (Jan. 31, 2008) (unpublished) (judgment information available at http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&Submit=Submit&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=alldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoj=docnoj&docnoor=docnoor&radtypeord=on&typeord=ALL&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=c-264%2F07&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=&domaine=&mots=&resmax=100) [hereinafter Acheloos III] (brought for failure to fulfill obligations under Article 5(1) and 15(2) of Council Directive 2000/60, 2000 O.J. (L 327) 1); Case C-293/07, Commn. v. Hellenic Republic (Dec. 11, 2008) (unpublished) (available at http://curia.europa.eu/jurisp/cgi-bin/form.pl?lang=en&newform=newform&Submit=Submit&alljur=alljur&jurcdj=jurcdj&jurtpi=jurtpi&jurtfp=jurtfp&alldocrec=alldocrec&docj=docj&docor=docor&docop=docop&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoj=docnoj&docnoor=docnoor&radtypeord=on&typeord=ALL&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&numaff=C-293%2F07&ddatefs=&mdatefs=&ydatefs=&ddatefe=&mdatefe=&ydatefe=&nomusuel=&domaine=&mots=&resmax=100) [hereinafter Acheloos IV] (brought for failure to fulfill obligations under Article 4(1), (2) and (4) of the Council Directive 79/409/EEC, 1979 O.J. (L 103) 1,, as amended by Council. Directive 92/43/EEC, *supra* n. 41, at 7, art 6(2) & (4)).

46. *Background and General Elements*, *supra* n. 23 (stating that the project will turn the Acheloos delta "into a vast salt-basin").

47. Brown, *supra* n. 20.

48. *Id.*; Kagkelidou, *supra* n. 18.

Community funding.[49] Meanwhile, project sponsors back home were presenting it as an agriculture project to rescue the Thessaly plain.[50] They knew what was real and what was window dressing.

Compounding the project's identity crisis was the fact that the claimed power and the irrigation benefits did not mix together in the same glass.[51] The more water one stored for power the less was available for agriculture, and the reverse was likewise true. At which point, in the words of the London Guardian, "the scheme descend[ed] into farce."[52] The Greek Power Corporation complained the project would actually reduce water supply to its existing plants. It was demanding to be paid sixteen million pounds in compensation.[53] Not a good omen.

The economics got worse from there. Cotton production would not increase by the predicted seven times; best case, it would be lucky to increase by 50%.[54] Low inflation would not keep costs down; inflation, in fact, was soaring.[55] The costs of operating the facilities, some highly complex, and fixing them when they began to break down, did not make it into the debit column, nor did the costs of actually getting the water from the diversion canal to the fields. One report likened these economic machinations to "the thief of mythology, Procroustes, who cut or stretched the bodies of those he robbed so that they would fit his bed."[56]

Not that the Greek government did not try for a good report card. It contracted three times for independent analyses of the Acheloos project, but each one had found it a loser.[57] On the last try, the government turned to a British firm, Morgan Grenfell, giving it a very short deadline and even more limited information, which was not to be questioned.[58] The ensuing report, which reads like an excuse for bad homework ("taking in mind the time restrictions . . . [which] precluded the collection of data and "use of the most developed methods of hydrology technology"[59] ended with a cold embrace: If cotton prices remained at an all-time high and inflation at an all-time low, the Acheloos might break even.[60] Not long afterwards, the director of Morgan Grenfell was retreating from even this prediction, saying that "'anyone who suggests we endorsed [the Acheloos] is being economical with the truth.'"[61] No one would claim the dog.

None of this, of course, mattered to the agriculture industry in Thessaly nor to the government in Athens. The point of projects like these is not to justify the money but to deliver it, particularly where the costs are paid in Monopoly fashion at the beginning of the game. Also irrelevant was the fact that Thessaly farmers were wasting water as if it

49. Brown, *supra* n. 30.
50. *Id.*
51. *Id.*; *Background and General Elements*, *supra* n. 23 (calling the deception "an organized confusion").
52. Brown, *supra* n. 30.
53. *Id.*
54. *Id.* (calling the irrigation benefits purely imaginary).
55. Hadjibiros, *supra* n. 13.
56. *Last Study*, *supra* n. 34.
57. Hadjibiros, *supra* n. 13.
58. Brown, *supra* n. 30; *see generally Last Study*, *supra* n. 34.
59. *Last Study*, *supra* n. 34.
60. Hadjibiros, *supra* n. 13.
61. Brown, *supra* n. 30.

were their last day on earth. The prevailing custom was to irrigate crops throughout the heat of the day[62] with water "'cannon[s]'" that shot streams of liquid high into the air, from whence they descended "like a sprinkling rain."[63] Some of it descended. Much of it was lost to evaporation before it hit the ground. The irrigation canals in the region were both unlined and uncovered, so much of the water in transit either leaked down into the soils or also went up into the sky.[64] At the same time, growing crops on exhausted soil required ever-greater loads of fertilizers, and pesticides to control insects that thrive on monocultures, all of which leaked back into the groundwater and what surface water remained.

By the 1980s then, Thessaly cotton was growing on chemicals and borrowed time.[65] The Pineios was shot, and the water wells were starting to pump up brines.[66] The response to these problems was not to water at night instead of by day, nor to irrigate with hoses but water-canons in the sky, not to line the feeder canals, not to cover them on top, nor to begin to charge farmers increasing rates for the use of water, which would induce them to conserve. Way off the table was any notion of rotating crops to allow the land to recover, or substituting other crops more sustainable in a future all could see was going to bring higher energy prices and more intense cycles of drought. Thessaly's solution was far more simple. It would bring over the Acheloos River no matter how much times had changed, and it was not going to budge. It had waited long enough, and it had Athens on its side.

D.

There was another government in Europe, however. Its formation had been a lot slower than that of the United States, which managed to package itself in less than 20 years, but then again the wars of Europe had been going on for two millennia among people who spoke different languages and learned to hate each other from childhood. Americans call the construction of their government the Miracle at Philadelphia,[67] and it was indeed remarkable, but the case could be made that an equally dramatic event was launched in Europe 50 years ago and is still in motion. The question on both sides of the Atlantic was the same: As between the central government and the member states, push come to shove, who held the power?

It took the United States two tries to agree on a national authority that could get things done. The member States of Europe moved with equal caution, and what emerged in the Treaty of Rome was something like the American Articles of Confederation, but even more diffuse.[68] It was originally named the European Community, not Union, and

62. Kagkelidou, *supra* n. 18.

63. Psaropoulos, *supra* n. 31.

64. *Id.*

65. *Id.* The Pieios River "is reduced to a poisonous trickle of agricultural runoff during summer." *Id.*

66. *Id.*

67. *See* Catherine Drinker Bowen, *Miracle at Philadelphia: The Story of the Constitutional Convention May to September 1787* xi (Little, Brown & Co. 1986).

68. *Treaty Establishing the European Economic Community* (Mar. 25, 1957), 298 U.N.T.S. 11 [hereinafter *EEC Treaty*]; *see* Rod Hunter & Koen Muylle, *European Community Environmental Law*, in Envtl. L. Inst., Rod Hunter & Koen J. Muylle, *European Community Deskbook* 7, 7–11 (2d ed., Envtl. L. Inst. 1999). The summary of European Community (EC) history and organization that follows is taken from these sources. The

for good reason. There would be no fixed presidency, but a leader who rotated frequently among the member states. Laws could be passed only by state government ministers, and only unanimously, which meant that a single unwilling government had the veto. Even when enacted, these laws, in the main by "directives," only set goals and let the states adopt their own programs to accomplish them. A Commission in Brussels would supervise state performance, from afar. So would a European Court of Justice, but only after a lengthy process aimed at reconciliation. In sum, a more indirect and deferential super-authority would be hard to imagine. If it had been imaginable, they would have probably adopted it instead.

When it came to environmental policy, the Community's power was not simply indirect. It did not exist. Commerce was the magnet that brought these countries together and the initial pact committed them to the removal of trade barriers and little else.[69] There was nothing in the Treaty about environmental protection, not a word. One would think, then, that Greece and its sister countries had little to fear from Brussels over their environmental policies. If, indeed, they had any policies. In fact, however, the opposite happened.

In the 1970s, the Community began to pass environmental laws. Lacking explicit authority in the Treaty to do so, Brussels teased it out of a duty to "harmonize" national laws to prevent economic disparities.[70] The theory worked for environmental programs, like pollution control, where some states might try to lure industry with weak controls.[71] Over time, though, the idea of protecting the environment in order to equalize commerce seemed increasingly fictitious,[72] and so Europe did a straightforward thing. In the 1980s, it dropped the fiction and changed the Treaty.[73] It would protect the environment in order to protect the environment,[74] and it would go on to say how. These amendments would jolt Greece and its designs on the Acheloos River.

The amendments were dramatic. They dropped the requirement for unanimity to pass environmental laws, which enabled the passage of tough requirements over the objections of a few recalcitrant states.[75] In the same vein, they beefed up the role of the

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workings of the EC are, of course, far more complex and the role of its parliament, mentioned later in this story, of greater magnitude.

69. It was, after all, the European *Economic* Community and its provisions were designed to reduce trade barriers. *See EEC Treaty*, *supra* n. 68, at 34–37.

70. Ludwig Krämer, *EC Treaty and Environmental Law* 1–3 (2d ed., Sweet & Maxwell 1995); Hunter & Muylle, *supra* n. 68, at 19. Additional authority was found under *EEC Treaty*, *supra* n. 68, article 235(a), a "Necessary and Proper"-like clause, authorizing action to obtain Community "objectives." See *EEC Treaty*, *supra* n. 68, at 156.

71. *See* Karakostas & Vassilopoulos, *supra* n. 13, at 29–30; Krämer, *supra* n. 70, at 2.

72. *See* Hunter & Muylle, *supra* n. 68, at 19 (identifying "some uncertainty over the Community's competence in this area").

73. *Single European Act*, 1987 O.J. (L 169) 1, 4 [hereinafter *SEA*] (amending *EEC Treaty*, *supra* n. 68). The U.S., by contrast, still clings to the constitutional notion that environmental laws are justified as protecting interstate commerce, causing considerable confusion where the objects, such as endangered species and isolated wetlands, are not in commerce at all. *See e.g. Natl. Assn. of Home Builders v. Babbitt*, 130 F.3d 1041, 1045–46, 1048 (D.C. Cir. 1997), *cert. denied*, 524 U.S. 937 (1998); *Rapanos v. U.S.*, 547 U.S. 715, 760, 768, 783, 794 (2006).

74. *SEA*, *supra* n. 73, at 8, art. 100(A)(3). *See also id.* at 11, art. 130(r)(2) (reiterating environmental objectives of Community "action"). For rigors of the SEA's environmental policies, see Krämer, *supra* n. 70, at 29–30.

75. *SEA*, *supra* n. 73, at 12, art. 130(s). For a discussion of Europe's odyssey over the legislative role of Parliament from debate club to full partner with the Council of Ministers, see Hunter & Muylle, *supra* n. 68, at

popularly elected Parliament, giving it eventually an equal seat in passing Community laws.[76] The *vox populi* in parliament was now in play, and the European *vox populi* was decidedly green. A spate of green directives would follow.

At the same time, the amendments declared that environmental protection would be[77] guided by three overriding principles: Pollution should be abated at the source,[78] the polluter should pay, and development would be "sustainable" over time.[79] Read literally, these principals offended industry and developers of every stripe. No rational enterprise wants to pay for pollution controls if the costs can be passed on to the general public, nor is the rational enterprise eager to control discharges at the source if it can get the government to bring over the Acheloos River and flush them away. The principle of "sustainability" was even more threatening because no one could exactly say what it meant. Which left it for the courts to decide. As the Acheloos project came on, then, in the late 1980s, it would face a rising focus on environmental problems in Brussels and a new set of laws to address them. One of the first of these laws was a mechanism that, at that time, was traveling the world seeking environmental review for development projects.[80] Europe followed with an impact assessment directive, and Greece was obliged to follow suit.[81] This said, the basic leave-it-to-the-states philosophy of the European Union remained in place, which left the execution of impact analysis to the Greek government and the Greek judiciary.

Two thirds of the Greek government was no problem to Thessaly. It had carried the day with the legislature and the presidency. The judiciary was another matter, a cipher really, because the too were emerging from the long darkness of the Second World War, followed by a civil war, and then a military coup. No one knew what they would do.

E.

The first time the Acheloos project went to court, it emerged with a black eye and a bloody nose. The year was 1994 and a group of environmental organizations led by the Hellenic Ornithological Society and by the World Wildlife Fund filed a lawsuit against the venture, its first impoundments already well under construction.[82] The defending agencies formed a mighty phalanx, including Agriculture; Industry, Energy and Technology; National Economy and Tourism; and the lead agency for the project, Environment, Planning, and Public Works.[83] Their very names bespoke the difficulties of getting an environmental word in edgewise. Three of the four had nothing to do with

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9–10.

76. *SEA, supra* n. 73, at 5, art. 7 n. 1.

77. *Id.* at 11, art. 130(r)(1) n.1.

78. *Id.* at 11, art. 130(r)(2).

79. *Id.* at 11–12, art. 130(s). A full discussion of Article 130(r) and (s) can be found in Krämer, *supra* n. 70, at 31–91.

80. Hunter & Muylle, *supra* n. 68, at 32–33.

81. *See* Council Directive 85/337/EEC, *supra* n. 41, as amended by Council Directive 97/11/EC, 1997 O.J. (L 73) 5.

82. PENELOPE, *The Greek Case Study*, http://www-penelope.drec.unilim.fr/Penelope/cases.htm (accessed Mar. 11, 2009). The PENELOPE Project is a new online resource designed to show how environmental law is being developed and applied within Europe. *See also* Nantsou, *supra* n. 22, at 4.

83. PENELOPE, *supra* n. 82.

environmental protection, and indeed pursued missions that would be complicated by the oncoming requirements of environmental law. The name of the fourth, Environment, Planning, and Public Works, misspoke where the power lay.

Public Works, in any country, has clout. It builds things from which people make money. Planning on the other hand is popular nowhere and is usually reduced to half-hearted exercises in zoning. Which left the third part, the Environment, at the dance but clearly standing against the wall. It might see strange then, to read a news report that a Mr. George Souflias, the "Minister of Environment," waxed enthusiastic in the news about the completion of the Acheloos project.[84] His title was misleading. He was first and foremost the Minister of Public Works, and the project was his child.

The Acheloos opinion came as a rude shock to a great deal of power. The Council of State, the supreme tribunal for administrative issues, began by according environmental groups the right to sue not because they had members that were harmed but, rather, because their sole purpose was to protect the environment.[85] It next announced that environmental protection was a "fundamental principle" for the benefit "not only of the present generation, but also of those who will follow.[86] At which point it took off the gloves.

What followed was a blistering critique of the Acheloos project, a litany of its adverse effects on the "exceptionally rich flora and fauna of the region"; the disruption of lives, communities, and transportation systems; the loss of the Acheloos delta; the continuing contamination of both the Acheloos and Pineios basins; and the high risks of moving aquatic organisms from one self-contained ecosystem to another.[87] Clearly, in the words of the trade, this was an "educated" court. The Ministry of Environment, Planning, and Public Works had tried to mask the project's impacts by cutting the project into pieces, treating a single dam or diversion canal, where it was obvious that the total effect was larger than its parts.[88] The court saw the impacts as "dynamic," not "linear," and called for a "composite" review that put the whole together.[89] The ball went back to the agencies.

All of which is worth a pause. We are in Greece circa 1990, one of the least developed countries in Western Europe and just emerging from nearly 50 years of chaos. The Acheloos was the biggest development bonanza in the country's history, supported with religious zeal by the dominant political party and the power of Thessaly. It was on a roll. Environmental lawsuits were a new phenomenon, just beginning to trickle in to a court system trained in the tenets of civil law that zealously protected the government from outside litigants like an elite regiment of the Royal Guards. Greek law schools barely mentioned the word "environment," and then only as a small appendix of administrative law. The number of lawyers in environmental practice could be counted on one hand without using the thumb. Where, then, did a Council of State opinion like

84. *See* Kagkelidou, *supra* n. 18 (citing Environment Minister George Souflias).

85. Symboulion Epikrateias [SE] [Supreme Administrative Court] 2759/1994 (Greece) (available at http://www-penelope.drec.unilim.fr/Penelope/cases.htm) [hereinafter SE, 2759/1994].

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

this one come from? The answer, like so many in history, is that it came from a remarkable person at the right place and time.

F.

Dr. Michael Decleris is an intellectual in the Greek tradition, educated at the Universities of Athens and London, ending with a doctorate of laws from Yale.[90] His first interests were in public policy and the workings of government, but he soon immersed himself in the sciences, particularly the workings of large-scale ecological systems. His work shows a steady trend from the question of governance to the even more elusive question of sustainable development. The ranks of environmental lawyers around the world include a strain of lawyers who discovered the intricacies of science and simply fell in, and Decleris seems to have been one of them. At the time the Acheloos project came along, he had been a member of the Council of State for over two decades and was now its Vice President. More germane to the Acheloos, he was in his tenth year heading a new branch of the Council, Section V, exclusively dedicated to environmental cases. It was no accident. He had created the Section. Michael Decleris was an intellectual who also got things done.

The very existence of Section V affected the Acheloos opinion. An environmental court, a concept still foreign to the United States,[91] offers the advantage that it learns the law and the agencies it is dealing with. A lawyer does not have to struggle to educate a new judge, often impatient and a little timid towards the unknown, on the purpose of a program and how it works. Nor does the environmental side have to convince the judge that the government—which is presumed to do no wrong—can actually do wrong, at times repetitively, even deliberately. It does not take many cases against a ministry like Environment, Planning, and Public Works for the judges to conclude that there is a bad attitude here and to stop granting it the benefit of the doubt. That kind of understanding of what an environmental program is about—in this case, the impact review process—and how agencies tend to thwart it—in this case, by dividing the process into pieces—jumps from the Council's opinion. Section V saw what was going on.

Decleris's problem was, having arranged a new branch for environmental cases, he did not have much substantive law to apply. Greece did not join the European Community until 1980, and did not pass even a framework environmental statute until 1986.[92] In the absence of legislation, all the Court had to work with was the Article 24 of the Greek Constitution, which stated opaquely that environmental protection was an "obligation of the state" and that the government should take "special measures" to

90. Michael Decleris, *Global Judges: Sustainable Development and the Rule of Law* 26 (unpublished ms.) (available at http://www.unep.org/Law/Symposium/Documents/Country_papers/MICHAEL_DECLARIS.doc); *see also* Michael Decleris, *The Law of Sustainable Development: General Principles* (European Communities 2000) (citing his work on systems analysis) [hereinafter Decleris, *General Principles*]. The description of Decleris's background that follows is taken from these sources.

91. Pres. Decree 18/89, *Codification of Provisions of Law for Council of State*, art. 14, ¶ 8 (Dec. 1989) (established a separate environmental court). No other statute has yet followed suit to the author's knowledge. *See* Assn. of European Admin. Judges, *Fundamentals on Access to Administrative Justice in Environmental Matters According to Greek Law* (May 16, 2008) (available at http://www.aeaj.org/ spip.php?article109).

92. *See Greek Envtl. Legis.* 86/1650/L (accessed Mar. 13, 2009) (available at www.imbc.gr/institute/idd/Greek_Legislation4.doc) (concerning the protection of the environment).

conserve it.[93] There was nothing about citizen lawsuits, impact assessment, or sustainability. So Section V invented them. It took Article 24 and within a few years created a roadmap for environmental impact review, and strong protections for coastal areas, urban ecology, and other sensitive parts of the landscape[94]—and the right of all Greek citizens to enforce them.

Not without controversy. The most heated complaint of the Council's critics is that it legislated,[95] and the loudest applause acclaim of its supporters is that it legislated.[96] There is no doubt this is what it did and that it was spearheaded by Decleris, opinion by opinion, each step of the way. He was quite open about it. Like other scholars and members of the media, he saw the Greek government not only failing its environmental responsibilities but inherently incapable of meeting them.[97] The legislature was paralyzed, he would write, even where required to act by treaty, as in the case of wetlands protection where a convention had been signed and then ignored for twenty years.[98] The executive remained paralyzed as well, "in thrall" he wrote, "to an all-powerful, party-political and everlasting patronage system which abhors order because it feeds on and is strengthened by disorder."[99]

These are not the words of an anarchist. They are those of an expert on government systems who had published a half a dozen books on the subject. Decleris continued, with perhaps the Acheloos in mind: "The governments of the day, reserving most of their time and energy for economic development and 'projects' of all kinds, act only opportunistically and in a fragmented way on behalf of the environment."[100] He concluded, perhaps with the farmers of Thessaly in mind: "The regulatory vacuum is exploited by various private interests to create *faits accomplis* to their own advantage,

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93. 1975 Syntagma [SYN] [Constitution] 2:24(1) (Greece) (providing that the protection of the physical and cultural environment constitutes an obligation to the State. The State must take special preventive or repressive measures in the conservation thereof).

94. Decleris, *General Principles*, *supra* n. 90, at 10–11 (tracing development of law), 22–25, (summarizing council jurisprudence), 67–125 (analyzing application to environmental issues); *see also* Karakostas & Vassilopoulos, *supra* n. 13, at 36.

95. *See* Interview by Alexander Marcopoulos with Dr. Glykeria Sioutis, Asst. Prof. Pub. L. & Envtl. L., U. Athens, (Jan. 3, 2008).

96. *See* Karakostas & Vassilopoulos, *supra* n. 13, at 16 (calling the Greek Council of State "the missing link between what is and what ought to be environmental law"); *see also* Glykeria Sioutis, *Public Environmental Law in Greece*, in *Comparative Environmental Law in Europe* 193, 199 (René Seerden & Michiel Heldeweg eds., MAKLU 1996) (explaining that the Council of State was applying article 24 "in a very large and creative way").

97. *See* Karakostas & Vassilopoulos, *supra* n. 13, at 12.

> Private interests in Greece define policies and practices in the public sector in such a way as to evade any legal controls while, at the same time, managing to present themselves as representatives of the people. The way private interests escape legal control is through financial power and co-ordinated action at various levels. In many instances, they are also organized in associations which, at least in name, represent the needs of larger parts of the citizenry (e.g. unions, agricultural and building associations). The reasons for the uncontrolled growth of private interests in Greece are historical and relate mainly to the undeveloped environmental consciousness of the people and the lack of respect for public goods, common spaces and legal rules.

Id. at 13–14.

98. Decleris, *General Principles*, *supra* n. 90, at 13.

99. *Id.*

100. *Id.*

which are then as a rule accepted by the State."[101]

To Decleris, the environmental crises could not wait for the utopia of government reform. Natural resources were being destroyed right now, and what was being lost could not be replaced. The Byzantine monastery high in the high Pindos valley was going under eight feet of water and would be gone forever. The same fate awaited endangered deltas, coastlines, and species. The judicial role was to fill the gap. It is one of the most controversial, and controverted, judicial roles in the world. But it just might save the Acheloos.

The Ministry of Environment, Planning, and Public Works offered a classic response. It proceeded with construction. Within record time, it pumped out a new project decision and re-declared itself good to go.[102]

G.

Vassilis Anagnostopoulos takes another view.[103] He is an elected official in Thessaly and has supported the Acheloos diversion from the start. The way he sees it, the farmers in Thessaly were caught in a trap. The government encouraged them to switch from cereal crops to cotton in order to boost foreign exchange, reinforced by European programs that were throwing money at them to put ever more acreage into production. At the peak, draining and pumping their water to the last drop and, adding heroic loads of chemicals, Thessaly farmers were pulling in three and four crops of cotton a year. Thessaly had no hand in promoting these policies, of course. It was all the government's fault. Bridling at project delays, he says that if the government was "'now going to spend over half a billion euros from what little money the Greek people can afford for more studies,'" then "'they might well be the worst administrators ever.'"[104] On which possibility, the environmentalists might agree.[105]

Anagnostopoulos finds an ally in Dr. Glykeria Sioutis, an attorney who has been defending the Acheloos project before the Council of State for the past thirteen years.[106] A few early missteps in the paperwork aside, she thinks the project is sound. Thessaly needs the water, she explains, and there is too much of it, a "surplus" in her words, on the other side of the Pindos. Of course, she is paid to represent the project, and the agriculture industry in Thessaly is not exactly an indigent client. On the other hand, Sioutis is also a professor of administrative and environmental law at the University of

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101. *Id.*; *see also* Karakostas & Vassilopoulos, *supra* n. 13, at 13.

> Another particularly serious problem in Greece is the destruction of the natural environment by public works. The public works do not cause this destruction alone; rather it is caused by the low quality of planning and a vicious circle of corruption, which starts with the decision-making process and goes all the way to the selection of the contractor.

Id.

102. *Last Study*, *supra* n. 34. The new statute was produced in the "record time of only 100 days," during a "period when Greece lies dormant because of the summer holidays." *Id.*

103. Kagkelidou, *supra* n. 18. The description of Anagnostopoulos's views that follows is taken from this source.

104. *Id.*

105. *Id.* Both Anagnostopulos and the Counsel for Thessaly see the project as too far underway to stop. Interview, *supra* n. 95; Kagkelidou, *supra* n. 18.

106. Interview, *supra* n. 95. The quotations that follow are taken from this interview. Decleris's part of this conversation is extrapolated from his treatise, *General Principles*, *supra* n. 90.

Athens, with a respectable number of publications on environmental policy to her name.[107] Her complaint is that the Council of State "overstepped its bounds," to the point of "scandal." Withal, she characterizes herself an environmentalist who aims to protect the environment "wherever possible." Which begs the question, of what is possible?

Were we invisible in a room with Dr. Michael Decleris and Dr. Glykeria Sioutis, we might at this point eavesdrop on the following conversation:

> Decleris: Are there no decisions of the Council on Acheloos with which you agree?
>
> Sioutis: As you know, I represented the project in the first case, in 1994, and your ruling requiring a "composite" impact statement was correct. It was required by law.
>
> Decleris: But "composite" was not in the law. We had to interpret the Constitution to find it. Was that improper?
>
> Sioutis: It was at least limited because the experts in the Ministry could go back and fix the statement. You did not dispute their scientific findings. But in the next decisions, you went too far. You found the impacts to be serious and unacceptable, when government experts found the opposite. There you stepped out of bounds.
>
> Decleris: Would you have courts take the Ministry's statements at face value, without question? This is, after all, the same Ministry that is promoting the project.
>
> Sioutis: These are technical questions, not legal ones. We must stay within our roles.
>
> Decleris: But are they only technical? The weight of opinion says, that the impacts on the Acheloos system will be severe, and violate European directives on endangered habitats and water quality.
>
> Sioutis: Where scientists disagree, we defer to the agencies. Otherwise, it is judicial tyranny. As for the European directives, if Greece is not doing a good job, then the Commission can take it to the European Court.
>
> Decleris: Greek courts have their own responsibility to see that European laws are obeyed.
> Sioutis: You can't rely on the absence of law as law.
>
> Decleris: We can interpret European law and our own constitution to fill the gap. Which is what we have done.
>
> Sioutis: You have done too much.

So it would go among the lawyers. Meanwhile, the project would–and did–roll forward. The village of Messohora attempted to save itself from the flooding by showing that reducing the height of one dam under construction would have spared it and the monastery, with no loss in power production.[108] No reduction was made. Instead, the government preferred to pay damages to the displaced residents of the town,

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107. *E.g.* Glykeria Sioutis, *Les Institutions Grecques*, in *Droit Mediterranéen de l'Environnement* (Jean-Yves Cherot & Andre Roux eds., Economica 1988); *see also* European Pub. L. Ctr., *Glykeria Sioutis*, http://www-penelope.drec.unilim.fr/Penelope/partners/eplc/siouti.htm (accessed Mar. 13, 2009) (providing a copy of Dr. Sioutis's curriculum vitae).

108. Brown, *supra* n. 30; *see also e.g. Last Study*, *supra* n. 34.

including families who had lived there for centuries.[109] The people in the way of the Acheloos venture were not just dealing with a project. They were dealing with the attitude of a project that thought itself invincible and was beginning to feel itself under siege.

Shortly after the new impact statement emerged, World Wildlife Greece and its allies went back to court to challenge it as little different from before.[110] In 1999, Section V ordered the project to be scaled back in order to spare historic and cultural landmarks.[111] The Council of State had issued such decisions before, imposing development limits to protect unique resources,[112] but this was the first application of the principle to a venture this big and it offended Dr. Sioutis.[113] One of the affected sites was an old stone bridge, associated with an ancient church. In poor condition, she contended, the bridge was "doomed anyway."[114] No steps had been proposed to preserve it. Yet here came an opinion saying the bridge must be saved. Another example of a court out of control.

This time, the court was explicit in ordering the construction to stop, and so it did, for the next two years.[115] Meanwhile, however, the Greek government had appropriated over $200 million towards completing the project, and that was a great deal of money just sitting around.[116] And so, in 2003, the Ministry issued yet a third environmental statement and let the bids once more.[117] Two years later, the Council of State issued yet a third opinion rejecting the project, this time because the project did not conform to yet another European water policy.[118] The directive had a bite. Water projects had to assure that water quality would not be impaired and their beneficiaries paid full costs.[119] The Acheloos project violated both principles, except for the fact that Greece, rather handily, had done nothing to implement them. It was the Council's reliance on the water directive that most upset Dr. Sioutis and to understand her complaint, we need to bring Europe back on stage.

The Community never arrogated to itself the power to implement its laws.[120] Instead, the members would. The problem soon became apparent. Some members were not about to, which left the Community with the chore of trying to cajole countries like Greece into complying or, after protracted jawboning, taking them to the European Court.[121] Which might then, after more years, impose a fine.[122] These were not rare cases. In the 1990s, nearly a third of all the Commission's enforcement actions against

109. Brown, *supra* n. 30.
110. Acheloos II, *supra* n. 44.
111. *See* Decleris, *General Principles*, *supra* n. 90, at 113-15, and cases cited therein.
112. *See* Interview, *supra* n. 95. The quotations that follow are taken from this interview.
113. *Id.*
114. *Id.*
115. Nantsou, *supra* n. 22, at 4.
116. *Id.*
117. Acheloos III, *supra* n. 45.
118. *Id.*
119. Council Directive 2000/60/EC, 2000 O.J. (L 327) 12 (available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0060:EN:HTML).
120. *See* Hunter & Muylle, *supra* n. 68, at 16–17.
121. *Id.* at 17–19.
122. *Id.* at 18.

member states—for violations of everything from labor laws to commodity prices—concerned the environmental directives.[123] Environmental law is that hard to make happen. In recent years, Greece had been found in violation of the Wild Birds Directive, Natural Habitats Directive, Water Directive, and Nitrates Directives, to name only those directly connected to the Acheloos case.[124] For openers, the Acheloos delta, about to lose its river, was on the World Heritage list. Setting aside yet other European policies to protect the culture of mountain communities.[125] In the meantime, while these disputes between the Commission and Greece ran their course, projects like the Acheloos ran free.

Enter a doctrine to plug the gap. Certain European directives, if their requirements were specific, were found to have "direct effect" and constitute national law by themselves, without waiting for state action.[126] The doctrine was the invention of the European judiciary this time, and the idea was that member states would have nothing to gain by dragging their feet. The doctrine was all the handle the Council of State needed. Once a European directive like the new one on water had the effect of Greek law, anyone, including the Hellenic Ornithological Society, could take the government to court to enforce it against water projects. Very bad news for the Acheloos, unless the Greek government could find an escape valve.

H.

In early 2006, following the Supreme Court's third Acheloos opinion and yet another rebuke from the European Court of Justice on its overall compliance, the Minister of Environment, Planning, and Public Works pulled a double coup. The European directives on water as habitats were in his way, but each had a loophole. At the insistence of the member states, they allowed a country to opt out for projects of "overriding public interest."[127] Spotting the opening, the Minister went to the Greek

123. *Id.* at 16–17.

124. *See* Council Directive 85/337/EEC, *supra.* n. 41; *see also Treading Familiar Path to Court,* Athens News, (Oct. 21, 2005); Clairie Papazoglou, *The Acheloos River Case: The Diversion of Common Sense!* (unpublished) (copy on file with author); Minutes from Envt. Comm. Meeting, *Implementation of European Environmental Law* (May 3, 2006) (available at http://www.europarl.europa.eu/meetdocs/2004_2009/documents/dt/608/ 608859/608859en.pdf). "In October 2005, Greece was condemned for non-compliance with the Waste Framework Directive at 1125 uncontrolled sites." *Id.* (citing Case C-502/03, Commn. v. Hellenic Republic (unpublished) (Oct. 6, 2005) (confirmed source discusses "waste" not "water" framework).

125. Hunter & Muylle, *supra* n. 68, at 11–15.

126. Council Directive 75/268/EEC, 1975 O.J. (L 222) 37 (no longer in force) (protecting mountain communities and promoting their agricultural livelihood). Direct effect is not mentioned in any of the EC Treaties and was established by the European Court of Justice in Case 26/62, Van Gend en Loos v. Nederlandse Administratie der Belastingen, 1963 E.C.R. 1, in which the court held that rights conferred on individuals by European Community legislation (treaties, regulations, directives, etc.) should be enforceable by those individuals in national courts. In Case 9/70, Grad v. Finanzamt Traunstein, 1970 ECR 825, a case involving VAT, the ECJ ruled that a directive could be directly effective, as they imposed an obligation to achieve a required result.

127. *E.g.* Council Directive 92/43/EEC, *supra* n. 41, at art. 6(4) (providing explicit exemption for areas raising an over-riding public interest).

> If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted.

parliament and requested that it pass laws to implement both directives, long overdue, while at the same time exempting the Acheloos from them, declaring it to be a project of overriding significance.[128] Which it did,[129] scoring two goals for the Thessaly-Athens team. It got the European Commission out of their hair. And, by making the declaration legislative, it would evade the Council of State. The Council could declare a Ministry action to be against the law, but the parliament *was* the law. For Thessaly-Athens it looked like victory at last.

At this point in the fracas, the European Commission backed off. To be sure, it was continuing to sue Greece for its reluctance to implement environmental directives, nothing new here, but when questioned by a member of the European Parliament about the Acheloos project[130] the Commission replied that it had stopped providing monies for the Acheloos a few years back, when the power projects were completed, and that no new applications were pending.[131] Greece was on its own with the remaining funding. It was also, apparently, on its own with respect to European intervention. Having fed the monster and encouraged it forward, the Community was walking away.

Not so fast, said the environmentalists. In early 2007 World Wildlife Greece filed a complaint with the Commission raising a new claim. The Greek legislative maneuvers violated their treaty rights to justice and environmental protection. This was a claim that the Commission could not ignore. Hedging its bets, World Wildlife took a similar appeal to the Council of State. As the dust continued to swirl, Acheloos remained in litigation, too hot a potato for either Brussels or Athens to resolve.

Anyone who complains that environmental litigation ties up development projects in red tape would have a field day here. Yet sometimes, and often in public interest law, red tape is the only thing that public rights have. On the one side is money. On the other side is process. Meanwhile the Acheloos project, which has flaunted nearly every environmental and economic principle of the European Union, stands impatient in the wings, pawing the floor, ready to roll.

I.

Plato saw it. Two thousand years ago, he wrote of the abuse of Roman-occupied lands along the Mediterranean coast "'like the skeleton of a sick man, all the fat and soft earth having wasted away,'" only the bare framework remaining.[132] Two hundred years ago, George Marshall, as Ambassador to Turkey, traveled the area and wrote his master work, *Man and Nature*, which pointed out that the sandy wastes of North Africa had

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Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.

128. *Acheloos River Diversion Scheme, Greece*, *supra* n. 25. "In July 2006, the Environment Minister, George Souflias, successfully argued that the project was of national interest and after a lengthy debate, the Greek parliament voted through legal amendments to allow it to proceed." *Id.*

129. *Id.*

130. Press Release, European Parliament, *Parliamentary Questions* (Feb. 7, 2007) (copy on file with author).

131. Press Release, European Parliament, *Parliamentary Questions* (Apr. 4, 2007) (copy on file with author).

132. Norman Davies, *Europe: A History* 99 (Oxford U. Press 1996) (From Plato, *Critias*, quoted by Clive Ponting, A Green History of the World 76–77 (London, 1991).

once been the breadbasket of Rome.[133] Civilizations as old as the Aztec and as young as the homesteaders of the American Southwest have also stripped their soils, outrun their water, come on dry times, and expired in the dust.[134] They have done so even more rapidly with cotton, which in a few decades left the soils of the American South too sour to plant, and then did the same in Uzbekistan, turning Asia's fruit bowl into Dustbowl II.[135] On a short time frame, very short, what Thessaly is doing to the Acheloos may be argued as tenable, taking another region's water to postpone the day of reckoning, but over even a medium term, everything it is doing—from the crops it is planting to the manner it is growing them—is doomed to crash. This is before the oncoming crunch of energy costs and climate change.

But are these legal questions? Dr. Decleris would say so. He *has* said so in a book on the subject, and in his support the Green constitution has been amended to adopt key Section V rulings on sustainability. Dr. Sioutis, of course, would say otherwise. We can perhaps steal secretly back into the room for a final snippet of their conversation:

Sioutis: Sustainability depends on political choices.

Decleris: It is also a legal norm.

Sioutis: But in defining it, you are legislating.

Decleris: Not at all, I am interpreting the law.

Which would end it, except for the second act of the story of Hercules and Acheloos, the river god. On his way home with Deianira, now his bride, brave Hercules faced another river, the Evenus, made impassible by recent storms. As he pondered his dilemma, the centaur Nessos arrived on scene and offered to carry Deianira across in his ferry. Hercules agreed with the plan, and went across first with the couple's belongings to prevent any thievery on Nessos's part. But as he reached the far shore, looking back, he saw Nessos attempting to carry Deianira away. Enraged by yet another challenge so soon after his defeat of Acheloos, he shot a poisoned arrow at the centaur, wounding him fatally. As Nessos lay dying, he told Deianira to take a sample of his blood as a charm to win back Hercules's love, should he ever tend to stray. And that she did.

Not long following, Hercules was again off to war and had set his sights on yet another attractive princess, Iole. Learning of the relationship and remembering Nessos's dying words, Deianira sent her husband a gift, a robe of gold treated with Nessos's blood. When Hercules donned the robe, however, the blood, still tainted by the poisoned arrow, began to burn his skin. The harder Hercules struggled, the more tightly the robe clung. Certain that his wife had betrayed him and suffering the agony of the burning robe, he ordered his men to immolate him on a pyre at Mt. Oeta, which they did.

You can defeat Mother Nature, for a while. Then it becomes very difficult.

133. *See* George Perkins Marsh, *Man and Nature* 7–52 (David Lowenthal ed., U. Wash. Press 2003).

134. *See* Timothy Egan, *The Worst Hard Time: The Story of Those Who Survived the Great American Dustbowl* (Houghton Mifflin Co. 2006).

135. Psaropoulos, *supra* n. 29.

II. TRILLIUM

"I told David Syre the first time I came back from seeing the property in Tierra del Fuego, I said, David, you bought a national park which has some timber."

Dr. Jerry Franklin, Forest Ecologist and Professor, University of Washington [136]

In the winter of 1520, Ferdinand Magellan was bumping his way down the flank of South America in search of an eastern passage to the treasure of the day, the spices of the far Pacific.[137] Henry Hudson and others were about to probe the northern route, and Christopher Columbus had just attacked the middle, certain to the end that he had found China. Magellan went for the southern flank, and it was brutal.[138]

Dogged by sea ice, sabotage, mutiny, unspeakable weather, useless charts, an unyielding landmass, and superstitions about the sea world so paralyzing that he had to command his crew by guile and torture, the Captain General nosed into yet another lead.[139] The strait widened, storms howled in his face, and to his left and right rose steep forests of small trees, rocks, and ice. It looked promising. Whatever was ahead seemed open to the ocean beyond. In the evening, they spotted distant fires on the port side, which they took for signs of life.[140] Perhaps they were lightning strikes. Magellan saw no one, but the fires made an impression, and he called the land mass he was passing Tierra del Fuego ("Land of Fire").[141] Within a year, he would be hacked to pieces on a small island, half a world away.[142]

Three hundred years later, Charles Darwin and the Beagle rounded the same strait and did a little more exploring. Within only a few feet of shoreline, they found "a dense forest with dozens of types of ferns; windblown, stunted trees; silky moss; and a layer of spongy tundra."[143] The place was strangely fertile. The same diet of mist and squall that daunted the human heart produced woods so thick that "'it was necessary to have constant recourse to the compass.'"[144] The few native people Darwin encountered were so dwarfed in their growth and "'hideous'" in appearance that he could hardly believe them to be "'fellow-creatures,'" or "'inhabitants of the same world.'"[145] There were few souls here worth converting and no gold—nothing to claim the European heart.

Thus, Tierra del Fuego remained an isolated dab at the foot of the continent and a dragon at the gate to the Pacific Ocean. One sailed by Tierra del Fuego, God willing, as quickly as one could. The thick and stunted forests also remained untouched and off the

136. Wayne Crosby, *The Challenge of Developing Sustainability in Tierra del Fuego: Environmentalist Contestation of the Río Cóndor Forest Project in Chile* 94 (unpublished M.A. thesis, Simon Fraser U., 2006) (copy on file with author) (quoting Dr. Jerry Franklin, Forest Ecologist and Prof., U. Wash. (July 19, 2004)).

137. Laurence Bergreen, *Over the Edge of the World: Magellan's Terrifying Circumnavigation of the Globe* 34–39 (William Morrow 2003).

138. *Id.* at 182–83.

139. *Id.* at 184.

140. *Id.* at 179.

141. *Id.*

142. Bergreen, *supra* n. 139, at 286.

143. *Id.* at 185.

144. *Id.* (quoting Charles Darwin).

145. *Id.* at 186–87 (quoting Charles Darwin).

radar of a globalizing world until 1993, when an enterprising businessman from Seattle, Washington decided to buy them and cut the timber. Suddenly, Tierra del Fuego mattered, halfway up the chain of the Andes Mountains to Santiago, Chile and back to the boardrooms of corporate North America. The furor was certainly a surprise. Who could possibly care about some dwarf trees at the bottom of the world?

A.

In 1993, David Syre purchased over half a million acres of real estate that he had never seen.[146] He was looking for forests, and this was one available. The fact that it was 10,000 miles away from his corporate headquarters in Seattle was no obstacle. He had sent two foresters to Tierra del Fuego, and they reported that the purchase was a "terrific value" with 640,000 acres of virgin timber, most of it hardwood, a local community hungry for jobs, and a country with no hint of environmental compunctions and falling all over itself to attract foreign investment.[147] Better yet, the headquarters of the company trying to sell the land was located only an hour's drive away, in Vancouver.[148] Syre drove north to make the deal.

Syre was used to taking chances, and winning. Tall, soft-spoken, and personally charming, even his adherents used the word "aggressive" when speaking of his ventures.[149] Syre had fought his way back from polio at an early age to engage in a series of investments that put him, then in his early 50s, at the top of a $400 million enterprise that stretched from Alaska to the tip of South America.[150] He started out in real estate by building a 176-unit condominium complex near Glacier Park, then purchasing a shopping mall in his hometown of Bellingham, Washington, and he purchased "at fire-sale prices, large chunks of downtown Denver; Vancouver, B.C.; Ketchikan; and Anchorage."[151] He opened a business park named Cordata and a nearby resort called Semiahmoo.[152] He did nothing by halves here, not even the names.

At the same time, Syre was diversifying. He bought out a manufacturer of sunglasses and another of bicycle helmets.[153] He had "a model farm and agricultural theme park[,] . . . Hollyhock Farms . . . ."[154] Then he started buying forests, a cluster from Boise Cascade and another on Whidbey Island in Puget Sound, which is when he made his first mistake. He began clear-cutting the forests.[155] Worse, he committed the cardinal sin of a timber operator; he clear-cut where people could see it, and clear-cut timber is as ugly as a fire-bombing. It was such bad form that the state lands

146. Bill Dietrich, *Chile's Tierra del Fuego; Harvest with Care*, Seattle Times A1 (Jan. 26, 1997). Trillium's original purchase of around 640,000 acres in Chile was augmented by a subsequent purchase in Argentina, bringing its total to 825,000 acres. *Id.*

147. *Id.*

148. *Id.*

149. Crosby, *supra* n. 138, at 51 (quoting Rand Jack, First Land Steward of Río Cóndor Project).

150. *Id.* at 50; *see also* Dietrich, *supra* n. 148.

151. Dietrich, *supra* n. 148. For further information on Trillium's ventures, see generally Public Information Network, *Profile of the Trillium Corporation*, http://www.endgame.org/trillium.html (last updated Dec. 2003).

152. Dietrich, *supra* n. 148.

153. *Id.*

154. *Id.*

155. *Id.*; *see also* Crosby, *supra* n. 138, at 51.

commissioner sent him a "blistering letter of reprimand,"[156] not about the cutting, but about its visibility. Syre was making the timber industry look bad.

Projects like these make their own controversy. His shopping mall provoked a storm of protests from people who preferred their old stores and less traffic, and neighbors blocked his Hollyhock Farms.[157] Some opponents got nasty. They dumped sawdust in his lobby and held a "group vomit," where one spat at him in the street.[158] His timber cuts, memorialized in photographs, were called "savage" and "destructive."[159] It was a stigma that would last, to the detriment of his next big play, the Río Cóndor project in Tierra del Fuego. Whatever David Syre *said* he was going to do, these photos showed what he had done. Which were you going to believe?

Syre did not choose the southern tip of Chile by accident. He wanted to do more in timber, and the market around him was grim. Apart from the buzz his own projects had caused, by the 1990s the Pacific Northwest was embroiled in controversy over its remaining original forests. Denuded slopes were choking off salmon streams all the way inland to Idaho,[160] and the coastal forests were so depleted that deep woods animals like the Spotted Owl and the Marbled Murrelet were being pushed to extinction.[161] More to the point of a farsighted businessman, the good timber was gone, logged out for decades in a spree led by the below-cost sales of the U.S. Forest Service.[162] Syre considered Canada, but with most forests up there in government hands, it seemed a risky investment.[163] He looked into New Zealand but discovered that other companies had beaten him to the punch.[164] His plans to enter Russia's vast storehouse of timber crashed when his business contact there was assassinated and found stuffed in the trunk of a car.[165] By comparison, Chile was a piece of cake. There was nobody else of consequence there but a stable military regime, only beginning to cede real power, and an unusual forest product. The primary tree of Tierra del Fuego was the lenga. With a hard red core turning white towards the bark, the lenga had high-end potential for furniture and interior carpentry.[166]

It was to be done the right way. To Syre himself, and to many whom he recruited, he was green at heart and had an ambitiously green project in mind for Tierra del Fuego.[167] They would showcase the world's largest venture in sustainable forestry.

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156. Dietrich, *supra* n. 148.

157. *Id.*

158. *Id.*

159. Crosby, *supra* n. 138, at 51 (quoting e-mail from Pat Rasmussen, Forest-Americas Coord., Am. Lands Alliance, to Wayne Crosby, Graduate Student, Dept. Sociology & Anthropology, Simon Fraser U., *Complaints about Trillium* (June 9, 2004)).

160. *See generally Natl. Wildlife Fedn. v. U.S. Forest Serv.*, 592 F. Supp. 931 (D. Or. 1984) (describing the effects of logging on salmon streams in Idaho).

161. *See generally e.g. N. Spotted Owl v. Lujan*, 758 F. Supp. 621 (W.D. Wash. 1991) (describing the effects of logging on the Spotted Owl).

162. For a critique of the economics of U.S. Forest Service practices, see Randal O'Toole, *Reforming the Forest Service* (Is. Press 1988).

163. Dietrich, *supra* n. 148; *see* Crosby, *supra* n. 138, at 52 ("[H]arvesting had been extensive for decades and [there] weren't any trees—[the] same kind of inventory was not available" (quoting David Syre)).

164. Dietrich, *supra* n. 148.

165. *Id.*

166. *Id.*

167. Crosby, *supra* n. 138, at 53–57.

Syre would only cut the amount of lenga that could regenerate on the island, and thus, he would provide a perpetual source of trees and revenue. He would even help the re-growth along by tree thinning and by growing seedlings in nurseries. He would reduce the knots in the trunks by trimming off their limbs, making the lumber more marketable.[168] In the words of his operations manager in Chile, which could be the words of a forest manager anywhere in the world, the uncut trees of Tierra del Fuego were "over-mature."[169] They were too old, they had stopped growing, and they might as well be dead. Syre saw his team as coming to the rescue:

> We thought over time, we would improve the environment for all the different species of people and birds and animals that depend on it. Now it's just sort of decadent and about as much lives as dies each year—is [sic] pretty much in balance and you'd have a much wider variety of habitat because you would have different kinds of growth taking place.[170]

To Syre and others, they were not just improving Tierra del Fuego with a new port, a sawmill, a wood drying plant, an energy plant, an airport, and 1,200 miles of forest roads.[171] They were improving Mother Nature.

There were two problems with Syre's approach. The first was that nobody in the vast array of technicians at Syre's disposal, including those in the Chilean government, knew anything about the lenga forests of Tierra del Fuego, much less how to regenerate them. The second was political. Syre's team was stepping into a country that was in much greater flux than it had reason to believe, even with the Chilean experts on the payroll and in the government itself.

B.

At first blush, Chile looked like the ideal place for a United States investor, and that was no accident. For the past 17 years, it had been under the thumb of General Augusto Pinochet, a dictator with a strong penchant for free market economics.[172] Some might say the dictator provided the best of both worlds. Granted, Pinochet had ousted a democratically-elected President, Salvador Allende, but his coup was backed strongly by the United States government, which indeed had a hand in it, and by 1993, it seemed a distant memory, if a memory at all.[173] Chilean authors since have described a sort of collective amnesia that settled on Santiago and expanded to the rest of the country that ignored the dictatorship and took the profits in return.[174] One could not blame Syre for treating it the same way.

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168. *Id.* at 63–65.

169. *Id.* at 55 (quoting Gabriel Rodriguez, Trillium Operation Manager, Forestal de Trillium Ltda., Punta Arenas, Chile (Jan. 22, 2004)).

170. *Id.* (quoting David Syre).

171. TED Case Studies, *Chilean Forest Preservation and the Project River Condor*, http://www.american.edu/TED/chilewd.htm (accessed Oct. 9, 2008).

172. Crosby, *supra* n. 138, at 5; *see also* Wikipedia, *History of Chile*, http://www.wikipedia.org/wiki/History_of_Chile (accessed Oct. 9, 2008) [hereinafter *History of Chile*].

173. Crosby, *supra* n. 138, at 49. For further detail on the role of the United States in the Pinochet coup, see generally Christopher Hitchens, *The Case against Henry Kissinger—Part One: The Making of a War Criminal*, 302 Harper's Mag. 33 (Feb. 2001) [hereinafter Hitchens, *Part One*] & Christopher Hitchens, *The Case Against Henry Kissinger—Part Two: Crimes against Humanity*, 302 Harper's Mag. 49 (Mar. 2001).

174. Crosby, *supra* n. 138, at 41. "[T]he generation following the Pinochet era are [sic] nearly oblivious of Chile's history between 1973 and 1990." *Id.* (citation omitted).

Chile's profits came largely from selling its natural resources. Some 3,000 miles long and less than 300 miles across at its widest point, Chile formed "'a dagger pointed at the heart of Antarctica'" to the strategic mind of Henry Kissinger.[175] The country's primary resources were minerals in the north and trees in the south. Chile had taken a brief run at nitrates and mining islands of guano until the dung ran out[176] and had been exploiting copper, its number one export, for some time.[177] The trees presented a new opportunity. Most of the world's timber came from northern climes with large, uniform stands of trees, few in species and seemingly endless in number. With the construction boom that followed the Second World War, suppliers began to look below the equator, but the view was disappointing. They saw large stands, to be sure, but with a bewildering diversity of trees that made them hard to market. The answer was to take them all down and replace them with fast-growing, northern species—soft pine, for example. Thus came a surge of pine plantations to South America, and to Chile in particular. Before long, almost half of the original forest inventory had been replaced by two foreign tree types, eucalyptus and radiata pine.[178]

The Pinochet government saw nothing but dollar signs. It sold forest lands to foreign corporations at pennies on the acre. It eliminated the cap on foreign investments, waived taxes on them for fifty years,[179] paid three-quarters of the costs of developing pine plantations,[180] and lifted a ban on exporting raw forest products.[181] Most of the trees were cut into chips for the booming pulp industry, and mountains of chips were soon lining the Chilean coast awaiting shipment abroad.[182] Raw wood became the country's number two export—in the words of the government forest agency, the "'new copper.'"[183] It might seem anomalous that a government so ostensibly committed to markets without government intervention that its financial managers were dubbed "the Chicago Boys" would also commit itself to provide lucrative subsidies aimed at sacking its natural resources to be sold abroad.[184] One difficulty with subsidies on this scale, of course, is that they do not allow the market to weed out marginal ventures, as was about to be seen in Tierra del Fuego.

David Syre was once again at the right place at the right time for a deal. He bought forests for his Río Cóndor project at prices ranging from $5 to $50 an acre when surrounding lands were selling for ten times that amount.[185] He got his price largely

175. Hitchens, *Part One*, *supra* n. 175.

176. Frederic D. Schwarz, *Does Guano Drive History? Men Have Climbed Mountains, Sailed the Seas, and Fought and Died for It*, 19 Am. Heritage of Invention & Tech. Mag. 63 (Spring 2004).

177. TED Case Studies, *supra* n. 173; *see also* CIA, *The World Factbook: Chile*, https://www.cia.gov/library/publications/the-world-factbook/geos/ci.html (last updated Feb. 10, 2009).

178. Crosby, *supra* n. 138, at 29.

179. TED Case Studies, *supra* n. 174.

180. Crosby, *supra* n. 138, at 32.

181. TED Case Studies, *supra* n. 173.

182. Crosby, *supra* n. 138, at 48.

183. TED Case Studies, *supra* n. 173. "If one was [sic] to travel to Puerto Montt, Chile, in the early 1990s, it was likely one would see mountains of wood chips awaiting transport to their distant destination of Japan." Crosby, *supra* n. 138, at 69.

184. TED Case Studies, *supra* n. 173.

185. Crosby, *supra* n. 138, at 57. The Chilean government began selling forest lands from $.50 to $1.50 an acre; Cetec-Sel purchased at between $2.50 and $25 an acre. *Id.* at 57 n. 22 (citing Nathaniel C. Nash, *For Tierra del Fuego, It's Time to Consider a Rain Forest's Worth*, 140 N.Y. Times C4 (June 4, 1991)).

because prior owners had gotten an even better one from the government of a $1.50 an acre.[186] In 1991, a company called Magallánica Industrial had aimed to grind some 250,000 acres of lenga forest into wood chips and sell them to Japan.[187] It might have succeeded had the company lent the slightest attention to environmental impacts and paid its workers on time.[188] Instead, within a period of less than two years, the Chilean forest ministry, overstretched and under funded as it was, managed to fine Magallánica fourteen times for violations of its none-too-stringent management plan.[189] Magallánica stopped paying its employees. When it ended production and pulled out of Punta Arenas, it left behind a mountain of wood chips that ignited into "a massive, slow burning fire . . . ."[190] Magallánica sold to a Canadian company, Cetec-Sel, which also had a mind to clear-cut the forests and market the chips.[191] When Cetec-Sel ran into uncertain water sources and permit delays, it was ready for Syre to drive up from Seattle and take the project off its hands.[192]

David Syre was coming with something different. He thought cutting up such fine wood for chips and pulp was barbaric, "like using old-growth fir to make tissue paper."[193] He put down $30 million for the initial purchase and went out to raise funds for the rest.[194] He could afford the payment. A Chilean economist later calculated that his government would be paying Syre two dollars in subsidies for every dollar he invested.[195] Syre called the project Río Cóndor, but it would be forever known by the name of his Seattle corporation, the majority owner in the venture, Trillium Ltd. By the time Syre was done, his investment would triple—before a single tree was sold.

C.

While all appeared calm on the surface, Chile was a nation in transition. Indeed, like many Latin American countries, transition seemed to be the normal order of things. In less than two hundred years, Chile had endured four civil wars and ten military coups.[196] These upheavals revealed the struggle beneath, common to the entire continent, between a ruling oligarchy and almost everyone else. There were not all that many large landowners, bishops, and generals in Chile, but they presided over the banks, Sunday masses, heavy weapons, and even the occasionally elected governments. When a civilian president showed signs of leaving that box, as one did in 1924 and as Allende did again in 1970, the Chilean military, backed by the church and nation's wealth,

186. *Id.* at 57; Dietrich, *supra* n. 148. Comparable forest lands in the State of Washington were selling at up to $30,000 an acre. *Id.*

187. Crosby, *supra* n. 138, at 48.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 57.

192. Crosby, *supra* n. 138, at 57.

193. Dietrich, *supra* n. 148.

194. *Id.*

195. Bernardo Reyes, Dir. of Ecological Econ. Programme, Inst. for Pol. Ecol., Santiago, *Trillium: Lessons Learned from a Conflict over Patagonian Forests in Southern Chile* 8 (paper submitted for conference at U. B.C., Vancouver, Can., Sept. 25–27, 2002) (copy on file with author).

196. Dietrich, *supra* n. 148.

stepped in and took over.[197] In Allende's case, the air force strafed and then bombed his office; they later said he committed suicide.[198] The root issues of land ownership, social services, and distribution of resources remained unsolved. Even today, following three decades of prosperity that Chileans call their economic miracle, the country displays one of the most disproportionate stratifications of wealth in the world, and it also spends the second-highest amount of money on military defense in South America after Brazil, a country five times its size.[199] The national coat of arms bears the legend, *Por la razón o la fuerza* ("By right or might" or "By reason or by force").[200]

For the seventeen years following the Pinochet coup, it had been pretty much *la fuerza*.[201] The economy improved. Civic democracy went on ice. The mass killings and disappearances abated early on, but citizens continued to disappear without explanation and never appeared again. Union activity was on a very short leash. Social organizations were explicitly apolitical. When, finally, under strong international pressure, Pinochet agreed to national elections, he lost and was replaced by a new President in 1989.[202] So began a slow transition, during which Pinochet remained a member for life of the Chilean Senate, and his former subordinates were in firm control of the military. His presence, and the threat of his return, remained. Syre was careful to secure Pinochet's blessing for Río Cóndor. There was more here for the General than money. The access roads would facilitate military operations as well.[203]

At the time Trillium came to Chile, civil society was in an uncertain thaw. The first new shoots of opposition and free speech were beginning to appear, along with a brand new phenomenon that relied principally on both opposition and free speech: environmentalism. These indications were not front page and were easy to overlook, but through long-suppressed civic organizations, a few legislators, and even courts of law, they were ready to test the air. Even had he seen all this, David Syre would probably not have been concerned about its impact on the Río Cóndor project. The Chilean government seemed to have environmental issues under its thumb.

Indeed, Chile's response to environmental concerns was extremely cautious. It believed in the free market, it believed in its economic miracle, it was finally struggling back to a government approximating democracy, and it was not about to let anything rock the boat. While the Pinochet government, paying lip-service to the rising phenomenon of environmentalism, had tasked a committee to develop a system for impact review,[204] years went by, and no such system appeared. Finally, in 1993,

197. *History of Chile*, *supra* n. 174.

198. *Id.*

199. Wikipedia, *Chile*, http://en.wikipedia.org/wiki/chile (accessed Oct. 16, 2008) ("Chile . . . suffers from one of the most uneven distributions of wealth in the world, ahead only of Brazil in the Latin American region and lagging behind even of [sic] most developing sub-Saharan African nations.") [hereinafter *Chile*].

200. *Id.*

201. *Id.*

202. *Id.*

203. For a summary of the control and fear imposed by the Pinochet regime, see Crosby, *supra* n. 138, at 39–42. The Rettig Report determined that "[a]t least a thousand people were executed during the first six months of Pinochet in office, and at least two thousand more were killed during the next sixteen years . . . ." *Chile*, *supra* n. 201. A subsequent investigation by the Valech Commission found that "[s]ome 30,000 were forced to flee [Chile], and tens of thousands of people were detained and tortured" as well. *Id.*

204. Crosby, *supra* n. 138, at 43. The committee, called the National Commission of Ecology, remains

transitional President Aylwin issued an executive order directing impact assessments for all public works.[205] Review of private projects such as Trillium's Río Cóndor, however, remained optional. The following year the legislature adopted a framework law creating a National Commission on the Environment (CONAMA)[206] and directing that impact assessments be prepared for all major projects as soon as CONAMA published the necessary regulations.[207]

On one level, Chile's CONAMA could be seen as a powerhouse. In theory, it could veto projects on environmental grounds. Looking more closely, however, it had the power only to make recommendations to a council of government ministers, that is to say to the very agencies proposing projects under review.[208] Further, it was not an independent body, but instead, it reported to the Ministry Secretary General of the Presidency ("*Ministro Secretario General de la Presidencia*"), which imposed yet more political pressure.[209] This kind of pressure induces sleep, which is what happened. CONAMA's first statutory duty was to develop the long-promised regulations for environmental review. More years went by. The regulations did not happen. Into the vacuum stepped Trillium's Río Cóndor project. The only requirements around were President Aylwin's order, and because the project was private they did not apply to Trillium at all.[210]

This is where David Sayre, depending on who is telling the story, made his grandest gesture or his fatal mistake. He voluntarily submitted his project for environmental review.[211] Enter the problems of the lenga forest.

D.

Syre's decision to submit an environmental impact statement seemed risk-free at the time, and it would demonstrate his *bona fides* to the Chilean authorities. Sustained yield forestry had become the catchphrase for timbering in America, and, after all, trees are trees—you cut them; they grow back. In Tierra del Fuego, it would be no different. Indeed, according to Syre's project managers, it would be easier because there was basically one kind of tree. In order to sustain the ecosystem, only that one tree needed to grow back.[212] "'[A] naturally occurring monoculture,'" in the words of a Trillium land steward, was "'much simpler'" to maintain than other forests, much "'like a farm where you are growing wheat.'"[213] How hard could that be?

With this understanding, the Syre team set out to create a model for the sustained

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largely intact today as a successor to the National Commission for the Environment, established in 1990. *Id.* at 43–45.

205. Memo. to Chilean Environmental Impact Evaluation System ("EIES"), *Ref.: Legal Aspects Concerning Projects Which Voluntarily Submitted to the Environmental Impact Evaluation System before the Enactment of the Relevant Regulations* 1 (June 6, 1997) (copy on file with author).

206. Crosby, *supra* n. 138, at 44–45.

207. Memo., *supra* n. 207, at 2–3. The new environmental provisions were to come into effect only after the regulations were published. *Id.* at 3.

208. Crosby, *supra* n. 138, at 44–45.

209. *Id.* at 44.

210. Memo., *supra* n. 207, at 2.

211. Crosby, *supra* n. 138, at 57–58.

212. *Id.* at 56.

213. *Id.* (quoting Rand Jack, First Land Steward, Río Cóndor Project, Bellingham, Wash. (July 7, 2004)).

harvest of the lenga forests of Tierra del Fuego. He would not clear-cut them, as his predecessors had intended, and as he had done back home. Instead, he would cut some of them, weed them out, and leave other adults standing to "shelter" new trees growing up.[214] He called the process "'shelterwood harvesting,'"[215] a name implying comfort and protection, and his accompanying diagrams showed, first, an original stand of trees, then a few trees on a cut-over landscape, and then, happily, these same adult trees surrounded by smaller ones pushing up around them like children on a playground.[216] Syre had confidence in his experts and his models.[217] He hired a prestigious consulting firm, Dames and Moore, to prepare the impact statement.[218] He had nothing to hide. To the contrary, he wanted to show the world.

Tierra del Fuego, however, was a different place, vastly different from anywhere that Syre and his experts had ever worked before. No one had ever tried sustainable forestry in an environment this hostile and this precarious for all life, including trees. It was not just the climate, which was cold almost all the time, frozen much of the time, and subject to ferocious winds and storms that could break apart a passing ship in minutes, to say nothing of lone trees on a cut-cover landscape.[219] It was also basically rock. The top soil was wafer thin, an inch or two in places, anchored only by the roots of the very plants Trillium was intending to remove.[220] It was, in the words of a Chilean scientist, "'young soil[;]'" indeed he said, "'it is a miracle to have [stands of] trees on this [type of] soil,'" at all.[221] Further, most of the nutrients of the forest were in the bodies of the trees themselves, not on the ground. When someone thinned the stands, that person also removed the food source for what would re-grow.[222] Trillium was proposing to take out sixty percent of the trees in its first cut.[223] The nutrient cycle was "'very, very slow.'"[224] Worse still, once these stands were cut open to the winds and rains, they would be open to erosion as well, and there was not all that much soil to erode before one was back to bare rock.[225] The very thickness of the natural stands, which grew so closely together they literally linked branches at the top, was also their only defense to the gales that blew across Tierra del Fuego like the wrath of God. To some scientists, even shelterwood cutting was a highly problematic operation.[226]

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214. *Id.* at 64.

215. *Id.*

216. Dietrich, *supra* n. 148.

217. Crosby, *supra* n. 138, at 67. In Syre's words, "'we made virtually everybody unhappy because they felt we set standards too high . . . [and] we made the environmentalists unhappy because we had answers.'" *Id.* (emphasis omitted).

218. *Id.* at 59.

219. *Id.* at 67 (quoting Bedrich Magas, Dir. Iniciativa de Defensa Ecológica Austral, Puntas Arenas (Feb. 24, 2004)).

220. *Id.*

221. Crosby, *supra* n. 138, at 67 (quoting Bedrich Magas, Dir. Iniciativa de Defensa Ecológica Austral).

222. *Id.*

223. *Id.* at 64.

224. *Id.* at 67 (quoting Bedrich Magas, Dir. Iniciativa de Defensa Ecológica Austral, Puntas Arenas (Feb. 24, 2004)).

225. *Id.* at 60 (citing Alan J. Rebertus et al., *Blowdown History and Landscape Patterns in the Andes of Tierra del Fuego, Argentina*, 78 Ecol. 678 (1997)).

226. Crosby, *supra* n. 138, at 83 (quoting Dr. J. Franklin, Forest Ecologist & Prof., U. Wash. (July 19, 2004)) (citing Rebertus, *supra* n. 227; Alan J. Rebertus & Thomas T. Veblen, *Structure and Tree-Fall Gap Dynamics of Old-Growth Nothofagus Forests in Tierra del Fuego, Argentina*, 4 J. Vegetation Sci. 641 (1993)).

They were not alone. The local reaction to Río Cóndor was initially positive, if guarded, and it would soon turn sour. To begin, they had been badly burned before by the Magallánica project and others like it. Foreign companies had come in with big promises, stripped the land, short-changed the locals, and left them with burning piles of waste. A community leader in the town of Porvenir spoke for many: "'In the beginning, I was really hopeful . . . because . . . the project they were bringing in was marvellous [sic],'" with developments such as new schools, drying sheds, even a deep new port.[227] The logging would be "'moderate,'" and they would even "'bring in plants'" to re-grow, so hopes were high.[228] Then the deep port fell out of the plan; it would not be necessary.[229] Then the local mills dropped out of the plan; it would be easier to buy an existing mill to the north.[230] It all began to smell like bait-and-switch. Rumors also started circulating that this might not be so moderate a cut after all.[231] A forest with trees dating back to the time of Joan of Arc would be reduced to trees half their size and a few decades old, and laced with forty miles of new forest roads each year, more than a thousand miles in all.[232] The same previously enthusiastic community leader later reflected, "'it was a wave of proposals that came crashing down, and we started seeing that it wasn't like it had been promised.'"[233] Once the plan was "'analyzed better,'" she said, was when "'a tough battle started.'"[234]

They, too, were not alone. To a fledgling environmental community stretching its wings after the long period of Pinochet, this was the latest in a two-decade string of insults ranging from uncontrolled mining, copper smelters, and the nationwide fire-sale on native forests. Here was a priceless and irreplaceable ecosystem, a "'cold jungle[]'"[235] at the bottom of the world, about to go on the block to yet another foreign corporation for short-term profits that would largely go abroad, leaving Chile holding the bag. They connected with the skepticism of the few scientists and locals willing to express their reservations.[236] Slowly they began a campaign.

See id. at 67–68 (quoting Bedrich Magas, Dir. Iniciativa de Defensa Ecológica Austral), 124–25 (quoting Dr. Jerry Franklin, advocating the use of group selection rather than shelterwood technique).

227. *Id.* at 84 (quoting Marta Soto Andrade, Community Leader of Porvenir, Tierra del Fuego, Chile (Mar. 3, 2004)).

228. *Id.* at 84 (quoting Marta Soto Andrade, Community Leader of Porvenir, Tierra del Fuego, Chile (Mar. 3, 2004)).

229. *Id.* at 84.

230. Crosby, *supra* n. 138, at 82 (citing Harold Schmidt, Forest Engr. & Prof., U. Chile, Santiago (Nov. 13, 2005)).

231. *See e.g.* Dietrich, *supra* n. 148.

232. *Id.*

233. Crosby, *supra* n. 138, at 85 (quoting Marta Soto Andrade, Community Leader of Porvenir, Tierra del Fuego, Chile (Mar. 3, 2004)).

234. *Id.* (quoting Marta Soto Andrade, Community Leader of Porvenir, Tierra del Fuego, Chile (Mar. 3, 2004)).

235. TED Case Studies, *supra* n. 173. "Native [southern] Chilean forests are temperate rainforests," often referred to as "cold jungles" due to their subantarctic climates. *Id.*

236. *See e.g.* Press Release, James. A. Ahlers, *Trillium Looks to Argentina, May Put Native Forest Project in Chile on Hold for Several Years* (Sept. 2, 1998) (available at http://forests.org/archived_site/today/recent/1998/trilhome.htm); Press Release, Leavenworth Audubon Adopt-a-Forest, *Washington Company Backs out of Chile Proposed Logging Project* (Sept. 24, 1998) (available at http://forests.org/archived_site/today/recent/1998/trilhome.htm).

E.

The Syre team submitted its environmental report in 1995, and all appeared well.[237] Based on its own reviews, COREMA, the regional branch of CONAMA, approved the project on the understanding that Trillium would later prepare a "sustainable forest management project"[238] and commit to only a "selective harvest[]" of the lenga forest.[239] Further, the company offered to set aside a quarter of its purchase—largely the quarter without the trees—as a biological preserve and reference point for future management decisions.[240] The conditions were all very rational and acceptable to Trillium. It had never intended clear-cutting, it maintained.

The problem surfaced with the report of COREMA's technical committee, which had some very different things to say. Composed of scientists from several different Chilean agencies, the committee dedicated the first six pages of its report to "'positive environmental aspects'" of the project.[241] The next 18 pages were pure criticism.[242] There was no inventory of the forest, which would form the basis for any intelligent evaluation or plan.[243] There were no data on tree growth, rates, or cycles in the area; the data provided came from very different environments.[244] Nor were there data on "extraction impacts," and the inevitable pull towards more harvesting created by a machine whose profitability depended on harvesting, once the machine was in place.[245] On this basis, the committee recommended against the project.[246] COREMA's approval had overridden its own experts.[247]

Two things followed. The first was that CONAMA, in turn, approved the project, subject to several monitoring conditions that were to be made more specific in the future.[248] Everything was going according to form. The second was that environmentalists went to court to enjoin the approvals.[249] They filed suit against the COREMA approval when it first came down, and then they filed against the CONAMA approval.[250] This was new.

The heart of both lawsuits was that the Chilean agencies were giving away a national treasure based on conditions that seemed unenforceable and, further, unlikely to work.[251] The difficulty with these claims is that agencies make unwise and politically-motivated decisions every day of their lives. Nothing in law required COREMA or CONAMA to be intelligent or, in the end, environmental. Indeed, these agencies had

237. Crosby, *supra* n. 138, at 77.
238. *Id.* at 51.
239. *Id.* at 64.
240. *Id.* at 63–64.
241. TED Case Studies, *supra* n. 173.
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. *E.g.* Reyes, *supra* n. 197, at 5; Memo., *supra* n. 207, at 4.
247. Memo., *supra* n. 207, at 4.
248. *Id.* at 4–5.
249. *Id.*at 5.
250. *Id.*
251. Reyes, *supra* n. 197, at 5–6.

been established the way they were precisely in order to keep politics at the helm. Accordingly, as might be expected, the lower courts rejected both lawsuits.[252] The environmentalists, led by two members of the "Green Bench" in the Chilean legislature,[253] then took their appeal to the Constitutional Chamber of the Supreme Court, where the two cases were consolidated for hearing.[254] It was their last roll of the dice.

They were rolling at a propitious time in history, and one of the few unlucky times for David Syre. Environmentalism was moving from soft to hard, from science to law, and finding new remedies where none had existed before. In the United States, which had led the pack, these remedies were captured in legislative requirements that depended on strong agencies and the judiciary to enforce them. Unlike the United States, the kick-start in many other countries of the world was their constitutions.

Back in 1972, after Rachael Carson and Jacques Cousteau had shocked the world with their disclosures of a threatened planet, national governments convened in Stockholm for a summit on this new phenomenon, environmental protection.[255] As with many summits of this nature, the participating nations did not really foresee difficult commitments, but it seemed safe to make the gesture. However, a group of dissidents led by Jacques Cousteau, who had quit the French delegation to take a more proactive role, held a counter-summit with their own agenda, paralleling the official one, but treating each issue on the agenda the day before it would be taken up by the official event.[256] Quickly seized on by the press, their proposals became, in effect, the agenda to which the government delegations had to respond. One of the more dramatic proposals was a declaration of a right to a healthy environment.[257] Who could oppose that? Who even knew what it meant? And so, emerging from Stockholm was an official resolution that nations should declare a constitutional right to a clean and healthy environment. Most nations in attendance did just that, and little more. Of all the resolutions adopted, this one seemed the most innocuous.

The notion of a constitutional environmental right, once stated, lay dormant for a long time. It might have remained so in Latin America, as well, but for a second

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252. Memo., *supra* n. 207, at 5.

253. Reyes, *supra* n. 197, at 5–6. The two Chilean senators backing the suit were Guido Girardi and Alejandro Navarro. *Id.*

254. Memo., *supra* n. 207, at 5.

255. UN Conference on the Human Environment, GA Res. 2581 (XXIV), UN GAOR, 24th Sess., Supp. No. 30, UN Doc. A/RES/2581(XXIV) (1969) (unanimously adopted on Dec. 15, 1969); *see* UNEP, *Brief Summary of the General Debate*, http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=97&ArticleID=1497&l=en (accessed Feb. 23, 2009) [hereinafter Stockholm Conference]. *See also* Lakshman D. Guruswamy, Sir Geoffrey W.R. Palmer & Burns H. Weston, *International Environment Law and World Order: A Problem-Oriented Coursebook* 229 (W. Publg. 1994); David Hunter, James Salzman & Durwood Zaelke, *International Environmental Law and Policy* 173 (2d ed., Found. Press 2002).

256. Interview with Jacques Cousteau, Marine Biology Researcher (Sept. 26, 1983).

257. UNEP, *Declaration of the United Nations Conference on the Human Environment*, http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=97&ArticleID=1503&l=en (accessed Feb. 23, 2009). Principle 1 states:

> Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.

Id.

constitutional right, a procedure really, that would propel it forward. The process is variously called an action of *amparo* or *tutela* and works like a habeas corpus.[258] One story goes that a Spanish judge was dining on the veranda one day when a group of soldiers came down the street, kicking and propelling a prisoner ahead of them.[259] The prisoner called out, "Protect me!" ("*Amparo*!"), at which point the judge ordered the soldiers to stop, held a hearing on the matter, and freed the prisoner. Whatever the true origins, Spanish and Latin American jurisprudence have long afforded special adjudication for constitutional rights. Where a constitutional violation is alleged, plaintiffs may go directly to a judge, bypassing the labyrinth and delays of civil practice.[260] All of which would be academic, but for the fact that, years after they were enacted, enterprising environmental lawyers dug up the forgotten environmental provisions of their country's constitutions and began seeking direct and expedited *amparo* review to determine what the phrase "right to a healthy environment" might mean. Trillium would be the first case in Chile.

F.

The Chilean Supreme Court found that it meant a great deal. The decision was close—three votes to two—but it reached a remarkable conclusion by equally remarkable reasoning. Chilean law provided *amparo* relief for government actions that were illegal, arbitrary, and unconstitutional.[261] CONAMA's approval did not seem illegal—after all, CONAMA was authorized by statute to make just such a decision—but to the finely-trained judicial eye, the approval was caught in a sort of a catch-22. Chile's environmental law required impact assessment on the basis of CONAMA regulations, but, of course, CONAMA had never issued these regulations. Ergo, no assessment *based* on them took place, so the assessment that did take place was unlawful.[262] The fact that Trillium submitted its assessment voluntarily and in accordance with President Aylwin's directive, the only regulations around, did not save the day. The ineluctable fact was that the process was not the one the law required. Up to this juncture, even the dissenting judges agreed.[263] The Syre team could be forgiven if they thought themselves adrift in something of a wonderland at this point. If the Supreme Court was correct here, *no* government action affecting the environment in Chile was lawful because there were no impact regulations. Meanwhile, Trillium, to which the current directive did *not* apply, was the one in the trap.

The Court's more difficult question, because there was no procedural hook, was whether the CONAMA approval was arbitrary. Here the opinion split, but the majority sided with the COREMA technical committee 100%. Identifying the expert agencies on

258. For a description of the development of these actions in Argentina, Brazil, Chile, Colombia, Mexico, and Venezuela in the 1990s, see generally Isabel Martínez, *El Acceso a la Justicia Ambiental en Argentina, Brasil, Chile, Colombia, México y Venezuela Durante la Década de 1990* (UNEP 2000) (available at http://www.eclac.cl/dmaah/noticias/paginas/7/27987/PNUMA_LIBRO_AccesoJusticiaAmbiental_ALC.pdf).

259. Interview with Isabel Martínez, UNEP Programme Officer (Aug. 1998).

260. *The* Amparo *as a Tool for Environmental Protection* 9 (unpublished ms.) (copy on file with author).

261. *Trillium Case*, No. 2.732-96, at 8° (Sup. Ct. Chile Mar. 19, 1997) (available at http://www.elaw.org/node/1310) (English translation on file with author).

262. *Id.* at 11°.

263. *Id.* at 1–4° (dissenting).

the committee by name—Forestry, Fisheries, Livestock and Agriculture, Water, Public Health—they found the criticisms of the project to be significant and found the assurances that all problems would be fixed by vague and subsequent conditions unsatisfactory,[264] particularly so when the committee had gone on to recommend that the project be denied. Furthermore, the Chilean Constitution guaranteed a right to environmental protection, which the majority said required "the maintenance of the original conditions of natural resources," reduced only by "human intervention to a minimum."[265] Here, then, was more than an opinion on environmental impact review. Here was a requirement for environmental *result* that, in the Court's view, CONAMA must be "vigilant" to secure. In the face of so much contrary expertise, CONAMA's approval failed the vigilance test, which made it arbitrary as well.[266]

The center ring of the Trillium opinion, however, was the question of whether the plaintiffs had the right to be in court at all. Those who were residents of Tierra del Fuego had shown no special injury to themselves. The environmental plaintiffs were more than a thousand miles away in Santiago and few of them had ever even been to Tierra del Fuego, including the pair of legislators who were spearheading the action. Who in the world were they to complain? Basically, said the dissent, theirs were only "'diffuse interest[s],'" common to all, part of living in modern society, and no excuse for opening the courthouse door.[267] The majority, on the other hand, found that all persons had a constitutional right to a clean environment, meaning that anyone could vindicate this right, including those in Tierra del Fuego *and* those in Santiago, half a world away.[268] Trillium was not the only one in trouble here. Whatever CONAMA approved anywhere in the country from now on could be challenged by members of the general public on environmental grounds.[269] The opinion had dropped a bomb.

G.

The decision had immediate effects. The first was to light a fire under CONAMA's bottom and, within a few weeks, the impact assessment regulations that had been stalled for seven years popped out in final form.[270] The decision had flipped the default position. Without it, government and industry could go forward with their projects without bothering to publish regulations that, among other things, would bring nosey environmentalists into their business. The regulations might even supply the basis for lawsuits against their decisions. Following the ruling, the same government and industry had to get the regulations out in order to move their projects forward. It was

264. *Id.* at 9° (majority).

265. *Id.* at 12° (quoting unofficial English translation).

266. *Trillium Case*, at 11°.

267. *Id.* at 9° (dissenting).

268. *Id.* at 13° (majority).

269. *See id.* Chilean business leaders were said to be "fuming" over the ruling. Heather Walsh, *Chile: Court Ruling Prompts New Environment Regulation*, Panos London, (Apr. 28, 1997) (available at http://www.sunsonline.org/trade/areas/environm/05050197.htm). The President of Sofofa, a Chilean manufacturing association, stated that it "create[d] 'an atmosphere of incredulity on the part of the private sector.'" *Id.*

270. Eric Dannenmaier & Gabriela Donini, *The Trillium Decision in Chile: Constitutional Standing for Citizen Review of Environmental Impact Procedures*, http://www.ispnet.org/Documents/chile.htm (accessed Aug. 15, 2005) (This is no longer available online, but a copy is on file with the author.).

magic.

A second effect was to galvanize the Syre team into a new round of project analysis and defense. Trillium assembled a dream team of U.S. forestry experts, including some who had long criticized U.S. Forest Service practices in the Pacific Northwest.[271] It hired the opposing lawyer from its Bellingham shopping center imbroglio to be a project watchdog.[272] It hired a turnaround expert from the Plum Creek timber corporation, which had its own checkered history in forest management, to handle public relations.[273] It lined up project endorsements from the field of biodiversity and ecosystem management, scientists whose names and publications drew crowds.[274] It lined up the approval of several well-known international conservation organizations, including The Nature Conservancy, who supported sustainable forestry as a way to offset a pandemic of clear-cutting around the globe.[275] It even won over Greenpeace, an organization notorious for its hard-edge brand of environmentalism. Greenpeace was cautious towards the Río Cóndor project at first, favoring an approach more conditional than oppositional. Still confident of success, Syre's troops would redo the impact statement posthaste and resubmit it. Syre remained committed to making Río Cóndor a world model of sustainable forestry.

The Trillium opinion, however, had one more impact. It gave Chilean environmentalists a jolt of adrenaline that would carry them forward for years. They would need it, because the court victory proved only temporary, and the fight ahead was going to be long, expensive, and straight uphill. They did an unprecedented thing in a country so fractious and new to the game as Chile. They agreed to set aside their competition for press and funding to form a national network of over 150 organizations, scientists, local activists, eco-tour guides, and companion groups in the United States, Canada, Argentina, Australia, and Russia.[276] At this point, the environmentalists did not just want a better project; they wanted *no* project.[277] In fact, they were shooting yet higher. They wanted to create a reserve for cold climate forests starting in Tierra del Fuego and extending around the world. They even had a name for it, worthy of some of the project names conjured up by David Syre. They called it the Gondwanaland project, a *Lord of the Rings*-sounding amalgam of the regions involved.[278]

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271. Dietrich, *supra* n. 148.

272. This was Yale Law graduate Steve Brinn, who became President of Trillium. *Id.*

273. Robert Manne had been an executive of Plum Creek, which had incurred significant damage to its image for its own clearcutting practices. *Id.*

274. *Id.* The project was even endorsed by liberal lawyer and former college professor Rand Jack, who became Project Steward. *Id.*

275. *See* Crosby, *supra* n. 138, at 89; *see also* Cal. Green Solutions, *CalPERS to Invest in the Ultimate Growth Fund—Sustainable Forestry: The Nature Conservancy Helps Pension Fund Craft Environmentally Sound Policy*, http://www.californiagreensolutions.com/cgi-bin/gt/tpl.h,content=1764 (Feb. 19, 2008) (reporting The Nature Conservancy's endorsement of investments into sustainable forestry); *see generally* Nat. Conservancy, *Bolivia: Places We Protect*, http://www.nature.org/wherewework/southamerica/bolivia/work/art12260.html (accessed Mar. 2, 2009) (detailing The Nature Conservancy's support of Bolivia's sustainable forestry project).

276. Reyes, *supra* n. 197, at 8.

277. Press Release, Global Response's "Quick Response Network", *Protect Ancient Gondwana Forests/Tierra del Fuego: May–June 2001* (May 29, 2001) (available at http://forests.org/archive/samerica/prangond.htm).

278. *See* Crosby, *supra* n. 138, at 88–89, 103–05; *see also* Reyes, *supra* n. 197, at 9.

Within months, Trillium was back with a new plan and a new impact evaluation. Burned the year before by the Supreme Court and the attendant press, CONAMA did its homework this time.[279] It assembled its own blue-ribbon team to scrub the project. That the Commission would ultimately approve the proposal was foreordained. It remained, after all, a political body, but its staff imposed, and the Commission approved, no fewer than one hundred conditions on the project that were to prove onerous, indeed.[280] Trillium's annual cut of timber was severely trimmed.[281] Restoration benchmarks had to be met at each step before additional logging continued. Most innovatively, Trillium would post an "'environmental insurance'" bond to assure the performance of all of its obligations.[282] The performance bond requirement in particular stuck in Trillium's craw, so much so that the company filed suit against CONAMA for exceeding its authority.[283] But a challenge such as this went against the grain of David Syre's public philosophy. He was guaranteeing a sustainable project. So why would he not be willing to back that up?

The environmentalists appealed CONAMA's approval again to the Supreme Court, but they lost this time—five votes to zero. The agency had crossed its t's and dotted its i's. The Court would not gainsay it again. But the time between these two decisions was a precious win for the environmental opponents of Río Cóndor and was increasingly costly to David Syre. There were information problems ahead, a drumbeat of bad press, and looming money problems. At some point, Río Cóndor might not be worth the candle.

H.

David Syre now had the green light and an economic challenge. The more environmental he made the project appear, the less profitable it became. The lands he agreed to set aside would now include some important lenga forest, and every reserved hectare of trees was board feet that would never reach the mill. To Chilean environmentalists, the numbers just did not add up. "'We saw that they had a very huge industrial [project] to use the wood[,] . . . the kinds of saws, the sawmill, [and] the plants,'" one commented, but when "'you look at the forest[,] . . . it is impossible to get all this kind of material to feed the industry.'"[284] Unless, of course, Trillium simply cut and ran or got the permit and then sold it to another timber company. "'They could disappear, declare bankruptcy[,] or things like that.'"[285] It had happened before with Magellan and Cetec-Sel. A professor of forestry at the University of Chile did the numbers and concluded that Trillium could harvest a maximum of 1,000 hectares a year.[286] Trillium was counting on 2,700 hectares.

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279. Crosby, *supra* n. 138, at 88–93.

280. Reyes, *supra* n. 197, at 6.

281. *Id.*

282. Reyes, *supra* n. 197, at 10–11; *accord* Crosby, *supra* n. 138, at 80.

283. Reyes, *supra* n. 197, at 5.

284. Crosby, *supra* n. 138, at 81 (quoting Carlos Noton, Envtl. Coord. 1994–98, CONAF (Santiago, Nov. 26, 2003)).

285. *Id.* (quoting Carlos Noton, Envtl. Coord. 1994–98, CONAF (Santiago, Nov. 26, 2003)).

286. *Id.* at 81–82 (citing Harald Schmidt, Forest Engr. and Prof., U. of Chile, (Santiago, Nov. 13, 2005)).

Trillium countered that its nurseries and management practices would increase rates of growth, but internally, it knew it had a problem. The method might not work. Trillium's chief forester later commented that they "'could probably have a very viable sustainable forest operation with probably 25% of the property'"—a considerable reduction in ambition—but even that would require "'group selection'" rather than the shelterwood model.[287] By group selection, he meant cutting all the trees in wide patches, or in other words, clear-cutting. One could imagine the reception such a proposal might receive. It never became the new model, even while the old one bogged down.

Months following the second Supreme Court decision, Trillium announced its first cut of 500 hectares.[288] It started bulldozing roads and powered up the saws. Then, it stopped. The Chilean Forestry Commission was giving it fits over the permit conditions, and when the company submitted its revised plan and $70,000 in fees, the commission rejected the plan and fees as inadequate.[289] Suddenly, in the fall of 1998, Trillium announced that it was putting Río Cóndor on hold, laying off all but three of its Chilean employees, and going to move across the border to Argentina to focus on its project there, called Lenga Patagonia.[290] Its head of forestry operations stated that there would be nothing Chile could do to get the company back for the moment "'except maybe give us a clean [Environmental Impact Statement], and say forget all these conditions, . . . all this crap.'"[291] The Trillium locker room was not a happy place.

Meanwhile, the environmental opposition was flourishing. Local and national critics of Río Cóndor had grown so strong that they drowned out the efforts of other groups to find a compromise. Adriana Hoffman, a former director of CONAMA then heading the Defenders of the Chilean Forest, made common ground with Pat Rasmussen of the America Lands Alliance, and together they began to take the message to Trillium's home turf, Seattle and Bellingham.[292] They returned to Chile with photographs of Trillium's operation on Whidbey Island. Trillium's modus operandi, they said, was "'clearcut, build roads, [and] spray herbicides.'"[293] They also turned up the choice bit of information that Trillium's public relations man had been ousted from another timber empire, Louisiana-Pacific, which had been indicted on 56 counts of misconduct by the U.S. Department of Justice for pollution violations[294] and was now under heat for the sale of house sidings that, despite their representations, "began crumbling and sprouting mushrooms."[295]

Back in Chile, grassroots activists took to the streets, with imagination. In June 1998, on the International Day of the Environment, they staged a play in pantomime in which an actor representing President Frei took a chainsaw, rented from a local hardware

287. *Id.* at 83 (quoting Dr. Jerry Franklin, Forest Ecologist and Prof., U. of Wash. (July 19, 2004)).
288. *Id.* at 80; Reyes, *supra* n. 197, at 7.
289. Press Release, Ahlers, *supra* n. 238.
290. *Id.*
291. *Id.* (quoting Bob Ellis, Head Forestry Operations).
292. *See e.g.* Press Release, Leavenworth Audubon Adopt-a-Forest, *supra* n. 238.
293. *Id.*
294. Tim Johnson, *Is Trillium Solvent?* Every Other Wkly. 3, 5 (May 3, 2001); Peter Sleeth, *Grand Jury Indicts Louisiana-Pacific*, Oregonian (June 16, 1995).
295. Jeff Manning, *Timber via Tierra del Fuego*, Oregonian (Feb. 16, 2000).

store, from another player representing Trillium.[296] The rain was pouring down at the time, and there was no one watching, save a few members of the press, when two hundred Chilean police officers, four to a demonstrator, appeared and carted them off to jail.[297] This demonstration was not good press for the company. On another occasion, following CONAMA's second approval of the project, a small group of protesters showed up at its headquarters and took off their pants, telling all who would listen that the agency lacked the *cojones* to turn the project down.[298] Reportedly, CONAMA employees in sympathy with the protestors "'were laughing their heads off.'"[299] The beat went on. A U.S. campaigner on forest issues who went to Chile to join the action later commented,

> I come down here and there is a handful, and I know them, a handful of people with no experience who stood up against a 500,000 acre logging plan that would have been sailed through in any other country and they stopped it, postpone it, postpone it, postpone it, stab it, jam it, jam it, tilt it, knocking it off balance, but never really hitting a good frontal assault. . . . I couldn't believe it, it[']s unbelievable.[300]

At the same time, Hoffman, Rasmussen, and others were shaping an offer for David Syre. He could sell his holdings for an international park of the most unique forests in the Southern Hemisphere.[301] They started an Adopt-a-Tree-in-Tierra-del-Fuego campaign in Bellingham and eastern Washington.[302] For his part, Syre's public comments remained bullish on Río Cóndor. In 1999, he was talking about using the Cóndor forests as a carbon sink and selling the credits to carbon emitting industries.[303] In a 2002 speaking event hosted by Yale University entitled *Sustainable Development, Can It Work? An Entrepreneur's Experience in Tierra del Fuego*, he advised: "'Always have a great sense of hope because you will finally prevail.'"[304]

Then the money ran out. Projects the size of Río Cóndor are not financed out of the pockets of their proponents but are leveraged on loans, and when they run into delays and difficulties, more loans. In 2000, Trillium, already in hock over this and other ventures, borrowed $56 million "at a hefty interest rate of prime plus 5 percent."[305] When the lender, in turn, crashed from assorted financial and criminal difficulties, it was bought out by one of the largest investment banks in America, Goldman Sachs.[306] At

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296. Crosby, *supra* n. 138, at 125 (citing Maria Luisa Robleto, Forest Campaign Dir., Greenpeace S.P. (Santiago, Nov. 3, 2003)).

297. *Id.*

298. *Id.*

299. *Id.*

300. *Id.* at 70 (quoting Interview with Rick Klein, Exec. Dir., Ancient Forest Intl. (Pucon, Chile, Dec. 22, 2003)).

301. Scott Ayers, *Adopt-a-Tree Plan Targets Trillium Land*, Bellingham Herald (Apr. 24, 2001).

302. *Id.*

303. Corporación de Defensa de la Soberanía, *Del Proyecto Trillium de Depredación Forestal y Venta de Bonos de Carbono en la Tierra del Fuego, a la Intervención de la Goldman Sachs y Su Oscura Transferencia de Terrenos*, http://www.soberaniachile.cl/patag3b.html (accessed Oct. 27, 2008).

304. Global Inst. of Sustainable Forestry, Yale Sch. Forestry & Envtl. Studies, *Sustainable Development, Can It Work? An Entrepreneur's Experience in Tierra Del Fuego* http://research.yale.edu/gisf/assets/pdf/yff/lunch_summaries/david_syre.pdf) (Oct. 17, 2002) (summarizing a speech given by David Syre).

305. Johnson, *supra* n. 296, at 5.

306. Jeff Manning, *Bid Lightens Investment Losses*, Oregonian (Jan. 25, 2002).

that point, Trillium owed $30 million on its Río Cóndor project alone.[307] It handed over the property to quit the debt. A silk-stocking Wall Street banking firm now owned the lenga forests at the bottom of the world. What on earth could they do with it? "'We work with money, not trees and animals,'" said a company officer.[308] Hoffman and Rasmussen had an idea for them.

The idea took hold. Goldman handed the Trillium portfolio over to the company's charitable trust, and the trust, in turn, to the Wildlife Conservation Society, an international organization with a track record for managing wild lands in South America.[309] Goldman also put $6.6 million onto the table to cover the costs of running the reserve for the first three years[310] and offered to match another $6 million raised by the Society.[311] Not just Goldman the bank, either. A considerable chunk of these monies was contributed by its employees who were said to "have taken the project to heart."[312] Some monies were in all likelihood contributed by Henry Paulson, CEO of Goldman at the time and an ardent conservationist. The decisions were made "at the highest level," it was said.[313]

What followed was a love-in. A Goldman spokesman called it "'a gift to the people of Chile.'"[314] The office of the Chilean President said it was "'a very interesting project, very good, because it creates a protected area in a zone that is very fragile ecologically.'"[315] A coordinator of the environmental resistance in Santiago declared that "'the war is over.'"[316] Adriana Hoffman called it "'unbelievable,'"[317] and Pat Rasmussen added that it was "'exactly what [he and his allies] were looking for in Chile.'"[318] Even Trillium came on board. According to their managing director, this was what the company had wanted all along.[319] The new reserve was "not all that different" from the Río Cóndor project; "'[i]t was always our intention to put about 70 percent of the land into conservation zones,'" he said.[320]

I.

The aftershocks of the Trillium case continued to rumble for some years. Its

307. Jeff Manning, *Good News Emerges from Local Scandal*, Oregonian (Dec. 22, 2003).

308. Mauricio Rodriguez & Valeria Ibarra, *Goldman Sachs Gives Ex-Trillium Property in Tierra Del Fuego to Environmental Organizations*, La Tercera (Dec. 13, 2003) (quoting Peter Rose, spokesperson for Goldman Sachs) (taken from an English translation made available by George Draffan, Pub. Info. Network, *Profile of Trillium Corporation*, http://www.endgame.org/trillium.html (last updated Dec. 2003)).

309. *Id.*

310. *Saving the Ends of the Earth: Preserving Chile's Southern Forests*, 378 Economist 74 (Mar. 11, 2006) [hereinafter *Saving the Ends of the Earth*]; *see generally* Scott Ayers, *Trillium Logging Plan Trimmed*, Bellingham Herald (Dec. 16, 2003); Wildlife Conserv. Socy., *Rhode Island-Sized Wilderness Given Away by U.S. Investment Firm*, http://www.newswise.com/p/articles/view/507119/ (last updated Sept. 16, 2004).

311. *Saving the Ends of the Earth*, *supra* n. 312.

312. *Id.*

313. Patrick Nixon, *Goldman Sachs to Create Nature Reserve in South Chile*, Reuters, (Dec. 15, 2003) http://www.planetark.com/dailynewsstory.cfm/newsid/23112/newsDate/15-Dec-2003/story.htm .

314. Rodriguez & Ibarra, *supra* n. 310 (quoting Peter Rose, spokesperson for Goldman Sachs).

315. *Id.* (quoting Rodrigo Egaña, subsecretary to President).

316. *Id.* (quoting Nicolo Gligo, academician at U. Chile).

317. Manning, *supra* n. 308.

318. Ayers, *supra* n. 312.

319. Manning, *supra* n. 308.

320. *Id.*

momentum carried the new-fledged environmental community to places it had only dreamed of on paper and had no realistic hope of achieving. One was the Gondwana Forest Sanctuary, first conceived of as an alternative to the Río Cóndor project, more aspiration than plan. Then, in 1998, as Trillium was showing the first cracks in its armor, an environmental foundation bought up lenga forests between the Río Cóndor project and the Argentinean border, next to an Argentine park, blocking any timber expansion in that direction.[321] This purchase set the stage for a joint dedication, by Chile and Argentina, of a 4.6 million hectare cross-border nature reserve to be jointly managed with core zones of absolute protection, surrounded by rings of limited agriculture and tourist development.[322] Joint management by Chile and Argentina, who would have imagined such a thing? Meanwhile, Chilean environmentalists were advancing the Gondwana network of frozen forests to Tasmania and New Zealand.[323] Riding the tide, anything seemed achievable.

Then, yet another gift fell from the sky, only Chile nearly rejected it. In the early 1990s, as the Trillium war was heating up, an American billionaire named Douglas Tompkins was quietly buying a 1,200 square mile stretch of forest for a conservation park to the north of Río Cóndor.[324] Tomkins had made his money in outdoor gear, the Esprit and North Face clothing chains, and was deeply green. The park would be supported by eco-tourism and other light-impact uses. Other North Americans had made small conservation purchases in Chile but this property ran in a narrow swath from the Pacific Ocean clear to the Argentinean border. A coalition of the Chilean military, church leaders, and private landowners—the Big Three of Chilean history—came out against the purchase on grounds familiar to any student of Latin America. Tomkins was in reality trying to establish a Jewish state (similar claims were prevalent in the regimes of Pinochet and the Argentinean generals),[325] and was presenting a threat to national security.[326] Further, of course, Tomkins was a foreigner.[327] The press picked up the cry, painting the proposal in dark colors. Of course, the fact that David Syre and Trillium were also foreigners did not appear to bother them. Trillium was going to make money the old-fashioned way. Tompkins was going to do something new, and green, and they were simply not ready to go there.

The Trillium outcome changed the Chilean mind. It was legitimate to be green and to make money, less money to be sure, but more sustainable money over time. Tompkins's lands are now the Pumalín Park.[328] They inspired yet another businessman and politician, a Chilean named Sebastián Piñera, to buy nearly 1,000 square miles of

321. David Haskel, *Argentina, Chile to Create Nature Reserve That Straddles Andean, Patagonian Region*, 29 Intl. Env. Rep. 579 (2006).

322. *Id.*; Native Forest Network, *Gondwana Forest Sanctuary*, http://www.nativeforest.org/campaigns/gondwana/index.htm (accessed Mar. 5, 2009).

323. Crosby, *supra* n. 138, at 88–89; Native Forest Network, *supra* n. 324.

324. James Langman, *Thinking Big: After Founding Esprit and North Face, Doug Tomkins Dresses up an 800,000-Acre Park*, 8 E Mag. 24, 24–25 (Sept.–Oct. 1997).

325. *See e.g.* Gabriel García Márquez, *Noticia de un Secuestro* (Penguin Bks. 1996) (recounting anti-Semitism during this period).

326. Langman, *supra* n. 326, at 25.

327. *Saving the Ends of the Earth*, *supra* n. 312.

328. *Id.*; Parque Pumalín, *History*, http://www.parquepumalin.cl/content/eng/index.htm (accessed Mar. 5, 2009).

forest for a nature preserve on Chiloé Island, also just north of Tierra del Fuego.[329] Better yet, he would invest another $20 million to cover its operations, boosted by anticipated revenues from tourism. Chilean suspicions remained. Private parks were beginning to drive the conservation agenda of the country. On the other hand, the Chilean forestry service has to manage protected areas fifty times the size of Chiloé Island on an annual budget of $5 million, total.[330] Those numbers do not match the job. It was no accident that Goldman Sachs, looking to unload its Río Cóndor property, chose an international conservation organization. No accident, but more than a little insulting at the same time.

The impact of the Trillium case on Chilean environmental policy is more ambiguous. CONAMA, the official protector of the environment, remains a heavily conflicted organization. The first Supreme Court decision was such a shock that CONAMA's director was sacked.[331] Her replacement was compliant. He spoke of "balance," which is the usual code of agencies that do not make environmental protection a priority and added, as if reassuring his superiors that the agency was not independent and not designed to be, "'[w]e are, in fact, part of the government.'"[332] He continued to explain, "'I think it would be strange if we weren't close to the government on development issues.'"[333] Strange or not—after all, legislatures routinely task government agencies with duties such as the protection of public health that are not supposed to be carried out on the basis of politics—Chile's lead environmental agency remains on a short leash, more advisory than decisional, and under the watchful eye of a government dedicated to free market first and the rest where it doesn't get too much in the way.[334] There is environmentalism, and it is good that some groups advocate it. Then there is the national agenda.

The Chilean legal system has also retreated from the opportunities offered by the Trillium opinion. The right to sue by citizens remains, as does the Court's outspoken ratification of the importance of environmental protection. On the other hand, few injunctions against government decisions, however guided or misguided, have followed. According to a CONAMA attorney now in private practice, the courts have taken an increasingly narrow view of the Trillium principles, reducing judicial review to the question of whether permitting agencies filled out the proper forms. The constitutional right to protect the environment—the basis of the first Supreme Court opinion—has been lost in the interminable hallways of administrative law. One has the impression that it will be a hot day in Tierra del Fuego before the Chilean judiciary goes this way again.[335] This said, the decision produced one ineludible effect. An intact, virgin, and very unusual forest park at the very bottom of the world.

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329. *Saving the Ends of the Earth*, *supra* n. 312; Triple Pundit, *Sebastián Piñera: Chilean Businessman, Politician, and Environmental Philanthropist*, http://www.triplepundit.com/pages/sebastian-piaera-chilean-busin-003071.php (May 1, 2008).

330. *Saving the Ends of the Earth*, *supra* n. 312.

331. Greg Brown, *Logging Gripes*, Latin Trade (Sept. 1999) (available at http://findarticles.com/p/articles/mi_m0BEK/is_9_7/ai_55548155).

332. *Id.*

333. *Id.*

334. Crosby, *supra* n. 138, at 44–49.

335. *See* Memo., *supra* n. 207, at 8–9.

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At the end of the day, the question remains. What in the context of Tierra del Fuego does sustainable development mean? To the Trillium team, the option was to develop wisely or to watch the whole thing succumb to a series of fly-by-night operations. Their task was a technological one, to offer an alternative to people who would otherwise take the trees to the ground. In Syre's view, the environmentalists were frustrated precisely because, whatever their objections, "'[Trillium] had answers.'"[336] As his chief forestry consultant put it, their opponents did not give a damn for sustainable forestry. "'[T]he reality was they did not want any trees cut. They wanted it all preserved.'"[337] To the ecological forester, to the sustainable natural resource developer, the absurdity of this position speaks for itself.

Of course, there is serious doubt whether the project really was sustainable over any period of time. The conditions necessary to protect the environment made logging questionable, and logging on a scale sufficient to pay off United States investors was going to run out of trees. Then what? One look at the track record of the sustained yield practices of the U.S. Forest Service shows the relentless pressure of politicians, the timber industry and local communities to cut a little more. And then a lot more. Or one could look to the sea, where sustained yield has been the golden rule of fisheries management for the past 50 years, during which many a managed fishery has collapsed. Some stocks are completely gone. In the real world, the concept of sustainability has a very hard time holding the line.

Beyond these practical difficulties, however, there was another force at work here, and the Syre team put its finger right on it. They were facing an entirely different brand of environmentalism on the move here, and it was not driven by reason but by a passion for living spaces that defies logical plans for their development. Pat Rasmussen spoke for thousands of people who will never see Tierra del Fuego and could not spell the name of the lenga tree with the aid of a dictionary when she said, after it was all over, "'[s]ome places are wild and should stay that way.'"[338] The same impulses won a wilderness system in the United States, after 13 years of to-the-last-ditch opposition from commodity groups to whom the very idea of leaving a place alone was insane. The same impulses have risen up repeatedly to defeat proposals for opening the Arctic National Wildlife Refuge to oil and gas drilling. There would be only a small amount of drilling on a huge landscape that no more than one protesting environmentalist in ten thousand would ever visit in a lifetime, but for these people, and they are not insane, it is the idea of a wild place that matters and that is enough.

In the end, there are those who think of the Río Cóndor story as a wonderful opportunity missed. There are others who see it as a once-in-a-blue-moon opportunity achieved, against tremendous odds, and a victory for the natural world. We may leave the last word to Marta Soto Andrade, a community leader in Porvenir, Tierra del Fuego:

"In this moment, [I] leave a message for you to take to the world, that Porvenir, Tierra

336. Crosby, *supra* n. 138, at 67.

337. *Id.* at 74 (quoting Dr. Jerry F. Franklin, Forest Ecologist and Prof., U. Wash. (July 19, 2004)).

338. Ayers, *supra* n. 312.

del Fuego, is like what many call 'God's pocket' where we have pure air, clean and pure water also. We consume natural foods, because here cows and sheep are not yet injected [with hormones], nor are chickens or any of that, do you understand? And [there is] safety for the citizens because, despite the isolation, we have [here], the people, are good and affectionate and wherever you go you are going to be received well."[339]

339. Crosby, *supra* n. 138, at 104–05.