Building dams to assuage the hunger for electricity: The Chilean *Hydro-Aysén* decision

Antonio Horvath Kiss y otros contra Comision de Evaluacion Ambiental de la Region de Aysén Rol No 10.220-2011

(*Antonio Horvath Kiss v [the] Environment Evaluation Commission of the Aysén Region* List/Roll No 10.220-2011 [Decision of the Third Chamber of the Supreme Court, Santiago, Chile, 4 April 2012])

1 Introduction

'"Yes, it's sad," we say. "But it can't be helped. We need electricity".'
Arundhati Roy, unnumbered Preface to *The cost of living* (1999)

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[56]ITAC Reports 182, 289, 295 and 389.
[57]Anti Dumping Regulation 1.

'After mining, indigenous communities regard
hydro electric projects and other dams as posing
the greatest single threat to their land and culture'.
Roger Moody (ed) *Indigenous* Voice: Visions and realities (1993)

There is an evocative image of unspoilt wilderness – untamed and untainted by humankind – to the region shared by Argentina and Chile, known as Patagonia. Unfortunately, both this image and the reality has turned out, both in Chile and world-wide, to be the symbol of the clash between development/ progress and the hunger for energy (electricity) to drive such progress on the one hand, and the conservation of unspoilt land on the other. What is more, this symbol also has a true human face since indigenous (and more often than not minority) communities living off the land, find themselves caught in the middle between these two poles.[1] The danger looming over the pristine wilderness of Patagonia, is a proposed hydroelectric project involving the construction of five 'mega-dams' – the subject of the Chilean decision to be discussed.

In 2003, years before the current outcry against the proposed project, the current appellant, Patagonian Senator Antonio Horvath Kiss, commented on the biodiversity and importance of an unspoiled Patagonia

> Patagonia is one of the planet's largest reserves of biodiversity. If it is destroyed by incompatible projects or denied a clean environment, sooner or later, the way of life and the economic growth of its inhabitants will be affected.[2]

This on-going and ever-increasing tension between a recognised environmental right and development in the context of the hunger for energy to be assuaged through a huge hydro-electric construction project, was once again underscored in the decision of the Supreme Court of Chile in the *Hydro-Aysén* case.[3] In a split three-two decision, the court upheld as sound and

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[1] In a publication of the International Work Group for Indigenous Affairs (IWGIA) entitled 'Indigenous Voice: Visions and Realities', the construction of dams was highlighted as one of the greatest fears of indigenous communities (187 and further). In an interview an elder gave to a member of the German *Gesellschaft für bedrohte Völker* (*GfbV*) ('Society for endangered nations') his answer to the question as to what the impact of the dam construction would be on his people, was: 'Even if our village doesn't go down, most of the woods around us and most neighbouring villages will disappear. What sense will it then still have for us to stay here? We are people of the woods. … If the woods disappear under water, the people will go down, too.' See 'The land belongs to the gods!' at 189.

[2] Greenpeace *Noranda: From Canada to Patagonia a life of crime* (2003) (Greenpeace) at 7.

[3] *Antonio Horvath Kiss y otros contra Comision de Evaluacion Ambiental de la Region de Aysen (Antonio Horvath Kiss v Environmental Evaluation Commission of the Aysen Region)* Rol no 10.220 2011. My thanks to Ms Gloria Rivera Green, Spanish teacher and provider of 'Spanish Portuguese English Translation Services' in Pretoria, South Africa who translated the decision

justifiable, the decision by the Environment Commission authorising the commencement of a controversial hydro-electric dam project in an ecologically sensitive area in Patagonia, Chile, despite vehement opposition to the project from civil society and non-governmental organisations (NGOs) alike. The Commission's decision may, consequently, be regarded as an indispensable step in the environmental context, and in line with the Commission's duty to undertake a mandatory environmental impact assessment (EIA)[4] and consider its findings so as at least to attempt to prevent harm to the environment. However, an opposite view may also find approval in that the Commission's decision may seem to have overlooked substantive issues such as the negation of a legislatively prescribed principle – encapsulated in the 'precautionary' principle – to act on the side of caution as regards the impact of the project.[5]

In exercising its powers and performing its functions under the first scenario above, it may be submitted that the Commission infringed upon or limited local/indigenous community members' constitutionally protected environmental right.[6] In essence, the minority judgment subscribed to this line of reasoning in that it found that the Commission had reneged on its legislative obligation to take 'proper' cognisance of the precautionary principle.

Against the background of the facts of the *Hydro-Aysén*-case, this note

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delivered in Chilean Spanish into English. The overview of the decision is based on her unofficial translation of the decision. References in the discussion are to the paragraph numbers of the decision as reflected in her translation but correspond to the original text in Chilean Spanish. Original Chilean Spanish text available at http://www.poderjudicial.cl/noticias/File /Fallo%20Hidroaysen Suprema.pdf (accessed 25 06 2012).

[4] See below for the provision regarding the undertaking of an EIA as provided for by the relevant Chilean environmental legislation.

[5] Although I will elaborate on the precautionary principle below, Kidd's explanation of the principle encapsulates its essence succinctly as 'the application of preventive measures in situations of scientific uncertainty where a course of action *may* [Kidd's emphasis] cause harm to the environment'. See *Environmental law* (2011) at 9. The precautionary principle in its South African context is also explained by Glazewski *Environmental law in South Africa* (2013) chapter 1 'The nature and scope of environmental law' under a paragraph headed 'Emerging environmental law norms and principles'. He notes, as regards the historical roots of the concept, that the principle enjoys 'currency in many developed countries' and more particularly in the European Community (EC), where it originated in the (then) West German environmental law notion of the *Vorsorgeprinzip* (the principle of foresight). See par 1.4.7 at 1 125.

[6] Article 19.8. Chapter 3, art 19 contains the fundamental rights of the people of Chile under the heading 'Constitutional rights and duties'. Article 19.8 is headed 'The right to live in an environment free from contamination'. It continues as follows, 'It is the duty of the State to see to it that this right is not affected and to control the preservation of nature. The law may establish specific restrictions on certain rights or liberties in order to protect the environment.' See Wolfrum and Grote (eds) 'The Political Constitution of the Republic of Chile' in *Constitutions of the countries of the world* (2005).

considers the views expressed in both the majority and the minority judgments, as regards the position of the Environment Commission in the event of a dispute arising from its positive decision on the commencement of a project with a potentially disastrous impact on the environment.

In what follows, a factual background to the decision is provided leading to an outline highlighting the salient points in both the majority and minority judgments. The note concludes with a brief excursion into the legal milieu in which the judgment needs to be considered, with a few comments on the shortcomings of the majority judgment; why the minority judgments should be preferred, and the current position as regards the future of the project.

2 Factual background to the decision

Aysén is a remote part of southern Chile known as Region XI of Chile's thirteen administrative regions. To assist in visualising the pristine nature of the region, the description offered by Greenpeace is suitably picturesque:

> In addition to forest [ancient forests], this area of Patagonia is characterized by glacially carved landscapes, rainy temperate climate, clean air, unpolluted lakes, rivers, fjords and glaciers. Aysén sustains more than one million hectares of wetlands, and almost two million hectares of glaciers. It contains 30 per cent of all lakes mostly formed through glacial activities and 29 per cent of all rivers in Chile. … Aysén's unique geographical features have created a network of diverse ecosystems rich in biodiversity, supporting many rare and endemic species.[7]

Greenpeace added that by reason of these physical attributes, the inhabitants of the region have declared it 'a Reserve of Life' with the concomitant commitment to support an 'alternative strategy for the region' through the promotion of 'sustainable activities such as tourism, fishing, and organic farming'.[8]

Aysén Hydroelectric Stations SA ('Hydro-Aysén'[9]), is a private venture formed by Endesa, Chile and Colbún, Chile, both subsidiaries of Italian-Spanish companies.[10] Hydro-Aysén proposed to build five 'mega-dams' in the Aysén region to increase hydroelectric power production in and for Chile.

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[7] Note 2 above at 7.

[8] *Ibid.* It is unclear exactly how the inhabitants of the region went about declaring their region 'a Reserve of Life' and whether it is merely a drive towards such declaration. Exactly what the effect of such a declaration is or will be, is undetermined at this stage.

[9] Note that the spelling of 'Hydro Aysén' varies. In some sources the spelling is HydroAysén, in others 'Hidro Aysén' or 'HidroAysén'. In this casenote 'Hydro Aysén' will be used throughout.

[10] May 'Chile dams will bring social and environmental destruction: A giant hydroelectric project threatens the Chilean Patagonian landscape. The country badly needs more energy diversity' in (12 May 2011) *The Guardian*. See http://www.theguardian.com/commentisfree/2011/may/12 /chile hydroelectric patagonian destruction (accessed 25 06 2012).

In relation to the economy of Chile, LiIa Barrera-Hernández observed that 'in the investment community Chile has a reputation of being a safe and dynamic market backed by sound and steady free-market policies and institutions, as well as a long-standing commitment to trade liberalization'.[11] She continued that mining, forestry, and energy, are the sectors 'most favoured' by investors.[12] Juxtaposed with this positive model, economic reality encapsulated in her reference to the Chilean institutions' 'efficiency and diligence in facilitating investment',[13] is the inefficiency of Chilean institutions, and the country's movement 'at a surprisingly glacial pace',[14] to recognise and implement indigenous communities' rights to land and resources. It follows logically that such a dichotomy would set the scene for conflicts varying in intensity between the Chilean government and its administration, and industry and civil society (including members of indigenous communities). It is worth mentioning in passing that currently a growing international trend towards an enforceable recognition of the indigenous rights of indigenous peoples (minorities) (closely linked to the archetypal African right to development) is gaining momemtum.[15] This conflict manifested itself clearly in the *Hydro-Aysén* case.

Returning to the factual background to the decision, in her dissenting judgment Araneda J, highlights this clash as regards the project even more crisply as regards its location, duration, and objective. The intended development related to the Aysén Hydroelectric Project development in the Aysén Region of General Carlos Ibáñez del Campo, in the province of Capitán Prat, covering the districts of Cochrane, Villa O'Higgins, and Tortel. The construction project was set to continue for a period of eleven years and five months (with the construction of one or more plant stations overlapping in that certain of the plants need to be constructed simultaneously). The construction project included the construction of a hydro-electric complex, consisting of five plants called 'Baker 1' and 'Baker 2' in the Baker River, and 'Pascua River 1', 'Pascua 2.1' and 'Pascua 2.2' on the Pascua River, respectively. The complex aimed for a total installed capacity of 2 750 MW[16] producing a combined

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[11] 'Got title; will sell: Indigenous rights to land in Chile and Argentina' in McHarg *et al Property and the law in energy and natural resources* (2010) 184 209 at 190.
[12] *Ibid.*
[13] *Ibid.*
[14] *Ibid.*
[15] See, eg, the work of the International Law Association's (ILA's) committee on the 'Implementation of the rights of indigenous people' with Prof Willem van Genugten acting as chairman. See also Beukes 'The recognition of "indigenous peoples" and their rights as "a people": An African first' (2010) 35 *SAYIL* at 216 and the references there to the recognition of the rights of indigenous peoples and the close relation between the recognition of this right and the right to development.
[16] According to the *Compact Oxford English dictionary* (2005) a megawatt is a unit of power 'equal to one million watts'. A 'watt', in turn, is the measurement of electrical power. According

annual average energy output of some 18 430 Gw/h. However, the effect of the project would be such that 5 910 surface hectares would be dammed ('embalse' in Chilean Spanish).[17]

Back in August 2008, Hydro-Aysén submitted its environmental impact study (EIS) (better known in the English-speaking world as an environmental impact assessment (EIA)) to the Regional Environmental Commission of the Aysén Region. (In Chilean Spanish the thirteen regional commissions on the environment were known as the Regional Environmental Commission (*Comisión Regional del Medio Ambiente* (*COREMA*.) The first review of the EIS was undertaken, and the public was invited to comment on the EIS. In light of the telling response by government agencies (state departments), municipalities of Aysén, and civil society in general, to the effect that the EIS document was of a 'poor quality' and in essence 'in "non-compliance" with the requirements for approval', Amanda Maxwell's comment that 'Hidro-Aysén should have been rejected then and there'[18] is spot-on.

The background to the facts of the decision has been set out in brief above. The Supreme Court decision, the subject of this case note, was the upshot of subsequent events as the project continued – complaints and protests notwithstanding. Three years after Hydro-Aysén submitted its first EIS, and regardless of the deluge of objections to it, Hydro-Aysén, through Resolution 225 of 9 May 2011, received environmental approval to proceed with the project. Opponents of the project, including environmental organisations (environmental NGOs in particular), local mayors, members of parliament, and even residents (in particular those whose houses and property were to be flooded as a result of the project), on the same day, filed a joint appeal against the decision arguing that the approval of the project was not only arbitrary, but

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to the *Système International (d'Unités*) 1 watt is 'equivalent to 1.341X103 horsepower'. See *Collins English dictionary: Millennium edition* (1999).

[17]At par 1 of her minority judgment, and see below. Note that in the outline and discussion of the judgment the reference will be to 'the Judge' or the acronym 'J' and not to 'Minister' as the judges are referred to in the original Chilean Spanish text of the judgment.

[18]Maxwell 'The vote to approve or reject Hidro Aysén's dams takes place today, amid controversy and heated events' in 'Amanda Maxwell's Blog on *Switchboard* (*Switchboard* is the staff blog of the USA NGO, Natural Resources Defense Council (the NRDC)). See http://switchboard.nrdc.org/blogs/amaxwell/the vote to approve hidroaysen.html posted 2011 05 09 (accessed 25 06 2012). It needs to be noted that language barriers (the author's knowledge of Spanish in general and Chilean Spanish in particular, is rudimentary, to say the least) the author like it or not, had to rely on English sources and unofficial translations of Spanish sources. This may create the impression of a measure of bias in favour of the opponents of the Hydro Aysén project. This becomes even more evident in light of the generous use of information gleaned from an NGO blog favouring the halt of the project. However, as will be seen when the Supreme Court decision is discussed below, the judges too were not unanimous in their opinion of the viability of the project.

also illegal and in violation of local inhabitants' constitutional rights.[19] It should be noted that the reference to the arbitrary approval of the project, and that the decision was 'illegal' ('unlawful'), meant in effect, that the Court of Appeals was requested to review the legality of the approval process.

It is noteworthy that before the Appeals Court (the equivalent of the South African High Court) handed down its decision, it halted all construction and permitted processes as from 20 June 2011 until it had decided the appeal.[20] The case was heard by the regional Court of Appeals in Puerto Montt and on 6 November 2011, the court rejected the seven grounds of appeal raised by the appellants, and ruled in favour of Hidro-Aysén with two judges in favour of the project, and one judge opposing it.[21]

One of the many NGOs who opposed the project, the Patagonia Defence Council (*CDP*) through its legal representative, Marcelo Castillo, immediately announced its intention to lodge an appeal against the decision to the Chilean Supreme Court, the country's highest court. He stated:[22]

> We will appeal to the Supreme Court because we believe our legal arguments demonstrate that the decision taken by the Environmental Evaluation Committee violates constitutional guarantees and is completely illegal.

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[19]Maxwell 'Finally, a Chilean authority says no to HidroAysén'. She also pointed out that the appeal would normally have been heard by the Court of Appeals of Coyhaique, the capital city of the Aysén region but since several of the 'ministers' (read 'judges') who were on the bench 'recused themselves from the case due to conflicts of interest', the case had to be moved to the neighbouring region's Court of Appeal. http://switchboard.nrdc.org/blogs/amaxwell/finally a chilean authority sa.html posted 2011 06 20 (accessed 25 06 2012). See too 'Chile court suspends Patagonian HidroAysen dam project' at http://www.bbc.co.uk./news/world latin america 13851219 (accessed on 25 06 2012). According to the BBC news report that the project was approved in May, 'after heavy backing from President Sebastian Pinera'. It reported further that the 'project has sparked a number of protests, some of which have seen violent clashes between demonstrators and the security forces'. See as regards the protests, Alexei Barrionuevo 'Plan for Hydroelectric Dam in Patagonia Outrages Chileans' *The New York Times* 6 June 2011 at 8.

[20]Maxwell n 18 above.

[21]Maxwell 'Appeals Court rules in favor if HidroAysén and sends our case to Chile's Supreme Court' posted 2011 10 12 http://switchboard.nrdc.org/blogs/amaxwell/appeals court rules in favor o.html (accessed 22 06 2012).

[22]See press release of the Patagonia Defence Council headed 'The HidroAysén Controversy will head to the Supreme Court of Chile' issued on 06 10 2011 per information provided by Ms Gloria Rivera Green (translator).

3 The decision of the Supreme Court of Chile

3.1 The arguments before the court

One of the grounds of appeal raised by the appellants,[23] related to the 'jurisdiction' (a more correctly 'authority or power') of the Commission for Environmental Assessment of the Aysén Region (the *Comisión de Evaluación Ambiental de la Región de Aysén*) to decide on the project ('the Aysén Hydroelectric Project').[24] Although the translation (with due respect to the translator) is somewhat clumsy resulting in the appellants' arguments appearing somewhat convoluted, the gist of this argument was that after the Aysén Regional Environmental Commission gave its permission for the project to proceed, Law 20,417 came into operation. This Law had a direct impact on the decision to allow the project. The impact manifested through the reality that the agency, despite have been abolished, nevertheless subsequently (in its new guise) required from the owner of the project, 'clarifications, corrections and additions' regarding the permission to proceed with the project requested by the appellants.[25] Consequently, the appellants reasoned that there was no legal authorisation for the environmental assessment and evaluation conducted by the 'Commission of the Environmental Assessment', as its action violated articles 6 and 7 of the Constitution of the Republic.[26] Given the content of articles 6 and 7, the crisp argument was that the organs of state involved in the internal appeal, acted unlawfully in that they were not 'properly constituted'.

Law 20, 417 which was published and came into operation on 26 January 2010, amended Chile's environmental institutions.[27] This Law, for example,

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[23] In the original Spanish text the 'appellants' are referred to as *'Que diversas personas naturales o jurídicas individualizadas'* (par 1) and translated as 'A range of persons or identified legal entities'. For the sake of convenience the reference will be to throughout to the 'appellants'. The opposing party (the *COREMA*) will be referred to as the 'respondent' throughout the discussion. Incidentally, the *COREMA* (the opposing group) was represented on appeal by its 'president', Pilar Cuevas Mardones (par 1 of the decision).

[24] At par 5 of the decision.

[25] *Ibid.*

[26] *Ibid.* Articles 6 and 7 of the Constitution (The Political Constitution of the Republic of Chile, 1980 (as amended in 2005) are found in chapter 1 of the Constitution entitled 'Institutional Foundations'. Article 6 provides, *inter alia,* that the state organs must 'act in accordance with the Constitution and the norms dictated in conformity therein, and guarantee the institutional order of the Republic'. Article 7 states that 'The organs of the State act lawfully if they have been properly constituted and [act] within their competence and in the manner prescribed by law'. Further, 'No magistrate, individual or group of persons may claim for itself, not even under the pretext of extraordinary circumstances, powers or rights other than those that have been expressly conferred upon it [them] by virtue of this Constitution or the laws. And further, 'Every act in contravention of this article is null and shall give rise to the responsibilities and sanctions prescribed by law'. See Wolfrum and Grote n 6 above.

[27] Diego Vio Gorget 'Chile: Amendments to environmental institutions' in *Desde Santiago (From Santiago)* (11 10 2010) at 1. Available at http://www.nam.cl/assets/From Santiago

created 'Regional Consultation Councils' (presumably successors the *COREMA* established in 1994 for each of the thirteen regions of Chile) under the supervision of the legal successor to the National Commission on the Environment (the *CONOMA*) – the Environmental Assessment Service (an Environmental Ministry – the *Comisión de Evaluación Ambiental*).[28]

The appellants argued that pursuant to article 3 of Law 20,417, the successors of the *CONAMA* were the Ministry of Environment, and the Environmental Assessment Service. For the purpose of the request for 'clarifications, corrections and additions' the agency to be turned to was accordingly the 'Regional Directorate of Environmental Assessment Service' and not the *COREMA*.[29]

A second ground of appeal was the 'complaint of illegality regarding the treatment given to the objections'.[30] The appellants contended that the action of the secretary of the Aysén Regional Environmental Commission who, without an agreement from the agency (it appears that this ground relates to the absence of permission from the agency to prepare and issue such a report), prepared a consolidated report 'requesting for clarification, correction and expansion', and that this was completely without any merit (unlawful?).[31] The respondent's actions also exposed a 'lack of urgency in the need of protection' and moreover, 'every time they released the respective addenda [to the original permission to proceed with the project], they [the respondents] issued their statement without questioning the legality of the proceedings'.[32]

Yet another ground of appeal was the respondent's violation of the principles of consistency, impartiality, and citizen participation. The respondent stood accused of not considering the comments made by the community on the project, and also preventing the citizens from 'making observations and possible claims, as allowed by law'.[33] In short, the respondent did not allow for proper public participation in matters pertaining to the environmental right.

A fourth ground of appeal involved the impact of the project on the Laguna San Rafael National Park. Under this ground, the appellants raised a number of issues – two of which relate to international law (or more accurately, regional inter-American law). The appellants maintained that pursuant to

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Volume1 Issue 5.pdf (accessed 12 11 2012).
[28] *Id* at 2.
[29] At par 5 of the decision.
[30] At par 8 of the decision.
[31] *Ibid*.
[32] *Ibid*.
[33] At par 9 of the decision.

article 10 ('letter p') of Law 19,300 of 1994 which sets out the Chilean environmental regime the *Ley sobre Bases Generales del Medio Ambiente* ('LBMA') – an environmental impact assessment of the execution of works, programmes, or activities in national parks, had to be undertaken.[34] The appellants claimed that 'in this case, there is no law to authorise work to be executed/carried out in an area which is intended as a national park'.[35] In essence, as the EIA undertaken was 'deficient', there was no permission to undertake work in the national park. The appellants argued further that article 3 of the Convention for the Protection of Flora, Fauna and Natural Scenic Beauty of the Countries of America (the Washington Convention which entered into force for Chile in 1967), provides that the 'limits of these parks cannot be altered nor any portion thereof alienated except by the competent legislative authority'.[36] However, in the case under discussion, an area was added to the 'surface' of the park as compensation for the area of the park which was to be flooded, and this was done by way of resolution, not by Law. Closely linked to this, is that the Convention also prohibits hunting, killing and capturing specimens of fauna, and the destruction and collecting of specimens of flora in these protected places (including a prohibition on exploiting existing resources for commercial purposes). Flooding part of the park for development purposes was 'precisely [a] commercial activity'.[37] On this ground it was argued, finally, that in accordance with article 15 of the Rules of Acquisition, Management and Disposal of State Property, Decree Law 1939 of 1977, only state bodies or legal persons governed by Title XXXIII of Book I of the Civil Code, may be given or use national parks 'for purposes of conservation and environmental protection'.[38] In the present case this did not happen.

3.2 The majority decision

The decision was delivered by a five-judge bench of the Third Chamber of the Supreme Court.[39] The majority judgment was written by Hector Carreño J (with Pedro Pierry and Maria Sandoval, J concurring).[40] The majority pronounced favourably on the Aysén Hydroelectric Project, headed 'Hydro Aysen'.

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[34] At par 10 of the decision.
[35] *Ibid*.
[36] *Ibid.*
[37] *Ibid.*
[38] *Ibid.*
[39] The 21 member Supreme Court of Chile is the highest court of Chile. The court is divided into four specialised chambers ('civil, criminal, constitutional and mixed'). See Hilbink *Judges beyond politics in democracy and dictatorship: Lessons from Chile* (2007) at 252.
[40] In the subsequent summary and discussion of the judgment the reference will be to 'the Judge' or the acronym 'J' and not to 'Minister' to avoid confusion.

3.3 The judgment for the majority delivered by Carreño J

As regards the contested jurisdiction/authority of the agency with which the [internal] appeal should have been lodged, the judge found that the relevant project began its processes under the environmental institutions created by Law 19,300. However, before the appeal could be finalised, the new bodies created by Law 20,417 came into operation.[41] Under article 86 of Law 19,300, the Commission responsible for the evaluation of the project, consists of the Mayor – as presiding officer – and members of the Ministerial Regional Secretariats of the Environment; Health; Economy; Development and Reconstruction; Energy; Public Works; Agriculture; Housing and Urban Affairs; Transport and Telecommunications; Mining; and Planning, together with the Regional Director of Services, who acts as secretary.[42]

The judge held that because 'transitory article 3 of Law no 20,417', expressly provides that the successors to the National Environment [Commission] are the Ministry of Environment, and the Environmental Evaluation Service (ESS), and as the composition of the ESS corresponds to that of the Environmental Review Commission as the body responsible for 'qualifying projects' – as per article 86 of Law 19,300 (as amended by Law 20,417) – the appellants could not claim, as they had, that the changes to the law had resulted there being no organ competent 'to qualify the project'.[43] As a result, the project had been rated 'by the agency to which today it belongs under … the new rules'. This action did not violate the appellants' constitutional guarantees, and what is more, allowed for the continued administrative functioning of the state as required by article 3 of Law 18,575 (Constitutional Organic Law of the State Administration).[44]

The judge's approach to the second ground of appeal (the 'complaint of illegality as regards the treatment given to the objections') was a question of fact. He held that since the decision to permit the project occurred in November 2008, it was inappropriate to 'denounce' those actions through a process of filing for constitutional protection in June 2011 – more than two years after the decision had been taken. Such a delay revealed 'a lack of urgency in the need of protection'. Moreover, the judge found that the Secretary of the Aysén Regional Environmental Commission, had, without the agreement of the agency, elaborated on the consolidated report after 'clarification, correction and expansion' had been requested. For this reason, the judge found no merit in this ground of appeal.[45]

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[41] At par 6 of the decision.
[42] *Ibid.*
[43] At pars 6 and 7 of the decision, respectively.
[44] At par 7 of the decision.
[45] At par 8 of the decision.

As to the lack of public participation, the judge held that there were 'thousands of comments on the draft (folio 65)'.[46] This showed that the community had been heard and that the principle of public participation had therefore been satisfied. He added that the fact that the appellants did not agree with the arguments presented by the authority in response to the objections raised by different people or organisations, 'cannot qualify as illegal or arbitrary'.[47]

As was seen above, the fourth ground of appeal revolved around a number of issues impacting on the Laguna San Rafael National Park should the hydroelectric project move ahead. The judge introduced this part of his judgment with the blunt statement that 'the execution of such a project/plan which was directed at a national park was not prohibited by law'.[48] He reasoned that the interpretation to be given to article 10 ('letter p') of Law 19,300, was not to require the existence of a specific law authorising the development of a hydroelectric plant in a national park, but to consider what was intended to be done in the park under the rule of protection In other words, according to the Judge the only question to be asked was whether the development activity would be lawful and not contrary to the law in relation to the 'rule of protection'. What should be considered, therefore, was that the development in a national park or other area placed under official protection must undergo an environmental impact study. Consequently, when the rule states '... in cases where the relevant legislation permits', this must be understood to refer to an activity permitted by law.[49]

With reference to the argument based on the Washington Convention raised by the appellants, the judge, relying on an 'ordinary official letter' 344 of 15 November 2010 and issued by CONAF (the National Forestry Corporation), found that in up to eighteen hectares of the park, no tree or shrub in the protection category was to be found, nor were there any flora and fauna, geomorphological formations, or landscapes as required by the Convention. Consequently, the use of park resources for commercial purposes could be supported.[50]

With added reliance on CONAF, the judge held that flooding the area would not conflict with the spirit of the Washington Convention, as no landscapes of

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[46] At par 9 of the decision.
[47] *Ibid.*
[48] At par 11 of the decision. The statement in Chilean Spanish reads '*Que la ejecución de un proyecto como el que se pretende en un parque nacional no se encuentra prohibida por la ley*'.
[49] *Ibid.*
[50] At par 13 of the decision. The Chilean Spanish reads '*Lo anterior permite concluir que no puede aseverarse la utilización de recursos del parque con fines comerciales, pues éstos no se encuentran presentes en el área*'. This part of the judgment is somewhat confusing as it is not clear to what exactly 'éstos' (meaning 'these') as used by the Judge refers. Does it refer to the absence of 'commercial purposes' or the absence of 'protected fauna and flora'?

incomparable beauty, extraordinary geological formations, or natural objects of historic or scientific interest, would be affected. It would also not result in the extinction of any species inhabiting the area to be flooded. Since these arguments were considered by the Commission when it deliberated on this point, 'no arbitrary [consideration] or illegality [having] any effect on the decision to allow the change [in] the National Park Laguna San Rafael' emerged. Moreover, the 'project holders' indicated that the project would result in the Park receiving an adjacent additional 100 hectares in return.[51]

The appellants also argued that the area of the contested project is the habitat of two deer species – the Huemul (Chile's national symbol and an endangered species) and the Pudu. The judge acknowledged the existence of the deer in the Baker and Pascua river basins (the area of the project where the dams were to be built), but at the same time criticised the 'deficiencies' in the appellants' arguments on this issue. This criticism was directed at the appellants having used an 'incorrect methodology in the quantitative estimation of the number of deer involved'; to characterise the animals' biological corridors or habitat, and for not incorporating appropriate compensation measures for the animals' preservation.[52]

The judge stressed that account had to be had of the fact that the implementation of a project such as that under consideration, and, indeed, any of the projects listed in articles 10 and 11 of Law 19,300, would inevitably have an environmental impact and result in an alteration in the environment. For these reasons, the court had to study the impact of the actions to be implemented to prevent or minimise significant adverse effects. Further, although it had to be accepted that in a project of this scale, the environment would go through change and it could, therefore, not be expected that the deer species would be unaffected, in order to comply with environmental legislation, the project had proposed compensation measures and these had been accepted by the Evaluation Commission. The measures consisted of a study of deer which aimed at contributing to the knowledge of the biology of the two native deer species present in southern Chile, in order to promote their conservation, and the creation of an 11 560 hectare area to meet that need. In addition, it was decided that the study was to be undertaken with the approval of the competent authority, and that its findings had to be submitted during the first year of work on the project. For these reasons, the measures taken by the Commission and challenged as illegal or arbitrary, were the actions necessary to minimise adverse effects that might have arisen.[53]

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[51] *Ibid.*
[52] At par 15 of the decision.
[53] At par 16 of the decision.

A very pertinent issue was the appeal relating to the potential risk the project posed.[54] The appellants argued that almost all statements about the project which the project applicants had issued were conditional and related to the provision of information prior to the construction of the project. Many of these conditions or requirements actually represented the requirement of providing the minimum content of the project, and that the project holder had failed to submit them during the environmental assessment process. Moreover, the appellants disputed that the environmental impact assessment is a precautionary ('*un sistema preventivo*') process aimed at addressing any activity or project likely to have an environmental impact. According to the judge, prevention of this nature derives from certain legal and regulatory inferences relating to the minimum content which all studies submitted for assessment should include.

Among the risks and threats evaluated, were the so-called 'GLOF phenomena' and 'flow fluctuations'.[55] As regards 'GLOF', the appellants explained that the Baker River has two glacial lakes, Arco and Cachet II, at its source ('*su cabecera*'). Masses of rocks, sediment, and water are regularly carried down and deposited by these glaciers (the so-called '*moraines*'[56]). These *moraines* cause the flooding of the valleys downstream. It was, therefore, argued that there was a risk to the people in the sense that both lakes could be breached simultaneously – an eventuality not addressed by the project owner.

The second phenomenon was 'flow fluctuations'. Such a 'fluctuating river flow' could result from the operation of the plants. These fluctuations normally occur during the year with the change of winter and summer seasons. Once the plants start operating, however, flood and low flow events would be recorded in a single day. This means, the appellants argued that if the flows are ignored, these fluctuations would affect the rivers, with unknown risks to people's lives.

The judge did not pronounce on these claims, but merely stated that 'there is no space for making any comments or complaints to be assessed by the agencies with jurisdiction over environmental matters', because there was no response calling for the project that had already been approved, to be redesigned.[57]

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[54]At par 20 the judge referred (in Chilean Spanish) to the '… *la predicción y evaluación de eventuales situaciones de riesgo*' (ie, the 'prediction and assessment of potential risk'). At pars 20 24 of the decision the judge proceeded to assess this 'risk' and to describe the ways and means the risks were to be eliminated or at least mitigated.

[55]The 'GLOF' phenomenon (the judge referred to it in the text in English as a 'glacial lake outburst flood') means in simple terms an overflow of a glacier with a discharge of water, rock and sediment (par 21 of the decision).

[56]The *Compact Oxford English dictionary* (2005) defines the term 'moraine' as 'a mass of rocks and sediment carried down and deposited by a glacier'.

[57]At par 21 of the decision.

In paragraph 22 the judge described in detail how the Environmental Commission had subjected the contested EIS, to a series of requirements and environmental conditions. These included: (a) analysing the scenario relating to the emptying of the glacial lakes Arco and Cachet II, regardless of the probability of such an occurrence, and establishing a plan of action to achieve this, and reporting it to the General Water Management of Aysén ('Dirección General de Aguas de Aysén'); and (b) once authorisation from the sector division of the Water Directorate for the construction of the first dam had been obtained, the authorisation had to be submitted to the Directorate of Public Water for approval of the report. (The report had to explain, by means of aerial photographs and topography of control, the initial condition of the fluvial geomorphology, before any work on the channels located within the areas of the project. It also had to include a risk analysis of the identified areas either within sectors or existing infrastructure – that might be violated or affected by aggradation (enlargement) or degradation of the river bank and/or the bottom of the riverbed, in the early stages of the implementation and operation of the Hidro Aysén Project.

Once the report had been approved by the Directorate of Public Water and the General Water Management of Aysén, the operator was required ('shall') to submit 'mitigation work plan' for infrastructure identified as vulnerable; a 'monitoring plan' in fluvial geomorphology channels involved in the project; and an 'action plan' to be implemented in the event of changes in river morphology generated by the implementation and operation of the project (specifically changes relating to the phenomena of the aggradation[58] or degradation of the river bank and/or river bed). These projects and plans had to be approved by the Directorate of Public Water and the General Water Management of Aysén, and implemented before the construction phase and operation of each reservoir.

Elaborating on this explanation, the judge further raised the applicability of the provisions of Law 19.300. Article 25 and 25(5) of the Law allow the 'Environmental Qualification Resolution' ('*la Resolución de Calificación Ambiental*') to set conditions for the project owner. In addition, the competent body – the Environmental Review Commission – having analysed all the facts presented in the case and concluded that the project could be rated favourably, nevertheless imposed studies and action plans before the finalisation (of the project), and instructed that this information be submitted to the competent bodies, specialised in environmental matters, such as the General Water Management and the Directorate of Public Water. These considerations led the judge to conclude that

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[58] 'Aggradation' from the verb 'aggrade' means 'to fill and raise the level of (the bed of a stream) by deposition of sediment'. See www.thefreedictionar.com/aggradation (accessed 12 06 2012). 'Degradation' constitutes the opposite of 'aggradation' and refers to 'the reduction of land, as by erosion' (*ibid*).

the conditions imposed on the project did not violate the law. There was no evidence of arbitrary action on the part of the authority, in and also no impairment of any of the appellants' constitutional guarantees. Moreover, through the above action, the threat of the risks to the appellants were ruled out as the project holder was obliged to perform such studies and implement them in accordance with mitigation plans for vulnerable areas, before the commencement of the work. The judge did concede, finally, that should it appear from the findings of the prescribed studies, that the 'evaluated variables varied substantially in relation to the projections', the decision could be reviewed under article 25d(5) of Law 19,300.[59]

Against this background, the judge held that he had to conclude that the 'rights of the petitioners remain[ed] intact' and there was no need to issue an 'emergency order' ('*una tutela de emergencia*') in their favour.[60] In essence then, the appellants'/petitioners' failed in their application.

As an afterthought (one is inclined to describe it in common-law idiom as an *obiter dictum*), the judge mooted what he termed 'another controversial aspect'. This related to the 'alleged fragmentation of the project'.[61] He described the appellants' contention as one that Hydro-Aysén (for the purpose of 'operational development') in essence divided ('separated') the works and activities that constituted the project into two different subprojects – the one involving the power plant and related works, and the other, the matter of the construction of 'transmission lines'.[62] The appellants argued that the two projects were interdependent, and that to subject them to separate environmental impact studies would prevent determining the interaction (synergy) between the various parts that make up the project.[63] Moreover, this separation also allowed for changing the experts dealing with the impact of the environmental study. Presented separately, the proceedings were initiated before the Regional Environmental Corporation of Aysén, whereas should the project have been properly presented with due consideration that the impact would be felt in seven regions of the country, it would have been evaluated by the national body – CONAMA – by express provision of the law.[64]
From a reading of both Law 19,300 and Law 20,417, it did not follow that the

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[59] At par 23 of the decision. Exactly which institution would be responsible for the review process is not apparent from the judgment.
[60] At par 24 of the decision.
[61] At par 25 of the decision.
[62] *Ibid.*
[63] *Ibid.*
[64] *Ibid*. It was common knowledge that having built the dams and completed the hydro electric installations, the energy thus generated had to be 'transported' via electricity pylons to Santiago, the recipient of the electricity over 2000 kilometres away. See as regards the pylons 'Chile court suspends Patagonian HidroAysen dam project' (relating to the Court of Appeals decision) dated 20 06 2011, available at http://bb.co.uk/news/wordllatin america 13851219 (accessed 25 06 2012).

law peremptorily requires that both projects should be submitted jointly for evaluation. What is prohibited, however, (by art 11*bis* of Law 19,300, incorporated by Law 20,417) is the intentional fragmentation of a project or activity in order to change the assessment with the aim of evading the environmental impact assessment system altogether and disguising the need for assessment.[65] The developer of the transmission lines was nonetheless required 'in due course' to submit both to an environmental assessment as required by article 10 (letter b) of Law 19,300, and also to an environmental impact study under article 11 (letter e) of the Law.[66]

Having regard to the above-mentioned observations, the judge concluded that 'no illegality or arbitrariness in the decision of the appeal authority exits'. The appellants also failed to convince the court of the need for urgent action 'to safeguard the interests of those affected',[67] and the appeal for protection failed.[68]

3.4 The minority judgments

3.4.1 The judgment by Avaneda J

One of the minority judgments was delivered by Sonia Araneda J. She acknowledged that, given the 'nature of the mentioned project', the project 'owner' had to, and indeed did, submit an environmental impact study ('EIS/EIA'), since such a requirement was in force and the prescribed procedure under Law 19,300. The study culminated in a favourable 'rating' by the Environmental Assessment Commission of Aysén under the amendments introduced by Law 20,417.[69]

The judge added, however, that the project had to be studied and analysed rigorously by the relevant agencies through the prism of the environmental principles in the relevant legislation. Law 19,300 established a legal framework for environmental issues which applied to all activities or resources for which special (sectoral) laws were subsequently established. What is significant, however, is that having said that the EIS was 'rated favourably' she qualified this statement with reference to certain environmental principles recognised in Chilean environmental legislation. It can be submitted that her ensuing 'arguments' reflect a conscious effort to take cognisance of recognised environmental principles which guide any development affecting the

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[65] At par 26 of the decision.
[66] *Ibid.*
[67] At pars 28 and 29. The Court held that no need for urgent action was proven in that the Court 'must be thoroughly satisfied' that the risks the appellants feared demanded 'preconditions to start works' (at par 28).
[68] At par 29.
[69] Paragraph 2 of her dissenting decision.

environment in a given country. (It should be noted that there is no general agreement on the universality, or universal agreement as to the enforceability, of all the principles she identified.[70])

The principles the judge identified which lend coherence/logic to the law and without which the legislation's real scope and aims could not be fully understood, are the following:

(1) the preventive principle ('*el principio preventive*');
(2) the 'polluter pays' principle ('*el principio que quien contamina paga*');
(3) the gradual – as opposed to sudden or drastic – change principle ('*el gradualismo'*);
(4) the principle of responsibility towards the environment ('*el principio de la responsabilidad*');
(5) the participatory principle ('*el principio participativo*'); and the efficiency principle ('*el principio de la eficiencia*').[71]

What mattered most for the judge, however, was a consideration of 'the precautionary principle' – a principle aimed at avoiding environmental problems. She emphasised that it was impossible to continue with the environmental management policy which had prevailed in Chile and which amounted to attempting to overcome environmental problems once they have emerged. For this reason, Law 19,300 introduced 'a number of instruments' to prevent rectifying an environmental problem only after it has surfaced. One of them is the 'environmental impact system'. Any project with an environmental impact must follow this system. Avaneda J, proceeded to indicate that the Act concretises two types of 'document' (*'[e]ste se concreta en dos tipos de documentos'*): 'The environmental impact statement, for those projects whose environmental impacts are not of great importance; and environmental impact studies for projects with environmental impacts of larger scale'.[72] Under the latter conditions, the studies should be designed before the completion of the project, and should include all measures to minimise the environmental impact, or even to reject the project.[73]

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[70]See, eg, Kidd n 5 above, who identifies only two 'distinctive principles' which are universally recognised namely, the 'polluter pays' principle and the 'precautionary principle (at 7).
[71]At par 3 of the decision. Note that the official translation of '*el principio de la eficiencia*' is indeed the 'efficiency principle' and not the expected 'principle of effectivity'. 'The principle of efficiency is concerned with the best relationship between resources employed and results achieved'. See www.linguee.com/spanish english/translation/principio+de+eficiencia.html (accessed on 28 11 2013).
[72]At par 4 of the decision.
[73]*Ibid.*

In light of what has been stated above, in her judgment the Environmental Review Commission of Aysén, (the organisation used in the constitutional protection of the environment) erred and unlawfully failed to apply the express language of Law 19,300. It also ignored the principles governing it by giving a favourable rating to a project that did not meet the requirements prescribed in article 12(d) and (e) of Law 19,300. Article 12 compels a prediction and evaluation of the environmental impact of the project or activity, including the eventual situation as regards any risk; as well as measures to be taken to eliminate or minimise the adverse effects of the project or activity, and to implement remedial action when this is required.[74]

She continued to hold that these illegalities ('*las ilegalidades*') were clear in the case of the Laguna San Rafael National Park and the *huemul* deer. They were also evident in the escalation in the effects of GLOF[75] and flow fluctuations. This meant that the legal obligations had not been respected, which, in turn, demanded the required mitigation on the basis of their acknowledged impact for the owner of the development. Nonetheless, the owner was able to achieve a favourable rating, without first meeting the legal duty of identifying the risk and proposing key measures to address the need for mitigation or elimination of the risk.[76]

As regards the land issue (the involvement of the Laguna San Rafael National Park), Avaneda J, stated that, with regard to compensation, the owner of the project 'undertook' to include the addition of a piece of at least 100 hectares of land on the same riverbank on which Baker Plant 2 was to be constructed. However, it was also patently obvious that, despite correspondence between the 'National Land Authority' ('*SEREMI de Bienes Nacionales*'), and the project owner, the latter had not responded satisfactorily to the mitigation measures required with regard to the land. The authority indicated, for example, that '… it is assumed that the owner left to others the effective implementation of the compensatory measure corresponding to it, and have the responsibility to ensure the implementation of the necessary compensation for the impacts generated by the project (313 of the contested decision)'. From this evidence, she inferred that it was clear that despite the observation made by the competent authority indicating the deficiency and inaccuracy of the measure the project owner proposed for compensation, the project was still favourably rated. Hence the disagreement that the requirement of paragraph (e) of article 12 of Law 19,300 – which requires the environmental impact study – sets out the measures to be taken 'to eliminate or minimise the adverse

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[74] At par 5 of the decision.
[75] See n 54 above for an explanation of the 'GLOF' phenomenon.
[76] At par 6 of the decision.

effects of the project and the repairing actions to be performed' which were met. Clearly because the proposed measure was entirely inaccurate in that under article 16 of the Law the relevant environment authority had the power to reject the study subjected to evaluation.[77]

The system was, according to the judge, analogous to that of the *huemul* deer species. She pointed out that the project owner had indeed recognised that the project would have an effect on this particular species, as well as other species. In this regard, she referred the owner's statement that 'the project will alter the terrestrial wildlife habitat in areas of existing development of the works, and will directly affect populations through the loss of individuals (182 of the resolution)'. She continued that the compensatory measure proposed by the licensee and accepted by the Commission, was to conduct a study of deer, which aimed to contribute to the knowledge of the biology of the two native deer species in southern Chile – the *huemul* and the *pudú* – to favour preservation. It further proposed the creation of a conservation area of 11 560 hectares, and that the study had the approval of the competent authority before the onset of construction.[78]

However, Avaneda J found this procedure unacceptable as it did not provide due effect to the prescripts of paragraph (e) of article 12 of Law 19,300. The particular paragraph required prior action in order to prevent further endangering the species. Any study after the start of the project to determine how to conserve the species was not acceptable since such an approach would conflict with the particular paragraph.[79]

Judge Avaneda finally addressed the 'risk situations' surrounding the damming of the rivers in light of the 'GLOF' phenomena and the resultant fluctuations in the flow of the river(s). She referred to the fact that once the 'project holder' had been authorised by the Water Directorate to construct the first dam, it had to submit the following to the 'Management' (Directorate) of Water Works:[80]

> (a) [A] report to account for the initial condition of fluvial geomorphology prior to any intervention in the channels located within the area covered by the project intervention, through aerial photographs and topographies of control, and an analysis of identified risk areas in which sectors or existing infrastructure could be compromised or affected by aggradation or degradation of riparian and/or bottom of the [stream] bed in the

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[77] At par 7 of the decision.
[78] At par 8 of the decision.
[79] *Ibid.*
[80] At par 9 of the decision.

implementation phases and operation of [the] PHA [Hidro Aysén Project].

(b) Once [the report was] approved by the Directorate of Water Works and DGA Aysén [the General Directorate of Architecture depending on the Ministry of Public Works] the operator shall submit mitigation works projects in sectors identified as vulnerable infrastructure, a monitoring plan in fluvial geomorphology channels involved in the area of the PHA, and an action plan to be implemented upon the occurrence of changes in river morphology generated by the implementation and operation of the project, specifically phenomena leading to the aggradation or degradation of the banks and/or streambed. These projects and plans must be approved by the DGA and the DOH [Directorate of Water Works], and implemented prior to the construction phase and operation of each dam (pages 665 and 666 of the Resolution No. 225).

Having quoted the conditions applicable to the project holder, she held that the situation was not remedied by the provision that these studies and plans must be made in the future and be approved by the General Water Directorate and the Directorate of Water, as these two bodies are not the only agencies involved in environmental 'contests'. This meant that not all the agencies involved in the project evaluation would have been heard, or would be in a position to enforce applicable rules.[81]

The judge found that the illegalities she had identified indeed constituted a threat to the constitutional guarantees in paragraphs 1 and 8 of article 19 of the Constitution.[82] Consequently, the environment – particularly the National Park Laguna San Rafael and the *huemul* species – affected by the project is protected by law but that in this instance, would not enjoy this protection unless clear measures ('*medidas claras*') aimed at specific and effective mitigation or compensation, were adopted. This also applied to the physical safety of people living in the communities falling within the project in that the defendant authority, Baker, had sanctioned the favourable rating of a project without being fully conversant with potential risk areas or appropriate plans for mitigation.[83]

3.4.2 The second minority judgment delivered by Brito J

The second minority judgment (delivered by Brito J) consisted in the main of

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[81] At par 10 of the decision.

[82] As indicated in n 6 above, art 19 contains the fundamental rights of the people of Chile. Paragraph 1 guarantees to all persons 'the right to life'. It is headed: '[T]he right to life and to the physical and psychological integrity of the person' and provides that '[t]he law protects the life of the one that is to be born. The death penalty may only be established for a crime contemplated in a law approved by a qualified quorum. The use of all forms of illegitimate pressure is prohibited'. Paragraph 8 contains, as said (n 6 above) the environmental right ('the right to live in an environment free from contamination').

[83] At par 11 of the decision.

an extensive 'summary' of the reasoning of the dissenting judge in the court *a quo* (the Court of Appeals of Puerto Montt). In the court *a quo* Crisosto J expressed his opposition to the Commission for Environmental Assessment's consent to the Aysén hydroelectric project subject to a series of qualifications/ terms to be met in the future.[84]

Crisosto J held that such 'future' conditions were not permitted by law. From the outset it had to be borne in mind that the objectives of Law 19,300, gave concrete expression to the constitutional guarantee that all people have the right to live in a pollution-free environment ('*un medio ambiente*'). He held that the 'presidential message' which accompanied the presentation of the Law, stated that the Law aimed at regulating a number of conflicting interests guaranteed under the Constitution. However, prominence was given to the fact that no activity, however legitimate, could take place at the expense of the environment. Such a view, according to the judgment in the court *a quo,* introduced a new approach to production management to be developed by companies. The 'presidential message' also addressed the various principles underpinning the Law – one of special importance is the 'precautionary principle', which was to be generated through various instruments. One of these instruments is the 'Environmental Impact Study' of which it was said that 'in pursuance thereof, shall be designed, prior to the completion of the project, all measures to minimise environmental impact, or measure, or even to reject [the project]'. It is for this reason that the text of Law 19,300 provides that conditions based on studies yet to be conducted, are not allowed.[85]

Thus article 2 (letter (i)) of the Law defines 'Environmental Impact Studies' as

> a document that describes in detail the characteristics of a project or activity that seeks to carry out or to modify … It must provide sound grounds to predict the history, identification and interpretation of its environmental impact and describe the actions to be executed or to prevent or minimise significant adverse effects.[86]

The letter (j), in turn, defines the concept of 'Evaluation of Environmental Impact' to mean 'the process, by the Environmental Evaluation Service, which, based on a study or environmental impact statement, determines whether an environmental impact activity or project meets current standards'.[87]

For its part, article 12 provides that the Environmental Impact Study will

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[84] At par 1 of his judgment.
[85] At par 2 of the decision.
[86] *Ibid*.
[87] *Ibid.*

consider: '(d) A prediction and environmental impact assessment of the project or activity, including any risk; (e) the measures to be taken to eliminate or minimise the adverse effects of the project or activity and repair actions to be performed when this is coming'.[88]

Finally, the last paragraph of article 16 (as amended by Law 20,417) provides that

> The Environmental Impact Study will be approved if it meets the environmental standards and, if it is taking charge of the effects, characteristics or circumstances set out in Article 11, proposes mitigation measures, appropriate compensation or reparation. Otherwise, it will be rejected.[89]

Continuing from the summary of the judgment of the court *a quo,* Brito J held, in the case under discussion, that it is indisputable that the law requires that the owner of a project requiring an EIS must meet a legal duty *before* any 'declaration' ('*antes enunciado*') to submit a description of the risk or impact mitigation plans to the body assessing the project. It can, therefore, not be accepted that the party may fulfil this obligation in the future, as this would mean that such circumstances have been omitted from the assessment. It would also imply that the body assessing the project will have surrendered its jurisdiction to the Water Directorate and the Directorate of Water Works – bodies that differ from that required by law, to wit the Commission of Environmental Assessment.[90]

Brito J continued to hold that although the ruling had been interpreted as permissive of future constraints, this interpretation was incorrect in the light of the guiding principles in the legislation and the standards listed in previous forms. In effect, the resolution that describes a project favourably and establishes conditions must be understood as an enabling requirement for the operation of the project. This will ensure that the risks and possible mitigation measures are evaluated and managed in the way approved by the properly authorised body, and not any other authority. This means that the technical inspection of all the variables is a prerequisite for the authorising body in order to evaluate compensation plans, mitigation or compensation that are relevant and having done that, to set the conditions for implementation.[91]

The fact remains that article 25 of Law 19,300 prescribes that under exceptional circumstances an Environmental Qualification Resolution may be

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[88] *Ibid.*
[89] *Ibid.*
[90] At par 3 of the decision.
[91] At par 4 of the decision.

revised, *ex officio,* or on petition from the project holder or those directly affected by the running of the project, when the variables evaluated and listed in the monitoring plan and set as conditions or actions, have changed substantially in relation to what has not been screened or verified, with a view to adopting the necessary remedial action.[92]

The rule speaks of 'variables evaluated' which differ from those 'as designed'. It is, therefore, clear that the Commission for Environmental Assessment must be aware of all the variables required to be submitted as part of the project, as only then can a thorough understanding of the project lead to a valid decision on whether the project will interfere with the environment.[93]

Brito J concluded that what the court *a quo* had done was to allow future studies on such important matters as the analysis of possible draining of interglacial lakes; the determination of risk or vulnerable areas; and mitigation plans or monitoring. This not only violated the constitutional guarantee of living in a pollution-free environment, but most importantly constituted a threat to the physical safety of the residents of the affected areas.[94]

4 The orders of the court

For the reasons set out by the majority of the court, as well as the provisions of article 20 of the Constitution of the Republic,[95] the Supreme Court dismissed the appeal and confirmed the judgment of the Court of Appeals.[96]

In contrast, the minority found that the appeal should be upheld. Judge Avaneda concluded that the protection measures sought by the applicants were warranted, and that they should receive the precautionary protection requested. She further held that Resolution 225 of 13 May 2011 (the Environmental Assessment of the Commission Aysén) should be rescinded and the judgment reversed on the basis of the violation of rights. The developer, in her view, should be ordered to comply with the law applicable to the case.[97]

Brito J, in turn, held that there was indeed a need to provide the constitutional protection sought by the applicants and, therefore, to rescind Resolution 225 of May 13, 2011, which permitted the Aysén Hydroelectric Project to proceed.[98] Rescinding the permission will result in the project holder meeting

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[92] At par 5 of the decision.
[93] *Ibid.*
[94] At par 6 of the minority judgment of Brito J.
[95] See n 113 below for the wording of art 20 in the context of the comments on the judgments.
[96] At par 29.
[97] *Ibid.*
[98] *Ibid.*

the requirements set out by paragraph 3 of article 16 of Law No. 19,300 prior to qualifying the project.[99]

5 Comments on the decision

5.1 A brief excursion into the legal environment in Chile

The Chilean legal system must be viewed in the context of the military *coup d'état* during which the Marxist President, Salvador Allende (the first democratically elected Marxist leader in Latin America), was overthrown by General Augusto Pinochet in 1973, and the aftermath of the *coup*.[100] Chile was governed by Pinochet under army rule during a 'reign of terror' until he stepped down in March 1989.[101] Mallén reminds us that Pinochet's dictatorship is the 'only authoritarian regime to date that was not overthrown by the opposition, or a social upheaval, or the death of the leader. In fact, Chile's military regime was brought down by the very thing it tried so hard to suppress: Citizen's choice.'[102] Pinochet's government was overthrown by 'popular vote' in a plebiscite held in October 1988. The Chilean population was required to vote either 'yes' or 'no' on whether Pinochet should remain in office. A 'yes' vote would mean he remained in office but general elections would follow. In the event of a 'no' vote, Pinochet would step down after a year, and joint elections for parliament and government would have to be held.[103] The 'no' votes secured 55,99 per cent of the votes cast,[104] Pinochet accepted the results and stepped down as president in March 1989.[105] Chile returned to democratic rule in 1990.

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[99] *Ibid.*

[100] For a brief historical overview of this part of Chilean history, see Fox 'Remembering Salvador Allende' published on the *openDemocracy* website (http://www.opendemocracy.net). See www.opendemocracy.net/senan fox/remembering salvador allende (accessed on 2013 10 01). Fox opined that Allende, despite his 'Marxist credentials', was 'quintessentially a Chilean nationalist' whose life work was devoted to the betterment of the life of the poor and 'to freedom from economic dependence or servitude to any outside power'. Allende died 'during a US backed *coup d'état*' on 11 September 1973 by committing suicide (it needs to be noted that there is no unanimity on the cause of his death). As a result Chile, a democracy since 1925, was transformed into a dictatorship under the leadership of the leader of the *coup*, General Augusto Pinochet.

[101] Mallén 'Chile since Pinochet: On the 25th anniversary of the dictator's ouster, is he among the disappeared?' (4 October 2013) *International Business Times* at 5. See http://www.ibtimes .com/chile pinochet 25th anniversary dictators ouster he among disappeared 141428 (accessed 10 10 2013).

[102] *Ibid.*

[103] *Id* at 6.

[104] *Ibid.*

[105] *Id* at 7. Mallén continued that Pinochet did not disappear from the political scene; he continued to hold the title of commander in chief of the Chilean army until 1998, and was then appointed 'senator for life, which granted him judicial immunity' in Chile (*ibid*). Pinochet, however, was prosecuted in the UK, after a Spanish Judge (Baltasar Garzīn) opened a case against him for human rights violations against several Spanish citizens in Chile during his time in power. See in this regard *R v Bow Street Metropolitan Stipendiary Magistrate, Ex p Pinochet Ugarte* (no 3) (1992) 2 All ER 97 (HL). In this decision the House of Lords denied Pinochet

An enquiry into the role of the judiciary under an authoritarian regime and its role when democracy is restored in a particular country provides fertile ground for research. For example, the conclusions drawn from such research can serve as a useful aid in interpreting and understanding a particular train of thought evinced in later judgments by the courts in the particular country's new democratic order. As a matter of fact, such an enquiry was undertaken for Chile in 2007.[106] The author set the following question as central to her enquiry:

> Why did Chilean judges who had been trained under and appointed by democratic governments facilitate and condone authoritarian policies? Put differently, why in a country with such a long history of democratic practice and respect for legality, a country whose human rights movement was one of the strongest on the continent, did judges make no public and concerted effort to defend liberal democratic principles and practices, not only under Pinochet but well into the 1990s?[107]

For her, the answer was to be found in what she called 'institutional factors'.[108] In her 'overview of the argument' she explained that these 'institutional factors/features' are encapsulated in the notions of 'institutional structures' and 'institutional ideology'.[109] The concept 'institutional structures' refers to the 'organizational rules governing the powers and duties of different offices within the institution, including their relationship to each other and to other governing offices'.[110] 'Institutional ideology', in turn, relates to the distinct and coherent 'set of ideas' shared by members of the institution as regards its 'social function or role' (the rules and customs ('norms') guiding behaviour within the institution).[111] She explained further that these norms were both included ('embodied') in, and reproduced by, the institutional structure.[112] According to her, the institutional factors/features guiding the Chilean judiciary were constructed around the concept of 'a-politicism' evinced in a 'high conceptual wall between "law" and "politics"'.[113] The impact of this 'wall', however, proved counter-productive since, instead of leaving the judiciary 'politically neutral' in the true sense of the term, the institutional factors 'worked to foster and enhance a strongly conservative' leaning among

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immunity based on the fact that he was a former head of state and no longer entitled to immunity.

[106]Hilbink n 38 above.

[107]*Id* at 4.

[108]*Id* at 4, 33 40, 41 71 and *passim*.

[109]*Id* at 5.

[110]*Ibid.*

[111]*Ibid.*

[112]*Ibid.*

[113]*Ibid.*

judges.[114] This conservative leaning manifested itself in decisions that 'bolstered the power of state officials and reinforced the traditional social hierarchy, long before and well beyond the seventeen-year dictatorship'.[115] In effect, therefore, Chilean decisions reflected legal positivism or black-letter law in its most absolute form.[116]

What is more, it is possible to link such veneration of legal positivism directly to the notion of judicial deference, in that the judges 'deferred to the executive … leaving individual citizens at the mercy of the state'.[117] It is worth noting that such deference is not a concept unique to Chile. It is accepted in South Africa as well. The idea of deference (in the sense of showing some measure of 'respect') to the executive branch of government, is closely linked to the separation of powers doctrine. Deference in its starkest form of 'leaving individual citizens at the mercy of the state' was particularly evident in South Africa's pre-democratic era under the Westminster system of parliamentary sovereignty.[118] At present, its supreme Constitution notwithstanding, such deference is still acknowledged. In *National Treasury v Opposition to Urban Tolling Alliance*; for example, Moseneke, DCJ refers to this concept as 'the comity the courts owe to other branches of Government, provided they act lawfully'.[119] It is, however, significant that he added the rider that the other branches of government act 'lawfully'.

Returning to the Chilean legal environment, one needs to ask whether the legal environment changed post the return to democracy in Chile.[120] This question is

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[114] *Id* at 7.

[115] *Ibid.*

[116] Hilbink n 39 above at 6 explained this phenomenon as follows: 'Judges understood "law" and "politics" as two entirely distinct and unrelated pursuits, and, considered the goals of judges and legislators to be two entirely distinct and unrelated pursuits … the less "political" judges were, the more "legal" they would be'.

[117] *Id* at 74.

[118] See eg Hoexter under the heading 'deference and respect' who writes that there is 'no doubt that our courts erred grievously on the side of executive mindedness in the era of parliamentary sovereignty' in *Administrative law in South Africa* (2012) at 147.

[119] 2012 6 SA 223; 2012 11 BCLR 1148 (CC) par 26.

[120] In their 'Editor's note' Wolfrum and Grote n 6 above, observe that after years of discussion the National Congress of Chile (its parliament) finally adopted a 'raft of constitutional amendments designed to eliminate the remaining undemocratic parts of the *Constitution of 1980.* The amendments entered into force with the publication of *Law No. 20.050*, which incorporated the changes into the text of the Constitution, in the *Diario Oficial* of 26 August 2005.' (See at iii.) Simultaneously the law empowered the President to create a consolidated text of the '*Political Constitution of the Republic of Chile* within one year after the approval of the amendments in order to preserve the coherence and the consistency of the document, given the numerous changes and derogation which had been made to the original text since 1980' (*ibid*). The task of consolidating the text of the Constitution was completed that same year (2005) and published in the *Diaro Oficial* of 17 09 2005 (*ibid*). For a general overview of the Chilean legal

particularly pertinent in light of Hilbink's view that during the 1990s in particular, 'Chilean judges did not seize on the opportunities presented by the new political context of the 1990s to chart a broadly liberal constitutionalist course' resulting in the 'old patterns persist[ing]'.[121] In their decisions they demonstrated very little appetite 'to enforce – much less develop – constitutional limits on the exercise of public power' and, as in the past, their decisions favoured 'order over liberty, and the state or society over the individual'.[122]

Hilbink contends that the detention and trials of General Pinochet were the catalyst for any change in the judiciary's line of thinking. Nonetheless, she remains adamant in her reading of the Chilean judiciary as inherently positivist, and thus per definition in favour of black-letter law. Hence her concluding remarks:[123]

> In postauthoritarian [*sic*] rights cases, and in the face of judicial reform proposals, judges continued to behave in conservative and conformist ways. The few who were interested in advancing a broader liberal turn found themselves frustrated by the institutional setting in which they worked.

5.2 Comments on the Hydro-Aysén decision in the context of the legal milieu in which the decision was delivered

Having taken a detour via a brief excursion into the milieu in which the Chilean legal system should be considered, some comments on both the majority and minority decisions are warranted.

It is submitted that it is viable to view the majority judgment in the *Hydro-Aysén* decision as 'old-school' and, in the words of Hilbink, 'conservative and conformist'. It can also be submitted that the decision is in line with the thinking that in cases when 'polycentric issues' are at issue (when a number of different public interests are involved[124]) the administrative bodies should be afforded due respect (deference).

In contrast, the two decisions reflecting the minority view are – once again using Hilbink's words – 'advancing a broader liberal turn'.[125] It is thus possible to propose that the majority judgment shows a greater measure of deference toward the executive than the two minority decisions. In 2005 the Canadian journal *The*

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system see Gómez *Essential issues of the Chilean legal system* http://www.nyulawglobal.org/globalex/chile/.htm (accessed 24 10 2013).

[121] Note 39 above at 207.

[122] *Ibid.*

[123] *Id* at 222.

[124] Hoexter n 113 above at 353.

[125] *Ibid.*

Advocate published an article relating to the issue of deference to the executive in environmental matters in Chile.[126] The author introduced his article by stating that 'in a world of increasing globalization, the approach of the courts and administrative bodies of a major trading partner to environmental matters is (or should be) a matter of interest' to the other party (in that instance Canada).[127] Having labelled article 19.8 of the Chilean Constitution as a 'strong constitutional tool' available to advocates of environmental protection,[128] Poole endorsed Hilbink's observation on the role of the Chilean Supreme Court in matters concerning fundamental rights generally. The statement that '[h]istorically the Supreme Court's failure to accord sufficient weight to this guarantee [provided by the Chilean environmental right] has significantly reduced its effectiveness', supports Hilbink's argument.[129]

The arguments of the majority in the *Hydro-Aysén* decision are remarkably similar to those in an earlier decision by the Supreme Court – the *Caso Itata* decision – the subject of Poole's article.[130] In this decision, as in *Hydro-Aysén,* the Supreme Court concluded that there was no 'present environmental damage, only *possibilities* of future environmental damage and therefore the constitutional right had not been infringed'.[131] On this point, Poole's response was that the Supreme Court should have paid closer attention to the constitutional guarantees 'that should elicit closer judicial scrutiny of any challenges to the decisions of the environmental bodies'.[132] Consequently, she contended that the arguments by proponents of the Supreme Court's decision (that the decision showed the necessary deference toward the technical aspects of the decision which 'fall within the expertise of the administrative authority') were inappropriate and improper since they failed to 'give closer judicial scrutiny of the actions of the administrative body when constitutional guarantees are affected'.[133] Poole concluded this brief note with the following observation:[134]

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[126]Poole 'Judicial deference to environmental assessment approvals in Chile' (2005) 63 *The Advocate* at 549.
[127]*Ibid.*
[128]*Id* at 550. For the wording of art 19.8 of the Constitution see n 6 above.
[129]*Ibid.*
[130]The *Caso Itata* decision (the full reference is set out at 554, n 10 of the article Sentencia de la Corte Suprema de fecha 19 de junio de 2002, No 764 2002, causa *Modesto Sepúlveda, en representación Ilte. Municipalidad de Portezuelo y otros contra Consejo Directivo de CONAMA*, no 764 2002 (*Caso Itata*)).
[131]Note 120 above at 553.
[132]*Ibid.*
[133]*Ibid.*
[134]*Ibid.* It could be argued though, that Poole's reference to administrative law principles conflated the remedies of review and appeal. (In a South African context an appeal is a rehearing of the matter and may go to the merits of the decision, but is restricted to the record of the proceedings. In saying that appeal goes to merits, the question is asked whether the administrative decision was 'right' or 'wrong'. A review scrutinises the legality/validity of the

> To support the decisions of CONOMA and the Supreme Court on the basis of administrative law principles is an attempt to portray these decisions on the basis of administrative law principles is an attempt to portray these decisions as legally and juridically sound when, in my opinion, the deference shown to CONOMA by the Supreme Court in this case is insupportable because it ignores the reality of the composition of the national environmental assessment body as well the CONOMA's failure to follow the requirements of environmental legislation.

It must be borne in mind that since this article was published the CONAMA has been abolished (in 2010) and replaced by a comprehensive Ministry of the Environment.[135] Nonetheless, given the appellants' arguments set out above, the conclusion drawn by Poole remains relevant.

In the two minority judgments the emphasis was heavily on maintaining and

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decision whether it was defective and therefore not conforming to the requirements for validity/legality. In other words in review the *manner* in which the decision was reached is examined. Further, a review may go beyond the record to establish whether any irregularities were present, but may not go into the *merits.* A review scrutinises the process of decision making whether the correct process/procedure was followed or whether any irregularity or excess of power was present. In short, a review does not judge the merits of the decision.) This argument gains in veracity in light of the fact that a complainant's approach to a court of law for relief is referred to as '*recurso de protección*' which literally translated means 'an appeal for protection'. However, to my mind a counter argument refutes this accusation. This argument relates to the reality that the complainants' pleadings for relief relate to the protection of their rights (in this instance the protection of their environmental right). In terms of art 20 of the Chilean Constitution 'anybody who, due to arbitrary or illegal actions or omissions, suffers privation, disturbance or threats in the legitimate exercise of the rights and guarantees established in art 19 … [followed by a list of rights involved] may on his/her own or by third party approach the respective Court of Appeal which shall immediately adopt the measures that it deems necessary to re establish the rule of law and to ensure the due protection of the affected person without prejudice to other rights which he/she might invoke before the competent authorities or courts. The action of for the protection of fundamental rights (*recurso de protección*) shall always lie in the case of numeral 8 of art 19, when the right to live in an environment free from contamination has been affected by an illegal act or omission imputable to an authority or specific persons.' Wolfrum and Grote n 6 above. It is therefore submitted that given the wording of the provision of article 20 on the subject of the protection of rights of the Chilean Constitution the distinction between appeal and review in the common law tradition should not be taken as the guiding principle in a country who 'has a legal and judicial system constructed primarily in the civil law tradition' (Hilbink n 101 above at 251). This argument is strengthened when one considers the brief explanation by Goméz (n 115 above) who writes as regards 'legal remedies' (and in effect referring to art 20) that '[a]ny person shall file a prompt and summary proceeding regarding constitutional guarantees ("Recurso de Protección") provided there is no other legal remedy, against any act or omission of the public authorities or individuals which currently or imminently may damage, limit, modify or threaten rights and guarantees recognized by this Constitution, treaties or laws, with open arbitrariness or illegality'.

[135] See n 28 above and accompanying text.

upholding the 'precautionary principle'.[136] The 'precautionary principle' finds expression in international law as 'soft law' embodied in Principle 15 of the Rio Declaration[137] which states:

> Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation.

In the South African context, Kidd proposes that 'environmental impact assessment legislation is premised upon the precautionary principle'.[138] Kidd's proposal has found 'recognition' in South Africa's foremost decision on environmental law, *Fuel Retailers Association of SA v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province,* where it was held by Ngcobo J that[139]

> [t]he precautionary approach is especially important in the light of section 24(7)(*b*) of NEMA which specifically requires the investigation of the potential impact, including cumulative effects, of the proposed development on the environment and socio economic conditions, and the assessment of the significance of that *potential* impact [my emphasis].

It is submitted that this proposal holds true for the Chilean provisions governing environmental impact studies as well. However, two features of the precautionary principle highlighted by Kidd and Holder and Lee, respectively, should be borne in mind when the principle is analysed and applied. First, Kidd correctly points out that the precautionary principle is not and cannot absolute,

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[136]It is interesting to note that Poole (n 120 above at 555, n 11) disagrees with the English translation of 'sea afectado' in the Spanish since the translators used the 'subjunctive mood and more accurately in English should read "may be affected", not "has been affected"'. It is obvious that a correct interpretation of the tense involved is important in Spanish as well, since the majority of the court in the *Hydro Aysén* decision by implication argued that the remedy is not available when there is only the possibility that a right may be affected or infringed.

[137]The Rio Declaration of Environment and Development adopted by the United Nations Conference on Environment and Development (14 03 1992) at Rio de Janeiro on 14 06 1992. For the full text of the Declaration see Patel and Watters *Human rights: Fundamental instruments and documents* (1994) at 55. See also 'International environmental law' in Dugard *International law: A South African perspective* (2011) where the 'precautionary principle' with reference to the Rio Declaration is highlighted as one of the 'principles of international co operation' whereby '[s]tates are required to prevent and control threats to the environment' (at 407).

[138]Note 5 above at 10. It needs to be noted that the precautionary principle is recognised in South Africa as well. Section 2(4)(*a*)(vii) of the National Environmental Management Act 107 of 1998 (NEMA) provides that '… a risk averse and cautious approach is [to be] applied, which take into account the limits of current knowledge about the consequences of decisions and actions …'.

[139]2007 10 BCLR 1059; 2007 6 SA 4 (CC) at par 81.

> [s]ince every development that takes place runs the risk of causing some environmental damage that is unknown at the time of the development taking place. For this reason, it is necessary to balance the degree of likely risk with the cost of avoidance and the likelihood of the damage eventuating.[140]

On this point the insistence of the minority on 'complete' adherence to the precautionary principle could perhaps be faulted. However, this objection loses traction given the facts of the case and the reality that upon a close reading of the decision. the minority did take cognisance of the rider, but nonetheless required that precaution should not be exercised in the future since this would defeat the purpose of the principle as well as the provisions of the pertinent Law.

Holder and Lee link the precautionary principle to the reality of 'scientific uncertainty'.[141] They further characterise the definition of the 'precautionary principle' as found in the Rio Declaration, as a '*weak* [their emphasis] approach to the precautionary principle' since it emphasises the need for 'serious or irreversible damage and the question of cost-effectiveness'.[142] They explain:[143]

> The latter not only limits the space for precautionary action, but may even deny much of the radicalism of the principle, as it is precisely in situations of uncertainty that calculation of costs and benefits are most difficult.

Their 'solution' is to suggest that the precautionary principle involves an understanding that it points towards 'open decision making, and may even reinforce the move towards "public participation" … [and] democratising technical decision making'.[144] It is submitted that in effect this approach to the precautionary principle is in evidence in the decision of the minority in considering the environmental right of the various complainants/appellants, and taking cognisance of the public's assertion that their concern was overlooked in the matter.

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[140]Kidd n 5 above at 9.
[141]*Environmental protection, law and policy: Text and materials* (2007) at 18.
[142]*Id* at 21.
[143]*Ibid.* They contrasted the 'weak' approach with a '*strong* version'. In terms of the strong approach the proponent of an activity which threats the environment or health, must 'prove its safety, without reference to costs and benefits'. The acknowledged difficulties of such an approach, such as the reality that 'proof of 'no risk' is rarely if ever available' and secondly, that a persistent refusal to 'innovate in the absence of such proof would lead to technological stagnation' (*ibid*).
[144]*Id* at 22.

6 Conclusion

Since Amanda Maxwell of the American NGO the Natural Resources Defense Council, was the source of so much background information to the *Hydro-Aysén* saga, it is apt to conclude this case note with her pointed observation (and one that should be taken into consideration by governments and corporations alike when decision-making involving people and their environment is at issue). In a blog in which she responded to an opinion piece in the *Wall Street Journal* dealing with the Hydro-Aysén project, in which it was contended that the project would satisfy Chile's growing energy demand and result in Chile's energy independence, entitled 'Setting the Record Straight: Correcting Misconceptions about HidroAysén',[145] she pithily summed up the realities around the problem as follows:

> Indeed, the WSJ piece oversimplifies the controversy as a choice between conservation and development, when the real question is what is the best way for Chileans [read here every country on the planet at present] to achieve their development goals.

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[145] See http://switchboard.nrdc.org/blogs.amaxwell/setting the record straight co.html (accessed 25 11 2012).

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