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Making environmental law for the market: the emergence, character, and implications of Chile's environmental regime

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As one of the earliest and deepest cases of neoliberal reform, Chile's political economic model has been the subject of extensive debate. The associated environmental law and policy that emerged in this context has, however, received little attention. The country's environmental policy-making process as well as the character and effects of the environmental regime that emerged are examined. Environmental policymaking has been tightly constrained by institutional and political arrangements that embody neoliberal principles such that legislation only advances when internal demands connect up with global forces. As a result, and despite many regulatory initiatives, the environmental regime expresses a strongly market-enabling quality instead of the market-regulating character commonly ascribed to environmental law and policy.

Keywords: neoliberal policy; environmental law; environmental governance; Chile

Introduction

There is broad agreement that environmental governance has undergone major transformations worldwide over the last few decades and that these are linked to economic globalisation – i.e. the increasing interdependence of economies – and, at least until recently, the spread of neoliberal policy models (Cutler *et al.* 1999, Pierre 2000, Harvey 2005). Here we present a case study of environmental policymaking within the context of Chile's neoliberal regime. Because Chile is often seen as the economic success story of Latin America, and because it represents one of the earliest and most thoroughgoing examples of neoliberal policymaking, the accompanying development of environmental governance is of broad relevance. The relationship between neoliberalism and environment in Latin America has been the subject of recent debate (e.g.

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Liverman and Vilas 2006, Heynen *et al.* 2007), and while ‘neoliberal’ has recently become something of a catch-all term, in this case it refers to an explicit policy approach (explained below), designed by Chile’s military government in the 1970s and institutionalised in the 1980 Constitution and subsequent government-wide reforms.

Our case study addresses the following questions: how have environmental laws emerged within Chile’s neoliberal context? What does this case say about the relationship between the *process* of environmental policymaking and the *character* of the resulting environmental regime? At a more general level, what can Chile tell us about the nature of pro-market environmental governance? Chile’s environmental policy model often seems to perplex outside observers, many of whom highlight the relative efficiency of some environmental institutions but bemoan the absence of basic regulatory and enforcement measures, without exploring whether these characteristics are connected (see e.g. OECD-ECLAC 2005). Within Chile, environmental institutions have suffered a long decline in credibility but proved resistant to change until reforms were enacted in 2009.¹ Nonetheless, there are still few explanations for why this environmental model emerged, what have been its key characteristics, or why it proved so difficult to reform. The *Ley de Bases Generales del Medio Ambiente* or National Environmental Framework Law (NEFL) of 1994 forms the core of Chile’s environmental regime, along with sectoral legislation governing natural resources (e.g. mining, forests, water, coasts, and fisheries). Based on our analysis of its emergence and character, we develop three propositions.

- Environmental policymaking has been driven primarily by external forces linked to economic globalisation rather than by the kind of internal societal and political changes commonly identified as drivers of environmental policy in the comparative literature on environmental regulation.²
- The legislation that emerged in this context departs from the conventional image of environmental law as fundamentally regulatory, and rather shows how environmental law can function to enable the expansion of natural resource markets.
- Finally, we argue that analysis of environmental law and policy in developing country contexts must overcome the tendency to focus on superficial statutory similarities and snapshots of legislative developments, and pay closer attention to the way in which broader institutional settings determine regulatory performance.

In the following section, we provide a brief overview of the historical setting. We then review the literature that supports our conceptual framework before examining the policymaking process for the NEFL of 1994 and the characteristics of the resulting environmental regime, followed by its loss of legitimacy and recent reform. In concluding, we revisit the way in which the

outcome of this particular policymaking process produced an environmental legal framework moulded to neoliberal principles, and the kind of path dependencies this implied.

Chile's political economic model and environmental policy

Whereas most of the neoliberal reforms in Latin America were based on externally imposed structural adjustment programmes, the Chilean shift toward a neoliberal political economy was internally imposed by General Augusto Pinochet's (1973–1989) military government a decade before its neighbours. On assuming power after the coup that toppled the left-wing government of Salvador Allende (1970–1973), the military did not have a coherent political economic project other than authoritarian nationalism. However, through an alliance with extreme free market economists commonly known as the 'Chicago Boys',³ ultra-catholic lawyers organised in the *gremialista* movement, as well as elements of the business sector, the Pinochet government over time assumed a revolutionary economic project infused with neoliberal ideology (Vergara 1985, Bauer 1998).⁴ This ideology combined utilitarian economic arguments of state failure and free-market efficiency with a libertarian morality drawn from Hayek (1960), and conceives the state's role as largely limited to that of establishing the conditions for 'free' markets.

The major policy prescriptions of this discourse, as carried out in Chile, were: the maximum privatisation of economic activities; a strict limitation on government regulation; strengthening of private property rights; freedom in pricing; openness to the international economy; and generally, the free functioning of markets (Vergara 1985, Foxley 1995). These elements became axioms of the legal system in the Chilean Constitution of 1980, which explicitly embraced constitutional principles that, on one hand, reinforce the right to private property and the freedom to pursue economic activities, and, on the other hand, limit the state's role in the economy. Following installation of this 'blueprint for the neoliberal model' (Bauer 1998), the entire governmental system was reorganised. In the words of Pinochet's most influential finance minister during the 1980s, 'In Chile there had to be . . . a complete sweep within all the sectors of the economy to remove the statist weed. That was what gave the Chilean economic revolution so much significance, range and depth' (Büchi 1993, p. 64). Sectoral reforms, though unevenly applied, included the liberalisation of nearly all aspects of the country's economy (e.g. state assets, water, energy, labour relations). These reforms were accompanied by unilateral and across-the-board reduction in tariffs, and a focus on promoting natural resource exports. At the same time, the constitution established a series of technocratic checks on any government action that could be construed to affect property and economic rights and as a hedge against future democratic law-making (Bauer 1998). Following these changes, Chile has consistently been recognised as one of the 'freest' economies in the world (see, e.g. Gwartney *et al.* 2009). Notably, law has long enjoyed an elevated status in Chile linked to

a deeply rooted ‘legalist’ tradition. Property law in particular was further buttressed in the neoliberal reform period by the new everyday role of the 1980 constitution with its focus on the economic framework (Bauer 1998), and as an elite response to the institutional breakdown of the early 1970s.

Within this context, most forms of planning and regulation were considered best left to the market, and environment was no exception. Thus, although most of Latin America enacted environmental regulatory frameworks and ministries in the mid-1970s (Acuña 1999), such developments in Chile were limited to a tiny environmental policy unit and the inclusion of an environmental right in the 1980 constitution – though this is vague and limited compared to economic rights.⁵

Chile returned to democratic government in 1990 after a negotiated political transition in which the coalition of pro-democracy parties, known as the *Concertación*, agreed to maintain the economic core of the 1980 Constitution and its associated economic model (Bauer 1998, Godoy 1999). From 1990, the *Concertación* then held power through a succession of four presidencies until being replaced by the centre-right government of Sebastian Piñera in 2010.⁶ Chile’s central piece of environmental legislation, the NEFL, was passed in 1994 in the final days of the first *Concertación* administration of President Aylwin, though its implementing regulations were not enacted until 1997 during the administration of President Frei Ruiz-Tagle.

Environmental policymaking, law, and markets

The United States and Western Europe shared a relatively similar historical process of environmental policymaking, and the large literature on this as compared to the scarcity of studies of other contexts, has arguably become a lens through which the rest of the world is viewed. This conventional view centres on the period from the early 1960s to the mid-1970s when the United States’ major environmental statutes emerged.⁷ In this context, environmental policymaking is generally explained in terms of large-scale shifts in environmental values in response to urbanisation, industrialisation, and growth of scientific understanding, which is then politically expressed in a growing popular environmentalism that was well represented in the political sphere and had a strongly regulatory character (e.g. Kraft and Vig 2000, 2004, Paehlke 2000). Whatever the merits of this analysis, the general taken-for-grantedness of this conventional view seems to have obscured a more complete picture of both the origins and the character of environmental law in ‘developing’ country contexts.

Pioneering work in Latin America by Silva (1995), Kaimowitz (1996) and Mumme (1992, 2007) provides a rare exception. Kaimowitz (1996) sketched a political economic explanation for trends in environmental policy reform in Latin America through a focus on the relative power of environmentally relevant sectors, compatibility between environmental reform and dominant economic policies, and characteristics of the political regime. Mumme (2007)

applies a similar approach to explore the connections between economic and environmental policy in Mexico. Silva (1995) analysed post-transition political conflict and alignments in Chile to explain how a market-friendly approach to governance gained ascendancy. While our analysis covers some of the same territory, we aim to extend this work by exploring the relationship between the policymaking process and the character of the resulting environmental regime, with specific attention to the relationship between national and global forces and to the way in which neoliberal principles were institutionalised. To this end, our analysis draws on approaches and concepts from the policy sciences, regime theory, and legal history.

Scholarship on policymaking has demonstrated the usefulness of an analytical division of the policy cycle into distinct phases, including agenda setting, policy adoption, and implementation, each with its own politics and actors (Kingdon 1995, Jones and Baumgartner 2005). We follow this approach here, and focus first on how the ‘policy window’ opened for environment in Chile, i.e. how it rose on the agenda. Secondly we look at the selection of alternatives, i.e. why the specific legal model was selected. The concept of regime – defined as ‘persistent and connected sets of rules and practices that prescribe behavioral roles, constrain activity, and shape expectations’ (Keohane, Haas and Levy 1993, cited in Levy and Prakash 2003, p.133) – is useful to broadly characterise the outcomes of the policy process. This overlaps with the notion of a set of institutional arrangements (Ostrom 2005), but serves to highlight the relative coherence of a national approach to policy.

As a means of understanding the politics around international regimes, Levy and Prakash (2003) propose that these can be primarily ‘market-enabling’ or ‘market-regulating’. They describe market-enabling regimes as those that ‘tend to reduce transaction costs and provide collective goods important to MNCs [multinational corporations], such as standards, multilateral recognition, and enforcement of Intellectual Property Rights’ (Levy and Prakash 2003, p.136). Market-regulating regimes, on the other hand, are ‘primarily designed to impose constraints on aspects of corporate behavior, including sourcing, production, sales, and distribution of profits...[and] typically address the social costs of corporate operations and provide collective goods, such as environmental improvements and worker safety’ (Levy and Prakash 2003, pp. 134–135). These are only ideal types; regulatory regimes often inadvertently create new markets, whereas enabling regimes include regulatory components. Thus, in reality, regimes tend to be complex and hybrid. However, for highly neoliberal policymaking contexts, it is the *perception* about whether policy approaches are regulating or enabling of markets that is crucial. In the Chilean context the perception that environmental institutions could be market-enabling has arisen primarily through concern for trade and investment.

The market-enabling versus market-regulating dichotomy fits squarely with scholarship in US legal history that analyses links between legal change and economic growth. While neoclassical economic approaches (and particularly their neoliberal variants) tend to represent the market as an area of

spontaneous exchange outside the state, historical legal scholarship such as that by Hurst (1956) and Horwitz (1992) has documented the role of law in facilitating and shaping US economic development, and conversely how patterns of capitalist growth have provoked transformations in the law.⁸ Both authors share an overall view that the state provided a form of ‘legal subsidy’ for early US industrialisation. Particularly during periods of rapid economic expansion – like that of the nineteenth-century US and contemporary Chile – their work suggests attention to the ways in which legal forms of diverse origin can be reworked and moulded to facilitate capitalist expansion.

Emergence and character of the Chilean environmental regime

Politics and the opening of a policy window for environment

With the return to democracy in 1990, many internal factors – including an accumulation of severe environmental problems, the organisation and mobilisation of environmental non-governmental organisations (NGOs), and the prevailing logic of governance (described below) – militated for environmental reform. However, it was not until such factors were articulated with external demands from the international arena that a policy window could be opened for the environment.

By the early 1990s, the environmental and associated public health problems associated with Chile’s rapid economic expansion were increasingly evident. The capital city of Santiago had become one of the most polluted cities in the world (Morales 2006, Universidad de Chile 2006). Each of the country’s major natural resource sectors had environmental problems and was entangled in conflicts. Copper mining and smelting had generated extensive air and water pollution in the northern and central portions of the country. Plantation forestry and associated conversion of native forests, as well as a new phase of dam building, sparked indigenous and environmental mobilisations. Open access to and unregulated exploitation of coastal fisheries had led to the collapse or rapid reduction of high-value stocks and to social dislocation. In sum, there was a significant accumulation of both public health and ecological concerns within Chilean civil society, and an emergent set of small but active environmental organisations (Camus and Hajek 1998).

In addition, throughout the 1980s, the environment had been one centre of organising and opposition to the military dictatorship, along with larger social causes such as human rights, women’s rights, and indigenous movements. In general terms, the logic of governance pursued by the *Concertación* was to ‘demobilise’ society, and institutionalise these new social movements into the party and state apparatus as a means of achieving stability. To this end, during the first few years after the transition, official entities, laws, and finally agencies were developed for the indigenous, women’s and human rights movements.⁹ Thus, the prevailing logic of governance indicated that environmental protection should be similarly institutionalised.

However, to a greater extent than other social issues, environmental protection faced a series of barriers that were ideological – particularly the widely held notion that environmental regulation could slow and distort natural resource markets – and institutional, in terms of a closed policymaking context designed to limit regulatory action. It also faced the opposition of a powerful and cohesive business sector that was dominated by a small number of mostly family-controlled holding companies (Fazio 1997) and felt threatened by nearly all forms of environmental regulation. After the return to democracy, through trade organisations and think tanks, the business sector worked actively in alliance with the right-wing parties, as well as elements of the governing coalition and the government ministries, to project their vision that growth and investment came first and environment was a secondary concern. Moreover, this ‘growth-oriented’ vision was generally shared by the leadership of the *Concertación* whose political views were forged in the Latin American political struggles of the 1960s and 1970s when environment had little salience. The core of the *Concertación*’s policy vision was to maintain the dynamism of the economy while restoring democratic institutions and gradually strengthening a social safety net. Environment in itself was not seen as important to any of those endeavours, and thus had few committed proponents within the coalition. Thus, without significant political counter-balances, the structures of exclusive policymaking formed between business representatives and ministry staff during the Pinochet period were expanded (into ‘iron triangles’ including politicians) but otherwise unshaken under the new democratic governments (Silva 1995, 1996).

Given this politically adverse context, the environment rose to the top of a crowded political and policy agenda not primarily out of concern for health and ecological conditions, but out of concern for trade and investment. Of particular importance, beginning in 1992, were the combined efforts by government, right-wing opposition and the business sector to include Chile in the North American Free Trade Agreement (NAFTA). In the early stages of NAFTA discussions, along with Mexico and Canada, Chile was considered a potential signatory. However, the existence of minimum environmental legislation, including some form of environmental impact assessment, was a condition established by the US Congress as part of ‘fast track’ trade negotiation authority. In this context, the Chilean presidency took up dormant legislative proposals and pushed for rapid passage of an environmental law. Public justifications for development of the NEFL and much of the debate over the law in the Chilean congress emphasised this fact and presented the law as an imperative for the country’s commercial strategy (see Arriagada 1995, Silva 1995, Rutherford 2001, OECD-ECLAC 2005). As one business-sector participant in the discussion remembered, ‘It was a situation where the environmental law was considered neither important nor a priority, but NAFTA was considered to be both’.¹⁰ As the minister charged with coordinating the government’s legislative agenda wrote, ‘Lately, discussions of the environment tend to begin and end with the issue of NAFTA. If we

begin with NAFTA we end up talking about national environmental policies and vice versa' (Arriagada 1995, p. 12). In addition to direct requirements related to NAFTA, the business sector had already begun to acknowledge the need for some minimal environmental framework in order to maintain access to foreign markets and the unobstructed flow of foreign direct investment. Such recognition was particularly evident in the country's historically dominant export sector: mining (Borregard *et al.* 1999). Thus, the window for environmental policymaking was open, though not very wide.

Policy selection in a neoliberal context

When environment reached the legislative agenda, a range of 'environmental models' (in terms of framework legislation and governmental structure) already existed in Latin America (see, e.g. Acuña 1999). Chile, however, took a distinctive approach in the NEFL. The NEFL does not provide substantive regulation but rather establishes a general legal framework for the environment. The law has three major components, enacting: (1) an environmental impact assessment system (or SEIA, *Sistema de Evaluación de Impacto Ambiental*), together with a framework for enacting regulations for areas such as water and air quality; (2) the country's first bureaucratic structure for the environment in the form of a coordinating agency named the *Comisión Nacional del Medio Ambiente* (CONAMA, National Environmental Commission); and (3) a system for environmental liability.

The CONAMA was placed under the *Secretaría General de la Presidencia* (equivalent to the president's Chief of Staff in the US system), and a council of 10 ministers was established as its governing body and charged with setting governmental policy and enacting regulations. In addition, Regional Environmental Commissions (COREMAs, *Comisiones Regionales del Medio Ambiente*) were established whose principal function is to decide on SEIA applications: i.e. they issue permits. In summary, the system was designed to rely upon a national agency (the CONAMA) for regulatory actions, but project-level decision-making occurred (formally at least) through regional branches of the various ministries. Municipal governments had a role in the COREMA decision-making but little else. How can we explain the emergence of this particular design – i.e. what was included, excluded, and emphasised?

On the one hand, policy selection responded to the perceptions held by Chile's government and business elites regarding the formal requirements of global commerce, and on the other, national institutional and political alignments constituted a form of 'neoliberal policy filter', which selected against regulatory elements and authority. NAFTA's policy influence occurred in terms of time constraints and content. In the first case, the NEFL had to be well advanced before the scheduled NAFTA vote in the US Congress that effectively could not be postponed beyond 1993 (when President Bill Clinton's fast track trade negotiating authority was set to expire). Secondly, since North American tripartite negotiations were already underway, and Mexico had

enacted broad national environmental legislation in order to meet US conditions, the expectation was that Chile would have to demonstrate a framework at least comparable to Mexico's. Such expectations and scrutiny, however, did not extend beyond a very general level, and never touched on the minimal content of a legal framework.¹¹ Moreover, Environmental Impact Assessment (EIA) procedures were increasingly seen – and represented in multilateral arenas such as the World Bank and the 1992 Earth Summit – as essential international norms for investment (Wood 2003). Thus, the inclusion of some kind of EIA system was a foregone conclusion.

Heading into the reform, the Chilean government was split as to whether to push for a full environmental ministry or some lower profile organisational form (Silva 1995). At this moment, it appears that the speed with which the NEFL had to be prepared, together with the existence of entrenched bureaucratic and business interests, functioned to limit the scope of reform. As noted above, the sectoral ministries (e.g. mining, agriculture, public works) were subject to neoliberal restructuring in the 1970s and 1980s. Since their regulatory authority was sharply limited and the defence of property rights and facilitation of markets had become central mandates, the idea of a new ministry that could exercise regulatory authority across many domains appeared threatening to many sectoral officials. A final inducement towards a minimalist approach to reform was provided by the World Bank which offered a US\$17 million loan for the reform process. According to a Bank official,

This project embraced a decentralized, unproven, and therefore risky vision of environmental management ... The commitment made early on by the World Bank was essential for convincing the government – which was divided in views on the merits of the model – to give it a fair test. (Rutherford 2001, p. 18)

Although this document does not provide a detailed rationale for why the Bank elected to tip the balance in one direction, its preference can be understood as coherent with the principles of decentralisation and 'subsidiarity' (decision-making at the lowest appropriate level) that were then in vogue at the Bank.

In addition to the pressures mentioned above, right-wing senators launched attacks on successive NEFL bills before the country's Constitutional Tribunal based on challenges of the constitutionality of alleged new limits on private property rights that, along with economic freedoms, enjoy strong protections in the Constitution.¹² These attacks were designed to create a dampening effect on the regulatory reach of the law, and exemplify the technocratic checks on democracy established by the Constitution.

In presenting the NEFL bill to the Chilean Congress, President Aylwin summed up the argument for a 'coordinating model', stating that it was not feasible for Chile to undertake the institutional reform required to create a ministry, that this would have costs in terms of ministerial buy-in and coordinating capacity, and that in any case environment was a 'cross-cutting' issue.¹³

The neoliberal character of the law*The NEFL's market-enabling characteristics and innovations*

Beyond superficial similarities to US or other national legislation, the neoliberal character of Chile's framework can best be seen in its particular approach to EIAs and permitting, the lack of regulatory standards and authority, and the role assigned to the courts and to property rights in conflict resolution.

While the United States' National Environmental Policy Act (NEPA) system was the initial model for Chile's EIA system, the Chilean system is designed to function quite differently.¹⁴ The SEIA regulations created a two-tiered system similar to that in the United States, where full EIAs are required of higher impact projects and simple declarations of environmental impact (DIA) for the rest.¹⁵ EIAs are prepared by the project proponent, and are then evaluated by the relevant public agencies, which must submit assessments to the COREMAs. Rather than requiring an evaluation of alternatives, as is the case with NEPA, in Chile the EIA is presented as a single fully developed proposal and the government's evaluation is strictly limited to an analysis of whether the project complies with existing laws. If the EIA complies with existing laws and regulations then it must be approved. The COREMA's only procedural options are approval, rejection, or approval with technical conditions. The official rate of approval for projects submitted to the EIA system is over 90%, unless projects that are voluntarily withdrawn are included, in which case the rate falls to approximately 80%.¹⁶ A total of 9374 projects have been approved in the period 1993–2009, and over 95% of these were DIAs.¹⁷

The most distinctive element of the NEFL system, however, is that it is designed as a centralised permitting system, known in Chile as a '*ventanilla única*' (or one-stop-shop). This is designed to unify all existing permitting processes (not including local government) into a single window. The COREMA's decision then, known as the *Resolución de Calificación Ambiental* (or RCA), is equivalent to an over-arching permit for a project. This one-stop-shop function, and the reduction in transaction costs for investment projects that it provides, has consistently been one of the principal official rationales put forward by government for the NEFL system, and it has become a fixture of public presentations and discussion.¹⁸ Particularly through this mechanism, the intentional and consistent focus on reducing transaction costs for investment projects exemplifies the market-enabling logic behind the legislation. Significantly, no such one-stop-shop was considered for any of the more regulatory aspects of the law. Thus, for example, responsibilities for the monitoring and enforcement of project implementation were left divided among the sectoral agencies without any new consolidation of authority. In summary, the design for permitting is centralised, highly constrained and centred on efficiency, in contrast to enforcement and policymaking, which is decentralised and subject to multiple vetoes.

Lack of regulatory development

The NEFL establishes the authority of CONAMA, through its Council of Ministers, to propose new environmental laws and policy and to develop future regulations (see Bermúdez 2007 for a full discussion). It is authorised to regulate water and air quality standards and control emissions. In practice, however, the Council has concentrated its energies on SEIA issues, e.g. principally in resolving the appeals of project proponents. The CONAMA's first director notes that the Council has an 'operation that is sporadic and irregular, where its members have not adopted, implemented or monitored high-impact environmental policy decisions' (Asenjo 2006, p. 11). The few regulatory instruments that have been enacted focus on particular sources of emission and pollutants for which there is less political and ideological controversy, such as fine particulate standards in major cities. They do not establish either national emissions standards or water quality standards (OECD-ECLAC 2005), since this is left to decentralised processes. In all cases, regulations do not address the industrial processes themselves and instead focus on end-of-pipe limits (Silva 1995).

In addition, with a few relatively minor exceptions, the NEFL does not provide authority to regulate natural resource use.¹⁹ Rather than enact such regulations, the CONAMA's focus has been on creating non-binding policies and guidelines whose implementation depends on the existence of adequate political will at any given time, and which in some cases, contradict legally binding regulations.²⁰

Role of the courts, citizen lawsuits, and liability

In the environmental regime, and more broadly throughout Chile's model of governance, the courts are assigned a central role in resolving conflicts over resource use. In carrying out this role – and in strong contrast to the US experience with NEPA – the courts have taken a narrow and formalistic approach to jurisprudence, with most decisions reflecting procedural issues (e.g. standing, statute of limitations) rather than the substance of cases (Bauer 1998, 2004). Secondly, in the absence of substantive environmental regulation, property rights have constituted the fundamental issue in most decisions. Moreover, again unlike NEPA, the NEFL and its regulations do not open any new specific avenue for citizen lawsuits, though they do establish specific avenues by which project proponents can appeal denials or conditions (Bermúdez 2007). Despite increasing legal challenges to environmental permits, these have met with little success.

While beyond the scope of this paper, it is important to note that the legal treatment of liability thus becomes a fundamental question, and the reliance on a strict 'negligence doctrine' in Chile greatly limits possibilities for seeking compensation for environmental damages.

The vicissitudes of reform

Efficiency and legitimacy crisis of the environmental regime

While the NEFL has arguably been highly successful in enabling markets for exporting natural resources – at least for existing industries – its limitations in addressing environmental conflicts led to a loss of public legitimacy by the late 1990s and a series of reform proposals, one of which finally became legislation in 2009. Although debate continues regarding the efficiency of the ‘one-stop-shop service’ offered by the EIA process, the system has been able to handle an enormous volume of projects. Very few of these have been rejected, while many have enjoyed increased legitimacy. In general, the process has offered a low-risk, stable, and centralised means of permitting, and this has further been enhanced by executive actions of various kinds to accelerate approvals, including most recently the Bachelet administration’s introduction of the high-level office of ‘Fast-tracker’ (the English word is used) within key ministries, whose goal is to expedite EIA approval for strategic investment projects (Michell and Carmona 2008).

The environmental regime has also functioned to enhance the competitiveness of Chilean exporters in terms of attracting investment, securing credit, and maintaining or opening markets; foreign investment accelerated following passage of the NEFL (see e.g. Moguillansky 1999). While Chile did not in the end join NAFTA, due to internal US politics, it did negotiate and sign a bilateral free trade agreement with the United States in 2003. In this case, the United States’ congressionally mandated environmental review of Chile highlighted the existence and achievements of the NEFL (USTR 2003). Chile has also signed free trade agreements with the majority of Organisation for Economic Co-operation and Development (OECD) countries and the European Union, and in all cases, the NEFL has served as proof of the compatibility between environmental regimes (OECD-ECLAC 2005).

The regulatory role of the NEFL, on the other hand, has been subject to increasing criticism over the last decade by Chilean civil society, by external reviews such as the OECD-ECLAC analysis, and even in internal reviews commissioned by the Chilean government.²¹ The emphasis and scope of criticism has varied. However, given its visibility in major environmental conflicts, the SEIA has generally been targeted. Less visible issues such as the failure to produce implementing regulations for many of NEFL’s articles has generated internal criticism, but little public debate. Overall, though, the erosion of the CONAMA’s credibility has been notable. One element of this has been the high turnover of CONAMA directors (eight over 14 years), linked to major EIA controversies, thereby fuelling a public perception that regulatory deliberation will not be allowed when it conflicts with projects enjoying high-level political support.²² An oft-cited example was former Executive Director Viviane Blanlot, who was widely seen as having been forced from office by President Frei for being less than fully supportive of the Ralco Dam project.

Environmentalism criticism of the model deepened during the Frei Ruiz-Tagle presidency (1994–1999), following installation of the ‘Frei doctrine’. This was set out in a 1996 presidential memo to agency heads, stating that their job was to approve, and improve if necessary, but never to reject investment projects.²³ The document was backed up by President Frei’s vocal support for the Pangué Dam on the Bío Bío River at the height of indigenous and environmental protests over the project, and was further reinforced when Frei laid the first stone for Forestal Arauco’s paper pulp mill in Valdivia while its permit was awaiting a decision on appeal to the Council of Ministers.

The succeeding government of Ricardo Lagos (2000–2006) sought in its first phase to restore authority and credibility to the CONAMA, and consistently emphasised that decision-making should occur within legitimate institutional channels. Nonetheless, both President Lagos and his ministers intervened periodically in environmental conflicts, thereby reinforcing the view that the SEIA system had become politicised. The conflicts surrounding the NEFL peaked in 2004, when the Forestal Arauco pulp mill in Valdivia began operations, including discharge of wastes into the internationally protected *Río Cruces* wetlands. The resulting death and emigration of thousands of waterfowl was a staple of the news for months, and for a time, the Chilean public was witness to nightly images of dying swans literally falling from the sky. Moreover, a broad-based citizens’ movement kept national attention on this crisis. This has been widely described as a ‘before and after’ event for environmental policy in Chile. Thus, in 2005, CONAMA’s credibility fell below 20% according to a national opinion poll (CERC 2005).²⁴ One of the agency’s early supporters, Senator Guido Girardi, probably reflected broader opinion when he stated, with some hyperbole, ‘The Environmental Law is worthless. It is an embarrassment and we should take it together with the CONAMA and throw them in the garbage’.²⁵ By 2005, the CONAMA’s own analysis highlighted a series of critical problems: the coordinating model was an awkward fit and had not been legitimated within the rest of the government, enforcement was fragmented and ineffective, political intervention had undermined the agency’s technical credibility, and the model was focused excessively on the SEIA versus the rest of its tasks.²⁶

This context of multiple and growing environmental conflicts and delegitimation of the environmental regime intersected with Chile’s decision to seek membership in the OECD, which led to a well-publicised OECD review of Chile’s environmental performance (OECD-ECLAC 2005). It was in this context, in the election year 2005, that presidential candidates locked in a tight race proposed major environmental reforms as part of their campaign platforms, and simultaneously a number of reform proposals were launched in the Chilean Congress.²⁷ Thus, since environment had become an electorally salient issue, internal politics had a greater role in opening a new policy window for reform, but again, this only took shape in conjunction with a strong external demand, in the form of OECD accession talks. The importance

of these is evidenced by the consistent framing of the reforms by government and business as a response to OECD requirements.

Bachelet government (2006–2009) proposals for reform

The government of President Bachelet initially focused on reforming the state's structure in an effort to increase the authority, coherence, and credibility of the environmental bureaucracy *without* increasing the scope or nature of regulation.²⁸ This was evidently a rather contradictory goal. Bachelet's first measure, in 2007, was to elevate the CONAMA director to cabinet level.²⁹ Then, in early 2009 the government introduced a new bill to reform the NEFL. Throughout 2009, as this relatively modest bill moved through the legislature, environmental organisations and sympathetic legislators mounted a campaign to expand the scope of the law, and major revisions were made in the Senate committees. The legislative mobilisation continued, however, including elements ranging from a new agency for protected areas to greatly expanded venues for citizen participation, and culminated with over 1000 proposed amendments to the bill, many of which implied major changes to the regulatory approach. The response from the Bachelet administration was unusually rapid and decisive; the government forged a pact with the right-wing opposition to rule all amendments inadmissible and secured legislative approval for the more modest bill that had been approved in committee.³⁰

The core of this reform is the creation of a full environmental ministry. Thus, despite residual opposition from sectors such as the two most influential right-wing think tanks (*Libertad y Desarrollo* and *Centro de Estudios Públicos*),³¹ the government signalled the abandonment of the 'coordinating model' experiment. The most significant increase in regulatory authority, however, is the creation of a new 'Superintendency' within the ministry to coordinate monitoring of environmental permits and apply administrative sanctions. Leading up to this change, the dispersed model of enforcement had been broadly criticised. By the mid-2000s, the business sector also had joined such criticism, highlighting that the enforcement model introduces uncertainty, the risk of excessive delays and costs for investment, as well as constituting a potential obstacle to accession to the OECD.³² However, in exchange for accepting the 'Superintendency' and a consequent increase in regulatory authority, right-wing senators secured the government's acceptance of a proposal to create new 'environmental courts'. These are to be established outside of the normal judicial system, and take the technocratic form of a panel of experts with special jurisdiction over all environmental sanctions.³³ In other words, they represent an emphasis on 'regulating the regulator'.

In summary, this history of attempted reforms suggests that even substantial *organisational* changes are more feasible than minor changes in the *policy approach* within Chile's neoliberal model. This approach continues to eschew planning and zoning mechanisms as well as substantive evaluation

and regulation of natural resource uses, in favour of a case-by-case approach based on procedural compliance with legal requirements.

Conclusions

The market-enabling and market-regulating dichotomy presented by Levy and Prakash (2003) serves to highlight what are otherwise implicit understandings about the character of different regimes. The conventional view of environmental law and policymaking has tended to assume that these sit in the regulatory camp. Chile presents a useful case for looking beyond this conventional view, because it shows, on the one hand, an environmental law with strong neoliberal characteristics, and, on the other, a policymaking process driven by an interest in facilitating the growth of natural resource markets, especially for export.

We suggest, however, that the market-enabling versus market-regulating character of regimes is a starting rather than end-point for analysis, and leads to questions such as: which markets in particular are enabled? When does regulation facilitate market growth? In this sense, it appears that under the umbrella of a free-market approach, traditional natural resource exploitation in Chile became institutionally, politically, and ideologically entrenched in ways that inhibit not only regulatory measures but also other resource uses and markets. For example, specifically environmental markets (such as those for environmental services) have seen little development as compared to the rest of the region.

In this history of the environmental policymaking process, we have highlighted how Chile's internal politics and policymaking institutions over the last two decades connected with demands, incentives, and norms linked to economic globalisation. Since environmental law arrived so abruptly in Chile, this national context presents an opportunity to assess how the policy window for environment opened, as well as what kinds of policies were eventually pushed through this window. With Chile's 1990 return to democracy, there were strong reasons to expect that environmental protection would be legislated and institutionalised as part of the new mode of governance. However, this did not occur until the accumulation of internal demands found a connection and alignment with the external concerns of trade and commercial policy. Likewise, we argue that policy selection resulted from a connection between global factors – an externally determined timetable, international norms in the form of an EIA procedure, and the economic inducements of international trade – with local politics and a 'filter' of institutionalised neoliberalism. Despite widespread loss of credibility and civil society mobilisation, the resulting policy remained essentially unchanged for 15 years until internal factors again found connection with global forces, this time in the form of Chile's accession to the OECD in 2009.

While beyond the scope of this discussion, our interpretation of the policymaking process and character of the NEFL is broadly consistent with

analyses of Chile's complementary sectoral legislation. Earlier analysis of forestry legislation has documented the entrenched institutional and political barriers to reform (e.g. Clapp 1998, Silva 2004). And elsewhere we argue that the 15-year effort to reform the market-oriented Water Code was shaped by a combination of political ideology and institutional arrangements that functioned to select out the more regulatory elements from proposed reforms (Bauer 2004, Prieto 2007).

Analysis of the NEFL's character goes some way toward providing an empirical description of a neoliberal approach to environmental governance. The avoidance of certain issues such as environmental zoning, and the weakness of other regulatory and enforcement measures are relevant aspects, but the overriding emphasis on a certain type of EIA system is most notable. Despite the EIA system's superficial similarity to the US and other national contexts, it operates quite distinctly. In the Chilean case, it limits the state's role to evaluating and approving private initiatives, provides considerable security for investment, and reduces transaction costs for investment through the innovative creation of a *ventanilla única*, or one-stop-shop for permitting. In general, the NEFL framework has thus been successful in increasing the flow of foreign direct investment and indirectly has facilitated Chile's active commercial policy. Legal histories of capitalism have long explored how the meaning and function of legal concepts and frameworks can morph across different contexts. Property law has served as the classic case for many of these analyses (e.g. Horwitz 1992). We suggest that environmental law warrants greater attention of this kind, and that the creation of 'legal subsidies' for natural resource industries may be much wider than is generally acknowledged.

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Notes

1. Opinion surveys documenting the declining credibility of Chile's environmental institutions include CERC (2005) and UDP (2007).
2. Based in New Institutional sociological theory, Frank *et al.* (2000) make a similar argument. They showed that – independent of national conditions – a majority of nation-states have adopted the same environmental institutions since 1970, and explain this as a process of institutional diffusion from the 'world polity'. Buttel (2000), however, questioned whether the existence of nominally similar institutional forms can tell us anything about environmental management across different contexts. Our analysis thus supports both Frank *et al.*'s (2000) general argument (and provides details of the specific political mechanisms involved), and also Buttel's (2000) critique, in that the Chilean cases shows that superficial

similarities between legal institutions for the environment can hide vast differences in terms of their functions.

3. For a detailed historical analysis of the influence of the Chicago Boys on the Chilean model, see Fontaine (1988) and Valdés (1995).
4. A treatment of the *gremialistas'* political thought can be found in the writings of the movement founder Jaime Guzmán (see Guzmán 1996). Also see Bauer (1998) and references cited there.
5. Political Constitution of the Republic of Chile, Article 19, number 8.
6. These four presidential periods are: Patricio Aylwin Azocar (1990–1994), Eduardo Frei Ruiz-Tagle (1994–2000), Ricardo Lagos Escobar (2000–2006), and Michelle Bachelet Jeria (2006–2010).
7. This includes the National Environmental Policy Act of 1969, the Endangered Species Act of 1973, the Clean Water Act of 1972, and the Clean Air Act of 1963 (amended in 1970 and then several times since).
8. See also North (1981).
9. See for example, Law No. 19,253 (1993) and Law No. 19,023 (1991) which establish the National Indigenous Development Commission (CONADI) and the National Women's Service (SERNAM) respectively.
10. Lawyer representing the mining sector in the environmental law discussions (personal communication, 20 July 2009).
11. According to a legal advisor to the US State Department for the NAFTA negotiations (interview, 10 September 2010).
12. *Constitución Política del Estado 1980*, Article 19 numbers 21, 24 in relation to number 26. See also Bauer (1998).
13. Presidential message number 387-324, for the *Ley de Bases Generales del Medio Ambiente*, 14 September 1992.
14. By NEPA system we refer to the overall EIA framework established primarily by the US courts through NEPA case law and the Council on Environmental Quality (CEQ) guidelines of 1970, as well as the legislation itself. See e.g. Rodgers (1994) for a discussion of NEPA.
15. See: Law No. 19.300 and D.S. No. 95 (2002); *cf.* Rodgers (1994).
16. For the period 1994–1997 when completion of EIAs was voluntary, the approval rate was 95% (Castillo 1998, cited in Larrain 2006).
17. CONAMA website: <http://www.conama.cl>
18. We have been unable to identify the specific origin of the *ventanilla única* concept, participants in the process commented that the concept just emerged during discussions of the proposed bill.
19. Exceptions include Article 34 reinforcing the country's commitment to a protected areas system but without any additional authority; Article 35 which allows for the creation of private protected areas; and Article 37 for the classification of species with conservation problems; and possibly Article 42 on management plans.
20. This includes: 'National Strategies' for climate change, biodiversity, and wetlands; 'National Policies' for protected areas, species, integrated solid waste management, and the Environmental Policy for Sustainable Development.
21. Criticisms from a civil society perspective are best articulated by Pizarro (2006) and Larrain (2006). Internal criticisms are summarised in the internal CONAMA memorandum titled: CONAMA. Memo N° 40/ 11 January 2008/ LCV. 'Líneas generales tras la propuesta de rediseño' which makes reference to a series of government commissioned studies, particularly Jadresic *et al.* (1998) and Castillo (2000).
22. See Larrain (2006) and Pizarro (2006) for greater discussion of this issue.
23. Larrain (2006, p. 5), citing the presidential memo circulated on 26 August 1996.
24. Reflecting the recurrent view in the news media, a series of papers presented at the think tank Expansiva mention the Forestal Arauco case as a turning point in

- forcing reconsideration of the model, including papers by two ex-directors of the CONAMA. See e.g. López (2006), Asenjo (2006), and Pizarro (2006).
25. Declaration on national television quoted in: Ambientalistas Satisfechos Por Cierre De Celco; Diputados Pedirán Comisión Investigadora, *La Nación*, 8 June 2005.
 26. Memo N° 40/ 11 January 2008/LCV, 'Líneas generales tras la propuesta de rediseño'. These criticisms are echoed in the presidential message that accompanied the Bachelet government's proposed reform of the law.
 27. See, e.g. Bachelet's campaign commitments to the environmental sector (*Compromisos de Chagual*), November 2005. Available at: www.terram.cl
 28. See May 2008 draft bill prepared by the legislative coordinator for the Minister of Environment and titled, *Ley No 19.300 Sobre Bases Generales del Medio Ambiente*.
 29. Law No. 20,173 (2007).
 30. 'Protocolo de Acuerdo: Proyecto de Ley que Crea el Ministerio y la Superintendencia del Medio Ambiente', Boletín no. 5947-12. Santiago, 26 November 2009. With less than four months remaining in Bachelet's term the government stated there was insufficient time for further debate.
 31. See Libertad y Desarrollo (2008), Sierra (2008).
 32. See, e.g. Dinamarca (2006), Ferrada Nehme (2007).
 33. Acuerdo entre el Gobierno y la oposición se había registrado el pasado 26 de octubre: Avanza la nueva institucionalidad ambiental tras la aprobación de la Sala del Senado, *El Mercurio*, 11 November 2009.

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