

2017

Institutions of Environmental Democracy and Environmental Justice: The Case of Chile

Sherrie Baver Ph.D.

CUNY City College, CUNY Graduate Center

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Recommended Citation

Baver, Sherrie Ph.D., "Institutions of Environmental Democracy and Environmental Justice: The Case of Chile" (2017). *CUNY Academic Works*.

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S. Baver April 2017

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Introduction

As a comparativist, searching for a framework for “comparative environmental politics” (as opposed to policy), I began studying the three “Principle 10 (P10)” environmental access rights (also known as the pillars of environmental democracy)¹, first promulgated in the 1992 Rio Declaration. Since the late 1990s, these P10 rights, “access to environmental information,” “access to participation,” and, “access to justice in environmental matters,” are globally seen as promoting transparent, inclusive, and accountable governance. Their greatest adoption success to date is the European Union’s (EU) 1998 Aarhus Convention, which the EU saw as a way to deepen democracy and sustainability, especially in new Central and Eastern member states. Now, the push for environmental access rights worldwide is being promoted by several UN-related agencies, including the Economic Commission for Latin America and the Caribbean (ECLAC). They have been working since 2012 on promoting a regionwide Convention for Latin America and the Caribbean, along with The Access Initiative (TAI), a transnational network of civil society groups. I argue these access rights can be seen to be an institutional basis for promoting environmental democracy and justice as well as providing a framework for a subfield of comparative environmental politics.

Studying the adoption and implementation of these rights through concrete institutions in Latin America is complex, given that it is a region marked, throughout its history, by power differentials and inequities, especially regarding conflicts over exploitation of and benefits from natural resources. It is not surprising then that in Latin America, environmental justice has become an integrating and mobilizing concept connecting environmental, social, ethical and

political dimensions of sustainability and development. This concept helps researchers analyze the distribution and types of conflicts in the region that often puts the burdens of development impacts on the poorest, most discriminated against, and excluded areas and populations (Carothers 2008; Rasmussen and Pinho, 2016). In a larger project, I am comparing Mexico and Chile's adoption and implementation of environmental access rights to pursue justice, as well as recent attempts to negotiate a Principle 10 Convention for the entire Latin American and Caribbean Region. This specific paper focuses on the case of Chile.

I am interested in formal political institutions and define "P 10 institutions" as concrete political organizations and rules that states adopt to deploy environmental access rights. More specifically, for citizens to have the right to public environmental information, a state would need to have a Freedom of Information Act and often, an agency that provides the requested information or explains information denials. The most common institution promoting public participation in environmental matters is a national agency/service that oversees required public input in Environmental Impact Assessments (EIAs) for large-scale public and private projects. Finally, access to justice in environmental matters requires at a minimum, citizen standing in court if the Access Right to Information or Participation are denied by a government. In lieu of individual citizen suits, environmental NGOs need standing to sue in court, a fact still not recognized globally. Many countries, including Chile are now adopting specialized environmental courts or tribunals.

In this paper, I define environmental justice as a procedural concept; this means not only that citizens live in a country that allows for these three rights but also makes it possible for relatively equitable employment of these rights by all citizens. For example, if groups of non-dominant language speakers need project information or want to participate in an EIA, the state

must provide materials translated into the group's language. Or, the cost of requesting information or gaining technical or legal expertise, should not be burdensome to a group that is considered minority or low-income. Thus, the literature discussing these three procedural rights and justice in numerous national settings maintain that not only the distributional dimension of environmental injustice, i.e. the disproportionate harm faced by the poor and minorities (Agyeman, Bullard, Evans, 2003) but also the disproportionate abilities of some groups over others to employ these access rights (e.g. Foti 2008; Pring and Pring 2016) must be addressed by governments. In sum, to quote Chile's Environmental Minister, Pedro Badenier:

Greater and better access to information, to participation, and justice, will result in in greater legitimacy for each country's system of environmental management, will help to anticipate and prevent environmental conflicts, and will facilitate more efficient management of projects and programs, whether public or private, thus increasing the level of protection of natural resources.ⁱⁱ

Key Questions and Methods

Key research questions explored in this study are: 1) Why would individual countries (in this case, Chile) adopt Principle 10 access rights/institutions? 2) Is there an order of adoption? 3) Once adopted, how are the rights/institutions implemented and monitored? 4) How successful have environmental movements been in deploying these rights. Finally, 5) how do these access rights/ institutions help deepen democracy and contribute to environmental justice?

I use a qualitative methodology involving semi-structured interviews with numerous government bureaucrats as well as activists in environmental NGOs in Chile. I have also been guided, however, by the quantitative measures of the EDI put together by TAI and the World Resources Institute. Finally, I sketch out briefly in this work (but offer greater detail in the larger study) how these rights have worked in practice in some of the best known Chilean environmental justice conflicts. Especially notable conflicts involve large-scale energy/dam

project (e.g. HydroAysén) or mining projects (e.g. Barick Gold's Pascua-Lama project). Both projects were fought on both general environmental grounds and also on grounds of disproportionate harm to indigenous communities, thus raising basic environmental justice concerns.

The Three Procedural Access Rights in Depth

Pillar I: Access to Environmental Information

The right to environmental information:

has been characterized as a third wave of environmental governance or “regulation by revelation.” The first wave of environmental governance tools were command-and-control, the second wave, market based mechanisms and this is the third (Florini 1998, 57-58).

To translate Pillar I, “Access to Environmental Information,” into a formal institution, countries need to adopt a Freedom of Information (FOI) Act. Sweden is considered to be the first country to enact a Freedom of Information (FOI) law in 1766;ⁱⁱⁱ but in the modern era, the movement for access to public information began in 1948, in Article 19 of the Universal Declaration of Human Rights. The United States was the first country to adopt a modern Freedom of Information regime in 1966 under President Johnson. FOI laws are seen as a way to offer citizens transparency in government and thereby diminish corruption and enhance legitimacy. Typically, they encompass two different strategies. The first involves “mandatory disclosure” in which public or some private entities must provide scheduled data disclosures on what they do. The second strategy involves citizens themselves taking the initiative to make specific information requests (Fox and Haight 2010, 137).

The dilemma for governments, however, is that creating the constitutional or legal provisions of a FOIA, is only the first step. To implement an information act, officials must resolve several complex issues such as: what information is considered confidential and what

delivery mechanisms does the government use to provide information to the public?

Governments must insure that the information is systematic, understandable to average citizens, and produced on a predictable timetable. At a minimum regarding environmental information, governments should produce State of the Environment Reports and create air and water quality monitoring systems (Foti 2008, 8).

Another innovation related to “access to environmental information” are what the United States calls “Toxic Release Inventories (TRIs),” and in most other countries called “Pollutant Release and Transfer Registries (PRTRs).”^{iv} This instrument first appeared after several industrial accidents and nuclear plant mishaps in the 1970s along with an evolving sense that citizens needed information about the risks they were being asked to bear in their communities (Kraft, Stephan, Abel 2011:31).

In 1986, the United States passed the Emergency Planning and Community Right to Know Act (EPCRA). With this act, the U.S. Environmental Protection Agency (EPA) began requiring communities to create comprehensive emergency response systems, but it also created a national inventory of toxic releases that has become a worldwide model. The U.S. TRI mandates that information be made public by private industrial plants of a certain size that are releasing these toxins into the surrounding air, water, or as transfers to another site. Rather than containing a formal government sanctioning process, the TRI requires creating datasets that are standardized and publicly available, and will allow local communities, researchers, and activists to track and compare performance of industrial facilities and other businesses. Citizen groups and the media then can praise corporate leaders and shame laggards. The usefulness of PRTRs increasing numbers of countries have adopted them, and they also became part of the legally-binding Kiev Protocol of the Aarhus Convention in 2003. Therefore, all European Union

members must have a PRTR, but the Protocol also incentivizes other countries to create one as well (www.unece.org).

Additional practices considered important for environmental information access instituted in the last three decades are to develop Prior Informed Consent or PIC - based programs that now typically govern trade in pesticides or hazardous waste. A second practice are private eco-labeling schemes as found in forestry, fisheries, and organic food; these have been put in place to aid environmentally-conscious consumers. A third strategy involves corporate social responsibility-related voluntary initiatives, such as the Global Reporting Initiative, with private firms agreeing to report moves towards sustainability (UNITAR 2004; Gupta 2008). Finally, civil society activists and researchers consider freedom of access to environmental information (e.g. as in “State of the Environment” reports) essential for measuring national compliance with the roughly 1,000 multilateral environmental agreements (MEAs) that are now in force worldwide (Kanie et al. 2013).

By 2014, over 100 countries had adopted FOI laws, but their implementation must be analyzed on a case-by-case basis to ascertain their actual impact (Worker and De Silva 2014). In Latin America, both ECLAC and the Organization of American States (OAS) have been pushing for a FOI laws throughout the region, arguing that access to public information is essential for transparent, democratic governance. Indeed, the OAS’s support for transparency and FOI laws started in 1991 first with its Unit, and then its Department for State Modernization and Governance. It viewed such laws as an essential means of addressing governmental corruption (Herz 2012). In 2006, the OAS drafted a model FOI Law for the entire region to adopt.

The OAS and other regional and international organizations have understood that economic and socio-cultural conditions in Latin America pose fundamental challenges to

achieving an effective socialization of environmental information. As a result, these IGOs and activists argue that it is crucial for countries to go beyond merely adopting a FOI law but also develop suitable capabilities and conditions for extending the coverage and reach of current access to information tools. By the end of 2015, twenty Latin American and Caribbean nations had adopted some kind of access to information requirement, also with concerns for making the information widely available (www.freedominfo.org).

Pillar II: Access to Participation in Environmental Matters

After the 1992 Rio Conference, all United Nations summits related to sustainable development have promoted a model of participatory or bottom - up decisionmaking (Access to Participation). The oft-repeated argument is that only broad participation of groups will enhance the democratic legitimacy and public acceptance of decisions (Backstrand 2012). At its most basic, especially in poor or marginalized communities, access to public participation in environmental matters means: officials conduct and document meetings on proposed projects in language appropriate for the local community, participating bears little or no cost for attendees, and assistance is provided to local communities to understand the technical aspects of the project.

Environmental Impact Assessments (EIAs) are the most widely known instrument for providing a forum for public input; and again, the United States was the leader. The 1970 National Environmental Policy Act (NEPA) mandated that impact assessments would be required for large-scale projects with potential ecological consequences. A 1972 follow-up act strove to make the process less adversarial and to allow citizen input at various stages of project development. A large scholarly literature exists on public participation in bureaucratic reviews and the EIA process more specifically; however, after almost fifty years of research, authors

conclude that creating just and effective participation in impact assessments remains “a work in progress (e.g. Arnstein 1969; Fung 2006; Dietz and Stern 2008).”

One reason for the present study procedural access rights in Latin America and especially access to participation is that in the last roughly two decades, the region has been the epicenter of participatory initiatives (Cameron, Hershberg and Sharp 2012). Yet studies specifically on participation in environmental decisionmaking are rare; and this gap is all the more glaring since conflicts over natural resource exploitation and the environmental impact of development projects, more generally, are among the key issues animating Latin American politics at present.

Notably, international and regional organizations have been in the forefront in promoting environmental participation in Latin America. Perhaps the first example (although not necessarily promoted as “access to environmental participation,” but a nod towards participation in marginalized communities) is the International Labor Organization’s (ILO) Convention 169 of 1989. This convention, generally characterized as an international human rights/indigenous rights instrument, needs a special mention is because of its increasing use in Latin America. ILO 169, as it is commonly known, is the first international treaty recognizing the inalienable rights of indigenous and tribal peoples regarding development of their lands and natural resources.^v In the first two decades of the Twenty-first century, Latin America has experienced a major commodity boom causing intensified pressure on arable land and natural resources. Major new investments in agriculture, mining, oil, gas, and timber have impacted and infringed upon indigenous territories.

As of 2016, twenty-two countries had ratified ILO Convention 169, with fifteen of the ratifiers coming from Latin America and the Caribbean. The most important feature of ILO 169 has been the requirement of Free, Prior Informed Consent (FPIC) or *consulta previa*, in Spanish.

Yet, globally, states have struggled to define and implement this vaguely - worded right, with perhaps, the most contentious question not fully answered—does prior consultation allow for a veto over potential projects on which they are being consulted? In sum, “realizing this difficult but important right will require clear, objective, and effective state presence—often in territories where the state has effectively been absent (Sabatini 2014, 3).”

Pillar III: Access to Justice in Environmental Matters

Access to justice requires all levels of governments to establish institutions and procedures involving courts or some other impartial deliberating body to adjudicate individual and NGO claims of denial of rights to information or participation. The three access rights are widely viewed as interdependent; and access to justice strengthens the first two rights. In general, Pillar III reforms, which pose major challenges to national judicial systems, have been slow to be adopted (Rose-Ackerman and Halpaap 2001).

Access to justice is a vital aspect of accountability since it provides venues for enforcement of procedural and substantive environmental rights and duties. Access to justice in the context of environmental decisionmaking can: 1)strengthen freedom of information, 2)allow citizens to participate meaningfully and appropriately, 3)level the playing field by empowering the previously unempowered to seek redress in courts and other forums, and 4)increase the public’s ability to seek redress and remedy for environmental harm (Foti 2008, 37). Obviously, seeking justice through the judicial branch can only function if the courts are sufficiently free of political influence.

To begin to give substance to this right, a wide range of individuals and groups must have legal standing before courts and administrative bodies to participate in environmental cases. Citizens must have the right of appeal or review by a higher governmental authority or (when

relevant) to alternate dispute resolution mechanisms. They also must have the right to have public officials who are independent in matters of implementation, appeals, and oversight. Finally, governments must provide access environmental justice at a reasonable cost; there should be no financial barriers to litigation (e.g. UNITAR-UNECE (2004: 49).

Again, the United States has been a model for the spreading norm of “access to justice in environmental matters.” The 1946 Administrative Procedures Act gave Federal courts a direct role to help enforce bureaucratic agency obligations. The public could request that the courts review agency decisions. Furthermore, the United States provided a global environmental precedent when the court broadened its notion of “standing to sue” in the *Scenic Hudson* case of 1965.^{vi} With this case, United States became the first country to recognize legal standing for groups of citizens suing on behalf of the environment. It also became the springboard for the modern specialty of environmental law and modern U.S. environmental legislation such as the 1970 National Environmental Policy Act (NEPA). Importantly, the 1970 law not only expanded citizens’ right to sue on behalf of the environment but also to sue for procedural violations in formulating environmental impact assessments (Gellers 2011; Foti, 2008, 11.)

Globally “standing to sue in environmental matters,” remains a contentious issue. In many countries, even in those with a legal “Right to a Healthy Environment,” citizens may have to prove direct harm by environmental degradation. Jurisdictions vary on whether individuals or groups can sue in the public interest or whether it is possible to sue for violation of certain collective rights belonging to, for example, indigenous or tribal groups. These are only the most common issues in determining “who,” specifically, has the right to sue for justice. Pring and Pring, in *Greening Justice* (2009), have compiled the most comprehensive global overview of “access to justice” institutions and cited about 350 worldwide. Their overall finding is that

although the world community agreed to provide access to justice at the 1992 Rio Conference, most citizens still lack access to courts and remedies for environmental complaints.

Turning to Latin America, overall judicial reform has been a part of the two-pronged push for both democratic consolidation and economic reform in these Third Wave democracies. Yet, for the most part, the region remains in the early stages of creating an independent judiciary. Historically, Latin America's judiciary had been considered the least independent of any region in the world (Payne et al. 2007, 118- 119). Only in the last twenty-five years that Latin American courts have started to become central players in many of the region's political system (Helmke 2004, Hibbink 2007, Brinks 2007). This increasing activism owes to the introduction of recent notions into the region's law school curriculum, of the global doctrine that human rights are central to constitutionalism.

Moving specifically to the emerging varieties of environmental courts and tribunals appearing around the world, by 2016, Pring and Pring found roughly 1,200 courts or tribunals in forty-four countries. By 2016, the Latin American and Caribbean region had eleven environmental courts or tribunals with more in the planning stage (OAS 2015).

Standing to sue on behalf of the environment raises a difficult issue in many judicial systems. As Pring and Pring (2009) write:

Standing is a non-issue when three things are clear: the plaintiff's injury, defendant's causation, and the court's ability to provide an effective and effective remedy. But environmental harms are seldom so clear (34).

Indeed, it is still uncommon for individuals or groups to sue on behalf of the environment in Latin America. It helps if the country has a constitutional "right to a healthy environment," which some countries do have. It also helps if the country has experienced environmental law firms. Finally, it helps if countries have Environmental Management tools that incorporate Pillar

III access rights (and some LAC countries have them), such as: alternative dispute resolution and other administrative justice mechanisms such as planning councils and specialized bodies with environmental jurisdiction.

The Environment-Development Nexus in Chile: A Brief Historical Overview

Chile's economy, like others in Latin America, has been tied to natural resource exploitation from its founding to the present. It has large deposits of copper, iron ore, nitrates, precious metals, molybdenum, a major timber industry, and with hydropower as its only domestic source of energy. Not surprisingly, then, since Chile's return to democracy in 1990, but with a continued neoliberal economic orientation, political conflicts are frequently related to resource extraction.^{vii} More recently, conflicts are also related to the energy-infrastructure projects, especially dams, required to power the growing economy. An overall environmental assessment shows that Chile suffers from widespread deforestation, the numerous harmful effects of strip mining, overfishing, overuse of chemicals in the fruit belt, air pollution from industrial and vehicle emissions, and water pollution from raw sewage. Furthermore, the country experiences severe earthquakes, significant volcanic activity, forest fires, and tsunamis, so that Chilean citizens need a state-of-the-art emergency preparedness system.

It is essential to review Chile's recent political history to understand why economic growth has, until recently, greatly outweighed concerns for environmental protection, until quite recently. To summarize, Chile had a long democratic but elitist tradition; by the mid-twentieth century, the party system had crystalized into right, center, and left coalitions. Between 1970 and 1973 the leftist coalition was in power headed by the Socialist president, Salvador Allende. Both internal and external pressures contributed to escalating instability in the 1970-1973 period; and

on the “other September 1,” President Allende was overthrown by a military junta lead by General Augusto Pinochet.

The Pinochet regime remade the Chilean economy as a neoliberal model, emulated in much of Latin America in the 1980s and 1990s, and parts of Central and Eastern Europe at the end of the Cold War. Chile’s democratic regime was outlawed for seventeen years, until the transitional election of 1989. Patricio Aylwin of the Center-left *Concertación por la Democracia* (commonly known as *Concertación*) won that election, and the Concertación kept winning every election until 2010, when the center-right *Alianza* took the presidency for four years (Sehnbruch and Siavelis 2014). In December 2014, Michele Bachelet (who had been president in the 2006-2010 term), was reelected. She now headed a coalition that had changed its name to *Nueva Mayoría*, and included the Communist Party. Importantly, since the 1990 return to democracy, Chile has continued its neoliberal economic path started in the Pinochet era, albeit in a more moderate form.

The task now is to examine Chilean environmental politics in the contemporary era and especially the adoption and implementation of procedural access rights, the institutions of environmental democracy and justice. While the main focus is on the post-1990 period, some understanding of Chilean environmentalism in earlier decades may be helpful. A small Chilean environmental movement that first appeared in the 1960s and early 1970s, mirroring the growth of environmental movements worldwide at this time. Some minor environmental activism occurred the 1980s during the years of the military junta, but the government’s nearly total embrace of a neoliberal ideology, “relegated environmentalism to the margins both culturally and politically (Carruthers, 2001, 351).^{viii}

Essentially, environmentalists had no voice until the political transition began in the late 1980s. The first significant environmental gathering occurred in 1989 with “The First National Meeting of Environmental Action organizations,” to prepare for the 1992 Earth Summit in Rio. After the euphoria of the transition to civilian government, the movement soon lost steam, similar to much of the rest of Chilean social movements (Kurtz 2004).

Perhaps any action towards environmental protection after the Pinochet era would be a positive change. Eduardo Silva (1997), David Carruthers (2001), and Kathryn Hochstetler (2012) examined Chilean environmental politics pre- and post - Pinochet; and while all authors agree that democracy is better for environmental protection, than the military junta, at least Silva and Carruthers warn that environmental institutions and practices inherited from the authoritarian era were not simple to overcome. According to Carruthers, environmental policy, institutions, and participation have continued to be shaped by ominous legacies from history, dictatorship, and an economic orthodoxy inimical to sustainability (2001, 343). Hochstetler suggests/concludes that democratization has been “necessary but not sufficient, as a driving force for environmental protection” in Chile, and throughout the region (2012, 217).

Institutionalizing Environmental Democracy in Chile

In 2016, the Organization of Economic Cooperation and Development(OECD) Report on Chile noted:

During the last decade, Chile has made remarkable progress in strengthening its environmental institutions and policy framework, as recommended by the 2005 OECD Environmental Performance Review.... However, the environmental benefits of institutional reforms are lagging behind; rigorous implementation is needed to tackle environmental pressures as Chile’s income level continues to catch up with the OECD average (OECD 2016, 17).

What follows is the story of environmental institution-building amid anti-regulatory historical legacies to explain why this economically high-performing OECD member has been slow in implementing the environmental institutions of democracy and justice.

As of 1990, the democratically-elected *Concertación* government moved to create a more integrated legal and institutional environmental framework. Yet even under this center-left government, economic growth was by far the privileged policy concern as it hoped to continue as Latin America's most successful economy. From 1990-2010, *Concertación* presidents operated in a political culture that has prized conflict avoidance in hopes of avoiding an authoritarian reversal; thus politicians moved slowly in promoting reforms other than those that would enhance neoliberalism, (Valenzuela and Dammert 2006).

Still the *Concertación* wanted to begin to improve sustainability policies and established a bureaucracy in 1990, the *Comisión Nacional del Medio Ambiente* (CONAMA) to begin the task. In 1994, Congress created an overarching legal framework *Ley No. 19.300 Ley de Bases Generales del Medio Ambiente* (LBGMA), in 1994, and in this law, CONAMA was given wider responsibilities. This agency would have a central directorate and decentralized regional commissions (*Comisiones regionales del Medio Ambiente* (COREMAS)). Now CONAMA would oversee initiatives in environmental education and research, public participation, environmental quality standards to preserve flora, fauna, and their habitat, emissions standards, liability for environmental damage, and an environmental impact assessment system.

Related to creating procedural access rights, the 1994 framework law mandated popular participation in formulating environmental policy, particularly in terms of Environmental Impact Assessments (EIAs). Assessing these institutions in the early years of their operation, however, Carruthers noted at that time, a wide gap remained between the formal legislation and how it was

implemented on the ground, including participation in the EIA process (2001, 349). Again, writing a decade after the democratic transition, Carruthers continues:

...the austere neoliberal state offers chronically limited funding to environmental institutions whose leaders likewise lack political clout. Government officials concede the paucity of the most basic environmental infrastructure – scarce water treatment, virtually no limits on the discharge of pollutants, no limits on toxic pesticides, no certified dumps for industrial or mining waste, no ‘right-to-know’ laws, and so forth (349).

Eduardo Silva came to a similar conclusion, that at least in the first decade after the transition, neoliberalism trumped sustainable conservation in Chile’s environmental policy (1997, 60). Silva drew his conclusions after focusing on Chile’s southern native forests, the epicenter of an extremely profitable forestry industry and the government’s non-conservation approach, becoming a growing area of contention.

The Role of Supranational Organizations in Promoting Environmental Democracy in Chile

While NGOs concerned about the environment, public participation or both were beginning to find their voice, the initial impetus to create and empower environmental institutions came from external sources, that is, supranational organizations. Certainly these external organizations help to energize domestic environmental NGOs and social movements. One possible place to start is in Free Trade agreements (FTAs) that Chile signed with developed countries, given that the North America Free Trade Agreement (NAFTA) with its accompanying environmental requirements had become at least an early model for other trade agreements (GAO 2009, Danemeier 2011, Jinnah 2016) Chile’s first modern Free Trade Agreement (FTA) was with Canada (1996); and before Chile signed with United States in 2004, it had agreements with Mexico (1998), the European Union (2002), and South Korea (2004). While these FTAs contained some environmental obligations for Chile and may have prompted some minor environmental adjustments, by far, the main driver of Chile’s adopting modern environmental

governance structures was the country's desire to join the Organization of Economic Cooperation and Development (OECD). Negotiations with the organization occurred throughout the first presidential term of Michelle Bachelet, and Chile became one of only two Latin American members in May 2010 (Mexico joined in 1994).^{ix} Finally, while the OECD and other regional and international governmental organizations were the primary drivers pressuring Chile to adopt these environmental access reforms, reforms, domestic NGOs and social movements were quick to make them part of their toolkit.

A)Pillar One: Access to Public Information

During President Bachelet's first term, Chile created its Transparency and Access to Public Information law 20.285), which took effect in 2009 (Michener 2009). Here, perhaps the primary organization pushing for this law was not the OECD but rather the Inter-American Court of Human Rights (IACHR). Its ruling in *Claude Reyes et al. v. Chile* (2006) focused on the matter of Chile's excessive governmental secrecy. Chile had to accept the compulsory jurisdiction of the court since, as an early step in its democratization, it had signed on a State Party to the Inter- American Court in 1990.

Briefly, *Claude Reyes* was initiated in 1998 and involved several prominent Chilean NGOs (e.g. *Pro-Acceso* and *Participa*) that requested publicly - held information on a proposed forestry project. The plaintiffs had requested documents from the government's Foreign Investment Committee about the Trillium Forestry Company and its proposed Rio Condor project. The project would have involved major deforestation in Chile's southernmost Region XII, but the government felt no need to provide the requested information. In September 2006, the Inter-American Court found that the state had refused the request without providing any valid reason for the refusal under Chilean law; and the court ordered the government to adopt specific

measures to address information requests as well as pay for the plaintiffs' costs to bring the case. Unsurprisingly, as a response to the court ruling and her government's rapidly declining popularity, President Bachelet announced her support for an Access to Information law in late 2006. More generally, *Claude Reyes* has had a regionwide impact in promoting national access to information laws.^x

In case the president needed further reasons to support an information law, the Chilean Constitutional Court decided in *Casas Cordero et al. v. The National Customs Service*, August 9, 2007, that Chileans had a right of access to information.^{xi} Thus, given the OECD's requirement of a FOI law for membership, regional and domestic court rulings, and President Bachelet's support, in 2009, the Chilean government created Law 20.285, the Right to Public Information law to be administered by a newly-created *Consejo para la Transparencia* (Transparency Council).

The good news for Chile is that the Transparency Council reported that between April 2009-November 2016 it received over 17,500 complaints of denial of public information. In 79% of cases, the Council either totally or partially agreed with the plaintiff and the plaintiff received information; in the same period, 262 public officials received financial sanctions. From these data and from interviews, Chile's Transparency Council seems to be working fairly well.

Perhaps some of the explanation, and a sign of good faith from the government, is that its first Commissioner, Juan Pablo Almedo, came out of the NGO community, having headed the group, *Participa*.

Yet problems remain. While the law has represented a great step forward in a country with little history of governmental transparency or accountability, it had weak points. First it only covers information from the Executive branch; the Legislative and Judicial branches are

under no transparency obligations. Also significantly, as Delamaza (2014) points out, in Chile, the bulk of information related to environmental matters (e.g. resource exploitation) is in private hands and not covered by the transparency law. A second problem under “access to information” relates to emergency preparedness and community-right-to-know measures. This is a highly sensitive issue in Chile, a country subject to many natural disasters, especially earthquakes and tsunamis. This became a serious issue for the outgoing Bachelet administration in 2010 when an earthquake and major tsunami hit the coast with over 150 killed. The government was blamed for failing to give adequate tsunami warning (as well as failing to marshal an adequate response to the resulting devastation). These failures were used against Bachelet as she ran for President again in 2013. (Sigmund 2014, 146). Finally, Chile has published PRTR reports since the mid-2000s, but the OECD suggests that the country collect more and better statistics as required by international organizations and international conventions (OECD 2016, 28).

Restructuring Chile’s Environmental Governance in 2010

Given Chile’s desire to join the OECD, in addition to creating a FOI law, the Bachelet administration initiated a comprehensive overhaul of the country’s environmental management. The result was the 2010 legislation amending the 1994 General Environmental Framework Law (19.300). The new law (20.417) contained four major institutional reforms. It established for the first time, 1) a Ministry of the Environment, 2) an inter-agency Council of Ministers for Sustainability, 3) an Inspectorate or *Superintendencia*, and 4) an Environmental Evaluation Service. Finally, the 2010 amendments called for establishing three environmental courts in Chile. This ultimately happened with another law, 20.600, passed by Congress in 2012.

In addition to proposing policy, the Environmental Ministry oversees distribution of eight types of environmental information (including data from monitoring activities such as the

country's PRTR adopted in 2005; information on international environmental treaties signed by the government; all domestic environmental laws; State of the Environment reports; and final decisions of the environmental tribunals). It also coordinates the Council of Ministers and their regional offices. The Council of Ministers is supposed to balance the country's need for environmental protection with the need to promote economic growth. The Environmental Inspectorate or *Superintendencia* is charged with overseeing compliance with laws and regulations, while the Environmental Evaluation Service is tasked with ensuring public participation in Environmental Impact Studies (EIS) and Environmental Declarations (EIDs). The three environmental courts exist to ensure access to justice when the other access rights have been infringed upon.

B) Pillar Two: Access to Public Participation

Any measure that would promote public participation in Chile is sorely needed. Perceptions of meaningful participatory opportunities are important for bestowing legitimacy for formal institutions and support for specific policies.^{xii} Although Chileans have experienced a high degree of political stability in recent decades, citizens are deeply disillusioned with primary mechanisms (other than elections) to influence policy. The major change regarding participation in in the 2010 environmental law was that the new, innovative, semi-autonomous, Environmental Evaluation Service (SEA) would expand the types of projects requiring participation in impact assessments. While the 1994 law, 19.300, required public participation only in large projects (EIS), now smaller projects requiring declarations of impact (EID) might also require public participation if public officials decided it necessary. Furthermore, post-2010, the Environmental Evaluation Service was now required to take account of public comments and studies, and its decisions are subject to appeal. Additionally, the Service is required to consider social, economic

cultural, and geographic characteristics of communities affected by a project and make participation accessible to vulnerable, geographically isolated, or indigenous communities.^{xiii}

Yet, Chile still has a deficit in terms of facilitating participation in environmental impacts. Legal scholar, Matias Guiloff Titun (2015), shows that since the 2010 law's enactment, the majority of impact statements are considered *declaraciones*, which means they do not require citizen participation project assessment,^{xiv} and the 2016 *OECD Report on Chile* notes:

The existing provisions for public participation in the EIA process do not ensure adequate of project alternatives or minimization of potential envtl impacts, which may potentially lead to environmental and social conflicts (27).^{xv}

Finally, Chile's experience with and ILO 169, covering participation rights of indigenous people in development projects, deserves a brief discussion. While ILO 169 was first proposed in 1989, it took Chile took twenty more years to put in place in 2009.^{xvi} Christopher Sabatini notes, somewhat counterintuitively, the countries that have made the greatest advances in sorting out the vagaries of "the right to prior consultation" to date, have not been the ones most rhetorically committed to indigenous rights (e.g. Bolivia, Ecuador, and Venezuela), but those most committed to neoliberalism and investor rights (e.g. Chile, Colombia, and Peru) (2014, 3)."

In Chile, by law, the two government agencies that oversee prior consultations are the National Corporation of Indigenous Development (CONADI) and the Environmental Evaluation Service (SEA). In theory, CONADI's task is to provide technical assistance to indigenous communities (about 1 million Chileans identify with an indigenous ethnic group) while the SEA remit is to facilitate, more generally, citizen participation in evaluating the environmental impacts In practice, however, this division of labor has been unclear.

Early in her second administration (2014-2018), President Bachelet pledged to create a more institutionalized and transparent prior consultation process with indigenous communities.

Starting around 2000, these communities have shown determined resistance to the government's mining and hydropower ventures on their lands. At present, the results on citizen participation and, more specifically, on indigenous participation in environmental matters remains decidedly mixed.^{xvii} One key analyst of general trends in Chilean citizen participation (Delamaza 2014) argues that after the citizen protests starting in 2011, there has been some widening of the space for debate on citizen participation and feels somewhat optimistic that the space will continue to widen. Still, he would probably agree with Teckler, Bauer and Prieto (2011) and Montoya (2014) that indigenous Chileans do not have effective participation rights through either national legislation or through ILO 169.

C) Pillar Three: Access to Justice

Under Chile's 2012 law 20.600, Congress authorized creation of three environmental courts. Such specialized courts have begun to appear around the world in, roughly, the last quarter century, but are still seen as novel in the pursuit of access to environmental justice. Interestingly, after passage of the 2010 Environmental law, demands for environmental courts (seemingly a way to promote both procedural and substantive environmental justice) actually were initiated by the exceptionally powerful business community. Business leaders wanted to have a way to litigate potentially burdensome environmental regulations.

The three courts were designated for Antofagasta, Santiago, and Valdivia; but they are meant to cover all of Chile. As of this writing (April 2017), only the Santiago and Valdivia were operating. Each court is to have three judges appointed by the President, along with Senate approval. The Court is comprised of both lawyers and scientific experts (common in these kinds of courts, e.g. Pring and Pring 2009); but a major innovation in Chile is use of *amicus curiae* briefs in proceedings (Ferrada Bórquez 2015). In addition to claims of simple denials of access to

participation in impact assessments, the courts hear cases on compensation for environmental damage, challenges to rulings of the Committee of Ministers or the Executive Director of Environmental Evaluation Service when no environmental impact assessment was conducted, implementation of emissions or environmental quality standards, and complaints against administrative decisions that annul environmental regulations (UNEP 2015, 108; Muñoz Gajardo 2014, 17-38). While these reforms represent moves toward wider access to justice in Chile, the OECD notes that in reality, “the high cost of legal counsel often puts this access out of reach of NGOs and private citizens (2016, 28).”

Analysis

These above outlined access rights are increasingly becoming the global norm in domestic environmental governance, and, indeed, for environmental justice. Making these rights meaningful in the Chilean case is essential since Chile ranked ninth of seventy-six countries examined worldwide and fourth in Latin America in terms of environmental conflicts (OECD 2016, 15). Chile’s environmental conflicts overwhelmingly involve energy transmission and mining projects. At this point, we simply note Chile’s Environmental Democracy scores from the World Resources Institute’s Environmental Democracy Index (EDI). The country received a score of 1.89 for “access to information” and 1.88 for “access to justice.” Both are considered “good.” In contrast, the country received a 1.24 for “access to participation,” a score considered only “fair” for a high-income OECD country (www.environmentaldemocracyindex.org).

To make our discussion of environmental democracy and environmental justice in Chile more concrete, we briefly examine some major environmental struggles, the citizen groups involved and their use of access rights, and the outcomes to date. The most notable conflicts have taken place in indigenous territories and typically involve dam or mining projects. While Chile

has embraced renewable, hydropower, project development has primarily targeted the country's southern region. An early dam project that galvanizing major opposition was Endesa's^{xviii} RALCO Dam (which went into operation 2004), near Temuco in Chile's Biobío region. Significantly, this project was developed before the government adopted the three procedural access rights. In hopes of preventing other projects in what became known as a watershed conflict area, a mix of environmentalists and Mapuche rights activists formed the Citizen Action Network for Environmental Rights (*Red de Acción por los Derechos Ambientales* or RADA) in 2005. In 2006, it became the Interregional Action Network for Environmental and Social Justice (*Red de Acción por la Justicia Ambiental* RAJAS).

Key strategies used by the network since the mid-2000s have been to explicitly link these environmental struggles with human rights discourses and allusions to past colonial abuses (Urkidi and Walter 2011; Montoya 2014). This network and others that formed around other environmental protests have used the now classic "boomerang strategy (Keck and Sicking 1998) to successfully stop some projects but not others. It should be noted that the push for procedural environmental access rights was, at least in part, pushed by early defeats such as the RALCO dam.

HydroÁysen was the watershed conflict project that has received the most international coverage and notoriety to date. This was a \$10 billion project of Endesa first proposed in 2005. It would have been the country's largest energy project in its history consisting of five huge dams on two rivers, the Baker and Pascua, in Patagonia. This area of South-Central Chile is not only Mapuche territory but it is also an area renowned for its natural beauty. In return for permitting the project on their ancestral lands, Mapuche leaders demanded the return of approximately one million acres of territory. Ultimately, after a decade of protest, the jailing of Mapuche activists,

and global negative publicity, the Chilean government backed away from this project in 2014. Leaders of the NGO, Patagonia Defense Council, called the decision the greatest win for Chile's environmental movement, where an empowered public was allowed to participate in decisions that affect their environment and their lives (Edwards and Roberts 2015, 56-57).^{xix}

A final project relevant for this study is Barrick Gold's Pascua-Lama project in the northern part of the country. This Canadian firm, the largest gold mining company in the world began, project negotiations in 1994 and broke ground in 1999. In 2000, Chile and Argentina signed a treaty 2000 to allow cross-national collaboration in the mine development with 75% of the concession on the Chilean side and 25% on the Argentine side. Project opponents cited the normal threats associated with mining, the threat of toxic waste for the area's water and soil and cultural threats to Diaguita indigenous communities, In addition to these general risks, however, were environmentalists' special concerns about exploration and extraction in the High Andes, potential earthquakes and threats to glaciers that provide the region's water.

After conducting an EIA, Chile's environmental agency at the time, CONAMA, signed off on the project in 2006. The Diaguita (Indigenous) Agricultural Communities claimed they did not have adequate participation in the decision including discussions for FPIC (as required by ILO 169); and in 2007, submitted their case to the I-A Commission on Human Rights (M Serrano 316-320). The project has been delayed for almost two decades, but in 2015, the Chilean Environmental court gave permission for the project, now smaller and a joint - venture between two companies, Barick and Goldcorp, to proceed.

Conclusion

The first intent of this study has been to contribute to an understanding of procedural environmental democracy, especially to attain environmental justice; it is also meant to offer one

framework for the comparative study of environmental politics. Studying the adoption and implementation of procedural environmental rights and institutions at the national level, will allow comparativists interested in these topics (information, participation, and legal remedies) to build systematically on each other's work. To date, comparative politics researchers have provided hundreds if not thousands of studies on environmental issues/conflicts around the world, but have not necessarily asked similar questions or explored similar hypotheses to build theory. Furthermore, there is a clear overlap with International Relations and legal scholars studying Environmental Human Rights.^{xx} While these scholars are anchoring their work in international human rights treaties and the growing numbers of constitutions calling for the "right to a healthy environment," these studies and those of comparativists can reciprocally enrich each scholarly track.

Studying procedural environmental democracy will also allow researchers to comment on democratic deepening, useful in the Chilean case and in other Third Wave democracies. We asked questions here but only began to find the answers. It was only in the 2000s that environmental and environmental justice conflicts begin to appear. It is not that environmentally harmful activities only began at this time, but rather that after the 1990 transition, it took time for Chilean NGOs and social movements to "get up to speed." Through the first post-transition decade, Chilean social movements and civil society remained weak and fragmented (Luna and Maradones, 2010, 114-15). It is, perhaps, obvious but important to emphasize is that procedural environmental rights typically have not simply given by governments; they are granted after years of citizens demands or when the state is being when being incentivized by an International Organization, such as the OECD in the case of Chile. Now that Chilean ngos and environmental movements have gained in strength, however, the main

question is “how successful have Chilean NGOs environmental movements been in employing the relatively recently legislated environmental access in rights in blocking or modifying projects that might cause major environmental impact, environmental injustice, or both?”

To conclude, we have provided a potential framework for comparativists studying environmental conflicts, including environmental justice conflicts. We have also provided what, somewhat surprisingly, may be an optimistic case study of a country with a neoliberal ideology that while slow in institutionalizing environmental protection and access rights, is in some ways now a regional leader. After the Rio+20 UN Environment and Development Conference in 2012, Chile became the lead state in pushing for an Aarhus-type Convention for the Latin American and Caribbean region. Surely Chilean social movements employing newly-acquired access rights explains some of the change.

ENDNOTES

ⁱ Kofi A. Annan. 2000. “Forward.” *The Aarhus Convention: An Implementation Guide*, by S Stec and S Casey-Lefkowitz with J. Jendroska. United Nations: New York and Geneva.

ⁱⁱ P. Badenier speech, Fifth Negotiating Session for ECLAC Regional Convention on Environmental Access Rights, Santiago, Chile, Nov. 21, 2016, <http://negociacionp10.cepal.org>.

ⁱⁱⁱ Sweden’s “Act on the Freedom of Publishing and the Right of Access to Official Documents” of 1776 is considered the world’s first Freedom of Information Law. See, UNITAR and UNECE, *Preparing a National Profile*, p.1).

^{iv} In Spanish, they are called Registros de Emisiones y Transferencia de Contaminaciones (RETCs).

^v <http://www.ilo.org/indigenous/conventions/no169/lang--en/index.htm>.

^{vi} *Scenic Hudson Preservation Conference v. FPC*, 354 F.2nd 608 (1963-1981).

^{vii} Much of Latin American historical analysis has focused on the role of natural resource exploitation in the colonial era as well as in constructing modern nation states in the region (Leff 1994, Alimonda 2011).

^{viii} Although on paper, Chile was an innovator in the region in that its 1980 constitution gave its citizens “the right to live in an environment free of contamination,” this right was essentially meaningless at the time, given the military junta’s ideological approach to unbridled economic growth.

^{ix} Several interviews with UN ECLAC officials in Santiago between 2012 1st and 2016.

^x In April 2010, the Organization of American States (OAS) Commission on Juridical and Political Issues promulgated a model “Access to Information” law. Based on the *Claude Reyes* finding that “access to information is part of the fundamental human right to free expression,” the OAS’s General Assembly approved adoption of FOI laws for all of Latin American countries/in June of that year.

^{xi} Statistics found at www.consejotransparencia.cl.

^{xii} Rhodes-Purdy, 2017, 265-269.

^{xiii} UNEP 2015, *Putting P10 in Action*, 79.

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- ^{xiii} In January 2016, Delamaza was named by Michelle Bachelet to a presidential panel, el *Consejo de la Participación Ciudadana y Fortalecimiento a la Sociedad Civil*, to promote citizen participation.
- ^{xiii} (Luna and Maradones 2010, 114-115;
- ^{xiv} In a personal interview, Guiloff Titiun also expressed concern about another new environmental agency, *Servicios de Biodiversidad*. The fear was that with increased natural resource-based projects and projects involving infrastructure expansion, the cause of biodiversity protection was at risk.
- ^{xv} Also see, Costa Cordella and Fuentes Merino (2011).
- ^{xvi} CEPAL (overseeing negotiations for the LAC P10 Convention) notes similarities between the LAC regional agreement and the UN's Sustainable Development Agenda 2030, approved in September 2015. Both emphasize the "virtuous circle" involving access rights, environmental protection, and human rights. The documents stress that "informed participation and transparency contribute to improving environmental policies and, therefore, environmental protection, which in turn enables compliance with substantive rights such as the right of every person to a healthy environment, to life and health (<http://negociacionp10.cepal.org> 21 June 2016."
- ^{xvii} Indigenous Chileans have had more success participating on issues such as bilingual-bicultural education rather than on issues involving socio-environmental conflicts (Delamaza 2014).
- ^{xvii} Endesa is a subsidiary of the Italian Company, ENEL.
- ^{xviii} Edwards and Roberts offer an interesting "take" on this case that highlights the ambiguity of this case. Clearly it was a win for environmental justice but a possible loss for climate change mitigation. Scholars must further unpack the sometime competing virtuous policy goals of environmental justice and effective policy to combat climate. HidroÁysen would have provided 15-20% of Chile's energy needs. While Chile has a potential for other types of renewable energy (solar, geothermal, and wave and tidal) it remains energy-poor and relies on imported natural gas.

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