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# The Campiche Case: Legal or Ideological Factors?

## INTRODUCTION

In July 2009, the Chilean Supreme Court, in *Correa v. Comision Regional del Medio Ambiente of Valparaiso*,<sup>1</sup> annulled the environmental permit held by Campiche's coal-fired power plant (the Campiche Project), located in the industrial area of Las Ventanas, in the Valparaiso Region of Chile.<sup>2</sup>

The Supreme Court, upholding the decision reached by the Valparaiso Appeals Court,<sup>3</sup> ruled that the permit was illegal under the Valparaiso Zoning Plan,<sup>4</sup> as the new plant was located in an area restricted only to recreational and green uses due to flooding risks.<sup>5</sup> The project, which was in the construction stage, had to be stopped, and its final outcome remains unclear.

After the Supreme Court decision, the Housing and Urban Ministry amended a provision of Supreme Decree No. 47/92 (the Urban Regulations) in a manner that would allow the Campiche Project's construction to proceed under the existing conditions of the Valparaiso

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1. See *Correa v. Comision Regional del Medio Ambiente of Valparaiso*, Supreme Court, No. 1219-09 issued on July 22, 2009, at [www.poderjudicial.cl](http://www.poderjudicial.cl).

2. The Campiche Project is a 270 MW power plant and involves a \$500 million investment. Its owner is AES GENER S.A., which is a subsidiary of AES Corporation. See Campiche's Environmental Impact Study at [www.e-seia.cl](http://www.e-seia.cl). Further information about the Campiche Project can be found at [www.gener.cl](http://www.gener.cl).

3. See *Correa v. Comision Regional del Medio Ambiente of Valparaiso*, Valparaiso Court of Appeals, No. 317-09 issued on Jan. 8, 2009, at [www.poderjudicial.cl](http://www.poderjudicial.cl). The petitioners, Ricardo Correa Dubri and two local NGOs, Grupo de Accion Ecologica Chinchimen and Consejo Ecologico de las Comunas de Puchuncavi y Quintero, alleged that the project's environmental authorization was unlawful because it had been granted in violation of the land uses established by the Valparaiso Zoning Plan. The defendant, Comision Regional del Medio Ambiente de Valparaiso, argued that the authorization was granted in full compliance with the zoning and environmental regulations.

4. Decree No. 116/87 issued by the Housing and Urban Ministry on Aug. 5, 1987.

5. According to Article 2 of Decree No. 116/87 the specific area is denominated Z-R2 and is restricted for human settlements due to flooding risks. Only recreational and green areas are permitted.

zoning plan.<sup>6</sup> Most project opponents, which include the municipality of Puchuncavi, the local community, and NGOs, have described the amendment as specially tailored to the Campiche Project, and more litigation can be expected.<sup>7</sup>

The Supreme Court's decision represents an important victory for citizen environmental suits, yet is weakly supported by existing regulations. Article 2.1.17 of the Urban Regulations permits the authorization of projects in restricted areas when appropriate protection measures are developed.<sup>8</sup> This piece argues that the court ruling did not accurately interpret the Urban Regulations in relation to the Valparaiso Zoning Plan. Furthermore, it suggests that the decision can be explained as a reaction to the historical environmental problems in the area, and, from a policy perspective, to unclear zoning provisions applicable to power plants and similar infrastructure projects. Ultimately, this piece concludes that if the environmental and social concerns of Las Ventanas are not properly addressed by the authorities, we will be seeing more and more litigation with unpredictable results.

## I. BACKGROUND

### A. *The Right to Live in an Environment Free of Pollution*

The Chilean Constitution guarantees all people the right to live in an environment free of pollution.<sup>9</sup> It adds that the State is duty bound to assure that such right will not be impaired and to provide for the conservation of nature.<sup>10</sup>

The Constitution gives affected parties a judicial remedy to challenge unlawful or arbitrary acts or omissions that violate constitutional rights, including those contained in the article providing for the conservation of nature.<sup>11</sup> The Court of Appeals must review whether illegal actions or

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6. Supreme Decree No. 68/09 issued by the Housing and Urban Ministry. Pub. Official Gazette Dec. 31, 2009. The amendment refers to lots that have more than one authorized land-use. If at least 30 percent of the property allows industrial or infrastructure uses, the remaining portion can be also developed with that use.

7. In fact, the Valparaiso Regional Environmental Commission, upon the company's request and relying on the amendment to the Urban Regulations, granted a new environmental approval to the Campiche Project. See Resolution No. 275 issued on Feb. 26, 2010 at [www.e-seia.cl](http://www.e-seia.cl). Two new constitutional claims have already been filed against Resolution No. 275. See Valencia vs. Comision Regional del Medio Ambiente of Valparaiso, Court of Appeals of Valparaiso, No. 135-10, filed on Mar. 24, 2010, at [www.poderjudicial.cl](http://www.poderjudicial.cl).

8. Urban Regulations, Article 2.1.17.

9. Decree No. 100 issued by the Ministry of the Presidency on Sept. 17, 2005. See CONSTITUCION POLITICA DE LA REPUBLICA DE CHILE., art. 19, No.8.

10. *Id.*

11. *Id.* art. 20, para. 2.

omissions impair the constitutional right to live in an environment free of pollution.<sup>12</sup> If the petitioner prevails, the Court usually will grant injunctive relief, which could prohibit an emission source from operating, or it will set aside a governmental authorization, as in the Campiche case.<sup>13</sup>

Most Chilean environmental jurisprudence since 1980 is derived from this constitutional remedy. This can be explained by the fact that it is filed directly before a competent Court of Appeals, does not have extensive procedural requirements, and cases usually are decided in a relatively short time period. As Professor Oliver A. Houck notes, “in these cases a plaintiff may go directly to a judge, bypassing the labyrinth and delays of civil practice.”<sup>14</sup>

Nevertheless, the Supreme Court’s jurisprudence over the last twenty years has given great deference to decisions made by environmental agencies.<sup>15</sup> The Campiche decision represents a shift in this trend and could likely open a new era in Chilean judicial review.

### B. *Campiche Project Environmental Assessment*

The environmental impact study for the Campiche Project, required by Law 19,300, was submitted to the Environmental Impact Assessment System (SEIA)<sup>16</sup> in August of 2007 and was approved by Resolution No. 449/08 (Resolution 449), issued by the Valparaiso Regional Environmental Commission (COREMA).<sup>17</sup> According to Chilean law, the environmental approval resolution certifies that the project complies with applicable laws and can adequately mitigate, compensate, or restore its environmental impacts.<sup>18</sup>

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12. *Id.*

13. See No. 11, *Correa v. Comision Regional del Medio Ambiente of Valparaiso*, Supreme Court, No. 1219-09 issued on July 22, 2009.

14. OLIVER A. HOUCK, *TAKING BACK EDEN: EIGHT ENVIRONMENTAL CASES THAT CHANGED THE WORLD* (2009).

15. In a similar way, the United States Supreme Court in *Chevron* established that an agency interpretation of the statute it administers is entitled to deference to the extent that the interpretation is reasonable and comports with the intent of the statute. *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

16. The SEIA, regulated by Law No. 19,300 (1994) and Supreme Decree No. 95 issued by the Ministry of the Presidency on Aug. 21, 2001, requires that an environmental impact study or an environmental statement be submitted to the relevant COREMA prior to the construction or modification of all major projects and activities, including power plants that generate more than 3 MW.

17. The COREMA is the main environmental authority of the Valparaiso Region and has the duty to review the environmental impact studies and statements.

18. The U.S. National Environmental Policy Act, 42 U.S.C. §§ 4321–4370d (2006), was a relevant antecedent for the creation of the Chilean SEIA. Nevertheless, one important difference between the systems is that in Chile the role of the environmental agency is to authorize the environmental impact study or statements that are elaborated by the project’s

The most significant environmental impact identified during the Campiche Project assessment was its air emissions, and in particular its emissions of sulfur dioxide and particulate matter.<sup>19</sup> In 1992, the area was declared as non-attainment for both pollutants, and a decontamination plan was enacted.<sup>20</sup> Currently, under the SEIA, all new emissions must be compensated with equivalent or greater reductions from existing sources. According to Resolution 449, the Campiche Project's emissions should be compensated with reductions in an existing power plant in Las Ventanas that is owned by the same company.<sup>21</sup>

With regard to the land use assessment, the Regional Housing and Urban Secretariat declared the project location to be favorable under the SEIA.<sup>22</sup> A relevant factor for this decision was that, in 2006, the local municipality had authorized the construction of a power plant subject to the same zoning restrictions.<sup>23</sup>

### C. Zoning and Infrastructure Projects

Another relevant aspect of the Campiche case is related to several inconsistencies within the Chilean land use policy, as well as within regulations pertaining to infrastructure projects. In Chile, all power plants are considered to be "energy infrastructure."<sup>24</sup> As such, they have been subject to specific land use regulations ever since they were differentiated from industrial uses in 2002.<sup>25</sup> However, this new policy approach, premised on the understanding that power generation involves public interest considerations, overlapped with the reality of local zoning plans, which only recognize traditional uses, such as housing, commercial, and

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owner. Law 19,300 (1994). In the United States, only major federal actions can trigger the requirement of an environmental impact statement and the relevant agency is responsible for its elaboration. *Id.* § 4332(C).

19. The Campiche Project environmental impact assessment can be reviewed at [www.e-seia.cl](http://www.e-seia.cl).

20. Supreme Decree 252/92 issued by the Mining Ministry on Dec. 30, 1992.

21. The AES Gener power complex in Las Ventanas includes the following units: (i) Central Ventanas, (ii) Nueva Ventanas, and (iii) Campiche, totaling 880 MW. *See* Gener, [www.gener.cl](http://www.gener.cl). According to Resolution 499, the plant will compensate 110 percent of the SO<sub>2</sub> emissions by implementing a new scrubber in Central Ventanas and by optimizing the operation of the whole complex. *Id.*

22. Resolution No. 1701 issued on Oct. 26, 2007. *See* No. 19, *Correa v. Comision Regional del Medio Ambiente of Valparaiso*, Valparaiso Court of Appeals, No. 317-09 issued on Jan. 8, 2009.

23. The previous unit developed by AES Gener was Nueva Ventanas Power Plant. *See* [www.gener.cl](http://www.gener.cl).

24. Urban Regulations, Article 2.1.29.

25. Supreme Decree No. 217 issued by the Housing and Urban Ministry, Pub. Official Gazette Feb. 20, 2002, amending Article 2.1.29 of the Urban Regulations.

industrial ones.<sup>26</sup> To fill this gap, the Housing and Urban Ministry took a pro-industry approach, interpreting that power facilities, similar to transmission lines or gas pipelines, could not be banned by zoning plans.<sup>27</sup> As can be imagined, several controversies developed between impacted neighbors and municipalities until this interpretation was overruled by the General Controller.<sup>28</sup> Later, the Housing and Urban Ministry confirmed that the rule was applicable only to transmission lines or pipelines, not to power plants or similar projects that could be regulated or prohibited by the zoning plans.<sup>29</sup>

The liberal interpretation regarding the location of power plants was applied during the Campiche Project approval and to some extent helps explain why the land-use permit was granted without extensive deliberations by the Regional Housing and Urban Secretariat and the COREMA.<sup>30</sup>

Recently the Housing and Urban Ministry returned to its original interpretation, ruling that the zoning provisions applicable to industrial uses applied equally to power plants.<sup>31</sup> Although this seems to be the correct interpretation, it highlights the inconsistency of land use policy in this area.

## II. THE SUPREME COURT DECISION

The Supreme Court upheld the Valparaiso Court of Appeals decision that the project should not have been authorized because it was zoned in a restricted area.<sup>32</sup> It held that the permit granted to the company by the municipality pursuant to Article 2.1.17 of the Urban Regulations was not enough to develop the project because only

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26. For example, the Valparaiso Zoning Plan (Decree No. 116/87 issued by the Housing and Urban Ministry on Aug. 5, 1987) does not recognize energy infrastructure uses in any area of its territory.

27. Guideline No. 173 issued by the Housing and Urban Ministry on June 30, 2006.

28. The General Controller is an independent public entity whose main duties are to review the legality of governmental acts and to control public expenses. The General Controller decisions are expressed through "legal opinions" that are binding on ministries and agencies. The legal opinions regarding the correct interpretation of "energy infrastructure" were the following: Legal Opinions No. 37,731/07, No. 44,742/07, No. 13,529/08, and No. 59,822/08, all available at [www.contraloria.cl](http://www.contraloria.cl).

29. Supreme Decree No. 8, issued by the Housing and Urban Ministry, Pub. Official Gazette Apr. 13, 2009; Guideline No. 218 issued on Apr. 29, 2009.

30. Guideline No. 173 issued by the Housing and Urban Ministry on June 30, 2006; Resolution No. 449/08 issued by the Valparaiso Regional Environmental Commission that approved the Campiche Project.

31. Supreme Decree No. 68 issued by the Housing and Urban Ministry, Pub. Official Gazette 12/31/09.

32. *See* Correa v. Comision Regional del Medio Ambiente of Valparaiso, Supreme Court, No. 1219-09 issued on July 22, 2009, No. 11.

recreational and green areas were authorized uses.<sup>33</sup> The Court mentioned that an amendment to the Valparaiso Zoning Plan would be required to allow infrastructure development in the area.<sup>34</sup>

The Court, linking the illegal permit with the constitutional right to live in an environment free of pollution, stated that the recreational and green area zoning requirement was designated to mitigate the air pollution caused by existing industrial activities.<sup>35</sup> Consequently, the Court set aside the environmental permit, concluding that the illegal construction in a highly polluted area impaired the petitioner's rights as guaranteed by Article 19, No. 8 of the Constitution, which protects the right to live in an environment free of pollution.<sup>36</sup>

### III. ANALYSIS

The apparent simplicity of the Supreme Court's decision in Campiche is complicated when confronted with the language and spirit of Article 2.1.17 of the Urban Regulations. This provision establishes that in areas identified as "restricted" by the zoning plan, which is the precise condition of the Campiche Project location, a project can be approved if it includes environmental protections such as floodwalls and canals. The idea behind this provision is to ensure no human settlement occurs in areas that present flood hazards or other natural risk conditions without engineering works that mitigate the risk.<sup>37</sup>

Therefore, the legal question of this case was whether a project approved under Article 2.1.17 of the Urban Regulations is also conditioned by the land use established in the zoning plan. The answer seems to be in the negative because the land use restriction is consistent with the flooding risk nature of the area. If the condition is overcome by protection efforts as required by Article 2.1.17, the restriction is no longer justified. This was the interpretation that moved the municipality, the Regional Housing and Urban Secretariat, and the COREMA to authorize the project.<sup>38</sup> Moreover, it seems reasonable to give some power to the municipalities, due to their knowledge of local circumstances, to negotiate new projects in areas that traditionally are banned from development. Additionally, under the Court's interpretation, Article 2.1.17 of the Urban Regulations becomes almost inapplicable because developers would not have any incentive to invest in

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33. *Id.* at No. 8.

34. *Id.*

35. *Id.* at No. 10, para. 2.

36. *Id.* at No. 11.

37. Urban Regulations, Article 2.1.17.

38. Resolution No. 112/06 issued by the municipality of Puchuncavi; Resolution 499.

restricted areas. The Supreme Court seems to have ignored these arguments, which is surprising considering that the courts traditionally have been very deferential towards decisions by environmental agencies.<sup>39</sup>

It is clear that the court gave strong weight to the fact that the restricted land use may have been created to alleviate air pollution in Las Ventanas.<sup>40</sup> Although the air emissions would have been mitigated through the environmental assessment process as the Campiche Project went forward, it is true that the restricted area is a transition corridor between heavy industry and a residential area, so there could be some justification for the permanence of the zoning restriction.<sup>41</sup>

Notwithstanding this last argument, the outcome in the Supreme Court may also have ideological explanations.

First, the area has historically been home to heavy industries such as copper smelting, power plants, production and storage of hazardous substances, and port activities.<sup>42</sup> Although all new projects since 1997 are subject to an environmental assessment process,<sup>43</sup> and a decontamination plan was enacted in 1992,<sup>44</sup> there is a sense that these measures have not been sufficiently effective and that many externalities continue to be endured by the community.<sup>45</sup> The concerns are not related only to unresolved environmental impacts, but also to adverse health effects in susceptible populations.<sup>46</sup>

Second, the high level of poverty in the area demonstrates that industrial development has increased inequalities to a greater extent than it has benefited the impacted communities. A harmonic interaction between industrial and residential development not only requires clear and stable zoning regulations and comprehensive environmental assessment and enforcement, but also, at some point, transparent

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39. See Questions and Learnings from Campiche, July 5, 2009, [www.cdauch.blogspot.com](http://www.cdauch.blogspot.com).

40. See *Correa v. Comision Regional del Medio Ambiente of Valparaiso*, Supreme Court, No. 1219-09 issued on July 22, 2009, No. 11 and 12.

41. Decree No. 116/87 issued by the Housing and Urban Ministry on Aug. 5, 1987, which modified the Valparaiso Zoning Plan. Articles 1 and 2 establish that the restricted zones Z-R1 and Z-R2 are adjacent to the industrial zones.

42. Municipality of Puchuncavi, History, [www.munipuchuncavi.cl](http://www.munipuchuncavi.cl).

43. The SEIA was created by Law No. 19,300 (1994) but only began to be mandatory with the enactment of Supreme Decree No. 30 issued by the Ministry of the Presidency in 1997. This was later modified by Supreme Decree No. 95 issued by the Ministry of the Presidency on Aug. 21, 2001.

44. Supreme Decree No. 252/92 issued by the Mining Ministry on Dec. 3, 1992.

45. REG'L ENVTL. COMM'N OF VALPARAISO, LAS VENTANAS DECONTAMINATION PLAN REPORT FOR THE PERIOD 1993-2006 (2007).

46. See SINA: Plan de Descontaminación Complejo Industria, [www.sinia.cl/1292/article-26298.html](http://www.sinia.cl/1292/article-26298.html) (last visited May 9, 2010).

mechanisms to transfer resources to the communities, which should not be excluded from progress.<sup>47</sup>

#### CONCLUSION

The Campiche case represents a shift in the trend of the Supreme Court, which traditionally has been very deferential towards decisions by environmental agencies. Nevertheless, the legal analysis made by the Court seems to be inconsistent with Article 2.1.17 of the Urban Regulations, which allows for approval of projects in restricted areas if protective engineering works are performed as mitigation. The Court's requirement that the land use in the zoning plan must also be modified to authorize a power plant in a restricted area did not recognize that Article 2.1.17 is an exemption to the general rules applicable to zoning plan amendments. Therefore, the Supreme Court decision seems to rely less on legal than ideological factors, such as the environmental and social conditions in Las Ventanas that have created a situation of permanent conflict and inequalities. The role of judges is not to make policy, but to resolve questions of law. If the policymakers do not address these environmental and social concerns, we will be seeing more and more litigation with unpredictable results.

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47. Although local development is a primary role of the government, many firms are promoting corporate social responsibility programs to encourage community growth and development where they operate.

**We welcome responses to this In Brief. If you are interested in submitting a response for our online companion journal, *Ecology Law Currents*, please contact [ecologylawcurrents@boalt.org](mailto:ecologylawcurrents@boalt.org). Responses to articles may be viewed at our website, <http://www.boalt.org/elq>.**