
STUDY

Traslated by Tim Ennis

GENERAL ENVIRONMENTAL FRAMEWORK LAW

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This paper analyzes the content and scope of Law N° 19.300, the General Environmental Framework Law, most of which came into force on March 19th 1994. The author states that this legislation regulates the most fundamental aspects of environmental issues, with the basic aim of initiating a process to structure environmental regulations in this country.

Thus, it is argued that the Law contains a set of legal definitions of the utmost importance for correctly attributing juridical responsibilities, including, most importantly, definitions of biodiversity, contamination, environment, conservation of environmental heritage, conservation of nature, environmental impact and environmental damage. In addition, the author draws attention to the fact that the Law provides the state with tools of environmental management to administrate and regulate the use of the different components of the environment. Fundamental in this respect is the Environmental Impact Assessment system (EIA) for both public and private investment projects, and the “single window” concept for granting envi-

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Estudios Públicos, 54 (otoño 1994, “Ley sobre bases generales del medio ambiente”).

ronmental permits. It also considers the mechanism for generating both environmental quality standards and emission standards, plans for managing renewable natural resources, as well as prevention and decontamination plans.

As well as regulating responsibilities on environmental issues, the author adds, the Law makes a legal innovation by creating responsibility for environmental damage. This gives rise to legal action which may end in a judicial ruling obliging the person responsible to repair the damage caused to the environment.

Finally, the Law sets up a regionalized public service, called the National Environmental Commission (CONAMA), a dependency of the General Ministerial Secretariat of the Presidency, to take charge of environmental issues.

I. Introduction

On March 9th 1994 the Official Gazette (*Diario Nacional*) published Law N° 19.300, the General Framework Law on the Environment, which the National Congress had passed in January that year. The Law had begun its legislative process in the Senate, at the initiative of the President of the Republic, in September 1992. At the moment of publication publication most of the Law came into force.

The Law does not aim to cover every issue relating to the environment, as special legislation will be needed to regulate in detail areas which pose particularly complex problems (consider, for example, a law on tradable emissions permits, a law of land use, a forestry law etc.). As its name indicates, it is a general framework law that deal with the most fundamental points in order to initiate a process of structuring environmental regulations in the country.

For the purpose of this analysis, the contents of the Law have been divided into four aspects. Firstly, legal definitions whose particular importance stems from the fact that they oblige citizens, authorities and judges to understand technical terms in the way the legislature has defined them. Thus, concepts are defined that are of the utmost importance for understanding and correctly attributing people's legal obligations and responsibilities. Such definitions include those relating to biodiversity, pollution, environment, environmental heritage conservation, nature conservation, environmental impact and environmental damage.

Secondly, the Law establishes various tools of environmental management, i.e. it gives the state mechanisms for administrating and regulating

the use of components of the environment. Fundamental to this is the Environmental Impact Assessment System (EIA), for both public and private investment projects. The Law indicates the type of projects that must submit to environmental impact assessment and sets out the criteria for determining whether an investment project needs to present an Environmental Impact Declaration (EID) —a rapid formula applicable to projects whose activities are adequately regulated by standards— or whether it needs to draw up an Environmental Impact Study (EIS) —a more complex document basically applicable to large-scale investment projects, which might have a significant impact on the environment, and whose potential effects are either not entirely regulated or else depend on subjective opinions (for example the alteration of landscapes with heritage value or effects on a community and its culture, etc.). The relevant provisions indicate the form and the process for classifying the EID and the EIS, instances for citizen participation in this process, the deadlines within which the authority must present its findings, the coordination needed to make the “single window” concept for granting of environmental permits functional, as well as the conditions which oblige approval or rejection of an EID or EIS, and appeal mechanisms against the authorities’ decisions. However the EIA system will not come into force until the detailed regulations anticipated by this law are published.

In addition, as regards the environmental management tools provided to the state, i.e. apart from the EIA system, the Law sets up a mechanism for generating environmental quality standards (both primary and secondary), as well as emission standards, plans for the management of renewable natural resources, prevention plans for areas declared latent and decontamination plans for zones declared saturated. In all these cases a Supreme Decree is required, the design of which must follow certain steps, and which must set out specific standards. This involves having scientific studies and evidence to back up the suitability of the standard or of the plan, etc., cost-benefit analysis of the measures and standards being proposed, and opportunities for presenting any observations, objections and comments that interested parties may feel the proposal in question merits. This forms part of what is known as citizen participation and is also considered as an tool of environmental management. Moreover, any decree issued may be legally challenged in the ordinary courts of law, if it infringes the law or causes some harm or damage.

Thirdly, mention should be made of the question of responsibility in environmental matters. Here two levels have to be distinguished: one corresponding to ordinary civil responsibility; and secondly responsibility for

environmental damage. In the first case, the Law is applied for those suffering damage or harm from a premeditated or a negligent action by another person. The second case is a legal innovation. Responsibility for environmental damage gives rise to an action that can end up in a ruling obliging the responsible party to repair the damage caused to the environment when this is “significant”. Also required in this case is culpability or premeditation on the part of the supposed responsible party, although certain legal presumptions are established in favor of the plaintiff in the case of infringement against the standards or plans referred to above, whereby the burden of proof is inverted, and the accused must prove that he acted without negligence or premeditation. Notwithstanding this, in certain cases where special legislation has already defined responsibility for damage to the environment, such legislation applies because it overrides the Environmental Framework Law.

Lastly, the fourth relevant aspect of the Law relates to the creation of a state institutional framework to be responsible for environmental issues. A public service is set up, known as the National Environmental Commission (CONAMA) responsible to the President of the Republic via the General Ministerial Secretariat of the Presidency, with attributions and functions and its own staff and budget. This commission will be decentralized, with each region of the country having a Regional Environmental Commission (COREMA), comprised of the services with environmental jurisdiction in each region, with a significant degree of autonomy to decide on investment projects and environmental questions in its own region.

I am grateful for extremely valuable collaboration provided by Ricardo Katz, Coordinator of the Environmental Commission of the CEP, and Leonel Sierralta, member of the CEP Environmental Commission, in the preparation of this paper. The whole chapter relating to tools of environmental management was based on an unpublished paper by Ricardo Katz, and in the chapter relating to definitions, as well as the analysis of citizen participation, I benefitted from contributions by Leonel Sierralta. As well as this, they suggested ideas, reviewed the paper and made important comments, all of which redounded to the benefit of the analysis presented below.

II. Legal definitions

Legal definitions are crucial in legislation regulating highly specialized and complex issues. The problems and realities peculiar to the environ-

ment have these characteristics, so it is crucial for the law establishing the general framework for legal regulation of the environment in Chile to contain a significant number of definitions of fundamental concepts relating to the issues in question. The importance of legal definitions stems from the fact that the meaning of words as used by the legislature departs from the realms of common language, whose meaning Chilean jurisprudence relates to the dictionary of the *Real Academia de la Lengua Española*, or from the technical language of a science or art. Thus, the Law obliges the interpreter of a given rule, who may be a judge, a legal or natural person or an administrative authority, to adopt the meaning that the Law itself defines for the concept in question. This has consequences for understanding legal obligations and responsibilities, i.e. regarding what conducts the legislature expects from the regulated subjects. The legal definition is used, therefore, when the natural or technical-scientific meaning of the words is not adequate to describe the expected conduct, or to give an account of facts that are relevant from an exclusively legal point of view, or else when it is desired to provide greater certainty as to the scope of the rules, thereby avoiding unnecessary ambiguities.

Below, reference will be made to some of the definitions contained in Article 2, which forms part of Title I, relating to the general provisions of Law N°19.300. For this purpose, definitions have been classified conceptually into four categories: those relating to expressions or concepts used by the Political Constitution and which it is considered need to be made explicit; those containing new legal concepts of special relevance; those defining tools of environmental management and those relating to instruments of environmental assessment. Obviously, these definitions are linked to the most important normative contents of the Law.

2.1 Development of fundamental constitutional concepts

Article 19, N°8 of the Political Constitution provides for a guarantee of the right to live in a “pollution-free environment”, and that it is the duty of the state to ensure the “conservation of nature”. In turn, Article 19, N°24 of the Fundamental Charter states that the social function of property includes, among other things, whatever is required for the “conservation of environmental heritage”.

From a simple reading of these constitutional provisions one can see the potential conflict of rights that could arise under the mandate of different rules, and which the Law has to regulate. The right to live in a pollu-

tion-free environment may come into conflict with the right to carry on any economic activity, which is also enshrined in the Constitution. Different human activities affect the natural surroundings: they use air, water, soil and natural resources, both renewable and non-renewable; they alter landscapes, etc. In short, they have countless effects, some of which are avoidable and others not.

Moreover, the environment is not static, and it is not only human activities that modify it: natural phenomena themselves also produce changes of enormous consequences.

On the other hand, property rights are also guaranteed by the Constitution. Hence a debate arises over how far the Law can impose limitations on property rights and their attributes, with the aim of conserving environmental heritage, without affecting the essence of such rights. This also raises the applicability of another constitutional precept which also enters this necessary process of harmonization: Article 19, N°26, which prevents laws issued by order of the Constitution from affecting the essence of rights, or imposing conditions, requirements, or taxes which make the exercise of those rights impossible.

As can be seen, important political, doctrinaire, and fundamental legal rights and definitions are at stake in environmental regulation. It is a new way of expressing the tension between the public and private good. Harmonizing implied rights involves the need to understand as objectively as possible the purposes of individual constituent rights, so as to clarify the scope and number of obligations that state, society and private individuals have to assume in their respective spheres.

The constitutional rules mentioned above are evidence of the need to define what is meant by environment, contamination, nature conservation and the conservation of environmental heritage. The Environmental Framework Law established the meaning of such terms.

Article 2, Letter II, defines “Environment” as the “global system comprising natural and artificial elements of nature —be they physical, chemical, biological, sociocultural— and their interactions, under permanent alteration by human or natural action, and which governs and conditions the existence and development of life in its multiple manifestations”.

Here we need to highlight three extremely positive concepts contained in the definition transcribed above:

- (i) The inclusion of natural, artificial and sociocultural elements as components of the environment.
- (ii) The modification of these components over time, and

- (iii) The consideration of environment as a *neutral* substrate which governs and conditions life.

The version of the Law originally proposed by the Executive restricted the components of the environment to those of a natural type, forgetting that the environment is also the product of human activity, and culture, as well as social, political and economic phenomena. Moreover, the environment was conferred the virtue of *favoring* the existence of life, an attribute which some environments in reality do not possess, but which according to the original definition it had to conserve in all circumstances.

Letter c) of Article 2 defines “Pollution” in the following terms: “the presence in the environment of substances, elements, energy or a combination thereof, in concentrations and permanency superior or inferior, as appropriate, to those established in current legislation”.

This is perhaps the most relevant definition contained in the Law, but it was not included in the original version. Its legal effect consists of defining the space for legitimate use of the environment. This space lies below the limits of what the legislation permits, and pollution will only exist insofar as a pre-established standard is infringed, with precise limits being indicated for the quality of some component of the environment, or for emission levels. This makes it possible to distinguish legitimate use and alteration of the environment, from illegitimate use and alteration, with the latter constituting environmental pollution. Thus, it is a question of differentiating mere alteration of the environment, from pollution, and consequently giving precise definition to what should be understood by a pollutant and by a pollution-free environment.

The legislative Bill originally defined a pollutant as any substance, of human origin, whose presence might alter the composition, properties or natural behavior of the components of the environment. This definition made the phenomena of alteration and pollution equivalent, without any reference to environmental quality standards.

However, alteration does not necessarily constitute pollution. Alteration is a physical, chemical or biological phenomenon that is measurable in absolute or real terms. On the other hand, pollution implies a political and social agreement that is eminently variable according to cultural, ethical, philosophical, economic and other situations. Hence the vital need for pollution to be legally defined; otherwise, even human breathing or plant photosynthesis would be polluting. Consequently, what had to be defined as pollution was anything constituting a relevant alteration of the environment, and so from a legal standpoint was considered to be “polluting”. For

this purpose, the Law itself envisages the mechanism of environmental quality standards, which precisely determine the quality level we want for our environment.

To recapitulate, what is legally considered polluting must be the outcome of social convention or agreement, expressed through standards, because in the real world everything pollutes in one way or another, as there is no unique natural state, or a state of “purity”.

Accordingly, a pollution-free environment would be one in which environmental quality is equal to or better than that established by the environmental quality standards. Likewise, “polluting”, would be any substance whose concentration during a given lapse of time exceeded the environmental quality standards. If such concentrations and durations are not exceeded, the substance is not polluting, even though it may alter the composition, properties or natural behavior of the components of the environment. This always happens in nature.

Letter p) of the Article in question, defines “conservation of nature” as the “set of policies, plans, programs, standards and actions aimed at ensuring the maintenance of conditions permitting the evolution and development of the country’s species and eco-systems”.

In the original version, two distinct concepts were mixed in referring to preservation of the “environment”. This definition clarified the state’s duty towards nature, according to Article 19, N° 8 of the Constitution. The definition aims at ensuring strict maintenance of certain conditions to permit the natural evolution of species and the development of the country’s eco-systems. It should be pointed out that this definition only alludes to environmental components that are native or belong to this country. Thus it excludes exotic elements that may be found in the sphere of fauna and flora.

Letter b) of the same Article N° 2 defines “Conservation of Environmental Heritage”, establishing this as “the rational use and exploitation or repair, as appropriate, of components of the environment, especially those belonging to the country and which are unique, scarce or representative, in order to ensure their permanency and capacity for regeneration”.

Environmental heritage conservation is dealt with in Article 19 N° 24 of the Constitution as part of the social function of property. The original version did not emphasize or distinguish which components of the environment, domestic or foreign, would be considered heritage or valuable, whereby limits or requirements could be imposed on the exercise of property rights as part of the social function of property, specifically in relation to the conservation of environmental heritage. It should be kept in

mind that regulations of this type could almost become covert expropriations and so enter into conflict with the cited Article 19, N°26, given that, in theory, limitations and obligations deriving from the social function of property, in principal, are not subject to compensation. However this is a question of degree, i.e. it depends on the restriction that is imposed on ownership. It is perfectly conceivable that limitations on a property right, founded on its social function, would have to be compensated for involving, in practical terms, the curtailment of this right or some of its attributes. Other limitations, on the other hand, can be imposed to the extent that they regulate the exercise of the right in certain ways without affecting its essence. The problem is a delicate one, and each regulated case should be analyzed with the utmost attention.

The original version also did not define what characteristics environmental components would need to have to be considered heritage. In the final approved version, at least some indications were given to make it possible to identify what could be considered worthy of conservation due to its constituting environmental heritage, i.e. valuable in environmental terms. This category includes elements that are scarce, unique or representative, (think of an autoctonous animal species becoming extinct, or the “Portada de Antofagasta”). The definition adds that restoration is also part of environmental heritage conservation, along with the rational use and exploitation of resources and components of the environment; i.e. it is possible to envisage the transitory or temporary destruction of some aspect of environmental heritage if one has the absolute certainty that after a certain time it will be restored to the state in which was found before human intervention.

2.2 Relevant new legal concepts

The aim of this section is to point out the introduction of important legal concepts into the national regulatory system, whose relevance not only exceeds the scope of the General Environmental Framework Law, which is wide-ranging in itself, but also influences other pieces of legislation concerned with regulating specific issues relating to the environment. Here it is worth keeping keep in mind the possible influence on forestry, water, fishing, mining and land-use legislation etc. These concepts should also be kept in mind when the state designs its economic and social, policies, as well as urban and rural regulations, agricultural policies and those relating to infrastructure, among other things.

Letter k) of the above-mentioned Article 2 of the Law provides a definition of “Environmental Impact”, which is understood as “alteration to the environment caused directly or indirectly by a project or activity in a given area”.

The most relevant aspect of this definition is its consistency with the concept of pollution analyzed above. Environmental impact is any alteration of the environment, which may be positive, neutral or negative. There is no *a priori* presumption that all environmental impact is harmful. Hence a phenomenon should be susceptible to evaluation, i.e. a given investment project, whether public or private, should be susceptible to investigation to determine its environmental suitability, by quantifying and classifying its impacts. Thus, the concept of alteration to the environment is legitimized, conceptually, as distinct from pollution. In this definition it is also worth emphasizing the restriction of environmental impact to a project’s area of influence, i.e. impacts that are the exclusive result of the project’s activities.

Again, Article 2, mentioned above, in letter a) defines “Biodiversity or biological diversity”, in the following terms: “Variability of living organisms, forming part of all terrestrial and aquatic eco-systems. This includes diversity within a given species, between species and among eco-systems.

This definition, originally proposed as biological diversity, is essentially the same as that included in the Presidential Message accompanying the Bill. It suffers by including eco-systems as a variable unit when really this is a methodological device, lacking in reality in itself. Moreover it is a very vague and confused definition, which does not allude to the richness of species and the number of individuals —basic concepts synonymous with biological diversity. Nor does it refer to the fact that biological diversity needs to be expressed in relation to an area and a given moment. These two elements are fundamental, as they place the issue in a real and quantifiable context. Consequently, this definition has serious problems of a technical nature which make it deficient.

Letter e) of Article Nº 2, provides us with the definition of “Environmental Damage” in the following terms: “Any loss, reduction, detriment or significant impairment inflicted on the environment, or on one or more of its components”.

This definition was not included in the Bill sent to Congress by the Executive. According to this definition, environmental damage does not occur, as in the case of pollution, due to the breaching of some standard, but through losses, reductions, detriments or *significant* impairment. Although this definition contains a significant degree of ambiguity, an attempt will be made to give a possible precise meaning.

Given that environmental quality standards define the environment's capacity for use and alteration, then either management plans, or prevention and decontamination plans, referred to be below, eventually define this, or else assessment of the environmental impact of a project through environmental impact studies or declarations. Any damage may be considered significant if it is caused by the infringement of a standard or plan, or the breaking, or lack of commitment entered into during the procedure of environmental impact assessment, or a management, prevention or decontamination plan. If the use-capacity of the components of the environment is limited by the instruments indicated above, this means that alterations to the environment, while they may be negative, are within the acceptable ranges, and so are not significant.

It may be considered therefore, that reduction, detriment or significant impairment, characteristic of what may be considered environmental damage, is verified when environmental impact exceeds what is permitted by standards, plans or studies and environmental impact declarations. This naturally means the infringement of these regulatory instruments. This interpretation is consistent with the nature of the standards and plans indicated and with the purposes pursued by environmental impact studies and declarations, insofar as they have the purpose precise of evaluating the environmental impact of human activities in order for them to be acceptable and not significant.

In this way, it is possible to distinguish common damage, from which ordinary civil lawsuits arise, from environmental damage itself, which gives rise to environmental lawsuits whose purpose is to achieve reparation, a concept that is analyzed below and which is closely related to the definition in question.

Letter s) of Article N°2 defines "Reparation", as "the action of restoring the environment, or one or more of its components, to a quality similar to what existed before the damage was caused, or, where this is not possible, restoring its basic properties".

This definition replaces the one originally proposed for "restoration". The concept of reparation alludes to improving or repairing some damage. On the other hand, the concept of restoring means returning something to state it in was before. It is clear that the latter is not possible in the case of environmental damage, due to the nature of the thing damaged. What is notable in this definition is the realism with which the issue is being treated, by obliging the re-establishment of basic properties of the environment when restorative action as such is impossible.

The allusion made by the definition to returning the environment, or one or more of its components, to a quality similar to that which existed prior to the damage, backs up what is expressed above, in the sense that environmental damage is what is caused by the infringement of standards, plans or commitments that define legitimate modes of use for environmental components, because it is these mechanisms that prevent significant damage implying degradation of the quality of the environment, or one of its components, to an unacceptable level.

2.3 Instruments for defining environmental quality

The basic instruments through which a country's environmental quality is defined are the environmental quality standards themselves, which may be primary if they refer to human health, or secondary if they relate to other components of the environment such as flora and fauna, etc.

In letters n) and ñ) of Article N° 2, these instruments are defined. The definitions are of little use from a legal point of view, as they are limited to describing what an environmental quality standard is, and they lack significant legal effects, despite their undeniable didactic value. What is interesting about these standards is the mechanism for generating them, which is analyzed later in this paper.

Having said that, it is important to keep in mind that the definitions of these standards do not classify the level of risk they imply for human health or for other components of the environment, whereas it will always be necessary to classify this level, because all human activity implies a degree of risk or danger, which may be acceptable or unacceptable. The definitions omitted to indicate that the level set by the standards must be such as to not constitute an *inadmissible* risk for human health, or for the other components of the environment. This would have been the only element of these definitions which could have justified their inclusion as a legal definition, because in this way a clear signal would have been given, with legal consequences for the authority in charge of defining standards, and for the citizenry to make observations on the relevant proposals. Neither the Executive nor Parliament wanted to include in the definition of primary environmental quality standard, the central element of such standards, i.e. *unacceptable* risk for human health. In the end, the adjective "unacceptable" was also eliminated from the definition of the secondary environmental quality standard, so as not to differentiate between one and the other.

2.4 Instruments for environmental assessment of investment projects

The tools of environmental assessment for investment projects are Environmental Impact Studies (EIS), Environmental Impact Declarations (EID) and the Environmental Impact Assessment System (EIA).

The two first instruments mentioned are defined in letters f) and i) of Article N° 2, which are perfectly clear and present no difficulties.

Letter j) of Article N° 2 defines “Environmental Impact Assessment” as “the procedure, whereby the National Environmental Commission or the respective Regional Commission, as appropriate, on the basis of an Environmental Impact Study or Declaration, decides whether or not the environmental impact of an activity or project is in line with the ruling standards”.

This definition was not envisaged in the original version. It is the most import procedure being proposed among the environmental management instruments. It has the ultimate aim of deciding whether the environmental impact of a project or activity is compatible with the ruling criteria or standards. In other words, it makes it possible to verify that the environmental impacts of a project are not significant, so the execution of the project does not raise objections from the environmental point of view, given that it shows that it will have no adverse affects of any significance, either due to the characteristics inherent in the conception of the project or activity, or else because all the necessary measures have been taken to ensure this does not happen.

III. Tools of environmental management

In Title II of the Law, which contains seven paragraphs which run from Article 6 to 50 inclusive, establishes and regulates the environmental management tools that can be used to achieve the environmental quality targets desired by Chilean society. The latter needs to be stressed, because, as their name indicates, these tools are means of achieving certain ends, in this case of an environmental nature. This implies that the environmental goals which the country wishes to achieve need to be made explicit and agreed upon. This is an eminently political definition, because various factors need to be weighed up in formulating these targets, including, of course, the very need to have a given environmental target, the benefits and costs of achieving it, the human and financial resources needed, the time periods over which it is to be achieved, etc.

These instruments are:

- education and research;
- the environmental impact assessment system;
- community participation;
- environmental quality standards and standards for the preservation of nature and the conservation of environmental heritage;
- emission standards;
- plans for management, prevention or decontamination, and
- citizen participation.

The importance of the instruments indicated above lies in the fact that they ought to limit the state's action as regards ways of regulating the use of the environment or its components. It is important to reiterate that the sense of these instruments is to serve as a means for achieving environmental quality targets, as expressed in environmental quality standards, and norms relating to the preservation of nature and the conservation of environmental heritage, leaving maximum freedom as regards how to do so to the regulated subjects. Thus, the instruments of environmental management should not be seen as, or transformed into targets in themselves.

The instruments mentioned above are discussed in further detail below.

3.1. Education and research

This instrument appears in Article 6 and 7 of the Law, corresponding to Paragraph 1 of Title II, as a mere declaration of principals only, without creating anything new or guiding current educational policies.

It would have been desirable to emphasize this instrument more strongly, because without doubt it is of the greatest relevance in the long term and in the formulation of an environmental conscience among the population. Appropriate training of professionals in environmental issues, the design of objective and realistic educational programs dealing with the multiple implications of environmental issues, the formal incorporation of these issues into education etc., are elements that are highly necessary and which should be included in legal norms.

3.2. The Environmental Impact Assessment System (EIA)

In Articles 8 to 31, corresponding to Paragraphs 2 and 3 of Title II, the Law regulates quite thoroughly the Environmental Impact Assessment

System (EIA) for investment projects or activities, whether public or private, although the detailed rules need to be issued for this system to come into force.

The Law provides that projects or activities specified therein can only be carried out or modified subject to prior assessment of their environmental impact, and that all permits or rulings of an environmental nature which, in accordance with current legislation, must be or can be emitted by state organizations, will be granted through the EIA (Art. 8) .

Briefly, it could be said that the Law creates a system that integrates all sectoral environmental requirements. This is known as the “single window”, and it is made functional through coordination carried out by the respective COREMA or CONAMA, as appropriate, and through resolutions certifying that the project or activity does or does not comply with all applicable environmental requirements. In the case of a favorable environmental assessment, no state organization can deny the relevant environmental authorizations, and in the case of a negative ruling, these same organizations must deny them.

In a complementary way, it should be understood that all activities or projects that are not included on the list contained in Article 10 of the Law, do not enter the EIA, and therefore have to submit to a permit procedure of another easier, or more expeditious type than those entering into the EIA. This means that such investment projects do not run the risk of affecting the environment, and so should not be assessed from this point of view.

The list established in the Law is basically very similar to lists used by the World Bank, while attempting to adapt them to national reality, given that the World Bank does not finance small projects. This imposes a minimum hurdle for Bank projects, which does not exist in the list contained in the Chilean Law. An attempt was made to remedy this situation by specifying a minimum size wherever a possible. This specification could not be quantified in all cases, hence the need to do so in the detailed rules to be issued, indicating what should be understood in concrete terms when the Law refers to projects of “industrial size”.

Without pretending to be exhaustive, the types of project entering the EIA include reservoirs, dams, high-voltage electricity transmission cables, power plants, nuclear reactors, airports, ports, highways and mining projects, as well as forestry, oil pipelines, sewage treatment plants, among others listed in Article 10 of the Law.

A really interesting aspect of the list is the obligation imposed on the state to present to the EIA its plans for regional and inter-borough

development, as well as borough building regulations and sectional plans. The inclusion of these among activities entering the system suggests an expectation that environmental impacts will tend to be caused by national macro-policies, which therefore need to be assessed from the environmental impact point of view, to ensure that, subsequently, activities carried out in the framework of these policies adhere to the directives arising from their environmental impact assessment. Otherwise the environmental impact of development would have to be regulated via individual environmental assessment of each activity and project. Thus, by way of example, if building regulations declare a certain zone to be industrial, industries setting up there would not have to consider among their assessable impacts those arising from installing in that zone, because it would be pre-defined that the area is apt for industrial installation, from an environmental standpoint. This situation warrants thinking about widening the scope of state activities that ought to be subject to impact assessment, because the resource saving could be significant. There can be no doubt, for example, that urban and rural infrastructure plans, as well energy development, settlement of areas etc., should be subject to an assessment of their global environmental impact. As more state policies and regulatory activities get submitted to the EIA, a larger number of activities carried out under the auspices of such policies and regulations will be able to make an Environmental Impact Declaration instead of complex and lengthy studies, thereby shortening time periods for executing investment projects and avoiding unnecessary costs which ultimately the whole of society pays.

The list of projects should be subject to permanent revision and complementation. This process will eventually involve a modification of the Law, or otherwise it will be done through a regulatory channel when the parameters being considered have been specified at the regulatory level.

Currently, various public offices are demanding environmental impact assessment studies, for projects or activities not considered under the Law. Although there is a awareness that the Law's list is not immutable, it does not seem reasonable when Government efforts need to be concentrated on making the law operational, to widen its *de facto* scope of action. This would only lead to CONAMA or COREMA, as appropriate, losing control over national environmental management, and cause parallel channels and methodologies to be generated.

Environmental impact assessment is carried out through an Environmental Impact Declaration (EID) or an Environmental Impact Study (EIA)

(Article 9). To decide which projects or activities have to carry out a EID or an EIA the Law establishes, in Article 11, a series of criteria which are intended to estimate the environmental risk implicit in projects or activities. If projects or activities generate or present at least one of the effects indicated, it has to carry out an EIA, otherwise it is only necessary to present an EID. The criteria are as follows:

a) Public health risk, due to the quantity and quality of effluents, emissions and residues.

b) Significant adverse effects on the quantity and quality of renewable natural resources, including land, air and water.

c) Resettlement of human communities, or a significant alteration to the systems of life and customs of human groups.

d) Location near to population, resources and protected areas likely to be affected, as well as environmental value of land in which it is intended to install the activity.

e) Significant alteration, in terms of magnitude or duration, of an area's scenic or touristic value.

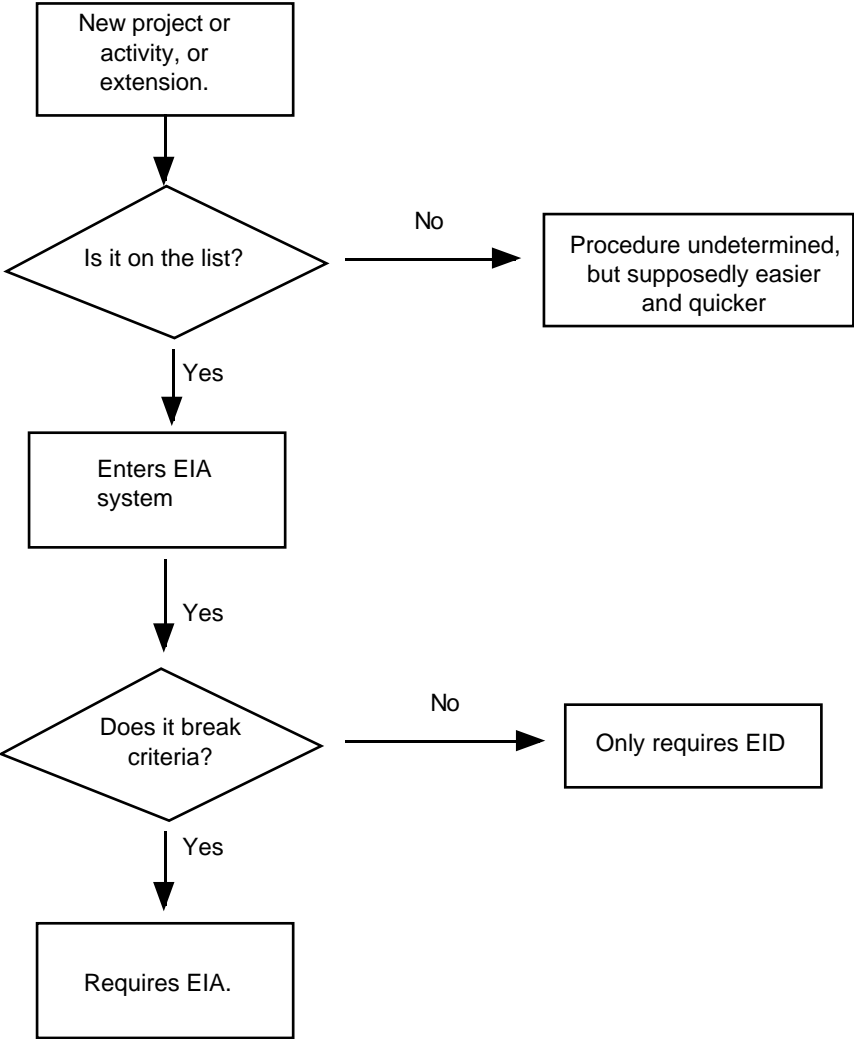
f) Alteration of monuments, sites of anthropological, archaeological or historical value, and in general those pertaining to cultural heritage.

The final paragraph of Article 11 provides that for purposes of evaluating the risk indicated in letter a) and the adverse effects indicated in letter b), account should be taken of what is established in the environmental quality standards and emission standards currently in force. In the absence of such norms, reference will be made to those ruling in countries indicated in the regulation.

It is of the utmost importance that when a regulation is drawn up, the authority keeps in mind that in generating environmental quality standards, both primary and secondary, as well as emission standards, there is a procedure which is regulated by the Law itself. From this point of view, one cannot expect the standards of countries indicated in the regulation not to be subject to some process of assessment of the applicability of such environmental quality standards in Chile. From this point of view it may be advisable that prior to approving the regulation, the standards mentioned in the regulation be ratified by the General Ministerial Secretariat of the Presidency and by the Ministry of Health, in the case of primary norms, and by the relevant Ministries in the case of secondary standards.

The part of the procedure established in the EIA that has been discussed so far can be summarized in Figure N° 1.

FIGURE N°1 PROCEDURE FOR DECIDING WHETHER A PROJECT OR ACTIVITY ENTERS THE EIA AND WHETHER IT REQUIRES A EID OR AN EIA.



From an analysis of the criteria the following can be deduced:

Letter a) considers effects caused by emissions. The risk produced by these emissions should be assessed on the basis of emission standards or environmental quality standards. Strictly speaking, only primary environmental quality standards should be used, which assess effects on human health. Considering this situation, two possible scenarios can be posed:

- Emissions do not comply with emission or environmental quality standards.
- Emissions do comply with emission or environmental quality standards.

The regulation should stipulate how to assess these situations, for example by the use of dispersion models. In the first case, emitting activities will not be allowed to operate if they exceed the standards on the basis of which they were assessed. In the second case, if the standards are complied with, emissions would not be generating a public health risk, as the standards are set so as to avoid unacceptable risk levels.

Letter b) considers the *significant* adverse effects caused by the project or activity, on the quantity and quality of renewable natural resources. The effect produced by emissions, as in the previous case, has to be assessed in relation to the environmental quality standards, which in this case are secondary, it being understood that the standard is set at levels which do not cause significant adverse effects on the quality of renewable natural resources. The reasoning is the same as in the previous case.

In summary, for letter a), and where quality is affected in letter b) the EIA should converge considerably on an EID, i.e. by making a commitment to comply with the environmental quality standards (or emission standards, although for the desired target this is not relevant) in force at the time, as determined by the regulations. The means of verifying these situations may be agreed in the EIA or EID, to be applied once the project or activity is operating.

A different case is related to effects on the *quantity* of natural resources. This criterion cannot be applied to the air component of the environment, but it can to land (although it is difficult to consider this as renewable in a human time span) as well as to water and other renewable natural resources. In view of the fact that the quantity of such resources is regulated by legislation of a non-environmental nature (water-rights, ownership of land and forests, for example), this provision does not seem to make environmental sense, because under no circumstances should the “quantity” of a resource be affected if this is self-owned. Under these

premises, the EIA should be considered as a base line declaration and commitment to not affect third-party rights, so that if this happen those affected would be able to rely on the means of proof provided by the EIA.

Letter c) aims to deal with effects on communities, either in terms of changes to living spaces or ways of life. There can be no doubt that these parameters are really difficult to assess. The purpose of the Law is to facilitate the protection of ethnic and other human groups that are specially vulnerable.

Letter d) is aimed more at anticipating and eventually mitigating effects on protected areas with environmental heritage characteristics, as effects on populations (not considered as vulnerable groups) are partially covered by letter a), and effects on resources by letter b); so the only effects left to be assessed are indirect ones such as employment, health, living conditions etc.

Letters e) and f) aim to prevent effects on areas or objects with heritage characteristics. It is interesting to note that alterations are conceivable, and equivalent, in magnitude and duration terms.

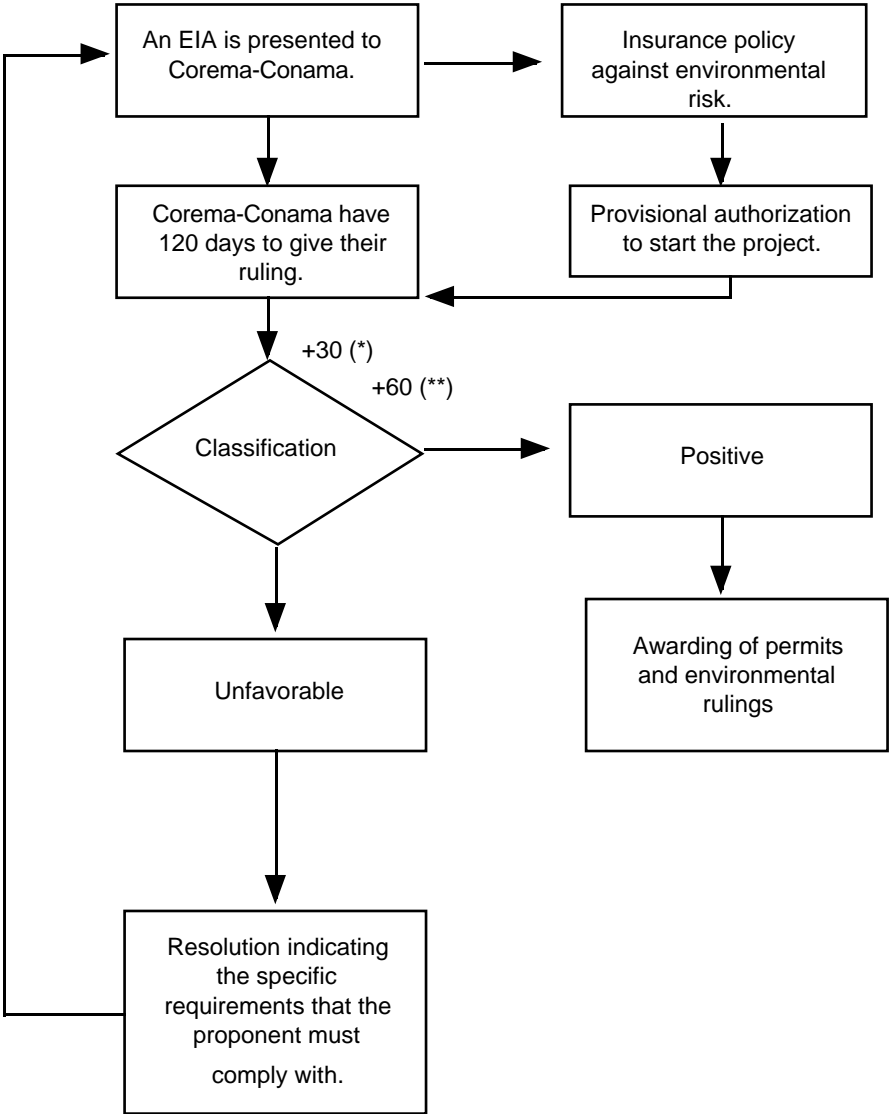
An EIA must include a description of the project or activity, the base line of the environment affected, and most importantly a description of the conditions (criteria), giving rise to the need to carry out an EIA, as well as effects on elements contained in the criteria and measures to be undertaken to avoid or mitigate them (Art. 12). The EIA must be approved if it complies with the environmental-type rules applicable to the project and if it takes account of the conditions (criteria) that gave rise to the need to carry it out. Otherwise it will be rejected (Art. 16).

The EID is presented in the form of a sworn statement, in which the responsible party (the proponent) states that the project or activity complies with ruling environmental legislation (Art. 18).

All the above still has to be regulated in detail, as was explained above. Until this happens, the EIA system will not come into force. The administrative procedure for presenting and classifying EIAs is presented in Figure N°2. The administrative procedure for presenting and classifying EIDs is presented in Figure N°3.

The resolution classifying an EIA or an EID as positive or negative has the nature of a environmental super-permit, because if it is positive, no state agency can deny the relevant environmental authorizations, and if it is negative, state agencies are obliged to deny the corresponding authorizations or relevant environmental permits (Art. 24).

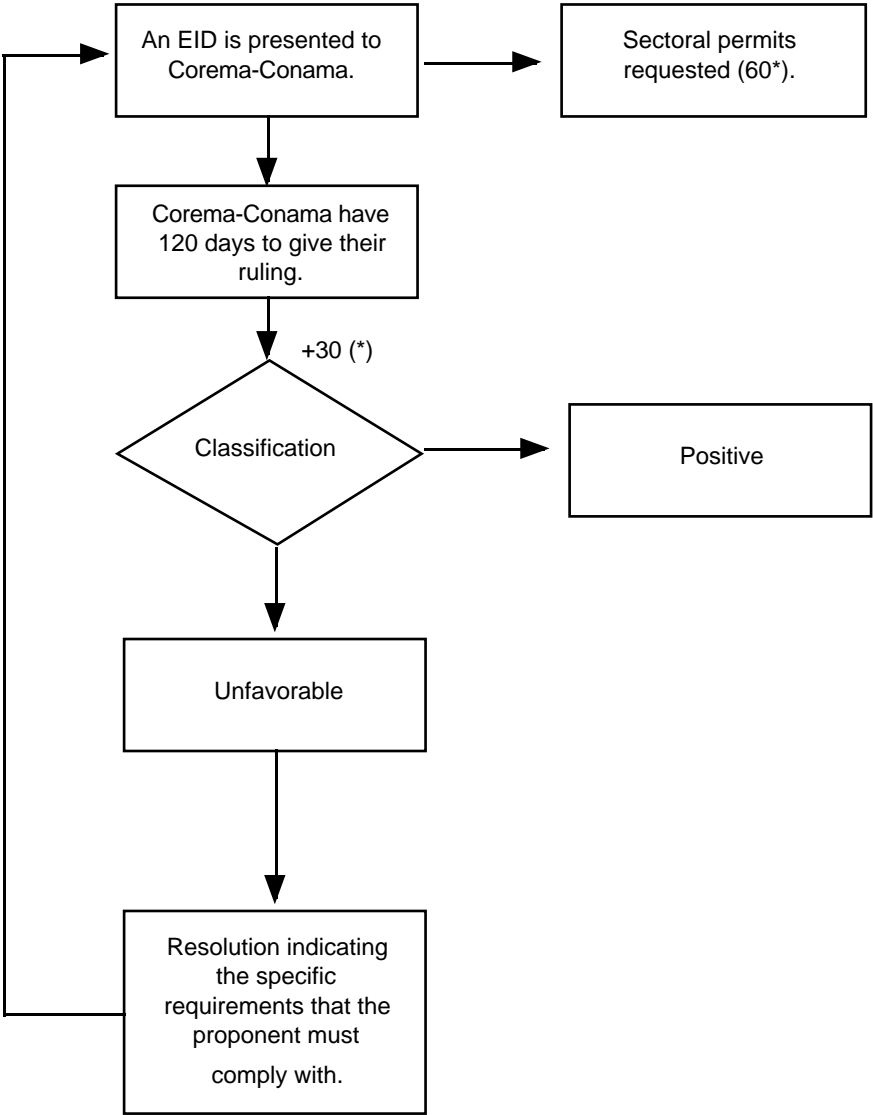
FIGURE N°2 ADMINISTRATIVE PROCEDURE FOR CARRYING OUT AN EIA.



* Once these periods have expired, if there is no ruling it will be understood that the EIA has been favorably classified, and the outstanding permits or rulings will be assumed to have been given.

** In duly justified extreme cases, a 120-day period may be extended once only, for up to 60 extra days.

FIGURE N°3 ADMINISTRATIVE PROCEDURE FOR CARRYING OUT AN EID.



* Once this period has expired, if the competent state agencies have not granted the permits or made rulings, CONAMA-COREMA, at petition of interested party will demand them. If a further 30 days expires and they have not been granted it will be understood that a favorable result has been awarded.

3.3 Environmental quality standards for the preservation of nature, and the conservation of environmental heritage

Paragraph 4, Title II of Law N°19.300 in Articles 32 to 39 deals with the issues mentioned in this section's title.

Environmental quality standards (both primary and secondary) define the environmental quality targets that society desires. No environmental management policy can exist if the targets it is intended to achieve have not been defined. For this very reason, and due to equality under the law guaranteed by the Political Constitution, these standards must be equal throughout national territory. This means that all Chileans, wherever they live in national territory have the right to a minimum environmental quality. This minimum must be the same for everybody. Naturally this does not exclude some places enjoying better qualities than others, but never worse than what the environmental quality standards require.

The Law does not give guidance on maximum admissible risk levels permitted in the definition of a standard contained in the environmental quality standards, as was explained in the analysis of the legal definitions of these instruments. The admissible risk level, which should be defined at the highest political level, is subject to procedures stipulated in the Law, which at least contemplates mechanisms for consultation among those involved.

The big change in the Law compared with the legislation and procedures currently in force can be summarized in the following aspects:

- Standards must define levels at which normal environmental management becomes emergency administration, and therefore actions to be applied are different (more severe). The standards must be promulgated by Supreme Decree (at the present time some are fixed by mere administrative resolution) (Art. 32).
- Given that environmental quality targets do not relate to technical parameters alone, it is necessary to weight these parameters according to political variables, which obviously include economic, ethical, moral and social aspects. As the environmental quality standards are not approved through a law —an issue which gave rise to considerable discussion¹— considerations of a political nature should appear, as the relevant Supreme Decrees have to be signed

¹ See María de los Angeles Pérez, "Normas de calidad ambiental. Algunas consideraciones constitucionales y legales", in *Medio ambiente en desarrollo*, R. Katz and G. Del Fávoro, editors, (Santiago de Chile: Centro de Estudios Públicos, 1993), pp. 120-140.

by the General Ministerial Secretary of the Presidency, as well as the Ministry of Health for primary standards, or sectoral Ministries (Agriculture, Economics etc.) in the case of secondary standards.

- There is an mandatory procedure for approving the standards (Art. 32). This procedure includes at least the following stages:
 - Technical and economic analyses;
 - Carrying out of scientific studies;
 - Consultations with competent agencies, both public and private,
 - Analysis of observations made, and adequate publicity.

In a complementary way, the Law establishes that responsibility for coordinating the process of generating standards and deciding programs and times for fulfilling them will rest with CONAMA. It is interesting to note that the programs and time periods to be defined by CONAMA have the implicitly gradualist nature that predominates in the Law, and the concept that a decision on the speed of achieving environmental quality targets is a decision of broader scope than that corresponding simply to sectoral and technical agencies. For these purposes, the Law determines that the regulation should state the time periods and formalities required and the criteria for revising or altering existing standards (Art. 32).

The Law also provides that state agencies must undertake programs of environmental quality monitoring to ensure the right to live in a pollution-free environment, and the state must administer as National System of Protected Forestry Areas with the aim of assuring biological diversity, supervise the preservation of nature and conserve environmental heritage (Art. 33 and 34). What is interesting in these obligations is that they define the targets that should partly govern the policies of state agencies (protecting environmental quality and seeking to maintain areas under protection).

In addition, the Law also specifies that state agencies should maintain up-to-date inventories of wild flora and fauna, favoring species considered to be in danger of extinction, vulnerable, rare or insufficiently known (Art. 38). Again the Law guides policy to be adopted by public organizations.

3.4 Emission standards

Paragraph 5 of Title II, which contains a single article (Art.40), relates to emission standards.

Emission standards are one of the most widely used tools of pollution control of a regulatory nature (as opposed to a market instrument). The Law establishes that these standards must be issued through a Supreme Decree and be territorially specific, i.e. they are only valid in the area that

the Decree determines, and relate to environmental characteristics peculiar to the area which they will be applied.

The above is of the utmost importance as a mechanism favoring future decentralization, in terms of emission densities and environmental assimilation conditions, which naturally differ between regions of the country. In this case there is the possibility that emission standards may not be equal throughout the country, and account should be taken of the different environmental capacities to absorb emissions, effluents and residues, without impairing environmental quality. In this way, the environment can be protected at minimum cost, thereby enabling the country's resources to be used in a socially optimal way.

It will be CONAMA's responsibility to propose, coordinate and approve emission standards, for which purpose it should be subject to the stages mentioned in the previous point. The importance of this attribution granted to CONAMA is that it constitutes a tool enabling it to take responsibility for national environmental policy. The implementation of control measures such as standards for vehicle emissions (mobile sources), or industrial emissions (fixed sources), and the regulation of liquid industrial waste, among other things, no longer is solely in the hands of the relevant sectoral Ministry.

3.5 Management, prevention and decontamination plans

These instruments of environmental management are dealt with in Paragraph 6, Title II of the Law (Art. 41 to 48), and are basically aimed at two different spheres: (i) renewable natural resources, which are subject to management, and (ii) pollution control, which involves prevention and decontamination plans.

a) Management plans

These plans are intended to achieve the use and exploitation of renewable natural resources, while ensuring their capacity for regeneration and the biological diversity associated with them, specially as regards species in danger of extinction, or those which are vulnerable, rare or insufficiently known (Art. 41). The intention of the law makers was to complement the productive nature of currently existing management plans, with environmental considerations.

This provision obliges activities devoted to exploiting renewable natural resources to consider at least one additional variable, namely the

conservation of species with characteristics similar to those mentioned above. The obligation to ensure the regeneration capacity of the exploited resource is not an obligation that can be imposed on a case-by-case basis, but one that has to be managed in an integral way (i.e. in national parks, nurseries, gene banks, or in other forms).

Management plans which the competent agencies require should include at least the following environmental considerations, unless projects have environmental impact declarations or studies already approved (Art. 42):

- Maintenance of water courses and conservation of soils;
- Maintenance of landscape value;
- Protection of species that are in danger of extinction, vulnerable, rare or insufficiently known.

b) Prevention and decontamination plans

These plans are regulated by Articles 43 to 47 in the Law, and are closely related to the clarification that can be given to a specific zone in terms of the levels of pollution present therein. Problems of pollution in zones declared “latent” should be dealt with via “prevention” plans which, as their name suggests, have the aim of *preventing* the pollution indices established in the environmental quality standards being exceeded. In the case of zones declared “saturated”, the mechanism is the decontamination plan, whose purpose is to decontaminate, i.e. achieve compliance with the levels established in the environmental quality standards, when one or more of these standards has been breached. This is equivalent to saying that legally there is a pollution phenomenon. For that reason these plans are referred to as “decontamination”.

A zone is declared “latent” from the pollution point of view if levels of pollutant concentrations in the air, water or soil, are between 80 and 100% of the respective environmental quality standard, and it is declared “saturated” if one or more environmental quality standards are actually exceeded. Such declaration must be made by Supreme Decree from the General Ministerial Secretariat of the Presidency and should contain a precise determination of the geographical area covered, and be signed by the Minister of Health, if the standards affected are primary ones, or the corresponding sectoral Minister depending on the nature of the secondary norm affected (Art. 43).

A declaration of saturation or latency will be based on measurements carried out or certified by the competent public agencies. This proce-

dure is the responsibility of the COREMA, or else CONAMA where the zone in question covers more than one administrative region of the country.

It is also CONAMA's responsibility to draw up prevention or decontamination plans, following the same stages that exist for approving environmental quality standards. These plans will be issued by Supreme Decree from the General Ministerial Secretariat of the Presidency, signed by the corresponding sectoral Ministers (Art. 44). Once again CONAMA has been provided with a powerful tool for implementing environmental policy, as it has responsibility for declaring of zones to be "latent" or "saturated", as well as for drawing up prevention or decontamination plans. As far as prevention and decontamination plans are concerned, this is a change compared with the current situation, in which polluting activities must themselves present their plans to the authority, in accordance with Supreme Decree N° 185, Ministry of Mining, 1992.

The Law clearly establishes the minimum content of prevention and decontamination plans (Art. 45). These are set out below:

- Relation between total emission levels and the pollution levels to be regulated;
- The time period in which it is expected that planned emission reductions will be achieved;
- Indication of those responsible for fulfillment;
- Identification of authorities in charge of inspection;
- Environmental management instruments to be used to comply with targets;
- Proportion in which emissions by activities responsible for pollutant emissions referred to in the plan must be reduced, which must be equal for all;
- Estimation of the economic and social costs.
- Proposal, where possible, of mechanisms of emission compensation.

A uniform proportional reduction for all emission sources seems to be a bad signal for any voluntary commitments that private entities might enter into, because in principal it benefits those who contaminate most. In reality, abating pollutant emissions by 90% is comparatively more economic and efficient than cutting the final 10%. This means that if the authority has done nothing to prevent the easiest pollution to eliminate, through appropriate regulations, then private entities need do nothing about it. Thus, before applying a decontamination plan which may generate distortions and benefit the most polluting activities, the state is called on to act vigorously to gain approval, application and fulfillment of environmental quality standards.

In areas where a prevention or decontamination plan is being applied, only activities that comply with the standards established therein can be carried on (Art. 46).

The Law enumerates the instruments that can be used in the plans (emission standards, tradable emission permits, emission taxes, tariffs etc.), without setting priorities or preferences. Nevertheless, the content of the plans mentions emissions compensation mechanisms (Art. 47). Then, following the list of regulation instruments it is feasible to use, it expresses the need for a law to establish the nature, forms of allocation, division, duration and other characteristics of tradable emission permits (Art. 48). This allows one to infer that the aim of the Law is to tend towards the use of this type of instrument.

In relation to standards and plans, the issue of special regulations for emergency environmental situations merits special mention, enshrined in Article 49 in the Bill approved by the National Congress, but which had to be eliminated because the Constitutional Tribunal deemed it unconstitutional.

Environmental quality standards must stipulate the levels that give rise to emergency situations. To deal with such situations, the contested norm made it possible to establish, by decree, special regulations of a permanent nature, to be applied automatically when the levels stipulated in an environmental quality standards were reached, and only to be enforced during the period needed to achieve a reduction in the levels giving rise to the application of the measures. In this way the exercise of constitutionally guaranteed rights was being restricted.

In this regard it is worth being clear that all the Bill's regulations imply some degree of restriction on certain constitutional rights (property rights, freedom to work, freedom to carry on any economic activity, freedom of transport), and not only in emergency situations. In such cases a greater possible degree of restriction was established, but this does not mean that the environmental impact assessment system, as well as prevention and decontamination plans, do not restrict those rights by regulating how to exercise them.

Articles 38, 39 and 40 of the Bill originally sent by the Executive were merely a listing of constitutional rights that might be affected in emergency situations, in which specific restrictions were also delegated to be determined by the administrative authority by issuing Supreme Decrees, i.e. through the exercise of regulatory power. From this point of view, the relevant standards only maintain formal consistency with the Constitution, as regards the fact that they use the same words, but they do not comply

with the essence of the the legislature's mandate. The latter had to regulate this issue with enough detail for the administrator only to have to apply what was foreseen in general standards and with legal rank.

Indeed, the specific nature of restrictions on certain constitutional rights, as required by the Political Constitution, does not necessarily translate into an enumeration of rights affected, but it is sufficient to establish precise obligations on the objects of the standard, with a permanent nature, although they may be of occasional application and for limited periods. This means substantive restrictions on constitutional guarantees, which is what is required of the legislature by Article 19 N°8 of the Fundamental Charter.

The same happens when the Law establishes obligations such as undertaking environmental impact studies, or imposes environmental quality standards, or requires management plans, or prevention or decontamination plans. All these instruments, like special regulations in emergency situations, presuppose a restriction of constitutional guarantees without the need to point them out formally. The fundamental point is to establish the concrete obligation in the Law, into which restriction of constitutional guarantees translates, because the Constitution allows the exercise of constitutional rights to be regulated by law, but never by Executive regulatory power.

The precise form the regulated subject would have to adopt to adapt emissions to the level required by the special standard drawn up for this purpose, would always assume that some or all of the following rights would be affected: right of transport and of ownership (use and benefit), right to carry on any economic activity and freedom to work. This limitation on such rights is valid, because the Law itself contemplates this (by imposing the obligation to cut emissions so that the total level of emissions comes down to non-critical levels), thereby complying with requirements imposed by the Constitution in Article 19 N°8, Paragraph 2.

If the regulated subject knows in advance the extent of the obligation (quantity of emissions to be reduced) to which he will be submitted in cases of environmental emergency, as determined in special emission regulations, he can adopt different solutions, and prepare them in advance, in order to comply with the requirements of emergency cases, without this having to lead to a stoppage of his activities or the non-use of assets owned by him. He can use non-polluting vehicles (electric), or bring special decontamination mechanisms into operation, or else turn to non-polluting energy sources or adopt alternative methods, which despite being burdensome, will be less so than bringing operations to a halt. Also one can

imagine emission compensation mechanisms between different emission sources, giving rise to transactions that would make reductions more effective and less costly for society.

In the alternative that was proposed at one time, and which was moderately successful, the Law would establish for every case what the concrete obligation facing regulated subject (cutting emissions) would consist of, as well as how the affected area would be determined, when the requirement would become valid (which would depend on objective conditions pre-defined in the environmental quality standards and not on decisions by the administrative authority), as well as emissions compensation systems, the existence of studies to support the authorities' proposals, and finally, that there would be an opportunity for all interested people, entities or organizations to give their opinions, challenge the authorities' proposals, make suggestions, etc.. It thus avoided giving wide-ranging attributions to administrative authority on matters involving a restriction of constitutional rights, a situation which is only foreseen for exceptional constitutional circumstances.

In this way, the administrative authority would only have had to apply the provisions of this law in situations of emergency, and regulated subjects would have had pre-existing rules known to them at the outset, regarding their obligations in such cases. In synthesis, this involved a similar treatment to the cases of environmental quality standards and prevention and decontamination plans, which, as was mentioned, also meant restrictions on constitutional guarantees, insofar as they regulate the exercise of them.

For its part, the procedure contemplated in Article 49 for approving these special regulations, which was approved and later thrown out by the Constitutional Tribunal, had to adhere to the same stages, mentioned above, for issuing environmental quality standards. It had to be dealt with in a Supreme Decree from the General Ministerial Secretariat of the Presidency and the Ministry of Health, establishing the maximum total emissions that would be permitted during the emergency period, the authorities in charge of the applying regulations and the corresponding obligations for measurement and control. On the basis of total maximum emissions, the special regulations had to stipulate which activities were obliged to reduce their emissions, and by how much.

The Article in question also permitted, but *only when indispensable*, a restriction on the use of polluting vehicles as well as emissions prohibition on activities which cause or could increase environmental pollution. The importance of this proposal lay in the fact that it was intended to

regulate the emissions of activities. However, an insistence on expressly stipulating the possibility of decreeing vehicle restriction, when deemed appropriate by the authority, and issuing a decree for this purpose, rather than the regulation of emissions from mobile sources, was probably the reason that led the Constitutional Tribunal to object to the norm in question.

In reality the Political Constitution is absolutely clear in this respect, when in Article 19 N° 8 it establishes that restriction on the exercise of certain rights for purposes of environmental protection can only be effected by law². Vehicle restriction means a restriction on the exercise of certain constitutionally enshrined rights, and so it is correct that this cannot be invoked by administrative decree. The acceptance of this type of proposal would have given an incorrect signal for enforcing the rule of Law, and a virtual threat to the democratic system due to the precedent it would be setting. In other words, it would give an attribution of enormous transcendence to administrative authority, with effects reaching into other areas of national life, and if used with malicious intent could lead to a repeat of the legal “loopholes” scenario, of painful memory for the Chilean legal order and democracy itself.

If the proposal had confined itself exclusively to trying to regulate the problem of emissions, leaving to private entities their means of complying with the standard, maybe it would have passed the test of constitutionality, and the provision would have meant an obligation of the part of the authorities to define clearly the source classified as polluting or responsible for increasing environmental pollution and therefore obliged to cut its emissions.

3.6 Citizen participation

The participation of citizens in the new environmental order which emerges from the General Environmental Framework Law goes much further than what it is indicated in Paragraph 3, Title II entitled “On Community Participation in the Procedures for Environmental Assessment”, where there is an assurance of informed participation by the organized community in the process of classifying environmental impact studies.

Indeed, and as established in Article 4 of the Law in question, this is a topic covering all normative legislation and which promises to turn into a

² See Julio Lavín V., “Análisis para los casos de emergencia y otras limitaciones a los derechos”, in Working Paper N° 191, “*Discusiones y aportes al proyecto de Ley de Bases del Medio Ambiente*”, Centro de Estudios Públicos, February 1993, pp. 89-111.

huge challenge, now and in the future, for the citizenry in general, as well as for academic and non-governmental organizations concerned with environmental issues, and for business management, in particular. The standard mentioned indicates that it is the state's duty to facilitate citizen participation on matters relating to environmental protection. So citizen participation becomes relevant by making it possible to administer and validate decisions adopted on issues relating to the environment, and in this sense it also constitutes an instrument of environmental management.

This desire on the part of the legislature is materialized by setting up citizen participation in three areas: i) the process of generating standards, plans and regulations of an environmental nature (Art. 32, Paragraph 3; 40, Paragraph 2; and 44, Paragraph 2); ii) participation by the community in the procedures for assessing environmental impact (Arts. 26 to 31); and iii) in the right granted to citizens to bring legal action against possible environmental infringements (Art. 54, Paragraph 2). These three areas will be examined briefly.

- a) Citizen participation in the process of generating norms, plans and regulations of an environmental nature

Competent organizations, both public and private, must be consulted during the processes of: i) generation of environmental standards (Art. 32); ii) generation of emission standards (Art. 40); iii) development of prevention plans (Art. 44), and iv) drawing up decontamination plans (Art. 44).

One aspect that is very interesting to highlight is the appeals procedure enshrined in Paragraph 7 Title 2 of the Law (Art. 50), wherein any person may appeal to a professionally qualified judge, within a 30-day period counted from the date of publication of the corresponding law in the Official Gazette (*Diario Oficial*), against decrees establishing standards, plans and special regulations, or declaring zones to be latent or saturated, considering that such decrees do not adhere to this Law and are damaging to it.

On the other hand, the National Consultative Council and the Regional Consultative Councils have to express opinions on legislative bills and supreme decrees that set environmental quality standards, as well as on norms relating to preservation of nature and conservation of environmental heritage, prevention or decontamination plans, special emissions regulations and emissions standards that get submitted to them for consideration, as provided in Article 79. These councils include business representatives, entrepreneurs, workers, environmental NGOs, independent academic cen-

ters and universities (Arts. 78 and 82), so they also represent an opportunity for participation by the organized community.

b) Citizen participation in the Environmental Impact Assessment System

Article 14, letter d) of the Law, provides that regulation of environmental impact assessment should include the mode of participation by citizen organizations in the of Environmental Impact Assessment System (EIA).

The environmental commissions, COREMA and CONAMA, have to establish mechanisms which ensure informed participation by the organized community in the process classifying environmental impact studies (EIA) (Art. 26). For this purpose the proponent has to publish an extract of the EIA in the Official Gazette and in a newspaper or weekly magazine of regional or national circulation, as appropriate (Art. 27). In addition, citizen organizations can inform themselves of the content of environmental impact studies, apart from information needed to protect inventions or patentable procedures (Art. 28). Citizen organizations and persons affected can make observations to the EIA during a 60-day period (Art. 29).

In turn, the environmental commissions —COREMA or CONAMA as appropriate— in justifying the resolution they issue on an environmental impact study, whether favorable or not, have to weigh up all observations they receive, and notify those making them. If observations are not duly considered, those presenting them can appeal to higher authority within 15 days, and the latter has to give a ruling on the appeal in the space of 30 days (Art.29). It should be kept in mind that opinions given are not binding on the authority, but should be taken into consideration for the purpose of making its decision.

c) Right of citizens to take legal action against environmental infringements

Of course, it is should be kept in mind that in order to gain compensation for damages caused by polluting conduct contrary to the ruling standards, those directly affected may make an ordinary claim for damages (Art. 53).

Meanwhile, in order to obtain restoration of the damaged environment, certain persons or institutions can table an environmental lawsuit in the courts, against the presumed infractor (Art. 54), subject to fulfillment of certain requirements, as will be seen below in the next chapter.

IV. Responsibility for environmental damage

4.1 General substantive rules

Responsibility for environmental damage is dealt with in Title III of the Law, divided into two paragraphs: the first refers to “Environmental Damage”, a concept analyzed earlier in this paper, and a second to “Procedures” covered in Articles 51 through 63.

Responsibility for environmental damage is a significant legal innovation in this Law. It arises from the occurrence of the latter concept analyzed above, which gives rise to an environmental lawsuit aimed at obtaining repair of the damaged environment (Art. 53). Article 3 of the Law contained in Title I of “General Provisions”, is also basic to this question, as it enshrines the general rule on the issue of responsibility, establishing that “anyone who culpably or deliberately damages the environment” will be obliged to repair it and provide compensation in accordance with the law. Consequently, to make effective a person’s responsibility regarding damage he is alleged to have caused, the conditions established in the general rules of responsibility existing in Chile must exist, i.e. it requires the existence of intention (bad faith) or blame (negligence) (Arts. 3 and 51).

The Chamber of Deputies approved the intention of establishing objective responsibility on environmental issues, i.e. that the mere occurrence of damage was responded to, with no allusion to intentionality of behavior on the part of the presumed responsible entity, contrary to what was proposed by the Executive and approved by the Senate in its first constitutional reading. Finally, the Mixed Commission which settles differences between the Chamber of Deputies and the Senate, re-established what the latter had approved and upheld “subjective” responsibility, the general rule that exists in the Chilean legal order.

It should be mentioned that objective responsibility is used on questions that are totally and perfectly regulated, where the occurrence of damage implies that there has been negligence or culpability, at least, in carrying on this regulated activity. In other words, damage can not occur without infringement of the regulatory standards of the activity in question. Thus, negligence or premeditation are implicit when damage occurs. For that reason the mere occurrence of damage is responded to. Strictly speaking, even in the case of objective responsibility, “intentionality” on the part of the responsible subject is present. On environmental issues we are, for the moment, a long way from this reality, so to enshrine objective responsibility might have led to injustices.

In principle the repair of environmental damage is different from ordinary compensation for damage and loss, which can be demanded independently in accordance with the general rules of the Civil Code. The Law is applied for those suffering damage or loss due to a premeditated or negligent action on the part of another party (Art. 53). However, in cases where special laws have enshrined responsibility for environmental damage, those laws are applied, as they take precedence over the legislation being analyzed (Art. 51, Paragraph 2).

Presumptions are established in favor of the plaintiff, i.e. there is a legal presumption of responsibility on the part of the defendant (intentionality or culpability). Legal presumption admits the possibility of proof to the contrary by the defendant. The legal effect lies in the fact that it inverts the burden of proof, with the defendant having to prove that he operated diligently and in good faith. The facts giving rise to the presumption that the defendant is responsible for the environmental damage are as follows (Art. 52):

- infringement of environmental quality standards;
- infringement of emission standards,
- infringement of prevention or decontamination plans;
- infringement of special regulations for cases of environmental emergency, which now have to be established by law;
- infringement of standards on protection, preservation or conservation of the environment as established by law.

However, compensation can only proceed when a cause-and-effect relation can be shown between the infringement and the damage caused (Art. 52, Paragraph 2). This means the relation of causality is not subject to presumption. Consequently, if the causal relation between the infringement and the damage is not proven, it should only be subject to the sanctions the law establishes for infringement of the standards mentioned above. This means that there can be infringement of the standards without there being damage.

4.2 Procedures and competent judge

The parties to an “environmental lawsuit” to obtain repair of the environment are indicated in Article 54 and are as follows:

- natural or legal persons, public or private, who have suffered damage or loss;
- municipalities for situations occurring in their boroughs,

- the State through the State Defense Council;
- any person through their respective municipality.

In the latter case certain formalities and requirements need to be complied with (Art. 54, Paragraph 2):

- The plaintiff must provide technical data to support the claim.
- If the municipality decides to make a claim, it must be done in 45 days.
- If the municipality decides not to make a claim, it must issue a justified resolution before 45 days have elapsed.
- If the municipality does not take a decision, it becomes collectively responsible for the losses caused to the plaintiff, arising from the environmental damage being claimed.

The competent judge is the professionally qualified civil law judge from the affected party's residential district, or from where the event occurred, at the choice of the latter (Art. 60), and the procedure is by indictment (Art. 61, Paragraph 1), which can be changed to ordinary jurisdiction, in accordance with the general rules of Article 681 of the Code of Civil Proceedings. At a certain moment, during the processing of the law, it was proposed not to apply this Article 681. This would have been an mistake and a lack of realism.

Investigative proceedings, which according to the Law last 30 days and are basically oral (or should be), may be suitable for resolving simple disputes. On environmental issues the difficulties or differences to be settled may be important, in the which case it is an illusion to imagine a brief hearing resolving them. Leaving open the possibility, if the case warrants it, to switch to an ordinary trial was a sensible decision on the part of the legislature (Art. 61, final paragraph).

As regards proof, the Law accepts any means and specially rules on expert appraisal (Art. 61, Paragraph 2). This is the most important means of proof in hearings and disputes of an environmental type, especially when it is matter of establishing a causal relation between the defendant's actions and the alleged damage. The following special rules govern expert appraisal:

- They may be named by the parties through mutual agreement;
- If there is no agreement the judge names one from a register kept in the respective Court of Appeals, in accordance with a regulation to be issued in this respect;

- The parties may name additional experts for all phases of the study, and their observations have to be taken into account in the expert report;
- The expert report has to be presented in as many copies as there are parties in the hearing;
- The parties have 15 days to make observations.

The appreciation of the proof (Art. 62, Paragraph 1) will be made according to rules of healthy criticism. This means that the appreciation of the proof submitted, which the judge has to make in order to establish the events in question, does not have to adhere to the rules established in the Code of Civil Proceedings, but the judge must weigh them up according to common sense, in a rational way. There is here a call to subjectivity on the part of the judge, but he may not be arbitrary.

On the question of recourse (Art. 62, Paragraphs 2 and 3), appeal is limited to resolutions of great importance, with a preference for judicial review without suspension of the process. However, nothing justified preventing the recourse of annulment on merit, against sentences handed down for environmental damage, as was once proposed in the text agreed by the Chamber of Deputies; still less when it deals with a new issue being handed to the law courts to rule on, and where, as has been shown, people's fundamental rights are at stake.

The prescription of environmental action and civil actions becomes effective after five years counted from the clear manifestation of the damage, as provided by Article 63 of Law. With this provision, the rights of presumed affected parties are adequately safeguarded, while the five-year prescription period does not run until damage has manifested itself in a clear way. In other words, the signs of damage must be manifested unequivocally, and from that moment the period of prescription begins. This assumes that if the damage takes thirty years to manifest itself clearly, the affected party will have five further years to bring an action. Something that could be a point of discussion is the question of what should be considered clear manifestation of the damage. Of course this alludes to the possibility that the affected party may detect it himself, without necessarily having undertaken complicated studies to permanently verify it; otherwise, the evidence may be provided by sophisticated examination and analysis, in cases where the damage is not appreciable by the senses, but in any case there must be an objective fact to allow the prescription period to start to run.

The Chamber of Deputies proposed a 30-year prescription term, measured from the moment at which the actor noticed the damage. Such a

regulation would have meant that environmental actions were virtually non-prescribable, with a possible sequel of legal insecurity stretching into the future, generating total and permanent uncertainty due to the extension of the period, made worse by the lack of definition regarding its starting date. Indeed, it is difficult to see how the existence of a subjective fact such as “taking cognizance” of the damage on the part of the actor could ever have been proved. This becomes important in cases of transfer of ownership of productive activities, because along with a firm’s assets and liabilities a purchaser runs the risk of acquiring non-quantifiable environmental liability. The way in which the Law treats the prescription limits makes it possible to quantify these liabilities and provide the necessary legal security which every prescription rule seeks.

4.3 Legal consequences

As regards legal consequences for infractors and those responsible for environmental damage, in the first place there are sanctions contemplated in Article 56 of the Law offering a wide range to the judge. Possible sanctions are:

- Warning
- Fines of up to 1,000 UTM;
- Temporary or definitive shutdown.

The sanction that is imposed depends on certain conditions established in Article 58 that the judge must weigh up, relating to the following aspects:

- The seriousness of the infringement in relation to the levels at which the environmental regulations have been exceeded;
- Repeat offences;
- Economic capacity of the offender;
- Compliance with commitments contracted in a EID or in an EIA.

The judge may also order immediate suspension of activities, depending on the seriousness of the infringement, or else grant offender a time period to adjust. It is important for the judge to have wide spectrum of sanctions to apply, as this will allow him to judge each situation in particular with precision. Very strong sanctions, accompanied by rigidity as to conditions of application, may provoke *de facto* inapplicability of the law, due to disproportionality. This, of course, would be very negative for the

effectiveness of the Law and could bring it into disrepute. The judge has been given objective parameters for judging cases, and wide room for maneuver in applying sanctions appropriate to the circumstances.

The application of sanctions under this Law excludes the possibility of applying sanctions against the offender for the same facts under other legislation (the Sanitary Code, for example). This rule, contained in Article 56, final paragraph, is crucial for clarifying the judge's task, considering that special laws, which might overlap with the provisions of the Law in question, are not rescinded.

The legal consequences of a judicial ruling against the defendant will consist of the obligation to repair damage caused to the environment or one of its components. If it is a question that exclusively affects a private legal asset, the effect of the repair will be confused with the act of compensation for the damage caused to the property of the directly affected party. On the other hand, if it is a question of public-use assets being affected, the environment or its damaged component will have to be repaired, notwithstanding any compensations directly affected private individuals may have the right to claim.

V. Institutional framework for the environment

In its final Title the Law creates the National Commission for the Environment (CONAMA) as a public service, functionally decentralized with legal identity and its own assets, subject to supervision by the President of the Republic through the General Ministerial Secretariat of the Presidency (Art. 69).

The significance of CONAMA being responsible to the President of Republic through the General Ministerial Secretariat of the Presidency, should be noted, because this is a ministry which by its nature has two comparative advantages over the other sectoral ministries: its multisectoral nature and its closeness to the President of the Republic.

These characteristics are crucial, because the environmental issues and problems associated with it cross all sectors of the country horizontally: i.e. they are multisectoral, and also because this very characteristic requires the collaboration of ministries and public services which have and conserve their attributions, functions and competencies relating to components of the environment (health, agriculture, public works, mining, economics, etc.). This imposes a need for the ministry in charge of environmental issues to have a global, non-sectoral outlook and to be able to rely on a

powerful or strong convening power to achieve an effective and authentic coordination of these issues. It can be concluded that the legislature's choice was appropriate and convenient for these purposes.

The organs of CONAMA comprise a Directive Council, an Executive Board, a Consultative Council and the Regional Environmental Commissions (COREMA) (Art. 69). Its principal attributions, as enshrined in Article 70 of the Law, include the following:

- Propose environmental policies to the President of the Republic;
- Maintain a public national system of environmental information, regionally detailed,
- Administer the environmental impact assessment system;
- Coordinate the process of generating environmental quality standards and their programs of compliance;
- Finance projects and activities aimed at environmental protection, preservation of nature and conservation of environmental heritage;

The Directive Council of CONAMA is its most important organ and is made up of the General Ministerial Secretariat of the Presidency (President of CONAMA), and Ministers of Economics, Development and Reconstruction, Public Works, Agriculture, National Heritage, Health, Mining, Housing and Urban Development, Transport and Telecommunications and Planning and Cooperation (Art. 71).

The CONAMA President is substituted by the minister succeeding him in the order indicated above. Its quorum for being in session is five members.

Its principal attributions and functions (Art. 72) are the following:

- Exercise and comply with the functions indicated above;
- Propose to the President of the Republic legislative bills and administrative acts on environmental issues;
- Ensure environmental coordination between public agencies with environmental competencies;
- Promote coordination of the work of supervision and control of the various public and municipal agencies;
- Approve the general bases for the administration of resources destined to financing projects and activities aimed at environmental protection, preservation of nature and the conservation of environmental heritage;
- Approve the annual program of activities and CONAMA's budgetary bill;
- Hear appeals on the EIA issues.

The executive board is made up of an Executive Director, head of the service and legal representative of CONAMA, appointed by the President of the Republic, and a staff of 62 people (including the Executive Director) (Art. 88).

Its principal attributions and functions are established in Article 76 of the Law, and include requiring state agencies to provide the information and data it needs in the sphere of their respective competencies, proposing an annual program of activities to the Directive Council, appointing Regional Directors of the COREMAs from groups of five put forward by the Regional Government, administering resources for financing projects and activities aimed at environmental protection, preservation of nature and conservation of environmental heritage, complying with agreements and instructions of the Directive Council and others relating to the internal management and administration of CONAMA.

The Consultative Council, an eminently advisory body, has twelve members (Art. 78):

- The Minister, President of CONAMA;
- Two scientists out of five proposed in by the Council of Rectors;
- Two representatives of non-Governmental non-profit-making organizations whose aim is environmental protection;
- Two representatives of independent academic centers who study or are concerned with environmental issues;
- Two representatives of the business world, out of five proposed by the most representative business organization in the country;
- Two worker representatives, out of five proposed by the most representative union organization in the country;
- One representative of the President of the Republic.

The President of the Republic appoints councillors for two-year terms, renewable for a single further term. Their functions will be governed by a regulation.

The attributions and functions of this Consultative Council (Art. 79) are very important, particularly in view of the social groupings which are represented. According to the Law this Council should:

- Express opinions on legislative bills and supreme decrees setting environmental standards, as well as rules for preservation of nature and conservation of environmental heritage, prevention and decontamination plans, special emission regulations and emission standards, which are submitted for their consideration;

- Deal with consultations formulated by the Directive Council;
- Other functions committed to them by the Directive Council;
- Give its opinion on the selection of projects to be financed by the Environmental Protection Fund when the amount exceeds 500 UF (Art. 7);
- Other functions as may be indicated in the Law (there are no more for the moment).

The Regional Environmental Commissions (COREMAs) are regulated in Articles 80 to 86 of Law N°19.300. Their organs are the Regional Environmental Commission (COREMA), the Regional Director of the National Environmental Commission, the Technical Committee and the Regional Environment Consultative Council.

A COREMA is composed of a variable number of members depending on the region in question:

- Regional *Intendente* presiding;
- Regional Governors;
- Ministerial Secretary for Economics, Development and Reconstruction;
- Ministerial Secretary for Public Works;
- Ministerial Secretary for Agriculture;
- Ministerial Secretary for National Heritage;
- Ministerial Secretary for Health,
- Ministerial Secretary for Mining;
- Ministerial Secretary for Housing and Urban Development
- Ministerial Secretary for Transport and Telecommunications;
- Ministerial Secretary for Planning and Cooperation;
- Four regional councillors elected by the respective council;
- Regional Director of the Environment.

Its principal attributions and functions consist of fulfilling the functions that the Law determines, coordinating environmental management at the regional level, establishing systems ensuring the participation by municipalities and social organizations of the region in all issues relating to the environment.

The Technical Committee, in turn, is composed of the following members:

- The Regional Director of the Environment, presiding;
- Regional Directors of Public Services with environmental competencies (Health, Agriculture, Geology and Mining Service, Water, CONAF, etc.);
- Maritime Governor.

Finally the Regional Consultative Councils, the advisory organs of the COREMAs have nine members:

- Two scientists proposed by universities or professional institutes in the region;
- Two representatives of non-governmental non-profit-making organizations whose purpose is protecting or studying the environment;
- Two representatives of the business world, proposed by the most representative business organization in the region;
- Two workers representatives proposed by the most representative union organization in the region;
- One representative of the regional governor or *Intendente*.

The *Intendente* appoints councillors for two-year terms, renewable for a single further period. Their function is governed by a regulation. Their attributions and functions are those of dealing with consultations which are presented to them by the COREMA and other functions which the Law may assign (there are none).

VI. Conclusión

By way of conclusion it can be said that Law N°19.300 or General Environmental Framework Law, constitutes a reasonable and balanced starting point for ordering and generating the country's environmental norms. This leaves another stage, just as difficult as the previous one: applying the Law and making it operate in practice, as well as generating complementary regulations, especially those of the EIA system, whose standards will not come into force until the pertinent regulation is approved, and promoting the passage of other special legislation, the urgent need for which is already being noticed. The latter is crucial for the promotion and security of new investments, in the same way that tax or labor legislation is, for example.

The Law analyzed here signifies real modernization for the country, in the same way as social security reform, or the creation of the private health system, were in their time,. However, the regulation of environmental issues will need continuous improvement with the introduction of market instruments in order to achieve a more efficient and concrete improvement in support of the environment. ☐