Borrowing from foreign models in policy reforms: Reforms to Chile's competition laws

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Abstract

The literatures on diffusion and policy transfer suggest that policymakers replicate foreign models in public policymaking for various reasons, including coercion from powerful countries and international organizations, competition for trade and investment, and learning from or imitation of other countries. In this paper I examine the use of foreign models in the reforms to the competition (antitrust) law in Chile. Chile adopted a law to protect competition in 1959, and reformed this law in 1973, 2003, 2009 and 2016. This paper examines how Chilean policymakers learnt from foreign models of antitrust in the last three of these reforms, and explores the factors that explain the variation in how foreign models figured in domestic policymaking processes.

Introduction

Competition (antitrust) laws seek to regulate competition in the market place, and typically include provisions that prohibit cartels and abuses of dominant position, and that allow for review of mergers for their anticompetitive effects. Since the early 1990s, competition laws spread to more than a hundred and thirty jurisdictions, a majority of which are developing or emerging countries (Aydin and Büthe 2016)(Aydin and Büthe 2016). Many of these jurisdictions, after adopting competition laws for the first time in this period, also went on to reform their laws multiple times. These reforms have included the establishment of specialized competition courts, the introduction of merger notification systems, higher administrative fines and greater investigative powers for the competition agency, and various measures to combat cartels, such as leniency programs and the possibility of imposing criminal sanctions against cartel participants.

Various domestic factors may explain why policymakers reform existing policies. A political or economic crisis, dissatisfaction with existing policies, or the influence of new ideas may lead policymakers to consider reforms. Frequently, even if the motivation for reforms to the competition law is domestic (Aydin 2012a, 2016), policymakers examine, borrow from or imitate foreign models and the recommendations of international organizations (IOs) in the design of reforms. This paper examines how and why policymakers learn from or imitate foreign models in reforming their competition laws.

Foreign models can influence policymaking in a country through various mechanisms (Simmons, Dobbin, and Garrett 2006). For instance, external pressures from powerful countries and international financial institutions can lead policymakers to adopt a particular policy model. Policymakers may also adopt foreign models in response to policy changes in other countries with whom they compete in trade or investment. They may also learn from the experience of other countries or from international organizations, or may imitate international models that become fashionable. I argue that in competition law reforms, coercion and competition are likely not to be the mechanisms that drive borrowing from foreign models. Instead, I explore learning and imitation as plausible mechanisms explaining the influence (or the absence thereof) of foreign models in policy reform. Furthermore, I seek to distinguish between learning and emulation. Whereas the first involves a purposive exploration of policy alternatives tried in other countries, and a reflection of the causal relationship between the policy and the outcomes, the second is motivated by a desire for credibility and status, and does not involve a reflection on the relationship between policies and outcomes (Meseguer 2005).

Through case studies of reforms to the competition law in Chile in 2003, 2009 and 2016, I examine how and from whom policymakers borrow when undertaking reforms in this policy area. Chile adopted a law to protect competition in 1959, and reformed this law in 1973, 2003, 2009 and 2016. I focus on the last three reforms, all undertaken under democratic and market economy conditions, to hold these factors constant across the reform episodes. Even though the empirical analysis is focused on a single country, the paper takes advantage of multiple episodes of reform to the competition law in Chile while at the same time controlling for country specific factors. I use process tracing technique to examine the casual mechanisms behind foreign borrowing in the reform processes, relying on official reports of Chilean and international organizations, interviews with key actors, and congressional debates leading to the reform processes.

The Chilean case is useful to analyze because even though it is a relatively early adopter of competition law, its experience is typical of more recent adopters of competition law in various respects, and thus the case study can help us draw broader lessons about borrowing from foreign models in this policy area. Its experience is representative in the sense that it was a developing country with little expertise in competition law at the time of the law's adoption (and for some decades afterwards), and undertook many reforms to the law, which has also been the case in many later adopters (Aydin and Büthe 2016). Chile's experience is also representative in terms of the social and economic conditions of the country, such as a history of high state involvement in the economy (which ended with the neoliberal reforms in the 1970s), and a high degree of inequality (which continues to this day), conditions that generally make it difficult for competition law to flourish. For these reasons I argue that analyzing the Chilean case can provide us with generalizable insights into competition law reforms in developing and emerging economies.

Analyzing reforms to competition laws can generate broader insights about borrowing from foreign models. Many developing countries adopted competition laws with little knowledge of and experience with it, and many of them ended up reforming their laws multiple times, with the objective of making them more effective, or adapting them to the changing conditions of their economies. Given the multiple episodes of reform in many countries, there is potentially much room to borrow from foreign models in competition law reforms, and therefore the policy area is fruitful for exploring the mechanisms of foreign borrowing in policy reforms.

Furthermore, competition law is an area in which a global regime has not emerged, despite various attempts to generate one. This means that there is no structural condition pressuring or guiding policymakers to adopt a particular policy model. Instead, various templates are on offer for national policymakers to learn from, for instance from more established competition laws such as those of the United States and the EU, recommendations of international organizations such as the United Nations Conference on Trade and Development (UNCTAD), or the Organization for Economic Cooperation and Development (OECD) and more recently transnational regulatory networks such as the International Competition Network (ICN). Such an international context allows national policymakers to pick and choose in borrowing from abroad, which allows us to explore why they choose to learn from one source rather than another.

In the remainder of the paper, I first review the literature on the role of foreign models in policymaking and derive some hypotheses about how and why policymakers utilize foreign models in competition law reforms. The following section briefly discusses the history of

competition law in Chile from 1959-2002, and then examines in more detail the three reform episodes. The final section concludes with a discussion of preliminary findings and the roadmap for the rest of the project.

The Influence of Foreign Models in Policymaking

There is a large literature in sociology and political science on how foreign models influence policymaking. As synthetized by Simmons, Dobbin and Garrett (2006), foreign models may influence policymaking in a country through various mechanisms, such as pressures from powerful countries and international organizations, exigencies of economic competition for trade and investment, learning from successful or similar countries, and emulation of other countries. The literature on policy transfer likewise describes a range of possible mechanisms of transfer, distinguishing between more or less coercive forms (Dolowitz and Marsh 2000).

In competition law reforms, coercion and competition are unlikely to be sources of borrowing from foreign models. Powerful countries or international organizations may have an interest in spreading competition law and may do so through using conditionality of trade agreements or foreign aid (Aydin 2012b), but they are unlikely to be as concerned about the particular reforms of competition law that a country adopts so as to try and coerce others to influence their reform choices. Likewise, competition for trade and investment is unlikely to motivate a country to reform its competition law, because other factors such as infrastructure, investment environment, availability of tax breaks and subsidies are much more important when countries compete for trade and investment than the particular model of competition law that a country adopts (Fox 2001). Therefore, the paper tentatively rules out coercion and competition as reasons for borrowing from foreign models in competition law reforms, and focuses instead on more voluntary forms of policy diffusion such as learning and emulation as potential mechanisms.

Following Levy I define learning as the "a change of beliefs (or the degree of confidence in one's beliefs) or the development of new beliefs, skills, or procedures as a result of the observation and interpretation of experience" (Levy 1994, 283). This definition does not imply that learning always changes actual behavior; "whether learning shapes political action and policymaking therefore remains to be investigated empirically" (Weyland 2004, 5). In particular, I focus on why policymakers study foreign models in the first place, which foreign models they focus on, and in what ways they learn from them. In the case of emulation, I similarly explore the reasons and sources for emulation. Following Gilardi, in this paper I define emulation as "the process whereby policies diffuse because of their normative and socially constructed properties instead of their objective characteristics" (Gilardi 2013, 466). In the analysis, I put national policymakers as learners or imitators at the center, rather than taking them as passive subjects of other actors' teaching (Duina and Nedergaard 2010).

Much of the rationalist learning models posit that learning starts with the identification of a policy problem (Dolowitz and Marsh 2000, 14), however, more recent accounts have emphasized that learning might also be motivated by a desire to do things better, in the absence of a pressing crisis or problem (Dolowitz 2009, 319-320). Actors may also learn in non-crisis times through their participation in international and regional organizations and transnational networks, where they interact with their peers regularly, and this learning might be used in crisis times as an input for policy reforms.

According to the rationalist model, once policymakers identify a policy problem, they scan available information about the outcomes of policies in other countries, and revise their prior beliefs on the basis of this information (Meseguer 2005, 74). Actors are unbiased as to the source of

information, that is, they take into account information coming from different sources in exactly the same way (Meseguer 2005, 74). They use information about the outcome of policies implemented elsewhere to design policies to resolve the policy crisis at hand. Following the rationalist learning model, one could expect policymakers to learn especially from foreign models that have had successful outcomes. Scholars exploring the influence of successful foreign models have found evidence of learning from success. For instance, Meseguer (2015) demonstrates that governments in Latin America learnt from the growth results of other countries' privatization decisions, and made their decisions to privatize in part based on how other reformers and non-reformers performed. Elkins, Guzman and Simmons (2006) demonstrate that countries are more likely to sign Bilateral Investment Treaties if other countries that have signed such treaties have had a better record of attracting foreign investment. Linos (2013) shows that countries were more likely to adopt universal healthcare regimes of the NHS type if there was evidence that such regimes were successful.

Others argue, however, that rational learning is quite rare in the real world, and that learning will most likely be boundedly rational (Lee and Strang 2006; Weyland 2004, 5). Research has shown that policymakers are frequently biased in selecting their sources of information, use cognitive shortcuts in interpreting evidence, and may draw incomplete or invalid inferences from the evidence (Weyland 2004, 5; Lee and Strang 2006). When it comes to the sources of learning, arguments emphasizing bounded rationality lead us to expect policymakers to learn from countries perceived as "high status," and countries with whom they share economic, political and cultural characteristics, historical backgrounds and needs (Weyland 2004, 11). Policymakers may also learn from international organizations (IOs), which enhance the "availability" of a certain policy model for those looking for solutions, especially if a single, unified international model has emerged in a policy area (Linos 2013).

In a different departure from the rational learning model, Linos argues that politicians borrow from foreign models to legitimize their preferred policy solutions in the eyes of the public, and they therefore tend to borrow from countries that are disproportionately familiar to voters, that is, proximate countries heavily covered in the media (2013, 3). For instance, she demonstrates that policymakers in Southern Europe were more likely to learn from "rich and familiar" European countries in social policy reforms, even when domestic conditions in the adopting country were not similar enough to warrant such lesson drawing (2013, 11).

Based on this review of the literature, I will explore the following hypotheses. First, with respect to the international context, if there is a clear single international model promoted by international organizations and adopted by many countries in a policy area, this model is likely to have strong influence on reformers. If, on the other hand, there is a diversity of models in the international arena, backed by different IOs or regional organizations, and adopted by different states, policymakers will have more options to choose from, and therefore the influence of one particular model will be weaker.

Second, if learning follows the rational model, we would expect policymakers to study successful cases most intensely in the reform processes. If learning follows sociological or “bounded rationality” models, we would expect policymakers to study more intensely policy solutions from geographically and/or socially proximate countries, or countries considered "high status" which receive disproportionate public attention in the country.

Another objective of the paper is to distinguish between learning and emulation. The distinction between the two processes is theoretically clear. According to Meseguer (2005, 73), "the drive behind emulation is not so much problem solving as the search for credibility, status, or simple conformity with international trends." Moreover, learning entails a reflection on causal paths

leading from policies tried elsewhere and their outcomes, whereas emulation does not (Meseguer 2005, 73). Emulators may adopt policies during a norm cascade in search for legitimacy and without much concern for how the adopted policies will work in their context (Finnemore and Sikkink 1998; Kelley 2008).

In empirical research, emulation is frequently analyzed by exploring how the sheer number of countries that adopt a particular policy have influenced the decisions of other countries to adopt the same policy (Levi-Faur 2005). The problem with this is that "the gap between the indicator and the underlying concept is large, so that the interpretation of the measure remains ambiguous," resulting in the same indicator being interpreted as a measure of learning, competition or imitation in different studies (Gilardi 2013, 468). Moreover, quantitative studies most of the time do not test the causal mechanisms behind emulation, and therefore we do need detailed, qualitative analyses of how policies might diffuse through emulation.

In order to distinguish between emulation and learning, I focus on the public debate around the policy reforms. I would expect frequent references to foreign models and how they address the policy problem in debates in the congress and in the media, if learning is the dominant model of foreign borrowing in this area. If learning is the main mechanism of diffusion rather than emulation, I would expect the discussion preceding policy reform and the design of adopted policies to reflect a concern about the fit of the foreign template to local conditions.

Competition law and its reform in Chile

Chile adopted its first competition law in 1959 following the recommendation of the Klein-Saks Mission, a United States consultancy hired by the Chilean government to help in its efforts to combat inflation (Bernedo 2013, 34). The law defined actions and agreements that limit competition as civil and criminal violations, and established the Antimonopoly Commission to investigate and sanction infringements. A law passed in 1963 increased the Commission's powers and created the position of the National Economic Prosecutor.

From 1959 to 1973, when it was replaced, the Antimonopoly Commission investigated around 120 cases (see Bernedo 2013, 52), and was involved in some controversial cases, such as bank nationalizations during the left-wing government of Unidad Popular. Nonetheless, the implementation of the law remained limited during this time due to high state involvement in the economy and the lack of political will to implement the competition law. The Antimonopoly Commission and the National Economic Prosecutor's Office (NEPO) did not have the economic and administrative resources, or autonomy from the executive to implement the law effectively (Illanes, 1965 cited in Bernedo, 2013, 44–45).

The military junta that took power in 1973 enacted a new competition law to replace the 1959 law. The junta was advised by a group of economic advisors who had obtained graduate degrees at the University of Chicago under the guidance of monetarist economists, and who came to be known as the Chicago Boys (Silva 1996). Some of these economists had devised the economic program of the right wing candidate in the 1970 elections, and some had been meeting regularly in what came to be known as the "Monday Club" during the left-wing government of Unidad Popular (1970-73) in opposition to the economic policies of the government. During these meetings, they devised an economic program known as "the Brick" to guide the future government of Chile, which followed a monetarist line. The Brick suggests "a firm policy of anti-monopolies" to break the power of strong economic groups that have come to behave against the general interest, among other measures such as liberalization of trade (El Ladrillo 1973, 47).

The law adopted under military rule did not change the content of the 1959 law, but introduced new enforcement institutions. It established a central and regional preventive commissions with a consultative character that would answer questions regarding competition law, and had the power to issue orders to temporarily stop anti-competitive practices. The law also established a resolutive commission based in Santiago that would decide on the cases investigated by the NEPO, and impose sanctions in the case of infringements. The members of the preventive and resolutive commissions served part-time, and did not receive compensation.

The changing economic conditions of the country allowed for a more active implementation of the law, nonetheless, over time the institutional structure became problematic. The fact that the members of the preventive and resolutive commissions were part-time and not compensated financially for their work meant that institutions remained with limited resources, effectiveness and power (Bernedo 2013, 145). Implementation of the law depended too much on the National Economic Prosecutor, which meant that it could be very active under enthusiastic prosecutors and less so under others. The strength of the Prosecutor's Office, which was responsible for investigation of the cases and whose resources and powers were increased with a law in 1999, and the weakness of the Resolutive Commission, which decided on the cases, also raised concerns in business circles about due process because it tilted the balance in favor of the prosecutor (Bernedo 2013, 146-7). Moreover, the Resolutive Commission did not even have its own office (it met in the offices of the NEPO once a week), which added to the concerns about its independence and objectivity. These concerns led many to call for reforms to modernize and professionalize the competition regime (Bernedo 2013, 146-150).

The 2003 Reform

In the late 1990s, voices calling for a reform of the competition law, especially of the institutional structure for implementation, became stronger. A report by the Presidential Commission on the Modernization of the Regulatory Institutions of the State suggested the creation of a competition commission to investigate cases, whose decisions would be subject to appeal in a specialized tribunal (Agüero 2016, 128). An influential former National Economic Prosecutor recommended separating the work of the NEPO from that of the commissions, and various academics and former members of the preventive and resolutive commissions suggested the idea of a specialized tribunal for competition matters (Bernedo 2013, 148). Libertad y Desarrollo, a conservative think tank, proposed the establishment of a specialized tribunal with permanent judges made up of economists and lawyers for competition matters to counterbalance the power of the NEPO that was strengthened with the 1999 reform. According to Agüero, a growing consensus emerged among economists at the time on the need to establish an independent tribunal (2016, 128). One of the most powerful business associations, SOFOFA, joined the call for a reform of the competition regime, and the government and SOFOFA in 2002 agreed on a growth agenda (Agenda Pro Crecimiento) that included the creation of an independent and specialized competition tribunal among other reforms that focused on revamping the Chilean economy (SOFOFA 2002).

The president initiated the legislative process for the creation of a tribunal in May 2002, and the law was adopted by the Chilean congress in November 2003. The new law replaced the preventive commissions and the resolutive commission with the Tribunal for the Defense of Free Competition, a specialized competition court that decides on competition cases brought to it by the NEPO and private parties. The Tribunal is composed of three lawyers and two economists, who are selected by the President of the Republic and the board of the Central Bank. Its decisions can be reviewed by the Supreme Court. The reform maintained the NEPO as the body that investigates infringements and presents cases to the Tribunal (Bernedo 2013, 152).

The 2003 reform also made some substantive changes to the law. It eliminated criminal sanctions for infringements of the competition law. Although a small number of cases had been criminally prosecuted under the previous system, none of them had resulted in conviction due to the high standards of proof in criminal proceedings (Bernedo 2013, 46, 164). To ensure deterrent sanctions, the cap on monetary fines was raised. The 2003 reform also allowed for the possibility for affected consumers, the National Consumer Protection Agency (Servicio Nacional del Consumidor), or consumer associations to bring cases to ordinary civil courts to claim compensatory damages in competition cases, which, if awarded frequently by the courts, would add to the deterrent effect of the fines.

All available evidence suggests that the motivations for the 2003 reform were domestic. First of all, many experts, economic actors and the government had identified important problems in the existing institutional setup. One of the most important issues in the eyes of the business sector was that the NEPO had been strengthened with the 1999 reforms, and a strong adjudicative body was needed to balance the NEPO's powers and assure due process in competition cases. Furthermore, a sense of crisis arose in the system in the early 2000s because the National Economic Prosecutor resigned in 2001, and one of the members of the Resolutive Commission in 2002. These resignations were interpreted to be due to political interference with the agencies' work (Bernedo 2013, 158, 161).

There is also little evidence that policymakers analyzed or borrowed from foreign models during the reform process. President's message to the Congress that accompanied the draft of the reform, which presents a justification for the reform, only makes one reference to "global experience," in vague terms and only on the elimination of criminal sanctions for the infringements of competition law (Lagos 2002, 12). It makes reference to the changing structure of the Chilean economy and its insertion to the world economy, and how these make stronger institutions necessary, but only in these vague terms (Lagos 2002, 5). The President's message presents a detailed and concrete analysis of the existing Chilean institutional setup and the problems that it generated, suggesting that domestic experience and the perceived problems with it have been more influential in shaping the institutional design proposed by the draft.

The debates that followed the introduction of the draft to the Congress make multiple references to international experience and to the experience of specific countries, but in fairly general terms. For instance, Europe and the European Union are mentioned to emphasize that most countries in Europe have competition laws and strong institutions to enforce them (particular reference is made to Spain and Germany). The European Union is also mentioned in the context of discussions about elimination of criminal sanctions (noting that the EU only has administrative sanctions and not criminal ones). There are also multiple references to the United States, most of them fairly vague, and only once the United States is mentioned in the discussion of criminal sanctions. In this instance, the Subsecretary of the Ministry of Economics points out that antitrust infringements can be penalized with criminal sanctions in the United States, and that Chile followed the example of the United States in incorporating criminal sanctions in the 1959 law, but nonetheless the conditions have changed and that it makes more sense to sanction and deter anticompetitive acts with high monetary fines rather than criminal sanctions (Congressional Debate 2003, 576-7).

Therefore, even though references are made in the debates of the various commissions and plenary in the Congress, these references do not indicate that the lawmakers, the policymakers or the experts that presented opinions in the debates borrowed from foreign models. References to foreign models are used to support the proposal to strengthen the institutions, but they do not indicate that any concrete idea or model was borrowed from abroad, especially when it comes to the most fundamental aspect of the reform, the design and the division of responsibilities of the

implementing institutions. In this sense, the creation of an independent and specialized tribunal, and its design seem to be "Chilean inventions" (Anonymous interview, 2018). In fact the institutional design of the Chilean system that the policymakers opted for in 2003 is quite unique, and the only examples that come close to it (Canada and South Africa) are not mentioned at all in the discussions. It is also noteworthy that not a single international organization is referenced in the congressional debates.

The 2009 Reform

The 2003 reform invigorated the Chilean competition regime, in that the number of decisions increased, and higher levels of fines were imposed in competition cases (Aydin and Figueroa 2019). Nonetheless, certain problems persisted. For one, Chile still did not have a merger notification and review system. Many experts continued to think that the administrative fines were too low to deter firms from engaging in anticompetitive behavior. An OECD peer review of conducted in 2002-3 and published in 2004, while praising the Chilean competition regime and the NEPO and the Commissions for their pioneering work, drew attention to aspects that needed improvement, such as the lack of a merger review system, the low level of fines permitted by the law and actually imposed, and the weakness of implementation against cartels (OECD 2004).

However, these criticisms of the Chilean regime might not have led to a reform so soon after the 2003 reform by themselves. It was the discovery of a price-fixing cartel among drugstore chains in 2008 that captured the public's attention and put pressure on the politicians to strengthen the Chilean system, especially with respect to cartels. In 2008, the NEPO began investigations into price fixing among the three major drugstore chains in the country. The companies had colluded on the price of 220 drugs for over a year, resulting in price increases reaching 100% in the case of some drugs (CITE). This case drew the public's attention to the extent of cartelization in the Chilean economy and its effects on the consumers, and created strong political support for a more effective competition regime (Agüero 2016). The lawmakers responded by swiftly adopting a reform package that had been sent to the Congress by President Michelle Bachelet three years ago that aimed at strengthening the FNE's efforts to tackle cartels, a draft that was slowly making its way through the various congressional committees when the drugstore cartel became public.

The 2009 reform did not change the basic structure created in 2003, but it gave two important tools to the NEPO in its fight against cartels. The first was the ability to make dawn raids, intercept and record telephone conversations, requisition computers and other documents and, in general, use procedures to search for evidence that were previously only available for criminal prosecution. The second was the introduction of a leniency program, which allows cartel participants to come forward with evidence of the cartel in exchange for a reduction of (or total exemption from) fines. Additionally, the 2009 reform raised the severity of sanctions by increasing the cap on fines that the law established, allowing the Tribunal to apply up to US$24 million in fines.

The motivation for the 2009 reform, like the 2003 one, was domestic. When the draft was sent to the Congress in 2006, the government's motivation was to address perceived gaps and weaknesses of the existing system. In particular, the draft aimed at making the Tribunal more independent and professional, and strengthening the investigative powers of the NEPO. In her message to the Congress accompanying the draft bill, President Bachelet put emphasis on domestic experience when explaining the motivation for reforming the Tribunal. MORE

When presenting the motivation for strengthening the NEPO's investigative powers, she refers to both the domestic and the international experience with cartel detection and prosecution. In discussing leniency, she starts the discussion with a reference to a domestic experience, that with

money laundering and drug trafficking, where a kind of leniency program was in effect in Chile. In the rest of the message, she references "comparative law" and "international experience" a number of times to underline that leniency has been effective in other countries in the fight against cartels. She also emphasizes that with increased investigative powers and the leniency program, Chilean competition regime will be able to conduct efficient investigation of collusive behavior "at the level of most modern competition legislations in comparative law" (Bachelet 2006, 9).

While the references to international and comparative experience remains fairly vague in the President's message, discussions in the congressional committees and the plenary sessions include much more concrete references to international experience. For instance, Europe/European Union is mentioned a total of 23 times, and the United States a total of 22 times, and mostly in reference to their experiences with leniency, and on a few occasions with respect to criminal sanctions in competition cases.[1] Presentations of experts and policymakers (such as a presentation by the National Economic Prosecutor at the time) make even more specific references, for instance, to the number of cartel cases prosecuted thanks to the leniency program in the United States and the European Union in the last years. The legislators also had access to more specific information through reports prepared by congressional aides, such as one titled "Leniency in comparative law of the United States and the European Union".

Finally, in contrast with the 2003 reform, there are also references to the OECD in the discussions. In 2007, Chile and the OECD agreed on a roadmap for the country's accession to the organization, and in this context the OECD was to review Chile's legislation and the state of implementation in a number of policy areas, competition law being one of these. In the congressional discussions of the 2009 reform to the competition law, the OECD is referenced in the presentation made by the National Economic Prosecutor to the Economics Commission of the Congress, in which he discusses some of the proposed reforms in the context of specific OECD recommendations (referring, for example to the OECD Council Recommendation on Hard Core Cartels of 1998), and the need to incorporate the feedback of the then-forthcoming OECD accession report on Chilean competition law and policy (Second Report of the Economics Commission 2009). Another reference to the OECD is made by the legal aide of the Minister of Economy in the same congressional commission.

The process that led to the 2009 reform began in 2006 with the objective of correcting the problems or deficiencies in the existing system, which were identified by national experts as well as the OECD in its peer review published in 2004. The domestic crisis that arose with the discovery of the drugstore cartel put pressure on the legislature to speed up the adoption of reforms. While the concern to improve on the functioning of the competition regime was the main motivation, in this reform process foreign models became reference points in the discussion, in much more concrete ways than the 2003 reforms. In some way, this is natural, since one of the proposed reforms, the introduction of leniency, is a foreign (US) invention, and there was plenty of international experience with the policy both in the United States and in other parts of the world to merit some discussion of the comparative experience and learn from it. The congressional debates include numerous references to the US and European experiences, and in contrast with the vagueness of the references to "international experience" in the 2003 reform debates, the 2009 references show signs of more complex analysis of comparative experience. The lawmakers also reference the OECD, which is to be expected given the country's ongoing accession negotiations with the organization at that time. It is worthwhile underlining that discussions about leniency also frequently referenced

[1] Even though criminal sanctions were not in the draft, some congressional members (from the left) and some testifying experts argued that leniency would only be effective in the context of strong sanctions such as of the criminal type, an argument made frequently in the economics and law literatures on the topic.

domestic experience with leniency the area of drug trafficking (and it being a success), though no concrete evidence was presented as to the extent of its usage and success.

The 2016 Reform

The latest reform to the competition law in Chile introduced a merger review and various measures to increase the effectiveness of enforcement against cartels. The motivation for the reform was a mix of domestic and international factors. The idea of introducing a merger pre-notification and review system had been on policymakers' agenda for at least some years, but the push for finally introducing such a system was a report by the OECD in 2014 (OECD 2014).

Reforms in the area of cartels, on the other hand, were driven by domestic factors, most importantly, by the public outrage caused by the discovery of various cartels in the recent years. A case of collusion among the poultry producers was discovered in 2011, which spurred public outrage and led to the creation of a presidential advisory committee on competition law and policy led by national experts in this field. This commission evaluated the possibility of re-introducing criminal sanctions for cartel participants, and other legal changes to strengthen anti-cartel policy (Informe de la Comisión Asesora Presidencial para la Defensa de la Libre Competencia 2012). In the subsequent presidential elections, the two main candidates promised stronger competition policy in their campaigns, and once in office, the government of Michelle Bachelet initiated a legislative process to reform the competition law (Agüero 2016, 131–32). The discovery of collusion among producers of tissue paper in 2015, and among supermarkets in 2016, put increased pressure on lawmakers, who finally adopted a law that further reformed Chile’s anti-cartel policy by allowing for criminal sanctions on convicted cartel participants, and banning them from public offices and directorships of companies for a period of five years. The reform also introduced a system that obliged mergers of companies above a certain threshold of turnover to be notified to the NEPO, and allowed the NEPO to review the transaction and impose conditions or even block the merger if the merger reduced competition in the market.

The role of foreign models features very strongly in the 2016 reform. President Bachelet's message to the Congress included ample references to other country's models and to the work of the OECD. On the issue of mergers, Bachelet directly cites the OECD report on merger review in Chile (Bachelet 2015, 8), and discusses the proposed reforms in the context of the OECD recommendations. With respect to tougher sanctions on cartels, her message includes references to the United States, Australia and Mexico in fairly concrete terms, including for instance the maximum years of prison sentence that could be imposed on a cartel participant in these countries. The presentations and discussions in the congressional commissions and the plenary session also include a large number of references to countries that also were referenced in the previous reforms (87 references to the United States, 74 references to Europe/ European Union), but also a much wider variety of countries and actors. Canada is mentioned 21 times, Australia 18 times, Mexico 14 times, Brazil and Great Britain 13 times, Germany 8 times, and France 3 times. The OECD is referenced 66 times, and the International Competition Network twice and the International Bar Association once. More broadly, the word international is mentioned, followed by phrases like "experience" or "standards" or "studies" or "tendency" about 70 times. While some of these references are fairly vague and generic, many also cite very specific data or experience from these foreign and international models.

The high number of references to foreign models and international organizations suggests that policy and lawmakers have at least to some degree analyzed these models and drew lessons from them. And the resulting law shows some indications of foreign borrowing. For instance, the law eliminates the former caps that existed on the monetary fines in cartel cases, and instead establishes

that the Tribunal can impose fines up to twice the profits collected by the company due to collusion, or 30% of the total sales of the company in the product line in which collusion occurred, the first method approaching the US treble damages principle and the second comes close to the European Commission's method of calculating fines on cartel cases.

The discussion surrounding the reform in the press and in seminars involving policymakers and experts (ADD CITES) also shows that these actors analyzed foreign models and the academic literature on the topic. These discussions also suggest that foreign models were not simply copied, and not just strategically used to signal the credibility of the proposed policies. Discussions about foreign models were fairly complex, and suggested that the actors were reflecting on how these foreign templates would function if transferred to Chile. Rather than generous borrowing from US policies such as leniency and criminal sanctions in cartel cases, which by now have spread to many countries and are constantly being discussed in international forums (Shaffer, Nesbitt and Waller 2015), there was quite a bit of resistance to these, with many actors arguing that the economic and social reality in Chile would make these foreign implants quite impossible to work in practice.

Conclusion

This paper has explored the dynamics of learning from foreign models in competition law reforms. In particular, it has sought to examine why, how and whom policymakers learn from in reforming these laws. Empirically, it has focused on three distinct reforms of the Chilean competition law, and presented initial findings of an analysis of congressional debates leading up to the reforms. This preliminary analysis shows that the first and second reforms (2003 and 2009) were motivated by domestic concerns, while the third one had a mix of domestic and international motivations. While there is little evidence that policymakers borrowed from foreign models in the first reform (which also resulted in a quite unique institutional design for Chilean competition regime), in the second reform, foreign models are referenced much more and with greater precision, and in the third one, the congressional and public debates leading to the reform are replete with references to foreign models. Part of the explanation for the variation across the three reform episodes may be the greater availability of information on foreign models in the later reform periods, through Chile's greater integration into organizations and networks such as the OECD and the International Competition Network.

In future versions of this paper I will seek to elaborate on the theoretical model to account for the variation in learning from foreign models in different reform processes. I will also deepen and expand on the empirical analysis with additional interviews with policy and lawmakers in the country, which will help establish how they perceive the role of foreign models in the policy process.

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