

CORRUPTION RISKS IN THE MINING SECTOR: PERU REPORT

An analysis of vulnerabilities and risks of corruption in the granting of licenses, permits and contracts related to the mining sector

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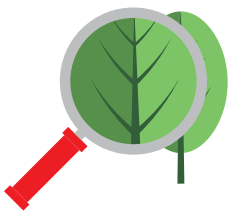
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PROGRAMA DE
GOBERNANZA
CLIMÁTICA



LIST OF ACRONYMS

ANA	National Water Authority
CAS	Administrative Contract for Services
CEJ	Legal and Administrative Stability Contracts
CIRA	Certificate of No Existence of Archaeological Remains
CLPI	Free, Prior and Informed Consent
CONACAMI	National Confederation of Communities of Peru Affected by Mining
CSO	Civil Society Organisation
DAC	Consolidated Annual Statement
DAR	Derecho, Ambiente y Recursos Naturales
EEZ	Ecological Economic Zoning
EIA	Environmental Impact Assessment
EIS	Social Impact Assessment
EITI	Extractive Industries Transparency Initiative
GEM	Special Mining Lien
GEOCATMIN	Mining Catastral Geological System
GORE	Sub-national Government
GPC	Grupo Propuesta Ciudadana
ILO	International Labour Organization
INEI	National Institute of Statistics and Informatics
INGEMMET	Geological, Mining and Metallurgy Institute
M4SD	Mining for Sustainable Development Programme
MACRA	Mining Awards Corruption Risk Assessment
MEF	Ministry of Economy and Finance
MINAG	Ministry of Agriculture and Irrigation
MINAM	Ministry of Environment
MINCU	Ministry of Culture
MINEM	Ministry of Energy and Mines
NGO	Non-governmental organizations
NRGI	Natural Resource Governance Institute
OEFA	Environmental Assessment and Inspection Agency
OSINERGMIN	Supervisory Body for Energy and Mining Investment
PCM	Presidency of the Council of Ministers
PEST Analysis	PEST: political, economic, socio-cultural and technological factors of a context. These external factors are usually out the control of the organization; can be presented as threats, as well as opportunities
SEIA	Environmental Impact Assessment System
SENACE	National Service of Environmental Certification for Sustainable Investments
SERFOR	National Forestry and Wildlife Service
SERNANP	National Service of Natural Areas Protected by the State
SIDEMCAT	Mining Rights and Cadaster System
SINANPE	National System of Protected Natural Areas
SINEFA	National Environmental Assessment and Inspection System
SNGRH	National Water Resources Management System
SUNARP	National Superintendence of Public Registries
SUNAT	National Superintendence of Customs and Tax Administration
TI	Transparency International
TO	Territorial Ordering
TUO	Unique Ordered Text
TUPA	Single Text of Administrative Procedures



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INTRODUCTION

Proética is the Peruvian Chapter of Transparency International (TI), established in 2002 as the first Peruvian NGO dedicated exclusively to promote ethics and fight against corruption. Since then it has carried out different activities aimed at eradicating corruption in the country, studying this phenomenon and its causes, as well as encouraging other institutions and actors to get involved in this cause and take action against it.

Proética is one of the 20 national TI chapters that are part of the Transparency International Global Programme called “Mining for Sustainable Development” or M4SD, led by TI Australia. The Global Programme seeks to improve transparency and accountability in the extractive industries, focusing especially in the very first link in the mining value chain: the moment in which the states grant permits, mining licenses and negotiate contracts.

Phase I of the Global Programme, called “Assessing Corruption Risks”, was carried out from the end of 2016 to the middle of 2017. The national chapters of 20 resource-rich countries conduct risk assessments to understand the nature and source of corruption risks in mining approval processes. To conduct these assessments, the Mining Awards Corruption Risk Assessment (MACRA) Tool was developed. Thus, this report presents the main findings of the risk assessment in Peru. The participation of Proética in Phase I of the Programme is funded by the BHP Billiton Foundation.

Phase II, “Addressing corruption risks”, began in 2018 and will continue until the end of 2020. The national chapters of Transparency International will develop and implement action plans to prevent the corruption risks identified

in Phase I. They will work with key stakeholders - government, civil society, local communities and the mining sector - as part of their national, regional and global strategies to build trust, improve transparency and accountability, and influence positive behavior change of all the stakeholders that participate in the mining sector. This stage seeks to promote the improvement of policy and practice at the national and international levels.

This national report is divided in three chapters. Prior to its development, both the conceptual framework and the methodological framework are considered. Chapter I addresses the importance of mining in Peru, the effects derived from mining activity in the economic sphere - reviewing the inherent aspects of social conflicts - and the legal framework of the mining concessions system. At the same time, the environmental obligations and the key actors in the granting of both mining concessions and environmental licenses are analyzed.

Chapter II describes the processes for granting a mining concession and environmental certification, as well as focusing on the development of risk and vulnerability findings, contextual factors and the results of the risk assessment.

Chapter III details the main findings of the study, as well as the conclusions and final recommendations.

OBJECTIVE AND SCOPE OF THE STUDY

The objective of the study is to identify systemic, regulatory and institutional corruption vulnerabilities in the granting of licenses, permits and contracts related to the mining sector, as well as to assess the corruption risks generated by these vulnerabilities.

This report focuses mainly on the licensing, permits and contracts related to the mining sector, being prioritized by the M4DS at a global level¹ because it is a little studied phase at an international level and considered relevant as a first step in the mining activity.

This report presents the main findings of the study and the results of the risk assessment.

¹ The present study was developed in parallel with 20 national chapters of Transparency International, led by TI Australia and the Secretariat of Transparency International.



CONCEPTUAL FRAMEWORK

Transparency International defines corruption as “the abuse of entrusted power for private gain”². As chapter in Peru of this global organization, Proética subscribes to this concept and uses it both in its studies and in its interventions.

This concept is composed of the following characteristics: i) the use of power implies an action developed by a person with the capacity to mobilize certain resources; ii) it is a power that has been entrusted or delegated, and both the position and the ability to mobilize resources associated with it are based on the formal bond of trust between the person committing the corrupt action and the(ose) person(s) to whom(s) he owes his responsibility; iii) private gain refer to the appropriation of the results of the corrupt action by one or several persons, who would be the beneficiaries of the act of corruption; iv)

finally, it should be added that the benefits generated are undue because they result from the deviant use or abuse of the entrusted functions.

As we can see, corruption, understood as such, focuses on the behavior of individuals, whether individually or collectively. As a social action, corruption can not be understood in a vacuum, but must be interpreted in relation to other elements such as formal and informal regulations, political or economic systems or value systems. In addition, different groups within the same society must be differentiated to understand the meaning of a corrupt action and its specific reasons. Thus understood, some of the most common ways to classify corruption are the following:

CATEGORY	CRITERIA	DEFINITIONS
According to incidence	Systemic or endemic	Corruption is an integral part of the political, economic and institutional system of a society.
	Sporadic	Acts of corruption manifest themselves without a pattern, beyond taking advantage of occasional opportunities in the institutional fabric.
According to level of organization	Centralized or controlled	Acts of corruption are controlled by a group at the top political power and the benefits are distributed by it.
	Scattered	Acts of corruption occur without responding to any organization. They tend to be more common and unpredictable, and generally, small.
According to the amount of obtained benefits	Big	It occurs in levels of rules and policies decision making, and in processes where large economic amounts are handled.
	Little	It usually occurs at relationship levels between the official who provides a service and the user. The amounts involved are relatively small.
According to its origin	Oriented by a demand (the corrupt side)	The actor who has the trusted power takes the initiative to use it in a corrupt manner.
	Oriented by the offer (corruptor side)	The initiative is taken by the actor who does not have the trusting power, focusing on who does.
According to the relationship with formal rules	To access a good or right	An act of corruption is committed so that the formal rules are fulfilled.
	To avoid the rules	An act of corruption is committed to not comply with formal rules.
	Preparation of rules (political capture or state capture ³)	A group of political or economic power manipulates the development of formal rules to obtain undue benefits, generally large.

Source: Serie Cuadernos Anticorrupción: “¡Exijo una explicación!” - Rendición de cuentas para reducir la corrupción. Proética 2012.

² Transparency International. Anti-corruption glossary: “corruption”. <https://www.transparency.org/glossary/term/corruption> / ³ During the government of Ollanta Humala (2014), Law 30230 (known as “environmental paquetazo”) was approved, through which bureaucratic obstacles to large extractive investments were eliminated in order to “stimulate investments”, which had an effect on institutions of national level, regional governments, municipalities and a series of social groups. In tax matters, the law seeks to help investments by forgiving debts, limiting SUNAT’s oversight capacity, improving the system of preferential treatment of tax payments and extending the terms of tax stability agreements for large investments (which protects them in case the legislation changes while this contract is in place). The law also grants an amnesty in the case of tax debts pending payment. Likewise, OEFA’s sanctioning capacity was suspended for three years and, finally, article 21 of the law imposes peremptory deadlines with a maximum of 45 working days for binding and non-binding opinions in the framework of the evaluation process of an EIA, without distinguishing between types of projects and their variable evaluative complexity, and stating that officials who do not comply are sanctioned with a serious offense (Durand 2016).

Corruption risks

The risk is the uncertainty regarding the probability and impact of an assumption that could have a corruption effect on a licit and ethical allocation of licenses, permits and contracts, which meets the appropriate requirements. It is important to point out that the “assumptions” that could have a corruption effect in the granting process include the possibility that something does not happen, for example, that the background of an applicant is not checked, that a conflict of interests is not declared or that an alleged case of corruption is not investigated⁴.

Carrying out corruption studies is particularly complicated because the corrupt usually seeks to hide their actions. However, there are different ways to approach this type of research. The best known way is the indirect study through perceptions. The Corruption Perceptions Index of Transparency International is probably the most famous analysis tool, achieving a wide coverage in international media every year⁵. At the country level, various perception surveys deepen in representative national samples on opinions, attitudes and experiences of the populations⁶. A variation of the study through perceptions is done with the opinions of experts: studies on certain aspects of corruption through interviews with people located in key positions within the public function, journalists or academics who know about the subject. Surveys to users of a certain type of service, although much more focused and of more limited scope, are also used and allow the collection of experiences with greater reliability.

Moving from perceptions to what is known as “hard data” on corruption is a great challenge, precisely because of what was mentioned at the beginning: the difficulty of accessing said information. To overcome this barrier, researchers often resort to analyzing variables that are strongly related to corruption. For example, although the increase in the cost of public works is not explained only by acts of corruption, there is sufficient evidence systematized and analyzed through an abundant amount of studies to suggest that it can play an important role. That is why it is usual to study corruption in infrastructure by reviewing, among others, an indicator such as the rate of cost overruns.

Another strategy, also widespread, is the analysis of corruption risks, although this is more recurrent in the field of anti-corruption policies and in the private sector than in academia, mainly due to the anti-bribery

regulations of several countries that bind institutions and corporations to adopt preventive measures, which include detecting corruption risks and addressing them⁷. Corruption risks are understood as vulnerabilities of the systems and of the regulatory and institutional frameworks, through which corrupt behaviors could occur.

The present study is framed within this last methodological approach. Therefore, it is not a study on corruption in the mining sector nor determines the likelihood of corruption taking place: it takes emblematic events to make visible the vulnerabilities and risks that occurred up to June 2017, without having the purpose of listing corruption cases or holding accountable officials or professionals. This research shows the systemic vulnerabilities that have been detected in the process of mining concessions.

CORRUPTION AND NATURAL RESOURCES

Specialized literature indicates that corruption in the sector of natural resource management occurs in two large dimensions (Kolstad et al., 2008): i) there is corruption in systems related to this kind of management, among public officials responsible for managing various functions of these systems and private stakeholders that seek to reduce procedures, avoid fines, among other management situations; ii) in countries where the availability of resources is abundant, special opportunities are generated for corrupt behavior at the highest level, seeking to exploit and ensure their exploitation by a rent-seeking political-business dome.

In this last situation, acts of corruption are part of a system that seeks and defends the extraction of income and is complemented by a larger set of actions conducted by the elite. The studies that have analyzed “capture of the State” are part of this dimension. “Capture of the State” is understood as the set of actions deployed by an elite or a group of interest to adapt the regulatory and supervisory norms, to deliver or assure them privileges that they would not otherwise obtain (Durand, 2016), certainly not in a full free market context.



⁴ Mining Awards Corruption Risk Assessment Tool (MACRA) / ⁵ Transparency International, Corruption Perceptions Index 2016. https://www.transparency.org/news/feature/corruption_perceptions_index_2016 / ⁶ In Peru, Proética's National Corruption Index has been published nine times between 2002 and 2015. <http://www.proetica.org.pe/?q=content/encuesta-nacional-sobre-percepciones-de-la-corrupt%C3%B3n> / ⁷ The obligations established in the Foreign Corrupt Practices Act of the United States or the Anti-Bribery Act of the United Kingdom are best known.

DEFINITION OF KEY CONCEPTS

In this section, the main concepts used in this study are identified, presenting their definition and the way they are used in the study.

CORRUPTION

The “Corruption Risk Assessment” uses the definition of corruption adopted by Transparency International (TI) and is also one of the most widespread in political science: “corruption is the abuse of entrusted power for private gain”.

Along this line, the TI glossary indicates that corruption can be classified as large, petty and political. The latter, political corruption, is defined as “the manipulation of policies, institutions and rules of procedure in the allocation of resources and financing, by political decision makers, who abuse their position to sustain their power, status and wealth”.

The present evaluation uses the concept of corruption in a broad sense, which includes legal behavior, although unethical or undemocratic. This concept is part of the notions of “systemic, regulatory and institutional corruption risks” and “systemic, regulatory and institutional vulnerabilities”. Methodologically, a corruption risk is the result of the probability of a vulnerability occurring and how serious (i.e., its impact) the resulting corruption could be.

Vulnerabilities are weaknesses that “create opportunities for corruption to occur or go unnoticed. They can arise from the design of the process (the law), the practice (implementation) or surrounding contextual factors”. As examples of vulnerabilities, the MACRA tool mentions: “unregulated lobbying, lack of due diligence in the financial and technical claims of companies, development of new laws and mining policies without public scrutiny, lack of a system to declare and manage conflicts of interest, access to confidential information, lack of verification of information on environmental and social impacts of the proposed mining project, withholding information from companies or communities, lack of scrutiny on the decisions of officials (whether by the public, the managers or the parliament) and lack of transparency about what decisions are made and why”.

TRANSPARENCY AND ACCOUNTABILITY

The MACRA tool argues that the prevention of corruption is based on two principles: transparency and accountability. The principle of transparency includes both rules and practices. The rules are transparent “when we know what laws, regulations and processes exist; that is, when this information is in the public domain”. The transparency of the rules allows “to compare what should happen with what is really happening”. On the other hand, the practices are transparent “when we have information about real decisions and actions”. The transparency of the practices allows “holding individuals and organizations accountable for their behavior”. In both cases, transparency is linked to the accessibility of information because “genuine transparency requires that information not only exist but is available to the public, is easily accessible and usable by all interested parties”.

Accountability is required of authorities and public officials to respond to their decisions and actions, which must be based on clear and transparent criteria and whose results must be public. “In the case of mining approvals, decision makers may need a degree of discretion to ensure the efficient allocation of permits and licenses. Therefore, it is crucial to have accountability mechanisms that work, such as clear and transparent criteria for decision making, publication of license details and other documents, and audits so that this discretion is not abused”⁹.

GOVERNANCE

Governance is usually defined as the mechanisms used by the State to make decisions¹⁰. NRGi defines it as the decision-making system around certain spheres of social life (in this case, mining as part of extractive industries) in which the stakeholders involved exercise their capacity to influence, which may be greater or less than the one of the others. This concept is useful because it opens space for decision-making to other stakeholders, in addition to the government or the State. For this reason, for Anthony Bebbington, the concept of governance is useful and different from the concept of government, although in itself any form of governance is neutral and will depend on the position one takes to qualify it as good or bad¹¹. For example, NRGi considers as good governance or democratic governance the one that includes all relevant stakeholders in the system, in a balance of power relations.

“We can only talk about good governance if the decision-making system is multi-sectoral (sectors responsible for mining and hydrocarbons, the environment, indigenous peoples, strategic planning); multilevel (central government, intermediate governments, local governments); and multi-actor (indigenous and afro peoples, local populations, private sector). It should also involve a balance of power relations, currently absolutely asymmetric, between these actors, so that the populations and local authorities participate on equal terms with the central government and companies”¹².

In this regard, DAR - Derecho, Ambiente y Recursos Naturales Peru defines governance as “a framework of rules to achieve “good governance”, which seeks to achieve effective and efficient management among public entities and social organizations that conduct economic activities towards the satisfaction of citizens’ welfare. It is a way to govern together with all the actors of society and generate their participation in public decision-making, which is why it is the best way to make decisions in the State”¹³.

The normative content of the concept of good governance makes it possible to be critical of existing forms of governance related to a model of extractivism development, also called sectoral governance, which limits itself to include in the decision-making system only actors belonging to the mining/extractive sector of the national government and excludes relevant actors belonging to other sectors of the national government, subnational governments and civil society.

8 Mining Awards Corruption Risk Assessment Tool (MACRA). Pág.9 / 9 8 Mining Awards Corruption Risk Assessment Tool (MACRA). Pág.9 / 10 Glave, Baca y Ávila. “Claves para la gobernanza de las industrias extractivas”. GPC. Lima, abril 2015. / 11 Anthony Bebbington. “¿Qué queremos decir con “la gobernanza de las industrias extractivas”? Ver: <https://www.youtube.com/watch?v=ScTzUWyoGuU&list=PLpH1GF5tTHBGuhkLmtvzINZIoVJ5HC7UPR&index=1> / 12 Ballón, Viale, Monge, Patzy y de la Puente. “La agenda de la sociedad civil frente a las industrias extractivas en América Latina”. NRGi, 2017. Págs. 18 y 19. / 13 Aída Gamboa. “Gobernanza en las APP: Lecciones aprendidas del Gasoducto Sur Peruano”. Pág. 8. Lima: DAR, 2017

GENERAL CONTEXT

The present study has been framed in a context marked by two processes of particular relevance for this issue: on the one hand, Peru is in the initial phases of the scandal known as “Lava Jato”, a mega corruption case uncovered in Brazil in 2014, which has an important international dimension since the systematic payment of bribes by Brazilian construction companies involved in at least eleven countries, mainly Latin American ones, has been verified. Currently, justice institutions are investigating former presidents and political leaders of Peru, in a process whose only precedent could be the investigation and trial of the top government of Alberto Fujimori (1990-2000) and his partner in the shadow, Vladimiro Montesinos. Although it is necessary to point out that the “Lava Jato” case differs from the Fujimorist corruption which occurred in indisputably democratic¹⁴ and different governments, in addition to the degree of corruption penetration in the government, since in the case of Fujimori and Montesinos “[...] corruption came to penetrate the very center of State power, to be used as an instrument of government” (INA 2001: 8); that is to say, it was about what the literature categorizes as systemic corruption. On the other hand, Peru, together with other countries that export raw materials, is at the end of what is known as the “super cycle”, which led to these products having very high prices during the past decade, but which currently, as of 2012, have collapsed due, in particular, to the slowdown in the economic expansion of consumer countries, mainly China. This situation generates a scenario of uncertainty against the expectations assumed by different stakeholders. The state income from extractive activities has also fallen sharply, with impacts on tax revenues and their distribution, affecting especially local and subnational governments.

METHODOLOGICAL FRAMEWORK

The research method used was the one in the Mining Awards Corruption Risk Assessment (MACRA) Tool (Nest, 2016). This was prepared by an independent expert hired by Transparency International to provide a consistent, clear and robust methodology to facilitate the identification and assessment of corruption risks in the twenty countries participating in the “Mining for Sustainable Development” Programme. MACRA defines its research method as a critical analysis of solid evidence, which is compiled through various data sources and interviews with experts.

The first part of the risk assessment is about the collection and analysis of data. The research was developed based on primary sources consisting of semi-structured interviews that follow the objective of the research, made to representatives of the private sector, public officials and former public sector workers, representatives of civil society, all selected taking into account their influence, incentives, interests around the objective of the research and the speeches of other stakeholders involved, so that the interviews were adapted to the characteristics of the interviewees using a questionnaire as a reference tool.

As secondary sources, pre-elaborated data obtained from mining concession granting files processed by INGEMMET were used, information obtained

from the official web pages of various public bodies, as well as academic research and journalistic articles that refer to emblematic cases.

DEVELOPMENT OF THE METHODOLOGY

The methodology consists of four different steps:

Definition of the scope of the risk assessment

The evaluation covers the exploration phase of the medium and large formal metal mining in Peru, which is the responsibility of the national government.

Identification of the vulnerabilities in the design, practice and context of the granting process (steps 2 and 3)

Two processes were selected: the granting of mining concessions and environmental certification. The mining concession grants its owner the right to explore and exploit the mining resources granted, which is different from the right to use the surface land. However, alone the title of the mining concession does not authorize carrying out exploration and exploitation activities. The owner must have other titles or enabling rights such as: permits for the use of land, licenses for water use, among others, and environmental certification. The environmental certification is granted after approval of the environmental assessment. The Environmental Impact Assessment (EIA) contains a citizen participation plan that provides mainly informative, non-binding mechanisms (public hearings and information workshops) to prevent conflicts¹⁵.

In both processes, the study identified corruption vulnerabilities. A PEST analysis of political, economic, social and technological factors was also carried out.

Due to their formal characteristics, the vulnerabilities and/or risks are classified into five (5) thematic axes:

- 1) Contextual factors.
- 2) Process design.
- 3) Practice of the process.
- 4) Administrative or institutional response to accountability.
- 5) Responses, legal mechanisms against identified corruption.

Identification, evaluation and validation of risks (steps 4 to 7)

Initially, 32 vulnerabilities were identified (see form A), which were differentiated, resulting in 18 vulnerabilities and 17 corruption risks. Finally, 7 risks with a “very high” rating were prioritized. Two validation workshops were held to corroborate these findings.

Prioritization of risks and communication of findings (steps 8 and 9)

Six corruption risks were prioritized for having a “very high” rating.

¹⁴ The Democracy Index (Economist Intelligence Unit) consistently categorizes Peru as a flawed democracy, which is a category inferior to the optimum (full democracy). The biggest problem the country has according to the index is related to the scale of the functioning of the government, which can be summarized in that it is not perceived that the Executive Power is capable of delivering the results it promised when winning the elections. / ¹⁵ See Chapter 5. “Análisis del marco normativo para el desarrollo de las actividades mineras”. In Baca and Avila. “Concesiones mineras en Perú. Análisis y propuestas de políticas”. Grupo Propuesta Ciudadana. Lima, September 2014.

PICKING THE STAKEHOLDERS

A mapping of the stakeholders was carried out, selected with criteria based on the specialty, experience, influence, incentives and interests around the object of the research. Under these criteria, 26 stakeholders were selected among public officials of the sector and others related, representatives of private mining companies, consultants specializing in the preparation of EIA, former sector workers including those from technical bodies who emit opinion, representatives of civil society and journalists. From this selection, we interviewed 17 stakeholders.

INTERVIEWS

The interviews were carried out in two phases: a first one with the purpose of framing the study and having some first findings; the second, after the first validation workshop to deepen the vulnerabilities and risks found.

Maps of the process of granting the mining concession as well as the environmental certification process were drawn up, as established in the regulations and official guidelines. Then we proceeded to collect information regarding the implementation practices for these processes and regarding relevant contextual factors. Subsequently, these three aspects of the granting of mining concessions (the process, practice and context) were analyzed to identify corruption vulnerabilities.

The interviews with the stakeholders were carried out, in some cases, by previously showing a flowchart of the actual process of granting a mining concession and a real process flowchart of the environmental impact assessment study, in order to visualize the process involved in the procedures and understand its context, identify vulnerabilities as systemic, regulatory, institutional or other weaknesses that produce corruption risks.

The interviews were carried out using a questionnaire as a guide, based on the questionnaire that contains the tool, which, for the sake of sampling, were reduced and adapted taking into account:

- a) national regulations
- b) the characteristics of the interviewees in consideration of their specialization and sector

The questions asked focused on the following thematic axes:

Category 1: Contextual factors: risks related to the context of the mining sector, external to the immediate process of granting the mining concession, licenses, permits and contracts.

Category 2: Process design: risks related to opportunities that originate in the design of the process of granting the mining concession and granting of environmental permits.

Category 3: Practice of the process: risks related to opportunities that originate in the concrete practice of the process of granting the mining concession and granting environmental permits.

Category 4: Responses, accountability: risks linked to mechanisms designed to hold public officials, mining companies and other parties accountable, when there is concern about possibilities of corruption.

Category 5: Legal responses: risks related to the legal mechanisms available to respond to corruption when it is presumed or has been identified.

METHOD USED FOR VALIDATION AND RISK SCORING

According to the tool, to carry out the validation and scoring of the risks, the evidence supporting the assessed probability and the evidences that support the evaluated impact were analyzed. It started with the structure used for questions about common risks (“What risk is there that ...?”). This helped to think and analyze the likelihood of certain assumptions that could lead to corruption and its impact, for example:

RR7: What risk is there that the Environmental Impact Assessment reports are not available to the public once they are ready? To find the probability, the word “risk” is replaced by “probability”.

RR7: What is the probability that the Environmental Impact Assessment reports are not available to the public once they are ready? To determine the impact, the word “risk” is replaced by “impact”.

RR7: What would be the impact if the Environmental Impact Assessment reports were not available to the public once they are ready?

A form was drawn up (Form C) for each risk registered, each one with its analysis of the probability and impact of each one of the previously identified risks on the flowcharts of procedures for granting a mining concession and environmental impact assessment.

Evaluations of probability and impact have been supported by evidence such as observations in the cadastral agency, observing the presentation and processing of applications, analysis of academic and other research reports, analysis of maps of allocation processes, analysis of laws and national mining codes, EITI report for Peru, interviews with experts (among cadastral agency staff, workers in the mining sector and environmental certification), representatives of civil society, mining companies, environmental consultants, academics and journalists, legal investigations previous, corruption cases in relation to the subject of study and Transparency International’s Perception of Corruption Index.

Once the probability and impact were evaluated, points were assigned to generate a total scoring method (multiplying probability by impact) for each risk, in order to identify the important ones. The probability of each risk was assigned a score over a total of 5, on a scale of 5 points, where:

5 out of 5 means that it is almost certain that an assumption will occur.

3 out of 5 means that it is possible that an assumption occurs, that is, there is a 50% probability.

1 out of 5 means that it is almost impossible for an assumption to occur

The impact was evaluated as follows:

Score of 4-5 (significant-catastrophic impact) for any serious event.

Score of 2-3 (minor-moderate impact) depending on how systemic and controllable the possible impacts are.

Score of 1 (insignificant impact) for isolated cases that have impacts between minors and moderates.

The prioritized risk matrices (Form C) were put into consideration in the validation workshops.

Two validation workshops were carried out based on expert judgment, whose opinion was informed by specialists in the field and recognized by other qualified experts. In these workshops, information, evidence, judgments and assessments were presented about the risks and vulnerabilities in the granting of mining concessions and environmental licenses.

The objective of the first workshop¹⁶ was to preliminarily validate the first draft of the study, to frame it and to sort the first findings as a result of the research made and interviews with specialized actors, as well as to validate the quality of the responses of the interviewed actors. The first workshop was held in April 2017, with the participation of 10 experts from the public sector, civil society and the private sector.

The objective of the second workshop¹⁷ was to evaluate the findings obtained in the prioritized matrices for vulnerability, validate the scoring criteria and prioritize them. It was held on June 23 of the same year and representatives of the public sector, private sector and civil society participated in it. This information was used in the second part of the tool, where the specific corruption risks that these vulnerabilities generate were identified and evaluated.

SELECTION OF RISKS

Of all the risks that the tool identifies, a first selection was made taking into account mainly the legal basis of the mining activity in the country. Thus, there were risks that did not apply to Peru since, to carry out the mining activity, no contracts are signed or auctions or bids are carried out, but through an administrative process the State grants a permit that is known as Mining Concession. Subsequently, some of the common risks were modified, taking into account that the environmental certification process is also being addressed. Finally, risks were created taking into account the national context, related to the impact of mining in the areas where the mining activity is carried out, the territorial rights, the participation of those directly involved and the management of resources, all aspects focused on the vulnerability and corruption risks that are generated.

Each corruption risk was evaluated, analyzing the evidence of the probability that occurs and its possible impact.

The final stage is the prioritization of risks. The prioritized corruption risks are those that the chapter will seek to mitigate or manage. This way, when deciding the risks, the results of the risk assessment were taken into account, but also issues such as the necessary resources and the possibility of having the support of other relevant stakeholders.

INFORMATION PROCESSING

The information collected was synthesized in a matrix of interviews from which a qualitative analysis of the information obtained was carried out. For this, the interviews were transcribed and summarized. From its qualitative analysis, the guidelines that define the risks and vulnerabilities in the granting of mining concessions and environmental licenses were obtained.

The method of individual interviews was chosen due to each stakeholder perspective on mining issues and the source of the information, private

VALIDATION PROCESS, REVIEW AND LIMITATIONS

companies, civil society and public bodies, that do not allow the majority to meet in a group due to questioning among stakeholders and secrecy of information understood as private, both concerning the information they handle and to not expose their identity in order to not be recognized and/or stigmatized in the sector.

Therefore, individual interviews were carried out. Thus, the workshops for the validation of findings and risk assessment served to contrast the quality of the information and to validate the findings contained in the gathering information instrument after being submitted to consultation and expert judgment.

The MACRA tool is based on Transparency International's experience in assessing corruption risks in other areas, such as national integrity systems and other instruments, indexes and resources of the extractive industry sector. In the development of the tool, experts from multilateral institutions, international non-governmental organizations and industry bodies provided valuable comments.

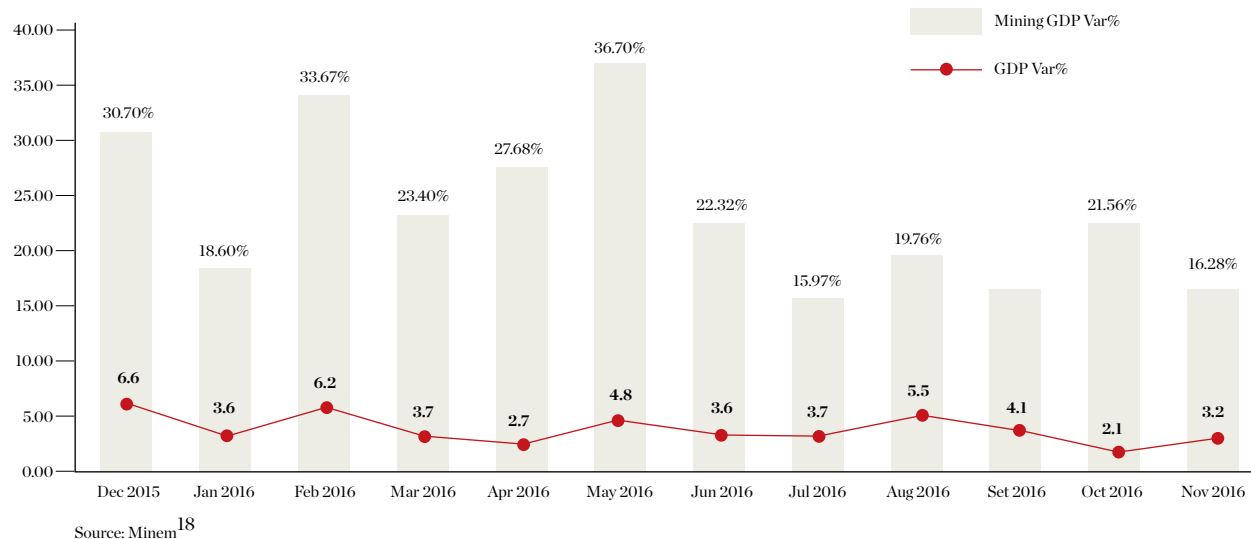


CHAPTER 1

1. BACKGROUND

IMPORTANCE OF MINING IN PERU

NATIONAL AND MINING GDP – VARIATION %



Mining is the main export sector of the country. In average of the last 10 years, it represented 59% of total exports¹⁹. At the subnational level, it is evident by the transfer of mining canon²⁰ and the promotion of resources for development through direct contribution.

In the boom decade from 2003 to 2012-2013 (known as the super cycle of commodities period), the mining and hydrocarbon sectors (oil and natural gas) obtained great profits during the years of the super cycle, originated in good measure by the increase of prices at the international market and not so much by greater volumes of production. These extraordinary and unforeseen gains for the sector led to a national debate on the need to modify the tax scheme by applying a tax on said profits, in such a way that the State achieves a greater share of the generated wealth, taking into account that the companies, especially mining companies, had Legal Stability Contracts²¹ that protect and protected them against these proposed changes.

In Peru, mining has an important presence in investments, exports, taxes, employment and other important economic variables; although there is also a relationship of equal value regarding social conflicts originating in the mining sector. The following graph shows the impact of the Mining GDP on the National GDP in the December 2015 - November 2016 period:

In September 2011, the new government substantially changed the scheme of mining royalties defined in the Mining Royalty Act (Law No. 28258)²² and the Voluntary Contribution (which was only valid until 2010)²³. This marked a first change in fiscal policy in the exploitation of natural mineral resources. Until then, mining companies paid the income tax - like any other company in the country - but not the value of the extracted natural resource²⁴.

The new scheme was regulated by three new laws: Law No. 29788 (amending Law No. 28258, Mining Royalty Act)²⁵, Law No. 29789 (creating the Special Tax on Mining)²⁶ and Law No. 29790 (that establishes the legal framework of the Special Mining Lien). Under this change, only in 2011 the total amount of mining contribution ascended to 13,300 million soles, amount equivalent in the same year to the sum of the budgets of the Ministries of Health, Education, Work and Promotion of Employment and Housing, Construction and Sanitation.

¹⁸ <http://www.minem.gob.pe/minem/archivos/file/Mineria/PUBLICACIONES/VARIABLES/2016/DICIEMBRE.pdf> / ¹⁹ http://www.sgp.org.pe/wp-content/uploads/Importancia-de-la-Miner%C3%ADa_SGP-7dic161.pdf / ²⁰ "canon minero" is the participation enjoyed by the Local and Regional Governments on the income and rent obtained by the State for the exploitation of mineral, metallic and non-metallic resources. / ²¹ In Peru there are legal stability agreements, commonly called "law contracts". These contracts guarantee the provisions of the contract, laws, regulations and other rules, without implying, in any way, exemptions or other benefits. These agreements between the investor and the State are made so that the existing legal framework is respected at the moment in which the agreement or contract was agreed, which can not be modified by any legal regulation. The mining investors will enter into stability contracts with the Ministry of Energy and Mines when they present investment programs for the minimum equivalent in national currency to US \$ 2 million, which may be extended for a period of 10 years, while the investors that submit investment programs for amounts equal to or greater than US \$ 20 million, may be extended for 15 years. These contracts also contain a clause that expressly states that no rule that may mean the reduction of their cash availability, whether it is new taxes, encumbrances or other obligations, can be applied to the mining investor. These contracts were created in 1992 and the Constitution of 1993, in its Article 62, blinded these contracts in a way that no one can review them, not even the Congress, since they can only be modified by agreement between the parties. / ²² Regulation that generated opposition from the business sector, which - through the National Society of Mining, Petroleum and Energy - filed a claim of unconstitutionality. However, the ruling of the Constitutional Court (2005) declared it inadmissible and determined that royalties are not a tribute but an economic consideration for the exploitation of mineral resources. On July 28, 2006, the government opted to negotiate a "voluntary contribution" with mining companies, stressing their respect for legal stability and the law contracts. Its signed between the State and the companies. It was agreed a voluntary contribution of \$ / 500 million per year, for five years. / ²³ As a result of the high prices experienced in the period 2003 to 2005, in 2006 the Voluntary Contribution was created. In this scheme, the mining companies with the most important Contracts of Guarantees and Investment Promotion Measures committed to create a fund with a percentage of their profits, as long as the prices of metals remain at high levels. The contribution of each company was calculated on the basis of the annual net profit before the distribution of dividends, not being deductible as an expense. The use of these resources was allocated for projects and social support programs, especially nutrition, education and health. This scheme was in effect between 2006 and 2011. / ²⁴ <http://www.convencionminera.com/perumin31/images/perumin/recursos/OLD/Econom%D0%B1a%20SNMPE%20Impacto%20econ%D0%B2nico%20de%20la%20miner%D0%B1a%20en%20el%20Per%D0%B3.pdf> / ²⁵ The first royalties outline was created in 2005 and included a percentage rate on the value of the extracted concentrate, according to the following 1% (up to US \$ 60 million per year), 2% (from the excess of US \$ 60 million up to US \$ 120 million) and 3% (from the excess of US \$ 120 million). Under this scheme, between 2006 and December 2011 the royalties totaled \$ / 3,400 million, approximately 6.6% of the total tax revenue generated by the mining activity in said period. It should be mentioned that only mining companies without a stability contract were subject to this royalty system. Law No. 29788 modifies the base, rate and periodicity of the royalty, going from the collection on the value of the extracted concentrate (monthly) to an outline that taxes the profits of the activity on a quarterly basis. Under the new outline, the mining royalty is fixed based on the quarterly operating profit of each company. / ²⁶ Law No. 29789 creates the Special Tax on Mining (IEM) as a particularity of mining activities, distinguishing them from non-metallic mining activities. The particularity of the IEM is that it applies to those metal mining companies that do not have Guarantees Contracts and Investment Promotion Measures. Like the new mining royalty, the IEM is determined on the quarterly operating profit of each company. The effective rate of the IEM is established based on the operating margin for the quarter (ratio between quarterly operating profit and sales revenue for the quarter).

RECAUDACIÓN DE RÉGIMEN TRIBUTARIO MINERO (millones de soles)

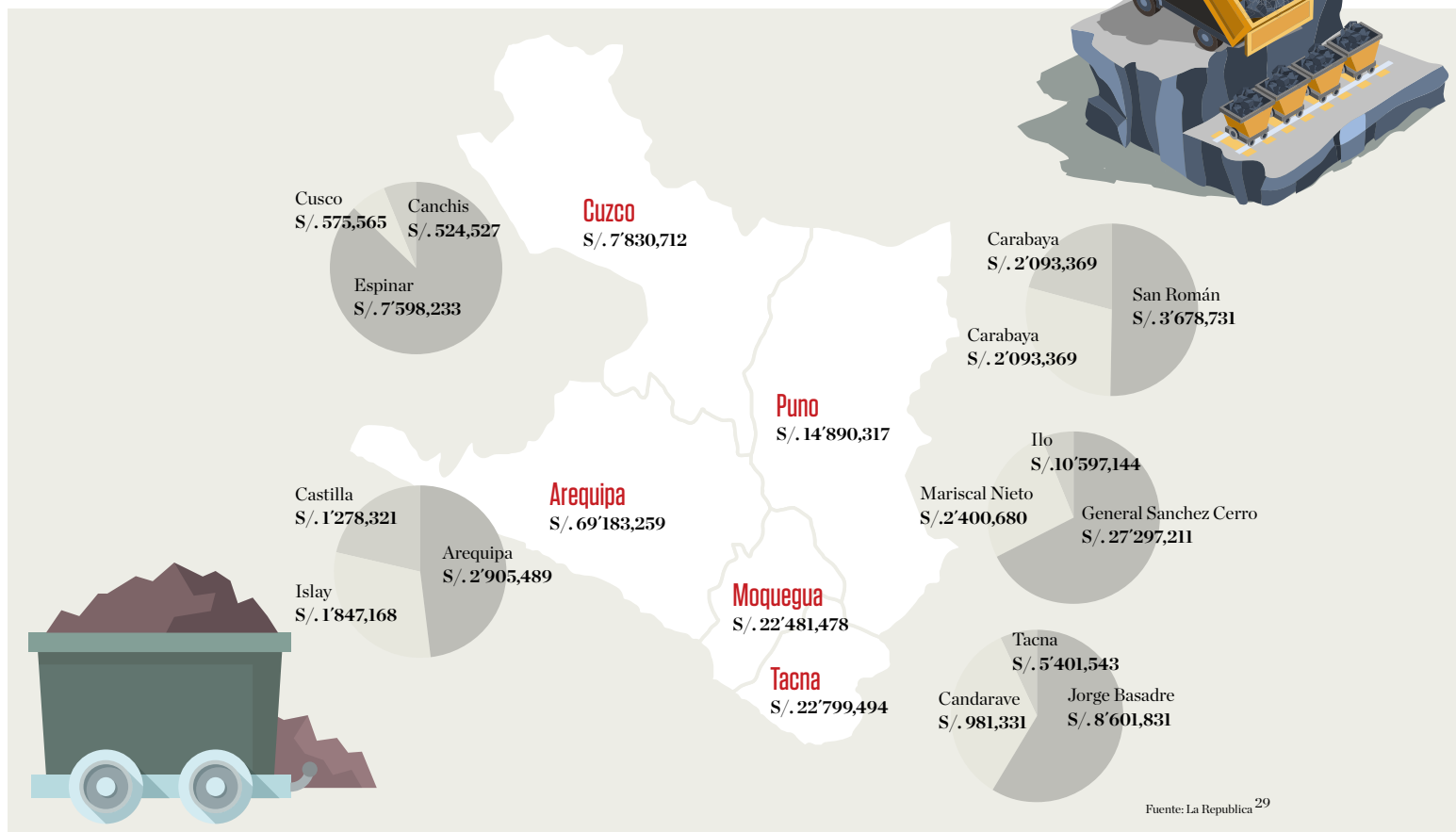
PERIOD	SPECIAL TAX ON MINING	MINING ROYALTIES	MINING ROYALTIES LAW 29780	SPECIAL MINING LIEN	TOTAL TAXES
2011	58.66	146.12	70.68	135.63	411.09
2012	441.66	12.71	51.76	941.67	1,967.71
2013	336.96	11.91	505.37	809.47	1,663.73
2014	372.45	120.64	528.97	535.11	1,557.17
2015	208.18	198.71	352.16	344.16	1,103.20
2016	236.43	205.76	519.58	101.50	1,063.27
Total	1,654.36	695.85	2,548.42	2,867.54	7,766.17

Source: Minem²⁷

According to the information from the National Institute of Statistics and Informatics (INED), the Mining Extraction sector, together with the Oil sector, represented 11.5% of the National GDP in 2014, being the third sector to contribute to the GDP, behind the sectors of Other Services (44%) and Manufacturing (14%)²⁸.

In those regions where mining is preponderant, it is the main financier of local budgets through canon and royalties. Mining has become relevant to explain the evolution of national investments, a situation that will be clearer given the perspectives of world-class mining projects.

ESTIMATED AMOUNTS FOR 2017 MINING CANON



INVESTMENTS

In the decade 2004 - 2013 Latin America grew at an average rate of 4%, while in the previous period 1970-2004 the growth rate was only 1%. One of the main factors of this growth has been the increase in trade triggered by the sustained increase in the prices of commodities worldwide. From 2012 onwards, the region entered into a process of economic slowdown with a growth of 3.1% that year, 2.5% in 2013 and below 1.5% in 2014³⁰.

Investment for the mining sector in Peru showed an increasing trend during the last 15 years. The mining investment went from US \$ 1,146 million in 2001 to US \$ 7,525 million in 2015, which represents an increase of 400%, mainly due to the completion of the investment of important mining projects. During the period from 2011 to 2015, US \$ 42,073 million was invested, 3.9 times more than what was invested during the period from 2006 to 2010 (US \$ 10,881 million) and 28.3 times more than what was invested during the period from 2001 to 2005 (US \$ 1,484 million)³¹.

NEW INVESTMENTS

In January 2016, the Ministry of Energy and Mines reported that the Peruvian Portfolio of Mining Projects had 47 projects with a global investment that exceeded US \$ 47,399 million. This means that investment in mining will be channeled for 47 main projects, including the following:

- Expansion projects in mining units: 6 projects.
- Projects in progress, with EIA approved and under construction: 14 projects.
- Projects with EIA submitted or in the process of evaluation: 4 projects.
- Projects in the process of exploration: 24 projects.

Some of the 47 projects included in the 2015 Mining Portfolio does not have an operation start date, the construction date or their investment plan, given that they are still in the studies and permits stage. Among them are the following projects:

- Empresa Proyecto Región Metal - Relian Ventures SAC San Luis Ancash Au-Ag
- Minera Cuervo SAC - Cerro Ccopane Cusco Fe
- Corporación Minera Centauro - Quicay II Pasco Au, Cu³²

As of March 2017, Peru had a portfolio of mining projects of US \$ 46,996 million. There is a huge potential for mining development, due to the favorable geology of the country and the investment conditions and opportunities. The mining investment in Peru grew by 267% in the 2011-2015 period compared to the five-year period of 2006-2010 but currently there is a decrease, taking into account that in 2016 US \$ 4,251 million were registered, that is, around 44% less³³.



³⁰ Epifanio Baca. <http://www.propuestaciudadana.org.pe/sites/default/files/publicaciones/archivos/NIA%207-2015.pdf> / 31 Osinergmin: "Reporte de análisis económico sectorial. Sector Minería. Mercado mundial, nacional, efectos derivados y visión de la minería". August 2016. http://www.osinergmin.gob.pe/seccion/centro_documental/Institucional/Estudios_Economicos/RAES/RAES-Mineria-Agosto-2016-GPAE-OS.pdf / 32 <http://mineriadelperu.com/archivos/acarteraproyectos.pdf> / 33 <http://gestion.pe/economia/peru-tiene-cartera-proyectos-mineros-us-46996-millones-inversion-caera-2017-2183479>

NATIONAL MINING PRODUCTION

Peru is the second largest producer of silver and third largest copper producer in the world, the leading producer of gold, zinc, tin, lead and molybdenum in Latin America. Likewise, it is the third country in the world with the largest reserves of gold, silver, copper and zinc³⁴.

The minerals produced are in great demand in the world market: the United States, China, Switzerland, Japan, Canada and the European Union are the main buyers.

Gold production showed a decrease between 2011 and 2015 (-13%), mainly due to the less strict laws of some mines and, as it will be explained later, to the interventions to illegal mining. However, between January and April 2016, metal production registered a growth of 6.8% compared to the same period last year³⁵.

Exports

The value of metallic mining exports in recent years has declined, mainly due to the reduction of international prices of metals and the volume exported. According to a report from the National Institute of Statistics and Informatics (INEI)³⁶, the volume of exports from the mining sector until July 2016 grew by 40.6%, which explains mainly the positive result of exports of traditional products in 38.9%, regarding the same month of 2015. The volume exported from the mining sector expanded due to higher shipments of copper (77.1%), lead (63.4%), tin (13.8%) and iron (3.6%).

EFFECTS DERIVED FROM MINING AT THE NATIONAL LEVEL

Taxes

In the last five years, there has been a decrease in the percentage of participation of mining tax revenues in regards to total taxes, going from a maximum of 18% in 2011 to a participation of 6% in 2015, which translates into an annual decrease of 25%. This reduction is explained by the lower prices of minerals.

This shows mining taxes high dependence on the evolution of international mineral prices, which would be confirmed by the SUNAT³⁷ report of April 2017, which reports that the collection of Income Tax reached S/. 4,165 million, representing a year-to-year fall of 16.3% compared to S/ 4,785 registered in the same period a year ago.

However, just as the income and recovery of Income Tax was compensated by higher payments from the mining sectors, tax revenues continue to fall steadily due to the increasing returns of the Value-added Tax (VAT) to the mining companies³⁸. Since 2015, SUNAT has been returning to companies more than what they give for taxation³⁹. The amount returned to the companies exceeds the Income Tax collected by SUNAT and the difference reached the figure of -3,945.2 million soles in 2016.

Transfers to regional governments

Likewise, transfers to the regions (mining canon, validity fees and royalties)⁴⁰, according to MEM statistics (2016), have gone from 5.13 billion soles in 2011 to 2.99 billion soles in 2015 (- 41.6%). This reduction can be observed as of 2012 in the regions that concentrate close to 70% of the total transfers.



34 US Geological Survey - USGS figures. Citado en la página web del Ministerio de Energía y Minas <http://www.minem.gob.pe/.detalle.php?idSector=1&idTitular=159&idMenu=sub149> / 35 "Análisis económico sectorial minería. Agosto 2016". Gerencia de Políticas y Análisis Económico - GPAE http://www.osinergmin.gob.pe/seccion/centro_documental/Institucional/Estudios_Economicos/RAES/RAES-Mineria-Agosto-2016-GPAE-OS.pdf / 36 <https://www.inei.gob.pe/prensa/noticias/productos-mineros-dinamizaron-las-exportaciones-de-productos-tradicionales-en-julio-2016-9292/> / 37 Sunat, quoted in Semana Económica: "Recaudación del Impuesto a la Renta cayó 16% en marzo". 12.04.2017 <http://semanaeconomica.com/articulo/economia/macroeconomia/223450-recaudacion-del-impuesto-a-la-renta-cayo-16-en-marzo/> / 38 Minister Thorne acknowledges that "the large mining projects are taking away our revenue". 27.02.2017 <https://www.servindi.org/actualidad-noticias/26/02/2017/subsidiando-las-empresas-mineras-devolucion-de-igy-y-caida-de-la/> / 39 Any company that sells something that it produces or commercializes has to pay the Value Added Tax (VAT), which generates a fiscal debit. Exports are not taxed with the VAT; therefore, their sales do not generate fiscal debits. That same company when it makes diverse purchases generates a tax credit: the tax credit is the VAT that taxes the purchases made by the companies. In the case of mining companies, when selling abroad without the payment of VAT, the debit-credit chain is interrupted and what is known in tax jargon is known as "balances in favor of the exporter". The tax legislation in Peru allows companies to use the "balances in favor of the exporter" against the payment of Income Tax and/or request their return. Interview with José de Echave, former vice minister of Environmental Management of the Ministry of the Environment, is currently the deputy director of the NGO CooperAcción. <https://www.servindi.org/actualidad-noticias/26/02/2017/subsidiando-las-empresas-mineras-devolucion-de-igy-y-caida-de-la/> / 40 The mining canon is the share enjoyed by local and regional governments on the income and rent obtained by the State for the exploitation of mineral, metallic and non-metallic resources. The mining royalty is the economic consideration that mining concessionaires have to pay to the Peruvian State for the right granted to them to exploit non-renewable natural resources. The validity fee is the annual payment made by any holder of any mining concession, whether it is a large, medium, small-scale mining or artisanal mining, for the maintenance of its concession area's title and for the validity of the real right.

SOCIAL CONFLICTS

Social conflict is a complex process in which sectors of society, the State and/or companies perceive that their positions, interests, objectives, values, beliefs or needs are contradictory, creating a situation that could lead to violence. The complexity of conflicts is determined by the number of actors that take part in them, cultural, economic, social and political diversity, the forms of violence that may occur or the institutional weakness to address them, among other elements⁴¹.

In Peru, the general scenario of social conflicts is strongly influenced by the dynamics of economic growth that the country has had in recent years, which has not necessarily implied the establishment of measures that generate a perception of social well-being and political representativeness of certain sectors of the society.

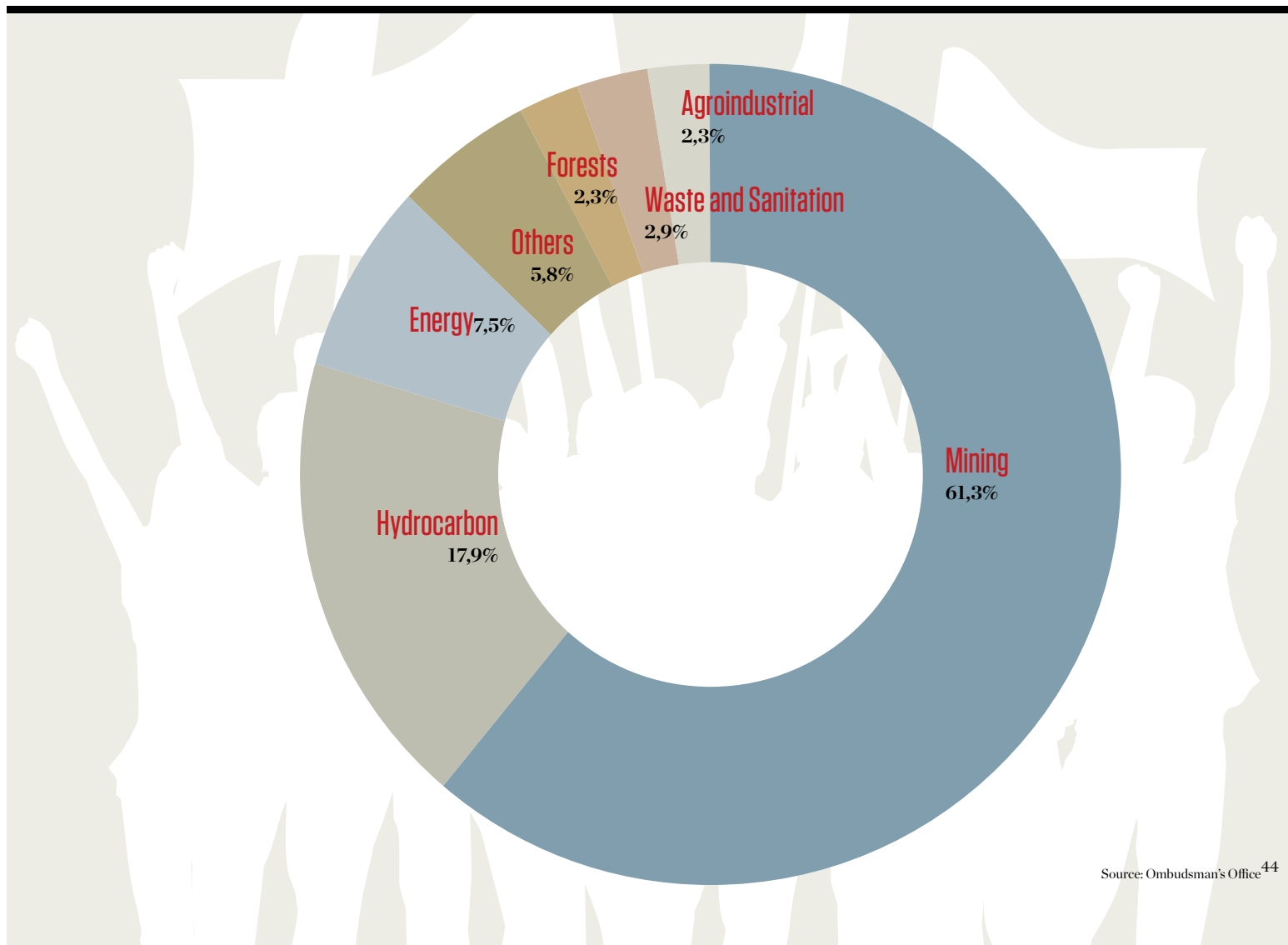
Peru has considerable mineral reserves whose exploitation is profitable, so successive governments have progressively implemented, since 1990, a

series of reforms designed, firstly, to facilitate investments oriented to the exploitation of mining resources and, secondly, to mitigate the negative impacts that these exploitations could have. These reforms, however, have not managed to avoid the multiplication of social conflicts around the mining activity throughout the country.

According to the Ombudsman's Office Twentieth Annual Report - 2016⁴², socio-environmental conflicts are still the most numerous: 173. Its main causes were the fear of possible environmental damage, the problems in relationships and the ownership and possession of the land. That year, mining was responsible for 61.3% of the total socio-environmental conflicts in the country.

The following graph shows in percentages the existence of various conflicts, of which 61.3% are of a socio-environmental nature related to the mining activity, directly affecting the portfolio of projects⁴³.

SOCIAL CONFLICTS RELATED TO MINING ACTIVITY



Source: Ombudsman's Office⁴⁴

2. MINING ACTIVITY IN PERU

DIFFERENCES IN THE MINING EXPLOITATION IN PERU

a) Illegal mining is the mining activity that takes place in prohibited spaces. The use of equipment and heavy machinery that does not correspond to the category of small mining or artisanal mining is considered part of illegal mining.

b) Informal mining is composed of those mining operators that are not legal, informal miners do not operate in prohibited areas or use machinery that does not correspond to their category.

c) Formal mining is mining that is carried out complying with all the requirements and permits established in the Mining Law. It has a mining concession or allocation or exploitation contract, permission to use the surface land, environmental impact assessment, water use license, social license and authorization to start or restart a mining operation. It includes the medium and large mining, small mining, artisanal mining.

ILLEGAL MINING IN PERU

Illegal mining in Peru, or illegal extraction of minerals, is an economic activity that consists of the exploitation of metallic minerals (such as gold) and non-metallic minerals (clay, marble, among others), without social or environmental control and regulation by the Peruvian State. Legislative Decree No. 1105⁴⁵ defines illegal miners as those who do not comply with the administrative, technical, social and environmental requirements of law, or that they carry out this activity in prohibited areas.

In Peru, the leading gold producer in Latin America⁴⁶, illegal mining is mainly focused in the extraction of that precious metal. This activity is practiced throughout the country, most of the illegal production comes from the regions of Madre de Dios, Puno and La Libertad.

In the midst of the mining boom⁴⁷ and the sustained increase of the international price of metals, areas with a presence of small-scale, informal and illegal mining also increased notoriously. In recent years, it has been found that there is informal and illegal mining activity in 21 of the 25 regions of the country.

Until a few years ago, large and medium-scale mining did not share territories with small-scale mining and informal and illegal mining. In many of these areas, the gold rush has caused entire communities to turn to the extraction of this mineral in areas close to operations and in concessions of large and medium formal mining companies⁴⁸.

Three main factors explain the growth of this type of mining: the sustained rise of the international price of gold, which made this activity increasingly attractive and profitable despite the openly risky conditions that means to operate in illegality; the lack of adequate employment, both in rural and urban areas, which causes part of the population to opt for an activity that generates significant income; and the institutional weakness of the Peruvian State in its different instances, national and subnational, which translates into a limited capacity for control and law enforcement in the territories⁴⁹.

In terms of production, the Ministry of Energy and Mines estimates and registers only a fraction of the gold produced by the illegal miners of Madre de Dios⁵⁰.

As gold production became more profitable due to the sustained rise in the international price of metals, illegal and informal mining became, at the same time, more extensive and intensive, particularly in that region. This illegal production increased the production of gold officially registered in Peru during 2003-2015 by 13.2%. This difference is obtained by comparing the volume of gold exported with the volume of gold produced. That is 2,516 tons were exported, but only 2,224 tons would have been produced according to MINEM records⁵¹.

Taking into account this profit margin, illegal and informal mining evaded the tax on business profits of US \$ 1,905 million during 2003-2015; that is, US \$ 147 million in annual average. The largest amounts of evasion were recorded between 2007 and 2011 when the price of gold reached its maximum levels

LEGAL FRAMEWORK OF THE PERUVIAN MINING CONCESSIONS SYSTEM

and the number of “fake” producers and exporters increased.

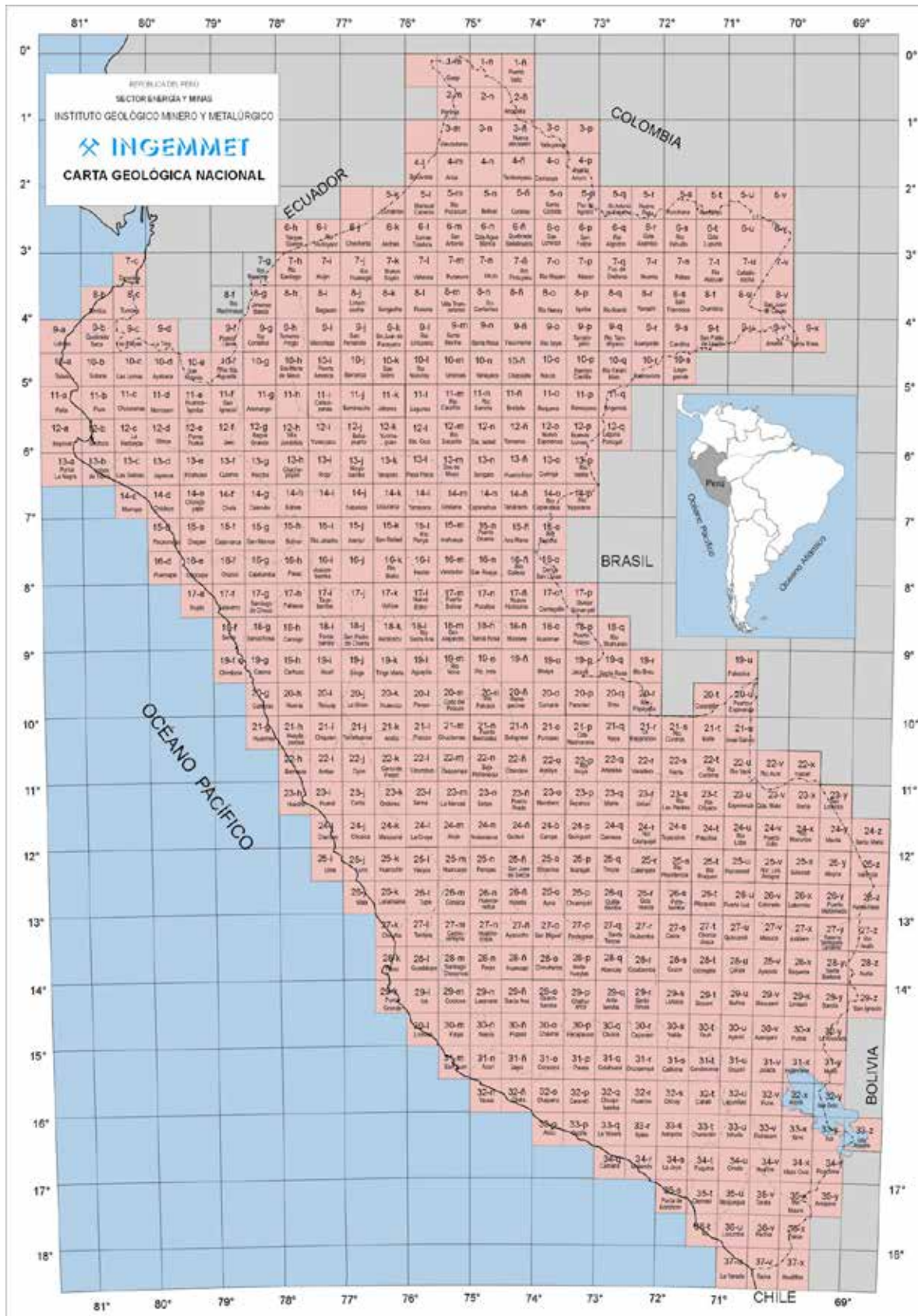
Peruvian legislation has adopted the Dominalist System, embodied in Article 66 of the Political Constitution of Peru, which declares that renewable and non-renewable natural resources are the Nation's assets. By this system, the deposits originally belong to no one, but the State has some kind of prominent or radical power on all things located in the territory that must be separated from the patrimonial domain. Due to this, the State retains the right to regulate the destination of mining wealth, which, although it does not belong to it, falls under its control by virtue of sovereignty and, in its merit, the State manages, distributes or grants it. The Unique Ordered Text of the General Mining Law reiterates the constitutional declaration (Article II T.P. of the TUO): “All mineral resources belong to the State, whose property is inalienable and imprescriptible.”

Surface and deposit

Article 954 of the Civil Code establishes that “the property of the land extends to the subsoil and above the surface that are included within the vertical limits of the surface perimeter and up to where it is useful for the owner to exercise his right. The property of the subsoil does not include natural resources, archaeological sites and other assets governed by special laws. “For this reason Article 9 of the Unique Ordered Text of the General Mining Law states that “the mining concession is a different and separate property from the land where it is located”.

Mining Cadastre

In Peru, the cartographic base of the mining rights system is found in the National Geological Map that includes the mapping of maps at different scales. The National Geological Map at a scale of 1: 100 000 is made up of 501 quadrangles, which were mapped between 1960 and 1999. Each geological map or group of maps is accompanied by a Series A bulletin (National Geological Map), in which objective information is provided about the studied territory. In some cases, it is accompanied by data of economic geology, historical geology among other geological branches of the region studied. All information is illustrated with field photos, stratigraphic columns, structural sections, laboratory results and the bibliography reference, to give the product scientific and technical robustness.



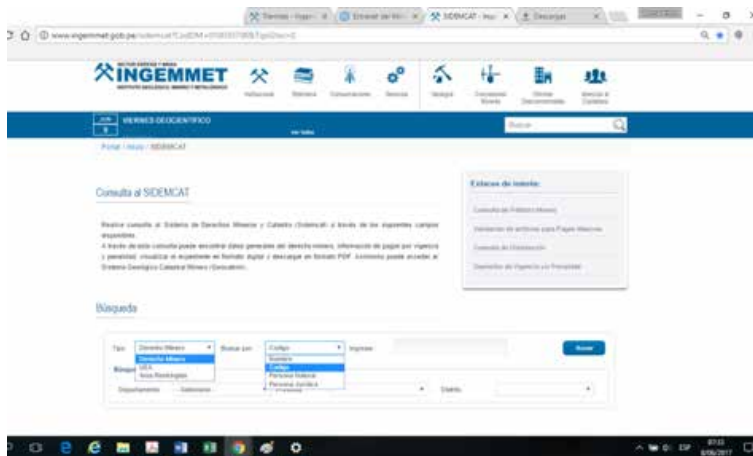
Source: Ingemmet 52

The national mining cadaster comprises:

- The existing mining concessions granted and those granted as a result of complaints made under laws prior to legislative decree 708, which have definitive UTM coordinates according to the law of the national mining cadaster.
- The mining concessions in force granted and those granted under the TUO of the general mining law approved by supreme decree 014-92-EM and that have a consent resolution.
- The concessions of benefit, general work and mining transport that have definitive UTM coordinates.

The Directorate of Mining Cadaster of INGEMMET is in charge of the Mining Rights and Cadaster System - SIDEMCAT and it contains information of mining rights, the national mining cadaster, the pre-mining cadaster, the cadaster of areas restricted to mining activity and information regarding compliance with the payment of validity fees and its penalty, among others.

The INGEMMET, based on SIDEMCAT information, carries out the national publication of free denunciability of the petitions and mining concessions of the general regime, of small mining producers and artisanal miners, and elaborates the national mining register⁵³. The information contained in the SIDEMCAT is supported by the administrative files for the mining concessions title, for benefit, for general work and mining transportation concessions, as well as the files of the Law of Validity and Penalty and others, whose information is collected by SIDEMCAT. This system has a guide with a geographic cadastral mining line created to be a tool in the fast and precise location of mining rights in any part of the national territory that can be viewed from the INGEMMET website and be downloaded from the GEOCATMIN portal.



Fuente: Ingemmet⁵⁴

However, this tool is of limited access for the rural area (where peasant communities live, a population potentially affected by the location of the mining activity), due to its limitations in terms of connectivity, accessibility, training in the management of the tool, among other factors⁵⁵.

GEOCATMIN⁵⁶ and SIDEMCAT databases are only accessible from a computer with Internet access, a service that is limited -and in some cases non-existent- in the high Andean rural areas, so that all the existing information on this database is useful but it is of limited access for this population⁵⁷.

In the following image you can perceive the degree of complexity and information management for the use and access to the system:



Source: Ingemmet⁵⁸

On the other hand, according to the ordinary mining procedure, after submitting the mining petition, INGEMMET orders the interested party to comply with the publications through notices in the local newspaper and in the official newspaper, thus complying with the notifications to all those who could be affected by the granting of the mining concession. In this case, the notification is made to the peasant communities that their superficial property rights are being affected and that they can act if they deem it appropriate.

There are efforts from the State and civil society to provide more and more information regarding the situation of mining concessions. However, these efforts would be focused on virtual media that have a huge database that can not necessarily reach the areas that are involved with the granting of mining concessions.

53 Manual de Legislación Ambiental, Sistema de Derechos Mineros y Catastro, http://www.legislacionambientalspd.org.pe/index.php?option=com_content&view=article&id=348:sistema-de-derechos-mineros-y-catastro&catid=31:cap-1&Itemid=3477 / 54 Screen capture made of INGEMMET's official website, 08.06.2017 <http://www.ingemmet.gob.pe/transformacion-de-coordenadas-psad56-a-wgs84/> / 55 "People of the countryside only knew thanks to the radio and when we are in the city thanks to television. In the countryside, no newspaper is used, that is not a practice of the communities" quote from a leader of Cajamarca. Concesiones mineras: procedimiento y acceso a la información, p.32. <http://siar.regioncajamarca.gob.pe/documentos/concesiones-mineras-procedimiento-acceso-informacion/> / 56 GEOCATMIN is considered the first geographic metadata catalog system that complies with the ISO19115 reference standard. It allows to register, control and order the information generated by the institution. The system is made up of 01 institutional geographic metadata catalog system; 01 technical standard for the generation of metadata; 01 metadata sheet implemented in the ISO 9001 process; 10,000 geographic metadata developed for internal or external users; and 01 metadata module implemented in the geoscientific database <http://www.rumbominero.com/noticias/mineria/pcm-premia-a-ingemmet-por-buenas-practicas-en-gestion-de-geo-informacion/> / 57 <http://www.derechoshumanospuo.org/agenda/noticias/245-la-actividad-informativa-del-Ingemmet-respecto-a-las-comunidades-campesinas/> / 58 INGEMMET, based on a screenshot of the official INGEMMET's website, with the result of the UTM coordinates search of mining requests and mining concessions made in order to verify the degree of accessibility to the information without having specific technical data of a concession area, such as UTM coordinates or names of the holders of a mining concession, 08.06.2017 http://www.ingemmet.gob.pe/documents/73138/590807/ANEXO_2.pdf/0073b472-6e52-43bd-b8b5-8780fefd117



CLASSIFICATION OF FORMAL MINING

Formal mining activity in Peru can be classified according to various aspects, such as: by type of activity, by nature of the substances, by exploitation method, by the shape of the deposit, by the location of the mineral, among others.

By method of exploitation

- Surface (sky or open pit)
- Subterranean or sinkhole.

Due to the size and capacity of the concession⁵⁹

The classification that determines the competence of supervisory entities is the size of the concession; that is, the number of hectares they have and the productive capacity, this is according to the number of metric tons they produce per day. In this context they are classified as:

1.Great mining: when the activity is carried out with a productive capacity greater than 5000 MT/day (according to the size of the production).

2.Medium scale mining: when the activity is carried out with a productive capacity between 350 and 5000 MT/day.

3.Small mining: when the activity is carried out in a land of up to 2000 hectares and / or a productive capacity between 25 to 350 MT/day.

4.Artisanal mining: when the activity is carried out in a land of up to 1000 hectares and / or a productive capacity up to 25 MT/day.

By type of Activity

The mining activity takes place in different phases and has a different regulatory compliance framework:

1.Search and Prospecting: is the search for geological zones susceptible to exploitation (veins, disseminated, placers) over areas where a mining deposit is presumed. The search and prospecting are free activities in the national territory, except for the Law exceptions⁶⁰.

2.Exploration and feasibility study of the project: it is carried out in order to demonstrate the dimensions, position, mining characteristics, reserves and values of the mineral deposits. With the information of the field a file is formed. An analysis of the samples is carried out to determine the quantity and quality of the mineral that can be extracted. The feasibility study of the project is carried out and reserves, tonnage and grades are determined⁶¹.

3.Development and Exploitation: development is the operation that is carried out to make possible the exploitation of the mineral contained in a deposit. Exploitation is the activity of extracting the minerals contained in a deposit. The natural or legal persons who carry out or wish to carry out

exploitation and benefit activities require the approval of the projects for the location, design and operation of their activity by the competent authority. New applications for benefit concession will include an Environmental Impact Assessment⁶².

4.Benefit: The Benefit Concession grants its owner the right to extract or concentrate the valuable part of an aggregate of uprooted minerals and/or to melt, purify or refine metals, either through a set of physical, chemical and/or other physical-chemical processes. The benefit includes the stages of mechanical preparation, metallurgy and refining. It is in the foundries where the concentrate is taken to high temperatures to eliminate impurities and to be able to refine it later. The ore that leaves the mine undergoes a metallurgical process (called concentration) to improve its grade⁶³.

5.Mining transport: system used for the massive and continuous transport of mineral products by unconventional methods. It is common in medium and large mining.

6.General work: refers to the provision of auxiliary services given to a mining operation center, such as ventilation, drainage, lifting or extraction. It can include two or more concessions from different concessionaires.

7.Commercialization: the commercialization of mineral products is free, internally and externally, and the granting of a concession is not required for its exercise. However, in the transactions or contracts of sale of mining products, both buyer and seller are obliged, under responsibility, to specify the origin of the products, that is, they must identify the mining right from which it has been extracted and/or specify, in the case of metallurgical products, the benefit plant certificate⁶⁴.

8.Closure: the closing of mines is a progressive process. It begins in the first stage of the project, with the conceptual design, and ends when the specific objectives of the closure have been reached permanently. It consists of the set of activities that must be implemented throughout the operations of a mining project in order to comply with established environmental standards and achieve the desired social objectives, after the mining stage.

59 MINEM. Prepared by engineer Guillermo Medina C. <http://slideplayer.es/slide/10643268/> 60 Article 2 of the General Mining Law: "The search and prospecting are free throughout the national territory. These activities may not be carried out by third parties in areas where there are mining concessions, non-admission areas for complaints and fenced and cultivated lands, unless prior written permission is granted by the owner or title owner, as the case may be. It is prohibited to search and prospect in urban or urban expansion areas, in areas reserved for national defense, in archaeological zones and on public property, unless previously authorized by the competent authority". If the results of the search and prospecting activities are positive, a mining concession is requested from the competent authority. The request for a mining concession in process is known as "mining petition". The mining concession grants the owner the right to explore and exploit the mineral resources granted./ 61 Exploration Regulations, Supreme Decree No. 038-98-EM. Article 2: "In the case of exploration, prior agreement is required with the owner of the surface land or the completion of the easement process, as mentioned in Law No. 26615, Law of Private Investments in the Development of Economic Activities in the Lands of the National Territory and of the Native Peasant Communities, modified by Law No. 26570" / 62 Art. 221° TUO: for the exercise of mining activity by foreigners in border areas, the issuance of a Supreme Decree approved by the Council of Ministers is required (Article 71° Constitution and TUPA N° AM3D) / 63 General Mining Law, Articles 17 and 18: "Benefit concession grants its owner the right to extract or concentrate the valuable part of an ore of uprooted minerals and/or melt, purify or refine metals, either through a set of physical, chemical and/or physical-chemical processes". The benefit includes the following stages: mechanical preparation, metallurgy and refining./ 64 Supreme Decree No. 005-91-EM/VMM declares the free marketing of raw or semi-finished gold, as well as the one obtained as a direct product of a mining and/or metallurgical process. The exercise of this activity is free, to perform it is not required to grant a concession.

REQUIREMENTS TO PERFORM EXPLORATIONS

a.The project category (A, B, C) is determined according to the intensity of the activity and the area that is directly affected by its execution.

b.If the original exploration project is modified, it must be communicated to the Ministry of Energy and Mines.

c.In the event that the holder transfers or cedes his exploration rights, the acquirer or assignee will be obliged to execute the commitments assumed in the sworn statement or the environmental assessment that has been approved or transferred.

CATEGORIES OF EXPLORATION PROJECTS

The Environmental Impact Assessment (EIA) is required for all holders of mining concessions that plan to start the exploitation stage.

CATEGORY	INCLUDE PROJECTS THAT INVOLVE ANY OF THE FOLLOWING ASPECTS	ENVIRONMENTAL ASSESSMENTS
Category I	<ul style="list-style-type: none"> a) A maximum of 20 drilling platforms. b) An effectively disturbed area of less than 10 hectares considering these platforms, trenches, auxiliary facilities and accesses all together. c) The construction of tunnels up to 50 meters long, as a whole. 	Declaration of Environmental Impact (DIA)
Category II	<ul style="list-style-type: none"> a) More than 20 drilling platforms. b) An effectively disturbed area greater than 10 hectares considering these platforms, trenches, ancillary facilities and accesses all together. c) The construction of tunnels over 50 meters long. 	Semi Detailed Environmental Impact Assessment (EIASd)

THE MINING CONCESSION IN PERU

The mining concession is an administrative step where the State authorizes individuals, the State itself or organizations linked to it, to conduct activities of exploration, exploitation, benefit, general work or transportation in an area in exchange for compliance by these parties of the legally established conditions.

Classification

Depending on the right granted, the concessions are classified as:

- a.Mining (metallic and non-metallic according to the type of substance) for exploration and exploitation activities
- b.Of benefit
- c.Of general work
- d.Mining transport

Therefore, without a concession mining activity can not be exercised, except for the activities of search, prospecting and commercialization located at the beginning and end of the mining process. The concession also entails the imperative fulfillment of a series of obligations set forth in the law that are manifested in the duty to work it and to invest in it for the production of mineral substances, although at present the ownership can be maintained by means of the payment of the validity fee and the penalty when it is required. Finally, the legal and non-contractual nature of the legal status of the concession implies that its granting is irrevocable and that the grounds for termination are exhaustively enumerated in the law.

Attributes

According to the General Mining Law, concession holders enjoy the following attributes: The free mining use of unoccupied land within the concession without the need for a free additional request. The free mining use of unoccupied land outside the concession, upon request. Request the mining authority authorization to establish easements on third party land that are necessary for the rational use of the concession. If it is the case, the easement will be established before the appraised compensation.

d. To build in the neighboring concessions the tasks that are necessary for the access, ventilation and drainage of their own concessions, for the transport of the minerals and for the safety of the workers, previous corresponding compensation if they cause damages and without any tax for the servant concessions, leaving in the field, free of costs for these concessions, the minerals resulting from the work performed.

e. Execute the work with the same aim indicated in the previous point in the land that is not currently under claim, with authorization from the General Directorate of Mining (DGM).

f. Request the expropriation, prior appraised compensation, of the properties destined for another economic purpose, if the area were necessary in the opinion of the mining authority, for the rational use of the concession and if a greater importance of the mining industry was agreed over the activity affected.

g. Use the waters that are necessary for the domestic service of the personnel and for the operations of the concession, in accordance with the legal dispositions indicated in the Law of Water Resources.

h. Take advantage of the mineral substances contained in the waters found with their work.

i. Inspect the work of neighboring or bordering mining concessions, when they suspect advances or when they fear flood, collapse or fire due to the poor state of the work of neighboring or bordering concessions.

j. Execute exploration, development, exploitation and benefit work with specialized companies registered in the DGM.

These attributes, however, have in many cases been significantly modified by non-mining regulations, in areas such as eriaza land⁶⁵, easement and expropriation.

PROCEDURES FOR THE GRANTING OF MINING RIGHTS

The procedures for the granting of mining rights, officially established, are fundamental to the Peruvian State, represented by the Geological, Mining and Metallurgical Institute for large and medium-scale mining and the Regional Energy and Mines Directorates of the regional governments of Peru, for small and artisanal mining, which grant the rights to explore and exploit mining resources.

The Peruvian State, through the Ministry of Energy and Mines, has regulated the following procedures:

Ordinary mining procedure

Only applicable for obtaining mining concessions for exploration and exploitation.

Special procedures

Applicable for benefit concessions, benefit authorization, general work concessions, mining transport concessions, authorization of areas of non-admission of complaints - ANAD, mining concessions accumulation, mining concessions division, complaints for entering and extraction of minerals

without right, change of substance of the mining concession, constitution of legal societies and imposition of mining easements.

PERSONS UNSUITABLE FOR MINING ACTIVITIES

Absolute disqualification

The following persons may not exercise mining activities throughout the national territory due to their position or function:

- The president of the Republic
- Members of the Legislative Branch
- Members of the Judiciary Branch
- State Ministers • Officials with the rank of ministers
- The Comptroller General of the Republic
- Prosecutors General of the Republic
- Officials and employees of the energy and mining sector
- Personnel of the agencies or dependencies of the national public sector and decentralized public bodies that exercise jurisdictional function or perform mining activities
- The members of the Public Ministry and the Constitutional Court, in application of Arts. 158 and 201, respectively, of the Constitution.

Relative disqualification

In the territory of their jurisdiction, they may not exercise mining activities:

- Political authorities (governors, lieutenants' governors)
- Members of the National Police of Peru
- Members of the Armed Forces

Disqualification extension

Are prohibited from absolute or relative mining activities, as the case may be, the spouse and relatives who depend economically on the disqualified person, whatever the degree of consanguinity or affinity (Arts 33 of the TUO).

Exceptions

That the non-business person has acquired mining rights prior to the election or appointment, in which case the acquisition is lawful. That during the exercise of the position or function the non-employee acquires mining rights by inheritance or legacy. That the spouse of the disqualified person adds mining rights to the conjugal society.

Sanctions

The disqualified person who acquires, in violation of the law, mining concessions, will cause the authority to declare the nullity of the acquisition and the area of the concession will revert to the State's domain. If the acquisition is only a participation in the mining right, the nullity will affect only that percentage. The declaration of nullity proceeds at the request of a party or automatically. During the process of titling a mining petition, the Mining Authority (INACC) must declare the nullity. Once the mining concession is titled and registered, the administrative litigation proceeds.

Other cases of relative disqualification

The Mining Law considers disqualified persons the partners, directors, representatives, workers and contractors of natural or juridical persons

dedicated to mining activity, who may not acquire mining rights for themselves within a radius of ten kilometers from any point of the perimeter. It encloses the area where the mining rights are located. This prohibition includes relatives who depend economically on the disqualified. The person affected by this disqualification has the right to substitute himself in the respective file, within a period of 90 days after the last publication of the request notice. If the affected person does not use this right within the indicated period, the relative disqualification will disappear.

Exception

In cases of disqualification or relative incapacity, the persons with relative incapacities may exercise a mining activity only with the prior and express consent of the holder of the mining right. Other impediments: the concessionaire and its relatives are prevented from formulating mining claims until the second degree of affinity or consanguinity, whose right has become obsolete, abandoned, void and/or waived until two years after being published as reportable.

REGISTRATION OF MINING RIGHTS

The Registry of Mining Rights is part of the Registry of Real Property that is part, in turn, of the National System of Public Registries. According to resolution 052-2004-SUNARP-SN, it is established that the acts registered in the Mining Rights Registry are:

- a. The concessions referred to in the General Mining Law (mining, profit, general work and mining transport).
- b. The resolutions of areas of non-admission of complaints.
- c. The contracts that are celebrated on the mining concessions.
- d. Other acts that declare, transmit, modify, limit or extinguish obligations, rights and attributes established in the General Mining Law, CMA and complementary provisions that correspond to the concessions. The administrative and judicial resolutions, at the request of the party or mandate of the authority, that fall in the concession, the obligations, the rights and the attributes that correspond to those concessions.

3. ENVIRONMENTAL ASPECTS

The owner of the mining-metallurgical activity is responsible for the emissions, discharges and disposal of waste to the environment that occur as a result of the processes carried out in their facilities. Its obligation is to avert and prevent those elements or substances that may have adverse effects on the environment from exceeding the maximum permissible levels established.

Likewise, it is the obligation of the title holder to start up and keep up-to-date the forecast and control programs contained in the PAMA, based on adequate sampling systems, chemical, physical and mechanical analysis that allow for a representative evaluation and control of liquid effluents,

solid waste, gaseous emissions, noise and others that may generate their activity by any of their processes when these could have a negative effect on the environment.

ENVIRONMENTAL IMPACT ASSESSMENT (EIA)

The law creating the National Environmental Impact Assessment System (SEIA) establishes that the SEIA is a unique and coordinated system of identification, prevention, supervision, control and early correction of negative environmental impacts derived from human actions, meaning through the investment project.

The process of Environmental Impact Assessment is a participatory and technical-administrative process, aimed at preventing, minimizing, correcting or mitigating and informing about the potential negative environmental impacts that may arise from investment projects, as well as intensifying its positive impacts.

Stages

Classification of the type of environmental assessment

The owner of the investment project submits his request for classification to the competent authority, attaching a preliminary environmental assessment, from which the authority will determine the category of environmental assessment that corresponds to the investment project according to the magnitude of the risks that this one could generate. If the authority determines that the investment project corresponds to category I, it issues the environmental certification that approves the preliminary environmental assessment, which is the declaration of environmental Impact. In the other cases, the competent authority issues the resolution assigning the category II or III and approves the terms of reference that will be used for the purpose of preparing the semi-detailed or detailed EIA in the corresponding investment projects.

Development of the EIA

The investment project owner prepares his detailed or semi-detailed EIA based on the terms of reference approved by the authority⁶⁶. During this stage, the baseline information is collected and some citizen participation mechanisms are carried out to help determine priorities regarding the area of influence of the project.

Evaluation of the EIA by the competent authority

The evaluation process of the EIA-sd (semi-detailed) is carried out within a period of 90 working days, counted from the day following the acceptance of the request for environmental certification. This process includes up to 40 business days for the review and evaluation, up to 30 business days for the correction of observations by the owner, and up to 20 working days for the issuance of the respective resolution.

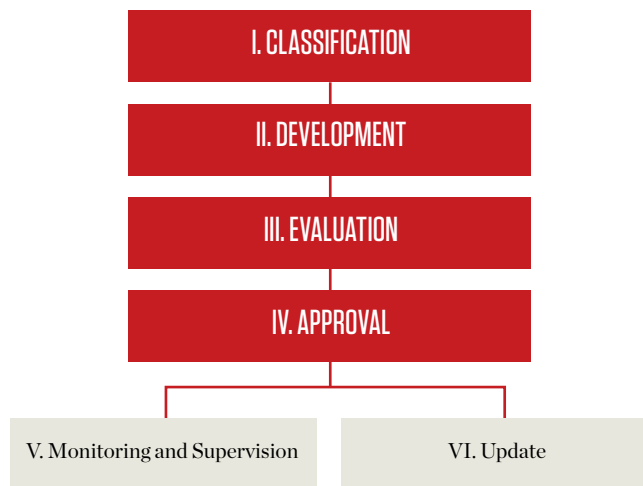
For its part, the process of evaluating the EIA-d (detailed) is carried out within a maximum period of 120 working days, counted from the day following the submission of the request for environmental certification. This process includes up to 70 business days for the evaluation, up to 30 business days for the correction of observations by the owner, and up to 20 working days for the issuance of the respective resolution. If a prior technical opinion, both binding and non-binding, is required from other authorities, these must be issued under responsibility within a maximum period of 45 working days.

66 Since December 28, 2015, the environmental consultant companies that prepare environmental assessments of the energy and mining sectors will perform their registration, renewal, modification or procedures' update, as appropriate, at SENACE whom manages the National Registry of Environmental Consultant Companies that are authorized to prepare environmental assessments of investment projects. Environmental consultant companies are responsible for preparing the environmental assessments and are recruited by the investment projects owners. The payroll professionals provide support in the evaluation of the environmental assessments and in the baseline supervision in case SENACE requires it. In the latter case, SENACE will hire them based on technical guidelines and objectives. <https://www.senace.gob.pe/wp-content/uploads/2016/10/DossierDRA.pdf>

The approval of the EIA

The resolution that approves the EIA constitutes the environmental certification, which empowers the holder to obtain the other authorizations, licenses, permits or other requirements that are necessary for the execution of the investment project. If, as a consequence of the revision of the EIA, it is noticed that the EIA has not considered the terms of reference approved or that the potential negative environmental impacts derived from the project could have unacceptable effects or another relevant aspect that is identified, the competent authority must issue a disapproving resolution that will be notified to the owner.

ENVIRONMENTAL IMPACT EVALUATION PROCESS



Source: Minam⁶⁷

The EIA is required to:

- Title holders of mining activities that pass from the exploration stage to the exploitation stage.
- The mining and/or profit concessionaire that plans to carry out production extensions in its operations or with a profit plant size greater than 50%.
- The mining and/or profit concessionaire that plans to carry out production extensions in their operations or in the size of the beneficiation plant and that have a PAMA. The EIA will be presented regarding the expansion of operations to be carried out.

ENVIRONMENTAL IMPACT ASSESSMENT SYSTEM (SEIA)

SEIA is a unique and coordinated system of identification, prevention, supervision, control, mitigation and anticipated correction of the negative environmental impacts derived from human actions, such as policies, plans, programs and investment projects. The SEIA is made up of a set of institutions that fulfill precise roles and functions within the framework of this system.

MINAM, as the governing body of the SEIA, is responsible for ensuring integration and cross-sectoral coordination mechanisms on the

environmental management of the environmental impacts of investment projects among the different levels of government. Consequently, it is constituted as a technical-normative authority at national level and, as such, dictates the regulations and establishes the procedures related to the SEIA, coordinating and supervising its proper functioning.

The SEIA is also made up of the competent authorities, which are the national sectoral authorities, the regional authorities and the local authorities in charge of conducting the environmental impact evaluation process through the categorization, review and approval of the environmental assessment of the investment projects subject to the SEIA, according to their respective competences. Said authorities are in charge of approving the Environmental Impact Assessment (EIA) of the investment projects who are part of the Inclusion List of the Investment Projects subject to the SEIA.

The law creating the SEIA incorporates the obligation that all public, private or mixed capital investment projects that involve activities, constructions, works and other commercial activities and services that may cause significant negative environmental impacts must necessarily have an environmental certification prior to its execution. The environmental certification is the resolution issued by the competent authority approving the EIA.

CLASSIFICATION FOR PROJECTS REQUIRED TO SUBMIT AN EIA

Within the framework of the SEIA, environmental assessment for investment projects has three categories, according to the magnitude of the environmental impacts: mild, moderate and significant. At each level, a different type of environmental management instrument corresponds according to what is established in the following table.

The law creating the SEIA establishes the following classification⁶⁸ for the projects included within its scope of application:

Category I: Declaration of Environmental Impact (DIA). Includes projects whose execution does not cause significant negative environmental impacts.

Category II: Semi-detailed Environmental Impact Assessment (EIA-sd). It includes projects whose execution may cause moderate environmental impacts and whose negative effects can be eliminated or minimized by adopting easily applicable measures.

Category III: Detailed Environmental Impact Assessment (EIA-d). It includes those projects whose characteristics, scope and/or relocation can produce negative environmental impacts, quantitatively or qualitatively, and significant, requiring a thorough analysis to review their impacts and to propose a management strategy.

KEY ACTORS IN THE GRANTING OF MINING CONCESSION AND ENVIRONMENTAL LICENSES

Ministry of Energy and Mines (MINEM): responsible for the regulatory development of the state in its sector and pursues the balance between the rights and obligations of mining companies, emphasizing the environmental issue, in accordance with international standards and commitments acquired by Peru.

Geological, Mining and Metallurgy Institute (INGEMMET): an entity that is part of the MINEM, manages the Geographic Cadastral Mining Guide, a tool for the quick and precise location of mining rights in any part of the national territory. Its ease of access and the geographic, urban, protected areas, archaeological sites, roads, rivers, lakes and population centers information that it contains has made it a tool whose use transcends the exclusive mining interest and is also essential as an element of consultation for users related to urban sectors, natural resources, archaeological resources and even for tourists⁶⁹.

Ministry of the Environment (MINAM): among its functions is to direct the Environmental Impact Assessment System (SEIA) and the National Environmental Information System (SINIA), as well as to establish the criteria and procedures for the formulation, coordination and execution of decontamination and recovery plans for degraded environments

National Service of Environmental Certification for Sustainable Investments (SENACE): within the framework of the SEIA⁷⁰ it is also a competent authority. This institution was created in 2012 as a specialized technical agency attached to the Ministry of the Environment, in charge of reviewing and approving the detailed Environmental Impact Assessments (EIA-d) of public, private or mixed capital investment projects of national and multiregional scope, involving activities, constructions, works and other service activities that may cause significant environmental impacts.

Since the second quarter of 2015, the Mining and Energy functions transfer process began: in 2016 the transfer of functions of Transportation and Agriculture and in 2017 the transfer of functions of Housing and Construction and Sanitation began. The evaluations that are in process will continue in each sector. As of January 31, 2017, SENACE evaluated five EIA-d, only one was disapproved.

Main technical bodies who emit opinion

Entities called technical bodies who emit opinion play an essential role during the process of reviewing the EIA. These entities may issue binding or non-binding technical opinions as established by the legal framework. The implication of a binding opinion is that it can determine the approval or disapproval. Entities that issue binding opinions:

National Water Authority (ANA): intervenes in the environmental impact evaluation process when the investment project compromises water resources⁷¹. The legal framework has established that, without going against what is mentioned in the SEIA framework, any project that is related to water resources must have the favorable opinion of the ANA. In that sense, this provision covers any project that includes the use or enjoyment of any water resource and not only those related to the dumping of wastewater.

National Service of Natural Areas Protected by the State (SERNANP): issues binding opinions on the EIA when the investment project overlaps a protected natural area (ANP) or its buffer zone⁷². The regulation of the Law of Protected Natural Areas establishes that the EIA and the DIA of activities to be developed inside an ANP or its buffer zone require the prior favorable opinion of SERNANP. This means that if there is no prior opinion - and also if this is not favorable - no authority can approve the EIA or the DIA presented by the owner of the activity.

The authorization, license, concession, permit or other entitlement right, as well as their renewals, that have been granted in favor of activities of natural resource exploitation or the qualification of infrastructure that they perform within the ANP will be null within full rights if they do not have the prior binding technical opinion of SERNANP.

Vice Ministry of Interculturality of the Ministry of Culture: issues binding technical opinions on the EIA when the investment project is carried out in territorial reserves created for the protection of indigenous peoples in voluntary isolation and initial contact, among others⁷³.

Environmental Assessment and Inspection Agency (OEFA)

Organization in charge of the National System of Evaluation and Environmental Enforcement (SINEFA), whose purpose is to ensure compliance with environmental legislation by all natural or legal persons, as well as to supervise and guarantee that the functions of evaluation, supervision, inspection, control and sanctioning authority in environmental matters, in charge of the various entities of the State, are carried out independently, impartially, agilely and efficiently.

Roles:

- Evaluation function:** it includes surveillance, monitoring and other similar actions carried out by the OEFA, according to its competences, to ensure compliance with environmental regulations.
- Direct supervisory function:** includes the power to carry out follow-up and verification actions in order to ensure compliance of the oversee company with the rules, obligations and incentives established in environmental regulation.
- Supervisory function of public entities:** includes the power to carry out actions to monitor and verify the performance of environmental, regional or local oversight entities.
- Inspection and sanctioning function:** includes the power to investigate the commission of possible punishable administrative infractions and to impose sanctions for the breach of obligations derived from the environmental management instruments, as well as the environmental norms and the mandates or dispositions issued by the OEFA.
- Regulatory function:** includes the power to dictate in the field and in terms of their respective competences, the regulations and norms that regulate the procedures under their charge, and others of a general nature related to interests, obligations or rights of natural or legal persons, public or private, which it oversees.

69 <http://www.ingemmet.gob.pe/e-catastro-minero/> 70 Environmental Impact Assessment System. / 71 ANA, of the Ministry of Agriculture and Irrigation, according to Law No. 29338 - Law on Water Resources, is the governing body and the highest normative technical authority of the National Water Resources Management System, which is part of the National Environmental Management System. / 72 SERNANP is a Specialized Public Technical Agency attached to the Ministry of the Environment, through Legislative Decree 1013 of May 14, 2008, in charge of directing and establishing the technical and administrative criteria for the conservation of Protected Natural Areas (ANP), and to protect the maintenance of biological diversity. SERNANP is the governing body of the National System of Natural Protected Areas by the State (SINANPE) and, in its capacity as a technical-regulatory authority, carries out its work in coordination with regional governments, local and owners of properties recognized as private conservation areas. / 73 The Vice Ministry of Interculturality of the Ministry of Culture is in charge of preparing policies, programs and projects that promote interculturality, as a guiding principle, to promote and guarantee the rights and integral development of the culturally diverse groups of the country, and to build a citizenship that recognize, respect and be enriched by the interaction with cultural diversity.

CHAPTER 2



1. DESCRIPTION AND ANALYSIS OF THE PROCESS OF GRANTING MINING CONCESSIONS FOR EXPLORATION AND EXPLOITATION

In Peru, to obtain an exploration and exploitation mining concession, an administrative process is carried out, meaning, a tender is not carried out. The applicant must submit a request for the mining concession (exploration - exploitation) to the Geological, Mining and Metallurgy Institute (INGEMMET), a specialized technical body of the energy and mining sector that is part of the Ministry of Energy and Mines. The applicant can be a natural or legal person.

Mining concessions are granted administratively and in a decentralized manner. The Central Government, through INGEMMET, processes and grants mining concessions for medium-sized mining and large-scale mining, while subnational governments process and grant mining concessions for artisanal mining and small-scale mining within their territorial jurisdiction⁷⁴.

Once the concessionaire has registered in INGEMMET the title of its granted mining concession, the owner will have the right to exercise

exclusively, within the area properly delimited, the activities inherent to the concession, as well as the other rights mentioned in the general mining law.

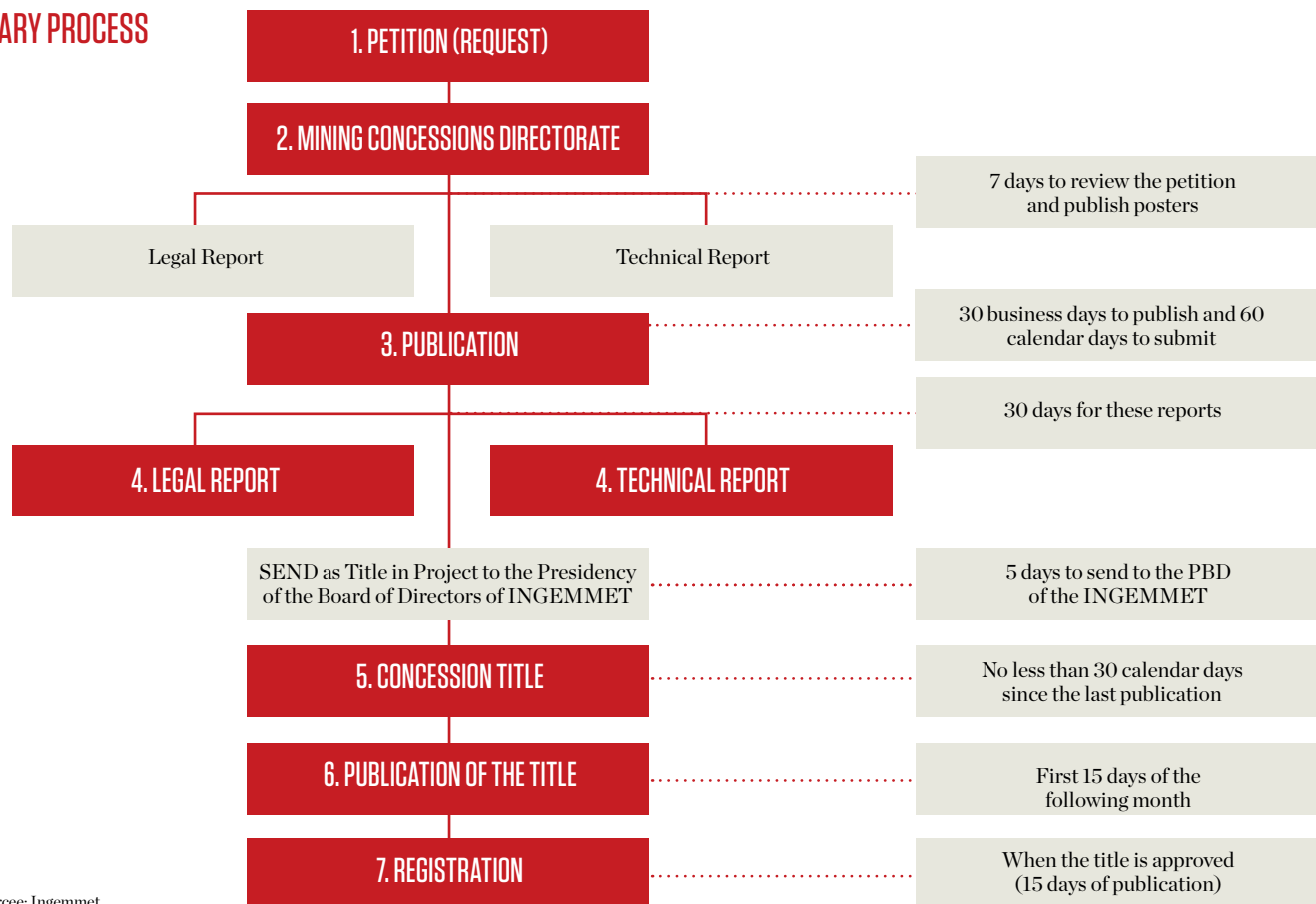
In general, the mining concession grants its owner a real right to explore, develop and exploit the concession and, consequently, extract the mining substances contained therein, to become the owner of the extracted substances in order to dispose of them.

The Governance Index⁷⁵ also identifies as a critical point in the governance of tenders that there are no criteria to qualify concessionaires. In effect, the indicator “Rules of the bidding rounds prior to licensing” is the information prior to the delivery of the concessions (criteria for delivery). It has a score of 0 because, although there are no tenders, NRG I believes that criteria should be established to qualify for a license.

On the other hand, there are studies that explain the impacts of the fact that the requirements for obtaining a concession are minimal: lack of technical capacities for the mining activity to develop in a socially and environmentally appropriate manner, which could cause risks such as negative environmental impacts and to rent concessions to informal or illegal miners. These studies explain the normative and institutional design of the concession granting process in mining investment promotion policies⁷⁶.

The ordinary process for granting exploration and exploitation mining concessions can be seen in the following illustration:

MINING ORDINARY PROCESS



Source: Ingemmet

Requirements

To start the process it is necessary to have clearly identified the area that will be given as a concession, determining the exact coordinates of the area taking as reference the National Map of the National Geographic Institute that is in the GEOCATMIN. With this, the process must be initiated with INGEMMET by submitting an application for a mining petition.

INGEMMET and the regional governments keep an entry record of petitions in the SIDEMCAT to know the priority order in the submission of petitions. The reception of the petitions will be carried out in strict order of arrival of the interested parties to the respective offices.

If before the activities start in the offices of INGEMMET or the regional government, there are two or more people requesting mining petitions, the person in charge of the reception desk will assign to all of them the same date and the initial time of receipt of petitions in the SIDEMCAT.

The petition must meet the following requirements:

a) It will be presented in writing in original and in copy, and will contain the following information:

- The names, surnames, nationality, marital status, address, ID number or immigration card and RUC of the petitioner, as well as the names, surnames and nationality of the spouse, if applicable. If two or more persons make the request, it will also indicate the names, surnames, address and the ID number or immigration card and RUC of the common attorney, with whom the mining authority will be in contact during the processing of the entire file. Likewise, if the petition is made by a legal entity, the data of its registration in Public Registries will be indicated, as well as the general information of its legal representative. In the event that the legal entity is not yet registered, a copy of the delivery notice of the presentation of the certificate of incorporation may be presented, stating the date of entry into the registry. In any case, an address will be indicated within the urban areas of the city where the office who receives the petition is located, as well as where there is a permanent postal service available.
- Name of the petition.
- District, province or region where the request is located.
- Type of concession according to whether metallic or non-metallic substances are involved.
- Identification of the grid or polygon of the set of requested grids, with UTM coordinates, indicating the name of the map and the area where the area petitioned is located.
- Surface extension in hectares of the requested area.
- Identification of the grid or set of adjoining grids, at least on one side, on which the concession is requested, respecting pre-existing rights.
- Names, surnames and address of the owner of the surface land where the mining concession requested is located, if known.
- Prior commitment in the form of a sworn statement from the petitioner⁷⁷.

b) The application must be accompanied by the following documents:

- Payment receipt of the validity fee corresponding to the first year.
- Payment receipt of the processing fee equivalent to 10% of an UIT.
- ID or immigration card copy of each of the petitioners and the legal representative or attorney-in-fact.

Any person, without need of authorization or power of the petitioner, may present petitions. Once the petition for the mining concession is submitted, the INGEMMET will initiate the consultation procedure with those

populations that it deems necessary in coordination with the Ministry of Culture. The petition file will pass to the Mining Concessions Directorate once the consultation process has been completed.

2.- Once the petition for the mining concession has been submitted to INGEMMET, the file is sent to the Mining Concessions Directorate where the technical evaluation reports and legal reports are analyzed and developed.

Technical evaluation

- Evaluate the UTM coordinates, look out for their correct formulation and identify if they are in border or maritime zones or overlap other territory.
- Analyze the overlaps cases and their degree, both with other concessions areas and with areas restricted to mining activity (such as archaeological zones, special projects, protected natural areas, etc.).
- Verify with the national map of the National Geographic Institute, road lines, rivers, lagoons, agricultural areas and possible urban areas.
- Determine the political demarcation of the petition considering the information available in the INEI.

Legal report

- Verifies compliance with the requirements established in the General Mining Law and the Regulation of Mining Procedures.
- Corroborates if the petition meets all the requirements to be admitted (such as the payment of fees, if all the required information is included in the form), one of its elements of analysis being the technical report.

3.- If approved, the applicant must make a publication in the official newspaper “El Peruano” and in a newspaper of the capital of the region where the mining concession is located to make his petition known and avoid that his concession partially or totally overlaps another. The publications in the newspapers must be presented to the INGEMMET so that the file is again evaluated by the legal and technical areas.

4.- In this second analysis the technical report updates the information of the first technical report on the existence or not of a restricted area, any update in the demarcation data of the INEI or another similar one. The second legal report gives an account of compliance with the application procedure of the concession, such as terms of publication, analysis of favorable opinions from other sectors that condition the granting of concessions (for example, if the petition includes buffer zones of Natural Protected Areas, the request will be sent to the National Service of Protected Natural Areas for its opinion) and similar cases.

5. Based on the second legal and technical evaluation, the Presidency of the Board of Directors of INGEMMET issues the resolution granting the title of the mining concession.

6.- The publication is made in the official newspaper El Peruano.

7.- The last step is to register it in the registry of Mining Rights of the National Superintendence of Public Registries (SUNARP). This must be done in the SUNARP offices where the concession is located and request the registration of the title, presenting an ID copy and a copy of the resolution where the mining right is granted. This registration is optional because it is done thinking in third parties who might want to oppose.

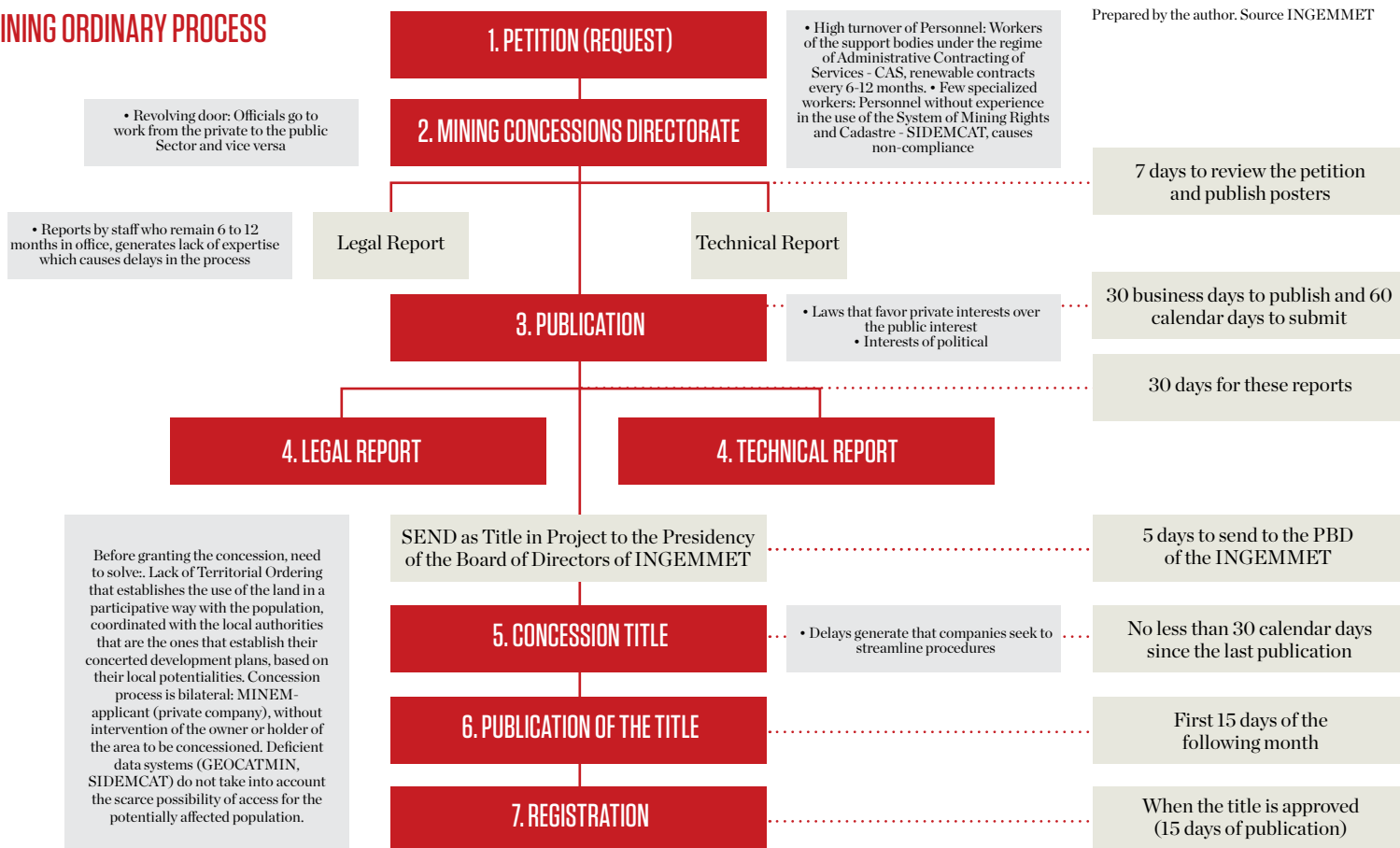
VULNERABILITIES IN THE PROCESS OF GRANTING MINING CONCESSIONS FOR EXPLORATION AND EXPLOITATION

As explained initially, while the present investigation was developed and getting information provided by the prioritized government stakeholders, former public officials, civil society, and representatives of the mining industry, it was noted that during the processes of granting a mining

concession, there would be various economic, political and sociocultural factors that would intervene in the generation of vulnerabilities that could lead to opportunities for certain corruption risks to take place.

Below are the vulnerabilities found, identified on the map of the ordinary process of mining concessions and the detail of said vulnerabilities that were discussed and validated in the two validation workshops held in April and June of 2017.

MINING ORDINARY PROCESS



Conflict of interest that can occur when there is a rotation of public officials, mainly referring to senior positions of trust, which go from serving in the private sector to the public sector and returning to the private sector repeatedly.

Sources

In the first validation workshop, the actors that participated exemplified this vulnerability with a case raised in 2016 in the mining sector, and validated by a journalistic investigation prepared by Convoca⁷⁸, called “Carrusel tóxico”⁷⁹. This investigation accounts for the case of a former manager of Environmental Permits of Yanacocha -the most important gold mine in South America- who in 2016 was appointed as director of the area that approves the environmental studies of large investment projects in SENACE, the public institution responsible of approving environmental certification.

They indicated that following the formal denunciation of parliamentarian Marco Arana to the Minister of the Environment (because it could incur in a conflict of interest), SENACE accepts the resignation of that official⁸⁰.

Along the same lines, Francisco Durand⁸¹ points out “in Peru, the economic elites are concerned about who occupies key positions and prefer to deal with politicians and technicians close to large companies, both personally and ideologically. These are, more than any other social group, those that require access and influence, which is resolved with the revolving door”. This pattern of “revolving door”, he maintains, is observed in Peru, in the particular case of MEF, because it is the most powerful ministry and from where Law 30230 came from, a law that establishes tax measures, simplification of procedures and permits for the promotion and invigoration of investment in the country, better known as the “environmental paquetazo” law⁸².

78 Convoca.pe is a Peruvian digital media that has obtained several international awards such as the Data Journalism Awards 2016, the most important global prize in data and innovation journalism, in the News Data Apps category for its investigative series “Excesos sin castigo”, which reveals, in a systematic way, the situation of environmental supervision and the behavior of the extractive industry in Peru / 789. According to report “Carrusel tóxico” of Convoca, Investigative journalism <http://convoca.pe/especiales/juegodelpoder/el-carrusel-toxico/> 79 <http://www.prensaaldia.blogspot.pe/2016/09/renuncia-julio-bonelli-director-de.html> / 81 Francisco Durand is considered an expert in groups of economic power and capture of the state, in collaboration with Oxfam-Peru and the sociologist Emilio Salcedo, they managed to publish “Cuando el poder extractivo captura el Estado. Lobbies, Puertas Giratorias y Paquetazo Ambiental”. This research acquires a relevant value because it allows us to delve into those mechanisms that allow extractive corporations to have an influence on the state apparatus and capture it for their benefit, in recent years -even decades- these large companies have had the doors open to produce laws that increase their profits, a voracious appetite that has been promoted to the detriment of public institutions and vulnerable social groups. <https://peru.oxfam.org/files/file-attachments/capturadurand%20Epdf/82> Francisco Durand also said that this power is so strong that the former president of Congress, Daniel Albugattis, said with reference to the Humala government that “the MEF governs, not the presidency”. Reference is also made to the Central Reserve Bank of Peru (BCR) and that a way to co-opt them is by influencing the selection process of the president when a government starts. If they manage to influence this election, and then a minister or his advisers pick and technicians of greater influence, it is easier to listen to the recommendations of the aforementioned elites. He also remembers that Hernando De Soto, when he met with Fujimori, once he was elected president of the Republic, recommended that he should “surround himself with technicians and advisers of influence”.

Carlos Monge, Director for Latin America of the Natural Resource Governance Institute - NRGI, one of the actors interviewed as an expert of Civil Society, argues that in Peru, specifically in the public sector, there is a second dimension of State capture⁸³, which is known as “Revolving door”, where private interests get public officials appointed in mining sector entities where decisions of interest to the company will be made and even workers from mining companies will be appointed, and “this could be a direct violation of the norm to approve, for example, the EIA of the mining company”.

In contrast, in the second workshop to validate the vulnerabilities found, the participants indicated that there is nothing illegal when a professional goes from the public to the private sector if the legal moratorium is complied with, and that when the private sector worker goes to the Public Sector, there is no prohibition or illegality, on the contrary the public sector benefits from the experience of said professional. Regarding the case that is set as an example, they maintained that there was no evidence that said official had entered the SENACE to favor the mining sector. In addition, Proética got access to the deposition made by SENACE in response to the complaint of the journalistic investigation agency Convoca. They allege that the professional unionized in that journalistic note had worked for a mining company (without specifying dates), and then he was appointed as Director of Environmental Certification for SENACE. In said note, they maintain that no dates are required. That the aforementioned professional worked in the private company from July 2010 to December 2013, and then from that year he worked in the private practice of his profession (independent consultant). Therefore, its incorporation into the SENACE did not constitute a case of conflict of interest since the aforementioned professional was not incurring in an abstention contained in numeral 5 of article 97 of the Unique Ordered Text of Law 27444 (General Administrative Procedure Law).

Conclusion

The risk of corruption that is generated in what is called revolving door is that one could use privileged information for undue private benefit and manage, from the public sector, causes of particular interest for the private sector.

This vulnerability was exposed by the interviewees, as well as by civil society actors and former employees of the sector in the first validation workshop of this study. However, it is very difficult to verify because there is no reliable evidence to support the likelihood and corroborate the intention to favor a particular sector, therefore obtained a score of “minor risk”.

Little permanence in the positions due to the fact that there is no regulated public career, which results in a contracting system for temporary services and causes mid-level officials to not achieve a specialization in the work they perform.

Sources

The interviewee GHTN⁸⁴, public official of the sector, informed that the personnel of the sector have contracts of 6 to 12 months of duration and that, in some cases are renewable by cooptation, based on the recommendation of high level officials, without carrying out a real process of prior selection, which means that the specialization required for the work is not achieved. This generates job instability, in addition to the salaries that are received in

the sector are not in line with the specialized work that is done, which would lead to the desertion or “escape” of talent to mining companies for superior working conditions to those offered by the sector, thus losing the experience achieved by the staff.

This reference could be contrasted through the official website of the INGEMMET (April 2017)⁸⁵ where job announcements can be seen to hire personnel in the CAS (Administrative Services Contract) modality, specifying that it is necessary to hire an engineer expert in structural geology that has a series of trainings, specialties and experience, indicating that the contract is only for eight months. Under the CAS system, the permanence of the worker depends on periodic reports from a superior, the renewal of the contract is given by cooptation. The uncertainty due to the lack of job stability generates a vulnerable space in which the worker who has to perform technical work on processes of a mining company, seeks or accepts the possibility of working directly for it, which could generate a risk of flexibility in the fulfillment of its duties, with the additional pressure that these functions have an end date.

The labor conditions of the CAS regime, under which the vast majority of employees of the public sector work does not guarantee job stability, something that the State should grant along with other labor rights, encouraging the improvement of public administration, a vital instrument for the development of the country. In Peru, there are more than 183 thousand workers under this scheme, so that it should no longer hire under this modality⁸⁶.

In an interview with another public official (codified in the matrix), he stated that INGEMMET has identified vulnerabilities within the institution regarding the hiring of personnel. Proof of this is that INGEMMET Institutional Anti-Corruption Fighting Plan 2014-2016 shows that, in relation to the previous plan, it increases actions and takes new measures to counteract acts of corruption, recommending improving the personnel selection process (psychological evaluation, suitability and capacity for the position to perform or performed, as well as ongoing training in ethical values), request both workers and incoming staff affidavits notarized or certified stating that they do not work in private companies related to the entity, strengthen and improve the systems of transparency and access to information that allow monitoring of the complaints presented⁸⁷.

Conclusion

Not having a public career, low salaries and a lack of job stability would create a risk that the staff, especially those who enter with temporary contracts, may be prone to commit acts of corruption.

Design of a non-participatory process and with transparency mechanisms that are not directed towards the affected communities.

The mining concession is granted in a process that does not involve the potentially affected population (which is primarily rural and, among other things, with great Internet access limitations). Peasant and/or native communities can not perceive the transparency and advantages of the GEOCATMIN system because it is not adapted to the rural characteristics where the concession territories are located.

⁸³ The capture of the State in the mining sector occurs when officials of some companies in the sector manage to be appointed in key positions in the sector, where they would be able to make decisions that could favor these companies, distorting the purpose of the institution; based on their capacity as the most powerful economic actors within a country, they gain privileged access and undue influence over parts of the state apparatus, understanding that in that process they pass “above the general interests of society.” Source: Informe de la lucha anticorrupción en el Perú. <http://www.cerjusc.org.pe/adjuntos/notas/prensa20150824133001.pdf> / ⁸⁴ Some interviewees, officials or former officials of public institutions related to the mining sector, provided information with the condition that their identity should not be revealed, therefore their identities are coded safeguarding the confidentiality agreement. / ⁸⁵ <http://www.ingemmet.gob.pe/documents/73138/738900/11.Conv.DIRME.ExpertoGeologiaEstructural.pdf/16674e2f-6bae-4918-a918-271d1592495d> / ⁸⁶ Interview with labor lawyer Germán Lora: “Beneficios otorgados a trabajadores CAS no les aseguran estabilidad laboral.” Diario La República. <http://larepublica.pe/09-04-2012/beneficios-otorgados-trabajadores-cas-no-les-aseguran-es/> / ⁸⁷ http://www.ingemmet.gob.pe/documents/73138/109108/Plan_Contra_Corrupci%C3%B3n_2014-2016.pdf/a312cbf5-a8e-4906-9685-9f2b7a97749e

The mining concessions in Peru are granted through an administrative process where the applicant, which is the mining company, identifies in the cadastral map a certain area and requests its granting through a concession. The population potentially affected by the mining activity is not consulted in this step, therefore they have the perception that regulations are designed in such a way that they favor the mining company since only the company and the State intervene in the administrative process, without taking into account the population, regional and local governments too.

Sources

INGEMMET in 2012 was awarded by the NGO Ciudadanos al día⁸⁸ in the category of Transparency and Information Access, recognition that is based on the use of the information systems GEOCATMIN and SIDEMCAT, and as a dissemination tool of the information that the institution administers, since it contains more than 100 layers of geological and cadastral mining information in real time and online. INGEMMET also obtained the Good Practices in Management of Geo Information 2015 award, in the Metadata Management category⁸⁹. GEOCATMIN is considered the First Geographical Metadata Catalog System, which complies with the ISO 19115 reference standard; that allows you to register, control and organize the information generated by the institution⁹⁰.

However, for Javier Jahnce, Executive Secretary of RED MUQUI, “in the concessions granting there are only two parties, the State and the company, neither the regional, nor local governments, nor the peasant community that may be in the area is a party or is considered in the process and that is reflected with the newspaper publication that is a publication that only reaches certain parts of the country, a certain public. It does not reach distant communities so that they can assert their right to opposition⁹¹, which would be the only thing that could be done by those who have interests in that area, requesting the granting of a concession to be reviewed.”

He adds “the process of granting a mining concession can not be considered transparent or open to the public, because with this information people are not informed that a concession has been granted, something that has more power than a property right, it should have some mechanism of transparency and should not constitute an imposition in practice. In mining concessions there is no prior consultation, the only time in mining that there is prior consultation is when the administrative resolution in which the start of the activity is established after the EIA is finished, after the mining concession has been approved, that is, there is no decision of interest that is taken to consultation.”⁹² Emphasized Jahnce.

In the second validation workshop, the representatives of the mining companies and INGEMMET argued that “the process of mining concession does not require to be consulted to the inhabitants of the place because at that stage it is not yet known if there really are minerals or not to exploit, therefore, there would be no impact in this first phase”. In addition, they indicated “it is not true that the inhabitants are totally uninformed because the State is present, and it goes to the areas to provide information to the population”.

In contrast, according to Nelly Luna, a journalist from Ojo Público, “when a concession is requested, coordinates are established, spaces within some grids in the mining cadaster, and mining companies make the request in that

area because it is known that there is mineral, because the INGEMMET has the information and the company has already done a minimum study of search or prospection to establish more or less what type of mineral and where the vein may be; that is, they are not uninformed, the only thing that is going to be located later is the final vein where it will work. So, if we already know that there are minerals, why should not the concession granting process be framed in the prior consultation?” She adds that “in order for rural communities to have access to the GEOCATMIN database they need to have access to a computer connected to the Internet, but in rural communities many times there is not even access to electricity during the day, and in many cases there is not even access to a telephone line or Internet, many of them have to travel for four or five hours by waterway or trails, if any, to reach a town that has such services, resulting, then, useless for the communities said system. So, for whom is it accessible? For whom is it transparent? These systems are not designed for the populations directly affected. In the event that any community manages to enter a computer with Internet, the management and the system is an even greater barrier, since it can only be operated by a person who is familiar and who also has the necessary data to locate the information you want to get”⁹³.

According to the ordinary mining procedure, after presenting the mining petition, INGEMMET orders the interested party to comply with the publications through notices in the local newspaper and in the official newspaper. However, in some communities it is not customary to buy newspapers or papers, so this type of information does not necessarily reach the community. And if it is the case, the information arrives without any reference that will help the communities identify the concession area, there is no information in relation to small towns, rivers, streams or others that can give better orientation about which area it is, since it does not mention which community or communities will be involved in the mining petition, or the names of the petitions or provide information that can be processed and understood by the majority of local stakeholders, only the UTM coordinates are published and with it the notification for the peasant communities whose right of superficial property is being affected “is already fulfilled”⁹⁴.

In the journalistic article “Un Perú polarizado: la ebullición de los conflictos sociales en el país”, César Guzmán Barrón⁹⁵ explains the context in which the regulations of the sector occurred. He argues that the change in the economic rules in the 90s in which the regulations related to the mining sector were done, found the State, private companies and communities poorly prepared because the State began only to dictate some provisions for citizen participation in the mining, hydrocarbons, electrical sector in 2002. Among them, the General Law on the Environment that was given later, in 2005, establishing basic principles on how studies and citizen participation should be, and the company-State-community relationship; the creation of the Ministry of the Environment in 2008 and the National Service of Environmental Certification for Sustainable Investments in 2012. These are landmarks of how the State faces social conflict from public management and the regulations that require revision⁹⁶.

In the study “Extractivismo y transiciones hacia el postextractivismo en el Perú”⁹⁷ by Javier Azpur and Epifanio Baca, it is analyzed that during the campaigns for the regional elections of October 2010, in Cajamarca, Cusco and Junín, the criticism of what they call “Irrational and overwhelming extractivism” was the central theme of the agenda. consulting them about

88 http://repositorio.ingemmet.gob.pe/bitstream/ingemmet/532/1/Revista_Ingemmet_19-2012.pdf / 89 <http://www.rumbominero.com/> / 90 <http://www.rumbominero.com/noticias/mineria/pcm-premia-a-Ingemmet-por-buenas-practicas-en-gestion-de-geo-informacion/> / 91 “People of the countryside only knew thanks to the radio and when we are in the city thanks to television. In the countryside, no newspaper is used, that is not a practice of the communities” quote from a leader of Cajamarca. Concesiones mineras: procedimiento y acceso a la información, p.32. <http://siar.regioncajamarca.gob.pe/documentos/concesiones-mineras-procedimiento-acceso-informacion/> / 92 Interview with Javier Jahnce, Executive Secretary of RED MUQUI, ONG Red de Propuesta y Acción. Source: Interview, Lima, April 2017 / 93 Interview with investigative journalist Nelly Luna, Ojo Público, Investigative Journalism, 15/03/2017 / 94 Organization Derechos Humanos y Medioambiente. <http://www.derechoshumanospuno.org/agenda/noticias/245-la-actividad-informativa-del-Ingemmet-respecto-a-las-comunidades-campesinas/> / 95 Director of Centro de Análisis y Resolución de Conflictos of the Pontificia Universidad Católica del Perú. / 96 Diario Gestión. <http://gestion.pe/economia/peru-polarizado-ebullicion-conflictos-sociales-pais-2139894/>

the viability of large mining projects. The central objectives of these new regional authorities are: to stop the mining concessions, which were granted without consultation or participation of the towns where the mining activity would take place, to renegotiate the projects already underway and to carry out the zoning and territorial organization before continuing to authorize more exploration and more mining extraction”.

It should be noted that there is a current regulatory framework that regulates the implementation of citizen participation mechanisms for all stages subsequent to the granting of the mining concession; that is, throughout the life of a mining project.

Conclusion

In Peru, mining laws and, above all, regulations on the granting of mining concessions are designed within the context of incentives for private investments, establishing that such concessions are granted through an administrative process involving the State and the mining company; neither the population nor the regional and/or local governments intervene.

Territorial ordering. Obstacles to the processes of TO and Ecological Economic Zoning (EEZ) with risk of absence of a plan for a rational management of the territory and social conflicts.

Our country has managed to specify the Territorial Ordering (TO) that establishes the use of the soils in a participative way with the population, coordinated with the local authorities that establish their concerted development plans, based on their local potentialities.

The TO is a technical, administrative and political decision-making process agreed with the social, economic, political and technical stakeholders for the orderly occupation and sustainable use of the territory. It considers the social, environmental and economic conditions for the occupation of the territory, as well as the use and exploitation of natural resources to guarantee a balanced development and in conditions of sustainability. The TO seeks to manage and minimize the negative impacts that could be caused by the various activities and development processes carried out in the territory, thereby guaranteeing the right to enjoy a balanced and adequate environment for the development of life⁹⁸.

Currently, many decisions are made without knowing the vulnerabilities or potentialities of mining activities and without considering the effects they will have on resources that are more scarce each day, such as water. The absence of a plan for the rational management of the territory creates conditions for conflict, because even projects without real risks for the territory can be considered dangerous due to the lack of prior agreements based on reliable information. In addition, there is a divorce between the will to move towards regional integration and the reality of political demarcation given that it was considered in the speech to address these aspects, mechanisms and procedures to face the problems of political demarcation existing in the country. However, the real advances show that, the progress has been null and did not go beyond the rhetorical aspects⁹⁹.

The lack of TO and EEZ harms not only the population but also private investment, as expressed by representatives of the Regional Government of Piura, arguing that, in some cases, these EEZ attempts would be used

as a political weapon to veto the development of extractive projects and generate greater conflict due to a mismatch between the expectations of the population and the development imperatives of the central government. For this reason, to decide before granting concessions where certain activities could be developed, to determine which areas are suitable for extractive projects and which are not, makes them key aspect of a preventive nature in this conflictive situation¹⁰⁰.

For Jahncke: “Territorial ordering is urgent and must be carried out with the participation of regional and local governments, which are responsible for establishing the use of the soils of their areas in a participatory manner with the population, coordinated with the local authorities, which they are those that establish their concerted development plans, based on its local potential. Regional governments are in charge of the process of territorial organization, however the central government has decided that the process has to go through the Ministry of the Environment first and then pass seven subsequent studies to the economic and ecological zoning process to approve the Territorial Ordering. This would imply a series of obstacles to establish the areas where there can be or can not be an activity and of what kind, including mining. Currently it is the Ministry of Energy and Mines that makes that decision, without the intervention of the local and regional governments who establish their concerted development plans; then it makes no sense to ask local governments for their concerted development plans if, as in many municipalities in the south, their territories have already been concessioned. The Ecological Economic Zoning, that is part of the Territorial Ordering, must have maps that establish where the economically important zones are for what type of activity (agricultural, tourist, livestock) and establish the zones with potential in terms of water resources, protected areas, fragile ecosystems, water zones, all that has to have a level of protection”¹⁰¹.

In an interview to Luis Marchese, president of the National Society of Mining, Petroleum and Energy (SNMPE)¹⁰², and also national representative of the mining company Anglo American, he stated that “Territorial Ordering can be a rigid instrument that can limit investment since in the mining activity you work with resources not yet discovered and you do not have certainty that there are resources, therefore you must work in development plans rather than ordering, the population should decide what do they want. It should be a more flexible instrument, more oriented to the development of the population than to the territorial ordering”.

Given the alternative whether it would be better to know in advance the opinion of the population, that is to say if they wish, for example, to continue with their agriculture or livestock activities and choose to not accept the mining industry in order to avoid possible social conflicts, he said that it is difficult for the population to take that decision without knowing in advance what they have: “First they must know what they have below, if it is something so valuable that they can change their decision”. He suggested that it would be better to aim at development plans that are agile: “For an exploration task, Territorial Ordering does not make sense, it is not an invasive activity, the first thing that is done is geophysical or geochemical. As you have more information, you have to see if the extractive activity is or not desirable, to say it a priori is not a good idea, who knows, they can get benefits of a responsible extractive activity”.

The lack of Territorial Ordering prevents the possibility that regional and local governments can consider their development prospects. If they want to invest in their area, they are less likely to make an investment without the certainty of what will happen next, if there may be a mining operation where they would like to invest. Mining companies consider that Territorial Ordering can be a rigid instrument that can limit the investment, that in the mining activity one works with resources not yet discovered and it is not certain that there are resources, for that reason one must work in development plans rather than for ordering. The absence of a plan for the rational management of the territory would create conditions for conflict, which in turn would generate advantageous spaces for particular interests and, with this, scenarios that facilitate corruption and increase social conflicts. Even projects without real risks for the territory could be considered dangerous due to lack of determination of which areas are suitable for extractive projects and which are not.

Regulation mainly oriented to promote mining investment, without adequate participation, transparency, access to information and accountability mechanisms, with risks for the rights of communal territories and social conflict.

Peru has considerable mineral reserves whose exploitation is profitable, which is why successive governments have progressively implemented, since 1990, a series of reforms aimed at making easier investments oriented to exploiting mining resources. However, a series of legal measures have been systematically taken, putting land rights of the populations at serious risk, especially of peasants and indigenous communities living in the area of direct or indirect influence of the investment projects.

Sources

A recent case that illustrates this type of regulations is the promulgation of the D.L. No. 1333 that, at the beginning of 2017, created the Special Project for Land Access for Prioritized Investment Projects (APIP), with the purpose of facilitating access to rural areas, whether public or private, formal or informal, to encourage investment projects of national interest. The explanatory memorandum states that the MEF would have prioritized a list of 53 projects in the mining, hydrocarbons, transportation, electricity, agriculture, telecommunications and sanitation sectors that have an amount of US\$ 78,946 million¹⁰³. This amount represents, as indicated, 41% of the national GDP, almost three times the Peruvian external debt and almost twice the value of the foreign direct investment that entered the country in 2015. It also indicates that so far the cumulative investment of these projects is US \$ 31,136 MM (16% of GDP), meaning 61% of investment execution is still pending (US \$ 47,810 MM, 25% of GDP)¹⁰⁴. The Government justifies the regulation mentioning that one of the main causes of this delay is timely access to land. Therefore, the APIP had the mission of clearing, on behalf of the State, the ownership of all the properties required for a project¹⁰⁵.

Through various groups¹⁰⁶ it was denounced that this regulation was created to favor private interests, since its purpose was to grant the land right to companies that request the clearing or to ensure occupation of the territory, without taking into account that they are putting in serious risk

the land rights of the populations. Even more so for peasants and indigenous communities included within the area of direct or indirect influence of the investment projects, all the more taking into account that 72.7% of the indigenous peoples and native communities throughout the country has no way to proof irrefutably of its property right, due to the lack of georeferencing of the dimension and location of its lands, a historical debt that the Peruvian State has not yet settled¹⁰⁷. In addition, they maintain that said rule does not mention a guarantee or limit on ownership and possession, and is based on a concept too broad as the “national interest”, it does not respect acquired rights of property, possession, occupation or tenure since it establishes that both formal and informal properties, public or private, will be cleared by the APIP, which generates legal uncertainty and goes against the Constitution.

In April 2017, within the framework of the Pan Amazonian Social Forum held in Tarapoto¹⁰⁸, the indigenous peoples met to demand transparency and no more corruption in tenders and megaprojects in their territories, denouncing that through the latest regulations it is being carried out a strategy of deregulation, flexibility of socio-environmental standards and systematic violation of the peoples’ rights, which leads to the weakening of channels of transparency, access to public information and participation. They also denounced that the State continue to promote large investments, at the expense of respect for their territories, without the benefits having reached their native and peasant communities settled in the areas of influence of the projects in the Amazon and in the Andes, which has brought socio-environmental conflicts.

Under pressure from civil society, the Congress of the Republic repealed, four months after its enactment, the D.Leg.1333¹⁰⁹, the Constitution Committee argued that this rule created legal uncertainty among indigenous peoples and put their lands and territories at risk, since it authorized the reorganization of all legal property documents and, in practice, forced the owners of any land or property, within the area of a megaproject, to dispose of their property in favor of the beneficiary companies¹¹⁰.

Conclusion

The regulations that are perceived as favorable only for the mining activity and to the detriment of the citizens, above all of the peasant communities, could generate vulnerable scenarios for socio-environmental conflicts in a context without adequate mechanisms of participation, transparency and access to information.

103 The objective of the regulation is to help the execution of prioritized infrastructure works of national interest and large-scale and other projects declared of national interest; and those prioritized by regional governments. Such prioritization is carried out by Supreme Decree, endorsed by MEF and the main public entity of the competent sector. In that sense, through this regulation it was intended to use the figure of national interest to regulate all projects, picked by the national government and regional governments, as well as present and future projects. Source: General Provisions of D.Leg.1333.<http://spij.minijus.gob.pe/Graficos/Peru/2017/Enero/06/EXP-DL-1333.pdf> / 104 Data obtained from the Peruvian Legal Information System (SPLI) that can be found on the official website of the Ministry of Justice. <http://spij.minijus.gob.pe/Graficos/Peru/2017/Enero/06/EXP-DL-1333.pdf> / 105 D.L. 1333 is preceded by rules promulgated by the previous government of Ollanta Humala, called “environmental paquetazo”. Law 30230, and whose characteristic is to make the environmental regulations and institutions flexible, as well as to weaken the legal security of communal lands in order to facilitate and promote investment. The impacts of this law are also analyzed in the matrices BLS ADAPT and DPN2 / 106 Several NGOs, representing both peasant and indigenous communities, spoke out against this regulation, organizations such as Colectivo Territorios Seguros para las Comunidades del Perú, which groups various confederations.[https://ia601606.us.archive.org/14/items/InformeDecretoLegislativo1333/Informe%20Decreto%20Legislativo%201333%20\(1\).pdf](https://ia601606.us.archive.org/14/items/InformeDecretoLegislativo1333/Informe%20Decreto%20Legislativo%201333%20(1).pdf) / 107 Study on impacts, interests and beneficiaries of Law No. 30230. “ Medidas tributarias, simplificación de procedimientos y permisos para la promoción y dinamización de la inversión en el país”. p.39. Prepared by: NGO DAR. http://dar.org.pe/archivos/publicacion/154_analisis_Ley30230.pdf / 108 DAR. http://www.dar.org.pe/archivos/docs/pronun_ppii.pdf / 109 Digital file of the legislation of Peru. Official Newspaper El Peruano and SPLI. Prepared by: Grupo Funcional Sistematización de Informes y Opiniones - DHD/PS Area de Servicios Documentales y de Información. <http://www2.congreso.gob.pe/Sicr/TraDocEstProc/InfSiste.2013.nsf/C8CE491805E736C405257AF700743CC6?026C42D673E91000E0525805F00700A66?OpenDocument> / 110 RED Muqui. <http://www.muqui.org/comunicaciones/noticias/item/591-congreso-deroga-ley-que-crea-entidad-expropiadora-de-territorios-indigenas-para-inversiones>

CORRUPTION RISKS IN THE PROCESS OF GRANTING MINING CONCESSIONS FOR EXPLORATION AND EXPLOITATION

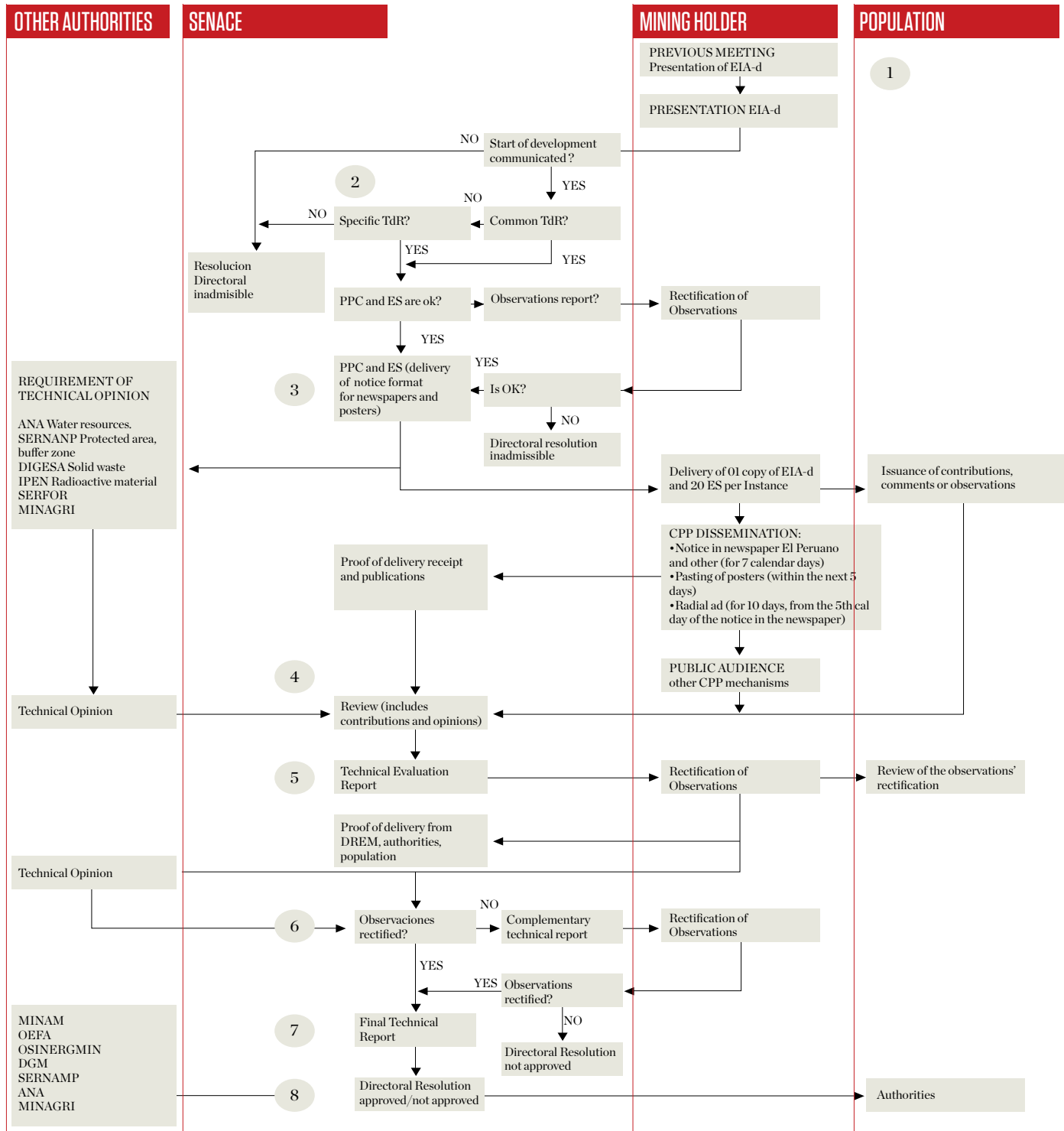
The following are the corruption risks generated by the vulnerabilities identified in these stages of the ordinary process of granting the exploration and exploitation concessions, as well as the questions associated with said risks:

VULNERABILITY	CORRUPTION RISK	QUESTION
High turnover of officials especially in high positions of trust, who go from serving in the private sector to the public sector and return to the private sector repeatedly, a fact that is known as “revolving door”.	When a private company places a trusted official in key positions in the sector, it could use privileged information in its favor and also manage, from within the institution, interests that previously would have been handled by private companies, which would also generate the risk of distorting the institution’s function.	PPN1: What is the risk of the sector’s personnel constantly shifting from providing services in the public sector to the private sector and then back to the public sector?
The mining concession is granted in a process in which the potentially affected population does not have a say, which is primarily rural and with great Internet access limitations.	The current mining granting system does not include potentially affected communities or subnational governments in its process. The risk is that there are no mechanisms for participation and/or surveillance for the population potentially affected in this stage.	DPI ADAPTED: What is the risk that the process of granting a mining concession has been structured to favor the interests of mining over the public interest or to structure it in that way if a reform is planned?
Design of the non-participatory process and with transparency mechanisms that are not meant for the affected communities.	The design of the mining concession granting system is flexible to promote concessions and has gaps in the social level (participation of communities) and in the transparency of the process (accessibility of communities to timely, accurate, and complete information). This reading is shared by various institutions of civil society, reflects sectoral governance and undemocratic transparency (not accessible to all). Its effects on governance, participation and transparency are clear. Corruption risk: the design of the process favors the private interest of mining companies over the public interest.	FC3 ADAPTED: What is the risk that there is no Territorial Ordering that clearly establishes the surface rights by law and determines the areas open to mining?
Regulations oriented mainly to promote investment, with the absence of adequate participation, transparency, access to information and accountability mechanisms, to the detriment of land rights.	To give rules that are born to favor private interests, to the detriment of land rights, generates propitious scenarios of corruption, creating legal insecurity in a context without adequate mechanisms of participation, transparency and access to information.	FC1: What is the risk that mining laws have been drafted (or drafted if a reform is planned) in order to favor private interests over the public interest?

2. DESCRIPTION AND ANALYSIS OF THE PROCESS OF GRANTING ENVIRONMENTAL CERTIFICATION

The National Service of Environmental Certification for Sustainable Investments (SENACE) is the entity in charge of reviewing and approving the detailed Environmental Impact Assessment (EIA-d) regulated in Law No. 27446, Law of the National Environmental Impact Assessment System (SEIA) and its regulatory standards.

ENVIRONMENTAL CERTIFICATION PROCESS



Prepared by autor. Source: Manual de Evaluación de Estudio de Impacto Ambiental del Sector Minero del SENACE

The EIA-d is an instrument of environmental management for decision making and constitutes one of the key mechanisms to promote sustainable development. The evaluation of environmental impacts is a participatory, technical-administrative procedure aimed at preventing, minimizing, mitigating and informing about the potential negative environmental impacts that may arise from investment projects, as well as intensifying their positive impacts. It includes the following steps:

1.- Start of the evaluation procedure of the EIA-d

To initiate the procedure of evaluation of the EIA-d, the company must present/display its request to SENACE¹¹¹. With the request presentation, the step that includes the admissibility analysis begins¹¹². Prior to the presentation of the EIA-d, the company may request at least one meeting with those responsible for evaluating the EIA-d to present the general aspects of the same. This meeting is useful for the SENACE to indicate if it is necessary to expand or clarify some aspect of the EIA-d and can participate in it:

- From the company: its representative or the professionals of the consultant company who prepared the EIA-d.
- From SENACE: the officials in charge or evaluators of the EIA-d.
- From other entities of the State: competent authorities of other sectors, authorities from entities who emit technical opinion and authorization entities, at the request of Senace. This meeting can also be held after the EIA-d has been presented, at the request of the company or SENACE.2.-

Executive Summary

The evaluation team carries out the initial evaluation by reviewing the executive summary and the citizen participation plan. This revision culminates with the declaration of conformity of the Executive Summary and the Citizen Participation Plan¹¹³. The Executive Summary is a synthesis of the relevant aspects of the EIA-d of the mining project and includes its main impacts from the point of view of the company and the environmental management plan that the company has chosen to mitigate those impacts. It should consider the following topics:

- The legal framework that supports the EIA-d.
- A brief description of the mining project, its total investment and implementation schedule.
- Attached there is a map with the location. Delimitation of the area of environmental and social influence, direct and indirect.
- Geographical characteristics of the area where the mining project will be developed.
- The components of the mining project, which include infrastructure, access, labor requirements in the construction and operation steps.
- A plan of the main components of the mining project must be attached.
- Possible environmental and social impacts, direct and indirect, positive and negative.
- Prevention, control and mitigation measures and others that may correspond to the identified impacts.
- Summary of the budget allocated for the environmental management strategy.
- Summary of the social baseline.
- Summary of the community relations plan.
- Brief description of the closure plan.

3. Citizen participation plan

The citizen participation plan is the document through which the company

proposes to the SENACE the area of social influence of the project and informs the mechanisms of citizen participation that will be used during the evaluation of the EIA-d and during the execution of the mining project¹¹⁴. The plan should consider the following topics:

- Area of social influence: officials corroborate the realization of citizen participation mechanisms¹¹⁵.
- Background: it must describe and document the activities of citizen participation developed.
- Proposal of participation mechanisms to be developed during the evaluation procedure of the EIA-d.
- Proposal of participation mechanisms to be developed during the execution of the mining project.
- Proposal of a Participation Mechanisms' schedule to be developed during the evaluation of the EIA-d.

Once these points have been reviewed and analyzed, the compliance of the executive summary and the citizen participation plan is communicated.

4. Review of the EIA-d

Once the compliance of the executive summary and the citizen participation plan has been communicated, the evaluation step of the EIA-d begins, which involves:

- A technical evaluation: must take into account the technical, environmental, social and legal aspects of the project, verifying compliance with the Terms of Reference (TdR)¹¹⁶. If deficiencies are found in the EIA-d, if said assessment was not prepared in accordance with the ToR or if it is necessary to clarify some aspect of said assessment, the corresponding observations are made in the Technical Evaluation Report. If the EIA-d was not prepared on the basis of the mining project and its components with a feasible design, the environmental assessment is declared inadmissible¹¹⁷.
- Citizen participation during the evaluation: the process of citizen participation during the evaluation of the EIA-d begins with the declaration of conformity of the citizen participation plan that, among other topics, includes:
 - The delivery of the executive summary and the EIA-d to the regional and local authorities..
 - Dissemination of the citizen participation plan, presentation of proof of delivery and publications to SENACE, Public hearing..
 - Execution of other citizen participation mechanisms according to the citizen participation plan.
- Field work: provides the evaluator with additional judgment criteria to evaluate the environmental viability of the mining project. This activity is important, mainly because it facilitates the knowledge and recognition of the area of influence of the project and the area of the footprint of the project¹¹⁸.
- Inter-institutional coordination: during the evaluation procedure and after the communication of declaration of conformity of the executive summary and citizen participation plan, SENACE requests binding or non-binding technical opinion from other State entities with environmental competencies, according to what is established in the current regulations. In addition, it carries out all the follow-up of the requests made. The consulted authority must circumscribe its technical opinion specifically to the topics that fall within its sphere of competence. Opinions are classified as:

111 This administrative procedure is regulated by the regulatory provisions of the Environmental Protection and Management Regulation for Exploitation, Benefit, General Labor, Transportation and Mining Storage Activities approved by Supreme Decree No. 040-2014-EM ("Mining Environmental Regulation"); and, in an additional manner, by the provisions contained in Law No. 27446, Law of the National Environmental Impact Assessment System and its respective regulations approved by Supreme Decree No. 019-2009-MINAM), Law No. 28611, Law General of the Environment and Law No. 27444, Law of General Administrative Procedure. / 112 In accordance with Article 117 of the Mining Environmental Regulation. / 113 In accordance with Article 119 of the Mining Environmental Regulation / 114 It must be taken into account that during the preparation of the EIA-d the company must have had a prior Citizen Participation Plan duly approved for this step, in accordance with the provisions of the Mining Environmental Regulation, Ministerial Resolution No. 304-2008-MEM/DM, Ministerial Resolution No. 116 2015 MEM/DM and Supreme Decree No. 028-2008-EM (Regulation of Citizen Participation in the Mining Subsector) / 115 In accordance with the provisions of Article 4 and 58 of the Mining Environmental Regulation / 117 In accordance with the provisions of Article 123 of the Mining Environmental Regulation / 116 In accordance with the provisions of Article 30 and 41 of the Mining Environmental Regulation / 118 Fieldwork involves a significant number of people, resources and time, so it is important to define the scope of it. The days required for its execution will be established in the work plan based on the information provided by the company. Also, by virtue of the characteristics of the project, it is determined if the fieldwork involves taking samples of environmental components. If the total or partial construction of a component described in the assessment or the modification presented is noted, the procedure will be declared inadmissible and OEPA and OSINERGMIN will be informed for the next steps according to their competence.

- Favorable technical opinion (binding)
- Mandatory technical opinion (non-binding)
- Optional technical opinion

5.- Reports and observations

In case there are observations to the Executive Summary and/or the Citizen Participation Plan, these should be transferred, only once, to the company, who will have a period of eight working days to correct them. For this purpose, a Report of Observations is prepared with all the observations made to the Citizen Participation Plan and the Executive Summary addressed to the Environmental Certification Directorate. If the company does not correct the observations within the indicated period, the EIA-d will be declared inadmissible.

After the corresponding analysis, within the aforementioned deadlines, the administrator is informed of the compliance with the mechanisms proposed in the executive summary and in the citizen participation plan, specifying the execution schedule of the aforementioned plan and other aspects considered necessary to guarantee the effectiveness of the citizen participation process. For this purpose, a Technical Report is prepared supporting the compliance of the citizen participation plan and the executive summary.

6. Technical evaluation

In this step the review and evaluation of the EIA-d is carried out, focusing on the technical, environmental, social and legal aspects of the mining project. The technical evaluation is the main step in the evaluation procedure of the EIA-d and is carried out simultaneously with the processes of citizen participation during the evaluation of said assessment, the fieldwork and the inter-institutional coordination. The technical evaluation includes:

- To approve the work plan for the technical evaluation of the EIA-d, as well as lead the coordination and meetings with the entire evaluation team.
- Evaluate the technical documentation of the EIA-d according to the structure and content of the ToR.
- Consolidate the technical observations report containing SENACE's observations and those sent from State entities that issue technical opinions (binding and non-binding)
- Carry out field work in the project area, which includes the collection of relevant information for the review of the file, in coordination with the field specialist.
- Carry out the general review and technical evaluation of the EIA-d in accordance with the professional competence of each member of the evaluation team and the tasks described at the beginning of this manual.
- Make the corresponding observations to the EIA-d.
- Carry out the internal and external coordination and administrative measures that are necessary for the EIA-d evaluation procedure to be effective.
- Determine jointly whether to approve the EIA-d or not.
- Conduct a review of the social aspects of the EIA-d according to the manual and the responsibilities designated by the Mining Subsector's coordinator.
- Carry out an analysis of the social characteristics, determining the importance of the project for the communities involved and/or vulnerable populations of the Area of Influence of the project.
- Verify that the social variables have been analyzed according to the nature of the project.
- Verify the social impacts and corresponding mitigation measures.
- Alert the coordinator of the Mining Subsector on relevant aspects of the

EIA-d that could generate potential social conflicts.

- Review and analyze the definition of the area of social influence proposed by the company.
- Verify progress in the implementation of the citizen participation plan.
- Prepare the specific field work plan with the support of the evaluation team and the supervision of the Mining Subsector's coordinator.
- Carry out the legal evaluation according to the current regulations.
- The final product is the preparation of the final technical report and the respective resolution of approval or disapproval of the EIA-d.

7. Final technical report

If the observations are satisfactorily lifted by the company and the State entities that issued the technical opinion to the EIA-d have received the agreement, the Final Technical Report is prepared, which supports the approval resolution of the EIA-d.

In the event that the observations are not satisfactorily drawn up, the final technical report details the observations that have been considered raised and those that are not, with the corresponding justification, which support the resolution disapproving the EIA-d. The final technical report that supports the approval of the EIA-d must be duly substantiated, as well as the final technical report that supports the disapproval of the EIA-d. The resolution must refer to the final technical report, whose content constitutes the motivation and is an integral part of it.

8. Resolution and notification of the resolution

The approval resolution of the EIA-d constitutes the environmental certification of the project, that is, it certifies the environmental viability of the mining project in its entirety.

The resolution that grants or denies the approval of the EIA-d must be notified to the company, attaching the final technical report that supports it. The evaluator appointed by SENACE must send a copy of the resolution approving the EIA-d and a copy of the file in physical or digital format to the OEFA, MINAM, DGAAM and OSINERGMIN for the supervision and audit of the subjects of their competences or for the issuance of the corresponding permits. In addition, you must send a copy of the resolution and final technical report to the bodies involved in the citizen participation process and to the State entities that have issued a technical opinion during the evaluation of the EIA-d. The resolution can not be granted partially, fractionally, provisionally or conditionally. It does not authorize for itself the start of the activities mentioned in it, nor does it create, recognize, modify or extinguish the existing rights on the superficial land in which the activities are planned.

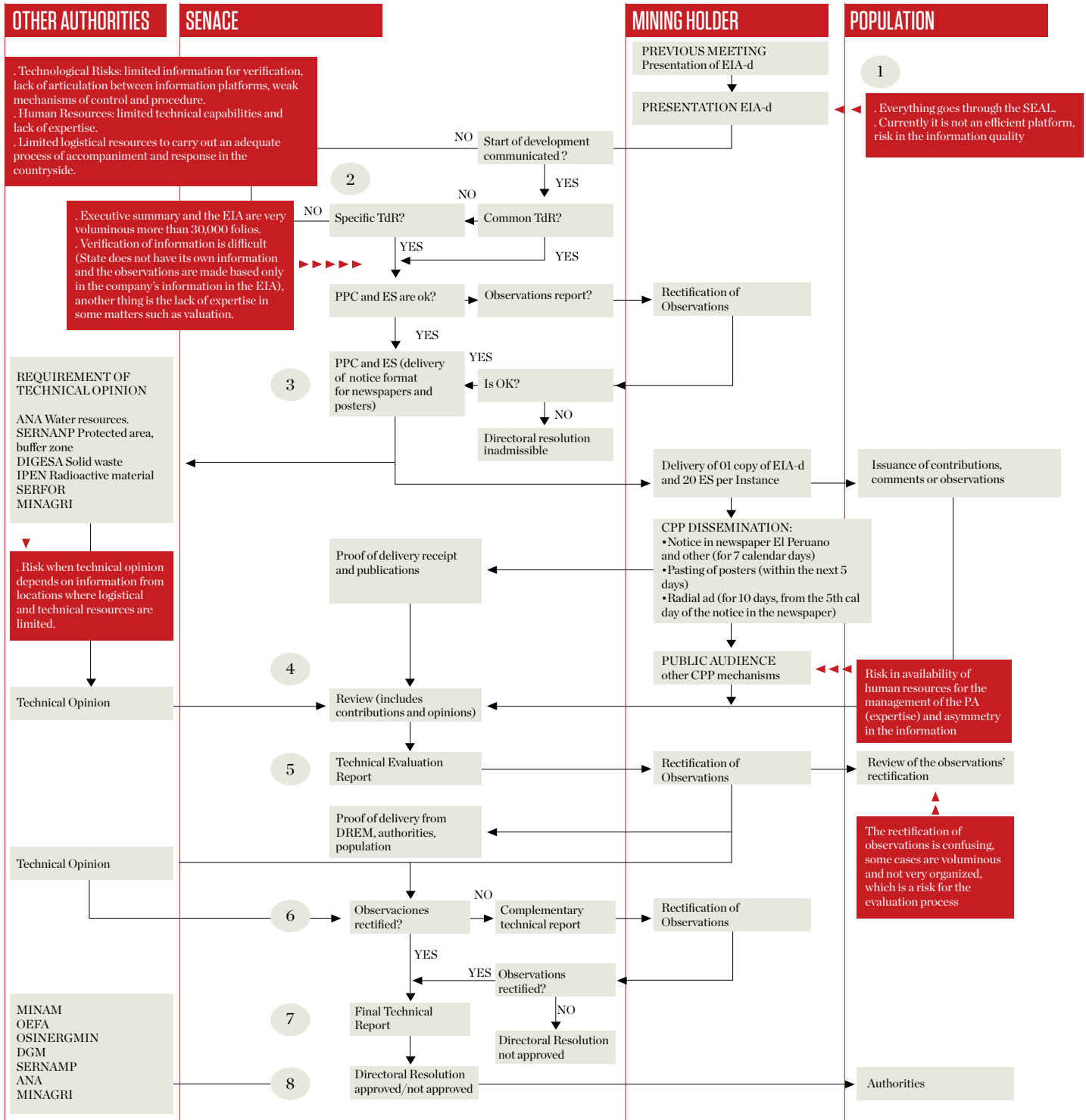
This way the company must obtain the licenses, permits and authorizations established in the current regulations for the execution of their mining activities. This warning is recorded in the respective resolution.

VULNERABILITIES IN THE ENVIRONMENTAL CERTIFICATION PROCESS

From information provided by the prioritized government actors, former public officials, civil society, representatives of communities that are considered potentially affected, and the mining industry itself, the following

vulnerabilities were warned that, in turn, they would generate opportunities for specific corruption risks to occur, identified on the map of the process shown below. Below is a detailed description of these vulnerabilities that were discussed and validated in the first validation workshop held on April 18 and the second validation workshop on June 23, 2017.

ENVIRONMENTAL CERTIFICATION PROCESS



Prepared by autor. Source: Manual de Evaluación de Estudio de Impacto Ambiental del Sector Minero del SENACE

The bodies that emit an opinion would not have sufficient resources to gather the information necessary to issue a technical opinion.

In Peru, the Ministry of Energy and Mines or SENACE request during the process of reviewing the EIA the opinion of bodies -called technical opinion-, like the Ministry of Culture for the verification of archaeological remains, SERNANP for protected areas and its buffer areas, DIGESA for solid waste, IPEN for radioactive material, SERFOR for forestry, MINAGRI and ANA. These bodies have to collect information in situ; however, they would not have sufficient resources for logistical and technical expenses, so they could issue an opinion “from the desk”. A situation that would generate risk of granting permits without considering the various aspects related, for example, with the use of water, quarries, protected natural areas, among others, which would lead to the certifying body only having information presented by the applicants, information of difficult or impossible verification and, given the ignorance, the body favor the administrative “celerity”.

Sources

Carlos Monge, director of the Natural Resource Governance Institute (NRGI), comments on the risk that would exist for EIA due to the manipulation of technical reports because public institutions do not have resources and personnel, which can be used by mining companies. He argues that to obtain the EIA approval, the approval of various permits is required too, issued for example, by the ANA; from there, there is a space for discretion. The risk is that the verification can not be done due to lack of resources and short deadlines¹¹⁹.

For César Gamboa, executive director of the NGO Derecho, Ambiente y Recursos Naturales (DAR), there would be a political will to not strengthen the bodies who emit opinion since, if their technicians had more capacity to go to the field, their technical opinions could bring up more findings and make observations to the information of the EIA owner, they would raise information in greater detail and better endorse the type of impact brought by the operation¹²⁰.

Sergio Sánchez, former manager of Natural Resources of the Regional Government of Cajamarca, explains that in Peru there is a policy of granting mining rights that overlaps the headwaters of the basin. “In the country, the population distrusts the EIA and its reports because neither the ANA nor the Ministry of the Environment monitors what the mining companies, industries and farmers declare is really the volume of water they use, and the ANA technicians themselves recognize that there is no budget or enough staff to oversee the different operating units of mining companies or to visit the different areas of the industries that use surface and underground water.” It maintains that more than 60% of the country’s water sources are delimited by the 48 000 registered mining claims, that there are doubts about the Environmental Impact Assessment, the impartiality of the authorities that carry out the evaluation, the real economic impact on the populations, the intensity of the damage to ecosystems. “The issue is that neither ANA nor the Ministry of the Environment monitor if the number declared by the mining companies, industries and farmers is really the volume they use. The ANA technicians recognize that there is not enough budget or personnel to oversee the different operating units of the mining companies, nor to visit the different areas of the industries that use surface and underground water”, he says¹²¹.

The binding opinion of the technical advisory bodies plays an essential role in

the EIA, mainly in the case of the ANA that intervenes in the environmental impact assessment process when the investment project compromises water resources. The implication of a binding opinion is that it can determine the approval or disapproval of the EIA.

The National Water Authority (ANA) has not established in its Consolidated Text of Administrative Procedures (TUPA), the collection of a fee for the issuance of technical opinion for the EIAs that are in charge of the Directorate of Water Resources Quality Management from said institution, even when these technical reports are binding. Other opinion bodies, such as the Ministry of Culture, do have it established in their respective TUPA amounts up to S / 3,250.60¹²².

Conclusion

The risk that would arise if there were no controls to verify the accuracy and the veracity of the environmental impact assessment reports due to lack of resources, is that a large space for discretion could be generated. This could be exploited by mining companies to obtain favorable technical reports even if they did not meet the conditions, and there is a risk that the actual impacts of mining activity could not be evaluated. For example, in the headwaters of the basin, where the freshwater sources are located and that supply the coastal and mountain populations of the country, putting their ecosystem at high risk.

Limited information for verification, lack of coordination between information platforms, control and procedure mechanisms of the Online Environmental Assessment System (SEAL).

In Peru, there is the Online Environmental Assessment System (SEAL), which is an online tool created and implemented in 2011 by MINEM’s General Directorate of Mining Environmental Affairs and that currently is insufficient or inefficient, with no progress in the debureaucratization and problems of “too many procedures” in the process of environmental evaluation, keeping the delay of processes. In addition, the quality of information (such as the coordinates of the concession) is not always up to date, proving not to be a system that meets the appropriate transparency characteristics and is not very friendly, since not all information is downloadable, among other weaknesses. If we follow the chronology since its implementation in 2011¹²³, it was not until 2014 that the SEAL was implemented for the presentation and evaluation of the EIA-d, corresponding to Category III for medium and large-scale mining projects¹²⁴; that is, three years after its approval.

On that subject, in 2015, within the framework of the 32nd Perumin Convention¹²⁵, representatives of the mining union showed their claim directly to the Minister of the Ministry of Energy and Mines, Rosa María Ortiz, regarding the fact that “too many procedures” continue to be a problem for the sector. Both the mining sector and civil society demand greater transparency in the environmental assessment system. Thus, in the framework of the Pan-Amazonian Social Forum held in May 2017, Indigenous Peoples demanded transparency and no more corruption in tenders and megaprojects in indigenous territories of Latin America and the Caribbean, denouncing that in these countries they are weakening their environmental and social policies in order to promote investments. This strategy of deregulation, making socio-environmental standards more flexible and systematic violation of the rights of indigenous peoples, includes the weakening of transparency, access to public information and participation¹²⁶.

119 Interview with Grupo Propuesta Ciudadana (GPC), Carlos Monge, director of Natural Resource Governance Institute. Representative of Civil Society. Bogotá, 06.03.2017 / 120 Interview with NGO Derecho, Ambiente y Recursos Naturales (DAR), César Gamboa, director of Politics, Representative of Civil Society, Lima, March 2017 / 121 Investigative article InfoRegión, Environmental Press Agency. “Minería se extiende sobre fuentes de agua”. Interview with Sergio Sánchez, ex-manager of Natural Resources of the Regional Government of Cajamarca, Cajamarca, November 20, 2011. <http://www.inforegion.pe/123893/mineria-se-extiende-sobre-fuentes-de-agua/> / 122 <http://apps.mineco.gob.pe/transparencia/Reportes/Default.aspxhttp://www.mae.pe/descargas/Tramite/ctra.pdf/123> Resolution of the Ministry of Energy and Mines No. 270-2011-3/REMIM of 10.06.2011 approving the Online Environmental Assessment System (SEAL) for the presentation of evaluation and granting of environmental certification for medium and large-scale mining. <http://extvprlegs.lao.org/docs/pdf/per105949.pdf/124> <http://www.ejperulegal.com/2014/07/resolucion-ministerial-n-314-2014-memdm.html/> 125 Extremely important event for Peru with more than 100 000 attendees, business and government delegations from more than 30 countries and more than a 100 speakers, projections indicate that more than 118 000 visitors will attend and more than 3 billion in commercial transactions will be made. Diario La República, 25.09.2015. <http://larepublica.pe/impresia/politica/705902-ministra-esperemos-que-tia-maria-se-haga-en-este-gobierno> <https://www.convencionminera.com/perumin32/> / 126 Foro Social Panamazónico took place in Tarapoto, 26.04.2017. <http://www.dar.org.pe/noticias/pronunciamiento-ppii-fospa/>

In this regard, in the Round Table on Integrity organized by SENACE, representatives of that body maintained that in fact it was necessary to communicate better with the population and disseminate good practices so the population will be encouraged to understand the projects, their impacts and environmental management measures in order to strengthen confidence in the results of the EIA and they are working on it. In the same way, the improvement of SEAL and the evaluation of implementing a new system, much more effective, friendly and transparent than the current one was mentioned.

Subsequently, in another Round Table, dated May 23, 2017, also organized by SENACE, called "Path to integrity: the value of ethics in the evaluation of the EIA", in which Proética participated jointly with other organizations of civil society, mining sector and representatives of consultant companies specialized in EIA, within the framework of its open door policy and close to key stakeholders. This environmental body communicated its main conclusions:

- a. The quality of the EIA goes hand in hand with the integrity of the process: the quality assurance before and after the resolution of each EIA can help to improve the effectiveness and transparency of the evaluation.
- b. In parallel, SENACE must continue working to promote that the registered environmental consultants incorporate the best practices and evaluate their performance through objective performance indicators.
- c. Promote e-government as a promotion of transparency: it is advisable to publish the full texts of the EIA and the opinions of other bodies through SENACE's website; it is not enough to publish resolutions and reports. The environmental management instruments can be more easily accessible through a single repository that contains all the information of each project, including the EIA, modifications and ITS.

Ignorance regarding the EIA content, the statements made by the state services with environmental competence and the entire evaluation process would create, on the one hand a risk of lack of fair conditions for companies that comply with the laws and duly observe the process, and on the other hand a lack of transparency in the access of information for the native and indigenous communities potentially affected by the mining activity. It is essential to generate an effective automated control of the environmental assessment process. In that sense, since 2017 SENACE has started their accreditation to obtain ISO 37001, as an institutional effort of the body to identify, evaluate, and mitigate the risks of bribes.

Weak transparency. The EIAs are voluminous (more than 31 000 folios) written in technical terms, little understood by citizens in general and for communities that could be impacted by mining activity

The EIA is a legal-administrative procedure that contains the identification and prediction of environmental impacts, produced by a project or activity, as well as the prevention, mitigation and assessment of these impacts. It is a preventive process, including studies and multidisciplinary technical systems where alterations in the environment are identified, management measures and its valuation are proposed; it is a tool of sustainable development. Through the EIA, the impacts are identified and evaluated to achieve an

Environmental Management Program (EMP) and the monitoring and evaluation of compliance of this program¹²⁷.

Javier Jahncke, Executive Secretary of RED MUQUI, explains the lack of transparent access to EIA's reports, maintaining that Peru is a multicultural country, it can not be assumed that because the rules, legislation or procedures are on the Internet it means that the concession process or the environmental certification process is transparent and it is accessible to the public, since in many places in Peru there is no Internet. In that case, that level of transparency can not be considered to be for the general population, much less for the communities in rural areas. "When we talk about transparency is it understood for the citizen of Lima? For city capitals? Where is the country's intercultural perspective that we are part of? We do not follow that pluricultural perspective that we are part of", he remarks¹²⁸.

For his part, Carlos Monge, director of NREGI, representative of Civil Society maintains that "The EIA, are unclear, voluminous, technical and confusing for the populations, which creates an enormous space for corruption, even more because it is not known which official has produced it"¹²⁹.

SENACE's Institutional Head, Patrick Wieland, indicated in an interview that his management is addressing the problem of "encyclopedic EIAs", which are bulky and do not manage to transmit the information. Therefore, in order to give a solution and strengthen the trust of its results, they will improve the online Environmental Assessment System, including the complete EIAs on SENACE's website, as well as the reports of the technical opinions that are part of the process. He maintains that information must be organized by project, in such a way that the EIA can be accessed in one place. Subsequently, in the Round Table dated 23.05.2017, it concluded that the ex ante quality control of the EIA should be strengthened and evaluated to ensure technical rigor and neutrality through the adoption of internal guidelines.

In an interview with an actor from the mining business sector -encoded as EP02-, he said "EIAs are technical by nature, bulky, which is not easy even for users to read. They are not, nor do they fulfill an informative role for the public, it should not be, since SENACE should do so, making a document less cumbersome and that will not generate distrust in the communities with the arrival of mining to their territory, there should be a mechanism that makes them more friendly and easily accessible for communities that feel that will be affected by the presence of mining companies, thereby avoiding social conflicts" he detailed.

EIAs are technical instruments and as such the populations have difficulty to understand them; it is the State's role, and specifically of the body in charge of environmental certification, taking into account the reality of the country, to make accessible to the population the information in EIAs. On that subject, that body has been carrying out actions to communicate and bring EIAs closer to the public, through a Guide for Executive Summary, promoting the use of visual media, video campaigns on environmental impact evaluation and EIAs, social outposts, regional coordination and events with representatives of indigenous organizations.

If EIAs continues to be a confusing instrument and perceived as not very transparent, it would generate vulnerability that would create a space for discretion in some of its steps and with it risks of corruption.

The asymmetry or inequality in negotiation could generate manipulation of the leaders of the communities.

Nelly Luna, from Ojo Público, said that some mining companies try to capture the leaders of the communities by paying and offering them work, jobs or perks. “These are micro processes of corruption at the communal level that it is not known how significant they are or how many could be found throughout the country because there is no registry. There are ambiguous unclear forms of what is legal or illegal because hiring the head of the community is not illegal but it is a way of subordination and generates, in addition, an organizational discredit within the community. For this reason, there are currently serious denunciations of communities denouncing their own leaders, incidents that not even local or national press investigate”¹³⁰⁹.

For the lawyer Marco Huaco Palomino¹³⁰, the called “prior agreement” between communities and companies is an example of “perverse” legal interaction that leads to the cancellation of the previous character of the prior consultation, this by not adapting the prior agreement established in the Land Law and its regulations to the ILO Convention 169. Applying the prior consultation regulation that only establishes the prior consultation of an administrative act that authorizes the start of exploration and exploitation activities but not the granting of concessions and the mining legislation that requires prior agreement as a requirement for the start of those activities. He argues that an example of this is what happened in the case of the Angostura Mining Project, in which after the granting of the mining concession without any participation of the community, the mining owner approached the community to achieve a Prior Agreement. Thus, the Nueva Esperanza de Mollepiña Community stated that “it did not recognized itself as an indigenous people community and declared itself unaffected by the exploration and exploitation of the Angostura mining project”. Once this agreement was obtained, the exploration start authorization was requested and MINEM authorized the use of the land to do the exploration, “since there was no place for a prior consultation process”¹³².

For Jahncke of RED MUQUI the solution to this situation is not to issue more laws, the laws are given the agreement 169 of the ILO establishes the prior consultation. He argues that this type of manipulation could be avoided by mining companies but there is inaction by the State, if the companies use the prior agreement not to carry out the prior consultation it is because the State, through the vice ministry of interculturality, until today does not recognizes all indigenous peoples. The Ministry of Culture, all it does in this process is to establish who are indigenous peoples and who are not, based on what? The Vice Ministry of Interculturality manages a database that is not constitutive of rights because the Prior Consultation Law and ILO Convention 169, to which we are subscribed, establish that indigenous peoples recognize themselves. Then, the State should recognize the indigenous peoples and not force them to manage their recognition through files at the Ministry of Culture, “they come with their files to Lima to demonstrate and establish how they recognize themselves as indigenous, if it is through an assembly or because they maintain their cultural ways, their space of political decision, only God knows how that is demonstrated” (sic). And that should not be done by the community coming from the most remote areas of Peru with their files to be recognized, taking into account that they are populations that do not have resources, spending each one 40 soles only to reach a city and then Lima. It is the Ministry of Culture, through the Vice Ministry of Interculturality, that should go to these towns and determine who they are and who they are not, this way private companies would not use

its resources to “convince” them and not carry out the prior consultation”, said Jahncke.

Conclusion

Negotiations for the “prior agreement” figure between communities and concessionaires legally do not require to be supervised by the State, since it participates in another step, when the prior consultation proceeds. Thus, the potentially affected communities would perceive that such negotiation, far from being a guarantee that protects their rights, becomes harmful because of the asymmetry and inequality in the negotiation that could create elements for potential conflict.

Laws that allow mining companies to stop being sanctioned due to non-compliance with tax or environmental obligations and regulations that economically weaken the body in charge of overseeing compliance of environmental commitments.

The Environmental Assessment and Inspection Agency (OEFA)¹³³ is a specialized public technical body, attached to the Ministry of Environment, created in 2008, in charge of environmental enforcement and to ensure the proper balance between private investment in economic activities and environmental protection. The environmental supervision done is a macro process composed of:

- a. Evaluation functions: includes the tracking and monitoring of the quality of the environment and its components.
- b. Direct supervision function: verification of compliance with environmental auditable obligations, which includes the power to issue preventive measures, mandates of a particular nature and requirements to update environmental management instruments.
- c. Supervision and sanction function: investigation of the commission of possible administrative infractions, and the imposition of sanctions, precautionary and corrective measures.
- d. Application of incentives function: through which the Register of Good Environmental Practices is administered and incentives are given to promote the over-compliance of environmental regulations.

There is a perception that environmental institutions are increasingly weakened by the enactment of standards and devices, including Law 30230, known as “environmental paquetazo” in whose article 19 it was decided to reduce the fines imposed by OEFA to mining companies with the purpose of promoting private investment, especially in the extractive sector. This type of regulations is perceived as dictated under the influence of private interests, coordinated through lobbies with the Executive and Legislative Power, due to the fact that they would limit the tax and environmental control of the State and the role of other public entities important for accountability. This perception would be reinforced by the actions of some mining companies that would seek to leave without effect the Contribution By Regulation (APR) through different lawsuits, taking into account that Peruvian environmental supervision depends 80% of this contribution¹³⁴, so reducing the income received by OEFA to be able to fulfill its tasks would weaken the supervision of the socio-environmental obligations done in mining companies and could lead to more conflicts related to the environment.

130 Interview with investigative journalist Nelly Luna. Ojo Público. Investigative Journalism. 15.03.2017 / 131 Lawyer from the National University of San Marcos (UNMSM, Peru). Master of Social Sciences of Religion (UNMSM). Master in Protection of Human Rights by the Institute of Higher European Studies in Strasbourg, France. Diploma in Economic, Social and Cultural Rights by the Summer University of Human Rights in Geneva (Switzerland). Advisor in the Congress of the Republic / 132 Asociación Derecho y Sociedad. Magazine Pontificia Universidad Católica del Perú PUCP. “Un nuevo efecto perverso de la actual configuración del acuerdo previo: la anulación del sujeto Indígena - Caso del Proyecto Minero Angostura”. 28.11.2013. [http://marcohuaco.blogspot.pe/2013/11/caso-del-proyecto-minero-angostura-un.html](http://revistas.pucp.edu.pe/index.php/derechosociedad/article/download/12796/13353) / 133 <http://www.oefa.gob.pe/que-es-el-oefa/> / 134 Data collected from the publication dated 18.05.2015, made by the Sociedad Peruana de Derecho Ambiental. <http://www.actualidadambiental.pe/?p=28951>

In 2014, 32 mining companies requested a writ of amparo to stop paying it¹³⁵, while four sued OEFA at INDECOPI to declare it a “bureaucratic barrier”. On the other hand, the Peruvian Mining Society filed a popular action aimed at determining the illegality of the APR but it was declared unfounded. However, the miners that went to INDECOPI were favored in the first instance, for which OEFA had to appeal to this decision.

In the session dated 08.11.2016 at the Commission of Andean, Amazonian and Afro-Peruvian Peoples, Environment and Ecology of the Congress of the Republic, OEFA’s Head¹³⁶, Tessa Torres expressed her concern regarding Law 30230 because it contains limitations that do not allow OEFA to fulfill its roles of supervision and sanction. Regulation that in addition, in terms of incentives, means that it is less burdensome now to commit an infraction that it was before the existence of Law 30230, since in the fine what was added was the damage caused to the environment, any component of the environment affecting human beings. Now these aspects are no longer considered within the scheme of Law 30230 because there is no fine to apply.

Before the context of Law 30230 what was done was to initiate a sanctioning procedure: if it was determined that there was effectively liability on the part of the company and that an infraction had been committed, the procedure was to apply a fine and a corrective measure. To date, in case the supervision finds an infraction, what is done is to initiate the sanctioning procedure; however, the consequence of the infraction is a corrective measure whose compliance terminates the sanctioning procedure. Only if the corrective measure is breached a penalty is imposed to the company that is equivalent to 50% of the fine that should have been imposed for the commission of the offense and, in exceptional cases, this is when they generate a real and very serious damage to life and to the health of people, the emphasis on very serious is thus established in the law. Then, only in those cases of infractions qualified as very serious it can be sanctioned. The other exception, that is to say when it is possible to sanction, is when they are dealing with activities that do not have environmental management instruments and, finally, in cases of recidivism. Only in these three cases to date, OEFA has the capacity to exercise the sanctioning power.

“If we take into account that companies are driven or act in function of incentives, what it is better to do or not do? Before Law 30230, the cost of committing a violation was associated with the cost of remediation and the fine, remediation cost plus fine. After Law 30230, what we have is that the cost of non-compliance is reduced to remediation, the only thing that is assumed as a cost for infringing the administration, given that the fine disappears. Then, in terms of incentives, to date it is less burdensome to incur infringement than it was before Law 30230. There has been the case of the Norperuano Pipeline that has suffered some spill incidents, in some cases attributed according to the investigation to the operating company itself. In these cases, these spills, for not having affected in a very serious and verifiable way to date the health of people, could not be sanctioned. That is to say, the effects on flora and fauna, even the spill that has arrived to the river, can not be sanctioned. Likewise, what refers to a vital issue, in front of an environmental accident, the implementation of the contingency plan. The contingency plans, if not complied with, are not subject to sanctions. Also, in case of remediation, the lack of remediation for soils impregnated by hydrocarbons, for example, which is one of the cases generated by the spills that have occurred in the Norperuano Pipeline, also go unpunished”¹³⁷

stressed Tessa Torres.

The corrective measure assumes that the offending conduct has already been committed; that is to say, that “something bad” has already been done and that has to be “corrected”. Nevertheless, correcting something that has already been committed is not and should not be the ultimate goal of the OEFA regime or of any oversight agency such as OSINFOR, ANA, SERNANP, etc. The purpose must always be to create the necessary factors and locks so that failure to comply is always more costly in terms of money, time, image, than to comply¹³⁸.

Nelly Luna, from Ojo Público, was one of the civil society actors consulted and said that mining companies that were sanctioned for having incurred in environmental faults initiated various demands, questioning the APR, arguing that this contribution is confiscatory. Most of these companies have been sanctioned for not complying with environmental regulations and others for tax breaches.

On this subject, already in 2015, Manuel Pulgar-Vidal, then Minister of the Environment, at a press conference, denounced that four mining companies that want to weaken OEFA have fines for more than 10.4 million soles. According to Pulgar-Vidal, there is a clear intention to limit the resources of OEFA with the intention of minimizing it, limiting it and even disappearing it. This intention would be explained in the recurrent arguments of the mining union of the country: “The volume of fines is very high, fines should not remain in OEFA but should go to the public treasury” and “The contribution by regulation is not legal because OEFA can not be the tax recipient because it is not a regulatory body”¹³⁹.

And he continues: “If we allowed these three recurring accusations to materialize, we would have OEFA without resources and we will not accept that. As head of the Environmental sector, I will defend, until the last day I am a minister, for OEFA to have the resources to fulfill a role that today is done in a right way, not only supervising sectors such as mining, hydrocarbons, energy, fishing, even the municipalities in the case of the treatment of solid waste and now also in genetically modified organisms issues”, adding that OEFA has become a very solid organization that requires resources for its operation. “Is it because we are the State that we should remain silent or duck our heads when 32 companies demand us? No way. We are not going to be quiet. The contribution by regulation is a necessity for the country, for environmental responsibility and for supervision”¹⁴⁰.

Francisco Durand is a Senior Lecturer in Political Science and Government at the Pontifical Catholic University of Peru (PUCP), he explains in his book “When Extractive Power Captures - The State lobbies, revolving doors and environmental paquetazo in Peru”, that in the case of modern economic elites, corporations (business form that is universalized with economic globalization), several studies agree in arguing that the size of productive units and interest in generating income are behind the capture phenomenon. There is a reciprocal causation between size and influence of the firm that conditions the decisions because the large company or corporation has greater resources, better networks and more administrative capacities and organizational supports. The pressure of the special interests is more persuasive, therefore they are the winners of the power game, and therefore the regulations are approved only for the benefit of the big firms¹⁴¹.

135 The APR was created in 2000 as companies’ contribution to finance the role of public regulatory entities. It was established that it would not exceed 1% of the annual sales turnover of the supervised companies after the payment of taxes. In December 2013, through Supreme Decree 130, it was decided that this aliquot would be 0.15% of the annual sales turnover in 2014 and 2015 and that it would fall to 0.13 in 2016. With this rule it was established that the OEFA would directly receive the contribution of the mining companies when assuming the regulatory role of Osinergmin in environmental matters, for which reason it started to collect this contribution since 2014. / 136 Area de transcripciones of the Congress of the Republic. <http://www.congreso.gob.pe/Docs/comisiones2016/PueblosAndinosEcologia/files/sesionesordnarias/osoctavo-sesion-8noviembre2016.pdf> / 137 Excerpted from the statement of OEFA’s head at the Congress of the Republic that the impact of law 30230 is harmful to environmental supervision. Servindi. <https://www.servindi.org/actualidad-noticias/10/11/2016/oefta-reconoce-impacto-noctivo-de-la-ley-del-paquetazo-ambiental-balta/> / 138 Sociedad Peruana de Derecho Ambiental SPDA, in an article published on 09/08/2015, explains the scope and implications of art.19 of Law 30230. <http://www.actualidadambiental.pe/?p=31619> / 139 Sociedad Peruana de Derecho Ambiental. <http://www.actualidadambiental.pe/?p=28964> / 140 Currently, although all these demands have been dismissed by the Judiciary, the mining companies would be seeking the non-application of the APR at the Constitutional Court, as the Peruvian mineral storage and shipment company - subsidiary Glencore, the largest trader of worldwide minerals and shareholder of Antamina - has filed a lawsuit at the Court, while some mining companies do not comply with this contribution, so the role of OEFA is limited. / 141 Francisco Durand is a senior professor of political science and government at Pontificia Universidad Católica del Perú (PUCP), in his book “Cuando el poder extractivo captura - El Estado lobbies, puertas giratorias y paquetazo ambiental en Perú”. http://209.177.156.169/libreria_cm/archivos/pdf.1310.pdf

Luis Marchese, president of the SNMPE¹⁴², when asked about the perception of capture of the state, favoritism that exists regarding the approval of favorable rules to the extractive sector (such as the reduction of deadlines for the issuance of technical reports within the EIA) he maintained that “there is no capture of the state, here in Peru the fiscal rules apply to all sectors and also to mining companies. All mining companies are interested in a solid environmental permit, it is the work of the authority for it to be that way, if they actually have three officials where they should have 30 is a problem of the government, which must be resolved, that the government intends that those three do the work of 30 -then- we all have a problem. There is no guild agenda to say that “this should take 10 days”, it’s just a permit of something that allows you to do something. It is not that the guild has an agenda that decides “hey reduce the deadlines, you see how”, the agenda is “please, do it well in the shortest time possible”. He added that it is true that the perception is not the best, for that reason at the local level a communication campaign is going to be launched to start responding to this type of domestic doubts about the mining industry.

This type of rules creates a risk of weakening the body in charge of monitoring compliance of environmental commitments and gives the impression that they are due to acts of corruption understood as the abuse of delegated power for the benefit of one group to the detriment of others, which, in turn, it weakens the legal system, as well as mining and environmental institutions¹⁴³.

Harmful rules for the work of public entities of the sector. In Peru, regulations have been issued to boost investments, reducing deadlines within the environmental certification process for the issuance of a technical opinion.

Law 30230 establishes that public entities have 45 business days to issue a technical opinion on any type of Environmental Impact Assessment (EIA). That is, the technical opinions of semi-detailed or detailed Environmental Impact Assessment that have many volumes of thousands of pages will have to be reviewed by the officials in charge of the competent entities within a period of no more than 45 days.

The Sociedad Peruana de Derecho Ambiental (SPDA)¹⁴⁴, took a stance on the subject sustaining that, instead of accelerating procedures, the government had to attack the problems that produce these delays: the lack of trained personnel, the absence of specialists and the scarce resources. This reduced timeframe, thought only in the promotion of investments and not in the strengthening of capacities, it will generate a wrong perception in the population that will see the EIA as a simple procedure that the State will approve no matter what, which will generate greater conflicts.

The 18th Report of the Observatory of Mining Conflicts in Peru (Edition 2017)¹⁴⁵ warns that a topic that appears in the public debate is the way in which instruments created by the so-called “environmental paquetazos” are being used. This is the case of the ITS Technical Report, created by Supreme Decree 054 of the year 2013. In the case of Las Bambas, the mining project has been modified up to four times due to the ITS Technical Reports and there have been no minor changes: first, perhaps the most important, was the relocation of the molybdenum plant, the filter plant and the ore concentrate storage area from Tintaya to Las Bambas area, according to the company. The second report -of November 3, 2016- authorized changes in components for

the use of water. The third modified the water management system of tailings deposit and expanded the concentrates warehouse from 20 000 to 47 000 tons, and finally, the fourth has to do with the habilitation of the low grade ore pile, office and warehouse facilities, geotechnical monitoring, diamond drilling in the Chalbobamba pit, and updating of water and air monitoring points. All these changes, in addition to two modifications of the EIA itself, have occurred in approximately two and a half years.

Consulted on this matter, Luis Marchese, maximum representative of the mining sector, explained from the point of view of mining businessman that “it is not true that the regulatory incentives have been given specifically to favor mining companies or that there is regulation to favor them. Peru is not the cheapest country to invest in mining if you consider and add all types of taxes and charges that the mining sector has, including royalties, the Special Tax on Mining (IEM), the Special Mining Lien (GEM), 8% of profits for workers, the Value-added Tax (VAT), plus the income tax, the Contribution for Regulation (APR) to the OEFA, to OSINERGMIN, if the tax burden is added, Peru is not a country that is particularly attractive from the tax point of view, the advantage of investing in Peru is its geological wealth, its workers, that the energy has a reasonable price, that compensates, but it is not due to tax or regulation”.

The risk of issuing this type of regulations is that it could affect the low quality of environmental standards since it could be possible to issue binding technical reports favorable to the mining companies without real support because pressure could be exerted on the technical staff to meet the new deadlines and “unblock the process”.

The legal framework and the processes inherent to the granting of environmental permits may be perceived as not very transparent by the communities and land owners potentially affected by the mining activity.

Peru is a multicultural and intercultural country, officially has 55 indigenous or native peoples who speak 47 different languages, with official alphabets, different ethnic and cultural characteristics¹⁴⁶. In this context, the legal framework and the processes inherent to the granting of environmental permits would not be perceived as transparent by the communities and land owners potentially affected by the mining activity because it is not enough to consider this information of “public knowledge” due to the fact that the regulations and procedures are published in the official newspaper and are available on the institutions web portals of the sector, since it would be presumed that the authorities of the communities have access to these means, that they buy and read everyday the newspapers and have access to Internet. The reality is that the potentially affected communities live in rural areas, of scarce resources, where the written press does not arrive, they do not always have electricity and the Internet coverage is scarce or null¹⁴⁷.

The Ombudsman’s Office of Peru, through its program of Groups for Special Protection of Indigenous Peoples, reported that the existence of diverse cultures in our country, far from being valued as a contribution, reveal the existence of different ways of discrimination and exclusion of indigenous peoples, appearing in the limited exercise of their duties and rights, as well as in the scarce participation in decision-making, even when dealing with factors that affect their development. “The lack of a comprehensive policy that takes into account the rights of indigenous peoples should be a

142 Diario Gestión, February 2017, <http://gestion.pe/empresas/snmpe-luis-marchese-montenegro-nuevo-presidente-periodo-2017-2019-2181305/> 143 At the time of preparation of this document, the Congress of the Republic approved the repeal of art.19 of Law 30230 on 27.05.2017, the Executive Branch has 30 days to formalize the repeal or observe it. However, there is a lot of pressure from the private sector to prevent the repeal, <http://www.muqui.org/comunicaciones/noticias/item/571-congreso-le-devolvio-a-oefta-las-facultades-de-sancion-que-habia-perdido-con-ley-30230/> 144 Source: Sociedad Peruana de Derecho Ambiental SPDA, statements of the Director of the Program of Policy and Environmental Management of the SPDA, Isabel Calle, August 15, 2013, <http://www.actualidadambiental.pe/?p=19967> 145 Article “Presentan informe N°18 del observatorio de conflictos mineros en el Perú”, <https://www.ocmal.org/presentan-informe-n-18-del-observatorio-de-conflictos-mineros-en-el-peru/> 146 Database of indigenous or native peoples from the Ministry of Culture of Peru, <http://bdpi.cultura.gob.pe/lista-de-pueblos-indigenas/> 147 Interview with Javier Jahncke, Executive Secretary of RED MUQUI, NGO Red de Propuesta y Acción, Lima, April 2017. <http://www.defensoria.gob.pe/grupos-estencion.php?des=20>

priority in the country” comes to conclusion the document prepared by the Ombudsman’s Office.

Patricia Quiñones, anthropologist of Asociación Servicios Educativos Rurales (SER), points out in the study “Límites de la expansión minera en Perú. Concesiones, participación y conflicto en Puno. El caso del proyecto minero Santa Ana”¹⁴⁸ the origins of the conflict between authorities and residents of the districts of Huacullani and Kelluyo and the Canadian company Bear Creek, in the first half of 2011. This conflict led to the cancellation of the concession and the suspension of the granting of new concessions for the large mining industry in Puno for three years. Several testimonies illustrate the lack of transparency of legal information and in the information process itself for the communities in whose land the mining exploitation is expected to happen. For the affected communities these mechanisms imply that their voices and comments are heard and not only that is an “informative session”, for the State and the company, this participation can be reduced mainly to provide information as established by law¹⁵⁰.

Not all mining companies would be complying with the existing regulations and as the population does not know, does not have access to it and the State does not perform a corresponding supervision, the EIA is approved without objection, as occurred in Santa Ana. According to the General Directorate of Mining Environmental Affairs (DGAAM), the BCMC-SP company would have complied with implementing several of these mechanisms before and during the preparation of the EIA that was carried out by Ausenco Víctor Perú SAC Consultant Company. The executive summary of the EIA establishes that during this stage the main mechanisms were the opening workshop in August 2009 and a round of informative workshops in November 2010. When the conflict broke out in 2011, the company declared having carried out 48 information meetings with the communities. According to the company’s tables, the participatory workshops were held mainly in the communities of Orconuma, Huacullani, Concepción de Ingenio, Challacollo and Ancomarca. This has generated many criticisms and problems. Especially because of the contradictory information that reached the communities.

To put the impact of this vulnerability into context, it should be kept in mind that although some researchers estimate that the indigenous population is much larger, according to official figures from INEI in 2007, there are more than four million indigenous people in Peru: 83.11% Quechua, 10.92% Aymara, 1.67% Asháninka and 4.31% members of Amazonian indigenous peoples¹⁵¹. Approximately five thousand mining concessions are issued by the INGEMMET per year, reaching half of the territory of peasant communities. However, under no circumstances the State inform the communities that the mineral resources under its territory have been concessioned. What happens in reality, according to current regulations, is that the INGEMMET or regional governments publish a notice in a local newspaper, noting the district, the province and the coordinates of the grids.

If the legal framework and the processes themselves are not transparent, understood from the Peruvian reality as a multicultural and intercultural country and from the perspective of the population in whose land mining projects are expected to happen, and if decisions that impact and affect the property rights and the territory of the peasant communities are still made without giving them in practice the right to oppose and defend their territory,

it could cause a high risk of corruption since this scenario could be, on the one hand, used for political maneuvers by interested authorities that let carry out the project in exchange for donations or financing of their campaigns, manipulating the population. On the other hand, there could also be a risk of corruption within the same population, who in exchange for benefits that could be offered by mining companies would come into conflict with factions of their own community, which would also ultimately be detrimental to the company - as seen in this case- because within the conflictive climate of the area it is impossible to carry out the mining project. In this regard, we must indicate that the competent entity for environmental impact assessments has been implementing a road map with the indigenous peoples within its 2016-2017 Action Plan, based on the principles of legality, interculturality, transparency, continuous dialogue and citizen participation as well as gender equality, which is in the process of being implemented.

Regulations that favor the promotion of private investment for the sake of the “national interest” over environmental and community rights.

As it has been mentioned, in Peru, since 1990, a series of reforms aimed at helping investments focused in the exploitation of mineral resources has been carried out, which today is perceived as placing environmental supervision at serious risk and making environmental standards more flexible in favor of extractive and productive activities to the detriment of the common good. Recently the Ministry of the Environment (MINAM) reduced the Environmental Quality Standards (ECA) through Supreme Decrees No. 003-2017-MINAM and No. 004-2017-MINAM, dated January 7th, 2017, which reduce the ECAs for air and water because the sulfur dioxide emission parameter has been raised from 20 micrograms per cubic meter to 250 micrograms per cubic meter for periods of 24 hours.

On that subject, MINAM official coded as FP-A5, said that the proposed regulations for the approval of the ECAs for water and air¹⁵² were submitted to citizen consultation, and informative and face-to-face workshops were held in several cities, as well as a public hearing in the Congress of the Republic and that these new Environmental Quality Standards for water and air update the regulations and meet the recommendations of the World Health Organization and those made by the OECD in the Environmental Performance Review of Peru, as well as to the Sustainable Development Goals by 2030¹⁵³. The fact that the ECA concept differs from the concept of Maximum Permissible Limit (MPL) also contributed to it, the latter being the one that is under supervision and, therefore, under mandatory compliance for companies¹⁵⁴.

In July 2016, the newly elected Peruvian President Pedro Pablo Kuczynski anticipated that environmental standards in Peru were “unreal” and more demanding than in Finland, arguing that this had stopped the construction of more smelters and mineral processing plants. These new environmental standards, more flexible for extractive, productive and services activities are similar to those adopted by other countries in the region such as Chile and Colombia and were requested by some mining sector companies that described the previous quality standards as “strict” because there were no deadlines, nor the technology necessary to meet them, nor the standards were adapted for the different cities of the country¹⁵⁵.

149 Asociación Servicios Educativos Rurales (SER), Study “Límites de la expansión minera en el Perú” by anthropologist Patricia Quiñones. http://www.ser.org.pe/files/los_limites_de_la_expansion_en_el_peru.pdf / 150 According to Supreme Decree 028-2008-EM, the population’s access to executive summaries and the content of environmental assessments; advertising of notices of citizen participation in written and/or radio media; conducting surveys, interviews or focus groups; distribution of informational materials; guided visits to the area or project facilities; dissemination of information through the team of facilitators; participatory workshops; public hearings; presentation of contributions, comments and observations before the competent authority; establishment of a permanent information office; participatory environmental monitoring and surveillance; use of traditional media; dialogue tables and others that the competent national authority resolve through ministerial resolution in order to guarantee an adequate citizen participation must be provided. / 151 Ombudsman’s Office, Special Protection Groups. <http://www.defensoria.gob.pe/grupos-ecacion.php?des=20> / 152 Environmental Quality Standard (ECA), the measure that establishes the level of concentration or the degree of elements, substances or physical, chemical and biological parameters present in the environment (air, water or soil) that does not represent a significant risk to health of people or the environment / 153 Information found in MINAM’s press release. <http://www.minam.gob.pe/notas-de-prensa/minam-aprueba-estandares-de-calidad-ambiental-para-agua-y-aire/> / 154 Another issue to consider is that the ECA is not necessarily capable of monitoring if it does not reflect the state of the environment; in the case of the water ECA, it has more than 100 parameters, which have been organized and proposed in an appropriate manner for its application; in the case of the air ECA, although it has 10 parameters, only one of these has been relaxed and the others have become stricter. In particular, PM10 particulate matter cases went from 150 to 100 micrograms per cubic meter for 24 hours, making it stricter. Likewise, the value of PM2.5 was modified for 24 hours in order to correspond to the value of PM10. An annual value for PM2.5 is also added / 155 Diario Gestión. <http://gestion.pe/economia/peru-oficializo-estandares-ambientales-mas-flexibles-actividades-extractivas-y-productivas-2191898>

An ECA is related to the protection of the health of the population and not to the economic competitiveness of the country. For this reason, different organizations have expressed their opinion¹⁵⁶, arguing that environmental quality standards are aimed at matters of public interest: the life and health of Peruvians, and that these standards can be modified if the aim is to improve the environmental quality of air, water and soil and thereby ensure adequate conditions of the quality of life and health of people. However, these regulations recently given by MINAM “downwards” the environmental standards, that is to say, they pull back the standards already adopted by the State. By virtue of the principle of progressiveness of environmental management, standards should seek to ensure always better legal and technical scenarios. A scenario of 250 ug/m³ for sulfur dioxide entails lower levels of environmental quality in relation to the derogated standard.

The Peruvian press has revealed that one of the beneficiaries with the standard modification would be La Oroya Metallurgical Complex (CMLO), located in one of the most polluted cities in the world, whose sale was frustrated in March 2017 after three auction rounds were declared void because investors expected new and more flexible environmental quality standards¹⁵⁷.

This has been confirmed by Manuel Pulgar-Vidal, Minister of the Environment in the previous government of Ollanta Humala, who denounced that this flexibility in the standards had been requested by potential new CMLO investors, noting that the change in the ECA for air represents a setback in the protection of people’s health. Likewise, this decision generates judicial risks for Peru since, in July 2016, the International Center for Settlement of Investment Disputes (ICSID) dismissed a US\$ 800 million lawsuit filed by The Renco Group - former owner of Doe Run- against the Peruvian State due to issues of form and not substance. Therefore, the recent environmental regulatory change made by the Government paves the way for The Renco Group, since one of the arguments of the ICSID lawsuit was that they suffered “discriminatory treatment”, since when they requested it, environmental regulations were not allowed to be relaxed, however, it was done in favor of other companies. Now, the new environmental flexibility gives advantages to the bidders that seek to acquire the CMLO, which will reinforce The Renco Group’s thesis of having suffered discrimination.

On this point, it is necessary to comprehensively analyze the State’s action through MINAM in the previous administrations. When Doe Run bought the smelter in the 90s, it committed to complying with an Environmental Adjustment and Management Program (PAMA) within a period of ten years, which was later expanded in 2006 for two years and seven months with a custom-made standard, despite its repeated breaches. Then, during the government of Ollanta Humala, the government formed a special team “ad hoc”¹⁵⁸ to approve in four months the Corrective Environmental Management Instrument (IGAC)¹⁵⁹, in addition, granted the new operator of the plant another 14 years to adapt to the environmental requirements. This means that during this period the operator can not be sanctioned for exceeding the current parameters of sulfur dioxide generated by metal smelting. Only from the year 2030, the inhabitants of La Oroya will be able to breathe a different air unlike the rest of the mining settlements of Peru. “It did not matter the president on duty. Nor the elapsed time: first ten years, then three, two more and so on until reaching 18 years of non-compliance and postponements of Doe Run’s environmental commitments - the last

operator of the main metal foundry of the country located in the grayish city of La Oroya -, which declared bankruptcy for not fulfilling its obligations and in September 2014 it benefited of the reduction of a millionaire fine thanks to Law 30230. With Alejandro Toledo the term to implement the Environmental Adjustment and Management Program was extended, with Alan García the story repeated itself and with Ollanta Humala the Corrective Environmental Management Instrument (IGAC) was approved, which, supposedly, would protect this time the health of the inhabitants and guarantee an environmental management according to the current demands in the hands of a new operator of the plant. However, the public health of the inhabitants of La Oroya, considered one of the most polluted cities in the world, has been postponed again”¹⁶⁰.

The foreign press has also reported about it¹⁶¹. The British newspaper The Guardian published a report saying that the Ministry of the Environment approved measures to reduce the control of pollution in the air¹⁶². It reports that the ministry’s proposals have been the subject of serious concerns and criticisms by the Commission on the Environment, Ecology and Andean, Amazonian and Afro-Peruvian Peoples of Peru, NGOs and many others. APRODEH, based in Lima and the Inter-American Association for Environmental Defense (AIDA) maintain that MINAM is ignoring the scientific evidence of serious health damage caused by both sulfur dioxide and particles. These include lung problems and premature death of children, the elderly and people with asthma being particularly vulnerable. According to AIDA and APRODEH, the CMLO, a smelter that has been owned by Doe Run Peru since 1997 and now under the control of the Renco Group of the United States, closed in 2009 and was partially reopened in 2012. Currently managed by the liquidators, it is said that the sulfur dioxide limits of Peru are scaring potential investors. The tenders have been held for Doe Run Peru in March of this year but no offers were received. “Now, given the lack of offers, MINAM has introduced a law to relax the limits, which aims to help with the next round of tenders, this would seriously affect the rights to a healthy and the clean environment for the people living in the Oroya”¹⁶³.

Liliana Carhuaz, a resident of La Oroya and a member of the La Oroya Health Movement (MOSAO), stated that the local people rejected MINAM’s proposals suggested at the time, arguing that they did not agree with the changes and cited respiratory problems and lead poisoning as health impacts¹⁶⁴.

This vulnerability was widely discussed in the second validation workshop, where the representative of MINAM informed that the issue of ECA is a very technical issue and that it can not be analyzed only taking into account the current situation or political positions.

The political pressures within the Environmental Assessment System, through rules that would favor investments oriented towards the exploitation of mining resources and that would make environmental standards more flexible in favor of extractive and productive activities to the detriment of the common good, produce irregularities in all the system and violation of the evaluation technical aspects, which could generate a very high risk of corruption since projects could be approved or rejected due to undue political pressure.

156 SPDA questions MINAM’s proposal on new Environmental Quality Standards for air. <http://www.actualidadambiental.pe/?p=44307> / 157 Diario Gestión. <http://gestion.pe/economia/peru-oficializo-estandares-ambientales-mas-flexibles-actividades-extractivas-productivas-2191898/> / 158 Diario La República. <http://larepublica.pe/impres/politica/704757-14-anos-mas-de-contaminacion-ambiental-le-esperan-la-oroya/> / 159 This document is key because it contains the new environmental standards to be met by the future investor of the complex, which will choose a new administrator, after the American Doe Run went into liquidation for declaring bankruptcy without meeting its environmental obligations. / 160 Convoca journalistic investigation. <http://convoca.pe/agenda-propia/14-anos-mas-de-contaminacion-para-la-oroya/> / 161 Servindi. <https://www.servindi.org/actualidad-noticias/03/05/2017/medio-britanico-alerta-sobre-reduccion-de-estandares-ambientales-en/> / 162 “It’s a fairly common tactic in Peru to issue a significant or potentially controversial decision or resolution when you hope no one is paying attention. 24, 26 or 31 December, for example. The Environment Ministry (MINAM) recently adopted that ploy by releasing, just before the Easter week holiday, proposals to dramatically roll back certain air quality standards across the country”. The Guardian.com. https://www.theguardian.com/environment/andes-to-the-amazon/2017/may/01/peru-plans-cut-air-quality-rules-smooth-sale-major-polluter?CMP=twt_a-environment_b-gdneco/163 “There is overwhelming scientific evidence to conclude that sulfur dioxide pollution poses a serious health risk, particularly when the contamination reaches high levels over short periods of time, something the proposal does not take into account,” says AIDA’s co-director Anna Cederstav in a joint statement with APRODEH”. The Guardian.com. https://www.theguardian.com/environment/andes-to-the-amazon/2017/may/01/peru-plans-cut-air-quality-rules-smooth-sale-major-polluter?CMP=twt_a-environment_b-gdneco/164 <https://es.mongabay.com/2017/04/peru-oroya-dioxidodezafre-minam/>

CORRUPTION RISKS IN THE ENVIRONMENTAL CERTIFICATION PROCESS

The following are the corruption risks generated by the vulnerabilities identified in the steps of the environmental certification process, as well as the questions associated with said risks:

VULNERABILITY	CORRUPTION RISK	QUESTION
The bodies who emit an opinion have limited resources to verify the accuracy of the Environmental Impact Assessment reports, necessary to issue their technical opinion.	The risk is that there is discretion and lack of control for the opinions issued by the bodies, known as technical opinions. Because of their limited resources, they can grant permits without a real evaluation in the field, as well as being susceptible to manipulation of private interests.	PP9: What risk would there be that there is no verification of the accuracy and veracity of the environmental impact assessment reports?
Limited information for verification, lack of coordination between information platforms, weak control and procedural mechanisms of the Online Environmental Assessment System (SEAL). There is no progress in the debureaucratization and problems of “too many procedures” in the process of environmental evaluation.	The risk is that there is opacity in decision making due to lack of transparency and limited access to public information.	RR7: What risk is there that the EIA reports are not available to the public once they are ready?
The EIAs are voluminous (more than 31 000 folios) written in technical terms, little understood by citizens in general and for communities that could be impacted by mining activity.	If it continues to be a confusing instrument and perceived as not very transparent, EIAs can create a space for discretion by not having adequate control mechanisms in any of its steps.	RR6: What risk is there that the criteria relating to EIAs are not made of public knowledge?
The asymmetry or inequality in negotiation could generate manipulation of the leaders of the communities.	The agreements reached in the negotiations (when these do not represent the interests of the community but private interests), through incentives, generate corruption risk at the level of communal governance, vulnerability and weakening of the communal organizational logic. In turn, the asymmetric relationship of rural inhabitants with the company can be manipulated.	DP16 ADAPTED: What risk is there that negotiations of agreements with landowners or communities can be manipulated? PP7 ADAPTED: What risk is there that community leaders who negotiate with mining companies do not represent the interests of the members of the community?
Laws that allow mining companies to stop being sanctioned due to non-compliance with tax or environmental obligations.	This type of regulations generates a risk of weakening the body in charge of supervising compliance of environmental commitments.	RL5 ADAPTED: What risk is there that holders of mining concessions that fail to comply with tax or environmental obligations could avoid being sanctioned or judged?
In Peru regulations have been issued to boost investments that reduce the deadlines for issuing technical opinions within the environmental certification process.	These standards may affect the low quality of environmental standards. The technical reports could be issued without real support due to the pressure on the technical staff to comply with the new deadlines and “unblock the process”.	DPN2: Is there a risk that the deadlines change in the process of approval of the EIA has been structured to favor the interests of mining over the public interest?
Deficient transparency in the legal framework and in the processes inherent to the granting of environmental permits for the communities potentially affected by mining activity.	If the legal framework can not be identified in a precise and understandable manner by the communities potentially affected by the mining activity, opportunities for corruption can be created while looking for “consent”.	DP8: Is there a risk that the legal framework and processes for granting concessions and environmental permits will be or not of public knowledge for the communities in whose territory the mining activity is expected to take place?
Regulations that favor the promotion of private investment for the sake of the “national interest” over environmental and community rights.	The risk is that the regulations may produce irregularities in environmental standards and/or technical aspects of the evaluation, which would lead to the approval or rejection of projects due to undue political pressure.	FC1: What risk is there that the laws on mining have been drafted (or drafted, if a reform is planned) in order to favor private interests over the public interest?

CHAPTER 3



1. RESULTS

After organizing the vulnerabilities detected in the processes of granting mining concessions for exploration and exploitation as well as in the environmental certification process, verify the findings with the interviews conducted with relevant actors of the sector, and corroborate them in two validation workshops, 32 vulnerabilities were evidenced. These are detailed in the attached Form A, which shows how the selection was carried out taking into account the evidence supporting them, which resulted in 18 risks identified according to the TI tool.

In order to properly identify each risk, we started with the structure used for questions about common risks of the TI tool: "What risk is there that...?" The following table shows how vulnerabilities -and subsequently risks- are organized in the categories established according to the tool, based on contextual factors (FC), design of the process factors (DP), practice of the process factors (PP), accountability mechanisms (RR) and legal responses (RL). To be able to locate them in each of the categories, adaptations were made according to Peru's mining and environmental legal system (for example, in Peru, mining rights are given through a concession, they are not awarded or there is no auction for them). In addition, an exercise was conducted by asking questions that helped to place the category risk that is associated with the identified vulnerabilities, as shown:

CATEGORY 1 (FC)	CATEGORY 2 (DP)	CATEGORY 3 (PP)	CATEGORY 4 (RR)	CATEGORY 5 (RL)
Contextual factors	Design of the process factors	Practice of the process factors	Accountability Mechanisms	Legal Mechanisms
Does this vulnerability reflect contextual factors that facilitate corruption?	Is this vulnerability related to the design of allocation processes?	Does this vulnerability relate specifically to the practice of the process?	Does this vulnerability relate specifically to administrative or institutional responses to hold companies, community leaders, or public officials accountable?	Does this vulnerability relate specifically to formal legal responses, especially laws, regulations and other deficient or non-existent legal mechanisms when corruption has been effectively identified?

Risk and score list

The risk validation and scoring was calculated using the methodology developed for the TI tool, explained in this report. For this, as indicated, the evidence supporting the assessed probability and the evidence supporting the evaluated impact were analyzed, this helped to analyze the probability of certain assumptions that could lead to corruption and its impact. Both variables have a score range of 1 to 5. To obtain the final risk score, both scores are multiplied and the type of risk is obtained.

The following graph shows the 17 risks studied, identified with the code associated to the risk that allows identifying it in the next matrices, designed to describe and substantiate each risk and its score, as well as the evidence of the corruption risk impact that it generates.

RISK	CODE	PROBABILITY (1-5)	PROBABILITY (1-5)	RESULT	TYPE OF RISK
01.- What risk is there that mining laws have been drafted (or drafted, if a reform is planned) in order to favor private interests over the public interest?	FC1	4	3	12	Significant
02.- What is the risk of mining rights being expropriated?	FC2 ADAPT	2	3	12	Very low
03.- What is the risk that there is no Territorial Ordering that clearly establishes the surface rights by law and determines the areas open to mining?	FC3 ADAPT	4	3	12	Significant
04.- What risk is there of politicians or officials with particular interests in mining?	FCN1	4	4	16	Very high

05.- What is the risk that the process of granting a mining concession has been structured to favor the interests of mining over the public interest or to structure it in that way if a reform is planned?	DPI ADAPT	4	3	12	Significant
06.- Is there a risk that the legal framework and processes for granting concessions and environmental permits will be or not of public knowledge for the communities in whose territory the mining activity is expected to take place?	DP8	5	4	20	Very high
07/08.- DP16 ADAPTED: What risk is there that negotiations of agreements with landowners or communities can be manipulated? PP7 ADAPTED: What risk is there that community leaders who negotiate with mining companies do not represent the interests of the members of the community?	DP16+PP7	4	4	16	Very high
09.- What risk is there that the concessions of mining requests are based on cadastral maps that are not coordinated or that are not geodesically compatible with other land administration organizations, such as agriculture and forest services?	DP27 ADAPT	1	1	1	Very low
10.- Is there a risk that the deadlines change in the process of approval of the EIA has been structured to favor the interests of mining over the public interest?	DPN2	3	4	12	Significant
11.- What is the risk of not having an effective regulatory regime applicable to the mining activity?	DPN4	1	1	1	Very low
12.- What risk would there be that there is no verification of the accuracy and veracity of the EIA reports?	PP9	3	3	9	Moderate
13.- What is the risk of the sector's personnel constantly shifting from providing services in the public sector to the private sector and then back to the public sector?	PPN1	4	1	4	Minor
14.- What risk is there that holders of mining concessions that fail to comply with tax or environmental obligations could avoid being sanctioned or judged?	RL5 ADAPT	4	4	16	Very high
15.- What risk is there that the criteria relating to EIAs are not made of public knowledge?	RR6	5	4	20	Very high
16.- What risk is there that the EIA reports are not available to the public once they are ready?	RR7	3	5	15	Very high
17.- What risk is there that there is no access to information on the main payments made by mining companies such as income tax and royalties?	RRN1	3	5	9	Moderate

Risk Matrix

Below is the TI tool's risk matrix, marked as Form D. It is a two-dimensional risk matrix and has been used to mark the total scores (probability by impact) of the different risks. It uses a multicolored system based on the colors of the traffic light: it is enough to place a risk in the matrix to appreciate its level of importance. It has five levels of importance, in each color the risk scores are located and in them the number associated to the question about the risk

described in the previous matrix has been located.

The color blue represents a very low risk, the green color represents a minor risk, the yellow color is a moderate risk, the orange color is a significant risk and the red color represents a very high risk.

PROBABILITY	5 ALMOST SURE	5	10	15	20	25
	4 PROBABLE	4	8	12	14	20
	3 POSSIBLE	3	6	9	12	15
	2 UNLIKELY	2	4	6	8	10
	1 ALMOST IMPOSSIBLE	1	2	4	4	5
		1 VERY LOW	2 MINOR	3 MODERATE	4 SIGNIFICATIVE	5 CATASTROPHIC
		IMPACT				

The matrix shows us that seven risks are classified as very high, which represents 40% of the total risks that are shown and are identified as:

- A. FCN1: What risk is there of politicians or officials with particular interests in mining?
- B. DP8: Is there a risk that the legal framework and processes for granting concessions and environmental permits will be or not of public knowledge for the communities in whose territory the mining activity is expected to take place?
- C. What risk is there that negotiations of agreements with landowners or communities can be manipulated?

- D. What risk is there that community leaders who negotiate with mining companies do not represent the interests of the members of the community?
- E. What risk is there that holders of mining concessions that fail to comply with tax or environmental obligations could avoid being sanctioned or judged?
- F. What risk is there that the criteria relating to EIAs are not made of public knowledge?
- G. What risk is there that the EIA reports are not available to the public once they are ready?

These risks were studied in detail in the previous chapter when establishing the vulnerabilities and risks in mining concession processes and environmental certification. However, it is important to note that the risks of higher scores are related to contextual factors; that is, risks related to the context of the mining sector of a country, external to the immediate process of concession granting and environmental certification; risks related to the design of processes associated to opportunities for corruption risks that originate in the design of the process associated to the legal and administrative framework; risks related to legal responses or lack of them, such as the risks related to the legal mechanisms available to respond to corruption when it is presumed or has been identified; and, finally, risks related to accountability, linked to mechanisms designed to hold public officials, mining companies and other parties accountable when there is concern about corruption possibilities.

Risk A is related to the perception that exists regarding the influence exerted by mining companies in the sector. In Peruvian regulations, contributions to political campaigns are legal as long as they are declared. Not being a crime could be exploited by private interests and generate political clientele. The corruption risk that interest groups related to the mining activity could promote candidacies is very high because, through the financing of political candidates, they would seek to “gain access to power, gain access to political power.”

Risk B is related to the perception of lack of transparency of the legal framework and the processes themselves, understood from the Peruvian reality as a multicultural and intercultural country and from the perspective of the population in whose land the mining exploitation is expected to happen without giving them in practice the right to oppose and defend their territory. Also taking into account that it is policy of the Peruvian State to encourage extractive investments, with regulations issued for this purpose but without generating a space for the potentially affected population where they could, perhaps not even oppose, but be participants, through regional or local governments, of the decisions that are to be taken knowing that these activities will be developed in the territories they are occupying -in possession or ownership- and will impact their lives.

In risks C and D, it is evident that the asymmetry or inequality in the negotiation between the parties. This generates agreements that can be manipulated, in one case, with the owners of communal lands, but also regarding the implementation of the prior agreement before the prior consultation, covered by the current legislation.

These are factors that cause much of the socio-environmental conflicts and generate a considerable risk of corruption, because in each community and in each community leaders' recruitment micro processes of corruption took place at the community level for the benefit of the mining company. It is not known how significant or how much is the amount throughout the country because there is no record of it.

As for risk E, it refers to the laws that allow mining companies to stop being sanctioned due to non-compliance with environmental obligations, basically the regulations contained in Law 30230 (known as “environmental paquetazo”), which also limits economically OEFA, the agency in charge of overseeing compliance with environmental commitments. This generates the perception that they follow acts of corruption understood as the abuse of power for the benefit of a group to the detriment of others, weakening the

legal system and the environmental institutions.

In risk F, the problem referred to EIAs is revealed, technical instruments that, as such, are difficult to understand by potentially affected populations. It is the role of the State, and specifically of the body in charge of environmental certification, to make accessible to the population the information contained therein taking into account the reality of the country.

Risk G is generated by the lack of an effective automated control system for the environmental evaluation process, since the Online Environmental Assessment System (SEAL) is currently a computer tool that is insufficient and inefficient because there is no progress in the debureaucratization and problems of “too many procedures” in the process of environmental evaluation. This generates a risk of lack of fair conditions both for companies that comply with the laws and the corresponding process, as well as for potentially affected communities due to the lack of transparency in the access to information.

That currently could be insufficient or inefficient due to the lack of progress in the debureaucratization and problems of “too many procedures” in the process of environmental evaluation, keeping the delay of processes.

2.- The matrix shows us that four risks are classified as significant, which represents 23.33% of the total risks that are shown and that are identified as:

- A. What risk is there that mining laws have been drafted (or drafted, if a reform is planned) in order to favor private interests over the public interest?
- B. What is the risk that there is no Territorial Ordering that clearly establishes the surface rights by law and determines the areas open to mining?
- C. What is the risk that the process of granting a mining concession has been structured to favor the interests of mining over the public interest or to structure it in that way if a reform is planned?
- D. Is there a risk that the deadlines change in the process of approval of the EIA has been structured to favor the interests of mining over the public interest?

It is noted that these risks are related to contextual and the design of processes factors.

Risk A gives an account of the effect caused by regulations that favor mining activity to the detriment of citizens and, above all, of communities that would be directly affected by extractive activities. This would create scenarios vulnerable to socio-environmental conflicts in a context without adequate mechanisms of participation, transparency and access to information.

Regarding risk B, it is clear that the absence of a plan for the rational management of the territory creates conditions for conflict, scenarios that in Peru are constantly exploited for political purposes, which generates opportunities for private interests and thus scenarios that facilitate corruption. The lack of Territorial Ordering affects social conflicts that are already taking place, even projects without real risks for the territory could be considered dangerous due to lack of decision on which areas are suitable for extractive projects and which are not.

Risk C has been extensively developed in the previous chapter and is related to the fact that in Peru mining laws and, above all, regulations on the granting of mining concessions are designed within the context of incentives for

private investments, having established that such concessions are granted through a bilateral administrative process where only the State and the mining company participate; where neither the population nor regional governments participate nor are they asked about the feasibility of large mining projects, it is a situation that would increase social conflicts.

Risk D warns that regulations that reform and reduce time periods in the process of approval of the EIA are structured to favor the interests of mining over the public interest and would affect the already low quality of environmental standards, favoring mining companies because they would be putting pressure on the technical staff to comply with the new deadlines and “unblock the process”.

3.- The matrix shows us that two risks are those classified as moderate, which represents 12.22% of the total risks that are shown and are identified as:

A. What risk would there be that there is no verification of the accuracy and veracity of the EIA reports?

B. What risk is there that there is no access to information on the main payments made by mining companies, such as income tax and royalties?

Risk A reflects the lack of verification of EIA reports when SENACE requests the opinion of bodies (known as bodies who emit technical opinion) during the process and they have to collect information on site. However, they would not have resources for logistical or technical expenses, so they would be issuing opinions “from the desk” without considering various aspects (such as the use of water, quarries, protected natural areas) and that the certifying entity only has information presented by the applicants - of difficult or impossible verification - and, given the ignorance, the administrative “speed” is preferred.

Regarding the lack of access to information on the main payments made by mining companies, risk B indicates that in Peru the implementation of Law 27806, Law of Transparency and Access to Public Information, allowed significant advances in access to the information regarding mining and hydrocarbon production, tax revenues, the distribution of extractive income, public spending in general; and investment and social spending in particular. The degree of openness for access to information is partial due to the existence of a tax reserve. However, the Peruvian government becoming in 2005 an EITI member has allowed the publication of national reconciliation studies of payments and revenues on tax and non-tax payments made by extractive companies to the State, which give signs that mining companies accept the importance of transparent accounts. But it is still pending for the sector to publish their statements on social works that are tax-deductible.

4.- The matrix shows us that one risk is classified as minor, which represents 6.68% of the total risks that are shown and that is identified as:

A. What is the risk that the sector’s personnel constantly shift and go from providing services in the public sector to then move to the private sector and then return to the public sector?

This risk is related to the fact that in Peru there has been questionings regarding the conflict of interest that may arise when there is rotation of public officials, specifically referring to senior positions of trust, which go from serving in the private sector to the public sector and returning to the private sector, repeatedly. It is what is currently known as “revolving door”, a fact that becomes more worrying when the rotation occurs inside the same

sector. On the other hand, personnel of some mining companies manage to be appointed to key positions in the sector, where they would be able to make decisions that could favor these companies, undermining the purpose of the institution.

On this particular risk, a broad debate was developed both in the first validation workshop and in the second. We discussed the risk of corruption that would arise when the private company places a trusted official in key positions in the sector and could use privileged information in its favor and also manage the EIA from the State that it would have previously managed from the company, which also generates the risk that the institution’s function will be distorted. This was denounced both in the interviews and in the first validation workshop by civil society and even former employees of the sector. There are also academic studies and journalistic investigations in this regard and that are developed extensively in the previous chapter. However, it is very difficult to prove because the representatives of the mining society as well as officials in the sector questioned the fact that the existence of the risk is confirmed without reliable evidence to support the probability and corroborate the intention to favor a certain sector that is why it initially obtained a “very high” score. But at the time of the second validation, due to the lack of evidence to support the probability, the score fell to lower risk.

5.- The matrix shows us that three risks are classified as very low, which represents 17.77% of the total risks that are shown and that are identified as:

A. What is the risk of mining rights being expropriated?

B. What risk is there that the concessions of mining requests are based on cadastral maps that are not coordinated or that are not geodesically compatible with other land administration organizations, such as agriculture and forest services?

C. What is the risk of not having an effective regulatory regime applicable to the mining activity?

These risks are mainly related to the level of legal stability, transparency and access that exists during the process of obtaining mining concessions, both exploration and exploitation, which are accessible digitally. It should be noted that Peru has strength in terms of standardization and clarity of the processes that allow obtaining concessions.

On risk A, in Peru both legislation and mining policies are very stable. Through laws like the Framework Law for the Growth of Private Investment and the Law of Promotion and Guarantees for Foreign Investments, Legislative Decree No. 662, published on September 2, 1991 and Legislative Decree No. 757, published in Decree 13 November 1991, the guarantee of free private initiative, the social market economy system and the obligation to promote and monitor free competition are recognized, and in particular, the State guarantees private property and the right of companies to freely agree distributing the full amount of their profits and the right of investors to receive all of the profits that correspond to them. At present, there are no risks of confiscation or expropriation of mining rights. The promotion regime guarantees above all the invariability of the current tax regime. The likelihood that mining laws and policies will change after mining companies have started their activities is practically non-existent and, if it occurs, it would have to first change the political scenario and the economic policy of the country, which it is highly unlikely in the immediate future.

Regarding risk B, it should be indicated that Peru has the GEOCATMIN, which is the Mining Cadastral Geological System, developed by INGEMMET, with the latest GIS technology (geographic information system), in order to give users georeferenced information; contributing to the promotion of mining investments, disaster prevention, land use planning and sustainable development. The system allows searching information from the national mining cadaster, graph mining rights, consult areas restricted to mining activity, interact with Google Earth base maps, obtain coordinates, calculate areas and distances, geographic information systems and global positioning systems (GPS). The risk that there are concessions of mining requests based on cadastral maps that are not coordinated or that are not geodesically compatible with other administration organizations is minimal.

Risk C refers to the lack of regulation in the sector. However, in Peru, the

regulations that regulate the operation of mining activity were reformed at the beginning of the 1990s in order to encourage the arrival of foreign investments in the sector. Regarding environmental regulation, without whose approval can not start the mining activity, the environmental management system is made up of five systems: 1) Environmental Impact Assessment System (SEIA); 2) National Environmental Assessment and Control System (SINEFA); 3) National Water Resources Management System (SNGRH), 4) National System of Protected Natural Areas (SINANPE); 5) National Environmental Information System (SINIA). Peru does not lack of regulations; on the contrary, there are regulations that regulate the operation of mining activity, cover various cases and are mandatory, also having an Environmental Assessment and Inspection Agency (OEFA). In this context, some regulatory adjustments may be necessary, but there is no risk of a lack of adequate regulations.



2. CONCLUSIONS

In the 1990s, Peru carried out a series of legal reforms that regulate the operation of mining activity in order to encourage the arrival of foreign investment in the sector. One of the determining factors for foreign investors to take the country into account as the future destination of their capitals was the legal stability in the sector that has been maintained, since mining investments are by nature long-term, they take more than 20 years and increasingly require a climate of clarity and legal stability, tax and social sustainability.

One of the main strengths of Peru is that the mining legislation and policies are very stable, the guarantee of free private initiative, the social market economy system and the obligation to promote and monitor free competition are recognized; and, in particular, the State guarantees private property and the right of companies to freely agree on the distribution of the full amount of their profits and the right of investors to receive all the profits that correspond to them. The promotion regime guarantees above all the invariability of the current tax regime.

The system of mining concessions is another factor that encourages the investor, since it is carried out through an administrative process and with an entity such as INGEMMET that has fully computerized tools, such as the Mining Rights and Cadaster System (SIDEMCAT) and the Mining Cadastral Geological System (GEOCATMIN), whose systems leave very little room for discretion, reducing the risk of corruption at that stage. It is worth mentioning that GEOCATMIN contributes to the promotion of mining investments because it has the latest GIS technology, which provides georeferenced information, and helps in preventing disasters. The system allows to look for information of the national mining cadaster, to graph mining rights, to consult the areas restricted to the mining activity, to interact with the base maps of Google Earth, to obtain coordinates, to calculate areas, distances, and with global positioning systems (GPS).

However, when identifying the vulnerabilities in the process of granting concessions for exploration and exploitation, the lack of connection is evident between the State as a promoter of investments and the population that is considered potentially impacted or that inhabits the areas of mining activity, whose arguments are not of radical opposition to mining investment, but are a claim of lack of transparency in information and the asymmetry of power that exists when a concession is granted without involving in the State's decision the communities land owners, whose lives will be impacted by the mining activity, and who learn of the concession after it has already been granted. Another pending claim is the lack of territorial ordering and ecological economic zoning that allow determining in advance the areas where you can and can not perform mining extractive activities.

The position of the State reflected in the regulations, as well as the position of mining companies, is that the concession process does not require to be consulted with the local inhabitants because at that stage it is not yet known if minerals exist or not to be exploited, therefore there would be no impact in this first phase.

This scenario is presented as a risk in the design of the process in the immediate stage prior to the granting of the mining concession, which could harm the mining company itself.

An important contextual factor due to the impact it generates is that there would be political interest groups related to the mining activity that promote candidacies. In Peruvian regulations, contributions to political campaigns are legal as long as they are declared. The corruption risk that interest groups related to mining activity could promote candidacies is very high because through the financing of political candidates they would seek to "gain access to political power." In this context, it is the State that through the National Office of Electoral Processes (ONPE) must investigate these donations and how they become effective.

Another factor that has to do with the practice of the process and labor issues that affect the sector, and found as a weakness, is the high rotation of officials in senior positions of trust, what is known as "revolving door". The conflict of interest can occur because the State would be in a position to make decisions that could favor private interests, distorting the purpose of the institution. However, as already explained, this risk is extremely difficult to prove.

With regard to environmental certification, to have extremely voluminous EIA, with more than 31 000 pages written in a technical language not very understandable to citizens in general and to communities that could be impacted by mining activity, generates a perception of lack of transparency.

The lack of an effective and efficient automated system also harmed the environmental certification procedure, SEAL turned out to be insufficient; this added to the management of excessive procedures and permits, because the regulations are per sector which requires managing more than 40 permits to start mining, and that increases as the mining project progresses.

For example, for the construction of the facilities of the mining company Antamina, more than 250 permits and licenses were obtained from more than 15 different entities¹⁶⁵, a situation that harms and discourages private investment.

Environmental institutionalism is another aspect that generates risk due to the fact that regulations have been issued that allow mining companies to stop being sanctioned due to non-compliance with environmental obligations.

These regulations generate a risk of weakening the body in charge of monitoring compliance of environmental commitments and the perception that the argument of favoring the promotion of private investments for "national interest" goes over environmental and community rights, and that it rather follows acts of corruption understood as the abuse of delegated power for the benefit of a group to the detriment of others, which, in turn, weakens the legal system and the mining and environmental institutions.



ANNEXES

1. MAIN CONTRIBUTIONS OF THE 1ST VALIDATION WORKSHOP

Participants:

Representative MINAM, Director of INGEMMET; Former Head of SENACE; Sub director of NGO Cooperation and former Deputy Minister of Environmental Management of MINAM; NGO Representative Grupo Propuesta Ciudadana; Latin American Director of the NGO Natural Resource Governance Institute (NRGI).

MINAM: There are limitations to access complaints cases regarding certain officials. The case of advertising. At the Office of the Comptroller General of the Republic it is difficult to access cases. What role can assume the Office of the Comptroller to prevent this from happening? We do not necessarily know the real state of the processes.

Cooperación:

- To incorporate informal and illegal mining in the study, because the extract of the mining boom is an extract strongly present in the territories and the evolution of that sector is linked to the “dark side”, whether it is the illegal one where political power has been gained, economic power. There is much to see from the work hypotheses that are being considered. In this case, the regional scope has a greater role that could be seen in more detail.

- It is not clear if you give equal weight to the mining concession regime and the environmental EIA regime. In cadaster-grid procedures, how would corruption mechanisms work clearly established? Is it a more complicated task? Corruption is mixed with ethics, example Conga's EIA, and there are other similar examples. Law Contracts and arbitration processes: the issue of 2% of GDP seems enormous. If one added all the arbitration processes underway, Peru lost or won others.

- Law contracts may not weigh as much as investment contracts, bilateral, sometimes the use of investment clause, the issue of arbitration is very favorable for companies

NRGI:

- There are 2 main things to distinguish:

The capture of the state to formulate regulations for a particular interest, where we find revolving doors, lobby, capture of the state. State capture = corruption?

Violation of existing regulations, I pay someone to have an approved EIA or for the use of the laboratory of my consultant, etc.

- Opportunities for corruption are as many as the decisions to make. We must prioritize the really important moments/decisions. What are the critical decisions, transcendent?

- Transfer pricing mechanism, an issue that came out of the Panama Papers to lower tax payments and transfer prices, there is a theme that can be interesting to analyze.

Former Public Officer:

- It is necessary to organize the regulation part and not only mention the revolving door phenomenon. I think that in some cases the EIA part has identified vulnerable moments quite well. The official is vulnerable in the revision of the EIA due to the volume of these, the deadlines, and the importance of the project. With the Law 30230 you can not control and apply sanctions. In mining even more so because afterwards you can not adapt. The recommendation goes to see the environmental regulation but also the environmental control/supervision.

- The obligations are very general, too general, when the project is executed it turns out that it does not respond to the expectations of the project, and it turns out that the decision was not taken properly when making the decisions. Social perception of projects is the main reason why projects are not done.

- ANA does not charge for its technical opinion, MINAGRI does charge, both issue a binding opinion.

MINAM:

- A single point of contact may be able to reduce the risks of corruption

- Large-scale mining camouflaged on a small scale. When you see how much material you process and you see that it is not small mining. There are signs of large mining that is camouflaged in small or medium mining.

Former public official:

- In the mercury negotiation: company says 1000 or 2000 ha that is not small, maybe it is not the name but the magnitude of the territory that is managed that defines what large mining is.

MINAM:

- OEFA has resolutions that have shown that they are not small-scale mining companies and have managed to sanction them.

NRGI:

- Decisions related to water. When a framework of water rights has been sought, it dates from 2012. In the effective monitoring of consumption there is an absence of symmetry between the capacities of the State and the private sector, there is a field of opacity where corruption risks may be found. It is an emerging field that has not been discussed yet enough.

INGEMMET:

- We have a deficiency of who is who in mining. However, the State lacks this information but they can still do mining. There are many public officials whose links are unknown. It is damaging because a journalist investigates and finds out. That information needs to be consolidated. Who are mayors, consultants, companies, congressmen minority owners of companies? Due to this there is a constant risky situation. Greater discretion, greater risks. In concessions system, an automated concession system has been designed. The machine is the one that sets the date and time, if I eliminate man's hand it is easier. The identification of competences must stop to stop the fight between regions on whoever supervises, as this benefits the offender. The dispersion of competences also benefits the offender.

- Random lottery system, we must have a ranking of how officials behave. The issue of transparency is fundamental in concessions.

- Within administrative processes we require opinions. If opinion consists of giving information, this should be on the web and it is taken out of there.

- Illegal/informal mining is linked to who is the one in the extractive industries. We have 3 records, who is who, to whom they are linked. The issue of transparency and who is who are fundamental.

GPC:

- Weak transparency in the complying with the social/environmental commitments that are drawn up when EIA is made.

- There is little transparency about what companies really do to mitigate environmental and social risks. This information is considered confidential in Article 50 of the old mining law. The EITI initiative wants to include social and environmental transparency. This information is presented to the State, which does not follow up and this information is not made public. For example, in the middle of the Yanacocha conflict, the state asks for how much it spends in social and environmental responsibility, in 10 years like 1000 million soles but it was not possible to know in which projects, part of this money could have gone to purchase of leaders, etc., and it is a factor to take into account to make it transparent.

Former public official:

- Information management can be vulnerable. In MINEM the system fell but they had a rule that when the information fell, the information could enter in a physical format and in that case it could no longer be verified with the system. In that case, the vulnerability is in the people who received the information.

- Mechanisms to ensure those who have access to information as well.

INGEMMET:

- If the system falls, you have to wait. Prior consultation but I do not see links with corruption.

- Prior consultation is a State commitment.

- For prior consultation, do we have to consult all the administrative measures? You have to have some flexibility. Without information about pro and cons the consultation does not work. Seeing it associated with the issue of concessions may restrict them.



2. MAIN CONTRIBUTIONS OF THE 2ND VALIDATION WORKSHOP

Participants:

Angloamerican Representative; MINAM representative; SENACE representative; SNMPE representative; Proetica.

Comments on sources of information for the study

- There is confusion between the ECAs and the maximum permissible standards.
- The arguments given by some ex-employees (former Minister of MINAM, former Vice-Ministers) recently about the ECAs and demands are not 100% certain.
- Journalistic sources in Peru should be analyzed with care. The Diario Gestión case where they have published news that are not true/ambiguous. Be careful with these sources.
- The congress would not allow a law to be made with a specific beneficiary in mind. The congress is considered as a control mechanism.

RL5 ADAPT: What risk is there that the holders of mining concessions that fail to comply with tax or environmental obligations can avoid being sanctioned or judged?

- Environmental effects have increased due to this regulation (Law 30230). This law has not prevented the control/supervision.
- It would be necessary to see if the values of the ECAs are reasonable for the infringement
- The oversight of OEFA: the impacts/findings are oversized
- An OEFA report comes 2 years 11 months later. Do you want immediate remediation or not? Reports, appeals, etc. are on the OEFA page, you can access it.
- There is an example where the EPA report said that OEFA supervisors did not know what to supervise.

FC3 ADAPT: What is the risk that there is no Territorial Ordering that clearly establishes the surface rights by law and determines the areas open to mining?

- We must differentiate the term of consultation: Prior consultation applies to indigenous communities and the State does it.
- Be careful when using the term consultation since it can be taken as a prior consultation, although in this case it is used as citizen participation.
- The concession does not grant exploration rights.

- It is necessary to differentiate territorial ordering from the EEZ.
 - An erroneous definition of territorial ordering is being disseminated. Ordering seeks to take a long-term planning. A TO plan is obligatorily subject to national laws. There are many like the ANP law, in this case the TO plan must pick up what this law mentions. The TO must be conceived taking into account that there are resources in the subsoil that are not known.
 - TO is a planning and guidance instrument, in recent years this definition has been stripped.
 - The vision of the TO must adapt to what the constitution and the regulations establish.
 - There is no law of TO, and every time someone wants to do it is said “can you order what you do not know?”. Through the exploration you can confirm if you have a concession that you can explore/exploit. The exploration is what gives you an idea of the quantity.
 - TO does not necessarily guarantee the reduction of conflicts.
 - To develop the exploration process there are participation mechanisms that must be given.
 - There is no technology that determines the deposits, the most precise/exact characteristics of these.
 - It would be necessary to see the requests of concessions that finally do not reach the exploitation stage.
- DP8 ADAPT:** When it is required to consult communities or landowners, is there a risk that the legal framework and the consultation process itself are not transparent, of public knowledge for the communities in whose territory the mining activity is expected to take place?
- When the company proposes to develop a mining operation, there is already the state presence.
 - Consult the mining concession violates the right to consultation. In the certification processes, a consultation is made accompanied by the State. Efforts are made to give the information available.
 - The process of citizen participation is important for environmental certification. A large number of workshops are carried out and are related to the activity.
 - We are trying for workshops to be done in the language of the populations that inhabit the place.
 - SENACE makes an accompaniment during this participation stage and also others.
 - SENACE has published tools for civil society and populations as well.
 - SENACE is working in a single point of contact window that will give more speed and efficiency.

PP3 ADAPT: What is the risk that the personnel of the sector, including those of the bodies that issue the Technical Report for the granting of the EIA Environmental Certification, will suffer “regulatory capture” by mining companies?

- It is not true that, due to pressure from the press, the certification director of SENACE who worked for Yanacocha had to resign. The resignation came from him/ it was voluntary. The person was very qualified. It was not due to media pressure.

- The interpretation of news must be careful, there is little evidence to speak of capture of the State. There is no evidence.

- It seems that the State is unable to hire qualified people because they come from the private sector. The vulnerability comes from that side.

PP9: What is the risk that there is no verification of the accuracy and veracity of the environmental impact assessment (EIA) reports?

- The risk that officials do their work wrong exists anyway, so they are given more time.

- The issue of the lack of financial resources and personnel appears in the interviews of entities that issue binding technical opinions.

- Another possibility is that to avoid problems the official may not approve, he makes observations and thus win time.

- It is necessary that the official knows the subject that he is evaluating.

- The training of the body and the official is necessary.

- Reasonable performance of the official, one thing is to ask for information, another thing is to ask for a technical opinion.

- SERFOR and other organizations have opposed to make their opinions transparent.

- Inefficient use of public resources.



CORRUPTION RISKS IN THE MINING SECTOR: PERU REPORT

An analysis of vulnerabilities and risks of corruption in the granting of licenses, permits and contracts related to the mining sector

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