COUNTRY REPORT: PERU
EIA Legal Reform in Peru: The Birth of SENACE

PEDRO SOLANO*

Introduction

The Environmental Impact Assessment System has twenty plus years of history in Peru. Back in 1990, the first *Peruvian Environmental Code*, DL 613, introduced for the first time the concept and regulation for EIAs. According to the *Environment Code*, an EIA was required prior to obtaining a license or permit for environmental risky activities in the country. The *Environmental Code* also listed some of the activities that would necessarily require an EIA, and made an ambiguous reference to the responsible body as "the competent authority". The idea was to maintain sectorial environmental competences and EIA preparation and evaluations, but incorporate a coordinating entity to make the EIA system operational and articulated under a single public environmental entity.

The *Environmental Code* included a provision regarding a coordinating body for the national environmental system, which would be determined by future regulation, be responsible for guiding all competent authorities and lead the implementation of a national environmental policy. This provision was soon derogated, as it was thought that a new environmental authority or coordinating body would be bureaucratic, expensive and most of all, it could mean a threat for the much needed promotion of private investment in the country.

Over the next few years, a hybrid model was consolidated and EIA became regulated by individual sectoral authorities, which fictionally consolidated themselves as the environmental "competent authorities" with no coordinating body to articulate and provide a sense of unity. At the time, these "competent authorities" already regulated, granted permits and supervised potential environmental risky activities. With the *Environmental Code* they were also granted the role of evaluating and approving EIAs. Acting as a "judge and party" has been questioned over the years, but has more or less remained the same in spite of important milestones in the country, such as the creation of a National Council for the Environment (CONAM) in 1994, later to be replaced by the creation of the Ministry of

* Executive Director for Peruvian Society for Environmental Law – SPDA. Email: psolano@spda.org.pe.

Environment (MINAM) in 2008. Both CONAM and later MINAM were legally mandated to act as the coordinating body for the National System of Environmental Impact Assessment. However, apart from regulating some limits and approved guidelines, their role in regard to EIAs has been very modest and limited over the years. EIAs basically remained in the kingdom of each one of the sectoral "competent authorities".

Against this background comes the breaking news that the Peruvian Congress recently approved (in November 2012) the *Law for the Creation of the National Service of Environmental Certification for Sustainable Investments – SENACE*. SENACE is an independent entity, falling under the Ministry of Environment, which is granted supervisory and regulatory competence over all major EIAs. "SENACE", if broken down into two separate words in Spanish, means "being born" (se-nace). There was never a more appropriate acronym for a new institution.

The Environmental Impact Assessment System.

In 2001, the *Law for the National System of Environmental Impact Assessment – SEIA* (Law 27466) was approved. Under the SEIA framework, an environmental certification is required prior to execution of investment projects, whether private or public, that imply activities that may cause significant negative environmental impacts. The certification is a resolution given by the competent authority, which approves the environmental impact assessment study.

This Law also determined three different levels of classification for projects that require an EIA:[1]

- *Category 1.* Environmental Impact Declaration, or DIA.[2] This is meant for projects of very low risk, and which presumably do not cause significant negative environmental impacts.
- *Category 2.* Semi-detailed Environmental Impact Study, EIA-sd[3]. This is for projects that may cause moderate environmental impacts, but negative effects can be avoided or reduced through the adoption of simple mitigation measures.
- *Category 3.* Detailed Environmental Impact Study, EIA-d[4]. This is meant for projects that may produce relevant and significant negative environmental impacts, due to

[1] To prevent confusion, later it was decided to call all levels of EIA generally as "IGA". IGA stands for *Instrumento de Gestión Ambiental* or *Environmental Management Instrument.* In some cases, as we will see, an IGA means a Declaration and in other cases a more complex document.
[2] Stands for *Declaración de Impacto Ambiental*.
[3] *Estudio de Impacto Ambiental semidetallado*.

their nature, size or location. They therefore require a more detailed and in-depth analysis to anticipate, prevent, reduce or mitigate the impacts and develop a management strategy to deal with risks.

Prior and after this Law was passed, different "competent authorities" for different sectors (such as fisheries, mining, forestry, oil and industry) started to develop their own regulations and organizational structures to exercise and inform their EIA competences. As a result, for more than a decade, different types of criteria and principles were applied by different sectoral authorities, even where the nature of the activities they were regulating were similar. Among the more active and leading sectors, energy, mines and hydrocarbons certainly stand out. There was also interesting regulations developed for the following sectors: fisheries; railroad infrastructure; and some industrial activities. On the other hand, EIA structures and rules for agriculture and housing activities were very poorly developed.

To complicate matters further, a decentralization process oriented to empowering Regional Governments was initiated in the early part of the last decade. As a result of this process, several faculties were transferred to the regions, including some related to investment and infrastructure developments that required EIAS. In these cases, the role of the Regional Governments to approve or monitor compliance of EIAs was very unclear or badly defined in the best of cases.

The Good and the Bad of 20 Plus Years of EIA as a System, with Different "Competent Authorities"

Implementing EIAs in Peru has been a constant learning process. Below are some thoughts regarding good ideas and decisions that unfortunately had perverse effects:

- *Public hearings*. From the start, it was decided that all major EIA required also the presentation of information and management plans to all interested stakeholders. This was a seemingly good idea both posed certain challenges. Firstly, how to present large volumes of information based on sophisticated analysis to common people. Secondly, how to validate that information or propose alternative options, which additionally, often had budgetary and technical implications.

[4] *Estudio de Impacto Ambiental detallado*.

- *Environmental consulting firms*. According to Peruvian Law, only registered firms can produce an EIA and the holder of the project is responsible for hiring and paying for this service. The good part is that only qualified and accountable firms are permitted to undertake this role. The perverse effect of course is that companies deciding who undertakes the study influence in some way the results; and at the end, a poorly produced document is often generated. Quite often the firms preparing these documents adopted a “copy and paste” approach, filling thousands of pages in the hope of producing the image of a “detailed” EIA.

- *Environmental system*. It is very good news to have every productive sector taking environmental responsibilities and producing their own environmental regulations. The perverse effect is the application of different criteria in each sector, which produces unfair differences for investment projects, the rights of stakeholders and the conditions that should be relatively common and similar.

- *Decentralization process*. Over the last 10 years Peru has moved from a centralized model of government to a model that seeks to strengthen capacities and roles of Regional Governments to issue permits for the use of natural resources and to regulate landscape planning. It seems unfair then, that these same Regional Governments are not afforded a role in the approval process for EIAs in respect of projects falling within their jurisdiction.

It is worth mentioning that between 2011 and 2012, several cases dealing mostly with mining projects questioned the extent to which approved EIAs were effectively promoting environmental risk prevention and how they contributed to facilitating an “environmental and social license” for the execution of big development projects where, in most cases, you have rural populations living in poverty and sensitive ecosystems.

The most noticeable case was the Conga project, a big mining operation located in Cajamarca, where an EIA approved by the national government was challenged by local authorities and inhabitants of the area. The EIA had complied with all legal requirements including public hearings and adjustments to the project required by competent authorities. Regardless of this compliance, when the company was about to start its operations, the local community strongly resisted and compelled to mining company to stop its operations. The community raised several social and environmental concerns which apparently had been covered in the approved EIA. These included the use of two lagoons for the disposal of

waste. To cut a long story short, the Government decided to establish a panel of experts to make new recommendations regarding the management of waste water emanating from the proposed project. The mining company accepted these new requirements in spite of having their initial EIA approved. Notwithstanding the amended approval, the population continue resisting and frustrating the commencement of the mining operations.

Why have the community not accepted these new legal arrangements? The basic answer would appear to be that they do not trust the mining company and the Central Government. The EIA process means nothing to them, as it is basically perceived as an agreement between the company and the Central government.

SENACE. The Creation of the National Service of Environmental Certification for Sustainable Investments

After the social conflicts of 2011-2012, it was clear that the EIA legislation and the institutional framework needed to be re-built in order to make it a more efficient and inclusive instrument; and most of all to restore credibility in the EIA regime.

One of the key challenges to the EIA regime has related to the same authority being tasked with both promoting and regulating projects requiring EIA approval. One alternative which was proposed was having an independent institution for approving the EIA. With strong and direct political support of the President, SENACE was created to act as this institution.[5]

What is SENACE?

SENACE is a public body falling within the Portfolio of the Ministry of Environment. It has technical independence and its own legal status and budget. SENACE is part of the National System for Environmental Impact Assessment, whose coordinating body is the Ministry of Environment.

What is SENACE Responsible For?

[5] *SENACE Bill* proposal was an initiative of the executive power, by the request of President Ollanta Humala to deal with solutions for social conflicts in the country linked to high investments projects. In August 2012, the Council of Ministers approved a proposal for the creation of SENACE that was sent to Parliament. On 22 November 2012, the Bill was approved by Congress and sent back to President Humala who finally signed and promulgated the Bill on 19 December 2012, by Law 29968.

From the start of the discussions, it was obvious to most people that not all levels of EIA needed to be regulated by the new institution, as that would be overwhelming and not very practical. So it was decided that SENACE would be responsible only for detailed Environmental Impact Studies (EIA-d). In a controversial political move, it was decided in the law that in some cases the Council of Ministers may decide that a major project that requires an EIA-d, could be revised and approved by the sector in charge of the activity instead of SENACE. This means going back to the traditional sectoral "competent authority" system, albeit, in very exceptional cases.

Apart from this exception, general activities of SENACE will be: approving the EIA-d; implementing both the National Register of Environmental Agencies qualified to develop the EIA and the Register of Environmental Licenses; asking relevant authorities for their opinion about an EIA prior to making their decision; developing draft proposals for improving the EIA framework; coordinating mechanisms for the public participation processes; and implementing an "only window" system in all procedures related to EIA-d.

Organizational Facts

SENACE has a Board of Directors, consisting of six ministers: Environment (president); Finance; Agriculture; Energy and Mines; Production; and Health. The Board will approve the designation of a Chief for the executive operations of SENACE. This head will be the legal representative of SENACE, with all the administrative faculties needed for fulfilling SENACE's duties. Finally, SENACE has a Technical Counselor Council comprising of five individual specialists.

Implementation Process

It is not a usual legislative practice for Peruvian laws to include a section about an "implementation process". However, this time the legislator opted to include such a section, which dictates four phases in the implementation process:

- *Phase 1.* Install the board of Directors and design the Chief of SENACE.

- *Phase 2.* Design and implement the legal and administrative tools, such as a new set of procedures and regulations; hire the personnel of SENACE and implement capacity building and training processes; coordinate and follow up with each one of the current "competent authorities" to work with them until the transfer of

faculties has been completed; and design and regulate both registers in charge of SENACE. Once the completion of these tasks has been validated by the Board, SENACE can move onto the next phase.

- *Phase 3.* Transfer of faculties from the "competent authorities" to SENACE. A new Supreme Decree[6] will be needed to approve the schedule for all individual transfers. Then a Ministerial Resolution will also be required to accept each one of the transfers. Pending the adoption of these resolutions, individual projects will continue to be regulated by the sectorial "competent authorities".

- *Phase 4.* Follow up to the transfer of faculties. The Ministry of Environment will follow up the processes of transfer of faculties to SENACE.

As the above illustrates, the idea is to implement SENACE in a progressive way, starting with the institutional design and framework, hiring personnel, working on capacity building and training, promoting regulations and guidelines, and finally working with the current "competent authorities" to conclude the transfer of faculties to SENACE. It may be a long process, but it is certainly a big next step in Peru's path towards improving the country's Environmental Impact Assessment System.

In parallel to SENACE's creation, the Government has been working on improving the environmental prosecution regulations and some environmental compensation schemes. All these regulations and processes are the result of a set of recommendations provided by a Multisectorial Commission Report (October 2012) which identified several strategic issues requiring attention to address escalating environmental and social conflicts: environmental justice; governance; the right for a healthy environment; sustainable investments; social inclusion and natural heritage.

It is expected that the environmental policy and law agenda for 2013, and subsequent actions and measures, will be informed by this Report. The fact that Congress approved SENACE is a very good indicator that Peru has rapidly started taking note of this Report and commenced implementing its recommendations. However, the reality of implementing these recommendations may prove very challenging as many of them are still resisted by traditional extractive, industrial and productive sectors, and require considerable capacity building, budget allocations and political will. The situation at present looks promising and

[6] The highest legal norm the Executive Power can approve.

positive, but the mid- and long-term future may still present challenges. The most important of these challenges will be to present and internalize these instruments not only as part of a legal or technical debate, but as viable tools for building trust, governance and justice; and ultimately, striving towards true sustainable development.