11 New institutions, old practices

The weakening of new environmental control institutions in Peru

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Introduction

The aim of this chapter is to explain the emergence and implementation of new environmental institutions in Peru in the most recent commodity boom cycle. More specifically, it seeks to answer why, in spite of these changes, the country is still reproducing a pattern of weak environmental institutions. The paper focuses on environmental control institutions, such as the *Agency for Environmental Assessment and Enforcement* (*Organización de Evaluación y Fiscalización Ambiental*, OEFA). This agency has been gravely damaged in the first decade of its operation, and today it faces serious challenges for achieving its goals. Meanwhile, in a recently published report, the Ombudsman's Office declared that 9,000 Peruvians have been exposed to heavy metals and polluting chemicals resulting from the waste of extractive industries in Peru.¹

A growing literature explains the emergence of new environmental rules in the previous decade in Peru (Orihuela & Paredes, 2017; Granados, 2016; Orihuela, 2014). In 2008, the government of Alan García approved new environmental legislation whose main change was to dismantle the previous fragmented cross-sectoral system. Previous rules dictated that each productive sector had an environmental office and was also responsible for regulating the quality of the environment in its own sector (Pulgar-Vidal, 2008). In the case of mining, for example, a specialized office called the Direction of Mining Environmental Management (Orihuela & Paredes, 2017; Granados, 2016) carried out this responsibility within the *Ministry of Mining and Energy* (*Ministerio de Energía y Minas*, MINEM). It had little autonomy and resources. This cross-sectoral system was consolidated in the 1990s by the Fujimori government, which sought to favor the promotion of private investments in the exploitation of natural resources (Orihuela & Paredes, 2017).

The creation of the *Ministry of the Environment* (*Ministerio del Ambiente*, MINAM) in 2008 brought the promise of a centralized, autonomous and technical system of environmental governance.² New rules were promulgated, including the creation of a technical organization to handle the control of environmental quality: the OEFA. The creation of the OEFA was thought to be the beginning of autonomous environmental governance without private

interference, in particular in light of the doubts cast by communities impacted by mining regarding the MINEM's independence in making environmental decisions (Pulgar-Vidal, 2008; Lanegra, 2015).

Given these institutional innovations, one could argue that Peru's new environmental governance is a departure from the *resource curse*. This chapter argues that, unfortunately, this is not the case: there are new carafes, but the wine is still quite old. New formal institutions represent progress in the right direction to reduce environmental inequalities in the context of extractive exploitation. However, if daily activities and practices in organizations often have very little to do with the goal of the new formal institutions, these end up being "myth and ceremony" (Meyer & Rowan, 1977). This chapter explains why isomorphic institutional change has produced limited results in the context of extractive environmental governance in Peru, and how the natural resource curse subtly persists in a more *acceptable* institutional scheme.

The argument puts forward two mechanisms. First, the forging of isomorphic institutional change often does not dismantle old and informal practices embedded in the governance of extractive industries, such as the influence of the mining and oil industry on the public sector. These practices survive and persist in spite of the new formal institutions, undermining them from the start and throughout their formation. Second, the formation of isomorphic institutional change can be assisted by the action of social movements or the mobilization of communities. Nonetheless, the process of creation of new institutions does not necessarily articulate social bases in a significant way that would allow the development of ownership over these new rules. Actors involved in the creation of these rules are often professional elites associated by epistemic values and beliefs (Orihuela & Granados, 2021). The study provides empirical information to show how old practices, uncontested by social forces, undermine the coercive capacity and the shared benefit of new institutions. In the eyes of the people, these new rules are *more of the same* and are quickly discredited, repeating the pattern of weak institutions in Peru.

This chapter developed a case study in 2019 based on the revision of official documents, the media and interviews conducted between 2016 and 2018. Section 2 summarizes the institutional change in Peru in relation to environmental control. Section 3 develops the explanatory argument by showing evidence of the old practices that are maintained despite the new rules and how they undermine the capabilities and legitimacy of the new institutions. Finally, Section 4 concludes with some reflections.

Institutional change and environmental protection in Peru: the OEFA

This chapter addresses the institutional transformation of the *rules of the game* (North, 1990) in the environmental sector in the new commodity boom cycle. The analysis focuses on institutions for the protection of the environment in the context of extractive activities, such as mining and hydrocarbons.

Both activities taken together have represented in the last decade about 70% of national exports.³

Institutional changes consisted in the transition from a cross-sectoral system in operation since the 1960s to a centralized one, with the creation of the MINAM. The main problem with the old rules was the lack of autonomy. Environmental control of each type of industry was the purview of the same government sector in charge of promoting that particular industry. Thus, the MINEM was in charge of both promoting mining and hydrocarbons activities in the country as well as responsible for environmental protection in the sector. In addition to the problem of autonomy, environmental agencies within the ministries developed very different legislative bodies and capacities, making coordination between sectors problematic and generating confusion among the different state actors and society (Charpentier & Hidalgo, 1999, p. 164). This old system was highly criticized by experts and communities that mobilized against extractive industries throughout the decade (Lanegra & Hurtado, 2013).

Orihuela and Paredes (2017) suggest that during this period environmental protection rules evolved *gradually by layers*.⁴ The mining sector incorporated important environmental institutional expansions in the 1990s and early 2000s. An important milestone was the incorporation of the environmental impact assessment in mining in 1993.⁵ In addition, the MINEM, with the technical assistance of the Canadian Cooperation and the financial support of the World Bank, modernized the laws regulating concessions, licenses, exploration, exploitation and extraction in the sector (Pulgar-Vidal, 2008; World Bank, 2007).⁶ These legislative improvements, unfortunately, did not have effective consequences on the capabilities and actions of the unit in charge of environmental protection within the MINEM. The Mining Environmental Management Agency had limited human and budgetary resources and carried out its assignments from the desk (World Bank, 2007). This means that documentation presented by extractive companies was revised with little sense of the reality of the terrain.

The escalation of mining conflicts, with a peak in 2008, partly illustrates the discontent of communities with these environmental rules. However, both the industry and the MINEM resisted until the end to give up its environmental authority in order to build a centralized and external agency. Peru and Chile were laggards in the institutional transition to the ministry system. This transition had already taken place everywhere else in Latin America a decade before.

It was only under intense international pressure that the new environmental rules took their final form, a centralized and technical authority, the Ministry of the Environment. The emergence of the MINAM took place, paradoxically, in one of the most conservative governments since the Fujimori government. Alan García (2006–2011) was an open advocate of the expansion of the frontier for the exploitation of natural resources, in particular in the Amazon. His government faced one of the strongest conflicts of the new century with indigenous populations in the Amazon.⁷ New rules emerged despite the opposition of García and his allies. International pressure from transnational actors played a

crucial role in the context of financial negotiation of bilateral and international agreements with the government, in particular the *Free Trade Agreement with the United States* (PTPA) and a second financial loan from the *Inter-American Development Bank* (IDB) for stage 2 of the *Camisea* project (Orihuela & Paredes, 2017, Lanegra, 2015). In this process, the literature has highlighted the convergence of agendas of transnational actors with local allies and entrepreneurs, who knew how to take advantage of local political opportunities to effectively collaborate with these transnational agendas (Orihuela & Paredes, 2017; Orihuela, 2014).

The interesting thing about the Peruvian case is that these institutional changes arrived despite the opposition and influence of the extractive industries. Thus, Peruvian institutional change responded much more to a diffusion of change supported by the transnational connection of actors in the environmental field and in multilateral organizations that managed to apply sufficient pressure on the government (Tarrow, 1998; Keck & Sikkink, 1998).

Some of the social conflicts, whose protests escalated significantly to the international level, contributed to place the controversies surrounding the environmental control system in Peru under international scrutiny. For example, the World Bank and then the Inter-American Development Bank came under heavy pressure from transnational activists to use their influence on the Peruvian government to transform environmental institutions. Thus, the old formal rules were attacked and progressively lost legitimacy (Pulgar-Vidal, 2008) among the actors in the environmental field. As mentioned before, Peru was late in responding to the new demands and pressures that governments throughout the region were subject to. By then, most of the countries in Latin America had already progressively moved towards a centralized and leading authority, that is, to a Ministry of the Environment (Orihuela, 2014).

In the context of the financial loan negotiation for the second stage of the *Camisea* gas project and the FTA negotiations with the United States, multilateral agencies strongly influenced the change that the state had to make, in environmental matters, if it wanted to continue being their financial and commercial partner (Lanegra, 2015). Thus, the institutional transformation of environmental control in Peru must be understood more as a consequence of the global diffusion of new norms in a highly rationalized and global field, such as the environmental field (DiMaggio & Powell, 1983), than a nationwide pushed institutional reform. The MINAM was strategically inaugurated on May 31, 2008 at a Latin America and the Caribbean and the European Union (LAC-EU) summit, where the participating governments adopted the *Declaration of Lima*, which put great emphasis on environmental problems (Larsen, 2010).

However, a decade later, the new rules and the OEFA show serious difficulties in achieving their objectives, as this chapter demonstrates with different data. Nonetheless, the most emblematic case illustrating the failure of the rules to protect the environment are the numerous oil spills of the *North Peruvian Pipeline* (ONP). This pipeline crosses through Loreto, Amazonas, Cajamarca and Piura for more than 850 kilometers and was built in 1977. Numerous spills have been recorded between 2008 and 2019, which have affected large areas

of indigenous communities. Several professionals and experts, including the former Minister of the Environment, Manuel Pulgar-Vidal, argued that the spills were due to the lack of maintenance and corrosion of infrastructure as old as the pipeline.

Isomorphic institutional changes and the persistent resource curse

This chapter seeks to problematize the consequences of isomorphic institutional change. In contexts such as those in much of the developing world, strong formal institutions are the exception and not the rule, and the power of formal institutions should not be taken for granted (Murillo & Levitsky, 2013). Although new environmental institutions emerged in Peru in the last resource boom cycle due to isomorphism, they now suffer from weak enforcement capacity and, in the eyes of the people, have lost legitimacy and the shared meaning of its mission. Enforcement refers to the degree to which these laws are complied with in practice (Murillo & Levitsky, 2013). When all relevant actors in the extractive sector in the territory routinely comply with these laws or face a high risk of punishment, then enforcement is high; when this is not the case, enforcement is low. In addition, many scholars have stressed the centrality of the cultural-cognitive elements of institutions, or, as Scott puts it, “the shared conceptions that constitute the nature of social reality and the frames through which meaning is made” (2008, p. 57). Thus, an institution is stronger if it achieves significant “sedimentation of meaning” of its mission. This means that compliance to its rules follows from routines that are taken for granted, because they develop an (otherwise inconceivable) common understanding and cultural frame of their actions and the particular actors associated to them (Scott, 2008).

This chapter argues that two mechanisms are weakening institutional reform. The first mechanism is that isomorphic institutional change does not necessarily dismantle old practices, which undermine enforcement capacity and the sedimentation of a shared meaning of the mission of the institution. Old practices survive the new institutions in informal and embedded practices in the sector, rooted in “the way we do these things” (Scott, 2008, p. 58). They do not threaten the formal stability of institutions (Murillo & Levitsky, 2013), as they are lawfully in force, but sabotage the enforcement power of new rules and their legitimacy among the public. The chapter shows in the following section how the influence of the industry over the state, mainly over the MINEM, remained an old practice and undermined the regulative (enforcement) and cultural (legitimacy) power of the OEFA.

The persistence of these old practices, in this case of the mining industry, has important consequences regarding the weakening of new institutions to protect the environment in the context of the new extractive industries boom cycle. The analysis seeks to highlight that the deficit of institutions such as the OEFA is not due to the inexorable ambiguities found in the laws themselves or to a

lack of administrative capacity, but mainly because of “the ability of the actors to avoid the application, in direct violation of the (de facto) rules” (Murillo & Levitsky, 2013, p. 100). Isomorphic institutional change does not necessarily alter previous power arrangements, which explains the inconsistency or decoupling (Meyer et al., 1997), between the formal processes of rulemaking and those who possess de facto power. In Meyer & Rowan’s (1977) words, the new rules may change their form and acquire an official preponderance, but, as we have noted, they are “myth and ceremony”.

The second mechanism is that isomorphic institutional change does not necessarily articulate broad social support around these new rules once created. Many scholars have stressed the important role of professional elites in translating and disseminate new rules (Powell & Dimaggio, 1991). These professionals are embedded in epistemic (Haas, 1992) and transnational networks of activism (Keck & Sikkink, 1998). Many times, these professionals gain power by occupying crucial positions in the government. However, the power of these professionals is unstable. Sometimes their opinion can transcend to the media due to their expertise, but they do not articulate political power or social movements to rally in support of the new rules.

In the particular context of Peru, extractive industries have been associated with hundreds of conflicts, which represent close to the 70% of all social conflicts, according to the Ombudsman’s Office. However, these conflicts were *glocalized mobilizations* (Paredes, 2016). This means that local protests have scaled up into global platforms and communities have reached international alliances to defend their demands. However, at the national level, these conflicts have remained disarticulated (Paredes, 2016). Thus, they open opportunities for institutional change by accentuating crucial institutional agendas, and placing pressures on international actors that strike back on national governments (Keck & Sikkink, 1998). Nonetheless, once institutional changes occur, and new rules face opposition, there is a lack of articulated social support to avoid the assault of still-powerful actors that can use informal practices to undermine the enforcement and legitimacy of the new institutions.

Table 11.1 summarizes the empirical evidence presented in the chapter. The first four sections explain in chronological order the effects of the first mechanism to weaken the power of OEFA: mission reduction first sapped its enforcement power, then later its sanctioning power, and ultimately damaged the meaning of its mission through divisive accusations that environmental regulation was obstructing investment, which set up a false dilemma between sanctions and incentives. As a result, OEFA ended up with a lack of credibility among communities and with the public in general.

Finally, Section 5 explains how in mechanism 2, local conflicts were important to open opportunities for the expansion of institutions, and how many were even crucial in emphasizing some institutional issues in the global and national agenda. However, there was nonetheless a lack of articulation of a social base to defend the new rules after their creation in a context of significant opposition and power from the industry.

Table 11.1 The weakening of environmental institutions to protect the environment in Peru

<i>Mechanisms</i>	<i>Enforcement capacities</i>	<i>Common sense of its mission</i>
1) New institutions do not replace old practices: the influence of the extractive industry on the public sector	Mission reduction The weakening of sanction instruments.	Distortion of the institution's objective: "Tramitology" and the false dilemma between a sanction and an incentive approach
2) Institutional change without social mobilization	Local conflicts opened opportunities for the expansion of institutions. Lack of articulation of a social base to defend the new rules	

Source: Own elaboration

Old practices and the weakening of the OEFA's power

In order to create the new environmental rules, the government of Alan García formed a commission led by a well-known and recognized environmental professional, José Brack,⁸ which also included 12 other environmental specialists.⁹ Most of them knew each other and had discussed over the years the problems of Peruvian environmental institutions. Some had been extremely critical of the previous cross-sectoral model (Aldana, 2013). A crucial organization that articulated these professionals was a legal NGO, the *Peruvian Society of Environmental Law* (Sociedad Peruana de Derecho Ambiental, SPDA), which had many ties to other international organizations in the environment field. The leader of SPDA was Manuel Pulgar-Vidal, who had manifested on multiple occasions that the previous institutional system of supervision was inadequate (Pulgar-Vidal, 2008). Thus, the government's call to elaborate the Law of the Ministry of the Environment was a unique opportunity for these professionals to dismantle the previous model and move on to a centralized and more autonomous one.

Narrowing its mission from the beginning

The *National Society of Mining, Petroleum and Energy* (Sociedad Nacional de Minería, Petróleo y Energía, SNMPE) and the MINEM together became the main opposition to this commission. They entered into direct conflict with the commission by resisting the application of the new rules to the mining and energy sectors. They agreed with the creation of a Ministry of the Environment but opposed its authority over their sectors. While not able to avoid the application of the new rules entirely, the SNMPE and the MINEM opposition did manage to reduce the power and coherence of the overall system by narrowing the mission of the newly created regulatory agency, the OEFA.

The Brack Commission had proposed the creation of an agency of supervision and control as a specialized technical agency with authority over all sectors.¹⁰ This agency would have, among other functions, the responsibility for environmental certification, with the execution of environmental

impact assessments; and environmental audits, carrying out the supervision and enforcement of environmental standards across the sectors. The industry and the MINEM voiced strong disagreements with the Brack Commission over this proposal.

When the commission began its work, there were already rumors that the new environmental authority would not have authority over mining and hydrocarbons.¹¹ These rumors were made public with statements from MINEM authorities. Alongside declarations from the Prime Minister that “mining issues would be left to the Supervising Organism for Investments in Energy and Mining (OSINERGMIN)”, the Minister of Energy and Mines, Juan Valdivia, openly declared that “the creation of a new agency to protect the environment in the sector of mining and energy within the MINAM would be unnecessary, due to the existence of a similar agency already operating in the MINEM, the OSINERGMIN” (Balbi, 2008).

However, there was a consensus among experts and international representatives that the whole point of the reform was to make the system more autonomous. For Pulgar-Vidal, member of the Brack Commission, creating a new agency without authority over some sectors, in particular the most important, was “nonsense”.¹² Even the newspaper *El Comercio* (2008), known for its conservative editorial line, produced a report expressing that there was a consensus among professionals and experts on the need for a centralized agency with authority over all sectors: “the new ministry should absorb the supervisory role of the sectors, especially regarding mining, energy projects and other extractive activities”.

The OEFA finally achieved authority over all sectors, but in the negotiation process lost half of its proposed functions. With this, the new system of rules lost much of the coherence that the initial proposal had planned. This consisted in a single body that would grant the permits that would then supervise and control that the economic agents comply with the conditions with which those environmental permits were granted. In the negotiation, however, these two important functions ended up separated, when the new agency, the OEFA, lost its authority in granting environmental permits. The MINAM and the OEFA were both created by Legislative Decree 1013, but the OEFA ended up with much less authority than the one initially envisioned by the Brack Commission (Granados, 2016).

Environmental permits and the carrying out of environmental impact assessments remained in the hands of the MINEM until 2015, the year in which all new requests were processed by the *National Environmental Certification Service* (*Servicio Nacional de Certificación Ambiental*, SENACE). All unresolved requests before 1995 remained under the authority of the MINEM. SENACE only emerged because of the pressure of international organizations to ensure that the Peruvian State comply with the commitments of the reform. Environmental permits were to be centralized in a single agency, but the MINEM resisted until the end, arguing that the creation of this additional agency was unnecessary, as was the creation of the OEFA. The MINEM’s position was that

“there were already mechanisms that could be reinforced” inside the MINEM (Carlos Aranda, president of the Committee of Environmental Affairs of the SNMPE).¹³

Thus, in practical terms, SENACE defines the OEFA’s scope of authority, as it is SENACE that indicates, by an administrative instrument, what the OEFA must inspect.¹⁴ In addition, the MINEM achieved during the negotiation that the OSINERGMIN, the control agency within the MINEM, retain the supervision of technical aspects and of the security of the infrastructure of companies (machinery, transport pipelines etc.). The OEFA is responsible for supervising and sanctioning the impact of companies on natural bodies (water, air, soil), according to fixed environmental standards.¹⁵ However, it cannot control or sanction the infrastructural problems that are the cause of these impacts. For example, the *North Peruvian Pipeline* had various dangerous spills in the previous years in the Amazon, with serious impacts for indigenous communities. The OEFA can assess the presence of heavy metals in the water and punish *PetroPeru* for these spills, but cannot take any action regarding the repair or renewal of infrastructure of the pipeline, because this is OSINGERMIN’s purview.

To sum up, the formative stage of environmental control was influenced by the new centralized models of environmental management, internationally spread, but also by the opposition of the industry whose influence over the MINEM had not been unsettled. Despite all these limitations, the creation of the OEFA has meant a radical change for Peru, which nonetheless still has a long way to go in fulfilling its promise.

Taking the OEFA’s enforcement power

The industry quickly challenged the new rules following the activation of the OEFA in 2010. An important first step was that the OEFA changed from the system of outsourcing used by OSINGERMIN (hiring external companies and themselves doing desk inspection) to supervisions carried on by its own personnel and with increasing visits to the field. Greater financial capacity due to the establishment of a “Contribution for Regulation” (*Aporte por Regulación*, APR) in 2014 enhanced the supervision of activities.¹⁶ The APR established that extractive companies pay a percentage of their profits, not more than 1%, to finance the supervisory work carried out by the OEFA. Although the law allows for a maximum percentage of 1%, the OEFA has only charged a maximum of 0.15% of the annual sales of each company, after the deduction of several taxes.¹⁷ The APR constitutes between 70% and 80% of the agency’s budget.

By 2014, the OEFA’s sanctioning capacity became highly visible. The enforcement of environmental standards in the extractive sector started some years ago with the creation of the OSINERGMIN in 2008 (Orihuela & Paredes, 2017). However, since 2014, the number of sanctions and fines imposed by the OEFA has risen steeply. Autonomy came with transparency in the numbers: sanctions grew from 150 in 2011 to 645 in 2012, and to 1,486 in 2013. In a ranking published by *Convoca* (Valle & Castro, 2015) of the companies with the

most infringements in the extractive sector between 2008 and 2014, the 30 largest offenders in the mining sector paid around \$56 million in fines, while only three offenders in the hydrocarbons sector paid around \$27 million in fines.

Pollution generated by these industries was always well known among the public, but never before measured. The industry frequently denied the existence of this contamination, particularly in the mining sector. Since the 2000s, companies tried to reinforce the idea of *New Mining*, a clean break with the extractive industry's dirty past in the country, and offered a new friendly relationship with the environment and local communities (Li, 2015). The discussion of enforcement of environmental sanctions and fines by an official state agency in the media was without precedent in Peru.¹⁸ The former director of the OEFA, Hugo Gómez, said in an interview: "it was the first time in Peru that an industry as strong as the mining industry complained about excessive environmental control and regulation. . . . [W]hat happened is that there was no control whatsoever before".¹⁹

The industry reacted by pushing the government of Ollanta Humala to reduce the OEFA's authority. On one hand, in June 2014, a group of mining companies decided to sue the OEFA because of the APR payment, as it was the main source of the OEFA's resources for supervision.²⁰ The MINEM claimed that ideological positions were emerging to oppose private investment in the name of environmental protection (Ernesto Soto Chávez, advisor to MINEM).²¹ The Judiciary has ratified the APR payment several times since 2015; however, companies have appealed each time. The Constitutional Tribunal, Peru's highest judicial authority, made a final decision in 2019, stating that the OEFA could continue charging the APR.²²

On the other hand, the industry's opposition to the OEFA's power of enforcement materialized with the promulgation of Law 30230,²³ known as the first *paquetazo ambiental*. The law restricted the OEFA's sanctioning power for two years. It could only issue exceptional sanctioning procedures and corrective measures. In addition, fines previously issued by the OEFA were reduced by 50%.²⁴ Finally, the approval of the Environmental Quality Standards (*Estandares de Calidad Ambiental*, ECA) and Maximum Permissible Limits (*Límites Máximos Permisivos*, LMP), with which fines are determined, would no longer only be the purview of the environmental sector (the MINAM) but also of "each sector involved", for instance the MINEM for mining and hydrocarbons (Araujo et al., 2015). With these measures, the state exempted the mining and hydrocarbons industry from up to \$20 million in fines for environmental infractions that had been ratified by the courts and even consented to by the companies themselves (Valle & Castro, 2015).

Figure 11.1 shows the decline in OEFA's enforcement power after the *paquetazo ambiental*. The industry openly supported these measures. The president of CONFIEP, the National Confederation of Private Business Institutions, Alfonso García Miró, said that regulatory bodies, including the OEFA, were not acting neutrally but were rather unfairly sanctioning companies: "They have changed their attitude and have neglected its role in the market with unbalanced

Figure 11.1 Fines collected by the OEFA, 2011–2017

Source: OEFA 2017.

penalties that cause cost overruns for companies”.²⁵ Furthermore, García Miró pointed out that he agreed with the new law, although he was not satisfied because it was “a shy step”. However, at least it made the OEFA “correct its excesses that slow down economic investment”.²⁶

Distorting the shared meaning of the OEFA’s mission

The opposition of the business associations did not only succeed in weakening the OEFA’s enforcement capacity. This also contributed in diminishing the shared meaning of the OEFA’s purpose. On the one hand, several declarations were made by business sector representatives in the media in defense of eliminating the red tape (*tramitología*) that surrounds and *hinders* private investment in the extractive sector. This has gradually contributed to undermining the original meaning of the institution. In 2012, Alonso García Miró, the aforementioned president of CONFIEP, declared: “there is a large stock of private investment projects paralyzed by administrative issues. There are energy, oil, mining and industrial projects paralyzed by lack of authorizations, permits” (Perú21, 2012).

In response, the state responded with a series of initiatives to finish and make environmental regulation processes more flexible (Durand, 2016). In 2014, Minister Eleodoro Mayorga of the MINEM supported the petition and maintained that new environmental regulation was being prepared in his ministry in order to deal “organically with the red tape and part of the bureaucracy that impedes private investment” (Quispe & Cárdenas, 2018). These regulations would be the reforms included in Law 30230 and the New Hydrocarbons Law, which would cause, months later, the Cornejo Leaks scandal.²⁷ The leaks uncovered the still-blurry frontier between the public and private sectors that

persists in environmental administration in Peru. The news site *Ojo Público* ran an independent investigation that revealed a series of conversations between the minister of the MINEM, Eleodoro Mayorga, and of the MINAM, Manuel Pulgar-Vidal, in which they admit that the initiative to modify the Hydrocarbons Law to eliminate the requirement of environmental impact assessments within the sector was drafted by the oil company Karoon. Karoon acted as a consultant at the request of Minister Mayorga, tasked with justifying a favorable law for private oil companies (Mejía, 2014). According to the leaks, Minister Mayorga sustained that “the companies and their technicians are those that can better explain what the operations and their impacts are” (Durand, 2016, p. 66).

Furthermore, interviews with OEFA officials indicate that they sought to adapt to these losses of power. OEFA Board of Directors Resolution 040-2014-OEFA/CD changed the environmental control regime from fines to an incentive system. Likewise, OEFA executives built a narrative that highlighted the importance of incentives and was critical of fines and to the previous over-regulatory nature of the OEFA. Hugo Gómez pointed out that “emphasizing environmental protection, through corrective measures, is consistent with the OEFA’s role in contributing to the continuous improvement of environmental performance”.²⁸

The choice between incentives and fines is a false dilemma, because institutions use both enforcing and promotion mechanisms to be strong (Rueschmeyer, 2009). The result of the *paquetazo ambiental* was the weakening of the OEFA and the subsequent rapid rise of infractions in the sector. In 2016, the new director of the OEFA declared that Law 30230 did not help to reduce environmental infractions. On the contrary, there were more incentives to be an offender because of the lower cost of incurring in a liability.²⁹ In the same report, the OEFA presents alarming data, with the percentages of unpaid fines and regulatory violations increasing from 24% to 71% in hydrocarbons and from 10% to 37% in mining.

The delicate situation of the OEFA after the paquetazo law

The mining and hydrocarbons industry’s influence has also gradually extended to the OEFA through a series of revolving doors. These are mechanisms through which professionals with long trajectories in the extractive sector occupy high-level positions in the regulatory agency. In 2018, the virtual platform for investigative journalism *Convoca* presented data describing this movement of high-level employees between the private and public sectors, including in the OEFA (Quispe & Cárdenas, 2018). For instance, it showed that the OEFA in 2014 hired as coordinator of the Direction of Environmental Supervision in Mining a professional who worked 15 years as a high-level office at the Buenaventura mining company. Buenaventura had an accumulated number of 74 sanctioning processes between 2008 and 2018 (Quispe & Cárdenas, 2018), and was, according to the same study, one of the main beneficiaries of the environmental *paquetazo* law in 2014 that exempted the company from a large

part of its fines. A similar situation was demonstrated for two other supervisors (Quispe & Cárdenas, 2018).

The extractive sector continued to press for reductions in the enforcement and regulatory power of environmental institutions. One example of this is a bill still in debate to modify the Organic Hydrocarbons Law (Law 26221).³⁰ This bill seeks to bring back environmental assessments and supervision from the National System of Environmental Impact Assessment (*Servicio de Evaluación de Impacto Ambiental*, SEIA) and SENACE to the MINEM and *PetroPeru* (CooperAcción, 2018). The bill aims to make environmental regulation more flexible and, for instance, gives *PetroPeru* powers to prepare required environmental baselines (Centro para el Desarrollo del Indígena Amazónico, 2018). Finally, the bill extends oil concessions to up to 80 years, and eliminates hydrocarbons companies' obligation to contribute to the National Environment Fund (*Fondo Nacional de Medio Ambiente*, FONAM). This fund currently serves to remedy environmental liabilities and sites impacted by this activity.

Since its creation, the OEFA has tried to appeal to the public by employing a host of participatory mechanisms (Paliza, 2017). For instance, it created a Participatory Environmental Monitoring Program and guided visits to Early Environmental Assessments (*Evaluación Ambiental Temprana*, EAT). The OEFA has also opened decentralized offices in an effort to disseminate its presence nationwide.³¹ However, no effort has been successful in neutralizing the growing harm to its reputation. While this chapter offers a national perspective on the OEFA, a close-up of one of the OEFA's decentralized offices in a mining area, for example in Espinar, Cusco, shows a process of discredit among the population. The Espinar office was announced with great enthusiasm by civil society organizations in Espinar, and local communities were highly optimistic that their presence would guarantee better and more transparent information regarding the quality of the environment (CooperAcción, 2015). However, four years after its creation in 2015, people believe the office serves no purpose. After the emergence of serious controversies regarding pollution in the area, the OEFA has been unable to offer solutions or better information. The following testimony registers the disappointment in the work done so far by the OEFA in Espinar:

About the OEFA, they tell us that the "OEFA is the mine's right hand". Likewise, for them, the "ANA (National Authority of Water), the OEFA and the company live together". The distrust towards these institutions is based, mainly, on the lack of support and attention that they receive regarding their claims of pollution: If you put forward a complaint, they tell you nothing can be done.

(Espinar, June 29, 2019)

A crucial problem is that the OEFA has insufficient technical equipment in its laboratories, and lacks modern technical support to systematize and integrate data with other authorities, and thus in certifying the validity of its results.³²

The results of a survey conducted in 2017 in selected areas by the OEFA are therefore not all that surprising. Only 21% of those consulted knew the OEFA, and of those only 19% had any knowledge of the existence of decentralized offices. Moreover, among those who did have knowledge of the OEFA, an overwhelming 72% considered that it had not improved the protection of the environment since its creation (OEFA, 2020). The OEFA's situation is currently delicate after all these years of modifications.

Isomorphic institutional changes and the lack of social support

The isomorphic institutional change process has failed to articulate a social base with a common narrative in defense of autonomous and more effective environmental institutions. In Peru, economic growth generated by the expansion of extractive industries went hand in hand with a steep increase in socio-environmental conflicts (Paredes & de la Puente, 2014), as shown in Figure 11.2.

Many researchers coincide in associating these conflicts with distribution budget problems and environmental unrest associated with extractive activity

Figure 11.2 Conflicts in Peru (environmental, mining and hydrocarbons, 2007–2018)

Source: Paredes (2019) based on the Ombudsman's Office annual reports (2007–2017).

(Orihuela & Paredes, 2017). One of the main demands of these conflicts was the need for a transparent institutional reform of environmental protections. Some of these socio-environmental conflicts were crucial in putting the modification of environmental institutions on the national agenda.

The massive social mobilization in Tambogrande, Piura, in rejection of a mining project that threatened the agricultural character of the area, was one such conflict. This mobilization in the Tambogrande valley had important consequences in the enforcement of environmental regulation policy, mainly in the modification and improvement of the environmental impact assessments (de Echave, 2013). Similarly, the opposition to the Conga mining project in Cajamarca and the Tía María mining project in Arequipa raised questions about environmental impact assessments, and both opened an important political space for the creation of SENACE (CooperAcción, 2012). However, none of these social mobilizations produced sustained articulated movements at the regional or national level that could support the consolidation of new environmental institutions once they are in place. In fact, no important social base emerged to defend the OEFA against the successive efforts to weaken it. Conflicts in Peru are like an archipelago of mobilizations. Each island in the archipelago is individually connected to transnational actors, mining companies, the central state and networks of transnational activism, while being very much disarticulated at the national level (Paredes, 2016).

The many scandals surrounding the influence of the industry over the public sector was followed by very little mobilization, limited to media networks, NGOs (such as *Red Muqui*, *Servindi* etc.) and independent journalism (*Ojo Público*, *Convoca*). No large mobilization followed the different instances in which OEFA was undermined and did not use its power. Regarding the controversy around the APR, the government has opted for silence. With the exception of the OEFA's current president, no state representative, neither from the MINAM nor from the Ministry of Justice, has made declarations in defense of the OEFA (Ruiz, 2017). Some NGOs have again initiated internet campaigns, such as the *Red Muqui* (2019) or SPDA (2019), but there has been no articulated support or activism.

Conclusion

In this chapter, we have tried to explain why isomorphic institutional changes in environmental control in Peru produced weak institutions. This chapter argues that the new rules regarding environmental control are a positive expansion in the governance of extractive industries in Peru. However, the chapter seeks to problematize their effectiveness in practice and implementation.

The main problem that arises regarding isomorphic institutional change is that it does not undermine the political power existing underneath the old rules. Old power arrangements survive embedded in informal practices that persist and undermine new institutions. The alliance between the extractive industry and the MINEM has led to the weakening of the enforcement capacity of the

OEFA throughout the past years. In addition, this alliance serves to shape the public discussion in a way that distorts the shared meaning of the mission of the new institutions and their legitimacy.

Another important part of the argument is that this type of isomorphic change in Peru has not required the articulation of social bases at the national level than can defend the new rules. Institutional reform articulates groups of elite entrepreneurial professionals, who, throughout the persistent weakening of the institutions, can seldom do very much to defend their own creation. Mobilizations are locally situated and with a lot of international resonance, but there has been significant articulation into a national social movement whose objective would be the strengthening of the environment institutions.

Thus, this chapter highlights the role of social mobilization in institutional change as crucial in a context where there is a strong opposition from part of the industry to build strong environmental governance. However, isomorphic institutional change does not seem to trigger that mobilization. It remains important to analyze more deeply the role that territorial and ecological conflicts and their capacity to accumulate and articulate play in guaranteeing better national rules.

Notes

- 1 <https://peru21.pe/economia/defensoria-hay-9-000-peruanos-expuestos-contaminacion-industrias-extractivas-nndc-429179-noticia/>
- 2 Legislative Decree 1013, May 2008.
- 3 Peruvian Central Reserve Bank (BCRP) statistics, reviewed in 2019.
- 4 In the sense of Mahoney and Thelen (2009).
- 5 Supreme Decree 016–93-EM.
- 6 Several of these advances were made in the context of the Mineral Resources Sector of Peru Reform Project—*Proyecto de Reforma del Sector de Recursos Minerales del Perú* (PERCAN).
- 7 https://elcomercio.pe/edicionimpresa/html/2007-1028/el_sindrome_del_perro_del_hort.html
- 8 Ministerial Resolution 025–2008-PCM, January 30, 2008
- 9 The Brack Commission was constituted by Antonio José Brack Egg, Carlos Aranda Arce, Manuel Ernesto Bernal Alvarado, Richard Bustamante Morote, Luis Campos Baca, Fabiola Capurro Villarán, Mariano Castro Sánchez Moreno, Jaime Delgado Zegarra, Elsa Galarza Contreras, Luis Gomero Osorio, Ruth Aubert Cárdenas and Patricia Fernández-Dávila.
- 10 Multisectoral Technical Commission established by Ministerial Resolution 025–2008-PCM.
- 11 <https://elcomercio.pe/edicionimpresa/Html/2008-01-28/es-desproposito-que-ministerio-medio-ambiente-no-vea-mineria.html>
- 12 <https://elcomercio.pe/edicionimpresa/Html/2008-01-28/es-desproposito-que-ministerio-medio-ambiente-no-vea-mineria.html>
- 13 <https://gestion.pe/peru/politica/snmpe-creacion-senace-responde-decision-politica-necesidades-tecnicas-sector-minero-25253>
- 14 Environmental Adaptation and Management Program (*Programa de Adecuación y Manejo Ambiental*—PAMA)
- 15 Environmental Quality Standards (ECA's) and Maximum Permissible Limits (LMP) established by the MINAM

- 16 Supreme Decree 130–2013-PCM, that established, for 2014 and 2015, that big- and medium-scale mining companies would contribute 0.15% of annual turnover to the functioning of the OEFA; and for 2016, 0.13%. For 2017, 2018 and 2019, Supreme Decree N 097–2016-PCM stated that the APR would be 0.11%.
- 17 www.muqui.org/comunicaciones/noticias/item/146-oefa-explica-por-que-el-aporte-por-regulacion-es-mejor-para-la-mineria-y-el-peru
- 18 <http://utero.pe/2015/01/30/exclusivo-las-mineras-mas-multadas-por-contaminar-son-las-que-quieren-debilitar-al-oefa/>
- 19 Interview with Hugo Gómez Apac, former CEO of the OEFA (2015).
- 20 On October 30, 2014, according to the OEFA Environmental Oversight Court, 32 of the 36 mining companies against the Contribution for Regulation (APR) had committed at least one environmental infraction. By the same date, according to the OEFA's Registry of Administrative Acts, 363 companies (mostly from the mining and hydrocarbons sector) had breached and exceeded the environmental standards stipulated by the OEFA, especially regarding the Maximum Permissible Limits.
- 21 <https://gestion.pe/opinion/regulacion-ambiental-2-0-67098>
- 22 www.oefa.gob.pe/noticias-institucionales/el-tribunal-constitucional-valida-la-legalidad-del-aporte-por-regulacion-que-financia-la-fiscalizacion-ambiental-del-oefa-en-el-sector-minero
- 23 Article 19 of Law 30230 prevents the OEFA from imposing fines in the first instance for violations of the regulations.
- 24 Board of Directors Resolution 041–2015-OEFA/CD (September 24, 2015).
- 25 <https://gestion.pe/opinion/regulacion-ambiental-2-0-67098>
- 26 <https://peru21.pe/economia/confiep-paquete-economico-castilla-quedado-corto-167214>
- 27 “Cornejo Leaks” was the name given to the 2014 political scandal in which the personal mail of former Prime Minister of Ollanta Humala, René Cornejo, was leaked, revealing differences and arrangements among the members of the Cabinet, as well as acquaintances between businesspersons and executive authorities. Peruvian hackers *Anonymous Peru* and *Lulz Security Perú* were behind the leak.
- 28 <https://elcomercio.pe/opinion/colaboradores/oefa-camino-trazado-hugo-gomez-apac-334136>
- 29 Interview with Tessy Torres. See: <http://convoca.pe/agenda-propia/oefa-reconoce-impacto-nocivo-de-la-ley-del-paquetazo-ambiental>
- 30 www.actualidadambiental.pe/propuesta-para-modificar-ley-de-hidrocarburos-debilitaria-la-institucionalidad-ambiental/
- 31 Board of Directors Resolution 018–2018-OEFA-CD
- 32 www.minam.gob.pe/oficina-general-de-planeamiento-y-presupuesto/wp-content/uploads/sites/139/2019/04/Formato-04-Apublicaci%C3%B3n.pdf

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