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#### **Author**

Weber, Franziska

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# Towards an Effective Environmental Law for Developing Countries

- Illustrated with the recent legislative proposal for the establishment of regional and municipal protected areas in Peru -

## *Abstract*

*The paper consists of two parts: a theoretical part followed by a practical part. On the basis of the economic literature concerning environmental law and economic development it is illustrated how criteria can be developed to examine whether specific environmental policy instruments can be used in the context of developing countries. Next these hypotheses are applied in a case study of Peru. The starting point for the analysis is the recently established Ministry of the Environment and its implications. Then a recent legislative proposal for the establishment and management of municipal and regional protected areas shall be analysed*

*In the conclusions based on the case-study some ideas shall be presented on how to minimize the disturbing effects of external players in the form of lobbying or corruption in law-making and administration.*

Franziska Weber, LL.M.  
Promovenda  
Rotterdam Institute of Law and Economics (RILE)

Email: [f.weber@frg.eur.nl](mailto:f.weber@frg.eur.nl)

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## I. Introduction

With Climate Change the topic environmental law has gained considerable importance. To fight it, for example, the UNFCCC Kyoto protocol was established. It entails different obligations for developed and developing countries.<sup>1</sup> When talking about sharing the burden to stop climate change, in particular by controlling CO<sub>2</sub> emissions, emphasis is put on the responsibility of the industrial nations for causing the current level of emitted CO<sub>2</sub> and therefore also for ‘making good’ the damage. Having said that, a fifth of the worldwide CO<sub>2</sub> emissions are caused by deforestation of, particularly, tropical rain forests. It thus ranks second after the combustion of fossil raw material and these rain forests are to be found mainly in developing countries.<sup>2</sup> Rain forests are equally important for the protection of biodiversity as they are one of the most multi-faceted ecosystems.<sup>3</sup> For the climate it is thus of indispensable importance to ensure that there is an effective environmental law in the rain forest rich countries to save these areas.

In the following first some obstacles to effective law-making and administration in developing countries shall be illustrated and possible solutions in form of hypotheses provided.<sup>4</sup> Structural deficits will be identified and subsequently the implementation of legal norms adapted to these weaknesses shall be explored.

Next the hypotheses shall be tested with two aspects of Peruvian environmental law in relation to protected areas. The starting point for the analysis in the structural part is the recently established Ministry of the Environment and its implications. Then a recent legislative proposal for the

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<sup>1</sup> Definition of ‘Developing country’: It means that it has ‘an undeveloped or developing industrial base, and an inconsistent varying Human Development Index (HDI) score and per capita income, but is in a phase of economic development’.

<sup>2</sup> See ‘Schutz des Regenwalds: Südamerika könnte Millionen verdienen’; Ebeling & Yasué (2008), p. 1922.

<sup>3</sup> See ‘UN Conference Divided over How to Protect Biodiversity’: Biodiversity is the variation of life forms within a given ecosystem, biome or for the entire Earth; ENDS, ‘EU makes economic case to halt ‘unprecedented’ rate of biodiversity loss’.

<sup>4</sup> Please note that this paper is restricted to an effectiveness analysis and will not deal with efficiency criteria.

establishment and management of municipal and regional protected areas shall be analyzed.<sup>5</sup> Among these e.g. rain forests can be subsumed.

It shall thus be illustrated in how far the developed criteria are applied in Peru as regards this legislative proposal in particular and law-making in general. As the title of the legislative proposal suggests, Peru's ongoing decentralization process plays an important role. The scope of this paper will be confined to finding an adequate shape for the legal norm. Once the law is passed, difficulties at further stages, e.g. enforcement or the working of the judiciary will however come up. They are not included in this paper – only where appropriate shall some considerations be formulated. It shall be assessed what the first best solution is to currently come to effective legislation in Peru in the chosen sector and how close the proposal comes to this optimal solution.

As the last aspect is concerned, some ideas shall be presented on how to minimize the disturbing effects of external players in the form of lobbying or corruption in law-making and administration.

With regard to the legal discipline it will be focused on the Law and Economics literature. The assessment is however interdisciplinary in that some insertions on environmental legal doctrine and Law and Development scholarship will be made.

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<sup>5</sup> The Definition of protected area provided by International Union for Conservation of Nature (IUCN) is: An area of land and/or sea especially dedicated to the protection and maintenance of biological diversity, and of natural and associated cultural resources, and managed through legal or other effective means, at [http://www.unep-wcmc.org/protected\\_areas/categories/index.html](http://www.unep-wcmc.org/protected_areas/categories/index.html), as of 28 July 2008.

## **II. Towards an Effective Environmental Law for Developing Countries**

### **1. Formulation of Hypotheses**

In the following problems with regard to the effectiveness of environmental laws in developing countries shall be illustrated.<sup>6</sup> After giving a brief outline of the traditional view in environmental legal doctrine, the focus shall be on the Law and Economics scholarship.

#### **1.1. Legal Instruments**

In general a variety of environmental legal instruments is available, ranging from command-and-control to e.g. flexible market-based instruments.<sup>7</sup> Over the last years the perception that environmental problems are of such variation and complexity that the ideal instrument will be different in each context has become accepted. Every instrument has its strengths and weaknesses. Therefore traditionally – for developed and developing countries – it is advocated that a mix of different instruments is the most effective solution.<sup>8</sup> There is evidence that often for developing countries the same instruments as for developed countries are advocated. One can think of new, trendy instruments, such as flexible market-oriented measures or a strong focus on decentralization to adapt legal norms to the local needs.<sup>9</sup> In a similar vein the introduction of refined legal instruments, such as public participation, integration of environmental permits and environmental impact assessments (EIA) can be seen. Furthermore the use of tax and quota-trading systems has been recommended in developed and developing countries.<sup>10</sup> The World Bank and the International Monetary Fund e.g. have at several instances officially suggested some of these instruments for the

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<sup>6</sup> Remark: The situation in all developing countries is different, however there are also many similarities that take differently strong shapes and for which common conclusions can be drawn. When coming to the case-study the conditions prevalent in Peru will be narrowed down to.

<sup>7</sup> Gunningham (1998), pp. 88.

<sup>8</sup> Faure & Niessen (2006), p. 278; Gunningham (1998), pp. 371, 424; See for an overview and positive and negative aspects of various environmental law instruments: Gunningham (1998), pp. 70.

<sup>9</sup> Faure (2008), p. 744.

<sup>10</sup> Stewart (2006), p. 159.

developing world.<sup>11</sup> These instruments can be rather effective in a typical Western environment, generally providing for sound administrative capacities and little corruption. However, when it comes to effective instruments in environmental law in developing countries, a different starting point has to be taken. This, according to Law and Economics scholarship, in the past has not always been adhered to.<sup>12</sup> In the following paragraphs, main lines of thought in Law and Economics literature shall be presented, which discourage from the application of various of these instruments in developing countries and advocate a better adaptation to local needs. The assumptions are based on considerations of effectiveness in general and of cost-effectiveness, particularly looking at the costs of drafting, passing and administering laws, including e.g. costs of corruption or lobbying, education or training.<sup>13</sup>

## **1.2. Law and Economics Approach**

In analyzing the effectiveness of environmental law in developing countries one can take two different angles:

### 1.2.1. Institutional and Structural Arrangements

### 1.2.2. Shape of the Legal Norms

In establishing these two categories one has, however, to keep in mind that they are interconnected in the way that the institutional and structural aspects form the framework that the shape of laws has to be adapted to in order to be effective. The same weaknesses thus come up as to both perspectives.

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<sup>11</sup> Boeri (2005); Shah & Andrews (2005), pp. 153-182; but there are also critical voices, e.g. World Bank (1998). Also the UN, more specifically the UNEP is promoting economic instruments (as set out by principle 16 of the Rio declaration), see UNEP (2007), available at [http://www.unep.org/geo/geo4/report/GEO-4\\_Report\\_Full\\_en.pdf](http://www.unep.org/geo/geo4/report/GEO-4_Report_Full_en.pdf), pp. 30. Among the variety of economic instruments there are property rights, market creation, fiscal instruments, charge systems, financial instruments, liability systems, bonds and deposits. However, they are also self-critical: UNEP (2004), available at <http://www.unep.ch/etb/publications/EconInst/econInstruOppChnaFin.pdf>, pp. 97

<sup>12</sup> Faure & Niessen (2006), 1; Ogus (2007), p. 159; Davis & Trebilcock (2008), pp. 4.

<sup>13</sup> The cost-effectiveness approach is generally applied by A. Ogus. He takes e.g. high enforcement as a goal and looks for the least costly way of getting there with a view to indicating how assumed limited resources can be allocated so as to maximize the benefits to society. See Ogus, Faure & Philipsen. (2006), pp. 290.



The analysis will lead to conclusions on how the formulations of laws in developing countries should look like, which also gives guidance as to the level at which law-making and administration is effective.

### **1.2.1. Institutional and Structural Arrangements**

Before making suggestions about possibly effective legal norms in developing countries, one has to identify the weaknesses from a structural point of view. In this context it is particularly interesting to assess whether one wants to apply a multi-level approach, consisting of various interacting levels of government. As the first part an overview shall be given about the particularities in general. Next different levels of the government system shall be elaborated upon. Where appropriate reference is made to possible remedies.

#### **(1) General issues**

Common issues that are reflected to a certain extent at all levels of government or administration are the following problems.

##### **a) Availability of resources**

Put in very simple terms, rich countries have more resources available to invest in their legal systems than developing countries do.<sup>14</sup> In those countries one will often be confronted with the problem of lacking capacities. This term refers to missing (qualified) personnel, same as a lack of financial resources or just deficits in the structure. Among lacking capacities one can also subsume a weakly developed academic research and universities landscape.<sup>15</sup> The problem of lacking administrative capacity originates from the Law and Development literature.<sup>16</sup> One way to tackle this problem would be to engage in capacity building.<sup>17</sup> This is however a costly process and therefore not appropriate in most developing countries.

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<sup>14</sup> Posner (1998), pp. 1-11.

<sup>15</sup> Faure (2008), p. 739.

<sup>16</sup> See e.g. in the area of human rights de Feyter (2007), pp. 231-249.

<sup>17</sup> Faure & Niessen (2006), p. 283; Faure (2008), p. 740. For an overview about all the institutional changes that are proposed by the Law and Development literature over the last

## **b) ‘Cultural gap’**

A related and often underestimated factor as to institutional arrangements is the so-called ‘cultural gap’.<sup>18</sup> Assuming that sound structures are put in place in a developing country and adequate resources provided, the individual will then still not behave in the mode that someone from a Western country would. The way law-making and administration is done in Western countries is not natural to many people in legal and political systems of developing countries. In other words, if a norm is developed with a close relation to a different country’s legal system, then for members of the receiving society this is difficult to handle and understand without a solid background knowledge of the system from which it originates. To practically invoke the law can therefore be considered as even more difficult, which renders its effectiveness very low. One author describes this for Afghanistan.<sup>19</sup> According to him there is a very well developed structure of law, morality and justice, but it follows a different logic than ‘our own’ and was therefore ignored when the reconstruction of the country was organized.

*Faundez* stresses that when new legislation in a developing country has to be effective – he considers it in the context of legal reform – in particular the compatibility with the existing legal and political system has to be guaranteed.<sup>20</sup> The knowledge of the local context is a *conditio sine qua non*.

## **c) Opportunistic behavior**

Indisputably corruption is present in many developing countries.<sup>21</sup> Corruption is regarded as dishonest or illegal behavior. It is operationally defined as the misuse of entrusted power for private gain.<sup>22</sup> Normally a

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50 years in order to stimulate development, see Davis & Trebilcock (2008), pp. 7 (e.g. rule of law, separation of powers etc.).

<sup>18</sup> Mattei (1997), 5 (39); Ogus (2008), p. 722; also Davis & Trebilcock (2008), pp.39; Pistor (2002), p. 101; There are also voices that doubt the determining effect of cultural, political or economic background, see Davis & Trebilcock (2008), p. 56.

<sup>19</sup> Barfield (2002), pp. 437-44.

<sup>20</sup> Faundez (2000), pp. 4.

<sup>21</sup> See for an elaborate argumentation on the reasons for high occurrence of corruption in poor countries: Pande (2007).

<sup>22</sup> Definition by Transparency International: [http://transparency.org/news\\_room/faq/corruption\\_faq#faqcorr1](http://transparency.org/news_room/faq/corruption_faq#faqcorr1), as of 28 July 2008.

payment is received for it. It shall for the purpose of this paper simply be assumed that corruption is not desirable without going into details.<sup>23</sup> It would, of course, be the best solution to abolish corruption in general. One can think of reforming the civil service by depoliticising it, removing conflicts of interests, raising the quality of public officials recruited, increasing transparency by establishing clear procedural steps, improving auditing and monitoring systems and extending external powers of appeal and review.<sup>24</sup> However in many developing countries the resources for these measures will not be available.<sup>25</sup> One would also need a powerful and independent system of criminal and administrative justice that is not at hand in many developing countries. Other proposals to mitigate the effects of corruption include bringing competition in the bureaucratic structures.<sup>26</sup> Monopolies are ‘corruption’s best friend’. In a similar vein might it be recommended to use committees instead of single decision-makers or have officials regularly move between various offices. However, this increases the costs of administration. For the time being it seems therefore easier – as scholars suggest – to find ways to provide for a form of law-making and administration that limits possibilities for corruption to occur.<sup>27</sup> Also should the structures work with a low administrative capacity at hand. These conditions would have to be reflected in legal norms – as will be discussed in the next paragraph.

#### **d) Lobbying**

Apart from corruption, one would have to think about mitigating the effects of lobbying, which takes place at all stages of the legislative process.<sup>28</sup> Lobbying in contrast to corruption is as such not illegal and occurs mainly to the political sphere, primarily the legislative but also the executive power

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<sup>23</sup> See for an overview of the negative aspects Klitgaard (1988), p. 42; Ogus (2003), pp. 9.

<sup>24</sup> Rose-Ackerman (1999), chap. 5; World Bank (2003).

<sup>25</sup> Ogus (2008), pp. 728.

<sup>26</sup> Klitgaard (1988), Chap. 3.

<sup>27</sup> Ogus (2003), pp. 12.

<sup>28</sup> Faure (2008), p. 743; Schäfer (2006), p. 115. *Schäfer* chooses a purely normative approach in that in his model he excludes public choice considerations even though he admits that they determine the outcome of the legislative process. For the purpose of this paper, they shall however be included with the aim to formulate some suggestions as to the best strategy when passing environmental law to guarantee its effectiveness, despite the occurrence of lobbying.

can be subject to it. By providing information, lobby groups try to influence the outcome of political processes according to their interests. Lobbying can amount to corruption. Strong lobby groups are able to disturb the legislative process to such an extent that passing of effective norms is inhibited. This is particularly important in procedures that lack transparency and accountability, as developed countries will have.

### **e) Conflicts of interests**

Another term that shall be introduced is conflict of interests.<sup>29</sup> As law-making is a political process also apart from lobby groups internally e.g. among ministries the environmental interests might have to back down behind economic or other interests. These conflicts are generally difficult to solve. One can also imagine a politician to be subject to a conflict of interests because he might have the competence to deal with different, partly conflicting dossiers.

## **(2) Central level**

When looking at the government system one can begin arguing from the top of the ladder. While it is customary for European countries, e.g., to have a Ministry and a Minister of the Environment, this is not the case in all developing countries. Peru, for example, just recently set up a Ministry of the Environment.<sup>30</sup> There is evidence that the implementation of environmental laws can be jeopardized because of conflicts of interests between various sectors at subnational level or also between different ministries.<sup>31</sup> The importance of institutions for a country's development is generally acknowledged, however it is not quite clear which institutions are needed.<sup>32</sup> Early Law and Development movements believed that in order to advance, developing countries would have to undergo the same process as developed ones have.<sup>33</sup> However until today there is no general notion as to

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<sup>29</sup> Faure & Niessen (2006), p. 282.

<sup>30</sup> Law Blog: 'Hoy juramento Brack como nuevo ministro', 20 May 2008.

<sup>31</sup> Faure & Niessen (2006), p. 282.

<sup>32</sup> Davis & Trebilcock (2008), p. 61.

<sup>33</sup> Davis & Trebilcock (2008), p. 4.

the value of this view.<sup>34</sup> *Davis & Trebilcock* advocate that in carrying out structural legal reforms in a country a larger role has to be given to insiders with local knowledge. Less influence should come from outside. Having said that, it is regarded as positive if a developing country's Ministry of the Environment, in this case of Indonesia, seeks the cooperation with foreign scholars.<sup>35</sup> It can be summarized that guidance is indeed positive as long as it does not dictate but consider the local conditions. Another crucial aspect is the resources the government has at its disposal. Corruption can, e.g., be an issue in the choice of the Ministry personnel. It can end up costly if because of bribery an unsuitable candidate is selected.

The most important factor that renders decisions unpredictable is the issue of lobbying groups. Depending on how well they can organize themselves, their influence might lead to ineffective results. The same is however true, when decision-making takes place at lower levels of government.

### **(3) Lower Levels**

It can be observed that decentralization efforts take place in many developing countries.<sup>36</sup> It means to spread power away from the centre to local branches or governments. Procedures that require a high degree of cooperation with the administration are, however, susceptible to corruption.<sup>37</sup> Different to Western countries, there are not as many checks and balances to guarantee the accountability of civil servants and public authorities in developing countries and their behavior can therefore less be guaranteed for.

If one considers again a Western expert stepping in and selling the home-made laws the problem is faced that many – in particular Western – legal instruments presuppose a relatively solid administrative structure. This will most unlikely be given in developing countries. In order to know which

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<sup>34</sup> Davis & Trebilcock (2008), on p. 7 he refers to three recent publications (Carothers, T. (ed.), *Promoting the Rule of Law Abroad: In Search of Knowledge*; Dam, K., *The Law-Growth Nexus: The Rule of Law and Economic Development* and Trubek, D. & Santos, A. (eds.), *The New Law and Economic Development: A Critical Appraisal*) as the best current thinking on the part of American lawyers about the relationship between legal reforms and development.

<sup>35</sup> Faure & Niessen (2006), p. 286.

<sup>36</sup> Faure & Niessen (2006), pp. 271.

<sup>37</sup> Faure (2008), p. 738.

sector can fruitfully be decentralized, a close look has to be taken at the particular sector.<sup>38</sup> As regards environmental issues one can imagine that particularities of different regions have to be taken into account. There might not be a one-size-fits-all environmental protection regime for each region.<sup>39</sup> This aspect will be dealt with in more details in the second part, when elaborating on how to design fit legislation.

#### **(4) Population**

A way to involve a country's population are public participation measures. It is a controversial topic, even though its negative aspects are not straightforward. One would – thinking in a Western way – assume increasing transparency of the procedure to be a positive aspect. Public contributions and contact are on the one hand indeed welcomed. On the other hand, however, this direct contact with public officials can facilitate corruption.<sup>40</sup> Another example of personal contact that increases the danger of corruption is if e.g. for the application for a license one has to appear in person. Other drawbacks are that one would face the problem of a prolonged decision-making process.<sup>41</sup> It is particularly dangerous if no clear and precise rules are given as to how precisely the public participation has to be carried out. A crucial aspect and challenge is how to insure that the input is taken into consideration.<sup>42</sup>

Apart from involvement in the decision-making process in Western countries – varying in degree as to the claims culture in a country – also the enforcement process is backed up by individuals (e.g. victims). In developing countries one can, however, not count on the individual to that extent. The level of education in developing countries can generally be considered as lower and this considerably affects the ability of the ordinary citizen to contribute to law-enforcement.<sup>43</sup> Often the laws are simply not

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<sup>38</sup> Niessen (2006), p. 146.

<sup>39</sup> Niessen (2006), p. 144.

<sup>40</sup> Ogus (2003), p. 16; Ogus (2008), p. 730.

<sup>41</sup> Faure (2008), pp. 741.

<sup>42</sup> See Aarhus Convention, Arts. 6-8, particularly Art. 6 VIII 'Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.' as an example of a detailed provision, at <http://www.unece.org/env/pp/documents/cep43e.pdf>, as of 28 July 2008.

<sup>43</sup> Ogus (2008), pp. 723.

known.<sup>44</sup> An additional problem – if there is a victim that is willing to sue – is the corruption that also infiltrates the criminal justice system.<sup>45</sup> Effective enforcement mechanisms are thus an additional challenge.<sup>46</sup>

### **1.2.2. Shape of Legal Norms**

Having established some particularities of the legal and political system in developing countries that can only be cured in the long-term, it shall be turned to the question what kind of legal instruments can be provided to mitigate current structural deficits and specificities. More particularly, the focus shall be on the form of the legal instruments.

#### **(1) Origin**

A first drawback that affects the effectiveness of the shape of legal norms in developing countries is that many of these countries still apply the laws of the colonial powers even though they do not perfectly fit their local needs.<sup>47</sup> The formulations of written laws in a developing country are often very similar to legal norms in a developed country. The effectiveness of the norms differs however considerably.<sup>48</sup>

Also nowadays Western influence can occur, for example when Western experts are invited to give input to fill legislative gaps in developing countries. This can be problematic in that they do not sufficiently consider local needs and that the gap is filled with a legal transplant that does not fit well into the legal system and culture.<sup>49</sup> It can thus have a negative impact on the local norms and lead to a disintegration of the local legal system.<sup>50</sup> Examples of these legal transplants have been mentioned under 1.1. To a certain extent this problem is a natural consequence of the Western drafter being trained in the legal system of his country. There are, however, also

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<sup>44</sup> Information obtained from Lily Rodriguez, gtz-office Moyobamba, Peru, 23 January 2008.

<sup>45</sup> Ogus (2008), pp. 728.

<sup>46</sup> Weak enforcement is given in a lot of developing countries, according to e.g. O'Connor (1998), p. 95.

<sup>47</sup> Faure (2008), p. 737.

<sup>48</sup> Cooter & Schäfer (2008), p. 15.

<sup>49</sup> Nader (2007), p. 16. She calls it a 'cookie-cutter, a-cultural approach'. Chen (1999), pp. 358, Seidman & Seidman (1996).

<sup>50</sup> See also Nader (2007), p. 4.

positive aspects to it: Indeed Western experts often step in where capacities in developing countries are lacking and where developing countries ask for the input. Nevertheless one has to act with care in that this specific law has to be adapted to local needs and take account of the local legal culture. Put in *Schäfer's* terms there is a 'rules and standards divide'.<sup>51</sup> He argues that the legislation coming from a developed country will generally be standard based which is not suitable for a developing country. What this exactly means shall be explored in the next paragraph.

## (2) Implications of the Precision of Formulations

An important aspect for the suitability of legal norms is the precision used in their formulation and the consequences of it. In most developed countries a standard based system can be found.<sup>52</sup> It means that the laws are formulated in a rather vague, 'mission-oriented' way. At the same time decision-making power is delegated from the central authorities to lower levels of the system.<sup>53</sup> The bureaucracy is active and powerful, having a huge discretion. This is typical for decentralization. The advantages of this system lie in the fact that civil servants are close to the problem and can take account of local specificities.<sup>54</sup> The decentral authority has better access to local information. Also does non-centralized decision-making enable different jurisdictions to experiment with various policies and possibly innovate new, more effective regulatory approaches. The system is very flexible. Having said that the administrative, technical and financial capacities at local level might be weaker.<sup>55</sup> *Schäfer* argues that for developing countries a rule-based system should be favored. Under this approach legal norms are formulated as precise rules, which are 'blueprints for action' and allow for mechanical decisions by civil servants.<sup>56</sup> At the same time more power is concentrated at the level of Parliament or other central decision making authorities where

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<sup>51</sup> Schäfer (2006), p. 120.

<sup>52</sup> See also Ogus (2008), p. 730.

<sup>53</sup> Remark: *Schäfer* formulates his assumptions for the bureaucracy and the judiciary. As this paper does not include an analysis of the judicial system, only the bureaucracy will be referred to.

<sup>54</sup> Schäfer (2006), p. 120; as to rules and standards see also Kerber (2008), pp. 491; Cooter & Schäfer (2008), pp. 120; Dunoff (2006), pp. 88.

<sup>55</sup> See Niessen (2006), pp. 144 for a list of all positive and negative aspects.

<sup>56</sup> See Schäfer (2001), pp. 2 and Schäfer (2006), pp. 116 for several other considerations to this theory. For the purpose of this paper, the main reasoning shall be precise enough.



the precise rules will be developed. Another advantage of rules is that they require little information to take a final decision and thus parties have less possibilities to argue which increases the effectiveness of dispute resolutions.<sup>57</sup>

Taking the weakness of lacking resources, *Schäfer* argues that the decision – which system one should adhere to – should mainly be made dependant on the available amount of a country's human capital and how it is distributed. A centralized, rule-based, system works in a less capital-intensive manner. To accumulate the few existing work force on the central level is therefore advisable for developing countries. In addition to that the system's precise rules also cure difficulties related to obtaining information, an inadequate level of education and narrower experience of the civil servants that is usually prevalent in developing countries.<sup>58</sup> Should later additional human capital be added to the legal sector, it becomes more effective to have less precise legal norms.<sup>59</sup> To support his statements he refers to the time of early capitalist development in Europe.<sup>60</sup> In several Western countries one could observe that rules developed from rule-based to standard-based because of a higher endowment to the legal system with more human capital and following with the efficient distribution of human capital shifting in favor of lower level governance.

In developed countries vague standards can be optimized by skilled civil servants, which is a very capital intensive approach. Before that stage is reached, precision of legal rules is thus a substitute for missing legal and administrative skills at lower levels of the bureaucracy.

In practice there are several limits to these considerations. The system is namely inflexible as to the adaptation to current circumstances. For rules that will not have a long-lasting value, the capital-intensive effort to provide for detailed rules at central level seems to be a waste of resources.

Besides the aspect of human capital, another eye-catching problem in most of the developing countries is corruption. Assessing rules and standards in the light of that, it is obvious, that rules leave little discretion.<sup>61</sup> Also in the

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<sup>57</sup> Cooter & Schäfer (2008), p. 121.

<sup>58</sup> Schäfer (2001), p. 7.

<sup>59</sup> Schäfer (2006), p. 129.

<sup>60</sup> Schäfer (2001), pp. 22.

<sup>61</sup> Faure & Niessen (2006), p. 276.

light of curing this deficiency of the bureaucracy in developing countries, a stronger reliance on rules can therefore be advocated. To leave no discretion is, of course, impossible, so little discretion should be headed for.<sup>62</sup> If the administration can use the precise rules basically as a template, less problems with corruption will come up at this stage of the process. If little discretion is left to the civil servant, his behavior can more easily be monitored from the outside, too.<sup>63</sup>

Also *Ogus* lists some opinions about the interaction of corruption and decentralization that remain undecided about the implications.<sup>64</sup> Arguments are that one expects higher transparency when decisions are taken at a local level where information flows are much faster.<sup>65</sup> Another point would be that central administration can lead to ineffectiveness in remote areas if the authority of laws is simply not recognized there.<sup>66</sup> It is argued that one payment to an official at central level leads to less distortion than several payments at lower levels.<sup>67</sup> Here one can remark that it might be less costly for the briber, if there is only one responsible person to be identified and bribed. The costs for organizing interests at higher government levels can be considerable as regional and national possibly diverse interests have to be aligned.<sup>68</sup> *Faure* argues that the danger of capture by the local industry might be higher at local than at central level because authorities might want to boost their regions.<sup>69</sup> The optimal solution would be to find a way to adopt environmental legal norms to the local conditions while reducing the risk of capture as far as possible. This might be an intermediate solution as to the formulation of the legislation, giving some precision and leaving some discretion.<sup>70</sup>

So far it has been assessed what the ideal solution for the shape of legislative norms would be if in the Parliament laws could be passed that were based on e.g. economic assumptions. This is, however, not the case. The more detailed the rules are to be, the heavier furthermore the burden

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<sup>62</sup> *Ogus* (2007), pp. 157.

<sup>63</sup> See also *Posner* (2007), p. 265.

<sup>64</sup> *Ogus* (2008), pp. 729.

<sup>65</sup> *Lederman, Loyaza & Soares* (2001).

<sup>66</sup> *Green* (1997), chap.3.

<sup>67</sup> *Shleifer & Vishny* (1993), pp. 599-617.

<sup>68</sup> *Ogus* (1994), pp. 103.

<sup>69</sup> *Faure* (2008), pp. 743.

<sup>70</sup> *Schäfer* (2006), pp. 121.

becomes that is put on Parliament. To round off the picture, some reflections shall be made about the danger and the consequences of lobbying.<sup>71</sup>

One can make a case for passing laws at a central level, when talking about protecting the outcome from the lobbying industry. *Faure* regards it as probable that – acknowledging that lobbying take place at all levels of government – decisions are taken in the public interest if they are taken far away from local lobby groups (in particular the strong local industry).<sup>72</sup> This speaks in favor of passing the laws at a central level in the danger of lobbying. It depends however on each legal system where the lobbying influence is the lowest and where the procedures are the most transparent. In certain cases costs can be economized by shifting law-making to decentralized authorities when e.g. no strong lobby is present at the local level. Apart from public choice consideration there is another aspect to be mentioned if one wants to advocate detailed rules. The legislative process will be slowed down if very detailed legislation has to be passed. As updating has to be done regularly but is time-consuming, the legislation may lack behind and have the effect that officials simply disregard outdated norms.

When searching for the level at which lobbying and corruption have the least effect, one has to see very clearly that the decision-making process entails law-making and administrative aspects. While one might be able to shield legislative powers from the local level, it seems in some sectors far too costly to execute the administration process without their involvement. In order to know which sector can fruitfully be decentralized, a close look has to be taken at the particular sector and the specificities surrounding it.<sup>73</sup>

A last differentiation is formal and informal norms. In developing countries one finds evidence that regulatory practices based mainly on unwritten or informal rules are more sensitive to corruption than others because there are fewer mechanisms to ensure accountability.<sup>74</sup> *Ogus* therefore argues in favor

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<sup>71</sup> Remark: As mentioned above lobbying can amount to the severity of corruption.

<sup>72</sup> *Faure* (2008), p. 743.

<sup>73</sup> *Niessen* (2006), p. 146.

<sup>74</sup> *Lederman, Loyaza & Soares* (2001), pp. 30.

of providing few and simple formal rules.<sup>75</sup> At the same time they should be as detailed as possible and preferably be passed at the highest level.<sup>76</sup>

### 1.3. Hypotheses

In order to provide for an effective environmental law, specific problems, requirements, shortcomings but also the strong points of a country have to be considered.<sup>77</sup> The main problems can be cut down to lacking resources, corruption and lobbying and inappropriate Western influence. One way to tackle the weaknesses is e.g. to fight corruption and to carry out capacity building.<sup>78</sup> However one can also as a first step accept the diseases because these are long-term issues and deal with them for the time being by adapting the legislation. This leads to the questions at which level environmental law-making and administration can best be provided for and how to reflect this in the shape of legal norms to guarantee effective environmental law under the current local conditions.

As regards the question at which level to pass legislation, the cost-effective solution as to the problem of missing human capital is to concentrate highly trained legal experts in a developing country in a centralized way. Despite the high costs of legal drafting the system can work with little human capital.<sup>79</sup>

Another argument for passing the laws at the central level can be provided by the sector at hand. Traditionally a powerful argument for centralized decision-making is the aspect of transboundary effects of e.g. pollution.<sup>80</sup> Otherwise stricter rules in one region, lead to evading to neighboring regions. In environmental issues it is quite obvious that jurisdictional boundaries do often not coincide with ecological boundaries.<sup>81</sup> Preferably the decision-making power should rest with the authority that has the

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<sup>75</sup> Ogus (2008), pp. 721-734.

<sup>76</sup> E.g. Ogus (2007), p. 158.

<sup>77</sup> Faure (2008), p. 740.

<sup>78</sup> Faure & Niessen (2006), p. 283; Faure (2008), p. 740.

<sup>79</sup> Schäfer (2006), p. 132.

<sup>80</sup> Faure (1998), pp. 169-75; Faure (2003), pp. 314.

<sup>81</sup> Niessen (2006), p. 146.

jurisdiction about the territory large enough to deal adequately with the problem.

Influences of lobbying and corruption have to be assessed for each country individually. As regards the importance of the lower levels of government the realization of administrative issues only at central level is probably ineffective if there is an environmental problem with different embodiments depending on the region at hand. Particularly for this case, but also for any legislative task, guidance in legal norms for lower levels of government will be necessary and should have the following form:

As regards the shape, the legal norms should provide for many details. This enables the bureaucracy to take decisions, while little discretion is left to them. At the same time the routines that the bureaucracy has to follow should be simple and clear to pay tribute to the inadequate level of education and experience of the local level and the difficulty to obtain information. This is the cost-effective solution as regards the costs of law-making, administration and e.g. the costs of training of the civil servants. It also decreases the number of disputes and thus the costs of it to arise if a decision is based on unambiguous legal norms.

Generally instruments that need high administrative capacity should be avoided even if this means that from an optimal administration perspective in Western countries second best solutions have to be chosen.<sup>82</sup>

When looking for environmental norms that are less corruptible, the findings are similar to those fighting the resource problem.<sup>83</sup> Little discretion to the executive should be left and detailed rules that allow for simple routines should be provided in the legislation itself. This reduces the costs of opportunistic behavior of the bureaucracy. Even though many details are positive as regards reducing corruption, too many details – in particular if they are formulated in an informal way – also run the risk of not being followed because of the missing qualified human capital at each stage of the government.

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<sup>82</sup> Faure (2008), p. 745.

<sup>83</sup> Ogus (2004), pp. 299-246.

Additionally, another solution is provided by *Braithwaite*.<sup>84</sup> He advocates responsiveness as a solution. Responsive regulation conducted by regulatory networks of public and private actors allows for networking around capacity deficits, in particular as regards administration and enforcement. NGOs play a vital role in this kind of regulation. He argues that both networking strategies and involvement of private actors can cure capacity deficits and lead to less corruption because there is more control and less possibilities to predict outcomes.

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Generally one can thus say that Western influence has to be applied with caution as local conditions always have to be sufficiently considered before a legal transplant can be incorporated or advice taken. Looking back to part 1.1. it can be seen that this advice has not always been followed.<sup>85</sup> A guideline for Western experts should be to forget their own background and dive into the legal system in the receiving country, thereby considering the mentioned criteria. *Davis & Trebilcock* call for knowledge of comparative experience with similar initiatives (successful and unsuccessful) in other developing countries, including suitably cautious interpretations of the preconditions to success or failure of these initiatives.<sup>86</sup> They can however not imagine ‘outsiders’ carrying out a leading role in designing it. In terms of effective instruments it is – having considered all that – doubtful whether developing countries can join the wave of flexible or economic instruments at all, particularly because they require a solid administrative basis and allow for more flexibility, thereby providing potential for collusion.<sup>87</sup> Other instruments that cannot fully be recommended because of the discretion they leave are decentralization strategies or public participation.<sup>88</sup> Similar problems are posed by the integration of environmental permits and environmental impact assessments or tax and quota-trading systems. If one

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<sup>84</sup> Braithwaite (2006), pp. 884, 896.

<sup>85</sup> Ogus (2008), p. 731; Faure (2008), p. 746; Schäfer 2001, pp. 22.

<sup>86</sup> Davis & Trebilcock (2008), p.62.

<sup>87</sup> Peeters (2006), pp. 256; Faure & Niessen (2006), p. 278. A positive aspect about implementing economic instruments in developing countries could, however, be that the policy makers are newly trained in applying these instruments and could thus enjoy more freedom in experimenting with them than policy makers in countries that long been trained in ‘reliance on regulation and an entrenched bureaucracy accustomed to the old rules, see O’Connor (1998), p. 95.

<sup>88</sup> Faure & Niessen (2006), p. 277: They stress the danger of the influence of the lobbying sector.

applies these systems nevertheless, things can easily deteriorate. The application of the wrong system can provide more discretion to the lower administration level and thus be an invitation to corruption.<sup>89</sup> The choice of instruments can clearly be oriented at old systems in Western states, thinking in particular of the command and control approach, where detailed duties are imposed and breaches can be easily identified.<sup>90</sup> This system is less sensitive to corruption. Another system that could work are licensing systems because they allow for a concentration of resources at an *ex ante* stage by scrutinizing e.g. that an application satisfies the requirements. This is convenient for most developing countries where there generally is no capacity for an effective *ex post* deterrence via control mechanisms.<sup>91</sup>

When passing legislation and thus also of this kind, the legislator can, of course, engage in rent-seeking behavior.<sup>92</sup> Keeping in mind the weaknesses of the parliamentary process – it might indeed be difficult to say whether the central level (lobbying influence at the parliamentary stage or corruption issues at Ministries) or the local level (lobbying and corruption as to delegated law-making and administration) is more susceptible to ‘external influences’. This is particularly valid if one assumes that people standing for the same interests either try to influence the legislation *ex ante* or once it is passed *ex post* by trying to influence the administration. To what degree which influence increases the ineffectiveness of environmental legislation will depend on the realities in each country and on the sector that is dealt with.

As mentioned above the optimal solution allows for considering local aspects without being captured by local industries. This could be the form of an interior solution (a norm with some precision and some discretion). For this approach, however, a certain amount of human capital at the local level would be needed to carry out the delegated tasks. The less educated and experienced the personnel, the higher is the risk of capture. As to an

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<sup>89</sup> Faure (2008), p. 746.

<sup>90</sup> Faure (2008), p. 742; Ogus (2008), p. 730.

<sup>91</sup> Ogus (2008), p. 725.

<sup>92</sup> Gunningham (1998), p. 46.

environmental problem with regional differences in large countries, it will not be possible to carry out the administration without the support of local governments.<sup>93</sup> The guideline should always be to leave as little discretion as possible.

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<sup>93</sup> Faure & Niessen (2006), p. 6.



## 2. Case Study: Peru

As the right approach clearly depends on each country, after this detailed theoretical elaboration, a practical part shall be added. Several empirical studies have already been carried out.<sup>94</sup> This paper serves to enrich these by giving a recent example from South-America where little data has been collected so far. The focus is on the assessment of the wording of one piece of legislation. However, instead of exclusively looking at it, the circumstances surrounding it shall also be taken into consideration to a certain extent to make more detailed suggestions.

### 2.1. Introductory Words

When analyzing to which extent the hypotheses established can be upheld the first and foremost consideration is that the situation in one developing country is not necessarily the same as in another.<sup>95</sup> On the one hand environmental problems in each country are different. On the other hand the legislative and administrative infrastructure vary. Neither should the impact of legal culture and particular societal settings be underestimated.

By reason of various aspects Peru is a suitable 'candidate' for the purpose of this evaluation. It is listed among the 'Emerging and Developing Economies', according to the International Monetary Fund's World Economic Outlook Report, April 2008.<sup>96</sup> There is a considerable degree of corruption.<sup>97</sup> Also the issue of capacity deficiencies is present.<sup>98</sup> It is a former colony of Spain and various Western development agencies are present.<sup>99</sup> Peru has 25 Regions and 1838 Municipalities.<sup>100</sup> With

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<sup>94</sup> See recent dissertation on the case of China: Van Rooy, B. (2006).

<sup>95</sup> Faure (2008), p. 736; Nader (2007), p. 1.

<sup>96</sup> See IMF Emerging and Developing Economies List. World Economic Outlook Database, April 2008, <http://www.imf.org/external/pubs/ft/weo/2008/01/weodata/groups.htm#oem>, as of 29 June 2008.

<sup>97</sup> According to the corruption perception index 2007 Transparency International is concerned about the ongoing high corruption rates in developing countries. Peru ranks 72 out of 172 countries, see [http://www.transparency.de/uploads/media/Pressematerial\\_CPI2007\\_TI-S\\_deutsch\\_komplett.pdf](http://www.transparency.de/uploads/media/Pressematerial_CPI2007_TI-S_deutsch_komplett.pdf), as of 28 July 2008.

<sup>98</sup> Emailcontact with Bruno Monteferrri Siles, SPDA, Lima, 27 July 2008.

<sup>99</sup> Examples of NGOs on the spot are the gtz, see <http://www.gtz.de/en/weltweit/lateinamerika-karibik/643.htm>, as of 28 July 2008; or the KfW: <http://www.kfw->

1,285,220 km<sup>2</sup> it ranks 20<sup>th</sup> among the countries with the largest total area. Lobbying – as in every other country – is also an issue at Peru’s various levels of government.<sup>101</sup> It is thus an interesting example to consider.

Having established their importance in the introduction, for the present paper in the case study, some aspects of the Peruvian system of protected areas shall be analyzed. In Peru 64% of the country – in particular east of the Andes – is rain forest.<sup>102</sup> With this it ranks ninth among the world’s countries with the biggest rain forests and deforestation is a big issue.<sup>103</sup> Furthermore Peru harbors approximately 82-84% of the biodiversity in the world.<sup>104</sup> Areas of nature conservation were considered for the first time in the Environmental Law Act of 1990 and their legal basis has ever since evolved.<sup>105</sup> For national protected areas the norms are straightforward. This paper will deal with the last, remaining aspect: to create a sound basis for municipal protected areas, which will at the same time reform the legal basis for regional protected areas. The particular importance of municipal conservation areas is to bring the culture of conservation to the people.<sup>106</sup> The legislative proposal is led by the consideration that the notion of sustainable development has to strike root at the basis of the society, which can be reached at local or municipal level. On top of what has already been mentioned, this topic nicely gives the possibility to assess the success of two typically Western instruments: decentralization efforts and public participation strategies.<sup>107</sup> As regards competing interests, the extracting industry is particularly interesting.

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[entwicklungsbank.de/DE/Home/Laender\\_Programme\\_und\\_Projekte/Lateinamerika/Peru/Foerderschwerpunkte.jsp](http://entwicklungsbank.de/DE/Home/Laender_Programme_und_Projekte/Lateinamerika/Peru/Foerderschwerpunkte.jsp), as of 28 July 2008.

<sup>100</sup> See for further information: <http://en.wikipedia.org/wiki/Peru>, as of 28 July 2008.

<sup>101</sup> The legislator in Peru – the Congress – is known for being unpredictable, see Emailcontact with Lily Rodriguez, gtz-office, Moyobamba, Peru, 29 July 2008.

<sup>102</sup> See for further information: <http://en.wikipedia.org/wiki/Peru>, as of 28 July 2008.

<sup>103</sup> Law Blog: ‘Alfredo Palacios Dongo: Ministro del Ambiente y depredación de nuestros bosques’, 26 May 2008.

<sup>104</sup> Solano (2006), p. 1.

<sup>105</sup> See Blog Fabiola Morales Castillo; Código del Medio Ambiente (Environmental Code), Decreto Legislativo 613 de setiembre de 1990; see Solano (2006), p. 2.

<sup>106</sup> Solano (2006), p. 1.

<sup>107</sup> Art. 6.1.f of Act 1013: ‘The Ministry of the Environment is to support the Regional governments/Municipalities to enable them to successfully comply with the functions that were transferred to them in the ambit of decentralization.’ The legislative proposal provides for several public participation requirements that will be dealt with in the following. Also

## 2.2. Background Information to the Legislative Proposal

In Peru the administration of protected areas is organized in the following way<sup>108</sup>: There are different kinds of areas that form part of a national system for protected areas ('Sistema Nacional de Áreas Naturales Protegidas por el Estado' (SINANPE)). There are national protected areas ('Áreas Naturales Protegidas' (ANPs)), which are established by a Supreme Decree and currently cover 19 million ha.<sup>109</sup> Besides there are also regional ('Áreas de Conservación Regional' (ACRs)) and private conservation areas ('Áreas de Conservación Privada' (ACPs)) pooled under the scheme, which cover another 235378, 6 ha.<sup>110</sup> The last category of protected areas are the municipal protected areas ('Áreas de Conservación Municipal' (ACMs)).<sup>111</sup> There are approximately 75 of them.<sup>112</sup> The territory amounts to ca. 377819 ha.<sup>113</sup> The municipal areas have developed despite strong weaknesses in the legal basis for their establishment, which shows a potential for further developments once a sound legal basis is created.<sup>114</sup> In 1997 Act 26834 on Protected Areas ('Ley de Áreas Naturales Protegidas'), established the current system of national, regional and private areas. No competence was given at this stage to create municipal areas. Later they were included under the National Institute for Natural Resources ('Instituto Nacional de Recursos Naturales' (INRENA)) and in 2001 a register was set up that provided for certain criteria that an ACM had to fulfill in order to be registered.<sup>115</sup> In 2003 with another act it was finally established that the Municipalities could

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has the law-making process been shaped by many public hearings – for the text of the Act see Appendix I.

<sup>108</sup> See 'Áreas Naturales Protegidas en el CDC-UNALM'.

<sup>109</sup> Morales Castillo (2007), p. 25.

<sup>110</sup> Cf. Art. 5 of Act 26834 Ley de Areas Nacionales Protegidas (Act on NAPs).

<sup>111</sup> There is no official definition, the gtz (Gesellschaft für technische Zusammenarbeit) in its manual defines it as 'an instrument for the conservation of natural areas of interest or local value to complement the initiatives promoted by the National Government and Regional Governments for the purpose of protecting and conserving ecosystems, forests, vegetation, wild animals and other natural resources that offer us quality of life and sources for development', see gtz (2008), p. 11.

<sup>112</sup> For example in San Martín, Huánuco, Apurímac, Loreto, Lima, Cajamarca, Pasco, Ayacucho, Amazonas and La Libertad, see: Blog Fabiola Morales Castillo.

<sup>113</sup> Gtz & INRENA (2008); remark: for some ACMs the data concerning the size of the area is missing.

<sup>114</sup> Ayuda memoria, SPDA. See Art. 56, 57 of the Code for the Environment and Natural Resources ('Código del Medio Ambiente y los Recursos Naturales' (CMARN)) – Legislative Decree 613 of September 1990; Monteferrri Siles (2007), p. 2.

<sup>115</sup> Solano (2006), p. 4.

propose ACMs.<sup>116</sup> This, however, did not mean they had the competence to establish them and neither was clarified to whom to propose their establishment. With another act in 2004 it was stipulated that, where the legal basis for the establishment of ACMs was not given, it should be proceeded like in the case of the creation of ACRs.<sup>117</sup> This turned out to mean it had to be done via Supreme Decree – a hardly workable solution. While it was called for a revision, the enactment of Supreme Decree N° 015-2007-AG in March 2007 shot down all efforts.<sup>118</sup> The Decree withdrew all legislative norms referring to ACMs and excluded them from SINANPE, which left the Regions without any tool.<sup>119</sup>

It is crucial to realize that the passing of the Decree stands in strong contrast to the generally advanced policy of decentralization.<sup>120</sup> The Peruvian Environmental Law Association (‘Sociedad Peruana de Derecho Ambiental’ (SPDA)) alleges that this decision also goes against the government’s general policy towards protected areas.<sup>121</sup> The decision led to a lack of regulation and procedures for protected areas, which, in turn, caused less transparency and more conflicts. The Regional governments strongly disagreed with the Supreme Decree and put forward that it was passed without even considering their opinion.<sup>122</sup>

As the event cannot be aligned with the general government’s decentralization and environmental policy, it hit people by surprise.<sup>123</sup> Whenever political decisions are difficult to explain, it is worthwhile devoting some time to public choice considerations. The establishment of protected areas runs counter to the interests of the extracting industries like mining and exploitation of hydrocarbons, petrol or trees. What is eye-catching in this example is the strong lobby of the mining industry.<sup>124</sup>

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<sup>116</sup> Act concerning the structure of Municipalities No. 27972 (‘Ley Orgánica de Municipalidades’).

<sup>117</sup> Act 10408, Solano (2006), p. 6.

<sup>118</sup> Morales Castillo (2007), pp. 4, see also DAR (2007), Nota Informativa.

<sup>119</sup> Gtz (2008), p. 6.

<sup>120</sup> DAR (2007), Nota Informativa; Monteferri Siles (2007), p. 1.

<sup>121</sup> SPDA (2007).

<sup>122</sup> Declaración de Iquitos (2007); Declaración por la Gestión Ambiental Regional de Concepción (2007).

<sup>123</sup> Morales Castillo (2007), p. 90.

<sup>124</sup> E.g. the National Mining Association (Sociedad Nacional de Minería, Petrolío y Energía (SMNPE)) see <http://www.snmpe.org.pe/revista/edicion07mar2004/especial.htm>; Christine Bohn, gtz-office, Moyobamba, Peru, 23 January 2008; Monteferri Siles (2007), p. 2; Morales Castillo (2007), p. 14.

ACMs have been disliked by the private sector because their establishment limits the possibility to carry out economic activities in those areas.<sup>125</sup> Thus the majority of the private sector has ever since ignored the authority to establish protected areas. Also the source of the Supreme Decree speaks the same language. The Decree was passed by the Ministry of Energy and Mines without consultation of INRENA, other environmental organizations, NGOs or the Regional Governments.<sup>126</sup> The main reason for their action on the other hand are said to be events in the region of Cajamarca, where the Municipality used conservation issues as an excuse to hinder the mining industry and thus abused the legal norms.<sup>127</sup> It was thus clearly a weakness of the form of the previous legislation that it enabled the establishment of ACMs with the aim not to conserve but to put pressure on the mines or prohibit them from carrying out their activities. Having said that there is information that the person who signed the Decree used to be engaged in guarding protected areas.<sup>128</sup> Whenever people change their opinion so drastically this is also a sign of external influences.

As a main weakness in Peru's decision-making process unequal bargaining powers can be identified. Peru's situation, not to have a Ministry of the Environment at that time, made the procedure, to bypass the proponents of environmental issues, easily possible. Obviously lobbying and corruption issues play a role and have to be considered to explain the result.

Initiatives to pass a new law emerged soon as since March 2007 there has been no legal basis for the establishment and management of ACMs.<sup>129</sup> The new proposal is an Act that shall be passed by Congress, which is the highest form of legal norms in Peru. By July 2007, a Member of Congress, Fabiola Morales Castillo, invited to a public hearing on ACMs, acknowledging their importance for territorial management and as a part of

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<sup>125</sup> Actualidad Minera Peru (2007).

<sup>126</sup> Declaración por la Gestión Ambiental Regional de Concepción (2007).

<sup>127</sup> Monteferri Siles (2007), p. 2.

<sup>128</sup> Morales Castillo (2007), p. 15.

<sup>129</sup> Generally ACMs are currently in a lawless state. This is very dangerous because there is no legal basis to form guards for the protected territory or to punish perpetrators. However the state is not completely lawless. As an example of an interim measure the Manual de Vigilancia y Control Ciudadano al Interior de las ACM developed by the gtz shall be mentioned, that summarizes the laws applicable to citizens in this situation, see gtz (2008).

SINANPE.<sup>130</sup> All involved actors were present at this hearing, such as the mining industry, government officials, representatives of the Regions and Municipalities, SPDA, the gtz<sup>131</sup> and other international organs.<sup>132</sup> In a working group, in which likewise all involved actors took part, the legislative proposal that will be discussed was then drafted. In the national public hearing it was decided that the topic should be further discussed in several regional hearings to stimulate a public debate.<sup>133</sup> These 6 public hearings took place from 17 January 2008 until 18 April 2008 (Iquitos, San Martín, Huancayo, Cusco and Lambayeque and Lima). The objective of the hearings was to consolidate the legislative proposal to regulate in a final and consensual manner the establishment and management of ACMs.<sup>134</sup> As also the current procedure to establish ACRs by Supreme Decree is too complicated, the Act will provide a new basis for ACMs and ACRs.<sup>135</sup>

### **2.3. Effectiveness Analysis**

After having given quite a detailed background overview on the legislative proposal and the problems leading to it, the effectiveness of the Peruvian system of municipal and regional conservation areas shall be assessed. As put before in the first part, also here, the analysis shall be split up.

#### **2.3.1. Institutional and Structural Arrangements**

In the following some statements about the different levels of government in Peru shall be made. The universal problems like resources, ‘cultural gap’ and conflicts of interests shall be elaborated upon for the different levels where appropriate. The issues corruption and lobbying will be dealt with mainly when coming to the effective shape of the legislation.

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<sup>130</sup> See Morales Castillo (2007).

<sup>131</sup> German Development Cooperation (Gesellschaft für technische Zusammenarbeit (gtz)).

<sup>132</sup> Remark: In this paper it is tried to include proof of lobbying or corruption as far as possible. Due to the nature of the issues it is however not possible to detect all instances in which they occur.

<sup>133</sup> Public Hearing No. III - results.

<sup>134</sup> PDRS (2008), RENACAL (2008).

<sup>135</sup> Emailcontact with Lily Rodriguez, gtz-office, Moyobamba, Peru, 29 July 2008.

## (1) Central Level

It is evident from the background information that it was simply possible for the Ministry of Energy and Mining to pass a Supreme Decree on its own without consultation of other environmental authorities.<sup>136</sup> Wherever there are conflicting interests, an issue, which is generally difficult to solve, it is essential to provide for equally strong representatives of the diverging interests.<sup>137</sup> Only very recently – in May 2008 – a Ministry of the Environment was established in Peru, replacing a mix of institutions.<sup>138</sup> Peru is the last of the South-American countries without a Ministry of the Environment. From the announcement in December 2007, it took 5 more months until the Minister was inaugurated. The Ministry shall be completely working by January 2009. In order to make some assumptions on the question whether this will be a stronger counterpart to the Ministry of Energy and Mines and whether it will add to the effectiveness of environmental law, particularly about protected areas, some aspects of its development and organization shall be outlined.

The first aspect is personnel-wise. One can ask who the first Minister of the Environment is. Generally the person is of importance, of course, but particularly if a position is to be filled for the first time, there is a strong announcement effect emanating from this – in particular with regard to countries which face high numbers of corruption and collusion and are susceptible to strong lobbies. The first Minister of the Environment, *Anthony Brack Egg*, who was inaugurated on 19 May 2008, is one of Peru's most famous ecologists.<sup>139</sup> He has studied in Germany. Before being appointed he used to have his own environmental impact consulting

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<sup>136</sup> Remark: The following paragraph is also of importance for the continuation of the system of NAPs – even though the focus of this paper are ACRs and ACMs.

<sup>137</sup> Faure & Niessen (2006), p. 282.

<sup>138</sup> Among them INRENA, the National Environmental Council ('Consejo Nacional del Ambiente' (CONAM)), The General Directorate of Environmental Health ('La Dirección General de Salud Ambiental' (Digesa)), a Supervising Instance for Investment in Energy and Mining ('Organismo Supervisor de la Inversión en Energía y Minería' (Osinergmin)), the National Superintendency of Sanitary Services ('Superintendencia Nacional de Servicios de Saneamiento' (Sunass)), the Research Institute of the Amazon ('Instituto de Investigaciones de la Amazonía'); Watch the declaration of the Peruvian President under: <http://www.youtube.com/watch?v=sbSUI3n1Xkg>, as of 28 July 2008.

<sup>139</sup> 'Bau eines Umweltministeriums beschlossen', Fokus, 17 May 2008; Law Blog: 'Hoy juramento Brack como nuevo ministro', 20 May 2008.

business for the mining industry, which is why some people regard him as corruptible.<sup>140</sup> Voices that raise this accusation refer to an incident in 2006 where *Brack Egg* at first heavily criticized a mining project and then all of a sudden began promoting it.<sup>141</sup> *Brack Egg* furthermore led the Commission that created the final draft for a proposal to create a Ministry of the Environment. His appointment can therefore not be seen in a clear light and it is for future to show how he will perform.

As regards the structure, the Peruvian Ministry of the Environment is established following the German example and with the help of Chancellor Angela Merkel.<sup>142</sup> The Peruvian President, Alan Garcia, admires German organization and emphasized this during Merkel's last visit in May 2008. A comment shall be made on the German involvement in the starting phase of the Ministry. On enquiry the German Department of Foreign Affairs confirmed German engagement.<sup>143</sup> Currently negotiations on the form of support are ongoing in the Federal Ministry for Economic Cooperation and Development ('Bundesministerium für wirtschaftliche Zusammenarbeit und Entwicklung' (BMZ)) and the Federal Ministry of the Environment ('Bundsumweltministerium' (BMU)). It is probable that the support will take the form of consulting services by a German expert. Referring back to the theoretical part, it has to be recommended to closely consider the local facts and conditions when making suggestions from a Western perspective. The mere fact that President Garcia appreciates German organization is a good motivation but not sufficient to establish the same system in Peru. And as it was outlined, even when establishing a Ministry with working processes and competences modeled after the German BMU the 'cultural gap' would prohibit its effective functioning. The main engine for the creation of the Ministry, however, was a Commission led by the current Minister that by their own account consulted all possible specialists and

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<sup>140</sup> See Law Blog about Anthony Brack Egg.

<sup>141</sup> See Law Blog 'Ministerio del Medio Ambiente – Mayo'.

<sup>142</sup> 'Bau eines Umweltministeriums beschlossen', Fokus, 17 May 2008; 'Lateinamerika-Reise zur Auffrischung alter Kontakte', Fokus, 19 May 2008; Law Blog: 'Hoy juramento Brack como nuevo ministro', 20 May 2008.

<sup>143</sup> See emailcontact with the Department of Foreign Affairs, Germany, 14 July 2008.



decentralized authorities.<sup>144</sup> This speaks in favor of the fact that the Peruvian reality is sufficiently considered. This fact lies also comfortably with the arguments that are most explicitly put forward by *Davis & Trebilcock* as to the importance of giving a large role to insiders when legal reforms are carried out.<sup>145</sup> In contrast to the environment of institutions before, this Ministry is finally at a high level of political decisions and has a voice and a vote in the Council of Ministers that approves legislative proposals, submitted by the President to the Congress.

An analogy can be drawn to a wide research project about Indonesia in which it was made clear that not the Ministry of the Environment as such, but its powers are key.<sup>146</sup> As regards the competences of the Ministry its overall task shall be to serve guaranteeing a sustainable and responsible use of the natural resources.<sup>147</sup> It will take over all the competences in the environmental sector, i.e. design, establish, execute and supervise the national and sectoral environmental policy.<sup>148</sup> As of January 2009 an Environmental Evaluation and Control Organ ('Organismo de Evaluación y Fiscalización Ambiental' (OEFA)) will be set up.<sup>149</sup> The institution will intervene in all environmental topics (mining, fishing, hydrocarbons, industry and agriculture) to control and sanction. *Brack Egg* hopes that an own Ministry can capture more international aid and investment. When signing the establishing contract, Peru's President referred to the world's challenge of finding a way how to secure reforestation and how to finance it and gave an example of the amount of CO<sub>2</sub> capture that can be achieved with reforestation. Also the new Minister of the Environment justifies the creation of another Ministry, among others, with the international developments to fight climate change and the business that will emerge

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<sup>144</sup> Law Blog: 'Esta semana saldria Ministerio del Ambiente', 30 April 2008.

<sup>145</sup> Davis & Trebilcock (2008), p. 61.

<sup>146</sup> Faure & Niessen (2006), p. 270.

<sup>147</sup> See declaration of President Garcia: <http://www.youtube.com/watch?v=sbSUI3n1Xkg>, as of 29 July 2008.

<sup>148</sup> See Legislative Decree N° 1013 establishing the Ministry of the Environment, Art. 2, and was then amended by Act 1039 that clarifies the function of the ministers and the Vice-ministers and the different institutions; Law Blog: 'Ministerio del Ambiente tiene pocas facultades sobre su sector', 2 July 2008.

<sup>149</sup> 'El Ministerio del Ambiente tendrá amplias facultades para sancionar', 19 May 2008.

from the investment in capture.<sup>150</sup> In one of his first interviews *Brack Egg* stressed that he has already had many meetings with businessmen from European countries who want to pay for reforestation in Peru. Indeed the latest reform proposal as to the Kyoto protocol even go towards paying e.g. South American countries for the preservation of their forests.<sup>151</sup> At a recent biodiversity conference in Bonn, it was discussed how to make money available for the protection of rain forests to compensate developing countries for safeguarding them.<sup>152</sup> Nature conservation is thus to possibly become a profitable business for developing countries. Most of this business would have to be carried out via the Ministry as it is empowered in the area of conservation and sustainable use of natural resources, biodiversity and protected areas such as the sustainable development of the Amazon.<sup>153</sup> In the area of nature conservation the Ministry is furthermore to manage SINANPE.<sup>154</sup> It is in charge of ANPs.<sup>155</sup> Therefore a special service will be established ('Servicio Nacional de Áreas Naturales Protegidas por el Estado' (SERNANP)).<sup>156</sup> Art. 11 describes the functions of the Vice-minister for the Strategical Development of Natural Resources, who is in charge of biodiversity issues and protected areas.<sup>157</sup> Besides, the Ministry will fuse with the National Environmental Council ('Consejo Nacional del Ambiente' (CONAM)) for continuity reasons and the administration of INRENA will be incorporated into SERNANP. After initial struggles, particularly with an amendment of the establishing Act the competences of the Ministry on paper are quite wide.<sup>158</sup> As regards the resources on 28 May 2008 it was announced that 18 million Soles<sup>159</sup> will be given to the Ministry

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<sup>150</sup> See for the following: Prensa Libre - Porque Crear Ministerio Medio Ambiente? (Part I + II): <http://www.youtube.com/watch?v=VFWPy9lvYmY&feature=related>; <http://www.youtube.com/watch?v=NWplQ0ldVwM&feature=related>.

<sup>151</sup> 'Schutz des Regenwalds: Südamerika könnte Millionen verdienen', Spiegel, 8 April 2008; Ebeling, J. & Yasué, M. (2008). *A far more complicated mechanism stands behind it but shall be fine for the purpose of this paper with this statement.*

<sup>152</sup> See 'UN Conference Divided over How to Protect Biodiversity'.

<sup>153</sup> See Art. 3.2.a of Act 1013.

<sup>154</sup> See Art. 7 h of Act 1013.

<sup>155</sup> See Art. 7 i of Act 1013.

<sup>156</sup> See e.g. Art. 7 of the legislative proposal for the establishment and the management of ACMs and ACRs.

<sup>157</sup> Also amended by Act 1039.

<sup>158</sup> Law Blog: 'Ministerio del Ambiente tiene pocas facultades sobre su sector', 2 July 2008; Act 1013 was amended by Act 1039.

<sup>159</sup> This equals 4.046.272,70 Euro, converted 26 July 2008.

by the Council of Ministers.<sup>160</sup> It took however several weeks until the money finally reached its destination, while the Minister already threatened to resign.<sup>161</sup> In the light that also CONAM, the ‘predecessor’, had 12 million at its disposal and considerably less personnel and competences, resource-wise the Ministry is not very well equipped.<sup>162</sup> Therefore it is a justified hope of the minister to have at least the double amount for next year. The fact that the first payment was delayed, however, casts a damning light on the starting phase.

## **(2) Lower Levels**

In Peru generally a strong decentralization strategy is followed.<sup>163</sup> As regards the working structure there shall be a well-organized coordination between the Ministry and the Regional Governments and Municipalities.<sup>164</sup> It is planned to establish Regional Commissions for Environmental Cooperation (‘Comisiones Regionales de Concertación Ambiental’). Among the functions of the Ministry it is laid down that it should support the Regional Governments and the Municipalities to enable them to successfully comply with the functions that were transferred to them in the context of decentralization.<sup>165</sup>

### **a) Regional Governments**

Peru’s 25 Regional Governments are in favor of the decentralization strategy.<sup>166</sup> At a meeting in 2007 – right after the Supreme Decree was passed – they initiated an Interregional Environment Network (Red Ambiental Interregional) to facilitate the exchange of best practices etc. among the Regional Governments. They mention that their units need further strengthening as regards capacities and that more macro-regional

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<sup>160</sup> Law Blog: ‘Darán S/.18 millones al Ministerio del Ambiente’, 28 May 2008; ‘Transfieren S/. 5 millones a Ministerio del Ambieten’, 27 June 2008.

<sup>161</sup> Law Blog: ‘Brack espera presupuesto’, 9 June 2008; ‘Brack se ‘irá a su casa’ si no le dan recursos’, 9 June 2008; ‘Darán ley para facilitar presupuesto a Brack’ 10 June 2008.

<sup>162</sup> Law Blog: ‘Brack, el Ministro sin ambiente’, 14 July 2008.

<sup>163</sup> Monteferri Siles (2007), p. 1.

<sup>164</sup> Law Blog: ‘Brack y titulares regionales se reunirán el 6 de Junio’, 23 May 2008; ‘Los transgénicos no son el camino’, 6 June 2008.

<sup>165</sup> See Art. 6.1.f of Act 1013.

<sup>166</sup> Declaración por la Gestión Ambiental Regional de Concepción (2007).

approaches should be followed (as it is done in some regions such as the Amazon). This is a cost-effective solution from the point of view of lacking capacities. On the other hand the danger of rather informal rules has to be aware of. If obligations are not formulated in a very detailed and clear way, it is unlikely for action to follow.

Another problem is that differences in the level of engagement of civil servants or mayors are prevalent.<sup>167</sup>

The Regional Governments already have some experience in the area of nature protection from administering the ACRs.

### **b) Municipalities**

In Peru there are, in total, 1838 Municipalities. Here, strong weaknesses in the capacities can be observed. Strong opposition to giving the decision-making in the hand of the Municipalities is advanced by SPDA.<sup>168</sup> As it was outlined, the Municipalities took arbitrary decisions in the past. Depending on how much discretion legal norms leave to them, this is likely to continue. Also do they not have sufficient resources. They might therefore not be prepared for a strong role as to the establishment and the management of ACMs. Currently it can already be observed that due to their lacking capacities personnel from the central level steps in to support them.<sup>169</sup>

### **(3) Population**

As regards the public participation in the decision-making process, the establishing act reads that public participation in the decision-making and the forming of a national environmental culture shall be promoted.<sup>170</sup> This is at such positive. However, as it was explained close contact in some situations rather facilitates than prevents corruption. More assumptions

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<sup>167</sup> See Interview with Anthony Brack Egg in 2008, Prensa Libre, Porqué crear un Ministerio del Medio Ambiente? (Part II): <http://www.youtube.com/watch?v=NWplQ0ldVwM&feature=related>, as of 28 July 2008.

<sup>168</sup> Morales Castillo (2007), p. 69.

<sup>169</sup> This is also required according to Art. 5.3.d of Act 1013.

<sup>170</sup> See Art. 7 o of Act 1013.

related to the concept of public participation in Peru shall however be made when analyzing the different aspects of the legislative proposal in the next part.

Another topic is the protection of the areas as such.<sup>171</sup> In analogy to ANPs where for 60 areas there are 250 forestal agents that do not even have the capacity to control 50 % of the areas, problems for ACMs and ACRs can be deducted.<sup>172</sup> The resource problem is rather severe as to this and even though vigilantes partly help out one is left with the impression that once effective law-making and administration in the public authorities is guaranteed, there will be more issues to come.<sup>173</sup>

Another problem of area-wide enforcement is that nobody knows the law.<sup>174</sup> Furthermore environmental law simply does not have an overall priority role as in many developing countries measures to fight poverty are on top of the agenda.<sup>175</sup> In the short-term it is therefore unlikely that the population can be involved to a large extent in the processes.

### **2.3.2. Shape of Legal Norms**

Structure-wise in Peru several of the weaknesses that are mentioned in the theoretical part are present. It shall be the starting point to see whether the given structures and particularities of the system are adequately considered in the shape of the legal norm that is to be analyzed.

#### **(1) Content of the proposal**

When looking at the actual proposal the following comments with regard to its style can be made:

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<sup>171</sup> This cannot be included in the thesis, however.

<sup>172</sup> Law Blog: 'Alfredo Palacios Dongo: Ministro del Ambiente y depredación de nuestros bosques', 26 May 2008.

<sup>173</sup> The term administration is used in a rather narrow sense, not including all possible enforcement efforts.

<sup>174</sup> Morales Castillo (2007), p. 14: It is estimated that 90% of the population in Peru does generally not know the laws.

<sup>175</sup> According to the National Statistical Institute (INEI), just under 50 per cent of the population continues to live in poverty, with the number rising to 70 per cent in rural areas. <http://www.younglives.org.uk/countries/peru>, as of 28 July 2008.

The objective of the proposal is the establishment and the management of ACM and ACR in the context of the current process of decentralization.<sup>176</sup>

In the management of the ACM and ACR the following actors shall be involved: the Regional Governments and the Municipalities, public entities at national and sectoral level, the private sector, the organized civil society and local settlers, native communities and farmers.<sup>177</sup>

The declared aim of these areas is to conserve representative samples of biodiversity at regional and local level.<sup>178</sup> Art. 3 takes the areas back under the system SINANPE.

In Art. 7 the general obligations of the Ministry of the Environment, executed by SERNANP, are laid out. As referred to above, for the Regional Governments, the Municipalities and the private owners of ACP the Ministry provides support and orientation. It is also empowered to carry out projects of capacity building for the Regional Governments, the Municipalities and civil society.<sup>179</sup> In a first step, according to Art. 9 every Regional Government is empowered by means of a Regional Order to establish a Regional Conservation System to implement its respective Regional Biodiversity Strategy, which regulates the interaction of protected areas, biodiversity issues and involvement of public and private institutions. Several consultative and two conflict solving bodies with different competences are established in Arts. 10, 11 and 19.

The most interesting part is Title 3 in which the establishment procedure for ACMs and ACRs is laid out. Some requirements are the same for both:<sup>180</sup> The territory has to be considered as a priority zone for conservation purposes in the Territorial Settlement Plan and once it is established in the Development Plans of the Regional Governments or the Municipalities. The area shall preferably be publicly owned. For territories privately owned, a special procedure shall be set up in a regulation to the Act. As a third

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<sup>176</sup> See Title 1, Art. 1 Legislative Proposal (LP) - for the text of the proposal see Appendix II. Please note that the proposal has been amended since the termination of this paper and that the consultation process is still ongoing. For some of the latest developments, please see Solano & Monteferrri (2009).

<sup>177</sup> See Art. 2 LP.

<sup>178</sup> See Art. 3 LP.

<sup>179</sup> See Part. I LP.

<sup>180</sup> See Art. 12 LP.

requirement a technical protocol has to be created to establish the area's contribution to the protection of biodiversity, based on the Terms of Reference to be approved by SERNANP.<sup>181</sup> The elements it has to entail, such as description of the landscape and the aim, the viability of the project and the identification of property right conflicts are laid down in Art. 13.

The details for the establishments of ACMs and ACRs are then divided in two paragraphs. The procedure for the setting up of the ACM shall be illustrated (and differences in setting up an ACR in Art. 14 be mentioned in brackets): According to Art. 15 the Regional Government has to adhere to the following structure: A technical protocol has to be formulated by the Municipality (here for ACRs it is the Regional Government). In that process public participation is required by the local population via consultation schemes and other mechanisms. Then the protocol is sent to the Regional Government for its approval (this step is, of course, missing for ACRs). Next the document is sent to SERNANP for its opinion and then a pre-version of the Regional Order is published in an Official Journal to circulate in the Region allowing for the filing of objections. The contributions and objections have to be evaluated. Then a Regional Order that establishes the ACM is approved upon a positive opinion from SERNANP. The ACM is registered at a National Register ('Superintendencia Nacional de Registros Públicos' (SUNARP)) and the final order is sent back to SERNANP for its register. Should the area cover several Municipalities, the mayors can present their proposal together. (The same is possible for territories covering various Regions.)

Art. 17 further lays down procedures regarding the administration of ACMs and ACRs. Generally ACRs are administered by the Regional Government and ACMs by the Municipality according to the corresponding Regional Order. According to Art. 17 III other actors can be involved in the management, via co-management mechanisms, 'involvement of the community'<sup>182</sup>, 'contracts of the administration'<sup>183</sup> and others to be established by law. At the discretion of the government it can be decided

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<sup>181</sup> See Art. 12.3 LP.

<sup>182</sup> In Spanish: mancomunidad.

<sup>183</sup> In Spanish: contratos de administración.

which other actors to be put in charge of the execution. In Art. 18 further mechanisms for the enacting of management instruments are laid down. Again public participation plays a role in the setting up of the Operational Plans of ACRs and ACMs. Master Plans are to be based on General Guidelines<sup>184</sup> and Terms of Reference set out by SERNANP. For ACRs and ACMs these measures have to be approved by the Regional Government. There is no role given to the Municipalities. Only less important, further internal planning and managing instruments are approved by the respective Regional Governments and Municipalities themselves.

Financing is organized in Art. 20. It is laid down that the costs for the establishment and the management of ACRs ad ACMs are to be included in the budgets of the respective Regional Governments or Municipalities, without prejudice to other financing possibilities.

In its last Article, Art. 21, the proposal considers the current situation. Supervision and sanctioning is generally carried out by the Regional Government or the Municipality based on the General Guidelines but they are authorized to empower citizens to take part in this process. This can, for example, happen in the form of the currently existing ‘rondas campesinas’.<sup>185</sup>

## **(2) Analysis**

### **a) Origin**

With regards to colonial powers’ influence, it can generally be said, e.g. in the case of property and contract law that the black letter law, the law-on-the-books, in Peru resembles the Spanish civil code. The written laws, however, are less effective in Peru than in Spain.<sup>186</sup>

To the content of the analysed legislative proposal there is no Western influence noticeable. Its content was developed by a working group with participants from the SPDA, representatives of Regional Governments and Municipalities and of the energy and mining sector on the initiative of

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<sup>184</sup> In Spanish: lineamientos generales.

<sup>185</sup> A ‘ronda campesina’ is an army set up by farmers.

<sup>186</sup> Cooter & Schäfer (2008), pp. 15.



Fabiola Morales, Member of Congress.<sup>187</sup> The gtz did provide money to contract a consultant; the content of the proposal is, however, based on the experiences of the participants.<sup>188</sup> Also as to the public hearings, both on the national and on regional level, the gtz is involved as to their organization, however not giving input as to the content. The Western support can in this context be positively judged as it secures a wide participation of many different groups in the hearings. The content is based on local conditions as it is the different involved actors that prepared the proposal. The importance of effective alliances during policy formulation and approval could be seen with regard to ineffective efforts of reforming the forestry law in Cameroon.<sup>189</sup> In that case it was the World Bank that allegedly did not consider the local situation. It has thus been adhered to the Law and Economics theory as regards the development of the content and it shall be seen in how far the shape of the legislative proposal can be approved comparing it to the hypotheses.

#### **b) Precision of Formulations**

As regards curing the disease of corruption, one generally finds strategies in Peru to involve the public and to check the decisions of the Municipalities or of the Regional Governments by a higher authority. When setting up the technical protocol the Regional Government is to approve the decision of the Municipality and both decisions are to be authorized by SERNANP.<sup>190</sup> There are thus some control measures involved, which mitigate the effects of external influences directly.

To go about the problem of missing capacities, it is interesting to note that SERNANP has the competence to promote capacity building in the regions. As the Act has not yet been passed, it is not possible to predict how SERNANP will make use of this competence and what the budget will look like. It expresses, however, the political will to improve the management of

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<sup>187</sup> Emailcontact Bruno Monteferri Siles, SPDA, 27 July 2008.

<sup>188</sup> Emailcontact Bruno Monteferri Siles, SPDA, 27 July 2008 and Lily Rodriguez, gtz-office, Moyobamba, Peru, 29 July 2008.

<sup>189</sup> A less successful example in which the strong influence of the World Bank led to legislation that was not doable with the weak public sector, particularly because the World Bank did not consider Cameroon's socio-political culture and adopted a top-down approach, is discussed in the following paper: Ekoko (2008), pp. 131-154.

<sup>190</sup> See Art. 14 .1 b and d and 15.1 b, c and d LP.

the regions and is at the same time proof that there is potential for improvement.

Does the Act fulfill the conditions for effective environmental law in developing countries under the current given circumstances, mainly being needing little human capital and being hardly corruptible by providing for simple routines and precise rules at high level?

The primary example given by *Schäfer* of a rule leaving hardly any discretion, being precise and simple to administer is if ‘at the birth of their child parents can only pick a name from a closed list’.<sup>191</sup> This extreme example is not the approach followed in the Peruvian legislative proposal at hand. The proposal is not independent, in that only its text would not be sufficient for establishing and administering ACMs and ACRs because partly details are given but to some extent also follow-up legislation is needed. As an example about the degree of precision the possibilities to solve conflicts shall be illustrated. In Art. 10 the Coordination Council of SINANPE<sup>192</sup> is mentioned as one of these institutions to help with conflicts in the establishment and management of ACRs and ACMs. It steps in if conflicts of Regional Governments or Municipalities with a national authority or if conflicts among Regional Governments or between various Municipalities of different Regions arise. In Art. 11 another body is introduced: The Council for Regional Coordination<sup>193</sup> is an additional consultative and conflict-solving body and provides for an interface between Regional Governments and Municipalities just as in case of the establishment of ACMs. With regard to the scope, conflicts among various Municipalities in the same Region are dealt with. The last body’s nature is also a consultative one. Details about its composition and decision-making process are summarized in six lines in Art. 11 I. According to Art. 11 III there is an instance where the Council can also give its opinion about ACRs, i.e. when the ACR (and also ACM) does not comply with the requirement expressed in Art. 12 I – to be designated a priority zone in an official plan. In the formulation of Art. 19, Art. 10 II and Art. 11 II are repeated, which does not lead to a very clear structure. While it is generally positive to have

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<sup>191</sup> Schäfer (2006), p. 114.

<sup>192</sup> Consejo de Coordinación del SINANPE.

<sup>193</sup> Consejo de Coordinación Regional.

the possibility to resort to many involved players in terms of capacity problems, the number of those involved in this case might be too high with also SERNANP having consultative powers<sup>194</sup> plus the Regional Governments for the Municipalities. This runs counter to the requirement of clear routines. It has to be feared that the empowerment of too many actors in similar or the same situations might lead to a reluctance of all to get involved in the end. Remembering the foregoing, the Regions additionally also established a network to exchange best practices. Another aspect where a variety of different terms can be found are the plans and strategies one has to set up and follow: Starting with the Biodiversity Strategy that the Region has to establish in its Regional System of Conservation (Art.9), it goes on with the mentioned preconditions in Art. 12. In the next step the technical protocol is needed. Furthermore different management devices are to be passed. The proposal in this regard lacks the requirement of precise and easy routines. Partly matters simply seem to be complicated. Particularly in rural areas in Peru, where there is only a minimum number of personnel this will be ineffective.<sup>195</sup> Having said that the possibility to adapt the follow-up legislation to the regional conditions is perfectly provided for.

Many details are given about the technical protocol that has to be established. This is positive, as it is the central document of the establishment process and a new instrument in the procedure. Several control mechanisms can be found. The Regional Governments and SERNANP have to approve decisions of the Municipalities and only SERNANP checks decisions of the Regional Governments. Furthermore public participation is provided for. Less details can be found as to administration and financing. This will have to be decided in every Region, which gives them the possibility to adapt it to its resources. It is positive that there is a link to the current 'lawless' times in Art. 21, where it comes to the participation of the individual in the process of controlling and sanctioning.

One could argue that too many details are given about the topic ANPs. Under Art. 7 quite some details about the management of ANPs are laid out

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<sup>194</sup> See e.g. Art. 7 LP.

<sup>195</sup> Emailcontact Bruno Monteferri Siles, SPDA, 27 July 2008.

even though the Act is meant to be for ACMs and ACRs only. In the light of the argument that there are already confusingly many different procedures and documents involved, this does not enhance the clarity and will influence the effectiveness. Also the entire Art. 8 is devoted to ANPs and Art. 10 I refers to them. One has to read very carefully and this might clash with the hypothesis of providing clear guidance and avoiding human capital-intensive procedures and structures in the Regions or Municipalities. While there are some dispensable details given, others – that would reduce discretion – are not included. The special procedure for territories that are not publicly owned (Art. 12 II) has to be provided for at a later stage. Another example are the different plans mentioned in Art. 18. Many decisions are left to the Regional Governments.

Arguing with *Schäfer* the cost-effectiveness of the proposal is not given in the way that it accumulates human capital at the central level. In regard to some aspects, there are indeed the same country-wide rules, which are set up at the central level, by SERNANP. General Guidelines and Terms of Reference are mentioned in Arts. 12 III, 18 and 21. Having said that the majority of follow up decisions is left to the Regional Governments or even, but to a lesser extent, the Municipalities (e.g. the Technical Protocol). Currently many of the Municipalities do not have the technical capacities and are supported by civil servants with national experience. Giving wide competences to the lower levels that they cannot fulfill could have a similar effect. It could end up being the Regional Governments, reformulating the Municipalities technical protocols, when they are sent to them for approval. Or most of the work could even end up at the last instance for approval: SERNANP. It is, however, said that the current involvement of personnel from a higher level has a negative effect in that it leads to the ‘guest personnel’ overcomplicating things for the small Regions.<sup>196</sup>

It is cost-effective to shield law-making and administration away from the Municipalities. Another recommendation would be to take some complexity out of the system and clarify the different strategies and competences of the involved actors more. Possibly the number of consultative actors should be narrowed down. More tribute should be paid to the principle of simple

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<sup>196</sup> Emailcontact Lily Rodriguez, gtz-office, Moyobamba, Peru, 29 July 2008.

procedures. The competences that are left for the Regions and Municipalities and the discretion that comes with it are generally also negative in terms of corruption. What is interesting to mention is that currently the sector is not the primary aim of corruption and lobbying strategies because a relatively low amount of money is involved in the business of protected areas.<sup>197</sup> Having said that several influences of the mining industry could be observed. For the time being the capacity issue is thus the slightly more severe problem. Having in mind developments on the international level, more money could however be invested in the future which will cause an increase in corruption and lobbying. The accountability mechanisms to higher government levels might turn out to increase effectiveness whenever corruption is an issue.<sup>198</sup>

As the proposal has not yet been passed, some unclear aspects might still be improved. To name some, on the one hand the proposal begins using the abbreviation ANP without defining it (see Art. 7 e). One can only assume that it stands for 'Áreas Naturales Protegidas' (i.e. the national protected areas). In Art. 11 the Council of Regional Coordination is introduced, however in 11 II the term Regional Council is used. It is probably referred to the same body but this should be made clear. The same is true for Art. 19 where Art. 10 II and 11 II are basically copy-pasted. Particularly as to Art. 19 II because the other paragraphs of Art. 11 are not repeated it is not obvious which body is referred to. Also in Art. 15 III – the procedure for the ACMs – it is referred to an Art. 2.1a that does not exist but it is probably meant to refer to Art. 12 I as this is the procedure for the ACRs.

## **2.4. Hypotheses confirmed?**

One can identify two of the contested Western strategies in the developments in Peru – Decentralization and Public Participation – that provide differently fruitful results.

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<sup>197</sup> Emailcontact Lily Rodriguez, gtz-office, Moyobamba, Peru, 29 July 2008.

<sup>198</sup> Cf. Art. 14 and 15 LP.

### 2.4.1. Centralization vs. Decentralization

First some conclusions shall be drawn on the questions of centralization and decentralization in regard to the present Act:

Looking at the level at which the Act is intended to be passed, one identifies Congress – thus the central level. This is positive in terms of an economic use of scarce human capital.

One can make a case for transboundary effects also in the case of protected areas, imagining that a legal regime will lead to e.g. the mining industry escaping to the neighboring region. From this point of view all rules that are country-wide aligned are effective. The same is true for the fact that protected areas can be administered by two Regions or Municipalities in which they are situated. Actually this might not even be enough. To ensure that international ‘leakage’, whereby forest conservation in one country drives deforestation in another, does not occur, even more cooperation – also between countries – has to be initiated in the long-run.<sup>199</sup> However international leakage is more likely to occur with regard to bigger national protected areas than with regional or municipal ones. The central level should therefore be effective for this case-scenario.

It is interesting to observe that Western states are going back to (re)centralization.<sup>200</sup> In the light of strengthening the central level one might also see the establishment of the Ministry of the Environment – having in mind Peru’s general focus on decentralization as to environmental issues. While it is optimal from a human capital perspective, some conclusions shall be drawn on whether in the light of the new stronger Ministry a focus on centralized decision-making can be effective, considering mainly the danger of lobbying and corruption. As regards these dangers, the political will to have a professional and not a political body is expressed and the question is thus how susceptible to corruption the new institution will be.<sup>201</sup> As regards the personnel, partly employees of CONAM and INRENA were

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<sup>199</sup> Mongabay.com, ‘Reducing deforestation rates 10% could generate \$13B in carbon trading under REDD’.

<sup>200</sup> Niessen (2006), p. 149.

<sup>201</sup> Law Blog: ‘Nuevo Ministerio ... debe ser profesional y no político’, 29 December 2008.

taken over.<sup>202</sup> They are hence already settled in their networks. To some extent new personnel will be employed, e.g. also the Minister and different Vice-ministers, whose status might increase their loyalty because they are unknown also in terms of ‘their degree of corruptibility’. Having said that it might be comparably easy to influence them because they are lacking experience. To draw firm conclusions, much depends on the recruitment process and thus the professional experience the people already have.

As *Faure* argues the danger of lobbying could be less strong, if the decision is taken far away from local lobbying groups. However, as regards the mining industry e.g., one could imagine that also on the central level they could form a strong lobby.<sup>203</sup> The big business plans the Ministry has for international aid etc. might contribute to reducing corruption because in order to attract foreign investors or to qualify for certain projects Peru<sup>204</sup> and thus also its Ministry of the Environment needs a ‘good’ reputation. In the light of this last aspect one can generally advocate centralized decision-making for environmental issues that concern nature conservation. Likewise however also Regional Governments could have an interest in presenting themselves as reliable business partners.

Apart from domestic issues, another aspect to consider is the influence of international lobbyism. Strong influences can emerge from abroad and as it is led by self-interests, it will often not be positive for Peru’s development. It is easier for international players to establish contacts with the central level than with Regional Governments. Should however negotiations take place with Regional Governments – which is less likely – they would possibly be particularly susceptible to influences because they might be less experienced in carrying out international negotiations and be in a weak bargaining position. At the central level the personnel has more experience with carrying out international business negotiations. This might be another argument in favor of centralizing of decision-making whenever experienced international players are involved. Having said that it would also be in the

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<sup>202</sup> Art. 18.2 of Act 1013.

<sup>203</sup> E.g. the national mining association SNMPE (Sociedad Nacional de Minería, Petróleo y Energía) see <http://www.snmpe.org.pe/revista/edicion07mar2004/especial.htm>.

<sup>204</sup> E.g. in order to be eligible for Clean Development Mechanisms (CDM) under the Kyoto protocol a developing country has to fulfill certain criteria as to its legal system.

interest of the Regional Governments to profit from international business to have more resources available.

It is thus not straightforward which institution is less susceptible to lobbying and corruption. The mining industry e.g. can presumably form a strong lobby on each level. If one takes it as a given fact that there are strong lobby groups at every level, another aspect, e.g. the human capital saving factor should be decisive for the choice of the level at which most of the law-making and administration should take place. For the sector at hand in Peru one would thus currently advocate an allocation of powers at the central level. This is, however, not followed with the current proposal and it shall be established whether there are economic reasons for it:

Having said that the Act will be passed on central level, its content stands in the light of Peru's ongoing decentralization process. Establishing ACRs and ACMs via a Supreme Decree as it used to be is said not to have been practicable. Several competences are left to the Regional Governments, such as Regional Orders, Master plans, Operational Plans, technical protocol, Regional Conservation Systems and some even to the Municipalities (technical protocol). The question is whether this focus on regional autonomy has come to too early and drastically.<sup>205</sup> It will be established whether this sector can fruitfully be decentralized as for many environmental problems there are no one-size fits all approaches. Remembering the assumptions in the theoretical part, in countries with certain conditions, e.g. huge size, one will in any case need the support of the local level for the administration (even if law-making can be shifted to the central level). This seems to be the case in Peru's system of protected areas. Positive aspects of decentralization are that the decision maker is close to the local problem and that it could speed up decision-making processes if the central authority is not involved in every decision. In the sector at hand, decentral decisions are e.g. effective in that local governments have better knowledge about indigenous communities and their needs. One of the mayors remembers a recent incident where a group of foreign investors came to his region and had gotten the permission to

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<sup>205</sup> Niessen (2006), p. 143.



invest in ethanol from the central government that did simply not know that the zone belonged to a local community.<sup>206</sup> In a country with the size of Peru the central government cannot have the overview over the local realities. Examples of this kind might indeed support the process of decentralization because it is the closest politics can get to the people. Another positive aspect of decentralization as regards environmental law becomes clear in the context of monitoring.<sup>207</sup> If this is to be done from Lima over the entire country – by the time e.g. a delegation arrives in the Region the information about their control visit has probably leaked and no violations will be detectable. This could be handled more rigorously from the regions.

Remembering *Faure* the optimal solution would be to find a way to adopt environmental legal norms to the local conditions while reducing the risk of capture by the local industry as far as possible. The approach at hand seems to fit quite well with this hypothesis. Currently the advantage of the sector is that corruption issues are still not that strong, which facilitates advocating some decentralization efforts. Furthermore while lower levels have several competences, also many control mechanisms can be found. This is a direct measure to fight corruption that could occur with the discretion that is left in setting up plans or empowering other players. The control mechanisms can be welcomed, still at least some of the Municipalities will resource-wise be overstrained with all the provisions they have to adhere to and the provisions they will have to pass and then apply. As the proposal shows however, generally, Municipalities are disburdened and the competences are given to the Regional Governments which is the cost-effective decision comparing the realities in the Regional Governments and the Municipalities.<sup>208</sup>

#### **2.4.2. Public Participation**

The second typical Western instrument that is made use of in Peru is public participation. It is mentioned in various parts of the legislative proposal (e.g. Art. 15 I a and d, 14 a and c, 18 II). In contrast to – for example the

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<sup>206</sup> Morales Castillo (2007), p. 12.

<sup>207</sup> Morales Castillo (2007), p. 18.

<sup>208</sup> See e.g. Art. 18 LP.

formulations in the Aarhus convention<sup>209</sup> – detailed rules for public participation, e.g. the kind of information that has to be automatically provided and how the results of a public participation have to be incorporated, are not given. Neither can any exact respites or deadlines be found. ‘The contributions and criticism have to be evaluated’, is all that is says about public participation aspects as to the technical protocol. The details are not laid down in this Act, neither in other legislation.<sup>210</sup> The country has however some experience with involvement of the public from managing ANPs. To a certain extent there is thus a participatory culture.<sup>211</sup> SPDA, however, admits that if the decision is already taken, public participation will not change the outcome. The danger of having public involvement in societies that are not yet ready for it, is, as outlined in the theoretical part, a factor facilitating corruption and naturally slowing down the process. Furthermore public participation provisions, same as EIA or decentralization are usually deemed to fail because they require a high degree of administrative capacity.<sup>212</sup> While the benefit in terms of improved information flows, better transparency, greater accountability<sup>213</sup>, access to public officials are obvious, public participation has to be carried out according to strict rules and sidelined by transparency strategies.<sup>214</sup> One can think of meetings being placed on an official record. This however might be too costly for developing countries. If no details are provided and no resources designated to it, instead of the public as such at a maximum some privileged groups might be reached as an African example shows.<sup>215</sup> In South Africa in 1995 a Development Facilitation Act was introduced that also provided for the possibility of public participation. In the end, however, it was difficult to include the previously disadvantaged groups of people and only white people participated. The gap as regards knowledge and resources could not be overcome. It is unlikely that in Peru the broad public can be reached also if one remembers how scarcely disseminated the knowledge

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<sup>209</sup> See Art. 6-8, accessible at <http://www.unece.org/env/pp/documents/cep43e.pdf>.

<sup>210</sup> Emailcontact Lily Rodriguez, gtz-office, Moyobamba, Peru, 29 July 2008.

<sup>211</sup> Emailcontact Bruno Monteferri Siles, SPDA, 27 July 2008.

<sup>212</sup> Faure (2008), p. 738.

<sup>213</sup> See more detailed Mehta (2006), pp. 141-156. He furthermore argues that public awareness and civic actions is the only long-term solution.

<sup>214</sup> Ogus (2008), p. 158.

<sup>215</sup> Rigby & Diab (2003), p. 33.

about laws is. On the other hand a participation of some could also be a positive result. Under the given circumstances one would advise Peru rather to guarantee a sound administration of the ACRs and ACMs and not to invest the few resources it has in public participation mechanisms that provide little results. Another stage where public participation was an issue is the law-making process of this legislative proposal. As outlined above the public hearings have been very effective. Involvement of the public is indeed costly, the hearings, targeted at the main actors, however provided fruitful results not least because the gtz supported the process financially and organizationally.

### **2.4.3. Summary**

Summarizing, for improvements as to the clear routines and clear allocation of tasks referral can be made to the recommendations formulated above. It can be said that it is in line with the hypothesis that the norm is developed at a central level. The gaps it leaves to be filled by the Regional Governments are at first sight not optimal in terms of a human capital saving strategy and the reduction of corruptibility. The procedures are not kept simple, they are, however, not extensively detailed either. A lot of follow-up legislation has to be passed on central and on regional level. Having said that, the weakest part of the governance, the Municipalities, are not provided with many competences which is cost-effective. At hand Peru opted for an, in *Schäfer's* terms, intermediate solution, providing for some discretion and some precision. It can mainly be explained with the fact that in the given sector lower levels of governance are indispensable for administrative tasks. Having looked carefully at the sector, it can be regarded as a cost-effective decision to decentralize, particularly looking at the different specificities of the regions and the size of the country. This is also true because corruption is currently not so much an issue in this context. Furthermore it also seems to make sense to start with the people because educating and involving them can help to cure capacity deficits in the Regions. The dilemma is that human capital-wise there are huge varieties among the different Regions and

Municipalities.<sup>216</sup> Therefore it can be costly to advocate decentralization generally. On the other hand it was said that personnel of the central authority can step in, which is however seen in a critical light. As to the discretion that is left the checks and balances in form of approvals that will be introduced are a positive counterpart. Taken together this might keep capture to a minimum, while for this sector important local information are received which comes very close to *Faure's* optimal way. The issue of missing human capital should, however, not be underestimated. In the case of Indonesia, for example, as most districts and municipalities were not yet ready to deal with their new responsibilities in the case of environmental management due to a lack of legal and technical expertise, the decentralization led to various negative results.<sup>217</sup> Apart from personnel of the central level stepping in, however, also *Braithwaite's* model for the inclusion of other actors seems to have been followed to a certain extent. Looking at the legislative proposal there are several instances where – apart from the involvement of the public – other actors can be involved. In Art. 2 several actors are mentioned; also the Regions can empower other institutions. The official policy is called ‘Cogestión’ (co-management), which means that not only the local governments but also their populations share responsibility.<sup>218</sup> In Moyobamba – one of Peru's Regions –, for example, the gtz or the ‘Proyecto Especial Alto Mayo’<sup>219</sup> and the Regional Government are building an alliance to manage the issues occurring in relation to protected areas.<sup>220</sup> In order to mitigate the effects of lacking human capital, this is a cost-effective decision.

Should the proposal be passed as it stands now Peru's strategy as to the establishment and management of municipal and regional protected areas can be judged as rather cost-effective although several issues – particularly as regards clarifying the procedures – can still be improved. Acknowledging that the lower levels are heavily burdened and thus capacity issues might

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<sup>216</sup> Emailcontact Bruno Monteferri Siles, SPDA, 27 July 2008.

<sup>217</sup> Niessen (2006), p. 166.

<sup>218</sup> Morales Castillo (2007), p. 35.

<sup>219</sup> It is a decentralized public authority to support the development of the Region San Martín, for more information see: <http://www.peam.gob.pe/>, as of 28 July 2008.

<sup>220</sup> Morales Castillo (2007), p. 73.

occur, the application of a decentralization theory can be approved for this sector in Peru. The envisaged public consultation provisions lack precision and do therefore probably not further the effectiveness of this proposal. While it is a very promising approach to accept structures in a developing country as they are, it seems to be cost-effective to include some minor instruments that ensure e.g. accountability to sideline the concept by some direct measures to fight corruption as Peru's example shows. As a closing remark it shall be pointed out that for the purpose of this paper I looked at the proposal in a very critical way. Comparing this Act to the situation that was in the country before there would be clear improvements.

### **III. Conclusion**

A first issue that shall generally be expressed is that this paper seems to claim that corruption, lobbying and resource problems are only an issue in developing countries. This is, of course, far from true. Also developed states struggle with many of these issues.

The concluding words shall thus be generally devoted to some suggestions deriving from the case study as to improving law-making and administration by mitigating corruption and lobbying in a cost effective way:

When looking for the most effective way to pass and manage environmental legislation in Peru, what comes to mind is that there is a new Ministry of the Environment. While it is undisputed that this is a clear improvement for providing an effective counterpart to other Ministries and thus interests, some assumptions were made about corruption and lobbying and no clear statement could be formulated on whether due to this development a focus on centralized or decentralized decision-making should be advocated.

For the following conclusion it shall be assumed that there are two levels at which external influences occur: the central level and the decentral level. Furthermore suppose that presumably the same interest groups will try to influence law-making or administrative decisions at the different levels. While at the central level mainly legislative procedures take place, the focus of administration/execution is more likely to be at the lower level. The main consideration for the following reasoning shall be that it is more cost-effective to try to mitigate capture at the central level. Why is that so? In order to have hardly corruptible structures at lower levels detailed legislation that does not leave a high degree of discretion has to be passed – i.e. effective laws. However as the paper outlined, strong unregulated lobby influences that take place at the central level can inhibit effective legislation. One can imagine various reasons why detailed legislation in favor of the environment will not be in the interest of strong lobby groups. If one lets lobby groups act in an unregulated way at this stage, it becomes thus very unlikely that detailed legislation will be passed. For the purpose of this simple model it can be formulated in a more drastical way: If lobby groups act at central level in an uncontrolled way, detailed legislation will never be

the result of the law-making process. If the lobby is strong at both levels, the more cost-effective starting point to mitigate external effects is thus the central level because then there is a 'chance' to achieve effective laws (detailed laws), the consideration behind it being that once an act is passed and leaving a wide margin, it will be more difficult to curtail corruption at lower levels. If only external influences at the local level will be reduced, the probability that corruption friendly legislation will be passed is much higher. It is thus effective to invest in securing the enactment of detailed legislation free from opportunistic behavior at the central level.

Having established that the central level should be the starting point for action, an optimal solution would be to find a resource saving strategy to mitigate the effects of lobbying at the central stage. When giving an example as to how such a strategy could look like, the Peruvian case is interesting. The legislative proposal originated out of a series of meetings of working groups and public hearings at central and regional level. In those meetings all the affected actors were present and the result can thus be called a compromise. When analyzing the proposal, it was concluded that it does not perfectly adhere to the hypotheses on the precision of the formulations, mainly because of the gaps it leaves to be filled by the Regional Governments. However many of the deviances could be explained with the fact that there are very valuable arguments in favor of advocating decentralization for this sector and a still quite low degree of corruption. It is thus a rather detailed and effective outcome.

It is fair to assume that having a compromise should reduce the level that a Member of Parliament is then subject to lobbying/corruption, if all parties have actually before the proposal comes to Parliament, already agreed upon it. One can e.g. imagine that a Member of Parliament would be more cautious in deviating from a compromise with his vote. Also is more control given about the different interests that are present. Referring back to the theoretical part of the paper consultation mechanisms are of a doubtful value for developing countries in terms of direct contact to facilitate corruption. However, these dangers can be mitigated by providing for transparent structures. Establishing these structures is a costly process, but obviously e.g. the gtz in Peru is involved, willing and authorized to provide money for

the execution of these consultation schemes. Due to the reasoning above it is thus cost-effective to invest the little resources that there are at this stage – involving the different actors in drafting a compromise before the decision in the Parliament is taken – to increase the probability to have detailed legislation which, in turn, economizes the conditions to be found at lower government levels.

In short: An increase of the effectiveness of the shape of environmental legislation can be reached via mitigating disturbing effects of lobbying and corruption at the central stage by providing for an *ex ante* consultation scheme that leads to a compromise which reduces the occurrence of lobbying later on.

Having said that once there is money to invest in capacity building and to fight corruption a new strategy might be more cost-effective, e.g. to regulate lobby groups at the central level.

Limits to this theory are that the involvement of many actors will automatically decrease the amount of predictability of the outcome as to the legislative proposal and possibly less details will be agreed upon. Another drawback will be that incidents at the Parliament in relation to lobby groups will to a certain extent always remain unpredictable.

For the present proposal answers as to the severity of the lobby influence at central level will be given in December when the enacting of the Act by Congress is expected.<sup>221</sup> The probability that few changes will be made is quite high, as the proposal is a compromise and the sector ‘nature conservation’ is currently not very attractive because of its low profitability. With the international developments, that have been referred to, more money will circulate and thus corruption will automatically increase. A lesson to be learned is thus that passing an effective shape of environmental legislation is also a question of the right timing – rather now than once the sector is profitable and therefore more endangered by lobbying and corruption.

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<sup>221</sup> Remark May 2009: This paper was finalized in August 2008. In the meantime the consultation period has been prolonged.



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## **V. Appendix**

### **1. DECRETO LEGISLATIVO N° 1013**

**EL PRESIDENTE DE LA REPÚBLICA**

**POR CUANTO:**

El Congreso de la República, por Ley N° 29157 y de conformidad con el artículo 104 de la Constitución Política del Perú, ha delegado en el Poder Ejecutivo la facultad de legislar sobre materias específicas, con la finalidad de facilitar la implementación del Acuerdo de Promoción Comercial Perú - Estados Unidos y su Protocolo de Enmienda y materializar el apoyo a la competitividad económica para el aprovechamiento del Acuerdo, siendo una de las materias el fortalecimiento institucional de la gestión ambiental;

La gestión ambiental en el país y la estructura organizacional para ese fin tienen serias limitaciones que dificultan una respuesta eficiente a los desafíos ambientales en un mundo cada vez más globalizado, por lo que la dispersión y la escasa integración y coordinación son problemas que deben resolverse en beneficio de la gestión ambiental, la que debe velar por el buen uso de los recursos y revertir los procesos de deterioro ambiental;

Por tanto, se requiere de una institución con el nivel jerárquico de un Ministerio, con las prerrogativas establecidas por la Ley N° 29158, Ley Orgánica del Poder Ejecutivo; Con el voto aprobatorio del Consejo de Ministros y con cargo a dar cuenta al Congreso de la República;

Ha dado el siguiente Decreto Legislativo:

### **DECRETO LEGISLATIVO QUE APRUEBA LA LEY DE CREACIÓN, ORGANIZACIÓN Y FUNCIONES DEL MINISTERIO DEL AMBIENTE**

#### **TÍTULO I**

#### **DISPOSICIONES GENERALES**

##### **Artículo 1.- Finalidad de la ley**

La presente ley crea el Ministerio del Ambiente, establece su ámbito de competencia sectorial y regula su estructura orgánica y sus funciones.

##### **Artículo 2.- Creación y naturaleza jurídica del Ministerio del Ambiente**

2.1 Créase el Ministerio del Ambiente como organismo del Poder Ejecutivo, cuya función general es diseñar, establecer, ejecutar y supervisar la política nacional y sectorial ambiental, asumiendo la rectoría con respecto a ella.

2.2 El Ministerio del Ambiente es una persona jurídica de derecho público y constituye un pliego presupuestal.

##### **Artículo 3.- Objeto y objetivos específicos del Ministerio del Ambiente**

3.1 El objeto del Ministerio del Ambiente es la conservación del ambiente, de modo tal que se propicie y asegure el uso sostenible, responsable, racional y ético de los recursos naturales y del medio que los sustenta, que permita contribuir al desarrollo integral social, económico y cultural de la persona humana, en permanente armonía con su entorno, y así asegurar a las presentes y futuras generaciones el derecho a gozar de un ambiente equilibrado y adecuado para el desarrollo de la vida.

3.2 Son objetivos específicos del Ministerio del Ambiente:

- a) Asegurar el cumplimiento del mandato constitucional sobre la conservación y el uso sostenible de los recursos naturales, la diversidad biológica y las áreas naturales protegidas y el desarrollo sostenible de la Amazonía.
- b) Asegurar la prevención de la degradación del ambiente y de los recursos naturales y revertir los procesos negativos que los afectan.
- c) Promover la participación ciudadana en los procesos de toma de decisiones para el desarrollo sostenible.
- d) Contribuir a la competitividad del país a través de un desempeño ambiental eficiente.
- e) Incorporar los principios de desarrollo sostenible en las políticas y programas nacionales.
- f) Los objetivos de sus organismos públicos adscritos, definidos por las respectivas normas de creación y otras complementarias.

## **TÍTULO II COMPETENCIA Y FUNCIONES CAPÍTULO I COMPETENCIAS**

### **Artículo 4.- Ámbito de competencia del Ministerio del Ambiente**

4.1 El Ministerio del Ambiente es el organismo del Poder Ejecutivo rector del sector ambiental, que desarrolla, dirige, supervisa y ejecuta la política nacional del ambiente. Asimismo, cumple la función de promover la conservación y el uso sostenible de los recursos naturales, la diversidad biológica y las áreas naturales protegidas.

4.2 La actividad del Ministerio del Ambiente comprende las acciones técnico-normativas de alcance nacional en materia de regulación ambiental, entendiéndose como tal el establecimiento de la política, la normatividad específica, la fiscalización, el control y la potestad sancionadora por el incumplimiento de las normas ambientales en el ámbito de su competencia, la misma que puede ser ejercida a través de sus organismos públicos correspondientes.

### **Artículo 5.- Sector ambiental**

5.1 El sector ambiental comprende el Sistema Nacional de Gestión Ambiental como sistema funcional, el que integra al Sistema Nacional de Evaluación de Impacto Ambiental, al Sistema Nacional de Información Ambiental y al Sistema Nacional de Áreas Naturales Protegidas por el Estado; así como la gestión de los recursos naturales, en el ámbito de su competencia, de la biodiversidad, del cambio climático, del manejo de los suelos y de los demás ámbitos temáticos que se establecen por ley.

5.2 El sector ambiental está integrado por el Ministerio del Ambiente y las entidades de su ámbito orgánico.

## **CAPÍTULO II FUNCIONES**

### **Artículo 6.- Funciones generales**

Son funciones generales del Ministerio del Ambiente:

6.1 Funciones rectoras:

- a) Formular, planificar, dirigir, coordinar, ejecutar, supervisar y evaluar la política nacional del ambiente aplicable a todos los niveles de gobierno.
- b) Garantizar el cumplimiento de las normas ambientales, realizando funciones de fiscalización, supervisión, evaluación y control, así como ejercer la potestad

sancionadora en materia de su competencia y dirigir el régimen de fiscalización y control ambiental y el régimen de incentivos previsto por la Ley N° 28611, Ley General del Ambiente.

- c) Coordinar la implementación de la política nacional ambiental con los sectores, los gobiernos regionales y los gobiernos locales.
- d) Prestar apoyo técnico a los gobiernos regionales y locales para el adecuado cumplimiento de las funciones transferidas en el marco de la descentralización.
- e) Las demás que señala la ley.

6.2 Funciones técnico-normativas:

- a) Aprobar las disposiciones normativas de su competencia.
- b) Coordinar la defensa judicial de las entidades de su sector.
- c) Promover y suscribir convenios de colaboración interinstitucional a nivel nacional e internacional, de acuerdo a ley.
- d) Resolver los recursos impugnativos interpuestos contra las resoluciones y los actos administrativos relacionados con sus competencias, así como promover la solución de conflictos ambientales a través de los mecanismos extrajudiciales de resolución de conflictos, constituyéndose en la instancia previa obligatoria al órgano jurisdiccional en materia ambiental.
- e) Formular y aprobar planes, programas y proyectos en el ámbito de su sector.
- f) Las demás que señala la ley.

### **Artículo 7.- Funciones Específicas**

El Ministerio del Ambiente cumple las siguientes funciones específicamente vinculadas al ejercicio de sus competencias:

- a) Formular, aprobar, coordinar, supervisar, ejecutar y evaluar el Plan Nacional de Acción Ambiental y la Agenda Nacional de Acción Ambiental.
- b) Dirigir el Sistema Nacional de Gestión Ambiental.
- c) Establecer la política, los criterios, las herramientas y los procedimientos de carácter general para el ordenamiento territorial nacional, en coordinación con las entidades correspondientes, y conducir su proceso.
- d) Elaborar los Estándares de Calidad Ambiental (ECA) y Límites Máximos Permisibles (LMP), de acuerdo con los planes respectivos. Deben contar con la opinión del sector correspondiente y ser aprobados mediante decreto supremo.
- e) Aprobar los lineamientos, las metodologías, los procesos y los planes para la aplicación de los Estándares de Calidad Ambiental (ECA) y Límites Máximos Permisibles (LMP) en los diversos niveles de gobierno.
- f) Dirigir el Sistema Nacional de Evaluación de Impacto Ambiental y el Sistema Nacional de Información Ambiental.
- g) Establecer los criterios y procedimientos para la formulación, coordinación y ejecución de los planes de descontaminación y recuperación de ambientes degradados.
- h) Dirigir el Sistema Nacional de Áreas Naturales Protegidas por el Estado - SINANPE – de carácter nacional.
- i) Evaluar las propuestas de establecimiento o modificación de áreas naturales protegidas y proponerlas al Consejo de Ministros para su aprobación.
- j) Implementar los acuerdos ambientales internacionales y presidir las respectivas comisiones nacionales.
- k) Promover y coordinar la adecuada gestión de residuos sólidos, la protección de la calidad del aire y el control del ruido y de las radiaciones no ionizantes y sancionar su incumplimiento.
- l) Supervisar el funcionamiento de los organismos públicos adscritos al sector y garantizar que su actuación se enmarque dentro de los objetivos de la política nacional ambiental.
- m) Formular y proponer la política y las estrategias nacionales de gestión de los recursos naturales y de la diversidad biológica.
- n) Promover la investigación científica, la innovación tecnológica y la información en materia ambiental, así como el desarrollo y uso de tecnologías, prácticas y procesos de producción, comercialización y consumo limpios.
- o) Promover la participación ciudadana en los procesos de toma de decisiones para el desarrollo sostenible y fomentar una cultura ambiental nacional.

- p) Elaborar el informe sobre el estado del ambiente y la valoración del patrimonio natural de la Nación.
- q) Ejercer la potestad sancionadora en el ámbito de sus competencias, aplicando las sanciones de amonestación, multa, comiso, inmovilización, clausura o suspensión por las infracciones a la legislación ambiental y de acuerdo al procedimiento que se debe aprobar para tal efecto, ejerciendo la potestad de ejecución coactiva en los casos que corresponde.
- r) Las funciones de sus organismos públicos adscritos, definidos por las respectivas normas de creación y otras complementarias.

### **TÍTULO III**

#### **ORGANIZACIÓN DEL MINISTERIO**

##### **Artículo 8.- Estructura orgánica del Ministerio del Ambiente**

- 8.1 La estructura orgánica del Ministerio del Ambiente se conforma según lo establecido por el artículo 24 de la Ley N° 29158, Ley Orgánica del Poder Ejecutivo.
- 8.2 Los órganos que conforman la estructura orgánica del Ministerio del Ambiente, así como sus funciones, se regulan por el Reglamento de Organización y Funciones del Ministerio del Ambiente.
- 8.3 La presente ley regula la estructura orgánica básica del Ministerio del Ambiente.

##### **Artículo 9.- Estructura orgánica básica del Ministerio de Ambiente**

- 9.1 El Ministerio del Ambiente tiene la siguiente estructura básica:

###### **ALTA DIRECCIÓN**

- 1. Despacho Ministerial
- 2. Viceministerio de Desarrollo Estratégico de los Recursos Naturales
- 3. Viceministerio de Gestión Ambiental
- 4. Secretaría General
- 5. Comisión Multisectorial Ambiental
- 6. Comisión Consultiva Ambiental
- 7. Tribunal de Solución de Controversias Ambientales

- 9.2 La Alta Dirección cuenta con un gabinete de asesoramiento especializado para la conducción estratégica de las políticas a su cargo y para la coordinación con el Congreso de la República.

- 9.3 Las funciones y la estructura de la Secretaría General y de los órganos de defensa judicial, de control institucional, de administración interna y de línea se desarrollan en el respectivo Reglamento de Organización y Funciones del Ministerio del Ambiente.

##### **Artículo 10.- Despacho Ministerial**

El Ministro, como titular del sector y de su respectivo pliego presupuestal, tiene las siguientes funciones:

- a) Dirigir el proceso de planeamiento estratégico sectorial y determinar los objetivos sectoriales funcionales nacionales aplicables a todos los niveles de gobierno, en el marco del Sistema Nacional de Planeamiento Estratégico, así como aprobar los planes de actuación y asignar los recursos necesarios para su ejecución, dentro de los límites de las asignaciones presupuestarias correspondientes.
- b) Dirigir y supervisar las acciones de los organismos públicos bajo su competencia.
- c) Determinar y, en su caso, proponer la organización interna del Ministerio, de acuerdo con las competencias que le atribuye esta ley.
- d) Aprobar, dirigir y evaluar las políticas y los planes de gestión del Ministerio y ejercer el control sobre la gestión.
- e) Designar y remover a los titulares de los cargos de confianza del Ministerio, de los organismos públicos adscritos y de otras entidades del sector, cuando dicha



competencia no está expresamente atribuida al Consejo de Ministros, a otra autoridad o al Presidente de la República y elevar a éste las propuestas de nombramiento cuando corresponde.

- f) Mantener las relaciones con los gobiernos regionales y locales y convocar a reuniones sectoriales en el ámbito de las competencias atribuidas a su sector.
- g) Refrendar los actos presidenciales que corresponden a su sector.
- h) Las demás que la Constitución Política del Perú, las leyes y el Presidente de la República le asignen.

#### **Artículo 11.- Funciones del Viceministerio de Desarrollo Estratégico de los Recursos Naturales**

El Viceministerio de Desarrollo Estratégico de los Recursos Naturales tiene las siguientes funciones:

- a) Diseñar la política y estrategia nacional de gestión integrada de recursos naturales y supervisar su implementación.
- b) Diseñar la política y estrategia nacional de gestión integrada de las áreas naturales protegidas por el Estado y supervisar su implementación.
- c) Elaborar y coordinar la estrategia nacional de diversidad biológica del Perú y su desarrollo estratégico, así como supervisar su implementación.
- d) Elaborar y coordinar la estrategia nacional frente al cambio climático y las medidas de adaptación y mitigación, así como supervisar su implementación.
- e) Elaborar y coordinar la estrategia nacional de lucha contra la desertificación y la sequía, así como supervisar su implementación en coordinación con los sectores competentes.
- f) Expedir las resoluciones viceministeriales que le competen, así como coordinar la elaboración y el cumplimiento de la normatividad ambiental, en el ámbito de su competencia.
- g) Elaborar el inventario y establecer mecanismos para valorizar, retribuir y mantener la provisión de los servicios ambientales, así como promover el financiamiento, el pago y la supervisión de los mismos.
- h) Las demás que señala la ley o le delega el Ministro.

#### **Artículo 12. - Funciones del Viceministerio de Gestión Ambiental**

El Viceministerio de Gestión Ambiental tiene las siguientes funciones:

- a) Diseñar y coordinar la política, el plan y la estrategia de gestión ambiental, así como supervisar su implementación.
- b) Expedir resoluciones viceministeriales, así como coordinar la elaboración y el cumplimiento de la normatividad ambiental, en el ámbito de su competencia.
- c) Elaborar el Plan de Estándares de Calidad Ambiental (ECA) y Límites Máximos Permisibles (LMP) respectivos, que deben contar con la opinión del sector correspondiente y ser aprobados por decreto supremo.
- d) Aprobar los lineamientos, las metodologías, los procesos y los planes para la aplicación de los Estándares de Calidad Ambiental (ECA) y Límites Máximos Permisibles (LMP), que deben ser aplicados por las entidades públicas en el ámbito de sus competencias.
- e) Promover y difundir tecnologías ambientales innovadoras, desarrollar capacidades y fomentar las ciencias ambientales.
- f) Coordinar, fomentar y promover la educación, la cultura y la ciudadanía ambiental.
- g) Diseñar, aprobar y supervisar la aplicación de los instrumentos de prevención, de control y de rehabilitación ambiental relacionados con los residuos sólidos y peligrosos, el control y reuso de los efluentes líquidos, la calidad del aire, las sustancias tóxicas y peligrosas y el saneamiento, con el objetivo de garantizar una óptima calidad ambiental.
- h) Dirigir el Sistema Nacional de Información Ambiental (SINIA).
- i) Coordinar, preparar y difundir los informes sobre la situación del ambiente.
- j) Coordinar el manejo de los asuntos socio-ambientales con los gobiernos regionales y locales, de acuerdo con la Ley N° 27783, Ley de Bases de la Descentralización y demás normas relacionadas.
- k) Las demás que señala la ley o le delega el Ministro.

### **Artículo 13.- Tribunal de Solución de Controversias Ambientales**

13.1 El Tribunal de Solución de Controversias Ambientales es el órgano encargado de resolver los conflictos de competencia en materia ambiental y la última instancia administrativa respecto de los procedimientos administrativos que se precisan en el reglamento de la presente ley. Asimismo, es competente para resolver conflictos en materia ambiental a través de la conciliación u otros mecanismos de solución de controversias extrajudiciales, constituyéndose en la instancia previa extrajudicial de carácter obligatorio antes de iniciar una acción judicial en materia ambiental.

13.2 Las funciones y la organización del Tribunal de Solución de Controversias Ambientales se rigen por lo establecido en la Ley N° 28245, Ley Marco del Sistema de Gestión Ambiental y demás normas pertinentes.

### **Artículo 14.- Comisión Multisectorial Ambiental**

La Comisión Multisectorial Ambiental es el órgano encargado de coordinar y concertar a nivel técnico los asuntos de carácter ambiental entre los sectores. Su composición y sus funciones se rigen por las disposiciones aplicables a la Comisión Ambiental Transectorial, regulada por la Ley N° 28245, Ley Marco del Sistema de Gestión Ambiental y demás normas pertinentes.

### **Artículo 15.- Comisión Consultiva Ambiental**

La Comisión Consultiva Ambiental es un órgano de carácter permanente del Ministerio del Ambiente. Su función es promover el diálogo y la concertación en asuntos ambientales entre el Estado y la sociedad. Su conformación, forma de designación y número de miembros, así como su funcionamiento, son establecidos por el reglamento correspondiente.

## **TÍTULO IV COORDINACIÓN Y ARTICULACIÓN INTERINSTITUCIONAL**

### **Artículo 16.- Cooperación del Instituto del Mar del Perú – IMARPE**

El Instituto del Mar del Perú - IMARPE - mantiene una estrecha colaboración con el Ministerio del Ambiente y debe proporcionarle información sobre los recursos hidrobiológicos, según el reglamento de la presente ley.

### **Artículo 17.- Coordinación con las Comisiones Ambientales Regionales - CAR - y las Comisiones Ambientales Municipales – CAM**

17.1 Los gobiernos regionales y locales aprueban la creación, el ámbito, la composición y las funciones de las Comisiones Ambientales Regionales - CAR - y de las Comisiones Ambientales Municipales - CAM -, respectivamente.

17.2 El Ministerio del Ambiente apoya el cumplimiento de los objetivos de las CAR y de las CAM, en el marco de la política ambiental nacional, manteniendo estrecha coordinación con ellas.

### **Artículo 18.- Relación con el Instituto de Investigaciones de la Amazonía Peruana - IIAP**

El Instituto de Investigaciones de la Amazonía Peruana - IIAP - es un organismo público ejecutor con personería de derecho público interno adscrito al Ministerio del Ambiente. Se relaciona con el gobierno nacional a través del Ministerio del Ambiente y directamente con los gobiernos regionales de su ámbito.

## **TÍTULO V RÉGIMEN ECONOMICO Y FINANCIERO**

## **Artículo 19.- Régimen económico y financiero del Ministerio del Ambiente**

Los recursos del Ministerio del Ambiente están constituidos por:

- a) Aquellos asignados por la Ley Anual de Presupuesto del Sector Público; y
- b) Los demás que se le asignan conforme a ley.

### **DISPOSICIONES COMPLEMENTARIAS TRANSITORIAS**

#### **PRIMERA DISPOSICIÓN COMPLEMENTARIA TRANSITORIA.- PROCEDIMIENTOS ADMINISTRATIVOS**

Hasta que se apruebe el Texto Único de Procedimientos Administrativos del Ministerio del Ambiente, mantienen su vigencia los procedimientos aprobados en los textos únicos ordenados de procedimientos administrativos de las entidades fusionadas o adscritas al Ministerio, así como aquellas funciones transferidas.

#### **SEGUNDA DISPOSICIÓN COMPLEMENTARIA TRANSITORIA.- DISPOSICIONES PARA LA IMPLEMENTACIÓN DEL MINISTERIO**

Facúltase al Ministerio del Ambiente a aprobar las disposiciones complementarias que se requieran para la adecuada implementación de la presente ley.

#### **TERCERA DISPOSICIÓN COMPLEMENTARIA TRANSITORIA.- RÉGIMEN LABORAL**

1. En tanto se elabora y aprueba la nueva Ley General del Empleo Público, el régimen laboral del personal del Ministerio de Ambiente se rige por lo dispuesto en el Decreto Legislativo N° 276, Ley de Bases de la Carrera Administrativa y Remuneraciones del Sector Público y normas complementarias y reglamentarias.
2. El personal transferido al Ministerio del Ambiente mantiene su régimen laboral.
3. Las escalas remunerativas del Sector Ambiental se aprobarán de acuerdo al numeral 1) de la Cuarta Disposición Transitoria de la Ley N° 28411, Ley General del Sistema Nacional de Presupuesto.

#### **CUARTA DISPOSICIÓN COMPLEMENTARIA TRANSITORIA.- APROBACIÓN DEL NÚMERO DE PERSONAL DEL MINISTERIO DEL AMBIENTE**

Mediante Decreto Supremo refrendado por el Ministro de Economía y Finanzas y por el Ministro del Ambiente, se aprueba el número de personal que requerirá el Ministerio del Ambiente para el cumplimiento de sus funciones. Dicha aprobación se realiza luego de aprobados el Cuadro de Asignación de Personal (CAP) y el Reglamento de Organización y Funciones (ROF) del Ministerio del Ambiente, a que se refiere la Séptima Disposición Complementaria y Final del presente Decreto Legislativo.

#### **QUINTA DISPOSICIÓN COMPLEMENTARIA TRANSITORIA.- MATRIZ DE COMPETENCIAS Y FUNCIONES**

En el marco del proceso de descentralización, el Ministerio del Ambiente debe elaborar, en un plazo no mayor de sesenta días hábiles, la matriz de delimitación de las competencias y funciones de los tres niveles de gobierno, la misma que será aprobada por decreto supremo, previa opinión favorable de la Secretaría de Gestión Pública y la Secretaría de Descentralización de la Presidencia del Consejo de Ministros. Dicha matriz será elaborada conforme a los lineamientos definidos por la Presidencia del Consejo de Ministros en el marco de implementación de la nueva Ley Orgánica del Poder Ejecutivo.

## DISPOSICIONES COMPLEMENTARIAS FINALES

### PRIMERA DISPOSICIÓN COMPLEMENTARIA FINAL.- ADSCRIPCIÓN DE ORGANISMOS PÚBLICOS AL MINISTERIO DEL AMBIENTE

#### 1. Servicio Nacional de Meteorología e Hidrología del Perú - SENAMHI

Adscribese el Servicio Nacional de Meteorología e Hidrología del Perú - SENAMHI, como organismo público ejecutor, al Ministerio del Ambiente, el mismo que se registrará por su norma de creación y otras complementarias.

#### 2. Instituto Geofísico del Perú

Adscribese el Instituto Geofísico del Perú - IGP, como organismo público ejecutor, al Ministerio del Ambiente, el mismo que se registrará por su norma de creación y otras complementarias.

### SEGUNDA DISPOSICIÓN COMPLEMENTARIA FINAL.- CREACIÓN DE ORGANISMOS PÚBLICOS ADSCRITOS AL MINISTERIO DEL AMBIENTE

#### 1. Organismo de Evaluación y Fiscalización Ambiental

Créase el Organismo de Evaluación y Fiscalización Ambiental - OEFA, como organismo público técnico especializado, con personería jurídica de derecho público interno, constituyéndose en pliego presupuestal, adscrito al Ministerio del Ambiente y encargado de la fiscalización, la supervisión, el control y la sanción en materia ambiental que corresponde.

Sus funciones básicas serán las siguientes:

- a) Dirigir y supervisar la aplicación del régimen común de fiscalización y control ambiental y el régimen de incentivos previstos en la Ley N° 28611, Ley General del Ambiente, así como fiscalizar y controlar directamente el cumplimiento de aquellas actividades que le correspondan por Ley.
- b) Ejercer la potestad sancionadora en el ámbito de sus competencias, aplicando las sanciones de amonestación, multa, comiso, inmovilización, clausura o suspensión, por las infracciones que sean determinadas y de acuerdo al procedimiento que se apruebe para tal efecto, ejerciendo su potestad de ejecución coactiva, en los casos que corresponda.
- c) Elaborar y aprobar el plan anual de fiscalización ambiental, así como elaborar el informe de resultados de aplicación del mismo.
- d) Realizar acciones de fiscalización ambiental en el ámbito de su competencia.
- e) Supervisar que las entidades competentes cumplan con las funciones de fiscalización establecidas por la legislación vigente.
- f) Emitir opinión técnica sobre los casos de infracción ambiental que puedan dar lugar a la acción penal por la comisión de los delitos tipificados en la legislación pertinente.
- g) Informar al Ministerio Público de aquellos hechos de naturaleza penal que conozca en el ejercicio de su función.

#### 2. Servicio Nacional de Áreas Naturales Protegidas por el Estado

Créase el Servicio Nacional de Áreas Naturales Protegidas por el Estado, como organismo público técnico especializado, con personería jurídica de derecho público interno, constituyéndose en pliego presupuestal adscrito al Ministerio del Ambiente. Es el ente rector del Sistema Nacional de Áreas Naturales Protegidas por el Estado (SINANPE) y se constituye en su autoridad técniconormativa.

Sus funciones básicas son las siguientes:

- a) Dirigir el Sistema Nacional de Áreas Naturales Protegidas por el Estado (SINANPE) y asegurar su funcionamiento como sistema unitario.
- b) Aprobar las normas y establecer los criterios técnicos y administrativos, así como los procedimientos para el establecimiento y gestión de las Áreas Naturales Protegidas.

- c) Orientar y apoyar la gestión de las áreas naturales protegidas cuya administración está a cargo de los gobiernos regionales y locales y los propietarios de predios reconocidos como áreas de conservación privada.
- d) Establecer los mecanismos de fiscalización y control y las infracciones y sanciones administrativas correspondientes; y ejercer la potestad sancionadora en los casos de incumplimiento, aplicando las sanciones de amonestación, multa, comiso, inmovilización, clausura o suspensión, de acuerdo al procedimiento que se apruebe para tal efecto.
- e) Asegurar la coordinación interinstitucional entre las entidades del gobierno nacional, los gobiernos regionales y los gobiernos locales que actúan, intervienen o participan, directa o indirectamente, en la gestión de las áreas naturales protegidas.
- f) Emitir opinión previa vinculante a la autorización de actividades orientadas al aprovechamiento de recursos naturales o a la habilitación de infraestructura en el caso de las áreas naturales protegidas de administración nacional.
- g) Emitir opinión sobre los proyectos normativos referidos a instrumentos de gestión ambiental, considerando las necesidades y objetivos de las áreas naturales protegidas.

### **TERCERA DISPOSICIÓN COMPLEMENTARIA FINAL.- FUSIONES**

#### **1. Fusión del CONAM**

Apruébase la fusión del Consejo Nacional del Ambiente - CONAM - en el Ministerio del Ambiente, siendo este último el ente incorporante.

El proceso de fusión se ejecutará en el plazo máximo de noventa días útiles, contados a partir de la entrada en vigencia de la presente ley.

En dicho plazo, se transferirán los bienes muebles e inmuebles, recursos, personal, acervo documentario, derechos, obligaciones, convenios y contratos, pasivos y activos a la entidad absorbente, conforme a las disposiciones legales vigentes.

Mediante resolución ministerial del Ministerio del Ambiente se podrá prorrogar el plazo antes señalado, para lo cual se deberá contar con la opinión previa favorable de la Secretaría de

Gestión Pública de la Presidencia del Consejo de Ministros.

Toda referencia hecha al Consejo Nacional del Ambiente - CONAM - o a las competencias, funciones y atribuciones que éste venía ejerciendo, una vez culminado el proceso de fusión, se entenderá como efectuada al Ministerio del Ambiente.

#### **2. Fusión de la Intendencia de Áreas Naturales Protegidas del INRENA**

Apruébase la fusión de la Intendencia de Áreas Naturales Protegidas del INRENA con el Servicio Nacional de Áreas Protegidas del Ministerio del Ambiente, siendo este último el ente incorporante.

El proceso de fusión se ejecutará en el plazo máximo de noventa días hábiles, contados a partir de la entrada en vigencia de la presente ley.

En dicho plazo, se transferirán los bienes muebles e inmuebles, recursos, personal, acervo documentario, derechos, obligaciones, convenios y contratos, pasivos y activos del INRENA que correspondan a la entidad absorbente, conforme a las disposiciones legales vigentes.

Mediante resolución ministerial del Ministerio del Ambiente, se podrá prorrogar el plazo antes señalado, para lo cual se deberá contar con la opinión previa favorable de la Secretaría de

Gestión Pública de la Presidencia del Consejo de Ministros.

Toda referencia hecha al INRENA o a la Intendencia de Áreas Naturales Protegidas o a las competencias, funciones y atribuciones respecto a las áreas naturales protegidas, una vez culminado el proceso de fusión, se entenderá como efectuada al Servicio Nacional de Áreas

Naturales Protegidas por el Estado.

#### **3. Comisión encargada del proceso de fusión**

Constitúyase una Comisión encargada de la transferencia de funciones, bienes, recursos, personal y materiales de CONAM y de la Intendencia de Áreas Naturales Protegidas del INRENA, integrada por seis miembros: un representante de la Presidencia del Consejo de Ministros, quien la presidirá; uno del Ministerio del

Ambiente; uno del Ministerio de Economía y Finanzas; uno del CONAM; uno del Ministerio de Agricultura; y uno del INRENA. Estos representantes serán designados mediante resolución ministerial del sector correspondiente.

La Comisión tendrá un plazo de noventa días hábiles para presentar a la Presidencia del Consejo de Ministros el informe detallado del proceso de transferencia. Dicho plazo podrá prorrogarse por una sola vez, por un período similar, mediante resolución ministerial del Ministerio del Ambiente.

#### **CUARTA DISPOSICIÓN COMPLEMENTARIA FINAL.- TRANSFERENCIA DE PERSONAL AL ORGANISMO DE EVALUACIÓN Y FISCALIZACIÓN AMBIENTAL.**

Transfírase al Organismo de Evaluación y Fiscalización Ambiental (OEFA), creado por la Segunda Disposición Complementaria Final del presente Decreto Legislativo, el personal de las entidades cuyas funciones de fiscalización en materia ambiental hayan sido asumidas por este organismo.

#### **QUINTA DISPOSICIÓN COMPLEMENTARIA FINAL.- TRANSFERENCIA DE FUNCIONES DE LA DIRECCIÓN GENERAL DE SALUD AMBIENTAL**

Confórmase una Comisión multisectorial encargada de analizar la complementación que deben tener las funciones sanitarias y ambientales y proponer, en un plazo máximo de seis meses contados a partir de su instalación, la delimitación de las funciones de la autoridad sanitaria a nivel nacional, actualmente ejercida por la Dirección General de Salud Ambiental, y las funciones del Ministerio del Ambiente, para que en ese contexto se determine las funciones que pueden ser transferidas de la Dirección de Salud Ambiental del Ministerio de Salud al Ministerio del Ambiente.

La Comisión estará conformada por tres miembros: un representante de la Presidencia del Consejo de Ministros, quien la presidirá; un representante del Ministerio de Salud; y un representante del Ministerio del Ambiente.

#### **SEXTA DISPOSICIÓN COMPLEMENTARIA FINAL.- ORGANISMOS PÚBLICOS ADSCRITOS AL MINISTERIO DEL AMBIENTE**

Se encuentran adscritos al Ministerio del Ambiente los siguientes organismos públicos:

1. Servicio Nacional de Meteorología e Hidrología del Perú - SENAMHI.
2. Instituto Geofísico del Perú - IGP.
3. Organismo de Evaluación y Fiscalización Ambiental - OEFA.
4. Servicio Nacional de Áreas Naturales Protegidas - SERNANP.
5. Instituto de Investigaciones de la Amazonía Peruana - IIAP.

#### **SÉPTIMA DISPOSICIÓN COMPLEMENTARIA FINAL.- DOCUMENTOS DE GESTIÓN DEL MINISTERIO DEL AMBIENTE**

Facúltase al Ministerio del Ambiente para que, en un plazo no mayor de ciento ochenta días calendario, contados a partir de la entrada en vigencia de la presente ley, formule sus correspondientes Cuadros para Asignación de Personal - CAP, los respectivos Presupuestos Analíticos de Personal - PAP, el Reglamento de Organización y Funciones - ROF, correspondientes al Ministerio y a los organismos públicos creados por la presente ley, así como para dictar las normas complementarias y las acciones de personal necesarias para implementar la estructura orgánica que se aprueba conforme a la presente norma.

#### **OCTAVA DISPOSICIÓN COMPLEMENTARIA FINAL.- VIGENCIA DE LA LEY**

La presente ley entra en vigencia al día siguiente de su publicación en el Diario Oficial El Peruano.

#### **DISPOSICIONES COMPLEMENTARIAS MODIFICATORIAS**

**PRIMERA DISPOSICIÓN COMPLEMENTARIA MODIFICATORIA.- MODIFICACIÓN DEL DECRETO LEY Nº 26154 - FONDO NACIONAL PARA ÁREAS NATURALES PROTEGIDAS POR EL ESTADO**

Modifícase el artículo 2, párrafo segundo, del Decreto Ley Nº 26154, que crea el Fondo Nacional para Áreas Naturales Protegidas por el Estado - FONANPE - en los términos siguientes:

“Artículo 2.-  
(...)

El Consejo Directivo del PROFONANPE está integrado por ocho miembros, de los cuales cuatro son representantes del Estado, dos de los organismos gubernamentales ambientalistas peruanos de reconocida trayectoria en materia de áreas naturales protegidas, un representante de los gremios empresariales y un representante de una organización internacional de asistencia técnica y financiera, invitada a participar por el Ministerio del Ambiente.

El Estado es representado por el Ministro del Ambiente o su representante, quien preside el Consejo Directivo; el Jefe del Servicio Nacional de Áreas Naturales Protegidas por el Estado; un representante del Ministerio de Economía y Finanzas; y un representante de los gobiernos regionales”.

**SEGUNDA DISPOSICIÓN COMPLEMENTARIA MODIFICATORIA.- MODIFICACIÓN DE LA LEY Nº 26793 – FONAM**

Modifícase el artículo 4 de la Ley Nº 26793, Ley de creación del Fondo Nacional del Ambiente - FONAM- en los términos siguientes:

“Artículo 4.- El FONAM está a cargo de un Consejo Directivo integrado por:

- a) El Ministro del Ambiente o su representante, quien lo presidirá;
- b) Un representante del Ministerio de Economía y Finanzas;
- c) Un representante del Ministerio de Agricultura;
- d) Un representante de los organismos no gubernamentales de desarrollo, especializados en asuntos ambientales;
- e) Un representante de la Confederación Nacional de Instituciones Privadas (CONFIEP); y
- f) Un representante de la comunidad universitaria, especializado en asuntos ambientales.”

POR TANTO:

Mando se publique y cumpla, dando cuenta al Congreso de la República.

Dado en la Casa de Gobierno, en Lima, a los trece días del mes mayo del año dos mil ocho.

ALAN GARCÍA PÉREZ  
Presidente Constitucional de la República

JORGE DEL CASTILLO GÁLVEZ  
Presidente del Consejo de Ministros

ISMAEL BENAVIDES FERREYROS  
Ministro de Agricultura

JUAN VALDIVIA ROMERO  
Ministro de Energía y Minas

JOSÉ ANTONIO GARCÍA BELAÚNDE  
Ministro de Relaciones Exteriores

HERNÁN GARRIDO-LECCA M.  
Ministro de Salud

**2. PROYECTO DE LEY DE ÁREAS DE CONSERVACIÓN  
REGIONAL Y MUNICIPAL  
(version: 23 May 2008)**

**TÍTULO I**

**DISPOSICIONES GENERALES**

**Artículo 1°.- Objetivo**

La presente Ley norma la iniciativa y participación de los Gobiernos Regionales y Municipales en el establecimiento y gestión de Áreas de Conservación Regional (ACR) y Áreas de Conservación Municipal (ACM), como parte del actual proceso de descentralización, las estrategias de ordenamiento territorial, los planes concertados de desarrollo regional y municipal, así como las estrategias regionales de conservación de la diversidad biológica, promoviendo la conectividad de las iniciativas de conservación en el territorio nacional.

**Artículo 2°.- Ámbito**

El ámbito de la presente Ley incluye a los Gobiernos Regionales y Municipales, así como la participación de las entidades públicas de nivel nacional y sectorial, el sector privado, la sociedad civil organizada y los pobladores locales, comunidades nativas y campesinas, quienes intervienen en distintos espacios para el establecimiento y gestión de las ACR y ACM.

**Artículo 3°.- Concepto de ACR y ACM**

Las ACR y las ACM son espacios de singular importancia por el Patrimonio Natural que albergan y constituyen Áreas Naturales Protegidas que tienen como objetivo la conservación de muestras representativas de la diversidad biológica a nivel regional y local.

Las ACR y ACM se integran al Sistema Nacional de Áreas Naturales Protegidas del Perú en el marco de las políticas de ordenamiento territorial y desarrollo sostenible.

**Artículo 4°.- Contribución de las ACR y ACM**

Las ACR y ACM contribuyen a la conservación de ecosistemas, especies y genes que forman parte del Patrimonio Natural de la Nación; así como a la provisión de servicios ambientales a nivel regional y local. En particular permiten:

- 4.1 La adecuada gestión de los recursos naturales.
- 4.2 La protección del paisaje natural.



- 4.3 La implementación de corredores biológicos y de conservación.
- 4.4 El mantenimiento de las fuentes de agua.
- 4.5 La educación, recreación y promoción del turismo.
- 4.6 La protección de espacios naturales que tengan importancia histórica, cultural o afectiva que identifique al poblador local con su entorno.
- 4.7 La seguridad alimentaria de los pobladores locales.
- 4.8 El mejoramiento de la calidad de vida.

**Artículo 5°.- Concordancia normativa en función del carácter unitario del Gobierno Peruano**

Las normas que aprueben los Gobiernos Regionales y Municipales para la gestión de las áreas de conservación en el ámbito de su jurisdicción, deben ser emitidas en concordancia con las normas de las entidades con las que comparten competencias, sean del nivel nacional, sectorial o regional, y sin transgredir su alcance y contenidos, en el marco del carácter unitario del Gobierno Peruano establecido en el artículo 43° de la Constitución Política del Perú.

**TÍTULO II  
DEL SISTEMA NACIONAL DE  
ÁREAS NATURALES PROTEGIDAS DEL PERÚ**

**Artículo 6°.- Del Sistema Nacional de Áreas Naturales Protegidas del Perú (SINANPE)**

Las Áreas Naturales Protegidas de nivel nacional, las ACR, las ACM y las Áreas de Conservación Privada (ACP) conforman en su conjunto el SINANPE, a cuya gestión se integran las instituciones públicas del Gobierno Nacional, Gobiernos Regionales, Gobiernos Municipales, instituciones privadas y la población local, de manera individual u organizada, que actúan, intervienen o participan, directa o indirectamente en la gestión y desarrollo de estas áreas.

El SINANPE comprende el Sistema de Áreas Naturales Protegidas de administración nacional y los Sistemas Regionales de Conservación.

**Artículo 7°.- Rol del ente rector del SINANPE**

El Ministerio del Ambiente, a través del Servicio Nacional de Áreas Naturales Protegidas por el Estado (SERNANP), en su calidad de ente rector del SINANPE, tiene entre sus funciones:

- a. Dirigir el Sistema de Áreas Naturales Protegidas del Perú.
- b. Aprobar las normas y establecer los criterios técnicos y administrativos, así como los lineamientos y procedimientos para el establecimiento o reconocimiento y gestión de las Áreas Naturales Protegidas.
- c. Orientar y apoyar a los Gobiernos Regionales, Municipales y a los propietarios de predios reconocidos como ACP, en la gestión de las ACR, ACM y ACP respectivamente.

- d. Supervisar la gestión de las ACR.
- e. Establecer el régimen de sanciones e infracciones en ANP.
- f. Asegurar la coordinación interinstitucional entre las entidades del Gobierno Nacional, los Gobiernos Regionales, los Gobiernos Municipales que actúan, intervienen o participan, directa o indirectamente en la gestión de las Áreas Naturales Protegidas.
- g. Proponer el Plan Director al Consejo de Ministros para su aprobación, previa opinión favorable del Consejo de Coordinación del SINANPE.
- h. Emitir opinión sobre los proyectos normativos referidos a instrumentos de gestión ambiental, considerando las necesidades y objetivos de las Áreas Naturales Protegidas.
- i. Desarrollar Programas para la generación de capacidades para la gestión de Áreas Naturales Protegidas por los Gobiernos Regionales, Gobiernos Municipales y la sociedad civil.
- j. Establecer mecanismos que promuevan la participación privada en la gestión de las Áreas Naturales Protegidas, incluyendo incentivos.
- k. Otras que establezca la legislación.

#### **Artículo 8°.- Del Sistema de Áreas Naturales Protegidas de administración nacional**

El SERNANP tiene a su cargo la administración del Sistema de Áreas Naturales Protegidas de administración nacional. Para este efecto, cumple las siguientes funciones:

- a. Administrar las Áreas Naturales Protegidas de nivel nacional.
- b. Otorgar derechos para el aprovechamiento de recursos naturales bajo su competencia dentro de áreas de nivel nacional.
- c. Aprobar los instrumentos de gestión de las áreas de nivel nacional.
- d. Designar un Jefe para la gestión de cada Área Natural Protegida de nivel nacional.
- f. Emitir opinión previa vinculante a la autorización de actividades orientadas al aprovechamiento de recursos naturales o habilitación de infraestructura en las Áreas de Administración Nacional.
- g. Otras establecidas por la legislación.

#### **Artículo 9°.- De los Sistemas Regionales de Conservación**

Cada Gobierno Regional está facultado para establecer, mediante Ordenanza Regional, un Sistema Regional de Conservación para la implementación de su respectiva Estrategia Regional de Diversidad Biológica, el cual articula el conjunto de iniciativas de conservación en el ámbito regional tales como las áreas naturales protegidas de nivel nacional, ACR, ACM, ACP, las concesiones para conservación, las concesiones para ecoturismo; las instituciones públicas y privadas vinculadas con su gestión, criterios de gestión y otros aspectos para la adecuada conservación y aprovechamiento sostenible de la diversidad biológica.

Los Sistemas Regionales de Conservación podrán comprender a un Gobierno Regional o más de uno, en función de los objetivos de

conservación correspondientes, para lo cual cada Gobierno Regional involucrado aprobará su respectiva Ordenanza.

#### **Artículo 10°.- Rol del Consejo de Coordinación del SINANPE**

El Consejo de Coordinación del SINANPE es una instancia de apoyo, coordinación, concertación e información, que promueve la adecuada planificación y manejo de las áreas naturales protegidas.

El Consejo de Coordinación del SINANPE ejerce dirimencia en caso de conflicto por el establecimiento o gestión de un ACR o ACM, cuando éste involucre a Gobiernos Regionales o Municipales y una autoridad nacional; a gobiernos regionales entre sí; o varias municipalidades de distintas regiones.

#### **Artículo 11°.- Rol del Consejo de Coordinación Regional**

El Consejo de Coordinación Regional es un órgano consultivo y de coordinación del Gobierno Regional con las municipalidades. Está integrado por el Presidente Regional, quien lo preside, los Alcaldes Provinciales y representantes de la sociedad civil de acuerdo a lo establecido en el artículo 11° de la Ley Orgánica de Gobiernos Regionales; siendo su naturaleza la concertación y la consulta, sus acuerdos se adoptan por consenso.

El Consejo Regional ejerce dirimencia en caso de conflicto por la creación o manejo de un ACM, cuando éste involucre a varias municipalidades del mismo ámbito regional, debiendo solicitar opinión consultiva previa al Consejo de Coordinación Regional.

El Consejo de Coordinación Regional emite opinión consultiva cuando las ACR y ACM a ser establecidas no cumplan con las condiciones señaladas en el artículo 12, numeral 12.1.

### **TÍTULO III ESTABLECIMIENTO DE ACR Y ACM**

#### **Artículo 12°.- Condiciones para el establecimiento de las ACR y ACM**

El establecimiento de las ACR y ACM está sujeto al cumplimiento de las siguientes condiciones:

- 12.1 El área debe haber sido expresamente considerada en los planes de ordenamiento territorial y de desarrollo de los gobiernos regionales o municipales, tales como el Plan de Ordenamiento Territorial o el Plan de Acondicionamiento Territorial correspondiente, como una zona prioritaria para fines de conservación. Una vez establecida, el área debe ser

incluida en el Plan de Desarrollo Regional o Municipal Concertado.

- 12.2 Los terrenos a ocupar deben ser preferentemente de propiedad pública. En caso se incluya predios con derechos otorgados o pendientes de resolución, se respetarán los derechos adquiridos, para cuyo efecto se seguirá un procedimiento especial que se definirá en el reglamento de la presente Ley.
- 12.3 Se contará con un expediente técnico elaborado en base a los términos de referencia que apruebe el SERNANP, a fin de sustentar la contribución del área a establecer, para la gestión sostenible de la diversidad biológica en el ámbito regional o municipal, según corresponda.

### **Artículo 13°.- Del expediente técnico**

El expediente técnico para el establecimiento de las ACR y ACM comprenderá los siguientes elementos:

- 13.1 Aspectos generales relativos a la ubicación, descripción del ámbito de la propuesta e importancia del área.
- 13.2 Objetivos de manejo.
- 13.3 Viabilidad de la gestión.
- 13.4 Consideraciones sociales y económicas.
- 13.5 Identificación de derechos adquiridos en el área y presencia de poblaciones.

### **Artículo 14°.- Procedimiento para el establecimiento de las ACR:**

14.1 El establecimiento de las ACR está a cargo del Gobierno Regional, para lo cual se seguirá el siguiente procedimiento:

- a) Elaboración del expediente técnico de acuerdo a los Términos de Referencia y en base a un proceso participativo que involucre a la población local a través de talleres de consulta u otros mecanismos.
- b) Envío del expediente técnico al SERNANP para que emita opinión y prepublicación simultánea del proyecto de Ordenanza Regional en un diario de mayor circulación en la Región para la presentación de aportes y el ejercicio del derecho de oposición.
- c) Evaluación de aportes y oposiciones.
- d) Aprobación de la Ordenanza Regional que establece el ACR previa opinión favorable del SERNANP.

- e) Inscripción del ACR en la Superintendencia Nacional de Registros Públicos - SUNARP.
- f) Remisión de la Ordenanza Regional al SERNANP, para su registro.

14.2 Cuando se proponga el establecimiento de ACR que involucren a más de un Gobierno Regional se podrá elaborar un solo expediente técnico y su envío al SERNANP podrá hacerse de manera conjunta. Para el establecimiento del ACR se requerirá que cada uno de los Gobiernos Regionales involucrados promulgue la Ordenanza Regional correspondiente.

14.3 Los Gobiernos Regionales podrán establecer mecanismos para gestionar el área de una manera integrada, como la aprobación de un Plan Maestro Integral, el reconocimiento de Comités de Gestión Unificados, entre otros.

14.4 En los casos que el área propuesta no cumpla con las condiciones establecidas en el artículo 12, numeral 12.1 se requerirá la opinión favorable del Consejo de Coordinación Regional y la prepublicación del proyecto de Ordenanza, en la gaceta de normas jurídicas del diario oficial El Peruano.

#### **Artículo 15°.- Procedimiento para el establecimiento de ACM:**

15.1 El establecimiento de las ACM está a cargo del Gobierno Regional en cuya jurisdicción se encuentre el área propuesta, para lo cual se seguirá el siguiente procedimiento:

- a) Elaboración del expediente técnico por el Gobierno Municipal de acuerdo a los Términos de Referencia y en base a un proceso participativo que involucre a la población local a través de talleres de consulta u otros mecanismos.
- b) Envío del expediente técnico al Gobierno Regional para que de su conformidad.
- c) Remisión del expediente técnico por el Gobierno Regional al SERNANP para que emita opinión y prepublicación simultánea del proyecto de Ordenanza Regional en un diario de mayor circulación en la Región para la presentación de aportes y el ejercicio del derecho de oposición.
- d) Evaluación de aportes y oposiciones.
- e) Aprobación de la Ordenanza Regional que establece el ACM previa opinión favorable del SERNANP.
- f) Inscripción del ACM en la Superintendencia Nacional de Registros Públicos - SUNARP.
- g) Remisión de la Ordenanza Regional al SERNANP, para su registro.

- 15.2 En el caso de ACM ubicadas sobre la jurisdicción de varios Municipios se podrá presentar un sólo expediente con la aprobación de todos los alcaldes involucrados.
- 15.3 En los casos que el área propuesta no cumpla con las condiciones establecidas en el numeral 2.1 a) se requerirá la opinión favorable del Consejo de Coordinación Regional y la republicación del proyecto de ordenanza, en la gaceta de normas jurídicas del diario oficial El Peruano.

#### **Artículo 16°.- Categorización y manejo de las ACR y ACM**

Las ACR y ACM podrán ser categorizadas de acuerdo a lo establecido en el reglamento de la presente ley y los lineamientos para el establecimiento y gestión de ACR y ACM que se definan a nivel nacional por el SERNANP.

### **TÍTULO IV GESTIÓN DE LAS ACR Y ACM**

#### **Artículo 17°.- Administración de las ACM y ACR**

- 17.1 Las ACR son administradas por los Gobiernos Regionales.
- 17.2 Las ACM son administradas por los Gobiernos Municipales, según lo establecido en la Ordenanza Regional correspondiente.
- 17.3 La administración de las ACR y ACM puede ser ejercida mediante mecanismos de cogestión, mancomunidad, contratos de administración u otros que sean establecidos la legislación.

#### **Artículo 18°.- De los instrumentos de gestión**

- 18.1 Los Planes Maestros de las ACR y ACM son aprobados por el Gobierno Regional, previo periodo de consulta pública y en base a los lineamientos generales y Términos de Referencia establecidos por la SERNANP.

Los demás instrumentos de planificación interna y gestión de las ACR y ACM son aprobados por sus respectivas jefaturas.\

- 18.2 Los Planes Operativos de las ACR y ACM deberán establecerse con participación de la población local y en base a los presupuestos establecidos.

## **Artículo 19°.- Conflictos entre las autoridades**

- 19.1 El Consejo de Coordinación del SINANPE ejerce dirimencia en caso de conflicto por el establecimiento o gestión de un ACR o ACM, cuando éste involucre a Gobiernos Regionales o Municipales y una autoridad nacional; a gobiernos regionales entre sí; o varias municipalidades de distintas regiones.
- 19.2 El Consejo Regional ejerce dirimencia en caso de conflicto por el establecimiento o gestión de un ACM, cuando éste involucre a varias municipalidades del mismo ámbito regional, debiendo solicitar opinión consultiva previa al Consejo de Coordinación Regional.

## **Artículo 20°.- Financiamiento**

- 20.1 El establecimiento y gestión de un ACR o ACM implica la obligación de incluir en los presupuestos del Gobierno Regional o Municipal correspondiente, recursos para el funcionamiento de dichas áreas, sin perjuicio de la generación u obtención de financiamiento proveniente de otras fuentes tales como donaciones, tasas, contribuciones, ingresos generados por las áreas, y otros.
- 20.2 Los recursos propios generados en la gestión de las ACR y ACM se manejarán por el principio de caja destinada.

## **Artículo 21°.- Supervisión, vigilancia ciudadana, fiscalización y sanción**

- 21.1 Los Gobiernos Regionales y Municipales estarán facultados para ejercer funciones de fiscalización y sanción al interior de las ACR y ACM, en base a los lineamientos para el establecimiento y gestión de ACR y ACM que apruebe el SERNANP y otras normas legales vigentes.
- 21.2 Los Gobiernos Regionales y Municipales están facultados para regular y establecer mecanismos de participación y vigilancia ciudadana que complementen la actuación del Estado tales como Comités de Gestión, Comités Vecinales y otras modalidades. Asimismo pueden reconocer formas de organización de autodefensa existentes como las Rondas Campesinas y otras modalidades.

## **DISPOSICIONES TRANSITORIAS, COMPLEMENTARIAS Y FINALES**

**PRIMERA.- De la modificación de la Ley N° 26834**

Modifícanse los artículos 3°, 7°, 9°, 11°, 19° 21° inc. "a" y "b" y 28° de la Ley de Áreas Naturales Protegidas, Ley N° 26834, con el siguiente texto:

**ARTÍCULO 3.-** *Las Áreas Naturales Protegidas, con excepción de las áreas de conservación privada, se establecen con carácter definitivo.*

*Con excepción de las áreas de conservación privada, la reducción física o modificación legal de las áreas del Sistema Nacional de Áreas Naturales Protegidas del Perú, sólo podrá ser aprobada por Ley del Congreso de la República.*

*Las áreas naturales protegidas pueden ser:*

- a) Las áreas naturales protegidas de nivel nacional, que están bajo administración del Gobierno Nacional.*
- b) Las áreas de conservación regional, que están bajo administración del Gobierno Regional correspondiente.*
- c) Las áreas de conservación municipal, que están bajo administración del Gobierno Municipal correspondiente.*
- d) Las áreas de conservación privada.*

*En su conjunto, las áreas naturales protegidas de los distintos niveles de administración conforman el Sistema Nacional de Áreas Naturales Protegidas del Perú – SINANPE. Este incluye las áreas naturales protegidas de administración nacional, las áreas de conservación regional, las áreas de conservación municipal y las áreas de conservación privada.*

**ARTÍCULO 7.-** *El establecimiento de las áreas naturales protegidas de nivel nacional se realiza por Decreto Supremo, aprobado en Consejo de Ministros, refrendado por el Ministro de Agricultura, salvo la creación de áreas de protección de ecosistemas marinos o que incluyan aguas continentales donde sea posible el aprovechamiento de recursos hidrobiológicos, en cuyo caso también lo refrenda el Ministro de Pesquería. Las áreas de conservación regional y las áreas de conservación municipal se aprueban mediante Ordenanza Regional con la opinión previa favorable del Servicio Nacional de Áreas Naturales Protegidas del Perú - SERNANP.*

**ARTÍCULO 9.-** *El ente rector cuenta en su gestión con el apoyo de un Consejo de Coordinación del Sistema Nacional de Áreas Naturales Protegidas del Perú, en tanto instancia de coordinación, concertación e información, que promueve la adecuada planificación y manejo de las ANP. El Consejo se reunirá regularmente tres veces por año, o de manera extraordinaria cuando así se requiera. Está integrado por un representante de los siguientes:*



- a. Instituto Nacional de Recursos Naturales - INRENA, quien lo presidirá.
- b. Consejo Nacional del Ambiente - CONAM.
- c. Dirección Nacional de Turismo del Ministerio de Comercio Exterior y Turismo.
- d. Ministerio de la Producción.
- e. Ministerio de Energía y Minas.
- f. Ministerio de Transportes y Comunicaciones.
- g. Ministerio de Vivienda, Construcción y Saneamiento.
- h. Presidencia del Consejo de Ministros.
- i. Gobiernos descentralizados de nivel regional.
- j. Instituto de Investigaciones de la Amazonía Peruana - IIAP.
- k. Los Comités de Gestión de las ANP a que se hace referencia en la presente ley.
- l. Las universidades públicas y privadas.
- m. Las Organizaciones no Gubernamentales con trabajos de significativa importancia y trascendencia en Áreas Naturales Protegidas.
- n. Organizaciones empresariales privadas.

**ARTÍCULO 11.-** Las áreas de conservación regional y las áreas de conservación municipal se conforman sobre áreas que tienen una importancia ecológica significativa en el ámbito regional y municipal. De ser el caso, la Autoridad Nacional podrá incorporar como ANP de administración nacional a aquellas áreas de conservación regional y municipal que posean una importancia o trascendencia nacional.

**ARTÍCULO 19.-** Los lineamientos de política y planeación estratégica de las Áreas Naturales Protegidas en su conjunto, serán definidos en un documento denominado "Plan Director de las Áreas Naturales Protegidas". El Plan Director será elaborado y revisado bajo un amplio proceso participativo y deberá contener, cuando menos, el marco conceptual para la constitución y operación a largo plazo del Sistema Nacional de Áreas Naturales Protegidas del Perú - SINANPE; así como analizar los tipos de hábitat comprendidos en el Sistema y las medidas para conservar y completar la cobertura ecológica requerida.

**ARTÍCULO 21 Inciso a.-** Áreas de uso indirecto. Son aquellas que permiten la investigación científica no manipulativa, la

*recreación y el turismo, en zonas apropiadamente designadas y manejadas para ello. En estas áreas no se permite la extracción de recursos naturales, así como modificaciones y transformaciones del ambiente natural. Son áreas de uso indirecto los Parques Nacionales, Santuarios Nacionales, los Santuarios Históricos y los Refugios de Vida Silvestre.*

**ARTÍCULO 21 Inciso b.-** *Áreas de uso directo. Son aquellas que permiten el aprovechamiento o extracción de recursos, prioritariamente por las poblaciones locales, en aquellas zonas y lugares y para aquellos recursos, definidos por el plan de manejo del área. Otros usos y actividades que se desarrollen deberán ser compatibles con los objetivos de creación del área. Son áreas de uso directo las Reservas Nacionales, Reservas Paisajísticas, Reservas Comunales, Cotos de Caza, Áreas de Conservación Regional y Áreas de Conservación Municipal.*

**ARTÍCULO 28.-** *Las solicitudes para aprovechar recursos naturales al interior de las Áreas Naturales Protegidas de nivel nacional, de las áreas de conservación regional, de las áreas de conservación Municipal y las áreas de conservación privada, se tramitarán ante la autoridad sectorial o nivel de gobierno competente y sólo podrán ser resueltas favorablemente si se cumplen las condiciones del artículo anterior. Para el otorgamiento de derechos se requiere la opinión previa de la autoridad nacional para el caso de las áreas nacionales y privadas, y del gobierno regional respectivo para el caso de las áreas regionales y municipales.*

**SEGUNDA.-** Los Gobiernos Municipales que hubieren establecido a la fecha áreas de conservación municipal, podrán adecuarse a lo establecido en esta Ley remitiendo al Gobierno Regional respectivo copia de las Ordenanzas de establecimiento de las áreas y una ficha resumen por cada área establecida, de acuerdo a un formato que la Autoridad Nacional proveerá.

**TERCERA.-** Se faculta al Ministerio de Agricultura para que en un plazo de 60 días y en coordinación con los gobiernos regionales y municipales elabore el reglamento de la presente Ley, a ser aprobado por Decreto Supremo como modificatoria al Reglamento de la Ley de Áreas Naturales Protegidas, Decreto Supremo 038-2001-AG.

**CUARTA.-** Los Bosques de Protección establecidos de acuerdo a Ley, serán considerados como ACR a partir de la fecha de publicación de la presente Ley. En el caso estos se encuentren sobre el ámbito de dos o mas regiones, los respectivos Gobiernos Regionales deberán determinar las condiciones para su administración conjunta.

**QUINTA.-** Toda referencia hecha por normas previas a la presente Ley al SINANPE se entenderá como efectuada al Sistema de Áreas Naturales Protegidas de Administración Nacional.

**SEXTA.-** La Superintendencia Nacional de Registros Públicos deberá remitir a la SERNANP, hasta el treinta y uno de enero de cada año, un informe con todas las áreas naturales protegidas que hayan sido inscritas en los Registros Públicos durante el año previo.

En el plazo de noventa días deberá remitir un informe con las áreas naturales protegidas que se encuentren actualmente inscritas en los Registros Públicos.