



INDEPENDENT AND SEPARATED BY THE FORESTS OF PERU?

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The appointment of the Agency for Supervision of Forest Resources and Wildlife (OSINFOR for its acronym in Spanish) to the Ministry of the Environment (MINAM for its acronym in Spanish) has raised a number of concerns about the independence of OSINFOR. Consultation mechanisms have even been activated for alleged non-compliance with the United States-Peru Trade Promotion Agreement (TPA). In this article, we will seek to clarify what the independence of Public Bodies (PBs) in general consists of, what is the independence that OSINFOR has had since it was conceived in 2000 and whether this independence has been affected by Supreme Decree N°122-2018-PCM. However, this concern for OSINFOR should not make us forget that what is important is the sustainable management of forests, for the benefit of local populations, but also for the country and the planet. And for that it is not enough just to be concerned about the independence of OSINFOR, but the institutional integrity and unity of the Forestry Sector, at the national level and especially at the regional level, must be strengthened.

What does the independence of Public Bodies entail? What is the independence of OSINFOR? Has it been affected by Supreme Decree N°122-2018-PCM?



1

What does the independence of Public Bodies entail?

The independence of PBs implies a diametrical change in the organizational model of the traditional State. Historically, the general rule has been the administrative hierarchy, as a principle of organization and delimitation of the competences of the PBs. But in a model of independence, there is no dependency relation presided over by the principle of hierarchy. In this sense, independence supposes the rupture of this principle of hierarchy and means neither submission nor dependence of one PB to another considered its hierarchical superior.

Independence implies a diametrical change in the organizational model of the traditional state: the administrative hierarchy. The motive is the need to exercise public functions under a technical rationality that must be protected from interference with political neutrality.

This change is mainly based on thematic specialization and the need for autonomy. The thematic specialization of certain sectors of the economy demands a high level of technical rationality in the exercise of functions, which requires autonomy from political power and private interest. That is why autonomy is manifested as political neutrality and impartiality. Political neutrality, which is the most important element of autonomy, presupposes that independent PBs are able to exercise their functions without political conditioning or interference from other executive or

legislative authorities. In addition, this exercise of their functions must also be carried out impartially, i.e. excluding any influence of private interests (individual or group).

In this way, independent PBs can exercise their functions outside of the political party struggle, as well as the interference of the governments in power in technical decisions. In theory, it is assumed that the greater the “neutrality” and distance from partisan and ideological political debates, it is possible to achieve greater effectiveness and application of technical rationality. In this way, an independent PB no longer depends on or is directed by a ministry, even though it is attached to it, being unconnected (fundamentally) from the power of political direction of the Government (president, ministers and other hierarchies). With this autonomy from interference, it is expected that the independent PB can be conducted technically, without political interference in its rules, organization or supervision intensities, apply the corresponding sanctions, plan activities with a prolonged horizon of time, etc. The aim is to increase the technocratic power of the independent PB, achieving an exercise of the public

function based on scientific and technological knowledge of the issues, with a tendency to find technically more effective solutions.

To this end, the independence of the PBs is manifested in four types of autonomy: organic autonomy, political autonomy, functional autonomy and financial autonomy.

1.1 Organic Autonomy

Organic autonomy encompasses the creation and nature of independent PBs. These PBs are created by law, which establishes the legal regime that governs them, and the degree of independence that they possess. One of the most important elements defined by the law of creation is the location of the independent PB within the organization chart of the State. This location shows the degree of the link that the PB maintains with the central Executive Power. Affiliation to the sector, with which it maintains a link by subject, does not guarantee autonomy. While such affiliation by itself does not mean a violation of the political neutrality or technical rationality of the PB, it does however, expose it to constant risk. For this reason, it is a practice to assign it to a neutral Ministry such as the Presidency of the Council of Ministers (PCM). However, the best guarantee of location that can be given to an entity is to constitute it as an Autonomous Constitutional Body, so that it is excluded from the organization chart of the Executive Power.

1.2 Political Autonomy

Political autonomy consists of mechanisms that seek to avoid political interference in independent PBs. In this sense, political autonomy is characterized by the rules of appointment, term and removal of the maximum authority of the independent PB, or the conformation of collegiate bodies of government. In this way, it seeks to eliminate the character of trust in the position of post holder of the independent PB and to give more stability to the maximum hierarchical levels of the PBs.

The assurance of political autonomy lies in the establishment, by law, of the formality for the appointment and dismissal of the holders of these PBs. For the appointment, the requirements may be a public competition of merits (with high professional and moral standards as requirements to apply) and an agreement between the Executive and the Legislative for the appointment of the holder. Likewise, one of these formalities consists of the appointment of these holders for a fixed term (even beyond the period of government), during which they are immovable, except for causes of cessation or removal previously pre-established in the law and which must be formally declared. During this period, a special regime of incompatibilities and prohibitions may also be established in order to avoid conflicts of interest that may affect their independence.

Political autonomy is strengthened by the formalities for the appointment and removal of the heads of Public Bodies, as well as by the establishment of time limits for the appointment and creation of collegiate government bodies.

The other form of political autonomy is the formation of commissions, councils or boards, avoiding leaving power to individual decision-makers. In this way, the maximum directive level of the independent PBs is in the hands of collegiate bodies. These collegiate bodies may have managerial and consultative functions, but what is important is the difference in the decisions they make. In this way, collegial decision-making has very different purposes and effects from simple (or executive) decision-making. It is aimed at the most important managerial decisions, consequently they need to be consensual, reflexive and pluralistic. To this end, multiple authorities are

usually considered as nominating instances for the members of these collegiate bodies, so that no one has the power to designate the entire group of directors.

Finally, it is also often considered that the end of mandates be staggered and not simultaneous in order to make a gradual renewal of the governing body of the entity. Also, a public and transparent procedure can be established for the early withdrawal of the holder or any of the members of the collegiate body when there is some legally foreseen cause for it.

1.3 Functional autonomy

Functional autonomy can be divided into planning functions and jurisdiction functions. Planning functions refer to the substantive powers for the development of the sector, as well as to the powers of self-organization; of personnel management at its service; and of disposition over its patrimonial means. In this sense, these independent PBs have the power to organize themselves internally, determine their plans and strategies of action, regulate the laws they must apply, regulate their services and activities, and select and hire their personnel. They have complete freedom to design and implement their personnel management policies, within the limits established by law. Although the employees of an independent PB should not be dismissed or removed from their functions in a discretionary manner, but only for substantial reasons and in the cases expressly determined by the norm, after following the procedure indicated in the law.

For its part, the functions of jurisdiction refer to the powers by which the independent PB can exhaust, by itself, the administrative route (only revisable by judicial channels and not being possible any appeal before the affiliation body), of not being bound to prior approval, confirmation or subsequent ratification on the part of another administrative authority, of not being subject to ex officio cancellation or annulment of its decisions by the affiliation entity, and of challenging by judicial channels those decisions or regulations given by the Central Administration that it considers affect its autonomy.

1.4 Financial Autonomy

It is not possible to speak of independent PBs if they do not have real financial autonomy or at least a guarantee of adequate financing. The independent exercise of these PBs can be chained if their income is approved or conditioned directly or indirectly by the Executive Power. It is true that, due to the principle of budgetary unity, it is not possible to speak of a separate budget, but at least it should approve its own draft budget and limit to the Executive Power the possibility of making modifications, rely on its own income (for example, income from companies subject to its supervision) and be immune to any budgetary cut that the Executive Power intends to impose, except in considerations of objective facts, on an equal footing with the rest of the Public Administration.

1.5 Limits of independence

The main limits of independent PBs are the law and jurisdictional control. Public entities can develop and implement public policies and practices within the framework of the law, and within government plans and guidelines. This does not mean that a PB should accommodate singular and arbitrary orders that undermine the purposes for which it was created. Independence is always exercised subject to jurisdictional control, and subject to the responsibility of its officials. All public officials from the President to the simplest position are subject to judicial control. All the more so the independent PBs, since their autonomy can more easily jeopardize respect for the law; for that reason, control here emerges as indispensable. Likewise, financial autonomy is not absolute either, since these PBs must submit to the limits imposed by the laws and regulations related to the financial administration of the Public Sector.

1.6 Independence risks

Independent PBs face a variety of risks. These include political, financial or private pressures; conflicts between functions with other allied entities; lack of democratic legitimacy and accountability mechanisms; and delays in the renewal of public policies.

The political capture of an independent PB can occur when the incumbents are people trusted by the political authorities or when a budget is approved that does not reflect the needs for the fulfillment of its functions, but allows the Executive or Legislative to influence the processes that falls under the competence of the independent PB. But these PBs can also be captured by private interests, when the industry under their supervision and control is favoured by the influence over it, that is, the regulated industry benefits unfairly from the decisions taken by a PB. In this sense, it is necessary to keep at a distance not only the authorities, but also those who have conflicts with the public interest.

Excessive autonomy can lead to the disconnection of sectoral policies, as well as leading to a discrepancy of priorities between Ministries and independent PBs. The very existence of independent PBs implies the inclusion of an additional bureaucracy and may also

The main risks of independence are political, financial or private pressures; conflicts between functions with other allied entities; lack of democratic legitimacy and accountability mechanisms; and delays in the renewal of public policies.

lead to duplication of costs and expenditures for support, coordination and administrative areas. The creation of more independent PBs for all sectors is often seen as a symbol of modernity and management. Although one of the arguments that justifies institutional independence is effectiveness, in practice it is observed that these entities are not as effective, often because of overlapping activities. Their functioning will be more or less effective depending, to a large extent, on the degree of prestige that independent PBs have attained.

Independent entities lack a truly legitimate basis, in electoral-democratic terms. In some

ways it is correct to say that all autonomous bodies (except those that have reached constitutional level) lack the basis of their own democratic legitimacy. There is a risk that these independent PBs will be exempt from any political control exercised by any of the holders of democratic power. The existence of these institutions generates a limitation in the possibilities of the Executive Power to renew and update the orientations of public policies that involve the competences of the independent PB. Thus, an obstacle arises to the prompt renewal of public policies, particularly in the case of changes of governments.

1.7 Public Bodies (PB) in the Organic Law of the Executive Power

In Peru, according to the Organic Law of the Executive Power, Law N°29158, all PBs are decentralized entities of the Executive Power, with legal status under Public Law, with competences of national scope, attached to a Ministry and created and dissolved by Law at the initiative of the Executive Power. The requirements for the creation of public bodies are those established in the Framework Law for the Modernization of State Management and the approval of the initial action plan of the body by the Ministry of its Sector. Its reorganization, merger, change of dependency or affiliation and its regulations of organization and functions are agreed by supreme decree with the affirmative vote of the Council of Ministers. The PBs are subject to the supervision and inspection of their Sector to verify the fulfillment of the objectives of the entity, by means of the instruments foreseen in the norms of the matter. Every PB must have an Institutional Strategic Plan. There are two types of PBs: executing public bodies and specialized public bodies.

Executing Public Bodies (EPBs) are created when the following conditions exist: a) an entity with its own administration is required, because the magnitude of its operations is significant; or b) an entity dedicated to the provision of specific services is required. They are subject to the technical guidelines of the Sector on which they depend; and the formulation of their objectives and strategies is coordinated with these. Also, their spending policy is approved by the entity on which they depend, within the framework of the general government policy. Likewise, they do not have normative functions, unless they are provided for in their founding norm, or were expressly delegated to them by the Ministry to which they report (they are considered to

Executing Public Bodies have the most basic level of independence because they are run by a Head, whose position is of trust; they are subject to the technical guidelines of the Sector on which they depend; and the formulation of their objectives and strategies is coordinated with these. Also, their spending policy is approved by the entity on which they depend on.

have the most basic level of independence). Finally, the EPBs are headed by a Head, whose position is one of trust. As an exception, they may have a Board of Directors when dealing with multisectoral matters. In these cases, their Board of Directors will be composed only of Ministers or representatives of the corresponding sectors. In addition, as part of the State's modernization and decentralization processes, the PCM evaluates the EPBs in order to determine the need for their continuity. This evaluation procedure is established by supreme decree with the approval vote of the Council of Ministers.

The Specialized Public Bodies (SPBs) have independence to exercise their functions in accordance with their founding law. They are attached to a ministry and are of two types: (a) regulatory bodies; and (b) specialized technical bodies.

Regulatory bodies (RBs) are created to act in specialized areas of market regulation or to guarantee the proper functioning of non-regulated markets, ensuring coverage of attention throughout the national territory. The RBs are attached to the PCM. Within their respective spheres of competence, they have supervisory, regulatory, normative, inspecting and sanctioning functions, as well as the solution of controversies and claims, under the terms established by the law of the matter. In addition, the RBs define their technical guidelines, objectives and strategies, and determine their spending policy in accordance with the general government policy. RBs are also governed by a Board of Directors, whose members are appointed through a public tender. The law sets out the requirements and procedure for their

appointment. Its members may only be removed in case of serious misconduct and manifest incompetence duly proven, and with the approval vote of the Council of Ministers. The law establishes the procedure for their dismissal. Finally, the RBs defend the interests of the users in accordance with the Political Constitution of Peru and the law.

Specialized Technical Bodies (STBs) are created, by exception, when there is a) the need to plan and supervise, or execute and control long-term, multisectorial or intergovernmental State policies that require a high degree of functional independence, or b) establish functionally independent instances that grant or recognize rights of individuals to enter markets or the development of economic activities that prove to be opposable to other subjects of the public

The Specialized Technical Bodies are directed by a Directing Council, are subject to the technical guidelines of the corresponding Sector with whom they coordinate their objectives and strategies, and their spending policy is approved by the Sector to which they are attached.

or private sector. The STBs are directed by a Directing Council, and are subject to the technical guidelines of the corresponding Sector with whom they coordinate their objectives and strategies. Their spending policy is approved by the Sector to which they are attached, within the framework of the general Government policy.



Foto: OSINFOR

2

What is the independence of OSINFOR?

2.1 The Supervisory Body for Timber Forest Resources

The Supervisory Body for Timber Resources (original OSINFOR) was created by Law N°27308, Forestry and Wildlife Law in 2000. The “original OSINFOR” belonged to the PCM, and should have had functional, technical and administrative autonomy. Its main function was to supervise and control compliance with forest concession contracts for timber purposes, including their management plans, and to apply appropriate sanctions. In other words, its supervisory functions were restricted to forest concessions for timber purposes, while the National Institute of Natural Resources (INRENA for its acronym in Spanish) was responsible for evaluating and controlling the sustainable use of the rest of the rights to use forest and wildlife resources. The premise behind an independent supervisory authority was that INRENA could not be “judge and party,” be the promoter and grantor of the concession contracts and the supervisor of their fulfillment. However, the Regulation of the aforementioned law, approved with Supreme Decree N°14-2001-AG, stated that the PCM should adopt the necessary provisions for the original OSINFOR to begin its activities no later than January 1, 2002. And it foresaw that until the original OSINFOR began its activities, the functions that the law states for that agency would be exercised by INRENA, reporting to the PCM.

However, at that time the PCM never showed enough interest in implementing and putting into operation this “original OSINFOR”, which never came into operation. The greatest proof is that the regulation of the “original OSINFOR” was never even approved. This regulation had to be approved by Supreme Decree countersigned by the PCM and the Minister of Agriculture and Irrigation (MINAGRI for its acronym in Spanish). The Regulations of the original OSINFOR were to establish, among other things, the organization and functions, the labour regime of its workers; the resources for financing its activities; the principles governing its supervisory and control functions; its relations with INRENA and other public

The Supervisory Body for Timber Forest Resources (original OSINFOR) belonged to the Presidency of the Council of Ministers, and should have had functional, technical and administrative autonomy; but it was never implemented.

administration bodies; the procedures, levels and mechanisms for citizen participation in supervision; the measures necessary to guarantee the suitability, objectivity and veracity of evaluations; and the requirements and procedures for registration in the records.

These regulations state that the “original OSINFOR” belonged to the PCM and speak of functional, technical and administrative autonomy. But they do not say anything

about the appointment of its holder; neither the term of his or her appointment nor the requirements for his or her removal from office. In addition, it establishes that the PCM would be the one that would define its organization, its labour regime, its financial resources, its procedures, etc. That is to say, except for its location in the PCM, it lacked real autonomies: political, functional and financial.

2.2

The Timber Forest Concessions Supervisory Office

Thus, in 2004, through Supreme Decree N°036-2004-AG, the “original OSINFOR” was merged with INRENA. This norm provided for the fusion of the original OSINFOR with INRENA, under the merger by absorption modality, with INRENA being the absorbing entity. With the favourable opinion of the Secretariat of Public Management of the PCM, this decision is protected by Law No. 27658, Framework Law for Modernization of State Management, and its Regulations, and approved by Supreme Decree No. 030-2002-PCM. These norms of modernization of the State seek to avoid duplication or conflicts of competences, functions and attributions between sectors and entities, making the principle of specialty prevail, and integrating the related functions and competences. In addition, these rules allowed the merger of directorates, programmes, dependencies, entities, decentralized public agencies, commissions and, in general, all instances of the Central Public Administration, as well as the modification regarding the assignment of a Decentralized PB from one sector to another, by means of a Supreme Decree. In this way, the separation of functions between INRENA and the original “OSINFOR” took a step backwards under State modernization norms, and the functions of granting rights were refocused with that of supervision by INRENA.

Therefore, in 2005, Supreme Decree No. 004-2005-AG amended INRENA’s Regulations of Organization and Functions. Thus, INRENA’s functions include the supervision and control of forest concessions for timber purposes, and the Office for the Supervision of Timber Forest Concessions (OSINFOR Office) was created as INRENA’s supervisory body. This norm established the attributions, functions, structure, and relations of the “OSINFOR office,” creating two units: the Supervision, Evaluation, and Control Unit; and the Regulation and Regulatory Affairs Unit. It was also stipulated that, as of the date of approval of this supreme decree, all references to the Timber Forest Resources Supervisory Body are referred to the Timber Forest

The Timber Forest Concessions Supervisory Office (OSINFOR office) was created, implemented and entered into operation as a supervisory body of INRENA instead of the original OSINFOR.

Concessions Supervisory Office. In this way, the “OSINFOR office” is implemented and enters into operation as part of INRENA and a “solution” is found to the lack of an operational supervisory authority. Until then, during the four years of Law N°27308, hundreds of forestry concessions had already been granted for timber purposes and there was no forestry supervisory authority.

This “solution” to the operation of forest supervision was left in charge of an office within INRENA and eliminated the references to functional, technical, and financial autonomy.

In fact, the “OSINFOR office” lacked any characteristic of independence at all, as it lost its legal status, was not attached to any ministry; rather, it became a supervisory body within the body in charge of the management and administration of forest and wildlife resources at the national level. The head of that office had a position of trust appointed by the Head of INRENA, and this was the last administrative instance that could review and annul the acts of the “OSINFOR office”. In addition, the OSINFOR office had no budget of its own, but was within INRENA’s budget.

2.3

The Agency for the Supervision of Forest Resources and Wildlife (OSINFOR).

However, this “solution” was criticized for distorting the institutional model foreseen in Law N°27308, by eliminating the separation of functions between the grantor and the supervisor. Several Peruvian civil society organizations raised their concerns, but they were not attended by the national authorities. However, within the framework of the TPA negotiations, the situation of the “OSINFOR office” was included in the negotiations, due to the concerns raised by the United States. During 2007, the Forestry Sector Management Annex of the TPA (Forestry Annex) defined that “Peru will establish OSINFOR, as provided for in Forestry Law N°27308. OSINFOR shall be an independent and separate entity, and its mandate shall include supervision of the verification of all timber concessions and permits.

Thus, in 2008, Legislative Decree No. 1085 was issued, a law that creates the Agency for the Supervision of Forest Resources and Wildlife (OSINFOR), within the framework of the delegation of legislative powers to the Executive Branch for the institutional strengthening of forest management, in order to facilitate the implementation of the TPA and its Protocol of Amendment. OSINFOR was created as an Executing Public Body, with legal personality under domestic public law, responsible for the supervision and inspection of the sustainable use and conservation of forest and wildlife resources, as well as environmental services from the forest, granted by the State through various modalities of use. OSINFOR was attached to the PCM and constituted a Budget Sheet. It was also established, as the competence of OSINFOR, to supervise and oversee the use and conservation of forest and wildlife resources, as well as environmental services from the forest, for their sustainability, in accordance with the national policy and strategy of integrated management of natural resources

and policies on environmental services established by MINAM, within the scope of its competence. By extending the competences of OSINFOR to all types of forest and wildlife use, it was also necessary to specify that the competences of OSINFOR do not involve Natural Protected Areas. They are governed by their own Law, that is, the National Service of Protected Natural Areas (SERNANP) is in charge of the granting, control and supervision of the protected areas of national level and of the Regional Governments in the protected areas of regional level.

OSINFOR's creation regulation also noted that it is headed by an Executive President appointed by public competition, for a period of four years. In order to be Executive President of OSINFOR, it was required as a minimum: a) To be a professional with no less than ten years of practice in the forestry sector; b) To have recognized professional solvency and suitability, and c) To have no less than five years of experience in a managerial position in the public or private sector or five years of experience in matters related to the management of forest and wildlife resources or to have an academic postgraduate degree, at least at a master's level, in matters related to the forest and wildlife sector and/or public management. In addition, the rule also established the incompatibilities to be appointed Executive President. It also states that OSINFOR's resources consist of: a) those allocated in the Annual Budget Law (which in practice have represented between 80 and 90% of its sources), b) donations and/or agreements with national and foreign institutions, as well as with international organizations, c) 50% of the economic retribution for the rights to use forest and wildlife resources. The remaining 50% of the amount collected will be distributed among the respective Regional Governments who will allocate part of it to the Forest Management Committees, constituted within the scope of their competence. The distribution indicated in the present literal will be carried out on the resulting amount, after the application of the percentages of distribution established in the Law of the Canon approved by Law N°27506, d) the 100% of the fines imposed in the exercise of

its functions; and, e) others that correspond to it according to the legal dispositions.

These norms ascribe OSINFOR to the PCM, separating it from the national forestry and wildlife authority, which in 2008 was MINAGRI, and which since 2015 is the National Forest and Wildlife Service (SERFOR), as the "original OSINFOR" was initially separated from INRENA in 2000 by Law No. 27308. As for political autonomy, these rules regulate the appointment of the Executive President through a competitive process, for a term of 4 years and establish requirements and incompatibilities for the position. In addition, in terms of functional autonomy, they recognize the powers to regulate the procedures under their charge and include all instances of the administrative procedure. Finally, in terms of financial autonomy, they recognize that OSINFOR is a budget sheet, with its own income. And as we said, the above line extends OSINFOR's powers to all forest and wildlife licenses granted by the State (except those of protected natural areas). Although none of these standards uses the words independent or autonomy to refer to OSINFOR, we all considered the provisions of the Forestry Annex to be fulfilled.

The Agency for the Forest and Wildlife Resources (OSINFOR) was created as an Executor Public Body (EPB), with legal status under domestic public law, attached to the Presidency of the Council of Ministers and was constituted in a Budget Sheet.

However, the supposed independence of OSINFOR has several weaknesses, among which we can highlight are: a) the first and most important is that OSINFOR is specifically an Executing Public Body (EPB), which as we have already pointed out is the most primary level of autonomy, since it has less independence to exercise its functions than the Specialized Public Bodies (SPBs), b) as a consequence, according to the same Organic Law of the Executive Branch, the holders of the EPB are positions of trust, for which in the Law creating OSINFOR there are no express causes for cessation of

the position, so that the incumbent can be removed when losing trust, which seriously affects its political autonomy; c) nor, despite the importance and risk of the supervisory function, OSINFOR employees do not have a special labour regime in which they can only be dismissed for substantial reasons and in the cases expressly determined by the law, after following the procedure set forth in the law, d) likewise, their spending policy must be approved by the entity to which they report, and e) they have no normative functions, except those provided for in their creation rule (which refer only to their procedures).

In addition, it should be borne in mind that, as of 2009, transfers of forestry functions to Regional Governments began to be completed. In 2002, with the approval of Law No. 27783, the Basic Decentralization Law and Law No. 27867, the Organic Law of Regional Governments, Peru's decentralization process was outlined. This decentralization process included the transfer of the specific forestry functions of paragraphs "e" and "q" of article 51 of Law No. 27867: (e) to develop surveillance and control actions to guarantee the sustainable use of natural resources under its jurisdiction; and (q) to grant forest permits, authorizations and concessions in areas within the region, as well as to carry out promotion and control tasks in strict compliance with national forestry policy. The five Amazonian regions (Amazonas, Loreto,

Madre de Dios, San Martín and Ucayali) have managed to complete the transfer of forestry functions, which together represent almost 50% of the national territory, 78% of the Amazon and 90% of the country's permanent production forest. Loreto and San Martín received the forestry functions in 2009, Ucayali and Madre de Dios in 2010 and Amazonas in 2011. In these regions, the forest functions and powers to grant licenses are exercised by the regional forestry and wildlife authorities. In regions where forest functions and competencies have not yet been transferred, they are the responsibility of SERFOR through the Technical Forestry and Wildlife Administrations (ATFFS for its acronym in Spanish). This unfinished decentralization distributes the functions of granting rights among the Regional Governments (in which forest functions have already been transferred and in the protected areas at the regional level), SERFOR (through the ATFFS in those regions where functions have not been transferred) and SERNANP (in the protected areas at the national level).



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3

Threatened independence and desired independence

Whether because of an awareness of the fragility of OSINFOR's real independence or the illusion of strong autonomy, Peruvian civil society organizations have been jealous watchdogs of OSINFOR. Several threats to its autonomy have been denounced, being perhaps the three most important: a) when former Executive President Rolando Navarro was removed, b) when Legislative Decree No. 1451 was issued which strengthens the functioning of national, regional or local government entities through clarifications of their competencies, regulations and functions, and finally c) the publication of Supreme Decree No. 122-2018-PCM which assigns OSINFOR to the MINAM and led to the resignation of its Head Máximo Salazar.

In January 2016, the Executive President in charge, Rolando Navarro, was removed from office, a few months before completing 4 years in office and after the Amazonian Operatives and the very well-known case of Yacu Kallpa. Before assuming the position, Navarro had been advisor to the Senior Management and Director of OSINFOR, and during his tenure he managed to get OSINFOR recognized for its actions of supervision and innovation. He was formally removed with a similar argument (it is pertinent) with which he was appointed (it is convenient), a situation that is possible because it was a position of trust. However, the criticism was that this would generate a weakening of OSINFOR's independence and would be a setback in its institutional achievements. At that time, it was announced that the public competition to appoint the Executive President of OSINFOR would finally take place, and a commission was even formed to draw up the terms of reference for the competition, but the competition was never held. The new Executive President in charge was Máximo Salazar, until then General Secretary of OSINFOR. Despite the concerns, OSINFOR's activities did not diminish and its recognition continued and even increased. Here, what really weakened OSINFOR's independence was that in its 10 years of existence

it has not had an Executive President appointed by public competition, but only by commission.

Another episode of concern over the weakening of OSINFOR occurred in September 2018 when Legislative Decree No. 1451 was published, which strengthens the functioning of national government, regional government or local government entities by clarifying their competencies, regulations and functions. This legislative decree, which was a PCM initiative not supported by OSINFOR, introduced four important modifications to Legislative Decree No. 1085, the law creating OSINFOR. The first is that it changed the name of Executive President to Head, evidently to adapt it to what is established in the Organic Law of the Executive Power, which provides that the EPBs are in the charge of a Head. This reaffirmed the EPB nature of OSINFOR. The second modification is that it changed the reference to the fact that the Head would be designated by public bidding to another that established that the bidding mechanisms for the election be approved by means of a supreme decree. In this way the mention of publicity for the contest is eliminated and added is that the rules of the contest will be established

by supreme decree. In February 2019, Supreme Decree No. 002-2019-MINAM was published, approving the Mechanism of the Contest for the Election of the Head of OSINFOR, which regulates, among other issues, the publicity of the contest. The third change was the elimination of the reference to the duration of the designation as holder of OSINFOR “for a period of four years”. Again in this way it reiterates the nature of being a position of trust, which can be withdrawn at any time. This formalizes

An OSINFOR with strengthened independence would not serve much to reverse the situation of illegal logging and the lack of sustainable forest management if the other national and regional authorities are not strengthened and given greater independence; and the spaces and mechanisms for inter-institutional coordination of the Forest Sector are strengthened.

what we had already advanced, that as being Head is a position of trust he/she can be removed at any time. Finally, the fourth important modification was that the reference to the forestry sector was eliminated in the requirement of no less than ten years of professional experience in order to be Head of OSINFOR. However, it should be noted that there is still the requirement of “having no less than five years of experience in a managerial position in the public or private sector or five years of experience in matters related to the management of forest and wildlife resources or having an academic postgraduate degree, at least at a master’s level, in matters related to the forest and wildlife sector and/or public management”.

Finally, the last chapter of the threats to the low independence of OSINFOR has been the issuance of Supreme Decree N° 122-2018-PCM that ascribes OSINFOR to the MINAM, which motivated the resignation of the then Head of OSINFOR, Máximo Salazar, considering that the change took away OSINFOR’s independence. After its publication, several claims have arisen due to the loss of OSINFOR’s independence and the failure to comply with the Forestry Annex. Almost all of these claims coincide in pointing out the successes of OSINFOR, especially in the last 5 years, the seriousness of illegal logging in Peru and how affiliation to the MINAM breaks the condition of an independent and separate body, a condition spoken of in the Forestry Annex.

The first two issues seem to be contradictory because, how can we consider the work of OSINFOR to be successful if illegal logging continues or increases, is it not one of the expected results of good work by OSINFOR that it contributes to reducing it? The multiple award-winning work of OSINFOR has had courageous, innovative

and exemplary achievements in many cases, which cannot be ignored or underestimated. However, the ultimate goal, the sustainable management of forest and wildlife resources, continues moving further away because illegal logging has not yet been stopped. And it must be recognized that the successes of OSINFOR, although important, are insufficient and have not had the necessary impact to stop illegal logging. This is largely due to two reasons, the first being the disconnection between the efforts of an independent OSINFOR and those of the other forest authorities, and the second and most important, due to the weaknesses and lack of independence of the other forest authorities, whose technical rationality and political neutrality are always strongly threatened. This lack of coordination and inequality means that the achievements of OSINFOR have little impact on the final result.

On the other hand, it is clear that the separation referred to in the Forestry Annex in 2007 was the separation of “judge and jury”, that is, the separation of supervisor and grantor. At that time, it was the separation of OSINFOR from the Ministry of Agriculture and Irrigation, and today it would be the separation of OSINFOR from the Regional Governments as Regional Forestry and Wildlife Authorities and SERFOR, as national forestry and wildlife authority and in some regions also regional forestry and wildlife authority. In 2008, when OSINFOR was created, it was not thought that this separation should mean a separation from MINAM. When the independence of OSINFOR was thought of, the aim was to end the merger by absorption between INRENA and the “OSINFOR office”. The current affiliation of OSINFOR to MINAM has not meant bringing together the supervisory authority with the authority that grants the rights, nor has it meant the merger by absorption of OSINFOR into MINAM. Because in contrast to what

some point out, neither MINAM, nor its associates, grant licenses that will be supervised by OSINFOR. On the contrary, among those attached to MINAM there is the Environmental Evaluation and Monitoring Agency (OEFA), a specialized public technical body, which is the national authority for environmental evaluation and monitoring, and which already regulates the functions of OSINFOR as an environmental monitoring entity. Some mention the situation of the Forest Conservation Programme for Climate Change Mitigation (Forests Programme) as a conflict of interest situation, as this promotes sustainable forest management in native communities. However, they forget that the Integral and Sustainable Alternative Development promoted by the National Commission for Development and Life without Drugs (DEVIDA for its acronym in Spanish), attached to PCM, includes the “promotion of forest activity, reforestation and conservation of ecosystems” that is to say, it has among its beneficiaries subjects who may have authorized licenses, and nobody had considered that there was a conflict of interest in these 10 years of existence of OSINFOR attached to PCM. The affiliation of OSINFOR to MINAM is as strong and as weak as the affiliation of OSINFOR to PCM, because OSINFOR remains an EPB.

This is why some of the critics, in proposing solutions to strengthen the independence of OSINFOR have proposed changing its nature and reforming the appointment of authorities. In this sense, they propose to change the nature of OSINFOR from an EPB to a Specialized Technical Organization (STO) in which its independence would be improved although still subject to the technical guidelines of the corresponding Sector with whom they coordinate their objectives and strategies, and their spending policy approved by the Sector to which they are attached, within the framework of the general government

policy. But the post of incumbent would no longer be a position of trust, there could be an ordinary board of directors and it could strengthen its normative functions, within the framework of the Organic Law of the Executive Power. Likewise, when putting forward reforming the appointment of authorities, they propose to follow procedures similar to those of the regulatory agencies and also to incorporate express grounds for the removal of authorities, in addition to strengthening incompatibilities with the position. It should be pointed out that it is also necessary to reincorporate the prescribed period for the exercise of the position, in order to fully strengthen the political autonomy of the position of OSINFOR holder. In this sense, in addition to expressly and exhaustively establishing the causes for the termination of the appointment of the Head of OSINFOR, a special labour regime should also be established that additionally protects the independence of OSINFOR supervisors and provides OSINFOR with a collegiate entity of government and accountability that supervises the executive work of the Head of OSINFOR, with a staggered renewal of its members to give continuity to the institutional policies.

However, an OSINFOR with strengthened independence would not serve much to reverse the situation of illegal logging and the lack of sustainable forest management if the national and regional authorities are not reinforced and given greater independence;

It is necessary to initiate an open, transparent and serious discussion in order to have independent and separate Public Bodies in the Forest Sector, but which work together for the people and forests of Peru.

and the spaces and mechanisms for inter-institutional coordination of the Forest Sector are strengthened. As we have indicated, these forest and wildlife authorities are the Regional Governments (in which forest functions have already been transferred and in regional protected areas), SERFOR (through ATFFS in those regions where functions have not been transferred) and SERNANP (in national protected areas). We should discuss how to increase their independence, especially regional forest and wildlife authorities, because due to their thematic specialization they need high technical rationality and autonomy to maintain their political neutrality, otherwise the work of a successful OSINFOR will continue to be insufficient to achieve sustainable management of forest and wildlife heritage and defeat illegal logging. And the coordination and mechanisms spaces are: the National System of Forest and Wildlife Management (SINAFOR for its acronym in Spanish), the Directive Council of SERFOR and

the National Forestry and Wildlife Commission (CONAFOR for its acronym in Spanish) as consultative entity of SERFOR. Otherwise, the efforts of one or another PB will continue to be isolated without generating the synergies and complementarities that are necessary to address such complex issues as sustainable forest management. It is necessary to initiate an open, transparent and serious discussion of these issues that goes beyond the mere discussion on OSINFOR affiliation. This can help us to have independent and separate PBs, but who work together for the people and forests of Peru.

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