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'MINISTRY OF PRODUCTION
J DAZ
N° 3187-2019-PRODUCE/DS-PA

Lima, April 10, 2019

Summary: "Although there is no scientific system or means that allows predicting the existence of juvenile specimens in the school before capture, it is possible to verify the extraction of the anchovy hydrobiological resource in smaller sizes at the time of collecting the mesh at 30% of the cloth."

1.- EXPOSITORY PART:

Seen: The administrative sanctioning file N° 6482-2015-PRODUCE/DGS; which contains the Notification of Charges N° 1826-2018-PRODUCE/DSF-PA of 04/10/18; the Final Report of Instruction No. 01563-2018-PRODUCE/DSF-PA-aperalta; the Legal Report No. 02331-2019-PRODUCE/DS-PA-haquino dated March 4, 2019.

II.- CONSIDERATIVE PART:

2.1.- JURISDICTION OF THE SANCTIONS DIRECTORATE-PA

That, article 2 of Decree Law No. 25977, General Fisheries Law (hereinafter, LGP), establishes that: "The hydrobiological resources contained in jurisdictional waters of Peru are the heritage of the Nation. Consequently, it is the responsibility of the State to regulate the integral management and rational exploitation of said resources, considering that fishing activity is of national interest." Likewise, Article 78 of the LGP establishes that natural or legal persons who violate the provisions established in said Law, and in all regulatory provisions on the matter, will be subject, depending on the severity of the violation, to one or more of the sanctions of: i) Fine; ii) Suspension of the concession, authorization, permit or license; iii) Confiscation; iv) Definitive cancellation of the concession, authorization, permit or license. By means of article 100° of the Regulations of the General Law of Fisheries (hereinafter RLGP), it was established that the Ministry of Fisheries (now Ministry of Production), through the National Directorate of Monitoring, Control and Surveillance (now, General Directorate of Supervision, Inspection and Sanctions - PA), as well as the regional fisheries departments and other organizations to which this power is delegated, will carry out the monitoring, control and surveillance of fishing activities, for which purpose it will implement the necessary mechanisms for the strict compliance of the obligations assumed by the users. Article 248 of the Consolidated Text of the General Administrative Procedure Law, Law No. 27444, approved by Supreme Decree No. 004-2019-JUS (hereinafter TUO LPAG)

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establishes that sanctions cannot be imposed without the respective procedure having been processed, respecting the guarantees of due process. The procedures that regulate the exercise of the sanctioning power must establish the proper separation between the

investigative

and sanctioning phases, entrusting them to different authorities. In this order of ideas, literal I) of article 87° of the Organization and Functions Regulations of the Ministry of Production, approved by DS No. 002-2017-PRODUCE (hereinafter, ROF of PRODUCE), established as one of the functions of the General Directorate of Supervision, Inspection and Sanctions (hereinafter DGSF-PA), to conduct the instruction stage of the Administrative Sanctioning Procedure (hereinafter PAS). Likewise, literal b) of article 89° of the ROF of PRODUCE, specified that the Directorate of Sanctions (hereinafter DS-PA), is in charge of resolving the PAS in the first instance. Finally, it should be noted that pursuant to numeral 1) of article 259° of the TUO of the LPAG,

the DS-PA issued Directorial Resolution No. 8187-2018-PRODUCE/DS-PA, dated November 30, 2018, by means of which the deadline for resolving in the first administrative instance the sanctioning procedures initiated in the period between March 1, 2018 and July 31, 2018 was extended by three (3) months. In this sense, the deadline for

yg pc to resolve this procedure is extended FOR THREE MORE MONTHS. ,

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J u,AZ 2.2.- BACKGROUND:

Through a control operation carried out by inspectors accredited by the Ministry of Production, in the town of Ilo — Zona Moliendo, at 00:32 hours on July 7, 2015, it was verified that the fishing vessel CORINA with registration CO-2660-PM (hereinafter, E/P CORINA), whose fishing permit holder is the company PESQUERA DIAMANTE S.A. (hereinafter, the administrator), had extracted anchovy hydrobiological resources in sizes smaller than those established, in a percentage of 76.04% of juvenile specimens, exceeding the percentage of maximum established tolerance; Likewise, it submitted the Fishing Report No. 02660-

00027, which would have exceeded by 56.04% the capture of specimens in smaller sizes, for which reason the Report of Occurrences 603-003 No. 000284 was raised against the administrator - in its

capacity as owner of the E/P CORINA, for the alleged commission of the infraction classified in section 6) of article 134° of the Regulations of the General Fishing Law (hereinafter, RLGP), approved by Supreme Decree (hereinafter, DS) No. 012-2001-PE, modified by DS No. 009-2013-PRODUCE. By Directorial Resolution No. 1756-2017-PRODUCE/DS-PA dated 03/15/2017, the Sanctions Directorate — PA sanctioned the administrator with 20.81 UIT, as well as the confiscation of 104,066

of the extracted hydrobiological resource, which was appealed by the administrator on 09/11/17, having declared the Nullity of this by Resolution No. 750-2017-PRODUCE/CONAS dated 10/06/2017. By means of Directorial Resolution No. 6643-2017-PRODUCE/DS-PA dated 11/30/17, the

Sanctions Directorate — PA issued a new administrative act, sanctioning the administrator with 20.81 UIT,

as well as the confiscation of 104,066 of the extracted hydrobiological resource, a resolution that was appealed

by the administrator on 01/09/2018, having declared the Nullity of said act by

CONAS Resolution No. 151-2018-PRODUCE/CONAS dated 03/09/2018.

2.3.- IMPUTATION OF CHARGES AND DISCHARGES. In response to the nullity declared by CONAS, the investigating body notified the administrator of the Charges No.

1826-2018-PRODUCE/DSF-PA received by the administrator on

04/10/2018, by which it was charged with having violated numeral 6) of article 134 of the RLGP,

because on 07/07/15 it was found that the E/P CORINA unloaded 185,700 t of the **anchovy hydrobiological**

resource, verifying in the sampling report that an incidence of

76.04% of specimens in smaller sizes was found, which exceeds the tolerance established in Ministerial Resolution No. 078-2015-PRODUCE, having exceeded the allowed tolerance by 56.04%.

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On April 16, 2018, the administrator presented its defense against the charges that precedes.

2.4.- FINAL REPORT OF INVESTIGATION AND ARGUMENTS.

By means of notification letter No. 11447-2018-PRODUCE/DS-PA (page 278), received on 09/18/2018, the DS-PA complied with summoning the administrator with the Final Investigation Report

No. 01563-2018-PRODUCE/DSF-PA-aperalta (hereinafter, !FI), granting a period of 5 days for the formulation of additional discharges.

By means of registration document No. 00090890-2018 (page 335), the administrator, within the period

conferred by law, presented its additional discharges (arguments), in which the arguments of defense of the discharges presented with the beginning of the PAS are reproduced.

2.5.- ANALYSIS. As previously indicated, the charge against the administrator is that it was charged with

having violated numeral 6) of article 134 of the RLGP, because on 07/07/15 it was found that the E/P CORINA unloaded 185,700 t of anchovy hydrobiological resource, verifying in the sampling report that an incidence of 76.04% of specimens in smaller sizes was found, which exceeds the tolerance established in Ministerial Resolution No. 078-2015-PRODUCE, having exceeded the permitted tolerance by 56.04%. The administrator has focused its defense, in summary, on the following arguments:

a) The administrator alleges the lack of proper motivation to support the order of a new notification of the start of the procedure, since they are notified of the same fact and the same initial charge, invoking articles 5, 6, 7 and 77 of the TUO of the LPAG.

It also argues that, in the Charge Notification Card No. 1826-2018-

PRODUCE/DS-PA, the name and identity of the person who signs the administrative act by delegation has not been recorded, nor has it been indicated which document authorizes him to sign the corresponding Director.

In this regard, we must point out that numeral 3) of article 255° of the TUO of the LPAG, states that: "Once the initiation of the sanctioning procedure has been decided, the authority in charge of the procedure formulates the respective notification of charges to the potential sanctioned party, which must contain the data referred to in numeral 3 of the preceding article so that he may present his defenses in writing within a period that may not be less than five business days from the date of notification" (emphasis added); 3

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In the present case, the PAS begins with the Notice of Charges No. 1826-2018-PRODUCE/DS-PA, which was notified on April 10, 2018, by which a period of five (5) business days was granted for the presentation of their discharges, in order to guarantee their right to defense, in this sense it should be noted that what was requested by the administrator lacks legal basis, since there is no violation of the principle of due process, recognized in numeral 2) of article 248° of the TUO of the LPAG. In this regard, it is necessary to point out that article 83 of the TUO of the LPAG authorizes the heads of administrative bodies to delegate, through written communication, the signing of acts and decisions of their competence to their immediate subordinates, except in the case of resolutions of sanctioning procedures, or those that exhaust the administrative route. Likewise, it is necessary to indicate that through Memorandum No. 00229-2017-PRODUCE/DSF-PA, various professionals are delegated the power to sign documents of imputation of charges and initiation of sanctioning procedures, this with the purpose of complying with the functions established in literal I) of article 87 of the Regulation of Organization and Functions of the Ministry of Production.

b) On the other hand, the administrator has indicated that it carried out fishing activity and extracted the anchovy hydrobiological resource in the area authorized by the Ministry of Production through Ministerial Resolution No. 056-2015-PRODUCE, which was based on the Report "Situation of the Southern Stock of Peruvian Anchovy as of January 2015" issued by the Peruvian Sea Institute — IMARPE. Along these lines, the administrator concludes that the result of the extraction of minor specimens exceeding the tolerance in the Southern zone is the absolute responsibility of the officials who authorized the fishing season, without a correct study of the development or size of the hydrobiological resource and who did not suspend the fishing zone in light of the Reports. Likewise, the administrator asks: If the Administration itself authorized fishing at the size in which the resource is found in the fishing zone, how can the result of said activity be considered as an infringing conduct? In this regard, although it is true that Ministerial Resolution No. 056-2015-PRODUCE was based on the complementary Report cited, so the administrator carried out its extractive activities protected by this Resolution; It is also true that section 6.1) of the aforementioned Ministerial Resolution provides for the presence of specimens of anchovy in smaller sizes (granting 10% express tolerance in number of specimens), which added to the 10% additional tolerance granted to the presentation of the Stock Report, according to section 3.2)

of article 3° of DS N° 009-2013-PRODUCE, demonstrate that both the authority and the administrated parties are aware of the commercial risk normally assumed that represents the possibility of extracting specimens in smaller sizes exceeding the tolerance, so this is not a cause beyond the control of the administered parties. Along the same lines, the Report "Situation of the Southern Stock of Peruvian Anchovy as of January 2015" does not guarantee that all the anchovy hydrobiological resource to be extracted will be found in adult sizes, as this would be a contradiction since we are talking about hydrobiological resources that are in a constant reproductive process; a contrario sensu it is possible to find specimens in smaller sizes in the biomass. Likewise, the fact that the Call Reports help the Administration determine the areas in which there is a high index of specimens in smaller sizes in order to suspend said areas, it is at the discretion of the authority to close the mentioned areas. Therefore, in the present case, if the area in which your vessel carried out the extraction was not Furthermore, the author Morón Urbina has pointed out that: "The delegation of signature does not imply an alteration of the original competence, since the delegator remains the exclusive person responsible for the decision and the competence. It is an instrumental technique created to accelerate the formalization of administrative decisions, without changing the competence and responsibility of the delegator. It is not a transfer of knowledge of a file to the delegate, but the delegator has already decided, instructed and conceptualized and imparted the meaning of the [administrative act], leaving only the formalization of the respective administrative act." Juan Carlos Marón Urbina. Comments on the Law of General Administrative Procedure. (Lima: Gaceta Jurídica, 2015), pp. 257 and 258.

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closed was because the presence of specimens in smaller sizes had not reported a high incidence in the days prior to the extraction carried out by its vessel. Likewise, it must be taken into account that with the Call Reports, the authority determines the areas in which there is a high rate of specimens in smaller sizes in order to suspend the exploitation of said areas, therefore, in the present case, if the area in which the vessel carried out the extraction was not closed it was because the presence of specimens in smaller sizes had not reported a high incidence in the days prior to the extraction carried out by the E/P CORINA. It is important to understand that beyond the fact that the Ministry of Production authorizes the start of the fishing season, it is the responsibility of the administrators to carry out their fishing

works maintaining due diligence in their fishing practices, in order not to exceed the tolerance of specimens in smaller sizes established in the regulations.

It is pertinent to indicate that through Official Letter No. 100-33-96-PE/IMP, dated 01/26/14996, it has been

indicated that:

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According to this technical opinion, it is verified that, the infringement of the percentages established in

the regulations cited above, referring to the capture of juvenile species or smaller sizes, is a situation clearly attributed to the administration, since it can determine the presence of peladilla before collecting 30% of the cloth.

c) The administrator has pointed out the Report issued by the Peruvian Sea Institute (IMARPE) through Official Letter No. DEC-100-102-2014-PRODUCE/IMP on "Technical opinion on the technology for determining the size composition of schools of anchovy and on the survival of released individuals, alleging that at present, there is no echo sounder on the market that allows to differentiate whether a school is composed of adult or juvenile fish (in the case of anchovy), being more complex, if the biodiversity of species in the Peruvian sea is taken into account. Furthermore, it concludes that with the Technical Opinion 5

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7 cited, the content of Official Letter No. DE-033-96-PE/ dated January 26, 1996 is distorted and that it is used repeatedly by the General Directorate of Sanctions-PA and the Sanctions Appeals Council — CONAS. In this regard, although it is true that there is currently no scientific means to determine a high incidence of juvenile specimens in a school of anchovy, it is also true that according to Official Letter No. DE-100-033-96-PE/IMP of January 26, 1996, sent to the then Sanctions Commission of the Ministry of Fisheries by the Peruvian Sea Institute - IMARPE, it has been established that at the time of carrying out their fishing activity, the administrators can easily foresee the extraction of the anchovy hydrobiological resource in smaller sizes, because: "it is possible to discover the presence of "peladilla" in the catch, before collecting 30% of the cloth because it is tied to the net and when collecting it it is easily observed. It is deduced that in this instance, mortality is relatively low and releasing the net so that the resource is free will contribute significantly to the sustainability of the resource". In this sense, the arguments presented by the administrator in this regard could not be considered as a cause exempting administrative responsibility, especially if it must be taken into consideration that although ex ante it cannot be known if in a school there is a high incidence of juvenile specimens, the technical body of the Ministry of Production itself has determined that before collecting 30% of the cloth

the administrators are in a position to verify a high incidence of juvenile specimens since they are entangled in the net, being able to release said specimens by releasing the trap so that the peladilla entangled in the net is free. Now, this fishing technique serves to reduce the incidence of specimens in smaller sizes in the catches made by the vessel, without this implying incurring in the infractions stipulated in numerals 25) and 123) of article 134° of the RLGP and its amendments. However, through the use of this technique, specimens in smaller sizes are released into the sea in a live state, with a relatively low mortality rate, so that a high rate of dead specimens is not returned, which would bring with it the contamination of a certain maritime area.

Consequently, although there is no system or scientific means that allows predicting the existence of juvenile specimens in the school before capture, it is possible to verify the extraction of the anchovy hydrobiological resource in smaller sizes at the time of collecting the net. (d) On the other hand, the administrator alleges that the investigating body has improperly interpreted the provisions of DS No. 008-2012-PRODUCE, by indicating that the cited rule refers to another type of infringement and in another context, without considering that before initiating the present procedure, the competent authority had the obligation to require the cessation of the extraction of hydrobiological resources exceeding the percentage in smaller sizes, and only in the event of non-compliance with the requirement was it appropriate to initiate the present sanctioning procedure, in accordance with the provisions of article 6 of DS No. 008-2012-PRODUCE. However, in the present case, the cessation requirement was not complied with, and the nullity of all actions taken and the filing of the present procedure should be declared. In this regard, it should be noted that, from a comprehensive reading of DS No. 008-2012-PRODUCE, it is not

inferred and much less stated textually that the authority has the obligation to require the cessation of

the extraction of hydrobiological resources exceeding the percentage in smaller sizes, before initiating the corresponding administrative sanctioning procedure; in this context, it is important to bring up the Principle of Legality established in section 1.1) of numeral 1) of article IV of the TUO of the LPAG, which states: "Administrative authorities must act with respect to the Constitution, the law and the right, within the powers that are attributed to them and in accordance with the purposes for which they were conferred." Therefore, the Administration is not obliged to carry out an act for which it is not compelled, such as in the present case requesting the cessation of the extraction of hydrobiological resources exceeding the percentage in smaller sizes, before initiating the corresponding sanctioning procedure. --- Page 7 ---

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e) Likewise, the administrator points out that in various similar cases the authority argues that noncompliance with article 6 of Supreme Decree No. 008-2012-PRODUCE, results in the imputation of the infraction stipulated in numeral 123) of article 134 of the RLGP, approved by DS No. 012-2001-PE and its amendments, especially if article 2 of DS No.

008-2012-PRODUCE establishes that it is applicable to the larger-scale fishing carried out by the E/P CORMA. Therefore, the administrator concludes that the authority should not

interpret the rule to the detriment of the administered, nor make clarifications not expressly contemplated in the rule, nor differentiate the application of the rule where the rule does not do so, but rather should interpret the rule in favor of the administered. In view of the above, numeral 6.1) of article 6° of DS N° 008-2015-PRODUCE, establishes that: "The holders of fishing permits of vessels that have captured hydrobiological resources in sizes smaller than those allowed, exceeding the tolerance limits established for each resource in the current regulations and their amendments, will immediately suspend the extraction work in the area, under penalty of initiating an administrative sanctioning procedure, as provided for in Supreme Decree N° 019-2011-PRODUCE that approves the Unique Ordered Text of the Fishing and Aquaculture Inspections and Sanctions Regulations - RISPAC and its amendments. Likewise, the holders of fishing permits of the vessels, their masters and/or crew are obliged to inform the authorities as quickly as possible. competent authorities, the area in which these specimens were extracted; which will facilitate the declaration of suspension of extractive activities in the area, in a timely manner." (emphasis added).

In this order of ideas, this section indicates - clearly - that the corresponding sanctioning procedure will be initiated against the holders of fishing permits for vessels that have captured juvenile specimens, exceeding the tolerance limits established for each resource in the current regulations, and have not spontaneously and immediately suspended their work in the extraction area. Likewise, the holders of fishing permits are obliged to communicate to the Ministry of Production the area in which specimens in smaller sizes have been extracted, in a timely manner.

Consequently, in these cases, the corresponding procedure will be initiated for the alleged commission of any of the infractions stipulated in article 134 of the Regulations of the General Fishing Law, approved by Supreme Decree No. 012-2001-PE and amendments, which are related to the unfulfilled obligation, and not only for the alleged commission of the infraction stipulated in numeral 123) of article 134 of the Regulations of

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the General Fishing Law, approved by Supreme Decree No. 012-2001-PE and its amendments. f) At the other end of its arguments, the administrator states that IF1 rejects the sampling conducted by the Internal Control area of the Plant and, on the other hand, considers the result of the Sampling conducted by the inspector as conclusive evidence, violating the principle of constitutional rank of due process, constituting an arbitrariness, a fact that is cause for nullity for contravening the Principles of General Administrative Procedure and

those of the Sanctioning Power, as well as for causing defenselessness by not assessing the evidence.

on the part, with the aggravating circumstance that in the report itself the charges are considered refuted.

g)

In this regard, it should be noted that article 5 of the TUO of the RISPAC, authorizes the inspectors

authorized by the Ministry of Production to develop strictly technical functions, among them, sampling, preparing the Occurrence Reports and the corresponding Acts, being documents of a public nature, the same that will be valued in accordance with the provisions of article 39 of the limited norm. Now, the inspectors being qualified persons and commissioned by the Ministry of Production, are instructed in order to correctly carry out a sampling, and consequently, all their work is carried out in accordance with the pertinent legal provisions. Therefore, the Sampling Report No. 002446, having been prepared by the inspector accredited by the Ministry of Production, is a valid means of proof.

Now, as established in article 173° of the TUO of the LPAG, the administered parties may provide the means of proof that they consider pertinent. However, the sampling presented by the administered party has been prepared and raised by the workers of the administered party who are not normatively authorized to carry out the sampling, likewise, said sampling has not been ratified by any authority that gives it the quality of public document. In this order of ideas, the sampling presented by the administered party has been taken as a statement by a party, since, when compared with the means of evidence in the file, which have the quality of public documents, it does not create sufficient conviction to disprove the infraction imputed to the administered party. In another part of its arguments, the administrator points out that in the Sampling Report No. 002450, the start and end time of the discharge of the hydrobiological resource is not indicated, contravening

Ministerial Resolution No. 257-2002-PE, concluding that the cited norm, establishes the procedure for taking samples, being the obligation of the inspector to indicate the time of each sample taking, therefore, as the Sampling Report does not indicate the time of the second sample taking, it is impossible for the administrator to verify if the samples were taken correctly, causing it to be defenseless; In this regard, from reading Ministerial Resolution No. 257-2002-PE and Directive No. 001-

2013-PRODUCE/DGSF on the "Procedure for Sampling and Physical-Sensory Evaluation of Hydrobiological Resources in Fishing and Aquaculture Activities", approved by Directorial Resolution No. 021-2013-PRODUCE/DGSF, it can be seen that in neither of its sections is there any reference made to the fact that the Administration is obliged to indicate the start and end time of the discharge in the Sampling Report, as well as specify the time of the second sample collection, since the sampling plan is drawn up based on the declared weight and not on discharge times. Likewise, the fact that the Sampling Part does not contain the information mentioned does not cause the administrator to be defenseless, given that the Weighing Report

issued by the weighing instrument of the administrator itself contains the start and end times of the unloading, as well as the time at which each sample was taken, and it is sufficient to locate the weight recorded by the inspector for each sample taken in the Sampling Part, in the Weighing Report. In this context, we have that according to the Weighing Report No. 3337, the start time of the unloading was at 21:55 hours and ended at 00:16 hours on July 7, 2015. Likewise, from the evaluation of the Sampling Part No. 002446 and the Weighing Report

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mentioned, it is found that the first sample was taken at 22:09 hours (at the unloading of 28,495 t. and 12,952%), the second sample was taken at 22:40 hours (at the unloading of 89,820 t and 40,827%) and the third sampling was carried out at 23:08 (when 143,410 t were unloaded and 65,186%). Therefore, the administrator could easily obtain the start and end times of the unloading, as well as the time of the second sampling, by evaluating the aforementioned documents; therefore, what the administrator has indicated in this regard has no technical or legal basis;

h) On the other hand, the administrator points out that the evaluation and analysis of the evidence contained in Report No. 032-2011-PRODUCE/OGTIE-Llores dated July 20, 2011, issued by the General Office of Information Technology and Statistics of the Ministry of Production, which is applicable to the present case, has been ignored, since it refers to the lack of validity of the declared weight to support reports, for which reason the sampling procedure carried out by the inspector is invalid because it was based on incorrect information, such as the declared weight and not on the registered weight, which is the actual weight unloaded by the fishing vessel. It should be noted to the administrator that Report No.

032-2011-PRODUCE/OGTIE-]flores, was

issued by the General Office of Information Technology and Statistics (hereinafter, OGTIE) and was intended to clarify the application developed by said Directorate to verify the daily landing of anchovy. In this sense, based on the content of the application (authorized MT, unloaded MT and declared MT), the OGTIE clarifies that: "declared tonnage: It is the approximate tonnage declared by the shipowner. It is a reference indicator] that has no effect on Fishing Rights, FONCOPES and other reports where reference is made to landings."

(i) On the other hand, the administrator mentions that the Supervision and Inspection Directorate—PA, lacks the authority to qualify the Appeal², ignoring the provisions of article 220° of the TUO of LPAG, corresponding to said authority to the Council of Appeal of Sanctions; also, it cites the report of the General Office of Legal Advice No. 288-2009-PRODUCE/OGAJ-nkics, which establishes that the former DIGSECOVI must raise the proceedings and not assume the authority to declare the admissibility of the impugned appeals (appeals in general). In this regard, articles 125° and 126° of the Organization and Functions Regulations of the

Ministry of Production approved by Supreme Decree No. 002-2017-PRODUCE and 2 Regarding registration document No. 00067148-2015 dated July 20, 2015.

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Article 2° of the Internal Regulations of the Sanctions Appeals Council approved by Ministerial Resolution No. 094-2013-PRODUCE, establishes that the Sanctions Appeals Council is the

resolution body that evaluates and resolves in the second and final administrative instance the appeals filed against the sanctioning resolutions of the Ministry of Production. That is to say, the Sanctions Appeals Council is not competent to resolve the appeals presented by the administrator against the Provisional Confiscation of Hydrobiological Resources Act 603-003 No. 000184.

On the other hand, numeral 3) of article 86° of the LPAG establishes as one of the duties of the authorities in the procedures, the: "To channel the procedure ex officio, when it notices any error or omission of the administrators, without prejudice to the action that corresponds to them," reason for which the appeal against the Confiscation Act,

was channeled as discharges that were evaluated by the DSF-PA, in its capacity as instructing body. On the other hand, it is important to bring up that the Report of the General Office of Legal Advice No. 288-2009-PRODUCE/OGAJ-nkics, was issued by virtue of the consultation carried out by the former General Directorate of Monitoring, Control and Surveillance, and was related to determining the treatment that should be given to the appeals filed late against administrative acts that are in the coercive execution stage; in that sense, in said report it was recommended that in the event of the presentation of an appeal against a Directorial Resolution issued by the General Directorate of Monitoring, Control and Surveillance, it is appropriate for said body to elevate the action taken to the hierarchical superior. Therefore, since the Provisional Confiscation Act of Hydrobiological Resources 603-003 No. 000184 is not an act that ends the instance, the aforementioned report is not relevant in the present procedure.

j) At the other end of its arguments, the administrator points out that the investigating body failed to notify it of the ex officio referral it made regarding the appeal, which is why it has proceeded arbitrarily by considering its appeals as a discharge, referring it without its knowledge and consent.

In light of the above, the TUO of the LPAG does not have the authority to notify the administrators when it carries out the ex officio referral, which is why the investigating body

has acted in accordance with the law. Likewise, the channeling of the appeal filed against the Confiscation Act was due to the fact that there was an error on the part of the administrated party when presenting the same counter-act that does not put an end to the instance nor determine

the impossibility of continuing with the procedure and that does not produce defenselessness to the

administrated party. Therefore, in application of the Principle of Official Impulse and Informalism

established in paragraphs 1.3) and 1.6) of numeral 1) of article IV of the Preliminary Title of the TUO of the LPAG, the arguments contained in said appeal have been considered as discharges in the present procedure, in order to satisfy the rights or interests of the administrated party, continuing the process of the present procedure³, obtaining a certain and immediate resolution⁴. k) On the other hand, the administrator states that its appeal against the Provisional Confiscation of Hydrobiological Resources Act meets the requirements set forth in Article 206 of the General Administrative Procedure Law, since the challenge is directed against the Confiscation Act of immediate execution, as there is no prior resolution ordering it issued by the competent authority. Therefore, since this is a measure of immediate execution, the appeal is admissible. In relation to this, 217.2) of article 217° of the TUO of the LPAG, establishes that: "Only the definitive acts that end the instance and the procedural acts that

Cf. Luis Alberto Huamán Ordoñez. General Administrative Procedure. (Lima: Jurista Editores, 2017), p. 634.

⁴ Juan Carlos Morán Urbina. Comments on the Law of General Administrative Procedure. (Lima: Legal Gazette, 2014), p. 362.

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are challengeable. The

contradiction to the remaining acts of The procedure must be alleged by the interested parties for its

consideration in the act that ends the procedure and may be challenged with the administrative appeal that, where appropriate, is filed against the final act." In this context, the appeal filed by the administered party against the Provisional Confiscation Act of Hydrobiological Resources 603-003 No. 000184, has not been directed against final acts that end the instance, since they are provisional measures that are subject to the result of the administrative sanctioning procedure, nor are they procedural acts that determine the impossibility of continuing with the procedure, since they are dictated during the inspection, that is, before the start of the procedure; likewise, these acts do not produce defenselessness to the administered party, since they are susceptible to being questioned with the presentation of the corresponding discharges.

Therefore, the appeal filed by the administrator against the aforementioned Act cannot be considered as an appeal, since it does not meet the characteristics

indicated in numeral 217.2) of article 217° of the TUO of the LPAG. 1) The administrator states that the TUO of the RISPAC does not regulate the provisional measures, only the precautionary measures, therefore, the authority is wrong in trying to adapt the provisional measures as powers of the inspectors in the execution of the confiscation if it is not regulated, being that the precautionary measures are contemplated in article 37 of said legal body, which are issued once the sanctioning procedure has begun or simultaneously with it, and the bodies must dictate the

precautionary measure by means of a duly motivated Directorial Resolution and with sufficient evidence to avoid the continuation of the detected infraction. In light of what is stated in the previous paragraph, article 10 of the TUO of the RISPAC establishes the possibility of using confiscation as a precautionary measure, so it is false that said measure is not regulated in said norm. However, the precautionary and provisional measures constitute exorbitant and instrumental acts, adopted in a unilateral and discretionary manner by the authority in charge of the proceedings, taking into account the periculum in mora. In this sense, the provisional measures fulfill a double objective: i) to ensure the effectiveness of the sanction that could be imposed, taking into account the danger that the resolution adopted may not be effective due to its late arrival. In this sense, its provisional nature refers to the function of temporarily making up for the lack of a resolution that has not yet been produced⁶; and ii) the effectiveness in achieving the public interest entrusted to the entities, avoiding the continuation of the effects of the unlawful conduct⁷; Likewise, the use of the precautionary measure of confiscation in fishing is so common that the Constitutional Court itself has recognized it in grounds 14, 15 and 18 of the Judgment issued in file No. 9884-2005-PA/TC⁸.

Consequently, it follows from the above that the provisional measure prior to the procedure (confiscation as a precautionary measure) may be given without a Directorial Resolution, provided that the use of said measure is classified, as has occurred in the present case. Therefore, the Provisional Confiscation of Hydrobiological Resources Act 603-003: No. 000184, does not have nullity defects, having demonstrated that the provisional confiscation of hydrobiological resources was carried out in accordance with the law. Therefore, the allegation of the administrator in this respect does not prejudice the validity of the provisional measure adopted by the authority.

II) On the other hand, the administrator points out that, in application of Supreme Decree No. 024-2016-

PRODUCE, an exempting cause was established so that a report of occurrences is not raised for the extraction of hydrobiological resources in a size smaller than that permitted, exceeding the

maximum percentages when a report of coves is submitted, notifying the competent authority of the fishing zone. In view of this, it should be noted that Supreme Decree No.

024-2016-PRODUCE implements the

Electronic Log, through which the holders of the fishing permit will communicate to the Ministry of Production the areas in which specimens in smaller sizes or associated or dependent species have been extracted, establishing, in numeral 3.2) of article 3 of Supreme Decree No. 019-2013-PRODUCE, modified by the second complementary modifying provision of Supreme Decree No. 024-2016-PRODUCE, the following:

"If the holder of a fishing permit complies with communicating the information through the electronic log, in accordance with the corresponding regulations, no Report of Occurrences will be made for the assumption contained in numeral 6) of article 134 of the Regulations of the General Law of Fishing, in the point referring to the capture of sizes smaller than those established or associated or dependent species". (emphasis added).

It should be noted that, before the entry into force of Supreme Decree No. 024-2016-

PRODUCE, numeral 3.2) of article 3 of Supreme Decree No. 009-2013-PRODUCE established that if the owner informed the Ministry of Production, through the Calas Report Form, the areas in which specimens had been extracted in sizes or weights Manuel Gómez Tomillo and Iñigo Sanz Rubiales. Administrative Sanctioning Law. General Part General Theory and Practice of Administrative Criminal Law. (Madrid: Thomson Reuters Aranzadi, 2013), pp. 709-710. Juan Carlos Morón Urbina. op. cit., p. 808.

"14. [...] the administrative precautionary measures regulated by article 146° of Law No. 27444 (currently article 146° of the TUO of Law No. 27444, General Administrative Procedure Law) will always be dictated within an administrative process or in conjunction with its initiation. However, when situations of risk or imminent danger of affecting constitutionally protected legal assets arise, the general administrative legislative model cited above remains silent regarding a preventive solution before the initiation of an administrative procedure, constituting in any case an exceptional case compared to the general rule the adoption of prior preventive measures, although they will always be subject, in their validity and effect, to the subsequent regulation of the initiation of the corresponding administrative procedure.

15. In such circumstances, the precautionary or preventive measures cited above may be issued before the opening of the administrative procedure. sanctioning, provided that there is sufficient motivation to perceive the need and urgency for its adoption, motivation that will always be aimed at safeguarding and protecting some constitutionally relevant legal asset. 18. In this regard, it must be taken into account that the fishing administration, apart from its regulatory, supervisory and sanctioning role, also has the constitutional purpose of protecting and promoting the rational and sustainable use and exploitation of fish resources, even more so in the opening of temporary fishing periods for a specific species, which is why it is able to impose preventive or precautionary measures in order to avoid its depredation, finding ourselves in an exceptional case of adoption of precautionary measures outside the administrative process, which are subject to the initiation of this immediately in order to determine the responsibility of the administered party with respect to the conduct that is allegedly in violation of the legislation on fishing matters." (Emphasis added).

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On the other hand, regarding the Principle of Benign Retroactivity, as an exception to the principle of ,571 Non-retroactivity, established in numeral 5) of article 246° of the TUO of Law No. 27444, establishes that "the sanctioning provisions produce retroactive effect as they favor the alleged offender or the offender, both in relation to the classification of the infraction as well as the sanction and its prescription periods.

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minors, or associated or dependent species, then an additional 10% above the permitted percentage could be discharged, with which the administered parties were already granted a benefit as recognition of the information provided. In this sense, taking into account the above, the Electronic Logbook

is a more precise and timely means of meeting the aforementioned objectives, as it provides information immediately (in real time) and truthfully, unlike the Calas Report Format, which is filled out manually and delivered at the point of unloading, which prevents the Ministry of Production from making decisions in a timely manner; therefore, it is not possible to equate the Report Format with the Electronic Calas Logbook, as both are of a different nature. L. CORTEZ

In this regard, when analyzing the provisions of Supreme Decree 024-2016-PRODUCE, it is verified that said regulation does not typify any infringing conduct, nor establish any sanction or prescription period, but that the referred legal provision only recognizes a benefit to the administrators during the inspection procedure, at which time the Occurrence Report is drawn up.

m) The administrator states that the investigating body has made an erroneous calculation with respect to the proposed fine, having used a factor approved by Ministerial Resolution No. 227-2012-PRODUCE, which was applicable for the sanctions corresponding to the year 2012 and not for those of the following years. In this regard, Ministerial Resolution No. 227-2012-PRODUCE is a rule that forms part of the Peruvian legal system, which is in full force since there is no other rule of equal or higher rank that has repealed it, so it is in full force, and the factors expressed therein are fully applicable to determine the fines in the administrative sanctioning procedures that are in process, and the administrator must take into account what is established in Article I of the Preliminary Title of the Civil Code, which contains a rule of public law. 13

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Therefore, the investigating body has acted appropriately by using the factor of the anchovy hydrobiological resource for CHI equivalent to 0.20, approved by Ministerial Resolution No. 227-2012-PRODUCE, to determine the quantum of the fine recommended in its Final Investigation Report, since it was the current norm at the time of the events that are the subject of this procedure;

o) Finally, the administrator argues that the Principle of Due Process and Presumption has been violated.

In this regard, it should be noted that, in this administrative instance, the administrators enjoy all the rights and guarantees inherent to Due Process, that is to say, that in the present case, the administrator is guaranteed the right to present its defense arguments, to offer its evidence and to obtain a reasoned decision based on law. In addition, they have the right to a plurality of instances and to

challenge the decisions of the Administration with which they do not agree, via an appeal. That is to say, that in the present procedure, the notification of the imputed facts was complied with and the legal deadline was granted to present their defenses, which determines that the Administration must rule based on the proven facts and documentation in the file. In application of the Principle of Presumption of Legality, established in numeral 9) of article 248° of the TUO of the LPAG, it is necessary to point out that this is not an absolute principle, since it admits as an exception the existence of evidence that determines the contrary. In that order of ideas, the evidence in the present procedure provides the necessary certainty to determine the infraction.

2.6.- ANALYSIS OF GUILT.

Article 248° of the TUO LPAG, includes the principles of Administrative Sanctioning Law, among them the one indicated in numeral 8, Principle of Causality, through which the following is expressed: "The responsibility must fall on the person who carries out the omission or active conduct

constituting a sanctionable infraction."

In this sense, in the field of administrative responsibility it must be a direct consequence of an action or omission attributable to its author, whether due to fraud or fault. Similarly, section 10 of said article includes the principle of guilt, through which it is established that administrative responsibility is subjective, except in cases where objective administrative responsibility is provided for by law or legislative decree, verifying that the structural guidelines of administrative offenses also tend, as in criminal offenses, to achieve the individualization of responsibility, prohibiting any attempt to construct objective responsibility or responsibility based on the simple relationship with a thing.

Alejandro Nieto points out that "the person who commits a typically unlawful act, not intentionally but by having violated a duty of care that was personally required of him and whose result he should have foreseen, acts with fault or imprudence (negligence) (...) so that fault consists, ultimately, in not having foreseen what should have been foreseen and in not having avoided what should have been avoided"⁹.

Likewise, fraud is understood as the conscience and will of the person acting, knowing what he is doing and wanting to do it.

In light of this, the infringement must be imputed to the administrator as fraud or fault, which must be determined prior to a value judgment of the proven facts, carried out at the time of determining administrative responsibility.

⁹ NIETO, Alejandro. "El derecho Administrativo Sancionador" Editorial Madrid Teco, 2012, p. 392.

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\\Natural and legal persons who carry out extraction, processing and

commercialization activities of hydrobiological resources are obliged to comply with the current regulations that regulate them, since this imposes a duty of ordinary diligence on all the actors who participate in this area, with the purpose of making a rational use of the hydrobiological resources in order to guarantee the preservation of the species. Among the obligations that are within the fishing regulatory framework, there is the obligation to extract species that exceed the minimum established size, with a maximum tolerance percentage, in the case of anchovy, of 10%, which allows ensuring the conservation of the species, a duty that is known by the companies in the sector.

Similarly, according to technical opinions, (Official Letter No. DE-100-033-96-PE/IMP issued by IMARPE) during the fishing work of fishing vessels it is possible to discover the presence of "peladilla" in the catch, before collecting 30% of the cloth, since it is tied to the net and when it is collected it is easily observed. Therefore, when the administrator extracted the anchovy hydrobiological resource, with a percentage that exceeded the minimum established sizes, it acted without due diligence since it did not take the steps related to compliance with regulations, and technical opinions to detect the capture of juvenile specimens, which is attributable to fault.

Based on the considerations indicated, it is concluded that the administrator incurred in noncompliance

of its obligations, a fact that determines the imputation of liability due to inexcusable fault; corresponding to apply the sanction established in the legislation on the matter. 2.7.-

APPLICATION OF THE PRINCIPLE OF BENIGN RETROACTIVITY

By Supreme Decree No. 017-20417-PRODUCE, the Regulation of Inspection and Sanction of Fishing and Aquaculture Activities (hereinafter RFSAPA) was approved, in which in its only complementary transitional provision it has indicated that "The administrative sanctioning procedures in progress are governed by the regulations in force at the time of the commission of the infraction, unless the subsequent regulation is more beneficial for the administered party. In this last case, benign retroactivity is applied in the first or second sanctioning instance, when appropriate." This provision is consistent with the provisions of numeral 5) of article 248 of the TUO LPAG. Having proven the commission of the infraction consisting of exceeding the established percentages of capture of specimens in sizes smaller than those established by the administrator, the sanction established in the fifth determination of the RISPAC should be applied.

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Code 6 of the Sanctions Table annexed to the TUO of the RISPAC, approved by Supreme Decree

No. 019-2011- PRODUCE, modified by Supreme Decree No. 009-2013-PRODUCE10, which establishes as a sanction the CONFISCATION of the hydrobiological resource extracted in excess and a

FINE equal to (quantity of resource in excess in t. x resource factor), expressed in UIT, as established in the following table:

EXCEEDING THE PERCENTAGES OF CAPTURE OF SPECIMENS IN SIZES SMALLER

THAN THOSE ESTABLISHED

D.S. No. 009-2013- PRODUCES Calculation of the Fine Confiscation Fine

Fifth determination of Code 6 (quantity of the resource extracted in excess (t) x resource factor), in UIT = 104,066 t. x 0.20 20,813 UIT 104,066 t. Likewise, it should be noted that, to date, the company PESQUERA DIAMANTE S.A., has not complied with depositing the commercial value of the confiscated hydrobiological resource to the E/P

CORINA, which should have been made within fifteen (15) calendar days following the discharge. In the present case, numeral 6) of article 134° of the Regulations of the General Fishing Law,

amended by Supreme Decree No. 009-2013-PRODUCE, in force at the time of the events that are the subject of this procedure, is currently contained in

numeral 11) of article 134° of the Regulations of the General Fishing Law, amended by Supreme Decree No. 017-2017-PRODUCE¹², whose sanctions are stipulated in

Code 11 of the Table of Sanctions annexed to the RFSAPA and contemplates the sanctions of FINE,

which is calculated in accordance with article 35° of the RFSAPA and Ministerial Resolution No. 591-2017-

PRODUCE¹³, and CONFISCATION of the percentage in excess of the established tolerance of the

hydrobiological resource. In this sense, we have that in the present case the sanction of CONFISCATION will not have any variation. However, the FINE sanction is calculated as follows:

CALCULATION OF THE FINE

DS No. 017-2017-PRODUCE RM No. 591-2017-PRODUCE

$M = B1P \times (1 + F)$ M: Fine expressed in UIT B= S*factor*Q B: Illegal Benefit

B: Illegal Benefit S: Marginal Sustainability Coefficient of the Sector

P: Probability of detection Factor: Resource and product factor

F: Aggravating and mitigating factors O: Amount of the resource compromised

REPLACEMENT OF THE FORMULAS IN MENTION, THE FINE FORMULA IS OBTAINED

$M = S*factor*QIP \times (1 + F)$ S:14 0.29

Resource factor:15 0.20

Q:16 104.066 t

P:17 0.75

F:18 80% = 0.8

$M = 0.29*0.20*104.066 \text{ t} * 0.75 \times (1+0.8)$ FINE = 14.49 UIT I° Regulation that was in force at the time of the imputation of the infraction.

11 Considering the date of the infraction, it is appropriate to apply the anchovy resource factor established in Ministerial Resolution No. 227-2012-PRODUCE.

12 REGULATIONS OF THE GENERAL FISHERIES LAW

Article 134°.- The following constitute administrative infractions in fishing and aquaculture activities:

[...1

11. Extracting or unloading hydrobiological resources in sizes or weights less than those permitted, exceeding the tolerance established in the regulations on the matter.
By means of this regulation, the components of the Variables "S" and "P" of the formula for the calculation of the fine sanction established in the Regulation of Inspection and Sanction of Fishing and Aquaculture Activities, approved by Supreme Decree No. 017-2017-PRODUCE and their corresponding values were approved.

14 The coefficient of marginal sustainability of the sector (S) based on the activity developed by the E/P CORINA, which is a vessel dedicated to the extraction for Indirect Human Consumption on a larger scale, is 0.29, in accordance with Ministerial Resolution No. 591-2017-PRODUCE.

15 The factor of the resource extracted by the EJP BAMAR 1, which is anchovy for Indirect Human Consumption, is 0.20 and is indicated in Annex III of Ministerial Resolution No. 591-2017-PRODUCE. According to literal c) of Annex I of Ministerial Resolution No. 591-2017-PRODUCE, the amount of the resource committed (0) for the case of vessels

corresponds to the tons of the resource, being that in the present case, the E/P BAMAR I extracted an excess of 104,066 t.

'7 According to literal 9) of Annex I of Ministerial Resolution No. 591-2017-PRODUCE, the probability of detection variable (P) for larger-scale vessels is 0.75.

'8 Article 44° of the RFSAPA establishes that: "In order to establish the applicable sanctions, the Ministry of Production or the Regional Governments according to their competences, consider the following as aggravating factors: [...] 4. When it is a question of fully exploited or recovering hydrobiological resources and when it is a question of legally protected species: An increase factor of 0.75 is applied. 80%". Consequently, given that through Ministerial Resolution No. 781-97-PE the anchovy was declared a fully exploited hydrobiological resource, this aggravating factor applies to the present case.

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2.8.- PENALTY TO BE IMPOSED.

In light of the arguments contained in this resolution, it is appropriate to apply the sanction to the administrator of the sanction of FINE equivalent to 14.49 UIT, as well as the SEIZURE of the hydrobiological resource extracted in excess, that is, 104,066 t of anchovy.

In application of article 10° of the TUO of the RISPAC, it was established that: "The confiscation of the

hydrobiological resources, as a precautionary measure, is carried out immediately at the time of the intervention (...) In direct proportion to the percentage in excess of the established tolerance. In this sense, through the Provisional Confiscation Act of Hydrobiological Resources 601-003 N° 000184, the confiscation amounting to 69,308 t. of the anchovy hydrobiological resource was carried out, and the confiscation sanction must be

considered fulfilled.

to impose.

III.- DECISION-MAKING PART - RESOLUTION

For the reasons set forth above, in exercise of the *ius imperium* and under the provisions of article 81° of Legislative Decree No. 25977, General Fisheries Law, in accordance with the provisions of Legislative Decree No. 1047, Law of Organization and Functions of the Ministry of Production, Supreme Decree No. 002-2017-PRODUCE, Regulations of Organization and Functions of the Ministry of Production; and other related regulations, the - Sanctions Directorate (DS-PA), in the first instance the PAS:

RESOLVES:

ARTICLE 1°.- **SANCTION the company PESQUERA DIAMANTE S.A.**, with RUC N° 20159473148, owner of the fishing vessel CORINA with registration CO-2660-PM at the time of the events, for having incurred in the infraction classified in numeral 6) of article 134 of the Regulations of the General Fishing Law, approved by Supreme Decree No. 012-2001-PE and modified by Supreme Decree No. 009-2013-PRODUCE, by having exceeded the tolerance percentages established for the capture of specimens in smaller sizes, on

July 7, 2015, in accordance with the reasons set forth in the present Directorial Resolution with:
FINE:

SEIZURE:

14.49 UIT (FOURTEEN WITH FORTY-NINE HUNDREDTHS OF A TAXABLE UNIT).

Of the hydrobiological resource extracted in excess (104,066 t.) of anchovy. 17

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ARTICLE 2°.- TO CONSIDER as COMPLIED the sanction of confiscation of the anchovy hydrobiological resource extracted in excess, amounting to 104,066 t., (ONE HUNDRED AND FOUR TONS AND SIXTY-SIX KILOGRAMS), carried out on the fishing vessel CORINA with registration CO-2660-PM, on July 7, 2015.

ARTICLE 3°.- TO CONSIDER that for the purposes of determining the amount of the fine, the Tax Unit (UIT) in effect at the time of payment of the same will be used, as stipulated in numeral 137.1 of article 137° of Regulation A of the General Fishing Law, approved by Supreme Decree No. 012-2001-PE.

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; ARTICLE 4°.- TO INSTRUCT the administrator that it must PAY the amount of the fine imposed in favor of the MINISTRY OF PRODUCTION in Current Account No. 0-000-L COR1EZ 296252 at the Banco de la Nación, and must prove the corresponding deposit by means of the

presentation of a written communication addressed to the General Administration Office, attaching the bank deposit voucher given to you by the Banco de la Nación, a document that must be presented at the General Office of Citizen Attention of the Ministry of Production. If within fifteen (15) business days following the date of publication or

notification of this Resolution, confirmation of the deposit made is not received and if there is no challenge to this Resolution, the corresponding coercive collection procedure will be initiated. ARTICLE 5°.- COMMUNICATE this Resolution to the corresponding

departments, PUBLISH it on the portal of the MINISTRY OF PRODUCTION:

www.produce.gob.pe and, NOTIFY according to law.

Register, communicate, comply

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