THE ENVIRONMENTAL ENFORCEMENT IN PERU

REFLECTIONS ON FUNCTIONS AND POWERS BY THE OEFA

OEFA
AGENCY FOR ENVIRONMENTAL ASSESSMENT AND ENFORCEMENT

The environmental enforcement in peru

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Preface

REFLECTIONS ON POWERS FOR IMPOSING PENALTIES BY THE AGENCY FOR ENVIRONMENTAL ASSESSMENT AND ENFORCEMENT

Hugo Gómez Apac
President of the Board of Directors
Agency for Environmental Assessment and Enforcement (OEFA)

This book is formed by several academic articles prepared by specialists in Administrative and Environmental Law and by officers of the Agency for Environmental Assessment and Enforcement (OEFA, by its initials in Spanish). Each one of them explains the scope of the provisions set forth by the Law No. 30011[1] and by the decisions of Board of Directors and of the Tribunal of Environmental Enforcement, which are intended to improve the environmental enforcement.

This publication is focused on informing all the citizens about the content of said provisions in order to facilitate its application, and, therefore, help to consolidate the new scope of the environmental enforcement: an effective one that combines the exercise of the economic activities and the environmental protection with a sustainable development.

The Law No. 30011, a rule that amends the Law on National Environmental Assessment and Enforcement System, represents a big change in the environmental enforcement of this country, which has been improved thanks to this provision. Part of this change is reflected in the jurisdiction that said law has granted to the OEFA to classify the environmental administrative offenses and approve the corresponding[2] scales of penalties. This new and very important

1 Law that amends the Law No. 29325, Law on National Environmental Assessment and Enforcement System, published in the Official Gazette *El Peruano* on April 26, 2013.

2 Refer to Articles No. 11, No. 17 and No. 19 of the Law No. 29325, amended by Law No. 30011.

function, without any doubt, shall be exercised with great responsibility. The OEFA, in order to show that this regulatory duty shall be exercised in such manner, has established some parameters which have to be followed at the time of developing this new function. In that sense, the OEFA has previously approved some General Regulations[3] for the classification of offenses and the scale of penalties comply with the principles of legality, classification, reasonableness, proportionality, gradualness and non-confiscation.

To present, the OEFA has issued three (3) classifications[4] which observe the criteria established in the General Regulations. These regulatory provisions reinforce the constitutional and legal guarantees recognized in favor of the companies. In this sense, such provisions explain with details the offending conduct and establish the objective criteria in order to accomplish a better predictability and gradualness in the determination of penalties. Likewise, they ensure the validity of the principle of non-confiscation, which permits that the penalties are not excessive for the companies.

On that matter, Milagros Maraví explains herein the power for classifying offending conducts as well as approving the scale of penalties by the OEFA. Said author states that the classifications approved by this entity are set within the parameters provided by the Law No. 30011, regarding the principles of classification and legality. On the other hand, Christian Guzmán develops the scope of the principle of classification in the determination of offending conducts; furthermore, he analyzes the application of the principles of reasonableness and predictability in the determination of the scale of penalties.

Similarly, Dante Mendoza explains the criteria to be considered for the adjustment of administrative penalties. He sustains that the increase of the

3 General Regulations on powers for imposing penalties by the Agency for Environmental Assessment and Enforcement, approved by the Decision of Board of Directors No. 038-2013-OEFA/CD, which were published in the Official Gazette *El Peruano* on September 18, 2013.

4 The abovementioned classifications are the following: (i) Decision of Board of Directors No. 042-2013-OEFA/CD, published on October 16, 2013, which approves the classification related to efficiency of environmental enforcement; (ii) Decision of Board of Directors No. 045-2013-OEFA/CD, published on November 13, 2013, which approves the classification related to the non-compliance with the maximum permissible limits; and, (iii) Decision of Board of Directors No. 049-2013-OEFA/CD, published on December 20, 2013, which approves the classification related to the environmental management instruments and the development of activities in prohibited zones.

5 By virtue of the Second Supplementary Provision of the Law No. 30011, it is amended the Sub-paragraph b), Number 136.2 of Article No. 136 of the Law No. 28611 - General

maximum amount of the fines, that the OEFA[5] may impose, does not represent any excess of punishment which may breach the principle of proportionality or result confiscatory. In Addition, he states that the regulatory rules approved by said entity have the sufficient mechanisms to guarantee the control of administrative discretion in the adjustment of penalties[6].

On the other hand, Richard Martin mentions another of the main amendments made by the Law No. 30011 which is the special system of enforcement of administrative acts issued by the OEFA[7]. To this regard, the author states that said system allows that the collection of fines, which have been imposed to protect the environment, are not extended in time, becoming, therefore, authentically deterrent. He also states that the request of an injunction bond for suspending the coercive execution procedure has the purpose of obtaining a balance between the interest of the plaintiff and of the people safeguarded by the Public Administration.

César Ipenza and Roy Cárdenas, on the other hand, analyze the constitutionality of the provisions approved by the Supreme Decree No. 008-2013-MINAM[8] for regulating the special system of enforcement of administrative acts issued by the OEFA. In that sense, they sustain that said provisions are in line with the constitutional framework because they do not breach the principles of non-confiscation, reasonableness, proportionality and due process.

Additionally, Jessica Valdivia analyzes the possibility that the Public Administration has to initiate a procedure of coercive execution before the deadline of three (03) months that the companies have in order to file a contentious-administrative action. Likewise, said author acknowledges that the Public Administration may declare by law the prescription of its power to determine the existence of administrative penalties.

Law on Environment, which increased the maximum amount of the fines from 10,000 to 30,000 Peruvian Tax Units (UIT, by its initials in Spanish).

6 Refer to the Methodology for the Calculation of Base Fines and Application of Aggravating and Mitigating Factors to be used in the adjustment of penalties pursuant to Article No. 6 of the Supreme Decree No. 007-2012-MINAM, approved by the President's Decision of Board of Directors No. 035-2013-OEFA/PCD, published in the Official Gazette *El Peruano* on March 12, 2013.

7 Refer to Article No. 20-A of the Law No. 29325, incorporated by the Law No. 30011.

8 Supreme Decree No. 008-2013-MINAM: It is the Supreme Decree which approves the regulatory provisions of the Article No. 20-A of the Law No. 29325, Law on National Environmental Assessment and Enforcement System, published on August 22, 2013.

This publication tries to explain the scope of the administrative measures that may be established by the OEFA, in compliance with the Law No. 30011[9].

In that sense, Pedro Gamio carries out a comparative analysis on the issuance of specific orders, the preventive and precautionary measures, considering the advances made on the environmental legislation in Chile, Colombia and Argentina. On the other part, Juan José Martínez explains the legal nature of the preventive measures and the requirements to be complied for its issuance; furthermore, he emphasizes the importance of said measures as an ideal mechanism to properly protect the environment.

Regarding the analysis on functions of the OEFA, in compliance with the guidelines set forth by the Law No. 30011, Arturo Delgado states that said entity, as governing body of the National Environmental Assessment and Enforcement System (SINEFA[10], by its initials in Spanish), has the function of monitoring other entities responsible for the environmental enforcement in order to ensure that they comply with their functions in an independent, impartial, simple and efficient manner. Likewise, he sustains that this entity has the function of controlling the companies, within the scope of its jurisdiction, to make sure that such companies comply with the environmental legislation[11].

On the other hand, an analysis of the main decisions issued by the Tribunal of Environmental Enforcement of the OEFA is made in this book. Regarding this matter, Verónica Rojas shows the criteria for interpretation issued by said body regarding the scope of environmental obligations to be controlled: the environmental commitments and the adjustment of penalties. Furthermore, this author presents the guidelines issued by said Tribunal on the configuration of offenses related to the excess of the maximum permissible limits.

In other aspects, Mario Huapaya and Ernesto Soto explain the new criteria issued by the Tribunal of Environmental Enforcement to obtain an efficient environmental justice. Both authors cover the interpretative criteria related to the application of administrative silence with regard to the environmental matters and the immediate nature of administrative offenses. They say that, by means of these criteria, the Tribunal has managed to properly balance the promotion of the economic activities and the safeguard of the public interest along with the environmental protection.

9 Refer to Articles No. 16-A (specific order) and 22-A (precautionary measures) of the Law No. 29325, incorporated by the Law No. 30011.

10 Refer to Number 11.2 of the Article No. 11 of the Law No. 29325, amended by the Law No. 30011.

11 Refer to Number 11.1 of the Article No. 11 of the Law No. 29325, amended by the Law No. 30011.

Furthermore, analyzing deeply the scope of decisions made by the Tribunal of Environmental Enforcement of the OEFA, Ernesto Soto details the criteria to be considered to determine when the non-compliance with the obligations, contained in an environmental management instrument, constitute an evident improvement which shall not be punished. The author declares that the environmental improvement has to be analyzed under the criterion of reasonability, distinguishing the conducts affecting the environment – which have to be proscribed and punished – from those protecting it, and shall, therefore, be encouraged.

Finally, Martha Aldana explains the Common Environmental Enforcement System[12]. The author describes the regulatory backgrounds of said system, develops its principles and details the scope of the environmental enforcement function, and emphasizes the duty exercised by the OEFA for specifying the functions of the different entities which are part of the SINEFA.

To sum up, it is important to emphasize that this publication is an effort made by the OEFA for promoting the research and discussion about such matters that are important in the planning of an effective environmental enforcement. We believe both the research and the discussion are key elements for joining efforts which lead not only to a better environmental conscience, but also to consolidate a responsible attitude about the environmental care.

12 Approved by the Ministry's Order No. 247-2013-MINAM, published in the Official Gazette *El Peruano* on August 28, 2013.

1.

POWERS FOR CLASSIFYING CONDUCTS AND APPROVING THE SCALE OF PENALTIES THROUGH DECISIONS OF THE BOARD OF DIRECTORS BY THE AGENCY FOR ENVIRONMENTAL ASSESSMENT AND ENFORCEMENT (OEFA).

MILAGROS MARAVÍ SUMAR

SUMMARY

This article analyzes the power of the OEFA to classify offending conducts with regard to environmental matters and approve the corresponding scale of penalties through decisions of its Board of Directors. In this regard, the author is focused on the amendments made by the Law No. 30011 related to the functions of the OEFA as governing body of the National Environmental Assessment and Enforcement System - SINEFA.

I. Introduction. II. Legal framework. III. Main provisions of Law No. 30011. IV. Power for classifying offenses by the OEFA V. Classification of offenses and approval of the scale of penalties through decisions of Board of Directors. VI. Classification of offenses by the OEFA. VII. Regulations for the Organization and Functions of the OEFA. VIII. Conclusions.

I. INTRODUCTION

By virtue of the Law No. 30011, published on April 26, 2013, the Law No. 29325 on National Environmental Assessment and Enforcement System (SINEFA) and the Law No. 28611, General Law on Environment[1], were amended with

1 Published in the Official Gazette *El Peruano* on October 15, 2005.

regard to the granting of powers to the Agency for Environmental Assessment and Enforcement (OEFA) for classifying conducts as well as approving the scale of penalties through decisions of Board of Directors.

In this regard, this article is focused on making a detailed analysis on the scope of the Law No. 30011 in connection with the power that the OEFA has to impose penalties within the scope of its jurisdiction, as well as the adjustment of potential penalties which the OEFA is entitled to impose.

In that sense, this article will develop, as a first point, the legal framework which established the creation of the OEFA, as well as the designation of its basic functions.

As a second point, it will cover the main amendments made by the Law No. 30011 related to the differentiation of functions in charge of the OEFA acting in its capacity of governing body of the SINEFA from those to exercise the environmental enforcement.

Likewise, it will develop the principles of legality and classification from a doctrinal and case law perspective in order to determine if the power for imposing penalties by the OEFA and its potential penalties strictly comply with the provisions referred to in the abovementioned principles.

Finally, an analysis with regard to the approval of the classification and the scale of penalties through decisions of Board of Directors of the OEFA will be made.

II. LEGAL FRAMEWORK

By virtue of the Legislative Decree No. 1013, published on May 14, 2008, the Law on Creation, Organization and Functions of the Ministry of Environment was approved. By means of its Second Supplementary Provision, the OEFA was created as a specialized public technical agency, with legal personality under domestic public law, establishing itself as a state-funded public body, registered with the Ministry of Environment and responsible for the enforcement, monitoring, control and imposition of penalties with regard to environmental matters.

Therefore, the basic functions of the OEFA are, among others, the following:

a) To direct and monitor the application of the common environmental enforcement and control system and the incentives system set forth by Law No. 28611, General Law

on Environment, as well as directly supervise and control the compliance with the activities to which it is entitled by Law.

b) To exercise the power to impose penalties within the scope of its jurisdiction, applying penalties of warnings, fines, confiscation, shutdown or cessation of activities for the offenses to be determined and according to the procedure to be approved for such purpose, exercising its power of coercive execution in the pertinent cases.

On the other hand, pursuant to Law No. 29325, published on March 5, 2009, the SINEFA was created in order to secure that all natural persons and legal entities comply with the environmental legislation, as well as monitor and ensure the functions of assessment, monitoring, inspection, control and imposition of penalties with regard to environmental matters are carried out in an independent, impartial, simple and efficient manner.

In that sense, it was ordered that the OEFA shall be the governing body of the SINEFA, while the national, regional or local environmental enforcement entities were defined as those with express powers to develop functions of environmental enforcement, exercising its jurisdiction regardless of the OEFA.

On the other hand, the Article No. 8 of the Law No. 29325 established that the Board of Directors shall be the highest body of the OEFA. This Board is composed of five (5) members appointed by supreme order, which composition is detailed as follows: two (2) members appointed at the request of the Ministry of Environment (MINAN, by its initials in Spanish), which will be presided by one of them who shall have the casting vote, and three (3) members appointed, within those selected, by public tender.

Finally, it is important to mention that before the amendment of the Law No. 29325, made by the Law No. 30011, the Article No. 11 of said Law established the following as one of the general functions of the OEFA:

e) Regulatory function: it covers the power to issue regulations and rules that regulate the procedures related to its jurisdiction, and others of general nature related to interests, obligations or rights of the natural persons or legal entities, either public or private, in charge of the enforcement, within the scope of its jurisdiction.

Similarly, Articles No. 17 and No. 19.2 established the following before the amendment made by the Law No. 30011:

> Pursuant to Supreme Decree, signed by the Ministry of Environment and made according to law, the administratively punishable conducts for environmental offenses set forth by the Law No. 28611, General Law on Environment, and other rules related to this matter have to be classified.
>
> The Ministry of Environment, at the request of the OEFA, will approve the scale of penalties in which the penalties applicable to each type of offense will be established, based on the penalties set forth by Article No. 136, General Law on Environment.

Finally, pursuant to Supreme Decree No. 022-2009-MINAM, published on December 15, 2009, the Regulation for the Organization and Functions (ROF, by its initials in Spanish) of the OEFA was approved.

In this sense, the Article No. 6 of the ROF ordered that the OEFA has as general functions, among others, the following:

> a) To regulate, direct and manage the National Environmental Assessment and Enforcement System, guiding the process of its implementation, as well as its effective and efficient operation in the levels of the national, regional and local government.
> (…)
> e) To draw up and approve regulations in terms of assessment, monitoring, enforcement, control and penalty, acting in its capacity of governing body of the National Environmental Assessment and Enforcement System.

Likewise, the Article No. 8 of the ROF established the Board of Directors has, among its general functions, the responsibility for issuing orders within the scope of its jurisdiction.

Pursuant to Decision of Board of Directors No. 012-2012-OEFA/CD, published on December 13, 2012, the new Regulation for Administrative Penalty Proceedings of the OEFA was approved, which established in its Article No. 3 that the administrative penalty proceedings, regulated in such rule, shall be governed, among others, by the principles of legality, classification, due process, reasonableness, internalization of costs, proportionality, environmental responsibility, legal presumption, causality, non-retroactivity, concurrent offenses, repetition of offenses, gradualness, non bis in idem and prohibition of reformatio in peius.

III. MAIN PROVISIONS OF LAW NO. 30011

The Law No. 30011 established several amendments such as the differentiation of the general functions of the OEFA, acting in its capacity of governing body of the SINEFA, from those to exercise the environmental enforcement.

3.1 Amendments regarding general functions of the OEFA

The Law No. 30011 sets the functions of the OEFA, acting in its capacity of governing body of the SINEFA, according to the following:

a)Regulatory function: to issue regulations and rules that regulate the procedures related to its jurisdiction, and others of general nature related to interests, obligations or rights of the natural persons or legal entities, either public or private, in charge of the enforcement, within the scope of its jurisdiction.

b) Supervisory function of the national, regional and local environmental enforcement entities: to make monitoring actions and verify the performance of the national, regional and local environmental enforcement entities.

Regarding the exercise of the environmental enforcement functions, said Law establishes the following:

a) Assessment function: to make surveillance, monitoring actions and other such actions in order to secure the compliance with the environmental regulations.

b) Direct supervisory function: to make verifications and monitoring actions in order to secure the companies comply with the regulations, obligations and incentives set forth by the environmental legislation. In addition, it includes the power to issue precautionary measures.

c Controlling and penalty function: to investigate the commission of potential administratively punishable offenses and impose penalties for the non-compliance with the obligations derived from the environmental management instruments as well as from the environmental regulations and orders or provisions issued by the OEFA.

3.2 Amendments of Articles No. 17 and No. 19 of the Law on SINEFA

The Article No. 17 of the Law on SINEFA, which was amended, established that the administrative offenses, within the scope of the jurisdiction of the OEFA, are the following:

a) Fail to comply with the obligations set forth by the environmental regulation.

b) Fail to comply with the obligations in charge of the companies, which were established in the environmental management instruments and detailed in the current environmental regulation.

c) Fail to comply with the environmental commitment made in the concession agreements.

d) Fail to comply with the precautionary, preventive or remedial measures as well as the orders or provisions issued by the competent authorities of the OEFA.

e) Others which are within the scope of its jurisdiction.

It is understood, from the foregoing, that the OEFA will be able to classify the offenses and approve the scale of penalties through the decisions of Board of Directors. The classification of general and transversal offenses and penalties will be applied in a supplementary manner to the ones used by the environmental enforcement entities (EFA, by its initials in Spanish).

The Law No. 30011 also amended the Article No. 19, pointing out that the determination of offenses shall be based on the implication on health and environment, on the potential damage or certainty of damage, as well as on its effects, without prejudice to other criteria which may be subsequently defined.

The Board of Directors of the OEFA approves the scale of penalties in which the penalties applicable to each type of offense are established, based on the penalties set forth by Article No. 136 of the General Law on Environment.

Finally, the Law No. 30011 amended the Sub-paragraph b) of the Number 136.2 of the Article No. 136 of the General Law on Environment, increasing the maximum amount of the fine to 30,000 Peruvian Tax Units (UIT by its initials in Spanish) for failing to comply with the environmental regulation.

IV. POWER FOR CLASSIFYING PENALTIES BY THE OEFA

As the Constitutional Court pointed out in the Docket No. 274-99-AA/TC, the constitutional prohibition to not be prosecuted or convicted for any act or omission that, at the time of its commission, was not previously prescribed in the law expressly and unequivocally as a punishable violation, as a punishable offense within the Item d), Sub-paragraph 24) of the Article No. 2 of the Political Constitution of Peru of 1993, is not a procedural guarantee applicable only to the criminal proceedings, but, by extension, it is also a guarantee which shall be observed within the administrative procedure, especially in the scope of the administrative penalty law.

However, the principle of legality, broadly described in the referred judgment, is explained in the Law No. 27444, Law on General Administrative Procedure (LPAG, by its initials in Spanish), differentiating between the power to impose the types of penalties, which may be applied to the companies, and the classification of punishable conducts or administrative offenses[2].

Indeed, the Article No. 230 of the LPAG establishes that the power of all public entities to impose penalties is governed, among others, by the special principles indicated as follows:

> 1. Legality: Pursuant to the legally binding rule, the entities are empowered to impose penalties and anticipate the administrative consequences that, as penalty, may be applied to a company. However, such entities, in any case, shall order the deprivation of liberty.
> (…)
> 4. Classification: Only the offenses expressly provided by a legally binding rule, according to their nature, are considered as administratively punishable conducts, without any further interpretation. The regulatory provisions of development may specify or adjust those focused on identifying the conducts or on determining the penalties, without constituting new punishable conducts to those stipulated under law, except in cases which the law allows the classification by regulation.

2 PEREIRA, Roberto. "La potestad sancionadora de la Administración y el procedimiento administrativo sancionador en la Ley 27444". *Comentarios a la Ley de Procedimiento Administrativo General.* Lima, Ara Editores, 2001, p. 294

4.1 Principle of legality

As it is observed, the principle of legality, defined in the Article No. 230.1 of the LPAG, establishes two legal reservations: i) the first is to grant to a public entity the power to impose penalties, and ii) the second is to regulate the potential penalties to which an entity is entitled to impose.

To this regard, Morón[3] points out that "is absolutely prohibited that a particular rule, with regulatory nature, intends, as direct granting, interpretation of a legal rule or indispensable complement, to grant to a legal entity under public law the power to impose penalties, or to indicate what kind of penalties this entity may apply to the companies in the administrative proceedings.

In this sense, the Second Final Supplementary Provision of the Legislative Decree No. 1013 expressly indicates that the OEFA is empowered to impose penalties within the scope of its jurisdiction, applying the penalties of warning, fine, confiscation, immobilization, shutdown or cessation of activities for the offense to be determined and according to the procedure to be approved for such purpose, exercising its power of coercive execution in the pertinent cases.

Likewise, the Article No. 136 of the General Law on Environment establishes that the penalties to be imposed by the OEFA are, among others, warnings and fines of up to 30,000 UIT.

Pursuant to the abovementioned legally binding rules, it is observed that the power the OEFA has to impose penalties, as well as the adjustment of potential penalties which such entity is entitled to impose strictly comply with the principle of legality set forth by the Article No. 230.1 of the LPAG.

4.2 Principle of classification

The principle of classification set forth by Article No. 230.4 of the LPAG, establishes that the administrative entities may apply only the penalties regulated by a legally binding rule to the commission of conducts which have been previously classified as offenses to the legal system. Such classification shall be carried out pursuant to the legally binding rule, except in cases the law allows the classification by regulation.

3 MORÓN, Juan Carlos. *Comentarios a la Ley del Procedimiento Administrativo General.* Eight edition. Lima: Legal Gazette, 2009, p. 687

To this regard, in the judgment registered in the Docket No. 05262-2006-PA, the Constitutional Court points out that "an important definition has been made with regard to what is understood as principle of legality and classification: the first is satisfied when the offenses and penalties are applied according to law, and the second, instead, constitutes the definition of the conduct which the law considers as offense. This definition, considered administratively as unlawful, is not subject to an absolute legal reservation, but it may be supplemented through the corresponding regulations, as evidenced herein".

Similarly, Morón[4] properly mentions that "the law itself is able to convene the attendance or request the support of the Administration to complete the work of classification (…). It is about of some kind of delegation of duties which the legislator makes in the Administration for considering that technical or very dynamic aspects, which shall not be within the legal reservation, are being addressed, but always determining the core of the wrongful conduct".

4.3 Regulatory delegation

We believe that the regulatory delegation in the classification of penalties shall necessarily comply with two requirements: i) that it is expressly established by a legally binding rule, and, ii) that the regulation does not distort the objective and the purpose of the law to be governed, in strict compliance with the principles of reasonableness and proportionality that are also part of the due process of law[5].

Regarding the OEFA, it is observed that the amendment made by the Law No. 30011 complies with the requirement of regulatory delegation by virtue of a legally binding rule, by expressly establishing that such entity will able to classify the penalties and approve the applicable scale of penalties through decisions of Board of Directors. This classification has to be carried out in compliance with the substantive content of what is considered as wrongful by the referred Law.

Likewise, the Law No. 30011 regulates the administrative offenses that, generally and essentially, will govern the classifications to be carried out subsequently, establishing as punishable conducts the following:

4 Idem, p. 706

5 Judgment issued by the Constitutional Court registered in Docket No. 05262-2006-PA.

a) Fail to comply with the obligations set forth by the environmental regulation.

b) Fail to comply with the obligations in charge of the companies, which were established in the environmental management instruments and detailed in the current environmental regulation.

c) Fail to comply with the environmental commitment made in the concession agreements.

d) Fail to comply with the precautionary, preventive or remedial measures as well as the orders or provisions issued by the competent authorities of the OEFA.

e) Others which are within the scope of its jurisdiction.

As it is observed, the Law No. 30011 regulates generally the administrative offense in order to protect the purpose and objective of the law; therefore, the second requirement of the principle of classification is met.

To this respect, Pedreschi[6] states that "the regulatory intervention may only constitute a necessary and essential complement from the established by the legally binding rule, which jurisdiction may only be extended to the development of the provisions herein, without exception".

Despite the fact that the LPAG does not require that the classification of new punishable conducts by regulation has a direct correlation with certain parameters provided by law, it is true that a remission made by law without even mentioning the fundamental aspects, which may be considered as a punishable conduct, may be questionable for not granting guarantees and sufficient predictability to the companies against potential situations of abuse of power by the public entities.

As Nieto[7] points out, "the law related to regulatory cooperation in the Administrative Penalty Law requires the compliance with two requirements

6 Quoted in: OCAMPO, Fernando. "El principio de razonabilidad como límite a la5tipificación reglamentaria de los Organismos reguladores". Lima: *Ius et Veritas* No. 42, July 2011, p. 296

7 NIETO, Alejandro. *Derecho administrativo sancionador.* Fourth edition. Madrid: Editorial Tecnos, 2008, p. 286.

derived from the legal reservation: the previous authorization allowing the regulatory intervention in general and, additionally, the remission, that includes the introduction of some conditions or essential guidelines that support the subsequently referred regulation".

Regarding the general administrative offenses set forth by the Law No. 30011, it is important to mention that the classification to be carried out by the OEFA shall be in accordance with the substantive content of what is considered as wrongful by the referred law. Consequently, the OEFA shall not classify the punishable conducts beyond the general causes provided by the Law No. 30011.

The classification function of the OEFA shall be understood as the power to separate and regulate the specific content of the abovementioned offenses, defining and detailing the punishable conducts within the established legal framework.

4.4 Criteria for classifying penalties

The Sub-paragraph a) of the Article No. 11.2 and Article No. 19.2 of the Law on SINEFA, amended by the Law No. 30011, regulate the power of the OEFA to approve the applicable scale of penalties, as well as the criteria for their adjustment and the scope of preventive, precautionary and remedial measures to be issued by the pertinent competent entities, based on the provisions set forth by Article No. 136 of the General Law on Environment.

To this regard, it is important to point out that Article No. 230.4 of the LPAG expressly allows that the regulatory provisions of development may specify or adjust those focused on identifying the conducts or on determining the penalties. In this sense, the approval of the scale of penalties, which is finally the adjustment of classified penalties, has the legal backing and complies with the principle of classification provided by the LPAG.

Accordingly, the approval of the scale of penalties to be applied by the OEFA shall comply with the provisions set forth by the Article 19.1 of the Law on SINEFA, which points out that the offenses and penalties are classified as minor, serious and major, and that its determination shall be based on the implication on health and environment, on the force or damage level, on its effects and on other criteria which may be provided in compliance with the current regulation.

As an example, the OEFA currently has rules regulating the calculation of fines, the remedial measures which have been applied and the specific

criteria to adjust penalties within the scope of its jurisdiction. This is the case of the President's Decision of the Board of Directors No. 035-2013-OEFA/PCD which approved the "Methodology for the calculation of base fines and application of the aggravating and mitigating factors to be used in the adjustment of penalties pursuant to Article No. 6 of the Supreme Decree No. 007-2012-MINAM"; Decision of Board of Directors No. 010-2013-OEFA/CD which approved the "Guidelines for the application of remedial measures provided by the Sub-paragraph d) of the Number 22.2 of the Law No. 29325, Law on National Environmental Assessment and Enforcement System"; and the referred Regulation for Administrative Penalty Proceedings approved by Decision of Board of Directors No. 012-2012-OEFA/CD.

Thus, as Granados and Villa[8] state: "(…) the Law No. 30011 has been very clear to establish the nature and the limits of the penalties, as well as the criteria for their adjustment. Therefore, the regulatory delegation is completely constitutional".

Finally, it is concluded that the relevant and general regulation of the administrative offenses with regard to environmental matters, made by the Law No. 30011, and the subsequent delegation of powers, which allows a regulatory rule completes the description of what is considered as wrongful and approve the applicable scale of penalties, comply with the principle of classification set forth by the Article No. 230.4 of the LPAG.

V. CLASSIFICATION OF OFFENSES AND APPROVAL OF THE SCALE OF PENALTIES BY DECISIONS OF BOARD OF DIRECTORS

Pursuant to Article No. 43 of the Law No. 29158 – Organic Law on Executive Branch (LOPE, by its initials in Spanish), published on December 20, 2007, the systems are the sets of principles, rules, proceedings, techniques and instruments in which are organized the activities of the Public Administration requiring to be carried out by all or different entities which are part of the State.

In addition, the Articles Nos. 44 and 45 of the LOPE establish that the systems are in charge of a governing body which constitutes itself in its regulatory-

8 GRANADOS, Milagros and Francisco VILLA. "Constitucionalidad de las disposiciones orientadas a fortalecer la fiscalización ambiental contenidas en la Ley No. 30011". In GÓMEZ, Hugo (compiler). *El nuevo enfoque de la fiscalización ambienta.* First edition. Lima: Organismo de Evaluación y Fiscalización Ambiental, 2013. p. 47

technical authority nationwide; issues rules and establishes procedures related to its area; coordinates its technical operation and is responsible for its proper operation in the framework of this law as well as for its special laws and additional provisions.

Likewise, it is stated that the Executive Branch is responsible for regulating and operating the Functional Systems; and that the rules of the system will establish the functions of its governing body.

On the other hand, the Law No. 29325 created the National Environmental Assessment and Enforcement System (SINEFA) in order to secure the compliance with the environmental legislation by all natural persons and legal entities; and appointed the OEFA as its governing body.

It is exactly such rule[9] that establishes the OEFA has the power to impose penalties with regard to the environmental obligations, and that, by virtue of the Decision of its Board of Directors, the conducts and the approval of the applicable scale of penalties are classified.

Thus, it remains clear that the OEFA, as governing body of the SINEFA and by the legally expressed delegation, is empowered to classify the administrative offenses related to the environmental matters. It is also important to make a brief analysis of the regulatory instrument used to execute such regulation (Decision of Board of Directors).

To this regard, it is normally considered that the legally binding rules shall be regulated by the Supreme Decrees, which must be defined by the Article No. 11 of the LOPE as "general rules that regulate the legally binding rules or that control the functional multisectoral activity or the functional sectoral activity nationwide". These decrees may require or not the approval vote by the Council of Ministers, as provided by law. Moreover, the decrees are signed by the President of the Republic and subscribed by one or more ministers with the pertinent jurisdiction.

Notwithstanding the foregoing, the Supreme Decrees are not the only regulations which may regulate the legal provisions or rules with the same jurisdiction. For example, the Article No. 61 of the LPAG establishes that "the jurisdiction of the entities is provided by the Constitution and law, and is regulated by the corresponding administrative rules".

9 Amended by the Law No. 30011.

Indeed, each entity is empowered to regulate its jurisdiction provided by law through the rules which such entity is entitled to issue, complying with the provisions set forth by the Article No. 5 of the Preliminary Title of the LPAG, which states that administrative proceedings are, among others, the Supreme Decrees and other regulatory rules of different branches of the State.

García de Enterría defines the regulation as a strict rule issued by the Administration. Regarding the public entities, this author states the following:

> *(…) it is important to differentiate what the article 62 of the LOFAGE calls "statutes" of such entities, which are a decree issued by the Government which organizes them after have been established by law, and do not have, therefore, the proper statutory nature considered herein and the regulatory power provided by law, or (according to the Article No. 42.1 of LOFAGE) by their own statutes, with regard to what is understood that, as a general rule, should be limited to their related organization.*[10]

In this way, it is clear that the body in charge of issuing regulations is the executive at its various instances[11]. "For this reason, the decrees and decisions of the different levels, containing this kind of order, shall be considered as part of the legislation within the Peruvian legal system because they comply with the regulatory function of the executive branch of the State"[12].

Regarding the OEFA, the decisions of its Board of Directors are the rule of highest hierarchy since it is the highest body of the institution.

To this regard, the Article No. 8 of the Law on SINEFA establishes that the Board of Directors is the highest body of the OEFA, while the Article No. 8 of its ROF points out that the Board of Directors is responsible for, among its functions, the issuance of orders within the scope of its jurisdiction.

Thus, the classification of offenses and the approval of the applicable scales of penalties shall be carried out by a regulatory rule, which is, in this case, a decision of the Board of Directors of general nature, and in compliance with law.

10 GARCÍA DE ENTERRÍA, Eduardo. *Curso de derecho administrativo.* Volume I. Twelth print. Lima-Bogotá: Palestra-Themis, 2011, p. 233.

11 RUBIO, Marcial. *El sistema jurídico. Introducción al derecho.* Tenth edition. Lima: Fondo Editorial PUCP, 2011, p. 140.

12 Idem, p. 145

A similar case is for the regulatory agencies which, within its regulatory functions, are empowered to classify the offenses for non-compliance with the obligations provided by legally binding rules, technical rules and those derived from concession agreements, under its scope, as well as for non-compliance with the regulatory provisions issued by such entities in compliance with the Article No. 3.1 of the Law No. 27332 - Framework Law on Regulatory Agencies for the Private Investment in Public Services[13].

For example, the Decision of Board of Directors of the Supervisory Body for the Investment in Energy (OSINERG, by its initials in Spanish) No. 028-2003-OS-CD approved the Classification of Offenses and the Scale of Fines and Penalties for such entity. Similarly, by virtue of the Decision of Board of Directors of the Supervisory Body for the Private Investment in Telecommunications (OSIPTEL, by its initials in Spanish) No. 002-99-CD-OSIPTEL, the General Regulation for the Offenses and Penalties was approved, in which the wrongful conducts, within the scope of its jurisdiction, were classified.

As it is observed, there are similar cases where public agencies classify conducts pursuant to the decisions of Board of Directors or pursuant to the decisions of their highest administrative authorities, which may be only in case a legally binding rule establishes expressly such delegation.

Finally, it is important to point out that the regulatory delegation is based on the same reason that is sustained by authorization for a regulatory rule participates in the procedure of classification, using, as a basis, factual arguments such as the technical complexity in some matters, the need to meet the dynamism of the activity, the variety of case studies and its subsequent non-viability to classify according to law[14].

Therefore, it is concluded the OEFA is not only empowered to classify conducts and approve the applicable scale of fines, in compliance with the principles of legality and classification regulated by the LPAG, but it also complies with the purpose and objective of the regulatory delegation; furthermore, the OEFA, as the specialized technical agency in charge of the enforcement, control, monitoring and imposition of penalties with regard to environmental matters and as the governing body of the SINEFA, is the entity of the State with the highest jurisdiction to classify the punishable conducts due to its knowledge and experience in the matter.

13 Published in the Official Gazette *El Peruano* on June 29, 2000.

14 MORÓN, Juan Carlos. Op cit. P. 707.

VI. CLASSIFICATION OF OFFENSES BY THE OEFA

From July 2013, the Board of Directors of the OEFA, exercising its regulatory power as well as the power for imposing penalties provided by the Law No. 29325, in accordance with public interest, has approved various orders to efficiently and properly protect the environment.

- On July 17, 2013, by virtue of Order No. 029-2013-OEFA/CD, it was ordered to publish the project of the Decision of Board of Directors of the OEFA, which would approve the General Rules for the Exercise of the Power to Impose Penalties by the Agency for the Environmental Assessment and Enforcement.

- Likewise, by virtue of Order No. 030-2013-OEFA/CD, it was ordered to publish the project of the Decision of Board of Directors, which would approve the Chart of Classification of Offenses and the Scale of Penalties related to the Effectiveness of the Environmental Enforcement.

- On July 23, 2013, by virtue of Order No. 031-2013-OEFA/CD, it was ordered to publish the project of the Decision of Board of Directors, which would approve the Classification of Offenses and the Scale of Penalties related to the Maximum Permissible Limits.

- By virtue of Order No. 034-2013-OEFA/CD, it was ordered to publish the project of the Decision of the Board of Directors, which would approve the Classification of Offenses and the Scale of Penalties related to the non-compliance with the Environmental Obligations to be controlled contained in the Environmental Management Instruments.

In this way, from July 2013, various regulatory projects were published in order to collect remarks, comments and recommendations from the interested persons. As a result of this process, the OEFA approved the following rules:

6.1 Decision of Board of Directors No. 038-2013-OEFA/CD

As noted above, in accordance with the Sub-paragraph a) of the Number 11.2 of the Article No. 11.2 of the Law on SINEFA, amended by the Law No. 30011, the regulatory function of the OEFA includes the power to issue, within the scope of its jurisdiction, rules that regulate the exercise of environmental enforcement in the framework of the SINEFA and others of general nature

related to the verification of the compliance with the environmental obligations to be controlled by the companies.

The same Article No. 11.2, Article No. 17 and Article No. 19 of the Law on SINEFA recognize the jurisdiction of the OEFA to classify administrative penalties and approve the pertinent scale of penalties, as well as the criteria for their adjustment.

Thus, pursuant to the Article No. 11.2 of the Law No. 30011, on September 17, 2013, by virtue of Order No. 038-2013-OEFA/CD, the General Rules for Imposing Penalties by the Agency for the Environmental Assessment and Enforcement (OEFA) were approved in order to ensure the compliance with the principles of legality, classification, proportionality and non-confiscation and, at the same time, protect efficiently the environment.

The following are the most important provisions of the Order No. 038-2013-OEFA/CD:

- The rules are binding and constitute criteria and guidelines in order to guide the national, regional and local entities in charge of the environmental enforcement.

- The Board of Directors of the OEFA has the power to classify administrative penalties and approve the respective scale of penalties. For such purposes, it will establish the subtypes of offenses, as evidenced as follows:

  a) General: it involves the obstruction of the functions of environmental enforcement.
  b) Transversal: it involves the non-compliance with the environmental management instruments or with environmental rules applicable to different economic activities subject to be controlled.
  c) Sectoral: it involves the non-compliance with the environmental obligations specified in the sectoral environmental legislation applicable according to the type of economic activity.

  It is important to mention that, through the classification, new environmental obligations for the companies will not be created.

- The conducts of act or omission that fail to comply with the environmental obligations to be controlled, including the obligations related to the environmental enforcement, will be classified as factual assumption of the administrative offenses.

- In accordance with the principle of legal presumption (presumption of innocence), the competent authority of the OEFA shall prove the cause of an administrative offense; that is to say, verify the factual assumption of the type of offense. However, the defendant company may be exempted from punishment if it proves the factors which break the causal nexus, either act of God, force majeure, or failure of third parties.

- The scale of penalties is established according to the seriousness of the administrative offense. For such purposes, the factors, indicated below, shall be considered:

  a) The environmental risk of the involved parameters.
  b) The actual damage caused to the human life or health.
  c) The actual damage caused to the flora or fauna.
  d) The percentage exceeding the maximum permissible limits.
  e) The development of activities in prohibited areas or zones declared as such by the competent authorities.
  f) The act of not having any operating permits for taking advantage of the natural sources.
  g) Other criteria which shall be approved by the Board of Directors of the OEFA.

The maximum fine for the most serious offenses shall be 30,000 UIT.

- The Board of Directors of the OEFA will approve the methodology for the adjustment of penalties under the principles of reasonableness and proportionality.

- In compliance with the principle of non-confiscation, the fine to be applied shall not be more than the 10% of the gross annual income earned by the offender the year prior to the date of the offense. In case the company is carrying out activities in a shorter time, the gross annual income will be estimated by multiplying by 12 the average of the gross monthly income that has been registered from the starting date of such activities.

In case the company is not earning incomes, an estimation of the earnings expected to earn shall be carried out.

The abovementioned rule will not be applied in the following cases where the offender:

a) Has developed his activities in prohibited areas and zones.
b) Has not proved his gross incomes or has not estimated the incomes he expects to earn.
C9 Is a repeat offender.

- The amount of the imposed fine will be reduced in a 25% if the punished company paid it within a period of 15 business days from the notification of the act being punished. Said reduction will be applied if the company does not file an appellation for the administrative act that imposes the penalty.

- The OEFA may impose, besides of the penalty, the following remedial measures:

a) The confiscation of objects, instruments, artifacts or substances employed for the development of the activity that caused the penalty.
b) The shutdown, cessation or restriction of the activity that caused the penalty.
c) The retirement, treatment, storage or destruction of materials, substances or infrastructure.
d) The partial or total closure of the premise and establishment where the activity that caused the penalty is taking place.
e) The obligation of restore, renovate or repair the altered situation, as the case may be, shall be the responsibility of the person causing the damage, if that does not happen, the said obligation shall be compensated in environmental and/or economic terms, pursuant to the guidelines ordered by the OEFA for such purpose.
f) The attendance to environmental training courses which shall be paid by the offender, being an indispensable requirement the attendance and passing of said courses.
g) The employment of measures of mitigation of risk or damage.
h) The imposition of compensatory obligations based on the national, regional, local or sectoral environmental policy, according to the case.
i) The adaptation procedures in accordance with the environmental management instruments proposed by the pertinent authority.
j) Other measures that are considered as necessary for reverting or reducing as much as possible, the damaging effect that the offending conduct may have caused to the environment, natural resources or people's health.
k) Other measures that are considered as necessary for avoiding the continuance of the damaging effect that the offending conduct cause or may cause to the environment, natural resources or people's health.

6.2. Decision of Board of Directors No. 042-2013-OEFA/CD

Pursuant to the Articles Nos. 11, 17 and 19 of the Law on SINEFA, which recognizes the power of the OEFA to classify administrative offenses and approve the pertinent scale of penalties, as well as the criteria for their adjustment, the Chart of Classification of Offenses and Scale of Penalties related to the Efficiency of the Environmental Enforcement, applicable to the economic activities which are within the scope of jurisdiction of the OEFA, was approved by Order No. 042-2013-OEFA/CD on October 15, 2013.

It is important to mention that, in that rule, the offending conducts are classified in minor, serious or major offenses and are of general nature, pursuant to the last paragraph of the Article No. 17 of the Law on SINEFA.

Within its provisions, the following are the most important:

1. The following are considered as administrative offenses related to the deliverance of information:

Administrative Offense	Offense Nature	Penalty
Refuse without justification to deliver any information or documentation required by the supervisor for field supervision purposes, as long as he/she is obligated to have said documentation within the supervised establishments	Minor	Warning or fine of up to 50 UIT
Fail to send the required information or documentation, or sending it out of the established due date, form or via to the OEFA	Minor	Warning or fine of up to 100 UIT
Send false information or documentation to the OEFA	Serious	Fine from 5 UIT up to 500 UIT
Incur in any of the abovementioned conducts despite the fact that there is a potential or actual situation of environmental damage	Major	Fine from 10 UIT up to 1,000 UIT

2. The following are considered as administrative offenses related to the obstruction of the direct supervision function:

Administrative Offense	Offense Nature	Penalty
Delay without justification the entry to the establishments or infrastructures which are under direct supervision	Minor	Warning or fine of up to 50 UIT
Fail to provide the facilities for entering to the establishments or infrastructures which are under supervision, or for its regular progress	Minor	Warning or fine of up to 100 UIT
Refuse the entry to the establishments or infrastructures which are under direct supervision	Serious	Fine from 2 UIT up to 200 UIT
Fail to provide the facilities of transportation, accommodation and food to the supervisor when he/she performs a field supervision in the establishments located in places that are hard to reach	Serious	Fine from 2 UIT up to 200 UIT
Obstruct the duties of the direct supervision by the disproportionate or unjustified demand of safety and health requirements approved by the company	Minor	Warning or fine of up to 50 UIT
Obstruct or impede the exercise of the supervisor's powers which are related to the obtaining or reproduction of physical or digital files	Minor	Warning or fine of up to 100 UIT
Obstruct or impede the performance of the duties of the experts and specialists accompanying the supervisor during the development of field supervision	Minor	Warning or fine of up to 100 UIT

Obstruct or impede the installment or operation of equipment for monitoring the establishments of the supervised entities or in the geographic areas related to the supervised activity, as long as the said equipment does not difficult the activities or the provision of the services of the companies subject to supervision.	Minor	Warning or fine of up to 100 UIT
Provide false statements during the field supervision	Serious	Fine from 5 UIT up to 500 UIT
Incur in any of the abovementioned conducts despite the fact that there is a potential or actual situation of environmental damage.	Major	Fine from 10 UIT up to 1000 UIT

3. The following are considered as administrative offenses related to the submission of the environmental emergency report:

Administrative Offense	Offense Nature	Penalty
Fail to send the environmental emergency reports or sending them out of the established due date, form or via to the OEFA	Minor	Warning or fine of up to 100 UIT
Send false information or documentation on the environmental emergency reports to the OEFA	Serious	Fine from 5 UIT up to 500 UIT
Incur in any of the abovementioned conducts despite the fact that there is a potential or actual situation of environmental damage	Major	Fine from 10 UIT up to 1,000 UIT

4. In order to determine the amount of the abovementioned fines, it shall be applied the Methodology for the Calculation of Base Fines and Application of the Aggravating and Mitigating Factors to be used in the Adjustment of Penalties, approved by the President's Decision of Board of Directors No. 035-2013-EFA/PCD, or the rule that substitutes it.

5. The fine to be applied shall not be more than the 10% of the annual gross income earned by the offender the year prior to the date of the offense

6.3. Decision of Board of Directors No. 045-2013-OEFA/CD

The Item a) of the Article No. 17 of the Law on SINEFA, amended by the Law No. 30011, establishes that the non-compliance with the obligations detailed in environmental regulations is considered as an administrative offense within the scope of jurisdiction of the OEFA.

Based on the abovementioned, the Classification of Offenses and Scale of Penalties related to the non-compliance with the Maximum Permissible Limits (LMP, by its initials in Spanish) was approved on November 12, 2013 by the Order No. 045-2013-OEFA/CD designed for the economic activities that are within the scope of jurisdiction of the OEFA.

The offending conducts are classified in the abovementioned rule as minor, serious or major and have a transverse order, in compliance with the last paragraph of the Article No. 17 of the Law on SINEFA.

The abovementioned rule orders, among other provisions, the following:

1. Regarding the parameters that do not qualify as a major environmental risk, the excess of up to 10% above the Maximum Permissible Limits (LMP) is considered as a minor administrative offense, which will be penalized with a fine from 3 up to 300 Peruvian Tax Units (UIT).

2. Likewise, the following are considered as serious administrative offenses:

Excess of LMP	Parameters	Penalty
Up to 10%	Qualified as a major environmental risk	From 5 up to 500 UIT
From more than 10% up to 25%	Not qualified as a major environmental risk	From 10 up to 1,000 UIT
From more than 10% up to 25%	Qualified as a major environmental risk	From 15 up to 1,500 UIT
From more than 25% up to 50%	Not qualified as a major environmental risk	From 20 up to 2,000 UIT
From more than 25% up to 50%	Qualified as a major environmental risk	From 25 up to 2,500 UIT
From more than 50% up to 100%	Not qualified as a major environmental risk	From 30 up to 3,000 UIT
From more than 50% up to 100%	Qualified as a major environmental risk	From 35 up to 3,500 UIT
From more than 100% up to 200%	Not qualified as a major environmental risk	From 40 up to 4,000 UIT
From more than 100% up to 200%	Qualified as a major environmental risk	From 45 up to 4,500 UIT
From more than 200%	Not qualified as a major environmental risk	From 50 up to 5,000 UIT
From more than 200%	Qualified as a major environmental risk	From 55 up to 5,500 UIT

3 The following are considered as parameters of major environmental risk:

3.1. Cadmium
3.2. Mercury
3.3. Lead
3.4. Arsenic
3.5. Cyanide
3.6. Sulfur Dioxide
3.7. Carbon Monoxide
3.8. Hydrocarbons

4. The following are considered as major administrative offenses:

4.1. To excess the LMP causing a real damage to the flora or fauna will be penalized with a fine from 100 up to 10,000 UIT.

4.2. To excess the LMP causing a real damage to the human life and health will be penalized with a fine from 150 up to 15,000 UIT.

4.3. To excess the LMP causing a real damage to the flora and fauna, without having an operating permit, will be penalized with a fine from 200 up to 20,000 UIT.

4.4. To excess the LMP causing a real damage to the human life and health, without having an operating permit, will be penalized with a fine from 250 up to 25,000 UIT.

It is important to mention that an operating permit is considered as the administrative act which authorizes the entity to discharge effluents or emissions into the environment or as the act which control said discharges.

The number of parameters exceeding the LMP and the amount of control points in which the said excess is made, are not considered as new types of offenses, but aggravating factors for the adjustment of the penalty.

6.4. Decision of Board of Directors No. 049-2013/OEFA-CD

The Item b) of the Article No. 17 of the Law on SINEFA, amended by the Law No. 30011, establishes that the non-compliance with the obligations in charge of the companies, contained in the Environmental Management Instruments (IGA), is considered as administrative offenses within the scope of jurisdiction of the OEFA.

Based on the abovementioned, the Classification of Offenses and Scale of Penalties related to the non-compliance with the Environmental Obligations to be controlled contained in the Environmental Management Instruments, was approved on December 18, 2013 by Order No. 049-2013-OEFA/CD.

In this case, the classified offending conducts are defined in this rule as minor, serious or major and have a transverse order, in compliance with the last paragraph of Article No. 17 of the Law on SINEFA.

The concerned rule basically establishes the following:

1 It is considered as a minor administrative offense to not communicate to the pertinent authority about the start of the construction for the execution of the project described in the environmental management instrument (IGA) within a period of 30 business days after the start of said activities, which shall be penalized with a warning or fine of up to 100 UIT.

2. The following are considered as administrative offenses related to the non-compliance with an environmental management instrument:

   a) Fail to comply with the IGA without causing any potential or actual damage to the flora, fauna, human life and health shall be considered as a serious offense and shall be penalized with a fine from 5 up to 500 UIT.

   b) Fail to comply with the IGA causing any potential damage to the flora or fauna shall be considered as a serious offense and shall be penalized with a fine from 10 up to 1,000 UIT.

   c) Fail to comply with the IGA causing any potential damage to the human life or health shall be considered as a serious offense and shall be penalized with a fine from 50 up to 5,000 UIT.

   d) Fail to comply with the IGA causing any real damage to the flora or fauna shall be considered as a major offense and shall be penalized with a fine from 100 up to 10,000 UIT.

   e) Fail to comply with the IGA causing any real damage to the human life or health shall be considered as a major offense and shall be penalized with a fine from 150 up to 15,000 UIT.

3. The following are considered as administrative offenses related to the development of activities without having an environmental management instrument:

a) To develop projects or activities without having an approved IGA causing a potential damage to the flora or fauna shall be considered as a major offense and shall be penalized with a fine from 175 up to 17,500 UIT.

b) To develop projects or activities without having an approved IGA causing potential damage to the human life and health shall be considered as a major offense and shall be penalized with a fine from 200 up to 20,000 UIT.

c) To develop projects or activities without having an approved IGA causing real damage to the flora or fauna shall be considered as a major offense and shall be penalized with a fine from 225 up to 22,500 UIT.

d) To develop projects or activities without having an approved IGA causing real damage to the human life or health shall be considered as a major offense and shall be penalized with a fine from 250 up to 25,000 UIT.

4. The following are considered as administrative offenses related to the development of activities in prohibited zones:

a) To develop projects or activities in prohibited zones, declared as such by the corresponding authority, causing any potential damage to the flora or fauna shall be considered as a major offense and shall be penalized with a fine from 225 up to 22,500 UIT.

b) To develop projects or activities in prohibited zones, declared as such by the corresponding authority, causing any potential damage to the human life or health shall be considered as a major offense and shall be penalized with a fine from 250 up to 25,000 UIT.

c) To develop projects or activities in prohibited zones, declared as such by the corresponding authority, causing any real damage to the flora or fauna shall be considered as a major offense and shall be penalized with a fine from 275 up to 27,500 UIT.

d) To develop projects or activities in prohibited zones, declared as such by the corresponding authority, causing any real damage to the human life or health shall be considered as a major offense and shall be penalized with a fine from 300 up to 30,000 UIT.

The abovementioned orders are set within the powers *to classify conducts and approve the scales of fines through the Decision of Board of Directors provided by the Law No. 30011.*

In such manner, the OEFA, acting in its capacity of governing body of the SINEFA, and, as the specialized technical agency responsible for the enforcement, control, monitoring and imposition of penalties with regard to environmental matters, is complying with the functions that were delegated according to law.

VII. REGULATION FOR THE ORGANIZATION AND FUNCTIONS OF THE OEFA

Pursuant to the Article No. 3 of the LOPE, all the entities which are part of the Executive Branch must have the management documents establishing its internal organization, as well as the functions that characterize its working units or bodies.

Therefore, as a supplement of the amendment of the Law on the SINEFA, made by the Law No. 30011, we consider appropriate to update the ROF of the OEFA which was approved by the Supreme Decree No. 022-2009-MINAM.

The update of the ROF would involve the inclusion of the power to classify the offenses with regard to the environmental matters and approve the applicable scale of penalties, within the general functions of the OEFA and within the functions of its Board of Directors, as indicated below:

Article No. 6: General Functions

The OEFA has the following general functions:

- To classify the offenses with regard to the environmental matters, as well as approve the applicable scale of penalties, through Decision of Board of Directors, pursuant to the Law No. 29325, Law on the National Environmental Assessment and Enforcement System, and the Law No. 28611, General Law on Environment.

Article No. 8: Functions of the Board of Directors

The Board of Directors, the highest body of the OEFA, consists of five (5) members and shall be presided by one of them.

The Board of Director has the following functions:

- To approve the classification of offenses with regard to the environmental matters, as well as approve the applicable scale of penalties, pursuant to the Law No. 29325, Law on the National Environmental Assessment and Enforcement System, and the Law No. 28611, General Law on Environment.

Having the approval of the proposed amendments, the delegation of powers carried out in the OEFA by virtue of the Law No. 30011, would be reinforced and complemented in compliance with the criteria established in the LOPE. Nonetheless, the fact that these amendments are not included in the ROF does not affect the power granted to the OEFA according to law since the ROF is a management document that gathers all functions granted by other rules.

VIII. CONCLUSIONS

The Second Supplementary Final Provision of the Legislative Decree No. 1013 and the Article No. 136 of the General Law on Environment expressly establish the power of the OEFA for imposing penalties within the scope of its jurisdiction, as well as the adjustment of potential penalties that said entity is entitled to impose (warnings, fines of up to 30,000 UIT, among others),

complying, therefore, with the principle of legality set forth by the Article No. 230.1 of the LPAG.

Regarding the principle of legality set forth by the Article No. 230.4 of the LPAG, it is considered that the delegation of the classification of offenses within the regulatory rules shall necessarily comply with two requirements: i) that it is expressly established by a legally binding rule, and, ii) that the regulation does not distort the objective and the purpose of the law to be governed.

On that sense, we see that the amendment made by the Law No. 30011 complies with the requirement of the regulatory delegation through a legally binding rule, by expressly establishing that the OEFA shall have the power to classify offenses, as well as approve the applicable scale of penalties by the Decision of Board of Directors.

Regarding the second requirement, the Law No. 30011 is not only limited to point out that the said classification has to be carried out in accordance with the substantive content of what is considered as wrongful by the referred law; but also it regulates the administrative offenses, which on a general and essential manner will govern the classifications to be subsequently made. Therefore, it is ensured that the classification of the new punishable conducts by regulation have a direct correlation with the parameters established by law.

The OEFA will not be able to classify punishable conducts that are beyond the general causes considered as administrative offenses by the Law No. 30011. The function of classification of the OEFA has to be understood as the power to separate and regulate the specific content of the said causes, defining and specifying the offending conducts within the established legal framework.

The OEFA will have to approve the applicable scale of penalties in accordance with the Article No. 19.1 of the Law on SINEFA, which points out that the offenses and penalties are classified as minor, serious and major, and that its determination is based on the implication on health and environment, on the potential damage or certainty of damage, as well as on its effects and other criteria which may be provided in compliance with the current regulation.

Regarding the regulatory instrument (Decision of Board of Directors) used to execute the classification delegated to the OEFA and the approval of the applicable scale of penalties, it is important to mention that each entity is empowered to regulate its jurisdiction provided by law through the rules which such entity is entitled to issue.

Regarding the OEFA, the decisions of Board of Directors are the rule of highest hierarchy since it is the highest body of the institution. On that sense, the Article No. 8 of the Law on SINEFA establishes that the Board of Directors is the highest body of the OEFA, while the Article No. 8 of its ROF states that the Board of Directors has the functions of issuing orders within the scope of its jurisdiction. Therefore, it is perfectly constitutional and legal that the OEFA classifies the offenses and approves the scale of fines applicable to such offenses through the abovementioned regulatory instrument.

Furthermore, the regulatory delegation is based on factual arguments as the technical complexity in some matters, the necessity of dealing with the dynamism of the activity, the variety of case studies, among others. The OEFA, as a specialized technical agency responsible for the enforcement, control, monitoring and imposition of penalties with regard to environmental matters, and as the governing body of the SINEFA, is the entity of the State with the highest jurisdiction to classify punishable conducts due to its knowledge and experience in such matter.

Therefore, the OEFA is not only legally empowered to classify conducts, in accordance with the principles of legality and classification regulated by the LPAG, but also complies with the objective and purpose of the regulatory delegation by being the specialized and competent agency regarding environmental enforcement and penalty matters.

On that base, the OEFA has issued decisions of Board of Directors, that, within the framework of the Law No. 30011, classify offenses and establish penalties and one that determines the general rules in respect of the exercise of its power to impose penalties.

Likewise, in a supplementary manner, we consider appropriate to update the ROF of the OEFA, including the power to classify offenses with regard to environmental matters, as well as approve the applicable scale of penalties, within the general functions of the OEFA and the functions of the Board of Directors. Nonetheless, the fact that this update is not included within the ROF does not affect the power granted to the OEFA according to law.

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2.

CLASSIFICATION AND CRITERIA FOR IMPOSING PENALTIES. ANALYSIS OF ARTICLE NO. 19 OF LAW NO. 29325

DANTE MENDOZA ANTONIOLI

SUMMARY

In this article, the author analyses the criteria used for the classification of penalties, the applicable scale of penalties; and, finally, the compatibility of several legal provisions issued by the OEFA with the principles of legality, classification and reasonableness of the power of the State to impose penalties and the general principle of non-confiscation of the performance of the Public Administration.

I. Introduction. II. Classification of offenses: minor, serious and major. III. The applicable scale of penalties and the principle of non-confiscation. IV. The principle of legality for imposing penalties by the State and the Article No. 19 of the law. V. The principle of classification and the Article No. 19 of the law. VI. The principle of reasonableness (proportionality) for imposing penalties and the scales approved by the OEFA. VII. Conclusions.

I. INTRODUCTION

By virtue of the Articles No. 17 and No. 19 of the Law No. 29325, Law on the National Environmental Assessment and Enforcement System[1], the OEFA has the express powers to not only classify but also to approve the scale of penalties for the offenses made to the environmental legislation. Furthermore, the Article No. 17 of the Law No. 29325, which was amended by the Law No. 30011[2], orders the following:

1 Published in the Official Gazette *El Peruano* on March 05, 2009.

2 Published in the Official Gazette *El Peruano* on April 26, 2013.

> Article No. 17: Administrative offenses and the power to impose penalties
> (…)
> The conducts are classified and the applicable scale of penalties is approved by Decision of Board of Directors of the OEFA. The classification of general and transversal offenses and penalties shall be applied in a supplementary manner with regard to the classification of offenses and penalties which may be used by the EFA.

On the other hand, the Article No. 19 of the same rule orders the following:

Article No. 19: Classification and criteria for the classification of penalties

19.1 The offenses and penalties are classified as minor, serious and major. Their classification has to be based on the implication on health and environment, on the force or damage level, on its effects and other criteria which may be defined in accordance with the current regulation.

19.2 The Board of Directors of the OEFA approves the scale of penalties in which the applicable penalties for each type of offense are established based on the penalties set forth by the Article No. 136 of the Law No. 28611 - General Law on Environment.

As an execution of its legal powers, the OEFA has issued the following Decisions of Board of Directors: Order No. 042-2013-OEFA/CD (which classifies the offenses and establishes the scale of penalties related to the efficiency of the environmental enforcement, applicable to the economic activities within the scope of its jurisdiction); Order No. 045-2013-OEFA/CD (which classifies the offenses and establishes the scale of penalties related to the non-compliance with the maximum permissible limits); and the Order No. 049-2013-OEFA/CD (which classifies the offenses and establishes the scale of penalties related to the environmental management instruments and the development of the activities carried out in prohibited zones).

The regulatory combination of definition, establishment and classification of penalties has created some concerns in the sectors to which it is intended to be employed, especially for the compatibility of the abovementioned provisions with the principles of legality, classification and reasonableness of the power of the State to impose penalties and the general principle of non-confiscation of the performance of the Public Administration.

II. CLASSIFICATION OF OFFENSES: MINOR, SERIOUS AND MAJOR

According to its seriousness, the offenses may be classified as minor, serious and major. Their classification has to be based on the damage caused whether on human health or on the environment; and in both cases, the force or damage level shall be also taken into account.

In compliance with the legal regulation, the three orders issued by the OEFA have divided the offenses into three groups where there are 11 offenses classified as minor, 19 offenses classified as serious and 17 offenses classified as major.

In the case of the minor offenses related to the environmental management instruments and the development of activities in prohibited zones, as well as those related to the efficiency of the environmental enforcement and the non-compliance with the maximum permissible limits, it has been ordered that both monetary and non-monetary penalties shall be imposed. The warnings are non-monetary penalties while the monetary penalties can range from up to 300 Peruvian Tax Units (UIT).

The serious offenses are punished with fines that can range from 5 up to 5,500 UIT while the major offenses may be punished with fines that can range from 10 up to 30,000 UIT. It is important to mention that, according to the chart corresponding to the offenses related to the efficiency of the environmental enforcement, the highest penalty is 1,000 UIT.

III. THE APPLICABLE SCALE OF PENALTIES AND THE PRINCIPLE OF NON-CONFISCATION

For the penalties that are punished with fines, the principle of non-confiscation has to be taken into account at the moment of their application and according to the case because they can collide with other fundamental rights or institutions of economic nature, which are also protected by our Political Constitution.

Regarding the principle of non-confiscation, it is important to specify that this has been extracted from the tax law and that, in order to ensure an effective protection of the citizens' rights, the OEFA has extended it into the entire scope of the jurisdiction of its power to impose penalties.

According to the most advanced tendencies on case laws, it must be understood by this principle that in the execution or defense of certain rights (as of the environmental and human health), *it is impossible to impose a penalty depriving*

the content of other fundamental rights that may be also contained in the Political Constitution of Peru.

In this regard, the Constitutional Court considers that:

> The principle of non-confiscation informs and defines the execution of the tax power of the State, ensuring that the tax law does not affect the assets of the people in an unreasonable and disproportionable manner.
>
> This principle also has an institutional aspect, since it ensures that certain institutions, which are part of our economical Constitution (economical pluralism, property, enterprise, and savings, among others), are not suppressed or deprived of content when the State executes its tax power[3].

Therefore, the principle of non-confiscation with regard to the administrative matter is closely related to the principles of reasonableness and proportionality, whose content has also been developed by the Constitutional Court, and which will be later discussed herein.

The OEFA, pursuant to the Decision of Board of Directors No. 038-2013-OEFA/CD, has used this principle within the general rules on the exercise of its power to impose penalties. Likewise, the first article of said Order expressly details that its objective is "(…) to ensure the compliance with the principles of legality, classification, proportionality and *non-confiscation*, and, at the same time, to have an efficient and appropriate environmental protection". Under this logic, in the Number 10.1 of the Article No. 10 of said rule, the same entity puts an "obstacle" in order to protect the companies from eventual excesses on the penalties which may affect the principle of non-confiscation. In that sense, it orders that:

> In compliance with the principle of *non-confiscation*, the fine to be applied shall not be more than the ten percent (10%) of the annual gross income earned by the offender on the year prior to the date of the offense.

IV. THE PRINCIPLE OF LEGALITY FOR IMPOSING PENALTIES BY THE STATE AND PRESCRIPTION OF ARTICLE NO. 19 OF THE LAW

The Sub-paragraph d), Number 24 of the Article No. 2 of the Constitution establishes that "no one shall be prosecuted or convicted for any act or

3 Dockets Nos. 004-2004-AI/TC; 0011-2004-AI/TC; 0012-2004-AI/TC, 0013-2004-AI/TC; 0014-2004-AI/TC, 0015-2004-AI/TC; 0016-2004-AI/TC and 0027-2004-AI/TC (accumulated)

omission that, at the time of its commission, *was not previously prescribed in the law expressly and unequivocally as a punishable violation, or did not constitute an offense penalized by law*" (emphasis added).

This constitutional provision has been developed in the administrative law as one of the principles of the power of the State to impose penalties, which is expressly explained in the Article No. 230 of the Law No. 27444, Law on General Administrative Procedure[4] (LPAG), under the name of "principle of legality".

The incorporation of this principle to our positive law establishes, without any doubt, that the power of entities of the State to impose penalties *does not constitute an implicit power of the Administration*, but that it always provides a legally express power. Without a law that empowers it, it is impossible that any entity of the Administration will be able to impose penalties to the companies.

As second but yet important point, the mentioned article details that the penalties which are going to be imposed to the company may be only established by legally binding rules, obtaining with this, a principle of protection for the people that are against the tax actions taken by the agents of the State who pretend to impose a penalty based on its particular belief or opinion regarding the conducts that, according to them, have to be punished.

4.1. The principle of legality and the role of regulation

In accordance with the statement of Danós, "the principle of legality or legal reservation, involves the prohibition of the imposition of penalties that do not have a legal scope, and the prohibition of the regulations that establishes offenses and penalties *by their own initiatives*, with no protection of legally binding rules" (emphasis added)[5].

The legality within the administrative law to impose penalties involves the impossibility to establish penalties that do not have its primary origin within a legally binding rule or law; furthermore, it prohibits that, by regulation, the offenses and penalties are differently established from the previously established by law. However, this is not an absolute prescription, since the regulation also has to fulfill a role which, according to the attribution of powers to impose penalties to institutions, has been detailed by Gallardo as follows:

4 Published in the Official Gazette *El Peruano* on April 11, 2001.

5 DANÓS, Jorge. "Notas acerca de la potestad sancionadora de la Administración Pública". Ius et Veritas. 1995, No. 10, p. 153, Lima.

> "The constitutional principle of legality involves a legal reservation, but *the law does not want to be exclusive or excluding with regard to the regulation, but it simply wants that its hegemony or dominant role is guaranteed*. This is the principle of legality in its version of supremacy of law. Definitely, on the distribution of roles, the law has the function of protagonist and the regulation of a secondary character, a supporting role; the subordination or supplementation[6] role".

It is important to mention that in Peru, the regulations can supplement the laws by developing penalties which have been previously set forth by legally binding rules or laws.

4.2. The Constitutional Court and the principle of legality

The Constitutional Court has several judgments in which the principle of legality with regard to the power of the State to impose penalties is mentioned. It particularly emphasizes the judgment issued regarding the case filed with the Docket No. 2050-2002-AA-TC, in which the following is expressed:

> The principle of legality with regard to the power to impose penalties impedes that he commission of an offense may be punished if it is not previously established by law, and it also prohibits that a penalty may be imposed if the same is not established by law. As this Court has ordered (Case of the Anti-terrorist Legislation, Docket No. 010-2002-AI/TC), this principle has three requirements: the existence of a law (*lex scripta*), that the law is prior to the fact that has been punished (*lex previa*), and that the law details a determined factual assumption (*lex certa*). As previously indicated, "Said principle involves a double guarantee; the first one has a material aspect and an absolute approach, strictly related to the penal aspect as well as to the administrative penalties; reflects the special importance of the principle of legal certainty in said limiting fields; and *involves the urgent need of regulatory predetermination of the offending conducts and of the corresponding penalties, that is to say, the existence of legal provisions* (lex previa*) that allow to predict those conducts with sufficient certainty* (lex certa*) and to know what to do regarding the possible responsibility and eventual penalty; and the second one has a formal aspect, related to the requirement and existence of a rule of respective aspect and that this Court has identified as…" legally binding rule or law*. (Judgment of the Constitutional Court (STC, by its initials in Spanish) of Spain 61/1990). (Emphasis added).

Although that, based on the principle of legality, the "*indeterminate*" types are prohibited, the Constitutional Court itself understands that the accurate and

6 GALLARDO, María Jesús. *Los principios de la potestad sancionadora. Teoría y práctica*.5Primera edición. Madrid: Iustel, 2008, p. 49.

absolute determination of legal concepts is impossible. This has been indicated in the judgment of the Docket No. 010-2012-AI/TC as follows:

> 46. (…) *this requirement of "lex certa" shall not be understood, however, as a request for the legislator makes an absolute clarity and precision in the formulation of the legal concepts. That is impossible, since the proper nature of language, with its characteristics of ambiguity and vagueness, admits certain level of indetermination, greater or lesser, as the case may be*. Even the most accurate, casuistic and descriptive formulations ever imagined cause problems in the determination in some of its assumptions since these always have a slight possibility of error. Therefore, it has been established in a justified manner that "in this matter, it is impossible to pretend to obtain a mathematical precision because the same even escapes from the language possibilities" (CURY URZUA: Enrique: La ley penal en blanco. Temis, Bogota, 1988, p. 69). (Emphasis added).
>
> 47. *Definitely, the constitutional doctrine specifies that the certainty of the law is perfectly compatible; however, it may have, in some cases, a certain margin of indetermination in the formulation of types*. (FERNÁNDEZ SEGADO, Francisco: El Sistema Constitucional Español, Dykinson, Madrid, 1992, p. 257). However, the level of indetermination will inadmissible when the citizens do not know which behaviors are prohibited and which are allowed. (In that sense: BACIGALUPO, Enrique: Manual de Derecho Penal, Parte General. Temis. Bogotá, 1989, p. 35). As it is sustained by this Court in the case "Exit poll" (Docket No. 002-2001-AI/TC), quoting the Conally vs. General Cons. Case of the Supreme Court of the United States of America, "a rule that prohibits to do something in such confusing term that men with average intelligence have to find out its meaning and differ about its content, violates the essence of the principle of legality" (legal basis No. 6).

4.3. Decisions of Board of Directors of the OEFA Nos. 042-2013-OEFA/CD, 045-2013-OEFA/CD, and 049-2013-OEFA/CD, and their compatibility with the principle of legality

We shall now observe the compatibility with the principle of legality from what was established in the decisions of Board of Directors of the OEFA Nos. 042-2013-OEFA/CD (in which the offenses are classified and the scale of penalties is established in relation to the efficiency of the environmental enforcement, applicable to the economic activities within the scope of jurisdiction of the OEFA); 045-2013-OEFA/CD (in which the offenses are classified and the scale of penalties is established in relation to the non-compliance of the maximum permissible limits); and 049-2013-OEFA/CD (in which the offenses are classified and the scale of penalties is established in relation to the environmental management instruments and the development of activities within prohibited zones).

The Number 1) of the Article No. 230 of the LPAG explains the principle of legality of the power of the State to impose penalties with the following text:

> *"Pursuant to the legally binding rule, the entities are empowered to impose penalties and anticipate the administrative consequences that, as penalty, may be applied to a company. However, such entities, in any case, shall order the deprivation of liberty.*

From here it can be understood that, regarding the administrative law to impose penalties, it is really important for the Public Administration that a legally binding rule or law considers at least these two aspects:

a) The authorization to a specific entity to impose penalties to the companies.
b) The establishment of the type of penalties that may be imposed.

Both provisions are met in the case of the Article No. 19 of the Law No. 29325. Indeed, the power to impose penalties executed by the OEFA *comes* from the order established in the Item b) of the Number 1) of the Second Final Supplementary Provision of the Legislative Decree No. 1013[7] as well as from the Article No. 17 of the Law No. 29325, amended by the Article No. 1 of the Law No. 30011; and not from its own decisions of the Board of Directors (042-2013-OEFA/CD, 045-2013-OEFA/CD, and 049-2013-OEFA/CD) *which are only limited to approve a chart of offenses and a scale of fines and penalties*.

On the other hand, as it has been previously mentioned, the same principle of legality requires that any legally binding rule or law establishes the "administrative consequences that, *as* penalty, are possible to impose to a company". It is important to mention that the types of penalties, which may be imposed by a particular entity, have also to be established by law.

These types of penalties (warnings, fines, among others) have to be approved by a legally binding rule or by law in order to comply with the principle of legality. This principle does not require that the explanation of each type of penalty is approved by law; on the contrary, it is common that this explanation is not even part of a regulatory rule (which will be the most transparent), but that it is directly defined by the interpretation of a public officer for each particular case.

In the particular case of the OEFA, the types of penalty that may be imposed have been established by its own Legislative Decree No. 1013, as evidenced as follows:

7 Legislative Decree, which approves the Law on Creation, Organization and Functions of the Ministry of Environment, published in the Official Gazette *El Peruano* on May 14, 2008.

> "SECOND FINAL SUPPLEMENTARY PROVISION:
> CREATION OF PUBLIC AGENCIES REGISTERED WITH THE MINISTRY OF ENVIRONMENT"
>
> 1. The Agency for Environmental Assessment and Enforcement. The Agency for Environmental Assessment and Enforcement (OEFA) has been created as a specialized public technical agency with legal personality under domestic public law, establishing itself as a state-funded public body, registered with the Ministry of Environment and responsible for the enforcement, monitoring, control and imposition of penalties with regard to the pertinent environmental matters. Its basic functions are the following:
> a) (…)
> b) To execute the power to impose penalties within the scope of its jurisdiction, *applying the penalties of warnings, fines, confiscations, immobilizations, shutdowns or cessation of activities* for the offenses to be determined and according to the procedure to be approved for such effect, exercising its power of coercive execution in the pertinent cases (…)"

As it can be observed, a legally binding rule and not an order is what establishes the types of penalties that may be imposed by the OEFA (warnings, fines, confiscations, immobilizations, shutdowns or cessation of activities) and; therefore, the principle of legality is complied. In fact, these types are detailed and explained in the Article No. 136 of the Law No. 28611, General Law on Environment, which establishes that the penalties to be imposed may be the following:

a) Warning.
b) Fine not more than 30,000 Peruvian tax units which will be in force at the date of the payment.
c) Temporary or definitive confiscation of the objects, instruments, artifacts or substances used for the commission of the offense.
d) Cessation or restriction of the activity which caused the offense.
e) Suspension or cancellation of the permission, license, concession or any other authorization, according to the case.
f) Partial or total, temporary or definitive shutdown of the premises or establishments where the activity which caused the offense is carried out.

V. PRINCIPLE OF CLASSIFICATION AND ARTICLE NO. 19 OF THE LAW

The principle of classification, like the principle of legality, is part of the main principles of the Administrative Penalty Proceedings, which has been defined by the Number 4) of the Article No. 230 of the LPAG, as evidenced as follows:

> "Principle of Classification: Only the offenses expressly provided by a legally binding rule, according to their nature, are considered as administratively punishable conducts, without any further interpretation. The regulatory provisions of development may specify or adjust those focused on identifying the conducts or on determining the penalties, without constituting new punishable conducts to those stipulated under law, *except in cases which the law allows the classification by regulation*" (emphasis added).

Based on this principle no one shall be prosecuted for having a conduct that is not previously and explicitly defined as a punishable conduct within a law. The classification is not only a principle but it also serves as a guarantee against the arbitrariness of the State and; therefore, it is a legal right that can be completely demanded by the companies. Is it not sufficient that the law establishes the prohibitions and the conducts to be punished, but it is also important that such prohibitions and conducts are written in a clear manner for any company may understand that it (the conduct) is not only prohibited, but its breach will lead to an administrative penalty.

According to Gómez and Vergaray:

> "The importance of this principle is strictly linked to the need of ensuring to the companies a legal safety level which allows them to determine what conducts are considered as punishable as well as determine its consequences"

> "In order to obtain this objective, *it will not be necessary that a rule considers all the factual assumptions which involves a penalty, nor the detailed explanation of all the characteristics of the punishable illicit acts, since it is not practical, but they shall only contain information that allow to identify the offending conducts and its effects*" (emphasis added)[8].

Therefore, thanks to the principle of classification, it is possible to distinguish a relative legal reservation, unlikely to the absolute legal reservation, which is required by the principle of legality. It is important to mention that, in order to execute the power to impose penalties and the determination of types of penalties of each institution, our legal system requires the previous legal authorization; for the cases of specific assumptions in which these penalties may be applied, the legally expressed authorization may be limited to the

8 GÓMEZ, Hugo and Verónica VERGARAY. "La potestad sancionadora y los principios del procedimiento sancionador". In MARAVÍ, Milagros (compiler). *Sobre la ley del Procedimiento Administrativo General. Libro homenaje a José Alberto Bustamante Belaunde*. Primera edición. Lima: UPC, 2009, pp. 410-411.

remission of the regulation. That can occur since it is allowed in our country that the law may authorize the regulation to classify offending conducts; and therefore, are subject to an administrative penalty.

5.1. Principle of classification and regulations

The Peruvian doctrine accepts without problem the option of the supplementary regulation related to the classification of the penalty. In that sense, for example, Gallardo considers that "(…) *the law does not cover the total adjustment of the penalty* that belongs to the matter in question, but it authorizes the regulation to intervene in the formulation of types and adjustment of penalties, distinguishing its corresponding levels, in order to contribute to the law in the elaboration of the penalty ordinance". (Emphasis added)[9].

Therefore, the legal reservation establishes that the regulations may classify provided that they have the express authorization of a law. However, the regulations are not able to directly classify without being directly supported by a legally binding rule. Doing so involves a violation of the principle of classification. In accordance with Morón, "*the rule of the regulatory cooperation in the classification* is focused on the development provisions (executive regulations) are able to specify or adjust previous legal provisions *in order to identify better the constitutional conducts of the illicit acts, but without establishing new punishable conducts to those previously provided by law*". (Emphasis added)[10].

Therefore, it should not be rare that several administrative penalties have been classified through regulations, especially in those areas in which the regulation is strictly specialized and where some technical complex criteria are required in order to establish prohibited conducts.

5.2. The Constitutional Court and the principle of classification

The Constitutional Court has declared the following in the case No. 00197-2010.-PA/TC about this principle:

> Consequently, and in accordance with the judgment registered in the Docket No. 2192-2004-AA/TC, the sub-principle of classification or certainty

9 GALLARDO, María Jesús. *Los principios de la potestad sancionadora. Teoría y práctica*. Primera edición. Madrid: Iustel, 2008, p. 44.

10 MORÓN, Juan Carlos. "Los principios delimitadores de la potestad sancionadora de la Administración Pública en la ley peruana". *Advocatus*. No. 13. 2005, p. 234.

> is considered as one of the manifestations or specifications of the principle of legality about the limits imposed on the criminal or administrative legislator, for the *prohibitions that establishes penalties*, either criminal or administrative, *are accurately written to allow any citizen to understand what is being proscribed without any problem*, under thread of penalty in a determined legal provision (emphasis added)[11].

It is important to mention that is not enough that offending conducts are collected by a legally binding rule or by law, but these shall be developed in such manner that any person may understand the extension of the prohibited conduct. To sum up, it is not constitutional to talk about an administrative offense by interpretation.

In the following quote, corresponding to the judgment registered under No. 2050-2002-AA/TC, we can appreciate how the court has considered, following completely our constitutional framework, the possibility to classify by regulation, as long as a *previous, express and specific legal* authorization exists:

> The principle of legality shall not be identified with the principle of classification. The first, according to the Item "d" of Sub-paragraph 24) of the Article No. 2 of the Constitution, is satisfied when the prevision of offenses and penalties pursuant to law are complied. The second, instead, is the exact definition of the conduct that the law considers as an offense. *Such specification of what is considered administratively as unlawful, therefore, is not subject to an absolute legal reservation, but it may be supplemented by the pertinent regulations, as evidenced in the Article No. 168 of the Constitution.* The absence of an absolute legal reservation in this matter, as Alejandro Nieto states ("Derecho Administrativo Sancionador, Editorial Tecnos, Madrid 1994, p. 260), "does not create the substitution of the law by regulation, but the collaboration of the regulation in the regulatory duties where it works in compliance with the law and as its complement" (emphasis added)[12].

In that sense, the legal classification itself, in some occasions, is not enough and it is indispensable the existence of a regulation which extends and specifies the types of offenses provided by law. This may occur by the imprecision or breadth by which the sanctions has been classified. This was expressed by the Constitutional Court in the judgment corresponding to the Docket No. 2192-2004-AA-TC:

11 To read the full text, refer to:
<http://www.tc.gob.pe/jurisprudencia/2010/00197-2010-AA.html>

12 To read the full text, refer to:
<http://www.tc.gob.pe/jurisprudencia/2003/02050-2002-AA.html>

> In this case, the appealed order that establishes the maximum possible punishment by regulation; that is to say, the dismissal of the appellants, has the legal backup of Article No. 28, Sub-paragraphs a) and d) of the Legislative Decree No. 276, establishing that: "(…) are disciplinary offenses that, according to their seriousness, may be punished by temporary cessation or by dismissal, previous administrative procedure: a) The non-compliance with the rules set forth by this law and by its regulation; d) The negligence in the compliance with the functions".
>
> 7. This Court considers that the two provisions contained in the order that establishes the dismissal of the appellants' job, *are clauses of remissions that require, by the municipal administration, the development of regulatory rules that allow the determination of the scope of action of the power to impose penalties due to their level of indetermination and inaccuracy;* consequently, the imposed penalty justified in these generic provisions is unconstitutional for violating the principle set forth by Article No. 2, Sub-paragraph 24), Item d) of the Constitution, in compliance with the criteria developed in the previous matters [emphasis added].

From the reading of the extracts of the case law of the Constitutional Court, it is concluded that we may find three possibilities:

a) That a law exists, but requires to be developed by a regulation. Without a regulation that serves as complement to the law, the power to impose penalties may not be executed.
b) That the existence of a law should be enough to properly classify a conduct as an offense.
c) That only one regulation exists. In this case, the only possibility to validate such regulation is that it comes from a legal authorization expressed for the classification.

5.3. Decisions of Board of Directors of the OEFA Nos. 042-2013-OEFA/CD; 045-2013-OEFA/CD; and 049-2013-OEFA/CD, and their compatibility with the principle of classification

In view of the foregoing, the Article No. 17 of the Law No. 29325, amended by Law No. 30011, establishes that: "(…) by virtue of the decisions of Board of Directors of the OEFA, the conducts are classified and the applicable scales of penalties are approved. The classification of general and transverse offenses and penalties shall be applied in a supplementary manner with regard to the classification of offenses and penalties which the EFA apply".

It is important to mention that there is a legally expressed order of remission of the classification of the punishable conducts for environmental offenses to a regulation approved by the Decision of Board of Directors. This is entirely

consistent with the theoretical framework previously detailed and with the position, regarding this matter, adopted by the Constitutional Court.

Therefore, there is no breach of the principle of classification since the classification of environmental offenses has been approved by regulation. Additionally, the same Law No. 29325 establishes in its Article No. 19.2 that "the Board of Directors of the OEFA approves the scale of sanctions in which the penalties applicable to each type of offense are established, based on the penalties set forth by Article No. 136 of the Law No. 28611, General Law on Environment".

Thanks to this provision, the strict compliance with the principle of classification is complemented, since it is the law itself which establishes that the regulation develops the applicable scale of penalties for the offenses that have been previously classified.

It is important to point out that this is not an open delegation and does not count on any parameters. The rule is clear in expressing that the scale of penalties shall consider the penalties that have been previously established in the Article No. 136 of the General Law on Environment. As a consequence, the Constitutional Court has fully complied with the provision and the case law development of this matter in the sense that the regulatory attribution is not absolute, but it is subject to some parameters which shall be defined by the law.

Similarly, the decisions of Board of Directors Nos. 042-2013-OEFA/CD; 045-2013-OEFA/CD; and 049-2013-OEFA/CD accurately detail the classification of offenses, the pecuniary penalty, the non-pecuniary penalty and the classification of the penalty. In each one of them, the offenses are clearly determined as minor, serious and major.

Furthermore, the rule is not only naturally subject to the principle of reasonableness and the concepts of affectation to certain protected legal rights, which by itself would have been enough to fulfill with the requirements of the principle of the principle of classification; but also it is supplemented by the "General rules on the execution of the power to impose penalties of the Agency for Environmental Assessment and Enforcement - OEFA" and by the "Methodology for the calculation of base fines and the application of the aggravating and mitigating factors to be used in the adjustment of the penalties", approved by the Decision of the Board of Directors No. 038-2013-OEFA/CD and by the President's Decision of the Board of Directors No. 035-2013-OEFA/PCD, respectively.

According to this provision, a real system of application of penalties is complemented in which the law and the provisions set by the Board of Directors of the OEFA (acting in its capacity of specialized technical agency) are interrelated with each other. There is no better guarantee of the compliance with the *lex certa* (and of all the requirements of principle of classification) than submitting the authority to the compliance with the requirements of adjustment of penalties expressly predetermined within the regulatory rules.

Therefore, for the application of the penalties from up to 30,000 UIT, the companies do not only have the expressed classification of the conducts that may require a penalty, but also they have an additional triple guarantee as indicated below:

a) That is subject to the principle of reasonableness of the power of the State to impose penalties, explained in the Article No. 230 of the LPAG.
b) The authority has to take into account, the following matters, among others:
   - To damage the natural resources.
   - To damage the protected natural areas.
   - To damage the native populations.
   - To damage the poverty of the community.
   - Compliance history.
   - Intention of the offender.
c) The chart of penalties is not able to be applied without taking into consideration the "Methodology of the calculation of penalties (…)" approved by the President's Decision of Board of Directors No. 035-2013-OEFA/PCD.

VI. THE PRINCIPLE OF REASONABLENESS (PROPORTIONALITY) FOR IMPOSING PENALTIES AND THE SCALES OF PENALTIES APPROVED BY THE OEFA

The idea of proportionality is relied on the traditional criterion of "prohibition of excess" of the European law on criminal matters. This criterion arises from two ideas: first, that the penalties are proportionally adjusted according to the felony; and, second, that the penalties are established with some level of proportionality related to the social importance of the fact and the protected legal property[13].

13 SAPAG, Mariano. "El principio de proporcionalidad y de razonabilidad como límite constitucional al poder del Estado: un estudio comparado". *Díkaion* Vol. 2, 2008, No. 17 p. 170.

From this criterion, the principle of proportionality is originated from the German jurisdiction, through the judgments ordered in the 19th Century by the Administrative Supreme Tribunal in Germany in the area of police[14] law. "Nowadays, the administrative contentious matters in Germany have changed the principle of proportionality (…) so the judges of the administrative contentious courts can monitor the police[15] with more efficiency".

Afterwards, with the purpose of making the public law as a manner to protect the subjective public rights, the Constitutional Court in Germany raises this principle to a constitutional aspect. As a result, the case law as well as the German constitutional doctrine took this principle as the maximum criterion to delimitate the essential content of the fundamental rights, which were on that time defined as follows:

> The constitutional principle by virtue of which the public intervention (…) [was] "susceptible" to reach the desired purpose, "necessary" or essential since there was not any other measure less restrictive in the sphere of liberty of the citizens (that is to say, for being the most soft and moderate medium of all the possible ones – law of the minimum interventionism–) and "proportional" in a strict aspect, this means, "adjusted" or balanced as more benefits or advantages for the general interest are derived from such intervention than prejudices on other property, disputed property or values, in particular, on the rights and liberties[16].

After the incorporation to the German ordinance, this parameter was moved to the community right, on which the quality of the legal principle is granted and it is explained in multiple rules, as the Letter of the Fundamental Rights of Nice. From that moment, the principle of proportionality in its codified version, started to direct the future case law of the Court of European Community, from where resulted a parameter of the judicial control and a reduction of the "density" of the control on the application of the principle of the Community Court[17].

14 BLANKE, Herman-Josef. "El principio de proporcionalidad en el Derecho Alemán, Europeo y Latinoamericano". *Revista del Círculo de Derecho Administrativo* No. 9, 2010, p. 343, Lima.

15 IBLER, Martín. "Importantes aspectos de la historia y dogmática de los derechos fundamentales en Alemania". *Revista Iusta* No. 21, 2004, p. 22, Bogota.

16BARNES, Javier. "Introducción al principio de proporcionalidad en el derecho comparado y comunitario". *Revista de Administración Pública* No. 135, 1994, p. 500, Madrid.

17 BLANKE, Hermmann-Josef. Op. cit., pp. 345-346

A clear sign of this tendency is shown in the Spanish law, on which it started to be manifested as a controlling tool of the administrative discretion; but, at the beginning, the principle was applied on a non-precise or non-systematic manner. At the end of the eighties, a progressive process of formalization of the principle of proportionality was initiated, due to the constant invocation of the majority of judgments of the elements that allowed filling the content[18]. Years later, the principle of proportionality would be taken to the constitutional right aspect, in such manner that the Spanish Constitutional Court has even considered it as a principle, in order to clarify the essential content of the fundamental rights against a rule that regulates or restricts them, and also constitutes, a criterion for the foundation of the judicial decisions that are on the rights[19].

According to the Spanish administrator, Sánchez:

> The principle of proportionality (…) is a principle of constitutional nature that allows measuring, controlling and determining those direct or indirect interferences, of the public as well as of the particular powers, on the aspect or sphere of the rights of the human person, to respond to the criteria of adaption, coherence, need, balance and benefit between the legally pursued purpose and the legal rights potentially affected or intervened, in the manner that they are compatible to the constitutional rules[20].

Taking this opinion into account, it is an interpretative tool that allows determining the constitutionality of the intervention or restriction, as well as the non-intervention of the public power on the fundamental rights. Supporting Sánchez's opinion, Bernal sustains that this principle has a constitutional aspect, since it "admits several supplementary foundations, to wit: (i) the proper nature of the principles of the fundamental rights; (ii) the principle of the rule of law; (iii) the principle of justice ; (iv) the principle of prohibition of arbitration"[21].

18 SAPAG, Mariano Augusto. Op. cit., pp. 172-173.

19 Ibídem.

20 SÁNCHEZ, Rubén. "El principio de proporcionalidad en la jurisprudencia mexicana". In CARBONELL, Miguel y Pedro GRÁNDEZ (coordinators). *El principio de proporcionalidad en el derecho contemporáneo*. Lima: Palestra, 2010, p. 221.

21 BERNAL, Carlos. *El principio de proporcionalidad y de los derechos fundamentales: el principio de proporcionalidad como criterio para determinar el contenido de los derechos fundamentales vinculante para el legislador*. Madrid: Centro de Estudios Constitucionales, 2003, p. 606.

On that aspect, the principle of proportionality becomes the criterion of balance or modulation between the actions that the State takes in order to comply with its purposes and the respect of the fundamental rights of the person or, briefly, the aspect of the exercise of the public powers, as long as it is specified as filter of harmony that prevent that the activity of the State from exceeding the required limits for the achievement of the collective interests when the individual rights are affected or infringed without any foundation.

In our administrative legal system, this principle is subsumed by the principle of reasonableness and, in the Article No. 230 of the LPAG, it is considered as the principle of the power to impose penalties of the State. According to Tirado, this principle has a special dimension because it is important to consider:

> (…) the following in order to determine the content of the principle of proportionality[22] regarding the administrative decisions:
> (…) it is applied to the decisions of the administrative authority that create obligations, classify offenses, impose penalties or establish restrictions to the companies.
> (…) it is applied to the decisions of the administrative authority that have to be adapted within the limitations of the granted power.
> (…) it is required that the decisions made by the administrative authority are equally proportioned between the medium to be employed and the public purposes to be safeguarded, for such decisions respond to what is strictly necessary to fulfill its purpose[23].

6.1. The Constitutional Court and the principle of proportionality

For its part, the Constitutional Court has created and defined the principle of proportionality. However, before the LPAG takes effect, the principle of proportionality of the administrative penalties did not, in a strict sense, have a positive recognition which would facilitate the judges its application or would allow the administrative officers to duly observe it. Proof of this is that, at the beginning, it could be observed that the Constitutional Court and other public institutions, as the President's Office of the Council of Ministers (PCM, by its initials in Spanish), were only limited to quote it[24].

22 It is important to mention that the author considers both the principle of proportionality and the principle of reasonableness as synonymous.

23 LUCCHETTI, Alfieri Bruno. "Algunos Alcances en la aplicación del principio de razonabilidad de las decisiones administrativas." *Revista del Círculo de Derecho Administrativo* No. 7, 2009, p. 484, Lima.

24 RUBIO, Marcial. Op. cit., p. 162.

However, since 2004 a specific reference about the principle of proportionality can be found. In that sense, in the Docket No. 0090-2004-AA/TC a definition of this principle can be found, establishing that it consists on a cause effect relation. In the same way, it establishes a barrier between the proportionality and the reasonableness, indicating that between both of them exist a relation of genre and specie, where the principle of proportionality is a sort of principle of reasonableness[25].

Furthermore, in the Docket No. 2192-2004-AA/TC, the Constitutional Court confirms the necessity of applying the principle of proportionality to control the administrative penalties as well as applying a triple judgment (which has been previously described): suitability, necessity and proportionality in a strict sense. As third point, it also explains that this principle will be only applied to the administrative penalties.

This idea was better expressed in the judgment corresponding to the Docket No. 0012-2006-PI/TC, as evidenced as follows:

> The principle of proportionality is constituted in a legal mechanism of significant importance in the constitutional State and, as such, has the function of controlling any act of the public powers in which the fundamental rights, among other constitutional goods, can be violated. As such, the principle of proportionality can be found on the last paragraph of the Article No. 200 of the Constitution, therefore, and taking into account the principles of unit of the Constitution and practical concordance, according to which the interpretation of the Constitution has to be oriented to be considered as a harmonic and systematic whole through which the legal system is organized, avoiding all the contradictions; therefore, it must be understood that when the public powers decide to limit the fundamental rights or the imposition of penalties, among other aspects, they have to observe the principle of proportionality.

6.2. Decisions of Board of Directors of the OEFA Nos. 042-2013-OEFA/CD; 045-2013-OEFA/CD; and 049-2013-OEFA/CD and the principle of proportionality

The scales of penalties approved by decisions of Board of Directors of the OEFA not only violate the principle of proportionality, but they also agree

25 However, for Rubio, this should not happen, due to the fact that "(…) it is necessary to eliminate this type of problems in order to provide an accurate meaning to such important definitions (…)". "The Court should make an effort to specify its definitions from the Cartesian principle of what is clear and different". (RUBIO, Marcial. Op. cit., p. 175).

with the most modern existing methodologies in our country to prevent an abusive situation against the companies.

The fines are not of 30,000 UIT, as some may say, but they can range from up to *30,000 UIT*, which, after being described and analyzed in the context, is completely different. The legal framework allows that the penalty may accomplish its function in all the cases, establishing a margin of administrative discretion subject to strong controls and legal limitations.

All the orders approving the charts of penalties expressly establish that the classification of the fines is subject to the methodology approved by the President's Decision of the Board of Directors of the OEFA No. 035-2013-OEFA/PCD. Likewise, *there is an express connection with the principle of reasonableness of the power to impose penalties*, established by the Article No. 230 of the LPAG; and, finally, the clear parameters that breach the fundamental rights are established as a criterion to properly adjust the penalty.

Based on the facts, the set of regulations which turns around the penalties that may be impose for environmental offenses is a lot more safe and predictable than the majority of the administrative penalty systems, in which the margin for the discretion of the Administration usually has, as only limit, the pure text of the principle of reasonableness, as has been developed by the PLAG.

It is common in other institutions (like in the regulatory agencies or in the INDECOPI - National Institute for the Defense of Competition and Protection of Intellectual Property, for example) that, in its penalty procedure, exist a sole guarantee to control the arbitration. On the legal framework that regulates the performance of the OEFA, three guarantees or explicit controls has been established, in such manner that the company is properly protected against any excess that may be committed in the application of a rule that been very respectful of all the principles ordering the power of the State to impose penalties.

6.3. Classification of offenses and penalties: minor, serious and major

The rule orders three groups of offenses, according to the seriousness of the damage that the conducts cause to the environment. In order to determine which one will fit in each of these types, it will be necessary to consider the following criteria:

Damage to the health, it shall be understood as the damage that has caused an effect on the people's health and, consequently, that such people are affected

by it. Although this may seem obvious, the classification of the magnitude of this offense will be (or shall be) made by taking into account the consequences that the damage caused in the victims, that is to say, as least damage, least is the need (reasonableness) of imposing a high penalty.

Damage to the environment, here what matters is that the damage has to be related to some kind of harmful (damaging) effect, whether actual or potential, on the environment, since this is one of the main objectives of the legal protection to be protected and defended with the scales of classified penalties for this kind of situations.

The potential damage or certainty of damage, considered as a source or starting point of a legal responsibility which is payable or punishable, since it puts the victim in an imminent dangerous position that may be catastrophic or irreversible.

VII. CONCLUSIONS

1. The charts of penalties approved by Decisions of Board of Directors Nos. 042-2013-OEFA/CD; 045-2013-OEFA/CD; and 049-2013-OEFA/CD, clearly and accurately define the offenses that may be punishable with fines *from up to 30,000 UIT*.

2. There is no excess of punishment that may be considered as a violation of the principle of proportionality much less the penalties are not considered as confiscatory.

3. The legal system of the OEFA has enough mechanisms that guarantee the control of the administrative discretion in the adjustment of the penalties that are imposed as a result of an environmental offense.

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3.

Classification of administrative offenses with regard to environmental matters

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MILAGROS GRANADOS MANDUJANO (*)

SUMMARY

In this article, the authors develop the regulatory techniques that may be used to classify the administrative offenses and establish the pertinent scales of penalties. They also point out that the regulatory collaboration is the most adequate technique to classify offending conducts. Likewise, they state that the current classification ***with regard to environmental matters are clear, accurate and strictly comply with the application of the principles of legality and classification.***

I. Introduction. II. Regulatory techniques on classification of administrative offenses. III. Classification of environmental offenses. IV. Classification approved by the OEFA. VI. Conclusions.

I. INTRODUCTION

The principle of legality requires that the conducts classified as unlawful and the applicable penalties are previously set forth by a legally binding rule. The application of this principle in the Administrative Law admits some aspects. The scope of the referred principle has been adjusted in order to be adapted to the dynamism and to the technical complexity of the administrative offenses (administrative penalties).

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This may be particularly observed in the environmental regulation, in which the specialized nature of the matter and the continuous advance in technology prevent the legislator from establishing, in a single legally binding rule, an exhaustive list of environmental offenses and applicable penalties. Therefore, it is normal to refer to the regulatory collaboration to specifically classify the offending conducts.

Indeed, in most cases, in order to accurately classify an administrative offense is necessary a greater detail and precision that the law itself may not be able to provide. Besides, in some occasions, is indispensable to make a rapid change of the regulation criteria, which cannot be easily achieved with the laws issued by the Congress of the Republic. Thus, it is required to use more flexible and dynamic regulatory techniques.

In this context, this article develops the main regulatory techniques that may be used to classify administrative offenses regarding the environment and establish the pertinent scale of penalties. Furthermore, it is proved that the current classifications with regard to environmental matters are clear and accurate, and strictly comply with the principles of legality and classification.

II. REGULATORY TECHNIQUES FOR CLASSIFYING ADMINISTRATIVE OFFENSES

The Number 24 of the Article No. 2 of the Political Constitution of Peru points out that in compliance with the principle of legality "no one shall be prosecuted or convicted for any act or omission that, at the time of its commission, was not previously prescribed in the law expressly and unequivocally as a punishable violation, or did not constitute an offense penalized by law".

The principle of legality has two manifestations: one formal, which is commonly defined as the requirement of the legal reservation; and other material, known as the order of legal classification[1]. The scopes of each of these manifestations determine the techniques that may be used to classify administrative offenses, which are developed as follows:

1 Cf. NIETO, Alejandro. *Derecho administrativo sancionador*. Quinta edición. Madrid: Editorial Tecnos, 2012, p. 259.

2.1 Legal reservation

The legal reservation constitutes a guarantee of formal nature[2], which requires that the offenses and penalties are previously set forth by in a legally binding rule[3]. The basis of the legal reservation is to secure that the determination of offenses and penalties is carried out by the legislative procedure; that is to say, by a public discussion in which the political opposition takes part and that is accessible for the citizens, achieving a greater democratic legitimacy[4].

Regarding the administrative aspect, the classification of offenses does not require an *absolute* legal reservation, since it is possible to refer to the regulatory collaboration. The legal reservation involves that in the legally binding rule (organic law, ordinary law or legislative decree) is set the penalty and the description of the offending conduct (classification), without any possibility to supplement such description by an administrative regulation of application or development, which is complex in the practice due to the immensity of existing administrative offenses. For such reason, it is valid to refer to the regulatory collaboration, according to which is sufficient that the law makes a generic description of the punishable conducts as well as of the kinds and of the amount of penalties, permitting the administrative regulation provides a detailed description of the offending conducts; that is to say, provide a classification.

In this sense, the Constitutional Court of Peru points out that the definition of what is considered as wrongful (classification) may be developed by administrative regulations, as evidenced in the following quotation:

2 The doctrine mentions that, by a legal reservation, is required that the regulation of a specific matter is expressly carried out by an organic law or by an ordinary law. Such rules limiting or prohibiting the rights and guarantees are subject, particularly, to the legal reservation (determination of offenses and penalties). Cf. BREWER – CARÍAS, Allan. *Derecho Administrativo.* Volumen I. Bogotá: Universidad Externado de Colombia – Universidad Central de Venezuela, p. 206.

3 Cf. ESTEVE, José. Lecciones de derecho administrativo. Madrid: Marcial Pons, 2011, p. 401.

4 Cf. NIETO, Alejandro. Op. cit., p. 219.

> (…) the principle of legality shall not be identified with the principle of classification.
> The first (…) is satisfied when the provision of offenses and penalties pursuant to law are complied. The second, instead, defines the conduct that the law considers as an offense. **Such specification of what is administratively considered as wrongful, therefore, is not subject to an absolute legal reservation, but it may be supplemented by the pertinent regulations[5].**
>
> (Bolt type added)

The statements made by the Constitutional Court are consistent with the established in the Number 4 of the Article No. 230 of the Law No. 27444 - Law on General Administrative Procedure, as evidenced in the following quotation:

> **Article No. 230 - Principles for imposing administrative penalties**
> The power to impose penalties of all the entities is governed by the special principles detailed as follows:
> (…)
> **4. Classification:** Only the offenses **expressly provided by a legally binding rule**, according to their nature, are considered as administratively punishable conducts, without any further interpretation. The **regulatory provisions of development may specify or adjust** those focused on identifying punishable conducts to those stipulated by law, **except in cases which the law allows the classification by regulation.**
>
> (Bolt type added)

On this particular, the national doctrine points out that the participation of a regulatory rule in the process of classification of the administrative offenses is based on factual arguments such as the technical complexity of some matters, the necessity of dealing with the dynamism of a specific activity, the non-viability to make case studies in a legally binding rule, among others. The legislator requests for the cooperation of the Public Administration when it considers that the technical or very dynamic aspects, which shall not be within the legal[6] reservation, will be addressed in the classification.

5 Cf. Constitutional Court of Peru, judgment dated August 24, 2010, registered in the5Docket No. 00197-2010-PA/TC, legal basis 5.

6 Cf. MORÓN, Juan Carlos. *Comentarios a la Ley del Procedimiento Administrativo General.* Novena edición. Lima: Gaceta Jurídica, 2011, pp. 712-713.

On the other hand, the Spanish case law mentions that the regulatory collaboration is based on the following arguments:

- The Public Administration "(…) has the advantage of expediting the means, the experience, the regularity, the speed and continuity, which explains (…) the ownership of the regulatory power"[7].

- The classification by regulation is "due or obliged by the nature of the things, since there is not any law that covers the problems of any kind"[8].

- Because "it would be absurd to request the legislator for a case law provision"[9].

- For the "insuppressible nature of the regulatory power in some matters"[10].

- Because "in the regulatory aspect, the considerations of opportunity may need a rapid change of the regulation criteria"[11].

In this way, and as the doctrine mentions, the legal reservation takes on a new dimension: it is not, therefore, the duty of the legislator to make the classification of offenses, but to have the possibility of doing so and decide whether it is going to be directly performed by himself or if it is going to be entrusted to the Executive Branch. The legal reservation, then, prohibits the regulation from entering, on its own initiative, in the legislative matter; but it does not prohibit the legislator from authorizing the Executive Branch to do so and in accordance with the parameters established. Deny this would suppress, on one hand, the power of decision making of the Parliament and, on the other, introduce a completely unreal system which will definitely paralyze the Public Administration. Take the legal reservation to its extreme would end up benefiting the offenders, since the legal network shall not be as strict or easily modified as the regulatory network[12].

7 Judgment of the Supreme Court dated March 10 and 20, 1985; January 28 and February 12, 1986, quoted by NIETO, Alejandro. Op. cit., p. 263.

8 Judgment 77/1985 dated June 27, legal basis 14.

9 Judgment 99/1987 dated June 11, legal basis 3.b).

10 Judgment 42/1987 dated April 7, legal basis 2.

11 Judgment of the Supreme Court dated June 8, 1988.

12 Cf. NIETO, Alejandro. Op. cit., p. 220.

Consequently, in the administrative aspect, the legal reservation may operate in two different ways. In the first modality, the law itself regulates all the matter reserved; this is the more logical conceptual change, but rarely used for the difficulty and inflexibility that represents the exclusive regulation in the law. In the second modality, which is the usual one, the law (that is always inexcusable) does not comprehensively regulate the matter, but it does limit to the essential, and the rest is referred to the regulation, which is invited (or is ordered) to contribute in the regulatory duty[13].

Now, each of the abovementioned modalities of classification is detailed below:

2.1.1 Classification according to law

The classification according to law is also known as the non-exhaustive or exhaustive classification in the law. In this modality, the punishable conducts are defined and characterized by a legally binding rule. In this way, only the prohibitions that the law defines as administrative offenses may be punished[14].

The law describes in detail the elements of the factual assumption of an offending conduct. Therefore, the offense, set forth by the law, does not require the complement or the development of any regulation.

A clear example of this kind of classification is found in the Article No. 191 of the Law No. 26859 - Organic Law on Elections[15], which establishes the following:

> **Article No. 191 -** Any kind of publication or dissemination of surveys and projections on the results of the elections through the media shall be made until the Sunday prior to the day of the elections.
>
> On the day of the election, it shall be only disseminated the projections based on the sampling of the electoral records after the publication of the first quick count made by the National Elections Office (ONPE, by its initials in Spanish) or from 22:00 hours, whichever occurs first16. In case

13 Idem, p. 223.

14 Cf. ESTEVE PARDO, José. Óp. cit., p. 406

15 Published in the Official Gazette *El Peruano* on October 1, 1999.

16 In compliance with the Judgment issued by the Constitutional Court, registered in the Docket No. 02-2001-AI-TC, published on April 05, 2001, it is declared unconstitutional the second paragraph of the Article No. 191 of the Law No. 26859, in the sense that: "The

> of non-compliance, the offender shall be punished with a fine from 10 up to 100 Peruvian Tax Units, which shall be established by the National Elections Commission; all the money collected by it, will be only used by such electoral body.

As it is observed, the referred legally binding rule explains in a clear and detail manner the offending conduct and the sanction to be imposed. The rule itself has regulated all the matter reserved.

Another example of classification according to law is found in the Articles Nos. 8, 9, 11 and 43 of the Law on Punishment for Anti-Competitive Conduct, approved by Legislative Decree No. 1034[17], which prescribes the following:

> **Article No. 8 - Absolute prohibition**
> In cases of absolute prohibition, in order to verify the existence of the administrative offense, it is sufficient that the pertinent authority proves the existence of an offending conduct.
>
> **Article No. 9 - Relative prohibition**
> In case of relative prohibition, in order to verify the existence of the administrative offense, the pertinent authority shall prove the existence of an offending conduct and the negative effects it causes, or may cause, in the competition and in the consumers welfare.
>
> **Article No. 11 - Horizontal collusive practices**
> 11.1 The horizontal collusive practices are the agreements, decisions, recommendations or concerted practices made by economic agents competing with each other, who aim to restrict, prevent or distort free competition such as:
> (a) To agree, either directly or indirectly, on the fixation of the prices or other trading or service conditions;
> (b) To control or limit the production, the sales, the technical development or the investments;
> (c) To share clients, suppliers or geographical zones;

day of the elections shall be only disseminated the projections based on the sampling of the electoral records after the publication of the first quick count made by the National Elections Office (ONPE) or from 22:00 hours, whichever occurs first", not being able to disseminate any information related to the vote, from whatever source, before its closing time.

17 Published in the Official Gazette *El Peruano* on June 25, 2008.

(d) To approve the quality of the products when these do not comply with the national or international technical regulations, affecting adversely to the consumer.
(e) To apply, in the trading or services aspects, unequal conditions to provide similar services, placing unjustly some competitors in a disadvantage situation against others;
(f) To agree the unjustified subordination of execution of agreements when accepting to provide additional services that, by nature or by virtue of the commercial purpose, are not consistent with the purpose of such agreements;
(g) To meet the demands of purchase, or accept the sale offers or the provision, of goods and services in a concerted or unjustified manner;
(h) To obstruct the entry or permanence of a competitor in an intermediary market, association or organization in a concerted or unjustified manner;
(i) To agree an exclusive sale or distribution in an unjustified manner;
(j) To agree or coordinate offers, positions or proposals, or refuse all of these in the tenders or bids, either public or private, or any other form of public contract, as well as in the public auctions, among others;
(k) Other practices having a similar effect that pursue benefits for reasons other than a greater economic efficiency.

11.2 The absolute prohibitions are those horizontal agreements of different marks that that are not complementary or additional to other lawful agreements, which aim to:
(a) Fix prices or other trading or service conditions;
(b) Limit the production or the sales, particularly by means of quotas;
(c) Share clients, suppliers or geographical zones; or,
(d) Take positions or abstentions in the tenders, bids or any other form of public contract set forth by the law, as well as public auction, among others.

11.3 The horizontal collusive practices that are not contained in the previous Number 11.2 constitute relative prohibitions.

Article No. 43 - Amount of the fines

43.1. The unfair competition shall be punished by the Commission, on the basis of the Peruvian Tax Units (UIT), with the following fines:

(a) If the offense is qualified as minor, it shall be punished with a fine of up to five hundred (500) UIT, as long as such fine does not exceed the eight per cent (8%) of the gross income or sales earned by the offender, or by its economic group, regarding all its economic activities, corresponding to the fiscal year immediately prior to the issuance of the Decision of the Commission;
(b) If the offense is qualified as serious, it shall be punished with a fine of up to one thousand (1,000) UIT, as long as such fine does not exceed the ten per cent (10%) of the gross income or sales earned by the offender, or by its economic group, regarding all its economic activities, corresponding to the fiscal year immediately prior to the issuance of the Decision of the Commission; or,
(c) If the offense is qualified as major, it shall be punished with a fine more than one thousand (1,000) UIT, as long as such fine does not exceed the twelve per cent (12%) of the gross income or sales earned by the offender, or by its economic group, regarding all its economic activities, corresponding to the fiscal year immediately prior to the issuance of the Decision of the Commission; or,

As it is observed, the abovementioned articles detail the specific assumptions that constitute the kind of offense. It is also established the penalties to be imposed in the pertinent cases, considering the seriousness of the offending conduct.

Another example of classification according to law is observed in the Law on Punishment for Unfair Competition, approved by the Legislative Decree No. 1044, which establishes that any act of unfair competition affecting or interfering with the proper development of the competitive process shall be punished. The following is an example of an act affecting the transparency in the market:

Article No. 8 - Act of deception

8.1. The acts of deception are those having the effect, either actual or potential, of misleading other agents in the market about the nature, mode of manufacturing or distribution, characteristics, suitability for use, quality, quantity, price, conditions of sale or purchase and, in general, about the attributes, benefits or conditions belonging to the goods, services, establishments or operations that the economic agent, performing such acts, makes available in the market; or, misleading about the attributes that such agent has, including everything that represents its business activity.

8.2. The dissemination of testimonial advertising that is not sustained in recent and authentic experiences of a person is considered as an act of deception.

Such offending conduct may be punished considering the following scale:

Article 52 - Parameters of the penalty

52.1. Any act of unfair competition is an offense to the provisions of this Law and shall be punished by the Commission, according to the following parameters:

a) If the offense is qualified as minor and does not produce an actual effect in the market, only requires a warning;
b) If the offense is qualified as minor, it shall be punished with a fine of up to fifty (50) Peruvian Tax Units (UIT), which shall not exceed the ten per cent (10%) of the gross income earned by the offender, with regard to all its economic activities, corresponding to the fiscal year immediately prior to the issuance of the Decision of the Commission;
c) If the offense is qualified as serious, it shall be punished with a fine of up to two hundred and fifty (250) UIT, which shall not exceed the ten per cent (10%) of the gross income earned by the offender, with regard to all its economic activities, corresponding to the fiscal year immediately prior to the issuance of the Decision of the Commission; and
d) If the offense is qualified as major, it shall be punished with a fine of up to seven hundred (700) UIT, which shall not exceed the ten per cent (10%) of the gross income earned by the offender, with regard to all its economic activities, corresponding to the fiscal year immediately prior to the issuance of the Decision of the Commission; and

As can be appreciated, the legally binding rule details the offending conduct and the pertinent scale of penalties. Likewise, such legally binding rule does not require to be complemented by any regulation.

2.1.2 Regulatory cooperation

The regulatory cooperation is also known as the classification by regulation. In this modality, the law requests the regulation to cooperate in the classification of offenses and penalties. The regulation shall be limited to specify or develop the offending conduct as well as adjust the penalty to be imposed, considering the parameters provided by law.

In this sense, and as the doctrine[18] points out, the following conditions have to be complied to establish the regulatory cooperation:

- The regulatory classification requires a legally expressed authorization.
- The law on remission shall establish the **parameters (instructions and limits)** within which the pertinent administrative regulation has to be established.
- The administrative regulation may only regulate what has been entrusted by the law, within the instructions and parameters established.

Regarding the parameters, the Constitutional Court of Spain has established that the regulatory classification is legally constitutional only when in the law on remission "**is properly determined the essential elements of the unlawful conduct** (in such manner that the acts or omissions that may be subsumed in a legally binding rule are considered as offenses) **and the nature and the limits of the penalties to be imposed**".[19]

Following the same reasoning, the Constitutional Court points out that is perfectly possible and legally constitutional the determination of offenses and penalties through the administrative regulations, as long as these **do not distort the purpose and the objective of the law** to be governed, in strict compliance with the principles of reasonableness and proportionality.[20]

Consequently, the principle of legal reservation will be violated if the legislator is limited to accept the regulatory regulation without making any precision[21]. In such cases, it would occur what the Constitutional Court of Spain calls "invalidation of the authenticity of the reserved matter, which is, a complete abdication by the legislator in relation to its power to establish limiting rules, transferring such power to the owner of the regulatory power, without even determining the purposes or objectives to be pursued by regulation"[22].

As the referred Court states, the legal reservation does not exclude "the possibility that the laws contain remissions to regulatory rules, but it does

18 Cf. NIETO, Alejandro. Op. cit., pp. 229 and 269.

19 Judgment 3/1988 dated January 21, 1988, legal basis 9.

20 Cf. Judgment dated March 29, 2007, registered in the Docket No. 05262-2006PA/TC, legal basis 6.

21 Cd. NIETO, Alejandro. Op. cit., p. 229.

22 Judgment 83/1984 dated July 24, 1984, legal basis 4.

exclude that such remissions make an adjustment completely independent and that is not clearly subordinated to the law (…), as the latter would deteriorate the main guarantee that the principle of legal reservation contains, as a way to regulate the scopes of liberty, which belong to the citizens, depend exclusively on the will of its representatives[23-24].

Similarly, the doctrine mentions that the legal remission would be unconstitutional if it involves the "authorization or reference to the regulation for structuring the obligations or prohibitions *ex novo*, which contravention leads to a punishable offense"[25].

Accordingly, through the regulatory provisions, it is possible to introduce the specifications or adjustment to the chart of offenses or penalties established by law, without constituting new offenses or penalties or modifying the nature or limits set forth by the law. The administrative regulation shall only contribute to a better identification of the conducts or to a more accurate determination of the pertinent penalties[26].

A clear example of regulatory cooperation is established in the classification of offenses for functional administrative responsibility. In the Article No. 46 of the Law No. 27785 - Organic Law on National Control System and Office of the Auditor General[27], a generic description of the offending conducts is made and the regulation is authorized to develop or specify them, as evidenced in the following quotation:

> **Article No. 46 - Offending Conducts**
> The offending conducts for functional administrative responsibility are those made by the public officers or servants who disobey the administrative system provided by law and the internal regulations belonging to an entity. Among these, it is found the following conducts:

23 Judgment 16/2004 dated February 23, 2004 legal basis 5.

24 In this sense, the doctrine points out that is not possible that the regulatory regulations are independent or that try to classify punishable conducts or penalties without having a specific legal scope, or that are intended to be protected by a clause on unspecific remission or invalidation of authenticity since it will violate the legal reservation. Cfr. GARCÍA DE ENTERÍA, Eduardo and Tomás Ramón FERNÁNDEZ. *Curso de Derecho Administrativo.* Volumen II, Lima: Palestra Editores, 2011, p.1077.

25 NIETO, Alejandro. Op. cit., p. 244.

26 Cf. LOZANO, Blanca, *Derecho Ambiental Administrativo.* Madrid: La Ley, 2010. p. 717.

27 Published in the Official Gazette *El Peruano* on July 23, 2002.

a) To not comply with the provisions that constitute the legal framework a applicable to the entities for the development of its activities as well as the internal provisions related to the functional performance of the public officer or servant.
b) To make any act or omission that constitutes the serious breach of the principles, duties and prohibitions stated in the honest and ethical standards of the public service.
c) To perform any act that is prohibited by law or by regulation.
d) To make any act or omission that shows negligence in the performance of the functions or uses such function for purposes other than the public interest.

The regulation describes and specifies such conducts that constitute functional administrative responsibility (serious or major), which are within the power of the Auditor General to impose penalties. Likewise, the processing of the minor offenses will be in charge of the owner of the entity.

(Bold type added)

In compliance with such law, it has been issued the Regulation for the Offenses and Penalties for Functional Administrative Responsibility derived from the reports issued by the bodies of the National Control System, approved by Supreme Decree No. 023-2011-PCM[28], in which the offending conducts are specified. For example, the generic offense set forth by the Sub-paragraph b) of the Article No. 46 of the Law No. 27785 has been developed under the following terms:

Article No. 7 - Offenses for breaching the principles, duties and prohibitions contained in the honest and ethical standards of the public service.
The public officers or servants are liable for functional administrative responsibility when committing serious or major offenses, related to the breach of the principles, duties and prohibitions stated in the honest and ethical standards of the public service, particularly for the following:

Offense against the principle of suitability

a) To exercise the profession or provide services in the entities without complying with the requirements required for such position, or using a false professional or academic degree, causing damage to the State.

28 Published in the Official Gazette *El Peruano* on March 18, 2011.

This offense is considered as serious. If the damage is economic, or a serious damage has been produced to public service, the offense is considered as major.

Offense against the principle of truthfulness

b) To not tell the truth or commit any act of falsehood in the procedures in which its function or position is involved, causing economic damage to the State or serious damage to the public service. This offense is considered as major.

As it is observed in the abovementioned example, there is a legally expressed authorization for the regulation specifies the offending conducts. The law has established the offending conduct in a generic manner and the regulation has been limited to specify it. The regulation does not create new obligations or violate the purpose or the objective of the law.

2.2 Order of legal classification

As previously indicated, the principle of legality has a material aspect known as the principle of classification or, more accurately, principle of certainty. This principle has the purpose of protecting the legal security (certainty) and reducing the discretion or judgment in the application of the Law[29].

For such purpose, this principle requires that the prohibited behaviors and the penalties to be imposed are clearly and unmistakably described in the legally binding rule. In this way, the citizen may prevent, in any time, the legal consequences (penalty) resulting from their conduct[30].

The order of classification is expressed in two successive levels: first, it establishes that the regulation describes the offending conduct; and, then, imposes a penalty. Such levels are detailed below:

2.2.1 Classification of offending conducts

Two techniques may be used to comply with the order of classification. Firstly, the direct classification by which a detailed description of the offending

29 Cf. NIETO, Alejandro. Op. cit., p. 260.

30 Cf. GÓMEZ, Manuel e Iñigo SANZ. *Derecho administrativo sancionador: Parte general. Teoría general y prácticas del derecho penal administrativo.* Segunda edición. Lima: Editorial Aranzadi, 2010, p. 153.

conducts is specified in a single legally binding rule. Secondly, the indirect classification by which the rule establishes that an offense constitutes the non-compliance with an order established in other regulation; therefore, the classification results from the combination between the rule that establishes the specific order (or prohibition) and the rule that declares in a generic manner that its breach constitute an offense[31]. The details of each of the abovementioned techniques can be found below:

a) Direct classification

In this modality, in a single rule is clearly and accurately established the offense considered as an administrative offense. In this way, a direct and complete classification of the punishable conducts is carried out.

A clear example of this modality of classification is found in the Law on Punishment for Unfair Competition, approved by the Legislative Decree No. 1044[32], which establishes that any act or conduct of unfair competition affecting or interfering with the proper development of the competitive process in an actual or potential manner shall be punished.

In the Article No. 6 of the referred law is clearly established what is considered as offending conduct:

> **Article No. 6 - General clause**
>
> 6.1. Any act of unfair competition is prohibited and shall be punished in any form this may be adopted or by any medium that allows its execution, including the advertising activity, regardless the sector of the economic activity in which they are developed.
>
> 6.2. An act of unfair competition is the one that is objectively contrary to the requirements of the good faith in business, which shall guide the competition in a social market economy.

Even in the Chapter II of the abovementioned law is found a list detailing the acts of unfair competition. Among these, it is found the following:

31 Cf. NIETO, Alejandro. Op. cit., p. 285.

32 Published in the Official Gazette *El Peruano* on June 26, 2008.

Article 15 - Acts of Sabotage in Business

15.1. It involves the execution of acts having the effect, either actual or potential, of affecting in an unjustified manner the production process, the business or trading activity, in general, of other economic agent, by interfering with the contractual relationship it maintains with its employees, suppliers, clients or other debtors as well as inducing them to fail to properly provide services or interfere in the process or activities of any kind of such agent.

15.2. The acts that provide better contracting terms for the employees, suppliers, clients or other debtors with another economic agent, as part of the competitive process in terms of efficiency, are not considered as acts of sabotage in business.

As it can be appreciated, the legally binding rule makes the classification in a clear and independent manner; therefore, the offending conduct is perfectly described in such rule.

b) Indirect classification

In this modality, the obligations of the company are established in a regulatory provision, and the non-compliance of such obligations, which are considered as administrative offense, is established in another one. As noted, the classification is indirect or may be used as reference

As the doctrine mentions, the administrative offenses are not independent, but they are based on another rule in which an order or prohibition is made, which non-compliance is considered as administrative offense. Consequently, the offending conduct is not made through a direct description, but results from the combination of two rules: the one which orders or prohibits, and the other which warns that the non-compliance constitutes an offense[33].

The validity of this regulatory technique has been recognized by various constitutional courts. Thus, the Constitutional Court of Spain has stated that the requirement of *lex certa* is not violated by "the remission that the rule, in charge of classifying the offenses, makes to other rules which impose specific duties or obligations that have to be complied; therefore, its infringement shall be considered as a defining element of the punishable offense itself, provided

33 Cf. NIETO, Alejandro. Op. cit., pp. 276-277.

that the penalty resulting from such non-compliance or infringement[34] may be anticipated with sufficient certainty.

Similarly, the Constitutional Court of Colombia has pointed out that, in the administrative aspect, is completely valid the indirect classification to establish offending conducts:

> The reprehensible conducts from the perspective of the penalty law of the administration does not require the express description of an offense and the classification of its illegal nature since, as the doctrine reaffirms "**the rigorous and perfect description of the offense is, except in special cases, almost impossible**". **The offenses of the penalty law operate, better, by remission to other legally binding rules** that oblige, impose, prohibit, regulate and modulate the conducts which the associates are subject to (…) with such methodology, the penalty law uses an **indirect classification[35].**
>
> The foregoing **does not mean a sacrifice of the principle of legality**, since it is possible to determine that **a specific, clear, relevant rule demands the compliance with certain requirements**, obligations or duties, **for the administration may, using the penalty law, impose a penalty for its breach[36].**
>
> (Bold type added)

Furthermore, said Constitutional Court has stated that, occasionally, it is necessary the indirect classification due to the variability and the technical nature of some offenses, as evidenced in the following quotation:

> Finally, it shall be noted that the technique of regulatory remission is necessary in certain legal aspects (…) indeed, some matters – as happens in the exchange matter – are subject to permanent modifications and adjustments, which make impossible that the Congress of the Republic or the special legislator may distinguish, in a specific moment, what the new duties, obligations and prohibitions are, which non-compliance,

34 Cf. Constitutional Court of Spain, judgment 219/1989 dated December 21, 1989, legal basis 5.

35 Cf. Constitutional Court of Colombia, judgment C-1153/05 dated November 11, 2005, legal basis 4.

36 Constitutional Court of Colombia, judgment C-564/00 dated May 17, 2000, legal basis 5.5.1.

> in a specific moment, may be considered as reprehensible conduct. Similarly, there are legal disciplines with a great technical complexity that complicate the legislator for making a detailed description of the said disciplines.[37]

It is important to mention that the Constitutional Court of Colombia has pointed out that the indirect classification is valid if the legally binding rule that establishes the obligation (which non-compliance is considered as an offense) is easily identified and is clearly and accurately described, as evidenced in the following quotation:

> Nonetheless, for the remission to be constitutional, the provision that establishes it shall have some **minimum contents** that allow the interpreter and the executor of the rule to **identify a certain set of regulations without ambiguities or indeterminations for this purpose.**
>
> **In addition, it is necessary that the rules, which are referred to, have, indeed, the elements allowing to clearly and accurately define the punished conduct**, in such a way that its application is carried out with due respect to the principle of classification[38].
>
> (Bold type added)

On the other hand, the legal doctrine considers that "the indirect classification has avoided the regulatory collapse that, otherwise, would have inevitably occurred since the laws – and not even the regulations – are in position to make a complete classification"[39].

A clear example of indirect classification is the offenses contained in the Code of Protection and Defense of the Consumer, approved by the Law No. 29571[40]. The Article No. 108 of said code establishes that the non-compliance with the obligations of the supplier is considered as administrative offense, as evidenced in the following quotation:

37 Constitutional Court of Colombia, judgment C-343/06 dated May 03, 2006, legal basis 5.1 and 5.2.

38 Constitutional Court of Colombia, judgment C-343/06 dated May 03, 2006, legal basis 5.2.

39 Cf. NIETO, Alejandro. Op. cit., p. 317.

40 Published in the Official Gazette *El Peruano* on September 02, 2012.

> **Article No. 108 - Administrative offenses**
> The conduct of the supplier that disobeys the provisions of this Code **is considered as administrative offense**, whether it involves the breach of the rights granted to the consumers or **fails to comply with the obligations imposed on the suppliers by these rules.** Likewise, the non-compliance with the conciliation agreements or arbitration awards and those set forth by the Legislative Decree No. 807, Law on Powers, Rules and Organization of Indecopi, and by the rules that complement or substitute them, are considered as administrative offense.
>
> (Bold type added)

To determine the content of the offense, the company shall consider the provisions of the code containing the obligations of the supplier. Among these are the Article No. 18 and No. 19 which establish the obligation detailed below:

> **Article No. 18 - Suitability**
> The suitability means the relationship between what a consumer expects and what he actually receives, according to what has been offered, the advertising and information provided, the conditions and circumstances of the operation, the characteristics and nature of the product or service, the price, among other factors, depending on the circumstances of the case.
> The suitability is evaluated according to the nature itself of the product or service and its suitability for use to satisfy the purpose by which it has been placed in the market.
> The authorizations by the bodies of the State to manufacture a product or provide a service, as the case may be, do not exempt the supplier from the responsibility against the consumer.
>
> **Article No. 19 - Obligations of the suppliers**
> The supplier assumes responsibility for the suitability and quality of the products and services offered; for the authenticity of the mark and legends that show its products or the sign that supports the service provider; for the lack of conformity between the commercial advertising of the products and services and for such marks or legends, as well as for the content and the shell life of the product specified on the package, where appropriate.

As it is observed, in order to know the offending conduct, the company shall jointly analyze the provisions set forth by the Article No. 18, No. 19 and No. 108 of the abovementioned code.

2.2. Classification of penalties

As previously detailed, not only the offense, but also the penalty shall be duly established in the legally binding rule. To classify the penalties, the following regulatory techniques may be used:

a) Penalty units

In this modality, each administrative offense receives penalty units. The relevant penalty has a fixed amount, invariable, that is equally applied to all the offenders. Generally, these penalties are determined to reduce recurrent offending conducts that are developed in similar circumstances, which allow standardizing the penalty to be imposed. The advantage of establishing penalty units lies in its expeditious nature as well as guarantee greater objectivity in the imposition of sanctions. All this given that, in these cases, the administrative authority is limited to impose the penalty set forth by the rule, without using its technical discretion.

As an example, the tax offenses shall be taken into account. In the Table I of the Single Organized Text of the Tax Code, approved by Supreme Decree No. 133-2013-EF[41], the following offense is set for the persons and entities earning Third Category Income:

Offense	Legal reference base	Penalty
To issue and / or deliver documents which not comply with the requirements and with the characteristics to be considered as payment receipts, or as accompanying documents, other than the waybill.	Number 2 of the Article No. 174 of the Single Organized Text of the Tax Code	50% of the UIT or shutdown

In the referred rule, the offending conduct receives a fixed penalty amounting to the 50% of the current UIT.

b) Penalty without a fixed amount

In this modality, the rule gives the offending conduct a penalty without a fixed amount. The penalty is flexible, since it is constituted by a certain range.

41 Published in the Official Gazette *El Peruano* on June 22, 2013.

Furthermore, it consists of a minimum amount and a maximum amount, allowing the Public Administration to adjust the penalty to be imposed, considering the circumstances of each case[42].

In general, the rule specifies the criteria that the administrative authority shall consider to establish the penalty in a particular case. Among these, we find the seriousness of the damage, the unlawful benefit, the probability of detecting the offense, the aggravating and mitigating factors, among others.

This mechanism of imposition of penalty allows the legal operators to have a margin of technical discretion, which shall be exercised in compliance with the principles of reasonableness and proportionality.

A clear example of penalty without a fixed amount is found in the Article No. 110 of the Code of Protection and Defense of the Consumer, approved by the Law No. 29571, which establishes the following:

> **Article No. 110 - Administrative offenses**
> The Indecopi may penalize the administrative offenses set forth by the Article No. 108 with warnings and penalties of up to four hundred and fifty (450) Peruvian Tax Units (UIT), which are classified as evidenced as follows:
> a. Minor offenses, with a warning or fine of up to fifty (50) UIT.
> b. Serious offenses, with a fine of up to one hundred and fifty (150) UIT.
> c. Major offenses, with a fine of up to four hundred and fifty (450) UIT.

The criteria to be taken into account at the moment of adjusting the abovementioned penalties are detailed in the Article No. 112 of the referred code, to wit:

> **Article No. 112 - Criteria for the adjustment of administrative penalties**
> The Indecopi may consider the following criteria at the moment of adjusting the penalty:
> 1. The unlawful benefit expected or obtained for the commission of the offense.
> 2. The probability of detecting the offense.
> 3. The resulting damage of the offense.
> 4. The effects of the offending conduct that may have produced in the market.
> 5. The nature of the damage caused or the effect on life, health, integrity or assets of the consumer.

42 Cf. NIETO, Alejandro. Op. cit., p. 511-512.

6. Other criteria that, depending on the particular case, are considered appropriate to be adopted.

In the abovementioned Article No. 110, the penalties without a fixed amount for each kind of the established administrative offenses have been included. In order to guarantee a proportional application of such penalties, the objective criteria that the administrative authority shall consider, at the moment of imposing a penalty in a particular case, has been included in the Article No. 112.

III. CLASSIFICATION OF ENVIRONMENTAL OFFENSES

The environmental offense means the existence of a legally binding rule that establishes, expressly, an environmental obligation in charge of a particular person with regard to the use of the natural resources or to the environment preservation.[43]

The adjustment of such environmental obligations is extensive and may easily vary due to the technological changes which generally create more risks to the environment or quickly change situations that are defined under the criteria which were approved. In this context, it is difficult for the legislator to anticipate or describe all and each one of the conducts through which the companies may violate the environmental rules and, therefore, damage the environment, health and the life of the persons. Due to the variability and complexity of said rules, the legislator has a clear difficulty to make a detailed list of each one of the specific and technical assumptions which establish the imposition of the penalty[44].

Thus, in order to classify the environmental offenses, the regulatory cooperation is generally used. The environmental offense as well as the penalties and their maximum amounts are generically provided by the Law, while the detailed list of the punishable conducts and the adjustment of the penalties are contained in the administrative regulation.

The foregoing is observed in the environmental offenses which are applied to the following sectors:

43 Cf. ÁLVAREZ, Gloria, "Las infracciones en materia ambiental". In AMAYA, Óscar and María del Pilar GARCÍA. *Nuevo Régimen Sancionatorio Ambiental.* Bogotá: Universidad Externado de Colombia, 201, p. 245.

44 Cf. Constitutional Court of Colombia, judgment C-703/10 dated September 06, 2010, legal basis 10.

a) Mining sector

Before the Law No. 30011[45] takes effect, the Article No. 17 of the Law No. 29325[46] granted to the Ministry of Environment (hereinafter referred as to MINAM) the power to classify environmental offenses according to the following parameters:

> **Article No 17 - Offenses**
> Pursuant to the Supreme Executive Order, signed by the Ministry of Environment and according to the regulation, **the administratively punishable conducts are classified as environmental offenses in compliance with the Law No. 28611, General Law on Environment,** and other related rules.
>
> (Bold type added)

In accordance with the foregoing, the original text of the Article No. 19 of the Law No. 29325 established the following:

> **Article No. 19 - Classification of offense and penalties**
> 19.1. The offenses are classified as Minor, Serious and Major. Its determination shall be based on the implication on health and environment, on the force or damage level, on its effects and other criteria which may be defined by the authorities of the System.
> 19.2. The Ministry of the Environment, at the request of the OEFA, **will approve the scale of penalties in which the penalties applicable to each kind of offense are established**, based on the penalties set forth by the Article No. 136 of the General Law on Environment.
>
> (Bold type added)

In compliance with the abovementioned rules, "The Chart of Classification of Offenses and Scale of Fines and Penalties applicable to the Large and Medium-sized Mining regarding Exploitation, Benefit, Transport and Storage of Ore Concentrate[47]" was approved by Supreme Decree No. 007-2012-MINAM. In this chart is included, among others, the following offense:

45 Law that amends the Law No. 29325 – Law on National Environmental Assessment and Enforcement System, published on April 26, 2013.

46 Published in the Official Gazette *El Peruano* on March 26, 2010.

47 Published in the Official Gazette *El Peruano* on November 10, 2012.

Offense	Legal reference base	Pecuniary penalty	Classification of the penalty
1.3. To not take measures or actions to avoid or prevent that the emissions, discharges, waste disposal, wastes and releases to the environment, which are produced as a result of the processes carried out, have negative effects on the environment.	Article No. 5 of the Regulation for the Protection in the Mining and Metallurgical[48] activity. Article No. 74 of the General Law on Environment[49].	Up to 10,000 UIT	Major

As it is observed, the regulatory cooperation was used to classify the offending conduct and establish the scale of penalties. Pursuant to Article No. 17 and No. 19 of the Law No. 29325, the Minam was authorized to classify by regulation, and the pertinent parameters were established. Among these, the non-compliance with of a legal obligation (general assumption) is considered as an offending conduct. Following the above mentioned parameters, the referred Ministry established that the non-compliance with the obligation set forth by Article No. 74 of the General Law on Environment and by Article No. 5 of the Regulation for the Protection in the Mining and Metallurgical activity (general assumption) also constitutes an offending conduct. Likewise, the range which is within the legal limit is considered as pecuniary penalty. As can be appreciated, in this case, a direct classification of the offending conduct has been carried out and a penalty without a fixed amount has been imposed.

48 **Regulation for the Protection in the Mining and Metallurgical activity, approved by Supreme Decree No. 016-93-EM, published on May 01, 1993.**
"**Article No. 5 -** the owner of the mining and metallurgical activity is liable for the emissions, discharges and waste disposal to the environment that is produced as a result of the processes carried out in its premises. Therefore, such owner shall avoid and prevent that those elements and / or substances, that due to their concentrations and / or prolonged presence may have negative effects in the environment, exceed the maximum permissible levels which have been established".

49 **Law No. 28611 - General Law on Environment**
"**Article No. 74 - General responsibility**
Any owner of the operations is liable for the emissions, effluents, discharges and any other negative impact on the environment, health and natural resources as a result of its activities. This responsibility includes the environmental risks and damages that may be produced by any act or omission".

b) Energy sector

Pursuant to Law No. 27332 – Framework Law on Regulatory Agencies for the Private Investment in Public Services[50] and the Law No. 27699 – Supplementary Law on Institutional Reinforcement of the Supervisory Body for the Investment in Energy[51], the Supervisory Body for the Investment in Energy (Osinergmin) was granted the power to classify administrative offenses.

The abovementioned legally binding rules properly detail the parameters within which such classification has to be made, establishing the following:

> **Law No. 27332 - Framework Law on Regulatory Agencies for the Private Investment in Public Services**
> **Article No. 3º - Functions**
> 3.1 The Regulatory Agencies exercise, within the scope of its jurisdiction, the following functions:
> (…)
> **c) Regulatory Function: (…) it involves, at the same time, the power to classify offenses for non-compliance with the obligations provided by the legally binding rules, technical rules and those derived from the concession agreements, under its scope, as well as for non-compliance with the regulatory provisions issued by said agencies.** Likewise, the Scale of Penalties will be approved within the maximum limits that have been established by the Supreme Decree which was signed by the President of the Council of Ministries and by the Ministry of the Sector to which the Regulatory Agency belongs.
>
> (Bold type added)
>
> **Law No. 27699 - Supplementary Law on Institutional Reinforcement of the Supervisory Body for the Investment in Energy**
> **Article No. 1 - Power to classify**
> Any act or omission involving the non-compliance with the laws, regulations and other rules, under the jurisdiction of the OSINERG, is considered as offending conduct.
> Notwithstanding the foregoing, **the Board of Directors of the OSINERG is empowered to classify the acts and omissions considered as administrative offenses as well as adjust the penalties** in compliance

50 Published in the Official Gazette *El Peruano* on July 29, 2000.

51 Published in the Official Gazette *El Peruano* on April 16, 2002.

with the principle of the power to impose penalties set forth by Law No. 27444 – Law on General Administrative Procedure.

(Bold type added)

Considering the established in abovementioned articles, the OSINERGMIN approved one of the main rules that regulate the classification applicable to the energy sector. This is the Decision of the Board of Directors of the Supervisory Body for the Investment in Energy (Osinerg) No. 028-2003-OS-CD[52], which includes, among others, the following offense:

Classification of the Offense	Legal reference base	Pecuniary penalty	Other penalties
1.1. To not comply with the rules on emission, venting and / or flaring of gases and fumes	Article No. 39, sub-paragraph f); Article No. 40, sub-paragraph b); and Article No. 77 of the Regulation approved by Supreme Decree No. 051-93-EM. Article Nos. 138 and 140 of the Regulation approved by Supreme Decree No. 027-94-EM. Article No. 84 of the Regulation approved by Supreme Decree No. 019-97-EM. Article No. 86, sub-paragraph k) of the Regulation approved by Supreme Decree No. 030-098-EM. Article No. 1 and No. 2 of the Supreme Decree No. 014-2001-EM. Article No. 189, No. 241, No. 244 and No. 245 of the Regulation approved by Supreme Decree No. 032-2004-EM. Article No. 43, sub-paragraph b); Article No. 74, sub-paragraph a), and Article No. 78 of the Regulation approved by Supreme Decree No. 015-2006-EM	Up to 8,000 UIT	Shutdown of the establishment; shutdown of the premises; removal of equipment and installations and, temporary cessation of activities; and definitive cessation of activities

52 Published in the Official Gazette *El Peruano* on March 12, 2003.

As can be appreciated, the regulatory cooperation was used to establish the offending conducts and the applicable scale of penalties. Pursuant to Law No. 27699 and No. 27332, the Osinergmin was authorized to classify by regulation, specifying the corresponding parameters. Following the previous example, this regulatory agency has used the indirect classification to establish the offending conduct. In this sense, the non-compliance with the obligations related to the emission, venting, flaring of gases and fumes is considered as an offense, which is set forth by other regulatory provisions. In order to secure the legal security, each one of the regulatory provisions that regulate such obligations has been specified (*v. gr.* the Sub-paragraph f) of the Article No. 39 of the Regulation for the Rules for Refining and Processing of Hydrocarbons, approved by Supreme Decree No. 051-93-EM). On the other hand, a penalty without a fixed amount has been established for the non-compliance with the abovementioned obligations.

c) Production sector:

The previous Law No. 27789, Law on the Organization and Functions of the Ministry of Production[53], admitted that the Ministry of Production (hereinafter referred as to Produce) has the power to classify offenses, under the following parameters[54]:

> **Article No. 5 - Functions**
> The Ministry of Production has following functions:
> (…)
> c) To regulate the development of the extractive and productive activities related to its scope of jurisdiction, within the framework of promotion to the free competence; controlling and supervising the compliance with the issued regulation; punishing the non-compliance with obligations related to the legal or technical rules, including the

53 Published in the Official Gazette *El Peruano* on July 25, 2002.

54 It is important to mention that the current Law on Organization and Functions of the Ministry of Production, approved by the Legislative Decree No. 1047, published on June 26, 2008, also grants to the PRODUCE the power to classify administrative offenses, according to following terms:
"**Article No. 7: OTHER SPECIFIC FUNCTIONS**
The Ministry, within the scope of its jurisdiction, has the following specific functions:
7.1. To approve the regulatory provisions that are within its jurisdiction, being this function the power to classify, according to the regulations, the offenses for the non-compliance with the legally established obligations.
(…)"

> productive activities which are developed in the free zones, zones of special treatment to business and special zones for development. This function involves, at the same time, **the power to classify the offenses, in accordance with regulations, for the non-compliance with the obligations established by legal and technical rules**, under its jurisdiction.
>
> (Bold type added)

Considering the said parameters, the Produce approved by Supreme DecreeNo. 019-2011-PRODUCE the Single Organized Text of the Regulation for Fishing and Aquaculture Inspections and Penalties (RISPAC[55], by its initials in Spanish). This classification includes, among others, the following offense:

Offense	Sub-Offense	Pecuniary Penalty
68.To leave or throw in to the water or sea, lake systems or rivers, beaches or shores, any elements of infrastructure, toxic material, polluting substances or other objects that represent danger to the navigation or the life of the aquatic ecosystem or cause any other prejudice to the populations located in shores or rivers.	68.1 If the objects or waste come from an industrial fishing establishment where fish meal and oil are produced.	Fine according to the installed capacity x 1 UIT
	68.3 If it happens in an aquaculture center	3 UIT
	68.4 If the objects or waste come from an industrial fishing establishment exclusively engaged in the production of products for the direct human consumption.	2 UIT

In this case, it has been recurred to the regulatory cooperation for establishing the offense and the scale of penalties. The Law No. 27789 authorized the Produce to make classifications considering certain parameters. Among others, it defines it is considered as offending conduct the non-compliance with the legal obligation (general assumption). Considering this, the regulation establishes as a type of offense the non-compliance with the obligation described in the Article No. 76 of the Decree Law No. 25977, General Law on Fishing, related to leaving waste in to the beaches and rivers or throwing in to

55 Published in the Official Gazette *El Peruano* on December 06, 2011.

water the wastes, toxic material or other elements that are considered as danger for the environment and the human health and life (specific assumption). As it is observed, in the regulatory rule a direct classification of the offending conduct is made and a penalty unit is set.

d) Solid waste:

The Law No. 27314, General Law on Solid Waste[56] authorizes to classify, according to regulation, the offenses related to the solid waste management, under the following terms:

> **Article No. 48 - Penalties**
> Regardless the constitutional, civil or penal actions which should be taken into account, **the offenses and penalties applicable for contravention of this Law and its regulatory rules, will be classified by said regulatory rules**, being additionally applied, the one mentioned in the Article No. 136 of the Law No. 28611, General Law on Environment, and in the Legislative Decree No. 1013, Law on Creation, Organization and Functions of the Ministry of Environment.
> The pertinent authorities for the application of penalties regarding solid waste **are empowered to approve the classification of the offenses and the corresponding scale of penalties** in order to adapt them into the characteristics of the activities under its jurisdiction.
>
> (Bold type added)

In accordance with the referred rule, the Regulation of the Law No. 27314 - General Law on Solid Waste was approved by Supreme Decree No. 057-2004-PCM[57], through which the offenses related to the management of solid waste are classified. The articles No. 145 and No. 147 of the abovementioned regulation establish the following administrative offense:

> **Article No. 145 - Offenses**
> The offenses to the provisions of the Law and the Regulation are classified in:
> (…)
> 2. Serious Offenses: The following cases are considered as serious offenses:
> (…)

56 Published in the Official Gazette *El Peruano* on July 21, 2000.

57 Published in the Official Gazette *El Peruano* on July 24, 2004.

c) Abandonment, disposition or elimination of waste in prohibited places.
(…)

Article No. 147 - Penalties
The offenders are to be punished by one or more of the following administrative penalties:
(…)
2. Serious offenses:
   a. Partial or total cessation, for a period from up to 60 days, of the activities or operational procedures of the Solid Waste Service Providers (EPS-RS, by its initial in Spanish), Solid Waste Trading Company (EC-RS, by its initial in Spanish) or generators of waste in the non-municipal management aspect; and,
   b. Fine from 21 up to 50 UIT. In case of harmful waste, the fine will range from 51 up to 100 UIT.

In this case, the regulatory cooperation has been employed once again. The Law No. 27314 authorizes the Executive Power to collaborate with the classification of offenses and the establishment of the scale of penalties, within the established parameters. Among these, it is specified that the non-compliance with an obligation described in a regulation (general assumption) may be considered as an offense. Taking this into account, a direct classification of the offending conduct has been carried out by establishing as such the non-observance of the prohibition prescribed in the Article No. 18 of the Regulation of the General Law on Solid Waste, related to the abandonment, disposition or elimination of waste in prohibited places[58] (specific assumption). On the other hand, a penalty without a fixed amount has been established, considering a range of penalties to be imposed.

For the abovementioned, the environmental offenses have been classified through the regulations, by observing the parameters established by the law. It has been recurred to the regulatory cooperation because it was necessary greater detail and precision that sometimes the law is not able to provide.

58 **Regulation of the Law No. 27314, General Law on Solid Waste, approved by Supreme Decree No. 057-2004-PCM:**
"**Article No. 18:** Prohibition for the final disposal in non-authorized places
It is prohibited the abandonment, discharge or disposal of solid waste in places that are not authorized by the corresponding authority or by law.
The places of inappropriate final disposal of solid waste, used as garbage dumps, shall be shut down by the Province Municipality, in coordination with the Health Authority of the jurisdiction and the corresponding district municipality.
(…)"

IV. CLASSIFICATION APPROVED BY THE OEFA

Nowadays, the OEFA has the power to classify the environmental offenses applicable to the companies that are under its supervision; that is to say, the companies developing economic activities in the following sectors: large and medium-sized mining, hydrocarbons, electricity, fishing (industrial fishing processing and large scale aquaculture) and manufacturing industry (beer, paper, cement and tannery)[59].

The said power has been granted in compliance with the Law No. 30011, which amended the Articles Nos. 11, 17 and 19 of the Law No. 29325, as follows:

> **Article No. 11 - General functions**
> (…)
> 11.2 The OEFA, acting in its capacity of governing body of the National Assessment and Enforcement System (SINEFA), has the following functions:
> a) Normative function: (…) In compliance with the normative function, the OEFA is authorized, among others, to classify administrative offenses and approve the corresponding scale of penalties, as well as to classify the criteria of their adjustment and the scopes of the preventive measures, precautionary and remedial, to be issued by the corresponding competent authorities.
> (…)
>
> **Article No. 17 - Administrative offenses and the power to impose penalties**
> (…)
> Through Decision of the Board of Directors of the OEFA, the conducts are classified and the applicable scale of penalties is approved. The classification of offenses and general and transverse penalties will be a supplementary application to the classification of offenses and penalties used by the EFA.
>
> **Article No. 19 - Classification and criteria for the classification of penalties**
> (…)

59 The general and transverse classification approved by the OEFA may be applied in a supplementary manner by the other Environmental Enforcement Entities, in compliance with the Article No. 17 of the Law No. 29325 - Law on National Environmental Assessment and Enforcement System.

19.2 The Board of Directors of the OEFA approves the scale of penalties in which the applicable penalties are established for each type of offense, based on the offenses set forth by the Article No. 136 of the Law No. 28611, General Law on Environment.

The power to classify by the OEFA is subject to the standards that guarantee the principles of legality, classification, reasonableness, proportionality, gradualness and non-confiscation, in accordance with the current constitutional and legal ordinance. For the purposes of this work, we are going to focus on the first two, the principles of legality and classification.

a) Legal parameters for the classification of the offenses

In the Articles No. 17 and No. 19 of the Law No. 29325 and the Article No. 136 of the Law No. 28611 - General Law on Environment (amended by the Law No. 30011), the instructions and limits were described according to which the classification of the environmental offenses have to be elaborated.

In first place, the Article No. 17 of the Law No. 29325, amended by the Law No. 30011, **the essential elements of the wrongful conduct** have been considered, establishing the following:

> Article No. 17 - Administrative offenses and the power to impose penalties
> **The following conducts are considered as administrative offenses** under the scope of jurisdiction of the Agency for Environmental Assessment and Enforcement (OEFA):
> (…)
> a) Fail to comply with the obligations set forth by the **environmental regulation**.
> b) Fail to comply with the obligations in charge of the companies, which were established by the **environmental management instruments** and detailed in the current environmental regulation.
> c) Fail to comply with the environmental commitment made in the **concession agreements.**
> d) Fail to comply with the precautionary, preventive or remedial measures as well as the provisions or **orders issued by the competent authorities of the OEFA**.
> e) Others which are within the scope of its jurisdiction.
> (…)
>
> (Bold type added)

In this manner, the OEFA will be only able to classify those offenses, the actions or omissions that may be subsumed according to the abovementioned parameters. That means that it can only be considered as administrative offenses the non-compliance with the obligations established in the environmental regulation, the environmental management instruments, the conciliation agreements or the administrative measures issued by the OEFA.

Secondly, in the Article No. 136 of the Law No. 28611, amended by the Law No. 30011, **the nature and the maximum limits of the penalties,** which may be considered in the classification by regulation, are anticipated, to wit:

> **Article No. 136 - Penalties and remedial measures**
> (…)
> 136.2 The following are considered as coercive penalties:
> a. Warning.
> b. Fine not more than 30,000 Peruvian Tax Units which shall be in force at the date of the payment.
> (…)

According to the referred rule, it is observed from the regulatory classification issued by the OEFA that warnings and fines are considered as penalty. As of the fine, the maximum amount that can be imposed ranges from up to 30,000 Peruvian Tax Units which nowadays corresponds to a 114 million of Nuevos Soles (approximately 40 million of American Dollars).

In order to guarantee that the regulatory classification is reasonable, it has been included into the Law the **criteria for establishing the scale of penalties**.

In this sense, the Article No. 19 of the Law No. 29325, amended by the Law No. 30011, establishes the following:

> Article No. 19 - Classification and criteria for the classification of penalties
>
> 19.1 The offenses and penalties are classified as minor, serious and major. Its determination has to be based on the **implication on health and environment, on the force or damage level, on its effects or other criteria** that may be defined according to the current regulation.
> 19.2 The Board of Directors of the OEFA approves the scale of penalties in which the applicable penalties are established for each type of offense, based on the penalties set forth the Article No. 136 of the Law No. 28611, General Law on Environment.
>
> (Bold type added)

As Maraví Sumar states "the approval of the scale of penalties, which actually is the adjustment of the classified offenses, has a legal backup and complies with the principle of classification"[60]. In effect, the law of remission has been very precise at establishing the nature and the limits of the penalty, as well as of the criteria of its adjustment.

b) General rules on the power to impose penalties

The OEFA has approved the "General Rules on the Execution of the Power of the OEFA to impose penalties" (hereinafter referred as to the General Rules)[61] with the purpose to properly execute its function of classification of the environmental offenses. These rules establish binding criteria for the classification of the offenses and the establishment of the penalties, for the purpose to ensure the compliance with the principles of legality, classification, reasonableness, proportionality, gradualness and non-confiscation and, at the same time, to accomplish an efficient and appropriated environmental protection.

In compliance with the Third provision of the General Rules, the OEFA, in compliance with its function of classification, may approve the following subtypes of offenses:

- **General:** it involves the obstruction of the functions of environmental enforcement.

- **Transversal:** it involves the non-compliance with the environmental management instruments or with environmental rules applicable to different economic activities to be controlled.

- **Sectoral:** it involves the non-compliance with the environmental obligations specified in the sectoral environmental legislation applicable according to the type of economic activity.

In regard to the offending conducts, the Fourth provision of the General Rules expressly establishes that it can be only considered as administrative offenses those actions or omissions that express the non-compliance with the environmental obligations to be controlled, including the obligations related

60 MARAVÍ, Milagros. *Informe presentado ante el Organismo de Evaluación y Fiscalización Ambiental*, 2013, paragraph 3.14.

61 Approved by Decision of the Board of Directors No. 038-2013-OEFA/CD, published on September 18, 2013.

to the environmental enforcement. Through the classification of offenses made by the OEFA, new environmental obligations for the entities will not be created.

In respect of the penalties, it has been decided to establish penalty without a fixed amount. In order to comply with the principle of proportionality, the Eighth provision of the General Rules indicates that at the moment of establishing the scale of penalties, it has to be mainly taken into account the following criteria:

- The environmental risk of the involved parameters
- The actual damage caused to the human life or health.
- The actual damage to the flora or fauna.
- The percentage exceeding the maximum permissible limits.
- The development of the activities in prohibited areas or zones declared as such by the competent authority.
- The act of not having any operating permits for taking advantage of the natural sources.
- Other criteria which shall be approved by the Board of Directors of the OEFA.

In that sense, it can be guaranteed that the penalty established goes along with the seriousness of the offending conduct. Likewise, it can be accomplished that the penalty is dissuasive enough in order to avoid that the offender obtains any benefit its illegal acting, but at the same time that it is not too onerous for him, avoiding therefore to discourage the private investment. Under these criteria, it can be ensured a better adjustment on the establishment of the scale of penalties.

In order to guarantee that the application of the penalty is not confiscatory, it has been established in the Tenth provision of the General Rules that the penalty to be imposed to the offender shall not be more than the 10% of the gross income he earned on the year prior to the commission of the offense. In that way, it is avoided that, through the execution of its power to impose penalties, the existence of the small scale enterprises is put in danger. Likewise, it accomplishes that the imposition of penalties is proportional to the economic capacity of the offender.

c) Recent classification approved by the OEFA

To present, the OEFA has issued three (3) classification, which are related to the "efficiency of the environmental enforcement"[62], the "non-compliance

62 This classification was approved by the Decision of Board of Directors No. 042-2013-OEFA/CD, which was published on October 16, 2013.

with the maximum permissible limits"[63] and the "environmental management instruments and the development of the activities in prohibited zones"[64].

The first classification is of a general aspect and the last two are of a transversal aspect. In said classifications, the parameters established by the Laws No. 29325 and 28611, as well as by the General Rules, have been strictly reviewed.

In that sense, the classifications approved are limited to consider as offense the non-compliance with the obligations established in the environmental rules, the environmental management instruments, the regulations provided by the corresponding authority, among others. Through this classification, new obligations for the entities have not been created.

Moreover, an effort has been made for specifically precise each one of the offending conducts. That is to say, a direct classification of the offenses has been made, detailing the elements that integrate each one of them[65]. On the other hand, a penalty without a fixed amount has been considered for each offending conduct, taking into account the criteria established in the General Rules.

We may take as an example the classification of offenses and the scale of penalties related to the maximum permissible limits. The said classification has been elaborated taking into account the obligation established in the Article No. 32 of the Law No. 28611- General Law on Environment, which orders as follows:

> **Article No. 32 - Maximum Permissible Limit**
> 32.1. **The Maximum Permissible Limit (LMP, by its initials in Spanish)**, is the measure of the concentration or level of physical, chemical and biological elements, substances or parameters that characterize an effluent or emission, which damages or may damage to the health, human welfare and the environment in case it is exceeded.

63 This classification was approved by the Decision of Board of Directors No. 045-2013-OEFA/CD, which was published on November 13, 2013.

64 This classification was approved by the Decision of Board of Directors No. 049-2013-OEFA/CD, which was published on December 20, 2013.

65 As the legal doctrine mentions: "it is a better technique, for legal security reason, to establish a detailed catalogue of the offenses that not disperses legal obligations throughout the regulatory texts". Refer to GÓMEZ, Manuel and Íñigo SANZ. Op. cit., p. 163.

> Its determination is in charge of the Ministry of Environment. Its compliance is required by the Ministry of Environment and the agencies which are part of the National Environmental Management System pursuant to law. The criteria for the determination of the supervision and penalty shall be established by said Ministry.
>
> (…)
>
> (Bold type added)

Considering such legal obligation, the previous classification, approved by Osinergmin[66], included four (4) subtypes of offenses applicable to the hydrocarbon subsector, which are detailed below:

Classification of the offense	Penalty
3.7.1. Non-compliance with the LMP regarding atmospheric emissions	Up to 2,000 UIT
3.7.2. Non-compliance with the LMP regarding effluents	Up to 10,000 UIT
3.7.3. Non-compliance with the LMP regarding hydrocarbons in soils and sediments	Up to 6,500 UIT
3.7.4.Non-compliance with the permissible maximum limit regarding noise emissions.	Up to 1,100 UIT

On the other hand, the classification approved by the OEFA[67] has developed said offending conduct taking into account sixteen (16) subtypes of offenses. The first twelve (12) have been classified according to the potential damage. While the other four (4) according to the actual damage. In order to determine the seriousness of the offending conduct, the damaged legal right (*v. gr.* flora and fauna, human life or health), the percentage exceeding the maximum permissible limits and the nature of the involved parameter (whether it involves or not a greater environmental risk) has been taken into account. For example, we can observe the following offending conducts:

66 Orderof the Board of Directors of the Osinerg No. 028-2003-OS/CD, amended by the Orderof the Board of Directors of the Osinergmin No. 358-2008-OS/CD.

67 Approved by the Decision of the Board of Directors No. 045-2013-OEFA/CD.

	Offense	Classification of the seriousness of the offense	Monetary
1	To exceed up to 10% above the maximum permissible limits established in the applicable regulatory rule regarding the parameters that do not classify as a greater environmental risk.	Minor	From 3 to 300 UIT
2	To exceed up to 10% above the maximum permissible limits established in the applicable regulatory rule regarding the parameters that classify as a greater environmental risk.	Serious	From 5 to 500 UIT
3	To exceed from 10% up to 25% above the maximum permissible limits established in the applicable regulatory rule regarding the parameters that do not classify as a greater environmental risk.	Serious	From 10 up to 1,000 UIT
4	To exceed from 10% up to 25% above the maximum permissible limits established in the applicable regulatory rule regarding the parameters that classify as a greater environmental risk.	SERIOUS	From 15 up to 1,500 UIT

As it can be observed, the OEFA has dedicated to classify as offenses the conducts that have the criteria established by law and to adjust the applicable penalties taking into account the legal limit, guaranteeing, in this way, the effective application of the principles of legality and classification. Furthermore, in order to reinforce the principles of predictability and gradualness, a more detailed classification has been made, in comparison to the previous classification approved by Osinergmin. In the classification issued by the OEFA, all the assumptions which configure the type of offenses and establish greater criteria for adjust the scale of penalties have been detailed.

V. CONCLUSIONS

Due to the variability and complexity of the environmental matters, it is difficult for the legislator to anticipate or describe all and each one of the conducts through which the companies may damage the environment. Therefore, in order to classify the environmental offenses, the technique of regulatory cooperation has been used. In that sense, the environmental offense is generally defined in the laws as well as the penalties and its maximum levels, referring the specification of the punishable offenses and the corresponding scale of penalties to the administrative regulation.

The environmental classifications issued until this date have been limited to define as offense the non-compliance with the obligations established in the environmental rules, in the environmental management instruments, and in the orders established by the respective authority, among others. Through the classification made by the technique of the regulatory cooperation, new obligations for the companies have not been created. Likewise, the technique of direct and indirect classification has been used. In regard to the establishment of penalties, the technique of establishing penalties without a fixed amount has been employed in general.

The classification of the offenses regarding the environmental matters approved by the OEFA has been made in accordance with the guarantor parameter established in the current constitutional and legal system, such as in the case of the application of the principle of legality and classification.

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4.

ADMINISTRATIVE OFFENSES AND THE POWER TO IMPOSE PENALTIES IN ENVIRONMENTAL MATTERS

CHRISTIAN GUZMÁN NAPURÍ

SUMMARY

In this article, the author analyses a series of themes related to the punishable and control function of the OEFA. In this sense, he explains the power to impose penalties of the Public Administration in environmental matters. In addition, he covers the principles of reasonableness, classification and predictability in order to explain the practice of the regulatory power.

I. Introduction. II. Regulation of the power to impose penalties. III. The principle of reasonableness: circumstances affecting the determination of an administrative penalty. IV. The principle of classification. V. The principle of predictability. VI. The exercise of the power to impose penalties. VII. Conclusions.

I. INTRODUCTION

By virtue of the power to impose penalties, the Public Administration is empowered to impose penalties to companies for offenses established by the legal system. In this case, the Agency for Environmental Assessment and Enforcement (OEFA) has such power, in accordance with the Law No. 29325 – Law on National Environmental Assessment and Enforcement System[1], and protected by Law No. 28611 – General Law on Environment[2].

1 Published in the Official Gazette *El Peruano*, on March 5, 2009.

2 Published in the Official Gazette *El Peruano*, on October 15, 2005.

Since not all act contrary to rules has to be legally punished, due to the subsidiary factor of such law branch, which always operates as the last ratio, it is worth to mention, when other legal mechanisms of social control[3] are not effective. Consequently, the laws have to establish the possibility to impose administrative penalties which also work as mechanisms for social control, but in a more lenient manner. Administrative penalties do not include, for example, the possibility to establish deprivation of liberty to companies, a power which is included in criminal penalties.

II. REGULATION OF THE POWER TO IMPOSE PENALTIES

The regulation of the power to impose penalties and, therefore, the penalty procedure, was a new concept in the Peruvian system, characterized by absence of, until the emission of the Law No. 27444 – Law on General Administrative Procedure[4], a rule or set of rules which regulate the principles and regulations applied to the penalty procedure, in general terms[5].

Subsequently, the Legislative Order No. 1029[6] mainly amended many factors of the administrative penalty procedure. Firstly, it amended the Article No 229 of the Law No 27444, establishing that provisions on administrative penalty procedure are supplementary applied to procedures established in especial laws, which shall observe the principles of the power to impose penalties established in the law, as well as the structure and guarantees planned for the mentioned procedure.

Such Legislative Order establishes, consequently, that such especial procedures will not impose conditions less favorable to companies than as established in the Law on General Administrative Procedure. This is a new concept of this rule and allows to bring a better predictability to especial penalty procedures. In this sense, administrative penalty procedures established in especial laws have to be coherent with the established by the Law No. 27444 in order to obtain uniformity in the treatment of mentioned procedures, and, additionally,

3 *CASTILLO, José Luis. Principios de derecho penal. Parte general. Lima: Gaceta Jurídica, 2002, p.226. See also HURTADO, José. Manual de derecho penal. Parte general. Lima: Grijley, 2005, p.46.*

4 *Published in the Official Gazette El Peruano, on April 11, 2001.*

5 *DANÓS, Jorge. "Notas acerca de la potestad sancionadora de la Administración Pública". Ius et Veritas, año V, No. 10, p.151, Lima.*

6 *Published in the Official Gazette El Peruano, on June 24, 2008.*

the penalty procedure covers the guarantees necessary for its result is fair, considering that the same includes tax actions related to the company.

As we will see below, legal rules regulate the administrative penalty procedure in environmental matters, so that they ensure that such principles will be due complied, particularly principles of legality, classification, proportionality and predictability, which are the purpose of analysis in this work.

2.1. Penalty prerogatives as a power

We understand as power, the situation of power assigned by the legal system prior to - particularly, by the law -, which enables its owner to impose behaviors to third parties[7], with the possibility to the passive subject has to bear the consequences of such power, which may not be favorable[8], and may not be prevented, unless they are executed in an illegal manner.

That passive subject has a fastening relationship with the entity into question. In the specific case of the power to impose penalties, the power consequences are burdensome and the fastening relationship is uniformly applied to all companies within a specific field, which determines the penalty calibration in accordance with the criteria below.

In contrast to certain cases in comparative law, as the Spanish Law[9], the Political Constitution of Peru does not establish the existence of powers to impose penalties in favor of the Administration, contrary to the constitutional rule that does it with the punitive power of the criminal law. This does not prevent to affirm the existence of the prerogatives mentioned above, each time that these come from the administrative self-protection[10], which is not discussed today, at least in our administrative tradition[11].

7 SANTAMARÍA, Juan Alfonso. *Principios de derecho administrativo*. Madrid: Centro de Estudios Ramón Areces, 200, p.394.

8 GARCÍA DE ENTERRÍA, Eduardo & Tomás Ramón FERNÁNDEZ. *Curso de derecho administrativo*. Volume II. Madrid: Civitas, 2000, p.31.

9 Idem p.161. See also GONZÁLES, Jesús. *Manual de procedimiento administrativo*. Madrid: Civitas, 2000, p.455.

10 DANÓS, Jorge. Op. cit., p.150.

11 However, the administrative self-protection is debatable in the Anglo-Saxon administrative law area. About this subject: VÉLEZ, Jorge. *Los dos sistemas de derecho administrativo*. Santa Fe de Bogotá: Institución Universitaria Sergio Arboleda, 1996, p.323.

Once we have justified the existence of powers to impose penalties in favor of Administration, it is clear the need for such powers to be regulated, in order to reduce to a minimum the possibilities of a discretionary practice by Administration, in defense of the company's rights. This purpose is also in charge of the Administration, according to the Article III of the Preliminary Tittle of the Law on General Administrative Procedure[12].

On the other hand, the administrative penalty procedure operates provided by a guarantee set applied to the company, allowing the procedure to be properly processed, protecting the fundamental rights of the particular, ensuring that the offense quality and the determination of the later penalty are made on a legal and objective basis.

2.2 Power to impose penalties in the environmental regulation

The power to impose penalties is clearly defined in the environmental regulation, so it meets the principles that regulate such power granted by the Law on General Administrative Procedure, especially, the principle of legality[13], a principle that, as we will see below, must not be confused with classification.

The Article 136° of the General Law on Environment provides natural persons or legal entities that violate provisions contained in the mentioned Law and in regulatory and supplementary provisions about the matter, shall be punished, according to the seriousness of the offense, with penalties or remedial measures, which will be presented in this document.

12 Law No. 27444 – Law on General Administrative Procedure
Preliminary Title
Article III. – Purpose
This Law aims to establish the legal system applicable for Public Administration action to protect the general interest, ensuring the rights and interests of companies and subject to the constitutional and legal system in general.

13 Law No. 2744 – Law on the General Administrative Procedure
Article 23°. – Principles of the administrative penalty power
The penalty power of all entities is subject to the following special principles:
1. Legality: Pursuant to the legally binding rule, the entities are empowered to impose penalties and anticipate the administrative consequences that, as penalty, may be applied to a company. However, such entities, in any case, shall order the deprivation of liberty. (...)

In addition to this, we must to add that Article No 142 of the mentioned rule provides that anyone who by use or exploitation of a good or in the practice of an activity may produce a danger to the environment, people life quality, people health or patrimony, shall assume the costs resulting from prevention and damage mitigation measures, as well as those related to surveillance and monitoring of the activity and the preventive and mitigation measures adopted.

It also indicates that environmental damage is all material harm on the environment and / or on any of its elements, by violating a legal provision or not, and producing current and potential negative effects, taking into account that the protection of the environment is a fundamental right. This definition of environmental damage is fundamental for later in order to connect this concept with the principle of classification.

The Article No 11 of the Law on the National Environmental Assessment and Enforcement System; however, establishes, as one of the powers of the OEFA, the power to investigate the commission of possible administrative punishable offenses and impose penalties due to the non-compliance with the obligations from environmental management instruments, as well as the environmental rules and orders or provisions issued by the OEFA. By this provision, the principle of penalty legality is complied, therefore, as we mentioned above, the legally binding rule establishes the power to impose penalties[14].

Linked with the function mentioned in the previous paragraph, there is the regulatory function, which includes the power to order - in the area to its proper jurisdiction- regulations and rules that regulate procedures related to its jurisdiction, and others referred to interests, obligations and rights of public or private, natural persons or legal entities to control. This provision grants to the OEFA a regulatory power, used, among other matters, to issue the rules regulating the penalty adjustment, as we see below.

2.2.1. Conducts including offense

The Article 17° of the Law No. 29325 amended by the Law No. 30011, establishes administrative offenses which are within the jurisdiction scope of the OEFA. That includes the non-compliance with obligations contained in the environmental regulation, as well as the non-compliance with obligations in the charge of the companies established in the environmental management

14 GARCÍA DE ENTERRÍA, Eduardo & Tomás Ramón FERNANDEZ. Op. Cit. O. 173.

instruments mentioned in the environmental regulation in force[15]. As a result, the OEFA applies the power to impose penalties related to the environmental obligations established in the plans, programs and other environmental management instruments to be approved by the Ministry of Environment (Minam).

On the other hand, the non-compliance with environmental commitments assumed in the contracts of concession is considered an offense. In addition, the non-compliance with precautionary, preventive or remedial measures, as well as with the orders or provisions issued by the competent authorities of the OEFA, is a matter of administrative penalty procedure. Finally, it is mentioned that an offense is all other conducts corresponding to its area of jurisdiction, mentioned in, for example, special rules.

2.2.2 Environmental Control

The Article 17° indicates, additionally, that the compliance with environmental obligations to be controlled is mandatory to all natural persons or legal entities executing activities under the jurisdiction of the OEFA, even when they have not permits, authorizations or licenses for the practice of such activities. This provision is applied to all environmental enforcement entities (EFA), according to their jurisdictions, as appropriate.

In addition, it is mentioned when the OEFA has reasonable and verifiable evidences of the non-compliance with conditions for an activity is within the jurisdiction scope of the regional governments, and therefore, its current condition should correspond to the jurisdiction scope of the OEFA, this one is empowered to develop environmental enforcement actions, as appropriate.

The actions executed by the OEFA, according to this article, are made without prejudice of competences corresponding to regional governments and other EFAs, as well as to the Supervisory Body for the Investment in Energy and Mining (Osinergmin) and other sectoral entities, according to their jurisdictions. Finally, the rule provides that, by Supreme Decree signed by the Ministry

15 Law No. 28611 – General Law on Environment:
Article 16°. – Instruments
16.1 The environmental management instruments are mechanisms intended to the execution of the environmental policy, on a basis of principles established in this Law, and as indicated in its supplementary and regulatory rules.
16.2 These instruments are operational means which are designed, regulated and applied on functional or supplementary basis, in order to make effective the National Environmental Policy and the environmental rules governing in the country.

of Environment at the suggestion of the OEFA, provisions and criteria for environmental control of the activities mentioned in previous paragraphs are established.

2.3. The objective liability

The Article 18° of the Law No. 29325 establishes that the companies are objectively responsible for the non-compliance with obligations from environmental management instruments, as well as the environmental rules and orders and provisions issued by the OEFA, making clear that the administrative liability is objective, as is the administrative liability generally. The above is fundamental to ensure the environmental administrative liability of legal entities, which would not be possible in case of assigning willful misconduct or fault.

III. THE PRINCIPLE OF REASONABLENESS[16]: CIRCUMSTANCES AFFECTING THE DETERMINATION OF AN ADMINISTRATIVE PENALTY

The original writing of the rule established the authorities have to provide that the commission of the punishable conduct should not be more beneficial to the offender than complying with the violated rules or assuming the penalty; as well as that the determination of the penalty considers criteria, such as the existence or not of intentionality, prejudice caused, circumstances of the commission of the offense and concurrent offenses.

In this order of ideas, the principle of reasonableness, greatly, may be included in the material or essential definition of the due process[17]. Due process consists in guarantees necessary to a process or procedure can be considered fair, with two factors, one adjective or procedure, and one essential or material. The first factor is related to the formalities; and the second factor, referred to the decision scope, including the reasonableness, proportionality and the arbitrariness interdiction.

16 Article No 230, Sub-paragraph 3) of the Law No 27444.

17 HUAPAYA, Ramón. "¿Cuáles son los alcances del derecho al debido procedimiento administrativo en la Ley del Procedimiento Administrativo General?". Actualidad Jurídica, tomo 141, 2005, p. 188, Lima.

For the first part of reasonableness definition contained in the Law No. 27444, the administrative doctrine and case law have established many mechanisms to carry out the calculation in terms of analysis-cost-benefit, which have resulted in many formulas, which have been mathematically expressed, used in public entities, especially in the OEFA, by the Bureau of Enforcement, Penalty and Application of Incentives.

The most well-known comparison is the one that relates the obtained by the company due to commission of the offense – which could be considered as illegal benefit- with the possibility that the offense can be detected by the administrative authority, to which we have to add the aggravating and mitigating factors to be analyzed below. This methodology is fundamental to demonstrate that there is not any violation to the principle of reasonableness, and there are parameters for the penalty to be properly and efficiently graduated.

3.1. Reasonableness and proportionality

The Legislative Order No. 1029 amended the Article No 230 of the Law No. 27444, and established that penalties to apply have to be proportional to the non-compliance qualified as offense, by analyzing a criteria series for its gradualness, such as the seriousness of the damage to public interest and/or legally –protected rights, economic prejudice caused, continuity of offending conducts, circumstances of the offending conducts, the benefit illegally gained and the existence or not of the intention of the offender.

In fact, firstly, the Law on General Administrative Procedure did not consider, expressly, within the principle of reasonableness, the principle of proportionality, which implies that the penalty to be attributed to an offense involves consistency among the offense made, the goals to be achieved by the penalty and its effect[18]. However, since this principle was considered included in the rule by the doctrine, it was considered necessary to incorporate it in this amendment.

According to the proportionality, it is required that the means used to achieve such purposes are in accordance with this one, so that before several possibilities of constraint, the Public Administration decides on such one which is less burdensome related to the fundamental right to be limited; finally, it is necessary that the scale of violation to the right is according to the

18 GARCÍA DE ENTERRÍA, Eduardo y Tomás Ramón FERNÁNDEZ. Óp. cit., tomo II, p. 177.

level of the purpose to be achieved with the constraint, conception which is entirely consistent with the rational support of the principle of preference for the fundamental rights, since this one allows the Deciding Authority, which determines when we are facing valid constraint, carries out an analysis in terms of cost-benefit in order to verify such proportionality.

In this regard, the case law has clearly[19] and repeatedly[20] stated, the need to comply with the three dimensions of proportionality related to the discernment or principle of suitability or adequacy, the principle of necessity, as well as the principle of proportionality in the strict sense[21]. The first one involves that the penalty which was imposed is suitable for the purpose to be achieved with the penalty, that is to say, the result of this one effectively constitutes the satisfaction of such purpose.

19 File No. 2235-2004-AA/TC, Judgment dated February 18th, 2005:
(…)
On its part, the principle of proportionality requires that the constrained measure meets the sub-criteria of suitability, necessity and proportionality in the strict sense, at the same time. The principle of suitability entails that all interference in the fundamental rights must be suitable in order to develop a constitutionally legitimate objective, that is, a relation of means between the restrictive measure and the constitutionally legitimate objective to be achieved with this one.

In turn, in the Legal Basis No. 109 of the Judgment No. 0050-2004-AI/TC, this Court affirmed that the principle of necessity imposes the legislator to adopt, among the different existing alternatives to achieve such purpose, that one which is lesser burdensome for the right which is constrained. As such, this one presupposes the existence of a variety of alternatives, all of them suitable to achieve the same purpose; but the legislator must choose such one which causes less damage on the fundamental right.
(…)
Also, in the same Judgment No. 0050-2004-AI/TC, this Court emphasized that "(…) in accordance with the principle of proportionality *strictu sensu,* in order that an interference in the fundamental rights is legitimate, the adjustment to carry out the objective of this one must be at least equivalent or proportional to the scale of violation to the fundamental right by comparing two intensities or scales: the one to carry out the purpose of the measure which was revised and also the one which violates the fundamental right" (Legal Basis No. 109).
(…)

20 In particular, the Judgment No. 2192-2004-AA/TC.

21 MORÓN, Juan Carlos. "El exceso de punición administrativa". *Actualidad Jurídica,* Tomo 144, 2005, p. 158, Lima.

Likewise, the criterion of necessity is referred, as indicated above, to the penalty to be less burdensome as possible before the equivalence to attain the result according to the purpose to be achieved with the penalty. Finally, the criterion of deliberation involves comparing the damage against the company interests through the penalty which was imposed with the intensity of satisfaction of the purpose to be achieved in order to determine if such damage is properly justified.

Since in accordance with Law on General Administrative Procedure, the principle of reasonableness also involves that the decisions of the administrative authority, when imposing obligations, classify penalties, impose penalties or establish restrictions to the companies, that is, regarding the related acts of limitations on rights must be adjusted within the limits of the power which was conferred by maintaining the proper proportion among the means to be used and the public purposes to protect in order to respond to what it is strictly necessary to carry out its role[22].

3.2 The adjustment of penalty

As indicated above, the Legislative Decree No. 1029 has included not only the additional criteria for the adjustment of the penalty, but also the existence of priority among them. The first element is the seriousness of the damage to the general interest and/or legally-protected right. The importance of this element exactly resides in the fact that the determination of an offense and the penalty to be imposed is oriented to the protection of a legally-protected right in which the general interest is included.

A second element to take into account is the economic damage which was caused. The first matter to be explained is to whom such damage must affect, if this one must affect the Administration or companies which may be affected by the offense. The second one is if such criteria may be, in effect, considered as a proof to determine a penalty, even beyond a situation seemingly as relevant as the repetition or continuation of the offenses committed by the company.

A third criterion is the repetition and/or continuation in the commission of the offense, which are different situations to a considerable extent. The repetition involves imposing the same offense many times. However, the continuation is related to the commission of a single offense for a certain period of time without the existence of a solution to continuation from one end to another one of such period. Both situations tend to increase the amount of the penalty

22 Article IV, Sub-paragraph 1), Item 1.4 from the Preliminary Title of Law No 27444.

because these ones show a serious damage to the legal right protected by the administrative penalty.

The circumstances of the commission of the offense were already imposed as a criterion in the previous drafting of the rule. However, its scope of application was never clear, since it was rather an element which enabled an important discretion in the adjustment of the penalty. In such sequence of ideas, it would have been better to eliminate such criterion in order to reduce, at least, the risk of arbitrary decisions.

Additionally, the benefit which was illegally obtained is a novelty of the rule under discussion and this one is focused on the intensity of the advantage achieved by the company when committing the penalty. In fact, this concept constitutes an assumption to determine the offense, rather than an aggravating factor of this one.

Finally, the existence or not of the intention in the conduct of the offender, which firstly appeared in the previous drafting of the rule, this one is now listed in the last place in priority, despite the fact that it constitutes a primary topic when determining a punitive responsibility. Moreover, the absence of intention must be rather an assumption to mitigate the responsibility rather than simply a criterion of adjustment of the penalty; this is what we will refer to below.

However, this initial consideration faces a specific situation related to the administrative responsibility of legal entities on which these ones will accept their orders are from the collective bodies, apart from the responsibility which may be attributed to these ones[23].

In any event, the secondary role that the intention of the offender plays when determining the penalty, shows us the option of the legislator for a more objective pattern of administrative responsibility by the private sectors, in which the willful misconduct or fault as factors to attribute responsibility is less important. As indicated above, this is absolutely clear in the drafting of environmental rule, in which it is indicated that the responsibility is objective.

23 For a different opinion: GONZÁLES, Jesús. *Temas de Derecho Procesal. Memoria del XIV Congreso Mexicano de Derecho Procesal*. México: UNAM, 1996, p. 754.

3.3. Mitigating assumptions of responsibility

Law on General Administrative Procedure includes assumptions which mitigate the administrative responsibility introduced by the Legislative Decree No. 1029. In that regard, the rule introduced the Article 236-A to the provisions of the law, which stated mitigating grounds of responsibility by the companies and consequently, the penalty which is liable to be imposed beyond the assumptions of adjustment of the penalty previously mentioned.

The first ground is spontaneously focused on the rectification of fault or omission, before the proceeding starts, which encourages the correction of the legal right which was damaged as it occurs in certain legal systems, for instance the tax system, in which reductions to penalties are established for certain assumptions stated in the Legislative Decree No. 816 – Tax Code[24]. Once the administrative procedure is started, the accusation must continue, since the company will be already aware of the charges which were imposed to and any merit would exist for the voluntary rectification of the penalty.

Secondly, the error which was induced is introduced for the existence of a confused or illegal administrative provision. In this case, it may be analyzed if any responsibility should exist, since the non-compliance of the rule would be justified, either because the rule is not understandable or the rule is in contrast with the rest of the system.

In the first case, we are facing what the criminal law refers to as error of prohibition, since the lack of understanding of the rule hinders its compliance, a situation that should be exempted from responsibility at the beginning. In the second case, it is necessary to indicate that, at the beginning, the illegality of

24 Legislative Decree No. 816 – Tax Code
Article 179. - System of incentives.
The penalty of applicable fine for the offenses stated in the numbers 1, 4 and 5 of the article 178 will be subject to the following system of incentives, provided that the taxpayer complies with paying off such fine with the corresponding discount:
a) The fine will be reduced in ninety per cent (90%) provided that the tax debtor complies with declaring the tax debt previously omitted to any notification or requirement from the Administration related to the tax or period to be regulated.
b) If the statement is carried out after the notification of a request by the Administration, but before the compliance of the period given by this Administration pursuant to the provisions of the article 75 or otherwise, if such period has not been given before the notification of the payment order or the Decision of Determination, as appropriate or the Decision of Fine takes effect, the penalty will be reduced seventy per cent (70%).
(…)

a rule does not exempt its compliance; however, the company may obtain the inapplicability of this one, either before government agencies or jurisdictional bodies.

3.4. The application of the principle on the rule under discussion

In the case of the Article No. 17 of Law No. 29325 subject of comment, the rule indicates which the applicable penalties are for each offense and these ones are adjusted in accordance with the provisions not only in Law on General Administrative Procedure, but also pursuant to the provisions of the regulations the OEFA issues. In fact, the OEFA is currently issuing regulatory rules intended to make valid such adjustment, so that it is possible to determine this one with total precision.

Thus, the rule establishes that through decision of Board of Directors from the OEFA, the conducts are classified and the scale of applicable penalties is approved. Also, it is important to note that the classification of offenses and general and transversal penalties will be additional in application to the classification of offenses and penalties to be used by the EFAs.

3.5. Excessive penalties

In this sequence of ideas, we must take into account that the penalties established by the OEFA are within the parameter of the General Law on Environment and as indicated above, such penalties are adjusted as stated by the applicable rules. In fact, in accordance with the Number 136.2 of the Article No. 136 of General Law on Environment, the fine may have an amount from up to 30,000 Peruvian UIT in force at the date of the payment. Therefore, there is no a punishable excessive assumption as wrongly indicated above.

It is important to remember that the administrative penalties are oriented to act as a disincentive to conducts which damage legal rights, reason why the penalty must be increased enough as well as causing such effect. For that reason, the OEFA carries out a precise calculation to the components of the fine to be imposed, a situation in which any violation would exist against the principle of proportionality.

On the other hand, it is said that such supposed excessive fines may be confiscatory. In this regard, it is necessary to remember that the amount of the fine is determined as an aggravating factor, among others, for the seriousness of the offense which was committed. In this sequence of ideas, the penalty should not take into account the property of the affected legal entity, but this one is calculated on the basis of the criteria used by OEFA in order to adjust this one. A good example of the above is the penalties that the National Elections

Office (ONPE by its initials in Spanish) imposes before the violation to Law No. 28094 – Law on Political Parties[25]. The fine may be up to 30 times the amount of which it has not been stated in the economic and financial information.

As a result, the imposition of the fine by the ONPE does not depend on the property of the party in any way. Also, the amount of the fine resulting from an administrative offense on mining matters cannot be defined or limited by the capital or profits from the company, but for the criteria specifically stated in the legal provisions as indicated above.

IV. PRINCIPLE OF CLASSIFICATION[26]

Regarding the principle of classification which is particularly important for the administrative penalty procedure, only the offenses expressly provided by legally binding rules, according to their nature, are considered as administratively punishable conducts, without any further interpretation.

In this regard, this principle is similar to its equivalent one at criminal law level, since this one determines that only the offenses and the corresponding penalties can be established by the law, no matter what the legal scope is in

25 Law No 28094 – Law on Political Parties
Article No 36.- The penalties
The Head of the National Elections Office (ONPE), previous report from the Management of Supervision for Political Party Funding, shall:
Penalize with the loss of the rights which the Article No. 29 is referred to when the a) political party does not comply with filing the detailed accounting of the income and annual expenses in the period prescribed the Article No 34. To those movements of regional or provincial importance and the political organizations of provincial or district importance as appropriate.
b) Impose a fine when it is recognized that the political party has received income from a prohibited source, or the information of the income and annual expenses accounting has been omitted or adulterated intentionally. The fine must be equivalent to not less than ten and more than fifty times the amount of the contribution which was received, omitted or adulterated.
c) Impose a fine when the existence of individual contributions or anonymous payments higher to the limit stated in the Article No. 30 is found. In these cases, the fine will not be less than ten and more than thirty times the amount of the contribution which was received.

The decisions of penalty may be contested before the National Jury on Elections within the period of five working days from the next day of its notification. Against the decision by the National Jury on Elections, any action of appeal proceeds.

26 Article No. 230, Sub-paragraph 4) of Law No. 27444.

which these ones are imposed. This situation causes that this principle is misled with the principle of legality of penalties, which states that the homonymous power comes from the law, which constitutes a different principle. This misunderstanding is even caused in the Constitutional Court and this one is used in the opinion of who discuss the relevance of the rule under discussion.

Therefore, the principle of classification comes from a double necessity. Firstly, to protect the general principles of freedom officially stated in the Political Constitution of Peru and with direct relationship to the enactment of the rule of law, since no one may be compelled to do what is not ordered by law or be prevented from doing what is not prohibited by law.

Secondly, the mentioned principle has correlative evidence in the legal certainty, since this one allows the companies to be accurately aware of the consequences of the acts to carry out[27]. Therefore, the rule must be prior to the commission of the offense and be clearly written.

Likewise, Law No. 27444 indicates that the regulatory provisions of development may specify or adjust those rules oriented to identify the conducts or determine penalties without adopting new punishable conducts to those ones legally contemplated.

Additionally, Law on General Administrative Procedure indicates that the law may state the possibility of classifying conducts by regulation. For some, this would involve an excessive flexibility of the principle which we are referring to, which may be injurious for companies, so that the parameters must be properly established.

An example of that one is precisely within the scope of the environmental rules, since, as we have mentioned above, the Article No. 17 of Law on National Environmental Assessment and Enforcement System establishes that the Board of Directors of the OEFA is in charge of classifying the conducts and approves the scale of applicable penalties in a case of regulatory cooperation, but within the parameters of the related Article No. 17.

It is important to note that this one constitutes an amendment of the drafting prior to the rule which established that through Supreme Decree signed by the Minister of Environment and by regulation, the administratively punishable conducts were classified for the environmental offenses specified in the General

27 GARCÍA DE ENTERRÍA, Eduardo y Tomás Ramón FERNÁNDEZ. Óp. cit., p. 174.

Law on Environment and other rules on this subject. At the same time, this one comes from an amendment to the original drafting of the rule in which was rather indicated that the punishable conducts were specified in the General Law on Environment and other laws on this subject.

Likewise, the Article No. 19 of Law No. 29325 states that the offenses are classified as minor, serious and major. Its determination must be based on the damage to the health, the environment, in its potentiality or certainty of damage, in the extension of its effects and other criteria which may be defined in accordance with the current rules. It may be established again that the Board of Directors of the OEFA approves the scale of penalties in which the applicable penalties are determined for each type of offense and takes as basis those ones stated in the Article No. 136 of the General Law on Environment[28]; considering that Law No. 30011 has increased the limit of the fine, among other amendments, exceeding the same one from 10,000 to 30,000 Peruvian UIT.

Within this scope, we also find a wide range of offenses and the need to protect fundamental rights, but it is also clear to analyze carefully if it is justifiable to provide broad responsibilities to the administrative authority in order that this one may determine the offenses on environmental matters by regulation. However, it is clear to note that in this case, although the entity which impose

28 Law No. 28611 - General Law on Environment
Article No 136.- Penalties and remedial measures
136.1 Individuals or legal entities which infringe the provisions included in this Law and in the complementary and regulatory provisions on this subject will be punished with penalties or remedial measures according to the seriousness of the offense.
136.2 The following are coercive penalties:
a) Warning
b) Fine not more than 30,000 Peruvian tax units in force at the date of the payment.
c) Temporary or definitive confiscation of the objects, instruments, artifacts or substances used for the commission of the offense
d) Cessation or restriction of the activity which caused the offense
e) Suspension or cancellation of the permission, license, concession or any other authorization, according to the case.
f) Partial or total, temporary or definitive shutdown of the premises or establishments where the activity which caused the offense is carried out.

186.3 The imposition or payment of the fine does not exempt the offender from the compliance of the obligation. If the non-compliance persists, this one is penalized with a proportional fine to that one imposed in every case, up to 100 Peruvian UIT for each month in which the non-compliance persists and when the period given by competent authority is passed.
(…)

penalties, also classifies, this one is subject to parameters so that a minor discretion exists in such classification.

In this sequence of ideas, it is clear to note that the initial classification comes from the General Law on Environment, particularly from the Articles No. 135 and 142 of such rule[29], the same one which is rather developed by the regulatory rules issued by the OEFA; which does not distort the principle of reasonableness, not only for the fact of being consistent with Law No. 27444 and its principles, but when eliminating the administrative discretion in favor of the company. All of this constitutes a sufficient guarantee to ensure that the behavior of the OEFA will not become arbitrary.

Likewise, the classification with the reasonableness must not be confused, since the first one is related to the determination of the responsibility regarding the classified action in the legal rule; while the second one, as indicated thoroughly above, is oriented to the adjustment of the penalty in accordance with the criteria legally stated.

4.1 Environmental damage

It should be noted that to determine environmental infringements, real environmental damage is not necessary. In fact, administrative infringements are offenses of endangerment since it is not required to demonstrate the production of damage to certain legal rights.

29 Law No 28611 – General Law on Environment

Article No 135.- System of penalties

135.1 *The non-compliance of the rules of this Law is penalized by the competent authority based on the Common System of Environmental Control and Enforcement. The authorities may establish complementary rules provided that these ones do not be against the Common System.*

135.2 *In the case of regional and local governments, the systems of environmental control and enforcement are approved in accordance with the provisions of its corresponding organic laws.*

Article No 142.- Responsibility for environmental damages

142.1 That one which through the use or exploitation of a good or in the execution of an activity may cause some damage to the environment, the life quality of people, human health or the heritage, is compelled to cover the costs which are derived from the measures of prevention and mitigation of damage, as well as those ones related to the surveillance and monitoring of the activity and the measures of prevention and mitigation which were adopted.

142.2 Environmental damage is referred to as all material loss the environment suffers and/or any of its components, which may be caused by violation or not of legal provision and which causes current negative or potential effects.

This can be evidenced clearly in the environmental regulation, in which the environmental damage is an aggravating circumstance of the offense committed, but not a constituent element of the offense committed whose absence would release the offender from punishment. Indeed, the major part of environmental offenses is based on the violation of environmental rules or the commitments derived from environmental management instruments which are not subject to the production of real environmental damage, but only to potential environmental damage.

As we have seen, the administrative liability results from failure to comply with the environmental regulation. This arises from the provisions of Number 135.1 of Article No 135 of General Law on Environment, which provides that the non-compliance with rules of the aforementioned law is punishable by the pertinent authority based on the Common Environmental Enforcement and Control System.

As a result, the lack of reference to the environmental damage in the offenses established in the regulatory rules does not affect the principle of classification, which is explained clearly in such rule. In addition to this, as described above, the general classification is already established in the General Law on Environment; therefore, the regulatory rule complies with the development of such classification.

V. PRINCIPLE OF PREDICTABILITY

The principle of predictability, which is an important element for simplified administrative formalities, is not a principle of the regulatory powers, but rather of the general administrative procedure included in the Preliminary Title of Law No. 27444. Such principle establishes that the administrative authority shall provide truthful, complete and reliable information to the companies or their representatives regarding each formality, so the company, at the beginning, may have a quite accurate awareness about what the final result will be.[30]

However, it is also required that the Public Administration provides predictable results, this is, internally consistent results. The Administration must not make differences regarding the persons - impartiality and neutrality-, and citizens

30 Article IV, Sub-paragraph 1), Item 1.15 of the Preliminary Title of Law No 27444.

should have, upon submitting a formality, an accurate expectation about what final result of such proceeding will be[31].

Therefore, the administrative acts must be subject strictly to the legal system, including to the administrative rules issued by the authority issuing these acts. Thus, in the particular context of the administrative procedures conducted by the OEFA, it is clear that these proceedings are subject not only to the relevant laws, which have been described in detail, but also to the sectoral regulations issued by the Ministry of Environment and to the regulations issued by the OEFA in exercise of its regulatory powers, with which such predictability is ensured.

5.1 Purpose of the principle of predictability

The principle of predictability has two clear purposes. The first purpose allows the company to determine previously the possible result of a procedure which will allow developing the most appropriate mechanisms of defense for its interests. Such principle clearly reduces the costs incurred by the company during the formalities of its procedures and also, promotes immediately the use of formal mechanisms to obtain benefits.

However, the principle of predictability allows acting, on the other hand, as a disincentive to the filing of requests without greater effectiveness or legality, since the company may know with certainty the impossibility of its request and may decide for the abstention in the performance thereof. At the same time, such principle will result in a clear reduction of organizational costs in favor of the Administration which will process fewer requests.

The regulations issued by the OEFA, pursuant to Article No. 17 of Law No. 29325, comply with this principle, which allows determining the decision that will be provided by the Administration as a result of the offense committed. Such rules include offenses to be attributed, as well as the corresponding penalties, which are within the parameters of relevant rules, as we have indicated clearly, especially the General Law on Environment and the National Environmental Assessment and Enforcement System.

In addition to this, we must add that there are regulatory rules that govern the adjustment of penalties through which the offender will know with certainty

31 ECONOMIC STUDIES DIVISION, INDECOPI. *Impulsando la Simplificación Administrativa: Un reto pendiente.* Documento de trabajo Nº 002-2000, published on April 10, 2000 in the Official Gazette El Peruano, p. 23.

the penalty for its non-compliance, as indicated exhaustively in the principle of reasonableness. As indicated previously, the administrative acts issued by the OEFA are subject to the legal system, which must be complied unquestionably by this entity, in accordance with the principle of legality.

VI. THE EXERCISE OF THE REGULATORY POWERS

The Number 8 of Article No. 118 of the Political Constitution of Peru provides that the President of the Republic is entitled to exercise the powers to regulate laws, without violating or distorting them; and, within such limits, issue decrees and decisions.

In this order of ideas, the regulations are a qualitative and quantitative source of the administrative law, and are also material rules. Therefore, they never have an individual scope. The regulatory rule is defined as the legal instrument of general scope issued by the Public Administration.

The so-called executive regulation *"secúndum legem"* has the function of governing legally binding rules. It is issued to make possible the application of these rules, completing them and detailing the necessary to ensure their application and compliance, making them operational[32]. The existence of regulatory powers, at this level, does not arise from an express legislative delegation, but from the constitutional rule[33], which establishes such prerogative in favor of the President of the Republic.

The Law No. 29158 - Organic Law on the Executive Branch[34] provides an important regulation of the executive rules[35]. This law points out, firstly, that the project of regulatory rule is prepared by the relevant entity, which has a clear technical justification, since this entity knows the matter to be regulated.

Likewise, it is established that the regulation is processed along with the statement of reasons, reports studies and inquiries carried out. The purpose of this process is that the President of the Republic learns in detail the process

32 DANÓS, Jorge. "El régimen de los reglamentos en el ordenamiento jurídico peruano". *Estudios en homenaje a Héctor Fix-Zamudio.* México: UNAM, 2008, p. 177. Véase también PAREJO, Luciano et ál. *Manual de derecho administrativo*. Barcelona: Ariel, 1998, p. 257.

33 FRAGA, Gabino. *Derecho administrativo*. México: Porrúa, 2003, p. 111

34 Published on December 20, 2007 in the Official Gazette *El Peruano.*

35 Article No 13 of Organic Law on Executive Branch

of preparing the draft regulation, which ensures that this project is duly supported, especially regarding the cost-benefit analysis of the rule, which is more than simply indicate if the rule generates budget expenses.

In this order of ideas, in accordance with the provisions of Article No. 2 of the Regulation for the Framework Law on Legislative Output and Systematization, approved by Supreme Decree No. 008-2016-JUS[36], the statement of reasons consists in the legal argument of the need for the regulatory proposal with an explanation of the most relevant aspects and a summary of the corresponding recitals and, if possible, of the comparative legislation and doctrine used for its preparation.

In addition to this, the argument must include an analysis regarding the constitutionality and legality of the initiative proposed, as well as its consistency with other current rules in force in the national legal system and with the obligations of the international agreements ratified by the State.

On the other hand, the principle of hierarchy involves that the executive regulation does not violate the law or the Political Constitution of Peru. Therefore, the rule provides that the executive regulations shall not violate or distort the law, which has consistency with the constitutional rules at the same time.

6.1 Autonomous Regulations

Generally, autonomous or independent regulations are the other regulations of the Executive Branch, regulations of the other powers of the State, statutes and bylaws of the entities, as well as the regulations of institutional scope or arising from the administrative systems[37] that do not regulate a law, but which are issued as an example of autonomy and regulatory powers of the agency concerned[38].

It is necessary to indicate that, at this level, autonomous constitutional agencies, public agencies and regulatory agencies may also issue regulatory rules, as well as several entities that do not belong to the executive branch. The administrative doctrine and the law, accordingly, have incorporated in

36 Published on March 24, 2006 in the Official Gazette *El Peruano.*

37 Article V, Subparagraph 2.5) of the Preliminary Title of Law No 27444.

38 PAREJO, Luciano et ál. Óp. cit., p. 259. See also DANÓS, Jorge. Óp. cit., p. 178

the Peruvian case the concept of autonomous regulations, which are those regulating a determined legal situation without the existence of a legal rule to regulate. The formal legal means used for issuing autonomous regulations are the administrative decisions, which are not formed by an administrative act obviously.

In the order of ideas as indicated previously, it is critical to establish clear limits to the exercise of the autonomous regulatory powers. Firstly, this function of regulatory provisions, or regulatory powers, shall be described expressly in the law and established as prerogative of a determined administrative entity and a body or set of bodies within this entity. Therefore, there are no implicit regulatory powers.

Secondly, an autonomous regulation may not regulate the established as legal reservation, which involves a limitation of material nature.[39]

As a result, the regulation must be limited to those areas established by law and, at the same time, not covered by other rules. Among the matters limited to the law, we find limitation and restriction of fundamental rights, as well as creation and regulation of public entities and establishment of powers or prerogatives in favor of certain entity or public officer.

VII. CONCLUSIONS

We consider that the analyzed rule is consistent with the principles of the power to impose penalties set forth in Law No. 27444, and is therefore consistent with the Political Constitution of Peru, the rules governing the administrative procedure in general, and the rules in environmental matters.

Likewise, the rule complies with the principle of classification, since the offending conduct and the corresponding penalty are clearly defined. Also, the environmental damage is important regarding the provisions of the rule.

The rule complies with the principle of reasonableness, since the adjustment parameters of the penalty are strictly defined in the legal rules. In addition to this, the penalties described by the corresponding regulatory rules are within the limits established by the General Law on Environment.

Furthermore, the principle of predictability is complied with, since according to the nature of the offense committed and the specifications in the paragraphs

39 FRAGA, Gabino. Óp. cit., p. 107

above, it is possible to predict the amount of the fine to be imposed by the OEFA.

Finally, it is necessary to point out that the regulations must comply with the parameters of the regulatory powers established by the Constitution and the law, specially, by the laws regulating the penalty administrative proceeding in environmental matters.

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5.

NEW DIRECTIONS OF THE ADMINISTRATIVE PENALTY PROCEDURE: REFORM OF PENALTY PROCEDURE OF THE OEFA PURSUANT TO LAW NO. 30011

RICHARD MARTIN TIRADO

SUMMARY

In this work the author analyses in detail Articles No. 17, 19 and 20-A of Law No. 29325 – Law on National Environmental Assessment and Enforcement System. In this regard, legal principles and limits are described for exercising the power to impose penalties of the Public Administration, as well as the procedure of coercive execution pursuant to current regulations.

I. Introduction. II. The power to impose penalties and its limits related to Articles No. 17 and 19 of Law No. 29325. III. Enforcement of administrative acts related to the provisions of Article 20-A of Law No. 29325. IV. Conclusions.

I. INTRODUCTION

Environmental law is a branch of administrative law that arises from the need to respond to society's requirements regarding environmental matters that exist before the decision of the persons to dominate nature. It is clear that education is the instrument through which the human beings moderate their behavior in order to protect life. In that regard, demanding this behavior through the rule and coercion is characteristic of law, in this special case, of the Administration.

In a broad sense, it can be stated that environmental law involves the solution of justice issues (environmental matters); however, we consider that environmental law must cover an extensive scope, and must establish an

environmental efficiency in the exercise of all human activity through a joint application of principles and rules.

This capacity and obligation of exercising justice by environmental law is reflected in our legal system through several rules (Law No. 29325 – Law on National Environmental Assessment and Enforcement System[1], Law No. 28611 – General Law on Environment[2]). In accordance with the Second Supplementary Final Provision of the Legislative Decree No. 1013 and the Article No. 136 of Law No. 28611, the Agency for Environmental Assessment and Enforcement (OEFA) is the authority in charge of exercising the power to impose penalties, and regulating the possible penalties to be imposed.

Number 22) of Article 2 of the Political Constitution of Peru recognizes that individuals have the right to "enjoy an appropriate and balanced environment according to the development of their life". This is the main purpose by which a set of rules has been established in order to promote protection and sustainable use of environment.

As indicated previously, environmental law is a specialized branch of administrative law; therefore, such law has not only the capacity of developing general and specific techniques, but may develop specialized techniques in accordance with the doctrine and the national regulatory framework.

Among other powers of the Administration through the administrative law, no one questions its capacity to categorize, classify, adjust and execute penalties, since it is understood that the Administration carries out such acts in search of the general interest; however, its performance must be governed by the respect for fundamental rights and for the principles regulated in the Law No. 27444 – Law on the General Administrative Procedure[3] (LPAG).

The Law No. 30011[4] amends the Law on National Environmental Assessment and Enforcement System, Law No. 29325, and incorporates, at the same time, relevant amendments to Articles No. 17, 19 and 20-A, which are referred to the powers of the Administration. Pursuant to this law, the OEFA is empowered to define, classify, adjust and execute penalties.

1 Published in the Official Gazette *El Peruano* on March 5, 2009.

2 Published in the Official Gazette *El Peruano* on October 15, 2005.

3 Published in the Official Gazette *El Peruano* on April 11, 2001.

4 Published in the Official Gazette *El Peruano* on April 26, 2013.

The most significant developments of the Law No. 30011, which amends the Law No. 29325, are contained in Articles No. 17 and 19, which provide the OEFA with the powers to define, classify, and establish criteria, as well as adjust penalties. Furthermore, Article No. 20-A establishes specific guidelines to be followed by the company in the event that this one seeks to suspend or annul a coercive execution arising from an administrative act issued by the OEFA.

The procedure established through Article No. 20-A, is different from the regulatory framework governing for the other entities, which is included in the Single Organized Text (TUO) of the Law on Coercive Execution Procedure, approved by Supreme Decree No. 018-2008-JUS[5]. Also, it has produced an active discussion regarding the powers of the OEFA, related to imposition of fines and proceedings available to execute these fines.

The purpose of this article is to analyze the suitability, legality and practical application of Articles No. 17, 19 and 20-A based on the regulatory framework and the existing doctrine, as well as the elements which must regulate the application of all administrative rules, and the reasons that would justify their application in the environmental rule framework. For the development of this document, it is planned to carry out a previous analysis regarding the concepts and legal premises which are very important to achieve an optimum understanding of this document. In this regard, this analysis will be divided in two major issues and, finally, their corresponding general conclusions will be presented.

II. POWER TO IMPOSE PENALTIES AND ITS LIMITS WITH REGARD TO ARTICLES NO. 17 AND 19 OF LAW NO. 29325

2.1 POWER TO IMPOSE PENALTIES OF THE ADMINISTRATION

The power to impose penalties arises from the existence of an administrative penalty law, which is based on the fact that "in principle, there is a power and legal system in all public law. Since there is an administrative penalty power and an administrative penalty legal system, we can talk knowledgeably about an administrative penalty law", according to Nieto[6].

5 Published in the Official Gazette *El Peruano* on December 6, 2008.

6 NIETO, Alejandro. *Derecho administrativo sancionador*. Madrid: Editorial Tecnos, 2008, p. 201.

The assignment to the Public Administration of penalty powers is imposed by the efficacy required to perform the assigned purposes. If the administrative and judicial system is violated, then this Administration will use ideal and necessary means to restore the disturbed legal system and replace the legally-protected right as it was before the commission of the offense. However, it is not enough to bring back the situation before the damage, but because of the transcendence of the disturbed rights, in this case the environment, and with the purpose that these injurious conducts do not continue violating the rules, punishable offenses are classified.

It is true that punitive powers are exercised by judges; however, the administrative law already has the capacity to exercise punitive powers in accordance with the provisions of the LPAG, which was result of the economic intervention of the State, doctrine and several rulings of the Constitutional Court, in which the need to provide the Administration with the capacity to impose penalties for injurious conducts is recognized.

LPAG regulates the legal framework of the administrative procedures, among which is the existence of a kind of general and supplementary administrative procedure, and the procedure regulated by special laws. Furthermore, in the LPAG it is possible to recognize the existence of two (2) kinds of special administrative procedures, under which the public entities make final decisions affecting the companies' interests.

In the event of general administrative procedures, entities adopt decisions regarding requests submitted by the companies, essentially, to obtain the permit for carrying out an activity. Unlike general administrative procedures, special administrative procedures have two kinds: *i) trilateral administrative procedure,* in which entities shall resolve conflict of interests between two or more individuals of the procedure; and, *ii) administrative penalty procedure,* in which entities exercise their penalty powers in order to ensure the compliance with rules of mandatory nature before a company.

Before the entry into force of the LPAG and as explained by Danós[7], there was a lack of regulations for general guidelines and principle systems to exercise the power to impose penalties by the Administration. Therefore, the administrative penalty law did not exist as such, since the wide range of rules that governed in such context implied the inexistence of a legal system to which such branch refers.

7 DANÓS, Jorge. "La preferencia de los principios de la potestad sancionadora". *Modernizando el Estado para un país mejor. Ponencias del IV Congreso Nacional de Derecho Administrativo*. Lima: Editorial Palestra, 2010, pp. 861-862.

Notwithstanding the above, the power to impose penalties of the Administration, "could be perceived from the need to regulate economic activities of the private sectors; however, the lack of a legal framework acting as a parameter of the main aspects of the power to impose penalties was a constant risk which the Administration, in exercise of its Self-protection, could violate guarantees and fundamental rights of the companies".[8]

According to Danós[9], the explanation of the power to impose penalties of the Administration is justified for practical reasons, since it was necessary to provide the Public Administration with coercive powers in order to enable it to comply with legal regulations. This situation requires an additional explanation since the power to impose penalties of the Administration is not only based on its practical nature.

Thus, the origin of this power, as explained by Nieto[10] and Danós[11], is found in the generic power *ius puniendi* of the State, which includes criminal law and administrative penalty law, and at the same time, such unit of the punitive power includes all type of punishable manifestation of the State.

Regarding its purpose, it is clearly defined by an essential aspect of preventing or discouraging the performance of wrongful conduct by the companies. For this purpose, the system must be oriented to the achievement of this purpose. In the LPAG, through Chapter II of Title IV, referred to Administrative Penalty Procedure, the existence of an administrative penalty law may be recognized, which has been evolving over the years under the same elements that contributed to its origin such as the Constitutional Court jurisprudence, national and foreign doctrine. Regarding the power to impose penalties, Article No. 231 of the LPAG[12] provides that only those authorities designed

8 bidem, p. 862.

9 DANÓS, Jorge. "Notas acerca de la potestad sancionadora de la administración pública". *Ius et Veritas,* 1995, julio, Nº 10, p. 150, Lima.

10 NIETO, Alejandro. Op cit., p. 91.

11 DANÓS, Jorge. Op. cit, p. 150.

12 Law No 27444 – Law on Administrative Penalty Procedure.
Article No 231.- Stability of the jurisdiction for the power to impose penalties.
The exercise of the power to impose penalties corresponds to the administrative authorities who have expressly these powers by virtue of laws or regulations. Such power shall not be assumed or delegated to other body.

by law or regulation may have this power, and whose exercise, in addition to respecting the constitutional framework, shall comply with the principles set out in Article No. 230 of the LPAG, as follows:

a) Legality[13]

This principle is established in the Constitution in Item d) of Number 24 of Article No. 2 and provides that "No one shall be prosecuted or convicted for any act or omission that, at the time of its commission, was not previously prescribed in the law expressly and unequivocally as a punishable offense, or did not constitute an offense penalized by law".

Regarding this issue, the Constitutional Court, in the judgment in Docket No 2192-2004-AA/TC[14], has established the following:

3. The principle of legality constitutes an authentic constitutional guarantee of fundamental rights of the citizens and a governing criterion in the exercise of the punitive power of the Democratic State. The Constitution establishes this principle in its article 2, sub-paragraph 24, item d), as follows: "No one shall be prosecuted or convicted for any act or omission that, at the time of its commission, was not previously prescribed in the law *expressly and unequivocally* as a punishable offense, or did not constitute an offense penalized by law" (emphasis added).

As shown, this principle is not only a guarantee for companies, but also establishes the prohibition of the application of penalties without a legal framework since regulations would not be able to establish offenses and

13 Law No 27444 – Law on Administrative Penalty Procedure.
Article No 230 - Principles of Administrative Penalty Power
The power to impose penalties of all entities is regulated by the following special principles:

> Legality: Pursuant to the legally binding rule, the entities are empowered to impose penalties and anticipate the administrative consequences that, as penalty, may be applied to a company. However, such entities, in any case, shall order the deprivation of liberty.

14 Constitutional Court Judgment registered in the Docket No 2192-2004-AA/TC, dated on October 11, 2004, regarding the amparo filed by Gonzalo Antonio Costa Gómez and Martha Elizabeth Ojeda Dioses against the Major of the Provincial Municipality of Tumbes in order to annul the executive order of the Mayor's Office No 1085-2003-ALC-MPT, dated on December 16, 2003, which imposed the penalty of dismissal of their jobs.

penalties for themselves, as only legally binding rules could establish penalties[15].

In that regard, it is important to indicate the Spanish Constitutional Court Judgment 127/1990 dated July 05, 1990, in which it is established that the principle of legality involves the existence of a law (*lex scripta*), that the law is prior to the fact that has been punished (*lex previa*), and that the law details a determined factual assumption (*lex certa*), which were assigned to the criminal legality, but that can be extended to the punishment legality.

It is important to remember that part of the administrative penalty law arises partly from *ius puniendi* applied to criminal law, but in contrast to the application of the principle of legality in criminal matters which establishes that no one shall be convicted for any act that is not regulated by law (in force), the application of this principle is different for the administrative penalty law. Nieto[16] states that the application of the principle of criminal legality is unfeasible in the administrative penalty law, *it is impossible the classification of administrative penalties and offenses without the support of a regulation,* since the administrative procedure presents a structure completely different from the criminal structure. This argument is described in the principle of classification; therefore, both are related strictly, and many authors even consider that the principles of legal reservation and classification are part of the development of the principle of legality.

In the Spanish legal system (Spanish Constitutional Court Judgment 08/19841 dated March 30, Page No. 3), the principle of legality of the administrative penalty procedure has a triple guarantee: the principle of legal reservation, the principle of classification and the principle of non-retroactivity. All this without prejudice to the implicit inclusion of other principles, in the same article 25.1 CE, such as the order of *non bis in idem* or the principle of culpability[17].

In the case of Peru, the Constitutional Court has indicated in the Judgment No. 8957-2006-PA/TC the following:

15 PEDRESCHI, Willy. *Análisis sobre la potestad sancionadora de la administración pública y el procedimiento administrativo sancionador. Comentarios a la Ley del Procedimiento Administrativo General, Ley Nº 27444*. Lima: Ara Editores, 2003, p. 518.

16 Cf. NIETO, Alejandro. *Derecho administrativo sancionador*. Madrid: Editorial Tecnos, 1993, p. 21.

17 REBOLLO, Manuel et. ál. *Derecho administrativo sancionador*. Valladolid: Lex Nova, 2009, p. 111.

> *(…) the principle of legality comprises a double guarantee: the first guarantee of material nature and absolute scope,* referred strictly to criminal matters and administrative penalties, reflects the special transcendence of the principle of legal certainty in such limited areas and involves the urgent need for regulatory predetermination of offending conducts and corresponding penalties, that is, *the existence of legal precepts* (lex praevia) *that allow predicting with high certainty* (lex certa) *those conducts and know what to expect* regarding the old responsibility and the further penalty; and *the second guarantee of formal nature, is related to the requirement and existence of a rule of appropriate status and that this Court has identified as law or legally binding rule*[18] (emphasis added).

In relation to the guarantee of the principle of legality, Nieto[19] establishes that there are two types of guarantees that the principle of legality shall comply: the first one is the principle of legal reservation and the second one is the principle of classification. Although it is understood that these principles which guarantee the principles of legality have specific characteristics and independent qualities, it is also true that the concept of both principles act jointly and it can be stated that they are indivisible concepts.

Likewise, Danós states that the principle of legality refers to the fact that it "prevents the *imposition of penalties without a legal framework and prevents that the regulations establish offenses and penalties on their own initiative without the protection of legally binding rules"*[20] (emphasis added).

b) Due process[21]

This principle orders the administrative authority to respect the previously established administrative procedure and the guarantees of due process.[22] In

18 Cf. Judgment of the Spanish Constitutional Court 61/1990

19 Cf. NIETO, Alejandro. Op. cit., p. 216.

20 DANÓS, Jorge. Op. cit., p. 153.

21 Law No 27444 – Law on Administrative Penalty Procedure.
Article No 230.- Principles of the Administrative Penalty Power. The power to impose penalties of all entities is additionally regulated by the following special principles:
(…)
2. Due process.- Entities shall apply penalties subject to the established procedure by respecting the guarantees of due process.

22 VERGARAY, Verónica y Hugo GÓMEZ. "La potestad sancionadora y los principios del procedimiento sancionador". *Sobre la Ley del Procedimiento Administrativo General. Libro homenaje a José Alberto Bustamante Belaunde*. Lima: UPC, 2009, p. 413.

that regard, it is understood that this principle must be construed in accordance with Article No. 139, Subparagraph 3, of the Political Constitution of Peru and Number 1.2 of Article 5 of the Preliminary Title of the LPAG.

The right to due process and, hence, the right to due administrative process, in addition to constituting a governing principle of the government action in the exercise of its *ius puniendi,* is a right recognized in the constitution in favor of the defendant, in the extent that the Article No 139, Sub-paragraph 3, of the Political Constitution of Peru, recognizes as one of the principles and rights of jurisdictional function the observance of due process and the jurisdictional protection.

In that regard, the Constitutional Court recognizes the principle of due process as a manifestation of the constitutional principle of due process carried out before an administrative authority. The Constitutional Court, which is the supreme interpreter of the Political Constitution of Peru, states the following:

> "The due process, as constitutional principle, *is understood as the compliance with all guarantees and rules of public policy that shall be applied to all the cases and procedures,* including administrative procedures, in order to enable persons to be in a position to defend properly their rights before any act of the government that could affect them. It is important to mention that any act or omission of the government bodies in a process, either administrative – as the case of records – or jurisdictional, must respect the due process of law" (emphasis added).

For the Constitutional Court, due process includes other series of constitutional rights, which must be guaranteed not only in courts but also before administrative authorities.

Indeed, the right to due process constitutes a mechanism of guarantee of rights required upon requesting the conflict of interest resolution, a situation of uncertainty, the determination of commission of a punishable conduct before the administrative authority and, in general, when the decision of the Administration could affect rights, obligations or interests of the companies in the framework of an administrative procedure.

Thus, this set of guarantees (right of access to authority, right to contradict or defend an allegation, right to a fair judge, right to offer and/or produce evidences, right to receive a decision within a reasonable time, among others) includes the right of defense and the right to appropriate reasoning for the decision.

c) Reasonableness[23]

The aim of this principle is that the administrative authorities anticipate that the commission of any wrongful conduct is not more beneficial for the offender than complying with the violated rules or assuming the penalty. According to this, the main purpose of this principle for companies is to discourage the commission of administrative offenses and the other purpose for administrative authorities is to value proposed criteria in order of priority, by the rule when establishing penalties to the companies.[24]

Therefore, the proceedings of the administrative authority regarding the description of offenses and imposition of penalties, in this case, in the context of an administrative penalty procedure, shall maintain the proportion between the means and respond to the satisfaction of the content.

In that regard, we must emphasize that the power of the Administration shall be exercised in a framework of reasonableness and proportionality, therefore, the Constitutional Court, in the judgment registered in the Docket No. 0090-2004-AA/TC[25] has stated as follows:

> 12. The requirement of reasonableness excludes arbitrariness. The idea that confers meaning to the requirement of reasonableness is the search

23 Law No 27444- Law on Administrative Penalty Procedure.
Article No 230 – Principles of Administrative Penalty Power.
The power to impose penalties of all entities is regulated additionally by the following special principles:
(…)
3. Reasonability.- Authorities shall provide that the commission of the punishable conduct is not more beneficial for the offender than complying with the violated rules or assuming the penalty. However, the penalties to be applied shall be according to the non-compliance classified as penalty.
The following criteria, which are indicated in order of priority for gradualness purposes, must be taken into account:
a) The seriousness of the damage to the public interest and/or protected legal right.
b) The economic damage caused.
c) The repetition and/or continuity in the commission of the offense.
d) The circumstances of the commission of the offense.
e) The benefit which has been illegally obtained, and
f) The existence or lack of intention in the offender's conduct.

24 VERGARAY, Verónica y Hugo GÓMEZ. Op. cit., pp. 414-415.

25 Available in: <http://www.tc.gob.pe/jurisprudencia/2004/00090-2004-AA.html>

> for the right solution of each case. Therefore, according to Fernando Sainz Moreno (*vide supra*), "an arbitrary decision contrary to the reason (understanding that in a positive law system the reasonableness of a solution is determined by its rules and principles, and not only by principles of pure reason), is essentially unlawful".

Likewise, in the Docket No. 2192-2004-AA/TC, the Constitutional Court has stated the following:

> *The principle of reasonableness or proportionality* is inherent to the Social and Democratic State of Law and is set out in the Constitution in its Articles No. 3 and 43, and described expressly in its Article No. 200, last paragraph. *Although the doctrine usually make differences between the principle of proportionality and the principle of reasonableness,* as strategies for settling conflicts of constitutional principles and guiding the deciding authority towards a decision that is not arbitrary but fair; *it can be established, prima facie, a similarity between both principles,* in the extent that a decision adopted in the convergence framework of two constitutional principles will not be reasonable, when the principle of proportionality is not respected. *In that regard, the principle of reasonableness seems to suggest an assessment in relation to the result of reasoning of the deciding authority expressed in its decision, while the proceeding to achieve that result would be the application of the principle of proportionality with its three sub-principles: adequacy, necessity and proportionality in a strict and broad sense (*emphasis added).

The concept of reasonableness, as indicated by the national doctrine, has also included the concept of reasonableness and proportionality in the administrative area. This is mentioned by Moron[26] in the following terms: "In our opinion, sharing the position of the National Constitutional Court in this matter, there is a similarity between proportionality and reasonableness in administrative penalty matters, which as principles converge in dealing with the arbitrariness through the reason. Therefore, the proportionality is the measurement of the reasonability of the penalty".

Within the same idea, Correa and Vasquez[27], like Frugone, state the following: "The administrative procedure is regulated by the principle of proportionality,

26 MORÓN, Juan Carlos. "Los principios de la potestad sancionadora de la administración pública a través de la jurisprudencia del Tribunal Constitucional. Palestra del Tribunal Constitucional". *Revista Mensual de Jurisprudencia*, año 1, número 7, julio 2006, p. 642.

27 CORREA, Rubén y Cristina VÁSQUEZ. *Manual de derecho de la función pública.* Montevideo: Fundación de Cultura Universitaria, 1998, p. 224.

which supposes the reasonable adequacy of the penalty to the offense, taking into account not only the damage to the officer but also the benefit, to impose penalties fairly or hold harmless when it is appropriate.[28]

With regard to the principle of proportionality applied to the fine, it is important to indicate the provisions by means of a legal report carried out as to whether the "table of classification of environmental infringements and scale of fines and penalties applicable to large and medium-scale mining regarding exploitation works, benefit, transport and storage of ore concentrates", which was issued by Supreme Decree No. 007-2012-MINAM and published in the Official Gazette *El Peruano* on November 10, 2012, respected the principles regulated in Article No. 230 of the LPAG, among them, the principle of reasonableness (proportionality).

In such report, it was indicated that the principle of proportionality imposes the obligation of fixing a maximum fine and a minimum fine as premise so the authority may personalize it to the specific case of the offender, choosing the proper fine in that range. Likewise, in such report, in accordance with Item b) of Number 1 of the Second Final Supplementary Provision of the Legislative Decree No. 1013, it was established that the OEFA was empowered to exercise the power to impose penalties in the area of its jurisdiction, applying penalties of warning, fine, confiscation, immobilization, shutdown or suspension, for the infringements determined and according to the procedure approved for that purpose.

Following the reasoning of such legal opinion, it can be affirmed that the Article No. 17 of Law No. 29325, which refers to the Article No. 136 of Law No. 28611, describes parameters for its application, in addition to considering criteria for establishing the scale of penalties through the Article No. 19 of Law No. 29325, with which we consider that we are under the same assumptions of reasonableness (proportionality) to which it was concluded in such report.

d Non-retroactivity[29]

This principle, pursuant to Article No. 103 of the Political Constitution of Peru, establishes the impossibility to impose penalties when the rule that classifies

28 Idem, p. 232.

29 Law No 27444 – Law on Administrative Penalty Procedure.
Article No 230 - Principles of Administrative Penalty Power

them is not in force when the offense takes place.[30] However, it admits the possibility to apply further penalty rules provided that these rules are in favor of the company and as long as there is no a firm statement by the entity[31].

e) Concurrent Offenses[32]

This principle, which is very similar to the principle established for criminal law, establishes that when a same offending conduct committed by the company is considered as more than one offense, such offense may be *subsumed* within one or more types of administrative offenses. Therefore, the penalty to be applied would be the most serious penalty, without prejudice to other responsibilities established by law.[33]

f) Continuation of offenses[34]

The current wording of this principle establishes exceptions to the general rule for applying penalties if the company incurs continuously an offense. In that

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The power to impose penalties of all entities is regulated by the following special principles:
(…)
5. Non-retroactivity.- Penalty provisions in force are applicable when the company incurs wrongful conduct, unless the subsequent provisions are more favorable to such company.

30 PEDRESCHI, Willy. Op. cit., p. 535.

31 Idem, p. 536.

32 Law No 27444 – Law on Administrative Penalty Procedure.
Article No 230 - Principles of Administrative Penalty Power
The power to impose penalties of all entities is regulated by the following special principles:
(…)
6. Concurrent offenses.- When a same offending conduct is considered as more than one offense, the penalty to be applied will be for the most serious offense, without prejudice to the other responsibilities established by law.

33 PEDRESCHI, Willy. Op. cit., p. 538.

34 Law No 27444 – Law on Administrative Penalty Proceeding.
Article No 230 - Principles of Administrative Penalty Power
The power to impose penalties of all entities is regulated by the following special principles:
(…)

regard, 30 days from the date of imposition of the last penalty shall pass and the company shall be requested to submit the evidence of the termination of offense in such term.[35]

g) Causality[36]

The purpose of this principle, which is based on the connection of causality between the offender and the offending conduct, is that the penalty shall be applied to the person who has effectively violated the legal system, under active and passive form[37].

Therefore, the immediate author of the wrongful conduct would be the only guilty rather than aiders and abettors. Regarding this issue, it can be concluded that the responsibility is subjective; it is only sufficient to define the causal link between the individual and the wrongful conduct. Consequently, it is not possible to establish joint and several liabilities.[38]

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7. Continuation of offenses.- In order to determine the origin of the imposition of penalties for offenses in which the company incurs continuously, 30 days from the date of imposition of the last penalty shall pass and the company shall be requested to submit the evidence of the termination of the offense in such term.
The entities, under penalty of nullity, shall not attribute the assumption of continuity and/or the imposition of respective penalty, in the following cases:
a) When an administrative appeal, which has been filed within the period against the administrative act through which the last administrative penalty was imposed, is in process.
b) When the administrative appeal imposed is not entered in the firm administrative act.
c) When the conduct that determined the imposition of the original administrative penalty has not administrative offense nature due to amendment of the legal system, without prejudice to the application of non-retroactivity principle to which Sub-paragraph 5 refers.

35 VERGARAY, Verónica y Hugo GÓMEZ. Op. cit., p. 423.

36 Law No 27444 – Law on Administrative Penalty Procedure.
Article No 230 - Principles of Administrative Penalty Power
The power to impose penalties of all entities is regulated by the following special principles:
(…)
8. Causality.- The responsibility shall be borne by the person who carries out the act of commission or act of omission of punishable offense.

37 VERGARAY, Verónica y Hugo GÓMEZ. Op. cit., p. 428.

38 Ibidem.

h) Presumption of legality[39]

This principle arises from the constitutional principle of the presumption of innocence. In that regard, the Administration shall presume that the companies have acted according to their duties, as long as they have no evidences to the contrary.[40]

i) *Non bis in idem*[41]

With regard to this principle, its current wording establishes the prohibition of imposing successive or simultaneous administrative penalties in the event that an identification of the individual, a finding of fact, and a statement of legal authority are observed, except in cases where the assumption of continuation of offenses is produced in order to avoid questioning about the violation of this principle in all the cases of continuation of offenses.

j) Classification[42]

Finally, this principle, in accordance with law, provides that only those offenses established expressly in legally-binding rules may be penalized, through its specific classification, and extensive or analog interpretations are not acceptable.

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39 Law No 27444 – Law on Administrative Penalty Procedure.
Article No 230 - Principles of Administrative Penalty Power
The power to impose penalties of all entities is regulated by the following special principles:
(…)
9. Presumption of legality.- The entities shall presume that the companies have acted according to their duties, as long as they have no evidences to the contrary.

40 VERGARAY, Verónica y GÓMEZ, Hugo. Óp. cit., p. 429.

41 Law No 27444 – Law on Administrative Penalty Procedure.
Article No 230 - Principles of Administrative Penalty Power
The power to impose penalties of all entities is also regulated by the following special principles:
(…)
10. Non bis in idem.- It shall not be possible the imposition of successive or simultaneous administrative penalties for the same offense in the cases where an identification of the individual, a finding of fact, and a statement of legal authority are observed.
Such prohibition also includes administrative penalties, unless the concurrence of the assumption of continuation of offenses to which the sub-paragraph 7 refers.

42 Law No 27444 – Law on Administrative Penalty Procedure.
Article No 230 - Principles of Administrative Penalty Power

In the Spanish Legal System, Rebollo Puig, Izquierdo Carrasco, Alarcón Sotomayor and Bueno Armijo, state the following:

> (…) the principle of classification, in a strict sense, requires the administration, in exercise of its power to impose penalties, to identify the legal grounds of the penalty imposed in each penalty decision; therefore, the body which imposes penalties is prevented from acting before acts that are outside the limit that delineates the penalty rule. Thus, the Administration shall carry out an operation of subsumption case by case, indicating in what rule the offense is classified and encouraging why the facts are part of that offense and why such facts must have that penalty imposed. The specific area of this principle will therefore be the area of the interpretation of the penalty rule[43].

One notable aspect is the requirement of the guarantee for companies: the wrongful conduct shall be expressly specified. However, achieving such degree of accuracy for determining administrative offenses is impractical and even impossible[44], given that having a detailed and extensive description of each administrative offense attributable to the companies could mean thousands of hours of work and million sheets of paper without determining all the existing or possible administrative offenses.

The flexibility of the requirement of classification corresponds to reality. If the principle of specificity is understood as absolute, it would lead us to the absurd scenario of having many laws that establish lists of conducts considered as punishable, and even if this were the case, human nature, which is constantly changing, as well as the scenario where it develops, would make it impossible to classify all the emerging conducts without excluding some of them. Therefore,

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The power to impose penalties of all entities is also regulated by the following special principles:
(…)
4. Classification.- Only the offenses expressly provided by a legally binding rule, according to their nature, are considered as administratively punishable conducts, without any further interpretation. The regulatory provisions of development may specify or adjust those focused on identifying the conducts or on determining the penalties, without constituting new punishable conducts to those stipulated under law, except in cases which the law allows the classification by regulation".

43 REBOLLO, Manuel et. ál. Op. cit., p. 161.

44 VERGARAY, Verónica y Hugo GÓMEZ. Op. cit., p. 428.

classifications drafted in abstract terms or indirect classifications (reference to other rules) are required[45].

In that regard, classifying all offenses and penalties in order to predict, with a sufficient degree of certainty, the type and grade of the penalty subject to be imposed[46] is a requirement that, in practice, is not absolute.

On the other hand, the LPAG indicates that, for classifying the administrative offenses, regarding identification, specification or adjustment of offenses and penalties, legally binding rules may refer to other rules, such as regulations, provided that these rules do not constitute new punishable conducts to those stipulated legally, unless otherwise stipulated by law.

Nieto[47] indicates that "the regulatory cooperation does not constitute a legal reservation but a modality of its exercise. Law, if it decides, may exhaust by itself the necessary regulation of the matter, but also may decide to remain incomplete, leaving gaps, and request a regulation to regulate the other issues according to the instructions and guidelines provided".[48]

In our legal system the Constitutional Court considers this idea in the judgment registered in the Docket No. 05262-2006-PA/TC[49].

> Regarding the possibility of regulating penalties through regulations:
>
> 5. It must be indicated that this Court, in the aforementioned case law, has carried out an important precision related to the definition of principle of legality and classification: the principle of legality is met when the provisions of offenses and penalties in law are fulfilled, and the principle of classification constitutes the definition of conduct considered as offense

45 EBOLLO, Manuel et. ál. Op cit., p. 167.

46 PEDRESCHI, Willy. Óp. cit., p. 410.

47 NIETO, Alejandro, Óp. cit., p. 265.

48 Ibidem.

49 Judgment of the Constitutional Court registered in the Docket No 05262-2006-PA/TC, dated on March 29, 2007, regarding the amparo filed by Luis Alberto Novoa Cabrera, representative of Empresa de Distribución Eléctrica de Lima Norte S.A.A. (Edelnor S.A.A.), against the Supervisory Body for Investment in Energy–OSINERG) in order the Decision OSINERG No 017-2004-OS/CD, dated on February 9, 2004, to be declared inapplicable.

> by law. *This precision of what is considered illegal, from an administrative point of view, is not subject to an absolute legal reservation,* but it may be complemented through the corresponding regulations, as happens in this case (emphasis added).

This judgment establishes that the classification of the wrongful conducts is not subject to an absolute legal reservation, but within the parameters of law, the cooperation or complementation by the regulations could be feasible. In practice, in our legal system is common to admit the regulatory cooperation regarding wrongful conducts and penalties, provided that they do not violate law. It is important to remind that the rule appears in the penalty system only if such rule has been authorized by law and only may regulate those issues ordered by law, following guidelines and criteria included in the rule.

In this document, it is important to evaluate the need to point out that the amendments carried out by Law No. 30011 also were performed to the Article No. 11 of Law No. 29325, through which the OEFA is empowered to exercise the regulatory function with which the OEFA may classify offenses, as well as approve the scale of corresponding penalties.

> Article No 11 – General Functions
> (…)
> 11.2 The OEFA, as governing body of the National Environmental Assessment and Enforcement System (SINEFA), exercises the following functions:
> a) Regulatory function: it includes the power to issue rules governing the exercise of environmental enforcement in the framework of National Environmental Assessment and Enforcement System (SINEFA), within the scope of its jurisdiction, and other general rules related to the verification of compliance with environmental obligations to be controlled of the companies under its responsibility; as well as those rules required to exercise the function of supervision of environmental enforcement entities, whose rules are mandatory for such entities in the three levels of government.

In exercise of the regulatory function, *the OEFA is empowered, among others, to classify administrative offenses and approve the scale of corresponding penalties, as well as criteria of adjustment of these penalties and scopes of preventive, precautionary and remedial measures to be issued by the respective competent authorities (…).*

The criteria described by the Article 11 of Law No. 29325, amended by Law No. 30011, are protected under the principle of classification indicated in Number 4) of the LPAG, and it is an exception to the principle of legality, which, as

we observed, is legally admitted. Regarding this exception to the principle of legality, Northcote[50] states the following:

> There is an interesting phenomenon regarding classification, since there are many cases where the classification of offenses by a legally binding rule often involves the use of terms or general methods requiring a further development through a lower-ranking rule. In this regard, the Law No. 27444, when regulating the principle of classification, provides that regulatory rules of development may specify or adjust rules classifying conducts or determining penalties, without this involving the establishment of new offenses, *unless the provisions where the legally binding rule authorizes the classification by regulation* (emphasis added).

On the other hand, the fact that the Administration may classify or establish offenses or punishable conducts by regulation, does not mean that it must not comply with three requirements of this principle, (*lex previa*, *lex scripta and lex certa*), which is considered as the formal nature of this principle.

Regarding these requirements, the Constitutional Court, in the Judgment No. 01514-2010-PA/TC, has indicated the following:

> The Constitutional Court has indicated in settled case-law (Judgment No. 2050-2002-AA/TC, Judgment No. 5262-2006-PA/TC y Judgment No. 8957-2006-PA/TC) that the principle of legality in penalty matters prevents to impute the commission of an offense if such offense is not previously determined in law, as well as prevents to apply a penalty if this one is not previously determined by law. As stated (Case of Anti-terrorism Legislation, Docket No. 010-2002-AI/TC), *this principle imposes three requirements, the existence of a law* (lex scripta), that the law is prior to the fact that has been punished (*lex previa*), and that the law details a determined factual assumption (*lex certa*). It involves the urgent need for regulatory predetermination of offending conducts and corresponding penalties, this is, *the existence of legal precepts (lex previa) that allow predicting with high certainty (lex certa) those conducts and know what to expect regarding responsibilities and further penalties* (emphasis added).

With reference to the Article No. 17 of the Law No. 29325, amended by Law No. 30011 – article by which punishable conducts are classified -, it is possible

50 NORTHCOTE, Cristian. "Importancia del principio de tipicidad en el procedimiento administrativo sancionador". *Actualidad empresarial*, Nº 191, segunda quincena de setiembre, 2009, Lima, p. VIII-2.

to affirm according to the aforementioned paragraphs, that the delegation of regulations is protected, provided that there is a specific law that classifies it, and provided that it is within the framework described by law, since the regulation cannot move away from the legal parameters established.

It is important to indicate that an incomplete law (for its content) or a reference law (for its function) must be aware of its limitations; therefore, the law shall assign to the regulations the task of completing these limitations and indicate how to do it. The regulations do not remedy the shortcomings of the law but completes what it has intentionally outlined or completes what it has not finished but has already started. Therefore, it is cooperation and not a replacement[51].

In that order of ideas, it can be seen how the Article No. 17 of the Law No. 29325, amended by Law No. 30011, refers to the Article No. 136 of Law No. 28611[52] in order to form a single legal block through the cooperation of both rules.

A combined reading of Article No 11 of Law No 29325 and of the provisions set forth in the LPAG (Law on the General Administrative Procedure), as

51 NIETO, Alejandro. Op. cit., pp. 265-266.

52 Law No 28611 – General Law on Environment
Article No 136.- Penalties and corrective measures
136.1 Natural persons or legal entities that do not comply with provisions included in this Law and in the supplementary and regulatory provisions on this matter, shall be punished with penalties or remedial measures, according to the seriousness of the offense.
136.2 They are coercive penalties:
a. Warning.
b. Fine not more than 10,000 Peruvian Tax Units in force on the date of the payment.
c. Confiscation, either temporary or permanent, of the objects, instruments, devices or substances used in the commission of the offense.
d. Suspension or restriction of the activity that caused the offense.
e. Suspension or cancellation of permit, license, concession or any other authorization, as appropriate.
f. Partial or total, temporary or definitive shutdown of the premises or establishments where the activity which caused the offense is carried out.
136.3 The imposition or payment of the fine does not exempt the offender from the corresponding obligations.
If non-compliance persists, it is punished with a fine proportional to that imposed in each case, up to 100 UIT per month in which the non-compliance is continued after the period granted by the Competent Authority.
136.4 The following are remedial measures:
a) The attendance to environmental training courses which shall be paid by the offender, being an indispensable requirement the attendance and passing of said courses.

well as in various decisions of the Constitutional Court and in national and international doctrine, allows us to state that Articles No 17[53] and 19[54] of Law

b) The employment of measures of mitigation of risk or damage.
c) The imposition of compensatory obligations based on the national, regional, local or sectoral environmental policy, according to the case.
d) The adaptation procedures in accordance with the environmental management instruments proposed by the pertinent authority.

53 Law 29325 – Law on National Environmental Assessment and Enforcement System.
Article 17 – Administrative offenses and power to impose penalties.
The following conducts are administrative offenses under the scope of jurisdiction of the Agency for Environmental Assessment and Enforcement (OEFA):
a) Failure to comply with the obligations envisaged in environmental regulations.
b) Failure to comply with the obligations, in charge of the companies, established in the environmental management instruments and which are shown in the environmental regulation in force.
c) Failure to comply with environmental commitments taken over in concession agreements
d) Failure to comply with precautionary measures, whether preventive or remedial, as well as with the provisions or orders issued by the competent authorities of the OEFA.
e) Others that correspond to the scope of jurisdiction of the OEFA.
Compliance with the above-mentioned environmental obligations to be controlled is mandatory for all individuals or legal entities performing activities within the jurisdiction of the OEFA, even though they are not in possession of permits, authorizations or operating permits to carry them out. This provision is applicable to all Environmental Enforcement Entities (EFA), with regard to their jurisdictions, as appropriate.
OEFA, has the power, when it has prima facie and verifiable evidence of non-compliance with the conditions for an activity to be considered within the scope of jurisdiction of regional governments and therefore, its present status should correspond to the scope of jurisdiction of the OEFA, to carry out the environmental enforcement actions which may apply.
Actions taken by the OEFA, as indicated in this article, are carried out without prejudice to the jurisdiction corresponding to regional governments and other Environmental Enforcement Entities (EFA), as well as OSINERGMIN (Supervisory Body for Investments in Energy and Mines) and other sectoral entities, according to their jurisdictions.
Through Supreme Executive Order countersigned by the Ministry of the Environment (MINAM), upon the proposal of the OEFA, provisions and criteria have been established for the environmental control of the activities mentioned in the foregoing paragraphs.
The Agency for Environmental Assessment and Enforcement (OEFA), exercises the power to impose penalties in relation to environmental obligations established in the plans, programs and other environmental management instruments, which the Ministry of the Environment (MINAM) is in charge of approving.
Through decision of the Board of Directors of the OEFA, conducts are classified and a scale of applicable penalties is approved. The classification of general and transversal offenses and penalties should be of supplementary application to the classification of offenses and penalties used by the EFAs.

54 Law No 29325 – Law on National Environmental Assessment and Enforcement System
Article No 19 – Classification and criteria for the definition of penalties.

No 29325, amended by Law No 30011, are empowered by explicit law to classify offenses and penalties on the grounds that rules which refers to other rules and the referred rule form a single regulatory body. Law should have the minimum and indispensable, in this way it can entrust regulation the power to supplement such rule (supplement presupposes the existence of something previous), as is the case of Articles No 17 and 19 of Law No 29325.

On the other hand, Articles No 17 and 19 of Law No 29325 have been explicitly empowered; however, it is important to highlight that authors like Nieto[55] point out as follows:

> Although a scrupulous rule with the power to impose penalties would use the following formula: first it would explain its own incompleteness justifying the call to regulatory cooperation; then it would explicitly authorize a future regulation (the government is empowered to rule subsequent provisions, which for the above-mentioned reasons do not appear regulated in law) and, finally, would establish guidelines or criteria to which subsequent regulations would have to submit, referring with these conditions to its content.
>
> However, in practice, justification for incompleteness and in many cases of explicit authorization is avoided. *Although authorization is inexcusable; it does not necessarily has to be carried out through an explicit clause, but it can be carried out implicitly. Implicit authorizations are allowed but not implicit references, as references should contain a minimum material which implicit formulas lack* (emphasis added).

Through this last statement, it must be noted that, if Articles No 17 and 19 of Law No 29325 have not had this explicit authorization, their validity and legality would have not been affected, provided they have an implicit authorization, based on a minimum content of the rule.

19.1 The offenses and penalties are classified as minor, serious and major. Their classification has to be based on their implications on health and environment, on their potential or certainty of damage, in the extension of its effects and in other criteria which may be defined in accordance with current legislation.
19.2 The Board of Directors of the OEFA approves the scale of penalties in which the applicable penalties for each type of offense are established based on the penalties set forth by Article No. 136 of the Law No. 28611 - General Law on Environment.

55 NIETO, Alejandro. Op. Cit., p.274.

III. ENFORCEABILITY OF ADMINISTRATIVE ACTS IN RELATION TO PROVISIONS SET FORTH IN ARTICLE 20-A OF LAW NO 29325

3.1. Principle of self-protection

The principle of self-protection appears as a consequence of historical development and of the way in which the principle of separation of powers has been understood since the French Revolution.[56] This is due to the fact that *dispute settlement in which the Executive Branch and its agents were implied could not be trusted to (ordinary) courts, otherwise, the Executive Branch would be subordinated to the Judiciary.*[57]

Self-protection is an institution of the general theory of law; therefore, it is not only peculiar of administrative law due to its great importance in relation with the sphere of protection and enforcement. The possibility citizens have to protect themselves is not completely excluded in our system, or in the majority of systems in the world, as can be inferred from some hypotheses through which the prohibition to obtain justice by one's own hand is allowed. However, this protection or self-protection should be recognized by an explicit rule, unlike the power granted to the Administration, where self-protection is the general rule, and is only excluded through explicit law. [58]

When Public Administration, exercises an administrative task, it appears invested of privileges which are inconceivable or inexistent in other legal subjects. These privileges derive from the principle of enforceability of administrative acts with which it is established that administrative acts, to a large extent, have the necessary force to be applied immediately and by themselves, i.e., without the intervention of the judicial authority, in part because administrative acts enjoy a presumption of legitimacy.

Enforceability is the result of presuming that administrative acts are legitimate, and although it is a legal presumption which admits evidence to the contrary, this privilege favors the Administration, as it imposes on individuals, that, in

56 GARCÍA DE ENTERRÍA, Eduardo. *La Revolución francesa y la administración contemporánea.* Madrid: Taurus, 1972, p.113.

57 VEDEL, Georges. *Derecho administrativo.* Traducción española de la sexta edición francesa: Editorial Aguilar, 1980, p. 56.

58 MUÑOZ, Santiago. *Tratado de derecho administrativo y derecho público general.* Volumen I Madrid: Thomson-Civitas, 2004, p. 473.

case they consider this act is illegal, it is up to them to prove this, with which the burden of proof is imposed on them. Enforceability is nothing else than the expression of some of the privileges Administration has and which derive from the principle of self- protection.

The principle of self-protection allows the Administration to comply with its institutional purposes, inasmuch as through this principle the "Administration has the capacity as a legal subject to protect by itself its own legal situations, even its innovative claims of status quo, releasing itself in this way of the need, common to the rest of individuals, to obtain judicial protection." [59]

Therefore, it can be said that the Administration is in the capacity of directly performing its administrative acts without undertaking judicial proceedings,[60] using coercion on an exceptional basis and within the limits of the legal system.[61]

In words of Morón[62] it is said that "in essence, the power to implement its own decisions is one of the clearest expressions of Administrative Self-Protection with which the legal system provides the Public Administration for the preservation of public order and achieve the satisfaction of general interests. Nor administrative appeals or lawsuits affect this quality of the administrative authority."

In this respect Cassagne,[63] considering self-protection as the principle of enforceability, indicates as follows:

> c) The principle of enforceability: Is a typical "outward" privilege which enables bodies which carry out a materially administrative function to order the performance or fulfillment of an act without court involvement, appealing on an exceptional basis to the use of coercion within the limits

59 GARCÍA DE ENTERRÍA, Eduardo y Tomás-Ramón FERNÁNDEZ. *Curso de derecho administrativo.* Volumen I. Décima edición. Madrid: Civitas, 2000, p. 505.

60 DIEZ, Manuel. *Derecho procesal administrativo*, Buenos Aires: Astrea, 1996, p. 319.

61 CASSAGNE, Juan Carlos. *La ejecutoriedad del acto administrativo*. Abeledo Perrot: Buenos Aires, 1971, pp. 21 y ss.

62 MORÓN, Juan Carlos. *Nueva Ley del Procedimiento Administrativo general*. Lima: Gaceta Jurídica, 2002, p. 404.

63 CASSAGNE, Juan Carlos. Op. cit., p. 21.

> established by the legal system. The principle of enforceability admits two important subspecies: a) one which operates at administrative courts by its own virtuality or by the provision of a rule without making use of coercion, and b) the power to perform the act by measures of compulsion on the part of bodies exercising the materially administrative function. It should be noted that this prerogative is, in principle, exceptional in our constitutional legal system, due to the fact that the use of measures of compulsion to perform an act in the person or assets of the company integrates the content of the function assigned to judges by the Constitution, configuring a material system which favors the company.

In our opinion, administrative self-protection is the technical instrument that Public Administration enjoys, through which it has the power to act and implement its decisions through administrative acts, so that they may force the recipient of the act, without needing to go to court.

In relation to decisions issued by the Administration, it is important to indicate that these have a presumption of legitimacy, which involves that they are enforceable. Besides, in case of resistance to comply with the administrative decision, the Administration does not need the intervention of courts to impose compliance, but it can achieve this by using its own means of compulsion or of compulsory enforcement. Therefore, in case companies disagree and oppose to decisions taken by the Local Authority, these will be the ones who will seek to go to the jurisdictional body to paralyze and annul the act, for re-establishment of their legal situation previous to this act, and reparation of damages to property or moral caused by such action.

It is important to indicate that although self-protection seeks to protect and provide with efficiency the essential function of Public Administration, it is subject to limitations contained in the Political Constitution of Peru and in the legal system as a whole. Besides, it could be object of future variations or limitations, if the legislator considers it appropriate[64]. The principle of self-protection among its variations includes the so-called power to issue declaratory orders and the power to issue enforcement orders.

64 According to the Ombudsman's Report N. 121, p. 21: "Self-protection is necessary for the functioning, efficacy and effectiveness of every administrative procedure, Likewise, in practice, it confers a great power to Local Authority, which does not only knows the rules, but also, in general, the law which protects or must protect its decisions. It is a power which must be exercised in function of the limits imposed by the Constitution and the legal system as a whole, and with respect, of course, to fundamental rights."

3.3.1. Power to issue declaratory orders

The power to issue declaratory orders principle is the power that the Administration has, through which it creates, modifies or extinguishes subjective legal situations, for its own need without the intervention of courts being necessary. Likewise, it is capable of defining a legal situation which faces the Local Authority against a private party or solve a dispute between one or two private parties.

According to what has been indicated by Peña:[65]

The enforceability or power to issue declaratory orders consists in the statement issued by the Public Administration (…) the so-called presumption of legality implies stating in general terms that every administrative act has been issued following the relevant legal rules. This is to say, that by the law it is presumed that there is a substantive and adjective compatibility of the act, both in the clause conferring jurisdiction, as with the one which establishes the validity and improvement of the resolution.

3.1.2. Power to issue enforcement orders

Professor García de Enterría indicates that "in the same way as the Power to issue declaratory orders is expressed in a statement or in an act, the power to issue enforcement orders, implicates passing to the facts on the grounds, behavior or material operations, in concrete, to the use of coercion vis-à-vis third parties."[66]

Authors like Huapaya[67] state that:

> (…) to translate the administration's formal activity into action presupposes, therefore, passing from a general framework of an expression of the so-called power to issue declaratory decisions of the Administration, to a factual or implementation level of the statement of will of the Administration, i.e., to a scenario where the so-called power to

65 PEÑA, José. Manual de derecho administrativo. Adaptado a la Constitución de 1999. Vol 1-3. Primera reimpresión. Caracas: Colección de Estudios Jurídicos, 2002.

66 GARCÍA DE ENTERRÍA, Eduardo y Tomás-Ramón FERNÁNDEZ. Op. Cit., p. 512.

67 HUAPAYA, Ramón. *Tratado del proceso contencioso administrativo*. Lima: Juristas editores, 2006, p. 649.

issue enforcement decisions of the Administration will develop,[68] i.e. the exercise of the power to use its own means of coercion, without the need to require legal support.

The legislator authorizes the Administration through the power to issue enforcement orders, to execute, through the *use of means of coercion*, the orders contained in the decisions regulating legal relationships between the Administration and companies. This attribution of coercive powers of the Administration is based not only in the presumption of legality but in an existing legal framework, which allows the use of force over the rights and assets of the company. Should the Administration act outside the limits granted by the legal framework, we would be talking of the existence of an illegitimate coercion.

In this paper illegitimate coercion, also called administrative material acts, will not be addressed; it takes place when Local Authority does not respect rules established for its performance. This subject will not be analyzed as, both in the analysis as in the conclusions of this article, we indicate that the powers and coercive action of the OEFA are protected by valid administrative acts and that the process it carries out to execute such acts does not violate the rules or principles of the legal system.

3.2. Legitimate coercion

The Administration may make use of its power to make use of legitimate means of coercion, whether it is to impose compulsory enforcement of administrative acts, or to act directly and immediately on a factual situation with a view to modify it, without trying to impose compliance of a previous declarative administrative act.[69] Thus, we can divide two assumptions with respect to legitimate means of coercion; the first one will be the so-called *compulsory enforcement* and a second assumption called *direct coercion*.

68 The power to issue enforcement orders is already recognized by the Constitutional Court as established in Legal Basis No 46 of the STC File No 0015-2005-PI/TC, case: "Luis Castañeda Lossio with Congress of the Republic," on the unconstitutionality of several articles of the Law on Coercive Execution.

69 Cf. GARCÍA DE ENTERRÍA, Eduardo y Tomás-Ramón FERNÁNDEZ. Op. cit., p. 765.

3.2.1. Compulsory Enforcement

The executability of the administrative act is the legal power recognized to the Administration with the purpose that it may carry out acts and operations necessary for compliance with declared administrative acts.

García de Enterría and Fernández[70] indicate that compulsory enforcement of an administrative act implies its application in practice, in the facts on the ground, the statement provided therein, notwithstanding resistance, whether passive or active, of the individual forced to its compliance.

In relation to administrative acts, Barcelona[71] indicates that generic characteristics of administrative acts, will be precisely, their executability i.e., their susceptibility to produce legal effects in the sphere of companies through the issue of a binding mandate.[72]

When the Administration imposes an order, restriction, limitation or commission through an administrative act, it is imposing the company a mandatory legal duty which it must comply. The company may comply with this order, restriction, limitation or commission voluntarily, but if it disagrees or opposes such act, the Administration may and should use those mechanisms deriving from the power to issue enforcement orders, in order to coerce and perform through compulsion enforcement the compliance contained in such act.

As these decisions (expressed through administrative acts) involve a public interest, these enjoy the *attributes of executability and enforceability* (the latter of these is known by *doctrine, as compulsory enforcement*), which guarantee their effectiveness.

The purpose of decisions issued by public entities is to satisfy the public interest involved, for example, when granting a permit, in the resolution of conflict of interests or in the exercise of the power to impose penalties, depending on the type of administrative procedure.

70 Ibidem.

71 Cf. BARCELONA, Javier. *Ejecutividad, ejecutoriedad y ejecución forzosa de los actos administrativos*. Santander: Servicio de Publicaciones de la Universidad de Cantabria, 1995, p. 39.

72 Cf. HUAPAYA, Ramón. Op. cit., p. 651.

Executability of administrative acts is understood by doctrine as follows:

> By executability is understood a characteristic which has traditionally been considered proper of every administrative act, as expression of a public power or attribute, such as being fully efficient and constitutive of legal situations which it defines from the very moment of its issuance, notwithstanding the opposition of a private individual –filing for appeals authorized by law- to prevent it, without prejudice to what may be determined before the courts.[73]

Similarly, Bandeira de Mello,[74] indicates the following in relation to *enforcement and enforceability:*

> "*Enforcement (also known as executability):* is the quality by virtue of which the State, in the exercise of administrative function, may require from third parties compliance, observation of the obligations imposed (…). *Enforcement* is the attribute of the act by which obedience, satisfaction of an obligation already imposed is reinforced (…) [While, on the other hand] *enforceability: is the quality by which public power may materially force the company to comply with the obligation imposed and required*. Likewise, it must be observed that both enforcement and enforceability are characterized by the fact that they are imposed without having to go to trial as would be the case of an act of a private individual (italics added).

On the other hand, Morón[75] indicates as follows:

> As we know, two effects are derived from the administrative act which refer to the binding of subjects obliged to its compliance: *executability*, which is an attribute of efficacy (material quality), and *enforceability*, which is referred to the attribute to coerce the will of others to achieve its implementation (instrumental quality). The so-called *executability* of the administrative act mentions the common attribute of every

73 TIRADO, José Antonio. *Ley de Procedimiento de Ejecución Coactiva*. Primera edición. Lima: Jurista Editores, 2006, p. 29.

74 BANDEIRA DE MELLO, Celso. *Curso de derecho administrativo*. LABRAÑA, Valeria (traductora). Primera edición. México: 2006, p. 359.

75 MORÓN, Juan Carlos. "La nueva dimensión constitucional de la ejecutividad administrativa: reflexiones necesarias a partir de la STC Nº 0015-2005-PI/TC". *Palestra Constitucional*. Nº 1, 2006, pp. 357-358.

> administrative act of being effective, binding or enforceable, as it contains a decision, statement or certification of the public authority. In this regard, *executability is equivalent to the capacity administrative acts have* –as any other act of authority - to produce vis-à-vis third parties, the consequences of every type that, according to their nature, they should produce, giving birth, modifying, extinguishing, interpreting or consolidating the legal situation or rights of the companies (…). On the other hand, *enforceability of administrative acts* may be defined as "a special expression of their efficacy, and for this reason, *when the legal authority imposes duties and restrictions to private individuals, these may be carried out even against their will by the direct bodies of administration, without prior intervention of declaratory actions of jurisdictional bodies being necessary"* (emphasis added).

Consequently, enforceability of administrative acts is an expression of the powers deriving from the power to issue enforcement orders principle, i.e., the authority to order the compliance of matters previously solved by Public Administration without previous judicial intervention, in such a way, that all administrative acts may be the object of compulsory enforcement, unless a law excludes or obliges them to go to the Judiciary.

Article No 192 of the LPAG, specifies in this regard as follows: "Article No 192.- Enforceability of the administrative act. Administrative acts will be *enforceable,*[76] unless otherwise expressly provided by law, writ of mandate or if they are subject to terms or conditions in accordance with law."

Therefore, it is relevant to comment that *every administrative act is enforceable,* unless *otherwise expressly provided by law, writ of mandate or if subject to terms or conditions, as provided for in Article No 192 of the LPAG*. Administrative acts –except those expressly established by law- are enforceable, i.e., their issuance obliges their immediate compliance although another subject may disagree about their legality. This quality of administrative acts applies to all those issued. In this way, administrative decisions benefit from a presumption of legality which makes its fulfillment necessary, without having to obey any previous declaratory judgment. This presumption of legality causes an effect

76 On this provision it has been noted, that "administrative acts have the attribute of constituting authentic legal titles, with full sufficiency and mandatory force, so they are self-sufficient. I.e., that they do not require a confirmatory or ratifying declaration from another public authority other than the one who produces them to have full legal validity – i.e., to create, modify or extinguish rights and impose obligations." HERNÁNDEZ-MENDIBLE, Víctor Rafael. El procedimiento administrativo a los 100 años de entrada en vigencia de la LPAG". *Revista de la Facultad de Derecho de la PUCP*, No. 67, pp. 360-380.

from the date of issuance of administrative acts. Moreover, if a sentence puts an end to this act, the effects already produced and the subsequent enforcement of the appealed action are not suspended.

Rizo[77] explains this clearly, when analyzing the enforceability nature of the administrative act:

> (...) Public Administration appears vested with the necessary powers to carry out by itself self-protection of its rights, and to this end it declares by itself which is its right, from where comes the compulsory nature of the administrative act*; and proceeds to perform by its own means and against the will of the companies, what it has previously declared*. The administrative act is executive; and executive is what is enforceable and enforceable is that which by itself is executive, circumstances which frame the administrative act. Indeed, once the administrative act is produced, it has executive virtuality; i.e. it has to be complied and does not wait or allows that the execution be postponed to another time. The administrative act is, therefore, executive and enforceable; being clear that the executive nature is a substantial quality and the enforceable nature is merely instrumental. Therefore, although *enforceability requires being enforceable,* it does not presupposes the original existence of executability nor executability necessarily accompanies enforceability. If both agree in the administrative act it is for the need to leave free from interferences the compliance of decisions affecting public interests and the principle of independence of the various branches of government.

Likewise, in relation to this issue, it is relevant to highlight the second paragraph of basis 5 of the Judgment of the Constitutional Court registered in Docket No 06269-2007-PA/CT, which specifies that:

> Coercive collection is one of the expressions of the power to issue enforcement orders which some administrative entities enjoy, and for this reason they are empowered to execute coercive collection of debts payable (whether tax debts or not). Such as this Constitutional Court instructed in legal basis 46 of the STC 0015-2005 -AI/TC, the self-protection power of Public Administration to enforce its own decisions - as it is the case with the procedure of coercive execution - is based on the principles of presumption of legitimacy and enforcement of administrative decisions,

77 RIZO, Armando. *Manual elemental de derecho administrativo*. Tomo I. León: Universidad Nacional Autónoma de Nicaragua, 1991, p. 434.

> which also implies protection of the companies' fundamental rights which can be threatened or vulnerated by the Administration's activity, such as the rights to due process and effective judicial protection.[78]

It is clear then that enforceability[79] *of the administrative act refers to the power the Administration has to coerce companies to comply as ordered, whereas the executability of the act refers to its mandatory obligation and enforcement as such. Therefore, both* features are an expression of the power of self-protection of the Administration which guarantees the protection of public interest by the declaration of the law applicable to the concrete case and the exercise of the power of coercion.

3.2.1.1. Characteristics of compulsory enforcement of administrative acts

a) It is the execution of an obligation previously established in an administrative act. Compulsory enforcement presupposes the existence of a prior administrative act, which should have some evidence of proof attesting to its existence. In addition, this act shall define unequivocally its content and scope, as well as to whom it is addressed. The administrative act must be explicit, and should contain specific individualized obligations to the entity to which it is addressed.

b) Enforcement shall be intended to carry out the obligation resulting from the act, without innovating or replacing it.- Compulsory enforcement is intrinsically linked to the administrative act previously issued. Compulsory enforcement is the continuation of the act carried out, reason why it should limit to what has already been imposed on the administrative act.

c) Compulsory enforcement does not require a non-appealable administrative act.- In relation to administrative acts, they enjoy a presumption of validity,

78 Such judgment may be verified in the following web page: http://www.tc.gob.pe/jurisprudencia/2008/06269-2007-AA%20Resolucion.pdf

79 On this subject (enforceability) the following has been indicated: "in the exercise of the powers to issue executive orders, there is the possibility that public administration may enforce its own decisions – materialize their consequences, even by force, and against the will of the recipients, in principle-, without requiring the collaboration of another public authority (power of enforceability). This enforceability is characteristic of administrative acts imposing duties and obligations, whether positive or negative, the fulfillment of which may not be voluntarily carried out or accepted by the recipient or the obligor." HERNÁNDEZ - MENDIBLE, Víctor Rafael. "El procedimiento administrativo a los 100 años de entrada en vigencia de la LPAG". *Revista de la Facultad de Derecho de la PUCP*, Nº 67, pp. 360-380. Lima.

which is collected in Article No 9 of the LPAG. Therefore, we can point out that the decisions of the Administration have an *iuris tantum* presumption, which allows the Administration to impose compulsory enforcement. It should be noted that this presumption of validity is subject to the notification of the administrative act.

3.2.1.2 Requirements and modalities of compulsory enforcement

The requirements that the administrative act must comply in order to be considered of compulsory enforcement have been clearly and exhaustively established in the Peruvian legislation. These requirements are envisaged in Article No 194 of the LPAG, which we indicate as follows:

> Article No 194.- Compulsory Enforcement
> In order to proceed with compulsory enforcement of administrative acts through their own competent bodies, or through the Peruvian Police Force, the authority must fulfill the following requirements:
> 1. That the obligation should be an obligation to give, to do or not to do, established in favor of the entity.
> 2. That the provision must be made in writing in a sufficiently clear and complete way.
> 3. That such obligation derives from the exercise of an attribution of power of the entity or from a public law relationship with the entity.
> 4. That the spontaneous compliance of the duty has been required to the company, under penalty of starting the specifically applicable coercive measure.
> 5. That it should not be an administrative act which according to the Constitution or the law requires the intervention of the Judiciary for its execution.
> 6. In the case of trilateral procedures, final decisions ordering corrective measures constitute enforcement instruments according to the provisions set forth in Article No 713 paragraph 4) of the Civil Procedural Code, amended by Act No. 28494, once the administrative act becomes final or the administrative proceeding is exhausted.

In the case of final decisions ordering remedial measures, the legitimacy to act in civil proceedings of execution corresponds to the parties involved.

In addition, the means of compulsory enforcement by which the Administration may perform administrative acts which comply with the requirements mentioned above are also specified. The means of compulsory enforcement stipulated are the following:

> Article 196.1.- Means of compulsory enforcement80
> The means of compulsory enforcement by the entity shall be carried out respecting always the principle of reasonableness, by the following means:
> a) Coercive execution.
> b) Subsidiary execution.
> c) Penalty payment.
> d) Enforcement against individuals.

3.2.1.3. Coercive execution according to the TUO (Single Organized Text) of the Law on the Procedure of Coercive Execution

One of the modalities of compulsory enforcement of administrative acts is the so-called coercive execution. For the Peruvian case, the TUO of Law No 26979 – Law on the Procedures of Coercive Execution[81] exhaustively establishes the regulation about this type of compulsory enforcement of administrative acts.

Coercive execution is the procedure through which the Administration seeks to satisfy an obligation to give, to do or not do, not complied by the company and which according to the regulation currently in force, can be summarized in two large categories: the collection of a sum of money and the execution of demolition, repair, closure or construction tasks ordered by law. *The procedure of coercive execution is born as an expression of the Administration's self-protection, a procedure used by bodies of the Public Administration to make effective decisions issued to entities.*

In this sense, the Constitutional Court, with regard to this institute, has pointed out, in Legal Ground 4 of Judgment 0774-1999-AA/TC, that:

80 On this provision it has been pointed out, that: "Voluntary non-compliance of the consequences derived from the legal statement contained in the administrative act, whether the result of an express conduct, or resistance or contestation, as well as a result of negligent conduct, that simple and deliberately fails to comply with the ruling, leads to the activation of mechanisms of compulsory execution envisaged in the legal system, for the strict compliance with the provisions of the administrative act.
However, it is important to mention that one of the two points where Peruvian legislation presents a notable deficiency is that related to modes of enforcement of administrative acts.
In the case that the obligors resists to voluntarily comply with the administrative act, law, besides recognizing improper execution in legal proceedings -even though it is not developed–, only envisages two possibilities. "One is the indirect execution by a subject other than the obligor – either the administration or a third-party- and the other is the imposition of penalties or fines" (emphasis added). HERNÁNDEZ-MENDIBLE, Victor Rafael. Op. cit., pp. 360-380.

81 Published in the Official Gazette *El Peruano* on September 23, 1998.

> (...) the procedure of coercive execution is the power that some Public Administration bodies have to enforce administrative acts issued by the same administration that is to say, [that] the enforceable obligations should come from matters proper to the functions each body has, based on the acknowledgement that each special law has considered for each Administration, this is to say, always within a regulatory framework (...).[82]

In the procedure of coercive execution we can find a subjective and objective aspect. *In the first one, it is specified what type of administrative agencies may use the procedure of coercive execution, their credits and/or obligations of do or not do and which officials are responsible for appraising the procedure. With regard to the second, the objective character is given by: 1) the public nature of the debts and obligations of do and not do susceptible to public execution and 2) the need for a prior administrative act or enforcement instrument of the obligation.*

In addition, Number 9.1 of Article No 9 of the TUO of the Law on the Procedure of Coercive Execution adds in the concept of coercive obligation through the use of coercive measures against the company as follows:

> Article No 9.Enforcement of the Obligation
> 9.1 An obligation coercively enforceable is the one established through an administrative act issued in accordance with law, duly notified *and that has not been subject to any contestation in the administrative appeal within terms specified by law or where the decision has become final confirming the obligation (...*) (emphasis added).

The legal provision in mention, establishes as an enforceable obligation, the provision approved in the first instance or the one issued in second administrative instance, without making no reference whatsoever to the contentious-administrative action.

Similarly, Tirado[83] gives his opinion, noting that:

> (...) as a general rule for the determination of obligations which may be objet of coercive execution, it can be said that only those established in an administrative act that has never been contested, or having been, are determined by an administrative act issued by the last competent

82 Judgment of the Constitutional Court No 00015-2005-AI, legal basis 41.

83 TIRADO, José Antonio. Op. cit., p. 29.

instance. *That is to say, this mechanism of enforcement only applies to those administrative acts that may no longer be subject to questioning or contesting in administrative agencies.*

With regard to the latter, he says, mentioning Danós, that: "This may be due to the fact that the administrative act was not contested promptly acquiring in consequence, the quality of approved or because it is an administrative act that has been issued by the Court of last instance in the legally established procedure and it can no longer be subject to challenge before administrative agencies."

Once the administrative act which will serve as an order for coercive enforcement, *it is impossible to contest it before an administrative agency*, the competent officer – in charge of coercive execution – shall inform the company responsible for the compulsory compliance thereof having been warned that a precautionary measure will be issued or a coactive execution will be implemented.

3.2.1.3.1. Initiation of the Procedure of Coercive Execution

The TUO of the Law on the Procedure of Coercive Execution develops in Article No 14, the requirements that must be met to start the procedure of coercive execution per se:

Article No 14. Initiation of the Procedure

14.1 *The procedure begins by notifying the Obligor on the Decision of Coercive Execution*, which contains an order for compliance of an enforceable obligation in accordance with Article No 9 of this Law; and within a period of seven (7) working days of notification, a *warning that a precautionary measure will be issued or a forceful enforcement will be initiated,* in case that they have already been issued on the basis of the provisions of Article No 17 of this Law.

14.2 The Coercive Enforcement Officer *can only start the procedure of coercive execution* once the administrative act which serves as enforcement instrument has been duly notified, and *provided that time limit for the filing of the administrative appeal has not expired and/or has been presented by the Obligor within this deadline*" (emphasis added).

Therefore, only those administrative acts that meet the conditions expressly established in Article No 194[84] of the LPAG may be subject of compulsory enforcement. In this

84 Law No. 27444 – Law on General Administrative Procedure
Article No 14 – Compulsory execution

sense, in order that an obligation may be enforceable using means of coercion, through the modality of coercive execution, it must not have been the subject of any contestation in the administrative proceeding, within deadlines imposed by law or a final decision has been issued confirming the obligation.

To initiate the proceeding of coercive enforcement, it is necessary that the administrative act that serves as enforcement instrument has been duly notified and the time limit to file the corresponding administrative appeal has not expired or the administrative appeal has not been filed within the time limit.

In this sense, we can say that for administrative acts to be enforced by means of coercion, in first place they must have been approved when it comes to acts of first administrative instance or, failing that, they should have been confirmed in second administrative instance. Also, to start the procedure of coercive execution of the administrative act that serves as an enforcement instrument, it must have been duly notified and the expiration of the deadline for the filing of the corresponding appeal should not be pending or, failing that, no appeal within the time limit should have been filed.

It should be noted that enforceability of administrative acts is subjected to deadlines for the filing of contestations in the administrative scope (remedy of reconsideration, appeal or review), but not in the judiciary as is the case of an administrative contentious claim or similar.

To proceed with compulsory execution of administrative acts through its own competent bodies or through the Peruvian Police Force, the authority complies with the following requirements:
1. That it is an obligation to give, to do, or not do, established in favor of the entity.
2. That the provision be determined in writing in a sufficiently clear and complete way.
3. That this obligation comes from the exercise of an attribution of power of the entity or from a public law relationship with the entity.
4.That the spontaneous compliance of the provision has been required from the company, under penalty of starting the specifically applicable coercive measure.
5. That it is not an administrative act which according to the Constitution or the law requires the intervention of the judiciary for its execution.
6. In the case of trilateral procedures, final decisions ordering remedial measures constitute enforcement instruments according to the provisions set forth in article No 713 paragraph 4) of the Civil Procedure Code, amended by Law No. 28494, once the administrative decision is final or the administrative proceeding is exhausted.

In the case of final decisions that order remedial measures, the legitimacy to act in civil enforcement proceedings corresponds to the parties involved.

In no case, nor to consider that an administrative act is a matter of compulsory enforcement or an enforceable obligation or to determine the initiation of coercive execution, it is necessary that the Coercive Enforcement Officer should wait for the expiration of the deadline for the filing of the contentious administrative claim. Moreover, *Article No 14 of the TUO of the Law on the Procedure of Coercive Execution indicates that the procedure of coercive execution initiates with the notification to the obligor of the decision of such execution which contains the order of compliance of the enforceable obligation within a deadline of seven (7) working days of notice, after which term the Office in charge of coactive execution is automatically authorized to order precautionary measures or initiate compulsory enforcement of the obligations imposed according to Article No 17 of TUO, Law on the Procedure of Coercive Execution.*

Indeed, the procedure of coercive execution is initiated as ordered by Article No 14 agreed with Number 17.1 of Article No 17 of the TUO of the Law on the Procedure of Coercive Execution that establishes that *once the deadline of seven (07) working days to which Article No 14 refers to has expired, without the Offender having complied with the order contained in the decision of coercive execution*, the Coercive Enforcement Officer may order the application of any of the precautionary measures established in Article No 33 of the TUO of the Law on the Procedure of Coercive Execution or, where appropriate, the obligation to do or not to do will be necessarily enforced.

3.2.1.3.2. Suspension of the procedure of coercive execution according to the TUO of the Law on the Procedure of Coercive Execution

In the case of the TUO of the Law on the Procedure of Coercive Execution the *suspension* of the procedure of coercive execution is established, a fact that by itself determines the pre-existence of a procedure of coercive execution initiated or pending. (In this regard, item e) of Article No 16 of the TUO of the Law on the Procedure of Coercive Execution establishes as follows:

> Article No 16. Suspension of the proceeding
> 16.1 No administrative or political authority may suspend the procedure, with the exception of the Coercive Enforcement Officer who should do it, under his responsibility, when: (...)
> (e) it is in process or pending expiry The deadline for filing the administrative remedy of reconsideration, appeal, review *or contentious administrative proceeding filed within the deadline established by law against the administrative act which serves as enforcement instrument*, or against the administrative act which determines

> joint and several liability in the case referred to in Article No 18, number 18.3 of this Law (...)" (emphasis added).

The legal provision mentioned, is applicable in those cases in which, once started the procedure of coercive execution, some of the premises referred to explicitly are arranged. Moreover, from a detailed reading of the above-mentioned number, we are before two different cases of suspension of the procedure of coercive execution:

(i) when the procedure is in process or the deadline for the filing of the administrative remedy of reconsideration, appeal, review is pending expiration; or
(ii) when the contentious administrative claim is *filed* within the deadline established by law against the administrative act which serves as enforcement instrument.

The reading of Item e) of Article No 16 is quite consistent with the provisions set forth in Article No 14 of the TUO of the Law on the Procedure of Coercive Execution, as it sets out as a condition for suspending the procedure of coercive execution that "the time limit for the filing of the corresponding administrative appeal is not pending expiration and/or has been submitted by the Obligor within this period" –the filing of the administrative remedy means the remedies of reconsideration, appeal or review −; adding a different and particular situation for the suspension of the procedure concerning the presentation of the contentious administrative claim, stressing that the suspension by such cause will only occur subsequent to the submission of the mentioned demand within the deadlines mandated by law (three months), constituting itself as a proof of this the acknowledgment receipt of its submission. That is to say, that the filing of the contentious administrative claim and the referral to the Coercive Enforcement Officer of the proof that this is done, is the only mechanism that will stop or suspend the procedure of coercive execution once so determined by the Coercive Enforcement Officer.

In this line of argument, Number 16.3 of Article No 16 of the TUO of the Law on the Procedure of Coercive Execution provides that "[the] Obligor may request the suspension of the procedure provided that it is based in some of the grounds provided for in this article, *filing the corresponding evidence* to the Coercive Enforcement Officer" (emphasis added).

If the company files evidence (the acknowledgment receipt of submission of the claim before the Judiciary) showing that it presented contentious administrative claim within the deadline, the Coercive Enforcement Officer shall proceed with the suspension.

3.2.1.3.3. Suspension due to judicial review

This process is intended to verify in court if the provisions laid down by the Law on the Procedure of Coercive Execution have been respected.

In Article No 23 of the TUO of the Law on the Procedure of Coercive Execution the judicial review of such procedure is regulated. In this legal provision, it is established that the process of judicial review will only proceed if measures of seizure have been ordered and/or after completion of the procedure of coercive execution.

Although not explicitly stated in the Law on the Procedure of Coercive Execution, *the consequence of protecting the demand for review of legality is without doubt, that the procedure of coercive execution be declared null,* because of the infringement of procedural rules contained in the Law.

In this sense, the Constitutional Law and Permanent Social Division of the Supreme Court in the Judgment in Docket No 501-2010, has indicated that: "failure to comply in the formality of notification, provided by law, as well as irregularities observed in the Procedure of Coercive Execution, evidence the violation of the provisions set out in the Law on Procedure of Coercive Execution, generating such infringements, the invalidity of the procedure."

The mentioned process, laying down the General Regime, begins with the single filing of the claim for judicial review which will automatically suspend the formalities of the procedure of coercive execution until the issuance of the corresponding pronouncement of the Superior Court, and provisions set forth in Article No 16, Number 16.5 of this law will continue being applicable. That is, once the process is suspended, precautionary measures will be lifted.

If the Court of Appeals will not issue the respective decision at the end of the sixty (60) working days from the filing of the claim, the suspension of the procedure of coercive execution will remain, even during the formalities for the procedure of appeal to the Court of Appeals concerning number 23.8, provided that the applicant at his choice, presents in the process surety bonds, letter of credit irrevocable, unconditional, and payable on first demand, issued by a local bank of first order on behalf of the lending institution for the amount of the obligation renewable every six (6) months; or a judicial deposit of the amount demanded before the Banco de la Nación, on behalf of the Court of Appeals. The execution of the surety bond, letter of credit or the delivery of the funds deposited to the Coercive Enforcement Officer will only proceed with an express court order.

> Article No 23.-Judicial review of the procedure
> (...) 23.2 The judicial review process will be processed through the contentious administrative proceeding according to the summary procedure provided for in the Article No 24 of the Law governing contentious administrative proceedings, without prejudice of the application of the provisions set out in this article (...)

As can be seen, the Law on the Procedure of Coactive Execution establishes the possibility of suspending the procedure of coactive execution upon submission of a request for judicial review, without providing any additional warranty.

3.2.1.4. The suspension of the process of coercive execution according to Law No. 30011

In the case of the OEFA, the rules to have access to the suspension of the processes of coercive execution of its decisions are regulated in Article 20-A 29325 of Law No 29325 - law amended by Law No 30011 – that establishes the following:

> Article 20-A.- Enforceability of the decisions of the OEFA
> The presentation of a contentious administrative claim, request of defense or other, does not interrupt or suspend the procedure of coercive execution of first or second instance administrative decisions concerning the imposition of administrative sanctions issued by the Agency for Environmental Assessment and Enforcement (OEFA, by its initials in Spanish). (…).

As Moron points out, the quality of the general rules of the administrative procedure's provisions implies the existence of a set of principles, techniques and rules of uniform compliance by all public bodies it includes. But, at the same time, this general character allows that they give up their place for special rules that apply to the same assumption, therefore being displaced to a supplementary role.

In this sense, the special rule applicable to the OEFA states that *the single filing of a lawsuit of any kind is not sufficient reason to suspend a process of coercive execution*. In this context, it is possible to affirm that the filing of a request for judicial review does not have the binding force alone to suspend this procedure.

On the basis of the analysis made, provisions should be taken into consideration in the second paragraph in Article 20-A of the Law No 29325 as regards:

> Article 20-A.-Enforceability of the decisions of the OEFA
> (...)
> Without prejudice to the requirements and other regulations established in the Civil Procedural Code in matters of precautionary measures, when the company, in any kind of judicial process, requests a precautionary measure that concerns the suspension or elimination of the decisions of first or second administrative instance referred to the imposition of administrative sanctions, including those issued under the procedure of coercive execution or that have as purpose to limit any of the powers of the OEFA provided for in this present law and complementary rules, the following rules may be applied:

a) To admit precautionary measures, companies shall submit real or personal property injunction bonds. In no case the judge can accept as injunction bond the promissory oath.

b) If an injunction bond of personal nature is offered, this should consist of a bank guarantee or financial letter under the name of the OEFA, of irrevocable character, unconditional, of immediate execution and without benefit of prosecution, issued by a first order entity supervised by the Superintendency of Banks, Insurance and Private Administrators of Pension Funds.

c) Such guarantee must have a validity of 12 months, renewable and issued by the amount of the debt derived from the administrative act, the effects of which are intended to be suspended or suppressed, updated on the date the precautionary measure was requested.

d) The letter of guarantee must be renewed and updated as long as the precautionary measure is valid, within twenty working days prior to the expiration date, according to the amount of debt accumulated at the date of its renewal. In the event that a letter of guarantee is not renewed or the amount is not updated in the above-mentioned term, the judge will proceed to its immediate execution.

e) If real property injunction bond is offered, it must be of first rank and cover the full amount of the debt derived from the administrative act whose effects are intended to suspend or set aside, updated to the date of the request of the preliminary injunction.

f) The OEFA is entitled to request the judicial authority to vary the injunction bond, in case this has become insufficient in respect of the amount granted

by the generation of interests. The judge must arrange that the applicant complies with the adequacy of the injunction bond offered.

g) In those cases where the legality and compliance of the rules foreseen for the start and formalities of the procedure for coercive execution is subject to review by the competent judicial body by means of an application for judicial review regulated by Law No 26979, Law on the Procedure of Coercive Execution, the coercive execution is only suspended if compliance of obligation is guaranteed by means of injunction bonds, which must comply with equal requirements to those listed in preceding subparagraphs.

It is pertinent to point out that with regard to the suspension of the precautionary measure by judicial review in the case of the OEFA, by direct application of Article 20-A of Law No 29325, amended by the Law No 30011, it is noted that *the sole presentation of a demand of any kind is not sufficient reason to cancel a procedure of coercive execution*. In that context, it is possible to state that the filing of a request for judicial review does not have binding force alone to suspend this procedure. In fact, it is established *that the sole presentation of a demand of any kind is not sufficient reason to cancel a procedure of coercive execution*.

3.2.2 Direct Coercion

Direct coercion is a legitimate coercion mechanism to which sufficient attention has not been paid.[85] It can be subsumed to the figure of the compulsion on people, which is indicated in Article No 200 of the LPAG, but its lacks of formal title would constitute an exception to the general rule of coercive action of the Administration.

Direct coercion constitutes itself as a temporary action, forced by exceptional circumstances. The competence to execute it must be foreseen by law, as well as in the purpose it obeys.[86]

3.3. Judicial Protection

Judicial protection stems from effective judicial protection, this being the governing principle whereby the State guarantees that any person whose right has been violated may go to a third party, in order to have his/her right respected.

85 HUAPAYA, Ramón. Óp. cit., p. 672.

86 GARCÍA DE ENTERRÍA, Eduardo y Tomás-Ramón FERNÁNDEZ. Op. cit., p. 775

Cassagne[97] points out that "precautionary measures display all the possibilities that the principle of effective judicial protection provides in order to compensate for the weight of the prerogatives of public power".

The Constitutional Court pointed out in various judgments that precautionary protection, which is implicitly contained in Article No 139, sub-paragraph 3 of the Peruvian Constitution,[88] has as function "the provisional assurance of the effects of final decisions of criminal courts and neutralization of the irreparable damages that may result from the duration of the process while ensuring the right to effective jurisdictional protection.[89]

According to what has been pointed out by Granados and Villa,[90] "in administrative contentious proceedings, the granting of a precautionary measure implies the relativization of the privilege of executability and enforceability of administrative acts, i.e., their presumption of validity,[91] and with it, the possible involvement of the legal assets which were protected through such acts."

87 CASSAGNE, Juan Carlos, Precautionary measures in the Contentious Administrative Proceeding. LL, 2001-B, 1090. In fact, GONZÁLEZ, points out that "the essence of the Administrative Law lies in the perfect equation between the prerogative and the guarantee. If public interest requires that the entities responsible for their execution not to follow classic standards of Common Law and adopt a position of supremacy in respect to the people with whom they interact, in order that this prerogative system does not end in injustice, it is necessary that it be indissolubly attached to a perfect system of guarantees." In GONZÁLEZ Jesús. *Comentarios a la Ley de la Jurisdicción Contencioso-Administrativa. Madrid: Civitas*, 1998, p.2024.

88 "*No due process, no Constitutional Rule of Law, no democracy would exist, if after a case is solved by the judicial authority, the compliance with the decision adopted is impossible*." Cf. Judgment of November 27, 2005, legal basis 49 of docket No 0023-2005-PI/TC.

89 Judgment of August 10, 2012, legal basis 7, Docket 0295-2011-Q/TC, vote of the judges Mesía Ramirez and Eto Cruz.

90 GRANADOS, Milagros and Francisco VILLA: "Constitucionalidad de las disposiciones orientadas a fortalecer la fiscalización ambiental contenidas en la Ley Nº 30011". In GÓMEZ, Hugo (editor) *El nuevo enfoque de la fiscalización ambiental*. Lima: Organismo de Evaluación y Fiscalización Ambiental, 2013, p. 56.

91 DE LA SIERRA, Susana. *Tutela cautelar contencioso-administrativa y derecho europeo*. Thomson Aranzadi. Navarra: 2004, p. 126.

Simon[92] points out that the precautionary process is configured as a set of acts originated in a claim of equal nature (cautionary, provisional or precautionary), oriented in a coordinated and progressive way towards the issue of a court ruling that ensures effective judicial protection, making possible the subsequent compliance of the judgment of merit to fall in another process, whether filed or executed.

On the other hand, as indicated by Palacio[93] the precautionary process "is the one that tends to prevent that law whose recognition or action is obtained through another process, loses its virtuality or efficacy during the period elapsed between the initiation of that process and the final verdict."

The purpose of a precautionary measure is to ensure that in the course of the process the undermining suffered is not harmed or aggravated, because in case this right is not protected, the ruling issued during the process could become ineffective.

In this understanding, Calamandrei[94] explains that precautionary measures, as long as they are inevitably preordained for the issuance of a subsequent final decision, they lack of an end in themselves. For this reason, this author understands that in the end they are temporary.

Judicial protection establishes the right an individual has of requesting the enforcement of precautionary measures, seeking to protect his/her interests. This principle is in Article No 139, Sub-Paragraph 3 of the Political Constitution of Peru:

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92 SIMON, Ramiro. *La tutela cautelar en la jurisdicción contenciosa administrativa*. Buenos Aires: Lexis Nexis, 2005, p. 61. Similarly, KIELMANOVICH argues that "we conceive the protection process as the one that has as purpose a true preliminary request (...) We understand that it is a process that conceptually enjoys autonomy, by its peculiar structure, degree of differentiated knowledge and particular tax for the adoption of precautionary measures (…) preliminary request is autonomous by its own nature and because it is not confused with the claim, object of the contentious process or with the request of the extra-contentious object, but this is about a request, or if you prefer action, different from the claim or request actuated in the main process, called to have a provisional virtuality, even though there may be any coincidence between the goodness of life apprehended in one and another." In KIELMANOVICH, Jorge L. *Medidas cautelares*. Santa Fe: Rubinzal-Culzoni, 2000, pp. 20 and 49.

93 PALACIO, Lino. *Manual de derecho procesal civil*. Décimo cuarta edición. Buenos Aires: Abeledo Perrot, 1998, pp. 773-774.

94 CALAMANDREI, Piero, *Introduzione allo studio sistematico dei provedimenti cautelari*. En AYERRA, Marino. Buenos Aires: El Foro, 1996, p. 40.

> Article No 139.- The following are principles and rights of the jurisdictional function:
> 3. The observance of due process and jurisdictional protection. No person can be diverted from the jurisdiction predetermined by the Law, nor subjected to processes other than those previously established, or judged by courts of exception or by special commissions created for the purpose, whatever their denomination.

The purpose of precautionary protection is to ensure the effectiveness of the main process, i.e., that the judgment which puts an end to the process will deploy all its effects.

Within the LPAG the precautionary measures are found in Article No 146 of the LPAG:

> Article 146.-Precautionary Measures
> 146.1 Once the procedure is started, the competent authority through motivated decision and with sufficient evidence can take, provisionally under his responsibility, the precautionary measures established in this law or other legal provisions applicable, by supported decision, if there is the possibility that without their adoption there is the risk of efficacy of the judgment to be issued.
> 146.2 Precautionary measures may be modified or lifted during the course of the procedure," ex officio or at the request of the party, in virtue of sudden circumstances or which could not be considered in their adoption.
> 146.3 Measures expire by operation of law when the order that ends the procedure is issued, when the time period fixed for its execution or issuance of the decision which ends the procedure has elapsed.
> 146.4 Measures cannot be issued which may cause impossible repair to the companies (...)"

In the case of contentious administrative proceedings, Article No 35 of Law 27584 - Law that regulates contentious administrative proceedings,[95] refers to the rules of the civil procedure code, in regard to precautionary measures, besides regulating the requirements, which we consider that complement with the rules outlined by the Civil Procedural Code.

> Law that regulates the Contentious Administrative Proceeding, Law No 27584

95 Published in the Official Gazette *El Peruano on December* 7, 2001.

Article No 35.- Opportunity
The precautionary measures may be issued before a process is started or inside this, provided that it is intended to ensure the effectiveness of the final decision.
For this purpose, the rules of the Civil Procedural Code with the established specifications will be followed in this Law (emphasis added).

Article No 36.- Requirements
Precautionary measures will be issued in the form that was requested or in any other form deemed appropriate to ensure the effectiveness of the final decision, provided that:

1. From the grounds exposed by the petitioner the right invoked is considered credible. For this purpose, the reasons exposed by the petitioner must be analyzed with the principle of presumption of legality of the administrative act, without which the latter preventing the jurisdictional authority to grant a precautionary measure.

2. Based on the grounds exposed by the petitioner it is considered necessary to issue a preventive decision as the delay of the process constitutes a risk or for any other justifiable reason.

3. The requested precautionary measure turns out to be appropriate to ensure the effectiveness of the claim.

Article No 37.- Measures to innovate and do not innovate
Precautionary measures to innovate and do not innovate are especially appropriate in the contentious administrative proceedings.

The requirements for the request of a precautionary measure, as well as the contents of this, and their characteristics are regulated in Article No 610 of the Civil Procedural Code (CPC, by its initials in Spanish):

Article No 610.- The one who requests the measure shall:

1. Present the grounds of its precautionary request;
2. Indicate its form;
3. Indicate, if applicable, the assets on which the measure must rest with and amount of their implication;
4. Provide injunction bonds; and
5. Designate the corresponding body of judicial assistance, if applicable. When it is a natural person, this individual shall show proof of identity enclosing a certified copy of the ID.

In relation to the precautionary measures, it must contain three essential requirements:[96] the legal credibility, the risk in delay and reasonableness. Its main characteristic is being an instrumental element to the main process:[97]

a) Legal Credibility

According to Monroy,[98] the credibility in law, or also called *fumus boni iuris*, is nothing more than the appearance of the law, which, based on a reasonable legal basis about the law to which it claims, can create, *prima facie*, some conviction in the judge about the grounds of the claim.

Meanwhile Rocco points out that "the so-called *fumus boni iuris* is no more than a subjective evaluation and, to a large extent, discretionary, of the judge on the appearance that there are interests, protected by the law, completely summary and superficial."[99]

The credibility does not imply that the claim requested in the main process is certified, since a ruling based on such characteristics will establish a prejudgment; it is just to establish that there is a probability that he who

96 Civil Procedural Code
Article No 611. Content of the precautionary decision.
The judge considering the nature of the main request and in order to achieve the efficacy of the final decision, issues a precautionary measure in the requested form or in that considered adequate, provided that from what has been exposed and the evidence submitted by the petitioner, it may be considered:

1. The legal credibility of the right invoked.
2. The need to issue a preventive decision as the delay in the process or any other justifiable reason may constitute a risk.
3. Reasonableness of the measure to guarantee the efficacy of the request. The measure issued, only affects assets and rights of the parties bonded by material relationship or its successors.
   The decision specifies the form, nature and scope of the injunction bond.
   The ruling which protects or rejects the precautionary measure is duly motivated under the sanction of nullity.

97 Civil Procedural Code
Characteristics of the precautionary measure.
Article No 612. Every precautionary measure implies a prejudgment and is temporary, instrumental and variable.

98 MONROY, Juan. "El juez nacional y la medida cautelar". *La formación del proceso civil peruano. Escritos reunidos*. Comunidad. 2003, p. 170.

99 ROCCO, Ugo. *Tratado de derecho procesal civil T.V*. Buenos Aires: DEPALMA, 1977, p. 48.

requested the precautionary measure will obtain a favorable ruling in process. In this same sense, Calamandrei[100] points out that:

> Precautionary cognition is limited in all cases to a judgment of probabilities and credibility. Declare the certainty of the existence of the right is a function of the main precautionary measure; in interim proceedings it is sufficient that the existence of the right appear credible, or to put it more clearly, it is enough that, in terms of statistical probabilities, it can be anticipated that the main precautionary measure will declare the right favorable to the one requesting the precautionary measure. The result of this summary cognition about the existence of right has, in all cases, a value not of a declaration of certainty but of a hypothesis: only when the order is rendered it will be seen if the hypothesis corresponds to reality.

Meanwhile CASSAGNE and Perrino[101] argue that "it is a safeguard linked to the appearance of good right (resulting in a lower rigorousness in the evidence of the ownership of the right which will only be clarified in the judgment) which is to be understood as the probability that the right exists and is not as its undeniable reality, that can only be achieved at the end of the process."

According to the above, it can be said that it is sufficient to verify the appearance of the right invoked by the actor, based on the probability of receiving a favorable ruling during the development of the process.

The Supreme Court of Justice of the Republic of Peru has also a case-law with respect to the subject of credibility:

> PRO TEM CIVIL DIVISION
> APE L. 150-2007
> LIMA
> Precautionary Measure
> FIVE.-That, however, with regard to the appearance of the right invoked or fumus boni iuris, this contains a condition related to the fact that the right invoked in the order has sufficient degree of credibility to justify the adoption of the precautionary measure required, all this under the understanding that these are not only temporary, instrumental and

100 CALAMANDREI, Piero. Óp. cit., p. 77.

101 CASSAGNE, Juan Carlos y Pablo E. PERRINO. *El nuevo proceso contencioso administrativo de la provincia de Buenos Aires*. Buenos Aires: Lexis Nexis, 2006, p. 341.

variable, but that in addition they import a previous prosecution, as refers number six hundred twelve of the Civil Procedural Code;
(Source: Case-law CD, Case-law RAE)

AP. No 443-2004
LIMA
SECOND.-That Article No 36 of Law No 27584, Law on the Contentious Administrative Proceeding establishes requirements for the granting of the precautionary measure, and pursuant to the second paragraph of Article No 35 of this provision, the Civil Procedural Code is of supplementary application, specifically Articles No 608, 610 and 611, respectively, which correspond, together with the doctrine, in which the assumptions are: to) the appearance of right, called the fumus bonis juris as fundamental assumption, through which the measure is granted not on the basis of the existence of an evident right which favors the petitioner, but because there is an appearance that the right invoked has grounds; in addition the claimed right should enjoy credibility.
(Source: Case Law CD, Case Law RAE).[102]

b) Risk In the Delay

Every precautionary request has as second essential requirement substantiate risk in delay (*periculum in mora*); i.e. the underlying risk during the course of time, whereby the effects of the decision established in the process is unworkable in practice.

In other words, before the possible completion of a risk, provisional protection is required in order to avoid the risk that, in the event that the applicant obtains a final decision, this lacks of effects. In words of GARCIA DE ENTERRÍA and Fernandez[103] *periculum in mora* is the urgency to avoid that delay in the decision of the main dispute may cause considerable harm.

This assumption stems from the potential threat that the sentence becomes ineffective, this during the time that elapses during the process. From this assumption, it is said that it comes the interest by requesting the precautionary protection, as it seeks that the right claimed in this process is not affected,

102 *BENITES, Junio. El derecho a la tutela cautelar en el derecho procesal civil y procesal constitucional. Lima: Ediciones Caballero Bustamante, 2009, pp. 15-16.* Consultation: February 3, 2014. www.raejurisprudencia.com.pe

103 GARCÍA DE ENTERRÍA, Eduardo y Tomás-Ramón FERNÁNDEZ. Op. cit., p. 628.

since there is the possibility that the generated damage cannot be restored or reverted.

The risk that an irreparable and imminent harm occurs is one of main reasons why a precautionary measure is requested, in the words of Gallegos[104] there is no precautionary measure that is not given to dispel fear of imminent harm; it constitutes the legal rationale and in fact of precautionary measures that substance with them.

According to Monroy "(...) the periculum in mora is the verification that the judge makes, that if he does not grant the precautionary measure, the final judgment might be illusory or unenforceable. In this sense, there must be a threat that puts at risk the effectiveness of the decision.[105]

In the opinion of Chiovenda, the interest for the granting of a precautionary measure "(...) always arises from the existence of a danger of legal damage, derived from a definitive judicial order (*periculum in mora*) (...)." The same author says that: "(...) The periculum in mora is a typical and distinctive condition of precautionary measures, in these cases the common judicial protection can assume a preventive character (...)."[106]

According to the above, we could say that the danger in delay is referred to two possibilities, the first one is the possibility of executing a judgment and that this may be viable, and a second possibility, referred to the risk that derives from affecting a right and that such affectation which extends to the culmination of the process, makes impossible the possibility of redress or remedy the right affected.

c) Suitability or reasonableness

With respect to this last requirement many authors consider that precautionary measures are based on the legal credibility and the risk in the delay, as that includes the concept of suitability or reasonableness in what credibility has indicated, however, authors like Ledesma point out as follows on suitability or reasonableness:

104 GALLEGOS, Pablo. *Las medidas cautelares contra la Administración Pública*. Buenos Aires: Ábaco, 2002, p. 70.

105 Citado por SIMONS, Adrián. "Medidas cautelares especiales y poder general de cautela". *Revista Advocatus*. Nº 7. Diciembre del 2002, p. 161, Lima.

106 CHIOVENDA, Giuseppe. *Curso de Derecho Procesal Civil*. México: Editorial Harla, 1997, pp. 77.

> It implies that the precautionary measure to be granted has an intimate relationship with the main request, i.e. the precautionary measure seeks to ensure the effectiveness of the future judgment, but not changing the meaning of its concession. In this sense, the judge must assess if the precautionary measure requested by the petitioner has a relationship with that of his claim request, and in case he sees that the request for precautionary measure does not have it, the judge ex officio judge can adapt it and grant a different precautionary measure to that requested, but which relates with the principal claim. It is important that precautionary measures are congruent and proportionate with the main claim. In that sense, congruence implies a logic correlation between the request and judicial protection; while proportionality implies a quantitative rating in relation to the measure granted and the object of protection.[107]

In our legal system in Article No 611 of the Civil Procedural Code, suitability or reasonableness is included as an element of precautionary measures.

> Article No 611.-Content of precautionary measures
> The judge, according to the nature of the main claim and in order to achieve effectiveness in the final decision, dictates precautionary measure in the requested form or in the way the judge considers appropriate, provided that from the statement and the proof submitted by the petitioner, the judge may appreciate:
>
> 1. The credibility of the right invoked.
> 2. The need for the issuance of a preventive decision as a delay in the process or any other justifiable reason is a risk.
> 3. The *reasonableness of the measure to ensure the effectiveness of the claim.*
> The measure issued only affects assets and rights of the parties linked by a material relation or its successors, as the case may be.
> The decision indicates the form, nature and scope of injunction bonds.
> The decision that protects or rejects the precautionary measure is properly motivated, under penalty of nullity.

In relation to the above, it is understood that this requirement is related to the principle of reasonableness, whereas reasonableness and proportionality are concepts that our legal system understands as synonyms, and is related to the fact that this measure is not only proportional or reasonable to the right

107 LEDESMA, Marianella. *Las medidas cautelares en el proceso civil*. Primera edición. Lima: Gaceta Jurídica, 2013, p. 205.

invoked in the main proceedings, but, in addition, from this reasonableness or proportionality, the balance between the damage for not having provided the precautionary measure should be proven, as there may be the possibility that because the precautionary measure was not granted some damage may occur which cannot be adequately redeemed through compensation which is considerably more serious than the damage the affected party may suffer by the measure, if it is granted.

In our legal system, we have different examples on the implementation of this concept, such is the case of Docket No 1209 - 2006-PA/TC,[108] in the proceeding followed by the Compañía Cervecera Ambev Perú S.A.C. against Backus, where the Backus Company argued that Ambev should not use the containers of its property; proceeding in which a precautionary measure was issued ordering Ambev to refrain from using any type of packaging, or introducing or commercializing other containers, while the main proceeding was being solved, a measure which was confirmed in the second instance. From all of this the company Ambev questioned such measure through a special proceeding, which was declared founded in the Constitutional Court among other reasons, because it was disproportionate, and was developed in legal basis 62: principle of proportionality (sub-principle of necessity), which must contain a precautionary decision:

> In this sense, which from a procedural perspective is known as principle of congruence, or in precautionary theory as principle of minimum interference, or "principle of suitability" serves to delimit the powers of the judge to issue precautionary measures, since it allows that the measure adopted to be not only adequate for the aim pursued, but at the same time not so harmful that it may cause even greater havoc compared to the danger of irreparable damage which is intended to guarantee on adopting it. In synthesis, the judge who adopts a precautionary measure, knowing of the omnipotence of his powers, should try that the measure adopted, not only is restricted within the scope of the main process, but within the possible alternatives presented (for example, among various types of possible assets to be affected), should opt for that formula which affects in a lower degree the rights of the person or persons on whom it will fall. From a constitutional perspective, such principles of precautionary measures are protected through the principle of proportionality and, in particular, through the sub-principles of adequacy and need. The objective is to optimize procedural techniques for the protection of rights

108 Published in the Official Gazette El Peruano on November 30, 2006.

> for the purpose of ensuring the observance of the rights not only from the person requesting a precautionary measure, but also and with even greater rigor, of the person who will suffer them (...).

According to the amendments laid down in Article 20-A, by Law No 30011; the person who seeks to suspend the process of compulsory enforcement filed by OEFA shall request a precautionary measure to comply with all the above features, as the process is no longer suspended by filing a procedure of compulsory enforcement, as regulated by Article No 16 of the TUO of the Law on the Proceedings for Compulsory Enforcement. The judge shall analyze all the assumptions mentioned to be able to grant a precautionary measure that suspend the coercive collection process started by an act issued from OEFA.

3.4 Injunction bond

Injunction bond is a guarantee that ensures granting of a precautionary measure, depending on the eventual damage that this could cause to the other party. On this issue, Peyrano[109] states the following: "(...) injunction bonds (...) must cover any damages incurred by precautionary measures requested without right, not being necessary to cover the amount by which the measure has been locked and which must not be equivalent to the amount of the judgment. The adjustment of the amount of the injunction bond is influenced by the degree of credibility of law alleged by the petitioner of the respective precautionary proceeding."

Within our legal system, an injunction bond is not defined; however, we found in Article No 613 of the Civil Procedural Code, that it has a restoration purpose in the event that the implementation of a precautionary measure (malicious or unnecessary), requested by the applicant and granted by the Court, harms the person against whom it is directed:

> Article No 613- Injunction bonds and judge discretion
> Injunction bonds are intended to *assure the aggrieved party with a precautionary measure for the compensation of damages that its execution might cause*.
>
> The admission of injunction bonds, in terms of their nature and amount, is decided by the judge, who can accept the proposal by the applicant,

109 PEYRANO, Jorge. *Compendio de reglas procesales en lo civil y comercial*. Segunda edición actualizada. Rosario: Edit. Zeus, 1997, p. 88.

> graduate it, modify it or even change it for whichever is necessary to ensure possible damage that the execution of the precautionary measure could cause.
>
> Injunction bonds can be real or personal in nature. The promissory oath is included in the second one, and can be admitted, duly substantiated, provided that it is proportionate and effective. This form of injunction bonds is offered in the letter containing the request for injunction bonds, with certification of the signature before the respective clerk.
>
> The personal property injunction bond is constituted with the merit of the judicial decision that supports it and falls on the property of the person who offers it; the judge forwards the respective official letter for its registration in the corresponding registry.
>
> If the injunction bond is executed, it is acted, at the request of the person concerned, before the judge who ordered the measure and in the same precautionary notebook; which solves what is suitable previous transfer to the other party.
>
> "When the injunction bond subjected to term is accepted, this remains without effect, in the same way as the precautionary measure, if the petitioner does not extend it or offers another of the same nature or efficiency, without having to request and within the third day of the expiration of the deadline." (emphasis added).

On injunction bonds, Calderon[110] points out that the bond is "an instrument which serves to restore the lost balance on granting the measure, acting as a condition of this measure and contributing to the immediate compensation of the damages its execution may cause".

Moreover Monroy[111] holds that the promissory oath is a "procedural guarantee that protects the interests of the respondent affected by the precautionary measure. An 'injunction bond, 'then, as it is a guarantee in relation to another

110 CALDERÓN, María Pía. *Las medidas cautelares indeterminadas en el proceso civil*. Madrid: Editorial Civitas, 1992, p. 52.

111 MONROY, Juan José. *La tutela procesal de los derechos*. Lima: Palestra Editores, 2004, p. 264.

locked against. Thus, others refer to the promissory oath as the 'precaution' of the respondent."[112]

Authors like Chiovenda define the injunction bond or promissory oath from its purpose, pointing out that it is that measure which is instituted for ensuring compensation for damages of the person who has been deprived or decreased of the use of an asset by virtue of a preventive measure, and that, for this reason it can be accompanied by an injunction bond that is to say, the order to the actor to provide a bail.[113]

Moreover, Podett[114] bases himself on the fact that the principle of equality replaces in a certain measure the controversy, as it implies that the precautionary measure must have two purposes, by ensuring a protection from an alleged right for the actor, and a possibility of compensation for damages for the respondent, in the event that such right did not exist.

According to Lazzari[115] an injunction bond is a condition of enforceability of the precautionary measure, and not an assumption of the precautionary measure. It complies with a guarantee role for the damages that may eventually be caused to the affected person if it should turn out that the applicant abused or exceeded in the right, granted by law.

In this regard Arazi[116] notes that the injunction bond is based on the principle of equality, since it seeks balance between the parties, by postponing bilateralism: on the one hand the petitioner is authorized to ensure a right not recognized at Court, without hearing the other party, but on the other the petitioner is guaranteed the effectiveness of compensation for damages caused, if that right did not exist.

112 However, this same author, in his work *Bases para la formación de una teoría cautelar denies the relevance of the term* injunction bond, on the basis that such guarantee does not have a precautionary nature, suggesting the name of "bond". As can be seen we share this position, reason why in this work we refer to injunction bond as bond.

113 CHIOVENDA, Giuseppe. Op. cit., p. 282.

114 PODETTI, Ramiro. *Derecho procesal civil comercial y laboral. Tratado de las medidas cautelares*. Buenos Aires: Ediar, 1956, p. 61.

115 DE LAZZARI, Eduardo Néstor. *Medidas cautelares*. La Plata: Librería Editora Platense, 1988, p. 112.

116 ARAZI, Roland. *Medidas cautelares*. Buenos Aires: Astrea, 2007, p. 7.

It is pertinent to point out that number 4) of Article No 610 of the Civil Procedural Code establishes as a requisite for the granting of precautionary measures, that an injunction bond be provided. The admission of the injunction bonds as stated in Article No 613 of the Civil Procedural Code mentioned above, with respect to their nature and amount, will be established in accordance with the criterion of the judge, who is entitled to accept it as it what was offered, or otherwise this judge can adjust it and even modify in all the aspects he considers necessary, implying that it will be the judge who decides what measure is the most effective.

Moreover,Calderon,[117] mentioning the book *Teoría general de las medidas cautelares (General theory of precautionary measures)*, of Serra Dominguez, indicates that the effectiveness of precautionary measures depends in many cases of the previous provision of the respective bond, and we find ourselves - under the thinking of the cited jurist - facing "an assumption of the execution not of the concession," implying that there are assumptions in which caution will be a requirement of the procedure for a precautionary measure, and another where they function as measures to guarantee the ruling, and therefore become requirements of their execution.

Writers like Monroy[118] argue that:

> [th]e bond is not a precautionary assumption, but the confirmation that for the granting of the measure, that is to say, for the judge, through summary cognition, can obtain an adequate knowledge of the situation on which the bond is requested, which involves the analysis of the two requirements, delay in risk and probability of law, but not of the procedural bond. This is located in a backplane, to the extent it refers to the possible damages which could result from the performance of such measure, but will not have to do by no means with the rating on the object of the precautionary procedure.

Furthermore, Priori[119] has the same ideology and points out that "injunction bonds are not really assumptions for granting precautionary measures, but for its implementation".

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117 CALDERÓN, María Pía. Op. cit., p. 52.

118 MONROY, Juan. Op. cit., p. 266.

119 PRIORI, Giovanni. *Comentarios a la Ley del Proceso Contencioso Administrativo*. Lima: Ara Editores, 2009, p. 239.

In this line of thinking, it can be said that the purpose of injunction bonds is to protect the right of the one who is affected by a precautionary measure. If the above is moved to the area of the OEFA, and in the provisions of Article 20-A of Law No 29325, amended by Law No 30011, injunction bonds are mechanisms used by the Administration so that it may not be affected in its rights. According to Article 20-A, injunction bonds are a requirement to request a precautionary measure, and it is even required both for the application of a precautionary measure or on requesting judicial review.

It is important to note that an information from the *Diario Gestion*[120], with regard to an interview to the President of the Directive Council of the OEFA, it was indicated that Law No 30011 will reduce legal barriers for the effective collection of environmental fines, since according to what has been estimated until May 8, 2013 by the OEFA, there are around S/.92 (ninety-two) million soles, equivalent to 81% of the total of fines imposed by the environmental enforcement agencies (EFA). This measure complies with the purpose searched with the bond, which is to protect the party affected by this precautionary measure, since the OEFA is a representative of the Administration.

IV. CONCLUSIONS

1. Environmental law is a specialized branch of administrative law; therefore it has the principles and elements of this law, besides the imperative need to regulate and protect the environment from human are activity.

2. The State has a number of powers which allows its operation in an optimal way according to the aims pursued and pre-established policies. One demonstration of these powers, occurred with the entry into force of Chapter II of Title IV of the LPAG, referred to the administrative procedure for imposing penalties.

3. Administrative penalty law is a branch that studies the power of the administration to impose penalties. In our legislation its implication is mainly pragmatic, as it was a natural consequence of the increasing participation of the State in the economy, as well as the different case-law of the Constitutional Court and of national and international doctrine, which continue nurturing the LPAG.

120 PRADO, Alfredo. "Jueces traban cobros de multas ambientales por S/. 92 millones". *Diario Gestión*. Lima, miércoles 8 de mayo del 2013. Consultation: February 4, 2014. <http://gestion.pe/economia/jueces-traban-cobros-multas-ambientales-s-92-millones-2065552>

4. The power to impose penalties seeks to prevent or discourage illicit conducts on the part of the entities, and to this end, legislation has to be oriented.

5. The power to impose penalties is not unlimited or absolute. For this reason, principles governing minimum guarantees of the power of the Administration to impose penalties are regulated in Article 230 of the LPAG, without prejudice to the application of other principles recognized by the Peruvian Constitution and declared through the case-law of the Constitutional Court, understanding that all this is part of the Peruvian legal system. Those principles include: legality, classification and reasonableness (proportionality).

6. The OEFA has been empowered, according to Item b) of Number 1 of the Second Final Supplementary Provision of Legislative Order No 1013, to exercise the powers to impose penalties in the field of its jurisdiction, by applying penalties of warning, fines, confiscation, immobilization, closing or suspension, for offenses that are determined and according to the procedure to be approved to such end.

7. The principle of legality is recognized by item d) number 24 of Article 2 of the Peruvian Constitution, as well as by Article 230 of the LPAG. The principle of legality, under a combined reading, establishes that there can only be penalty with an explicit rule, and that, in the case of administrative bodies, this penalty, which is exerted by the power to impose penalties, can only be assigned by an explicit law; however, in the case of the Administration, a reference to the regulation is envisaged, according to the last paragraph of sub-paragraph 4 of Article 230 of the LPAG, provided this does not create new assumptions or modify the parameters that the law sets out.

8. The principle of legality is directly linked to that of classification, since, through explicit referrals, in some implicit cases, the regulation will be the only way to establish the functions of the Administration and the conducts susceptible to penalties.

9. The OEFA, through the amendments introduced by Law 30011, which amended Articles 17 and 19 of Law 29325, making it possible to define, classify and set criteria, as well as impose adjusted sanctions, meets the criteria and principles indicated by the LPAG and the Peruvian Constitution.

10. The regulation appears in the enforcement system only if it has been authorized by law and can only regulate what was entrusted by law, following the guidelines and criteria contained within the rule. These elements are fully met by Articles 17 and 19 of Law 29325.

11. Self-protection is a power that the Administration has, which allows the Administration through administrative acts to create and modify relationships (power to issue declaratory orders), as well as carry out its decisions without the intervention of a third party, a judge (power to issue executive orders).

12. Self-protection allows the Administration, through the use of coercion, to execute the orders contained in the decisions that regulate legal relations between the Administration and the companies. This attribution of coercive power that management possesses is based not only a presumption of legality but on an existing legal framework which allows the use of force on the rights and property of the company.

13. Precautionary measures are instruments that the parties possess, so that, during the course of the process, the impairment suffered by the administrative is not affected or aggravated, as if this right is not safeguarded, the ruling issued during the procedure may result inefficient.

14. A precautionary measure should comply with three assumptions: credibility of the right, understood as establishing the probability that there is a right on the party requesting it; danger in delay, referred to the fact that during the procedure the damage may be irreparable or the judgment may become ineffective; and reasonableness, understood as the element that establishes that the measure is proportional to the right it seeks to safeguard.

15. In accordance with Article 20-A of Law 29325, which was amended by law No. 30011, the one who wishes to suspend an administrative act of the OEFA, through which he/she is punished, should apply for the granting of a precautionary measure and guarantee the amount of such punishment through an injunction bonds.

16. An injunction bond is the mechanism which according to a literal interpretation of the Civil Procedural Code, would be a requirement of admissibility; however, from a combined reading of the article and the doctrine, as well as the various judgments issued in our legal system at

court and the Constitutional Court level, it is understood that this is a mechanism that allows to guarantee the enforceability of the act.

17. The OEFA, through the Article 20-A of the Law No 29325 amended by Law No 30011, has established the need that, in case the suspension of the process of enforced collection is sought, this only can be suspended through a precautionary measure, which will have as requirement for the future admissibility and execution the presentation of injunction bonds. The fact that 81% of fines imposed by the OEFA were suspended according to the procedure indicated in the TUO of the Law on the Procedure of Coercive Execution, reflects the importance of this law, which allows that fines which seek to preserve the environment, which is the heritage of all, can be effective and are not delayed in time.

18. Injunction bonds are the ideal means through which a person who might be affected by a precautionary measure, in the scope of the implementation of the activities of the OEFA, may be protected. Injunction bonds have the purpose of deterring this illegal behavior of the companies, guaranteeing at the same time the effectiveness of the penalty imposed by the Administration. The purpose of the injunction bonds is to find the adequate balance between the interest of the applicant and the public interest protected by the administration.

19. Amendments incorporated in Articles 17, 19 and 20-A of Law No. 29325, through Law No. 3001 contain an authorization and explicit referral of the law. In this way, they comply with the principles established in of our legal system.

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6.

Thoughts on the power of the public administration to impose penalties

Notes on the initation of the coercive execution procedure and the statute of limitations ex officio

JESSICA VALDIVIA AMAYO

SUMMARY

In this article, the author explains her legal opinions regarding two controverted issues in both the exercise of the administrative function and the doctrine. The first one refers to the possibility that the Public Administration has to initiate the coercive execution procedure before the expiration of the three months period that the companies have to file an administrative contentious claim that contests the action exhausting all available administrative remedies; the second one refers to the possibility that the Public Administration has to declare ex officio the statute of limitations of its power to determine the existence of administrative offenses.

I. Introduction. II. Can the Public Administration initiate a coercive execution procedure before the expiration date of the period that the companies have to file an administrative contentious claim? III. Can the Public Administration declare ex officio the statute of limitations of its power to determine the existence of administrative offenses? IV. Conclusions

I. INTRODUCTION

This article has the purpose to address two specific questions about the Administrative Penalty Procedures. The first question refers to the possibility that the Public Administration has to initiate the coercive execution procedure

before the maturity date of three (03) months period that the companies have to file an administrative contentious claim in order to contest the action that exhausts all available administrative remedies.

The second question refers to the possibility that the Public Administration has to declare ex officio the statute of limitations of its power to determine the existence of administrative offenses.

We know, about both issues, that there are different opinions in both the doctrine and the exercise of the administrative function. In this article we shall present our opinion of both issues considering the management of public entities, in favor of an academic analysis that, we hope, would contribute to the debate.

II. CAN THE PUBLIC ADMINISTRATION INITIATE A COERVICE EXECUTION PROCEDURE BEFORE THE PERIOD EXPIRATION THAT THE COMPANIES HAVE TO FILE AN ADMINISTRATIVE CONTENTIOUS LAWSUIT?

According to the predominant doctrine, the compulsory enforcement of the administrative acts is one of the powers demonstration that derive from the principle of power to issue enforcement orders, that is, the right to dispose the compliance of issues that have been previously solved by the Public Administration without prior judicial intervention so all the administrative acts can be subject to a compulsory enforcement, unless they are excluded by a law and it is required to take the matter to the Judiciary[1].

In this way, the administrative coercive collection, which follows its formal course through a procedure denominated execution, is the procedure used by the public entities against the companies to exercise the legal consequences of the administrative act that issues. In our legal system, such procedure is regulated by the Single Organized Text of the Law No 26979 - Law on Coercive Execution Procedure[2], approved by the Supreme Executive Order No 018-2008-JUS (hereinafter referred to as Law on Coercive Execution).

1 Cf. TIRADO, José Antonio. "La ejecución de los actos administrativos en la Ley 27444". En MORÓN, Juan Carlos. Comentarios a la Ley del Procedimiento Administrativo General. Octava Edición. Lima: Gaceta Jurídica, 2003, p.404.

2 Published in the Official Gazette El Peruano on December 6 2008.

At the same time, the Article No. 196 of the Law No. 27444 – Law on the General Administrative Procedure[3] (hereinafter, LPAG) establishes the compulsory enforcement modalities of the administrative act, to wit: (i) the coercive execution[4] , (ii) the subsidiary execution[5] ,(iii) coercive fines[6] and (iv) enforcement against individuals[7].

Except particular exceptions, as the case of the tax liabilities collections from the Central Government, the coercive collection, as mean of the administrative act enforcement, it is regulated in the Law on Coercive Execution.

3 Published in the Official Gazette El Peruano on April 11 2001.

4 Article No. 197 of the LPAG-Coercive Execution.
If the entity would expect the execution of one liability to give, do or not, the procedure provided in the relevant law shall carry on.

5 Article No. 198 of the LPAG: Subsidiary Execution.
The subsidiary execution will be carried out when it comes to acts that for not being personal can be performed by a different individual of the offender:
1. In this case, the entity shall perform the act, by itself or through the determined individuals, at the expenses of the offender.
2. The amount of the expenses and damages shall be required in accordance with the established in the previous article.
3. Such amount may be liquidated provisionally and made it before the execution or be reserved to the definitive liquidation.

6 Article No. 199 of the LPAG- Coercive Fine
199.1 When authorized by the Law, and in the method and terms determined, the entity can impose, for the execution of determined acts, coercive payments repeated for long enough periods to comply with the established the following cases:
a) Personal acts where the enforcement against individual of the offender are not applicable.
b) Acts where applicable the enforcement, the administration will not consider convenient.
c) Acts which execution the offender may grant to another person.
199.2 The Coercive Fine is separated from the penalties that may be imposed with such capacity and compatible with them.

7 Article No.200 of the LPAG.- Enforcement Against Individuals
The administrative acts that impose a personal liability of not carry out or to tolerate, may be executed for enforcement against individual in the cases on which the law expressly authorize it, and always with all due respect to its dignity and to the rights set out in the Political Constitution.
If the acts were of personal compliance, and not executed, will lead to the payment of the damages produced, which shall be regulated judicially.

Now, it is relevant to comment that all administrative acts has an executive nature, except that there is any legal regulation, to the contrary, a court order or are subject to a condition or term, such as is set out in the Article No.192 of the LPAG.

All the administrative acts (except those expressly established by law) are enforceable; that is, its issuance obligates the immediate compliance although another individual disagree about its legality[8]. This quality of the acts of the Administration applies to all that the Administration determines. In this way, the administrative decision benefits of a legality assumption making it of required fulfillment, without the need of follow any prior declaratory judgment. This legality assumption causes the effect from the determination of the administrative acts. Furthermore, if there is a judgment that ends this act, do not suspend the effects already produced, and the subsequent execution of the appealed act[9].

Rizo explains when analyzing the enforcement nature of the administrative act[10]:

> (…) the Public Administration is invested with all the necessary powers to carry out by it-self the self- protection of its right, and for that declares by itself which is its right, from where the mandatory nature of the administrative act; and proceed to execute by its own means and against the will of the liable parties, what has previously declared. The administrative act is executive and this means the execution power, and enforceable is what by itself is executive, circumstances that determine the administrative act. Furthermore, once the administrative act is carried out, it has legal effect, that is, it has to be accomplished and does not wait nor allow to be postponed the execution. The administrative act is, executive and enforceable; having clear that the executive is a substantial quality and the enforceable is merely instrumental. For that, while this enforcement requires execution force, and does not anticipate the

8 TIRADO, José Antonio. Óp. cit.p.355.

9 REAÑO, Johanna. *Reflexiones sobre la determinación de la responsabilidad civil dentro del proceso de cobranza coactiva*. Thesis to obtain the degree of Magister. Universidad Nacional Mayor de San Marcos, Unidad de Post Grado de Derecho, p.8

10 RIZO, Armando. Manual elemental de derecho administrativo.León: Editorial Universitaria de la UNAN, 1992,pp. 149-150. Consultation: February 27, 2014 <http://issuu.com/ultimosensalir/docs/manual_elemental_de_derecho_administrativo_-_pdf>

> original existence of the enforceability, and this is not inseparable of the enforcement. If both coincide in the administrative act is for the need to hold harmless the interferences in the compliance of the resolutions that affect the public interests and the principle of the independence of the different branches of the government.

To this must be added that in the Peruvian legislation have been established, clearly and restrictively, the requirements that the enforceable administrative act has to accomplish to be in terms of enforcement. Such requirements are included in the Article No.194 of the LPAG which is indicated below:

> Article No.194- Compulsory Enforcement
> Article No 194.- Compulsory Enforcement
> In order to proceed with the compulsory enforcement of administrative acts through their own competent bodies, or through the Peruvian Police Force, the authority fulfills the following requirements:
>
> 1. It is an obligation to give, do, or not do, established in favor of the entity.
> 2. That the duty is determined in writing in a sufficiently clear and complete way.
> 3. That this obligation comes from the exercise of an attribution of power of the entity or from a public law relationship with the entity.
> 4. That the spontaneous compliance of the duty has been required from the company, under penalty of starting the specifically applicable coercive measure.
> 5. That it is not an administrative act which according to the Constitution or the law requires the intervention of the judiciary for its execution.
> 6. In the case of trilateral procedures, final decisions ordering remedial measures constitute enforcement titles according to the provisions set forth in Article No 713 paragraph 4) of the Civil Procedure Code, amended by Law No. 28494, once the administrative decision is final or the administrative proceeding is exhausted.
>
> In the case of final decisions that order remedial measures, the legitimacy to act in civil proceedings of execution corresponds to the parties involved.

Additionally, the Law on Coercive Execution includes in the number 9.1 of its Article No. 9 the concept of enforceable obligation to the company by coercive means:

> Article No.9
> 9.1 It is considered coercively enforceable obligation to that established through administrative act emitted pursuant to law, duly notified *and that has not being subject to an appeal in the administrative proceedings within the deadlines imposed by law or on those obtained effective resolution confirming the obligation* (emphasis added).

Once the characteristics of the administrative act are delimited that might be required to be enforceable, as well as the obligation that is enforceable by this proceeding, the Law on Coercive Execution develops, in its Article No.14, the requirements that shall be accomplished to start the coercive execution procedure per se:

> Article No.14. - *The procedure initiates with the notification to the Offender on the Coercive Execution Decision,* which include a compliance order of a Enforceable Obligation according to the Article No. 9 of this Law; and within the period of seven (7) working days from the notification date, *under penalty to order any precautionary measure or start the compulsory enforcement of these measures* in case that they have been already dictated on the basis of what is set forth in the Article No 17 of this Law.
>
> The coercive enforcement officer *will be able to start the coercive execution procedure* when the administrative act, which is considered as an enforceable instrument, has been duly notified, and *as long as the period for the filing of the corresponding administrative appeals has expired and/or the offender has not submitted an administrative appeal within such specified period.* (Emphasis added.)

In view of the above, it is evident that:

a) Only those administrative acts that follow the premises expressly established in the Article No.194 of the LPAG can be subject of compulsory enforcement.

b) The coercively enforceable obligation (a) must not have been subject to an appeal in the administrative proceedings, within the periods provided by law or (b) must have final decision confirming the obligation.

c) To start the coercive execution procedure is necessary (a) the administrative act considered as enforceable instrument is dully notified and (b) the period for the filing of the corresponding administrative appeals has expired and/or the offender has not submitted an administrative appeal within such specified period.

As it can be observed of the above detailed, in no case – neither to consider that an administrative act is subject to compulsory enforcement nor an obligation is coercively enforceable or to determine the start of the coercive execution- it is a requirement for the coercive enforcement officer to wait until the expiration of the period for the filing of the administrative contentious claim. Moreover, the Article No. 14 of the Law on Coercive Execution indicates that the coercive execution procedure starts with the notification to the offender of the coercive execution decision which contains the compliance order of the enforceable obligation within the period of seven (7) working days after having been notified thereof, period after which the coercive enforcement officer is automatically authorized to take precautionary measures or start the enforcement of those imposed according to the Article No.17 of the Law on Coercive Execution.

In fact, the coercive execution procedure has been started as is required in the Article No.14 of the Law on Coercive Execution, which in the number 17.1 of the Article No 17 of such law, establishes that, once the period of seven (7) working days to which is referred in the Article No.14 has expired and the offender has not complied with the order included in the coercive execution decision, the coercive enforcement officer will be able to allow the impediment of any of the precautionary measures established in the Article No.33 of the referred law, or, in its case, will order to necessarily execute the obligation to do or not to do.

Different is the case, on which the Law on Coercive Execution disposes or regulates the suspension of the coercive execution procedure, fact that by itself determines the pre-existence of a coercive execution procedure already started or in process. In this regard, the item e) of the Article No.16 of the Law on Coercive Execution establishes that no administrative or political authority can suspend the coercive execution procedure, with the exception of the coercive enforcement officer that shall do it, under responsibility, when:

> (…) the period for the filing of the administrative actions for reconsideration, appeal, review is in process or has not expired, or when the administrative contentious claim has been submitted within the period established by law against the administrative act considered as enforceable instrument or against the administrative act that determines the joint and several liability in the assumption set forth in the Article No.18, number 18.3 of this Law (…).

As is observed, the Item e) Article No.16 of the Law on Coercive Execution should be applied on those cases where, once initiated the coercive execution procedure, are provided some of the assumptions expressly detailed in such

article. In a detailed reading of the referred item, we note that we would be facing three (3) different assumptions of suspension of the coercive execution procedure: (i) when the period for the filing of the administrative actions for reconsideration, appeal, review is in process or has not expired, or (ii) the administrative contentious claim has been submitted within the period established by law against the administrative act considered as enforceable instrument or (iii) the administrative contentious claim submitted within the period established by law against the administrative act that determines the joint and several liability in the assumption set forth in the Article No.18, number 18.3 of the Law on Coercive Execution.

This reading of the Item e) of the Article No.16 of the Law on Coercive Execution would result congruent with the provided in the Article No.14 of such law, meanwhile this one considers as condition to suspend the coercive execution procedure that "the period for the filing of the corresponding administrative appeal has expired and/or the offender has submitted such appeal within the specified timeline" (filing of the corresponding administrative appeals mean proceeding for reconsideration, appeal and review). This include two different and particular situations for the suspension of such procedure, that involves, in both cases, the file of the administrative contentious claim (one against the administrative act that is considered as enforceable instrument and the other one against the administrative act that determines the joint and several liability in the assumption referred to in the Article No.18, Number 18.3 of the Law on Coercive Execution). The filing of such judicial appeals and the remission to the coercive enforcement officer of the evidence that this has been carried out, would be the mechanism that would stop or suspend the coercive execution procedure once it has been determined by the coercive enforcement officer.

In this line, the Number 16.3 of the Article No.16 of the Law on Coercive Execution establishes that "[the] Offender will be able to request the suspension of the procedure as long as is based in some of the legal grounds set forth in this article, presenting to the Coercive Enforcement Officer the corresponding evidences". In this sense, if the company submitted evidence (for example, the acknowledgment of receipt of the filing of the claim before the Judiciary) proving that the administrative contentious claim was filed within the specified period, the coercive enforcement officer would have to proceed with the suspension. Also it is affirmed by Pedreschi when he indicates the following "[the] concurrency of grounds of suspension of the coercive execution procedure can be supported in any evidence, wherever appropriate,

and the general provisions set forth in the Articles No.162 and seq. of the Law No. 27444 will be applied for such purposes"[11].

In such sense, to suspend the coercive execution procedure by the filing of the administrative contentious claim, as is set forth in the Item e) Article No. 16 of the Law on Coercive Execution, it would be necessary that such proceeding has been initiated, since the initiation of the coercive execution procedure would not be subject to the process of the legal period to file the administrative contentious claim. In that line, the Court of Appeals in and for Lima has maintained this same argument in the recitals 8 and 9 of the Decision No.13 entered on the Docket No 572-2006 filed by Expreso Wari S.A.C against Indecopi:

> Eight.- That, in accordance with the Number 2 of the Article 14 of the referred Law, "The Coercive Enforcement Officer shall only initiate the procedure when the administrative act, considered as enforceable instrument, has already been duly notified, and as long as the period for the filing of the corresponding administrative appeals has not expired".
> Nine.- that, strictly speaking and according to a systematic interpretation, *the commencement of the coercive procedure is not subject to the expiry of the period established in the Law for the filing of the review or administrative contentious claim, as erroneously is affirmed by the plaintiff.* (Emphasis added)

Now, in the same lines of analysis, there are special rules regulating the effectiveness and enforceability of the decisions issued by the last administrative instance, which include specific requirements in order to protect the enforceability of its decisions. Thus, for instance, the Article No.19 of the Legislative Order No. 1033 – Law on the Organization and Functions of the National Institute for the Defense of Competition and of Intellectual Property (INDECOPI)[12] establishes that the decisions issued by the divisions of the Tribunal for Defense of Competition and Intellectual Property are executed immediately, without prejudice to that the interested party files the corresponding lawsuit. Additionally, when a division of the Tribunal issues a decision that imposes or confirms in part or in its entirety the determination of a liability subject to a coercive execution, the appeal of the decision before the Judiciary through the Administrative Contentious Proceeding suspends the corresponding coercive execution procedure only if the compliance of such liability is covered by a letter of guarantee.

11 PEDRESCHI, Willy. "Breves notas sobre el tratamiento actual del procedimiento de ejecución coactiva de las obligaciones no tributarias de competencia de la Administración Pública". Revista Derecho & Sociedad No.25, 2008, p.346, Lima.

12 Published in the Official Gazette El Peruano on June 25, 2008. p.346, Lima

With the same perspective, the Article 20-A of the Law No. 29325 - Law of National Environmental Assessment and Enforcement System[13], by regulating the enforceability of the decisions of the Agency for Environmental Assessment and Enforcement (OEFA), establishes that the filing of an administrative contentious claim of amparo or other type, does not interrupt nor suspend the coercive execution procedure of the decisions of first or second administrative instance referred to the imposition of disciplinary penalties issued by such entity. In this way, impose- without prejudice to the requirements and other regulations established in the Civil Procedural Code in terms of precautionary measures – that when the company, in any type of judicial proceeding, requests a precautionary measure which has the aim to suspend or rescind the decisions of first and second administrative instances referred to the imposition of disciplinary penalties (included those issued in the coercive execution procedure or with the aim of limit any of the specified powers of the OEFA) present real or personal property injunction bond (and in no case promissory oath) that complies with minimum strict requirements.

In such way, it is noted that the different entities of the State have improved and exceeded the mechanisms established in the Law on Coercive Execution to oversee the duly compliance and the enforcement of the decisions of its Tribunals of last instance in order to the file contentious administrative claims stop its effects if and only if they are filed along with letters of guarantee or precautionary measures duly supported, as is the case of the OEFA.

As a result of the previous explanations, it would result feasible to argue that the execution of the administrative act starts independently from the maturity date of the period of three (3) months to file the administrative contentious lawsuit against the act as an enforceable instrument being the enforcement officer able to impose precautionary measures once the maturity date of seven has expired referred in the Article No. 14 of the Law on Coercive Execution. The coercive enforcement officer shall suspend, under responsibility, the execution proceeding once the company demonstrates with evidence that has filed the respective contentious administrative claim within the period of the law, therefore it is formed the condition of suspension regulated by the item e) of the Article No.16 of the Law on Coercive Execution. Also, in the case of the especial rules that stipulate that the mere filing of the administrative contentious claim does not stop the effects of the last instance decision questioned, additionally, the strict requirements that ensure the effective enforcement of the administrative decisions must be complied.

13 Published in the Official Gazette El Peruano on March 5 2009.

III. CAN THE PUBLIC ADMINISTRATION DECLARE EX OFFICIO THE STATUTE OF LIMITATIONS OF ITS POWER TO DETERMINE THE EXISTENCE OF ADMINISTRATIVE OFFENSES?

According to the doctrine, statute of limitations is a legal concept linked historically to the private law and civil action, with origin in the Roman law[14]. The statute of limitations has been defined as the "way to extinguish the proprietary rights because the holder of these rights has not exercised them during the lapse determined in the law"[15].

The purpose of such concept is to provide to the party, holder of a liability, the power to be exempt from payment of such liability by alleging, in a legal proceeding, the course of certain period legally established without the request of the payment by the creditor.

Due to the independency of the administrative law, this one includes for its proceedings certain concepts of the private law, among them, the statute of limitations[16].

Thus, the Article No 233.1 of the LPAG establishes the following:

a) The power of the authority to determine the existence of administrative offenses prescribes in the period established by special rules.

b) This without prejudice to the deadlines of the statute of limitations with regard to the other liabilities that derivate from the effects of the commission of offenses.

c) In this case it has not been determined, the power to determine the existence of administrative offenses prescribes at four (4) years.

14 VIDAL, Fernando. Código Civil comentado por los 100 mejores especialistas. Tomo X. Primera edición. Lima: Gaceta Jurídica, 2005, p.253.

15 CABANELLAS, Guillermo. Diccionario Enciclopédico de Derecho Usual. Tomo VI. Buenos Aires: Editorial Heliasta. Décimo octava edición, 1981, p.376.

16 Regarding to the evolution of the administrative law as autonomous branch, see: RODRÍGUEZ, Libardo. Derecho administrativo general y colombiano. Duodécima edicipón. Sante Fe de Bogotá: Editorial Temis, 2000, p.19.

The Article No 233.3 of the LPAG continues pointing out that the companies present the statute of limitations through defense, and the authority shall solve it only with the verification of the periods, and if it is considered as founded, decide the initiation of the responsibility actions to clarify the causes of the failure to undertake the administrative action.

It is clear that the statute of limitations as a part of the Administrative Penalty Procedures is regulated in the LPAG. However, it is expressly acknowledged, only the statute of limitations alleged by the companies in defense and not the statute of limitations by law evoked by the administrative authority. Regarding to this, it shall be analyzed if it is possible that the Public Administration declares ex officio the statute of limitation of its right to determine the existence of administrative offenses.

In this respect, it is convenient to mention that our civil legislation is clear on the fact that the statute of limitations can be alleged, only by the debtor, consequently the declaration ex officio is prescribed[17]. In effect, the Article No. 1992 of the Civil Code clearly establishes that "[the judge cannot substantiate a ruling in the statute of limitations if it has not been evoked". However, in administrative matters, although the Article No. 233 of the LPAG provides that the entities present the statute of limitations by filing a defense, such law does not provide, in any of its articles, the limitation of the Public Administration in declaring ex officio the statute of limitations of its right to determine the existence of administrative offense.

The rule of declaration of the statute of limitations upon the request of the party becomes important in a civil proceeding, in which private interests are disclosed, therefore, the party benefited for this statute of limitations, if it is requested, is able to waive it. However, the declaration ex officio of the statute of limitations of its own right by the administration to determine the existence of administrative offenses would result favorable for the companies in order to avoid that such companies are exposed for an unlimited period to the power to impose penalties by the Public Administration.

In the same regard, the group of work in charge of reviewing and amending the LPAG sees the need to regulate the statute of limitations ex officio invoked

17 Article No.1992 of the Civil Code.- Prohibition of declare by law the statute of limitations. The judge cannot file his judgments in the statute of limitations if it has not been appealed.

by the Administrative Authority[18]. In effect, the amended Article No.233.3 of the LPAG proposed by the group of work indicates the following:

> 233.3 *The authority will declare ex officio the statute of limitations* and shall terminate the proceeding when it points out that the period for determining la existence of offenses has expired. Likewise, the companies will be able to file the statute of limitations by filing a defense, and the authority shall solve it only with the confirmation of the periods.
> In case the statute of limitations is declared, the authority shall initiate the necessary actions to determine the causes and responsibilities of the failure to undertake the administrative action (Emphasis added)[19].

In that regard, when explaining the amendments included in the draft bill that suggests the amendment of the LPAG, the group states the following regarding the new Article No 233.3:

> Nowadays, it is expressly stated that the authority shall declare ex officio the statute of limitations and shall terminate the procedure when it points out that the period for determining the existence of offenses has expired. This is included in the established content of the referred provision, where it is established that the companies will be able to file the statute of limitations in defense, and the authority shall solve it without any proceedings and only with the confirmation of the periods. Also, it is maintained the reference, applicable to the two assumptions that are included in the Number 233.3 of the Article 233 today, that in case the statute of limitations is declared, the authority shall initiate the necessary actions to determine the causes and responsibilities of the failure to undertake the administrative action.

It is interesting to verify that the work group not only wants to protect the private right in order not to be indefinitely followed by the authority to sanction of the administration when regulating the declaration ex officio of the statute of limitations, but at the same time, seeks for the protection of the public interest when including in this case the determination of the causes and responsibilities of the failure to undertake the administrative action in case of filing a statute of limitations (as also happens in the case of the statute of limitations upon the request of the party).

18 Group created by Ministerial Order No 0155-2012-JUS (and amendments) issued by the Ministry of Justice and human Rights

19 The Draft plan of the law that proposes the amendment of the Law 27444- Law of General Administrative Procedure.

This proposal becomes increasingly clear when verifying that the statute of limitations, in an administrative matters, is related to the power assigned to the administrative authority to impose penalties, circumstance that requires the assessment ex officio if the period of the statute of limitations has expired, having into account that the power is a requirement of validation of the administrative acts, which shall be necessarily analyzed in each case, and the legality principles and duly proceedings regulated precisely by the Article No. 230 of the LPAG when referring to the power to impose administrative penalties.

The requirement of assess what are the obligations of the Administration to determine if the period of the statute of limitations has expired is found in the core of the jurisdiction of the penalty body. In this regard, the Tribunal of Indecopi through the decision No 079-2010/SC2 has specified the following:

> In accordance with the above-mentioned, *the statute of limitations in terms of protection to the consumer is linked to the jurisdiction* assigned to the Committee and the Division. To punish offenses of the Legislative OrderNo 716, *circumstance that requires the assessment ex officio the expiry date of the statute of limitations, even when it has not been alleged by means of defense,* having into account that the jurisdiction is a validity requirement of the administrative acts and, as such, it must be analyzed in each case regardless of being or not ratified by the parties. All this applying the legality principle that shall govern every action of the Public Administration (Emphasis added).

In effect, pursuant to Article No. 3 of the LPAG, the jurisdiction is a validity requirement of the administrative act, since such act shall be issued by the administrative body authorized regarding matters, territory, hierarchy, time or amount. As Dromi indicates, "the jurisdiction is the area of power of the bodies and entities, determined by the objective law or the legal system. That is, it is the set of powers and liabilities that a body can and shall exercise legitimately"[20].

Morón indicates, regarding the administrative statute of limitations, that the result of this one is just to become the penalty body incompetent given the course of the time, so that such body is prevented from opening or proceeding with the punishment procedure[21].

20 DROMI, Roberto. Derecho administrativa. Vol. I. Ciudad Argentina. Buenos Aires-Madrid, p.361.

21 MORÓN, Juan Carlos. Óp. Cit., p.733

The compared case law continues in this line. For example, the Spanish Supreme Tribunal is in favor of the assessment, by law, of the administrative statutes of limitations by the administrative authority:

> (…) it is not referred to the acquisitive or extinctive prescription of actions or rights, what could be considered in the purchasing power of the parties, according to the civil doctrine, but of an *objective condition required to exercise the penalty power of the Administration,* required for this one and inalienable for the offender; (…) in the course of the period indicated by the law without imposing a penalty, determining the legal impossibility of fulfill it, and, if it has been done, the radical annulment of the imposed penalty is produced (Emphasis added)[22].

In effect, according to the indicated by Maraví, the statute of limitations is a procedural concept that prohibits the prosecution of offenses given the course of the period for its prosecution and punishment has expired, which provides it with legal security and a reasonable period in order to make an offense pursued and punished[23].

The position of Maraví is emphasized by the consideration of the Constitutional Court when analyzing the constitutional and procedural laws of the companies before the power to impose penalties of the bodies of the administration through the judgment delivered in the Docket No 8092-2005-PA/TC that indicates the following: "As stated in the precedent fundamentals, the administration, in the power to impose penalties, has the unrestricted obligation to respect the *procedural and constitutional rights of the companies, among them, the procedure of the statute of limitations(…)"* (Emphasis added).

Having into consideration what has been raised so far, different Peruvian administrative entities regulate the declaration of the statute of limitations ex officio during the Administrative Penalty Proceedings, which grants express powers to its bodies and Tribunals to assess and declare, ex officio, the statute of limitations of the power to impose penalties.

The Order of the Office of the Comptroller General No. 243-2012-CG that approves the amendment of the organizational structure and of the Regulation

22 Judgment of December 5, 1988. Article No.9320. See: NIETO, Alejandro. Derecho administrative sancionador. Cuarta edición, Madrid: Editorial Tecnos, 2005, pp.391-392.

23 MARAVI, Milagros. "Alegación de la figura de la prescripción". Revista Jurídica Thomson Reuters. Año 1. No 6, February 4 2013, p.2, Lima.

for Organization and Functions of the Office of the Comptroller General of the Republic that in the Number 5 of its Article No.135 indicates that the Superior Tribunal of Administrative Responsibilities shall "assess and declare ex officio the statute of limitations of the power to impose penalties for functional administrative responsibility".

In addition, we noticed that the Order of the Office of the Comptroller General No. 333-2011-CG that approved the Administrative Penalty Procedure for Functional Administrative Responsibility, which regulates the statute of limitations declared ex officio in any instance or phase of the punishment procedure.

Furthermore, the Ministerial Order No. 067-2011-VIVIENDA that amends the Regulation for Administrative and Disciplinary Proceedings of the Ministry of Housing, Construction and Sanitation in its Article No. 42 (statute of limitations of the administrative action) indicates that the statute of limitations shall be declared ex officio or upon request of the party by filing a defense, and the authority shall solve it with the confirmation of the periods, for which, in case of consider it founded, must provide that the appropriate Commission of Administrative and Disciplinary Proceedings submit a report detailing the causes of the statute of limitations in order to elucidate the initiation of the administrative actions that might be granted.

In such a way, and on the basis of what has been indicated so far, we notice that the jurisdiction assigned to the administrative authority to impose penalties requires to assess, ex officio, if the period of statute of limitations has elapsed, having into account that the jurisdiction is a validity requirement of the administrative acts that must be necessarily analyzed in every case, according to the principles of legality and due process precisely regulated by the Article No. 230 of the LPAG when referring to the power to impose administrative penalties. Thus, in line with this position, different administrative entities regulate the determination of the statute of limitations ex officio of the power to impose penalties.

However, such particular regulation should provide, at least, the following assumptions:

a) Period of the statute of limitations for the power to determine the existence of administrative offenses (can be special- different from the four years established by the LPAG- taking into account the particular circumstances of the process of environmental assessment)

b) Period of the statute of limitations for the collection or execution of the imposed penalties.

c) The calculation of the period of the statute of limitations in (a) and (b.)

d) The assumptions of suspension of the calculation of the period for the statute of limitations in (a) and (b).

e) The power to assess and declare ex officio the statute of limitations of the power to impose penalties of the pertinent entity.

Thus, we conclude that the declaration of statute of limitation ex officio of the Public Administration is feasible, precisely to protect the private interest and avoid an unlimited prosecution in time. However, by protection the public interest, in case the statute of limitations is declared, the authority shall initiate the pertinent actions in order to determine the causes and responsibilities of the failure to undertake the administrative action.

IV. CONCLUSIONS

1. Pursuant to the provisions of Article No.192 of the LPAG, every administrative act must be enforceable, unless otherwise provided, ordered by court, or is subject to a condition or period. For its compulsory enforcement, the Public Administration must verify the compliance with the requirements established by Article No.194 of the LPAG.

2. The coercive execution procedure begins with the notification to the offender regarding the coercive execution order which contains the order of compliance of the enforceable obligation within the period of seven (7) working days from the date of notification, after this period the Coercive Enforcement Officer is empowered to issue precautionary measures or initiate the compulsory enforcement of those obligations imposed in accordance with the Article No.17 of the Law on Coercive Execution.

3. In the Item e) Article No.16 of the Law on Coercive Execution, we note there are three (3) different assumptions of suspension of the coercive execution procedure when: (i) the period for the filing of the administrative actions for reconsideration, appeal, review, is in process or has not expired, or (ii) the administrative contentious claim has been submitted within the period established by law against the administrative act considered as enforceable instrument or (iii) the administrative contentious claim has been submitted within the period established by law against the administrative act that

determines the joint and several liability in the assumption set forth in the Article No.18, number 18.3 of the Law on Coercive Execution.

4. The second case proposed by the Item e) of Article No. 16 of the Law on Coercive Execution proves the legal feasibility of initiating procedures of coercive execution before the expiry date of three (03) months that the companies have in order to file a contentious administrative claim with the purpose of appealing the act that exhausts all available administrative remedies.

5. Various State entities have improved and overcome the mechanisms established in the Law on Coercive Execution to ensure the proper enforcement and enforceability of their questioned orders, with the purpose that the submission of contentious-administrative actions stop their effects if, and only if, such actions are submitted along with letters of guarantee or precautionary measures duly supported, as is the case of the OEFA.

6. Although Article No.233 of LPAG indicates that companies submit the statute of limitations by means of defense, such law does not establish the limitation of public administration to declare ex officio the statute of limitations of its power to determine the existence of administrative offenses.

7. The statute of limitations in administrative matters is related to the jurisdiction assigned to the administrative authority to punish offenses, a circumstance that demands to assess ex officio if the period of statute of limitations has elapsed, taking into consideration that the jurisdiction is a validity requirement of the administrative acts that shall be necessarily analyzed in each case.

8. Declaring, ex officio, the statute of limitations of the power to determine the existence of administrative offenses is favorable for the companies for not being exposed in an unlimited way in the time to the power to impose penalties of the Public Administration.

9. Several Peruvian Administrative entities regulate the declaration of statute of limitations, ex officio, during the administrative penalty procedure, and grant, in this way, express powers to their bodies and tribunals in order to assess and declare, ex officio, the statute of limitations of the power to impose penalties.

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7.

POWER TO IMPOSE PENALTIES AND COLLECTION OF FINES OF THE OEFA IN ACCORDANCE WITH THE CONSTITUTIONAL PRINCIPLES

CÉSAR IPENZA PERALTA
ROY CÁRDENAS VELARDE

SUMMARY

In this article, the authors analyze, first of all, the constitutionality of the power to impose penalties of the OEFA, considering the principles of legality, classification, culpability, proportionality, non bis in idem, public access and plurality of instances. After that, they delve into a study of the enforcement of the orders issued by the OEFA, covering subjects as the injunction bond and the legal relationship generated between the OEFA and the company, as well as the relevant legal principles such as the non-confiscation, reasonableness, proportionality and due administrative procedure.

Introduction. II. The administrative power to impose penalties of the OEFA. III. The principles of the administrative power to impose penalties. IV. Analysis of the Supreme Executive Order No. 008-2013-MINAM, which approves provisions of the Article 20-A of the Law No. 29325. V. Conclusions.

I. INTRODUCTION

Over the last few months, there has been much debate as to whether, as a result of the enactment of the new Law No. 30011[1] which amends the Law

1 Published in the Official Gazette *El Peruano* on April 26, 2013.

The Article 20-A, Enforceability of the OEFA decisions, indicates that "the sole fact of filing a contentious administrative claim of amparo or other, does not interrupt

No.29325 – Law on National Environmental Assessment and Enforcement[2], the fines of the Agency for Environmental Assessment and Enforcement

or suspend the procedure of coercive execution of the decisions of first or second administrative instance referred to the imposition of administrative penalties issued by the Agency for Environmental Assessment and Enforcement (OEFA).

Without prejudice to the requirements and other regulations set forth in the Civil Procedural Code in terms of precautionary measures, when the company, in any kind of legal proceedings, requests a precautionary measure, including those decided within the procedure of coercive execution or those which aim is to limit any powers of the OEFA prescribed in this law and complementary provisions, the following regulations should be applied:

a) To admit the processing of the precautionary measures, the companies must state a real or personal property injunction bond. In no case the judge can accept the promissory oath as an injunction bond.
   If a personal property injunction bond is offered, this one must consist in a letter of Banker's guarantee on behalf of the OEFA, of irrevocable, unconditional, immediately enforceable nature, without discussion benefit, conferred by a first-rate entity monitored by Superintendence of Banking and Insurance and Private Pension Funds.
b) Such guarantee must be valid for twelve renewable months and be issued by the amount of the debt arising from the administrative act, whose effects the company plans to suspend or annul, updated at the date of the request of the precautionary measure.
c) The letter of guarantee must be renewed and updated, until termination of the precautionary measure, within 20 working days before its termination, according to the amount of the accumulated debt until the renewal day. In case the amount of the letter of guarantee is not renewed or updated in the aforementioned period, the judge proceeds to enforce it immediately.
d) f a real injunction bond is offered, this one must be of first-order and cover the full amount of the debt deriving from the administrative act whose effects the company plans to suspend or annul, updated at the date of the request of the precautionary measure.
f) The OEFA is empowered to request to the judicial authority the variation of the injunction bond, in case this one has become insufficient in relation to the amount provided by the generation of interests. The judge must order that the applicant complies with the adequacy of the injunction bond offered.
g) In case where the legality and compliance of the rules referred for the commencement and formalities of the procedure of coercive execution are subject to review of the competent judicial authority, by application of judicial review regulated by Law No 26979 – Law of Coercive Execution Procedure, the coercive execution is only suspended if the compliance of the obligation is guaranteed through injunction bond, which must comply with the same requirements aforementioned in the preceding sub-paragraphs.

2 Published in the Official Gazette *El Peruano* on 05 March, 2009.

(OEFA) are objectionable in administrative proceedings and if the payment[3] is enforceable or not. In particular, the Article 20-A of the provision under analysis provides that, in case the fines imposed are confirmed by the Tribunal of Environmental Enforcement (TFA, by its initials in Spanish[4]), their collection is coercively enforceable, even in case that the company had filed a contentious administrative claim, of amparo or any other legal proceedings.

In relation with the above mentioned, a significant part of the discussion is focused on determining if the fact of demanding a real or personal property conjunction bond (letter of guarantee) – forbidding the promissory oath – violates or not the companies rights in the context of a contentious administrative procedure. The same requirement would apply for submitting a lawsuit of judicial review of legality that discusses the beginning or procedure of a coercive execution.

In this context, we must bear in mind the Number 216.1 of the Article No.216 of the Law No. 27444 – Law on the General Administrative Procedure[5], which

3 In such context, the penalties imposed by this entity – for example possible suspensions – are enforceable even if they are contested, unless the authority suspends expressly their effects.

4 The Tribunal of Environmental Enforcement performs functions as last administrative instance. The orders provided by the Tribunal are mandatory.

5 Law No 27444 – Law on the General Administrative act
"Article No 216.- Suspension of the Execution.

216.1 The filing of any appeal, unless a legal rule provides otherwise, will not suspend the execution of the contested act.
216.2 Notwithstanding the aforementioned provisions, the authority, who is in charge of resolving the appeal, will be able to suspend ex officio or upon request of the party the enforcement of the contested act when one of the following circumstances applies:
The execution could cause damages of impossible or difficult restoration.
The existence of a transcendent process of annulment is clearly appreciated.
216.3 The decision of the suspension will be adopted subject to deliberation sufficiently reasoned between the damage that the suspension could cause to the public interest or to third parties and the damage of the immediate effectiveness of the contested act, which is caused to the appellant.
216.4 When the suspension occurs, the required measures will be able to be adopted to ensure the protection of the public interest or the third parties rights and the efficacy of the contested order.
216.5 The suspension will remain during the procedure of the administrative appeal or the corresponding contentious administrative act; except that the administrative or legal authority provides the opposite if the conditions under which it was decided are modified.

indicates that the filing of an appeal does not suspend the enforcement of the contested act; in this case, an order of administrative penalty.

This being said, it is relevant to remember what measures the OEFA can issue, in accordance with the indicated in the Law No. 29325, amended by Law N°30011:

- Warning
- Fine not more than 30,000 UIT (Peruvian Tax Units).
- Temporary or definitive confiscation of the objects, instruments, artifacts or substances used for the commission of the offense.
- Cessation or restriction of the activity which caused the offense.
- Suspension or cancellation of the permission, license, concession or any other authorization, according to the case.
- Partial or total, temporary or definitive shutdown of the premises or establishments where the activity which caused the offense is carried out.

Given this aforementioned considerations, we will analyze the elements and principles of the power to impose penalties of the OEFA in order to linking them with several judgments of the maximum body responsible for interpretation of the constitutional framework: the Constitutional Court.

II. THE ADMINISTRATIVE POWER TO IMPOSE PENALTIES OF THE OEFA

We should start by pointing out that the administrative power to impose penalties is an extension of the *ius puniendi* of the State which crosses the sphere of the criminal law and it is materialized in the administrative area. So, it should be emphasized that, in this last area, the institutions of the Public Administration that have the power to impose penalties are empowered to:

- Determine administrative offenses.
- Impose the corresponding penalties.

There is no need to say that these powers must be enforced by the entities of the Public Administration observing what is contained in the Political Constitution of Peru and, at the same time, in its respective laws, through which such power was given.

With respect to the foregoing, we must not forget that the entities of the Public Administration shall protect the right to due process that the companies have, on the understanding that, as the Constitutional Court has pointed out, the subject to the administrative penalty proceedings is to investigate and, when

applicable, to sanction determined offenses committed by the companies, in this case, in environmental matters.

In relation to this issue, Morón[6] points out that the administrative penalty proceedings tends to comply with two aims: first of all, to allow the institution of the Public Administration with power to impose penalties to confirm irrefutably if any offense has been committed and, secondly, to ensure to the suspected offending company to exercise its right to legal defense, alleging and demonstrating what is favorable and controlling the actions of the State.
Now it should be pointed out that the OEFA is a public specialized technical agency, assigned to the Ministry of the Environment (Minam), responsible of the control, supervision, assessment, monitoring and sanction in environmental matters[7]. In this framework, the Article No.11 of the Law No. 29325, modified by Law No.30011, establishes the controlling and sanctioning power of the OEFA, which comprises the power to investigate the commission of possible sanctioning administrative penalties and the power of *imposing penalties* for the non-compliance with obligations and commitments resulting from the environmental management instruments, environmental standards, environmental commitments of concession agreements and of orders or provisions issued by the OEFA[8].

6 MORÓN, Juan Carlos. *Comentarios a la Ley del Procedimiento Administrativo General.* Novena edición. Lima: Gaceta Jurídica, 2011, p.687.

7 Law No 29325 – Law on National Environmental Assessment and Enforcement System, amended by Law No 30011
"Article No 6 – Agency for Environmental Assessment and Enforcement (OEFA)
The Agency for Environmental Assessment and Enforcement (OEFA) is a public specialized technical agency, with legal personality under domestic public law, establishing itself as a state-funded public body, registered with the Ministry of Environment and responsible for the enforcement, monitoring, control and imposition of penalties with regard to environmental matters, as well as the application of incentives. Likewise, the OEFA exercises the functions provided in the Legislative Order No 1013 and this Law. The OEFA is the governing body of the Agency for Environmental Assessment and Enforcement".

8 Law No 29325 – Law on National Environmental Assessment and Enforcement System (SINEFA), amended by Law No 30011.
"Article No 11 - General functions
(…)
c) Controlling and penalty function: it includes the power to investigate the commission of possible administrative penalty offenses and the power to impose penalties for the non-compliance of obligations and commitments resulting of the environmental management instruments, of the environmental rules, environmental commitments of concession agreements and of the orders or provisions issued by OEFA, in accordance with the Article No 17. Additionally, it includes the power to issue precautionary and remedial measures".

As a result, the OEFA has, in view of the above mentioned, powers to determine administrative offenses on the scope of its competences, as well as to impose the corresponding penalties before the non-compliance of the controlling environmental obligations, as result of a prior administrative penalty proceeding.

III. THE PRINCIPLES OF THE ADMINISTRATIVE POWER TO IMPOSE PENALTIES

Having performed the prior analysis with regard to the power to impose penalties of the OEFA, we will develop the principles of the administrative power to impose penalties that the OEFA, like other entities of the Public Administration, must observe in the development of its powers. This analysis will be performed according to the developed principles by the Constitutional Court[9] in its different judgments, which are:

- Principle of legality
- Principle of classification
- Principle of culpability
- Principle of proportionality
- Principle of *non bis in idem*
- Principle of public access
- Principle of double instance or several instances.

Before turning to the principles of the administrative power to impose penalties, we must indicate that the principles are tools to be observed by judges and responsible officials of the Public Administration, among others, who give content and facilitate the implementation of the substantive and/or procedural rules, giving to them dynamism and allowing them to be adapted to the ever-changing reality in which we are subjected.

As a result, we may indicate that the aim of the principles is to support in the best possible manner the development of the legal system and, in certain cases, to give some dynamism that allow it to be adapted with the day-by-day adjustments.

It is important to indicate that the principles of the administrative power to impose penalties have the aim to guide the powers of the institutions of the

9 Judgment No 1873-2009-PA/TC, on September 3, 2010.

Public Administration[10], as well as protecting the companies from possible arbitrary acts by the entities of such administration[11].

As initially indicated, the administrative power to impose penalties is an extension of the *ius puniendi* of the State, reason why the administrative penalty law and the criminal law share similar basic principles of penalty law[12], among them:

a) Principle of legality

This principle is defined in the Article No. 230, Number 1) of Law No. 27444, which indicates that the power to impose penalties will be attributed to the entities of the Public Administration only by legally binding rules. Therefore, the principle of legality in administrative proceedings is not observed when an entity of the Public Administration claims determined penalty power that has not been attributed by law.

It is important to indicate that this principle has been developed in a different way by the Constitutional Court[13] along different judgments, pointing out that it constitutes:

- A constitutional guarantee of the fundamental rights of the citizens.
- A guiding principle in the exercise of the State punitive power.

Additionally, this Constitutional Court has indicated that this principle is established in the Article No.2, Number 24, Item d) of the Political Constitution, which indicates that it is impeded to attribute the commission of an offense if it is not previously determined in the law, as well as it forbids to apply a penalty if it is not previously approved or published[14].

As we can see, the Law No.27444 defines the principle of legality from the perspective of the attribution of powers to the institutions of the Public

10 Judgment No 8957-2006-PA/TC, on March 22, 2007.

11 GUZMÁN, Christian. *Tratado de la Administración Pública y del procedimiento administrativo.* Lima: Ediciones Caballero Bustamante, 2011, p. 27.

12 Judgment No 2192-2004-AA/TC, on October 11, 2010.

13 Ibidem.

14 Judgment No 1514-2010-PA/TC, on October 15, 2010.

Administration; meanwhile the Constitutional Court has developed this principle starting from the aphorism *nullum crimen, nullum poena, sine lege*, which affirms that the law must precede the punishable conduct, as well as the sanction to be imposed[15].

b) Principle of classification

Pursuant to Article No. 230, Number 4 of Law No. 27444, only the offenses expressly provided by a legally binding rule, according to their nature, are considered as administratively punishable conducts, without any further interpretation. Under that definition, such generic legal provisions are not in line with this principle, and must be, necessarily, established the specific conduct which will be considered as offense.

The Constitutional Court has pointed out, in the case of Vicente Rodolfo Walde Jáuregui[16], that this principle is derived from two specific legal principles:

- Freedom: it indicates that the conducts must be well defined, without indeterminacies.

- Legal certainty: it indicates that the citizens must be able to forecast, adequately and sufficiently, the consequences of their actions.

In that regard, it must be reiterated that this principle has the aim of defining the *ius puniendi* of the State and avoiding, in that way, the arbitrary action of this at the beginning of the punishment procedures that, first of all, are not previously established or, secondly, are began by conducts which are not previously established as offenses which are, therefore, punishable.

In the same way, Law No. 27444 indicates that the regulatory provisions of development can specify or graduate those related to identify the conducts or determine offenses, without constituting new offending conducts to the established legally, excepting the cases when the law allows classifying by mandatory regulation.

This means that the entity can establish procedures and offenses by regulations, provided that these find its basis on law or do not exceed their limits. For its part, the Constitutional Court pointed out, in the case of Carlos Israel Ramos

15 Judgment No1873-2009-PA/TC on September 3, 2010.

16 Ibidem.

Colque[17], that the capacity to regulate through regulation had to be *secum legem*, that is, completing that the corresponding laws establish.

In that regard, Morón[18] indicates that the classification of offenses by regulation is a kind of delegation of the Legislative to the entity of the Public Administration by virtue of the fact that this latter has a greater knowledge of the technical aspects to be considered within offenses to be classified.

c) Principle of culpability

While this principle is not established in Law No. 27444, the Constitutional Court has pointed out, in case of Vicente Rodolfo Walde Jáuregui[19], that the punishable action must be attributed as willful misconduct or fault, what includes the prohibition of the strict liability.

Additionally, the Constitutional Court, in case of José Antonio Álvarez Rojas[20], stated that the penalty, criminal or disciplinary, only can be supported in the checking of the subjective liability of the infringer agent of a legal right.

The above mentioned shall be applied as there is no special provision that establishes the strict liability regime in the Public Administration.

In the case of the OEFA, the Article No.18 of Law No. 29325 establishes that the companies are objectively liable by the non-compliance of the obligations derived from the environmental management instruments, as well as the environmental regulations, orders or provisions issued by the OEFA. As a result, the environmental authority will be able to sanction an administrative offense if, during the administrative penalty procedure, it proves that the company has committed this offense.

In summary, this principle seeks, in the possible case that the company is penalized, that every penalty imposed by the entities of the Public Administration consolidated to the strict liability regime is product of the procedure in which the punishment is performed using as a legal basis the offending act committed.

17 Judgment No 2050-2002-AA/TC, on April 16, 2003.

18 MORÓN, Juan Carlos. Óp. Cit. p.713.

19 Judgment No 1873-2009-PA/TC, on September 3, 2010.

20 Judgment No 2868-2004-AA/TC, on November 24, 2004.

d) Principle of proportionality

As the principle of culpability, the principle of proportionality is not established in Law No. 27444; however, this is associated with the principle of reasonableness established in the Article No 230, Number 3 of such law, indicating that the penalties to be applied shall be *proportional* to the qualified non-compliance as offense, establishing criteria for this purpose.

The Constitutional Court has pointed out that the penalty imposed must be according to the prohibited conduct, so the unnecessary or excessive measures[21] are forbidden. In the same way, in the case of Gonzalo Antonio Costa Gomez[22], it was established that this principle is structured by three principles: necessity, adequacy and proportionality, in the strict sense.

e) Principle of *non bis in idem*

The Article No. 230, Number 10 of Law No. 27444 points out that a punishment or administrative penalty will not be able to be successively or simultaneously imposed for the same fact in the cases where the identification of the individual, a finding of fact, and a statement of legal authority are observed.

With respect to the foregoing, we must indicate that the principle *non bis in idem* seeks, as the other principles of the administrative penalty power, to limit the *ius puniendi* of the State, since that forbids the double penalty to the same company.

This principle is not expressly established in the Political Constitution; however, the Constitutional Court has pointed out, in its different judgments, that this is implicit in the due process right recognized in the Article No. 139, Number 3 of the Political Constitution.

It is important to point out that this principle has a double configuration:

21 Judgment No 1873-2009-AA/TC, on September 3, 2010.

22 Judgment No 2192-2004-AA/TC, on October 11 2004.

Material	Two penalties cannot be imposed for the same offense.
Procedural	The same fact cannot be subject to two different procedures.

To understand this principle from its procedural aspect entails "(…) to respect a person's right, without limits, if such person is not being prosecuted twice for the same fact (…)"[23] or" (…) not to be prosecuted twice for the same facts, that is to say, the same factual assumptionh cannot be subject of two different criminal procedures or, if it is thought to bring two criminal procedures with the same subject (…)"[24]. On its part, from its material aspect" (…) shows the impossibility that two penalties fall on the same person for the same offense, since such action may constitute an excess from the power to impose penalties (…)"[25].

In addition, it may be noted that for the application of constitutional right for *non bis in idem* principle, the triple identity is required, that is, subject, fact and basis[26] must be the same.

Finally, it is necessary to indicate that this principle is not exclusively applicable to procedures brought to court, but it can be also filed in *proceedings before government agency*; but as indicated in the previous paragraph it is only necessary to file the triple identity.

23 Judgment No. 2050-2002-AA/TC from April 16th, 2003.

24 Ibidem.

25 Ibidem.

26 Concerning this matter, the subject identity is related to the defendant or accused but not with the victim identity. On the other hand, the identity of fact consists of those facts that caused penalty must be the same in connection with the subject to be investigated or penalized in the subsequent proceeding. This rule of procedure entails the principle of immutability of facts; that is, those facts which are subject of investigation matter cannot be added, varied or modified. Finally, the identity of basis and the formula to identify the identity of basis, according to the doctrine and case law as well, we must appeal to the legal right or interest to be protected, both by administrative and criminal type. GONZALES, Robinson. "El principio del 'Ne bis in idem'. Su aplicación en el derecho administrativo sancionador y el derecho penal peruano". *Revista de Análisis Especializado de Jurisprudencia-RAE Jurisprudencia,* tomo 34, 2011, p.357, Lima.

f) Principle of Publicity

Although this principle is not stated in Law No. 27444, we consider important that the Constitutional Court has already explained the importance of this one in administrative matters when indicating that the publicity of rules is a requirement of validity, since its non-observance is a violation of the Article No. 109 from the Political Constitution.[27]

In this regard, the entities of Public Administration cannot bring penalty procedures against the companies under laws, even if these ones have been approved, these ones have not been published yet because, as the Constitutional Court has indicated in the case of Guillermo Leonardo Pozo García and 218 citizens[28], "[a] law which has not been enacted, it is simply ineffective, since such law has not become effective".

In short, the purpose of this principle is to protect the principle of legal certainty, as well as the principle of classification, since it is necessary for the companies to be informed of the actions and omissions which are considered as offenses, as well as the proceeding and possible penalties these ones will be subject to.

g) Principle of double instance or plurality of instances

In this universal principle of *ius puniendi*, in which the administrative penalty law is also included, this double instance is established as general rule, and it is likely to make exceptions only in such special cases expressly established by law. Since this deals with exceptions, these ones will be never applicable by analogy.

The plurality of instances is included in the Political Constitution of Peru in the Article No. 139, Number 6, and expressly specified in the Item h) of the Article No. 8, Number 2 from the American Convention on Human Rights stating that "[during] the procedure, every person has the right, in terms of equality, to the following minimum guarantees: (…) h) the right to appeal a legal decision before the Judge or the Superior Court".

27 Political Constitution of Peru 1993.
Article 109°. Law is compulsory from the next day of its promulgation in the Official Gazette, unless otherwise provided in the same Law which postpones its validity part or all.

28 Judgment No. 0017-2005-PI/TC from January 22nd, 2007.

To that effect, the right to plurality of instances expressly recognizes the right of every person before the Court or company to appeal a judgment or decision to put an end to the instance, mainly when this one is adverse to its rights and/or interests. However, such right does not involve the right of the person before the court to appeal each and every decision issued in a proceeding. In this regard, the Constitutional Court has indicated that "it deals with a right of legal configuration and the legislator is responsible for determining in which cases a contestation is allowed in addition to the decision which puts an end to the instance" (Cf. STC No. 05019-2009-PHC/TC, basis 3)[29]. Under this reasoning, the appropriate practice of law accessing to the actions of appeals or means of recourse directly represents the use of mechanisms the legislator has created by regulation, so that the person before the Court may question the different decisions issued by judicial body.

IV. ANALYSIS OF SUPREME DECREE NO. 008-2013-MINAM, WHICH APPROVES REGULATORY PROVISIONS OF THE ARTICLE 20-A OF LAW NO. 29325

As indicated above, the Supreme Decree No. 008-2013-MINAM, which approves the regulatory provisions of the article 20-A of Law No. 29325, amended by Law No. 30011; this one has factors to allow us how to prove if this one concurs with the constitutional framework.

1. Injunction bond

At this point, we attempt to establish if the proposition of injunction bond may be considered or not under the terms stated in the Supreme Decree No. 008-2013-MINAM, as a method of payment of the imposed fine and consequently, the compliance of the penalty. Therefore, we must start by analyzing the characteristics and purposes of the precautionary measures, since the injunction bond is constituted from a request of precautionary measure.

29 The Constitutional Court has indicated regarding the right to actions of appeal or means of recourse, while the right of legal configuration, the legislator is responsible for elaborating them and establishing the requirements to be fulfilled so that these ones are accepted in addition to prefigure the proceeding to be carried out. Its constitutionally protected content guarantees that the conditions of access aiming to dissuade, draw out or hinder unreasonably and disproportionately its exercise are not either established or applicable. (Cf. STC File No. 5194-2005-PA/TC, basis 5).

a) Precautionary measure

This is a procedural tool aiming to guarantee the effectiveness of a judgment to be issued in a main proceeding, so that in case the request is rejected during the main proceeding, then the precautionary measure will be invalid.

In reference to the aforementioned, as Mesías[30] says, the precautionary measures have two purposes: one *abstract* and other *concrete.* The first one attempts to achieve the effectiveness/value, as well as the social acceptance of the court action; while the second one aims to ensure the compliance of the final decision.

On its part, the Constitutional Court, in the procedure of unconstitutionality brought by the Peruvian Human Rights Ombudsman against the third and fourth paragraph of the Article 15° of Law No. 28237 – Constitutional Procedural Code[31] which establishes the origin of the precautionary measure in amparo procedures has indicated that:

> (…) the role of precautionary measures is oriented, as an instrument, to the effectiveness of the right requested in the context of a due process, not only when it deals with procedures lacking from undue delays or those ones which are not resolved within the specified periods, but also when it deals with regular duration of the procedures. There are procedures, although those are processed within the corresponding periods, may constitute a serious risk for the effectiveness of the right[32] due to their duration.

Likewise, the Constitutional Court has indicated that, in the case of José Augusto del Busto Medina and others[33] "(…) the precautionary measures are vacated based on the authenticity of the right in question. It is clear that this is provisional until the final decision is issued during the main proceeding to determine the controversy".

30 MESÍAS, Carlos. *Exégesis del Código Procesal Constitucional.* Tercera edición. Lima: Gaceta Jurídica, 2007, p. 188.

31 Published in the Official Gazette *El Peruano* on May 31st, 2004.

32 Judgment N°00023-2005-PI/TC, on November 2005.

33 Judgment No. 03545-2009-PA/TC, from April 18th, 2011.

In this sequence of ideas, we see that:

- The precautionary measures are *provisional*, since their purpose is to guarantee the compliance of future obligation included in the judgment of the main proceeding.

- The precautionary measures, as precautionary proceeding, are *accessory*, considering that if the request is dismissed during the main proceeding, then the precautionary measure is also dismissed.

b) Injunction bond

Regarding this section, in the Article No. 610 of the Civil Procedural Code, is stated that the rule of procedures on precautionary measures are the authenticity of the right, the danger in the delay of the procedure and the injunction bond; however, some authors say that the injunction bond is really a requirement for the execution of the precautionary measure and not a rule of procedure[34].

Notwithstanding the foregoing, the injunction bond, as a requirement for the authorization of a precautionary measure serves as a type of mechanism in order to balance the interests of both parties during the procedure (the interest of the complainant in adopting the precautionary measure against the interest of the defendant from unjustified damages)[35].

In this sequence of ideas, as Ledesma[36] says, the injunction bond is based on the *principle of equality* as a procedural balance expression, since this one should not only aim to ensure the party a right which is not exercised, but also to keep the possibility of ensuring the defendant the effectiveness of compensation for damages, if such right does not exist at all.

As indicated in the previous paragraph, we may say that:

34 BENITES, Junior, "El derecho a la tutela cautelar en el derecho procesal civil y el procesal constitucional". *Revista de Análisis Especializado de Jurisprudencia – RAE Jurisprudencia,* 2009, p.13, Lima.

35 Cf. LEDESMA, Marianella. "Tratamiento de la contracautela en el Código Procesal Civil." En ARIANO, Eugenia. *Las medidas cautelares en el proceso civil.* Primera edición. Lima: Gaceta Jurídica, 2013, pp. 41-82.

36 Ibidem.

- The injunction bond is *accessory* the same as the precautionary measure, considering that its existence depends on a main proceeding.

- The injunction bond is *provisional*, the same as the precautionary measure even if the precautionary measure aims to guarantee the compliance of any future obligation included in the final decision of the main proceeding, the injunction bond aims to ensure the defendant that if the request is dismissed during the main proceeding, this one will not be affected as a consequence of the precautionary measure.

In view of the foregoing, the proposition of the injunction bond cannot be considered as a payment of the imposed fine, since the precautionary measure and the injunction bond are provisional and their existence depends on the main proceeding.

2. Legal relationship

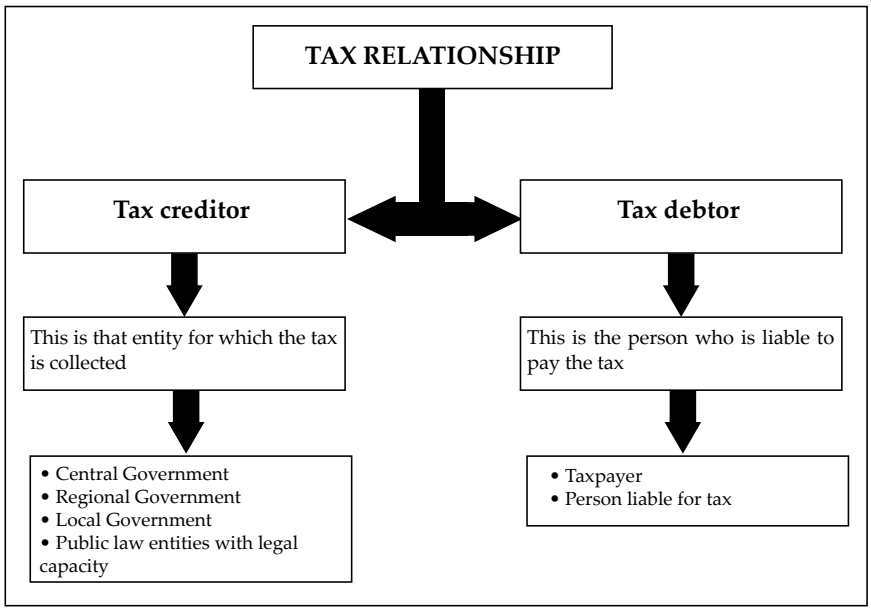
After analyzing the characteristics and purposes of the injunction bond, we will analyze the legal relationship between the OEFA and the company after having carried out the administrative penalty procedure (PAS), so that we can determine if the injunction bond, as part of a legal proceeding can be considered as collection of an imposed fine. Therefore, we will appeal to tax categories, in particular, the tax relationship. It is important to make an exception since such fines imposed by the OEFA are not defined as environmental taxes by the doctrine[37].

a) Legal tax relationship

Villegas defines the legal relationship as the "legally binding relationship instituted between the tax authority as tax collector aiming to collect a tax, and a taxable person who is required to pay this one"[38]. In the following diagram, we can analyze who the creditors and debtors are in accordance with the Tax Code:

37 "Environmental taxes are those which minimize costs and put in practice the principle 'who contaminates pays' of the OCDE (Organization for Economic Co-operation and Development). These ones provide higher increase of incentives to technological innovation aiming to protect the environment than strictly regulatory approaches and generate income which may be invested in the environmental care. These taxes are not intended to be collected in excess, but in order that the companies assume the cost and do not contaminate anymore". YACOLCA, Daniel. *Derecho tributario ambiental.* Lima: Editora Jurista Grijley, 2009, p.29.

38 VILLEGAS, Héctor. *Curso de finanzas, derecho financiero y tributario.* Buenos Aires: Editorial ASTREA, 2002, p. 318.



Source and elaboration: the authors

As seen in the diagram, the tax creditor is that entity for which a specified tax is collected, and the debtor is the person who is liable to pay the tax in quality of taxpayer or person liable for tax.

b) Legal relationship after concluding the PAS

After explaining the legal tax relationship, we can analyze the legal relationship between the OEFA and the company which is fined as a result of a PAS and then as part of a judicial proceeding.

If as a result of a PAS a fine is imposed, a legal relationship is started. This one may consist of the OEFA as a tax collector or creditor of such relationship, that is, for which the request may be carried out and for the company which is fined as a taxable person or debtor of such relationship and liable to pay the fine. This one can appeal to judicial proceedings in order to contest the administrative act included in the penalty.

The Supreme Decree No. 008-2013-MINAM indicates, if during a legal proceeding (contentious administrative process) the complainant (the company which is fined as a result of a PAS) asks for a precautionary measure, this one must provide as an injunction bond, an amount equivalent to the imposed

penalty. This fact has been misinterpreted by understanding the proposition of such injunction bond as a method of payment of the fine.

Regarding this point, we may say that the preposition of injunction bond cannot be confused or understood as the payment of the fine because it may result in confirming that the judge is the tax collector of such legal relationship and to whom the fine is paid, which is not true since, as indicated above, the injunction bond is provisional and its purpose is to prevent the defendant (the OEFA) to be affected as a result of a reckless precautionary measure.

After explaining the characteristics and purposes of the injunction bond and having analyzed the legal relationship between the OEFA and the company which is fined, we may say, as the beginning of this article, there are constitutional principles which have been invoked by different parties in order to question the provisions stated in the Supreme Decree No. 008-2013-MINAM, such as:

Principle of non-confiscation

Concerning this matter, it is clear that the confiscation cannot be always analyzed in a general sense, but this one must be analyzed in concrete cases. Also, the Constitutional Court, in procedure of unconstitutionality lodged by the Peruvian Human Rights Ombudsman has mentioned that "[the] confiscation in every concrete case will need the non-existence verification of a reasonable relationship between the global service costs each subject must pay and the way such confiscation has been quantified in its case, in order to prove that, according to economic conditions, it is not possible to pay that tax"[39].

Although the Constitutional Court has explained on tax matters, this principle is a limit imposed to the State so that this one does not affect, in exercise of its taxing powers, the property rights of individuals. Likewise, we must emphasize that the Supreme Decree No. 008-2013-MINAM does not violate the principle of non-confiscation since such rule determines that the complainant (referred before as company) must provide an injunction bond equivalent to the amount of the fine, this one complies with the purpose of the injunction bond: to ensure the complainant, if the request carried out in the main proceeding is dismissed, this one will not be affected as a consequence of the precautionary measure.

On its part, the OEFA has adopted different measures in order to prohibit the violation of the principle of non-confiscation of the offending companies at the moment of setting the amount of the fine, among them:

39 Judgment No 0053-2004-PI/TC from May 16th, 2005.

- Firstly, the OEFA has approved a "Methodology for the calculation of base fines and the application of aggravating and mitigating factors to be used in the adjustment of penalties"[40], in which objective criteria are established to be used by the tax authority for the adjustment of the sentence to be imposed and also, to avoid abuses by the government workers through any judgment.

- Secondly, this one has stated that, in any case, the fines to be imposed exceed 10% of the income earned by the offending company the year before to that one from the commission of the offense in the case of small and medium enterprises.

Principles of reasonableness and proportionality

Regarding these principles, the Constitutional Court, in the case of Empresa Pesquera San Fermín S.A. has mentioned that "[the] intervention of the State is considered legal and pursuant to the Political Constitution when it is a result of a reasonable and appropriate measure to those purposes of the policies to be achieved. As a consequence, it is necessary that such measure does not violate the fundamental human rights or, in any event, such implication is carried out under the rules of reasonableness and proportionality"[41].

Although the Supreme Decree No. 008-2013-MINAM states that the complainant who asks for a precautionary measure must offer as an injunction bond, an amount equal to the imposed fine, since this one attempts to guarantee the companies not to lodge precautionary measures in order to avoid the payment of their obligation and on the other hand, if the main request is dismissed, the OEFA is not required to bring proceedings for the compliance of the obligation by the company.

In this regard, although the constitutional principles are limitations to the State power as provided by the Supreme Decree No. 008-2013-MINAM, its purpose is to avoid the excessive practice of law, that is, to ask for precautionary measures in order to delay the compliance of an obligation.

40 Approved by Decision of Board of Directors No 035-2013-OEFA/PCD from March 11th, 2013.

41 Judgment No 2835-2010-PA/TC from December 13th, 2013.

Due administrative process

Regarding this point, different parties have affirmed that the provisions of the Supreme Decree No. 008-2013-MINAM violates the due administrative process, in particular, the right to contestation of acts of the Administration when including the obligation to the complainants who ask for a precautionary measure from offering an injunction bond equivalent to the imposed fine. In this regard, the analysis to be carried out below aims to conclude this one is not correct. Before that, we must reaffirm that such principle is contemplated in the Article 139°, Number 3 of the Political Constitution[42]. This one has been explained in repeated judgments of the Constitutional Court, among them, the case of César Hinostroza Pariachi[43], in which he said that this right includes:

> The right to due process and the rights included therein are invocable; therefore, these ones are guaranteed, not only as provided by a judicial proceeding, but also on the administrative proceeding. Thus, the due administrative process represents, in all circumstances, the respect of all the principles and rights generally invocable within the scope of the common or specialized jurisdiction by the Public or Private Administration to which the article 139° of the Constitution is referred (natural judge, impartial and independent judge, defense right, etc.)

Likewise, the Constitutional Court has indicated, in the case of Empresa Agroindustrial Tumán S.A.A., the right to due process has a double dimension: adjectival and substantive. "[The] first one represents the respect of all those elements which constitute the fundamental human rights of the procedure, while the second one; the substantive, this one entails the elimination of any arbitrary behavior of who unlawfully hold any contribution of power or, in other words, those who exercise the authority"[44].

Also, regarding the contestation of acts of the Administration by means of judicial proceedings, the Constitutional Court in the case of Ramón Salazar

42 Political Constitution of Peru 1993
Article 139°. The principles and rights of the jurisdictional role are
(…)
The observance of due process and jurisdictional protection
(…)

43 Judgment No 3891-2011-PA/TC from January 16th, 2012.

44 Vote of discord by Magistrate Eto Cruz in the Judgment No 05365-2011-PA/TC from September 5th, 2013.

Yarlenque has indicated that "(…) the due administrative procedure includes, among other aspects, the right to contest the decisions of the Administration, either through the mechanisms provided by the administrative procedure or, where necessary, through resort to law, or either through contentious administrative process or amparo procedure"[45].

In reference to the aforementioned, we may say that the Constitutional Court decided in the same judgment that the collection of fees by public administration entities to the companies for the concept of filing contested appeals or its proceeding is considered violation of the constitutional rights to due administrative process, the defense, the effective judicial protection and petition stipulated by our Constitution.

Having carried out this precision, we may say that the Supreme Decree No. 008-2013-MINAM does not violate or limit to due administrative process, given that the proposition of the injunction bond cannot be considered as a payment, since the OEFA does not receive in its treasury such money, but this one is constituted as a type of guarantee in favor of the defendant (for this case, the OEFA) in order not to be affected with the filing of any reckless precautionary measure by the complainant (for this case, the company).

In this sequence of ideas, we cannot take into account the injunction bond as a payment for the filing or formality of a contested appeal, since the entity does not receive in its treasury such money, on the contrary, the injunction bond is constituted as a type of guarantee in favor of the OEFA in order not to be affected.

V. CONCLUSIONS

As a conclusion, it is important to emphasize that due to the questioning regarding the collection of penalties, the OEFA filed an inquiry to the General Directorate of Legal System Development of the Ministry of Justice of Human Rights which has issued a report where concluding that it is absolutely viable or valid that the person in charge of making such collections, to do so without waiting for three months the company has to file a complaint before the Judiciary. Therefore, "[the] finality of the administrative act requires its immediate compliance apart from the questioning of its legality before the Judiciary"[46].

45 Judgment No 3741-2004-AA/TC from November 14th, 2005.

46 Legal inquiry No 011-2013-JUS/DNAJ from June 10th, 2013.

In a certain way, the report mentioned in the previous paragraph indicates that the filing of the complaint under judicial revision may not suspend the coercive enforcement proceeding which is processed in the OEFA; therefore, in case the complainant intends to interrupt it, this one must ask for a precautionary measure and provide an injunction bond which meets with the requirements stated in the Article 20-A of Law No. 29325. To take a different interpretation may go against the *ratio legis* and the logic of the rules.

On the other hand, we cannot affirm that the provision of an injunction bond equivalent to the fine imposed before government agencies by the OEFA is a method of collection, since this one may entail to affirm that the tax collector or creditor in the legal relationship is the Judge of the proceeding. As established in the previous section, this is not possible since the injunction bond is provisional.

Likewise, the injunction bond cannot be considered as a payment of a fine, since both the precautionary measure and the injunction bond are provisional and their existence depends on the main proceeding. Having said that, the injunction bond aims to ensure the defendant, for this case the OEFA, this one will not be affected as a consequence of the precautionary measure; through which the delay to compliance of an obligation is expected.

Although the constitutional principles are limited to the State power, the provisions stated in the Supreme Decree No. 008-2013-MINAM aims to avoid the excessive practice of law, that is, to ask for precautionary measures in order to delay the compliance of an obligation.

Finally, the injunction bond cannot be considered as a payment for the filing or formality of a contested appeal, since the entity does not receive in its treasury such money, on the contrary, the injunction bond is as a type of guarantee in favor of the OEFA in order not to be affected with the filing of any reckless precautionary measure.

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8.

Environment and power to impose penalties in administrative case law of the environmental enforcement tribunal in Peru

VERÓNICA ROJAS MONTES

SUMMARY

This article explains the interpretation criteria for the system of penalties on environmental matters set forth by the Environmental Enforcement Tribunal of the Agency for Assessment and Environmental Enforcement (OEFA) from the beginning of its duties in August 2011 to January 2014. The study and systematization of the universe of administrative decisions by the Environmental Enforcement Tribunal allows explaining such criteria putting into groups seven issues which will be analyzed in accordance with the administrative environmental law and administrative penalty law, as well as in accordance with the applicable legislation in such matters.

I. Introduction. II. Environment. III. Environmental obligations to be enforced and environmental commitment. IV. Principle of legality and sub principle of classification. V. Non-compliance of Permissible maximum limits and environmental damage in mining activity (Case of NYRSTAR). VI. Evidentiary value of test reports to verify the compliance of permissible maximum limits. VII. Gradualness of fines imposed by the Environmental Enforcement Tribunal. VIII. Statute of limitations of the power to impose penalties. IX. Conclusion.

I. INTRODUCTION

As part of the changes of the State for the environment care started upon execution of the Trade Promotion Agreement between Peru and the United

States of America in 2009, upon the entry into effect of the Legislative Decree No. 1013 – Law on the creation of the Ministry of Environment[1], was created together with such Agency for Environmental Assessment and Enforcement (OEFA), nowadays, governing body of the National Environmental Assessment and Enforcement System (SINEFA) created by Law No. 29325, Law on National Environmental Assessment and Enforcement System[2], amended by Law No. 30011[3] (hereinafter referred to as SINEFA Law). The main objective of the SINEFA is to protect the environment through two main lines of action: (i) to ensure the compliance of the environmental legislation of all individuals or legal, public or private entities; and (ii) to guarantee the duties of the different entities of the State to be carried out impartially, brief and efficient within the scope of public protection, both nationwide and worldwide.

The duty of the Environmental Enforcement Tribunal (TFA) is adopted in the exercise of the power to impose penalties of the OEFA. This is the last administrative resort hearing the appeals lodged by the companies against the decisions of the Bureau of Enforcement, Penalty and Application of Incentives (DFSAI), competent body of first instance in the administrative penalty procedures on environmental matters.

Although it dealt with a new agency, it is important to emphasize that this agency assumed the supervision and penalty duties on environmental matters that the Supervisory Body for Investment in Energy and Mining (OSINERGMIN) carried out before. In this context, the first TFA[4] started its duties as of its opening at the end of July 2011. From the beginning, there was a considerable load of files to be resolved, accepted through a duty transference process from Osinergmin to the OEFA. In addition to this, other numerous files were added by the DFSAI, a natural responsibility to exercise a new power. It is clear that the TFA assumed the great challenge to manage itself the responsibility conferred by the Osinergmin and the DFSAI, and all effort made to issue the pronouncements which put an end to the instance had concrete results.

1 Published in the Official Gazette *El Peruano* on May 14, 2008.

2 Published in the Official Gazette *El Peruano* on March 5th, 2009.

3 Published in the Official Gazette *El Peruano* on April 26th, 2013.

4 The first Environmental Enforcement Tribunal was consisted of Mr. William Postigo de la Motta as President; José Augusto Chirinos Cubas as Regular member; Ms. Verónica Violeta Rojas Montes as Regular member and who relinquished on April, 2013; also Mr. Francisco José Olano Martinez. In the second half of the year 2012, Engineer Héctor Adrián Chávarry Rojas was joined.

We assumed the challenge of reviewing more than six hundred and twenty decisions of the TFA which were issued for two years and seven months of working on it[5] and identify the most outstanding guidelines of this official body. This article is the result of the analysis of the universe of administrative decisions by the TFA from which the case NYRSTAR was only published in the Official Gazette *El Peruano* for having interpretative criteria of compulsory compliance in the administrative penalty procedure without having issued any legally binding administrative precedent at the date. Seven issues have been selected including the author's considerations, in addition to explain the reasoning of the TFA from the point of view of the administrative environmental law and the administrative law.

II. ENVIRONMENT

Undoubtedly, a subject of study in terms of administrative environmental penalty procedure is the concept of environment. Within the scope of the exercise of supervision, enforcement and powers to impose penalties regarding the conducts which constitute environmental offenses, the analysis and expression of the TFA's position is adopted on the environment as a subject of protection, reasoning depicted in all its decisions.

The most current definition of the decisions by the TFA is that one included in the decision of the Environmental Enforcement Tribunal No. 002-2014-OEFA/TFA from January 18th, 2014 – Case of Corona[6].

> (…)
> 16. The Constitutional Court has mentioned that the environment is the area where life is developed and includes natural elements, living and nonliving, social and cultural elements existing in a determinate place and time, which have influence or determine human life and other living beings (plants, animals and microorganisms).
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> Along the same lines, the Number 2.3 from the Article No. 2 of Law No. 28611, General Law on Environment is prescribed that the environment includes those physical, chemical and biological

5 These decisions stand for more than one hundred eighty million soles in fines for environmental offenses committed by the companies.

6 TFA Decision is attributed to the File No. 212-08-MA/E, taking legal action against SOCIEDAD MINERA CORONA S.A., which supports the decision of first instance.

elements of natural or anthropogenic source, individually or in association, constitute the environment where life is developed, factors which ensure the individual and collective health of people and the preservation of natural resources, the biological diversity and cultural heritage related to them, among others.

17. As rightly indicated, when societies lose their harmony with the environment and notice its deterioration, the environment emerges as a protected legal right. In that context, every State defines how much protection will give to the environment and natural resources, since the result of protecting such essential public goods have an impact on the quality level of people's life.

18. In our legal system, the first level of protection to the environment is formal and determined by granting constitutional status to the group of legal regulations which regulate the environmental natural lands and properties by providing recognition of an "Ecological Constitution" in the Political Constitution of Peru, which sets the relationships among individual, society and environment.

19. The second level of protection given to the environment is material and determined by its consideration (i) as legal principle, which disseminates all the legal system; (ii) as fundamental right whose essential content is constituted of the right to enjoy a balanced and appropriate environment for life development and the right to preserve such environment; and (iii) as a group of obligations imposed to the authorities and private sector in their quality of social taxpayers.

20. On the basis of this constitutional support, the State makes the protection to the environment effective because of the non-compliance of the environmental rules through the exercise of the power to impose penalties as part of a due administrative procedure, as well as the application of three large groups of measures: (i) measures of redress facing damages already caused, (ii) measures of prevention facing known risks before these ones occur; and (iii) preventive measures facing threats of unknown and uncertain damages.

21. In such context, the preservation of a healthy and balanced environment impose obligations to the private sector in adopting measures aiming to prevent, avoid or redress damages their activities cause or may cause to the environment. Such measures are specified in the legal framework which regulate the protection of the environment and

> also included in the corresponding instruments for environmental management.
>
> 22. Within such constitutional framework which protects the appropriate environment and its preservation, this Tribunal will explain the general and specific provisions, as well as the obligations of the private sector as part of the administrative penalty procedure (…).

From the explained basis, it is necessary to insist on the following substantive issues:

a) The fundamental right to the environment[7]. The environmental protection is constitutional and activated when societies lose their harmony with the environment and notice its deterioration.
b) The triple meaning of environment for its protection: (i) as legal principle; (ii) as fundamental right, such right to enjoy a balanced and appropriate environment for life development and its preservation; and (iii) as a group of obligations imposed to authorities and private sector in their quality of social taxpayers.
c) The administrative technique of protection, as regards to the offenses against the environmental rules through the exercise of the power to impose penalties, when the legal framework or instruments for environmental management are contravened.

We may not disregard that *environment* is a concept of difficult legal delimitation, since it tends to be broad and ambiguous, but in general terms:

> (…) the environment has been the basis of human existence, because this is the natural environment in which humans satisfy their needs and is the supplying source of all the basic consumer goods for humans' life. (…) An element that is clearly inseparable from the several human production activities intended to satisfy basic needs of humans – this is the influence on the environment, since these ones involves an economic and useful use of goods and resources the nature supplies (…)[8].

7 As fundamental right, this one is protected by amparo guarantee through the corresponding constitutional procedure before the Judiciary and the Constitutional Court.

8 ROJAS, Verónica. "El derecho administrativo y la protección del medio ambiente en el Perú. Su impacto sobre la biodiversidad". *Revista aragonesa de Administración Pública.* No. 28, 2006, Aragón.

For the Constitutional Court (TC)[9] is a starting point that our Political Constitution considers as fundamental right to enjoy a balanced and appropriate environment for life development (Article No. 22, Number 22), reason why, from a constitutional perspective and for the purpose of its effective protection, the TC defines the meaning of *environment*, since it is a concept that is inseparable from the own content of the corresponding right.

> 17. (…) From the constitutional perspective and for the purpose of its protection, it is generally referred to the environment as the place where humans and living beings interact. In such definition is included "(…) both the environment considered as a whole, natural spaces and resources which are part of the nature: air, water, soil, flora, and fauna and the urban surroundings as well"; besides, the environment seen in this way, involves the interrelations occurring among them: climate, landscape, ecosystem, among others.
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> Once the concept of environment is specified, we must refer to the right itself. For our Political Constitution, such right is fundamental now; if that is the case, the State has the obligation to make effective its full force and effect, as well as providing the mechanisms for its guarantee and defense in case of violation.
>
> The content of the fundamental right to a balanced and appropriate environment for the development of a person is determined by the following elements, to wit: 1) the right to enjoy this environment and 2) the right to preserve this environment.
>
> For the first manifestation, that is, the right to enjoy a balanced and appropriate environment, such right involves the power of people to enjoy an environment in which the elements are developed and interact naturally and harmoniously; and in the case humans take part; this should not represent a substantive variation of the interrelation among the elements of the environment. Therefore, it may suppose the enjoyment not of any environment, but only the appropriate one for the development of a person and his dignity (Article 1 from the Political Constitution). On the contrary, the

9 Judgment of the Constitutional Court attributed to the file No. 0048-2004-AI from April 1st, 2005, which dismissed the unconstitutional complaint as groundless brought against Law No. 28258, Law on Mining Royalties. (Footnotes omitted).

> enjoyment may be hindered and the right will be void of content as a result.
>
> But also, the right under discussion is defined in the right to preserve the environment. The right to preservation of a healthy and balanced environment entails unavoidable obligations for the public authorities; to preserve the environmental goods in appropriate conditions for its enjoyment. According to this Tribunal, such obligation also affects the private sector and even more, those whose economic activities have an impact directly or indirectly on the environment.
>
> 18. Regarding the existing relationship between the economic production and the right to a balanced and appropriate environment for life development, is objectified on the following principles: a) the principle of sustainable development (which will then deserve an analysis); b) the principle of preservation in whose merit is aiming to maintain the environmental goods in optimal conditions; (c) the principle of prevention which is supposed to protect the environmental goods of any risk that may affect their existence; (d) the principle of restoration related to sanitation and recovery of damaged environmental goods; (e) the principle of improvement, in whose view is aiming to maximize the benefits of the environmental goods for the enjoyment by humans; (f) the precautionary principle which involves to adopt precautionary and reserve measures when there is scientific uncertainty and signs of threat on real dimension of the effects of human activities into the environment; and (g) the principle of compensation which involves the elaboration of recovery mechanisms for the exploitation of non-renewable resources (…).

The concept of *environment* given by the TC is broad enough and difficult in concision; even more to be constituted as a fundamental right for a single individual, since it is collective for its own nature. At least on penalty matters, it involves the reading of environment should be always complemented with the legal framework applicable to the concrete case and particular circumstances of the case. We may say that the TFA appropriates this concept and complete it with the provisions stated in the Number 2.3 of the Article No. 2 of Law No. 28611 – General Law on Environment[10] (hereinafter referred to as General

10 Published in the Official Gazette *El Peruano* on October 15th, 2005.

Law on Environment), in order to make an analysis of remedies of appeal to be resolved then.

At this point, we attract attention to our legal system which considers the environment, in addition to be protected as a fundamental right; this one is also constituted, as the TFA states, as legal obligations and legal principle, this situation does not occur in other legal systems, as the Spanish legal system for instance, in which *environment* is a principle and a legal right of constitutionally vested collective interest without being constituted as a fundamental right. As Lozano says: "(…) the constitutional configuration of the environment as a governing principle of social and economic policy and not as an invocable fundamental right through an amparo decision is coherent with the status of environmental legal right which cannot be only formed within the scope of law attributable to the individual provision for the requirements derived from its protection as legal right of its scope of protection"[11].

On the other hand, in order to protect the environment as a legally-protected right and principle, the Public Administration develops different administrative techniques, mainly, through the National Environmental Impact Assessment System (SEIA) by means of previous approvals of the corresponding instruments for environmental management (activity of administrative police)[12]; the system of previous concessions for economic exploitation of public assets (activity of administrative police)[13]; the system of incentives to clean production and compliance of environmental rules[14]; the National Service of Natural Protected Areas (SERNANP); the National Environmental Assessment and Enforcement System (SINEFA) which imposes penalties for illicit administrative environmental acts[15]; and other market mechanisms or those ones from treaties or international agreements.

11 LOZANO, Blanca. *Derecho Ambiental Administrativo.* Vigésimo primera edición. Madrid: La Ley, 2010, p. 100.

12 The compliance of the instruments of environmental management by the private sector is supervised by the OEFA or the Environmental Enforcement Entities (EFA by its initials in Spanish) within the scope of its powers.

13 The compliance to develop economic activities for exploitation of public goods by the private sector, such as natural resources with the corresponding operating authorizations (authorizations, concessions, permits, licenses), is supervised by public entities with powers to give such permits.

14 OEFA is in charge of the system of incentives for the compliance of environmental rules.

15 In addition, there are environmental offenses regulated by the Criminal Code; however, that one is not an administrative technique of protection for the environment.

In effect, according to SINEFA Law, the enforcement and penalty role is the right to investigate the commission of possible punishable administrative offenses, to issue corrective and precautionary measures and impose penalties for:

a) Non-compliance of the obligations stated in the environmental rules

b) Non-compliance of obligations and commitments derived from the instruments of environmental management stated in the environmental rules in force (for instance, the Environmental Impact Assessment (EIA by its initials in Spanish), Environmental Impact Statement (DIA by its initials in Spanish), Environmental Management Plan (PMA by its initials in Spanish), Complementary Fishing Environmental Plan (PACPE by its initials in Spanish), etc.)

c) Non-compliance of environmental commitments derived from contracts of concession

d) Non-compliance of precautionary, preventive or corrective measures, as well as the provisions or orders issued by OEFA

e) Other ones related to the scope of its powers.

It may be considered as environmental obligations to be enforced (Article 17 of SINEFA Law[16]) those ones which are included in the previous items.

16 Law No. 29325, Law on National Environmental Assessment and Enforcement System.
"Article 17.- Administrative offenses and the power to impose fines
Constitute administrative offenses within the scope of powers of the Agency for Assessment and Environmental Enforcement (OEFA) the following conducts:

a) The compliance of the obligations included in the environmental rules.
b) The compliance of the obligations under the responsibility of the entities stated in the instruments for environmental management indicated in the effective environmental rules.
c) The compliance of environmental commitments specified in contracts of concessions.
d) The compliance of precautionary, preventive or corrective measures, as well as the provisions or orders issued by competent instances of the OEFA.
e) Other ones related to the scope of its responsibility.

The compliance of the foregoing environmental obligations to be enforced is compulsory for all individuals or legal entities which carry out activities which are responsibility of the OEFA, even though these ones have no permits, authorizations and operating authorizations for the execution of those ones. This provision is applicable

Regarding this point, we consider important those effects from the administrative penalty procedure, in particular, those ones related to the non-compliance of environmental management instruments so that the TFA has taken into account the concept of environment in its decisions.

III. ENVIRONMENTAL OBLIGATIONS TO BE ENFORCED AND ENVIRONMENTAL COMMITMENT

3.1 Environmental obligation to be enforced

The OEFA supervises the private sector to comply with the environmental obligations to be enforced (OAF) to which the Article 17 of SINEFA Law is referred to. From this point, the importance to clearly set out the meaning of the OAFs may emerge. It may be indicated that the Peruvian environmental rules, in terms of enforcement and penalty, has such a complex application because it is required the systematic management of different rules. In the case of offenses, the previous Article 17 of SINEFA Law is applicable and other laws on this subject as the General Law on Environment, these ones are complemented with the sectorial-environmental rules of each scope under supervision of the OEFA (of legal or regulatory status) and also, the regulatory rules issued by the OEFA.

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for all the Environmental Enforcement Entities (EFA) regarding their responsibilities, as appropriate. When the OEFA has reasonable and verifiable signs of the non-compliance of the conditions so that an activity is within the scope of its responsibility of regional governments and therefore, its current condition may correspond to the responsibility of the OEFA, this one is empowered to carry out actions of environmental enforcement that might be granted. The actions exercised by the OEFA, as indicated in this article, are carried out without prejudice to the responsibilities of regional governments and other Environmental Enforcement Entities (EFA), as well as the Supervisory Body for Investment in Energy and Mining (OSINERGMIN) and other sectorial entities according to their responsibilities.

Through Supreme Decree countersigned by Minister of Environment upon request of the OEFA, the provisions and criteria are stated for the environmental enforcement of the activities mentioned in the previous paragraphs.

The Agency for Assessment and Environmental Enforcement (OEFA) exercises the power to impose penalties regarding the environmental obligations established in plans, programs and other instruments of environmental management to be approved by the Ministry of Environment (MINAM).

Through decision by Board of Directors of OEFA the conducts are classified and the scale of applicable penalties is approved. The classification of general and transversal offenses and penalties will be additional application to the classification of offenses and penalties to be used by the EFA".

The case of the enterprise Electro Oriente is interesting in this sense[17]. In the basis 42 to 44, it is clear that the criteria of TFA regarding the conclusion of the enterprise as regards to the offenses which were imposed may not be valid because these ones violate the principle of legality and classification:

> (…) 42. In that regard, in order to explain the regulatory support of the applications carried out at the beginning of the administrative penalty procedures in the area subject to supervision, it is important to note that in repeated judgments, this Administrative Tribunal has carried out a qualification between the substantive rules and classification rules by indicating that the first ones include the environmental obligation to be enforced, whose non-compliance is charged; while the second ones describe such non-compliance as an offense establishing as the type of accused offender.
>
> 43. Concerning this matter, the Item i) of the Article No. 42 of the Regulation approved by Supreme Decree No. 29-94-EM and the Item h) of the Article No. 31 of Decree law No. 25844 (substantive rules), include the environmental obligations to be enforced consisting in preventing and minimizing the impact due to the sound in sensitive areas and comply with the rules of preservation for the environment, respectively.
>
> 44. On its part, the Number 3.20 from the Exhibit 3 of Order No. 028-2003-OS/CD (classification rules) expressly describes the non-compliance of the mentioned environmental obligation as punishable offense (…).

Along the line of argumentation given by the TFA, in the explained basis these important aspects may be emphasized:

- The OAFs are legal obligations stated by the environmental rules or instruments for environmental management, among others; and the offenses are the non-compliances against them.

- At the same time, the environmental offenses are governed by several legal systems according to the field: sectorial ones (such as energy, mining, fishing, etc)[18].

17 TFA Decision No. 143-2013-OEFA/TFA from July 2nd, 2013 attributed to the File 2007-185 taking legal action against the Empresa Regional de servicio de electricidad del Oriente S.A.-Electro Oriente, which dismisses the remedies of appeal as groundless.

18 Also, according to time and depending on the opportunity of the commission of the offense, the rules in force are applicable and favorable to the company.

- There is no an index of classification of all and every administrative environmental offense. This one is extremely difficult because, in addition to be a legal right of recent protection (from the last quarter of the XX century), this one has always had a great variety of rules by its specialty; also, the economic activities which are supervised are dynamic and in constant technological change.

- The technique used for the classification comes from the unification of rules as a whole: a substantive one and other one called classification, which in theory are referred to as classification by remission and this one should not violate the legality and classification principles.

By analyzing the case above, the Decree Law No. 25844, Law on Electric Concessions[19] and the Supreme Decree No. 29-94-EM, which approves the Regulation of Environmental Protection in Electric Activities[20] in the Article 31 and 42 respectively, establish the environmental legal obligation, that is, the *substantive* rule.

Substantive Rule

Decree Law No. 25844, Law on Electric Concessions
Article No. 31. - Both concession and authorization holders are required to:
(…)

h) Comply with the preservation rules of the environment and National Cultural Heritage.

Supreme Decree No. 29-94-EM, which approves the Regulation of Environmental Protection on Electric Activities
Article No. 42. - The petitioners of Concessions and Authorizations and those ones having Operating Electric Projects must comply with the following statute of limitations:
(…)
Construct and execute the Electric Projects in a way that the impact is prevented or minimized due to the sound in sensitive areas (residential, recreation areas, areas of habitat sensitive to the sound, etc.).

19 Published in the Official Gazette *El Peruano* on November 19th, 1992.

20 Published in the Official Gazette *El Peruano* on June 8th, 1994.

Concerning the *classification* rule whose starting point is the *substantive* rule, we analyze the following:

Classification Rule

Decision No. 028-2003-OS/CD – Approves the Scale of Fines
And Penalties on Electricity[21]

EXHIBIT 3:

Fines for non-compliance to the Rules
on Electric Sector over the Environment

N°	CLASSIFICATION OF OFFENSE	LEGAL BASIS	PENALTY
3.20	When the concession or authorization holder does not comply with the environmental provisions specified in the Law and Regulation or rules issued by the General Directorate of Environmental Affairs (DGAA by its initials in Spanish) and OSINERG	Item h) of the Article No. 31 of Decree Law No. 25844 and the Article No. 3 of the regulation approved by Supreme Decree No. 029-94-EM.	From 1 to 1,000 Peruvian Tax Unit (UIT)

Based on the above, the TFA states that the OAF is the *substantive* rule and following the subsequent line, this one concludes that the classification of the offense complies with the legality and classification principles which will be analyzed below. In this case, the OAF agrees with the *substantive* rule as an obligation stated by a legally binding rule and other regulatory one. Another matter to consider is that the OAFs are also non-compliances of environmental commitments derived, for instance, from the environmental instruments that the companies must approve by law.

21 Published in the Official Gazette *El Peruano* on March 12th, 2003.

3.2 Environmental commitment

As regards to the environmental commitments, these ones may be a denomination in the universe of the OAFs mainly referred to the non-compliance of instruments for environmental management. In this regard, the judgment of the TFA will be analyzed in two cases for non-compliance of commitments of Environmental Impact Assessments (EIA by its initials in Spanish): cases of PERÚ LNG[22] and Transportadora de Gas de Perú (TGP)[23].

The TFA carries out a detailed analysis on the rule applicable to both the environmental impact assessment process and the projects subject to different types of instruments for environmental management and of course, the structure the environmental impact assessments must include. In the following lines, we will emphasize upon our judgment, the main ideas of the TFA's reasoning and the applicable legal system by adding comments in this regard:

- There are some projects of public and private investment which are included in the SEIA which involve the development of activities, the execution of constructions or works which may cause significant environmental impacts, so before executing activities must necessarily have an environmental certification. The environmental certification is the order of administrative approval of the instruments for environmental management.
- In that respect, the General Law on Environment and sectorial rules firstly and Law No. 27446, Law on National Environmental Impact Assessment System[24] (hereinafter referred to as SEIA, SEIA Law) then, these ones create a variety of instruments for environmental management which disagree as regards to the detail and demanding technical preciseness; when the project is large scale, the preciseness is more than when we face a medium or small scale project[25].

22 TFA Decision No. 274-2013-OEFA/TFA from December 27th, 2013 attributed to the File No. 123-2013-OEFA-DFSAI/PAS taking legal action against PERÚ LNG S.R.L., which dismissed the nullity as groundless in accordance with the first instance decision and in all other particulars.

23 TFA Decision No. 276-2013-OEFA/TFA from December 27th, 2013 attributed to the File No. 106579 taking legal action against Transportadora de Gas del Perú S.A., which reduces the fine and invalidates the remedial measure issued by OSINERGMIN.

24 Published in the Official Gazette *El Peruano* on April 23rd, 2001.

25 The instruments of environmental management are those ones set forth in the Number 17.2 of the Article 17 of Law No. 28611 – General Law on Environment:

- The promoters of such projects for investment included in the SEIA must work on the instrument for environmental management and follow the approval proceeding stated before the competent entity. The EIA includes with regard to the community participation.
- The EIAs are instruments for the comprehensive project and these ones are governed by the principle of indivisibility.
- The EIAs have a legal content stated in general terms, according to the General Law on Environment and in the specific case of hydrocarbons (revised case) must constitute of the baseline, the description of the proposed project in detail, the technical description and assessment of the effects on the environment, the Environmental Management Plan and the Area Evacuation Plan.
- Upon the principle of indivisibility, the TFA concludes that the instrument for environmental management is a comprehensive

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Article 17°.- Types of instruments

(…)

17.2 The instruments for environmental management are deemed to constitute the systems of environmental, national, sectorial, regional or local management; the environmental territorial system; environmental impact assessment; Closure Plans; Contingency Plans; the National Environmental Quality Standards; the environmental certification; environmental guarantees; the systems of environmental information; the economic instruments; the environmental accounting; strategies; plans and prevention, compliance, control and remediation programs; the mechanisms of community participation; the comprehensive plans of waste management; the instruments oriented to preserve the natural resources; the instruments of environmental enforcement and penalty; the classification of species, closed seasons and protected and preservation areas; and in general, all those ones oriented to the compliance of the objectives stated in the previous article.

(…)

In the hydrocarbons sector: Supreme Decree No. 015-2006-EM, Regulation for the Environmental Protection in the hydrocarbons activities, published in the Official Gazette El Peruano on March 3rd, 2006 (which revoked the Supreme Decree No. 046-93-EM published in the Official Gazette El Peruano on November 12th, 1993).

Article 11.- The environmental assessments according to the hydrocarbons activities are classified in:

a. Environmental Impact Statement (DIA).
b. Environmental Impact Assessment (EIA).
c. Environmental Impact Assessment-semi detailed (EIA-sd)
d. The relationship of environmental assessments recorded in the previous paragraph does not exclude the other documents of environmental compliance management, such as the Environmental Compliance and Management Program - PAMA, Planning Assessment Commission - PAC, Special Environmental Management Program - PEMA, which are governed by this Regulation whatever is legally applicable.

> document and the environmental obligations (commitments) may be found not only in the Environmental Management Plan (document which includes, by nature, the environmental commitments of the EIA) but also, as noted in the other chapters of environmental instrument, in the whole EIA (without considering the specific part in which such commitments are) including that one concerning the statute of limitations of the proposed project and its context, since this one may be used for identifying the environmental impacts on which the environmental measures are focused in order to contribute to the early effective prevention, supervision, control and correction of the negative environmental impacts caused by projects of investment.

The TFA explains and uses the principle of invisibility to the comprehensive relationship between the description of the project, environmental impacts and measures included in the EIA regarding its supervision, enforcement and penalty. We do point out that this principle may be what in the doctrine is studied as a prohibition to the division of projects for works or activities in order to evade the application of the EIA. In effect, the companies in order to negotiate disintegration oriented to avoid the project to obtain an assumption from EIA (since this one is more rigorous), sometimes these ones tend to divide the projects not to be compelled to have an EIA, but other lesser demanding environmental instruments. This is what the prohibition of project division in the Spanish, German, the Netherlands and the United Kingdom environmental legislation is aiming to avoid, for instance, "providing that the environmental impact assessment will include the whole of the project and not only the partial environmental impact assessments of each phase or part of the project"[26]. To this last development, the indivisibility principle seems to be oriented to specified in the Regulation of SEIA Law approved by Supreme Decree No. 019-2009-MINAM[27]:

> Article No. 3. - SEIA principles
> The SEIA is governed by the principles stated in Law No. 28611, General Law on Environment and the following principles:
> Indivisibility: the environmental impact assessment is carried out in a comprehensive and integrated way on policies, plans, programs and projects of investment, including undivided all the components of those ones. Also, it involves the determination of concrete, viable and

26 LOZANO, Blanca. *Derecho ambiental administrativo.* Vigésimo primera edición. Madrid: La Ley, 2010, p.475.

27 Published in the Official Gazette *El Peruano* on September 25th, 2009.

> compulsory compliance measures and actions to ensure permanently, the appropriate environmental management of such components, as well as a good environmental performance in all its phases.

In case of TGP, the TFA then concludes that it is required that the commitment is or not in the Environmental Management Plan (PMA) of the EIA.

> 34.Furthermore, the Sub-paragraph e) of the Article 48 of the Regulation for the Environmental Protection of hydrocarbons activities approved by Supreme Decree No. 046-93-EM does not state any distinction regarding the enforceability of the parties of the related environmental instrument; but it is required in every respect[28].

With regards to the case of PERÚ LNG, it is relevant to insist on the TFA validates a penalty imposed by the DFSAI for non-compliance of labor standards, since the compliance of those ones was included in the EIA as a commitment to reduce the social impact[29].

IV. PRINCIPLE OF LEGALITY AND SUB PRINCIPLE OF CLASSIFICATION

The criterion of the TFA on the topic of reference has had a broad development in the mining sector, in particular regarding the Ministerial Order 353-2000-EM/VMM which approves the Scale of fines and penalties to be imposed because of non-compliance of the provisions from the Single Organized Text of General Law on Mining and its regulatory rules[30], which is applicable only

28 Supreme Decree No. 046-93-EM. Regulation for Environmental Protection in hydrocarbons activities, published on November 12th, 1993.
Article No. 48.- In case of non-compliance of the provisions for this Regulation, the responsible party will be officially imposed penalties according to the following:
(…)
In case the responsible parties fail to complete, the PAMA related to the temporary provision or the EIAs and EIAPs related to the Article 10 or the PMAs related to the Article 11, may be convenient the following (…)

29 An Environmental Impact Assessment according to the words of Professor Esteve Pardo is "(…) a fundamental key (…) an outstanding element, of course from this formula and at least this one will include the following information:
a) General description of the project. Foreseeable use of soil and other resources. Estimation of volume and type of waste and emissions.
b) Exposition of the main alternatives.
c) Assessment of foreseeable effects on human population and natural resources, also on the archeological, historical and artistic heritage.

until the entry into effect of the Supreme Decree No. 007-2012-MINAM which approves the Table of Classification of Environmental Offenses and the Scale of Fines and Penalties applicable to the Large and Medium-sized Mine regarding the tasks of exploitation, benefit, transport and storage of ore concentrates[31].

Mining companies have repeatedly stated that the previous order, prior to the entry into effect of Law No. 27444, Law on General Administrative Procedure[32] (hereinafter referred to as LPAG) does not comply with the status of a law that may be required by the Number 4 of the Article 203 of such rule and on the other hand, this one may not define with precision the constitutive conducts of administrative punishable offense, that is, this one is qualified as "penalty blanket law".

Concerning this matter, the TFA has repeatedly distorted what the companies have affirmed. In the recent case of VOCAN[33], the fundamental conclusion of the TFA is that the "*legality of the Ministerial Order No. 353-2000-EM-/VMM is guaranteed by the coverage the TUO confers this one from the General Law on Mining, Law No. 28964 and Law No. 29325"* (basis 38). In the matter of the supposed "punishable blanket law", at the discretion of the TFA, this one is

d Measures expected to reduce, eliminate or compensate the significant environmental effects.

e) Environmental surveillance program.

Under relevant demand, a summary of the study and conclusions in terms easy to understand is introduced. (…)".

ESTEVE PARDO, José. *Derecho del medio ambiente.* Segunda edición. Madrid: Marcial Pons, 2008, p. 68.

The renowned environmental Jurist Lozano Cutanda says that the environmental impact assessment is a "technique of environmental protection of preventive nature and consisting of a proceeding constituted by a group of studies and technical systems and opened to public participation, whose aim is to make possible the assessment by the environmental impact authority or effects for the environment of a work or activity project in a report referred to as environmental impact statement, in which is specified from the environmental assumptions on the interest or not in carrying out the project and the conditions to be made in that case". LOZANO Blanca. *Derecho ambiental administrativo.* Décimo primera edición. Madrid: La Ley, 2010, p. 467.

30 Published in the Official Gazette *El Peruano* on September 2nd, 2000.

31 Published in the Official Gazette *El Peruano* on November 10th, 2012.

32 Published in the Official Gazette *El Peruano* on April 11th, 2001.

33 TFA Decision No. 010-2014-OEFA/TFA attributed to the File No. 186-2012-DFSAI/PAS taking legal action against VOLCAN COMPAÑÍA MINERA S.A.A., which validates the penalty which was imposed.

not considered since the legal right (substantive rule) and the classification of the offense (classified rule) are clearly defined.

In that regard, we must specify that the LPAG states that the power to impose penalties is governed by the principles of legality and classification (called sub principle of classification by the TC). In view of the principle of legality, we largely have the guarantee not to be imposed penalties by the public competent entities if the offense and penalty are not prescribed in the law. However, beyond its presence in the LPAG, the greater importance of this principle is its constitutional basis.

The principle of legality and the sub principle of classification, as our TC is referred to, both in criminal and administrative matter have been recognized in the Article 2, item 24) from the Political Constitution of the State 1993, which includes "[no] one will be prosecuted and sentenced by act or omission whenever this one is committed is not previously described expressly and unambiguous by law as punishable offense, nor punished under penalty not provided by law".

Having said that, if the activity executed by the Public Administration in exercise of the administrative penalty power will always have a negative impact on the legal sphere of the private sector, it may have a guarantee of protection for the rights of the citizen, since this one will know in advance (*lex praevia*), with certainty, which conducts are considered illegal and which the legal burdensome consequences are to them (*lex certa*). To every illegal conduct, that is to say, administrative offense, a penalty is imposed to. The legality of the offense and penalty are related to a law may determine them, but the scopes of the principle do not conclude there: this law must be exhaustive in the legal statute of limitations of the illegal conduct and the punishment to be imposed (classification). Nevertheless, although it is an impossible task the legislator may foresee in the law, all the possible administrative offenses in each of the activities administratively regulated, is that the LPAG recognizes in the statute of limitations of the classification principle, the possibility through regulations to complete the circle of classification of offenses provided that a law allows the regulatory collaboration to the Public Administration.

In case of the Ministerial Order No. 353-2000-EM/VMM, the TFA concludes that the principle of legality and classification are not violated, because the Single Organized Text of the General Law on Mining, approved by Supreme Decree No. 014-92-EM[34] (hereinafter referred to as TUO of the General Law on

34 Published in the Official Gazette *El Peruano* on June 4th, 1992.

Mining), established the possibility that the Administrative Authority imposed penalties and fines to the holders of mining rights who fail to complete their obligations or infringe the regulatory provisions of the sector[35]. On the other hand, the TFA emphasizes that the Third final Provision of Law No. 26821[36], Organic Law for the Sustainable Exploitation of Natural Resources[37], declared that this law was still valid, among others, the TUO of the General Law on Mining, as well as its amending or complementary rules, among them, the Ministerial Order No. 310-99-EM/VMM[38], which approved the scale of fines and penalties to be imposed in case of non-compliance of the provisions included in the TUO of the General Law on Mining and its regulatory rules.

In addition, the TFA mentions that the cited Ministerial Order No. 353-2000-EM/VMM was also valid and applicable because the first Complementary Temporary Provision of Law No. 28964, law which conferred powers of supervision and enforcement of mining activities to the OSINERGMIN[39], the TFA stated:

> ONE.- Whereas the Osinergmin approves the inspection proceedings of mining activities related to its jurisdiction, the provisions *will be valid* on this matter included in Law No. 27474 and *will be still applicable* the proceedings stated in the Enforcement Regulation of Mining Activities approved by Supreme Decree No. 049-2001-EM and its amending rules, *as*

35 Supreme Decree No. 014-92-EM, Single Organized Text of the General Law on Mining, published in the Official Gazette *El Peruano* on June 4th, 1992.
Article 101.- The following responsibilities are from the General Mining Management:
(…)
l) To impose penalties and fines to the holders of mining rights who fail to complete the obligations or infringe the provisions included in this Law, its Regulation and the Environmental Code.

36 "Third.- The following laws on natural resources previously promulgated to this one, are still valid among others, including its amending or complementary ones:
(…)
General Law on Mining with the corresponding text published by Supreme Decree No. 014-92-EM, Single Organized Text of the General Law on Mining.
(…)".

37 Published in the Official Gazette *El Peruano* on June 26th, 1997.

38 Published in the Official Gazette *El Peruano* on July 7th, 1999. Rule revoked by Ministerial Order No. 353-2000-EM/VMM.

39 Published in the Official Gazette *El Peruano* on January 24th, 2007.

> *well as the Scale of Penalties and Fines, approved by Ministerial Order No. 310-2000-EM, becoming applicable all the complementary rules of these provisions that are valid to the date of promulgation of this Law* (…) (Emphasis added).

Therefore, the TFA focuses on the consistent criteria in which "the first complementary temporary provision of Law No. 28964 does not include an assumption of regulatory collaboration, this is from the Ministerial Order No. 28964 to complement or develop Law No. 28964, but such Law recognizes the provisions approved by the Ministerial Order No. 353-2000-EM/VMM 'such laws will be valid and applicable'. Under this appeal, Law No. 28964 appropriates the provisions of the Ministerial Order No. 353-2000-EM/VMM by giving legal coverage and guaranteeing this way, the compliance of the principle of legality of Law No. 27444[40]. In addition to this, the conferral process of duties initiated with Supreme Decree No. 001-2010-MINAM[41], in accordance with the First Complementary Final Provision of SINEFA Law which authorized the OEFA to impose the offenses on environmental matters by using the legal framework and scales of penalties that the Osinergmin carried on imposing, among which the mentioned Ministerial Order No. 353-2000-EM/VMM is, whose legality had been previously guaranteed.

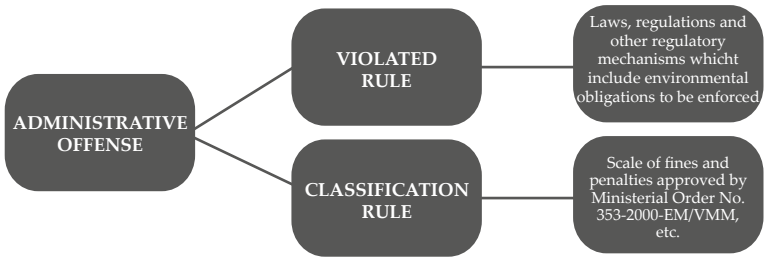
Relating to the supposed violation of the principle of classification specified in the number 4 of the Article 230 of Law on General Administrative Procedure, we may emphasize that the statute of limitations of the classified conduct as an offense has enough exhaustiveness which allows the company identify the elements of punishable conduct.

At the discretion of the TFA, as previously mentioned, we have a correct classification when a *substantive* rule is added, which undoubtedly establishes a legal obligation and other *classification* rule described as an administrative offense liable to penalty, which is accepted by the administrative doctrine as technique of classification by reference, frequently used by the legislator and the Public Administration.

40 Basis 35 of TFA Decision No. 010-2014-OEFA/TFA attributed to the File No. 186-2012-DFSAI/PAS taking legal action against VOLCAN COMPAÑÍA MINERA S.A.A.

41 Published in the Official Gazette *El Peruano* on January 21st, 2010.

Diagram used by the TFA[42]
Environmental administrative offense



In the case of VOLCAN, the offense which was charged consisted of the non-compliance of the Article 4 of the Ministerial Order No. 011-96-EM/VMM, which approved the permissible maximum levels for mining liquid effluents – metallurgical[43]; and the Article 5 of the Supreme Decree No. 016-93-EM, which approves the Regulation of the Fifteenth Header of the Single Organized Text of the General Law on Environment concerning the environment[44]. Besides, such offense was classified in the Number 3.1 of point 3 from the Scale of fines and penalties, approved by Ministerial Order No. 353-2000-EM/VMM, which indicates the following:

> 3.1*Offenses of the provisions related* to the environment included in the TUO, Environmental Code or Environmental Regulation approved *by Supreme Decree. No. 016-93-EM* and its amendment approved by Supreme Decree. No. 059-93-EM; Supreme Decree No. 038-98-EM, Environmental Regulation for Explorations; Decree Law N°25763, Law on enforcement by third parties and its regulation approved by Supreme Decree. No. 012-93-EM, *Ministerial Orders No.. 011-96-EM/VMM,* 315-96-EM/VMM and other amending and complementary rules detected as a consequence

42 Extracted from the TFA Decision No. 010-2014-OEFA/TFA attributed to the File No.186-2012-DFSAI/PAS taking legal action against VOLCAN COMPAÑÍA MINERA S.A.A.

43 Published in the Official Gazette *El Peruano* on January 13th, 1996. Rule revoked by Supreme Decree No. 010-2010-MINAM, which approves the Permissible Maximum Limits for the discharge of liquid effluents from mining-metallurgical activities (published in the Official Gazette *El Peruano* on August 21st, 2010).

44 Published in the Official Gazette *El Peruano* on May 1st, 1993.

> of the enforcement or special tests, the amount for the fine will be 10 Peruvian UIT for each offense, up to a maximum of 600 Peruvian UIT for offense (…) (Emphasis added).
>
> Such offense was considered as serious after the rising of the fine because this one caused damage to the environment (the fine was from 50 Peruvian UIT for each offense up to a maximum amount of 600 Peruvian UIT). In the case under discussion, the offense was considered as serious since the non-compliance of the permissible maximum limits (LMP) constitutes the assumption of environmental damage described in the Number 142.2 of the Article 142 of the General Law on Environment.

According to the words of TFA:

> 46. (…) the non-compliance of the environmental obligation to be enforced included in the Article 4 from the Ministerial Order No. 011-96-EM/VMM constitutes a serious and punishable offense in accordance with the type of content in the number 3.2 of point 3 from the Exhibit of the Ministerial Order No. 353-2000-EM/VMM[45].

As it is perceived, both the substantive obligation and the classified offense are fully identified from an ordinary analysis.

This controversy, certainly, related to the principles of legality and classification, may be still present until the administrative penalty procedures are definitively resolved, which were initiated during the validity of the Ministerial Order No. 353-2000-EM/VMM, since as of the Supreme Decree No. 007-2012-MINAM, a new chart of classification of offenses was approved. It may be emphasized that the importance, according to the principle of legality, an offense could not exist, in any case, without a legal obligation clearly stated in the environmental legal system, since this one may be unconstitutional.

45 In this regard, we must emphasize that the illicit conduct classified in the Number 3.2 of point 3 from the exhibit of Order No. 353-2000-EM/VMM is a precise and unambiguous offense regarding the non-compliance of the environmental obligations to be enforced which are imposed to the mining holder. And also, it may be verified that there is a legal predetermination of the corresponding conduct and penalty, resulted in no possible further interpretations when applying the rules that classified offense includes.

V, NON-COMPLIANCE OF PERMISSIBLE MAXIMUM LIMITS AND ENVIRONMENTAL DAMAGE IN MINING ACTIVITY (CASE OF NYRSTAR)

The analysis of this topic will include the case of NYRSTAR, depicted in the TFA Decision No. 082-2013-OEFA/TFA, published in the Official Gazette *El Peruano* on April 15th, 2013, through which the TFA approves the criteria of importance in terms of responsibility of the OEFA, in accordance with the provisions of the Article 4 of the Internal Regulation from the Environmental Enforcement Tribunal of the OEFA, approved by Decision of Board of Directors No. 005-2011-OEFA/CD[46] and amended by Decision of Board of Directors No. 014-2012-OEFA/CD[47].

The company NYRSTAR, through authorized and non-authorized mining-metallurgical effluents exceeded the LMP for the parameters Fe, Zn and Total Suspended Solids (STS by its initials in Spanish) stated in the Article 4 of the Ministerial Order No. 011-96-EM/VMM, which cause damage to the environment. In view of this, the offense was qualified as serious in accordance with the Number 3.2 of point 3 of the exhibit from the Ministerial Order No. 353-2000-EM/VMM.

The recurrent conclusion of mining companies which violate the LMPs is that these ones must be imposed penalties in accordance with the Number 3.1 of point 3 from the Ministerial Order No. 353-2000-EM/VMM therefore, these ones may deserve a penalty of 10 Peruvian UIT instead of 50 Peruvian UIT[48].

In that regard, the criterion of the TFA in the case of NYRSTAR is that the definition of environmental damage (basis 53 and 54) specified in the General Law on Environment, gathers two important elements:

46 Published in the Official Gazette *El Peruano* on July 22nd, 2011. Revoked by Decision of Board of Directors No. 032-2013-OEFA/CD (published in the Official Gazette *El Peruano* on August 2nd, 2013).

47 Published in the Official Gazette *El Peruano* on December 22nd, 2012.

48 Nowadays, these ones may be imposed penalties up to 25,000 Peruvian UIT in accordance with the Decision of Board of Directors No. 045-2013-OEFA/CD, published in the Official Gazette *El Peruano* on December 13th, 2013, which classifies the administrative offenses and establishes the scale of penalties related to the non-compliance of the permissible maximum limits (LMP) specified for the economic activities which are under the responsibility of the Agency for Assessment and Environmental Enforcement – OEFA, in case of the excess of LMP causes real damage to life or human health, and the company does not have operating authorization.

a) The environmental damage must affect a material loss to the environment and/or some of its components.
b) The mentioned material loss must cause negative effects which may be *current or potential*.

The continuation is as follows:

> (…) 55. As regards to the first element related to the material loss, it may be indicated that this one involves all damage to the environment which is caused, for instance, when emitting contaminant substances that damage the physical or chemical quality of some or several elements from the environment by modifying its natural condition to a greater or lesser degree.
>
> 56. In turn, the second element refers to what in the configuration of environmental damage is not essential the negative effects of the material loss produced in the environment are current, but it is enough that such negative effects are *potential*[49], *understanding as potential what it may occur or exist.*
>
> 57. As Sánchez Yaringaño points out "the negative effect of the environmental damage must not be necessarily immediate and current, but it may be potential and future. In that regard, it is necessary to distinguish between the causes and effects. According to the Law, the effects can only be current or potential, the causes which generate such effects if these ones really have to be verified (…) through the methods of science and technology".
>
> 58. To that effect, the material loss is constituted against every action or omission which modifies, disrupts or reduces any constitutive element of the environment; while the potential ones are the negative effects of such loss, that is, the future probability in verisimilitude degree to occur such negative effects.

49 Along the same lines, Peña affirms that "[thus], we violate one of the characteristic elements of casualty law, for which this must be always certain, effective, determinable, gradable, and personalized and not purely occasional or hypothetical, since dealing with environmental damage, it is only necessary its future probability to determine its existence and do everything in its power in order to prevent its damaging effects". See PEÑA, Mario. "*Daño ambiental y prescripción"*. Visited on February 18th, 2013 <http://huespedes.cica.es/aliens/gimadus/19/06_mario_penia_ chacon.html>.

> 59. In accordance with the number 32.1 of the Article 32 of Law No. 28611, the LMP "is the measure of the concentration or degree of physical, chemical and biological elements, substances or parameters which characterize an effluent or omission and when this one is exceeded, cause or may *cause damage to health,* human well-being and the environment (Emphasis added).
>
> 60. Therefore, if a company exceeds the LMPs, cause or may cause damage, in accordance with the number 142.2 of the Article 142 of Law No. 28611 explained in the whereas clauses 53 to 59 of this Order, constitutes environmental damage. In this case, the material loss is verified through the proper verification of excess of the LMPs, that is, the improvement of tolerable levels of discharges to the environment in relation to a particular parameter; while the negative effects of such material loss may be current or potential.
>
> 61. In view of the above, we have that the excess of the LMPs involves the existence of environmental damage; therefore, such excess constitutes the serious offense contemplated in the Number 3.2 of point 3 of the exhibit from the Ministerial Order No. 353-2000-EM/VMM, related to the cause of damage to the environment (…).

The offense for exceeding the LMPs stated by Ministerial Order No. 011-96-EM/VMM committed by VOLCAN is a serious offense because the fact of exceeding them, according to the legal definition of the number 142.2 of the Article 142 of the General Law on Environment, is considered as environmental damage.

VI. EVIDENTIARY VALUE OF TEST REPORTS TO VERIFY THE COMPLIANCE OF PERMISSIBLE MAXIMUM LIMITS

A topic related to the offense against the LMPs stated for the mining industry is relative to such means of test which support such compliance.

Regarding the offense of exceeding the LMPs, we must take into account that the presence of iron, pH, zinc, lead, among others, in the effluents of mining industries, it may be determined through lab tests. These ones are made with samples carried out with a specialized method the laboratories have and this one is also authorized by the National Institute for the defense of Competition and the Protection of Intellectual Property - INDECOPI.

In the recent case of Raura[50], the argument of the TFA, explained in the basis from Paragraph 48 to 60 of the TFA Decision No. 284-2013-OEFA/TFA, is focused on the rules of Indecopi on the system of certification to which they appeal by the reference specified in the Article 10 of the Supreme Decree No. 018-2003-EM, Regulation for the coloration and the use of indicators or tracers in combustible liquid and other products derived from the hydrocarbons and complementary rules for quality control[51], which established that the analysis of samples and tests that may be required for the actions of inspection must be carried out in the laboratories authorized by Indecopi.

In addition, the TFA makes use of the rules of sound criticism for the evaluation of the test within the administrative penalty procedure and concludes that the test reports issued by the laboratories authorized by Indecopi that have printed the logo of corresponding certification, constitute a valid and sufficient proof of the results included in them, unless proven otherwise. The TFA has considered that the evidentiary value of the document issued by the laboratory comes from both the result (which indicates that they exceeded in a particular parameter of the LMPs) and also for the fact that this one is guaranteed by the technical proven suitability of the certification given by Indecopi in relation to the test method and the facilities used to carry out the tests (equipment and conditions) used by the laboratory, which is valid with the visibility of certification seal on the document (test report) and these are objective matters that the companies may use with the capacity to distort.

VII. GRADUALNESS OF FINES IMPOSED BY THE ENVIRONMENTAL ENFORCEMENT TRIBUNAL

Three are the remarkable cases of the new calculation of fine that the TFA has carried out. For these cases, the TFA ascribed new values considered as the correct and fair ones by such Tribunal instead of the values used by the DFSAI in the decision of first instance. This caused that the method of determination of fines applicable to the case was an amount lesser than such one imposed by the punishable body. In the other cases in which the TFA has concluded that the calculation made by the DFSAI must be carried out again, we understand that these ones have not been compensated for the TFA, this one decided to declare the nullity of the decisions and send the proceedings to the DFSAI so

50 Compañía Minera Raura S.A.

51 Published in the Official Gazette *El Peruano* on May 30th, 2003. This is not part of the current legal system in accordance with the Article No. 3 from the Supreme Decree No. 118-2013-PCM (published in the Official Gazette *El Peruano* on November 1st, 2013).

that the first instance proceeds to calculate the fine again. The cases of new calculation are those ones which were taken against TGP, DOE RUN AND BRENNTAG[52].

The determination of fines and the revision of these ones are part of the power to impose penalties held by the punishable bodies of the OEFA (DFSAI and TFA), the same one which is a discretionary power, must be exercised in the context of principles applicable to the administrative penalty procedure, in particular, the principle of proportionality and reasonableness.

The principle of proportionality underlies, in every moment, the exercise of administrative powers, among them the power to impose penalties as a necessary limit to the sectors of administrative discretion. Thus, the related principle is inherent to impose a limit to the discretion of the body which exercises a responsibility on administrative matters; therefore, the TC and the administrative doctrine have considered this one as one of the basic aspects which anticipates a Rule of law and impose the obligation to the different public entities to exercise the roles they have been entrusted to in accordance with the Political Constitution and the Laws in order to achieve reasonably the satisfaction of the public interests, both in front of the society as a whole and in front of individuals.

In the case of the exercise of the power to impose penalties in order to impose economic offenses (fines) to the companies, the application of the proportionality principle together with or without mathematical formulas for its determination has been referred to by a sector of the doctrine as the "penalty gradualness" established in the "applicable dimension", which complements the "regulatory dimension" related to all the constitutional and legal context of a reasonable exercise of the power to impose penalties.

The TC with judgment issued on the file No. 2192-2004 mentions the following:

> The principle of proportionality in the administrative penalty law
>
> 15. The principle of reasonableness or proportionality is inseparable from the Social and Democratic Rule of law and constituted in the Political

52 TFA Decision No. 127-2013-OEFA/TFA from June 7th, 2013 attributed to the file No. 106601 taking legal action against TRANSPORTADORA DE GAS DEL PERÚ S.A., TFA Decision No. 275-2013-OEFA/TFA from December 27th, 2013 attributed to the File No. 093-08-MA/R, taking legal action against DOE RUN S.R.L. and TFA Decision No. 286-2013-OEFA/TFA from December 27th, 2013 attributed to the File No. 176-2013-OEFA/DFSAI/PAS, taking legal action against BRENNTAG PERÚ S.A.

> Constitution in its Articles 3 and 43 and expressly reflected in its Article 200, last paragraph. Although the doctrine makes distinctions between the principle of proportionality and reasonableness as strategies to resolve conflicts of constitutional principles and to guide the Deciding Authority to a decision which is not arbitrary but fair may establish, *prima facie*, a similarity between both principles, to the extent that a decision adopted in the context of convergence of two constitutional principles when the principle of proportionality is not respected, this one will not be reasonable. In this regard, the principle of reasonableness seems to evoke an assessment in relation to the result of the line of reasoning by the Deciding Authority revealed in its decision, while the proceeding to achieve this result may be the application of the principle of proportionality with its three sub principles: compliance, necessity and proportionality in the strict sense or deliberation"[53].

The constitutional basis is complemented in the administrative penalty procedure in accordance with the Law on General Administrative Procedure when in the Article 230 accepts this one as a principle of reasonableness.

> Article 230. - Principles of administrative penalty power
> The power to impose penalties of all the entities is additionally governed by the following special principles:
> (…)
>
> 3. Reasonableness. - The authorities must anticipate that the commission of the punishable conduct is not more beneficial for the offender than complying with the rules which were violated or accepting the penalty. However, the penalties to be imposed must be proportional to the non-compliance qualified as offense, having analyzed the following criteria which in order of priority are indicated for the purposes of its adjustment:
>
> a) The seriousness of damage to the public interest and/or protected legal right;
> b) The economic damage which generated;
> c) The repetition and/or continuation in the commission of the offense;

53 Judgment of the Constitutional Court attributed to the File No. 2192-2004-AA/TC, in the appeal for protection lodged by Mr. GONZALO ANTONIO COSTA GÓMEZ AND MARTHA ELIZABETH OJEDA DIOSES against the Mayor from the Provincial Municipality of Tumbes, in order to declare void the Decision of the Mayor's Office No. 1085-2003-ALC/MPT from December 16th, 2003, which imposed the penalty of dismissal from their jobs.

d) The circumstances of the commission of the offense;
e) The benefit which was illegally obtained; and
f) The existence or not of intention in each conduct by the offender
(…)

Within the environmental administrative penalty procedure, there is no uniformity in the regulation of penalty gradualness (applicable dimension of the principle of proportionality). The explanation of this one resides in the characteristic quality we have mentioned several times in this article regarding the legal evolution of environmental protection, the changes in the public structure to attend these ones throughout decades, the regulatory dispersion and the different competent bodies. At the present time, we have at least the following:

- Dispersed formulas used by the Osinergmin and which are being used by DFSAI, specified in rules which approve scales of different sectors which h were supervised (hydrocarbons, electricity); for instance, in the case of the hydrocarbons, the Order 028-2003-OS/CD and its amendments, approved the Classification and Scale of Fines and Penalties of Hydrocarbons (case of BRENNTAG PERÚ).

- Other formulas, in exercise of the legally discretional power conferred to the DFSAI and the TFA from the OEFA, these ones adopt and use them in every concrete case with criteria of proportionality (case of DOE RUM). These formulas are not approved by decision.

- From March 2013, the Methodology for the Calculation of Base fines and the Application of the Aggravating and Mitigating Factors to be used in the adjustment of penalties in accordance with provisions of the Article No. 6 from the Supreme Decree No. 007-2012-MINAM, approved by Decision of Board of Directors No. 035-2013-OEFA/PCD, Methodology for the calculation of base fines and the application of the aggravating and mitigating factors to be used in the adjustment of penalties in accordance with the provisions of the Article 6 of the Supreme Decree No. 007-2012-MINAM[54].

All those formulas are mechanisms to establish the administrative discretion within the parameters to make their execution reasonable, both for the protection of the environment and for the company, in the sense that this

54 Published in the Official Gazette *El Peruano* on March 12th, 2013.

one is not burdensome. Such aim can be achieved, provided that these ones are used within the rules established by the principle of reasonableness (proportionality) in the Law on General Administrative Procedure, and that is what the TFA is focused on when this one is informed of the files which are important to be known by such Tribunal.

In the cases above, as the case of BRENNTAG, the TFA replaces the value of cost which was avoided[55], resulting in the reduction of the fine. For DOE RUN[56], the TFA calculated the fine again because the recommendations were met, which was a mitigating factor that was not taken into account by the DFSAI. Finally, in the file of TGP, the TFA reduced the fine, since the value allocated by the DFSAI for the Factor 5 of the applicable formula[57] was eliminated.

55 "48. In this case, the DFSAI considered as part of the cost which was avoided, the worker's duty of a company to validate the instruments; however, considering that such worker is already part of the staff of the company and for such condition, this one receives a salary previously allocated; this Official Body considers that is not reasonable a cost which was avoided is charged as the savings of the worker's duty for the validation of the Solid Waste Management Statement of the year 2011 and the Solid Waste Management Plan of the year 2012".

56 "40. In this context, we verify that the DOE RUN met the recommendations formulated during the regular supervision carried out from December 26th to 30th in 2008, before the accusation of charges; for that reason, such circumstance must have been considered as a mitigating factor of the responsibility of DOE RUN when carrying out the calculation of the fine in accordance with the provisions of the Number 1 of the Article 236-A of Law No. 27444, which anticipates to constitute mitigating conditions of responsibility, the voluntary rectification by the possible accused party of the act or omission which was charged as constitutive of administrative offense prior to the notice of accusation of charges, however, this one did not occur.
41. Consequently, it may correspond to reformulate the calculation of the fine to both (2) offenses against the Article 10 of the Regulation approved by Supreme Decree No. 057-2004-PCM".

57 "71. In that regard, the facts subject of this accusation were verified under supervisions in 2003, considering that in such annual exercise the TGP recorded rate of sales '$ 0.00' according to the report in the annual statement sent to the Superintendent of Securities Market (SMV by its initials in Spanish), where was pointed out that TGP did not generate income for sales in 2003. It is clear that the project was in the phase of realization that year.
72. In this regard, it is necessary to estimate what was claimed by the appellant in relation to the value of the mitigating Factor F5 'Ability of facing the costs which were avoided' and as a result, to reformulate the calculation of the fine by eliminating the value allocated by the factor F5 in accordance with the previous whereas clause. Therefore, after the calculation of the fine, is necessary to set the amount of the fine in six hundred and twenty with thirty and seven hundredths (620.37) Peruvian Tax Units (UIT)".

In the exercise of the technical discretion carried out by the TFA, this body that has deep specialization on the subject must use criteria of equity to assure that the discretionary powers which exercises are carried out within the principle of proportionality, that is, at the same time the environment is simultaneously protected and to reasonably impose penalties those ones which violate the environmental rules.

VIII. STATUTE OF LIMITATIONS OF THE POWER TO IMPOSE PENALTIES

The statute of limitations "indicates the temporary limit for the legitimate exercise of the power to impose penalties"[58]. In this regard, in favor of the Public Administration requires that this one performs itself effectively and at the appropriate time to ensure the offenses to the rules; and in regards to the companies, the statute of limitations corresponds to a protective logic having its basis in the principle of legal certainty, since this one may not be imposed penalties after the set deadline so that the Administration imposes the administrative sanction[59].

The period of statute of limitations is established in the Article 233 of Law on General Administrative Procedure:

> Article 233. - Statute of limitations
>
> 233.1 The power of the authority to determine the existence of administrative offenses is limited in the period the special laws establish without prejudice to calculation of the statute of limitations periods regarding the other obligations derived from the effects of the commission of the offense. In case this one had not been determined, such power of the authority will be limited in the four (4) years.
> 233.2 The calculation of the statute of limitations period of the power to determine the existence of offenses will start from the day in which the offense has been committed or since this one was ceased, if this one was a constant action.

58 CANO, Tomás. "La imprescriptibilidad de las sanciones recurridas o la amenaza permanente del ius puniendi". *Revista general de Derecho Administrativo.* No. 31, 2012, p. 29. Madrid.

59 DANÓS, Jorge. "La prescripción de las infracciones, de la ejecución de las sanciones y la caducidad (perención) del procedimiento administrativo sancionador". En DANÓS, Jorge Et. ál (coordinadores). *Derecho administrativo en el siglo XXI.* Primera edición. Arequipa: Adrus, 2013, p. 695.

> The calculation of the statute of limitations period is only suspended with the start of the penalty procedure through notice to the company on the constitutive facts of offense to be charged as a crime in accordance with the provisions of the Article 235, Sub-paragraph 3 of this Law. Such calculation must be restarted immediately if the process of penalty procedure remains paralyzed for more than twenty five (25) working days for cause not attributable to the company.
>
> 233.3 The companies contemplate the statute of limitations through defense and the authority must resolve this one without any further process than the verification of periods, as the case may be considered as groundless, to establish the commencement of the actions of responsibility to explain the causes of the administrative inactivity.

It is important to note that, on environmental matters, the different regulations of administrative penalty procedures have transcribed this rule or referred to this one, for which in the cases the companies allege the statute of limitations before the TFA; this one analyzes them in accordance with the explained article.

The cited article of the LPAG shows us that the start of the calculation for the statute of limitations period is different if it deals with immediate or constant offenses.

In that case, it may be taken into account from the moment the offense was committed and then, when the offense ceased.

The administrative doctrine supports that the constant offenses and the permanent ones have different characteristics; nevertheless, in both cases the statute of limitations period is considered since these cases cease[60]. In our country, the LPAG regarding the statute of limitations period, indicates that in the case of *constant action* the calculation of the period starts when these ones cease.

The renowned Jurist De Palma specifies that:

60 The *dies a quo* is when these ones cease because at the time is when the offender puts an end to the unlawful situation which has generated with the offense" … and not before, to the extent that this one cannot start to expire which has not ended". See GÓMEZ, Manuel e Íñigo SANZ. *Derecho asministrativo sancionador. Parte General. Teoría general y práctica del derecho penal administrativo.* Segunda edición. Navarra: Thomson Reuters, 2010, p. 563.

> (…) the constant offense as the constant crime is a structure which aims to avoid recognizing that several statutorily defined constant facts of other many offenses concur when existing objective unit (the loss of the same legal right although having been caused by different actions) and/or subjective (the same statutorily defined fact but different taxable people) which allow observing different acts, illicit ones as part of a single constant process".

The Jurist continues saying as regards to the permanent offenses, these ones, on the contrary:

> (…) are characterized because these ones determine the creation of an unlawful situation extended for a while by will of the author. Thus, throughout such time, the illicit situation is still being carried out; the offense is still being committed, this one is extended until the unlawful situation is neglected. Consequently, in this case the statute of limitations period may be only calculated from the moment the unlawful situation has ceased, since this is when the offense is committed. (…) Therefore, only in the case of permanent offenses, the statute of limitations period starts running when the continuation of the illicit situation, since until now, the offense is being committed (…)[61].

Along the same lines, Gómez and Sanz affirm that "(…) with regards to the permanent offenses, these ones may be defined as such figures in which the action causes the creation of a long-lasting unlawful situation that the subject keeps intentional or indiscreetly over the years"[62].

Given the circumstances, when the Article 233 of Law on General Administrative Procedure alludes to the offenses of *constant action*, it is clear that the law includes and refers to an extensive unlawful situation over the time, that is, the permanent offenses as the doctrine understands these ones and even these ones may be also understood for the case of constant offenses, composed of consecutive offending acts in an objective unit. Therefore, in both cases, the *dies a quo* of the statute of limitations period begins to be taken into account as of the suspension of the offending conduct.

61 DE PALMA, Ángeles. "Las infracciones administrativas continuadas, las infracciones permanentes, las infracciones de estado y las infracciones de pluralidad de actos: distinción a efectos del cómputo del plazo de prescripción". *Revista española de Derecho Administrativo,* No. 112, 2001, pp. 553-574, Navarra.

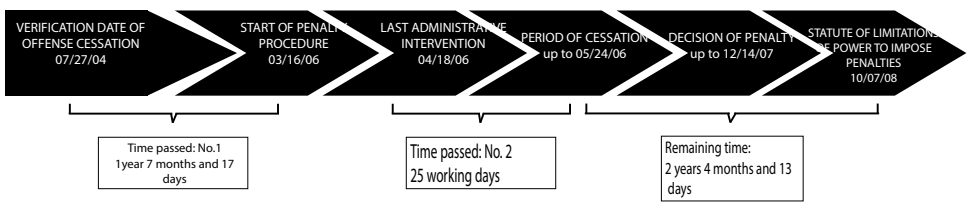
62 GÓMEZ, Manuel e Íñigo SANZ. Óp cit., pp. 561-562.

The TFA, in the cases of the statute of limitations which has recognized, carries out an analysis if the offenses which were charged are constant or momentary, which may only conclude that it is possible to evaluate case by case according to the penalty status and the applicable substantive and classification rules. Regarding this point, it is interesting to stand out the case of TGP[63].

Once the starting date of the calculation of the statute of limitations period is identified, other very important aspect to be emphasized is the same count of the period. We quote the following example:

Case: constant offense is started with cessation of the offense.

44. *In relation to the official observations raised on July 27th, 2004, having carried out the calculation of the period, we verify the following:*



45. In that regard, considering that the power to impose penalties of the Osinergmin expired on October 7th, 2008 and that the judgment was issued by Order of General Management No. 3740-2007-OS/GG on December 14th, 2007, it may be concluded that the power to impose penalties of the OSINERGMIN was not expired.

See that the diagram considers a period of twenty five (25) days, that is, pursuant to what LPAG states, in the sense that the start of the administrative penalty procedure suspends the calculation of statute of limitations period, and this one is restarted when such interval passed. As final mention, it is important that we pay attention that for the calculation of the statute of limitations term must take into account the days considered non-working in the years in which time is passing.

63 TFA Decision No. 219-2013-OEFA/TFA from October 23rd, 2013 attributed to the File No. 108014, taking legal action against Transportadora de Gas del Perú S.A.

IX. CONCLUSION

It deserves to be emphasized that the interpretative standards of the TFA explained in this article, reveals on one hand, the specialization the TFA has and, on the other hand, the importance of thinking about this one regularly, since this criteria are defining an environmental administrative legal center which must be within the constitutional and legal parameters to guarantee both the protection of the environment and the justice over the penalties which are imposed to the companies. The utility of a deliberation on a regular basis may enable improvements in the rule; to inspire measures so as to prevent the non-compliance of rules or pattern of programs for incentives, among others, in order to improve the efficiency of the SEIA.

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11.

PREVENTION IN PERUVIAN ENVIRONMENTAL LAW

PEDRO GAMIO AITA

SUMMARY

In this article, the author underlines the environmental prevention subject as a governing principle of the environmental policy to all States which aims to prevent the risks and damages to environment. In this sense, we shall develop the subject of preventives measures and specific orders in Peruvian laws, and then to explore environmental prevention experiences in Chile, Colombia and Argentina.

I. Introduction. II. Preventive Measures. III. Preventive measures in Peruvian Laws. IV. Specific Orders. V. The SEIA of Chile. VI. Colombia and Argentina: precautionary measures. VII. Conclusions.

I. INTRODUCTION

Peru currently faces institutional strength problems which limit its efficient management and solution responses in front of contamination and the increasing deterioration of its ecosystems. To high levels of local pollution, we should add the climate change effects which fall 4,5% of the GDP to 2025[1] according to an Andean Community study. To these reasons, we must be aware of the increasing vulnerability of the country, as well as the contamination costs and increasing impacts of the climate change. When we ignore the necessity of prevention and mitigation it supposes that the risks concerning the country will not be managed in long term and mainly suffered by the poorer areas. A prevention and mitigation strategy must be supported

1 SECRETARY-GENERAL OF ANDEAN COMMUNITY. El cambio climático no tiene fronteras: Impacto del cambio climático en la Comunidad Andina. Lima: Secretaría General de la Comunidad Andina, 2008, p. 22. Consultation: April 1, 2014. <http://www.comunidadandina.org/Upload/201166181345libro_cambioclimatico.pdf>

in a cross and comprehensive management which appreciates the local co-benefits and synergies with the economic increasing of a strategy aimed at increasing by smaller carbon footprint, essentially improving renewable and non-renewable resources, calculating its impacts on local environmental quality and the adaptation policy. Each of these action lines must be along with a proactive policy of prevention using the new environmental penalty regulation made and executed by the State in order to reduce the impacts due to contamination and the climate change.

The Peruvian State must promote the sustainable development based on a better relationship with nature, the symbolic figure of the equilateral triangle, which means the interaction and search for equilibrium among the economic profitability of an entrepreneur, the social equity and the nature conservation. In other words, the quality of people life must be improved from a sustainable and responsible management of natural resources. The Political Constitution of Peru establish that the person defense and the respect of his/her dignity are the highest purpose of society and the State, and all person have the right of peace, tranquility and the enjoyment of free time and the rest, as well as to a balanced environment and suited to the development of his/her life. In everyday life across Peru there is evidence of a controversial environmental situation which exacerbates extreme poverty statistics and contamination produced by the human activity, plus global warming effects so our country faces a big challenge.

A society that seeks the development must understand and know its social, culture, natural and physical resources, a situation which makes an imperative social and environmental strategy plan for economic activities. In Peru there is no plans in the medium and long terms neither public policies are assembled in favor of a healthy environment and a sustainable development. The environmental regulation is closely related to the sustainable development and overcoming poverty, if we do not generate prevention and management capacity for resources – with vulnerability criteria, the contamination and climate change can have a much higher cost for the country. In this regard, a better and greater regulation allows us to prevent contamination and have the capacity of solution in order to execute a suitable strategy of mitigation and the adaptation of the climate change.

Additionally, there are still problems in the assignment of competences in areas and levels of the Government. Therefore, it is also imperative to strong and develop the institutional capacity of the environmental authority in the country, within the framework of decentralization and modernization process of the State. In this line, it is essential to promote such decentralization defined as a technical and economic process of regional and local capacities

construction not only as the increased budget allocation[2]. This, in turn, must go in line with the development of systems and monitoring capacities, and the environmental standards and policies assessment. Parallel to these actions, citizen participation mechanisms must be fortified in all environmental management of the State in order to promote competitiveness, defined as a cleaner and more sustainable productive process which takes into account ecological footprint criteria in businesses.

Due to all these reasons, there are pending tasks: to promote competitive advantages of the biodiversity and territory configuration- called as land-use planning-; make, update and valuate a renewable natural resources inventory; identify, record and value traditional knowledge and environmental services; promote tripartite strategic alliances: State-university-enterprise; promote the predictability for actions from the State: promote meritocracy and development of technology and science skills to face risks, problems, tensions, conflicts and potential dangers to health, environment and biodiversity caused by environmental damage and climate change; take into account the mainstream and systematization of the national environmental policy which involve all productive and extractive areas, education system and, finally, national security.

Governability and, obviously, environmental security depends on regulation strengthening; that means, the degree to which a system is able to face the adverse effects of contamination and climate change. In this sense, a comprehensive management of strategic environmental assessment, ecological-economic zoning, environmental land-use planning, environmental impact assessment and environmental penalty system must be used as instruments within an ecosystem approach. In that context, it needs to take into account what Esain[3] says, in the following words: "(…)" As a main point for the environmental law, the environmental prevention acts taking care to avoid, within reasonable limits, anything that represents danger of creating an environmental damage, with the more effective and suitable means to dash the threat of injury from all degrading factor".

2 GAMIO, Pedro. "Energía en el Perú: ¿Hacia dónde vamos?". Matriz energética en el Perú y energías renovables. Tomo IV.Lima: Sinco Editores, 2010, p.9.

3 ESAIN, José. "Derecho ambiental. El principio de prevención en la nueva Ley General del Ambiente 25675". *Estudio jurídico José Esain*. Reviewed: on April 1, 2014. <www.jose-esain.com.ar>

The environmental preventions are usually included in legal system as a governing principle of the environmental policy of each State. For example, Jaquendo says that environmental prevention is over the principle range, attributing position quality to it, since those actions in advance are needed to prevent any type of environment degradation instead of being limited to verify and integrate a posteriori and repair the environmental damages"[4].

There is no doubt about the importance each State give to environmental prevention and this is justified in the possibility to give back soil, air or water to the state before the contaminant event, altering the dynamics of ecosystems on a permanent basis. For that reason, we will revise how some States have regulated preventive measures of environmental nature in their proper rules, recognizing differences and similitudes.

II. PREVENTIVE MEASURES

According to Constitutional Court of Peru,

> (…) this prevention principle is detached from the performing aspect attached to the right of enjoy a balanced and suitable environment (…). In that sense, it is inevitable for the State the duty to properly prevent risks to ecosystems, as well as the damages to environment resulting from human intervention, primarily the execution of an economic activity. Furthermore, the prevention principle force the State to execute actions and assume technical measures whose goal is to assess potential damages to environment[5].

Additionally, under the judgment mentioned from the Constitutional Court, the prevention criteria will prevail over any other public and private management of environment and natural resources.

On the other hand, with a different semantics, we have the precautionary principle stated in the Article 7 of the preliminary Title of Law No. 28611 - General Environment Law[6], which leads to the adoption

4 JAQUENDO, Silvia. *Derecho ambiental.* Madrid: Dykinson, 2005, p.683.

5 Statement on February 19, 2009, on File No. 03343-2007-PA/TC, legal basis 18.

6 Published in the official gazette *El Peruano* on October 15, 2005.

of efficient and effective measures to prevent the environmental degradation. In the case of the precautionary principle, if there is any doubt about an activity may be dangerous, it is preferable to limit it and privilege the environment preservation. Thus, we must not confuse the prevention principle with precautionary principle: (…) French authors distinguish between prevention and precaution in accordance with the knowledge about consequences of a particular action. If we know such consequences, they must be prevented. And, if we do not know them, since there is a doubt or there are not irrefutable evidences within the science environment, all necessary precautionary measures must be taken"[7].

The prevention principle is supported taking measures and precaution related to properties and people under environmental jurisdiction in order to ensure that economic activities made by people and enterprises will not produce environmental damage. This order is primarily regulated by a minimum rules set, maximum permissible limits, and technical and environmental regulation which regulate various economic activities, especially in which there are bigger potential risks, although not all are covered, where might exist or produce risks. Therefore, the State maintains active its controlling role in order to prevent environmental contingencies. Rodriguez and Páez define prevention measures provided in the regimen of environment control as "a chance of cautionary measures enshrined in the legal system"[8]. While we know that environmental prevention is enshrined, in most of Latin America States, as a governing principle for their national environmental policy, not all countries have implemented their legal instruments with the same intentions and reaches. We are going to precisely review this point in this article.

III. PREVENTIVE MEASURES IN PERUVIAN LAWS

Within a rule of law as having the Peru, there is a duty and right to conserve, protect, recover ecosystems and preserve the environment, leading to establish actions and measures in order to face threats

7 FRIANT-PERROT, Marine. *Curso de derecho agroalimentario*. Edición Lexis Nexis, 2005, pp.97-98.

8 RODRÍGUEZ, Gloria & Iván PÁEZ. "Las medidas preventivas ambientales, una aproximación desde el derecho administrativo". *Opinión Jurídica*, No. 12, 2013, p.23, Medellín.

or affectations against it. It is responsible of the State to do it for itself and for complaints or information from any citizen. It is the safeguarding of the right of a health environment as recognized in the Constitution.

The General Environment Law, published on October 15, 2005, is the law on the environment area field in the country and contains, in the Article VI of its Preliminary Title, the prevention principle which says that environmental management mainly aims to prevent, surveillance and avoid the environmental degradation. Where it is not possible to eliminate the causes that produce it, proper mitigation, recovery, restoration or occasional compensation measures are adopted.

With regard to the incorporation of articles to the Law No. 29325 – Law on National Environmental Assessment and Enforcement[9], what has been sought is the recognition of cross principles to all environmental management. Then, the incorporation of the Article 13-A recognizes the principle of environmental information access and transparency, and underlines the local people participation through public hearings in order to complement environmental control actions of the Agency for Environmental Assessment and Enforcement (OEFA, by its initials in Spanish). Additionally, in the parameters of reasonableness and proportionality, the Article 16-A empowers OEFA to give statements of specific nature, whose non-compliance results punishable in order to ensure an effective environmental control.

On the other hand, the incorporated Article 20-A determines that "upon filing of a contentious administrative claim, for amparo or other, does not interrupt and suspend the coercive execution process of decisions from first and second instance of Administrative Tribunal referred to the enforcement of administrative penalties issued by the Agency for Environmental Assessment and Enforcement (OEFA, by its initials in Spanish)"[10]. Furthermore, the company establishes rules to the application of precautionary measures. The Article 20-B

9 Published in the Official gazette *El Peruano* on March 5, 2009.

10 Law No. 30011 –Law amending Law No. 29325 – Law on National Environmental Enforcement and Assessment System, published on April 26, 2013, in the official gazette *El Peruano*.

regulates environmental tickets; and the Article 22-A establishes preventive measures, which do not need to start a punishment procedure, including orders to do or do not do, and are imposed only if there is evidence of an imminent danger or high risk of producing a serious damage to the environment, natural resources or their derivate, people health; as well as to mitigate the causes producing environmental degradation or damage".

Recent legal provisions aim to strong the environmental management system of Peru. In this line, the Supreme Decree No. 003-2013-MINAM (Ministry of Environment of Peru) states principles, stages and schedule for the implementing process of the National Service of Environmental Certification for Sustainable Investments (SENACE); and the Law No. 30011 modifies the Law on Environmental Assessment and Enforcement System[11] establishing new empowerments to the OEFA and entities of environmental control at local, regional and national level, in order to ensure an effective environmental control of the activities which are being developed in Peru. In this way, the process of the instruments and entities strengthening in the care of the environmental management in Peru is making progress and, simultaneously, becomes a tool to prevent socio-environmental conflicts in our country.

The development of the prevention activity depends on two operative instruments called as preventive measures and specific orders, and both of them are contained in the function of direct supervision in the care of the OEFA. Preventive measures are designed to be applied in case there is an imminent danger or high risk of a serious damage to environment, natural resources or their derivate, people health; as well as to mitigate the causes producing environmental degradation or damage. The Article VII of the Preliminary Title of the General Environment Law, related to prevention principle, classifies as follows: "The environment management mainly aims to prevent, surveillance and avoid the environmental degradation". Its provision will be made taking into account the principles of reasonableness, proportionality and prevention.

11 Published in the Official gazette *El Peruano* on April 26, 2013.

In the Regulation of Direct Supervision of the OEFA, approved by Decision of the Board of Directors No. 007-2013-EFA/CD[12], preventive measures and specific orders are regulates, as operative instruments, which aim to ensure the environment protection and efficient environmental control, regardless whether of there are evidences of administrative infringement within the matter of direct supervision. Preventive measures shall be ordered when a find related to an imminent danger or a high risk of producing a serious damage to environment, natural resources or their derivate, people health is demonstrated, as well as to mitigate the causes producing environmental degradation or damage. Its provision will be made taking into account the principles of reasonableness, proportionality and prevention.

Among the types of preventive measures to be taken are: (i) to temporary, partial or total close a building or establishment down in which an activity endangers the environment or people health; (ii) temporary, partial or total interruption of activities endanger the environment or people health; (iii) temporary confiscation of objects, instruments, machines or substances used that endanger the environment and people health; (iv) destruction or analogous action of hazardous waste or materials endanger the environment or people health; or (v) any other suitable measure to reach the provision goals of a preventive measure.

> Article 22-A. - Preventive measures shall be ordered when a find related to an imminent danger or a high risk of producing a serious damage to environment, natural resources or their derivate, people health is demonstrated, as well as to mitigate the causes producing environmental degradation or damage.
>
> In order to mandate a preventive measure, it is not necessary to start an administrative punishment procedure. Such measure is executed without prejudice to administrative penalty that may exist.
>
> Preventive measure validity will remain in force until fulfillment has been verified or originating conditions have been disappeared.

12 Published in the Official gazette *El Peruano* on February 28, 2013.

As we mentioned above, preventive measures can contain orders to do and do not do. These measures are imposed only if there is evidence of an imminent danger or high risk of producing a serious damage to the environment, natural resources or their derivate, people health; as well as to mitigate the causes producing environmental degradation or damage.

Probably, better antecedents or more important factual experiences the country had in risk prevention matter of environmental damage were the six incidents with Camisea duct, occurred in 2005 and 2006, forcing the control body, Osinerg (currently called Supervisory Body for Investment in Energy and Mining-Osinergmin), to order an administrative precautionary measure of preventive nature which was not previously classified. Such measure forces transportation concessionaire[13] to construct a tunnel within the area identified by experts as high risk due to continuous soil movements and climate features of the area. That was a requirement as a condition to maintain the operation of liquid transportation without a risk of bigger environmental damage. Additionally, the above mentioned had to be realized apart from responsibilities assignation by the six incidents produced, it means, the duct was constructed under international standards and parameters but within two-hundred kilometers, between forest and mountain regions, were not sufficient: extraordinary measures of security should be taken, taking into account the particular characteristics of the area. The tunnel was the technical exit and with the obligation of an investment of seventy millions dollars urgently and in a preventive way.

According to the audit made in 2007, the liquids duct experienced six incidents since the beginning of the operation in August 2004. The final cause of these incidents was related to, in five cases, hydrological, geotechnical and geological dangers. Four of the five cases have been involved, at the failure moment, by the presence of outside charges, due to the landslide; and the fifth case, although it is attributed to a huayco, is mostly related to a failure by mechanical damage in the tube body.

13 Before assignation of responsibilities in case of incidents and about the proper penalty proceeding.

IV. SPECIFIC ORDERS

According to Gómez, "it was conferred to the OEFA the power to realize specific orders to ensure an efficient environmental control, measures intended to the company provides relevant information or documentation to the direct supervision authority which allows a more effective and timely environmental control"[14]. Specific orders will be issued in accordance with the provisions of Articles 11 and 18 of the Law No. 29325. By specific orders, the OEFA will prepare audits and studies, or the information generation related to companies activities, and which are subject of supervision by the OEFA.

Specific orders are provisions required by the company in order to take certain actions intended to ensure an efficient environmental control.

The OEFA will prepare audits and studies, or the information generation related to companies activities, and which are subject of supervision by that institution.

> Article 16-A. – Specific orders
> In accordance with provisions in Article 11 of this Law and under reasonableness and proportionality parameters, the Agency for Environmental Assessment and Enforcement (OEFA, by its initials in Spanish) and the Environmental Enforcement Entities (EFA, by its initials in Spanish) issue specific orders which are provisions required by the company in order to ensure an efficient environmental enforcement.
>
> Specific orders are issued by notification addressed to entity mentioning the reason and the term to its compliance. Orders are refutable without suspensory effect. The incompletion of those order is punishable, in accordance with the pertinent administrative penalty procedure, and are regulated by decision from the Board of Directors of the OEFA.

The operative instruments mentioned above have the particularly of being issued without an administrative penalty procedure in process. The OEFA is

14 GÓMEZ, Hugo & Milagros GRANADOS. "El fortalecimiento de la fiscalización ambiental". GÓMEZ, Hugo (compilador). El nuevo enfoque de la fiscalización ambiental. Lima: Agency of Environmental Assessment and Enforcement, 2013, p. 19.

allowed to act against illegality and unreliability events which do not have an administrative penalty procedure in process, because the completion obligatory of controlled environmental orders are provided without prejudice of the proper administrative penalty, which shall be normally applied under the terms.

An example of specific order that we will summarize due to its importance, is the Order Directive No. 002-2013-OEFA/DS on May 24, 2013, which refers to Report No. 41-2013-OEFA/DS/HID on April 24, 2013, stated by the OEFA and issued by the Supervision Office relating to the supervision of the environmental impact study of the Project of NLG Exportation in Pampa Melchorita Peru by the company PERU LNG S.R.L., placed between kilometer 167 and 170 on Panamerica Sur Road, Pampa Melchorita, district of San Vicente de Cañete, Cañete province, department of Lima.

In accordance with provisions in Articles No. 29 and 30 of Decision of Board of Directors No. 007-2013-OEFA/CD, the Supervision Office as the authority for direct supervision, has the duty to make specific orders to the effect that the company takes certain actions related to a find under Articles 11° and 18° of the Law No. 29325. By Supreme Decree No. 015-2006-EM, Regulation for Environment Protection in Hydrocarbons Activities is approved, which expressly revokes Supreme Decree No. 046-93-EM. The Article 4° of the legal body mentioned defines the environmental impact study as a document of environmental assessment of investment projects, whose execution may produce negative significant environmental impacts in quantitative or qualitative terms. On the other hand, the Article 9 says that before to start hydrocarbons activities, the title holder shall present the proper environmental study to the General Office of Energy and Environmental Affairs of the Ministry of Energy and Mines, which shall be obligatory to completion after acceptance. By Order Directive No. 061-2004-MEM/AAE on June 24, 2004, the environmental impact study of the Project of NLG Exportation in Pampa Melchorita Peru by the company PERU LNG S.R.L., was approved. Then, by Report No. 041-2013-OEFA/DS-HID, the Supervision Office of the OEFA assessed the environmental impact study of the Project of NLG Exportation in Pampa Melchorita. Such study determines that monitoring results of aquatic sediments shall be compared with standards recommended by the Canadian Environmental Quality Guidelines (CEQGS, 2013), which establish two types of standards: Interim Sediment Quality Guidelines – ISQG (limit below which biology effects are not expected) and Probable Effect Level – PEL (concentrations which adverse biology effects frequently occur).

As a result of the assessment made to the environmental impact study in the report mentioned, the results reported during November 2011 and November

2012 showed: (i) progressive increase of heavy metals concentrations in aquatic sediments exceeding standard values CEQGS and PEL established in the Canadian Environmental Quality Guidelines; and (ii) the increase influence of heavy metal concentrations on the seabed placed on both sides of the platform structure, a seabed that is related to microcurrent system existing in the area.

The results from seawater quality monitoring for the period November 2011 and February 2012 were compared with environmental quality standards stipulated in Supreme Decree No. 002-2008-MINAM, which Approves National Environmental Quality Standards for Water, such results demonstrated that exceeding values established in the decree mentioned above are related to the progressive increase of metals concentration (arsenic, cadmium, copper and mercury) in the sediment of the area where the terminal dock of PERU LNG S.R.L is placed.

What is mentioned in the paragraph above agrees with the study report "Coast Morphology Survey Port PERU LNG, June 2010 – June 2011", elaborated by Ezcurra & Schmidt S.A., which shows sand shifting (containing metals and other particles) from seashore to both sides of the terminal, producing material loss of the coast line located in the north and south of the structure. That report concluded that dock infrastructure installation of terminal of PERU LNG S.R.L. would have produced current system partition in the area and would have created two current microsystems: one to the North and the other one to the South. Furthermore, in the documentation assessment sent by PERU LNG S.R.L., inclusion of current study, changes produced in fauna of supra, inter and the seashore area close to the project area were not observed.

In accordance with the precautionary principle established in Article 7 of Preliminary Title of General Environmental Law, efficient and effective measures must be taken in order to prevent environmental degradation, regardless of there are irreversible or serious damage. Under the precautionary principle mentioned, the report cited suggested:

a) To elaborate an oceanographic study that allows to understand the present situation of currents systems in Pampa Melchorita, by comparative analyses with the study report of an environment basis.

b) To develop reports including the interrelation between abiotic and biotic variables (analysis of the resource-environment relation), in order to determine possible impacts of PERU LNG S.R.L. on the aquatic ecosystem where the infrastructure is located.

c) To include in reports information relevant to the project, as in the case of "Coast Morphology Survey Port PERU LNG (Pampa Melchorita Plant)", which allows to understand the evolution of sand shifting process from the coast area adjacent to the project.

d) To elaborate dispersion studies of sediments and isotopes, in order to determine origin sources of heavy metals in both sides of the dock structure of terminal of PERU LNG S.R.L.

e) To make an ecotoxicology analysis of metals in aquatic organisms, especially fishes and benthic organisms (among them, bivalves) in order to implement contingency measures against a possible bioaccumulation of this substance to these organisms. According to heavy metal increase in the sediment, exceeding the value of ISQG (limit below which biology effects are not expected), and heavy metals in water exceeding the value of ECA to water Category 2 Aquatic Coast Activities, Subcategory 3 (other activities).

f) To ask The Peruvian Institute of the Sea for opinion, as a technical specialized body of the Ministry of Production, about possible changes in the aquatic ecosystem where the aquatic infrastructure of PERU LNG S.R.L. is placed.

g) To take into account the implementation of proper mitigation measures in the sand shifting process that is developing in the area of coast line focused in the influence area of the project, in order to avoid aquatic community displacement in supra and inter area, according to the framework of environmental commitments assumed in the EIA (Environmental Impact Assessment System).

h) To send a copy of reports stamped, signed and letterhead by the accredited laboratory to the OEFA, in order to confirm the reports validities.

i) To implement corrective measures needed to mitigate impacts on the aquatic ecosystem and fishing activities, according to the framework of environmental commitment assumed by the environmental impact study, given that the environment management plan of the company is in process of being approved since 2010.

In view of the Article 6 of the Law No. 27444 – Law on the General Administrative Procedure[15], the order of the administrative act can be made by declaration of conformity with basis and conclusions of earlier orders, decisions or reports contained in the file, provided that they are accurately mentioned and, for this situation, are an important part of such act. In this sense, the report No. 041-2013-OEFA/DS-HID should be part of the decision, since it is its support. From analysis of the environmental impact study, as well as documents and/or reports presented by PERU LNG S.R.L. to the OEFA, they showed that results from seawater quality monitoring was exceeding the values established in the Supreme Decree No. 002-2008-MINAM mentioned above. At discretion of specialist technicians, such result was related to the progressive increase of heavy metal concentrations in aquatic sediments, increase that influenced the seabed located in both sides of the dock built by the company. This construction would have generated two current microsystems (North and South of the dock), sand shifting with metal concentrations, and material loss of the coast line located. For all these reasons and under the suggestions made in the Report No. 041-2013-OEFA/DS-HID, providing specific orders, in order to the company takes specific actions. The purpose of specific orders is to ensure the completion of the environmental protection goals, so the OEFA shall determine the development of audits, studies or information generation related to entity's activities according to provisions in the Article 29 of the Regulation of Direct Supervision.

As part of the actions that PERU LNG S.R.L. shall take, are the elaboration of multidisciplinary studies involving biology, physics and chemical analysis of the aquatic ecosystem. In this sense, a term according to principles of reasonableness and proportionality was gave to each specific order.

In accordance with the provisions of the General Environmental Law, approved by Law No. 28611; the Law on National Environmental Assessment and Enforcement System, approved by Law No. 29325; the Regulation for Environment Protection in Hydrocarbons Activities, approved by Supreme Decree No. 015-2006-EM; and the Regulation of Direct Supervision of the Agency for Environmental Assessment and Enforcement, approved by Decision of Board of Directors No. 007-2013-OEFA/CD, it was ordered that PERU LNG S.R.L. shall fulfill the following specific orders:

1. To elaborate an oceanographic study which allows for understanding the presently situation of currents systems in Pampa Melchorita, by

15 Published in the Official gazette *El Peruano*, on April 11, 2001.

comparative analyses with the study report of an environment basis. In a term of 7 months.

2 To develop reports including the interrelation between abiotic and biotic variables (analysis of the resource-environment relation), in order to determine possible impacts of PERU LNG S.R.L. on the aquatic ecosystem where the infrastructure is located, in comparison with the study report in an environment basis. In a term of 7 months.

3) To include in reports information relevant to the project, as in the case of "Coast Morphology Survey Port PERU LNG (Pampa Melchorita Plant)", which allows to understand the evolution of sand shifting process from coast area adjacent to the project. In a term of 10 days.

4) To elaborate dispersion studies of sediments and isotopes, in order to determine origin sources of heavy metals in both sides of the dock structure of the terminal of PERU LNG S.R.L. In a term of 7 months.

5) To make an ecotoxicology analysis of metals in aquatic organisms, especially fishes and benthic organisms (among them, bivalves) in order to implement contingency measures against a possible bioaccumulation of this substance to these organisms. In a term of 7 months.

6) To implement proper mitigation and/or corrective measures against: (i) the sand shifting process that is developing in the area of coast line focused in the influence area of the project, in order to avoid aquatic community displacement in supra and inter area; as well as (ii) to mitigate the impacts on the aquatic ecosystem and fishing activities, according to the framework of environmental commitment assumed in the EIA. In terms of 8 months.

7) To send a copy of reports stamped, signed and with letterhead by the accredited laboratory, in order to confirm the reports validity. In term of 10 days. PERU LNG S.R.L. should send an execution schedule of each order to the OEFA.

In the item b) of Article 11 of the Law. No. 29325 establishes that the direct supervision application includes the power to take actions of monitoring and verification in order to ensure the fulfillment of standards, duties and incentives established in the environmental regulation by companies. In that sense, the Regulation of Direct Supervision of the Agency for Environmental Assessment and

Enforcement (OEFA) aims to establish criteria, modals and procedures applied to the execution of direct supervision by the OEFA, within the framework of the legislation in force.

The regulation regulates the execution of direct supervision, which consists in monitoring and confirm the fulfillment of controlled environmental duties contained in: a) environmental standard, b) environmental management instruments, c) orders and provisions issued by competent entities of the OEFA and d) other sources of controlled environmental duties. Furthermore, it also consists in confirm the fulfillment of requirements to give incentives. About the application scope, the regulation approved is applicable to companies subjected to the direct supervision of the OEFA, even when there are not authorizations or permits and licenses to execute their activities, if any.

It is states that the environmental authority of the OEFA, as part of preventive purpose of the direct supervision, takes actions needed to obtain evidence means supporting the facts verified, en relation to the fulfillment of control duties by the OEFA, as well as to add to the environmental investigations development made by the Public Ministry or other public bodies related to control environmental duties, in care of the companies under their jurisdiction.

V. THE SEIA OF CHILE (NATIONAL ENVIRONMENTAL IMPACT ASSESSMENT SYSTEM)

The Law on Environment General Basis includes regulatory principles of the environmental management of Chile[16]. One of the principles is prevention, which is contained in the Environmental Impact Assessment System (SEIA, by its initials in Spanish), which aims to ensure sustainability in investment projects. The Environmental Impact Assessment System (SEIA) consists in an administrative procedure intended to identify and assess the environmental impacts from a project or activity. The SEIA determines what projects is liable to pass through the SEIA due to its scale, nature or location in the background, as they are considered susceptible to arise environmental impacts. As Costa, Chief Executive Officer of FIMA Corporation and researcher for Regulatory and Power of the Law

16 Law No. 19.300

School in the University of Chile "prevention is present in the Chilean environment law and is specially reflected in the Environmental Impact Assessment System (SEIA). In effect, prevention, as Preventive Principle, is the logical support that give to the existence of this assessment system, so its observance is fundamental to its success"[17].

VI. COLOMBIA AND ARGENTINA: PRECAUTIONARY MEASURES

Colombian Laws consider operational instruments of prevention as precautionary measures. According to Páez and Rodríquez: "preventive measures contained in the environmental penalty system, are a kind of precautionary measures included in the legal system of Colombia, although they poses some specific characteristics of their application scope, which is the environmental law (…)"[18].
In the case of Argentine, the case law gives us some ideas. According to Esain, "prevention is fully operative, even for activities – as ranching – which do not have a specific legal regulation. The Court Supreme of Buenos Aires- in an excellent statement- justified a municipality who enforce to prevent the environmental impact, although it is not within the administrative environmental prevention mechanism of ranching like the EIA. That statement was a clear progress of major relevance"[19].

VII. CONCLUSIONS

The environmental law is more effective to the extent that it can prevent the environmental damage, and for that, the control position of the State is important, which is a permanent monitoring and proactive role. In the special legislation, as in the case of the Direct Supervision Regulation of the OEFA, provisions of preventives

17 COSTA, Ezio. "La prevención como principio del Sistema de evaluación de impacto ambiental en Chile". *Justicia Ambiental, Revista de Derecho Ambiental*, año V, No. 5, December 2013, p. 199.

18 PÁEZ, Iván et al. "Las medidas preventivas ambientales, una aproximación desde el derecho administrativo". *Revista Opinión Jurídica*, Volumen 12, No. 23.

19 ESAIN, José. "Derecho ambiental. El principio de prevención en la nueva Ley General del Ambiente 25675". *Estudio Jurídico José Esain*. Reviewed: on April 1, 2014. <www.jose-esain.com.ar>

measures and specific orders are regulated by the OEFA, in order to ensure the environment protection and an effective environmental control, regardless of there are signs of administrative infringement in the activity within direct supervision.

In relation with companies, the regulation limits the scopes of important operative instruments, such as preventive measures and specific orders, facilitating the understanding of these administrative powers.

It should be noted that law provisions allow supervision activities to have a bigger impact on environmental prevention and protection, as long as supervision application is regulated without notice, in a fluid and unannounced manner and without delay, as well as to regulate preventive measures against the imminent risk of serious damage to environment, natural resources or their derivate, and people health. Prevention means to anticipate events or activities that may be harmful to the environment, in compliance with the theological sense of environmental standards: to protect ecosystems, which is the natural source protecting people health and life.

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12.

Preventive measures in the national environmental assessment and enforcement system

JUAN JOSÉ MARTÍNEZ ORTIZ

SUMMARY

This article aims to demonstrate the reasonableness and the need to take actions by the State in order to protect the environment and avoid the affectations called "environmental damage". In addition, it refers to the State acting to the environment protection through the practice of its administrative function (by regulation, supervision and enforcement). In this background, preventive measures are presents and explained as measures of administrative right, contained in our legal system by the Act No. 29325 – Law on the National Environmental Assessment and Enforcement System, and its amendment, the Law No. 30011.

I. Introduction. II. Environmental protection and environmental damage features. III. OEFA Jurisdictions. IV. Consequences applied to environmental damage and preventive measures. V. Preventive measures and their connection with the function of the OEFA. VI. Preventive measures: some proceeding aspects provided in the law. VII. Preventive measures in direct supervision regulation of the OEFA. VIII. Conclusions.

I. INTRODUCTION

This article presents the reasonableness of acting by the State in order to protect the environment and its administrative function intended to reach that goal, and – in this background, the development of mechanisms called "preventive measures".

In this article, we present the environmental damage from a functionalist approach. For that, we will use the definition of

"externality" that comes from the economic science; and it will serve to explain the nature of such damage, its harmful damages and the need to deal it from the legal system.

Furthermore, we will make a reference to various legal mechanisms which are used by the State in order to face such damages or externalities. This article focuses on administrative adjustment mechanisms applied by the State as part of its administrative function, and also includes the functions and powers of the OEFA.

Preventive measures contained in our legal system in the Law No. 29325 – Law on National Environmental Assessment and Enforcement System (SINEFA, by its initials in Spanish)[1] and its amendment, the Law No. 30011[2].

II. ENVIRONMENTAL PROTECTION AND ENVIRONMENTAL DAMAGE FEATURES

The Law on SINEFA and the Law No. 28611 – General Law on Environment – in accordance with the established in the Politic Constitution of Peru – define the environment as a right or situation legally protected[4].

In this way, its affectation (called "environmental damage") is an illegality[5] situation arising administrative, civil and criminal consequences

1 Published in the Official gazette *El Peruano* on March 5, 2009.

2 Published in the Official gazette *El Peruano* on April 26, 2013.

3 Published in the Official gazette *El Peruano* on October 15, 2005.

4 This version is contained, for example, in the Article 9 of the General Law on Environment, which indicates:
Article 9. – The purpose
The National Policy of Environment aims to improve the life quality of people, ensuring the presence of healthy, efficient and functional ecosystems in long term; and the sustainable development of the country by prevention, protection and repair of the environment and its elements, conservation and sustainable exploitation of natural resources, in a responsible manner and coherent with fundamental human rights.

5 In this sense, the Article 142°, number 142.2 of the General Law on Environment, defines the "environmental damage" is any material harm of the environment and/or one of its elements, caused by violation or legal provision, and produces current and potential negative effects.

Environmental affectations (damages) represent typical demonstrations which are called negative externalities by economic science.

Negative externalities are composed of two components:

a) The acting of a person in where production or consumption activities negative impact on the production, properties (assets), consumption or utility of other person (affected by externality)[6], individual or collective considered.

   In case of environmental damage, it is considered that this acting produce effects in two levels: first, specifically to environment; and second, additionally to individuals, in their specific interests (this second level may or may not appear).

b) The absence of an agreement or contract between the originator and the affected person, which allows the action by the first one and the affectation of the second one; as well as the corresponding compensation terms.

This means that –prima facie- unilateral action by the originator does not create consequences to it. At first, the damage originator did not pay previously and did not subsequently compensate the victim of the damage[7].

The rule of the environmental law appears to have divided the damage in two aspects mentioned above.

On the one hand, we have the property damage that could have affected to specified or specifiable individuals, and on the other hand, we have the environment (as a legally- protected right). This

6 PARKIN, Michael. *Microeconomía: Versión para Latinoamérica*. Mexico: Pearson Education, 2001, p.344.
Negative externalities are an event of market failure. This means that they produce loss of efficiency or profit in society. Additionally, they produce an excess of activities (production or consumption) by the originator and unjustified "savings" (for not paying or compensate affected individuals).

7 In this situation, the Legal System provides special mechanisms, such as the extra-contractual civil liability (from the civil right) and mechanisms of regulation and enforcement (from the administrative right).

case- to environment[8]- shall be understood as damage to general, collective or diffuse interest[9].

Figure 1

Harmful fact (originator)

Own elaboration

As is well know from a legal perspective, any damage can be classified in two kinds: *consequential damage* and *loss of profits.*

8 The Article 2 of the General Law on Environment indicates the following:
2.3 It should be understood, to the effects of this Law, all mention about "environment" or "its elements", comprises physical, chemical and biological elements of natural or anthropogenic origin, individually or collectively, that are part of the background in which the life id developed, being the factors ensuring individual and collective health of people and the conservation of natural resources, biodiversity and cultural heritage, among others".

9 In this line, Articles 142 and 143 of the General Law on Environment are considered:
Article 142. – Liability for environmental damages
142.1 Any person by using or exploitation of a property or in the practice of an activity, can produce a damage to environment, people life quality, people health or patrimony, is obliged to assume the costs from prevention measures and mitigation of the damage, as well as the surveillance and monitoring of the activity and the preventive and mitigation measures adopted.
Article 143. – Legitimacy for act
Any person, natural or legal, is legitimized to act referred by this Law, against people provoke or help to produce an environmental damage, in accordance with the Article III of the Civil Procedure Code.

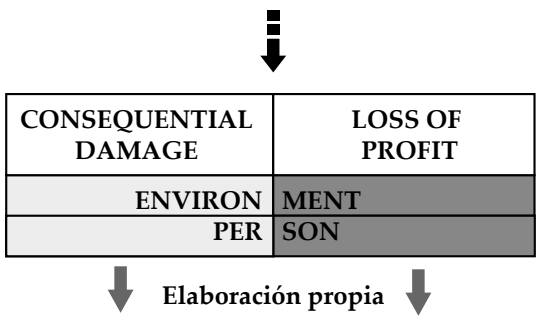
Consequential damage is the loss, detriment, prejudice or reduction (current and present) that directly comes from the harmful action. The loss of profits comprise all that has been ceases to receive or obtain in future (probabilistic level). In this last case, we are talking about the interruption of a profit.

In accordance with the automatic configuration of environment as a legally-protected right, the damage may produce two effects: damage to environment and damage to individuals[10].

If we represent such situation and assemble it with the classification of consequential damage and loss of profit, we will present situations showed in the following figure:

Figure 2

Harmful damage (originator)



If we consider its negative externality, from an economic science perspective, a series of measures to face it can be planned. One of such measures is the *administrative regulation*[11].

The administrative regulation, also called mechanism of *command and control, regulation and enforcement or police power*, allows the State to limit the acting

10 In this case, the damage affects human legal rights, such as life, health, property, etc.

11 Other mechanisms proposed –which shall not be included in this document, are:
- Pigovian tax
- Establishment of ownerships
- Incentive Payment
- Extra-contractual civil Liabilities

freedom levels of private persons[12] on behalf of the protection of other rights and the risk reduction of its affectation.

The limits and conditions to rights can include the establishment of obligations, duties, limits, specific was of right, acting standards, and others[13].

Against those limits and conditions, the State can intercede in two ways: (i) ex-early (previously), and (ii) ex-post (subsequently), to private activity, which may produce an environmental damage.

Licenses, permits and authorizations are representations of early acting by the authority. All these aims to fulfill the standards (by regulation) or the capacity of completion by the individual, so the occurrence probability is reduced in a year.
Supervision, enforcement and administrative penalties are representations of post-acting by the authority. They are produced when the individual infringes a standard (a rule or regulation). In this case, penalties operate as prevention mechanisms (general or special), which aims to induce the fulfillment of standards (by administrative regulation). Economically, penalties operate as a negative incentive, since they are applied when the standards are not fulfilled. If individuals want to evade the penalty, they shall obey the rules. That is the effect estimated of applying a punitive system.

Due to the damage or negative externality of affectations to environment, the environmental laws have established a series of principles, conditions and obligations related to prevention, internalization of damaged produced, restoration, as well as the compensation or repair. This is represented in many provisions of the General Law on Environment, which establish civil and administrative measures (especially in this last one).

Complementary, the Law on the SINEFA has established a system of environmental assessment, supervision, enforcement and penalty in care of

12 For the definition of police power, see DROMI, Roberto. Derecho Administrativo. Buenos Aires: Ciudad Argentina, 2001.

13 In the Anglo-Saxon world, this type of intervention is called *regulation* and has two variables, *social regulation and economic regulation*.

Social regulation is the delimitation of companies acting in cases of negative externalities, social security, inequity, and others. On the other hand, *economic regulation* is the case of natural monopolies, in which company rights and freedom are delimited in order to affect the kinds of production, quality, quantity and price regulated.

the administrative authorities (and, therefore, under the administrative right). This system of environmental assessment and enforcement is an administrative regulation established by the State in order to protect the environment.

In this context, preventive measures have been provided that are detailed below.

Previously, we will indicate that preventive measures are administrative measures within the framework of the prevention principle of the environment damage. About this principle, the Constitutional Court has pointed out the following:

> "(…) the prevention principle is detached from the benefit inherent to the right to enjoy a balanced and suitable environment (…). In that sense, it is inevitable for the State the duty to properly prevent risks to ecosystems, as well as the damages to environment resulting from human intervention, primarily the execution of an economic activity. Furthermore, the prevention principle forces the State to execute actions and assume technical measures which aim to assess potential damages to environment" (Docket No. 03343-2007-PA/TC).

These administrative measures are intended to avoid, prevent and take actions before a (environmental) damage is completed.

III. OEFA JURISDICTIONS

The OEFA is the governing body of the National Environmental Assessment and Enforcement System (SINEFA) and possesses specific attributions and jurisdiction to execute each of its functions mentioned.

Under provisions basis of the General Law on Environment, the Ordinance No. 1013 – Law on Creation, Organization and Functions of the Ministry of Environment[14] and the Law on the SINEFA. The OEFA has power to:

a) Supervise the activities made by many entities of environmental enforcement.
b) Start with administrative proceedings of enforcement

14 Published in *El Peruano* newspaper on May 14, 2008.

c) Determine the non-compliance with environmental obligations
d) Apply penalties
e) Order precautionary measures
f) Order corrective measures
g) Order measures of restoration, refurbishment, repair, compensation and recovery of the national natural heritage.

Since the amendment established in the Law No. 30011 is part of (legally) the new power of the OEFA to order *preventive measures*.

IV. CONSEQUENCES APPLIED TO ENVIRONMENTAL DAMAGE AND PREVENTIVE MEASURES

Based on the principles and standards of the specific environment framework mentioned, the originator of the environmental damage is subject to following measures from the administrative authority:

a) Preventive measure (category implemented by Law No. 30011)
b) Administrative Penalty
c) Application of precautionary measures
d) Application of corrective measures
e) Application of restoration, refurbishment, repair, compensation and national natural heritage recovery measures.

Preventive measures have been made in a way that an administrative penalty proceeding is not required; however, the issuing of them within a procedure of this kind is not exclusive.

This means preventive measures may be done in an autonomous way, without the need to establish an administrative penalty proceeding. It is worth mentioning that its establishment is not required in advance, present or later. Additionally, they are not precautionary measures, as we will see it below.

Those administrative measures are intended to avoid, prevent and take actions before a (environmental) damage is completed. It aims to avoid effects from a damage produced or mitigate the scope of a harmful action. Administrative measures are a representation of a preventive principle.

The Article 22-A of the Law on the SINEFA defines preventive measures as follows:

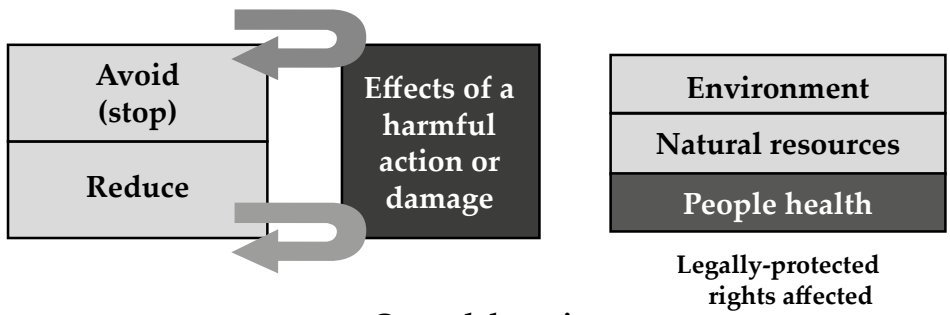
a) They are orders to do or not do, it means, they establish active obligations or omission by the individual receiving such order.
b) They require a high risk situation or an imminent danger, in other words, its probability of occurrence shall be very high.
c) They require a high probability of occurrence of one of the following damages:

   c.1 Serious damage to environment
   c.2 Serious damage to natural resources
   c.3 Serious damage to people health, due to affectations mentioned above.

d) They may be applied to mitigate the causes producing environmental damage or degradation.

As they are classified, preventive measures would be intended to avoid, stop, counteract (paralyze) or reduce the impacts or effects of a harmful action to environment, natural resources and people health (in order to stop such effect). In addition, they can be used to avoid, stop, counteract (paralyze) or reduce the scope of a harmful action.

Figure 3



Own elaboration

Some examples of preventive measures are property confiscation, activities restriction or stoppage, definitive or temporary closure of establishments, and others.

Preventive measures must be carefully used by the administrative authority, since they seem to be intended to face special situations in which are an imminent danger of a big damage or a high probability of occurrence of a

serious damage. It also must be taken into account if the measure to be applied is suitable to face the damage magnitude, its probability of occurrence and the harmful fact.

In this sense, the administrative authority shall previously analyze, in case of such enable elements of a preventive measure are applied.

Preventive measures are strong mechanisms, so they must be only used in case of or serious situations. Additionally, they have to be differentiated from administrative penalties, precautionary measures and corrective measures.

a) Administrative penalties come from the power to impose penalty of the Public Administration entities, representation of punitive power of the State. Under this administrative power, the State can impose –intentionality and properly- an harm, prejudice, affectation to someone[15] as a response (repression) to the infringement of a duty or obligation legally established (infringement), made by this last one.

I n case of administrative penalties, they are applied by a Public Administration entity[16], after the proper administrative penalty proceeding.

Due to it is the practice of the punitive power of the State, the power to impose penalties of the Public Administration is governed by a series of principles and guarantees, such as legality, (of the infringement and administrative penalty), classification (of the infringement), non-retroactivity, due process, among others[17].

The application of an administrative penalty aims to punish infractor in order to prevent a new similar action in the future (special prevention), but it can also be a general preventive measure, which demonstrates, to individuals, the effects of infringing legal obligations (general prevention).

As we mentioned above, the punitive aim is to produce a negative incentive that causes individuals to meet or obey their obligations legally established.

15 Penalty can be the limitation or privation of a right or power of the individual penalized; or the creation of a tax (imposition of a pecuniary duty or other nature).

16 Face the criminal penalty imposed by the Judiciary.

17 In our legal system, such principles are contained in Chapter II of Title IV of the Law on General Administrative Procedure.

b) Administrative precautionary measures are complementary mechanisms to a penalty proceeding. As in the procedural law, these measures are adopted by the administrative authority to make possible the order completion establishing a penalty.

c) By contrast, corrective measures have a purpose of reversion, restitution or repair and are intended to mend the status affected by the commission of the offense. This means that they aims to return, restore or mend the situation or the state of things prior to the infringement moment. These measures are always applied within the scope of an administrative penalty proceeding.

d) Administrative precautionary measures and corrective measures are already contained in the provisions of the Law No. 27444 – Law on the General Administrative Procedure[18] (LPAG, by its initials in Spanish) and in many special standards which regulate the practice of the power to impose penalties by the Public Administration[19].

18 Published in the Official gazette *El Peruano* on April 11, 2001.

19 In the case of precautionary measures, the LPAG establishes that:
Article 236. – Provisional measures
236.1 The authority that leads the procedure, shall determine the adoption of provisional measures, ensuring the efficacy of the final decision, subjected to the Article 146 of this Law.
236.2 Measures adopted shall to be adjusted to intensity, proportionality and necessities of the goals intended to achieve for each concrete case.
236.3 The completion or execution of these provisional measures, if any, shall be compensated with the penalty imposed.
Article 237. – Order
237.1 In the order where ends the procedure, different events during the procedure will not be accepted, regardless of its different legal value.
237.2 The order shall be executive when the administrative via is ended. The administration can adopt specific precautionary measures to ensure its efficacy, as long as it is not executive.
237.3 When the offender punished contests the order adopted, the decision of resources he/she presents, shall not determine the imposition of major penalties to the offender.
In case of corrective measures, the LPAG, establishes that:
Article 232. – Determination of liabilities
232.1 Administrative penalties imposed to the company, are compatible with the requirement of the situation recovery affected by the entity to its early state, as well as the compensation for damages and prejudices occurred, which will be determined in the proper legal process.

V. PREVENTIVE MEASURES AND THEIR CONNECTION WITH THE FUNCTIONS OF THE OEFA

The Article 11 of the Law on the SINEFA (amended by the Law No. 30011) establishes the OEFA has functions of assessment, supervision (direct and indirect), enforcement and imposing penalties.

The need, convenience or opportunity of the application of preventive measures can be applied in the scope and as a consequence of the practice of proper functions of the OEFA, especially in the functions practice of direct supervision, enforcement and imposing penalties. Because of the functions practice, the OEFA can be aware of harmful actions (causing facts) or serious affectations to environment (damages).

As the Law mentioned it, the evaluation function comprises actions of surveillance, monitoring and similar made by the OEFA in order to fulfill the environmental standards. The direct supervision function includes the power to take actions of monitoring and verification of the fulfillment of obligations established in the environmental regulation to companies. The Law on the SINEFA specifically indicates that in this stage, preventive measures can be ordered.

The function of enforcement and imposing penalties comprises the power to investigate the possible commission of administrative offenses and imposing penalties. The Law mentioned specifically indicates that this power include the power to order precautionary and corrective measures.

VI. PREVENTIVE MEASURES: SOME PROCEEDING ASPECTS PROVIDED IN THE LAW

The application of a preventive measure is represented in a specific order, to do or not do. In this sense, provisions in the Article 16-A, of the Law on the SINEFA (amended by Law No. 30011) result applicable to preventive measures. This is because preventive measures ordered are obligatory, so they are claimed to the company. Therefore, the fulfillment of a preventive measure ordered is an infringement and results in penalty through an administrative penalty proceeding.

Preventive measures ordered, being specific orders, can be administratively contested, without suspensive effect. Base on that, such orders maintain their enforcement.

The Article 20-A of the Law on the SINEFA (amended by the Law No. 30011) is also applicable to preventive measures. In this sense, we must keep in mind that lawsuits (contentious administrative, protection or others) do not interrupt or suspend coactive procedures of the order issued by the OEFA (including preventive measures).
In addition, if a precautionary measure is presented in a legal process, following rules shall be taken into account:

a) The injunction bond to be required, cannot be an own recognizance. A personal or real injunction bond must be required.

b) In case of a personal injunction bond, this one must be a bond letter awarded by a financial entity of first class, subject to the supervision of the Superintendency of Banking, Insurance and Private Pension Funds.

c) The guarantee awarded must have a validity not less than twelve (12) months, and keep in force in the period of the precautionary measure.

d) In case of a real injunction bond, this one must be of first range.

e) The OEFA can ask to legal authority, the variation of the injunction bond, if it becomes insufficient.

If the preventive measure is at a coactive level, and subject to review, in accordance with the Law No. 26979 – Law on Coactive Procedure, such coactive execution[20] shall be suspended only if the fulfillment of obligation is guaranteed by injunction bond, which must be subjected to the rules mentioned in Article 20-A of the Law on the SINEFA, as we mentioned above.

VII. PREVENTIVE MEASURES IN DIRECT SUPERVISION REGULATION OF THE OEFA

The development of preventive measures is in the Direct Supervision Regulation of the OEFA (approved by Decision of the Board of Directors No. 007-2013-OEFA/CD[21]). It is applied for cases originated within the scope of direct supervision actions.

20 Published in the Official gazette *El Peruano* on September 23, 1998.

21 Published in the Official gazette *El Peruano* on February 28, 2013.

This regulation has a definition of *preventive measure*, similar to the Law on the SINEFA[22]. Additionally, it establishes that the specific types of preventive measures that can be ordered are[23]:

a) Temporary, partial or total closure of the establishment or facilities in which activities endanger the environment or people health, are developed.

b) Temporary, partial or total stoppage of activities endanger the environment or people health.

c) Temporary confiscation of objects, instruments, machines or substances used which endanger the environment and people health.

d) Destruction or analogous action of hazardous waste or materials endanger the environment or people health.

e) Generally, any other suitable measure to reach the prevention goals.

The Regulation of Direct Supervision indicates that preventive measures shall be applied within the period established, which cannot be extended. It is because of its preventive and urgent nature, taking into account that it aims to face risks of high probability of occurrence or imminent harmful facts.

In case of preventive measure is not applied, the administrative authority shall apply it at its own expense and on behalf of the

22 The Article 22° Item j) of the Regulation of Direct Supervision of the OEFA defines a *preventive measure* under the following terms:

"Provision which orders to company, the execution of a specific obligation –to do or not do-when there are evidences of producing a serious damage to environment, natural resources and people health, as well as to mitigate the causes producing degradation or environmental damage".

The Article 22° of the above mentioned, indicates that:

"A preventive measure must be disposed when there is evidence of a discovery related to an imminent danger or high risk to produce a serious damage to environment, natural resources, their derivate, and people health, regardless of there are signs of administrative infringement in the activity subjected to direct supervision".

23 Article 24 of the regulation mentioned.

company[24]. The administrative authority shall directly act, in the following cases:

a) In case of the entity responsible of applying the measure is not identified, and its delay represents a risk of producing serious damages to environment and people health.

b) When there are many entities responsible of adopting the preventive measure, and it is not possible that the period and area are efficiently organized, so its correct application is guaranteed.

c) When the gravity and importance of the possible damage so required.

The Regulation of Direct Supervision establishes that to order preventive measures, the principles of prevention, reasonableness and proportionality must be considered. These probably are the most important provision of such regulation en relation with preventive measures, since they are assessment patrons that the administrative authority has to take into account prior to order them.

The prevention principle requires that the presence of a high risk situation or imminent danger[25] is proved, in order to act before the occurrence of the harmful fact or danger.

The reasonableness principle requires that preventive measures are useful and necessarily established to preserve the environment, natural resources and people health. This is to avoid the occurrence of the harmful fact or danger.

The proportionality principle requires the preventive measure meets adaptation, necessity and proportionality criteria, in relation with the harmful fact, the possible danger and its probability of occurrence.

The adaptation criterion requires an analysis of the causality of the preventive measure and its effect over the harmful fact or damage,

24Article 25° of the regulation.

25 It is the case of a situation with a high probability of occurrence, so the affectation to environment, natural resources and people health can be clearly deduced.

which means, if the measure effectively "serves" to prevent them. In this sense, this criterion is default in case of a measure that has not relation with or effect over the harmful fact or damage.

The criteria of necessity requires to determine if the preventive measure is the best or the most convenient among other measures that may, alternatively, be applied. This criteria requires the authority analyses the presence of many alternatives (preventive measures) to reach the desired goal. The determination of the convenience analysis requires an efficient analysis, due to there may be many alternatives which similarly are suitable to reach the goal (avoid or reduce the harmful fact or damage), but have different costs of implementation. The necessity analysis requires determining the correct measure, equally effective, involving a lower cost to the entity.

Finally, the criterion of proportionality measure requires analyzing the intensity, gravity or onerous of the preventive measure (to the company) against the impact from the harmful fact or damage that is intended to avoid. This last criteria is an efficient analysis since it is necessary to analysis of the measure cost is lower than the damage to be avoided (the benefit of getting by applying the measure). In this sense, this criterion will be disobeyed if an inefficient preventive measure is applied, with a cost higher than the damage to be avoided (the benefit).

VIII. CONCLUSIONS

1. The configuration and effects of the environmental damage can be explained from an economic perspective, under the definition of "externality". In addition, economic perspective also permits to understand, most clearly, the many mechanisms that the State uses, by the legal system, to face the environmental damage.
2. The acting of the OEFA is part of administrative regulation actions. elaborated by the State. These administrative regulation actions are part of its administrative function.
3. Preventive measures for environment respond to prevention principle, already recognized by the Constitutional Court. Their specific purpose is to avoid damages or reduce their consequences.
4. Preventive measures are a different category of administrative penalties, precautionary measures and corrective measures.
5. Preventive measure must be considered as an exceptional measure. The authority has to realize an analysis in advance to order it. For that, the principles of prevention, reasonableness and proportionality must be taken into account.

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13.

ANALYSIS OF SUPERVISION FUNCTIONS OF THE AGENCY FOR ENVIRONMENTAL ASSESSMENT AND ENFORCEMENT (OEFA) AS A GOVERNING BODY OF THE SINEFA

ARTURO DELGADO VIZCARRA

SUMMARY

In this article, the author analyses in depth the functions of the OEFA, as a governing entity of the National Environmental Assessment and Enforcement System, as well as its supervisory functions. To understand it, he also involves the constitutional basis which regulates systems and agencies performance in environmental matter, the General Law on Environment and environmental systems from the National Environmental Management System. In addition, she makes a resume of the Ministry of Environment creation.

I. Methodological Introduction. II. Preliminary Definitions. III. Our Political Constitution. IV. Law No. 28611, General environmental Law: Environmental Systems. V. Legislative Order No. 1013 – Law on Creation, Organization and Functions of the Ministry of Environment. VI. Law No. 29325 – Law on the National Environmental Assessment and Enforcement System (amended by Law No. 30011). VII. Definitions of Systems and the Governing Entity. VIII. Governing Functions of the OEFA. IX. Supervisory Functions of the OEFA. X. Conclusions.

I. METHODOLOGICAL INTRODUCTION

The creation of state institutions and the formulation of public policies are –according to our experience in the public area- the result of tendencies historically marked and that the right analyzes by systematic and historical interpretations. In this sense, in this article the governing function and its supervision by the Agency

for Environmental Assessment and Enforcement will be analyzed (OEFA, by its initials in Spanish). In this context, a progressive approach will be used, providing the reader a legal, technical context and the public management attached to those subjects.

This analysis shall serve not only to understand the currently legal situation, but also for any future modification, as well as the different understandings of standards by specialized authorizing officials, and who make statements according their experience.

II. PRELIMINARY DEFINITIONS

Currently, there are many scientific signs which clearly demonstrate that the human intervention in the nature and environment must have a new direction in order not to alter the natural cycles. Unfortunately, this aspiration is not possible today, since in approximate numbers, global population is 7 000 millions, Peru exceeds 30 million of population[1] and only in Metropolitan Lima are 8 million and a half[2] of population.

If we take into account only population and its basic needs –food, health, clothing and home-, we conclude that all resources related to provide such basic needs of the global population are directly and indirectly obtained from the nature: fishing, ranching, agriculture to food, agriculture or chemical processing to clothes or health, and mineral extraction to home, are small samples of planet's inhabitants collectively do for our support.

Numbers increase exponentially when we address the activities and needs of the society as a whole. Justice, defense or city security are needs of people requiring more resources, whose direct or indirect source is, again, the nature.

1 NATIONAL INSTITUTE OF STATISTICS AND INFORMATICS (INSTITUTO NACIONAL DE ESTADÍSTICAS E INFORMÁTICA)
2014 World Population Day 11 July. Document. Lima. Reviewed: on April 11, 2014. <http://www.unfpa.org.pe/Articulos/Articulos/INEI-Estado-Poblacion-Peruana-2013.pdf>

2 EL COMERCIO. "Lima tiene 8´500.842 habitantes: ¿Hay más hombres o más mujeres?". El Comercio. Lima, 2013. Reviewed: on April 11, 2014. <http://elcomercio.pe/lima/sucesos/lima-tiene-8500842-habitantes-hay-mas-hombres-mas-mujeres-noticia-1524307>

Taking into account mentioned reasons, and many others of technical and economic nature, the environment is established as a main subject for public policies formulations, specialized laws creation and, obviously, the creation of a state entity designed to it.

From a policy perspective, rural population and population outside urban areas constantly observe how nature, as they knew it, has changed: natural areas have been reduced and resources are scarce. Citizens also notice such degradation: air pollution, rivers passing the cities, solid waste and others are a big sample of how we affect our environment. Those situations result in claims solutions to the State, and which reacts establishing a series of conditions and requirement for nature intervention, such as licenses to natural resources exploitation and social licenses. Additionally, from an economic perspective, we are in a situation where negative externalities are produced in services and goods productions, which require the State acts to restart the equilibrium.

However, it happens that population wants to get away from anything that harms it or may affect it; in such moment where the equilibrium is broken, the policy action, in search of its voters and popular acceptance, will try to exercise power over the State to reach such distance.

The major problem occurs when such distance or disappearance affects not only population who have claimed it, and when regional and, even worse, national economy is harmed. In that moment, State should act again, this time to restore the order and equilibrium.

Let think about an economic intervention clearly intrusive in the environment: wood harvesting in our forest. Anyone who wants to execute it, shall obtain a forest concession, complete a number of formalities and commit to the State, a series of actions and inactions.

Considering this context, let realize an easy analysis, firstly on the positive side. What benefits does population get from such harvesting? First, wood is an economic resource of vital importance to cover our needs; second, it's harvesting produce employment; and finally, through its use, taxes are collected.

What its prejudices are? Tree harvestings will affect the natural environment, there will be less oxygen makers in the nature, animal habitats will be reduced, fruit collection will become more

complicated, and resources to natives of the area will be scarce, just to name a few.

Taking into account benefits and prejudices, what does the State do? The answer is just one word: regulates. The State uses its power, rights and authority, and orders a number of standards with rules creating, as much as possible, an equilibrium between the exploitation required and the affectation produced.

Then, the main idea is anyone can start wood harvesting, as long as all formalities, studies and managements are met in order to execute such activity, as well as all obligations and commitments produced by the harvesting.

Protected by law, both wood harvester and anyone affected by the forest exploitation, have their interests under protection, and the State, by legal expression, shall meet its goal and protect the common interest.

This is our starting point: the State exercises authority to regulate, authorize, monitor or guard the completion of laws, commitments and obligations, and imposes penalty in case of non-compliance.

There many elements at stake: authority provided by law; legitimacy provided by its confidence or should the population have confidence in the State, and the belief that economic actors will act in accordance with the standards.

These elements are in a complex equilibrium that, unfortunately, the reality works on alter it.

III. OUR POLITICAL CONSTITUTION[3]

The constitutional basis regulating systems operation and governmental agencies devoted to the environment are contained, among others, in following articles[4]:

3 Published in the Official gazette *El Peruano*, on December 30, 1993.

4 This constitutional review is focused in the subject of this document; it means, in governing and supervision functions of the OEFA.

> Article 2. Everyone has the right to:
> 22. Peace, calm, enjoy of a free time and rest, as well as to enjoy a balanced and suitable environment to the life development.
> Article 67. The State determines the national policy of the environment. It also promotes the sustainable use of natural resources.
> Article 68. The State has to promote the conservation of biodiversity and protected natural areas.

The interpretation of those articles leads us to affirm that:

a) Everyone has the right to enjoy a balanced environment: Everyone are national and foreign people; it is a self-imposed function by the State, without nationality limits.

   On the other hand, it declares that we have the right to enjoy balance environment. The Royal Spanish Academy enters the following meanings for the verb *enjoy*[5]:

   > enjoy
   > (enjoyment)
   > 1. have or possess something useful and pleasant. Enjoyment of wealth.
   > 2. Be happy, satisfied and pleasant for something.
   > (…)
   > 4. Feel pleasure, sweet and agreeable feelings. Joy at the expense of the lucky of others.
   > 5. Have a good physical and moral condition. Joy OF good health, vitality, respect, reputation.
   > 1. verb. Have a good time, enjoy with someone or something.

   Notice that, in all cases, the verb connotation of enjoy always is positive and subjective: the enjoyment produces positive and agreeable feelings to the receptor. Subsequently. If we are talking about perceptions and feelings, we are talking about subjectivity. In other words, the enjoyment is the result of a personal perception, which means that is a joy for someone, but a suffering for others.

   It is evident that the State cannot ensure the enjoyment of everyone, mostly if it is subjective; it is impossible to give pleasure

5 REAL ACADEMIA DE LA LENGUA. *Diccionario de la lengua lespañola*. Reviewed: on April 2, 2014.
<http://lema.rae.es/drae/?val=gozar>

to everyone at the same time. According to above, in case of the factual impossibility, the State shall establish a suitable balance in order to the positive feeling will extend to such human groups that, under their policy priority, have to posse it. Otherwise, there always be someone, thinking or not, that will sense the state decision in a negative and mirthless manner.

The development of a balanced and suitable life can have many interpretations depending on who and what have to understand about such equilibrium, and what life we are talking about.

We have started with a basis indicating the human action, important to supply our needs, produces unbalances in nature. In this sense, we may conclude that those interventions must be avoided, in the reach for a balanced and suitable environment to our life development.

From another perspective, such equilibrium and suitability should be establishing a balance between human needs and environment. This way of thinking leads us to other conclusions in which the human intervention is not reduced, but regulated[6].

It should be noted that, as environment refers not only nature, but our surrounding area, the right granted by our Political Constitution also refers to the urban level.

6 In that regard, the Order No. 3510-2003-AA/TC, published on June 30, 2005, and quoted in Compendio de legislación ambiental del Ministerio del Ambiente (http://www.minam.gob.pe/legislaciones/minam-publica-compendio-de-legislacion-ambiental-peruana/), in this case, Julio César Huayllasco Montalvo, says:
"It is consider that this link is guided by seven principles: regarding the tie between the economic production and the right to a balanced and suitable environment for the life development, it is represented according to the following principles: a) the principle of sustainable development (which will merit an analysis); b) the principle of conservation, in which merit is aims to maintain the optimal state of the environmental goods; c) the principle of prevention, which aims to protect the environmental goods against any danger that may affect its existence; d) the principle of restoration, referred to the sanitation and recovery of the environmental goods damaged; e) the principle of improvement, in which virtue aims to maximize the benefits of the environmental goods in favor of the human enjoyment; f) the principle of precaution, which adopts precaution and reserve measures when there are scientific doubt and signs of threat on the real dimension of the human activities effects on environment; and g) the principle of compensation, which includes the creation of recovery mechanisms in case of the exploitation of non-renewable resources".

Under this sense, we may constitutionally act, if the area established by a municipality prevent us from the enjoyment of a balance and suitable environment to our life development[7].

b) The State has to approve a national environmental policy. Considering, in such sense, many aspects. The policy is national, as is defined in the Political Constitution. Under that context, the entity that has to pronounce such policy, shall have power, national jurisdiction and governing rights. In that case, we refer to Ministry of Environment (Minam, by its initials in Spanish).

   As with any policy, it shall protect the general interest or, eventually, some interest differentiated by certain features justifying the distinction.

   The Article 67 of the Political Constitution has determined that the State promotes the sustainable use of natural resources. That means, human intervention in this kind of resources is not prohibited, but promoted as is sustainable. In this sense, the national Public Administration has to order regulations which guide and promote the sustainable use of natural resources; *contrario sensu*, unsustainable activities shall not be promoted, but neither, by the absence of this condition, prohibited.

c) In a same way, protected natural areas and biodiversity conservation shall be promoted.

IV. LAW NO. 28611, GENERAL ENVIRONMENTAL LAW: ENVIRONMENTAL SYSTEMS

The General Environmental Law[8] creates many management systems and environmental policies; thus, its articles 14 and 15 establishes functions to the National Environmental Management System:

> Article 14: National Environmental Management System
> 14.1 The National Environmental Management System is responsible for the functional and territorial integration of the policy, rules

7 It should be understood that this action meets all previous requirements stipulated by constitutional procedure regulation.

8 *Published in the Official gazette El Peruano on October 15, 2005.*

and management instruments, as well as the public functions and coordination relationship between State institutions and civil society, in environmental matter.

14.2 The National Environmental Management System consists of state institutions, bodies and offices in many ministries, decentralized public agencies and public institutions at global, national and local level exercising power and functions on the environment and natural resources; as well as by Regional and Local Environmental Management Systems, with the participation of private sector and civil society.

14.3 The National Environmental Authority is the governing entity of the National Environmental Management System.

Article 15. – Environmental Management Systems
The National Environmental Management System is part of public management systems in environmental matter, such as sectorial, regional and local environmental management; as well as other specific systems related to the application of environmental management instruments.

The logic for the establishment of a National Environmental Management System is, on our vision, quite practical. It is impossible that the environmental management can be centralized, since there are many specializations and interests at stake, and therefore, there are many authorities intended to that special part of environment, with many jurisdictions and power. Fishing, mining or forest harvesting, require specialized entities in different geographical locations and with different techniques and others. Subsequently, it is important to regulate the set, systematize it and establish common public policies.

In this context, , the National Environmental Impact Assessment System is created by the Article 24 of the General Environmental Law in order to assess the important impacts of works, services and other activities. In the same way, in Article 35 of such rule, the National Environmental Information System is created as a technical, institutional and technological integration network to make easier the systematization, access and distribution of the environmental information, as well as the use and exchange of information for the process of decisions making and environmental management. Finally, it is worth mentioning the Article 107, which recognizes the National State-Protected Natural Areas System, created in previous regulation.

In connection with the enforcement, Chapter I of Title IV of the law named, indicates that it comprises the actions of surveillance, control, monitoring, verification and others, made by the national environmental authority and

other competent authorities, in order to ensure the completion of standards and obligations in the environmental regulation. It is worth to mention that people creating environmental impacts and those that are determined by a national environmental authority and other competent authorities, are subject to such actions.

V. LEGISLATIVE ORDER NO. 1013 – LAW ON CREATION, ORGANIZATION AND FUNCTIONS OF THE MINISTRY OF ENVIRONMENT[9]

The State Secretary, according to Article 119 of the Political Constitution of Peru, is responsible for carrying out a portfolio with sectorial matters. He is, in the context of the Public Administration, an officer with constitutional recognition and power established from our fundamental regulation. For these reasons, it is not strange that, when a matter reaches special complexities, it becomes national and requires the establishment of central policies, there is a tendency to create a ministry. That happened in environment and culture, discussing today the creation of a ministry for sport.

Did the creation of the Minam strengthen the institutionalism of a dispersed and specialized area? Yes, we believe it. Since it is a fundamental creation to assemble policies, and gives it a national and univocal sense. It is also truth that these efforts are recent and the problem is complex, but the creation of such ministry is fully justified. Thus, by Legislative Order No. 1013, the Minam was created as the governing entity of the environmental area at national level.

In that sense, it is important to mention that, under the Number 22.2 of the Law No. 29158 – Organic Law on the Executive Power[10] (LOPE), the ministries[11] design, establish, execute and supervise national and sectorial policies, assuming the authority over them; therefore, the creation of a ministry helps the institutional mechanism of a subject and prioritization of particular problem, and obtains the advantage of possessing a secretary as the political responsible for the matter fully identified.

9 Published in the official gazette *El Peruano* on May 14, 2008.

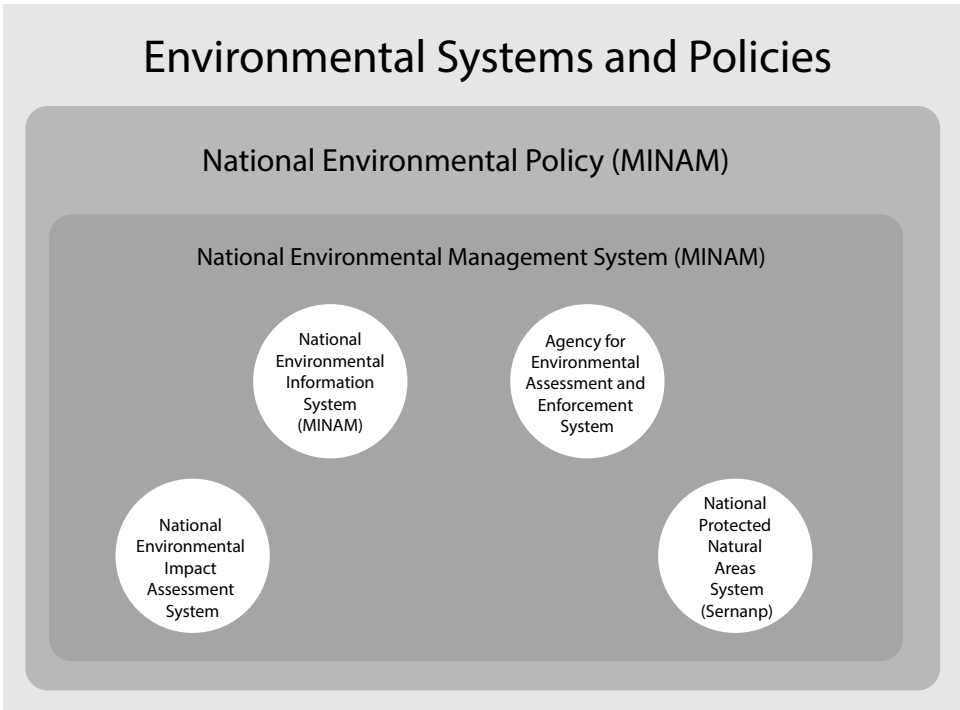
10 Published in the official gazette *El Peruano* on December 20, 2007.

11 n application of the subsidiarity principle, the ministries should be concentrated in the rectory of national public policies, including the design, formulation and assessment of policies. Following this structure, the execution of public policies correspond to decentralized courts, it means, public agencies or subnational governments.

In the Final Second Supplementary Provision of Legislative OrderNo. 1013, The Agency for Environmental Assessment and Enforcement – OEFA is created:

> 1. Agency for Environmental Assessment and Enforcement
> The Agency for Environmental Assessment and Enforcement – OEFA, is created as a specialized technical public entity, with legal nature of public internal right, established in state-funded public body, assigned to Ministry of Environment, and responsible for the control, supervision, monitoring and punishment in environmental matter.
> Its basic functions are the followings:
>
> a) To direct and supervise the application of the common system of environmental enforcement and the system of incentives included in the Law No. 28611, General Environmental Law, as well as the enforcement and direct control of the compliance with activities imposed by law.
> b) To practice the penalty power in its jurisdiction, applying penalties of written warning, fine, confiscation, immobilization, closure or cessation, by determined infringements and according to the procedure approved for such effect, applying its power of coercive execution, when appropriate.
> c) To elaborate and approve the Annual Plan of Environmental Enforcement, as well as the elaboration of the results report of its application.
> d) To take actions of environmental enforcement within its jurisdiction.
> e) To supervise that entities meet their enforcement functions established by the law in force.
> f) To give technical opinion about environmental infringement cases, which can produce penal action by the commission of crimes classified in the proper legislation.
> g) To report the Public Ministry on penal facts that knows during its function practice.

As long as the creation of the MINAM represents an adjustment in the institutional mechanism of the environmental area, it is important to check the global systems reviewed and establish its relationships:



Own elaboration

VI. LAW NO. 29325 – LAW ON THE NATIONAL ENVIRONMENTAL ASSESTMENT AND ENFORCEMENT SYSTEM[12] (AMENDED BY LAW NO. 30011[13])

As we mentioned above, the human intervention affects the nature. The State orders regulations to avoid and control damages, and ensure their completion.

From a guarantism perspective, and in conformance with Fernández, we can say that the supervising function "when the legality of activities, facilities, properties and services to be controlled are confirmed and its adjustment is investigated, it is a first order action as guarantee of legally protected rights by the order trying to ensure its effectiveness"[14].

12 Published in the Official gazette *El Peruano* on March 5, 2009.

13 Published in the Official gazette *El Peruano* on April 26, 2013.

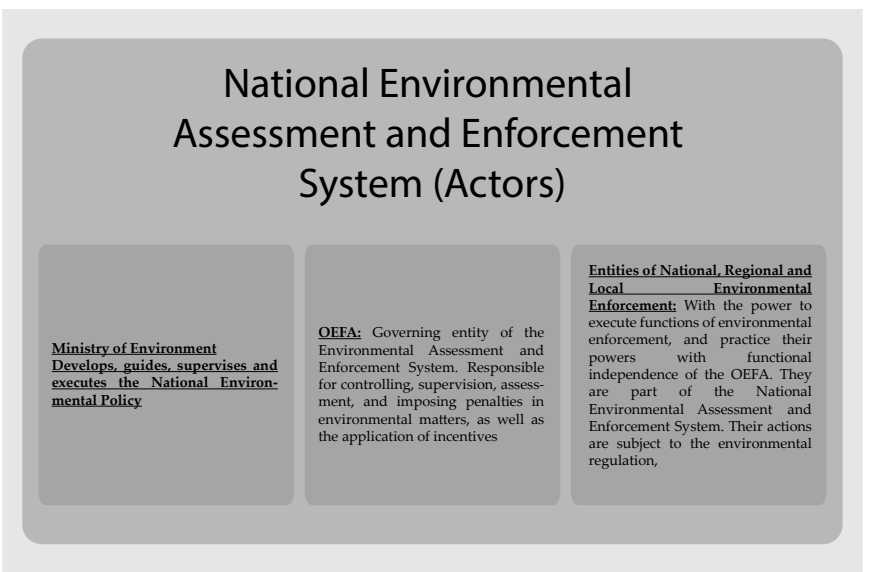
14 FERNÁNDEZ, Severiano. *La actividad administrativa de inspección. El régimen jurídico general de la función inspectora*. Granada: Editorial Comares, 2002, pp.13-14

In an ideal context, all citizens should meet the law and have an attitude beyond it, especially in case of the environment, since its damage weakens our future. However, that context does not exist, and there are activities that, valid or invalid, legal or illegal, endangers the environment or, in the worst case, harms it.

In order to prevent the environmental damage trough administrative actions which go beyond the regulation and proactively go to the site in where intervention in nature occurred, the State has created the Agency for Environmental Assessment and Enforcement, and its governing has been granted to the OEFA.

The OEFA challenge is, in this case, double, since, on one hand, it has an impact on people activities, ensuring the environmental legislation is completed; and, on the other hand, supervises and guarantees that functions of assessment, supervision, enforcement and the power to impose penalties in environmental matter, by many entities of the State, are executed in an independent, impartial, fast and efficient way.

Graphically, jurisdiction distribution in environmental assessment and enforcement, is as follows:



Own elaboration

VII. DEFINITIONS OF SYSTEMS AND THE GOVERNING BODY

Prior to thoroughly review the governing functions of the OEFA, we will talk about its features. By definition of the LOPE, the Article 43, a system is a set of principles, rules, procedures, techniques and instruments by which the activities of the Public Administration are organized, which require to be made by all or many entities of the powers of the State, constitutional agencies and the Government levels.

The systems can be administrative, related to the use of the State resources and functional, as well as the environmental systems listed above. These aims to, as indicated in Article 45° of the LOPE, ensure the completion of public policies[15] requiring the participation by all entities of the State.

The governing entity is responsible for the system organization, defined in Article 44 of the LOPE, as follows:

> Article 44. – Governing bodies
> The systems are the responsibilities of a governing body which constitutes in its technical-regulation authority at national level; it orders standards and establishes the procedures related to its context; coordinates its technical operation and is responsible for its correct function within the framework of this law, its special laws and supplementary provisions.

The OEFA, as we will discuss later, possess a set of functions which constitute it in a governing body of a functional system.

VIII. GOVERNING FUNCTIONS OF THE OEFA

In accordance with the LOPE, the governing functions of the OEFA is characterized by a dual intervention: first, in case of people exercising activities likely to be enforced and, second, public entities with power of environmental enforcement.

15 It is worth that a public policy is an action, decision or inaction executed by the State in order to resolve a public problem. It should be noted that public policies do not always involve legislation: there are decisions made by the State, result in public problems which have not been expressed in a law or regulation. For example, the Peruvian State decision not to internationally and officially act and discuss about the triangle at the southern end of our land border.

We have explained along this article that, the State intervention is fully justified by the negative externalities quantity produced by the economic human activity in the environment.

It should notice that the rectory obliges the institution to elaborate complex balances to adopt decisions which strengthen its market, in which the idea of neutralizing externalities and, ensuring the regulation, which impose greater administrative burden, is based on pertinent technical criteria, important values and public policies for the general interest.

In this sense, for analysis, it is important to mention the features named "a new approach of environmental enforcement"[16]:

> An enforcement which aims to an equilibrium allowing the harmonization between the free private initiative and the company freedom about the environmental protection, the right to develop economic activities in accordance with right to live in a healthy environment, the promotion of private investment on ecosystem protection, and that this balance, harmony, leads us to the sustainable development.

Having said that, we consider that an important challenge is to carry the bureaucratic management towards an active level, applying the framework of the old colloquial premise: "realty does not change by decree". The governing entity is responsible for overcoming the regulation issue established in a set of policies, coordination and actions which strengthen its functional system, becoming as an important element for public officers and people. The way to do it, is large, distant and means the construction of legitimacy in the governing practice within the context in which, as it happens in all national public area, resources restriction is a common place.

IX. SUPERVISORY FUNCTIONS OF THE OEFA

We have mentioned that state intervention to permit activities which exploit the nature, is justified in the general interest protected by the State. Additionally, we manifest that, from an economic

16 GÓMEZ, Hugo & Milagros GRANADOS. "El fortalecimiento dela fiscalización ambiental". En GÓMEZ, Hugo (compiler). *El nuevo enfoque de la fiscalización ambiental*. Lima: Organismo de Evaluación y Fiscalización Ambiental, 2013, p.15.

perspective, negative externalities produced by such exploitation make indispensable the state presence[17].

Supervisory function of the OEFA is the logical sequence of interventions mentioned above. If the State authorizes an activity, it is responsible for verifying the completion of conditions and obligations resulting from such authorization, permit or license.

It is important to emphasize what was stated by Fernández[18], related to penalties, as an incentive to meet the legal administrative regulation, they have lost effectiveness:

> (…) It is clear that the acceptance of punishable regulation does not mean the observance of the legality, but a positive and efficient activity of Management for its application.

17 For reference purposes, our bureaucratic structure supposes the obligatory state action. However, this direction in the Anglo-Saxon case, specifically in the United States of America, has been different, according Italo Bizerra, who indicates in its report "Análisis del Marco Regulatorio y de las normas de promoción de la inversion privada", pp. 1-2.
"In the context of the middle of the 19th century of the economic history of the United States, first management ideas arose by regulatory agencies or independent agencies, considered as one of the most important, contributions of the legal system of North America to the contemporary public law.
The trajectory of the independent regulatory agencies was decisive in the development of the North American society, since these were involved in public intervention policies in economy, and due to supervisory and regulatory functions, coverage were provided to important systems of the market.
The doctrine determines that one of the main factors, in which repercussion is decisive for the evolution and development of this system is the *Progressive Movement*. The essence of this movement resides from its fight to a professional, technical, reliable and public management, based on the scientific analysis, and governed by the principles of stability, efficiency and autonomy.
First independent regulatory agencies arose from the Industrial Revolution and acquired functions covering the design and execution of policies needed of specialized technical preparation. During the first decades of the 19th century, war and social facts caused the need of new and most powerful entities creations, with legal faculties. However, it had questions at constitutional level, consequently the Congress decided to approve its creation as independent agencies of the federal Government. Thus, the Golden Age of management began by agencies in the United States and beginning to come to light a series of new agencies, such as the Interstate Commerce Commission, the Federal Reserve System, the Federal Power Commission, among others".

18 FERNÁNDEZ, Severiano. Op. cit., p.10.

> In addition, although some specific sectors, the existence of specific interests serves as an efficient incentive to the Management, other sectors, the interests are collective- as in the case of environmental matter and the defense of consumers and users- which adds a plus to the difficult in the effectiveness of the regulation. (…)
> Due to these congenital problems in effectiveness of administrative regulation, the need to assemble mechanisms and control techniques, ensuring the application of administrative laws, become more important.

So, what happens when the author of the economic activity susceptible to enforcement and supervision is the State? If we apply the prevention principle to distance from possible environmental damage, we should apply the technical, economic and political autonomy in order to avoid any intention of political pollution. Unfortunately, the law writing is not introduced in this supposition, but we believe that in a future strengthening of enforcement functions and its institutions, this subject will be discussed. It should take into account that Article 3 of Law No. 29325 refers to the public area; in order to address the completion of supervisory and enforcement functions, unless it practices the economic activity.

Similarly, there are precautionary and prevention functions compulsory for this context. It is demonstrated that the best result of a damage is it does not happen. This idea can be contradictory, at first sight, but it is fully justified in reality, since economic activities can produce damages. In this context, such damages shall be prevented to avoid higher costs or irreparable harms.

In that regard, the statement of the Constitutional Court (page 24), established in Docket No. 0008-2003-AI, indicates:

> Indeed, the control of service quality standards, price reasonableness assigned, sustainable development of the area, proactive and effective action in environment care and technical power, are conducts that governing entities shall assume, by actions ex- early – previous regulations- or ex-post- penalties as model to dissuade the offender and many rivals to infringe upon values of an efficient and human market-.

With regard to governing entities that also have supervisory functions, Pérez[19] has said on a different ideological basis, from a perspective related to a branch

19 PÉREZ, Alejandro. "Servicio público, régimen, regulación y organismos de control en Servicios Público y Organismos de Control". In PÉREZ Hualde et al. *Servicios Públicos y Organismos de Control*. Buenos Aires: Lexis Nexis, 2005, p.43.

of police functions of the State. However, we consider that, in its factual application, the result is the same:

> The major function, which has to motivate all functions of the governing entity, is to protect and ensure the completion of the goals established by legislation, which had legal basis to impose the coverage of a need on the public regimen. The governing entity is a direct consequence of the public regimen existence, since it does not conceived one without the other.
> This would not make sense that the legislator establishes a public regimen that nobody can control. (…)
> The control agency is responsible of verifying the completion of public service roles, the completion of obligations supposed by the public regimen, and the legal and reasonable employment of privileged people of such regimen, express or implied.

Generally, the Number 11.1 of Article 11 of the Law on the National Environmental Assessment and Enforcement System, amended by Law No. 30011, establishes that environmental enforcement includes functions of assessment, supervision, enforcement and imposing penalties intended to ensure the compliance with environmental obligations to be enforced, as well as commitments from environmental management instruments and orders or provision by the OEFA.

In case of the Law No. 27332[20], the framework law on Governing Entities for Private Investment in Public Services, its Article 3 establishes the following functions:

> **Article 3. – Functions**
> 3.1 Within their respective competent areas, Governing Entities execute the following functions:
> a) Supervisory function: Includes the power to verify the completion of legal, technical and contractual obligations by entities or supervised activities, as well as the power to verify the completion of any order or decision issued by the governing agency or any obligation in charge of the entity or activity to be supervised;
> (…)
> d) Function to impose penalties and control: includes the power to impose penalties within the jurisdiction area as a result of infringing obligations from legal and technical regulation, as well as obligation contracted by concessionaires in respective concession contracts;
> (…)

20 Published in the Official gazette *El Peruano* on June 29, 2000.

From our perspective, the result of both legislations are the same: the supervisory function is characterized by monitoring, verification and, if it is wanted, the surveillance of the completion of legal obligations and order by the governing entity. There is not difference, in this point at least, between functions of governing agencies and for the environmental enforcement.

In the case of the OEFA, the article 11 of the Law on the SINEFA has determined two supervisory functions, the first one is defined as follows:

> b) Direct supervisory function: includes the power to take actions of monitoring and verification in order to ensure the completion of the obligation established in the environmental regulation by companies. In addition, it includes the power to order preventive measures.
> Supervisory function aims to promote the voluntary correction of assumed infringements of environmental obligations, provided that administrative punishable procedure has not been initiated, includes an obligation to correct, and the action or omission has not produced risk, damages to environment or health. In these cases, the OEFA can get the proper file of investigation.
> By order of the Council Directive, the paragraph above is regulated.

In that sense, Morales states the following:[21]

> The environmental supervision is a technical function requiring a close knowledge of the productive process to detect crucial environmental aspects (…)
> Within the structure of a punishable procedure, supervision includes a previous investigation phase. However, to operate as a mean to identify possible administrative infringements is one of the purposes or goals of the direct supervision function.
> While supervision function is, in laws, defined as the monitoring and verification of completion of environmental obligations, whatever its origin (instruments of management, environmental regulation or administrative measures provided by the OEFA), such function transcends the completion of environmental obligations and the infringements report.
> (…) For that, the practice of direct supervision precedes administrative measures, such as preventive measures (which comprises the activities

21 MORALES, Delia. "El reglamento de supervisión directa". In GÓMEZ, Hugo (compiler). *El nuevo enfoque de la fiscalización ambiental*. Lima: Organismos de Evaluación y Fiscalización Ambiental, 2013, pp. 106.107.

> stoppage) and specific orders. These measures operates in case of an imminent risk to environment, or imposing requirements to the company to ensure the efficacy of the environmental enforcement, even when there is not infringement of environmental obligations.

The execution of the supervision function, from our perspective, should be characterized for its impartiality. For that effect, the supervisor officer should eliminate all prejudice upon beginning of his or her activities in order to apply his or her functions without prejudices or preliminary understandings, and, in this way, he or she shall evaluate the real and correctly interpret the law.

It is important to give a value added to preliminary results of the supervision trough reports which can be part of the punishable processes and their instructions. In this context, supervision has a basis on the market laws and the need to adjust alteration between rivals and verify the products quality provided by companies. These definitions are larger than the administrative penalty in case of misconduct.

Preventive measures are a manifestation of functional independence of supervision. As a result of this administrative activity, orders can be stated, under some conditions, which shall prevent the beginning of a punishable procedure.

Preventive measures are fundamental to economic activities. The company can react and avoid the damage, and therefore, may has the economic perception; and the State shall save the big costs which involve the execution of a punishable procedure.

From another perspective, Fernández[22] notices that the guarantee aspect of the inspector or supervisory function forces it:

> "(…) to assess not only the completion grade of the rules applied, but the effective protection grade of the goods. And this assessment can be derived from reports about the convenience of altering normative standards or, in extreme cases, the adoption of provisional measures essential to cause an imminent danger to legally-protected rights, and all that, whether or not exists an legal infringement – blameworthy or not – (…)".

The second supervisory function is described in the following manner:

22 FERNÁNDEZ, Severiano. Op. cit. 14-15.

> b) The supervisory function of environmental enforcement entities (EFA), at national, regional and local level, includes: the power to take actions of monitoring and verification of the performance of enforcement functions made by national, regional and local environmental enforcement entities, which are mentioned in Article 7.
> The OEFA, practicing its supervisory function, can establish procedures for sending reports, technical reports and any information related to the incompletion of function by environmental enforcement entities (EFA).
> The incompletion of functions mentioned above result in a functional responsibility, which is notified to the proper agency of the National Enforcement System.

From our perspective, this function involves major complexities, by the following reasons:

a) The economic activities susceptible to enforce, are numerous and specialized, for that, the public agencies or *public entities responsible for enforcement.*
b) While it is truth that the OEFA, as a governing entity of the National Environmental Assessment and Enforcement System, has political independence, there is no guarantee a similar situation for the EFA.
c) There is no hierarchical relationship between the OEFA and the EFA. This condition, from our perspective and taking into account our bureaucratic tradition, is essential to the precepts of the OEFA have a suitable copy of such institutions.

At these deficiencies, we consider that some actions can be executed for legitimacy, which will give intrinsic strength to these supervision functions. Firstly, we must to closely coordinate, exchange experiences, make workshop to share understanding; and, find solutions.

Finally, in a second place, we suggest applying the method used by many governing agencies of administrative systems: training (continuous, permanent and on-site).

It is clear that the supervision of the OEFA is based on information, but it depends on that its forms and quality are approved. This is achieved, beyond the directive and format, by the public officers training in environmental enforcement.

The standard that establishes the supervision powers of the EFA is the governing expression of the OEFA, since it directly involves this

agency in the management of others public entities and gives it the opportunity to build, as it is indicated in the Political Constitution, a sustainable use of the environment and, in this way, make it suitable for our life.

X. CONCLUSIONS

1. The State has to establish policies to favor the enjoyment of a suitable environment for people development.

   The result of implementing such policies shall be perceived positively by some people and negatively by others. The State is responsible for acting in search of the best equilibrium possible.

   In that sense, sustainable economic activities will be promoted, but, with certain exceptions, other activities are not prohibited.

2. Since the Minam creation, public environmental policies have been strengthened; the major strength is to identify the secretary of the area as direct responsible for such policies.

3. Supervisory and enforcement functions are different: supervision includes verifying that economic activities are executed within the parameters established by Law; and enforcement includes verifying if the economic activity has infringed the legal regulation.

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14.

The common environmental enforcement system

MARTHA ALDANA DURÁN

SUMMARY

The author presents regulatory background of the Common Environmental Enforcement System and its main contents, with an emphasis on the role to execute to environmental control entities (EFA) and the Agency for Environmental Assessment and Enforcement (OEFA) as a governing body of the National Environmental Assessment and Enforcement System (SINEFA). Additionally, some future challenges for this matter are mentioned.

I. Introduction. II. Background. III. What does the Common Environmental Enforcement System contain? IV. Future perspectives. V Conclusion

I. INTRODUCTION

In Peru, the environmental enforcement is not in charge of a single entity. Since its beginnings, the environmental enforcement has been assigned as a responsibility of an entities group with powers in this matter.

However, the idea is that these authorities participate in the execution of their environmental enforcement functions in a consistent, integrated and harmonious manner. For this purpose, since the enactment of the Law No. 28611 – General Law on Environment[1], in 2005, the order to have a general tax regimen in this matter, was established.

This regulation aims to be the instrument assembling the practice of environmental enforcement by the environmental enforcement

1 Published in the Official Gazette *El Peruano*, on October 15, 2005

entities (EFA), respecting its functional independence. Its purpose is to ensure a homogeneous, efficient, effective, harmonious and coordinated environmental enforcement, by helping to improve the people life quality and the sustainable development of the country as a mean to ensure the respect for environmental rights.

This article contains the background of this regulation, as well as its main contents, and brings future perspectives in this subject.

II. BACKGROUND

2.1. Common System in the General Law on Environment

This regulation, which may be considered as the starter regulation of the Peruvian environmental law, declares the order to approve a Common Environmental Enforcement and Enforcement System[2]. In fact, in the Title IV about Liability for Environmental Damage of the General Law on Environment, noted:

> Article No. 131. – Environmental Enforcement and Control System
> (…)
> 131.2 By Supreme Decree, endorsed by the President of the Council of Ministers, the Common Environmental Enforcement and Control System is established, executing its respective powers and liabilities.

The reason of establishing an order to approve a Common System was the existence of a multiplicity of competent authorities for environmental enforcement, which required common rules for the practice of its functions.

In order to comply with the above mentioned in the General Law on Environment, the National Council of Environment (Conam), in 2006, created a multi-sectorial work team responsible for elaborating a proposal for the Common Regimen Regulation, which was made

2 The definition of this regulation was not uniform. In the General Law on Environment, it was named "Common Environmental Enforcement and Control System", en the Law of SINEFA, it was named "Regulation of the Common Environmental Enforcement and Control System", but they referred to the same thing. In order to clear this matter, in the Law No. 30011 – Law amending the Law of SINEFA, established that "all reference to the Common Environmental Enforcement and Control System or Regulation of the Common Environmental Enforcement and Control System, should be taken as made to the Common Environmental Enforcement System".

and presented to the Presidency of the Council of Ministers (PCM). However, it was not approved.

The institutional structure of the Peruvian environmental management changed with the creation of the Ministry of Environment (Minam) in 2008, as described below.

2.2. The Common System in the Law on the creation of the Minam and the Law on the SINEFA

In May, 2008, by Legislative Order No. 1013[3], the regulation of the Ministry of Environment (Minam) was approved, and the creation of the Agency for Environmental Assessment and Enforcement (OEFA) was ordered, so the Minam was supplied with a specialized agency for environmental enforcement.

When the creation of the OEFA was ordered, one of its basic functions was marked:

> SECOND FINAL SUPPLEMENTARY PROVISION. – CREATION OF PUBLIC AGENCIES ASSIGNED IN THE MINISTRY OF ENVIRONMENT
> 1. Agency for Environmental Assessment and Enforcement
> (…)
> Its basic functions shall be:
> a) To lead and supervise the application of the common environmental enforcement and control and the incentive system provided by Law No. 28611, General Law on Environment, as well as to direct enforce and control of the compliance with those activities imposed by Law.

Thus, when the OEFA was created, the first task imposed to it was to ensure the completion of the established in the Common System from a supervisory perspective to the EFA, recognizing, supplementary, the powers of direct enforcement in charge of such entity.

In 2009, the Law No. 29325 – Law on National Environmental Assessment and Enforcement System (SINEFA)[4] was ordered, establishing in connection with the Common System, the following:

3 Published in the Official Gazette *El Peruano*, on May 14, 2008

4 Published in the Official Gazette *El Peruano*, on March 5, 2009

> FINAL SUPPLEMENTARY PROVISIONS
> Seventh.– The OEFA, as the governing entity of the National Environmental Assessment and Enforcement System, shall approve the Regulation of the Common Environmental Enforcement and Control System, as well as the Incentive System, prior to the favorable opinion of the MINAM, which shall be mandatory to all entities with power of environmental enforcement.

Thus, the Law on SINEFA, in its original version, granted the power to approve the Common System to the Board of Directors of the OEFA, for which the favorable opinion in advance of the Minam was required.

In completion with such function, the OEFA elaborated the proper regulation proposal, which was sent to the Minam for the purpose of its prepublication, which was approved by Ministerial order No. 266-2012-MINAM, and published in the official gazette El Peruano on October 5, 2012.

2.3. The Common System in the Law No. 30011 – Law amending the Law on the SINEFA

The roadmap of the environmental management of the present Government was agreed with the different sectors through the Multi-sectorial Commission established by Supreme Decree No. 189-2012-PCM. This commission approved the report named "Strategic focus for environmental management".

The first subject contained in this report was the environmental enforcement. Indeed, in the Strategic focus A, called "Sovereign and right's guarantor State", the goal was the access to effective environmental justice and enforcement, in which the following commitment was included:

> To establish common guidelines, principles and basis for the enforcement to be executed by the EFAs in the area of SINEFA, regulating its assembly in order to ensure a harmonious practice of the environmental enforcement, as well as the coordinate and efficient participation as a mean to ensure the respect to environmental rights of the citizens.

In this way, the acceptance of the Common System, became part of priorities in the environmental agenda of the country.

As evidence of this was the reference of the Project of the Law No. 1815/2012-PE, in 2012, presented by the Executive Power prior approval by the Council of Ministers, and in accordance with the Common System indicated the following:

SEVENTH FINAL SUPPLEMENTARY PROVISION
The Common Environmental Enforcement System regulated in number 131.2 of article 131 of the Law No. 28611, General Law on Environment, shall be approved by Ministerial Order of the Ministry of Environment. Such regulation shall establish common guidelines, principles and basis for the environmental enforcement in the country, as well as the general provisions to be fulfilled by the EFA in a mandatory manner, in the area of the SINEFA, regulating its assembly in order to ensure an harmonious practice of the environmental enforcement and a coordinate and efficient participation as a mean to ensure the respect to environmental rights of citizens.
Any reference to the Common Environmental Enforcement and Control System or the Regulation of the Common Environmental Enforcement and Control System, shall be understood as made to the Common Environmental Enforcement System.
(…).

After the parliamentary debate according this subject, the Law No. 30011 captured the information indicated in the law project presented by the Executive Power in all its content. The only difference between the text presented and the text finally approved was the regulation position, which regulates regarding the competent authority to approve the Common System. Thus, while the law project considered, in the Seventh Supplementary Provision Final, that the Minam may approve the Common System by ministerial order, the Law No. 30011 established it by an amendment to the General Law on Environment, and not a part of their final and supplementary provisions.

In fact, the First Supplementary Provision amending the Law No. 30011, introduced an express amendment to the General Law on Environment, indicating as a new version of Article 131, the following text:

Article No. 131. – Environmental Enforcement and Control System
(…)
131.2 The Ministry of Environment, by ministerial order, approves the Common Environmental Enforcement System.

Thus, the Minam has been expressly empowered to approve the Common System by sectorial regulation, and for this reason, which by Ministerial order No. 247-2013-MINAM, such entity approved the Common Environmental Enforcement System[5].

5 Published in the Official Gazette *El Peruano* on August 28, 2013.

III. WHAT DOES THE COMMON ENVIRONMENTAL ENFORCEMENT SYSTEM CONTAIN?

3.1. Definition of environmental enforcement

One initial point of high importance to the harmony of practicing the environmental enforcement functions is the clear identification of what we understand of "environmental enforcement", particularly taking into account that each authority has many rules regulating, in many scopes, their respective participations.

In relation with the concept, the General Law on Environment indicates:

> **Article 130°. – Environmental Enforcement and Penalty**
> 130.1 Environmental enforcement includes actions of surveillance, control, monitoring, verification and similar, made by the National Environmental Authority and other competent authorities in order to ensure the fulfillment of the regulation and obligations established in this Law, and in their supplementary and regulatory rules.
> (…)

In that sense, the point around which activities in the area of environmental enforcement are identified, it is referred to those activities which aim to ensure the fulfillment of environmental regulation and obligations.

In that regard, we have to strictly understand the concept of "legal regulation", as a "order legally and logically result in a consequence, and that order is supported by the State power for the case of its fulfillment"[6]. In that sense, the concept of "regulation" shall be equivalent to "obligation".

Therefore, the environmental enforcement consists in the development of an action to verify the compliance with such obligation; this is an action to control the fulfillment. It is an action of the State as part of its protective role of public interest and in the exercise of its police power[7].

The environmental enforcement includes actions executed by the OEFA and the EFA in accordance with their competences, and can be understood in a wide and strict sense, knowing:

6 RUBIO, Marcial. *El Sistema jurídico. Introducción al derecho*. Décima edición. Lima: Fondo Editorial PUCP, 2009, p. 76.

7 DROMI, Roberto. *Derecho administrativo*. Volume II. Lima: Gaceta Jurídica, 2005,P. 154.

(i) The *environmental enforcement, in a wide sense*, includes actions of surveillance, control, monitoring, following, verification, assessment, supervision, a wide enforcement and similar, in order to ensure the fulfillment of environmental obligation to inspect and those produced by the practice of the environmental enforcement.
(ii) The *environmental enforcement, strictly*, includes the power to investigate possible administrative infringements to punish and the power to impose penalties[8]; subject to the beginning of the administrative penalty procedure.

Thus, the environmental enforcement includes a responses set elaborated by the State to verify the fulfillment of environmental obligations from companies.

The environmental obligations to be controlled, according to the provisions of the Common System of Environmental Enforcement, by their nature, can be as follows[9]:

a) *Obligations to do*: For example, to place a filter in the chimney of the facility, to construct a sewage treatment plant, to regularly water the road where the machinery will pass to a specific project.
b) *Obligations not to do*: For example: do not affect water in the construction of access ways, do not produce effluents, but recirculate all wastewater produced by the industry, do not introduce animals in operations made in the forest.

At the same time, the Common System indicates that environmental obligations to inspect can include points related to the environment protection (*brown* matter), as well as the sustainable use of natural resources (*green* matter), including social-environmental points[10].

All those are enforced and punishable obligations, and are the heart, the root of the environmental enforcement. Their fulfillment is subject to legal consequences which limit the company rights.

So, where the environmental obligations to be controlled are? What sources of these obligations are? In this regard, the Law on the SINEFA, in its original

8 The application of administrative measures in the enforcement and penalty function, which are the corrective and precautionary measure, also are for the concept of environmental enforcement in a strictly sense.

9 Article 2.3 of the Ministerial Order No. 247-2013-MINAM

10 Ibidem

version in 2009, when the enforcement and punishable functions[11] of the OEFA were regulated, mentioned the sources of environmental obligations to be controlled. The identification of these obligations was ratified by Law No. 30011, amending the Law No. 29325[12], and confirmed in the Common Environmental Enforcement System[13].

According this legal framework, the environmental obligations to be controlled can be included in:

(i) Environmental regulation (regulating the *brown* and *green* matters)[14 15].
(ii) Environmental Management Instruments[16] (environmental studies)

11 Original version of Article No. 1, Item d) of Law No. 29325 – Law on the National Environmental Assessment and Enforcement System.

12 The Law No. 30011 introduces the environmental commitments of concession contracts, the administrative measures of the OEFA and a space for other sources of environmental obligations to be enforced that can be established. We do not express reference to these other sources since they are not generally applied to the EFA, but particularly to the OEFA.

13 The Common Environmental Enforcement System also recognizes the possibility that other sources of environmental obligations to be controlled will establish. Article 2.3 of the Ministerial Order No. 247-2013-MINAM.

14 "According to Raúl Brañes, the Environmental Law comprises the legal regulation set regulating human behaviors that can affect and impact in a serious and relevant manner on the environmental systems and living organisms. Although the environmental legislation is intended to prioritize the natural environmental protection – forest, protected natural areas, biodiversity, continental water-, the legislation referred to the land-use planning; the legislation on constructed environments- urban, industry, solid waste- and people health, it means, the injurious effects of environment on human health, also are important". See: PERUVIAN SOCIETY FOR ENVIRONMENTAL LAW (SOCIEDAD PERUANA DE DERECHO AMBIENTAL). In Manual de legislación ambiental. Lima: Sociedad Peruana de Derecho Ambiental, 2003. P. s/n item 3.

15 In the Common Environmental Enforcement System, it is expressly recognizes that the environmental legislation can arise from competent entities of authorities from the three levels of the Government. Article 2.3 of the Ministerial Order No. 247-2013-MINAM.

16 The Article No. 17 of the General Law on Environment presents an extensive definition about "environmental management instrument". Within environmental enforcement framework, this concept is strictly understood as environmental studies to approve in the environmental legislation area of each sector.

(iii) Orders or provisions issued by the authority of the environmental enforcement[17].

See below some particularities of the three sources of environmental obligations to be enforced mentioned above:

- In relation to environmental regulation as a source of environmental obligation to be enforced, it should be noted that the Peruvian environmental legislation, even though it dates since 1990, it is heterogeneous and wide[18].

Regarding to the International Network for Environmental Completion and Enforcement (Inece), indicates:

> (…) However, because of having an environmental regulation, it is not sufficient to cover these problems. The States shall to ensure that the regulated community complies with requirements established by the environmental legislation and its implementation regulations. The successful strategies shall help to promote and enforce behavior changes within the regulated community, those required to achieve the environmental compliance[19].

- As seen above, the focus propitiated by Inece is to understand in a complementary manner promotion and penalty, due to be mechanisms used to achieve the completion of the environmental legislation. In our country,

17 Environmental enforcement entities (EFA), by Article 16-A of the Law No. 30011, are empowered to issue specific orders, which are provisions required to the company aimed to take actions in order to ensure the efficacy of the environmental enforcement. In this regard, the environmental enforcement authority has to make an environmental performance study of the activity to enforce and, while it does not have regulations or regulation established in an environmental study, it shall issue provision required to the company. This one has to be understood as a power of exceptional nature, and the natural authority to regulate the environmental performance of activities to be enforced is the authority responsible for the environmental certification of the corresponding sector which is in charge of the regulation or environmental assessment of the activities prior to its execution.

18 There is not an official source which determines how many environmental standards we have to date, and considers national, regional and local regulations.

19 INTERNATIONAL NETWORK FOR ENVIRONMENTAL COMPLIANCE AND ENFORCEMENT (Inece). *Manual de principios de acatamiento y ejecución ambiental*. Washington D.C.: Inece, 2009, p.3.

a similar approach was collected when incentives were established in order to complete the environmental legislation, which constitutes a matter included in, though it has not a regulation development in a regulatory manner, the wide concept of environmental enforcement, since it is one of the means to ensure the completion of the environmental legislation. However, it should be noted that regulations for environmental incentives are not obligatory, but voluntarily[20].

- Regarding environmental studies as source of environmental obligation to be enforced, it should mention that such obligations are not only established in the Environmental Management Plan (a part of the study including the environmental mitigation measures to execute); but also are contained in other parts of the study, such as the chapter corresponding to the study on a base line (environmental and social diagnostic prior to the activity development) or the chapter corresponding to the description of the project. The position of the obligation during the study is not important; the essential is that it is an obligation. For that reason, it is necessary to have mechanisms to systematize information produced in the acceptance process of environmental studies[21].

- Regarding orders and provisions issued by the environmental enforcement authority as a source of environmental obligations to be enforced, it should be noted that this initially was a power only recognized the OEFA However, with the Law No. 30011, Law amending the Law on the SINEFA, the many environmental enforcement entities (EFA), including the OEFA, are empowered to issue specific orders.

- Specific orders are obligatory provisions to the company in order to this company take actions to ensure the efficiency of the environmental enforcement[22]. For these purposes, it is required that the competent EFA makes an analysis of the environmental performance of the activity to control and, as long as does not have regulations in the specific rule or commitments established in an environmental study, it shall issue obligatory provisions to the company.

20 Article 2.4 of the Ministerial Order No. 247-2013-MINAM.

21 In that regard, an importance advance in systematization of the environmental impact assessment procedure has been called "Environmental Assessment System online - SEAL" of the Ministry of Energy and Mines, which has been applied for the environmental assess of mine exploration projects and is projected to be used in the environmental assess of other activities within its jurisdiction.

22 Article 16-A of Law No. 29325

3.2. Identification of environmental enforcement entities (EFA)

One of the crucial points in practicing environmental enforcement, which seems obvious but is not necessarily so, consists that the environmental enforcement authority identifies itself as such. That is crucial in the consolidation of a harmonious exercise of power in environmental enforcement, since the EFA identification is a requirement to coordinate during the practice of this function, as well as the practice of the governing role corresponding to the OEFA in this matter.

The environmental enforcement is a crucial function since, on one hand it can produce legal liability abusing its power, and, on the other hand, it can produce legal liability by omission of the functions empowered to entities.

In relation with the identification of the EFA, the Law No. 29325, indicates the below:

> Article No. 7. – The National, Regional and Local Environmental Control Entities
> National, Regional and Local Environmental Enforcement Entities are empowered to execute environmental enforcement functions, and apply their powers with functional independence of the OEFA. These entities are part of the National Environmental Assessment and Enforcement System, and their acting are subject to the regulation of this Law and other environmental regulation, as well as the provisions ordered by the OEFA, as a governing entity for that System.

Therefore, the authority identification as the EFA is subject to two pre-assumptions:

- To have express powers to exercise environmental enforcement functions, and
- To apply its powers with functional independence of the OEFA

In connection with this second pre-assumption, there are not major controversies since, in fact, the EFA are autonomous authorities and different from the OEFA. Then, the EFA has not a subordinate relationship with the OEFA. It means, it is compatible that the EFA, as part of the SINEFAM functional system expressly recognized as such, it has to fulfill the regulation ordered by the OEFA, in practice of the system governing.

However, in relation with the first pre-assumption, there are many controversies, specifically in the EFA at national level[23]. In fact, some EFA understood that in order to develop environmental enforcement functions, its organic standards should "literally" assign it the exercise of "environmental enforcement" functions. In order to clarify this situation, the Common System indicated:

> Article No. 2. – Application Scope
> 2.1 The provisions of the Common Environmental Enforcement System are applied to:
> a) The EFA, at National, Regional and Local level, being all public entity at national, regional and local level, which has been empowered by one or all environmental enforcement actions in a wide sense, and which is referred in paragraph 2.2 of this regulation.

Thus, public entities responsible for actions of surveillance, control, monitoring, following, verification, assessment, supervision, strict enforcement and similar, in order to ensure the completion of environmental obligations to be enforced and those from the exercise of the environmental enforcement" (the concept of environmental enforcement in a wide sense), shall be named EFA.

By this regulation, it is clearly established that, what should be analyzed, is if functions exercised by an entity aim to ensure the completion of environmental obligations to be enforced.

In this sense, in Guidelines for the Formulation, Acceptance and Assessment of the Annual Environmental Assessment and Enforcement Plan – PLANEFA, approved by the OEFA in January, 2014, indicates the following[24]:

> Environmental Enforcement Entity (EFA): National, regional or local Public Entity empowered by one or all environmental control actions in a wide sense. The environmental enforcement can be exercised by one or more organic units of the EFA. Exceptionally, and by legal provision, it should be considered EFA that body of the entity empowered to realizes environmental enforcement functions.

23 By its organic regulation, regional and local governments are qualified as EFA.

24 Article No. 3, Item b) of the Decision of the Board of Directors No. 004-2014-EFA/CD, which approves the Guidelines for the formulation, acceptance and assessment of the Annual Environmental Assessment and Enforcement Plan, published in the Official Gazette *El Peruano* on January 25, 2014.

This regulation, so, issued by the OEFA within the scope of its governing role of the SINEFA, has specified that, within a same EFA, the environmental enforcement can be exercised by one or more organic units. It is worth noting that in those cases, such organic units should respond before the OEFA as a single entity[25]. Exceptionally, and by legal provision, it shall be considered EFA that body of the entity direct empowered to, by regulation, execute environmental enforcement functions[26].

3.3 Environmental enforcement Principles

The Common System has established, for the first time, in the Peruvian environmental legislation, principle specifically to apply by practicing the environmental enforcement.

The importance of these principles shall be confirmed by its future application. However, we can note that its regulatory recognition helps to set the basis of a strong and effective SINEFA. It has been established that its application is mandatory.

Besides the recognition of the environmental principles from prior environmental regulation, the Common System establishes the following principles governing the environmental enforcement[27]:

a) Principle of coherence

> Principle of coherence.– The entities empowered to the environmental enforcement, coordinate their functions to its proper assembly, adding efforts, avoiding super-assumptions, duplicity and blanks in the exercise of such functions.

25 For example, in case of regional governments, the environmental enforcement functions can be responsible for regional directions of energy and mines, as well as the regional direction of health and production, among others offices. In such cases, those areas have to coordinate in-house, in order to respond, as a single entity, requirements from the OEFA.

26 It is the case of, for example, the General Directorate of Mining of the Ministry of Energy and Mines and the General Directorate of Captaincies and Coast Guard of the Ministry of Defense, in relation to small-scale mining enforcement in matters under its jurisdiction, according to the Legislative Order No. 1101, which established measures to the environmental strengthening as a mechanism to fight against the illegal mining, published in the Official Gazette *El Peruano*, on February 29, 2012.

27 Article No. 3 of the Ministerial Order No. 247-2013-MINAM.

Coherence is a pre-assumption necessary to a harmonious exercise of environmental control, since, in the Peruvian constitutional structure, it has established a wide distribution of environmental enforcement powers at national, regional and local level.

This principle is supported by the following principles of environmental management established in the Framework Law on National Environmental Management System[28].

- Assembly in the practice of public functions, according to the trans-sectorial point of the environmental management.
- Coherence, intended to eliminate and prevent super-assumptions, omissions, duplicities and blanks in the practice of environmental powers.

Furthermore, it is included among the main actions of the modernization process of the State management, which establishes as mandatory that public entities participate, coherently and together, in the exercise of its functions, in order to reach a better efficiency in the use of resources of the State. Therefore, duplicity or super-assumptions of powers, functions and powers among sectors and entities or among officers and servers, are eliminated[29], as well as the provision establishing that "any dependency, entity or agency of the Public Management has to clearly empowered in such a way the quality of its performance and the grade of its function completion are determined, in base on a multiplicity of measurement criteria"[30].

b) Principle of transparency

> Principle of transparency. – Information related to environmental enforcement is for public access. Taking into account the information qualified as confidential, by binding to the exercise of the penalty power, the EFA can publish reports and reviews for public access.

28 Article No. 5 of Law No. 28245 – Framework Law on the National Environmental Management System. Published in the Official Gazette *El Peruano*, on June 8, 2004.

29 Article No. 5 of Law No. 27658. - Framework Law on the Modernization of the State Management.

30 Article No. 6 of Law No. 27658. - Framework Law on the Modernization of the State Management.

Transparency includes a law regulation[31], a good governmental practice which contributes to reach an informed and strong citizen participation, consolidating democracy and lead us to reach a developed society.

Initially, in the OEFA, as provided in the Law on Transparency and Access to Public Information[32], the information managed by this agency was qualified as confidential, due to be punishable procedures and preliminary investigations about such procedures (assessment and supervision activities). In this sense, requests for access to information[33] were denied.

This approach changed by the acceptance of the regulation of the OEFA, intended to promote a better transparency for environmental enforcement[34]. In this sense, by Law No. 30011, Law amending the Law on the SINEFA, the same tendency was confirmed, establishing a rule, not only for the OEFA, but for all the EFA.

In fact, the Law on SINEFA, establishes the following:

> Article 13-A. – Transparency and access to environmental information
> The Agency for Environmental Assessment and Enforcement (OEFA) and the Environmental Enforcement Entities (EFA) make available and free access to technical and objective information from sample results, analysis and monitoring during the exercise of their functions, expressly recording that such information is not an earlier judgment related to the environmental enforcement power.

(…)

31 Regulated in both Political Constitution in its Article No. 2 Number 5, in the Law on Transparency and Access to Public Information (whose Single Organized Text is approved by Supreme Decree No. 043-2003-PCM), and in the Regulation about Transparency, Access to Public Environmental Information and Participation and Citizen Advice in Environmental Affairs, approved by Supreme Decree No. 002-2009-MINAM, among other standards about the matter.

32 Article No. 17, Number 3 of Supreme Decree No. 043-2003-PCM. Published in the Official Gazette *El Peruano*, on April 24, 2013.

33 ORELLANA, Luz. "El derecho de acceso a la información pública ambiental". In GÓMEZ, Hugo (compiler). *El nuevo enfoque de la fiscalización ambiental*. Primera edición. Lima: Organismo de Evaluación y Fiscalización Ambiental, 2013, pp. 75-76.

34 Directive No. 001-2012-OEFA/CD, promoting a greater transparency related to the information managed by the OEFA.

Therefore, when the Common System refers, as one of the environmental enforcement principles, that the information related to environmental enforcement is for public access, it reaffirms the transparency approach adopted by the regulation of the OEFA. Additionally, it adds that, if the information is qualified as confidential, *public reports*[35] *and reviews for public access*[36] can be published.

These two tools, regulated in the regulation of the OEFA, currently, will be applied by the other EFA within the frame as provided in the Common System. In this way, the regulation of the transparency principle, applied to all the SINEFA, aims to ensure a homogenous treatment granted by the EFA to public information access about environmental enforcement.

c) Principles of efficacy, efficiency and Effectiveness

> Principle of Efficacy.- Environmental enforcement entities, to a proper exercise of control in charge, shall have tools and resources required for a suitable planning, execution and assessment of its practice.
> Principle of Efficiency. - The environmental enforcement shall be made at the lowest social and environmental cost possible, increasing the use of its resources.
> Principle of Effectiveness.- The environmental enforcement shall be made, causing companies act meeting their environmental obligations.

The concept of efficacy, efficiency and effectiveness in publish management are often used to refer a modern management. Usually, such words mean:

> [Efficacy] is the grade achieved from suggested goals, and the acting to comply with such goals, as efficiency means do things better[37].

35 Public reports from Direct Supervision Reports are documents which have to contain technical and objective information from the sampling, analysis and monitoring, as well as other objective facts related to the supervision. This report has not contain any qualification related to possible administrative infringements, so it should be indicated that the document contain does not imply early judgment, early opinion or infringement sign.

36 Public reviews from Punishable Procedures, are made in accordance with orders which do not qualify as public and contain the docket number; the name or company name of the company investigated; identification of the supervised unit and, if any, the supervision date; the note if penalty was or no applied; and the note if a contestation mean was or no filed, if any.

37 PAREJO, Luciano. Eficacia y Administración. Madrid: MAP, 1995, p.94.

> Effectiveness in public management is determined by the creation of the public value[38] [39].

The Common System orders that the EFA has not only resources (economics and human), but tools necessary to make a suitable planning, execution and assessment of the practice of environmental enforcement functions.

An environmental enforcement properly implemented means an investment of public resources and, therefore, a prioritization in assignments within the functions of each EFA. It, at the same time, has to be complemented by a due planning, execution and assessment of goals achieved by control.

In efficiency words, this action by the Public Management shall allow that wanted results will be achieved, increasing the resource use, in environmental and social terms.

In addition, by the Common System, it aims to the companies comply with their environmental obligations, responding to city demand in order to the decisions of the environmental legislation are reflected to its reality and is not only a group of good wishes.

d) Principle of continuous improvement

> Principle of continuous improvement. – The environmental enforcement entities help to the continuous improvement process of the environmental legislation suggesting regulatory changes to competent authorizes, as consequence of their environmental enforcement function.

This principle is based on one of the themes of management systems and is focus in the search for a constant continuous improvement.

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38 OLAVARRUA, Mauricio. "Efectividad en la gestión pública chilena". Convergencia. Revista de Ciencias Sociales, 17 (52), 2010, p.15, Mexico DF.

39 Ibidem. In connection with the concept of public value, the author indicates that according to Moore (quoted in Olvarria), "the public value includes all values that individuals or volunteers groups connect to the State and society beyond its material well-being and are intended to execute by individual or collective, civil or political actions". In this approach, the citizen in "a central factor in the identification of what the State has to produce".

MOORE, Mark. "Creando valor público a través de asociaciones de público privadas". *Reforma y democracia*, number 34, in February, 2006.

The Inter-American Charter of Public Management Quality[40], collects the Principle of constant assessment and continuous improvement", indicating that:

> A quality public management is the one that covers a constant assessment internally and externally, intended to identify opportunities to a continuous improvement of public processes, services and provisions focused to provide a service to citizen and results, providing supplies to a proper accountability.

In this case, the principle collected by the Common System aims to contribute to the approach between the reality confirmed in the environmental enforcement and as established in the environmental regulations. This is a substantial principle, since its application aims to achieve the final goal of control: to ensure that regulations of the right correctly regulate the reality and, in this way, to achieve the solution of environmental problems to ensure the effective protection of the environment and people health.

We understand that this principle is not only applied for the regulation improvement, but also for environmental studies, which are subject of environmental enforcement and present, in many opportunities, information which does not coincide with reality, requiring to make adjustments (updates) in these instruments of environmental management[41].

3.4 Minimum conditions to practice the environmental enforcement

The Common System has established the minimum requirements and conditions to meet by all the EFA's in order to a suitable practice of their functions.

The EFA's play an important role which the society does not expect an incipient or deficient practice of their environmental enforcement functions, but a suitable and optimal performance.

40 Approved by the X Ibero-American Conference of Public Management Ministers and Reform of the State of San Salvador, El Salvador, on June 26 and 27, 2008. Adopted by the XVIII Ibero – American Summit of Heads of State and Government San Salvador, El Salvador, on October 29-31, 2008.

41 This subject is regulated in the Regulation of the Law on the National Environment Impact Assessment System (SEIA), which has been approved by Supreme Decree No. 019-2009-MINAM (see Article No. 78).

In order to have an objective parameter to measure such performance, the Common System establishes the following mandatory minimum conditions, executed by the EFA's, to a constant practice of their functions:

a) *To approve and promote, as appropriate, provisions regulating the classification of environmental infringements and penalties, adjusted to the regulation ordered by the OEFA on the particular, taking into account the maximum amount of fine established in the article 136° of the Law No. 28611, General Law on Environment.*

   In the absence of those regulations, the EFA's shall apply, supplementary, the classification of cross and general infringements and penalties, the assessment methodology of environmental tickets and other supplementary regulations on the matter approved by the OEFA. The classification power will be executed according to the faculties empowered, within the frame of the principles of legality and classification[42].

One of the main obstacles to a strict environmental enforcement, in other words, the practice of the penalty power, is not having the respective classification of infringements and penalties applied to an activity, whose control is under the jurisdiction of the proper EFA.

The need to have such legal provision has been an important matter in the practice of environmental enforcement. A case closed to the OEFA[43] is about manufacturing industry sector.

In fact, manufacturing activities were the first to have a regulation for environmental protection[44], even with an earlier regulation, promoter of pollution prevention. However, this has not been subject of enforcement and

42 Article No. 5 of Ministerial Order No. 247-2013-MINAM

43 Currently, the OEFA is in process of transparency in environmental enforcement functions of the manufacturing industry sector of the Ministry of Production, as established in the Supreme Decree No. 009-2011-MINAM. To date, the OEFA has assumed the functions of following, supervision, enforcement, control and penalties in activities of beer, paper, tannery and cement production, pending the transparency of other industrial activities.

44 Approved by Supreme Decree No. 019-97-ITINCI, published in the Official Gazette *El Peruano*, on October 1, 1997.

penalty since, to date, the classification and penalties required[45] has not been approved.

In the Common System, it is established that, if the EFA's has not have a classification applied to activities under their power, all these are legally empowered to apply the classification of general and cross infringements to be approved by the OEFA[46].

In that regard, in arguments of the "Classification of infringements and Penalty Scale related to the fulfillment of the Maximum Permissible Limits", approved by the OEFA, indicates that:

1.2.5 Supplementary Regulation

Applying the requirement in last paragraph of Article 17° of Law No. 29325, the classification of infringements and scale of penalties is applicable, supplementary, to other Environmental Enforcement Entities at local, regional and national level. Considering that those constitute cross infringements.

Therefore, in order to execute the application of this supplementary regulation of particular classifications approved by the OEFA, the respective EFA shall issue a legal regulation allowing the compliance with the required publicity and its companies know the classifications which may be applied to them. In this way, they cannot allege ignorance of legal consequences that would arise from the non-compliance with the environmental obligations.

b) To approve legal, operational, technical and other instruments required for the practice of these functions

45 While a "System of Penalties and Incentives of the Environmental Protection Regulation to Activities Development in Manufacturing Industry" was approved by Supreme Decree No. 025-2011-ITINCI, that regulation did not include the mentioned classification, so it was not implemented.

46 To date, the OEFA has approved the following classification applicable to this supplementary regulation:
- Decision of Board of Directors No. 042-2013-OEFA/CD, which approves the Classification of administrative infringements and the scale of penalties related to the efficacy of the environmental enforcement applied to economic activities under the power of the OEFA. (Published in the Official Gazette *El Peruano* on October 16, 2013).
- Decision of Board of Directors No. 049-2013-OEFA/CD, which approves the Classification of administrative infringements and the scale of penalties related to Environmental Management Instruments and the activities development in forbidden areas. (Published in the Official Gazette *El Peruano* on December 20, 2013).

Another minimum condition for the practice of environmental enforcement is referred to the order to have the tools necessary to execute such functions. These may not only be legal tools[47], but also operational technical scope[48].

It should be noted that the approval of these instruments should not be an obstacle for the practice of functions in the charge of the EFA. For example, in case of the entity does not have a special regulation for the administrative penalty procedure, it should consider that the Law No. 2744 - Law on General Administrative Procedure[49] sufficiently regulates such procedure with all guarantees of due process to the company. Therefore, if the EFA does not have a regulation of administrative penalty procedure, it should not be an excuse to stop the environmental enforcement. By this, we do not argue that the EFA should not have an own procedure, but the acceptance of this regulation is not indispensable for practice the penalty power.

The standardization of functions in the charge of any authority is necessary to ensure the achievement of continuous improvement in their applications. However, the standardization is not a requirement that prevent the practice of functions empowered to the entity.

It should be noted that the OEFA approves many regulations, in which it has established that the EFA can apply these regulations in a supplementary manner[50].

- Decision of Board of Directors No. 045-2013-OEFA/CD, which approves the Classification of administrative infringements and the scale of penalties related to non-compliance with the Maximum Permissible Limits. (Published in the Official Gazette *El Peruano* on November 13, 2013).

47 For example, regulations for the practice of its environmental enforcement functions, offenders record or administrative acts issued, and others. It is recommendable to have organic regulations which establish the power distribution inside the entity in order to ensure an efficient intervention.

48 For example, the calculation methodology for tickets, intervention protocols, and others.

49 Published in the Official Gazette *El Peruano*, on April 11, 2011.

50 In case of the following regulations:
- Regulation of Direct Supervision of the OEFA, approved by Decision of Board of Directors No. 007-2013-OEFA/CD
- Regulation for the voluntary repair of minor non-compliances, approved by Decision of Board of Directors No. 046-2013-OEFA/CD
- General Rules on the Practice of Penalty Power of the OEFA, approved by Decision of Board of Directors No. 038-2013-OEFA/C.

c) *To have the technical equipment required and resort to accredited labs to a suitable performance of its environmental enforcement actions, as appropriate.*

In that regard, we have to note that, while the environmental enforcement function is from technical nature, it is necessary to the EFA has the technical equipment required.

The environmental enforcement requires based on appropriate evidence means which allow the authority intervenes in case of infringements that may warm the in the practice of its functions. The enforcement authority starts from assuming that companies act in accordance with their duties, as long as there is no evidence supporting otherwise[51]; that is, it is assumed that all companies comply with their obligations, unless there is evidence to the contrary. Therefore, it is important to have solid proofs in both legal and technical terms.

In terms of labs use, we should note that the Law on National Standardization and Accreditation Systems indicates that "the accreditation is a voluntarily qualification which can be obtained by private and public entities in order to gain the recognition by the State about its technical competence in providing assessment services in a particular scope"[52].

When the Common System indicated that the EFA's has to go to accredited labs, it means that labs supporting the practice of the environmental enforcement should have a technical support needed and, consequently, have technical recognition, since the sectorial legislation is responsible for order regulation to use labs or testing methods accredited.

Each EFA is responsible for determining, under its competences empowered, measure equipment to have, protocols to follow and legal consequences that may arise from its analysis results.

d) To have mechanisms to measure efficacy and efficiency of the practice of environmental enforcement, within the frame of items established by the OEFA, as well as others made for such purpose

A latest environmental management requires public institutions use items. These management tools are:

51 Article No. 230, Number 9 of the Law 27444- Law on General Administrative Procedure.

52 Article No. 14 of Legislative Order No. 1030 – Law on National Standardization and Accreditation Systems. Published in the Official gazette El Peruano on June 24, 2008.

> Measure unit allowing the regular following and assessment of key variables of an agency, by its comparison over time with proper internal and external models.
>
> We can mention two basic functions of items. Firstly, a descriptive function, which consists in the approval of information about the real state of an action or program, and, at the same time, a value function which consists in adding to such information, a judgment, as objective as possible, about if the performance is or not the proper in such program[53].

The OEFA is responsible for establishing items allowing a standardized measure at the progress level of the performance of the EFA's, within the frame of its competences and in the practice of its environmental enforcement functions.

e) *To comply with the elaboration, approval, execution and reports of annual environmental enforcement plans referred by this regulation and to report to the OEFA the practice of its environmental enforcement functions according to proper provision issued by the OEFA for such purpose*

The EFA's has to comply with the elaboration, approval, execution and reports of the fulfillment of Annual Environmental Assessment and Enforcement Plans (PLANEFA), in accordance with the rules ordered by the OEFA for such purpose.

In this line, the OEFA has approved in January, 2014, the "Guidelines for the Formulation, Approval and Assessment of the Annual Environmental Assessment and Enforcement Plan"[54], in order to regulate everything related to this planning instrument.

Beyond the fulfillment report established by the PLANEFA of the entity, the Common System indicates that all EFA has to report to the OEFA the result of the practice of its environmental enforcement functions. In that sense, the OEFA has ordered that the EFA's has to present an annual report of activities of environmental enforcement, which has to be sent within thirty (30) days after the calendar year passed.

53 GUINART I SOLÁ, Josep Maria. "Indicadores de gestión para las entidades públicas". Presented by the International Congress of the CLAF on the Reform of the State and Public Management, 2003.

54 Decision of the Board of Directors No. 004-2014-OEFA/CD

In this annual report, has been included both actions contained in the PLANEFA and the execution of special supervisions or not programmed in case of environmental complaints, environmental emergencies or other events; it means, the annual environmental control report has contain the activities made in programmed or not environmental enforcement matter[55].

However, it should not be understood that the report of activities made from the EFA's to the OEFA is the annual report, since the OEFA has the power to ask for information required about the environmental enforcement in the charge of the EFA's, within the frame of supervision function to the EFA´s.

In that regard, in the Law on the SINEFA, it is mentioned that the OEFA, in application of its supervisory function of the EFA's, can establish procedures to send reports, technical reports and any type of information related in compliance with its environmental enforcement functions by the EFA's[56]. This information will allow the OEFA to know the state of the national environmental enforcement, so does not only elaborate diagnostics allowing improvement, in the practice, the implementation of the environmental legislation, resulting in a very useful for the continuous improvement process which must to be followed in order to ensure its effective implementation.

3.5 The PLANEFA and EFA´s liabilities

The Common System establishes that the PLANEFA is the planning instrument by which each EFA plans its actions, in environmental enforcement matter (in a wide sense), to be executed during the year[57].

55 Decision of the Board of Directors No. 004-2014-OEFA/CD. Article No. 8

56 Law No. 29325 – Law on National Environmental Assessment and Enforcement System. Article No. 11.2 b.

57 This structure mainly differs from that implemented in Chile by the Environmental Superintendency (SMA, by its initials in Spanish). In this case, the SMA is the authority responsible for the environmental enforcement by law and, for this reason, the SMA is responsible for the approval of programs and sub-programs of environmental enforcement each year. In those are determined the activity control number to make, items to apply and assumptions to appoint. The SMA has the power to establish agreements to "entrust" with sectorial authorities in order to execute such actions, with the obligation to notify the SMA about such practice.

The PLANEFA are elaborated, approved and its compliance is reported by the EFA's, according to directives established by the OEFA for such purpose[58].

In that regard, in the guidelines approved by the OEFA for the PLANEFA elaboration, it has established that these have to be approved by each EFA during the first fifteen (15) days of December of the year prior to its execution[59] [60]. In addition, it indicates that the PLANEFAs have to be registered in the institutional portal of the OEFA, ten (10) days after its approval[61].

At the same time, it has ordered that the PLANEFA's have to be made within the frame established by the National Environmental Enforcement Plan (PLANFA), which has to be approved by Decision of Board of Directors of the OEFA. This PLANEFA is made from the national instrument of biennial planning in environmental control matter which has to be included in the National Environmental Policy, the National Environmental Action Plan, the National Environmental Action Agenda and priorities of environmental policy established by the Ministry of Environment[62]. It is important to indicate that obligations related to the PLANEFA, in the charge of the EFA's, will continue its implementation without prejudice of the approval by the PLANEFA[63]

In accordance with the Common System, each EFA shall execute activities contained in its PLANEFA approved. En case of non-compliance with execution of activities of the PLANEFA, it has to be notified to the OEFA, by the annual report of environmental enforcement activities, the reasons for such situation. On the other hand, the regular practice of the environmental enforcement in the charge of each EFA is not limited to what is established in its proper PLANEFA[64]. This last statement is very important, since the approval by the

58 Articles No. 3 and 6 of the Ministerial Order No. 247-2013-MINAM.

59 Article No. 8 of the Decision of the Board of Directors No. 004-2014-OEFA/CD.

60 This regulation will be enforced since 2015, as established in the Single Supplementary Final Provision of the Decision of Board of Directors No. 004-2014-OEFA/CD.

61 Article No. 7.1 of the Decision of Board of Directors No. 004-2014-OEFA/CD. The regulation determines that the record is by a software. In case such software cannot be used, the EFA shall send it to non-electronic format, notifying the reasons why the PLANEFA could not be registered in the software.

62 Article No. 6.2 of Ministerial Order No. 247-2013-MINAM.

63 Article No. 10 of Ministerial Order No. 247-2013-MINAM.

64 Article 6.3 of Ministerial Order No. 247-2013-MINAM.

PLANEFA does not mean a requirement necessary to execute the environmental enforcement in the charge of each EFA. Otherwise, the planning instrument may become a possible obstacle for the compliance with its purposes, which may pervert its goals.

It should be noted that, in the Environmental Agenda 2013 – 2014[65], it has been established that, as part of actions included in Goal 13, referred to the environmental control improvement, the item to apply shall be the percentage of the EFA having its PLANEFA approved[66]. In addition, it is mentioned that the OEFA has to report the monitoring of the process of its elaboration, approval and compliance, as well as to take actions to strength technical skills of the EFA's and elaborate respective performance items.

In this same sense, the OEFA, as established in the Common System, will yearly publish the complete report of execution and fulfillment of activities scheduled by the EFA's in their respective PLANEFA, without prejudice of its communication to the competent agency of the National Enforcement System, as well as the adoption of other legal actions, if any[67].

However, it does not limit to the OEFA to, as appropriate, act as plaintiff of situations containing penalty infringements, according to the special feature of each situation.

3.6 Tools for a harmonious intervention

Within the frame of the principle of coherence, the EFA's are responsible for coordinating the practice of their environmental enforcement functions by a proper assembly, adding efforts, in order to avoid superposition, duplicities and blanks in the practice of such functions. In this case, it is recommendable to have mechanisms intended to ensure a coordinate action among the different authorities with powers related to environmental control.

One of those mechanisms are the protocols for joint intervention. In the case of environmental enforcement of small-scale mining, the Ministry of Environment complied with the establishment of the Protocol for Joint Intervention in

65 Approved by Ministerial Order No. 026-2013-MINAM, published in the Official Gazette *El Peruano*, on January 28, 2013.

66 It has been expressly referred to the purpose that unless 20% of the local provincial governments has their PLANEFA approved.

67 Article 6.4 of Ministerial Order No. 247-2013-MINAM.

Mining Environmental Control and Supervision Actions, approved by the Supreme Decree No. 010-2012-MINAM[68].

A positive experience in the implementation of a protocol for joint intervention was in the frame of the Camisea Project, in which different authorities responsible for their environmental enforcement functions of such project, agreed to use this tool in 2009, even though it has not been approved.

3.7 Role of the OEFA

The Common System reaffirms the role of the OEFA, as a governing entity of the SINEFA, within the frame established in the Article 44° of the Law No. 29158 – Organic Law of the Executive Power[69], mentioning that this entity is responsible for the direction and supervision of such system[70].

As a governing entity of the SINEFA, and accordance with the item b) of Article 11° of the Law on the SINEFA, amended by Law No. 30011, the OEFA shall realize the following functions[71]:

a) The regulatory function, by which regulates the exercise of the environmental control in the frame of the SINEFA and approves the regulation necessary to the supervisory function application by the EFA, which are mandatory to such entities at the three levels of the government. Additionally, it includes the regulation of environmental control functions made by the OEFA.

   This function has as one limit its regulation scope for rules to be enforced by the EFA, it means, it is not a natural function of the controller to establish the regulation to be controlled, but make a control of the approved

68 Article No. 8 of Ministerial Order No. 247-2013-MINAM.

69 Law No. 29158, Organic Law on Executive Power
Article No. 44. – Governing entities
The Systems are in charge by a Governing Entity, which comprises in its technical-regulatory authority at national level, orders regulation and establishes procedures related to its scope; coordinates its technical operation and is responsible for its correct performance within the frame of this Law, its special laws and supplementary provisions.

Published in the Official Gazette *El Peruano*, on December 20, 2007.

70 Article No. 4 of the Ministerial Order No. 247-2013-MINAM.

71 Ibidem

regulation and verify its completion. In addition, in case of difficult to the regulation implementation, it should be notified to the competent authority in order to, within the principle of continuous improvement, make the corresponding adjustments.

Other natural limit of the regulatory function is contained in the principle of regulation hierarchy, since the regulation approved by the OEFA has the range of Decision of Board of Directors; for that reason, the regulation amendment with range of law of Supreme Decree is not possible. For these purposes, the OEFA shall present the regulatory project for corresponding amendment.

b) Supervisory function of the EFA, by which takes actions of following and verification of the performance of environmental enforcement functions[72].

At this regard, the EFA allows the access to facilities by appointed personnel, provide the facilities need, and provide information and documentation required.

Additionally, the EFA shall comply with suggestions, orders and provisions from the OEFA, during the time established for such effect.

On the other hand, the OEFA is responsible for providing technical legal advice to the EFA during the application of its environmental enforcement functions, as well as providing opinion about regulatory projects, in environmental enforcement matter, proposed by the EFA.

IV. FUTURE PERSPECTIVES

As indicated by the Economic Commission to Latin America (ECLA), the future panorama for America in energy and climate change matters, may be direct connected with the establishment of environmental regulation increasingly demanding.

> According to the most optimistic scenes, renewable energies will represent one third of the electric generation increasing for 2030. Natural disasters would increase and the population would apply political pressure to introduce new emission extract regulation (…)[73]

72 To date, the elaboration of this article, is in the process of elaboration of supervisory regulation to EFA, which shall establish, in details, the regulation applied to the execution of this function.

73 CEPAL – Public Management Series No. 78. Las tendencias mundiales y el futuro de América Latina, p.18.

> It is necessary to establish regulations, make measures and assess the investment for reservoir works, water supplies and coast protection. Governments have to design food safety scenes with many temperature and pluviometric variables, and define measures and proper plans. (…) Foreseeable changes shall be traduced in regulation, much more strict with the consequent amending of habits, consumption patrons and productive processes[74].

The establishment of more strict regulations shall require further efforts to comply with control. This scene, so, brings new big challenges also to ensure a due exercise of environmental enforcement actions by the authority responsible for the environmental enforcement.

In this sense, the OEFA is committed to go with the EFA in order to contribute to it has tools necessary to improve its performance. The OEFA is responsible for approving directives, guidelines, formats, types and models of environmental regulation which include functions of assessment, supervision, control and penalty in environmental matter by the EFA[75] [76].

A factor that additionally can be expected in future, is the promotional approach of authorities recognized for a due performance in the practice of their control functions. In fact, as well regulations in incentive matter will be established to companies subject to environmental enforcement, the authorities can also be recognized for the best performance of its functions, by the citizen support involved.

V. CONCLUSION

Authorities are responsible for the environmental enforcement at local, regional and national level of the Government. All these have to act within the regulation frame established by the National Environmental Assessment and Enforcement System (SINEFA), and its governing is in the charge of the OEFA.

In order to ensure a proper and harmonious practice of this important function, the General Law of Environment of the year 2005 ordered the approval of the

74 Ibidem

75 The application of the Common Environmental Enforcement System by the EFA is not subject to the approval of these regulation or instruments. This regulation is expressly established in the Regulation of the Common Environmental Enforcement System (Article No. 9).

76 Article No. 9 of Ministerial Order No. 247-2013-MINAM

Common Environmental Enforcement System, which has been created by the Ministry of Environment in August, 2013.

The Common Environmental Enforcement System has complied with the obligation to establish concepts, principles, and mandatory regulations to a constant and planned practice of this function. The minimum conditions are particularly important to practice the environmental enforcement and its fulfillment shall be supervised, among other factors, by the OEFA in order to measure the performance level of applying the environmental enforcement in the charge of the corresponding EFA.

It is expected that its completion contributes to an environmental enforcement properly applied in different fields of economic and social life of the country in order to environmental regulations will be implemented and, by this implementation, progress to the real solution of environmental problems, as well as the protection of environmental right of people, in the present and future.

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