DAVID R. AVEN, ET. AL.

CLAIMANTS

V.

THE REPUBLIC OF COSTA RICA

RESPONDENT

UNCITRAL CASE NO. UNCT/15/3

EXPERT REPORT OF:

LUIS ORTIZ

EXPERT ON COSTA RICAN PUBLIC LAW

DATE: AUGUST 3, 2016.

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1. EXPERT´S BACKGROUND AND CREDENTIALS

Experience: Attorney recommended by Chambers and Partners 2014, 2015 and 2016 in the Public Law and Infrastructure practices. He currently advices and represents Globalvía Ruta 27, the concessionaire for the San José-Caldera Roadway project, in several contentious-administrative litigation proceedings. He served as legal counsel for IDB in the financing of the Reventazón Hydroelectric Power Project. Mr. Ortiz was also part of the local legal team of Nmás 1, a private branch of Banco de Santander, which was selected by The World Bank as consulting firm for the Works Concession Project for the Public Sewerage Network of the Greater Metropolitan Area. He assisted during the opposition stage with respect to the awarding of the Services Agreement for the Creation and Operation of Integrated Motor Vehicle Technical Inspection Stations. He served as local legal counsel specialized in Administrative Law for the Inter-American Development Bank (IDB) and the Overseas Private Investment Corporation (OPIC) for the refinancing of the Management Services of Juan Santamaría International Airport. Mr. Ortiz served as counsel over the course of several constitutional and contentious-administrative legal proceedings for the Costa Rican Union of Private Business Chambers, the Costa Rican Chamber of Construction, the Costa Rican Chamber of Tourism, the Costa Rican Chamber of Banking and Financial Institutions, and the Costa Rican Chamber of Investment Funds. He represents Telefónica de Costa Rica, Siemens and Baxter on a regular basis in connection with administrative, constitutional and contentious-administrative legal proceedings. Mr. Ortiz represented one of the affected families over a dispute instituted against the Costa Rican State as a result of the death of Chilean diplomatic officials at the Chilean Embassy in Costa Rica at the hands of a civil security guard. In addition, he has successfully represented several account holders of the National Financial System in a

claim against the Costa Rican Central Bank arising from the loss of their investments deposited with a bank declared bankrupt as a result of negligent misconduct of the regulating authority.

Practice areas: Administrative Law • Constitutional Law • Public Procurement • Regulation • Litigation and Arbitration

Professional background: Professor of Constitutional Law, Escuela Libre de Derecho, San José, Costa Rica. Member of the Examining Jury of the Masters in Public Law, Instituto de Enseñanza de Posgrado e Investigación, Universidad Autónoma de Centroamérica. Partner, BLP Abogados, San José, Costa Rica. Legal counsel for the Costa Rican Chamber of Banking and Financial Institutions. Statutory Auditor of the Costa Rican Chamber of Investment Funds.

Academic background: Universidad de Valladolid, Spain. Regulation and Competition Degree. Mexican Federal Regulatory Improvement Commission. Regulatory Affairs Degree. INCAE Business School. Business Administration for Lawyers Degree Program. Universidad de Salamanca, Spain. Administrative Law Postgraduate Degree, Economic Regulation and Public Services. Agreement between Universidad Autónoma de Centroamérica - Universidad Carlos III of Madrid. Doctoral Program in Law, Ibero-American Public Law Program. Master's Degree in Internal Public Law. Universidad Autónoma de Centroamérica, Law Degree (with honors).

Titles and affiliations: Chairman and member of the Administrative Law Commission of the Costa Rican Bar Association. Member of the Ibero-American Public Law Association and Institute: "Profesor Jesús González Pérez". Member of the Costa Rican Public and Administrative Law Association. Country's representative to the Ibero-American Association of Regulatory Policy Studies. Chairman of the Costa Rican Association of Regulatory Policy

Studies. Member of Centro de Estudios de Direito Administrativo, Ambiental y Administrativo of the Faculty of Law of Universidad de Sao Paulo, Brazil.

Personal information: Certified arbitrator. Latin American Business Arbitration Centre (CLAE) – Universidad para la Cooperación Internacional (UCI), 2005. Chairman of the 4th Edition of the Ibero-American Congress on Economic Regulation held in San José, Costa Rica on November 24 and 25, 2009. Lecturer. Ibero-American Congress on Economic Regulation. Sao Paulo, Brazil, 2008; Lima, Peru, 2010; Mendoza, Argentina, 2011; Bogota, Colombia, 2012; La Serena, Chile, 2013. Brasilia, Brazil, 2014; Monterrey México, 2015. Trainer. Central American Banking Academy, 2008-present day. Lecturer. Latin American Conferences on Administrative Law, Buenos Aires, Argentina, 2012 and 2013. Guest professor: Law Postgraduate Courses, Universidad de Salamanca, Spain, 2016. Universidad de Sao Paulo, Brazil, 2012. Guest Lecturer. Conferences on Administrative, Constitutional and Public International Law. Universidad de Costa Rica, San José, 2012-2013-2014. 2nd and 3rd Edition of the International Congress on Procedural Law, San José, Costa Rica, 2014, 2015. 1st and 2nd Edition of the Forum on Securities Law, Costa Rican Chamber of Investment Funds, San José, Costa Rica. 14th Latin American Infrastructure Leadership Forum, Buenos Aires, Argentina, 2016.

Publications: "La Responsabilidad In Vigilando del Banco Central de Costa Rica por la Supervisión del Sistema Financiero Nacional.", released by the Ibero-American Institute of Administrative Law "Profesor Jesús González Pérez", San José, Costa Rica, 2005; also published in the Argentinean digital journal "derechoybanca.com". Co-author: "Derecho Administrativo Iberoamericano. 100 autores en homenaje al postgrado de Derecho Administrativo de la Universidad Católica Andrés Bello." Paredes Editores, Caracas, Venezuela, 2007. Coordinator and co-author: "Derecho Público Económico." Editorial

Jurídica Continental, San José, Costa Rica, 2008. Co-author: "Desafíos del Derecho Administrativo Contemporáneo." Paredes Editores, Caracas, Venezuela, 2009. Co-author: "Regulación Económica de los Servicios Públicos. Dos Décadas de Regulación de Servicios Públicos en Iberoamérica." ARA Editores, Ibero-American Association of Regulatory Policy Studies. Lima, Peru, 2010. Co-author: "Regulación, Supervisión y Autoridades de los Mercados Financieros. Un Estudio de Derecho Público Económico." Editora Lumen Juris, Brazil, 2011. Co-author: "Liber Amicorum Gaspar Ariño Ortiz." Editorial La Ley, Madrid, Spain, 2011. Co-author: "El recurso de casación en Costa Rica." Editorial Juricentro, San José, Costa Rica, 2014. Co-author: "Temas relevantes sobre los contratos, servicios y bienes públicos." Editorial Jurídica Venezolana, Caracas, 2014. Co-author: "Garantías Constitucionales en el Proceso", Editorial Juricentro, San José, Costa Rica, 2015.

2. EXPERT´S STATEMENT

1. I have been asked by Vinson & Elkins RLLP ("Counsel"), Batalla and Dr. Weiler, representing David R. Aven, Samuel D. Aven, Carolyn J. Park, Eric A. Park, Jeffrey S. Shioleno, David A. Janney and Roger Raguso (jointly referred to as "Claimants"), to provide an objective and independent report as an expert in Costa Rican Public Law.
2. I understand that the Claimants sought to develop approximately 39 hectares of land on the Pacific Coast of Costa Rica, in Esterillos Oeste, including a 2.2-hectare in maritime terrestrial zone into a hotel, beach club, and villas (the "Project").
3. I understand that the main claim on this matter is that Costa Rica's intervention blocked the development and commercial exploitation of the Project, on indictments arguing that the Las Olas site contained protected wetlands and forests. According to Costa Rica, the presence of wetlands and forests allegedly infringed a set of municipal and environmental laws.

4. The report consists of a general description of the permitting regime in Costa Rica that is applicable to the Project´s developers, and specific discussion of Costa Rican law and its application to the developers' conduct. The report also entails an independent analysis and critique of the description and legal analysis employed by Costa Rica in its Counter Memorial.
5. In order to prepare this report, we have reviewed the following documents, as well as applicable case law, laws, decrees and regulations:
    a. The Claimants´ Memorial and its exhibits, expert reports, witness statements and legal authorities.
    b. The Respondent's Counter Memorial and its exhibits, expert reports, witness statements and legal authorities.

3. ROLES OF DIFFERENT GOVERNMENT BODIES IN COSTA RICA

(a) National System of Conservation Areas (SINAC)

1. SINAC was created by Law No. 7788, Biodiversity Law. It constitutes a deconcentrated,[1] participatory and institutional management and coordination system that integrates the powers in regards to forests, wildlife, protected areas and the Ministry of Environment and Energy ("MINAE") in order to issue policies, as well as plan and execute procedures to achieve sustainability in the management of natural resources in Costa Rica. Consequently, the Wildlife Office, the State´s

[1] In Mr. Jurado's First Witness Statement, the English translation (though not the original Spanish) refers to "decentralized" rather than "deconcentrated" bodies or agencies. There is an important distinction. Article 83 of the General Public Administration Act provides that minimum deconcentration occurs when the superior cannot: a) take over the inferior´s empowerments; and b) review or substitute the inferior´s conduct, either ex officio or by motion of the party. Deconcentration will be maximum when the superior, additionally, is unable to issue orders, instructions or memos to the inferior. The main difference between a deconcentrated body and a decentralized agency is that the latter always has full legal status and autonomy, whilst the former always belongs to a full legal status entity, and although it may have legal status, this is never full, but a very limited one (only budget).

Forest Administration and the National Parks Service shall execute its functions and powers as a sole body, by way of SINAC, which also has the duty to protect and preserve the use of river basins and hydric systems.

(b) National Technical Environmental Secretariat (SETENA)

2. SETENA was created by Law No. 7554, Organic Law on Environment. It is empowered to analyze and decide on the environmental viability assessments, investigate complaints related to environmental damages, perform on-site investigations, approve and present reports to the Minister of Environment and Energy, and supervise and make sure that their resolutions are obeyed.

(c) Town Defender´s Office (DEFENSORÍA)

3. The Defensoria has general and universal powers to protect fundamental rights and interests of the inhabitants; though its scope of action is limited to the public sector, as it has no empowerment to intervene in issues regarding individuals, nor matters being litigated at the Courts. However, none of its acts, orders or resolutions are binding, not for the inhabitants nor for other government agencies. Therefore, it is authorized to initiate investigations, either *ex officio* or once a claim has been filed in regards to the actions of public servants, but it can only issue non-binding recommendations.

(d) Municipality of Parrita (MUNI)

4. Municipalities are autonomous bodies, separate from the Central Government, that are empowered to elaborate and approve zoning plans, issue land use certificates, construction permits and commercial licenses.

(e) Environmental Administrative Tribunal (TAA)

5. The Environmental Administrative Tribunal (TAA) is a deconcentrated body of the Ministry of Environment and Energy (MINAE) that investigates complaints filed by any interested party or *ex officio* regarding violations to environmental regulations and the natural resources regime. Its final resolutions are binding and put an end to the administrative instance, although they can subsequently be challenged either before the Constitutional Chamber and/or the Administrative Court. Also, this Tribunal may establish compensation for damages caused by violations of laws protecting the environment and natural resources.

(f) Hierarchy among government bodies that supervise the environment

6. There is no hierarchy of authority among these bodies as SINAC, SETENA and the TAA were created by law with a deconcentrated nature, which means that they have independence in the way they exercise their powers and functions. Likewise, although they are all part of the Ministry of Environment and Energy, their legal nature prevents the Minister from taking over a case, reviewing the matter or giving them orders and/or instructions. In regards to the DEFENSORÍA, as we mentioned, it has no binding powers and can only issue recommendations. Finally, the MUNI is a decentralized entity, with political and administrative autonomy; hence, there is no hierarchy between it and the Ministry of Environment and Energy.

4. SINAC

(a) Powers and duties with respect to Wildlife Protected Refuges/Areas

7. SINAC is empowered to inspect all of the activities executed in protected areas, execute the actions related to the protection, delimitation of activities and any form

of development, to oversee the issuance of the use permits in restricted areas like the maritime-terrestrial zone and in general to supervise the issuance of the authorizations for every project that might be related to the use of natural resources that are located in wildlife protected refuges/areas or on private property.

(b) Powers and duties with respect to wetlands and forests

8. Wetlands are part of the natural patrimony and therefore of public domain. Their conservation and administration have been assigned by Law to the MINAE through SINAC.

9. Forest reserves and forests or properties suitable for forest[2] are also part of the natural patrimony and therefore SINAC, through the State´s Forest Administration, is in charge of their conservation, the implementation of policies that protect them, and of their plan of use. If a forest is necessary for the conservation of natural wildlife, an encumbrance on the property will be registered at the Registry Public that will prohibit a change of use of the land.

10. SINAC will be in charge of the issuance of a "permit of use" in properties that have natural patrimony. The wetland and forest reserves cannot be used, but the property in which they are located can be developed but with restrictions and this is what SINAC will determine along with other environmental permits that are required.

11. The properties do not have to be within a wildlife refuge to be protected because they are part of the natural patrimony, and therefore their conservation is of public

[2] In accordance to article 3 of the Forestry Law, Number 7575, there are certain types of land that are classified within a certain use in accordance to the official methodology of the use, management and conservation of land, regulated by Law Number 7779).

interest. They can be within a private property but the development of such property will be submitted to an environmental plan that includes environmental viability and later on, a management plan, replacement and recuperation of the natural resources or they can be expropriated and become public property if the owner agrees.

(c) Powers and procedure to investigate a property

12. SINAC may investigate a property that is using its forests or natural resources without following the requirements that the environmental law and its regulations establish, either *ex officio* or based on a complaint. The complaint must have the complete name of the person that is filing it, the name of the person that is possibly committing a violation to the environmental law and its regulations, the facts that serve as the background for the complaint and a place to receive notifications.

13. Public agents can enter the property and even confiscate private property that can serve as evidence of the commission of a crime or perform an inspection to obtain enough evidence in order to complete a technical report indicating any illegal use or harm of natural resources. However, any confiscated materials have to be surrendered to the Judiciary Authority within 3 days. It is also possible for any person to present a public complaint.[3]

14. Decisions issued by the different administrative bodies that make up SINAC can be challenged administratively by means of a motion for reversal and subsequently through appeal to the National Council of Conservation Areas (CONAC).[4]

[3] See article 105 of the Biodiversity Law.
[4] See article 13 of the Regulations to the Biodiversity Law, Executive Decree 34433.

15. Likewise, the affected party may challenge such decisions before the Judicial Branch, either before the Constitutional Chamber and/or file a judicial review before the Administrative Court.

16. Article 16 of the Wildlife Protection Law Number 7317, indicates that the landowner must be duly notified since the investigation is being held within private property and informed of the investigation process.

17. Likewise, SINAC must provide documentation relevant to the investigation and is under the obligation to disclose documents it has on file for a property at the request of the owner. However, once a formal administrative proceeding has been initiated, SINAC is then obligated to have all the supporting documentation within the administrative file and the owner of the property, as direct party to the proceeding, is entitled to have access to all the information.

18. If the preliminary investigation shows enough evidence of a violation of an environmental regulation, SINAC may take actions directly by issuing administrative interim relief injunctions measures to avoid serious and irreversible damages on the environment or an injunction. Still, once the injunction has been notified, an administrative proceeding and/or judicial review must be initiated within fifteen days. If SINAC does not comply with this fifteen-day time limit, the interim relief injunction must be reversed, as keeping an injunction for more than this time without initiating an administrative proceeding or filing a judicial review implies a violation of the fundamental right of due process of law (because an interim relief measure—here, an injunction-- is used as a final administrative penalty without following the legal proceedings). Subsequently, SINAC may also present the evidence to the Environmental Prosecutor for him to formalize the file

at the Judiciary Authority, or to the TAA to open the corresponding administrative proceedings.

19. In accordance to article 6 paragraph (p) of the Forestry Law and article 16 paragraph (u) of Executive Decree Number 32633, Regulations of the Wildlife Conservation Law, the matter should be referred to the Environmental Prosecutor when a crime against the environment has been committed or it has enough evidence of such situation. It is necessary, however, to demonstrate breaches of environmental regulations because it is not acceptable to refer the matter to the Environmental Prosecutor with the only suspicion that a breach of an environmental Law or its regulations might have occurred. In accordance to article 6 paragraph g) of the Forestry Law, when referring to possible use of the resources within a forest without having the proper permits, the State´s Forest Administration will have to visit the site in order to collect evidence of such illegal activity. In this case, article 54 of the Forestry Law indicates that the State´s Forest Administration will notify the landowner of the possible commission of the crime against the environment and that they have enough evidence to proceed with the file before the Judiciary.

(d) Powers and duties with respect to a violation of environmental regulations (with respect to wetlands or forests)

20. Wetlands are part of the natural patrimony of the country and therefore of public domain. Their conservation and administration have been assigned by the Law to the MINAET through the SINAC.

21. Forest reserves and forest or properties suitable for forest[5] are also part of the natural patrimony of the country and therefore SINAC, through the State´s Forest Administration, is in charge of their conservation, implementation of the policies that protect them and of their plan of use previous presentation of certain requirements to this Authority. If the forest is necessary for the conservation of natural wildlife, an encumbrance on the property will be registered at the Registry Public that will prohibit a change of use of the land.

22. In accordance to article 49 of the Biodiversity Law, article 7 paragraph (f) of the Wildlife Conservation Law and article 19 of the Forestry Law, SINAC is in charge of issuing the permit of use in properties that have natural resources that are part of the natural patrimony.[6] The wetland and forest reserves themselves cannot be developed but the property in which they are located can be developed but with restrictions.

23. They do not have to be within a wildlife protected refuge to be protected because they are part of the natural patrimony of Costa Rica and therefore their conservation is of public interest. They can be within a private property but the

[5] In accordance to article 3 of the Forestry Law, Number 7575, there are certain types of land that are classified within a certain use in accordance to the official methodology of the use, management and conservation of land, regulated by Law Number 7779.

[6] In accordance to the Manual for the Issuance of Certifications of Blueprints, Resolution Number R-SINAC-037-2009, the permit of use is an authorization issued by the Administration to the administered regarding the use of public domain properties or properties that are under private administration but that contain natural patrimony like wetlands.

If the permit of use is over public domain properties it will not generate any right to transform or sell the property. The conditions of use of the land that are privately owned will be subject to those established by the legal system and the content of the permit regarding technical environmental limitations for the protection of the natural patrimony within the property.

development of such property will be subject to SETENA's environmental impact assessments (discussed below).

(e) The National Wetlands Program

24. The National Wetlands Program is a research institute within SINAC (formerly, a body of MINAE), in charge of education, investigation, and support. Its role is to support SINAC's functions related to the preservation, conservation and correct management of the natural resources within the national wetlands.[7]
25. Resolution Number 5255-98 of the Costa Rican Constitutional Chamber has considered that SINAC is entitled to give special protection to wetlands as they are part of the natural patrimony of the country and therefore of public domain.
26. The Administrative Court, Resolution No. 00 48-2014, Section IV, decided a case in which a public complaint was filed against a private developer in light of the harm to the environment that was caused by some constructions that were carried on in a property in Limón that had evidence of having wetlands. Upon the complaint, SINAC coordinated an inspection of the site and determined through the issuance of a formal note, that although the property was not located within a wildlife protected area there was enough technical evidence of the existence of a wetland within a portion of the property. The technical study that SINAC performed in situ was enough for the Court to determine the existence of a wetland in a certain area of the property with all its consequences.
27. SINAC is the authority in charge of keeping a registry of all the category managements that are considered as Wildlife Protected Areas that exist within the Costa Rican territory, including those wetlands and forests that belong to this

[7] *See* Executive Decree No. 36427-MINAE.

category and have been created by the respective Executive Decree. It is important to mention that currently the registered Wildlife Protected Areas are inaccurate and Costa Rica is in the process of updating its data. If SINAC finds out of the possible existence of a wetland or forest within a private property its obligation is to make the in situ inspection to determine if in fact the land has the technical and scientific elements that the Executive Decree N°35803-MINAET uses to define a wetland.[8] In case it does, the area of the land considered as wetland should be registered in the list that this Authority keeps in order to clearly determine where it is located and to determine how the rest of the land surrounding the wetland can be used.

28. If the forest or the wetland is necessary for the conservation of significant natural resources, the environmental authority may consider expropriating the property or it can still be privately owned but an encumbrance will be registered at the Registry Public that will prohibit a change of use of the land and the landowner would be able to develop it but with restrictions.

(f) Injunctions

29. Articles 14.2, 146 and 148 of the Public Administration Act, as well as several precedents from the Constitutional Court enable government bodies to issue injunctions if the matter is under their supervisory jurisdiction and serious and irreversible damages may be caused. These injunctions must be notified to the developers, are binding and must be complied with.

[8] Articles 6, 7 and 8 of Executive Decree N°35803-MINAET develop these technical and scientific elements to determine a wetland. Article 6 indicates the ecological characteristics of wetlands, article 7 establishes the systems in which wetlands are classified in accordance to the Ramsar Convention and article 8 refers to the determination of wetlands in the maritime zone.

30. Nonetheless, like any other government body, once the injunction has been notified, an administrative proceeding and/or judicial review must be initiated within fifteen days. If SINAC does not comply with this, the interim relief injunction must be reversed, as keeping an injunction for more than this time without initiating an administrative proceeding or filing a judicial review implies a violation of the fundamental right of due process of law (because an interim relief measure illegally turns into a final administrative penalty without following proscribed legal proceedings).

31. In regards to the powers that government bodies possess to order interim relief injunctions, the Constitutional Chamber has determined the following rules:

> *"... the urgent nature of interim relief injunctions determines the exceptional possibility that government bodies have to order them even before an administrative proceeding has been initiated (ante causam). Nonetheless, the exercise of this power is conditioned - in light of its instrumentality – to the initiation of the principal proceeding within a relatively short period of time. Otherwise, the interim relief injunction becomes, inevitably, ineffective, based on the assumption that the beneficiary of the injunction has no interest and the need to avoid causing damages to the affected party.*[9]

32. More recently, case law on this matter has evolved to determine that the "relatively short period of time" within which the principal administrative proceeding must be initiated is fifteen days:

[9] Res. 2004-09232.

"In this sense, it must be considered that, from the relation of articles 229, 2° paragraph, of the General Public Administration Act, 26 of the Administrative Procedural Code and 243 of the Civil Procedural Code, the period of time that government bodies have to initiate the administrative proceeding once an interim relief injunction has been ordered is fifteen days."[10]

33. To sum up, articles 14.2, 146 and 148 of the Public Administration Act, as well as several precedents from the Constitutional Chamber enable government bodies to order interim relief injunctions even before an administrative proceeding has been initiated, that is within the preliminary investigation stage. However, to order these injunctions:

- the matter must be under the corresponding government body´s supervisory jurisdiction;
- the order must be based upon evidence and reasonable allegation of a possible serious and irreversible damage to the environment, or at least lack of scientific evidence that the corresponding activity will not cause any environmental harm (*"in dubio pro natura"* principle);
- a formal administrative proceeding must be initiated within fifteen days following the notification of the injunction to the affected party;
- the administrative proceeding must not take an unreasonable amount of time to issue a final act, as the injunction would turn out to be an indirect and oblique way of annulling, cancelling or paralyzing a subjective right without respecting the due process of the law.

[10] See, amongst others, Res: 2009-03315, 20100-15094, 2010-015424 and 2014-019433.

5. PERMITS

Chart of construction and operating licenses and permits
Real Estate Project - Las Olas

Agency	#	Permit/License	Description	Decrees and Regulations
Engineers' and Architects' Association (Colegio Federado de Ingenieros y Arquitectos or CFIA)	1	Agreement with Engineer	Footprints need to be approved by the CFIA as a first step. Before approaching CFIA, it is necessary to pay a registration fee for the project and submit a copy of the consultancy contract signed with the engineer in charge of the project.	Executive Decree Nº 36550 on the procedure to review building plans.
Fire Department (Cuerpo de Bomberos)	2	Fire Management Approval	The Fire Department has to approve the system for fire prevention.	Executive Decree Nº 36550 on the procedure to review building plans.
Municipality (Local Government)	3	Land use certificate (zoning permit	With the Land Use Certificate, the Municipality is able to verify if the land use proposed by the developer is in accordance with the Urban Development Plan, whether local or regional.	Urban Planning Law Nº 4240 and the Municipal Zoning Plan.
	4	Road distance permit	If the project is bordered by a local (as opposed to national) public road, the Municipality must specify the minimum distance from the public roads at which the construction line can be set up.	General Law Nº 5060 on public roads
	5	Rain Drainage System approval	The rain drainage system shall be approved before submitting footprints for the construction permit.	INVU's construction regulations and INVU's regulations for the national control of segregations and urbanizations.
	6	Solid waste transportation	Municipality picks up and transports ordinary solid waste not used in the process.	Law Nº 8839 for the integral waste management
	7	Construction Permit	Municipality grants the construction permit	Urban Planning Law Nº 4240, Law Nº 833 on Constructions, INVU's construction regulations and the Municipal Zoning Plan.
	8	Operating license and "patente"	After obtaining an operating permit from the Ministry of Health, the developer must obtain an operating license from the Municipality and pay the "patente" which is a tax for carrying out a lucrative activity on the territory of the Municipality. This "patente" is required for businesses like restaurants, bars, discotheques, etc.	Municipal "patente" law which vary to each Municipality
National Institute of Housing and Urban Planning (INVU)	9	Footprint approval	Footprints need to be approved by INVU before sending them to the Municipality.	Executive Decree Nº 36550 on the procedure to review building plans and INVU's construction regulations.
	10	Water alignment	In case of rivers, lakes, ponds, lagoons, and other water sources, INVU has to set up a "conservation zone" which is an area on the bank of rivers and other water sources in	Forestry Law Nº 7575

			which no building can take place.	
Ministry of Infrastructure and Transportation (MOPT)	11	Permit to access highways	A special permit to access the highway, if the facilities are located next to a highway	Bylaws Nº 35586 on restricted-access roads
	12	Road distance permit	If the project is bordered by a national (as opposed to local) public road, MOPT must specify the minimum distance from the public roads at which the construction line can be set up.	General Law Nº 5060 on public roads
Energy provider	13	Electricity availability	It is necessary to have a letter from the energy provider about the possibility of satisfying the energy requirements of the project.	Executive Decree Nº 36550 on the procedure to review building plans and INVU's construction regulations.
MINAE-SENARA-Water Department (Ministry of Environment Underground Water Agency)	14	Ground and underground water vulnerability	It is necessary to have a underground water vulnerability survey and pollutant transit survey	Law Nº 6877 Creation of Underground Water Agency (SENARA) and Regulations 510 for the provision of groundwater services.
	15	Well drilling permit	If it is necessary to drill a well, a well construction permit from SENARA and the Water Department is required	Water Law Nº 276, Executive Decree Nº 35884 on subsoil drilling for the exploration and use of underground waters and Executive Decree Nº 35271 on drilling permits and water concessions for self-sufficiency in condominiums.
	16	Water concession	If water will be provided from a water well or river.	Water Law Nº 276, Executive Decree Nº 35884 on subsoil drilling for the exploration and use of underground waters and Executive Decree Nº 35271 on drilling permits and water concessions for self-sufficiency in condominiums.
	17	Permit for waste water discharge	To discharge waste water from a water treatment plant, a permit from the Water Department is required	Executive Decree 31545 for approval and operation of wastewater treatment operation systems
MINAE-SINAC (Ministry of Environment- Protected Areas Agency)	17	Tree cutting permit	A permit granted by MINAET is required to cut certain types of tree	Forestry Law Nº 7575 and Guidelines R-SINAC-028
	18	Certification of being out of WPA	If the property is or may be located within a Wildlife Protected Area, a certification from SINAC of existing property surveys or an approval of new property surveys is required. If the property in indeed located within a Wildlife Protected Area, serious restrictions over the property apply.	Law Nº 7788 of Biodiversity, Law Nº 7317 of Wildlife Conservation, Forestry Law Nº 7575, Urban Planning Law Nº 4240, Executive Decree Nº 34433 to the Law Nº 7788 and administrative decision R-SINAC-037-2009.
	19	Natural Patrimony of the State	SINAC shall issue a certification whether or not a property is part of the State Natural Heritage	Law Nº 7788 of Biodiversity, Law Nº 7317 of Wildlife Conservation, Forestry Law Nº 7575, Urban Planning Law Nº 4240, Executive Decree Nº 34433 to the Law Nº 7788 and administrative decision R-SINAC-037-2009.
National Museum (Museo Nacional)	20	Archaeology	It is necessary to verify the archaeological maps and the potential of the property for archaeological discoveries	Law Nº 6703 on National Archaeological Heritage and Law Nº 7555 on Historical and Architectural Heritage of Costa Rica
Prevention of Emergencies Commission (CNE)	21	Natural Risks	It is necessary to verify natural risks in the region that could affect the project.	Law Nº 8488 on national emergencies and risk prevention

Costa Rican Institute of Electricity (ICE)	22	High Voltage Transmission alignment	is necessary to verify that the property is not affected by high voltage transmission lines.	Law 6313 on ICE's acquisitions, expropriations and easements ICE and Executive Decree Nº 29296 to rule electric and magnetic fields in works power transmission
Costa Rican Railways Institute (INCOFER)	23	Railroad alignment	It is necessary to verify that the property is not affected by railroads	INVU's regulations for the national control of segregations and urbanizations.
Directorate General of Civil Aviation (DGAC)	24	Air traffic alignment	It is necessary to verify that the property is not affected by air traffic restrictions.	General Law Nº 5150 on Civil Aviation and INVU's construction regulations
Costa Rican Oil Refinery (RECOPE)	25	Oil pipes alignment	It is necessary to verify that the property is not affected by an oil pipe.	Executive Decree Nº 38334 that approves Plan 2013-2030 updating the regional plan of the Greater Metropolitan Area (GAM)
MINAET- SETENA (Ministry of Environment- Environmental National Secretary)	26	Environmental Impact Assessment	This kind of project requires generally an Environmental Impact Study, usually a D1 type. An environmental license from SETENA is required before starting the approval procedures before INVU, ICAA, Ministry of Health and the construction procedure before the Municipality.	Environment Law Nº 7554, Executive Decree Nº 31849 general regulation on procedures for Environmental Impact Assessment (EIA), Executive Decree Nº 32079 technical instruments guidelines for the process of Environmental Impact Assessment (EIA Guidelines) –Part I, Executive Decree Nº 32712 technical instruments guidelines for the process of Environmental Impact Assessment (EIA Guidelines) - Part II, Executive Decree Nº 32967 guidelines of technical instruments for the process of Environmental Impact Assessment (EIA Manual) - Part III, Executive Decree Nº 32966 guidelines of technical instruments for the process of Environmental Impact Assessment (EIA Manual) - Part IV, Executive Decree Nº 33959 guidelines of technical instruments for the process of Environmental Impact Assessment (EIA Manual) - Part V, Executive Decree Nº 34522 Regulations for production, review and formalization of the Environmental Guidelines of good production practices and eco-efficient performance and Executive Decree Nº 36815 rules of internal functioning organization of SETENA.
Costa Rican Institute of Aqueducts and Drainage (ICAA)	27	Footprints approval	Footprints need to be approved by ICAA before they can be sent to the Municipality.	INVU's construction regulations and Executive Decree Nº 36550 on the procedure to review building plans.
	28	Drinkable water availability	A letter from the drinking water provider is required, guaranteeing there is water for the project	INVU's regulations for the national control of segregations and urbanizations
Ministry of Health	29	Water treatment plant construction and ubication permit	Water treatment plant requires a special ubication permit and construction permit from Ministry of Health.	Executive Decree Nº 31545.S-MINAR regulations for approving construction and operation of water treatment plans.
	30	Footprints approval	Footprints need to be approved by Ministry of Health before they can be sent to the Municipality	INVU's construction regulations, Executive Decree Nº 36550 on the procedure to review building plans and Executive Decree Nº 32688 regulations for approving construction plans.
	31	Sanitary operating permit	This permit allows the company to start operations	Executive Decree Nº 34728 General rules for granting operating permits from the Ministry of Health
Costa Rican Tourism Institute (ICT)	32	Footprints approval	If the project is a tourism project and located within the terrestrial-maritime zone (ZMT), footprints need to be approved by ICT before they can be sent to the Municipality.	Law 6043 of terrestrial-maritime zone (ZMT) and Executive Decree Nº 36550 on the procedure to review building plans.
	33	ZMT Concession	It is necessary to have a ZMT concession in order to develop in the ZMT	Maritime Zone Act N.6043

6. ENVIRONMENTAL VIABILITY & ROLE OF SETENA

(a) Legislation/regulations governing the environmental viability regime

34. Any project that can possibly affect the sustainability of wetlands has to have an EV issued by SETENA allowing any activity that in some way may affect the natural resources (wetlands and forests) that are located within the property. Nevertheless, SETENA has issued several resolutions by way of which it has established exceptions to this rule. During the time frame in which the Project requested construction permits for the easements there were three resolutions in force, namely: N° 2370-2004, dated December 7th, 2004, N° 583-2008, dated March 13th, 2008 and N° 2653-2008, dated September 23, 2008, in which SETENA excluded certain kind of activities from obtaining the EV (referred to as of very low potential environmental impact) and rather gave in to each Municipality to determine and grant the corresponding environmental permit.

35. The EV is governed by the following legislation: Organic Law on the Environment; Executive Orders Nos. 37803-MINAE-S-MOPT-MAG-MEIC and 31849-MINAE-SALUD-MOPT-MAG-MEIC-2004: General Regulations on Environmental Viability Assessment Procedures; Executive Order No. 32966-MINAE-2006: Guide for the elaboration of Environmental Viability Assessments; Executive Order No. 34522-MINAE-2008: Environmental Guides; Executive Order No. 34375-MINAE-2007: Form D1; Executive Order No. 32712-MINAE-2005: Instructions to fill out form D1; Executive Order No. 32079-MINAE-2004: Instructions to fill out form D2.

(b) Documents that must be submitted in order to obtain an environmental viability

36. In order to obtain the EV it is necessary to submit a D1 or D2 application form, in accordance to the type of project or activity that is going to be developed, as well as an environmental impact statement, or a description of the impact of such activity on the environment. In cases that involve a Wildlife Protected Area/Refuge, an environmental impact statement must also be submitted to SINAC.

37. Additionally, the developer must submit the technical description of the project, as well as the basic design of the site, a copy of the cartographic map sheet, a basic engineering study of the property, a geological and archaeological study, photos of the site and pay a corresponding environmental guarantee.

38. Articles 17 thru 20 of the Organic Environmental Law establishes SETENA as the Administrative body in charge of issuing all EV´s regarding any project or activity that may alter or destroy elements of the natural environment. The required documents for the approval of the EVs are elaborated by a group of multidisciplinary professionals that have to be registered at SETENA and the cost of the environmental evaluation will be covered by the developer. Article 20 of the Organic Environmental Law establishes that SETENA will establish the required instruments to control and verify that the developers are following the duties and obligations set in the administrative resolution issuing the EV.

39. Article 18 of Executive Decree Nº 31849, "General regulation on procedures for Environmental Impact Assessment (EIA)" determines the technical procedure that SETENA must follow in order to review the information submitted by the

developer in order to obtain the EV, which are: a) the verification of the information presented in the D1 or D2 form over the environmental impact significance (in this case SETENA is able to make an *in situ inspection*); b) revision of the geographical location of the project or activity in order to verify if it is within an environmental fragile area and in accordance to the context of the use of the land and c) the ranking on the environmental impact significance.

40. Article 46 of this Decree also establishes that the projects or activities that are under operation and that have an approved EV will be subject to what the Organic Environmental Law establishes and to the content of the resolution that issued the EV. Article 47 indicates the obligation of the developers to deliver to SETENA, when required through the respective administrative resolution, an environmental report with the content that SETENA will ask to control if the activities or the project is following the environmental compromises; article 48 enables SETENA to make aleatory visits to the property to verify the fulfillment of all environmental compromises acquired thru the Plan of Environmental Management; and finally, article 49 allows SETENA to coordinate an environmental scrutiny in certain cases as a verification process to evaluate if the project is following the Plan of Environmental Management that was originally submitted in order to obtain the EV.

(c) Projects within an "*Environmentally Fragile Area*"

41. All kinds of constructions are prohibited in a certain range around an environmentally fragile area. However, if the project is near but does not invade the protection limits of an "*environmentally fragile area*", it shall be considered as

High Potential Environmental Impact, Category A, meaning that the developer will have to provide additional information and additional environmental compromises.

(d) Impact of the existence of a wetland

42. It is important to mention that under Costa Rican environmental law, there is no need for a wetland to be declared for it to receive protection, as the mere fact of its existence constitutes a restriction of use of the property and any development has to respect its buffer area and take the required measures to provoke the least possible damage on the natural resources surrounding the wetland.

43. Hence, if there are wetlands on the site of a particular project, the type of application to be filed with SETENA should also be modified in accordance to the Executive Order number 31849-MINAE-SALUD-MOPT-MAG-MEIC and the Technical Instruments Manual for the EIA procedure as they are considered as being environmentally fragile.

44. The developer has to present the form D1 to obtain the EV with an identification of the technical environmental implications that cause the existence of a wetland within the property and will have to promote a design of his project that overcomes these limitations, which is part of the content of the instrument required as an Environmental Impact Study (EsIA). That has to be elaborated by a multidisciplinary group of professionals hired by the owner. The presented EsIA is sent by SETENA to SINAC and the Municipality where the property is located so that they can refer to it. SETENA has also the faculty to ask the developer to call for a public audience in order to inform the civil society of the development that is planning on doing and the possible impact that it might have on the environment.

45. The developer should identify from the beginning of the project the area within the property that is going to be developed that should be considered as being environmentally fragile through a technical report. For example, it should identify the existence of wetlands or forests.

(e) Right of review of SETENA over an issued EV

46. As a general administrative law principle, government bodies are empowered and even obligated to review their own administrative acts and resolutions if there is a defect that may cause nullity. The following are the corresponding procedures to annul, revoke and cancel administrative acts, resolutions and orders:

47. **Absolute, evident and manifest invalidity**: The Attorney General´s Office has defined this kind of invalidity as: *"...that which is patent and obvious, therefore discovered by the sheer comparison of the administrative act with the corresponding regulation, without any need of interpretation or exegesis… the absolute, evident and manifest invalidity not only entails the absolute absence of one of the administrative act´s essential elements, but also that such defect is so notorious and clear that no effort or deep analysis is required for its verification".*[11]

48. In this case, an ordinary administrative proceeding must be carried out and once a final decision has been reached the Attorney General´s Office or the General Comptroller´s Office (depending on the matter) must issue an opinion in regards to the type of nullity, whether it is relative, absolute or absolute, manifest and

[11] Opinion C-196-97, October 17, 1997.

evident. Only in the last case can the government body annul by itself the environmental viability.

49. **If the defect is not deemed to prompt absolute, evident and manifest invalidity:** The government body must declare the administrative act, resolution or order to be harmful for the public interest ("*lesivo*") and request the Attorney General´s Office to file a judicial review before the Administrative Court in order to seek its annulment. In this case, the party that was benefited by the administrative act, resolution, or order that is been challenged must be sued and summoned. Until a final ruling is reached the administrative act, resolution or order that is been objected maintains its validity and effectiveness, unless the Administrative Court issues an interim relief injunction to suspend its effects.

50. **Revocation:** In our administrative law regime there is also the possibility of revoking an administrative act if there is a discrepancy between its effects and the public interest. In this hypothesis there is no defect or invalidity whatsoever, but only a convenience criterion to determine if the administrative act is consistent with the public interest. If the government body decides to revoke the administrative act, once it has determined its inconsistency with the public interest, it must pay a compensation to the party that has obtained benefits from the act, as well as obtain the previous authorization from the General Comptroller´s Office.

51. **Cancellation:** In this case, there is no invalidity or inconsistency, but only a non-fulfillment by the beneficiary of the rules and conditions under which the administrative act has been issued, for example a license. A prior administrative procedure must also be carried on so the affected party may defend itself. Once a final ruling has been reached, the cancellation will be deemed valid and effective

unless an Administrative Court, once a judicial review has been filed, decides otherwise, as government bodies have adjudication powers.

52. SETENA is also empowered to order the suspension of an environmental viability even before granting the affected party the opportunity to defend itself (*ante causam).* It can act ex officio or based on a complaint that anybody has legal standing to file, as anything that has relation with the environment is deemed to be a diffuse interest. Nonetheless, once the suspension has been ordered, an administrative proceeding and/or judicial review must be initiated within fifteen days. If SETENA does not comply with this, the interim relief injunction must be overturned.

53. Likewise, article 99 of the Organic Environmental Act establishes that SETENA may also call an immediate halt of the acts that originate a claim, as well as shut down, partially or totally, permanently or temporarily, these acts. However, this regulation refers to an administrative penalty that may be imposed by SETENA only after an administrative proceeding has been carried out and a final ruling has been issued, and not as a result of an interim relief injunction alone.

54. In the specific case of the Project, SETENA and any other government body was entitled to issue interim relief injunctions if the matter fell under their supervisory jurisdiction and serious and irreversible damages could be caused. Nonetheless, an administrative proceeding and/or judicial review must have been initiated within fifteen days to seek the annulment of the environmental viability. If SETENA (or other government body issuing the injunction) did not comply with this, the interim relief injunction must have been reversed, as keeping an injunction for more than this time implies a violation of the fundamental right of due process of law (an

interim relief measure turns into a final and definite punishment without following the due process of the law).

55. In this case, there is no evidence of SETENA, or any other administrative body, of having at least initiated an ordinary administrative proceeding or a judicial review to seek the annulment or else cancellation of the environmental viability; even so, after carrying on a preliminary investigation SETENA later reversed the suspension, although it took much more than a reasonable time to do so. Consequently, this means that the interim relief measure was not pursuant to any later principal administrative procedure, and hence it could had been deemed as invalid, as it became an indirect and oblique way of annulling or cancelling the environmental viability without respecting the due process of the law, or at least of illegally paralyzing the Project.

(f) Nature and extent of duties of good faith, prudence and transparency that developers are allegedly under when making applications to government authorities under Costa Rican law

56. The Respondent has argued that the Investors were obligated by the principles of good faith, prudence and transparency, according to which it falls primarily on the private sector participants to notify the competent authorities of all possible impacts their projects might have on the environment. In this regard, private participants are held to an obligation of good faith in all submissions presented to the Costa Rican administration, and an obligation of prudence in all actions they undertake for the purposes of their projects.

57. This obligation is derived from article 50 of the Constitution that establishes the right that everyone has to an equilibrated environment, from which the main

environmental principles derive. In order for these principles to be implemented the landowner that wants to develop a project and use its natural resources should act with prudence in order to obtain sustainable development. This also includes that the developer must have obtained certain requirements and permits, depending on the magnitude of the project to be able to use the natural resources located within its property. In this regard, article 109 of the Biodiversity Law provides: "*The burden of proof, of the absence of pollution, deterioration or not permitted impact, will correspond to the applicant of approvals, permits or access to biodiversity or to the one accused of having caused environmental harm*."

58. Resolution Number 00083, September 16th, 2013, of the Administrative Court, Section IV, indicates that the sustainable development in the use of natural resources is one of the main principles that have been legally accepted. Article 2 paragraphs a) and b) of the Environmental Law indicate that both the Administration and the citizens are obliged to participate in the conservation and sustainable development of the environment.

(g) The principles of good faith, non-retroactivity, legitimate expectations and estoppel rule in regards to the Costa Rican Government

59. The Respondent has not discussed the principles of good faith, non-retroactivity, legitimate expectations, and the estoppel rule as applied to its own government bodies. Under Costa Rican law, an administrative body may not annul, revoke or suspend indefinitely an act or resolution that has previously been issued to grant rights to a third party. Either an administrative proceeding is carried out to declare the absolute, manifest and evident nullity, or a judicial review is filed, but what cannot happen is that through interim relief injunctions subjective rights of a

developer are paralyzed, thus converting those measures in final and definitive punishments.

60. Specifically, in regards to the principles of good faith and legitimate expectations our Constitutional Court has opined[12]:

> ***"IV.- THE GENERAL PRINCIPLE OF PROTECTION OF LEGITIMATE EXPECTATIONS OF THE CITIZEN BEFORE PUBLIC POWERS.*** *On the development of this principle and its deep constitutional root, our national doctrine has considered the following:*
>
> *"This principle originates in the Federal Republic of Germany and was later on recognized by the jurisprudence of the European Court of Justice, to define a situation worth of being protected when the Public Administration breaches the trust that has been placed in its actions. The Spanish Supreme Court, in its resolution issued on February 1, 1990 provided that this principle "...must be enforced not only when there is a psychological conviction in the private individual who has been benefited, but also when the Administration has produced external sign that are sufficiently conclusive to reasonably lead to trust in the legality of the administrative conduct; also, given the weight of the interests – individual interest and public interest – the cancellation or annulment of the act generates damages, due to expenses and investments, in the beneficiaries patrimony that reasonably trusted in such administrative situation that he has no obligation of bearing and that may only be restored with serious loss in his patrimony."*
>
> *In regards to the requisites of the legitimate expectations principle, the Spanish doctrine, following case law of the Spanish Supreme Court, has established the following:*
>
> 1. *There must be an act of the administrative body sufficiently conclusive to provoke one of the following types of confidence: a) confidence in the affected party that the administrative body has acted correctly; b) confidence in the affected party of the legality of its conduct in regards to the relationship it has with the*

[12] Res. Nº 2010-010171.

administrative body, hence existing a possible good-faith mistake, and c) confidence in the affected party that its expectations are reasonable.

2. *The administrative body must provoke external signals that, even without being binding, guide the investor to a determined conduct that, had it not been for the appearance of legality created, he had not executed.*

3. *An act of the administrative body that recognizes or constitutes an individualized legal situation in whose stability the investor trusts.*

4. *The appropriate cause to generate the legitimate expectation of the affected party may not be provoked by mere negligence, tolerance, ignorance of the administrative body or the unreasonableness of the investor´s expectations.*

5. *The duties and obligations of the investor must have been fulfilled.*

The breach to the principle of legitimate expectations causes various important juridical effects, for example:

1. *Acts as a limit to the exercise of discretionary powers.*

2. *Operates as a guarantee to the equality principle.*

3. *Generates the duty on the Public Administration to compensate the frustration of legitimate expectations and the infringed rights.*

The principle of legitimate expectations, along with good faith in juridical-administrative relations arises from the principle of juridical equality, that is, the certainty of the relations with public powers; the individual must know what to expect from public powers, which must avoid objectively confusing situations and maintain juridical situations, although not absolutely in conformity with the legal system. This principle stems, among others, in the theory of intangibility of administrative acts that confer subjective rights to private individuals, the limits to the acts that impose burdens and obligations and non-retroactivity. It is also applicable when an administrative body issues and executes a series of acts and conducts that, although incorrect, generate a series of expectations in the private individual that believes to have a juridical situation that is in agreement with the legal system." *JINESTA LOBO (Ernesto), Tratado de Derecho Administrativo – Parte General-, San José, IUSconsultec y Editorial Jurídica Continental, 2ª. Edición, 2009, pp. 294-296.*

V.- (…)

*"**IV.- On the duty of the Public Administration to respect the Principle of Good Faith in all its actions. –***

This is not the first time that this Chamber refers to this principle, in a previous opportunity it penalized the violation to the principle of good faith by the State based on which many public officers accepted the promises of an attractive retirement and for reasons attributable to the State, that was not possible to execute (sea resolution 96-1044, 09 hours 39 minutes, March 1, 1996) (…) This principle must be understood like a legal obligation, also to the Public Administration in all its actions to always act with the truth and without hidden second intentions. It is a principle that is applicable in all branches of public powers…".

61. In my opinion, in the specific case of the Project, these principles may have been breached for the following reasons:

    a. At first the Project was granted the corresponding permits without any government body or public official raising any red flags.

    b. Although the investors have a duty of good faith when filing the required information and requesting the permits, it is SINAC that has the duty of keeping a registry of the wetlands, as well as of declaring their existence.

    c. The competent government bodies waited until the Project was already in execution to raise red flags, failing to inspect, supervise and warn if there was a wetland in due time.

    d. There were contradictions among different government bodies and officials. They were not clear on their conclusions, nor on their motives; such was the case that several injunctions were ordered but no administrative proceeding

or judicial review before the competent jurisdictions was initiated to seek the annulment, revocation or cancellation of the permits. In fact, as the exhibits in file demonstrate, at first SINAC issued at least three reports in which it concluded there were no wetlands in the project, nonetheless, later on it changed its mind and determined that there was a "Palustrine Wetland". Also SETENA implicitly confirmed several times that there were no wetlands in the Project, with each and every EV it granted; however, later on, based on a simple note from SINAC, it ordered an injunction of the Project, which was reversed as soon as it determined that SINAC´s allegation that SETENA had granted the EV relying on a false report was invalid, as SETENA had relied on another report issued by ACOPAC. Likewise, the MUNI, that had granted the corresponding construction permits before, suddenly issued an injunction based on SETENA´s suspension. The TAA, on its part, relied exclusively on SINAC´s allegation to issue another injunction. What is worse, although SETENA reversed the injunction and explicitly determined that there was no nullity in the EV since they had not relied on the supposedly false document, the MUNI, the TAA and SINAC did not lift the suspension on the Project.

e. The injunctions were ordered in an irregular manner, as the authorities practically ordered them automatically and without complying with the legal requirements; that is, to ground the corresponding resolutions with reasonable and sufficient allegations, as well as evidence of the possible irreversible damages that could be caused to the environment if the interim

relief measures were not ordered.[13] Besides, the injunctions were kept in place more time that is allowed by our legal system, thus converting them in a final act and or punishment without following the due process of the law. It seems like the government bodies preferred to paralyze and freeze the Project, rather than taking clear and transparent actions to suppress the permits.

f. Rather than filing a judicial review before the competent jurisdiction -- the Administrative Court -- a criminal action was initiated. Therefore, although much of the permits were suspended, there was no principal procedure initiated to suppress the permits, which has the consequence of making the injunctions invalid, as they became a punishment rather than an instrumental measure to a principal procedure. For example, in the *Crucitas* case[14], the permits were effectively invalidated by the Administrative Tribunal, thus, in that case, at least the path that the law and the principles of legitimate expectations, intangibility of administrative acts and due process of the law determine was duly followed, however, in this case, the path was only followed partially, up to the injunctions, thus freezing the Project.

62. The consequences of having breached these principles in regards to the Project is that the acts and resolutions issued to annul, revoke or suspend the EV and the construction permits are null and void. Likewise, if the same legal consequences have been obtained by means of omissions, the government office or bodies could

[13] Article 136 of the General Public Administration Act states that the acts that impose obligations and limit rights, as well as the suspension of acts, must be well grounded.
[14] RES: 001469-F-S1-2011, First Chamber of the Supreme Court / ICSID Case No. ARB/14/5.

be obligated to recognize the validity of the EV and construction permits as well as pay compensation to the affected party.

(h) Failing to conform with the terms of the EV

63. Costa Rican law establishes that failing to conform with the terms of an EV might entail the closure of any construction in the property, and if the petitioner has already begun the construction, the environmental authorities can request the demolition and/or the imposition of economic environmental penalties in compensation for damages.

(i) Challenging an EV

64. The general procedure to challenge any administrative act, including an EV, is to challenge before the issuing body (in the case of an EV, SETENA), the Constitutional Chamber and/or Administrative Court.

    a. If an interested party challenges the EV, SETENA must grant a hearing to the holder of the EV to defend itself. In this case, as the act is not firm and definitive, since a party with legal standing has challenged it within the deadline, the administrative body is authorized to declare it null and void. Should that be the case, the holder of the EV that has been annulled may challenge as well such decision before the Administrative Court.

    b. If no one challenges the act or resolution within the legal deadline to do so, the administrative body is still authorized to void *ex officio* the act, but only under certain circumstances.

c. Moreover, anyone can challenge the EV either before the Constitutional Chamber and/or the Administrative Court, even if no administrative recourse has been filed in time. In either case, the Court has to summon the holder of the EV to become a party to the lawsuit which may result in a final ruling either annulling the EV, or declaring its validity.

(j) Does the EV grant subjective rights to its beneficiaries?

65. Although there is a leading case issued by the Court of Appeals that supports the Respondent´s allegations, in the sense that the EV is a preparatory act that does not grant any rights to its beneficiaries, in my opinion it *does* grant subjective rights to its holder and hence, it cannot be disregarded without attending the due process of the law. Certainly, there is a contradiction between the leading case issued by the Court of Appeals and ruling number 2010-17237 issued by Constitutional Chamber, whose precedents are binding *erga omnes.* In fact, the Constitutional Chamber determined that an EV cannot be voided ex officio by the Authority without a previous ordinary administrative proceeding and the authorization of the Attorney General.

66. Although the Attorney General considers that EVs can be voided without following a previous due process, it has had to accept the Constitutional Chamber´s criterion as it is binding *erga omnes;* henceforth, for example in criteria number C-294-2013, the Attorney General concluded that an EV can only be voided ex officio by the authority as long as the administrative proceeding was held and the act´s nullity is absolute, evident and manifest. Therefore, it is clear that an EV does produce effects and confers subjective rights to its beneficiary by itself.

7. STATUS OF EV´S AND AGENCY REPORTS

(a) Preparatory and final acts

67. The general rule is that a preparatory act will have no legal effects on its own and accordingly cannot grant subjective rights. However, article 163 of the Public Administration Act envisages the possibility of a preparatory act to have its own effects, therefore enabling to challenge it directly and immediately, without having to wait for the issuance of the final act. On the other hand, the final administrative act will always have direct and immediate legal effect on third parties, either conferring rights or establishing obligations.

68. The Respondent´s witness, Dr. Julio Jurado, declares that the EV granted by SETENA is a mere preparatory act or procedure, subordinate to a final act, this being the construction permit that the Municipality would have to grant. On that basis, the Respondent's thesis is that there was no need to follow an administrative proceeding to annul the EV, as it did not confer any subjective rights to the Claimants.

69. Notwithstanding this respectable opinion, it is important to mention that, not only does the Constitutional Chamber maintain a different criterion but also the Attorney General´s Office, in an opinion elaborated and signed precisely by the same Dr. Julio Jurado[15], who has had to accept that, in order to annul an EV, an

[15] *See* C-293-2013, December 10th, 2013:

"In ruling number 2010-17237, dated October 15, 2010, the Constitutional Chamber determined that environmental viabilities are licenses that can only be annulled *ex officio* by the corresponding administrative body in case the nullity is absolute, evident and manifest, in any case following the administrative proceeding set forth in articles 173 *et seq.* of the General Public Administration Act. In this regard, the Chamber provided in the aforementioned ruling:

administrative proceeding to declare the absolute, evident and manifest invalidity has to be followed, or else, if the invalidity does not have such characteristics, then a judicial review must be filed seeking its annulment at the Administrative Court prior celebration of a whole judicial procedure.

70. Now, in regards to technical reports issued by agencies and government bodies, though it is true that they are not final but preparatory acts and hence not binding on third parties, that does not mean that they can be disregarded by public servants and other administrative bodies within the corresponding administrative proceeding. Article 3 of the Law for the protection of citizens from the excess of requirements and administrative procedures provides that administrative bodies may not question nor review the permits and firm authorizations issued by other entities or bodies, except for the nullity regime. Furthermore, article 136.1 of the Public Administration Act states that the acts that separate from the reports of advisory bodies must be well grounded, and article 199 provides that there will be manifest illegality when the administrative body diverges from advisory reports or

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"*At discretion of this Constitutional Court, regarding a license (see General Regulations on the Environmental Impact Assessment), it breaches, in a demeanor way, the intangibility of own acts principle, by annulling, unilaterally, an administrative act that granted an environmental license to request the subsequent permits before the competent authorities. Consequently, the proceeding action is to annul resolution No. R -302-2010-MINAET issued at 11:00 hrs., June 2, 2010, by the Minister of Environment, Energy and Telecommunications, as being detrimental of the intangibility of own acts principle. The latter, without prejudice, obviously, that if the Administration considers that such license has an evident and manifest defect, it might initiate the corresponding administrative proceedings and, additionally, demand the respective requisites for the sake of adequately overlooking that the proposed activity will not be harmful to the environment."*

Consequently, in compliance with precedent contained in Constitutional Chamber´s ruling number 2010-17237, dated October 15, 2010, we proceed to analyze if the nullity that affects the environmental viability contained in resolution number 0804-2012, dated March 20, 2012, is also absolute, evident and manifest."

opinions that evidence illegality, if subsequently the act is declared null and void for the reason argued in the report or opinion.

71. Consequently, one cannot conclude that agency and/or other government bodies´ reports, although preparatory acts, do not have any legal effects or are not binding, at least within the Public Administration.

72. Anyhow, in this case the discussion on the EV having been a preparatory or a final act in my opinion does not have the importance it has had in other cases, as in this particular case not only was the EV granted, but also the corresponding construction permits. Even more, not only were the EVs suspended, but also the construction permits are still paralyzed, even though that SETENA lifted the injunction. Therefore, the discussion in this particular case is a bit innocuous, as the Project does have the construction permits validly granted on the basis of the corresponding EV´s. Therefore, there should be no doubt whatsoever that a subjective right was indeed granted, and that the only way to declare it null and void is by declaring its absolute, evident and manifest invalidity thru an ordinary administrative proceeding prior opinion of the Attorney General´s Office, or else file a judicial review before the Administrative Court, but not by way of a criminal process, nor by injunctions with no term and no principal procedure to which they must be instrumental.

8. PRECAUTIONARY PRINCIPLE

73. This is the principle that has most been developed by the jurisprudence and books of law and has been considered as one of the essential principles of the regime of Environmental Law.

74. For the author Aldo Milano, in his book "The Precautionary Principle" this principle limits the acts of the Administrative bodies to only those that will not harm the natural resources and will guarantee that they will be used accordingly. For this author a great amount of the risky activities are subordinated to the administrative police, which manifests itself through the approval or denial of any type of permit that the citizens file. This situation provokes that many conflicts might arise either because it might be considered that the permit is not valid because it was emitted against the precautionary principle or because it was denied based on it.

75. The Precautionary Principle is regulated under Public International Law and Costa Rican law, article 11 of the Biodiversity Law. Related to the precautionary principle is the invention of the burden of proof that operates in environmental issues. The First Chamber of the Supreme Court, in the Resolution Number 212-2008 of March 25th, 2008, indicated that when the plaintiff's complaint is related to the possible damage or harm to the environment, the defendant will be in charge of bringing all evidence that indicates the contrary. Which means that in Environmental Law the burden of proof is inverted to the person that has requested the permit to be able to develop the land or has been accused of causing harm to the environment.

76. The Constitutional Court, in its Resolution Number 2000-9773, has also called this principle *"in dubio pro natura",* which indicates the inversion of the burden of the proof above mentioned in all environmental issues and adds that the uncertainty regarding the consequences that a certain activity might provoke on the environment is enough for not permitting the execution of such project.

77. The above Resolution of the Constitutional Court indicates that this principle refers to the environmental policies in general and that to specific cases the preventive principle is what should be applied. For this Court, in environmental issues there can always exist scientific doubt of the possible damages that certain type of activities can cause. For this Chamber of the Supreme Court the precautionary principle refers to the cautious attitude that should be taken when there is any reasonable doubt related with the possible danger of the environmental repercussion of any activity that will result in taking the required measures to avoid it.

78. Resolution Number 00112 of the Administrative Court, of May 5th, 2012, Section III, indicates that the content of this principle is the cautious attitude that should be taken when a certain reasonable doubt exists, that is not possible to demonstrate with objective methods or scientific studies, in relation to how dangerous a certain activity may result for its consequences over the environment. And that in order to halt irreversible damages to the environment certain injunctions might be declared during the execution of the permit of use that has been given, during the procedure to obtain or to impose corrective measures that might mitigate the possible damage to the environment.

79. In this way, the resolution of the Administrative Court indicates that the objective of the precautionary principle is to anticipate any negative effect on the environment and to secure the protection and correct management of the natural resources. For this Court the principle is the high point of the principle of responsibility because it is born from the attention to the type of damages that might be caused to the environment and to the health of the individuals, that are

qualified as irreversible, not only because of their dimension but because of their accumulation.

80. Resolution Number 00394 of the Administrative Court of October 14th, 2011, Section III, indicates that when there is technical, objective and scientific doubt over the impact on the environment of a project, the Administration is obliged to apply this principle, which will result in the denial of the required construction permit or authorization. Consequently, what this principle satisfies is the need to take all the precautionary measures to avoid or contain any possible harmful effects on the environment, because regarding the environment, it is not useful to take the actions *a posteriori*, because there is no turning back once the damage has been done.

81. This is a principle of law that integrates the legal system and allows the Public Authorities to implement anticipated measures to protect and conserve the environment and health of the population in situations when they can be affected as a result. It even allows the Public Authorities to implement precautionary measures even if there are no scientific studies that justify them as long as the risk of permanent damage to the environment is possible or predictable on a short or long term basis. The measures that are implemented cannot be arbitrary and can be revised in order to update them because of changes in the conditions that justify them. For example, in the specific case of the Project, the reversal of the injunction ordered by SETENA should have been taken into consideration by the other government bodies to revise and eventually lift of modify the relief measures they had ordered.

82. The precautionary measures can prohibit or eliminate certain products, activities or substances. The restriction that can be applied has to be proportionate to the level of protection and the magnitude of the potential or eventual damage that the environment can suffer. But a person´s interest or right can be affected by the application of one of these precautionary measures because natural resources are an essential element for the maintenance of human life and if the environment is harmed, the population´s wellbeing will also be harmed, therefore the measure that implies a prohibition or restriction of a certain activity is justified.

9. PREVENTIVE PRINCIPLE

83. The preventive principle is related to the precautionary principle. It refers to the possible destructive effects that certain activities might have on the environment. The purpose of this principle is to apply preventive measures to avoid any type of harm to natural resources. This principle translates to the application of interim measures both in the administrative and judiciary authorities that take care of environmental issues. It also includes administrative policies that complement the EV and other requirements that are asked for the construction permit.

84. Its application is focused in the Judiciary process because of the long period that it takes for the system to emit a final resolution. The interim measures that derive from this principle are issued to guarantee the execution of the resolution because of the strong possibility that if they are not taken quickly, the environment can suffer irreversible damages while it awaits the final answer from the Authorities.

10. WILDLIFE PROTECTED AREAS

85. The Regulations to the Biodiversity Law, Executive Decree Number 34433, article 3, subparagraph a) defines a Wildlife Protected Area as a "geographical space, officially declared and designated into a particular management category because of its natural, cultural and/or socio-economic importance, in order to meet certain objectives in the conservation and/or management of natural resources."

86. It is important to mention that article 32 of the Environmental Law, Number 7575, under Costa Rican law there are nine different management categories that can be of public and/or private nature and/or a mix of both systems of property ownership; these include the forest reserves, national parks, biological reserves, national wildlife refuge, wetlands and national monuments.

87. Three of these categories have a special protection of its ecosystems, which translates into a restriction in the use of the property in which they are located. This is the case for wetlands, forests and all kinds of protected areas that have bodies of waters that include rivers, water sources, and springs, stream (among others).

88. The Executive Branch, through the Ministry of Environment and Energy, can establish a Wildlife Protected Area in their different management categories through the issuance of an Executive Order. This faculty gives it the power to include within the limits of the Wildlife Protected Area private properties that might be required for the protection of natural resources. If the private properties are required for the creation of national parks, biological refuges and national wildlife refuges they will be expropriated from their owners.

89. It will not automatically become a Wildlife Protected Area because the property can be expropriated by the Ministry of the Environment and Energy unless the landowner agrees to voluntarily subordinate it to the special protection established by law and emitted by the different environmental authorities. The landowner will also have to follow every requirement established for the property's use because of the restrictions of a High Potential Environmental Impact, Category A, meaning that the developer will have to provide additional information and environmental compromises.

90. SINAC is the authority in charge of registering the existence of a wetland as a restriction in a property and the National Registry records the existence of the different restrictions that can affect a property.[16] It is important to mention that, currently, the registered Wildlife Protected Areas are inaccurate and Costa Rica is in the process of updating its data.

91. SINAC is the authority in charge of registering all the category managements that are considered as Wildlife Protected Areas that exist within the Costa Rican territory, which include wetlands. Also in accordance to article 4 paragraph (e) of Decree N°35803-MINAET, the SINAC will include in this registry those wetlands

[16] Article 4 of the Executive Decree N°35803-MINAET establishes how a wetland is geographically located within the Costa Rican Territory by applying the following mechanisms:

a) Thru onsite information and the use of geographical information systems, the coordinates where the ecosystems of a wetland is located can be determined.
b) With the information obtained from point a) digital maps should be elaborated.
c) Each conservation area of SINAC within the territory should manage in its Geographical Information System the information regarding the location, delimitation and classification of the wetlands.
d) The Executive Secretary of the SINAC should establish an official Geographical Information System that will contain the location of all wetlands on a national level.
e) The wetlands that are part of the natural patrimony of Costa Rica must be included in this maps and information system.

that are part of the natural patrimony of Costa Rica.[17] It is also important to note, that the National Registry will record on the properties that are privately owned the existence of the different restrictions that can affect a property, including an environmentally fragile are like a wetland. It is important to mention that, currently, the registered Wildlife Protected Areas are inaccurate and Costa Rica is in the process of updating its data.

92. However, in case of a wetland there is no need for an administrative procedure like its registry to be protected, it is protected *ipso facto*.

93. When a specific area is a Wildlife Protected Area the permits it will require will depend on the management category (public and/or private) under which the Wildlife Protected Area is. In the specific case of wetlands all kinds of constructions and developments are prohibited in a certain range around the protected area/refugee. However, if the project does not invade the protection

[17] Article 4 of the Executive Decree N°35803-MINAET establishes how a wetland is geographically located within the Costa Rican Territory by applying the following mechanisms:

f) Thru onsite information and the use of geographical information systems, the coordinates where the ecosystems of a wetland is located can be determined.
g) With the information obtained from point a) digital maps should be elaborated.
h) Each conservation area of SINAC within the territory should manage in its Geographical Information System the information regarding the location, delimitation and classification of the wetlands.
i) The Executive Secretary of the SINAC should establish an official Geographical Information System that will contain the location of all wetlands on a national level.
j) The wetlands that are part of the natural patrimony of Costa Rica must be included in this maps and information system.

Article 8 paragraph d) of the Executive Decree N°35803-MINAET indicates that the Ministry of the Environment and Energy will have an official catalogue with the ecosystems that are considered as a wetland.

limits of the Wildlife Protected Area, it shall be considered as High Potential Environmental Impact, Category A, meaning that the developer will have to provide additional information and additional environmental compromises.

11. WETLANDS

94. The Respondent has argued in its submissions that certain areas within the Las Olas project site are wetlands. However, these areas alleged by the Respondent as wetlands have not been previously identified by SINAC as wetlands.
95. Executive Decree N°35803-MINAET, provides the technical criteria and procedures that must be followed to determine and mark out a specific area of land as a wetland, whether it has been declared by an Executive Decree or not. Article 4 of this text indicates that in order to identify and classify the ecosystems of the wetlands, there are certain technical criteria established and developed in articles 6, 7 and 8 of this Decree. It also determines that SINAC has the obligation of having a list with the geographical references of the location of the wetland areas within the Costa Rican territory. Article 6 of the Decree makes a detailed list of the ecological characteristics of wetlands, which are: hydrophilic vegetation; hydric soils; hydric condition, and article 7 and 8 determine a certain classification of wetlands.
96. There are a number of other definitions of wetlands under Costa Rican Law, but Costa Rican law requires *new* demarcation of wetlands to follow Executive Decree No. 35803-MINAET above:
    a. Law Number 7224 ratifies the Ramsar or Wetland Convention that defines wetlands as "*areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing,*

fresh, brackish or salt, that includes areas of marine water with a depth, at low tide, that does not exceed six meters".

b. Article 2 of Law No. 731, of Conservation of Wildlife, article 2 paragraph 18 of the Law of Fishery and Aquaculture No.8436 and article 40 of the Organic Law on the Environment, Law No. 7574 define wetlands using the same technical concept as the Ramsar Convention.

c. In accordance with article 7 of the Law of Conservation of Wildlife Law No. 7317, the creation and marking out of a wetland has to be done through the issuance of an Executive Decree, based on technical criteria. The land has to have the characteristics of a wetland determined in Article 2 of Law No. 7317 of Conservation of Wildlife, article 2 paragraph 18 of the Law of Fishery and Aquaculture No. 8436 and article 40 of the Law on the Environment, Law No. 7574 which define wetlands using the same technical concept as the Ramsar Convention.

d. In 1995, article 32 of the Organic Law on the Environment, Law No. 7574 was emitted giving a more ample protection to wetlands and forests by considering them as management categories within a Wildlife Protected Area located in the Costa Rican territory, which are under the administration of the Ministry of the Environment and Energy through SINAC´s National Wetlands program (wetlands) and the State´s Forest Administration (forests). They are in charge of their conservation, the implementation of the policies that protect them and of their plan of use previous presentation of certain requirements to this Authority.

97. Articles 41, 43, 44 and 45 of Law No. 7574 also declare that the conservation of wetlands is of public interest and therefore their existence within a property

imposes certain restrictions regarding the land´s use and any possible development has to be carried out within a certain range that is established by the environmental authorities.

98. Likewise, the property will be registered having a restriction regarding its use in Costa Rica´s National Registry in accordance with article 2 of the Law of Forests Number 7575 and article 37 of the Organic Law on the Environment. The owner can develop the land surrounding the wetland but following the restrictions that are required for this type of protected area. If the wetland is located within a Wildlife Protected Area, it can be expropriated previous compensation unless the landowner accepts to submit the land to a forest regime.

99. The Constitutional Court indicates that the Organic Law on the Environment states a definition of wetland that should be considered in two dimensions: a) the one referring to wetlands as an ecosystem and the other; b) as a category management within a Wildlife Protected Area. The first dimension refers to wetlands as an ecosystem that has a certain type of soil that allows water to deposit for a period of time allowing animal and vegetation to use it as their habitat, resulting in the same definition that is contemplated in the Ramsar Convention, the Organic Law on the Environmental, the Law of Conservation of Wildlife and in the Law of Fishery and Aquaculture. The second dimension is the one that indicates that the wetland is a management category within a Wildlife Protected Area located in the Costa Rican territory, as established by article 32 of the Environmental Law. [18]

100. Now, the principle of legality stems from articles 11 of the Costa Rican Constitution and the General Public Administration Act Law, which determine that

[18] Res. 84921-2004.

all Public Authorities are only authorized to execute the acts that are sanctioned by the law. In regards to Environmental Authorities this means that they have their powers and faculties delimited by what the law determines. Other acts that are not authorized by the law are illegal and will be considered as absolute nullity.

101. Section IV of the Administrative Court, in its Resolution Number 0096 of September 11, 2015, determined that the principle of legality is the basis of the Public Law system that governs the Public Authorities and must be understood in a positive and negative sense. The first one implies that the Public Authorities can only do what the Law allows them to do and the negative concept is that they are not allowed to do what exceeds their faculties; doing the contrary will be considered as an omission of the duties of the public agent.

102. The principle of legality determines that SINAC has to act in accordance with the faculties and powers that the law has granted to this Authority regarding the conservation and regulation of wetlands. Specifically in reference to wetlands this means that, for this Authority to establish that a certain property has a wetland it is essential to determine, through impartial and technical studies that the land indeed complies with the characteristics that are established in the definition of a wetland in accordance to Article 2 of Law No. 7317 of Conservation of Wildlife, article 2 paragraph 18 of the Law of Fishery and Aquaculture No. 8436 and article 40 of the Organic Law on the Environment, Law No. 7574. Therefore, SINAC has no discretionary powers in regards to the determination of a wetland as all its elements are regulated; consequently, once the necessary technical studies have been carried out, either a piece of land complies with the characteristics of a wetland or it does not; hence, SINAC is impeded to use other criteria different to

the criteria that have been expressly determined in the law to determine the existence of a wetland. [19]

103. Indeed, the principle of legality prohibits public officers from using their own discretion when applying the powers and faculties that the law has granted them.[20] Therefore, they are not authorized to use any of their own criteria when executing an administrative act and all of their actions should be limited to what the law establishes. They have to be strictly justified with a motivation that coincides with what the law determined as the objective of that act and may not deviate from this or the rules of logic and convenience. In this case, SINAC cannot indicate the existence of a wetland if it has not previously carried out an *in situ* inspection that gives as a result a technical report that verifies the existence of all the elements that the law defines as proper of a wetland.[21] If they cannot be verified, the public agent in charge cannot use its discretion to declare the existence of the wetland because he will be acting arbitrarily.

12. FORESTS

104. The Forestry Law of Costa Rica defines a forest ecosystem as "*…diverse plants and animals, major and minor, that interact: are born, grow, reproduce and die, depend on each other throughout their life. After thousands of years, this composition [of species] has reached an equilibrium which, uninterrupted, will remain indefinitely and will sustain transformation very slowly".* It defines a forest

[19] Articles 6, 7 and 8 develop these technical and scientific elements to determine a wetland. Article 6 indicates the ecological characteristics of wetlands, article 7 establishes the systems in which wetlands are classified in accordance to the Ramsar Convention and article 8 refers to the determination of wetlands in the maritime zone.
[20] *See* articles 15 thru 17 of the General Public Administration Act.
[21] *See* Articles 6, 7 and 8 of Executive Decree N°35803-MINAET.

as an *"ecosystem native or autochthonous, intervened or not, regenerated by natural succession or other forestry techniques, that occupies an area of two or more hectares, characterized by the presence of mature trees of different ages, species and of diverse sizes, with one or more canopy levels that cover more than seventy percent (70%) of the area and where there are more than sixty trees per hectare of fifteen or more centimeters of diameter at breast height (dbh)".*[22]

105. SINAC is the government body that has the duty to oversee tree felling.

106. To carry out tree clearance, a license is required. Everyone involved in the felling of trees (landowner, agent, timber merchant and/or contractor) must ensure that a license has been issued before any felling work is carried out. All parties involved in illegal felling (that is, cutting trees without the required permits) may be prosecuted before the TAA. Nonetheless, it must be noted that article 28 of the Forest Act/Law 7575 expressly establishes an exception to the above said rule, as it provides that forest plantations, including agroforest systems and trees planted individually and its products will not require a tree felling, transportation, industrialization nor exportation license.

13. FRAGMENTATION

107. First of all, Costa Rica has a national registry where all the properties and survey maps have to be registered in order to legally exist.

108. According to the National Control Fragmentation Rules and Regulations, Number 3391 issued by the Costa Rican National Institute of Urban Housing (in Spanish "INVU"), approved on December 13, 1982, the law authorizes fragmentation of land using easements. The requirements depend on the nature of

[22] *See* article 3.

the property. If the property is rural/agrarian (parcels with minimum 5000 square meters) the easement must have a width of 7m minimum with any length; if the property is urban, the easement would depend on the number of lots, with a width from 3 to 6 meters and 60-meter length as maximum. If there is a public road, then there is no need to establish an easement.

109. Article 2 of the Executive Order number 31849-MINAE-SALUD-MOPT-MAG-MEIC, establishes the need to obtain an EV regarding the fragmentations in which a condo or a lot housing complex is going to be developed. The developer will need an EV to be able to make use of the fragmentation; that is, an EV will be required prior to construction, but not simply in order to fragment the easement and create the easement lots. The requirement of an EV will depend on the magnitude of the construction and the environmental aspects of that certain terrain. If the property owner wants to build a house in the lot that has been previously been fragmented, then the Municipality would have to issue a municipal permit to build but no EV will be required.

110. However, if a wetland or water / river banks are located inside the property that has been fragmented, it will be considered as been a fragile environmental area that will need to comply with certain buffer zones and depending of the magnitude of the project it might be considered as an EV of high impact and might require an EV with the special conditions that having a fragile area imply.

111. A developer may request and obtain several EV´s for a same project, a general one and other EV´s to develop the project in later stages/phases. For a single Project there would only be one; for a Project to be developed in stages/phases, then there would be a possibility to obtain several EV´s that are going to be issued for each development once the owner decides to execute a

certain phase of the project. If each fragmentation within the Project requires an EV because the property is going to be used for the development of a condo or of a housing complex, SETENA would analyze each case and determine if the project meets the environmental criteria and would also determine, based on the technical report of the property (type of soil, the existence of certain ecosystems within the land) the type of category of the project and the requirements it should meet to be able to develop and make use of the land.

112. In order for fragmentation to be legally valid it must be filed before the National Registry and obtain their approval along with the Municipality stamp, that will examine whether the fragmentation complies with local urbanistic rules. A developer may not proceed with the fragmentation without the corresponding requirements; it would not be approved or registered and may not be done without having the EV that the law requires when it is going to be used for a lot housing complex or for condos, and only once construction is going to be effectively executed.

14. CONSTRUCTION PERMITS

113. One of Administrative Law´s most important principles, and yet one that is violated the most, is the principle of intangibility of its own acts ("estoppel rule"). This principle derives from the fundamental right to non-retroactivity, both of laws and administrative acts, as well as the principle of legal certainty. What it means is that administrative bodies cannot issue administrative acts in benefit – in this case of the developer – and immediately after not recognize their validity. Therefore, even though an act may be evidently void, the administrative bodies cannot simply disregard it and not enforce it. For that matter, the legal regime has

established a procedure, respectful of the due process, by way of which an administrative act that benefits a third party may be declared null and void, but, again, the administrative bodies cannot simply determine themselves that an act is void and not recognize and enforce it.

114. As long as an administrative act has not been declared null and void, either by the competent administrative body following the ordinary administrative proceeding, and with the authorization of the Attorney General, or else by a judge, such act is deemed valid and it must be enforced. Likewise, if the authority wishes to suspend the act, then an interim relief injunction may be issued, explaining and demonstrating why there may be irreversible damages and initiating the administrative proceeding within fifteen days, or else requesting the injunction of the judiciary authority.

115. Notwithstanding the above, the Municipality, as well as any other administrative body, has authority to initiate investigations, either *ex officio* or at the request of any party. As long as the investigation is in a preliminary stage, the Municipality is not obligated to grant the developer a hearing. However, if as a result of the preliminary investigation the Municipality concludes that there are enough grounds to initiate an administrative proceeding, then a formal act has to be issued in which the investigated party must be informed of the objective of the proceeding as well as of the list of charges against which it can present its arguments and allegations before an affecting resolution or order is made.

116. Likewise, the Municipality is empowered to suspend a construction permit it has issued before, but it must demonstrate that if it does not suspend it, serious and irreversible damages, either to third parties or the public interest may be

caused. Also, the Municipality is constrained to initiate an administrative proceeding and/or judicial review must be within fifteen days.

117. In this particular case, if the complaints were submitted with no evidence to support them, and still the Municipality ordered the suspension of the permits without any other evidence and/or reasonable allegation of a possible serious and irreversible damage, the injunction could be deemed invalid as it did not comply with its legal requirements.

118. Moreover, as it has been explained before, if the Municipality did suspend the construction permits, but did not initiate an administrative proceeding either to annul or cancel the permits, or else file a judicial review within a reasonable period of time (as explained before, the latest case law has determined that the administrative proceeding or judicial review must be initiated or filed within fifteen days after ordering the injunction), then the injunctions should have been lifted; even more, due to the fact that SETENA did lift the injunction on the EV. Thus, if the injunction was not lifted and was still kept in place without the existence of any administrative proceeding or lawsuit seeking the annulment of the permits, then the Municipality´s conduct might be deemed invalid as it could have breached the Claimants' fundamental rights, converting the injunctions into a final punishment without a due process.

15. TOWN DEFENDER´S OFFICE

119. The Defensoría´s function is to act only as an advocate to the inhabitants; thus, it cannot take any binding decisions but only recommendations. Consequently, in this case, any irregularity that may have caused an illegality in

the process would necessarily have to derive from SINAC, SETENA, the Administrative Environmental Tribunal and/or the Municipality.

120. In fact, the Defensoría´s participation in this case was limited to carrying out investigations that had no binding effects and/or filing claims with the competent authorities. In both cases, the acts of the Defensoría do not have legal effects that may have directly hindered the Claimants.

16. SCOPE OF MUNICIPALITY´S AUTHORITY

(a) Powers to initiate preliminary investigations

121. Municipalities, as well as any other administrative body have authority to initiate preliminary investigations, either *ex officio* or at the request of any party.

122. As long as the investigation is in a preliminary stage, the Municipality is not obligated to grant the developer a hearing. However, if as a result of the preliminary investigation the Municipality concludes that there are enough grounds to initiate an administrative proceeding, then a formal act has to be issued in which the investigated party must be informed of the objective of the proceeding as well as of the list of charges against which it can present its arguments and allegations.

(b) Suspension of permits

123. Likewise, the Municipality may suspend the permits it has issued before. Yet, to do so it must demonstrate that if it does not suspend construction permits, serious and irreversible damages, either to third parties or the public interest may be caused. Also, the Municipality is constrained to initiate an administrative proceeding and/or judicial review within fifteen days.

124. The possible defects of legality in this case may stem from the following:

- If the complaints were submitted with no evidence to support them, and still the Municipality ordered the suspension of the permits without any other evidence and/or reasonable allegation of a possible serious and irreversible damage, the injunction could be deemed invalid as it did not comply with its legal requirements.

- Once the injunction was ordered the Municipality had fifteen days to initiate an administrative proceeding to annul the construction permit or file the corresponding judicial review. However, the file reveals that, although SETENA lifted the suspension on the environmental viability, the Municipality not only did not lift as well the injunction it had ordered on the construction permit, but also did not initiate any administrative proceeding or judicial review to annul the permit. Therefore, as was explained herein, the injunction may have turned out to be an indirect and obliquus way of annulling, cancelling or paralyzing a subjective right (construction permit) without respecting the due process of the law; that is, following an administrative proceeding if the defect was deemed to be evident and manifest, or else filing the corresponding judicial review.

17. ENVIRONMENTAL ADMINISTRATIVE TRIBUNAL (TAA)

(a) Procedure

125. Once a complaint has been filed, the TAA must identify both the complainant and the defendant, as well as analyze if interim relief injunctions are applicable and grant the defendant the right to a defense. The TAA must also verify

that the complaint contains the basic requirements such as the parties' identification, the location of the environmental damages, a breakdown of the facts, evidence, etc. If the complaint fulfills the requirements, the TAA will proceed to collect the necessary evidence to discover the truth about the facts, and may request technical reports from different administrative bodies of MINAE or any other government agency, as well as order an *in situ* inspection.

126. The parties as well as their attorneys have the right to review the information contained in the file, unless the TAA forbids the access to certain documents, in which case it must issue a well-grounded resolution demonstrating that the corresponding information is either a State secret, confidential information of the counterpart, or else that it may confer an unlawful privilege to a party or an opportunity to harm the Public Administration, the counterpart or third parties.[23] Drafts of resolutions, reports and opinions from consulting bodies before they have been turned in are always presumed to be in this condition.

127. Once the preliminary investigation and gathering of evidence concludes, the TAA must initiate the administrative proceeding and summon the parties to an oral hearing in which all the evidence must be examined. The TAA will have a thirty-day period of time after the conclusion of the hearing to issue a final ruling, though, in special cases, an extension of thirty more days may be ordered.[24]

[23] See article 273 of the General Public Administration Act.
[24] See article 110 of the Organic Law on the Environment.

(b) Powers to order injunctions

128. When the seriousness of the facts contained in a claim may suggest that eventual environmental damages of difficult or impossible reparation may be committed, the TAA may order interim relief injunctions to prevent them.

129. For this purpose, the TAA has the authority to issue the following injunctions[25]:

- Partial or complete restrictions or immediate stop of the acts that originate the claim.
- Momentary suspension, either complete or partial, of the acts that provoke the claim.
- Provisional shutdown, either complete or partial, of the activities that originate the claim.
- Others that the TAA deems appropriate to avoid a damage of difficult or impossible reparation.

130. Nevertheless, these injunctions cannot be indefinite, not only because the same regulations and principles explained hereinabove are applicable, but also because article 27 of the Procedure Regulations of the TAA states that, once the hearing has finalized and the evidence has been gathered, this administrative tribunal has thirty days to issue a final ruling (which may be extended to thirty more days, as stated above).

[25] See article 19 of the Procedure Regulations of the TAA, Executive Decree Nº 34136

131. Thus, should the TAA take more than fifteen days to initiate an administrative proceeding, or take an unreasonable amount of time to summon the parties and hold the oral hearing, or else, not issue a final ruling within the thirty day term after the hearing, the injunction should be lifted, either at the TAA, or else through of a writ of "amparo" before the Constitutional Chamber and/or the Administrative Court, as it would become a final administrative penalty that breaches the due process of the law and not an interim relief injunction.

18. INVESTIGATION OF ENVIRONMENTAL COMPLAINTS

(a) Competent authorities

132. SINAC

133. SETENA

134. Town Defender's Office (Área de Calidad de Vida, la Defensoría de los Habitantes)

135. MUNI (Municipalidad de Parrita)

136. TAA

(b) Legal standing requirements

137. Anybody, as anything that has relation with the environment is deemed to be a diffuse interest, therefore anyone has legal standing to do so.

138. Additionally, it is possible to make complaints to different bodies about the same project and at the same time, as each of these bodies is independent in the way that they exercise their powers and functions without the need of the other. The MUNI and the Town Defender are not under the same institutional head or legal entity; therefore, the complaints filed before each of them are not known or

solved by a single resolution or office, but by different authorities with different functions and powers.

139. Notwithstanding the above, it is important to mention that article 22 of our Civil Code provides: "*The Law does not protect the abuse of process nor the antisocial exercise of it…*".

140. Based on that, our law doctrine has considered that the abuse of process is "*an excessive and degrading way of action and omission of someone that, with the excuse of exercising a procedural right, causes harm to the adversary, without this been required to defend itself*".[26]

141. The characteristics of the abuse of process are:

- It does not require an intentional or objective element.
- It is an excessive, unfair and improper conduct.
- In the exercise of rights and empowerments.
- That diverges from the designated objective.
- Causing unnecessary harm.

142. Amongst others, the abuse of process is applicable when a rash complaint or lawsuit is filed by someone that falsifies the facts to the judge.

143. Although there have not been many precedents of abuse of process in our case law, the possible consequences of it may be that the culprit of filing such

[26] Parajeles Vindas, Gerardo. "El Abuso Procesal". Investigaciones Jurídicas S.A., p. 61.

complaints and/or lawsuits could be obliged by a judge to pay a compensation to the affected parties based on articles 1045 and 1047 of our Civil Code if it is a private individual, and/or articles 190 – 194 of our General Public Administration Act if it is a public official.

(c) Procedure

144. The authority that receives the complaint must refer it to SETENA (if an environmental viability has been issued) and/or to SINAC (if the site is within a protected area) and in any case to the TAA. However, if the complaint involves other environmental issues, it might be possible that such complaint must be referred to another government office, as appropriate, in order to initiate the respective procedure.

145. If a formal administrative proceeding is initiated the owner of the land must be notified and must also become a party in order to defend its interests and position with regards to the particular situation filed against him or her. However, in the initial investigation phase, the notification to the owner is not necessary.

146. The owner of the relevant property must be notified and informed of the outcome of the investigations, and once the initial report has been issued, the owner would be entitled to the full file of information. The outcome is recorded in the file kept by the institution ruling on the claim.

147. There are no remedies against the initial investigation report, but once the administrative proceeding has been initiated, the final ruling, as well as other resolutions issued within the proceeding may be challenged by way of several administrative appeals. Likewise, the final ruling or any other preparatory act

within the proceeding that has its own effect, such as an order of injunction, may be challenged before the Administrative Court by way of a judicial review, including an interim relief measure.

148. In the same way, in case the complaint is dismissed, the person who originally made the complaint and/or anybody else may file the corresponding administrative remedies as well as file a judicial review and/or writ of "amparo" (because in environmental matters the legal standing is diffuse).

149. Should administrative remedies be filed, further site investigations could exceptionally be allowed, but their resolution is usually based on the administrative file.

150. Moreover, once a decision has been made on an appeal, the person who made the complaint is still able to make a further complaint before the authority that solved the initial complaint when there are new proven facts on the same matter, or before the Administrative Court or the Constitutional Court.

151. Also, the government office is entitled to unilaterally re-open the case, only when there are new proven facts on the same matter of such case.

(d) Injunctions

152. If environmental infractions are found (or suspected), the correct procedure for halting work on a project consists of granting a hearing to the landowner so that he or she can defend his or her interests and position with regards to the particular situation filed against the project. Then, a site investigation can be carried out by the respective authority in order to review such situation. Construction permits and

the environmental viability can be challenged once the infraction has been demonstrated appropriately and the due administrative process is completed.

153. However, if there is danger of serious and irreversible harm, the government agencies can even issue an injunction without granting a previous hearing to the affected parties (*prima facie*).

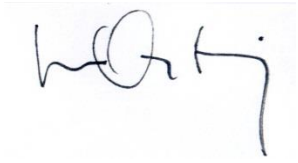
154. However, the order must be based upon evidence and reasonable allegation of a possible serious and irreversible damage to the environment, or at least lack of scientific evidence that the corresponding activity will not cause any environmental harm ("*in dubio pro natura*" principle);

155. Also, a formal administrative proceeding must be initiated within fifteen days following the notification of the injunction to the affected party, or alternatively, the filing of a judicial review. In both cases, the action would be seeking to annul the acts that have been suspended.

156. If the competent authority does not comply with this, the interim relief injunction must be reversed, as keeping an injunction for more than this fifteen-day time period without the initiation an administrative proceeding or the filing a judicial review implies a breach of the fundamental right of due process of law (where an interim relief measure illegally is used as a final administrative penalty without following the due process of the law).

Dated this 3rd day of August, 2016.

Respectfully submitted.



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