ARBITRATION PURSUANT TO THE RULES OF THE UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW (UNCITRAL 2010)

AND

PURSUANT TO THE DOMINICAN REPUBLIC – CENTRAL AMERICA – UNITED STATES FREE TRADE AGREEMENT

AMONG

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Claimants

– and –

THE REPUBLIC OF COSTA RICA

Respondent

SWORN STATEMENT
JULIO JURADO FERNÁNDEZ

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I. INTRODUCTION

1. My name is Julio Jurado Fernández. I was appointed Executive Director of the National System of Conservation Areas ("SINAC") in June 2014. I am an attorney, graduate of the Universidad de Costa Rica in 1986. I also have a Doctorate in Law from Universidad Carlos III [Charles III University] of Madrid, Spain.

2. Prior to being appointed Executive Director of the Sistema Nacional de Àreas de Conservación, I worked at the Office of the Attorney General of the Republic ("Office of the Attorney General") as a Public Prosecutor from 2000 until 2006 where my responsibilities included the preparation of legal opinions and reports by means of which the Office of the Attorney General answered queries that the Government might submit to that office. Furthermore, between 2006 and 2010, I worked on a project for the Government of Costa Rica, financed by Banco Interamericano de Desarrollo [Inter-American Development Bank], which consisted of the preparation of a cadastral map of Costa Rica. Then, in 2010, I returned to the Office of the Attorney General as an Environmental Public Prosecutor.

3. I have worked as a professor at the Universidad de Costa Rica since 1987, in the Faculty of Law and in the graduate program within the Environmental Law Department since 2004, where I was the director since its inauguration in that year until 2014. I have taught, among others, courses in administrative law, constitutional law [and] agricultural law in the undergraduate program in Law. In the post-graduate program, I have taught courses in Environmental, Constitutional, Land Use and Environmental Law.

4. As Executive Director of SINAC and taking into consideration my experience in Public Administration as an environmental public prosecutor, I have broad knowledge of the environmental regulatory framework and the procedures and mechanisms established by various organs charged with the administration of this subject matter in the Government of Costa Rica.

5. I will organize my statement into three sections which I shall present based upon my experience and knowledge of constitutional, administrative and environmental law. The first of these will explain the structure of the administrative entities responsible for protection of the environment in Costa Rica that participated to some degree in this process. The second section relates to the Costa Rican environmental regulatory

framework, specifically to the environmental principles, the wetlands and forestry resources regulations. Finally, in the third section, I explain the Costa Rican administrative law applicable to this specific case.

II. ORGANIZATIONAL STRUCTURE OF THE INSTITUTIONS RESPONSIBLE FOR ENVIRONMENTAL PROTECTION

A. The Ministry of Environment and Energy (MINAE)

6. The Ministry of Environment and Energy of Costa Rica (MINAE) is part of the Central Government and is the institution responsible for managing the country's environmental protection resources. Consistent with the environmental policy implemented in the 1990´s, in 1995, the *Ley Organica del Ambiente* [Organic Law of the Environment] no. 7554 granted the Ministry with new environmental authority and, thereby, created the National Environmental Council, the National Technical Environmental Secretariat, the Environmental Comptroller, the Administrative Environmental Court and the Regional Environmental Boards. Furthermore, other areas of responsibility related to water resources, oil and gas, environmental education, citizen participation, biodiversity, wetlands, climate change and rational use of energy and environmental quality have been added gradually in compliance with the mandates established in various legal requirements currently in force.

7. This Ministry has evolved as the environmental industry has become one of the most significant issues to the country's development plans in the last three decades. As a result of the work conducted by the MINAE, Costa Rica, today, is among the leading nations in the Worldwide Environmental Performance Index and is renowned worldwide for its efforts on behalf of conservation and sustainable development.[1]

8. Given its broad powers, the MINAE[2] is an organizationally complex entity. The agency comprises various decentralized bodies and other dependent bodies with specific statutory duties and expertise with a view to managing the conservation and protection of the environment. The decentralized bodies are essentially technical agencies that are functionally and administratively independent and make decisions. Among these are the National Technical Environmental Secretariat (SETENA), the National System of Conservation Areas (SINAC) and the Tribunal Ambiental Administrative (TAA). For the purposes of this case, please note that I am referring to the structure of several of the bodies that have participated on some level in various stages of the process, among which

[1] *See*, www.minae.gov.cr.
[2] *See*, R-219, Article 2 of Law 7 152, *Ley Orgánica del Ministerio de Ambiente y Energía*

are included the Conservation Areas System where I act as the head in my position as Executive Director.

B. National Technical Environmental Secretariat (SETENA)

9. SETENA is one of the more decentralized bodies of the MINAE, whose purpose, consistent with Article 83 of the Environmental Organic Act,[3] is harmonization of the environmental impact with the productive processes. In order to carry out this function, the law itself allocates among its functions the analysis of environmental impact assessments and their resolution, as well as the determination of the actions necessary to minimize the impact on the environment, among other functions.

10. SETENA is staffed by representatives of various public institutions, such as MINAE, the Ministry of Health, the Water and Sanitation Institute, the Ministry of Agriculture, the Ministry of Public Works and Transportation, the Costa Rican Electricity Institute and the Public Universities.

11. Moreover, the Environmental Organic Act assigns to SETENA responsibility for the approval of the environmental impact assessments prepared by the managed entities, as requirement essential to the initiation of any activity that might alter environmental factors. Specifically, Article 17 of this law provides that, "Human activities that alter or destroy environmental factors or create residue, toxic or hazardous material, require an environmental impact assessment by the National Technical Environmental Secretariat established in this law. The prior approval of the Secretariat shall be a necessary condition for the initiation of the activities, works or projects. The laws and regulations shall indicate which activities, works or projects require the environmental impact assessment".[4] Similarly, the law clearly provides that both private and public institutions must comply with SETENA's resolution in relation to these environmental impact assessments. Accordingly, SETENA is a technical body legally designated to analyze and resolve the environmental impact assessment as well as to monitor compliance, such that in the event of a breach of its resolutions, it may order the stoppage of works.[5]

C. Tribunal Ambiental Administrativo (TAA)

12. The Tribunal Ambiental Administrativo is created pursuant to the Environmental Organic Act as a level of judicial review with exclusive jurisdiction and functional independence in the exercise of its authority. The decisions of this Court exhaust the administrative recourse and its resolutions shall be binding.

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[3] C-184.
[4] C-184, Article 17.
[5] C-184, Article 20.

13. Among its principal functions are administrative proceedings for hearing and resolving complaints presented against any public or private persons for non-compliance with the legislation protecting the environmental and national resources as well as establishing the penalties that may arise from damages occasioned by violations of the environmental legislation. Additionally, the Court has authority to issue injunctions such as work stoppage if it determines that there is a risk of damage to the environment, among other functions.[6] It is important to clarify that the resolutions issued by this Court are not subject to administrative appeal as they exhaust the appeals. Accordingly, in the event of disagreement with the resolution, the matter must be reviewed judicially.

14. The Environmental Organic Act authorizes the *Tribunal Ambiental Administrativo*, if necessary, to impose penalties, issue warnings, order performance guarantees, apply injunctions such as closures, suspensions or cancellation of permits, modify or demolish constructions or impose compensatory obligations. That is, the Law offers a wide range of possibilities pursuant to which the damage may be compensated or potential damage to the environment may be avoided.

15. In this regard, it should be noted that the Constitutional Court has reiterated in various rulings the sanctioning power of the Administration, in this instance, in the hands of the Administrative Environmental Court, whose scope of power is limited to considering infractions of administrative environmental law, apart from the criminal infractions. Therefore, the authorities of the Administrative Environmental Court have sufficient jurisdiction to consider and resolve upon, in administrative proceedings, the complaints presented against public and private parties for violations of the environmental protection legislation.

D. National System of Conservation Areas (SINAC)

16. SINAC is a fully autonomous entity which is attached to the MINAE. It's creation, operation and powers are essentially governed by the *Ley de Biodiversidad*[7] [Law on Biodiversity] number 788, and its Regulation and the Wildlife Conservation Act number 7317.[8]

17. As regards its internal administrative organization, the SINAC comprises various entities with different responsibilities. Some of these (which are of interest for the purposes of this case) are the National Council of Conservation Area (CONAC), the

[6] C-184, Article 111.
[7] C-207, Article 22.
[8] C-220.

Executive Secretariat (which is where I hold the position of Executive Director) and the Regional Conservation Areas.

18. The National Council of Conservation Area (CONAC) is responsible, among other duties, for defining the policies and strategies related to the consolidation and development of the government protected areas, coordinating the preparation of the national strategy for conservation and sustainable use of the biodiversity as well as supervising its management, establishing guidelines and directives for developing coherent structures, administrative mechanisms and regulations of the Conservation Areas, among other duties necessary to meet the objectives of the laws related to the work that SINAC carries out. The CONAC is a collegiate entity comprised of the Ministry of the Environment, the Executive Director, the Director of the Technical Office of the Commission, the Directors of each of the Conservation Areas and a representative of the Regional Board of the Conservation Areas[9]

19. The Conservation Areas are administratively-limited territorial units which are responsible for the protection and conservation of highly-fragile protected areas or of private economic development areas.[10] The country is divided into eleven Conservation Areas, one of which is the Áreas de Conservación Pacífico Central (ACOPAC) [Pacific-Central Conservation Area], which is responsible for the conservation and environmental protection of the Esterillos Oeste area.

20. As relates to the Executive Secretariat and the role of the Executive Director, I should note that its duties are the execution and monitoring of the decisions whose implementation are agreed in various SINAC entities in order that their actions are coordinated among the internal agencies pursuant to the national environmental protection plan and its regulatory framework. With respect to the Executive Director, the Constitutional Court has provided that, in addition to its executive function, the Director holds a representative function. In this regard, the Court has made clear that:

"… as indicated by its name and its duties, the role is principally executive, but in addition, [the Executive Director] is the representative, as, in spite of the fact that the *Ley de Biodiversity* fails to specify which of these entities is responsible for representation of the System, the *Ley General de la Administracion Publica* [General Public Administration Law] is applicable for the definition of this characteristic. Clause 103 of paragraph two of the Law provides that when "together with the deliberating entity there is a manager or executive official, this party shall act as the representative

[9] C-207, Articles 24 and 25; R-220, First Chamber of the Supreme Court of Justice, resolution no. 1007 – F – 2006, December 21, 2006.
[10] C-207, Articles 26, 27 and 28.

of the entity or service. Accordingly, the Director of the SINAC, in addition to being and executive, is also a representative of SINAC".[11]

In other words, the law grants the Board the power to issue directives and the Director the obligation to ensure their compliance.

21. The powers of the SINAC are extremely broad with respect to environmental protection and conservation, as it covers, among other matters, forestry, wildlife, protected areas, protection and conservation of the use of watersheds and water systems. The ultimate goal of the duties that the legislation assigns to the SINAC is the issuance of policies and the planning and implementation of processes to achieve sustainability in the management of natural resources of Costa Rica, all consistent with national environmental policy that the country has promoted throughout the last decades. These duties have been repeatedly ratified by the Courts of our country.[12]

22. Similarly, I should add that the Wildlife Conservation Act supplements the Biodiversity law and its Regulations. More specifically, it establishes that the SINAC is the entity that has jurisdiction over planning, development and control of wildlife. Article 7 of this law includes among its duties establishing the technical methods to follow for proper management, conservation and administration of the wildlife subject of this law and the respective international agreements and treaties ratified by Costa Rica, establishing the national wildlife reserves and administering them, granting, denying or canceling the hunting permits, monitoring, extraction, research, scientific and academic collection and any permit for importing and exporting wildlife, its parts, products and derivatives, protecting, supervising and administering by means of an ecosystemic approach the wetlands as well as determining their rating in national or international importance, creating and administering the management programs, control, oversight and research of the wildlife, coordinating with other competent entities the prevention, mitigation and monitoring of the damages to the wildlife and, generally, promoting the conservation of the natural ecosystems.[13] Additionally, it should be noted that, in the event of damage to the environment, the SINAC is authorized to take measures to restore, recover and rehabilitate it.[14]

23. Given the duties that the Wildlife Conservation Act grants to the SINAC, it is clear that the responsibilities of the SINAC extend beyond protection and conservation of the

[11] R-221, Administrative Litigation and Civil Cassation Court of the Treasury, resolution no. 174 – F-TC-2009, August 20, 2009.
[12] R-221, Administrative Litigation and Civil Cassation Court of the Treasury, Resolution No. 000174 – F-TC-2009, August 20, 2009.
[13] C-220, Article 7.
[14] C-207, Article 54.

Protected Wildlife Areas. The conservation and protection of the Protected Wildlife Areas is indeed one of the main functions of the SINAC, but it is not the only one. On the contrary, the legislator grants many other functions related to conservation, management, control and monitoring of the wildlife throughout the country, so that the existing environmental protection regulatory framework, including the protection, supervision and administration by means of an ecosystemic approach of the wetlands and, generally, the conservation of natural ecosystems.

24. It is precisely for this reason that, for example, with respect to wetlands, consistent with the RAMSAR Convention, the Environmental Organic Act and the Biodiversity Law, it was decided to create the National Wetlands Program.

a. National Wetlands Program

25. As part of the actions carried out by the Government of Costa Rica to achieve sustainable development of all the areas declared as wetlands, the National Wetlands Program was created by means of Executive Decree 36427 – MINAET,[15] within the SINAC.

26. The aforementioned Decree expressly provides that: "Article 2 – The administration, protection and management of the wetlands shall be the responsibility of the National Conservation Areas System through its eleven Conservation Areas. Other public entities, in exercise of their powers, shall cooperate in the protection and management of the wetlands."[16]

27. That is, this Decree ratifies the authority of the SINAC in relation to the wetlands. Furthermore, for their better management and administration, the National Wetlands Program was created as a dependency within the SINAC. The National Wetlands Advisory Board was created within the National Wetlands Program, comprised, among others, by a National Wetlands Program Coordinator, who coordinates the actions and oversees the implementation of the agreements of the National Wetlands Advisory Board. Additionally, the Coordinator acts as the Secretary of the Committee. Moreover, by means of Decree 39161-MINAE, the structure of the Advisory Board is amended and its duties expanded.

28. The national environmental policy and regulatory framework described establishes institutions for the conservation and protection of natural resources, which ranges from the broadest public policy spectrum whose broadest authority belongs to MINAE, which

[15] R-222, Executive Decree 36427 – MINAET, "Creates National Wetlands Program and National Wetlands Committee as implementing authority of the RAMSAR Convention within the National Conservation Areas System and derogates Executive Decree No. 22839 of January 22, 1994 and No. 28058 of July 23, 1999".
[16] R-222, Executive Decree 36427 – MINAET.

is implemented by means of laws such as those previously mentioned that create various decentralized entities that, in turn, have technical and expert authority in each of their areas, among which are included the development of specific plans, the administration of resources, the control and monitoring of areas under their jurisdiction and implementation of the necessary measures to comply with the objectives of environmental protection and conservation established pursuant to the law.

29. All of these administrative agencies act in accordance with the environmental public policy objectives. Therefore, the role that each exercises is independent but complementary to the work of the others.

30. Accordingly, each agency must ensure that its actions remain within the framework of activities and authority that the law grants to it, notwithstanding the fact that, as the protection of the environment is an issued governed by the constitution, there must be coordination among the various entities charged with better achievement of the environmental public purpose.

III. ENVIRONMENTAL PRINCIPLES

A. Legal principles that should be followed by Public Administration on environmental matters

a. Basis of Costa Rican Environmental Law

31. The development of Costa Rican environmental law is based on Article 50 of the Political Constitution, which creates the right to a safe and ecologically balanced environment.[17] Furthermore, the aforementioned Article 50 grants the State the role of guarantor of the protection of this right as it is inexorably related to the right to life and health.[18]

32. The right to health arises from the right to life established in Article 21 of the Constitution.[19] On countless occasions, the Constitutional Court has discussed the strong bond that exists between the right to health and the right to a safe and balanced environment, due to the fact that the latter exists as a guarantee of compliance with and respect for, both the life and health of people. The right to a safe environment must be understood not only as a right but as an ambition: creating a space where people are better

[17] R-214, Article 50, Political Constitution of Costa Rica.
[18] R-185, Constitutional Chamber of the Supreme Court of Justice, Ruling 10791 of September 29, 2004.
[19] R-185, Constitutional Chamber of the Supreme Court of Justice, Vote No. 10791 of September 29, 2004; R-223, Constitutional Chamber of the Supreme Court of Justice, Vote No. 10028 of September 10, 2004; R-224, Constitutional Chamber of the Supreme court of Justice, Vote No. 1228 of February 14, 2003.

able to develop personally, professionally, with respect to their family and where they live.[20]

33. The protection of the right to a healthy and ecologically balanced environment is interpreted, then, as a guarantee of the protection of life and public health and not only of Costa Ricans, but also of the global community. The Constitutional Court has determined that the failure to protect the environment will negatively affect both biodiversity and, in the short-, medium- and long-term, the national and global populace.[21] For this reason, the obligation to protect the environment belongs to the State, which has the inflexible duty to supervise and act in order to avoid actions that might contribute to the degradation of the environment, which would also give rise to the degradation of the right to life and health.[22]

34. The significance of the right to a health and ecologically balanced environment has been broadly interpreted so that the guarantee of this right also includes the possibility of creating a better environment for people. Accordingly, the Constitutional Court has insisted that the duty of the government to conserve nature should not be analyzed in the abstract, but in strict relation to the other spheres wherein individuals act and the manner in which the environment affects them.[23] The convergence between the right to a healthy environment and the right to life consecrated in Article 21 of the Political Constitution[24] has attained a special protection for the environmental right by the judicial system, where the obligation of the State to act quickly and preventively through monitoring and direct intervention.[25]

35. Consequently, the right to a healthy and ecologically balanced environment (and, therefore, the area of law protecting it) has been deemed a transversal right that runs throughout the law, giving rise to the duty to model and reinterpret its institutions in order that they are in line with the government's objective to protect the environment. That

[20] R-185, Constitutional Chamber of the Supreme Court of Justice, Vote No. 10791, September 29, 2004; R-225, Constitutional Chamber of the Supreme Court, Vote No. 4830 of May 21, 2002; R-226, Constitutional Chamber of the Supreme Court of Justice, Vote No. 5722 of May 13, 2005.
[21] R-226, Constitutional Chamber of the Supreme Court of Justice, Vote No. 5722 of May 13, 2005.
[22] R-225, Constitutional Chamber of the Supreme Court of Justice, Vote No. 4830 of May 21, 2002.
[23] R-185, Constitutional Chamber of the Supreme Court of Justice, Ruling No. 10791 of September 29, 2004.
[24] R-214, Article 21, Political Constitution of Costa Rica.

[25] R-226, Constitutional Chamber of the Supreme Court of Justice, Vote No. 5722 of May 13, 2005; R-225, Constitutional Chamber of the Supreme Court of Justice, Vote No. 4830 of May 21, 2002.

obligation gives rise to the need to intervene in the public authority over the elements that may alter the balance of the natural resources.[26]

36. Safeguarding the right to a healthy and balanced environment finds its guide in the public interest, as this orients the actions of the Government in its obligation to prevent or intervene in actions that might cause serious and irreparable damage to the environment. The environmental public interest, consecrated in the Biodiversity Law, orders the rational use of biological resources, such that the development options of future generations, food safety, conservation of ecosystems and protection of human health and improvement of quality of life are guaranteed.[27]

37. As previously mentioned, according to Article 50 of the Political Constitution, the strict relationship to the right to life and health – the State is bound to intervene any time that there is a possibility that human activity might cause irreparable damage. For this reason, the law has granted the Administration various powers in order that, following this guiding principle, it may directly intervene in those cases where so required in order to safeguard the right to a healthy and ecologically balanced environment.

38. Given the significance that this constitutional mandate has acquired, Costa Rica has promulgated legislation specifically for the effective protection of the environment and for the institutionalization of the prohibition on actions that contribute to its damage. Some examples are the Wildlife Conservation Act, the Environmental Organic Act and the Forestry Law.

b. Development of case law regarding the principles underlying the Environmental Law

39. Both constitutional jurisprudence as the administration litigation has developed multiple principles that form the Environmental Law, among which are highlighted equality; protection of the environmental law under the authority of the Government; sustainability in the use of natural resources; the principle of rational use of resources; environmental quality; solidarity; citizen participation; the precautionary principle; the preventive principle.

40. The principle of equality, understood from the perspective of the equality of individuals before the law, without discrimination, is included within the Costa Rican law pursuant to

[26] R-169, , Constitutional Chamber of the Supreme Court of Justice, Vote No. 644 of January 29, 1999; R-224, Constitutional Chamber of the Supreme Court of Justice, Vote No. 1228 of February 14, 2003; R-223, , Constitutional Chamber of the Supreme Court of Justice, Vote No. 10028 of September 10, 2004.
[27] C-207, Article 11.

Article 33 of the Political Constitution[28], and Article 24 of the American Convention on Human Rights.[29]

41. Environmental law is permeated by the principle of equality which, in this context, grants equality to all individuals, to assert their right to a balanced environment and access justice without discrimination in order to defend that right in the event that it has been violated. This principle is also established in Article 2 clause a) of the Environmental Organic Act, which provides that the environment is the joint property of all the inhabitants of the Nation and, therefore, both institutionally and jurisdictionally, citizens are entitled to equal treatment.[30]

42. Similarly, the government obligation to protect the environment arises from the principle of protecting the environmental right for which the Government is responsible, derived from Article 50 of the Constitution mentioned above. As stated previously, the Constitutional Court has been compelling in indicating that the Government must ensure the protection of the right to a healthy environment, interpreting the obligation to defend implies preventing, prohibiting or impeding activities that violate the protected right; the Government must also preserve, anticipating activities that might place the right in danger. That is, the Government assumes the dual role of acting and not acting, as it must refrain from taking any action that might be detrimental to the environment and, at the same time, must issue legislation that complies with the constitutional requirements previously discussed.[31]

43. The principle of sustainability in the use of natural resources also embodies both Costa Rican environmental law and international environmental law. This principle is the result of the capacity to satisfy the present needs without compromising the ability of future generations to fulfill their own.[32] Furthermore, Article Two clauses a) and b) of the Environmental Organic Act establishes the obligation of the Government and the particulars for cooperating in the conservation of the environment.[33]

44. In spite of the plurality of the principles that provide content to the environmental law, the case law repeatedly and overwhelmingly has given special emphasis to two principles: the preventive principle and the precautionary principle.

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[28] R-214, Article 33, Political Constitution of Costa Rica.
[29] CLA-129, Article 24.
[30] C-184, Article 2.a.
[31] R-229, Constitutional Chamber of the Supreme Court of Justice, Vote No. 9193 of October 17, 2000.
[32] Loperena Rota, Demetrio, *Los principios del Derecho Ambiental* [The Principles of Environmental Law], p. 62, 1998, cited in R-230, Administrative Litigation and Civil Tax Court, Section IV, Resolution 79 of August 7, 2015.
[33] *See*, C-184, Article 2.a.

c. Governing principles of environmental most emphasized in the case law

i) Precautionary principle or *in dupio pro natura*

45. The precautionary principle consists of the action to prevent the negative effects that a project or activity might cause to the environment, ensuring the protection and adequate management of resources.[34] This principle is established both in Article 11 of the Biodiversity Law and in principle 15 of the Rio Declaration.[35]

46. This principle constitutes a limit on the actions of the Government, which implies that the Government's actions with respect to sensitive environmental matters must avoid, to the extent possible, serious and irreversible risks and damages. That is, in the event of a lack of certainty regarding the effects that an activity may provoke, the Government must refrain from permitting such activities.[36]

47. A majority of the activities that constitute a risk to the environment are subject to the administrative police power and this is expressed, inevitably, in the government power to grant and deny these types of authorizations.[37]

48. The Government must apply the precautionary principle to the extent that it lacks absolute certainty regarding the safety of an activity with respect to causing serious and irreparable damage to the environment. This implies that the Government has the responsibility, not only based on Costa Rican but international law, to adopt the precautionary measures necessary (including postponing activities that may be harmful) in order keep them from causing irreparable environmental damage.[38]

49. The principle *in dubio pro natura* is, then, an imperative consideration that must be weighed by the Government during its assessment of activities when it is not certain that they will not impact the environment in a serious and permanent manner, so that the necessary measures are taken to avoid serious and irreparable damage. This mandate is especially important for the Environmental Administration, the main entity responsible for the protection of the environment.[39]

ii) Preventive Principle

[34] *See*, C-207, Article 11.
[35] *See*, RLA-40, Rio Declaration on Environment and Development.
[36] Aldo Milano, *El Principio Precautorio* [The Precautionary Principle], pp. 55 to 58, cited by R-190, Administrative Litigation and Civil Tax Court, Section IV, Resolution 83 of September 16, 2013.
[37] Id.
[38] *See*, R-233, Constitutional Chamber of the Supreme Court of Justice, Vote No. 7934 of June 14, 2013; R-179, Constitutional Chamber of the Supreme Court of Justice, Vote No. 9122 of May 21, 2010; R-190, Administrative Litigation and Civil Tax Court, Section IV, Resolution 83 of September 16, 2013.
[39] R-179, Constitutional Chamber of the Supreme Court of Justice, Vote No. 9122 of May 21, 2010.

50. This preventive principle is closely related to the precautionary principle. While the precautionary principle is concerned with a cautious attitude by the administration, the preventive principle is concerned with the projection on certain negative consequences that some activities imply. This principle seeks to avoid these known impacts by means of anticipation.[40]

51. This anticipation is manifested by the preventive policies that supplement the process of obtaining Environmental Impact Studies or by the application of the administrative or judicial injunctions.[41]

52. Based on this principle, case law has developed the importance of precautionary protection in environmental processes, due to the fact that this action is decisive in administratively exercising the right to a healthy environment and to ensure the effectiveness of a judicial ruling.[42]

53. It concluded, therefore, that Costa Rican environmental law promotes the prevention of irreparable environmental damages by means of policies and precautionary protection in the cases in which such measures are appropriate.

B. Protection of the wetlands in Costa Rican law

a. Criteria for categorizing wetlands according to the RAMSAR Convention and national law

54. The ecosystems of the wetlands possess a broad classification and protection under national law, which draws from the RAMSAR Convention ratified on April 9, 1991.[43] This Convention has managed to impact both the scope of the definition of wetlands as well as its protection by affirming in its Preamble that the wetlands "are a highly valued economic, cultural, scientific and recreational resources, whose loss would be irreparable.[44]"

55. The definition of wetlands that the RAMSAR Convention established provides as follows:

> "For the purposes of this Convention, wetlands are the areas of marshes, swamps and peat lands or covered water surfaces, whether part of the natural or artificial system, permanent or temporary, static or flowing, fresh, brackish or salt, including

[40] R-190, Administrative Litigation and Civil Tax Court, Section IV, Resolution 83 of September 16, 2013; R-234, Administrative Litigation and Civil Tax Court, Section IV, Resolution 41 of April 30, 2013.
[41] Id.
[42] Id.
[43] *See*, R-235, Law 7224 "Approval of the Convention on Wetlands of International Importance, especially as aquatic bird habits, RAMSAR Convention".
[44] *See*, RLA-41, Preamble, RAMSAR Convention.

in the marine water areas whose depth during low tide is no greater than six meters."[45]

56. In strict compliance with the broad definition of the RAMSAR Convention, the Environmental Organic Act repeats, in Article 40, the definition of this ecosystem:

"The wetlands are ecosystems that are dependent upon the aquatic systems, whether natural or artificial, permanent or temporary, lentic or lotic, fresh, brackish or salt, including the marine areas up to the posterior boundary of ocean meadows or coral reefs or, in their absence, up to six meters in depth at low tide."[46]

57. Moreover, the Regulations to the Biodiversity Law, Executive Decree 34433, provides a definition of wetlands similar to the prior two:

"Wetlands: Geographic areas containing ecosystems of national importance with dependent aquatic systems, whether natural or artificial, permanent or temporary, lentic or lotic, fresh, brackish or salt, including the marine areas up to the posterior boundary of ocean meadows or coral reefs or, in their absence, up to six meters in depth at low tide, whose main function is the protection of those ecosystems in order to ensure the maintenance of its ecological functions and the provision of environmental goods and services."

58. Finally, Article 2 of the Fisheries and Aquaculture Act, number 8436 also provides a definition of wetlands along the same lines:

"Wetlands: Ecosystems dependent upon aquatic systems, permanent or temporary, lentic or lotic, sweet, brackish or salt, including marine areas up to the posterior boundary of ocean meadows or coral reefs or, in their absence, up to six meters in depth at low tide."

59. The foregoing gives rise to the conclusion that, in spite of the existence of various definitions of the wetland ecosystem in the legislation, the law is clear in its interest in protection this type of ecosystem, and the legislation is consistent in describing a similar notion in each one of the laws. For the purpose of harmonizing the usual characteristics of the wetlands, Executive Decree 35803 – MINAET established the ecological characteristics that permit its identification in Article 6, which provides as follows:

"The fundamental ecological characteristics that an area must possess in order to be considered wetlands are: (a) Hydrophytic vegetation composed of two vegetation types

[45] R-162, Article 1, RAMSAR Convention.
[46] C-184, Article 40.

associated with aquatic and semi-aquatic waterways, including phreatophytic vegetation that develops in permanent watersheds or shallow water tables. (b) Hydric soils, defined as those soils that develop in conditions with high humidity until reaching saturation and (c) Hydric condition, characterized by the climatic influence on a certain region wherein other variables are involved, such as geomorphological processes, topography, material constituting the soil and, occasionally, other processes or extreme events."[47]

60. It is important to note that Opinion 35803 – MINAE offers guidelines of characteristics that may be found in a wetlands ecosystem and that provide a basis for their identification, but that must be comprehensively analyzed. Each wetlands is composed of a series of physical, chemical and biological components that include considerations relating to the type of soil, presence of water, animal species residing therein, vegetation and concentration of nutrients. Not all of the characteristics are present in each wetlands and not all carry out their function in the same manner.[48] The strict interpretation of these criteria would make insignificant the broad protection that both the national and international legislation and the jurisdiction.[49]

b. Wetlands ecosystem protection system in Costa Rica

i) Protection system in the law

61. In Costa Rica, all wetlands, independently of whether they have been declared protected wildlife areas, are protected by the law. This protection is not limited to wetlands that are on public property, but also extends to those wetlands that are on private property.[50]

62. This protection is expressly established in Article 41 of the Environmental Organic Act. This article declares these ecosystems as within the public interest, whether or not they are protected by the laws governing this subject.[51] It is necessary to highlight that the law makes no distinction whatsoever in the protection of those wetlands that have been declared as such and those that have not been; the conservation of the ecosystem applies in all situations, in such a way that its location on a government property is not a requirement for guaranteeing the protection of a wetland.

[47] C-218, Article 6, Executive Decree 35803 – MINAET, Gazette No. 73 of April 16, 2010.
[48] R-233, Constitutional Chamber of the Supreme Court of Justice, Vote No. 7934 of June 14, 2013.
[49] *See*, R-177, Criminal Cassation Court of San José, Ruling 1209 of November 15, 2005.
[50] *See*, R-272, Constitutional Chamber of the Supreme Court of Justice, Vote No. 16938 of December 7, 2011.
[51] *See*, C-184, Article 41.

63. Similarly, Article 42 of the same Law grants MINAE the authority to delimit the protected regions in marine areas, coasts and wetlands.[52] Nevertheless, we should consider that it is a power and not an obligation of the Government. Therefore, the protection is widened to those wetlands that are outside of these areas.[53]

64. Moreover, the Environmental Organic Act, in Article 45, contains a prohibition on carrying out activities that affect the natural cycles of the wetlands ecosystems as well as draining, refilling or any other activity that might eliminate those systems.[54] Following this same line, the Wildlife Conservation Act introduces a crime in its Article 98, establishing that those persons will be penalized who "without prior authorization of the National Conservation Areas System, drain, dry, refill or eliminate lakes, artificial lagoons and other wetlands, declared or not."[55]

65. Thus, it is clear that Costa Rican legislation not only follows the guidelines of the RAMSAR Convention in relation to the definition of the wetlands, but, rather, has created standards that ensure the effective protection of the wetlands ecocystems, in order that they do not suffer changes that might extinguish the ecosystem and the speceies dependent upon it.

C. Protection of forests in Costa Rican law

a. Definition of forest according to Costa Rican legislation

66. Article 3 d) Forestry Law provides that the definition of forest is:

> "Forest: Native or aboriginal ecosystem, whether intervened or not, regenerated by natural succession or other forestry techniques, that occupy a Surface area of two or more hectares, characterized by the presence of mature trees of different ages and varied sizes, with one or more canopies that cover more than seventy percent (70%) of that Surface area and where there are more than seventy trees per hectare of fifteen or more centimeters in diameter, measured at chest height (DAP)."[56]

[52] *See*, C-184, Article 42.
[53] *See*, R-236, Criminal Cassation Court of San Ramón, Ruling No. 178 of April 30, 2008.
[54] *See*, C-184, Article 45.
[55] C-220, Article 98.
[56] C-170, Article 3(d).

67. In addition to the requirements set forth under the aforementioned article, which relates to the description of a forest, case law gave special attention to the protection of the forest as a whole ecosystem, and therefore, a forest must be characterized as a unit in order to avoid the division of the forest area into lots of less than 2 hectares in order to avoid the privilege guaranteed by Article 3 d) of the Forestry Law.[57]

b. Permits for tree-cutting on private property

68. The areas that have the characteristics of a forest are protected by the State even if they are on private property. For this reason, anyone who wishes to use forestry resources or cut down trees must request the respective permits from SINAC. Even the Third Certificate of the Law is solely for private forest property and the legal actions that the owner may exercise.[58]

69. The Forestry Law outlines several prohibitions, such as limitations on the change of soil use on forest-covered land.[59] Article 19 of the Law provides that the cutting of forests shall be limited, after application to the State Forestry Administration in order to determine the possibility of the need for an environmental impact assessment.[60]

70. Additionally, the Law provides that the cutting of trees may only be carried out on lands used for agriculture and without forests, with the prior permission of the Regional Environmental Council or the respective municipality.[61]

71. Costa Rican environmental policy relating to protection of forests raises infractions of the Forestry Law to the level of a crime.[62] The Law imposes a prison sentence from three months to three years on those person who invade a conservation or protection area, or forests or lands that is subject to the forestry regime. The law clearly provides that sanction shall be applied independently of whether the property belongs to the State or is private property. The same sanction is imposed upon those persons who use forest products on private property without the Administration's permit or those person who have not complied with the authorization granted to them.[63]

72. Therefore, it is possible to extract from the rule that the Costa Rican Government has stewardship over the management of both public property and private property, so that individuals are required to apply for permits for use and felling trees before SINAC, exposing

[57] R-250, Office of the Public Prosecutor of the Republic, Opinion C – 200 – 2009 of July 21, 2009.
[58] *See*, C-170, Articles 19-37.
[59] C-170, Article 19.
[60] Id.
[61] C-170, Article 27.
[62] C-170, Article 57.
[63] C-170, Article 61.

themselves to sanctions if they fail to request authorization or if the scope under which [the permit] was granted is violated.

D. Developer obligations

a. Manual for the Environmental Impact Assessment Process

73. In 2007, the Manual regulating the instrument of the Environmental Impact Assessment was Decree Number 32712.[64] That document set forth the guide for completion of document D-1 in order that this would comply with the requirements of Decree Number 31849[65] regarding the Environmental Impact Assessment process.

74. Article 5 of Decree number 32712 clearly establishes that the "developer and environmental consultant that sign the D-1 shall be responsible for the legal, technical and environmental information included in that document, which will be submitted as an Affidavit and, with the knowledge and awareness that, such information is current and accurate and that, otherwise, sanctions could be applied as a result thereof."

75. Thus, the Decree clearly indicates that both the developer and the environmental consultant are liable for the information submitted. Similarly, Attachment No. 3 of the Decree provides that for the completion of D-1, when the activities, works or projects are located in an environmentally fragile area, there must be a biological study. Furthermore, the study must be conducted according to the criteria of a professional biologist.

76. So, since it is a region with wetlands and forests, which is relevant from the biological perspective, it was necessary to have a biological study that indicated the way the activity may affect that region.

b. Obligation to have a multidisciplinary team for implementation of the Environmental Impact Assessment

77. Pursuant to Costa Rican Law, the Environmental Impact Assessment process before SETENA must have been approved before a developer starts project activities; this requirement becomes relevant when drafts, projects or segregations for developments are approved for urban or industrial purposes.[66]

78. The General Regulations on Environmental Impact Assessment Procedures clearly indicates that for the implementation of an Assessment, the developer must have a lead consultant team:

[64] C-215.
[65] C-208.
[66] R-238, Article 2, General Regulations on the Environmental Impact Assessment Proceedings.

"The developer of the activity, work or project must have the services of an inter- and multidisciplinary professionals, specialists in the environmental and technical field of interest team to prepare the Environmental Impact Study. These professionals must be duly registered and up to date in the Register maintained according to the law by SETENA."[67]

79. Thus, the Regulations ensure that professionals involved in Environmental Impact Assessment process are part of a responsible consultant team that must also have a coordinator to plan the performance of the assessment.[68]

80. It is also understood that those responsible for the information to be contributed to the Environmental Impact Study shall be the developer and his consultant team, and they are required to submit any response, clarification or addition requested by SETENA.[69] In addition, during the assessment process, SETENA reserves the right to make"ex–ante" environmental inspections during which it may visit the site where the project would be conducted. [70]

81. It is important to note, then, that although SETENA reserves the right to review the information submitted for analysis by the developer, the onus is on the developer to submit all true and relevant documentation for the specific case. Likewise, the power that the Administration has to revoke the Environmental Impact Assessments arises precisely from the fact that the developer must answer for the accuracy of the information presented.

82. Thus, the reversal of the burden of proof on environmental matters is expressly established in Article 109 of the Biodiversity Law, which states the following:

"The burden of proof, the absence of contamination, degradation or impermissible impact will be the responsibility of the party requesting approval, the permit or access to biodiversity or the party accused of having caused the environmental damage."[71]

83. The article cited above demonstrates that Costa Rica has adopted the theory of the dynamic burden of proof on environmental issues, because the burden of proof is transferred to the person who, as a result of his personal circumstances, is in better conditions to provide truthful information, whether as part of a submission of an application or permit, or if an indictment because of alleged environmental damage.[72] This reversal in the load test of the due directly to the precautionary principle, so that it is intended to achieve greater protection

[67] R-238, Article 31, General Regulations on the Environmental Impact Assessment Proceedings.
[68] R-238, Article 31, General Regulations on the Environmental Impact Assessment Proceedings.
[69] R-238, Article 36, General Regulations on the Environmental Impact Assessment Proceedings
[70] R-238, Article 44, General Regulations on the Environmental Impact Assessment Proceedings.
[71] C-207, Article 109.
[72] R-239, First Chamber of the Court, Ruling 212-2008 of March 25, 2008; R-234, Administration Litigation and Civil Tax Court, Section IV, Ruling 41 of April 30, 2013.

of natural resources and ecosystems if the person who provides the information in a better position to do so.[73]

84. It is precisely under the *pro natura* principle - developed previously - that the burden of proof rests primarily on the developer, as he is the one who must confirm that the project will make no negative, serious and irreparable impact on the natural resources, which does not seriously affect the ecological balance and does not place the health of individuals in danger.[74]

85. That is, the processing of urban permits is influenced by the investment of the burden of proof, due to the fact that this material starts from the presumption of causation of environmental harm. For this reason, it is the developer who must submit the information necessary for the Administration to authorize the project if it deems that there is not serious danger to the environment.[75] The liability placed upon the developer also arises from the concept of objective asset liability established in the Civil Code[76], which establishes objective liability for a risk created. Therefore, the developer is responsible for submitting the information necessary to prove that the project whose development is sought would not damage the environment or compromise public health.

86. Therefore, it is established as responsible for the information in the patent application Environmental Evaluación, and empowers SETENA, to conduct inspections for all projects undergoing environmental assessment.

c. Good faith obligation of the user in relation to the presentation of the Environmental Impact Assessment

87. In accordance with Article 7 of the General Public Administration Law, unwritten laws, by custom, case law and the general principles of law, serve to interpret, integrate and even define the scope of the application of the legislation.[77]

88. Although administrative actions are absolutely subject to the principle of legality, good faith also permeates all legal proceedings, and therefore, must be integrated into the existing relations between the Administration and the citizens .[78]

[73] R-234, Administration Litigation and Civil Tax Court, Section IV, Ruling 41 of April 30, 2013.
[74] R-234, Administration Litigation and Civil Tax Court, Section IV, Ruling 41 of April 30, 2013.
[75] R-256, Administration Litigation and Civil Tax Court, Section III, Ruling 112 of May 5, 2012.
[76] R-257, Article 1048, Civil Code; R-256, Administration Litigation and Civil Tax Court, Section III, Ruling 112 of May 5, 2012.
[77] R-198, Article 7, LGAP.
[78] R-240, González Pérez, Jesús. 1983. *The General Principle of good faith in Administrative Law*. *Real Academia de Ciencias Morales y Políticas [Royal Academy of Moral Sciences and Politics]*, Madrid, p. 35.

89. The principle of good faith is an undisputed protagonist in all areas of law, having been established as one of its general principles; and its presence in administrative law is essential to preventing erroneous expressions of this branch of law, such as abuse or misuse of the right.[79]

90. Good faith in administrative law is particularly important because of the possibility that the user may act to obtain a purpose other than the one contemplated by the law (in which case, it is an abuse of the law),[80] or to ignore in their entirety all the provisions stated in the law (in this case, committing a legal fraud).[81] Therefore, the practical application of the principle of good faith can be seen as "*a limit to/exercise of the right*",[82] avoiding the encouragement of actions that allow the user to achieve results contrary to law or different from those derived from the spirit of the law. The principle of good faith, then, ensures that the right is exercised so that the user adopts normal behavior under the law to which he is subject.[83]

91. Therefore, the principle of good faith is a necessary basis to "the constitution of relations and in fulfillment of the duties, implies the necessity of loyal, honest conduct..."[84] Thus, we can conclude that the principle of good faith is contemplated, intrinsically, within the obligations imposed by the Administration to the developer regarding the Environmental Impact Assessment. In particular, the principle of good faith is reflected in the requirement of the Affidavit of Environmental Commitments:

"Document with format established by SETENA that must be completed and signed by the developer, with the support of an environmental consultant, when needed, in which, in addition to starting the phase of the Initial Environmental Evaluation, a description of the activity, work or project to be developed is presented, its environmental aspects and impacts, the geographical space where it will be installed and an initial assessment of the significance of the environmental impact that will occur."[85]

92. Likewise, the definition of environmental impact assessment assumes that the developer will act in good faith as it raises the application for such a study to the category of affidavit:

"Environmental Impact Assessment (EIA): Procedure of analysis of the environmental characteristics of the activity, work or project, regarding its location to determine the

[79] Id.
[80] R-240, González Pérez, Jesus. 1983. *The General Principle of good faith in Administrative Law. Real Academia de Ciencias Morales y Políticas*, Madrid, p. 18, 38.
[81] Id., p. 18.
[82] Id., p. 22.
[83] Id., p. 23.
[84] Id.
[85] R-238, Article 3.29, General Regulations on Environmental Impact Assessment Proceedings.

significance of the environmental impact. It involves the submission of an environmental document signed by the developer, with the nature and scope of an affidavit. From its analysis, it can derive the granting of an Environmental Viability (license) or the environmental conditioning of it to the submission of other instruments of the EIA."[86]

93. From the above, we can conclude that the process of processing the Environmental Impact Assessment is based, primarily, on the principle of good faith and that the Administration categorically states that the information and documents submitted in relation to the environmental impact of a project shall be taken as true. One may also conclude that it is precisely the nature of the affidavit that SETENA retains discretionary rather than mandatory authority to carry out inspections as an instrument for the review by the developer in the environmental viability application.

d. Obligation to comply with precautionary measures

94. In their Memorial, the Claimants state that they decided "to ignore"[87] the notice informing them of the SINAC resolution wherein they were advised of the administrative precautionary measures leading to the cessation of activities that might affect the environment.[88] They indicate this since the notification "did not have any legal effect" because SINAC did not have the authority to issue such , they idicate such injunctions..[89] These statements are incorrect for two reasons, which I will explain below.

95. First, SINAC does have the power to issue injunctions of this kind. On the one hand, this power is established in the Environmental Organic Act, which has the aim of providing Costa Ricans and the State with the necessary tools to achieve a healthy and ecologically balanced environment. In addition, the Law indicates that by applying it, the State shall defend and preserve that right.[90] In addition, the Act provides that, when facing the violation of regulations of environmental protection or harmful behavior towards the environment, the Government may, among other measures, order the full or partial, temporary or final closure of the events or facts causing the complaint, or the

[86] R-238, Article 3.35, General Regulations on Environmental Impact Assessment Proceedings.
[87] Claimant's Memorial, paragraph 140: "On that basis, and on the basis that (i) they had all the permits corresponding to SETENA and the Municipality, which included the confirmation that the area did not represent a threat to the environment nor were they within an ASP; and (ii) they had done nothing wrong, the Complainants failed to include the SINAC Notice.
[88] C-112.
[89] Claimant's Memorial, paragraph 139.
[90] C-184, Article 1.

total, permanent or temporary, partial cancellation of the permits, licenses, premises or businesses causing the complaint, act or polluting or destructive deed.[91]

96. This also goes hand in hand with the provisions of Article 11 of the Biodiversity Law regarding the precautionary approach, the principle in *dubio pro natura*, the environmental public interest criteria and the criteria of integration, all discussed above. As mentioned, these criteria are guidelines for the Administration, which authorize it to act for environmental conservation, especially when there is possible damage to [the environment].

97. In addition, the Wildlife Conservation Law establishes the framework of action for SINAC to perform all activities and establishes the necessary measures for the proper management and conservation of wildlife in Costa Rica.

98. Therefore, Claimants are not right in stating that SINAC had no authority to issue those injunctions. On the contrary, SINAC fulfilled its mandate and its obligation to prevent any environmental damage, so its act was adjusted to the requirements of Costa Rican Law.

99. The second reason why Claimants' assertion is wrong is because citizens just cannot decide to "ignore" and disrespect an administrative order. That is why the order contained a legend stating that "if there is a violation to this administrative injunction, it is a cause for disobedience of the authority, and the case will be taken to the appropriate judicial authorities."[92]

100. If a citizen does not agree with an administrative resolution, that party has various opportunities to challenge it, as seen in the section set forth below. Accordingly, the citizen may enforce its rights and may provide bases for its arguments regarding reasons for its disagreement with the Government resolution. However, the capricious failure to comply is not an option, because this would cause confusion and uncertainty with respect to the application of the administration acts.

IV. COSTA RICAN ADMINISTRATIVE LAW

A. The administrative record

101. Administrative decions are unilateral statements of will directed at causing a legal effect, carried out in exercise of administrativeduties. *Ley General de Administración Publica*,

[91] C-184, Article 99.
[92] C-112.

which regulates these decisions, establishes that administrative decisions that substantially conform to the legal order shall be valid.[93]

102. In order for an administrative decision to be valid, it must have all the formal and substantive elements. Among the formal elements are the subject, the proceeding and the form. On the other hand, the substantial and material elements refer to motives, contents and purposes.[94]

103. The first formal element of the administrative decions is the subject, which corresponds to the author of the decision. The public official, agency or administrative entity that issues the administrative decision, which at the same time must have a series of requirements, such as investiture[95], competence[96] and ownership. The second formal element is the proceeding. The administrative proceeding is a concatenated series of procedural actions tending to an end. Thus, the proceeding refers to the mode of production of a document.[97] Finally, the third formal element of the administrative act is the form, which is the way in which the administrative act is exteriorized or expressed.[98]

104. With respect to the material elements of administrative decision, the motive is the juridical proposal or the conditioning fact that generates the administrative decision.[99] For its part, the content of the decision is the legal effect or the substantive part of the decision. It the part of the decisionthat stipulates a sanction, authorization, permit or concession.[100] Finally, the purpose is closely related to the ultimate purpose of the Government, which is the satisfaction of the public interest.[101]

a. Final records and preparatory records

105. It's possible to speak of two types of administrative decisions: final decisions and decisions in the process or preparatory decisions. . Final decisions are those that resolve administrative proceedings, with full effects in the juridical sphere of the administrative act. That is, they impose obligations or grant rights. On the other hand, the decisions in process, generally, are decisions of mere preparation that integrate the proceeding prior to the issuance of a determination. These, in and of themselves, are not capable

[93] R-198, Article 128, LGAP.
[94] *See*, R-242, Administrative Litigation Court, Section IV, Ruling 71 of July 14, 2015; R-241, Administrative Litigation Court, Section IV, Ruling 70 of July 13, 2015.
[95] *See*, R-198, Article 111 et seq. of the LGAP.
[96] *See*, R-198, Articles 59 and 129 of the LGAP.
[97] *See*, R-198, Article 214 et seq. of the LGAP.
[98] *See*, R-198, Articles 134 and 136 of the LGAP.
[99] *See*, R-198, Articles 133 of the LGAP.
[100] *See*, R-198, Articles 132 of the LGAP.
[101] *See*, R-198, Articles 131 of the LGAP.

generating direct juridical effects and do not have the force of deciding the basis of the matter.[102]

106. Jurisprudential criterion has been repeated which expresses that merely procedural or preparatory actions may not be subject of impugnation, because, in principle, they do not have direct, immediate or specific legal effects.[103] They only inform or prepare the issuance of the main administrative decision in such a way that they produce no external effect, but only by means of the latter. In order for an administrative decision to have its own legal effects, it should not be subordinate to any other that is subsequent. Accordingly, only final decisions generate effects on the administered parties.[104] Therefore, administrative decisions in process are subject to impugnation in administrative and judicial proceedings.

107. The Constitutional Court has ruled in this regard by stating that this is "[…] a principle of procedural concentration: we will have to wait until the final resolution in the proceeding is produced in order that, through its impugnation, we can present any possible discrepancies that the appellant might have regarding the way in which the proceeding is held, regarding the legality of each and every one of the procedural decisions […]".[105]

108. The foregoing is reinforced by the national law. On one hand, Articles 163 and 345 of the General Public Administration Law refer to the preparatory records and the final records. On the other, the Administrative Litigation Procedure Code provides that the administrative claim will be admissible with relation to the administrative decisions that are final, definitive or in process with its own effect.[106]

109. So, it is clear that Costa Rica administrative law differentiates between preparatory documents and final documents pursuant to the effects they produce on the administered parties as well as for their contestability.

b. <u>The environmental impact assessment as a preparatory act</u>

110. First, it is important to analyze the nature of the environmental impact assessment to understand what type of administrative decision it is. Article 17 of the Environmental Organic Act states as follows:

[102] R-243, Administrative Litigation and Civil Tax Cassation Court, Resolution 12 of February 14, 2013.
[103] R-245, Administrative Litigation Court, Section III, Ruling 842 of October 11, 2002; R-244, Administrative Litigation Court, Section III, Ruling 641 of July 29, 2002.
[104] R-246, Administrative Litigation Court, Section IV, Ruling 101 of October 29, 2013. 2013.
[105] R-247, Constitutional Chamber of the Supreme Court of Justice, Vote No. 4072-95 of July 21, 1995.
[106] R-248, Article 36 of the Administrative Litigation Procedure Code.

"Environmental Impact Assessment. Human activities that change or destroy environmental elements or generate residue, toxic or hazardous waste will require an environmental impact assessment by the National Technical Environmental Secretariat created in this law. **The prior approval by this entity will be a fundamental requirement for initiation of the activities, works or projects.** […]" (emphasis added).

111. As indicated in the previous article, the environmental impact assessment is a necessary requirement for certain activities related to works or projects. That is, the study is understood as a requirement for obtaining other permits. For this reason, achieving environmental viability for its own sake does not involve any effect since if the interested party does not continue the procedures, this has no effect. This is also consistent with the General Regulations on the Environmental Impact Assessment Procedures as this, by its nature and purpose, indicates that the processing of the Environmental Impact Assessment must have been completed and approved prior to commencement of the activities of the project, work or activity.[107]

112. As national courts have indicated on other occasions, with this, "[…] this is not a document that authorizes its holder to exploit the natural resources as it is a step toward the ultimate goal, which is the municipal permit to build. […] This is explained because the environmental study is required for the issuance of the final document, without there being any external effect by means of the latter."[108]

113. One may concluded from the foregoing that the environmental viability 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. The full legal effects would be produced until that time. In their Report, the Claimants confirm this understanding to explain the various permits necessary to conduct a real property project in Costa Rica. Specifically, upon indication that this environmental permit is a necessary

[107] R-238, Article 2, General Regulation on the Environmental Impact Assessment Procedures. In its entirety, it reads: "Article 2 – EIA Process for activities, works or projects. By its nature and purpose, the processing of the Environmental Impact Assessment (EIA) must have been completed and approved prior to the commencement of the activities of the project, work or activity. This is especially relevant when it relates to the approval of drafts, projects and partitions with urban or industrial purposes, procedures relating to the use of soil, construction permits and benefits of natural resources." (underlining not in the original).

[108] R-249, Administrative Litigation and Civil Tax Cassation Court, Resolution 104-F-TC-2009 of June 1, 2009.

step to proceed with many other permits, including the process for obtaining the construction permit before the Municipality.[109]

114. This is consistent with the statement of the Office of the Public Prosecutor citing the Constitutional Court, considering that the conduct of the environmental impact study prior to the initiation of the work is one of the constitutional parameters or guiding principles included in environmental law which, together with the principle of prevention, guarantees the effective protection of this right.[110] Thus, the environmental viability granted by SETENA is only an action that permits continuation of the other procedures for obtaining the permits required to implement the project, but it cannot be seen as a permit in itself to impact the environment. Environmental viability is only an interim communication, instituted by the Government to ensure that the human activities respect the environment and, thereby, protect the environmental public interest. However, its grant alone prompts continuation of other procedures as the action is not an end in and of itself.

c. Inspection reports as preparatory actions

115. *Ley de Biodiversidad, Forestry Law* and Wildlife Conservation Act grant SINAC broad powers related to forestry, wildlife and management of conservation areas. Thus, through the regional and sub-regional offices of the Conservation Areas, SINAC receives complaints related to its authority.

116. The officials of SINAC serve as administrative police,[111] consistent with the Criminal Procedure Code, when criminal investigative efforts are conducted. Furthermore, the Code authorizes them to investigate public action offenses, preventing that their completion or conclusion, identifying the authors and accomplices, and collecting elements of proof to provide grounds for the indictment, among others.[112]

117. During these preliminary investigations, citizens are not required to participate because at this stage it is inappropriate to call for liability or to impose any sanction. It is solely when a decision to initiate an ordinary procedure is taken, that the user is formally notified, with the accusation and intimidation and notice of charges and facts.

[109] *See,* paragraphs 51-62 of the Claimant's Brief of November 27, 2015. *See also,* C-202 regarding the description of the environmental impact study.
[110] R-250, Office of the Public Prosecutor of the Republic, Opinion 200 of July 21, 2009.
[111] R-197, Article 284, Criminal Procedure Code.
[112] R-197, Article 67, Criminal Procedure Code.

118. SINAC's inspection reports in this case were part of this preliminary investigation. These were internal documents of the Administration, which as usual, belong to the fact-finding phase to eventually determine the need to proceed with a formal procedure, either in the administrative or judicial fora. In accordance with what has been explained above, these are mere preparatory acts given that they do not produce a legal effect on the user, and are not capable of being challenged.

119. The Constitutional Chamber has also ruled in this regard, holding that in the preliminary investigation stage, the Administration has no duty to observe all the precepts of due process. This occurs until [the administration] decides to proceed with the ordinary procedure.[113] Also, as indicated by other local courts, "[i]f one considers that the participation of those on whom liability may fall as necessary, we would come to the absurdity of forcing investigators to act together with counsel and potential defendants, which besides the obvious risk of leakage of information it represents, it would hinder the acts within the investigation."[114]

120. That is why the Administration had no duty to notify the user about the inspection reports, or to involve him within the moment when the preliminary investigation of the facts was being carried out

B. Rights of citizens

121. Costa Rica is distinct for having a Judicial Authority renowned for its independence and professionalism. Additionally, it has always been distinguished for the Rule of Law, seeking to recognize and ensure all the fundamental legal guarantees, national as well as foreign. One of these basic principles that governs the any process carried out within Costa Rica is due process. This principle is consecrated in the Political Constitution[115], as well as in various international treaties[116] ratified by Costa Rica and governing the proceeding of the administrative and judicial processes.

122. Thus, the national courts[117] have repeated that this constitutional principle serves as a standard that guides the actions of the Government and the Courts of Justice,[118] which operates as a guarantee for citizens. Pursuant to these guarantees, the user may use different legal proceedings to challenge administrative decisions.

[113] R-251, Constitutional Chamber of the Supreme Court of Justice, Vote No. 729 of January 31, 2003.
[114] R-252, Court of Appeals of Criminal Rulings, II[nd] Judicial Circuit of Guanacaste, Santa Cruz, Ruling 107 of May 21, 2014.
[115] R-214, Articles 39 and 41, Political Constitution of Costa Rica.
[116] *For example*, CLA-129, American Convention on Human Rights, 1969.
[117] *See*, R-254, Constitutional Chamber of the Supreme Court of Justice, Vote Number 2387-1991 of November 13, 1991; R-253, Constitutional Chamber of the Supreme Court of Justice, Vote Number 15-90 of January 5, 1990.
[118] R-255, Office of the Public Prosecutor of the Republic, Administrative Procedure Manual, 2006.

a. Ordinary administrative appeals

123. The General Public Administration Law creates two ordinary administrative procedures, a motion for revocation of a judgment and a motion for an appeal[119] Administratively, the appellant may file: (1) only a motion for revocation of a judgment; (2) only a motion for appeal; or (3) both motions at the same time by means of a "motion for review with an appeal in the alternative". When the motions for review and appeal are submitted jointly, the agency issuing the administrative action must first hear the motion for review, once the action for review has been dismissed or partially dismissed.

124. The LGAP establishes the period of three business days for submitting actions after formal communication of the administrative action has been provided to the user, whether by means of notice or publication.[120] The action for review is filed before the higher authority of the agency that issued the appealed decision.

125. If the motion for review is accepted, the administrative action is totally or partially nullified. In these circumstances, the competent authority must issue a new administrative action consistent with law immediately or order that the process be returned to the moment at which the fault occurred. If the appeal for revocation of a judgment is partially or wholly rejected, and the appellant submitted the recourse with an appeal in the alternative, the lower body automatically refers the matter to the higher one, summoning the parties.

126. As regards the appeal, the parties may broaden or restate their arguments and the higher body hears the restated or broadened arguments in the second instance. Once the appeal is resolved, the ordinary administrative is exhausted.

b. Extraordinary administrative appeals

127. The appeal for review is an extraordinary appeal that is filed as an administrative procedure against final resolutions (whether or not the ordinary appeals have been exhausted). It is filed against the higher authority of the administrative entity that issued the appealed action. However, the appeal for review only proceeds in very special circumstances according to the specific cases expressly indicated in the legislation.[121]

c. Options when there are administrative delays in the resolution of appeals

128. In the instance of a delay in the resolution of an appeal, the appellant has various procedural mechanisms to require that the administration issue a resolution with respect

[119] *See*, R-198, Articles 342 et seq. LGAP.
[120] R-198, Article 346, LGAP.
[121] R-198, Article 353, LGAP.

to its petition in a short period, by filing one or more of the following recourses or proceedings: (1) the procedural protection of legality; (2) the complaint proceeding; and (3) the application for the delaying entity.

129. The first appeal or proceeding, the procedural protection of legality, is a suit that is filed in the Administrative-Litigation Court as the result of the existence of omissive conduct by the administration, when they are legal periods that were not respected. The regulation and construction of this procedural mechanism arises from an application by the Administrative Litigation Court of the case law of the Constitutional Chamber of the Supreme Court of Justice. It somehow becomes positive in Article 35 of the Administrative Litigation Procedural Code.

130. The notice of appeal for the procedural protection of legality is very simply and lacks major formalities. The judges reviewing the procedural protections of legality, without any particular process and within a period that normally does not exceed two weeks, notify the administrtion of the application and grant a period of fifteen business days to resolve the appeal. If the administrative respondent accepts the appeal and resolves it within the period of fifteen days granted by the judge, the legal protection is deemed terminated.

131. The majority of the entities issue resolutions with respect to appeals within the period granted by the judge. If the appeal is not resolved within that period, the administration must provide reasons to the judge for the delay in the resolution, the process becomes an ordinary civil action and there may be a series of expenses. The responsible official may be personally sued , for example, for failure to obey the authority. Accordingly, all possible efforts are made to resolve appeals in the period granted by the judge.

132. The protection of legality is definitely a very effective method, and well-used by Costa Rican citizens in order to obtain a quick resolution to any pending administrative appeal.

133. The second procedural method is the complaint proceeding,[122] which is submitted to the superior authority when the lower administrative body delays in accepting appeals or fails to comply with the published mandatory periods. This follows the admonition of the official and, consequently, the attention to the matter raised as quickly as possible.

134. The third procedure, the application before the delaying entity, is not a mechanism that is expressly governed by law. It is basically urging the entity that has not resolved the appeal to do so.

d. The judicial process in the administrative-litigation court

[122] R-198, Article 358, LGAP.

135. The person or entity affected by an administrative action may file an action before the Costa Rican Administrative-Litigation Court.[123] Administrative litigation actions seek to nullify an administrative action or attack administrative behavior and/or claim compensation for harm and damages for the time in which the administrative action or behavior affected the interests of the complainant. It is filed against the institution that issued the resolution whose nullity is sought.

136. It is not necessary to exhaust the administrative instance in order to commence administrative litigation.[124] If an appeal is being processed administratively and an administrative litigation action is filed, the administrative appeal may be suspended while the administrative litigation action is resolved.

137. Pursuant to the foregoing, it is clear that citizens has numerous resources for exercising his rights both administratively and judicially. Citizens even have the opportunity to urge the Government to issue a resolution quickly when it has delayed resolution. These show how, in practice, due process is guaranteed and the tools are offered so that the user may avail itself of prompt justice.

V. CERTIFICATION

138. I, Julio Jurado Fernandez, ratify the content of this witness statement and certify that the content and statements contained herein are true.

Signed,

[Signature]

April 8, 2016

[123] The Administrative Litigation Procedure Code governs these actions.
[124] R-248, Article 31, Administrative Litigation Procedural Code.