ARBITRATION UNDER THE ARBITRATION REGULATION OF THE

UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW

(UNCITRAL 2010)

AND

UNDER THE FREE TRADE AGREEMENT BETWEEN CENTRAL

AMERICA, UNITED STATES, AND DOMINICAN REPUBLIC

BY AND BETWEEN:

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PARK, JEFFREY S. SHIOLENO, DAVID A. JANNEY, AND ROGER

RAGUSO

Claimants

- and –

THE REPUBLIC OF COSTA RICA

Respondent

WITNESS STATEMENT

JULIO JURADO

FERNÁNDEZ

October 28, 2016

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1. INTRODUCTION

1. My name is Julio Jurado Fernández. On June 22, 2016, I was appointed as Attorney General of the Republic, which appointment was ratified by the Legislative Assembly of Costa Rica on October 6, 2016. From June 2014 to June 30, 2016, I developed the functions of Executive Director of the National System of Conservation Areas (hereinafter "SINAC"). I graduated as attorney from University of Costa Rica in 1986. Additionally, I have a Ph.D. in Law from Universidad Carlos III of Madrid, Spain.

2. Before being appointed as Attorney General of the Republic, before having developed my functions as Executive Director of the National System of Conservation Areas, I worked in the Office of the Republic Attorney General (hereinafter the "Office of the Attorney General") as an Attorney from 2000 to 2006, where my responsibilities included the preparation of legal opinions and judgments through which the Office of the Attorney General would answer to the Administration any inquiries filed by the latter. Additionally, between 2006 and 2010, I worked in a project of the Government of Costa Rica financed by the Inter-American Development Bank consisting in the preparation of a cadastral map of Costa Rica. Later, in 2010, I returned to the Office of the Attorney General as Attorney for Environmental Protection.

3. I worked as a teacher at the University of Costa Rica from 1987, in the Law course of studies and in the graduate school of Environmental Law from 2004, serving as director from the opening of such graduate course in that year until 2014. I delivered, to mention but a few, courses on administrative law, constitutional law, and agrarian law in the Law degree (undergraduate school). In graduate school, I delivered courses on Constitutional Environmental Law and Territorial and Environmental Planning.

4. Taking into account my experience in the Public Administration as attorney for general protection, I have extensive knowledge of the regulatory framework on environmental matters and of the procedures and mechanisms established by the different bodies responsible for the administration of this matter in the Government of Costa Rica.

5. I will structure my statement in six sections, which I will develop based on my experience and knowledge on constitutional, administrative, and environmental law. The first section will explain environmental viability as a preparatory act and the existing theories on this matter in Costa Rica. The second section will refer to the competences and obligations of the Environmental Technical Secretariat (SETENA). The third section will develop the matter of precautionary measures in the environmental-administrative field. The fourth section will discuss the good faith principle and its application for the Public Administration. The fifth section will resume the environmental regulatory framework of Costa Rica, environmental principles, the regulation on wetlands, the rules for interpretation and the application of the principle of legality. Lastly, the last section will provide an explanation on shoreline area concessions and the applicable regulation in Costa Rica. To finish, I will refer to certain legal uncertainties I have identified in the report prepared by Mr. Ortiz.

2. DEFINITION OF PREPARATORY ACTS IN ADMINISTRATIVE LAW

6. Both the national case law and the doctrine have established that the preparatory acts are those that lack any capacity to impinge on the sphere of individuals' interests and that generate no legal effects. In other words, they are acts of a merely formal nature that do not go far enough to analyze the merits of the case.[1]

7. It is worth mentioning that the result of a final act is the creation of a relationship between the Administration and the individual, establishing rights and obligations for the parties, as well as the possibility to modify or terminate previous legal situations.[2] Hence, it is possible to interpret that the acts of a merely formal nature are those making part of a procedure directed towards the final act. These acts are performed beforehand and are considered as preparatory requirements, for which reason they lack any effects in the sphere of the individuals' interests and they do not establish legal relationships of an administrative nature.[3]

8. In this context, it must be understood that the vital requirement for cataloging an administrative act as a final act is that it must not be conditional upon the result of any later act.[4]

2.1 Environmental viability as a preparatory act

9. The environmental viability issued by SETENA is framed under the features of the concept of

preparatory act, in the context of the authorizations that the developer must obtain for starting a project.[5]

A. **With no disrespect to Mr. Juardo, his above premise is completely wrong and he is attempting to deceive the court or more specifically the arbitration panel. He conflates two different situations, a preparatory act in paragraph 6, and then wrongly States that the environmental viability is a preparatory act. Here is what Mr. Jurado states in his first witness statement** "National Technical Environmental Secretariat (SETENA)

"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".

"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]

You don't have to have a law degree or being Atty. Gen. of the country to understand that laws are not proprietary acts. Those are instruments that give legal rights to both private and public institutions. The above statements made by Mr. Juardo in his first witness statement are in direct contradiction to his above statement that a SETENA viability permit is a preparatory act. It is not. It is a necessary first act that must be completed in order to get a project cleared environmentally. Once cleared by SETENA with a legal and binding resolution, it clears and green liked the project to move forward do the ultimate goal of acquiring a construction permit, that will then give rights to actually begin construction. However, the SETENA EV permit issued via a binding and legal SETENA Resolution comes with the force of law and gives the developer two things. (1) legal notice that the land set for development has no environmental sensitivities that would prohibit the development and (2) legal authority to proceed to the next step of actually getting a construction permit. Without a letter from MINAE that clears the land environmentally being sent to SETENA, SETENA would not issued the environmental viability permit and the prospective development would be stopped dead in its tracks. MINAE did issue that clearance letter on April 2, 2008. Once that box was checked along with all the other boxes that SETENA had to check, then and only then did SETENA issue their binding Resolution on June 2, 2008. Once issued that resolution became a government order they clearly stated that all public and private institutions were bound by the order and were required by law to comply with it. Mr. Juardo is simply wrong on the law and knows it and it's clear this is an attempt to deceive the court. This fundamental deception must be clearly exposed and attacked by the legal team and their experts.

10. Article 17 of the Organic Environmental Act states that the environmental impact assessment is a

vital requirement for starting any activity or project that may cause any alteration, damage, or disruption to the environment.[6]

11. It is worth highlighting that the environmental viability granted by SETENA constitutes a previous requirement or an act of a merely formal nature. This is subordinated to the issue of a final act, which is materialized with the construction permit provided by the pertinent Municipality.

12. This subordination to the municipal permit granted is precisely what characterizes the environmental viability as a preparatory act, since its sole issue does not allow the individual to start the activity, work or project for which it submitted the environmental impact study.

13. In other words, obtaining the environmental viability alone does not generate any legal effects, since this creates no rights in favor of the individual but it is part of the authorizing process[7], and therefore, it can be cataloged as a preparatory act without inherent effects.

The above is again utterly false.

2.2 Case law of environmental viability as a preparatory act

14. As mentioned by Mr. Ortiz in his report[8], it can be affirmed that there exists a dichotomy in terms of case law on the nature of the environmental viability, and the procedure for challenging it must be subject to if classified as a preparatory act with or without inherent effects.

15. The relevance to determine the effects of the act lies in the procedure for challenging that is available for each of these concepts, and the annulment procedure that should be started.

16. Article 163 of the General Law of the Public Administration, in its subsection (2), states that the preparatory acts shall only be challenged jointly with the final act, except the formal acts have generated any effects.

2.2.1 Criterion on environmental viability as a preparatory act without inherent effects

17. The administrative-contentious case law has declared that the environmental viability must not be confused with a license or a permit for the exploitation of natural resources, since it only serves the purpose to comply with a requirement allowing the developer to continue their process towards

the final act resulting in the realization of their project: the municipal permit for construction.[9]

18. Additionally, the administrative-contentious case law line indicates that the environmental viability is the instrument through which it is ensured the application of the precautionary principle in the processing of the construction of a work or project.[10]

19. By submitting the study on environmental impact, the developer delimits the risks that their project or work may cause, and they commit to taking certain corrective or mitigation measures to avoid a greater impact on the environment than the strictly necessary one, and allowing to keep a sustainable development.

Here's another attempt to deceive the court/panel. If there are no mentions of any environmental sensitivities on the project site in either the MINAE clearance letter or the SETENA environmental liability permit, then there is nothing to mitigate. Mitigation only kicks in if there are clearly identified environmental sensitivities on the project site. Then mitigation provisions would be negotiated and implemented. However, there are none mentioned in the MINAE clearace letter that MINAE sent to SETENA on April requirement, before a SETENA permit would be issued. If that MINAE clearance letter would have mentioned it to SETENA any environmental sensitivities, SETENA would not have issued a permit and would've required a mitigation plan by the developer to deal with those environmental sensitivities. However, there was no such mention of any environmental sensitivities in the MINAE clearance letter they issued on April 2, 2008. SETENA was required to accept that letter by MINAE and based upon the fact that it cleared the land environmentally and mentioned no environmentally problems with the project site, such as no wetlands, no Forest, no bird sanctuaries, no turtle reserves, no Lakes or lagoons, and no ecosystems; SETENA issued their permit wthout mentioning the necessity to mitigate anything since there were none MENTIONED by MIANE in their clearance letter.

Hence, the function of the environmental viability is to serve as the preparatory act ensuring that the work or project has been analyzed from the precautionary principle perspective, and it constitutes the formal requirement for environmental damage prevention. As provided in Article 17 of the Organic Environmental Act, the previous approval of the environmental impact study,

and the issue of the environmental viability, are a necessary requirement for starting the project. However, the regulation does not define the environmental viability as being, in itself, the document allowing to start the construction of a work, and it is not provided as a guarantee that the project will be actually executed. It is precisely this feature which distinguishes the granting of the environmental viability by SETENA from any final act.

No one is saying that the issuance of a SETENA environmental permit is a permit to start construction, we are not stupid developers. However, it is a final act by SETENA in that SETENA has carried out their responsibility under the law in checking all the boxes and once checked issued a SETENA Resolution that must be complied with under the force and penalty of the law.

20. In this context, the administrative-contentious case law characterizes the environmental viability as a preparatory act without inherent effects, which means that it could not be challenged in isolation, but that the efficacy thereof shall be discussed jointly with the final act.

The the factor the matter is that environmental viability permit was challenged in isolation and all the other government functionaries that challenge it did so illegally and simply refused to abide by the law and comply with the legally issue SETENA resolutions

2.2.2 Criterion on environmental viability as a preparatory act with inherent effects

21. In 2010, the Constitutional Chamber set a precedent on the matter, expressing that the environmental viability is a license favoring the individual, and, therefore, it is defined as a preparatory act with inherent effects.

22. Based on this definition, and consistent with subsection 2 of Article 163 of the General Law of Public Administration, a preparatory act producing inherent effects can be indeed challenged in an independent manner, without the need to count on a final act for starting such challenging.

(A) Environmental viability as an act that can be challenged in an independent manner

23. The first case-law line on the challenging process of preparatory acts was developed by the Administrative Contentious Court and by the Office of the Attorney General of the Republic.

24. The Administrative Contentious Court and its Court of Cassation have been emphatic when defining that the unscathed feature of preparatory acts is that, in themselves, they cannot generate any legal effects, since they do not solve the substance of the matter.[11] The acts of a merely formal nature[12] serve as preparatory requirements for substantial resolution, and they lack the expression of will of the Administration, but they serve as a requirement for the Administration to make a decision.[13]

25. Based on this definition of preparatory acts, and pursuant to Article 163 subsection 2 of the above-mentioned General Law of Public Administration, the administrative-contentious case law has indicated, on several occasions, that the environmental viability is not subject to independent challenging, since it produces no direct or inherent legal effects.[14]

This simply it is a false statement. If there are no inherent legal facts with the issuance of an environmental fidelity permit, then why does then why does that organic act law that's quoted by Mr.Jurado quoted in his first witness statement, say that all public and private institutions must comply with that government order. Mr. Juardo correctly told the truth in his first witness statement regarding the fact that all public and private institutions must comply with SETENA Resolutions. But it was inconvenient truth for the government, since it is obvious that none of the government functionaries complied with the law. Therefore Mr. Juardo has to do a course correction and in doing so he is contradicting himself and attempting to deceive this panel. In trying to explain away the statements he made in his first witness statement, he only succeeds in digging a hole deeper, when he says this in his clarification statement the second witness statement, quoted by Respondent Rejoinder in paragraph 727. Unfortuately, this statement also confirms Juardo's original statement in his first witness statement.

Dr Jurado, in his second witness statement, states what is the correct interpretation of Article 19 and explains why Claimants' interpretation lacks in precision and logic:

> **"The Environmental Viability certainly binds public authorities**; however, it cannot be understood to limit the power of public authorities to protect the environment where they observe that the Environmental Viability is causing environmental harm. To interpret otherwise would be to imply negative implications about the obligatory nature given to an Environmental Viability through the Regulation.
>
> **What's dose it bind them to**? **It binds them to complying with the law and government order that goes into effect once SETENA issue their environmental and viability permit. No one is suggesting that the permit limits the power of the public authority to protect the environment.**
>
> [A]n environmental viability is not granted as a guarantee for the execution of the project or construction work, given that is only one of the requirements of the authorization procedure. It should not be forgotten that an environmental viability is strictly linked to environmental law, and thus operates under the precautionary principle and compels the administration to take action in this direction.
>
> **Again, the developers are not stupid and clearly understand that the issuance of the environmental viability permit, does not authorize construction. But it does give the developer legal rights identified under the organic law that Mr.**

Juardo quoted in his first witness statement. It also Green likes the project to proceed to the next step, and ultimate goal, of acquiring the construction permit that would be issued by the municipality. The municipality will not issue the construction permit without verifying that SETENA issued their environmental liability permit. The entire process of getting a Real estate development permit is a series of progressive steps that all must be successfully completed by both the developer and the respective permitting Government agencies. Each step taken by the develop comes with its own legal protections and guarantees.

Once completed, and the developer is issued all leglly required permits, then the developer must have confidence that they can work, in confidence, under the authority of those legally issued permits, without fear of having the investment destroyed by corrupt public officials and charged the developer charged with environment crimes after refusing to pay a bribe. And or, an attempt is made on his life by the developer by the Government when he tries to defend himself against Government corruption.

Therefore, the Administration can carry out an audit to follow up on mitigation measures to which the developer agreed in the environmental impact assessment, thus ensuring a healthy and ecologically-balanced environment as enshrined in Article 50 of the Constitution, and may act in any instance of risk of environmental damage."

Many Govenmental audits were carried out by bothe MINAE and SETENA after the issuance of the environmental and the construction permits. They all concluded that there were no environmental problems on the project site. Jorge Bricenio, was a governmental internal auditor, who was specifically tasked with the duty to make sure that the Government of Costa Rica complied with Costa Rica law. After doing a deep dive into the Las Olas matter, he concluded that everything they were doing was illegal. He specifically warned the Costa Rica functionaries of serious civil and criminal penalties that could flow from from their illegal conduct. He also warned of serious liability to the treasure of Costa Rica do their illegal conduct. His warnings fell on deaf ears with the government functionaries that who were engaging in this illegality, and he resigned because no one would head his warnings.

26. Additionally, the administrative contentious branch has declared that the preparatory acts shall be challenged jointly with the final act, which does indeed create tangible rights and obligations.[15] The preparatory acts could even have internal effects (i.e., for the Administration itself) but still they would not be producing effects for any third parties.[16]

27. This theory has been the one used by the Office of the Attorney General of the Republic, and which, in my opinion, is the most accurate and appropriate one.

2.2.3 Environmental viability as an act subject to the administrative proceeding of annulment

28. The case law developed by the Constitutional Chamber is consistent with the resolutions of the Administrative Contentious Court in terms of the criterion that the preparatory acts without inherent effects are unchallengeable in an independent manner, and that they must be reviewed jointly with

the final act.[17]

29. Notwithstanding the above, the Court has indicated that the environmental viability is a license favoring the individual, which is the reason why it also indicates that, for its annulment, the administrative proceeding established in Article 173 of the Public Administration General Law.[18] It has also stated that ex officio nullity of the environmental viability shall only be valid in the event that there exists absolute, evident, and manifest nullity.[19]

30. Such procedure constrains the Public Administration to request the opinion of the Office of the Attorney General of the Republic, certifying that the nullity is absolute. This opinion shall be binding for the Administration, and if it is favorable, the Administration may continue with the annulment. The nullity procedure also includes the requirement of hearing the parties before the final act.[20]

31. Then, it is clear enough that there exist two case-law currents of thought on the nature of the environmental viability and the incidence it has in the legal sphere of the individual.

32. Now, contrary to what has been suggested by Mr. Ortiz in his report[21], the Report C - 293 - 2013[22] does not present any inconsistencies whatsoever with the criterion outlined in my first statement. The report does not represent my personal criterion and it was issued as part of the administrative proceeding under above-mentioned Article 173 for environmental viabilities that the Office of the Attorney General must apply as a consequence of a precedent issued by the Constitutional Chamber in 2010, which shall compulsorily be observed.

33. However, it must be added that both case-law currents of thought were exposed in the same report, and that it was not expressed which criterion is the one favoring the Office of the General Attorney of the Republic and me. It was simply indicated which criterion should be followed up in strict compliance with the erga omnes power of the judgments issued by the Constitutional Chamber.[23]

2.3 Impossibility to carry out an administrative proceeding

34. As it was explained above, and notwithstanding the criterion exposed by the Administrative Contentious Court, a precedent of the Constitutional Chamber would make it compulsory to carry

out an administrative proceeding for annulment. [24] It must be also made clear that SETENA has requested the opinion of the Office of the General Attorney of the Republic on the start of such proceeding in the event of environmental viabilities, and it has been made clear to it that it must follow the administrative proceeding for annulment pursuant to the order of the Constitutional Chamber.[25]

There was no attempt by the government to carry out the process of and administrative annulment of the Las Olas EV permit. There was no attempt by the government functionaries to even engage SETENA into the question of the EV permit they issued to Las Olas, as required by law. There was also no attempt by the government to get a witness statement from SETENA about their EV permit and the illegal nullification of their permit.

35. What is not mentioned is that the process for administrative annulment could not be performed by the pertinent body should there exist any pending lawsuit in court action that may impact on the proceeding for annulment. The prejudiciality assumption must be analyzed for each case in particular, since the provisions of a final resolution may be binding for the acting of the Administration and the manner in which the process for annulment must be performed.

At the time of the illegal nullification of the SETENA EV permit, there was no legal pending court action by the developers.

3. SETENA LEGAL OBLIGATIONS

37. The main mission of the National Technical Secretariat, created by the Organic Environmental Act[26] is the review of environmental impact assessments, which is a technical instrument of the environmental impact assessment, the purpose of which is to analyze the activity, work or project proposed, regarding the environmental condition of the geographic space where such activity, work or project is proposed, and, based on this, to predict, identify and assess the significant environmental impacts that certain actions may cause on that environment and to define the set of environmental measures allowing for the prevention, correction, mitigation, or compensation thereof, in order to achieve the insertion as harmonious and balanced as possible between the activity, work or project proposed and the environment where it shall be located.[27]

Again any correction or mitigation that would be necessary in the land designated for development would've been indicated in the EV permit when it was issued. There was not an issue because there was no identified environmental situations that would require mitigation or corrective action. Since 30% of the land must be set aside is green areas, the developers set aside any wet areas created by

rainfall coming off of the Hills into narrow valleys. This is just a commonsense decision on the part of the developers but it wasn't identified in the SETENA EV permt.

38. The approval of the environmental assessment instrument must be invoked by the interested party, who shall bear the expenses of such proceeding and who shall integrate an interdisciplinary team to fully comply with the requirements of the environmental assessment[28], as well as propose a series of mitigation measures counteracting the environmental damage that their activity will cause.

39. Therefore, and as indicated in my first statement[29], SETENA is the competent entity to approve the environmental impact studies submitted by the developers, and, consequently, to issue the environmental viability.

3.1 Environmental Impact Assessment

3.1.1 Obligation to review compliance with requirements

40. The environmental impact assessment may be approved or rejected by SETENA, or if necessary, the interested party may be requested a proposal of preventive, corrective or mitigating measure.[30]

(A) Necessary requirements for the granting of environmental viability

41. SETENA has the power to approve those works or projects subject to the technical-scientific administrative proceeding of the environmental impact assessment, as provided in the General Regulations on the Procedures for Environmental Impact Assessment. [31] For such purposes, the environmental impact assessment consists of three stages: a) an environmental assessment defining the environmental features of the project; b) a multidisciplinary environmental impact study to predict and assess the environmental impacts of the project or activity; and c) control and follow-up of the work, according to the environmental commitments undertaken by the developer.[32]

42. In the case under study, the developer submitted a form called D1 to request the environmental viability of the project. Both the information that must be included and the specific documents that must accompany this type of request are numbered in the article 9 of the concerned Regulation, in particular a detailed description of the productive activity, its size, the services required, and the resources that will be used. In turn, it is also required to submit the amount of waste and

environmental risk factors that the project would generate, and the measures that the developer must take in order to avoid or mitigate the environmental impact to be caused by the activity. [33] Additionally, geological, biological, and archeological studies of the site [34] must be submitted, as properly indicated by Mr. Luis Ortiz.[35] The function of these studies is to prove the suitability of the premises for the execution of the designed project.

43. It is of utmost importance to highlight that both the request containing information about the project, and the documents attached to the form are supported by an affidavit stating that the information submitted to the Public Administration is true, complete, and pursuant to the environmental law.[36]

44. Although SETENA has the authority to carry out inspection rounds ex ante, these are facultative and do not need to be performed for each environmental impact assessment analysis. These visits serve the purpose of verifying the socioeconomic, cultural, and technical aspects that were included in the environmental impact assessment by the developer.[37] The Regulation does not establish, at any point, the responsibility of verifying elements solely of an environmental nature (the existence of protected areas, for example), since the confirmation of these elements is outside of the scope of its mandate and competence. This is made clear through the exhaustive list of duties assigned to SETENA under section 17 of the Environmental Organic Law.

45. That said, it is evident that SETENA, by law, must provide a confirmation of requirements in this stage and not a verification of the information provided to it. The legal framework ruling the presentation and approval of the environmental impact studies foresees powers for the technician in charge of the process to carry out an inspection at the site, but this is not an obligation of the officer to carry out such action.[38] It shall be enough with the information that the developer submits under oath for the approval or rejection of the application for environmental viability.

46. Lastly, should there arise any doubts regarding the environmental impact study or the information submitted by a developer, SETENA may resort to the remaining institutions responsible for environmental integrity and preservation, in order to obtain their technical opinion.[39] SETENA does not submit any reports prepared by administrative entities to an analysis on the truthfulness of information, since the administrative acts enjoy the presumption of legitimacy.[40]

3.2 Obligations after the granting of environmental viability

47. The stage after the granting of the environmental viability consists of the environmental follow-up and control of the project.[41] The structure of duties assigned to SETENA allows the entity to exercise control over the way in which the developer carries out the project they submitted to assessment, being able to verify whether the commitments undertaken under the environmental impact study and the mitigation measures fixed thereunder.

This is very sloppy work on the part of Mr. Juardo. There're two important criteria that the developer has to accomplish after the issuance of the SETENA EV permit. (1) the must put up a bond, in this case it was $8000, and (2) they had to engage the services of a Government approved environmental Régent to monitor the activities on the project site into report back to SETENA directly. This was to ensure that the the project was being developed per they Master site plan that was submitted to SETENA with the development application. So why didn't mister you are go mention these two key majors that we're due be undertaken after the SETENA permit was issued? It seems that Mr. Juardo is afraid of even mentioning the word environmental regent, being afraid of the implication of those two words.

3.2.1 Control and follow-up

(A) Environmental reports before SETENA

48. The environmental reports that must be submitted by the developers make part of the tools for ensuring periodicity in the monitoring of the projects. The reports shall be submitted pursuant to the provisions in the administrative resolution approving the environmental viability, and they shall make part of the administrative file of the project.[42]

49. The reports that must be submitted to SETENA shall be supervised by an environmental manager with proper authorization from the entity to serve in such capacity. [43] Due to the importance of this requirement as a guarantee for the compliance with the conditions agreed on in the environmental viability, the regent may incur in criminal responsibility should they violate the terms approved by SETENA, or should any of the information declared before the Administration be false.[44]

Precisely. This is a true statement, however even this statement is an attempt to deceive the panel. Above Mr. Juardo stated that "environmental reports that must be submitted by the developers". That statement is false, is not the responsibility of the developers to file these reports with SETENA, it's the responsibility of the environmental Régent that the developers

hired to file environmental reports back to SETENA.

(B) Environmental Inspections

50. Among its follow-up activities, SETENA may also carry out the monitoring of works through inspections.

And SETENA did that.

51. Such power is homogeneously established in the instruments governing the environmental law of Costa Rica. The Organic Environmental Act[45] and the General Regulations on the Procedures for Environmental Impact Assessment[46] open up the possibility for SETENA to carry out follow- up inspections when deemed pertinent given the nature of the work.[47]

52. The criterion of SETENA is also discretionary in its election to notify the owner, since the technicians may conduct the inspection randomly and without serving previous notice to the developer. Additionally, they may be joined by officers from other State entities devoted to environmental preservation, for them to provide their technical opinion on issues that do not fall within the scope of SETENA's obligations.[48]

My experience in working with SETENA was that they were very transparent and operating under the good faith principle at all times. They would always notify us about any inspections they were doing and immediately supplied us with a report of those inspections and or resolutions.

53. Should any anomaly be verified during the control stage, SETENA must take action for the benefit of the environment. As it will be discussed later, before deciding on any administrative sanctions, SETENA may issue precautionary measures when there exists a latent risk to the environment.

This is a very interesting and important comment by the attorney general of Costa Rica Mr. Juardo. That SETENA may issue precautionary measures, however SETENA was never contacted or informed about a challenge to their permit by the criminal prosecutor, who took it upon himself to be God of the environment and file an injunction with the court for precautionary measures. This is totally outside provisions in Costa Rica Law and it was illegal.

3.3 Liability system

3.3.1 Responsibility of the developer

54. It is vital to contextualize the duties of SETENA as an assessing entity within the principles ruling the environmental law.

55. As it was mentioned above, the environmental assessment process starts upon request of the developer, who must submit any and all information and pertinent studies proving the real situation of the premises where the works are going to be performed. [49]

56. The documents submitted to SETENA must be supported with an affidavit, which serves as guarantee for the developer to undertake the environmental commitments according to the project design, features of the premises as declared by them and corrective measures presented to SETENA for approval thereof.[50]

57. This requirement to be met by the developer responds to the liability system governing the environmental law, based on the created risk theory and the risk/use theory. [51] Under these concepts, the person assuming a risk where there is risk of damage must be liable for the damage caused. This includes damage caused by legal activities, the sole liability of which shall fall on the person starting the activity.[52]

That is why SETENA requires a developer to put up a bond after the EV permit is issued.

58. Additionally, it must be considered that the permits, licenses or authorizations issued by the Public Administration do not hold the developer harmless, since the permits cover the authorization to use the proposed corrective measures, not the generation of environmental damage. [53] A procedural consequence of this is that the objective responsibility reverses the burden of proof, on the assumption that the activity created an environmental danger.[54]

59. Under this premise, it seems logical that it would be the developer, and not SETENA, that is responsible for the information contained in the administrative file on the environmental impact assessment. It is up to the developer to delimit his own responsibility, by foreseeing any type of damage that can be caused by his development, as per the current conditions of the property. In this regard, SETENA must oversee the responsibilities and commitments that the developer has assumed as a condition for carrying out the project, and SETENA, as described in the previous

section, has the tools to do this.

It's not a developer who establishes the rules and regulations by which projects are approved for real estate development. Those rules and regulations are the sole responsibility to be determined by the government of Costa Rica. Developers then hire attorneys and professionals to follow those rules and regulations. Up to the government to establish proper rules and regulations that will result in a successful outcome in the permitting process. If there's not a successful outcome, as it was with our situation, then the government cannot blame the developer, since it wasn't the developer that established the rules and regulations that would lead to a successful or unsuccessful outcome. So it's a height of your responsibility and unreasonableness for the government now attempting to trying to blame the developer for an unsuccessful outcome. This is just common sense, it's not rocket science.

3.3.2 SETENA resolutions enforceability

60. Article 19 of the Organic Environmental Act establishes that the resolutions of SETENA are compulsory for any and all individuals and public administrations.[55] The environmental viability of SETENA, since it is granted through a resolution, falls under this enforceability. However, the interpretation and scope that this article has are limited, and it must be interpreted pursuant to the basic principles of environmental law.

    So here we go again, first he says it's a preliminary act with no legal effect, and now he has to get back to the truth that says it does have legal effect. It must be interpreted based upon and pursuant to the principle of commonsense and fair play and applying the principles of what a reasonable person would think and do.

61. The granting of an environmental viability does not prevent the public bodies and entities with competence for that to exercise any environment care and protection actions assigned to them by the legislation. The environmental viability does not guarantee the realization of the projects or works concerned apart from any other rules of the legal system protecting and safeguarding the environment.

    Developers not stupid and you're not suggesting anything differently.

62. The provisions in the environmental viability shall be complied with by the individuals and the public the latter from exercising their competences for safeguarding the environment, should it be verified that the private parties are causing environmental damage. Interpreting the above like that implies derived perverse effects of the compulsory nature granted by the regulation to the environmental viability. Moreover, the Organic Environmental Act clearly states that SETENA must establish instruments and means for monitoring the compliance with the environmental viability resolutions. Should its content be violated, actions may be taken, like the stoppage of the works.[56]

We did comply with all of the SETENA provisions. It was the government functionaries that fail to comply with the law and the SETENA Resolution. It was the prosecutor who was the chief culprit in this disaster and failed to consult with and engage Costa Rica in the process. Instead, Mr. Martinez the chief "criminal" prosecutor, became a line to himself and took it upon himself to supplant Costa Rica and become the enforcer of the environment viability permit. He assumed powers unto himself that were Powers reserved for SETENA. His actions and conduct were illegal and what do you call a person that engages in illegal activities. I believe that person is called a criminal. I I will be sworn to tell the truth the whole truth and nothing but the truth. The fact that Mr. Martinez, by his own actions, maybe in the criminal is just the ugly truth.

63. As it was developed in previous sections, the environmental viability is not granted as a guarantee for the execution of the work or project, since it is only one of the requirements within the authorization process. It shall not be forgotten that the environmental viability is an element of environmental law, it operates under the precautionary principle and it forces the Administration to take actions in this line.[57]

64. Therefore, the Administration may carry out an auditing duty to follow up the mitigation measures undertaken by the developer in the environmental impact study, thus safeguarding the right to a healthy and ecologically balanced environment under Article 50 of the Political Constitution, and it may act in the event of any risk of damage to the environment.[58]

Here we go again with the attorney general talking about mitigation measures. There is nothing in the clearance letter that MINAE wrote to SETENA or the SETEAN EV Permit, that mentions any majors that need to be mitigated so I have no clue what the attorney general continues dimension mitigation measures. They simply don't pertain to our case based upon documents and evidence.

4. INJUNCTIVE RELIEF

4.1 Concept of precautionary measures in administrative law

65. The precautionary measures are instruments used by the Public Administration or the courts of justice, aimed at ensuring the preservation and integrity of the legally protected right, until a final judgment is issued. The precautionary measure may also be conceptualized as the decision of an

administrative or jurisdictional body establishing the appropriate and temporary protection of a right or legal interest, avoiding an irreparable damage. [59] This provisional anticipation prevents a favorable judgment to turn nugatory for impairment to the subject matter of the proceeding.[60]

Is another important distinction and comment, when the attorney general says "The precautionary measure may also be conceptualized as the decision of an administrative or jurisdictional body". Was that done? No it wasn't done by an administrative traditional body, this whole thing was carried out by the criminal prosecutor, who had no authority to do what he did.

66. Both the doctrine and the case law have recognized the importance to guarantee the protection of the legally protected right, even before the start of a main proceeding or the filing of a remedy. The early or ante causam precautionary measures[61] precisely respond to situations where there exists an imminent possibility of damage, which may be irreparable or irreversible. Faced with this situation, it is required to issue measures that may avoid this damage, and thus avoid damage that would be difficult to repair.[62]

There was an no evidence that there were wetlands and forest on the Las Olas projects site. This is a fabrication that was created in the sick and twisted mind of Mr. Martinez, a criminal prosecutor who usurped the powers of SETENA and took it upon himself to carry out duties and responsibilities reserved for SETENA. That is why Mr. Martinez totally ignored SETENA and there is nothing in the record indicating that Mr. Martinez ever contacted SETENA to engage them in his illegal process. It is telling that the government of Costa Rica failed to get a witness statement from anyone in SETENA, the issuance of their environmental permit is at the core of this dispute.

67. It is important to mention that the adoption of precautionary measures makes part of the elements ensuring the right to a swift and effective justice, a principle that is grounded in the constitution[63], and which shall safeguard the Administration.

68. No matter the urgency with which precautionary measures could be requested in an emergency situation, the administrative law has developed two main features that must be verified by the Administration or the legal professional in order to grant the right to injunctive relief in a sensible manner.

Here again the attorney general mentions precautionary measures as being part of administrative law. Up into this point I have not seen any mention of the right of a criminal prosecutor to engage himself in this process. A process that was started when SETENA issued their environmental viability permit which is a government order that Martinez was required to comply with, but refused to obey.

4.1.1 Necessary requirements for the filing of precautionary measures

(A) Periculum in mora

69. The key element of the precautionary measure, and the reason why it is invoked, is danger in delay (*periculum in mora*). This principle refers to the possibility that severe and irreversible damage is produced due to delay in the passing of final judgment on legally protected right or the right subject matter of the litigation.[64]

70. In other words, the injunctive relief takes into consideration the time that the obtaining of a final resolution could take, for which reason it allows to retain the property in order to favor those expectations that may arise in the main proceeding, and thus fully comply with the requirements in the judgment.

71. In order to comply with the previous requirement, the Administration or the law professional must verify that the possibility of damage is real, and that such damage could be difficult or impossible to be repaired.

Here again the the attorney general is talking about a situation in which he says the possibility of damage is real. However, he refuses to acknowledge the fact that there is a Government order in affect (SETENA Resolutions) as well as a number of government reports, including the INTA report, that all state there are no wetlands or forest, no lakes or lagoons, and no environmental problems with the Las Olas site. So on what basis is there for any government agency to start precautionary measures? The only basis is a rogue criminal prosecutor who has gone off the reservation and started to conduct himself in a totally illegal manner and became a criminal in doing so. This is exactly what Mr. Bricieno said in his witness statement. Again take notice that up to this point there is no mention of a criminal prosecutor been involved in this case, or a basis for his involvement in this case. There is a government order in effect and that is the legal governing document that was just totally ignored by Mr. Martinez and every other government functionary. In the attorney general is trying to dance around that ugly truth.

(B) Fumus Boni Iuris

72. The fomus boni iuris requirement or literally smoke of a good right refers to the requirement on the existence of the right claimed or the possibility that said right may exist in practice.

73. Given the nature of this precautionary measure, and the possibility to file it even before the formal process, it is virtually impossible that the claims of the claimant are analyzed, in addition to the fact that this cognitive exercise pertains to the background study of the case. On the contrary, this requirement simply requires the person requesting the measure to provide a sign of the existence and an initial justification of the right that shall be claimed within the proceeding.[65]

74. Consequently, this requirement is actually aimed at verifying that the claim will not prove to be reckless, and that the theory of the case of the claimant could be favored in the potential main proceeding.

75. Therefore, considering the two elements jointly, it is possible to issue the necessary precautionary measure allowing to protect the legal property until a final resolution is passed.

Is it reckless, to shut down a project that is legally permitted with an injunction, understanding that that action will economically destroy the investment? Mr. Martinez knew when he Took the illegal powers upon himself that was reserved under the law for SETENA, that it would destroy the project. Because it would take years to resolve the matter through the courts, any Project can't take even months of being shut down let alone years. So this Cavalier statement that the Atty. Gen. makes is revolting and disgusting when he says, _"it is possible to issue the necessary precautionary measure allowing to protect the legal property until a final resolution is passed"._

4.2 Injunctive relief in environmental matters

4.2.1 Flexibilization of precautionary measures in environmental law

76. Even though both the concept of precautionary measure and the essential features thereof are unequivocally established in the public law doctrine and case law, it is necessary to contextualize its use and concept according to the field of the law concerned.

77. The injunctive relief in environmental matters shall be understood depending on a right and a principle guaranteed at constitutional level: the law of person to a healthy and ecologically balanced environment and the principle on the State duty for environment protection and care.[66]

78. Since the purpose of the precautionary measure in this context is to prevent environmental damages difficult or impossible to repair, the urgency with which precautionary measures may be issued in order to ensure the maintenance of natural resources and of the ecological balance is even greater.[67]

Again there is nothing out there either with the SETENA EV permit or in the way of reports indicating that there was any reason to even think about undertaking a precautionary measure. The prosecutor new that this was a way he could destroy the project, because it would take years to resolve, and in fact hey process he started in November 2011 is still ongoing.

(A) Nature of the legally protected right

79. As it was indicated above, the environment enjoys protection at constitutional level, this being a

collective right of the whole citizenship. The importance of the environment for the citizenship and its close link with the right to health make the measures for environment protection gain a degree of relevance unique to this matter.

80. It is the environmental public interest which rules in the imposition of precautionary measures causing damage to the environment, whether now or in the future. The acting court must grant the measures deemed reasonable, proportional and specific to each case in particular. [68] Moreover, the relevance of the environment effective protection binds the court to guarantee such protection beforehand, should there be a possibility that an activity may have harmful effects on the environment.[69]

81. Among the measures that may be taken, we can mention the restriction or stoppage order of the acts or activities that could cause damage, the cancellation of the activity, or any other measure deemed necessary by the authority in order to avoid an irreparable damage to the environment.[70] Should the possible damage derive from an act of the administration, the typical precautionary measure that the judge may adopt is the suspension of the effects of the act concerned.

(B) Application of the precautionary principle or in dubio pro natura

82. Undoubtedly, the precautionary principle, a pillar of environmental law, gains relevance in the application of precautionary measures guaranteeing the protection of the environment before any potential irreparable damage.

83. The precautionary principle, which permeates and influences environmental law in a comprehensive fashion, establishes a presumption in favor of the environment that makes it possible to avert the negative effects on the environment caused by any human activity.[71]

84. Article 11 of the Biodiversity law enshrines the precautionary principle by establishing that where there is scientific uncertainty about the potential negative impact of a particular activity, the action in question must be restricted or suspended through the enforcement of protective measures.[72]

85. In environmental law, the precautionary principle amplifies the characteristics of the precautionary measure as the tool to prevent the continuation of environmental damage caused by a project or

activity. Both the urgency as well as the alleged inherent irreversibility of the damage to the environment are of greater relevance in this matter.[73]

86. The applicable case law has found that the protection in environmental matters must be immediate and not subsequent precisely to prevent the damage from causing serious and irreversible consequences for both environment and public health.[74] The precautionary principle is of such significance in environmental law that it substantiates the shifting of the burden of proof in this matter. As per Article 109 of the Biodiversity Law, the burden of proof corresponds to whoever is accused of causing environmental damage.[75]

Once again, you have a number of SETENA resolutions in force that our government orders that were supposed to be complied with by all private and public institutions. This was not done. As well there are a number of government reports stating there are no wetlands, no forest, no lakes, or lagoons on the project site. It was not only reckless but also illegal for the prosecutor to usurp powers on himself that we're reserved for SETENA in the process destroy a project that was worth tens of millions of dollars.

87. By virtue of the above, it is evident that the sense of urgency of the precautionary protection gains even more importance in environmental law than in other fields of the law, and that the precautionary principle ruling environmental matters requires to adopt the presumption that the environmental damage is severe and irreversible, for which reason the filing and use of precautionary measures is swifter and more common.

The attorney general talks in generalities about precautionary measures, without talking about the many extenuating circumstances that surrounds this particular case.

4.2.2 Precautionary measures issued in the administrative proceeding

88. Although the doctrine and case law are still scarce in the matter of injunction relief in the administrative proceeding, it is clear enough that the possibility of protection ex ante is not confined only to the jurisdictional process, but it is a power that can also be exercised in the administrative proceeding.[76]

89. Even though precautionary measures in jurisdictional proceedings have the function of safeguarding the efficacy of a final judgment, in the administrative proceeding, the injunctive relief has special impact in the collective exercise of the right to a healthy environment.[77]

90. Contrary to what Mr. Ortiz states[78], the competence to issue precautionary measures by the public

administrations in environmental matters is not exclusively grounded on the General Law of Public Administration. Such competence and obligation is conferred by the Costa Rican environmental law.

91. The regulatory framework allowing the Public Administration to adopt precautionary measures on environmental matters is integrated by the Political Constitution[79], the Biodiversity Law[80], and the Organic Environmental Act[81].[82] The competence of injunction relief that is regulated in the environmental regulation establishes an obligation of the State -as a whole- to preserve the natural resources, and to take necessary preventive actions to avoid environmental damage.

92. The above is important for two reasons: 1) the obligation on damage prevention (and consequently the decision to file precautionary measures) is linked to the precautionary principle which is distinctive feature of environmental law; 2) the features that move from the jurisdictional proceeding to the administrative proceeding are, *mutatis mutandis*, mainly two: (i) the variability (understanding it as the possibility to vary the precautionary measure should the status of the situation change) and (ii) urgency. Both are the most important elements that move from the precautionary system of the administrative proceeding.[83]

93. Therefore, Mr. Ortiz is incorrect in affirming that there is a peremptory term of 15 days, starting from the date of submission of the interim measure, to initiate the main process.[84] The term Mr. Ortiz refers to[85] is prescribed in section 26 of the Administrative Contentious Procedure Code, and applies solely to legal and not to administrative proceedings on environmental issues. Neither the regulation nor the jurisprudence supports the transposition of this term to administrative procedure.

94. Additionally, Mr. Ortiz is wrong when quoting Articles 14.2, 146, and 148 of the General Law of Public Administration as legal basis for the administrative competence to issue precautionary measures. [86] None of the three regulations quoted makes reference to the precautionary measure, but they refer to the administrative sanctions [87], execution of efficient acts [88], and purposes of administrative resources[89], respectively. In other words, none of them regulates precautionary measures, and neither refer to any term whatsoever.

95. Additionally, the resolutions quoted by Mr. Ortiz to support the application of the 15-day term to

on the implications and technicality level required to initiate a process of environmental nature. For example, the constitutional judgment number 2004 – 09232 quoted by Mr. Ortiz[90] refers to the reasonableness of the term between the filing of precautionary measures and the initiation of the main process.

96. In the case under study, three administrative precautionary measures were issued by SINAC, SETENA and the Administrative Environmental Court.

(A) Precautionary measures issued by SETENA

97. SETENA, as the entity responsible for the processing and approval of the environmental viability, has auditing power to ensure that the developer strictly complies with the mitigation measures proposed before that body.

98. The Environmental Organic Law explicitly authorizes the stoppage of works in the event of breach of the environmental viability terms. The General Regulations on the Procedures for Environmental Impact Assessment also refers to the temporary suspension of the work in the event of breach of environmental commitments.[91]

99. Under the assumption that the environmental law has as its main objective the prevention of environmental damage, these measures could also be applied in preventive manner when there exists a possibility for the activity under the audit of SETENA to generate irreversible environmental damage, since there exists a wide obligation regarding the preventive measures that the State may take in environmental matters.

100. Therefore, the stoppage of works, even the closing thereof, are not only proportional measures, but requirements of the law before the damage or risk of damage to the environment. The above-mentioned Regulation also contains the general obligation, enforceable for all the entities in charge of protecting and caring for the environment, to close down or stop works that do not comply with the provisions of the Environmental Organic Law.[92]

101. It must be highlighted that the damage caused by a breach in the environmental viability may carry criminal liability, for which reason SETENA is competent to file a precautionary measure and to resort to all necessary instances for the initiation of the criminal investigation.[93] As it was mentioned

above, SETENA is ruled by the environmental law principles, as the guarantor for compliance with the preventive principle through the granting of the environmental viability. Therefore, by virtue of the procedural flexibilization mentioned above, the 15-day term does not apply for the initiation of an administrative proceeding, as provided by Mr. Ortiz.[94] Additionally, the progressivity and no regression principles require the law professional to apply the regulation that most benefits the environment. [95] And under the precautionary principle, lacking any scientific formalities and allowing to protect the environment before the minimum risk that an activity may cause a negative impact on the protected legal right.[96]

SETENA never filed a request for precautionary measures. Make continue to ratify their initial permit incentive of 2010 and again in November 2011.

(B) Precautionary measures issued by SINAC

102. The competence of SINAC in the exercise of the injunctive relief arises from the regulatory framework mentioned above, which requires the State to take the necessary preventive measures for the preservation of the environment, on the understanding that the omission of the Public Administration before an activity that may cause damage to the environment constitutes a violation to this obligation.[97]

103. This is why the General Regulations on Procedures for Environmental Impact Assessment, in Article 105,[98] include the generic provision mentioned above, which allows any environmental authority to take preventive action in cases of violation of the Environmental Organic Law. The reference law develops the concept of preventive principle, for which reason the pertinent entities shall take actions with a preventive nature.

104. It must me mentioned that SINAC, in cases related to breach of the environmental viability, has the power to act (when there is risk that an activity may cause irreversible damage, pursuant to the Environmental Organic Law) but it does not have the power to initiate an administrative proceeding to revoke or suspend such [activity], since it is not the entity responsible for authorizing such act.

105. However, there exists indeed the possibility that the Administration files the pertinent complaint before the Agrarian and Environmental Public Prosecutor's Office, in the event that the activity undermining environmental integrity may imply the commission of a crime. Mr. Luis Ortiz agrees

on this point, indicating that SINAC has the competence to file complaints before the pertinent Public Prosecutor's Office.[99]

The question would have to be asked if SINAC if can't file a complaint with a criminal prosecutor stating that there are wetlands on the project site, when you have SETENA resolutions saying there're no wetlands on that project site. In the smmmer of 2010, a complaint was made by Mr. Bucelato, to SETENA, claiming that there was wetlands on the Las Olas site. SETENA acted on that complaint and conducted an investigation/audit and sent a biologist Mr. Pacheo to Las Olas for an inspection. A thorough audit/inspection was done and SETENA found no wetlands or forest and rejected Mr. Bucelato's complinat. They issued a resolution stating that and that resolution became a government order. Mr. Bucelato then filed the same complaint with Mr. Martinez and he started his own investigation. Why didn't Mr. Martinez okay the law and comply with the Government order that SETENA issued in September of 2010, just four months prior and tell Mr. Bucelato, that the matter was resolved by SETENA is September 2010 by the issuance of the resolution; and therefore he was precluded from starting at another investigation into this question. Based upon the fact that Government agency they had responsibility in this matter have already spoken. So on what legal basis did Mr. Martinez have to insert himself into a matter that was already addressed and resolved by the proper government agency. How would Mr. Martinez like it if he was charging someone with a crime and SETENA steped in and told Mr. Martinez they had dismissed those charges?

106. In the cases where there exists risk of a severe and irreversible damage to the environment, SINAC has the obligation to act in a preventive manner, and to file a complaint before the Environmental Public Prosecutor's Office or the Administrative Environmental Court, depending on the scope of the activity and the damage. The competence of the SINAC to file precautionary measures is grounded on the environmental law and the ruling and cross-cutting precautionary principle. Therefore, it must be made clear that the 15-day term between the filing of precautionary measures and the initiation of a main process mentioned by Mr. Ortiz does not apply to the case of the SINAC, since its performance became flexible in support to the purpose and public interest **under the environmental law.**[100]

The above statement is factually incorrect. At the time Mr. Martinez took his illegal action SETENA had already issued a resolution rejecting Bucelato's criminal compliant of wetlands on the project site. If anything there was persuasive evidence that there was no damage the environment taking place.

107. Therefore, if the Administration complies with these actions pursuant to the law, it would be complying with the precautionary action allowing the precautionary measure, and it would also comply with the instrumentality feature thereof by filing a complaint on the facts in order to initiate a main process, whether in the criminal field, before the Public Prosecutor's Office, or in the administrative field, before the Administrative Environmental Court.

108. In any case, as it was developed in my first witness statement, if the individual considers that their rights have been violated because of an administrative act, they have the possibility to resort to the administrative contentious courts to file appeals in connection with such acts.[101]

(C) Precautionary measures issued by the Administrative Environmental Court (TAA)

On what basis did TAA stepping in and issue an injunction. They two are required to comply with the government order issued by SETENA and respect the environmental permit that was issued by the governing agency. They did not and again Mr. Bricieno stated very clearly that everything that was not was totally illegal.

109. The Manual of Proceedings before the Administrative Environmental Court foresees the possibility that the Court may adopt precautionary measures when there exists the possibility of relevant environmental damage.[102]

110. The environmental damage over which the Administrative Environmental Court has competence is defined as any alteration to the environment that is caused by the human kind, and which results in an imbalance of the ecosystems.[103] Therefore, the TAA has the power to take the actions that may be necessary to exercise the protection over the environment and the natural resources. As in the case of SETENA and SINAC, the *in dubio pro natura* principle is invoked to take the precautionary measures safeguarding the environment and not allowing any future damage.[104]

111. With the purposes of avoiding damage to the environment, the precautionary measures that the TAA may adopt include from partial or total restrictions of the acts originating the complaint, to the temporary suspension of the administrative acts giving rise to the complaint.[105]

112. The actions of the TAA are governed, in turn, by the officiousness principle ruling the environmental matter, for which reason the obligation of the TAA is not completed by merely receiving the complaint, but it shall also continue the processing and investigation of the acts even when not requesting by the interested party.[106] This demonstrates, in a definite way, the public interest and social relevance that the environment preservation has.

113. Additionally, it must be stated that the permanence of a precautionary measure does not undermine the right of the individual. The individual can always request the TAA to modify the precautionary measure should they consider that there has been a change in the original situation status. This is because the environmental law allows to move from an injunctive relief system to a process where the immediate and early protection is allowed in order to avoid the occurrence of damage or the continuation thereof.[107] Therefore, if it is achieved to verify that the risk of damage has disappeared, then there would no longer exist the need to extend the precautionary measure.

114. The precautionary measures issued by the TAA could also impact on the actions of other

administrations if the Court deems it necessary to suspend any action or proceeding that may reduce the effectiveness of the preliminary measure filed.

TAA never notified us about the action they were taking. As Mr. Bricieno stated that Monica Vargas was illegally acting on her own when she was filing complaints with TAA. We didn't find out about TAA's illegal action until months after-the-fact, and was never given an opportunity to raise a defense two there is legal action. There was a government order in place that stated there were no environmental problems with the Las Olas project site. All of these agencies you legally refused to comply with and recognize that government order, the SETENA Resolutions.

115. Lastly, the precautionary measures taken in a precautionary way in order to ensure the result of the final judgment in the event that it is favorable to the claimant, and, as a specific feature of environmental law, to prevent an irreversible damage to the environment. Therefore, in absence of a final judgment and without any evidence whatsoever of any modifications in the actions of the individual aimed at avoiding the alleged environmental damage, it is possible, and also necessary, to continue with the filed precautionary measures; otherwise, the national legislation would be violated by allowing the continuation of the risk of environmental damage.

5. GOOD FAITH PRINCIPLE APPLIED TO THE PUBLIC ADMINISTRATION

5.1 Definition of good faith

5.1.1 General definition according to the law of Costa Rica

116. The principle of good faith is a general principle of law and its validity as such is indisputable. It is one of the most important principles of public and private law both at domestic as at international level. Such principle supports the legal relationships and the limits to the behaviors that are intrinsic to all individuals and, therefore, the issue of acts, the exercise of rights, fulfillment of obligations, commitments and legal purposes thereof.[108]

Please, is it good faith principle of shutting down a project that was fully and legally permitted without due process? Is it a good faith principle when government functionaries refused to comply with government orders (SETENA Resolutions)? Is it a good faith principle when a developer is criminally charged with environmental crimes when there is an outstanding government order stating there're no environmental problems with the project site?

117. In Costa Rica, the Second Chamber defines it in a general manner explaining that it is a principle that runs through all the legal fields. It requires to observe an attitude of respect, loyalty and honesty in the legal relations, both when exercising a right as well as when fulfilling an obligation.[109]

118. *Contrario sensu*, any act of a holder of rights not observing an attitude of respect, loyalty and honesty in the legal relations would constitute a breach of the good faith principle. This includes but is not limited to faking ignorance before facts or data that are known by the individual, performing misleading acts of doubtful significance or creating legal appearances with the purposes of using them to the detriment of any person who has been faithful in the fulfillment of their obligations and the law in general.

119. In relation to the principle of good faith in the field of Administrative Law, the Constitutional Chamber has indicated that this principle is an imperative also required from the Public Administration, for which reason it shall always act at the service of truth, without hiding information and without having hidden ulterior motives.[110]

120. The observance of an attitude of respect, loyalty and honesty, according to the definition provided above, is established for the Public Administration as part of the principle of legality that governs our system. The General Law of Public Administration[111] has established that the State, through its public servants, is committed to act in good faith through the performance of their duties in order to meet the public interest and legal certainty.

121. Pursuant to the constitutional law, the Public Administration shall fulfill its functions in the framework of serving the general interest. [112] The principle of good faith is, therefore, the framework allowing for greater objectivity, reasonableness and coherence towards the fulfillment of this purpose.

122. The Costa Rican constitutional law has recognized, additionally, the principle of balance of interests[113] as well as the principle of proportionality and reasonableness to maintain the legal certainty of the regulation in pursuit of that objective. This implies keeping some balance between the real and substantial object with the desired objective, as well as a continuous adaptation to the

constitutionality block made of the Political Constitution and the international instruments current in the country.[114]

123. In this regard, the Constitutional Chamber has recognized, in consistency with the doctrine, the principles of reasonableness and proportionality, by indicating that: "According to the former, the law cannot and shall not be irrational, since the means chosen shall have a real and substantial relationship with the desired objective. From this perspective, the technical rationality means proportionality between means and ends; the legal rationality implies an adaptation to the Constitution in general, and in particular, to the rights and freedoms recognized and warranted therein and in the International Instruments on Human Rights in full force and effect in our country and, lastly, the reasonableness on the personal elements implies that no further limitations or burdens reasonably derived from the nature thereof or greater than the vital ones to reasonably work in the society shall be imposed."[115]

124. On the other hand, the Political Constitution, in Article 50, recognizes as a subjective fundamental right the right to a healthy and ecologically balanced environment. If the basic structure of a subjective right is having the right to something[116], that something, in the case of the environment, is precisely the State obligation to protect and care for the environment. It is not only an individual right but also a collective right for which reason the legitimation to achieve its judicial protection corresponds to any person and not only to the person whose private interests are affected. It is a right protecting a collective right whose holder is the community understood as the set of inhabitants of the country, not only the ones born in the country, not only the citizens.[117]

125. In the same way, and by virtue of the recognized importance of these collective rights, and as I mentioned above, the Constitutional Chamber has widely developed principles as the sustainable development principle, the principle for the prevention of environmental risks, *pro natura* or precautionary principle, preventive principle, and, of course, the principle of social function of the property, which allows the individual to enjoy their property right in compliance with certain obligations established by the pertinent regulations.

126. The processing of an environmental assessment study to prevent irreversible damage to the environment is a good example of some of these obligations, through which the individual

undertakes the responsibility to submit relevant, technical, transparent documents in a responsible manner and with the same good faith as the one required from the Administration, especially if we consider that in environmental matters, the interested party is the one who holds the burden of proof.[118]

5.2 Application of the good faith principle in the acts of the Public Administration

127. Mr. Luis Ortiz mentions in his statement "the estoppel rule" and the concept of "legitimate expectations" regarding the Government of Costa Rica[119]. In that regard, it is pertinent to make it clear that, contrary to what Mr. Ortiz stated, however, following the parallel or equivalent concepts will be analyzed, specific of the Costa Rican system, the correct names of which are: principle of *actos propios* (*"venire contra factum proprium non valet"*) and the *confianza legítima* principle.[120]

5.2.1 Application of good faith to *actos propios*

(A) Definition of the *actos propios* principle

128. As a complement to what was mentioned about this matter in the first section, it is worth highlighting what the Constitutional Chamber states: "... the Administration shall not suppress by its own action those acts it may have issued conferring subjective rights to the individuals. Thus, the subjective rights constitute a limit regarding the revocation (or amendment) powers of the administrative acts, with the purposes of being able to requiring further procedural guarantees."[121]

129. Indisputably, this principle derives from the good faith and the non-retroactivity of the law, pursuant to Article 34 of the Political Constitution. [122] It is a constitutional right aimed at guaranteeing the legal certainty[123] in the matter of administrative law.

130. According to the definition described above, and pursuant to the doctrine, at least four features are required for this principle to be violated: 1) Valid, efficient and relevant conduct; 2) Claim through the exercise of a subjective right in contradiction to the objective nature derived from the previous conduct, 3) Serious damage caused to the third parties who trusted in the first conduct, e) Identity of the subjects.[124]

131. As a consequence of this principle, the Administration shall only be able to ignore its own favorable conducts to the individual, resorting to the suppression mechanisms made available by the legal

system, namely: a) unofficial statement of invalidity of acts affected with absolute, evident and manifest nullity pursuant to the procedure and requirements under section 173 of the LGAP; b) the lesividad proceeding ruled by provision 173 of the LGAP, 10.5, 34, and 39 of the CPCA, as well as 165 of the Code of Taxation Procedures and Rules -on this matter-; or c) resort to the revocation proceeding specified from Article 155 of the same LGAP..

5.2.2 Application of good faith to acts without inherent effects

(A) Definition of acts without inherent effects

132. The case law has understood by "subjective law the one granting" ... power to validly act within certain limits, and/or to be the beneficiary of the public conduct, requiring from the public power (specifically from the Administration), through a coercive means, if appropriate, the pertinent specific and particular conduct, granted by the legal system to that or those individuals for the achieving their purposes or meeting their interests."[125]

133. This implies that the acts with inherent effects declare or recognize a subjective right, a right that gives rise to a set of individual prerogatives. It grants to the holder of the right a set of powers, a "power to act"; it grants to them "a certain sphere of activity."[126] However, these individual prerogatives are exercised in the framework of the objective law.

134. In lieu of a declared subjective right, by definition, the principle of actos propios could be invoked, since we would not be before an act with inherent effects.

(B) *Confianza legítima* (legitimate confidence) principle

(1) Definition

135. In Costa Rica, the case law has recognized the legitimate expectations of the individual through the confianza legítima principle which derives, in turn, from the good faith principle.

By the above statement the developers had every right to expect then when they followed all the rules and regulations and that unlawful permits were issued, we had every right to expect that those permits would be honored and respected by all. That wasn't done. Another government agency came along because I refused pay a bribe, and arbitrarily and illegally nullified in canceled lawfully issued permits. That is neither legal, fair and equitable any total disregard for the good-faith principle.

(2) Features and treatment in the Costa Rican case law

136. The *confianza legítima* principle has its origins in the German public law. Its features have been adopted by our own constitutional case law[127] from the Spanish doctrine. Our case law has established the following features [128]: 1) There must be involved an act of the administration conclusive enough to cause confidence in the affected person. 2) The Public Administration shall cause external acts or facts that, even without the need to be legally binding, orientate the individual towards a particular conduct that, but for the created appearance of legality, would not have been performed. 3) An act of the Public Administration which recognizes or constitutes an individualized legal situation in whose stability the individual trusts. 4) The suitable cause for using the legitimate confidence in the affected person cannot be caused by the mere negligence, tolerance, ignorance of the Public Administration or the irrational nature of the claims of the individual. 5) The individual must comply with the duties and obligations under their responsibility.[129]

137. It is vital to highlight that this *confianza legítima* cannot be based on the ignorance of relevant information, facts or data by the Public Administration; especially if these data or documents were under the possession of the individual, who had the obligation to submit all of them, in a transparent manner and in good faith.

138. The above necessarily takes us to the fifth requirement, under which the individual must comply with all the duties and obligations imposed on them by the law. In other words, if it is their obligation to submit reliable data, from safe and qualified sources, in a transparent and complete manner, without causing fragmentation, deceits or diversions of attention, in a responsible manner, pursuant to any law ruling the matter, then they shall invalidate any non-compliance if they wish to invoke the *confianza legítima* principle before the Public Administration.

All of the above was done and they have no creditable evidence it wasn't done.

139. Lastly, making reference to the governing principles of the environmental law that I have developed in my first statement and which I reiterated in this statement, there must be taken into account the proportionality, reasonableness, legality, and search of public interest principles, which in this case implies the indispensable observance of the *pro natura* principle.

140. The assessment through the environmental law must be carried out in an integral manner under a proportionality criterion contemplating, in an objective manner, the public interests[130] and the private interests that come into play and not through an isolated, unrelated or fragmentary act that may imply serious and irreversible damage to the environment and, consequently, to the human rights of the community.[131]

5.3 Protection measures on the individual

5.3.1 Evident and manifest absolute nullity process

141. As I have already mentioned, the Costa Rican administrative law provides for the possibility to annul the *actos propios* in the administrative proceeding only in the exceptional events of evident and manifest absolute nullity, established by Article 173 of the General Law of Public Administration.

142. The absolute, evident and manifest nullity is notorious, and does not require a dialectical process for the verification thereof, since it stands out at a first glance.[132] This type of nullity refers to the existence of defects in the act or contract that are notorious, clear, easily noticeable, where no further efforts and analysis are required for the verification thereof, since the defect is evident, ostensible, manifest and of such a magnitude, and consequently, it makes the declaration of absolute nullity of the act or contract be a logical, necessary and immediate consequence, given the certainty and clear evidence of the serious defects such act or contract has. [133] This type of nullity is discovered by the merely confronting the administrative act or contract with the legal regulation, without the need to resort to any interpretation, deep analysis or expertise.

(A) Process of *lesividad* as a protection measure for the individual

143. For of all the remaining cases that are not covered in the exceptions above, the only possibility of nullity resides in the judicial proceeding, it is the process of lesividad pursuant to the provisions of the General Law of Public Administration[134] and the Administrative Contentious Procedure Code.[135]

6. REGULATORY FRAMEWORK ON WETLANDS IN COSTA RICA AND LEGAL APPLICATION

THEREOF

6.1 Legislation hierarchy in Costa Rica

144. In every legal system, there is a regulatory structure including different types of regulations, differentiated by their hierarchical rank. The same situation applies in Costa Rica, since the legal system has a hierarchical structure, where some regulations have a higher rank than others, and they support each other. Thus, the regulations of higher hierarchy serve as basis and validity for those of lower hierarchy, and, therefore, the latter cannot contradict the former.

145. This is known as the principle of legislation hierarchy. This principle allows to establish the order of applicability of the legal regulations and the criterion to settle the contradictions that may arise between regulations of different rank. The rules for this principle are: the regulation of higher rank prevails over the one of lower rank; the regulation of lower rank cannot modify the regulation of higher rank; and the law professional shall always observe the provisions of the regulation of higher rank.[136]

146. The principle of hierarchy of regulations is grounded on Articles 7 and 10, and implicitly, in Articles 121 and 140, subsections 3) and 18) of the Political Constitution, in Article 1 of the Law of the Constitutional Jurisdiction, and in Article 6 of the General Law of Public Administration.

147. The Political Constitution is the fundamental regulation of the legal system of Costa Rica, ruling its political system, its institutional structure, and defining and guaranteeing the protection of the fundamental rights of the people. The Constitution is the main source of law in Costa Rica. It is conceived as the superior and primary source of the legal system, and the validity of the entire legal system stems from it. Precisely due to the fundamental role it plays, it constitutes the main and highest rank legal regulation.

148. The second hierarchical rank, under the Costa Rican legal system, is covered by the international conventions or agreements duly approved, pursuant to the national law. This is pursuant to the provisions in Article 7, paragraph one of the Constitution stating as follows: “The public treaties, international conventions and concordats duly approved by the Legislative Assembly, shall have authority over the laws, from the date of their promulgation or from the date as established by

them."

149. The third line is covered by all the laws and acts with force of law, followed by the decrees regulating the laws in the fourth place and then the remaining regulations[137]. The principle of legislation hierarchy has been widely developed by the judicial and administrative case law. In this regard, it has been stated that: "The administrative legal system is a dynamic structural unit where a series of different source of Law coexist and articulate. The relationship between those diverse sources is ordered around the principle of legislation hierarchy, under which it is determined a rigorous and prevailing order of application, pursuant to the provisions of Article 6 of the General Law Public Administration; that is to say, it is all about knowing when a source is higher in rank than another one, and in the event of conflict, applying the one of higher rank."[138]

150. The above implies a relation of subordination, under which "the regulations of the lower-rank source can neither modify nor replace the ones of higher rank. This is the case of the Constitution compared to the law and the remaining of the regulations of the system, and this is also the case of the law in respect of the rules of procedure (...) in the event of contradiction, the law shall always and necessarily prevail. This expresses and applies the so-called "hierarchy" principle.[139]

151. The constitutional case law has established that in the matter of human rights or fundamental rights, if an international instrument grants more rights or a wider coverage than the one granted by the Constitution, the provisions of such treaty shall apply. Therefore, the international law has been constitutionalized.[140]

152. Along this line of thought, the Constitutional Chamber has stated that, in relation to the environmental international law, the phenomenon of internationalization of the environmental law had followed a pattern of development similar to the one of human rights, since it shifted from being a matter of domestic jurisdiction of the States to be part of the international jurisdiction. This is how the environmental laws make part of the Human Rights of the third generation given their universal and historical acceptance.[141]

153. The regulatory framework of the environmental law, as part of the human rights, is closely linked to the international instruments undertaken by Costa Rica in this matter, always favoring the application of the highest standard of protection the State may have adhered to, even if this is

contained in the Political Constitution.

All of the above sounds like a law professor teaching law 101 in legislative law and fails to connect anything him what he saying do the fax and matters at hand. Except for one thing, the conduct and actions of the government Costa Rica constituted a human rights violation upon my person.

6.1.1 Environmental law hierarchy and legal custody on wetlands in Costa Rica

154. In the environmental matter, pursuant to the reference case-law arising from the Constitutional Chamber, the international environmental instruments are mandatory and fully enforceable. Consequently, they shall be complied with, since they have a higher regulatory rank. Additionally, the principles contained in the Environmental Statements signed by Costa Rica have been recognized by the Constitutional Chamber as sources of the law. Therefore, the regulations of lower rank, like the laws, decrees and rules of procedure, shall be consistent therewith.

155. It is possible to affirm that the environmental international instruments signed by Costa Rica are fully applicable legislation and of direct judicial enforceability. This implies that any subject legitimated by the diffuse interest of the protection of the environment is empowered to file actions of unconstitutionality against a lower-rank regulation (laws, rules of procedure, decrees and administrative acts) contravening environmental international treaties, without the need for the existence of a judicial or administrative pending process.[142] Likewise, any person who feels affected by the violation of a fundamental right contained in an environmental international treaty is authorized by the law to file an action for protection of constitutional rights or guarantees (amparo).

156. Costa Rica has executed a series international treaties of relevance for the protection of wetlands. Even though the Convention Relative to Wetlands of International Importance Especially as Aquatic Birds Habitat (Ramsar) is the legal instrument of greatest importance for the protection and sustainable use of the wetland ecosystems, the issue has been treated in a transverse manner by other environmental international conventions, among them the Convention for the Protection

of Flora, Fauna, and Natural Scenic Beauties of the Countries of America, the Convention for the Protection of World, Cultural and Natural Heritage, the Convention on the International Trade of Endangered Species of Wild Flora and Fauna, the Convention on Biological Diversity, among others.[143]

157. The RAMSAR convention recognizes the fundamental ecological functions of the wetlands as regulators of the hydrological regimes. This is so since they constitute habitats of characteristic flora and fauna and, particularly, of aquatic birds, considering the wetlands as a natural resource of great economic, cultural, scientific and recreational value, the loss of which would be irreparable. The objective of the Convention is the preservation and rational use of wetlands both through actions at national level as well as through the international cooperation, with the purposes of contributing to the sustainable development.

158. Additionally, there exists a wide constitutional protection of wetlands as an integral element of the environment. This is mainly grounded on the Article 50 of the Political Constitution of the Republic of Costa Rica.[144] In this regard, through the vote number 5255-1998, the Constitutional Chamber indicated that: "… this Chamber, in reiterated case law, has manifested the importance to protect the environment, especially after the amendment to Article 50 of the Political Constitution, containing a specific provision guaranteeing the right to a healthy environment and the protection thereof, in addition to providing protection for wetlands, as in the case concerned herein..."

159. In order to protect this legal right, the Constitutional Chamber has based both on the environmental protection provided at constitutional level, as well as in the international treaties ratified by Costa Rica.[145] Moreover, the Chamber has been aware of the importance of these ecosystems for the human being and has reflected this in its judgments: "Wetlands are formed by a series of physical, biological, chemical components, namely soils, water, animal, vegetable species and nutrients... The importance of wetlands, among others, given their nature for the countries boosting their development and preservation, the sustaining of a great amount and variety of habitat, with favorable social-economic impacts for certain sectors of the population committed to the rational exploitation thereof and the rising of a particular landscape fully identifiable by its great beauty and diversity in terms of wild life making part of their cultural heritage, an important source for tourism in a country or region..."[146]

160. This position of the Constitutional Chamber is totally consistent with and complementary to the regulatory development provided on this matter.[147] Article 41 of the Environmental Organic Law, for example, declares the wetlands ecosystems as ecosystems of public interest, whether they are or not protected by the regulation ruling the matter. The regulation does not distinguish whether the wetland was declared as such or not, the protection of this ecosystem applies in all the situations given the social and environmental importance that this legal asset has.

161. Moreover, the case law[148] has clearly indicated that the location of a wetland within a state property shall not constitute a requirement for guaranteeing the protection thereof, since such protection goes beyond the wetlands located in a public property. For such purpose, the environmental legislation contains express prohibitions for those people affecting the wetlands ecosystems in a private property, as established in the Environmental Organic Law and the Wild Life Law.[149]

Again, all the above is more of something one would hear in law 101. There's no application to what the Atty. Gen. is saying here to the facts and evidence at hand in our particular case. All of this is intended to obscure the fact that there was legal permits issued and they were illegally nullified when I refuse to pay a bribe.

6.2 Interpretation of environmental legal regulations

162. Interpretation is one of the essential functions in the application of Law. To apply the law, the law professional must discover the meaning and significance of the legal regulations. Through the interpretation, it is intended to, in a reasoned manner, understand the meaning of a given regulation.

163. In environmental law, given the importance that has been given to the legal asset it protects, it is required the person applying the law to always consider the spirit and purpose of the regulation and, for such purposes, it shall be taken into account the own sense of its words, in relation to the context, the historical background and the social reality of the moment when the regulations shall be applied.

164. Consequently, when interpreting the environmental rules, we shall be guided by the decisive and evolutionary nature of the environmental law and its main objective of life and health protection and ecological balance. The person applying the law must seek the interpretation allowing to apply the regulation to "protect more and pollute less," "increase biodiversity and reduce pollution,"

always considering the need for a "rational use of natural resources" meeting the needs of the current and future generations.[150]

165. The environmental legal system must always pursue the protection of the environmental public interest in the light of Article 50 of the Constitution establishing the duty to guarantee, defend and preserve the right to a healthy and ecologically balanced environment and the evolutionary and decisive nature that is also shared by the environmental international law. The treaties, conventions and statements of environmental principles have established the importance of trying to reach a high level of environmental protection, improving the environment, increasing biodiversity, protecting the natural resources, and, of course, rooting out and mitigating contamination and environmental degradation.

166. Moreover, if we base on the fact that in the case of Costa Rica, the international environmental law is mandatory and enjoys full enforceability [151], the legal professional shall interpret the internal regulation pursuant to the obligations undertaken by the country by signing and ratifying such environmental agreements.

167. The environmental rules must serve the social purposes for which they are destined, for which reason they shall be interpreted and complied with pursuant to the hermeneutic principle *in dubio pro natura*, the observance of which implies that all actions of the public administration and of the individuals in environment-related issues, shall be performed with the due care in order to avoid severe and irreversible risks and damage. In other words, if there is lack of certainty regarding the risk of the activity in terms of causing a serious and irreparable damage, the legal professional shall interpret and apply the regulation in such a manner that it hinders the performance of this type of activities until there is scientific certainty that they do not constitute a risk of damage.

168. The consolidated environmental principles like the objectivation of environmental law, prevention, polluter pay, restructuring, public participation and rational use, widely developed by the constitutional case law, it is also a requirement to interpret the environmental rules pursuant to their essential purpose.[152]

169. As a complement to this environmental principles, the vote 2012-13367 of the Constitutional Chamber developed the no-regression principle as a substantive guarantee of environmental

rights prohibiting the State to adopt any measures or policies, approve or amend rules that worsen, without proportional or reasonable justification, the rights reached beforehand, in relation to the principles of progressivity of human rights, objectivation of environmental protection and non-retroactivity of the rules.

170. It is worth highlighting that the progressivity and no-regression principles[153] imply for the law professional, to interpret and apply the environmental regulation under the unequivocal science and technique rules. Likewise, the general principle of environmental protection objectivation, also called principle of link to science and technique, or, principle of reasonableness in relation to environmental law, has been recognized and widely developed in the last decade by the Costa Rican constitutional case law.

171. The objectivation principle of environmental protection consists of the obligation to prove, through technical and scientific studies, the decision-making in environmental matters, whether in relation to individual administrative rights or provisions of a general nature, both legal and regulatory,[154] strengthening with that the duty to count always and in every situation where the environment may end up affected with serious technical and scientific comprehensive studies guaranteeing the lowest possible environmental impact[155]. Then it is about the application of the constitutional principle of reasonableness to environmental law, requiring that the acts and rules issued regarding this matter shall be duly grounded on serious technical studies, even when there exists no legal regulation so expressly establishing.[156]

172. In relation to this principle, the Constitutional Chamber indicated in votes 2005-14293, 2006- 17126 and 2009-2009 that: “it is a principle that under no circumstances can be confused with the previous one [referring to the precautionary principle, provided that, pursuant to the provisions in Articles 16 and 160 of the General Law of Public Administration, it is translated into the obligation to accredit environmental decision making with scientific and technical studies, be it in relation to administrative rules, individual or general dispositions, both legislative and regulatory-, from where the requirement of "link to science and technique" derives, ... if there is evidence of an objective technical criterion denoting the probability of evident damage to the environment, the natural resources or the health of the people, the project, work or activity proposed shall be discarded;

and in the event of "reasonable doubt," decisions shall be taken to the benefit of the environment (principle *pro natura*), which can be translated into the adoption, both of compensatory and precautionary measures, with the purposes of properly protecting the environment."[157]

173. In other words, since environment rules shall serve the social purposes they are destined for, they shall be interpreted and integrated pursuant to the principle in dubo pro natura and the above-mentioned environmental principles, applying the regulation, whether written or not, whether substantive or procedural, that best serves the purposes inherent to environmental law, whether the protection of life, health, and ecological balance; the existence of a potential risk of damage to the environment shall be enough for the application thereof.

Again, all the above is more of something one would hear in law 101. There's no application to what the Atty. Gen. is saying here to the facts and evidence at hand in our particular case. All of this is intended to obscure the fact that there was legal permits issued and they were illegally nullified when I refuse to pay a bribe.

6.3 Principle of Legality

174. The principle of legality implies that the acts and behaviors of the Administration shall be subject to the law, and, in general, to all the regulations of the legal system. This is known as principle of lawfulness of the Administration. This principle is grounded on Article 11 of the Political Constitution and on the General Law of Public Administration.[158]

175. In that regard, the treaty-writer Eduardo Ortiz has stated that: "The block of legality is composed not only of the law, but also of all the written rules (regulations, decrees de facto, emergency decrees, delegated laws) and non-written rules (customs or administrative policies, case law and general principles of law) integrating such legal system. The rule authorizing the administrative conduct may be non-written and still be, however, as mandatory as the law... This way there arise powers and obligations under the responsibility of the Administration that may not be stated in any written text and that, eventually, can supersede such written text, if a principle of the higher hierarchy is concerned, as it is the case of the principles of constitutional rank compared to the law and the principles of legal rank compared to the regulation."[159]

176. Article 11 of the General Law of Public Administration covers the legality principle, and contains a direct relationship with the principle of legislation hierarchy. Then its interpretation and application

shall be understood in the light of the scale of sources of law. The legality principle as regards environmental law needs to be applied considering international environmental law principles, which are part of Costa Rican law and developed by local jurisprudence. The principle of legality in environmental matters shall be then analyzed taking into account both the written regulations and non-written regulations like the general principles of the law.

177. The treaty writer Ortiz further states: "but the non-written rules, especially the general principles of the law, may be useful not only for interpreting the written rules but also to replace them. This hypothesis speaks about integration of the Law. It is then possible to conclude that the integration of the administrative legal system is appropriate, through the application of non- written rules covering the total absence of written rules for a case in particular."[160]

178. It is due to this reason why, in environmental law, it has been taken into account the legal asset under protection (whose impact can be irreversible) and the principles of the environmental law. In that regard, the case law has understood that the impulse for action, speed, absence of formalities, the actions beyond the normal and the precautionary measures to be adopted shall have maximum elasticity in this proceeding. Therefore, the compliance with formalities is more moderate in relation to the general regulatory scheme contained in the Second Book of the General Law of Public Administration, given the values that are involved and the aims followed by the Public Administration in environmental matters.

179. When applying the principle of legality in environmental matters in Costa Rica, it shall not be considered separately from the above-mentioned principle of the objectivation of the environmental protection -also called principle of link to science and technique or reasonableness principle, which has been widely developed by the constitutional courts. As it was mentioned above, this principle consists of the obligation to accredit environmental decision making with scientific and technical studies, be it in relation to administrative rules, individual or general dispositions, both legislative and regulatory.[161]

180. This principle is grounded on the assumption that the regulation can use concepts whose objective and meaning can only be determined by an expert with specialized knowledge. Therefore, Article 16 of the General Law of Public Administration states that "1. Under no circumstances shall any

acts contrary to unequivocal rules of the science or the technique be issued, or contrary to elemental principles of justice, logic or convenience." This technique is incorporated in the terms of the law and it shall be taken into account that the law refers to such technique, provided that the matter to be decided is ruled by the exact science or by the rules of a given art.

181. Based on the above, it is possible to conclude that the principle of legality shall be understood in the framework of written and non-written regulations, having as reference the general principles of the administrative law and the protection of the asset being legally protected.

Again, all the above is more of something one would hear in law 101. There's no application to what the Atty. Gen. is saying here to the facts and evidence at hand in our particular case. All of this is intended to obscure the fact that there was legal permits issued and they were illegally nullified when I refuse to pay a bribe.

6.4 Definition of wetland and its characteristics under Decree 35803-MINAET

182. As it was mentioned above, the wetlands enjoy an important legal protection, given the number of benefits they provide for the environment. Among the benefits provided by the wetlands: water supply both for direct exploitation as well as for the refill of aquifers by infiltration; the regulation of flows of utmost importance for the control of floods; the prevention and protection against the entry of salty waters affecting underground waters and superficial drinkable waters; the protection against the forces of nature as storms, hurricanes, etc.; the retention of sediments, nutrients and toxics; supplying source of natural products like wood, derivatives from wild life and aquatic derivatives like shellfish, crustaceans, and fish; production of energy; transportation; preservation; entertainment and tourism; investigation and education; biodiversity and cultural heritage; landscape and scenic beauty; and maintenance of essential ecological processes.[162]

183. The wetland ecosystem is defined by the Ramsar Convention [163], but it is also regulated by several national laws, including the Wild Life Preservation Law, the Environmental Organic Law, the Fishery and Aquaculture Law. Additionally, through Decree 35803-MINAET, technical criteria are added for the identification, classification and preservation of wetlands.

184. Then we have multiple definitions and protection of the wetland ecosystem in different legislation, which is a clear indicator that the Costa Rican legal system is really interested in protecting this type of ecosystem. This is precisely why the existing regulation is consistent and pursuant to the

international treaties, general principles of Law and case-law developed on this matter. The above implies that it is of Costa Rica's interest to give a high value to the legal protection of wetlands.

185. It is with the purpose of counting on a more precise legal tool contributing to the identification of wetlands that Decree 35805-MINAET was created. This Decree provides a series of ecological features and parameters to define what a wetland is. In particular, Article 6 of this Decree states as follows:

"Article 6º—Ecological Features of Wetlands. The essential ecological features that an area shall have in order to be considered as a wetland are: (a) hydrophilic vegetation, made of vegetation types associated with aquatic and semi-aquatic media, including phreatic vegetation developed in permanent water sheets or superficial phreatic levels. (b) Hydric soils, defined as those soils developed in conditions with a high degree of humidity until reaching the saturation degree and (c) Hydric condition, characterized by the climate influence on a given territory, where other variables come into play, like geomorphological processes, topography, material forming the soil, and, occasionally, other extreme processes or events."

186. This article establishes a series of technical features to be taken into account when identifying a wetland. The above shall be done taking as higher-rank general framework the provisions of the Political Constitution in Article 50, the definitions established by the current legislation in the matter and the criteria based on science and technique.

187. It is important to highlight that, in the environmental matter, also the principles of environmental law already indicated like the precautionary principle[164], the preventive principle[165], the principle of objectivation of environmental protection, the irreducibility principle of ecosystems, and the no-regression principle.

188. Then, it is in the light of these principles and based on the rules of science and technique that the regulatory analysis of this type of ecosystems shall be carried out. The interpretation and application shall always depend on a series of technical factors that shall be assessed in every case in particular, in order to achieve an objective identification of the criteria provided by the legislation, and, in this case, Decree 35805-MINAET. Since we are talking about ecosystems, the normal thing

is that each wetland has very particular features, for which the scientific-technical criteria shall be the ones contributing to their identification.

189. It is neither correct nor convenient for the asset under legal protection (wetlands in this case) to use a restrictive interpretation of the criteria established in Decree 35805-MINAET. Doing so would be going against the wide protection that both the national legislation, as well as the international one, and our courts have provided to the legal protection of environmental assets and, in particular, wetlands. In the vote 2010-8312, the Constitutional Chamber ratifies its line regarding the function of the progressivity principle in the interpretation of fundamental rights: "The Chamber does not ignore that the existence of internal rules on these aspects respond to clinical or medical reasons of a general nature, but it is clear enough that the application thereof shall be always assessed for every situation in particular, since being subject to the mere or simple regulatory description categorically disputes a full protection of the fundamental rights, where the continuity and progressivity features impose agile and versatile interpretation criteria far from legal dogmas already largely exceeded.

190. For interpretation and application purposes of Decree 35805-MINAET, it shall be the technical and scientific criterion jointly with the environmental principles the one determining the way in which the features provided by such decree shall be taken into account in order to identify a wetland. Environmental law, given its decisive nature, always seeks to protect the environmental asset, especially when it is susceptible to being affected. Such is the objective that must be taken into account at the moment of its application.

191. Along the same lines, it shall be a technical and scientific decision, if using as reference the classification of soils established in Decree 23214-MAG-MINEREM, or another methodology for soil classification recognized technically and scientifically. What is relevant for these purposes is that the interpretation must be clearly grounded on science and technique criteria (principle of objectivation of environmental protection). As it was mentioned above and as provided by the treaties writer Eduardo Ortiz, the principle of the legality principle shall be understood broadly, as a requirement of a written or non-written rule like the general principles of the law. The purpose of the legality principle and the application thereof is to impose on the administration the respect of the legal system in its totality, taking into account the asset under legal protection.[166]

192. Therefore, if the purpose to be followed by the Administration is to protect the wetland ecosystems, it shall interpret and apply the regulation on this matter in a broad and integral manner. Doing so otherwise could infringe upon the principles ruling the matter and affect the asset under legal protection.

Again, all the above is more of something one would hear in law 101. There's no application to what the Atty. Gen. is saying here to the facts and evidence at hand in our particular case. All of this is intended to obscure the fact that there was legal permits issued and they were illegally nullified when I refuse to pay a bribe.

7. CONCESSIONS AT SHORELINE AREAS (ZMT)

7.1 Context and definitions

193. The concession, in broad terms, is the act through which the Public Administration transfers to another person -usually a private legal person, whether natural or legal- a power or *derecho propio* that the latter held beforehand. It is a legal act granting legal status, a legal situation or a right.[167]

194. In the matter of assets of public domain, it is understood as administrative concession the agreement executed by and between a private person and the Public Administration for the former to use certain assets of public domain in an exclusive manner, in exchange for a consideration in favor of the latter.[168]

195. Now, pursuant to the Costa Rican legislation, there is special treatment for areas located in the shoreline area (ZMT), an area covering the 200-meter wide strip along the Atlantic and Pacific coasts of Costa Rica[169]. Such strip constitutes national heritage, it belongs to the State, and given its nature, it enjoys the categories of publicity, imprescriptibility, unseizability, and inalienability[170]. Its protection, as well as the protection of its natural resources, is the obligation of the State, its institutions and any and all inhabitants of the country.[171]

196. The legitimate possession by a third party of the shoreline zone is possible through the request of a concession [172]. The granting of the concession is the suitable figure for the particular enjoyment of this good of public domain[173] as established in the regulation that has governed the matter since the year 1977: the ZMT Law (No. 6043)[174] and the Rules of Procedure therefor.[175]

197. The use and exploitation of the ZMT are subject to this regulation, which has awarded usufruct and administration to the municipalities[176], entities competent to grant concessions in restricted areas [177]. Additionally, the Costa Rican Institute of Tourism (ICT) is the entity in charge of monitoring everything related to the ZMT.[178] It has the obligation to establish a National Plan of Touristic Development taking into account the interest of preserving such zone as national heritage. This way, the ICT is the entity in charge of declaring touristic zones- whether on its own initiative or upon request of the municipality concerned.[179]

Again, all the above is more of something one would hear in law 101. There's no application to what the Atty. Gen. is saying here to the facts and evidence at hand in our particular case. All of this is intended to obscure the fact that there was legal permits issued and they were illegally nullified when I refuse to pay a bribe.

7.2 Legal framework applicable to concessions at shoreline areas (ZMT)

198. Given the particular nature of the ZMT, the touristic concessions given under this regime require the application of specific rules. The concessions are given for terms no shorter than five years and no longer than twenty years, indicating the fee to be paid and the payment method. The requirements and the formalities to process the request for the concession are established in the Rules of Procedure of the ZMT Law.[180]

7.2.1 Requirements and procedure for processing the application for concession

199. Concessions are granted directly to the petitioners, who shall submit their application for concession to the pertinent Municipality.[181]

200. Regarding the land for which the concession is requested, there exists a series of requirements including [182] the appraisal of the land by the Direct Taxation Unit of the Treasury, and this appraisal shall serve as basis for fixing the fee of the concession.[183]

201. Upon verification that any and all legal requirements have been complied with, an inspection will be carried out[184] - where applicable - as well as the publication of an edict in order to hear opposition[185]. The costs for all of the above shall be borne by the petitioner [186]. Should there be no oppositions, the Major shall prepare the well-founded resolution within a term of 30 days[187] and they shall send it to the Municipal Council for approval thereof, which shall fix a term of 30

days for the execution of the concession agreement[188]. Once the concession agreement is duly executed, it shall be remitted to the ICT for its approval. Upon approval of the concession, the interested party shall follow any pertinent procedures for its registration in the National Registry of Concessions of the Shoreline Area (ZMT) of the National Registry. The contract shall not have any legal effects until such registration has been completed.[189]

Again, all the above is more of something one would hear in law 101. There's no application to what the Atty. Gen. is saying here to the facts and evidence at hand in our particular case. All of this is intended to obscure the fact that there was legal permits issued and they were illegally nullified when I refuse to pay a bribe.

(A) Requirements for the concessionaires

202. In their capacity as petitioners of a concession, there exist two limitations that must be complied with by the parties wishing to obtain this type of permit. The above with the purpose of protecting the assets of public domain of the State and the public interest. The first limitation refers to the fact that the municipalities cannot grant concessions in favor of their rulers, municipal executives or relatives thereof.[190]

203. Secondly, pursuant to Article 47 of the ZMT Law and Article 25 of the Rules of Procedure thereof, there exists a prohibition to grant concessions to: foreigners who have resided in the country for less than five years without interruption[191]; corporations (sociedades anónimas) with bearer shares, companies domiciled abroad; to entities whose stocks, shares or capital belong in more than the fifty-one per cent to foreigners, nor to any other type of entity where more than half of its members are not Costa Rican[192]. Additionally, Article 47 of the Law, establishes in its second paragraph that once the concession has been granted to an entity, this shall not assign or transfer any stocks or shares -nor its partners- to any foreigners.[193] Consequently, any transfer, in violation to this regulation, shall be void.

The law was followed and there was no illegal transfer.

204. Under this last assumption, it is recognized the right to the concessionaire, but it is limited for reasons of reasonableness inherent to the performance of a true social function of the goods of public domain[194]. The essential right prevails, since foreigners who have resided in the country for at least five years without interruption may submit such request, just like companies of foreign capital stock provided that they hold a part (at least the 51%) of Costa Rican capital. The law has

simply constrained the extension or modality of the exercise of such right.

At all times a Costa Rican held a 51% interest in the La Canicula concession. I don't think the Atty. Gen.is trying to state that wasn't the case.

205. This restriction is reasonable provided that the concession in the shoreline area shall meet the public interest. Therefore, the concessionaire shall have a local base in the national territory, guaranteeing their permanence and use of the asset[195]. This function is even reflected in the fact that the abandonment of the premises or the legal absence of the concessionaire, for example, are grounds for concession termination. [196] The aim of the public interests legitimates the granting of the concession and, therefore, non-exercise thereof is considered as contrary to the general interest, since the exclusive and privileged nature granted to the concession in favor of the concessionaire is linked to the actual performance of the activity. This way, non-exercise of the activity in a continuous manner is also a ground for concession termination.[197]

Again, all the above is more of something one would hear in law 101. There's no application to what the Atty. Gen. is saying here to the facts and evidence at hand in our particular case. All of this is intended to obscure the fact that there was legal permits issued and they were illegally nullified when I refuse to pay a bribe.

(B) The concession agreement

206. The concession agreement is the agreement between the municipality of the jurisdiction concerned and the concessionaire, through which the concession is formalized [198]. For each concession granted, a contract is executed with the terms and conditions pursuant to the Rules of Procedure for the ZMT Law[199]. This agreement is of vital importance, since by virtue of the pacta sunt servanda principle, it is law between the parties. Additionally, this document establishes the specific obligations undertaken by the parties as well as the amount initially fixed for the fee.

(C) The obligations of the concessionaire

207. By virtue of the legal nature of the concession, the concessionaire shall undertake certain obligations, since the concessions are only for the use and enjoyment of specific areas in the restricted zone, for the term and under the conditions as established by the law[200]. This term shall be no shorter than five years and no longer than twenty years, but it may be extended upon request of the interested party and if so authorized by the municipality.[201]

208. The concessionaires must meet the condition that they shall not very the use of the land, as well as of any buildings or installations made therein without the consent of the municipality and the ICT[202]. In the same way, it is forbidden for them to transfer, assign, commit or otherwise tax the concessions or the rights derived therefrom, whether totally or partially, without the approval of the above-mentioned institutions. Any act or contract executed in violation to this provision shall lack any validity.[203] Additionally, pursuant to Article 44 of the Rules of Procedure for the ZMT Law, the concessionaire undertakes the obligation to deposit the amount pertinent to the first yearly payment of the fee to the municipality concerned. The exact amount fixed for the concession shall be established in the contract signed by the parties, this becoming one of the conditions for the proper exercise of the right.

7.3 The fee

209. The payment of the fee is the consideration of the concessionaire for the use of the good of public domain that the Administration has given to them in concession.[204]

210. It is about a consideration paid to the pertinent municipality, by way of rent or payment for the use by a private individual of an asset of public domain.[205] The nature of the consideration is also grounded in the provisions of the ZMT Law in Article 53, showing that the fee is a requirement to keep the concession current.[206]

211. With the purposes of applying the fee referred to by the law, the pertinent Municipality shall request from the General Revenue Office the preparation of an appraisal of the lands to be put under concession.

212. The Rules of Procedure for the ZMT Law establishes the criteria under which such appraisal shall be made [207]. The appraisal used for determining the fee of a concession shall have a validity of five years from the period after which it becomes final, and if so established in the contract.

Again, all the above is more of something one would hear in law 101. There's no application to what the Atty. Gen. is saying here to the facts and evidence at hand in our particular case. All of this is intended to obscure the fact that there was legal permits issued and they were illegally nullified when I refuse to pay a bribe.

7.3.1 Prohibition to dispose of the concession rights without authorization

213. There exists an express prohibition established in Article 45 of the ZMT Law for assigning, committing, transferring or taxing totally or partially, the concessions or the rights derived therefrom without the express authorization of the municipality and the Costa Rican Tourism Institute; any acts breaching such provision shall lack any validity.[208]

214. The rights derived from the concession are subject to legal transfer through deeds of transfer of ownership or deeds creating rights in rem, upon prior administrative authorization. As understood by the Constitutional Chamber in its votes 2001-01246 and 07792-98, the concession right is part of the constitutional concept of property, involving patrimonial rights with economic value of a person.[209]

215. Since this is a right *intuitu personae*, the non-authorized assignments are illicit, since as it has been also established by the Constitutional Chamber in the same vote, "the need for previous authorization in transfers inter vivos or mortis causa is not a merely formal requirement, but an *ad solemnitatem* requirement, since the absence of such authorization renders the transfer made ineffective and serving no purposes for the Administration itself."

7.3.2 The indirect transfer of property rights

216. By transfer -in broad terms- it is understood: "any legal business implying the transfer of control power on a legal person holding title of the real estate property."[210] In other words, this term covers any legal business through which a transfer of the asset is performed, on the basis of the legal nature thereof and not the denomination provided by the parties.

217. In Costa Rica, due to the frequent use of legal persons -and corporations (*sociedades anónimas*) in particular-, legislative reforms have been implemented with the purposes of avoiding the abuse that some natural persons could make of this legal concept in order to evade obligations. Its application to the concessions is not an exception, since this figure is used for the request of concessions.

218. In this framework, it is relevant to clarify what the Costa Rican legislation means by "indirect transfer"[211]. This is about any legal business implying the transfer of power of control on a legal

person holding title of a real estate property.

219. Regarding the concessions, even though the real estate property subject matter of the concession cannot be transferred for being a good of public domain, the concession rights can indeed be dispose of, which transfer is subject to the limitations discussed above. In the case of legal persons, the transfer of power of control may be performed in an indirect manner through transfers or assignments of stocks. In order to exercise the power of control, it is required to hold at least the 51% of the stocks[212]. So, in the event of an assignment or transfer of at least a 51% of stocks, the company changes its control, with the same effects on the goods its possesses as the effects of a transfer. Hence, an indirect transfer through a change of equity control would imply the duty to request authorization from the administration, since administrative rights in rem are concerned.

Again, all the above is more of something one would hear in law 101. There's no application to what the Atty. Gen. is saying here to the facts and evidence at hand in our particular case. All of this is intended to obscure the fact that there was legal permits issued and they were illegally nullified when I refuse to pay a bribe.

7.3.3 Legal consequences of changes of equity control performed in contravention of Article 47 of the ZMT Law.

220. There exist sanctions established by Article 53 of the ZMT Law, including the cancellation of the concession. The Office of the Attorney General of the Republic has been clear enough in establishing that those concessionaires breaking or breaching the regulation referring to shoreline areas (ZMT) or the contract clauses, might get their concession canceled: "(...) it is worth noting the sanction stipulated for the concessionaire breaking or breaching the regulation for the use of the shoreline zone, the contract clauses, or abusing the exercise of their right, in which case the concession shall be canceled; in this case, any improvements, constructions or installations shall be in favor of the municipality, which shall pay no fees whatsoever for them; moreover, the breaching party shall pay for the damages caused by their action or omission, notwithstanding the crimes they may have incurred in (Articles 53, 55 second paragraph and 65 ibid.)."[213]

221. Moreover, we shall refer to the possible constitution of "*Fraude de Ley*"[214]. The transfer of stocks from a concessionaire company to foreigners so that the latter acquire more than the 51% of the stocks contravenes Article 47 of the ZMT Law and can derive in fraude de ley, as provided by the

Office of the Attorney General of the Republic.[215] In that regard, the Office of the Attorney General of the Republic has indicated that there is *fraude de ley*, without violating or breaking any written rule, it is intended to circumvent the principles underlying the law, trying to avoid the public objective pursued by the legislator. It is about a conduct seeking to circumvent or frustrate the aim of a rule under the protection of a regulation issued with different purpose. This way, the legislation may be respected in form but not in spirit or substance.[216]

222. Through a consultation made to the Office of the Attorney General of the Republic, this was explicit in determining that the Article 47 establishes clear prohibitions without room for interpretations, for which reason: "when a concession is granted under this Article 47 to a legal person and it is accredited that their capital stock belongs in more than a fifty-one per cent to legal persons controlled by foreigners, then there could exist fraude de ley." [217]

The law was followed and ahered to.

(A) The nullity of the act as a consequence of *fraude de ley*

223. Article 47 explicitly establishes that any transfers made in contravention of the provisions therein provided shall lack any validity.[218] This way, the ZMT Law establishes that any act involving a transfer of control of 51% or more stocks of the concessionaire company shall be null.

224. This shall be understood in consistency with the statements of the Office of the Attorney General Office of the Republic regarding fraude de ley, since this applies to any person seeking to, in bad faith, circumvent legal provisions [219] . In the case of concessions in the ZMT, it is of great importance the information that the concessionaire submits to the Municipality, which shall be provided in good faith, truthfully and pursuant to law. For inalienable property in the public domain, the spirit of the law shall always be oriented to protect the public interest. In this regard, the hiding of information through the execution of assignment contracts, private records or other instruments, shall be contrary to the protection of the public interest.

225. *Fraude de ley* can have serious consequences. An administrative act committed in *fraude de ley* is void. In practice, this occurs through a criminal process involving a full investigation of the facts,[220] which permits the judge to declare the act's annulment where illicit conduct is found. Therefore, assuming an infringement of Article 47 of the ZMT Law, the transfer of shares

against the aim of the law. Furthermore, the clear consequence would be the absence of the developer's ownership of those shares, being that he is non-compliant with the minimum requirements. And the absence of ownership by that individual entails that, in no way, can he be the beneficiary of the concession, and, in consequence, he is lacking any legitimacy to assert his rights to the latter.

8. ABOUT THE STATEMENT OF MR. LUIS ORTIZ

227. I have read the statement of Mr. Luis Ortiz. Taking into account that throughout his report he makes some statements that (in addition to my first statement) where he provides an incorrect explanation on some of the topics raised, it is appropriate to refer to that in order to clarify several of the indicated aspects.

228. Mr. Luis Ortiz has a long and sound academic and professional career in administrative law. Nevertheless, for the purposes of this arbitration, it is important not to lose sight of the fact that we are dealing with proceedings of administrative law specifically correlated to environmental matters. As I mentioned above, when analyzing environmental administrative law, one must observe the special principles, substantive rules and particular formalities, keeping in mind our ultimate goal: the protection of the environment as a fundamental human right221. It is from this perspective that he made the following observations, with the only purpose of bringing accuracy, certainty and clarity on the issues of environmental administrative law that are being treated and that are in connection with this arbitration.[221]

229. Throughout my report and my previous statement, I have reiterated the importance of the environmental principles, including the precautionary principle or *pro natura* [222] and its differentiation with the preventive principle[223]. Considering the statement of Mr. Ortiz, it seems a *priori* those concepts are very familiar to him[224]. However, his position is inconsistent when providing his own interpretation. Such is the case of the burden of proof in relation to the precautionary principle and the filing of precautionary measures[225], on which topic he insists on quoting the General Law of Public Administration for the purposes of requiring evidence prior to the filing of precautionary measures. The above, notwithstanding the fact that it is clear enough that in environmental matters the legal basis is the application of the pro natura principle, under

which action is taken immediately just in case, in order to avoid any irreversible damage. Then, we could not wait until the end of an administrative or judicial complete process[226], as claimed by Mr. Ortiz, since the danger or environmental risk is imminent. The concept of “interim remedy measures” does neither apply for these purposes, since we cannot mix an accessory and precautionary measure with a remedy measure requiring to have reached a result in the main process.[227]

230. SINAC, SETENA, and the Administrative Environmental Court, are decentralized bodies of the Environment and Energy Ministry. There is hierarchy relationship among them, for which reason it is incorrect to assert that SETENA reversed a measure, and, therefore, the remaining entities should have done the same thing. It is clear that the reversion of a measure has no effect on the other measures, since pursuant to the Environment Organic Law, all these entities have competence to file precautionary measures, as it was clarified in the previous section on precautionary measures in this statement.

231. Moreover, Mr. Ortiz indifferently uses throughout his report the concept of “Natural Heritage”[228]. This is term that, as such, is not used in this matter, since what is widely recognized is the concept of Natural Heritage of the State,” ruled by the Forestry Law[229]. The concept of Natural Heritage of the State refers to the forests or lands suitable for forestry located in State property and in protected wild areas. For this reason, using the term interchangeably is incorrect, since not all forests and lands suitable for forestry make part of the natural heritage of the State. The ones located in private lands are out of this category. This incorrect use of the concept is aggravated when it is assured that “The wetlands make part of the natural heritage of the country and are, therefore, of public use”[230]. This phrase is incorrect, since not all the wetlands make part of the natural heritage of the State, since the ones located in private lands are not natural heritage of the State even though they are ecosystems that enjoy a special protection under the law. The regulation makes a differentiation between the wetlands that are indeed natural heritage of the State, which are administered by the SINAC, and the ones that are not[231], even though all of them are protected and of general interest given their ecological features.[232]

232. As indicated by Mr. Ortiz, it is correct that the SINAC must keep a record of the wetlands that

have been protected as management category[233] pursuant to the Executive Order 35803, which established the obligation of the Environment and Energy Ministry to delimit the wetlands of the country. However, the Constitutional Chamber, through its vote 2011-16938 dated December 07, 2011, widened its vision and regulation on the matter. Nowadays, it is current the obligation of the SINAC to keep a record of the protected wetlands, since the wetland concerned is a Ramsar wetland. But it is made clear that the private owners have the obligation to and are responsible for identifying, delimiting, and informing when they intend to carry out developments in real estate property where these ecosystems are located, in order to ensure their protection. In other words, currently the wetlands are protected, whether or not located in a protected wild area, whether or not registered in an official registry. Based on the above, the restrictions in private property, given the presence of wetlands, were imposed as a social and environmental limitation to the private property without further formalities, as provided by the Constitutional Chamber, whose decisions are binding for everyone.

233. The wetlands, as it has already been mentioned, are protected by constitutional order, and it is the responsibility of private owners to protect them and inform about their existence when activities or projects that may affect them are intended. The latter, precisely because they are protected ecosystems located in private property, and as such, fragile environmental areas, with a protection and management regime determined by the Constitutional Chamber. This is a situation very different from the obligations of the State to include in the official records the protected wetlands over the ones existing in additional protection conditions, like the ones located in the Natural Heritage of the State. Likewise, it is a mistake to confuse or expect that, as such, the wetlands shall be registered by the MINAE and entered in the Property Public
Registry, as a limitation to private property.[234]

234. Lastly, there exists a notion, throughout the report, that in presence of forests and wetlands, no type of development can be performed [235]. Regarding this consideration on prohibitions in relation to a particular type of constructions, in zones around wetlands, such prohibitions do not exist. That is ruled is the obligation of private individuals to identify in their property, especially if they are going to develop them, the wetlands located therein, which shall be done in compliance

with the criteria of the Executive Order 35803, pursuant to the already-commented constitutional judgment. It is also regulated that the authorized constructions depend on the environmental impact assessment process, which shall be initiated with the true information by the developer - in the capacity as project category A, as provided by Mr. Luis Ortiz- at the moment of submitting the D1. And, of course, it is also ruled the enforceability to preserve this type of ecosystems. In the matter of impact assessment, it is regulated the need to contemplating the interactions of an eventual project with its areas of influence, direct and indirect, for which purposes it shall be considered, to mention but a few, the environmentally fragile areas, whether wetlands, water flows or forests. As pertinent, SETENA authorizes or not the environmental viability, including in this the description of what has been authorized. The above, pursuant to the provisions of the Environmental Organic Law and related rules of procedure in terms of environmental impact assessment, including the Executive Order 31849.

235. In summary, a proposal of development in a plot of land including a wetland shall be environmentally assessed in order to determine the viability thereof. The above, based on the true information provided by the developer, who due to the same reason, submits an affidavit where they guarantee the truthfulness of the information provided. If the developer fails to comply with this condition, the entity in charge are misled, generating irregular situations, not matching the content and objectives of the environmental legislation.

The develop,r and the US investors, followed all the rules and regulations established by the government Costa Rica. We did no more and we did not less. There is no credible evidence that we did not comply with all these damn visuals and regulations. Because a government aid engaged in illegal conduct, human rights violations, destroyed the investment of the US investors, falsely charge with her crying the new I did not commit, ask me for bribes that were illegal, tried to assassinate me and then he referred me illegally to INTERPOL. The respondents memorial and rejoinder and they're weak and meager witness statements collectively are attempts to cover up their corruption and crimes that they committed, as a try to blame us for everything that's happened.

9. STATEMENT OF TRUTH

I, Julio Jurado Fernández, ratify the content of this witness statement and declare that the content and the affirmations therein contained are true.

Signed by,

[illegible signature]

October 28, 2016