



## Las Olas Case Reveals Institutional Weaknesses in Environmental protection

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September 25, 2018 Comex celebrated that plaintiffs must pay more than \$ 1 million to the State to cover their expenses in the process

A false document that was part of the file before the National Environmental Technical Secretariat (SETENA) and a municipality that in a single day issued seven construction permits are part of the institutional weaknesses exposed in the arbitration carried out by the International Center for Arrangement of Investment Disputes (ICSID) in the case known as Las Olas.

The Ministry of Foreign Trade (Comex) reported that on September 19, 2018 the State was notified of the decision adopted by the Arbitral Tribunal in the David Richard Aven et al. Case against Costa Rica known as “Las Olas”, since that was the name of an urban project that the plaintiffs planned to develop in the Esterillos beach sector, in the Central Pacific.

The decision rejected claims raised by the investors, who were seeking \$ 103.5 million. Rather, they were ordered to pay the Government of Costa Rica \$ 1,090,905.10 for the expenses incurred in the process.

The dispute was processed under case number UNCT / 15/3. US investors filed arbitration in 2014, under the Central America-United States Republic-Dominican Free Trade Agreement (CAFTA-DR). They alleged that the State acted arbitrarily when the environmental feasibility permits for the 39-hectare tourism project were suspended, which implied the project's suspension.

This suspension was given by government authorities, since "various wetlands and forests located on the land to be developed that had been affected by the plaintiffs were identified," according to Comex information.

In this way, Comex's hierarchy, Dyalá Jiménez, described the result as "very positive, the result of the tenacious and excellent work of an interdisciplinary team led by Comex that could be established thanks to the defense of the contracted legal firm", Herberth Smith Freehills.

Jiménez stressed that the resolution confirms the national commitment to respect "the rights of nationals and foreigners, maintaining our environmental standards that have always characterized us nationally and internationally."

## **Institutional contradictions**

When consulted in this regard, Nicolás Boeglin, professor of international law at the University of Costa Rica (UCR), pondered that the fact that the decision was taken unanimously by the three members of the arbitral tribunal sponsored by ICSID "speaks very well of the power of conviction of the arbitrator appointed by Costa Rica, the Venezuelan jurist Pedro Nikken".

However, the academic went further and asserted that the reading of this arbitration award "shows a series of contradictions of various Costa Rican environmental entities in the processing of this coastal megaproject", which, as he said, recalls "many details from other files "Processed in the 2006-2010 period," with SETENA 'intervened' from the Ministry of Competitiveness".

In this sense, he drew attention to paragraph 762 of the resolution, in which the court observes that "it is clear that there are inconsistencies in the documents and contradictions between the various authorities of Costa Rica" and points out that, although the country presented "some Claimants' unlawful assumptions regarding the Concession and the development of the Las Olas Project itself, "the State" omitted the application of domestic law to these situations. "

In addition, he points out that "the complexity of environmental legislation and the number of bodies empowered to apply it" cause a "confusion" that "has been, to some extent, was an invitation to litigate."

Boeglin offered an in-depth analysis of the resolution of the case on a blog that he maintains to provide inputs for the courses he teaches.

One of the aspects that appear in the resolution of the case and that the UCR professor highlighted is that a strange document appeared in SETENA's file that even came to be called "false" during the process.

It was an alleged report prepared by an official and the then director of the National System of Conservation Areas (SINAC). This "report" was introduced to the file in March 2008 and concluded that the project "does not constitute an obvious threat in the Esterillos Oeste biological corridor nor does it in any way undermine the biodiversity of the National Wildlife Refuge."

It wasn't until November 2010 that it was confirmed that it was a forgery, with the seriousness that "in the meantime, it seems that SETENA trusted the document," as indicated in paragraph 116 of the resolution.

In fact, in June 2008, SETENA issued an environmental viability permit, which served for the Municipality of Parrita to issue construction permits for a hotel, cabins and a swimming pool in August of that year. The permit expired without the works being built.

It was in March 2009 that residents of Esterillos Oeste filed a formal complaint with the Municipality, claiming that the site "had always been wetlands, as evidenced by the flooding of that area during the rainy season and the existence of typical fauna wetlands ". Neighbors accused the businessmen of "filling the lagoon, cutting down trees and building paved streets."

Thus, in April of that year the environmental manager of the Municipality of Parrita, Mónica Vargas, visited the sector and "confirmed the felling of trees and the construction of paved streets."

According to the resolution, Vargas made two more visits and in June 2010 she filed a complaint with the Administrative Environmental Tribunal (TAA) about the possible filling of wetlands, the construction of paved streets and the fact that vegetation had been cut down and burned.

On June 16, 2010, Vargas informed SINAC about her findings and previous reports issued regarding the Las Olas Project.

Paragraph 129 of the resolution states: "Curiously, on the same day that Mrs. Vargas publicly announced her concerns, the Municipality issued seven construction permits for the Easement Sector of the Las Olas Project."

The resolution also indicates that, although Costa Rica presented "illegal assumptions" committed by US investors, "the State failed to apply domestic law to these situations."

Boeglin explained that one of the points of interest in this case was the possibility that the country could obtain a compensatory amount for the environmental damage caused by the plaintiffs, which is known as a "counterclaim".

In this sense, the ICSID resolution points out that on the part of Costa Rica "there is no precise statement of the facts that support the claims", nor "a specification of the reparation that it seeks except in very general terms, and the quantification is very approximate, based solely on the personal experience of an expert rather than a precise method of valuation".

In addition, it points out that this claim was submitted at the wrong time.