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Workshop topic:

ATELIER 2: FACE AUX CONTRAINTES, LES POLITIQUES DE RÉGULATION SUFFISENT -ELLES?

À l'heure actuelle, un certain nombre de contraintes s'exercent sur la communauté internationale. On pense en premier lieu au caractère limité des ressources énergétiques, et notamment le pétrole. Ensuite, on peut évoquer le défi de la croissance démographique ou encore le phénomène de migrations climatiques. Mais comment agir face à ces contraintes ? Cette question nous conduit à revenir sur la notion d'arbitrage : doit-on privilégier la nature ? Comment mettre en place cet arbitrage ? Aujourd'hui, on se rend compte que si le monde des dirigeants parle de régulation, c'est parce que ce concept permet de réguler le libéralisme et son modèle de développement. Mais est-ce véritablement un concept capable de faire évoluer le monde ?

WORKSHOP 2. Considering the various restrictions (or limitations) are provisions (legal or political) or regulatory (statutes) enough?

The international community faces unlimited restrictions. We first think about the limited nature of energy resources, especially oil. Also, we can mention some challenges or demands due to the problem of demographic growth or climatic migrations. But, how could we react against these limitations? It is a question that guides us towards the notion of arbitration: should we favor nature?

How can we execute this arbitration? Today we realize that the ruling class or leaders of the world are repeatedly invoking the concept of regulations, because this concept allows regulation or stabilization of liberalism and its model of development. But can this concept be really apt to stimulate the evolution of the world?

Introduction

Previously to refer to the themes related to the analysis of this workshop, it is important to discuss some ideas from the evolution given to environmental protection in Costa Rica, as well as the mechanisms that our country has to do so, with the aim that it our position related to the environmental constraints or limitations, crisis we are facing nowadays, the protection of nature and the arbitration methods used to solve the conflicts around these issues can be better understood

- **General Aspects of Costa Rica**

Costa Rica, even though it is a very small country, around 51.100 square kilometers and with a population of approximately 4 millions of inhabitants, has a great natural richness. Approximately 5% of the world's known species inhabit it. This country is located within the Central American isthmus, known as CENTRAL AMERICA. It limits in the NORTH with Nicaragua, SOUTHWEST with the Pacific Ocean, in the **EAST** with the Caribbean or Atlantic Ocean; and SOUTHEAST with Panamá. The **CAPITAL** is **SAN JOSE**.

Also, for many years, the country enjoys a good reputation at the international level, due to its efforts, which began several decades ago, to protect biodiversity, the amount of trees per capita that exist and their diverse variety, the percentage of land destined to wildlife protection, as well as its struggle to protect natural resources in general. Also, environmental seals and certification have been promoted.

Thus, it is not unusual that, comparatively at the World level, in January 2009, Costa obtained first place in America and fifth in the World, in the Environmental Performance Index (which evaluates the relative sustainability among countries, based on the environmental health and vitality of ecosystems).

However, we cannot ignore that historically Costa Rica has elements of colonial poverty, the absence of precious gems and valuable raw materials, such as oil.

But, at the same time, we continue facing serious environmental problems, such as the following:

- We are the Central American country that produces most trash, due to a population of growing consumption. We do not have effective recycling programs and we have several open-air garbage dumps. Due to this serious problem there is great concern in some institutions, among them the Court, as well as private businesses and communities.
- Many special are in danger of extinction. "*Some 160.000 species, 30 percent of the total, are in danger due to climatic change and global warming.* (Admundo, October 17 2009, at:

http://www.adnmundo.com/contenidos/ambiente/especies_extincion_calentamiento_global_peligro_ma_150807.html).

  - There has not been planning nor government interest to face the serious environmental problems (such as solid waste disposal).
  - Our river basins are extremely contaminated.
  - The quality of the air is much compromised and we also suffer from sound pollution throughout the country, but especially in San Jose.
  - Water resources are not well utilized nor there any certainty of its preservation for future generations.

To these we must add:

- Disorderly tourism growth.
- Lack of urban planning.
- Few incentives to protect cultural heritage.
- Little protection of the marine areas and their biodiversity.
- Excess of sound pollution.

The State of Nation 2008 report, published in 2009, states:

"Costa Rica has arrived to a borderline situation regarding environmental management, a condition that is critical in the sphere of land-use planning. There are strong tensions derived from the major race for the use of land and natural resources, as well as accelerated economic dynamics and stakeholders and interests more powerful and diverse than in previous decades. Therefore, the balance between economic development and environmental protection is more

fragile each time and between both there seems to exist a conflicting border, not only due to the tensions, but because inadequate environmental management can have negative consequences for sustainable development… It is not surprising that each proposal or public or public action- with environmental implications generates reactions among the social and economic stakeholders, according to the activities or interests they affect".

Therefore the ecologic accomplishments obtained in our country are worthy to be valued, but there are insufficient to consider that we have accomplished the task of optimal environmental protection, from the point of view of sustainable development. There much to do to not only to maintain the country's international reputation, but to really secure a healthy environment for present and future generations.

- **Brief explanation of the evolution of the role of the Costa Rican State regarding the environment and the constitutional recognition of the right to a healthy and ecologically balanced environment (Article 50 of the Political Constitution).**

The Costa Rican State, since the last decades of the past century, has been promoting the protection of the environment as a main objective. It should be underscored that in the last decade of the 20th century, there was an impressive development of environmental law (the Law on Biodiversity, the modern Forestry Law, and the Law on the Environment, only to mention some examples) and a relevant advance in human rights regarding this topic. However, in some fields, the accomplishments have not been the most important, especially regarding the control of the enactment of the law and the implementation of environmental policies, especially due to the lack of economic resources or institutional budget to carry on the objectives defined.

But one of the most outstanding accomplishments was the recognition of the human right to a healthy and ecologically balances environment, as a fundamental right. This happened formally in 1994 and 1996, when the Constitution was amended, to enforce what the courts in our country had already been stating in their decisions, through interpretation of the constitutional rules.

Therefore, article 50 of the Constitution, second paragraph states:

> *"ARTICLE 50. - …*
>
> *Every person has a right to a healthy and ecologically balanced environment. Thus, he/she is has legal standing to file complain against any acts that violate this right and to demand reparation of the damage*

caused. The State will guarantee, defend and preserve this right. The law will determine the relevant responsibilities and sanctions."

And constitutional Article 46 constitutional, amended in 1996, complements the above Article by guaranteeing, in its final paragraph:

"The consumers and citizens have the right to the protection of their health, environment, economic security and interests, to receive appropriate and truthful information, to the liberty to choose and fair treatment. The State will support the organizations that they create for the defense of their rights. The Law will regulate these rights".

a) It must be emphasized that the constitutional rules ample legal standing for the protection of a healthy environment, which guarantees that every person, without distinction of age, nationality, beliefs, etc. can demand their rights.

b) On the other hand, through environmental law and the recognition of the human right to a healthy environment, **limits** have been set to the right of property, free Enterprise and free economic initiative.

This has happened, with regards to the topic of interest in these Workshops, at a time of World tendency towards deregulation, simplifying procedures and requirement, open markets, negotiation of free trade agreements, attraction of foreign investment. And, both tendencies, according to part of the doctrine lead us to an environment which, at times, is confusing and complicated and, why not, even contradictory (See Cabrera, Jorge). Thus, the topic of environmental restrictions or limitations plays a key role.

In our country, the majority of these conflicts, especially at the local or internal level, are resolved by the courts (which belong to the Judicial branch) or local administrative instances. At the international level we do not have important experiences to mention regarding the environmental restrictions or limitations and international commerce. However, with the signing of the Free Trade Agreements is a topic that can be subject to controversy and analysis in the futures.

As I mentioned, in Costa Rica many local instances exist to resolve environmental problems, related to the imposition of environmental restrictions. Our country is characterized, also, by a transparent judicial system and a legal framework that guarantees the respect to due process. This all allows the confidence of the people in the court system. Also, the procedures are not very expensive as arbitration procedures are.

Precisely the task of the Constitutional Tribunal, called Constitutional Chamber, has been one of the most outstanding, regarding this topic. It has determined, on numerous occasions, when an environmental restriction is founded or reasonable, according to the Costa Rican legal framework and considering that in our country the protection of the environment is based on the constitutional. I will now refer briefly to the impact of the court decisions on this subject.

- **Contribution of the Judicial Branch, especially the Constitutional Chamber of the Court, regarding the protection of the environment.**

The role of the Judicial Branch and the confidence that exists in it as a main recourse to resolve conflicts of all kind or obtain a prompt response to different petitions brought before the tours, especially regarding the environment, due to what will later be said about arbitration.

In Costa Rica, in general, there is a solid constitutional Framework that constitutes and guarantees the right of the citizens to health and to a healthy and ecologically balanced environment, Framework which has been widely recognized by the Costa Rican courts, especially the Constitutional Chamber, the Appellate Court called First Chamber of the Supreme Court of Justice, before the recognition of the constitutional right to a healthy environment, in 1994, as afterwards.

The courts protected the environment from the beginning through the right to health, then, as a derivative of the right to life. Finally and with the amendment of 1994, it is recognized as an important fundamental right, based on human rights' regulations.

The Constitutional Chamber has been a leading authority as one of the main instances that are sought for the protection of this fundamental right.

In its different rulings it has expressed the established principles and criterion for its implementation, amongst them wide participation (collective or diffuse interests), the state's obligation to protect the environment, the importance of sustainable development for this purpose, the rejection of the lack of resources as justification to not apply administrative or preventive measures, the obligations of private citizens and others.

Later I shall refer to some of the Constitutional Chamber's ruling related to the validity or legality of some of the environmental restrictions.

1. Topic: Environmental restrictions or limitations or restrictive environmental practices (constraints)

In general the restrictive environmental practices and regulations seek to organize the use of environmental resources and goods, on behalf of the protection of the environment and the aim of sustainable development, as well as the survival of the human being, of all living beings and the earth.

From an economic standpoint, the environmental restrictions can diminish the benefits of businesses and industry. However, the balance requires, in favor of sustainable development and the protection of the environment, a balance since we are definitely referring to the welfare of the present and futures generations. Sustainable development is, also, a goal of high priority in the world since among its objectives is: 1) to accomplish food security and 2) to achieve fairer trade, also to 3) recognize the importance of the environment and natural resources. It can be said the economic growth is limited due to a superior goal, as is survival and the welfare of humanity and the balance of the environment in the protection of planet Earth.

For example, due to the growing concern to limit gas emissions with greenhouse (or stove) effect, the Kyoto Protocol was written and signed by many countries. In it the introduction of new restrictions in the operation of energy systems, such as thermoelectric energy, is proposed.

The countries and businesses must then plan the short-term operations of the energy producing systems, respecting the environmental restrictions imposed to reduce the emission of greenhouse effect gases.

In the field of forestry, alter the Summit at Rio (UNCED) in 1992, it has been recognized at the international level that the sustainable forestry organization is the main principle for the conservation of the environment. Several institutions and countries have imposed a series of commercial and environmental bylaws to forestry industries. Some of these are: forestry prohibition seasons, limitations to the cutting of hardwoods in certain regions, regulations for the use of softwoods in mature forests, economic incentives for the protection of forests. The rules and bylaws have different effects in industry; for example, can produce an increase in the local or international price of wood, with the consecutive effects on the main markets of sawn timber and of the industries that use it as raw material.

In order to organize sustainable forestry, contemporarily for example a tool has been used for the certification of lumber, in order to limit the import and use of forestry products produced in an unsustainable manner. Precisely, in several countries, especially in Europe, certification and labeling of the woods is used by many producers as a commercial instrument that proves that those products come from sustainably organized forests.

From another angle, since the relationship between international trade and the environment is closer, environmental restrictions are imposed not only for the import of products but for their export. We must especially mention those imposed by developed countries to the exports of developing countries. The restrictions have been growing to the methods and production procedures through different tools, such as agreements for the preservation of the environment, ecological markets and specific laws.

Recently we receive a visit from Europe due to contamination problems that was denounced as occurring due to the pineapple plantations. This is an example that can be useful for the issue of international commerce and environmental restrictions.

According to the above, to the first part of the question posed in this workshop I must reply that it is true, there are limitations or restrictions for the internal community and there are international agreements such as the United National Treaty, the Law of the Sea (CONVEMAR high sea), and the Rio Summit of 1992, also related to the atmosphere. From these we conclude that the resources from the sea, fish, air, waters, forests and soil, among others, are considered goods belonging to humankind. Thus, they are common goods that belong to everyone equally. Since there have been and there continue to be human actions that have affected and continue to damage these common goods, for example, the ozone layer, the generation of greenhouse effect gases, noise pollution, improper handling of thrash, agrarian erroneous productions as well as the destruction of the animals, limitations to the international communities and at the local level are established also.

1.1 Topic: Restrictive Practices in Costa Rica

In Costa Rica, the right to property is recognized in Article 45 of the Constitution, which states:

> *"Property cannot be violated, nobody can be deprived of theirs except for a legally proved public interest, only alter proper compensation is awarded according to the Law. In the case of war of internal strife, it is*

not previous compensation is not necessary. However, the payment will be made within two years after the state of emergency has ended".

Due to reasons of public necessity the Legislative Assemble may, with the vote of two thirds of the total of its members, impose the limitations of social interest to property.

Also, Article 46 of the Constitution establishes freedom of trade or free economic initiative, by establishing the following in its first two paragraphs:

"Private monopolies are prohibited, and any act, even though base on a law, that threatens or restricts the freedoms of commerce, agriculture and industry.

The action of the State aimed at preventing all monopolistic practice or tendency is of public interest".

The First and Constitutional Chambers of the Court have established that it is appropriate to limit the exercise of those two rights: the right to private property and the freedom of economic initiative, which although recognized by the Political Constitution, admit important limitations, especially regarding the protection of the environment.

I shall now mention several ruling where the scope of the environmental restrictions or limitations imposed by local law, which affect of limit the exercise of the aforementioned rights, is analyzed.

❖**Freedom of trade**

"Freedom of trade is not unlimited, due to which the practice of a productive activity –be it commercial, industrial, agricultural, etc. - is subset to regulations.

The industrial activity is not an exception and its dealings must be subject to guidelines established, not only in the constitutional rules and principles, but in the legislation that is enacted to develop the former." (Constitutional Chamber: ruling 2864-2003).

For example, the imposition of minimum distances for certain act ivies and constructions, with the aim of protecting specific resources (i.e. water) cannot be considered an illegal or unreasonable limitation of property.

They consist of minimum and adequate regulations established for industrial activities, with the goal of protecting the environment, which is a matter of public concern.

Regarding free trade and its limitation base on superior or public interests, among other relevant ruling of the Constitutional Chamber are: 1391-2001; 4856-1996; 1394-1994; 896-1993; 414-1993; 269-1991.

❖**The right to work**

The Constitutional Chamber, when the legality of sanitary orders have been questioned, has determined: to protect the health of the population cannot be understood as opposing the right to work, which can be limited due to reasons of social welfare and for the right to a healthy environment" (ruling 4063-1993).

❖**Right to property**

❖Before the constitutional amendment of 1994, the Constitutional Court has stated: *"The exercise of fundamental rights, such as private property and freedom of trade is not unlimited; they can and should be limited due to the social good. The right to a healthy environment, to health and physical integrity are also fundamental rights that the State is in the obligation to protect"* (Ruling 240-1992. In the same sense, ruling 1488-1992).

Regarding the right to property, specifically, it has been stated:

"However, the task of protecting the environment is difficult due to the fact that we maintain a rigid conception regarding the right to property that does not allow advancement in favor of the environment, without which the rights to life, work, property or health could not exist. We should not forget the fact that we are in the sphere of Law, in which the most important rules are those that can prevent all sorts of damage to the environ*ment since there is no rule that repairs, after the fact, the damage already caused; the need for prevention is more urgent in developing countries". (Ruling 5893-1995")*

Other examples related to the Constitutional Court's right to property refer to the duty to exploit land in a rational and balanced way. Consult, regarding this topic, rulings: 1763-1994, 5976-1993; 2233-1993.

"The First and Constitutional Chambers have established the appropriateness of limiting the exercise of the right to property due to environmental reasons, as is evidenced in the restrictions contained in the Forestry Law for forest property: in Ruling No. 26 of May 13, 194, the First Chamber stated that "They pertain to goods with a mixed legal regime; private regarding their ownership, but fulfilling the functions determined by the public or common good, in the sense of a limitation or restriction to private property. This is the doctrine of Article 45 of the Political Constitution. Regarding goods of restricted use, pertaining to limitations on property, this special legal system (regimen) does not necessarily imply the expropriation and much less payment of damages, since the private ones maintain their ownership", and the Constitutional Chamber, in rulings 240-92 (of January 31, 1992) and 1.488-92 (of June 3, 1992), due to the alleged violation of the right to property, liberty of trade and due process due to a sanitary order of the Ministry of Health, stated that: "...with their action the Ministry accused does not arbitrarily limit any right, simply, in use of the powers that the law dispenses, forces the claimant to observe the current rules in the issue of health... The exercise of the fundamental rights, such as private

property and the freedom of trade is not unlimited and must be limited due to reasons of social wellbeing...”; and in ruling Nº 5.893-95 (of October 27, 1997) declared that "... it is rational an constitutionally allowed to impose limitations to private property in favor of the conservation of the environment and forest heritage.

*__Some relevant examples of the environmental practices or restrictive regulations in Costa Rica__

Some relevant environmental restrictions or practices in our country are:

1.__In the matter of urban planning:__

In the protection of natural resources, especially water, forest and soil, restrictions on the areas that will be built on are imposed, the location of dangerous establishments, the handling of residual waters (sewage) and other aspects, established both in the Urban Planning Law, the General Health Law and the Executive Branch's bylaws. The activities and buildings to be developed must be compatible with the use authorized in the regulating plan. If not so, the denial of the permit for the use of the soil must occur, especially if it pertains to activities which have been implemented without the due permits. Acquired rights to continue the activity that has not been duly authorized cannot be acknowledged. Administrative Tribunal, Section Two: Ruling 212-2005.

FOR EXAMPLE: No industrial establishment can operate if it creates an element of danger, is unhealthy or uncomfortable for the neighborhood, due to the conditions of the maintenance of the building, the manner in which it operates, the manner or system it uses to dispose of its wastes, residues or emissions that result from its endeavors, or due to the noise its operation produces (Article 302 of the General Health Law).

> No authority may award patents, permits or licenses for the operation of industrial establishments, without the previous authorization of the Ministry of Health (MINSA).
>
> In the same manner, its authorization is required to begin the procedures for the approval of maps. for the installation, operation, to amplify or vary, or modify industrial establishments.
>
> The location of industrial establishments must be subject to what is established in the regulating or zoning plans.

In the absence of a zoning regime in force, MINSA must decide about the place where it can be installed (Articles 300 of the General Health Law and 18 of the Bylaws of Industrial Hygiene (RHI).

The General Law on Health, in its Chapter V, regulates the obligations and restrictions that industrial activities are subject to (Articles 298 to 304). It also regulates the obligations and restrictions relative to urbanizations and home health standards (Articles 308 to 321).

Municipal certificate for the use of the land. (Administrative Tribunal, Section II: ruling no. 138-2009). "Regulating plans determine the place where it is allowed to build, to carry on activities of trade, industry and recreational areas, based no only on criteria of opportunity and convenience, but in technical decisions and objectives approved by the community. The determination of the use of the soil is done through the classification of the category or type of soil (urban, subject to urbanization and others) according to its basic urban destiny and classification, which is applied to designate the subdivision of those types of soil, through urban use (residential or industrial zones), in total or partial percentages according even to the densities of the population of a specific community… As has been indicated, all urban regulation consists of limitations and de tractions of use and owner's power's over the property, which determines the use of the soil and how this use must be done. This task is materialized through the administrative act called certification of the use of soil…"

The First Chamber: ruling 507-2004; y the Constitutional Chamber: rulings 5305-1993, 14186-2008, also refer to the limitations on property rights related to the topic of urban planning:

2. In the matter of **soil:**

The Law requires that a study of the conformity of the use of the soil, regulated in the Bylaws to the La won Soils to be able to register the ownership of properties in the country: Articles 34 a 39, 58, 59, and for other types of legal benefits.

3. In the matter of **waters:**

Some examples of the environmental restrictions to protect water resources are:

The Law restricts what can be done in areas of water resource protections (regulated by Article 34 of the Forestry Law), which are also lands of public domain.

These are the rulings regarding this topic. Agrarian Tribunal rulings No. 770-1998 y 682-2006 (exclusion of the area of the land that wants to be registered as private).

❖ ***Limitations to the right of property to protect springs:*** Administrative Tribunal, Section II: ruling no. 573-2005; Constitutional Chamber: ruling no. 1146-1996.

Perimeters of water sources are also protected.

❖ ***Perimeters of protection of springs and the prohibition to build upon them:*** Constitutional Chamber: rulings no. 1923-2004, 5159-2006. Constitutional Chamber: ruling no. 1923-2004.

The use of existing resources, especially from the forest, in areas of water reload is limited.

❖ ***Rejection of the forestry management plan in an area of water reload***: First Chamber: ruling no. 319-2004. Administrative Tribunal, Section II: ruling no. 474-2005.

The drilling of wells is regulated and restricted. Law on Waters: Articles 7, 43, 207. The existing regulations that control the drilling and registration of wells must be considered . Penal code: Article. 7, 43, 207, 394-3. General Health Law: Article 270. Bylaws for the Drilling and Use of Underground Waters, Executive Decree 30387.

A fee for the emptying of water is imposed: Constitutional Chamber: ruling no. 9170-2006.

It is also important to mention a series of obligations and duties imposed on the private citizens and public institutions for the adequate protection of the underground and superficial water resources of public domain that the Constitutional Chamber (ruling 5159-2006) emphasizes. Thus, the Law of Waters of 1942 and other laws determine a series of prohibitions and duties for the owners, concessionaries and users of the springs, which are the following:

☐ They must adjust to the police and health bylaws regarding residual waters that are returned by a spring to avoid contamination or stench (Articles 57 and 166-3 Law on Waters)

☐ The Law for the Conservation of Wildlife (Article 128) prohibits the disposal of waste or sewage waters, waste or any other contaminating substance to springs, rivers, streams, permanent or nonpermanent brooks and lakes.

☐ The construction of ponds for the harvest of fish in springs destined for the human supply is prohibited (Article 63 of the Law on Waters).

☐ Owners of land where there are springs along whose edges the forests that sheltered them have been destroyed, must plant trees on their borders at a distance of no more than 5 meters (Article 148 of the Law on Waters).

☐ It is prohibited to destroy, in national and private forests, the trees situated less than 60 meters from the springs that begin in the hills or less than 50 meters from those that begin on flatlands. (Article 149 of the Law on Waters). The Forest Law also contains this stipulation in its Article 33.

☐ All requests for the use of spring tides, running water and streams must be addressed to the Ministry of Energy, Mines and the Environment (MINAET) (Article 178 Law on Waters).

2.-Regarding the forests**:**

Regarding the forests, our country differentiates between forests situated in private lands and those that are owned by the State. The latter are formed by the forests and lands of (Articles 1, 6, 13-18, 33 of the Law on Forests, 7 of the Law on Lands and Colonization, 73 of the Law on Maritime Terrestrial Zone):

- Natural reserves,
- Areas declared inalienable,
- The Maritime zone,
- The zones for the protection of the water resources (Article 33 of the Law on Forests)
- Other properties registered under the State and its institutions, except those that are obtained by the National Banking system due to credits in its favor.

In the lands owned by the State it is prohibited:

- To cut and exploit the forests in national parks, biological reserves, mangrove swamps, protected areas, wildlife refuges and forest reserves owned by the State (Articles 1 and 18 Law on Forests)
- Any exploitation of forest resources for purposes different than those authorized by law (Article 58-b) Law on Forests)

In privately-owned forests: "Private forest property is a form of property that is subject to multiple limitations on behalf of the public environmental interest" (Cabrera, 2006, p. 159). In those it is prohibited, according to Articles 19 and 26 of the Law on Forests, 36 of the Bylaws of the Law:

- To change the use of the soil.
- To establish forest plantations.
- To export wood in pieces and in hewn timber that comes from the forests.
- Mobilize wood in pieces, hewn or sawed that comes from forests or plantations, without the legally required documents.

3. - Regarding **atmospheric** resources:

There are restrictions for the emission of gases of greenhouse effect, atmospheric contamination and regarding sonic contamination, a topic which is included in our country for the purpose of protection, within the atmospheric resources. Some minor regulations that specify the levels of emissions and immissions are:

- ☐ Bylaws for the control and technical revision of contaminant emissions
- ☐ Produced by automated vehicles, Executive Decree 28280.
- ☐ Bylaws for the immission of atmospheric contaminants, Executive Decree30221-S.
- ☐ Technical revision/review of the control of vehicle emission (eco-seal), Executive Decree 25166.
- ☐ Regulation of the emission of noise, gases and particles produced by automotive vehicles, Executive Decree 13470-T (regulates the levels of emissions allowed)
- ☐ Bylaws on the emissions of atmospheric contaminants that originate in boilers, Executive Decree 30222.

4.-Regarding **energy** resources:

In our country, the State must maintain a relevant role and dictate general and specific measures related to the investigation, exploration, exploitation and the development of energy resources.

Their exploitation must be done rationally and efficiently. Also, the exploration and exploitation of alternate sources of energy, renewable and environmentally healthy must be promoted (Articles 56 to 58 of the Environmental Law/).

Local "energy legislation" is ample and detailed and restrictions or specific regulations regarding the procedures, use of raw materials, etc. are enacted. For example:

- ☐ Executive Decree 6130 MODIFIED -Content sulfur combustibles-.
- ☐ Executive Decree 26443-MEIC Technical bylaws RTCR 249 97-Diesel.
- ☐ Executive Decree 26482 Technical bylaws RTCR 245-97 Gas spark plug motors.
- ☐ Executive Decree 29751 Technical bylaws RTCR 374-98-MINAE Efficiency and Labeling-Regulation refrigeration and freezing.
- ☐ Executive Decree 29820 Technical bylaws RTCR 376-2000 Regulation Fluorescent Lamps-G 3-10-2001.
- ☐ Executive Decree 31837 Bylaws Use of Alternate Fuels-Cement manufacturer.

2. <u>Topic: ¿How can we react against these restrictive practices?</u>

Thought: Regarding this second question, it has been observed that, in principle, there are no improvements in the general condition of the environment, even though there are abundant laws. Is the Law enough? International regulations and agreements establish periods of compliance for specific cases. In 1992 the United Nation's Agenda XXI was approved. This is an action program that determines how waste must be handled. Chapter IV stipulates that the change in consumption habits and the irrational and disproportionate use of natural resources is at the base of the problem, if humans do not change those habits of destruction, regardless of number of international agreements in existence, solutions will not be implemented.

Costa Rica has abundant special substantive legislation that regulates the topic of the environment, besides the international documents ratified by the Legislative Assemble, even those not ratified, according to the rulings of the Constitutional chamber of the Court since the 90s, which stipulate that the agreements that protect the environment are of mandatory compliance, as well as the laws that indirectly regulate aspects related to the environment.

However, as was mentioned in the preceding lines, the environmental situation in Costa Rica does not improve. Even with the passage of time, the environmental laws increasingly limit and control highly contaminating activities and restrictions to fundamental rights are imposed which can affect the right to a healthy and ecologically balanced environment. However, some deficiencies can be observed, with the most relevant regarding the topic of the following restrictions (Gonzalez Ballar, page 135):

1. Public institutions denounce the lack of economic resources to fulfill their duties, in spite of maximizing their existing budgetary and technical resources.

2. Lack of coordination amongst the different agencies, which induces that some citizens may violate the restrictions that the Law imposes and territorial laws.

3. Absence of State planning to protect natural resources which affects the State's budget.

4. Deficiencies in verifying the environmental impact studies and lack of supervision during the execution of the approved.

5. Overlapping responsibilities, which affects controls to verify the compliance with the restrictions imposed by the laws.
The situations mentioned significantly affect the environment, because it is evident that citizens try to evade compliance or there are deficiencies in the procedures for the State to supervise. It must be clarified that the Law on the Environment allows citizen participation or that of NGOs. These groups contribute to the process of filing complaints in an effective way, besides having the legitimacy to file administrative and judicial complaints. (Peña Chacon, page 73).

However, the problem of the effectiveness and efficiency of the restrictions or limitations is very complex in Costa Rica. First, as was stated, the limitations are clearly established in the law, which allows lawyers certainty, since many of them restrict fundamental rights. Therefore, there must be a balance in this field.

A second relevant aspect is the lack of moral conscience of humans towards the environment and another is the use of resources without training programs for their rational and sustainable use. I will immediately share some thoughts regarding the topic of ethics for the environment and how the effectiveness and efficiency of the restrictions and limitations can be improved.

Restrictive practices

In this workshop it is questioned if we should establish privileges on behalf of nature? The reply is affirmative, but not completely. Since the past century, human beings have played an important role in society and development, so we must not destabilize nature, but on the contrary promote sustainable development, learning how to balance economic, social and environmental demands.

Two things should be stated regarding restrictive practices: 1) the reaction will

depend on whether it is a well based or reasonable environmental practice or restriction, in favor of the objectives of sustainable development or, on the contrary, 2) an illegal or unjustified restriction.

1) If it is a well based and reasonable environmental practice or restriction, the reaction must be positive, understanding that all, government, citizens and business, must respect the limitations or controls that it creates and seek alternatives or other productive and industrial models that are in accordance with the protection of the environment.

For example: if the production of energy uses contaminating raw materials (emission of greenhouse effect gases), at the business level the use of another raw material or the search for environmentally friendly energy systems must be procured.

Another example that is very appropriate to Latin America's reality is changing the agriculture intensive productive system that erodes the soil's resources or requires the excessive use of agrochemical products and without controls, to sustainable productive or ecological models. It is in this field that changes in agricultural production must be made.

In response to sustainable development, at the Summit in Rio, some important documents emerged. Among others, as indicated, **Agenda XXI** formulates a new international economic order based on the protection of the environment that seeks to establish the required strategies to reduce environmental damage and assure sustainable development. In the **Declaration on Forests** measures are required to protect forestry goods. The **Convention on Climatic Change** is a response to the protection of the atmosphere due to contamination caused by industry and agricultural production. And with the **Convention on Biological Biodiversity** actions are taken to prevent the destruction of the biological species and ecosystems.

It must be considered that, at the same time, food security must be assured, due to the hunger problem in the world and the poverty of the majority of farmers, at least in Latin America. Therefore, at the same time, it is necessary that while taking in consideration the restrictive practices to protect the environment and nature, a more just society must be built; and it's necessary to improve not only the systems used to plant and agricultural productions but everything related to the incentives and assistance to these producers and activities. Hence, the importance of development and agro-environmental Law, at a doctrinal level and as teaching at universities, which in Costa Rica has had a constant study in order to upgrade and develop all the institutes that constitute this discipline, even in the field trial. (Zeledón Zeledón, Ricardo).

In Costa Rica there is currently a bill called "Agrarian and Agro-environmental Procedural Code", based on oral procedures, which contains all the specifics of this discipline and contains precautionary and protective measures to prevent damage to the environment and agrarian or related productions. Also, among other procedures and the protection of agrarian producers, it contains **SPECIAL REGULATIONS FOR THE PROTECCION OF THE ENVIRONMENT.** (See Annex 4)

At the political and governmental level, it seeks to more severely limit and sanction more, from a fiscal of tax sphere, for example, the companies that do not adjust to the environmental restrictions and to benefit and promote those that do, through tax exemptions, simplifying procedures, etc.

2) Now, if there is an unreasonable and unfounded environmental restriction, it must be fought through the legal procedures that each Nation has established. In the case of our country, one of the most frequent and effective ones is judicial protection, specially the appeal on the grounds of unconstitutionality.

Costa Rica is an exception to the political and cultural system of most of the countries in a convulsive Latin American region, where military regimes have predominated, since the country prohibited not only the army but also defeated and has eluded dictatorships. Our democratic system, although still imperfect, has allowed ideological pluralism, where besides other rights such as the freedom of expression, association, competing political parties, there are economic and cultural rights and the Constitution has established mandatory and free elementary education.

☐ **Ethics for the environment: it is necessary to refine moral conscience of the political leaders, business sector and citizens.**

It is obvious how gradually the topic of the behavior toward nature and the importance of inhibiting behavior contrary to it begin to evolve. There is a refinement in the moral conscience of the individual, as Ramon Martin Mateo states, through which an important change in the protection of the environment begins.

At this stage, we observe that the actions of humans must be directed towards the rectitude of behavior regarding the environment, freely and voluntarily and with an awareness of the importance of the preservation and rational exploitation of the resources.

Values can also be understood in different ways, some authors state that they are beliefs; others describe them as ideals, rules, thoughts or qualities. Due to the current generation's lack of clarity regarding current values, how to live and internalize them, it is important to start education processes in values, which must reflect the axiological concepts that are desired, with the aim of generating a culture that promotes the objectives and challenges towards human completeness in this field.

From another angle, in the Costa Rican legal system there is an abundance of the creation of rules and regulations that tend to regulate the protection and rational exploitation of natural resources. However, a national and international regulation has not been sufficient since they have been and are systematically violated, due to human actions or omissions. Coercion contained in the different regulations is insufficient because there is not in place a legislation or method that allows, in the case of environmental damage, a procedure to estimate the damage that must be repaired or its proper reparation and the impossibility of the State and civil society to monitor the obligations and restrictions that the law imposes, besides other aspects already mentioned in this dissertation. Also, awareness is necessary of cautionary measures to prevent irreversible and irreparable damage which in many cases would allow us only to foresee the payment of what has already been damaged.

On the other hand, humanity is the loser, since the environment is the sum of the relationships between the natural world and living beings, which influence the life and the behavior of these. Due to the lacks of the Legal Science we must appeal to the interior of men and women, so that their actions may be rational and adhere to correct and preventive behavior due to the alarming situation we are experiencing. It is believed that we must have an ethical conduct towards the environment and use its resources rationally as well as interact harmoniously with each of its elements.

Even though a moral crisis is at hand, ethics for the environment must be reinforced, as a way of strengthening people's consciences, not only to respect the law but to impose self-restrictions, in order to promote sustainability. (May, Roy. Page 110).

☐ **Examples of restrictive actions taken by the Courts:**

In the Costa Rican court, we are working to create conscience in men and women regarding the importance of environmentally friendly behaviors. We are working in the following areas:

1. Zero paper policy: Based on a decision by the Supreme Court, we decided to develop a policy for the whole judicial system which promotes the use of electronic media in order to diminish the impression of documents, including

during the processing of judicial cases, for example in the communication of judicial rulings. There is an initial plan being executed in the Province of Alajuela's Family Court (Annex 2).

2. Recycling committee: Created with the aim of promoting recycling and reuse. It is being supervised by the Environmental Committee and many court employees are involved.

3. **Project "Justice in Nature"**: it began with the approval, in 2004, of a Cooperation Agreement with the State Electrical Company and in 2005 with a similar agreement with the Ministry of the Environment and Energy, both due to the initiative of Justice Rolando Vega, a member of the Second Chamber of the Court. With these agreements, the Court took the first steps in the area of environmental protection by establishing a forest reforestation and conservation project in the unexploited lands of the Court's Forensic Medicine Complex in San Joaquin de Flores, in the Province of Heredia.

Due to the importance of water, the Court began the reforestation of springs at the Forensic Medicine Complex, with the goal of protecting and preserving these sources of water, and restoring the birds, fauna, recreation and the preservation of the soils, in complete harmony with nature and establishing strategic alliances at the institutional level. From this initiative, the program **Justice in Nature** was born.

The project's objective is to develop, as part of the institutional policies and in conjunction with the National Electrical Company and the Ministry of the Environment and Energy, a conservation plan with we hope will include other court districts of the country, within a concept of sustainable development as a fundamental contribution to Costa Rican society. (Annex 3-)

3. <u>Topic: Arbitration</u>

- **Brief description of alternate conflict resolution methods in Costa Rica. Arbitration, mediation and conciliation**

Regarding conflict resolution, in Costa Rica, since 1997, the Law on Conflict Resolution and the Promotion of Social Peace, Nº7727, commonly called RAC, was enacted. From the environmental perspective, it has been said that it opens new alternatives to resolve conflicts. (Gonzalez Ballar, page 57)

Among its principles and main objectives is to promote social peace through education and alternative conflict-resolution methods. (Escoto y Alpizar, page 25).

It contemplates as alternative forms of conflict-resolution dialogue, negotiation, mediation, conciliation and arbitration.

The principles at the foundation of alternative conflict-resolution have been said to be the following (Gonzalez Ballar, page 60):

1. **Accessibility**: This entails that the parties must have easy access to these peaceful conflict resolution methods, at the financial and institutional levels. The latter is understood as the optimum availability of space and time awarded to citizens by specialized personnel.

2. **Protection of the rights of the parties**: There must not be any type of discrimination due to financial, social or cultural status of any of the parties.

3. **Efficiency:** In terms of time and costs.

4. **Justice and equity**: Verification of compliance with constitutional rules must be guaranteed to society.

5.- **Principle of validity and effectiveness of the decision**: According to the RAC Law, the agreements and arbitral awards produce issue preclusion (*res judicata* of last instance) and immediately constitute writs of execution which can be upheld, through the procedures applied for the enforcement of rulings, in case of noncompliance from one of the parties.

6. **Principle of Trust**: All parties who use these tools must acknowledge them as legitimate parts of the legal system.

Conciliation is: a procedure, whereby a third party facilitates the communication between two or more parties, with the responsibility and capacity to orient the discussions, facilitating agreements designed and decided exclusively by the main parties. A third impartial person intervenes in the conciliation.

In **negotiation**, parties involved in the conflict seek amongst themselves the solutions without the intervention of a third party.

Mediation: by this institute we usually make reference to the process through which an impartial and trained person seeks to resolve or aims to promote communication between the parties involved in the dispute so that they themselves can find a solution, but without resolving or imposing it as in arbitration. It differs from conciliation, in which the judge that conciliates approves or disapproves the solutions, mediation involves a neutral individual who encourages and cooperates so the parties communicate with each other and find a solution to the conflict. In reality, their role is not that of a deciding authority, nor do they determine who is right or wrong. Their role is to only encourage dialogue among parties for them to explain their problems to each other, as a catalytic

agent required in these types of conflict. And finally among themselves the parties must find alternative ways of resolving them.

Doctrine has defined mediation as a system of negotiation and prevention or solution of group conflicts more active and complete than conciliation, since the mediator is a conciliator that has an additional authorization to suggest the formula to resolve the dispute. The MEDIATOR proposes the law to be applied and insinuates the rules and clauses that the group contract must contain, proposes the agreement to the parties of the conflict or negotiation to obtain the formula required to resolve the dispute, indicating that the non judicial mediation and the conciliation may be practiced freely by the individuals with the limitations established by law. However, the legislation applied only regulates judicial conciliation. And, in opposition, mediation does not require the approval of the agreement by a judge.

ARBITRATION, on the other hand, is defined as an AGREEMENT, since it entails an obligation "*for the parties to be subject, but the real agreement is one through which the party's rights and obligations are established."* (Artavia Barrantes, Sergio). Arbitration is authorized by the Constitution.

One of the most important subjects in the RAC Law regarding arbitration is the almost total exclusion of judicial authorities from the process. The law sought to remove the process from court jurisdiction.

With the enactment of this law, the courts can only intervene in the following situations:

1. The First Chamber of Cassation Appeals of the Supreme Court of Justice only hears appeals for the annulment and revision against arbitral awards in legally determined circumstances:

The lower courts are only competent to:

1. Decide the precautionary measures requested by the parties of the arbitration tribunal.

2. Assist arbitrators when they require the help of an authority or to obtain information.

3. Execute legal rulings.

Generally, it is estimated that conflict resolution methods "*are a movement that seeks to give controversies a treatment that is consistent with the needs of current life and to consider conflicts as a positive element since there are adequate*

methods to resolve them. It describes different conflicts without requiring judicial intervention…" (Gonzalez Ballar, page 58)

- **General considerations to implement arbitration in cases involving the environment.**

I believe the law considers it, and it may be a solution, its promotion as a system in private commerce. However, there is an important problem, which is the cost of arbitration, the limitations regarding jurisdiction and authority (for example: they cannot rule on precautionary measures that are vital in environmental disputes, they cannot enforce the arbitral award and must rely on the Courts of First Instance, among others).

Also the subject of if justice and equity can be assured in the same measure as it is by the Court system and the balance between powerful (financially and politically) multinational corporations in contrast to smaller business, organizations and poor communities. The essence is to question not only the problem that arise of using arbitration in developing countries but the excessive costs, and also the topic of national sovereignties in the case of international arbitration or those in which large multinational corporations are involved. These alternate methods have created problems in some cases.

Another issue that requires thought is that almost always besides the arbitration clause, it is stated that the laws that must be applied for the solution of the conflict are that of the developed country or that of the country of origin of the multinational corporation, which often does not provide guarantee the protection of the weakest party. Or it is based on different social and political assumptions than those of the country in which the conflict occurs. Thus, one of the main criticisms to arbitration regarding commercial and international disputes is that this method can be used but that it inhibits the application of local laws.

We can promote this method for private commerce issues, but in matters involving the States against business or environmental discussions, arbitration is not the appropriate method, since it causes pressure primarily against the weakest party. At least in Costa Rica it is not applied in a considerable percentage due of its high cost, except in cases involving major corporations. Therefore, the court system is preferred. Costa Rican idiosyncrasy, in principle, places great faith in the court system, which is where the majority of conflicts are settled and where parties attempt for their claims to be awarded, even those that are non-disputed.

As previously indicated, Costa Rica is a country in which the army was banned and we have not had dictatorships since more than 60 years ago. Judges are chosen

according to the law on Judicial Career and not due to political influences, they are trained and most of them have specialized in the area they are working in. This is not only in the case of Judges, but also Prosecutors and Public Defenders, since in our system they are part of the Court's personnel. Also, the constitution guarantees their independence, so they are protected from political, social and emotional influences, for which they receive appropriate training.

Recently, some countries have decided that the solution would be to create an International Environmental Court, which would be a good option, as long as full-time arbitrators are designated.

Arbitration, in consequence, in ineffective or necessary, according to our system and idiosyncrasy, but more expensive and not necessarily more effective.

Also, an additional problem regarding the environment in Costa Rica is there are many public properties, which belong to the State, and through conciliation and arbitration cannot be disposed of privately. Therefore, judges, the Public Defense and Prosecutors must bear this in mind, due to the training they constantly receive and their specialized knowledge. But, it is important to consider, who the people who conciliate and act as arbitrators are. The issue is, who would control the arbitrators?, meaning the legality of those aspects.

Another aspect of the text submitted is: ***"The Readers of the World are repeatedly evoking the concept of regulation to stabilize liberalism. But can this concept really stimulate the world's development?"*.** I consider that, at least in Costa Rica, it is not an issue related to liberalism, but has been handled by the Constitutional Chamber of the Court, since the restrictions originate due to the conflict between fundamental rights in a country that awards rights and these rights themselves. Thus, the fundamental rights that benefit the majority must prevail. With the notion of sustainable development, regulations are created, much of which are limitations aimed towards the survival of human beings and other living creatures, not only due to the freedom of commerce. Besides, this concept of sustainable development is based on the consideration of future generations. In the field of Human Rights, rights of the third generation have been developed related to the right of development, which includes: the right to

peace, the right to information and a healthy environment. However, human beings can destabilize nature and disappear with the rest of living beings due to damage to the Earth, if measures are not adopted, but with due consideration of fundamental rights.

I conclude remembering the words stated more than 150 years ago by the Chief of the Suquamish Indians, native of Seattle, when in 1854 in the United States he expressed the wisdom of what today we must acknowledge:

"Every part of the earth is sacred to my people. Every shining pine needle, every sandy shore, every mist in the dark woods, every meadow, every humming insect.

The shining water that moves in the streams and rivers is not just water… The rivers are our brothers. They quench our thirst. They carry our canoes and feed our children. So you must give the rivers the kindness that you would give any brother.

The rivers are our brothers. They quench our thirst. They carry our canoes and feed our children. The air is precious to us, that the air shares its spirit with all the life that it supports. The wind that gave our grandfather his first breath also received his last sigh. The wind also gives our children the spirit of life.

This we know: All things are connected like the blood that unites us all. Man did not weave the web of life, he is merely a strand in it. Whatever he does to the web, he does to himself… We ARE all brothers after all."

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Annexes:

JURISPRUDENCE

1.- Constitutional Chamber and First Chamber of the Supreme Court. Costa Rica

2.- Zero Paper Policy

3.- Project Justice for Nature

4.- Agrarian and Agro environmental Procedures Code. Drafting Commission: COMISIÓN REDACTORA: **Carmenmaría Escoto, Damaris Vargas, Ruth Alpizar, Rafael Gonzalez, Alvaro Meza.** Presented to the Supreme Court, in June 2008. San José, Costa Rica.