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# Costa Rica

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# VI. Costa Rica

## A. Foreign investment

Costa Rica has long been recognised for being open to foreign investment. Its stable social climate, highly educated workforce and solid legal framework make the country a favourable ecosystem for foreign investors. Just between January and September 2017, Costa Rica received US\$2.165,6m in FDI.

The Ministry of Foreign Trade (El Ministerio de Comercio Exterior ('COMEX')), the Export Promotion Agency (La Promotora del Comercio Exterior de Costa Rica ('PROCOMER')) and the Investment Promotion Agency (Coalición Costarricense de Iniciativas de Desarrollo ('CINDE')) all provide information and resources for potential foreign investors in Costa Rica.

### *i. Authorisations versus limitations or prohibitions*

#### A. ABSENCE OF LIMITATIONS

Generally, there are no limitations or prohibitions on foreign ownership or investment in Costa Rica, and prior approval or special registration is not required. The only exception applies to energy projects, terrestrial maritime zone concessions and border area concessions, which limit the equity ownership of foreign investors in a specific project to 65 per cent in energy projects and 50 per cent in the two other cases.

#### B. FAIR AND EQUITABLE TREATMENT

Following the fair and equitable principles contained in the Constitution, nationals and foreigners are treated equally under the law. All investors, foreign or domestic, must fulfil the same basic requirements to organise and operate a business in Costa Rica.

#### C. FREE CHOICE OF LAW

With the exception of government contracts and certain cases that require the application of Costa Rican law (eg, employment contracts), parties to a commercial agreement can freely choose the governing law of the contract. Furthermore, parties may agree to submit disputes arising under such an agreement to arbitration or other alternate means of dispute resolution, or to the Costa Rican courts or the courts of a foreign jurisdiction.

#### D. OPERATION PERMITS

Any person or business entity wishing to engage in commercial activity must register as a taxpayer before the General Directorate of Taxation (Dirección General de Tributación (DGT)). The applicant will be granted a Taxpayer Identification Number to be used when paying and filing national taxes.

Furthermore, if the investor seeks to operate facilities in the country, a series of local permits will be required, including a business license, issued by the respective municipality, and a health permit, issued by the Ministry of Health. Some business activities, such as mining, energy or high-risk activities in general, require an environmental feasibility permit granted by the National Environmental Technical Secretariat (Secretaría Técnica Nacional Ambiental ('SETENA')), prior to requesting the health permit from the Ministry of Health.

Finally, in order to hire employees, a person or business must register before the Costa Rican Social Security (Caja Costarricense de Seguro Social (CCSS)). All employees hired must be reported to the CCSS. Additionally, the employer must also obtain workers compensation insurance from the National Insurance Institute (Instituto Nacional de Seguros (INS)) and insure all employees under this policy.

## *ii. Treatment of foreign investment in infrastructure initiatives and PPP projects*

### A. CONCESSIONS IN GENERAL

In December 2016, the Costa Rican Government issued a regulation for procuring PPPs called the Regulation for Public–Private Collaboration ('Regulation 39965') to encourage this type of collaboration between the public and private sector. This regulation has to comply with the procurement legal framework of the country, such as General Law on Concessions of Public Works with Public Services ('Law No 7,762'), as well as the General Regulation on Concession of Public Works with Public Services Regulation ('Regulation 27,098'), and the Regulation of Unsolicited Proposal Projects of Public Works Concession or Public Work with Public Service Concession ('Regulation 31,836'). Other related laws are Article 3 of the Government Procurement Law ('Law No 7,494'); Constitutive Law of the Aqueduct and Sewer Authority ('Law No 2,726'); Telecommunication Sector Modernisation Law ('Law No 8,660'); Municipal Code ('Law No 7,794'); and Regulatory Law of the Activity of the Mixed Economy Companies ('Law No 8,828'). This last law is intended for projects of municipal interest and not for those of national coverage. There are also two specific laws created to promote the improvement of two of the major Costa Rican highways: the Law on the Development of Public Works in Corridor San José-San Ramón through Trusts ('Law No 9,292'); and the Law on the Development of Public Works in Corridor San José-Cartago through Trusts, ('Law No 9,397').

However, Costa Rica does not have a specific legal framework for PPPs. Regulation 39,965 mentioned above was issued based on Article 55 of Law No 7,494, but there is not a legal framework for PPPs in Costa Rica different from the General Law on Concessions and the two new specific laws that were created to improve two of the country's major highways.

Pursuant to Law No 7,762, and its regulation, the Costa Rican Government can grant a private entity a concession to develop a public work or provide a public service; the concession is established through a contract between the public and private entities. A concession may be granted for the construction of any public work or provision of any public service, provided there is a legitimate public interest. Certain activities, such as electricity, telecommunications, postal services, lottery and health, have their own special laws and regulations regarding concessions.

Generally, the concession is granted through a public tender or bidding process; this process may be initiated either by the Costa Rican Government entity or the private party ('unsolicited proposals'). The process is composed of four stages: (1) project development, planning, preliminary financial and environmental feasibility studies; (2) preparation of tender and bids; (3) bidding, concession awarding and contract signing; and (4) construction and/or operation of the project.

The governmental entity responsible for promoting, developing and implementing public works' concessions is the National Concessions Council (Consejo Nacional de Concesiones (CNC)), an entity associated with the Ministry of Public Works and Transport (Ministerio de Obras Públicas y Transportes (MOPT)).

With the exception of concessions in energy generation and transmission, and concessions in the terrestrial maritime zone, which have limitations on foreign participation, there are no restrictions regarding foreign investments in concessions.

In addition, Law No 7,762 allows and briefly regulates unsolicited proposals, which are further regulated in detail by Regulation 31,836.

According to Law No 7,762, the procuring authority will examine unsolicited proposals, and if considered feasible, of public interest and consistent with the National Development Plan, shall procure them.

The process to evaluate unsolicited proposals is regulated in detail in Regulation 31,386. Article 14 summarises the process, explaining that the private sector proposal will be in accordance with the procedure laid down in following articles and comprise two stages. In the first ('application'), the proponent will deliver the information and preliminary studies of the project – profile or prefeasibility level – depending on the nature and magnitude of the project, so that the procuring authority can assess whether the project lies within its sphere of competence, whether it is possible to be granted in concession of public work or work with public service, and whether there is public interest in their implementation.

In the case that the procuring authority, in a duly reasoned decision, indicates that there is public interest in the project in accordance with the terms approved by the administration, a second stage ('proposition') will start in which the proponent will submit the necessary studies to determine the technical and financial feasibility, and their social, environmental and legal feasibility.

Article 20 of Law No 7,762 states that the original proponent will participate in equality with other bidders in the competitive procurement process to award the concession. Following this provision, Article 24 of Regulation 31,836 establishes that the procuring authority will be ultimately responsible to prepare the public procurement notice and, if the unsolicited proposal is accepted, will proceed to the call for tenders in maximum of one year from the final approval of the unsolicited proposal. Also, Article 36 of the same regulation establishes that the procurement process will follow the same rules applicable for other concessions.

According to Article 31.2 of Regulation 31,836, if the procurement process results in a signed contract and the original proponent is not the winner or part of the winning consortium, then the proponent will have the right to recover the amount that the administration has accepted as development costs projected and established in the bid.

## B. CONCESSIONS IN ENERGY

The generation and transmission of electricity is reserved for the state. However, by virtue of the Law Authorising Autonomous or Parallel Electric Generation (Law No 7,200), the Costa Rican Government can grant a concession to a private party for the commercial generation of electricity. The National Electricity Service (Secretaría Nacional de Energía (SNE)) may grant concessions for operating power plants of limited capacity of up to 20,000 KW, and for a period of up to 20 years, a term that may be extended. The energy generated by the private concessionaire would then have to be sold to the Costa Rican Electricity Institute (Instituto Costarricense de Electricidad (ICE)) or the National Power and Light Company (Compañía Nacional de Fuerza y Luz (CNFL)), given that only public entities are authorised to distribute energy in the country.

Given that Law No 7,200 declared the purchase of energy of public interest, a company wishing to obtain a concession and consequently sell energy to the state cannot be wholly owned by foreign persons; that is, at least 35 per cent of the company's stock must be owned by Costa Rican citizens.

## C. CONCESSIONS IN THE TERRESTRIAL MARITIME ZONE

The Terrestrial Maritime Zone Law (Law No 6,043), enacted in 1977, created the terrestrial maritime zone, which consists of the first 200 metres of land inward from the main high tide line along the shores of the Pacific Ocean and the Caribbean Sea. The terrestrial maritime zone is divided in two parts: the first 50 metres is called the public zone and the inner 150 metres is called the restricted zone. Private parties are not allowed to use the public zone for any purpose. Investors may use the restricted zone through a concession granted by the local governments (ie, municipalities). The concession is a contract between the respective municipality and the private counterparty, whereby the former gives the latter the authority to develop the restricted zone for personal or commercial purpose. Concessions are granted for a minimum of five and a maximum of 20 years. Prior to the expiration of the concession, a renewal may be obtained from the respective municipality.

There are limitations regarding foreign investment in beachfront properties with concession rights. For example, a non-Costa Rican company, or a non-Costa Rican individual that has not lived in Costa Rica for at least five years, cannot be granted concession rights in the Restricted Zone.

However, a foreign investor does have legal options to indirectly acquire concession rights in the Restricted Zone. The most common way is through stock ownership of a Costa Rican company that holds the concession rights. It should be noted, however, that pursuant to the Terrestrial Maritime Law, the foreign investor cannot own more than 50 per cent of the stock of the company holding such rights.

### *iii. Treatment of foreign investment in oil and gas, and mining activities*

There is currently a ban on oil exploration and extraction in Costa Rica's continental and marine territory. In 2011, the Costa Rican Government signed an executive decree establishing a moratorium for oil exploration and extraction, and in July 2014, the President signed Executive Decree No 38,537-MINAE, extending the moratorium to 15 September 2021. Analysts have stated that the moratorium appears to exclude exploration and extraction of natural gas.

Regarding activities concerning the thermal processing of solid waste to produce biogas, in September 2015 a regulation on the operational conditions and emission control of co-incineration facilities of solid waste came into force (Executive Decree No 39,136). This regulation does not contain any disposition concerning direct foreign investment. Thus, provided the facility complies with all the requirements and conditions set forth in the regulation, a company may operate regardless of the equity ownership of foreign investors.

Mining exploration and extraction is permitted, but is limited in scope. Pursuant to the Mining Code (Law No 6,797), and its Regulation 29300-MINAE, individuals or companies wishing to engage in mining exploration must request a permit from the Directorate of Geology and Mining (Dirección de Geología y Minas (DGM)). The permit is issued for three years and may be extended for a period of two years. During this term, the permit holder may obtain an extraction concession from the DGM. The extraction concession may be issued for a maximum of 25 years and may be extended for a period of ten years.

Pursuant to the Law No 6,797, mining of most minerals and natural resources is permitted, with certain exceptions, such as oil, water and carbon, among others, which are reserved for the state. With the exception of oil, these may be given in concession to third parties. As of 2010, open pit metal mining is strictly prohibited.

In general, oil, gas and mining activities are a sensitive subject in Costa Rica, given the country's great focus on environmental protection and conservation. Therefore, concessions are limited and investors may face a great deal of pressure from activist environmental groups in the country.

It should be noted that these bans and limitations apply to all investors alike, whether foreign or domestic.

#### *iv. Treatment of foreign investment in real estate (rural and urban properties)*

It is no wonder that foreign investors have shown an interest in Costa Rica for a long time: Costa Rica has been recognised as a regional leader in Latin America for social and economic development. It guarantees economic stability with the highest standard of living, and political stability with the longest-standing democracy in Latin America. As a result, the business environment in Costa Rica is generally stable.

Costa Rica enjoys highly developed communication, electric and transport infrastructure, and maintains a self-sufficient power supply. ICE controls several hydroelectric power plants that produce enough electricity to fulfil the country's needs. New electricity production projects that include Eolic and geothermal generators, are currently being developed to meet the country's needs for the next century.

Costa Rica has over 15,000 miles of roads that run from coast to coast. There are two international airports (Juan Santamaría Airport, which is located in Alajuela and offers access to principal markets all over the world, and Daniel Oduber Airport, which is located in the western province of Guanacaste and is used particularly for tourism) and several small airports around the country for local flights in the metropolitan area; the most important is Tobías Bolaños in San José.

Furthermore, thanks to its geographical position, Costa Rica has two international ports covered by important shipping lines on both the Atlantic and Pacific coasts. The Costa Rican Government welcomes foreign investment. All major political parties back this positive attitude. Since 1982, Costa Rica has consistently improved investment conditions. CINDE, an association of private sector leaders, actively promotes investment through offices located in several countries.

Past governments have been moving away from state control and towards an open economy in anticipation of FTAs with nations such as the US, Mexico (already in force), Chile, Panama, Trinidad and Tobago, Venezuela and Colombia. A number of bilateral investment treaties (BITs) have been signed, such as those with Germany, France, Taiwan, Spain, Switzerland, Canada, Chile, the United Kingdom, Venezuela, Argentina, Holland, Paraguay, South Korea, Poland and others. Foreign investment in Costa Rica is strongly encouraged, as evidenced by the wide range of incentives available for different sectors, such as export orientated operations (free trade zones and special drawback), mining, agriculture, tourism and the forest industry. As tourism and the forest industry are directly related to real estate, we consider it appropriate to explain the incentives.

#### A. TOURISM INCENTIVES

Costa Rica is a tourist destination with a wide spectrum of tourist opportunities, including adventure tourism, eco-tourism, conventional five-star tourism and medical tourism.

The Costa Rican Government has implemented strong environmental legislation that has promoted the conservation and protection of an important extension of natural ecosystems located in the Costa Rican territory.

The hotel sector may obtain different incentives to operate in Costa Rica. A very attractive incentive is the Tourism Declaration that the Costa Rican Tourism Institute (Instituto Costarricense de Turismo (ICT)) can issue for companies and activities that meet established requirements, which is a prior step necessary for the award of a Tourism Contract, which grants benefits and tax incentives to individuals or legal entities. Non-compliance with the obligations set forth in the Tourism Declaration implies the immediate termination of the Tourism Contract. Applicants to this contract must comply with legal, financial and technical requirements.

Once granted, the agreement will contain the name of the beneficiary, description of activity, detailed list of incentives, list of duties and obligations, term of the contract and any other information included in the agreement. Tourism contracts with hotels, for example, have a maximum legal validity of 25 years. Beneficiaries must submit yearly reports to the ICT, within 90 days after the end of the fiscal year indicating the use given to all exempt goods. Beneficiaries of the incentives granted by the Tourism Incentives Law are not allowed for to sell, lease, lend or in any other way negotiate the exonerated goods without prior approval by the ICT, or to use the goods for unauthorised purposes.

Specific incentives and benefits that can be granted to service providers in the hotel business are as follows:

- exemptions to import taxes or taxes on local purchases of goods for the operation or establishment of new companies, or for those companies already established that offer new services;
- conferment of municipal licenses and permits that are required by the companies for the development of their activities within 30 days of application, including an alcohol license for local or imported alcohol within the authorised establishment; such a license can be used in the buildings and places that the license includes, and authorises but cannot be used within another establishment;
- authorisation from the Costa Rica Central Bank for Costa Rican companies engaged in international tourism to function as auxiliary cashiers to provide currency exchange services to foreign tourists on behalf of such institution. The contract between the Central Bank and the company shall establish terms and conditions for reimbursement transfers; and
- other incentives and benefits may apply for other tourism activities. Thus, the law and its regulations contemplate in its articles incentives and benefits that the enterprises of the following branches can opt for: tourist air or water transport companies, and tour operators, among others.

#### B. FORESTRY INCENTIVES

Under Law No 7,575, the Costa Rica Government grants Certificates for Forest Conservation (Certificado para la Conservación del Bosque (CCB)) to compensate proprietors or landowners for environmental services rendered to Costa Rica through the preservation of forests that are located on the respective property. However, prior to the application of the certificate, the law requires a certification that no lumbering activity has taken place during the two preceding years and that there will be no lumbering during the duration of the certificate, which carries a minimum of 20 years.

These certificates are marketable instruments that may be bought and sold or used for the payment of tax liabilities or other contributions. The value of the certificates has not yet been determined under the new forestry regime. The holders of the certificates are also entitled to the following benefits:

- full property tax exemption;
- full asset tax exemption; and
- special protection by police authorities against squatters that may invade the property.

The certificates must be registered with the National Registry as lien against the property for a specific period that is indicated in the signed contract. Another incentive exists for property owners who manage natural forests and provide environmental services to Costa Rica or those who engage in reforestation activities. People that engage in reforestation activities without the use of resources from prior forestry regimes will enjoy an additional incentive of a full income tax exemption on all income derived from the commercialisation of their products. In cases in which the reforestation activities have been financed with benefits granted under prior forestry regimes, the income tax exemption would be proportional.

## *v. Treatment of foreign investment in agribusiness activities*

In Costa Rica, agribusiness activities occupy around ten per cent of the country's land use and represent almost 6.5 per cent of the national GDP. The high quality of its products, including coffee, bananas, pineapples, tropical fruits and ornamental plants, among others, are well known worldwide, and those products are frequently exported to Europe, North America, China and Japan. The country is the main exporter of fresh pineapples in the world, and during winter in the Northern Hemisphere, it represents the leading melon provider for Europe.

The main specific objectives pursued by public policies for the next few years in this matter are the increase of agricultural productivity using the same land extensions; more efficient use of natural resources; reduction of the amount of energy required for agricultural process; and the incorporation of clean and renewable energies. Also, the production processes must be executed under social and environmental responsibility policies, looking forward to Costa Rica accomplishing international recognition as a carbon-free country.

Costa Rican fresh products are guaranteed by the GLOBALGAP, which certifies good agricultural proceedings during the entire productivity process, and this is expected to concede economic benefits in the near future. According to environmental policies and legislation in force, Costa Rica is promoting environmentally friendly products, with standard agricultural proceedings that must include organic agriculture, green products, free/fair trade and the incorporation of biotechnology techniques. Also, according to the trend that concedes priority to organic products, many exported commodities are produced under 100 per cent natural procedures, which are also certified under high-quality standards, according to Ocia, BSC, OkO, Ecocert and Skal.

PROCOMER and CINDE, work together to promote and offer all the facilities that foreign investors require to settle agribusiness in Costa Rica.

## *vi. Treatment of foreign investment in the rendering of public services*

Costa Rica has an open and non-discriminatory government procurement system and concession regime, under which nationals and foreigners can freely participate and bid for public contracts.

### **A. PUBLIC CONTRACTING IN COSTA RICA**

Public contracting in Costa Rica regulates the form in which the Costa Rican Government plans, selects its partner, executes, controls, supervises and closes its procurement processes on a balance between the principle of legality and private law.

This type of contracting has a constitutional basis, specifically Article 182 of the Constitution, which establishes that contracts for the execution of public works held by government authorities, municipalities and autonomous institutions, purchases made with the funds of those entities, and sales or leases of assets belonging to them will be developed by public tender in accordance with the law governing the amount involved.

## B. CONCESSION REGIME

The award of concession agreements to private companies for the construction, maintenance, conservation, restoration and operation of works, services and other infrastructure projects is governed by a special law, the Administrative Contracting Law and its regulations, as well as the General Law on Concession of Public Works with Public Services. Furthermore, an executive decree was recently enacted to regulate the Public Private Collaboration Agreement, which is another PPI to which the Costa Rican Government may resort to develop infrastructure projects.

Public concessions generally grant the right to build and operate infrastructure projects, and collect tolls and other fees from users of the project under the supervision of a regulatory agency. The award of concessions regarding power generation and distribution, telecommunications and ports, among others, are governed by sector-specific laws and are subject to different rules.

Foreign companies can participate by setting up a subsidiary, registering a branch in Costa Rica or entering into a joint venture arrangement with local or foreign companies already established in the country. As a general rule, the government agency seeking to purchase or grant a concession for the goods and services is the entity responsible for conducting the procurement process and awarding the contract. Contracts are awarded to the qualified participant that submitted the best bid in accordance with the tender documents.

Once the contract is awarded, the provider or supplier and the government agency enter into a final agreement in the form prescribed by the tender documents. This contract must then be recorded and countersigned by the Comptroller General of Costa Rica.

As mentioned above, Costa Rica has a generally open and non-discriminatory government procurement system and concession regime, under which nationals and foreigners can freely participate and bid for public contracts under equal conditions. Notwithstanding the foregoing, one main exception to this general rule remains, which is the Maritime Zone Law.

## C. MARITIME ZONE LAW

The Maritime Zone Law represents one of the limitations to the treatment of foreign investment in Costa Rica's public procurement system and concession regime. Article 31 of said law states that only Costa Rican natural or legal persons who may have concessions may intervene in tourism development in the maritime zone, and foreign entities may intervene if they constitute tourism companies for which more than 50 per cent of the development capital belongs to Costa Rican citizens.

Concessions in tourist areas require approval by the ICT, while in other areas of the maritime zone, such approval corresponds to the Rural Development Institute (Instituto de Desarrollo Rural ('INDER')) and Costa Rican Housing and Urban Planning Institute (Instituto Nacional de Vivienda y Urbanismo (INVU)). If the concession is referred to an island or islet sea, or part thereof, then the approval of the legislature is required.

Furthermore, Article 47 of the Maritime Zone Law provides that no concessions will be granted to:

- foreigners who have not resided in the country for at least five years;
- corporations with bearer shares;
- companies or entities domiciled abroad;
- entities established in the country by foreigners; and
- entities for which more than 50 per cent of shares, quotas or capital correspond to foreigners.

Entities that already have concessions may not assign or transfer quotas or shares, nor its partners, to foreigners. In any case, transfers made in violation of the above will have no validity.

#### D. THE CABOTAGE SERVICE LAW

In order to exploit the coastal shipping service in a regular and ongoing way, it is essential to obtain a license from the Costa Rican Government through the Public Security Ministry, subject to the provisions of said law and its regulations. This law used to represent one of the limitations to the treatment of foreign investment in Costa Rica's public procurement system and concession regime. Nonetheless, Article 7 of the Cabotage Service Law was declared unconstitutional by the Constitutional Chamber's Resolution 6,837 of 29 April 2009, in which it states that the granting of the correct line to exploit said service, will be granted to Costa Rican citizens and foreigners to provide equal conditions if they comply with certain limitations established by law and by the Constitution.

The granting of new lines will be made through public bidding and awarded to people or companies offering greater guarantees of security and service, preferring, in equal conditions, those that are organised and have provided services of this nature. In order to ensure the compliance of their obligations, dealers will constitute a reservoir or guarantee established by the Public Security Ministry.

## B. Rendering of public services

### *i. General framework*

Costa Rica does not have general restrictions for rendering public services. However, limitations related to public property and state monopolies do exist. Private entities can offer public services if, in compliance with national regulations, they were previously awarded authorisation from the corresponding institution, usually a ministry. By means of a public grant procedure, the state may contract the execution of public works and the rendering of public services with private parties.

Public services regulation is not a matter of a sole national entity, but of several authorities that regulate the diverse public services. The Regulatory Authority of Public Services (Autoridad Reguladora de los Servicios Públicos ('ARESEP')) regulates public utility services, such as water, electricity, sanitation, postal services, fuels and terrestrial, maritime and aerial transport. Meanwhile, the Superintendence of Telecommunications (Superintendencia de Telecomunicaciones ('SUTEL')), Superintendent General of Financial Institutions (Superintendencia General de Entidades Financieras ('SUGEF')), Superintendency of Insurance (Superintendencia General de Seguros

(‘SUGESE’)) and Superintendence of Pensions (Superintendencia de Pensiones (‘SUPEN’)) regulate the rendering of telecommunications, banking, insurance and pensions services, respectively.

## *ii. Governmental monopoly versus private initiative*

In Costa Rica, antitrust and competition law are mainly regulated by Law No 7,472 for the Promotion of Competition and Effective Consumer Defence and Executive Decree No 37,899. Law No 7,472 sets legal principles and regulations that seek to safeguard and promote competition and free market participation by restricting and forbidding monopolistic practices and concentrations. This law assigns the responsibility to investigate and correct anti-competitive practices to the Commission for the Promotion of Competition (Comisión para Promover la Competencia (‘COPROCOM’)). This law is applicable to monopolies, absolute or relative; mergers; and unfair competition. Acquisitions carried out for the purpose of diminishing, affecting or impeding free market competition for law also prohibits similar, identical or substantially related goods.

Under Costa Rica’s antitrust and competition law, absolute monopolistic practices (horizontal agreements) are those that have direct effects on price fixing, quantitative restrictions of goods or services, and arrangements made by competitors to divide the market. Relative monopolistic practices (vertical agreements) refer to those that have direct effects on competitors, inducing them to leave the market, limiting supply or enacting predatory pricing. According to Law No 7,472, concentration implies the merger, acquisition of control, or any other law whereby two or more companies’ partnerships, shares, equity, trusts or assets in general are concentrated into one, with the object or purpose of diminishing, affecting or impeding free market competition for similar, identical or substantially related goods.

On 5 April 2013, an important reform to Law No 7,472 came into force that shifted the approval of concentrations of companies subject to this law away from industry-related administrative authorities. The new procedure requires previous and mandatory reporting before the COPROCOM. In the case of the telecommunications industry, SUTEL still shares the responsibility of investigating and correcting anti-competitive practices in the sector.

The aforementioned law clearly states that if any of the following situations occur, then the merger must be notified to COPROCOM, regardless of the assessment of the effects that the merger or acquisition may or may not have on market competition: (1) the total amount of the productive assets of all the economic agents involved and their headquarters exceed 30,000 minimum wages; (2) the sum of the total revenue generated in the country during the last fiscal year of all the agents involved exceeds 30,000 minimum wages; or (3) one of the companies involved in the merger has productive assets or income that exceeds 30,000 minimum wages. Executive Decree No 37,899 has clarified that only mergers or acquisitions that involve at least two companies that hold operations in Costa Rica and meet at least one of the aforementioned conditions must undergo the previous and mandatory reporting procedure before COPROCOM.

It is also important to note that, as part of the application process to be admitted by the OECD, the Costa Rican Congress is discussing and making efforts to approve Bill No 19996, which aims to correct the weaknesses of the Costa Rican competition authority (COPROCOM) that were pointed out by the OECD in the 2014 Peer Review. Thus, the bill proposes to transform COPROCOM into

the National Council for Competition (Comisión Nacional de la Competencia ('CONACOM')). This council would have greater technical, administrative and economic independence than COPROCOM, which is currently part of the Ministry of Economy, Industry and Commerce, as well as greater powers to control and sanction anti-competitive practices.

As part of the efforts to have a much more independent competition authority, the bill also proposes important modifications such as: (1) full-time councillors, rather than the five part-time commissioners who currently make up COPROCOM; (2) more resources and powers to perform market studies and carry out inspections; (3) faculties to impose punitive fines; and (4) clearer structure of the proceedings, depending on the complexity of the matter.

### *iii. Privatisation general rules*

Costa Rica does not have a specific framework for the privatisation of assets, companies or services, and does not have an active privatisation agenda. During the 1980s, Costa Rica initiated limited public sector reforms, seeking to increase state decentralisation of public services, thus allowing the Costa Rican Government to contract operations with private suppliers, and designating the Ministry for National Planning and Economic Policy (Ministerio de Planificación Nacional y Política Económica ('MIDEPLAN')) as the government's privatisation administration. Nonetheless, privatisation initiatives have not implied the actual sale of state-owned companies and institutions to the private sector. Instead, Costa Rica allowed for concessions and authorisations in public service areas, assigning the management or provision of certain public services to private individuals.

As mentioned, ARESEP is the entity that regulates water, electricity, sanitation, postal services, fuel, and terrestrial, maritime and aerial transport public services, setting norms, regulations and technical standards on these matters. In order for private companies to be able to become a provider of regulated services, they must: (1) comply with ARESEP's requirements; (2) obtain the required license or concession from the Environmental and Energy Ministry (Ministerio de Ambiente y Energía ('MINAE')); and (3) be registered before the Costa Rican Public Registry. Furthermore, state-owned enterprises have their own independent board of directors, internal operating regulations and procedures, and may establish specific public tenders in order to allow private parties to manage or provide certain services.

The most restricted sectors for privatisation have been electricity, petroleum, telecommunications and insurance. After the Dominican Republic–Central America FTA ('CAFTA-DR') entered into force, the liberalisation and privatisation process in Costa Rica accelerated, and the telecommunications and insurance monopolies were finally opened.

Costa Rica reserves the right to legislatively grant concessions for the transmission, distribution and trade of electricity based on service demand. Priority will be given to concessionaires already supplying the service. In the telecommunications sector, important regulatory framework changes took place with the enactment of the General Law of Telecommunications, new regulations for the supply and quality of services, and the creation of new governmental agencies, such as SUTEL, the Ministry of Science, Technology and Telecommunications (Ministerio de Ciencia, Tecnología y Telecomunicaciones ('MICITT')) and the National Telecommunications Fund (El Fondo Nacional de Telecomunicaciones ('FONATEL')).

As stated above, wireless services cannot be permanently removed from state ownership. Private parties may supply wireless services through the following models: (1) authorisations, where they are authorised to provide services through wireline networks or networks owned by other operators; and (2) concessions, granted to those providing wireless services.

The insurance sector monopoly was eliminated in 2008 when the law regulating the insurance market came into force. SUGESE was created as the supervisory body in charge of overseeing the legal and technical requirements for the opening of the insurance market. Pursuant to the aforementioned law, and in order to provide services, private entities must be authorised to offer insurance products and services.

#### *iv. Limitations and/or prohibitions to private parties in the rendering of public services*

According to Law No 7,494, foreign private parties may participate in a public bid to obtain a concession or contract with the public administration. However, private parties may never render public services that are considered part of the ‘ordinary activity’ of the public administration, such as granting permits or licenses.

Pursuant to Article 121, subsection 14 of the Costa Rican Constitution, the state may grant the possibility of using, developing and benefiting from goods and services of its property to a private party through a public concession. Concessions are regulated by law, executive decrees and stipulations held in the concession contract between the state and party. The main applicable laws are the General Framework for Public Administration Law; Law No 7,494 regulating administrative contracting; Law No 7,762 regulating concessions for public services and public works; and Law No 8,422 against corruption and illicit enrichment in a public function. Public institutions may sub-contract with private parties in order to successfully provide certain public services if their organic law allows it, as is the case of the Costa Rican Institute of Electricity and the Costa Rican Water Supply and Sewerage Institute.

Finally, the public administration may also arrange interested management contracts, with private entities in which the administration itself renders a certain public service by means of a private manager (eg, the interested management contract of the Juan Santamaría International Airport).

## **C. Real estate**

### *i. Rural properties: limitations for private parties*

The definition of rural properties or agricultural parcels implies that they are destined for agricultural purposes. The Regulation of Urbanism and Fractionalisation issued by the INVU has established that the minimum size of such properties must be at least 5,000 square metres, and the survey for such properties must indicate that their use is ‘agricultural’. Construction restrictions may also apply as the regulation referenced allows a maximum coverage of 15 per cent. The density allowed as well as a height restriction is established by each local government through its regulatory plan and its zoning regulations.

It is not allowable to utilise the land for any use that is not compatible with the uses allowed and determined by the specific zoning plans of each local government. In order to verify compliance with the use pretended for a specific property, the owner must obtain a zoning certificate issued by the municipality. This certificate will indicate details about density allowed, coverage (as said, the maximum allowed is 15 per cent), setbacks and others.

The National Housing Institute will not allow the development of a property that is located outside of the zoning limits if it is far away from public services and facilities due to the high cost of such services and facilities, due to distance to inhabited areas, or because of any other health or security reason. If the proposed project is located outside the zoning limits but utility services are available, or the property owner will cover their connection costs, the National Housing Institute has no grounds to deny permission.

For this type of property, it is strongly recommended to keep the property lines of the land clearly visible by means of a fence or 3-metre width lane.

According to the Law for Use, Management and Conservation of Soil No 7,779, an owner can request a special tax incentive up to 40 per cent exemption of the property tax payment for land that is being used according to its classification, and good practices of management, conservation and soil recuperation are applied.

It is possible to request a change in the classification of the land through the Ministry of Agriculture, which will review and take into consideration the national plans and area plans, as well as regulations provided by SETENA and criteria issued by the Committees for the Use, Management and Conservation of Soils by Area, and will determine if a change of use is feasible or not.

## *ii. Urban properties: limitations for private parties*

Each local government has the obligation to issue a regulatory plan for its territory in order to protect interests related to health, security, comfort and public welfare for its community. This regulatory plan must contain regulations related to the minimum size of a lot, the use of land, and the distribution of properties dedicated for residential use and commercial, industrial, education or recreational use. Even if all regulatory plans share some common values, they present different regulations depending on the specific needs of the community. It is thus recommended to request a zoning certificate in the corresponding municipality, which shows the use permitted for the property in order to be able to verify the possibility of carrying out the project proposed on the property.

In the absence of a regulatory plan, general guidelines issued by the National Housing Institute will be applicable. These general guidelines include rules related to the size of the property; the obligation to perform a preliminary study of soil and terracing for land with slopes greater than 15 per cent in order to determine the minimum size of a lot; and maximum height of a building, among others.

In the case in which the property is located near an airport, the Directorate of Civil Aviation will indicate specific requirements related to height; and should the property be located next to a railway, the Rail Institute shall issue the respective alignment and setbacks to the railway.

### *iii. Expropriation events*

The property right is a constitutionally protected right in Costa Rica. As in most countries, Costa Rican law recognises eminent domain; however, the Costa Rican legal system provides a compensation system in cases of expropriation. Expropriation can only be carried out in cases of a legally verified public interest.

Law No 7,495 from 1995 regulates aspects related to expropriation, including provisions such as:

- declaration of public interest;
- that appraisal of a property's value must be rendered in a time frame of one month; once rendered, the administration proceeds to inform the owner of such an appraisal, who will be given five business days to accept or reject the amount established by the appraisal;
- if the appraisal is accepted, then the owner will be paid; if the appraisal is rejected, a special procedure in the Costa Rican courts is initiated to determine the fair value of the land; and
- in the case in which the property is not used for its intended purpose within a time frame of ten years, the original owner (or his/her heirs) may request in writing that the property or portion of property not used for public purposes be returned to the original owner. This request must be stated within three years after expiration of the ten-year period, and the owner must cover the current value of the property. Once the property is expropriated, the NPR takes note of such a transfer in order to register the property under the Costa Rican Government's name.

As part of the protection for consumers in the real estate market, due to the real estate crisis, the Costa Rica Government enacted Decree No 37,899-MEIC (September 2013), by which all future sales or presales of real estate development are regulated. This decree included the mandatory registration of all real estate developers before the Consumer Support Office (Dirección de Apoyo al Consumidor (DAC)) and the obligation to get pre-approval of option and sales contracts.

The new regulation includes minimum provisions required for future sales/presales. All real estate development companies issuing future sales will become part of the List of Registered Companies maintained by the DAC.

The new rules apply to contracts entered into with final consumers for the future sale of: (1) all types of goods, such as real estate, apartments and houses; (2) memberships or affiliations in programmes such as vacation plans, vacation clubs or similar structures; and (3) unbuilt real estate developments, such as social and tourism centres and urbanisations and/or condominiums.

Contracts regulated by these regulations will be those in which performance by the seller/developer depend on a future event. A contract for future sale that depends on a future event is defined as one where a buyer and seller execute a contract for the purchase of a good, service and/or development on a certain date, but the good, service or development is completed, provided and/or delivered to the buyer at a later date. Moreover, the obligation to complete/provide/deliver the good, service and/or development is assumed by the seller.

The other element to fall into this category for the application of the new provisions is that the transaction is structured through an instalment plan, where the buyer is required to make partial

deposits and payments to the seller/developer before the real estate project is completed and the transfer of title takes place. The registration filing therefore needs to include the plan for the future sale of goods, services and/or developments (including the presale of real estate units).

The pre-approval of the intended contract for future sales shall be submitted before the DAC for its approval. The DAC will review the contract template in order to determine if there are abusive or unconscionable provisions such as those that would: (1) restrict the consumer's statutory rights; (2) exonerate the seller from the payment of damages; (3) grant unproportioned benefits to the seller; or (d) allow the seller to unilaterally modify the contract. Moreover, the DAC will review the draft of the contract to guarantee the proportional relation between the payments being made by the buyer and the terms and conditions of the contract.

If future sales are performed without authorisation, a complaint may be filed before the National Consumer Commission that may issue a precautionary measure to cease future sales; refer the case to the Prosecutor Office; and impose a fine. The administrative ruling of the precautionary measure will be communicated to the appropriate municipality, the Ministry of Public Safety and the Ministry of Health.

The administrative fine that may be imposed by the current Consumer Protection statute could amount to up to 40 minimum wage salaries for these types of events.

## **D. Development of ample/integrated capital markets and joint activities between Latin American countries**

### *i. Merger of stock exchanges: attempts versus realities*

In the 1970s, the country's first stock exchange, BNV, was created and is currently regulated by Securities Market Regulatory Law No 7,732. In 1993, the Electronic Stock Exchange was founded (Electrónica de Valores de Costa Rica ('BEVCR')), and in 1999, a merger occurred between BNV and BEVCR in which BNV prevailed. The public offering of securities, as well as the provision of security intermediation services in Costa Rica are regulated by the General Superintendence of Securities (Superintendencia General de Valores ('SUGEVAL')).

To promote, inter alia, capital investment, as well as the development of an equity market in Costa Rica, the BNV created an alternative equity market for medium-sized, fast-growing companies called Mercado Alternativo para Acciones; which operates under private placement rules.

The integration of the stock markets in the region is a project that has been analysed by Central American stock exchanges for many years, with the goal of expanding opportunities for market participants and providing issuers with access to a larger investor base. In 2007, the stock exchanges in Costa Rica, El Salvador and Panama signed a cooperation agreement called the Central American Markets Alliance (Alianza de Mercados Centroamericanos ('AMERCA')) to facilitate securities transactions and securities market integration in the Central American region.

An integration process between securities markets requires complex regulations. One of the main obstacles for integration efforts has been the need for a common process to validate the offering of

securities that are authorised in the different markets (recognised jurisdiction rules), and the ability for brokerage firms to cross-access information and trading within the integrated market.

### *ii. MILA market: current results and expectations*

The MILA market is an initiative aimed at integrating the stock exchange markets of Chile, Colombia, Mexico and Peru. While Member Countries maintain their regulatory autonomy and process transactions in their local currency, they benefit from joint market growth. Through the integration of capital markets, MILA aims to develop the capital market through the integration of the four countries, and to give investors a greater supply of securities and issuers, and larger sources of funding.

MILA resulted from an agreement signed between the stock exchanges in Colombia, Peru and Chile in 2009, aspiring to set up an equity exchange regional market. MILA began operating in 2011, opening up opportunities for brokers from the three countries to sell and purchase shares from any of their stock markets through local brokers. In December 2014, the stock exchange in Mexico joined MILA. It does not look like Costa Rica will be joining this initiative in the near future.

### *iii. Pacific Alliances: governmental action and proposed treatment and agreements*

#### A. PACIFIC ALLIANCE

The Pacific Alliance is a regional integration initiative created on 28 April 2011 by Chile, Colombia, Mexico and Peru. The Pacific Alliance aims to deepen economic integration and free trade, promote the growth of its members' economies, and serve as a forum for political interaction, and economic and trade integration. Costa Rica has FTAs with the four countries. Costa Rica currently has an Observer State Candidate status in the Pacific Alliance. In February and December 2014, Costa Rica undertook initial steps towards starting its accession process in the first half of 2015. In March 2015, however, the process was suspended due to outstanding results from technical cost benefit analyses. Despite the beneficial results presented in late May 2015, Costa Rica is still cautiously expressing interest in the accession process. The Ministry of Foreign Trade initiated a process of information and consultation with the different sectors of civil society, with the aim of promoting a debate on this issue. A data-based management process was also carried out to determine the possible results of a possible inclusion of Costa Rica in this initiative.

#### B. WTO

In July 2014, Costa Rica and 13 other members of the WTO started negotiating an Environmental Goods Agreement. The aim is to promote sustainable global development and promote the access of goods linked with technologies that allow the protection of natural resources, the management of waste and the reduction of the effects of climate change, among others.

Also, Costa Rica is one of the 24 members of the WTO currently negotiating a plurilateral initiative on trade in services (Trade in Services Agreement (TiSA)). Negotiations are based on proposals made by members seeking the improvement of rules and the opening of markets, including financial services.

#### C. KOREA

Also, as an FTA in process, in February 2018, Costa Rica and the Republic of Korea signed an MOU for the promotion of trade, investment and cooperation, in addition to the activities of the FTA between the countries of Central America and the Republic of Korea.

This memo provides the basis for Costa Rica to learn from the Korean experience regarding the design, implementation and evaluation of policy mechanisms to improve production capacities and productivity, in the context of trade opening.

Costa Rica has concluded FTAs with several countries and regions, as follows:

#### D. CARICOM

Costa Rica has concluded an FTA with Caribbean Community ('CARICOM') countries that has entered into force with Trinidad and Tobago (2005), Guyana (2006), Barbados (2006), Belize (2011) and Jamaica (2015), and the aim of which is to strengthen trade and investment between Costa Rica and the Caribbean countries. In November 2008, an FTA between Costa Rica and Panama entered into force, including a chapter on financial services. Moreover, since 1 January 2009, Costa Rica has been part of the Central America Free Trade Agreement (CAFTA), which contains provisions on financial services, investment and, inter alia, capital flows and controls between its Member Countries.

#### E. CHINA

The People's Republic of China is one of the main players in the international economic context and is Costa Rica's second-largest individual trading partner after the US. Costa Rica and China have traded since the early 1990s; however, it is since China's accession to the WTO in 2001 that this trade relationship has experienced steady growth. In June 2007, Costa Rica announced the establishment of diplomatic relations with the People's Republic of China, thus initiating a process of greater economic and trade ties between the two countries. The FTA entered into force on August 2011. China is emerging as a market of high potential for the country due to its large size and a population of more than 1,300 million people, of which Costa Rica can take advantage for different market niches. The country is currently working on consolidating access to new products, as well as identifying trade and investment opportunities to take full advantage of this trade instrument.

#### F. AACUE

Costa Rica has concluded an Association Agreement between Central America and the EU ('AACUE') that entered into force in October 2013. The agreement includes political dialogue, cooperation and the creation of a free trade zone.

#### G. EFTA

The negotiation of the FTA with the European Free Trade Association (EFTA) states in 2014 was a natural step in the process of consolidating the country's foreign trade platform. In conjunction with the AACUE, this treaty promotes preferential access for Costa Rican products on the European continent.

Another important FTA is that signed with the Republic of Singapore that entered into force in July 2013, and the aim of which was to open the Costa Rica export market to Singapore. Due to the structure of its domestic market, Singapore depends, to a large extent, on the import of goods, which opens a window of opportunities for demand for products that could be supplied by Costa Rican exports.

With regard to BITs, Costa Rica has concluded negotiations with several countries to promote the creation of a favourable climate for investors under conditions of predictability, security and transparency, as well as to include provisions on investment promotion and protection, non-discriminatory treatment, expropriation and compensation and dispute settlement. Currently following BITs are in force: Germany, Argentina, Canada, Chile, Taiwan, Korea, Spain, France, Netherlands, Paraguay, Czech Republic, Switzerland, Venezuela and Qatar.

*iv. IPOs of multilatina companies in Latin American capital markets*

There have not been any IPOs of multilatina companies in the Costa Rican capital markets. Nonetheless, some Costa Rican companies that hold operations in other Latin American countries have conducted IPOs at the Costa Rican Stock Exchange, such as Florida Ice & Farm Co, BCT Bank, ILG Logistics and Café Britt.

## **E. Offshore vehicle providers in Latin American countries**

*i. General concept: legal framework and scope of activities*

Costa Rica is a favourable country for establishing offshore vehicles. The stable social and legal climates, coupled with a territorial tax system, have attracted many individuals and foreign companies to use Costa Rican vehicles for investments worldwide. Investors have an array of legal options for secure offshore asset protection and tax planning, including the limited liability company (LLC – sociedad de responsabilidad limitada), stock corporation (sociedad anónima) and Costa Rican trust.

*ii. Applicable legal regimes in Costa Rica*

A. LLC

A Costa Rican LLC possesses many of the same attributes as a corporation. In LLCs, the liability of the partners is also limited to their respective capital contributions. However, for US persons, the Costa Rican LLC offers the benefit that it may be considered a disregarded entity under the applicable US tax regulations.

An LLC's capital is represented by registered quotas (or units) of 100 Costa Rican colones each (or exact multiples of this amount). The quotas must be transferred by an assignment agreement and not by simple endorsement. Any assignment must be recorded in the LLC's legal books, and such assignments require the unanimous approval of the LLC quota holders. Quotas cannot be issued in a foreign currency.

One or more managers must be elected by the quota holders to represent the LLC. These managers must be physical persons (Costa Rican nationals or foreign persons), and may be jointly liable with the LLC for their actions vis-à-vis third parties. If at least one manager is not a resident of Costa Rica, the LLC must appoint a Costa Rican attorney as a resident agent. No comptroller is required for the LLC.

For tax purposes, an LLC and corporation are treated in the same manner in Costa Rica.

## B. CORPORATION

A Costa Rican corporation may be established either by private capital (closely held) or public subscription. At least two shareholders (individuals or registered legal entities) are required to create a corporation, but once incorporated, one single person or entity may own 100 per cent of the stock capital. Generally, there is no limitation regarding the ownership of shares by foreign entities. The stock capital of corporations is represented in shares, which are transferable by simple endorsement and registration in the corporation's private shareholders' registry book. Shares may be issued in Costa Rican colones or foreign currencies.

Furthermore, there is no minimum capital requirement, but at least 25 per cent of the subscribed capital must be fully paid at the time of incorporation.

Common shares have equal rights and one vote each. However, different classes and types of shares may be established, which may in turn offer different preferences, privileges, restrictions, terms and limitations to the shareholders.

A shareholders' meeting must be held at least once a year, and may be held in any place authorised by the corporation's charter. The shareholders' meeting is the main governance body of the corporation.

A board of directors comprised of a minimum of three directors (president, secretary and treasurer) manages the affairs of the corporation. Directors are named in the deed of incorporation or are later appointed by a shareholders' resolution, which may also remove them at any time. Costa Rican nationals or foreign individuals may be appointed as directors, but legal entities may not hold positions on the board of directors of a corporation.

The representation of the corporation is given by law to the president of the board, but other directors or powers of attorney may be appointed in the corporation's charter or by subsequent shareholders or board of directors' resolutions.

A comptroller must be appointed in the corporation's charter. The comptroller cannot be a legal representative or have any powers of attorney to act on behalf of the corporation. Furthermore, if none of the directors are Costa Rican residents, a Costa Rican attorney must be appointed as a resident agent.

In October 2016, the Minority Investor Protection Act No 9392 was published, which included Article 32-ter to the Code of Commerce, which was intended to protect the interests of minority shareholders of the commercial entities governed by this code, such as corporations and LLCs. In general terms, the new regulation requires these entities to approve internal rules regarding situations or transactions where a certain conflict of interest could arise, and also requires corporate authorisation

to be issued prior to any transactions involving the acquisition, sale, mortgage or pledge of assets representing ten per cent or more of the company's total assets.

#### C. TRUST

A trust is a binding agreement whereby one party transfers certain assets and/or rights to another party for a specific purpose, and consequently, to the fulfilment or not of such purpose, to transfer back such assets and/or rights to the original transferor (in the case of fulfilment) or to a third party (in the case of a breach), as outlined in the respective trust agreement. The trust is composed by three parties: the settler, which is the party that transfers the assets and/or rights into the trust; the trustee, which is the party to which such assets and/or rights are transferred, and which holds custody and administration over them according to the instructions given to it in the trust agreement; and the beneficiary, which is the person in whose benefit the trust is created.

There are two types of trusts that are mostly used in Costa Rica: guarantee trust and administration trust. The guarantee trust is used to secure the fulfilment of an obligation, usually of a financial nature (eg, a loan or credit transaction), where usually the debtor is the settler, the creditor is the beneficiary and the trustee is a third party that holds the settler's assets transferred to it in trust or fiduciary property (entrusted assets) until the secured obligation has been satisfied. The administration trust is a trust in which the settler transfers certain assets to the trustee, so the latter can administer or invest the assets in accordance with the trust agreement for the benefit of the settler or other beneficiaries. Entrusted assets constitute a separate patrimony from that of both the settler and trustee.

Pursuant to the Money Laundering Law (Law No 8,204), individuals or companies that manage third-party funds must register before SUGEF. Consequently, trustees of an administration trust must register before SUGEF; whereas trustees of a guarantee trust are not obliged to register, provided they merely hold the settler's property and do not manage or invest it in any way. However, there may be some tax benefits if the trustee of a guarantee trust is registered before SUGEF, as the transfer in trust property of real estate is exempt from taxes if the trustee is registered before SUGEF and the purpose of the trust is to secure a credit transaction granted by an entity also registered before SUGEF.





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