Sustainable Development in Central America: Translating Regional Environmental Accords into Domestic Enforcement Action

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Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38KZ60

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Sustainable Development in Central America: Translating Regional Environmental Accords into Domestic Enforcement Action*

Michael Holley**

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* Ecology Law Quarterly is pleased to include this Comment, which was the recipient of Boalt Hall School of Law's Harmon Award, and to offer ELQ's thanks to the Environmental Law Research Institute's support of the Award.

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When there's not a single clean river and all are polluted, when there's not a single tree to cut down, when there's not a single fish alive—only then will people realize that they cannot eat money.

—Juan Francisco Asturias, Engineer for Guatemala’s National Commission for the Environment

INTRODUCTION

The seven nations of Central America have recently entered into a series of regional accords that commit them to pursuing sustainable development. The agreements impose specific duties on the signatory states to restore the environment and to promote sustainable development. The international community has applauded these efforts, but it remains to be seen whether the accords will halt the wholesale depredation of the region’s natural resources. Since the agreements have already created some legal obligations, the pressing legal issue is one of implementation: do the signatory states have the ability, and

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1. Giovanni Francisco Bautista, *Biosfera Maya es la Zona Mas Deforested de Centroamerica [Mayan Biosphere Is the Most Deforested Zone in Central America]*, PRENSA LIBRE, Nov. 23, 1996, at 2 (reporting on the degradation of Guatemala’s rainforest, Asturias repeats a popular saying in the region (quoting Juan Francisco Asturias)).

2. The Central American countries are Belize, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and Panama.

3. See infra Part I.B.
the will, to translate their international commitments into local enforcement action?

This Comment describes the legal structure and commitments being formed on the international level, investigates the reality of enforcement on the local level, and suggests specific and practical steps to launch sustainable development in Central America. Part I reviews the efforts made over the last decade to create a system of regional environmental law and institutions in Central America, and describes the commitments that the accords impose on their signatories. The advancement of Environmental Impact Assessment (EIA) programs is used throughout the study as an exemplary measure of a state's commitment to promote sustainable development. Part II examines compliance with international accords and implementation of sustainable development at the local level using El Salvador as an example. Part III offers an analysis, again focusing on El Salvador, of why the critical work of translating international treaties into domestic environmental protection in Central America has been unsuccessful. Part IV proposes advancing domestic implementation of international accords by enabling popular sectors to participate in the sustainable development process.

I
BUILDING A REGIONAL ENVIRONMENTAL LAW REGIME IN CENTRAL AMERICA

A. The Need for Regional Environmental Protection

The effort to build a regional environmental law regime in Central America responds to the pressing need to preserve an invaluable, yet rapidly disappearing, ecosystem. Central America is a prime example of a single ecosystem that is fragmented by political boundaries and holds global importance. Its tropical climate and geographical position as a land bridge between the North and South American continents make the Central American isthmus an irreplaceable habitat for thousands of species. In just one Central American country, Costa Rica, there are nearly four times as many species of flora and fauna per square mile as in the United States. Further, the region's

5. See id. at 506-07.
6. For example, Costa Rica contains 7,037 mammal, bird, and plant species per 10,000 km², whereas the density in the United States is only 1,802 in the same area. The World Resources Inst. et al., World Resources 265 (1996) [hereinafter World Resources].
tropical jungles and mangroves help maintain global climatic equilib-rium, and its natural resources are vital raw materials.\(^7\)

The region must overcome unique—and especially difficult—political, economic, and social circumstances to achieve meaningful environmental protection. Most notably, civil wars in Central America over the past two decades have pushed the region to the brink of lawlessness.\(^8\) In the 1980s alone, at least 250,000 persons were killed by civil strife in an area about the size of Texas,\(^9\) and widespread poverty and the lack of a firm rule of law continue to plague the region in the wake of civil wars.\(^10\) During the 1980s, the poverty rate in the region rose by fifty-two percent and eventually encompassed seventy percent of the population.\(^11\) Today, delinquency, kid-napping, and murder rates continue to soar.\(^12\) In the long run the most harmful consequence of this "lawless" status quo may prove to be the rapid destruction of the environment and natural resources—destruction that could reinitiate widespread social unrest as resources become more scarce and poverty more acute.\(^13\)

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\(^9\) See Armed Conflicts, supra note 8, at 14.

\(^10\) See Carlos M. Vilas, Prospects for Democratization in a Post-Revolutionary Setting: Central America, 28 J. LATIN AM. STUD. 461, available in 1996 WL 12963542, *3 (1996) ("[T]he socioeconomic conditions that precipitated the revolutionary movements remain virtuallyunchanged, and indeed in some respects they are more pressing than three decades ago."). See also Delincuencia Provo[ca Psicosis en Honduras] [Delinquency Causes Psychosis in Honduras], LA OPINION, Apr. 28, 1997 at 1A (reporting that a "wave of delinquency" has induced emergency plan and mobilization of over two thousand police and soldiers).

\(^11\) Vilas, supra note 10, at *6.

\(^12\) In El Salvador from 1994-1995 there were an average of 8,506 murders per year. In comparison, during the 12 year civil war (1980 to 1992), an average of 6,600 persons were killed each year. See El Salvador Engulfed by Crime Wave, AGENCE FRANCE-PRESSE, Feb. 13, 1996, available in 1996 WL 3804615. See Vilas, supra note 10, at *24 ("Economic hardship, regressive public policies, diminished government extractive and allo-cative capacities, frustration at unfulfilled promises and unrealized expectations, extensive availability of weapons, all these contribute to a notorious increase in daily violence in Guatemala, Nicaragua and El Salvador."). Celina Zubieta, Guatemala-Crime: Increase in Kidnappings Shakes Country, Inter-Press Service, Nov. 21, 1996, available in 1996 WL 13589309 (reporting 234 kidnappings in Guatemala between January and October 1996).

\(^13\) See Andrew Hurrel & Benedict Kingsbury, Introduction to The International Politics of the Environment 1, 2-3 (Andrew Hurrel & Benedict Kingsbury eds., 1992) (explaining that the increasing scale of formerly regional or local environmental problems threatens broad international repercussions by undermining the economic base and social
In addition to armed conflicts and social strife, business-as-usual exploitation has caused serious environmental degradation throughout recent decades. Historically, Central America's rugged terrain, severe climates, and lack of valuable metals combined to protect the region's natural resources from extensive exploitation. However, landowners today strive to intensify production of export crops, such as coffee, sugar, cotton, and shrimp, to better enable them to compete in international markets. This trend has led to severe degradation of the region's best agricultural lands, where most intensification occurs. It has also displaced subsistence farmers from these lands, forcing them to farm increasingly unsuitable lands or, alternatively, to abandon farming altogether and move to urban centers. In a region whose cities already lack infrastructure to accommodate rising populations, the sudden influx of displaced rural inhabitants also has serious environmental consequences.

Two competing forces drive environmental degradation in Central America: extreme wealth and extreme poverty. Both the rich and poor depend on "environmental subsidies" to survive; that is, both depend on the cost-free exploitation of resources. The rich develop new areas and introduce new crops, often utilizing environmentally-harmful chemicals, and generally operate their industries without tak-

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15. See Daniel Gatti, Population-Latin America: Urban Growth Soaring in Latin America, Inter-Press Service, May 29, 1996, available in 1996 WL 10243041 (finding that between 1970 and 1996 the level of urban concentration of Latin America increased from 58% to more than 70%). See also PROGRAMA SALVADORENA DE INVESTIGACION SOBRE DESARROLLO Y MEDIO AMBIENTE [SALVADORAN PROGRAM FOR THE STUDY OF DEVELOPMENT AND ENVIRONMENT (PRISMA)], EL SALVADOR: DINAMICA DE LA DEGRADACION AMBIENTAL [ANALYSIS OF ENVIRONMENTAL DEGRADATION], 8 (1995) [hereinafter PRISMA] (from 1971 to 1992 the urban population of El Salvador grew from 40% to 50% of the country's total population); DANIEL FABER, ENVIRONMENT UNDER FIRE 73 (1993) (noting that 75% of San Salvador's population lives in marginal, illegal settlements).

ing adequate measures for environmental protection. Meanwhile, the poor slash and burn forests to grow subsistence crops, cultivate mountainsides, cut trees for cooking fuel, and dispose of their wastes without treatment. In short, Central America is burning its environmental candle at both ends as both the rich and the poor increase their dependency on subsidies from nature—the former fighting for a profit on the international commodity markets and the latter struggling for subsistence.

B. The International Legal Framework

In recent years, the discrete military-political battles for state control that once typified politics in Central America have given way to legal and economic negotiations among a loose federation of states. In 1987, the Esquipulus Summit of Central American Presidents led to a self-proclaimed “regional renaissance,” in which governments undertook the establishment of democratic rule in the region. In certain areas, such as environmental protection, the states espoused the principle of regional integration. Specifically, they created a regional environmental regime that features conventions, governmental institutions, and non-governmental organizations (NGOs). In addition, they have jointly signed agreements with industrialized nations to exchange environmental protection for foreign technical and financial support. Four milestones mark distinct phases in the formation of this emerging “regional environmental law.” They are: 1)

17. See Faber, supra note 15, at 52-54 (detailing the impunity with which industries and agro-export operations dump toxic waste). This is not a new phenomenon in Central America. Stonich, supra note 14, at 72-73, 80-86, observes that the coffee boom in the 1890s involved the clear-cutting of El Salvador, the cotton boom in the 1960s depended on the pesticide-poisoning of Nicaragua’s prime agricultural soils, and the current shrimp boom requires the destruction of Honduran mangroves.

18. The sub-text of this shift in Central American diplomacy features the creation of a hemispheric free trade zone. Fiscal and political reforms are considered requisites for entering a free trade agreement with the region’s more stable and powerful neighbors to the north. See Manolo Acabal, Centroamerica se esfuerza para insertarse en economia mundial [Central America tries to merge with world economy], Siglo Veintuno, Dec. 15, 1996, at 8; Ricardo Grinspun & Maxwell A. Cameron, US-Mexico Trade: Pulling Together or Pulling Apart?, Latin Am. Res. Rev., June 1, 1996 (book reviews), available in 1996 WL 13043409.

19. Secretaria General Del Sistema de la Integracion Centroamericano, el Sistema de Integracion Centroamericano [The System for Central American Integration] II (1993) (“Central America has crossed a threshold toward institutional order and cohesion with a strategic political vision which overcomes a past of fragmentary, redundant and uncertain actions.”).


21. See id. (At the Esquipulus II Summit in 1987, “the concept of environmentally sustainable development . . . became the foundation for cooperation in the region.”).

1. Central American Commission for the Environment and Development and the Adoption of Regional Conventions

The states' first task was to create an institution to serve as the coordinator of regional efforts to promote sustainable development. In 1989, three meetings of the region's presidents led to the signing of the Central American Convention for Environmental Protection by the five "core" nations of Central America. This convention provided for the formation of the Central American Commission for the Environment and Development (CACED), an institution that has been called "one of the most widely respected and influential institutions in the region's environmental and political arenas." 

CACED's mandate promotes sustainable development by encouraging cooperative work among Central American states. It has a permanent Secretariat in Guatemala, hosts conferences and training workshops, facilitates the sharing of environmental information, and attracts foreign funds for environmental programs. CACED's early efforts focused on developing a regional action plan to conserve tropical forests, and facilitating the ratification of regional conventions on climate change, biodiversity, tropical forests, and transboundary movements of hazardous wastes. CACED's accomplishments have been made in spite of rather tepid government support. Nations pledge just $20,000 per year to CACED and to date have paid only

22. See Central American Agenda, supra note 7, at 1. I call Guatemala, El Salvador, Honduras, Nicaragua, and Costa Rica the core nations because they have traditionally been considered to form "Central America" since liberation from Spain in 1821. Panama was only separated from Colombia in 1903, and Belize was under direct British rule until 1981 and today remains in the Commonwealth. Nevertheless, today's efforts at regional integration usually include Panama and Belize.

23. CACED is the primary environmental institution in the System for the Integration of Central America, a regional governmental structure that serves as an umbrella for all pan-Central American government institutions. See El Protocolo de Tegucigalpa para la Creacion del Sistema de Integracion Centroamericana [Protocol of Tegucigalpa for the Creation of the System for the Integration of Central America], Dec. 12, 1991.

24. Page & Schwarz, supra note 20, at 5.

25. See Central American Agenda, supra note 7, at 3; Page & Schwarz, supra note 20, at 3.

$149,000 of the $420,000 due. Furthermore, although staffing recently increased to eighteen employees, prior to 1994 CACED employed only three staff members.

2. The Central American Agenda for the Environment and Development

In 1992, CACED played a key role in reaching the second milestone: the drafting and delivery of the Central American Agenda for the Environment and Development ("Central American Agenda" or "Agenda"). The states negotiated this document in consultation with regional experts, representatives of the private sector, and NGOs, and delivered it at the United Nations Conference on Environment and Development (UNCED). The Agenda includes a diagnosis of economic, social, institutional, and financial obstacles to achieving sustainable development, and identifies regional priorities. As stated in its text, the Agenda was drafted "by Central Americans for Central Americans" to serve as a "conceptual framework" for achieving sustainable development.

The Central American Agenda places some responsibility on industrialized nations for the environmental degradation of Central America. It also notes that Central America retains vital ecosystems that "offer a valuable service for the survival of the planet's biosphere." The Agenda thus implies that because Central American ecosystems are vital to an environmentally-interdependent world, industrialized countries, as benefactors of efforts to protect these ecosystems, should contribute to such efforts.

3. Alliance for Sustainable Development

The third milestone marks the beginning of a practical regional effort to achieve sustainable development, as proposed in the Central American Agenda. In 1994, delegates of all seven Central American nations convened in Managua, Nicaragua, for an ecological summit meeting. There, they formed the Alliance for Sustainable Development (ALIDES), a framework organization for achieving sustainable development by following certain principles, initiating specific plans of action, and fulfilling precise obligations. The agreement created two institutions for fulfilling ALIDES, a National Council for Sustainable Development in each country, and the Central American Council for Sustainable Development (comprising the Central American presi-

27. See Page & Schwarz, supra note 20, fig. 1.
28. See id. at 5.
29. CENTRAL AMERICAN AGENDA, supra note 7, at 10.
30. Id. at 34.
31. Id. at 8.
dents and the Prime Minister of Belize at presidential summits). The ALIDES agreement identifies four basic areas for action: 1) democracy, 2) socio-cultural development, 3) sustainable economic development, and 4) sustainable management of natural resources and improvement of environmental quality. Under this rubric, the states agreed to forty-seven discrete, multi-part obligations, ranging from directing CACED to issue a report on states’ compliance with environmental conventions to requiring states to issue regulations for the control of vehicular emissions within one year. Because ALIDES contains affirmative requirements, it forms the backbone of present efforts to link sustainable development in Central America to a legal regime.

4. Central America-U.S.A. Joint Declaration

Two months after ALIDES was signed, the United States declared that it would assist the Central American states in “achieving a solid and sustainable economic development.” Along with the Central American states, the United States then signed the Central America-U.S.A. Joint Declaration (CONCAUSA), which departed only slightly from the four-part ALIDES structure. CONCAUSA features four narrow fields of action, all directly related to the environment: biodiversity conservation, energy, environmental legislation, and sustainable economic development. The Central American states and the U.S. each incurred specific obligations under these four fields, reflecting the other party’s environmental concerns. For example, under “Environmental Legislation,” the U.S. agrees to strengthen the Prior Informed Consent system for pesticide imports to Central America, and the Central American governments agree to gradually eliminate the use of leaded fuel in their countries. CONCAUSA thus represents a concerted effort to bring about sustainable development, as advocated by Central American governments since 1987.

32. See Compromisos de la Alianza para el Desarrollo Sostenible [Obligations of the Alliance for Sustainable Development (ALIDES)], PANORAMA CENTROAMERICANO, Mar.-Apr. 1995, at 47 [hereinafter ALIDES Obligations].
34. See ALIDES Obligations, supra note 32, at 35-36.
35. See id. at 49.
37. See id. at 55-63.
38. See id. at 60.
39. See id. at 61.
C. Environmental Impact Assessments as a Tool for Sustainable Development in Central America

In retrospect, the evolution from the first Esquipulas treaty, in 1987, to CONCAUSA, in 1994, makes for an orderly narrative in which sustainable development became a widely accepted and unifying goal of regional integration and cooperation in Central America. However, there is an inherent conflict in the concept of sustainable development. On the one hand, sustainable development calls for environmental conservation. On the other, it calls for development. These goals appear irreconcilable in a region in which the exploitation and degradation of natural resources has historically accompanied economic growth. ALIDES and CONCAUSA require that development be "sustainable," but the treaties rarely identify specific strategies for easing this perennial tension between conservation and growth. Nor do they indicate when and how environmental concerns should temper the usual tendencies of a free market economy. Perhaps the treaties are most significant because they at least obligate their signatories to consider the long-term environmental consequences of development, rather than allowing the signatories to simply assume that such development is necessary and beneficial, as they have in the past. At a minimum, the treaties oblige their signatories to avoid patently unsustainable policies and practices, by requiring foresight and planning before allowing major development projects to take place.

For this reason, the Environmental Impact Assessment (EIA) may be seen as a cornerstone of the ALIDES and CONCAUSA agendas. According to CACED, the EIA is the best planning protocol for sustainable development, because it provides decisionmakers with the technical data necessary to predict whether a project is sustainable.

40. This conflict is evident in the discrepancies between the definitions of "sustainable development" within the private sector and within ALIDES. The Federation for Private Development and Training (FEDEPRICAP), an organization representing the private sector, urges that "sustainability" will be best achieved by procuring an annual rate of economic expansion sufficient to sustain future generations. See ALIDES, Propuesta del Sector Privado a través de FEDEPRICAP [Proposal of Private Sector Represented by the Federation for Private Development and Training], in Instituto Centroamericano de Estudios Políticos (INCEP) [Central American Institute for Political Studies], CENTROAMERICANO 1994, 64, 71-72 (1995). Meanwhile, the theory underlying ALIDES calls for managing resources with forethought for all costs and benefits to future generations, rather than a simple fixation on financial indicators such as the rate of economic growth. See ALIDES Summit, supra note 33, at 22.

41. See CEPAL, supra note 14, at 1; supra note 16 and accompanying text.

42. As the Prensa Libre of Guatemala notes, sustainable development does not have to stop development but rather it aims to make continued development possible over the long run, and thus the paradox only exists if one takes a short-sighted view of the issue. See Bautista, supra note 1, at 10.
and thus to make responsible decisions.\textsuperscript{43} Though initially ignored, then resisted,\textsuperscript{44} today more than seventy-five countries have adopted EIA requirements as a tool for the rational management of natural resources and the environment.\textsuperscript{45} EIAs also play an important role in the field of international law, as demonstrated by the European Community's ratification of the Convention on the Evaluation of Environmental Effects in a Transboundary Context.\textsuperscript{46} Signatories of this convention agreed to conduct EIAs along specific guidelines for particular types of development.\textsuperscript{47}

Central American states have repeatedly supported EIA provisions in international agreements. For example, the 1983 Convention for the Protection and Development of the Marine Environment of the Caribbean compels signatories, including Guatemala and Belize, to cooperate in conducting EIAs for projects in the Convention zone.\textsuperscript{48} A 1989 protocol to this convention calls for EIAs on the impacts of development on fauna and flora.\textsuperscript{49} The Rio Convention on Biodiversity, ratified by all seven Central American states,\textsuperscript{50} obliges parties to conduct EIAs for projects that could have important conse-

\begin{footnotesize}
\textsuperscript{43} See Letter from Marco Gonzalez, Director of Environmental Legislation Division of CACED, to El Salvador's Executive Secretariat of the Environment (SEMA) (Dec. 1, 1996) (on file with author) ("The EIA has become the most important instrument of environmental policy and management in Central America.").


\textsuperscript{46} See Convention on Environmental Impact Assessments in a Transboundary Context, February 25, 1991, 30 I.L.M. 800 [hereinafter EIA Convention]. The Convention was signed by more than 30 countries. \textit{See also} Rio Declaration on Environment and Development, June 13, 1992, Principle 17, 31 I.L.M. 874, 879 ("Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.").

\textsuperscript{47} See EIA Convention, supra note 46, arts. 4, 5, and 7, 30 I.L.M. at 806-07.


\textsuperscript{50} See Memorandum from Marco Gonzalez, Director of the Environmental Legislation division of CACED, \textit{Estado de Ratificacion de Convenios Centroamericanos Normativos de Gestion/Proteccion Ambiental} [\textit{State of Ratification of Central American Conventions, Management and Environmental Protection Norms}] (June 15, 1996) (on file with author).
\end{footnotesize}
quences for biodiversity.\textsuperscript{51} Similarly, the Central American Convention on Biodiversity requires EIAs for projects to resettle refugees or colonize regions.\textsuperscript{52} Finally, under the 1993 Regional Convention for the Management and Conservation of the National Forest Ecosystem and Development of Forest Plantations, signatories\textsuperscript{53} agree to require EIAs prior to allowing large scale logging or development projects in forest regions.\textsuperscript{54}

While Central American governments have explicitly bound themselves on the international level to require EIAs only in certain circumstances, the governments' other declarations have consistently connected sustainability to EIAs. In fact, ALIDES itself may be understood to impose EIA requirements by calling on states to pursue development "without compromising the quality of life of future generations."\textsuperscript{55} When a state impedes the implementation of its own domestic EIA statutes, it risks violating ALIDES by breaching this promise to pursue sustainable development. The following Part demonstrates how one Central American country, El Salvador, has failed to take even the first steps toward meeting the obligations and aspirations of ALIDES.

\section{Domestic Compliance with Sustainable Development Commitments: The Example of El Salvador}

\subsection*{A. El Salvador's Environmental Crisis and Inadequate Response}

El Salvador represents circumstances that are typical of Central American countries and that impede the implementation of regional environmental commitments: poverty, dependance on few export crops, and social-political turmoil, to name a few.\textsuperscript{56} These, along with three additional factors, account for this study's focus on El Salvador.

\begin{enumerate}
\item See Convenio para la Conservacion de la Biodiversidad y Proteccion de Areas Silvestres Prioritarias en America Central [Convention for the Conservation of Biodiversity and Protection of Priority Forest Areas in Central America], June 5, 1992, art. 30.
\item All states except Nicaragua and Belize. See id.
\item See Convenio Regional para el Manejo y Conservacion de los Ecosistemas Naturales Forestales y el Desarrollo de Plantaciones Forestales [Regional Convention for the Management and Conservation of Natural Forest Ecosystems and the Development of Forest Planting], Oct. 29, 1993, art. 6.d.
\item ALIDES Summit, supra note 33, at 22.
\item Certain countries, like Costa Rica and Belize, may have made more headway in environmental protection. Yet these countries are somewhat anomalous because they enjoy higher standards of living than other Central American countries and have remained insulated from the region's civil wars. First Central American Conference on the Enforcement of Environmental Law, sponsored by CACED and U.S. AID, in Managua, Nicaragua (October 1996).
\end{enumerate}
First, prior to the civil and economic strife of the 1980s, El Salvador had one of the strongest environmental programs in the region, making it better situated and equipped for implementing sustainable development than its neighbors. Second, El Salvador has fully participated in, and committed itself to, ALIDES and the other regional environmental conventions. This indicates that it has the political impetus to put these commitments into effect. Third, El Salvador faces imminent environmental and economic crisis that provides ample motivation, even in the short-term, for the country to adopt sustainable development policies.

The third factor is perhaps the most impressive. Of the Central American states, El Salvador is the most densely populated and the most depleted in terms of natural resources. Only about six percent of its original forests and mangroves remain, ninety percent of the rivers are contaminated, and some eighty percent of the soils suffer from serious erosion. Unlike other Central American countries, El Salvador does not have an expansive frontier area of relatively unexploited territory. This results in universally high contamination and degradation levels, with concomitant detrimental effects on public health and the economy. Overall, Salvadorans suffer the third-worst standard of living in the hemisphere. Sixty-five percent of the popu-

57. In the 1970s, El Salvador's Director of Natural Resources "implemented some of the most sophisticated and effective environmental programs in Central America." PRISMA, supra note 15, at 27.
58. El Salvador's population density of 256.8 persons/km$^2$ makes it the most densely populated Latin American country. See Tommie Sue Montgomery, Revolution in El Salvador 23 (2d ed. 1995).
60. See id. at 10.
62. For instance, only 5% of El Salvador's territory is forested, compared to 27% in Nicaragua, which has the second lowest forest coverage in Central America. See Andrew Wheat, Land Reform in El Salvador, INTER-PRESS SERVICE, Sep. 1, 1996, available in 1996 WL 13094256.
63. For example, in 1990 there were almost 250,000 reported cases of serious respiratory infections (about one in 24 residents). See Secretaria Ejecutiva del Medio Ambiente [Executive Secretary of the Environment (SEMA)], Estrategia Nacional del Medio Ambiente y Plan de Accion [National Environmental Strategy and Action Plan] 10 (1995).
64. El Salvador's rank is 115, surpassing only Nicaragua (117) and Haiti (145). See Programa de las Naciones Unidas para el Desarrollo [United Nations Development Program (UNDP)], Informe sobre Desarrollo Humano [Report on Human Development], 154 (1996) [hereinafter UNDP].
lation lives in abject poverty, and seventy-three percent of the children suffer malnutrition. Further, the country’s population is expected to double within twenty-four years.

The impoverished and growing population puts pressure on the environment, to which current development strategies cannot adequately respond. El Salvador’s patterns of development and resource distribution appear to have strained, and perhaps overrun, the country’s capacity to support its population. For instance, the economy depends on the receipt of foreign currency in the form of remesas sent to residents by relatives living abroad; these remesas almost equal the total value of El Salvador’s exports. El Salvador’s best hope for avoiding an environmental disaster and the severe social crisis that would follow may be fulfilling the country’s obligations under ALIDES to promote sustainable development.

B. The Practice of Creating “Paper Institutions”

The ratification of ALIDES, which sets out a framework for achieving sustainable development, has produced few concrete results. For example, El Salvador still has not passed a General Law on the Environment. Adopting a General Law on the Environment is considered a crucial, albeit preliminary, step toward sustainable development. The delay in adopting a General Law in El Salvador does not, in itself, signify a lack of commitment to sustainable development. However, it appears that the drafting process has been prolonged intentionally, resulting in El Salvador’s continued noncompliance with ALIDES obligations.

65. See Montgomery, supra note 58, at 23.
66. See id. at 24.
67. See Faber, supra note 15, at 75.
68. For example, 42% of energy used in El Salvador comes from biomass. See CEPAL, supra note 14, at 14.
69. In 1994, total exports were nearly 1.2 billion, and remesas were just less than 1 billion. See CEPAL, Evolución Económica durante 1994 [Economic Evolution during 1994], Panorama Centroamericano, Jan.-Feb. 1996, at 204.
70. See CEPAL, supra note 14, at 2.
71. See supra section 1.B.3.
72. It is a preliminary step because a general environmental law requires the subsequent passage of several Special Laws, regulations for those Special Laws, and technical norms amplifying those regulations. Interview with Marco Gonzalez, Director of the Environmental Legislation division of CACED, in Guatemala City (Nov. 12, 1996). Nevertheless, this author presumes that passing a General Law is a necessary first step for El Salvador to meet its ALIDES obligations.
73. The process of drafting El Salvador’s General Law began strongly, as over 20 consultation sessions were conducted with sectors of the public during 1994 and 1995. See Interview with Carlos Canas, Adjunct Ombudsman for the Environment, El Salvador’s OHR, in San Salvador (Nov. 7, 1996) [hereinafter Canas (11/7/96)]; Gonzalez, supra note 72. However, in 1996, the President largely ignored those consultations (although most participants were from the business sector and so the proposed law was not all that restrictive), and began drafting a distinct General Law. Presently, El Salvador is paying a U.S.
its commitment under ALIDES to implement a general environmental law.\footnote{74}

While the government has complied with obligations under the Central American Agenda and ALIDES to create environmental institutions, it has failed to grant these institutions any real power. For example, El Salvador formed the National Commission on the Environment (CONAMA) to serve as an institutional focal point for environmental protection measures,\footnote{75} but never put it into action.\footnote{76} Instead, CONAMA was dissolved in 1994, and all of its functions were transferred to the already-overworked Executive Secretary on the Environment (SEMA).\footnote{77} El Salvador established SEMA in 1990, in compliance with the Constitutive Convention of CACED, to articulate and apply national environmental policy.\footnote{78} Yet SEMA bounced between three different ministries before becoming its own ministry in June, 1997.\footnote{79} SEMA also suffered a “restructuration” in 1994, which resulted in the loss of a large portion of its professional corps.\footnote{80} By 1996, SEMA’s budget of $800,000 permitted the agency to employ a total of thirty staff professionals.\footnote{81} But even today, as an independent ministry, SEMA has a “very low”\footnote{82} budget of $3 million and most of its functions are merely advisory.\footnote{83}

\footnote{74}{Telephone Interview with Carlos Canas, Adjunct Ombudsman for the Environment in El Salvador’s OHR (October 13, 1997) [hereinafter Canas (10/13/97).}
\footnote{75}{See PRISMA, supra note 15, at 29. The creation of CONAMA was a requirement of the Central American Convention for Environmental Protection, ratified and promulgated by El Salvador in February 1990. See Marco Gonzalez, Resumen de la Ley Ambiental de la Republica de El Salvador [Summary of the Environmental Law of El Salvador] 78 (June 1996) (unpublished manuscript, on file with author).}
\footnote{76}{See PRISMA, supra note 15, at 30.}
\footnote{77}{See Gonzalez, supra note 75, at 67.}
\footnote{78}{See Gonzalez, supra note 75, at 67.}
\footnote{79}{See Canas (11/7/96), supra note 73; Al Fin, SEMA Será Ministerio del Ambiente [Finally, SEMA Will Be the Ministry of the Environment], PRENSA G RÁFICA, Apr. 21, 1997. The ministry’s official name is now Ministerio del Ambiente y Recursos Naturales [Ministry of the Environment and Natural Resources]. Because the events described in this Comment occurred prior to the formation of the new ministry, this Comment refers to the agency by its original name, SEMA.}
\footnote{80}{See PRISMA, supra note 15, at 30.}
\footnote{81}{See Panameno, supra note 73. Most of SEMA’s budget came from foreign donations.}
\footnote{82}{See Canas (10/13/97), supra note 74.}
\footnote{83}{See Gonzalez, supra note 75, at 68.}
SEMA's processing of EIAs illustrates the obstacles that SEMA must overcome before becoming an effective environmental regulatory agency. In the first place, the EIA division is understaffed. In 1996, the division employed only four of the six professionals needed to function minimally.84 Additionally, SEMA's mandate in this capacity is limited to rendering advice on the quality of EIAs submitted to other executive branch agencies, such as the Ministry of Agriculture. Not only do the executive agencies make their own decisions regarding development, they often do so before SEMA can even review an EIA.85 In reality, the executive agencies are not likely to accept a recommendation from SEMA to withhold approval of a project on environmental grounds.86 This has led some to view SEMA as a normative, rather than executive, body, since it simply issues recommendations that pertain to programs executed by other agencies.87

Other government bodies control environmental concerns, but act with little regard for the environment. For instance, the Ministry of Health and Public Social Assistance, the Ministry of Agriculture, and the Office of Planning for the San Salvador Municipal Area all have discretion over which projects receive construction and operation permits.88 However, these agencies do not have environmental agendas, and they often depend on SEMA for direction and impetus in pursuing environmental policies. While CACED seeks to incorporate environmental considerations into the work of these types of entities in the future,89 to date, cooperation from such entities is minimal.90

El Salvador has seen one unique advance in the enforcement of environmental law, although this advance has not been supported by legislative or executive mandates.91 The Ombudsman of Human

84. See Pablo Hernandez Panameno, Chief of Environmental Impact Studies Division, Executive Secretary of the Environment, Primera Reunion de Expertos sobre EIA [First Meeting of EIS Experts] 2 (Mar. 17, 1995) (unpublished manuscript on file with author). SEMA needs at least nine professionals to conduct follow-up environmental audits. See Panameno, supra note 73.

85. See case study infra Part II.C.

86. In one instance, a foreign enterprise wanted to open a tire incinerator in La Union, but was prohibited by the executive branch, based on zoning regulations. However, the enterprise persisted, and submitted an EIA with a renewed request to build the incinerator. SEMA reviewed the EIA, recommended against the project, and the executive reiterated its initial decision to deny permission to the developer. See Panameno, supra note 73.

87. See Canas (10/13/97), supra note 74.

88. See Gonzalez, supra note 75, at 20, 50, and 63.

89. See CENTRAL AMERICAN AGENDA, supra note 7, at 21 (stating goal of restructuring institutions and agencies that oversee development to take into account environmental concerns during the planning process).

90. See Interview with Marco Gonzalez, Director of Environmental Legislation Division of CACED, in Managua, Nicaragua (Oct. 3, 1996).

91. Therefore, this advance can be reversed easily.
Rights (OHR)\textsuperscript{92} has developed, at her own discretion, an Adjunct Ombudsman for the Environment.\textsuperscript{93} Since the OHR's mandate is generally to "defend the human rights of persons against arbitrary or illegal acts by the state,"\textsuperscript{94} the Ombudsman's endeavors in environmental protection are limited to cases that can be framed as human rights violations and where the state can be held responsible for the violation. The new director of the OHR has utilized powers left dormant by earlier directors. However, even those powers are limited to investigating violations, publishing reports, and recommending corrective action to be taken by state officials.\textsuperscript{95} In addition to its lack of coercive powers, the OHR lacks the technical capacity to handle complex environmental issues; its few successes have been in cases where politically weak parties commit blatant violations.\textsuperscript{96} For this reason, the OHR's environmental branch remains largely unnoticed, despite its efforts.\textsuperscript{97}

C. Nejapa Power: An Example of Non-Compliance with Environmental Impact Assessment Requirements

This section describes how El Salvador's purported commitment to sustainable development proved hollow when a Texas-based corporation, Coastal Power (Coastal), submitted a tardy and inadequate EIA and then operated the "Nejapa Power" plant without proper approval. At first glance, the story of Nejapa Power may appear to have unfolded in a legal vacuum. In fact, the development of Nejapa Power is an example of a local politician and a transnational corporation acting in disregard of the law and with impunity—a phenomenon that

\textsuperscript{92} See Coleen Duggan, La Protección y Promoción de los Derechos Humanos en El Salvador: Una Contribución al Diálogo sobre Retos y Areas Prioritarios para la Cooperación Internacional [The Protection and Promotion of Human Rights in El Salvador], DERECHOS HUMANOS, June 1996, at 47 (reporting that the OHR is the "mechanism par excellence for combating impunity" in public administration in El Salvador).


\textsuperscript{94} Id. at 10; see EL SAL. CONST. ch. IV, art. 194, § 7.

\textsuperscript{95} See Interview with Carlos Canas, Adjunct Ombudsman for the Environment in El Salvador's OHR, in San Salvador, El Salvador (Oct. 10, 1996) [hereinafter Canas (10/10/96)].

\textsuperscript{96} For example, the OHR succeeded in inducing the Ministry of Health and local municipal authorities to close a family-run aluminum plant located in a residential zone, that was dumping raw, toxic sewage into a river. Due to its mandated restrictions, the OHR, awkwardly enough, had to frame the complaint as one against local authorities for not issuing regulations specific enough to clearly forbid dumping raw wastes into rivers in populated areas. See OHR, Fundacion de Aluminio de la Colonia Jardines de San Marcos (Dec. 14, 1993) (reporting on the aluminum plant) (on file with author).

\textsuperscript{97} See PRISMA, supra note 15, at 32.
experts involved in the case do not find unusual.98 This example illustrates how questions of law are frequently resolved through a show of economic and political power in Central America.

In May 1994, Coastal acquired a contract with the state electricity bureau to build the first private power plant in the country and to begin supplying power in August 1995. Needing at least a year to build the plant, Coastal requested immediate permission to begin construction, without submitting even a preliminary EIA. The mayor of San Salvador (and, at his bidding, the metropolitan planning agency) issued a so-called “partial permit” to begin construction.99 However, the mayor lacked authority to issue this permit for three reasons. First, Coastal did not submit an EIA prior to obtaining the permit. It is illegal to build and operate a thermoelectric plant in the San Salvador Metropolitan Area without first submitting an EIA to the planning agency for its approval.100 Coastal eventually submitted an EIA, but only after construction had already begun.101 In fact, SEMA was called in to evaluate the EIA and found it to be deficient.102 The second reason the mayor lacked authority to issue the “partial permit” is

98. See Canas (10/10/96), supra note 95; Interview with Marco Gonzalez, Director of the Environmental Legislation division of CACED, in Guatemala City (Nov. 11, 1996); Ibarra, supra note 73; Panameno, supra note 73.
99. See Letter from Mario Eduardo Valiente, Mayor, San Salvador, to Tenneco Gas Int’l Inc. (July 25, 1994) (on file with author) (Tenneco had the contract prior to Coastal; Coastal was the party to benefit ultimately from the permit. The letter gave “partial permission” to begin construction on August 1, 1994, and noted that final permits would be approved upon fulfillment of the legal construction requirements.). On the same day, the director of the municipal planning agency sent Coastal a letter granting the same type of permission, following word-for-word the Mayor’s letter. See Letter from Martha Silvia de Sandovar, Executive Director of the Office of Public Works for San Salvador Metropolitan Area, to Tenneco Gas Int’l Inc. (July 25, 1994) (on file with author). The OHR investigator of the case noted that the Mayor of San Salvador appeared to be the only official behind the granting of this permission. See Canas (10/10/96), supra note 95.
100. See Marco Gonzalez, Resumen de la Ley Ambiental de El Salvador [Summary of El Salvador Environmental Laws] 50 (1996) (unpublished report, on file with author) [hereinafter Summary of Laws], describing Ley de Ordenamiento Territorial del Area Metropolitana de San Salvador y de los Municipios Aldeanos [Law of Territorial Management for the San Salvador Metropolitan Area], 1994, Decreto Legislativo No. 732 del 26 Jan 94 (El Salvador), 1 [hereinafter Law of Territorial Management]. Articles 40 to 44 specifically extend the EIA requirement to thermoelectric plants, and Article 60 stipulates that such projects must receive a permit from the metropolitan planning agency prior to operation.
101. Even then, Coastal maintained that it was not required to submit an EIA. It claimed to have prepared the EIA for its own purposes, to ensure that the plant would not cause undue environmental damage to the area. See Coastal Technology, Environmental Impact Study for Nejapa Power 1-4 (1995) (on file with author); see also OHR, Matter of Nejapa Power (Sep. 9, 1995) (on file with author) (emphatically denying Coastal’s assertion that it was not legally required to submit an EIA).
102. See OHR, supra note 101. SEMA evaluated the EIA pursuant to a San Salvador regulation that directs the metropolitan planning agency to consult with SEMA when reviewing EIAs. See Instituto Salvadoreno de Administracion Municipal [Salvadoran Institute of Municipal Administration] (ISAM), Recopilacion y Analisis de Leyes relacionadas con el Medio Ambiente, TOMO III [Compilation and Analysis of
that state officials may not take action beyond what is explicitly provided for by law, and the metropolitan land-use statute does not provide for such permits. Finally, the plant site was not in the municipality of San Salvador. It was in the municipality of Apopa and therefore was beyond the jurisdiction of the mayor of San Salvador.

After obtaining the “partial permit,” Coastal built the plant as scheduled, and began operations in September, 1995. The plant, which runs on diesel fuel, creates significant air pollution; sulfur and particulate matter from this type of plant are linked to hazards such as acid rain and respiratory infections. In fact, in Finland, where the technology for Nejapa Power’s plant originated, costly ceramic filters are routinely used to reduce dangerous atmospheric emissions. Coastal eliminated the filters from its Nejapa plant, to reduce construction costs. Critics of the plant also claim that Coastal refuses to share information regarding its emissions with the public. After only one week of operation, members of the neighboring community reported excessive black smoke and fuel spills at the Coastal site.

Today, the community and organizations that resisted Nejapa Power want the plant closed, at least until a proper EIA has been

103. See Dr. Mauricio Alfredo Clará, Constitución y Orden Jurídico [Constitution and Legal Order], El Diario de Hoy, Oct. 10, 1996, at 12.
104. See Compilation of Laws, supra note 102, at 373.
105. Apopa is one of 13 municipalities within the San Salvador Metropolitan Area (SSMA). Nejapa Power takes its name from the municipality of Nejapa, which borders Apopa. Coastal officials originally believed the construction site was located in Nejapa.
106. The mayor supported his action by claiming that an “urgent” need for electricity existed in the country. See Valiente, supra note 99. This reasoning appears to have been a mere pretext, because at the time, El Salvador exported electricity to Honduras. See Canas (10/10/96), supra note 95.
107. See Work Report, supra note 93, at 73. To date no one outside the plant has been allowed to take sufficient samples of emissions, and therefore it is not known exactly how many toxins the plant releases. Coastal claims the pollution levels fall within permissible international levels. See OHR, supra note 101.
108. See Ibarra, supra note 73.
109. See id.
111. See Work Report, supra note 93, at 73; Serpas, supra note 110. The reports of employees who claimed to have witnessed a large quantity of diesel fuel being dumped into a river confirmed the spill. See Ibarra, supra note 73. Additionally, Coastal allegedly indemnified a neighboring sugar plantation for damage caused by the spilled fuel. See Interview with Yotsabeth Guerrero, Director of Center of Training and Development for the Nejapa Area, in Nejapa, El Salvador (Oct. 10, 1996). Coastal denied the spill. See Ibarra, supra note 73.
prepared and approved. Yet it would be unprecedented and unthinkable, to close a plant already operating with the backing of San Salvador's mayor.

In the words of one commentator, the brief conflict between the community and developers was like "a fight between a bound mule and a loose lion." The scenario will likely repeat itself, around San Salvador and elsewhere in El Salvador. In fact, two new development projects are presently planned for the Nejapa region—a trash incinerator and the largest Coca-Cola plant in Central America—and both projects have the potential to be more harmful than the thermoelectric plant. Evidently, the outlook for sustainable development in the region is dim.

III
HOW (NOT) TO ENFORCE ENVIRONMENTAL LAW

The refrain "there are good laws, but no enforcement" in the environmental arena is too often repeated without a specific analysis of how and why the breakdown in enforcement occurs. Such vague descriptions of the problem do not lend themselves to the formulation of effective cures. To dismiss the lack of environmental law enforcement in Central America as a symptom of the absence of a rule of law leads to a simplistic and daunting solution: build a rule of law. This, of course, is the ultimate goal. However, it is necessary to identify the particular failures of the present system, before beginning the process of creating a foundation for a rule of law.

A. The Need for Institution Building

A great deal of institution building is required to make environmental protection feasible in Central America. The complexity and

112. See id. An apology was extracted from Coastal, asking the Apopa Mayor to excuse it for opening the plant in his jurisdiction without notifying him because Coastal thought the plant was in Nejapa. See Guerrero, supra note 111.
113. See Ibarra, supra note 73.
114. See id. It is notable that the fight may not be completely finished. Coastal did submit a monitoring plan to SEMA in September 1996, which SEMA has yet to review. See Panameno, supra note 73.
115. See Guerrero, supra note 111.
116. See id.
117. There are signs that popular resistance to the incinerator project could succeed. In the mayoral elections of March 1997, the leftist candidate Hector Silva of the FMLN (Frente Farabundo Marti para la Liberacion Nacional) unseated the incumbent Valiente. Two days after the elections, the surprise-winner Silva announced that the incinerator plans would be scrapped because such a plant would be so harmful to public health. Prioridades para Silva [Priorities for Silva], Prensa Grafica (El Salvador), March 19, 1997. In October, 1997, Canas reported that Silva's position remained the same, although the transnational corporation which was slated to build the incinerator was threatening to sue for breach of contract. See Canas (10/13/97), supra note 74.
technical nature of development decisions make institution building particularly critical to achieving sustainable development. State institutions typically require numerous trained professionals to identify and prosecute violators. Particularly, sophisticated institutions are indispensable for reviewing EIAs, because the content of EIAs is variable, speculative, and largely at the discretion of the developer. At a minimum, the state must have the capacity to decide authoritatively what development is sustainable.

However, as President Figueres of Costa Rica noted in a 1992 speech, “our countries are poor, and face great limitations to financing new projects to achieve sustainable development.” Financial constraints often are identified by commentators from industrialized nations as a reason that “less-developed countries simply cannot afford the levels of [environmental] protection that the industrialized world now considers the norm.” Without giving up on high environmental standards, ALIDES itself recognizes the financial inability of the Central American states to implement sustainable development policies in the short-run. Building on the Central American Agenda’s sentiment that an “ecological debt” is owed to Central America, ALIDES solicits foreign donations to make the process possible.

The sums required to fulfill the promises of sustainable development are formidable. Amounts raised thus far, from regional and foreign contributions, are far below the amounts needed to implement sustainable development programs in the region. The Honduran Minister of the Environment estimates that $20 billion is needed to fully finance the ALIDES agenda for development projects throughout Central America. In a region where total export revenues in 1995

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118. See Abram Chayes & Antonia Handler Chayes, The New Sovereignty 14 (1995) (stating that for a government to bring private behavior into conformity with standards set out in an international agreement, it “will normally require detailed administrative regulations and vigorous enforcement efforts. . . . In developing countries, the characteristic situation is a severe dearth of the requisite scientific, technical, and financial wherewithal to build effective domestic enforcement systems.”).

119. See Wood, supra note 44, at 5 (institutional capacity is “a basic requirement” for a legal foundation for EIA programs).


122. See Central American Agenda, supra note 7, at 32.

123. See id. at 30.

amounted to $7 billion, the foreign assistance is clearly needed. In its first four years, CACED managed to attract $50 million, which it farmed out to specified projects. The Inter-American Development Bank has given $10 million to support ALIDES, and it recently promised to “work toward channeling” half of its annual loans into social and environmental development programs. The United States development agency (U.S. AID) has been the biggest donor to CACED, granting an initial $1.6 million and promising a total of $6 million. Regionally, the countries themselves have made only negligible financial commitments. For example, for the three years from 1994 to 1996, each country pledged only $20,000 per year to CACED; during that time, they paid less than half of what they had pledged.

El Salvador’s environmental protection regime (and consequently the environment) also suffers from neo-liberal economic policies that went into full swing beginning in 1989. These policies are characterized by reduced state expenditures and increased participation by the private sector in economic decisionmaking. However, since sustainable development calls for maximizing the quality of life for all sectors of society over the long-run, its implementation requires an expansion of the state’s role in managing the environment. At a minimum, the state must be able to prevent the private sector from making short term decisions that jeopardize sustainable development. Arguably, neo-liberal policies have caused an institutional “collapse,” rendering the state unable to implement sustainable development policies. The easiest “solution” for a government caught between the exhortations of neo-liberals and the mandate of sustainable development is to create environmental institutions on paper, while simply delaying any real confrontation with the private sector and its agenda for economic expansion. The developments in El Salvador exemplify the consequences of this superficial approach, namely, the prevalence of impotent institutions, heedless environmental destruction, and

125. See CEPAL, supra note 69, at 117.
126. See PAGE & SCHWARZ, supra note 20, at 3.
127. See Discurso de Albert Gore, Vice-presidente de los Estados Unidos, en la Cumbre Ecológica Centroamericana [Vice-president Albert Gore’s Address to the Central American Ecology Summit], PANORAMA CENTROAMERICANO, Mar.-Apr. 1995, at 107.
128. See Environmental Protection Efforts Gain Force in Central America, supra note 124.
129. See Interview with Martin Schwarz, U.S. AID Advisor to CACED, in Guatemala City (Nov. 16, 1996). A portion of these funds is earmarked for U.S. advisors and training courses.
130. See PAGE & SCHWARZ, supra note 20, fig.1.
132. See CEPAL, supra note 14, at 23.
133. See id. at 43; see PRISMA, supra note 15, at 27; see also WORK REPORT, supra note 93, at 44.
widespread cynicism in regards to the value of both environmental and international law. Leaving environmental enforcement to weak institutions threatens to nullify the advances made on an international level.134

B. Why Institutions Presently Cannot Ensure Compliance

Though environmental agencies have proliferated throughout Central America in recent years, the case study of Nejapa Power demonstrates how these institutions are not always effective. Several institutions could have prevented the construction and operation of Nejapa Power pending the completion and approval of an adequate EIA, yet none did so. The Nejapa Power case sheds light on at least four specific reasons why El Salvador—and the other Central American countries—cannot take even the first steps toward sustainability: 1) lack of funds for enforcement agencies; 2) lack of a proper legal mandate for certain institutions; 3) privatization; and 4) lack of political will. The following sections briefly describe the structural flaws and underlying policies that may have led to institutional failures in the Nejapa case.

1. Lack of Resources for Enforcement Agencies

The lack of financial and human resources for enforcement institutions is the most chronic problem plaguing Salvadoran environmental law enforcement. It is also the least complicated to remedy. SEMA’s budget, for example, is woefully tight, causing the agency to depend on only four engineers to run the entire EIA program. In the Nejapa Power case, the budget limited SEMA to responsive, not proactive, enforcement action. Yet even in its responsive role, SEMA’s performance was inadequate. It took the agency until nearly the day of the plant’s inauguration to find that the EIA lacked a monitoring plan.135 A glance at its table of contents should have revealed this deficiency. It is possible that SEMA was not able to respond promptly because it simply lacked the personnel or institutional capacity to do so. Furthermore, SEMA could not have monitored Nejapa Power’s emissions, even if it were granted full access to the plant (it was not), because it lacked resources to implement the “Control Phase” of its enforcement program.136

134. See Mark W. Janis, An Introduction to International Law 223 (1993) (explaining that primary responsibility for enforcement of international environmental agreements remains vested in national administrative agencies, which face internal pressures to sacrifice environmental concerns for perceived economic efficiencies).
135. See Panameno, supra note 73.
136. See id.
Drafts of the proposed General Law on the Environment only promise to aggravate this funding problem. They would expand SEMA's mandate to review EIAs for all prospective development (public and private) in the entire country, without providing for fortification of the institution.\footnote{137} Presently, SEMA depends heavily on international support. The EIA program receives funding from the Inter-American Development Bank that is roughly equal to the entire budget granted to SEMA by the national government.\footnote{138} Nevertheless, as one official observed, like other environmental protection institutions in El Salvador, SEMA simply is too weak to monitor polluters.\footnote{139}

2. \textit{Lack of a Proper Legal Mandate for Institutions}

El Salvador has institutions with authority to protect the environment. Yet, as Nejapa Power illustrates, certain players act with impunity. One way to address this problem is to modify the legal mandates of certain institutions. For instance, current regulations delineate a passive role for SEMA; it receives EIAs from the municipal planning agency, reviews them for technical integrity and thoroughness, and makes recommendations. As a result, SEMA was powerless to demand an EIA from Nejapa Power prior to construction. Nor could it suspend operations of the plant pending review of the EIA that Coastal finally did submit. The power to suspend the project belonged to the municipal planning agency, whose mandate is to promote growth, not to protect the environment. Consolidating power under SEMA to review EIAs and to issue permits might create a bottleneck, and could lead to delays in construction.\footnote{140} However, it is important to vest significant power over the entire EIA process to an institution devoted to environmental protection.\footnote{141}

3. \textit{Privatization}

The case of Nejapa Power demonstrates the way in which relinquishing control of utilities to the private sector makes environmental

\footnote{137} See Gonzalez, supra note 75, at 57.  
\footnote{138} See Panameno, supra note 84, at 2.  
\footnote{139} See Panameno, supra note 73. There are cases where pollution has been stopped, but these involve only the most egregious violations of environmental laws by the least powerful polluters. For example, the proprietors of a small aluminum factory dumped aluminum waste directly into a river for over a decade. A joint effort by SEMA, OHR, and the mayor stopped them. See OHR, supra note 96.  
\footnote{140} See Gonzalez, supra note 72 (explaining that Guatemala has such a system, which causes developers there much frustration).  
\footnote{141} An alternative to granting SEMA lone authority over the EIA process would be to allocate the power between SEMA and the OHR. The latter institution would be an effective, yet post facto, watchdog for compliance with EIA regulations if it were provided a suitable team of engineers and more power to press for enforcement actions.
enforcement more difficult for already weak state institutions. Since 1989, El Salvador has pursued an aggressive policy of privatizing its major utilities. Coastal acquired rights to build and operate Nejapa Power—the first private power station in El Salvador—as part of this policy. Nejapa Power’s status as a private installation facilitated the circumvention of EIA regulations, since Salvadoran law imposes more strict EIA requirements on public works than on private works. For instance, SEMA prepares its own EIAs for all public projects, whereas it simply reviews EIAs prepared by developers for private projects. An EIA prepared by SEMA is more likely to satisfy legal requirements, and be used as a planning tool, than a study prepared by a developer whose primary goal is to jump the EIA hurdle. Allowing private enterprises to head formerly public projects removes potential support for EIA procedures that the public sector’s participation engenders.

The involvement of the Ombudsman of Human Rights in the case of Nejapa Power further illustrates the consequences of privatization. As a state watchdog institution, OHR can only reprimand other state entities for their improper behavior. It cannot issue complaints against private parties. Therefore, although OHR criticized Coastal for applying a double standard by neglecting environmental safeguards that it would have observed in its home country, this critique was removed from the OHR’s final report because it was addressed to a private enterprise. One OHR official notes that not only does privatization diminish OHR’s influence over such projects, it also reduces governmental responsibility over major development projects in general.

Privatization also reduces the efficacy of one of the few enforcement tools available against the private sector with regard to EIAs: conditioning loans on the completion, and approval, of an EIA. In El Salvador, the nation’s Central Reserve Bank demands an EIA before it finances a project. Yet privatization largely neutralizes this mechanism. The private enterprises best suited to handle large-scale development projects are transnational corporations, like

143. See Gonzalez, supra note 75, at 55.
144. Most of SEMA’s work with EIAs has been through public projects. Since such projects often require foreign loans, which frequently come conditioned on preparation of an EIS by the recipient, compliance by the public sector has constituted the most significant movement toward the formation of a verifiable EIA system in the country. See id.
145. See WORK REPORT, supra note 93, at 9-15 (explaining OHR’s mandate).
146. See Canas (11/7/96), supra note 73.
147. See Canas (10/10/96), supra note 95.
148. See Gonzalez, supra note 75, at 55.
149. See id.; Panameno, supra note 84, at 3.
Coastal, which usually have their own, foreign-based sources of funding. Indeed, Coastal did not depend on Salvadoran finance institutions to finance Nejapa Power. This made it easier for Coastal to evade domestic EIA requirements.

Privatization thus undermines sustainability in Central America by pitting the state against private developers. Hamstrung by underfunding and inadequate legal mandates, government institutions cannot promote sustainable development in an increasingly privatized economy.

4. Lack of Political Commitment to Sustainability

Finally, little political will exists to accomplish sustainable development in El Salvador. Arguably, this poses the most formidable obstacle to integrating environmental protection with development. Not only does it account for inadequate funding and legal mandates, but it also manifests itself in acts that are plainly illegal. For example, the mayor of San Salvador circumvented EIA requirements by issuing the "partial permit" to construct Nejapa Power. This public disregard of environmental laws is particularly damaging because the mayor is a powerful figure in Salvadoran politics. There may also have been covert pressure from politicians to disregard environmental laws. In fact, the mayor of Apopa allegedly ordered SEMA officials to review the Nejapa project favorably, and the president of El Salvador is rumored to have made personal phone calls on behalf of Nejapa Power. At a different level, the creation of weak institutions promotes corrupt behavior because these institutions become rubber stamps for attaching legitimacy to the acts of misdirected public officials.

One way to shift political will to take real steps in favor of sustainable development is to increase political accountability for fulfilling international obligations under ALIDES and the other agreements. However, the institutional actors and most of the Central American public are not even aware of the existence of ALIDES commitments to sustainable development. The Secretariat General

150. In fact, it benefitted from the support of the Overseas Private Investment Corporation, which sent a letter to SEMA, advising that such thermoelectric plants are sound and do not pose significant danger to human health or the environment. See OHR, supra note 101; Panameno, supra note 73.
151. See supra notes 99 to 106 and accompanying text.
152. See Panameno, supra note 73. This could explain SEMA's tardiness in issuing their disapproval of the EIA.
153. See Canas (10/10/96), supra note 95; Interview with Lola Spillari, Staff Attorney at Asociacion para Investigaciones y Estudios Sociales [Association for Social Studies and Investigations (ASIES)], in Guatemala City (Nov. 11, 1996). (A series of conferences held in 1996 by a Guatemalan NGO to review the status of state compliance with ALIDES reached the conclusion that government officials, the private sector, and NGOs alike are largely ignorant of the provisions of ALIDES.).
of the System for Central American Integration, an umbrella organization for Pan-Central American organizations, ran a series of radio announcements in the border areas of Guatemala, Honduras, and El Salvador to inform the public about ALIDES programs, but the announcement reached only a handful of Central America's citizens. More steps are necessary to educate the public, and thus to make government officials accountable for failures to fulfill sustainable development obligations. As one OHR official stated, "the only way to induce compliance [with ALIDES] by the government will be through general and organized popular pressure to do so." The next Part of this Comment describes a proposal for generating such pressure.

IV TAILORING INTERNATIONAL ACCORDS FOR CENTRAL AMERICAN CIRCUMSTANCES

A. Enabling Communities to Promote National Compliance With International Norms

The structure of international law assumes that states, as the fundamental subjects of that law, will fulfill their international obligations. However, the possibility that a state may not comply is always a significant possibility under international law, often giving it a more normative than binding character. While non-compliance usually does not rise to the level of chronic inability to comply with international commitments, this phenomenon is on the rise in the field of international environmental law. Progressively weaker states are assuming costly obligations to achieve sustainable development, yet they often lack the resources, institutions, and domestic legal systems to fulfill these obligations.

There is a tension that characterizes the environmental treaties signed by Central American states: the traditional view of international law expects signatory states to be the key enforcers of provisions, while the states find themselves unable to procure compliance.

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154. See Inician Campafia de Difusion para Dar a Conocer Acciones de la SICA [Campaign Begun to Publicize the Activity of SICA], PRENSA LIBRE, Nov. 4, 1996, at 36.
155. See Canas (11/7/96), supra note 73.
156. See JANIS, supra note 134, at 176-79.
157. See id.
159. Some suggest that developing countries sign such environmental treaties in hopes of attracting foreign assistance packages. See Robert O. Keohane et al., The Effectiveness of International Environmental Institutions, in INSTITUTIONS FOR THE EARTH 3, 16 (Peter M. Haas et al. eds., 1993). Whether states sign in good or bad faith is a question that goes beyond the scope of this Comment. In any case, the best strategy for building an international legal regime and for promoting environmental protection would call for assuming that the states have signed in good faith. From that assumption, one can argue that the state has consented to a norm and insist that the norm should be followed.
by private actors within their jurisdiction. The so-called monitor-and-correct model of international law, in which each state monitors its society’s behavior and procures conduct in accordance with international agreements, is becoming an anachronism. In Central America, at least, states do not have the capacity to act in this manner with respect to environmental treaties, because they have agreed to monitor and correct aspects of domestic development that increasingly are beyond their control. Indeed, the Nejapa Power case is most noteworthy because the parties involved seemed to expect non-compliance and non-enforcement as a matter of course.\textsuperscript{160}

The monitor-and-correct paradigm is not the only alternative for a state to ensure national compliance with international norms. The U.S. Environmental Protection Agency (EPA) presently is promoting a paradigm in developing countries that utilizes tax incentives and other government concessions to encourage the private sector to comply with environmental norms.\textsuperscript{161} Yet, in a country like El Salvador, where the private sector already enjoys a relatively light tax burden, tax incentives are not likely to be as effective as in countries with more taxes.\textsuperscript{162} This is true of other Central American countries, as well.\textsuperscript{163} Central American states have little power to concede to the private sector, so incentive programs are not likely to yield better results than the monitor-and-correct paradigm.

Both the monitor-and-correct and the incentive approaches place too much responsibility on state institutions, especially on weak institutions, to implement international obligations. As an alternative, this Comment proposes a public participation paradigm to enable Central American states to meet their international environmental obligations. The public participation paradigm would include international obligations on states to enable their citizens to participate in the making of decisions that have long term and widespread environmental consequences. That is, a signatory state would not simply be obliged to create institutions that are expected to make sustainable decisions, but rather the state would be obliged to share such decisionmaking authority with its own public. Commentators consider public partici-

\textsuperscript{160} See Canas (10/10/96), supra note 95; Gonzalez, supra note 72; Ibarra, supra note 73; Panameno supra note 73.  

\textsuperscript{161} EPA is also highlighting ecosystem approaches and informational requirements as viable policy mechanisms to achieve environmental goals. See Telephone Interview with Peter Lallas, Office of General Counsel, EPA (Dec. 16, 1997) (explaining U.S. EPA, Elements of Effective Environmental Legal Regimes: Issues and Perspectives, May 5, 1997).  

\textsuperscript{162} See CEPAL, supra note 14, at 34 (noting that the state has little ability to use tax breaks as an incentive for compliance with environmental regulations because it only imposes three taxes presently—imports, sales, and interest—and therefore lacks leverage on most businesses).  

\textsuperscript{163} See Vilas, supra note 10 at 22 (Guatemala’s total tax is five to six percent, El Salvador’s is slightly higher).
pation a crucial component of any administrative enforcement regime, and it already appears to play an important role in inducing compliance with international obligations. Public participation is relatively cost-free, so it should be especially attractive to underfunded and understaffed environmental enforcement agencies in Central America. In short, the public participation paradigm would compensate for a state’s shortcomings in enforcement capacity by including Central American people in efforts to achieve sustainability.

B. The Parallel Environmental Impact Assessment Program

The core of this Comment’s proposal for a public participation paradigm consists of what might be called a “parallel EIA” requirement. Private developers would not only have to prepare their own EIA as part of a development project (as they presently do); they would also have to pay for an EIA conducted by the community most affected by the proposed project. Both EIAs would then be submitted to the governmental authority responsible for reviewing and approving EIAs. The authority could then conduct a more thorough analysis of the proposed project, because it would have a wider array of technical data and perspectives to consider than if it only received an EIA from the developer.

The parallel EIA program would reduce the state’s role to its most quintessential function: deciding what action should be taken given a certain set of facts and predictions. In essence, the state’s role would be that of an umpire in a debate between the developer and the community, each backed by its own EIA. The state would have less responsibility for conducting its own technical investigations and drawing scientific conclusions before making policy decisions. Instead, the state would compare the two studies, research specific points of conflict, and then issue its final determination. The parallel EIA requirement would thus significantly improve present Central American EIA programs, at the expense of the private sector.

The parallel EIA proposal responds to three recurring problems in environmental law enforcement in Central America. First, Central American governments typically lack funds to create new and effective institutions. A parallel EIA program would decrease the cost to the state of implementing an EIA program, because the state would

164. See Keohane et al., supra note 159, at 20 (“By political and administrative capacity, we refer not only to the ability of governments to make and enforce laws and regulations, but also to the broader ability of actors in civil society to play an effective role in policy making and implementation.”).

165. See Ankersen, supra note 4, at 522 (according to a recent U.S. G.A.O. report, “the principle mechanism for enforcement of international environmental agreements is peer or public pressure generated from information required to be reported under those requirements.”).
need to employ only the engineers and scientists needed to compare the EIAs, rather than investigate a single partisan EIA comprehensively for technical accuracy. Second, there is a lack of technical expertise in Central American environmental institutions. The parallel EIA proposal would reduce the demand for such expertise at the government level, and shift the burden to the parties preparing the EIAs. Third, the EIA process is extremely time-consuming and often results in delays to projects that are awaiting permits. By funding a parallel EIA, the developer (granted, at a greater cost) will accelerate the approval process, because state institutions will not need as much time to investigate each project. The state should be able to reach a decision more quickly, especially if the developer and the community have already ironed out differences raised by their EIAs as part of the process of drafting them.

Perhaps the most important aspect of the parallel EIA proposal, in terms of the region's long-term stability, is that it would promote greater public participation in political decisionmaking processes. This ultimately may contribute to a redistribution of political power to popular sectors. As Central America emerges from a decade of armed civil conflict, and adapts to democratic rule, the region urgently needs mechanisms that grant more decisionmaking influence and political power to popular sectors. A community's experience in organizing around and managing its own EIA would provide invaluable experience in using legal tools to protect the community's interests. In this manner, a parallel EIA program would be one step—admittedly, a small one—toward alleviating further socio-economic stratification.

In Central America, governmental entities are rapidly losing authority because they are widely distrusted by both the public and private sectors. A parallel EIA program would make the state's role narrower and more transparent. Such a program would also help the affected community to develop more trust in the government through the community's involvement in the parallel EIA process. The community would no longer be dependent on the state to review EIAs for development projects, but rather would be armed with its own EIA. Communities would thus participate in, and be prepared to challenge, the decision of whether to allow a project to go forward or not. The

166. In fact, developers themselves tend to complain more about the time delays caused by EIA requirements than about the expense of conducting the EIA. See Wood, supra note 44, at 20. But see Robinson, supra note 45, at 595 (indicating that opponents of EIA requirements in industrialized countries complain most about time delays, but their counterparts in developing countries object more to the expense of preparing an EIA).

popular sector would be a check to the state's discretion. Such a change would represent true progress toward a democratic society.

CONCLUSION

In recent years, Central American states have cooperated in a joint effort to build a regional regime of environmental law. Besides adopting specific obligations to work toward sustainability, the countries have formed regional institutions to help achieve their goals, and have attracted the assistance and commitments of foreign governments. However, despite these accomplishments, environmental protection on a domestic level shows only isolated signs of improving. As long as the regional accords are not translated into domestic protective action, it is premature to celebrate the Central America environmental accords.

Under international law, a state signatory to a treaty is expected to enforce the treaty's provisions within the state's jurisdiction. However, as the case study of Nejapa Power illustrates, Central American states often are unable to meet this expectation with regard to their regional environmental commitments. It is not realistic for states with inadequate budgets and weak institutional infrastructures to impose environmental requirements on a private sector that dominates local political and economic scenes. It is feasible, however, to call on states to grant the public meaningful participation in environmentally significant development decisions. The promises that have been made to promote sustainability in Central America call for an environmental regime that features cooperation, not only in setting standards for the region, but also in ensuring compliance at the local level. Tailoring international accords to include parallel EIA requirements would be one step toward achieving this long overdue goal.