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HYDROELECTRIC POWER PRODUCTION IN COSTA RICA AND THE THREAT OF ENVIRONMENTAL DISASTER THROUGH CAFTA

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Abstract: CAFTA's ratification threatens Costa Rica's environmental integrity by permitting foreign investors virtual free reign to destroy its precious waterways through environmentally unsound methods of hydroelectric power production. While CAFTA contains provisions that appear to protect the environments of the Central American signatory states, it also contains provisions similar to NAFTA's Chapter 11, which foreign investors have used to weaken environmental laws by suing those states that have dared to enforce them. This Note explores existing environmental laws in Costa Rica governing hydroelectric power production, including its privatization. It also discusses and compares NAFTA's Chapter 11 to CAFTA's Chapter 10 in order to illustrate the threat to Costa Rica's waterways through private hydroelectric power production. This Note then argues that, in order to preserve its waterways, Costa Rica must not ratify CAFTA. Alternately, it argues that if Costa Rica does ratify CAFTA, the state should consider adopting both preventative and remedial measures to weaken its blow.

INTRODUCTION

The decision to exploit hydroelectric energy resources in developing countries is a hotly debated issue.¹ Though hydroelectric power is economically sensible for many developing countries, it is simulta-

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¹ See, e.g., INT'L RIVERS NETWORK, RIVERS OF MESOAMERICA (2004), <http://www.irn.org/programs/meso/index.html>; see WORLD COMM'N ON DAMS, DAMS AND DEVELOPMENT: A NEW FRAMEWORK FOR DECISION-MAKING 6 (2000), available at <http://www.dams.org/report/overviews.htm>; Elizabeth Anderson, *Electricity Sector Reform Means More Dams for Costa Rica*, WORLD RIVERS REV., Aug. 2002, at 3, 3.

neously inherently destructive to their environments.² In some nations such as Costa Rica, policymakers inevitably tend to favor hydroelectric power despite the environmental consequences.³ In Costa Rica, this is partly because the country has unique natural resources that engender prime conditions for hydroelectric power production.⁴ Specifically, the orientation of Costa Rica's mountain chains combined with its heavy rainfall have created a large number of rivers that are perfectly suited for hydroelectric dams.⁵ These rivers and waterways have become the nation's foremost energy resource, which is impressive given that the country also enjoys a number of other natural energy resources including wind, geothermal, and solar power.⁶ In fact, hydroelectric power has become an indispensable energy resource in Costa Rica and currently provides over 80% of the nation's electricity.⁷

On one hand, hydroelectric power provides a number of benefits to Costa Rica.⁸ For example, because of its ability to produce great quantities of electricity, hydroelectric power helps minimize Costa Rica's dependence on fossil fuels.⁹ In fact, Costa Rica is largely self-sufficient in most energy needs and only requires the importation of oil for transportation.¹⁰ Costa Rica's need for oil is so minimal that, despite knowledge of oil deposits off the country's Atlantic coast, the president has chosen not to permit their development in light of environmental concerns.¹¹

On the other hand, hydroelectric dams also have the propensity to cause serious and irreparable damage to both the environment and

² See WORLD COMM'N ON DAMS, *supra* note 1, at 10. See generally JOHN D. ECHEVERRIA ET AL., RIVERS AT RISK: THE CONCERNED CITIZEN'S GUIDE TO HYDROPOWER 4-7 (1989) (describing how dams harm rivers).

³ See Anderson, *supra* note 1, at 3; WORLD COMM'N ON DAMS, *supra* note 1, at 9 (noting the increasing demands for water, electricity and other resources supplied by hydroelectric power).

⁴ See Anderson, *supra* note 1, at 3.

⁵ *Id.*

⁶ See INTER-AM. DEV. BANK, HYDRO AND GEOTHERMAL ELECTRICITY AS AN ALTERNATIVE FOR INDUSTRIAL PETROLEUM CONSUMPTION IN COSTA RICA 14 (1982).

⁷ See Anderson, *supra* note 1, at 3; CENTRO NACIONAL DE PLANIFICACIÓN ELÉCTRICA, ANÁLISIS COMPARATIVO: DE LAS VARIABLES RELACIONADOS CON EL CONSUMO DE ENERGÍA ELÉCTRICA EN COSTA RICA 2001-2002, at 10 (2003) [hereinafter CNPE].

⁸ U.S. DEP'T OF STATE, BACKGROUND NOTE: COSTA RICA (2005), <http://www.state.gov/r/pa/ei/bgn/2019.htm> [hereinafter BACKGROUND NOTE: COSTA RICA].

⁹ *Id.*

¹⁰ *Id.*

¹¹ See *id.*

their surrounding communities.¹² Even a well constructed and maintained dam can make a river inhospitable to native fish and plant species, and some types of dams actually dewater riverbeds for miles, such that animals, plants, surrounding communities, and recreation seekers are barred from using the river.¹³ Hydroelectric dams are also notorious for forcibly uprooting and displacing entire indigenous surrounding communities around the world.¹⁴

In developing countries such as Costa Rica, hydroelectric power's potential benefits are often lost and its environmental and social consequences exacerbated when production and distribution are privatized.¹⁵ Nevertheless, there has been no shortage of proposed international agreements aimed at privatizing state hydroelectric monopolies in Costa Rica and throughout Central America.¹⁶ One example, the Plan Puebla Panama (PPP), which aims to expand the electrical grid throughout Central America and Mexico in order to attract private producers and supply the United States with electricity from Central American hydroelectric dams.¹⁷ This project has been principally financed through international financing institutions like the Inter-American Development Bank (IDB) that would all receive substantial economic benefits if the project went through.¹⁸ International agreements like the PPP tend to share one disturbing feature: the benefits of privatization are enjoyed almost entirely by the international organizations, and those benefits come at a very high cost to the citizens and the environments of these countries.¹⁹

¹² See generally ECHEVERRIA, *supra* note 2, at 4–7.

¹³ *Id.* at 4–5.

¹⁴ U.N. Dep't of Econ. & Soc. Affairs, Comm. on Sustainable Development, *Statement of the 5th Global Civil Society to the 8th Special Session of the UNEP Governing Council/Global Ministerial Environment Forum: Background Paper No. 7*, at 3, U.N. Doc. DESA/DSD/2004/7 (Apr. 14–30, 2004), available at <http://www.un-ngls.org/Jeju%20Statement.doc>; see also Monti Aguirre, *Latin American Rivers Endangered by Regional Development Schemes*, WORLD RIVER REV., Dec. 2002, at 12, 12.

¹⁵ See ECLAC Reports *Privatization Has Been Bad for Regional Power*, NOTICEN: CEN. AM. & CARIBBEAN AFFS., May 13, 2004, at 1–3, available at 2004 WLNR 6570641 [hereinafter *ECLAC Reports*].

¹⁶ See Aguirre, *supra* note 14, at 12. See generally Fabian Borges, *CAFTA: A View from Central America*, RESOURCE CENTER OF THE AMERICAS, Feb. 20, 2004, available at http://www.americas.org/index.php?cp=item&item_id=13782 [hereinafter *CAFTA: A View*] (discussing both the failed “ICE Energy Combo Bill” of 2000 and the Central American Free Trade Agreement).

¹⁷ Aguirre, *supra* note 14, at 12.

¹⁸ *Id.*

¹⁹ See generally ECLAC Reports, *supra* note 15; Aguirre, *supra* note 14.

The Costa Rican legislature now faces the dilemma of whether to ratify the Central American Free Trade Agreement (CAFTA), which threatens environmental protections throughout Central America by allowing foreign investors to sue governments for enforcing their environmental laws.²⁰ For Costa Rica, whose electricity comes first and foremost from its rivers, this means that CAFTA threatens to irreparably destroy those rivers and their surrounding environments, thereby also threatening the unique and delicate ecological balance of the nation.²¹

The Background of this Note will discuss Costa Rican environmental laws regulating hydroelectric power production and compare them with laws in other Central American countries that have already shifted toward privatization. The Discussion section will describe the ways in which CAFTA threatens Costa Rica's environment through the partial privatization of Costa Rica's energy monopoly, specifically in hydroelectric power production. The Analysis will argue that Costa Rica must maintain its state energy monopoly, fight further privatization without increasing current restrictions on it, close loopholes in its current environmental laws, and more effectively enforce its existing environmental laws.

I. BACKGROUND

Though continuing to allow the development of private and public hydroelectric power production across the country, Costa Rica has recognized its dangers and has passed a number of laws strictly regulating it in order to protect both its citizens and the environment.²² Costa Rica started generating more comprehensive environmental leg-

²⁰ See Central American Free Trade Agreement, Aug. 5, 2004, available at http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/CAFTA-DR_Final_Texts/Section_Index.html [hereinafter CAFTA]; David Armstrong, *CAFTA Friends, Foes State Their Case on Free Trade Deal: Central America Pact Goes to House After OK by Senate*, S.F. CRON., July 3, 2005, at B1; Press Release, EarthJustice et al., U.S. Groups Oppose the Central American Free Trade Agreement: The CAFTA Signed Today Falls Short on the Environment, May 28, 2004, at 1, available at www.citizen.org/documents/CAFTA_Fact_Sheet_Enviro.pdf [hereinafter EarthJustice].

²¹ See generally Aguirre, *supra* note 14, at 12 (noting the damaging effects of international privatization agreements on rivers and their surrounding environments).

²² See Ley Organica, Law No. 7554 of Oct. 4, 1995, arts. 50, 51, 52, 57, 64, 65, 67, reprinted in RICARDO ZELEDÓN, CÓDIGO AMBIENTAL [ENVIRONMENTAL CODE] 14 (Porvenir 1998); Ley de Conservación de la Vida Silvestre, Law No. 7317 of Oct. 21, 1992, (reformed by Laws Nos. 7495 of May 3, 1995 and 7497 of May 2, 1995, and 7788 of Apr. 30, 1998), art. 132, reprinted in ZELEDÓN, *supra*, at 93; Ley de Aguas, Law No. 276 of Aug. 27, 1942 (reformed by Laws Nos. 2332 of Apr. 9, 1959, 5046 of Aug. 16, 1972 and 5516 of May 2, 1974), arts. 1, 2, 17, 19, 27, reprinted in ZELEDÓN, *supra*, at 141.

isolation around 1994, some of which was aimed specifically at protecting its rivers and waterways.²³

First and foremost, in 1994, Costa Rica amended Article 50 of its Constitution to endow every citizen with the right to a healthy and ecologically balanced environment.²⁴ Two years later, it amended Article 46, which makes clear that the state was obligated to ensure that protection.²⁵ Facilitated by Article 46, Article 50 has taken on great importance in Costa Rica and has become the foundation of nearly all environmental legal protection in that country.²⁶

Soon afterward, the government began passing laws specifically targeted at protecting the country's waterways.²⁷ First, Costa Rica has a number of laws which regulate private exploitation of the country's water.²⁸ For example, Article I of the Water Law specifies which waters are considered public including all rivers and their tributaries.²⁹ Also, Article 27 delineates a hierarchy of preferred exploitations of public water in which it demonstrates a strong preference for public over private hydroelectric dams.³⁰ Thus, anyone, including private hydroelectric generators, wishing to take advantage of the river's natural resources can only do so if granted a contract by the state, subject to certain restrictions, such as the hierarchy listed in Article 27.³¹

If a private electricity generator is granted a state contract, it must stipulate that it will sell all the electricity it produces to the state energy regulatory body, the Instituto Costarricense de Electricidad (ICE), which in turn maintains a complete monopoly over the distribution of electricity to customers.³² As a result, the government retains the ability and responsibility to control energy prices, which has

²³ See Constitución Política de la Republica de Costa Rica, arts. 46, 50, *reprinted in* ZELEDÓN, *supra* note 22, at 3; Ley Organica, *supra* note 22, arts. 50, 51, 52, 57, 64, 65, 67; Ley de Conservación de la Vida Silvestre, *supra* note 22, art. 132; Ley de Aguas, *supra* note 22, arts. 1, 2, 17, 19, 27.

²⁴ Constitución, *supra* note 23, art. 50.

²⁵ *Id.* art. 46.

²⁶ *Id.* arts. 46, 50; see, e.g., Lauren Wolkoff, *High Court Dampens Oil Plans*, TICO TIMES (San José, Costa Rica), Feb. 15, 2002, available at <http://www.elaw.org/news/partners/text.asp?id=989>. See generally FACIO & CAÑAS, ENVIRONMENTAL LAW MATRIX AND PRACTICE SKILLS (2002), available at <http://www.lexmundi.com/images/lexmundi/PDF/Costa%20Rica%20-%202002.pdf> (listing article 50 as governing a variety of environmental issues).

²⁷ See *infra* notes 29–42 and accompanying text.

²⁸ See *infra* notes 29–42 and accompanying text.

²⁹ Ley de Aguas, *supra* note 22, art. 1.

³⁰ *Id.* art. 27. In this list, public hydroelectric plants are listed fourth and private plants are listed seventh out of nine acceptable forms of exploitation. *Id.*

³¹ *Id.* arts. 2, 27.

³² Anderson, *supra* note 1, at 3.

historically allowed the government to set energy prices below cost or to delay energy price increases.³³

In order to obtain a state contract, private electricity generators are required to solicit an environmental impact assessment from the National Environmental Technical Secretariat (SETENA).³⁴ SETENA will assess the probable impact of the proposed project on the environment and decide whether that impact is within legal bounds.³⁵ If so, the company can move forward; if not, the project is quashed.³⁶

Once a private company has obtained a contract, it is subject to a number of legal restrictions.³⁷ For example, the plant is required to use the river rationally and efficiently in order to conserve and protect the environment as much as possible, and the law strictly limits the degree to which the company may alter the quality or the quantity of the water, even requiring the company to treat it if that is necessary to equalize it in quality to the receiving body of water.³⁸ The company is also required to actively protect and maintain the equilibrium of the river as well as the watershed which feeds the river and must take adequate remedial measures to limit and correct contamination.³⁹ Failure to do so is punishable by a minimum fine of ¢50,000 and up to two years in prison.⁴⁰

Nonetheless, several Costa Rican laws and regulations fall short of adequately protecting its environment.⁴¹ For example, Article 67, which requires both public and private entities using a river to protect its watershed, is only enforceable according to the classification of use and potential of the water.⁴² Thus, if a river is classified for hydroelectric use

³³ Cf. INTER-AM. DEV. BANK, *supra* note 6, at 76 (regarding Costa Rica's past decisions to set energy prices below cost and delaying price increases as negative).

³⁴ Ley de Aguas, *supra* note 22, art. 17 (establishing SETENA); Anderson, *supra* note 1, at 3.

³⁵ See generally Fabián Borges, *Environment Ministry Issues Proposal to Reform SETENA*, TICO TIMES (San José, Costa Rica), May 15, 2003, available at http://www.ticotimes.net/dailyarchive/2003_05/Week2/05_15_03.htm#story_two.

³⁶ See generally *id.*

³⁷ See Ley Organica, *supra* note 22, art. 51, 52, 57, 64, 65, 67; Ley de Conservación de la Vida Silvestre, *supra* note 22, arts. 132.

³⁸ Ley Organica, *supra* note 22, arts. 57, 64, 65.

³⁹ *Id.* arts. 51, 52, 67.

⁴⁰ Ley de Conservación de la Vida Silvestre, *supra* note 22, art. 132. The colon is the Costa Rican currency. As of March 11, 2006, one U.S. dollar was equal to 503 Costa Rican colones. Yahoo Finance, Currency Converter (Mar. 11, 2006) <http://finance.yahoo.com/currency/convert?amt=1&from=USD&to=CRC&submit=Convert>.

⁴¹ See *infra* notes 42–43 and accompanying text.

⁴² See Ley Organica, *supra* note 22, art. 67. Article 65 has a similar limiting clause. *Id.* art. 65.

only, the protection of its watershed is less than a watershed classified for bathing or drinking.⁴³

Furthermore, the stringent regulations that Law 7200 of 1990 originally imposed upon privatized electricity generators have since been greatly weakened.⁴⁴ Originally, this law limited the total amount of electricity generated by private companies to 15% of the total domestic production.⁴⁵ In 1995, however, Costa Rica amended the law to allow private companies to produce up to 30%.⁴⁶ Fortunately, the amendment did not weaken the law's other restrictions.⁴⁷ Thus, the law still limits the maximum installed generation capacity of private plants to twenty megawatts, and limits foreign investment in private generation companies to 65% of total investments.⁴⁸

It is arguable that achieving the goals of Costa Rica's environmental laws would have been easier without the passage of Law 7200, because electricity production and distribution was managed entirely by ICE, a government organization that could be held accountable by the public.⁴⁹ Granted, Law 7200 was passed with the intention of better distributing the costs and responsibilities of electricity production among several entities while simultaneously meeting the continually increasing demand for electricity.⁵⁰ But this legislation, as amended, has exposed Costa Rica to the negative consequences of permitting foreign investment in private electricity production that has been sweeping developing nations.⁵¹ Thus far, fortunately, Costa Rica has managed to fair far better than its Central American neighbors who have permitted greater degrees of privatization.⁵²

⁴³ See generally *id.*

⁴⁴ See La Ley que Autoriza la Generación Eléctrica Autónoma o Paralela, Law No. 7200 of Sept. 28, 1990, reformed in Law 7508 of May 31, 1995, at 2, 3, available at http://www.racsa.co.cr/asamblea/proyecto/leyes_r.htm [hereinafter Law 7200]; Anderson, *supra* note 1, at 3.

⁴⁵ Law 7200, *supra* note 47, at 5; CNPE, *supra* note 7, at 10.

⁴⁶ Law 7200, *supra* note 47, at 5; CNPE, *supra* note 7, at 10.

⁴⁷ Law 7200, *supra* note 47, at 2, 3.

⁴⁸ *Id.*

⁴⁹ See Anderson, *supra* note 1, at 3; *ECLAC Reports*, *supra* note 15, at 1–3.

⁵⁰ Anderson, *supra* note 1, at 3.

⁵¹ Anderson, *supra* note 1, at 3; *ECLAC Reports*, *supra* note 15, at 1–3.

⁵² See *ECLAC Reports*, *supra* note 15, at 1–3.

A. *Comparison of Costa Rica's Environmental Laws to Other Central American Countries That Have Seen Greater Degrees of Privatization*

In many other Central American countries, privatization of electricity production has already proven disastrous in numerous ways.⁵³ Privatization has occurred in varying degrees throughout Central America.⁵⁴ This ranges from the privatization of electricity generation, transmission, or distribution to actually selling state-run generation facilities like dams to private entities, thereby completely eliminating the government's role and responsibilities in the electricity sector.⁵⁵

One major problem borne by Central American countries that have experienced greater degrees of privatization is skyrocketing energy prices.⁵⁶ In fact, in Central American countries that have completely privatized energy production and distribution like El Salvador and Guatemala, energy prices are a staggering 56% higher than in Costa Rica.⁵⁷ In contrast, Costa Rica, where privatization of electricity production has been more gradual than in other countries, has generally managed to maintain low energy costs for its citizens.⁵⁸

Efficiency has also been a significant problem in privatized countries.⁵⁹ On average, privatized countries suffer between 20–32% production losses, whereas Costa Rica has managed to reduce losses to just 9%.⁶⁰ While privatization was expected to increase competition, only two companies control 70–90% of production in privatized Central American countries, providing them little incentive to improve efficiency.⁶¹ On the other hand, the gradual nature of privatization combined with the maintenance of a law limiting the degree of participation of private companies in hydroelectric power production in

⁵³ *Id.* at 1 (noting that privatization in Central America has only benefited the “fat fish,” who avoid renewable energy sources and concentrate on fossil fuel fired plants and under whose direction domestic rates have doubled or tripled in some areas).

⁵⁴ *Id.* at 1–3.

⁵⁵ Anderson, *supra* note 1, at 3.

⁵⁶ See ECLAC Reports, *supra* note 15, at 1–2.

⁵⁷ *Id.*

⁵⁸ *Id.* at 1; Mauricio Salas, *Down with Diesel*, PROJECT & TRADE FIN., Oct. 1, 2005, at S46, available at 2005 WLNR 18285805 (noting that consumer rates are stable and affordable).

⁵⁹ ECLAC Reports, *supra* note 15, at 2.

⁶⁰ *Id.* These production losses are due to technical shortcomings caused by lack of improvement in the infrastructure and theft. *Id.*

⁶¹ *Id.*

Costa Rica has helped the country avoid these kinds efficiency-related issues.⁶²

Privatization also has failed to improve distribution rates.⁶³ For example, in Guatemala, where an excess of electricity is produced, large numbers of people in rural areas are still without electricity.⁶⁴ In contrast, 98% of Costa Rica is electrified.⁶⁵

Costa Rica, however, has not managed to escape all of the problems associated with privatization.⁶⁶ As a result of the 1990 electricity reform, one serious consequence of privatization that Costa Rica now shares with other Central American countries is the devastating environmental impact.⁶⁷ In Costa Rica, while the distribution of electricity is still under the control of ICE, more privately owned and operated hydroelectric plants are gradually being built all over the country.⁶⁸ In fact, over a little more than a decade, more than thirty privately owned and operated small to mid-sized hydropower dams have been constructed on Costa Rica's rivers, many of them exploiting just three watersheds on the San Carlos, Reventazón, and General rivers, and over a hundred more are planned.⁶⁹ While the private electricity producers point out that they have been crucial in supplying Costa Rica's electricity during the twice daily peak demand periods, it is quickly becoming apparent that the rapid growth in hydroelectric power plants is causing serious, potentially irreversible damage to vital watersheds and the plants and animals that inhabit them.⁷⁰ As disturbing as this is, further privatization promises far worse consequences for Costa Rica.⁷¹

Overall, while Costa Rica has an admirable compilation of environmental legislation compared to its neighbors, the truth is that those laws fail to adequately prevent hydroelectric plants from causing serious environmental damage as is, and if Costa Rica further privat-

⁶² *Id.*

⁶³ *See id.* at 1.

⁶⁴ *ECLAC Reports, supra* note 15, at 1. By way of comparison, over nine million people in Mexico remain without electricity. *Id.*

⁶⁵ Salas, *supra* note 58, at 4.

⁶⁶ *See* Anderson, *supra* note 1, at 3.

⁶⁷ *See ECLAC Reports, supra* note 15, at 3; Anderson, *supra* note 1, at 3.

⁶⁸ Anderson, *supra* note 1, at 3.

⁶⁹ CNPE, *supra* note 7, at 10; Anderson, *supra* note 1, at 3; Aguirre, *supra* note 14, at 12.

⁷⁰ Anderson, *supra* note 1, at 3.

⁷¹ *See ECLAC Reports, supra* note 15, at 1-3. For example, Central American countries with greater degrees of privatization of electricity production have seen a dramatic decrease in the production of electricity from renewable sources like hydro, solar, and wind power and an increase in the usage of fossil fuels. *Id.* at 2.

izes its energy sector, the environmental consequences could be catastrophic.⁷² Yet, Costa Rica faces that very threat if its legislature ratifies CAFTA because of its liberal foreign investment rules.⁷³

II. DISCUSSION

Before discussing CAFTA, it is worth summarizing the current problems with Costa Rica's environmental laws regulating hydroelectric power and with privatization in order to better illustrate the problems that CAFTA threatens to create or exacerbate.⁷⁴

A. Current Problems with Costa Rica's Environmental Laws Regulating Hydroelectric Power Production

First, Costa Rica's laws do not stem the uncontrolled planning and expansion of dams, even though its domestic electricity needs are almost completely met.⁷⁵ In fact, Costa Rica currently produces enough electricity to export to other Central America countries.⁷⁶ Despite this, over a hundred more hydroelectric plants are being planned both by ICE and by private investors.⁷⁷ Some of these new plants are being permitted by the government despite the detriment being caused cu-

⁷² See, e.g., *Mueren Peces en Afluente del San Juan*, LA PRENSA, Apr. 27, 2004, available at http://www.ni.laprensa.com.ni/archivo/2004/abril/27/el_mundo/ (demonstrating the failure of current environmental law to stop environmental disaster by hydroelectric dams through the reporting of the second hydroelectric accident to affect the San Carlos river in six months); see Álvaro Sánchez Córdoba, *Descontrol Con Hidroeléctricas*, AL DÍA (San José, Costa Rica), Nov. 4, 2003, available at http://www.aldia.co.cr/ad_cc/2003/noviembre/04/el_norte2.html [hereinafter *Descontrol*]; EarthJustice, *supra* note 20, at 1.

⁷³ See CAFTA, *supra* note 20, arts. 10.3, 10.5, 10.6, 10.7, 10.16; EarthJustice, *supra* note 20, at 1. Cf. Final Environmental Review of the Dominican Republic—Central America—United States Free Trade Agreement, Feb. 2005, at 2, available at http://www.ustr.gov/trade_Agreements/Bilateral/CAFTA/Section_Index.html [hereinafter Final Environmental Review] (finding that “CAFTA-DR can have positive environmental consequences in Central America . . . by reinforcing efforts to effectively enforce environmental laws . . .”).

⁷⁴ See *infra* notes 72–88 and accompanying text.

⁷⁵ See Anderson, *supra* note 1, at 3; *Descontrol*, *supra* note 72; see, e.g., Álvaro Sánchez Córdoba, *Ríos Amenazados*, AL DÍA, Apr. 27, 2004, available at http://www.aldia.co.cr/ad_cc/2004/abril/27/el_norte0.html [hereinafter *Ríos Amenazados*].

⁷⁶ Energy Information Administration, Central America, Electricity, http://www.eia.doe.gov/emeu/cabs/Central_America/Electricity.html (last visited Feb. 22, 2006) (demonstrating that Costa Rica's production of electricity exceeds its consumption); Salas, *supra* note 58, at 1 (noting that Costa Rica exports its electricity surplus to Nicaragua and Honduras).

⁷⁷ Aguirre, *supra* note 14, at 12; see *Descontrol*, *supra* note 72 (noting that there are eighty hydroelectric projects planned on the San Carlos river alone).

mulatively by these dams to local communities and the environment.⁷⁸ For example, in October of 2003, less than a year after it began operations, the Peñas Blancas hydroelectric dam released a massive amount of sedimentation, causing the deaths of thousands of fish and other wildlife on the Peñas Blancas and San Carlos rivers and causing potentially irreversible environmental damage as well.⁷⁹ Unfortunately, this is not an isolated incident.⁸⁰ Just two years earlier, the same event occurred at a privately owned hydroelectric dam on the San Lorenzo River.⁸¹

At the heart of this problem is the fact that Costa Rican law does not limit the number of dams per watershed, which, combined with the law that severely restricts the amount of electricity that dams are allowed to produce, results in too many dams on a watershed whose individual environmental damage combines to create much more severe destruction.⁸² And there is no lack of incentive for private companies to continue constructing dams: the twenty-eight private hydroelectric plant owners collectively bring in thirty-five billion colones annually, while ICE makes less than thirty-two billion.⁸³ Moreover, with both domestic and foreign consumption rates rapidly increasing, there is no lack of customers.⁸⁴ Yet the decision to continue constructing new dams to meet exportation demands is risky and possibly unwise, as both of Costa Rica's major energy customers, Nicaragua and Honduras, are also in the process of developing their own domestic energy production systems (and thus won't need the electricity in the future), not to mention their mutual poverty begs the question of

⁷⁸ See Anderson, *supra* note 1, at 3; Eugenio Guido Pérez, Federación Costarricense para la Conservación del Ambiente (FECON), *ICE Impone, Comunidades se Oponen al Proyecto Hidroeléctrico Pacuare*, DIÁLOGOS AMBIENTALES, Oct. 2004, at 10.

⁷⁹ *Monteverde Group Circulates Petition Against Pocosol Dam*, TICO TIMES (San José, Costa Rica), May 7, 2004, available at http://www.ticotimes.net/dailyarchive/2004_05/Week1/05_07_04.htm [hereinafter *Monteverde Group*].

⁸⁰ See, e.g., Carlos Hernández P., *Sedimento Mata Peces*, LA NACIÓN (San José, Costa Rica), Oct. 25, 2001, available at http://www.nacion.com/ln_cc/2001/octubre/25/pais13.html.

⁸¹ See *id.*; *Ríos Amenazados*, *supra* note 75 (noting that serious contamination by hydroelectric plants occurred within a six month period to the Platanar, Peñas Blancas, San Carlos, and part of the San Juan rivers).

⁸² See Anderson, *supra* note 1, at 3; *Ríos Amenazados*, *supra* note 75.

⁸³ FECON, *Monitoreo de Represas*, DIÁLOGOS AMBIENTALES, Oct. 2004, at 11 [hereinafter *Monitoreo de Represas*]. As of March 11, 2006, 35 billion colones equaled approximately \$69,481,664, and 32 billion equaled approximately \$63,526,092. See Yahoo Finance, *supra* note 40.

⁸⁴ See Salas, *supra* note 58, at 4.

whether they will continue to be able to pay for the electricity.⁸⁵ This gap in the legal system has been recognized by the Costa Rican government, although legislation correcting it has yet to be passed.⁸⁶

Another problem that both compounds the aforementioned issue and creates its own problems surrounds the enforcement of environmental laws.⁸⁷ For example, SETENA has approved some environmental impact studies that should have been rejected.⁸⁸ More importantly, many observers feel that Costa Rica's environmental laws are simply not adequately enforced.⁸⁹ One researcher noted that, while interviewing environmental lawyers, a common response was, "In Costa Rica, the problem is not that there are not laws, but rather that they are not followed."⁹⁰ In addition, there has also been speculation about corruption within both SETENA and ICE, which inherently undermines public confidence in their effectiveness.⁹¹ All these environmental challenges, while significant indeed, will pale in comparison to the far more major problems CAFTA ratification would create.⁹²

B. *An Overview of the Problems Threatened by CAFTA*

Though Costa Rica would not submit to U.S. pressures to outright privatize the state energy monopoly through CAFTA (though it did agree to open the state insurance and telecommunications monopo-

⁸⁵ See *id.* at 4, 5; U.S. DEP'T OF STATE, BACKGROUND NOTE: NICARAGUA (2005), <http://www.state.gov/r/pa/ei/bgn/1850.htm> (stating that Nicaragua is still the second poorest country in the hemisphere and is highly dependant on foreign assistance); U.S. DEP'T OF STATE, BACKGROUND NOTE: HONDURAS (2005), <http://www.state.gov/r/pa/ei/bgn/1922.htm> (noting that Honduras is one of the poorest countries in Latin America and is in severe foreign debt).

⁸⁶ See Anderson, *supra* note 1, at 3.

⁸⁷ Michael Gelardi, *Environment, Economy and Energy in Costa Rica: The Case of Petroleum Exploration in the Province of Limón*, MACALESTER ENVTL. REV., May 2001, <http://www.malester.edu/environmentalstudies/MacEnvReview/costarica.htm>.

⁸⁸ See, e.g., *id.* (noting the controversy surrounding SETENA's original approval of the Harken environmental impact report to conduct exploratory drilling for oil, though that approval was later overturned by the Costa Rican Supreme Court, and a second environmental impact report was rejected by SETENA).

⁸⁹ *Id.*; Interview with Carlos Muñoz Brenes, Director, Monteverde Conservation League, in Monteverde, Costa Rica (July 15, 2004).

⁹⁰ Gelardi, *supra* note 87.

⁹¹ See Federación Costarricense para la Conservación del Ambiente, *Corrupción en SETENA: Necesaria una Profunda Investigación* (June 2004), available at <http://www.feconcr.org/contents/com-setena.htm> (last visited Apr. 11, 2006); *More Alcatel Kickbacks Uncovered*, INSIDE COSTA RICA (San José, Costa Rica), Oct. 10, 2004, available at <http://insidecostarica.com/dailynews/2004/october/10/nac0.htm>.

⁹² See Discussion *infra* Part B.

lies), CAFTA contains other provisions that directly threaten Costa Rica's ability to maintain that monopoly regardless.⁹³ At first glance, CAFTA appears to respect Costa Rica's energy monopoly and environmental laws.⁹⁴ The treaty recognizes a number of Costa Rica's regulations governing the privatization of hydroelectric power production, including Law 7200, and reaffirms Costa Rica's right to regulate privatization as it sees fit.⁹⁵ It also restates the more important aspects of Law 7200, such as the limitation on private plants' electricity production and the requirement that they sell their electricity to ICE for redistribution.⁹⁶ Furthermore, CAFTA's Chapter 17, which concerns the environment, specifically stipulates that "a Party shall not fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement" and that, "the Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic environmental laws."⁹⁷

1. Comparison to NAFTA and the Chapter 11 Threat

Many individuals, however, are concerned that CAFTA's foreign investment rules in Chapter 10 of the treaty are too similar to the North American Free Trade Agreement's (NAFTA) Chapter 11, which have been used to wreak havoc on labor and environmental laws.⁹⁸ The terms of NAFTA's Chapter 11 have been stretched to grant broad rights to foreign investors that do not exist under domestic U.S. law, to attack everything from domestic environmental and health regulations to the routine operations of the court system.⁹⁹

⁹³ See BACKGROUND NOTE: COSTA RICA, *supra* note 8, *ECLAC Reports*, *supra* note 15, at 1; CAFTA, *supra* note 73, art. 10.3, 10.5, annex 10-C.

⁹⁴ CAFTA, *supra* note 73, arts. 17.1, 17.2, 17.9, annex I-CR-32-33; see Final Environmental Review, *supra* note 73, at 15-17.

⁹⁵ CAFTA, *supra* note 73, annex I-CR-32-33.

⁹⁶ *Id.*

⁹⁷ *Id.* art. 17.2.

⁹⁸ See, e.g., Public Citizen, NAFTA Chapter 11: Corporate Cases, http://www.citizen.org/trade/nafta/CH__11/ (last visited Apr. 11, 2006); SIERRA CLUB, CAFTA'S IMPACT ON CENTRAL AMERICA'S ENVIRONMENT (2005), http://www.sierraclub.org/trade/cafta/cafta_centralamerica.asp.

⁹⁹ See Transcript of *NOW with Bill Moyers: Trading Democracy: A Bill Moyers' Special* (PBS television broadcast Feb. 1, 2002), available at http://www.pbs.org/now/transcript/transcript_tdfull.html; PUBLIC CITIZEN, NAFTA CHAPTER 11 INVESTOR-TO-STATE CASES: BANKRUPTING DEMOCRACY, at iv (2001), available at www.citizen.org/documents/ACF186.PDF [hereinafter BANKRUPTING DEMOCRACY].

Among other things, Chapter 11 grants investors the right to privately enforce the rights granted under NAFTA.¹⁰⁰ And the cases arising out of Chapter 11 have demonstrated that large international businesses are ready and willing to use such a provision to undermine domestic laws; moreover, some have even gone so far as to demand monetary compensation for the enforcement of domestic environmental laws.¹⁰¹ At least twenty-four cases have been filed under NAFTA's Chapter 11, in which corporations have collectively demanded over \$14.3 billion from governments enforcing such domestic laws.¹⁰²

NAFTA also has a broad expropriation and compensation provision, which is a virtual "regulatory takings" provision, because it allows a private investor to sue the government for compensation for any action that affects the value of an investor's property.¹⁰³ In this respect, NAFTA provides foreign business with a substantial advantage, as compensation for such action has already been repeatedly rejected by the U.S. Supreme Court for domestic businesses.¹⁰⁴

In light of the disastrous and unforeseen consequences of Chapter 11, the U.S. Congress passed legislation aimed at curbing similar provisions in future treaties.¹⁰⁵ In the Trade Act of 2002, Congress attempted to curb the kind of suits generated by NAFTA's Chapter 11 by requiring that international agreements give foreign investors no "greater substantive rights" than U.S. citizens have under U.S. law and specifically mentions standards regarding expropriation.¹⁰⁶

¹⁰⁰ North American Free Trade Agreement, ch. 11, Dec. 17, 1992, 32 I.L.M. 605 [hereinafter NAFTA].

¹⁰¹ See FRIENDS OF THE EARTH, CAFTA AND FOREIGN INVESTOR LAWSUITS: A THREAT TO ENVIRONMENTAL STANDARDS (2004), available at <http://www.foe.org/camps/intl/green-trade/CAFTAInvestmentFactsheet.pdf>. Under NAFTA's Chapter 11, a Canadian company, Methanex, sued the U.S. government for nearly \$1 billion. They alleged that California's ban of the toxic gasoline additive MTBE hurt the company's profits. The U.S. government is also being sued for \$50 million by another Canadian company, Glamis, a gold mining company, because California put cleanup and remedial requirements on controversial mining operations that would harm the environment and destroy sacred Native American sites in the state. *Id.*

¹⁰² PUBLIC CITIZEN, CAFTA BY THE NUMBERS: WHAT EVERYONE NEEDS TO KNOW (2004), available at <http://www.citizen.org/documents/CAFTAbNumbers.pdf>.

¹⁰³ NAFTA, *supra* note 100, at 641-42; BANKRUPTING DEMOCRACY, *supra* note 99, at iv.

¹⁰⁴ See *Tahoe Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330 (2002); *Concrete Pipe & Prods. of Cal. v. Constr. Laborers Pension Trust for S. Cal.* 508 U.S. 602, 645 (1993) (stating that the Supreme Court has repeatedly rejected the claim that the mere diminution of property value, however serious, is sufficient to demonstrate a government taking).

¹⁰⁵ Trade Act of 2002, Pub. L. No. 107-210, § 2102 (codified at 19 U.S.C. § 3802 (2006)).

¹⁰⁶ See 19 U.S.C. at § 3802(b)(3) (2006).

Despite this law, CAFTA still maintains a chapter on foreign investment that is strikingly similar to NAFTA's Chapter 11.¹⁰⁷ There are, however, a few notable differences between CAFTA's Chapter 10 and NAFTA's Chapter 11.¹⁰⁸ For example, CAFTA explicitly stipulates that "except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment" are not expropriations.¹⁰⁹

While the wording of the provision on investor suits is substantially different from NAFTA, nonetheless, it appears to permit the exact same kind of investor suits created by NAFTA regardless.¹¹⁰ And, even if the expropriations clause is denied to them, unhappy investors can file suit under the vaguely worded Minimum Standard of Treatment Provision.¹¹¹ Thus, in essence, under CAFTA, foreign investors can still sue Costa Rica before an international tribunal for any effects on its business interests caused by enforcing its laws and regulations.¹¹² Clearly, then, it is not surprising that there was a widespread outcry against CAFTA during its negotiation from both Costa Rican and United States citizens, many of whom feared NAFTA-like consequences.¹¹³

This fear is not without merit, as some foreign investors have already demonstrated that they are ready to take advantage of CAFTA's Chapter 10.¹¹⁴ The Harken oil drilling case illustrates this threat perfectly.¹¹⁵

In May of 2002, President Abel Pacheco announced a moratorium on oil exploration and open-pit mining in Costa Rica in response to a widespread mobilization of the country's environmentalists.¹¹⁶ Harken Energy, a Texas-based oil company with close ties to President George W. Bush, had previously obtained rights to search for crude oil in Costa

¹⁰⁷ Compare CAFTA, *supra* note 73, art. 10.7, with NAFTA, *supra* note 98, ch. 11.

¹⁰⁸ Compare CAFTA, *supra* note 73, art. 10.16, annex 10-C, with NAFTA, *supra* note 100, ch. 11.

¹⁰⁹ See CAFTA, *supra* note 73, annex 10-C(4) (b).

¹¹⁰ See *id.* art. 10.16; EarthJustice, *supra* note 20, at 1.

¹¹¹ See CAFTA, *supra* note 73, art. 10.5; FRIENDS OF THE EARTH, *supra* note 101, at 2.

¹¹² See CAFTA, *supra* note 73, art. 10.16; FRIENDS OF THE EARTH, *supra* note 101, at 1.

¹¹³ See José Eduardo Mora, *Activists Pledge to Keep Up Fight Against U.S. Trade Deal*, INSIDE COSTA RICA (San José, Costa Rica), Jan. 30, 2004, available at http://insidecostarica.com/specialreports/costa_rica_trade_activists.htm; *CAFTA: A View*, *supra* note 16; John J. Sweeney, *A Bad Deal on Free Trade*, BOSTON GLOBE, Mar. 21, 2005, at A11.

¹¹⁴ See *infra* notes 111–20.

¹¹⁵ See Mark Engler & Nadia Martinez, *Harken v. Costa Rica*, ALTERNET, Mar. 26, 2004, <http://www.alternet.org/module/printversion/18258>.

¹¹⁶ *Id.*

Rica.¹¹⁷ The company had intended to drill offshore until it failed its environmental impact study two months prior.¹¹⁸ Despite the failed study, Harken tried to sue the Costa Rica government for \$12 million in reparations for its aborted operation.¹¹⁹ The Costa Rican government declined to accept an out-of-court settlement, and the company then decided to use international agreements, specifically through the World Bank's International Center for the Settlement of Investment Disputes, to support a new \$57 billion claim for the profits it projected it would have earned if the venture had gone through.¹²⁰ The Costa Rican government refused to submit to international arbitration or to recognize any decision made by the World Bank body.¹²¹ Unable to compel Costa Rica to submit to international arbitration, Harken withdrew its claim a few days later and then tried again to reach an out-of-court settlement.¹²² Those talks fell through, though it has been speculated that Harken will try once more to force international arbitration.¹²³ Although Costa Rica successfully avoided arbitration with Harken, if CAFTA had been in force then, the result would likely have been quite different.¹²⁴

So what does CAFTA mean for Costa Rica's waterways and the hydroelectric plants exploiting them? First, it means that, like Harken, companies that are impeded by Costa Rica's environmental laws are more likely to sue the Costa Rican government under Chapter 10 for any investment they had already made in anticipation of constructing a plant or dam, or even, as Harken did, to recoup expected profits.¹²⁵ Regardless of the merits of such cases, their existence alone is likely to have a chilling effect on the creation and enforcement of environmental laws protecting those waterways; Costa Rica, as a developing nation, cannot afford to effectively litigate every potential case nor can it afford to pay out a large verdict if it loses.¹²⁶

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Engler & Martinez, *supra* note 115.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ *See id.*; CAFTA, *supra* note 73, art. 10.5, 10.7, 10.16.

¹²⁵ *See* Engler & Martinez, *supra* note 115; *see, e.g.*, FRIENDS OF THE EARTH, *supra* note 101, at 1–2 (noting examples of corporations that took governments to court using similar provisions in NAFTA's Chapter 11).

¹²⁶ *See* Engler & Martinez, *supra* note 115; EarthJustice, *supra* note 20.

Moreover, while CAFTA does contain provisions permitting foreign investors to sue on their own behalf, citizens of Costa Rica (or any Central American party) may only submit complaints to the Secretariat alleging that the government has failed to enforce its environmental laws, though there are no clear mandates to ensure that environmental laws are enforced, nor does it provide citizens access to the court system if that avenue fails.¹²⁷ And even if a situation arose in which Costa Rica was found to have violated Chapter 17 by not enforcing its environmental laws or the environmental provisions in CAFTA, CAFTA's enforcement provisions for environmental laws are weak and ineffective.¹²⁸ For example, while foreign investors can seek unlimited damages in their suits under CAFTA, fines against the government for failing to enforce its environmental laws are capped at \$15 million annually.¹²⁹

III. ANALYSIS

Before discussing Costa Rica's options to protect its waterways if CAFTA is passed, it is worth reviewing one option that seems attractive at first glance but does not appear viable on closer analysis.¹³⁰

A. *Repealing Law 7200: A Non-Option for Costa Rica*

One option that initially appears attractive is for Costa Rica to repeal Law 7200, thereby forbidding all private companies from participating in hydroelectric power production.¹³¹ This may, however, constitute a government taking prohibited by Article 45, because although the private owners do not own the rivers on which their plants operate, this would effectively force them to relinquish any investment they made in construction and maintenance of the plant and force them off that property.¹³²

¹²⁷ See CAFTA, *supra* note 73, art. 17.7, 17.8.

¹²⁸ See SIERRA CLUB, *supra* note 98. See generally CAFTA, *supra* note 73, art. 17.1, annex 17.9.

¹²⁹ CAFTA, *supra* note 73, art. 20.17.

¹³⁰ See *infra* III.A.

¹³¹ See generally Law 7200, *supra* note 47.

¹³² See Ley de Aguas, *supra* note 22, arts. 1, 2. U.S. DEP'T OF STATE, COSTA RICA: 2005 INVESTMENT CLIMATE STATEMENT (2005), available at <http://www.state.gov/e/eb/afd/2005/42003.htm> ("Article 45 of the Constitution of Costa Rica stipulates that no property can be expropriated from a Costa Rican or foreigner without prior payment and demonstrable proof of public interest.").

The government's ability to expropriate property became much more difficult after passage of the 1995 Law 7495, which stipulates that expropriations can take place only after full and prior payment is made to the affected property owner.¹³³ This restriction is significant because the Costa Rican government most likely cannot afford to compensate all of the current private hydroelectric companies if a court determines that repeal of Law 7200 constitutes a taking.¹³⁴

B. *Possible Options to Minimize the Environmental Ramifications Threatened by CAFTA*

In order to minimize CAFTA's potential negative consequences for its waterways and hydroelectric power production, there are a number of things Costa Rica can and should do.¹³⁵ The first, most obvious solution would be to refuse to ratify the treaty so that it does not take effect. After all, if Costa Rica ratifies CAFTA and then is sued by a foreign investor who claims financial harm caused by the enforcement of Costa Rica's environmental laws, it cannot then argue that its domestic environmental laws are superior to CAFTA's Chapter 10 foreign investor provisions, because Article Seven of Costa Rica's Constitution states that all ratified international treaties are superior to national laws.¹³⁶ By refusing to ratify, Costa Rica can ensure the enforceability of its environmental laws to foreign investors.¹³⁷

If Costa Rica does decide to ratify CAFTA, though, there are other ways of protecting its waterways.¹³⁸ First, the Costa Rican government must start effectively enforcing its environmental laws, which includes aggressively prosecuting known violators.¹³⁹ One highly publicized case of a power plant violating the environmental laws was the aforementioned Peñas Blancas hydroelectric plant disaster, in which the dam dumped an immense amount of sedimentation into the Peñas Blancas and San Carlos rivers in 2003, killing thousands of fish

¹³³ U.S. DEP'T OF STATE, *supra* note 132. Also, Article 45 of the Costa Rican Constitution grants equal rights and protection to private property, whether it is owned by nationals or foreigners. *Id.*

¹³⁴ See generally Engler & Martinez, *supra* note 115 (stating that Costa Rica's annual GDP is around \$17 billion, and the government's entire annual budget is only around \$5 billion).

¹³⁵ See *infra* III.B.

¹³⁶ Gelardi, *supra* note 87.

¹³⁷ See *id.*

¹³⁸ See *infra* notes 135–81 and accompanying text.

¹³⁹ See Interview with Carlos Muñoz Brenes, *supra* note 89.

and other wildlife.¹⁴⁰ The Judicial Investigation Organization (O.I.J.) was ordered by the Ministry of Environment and Energy (MINAE)¹⁴¹ to investigate the cause of the contamination.¹⁴² It found ICE responsible and ordered it to pay reparations for the contamination and ecological damage incurred.¹⁴³ ICE accepted responsibility for the harm caused and offered to pay one million dollars in reparations.¹⁴⁴

While this particular offense was prosecuted and ICE was eventually honest enough to accept responsibility for its actions, many other dams, both private and public, are allowed to continue illegally contaminating Costa Rica's rivers because the government is not holding them accountable for these crimes.¹⁴⁵ If, after ratifying CAFTA, Costa Rica prosecutes violations by dams owned by foreign investors without concurrently increasing its prosecutions of locally owned violators, foreign investors will likely attempt to use Chapter 10 to annul any judgment against them, arguing that it was discriminatory.¹⁴⁶ Those companies certainly have the financial resources to fight that legal battle as long as possible in order to try to make the government back down.¹⁴⁷

Also, before ratifying CAFTA, Costa Rica should pass legislation restricting privatization.¹⁴⁸ An example of such legislation would be a law amending Law 7200 that would limit privatization to its current capacity, such that even if ICE continues to construct more public facilities, no more private facilities would be allowed.¹⁴⁹ Such a law would restrict the percentage of total domestic electricity production that private facilities may permissible produce beyond what Law 7200

¹⁴⁰ See *Monteverde Group*, *supra* note 79.

¹⁴¹ Ministerio de Ambiente y Energía.

¹⁴² Carlos Hernández, *Muerte de Peces Indigna a Vecinos*, LA NACIÓN (San José, Costa Rica), Nov. 3, 2003, available at http://www.nacion.com/ln_ec/2003/noviembre/03/pais5.html [hereinafter *Muerte de Peces*]; Carlos Hernández, *Investigan Masiva Muerte de Peces*, LA NACIÓN (San José, Costa Rica), Apr. 26, 2004, available at http://www.nacion.com/ln_ec/2004/abril/26/pais5.html [hereinafter *Investigan Masiva*].

¹⁴³ *Muerte de Peces*, *supra* note 142; *Investigan Masiva*, *supra* note 142.

¹⁴⁴ *Investigan Masiva*, *supra* note 142; *Ríos Amenazados*, *supra* note 75.

¹⁴⁵ Álvaro Sánchez, *Miles de Peces Asfixiados*, AL DÍA (San José, Costa Rica), Apr. 27, 2004, available at http://www.aldia.co.cr/ad_ec/2004/abril/27/nacionales10.html; *Ríos Amenazados*, *supra* note 75 (noting that over the last three years there have been numerous documented cases of river contamination, only some of which have been investigated and prosecuted).

¹⁴⁶ See generally CAFTA, *supra* note 73, art. 10.3; FRIENDS OF THE EARTH, *supra* note 101, at 1–2.

¹⁴⁷ See generally Engler & Martínez, *supra* note 115; FRIENDS OF THE EARTH, *supra* note 101, at 1–2.

¹⁴⁸ See generally Law 7200, *supra* note 47.

¹⁴⁹ See *id.*

currently allows.¹⁵⁰ This law, however, would have to be passed before CAFTA is ratified, because CAFTA's Chapter 10 forbids national companies to be treated more favorably than foreign investors.¹⁵¹ Consequently, since there are only twenty-eight private hydroelectric companies, only a few of which are controlled by foreign investors, such a restriction would almost certainly be successfully challenged if it were passed after CAFTA was ratified.¹⁵²

Another positive reform that Costa Rica should enact prior to CAFTA's ratification is legislation that closes the gaps in its current law that permit over-exploitation of watersheds.¹⁵³ A law that restricts the number of plants, both public and private, that are permitted to exploit a watershed could easily accomplish this goal.¹⁵⁴ Costa Rica must pass such a law before CAFTA is ratified and foreign investors begin investing in new plants that crowd these watersheds.¹⁵⁵ If it does not act promptly, it risks environmental collapse of these watersheds.¹⁵⁶ Further, if Costa Rica waits until after ratification to pass this type of legislation, foreign investors can be expected to sue Costa Rica under Chapter 10 in much the same way that companies have sued Canada, the United States, and Mexico under NAFTA's Chapter 11 for post-ratification environmental laws that hinder their business or profits.¹⁵⁷

It is also important to note that CAFTA recognizes that Costa Rica retains full rights to decide the degree of privatization of its state energy monopoly.¹⁵⁸ Therefore, if Costa Rica ratifies CAFTA, even if it chooses not to pass preemptive legislation further restricting privatization, it should not pass further legislation expanding privatization of energy production.¹⁵⁹ Greater privatization will mean more attempts by foreign investors to participate in hydroelectric power production and more

¹⁵⁰ See *id.*

¹⁵¹ CAFTA, *supra* note 73, art. 10.3.

¹⁵² *Id.*; *Monitoreo de Represas*, *supra* note 81, at 11.

¹⁵³ See generally Anderson, *supra* note 1, at 3; *Descontrol*, *supra* note 72; *Ríos Amenizados*, *supra* note 75.

¹⁵⁴ See generally Anderson, *supra* note 1, at 3; *Descontrol*, *supra* note 72; *Ríos Amenizados*, *supra* note 75.

¹⁵⁵ See CAFTA, *supra* note 73, art. 10.3, 10.5; Aguirre, *supra* note 14, at 12 (noting that multinational organizations are aggressively pushing to get full access to Central America's energy sectors through various international agreements).

¹⁵⁶ *Ríos Amenizados*, *supra* note 75.

¹⁵⁷ CAFTA, *supra* note 73, art. 10.3, 10.5; FRIENDS OF THE EARTH, *supra* note 101, at 1-2.

¹⁵⁸ See CAFTA, *supra* note 73, annex I-CR-32-33.

¹⁵⁹ See generally ECLAC Reports, *supra* note 15, at 1-3 (pointing out that privatization in other parts of Central America has created significant problems).

suits against the government by disgruntled foreign investors.¹⁶⁰ In order to minimize such suits, Costa Rica must, at a minimum, maintain the status quo on legal restrictions of its energy monopoly.¹⁶¹

Another option for Costa Rica is to create legal incentives to encourage private investors, both foreign and domestic, to seek out other forms of electricity production than hydropower.¹⁶² For example, Costa Rica is Latin America's largest producer of wind power, although most of its wind potential remains untapped.¹⁶³ So Costa Rica could try to curb over-exploitation of its rivers by offering incentives for private companies to invest in the development of wind power instead.¹⁶⁴ In fact, Costa Rica has already experienced a positive response from private individuals and companies to similar government incentives.¹⁶⁵

One example that the government can use as a model is a program already in place called Pago de Servicios Ambientales (PSA).¹⁶⁶ Since 1996, the Costa Rican government has offered PSAs, through the regulatory body Fondo Nacional de Financiamiento Forestal de Costa Rica (FONAFIFO) to compensate private landowners for, among other things, both conservation and reforestation of their property.¹⁶⁷ The success of these subsidies is surprising given that they are fairly modest: roughly \$64 per hectare of private property conserved each year, or about €32,000.¹⁶⁸ Similarly, the government could offer a minimal subsidy or other incentive to private companies that choose to invest in the development of wind power instead of hydropower.¹⁶⁹ The government, however, should immediately review its legislation regulating wind power to make sure that, should private wind power operations become a successful alternative to hydro-

¹⁶⁰ See generally Engler, *supra* note 115; FRIENDS OF THE EARTH, *supra* note 101, at 1–2.

¹⁶¹ See generally Engler, *supra* note 115; FRIENDS OF THE EARTH, *supra* note 101, at 1–2.

¹⁶² Fondo Nacional de Financiamiento Forestal de Costa Rica, Servicios Ambientales, http://www.fonafifo.com/paginas_espanol/servicios_ambientales/servicios_ambientales.htm [hereinafter FONAFIFO] (last visited Apr. 11, 2006).

¹⁶³ Anderson, *supra* note 1, at 3.

¹⁶⁴ See generally Anderson, *supra* note 1, at 3; FONAFIFO, *supra* note 162.

¹⁶⁵ FONAFIFO, *supra* note 162.

¹⁶⁶ *Id.* The acronym stands for Payment for Environmental Services. See *id.*

¹⁶⁷ See FONAFIFO, *supra* note 162.

¹⁶⁸ Email from Carlos Muños Brenes, Director, Monteverde Conservation League, to author (Jan. 19, 2006, 14:06:59 EST) (on file with author).

¹⁶⁹ See FONAFIFO, *supra* note 162; Anderson, *supra* note 1, at 3; but see Karl Royce, *What Chance Latin America?*, WINDPOWER MONTHLY, May 2002, available at <http://www.windpower-monthly.com/may02/leader.htm> (arguing that Costa Rica will never have a windpower industry because of its small economy).

power, the industry is not permitted to get out of control or destroy the surrounding environment.¹⁷⁰

C. *Potential Options to Minimize the Threat of Foreign Investor Suits Threatened by CAFTA's Chapter 10*

Finally, if Costa Rica does ratify CAFTA and finds itself sued by foreign investors for enforcing its environmental laws, its Constitution provides a potential solution.¹⁷¹ As mentioned before, Articles 46 and 50 of Costa Rica's Constitution guarantee its citizens a right to a healthy and ecologically balanced environment, and the government is obligated to enforce that guarantee.¹⁷² This is clearly in direct conflict with any interpretation of CAFTA that undermines its environmental laws to the benefit of foreign investors.¹⁷³ Before Costa Rica's Legislative Assembly can pass any treaty into law, the Supreme Court of Justice, which handles all constitutional legal matters, must be consulted regarding the compatibility of the treaty with the country's Constitution.¹⁷⁴ Therefore, Costa Rica could argue that CAFTA is constitutionally compatible, otherwise it would not have passed the Supreme Court of Justice, and as such the vaguer provisions of Chapter 10 most likely to be relied on by foreign investors cannot be interpreted contrary to Costa Rica's constitutional protections.¹⁷⁵ Also, by arguing that any conflict of interpretations favors Costa Rica's Constitution, Costa Rica can justify the enforcement of its environmental laws over any apparent conflict with CAFTA, as their enforcement is clearly necessary to fulfill its obligation to provide its citizens with an ecologically balanced environment under Article 46.¹⁷⁶

Costa Rica could also look for support to its neighbor Nicaragua, which faced this exact same problem when it considered ratifying

¹⁷⁰ See Culture Change, The Most Frequently Asked Questions About Wind Energy, <http://www.culturechange.org/wind.htm> (last visited Apr. 11, 2006). Some of the negative environmental impacts of windpower include erosion, bird kills, noise, and the need for an open space, which in Costa Rica could create clear cutting of forest land. See *id.* See generally Anderson, *supra* note 1, at 3.

¹⁷¹ See generally Constitución, *supra* note 23.

¹⁷² See *id.*

¹⁷³ Compare Constitución, *supra* note 23, with CAFTA, *supra* note 73, art. 10.3, 10.5, 10.7; see also FRIENDS OF THE EARTH, *supra* note 101, at 1–2.

¹⁷⁴ See International Humanitarian Law National Implementation, General Comment, Costa Rica, <http://www.icrc.org/ihl-nat.nsf/0/430cd0a214d63d40c1256b190033d202?OpenDocument> (last visited Apr. 11, 2006) [hereinafter IHLNI].

¹⁷⁵ See generally CAFTA, *supra* note 73, art. 10.3, 10.5, 10.7; IHLNI, *supra* note 174.

¹⁷⁶ See generally Constitución, *supra* note 23.

CAFTA.¹⁷⁷ Nicaragua determined that a number of CAFTA's provisions were in direct conflict with its Constitution.¹⁷⁸ Nicaragua holds its own Constitution supreme over international law, and it decided that it would almost certainly have to alter its Constitution to comply with CAFTA before ratification if the conflicting CAFTA provisions were to be enforceable in Nicaragua.¹⁷⁹ Similarly, Costa Rica could argue that the fact that it has chosen not to alter its Constitution indicates that any ambiguous provisions must be interpreted as complying with its Constitution.¹⁸⁰

Finally, Costa Rica can turn to CAFTA itself as a source of support.¹⁸¹ As aforementioned, both Chapter 17 and Chapter 10 have provisions respecting environmental laws.¹⁸² Costa Rica can utilize these provisions to counter any Chapter 10 foreign investor suit trying to undermine its environmental laws.¹⁸³ Chapter 17 is the most helpful provision for Costa Rica in this respect because it states that it is inappropriate to encourage trade or investment by weakening domestic environmental laws.¹⁸⁴ Costa Rica should also utilize Chapter 10, Article 11, which places priority of measures taken "otherwise consistent" with the chapter to protect environmental issues over all other provisions in the chapter.¹⁸⁵ Whichever provisions Costa Rica does decide to use in its defense, it should strongly assert its rights under those provisions to assure that whatever value those provisions have to protect the environment is not permitted to be nullified through litigation as the environmental provisions in NAFTA have been.¹⁸⁶

¹⁷⁷ See generally JEANNETTE CHÁVEZ GÓMEZ ET AL., CAFTA CONSTITUTIONAL ANALYSIS (2004), available at http://www.citizenstrade.org/pdf/quixote_nicacftachallenge_07012004.pdf.

¹⁷⁸ See *id.*

¹⁷⁹ See *id.*

¹⁸⁰ See *id.*

¹⁸¹ See generally CAFTA, *supra* note 73, art. 17.1-Annex 17.9; cf. SIERRA CLUB, *supra* note 98 (arguing that CAFTA's Chapter 17 environmental provisions are so weak that they provide only minimal protection).

¹⁸² See CAFTA, *supra* note 73, arts. 10.9, 10.11, 17.1, 17.2, 17.4.

¹⁸³ Cf. SIERRA CLUB, *supra* note 98. See generally CAFTA, *supra* note 73, arts. 10.9, 10.11, 17.1, 17.2, 17.4.

¹⁸⁴ See generally CAFTA, *supra* note 73, art. 17.2.

¹⁸⁵ See *id.* art. 10.11.

¹⁸⁶ See also BANKRUPTING DEMOCRACY, *supra* note 99, at iv (noting numerous cases where investor rights took precedence over environmental protection). See generally CAFTA, *supra* note 73, arts. 10.9, 10.11, 17.1, 17.2, 17.4; NAFTA, *supra* note 100, at 640, 642.

CONCLUSION

Costa Rica's waterways are arguably its most valuable resource.¹⁸⁷ Although the benefit and burdens analysis clearly tips in favor of developing its hydroelectric resources, Costa Rica must understand that these waterways also serve a number of other essential functions, including sustaining the rainforests that now bring the country more revenue in eco-tourism than do its two traditional exports, bananas or coffee.¹⁸⁸ Costa Rica has much stronger environmental laws protecting its waterways and regulating hydroelectric power than many of its neighbors.¹⁸⁹ And Costa Rica's Constitution, through Articles 46 and 50, promises much in the way of a healthy environment.¹⁹⁰ These laws are not, however, sufficient to prevent private investors from exploiting Costa Rica's waterways.¹⁹¹

CAFTA promises to wreak further havoc on Costa Rica's unique resources through the suppression of its environmental laws.¹⁹² In order to minimize the anticipated negative consequences on its environment and environmental laws, Costa Rica must engage in an aggressive campaign to protect its waterways.¹⁹³ It would be unwise for Costa Rica to completely eliminate privatization because such a measure would, most likely and unfortunately, be considered an expropriation of currently existing private plants.¹⁹⁴ It can and should, however, either further restrict private hydroelectric power production or, at the very least, pass legislation restricting it to its status quo.¹⁹⁵

The Costa Rican legislature must also immediately address the loophole in its current environmental law that permits over-exploitation of its watersheds.¹⁹⁶ In addition, it should create minimal legal incentives for private investors to invest in other underutilized energy resources like wind power.¹⁹⁷ Moreover, Costa Rica must start to aggres-

¹⁸⁷ Anderson, *supra* note 1, at 3.

¹⁸⁸ ROB RACHOWIECKI, LONELY PLANET: COSTA RICA 25 (2002). In fact, today over one million ecotourists visit Costa Rica each year. *Id.*

¹⁸⁹ SIERRA CLUB, *supra* note 98.

¹⁹⁰ See Constitución, *supra* note 23.

¹⁹¹ See SIERRA CLUB, *supra* note 98 (noting that Costa Rica is often hailed as a country with strong environmental law, but that even here their environmental laws are either conflicting with one another or there is no financial support for new agencies or cooperative measures).

¹⁹² See EarthJustice, *supra* note 20.

¹⁹³ See *infra* notes 192-97.

¹⁹⁴ See *supra* notes 131, 135, 145.

¹⁹⁵ See ECLAC Reports, *supra* note 15.

¹⁹⁶ See Anderson, *supra* note 1, at 3.

¹⁹⁷ See *id.*

sively prosecute known domestic violators of its current environmental laws to prevent foreign investors from claiming discrimination in lawsuits should CAFTA be ratified.¹⁹⁸

Finally, in the event CAFTA is ratified and Costa Rica finds itself locked in litigation with a foreign investor over the enforcement of its environmental laws, Costa Rica should argue that its Constitution is consistent with CAFTA, such that any asserted conflict demands an interpretation favoring the environmentally protective mandates of Articles 50 and 46.¹⁹⁹

CAFTA does not have to mean the death of Costa Rica's precious waterways and surrounding environments, but in order to avoid that fate, Costa Rica's government must act proactively to anticipate and overcome opportunistic foreign investors.

¹⁹⁸ See Interview with Carlos Muñoz Brenes, *supra* note 89. See generally CAFTA, *supra* note 73, art. 10.3.

¹⁹⁹ See Constitución, *supra* note 23; CHÁVEZ GÓMEZ, *supra* note 177.