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**Protecting Environmentally-Sensitive Areas and Promoting
Tourism in The Back Patio of the United States: Thoughts about
Shared Responsibilities in Ecosystem and Biodiversity Protection**

Colin Crawford

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Protecting Environmentally-Sensitive Areas and Promoting Tourism in “The Back Patio of the United States:” Thoughts about Shared Responsibilities in Ecosystem and Biodiversity Protection

*Colin Crawford**

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I.

INTRODUCTION

Leonel Fernández, President of the Dominican Republic, famously declared that his nation of over nine million people¹ exists in “the back patio of the United States.”² The locution is striking from a Dominican president, notably because of the repeated involvement – some would say interference – of the U.S. in Dominican affairs during the course of its history.³ But Fernández is a sophisticated and erudite scholar, as well as a politician, and can speak with authority on the history of the Americas from before the Monroe Doctrine and since.⁴ Without question, he used the phrase with deliberation.⁵ For Fernández, the phrase thus doubtless represented many things, among them the economic and social dependence of the Dominican Republic upon the United States, and the history of expansionism and territorial

1. As of July 2007, the U.S. Central Intelligence Agency estimates that the population is 9,365,818. U.S. CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/dr.html> (last accessed Sept. 9, 2007).

2. Alois Hug, “Somos el Patio Trasero de Estados Unidos, no Podemos Enfrentarnos,” EL PAÍS, July 19, 2004, available at http://www.elpais.com/articulo/internacional/Somos/patio/trasero/Estados/Unidos/podemos/enfrentarnos/elpepiint/20040719elpepiint_13/Tes (last accessed Sept. 9, 2007).

3. The Dominican Republic has twice been subject to U.S. control of its affairs. The first occasion was in the first decade of the 20th century, in the events that led to the signing of the Dominican-U.S. Treaty, which solidified U.S. control of Dominican economic life and gave it rights to intervene politically. See FRANK MOYA PONS, MANUAL DE HISTORIA DOMINICANA 439-55 (13th ed. 2002) [hereinafter MOYA PONS, MANUAL]. Within the next decade, the U.S. occupied the country militarily. *Id.* at 475-94. The second event occurred during the tumultuous civil war in the years following the death of the dictator Leonel Trujillo, when President Lyndon Johnson sent 42,000 troops to protect “North American interests” in the island nation. *Id.* at 534.

4. The author of this article was privileged to hear an example of this in Santo Domingo at a February 2006, debate with the linguist and political activist Noam Chomsky.

5. “Una de las cualidades positivas del doctor Fernández es que no habla ‘a lo loco’ ni como el que ‘culpa y no siente.’ Su manera de ser lo empuja a ser medido en sus expresiones, y a cuidarse en su decir, para ‘no meter la pata.’” Reginaldo Atanay, *Dominicano: ¿Patio trasero de Estados Unidos?*, EL DIARIO/LA PRENSA ONLINE, July 23, 2004 (last accessed Apr. 3, 2006) (referring to the controversy over this statement, explaining that “one of the positive qualities of Dr. Fernández is that he speaks neither ‘to the crazy’ nor with ‘blame without feeling.’ His manner is to strive to be measured in his expressions, and to take care in what he says, so as ‘not to put his foot in it.’”).

control that marks nearly two centuries of U.S. involvement with the Caribbean nation.⁶

The phrase also resonates in the area of environmental law and policy, although likely this did not cross Fernández' mind when he used it. Specifically, the proximity of the Dominican Republic to the continental U.S. and to its Caribbean possessions to the east – Puerto Rico and the U.S. Virgin Islands – begs questions about the designation of particular areas for special environmental protection, management and oversight. At a general level of inquiry, this is to ask whether richer nations like the U.S. may have responsibilities to protect ecosystems and biodiversity beyond their territorial borders without a corresponding right to interfere in the affairs of those nations. Specifically, in the context of this paper, Fernández' phrase compels us to ask whether the United States bears responsibility for environmental protection in the Dominican Republic. This is a complicated question and needs to be unpacked.

Importantly, too, this question has ramifications that go well beyond the relations between a small and, in geopolitical terms, relatively unimportant country and the current world superpower. To ask such a question on its surface raises the specter of a reassertion of colonial power and so has historical and political

6. A leading Dominican historian (and the first Minister of the Environment) describes in detail the various efforts of the U.S. to exert control over the Caribbean nation, from the creation of the Samaná Bay Company in the 1870s, in order to control the strategically located Samaná Peninsula, MOYA PONS, *MANUAL*, *supra* note 3, at 376, and the later effort of Theodore Roosevelt to “eliminate once and for all the European interference in Dominican finances and politics and substitute that influence for an administrative financial protectorate already expressed in the Convention of February, 1905.” MOYA PONS, *MANUAL*, *supra* note 3, at 444 (“El interés del Gobierno de los Estados Unidos era eliminar de una vez por todas la ingerencia [sic] europea de las finanzas y la política dominicana y substituir esa influencia por un protectorado administrativo financiero expresado ya en el Convenio de febrero de 1905.”). Others, notably the former leftist President, historian and novelist Juan Bosch, credited the U.S. military occupation for making possible the entry into a military career and subsequent ascent of the tyrannical dictator Trujillo, who was trained under U.S. occupation. See, e.g., JUAN BOSCH, *TRUJILLO: CAUSAS DE UNA TIRANIA SIN EJEMPLO* 124 (2003). More immediately, today nearly 80% of the island nation exports go to the United States. U.S. CENTRAL INTELLIGENCE AGENCY, *THE WORLD FACTBOOK* [hereinafter *CIA WORLD FACTBOOK*], available at <https://www.cia.gov/cia/publications/factbook/geos/dr.html#Econ> (last accessed Aug. 16, 2006). Dominicans now constitute the single largest group of foreign-born immigrants in New York City, with nearly 400,000 residents. NEW YORK CITY DEPARTMENT OF CITY PLANNING, POPULATION DIVISION, *THE NEWEST NEW YORKERS, 2000: IMMIGRANT NEW YORK IN THE NEW MILLENNIUM*, Executive Summary, available at http://www.nyc.gov/html/dcp/html/census/nny_exec_sum.shtml (last accessed Aug. 15, 2006).

reverberations that need exploring well beyond the particular example of U.S.-Dominican relations. In addition, such a question demands an examination of the extent of responsibility by powerful, richer countries to other nations – whether neighbors or not – under the maturing system of global environmental law. Moreover, the question asks us to consider the extent to which, irrespective of international or regional treaty commitments, one nation bears responsibility for the environmental effects of its actions. Put another way, if the Dominican Republic is really in our back patio, what role, if any, do we bear in keeping it – as part of a property over which we have some dominion – in order?

This article seeks to answer that question and, in the process, to provide some answers. In Part II, it will briefly lay out the urgency of strengthening the Dominican system of environmental protection areas, both for that nation and for the region of which it is a part. Part II thus endeavors to outline the importance of protected areas as the fulcrum of a larger plan of environmental protection aimed at protection of everything from pristine environments to densely settled urban areas. It also will look in particular at the Dominican struggle to preserve biodiversity in the face of the promise of expanded tourist development. The tourism example is a significant one, not only as regards the Dominican Republic but throughout the world, since, for many poorer nations, tourism promises to bring much-needed economic development, which puts enormous strain on the environment and on natural resource use. Finally, Part II will undertake to locate the role of Dominican protected areas within a larger, regional context. Part III will detail the existing legal responses to such protection, looking at Dominican legal obligations. In doing so, Part III will elaborate on some of the competing tensions and obligations present in Dominican legislation affecting protected environmental areas, especially as they relate to the sometimes competing goals of environmental protection and rapid mass tourism development. Part IV will explore the particular roles and responsibilities, if any, of the United States and other richer nations with respect to the protection of environmentally sensitive areas in the Dominican Republic. Part IV will do this by examining existing multilateral regional and international obligations that might serve to balance competing values of environmental protection, particularly with respect to preserving biodiversity, on the one hand, and economic development on

the other hand. In this, Part IV particularly notes the underlying tension in any such action by the U.S., in light of the historical, political and economic implications of any such activities. Once again, the question of tourism – and how it should be managed – looms large over this discussion. Part V will then identify a solution that asserts responsibility for enforcing the impact of economic development on biodiversity with entities located outside the Dominican Republic in nations whose economic power is putting that biodiversity at risk.

II.

WHY PROTECTED AREAS IN THE DOMINICAN REPUBLIC (OR ANYWHERE ELSE) MATTER

A. *What is an Environmental Protection Area?*

At its most general, an environmental protection area is an ecosystem or portion of an ecosystem that is deemed worthy of safeguarding from complete or limited human interference for reasons related to larger environmental protection and resource conservation goals. For purposes of this paper, however, the definition needs to take account of differences in land use rights and responsibilities. A protected area shall be understood as a natural area, whether public or private, that is regulated by rigid rules designed to assure its long term use in order to preserve characteristics, whether biological, economic, social or cultural, of benefit to humanity and the other biota of which we are a part.⁷

Designation of environmental protection areas is a product of at least three phenomena. Historically, the concept has its origins in the effort in the United States during the late 19th century to establish a system of national parks, notably with the creation of the Yellowstone National Park.⁸ At the very least, an environ-

7. Dominican law defines a protected area as: "A portion of land and/or sea especially dedicated to the protection and maintenance of significant biodiversity elements and of associated natural and cultural resources, managed by legal mandate and other effective measures." Law 64/00, Tit. I., Cap. I., Art. 16 ("Una porción de terreno y/o mar especialmente dedicada a la protección y mantenimiento de elementos significativos de biodiversidad y de recursos naturales y culturales asociados, manejados por mandato legal y otros medios efectivos.").

8. "Then having established the definition of what is a national park, it merits responding now to the questions posed as to the initial development of the concept; and we can begin by saying that the first national park emerged in modern times, born in the U.S., in the 19th century (1872), with the name of Yellowstone National Park. . . ." GABRIEL VALDEZ SIERRA & JOSÉ MANUEL MATEO FÉLIZ, SISTEMA DE ÁREAS PROTEGIDAS DE REPUBLICA DOMINICANA 12 (1992) ("Luego de haber establecido la definición de lo que es un parque nacional cabe responder ahora las

mental protection area corresponds, in the U.S. concept, to a federal or state park or forest. Second, at a legal and political level, the concept of a protected area is a response to the 1992 Earth Summit, in which the world community first formally recognized the importance of strictly delimiting the use of some lands not just for environmental protection but for long term economic development as well.⁹ Thus, an environmental protection area can constitute more than state-held lands such as parks and forests. As a result, worldwide since 1992, there has been a dramatic increase in the numbers of countries that have enacted or strengthened protected area legislation.¹⁰ As such, protected areas are an aspect of ecosystem management.¹¹ Third, environmental protection areas reflect advances in scientific understanding. Specifically, protected areas are a concrete application of the realization that, if we wish collectively to sustain biological life, we must respond by protecting not just individual species or small

interrogantes planteadas al inicio del desarrollo del concepto; y comenzaremos por decir que el primer parque nacional surgido en los tiempos modernos, nace en los Estados Unidos de Norteamérica (EE.UU.), en el siglo XIX (1872), con el nombre de Parque Nacional de Yellowstone . . .”).

9. As, for example, in Principle 15 of the Rio Declaration on Environment and Development: “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” *DOCUMENTS IN INTERNATIONAL ENVIRONMENTAL LAW* 21 (Philippe Sands & Paolo Galizzi eds., 2d ed. 2004).

10. In Brazil, for example, protected areas constitute traditional national and state parks, as well as “private lands of national patrimony” and various types of “reserves,” including biological and extractive activity reserves (viz. mining), in which the protected area legislation strictly limits the use of the area. See MINISTÉRIO DO MEIO AMBIENTE, *SISTEMA NACIONAL DE UNIDADES DE CONSERVAÇÃO* (2004).

11. According to the Commission on Ecosystem Management of the World Conservation Union (formerly the International Union for the Conservation of Nature and Natural Resources, or IUCN), “[t]he Ecosystem Approach places human needs at the centre of biodiversity management. It aims to manage the ecosystem, based on the multiple functions that ecosystems perform and the multiple uses that are made of these functions. The ecosystem approach does not aim for short-term economic gains, but aims to optimize the use of an ecosystem without damaging it.” The World Conservation Union, Commission on Ecosystem Management, at <http://www.iucn.org/themes/cem/ourwork/ecapproach/index.html> (last accessed Apr. 4, 2006). This approach was adopted by the Convention on Biological Diversity in 2000. UNEP/CBD/COP/5/23. Decision V/6(Conference of the Parties 5) (May 15-26, 2000) available at <http://www.cbd.int/convention/cop-5-dec.shtml?m=COP-05&id=7148&lg=0>.

parts of an environment, but must respond holistically to its management.¹²

B. *Extent of Dominican Biodiversity*

In this article, I do not make any pretensions to treat exhaustively the subject of biodiversity protection, a topic that has already received extensive treatment in various contexts, from governmental and international reports, to studies conducted by non-governmental organizations and academic institutions.¹³ It is sufficient to observe, therefore, that the Dominican Republic¹⁴ contains one of the densest concentrations of biodiversity in the world. Within its 48,442 square kilometers are 5,600 plant species, 20 land mammal species, and 303 bird species.¹⁵ In one park alone, the Madre de las Aguas Conservation Area (so named because it supplies water to nearly 50% of the nation's population), approximately 90% of the conservation area's amphibian and reptile species, 43% of its butterfly species, 10% of the bird species, and 94% of the bat species are unique to this area. The solenodon, a small shrew-like mammal found only on the island of Hispaniola, has been in existence for 30 million years. The hutia, a rare rodent, still exists in the country. Of the 303 birds

12. See, e.g., EDWARD O. WILSON, *THE DIVERSITY OF LIFE* 312 (1992). "An ideal ethic is a set of rules invented to address problems so complex or stretching so far into the future as to place their solution beyond ordinary discourse. Environmental problems are innately ethical. They require vision reaching simultaneously into the short and long reaches of time. . . . The solution will require cooperation among professions long separated by academic and practical tradition. Biology, anthropology, economics, agriculture, government, and law will have to find a common voice." *Id.*

13. See, e.g., WILSON, *id.* (passim). In addition, Stetson University Law School has a Biodiversity Institute; an example of a non-governmental organization is GRAIN, "an international non-governmental organisation (NGO) which promotes the sustainable management and use of agricultural biodiversity based on people's control over genetic resources and local knowledge." GRAIN, About Us, at <http://www.grain.org/about/>. GRAIN contains link to an English translation of a 1998 Decree on Biodiversity Law by the Legislative Assembly of the Republic of Costa Rica, at <http://www.grain.org/brl/?docid=475&lawid=1859> (last accessed Aug. 15, 2006). See also JOHN COPELAND NAGLE & J.B. RUHL, *THE LAW OF BIODIVERSITY AND ECOSYSTEM MANAGEMENT* (2002).

14. Tragically, that is not true of the remaining 1/3 of the island of Hispaniola, namely Haiti, nearly 90% of which has been deforested: "Haiti was once a lush tropical island, replete with pines and broad leaf trees; however, by 1988, only about 2 percent of the country had tree cover." HAITI: A COUNTRY STUDY (Richard A. Haggerty, ed., Washington: GPO for the Library of Congress), Federal Research Division, U.S. Library of Congress (1989), available at <http://countrystudies.us/haiti/53.htm> (last accessed Aug. 15, 2006).

15. See The Nature Conservancy: Dominican Republic, at <http://www.nature.org/wherewework/caribbean/dominicanrepublic/> (last accessed Apr. 6, 2006).

found there, 27 can be found nowhere else, among them the Hispaniolan woodpecker and the narrow-billed tody.¹⁶ In addition to these well-documented species, new species are discovered throughout the Caribbean with regularity,¹⁷ suggesting that the above numbers are conservative.

Why do these numbers matter? Again, I need not traverse ground that has been well covered by others. It should be sufficient here to observe that biodiversity protection – which is best made possible by the establishment of a system of protected areas, as now exists in the Dominican Republic – has various benefits. Among the most important of them are the aesthetic and moral values of respecting the nature of which we are a part.¹⁸ Of equal importance, because they are rich sources of potential economic wealth, are the possible development of pharmaceuticals,¹⁹ as well as the protection of hydrological and other natural resources.²⁰

16. *Id.*, at <http://www.nature.org/wherewework/caribbean/dominicanrepublic/work/art8531.html> (last accessed Sept. 9, 2007).

17. See, e.g., Carlos A. Mancina & Linet García-Rivera, *New Genus and Species of Fossil Bat (chiroptera: Phyllostomidae) From Cuba*, 41 CARIBBEAN J. OF SCI. 22 (2005); S. Blair-Hedges & Richard Thomas, *At the Lower Size Limit in Amniote Vertebrates: A New Diminutive Lizard From the West Indies*, 37 CARIBBEAN J. OF SCI. 168 (2001) (discussing the discovery of a previously un-catalogued lizard off the south-eastern coast of the Dominican Republic); Luiz M. Díaz et al., *A New Riparial Frog of the Genus Eleutherodactyl (Anura: Leptodactylidae) from Eastern Cuba*, 37 CARIBBEAN J. OF SCI. 63 (2001).

18. See, e.g., WILSON, *supra* note 12, at 351 (“For what, in the final analysis, is morality but the command of conscience seasoned by a rational examination of consequences? . . . An enduring environmental ethic will aim to preserve not only the health and freedom of our species, but access to the world in which the human spirit was born.”).

19. This is a principal concern of Articles 15 (Access to genetic resources) and 19 (Handling of biotechnology and distribution of its benefits) of the United Nations Convention on Biological Diversity. See DOCUMENTS IN INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 9, at 696, 706-09.

20. For example, in tropical forests, the tree cover constitutes an important feature in the watershed; deforestation can lead to water shortages and exacerbate water scarcity problems during droughts. See, e.g., Frank Moya Pons, *Explicando las Áreas Protegidas*, in DOCTRINA Y POLÍTICAS DE MEDIO AMBIENTE Y RECURSOS NATURALES 431 (2004) [hereinafter Moya Pons, DOCTRINA Y POLÍTICA] (“. . . a diferencia de otros países que tienen nieve durante seis meses de invierno, en la República Dominicana el agua que utilizamos viene de la lluvia que cae en las montañas. Y esa lluvia que cae en las montañas son los bosques que la captan, la retienen, la conservan, la administran y finalmente la sirven tanto en ríos como en estratos subterráneos.” (“. . . the difference from other countries that have snow for six months of winter, [is that] in the Dominican Republic the water that we use comes from the rain that falls in the mountains. And the forests capture that rain that falls in the mountains, that retains it, that conserves it, that disperses it and, finally, that provides it to all of the rivers as well as in aquifers.”)); WARREN DEAN,

C. Importance of Protected Areas

What further merits stressing is the *particular* importance and role of protecting biodiversity in poorer countries.²¹ As the first Dominican Environment Minister, Frank Moya Pons, explained, referring to the economic development of an area known as the Northwestern Line, a northwestern segment of the country along the Haitian border that is both one of the driest and one of the most mountainous areas in the Republic, containing the highest peak in the Caribbean, Pico Duarte:²²

. . . protected [biodiversity] areas offer a series of environmental services that, although difficult to value, without which human life would be much more difficult . . . Take the environmental services that are offered by the forests in the national parks of the Cordillera Central [the central mountain range bisecting the country]. Without these woods, without this forest, we would not have water here in the Northwestern Line. [The area] would be left with very little water to sustain the agricultural revolution that has occurred in the country in the last 50 years to convert the Northwestern Line into a zone of agricultural food production. The Northwestern Line was a desert, and such a desert that it was known as "the No Man's Land of Santiago." Later it began to be called the Northeastern Line. But it was called No Man's Land because it didn't have people. When we started to open canals, there began the planting of rice, bananas, later plantains, and now tobacco is being planted. And the Northeastern Line is being converted into one of the zones of greatest economic growth and of the highest population growth.²³

WITH BRAODAX AND FIREBRAND: DESTRUCTION OF THE BRAZILIAN ATLANTIC FOREST 223-24 (1995) (describing the 19th century reforestation of Rio de Janeiro when the imperial government recognized the role of the forest in the watershed).

21. Here and throughout this article, I deliberately avoid what I call "the language of development," and specifically the designations "developed" and "developing" countries. The reason for this is that I think the terms obscure as much as they hide. Like many poorer countries, elements of Dominican society are fantastically rich, and thus "developed" by any measure. The increasing challenge globally, it seems to me, is to address these differences of resources both within and as between nations. As a result, the language of development seems to me to hide the potential for a local role in addressing the redistribution of resources.

22. See generally, ORGANIZATION OF AMERICAN STATES, REPÚBLICA DOMINICANA—PLAN DE ACCIÓN PARA EL DESARROLLO REGIONAL DE LA LÍNEA NOROESTE (1997) [PLAN OF ACTION FOR THE REGIONAL DEVELOPMENT OF THE NORTHWESTERN LINE], available at <http://www.oas.org/dsd/publications/Unit/oea17s/begin.htm> (last accessed Sept. 8, 2007).

23. Moya Pons, DOCTRINA Y POLÍTICA, *supra* note 20 (" . . . de que las áreas protegidas brindan una serie de servicios ambientales que aunque son difíciles de valorar, sin ellos la vida humana sería mucho más difícil . . . Tomen los servicios ambientales que ofrecen las forestas de los parques nacionales de la Cordillera Cen-

In other words, as Dr. Moya Pons' example reminds us, protected areas matter not just because they might provide those with access to natural resources the opportunity to enjoy a walk through the woods that is more varied and richer in flora and fauna than might otherwise be the case. This is worth emphasizing because a common feature of opposition to such areas and similar ecosystem protection measures in the United States and other richer nations is to characterize these measures as flights of fancy of rich and privileged environmentalists bent on preserving their own access to nature's glories.²⁴

On the contrary, protected areas matter because, in addition to preserving the variety and wonder of multiple species, they serve to assure long term, collective social and economic interests. As the American Academy for the Advancement of Science recognized nearly a quarter century ago:

[C]ountries that fail to plan their development strategies in coordination with resource conservation and environmental management could be incapable of maintaining progress in health, food, housing, energy, and other critical national needs for more than a few decades.²⁵

This is a lesson often ignored in richer countries like our own,²⁶ and no less so in countries like the Dominican Republic, for at

tral. Sin esos bosques, sin esa floresta, aquí no habría agua en la Línea Noroeste. Quedaría muy poca agua para sostener la revolución agrícola por la que ha pasado el país en los últimos cincuenta años al convertirla Línea Noroeste en una zona agrícola productora de alimentos. La Línea Noroeste era un desierto, y tan desierto era que antes se la llamaba El Despoblado de Santiago. Luego empezó a llamarse la Línea Noroeste. Pero se le llamaba El Despoblado, porque no había gente. Cuando comenzaron a abrir canales, se comenzó a sembrar arroz, guineos, después plátanos, ahora se siembra tabaco, y la Línea Noroeste se ha convertido en una de las zonas de mayor crecimiento económico y de mayor crecimiento poblacional.”).

24. This criticism of the U.S. Endangered Species Act is suggested by Justice Scalia's opinion for the majority in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (judging the commitment of two members of defendant organization whose claims to return to see endangered species were dubious).

25. F. CONANT ET AL., *RESOURCES INVENTORY AND BASELINE STUDY METHODS FOR DEVELOPING COUNTRIES* 539 (AAAS, 1983), *quoted in* Sixto J. Incháustegui & Grupo Jaragua, Inc., *Consideraciones Sobre Las Áreas Protegidas de la República Dominicana*, in *COMPENDIO Y RESULTADOS PRIMER SEMINARIO NACIONAL ÁREAS PROTEGIDAS EN REPÚBLICA DOMINICANA* 72 (Ing. Gabriel Valdez Sierra & Agrón. José Ml. Mateo Félix eds., n.d.).

26. See, for example, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), in which the Court hampered the ability of state authorities to limit coastal developments. On the Gulf Coast more than a decade later, such developments were judged to have added to the extent of the destruction of Hurricane Katrina. See, e.g., *CENTER FOR PROGRESSIVE REFORM, UNNATURAL DISASTER: THE AFTERMATH OF HURRICANE KATRINA* 10-12 (2005) (discussing a disastrous federal and

least two reasons. First, the limited physical dimensions of the Dominican Republic pose more immediate challenges than a larger, continental area. As a former Dominican official charged with responsibility for wildlife protection noted: “[a] characteristic of the Dominican Republic is that it is constituted by its limited territorial extent.” Such limitation reflects an elemental requirement for the design and implementation of standards for the conservation of renewable natural resources. The state of deterioration in which these vital resources are found requires even more dedication of efforts in the search for guidance oriented to their conservation.²⁷ Second, the Dominican Republic is undergoing an aggressive national push to further develop the nation’s natural and scenic resources into tourist destinations.²⁸ A major conflict emerging in the country concerns the degree to which these developments will be environmentally sensitive.²⁹ In addition, the country continues to suffer a critical energy shortage that promises in the short- and long-term to threaten its ability to be economically competitive.³⁰ As a result, the importance of strengthening the role of environmental protection areas in Dominican law, society and the economy can hardly be overstated.

D. *Tourism: Engine of Protection or Destruction?*

In 2005, a Dominican presidential decree emphasized the importance of tourism for the nation: “[t]he development of tour-

state wetlands policy as a contributing factor to Hurricane Katrina). The report is available at http://www.progressiveregulation.org/articles/Unnatural_Disaster_512.pdf (last accessed Aug. 16, 2006).

27. Emilio Bautista M., *Lineamientos para el establecimiento de un sistema nacional de áreas protegidas*, in COMPENDIO Y RESULTADOS PRIMER SEMINARIO NACIONAL AREAS PROTEGIDAS EN REPUBLICA Dominicana 65-66 (Ing. Gabriel Valdez Sierra & Agrón. José M.I. Mateo Félix eds., n.d.).

28. For example, in 2006, the Dominican Republic invested over \$1.5 billion in tourist construction to build golf courses and marinas. In 2007, the amount is expected to be raised to \$1.8 billion, and to \$1.9 billion in 2008. Desirée Martínez, *Inversiones en turismo serán \$5 mil millones*, LISTIN DIARIO, Mar. 17, 2006, at D1.

29. Alexéi Tellerías, *Una apuesta hacia el ecoturismo*, LISTIN DIARIO, Mar. 22, 2006, at C1 (describing the challenge to tourism development in the largely undeveloped area of the southwest); *Apoyando el Desarrollo de Pedernales y la Región*, LISTIN DIARIO, Mar. 31, 2006, at p. 14 (letter advertisement from federal representatives to the southwest, arguing for tourist development of the region, in favor of the Tourism Ministry and against the opposition of the Environment Ministry).

30. “[T]he Dominican Republic has been impeded in its development efforts by the cost and scarcity of energy . . .”, LIBRARY OF CONGRESS, FEDERAL RESEARCH DIVISION COUNTRY STUDIES, DOMINICAN REPUBLICAN AND HAITI COUNTRY STUDIES 145 (2001) [hereinafter “DOMINICAN REPUBLICAN AND HAITI COUNTRY STUDIES”].

ism is the highest priority of the Dominican State as an adequate measure for the advance of economic progress in the country.”³¹ One could hardly look for a more unblemished statement of national priorities. It is frequently touted as the solve-all solution for the nation’s future economic growth.³²

On its face, this is entirely understandable in a comparatively poor country with relatively few exploitable resources and an abundance of sun and sand. Many of the agricultural commodities that once helped sustain the country now face depressed global prices. The most notable of these commodities is sugar.³³ As a result, it is not surprising that the Dominican Republic sees its future in the “global economy” built on the development of the service sector and, more specifically, in tourist services.

Yet there are several dangers presented by such a strategy. The remainder of this section shall detail those dangers. In particular, this discussion will strive to lay the groundwork for a tourist policy that is both socially and environmentally responsible in the long term.

At a minimum, unbridled tourist development presents four serious areas of concern. First, it fails to pursue a diverse economic policy, and in so doing risks repeating past economic judgments that have harmed the country. Second, the nature of the tourist enterprises being developed raise serious social, environmental, and land use justice concerns. Third, the environmental

31. Decree Law 240 of 2005 (“Que el desarrollo del turismo es de alta prioridad para el Estado Dominicano como medio adecuado para alcanzar el progreso económico del país.”). The law creates a federal institute on tourism and a national tourism school. http://www.presidencia.gob.do/app/pre_decretos_det.aspx?id=5581&e=4%2f11%2f2005 (last accessed Oct. 14, 2007). This is a note frequently sounded, reiterated and refined in these Decree Laws, exercises of constitutional Presidential power. See also, e.g., Decree Law 1374 of 2004, available at http://www.presidencia.gob.do/frontend/amp_decretos.php?id=524 (last accessed Apr. 11, 2006) (creating various government organs like a Council on Competitiveness to promote tourism, as the highest economic development priority of the country).

32. See, e.g., Decree Law 1083-04, available at http://www.presidencia.gob.do/frontend/amp_decretos.php?id=230 (last accessed Apr. 12, 2006) (establishing a federal Tourist Office in light of the priority of developing investments in this area).

33. For years, world sugar prices have been depressed, a situation that has proved especially difficult for a one-crop economy like the Dominican Republic. Adding to this situation is the fact that sugar crop labor is poorly regarded by Dominicans of all classes. DOMINICAN REPUBLICAN AND HAITI COUNTRY STUDIES, *supra* note 30, at 131-32. In 2006, world sugar prices rebounded somewhat, although the markets remain volatile. Food and Agriculture Organisation of the United Nations, *High and Volatile Food Prices in the Months to Come*, FAO NEWSROOM, June 8, 2006, available at <http://www.fao.org/newsroom/en/news/2006/1000319/index.html> (last accessed Aug. 16, 2006).

impact of such projects threatens to do long term environmental damage that might easily be avoided were the country to make other choices. Finally, the social consequences of these long term environmental harms are dangerous and avoidable:

1. Lack of Economic Diversity

The histories of Caribbean countries like the Dominican Republic, Cuba, and Haiti have long included reliance on monocultures. Although this history is arguably more severe in the case of Cuba and Haiti than their eastern neighbor,³⁴ it is nonetheless true that from Spanish colonization to Rafael Trujillo, the island's dependence on few crops has limited its economic prospects. This is because, in the Dominican context, limited numbers of crops have existed hand in glove with a highly unequal distribution of land, in which the richest 10% of the population has enjoyed well over half of the nation's wealth.³⁵ In addition, limited crop types require higher inputs of external resources, notably pesticides and fertilizers.³⁶ Thus, limited crop types, while permitting consolidated land holdings, simultaneously limits employment opportunities (and thus income) for the many, strains the capacity of land to regenerate through crop rotation, introduces heavy volumes of toxics into the environment, and limits food selection.

Although the cause-and-effect relations are complicated here, one important consequence of this pattern of land use and resource exploitation is a population with widely divergent incomes. A large, impoverished population sustained by agriculture is also less well educated and, therefore, less well disposed to have the professional and intellectual resources to adapt and seek new employment, much less to innovate.³⁷

34. Colin Crawford, *Necessity Makes the Frog Jump*, 16 TULANE ENVIRO. L.J. 734, 743 (2003); Carmen G. Gonzalez, *Seasons of Resistance: Sustainable Agriculture and Food Security in Cuba*, 16 TULANE ENVIRO. L.J. 685, 695 (2003). On Haitian sugar cultivation, see DOMINICAN REPUBLICAN AND HAITI COUNTRY STUDY, *supra* note 33, at 392.

35. See, e.g.: CIA WORLD FACTBOOK, *supra* note 6 ("The country suffers from marked income inequality; the poorest half of the population receives less than one-fifth of GNP, while the richest 10% enjoys nearly 40% of national income.").

36. Gonzalez, *Seasons of Resistance*, *supra* note 34, at 708.

37. HERNANDO DE SOTO, *THE OTHER PATH: THE ECONOMIC ANSWER TO TERRORISM* 10 (1989) (discussing the changes in Peruvian society as rural peasants migrated to the cities, seeking, education, and stating that "[t]o peasants whose only capital is themselves, education seems a valuable and productive investment"); Elena Brineman, *Sin inversión en educación, la República Dominicana no obtendrá*

Certainly it is true that the Dominican Republic is marked by a comparatively un- to poorly-educated population, with national illiteracy rates at about 18%³⁸ and insufficient basic education.³⁹ In part, at least, this is true because of the legacy of a deeply unequal agricultural economy based on limited products and operated by autocrats and their supporters. It would be regrettable, therefore, if the same model were repeated, as promises to be the case at present, with tourism not controlled just by a small domestic elite but, in a global economy, by members of a global elite.⁴⁰

beneficios del DR-CAFTA, CLAVE DIGITAL, Aug. 18, 2006 (editorial by Director in Dominican Republic of U.S. Agency for International Development arguing that "Without Investments in Education, the Dominican Republic Will Not Obtain Benefits From DR-CAFTA"), available at http://www.clavedigital.com/Economia/Articulo.asp?Id_Articulo=5983 (last accessed Aug. 18, 2006).

38. DOMINICAN REPUBLIC AND HAITI COUNTRY STUDIES, *supra* note 33, at 2 (stating 1997 statistics).

39. *Id.* ("Teaching materials and well-maintained facilities are lacking at every level. Salaries and operational expenses take up most of the education budget, leaving little surplus for additional investment and growth. Various recent estimates about the extent of literacy appear to be unduly high . . . Although there are programs in adult literacy, in 1981 fully one-third of the population more than twenty-five years of age had never attended school; in some rural areas the proportion rose to half of the population.") See also Bethania Apolinar, *Rector Intec dice preocupa deficiencias en estudiantes* (INTEC Rector says he is worried about student deficiencies), LISTIN DIARIO ED. DIGITAL (Mar. 12, 2006), available at <http://www.listin.com.do/antes/marzo06/120306/cuerpos/republica/rep13.htm> (interview with head of country's leading technological university about alleged basic school deficiencies). But see Bethania Apolinar, *Denies There Is Insufficient Investment in Education*, LISTIN DIARIO ED. DIGITAL (Mar. 12, 2006), available at <http://www.listin.com.do/antes/marzo06/120306/cuerpos/republica/rep14.htm> (head of nation's National Education Forum stating contrary position) (both last accessed Apr. 12, 2006).

40. For example, ARGOS, a French resort development firm, is a leading contender to develop the Bahía de los Agüiles, in the Pedernales region. "*La empresa ARGOS aclara que Fontes no es 'socio' del secretario de Turismo, Félix Jiménez*" ("The ARGOS firm explains that Fontes [the firm's President] is not an associate of the Tourism Secretary, Félix Jiménez."). CLAVE DIGITAL (Apr. 12, 2006), available at http://www.clavedigital.com/Portada/Articulo.asp?Id_Articulo=7231# (last accessed Aug. 17, 2006). On the eastern coast (Punta Cana, Bávaro), Spanish hoteliers have the largest share of the tourism market, like the Barceló Hotel Group: <http://www.barcelo.com/BarceloHotels/en-GB/NuestrosHoteles>. The Dominican press is keenly aware of this as yet another form of foreign "invasion." See, e.g., Victor Manuel Tejada, "*Los Nuevos Conquistadores*," RUMBO 42-47, Nov. 12, 1996 (discussing in an article entitled "The New Conquistadors" Spanish tourism developments in the country.); Quiterio Cedeño, "*Los Españoles: Al Asalto de las Playas Dominicanas 500 Años Después*," RUMBO 16-17, Mar. 30, 1994 ("The Spaniards: The Assault on Dominican Beaches 500 Years Later") (same). On possible responses to this phenomenon, see Lisa Mastny, *Redirecting International Tourism*, in STATE OF THE WORLD 2002 103 (Linda Starke ed., 2002).

At a macro level, what this lack of diversity means, too, is that when and if tourism collapses as the preferred economic driver, so too do the nation's fortunes. Put more simply, there is no reason this or any country should set itself up so that tourism becomes the next sugar.⁴¹

2. Distributional Justice Concerns: Privileged Tourism and Environmental Harm

The current state of tourist development in the Dominican Republic also raises serious distributional justice concerns. Specifically, the development poses a range of environmental and land use justice issues.

To understand the crux of this problem, however, it is essential to appreciate the "all-inclusive" tourism model that currently dominates Dominican development of the industry. Tourist development in the Dominican Republic is clustered largely along the northern coast, from Puerto Playa towards the west and Las Terrenas (in the Samaná Peninsula) towards the east, and along the eastern shore, in the stretch that runs north from Punta Cana to Bávaro. There is comparatively little historical tourism, despite the country's rich past. Even compared to a relatively new-to-mass package tourism nation like Cuba, or as compared to Old San Juan, Puerto Rico, for example, relatively few tourists make historic Santo Domingo a mandatory stop on their itinerary, despite the fact that it was the first European colonial capital in the Americas and boasts an array of notable colonial architecture, mostly clustered in the core Colonial Zone, construction of

41. This is not mere rhetorical excess. It merits observing that, in fact, an early "all-inclusive" Dominican resort was established on property owned by the multinational Gulf & Western Corporation, on land that had formerly been cane fields in the control of the South Puerto Rico Sugar Company. See, e.g., Richard Alan Sambrook et al., *Seaside Resort Development in the Dominican Republic*, 12 J. OF CULTURAL GEOGRAPHY 67 (1992). The dangers of monoculture or mono-industry are many. Among the most pernicious effects is the creation of an economically-dependent relationship on the principal investors in the new industry. See Gonzalez, *Seasons of Resistance*, *supra* note 36, at 706-07. For poorer countries, this can have especially deleterious effects for food security. Carmen G. Gonzalez, *Trade Liberalization, Food Security, and the Environment: the Neoliberal Threat to Sustainable Rural Development*, 14 TRANSNAT'L L. & CONTEMP. PROBS. 419 (2004); see Andréa M. O'Ferral, *Tourism and Agriculture on the North Coast of the Dominican Republic*, 113 REVISTA GEOGRÁFICA 171 (1991) (in the Dominican context, reporting mixed results by local agricultural sector in trying to adapt to needs of mass-tourism resorts).

which was begun by Christopher Columbus and his family.⁴² Similarly, despite an intriguing and extensive footprint left by the indigenous Taino inhabitants of the island, this is not a major feature of most of the country's tourist marketing.⁴³

Instead, Dominican tourism is "inclusive" for the traveler. That is, most tourists arrive at a local airport and are whisked to their resorts by dedicated buses. The resorts provide a range of services and amenities – restaurants, shops, and recreational activities. By design, they are meant to look like a picture-postcard version of a Caribbean vacation: sun, sand, beach chairs, aquamarine waters and swaying coconut palms. The foreign visitor thus has virtually no need to leave the resort, and, indeed, most expect not to do so as they pay a single fee which includes everything from their airfare to abundant bar drinks.⁴⁴ In short, the all-inclusive Dominican resort is, in style and design, more like a cruise ship than anything else – one moored to the scenic shores of the island nation.

As a result, the majority of such travelers have little or no contact with Dominican life or culture unless they engage in a chat with a check-in clerk, maid, waitperson or groundskeeper. The restaurants typically feature "international" fare – food available everywhere and from nowhere in particular. The stalwarts of the Dominican diet – the plantain or bean and meat stew called *sancocho*, the onion-enriched plantain paste known as *mangú* or the pork-filled balls of cooked tubers known as *mofongo* – these are rarely, if ever, seen on the all-inclusive steam table, which is more likely to have a pasta bar, if not also a sushi counter. The recreational activities may feature some lessons in dancing to the distinctive and rich local musical beats bred on the island – *merengue* and *bachata* – but are equally likely to offer a taste of such non-local traditions like *flamenco* and *tango*. Thus, although the resorts may celebrate something stereotypically "Latin," it is not

42. SEAN HARVEY, *THE ROUGH GUIDE TO THE DOMINICAN REPUBLIC* 71-80 (2002).

43. Although one study indicated that this would have a strong appeal for many tourists. Leida Mercado & James P. Lassoie, *Assessing Tourists' Preferences for Recreational and Environmental Management Programs Central to the Sustainable Development of a Tourism Area in the Dominican Republic*, 4 ENV'T DEV. & SUSTAINABILITY 253, 261 (2002) (reporting results of survey in which "[m]arine life and Taíno cultural exhibits received the highest rating of interest").

44. For an academic description of the cloistered nature of this tourist experience see, for example, Sambrook et al., *supra* note 41, at 65 (describing pattern of creating "self-contained, semi-insular/interactive enclaves and integrated domestic/international resorts").

an image of culture, tradition, or resources tied to a distinctive place.

These details matter because they are telling as to the concept: the all-inclusive resort is about maximizing return and not about sharing and informing the visitor about Dominican reality. This choice has consequences for environmental protection.

Specifically, where the foreign traveler is included, Dominicans are largely excluded, leading to considerable land and environmental resource distribution disparities. First, Dominicans are denied access to their own beaches. Although an early law enacted during the Trujillo dictatorship declares that 60 meters of all beaches in the coasts of the seas, lakes and lagoons are open to the public,⁴⁵ recent tourist development has flouted this requirement. This exclusion is achieved in various ways. Some are more obvious and threatening, with owners erecting "a wall, a rope, a sign or security guards who inform 'entrance forbidden, this is private property.'"⁴⁶ In other cases, the exclusion is achieved less ostentatiously: the citizen cannot seek to get near the beaches because he is prevented by iron gates that delimit the property, strategically located at some distance from the coast.⁴⁷

Moreover, the law further requires that hotel developments permit citizens beach access. However, this provision, too, is honored far more in the breach than in the observance. By some estimates, as much as 70% of Dominican beaches are closed to the nation's public.⁴⁸ Although the intellectual and environmental elites regularly protest this phenomenon,⁴⁹ it continues, sometimes with presidential approval.⁵⁰ Clearly, if the environmental

45. Law 1474 of 1938, as modified by Law 305 of 1969.

46. "...colocan un muro, una cuerda, un letrero o agentes de seguridad que informan: 'no puede pasar, esto es propiedad privada'. *Nuestras playas son 'Propiedad Privada': En por lo menos un 70% de las playas, los dominicanos no pueden pasar, si no pagan un hotel* ('Our beaches are Private Property: in at least 70% of the beaches, Dominicans cannot pass if they do not pay a hotel'), DIARIO LIBRE ONLINE, Apr. 4, 2006. Available at <http://www.diariolibre.com/app/article.aspx?id=62671> (last accessed Oct. 14, 2007).

47. *Id.* ("En otros casos el ciudadano no logra siquiera aproximarse a las playas, porque se lo impiden las kilométricas verjas que delimitan la propiedad, estratégicamente colocadas a todo lo largo de la costa.").

48. *Id.* (reporting the rapid 'privitization' of Dominican beaches without legal authority); *Turismo hará senderos para entrar a las playas*, DIARIO LIBRE ONLINE, Apr. 3, 2006 (reporting the 70% exclusion figure).

49. Miguel Ceara-Hatton, *Inacceptable* ("Unacceptable"), CLAVE, Apr. 13, 2006 (lamenting that the exclusion of Dominicans from their own beaches is not even a subject of the electoral campaign)(editorial in print edition, on file with author).

50. See, *infra* note 51 and accompanying text.

and land use justice movements teach anything, it is that a disciplined effort must be undertaken to distribute equitably both the environmental burdens and the benefits of environmental resources.⁵¹ Surely, therefore, beaches and their access must be considered a central aim of Dominican environmental and land use justice.

The story does not stop, however, at beach access. One of the unresolved challenges of Dominican Protected Areas legislation and its effective implementation is the problem of lands traditionally owned or used within the limits of what became Protected Areas. Many of the people who inhabit these lands are members of families that have been there for generations, mostly as subsistence farmers cultivating various types of tubers and other vegetables.⁵² Environmental justice principles demand that their concerns be respected and worked into management plans for Protected Areas. At the same time, this is likely to prove enormously complicated. Anecdotal evidence from federal prosecutors suggests that some opportunistic businessmen have tried to stake claims to the status of traditional cultivators as a way of sidestepping the Protected Areas laws.⁵³ Simultaneously, some – including local politicians eager to see their communities cash in on the tourist bonanza – are challenging the integrity of these claims to lands within Protected Areas.⁵⁴ It can only be hoped that the needs of this relatively resource-poor population be taken into account as Protected Areas legislation is enforced. That is, Protected Areas legislation need not be used as a sword against the most defenseless in an effort to “clean up” protected areas, only to make way for large scale tourist development.

51. Admittedly, however, “environmental justice” means different things to different people. On the varieties of uses of the term “environmental justice,” see Robert R. Kuehn, *A Taxonomy of Environmental Justice*, 30 ENVTL. L. REP. 10,681 (2000).

52. For example, in the northern Dominican Republic, the area of Los Haitises, now the site of a national park, the definition of the boundaries was problematic because of historical uses of the land by, among other, peasants growing subsistence crops and cattle farmers. Moya Pons, *DOCTRINA Y POLÍTICA*, *supra* note 20, at 428-30.

53. This claim was advanced to the author by a former prosecutor, Lic. Euren Cuevas Medina (March 22, 2006).

54. Moya Pons, *DOCTRINA Y POLÍTICA* *supra* note 20, at 424-25; *see also id.*, *Eco-turismo, Recursos Naturales y Medio Ambiente* 411-15 (explaining the necessity for tourism to develop within a conservationist framework).

3. Long Term Environmental Damage

The prevailing model of Dominican tourism also has several negative results for protecting environmentally sensitive areas. First, it promotes activities that flout the 60 meter requirement, and, as will be explained below, with explicit approval of national authorities. It merits noting that the 60 meter requirement exists to further democratic principles – use by all – but also serves to protect against erosion that can result from excessive pressure and development on beaches.⁵⁵ Second, it creates a false impression of private beach ownership. This is dangerous because those who view property – even public property – as their own tend to use it as they wish, without considering the connection of beaches, in this instance, to the larger environment of which they are a part.⁵⁶ This possibility may be particularly likely in a country like the Dominican Republic, where an absence of capital in-country makes the island an attractive investment for foreign interests – principally from the U.S., France and Spain.⁵⁷ Of course foreign corporate citizenship does not mean that an entity is unconcerned about the local environment per se. But it may be a fair assumption that the drive for environmental protection is less intense than it is in the entities' actual backyards.

Third, that the Dominican tourism model is focused on sun and sand tourism – nearly to the exclusion of all else – may work to segregate environmental resources so that coastal resources are not regulated and managed as part of a larger whole. One of the principles of Protected Areas legislation is, after all, the recognition that environments need to be managed and protected as a sum of many parts, rather than protecting individual aspects of the whole. In the Dominican context, this has implications for turtle habitat (since they lay eggs on beaches and sometimes traverse land to get to them), indigenous iguanas, and marine mammals such as manatees, dolphins and whales.⁵⁸ Fourth, the Dominican tourism model also threatens the integrity of vital coastal resources like mangroves, which serve an essential medi-

55. See, e.g., Daniel Suman, *Status of Mangroves in Latin America and the Caribbean Basin*, in *EL ECOSISTEMA DE MANGLAR EN AMERICA LATINA Y LA CUENCA DEL CARIBE: SU MANEJO Y CONSERVACION* 11 (Daniel Suman ed., 1994).

56. This, of course, is a familiar example of the "tragedy of the commons." See Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243 (1968).

57. See *supra* notes 7, 41, and 42.

58. Felecita Heredia L., *Manejo Integrado de Costas (Planificación y Conservación)*, in 1 *VERDER* 55 (2005) (identifying special needs for marine mammal protection in the Dominican Republic).

ating function between salt and freshwater, can filter huge volumes of dirty water, are home to multiple species, and serve as barriers against hurricane and other coastal disasters.⁵⁹ The tendency throughout the Caribbean, southeastern United States, and Central America has been to sacrifice mangroves in the push for more sand-grabbing tourism.⁶⁰ Fifth, this model of tourism appears more focused on short term financial returns than on long term environmental sustainability. This is evident in numerous ways, large and small. For example, resort plantings typically feature a range of tropical plants but not necessarily indigenous plants, without concern to the long term impact of introduced species. More seriously, the resorts make excessive demands on water and electricity in a country that has serious supply problems with both.⁶¹ Surely, this calls into question the sustainability of the current Dominican tourist model.

4. Social Consequences of Environmental Damage

Social consequences also flow from ill-considered environmental management (and from poorly enforced environmental laws). They are many and are often serious. The first and most obvious such consequence is also distributional in nature. The need to deliver tourists a steady supply of water, wastewater services and electricity can overburden the existing, poorly served Dominican infrastructure. In a country where only 49% of the population has interior potable water connections⁶² (to say nothing of the poor quality of the water when delivered),⁶³ where only 27% of the residents of Santo Domingo, have wastewater connections⁶⁴

59. Carlos Muñoz Piña, *Guía rápida para estimar el valor monetario de los beneficios ecológicos de los manglares*, in *EL ECOSISTEMA DE MANGLAR EN AMERICA LATINA Y LA CUENCA DEL CARIBE: SU MANEJO Y CONSERVACION*, *supra* note 55, at 238-42.

60. See *EL ECOSISTEMA DE MANGLAR EN AMERICA LATINA Y LA CUENCA DEL CARIBE: SU MANEJO Y CONSERVACION*, *supra* note 55.

61. On the water shortages and water infrastructure inadequacies, see WORLD BANK CARIBBEAN COUNTRY MANAGEMENT UNIT, DOMINICAN REPUBLIC ENVIRONMENTAL PRIORITIES AND STRATEGIC OPTIONS: COUNTRY ENVIRONMENTAL ANALYSIS 3, Table 1.2 (2004) [hereinafter WORLD BANK, DOMINICAN ENVIRONMENTAL PRIORITIES].

62. *Id.* at 3, Secs. 3.11-3.15.

63. Yolanda León, *Ch. 3, Estado del Medio Ambiente*, GEO SANTO DOMINGO 8, Sec. 1.2.3 (draft 2006) (reporting high levels of bacterial contamination in surface and ground waters, as reported in different studies) (copy on file with author).

64. *Id.* at 1.2.3.(a). Because of inadequate or poorly-functioning wastewater infrastructure in the country, for example, hotels and resorts operate half of the waste-

and where rolling electricity blackouts are common,⁶⁵ this is no small matter. A corollary of this is the question of future supply. Given these deficiencies, real questions exist about the long term ability of Dominican tourism to be self-sustaining, particularly with respect to the provision of potable water.⁶⁶

This concern extends as well into other areas. For instance, some studies indicate that with the construction of resorts, "local demand [for food] outstrips supply, particularly in the case of seafood."⁶⁷ A possible consequence of these shortages appears to be that, in the long term, "[t]he expense of stimulating local supply, and aiding local suppliers may be prohibitively high, and in the final analysis, the tourism industry in the Dominican Republic may become less closely linked with the agricultural sector instead of more, as seen many times in the Caribbean."⁶⁸

A second and related concern flows from this distributional inequity, and that is the potential for social unrest. This is not the prediction of an armchair Cassandra. In March 2006, along the northern coast's most famous stretch of tourist development, residents of local communities stopped seven buses packed with British and Canadian tourists en route to their destination. The residents protested the fact that the tourist taxes benefited only the National Parks Agency, and not the municipalities that the parks depended upon for basic services, including labor. The principal demands behind the 48 hour protest, which was conducted with the support of municipal authorities, were to demand the repair of a local highway and the provision of potable water.⁶⁹

A third area of concern relates to the nature of the communities that build up around these developments. Naturally enough, in a country with chronic unemployment, these resorts become

water treatment plants. And they do so for themselves and their guests only. Mercado & Lassoie, *supra* note 43, at 254.

65. The electricity shortage is a subject that yields news reports virtually daily. See, e.g., *Crisis Energía: Presidente advierte que todos los sectores deben pagar la electricidad* ("President warns that all sectors must pay electric bills") CLAVE DIGITAL (Aug. 17, 2006), available at http://www.clavedigital.com/Economia/Articulo.asp?Id_Articulo=6004.

66. WORLD BANK, DOMINICAN ENVIRONMENTAL PRIORITIES, *supra* note 61, at 10-13 (explaining, *inter alia*, that there is "little water to meet future demands in certain regions.").

67. O'Ferral, *supra* note 41, at 175.

68. *Id.* at 190.

69. See, e.g., Manuel Gilbert & Richard Santana, *Las Protestas se extienden por Puerto Plata y Línea Noroeste*, LISTIN DIARIO, Mar. 25, 2006, at 6.

magnets for employment, in both the formal and informal economy. This is true in the Dominican Republic, where the resorts of the northern and eastern coasts attract high levels of internal immigrants.⁷⁰ As in any place where a suddenly heterogeneous group of people with relatively few resources are thrown together, available evidence indicates that the towns serving the resorts register increased rates of petty property and other crimes.⁷¹ This is true in Verá, for example, a town virtually formed by the developments along the eastern coast in Bávaro.⁷² In addition, monitoring indicates high levels of prostitution and other forms of sexual tourism.⁷³

The question with all of these social effects, as with the long term environmental and distributional justice consequences of the current model of Dominican tourism, is whether more thoughtful environmental management (and not just thoughtful environmental laws, which the Dominican Republic has in abundance, as seen below) can help avoid them. Providing that the country and its international partners, both private and public, are prepared to support a different model, one that endorses a redistribution of resources, the answer to that question is a resounding "yes." This article will now turn to a consideration of the current laws related to environmental protection and their relation to the push for tourist development. Following the analysis of relevant laws, the article will consider how the laws and their application might be strengthened.

III.

LEGAL REGULATION AFFECTING DOMINICAN PROTECTED AREAS

This Part will first describe the existing framework for protecting environmentally-valuable areas in the Dominican Republic. In doing so, Part III will also highlight some conflicts in the law and problems in its enforcement. This Part will next look at the global regulation of such areas, discussing briefly international instruments adopted or opened for adoption since the 1992 Earth Summit. Part III will conclude by looking at the environmental

70. O'Ferral, *supra* note 41, at 186 (describing instability of internal migratory employment related to agricultural work serving tourist sector).

71. See Sambrook et al., *supra* note 41, at 72.

72. Interview with Dr. Yolanda León, Mar. 26, 2006.

73. See, e.g., MARIVÍ ARREGUI, EL IMPACTO DEL TURISMO EN LA VIDA DE BOCA CHICA 23 (2001) (copy on file with author).

provisions and larger implications of the Dominican Republic-Central American Free Trade Agreement (DR-CAFTA), which the Dominican Republic has ratified.⁷⁴

A. *Dominican Law and Policy of Protected Areas*

The extensive Dominican system of protected areas, covering around 19% of the national territory,⁷⁵ takes its cue from the categories and standards developed and refined by the International Union for the Conservation of Nature (IUCN), from 1978-92.⁷⁶ The IUCN taxonomy identifies six possible categories of protected area, embracing a wide range of possible social, economic and cultural aspects. IUCN Category I affords the highest possible degree of protection for scientific research and demands a minimum of human intervention. Category II refers to national parks, whether merited for environmental protection or for human use and enjoyment over time. Category III protects national monuments and, specifically, "areas that may contain one or more natural, specific features that may have an outstanding or unique value, owing to their intrinsic rarity, their representative aesthetic qualities or cultural significance."⁷⁷ Category IV protects wildlife habitat. Category V provides for the protection of land or marine landscapes. As with Category II, the possible value of such landscapes is broadly defined to embrace places of "aesthetic, cultural and/or ecological significance and often places of high biological diversity."⁷⁸ Finally, Category VI is the broadest and allows for the greatest degree of human interference, covering:

74. The U.S. Congress approved CAFTA in late July, 2005. It was signed by President Bush on August 2, 2005. <http://www.whitehouse.gov/news/releases/2005/08/20050802-2.html>. Like most signatory countries, the Dominican Republic ratified it before the President's signing. Office of the U.S. Trade Representative, *Statement of USTR Spokesman Stephen Norton Regarding CAFTA-DR Implementation, available at* http://www.ustr.gov/Document_Library/Press_Releases/2005/December/Statement_of_USTR_Spokesman_Stephen_Norton_Regarding_CAFTA-DR_Implementation.html (last accessed Aug. 18, 2006).

75. MOYA PONS, *MANUAL*, *supra* note 3, at 365 ("Nosotros hemos heredado un conjunto de áreas protegidas que cubren alrededor de un 19 por ciento del territorio nacional.").

76. Eco-Hispanola, <http://www.marcano.freesevers.com/areas/uicn.html> (last accessed Apr. 4, 2006).

77. "Área que contiene una o más características naturales o naturales/culturales específicas de valor destacado o excepcional por su rareza implícita, sus calidades representativas o estéticas o por importancia cultural." *Id.*

78. *Id.* ("estéticos, ecológicos y/o culturales, y que a menudo alberga una rica diversidad biológica.").

areas that contain some natural, unmodified or lightly modified systems, managed to assure the protection in the long term and the maintenance (or motive for development) of biological diversity, while providing, at the same time, a sustainable flow of natural products and services for the satisfaction of the needs of human populations.⁷⁹

Dominican law loosely tracks these categories, although with considerable elaboration and refinement, revealing the complexity of this subject in the context of the island nation's rich environment. Moreover, it merits noting that even before the more systematic regulation of protected areas described below, Dominican law had over several decades evolved a detailed taxonomy for legal protection of environmentally sensitive species and spaces. The megalomaniacal dictator Rafael Trujillo, whose brutal rule lasted from 1930-61, decreed in 1957 that the flower of the mahogany tree be protected, as the indigenous tree most appreciated in the nation for its beauty and utility.⁸⁰ Even more significantly, it deserves remembering that by 1991 – a year *before* the Earth Summit – the nation counted eight national parks, six national scientific reserves, two national historic parks, one national marine park, one panoramic view, one marine mammal sanctuary, and one natural monument – in other words, 19 protected areas grouped into seven different management categories.⁸¹

1. Framework Law 64/00

The Republic's framework environmental law is Law 64 of 2000 (Law 64/00). Few current environmental questions can be addressed within the territory without reference to Law 64. Law 64 is a broad, comprehensive piece of legislation affecting nearly

79. "Área que contiene predominantemente sistemas naturales no modificados, que es objeto de actividades de manejo para garantizar la protección y el mantenimiento de la diversidad biológica a largo plazo, y proporcionar al mismo tiempo un flujo sostenible de productos naturales y servicios para satisfacer las necesidades de la comunidad." *Id.*

80. Decree Law 2944 of 1957. See <http://www.marcano.freeseervers.com/legales/flornac.html> (last accessed Apr. 11, 2006). The law was signed by his brother, Héctor, the titular President of the Republic, although for all intents and purposes Rafael Trujillo governed.

81. Ing. Eleuterio Martínez, *Fundamentos de las categorías de manejo de las áreas protegidas de la República Dominicana*, in COMPENDIO Y RESULTADOS PRIMER SEMINARIO NACIONAL ÁREAS PROTEGIDAS EN REPUBLICA DOMINICANA 49-51 (Ing. Gabriel Valdez Sierra & Agrón. José M.I. Mateo Félix eds., n.d.) (reporting the results of a 1991 conference on the subject).

every aspect of environmental protection, from resource conservation to air and water pollution control, to the regulation of solid and toxic wastes. Law 64/00 evidences a considerable debt to the principles endorsed by the world community in Rio de Janeiro in 1992, from the emphasis on environment as a function of "sustainable development"⁸² to a version of the precautionary principle.⁸³

For purposes of this article, however, what matters is the elevated status the law creates for protected areas. Notably, in the law's equivalent of the introductory "whereas" clauses in a U.S. statute, which set out the intentions behind the statute, the third of fifteen such clauses articulates the importance of ecosystem protection⁸⁴ and the following, fourth such clause stresses the importance of biological diversity: "CONSIDERING: that natural resources and biological diversity are the base for the sustenance of present and future generations, for which it is urgent that the Dominican State apply an environmental and natural resource policy that will guarantee sustainable use."⁸⁵ Clearly, biodiversity protection figured prominently in the drafters' conception of the statute's purpose.

82. See, e.g., Tit. I, Cap. I, Arts. 3, 5, and 7.

83. "The prevention criterion shall prevail above any other in the public and private management of the environment and natural resources. The lack of absolute scientific certainty shall not be claimed as a reason not to adopt preventative and efficient measures in all activities that negatively impact the environment, in conformity with the precautionary principle." *Id.* at Art. 8. ("El criterio de prevención prevalecerá sobre cualquier otro en la gestión pública y privada del medio ambiente y los recursos naturales. No podrá alegarse la falta de una certeza científica absoluta como razón para no adoptar medidas preventivas y eficaces en todas las actividades que impacten negativamente el medio ambiente, conforme al principio de precaución."). The Dominican law also has a historical antecedent, the Law of 1974, which established the original system of protected areas under the direction of the Dominican national park service. See Eco-Hispanola, <http://www.marcano.freesevers.com/legales/ley67.html> (last accessed Apr. 5, 2006).

84. "CONSIDERING: that the protection, conservation and sustainable use of the various ecosystems that constitute the natural and cultural patrimony of the Dominican nation and of the native species of flora and fauna, endemic and migratory, that are a fundamental part of them is of vital importance . . ." Law 64/00, Intro. para. 3 (copy on file with author) ("CONSIDERANDO: que es de vital importancia la protección, conservación y uso sostenible de los variados ecosistemas que componen el patrimonio natural y cultural de la nación dominicana y de las especies de flora y fauna nativas, endémicas y migratorias, que son parte fundamental de ellos . . .").

85. "CONSIDERANDO: Que los recursos naturales y la diversidad biológica son la base para el sustento de las generaciones presentes y futuras, por lo que es de urgencia que el Estado Dominicano aplique una política de medio ambiente y recursos naturales que garantice un desarrollo sostenible." Law 64/00 Intro para. 4 (copy on file with author).

This intention is clearly evident in the law's actual text, which directs that the objectives of the law include the goal "to strengthen the National System of Protected Areas to guarantee biological and landscape diversity."⁸⁶ This goal is given concrete expression in the law's creation of one of five State sub-secretaries devoted expressly to protected areas and biodiversity.⁸⁷ In turn, the Sub-secretariat is charged in a separate chapter of the law with the creation of "a national system of protected areas that includes all of the areas of this character, existing now or in the future, public or private."⁸⁸ The Sub-secretariat must in turn take into account an ambitious (and potentially contradictory) range of concerns in defining the protected areas, from ecosystem preservation and protection of water resources and "promoting recreational activities and tourism together with nature" to favoring environmental education, scientific education and ecosystem study.⁸⁹ These objectives conclude, moreover, with a requirement that "the management and care [*vigilancia* – care in the sense of physical security] of protected areas obligatorily must be the foundation of management plans."⁹⁰ This focus on physical protection – *vigilancia* – is noteworthy and impressive since, as detailed later in this article, such enforcement is one of the most problematic aspects related to protected area oversight.⁹¹ The law further provides for the creation of dozens of protected areas, incorporating most areas to that point so designated.⁹²

Finally, the framework law states five objectives to be pursued in the creation of protected areas. They are of interest both for their breadth and ambition and for their potential to ignite controversy. For example, the first objective is that protected areas shall be to "save, identify, conserve, and use" the areas in con-

86. "Fortalecer el Sistema Nacional de Áreas Protegidas para garantizar la diversidad biológica y paisajística." Law 64/00 Tit. I Cap. II, Art. 15(4).

87. *Id.* at Tit. I, Cap. IV., Sec. II, Art 20(4).

88. "Se crea el sistema nacional de áreas protegidas, que comprende todas las áreas de ese carácter, existentes y que se creen en el futuro, públicas o privadas." Tit. II, Cap. III Art. 33.

89. "Promover las actividades recreativas y de turismo en convivencia con la naturaleza." Art. 33(5).

90. "La gestión y vigilancia de todas las áreas protegidas, se debe hacer obligatoriamente bajo planes de manejo." Art. 33, Párrafo.

91. See *infra* Section II.(B-D).

92. Art. 34.

formity with their designation.⁹³ By virtue of the inherent tension between “saving” and “conserving” – to say nothing of the generality of “use” – this provision is an invitation to conflict, paralleling the celebrated tension in U.S. environmental law between “preservationists” (savers) and “conservationists” (users).⁹⁴

The next objective presents even more potential for conflict, with its directive to “maintain in a natural state representative samples of biotic, life zones, physiographic regions, biogeographic unities, genetic resources and species of threatened wildlife, in danger or in the process of extinction . . .” Aside from the problematic use of “natural state,” as if that were a term with a broadly agreed definition,⁹⁵ so far, so good. But what follows reveals the potential minefield laid by this ambitious law, explaining that this diversity shall be sought so as “to facilitate scientific investigation, maintenance of biological diversity, to assure ecologic stability, promote recreational activities and sustainable tourism and to assist [with] environmental education, scientific investigation and ecosystem study.”⁹⁶ Well, those are fighting words.

In the Dominican context, this language presents a potentially irresolvable conflict, with its emphasis on preservationist activities (scientific investigation, biodiversity, “ecologic stability”) and its promotion of “recreational activities” in the first instance and then “sustainable tourism.” Leaving aside the question of what kind of tourism is “sustainable,”⁹⁷ the first – preservationist – set of goals are set on a collision course with using environmental resources to develop recreational opportunities in a country desperate for economic development. The appeal of tourist de-

93. Art. 35 (1). See also the third objective, which directs promotion and encouragement of all of conservation, restoration and sustainable use of natural resources. Art. 35 (3).

94. See, e.g., ROBERT V. PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 11-17 (2000) (discussing the various ideological strains in U.S. environmentalism).

95. On the inherent difficulty of defining “nature” and the conflicts raised by that definition, see, for example, PAUL W. TAYLOR, RESPECT FOR NATURE: A THEORY OF ENVIRONMENTAL ETHICS (1986), which discusses, *inter alia*, the consequences for our understanding of what constitutes nature if one adopts a bio-centric as opposed to an anthropocentric environmental ethic.

96. Art. 35 (2).

97. DANIEL A. FARBER ET AL., CASES AND MATERIALS ON ENVIRONMENTAL LAW 32 (7th ed. 2006) (“The literature attempting to define what sustainable development means and how to implement it as a coordinating principle is vast and burgeoning.”).

velopment – and fast – cannot be underestimated in a nation where the estimated per capita gross domestic product is \$7,000 a year, 25% of the population lives below the poverty rate, the unemployment rate is 17%, and the public debt is estimated at 46% of the gross domestic product.⁹⁸

In sum, while there is much to laud in the Dominican framework law with respect to the protected area provisions, there are ambiguities in the law that are red meat to enterprising hotel and recreational tourism ventures.

2. Sectoral Law for Protected Areas

As is typical under civil law, the framework environmental law was subsequently followed by a “*ley sectorial*,” a more specific law directed to that sector of the nation’s activity. Specifically, four years after enacting the framework law, the Dominican Congress enacted Law 202 of 2004 (202/04), a sectoral law that deals specifically with protected areas. A sectoral law is basically like a cross between a U.S. statute and a U.S. regulation, because it contains more detailed provisions than the typical U.S. statute. In the case of Law 202/04, the law actually creates 68 different protected areas, including six scientific reserves, two marine mammal sanctuaries, 25 national parks (including, for example, specialty national parks like the Wetlands of the Río Ozama National Park), three marine parks, sixteen natural monuments, thirteen wildlife refuges, seven panoramic views and one national recreation area. In each case, the Congressionally-approved law specifies the exact cartographic limits and territorial dimensions of the protected areas.⁹⁹

Like Law 64/00, Law 202/04 is ambitious in its scope and effect. Although it endorses a distinctly anthropocentric vision of environmental protection,¹⁰⁰ it also repeats the intergenerational equity principle twice in its statement of principles.¹⁰¹ This

98. CIA WORLD FACTBOOK, *supra* note 6.

99. Law 202/04, Tit. V.

100. “It is declared that the human being is the principal being that must be protected in nature and at the same time, the right of present and future of Dominicans to the benefit and the product of the environmental goods and services that ecosystems and existing species bring to them is recognized.” Law 202/04, Tit. I, Cap. 2, Art. 1, Principio 1 (“Se declara que el ser humano es el principal ente que debe ser protegido en la naturaleza y en concurrencia, se reconoce el derecho de la presente y las futuras generaciones de dominicanos al beneficio y al producto de los bienes y servicios ambientales que le puedan brindar los ecosistemas y las especies existentes.”).

101. Principio 1, *supra*, and Principio 2.

emphasis on intergenerational equity reveals, once again, an endorsement of the precautionary approach that acquired global popularity at the Earth Summit.¹⁰² In terms of their potential for conflict, the third, fourth and fifth principles of Law 202/04 are the most controversial. The law's third principle recognizes that protected areas serve multiple aims and have "decisive environmental, economic and strategic importance in the development of the country."¹⁰³

Of these terms, the only one defined in the law is "conservation." Under Law 202/04, "conservation" promotes the "actions that will permit the maintenance of [the conservation area] in its natural state or that will make possible the recuperation of natural ecosystems to assure productive, recreational or sustainable preservation activities that in the long term will not result in irrevocable or irreversible alterations in ecosystems or the environment."¹⁰⁴ This definition is internally contradictory because, the possible demands of "recreational activities" may well be at odds with "sustainable preservation activities," especially in the age of mass tourism. Moreover, it is difficult to see how a "recuperated" conservation unit can be made to "assure" all of those activities; this is a difficult task to accomplish. As if to make this task even greater, the fourth principle states that the law is designed to guarantee that both the State and private owners will see to it that protected areas will be used *both* in a "sustainable form" and in service of the nation's "economic development." In the hands of an ambitious developer, that statutory language invites manipulation and, if the healthy growth of Dominican tourism continues – about 5% a year in recent

102. The notion of "inter-generational equity" was articulated in Principle 3 of the Rio Declaration on Environment and Development. See DOCUMENTS IN INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 9, at 19.

103. Principio 3: The conservation units that constitute the National System of Protected Areas have decisive environmental, economic and strategic importance in the development of the country." ("Las unidades de conservación que conforman el Sistema Nacional de Áreas Protegidas tienen importancia decisiva, ambiental, económica y estratégica para el desarrollo del país.").

104. Tit. I, Cap. I, Art. 2: "Es el conjunto de acciones que permiten mantener en su estado natural o que tienden a la recuperación de los ecosistemas naturales para asegurar actividades productivas, recreativas o de preservación sostenibles que en el largo plazo no signifiquen alteraciones irrecuperables o irreversibles en los ecosistemas o el ambiente."

years¹⁰⁵ – the forces of “economic development” are likely to take the upper hand.

Later in its text, the Protected Areas law directs more aggressive environmental protection, although again not without potential for conflict with rapid economic ends. For example, the Law states: “the use of environmental services in Protected Areas, their conservation and sustainable use, must be incorporated in the sectoral and inter-sectoral national plans, programs, activities and strategies for their effects so as to integrate them in the process of development in the country.”¹⁰⁶ Furthermore, the law provides “criteria for the application of the present law” that “all types of use of and benefit from natural resources within Protected Areas, be they public or private, must be incorporated into a specific Management Plan for each area and its operative plans, and must be related in the respective environmental evaluation [to which] it corresponds.”¹⁰⁷

Despite its environmental protectionist stance, Law 202/04 does not provide a framework for resolving the conflicts generated by economic development’s potential for development degradation of environmental quality. The law requires that:

[H]uman activities in Protected Areas, *in particular those related to research and tourism, must adjust themselves* to the scientific-technical norms released by the Environment and Natural Resources Ministry and other competent public authorities, to guarantee the maintenance of vital ecological processes and to assure their permanence and sustainability.¹⁰⁸

105. The Central Bank reports that the country had 3,088,247 foreign visitors in 2005; 2,872,891 in 2004; and 2,758,500 in 2003, *available at*: http://www.bancentral.gov.do/estadisticas.asp?a=Sector_Turismo (last accessed Apr.6, 2006).

106. “Son criterios para aplicar la presente Ley . . . El aprovechamiento de los servicios ambientales de las Áreas Protegidas, su conservación y uso sostenible, deberán incorporarse a los planes, los programas, las actividades y estrategias sectoriales e intersectoriales nacionales para los efectos de que se integren al proceso de desarrollo del país.” Art. V(3)

107. “Son criterios para aplicar la presente Ley . . . Todo tipo de uso y aprovechamiento de los recursos naturales dentro de las Áreas Protegidas, sea público o privado, deberá estar incorporado en el Plan de Manejo específico a cada área y a sus planes operativos, y deberá contar con la respectiva evaluación ambiental cuando corresponda.” Art. V(4).

108. “Las actividades humanas en las Áreas Protegidas, en particular aquellas relacionadas con la investigación y el turismo, deberán ajustarse a las normas científico-técnicas emitidas por la Secretaría de Medio Ambiente y Recursos Naturales y las demás entidades públicas competentes, para garantizar el mantenimiento de los procesos ecológicos vitales y asegurar la permanencia y sostenibilidad de las mismas.” Art. V(7) (emphasis added in article text).

Nonetheless, an internal governmental conflict between the Environment and Natural Resources Ministry and Tourism Ministry regarding the island's tourism development is widely recognized,¹⁰⁹ with the Tourism Ministry appearing to have the upper hand. As a result, it difficult to predict how this and other, similar provisions of the Protected Areas law will be applied.

In addition, two other points merit discussion in the context of this article. First, the Protected Areas law states that "the maintenance of vital ecological processes is a *right* of the State and of the citizens."¹¹⁰ The declaration of a right demands attention, not least because it appears unqualified in this provision. In a subsequent provision, however, the law also states that persons with "lands in private ownership with a title to land legally registered"¹¹¹ shall have the rights to have those titles recognized as valid. Under most approaches to statutory interpretation, this is unproblematic: the specific controls the general, and so the titles trump the right of the State and its citizens to the protection of these "vital ecological processes." However, as in any legal system, where land is at stake, people will go to extreme measures to try and assure their claims. As a result, for example, a current feature of the effort to develop the relatively untouched and Protected Areas of the southwestern Dominican Republic is a dispute over titles to land granted by now disgraced national governments.¹¹²

Second, the law contemplates enforcement not only by Dominican legal authorities, but also by a wide range of actors, both public and private, inside and outside of the country. Specifically, the law states that one of its objectives is to "foster international and regional cooperation for the achievement of conservation, sustainable ecological use and the distribution of benefits derived in the creation and management of Protected Areas, of biodiversity, especially in frontier areas and in shared

109. See *infra* Sec. II(A)(3).

110. "El mantenimiento de los procesos ecológicos vitales es un deber del Estado y los ciudadanos." Art. 8 (emphasis added in article text).

111. "Los terrenos de dominio privado con título de propiedad inscrito legalmente . . ." Art. 9.

112. See *Apoyando el desarrollo de Pedernales y la región* ("Supporting the Development of Pedernales and the Region"), LISTIN DIARIO, Mar. 31, 2006, p. 14, col. 1 (open letter to the President of the Republic supporting touristic development of country's southwestern beaches, including resolution of longstanding title disputes caused by previous governments).

resources.”¹¹³ Later, in the portion of the law devoted to administration, it explains that:

[p]ublic sector institutions, non-governmental organizations, grass-roots organizations and legal persons, whether [Dominican] nationals or strangers and international [persons], shall be considered eligible to execute management, co-management and service administration agreements in Protected Areas always in accord with the regulation and other norms of the present law.¹¹⁴

The very next provision allows the Environment and Natural Resources Secretary to impose entrance fees as well as “rates for services, patents, licenses, permits, and the sale and charges for environmental services.”¹¹⁵ This fee provision suggests that the drafters recognized that biodiversity is exploitable for financial gain, especially with regard to multinationals based outside the island in areas such as tourism, pharmaceuticals and biotechnology. It should be observed, too, that of the five broad categories of Protected Area listed in the law, all of them, including the first such category, the Strict Protection Area, permit some form of tourism.¹¹⁶

Finally, with respect to the sectoral law, it bears noting that the law’s sanctions are draconian, ranging from a minimum fine of 10,000 minimum salaries to the closure of the offending enterprise.¹¹⁷

3. Sectoral Law for Biodiversity Protection

In addition, in 2002 the Dominican Congress enacted Law 10, a sectoral law devoted to Biodiversity Protection. Like its companions Law 64/00 and Law 202/04, discussed above, Law 10/02 is ambitious in its scope. Law 10/02 makes general exhortations

113. “Fomentar la cooperación internacional y regional para alcanzar la conservación, el uso ecológicamente sostenible y la distribución de beneficios derivados de la creación y manejo de Áreas Protegidas, de la biodiversidad, especialmente en áreas fronterizas o de recursos compartidos.” Tit. I, Cap. II, Art. 9.

114. “Se considerarán elegibles para ejecutar acuerdos de manejo, co-manejo y administración de servicios en las Áreas Protegidas, las instituciones del sector público, las organizaciones no gubernamentales, las organizaciones de base y personas jurídicas, tanto nacionales como extranjeras e internacionales, siempre de acuerdo con el reglamento y demás normas de la presente Ley.” Tit. III, Cap. I, Art. 17.

115. “. . . tasas por servicios, patentes, licencias, permisos, vender y cobrar servicios ambientales . . .” Art. 18.

116. Tit. II, Cap. II, Art. 14. The “Área de Protección Estricta” permits only “turismo ecológico.” In some cases, only “ecological tourism” is allowed. Frustratingly, this term is not defined in the law.

117. Tit. IV., Cap. II, Art. 35.

about the importance of protecting biodiversity, promoting sustainable development and preventing habitat destruction. However, its focus is largely directed to three goals: (1) to protect genetic and biological resources from exploitation; (2) to promote identification and monitoring of threatened and endangered species; and (3) to limit trade in such species.¹¹⁸ Regarding these goals, Law 10/02 appears to draw heavily upon the U.S. Endangered Species Act¹¹⁹ and post-1992 international environmental instruments.¹²⁰

While Law 10/02 does not explicitly limit development activities – such as the construction of tourist resorts – that might adversely affect biodiversity, it encourages cooperative efforts between government, the private sector and civil society to develop conservation and use plans.¹²¹ Such collaboration might be seen as endeavoring to balance development and environmental goals. In addition, Law 10/02 specifically mentions “commerce” as one of the “regulated uses” of biodiversity.¹²² However, on examination, the section on “commerce” regulates commercial trade in protected species, not commercial impacts on biodiverse areas.¹²³ Similarly, a key section of the law that addressing sanctions, penalties, and prohibitions is addressed almost exclusively to removal, trade, capture or hunting of protected species.¹²⁴ Thus, Law 10/02 provides no concrete tools to protect biodiversity in the face of development that presents itself as “sustainable.” Given the infinite meanings of the term “sustainable development,” Law 10/02 cannot be relied upon to assure biodiversity protection related to development projects.

4. The Problem of Presidential Decree Laws

There are other areas of concern. As in other civil law countries, Dominican law allows the Executive power the right to issue so-called decree laws. As created in the Dominican Constitution, the power is general, relating to the Executive’s role as steward of the laws enacted by the Congress. The Consti-

118. A copy of the law appears on the IRG website, http://www.irgltd.com/Our_Work/Projects/Latin_America_the_Caribbean.html#dominican_rep (last accessed Sept. 9, 2006).

119. 16 U.S.C. §§ 1531-1544.

120. Discussed below in Part IV.

121. Art. 19 of Law 10/02.

122. Art. 65(d) of Law 10/02.

123. Arts. 66-69 of Law 10/02.

124. Arts. 90-100 of Law 10/02.

tution thus gives the President the following powers: “[to] promulgate and to have published the laws and resolutions of the National Congress and to oversee their faithful execution; to issue rules, decrees and instructions whenever it may be necessary.”¹²⁵ What the section does not do, obviously, is to address – much less resolve – the possible contradiction between the President’s role as faithful steward of legislatively-enacted laws and his own decrees.

Although theoretically of lesser status than a legislatively-enacted law like Law 64/00, decree laws can only be revoked or ignored if they are challenged as expressly contradictory to a legislatively-enacted piece of legislation.¹²⁶ Some are permitted as exceptions to the larger law. As a general rule, decree laws are – at least where a democracy functions moderately well and is not harshly authoritarian – seldom as expansive as legislative laws. Many decree laws are unsurprising expressions of Executive policy – they appoint people to head commissions and grant citizenship to others. They tend not to have ambitious titles, and are not typically accompanied by press conferences and news releases proclaiming their promise. Other decree laws are unsurprising exercises of Executive power on behalf of the country. For example, in early 2005, as a result of the “special interest of the Dominican State to encourage tourist development in impoverished areas,”¹²⁷ President Fernández directed that funds be used to restore a closed tourist complex in San José de las Matas. The town, the highest single source of Dominican immigration to the United States,¹²⁸ had since the closing of the hotel complex in 1997, seen a complete loss of the “progress and dynamism generated by tourist development.”¹²⁹

125. “Promulgar y hacer publicar las leyes y resoluciones del Congreso Nacional y cuidar de su fiel ejecución. Expedir reglamentos, decretos e instrucciones cuando fuere necesario.” 2002 Constitution of the Dominican Republic, as reprinted in the Political Database of the Americas, <http://pdba.georgetown.edu/Constitutions/DomRep/domrep02.html> (last accessed Apr. 11, 2006).

126. As explained to the author by lawyer César A. Vargas Pimentel, Executive Director of the Dominican Institute of Environmental Law (IDARD—Instituto Dominicano de la República Dominicana) (Mar. 22, 2006).

127. “. . . resulta especial interés para el Estado Dominicano impulsar el desarrollo turismo en aquellas zonas empobrecidas . . .” Decree Law 16 of 2005, *available at* http://www.presidencia.gov.do/frontend/amp_decretos.php?id=784 (last accessed Apr. 11, 2006).

128. HARVEY, *supra* note 42, at 249.

129. 16 U.S.C. §§ 1531-1544.

a. Recent Decree Laws as Threats to Environmental Protection

In many instances seeming decree laws will have significant environmental implications. In fact, the Dominican Executive routinely uses his constitutional powers to circumvent the strict requirements of environmental laws in the promotion of tourism development.¹³⁰ For example, Decree Law 688-05,¹³¹ signed into law by President Fernández on January 2, 2006, authorized a construction company to construct a hotel in the Samaná Peninsula, home to the National Park Los Haitises and the Silver Banks Marine Sanctuary, a globally important humpback whale breeding ground. The developer was given dispensation to build his hotel within the 60 meter zone ostensibly protected by a comprehensive congressional law regulating coastal protection.¹³²

b. "Liberated Areas"

In terms of environmental protection, more recent Presidential decree laws are even more troubling. Of particular concern has been the creation of "liberated areas" within Protected Areas.

Decree Law 686 of 2005 begins with the recognition that the Sectoral Law on Protected Areas "left outside of the restrictions on tourist development imposed by the National Park category a fringe of land" in two National Parks hitherto largely undeveloped – one in the far southeast and the other in the far southwest corner of the country, on the Haitian border.¹³³ This reading of

130. See, e.g., Decree Law 305 of 2005, available at http://www.presidencia.gov.do/frontend/amp_decretos.php?id=1057 (dispensing with prohibition on building within 60 meters of the shoreline on a southern coastal hotel expansion); Decree Law 177 of 2005, available at http://www.presidencia.gov.do/frontend/amp_decretos.php?id=946 (same with respect to the construction of a 500-boat marina on the banks of the Río Ozama, near Santo Domingo); Decree Law 34 of 2005, available at http://www.presidencia.gov.do/frontend/amp_decretos.php?id=802 (allowing construction within the marine fringe in the rest of Boca Chica) (all last accessed Apr. 11, 2006).

131. http://www.presidencia.gov.do/frontend/amp_decretos.php?id=1458 (last accessed Apr. 11, 2006).

132. Law 305 of 1968.

133. "CONSIDERANDO: Que la Ley Sectorial de Areas Protegidas No. 202/04, del 30 de julio del 2004, dejó fuera de las restricciones para el desarrollo turístico impuestas por la categoría de 'Parque Nacional' a una franja de terreno localizada en El Parque Nacional del Este, en Bayahibe, y otra, en el Parque Nacional Jaragua, en Pedernales, estableciendo nuevas categorías de conservación, superficies, ubicaciones y límites." ("CONSIDERING, that Sectoral Law on Protected Areas No. 202/04 . . . left outside of the restrictions on tourist development imposed by the category 'National Park' to a fringe of land located within [names parks], establishing new conservation categories, surface areas, locations and borders."). Decree Law 686-05, available at http://www.presidencia.gov.do/frontend/amp_decretos.php?id=1456 (last accessed Apr. 12, 2006).

the Protected Areas law is striking for its frankness and for the enterprise it involved, since it is supported by a careful parsing of what a common law attorney would call the “metes and bounds” descriptions creating the National Parks in the Sectoral Law. The Decree Law continues by acknowledging the economic benefit of tourist development to these areas, with language that implicitly contradicts the initial suggestion that the said lands were “outside” the protection of the Protected Areas laws. Specifically, the Decree Law observes that:

“[T]he intention to *liberate the previously cited areas* responds fundamentally to the interest in permitting the towns and provinces where said lands are located, so that they may receive the economic, labor and commercial benefits that the tourism industry generates through investments directed at the development of important hotel projects and complementary demands of tourist activity.”¹³⁴

That is, if the said areas were already “left outside” the scope of the areas to be protected for biodiversity by the Sectoral Law, why “liberate” them?

The Decree Law goes on to observe that there “must be carried out in a coordinated form well-defined plans directed to the development of *sustainable tourism*. . . .” While, arguably, this fashionable language of sustainability evidences the Decree Law’s intent to balance economic growth against long term environmental quality, further language in the Decree Law disproves this contention. The provision continues by detailing not the sustainability of tourism, but rather its relation to other tourism planning in the country. Specifically, the plans need to “integrate in an effective manner the institutions and related sectors that must lead and establish a policy to be implemented in conformity with the studies and territorial plans carried out and to [be] carried out in the two tourist poles.”¹³⁵ What is striking here is the assumption of development, the conclusion that these will be-

134. *Id.* (emphasis added in article text). (“CONSIDERANDO: Que el propósito para la liberación de las áreas precitadas obedece primordialmente al interés en permitir que los municipios y provincias donde se encuentran ubicados dichos terrenos, puedan recibir los beneficios económicos, laborales y comerciales que genera la industria turística a través de las inversiones dirigidas al desarrollo de importantes proyectos hoteleros y ofertas complementarias a la actividad turística.”).

135. *Id.* (“Que deben llevarse a cabo en forma coordinada, planes bien definidos, dirigidos al desarrollo de un turismo sostenible que integre de manera efectiva a las instituciones y sectores relacionados que deberán dirigir y establecer la política a implementarse conforme a los estudios y planes de ordenamiento territorial realizados y por realizarse en ambos polos turísticos.”).

come “polar” sites for tourism. Moreover, although the reference to territorial planning might on the one hand be understood to refer to the environmental review requirement under Dominican law, it equally might be understood to refer to the pro-tourism efforts now driving the country’s economic planning.¹³⁶

This latter view is supported in at least two aspects of the Decree Law itself. First, the suggestion that the Decree Law creates “liberated areas” squarely fits into an interpretation of this Decree Law as minimally – if at all – focused on biodiversity protection. Second, the remainder of the law focuses almost entirely on the economic benefits of tourism – albeit recognizing that the “natural conditions” of the areas create the conditions for “tourist exploitation.” In this connection, the law rather blithely affirms that “where possible” there should be efforts to “reconcile the preservation of natural riches with an activity that generates and propels the economy like the tourist industry.”¹³⁷ Yet it makes no effort to explain just how these sometimes conflicting ends are to be reconciled. On the contrary, the Decree Law’s principal substantive provision creates a national Commission for Development of the Fringes Liberated from the Sectoral Law of Protected Areas, headed by the Tourism Minister. The other four members of the Commission are the Ministers of the Environment, Natural Resources, and Public Works, and the Director of the National Sewer Institute. The fifth – presumably the tie-

136. See, e.g., *Alrededor de cuatro millones de turistas visitarán a RD en 2006* (“Around four million tourists will visit the Dominican Republic in 2006”), available at the President’s website: <http://www.presidencia.gov.do/frontend/articulo.php?id=4219> (July 28, 2006) (reporting Tourism Secretary Félix Jiménez’s boast that “tourism is above all in Dominican economic development and in the expansion of the economy.”) (“Jiménez manifestó que el turismo es sobresaliente en el desarrollo económico dominicano y en la expansión de la economía.”); Desirée Martínez, *Inversiones en turismo serán US\$5 mil millones*, *LISTIN DIARIO*, Mar. 17, 2006, p. D1, col. 1 (reporting that “Investments in Tourism Will BE US \$500K Million” for the 2006-08 period). The President’s website lists free zones, tourism, and remittances from abroad as the primary source of funds in the country. <http://www.presidencia.gov.do/frontend/generalidades.php> (last accessed Aug. 18, 2006).

137. “CONSIDERANDO: Que el turismo debe mantenerse como un factor de desarrollo sostenible en aquellas zonas que por sus condiciones naturales resultan de gran valor para la explotación turística y donde se pueden conciliar la preservación de las riquezas naturales con una actividad generadora y propulsora de la economía como la industria turística. la preservación de las riquezas naturales con una actividad generadora y propulsora de la economía como la industria turística.” *Id.* (“CONSIDERING: that tourism is a factor of sustainable development in these zones that because of their natural conditions results in great value for tourist exploitation and where possible to reconcile the preservation of natural riches with an activity that generates and propels the economy like the tourist industry.”).

breaking – member is not an official, but a private citizen: el señor Mario Ginebra.¹³⁸

Mario Ginebra is one of the nation's most powerful industrial leaders, and the past President of the National Council of Private Businesses. Ginebra has been appointed in his private capacity rather than in his capacity as the President of the National Council of Private Businesses. Ginebra has insurance, telephone and, most tellingly, tourism holdings in the Dominican Republic.¹³⁹ The Amhsa Marina Resorts he leads operates seven resorts on the northern and northeastern coasts of the island and boasts that it is the “the largest ‘genuinely’ Dominican hotel chain that manages resorts across the country under the All Inclusive Concept since May 2000.”¹⁴⁰ He is also – by Presidential appointment – a director of the National Department for the Promotion of the Hotel Industry and Tourism Development.¹⁴¹ To date, none of the Amhsa resorts is in the southeast or the southwest, the focus areas for the creation of tourist “poles” under the Decree Law. The concern here, of course, is a worry about favoritism and the dominance of an oligopoly or a hegemonic elite looking after its own and not the nation's long term best interests.

The focus on tourism development at the possible expense of environmental protection is revealed by the Decree Law's order that the Commission develop for the liberated areas “elaborate, defined and guaranty” plans for investment and development of tourism and eco-tourism projects so as to raise the quality of life of the local communities and populations.¹⁴² Since the release of this Decree Law in January 2005, the country has been inundated by talk of development projects, particularly in the comparatively undisturbed southwestern corner of the country. In March 2006, for example, in the wake of President Fernández' Euro-

138. Decree Law 686/05, Art. 1.

139. *Mario Ginebra to preside leading business group in 2001*, DAILY NEWS 15 Nov. 2000, in DR1.COM, available at <http://www.dr1.com/news/2000/dnews111500.shtml> (last accessed Apr. 12, 2006).

140. <http://www.amhsamarina.com/AmhsaIngles/corporateinformation.aspx>.

141. Decree Law 17 of 2005, available at http://www.presidencia.gov.do/frontend/amp_decretos.php?id=785 (last accessed Apr. 12, 2006).

142. *Id.* at Art. 2 (“... orientar y garantizar la ejecución e implementación de un plan de desarrollo para las áreas liberadas por la Ley Sectorial de Áreas Protegidas en el Parque Nacional del Este y en el Parque Nacional Jaragua, a través de la inversión en proyectos turísticos y ecoturísticos, que deriven beneficios económicos significativos que incidan positivamente en mejorar el nivel de vida de las poblaciones y comunidades locales.”).

pean trip for business development, a Spanish hotel chain announced that it would lead the way of “eco-tourist” developments with 70-room hotels in the middle of a Protected Area.¹⁴³ Proponents advocated the construction of six or seven of such “all-inclusive” luxury resorts, into which visitors would be flown by helicopter or hydrovans.¹⁴⁴

B. *Lack of Coherence Between Laws & Efforts Affecting the Environment and Protected Areas*

The Decree Law “liberating” some areas from protection of the Protected Areas Law is problematic as a threat to efforts to preserve biodiversity in the Dominican Republic. But it also reflects the need to harmonize the Dominican project of environmental legal and regulatory protection. Specifically, the device of the Decree Law opens the possibility to undercut both letter and spirit of the framework Law 64/00 and of the Sectoral Law 202/04, creating the potential for a larger risk of legal incoherence. Consider, for example, a recent Decree Law establishing a Commission to oversee developments within and affecting Protected Areas. This body clearly threatens to undermine the integrity of the system. Decree Law 12 of 2006 creates a seven-member Commission, headed by the Secretary of State for Culture, created to “identify and evaluate national monuments.” The problem here is that natural monuments are a management category under Protected Areas Law 64/00. Although the Commission includes the Ministers of Tourism and the Environment, by locating control outside the Environment and Natural Resources Ministry, and by creating specific authority over one portion only of the areas protected by Law 64/00, the Decree Law could lead to fractured regulatory control over the entire system of protected areas.

Similarly, however admirable the reach and ambition of Law 64/00, it failed to reconcile earlier laws that potentially divide and

143. *Consultor de la OMT advierte construcción de hoteles dañaría Bahía de las Águilas*, CLAVE DIGITAL, Mar. 31, 2006 (reporting on judgment of a World Tourism Organization consultant that the nation World commit a tremendous error if it allowed construction of an “eco-resort” within a protected area), available at http://www.clavedigital.com/Portada/Articulo.asp?Id_Articulo=7164 (last accessed Sept. 8, 2006).

144. *Promotores galos piden expropiación de terrenos de Bahía de Las Águilas*, CLAVE DIGITAL, Apr. 21, 2006 (“French Promoters Ask for Expropriation of Lanais in the Bay of the Eagles”), available at http://www.clavedigital.com/Portada/Articulo.asp?Id_Articulo=7275 (last accessed Sept. 8, 2006).

weaken, its authority. An example is Law 67 of 1974,¹⁴⁵ which created the national parks. Parks Law 67/74, which was primarily responsible for control and issuing park entry permits, was not repealed by Law 64/00, although the administrative functions it entailed were effectively transferred by Law 64/00, which made national parks the second (and largest) of the Protected Areas' Law management categories.¹⁴⁶

More problematic for purposes of the present inquiry is Law 266 of 2004. Enacted in the same year as the Sectoral Law on Protected Areas, Law 266/04 established a "tourist pole area" in the impoverished southeastern part of the country.¹⁴⁷ The law, prompted by the recognition of the "fundamental obligation of the State to promote economic development in a manner that will raise the living standard of its citizens," creates this special tourist zone in light of the knowledge that "tourism and eco-tourism" constitute major drivers of economic growth in the country. Once again, this is fair enough. The devil, however, is in the details. In this instance, the law not only declares that its provisions shall supersede any other law in conflict with it,¹⁴⁸ it also places restrictions on the size and density of tourist developments in the region¹⁴⁹ and prohibits development within certain natural features of the area, such as specific wetlands and lagoons.¹⁵⁰ However, these and other authorities are vested not in the Environment and Natural Resources Ministry, but in the more powerful Tourism Ministry. Although this law has yet to be tested, the potential for ministerial conflict – and resultant incoherence in the application of the laws – is evident.

C. *Projects to Promote Implementation of Laws*

Most nations today undertake projects to ensure effective enforcement of new laws designed to protect ecosystems and biodiversity, typically with global or at least regional oversight. The Dominican Republic is no exception. For example, the International Resources Group (IRG), a contractor of the United

145. Law 67/74 is available from the Environmental Law Institute of the Dominican republic (IDARD), at <http://www.idard.org.do/leyes.asp> (last accessed Sept. 9, 2006).

146. Law 64/00, Tit. II, Cap. II, Art. 14.

147. Law 266 of 2004, available at <http://www.informejudicial.com/?go=2> (last accessed Apr. 12, 2006).

148. *Id.* Art. 9.

149. *Id.* Art. 2.

150. *Id.* Art. 1

States Agency for International Development (USAID) has, in cooperation with teams of Dominican professionals, analyzed Dominican laws, regulations and institutions related to environmental protection. These multiyear projects have produced significant analytical and informational work on the status of Dominican environmental law.¹⁵¹

D. *Enforcement of Dominican Protected Areas Law*

As the previous section demonstrated, the structure of Dominican protected areas can, at least in theory, go a long way to protect imperiled biodiversity. However, the resource limitations of a poor government complicate the story considerably, making enforcement of admirable laws a challenge, at best. Moreover, as the previous section also showed, governmental interest in generating income in a poor country, largely dependent on the favors of and investments by foreign economic interests, threatens effective enforcement of environmental laws even when resources might be available.

There is nothing wrong, in principle, with economic development for a poor country – or any other country. It is an essential and important government activity. The challenge, as this article endeavors to demonstrate, is to ensure that the proper balance is struck between economic development today and preserving the sources for future economic strength and a habitable natural environment.

IV.

INTERNATIONAL LAW AND POLICY

A central question, then, is whether regional or global legal regimes can effectively aid the enforcement of environmental protection laws. The existing evidence provides a mixed answer to this question.

151. IRG's work consists of two principal components. First, a 2000-2002 project looked at environmental assessment, policy reform and institutional strengthening. The second, from 2003-07, involves IRG working with the Environment Ministry to improve policies for environmental protection, including management of a \$1.25 million fund to help civil society organizations more effectively participate in environmental protection. A description of IRG's Dominican work and projects, and several of their related reports, appear at http://www.irgltd.com/Our_Work/Projects/Latin_America_the_Caribbean.html#dominican_rep (last accessed Sept. 9, 2006).

This section will look at the limited available evidence on this question. First, however, it will consider an anterior and important legal and ethical question.

A. *The Extent to Which Rich Nations Have an Obligation to Help Protect Biodiversity in Poorer Nations*

This article has endeavored to demonstrate that the footprint of richer nations in poorer nations like the Dominican Republic is considerable. As the example of tourism on the island nation demonstrates, in fact, the foreign footprint is often greater than that left by local inhabitants. Put another way, President Fernández' description of the Dominican Republic – and, for that matter, many other nations – as sitting in the “back patio” of the United States could not be more apt. As the preceding sections demonstrate, U.S. and other foreign, mostly European visitors are the greatest beneficiaries of the Caribbean's natural wonders. Importantly, this is true in most of the world.¹⁵²

International treaty regimes are beginning to recognize this external impact by incorporating mechanisms for protecting against environmental harms within their jurisdictions. However, such treaty regimes are clearly not enough because they lack effective mechanisms for the enforcement of environmental protection measures. Such treaties also have the weakness of placing the enforcement burden on the citizens of poor countries where civil society organizations are less well funded, less well staffed, and less well positioned to monitor threats to stable ecosystem functioning. Additionally, these countries feel pressured to accept the incoming capital flows that tourism brings and often turn a blind eye to the environmental degradation of tourism. Clearly, something more is needed.

As citizens of richer nations, we cannot demand the opening of markets without, simultaneously, accepting our role in the long term preservation of those markets by accepting responsibility to protect the integrity of the environments of which they are a

152. “. . . [T]ourism remains restricted to a tiny, more affluent share of the world's population. Nearly 80 percent of international tourists come from Europe and the Americas, while only 15 percent come from East Asia and the Pacific and 5 percent come from Africa, the Middle East, and South Asia combined. . . All told, annual international tourist arrivals represent just 3.5 percent of the world's population.” Mastny, *supra* note 40, at 103.

part. As the first-year law student quickly learns, there are no rights without responsibilities.¹⁵³

In environmental law, this notion is well-established; it is the principle of forcing those who may harm the environment to internalize the external effects of their activities.¹⁵⁴ That is, when external costs are internalized, the generator of the costs accepts – or is legally compelled to accept – responsibility for them.

The task is to seek a solution or combination of solutions that will seek to balance rights of use (one might say the “privilege”) of extra-territorial environments and corresponding duties to respect and maintain the integrity of those environments. First, however, it merits examining international instruments and treaties relevant to this goal, and inquiring as to the extent they can help protect biodiversity in the face of economic development.

B. *International Instruments to Protect Biodiversity*

Since the “Earth Summit” held in Rio de Janeiro in 1992, there has been extensive activity to promote the goal of biodiversity protection. There is also an enormous literature on the subject. The purpose of this portion of the article, therefore, will merely be to highlight relevant portions of these international instruments as they relate to the theme of biodiversity protection in poor countries like the Dominican Republic.

1. The Rio Declaration and Agenda 21

Although neither the Rio Declaration on the Environment and Development nor the so-called “Agenda 21,” a compendium of understandings and articulations of policies discussed at the 1992 Rio conference, are binding legal instruments, their mark is easily discernible worldwide in post-1992 environmental legislation.¹⁵⁵ The Dominican Republic is typical in this regard. For example, its relatively new environmental legislation contains commitments to sustainable development of resources¹⁵⁶ and the precautionary principle in the face of scientific uncertainty.¹⁵⁷ Modern Dominican environmental law commits to observe prin-

153. See, e.g., JOSEPH SINGER, *PROPERTY LAW: RULES, POLICIES AND PRACTICES* 157-59 (1997) (discussing Hohfeldian terminology).

154. See, e.g., ROBERT V. PERCIVAL ET AL., *supra* note 94, at 27 (5th ed. 2006).

155. See *supra* notes 83-84 and accompanying text.

156. See, e.g. Law 64/00, Cap. I, Art. 1; Law 10/02, Art. 7; cf. Rio Declaration Principles 1 and 4.

157. See, e.g. Law 64/00, Cap. I, Art. 8; Rio Declaration Principle 15.

ciples first widely advanced at the Rio conference, such as the notion of intergenerational equity¹⁵⁸ and the emphasis on community rights.¹⁵⁹ While international recognition of the Agenda 21 principles deserves celebration, those aspects of the Rio-related documents that appear in Dominican environmental law, at least, contain no “bite” that will assure substantive enforcement of biodiversity protection principles. For the possibility of such protection, it is necessary to look at more specialized instruments.

2. Convention on Biological Diversity

The Convention on Biological Diversity (CBD) was opened for signature at the Rio conference, where 150 nations signed onto its terms.

Conceived as a practical tool for translating the principles of Agenda 21 into reality, the Convention recognizes that biological diversity is about more than plants, animals and micro organisms and their ecosystems – it is about people and our need for food security, medicines, fresh air and water, shelter, and a clean and healthy environment in which to live.¹⁶⁰

One hundred eighty-eight nations have now ratified it. The Dominican Republic signed it in 1992 and ratified it in 1996.¹⁶¹ The centerpiece of the CBD is its requirement that the signatories commit to both *in-situ* and *ex-situ* conservation.¹⁶² “In-situ” refers to the protection of biodiversity through protected areas legislation, including a commitment “to provide the conditions needed for compatibility between present uses and the conservation of biological diversity and the sustainable use of its components,”¹⁶³ a provision that at least hints at the need to balance economic development and biodiversity protection. A comparable provision underlines the importance for signatory institutions to “[e]ncourage cooperation between its governmental authorities and its private sector in developing methods for sustainable use of biological resources.”¹⁶⁴ Notably, therefore, *in situ* conser-

158. See, e.g. Law 10/02, Art. 8; cf. Rio Declaration Principle 3.

159. See, e.g. Law 10/02, Art. 9; cf. Rio Declaration Principle 10.

160. Preamble from the CBD website, <http://www.biodiv.org/convention/default.shtml> (last accessed Sept. 9, 2006).

161. See CBD webpage, <http://www.biodiv.org/world/parties.asp> (last accessed Sept. 9, 2006).

162. Arts. 8-9.

163. Art. 8(j).

164. Art. 10(e).

vation hints at the need to balance biodiversity protection with economic development. "Ex-situ" refers to research and scientific activities directed to preservation, such as in zoos and universities.

As with the Dominican Law 10/02 addressing biodiversity, the real thrust of the CBD is to establish a framework for sustainable development by the biotechnology industry, including technology transfer and other measures designed to give nations control over biotechnology development.¹⁶⁵ In other words, the CBD contains neither a substantive mechanism that balances biodiversity protection against environmental protection nor a model for such a mechanism that could be implemented at the national level.

3. Cartagena Protocol on Biosafety

The Cartagena Protocol on Biosafety to the Convention on Biological Diversity is a narrower and more focused legal instrument, taking as its objective a recognition of the parties' "awareness of growing public concern over potential adverse effects of transboundary movements of living modified organisms on biological diversity and human health, [and recognizing] the 'great potential' of biotechnology and [addressing] the relationship with trade agreements."¹⁶⁶ One hundred thirty-four parties have ratified the Cartagena Protocol. The Dominican Republic did so in 2006. In short, the focus of the Cartagena Protocol is with genetically-modified organisms and other types of biotechnology. The Protocol indirectly limits economic development for the sake of environmental protection. For instance, if a developer wished to introduce foreign species to create a "tropical" environment different than one where he was working, and wished to introduce a modified organism, a signatory might be compelled to submit the developer to risk assessment under the Protocol.¹⁶⁷ Overall, it is simply the case that the Cartagena Protocol has different concerns than those posed in this article.

C. *Regional Controls: Implications of CAFTA-DR*

The concluding section of this article will suggest that the best solution to biodiversity protection in the face of development

165. Arts. 15-19.

166. DOCUMENTS IN INTERNATIONAL ENVIRONMENTAL LAW, *supra* note 9, at 725.

167. Art. 15; *see also* Annex III, which details the Risk Assessment procedure.

pressure by tourism is one that will compel foreign users of bi-diverse environments to contribute financially to their protection. Before turning to that solution, however, and having surveyed the appropriate international legal instruments, it is appropriate to ask whether regional legal regimes and/or obligations have a role to play in this effort. For the Dominican Republic, the most important such regime is the Central American- Dominican Republic Free Trade Agreement (CAFTA-DR).

Modeled on the North American Free Trade Agreement (NAFTA),¹⁶⁸ CAFTA-DR seeks to open up trade for five Central American nations¹⁶⁹ and the Dominican Republic. The Dominican government is expected to finalize the agreement and enter into it before the end of 2006.¹⁷⁰

In addition to providing for measures to promote free trade such as tariff reductions and waiver of customs duties, CAFTA-DR also seeks to improve on some of the more criticized aspects of NAFTA. In particular, NAFTA was criticized at its creation for the absence of environmental and labor provisions within the text of the treaty itself.¹⁷¹ Instead, NAFTA contained environmental and labor side agreements.¹⁷² Moreover, available evidence suggests that the predictions of NAFTA's critics, specifically the view that the failure to incorporate environmental protection guarantees within the treaty itself would result in environmental deterioration, have been borne out. For instance, while commerce between the parties to NAFTA more than doubled between 1993 and 2002, resulting in trade worth \$1.2

168. NAFTA went into force on January 1, 1994. It aimed to create "a regional agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America to implement a free trade area." Frequently Asked Questions and Answers, webpage of the NAFTA Secretariat, *available at* http://www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=282#3 (last accessed September 3, 2006).

169. Namely Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua.

170. "Dominican Free Trade Delegation Is Off to Washington," BILATERALS.ORG (Aug. 10, 2006), *available at* http://www.bilaterals.org/article.php3?id_article=5489 (last accessed Sept. 3, 2006).

171. Although this criticism largely came from the political left, it is a reality that even its corporate supporters acknowledged. The former Chief Executive Officer of American Express, for example, observed that "NAFTA happened . . . because of the drive Bill Clinton gave it. He stood up against his two prime constituents, labor and environment, to drive it home over their dead bodies." THE NATION, Feb. 13, 2006.

172. On the environmental side agreement, see, for example, Steve Charnovita, *The NAFTA Environmental Side Agreement: Implications for Environmental Cooperation, Trade Policy, and American Treaty making*, 8 TEMP. INT'L & COMP. L.J. 257 (1994).

million per minute,¹⁷³ a 2003 report by the Carnegie Endowment concluded that in Mexico, as a result of NAFTA, the nation experienced increased nitrogen pollution (from expanded pesticide application), strained water resources and hastened biodiversity loss.¹⁷⁴ The United States Federal Reserve Bank of Dallas observed that with the growth of the *maquiladoras* – the assembly manufacturing plants in Mexico largely along the U.S.-Mexican border – infrastructure for basic services in the urban centers along the border lagged behind.¹⁷⁵ A consequence of such a lag is increased burdens on natural resources, including polluted water and wastewater.¹⁷⁶

By contrast, CAFTA-DR incorporates environmental and labor protections within the text of the treaty itself.¹⁷⁷

D. CAFTA-DR's Environmental Provisions

In at least three important respects concerning environmental protection, CAFTA-DR differs from NAFTA. First, as mentioned above, CAFTA-DR contains a dedicated chapter, Article 17, on environmental protection. Second, Article defines key terms relating to environmental protection that may go some way towards giving the treaty some environmental teeth. Third and of potentially greatest importance, Article 17 creates a mechanism for citizens of signatory countries to assert environmental interests.

173. According to the Office of the United States Trade Representative, available at http://www.ustr.gov/Trade_Agreements/Regional/NAFTA/Section_Index.html (last accessed Sept. 3, 2006).

174. Scott Vaughn, *The Greenest Trade Agreement Ever? Measuring the Environmental impacts of Trade Liberalization*, in CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, *NAFTA'S PROMISE AND REALITY: LESSONS FROM MEXICO FOR THE HEMISPHERE* (2003), available at <http://www.carnegieendowment.org/publications/index.cfm?fa=view&id=1390> (last accessed Sept. 3, 2006).

175. Lucinda Vargas, *Maquiladoras: Impact on Texas Border Cities*, Federal Reserve Bank of Dallas, June 2001, available at http://www.dallasfed.org/research/border_the_vargas.html (last accessed Sept. 3, 2006).

176. Natural Resources Defense Council, *New U.S.-Mexican Pollution Treaty Lacks Funding to Make a Difference*, Apr. 4, 2003 (concluding that post-NAFTA commitments to clean up environment had strained resources and failed to reduce pollution along border), available at http://www.nrdc.org/bushrecord/2003_04.asp (last accessed Sept. 3, 2006).

177. See Office of the United State Trade Representative, *DR-CAFTA Summary of the Agreement*, available at http://www.ustr.gov/Trade_Agreements/Bilateral/CAFTA/Transmittal/Section_Index.html (last accessed Sept. 3, 2006).

1. Article 17

As in any bilateral agreement that must respect the sovereign rights of its signatories, Article 17 is hobbled at the outset from the ability only to *encourage* signatories to observe high levels of environmental protection.¹⁷⁸ At the same time, however, Article 17 goes out of its way to provide that signatories shall undertake to provide remedies for redress of environmental harms, and lists preferable forms of remedy.¹⁷⁹ Additionally, it details extra-judicial means of achieving environmental protection, such as public-private partnerships.¹⁸⁰ Article 17 further commits the parties to environmental cooperation¹⁸¹ and requires that the parties engage in environmental consultations when another signatory party requests one.¹⁸² The importance of this kind of transparency and commitment at the highest levels of bilateral governance cannot be underestimated. Perhaps more important still, in terms of indicating the treaty's willingness to address environmental harm, the treaty creates an Environmental Affairs Council to be staffed by Cabinet-level officers from signatory nations.¹⁸³

Furthermore, the principle of transparency extends to a commitment to provide that "persons" of a signatory nation may file claims with a jointly-staffed Secretariat alleging failure of a signatory nation to comply with environmental regulations. Although the Secretariat is not required to respond to such a request, the terms on which it must do so are loose enough – the claim must not be frivolous; it must not be based solely on media reports, for example – that a large percentage of such submissions would likely pass muster.¹⁸⁴ In addition, Article 17 explicitly requires each signatory nation to provide a means for public comment and thus participation in the application of the treaty's terms.¹⁸⁵ Like the other transparency measures contained within the treaty, the potential use of this tool to assert environmental protectionist goals is considerable.

178. Central America-Dominican Republic-United States Free Trade Agreement (Apr. 5, 2004) Article 17.1.

179. *Id.* at 17.3.

180. *Id.* at 17.4.

181. *Id.* at 17.9.

182. *Id.* at 17.10.

183. *Id.* at 17.5.

184. *Id.* at 17.7.

185. *Id.* at 17.6.

2. Key Definitions within CAFTA-DR

Two definitions within CAFTA-DR merit special attention for their potential to promote aggressive environmental protection. The first is contained in Article 17 and applies only to it. The second appears in the General Definitions article and applies throughout.

The definition of "environmental law" in Article 17 is broad and includes any statute or regulation that aims to protect the environment or prevent harm to human, animal or plant life.¹⁸⁶ Especially notable here is the fact that the definition extends from humans to all flora and fauna, rejecting a solidly anthropocentric view. In the Dominican context, the words "statute or regulation" are, however, problematic. They include "a law of its legislative body or a regulation promulgated pursuant to an act of its legislative body that is enforceable by the executive body."¹⁸⁷ It is not clear whether this definition covers the Presidential Decree Laws.¹⁸⁸ As discussed above, their status is ambiguous; they are not regulations but carry nearly the weight of legislatively enacted laws. In this respect, the "environmental law" definition in CAFTA-DR falls short.

Arguably even more significant, however, is the definition of "person" and related definitions in the treaty's General Definitions section, Article 2. "Person" is defined as "a natural person or an enterprise." "Enterprise" is in turn defined as "any entity constituted or organized under applicable law, whether or not for profit, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, sole proprietorship or other association." Furthermore, any "person of a Party" means "a national or enterprise of a Party."¹⁸⁹ The significance of this provision is that "a person of a Party" has standing to submit matters for enforcement under Article 17.¹⁹⁰ Thus, not only individuals but, because of the breadth of the definition, also non-governmental entities and other public watchdog groups, would be entitled to advance claims "asserting that a Party is failing effectively to enforce its environmental laws."¹⁹¹ Although, once again, due to the inherent enforcement limita-

186. *Id.* at 17.3(1).

187. *Id.* at 17(3)(1)(a).

188. *See supra* Sec. II(3).

189. All of the above definitions appear in Art. 2.1.

190. Art. 17.7(2)(f).

191. *Id.* at 17.7(1).

tions of a bilateral treaty that must allow signatories the right to protect their sovereignty and decisions made in the execution of that sovereignty, this is a powerful tool. In an evermore closely-linked region, this definition potentially allows better-funded non-profits outside of a small, relatively poor nation like the Dominican Republic to work with colleagues on the island nation to seek environmental protection. In a world where adverse publicity can be as damning as judicial orders, the power of such a tool cannot be underestimated.

3. Advancing Environmental Claims within CAFTA-DR

The procedure for raising disputes within CAFTA-DR is straightforward. Any submission for enforcement may be submitted to the CAFTA-DR Secretariat by any "person of a Party," provided that he or she "appears to be aimed at promoting enforcement rather than harassing industry,"¹⁹² and the complaint has already been communicated to the responsible authorities in the relevant Party.¹⁹³ Although the Secretariat is not compelled to respond, the language of Article 17 suggests that a response is appropriate in most reasonable cases. Specifically, so long as the submission is not frivolous, alleges harm to the person, and it raises matters "whose further study would advance the goals" of Article 17 and the Environmental Cooperation Agreement it establishes,¹⁹⁴ a response appears to be encouraged. Moreover, the Article requires that a person demonstrate that he or she has pursued private remedies.¹⁹⁵ In this instance, the provision does not indicate, whether such remedies must have been exhausted prior to advancing them before the Secretariat. This detail should be watched because exhaustion of private remedies would be costly for most non-governmental organizations (to say nothing of individuals), particularly in a country with extreme income inequality like the Dominican Republic.

Finally, Article 17 also requires that a person of a Party not base his or her submission entirely on media reports,¹⁹⁶ a requirement that ultimately will promote information disclosure since it compels persons to engage in fact-finding of their own.

192. Art. 17.7(2)(d).

193. Art. 17.7(2)(e).

194. Art. 17.7(4)(a-b).

195. Art. 17.7(4)(c).

196. Art. 17.7(4)(d).

In a nation like the Dominican Republic, where, under Trujillo and subsequent dictators, a tyrannized population risked imprisonment or worse when it protested government action, this requirement is potentially important in promoting the development of civil society.

Following review of the submission, the Secretariat may then choose to develop further the factual record and submit it to the Council of the Parties.¹⁹⁷ In a further reflection of the transparency built into this Article, the Secretariat may include in its draft report relevant materials submitted by any person.¹⁹⁸ Upon a vote of the Council, the final report may be made public.¹⁹⁹

In terms of promoting the most transparent process imaginable, one that would uniformly promote the most aggressive environmental protection goals, this Article clearly falls short because the Council and the Parties retain complete discretion over what must be reviewed, considered, and made public. At the same time, as compared to NAFTA and its egregiously limited procedures, the provisions of Article 17 reflect a strengthening of popular interests in environmental protection. In the Dominican context they suggest, for example, that an individual or non-governmental organization could seek action in a cross-national forum for the protection of the island's admirable but often un- or under-enforced framework environmental laws and accompanying sectoral laws protecting, among other goals, biodiversity.

V.

SEEKING SOLUTIONS FOR BIODIVERSITY PROTECTION

Nevertheless, it would be foolish to suppose that encouraging innovations of a bilateral free trade treaty should be relied upon to protect biodiversity in the Dominican Republic or any similarly-placed poor nation. This section argues, therefore, that protecting biodiversity in the face of excessive foreign environmental exploitation requires other creative solutions.

197. Art. 17.8.

198. Art. 17.8(4)(b).

199. Art. 17.8(7-8).

A. *Responsibilities of Host Nation*

First, of course, the responsibility of the host nation cannot be minimized. Cases of corruption and mismanagement of foreign funds by officials in poorer, less developed countries are legion and need be confronted.²⁰⁰ If any scheme is to succeed, there must be a concerted effort to remedy the legal, economic and political weaknesses in the host country that would interfere with an effective compensation scheme. Above all, this requires minimizing the potential for corruption and/or misuse of funds and a procedure for ensuring that they are appropriately applied to biodiversity protection.

B. *Dominican Case*

In the case of the Dominican Republic, there are at least two obvious needs that must occur within the country before external funds are used to help protect biodiversity. One feature of the existing legal framework that must be changed is the phenomenon of the Presidential Decree Laws. As noted above in Section II(a)(4), the Decree Laws often run counter to legislative enactments, even superseding them in effective enforcement. Not only does this create confusion and uncertainty at a practical level, the practice also undercuts the rule of law, hinting as the laws do at the possibility of special deals and favoritism.

A second need is more difficult to achieve, namely improved enforcement of existing laws. In the Dominican Republic and other poor countries, the difficulties of enforcement are well documented. Despite an admirable system of national parks and protected areas, for example, the staffing and policing of these areas is woefully insufficient. Researchers tell tales, for instance, of inspectors meeting visitors without shoes to wear and begging for food to eat.²⁰¹ Under such circumstances, it is little wonder that tourist enterprises can ignore set back limitations on beach construction and farming enterprises can introduce cattle grazing into delicate ecosystems full of rare species. The difficulty in this

200. See, e.g., Tugrul Gurgur and Anwar Shah, *Localization and Corruption: Panacea or Pandora's Box?*, World Bank Policy Research Working Paper 3486 (Jan. 2005), available at http://www-wds.worldbank.org/external/default/main?menuPK=64187510&pagePK=64193027&piPK=64187937&theSitePK=523679&menuPK=64154159&searchMenuPK=64258545&theSitePK=523679&entityID=000009486_20050209115510&searchMenuPK=64258545&theSitePK=523679 (last accessed Sept. 1, 2006) (discussing endemic problems of corruption in developing world and decentralized strategies for reducing it).

201. Personal communication with Dr. Yolanda León (Feb. 16, 2006).

instance presents a chicken-and-egg problem. That is, funds are needed for increased enforcement, but without greater enforcement there is little evidence it will matter. The best solution, therefore, may be to concentrate efforts on a limited number of locations as demonstration projects. With an established track record, increased funding will be easier to justify and perhaps easier to obtain. Also essential are strengthened administrative structures within the relevant agencies, from the writing of regulations to their public airing. In countries like the Dominican Republic, which have only recently enacted environmental laws, national authorities have already begun strengthening administration.

C. *Responsibilities of Richer Nations*

As noted earlier, foreign tourists and foreign leisure enterprises and operators have a far greater environmental impact on poor countries like the Dominican Republic than do nationals of the country. This is a problem of international dimension: "[t]ourism is one the world's least regulated industries, which has serious implications for ecosystems, communities and cultures around the world."²⁰² It is an industry that benefits from the absence of regulation. The "unregulated nature of the tourism industry" as "compared with other service sectors" is a striking and worrisome phenomenon:

It is increasingly easy for international businesses interested in tourism development to enter markets worldwide. This is especially true as more and more governments privatize national airlines and other state services, reduce domestic subsidies, embrace market reforms, and liberalize trade and investment policies more generally. Many developing counties, in particular, are opening their markets to tourism in an effort to improve their chances on the world economic stage. But whether this actually brings widespread benefits will depend on the extent to which governments and the industry balance the drive for more tourists with the need for socially and culturally responsible tourism.²⁰³

The goal is to protect ecosystems and implement some form of socially and culturally responsible tourism.

202. Mastny, *supra* note 40, at 101-02.

203. *Id.* at 104-05.

1. Global Responses

Part of the leadership in service of this goal can come from global sources. Certainly global entities like the World Tourism Organization (WTO), a special United Nations' agency based in Madrid, Spain,²⁰⁴ are part of the answer. The WTO considers as its part of its obligation "the sustainable development and management of tourism so that its benefits can be enjoyed for generations."²⁰⁵ To this end, the WTO sponsors sustainable development and promotes "eco-tourism."²⁰⁶

Clearly, however, reliance on another international body is not enough. Change must ultimately come from those who have the most at stake, namely the foreign tourists themselves and the entrepreneurs who cater to them.

2. A Global Solution of National Dimensions

Better practices are more likely to be observed if those interested in developing tourist projects have a financial incentive to reduce the environmental impact of their activities. The sponsors of tourist projects, from hotel and resort developers to transportation operators and booking agents, should be required to contribute to funds, whether global, regional, or national, designated for ecosystem protection and biodiversity preservation. Such funds could be administered in individual countries by impartial bodies with wide geographic representation to minimize corruption and assure fair distribution of resources. The sponsors of tourism would in turn, presumably, pass this cost onto consumers. As with any revenue-generating scheme, such charges could be calculated in various ways, using the physical size of the facility or even a per capita charge on site visitors. Alternately, the funds collected could be tied to the protection of particular ecosystems or environments. That is, criteria could be used to calculate the consequences of environmental harm at a site. For example, a site of especially rich biodiversity might be entitled to collect higher charges because of the nature of the resources meriting protection. The charges could be offset to the extent that an entity observes sustainable development standards like those articulated by the WTO.²⁰⁷

204. The United States is not a member. See <http://www.world-tourism.org/states/eng.html>.

205. <http://www.world-tourism.org/aboutwto/eng/menu.html>.

206. *Id.*

207. See, e.g., http://www.unwto.org/frameset/frame_sustainable.html.

Ultimately, the best of these ideas could be worked up into a Model Tourism Code for Sustainable Development. This Code would ensure relatively uniform adoption of these ideas worldwide. There are innumerable ways in which such a fund or funds might be configured and administered. The key idea to recognize, however, is the necessity that they be enforced at the national level. This would mean, for example, that the United States, or France, or Spain – among the developed countries whose businesses are most benefiting from the fruits of tourist development – would need to compel their citizens to participate in the long term care and protection of those entities. The only way to do guarantee such participation on a national level, in a manner that will ensure long term protection and resources to back them up, is to adopt laws at the national level that regulate the extra-territorial impacts of those operations.

The exact form of such a Model Code and the challenges of enacting it at the national level, whether in the United States or elsewhere, are a subject that I intend to explore in a future article. To be sure, any such idea would only be possible with countries demonstrating their support for governance by international or regional bodies. Unfortunately, the United States has been reluctant to display such support in recent years. Nonetheless, because of the importance of biodiversity for all nations, national support of responsible transnational tourism is an idea that merits serious exploration. For the time being, however, it must suffice to say that the leadership for the creation of such funds must come from the nations, such as the United States, that are creating the greatest impacts on fragile ecosystems. In closing, if we wish to avoid destroying our back patios in the process of enjoying them too much, we must link ecosystem and biodiversity protection with economic development through tourism.