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Occasional Papers Series

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FROM THE LEGAL COMMUNITY:
OPPORTUNITY FOR
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President, Center for Environmental
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Costa Rica



**Natural Resources
Law Center**

University of Colorado
School of Law

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**Contributions to Sustainable Development from the Legal Community:
Opportunity for International Cooperation**

Rodrigo G. Barahona*

Last year the Universities of Colorado and of Costa Rica entered into a framework agreement to promote faculty and student exchange and cooperation in research projects. Having collaborated in its drafting, I am hoping for wide benefits to the legal community of both Universities. As a Visiting Fellow at the Natural Resources Law Center fall semester 1991, I particularly appreciate the value of a comparative law approach.

I want to take this opportunity to describe some of the natural resources law problems in Costa Rica which are common to most Third World countries. I hope to stimulate the interest of you readers in contributing to solve them, as they are ecological problems relevant to all of us on this earth.

Before describing the legal situation, however, it useful first to mention key features of international and national economic questions which are at the base of many natural resource conservation problems. Perhaps the single most important international economic issue affecting natural resources in Third World countries is foreign debt. Incurring debt was undoubtedly the responsibility of the national governments, and

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where the money went is an issue which in some cases still has to be brought to light. The questions we face today, however, are how this debt is to be paid and at what cost to the environment. The current policies of powerful international institutions (particularly their promotion of exports) play a key role in the alarming soil erosion, water pollution and forest destruction going on in these countries.

More encouraging results are arising from the efforts of those international non-profit conservation organizations which have been involved in debt-for-nature swaps. Even though some of these swaps have been controversial, from the experience of my country they are undoubtedly a more environmentally sound approach to the debt crisis of the Third World. In Costa Rica, the swaps have not interfered with sovereign rights of land control and in many cases have involved local non-profit organizations and farmers groups in sustainable development initiatives. If these initiatives can become successful alternatives to agricultural export-dependent development programs, the debt-for-nature swaps will surely be a way to negotiate larger quantities of debt than they have in the past, and of eliminating debt-related encumbrances in the future.

Many natural resource law problems relate to the rural land tenure and use situation. For several decades, and certainly since the Kennedy administration's Alliance for Progress singled it out in the early 1960s as the main obstacle to development in Latin America, the poorer countries have made efforts to correct their agrarian structure. To the traditional issues of social inequality and low productivity, conservation interests have recently added ecological considerations, widening the range of problems and even making obsolete key aspects of some of the most widely used mechanisms for land

tenure reform. For example, provisions concerning clearing of public land as evidence of its occupation and use--the main elements of "possession" under Civil Property Law--are part of the legal systems of most Latin American countries. These provisions--somewhat reminiscent of the 1862 U.S. Homestead Act--have in fact promoted deforestation by allowing the acquisition of cleared land, but went uncontested until conservation-minded people pointed out the obvious contradiction of trying to better the conditions of the rural poor by inducing them to destroy their natural resource base.

It is precisely in this difficult environment of economic pressures and contradictory laws, that natural resource law must carry out its function. Other major problems have to do with public agency overlapping jurisdictions, and limitations on law enforcement.

Bearing these introductory remarks in mind, I would now like to describe briefly the type of work being done by the only non-governmental organization (NGO) specializing in the legal field which exists in Costa Rica, the Environmental and Natural Resource Law Center, in Spanish "*Centro de Derecho Ambiental y de los Recursos Naturales*" (CEDARENA), of which both University of Colorado School of Law Professor David Getches and I are founding members. Perhaps the best way to describe this work is to refer to an ongoing project in the Osa Peninsula, an ecologically-valuable and fragile area located in the Southern Pacific part of Costa Rica. The project, known as the OSA 2000 Boscosa project, includes the participation of Costa Rican government agencies, national and international NGOs, together with local farmers' associations. This project is approaching conservation and community development by emphasizing

management of wildlands by the local people, most of whom have economic interests in the sustainable use of the natural resources of the Peninsula. Involving the population of the Osa has been considered the best alternative for controlling the illegal logging, hunting, and gold mining which have caused substantial environmental damage in the last decade.

The Osa Peninsula covers an area of approximately 190,000 hectares (474,000 acres) and includes four different units: (a) the Corcovado National Park (41,788 ha. or 103,216 acres); (b) the Golfo Dulce Forest Reserve (787,800 ha. or 197,000 acres); (c) the Guaymi Indian Reserve (2,750 ha. or 6,820 acres), and (d) the Sierpe-Terraba Mangrove Reserve (30,000 ha. or 75,000 acres). It is the largest lowland rainforest on the Pacific Coast of Central America, with a unique concentration of biological diversity of which there is still much to be learned.

The forest in the Osa is rich in commercial hardwoods, epiphytes and tree species which produce valuable natural products such as resins, nuts and latex. Placing the forest and the forest land under secure long-term management to provide sustainable income to the local people is the most important single issue of the OSA 2000 project. It cannot be done unless solutions are found to basic questions, the main one being the ambiguous and conflicting land tenure and title situation that generates the insecurity in which the vast majority of the inhabitants of the Peninsula presently live. With no guarantee that they will be able to keep the land, the tendency is to deplete it of its economically valuable resources, as fast as possible and with no concern for the future.

The need to find solutions to land tenure problems originally prompted CEDARENA's involvement in the OSA 2000 project. Less than ten percent of the land is under registered title, which is the category that under Costa Rican law provides the highest tenure security, and the only one that guarantees the title holder immediate court protection from disturbance or dispossession. The rest of the land is under various regimes of land tenure, most of them originating from temporary and revocable authorizations granted by government agencies with overlapping jurisdictions and practically non-existing coordination. These agencies have been charged with: managing the forests and forest lands (Dirección General Forestal, DGF); distributing the agricultural lands to landless peasants (Instituto de Desarrollo Agrario, IDA); and protecting the Indian lands (Comisión Nacional de Asuntos Indígenas, CONAI).

The forestry law provides that lands once classified by the government agencies as agricultural-cattle or as forestry lands be transferred to IDA if deemed appropriate for agriculture or cattle ranching, or to DGF if their best use is for forestry production or protection. Because the land use classification was not done in 1978 when the Golfo Dulce Forest Reserve was established, and has only begun as part of the ongoing Boscosa Project, the tenure authorizations granted by the agencies have in fact, contributed to the insecurity since their validity depends on the pending land use classification.

This lack of clarity also fosters conflict between landowners, squatters and gold miners, and makes approval of any forest management plans very difficult, as a defined land tenure situation is a prerequisite for the approval. All this results in deforestation.

From an economic perspective, perhaps the best way to control deforestation is to place high values on forest resources. Historically, standing natural forests have not been an interesting asset for investors, nor have the governments in tropical countries paired the possible benefits from sustainable timber production or other natural forest products, with agriculture and livestock production. On the contrary, there has been an overvaluation of those land uses to which the forest has been lost, as is reflected by legal provisions such as the ones mentioned above.

This situation is in itself an obstacle to innovative considerations of the economical values of the forests, and to this day there is very little experience on the management of natural tropical forests for sustainable timber production. It is for this reason that groups such as the World Rainforest Movement consider deforestation to be an inevitable result of the economic policies which, according to the main international development institutions, lead to development.

From this standpoint, attempting to save the forests in the buffer zone of the Corcovado National Park in the Osa peninsula through sustainable management in fact implies an attempt to bring about the benefits assigned to development without its maladies, something which has yet to be proven possible in the natural resource area. This effort, which would be classifiable under the current heading of sustainable development, requires that those investing their own personal resources perceive that their investment has the highest possible degree of security attainable under the circumstances.

The outcome of the sustainable forest management being unverifiable at the outset, security translates into guaranteed land tenure rights. In the OSA 2000 project, this may mean limited property rights in those areas of the Corcovado's park buffer zone excluded from the Golfo Dulce Forest Reserve and under the jurisdiction of IDA, and DGF granted concession rights in the forestry lands, which will continue to be subject to the restrictions derived from the Forest Reserve status. This is not completely satisfactory in terms of providing the project the most favorable circumstances in which to evolve, as the farmers' main interest continues to be to obtain property rights over land which can provide for their sustenance over the long term and which they can leave to their children.

This issue is one of the most difficult the project faces and has created controversy among its participants. On the one hand, the government agency charged with managing the forest and forest lands, the DGF, prefers to retain control over the land, granting only its use to the farmers under concessions for the purposes of the project. In the agency's view, this will permit a permanent control of the farmer's compliance of the terms of the concessions, and would preclude them from transferring possession rights to the land, a common if illegal practice among beneficiaries of the agrarian institute, IDA. IDA would prefer to distribute the land among the farmers granting them property rights in compliance with its institutional purpose.

The NGOs have come to CEDARENA for advice and we have proposed that lands part of the sustainable forestry project be granted to local groups, which, however, would own a conditioned title as they would be precluded from selling, leasing,

subdividing, mortgaging or devoting the lands to a different use. On the other hand, ownership of these lands would not be reversible to the government as long as the groups comply with their obligations under the objectives of the project. The forestry lands would be owned and managed by the groups in accordance with the project's requirements, whereas the individuals pertaining to the groups would be assigned parcels of agricultural land for their families' nutritional and very basic financial needs.

We have drafted amendments to the new Forestry Law bill under discussion of the National Assembly (the law-enacting body in Costa Rica) to expressly provide the DGF with the necessary powers for this allotment of forestry lands. The alternative solution we have proposed in case the amendments are not enacted as law, are long-term concessions renewable for as long as the groups comply with their obligations.

Developing the legal tools for our work in the Osa Peninsula was largely facilitated by a grant given to CEDARENA by the Ford Foundation. That grant provided funds for an ongoing project to study legal and institutional aspects of what is known in Spanish as "Ordenamiento territorial," and which includes land tenure and use regulation and planning, title and cadastral registration, as well as incentives and sanctions related to land use. These have been analyzed in relation to the different regimes of land regulation, such as public and private, individual and associative, productive and conservationist, and so forth.

Our work on these subjects has benefitted from the collaboration of several public and private agencies and groups with varied jurisdictions and interests. Their input has not only added to our Center's information base and helped us acquire the working

knowledge necessary to conduct specific projects, but also aided us in obtaining the overall vision of the institutional and legal reforms and adjustments required to achieve conservation and sustainable development objectives.

Our work at the Center keeps close connection with University of Costa Rica's School of Law teaching and community extension activities. Some of us are professors at the School and more than ten students are currently doing their law practice work--a requisite for graduation--at CEDARENA.

As we have been consolidating our research expertise and acquiring more analytical capacity, our outlook on the natural resource problems of Costa Rica has become more comprehensive -- to integrate environmental concerns with the requirements of agricultural activities and the social dimensions of these problems, as implied by the OSA 2000 Boscasa Project.

We are now very interested in engaging in international cooperation for comparative research projects where this holistic outlook may be put to use. One such opportunity is arising out of a collaborative research project jointly proposed by the Natural Resources Law Center and CEDARENA, focused on examining opportunities for the participation of indigenous people in research and management activities at biosphere reserves. Possible case studies of this project are the Glacier-Waterton Biosphere Reserve in Canada and the United States, and La Amistad Biosphere Reserve in Costa Rica and Panama, and may broaden to include other biosphere reserves containing or adjacent to settlements of indigenous people in the Americas.