

# Ending the Tradeoff

## Harmonizing Efficiency and Effectiveness in Environmental Licensing and Enforcement Systems

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## 1. Executive Summary

In many parts of the world, environmental impact assessment (EIA) and its component government functions of review, licensing, monitoring, and enforcement, represent the dominant regulatory mechanism for the protection of natural resources and the rights of those harmed by environmental degradation.<sup>1</sup> The process of formulating enforceable rules and procedures for potentially harmful activities is at the very core of environmental and social governance. Yet the achievement of a coordinated and consistently functional link between environmental licensing and the enforcement of licensing requirements is elusive in many countries, including in Latin America.<sup>2</sup> Moreover, there is a widely held belief that streamlining procedures to achieve efficiency, indispensable for catalyzing investment and economic growth, can only be accomplished at the cost of sacrificing quality and effectiveness. However, a number of considerations that are highlighted in this document support the opposite position – that efficiency and effectiveness can be harmonized to preserve environmental and social integrity, while achieving robust levels of economic growth.

An environmental license<sup>3</sup> represents one of several key tools governments use to formalize the steps that the proponent of a proposed activity must follow to mitigate adverse environmental and social impacts. It is intended to secure a set of legally binding commitments from the developer of a factory, plantation, mine, public transit system, or other project. A license is designed to enable authorities to compel performance of a management plan for protecting environmental, social, health, and other concerns during the project's construction, operation, and final decommissioning. The government authority charged with enforcing compliance with the terms of the license may be the issuing entity or consist of one or more different entities. The effectiveness of the EIA process in managing risk and ensuring desirable outcomes is highly dependent on coordination between the licensing (drafting of requirements) and enforcement functions.

This paper is intended to foster discussion of ideas for strengthening the critical relationship between licensing and enforcement in Latin American Countries (LACs), building on the findings of earlier dialogues, including the DR-CAFTA forum held in November 2014 in Santo Domingo.<sup>4</sup> To facilitate discussion, this paper groups the broad range of issues involved into five core themes – the harmonization of goals, proactive approaches, drafting licensing terms, coordinating tasks, and institutional capacity.

## 2. Background

The process of Improving integration between licensing and enforcement functions must take into account an overarching concern: how procedural safeguards for reducing and managing risk will burden (or ease) the work of investors and authorities, and how these requirements are justified by future economic benefits.<sup>5</sup> It is the norm for public authorities and private sector parties involved in a project proposal to perceive only a tradeoff rather than considering hidden opportunities for the advancement of both socioeconomic and environmental policy goals. Regulatory measures that appear to place a drag on the economy are likely to meet resistance.<sup>6</sup>

The risk of *not* having an effective system for licensing and enforcement is not always obvious – a fact that may not trouble project developers, investors, and lenders who live far from the impacts of the activity they are undertaking or supporting.<sup>7</sup> Profits may appear to be large and immediate, while damages may be latent or diffused among many stakeholders. Nevertheless, staggering environmental, social, and economic costs may result from poorly drafted licensing

provisions and weak communication between authorities, which may amount to an exponential multiple of the developer's cost of compliance with well-designed requirements.<sup>8</sup>

It is commonly the case that project developers regard the issuance of an environmental license as the final step in a burdensome bureaucratic process, not as the beginning of an ongoing execution phase that is formulated to result in desirable environmental and social outcomes.<sup>9</sup> However, without the certainty of monitoring and enforcement during this phase, licensing requirements are merely words on paper.

### The value of a well-integrated licensing and enforcement process

Managing risk by enabling more predictable environmental, social, and economic outcomes is at the heart of the licensing process. The challenges involved are numerous and have been identified in expert roundtables, practitioner journals, and multinational conferences. Increasingly, environmental authorities have been working toward the adoption of systems and procedures that force a matching of environmental and socioeconomic licensing obligations with mechanisms for environmental compliance and enforcement (ECE).<sup>10</sup> The value of such mechanisms is not always recognized at the highest levels of a national government.

On a macro level, the key to securing political support for more effectively linked environmental licensing and enforcement institutions lies in reconciling, within a common framework, two national policy goals that have traditionally been in tension with one another: the need to reduce regulatory obstacles to economic growth, and the need for enhanced environmental and social protections. Yet a country's political will to enforce robust environmental standards is increasingly the "price of admission" to stronger trading ties with developed countries and access to international finance.<sup>11</sup> Similarly, International and commercial financial institutions, as foreign investors, are increasingly finding effective environmental regulatory frameworks and enforcement as necessary to mitigate the risks of losing social license to construct and operate infrastructure and extractive activities. The ability of a well-integrated "EIA-ECE" system to ensure more certain outcomes not only unlocks doors to foreign markets, but also provides a reliable basis for exploring, at the very outset of the conceptual process, fundamental project design options for harmonizing key policy goals.<sup>12</sup>

For much of Latin America's population, the pursuit of improved economic wellbeing is a fundamental need, rather than just an option.<sup>13</sup> In many cases, a country's natural resources represent the most valuable asset for fueling sustainable economic gain and fundamentally serve a social purpose.<sup>14</sup> However, the very real connection between environmental health and enduring prosperity is often hidden beneath the surface and further obscured by opportunities for short-term profit from natural resource exploitation. As a result, compelling justification may be needed to prevail in an uphill struggle that is an intrinsic part of protecting environmental and social concerns.<sup>15</sup> When justification *has* been made, clear rules and robust procedures are needed to ensure that commitments to minimizing environmental and social risks are captured in manner that is quantitatively measurable and likely to be enforced.<sup>16</sup>

### 3. Achieving both investment-friendly efficiency and risk-reducing effectiveness

Like other regions with emerging economies, creating a favorable climate for attracting investment, both domestic and foreign, is a key priority throughout Latin America.<sup>17</sup> To become more competitive, some countries have been working to shed much of the bureaucratic overhead that constrains the pursuit of commercial opportunities by investors and infrastructure development.<sup>18</sup> Historically, governments have often slashed environmental regulation – seeing background preparation associated with obtaining an environmental license as red tape that hinders investment and economic activity. At the same time, however, unregulated exploitation of natural resources usually offers only short-term benefits and mainly for those most centrally involved. Moreover, a weakening of licensing requirements – or their elimination altogether – can lead to unnecessary social conflict.

Informed analysis of potential impacts to the environment and human stakeholders at the outset can help avoid significant controversies, bad publicity, and unnecessary costs after the fact. Local communities and members of the public are an important source of valuable information. Given the opportunity, they can express concerns and draw attention to risks and impacts that would otherwise be overlooked. Obtaining public input allows project developers the opportunity to modify or augment mitigation plans proactively, preventing potentially crippling costs or work stoppages after project implementation.

The tension between regulatory streamlining and environmental sustainability may be most acutely felt at the point where environmental requirements are established (environmental mitigation and monitoring plans) that are connected with plans for enforcing these rules. It is here that legally enforceable commitments on the part of the project developer are either created or avoided.

Requirements and commitments imposed by financial lending institutions, investors, insurance companies and other nongovernment parties may also present challenges at the licensing and enforcement stages. A disconnect may exist between the timetables and deadlines of financing institutions and those of regulatory bodies for fulfilling the steps in the environmental licensing process.<sup>19</sup> Moreover, it has been observed that anything short of final approval (for example a provisional license generated by an integrated online permitting application) may not offer sufficient assurance for lenders to disburse funds.<sup>20</sup>

Removing barriers to investment is a significant political concern in most LACs, where economic growth is a top-level priority and impact on GDP is a key indicator of the viability of any initiative.<sup>21</sup> Increasingly, GIS technology and web-based information systems are being looked to and piloted with the goal of streamlining environmental licensing procedures for investors while simultaneously improving the accuracy, integrity, and completeness of risk assessment and mitigation plans.<sup>22</sup> When the public is given access, these systems can provide a strong mechanism for transparency and offer a check against back-office decisions that are not based on merit.<sup>23</sup>

Known as “single window” systems because all procedures are encompassed in one interface, these information platforms coordinate, streamline, and consolidate internal procedures from each government agency and department that has a role in the licensing process. These systems channel all project application and licensing data through a single electronic case file that enables the tracking of project status – including the compliance history – throughout the project lifecycle.

Four examples of single window systems, which channel all project application and licensing procedures through a single electronic case file on a shared information system, have recently been operationalized in Honduras (2015), El Salvador (2014), Chile (2012), and the Dominican Republic (2009).<sup>24</sup> In El Salvador, 23 separate application forms were previously required, and applicants had to travel to San Salvador to satisfy the paperwork.<sup>25</sup> In Honduras, there had been 77 procedural steps were involved.<sup>26</sup> Three of the systems (Honduras, El Salvador, Dominican Republic) are based on the NEPAssist tool developed by the U.S. Environmental Protection Agency (US EPA) and are designed to greatly reduce the number of steps and wait time associated with licensing decisions and project approvals.

Do these systems merely shift – to a different time and place – the gathering of source materials and the work involved in preparing reports (as one private sector trade group has suggested<sup>27</sup>) or do they represent a quantum improvement in not only streamlining the licensing process, but also aiding the effectiveness of future compliance monitoring tasks? More time will be needed to evaluate the early performance of integrated electronic licensing platforms, particularly in helping to coordinate licensing functions with post-licensing compliance monitoring and enforcement.

#### **Case examples: Single-window licensing systems in the Dominican Republic and El Salvador**

Since 2009, the Dominican Republic has led the LAC region in pioneering the deployment of a web-based single-window environmental licensing registry to promote commercial investment.<sup>28</sup> Based on the NEPAssist tool developed by the US EPA, the system streamlines licensing procedures for investors, coordinates the tasks of competent government ministries, and enables the tracking and monitoring of the compliance status of specific projects over time.<sup>29</sup> The system is also accessible to the public, offering unprecedented transparency concerning the environmental performance of commercial activities.

El Salvador's VIGEA online licensing system (launched in November 2014) features autofill of permit applications, built-in categorization, and automated permits for lower level impact projects. The system also allows transparent, web-based tracking for all stages of the EIA system, including monitoring, reporting of complaints, and enforcement.<sup>30</sup> The system has enabled the Salvadoran government to differentiate pre-construction permitting for low impact projects from EIA-based licensing, since the two often implicate separate considerations and different levels of scrutiny.<sup>31</sup> This has relieved significant workload from the EIA licensing process, which had been overburdened, resulting in unnecessary costs and delays.

El Salvador and the Dominican Republic are two of seven countries for which the US EPA has allowed adaptation of its proprietary NEPAssist application for use on the countries' own servers, customized with their own designs, databases, and sets of analytical questions.<sup>32</sup>

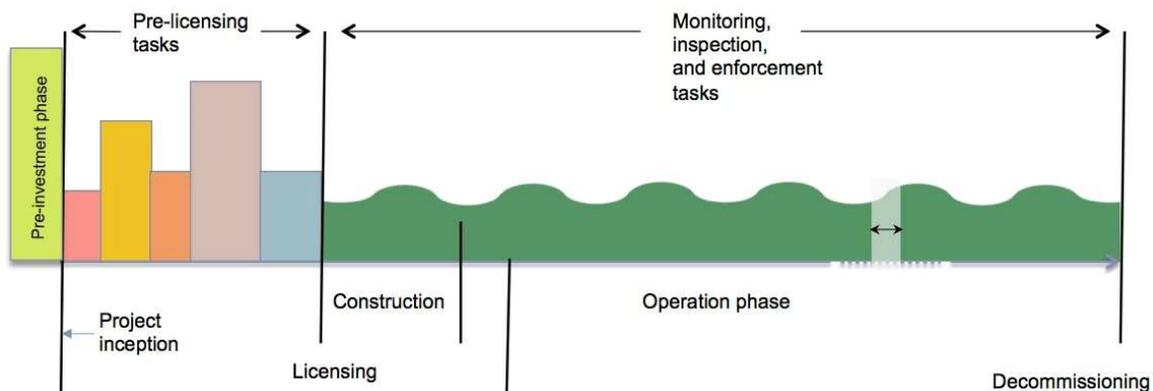
#### **4. Taking a proactive approach to feasibility and benefits during the licensing process**

An increasing number of countries are going beyond a “do no harm” approach to the impact assessment and licensing process to one that aims to provide net benefits, not only to the environment, but also to local stakeholders, including communities where a proposed activity will take place.<sup>33</sup> Ideally, government licensing authorities will do more than accept or reject a project proponent's findings. Instead, they will look at the role the project plays in the overall development strategy of the country, the project's contribution to cumulative impacts, and plans for avoiding conflicts with local stakeholders or land use ordinances.<sup>34</sup>

It is necessary to look beyond the boundaries of the environmental impact study alone when integrating a developer’s plans into a broader picture, not only to ensure that the developer can realistically carry out the full range of licensing requirements, but also to ensure that it is feasible for authorities to monitor and enforce them. Clearly segregating legal obligations from purely aspirational goals will also help avoid future confusion regarding compliance. Likewise, a thorough consideration of alternatives may be misleading if there is not a realistic evaluation of the enforceability of the project relative to the options considered.

The best opportunity for openly evaluating alternatives regarding key aspects of project design (location, core technologies, engineering choices, etc.) is early in the conceptual stage – often referred to as the pre-investment phase. The ability to assess a range of options before project details are solidified enables a more objective consideration of the responsibilities, impacts, and hurdles that project stakeholders and a variety of government departments must deal with. Once decisions are finalized, there will be a long “tail” of implications (see diagram below) concerning actions required, expenditures that must be made, and other resources that must be committed over an extended period of time in order to realize outcomes that are consistent with core policy goals.

**One-time and recurring government tasks (and costs) related to overseeing a project that is subject to EIA requirements**



Lastly, licensing and enforcement authorities cannot cooperate with one another effectively on big picture considerations if their exchanges only occur on a project-by-project basis. Without channels of communication on a broader basis, opportunities to influence systemic improvements and provide generalized insights will likely be forfeited.

Tailoring the level of review

At the 2014 DR-CAFTA forum, representatives found consensus around the idea of maximizing efficiency and effectiveness by tailoring the level of environmental review to the circumstances and level of impact of each proposed activity, focusing full EIA studies on proposed actions with the highest potential for significant impact.<sup>35</sup> A graduated scale for depth of review would ensure that all levels of impact are subject to performance, accountability, and reporting requirements that are adequate and appropriate for decision-makers to correctly allow or deny a proposed activity.<sup>36</sup>

This approach would include early review of proposed projects, resulting in legally binding provisions regarding environmental measures to be taken to ensure compliance if the license, permit, or authorization is granted.<sup>37</sup> This would timely eliminate projects and project elements that are inconsistent with environmental regulations and land use laws, allowing the project proponent to avoid costly delays, wasted sunk costs, and irrevocable commitments.<sup>38</sup> It would also enable early identification of the potential for incorporating net improvements to environmental and social conditions in the area the proposed activity will take place.

From a benefits perspective, there was consensus at the DR-CAFTA forum that a proactive and well integrated environmental licensing system would build seamless links between impact assessment and a process for monitoring environmental performance, following up on complaints, and coordinating permits (preconstruction, construction, and operating permits). It would provide channels for a variety of entities to share feedback, including ideas for new opportunities or best practices.<sup>39</sup> More broadly, a seamless system would provide government entities with a more complete foundation for evaluating how individual projects may integrate with land use ordinances, the planning of infrastructure improvements, and overarching strategies for low-impact development (strategic impact assessment).

Although a proactive licensing approach may help government actors perform their job more effectively, the initial stages of the process usually rely heavily on the work of independent, private sector consultants.<sup>40</sup> In most countries in Latin America, project proponents hire environmental consultants to carry out environmental impact studies and produce a preliminary terms of reference (ToRs) or similar document that elaborates the steps that the proponent will take to protect the environment and local stakeholders while executing the project.<sup>41</sup> Government regulatory agencies may oversee a national accreditation system for assuring that consultants have minimum level of professional expertise.<sup>42</sup>

Since consultants are typically paid by the project developer, they may have a built-in motive to provide information favorable to their client and may avoid a candid analysis of project alternatives. For this reason it is reasonable not only to consider accreditation as a mechanism for quality control, but also mechanisms that recognize and account for structural conflicts of interest.

It is established best practice that, based on an independent expert review process, designated government licensing authorities will augment and amend mitigation and monitoring plans and terms of reference (ToR) or other document drafted by the consultant, who may take the first turn in specifying the actions that the project developer must carry out.<sup>43</sup> Due to the technical expertise needed to understand the broad realm of environmental and social considerations encompassed by environmental impact studies, the expert team may be composed of specialists from a range of disciplines, including environmental engineering, forestry, soil science, geology, and social sciences.<sup>44</sup>

## **5. Drafting enforceable licensing terms**

### Incorporating enforceable provisions in environmental licenses

The process of capturing a set of commitments that legally bind a project proponent to the execution of a set of appropriate mitigation requirements is the very heart of an integrated EIA-ECE process.<sup>45</sup> For the purpose of this discussion paper, “appropriate” refers to requirements that are feasible, comprehensive, and enforceable. To be enforceable, the ToR or

other licensing document must express environmental mitigation requirements in sufficient detail, using performance indicators that are stated in terms of quantitative limits that are auditable and measurable according to widely recognized objective standards.<sup>46</sup>

For licensing requirements to be auditable, they must be recorded in clear quantitative units that can be measured by an independent verifier, such as a government inspector. It is frequently the case that a developer's consultants will draft a ToR for environmental mitigation and monitoring plans, which are then approved or disapproved by a licensing body. Since the consultants may not have experience in monitoring compliance in the field, performance indicators for measuring the level of compliance may be stated in qualitative terms such as "near" a river instead of "within 100 meters" of a river, or "clean" rather than "less than .05 parts per million."

Many performance indicators are specific to a type of activity and sometimes are even unique to a specific project. Given the vast range of human activities that are routinely licensed and the corresponding variety of objective details that inspectors must be measured, a licensing body must have access to a spectrum of specialized expertise or have the means of acquiring the relevant information. It is particularly important to have standardized performance indicators for making objective comparisons if government licensing and enforcement bodies are measuring cumulative impacts from a sector or industry.

There may be little need to reinvent the wheel if a proposed project or activity is largely of the same type as one that has already been subject to a robust licensing process nearby or in another jurisdiction. Previously drafted license templates may be available and require only minor modifications or a selection from a predefined range of choices, saving a licensing body an enormous amount of time and resources.

An example of preexisting guidelines for drafting enforceable and appropriate commitments for project applicants is the *CAFTA-DR Regional EIA Technical Review Guidelines*, a body of licensing manuals for the mining, energy, and tourism sectors, and which is the product of collaboration between environmental and sectoral ministries in Central American countries, the Dominican Republic, and the United States.<sup>47</sup> Model terms of reference contained in the *Guidelines* provide adoptable provisions in enforceable commitment language that address a variety of pollutant media that are common to many types of activities. Starting with these examples may help licensing bodies overcome challenges that are frequently encountered in drafting license provisions from square one.

#### Building incentives for compliance into the environmental license

The legal provisions that specify the actions a developer will undertake are critical not only to the planning of government follow up actions, but also in motivating the proponent of an activity to carry out the plans once they are approved.<sup>48</sup> When properly orchestrated, compliance is built into the environmental permit, meaning that the rewards and legal deterrents, including the threat of sanctions, make it more attractive and less costly for the proponent to comply than to violate these provisions.<sup>49</sup> On the reward side, a compliant developer may enjoy reputational benefits, the possibility of less frequent inspections, or private access to international markets.<sup>50</sup>

#### Adaptive management and built-in flexibility

Although a tailored approach can efficiently channel EIA review resources to where they are most needed, even the best environmental planners and reviewers cannot accurately predict all potential impacts. Some flexibility needs to be built into terms of reference and environmental

management plans so that small adjustments from the licensed plans can be made, not requiring repeated visits to authorities for re-approval each time the unexpected happens.<sup>51</sup> “Adaptive management” is a mechanism that provides project developer the flexibility to respond to unanticipated impacts without the need to undergo repetitive license modification procedures. The license should allow self-execution of changes in management to the extent possible, combined with timely and accurate reporting.<sup>52</sup> However, the ability to adaptively manage should never serve as a substitute for sound planning and decision-making at the outset.<sup>53</sup>

### Information systems as a tool for generating appropriate licensing requirements

The implementation of single window licensing systems can secure more predictable environmental outcomes by generating licensing requirements that are better tailored to a specific project and more enforceable. They not only integrate all stages of the licensing process, but also can evaluate cumulative effects, and overlay information on proposed projects with a database of ecological, geological, social, and health data corresponding to the exact boundaries of a project site (for example, the project’s proximity to a school).<sup>54</sup> These systems not only allow early screening for many important criteria, but also can be enabled to auto-fill many of the relevant mitigation and monitoring requirements in terms that can be objectively audited and enforced.

When all the relevant environmental and social considerations have been resolved by the information platform, the project proponent makes a legal commitment to a set of auditable requirements that are compiled in a single, integrated record. The system can track the performance of the project through the construction, operation, and decommissioning stage and provide information to environmental authorities, as well as the public, on the compliance status of any entity in the system.

## **6. Seamless hand-offs of tasks and inter-agency coordination**

### Ensuring that each competent authority performs its role

In order to facilitate seamless transition from licensing to compliance monitoring, the licensing provisions must not only have enforceable rules that the developer must follow, but also must be backed by a system for ensuring that the right government actors will do the right things at the right time.<sup>55</sup> In other words, assuring desirable environmental and social outcomes is also dependent on the ability of regulatory bodies to coordinate their actions in a predictable, specified manner.

Government ministries can better carry out their responsibilities if they are aware of how their actions impact other departments and affect outcomes downstream. Effective multi-directional feedback enables environmental authorities to continually expand their body of institutional knowledge, fueling ongoing improvements in both licensing and enforcement.<sup>56</sup> Feedback may also be shared horizontally, through networks that enable staff to share lessons learned with their counterparts in other regions or countries.

As stated above, the environmental licensing process can be viewed as a co-dependent part of a unified system that also includes the functions of compliance monitoring, enforcement of the project-specific requirements, and the enforcement of environmental legislation (whose applicability extends beyond the project).<sup>57</sup> Similarly, regulatory oversight of the preconstruction,

construction, operation, and decommissioning project phases should be planned in a holistic manner if these functions are to work together seamlessly.<sup>58</sup> The critical junctures that most determine success or failure of this integration occurs where tasks are handed off from one government ministry or department to another government entity.<sup>59</sup>

When the EIA and ECE authorities are hindered by a “silo mentality” – isolated by virtual walls resulting from different organizational cultures and/or poorly drafted legislation, project developers who are applying for environmental licenses may face the challenge of multiple permitting authorities, such as an environmental ministry department and the ministry of an industry sector.<sup>60</sup> In a decentralized system, conflicts between national and local ministry offices may also pose problems if these bodies’ respective roles have not been clearly delineated. When government authorities are not well coordinated, proponents may need to deal with inconsistent or conflicting rules (such as license-specific distance requirements that are different from marine coastal management setback requirements).

For seamless handoffs to occur, there must be mechanisms for effective communication between each ministry or department involved.<sup>61</sup> It is often observed that licensing and enforcement authorities do not exchange experiences and lessons learned with one another.<sup>62</sup> As a result, licensing authorities do not refine their knowledge concerning the feasibility of monitoring specific licensing requirements in practice. Likewise, enforcement authorities are not able to learn from, and respond to, the strategies and purposes behind many of the specific performance indicators that must be monitored. Ultimately the ECE process can be viewed as an evaluation of the license itself, highlighting where the drafting of the license terms were or were not successful in defining the aspects of environmental performance that needed to be monitored.<sup>63</sup>

## **Coordinating tools**

One of the core lessons resulting from the DR-CAFTA forum was the conviction that high-level agreements between the environmental ministries, the finance ministry, sectoral ministries, and other government departments are necessary for effective collaboration within the EIA-ECE process. Adequate investment by the national government in institutions for environmental compliance assurance will not occur unless the competent authorities involved share data on risk-related economic costs in connection with public health, resources, and infrastructure if environmental challenges are not properly addressed.<sup>64</sup>

### Coordination through Inter-Ministerial Agreements

One mechanism that has been useful in coordinating government departments is the inter-ministerial agreement or memorandum of understanding (MOU).<sup>65</sup> An agreement of this type, whether formal or informal, provides clarity concerning where the role of each competent government entity begins and ends.

El Salvador’s *Inter-institutional Cooperative Agreement to Control Imports, Exports and Traffic Related to Multilateral Environmental Accords* is an example of how an inter-ministerial agreement can be used to achieve cooperation between national level government ministries in realizing environmental objectives. The agreement was signed by competent ministries in 2008 in order to ensure smooth implementation of El Salvador’s commitments under the Central American Free Trade Agreement (CAFTA).<sup>66</sup> Complying with CAFTA required organizing the respective roles of four ministries<sup>67</sup> in strengthening control over imports, exports, and international commercial traffic through effective application of customs and environmental laws. The agreement established a clear and detailed designation of each ministry’s role and

responsibilities, including a stipulation that all relevant information would be communicated between agencies in a timely fashion. Similar documents have since been collaboratively developed for inspections and environmental audits.<sup>68</sup>

#### Coordination through Internet-based Information Systems

As stated earlier, integrated, web-based information systems represent another mechanism that holds promise for connecting relevant government authorities in a new way. These systems provide comprehensive project information to all ministries and departments that have a role in licensing and assuring compliance, allowing each entity involved to be apprised of the actions of other government agencies involved. Since these systems are a relatively recent phenomenon and are still not fully deployed in some countries, experience with the agency-coordinating role is still thin. It is still an open question how these tools change the nature of communication between competent government bodies.

While inter-agency agreements and MOUs may define how individual government departments report the status of their work to one another, this function is more automated in a shared information system, reducing the delays that may arise from status reports that are updated irregularly or at widely spaced time intervals.

#### Coordination through inter-ministerial committees

Inter-ministerial committees are used in Guatemala and Honduras as well as a number of countries in sub-Saharan Africa to coordinate multiple agencies in decision and policy making related to a variety of regulatory issues, including EIA and other environmental topics.<sup>69</sup> In Guatemala, the *Technical Council for the Enforcement of Environmental Law* was created to achieve more effective and efficient implementation of environmental law by facilitating coordination between institutions whose responsibilities implicate environmental compliance and enforcement needs or are related to the execution of these functions. The council consists of a representative from the Ministry of Environment and Natural Resources, representatives from twelve sectoral ministries, representatives from three government bodies related to environmental enforcement, and a representative from the National Council of Protected Areas.

### **7. Capacity needs for a well-functioning EIA-ECE system**

There is no universal definition of capacity. According to UNEP, capacity can be understood as “the ability of a country to identify and solve its own problems and risks.”<sup>70</sup> For convenience, this paper will refer to capacity in connection with carrying out environmental governance functions, organizing “ability” into four parts: knowledge, skills, resources, and delegated authority.

#### What constitutes a “well-functioning” system for integrating review, licensing and enforcement?

Capacity is often understood relative to quantity and quality requirements. Capacity for environmental licensing involves not only the number of the licenses issued, but also minimum quality standards for the process through which the license was drafted, reviewed, and approved. Merely stating that 50 inspections were performed during a time period means little without also knowing the thoroughness with which the inspections were carried out and the performance indicators used. With respect to seamlessly linking environmental licensing and enforcement functions, a “well-functioning” system, should meet the minimum standards that each component task requires.

## Resource needs

There are a number of types of resource needs for government authorities involved in the environmental licensing and enforcement functions:<sup>71</sup>

1. *Human resources*: number of available staff with minimum knowledge and skills:
  - a. Knowledge - of the rules and procedures, accepted principles and best practices, and applicable underlying technical knowledge.
  - b. Skills – the ability to carry out assigned tasks competently and efficiently, through experience and practice.
2. *Material and financial resources* – capital goods (e.g., vehicles, laboratories); budget allocations, revenues, and reserve funds; technological resources (information systems).
3. *Authority* - Delegated legal power and authorization to carry out official duties.

### A deficit of adequately trained enforcement staff

During the 2014 DR-CAFTA forum, a recurring and widely shared observation was the critical need for training for government enforcement staff. It was noted that the ratio of enforcement staff to licensing staff was low. An important area of discussion for competent authorities is how to highlight this need and ensure better funding for this function.

### The role of independent auditors

The use of independent, non-government auditors is one way for environmental regulatory bodies to extend their monitoring and inspection capacity, although it should never be used as a substitute for government oversight.<sup>72</sup> Like environmental consultants, it is important to ensure that auditors are qualified to perform their work and that they retain independence from the entity being audited. To ensure minimum standards, governments frequently adopt an auditor accreditation process with qualification standards that are built into the legal framework.<sup>73</sup> Mechanisms to maintain auditor independence include avoiding scenarios where project developers select the auditors used and pay directly for their services. It is important to recognize that implementing and regulating an auditor accreditation system may require significant government resources.

## **8. Conclusion**

The preceding sections have highlighted challenges and also have identified a number of tools that government regulatory bodies have utilized to address specific regulatory needs. These tools include, but are not limited to incentive-based compliance approaches, single window licensing and project tracking systems, auditable (enforceable) licensing requirements, interministerial agreements, and adaptive management provisions.

It is proposed that these tools can be deployed so that national environmental and social governance systems can adeptly integrate their licensing and enforcement functions and provide new efficiencies that are pivotal to investment – all while improving (rather than sacrificing) quality and effectiveness. The challenge will be for each country to determine how to best interconnect and utilize these tools in a way that creates an effective framework that is tailored to the country's unique circumstances.

A commitment to a new framework of best practices is only part of the equation. In order to secure political and budgetary support at the highest levels of government, public regulatory bodies and private sector institutions alike will need to demonstrate the true economic value of robust licensing and enforcement systems, as well as the certainty of grave consequences that will result from not implementing them well. This is not an easy task, and will require a willingness to explore new ideas about structuring effective systems, as well as coordinating the allocation and sharing of roles in a highly productive manner.

Perhaps most importantly, it is proposed that implementing a new framework well means stepping back and looking strategically at how environmental and social governance can be used as competitive policy tool and to manage macroeconomic risk. The result of reacting to new proposals on a project-by-project basis will never prepare a country to benefit fully from the next investment cycle.

## END NOTES

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- <sup>1</sup> Environmental Impact assessment is just one of a number of tools that governments use to manage the way that human activities utilize natural resources. Examples of other mechanisms include zoning laws, territorial ordinances, logging concessions, severance taxes, and emissions permits.
- <sup>2</sup> DR-CAFTA, *Final Report, DR Best Practices Forum on Environmental Impact Assessment and Related Permitting and Enforcement*, Santo Domingo, Dominican Republic (November 11-13, 2014); Wood, Christopher, *Environmental Impact Assessment in Developing Countries: An Overview*, Conference on New Directions in Impact Assessment for Development: Methods and Practice 14 (2003).
- <sup>3</sup> *Id.*
- <sup>4</sup> The DR-CAFTA forum was held from November 11-13, 2014, for the purpose of make progress in overcoming common challenges, share national experiences, and enhancing recommendations for strengthening the EIA process in DR-CAFTA countries.
- <sup>5</sup> Wasserman, Cheryl and Nieto, Salvador, *Next Generation Environmental Impact Assessment, Permitting and Enforcement in El Salvador*, INECE Report on Next Generation Compliance (2015) Available at [http://www.inece.org/nextgen/09\\_NextGenEIA.pdf](http://www.inece.org/nextgen/09_NextGenEIA.pdf).
- <sup>6</sup> Pratt, Lawrence and Mauri, Carolina, *Environmental Enforcement and Compliance and Its Role in Enhancing Competitiveness in Developing Countries*, 7<sup>th</sup> INECE Conference Proceedings. 296 (2005), Available at [http://www.inece.org/conference/7/vol2/63\\_Pratt.pdf](http://www.inece.org/conference/7/vol2/63_Pratt.pdf).
- <sup>7</sup> DR-CAFTA Final Report, *Supra* note 2.
- <sup>8</sup> Breakout discussion at the DR-CAFTA forum in November 2014, Small Group #4: Donor Groups, Safeguards and Lessons learned, p.59.
- <sup>9</sup> Sadler, Barry, *Environmental Assessment in a Changing World: Evaluating Practice to Improve Performance International Study of the Effectiveness of Environmental Assessment*, Canadian Environmental Assessment Agency and the International Association for Impact Assessment (1996).
- <sup>10</sup> Arend and Ruessink, Henk, *Environmental Impact Assessment and Environmental Compliance and Enforcement: An Agenda for a Common Approach* (2011) Available at [http://inece.org/conference/9/proceedings/53\\_Kolhoff%20Ruessink.pdf](http://inece.org/conference/9/proceedings/53_Kolhoff%20Ruessink.pdf).
- <sup>11</sup> Pratt, *Supra* note 6.
- <sup>12</sup> Often referred to as the “pre-investment phase.”
- <sup>13</sup> Organization of American States, *Monitoring Progress of the Environmental Cooperation Agenda in CAFTA-DR Countries – Fourth Evaluation Report*, 3 (2014) (Noting the fact that safeguarding the environment is not viewed as a fundamental pillar of the development agenda of DR-CAFTA countries and that economic and social agendas receive priority).
- <sup>14</sup> Bhat, Siriam, *Natural Resources Conservation Law*, Sage Publications, Inc., 7 (2010).
- <sup>15</sup> Organization of American States, *Third Evaluation Report*, 24 (2013) (Stating that the strengthening of the EIA process is “an ongoing effort,” that DR-CAFTA countries are tackling with enthusiasm and commitment, but noting that the EIA process was falling short of its potential as a mechanism for (a) attaining target levels of environmental performance and (b) “reconciling environmental, social and economic interests for sustainable development.”
- <sup>16</sup> Wasserman, Cheryl *Enforcement of Environmental Impact Assessment Requirements*, INECE 9<sup>th</sup> Conference paper, Available at [http://inece.org/conference/9/proceedings/57\\_Wasserman.pdf](http://inece.org/conference/9/proceedings/57_Wasserman.pdf).
- <sup>17</sup> Organization of American States, *Monitoring Progress of the Environmental Cooperation Agenda in the CAFTA-DR Countries: Fourth Evaluation Report* (2014).
- <sup>18</sup> European Commission, *Streamlining environmental assessment procedures for energy infrastructure Projects of Common Interest (PCIs)* 5 (2013), Available at [http://ec.europa.eu/environment/eia/pdf/PCI\\_guidance.pdf](http://ec.europa.eu/environment/eia/pdf/PCI_guidance.pdf)
- <sup>19</sup> DR-CAFTA *Final Report*; INECE, *Moving Forward: A Summary of INECE’s Roundtable Discussion on the Enforcement of Environmental Impact Assessment (EIA) Requirements* (2012) Available at [inece.org/eia/EIARoundtableSummary.pdf](http://inece.org/eia/EIARoundtableSummary.pdf)
- <sup>20</sup> Interview with COHEP (Consejo Hondureño de la Empresa Privada), Tegucigalpa (March 18, 2015).
- <sup>21</sup> *Id.*
- <sup>22</sup> DR-CAFTA Final report; Wasserman, Cheryl, *Enforcement of Environmental Impact Assessment Requirements*, INECE 9<sup>th</sup> Conference paper, Available at [http://inece.org/conference/9/proceedings/57\\_Wasserman.pdf](http://inece.org/conference/9/proceedings/57_Wasserman.pdf).
- <sup>23</sup> DR-CAFTA, *Final Report*, *Supra* note 2.
- <sup>24</sup> Wasserman, Cheryl and Nieto, Salvador, *Supra* note 5.
- <sup>25</sup> *Id.*
- <sup>26</sup> Unidad de Planeamiento y Evaluación de Gestión (UPEG) Statement, (16 March 2015) (Commenting that the reengineering of Honduras’ licensing process reduced the licensing process from 77 steps to 2 steps).
- <sup>27</sup> Comment by Consejo Hondureño de la Empresa Privada, (COHEP), March 2015.
- <sup>28</sup> DR-CAFTA, *Final Report*, *Supra* note 2.
- <sup>29</sup> *Id.*

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<sup>30</sup> Wasserman, Cheryl and Nieto, Salvador, *Supra* note 5.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *But see* Acerbi, Marcelo et al., IAIA14, *Environmental Impact Assessment Systems in Latin America and the Caribbean*, 4-5 (2014) <http://www.iaia.org/conferences/iaia14/IAIA14-final-papers/Acerbi,%20Marcelo.%20%20EIA%20systems%20in%20Latin%20America%20and%20the%20Caribbean.pdf>

<sup>34</sup> A systematic, broad analysis of environmental and social impacts for planning and policy making is referred to as Strategic Impact Assessment (SEA)

<sup>35</sup> DR-CAFTA, *Final Report*, *Supra* note 2 at p.5.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> DR-CAFTA, *Final Report*, *Supra* note 2 Par. 5.

<sup>40</sup> Acerbi, Marcelo et al., *Supra* note 33.

<sup>41</sup> Depending on the jurisdiction.

<sup>42</sup> Acerbi, Marcelo et al., *Supra* note 33 at p.2.

<sup>43</sup> Wasserman, Cheryl, *supra* note 16 at p.6; Wood, Christopher, *Environmental Impact Assessment in Developing Countries: An Overview*, Conference on New Directions in Impact Assessment for Development: Methods and Practice (24-25 November 2003).

<sup>44</sup> Stoughton, Mark and Fisher, Weston, *Topic Briefing: An Introduction to Environmental Assessment*, USAID (2005) Available at [http://www.encapafrika.org/EGSSAA/EGSSAA-Pt4Ch00-EIA-Topic-Briefing-\(17Jan05\).pdf](http://www.encapafrika.org/EGSSAA/EGSSAA-Pt4Ch00-EIA-Topic-Briefing-(17Jan05).pdf).

<sup>45</sup> Wasserman, *Supra* note 16.

<sup>46</sup> *Id.* at 10.

<sup>47</sup> CAFTA-DR Regional EIA Technical Review Guidelines and Example Terms of Reference, Available at <http://inece.org/resource/eia-review-guidelines/>.

<sup>48</sup> DR-CAFTA *Final Report*, *Supra* note 2.

<sup>49</sup> Jones, Davis and Silberman, Jon, *Designing Rules to Better Achieve Compliance*, Presentation at 2014 IAIA Conference: Impact Assessment for Social and Economic Development, 28.

<sup>50</sup> INECE, *Principles of Environmental Compliance and Enforcement* 38, 49 (2009), Available at [http://inece.org/principles/PrinciplesHandbook\\_23sept09.pdf](http://inece.org/principles/PrinciplesHandbook_23sept09.pdf).

<sup>51</sup> DR-CAFTA *Final Report*, *Supra* note 2.

<sup>52</sup> *Id.*, Focus enforcement on prevention, USA comments. 34

<sup>53</sup> NEPA Task Force (2002-04) Council on Environmental Quality, Modernizing NEPA Implementation, Chapter 4: *Adaptive Management and Monitoring*, 48, Available at <https://ceq.doe.gov/ntf/report/chapter4.pdf>.

<sup>54</sup> DR-CAFTA Final Report, Dominican Republic presentation, 18 (2014).

<sup>55</sup> INECE, *Supra* note 19

<sup>56</sup> *Id.*, comments of Arend Kolhoff.

<sup>57</sup> Kolhoff, and Ruessink, *Supra* note 10.

<sup>58</sup> *Id.*

<sup>59</sup> Wasserman, *Supra* note 16.

<sup>60</sup> DR-CAFTA Final report, *Supra* note 2.

<sup>61</sup> Kolhoff, Ruessink

<sup>62</sup> INECE, *Supra* note 19; Wood, *Supra* note 43, at 7.

<sup>63</sup> Kolhoff and Ruessink, *Supra* note 10.

<sup>64</sup> DR-CAFTA Final Report, Executive Summary about Better/Best Practices, p.7

<sup>65</sup> El Salvador's *Inter-institutional Cooperative Agreement to Control Imports, Exports and Traffic Related to Multilateral Environmental Accords* is an example of how an inter-ministerial agreement can be used to achieve cooperation between national level government ministries in realizing environmental objectives. The agreement was signed by competent ministries in 2008 in order to ensure smooth implementation of El Salvador's commitments under the Central American Free Trade Agreement (CAFTA). The agreement established a clear and detailed designation of each of four ministries' respective roles and responsibilities, including a stipulation that all relevant information would be communicated between agencies in a timely fashion.

<sup>66</sup> An English translation is available at [http://www.inece.org/cooperation/EISavadorSignedAgt\\_edited\\_kopsick.pdf](http://www.inece.org/cooperation/EISavadorSignedAgt_edited_kopsick.pdf).

<sup>67</sup> El Salvador's Ministry of the Environment and Natural Resources, the Ministry of Agriculture and Livestock, the Ministry of Public Health and Social Assistance, and the General Customs Office.

<sup>68</sup> DR-CAFTA Final Report, Executive Summary about Better/Best Practices

<sup>69</sup> *Consejo Técnico para el Cumplimiento de la Legislación Ambiental*, [http://www.marn.gob.gt/sub/portal\\_consejo/index.html](http://www.marn.gob.gt/sub/portal_consejo/index.html); Organization of American States, *Monitoring Progress of the Environmental Cooperation Agenda in the CAFTA-DR Countries*, Second Evaluation Report, 33 (2011).

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<sup>70</sup> Environmental Impact Assessment Training Resource Manual, Second Edition, Section B: Capacity building and the environment 28 (2002) Available at [http://www.unep.ch/etu/publications/EIA\\_2ed/EIA\\_B\\_body.PDF](http://www.unep.ch/etu/publications/EIA_2ed/EIA_B_body.PDF).

<sup>71</sup> Netherlands Commission for Environmental Assessment (NCEA), Funding Governmental Tasks in Environmental and Social Impact Assessment and Environmental Approval (2014).

<sup>72</sup> Wasserman *Supra* note 16.

<sup>73</sup> NCEA, *Supra* note 71.