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# A Solid Foundation: Belize's Chalillo Dam and Environmental Decisionmaking

*Ari Hershowitz\**

*Originally introduced in the United States through the National Environmental Policy Act (NEPA) of 1969, environmental assessment requirements are now incorporated in the environmental laws of countries worldwide. These requirements are viewed with ambivalence by some developing country governments, which see them at best as a nuisance, and at worst as a barrier to progress. For citizens in these countries, however, environmental assessments and their rigorous judicial enforcement may provide the only mechanism available to hold governments accountable for their decisions on major infrastructure projects.*

*This Article describes the legal battle over one such project, the Chalillo dam in Belize.*

*Plans by a Canadian-owned utility to build the hydroelectric facility on Belize's Macal River sparked a national and international debate and culminated in the first environmental lawsuit to reach the Judicial Committee of the Privy Council in London, the highest court of appeal for Belize. Belizean environmental groups argued, inter alia, that the Environmental Impact Assessment (EIA) for the dam was fundamentally flawed, containing errors in the geological description of the dam's foundation. In an unusually divided 3-2 ruling, the Privy Council upheld Belize's decision to allow construction of the dam. The majority judgment discounted the geological flaws in the EIA, ruling*

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*that the decision to build the dam was essentially a sovereign one for Belize to make. The dissent, meanwhile, maintained that the geological flaws could not be ignored, and that Belizean authorities should be held to the same standards as those in the developed world. To do any less, the dissent reasoned, would undermine good governance and the rule of law. This Article argues that the trajectory of the case itself, as well as its aftermath, demonstrate the wisdom of the minority view.*

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#### INTRODUCTION

How solid a foundation must decisionmakers have before approving construction of a major infrastructure project? Belize, a small, former British colony in Central America, faced that question when a Canadian power company sought regulatory approval to build the Chalillo dam—the country’s second major hydroelectric facility and one of the largest infrastructure projects in its history.<sup>1</sup> The project’s supporters, including Belize’s Prime Minister, claimed that the dam was needed to bring cheap power to Belize, to reduce the country’s dependence on foreign energy sources, and to draw foreign

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1. The Chalillo dam is rivaled only by the Maya pyramids in height, and is one of the most costly private infrastructure projects in Belize. See WORLD BANK, PRIVATE PARTICIPATION IN INFRASTRUCTURE DATABASE (2007), [http://ppi.worldbank.org/explore/ppi\\_exploreCountry.aspx?countryID=102](http://ppi.worldbank.org/explore/ppi_exploreCountry.aspx?countryID=102); see also *Evening Newscast: Chalillo is Commissioned but BEL will still seek Rate Hike* (Channel 5 Belize television broadcast Nov. 15, 2005), available at [http://www.channel5belize.com/archive\\_news\\_cast.php?news\\_date=2005-11-15](http://www.channel5belize.com/archive_news_cast.php?news_date=2005-11-15) (calling the project “perhaps the largest [by cost] private undertaking in Belize’s history”) (transcript).

investment.<sup>2</sup> Opponents raised numerous objections: the dam would flood one of the richest wilderness areas in Central America, habitat for more than a dozen threatened and endangered species; it would further concentrate Belize's power sector in the hands of one foreign company; it would detract from tourism; and it would ruin an important drinking source for downstream communities.<sup>3</sup> But when a lawsuit over approval of the project reached the Judicial Committee of the Privy Council in London, the highest court of appeal for Belize and more than a dozen other Commonwealth nations, the decision came down to a question of geology. In particular, whether the foundation of the proposed dam site was made of granite or of sandstone, and whether Belizean officials could legally approve the project without knowing the answer. Because the physical integrity of the dam—and therefore its construction cost and likelihood of failure—depended so strongly on its foundation, this question of geology also had implications for the social, economic, and environmental concerns raised by opponents of the project.

Through an analysis of the Chalillo dam case, this paper explores: (1) what information is needed for rational government decisionmaking on environmental matters; (2) to what degree this information should be made available to the public during the decisionmaking process; (3) how judicial review of environmental decisions facilitates this process; and (4) whether the answers to these questions depend on a country's level of economic development. Ultimately, the experience of the Chalillo project shows that the need for accurate, publicly available information about the potential impacts of large infrastructure projects is as great in Belize as it is in England or the United States. The need for judicially enforceable procedures to ensure that government officials not only disclose such information but also consider it in their decisionmaking may be even greater.

## I. ENVIRONMENTAL IMPACT ASSESSMENTS: FROM THE UNITED STATES TO BELIZE

### A. *NEPA and Environmental Decisionmaking*

Belize requires an environmental impact assessment (EIA) for each major infrastructure project. Like many countries worldwide, Belize's environmental assessment requirements are modeled after the National Environmental Policy Act (NEPA)<sup>4</sup> in the United States and the novel concept it introduced—the Environmental Impact Statement (EIS).<sup>5</sup> For any “major federal action

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2. See, e.g., David Gonzalez, *Upbeat Plans for a Dam in Belize Turn Nasty*, N.Y. TIMES, Mar. 2, 2001, at A6.

3. See *id.*

4. National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321–4347 (2006).

5. See William L. Andreen, *Environmental Law and International Assistance: The Challenge of Strengthening Environmental Law in the Developing World*, 25 COLUM. J. ENVTL. L. 17, 40 (2000) (“Based on NEPA's original example, environmental impact assessment has evolved into one of the

significantly affecting the quality of the human environment,” government decisionmakers in the United States are required to prepare a “detailed statement” describing, inter alia, “the environmental impact of the proposed action.”<sup>6</sup> The basic purposes of this “detailed statement,” the EIS, are:

to provide decision-makers with an environmental disclosure sufficiently detailed to aid in the substantive decision whether to proceed with the project in light of its environmental consequences... [and to] provide the public with information on the environmental impact of a proposed project as well as encourage public participation in the development of that information.<sup>7</sup>

NEPA, signed into law on January 1, 1970, created a new way of looking at environmental decisions.<sup>8</sup> Establishing “purely procedural”<sup>9</sup> obligations, NEPA does not prevent decisionmakers from making unsound choices,<sup>10</sup> but rather mandates that those choices be based on “detailed information”<sup>11</sup> about the project and its potential environmental effects. NEPA also provides an important platform for public participation by “guarantee[ing] that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision.”<sup>12</sup>

The creation of a public, legally-mandated environmental assessment process was, in many ways, an accident of history. NEPA was developed in the late 1960s, following the rise in environmental consciousness stimulated by Rachel Carson’s *Silent Spring* and other environmental exposés.<sup>13</sup> The legislation, as it was introduced in the Senate, lacked a concrete enforcement mechanism.<sup>14</sup> It was not until the single Senate hearing on the proposed NEPA

most utilized methods worldwide for helping decisionmakers understand and heed the environmental ramifications of their actions. Today, at least 60 nations have adopted an EIA process in some form, whether by legislation, regulation, or informal policy pronouncement.” (internal citations omitted)).

6. NEPA, 42 U.S.C. § 4332(2)(C)(i).

7. *Trout Unlimited v. Morton*, 509 F.2d 1276, 1282 (9th Cir. 1974).

8. “This was blockbuster stuff in the United States circa 1969 . . . . The NEPA ideas of disclosure, public participation, alternatives, and judicial review are blockbuster stuff as well for the developed countries of Europe and are absolutely revolutionary stuff for developing nations in Latin America and the Far East and for those, like Croatia and Cuba, who are also signing on.” Oliver A. Houck, *Is That All? A Review of the National Environmental Policy Act*, 11 DUKE ENVTL. L. & POL’Y F. 173, 191 (2000) (reviewing LYNTON KEITH CALDWELL, *THE NATIONAL ENVIRONMENTAL POLICY ACT, AN AGENDA FOR THE FUTURE* (1998)).

9. *Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1070 (9th Cir. 2002).

10. “NEPA itself does not mandate particular results, but simply prescribes the necessary process . . . . NEPA merely prohibits uninformed—rather than unwise—agency action.” *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350–51 (1989).

11. *Id.* at 349.

12. *Id.*

13. See Paul S. Weiland, *Amending the National Environmental Policy Act: Federal Environmental Protection in the Twenty-First Century*, 12 J. LAND USE & ENVTL. L. 275, 275 (1997).

14. See Matthew J. Lindstrom, *Procedures Without Purpose: The Withering Away of the National Environmental Protection Act’s Substantive Law*, J. LAND RESOURCES & ENVTL. L. 245, 252–53 (2000)

legislation in April 1969 that Congress hit on a way to bring NEPA's broad policy goals into practice.<sup>15</sup> The requirement that environmental impact statements be prepared in conjunction with major federal actions was included in the bill at the urging of Dr. Lynton K. Caldwell, a Senate consultant and one of the framers of NEPA,<sup>16</sup> who testified that the EIS would ensure that NEPA's policy objectives could not be ignored.<sup>17</sup>

Indeed, NEPA is credited with transforming federal decisionmaking on environmental matters,<sup>18</sup> in large part because of the statute's judicially enforceable EIS obligations.<sup>19</sup> However, it was not clear at the outset what these obligations entailed—or whether they were even judicially enforceable.<sup>20</sup> In the first decade after its enactment, the contours of NEPA were shaped by litigation brought by environmental groups against federal agencies. This litigation was made possible largely as a result of D.C. Circuit Court of Appeals Judge Skelly Wright's 1971 decision in *Calvert Cliffs' Coordinating Committee, Inc. v. U.S. Atomic Energy Commission*.<sup>21</sup> Before that decision, it was uncertain whether private parties could effectively sue to enforce the new Act—doctrines of standing, cause of action, ripeness, and others all potentially stood in the way.<sup>22</sup> After Wright's decision, however,—at least for a time—there would be no doubt.<sup>23</sup> As one commentator put it, Judge Wright's holding that “NEPA set standards that were to be ‘rigorously enforced’ by reviewing courts . . . set the precedent, and a very high standard, for judicial review. Without that, nothing in NEPA would have followed.”<sup>24</sup> What did follow was a

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(describing the integration of the EIS requirements into NEPA as a mechanism to enforce the policy statement).

15. *National Environmental Policy: Hearing before the S. Comm. on Interior and Insular Affairs*, 91st Cong. 116–17 (1969) [hereinafter *National Environmental Policy Hearing*].

16. See Weiland, *supra* note 13, at 281.

17. See *id.* (citing *National Environmental Policy Hearing*, *supra* note 15, at 116–17).

18. See generally Paul Culhane, *NEPA's Impacts on Federal Agencies, Anticipated and Unanticipated*, 20 ENVTL. L. 681 (1990).

19. “Judicial review, therefore, is more responsible than any other factor for improving the quality of the assessment process in the United States, and keeping mission-oriented agencies on their toes.” Andreen, *supra* note 5, at 54.

20. NEPA was formulated in such broad terms that some commentators have described it as “constitution-like in tone.” Michael C. Blumm, *Introduction: The National Environmental Policy Act at Twenty: A Preface*, 20 ENVTL. L. 447, 449 n.12 (1990) (citing Frederick Anderson, *The National Environmental Policy Act*, in *FEDERAL ENVIRONMENTAL LAW* 238, 241 (Erica L. Dolgin & Thomas G. P. Guilbert eds., 1974); accord Lynton Caldwell, *A Constitutional Law for the Environment: 20 Years with NEPA Indicates the Need*, ENV'T, Oct. 1989, at 6; Lynton Caldwell, *The National Environmental Policy Act: Retrospect and Prospect*, 6 ENVTL. L. Rep. (Envtl. L. Inst.) 50,030 (1976).

21. 449 F.2d 1109 (D.C. Cir. 1971). According to one commentator, NEPA was “brought to life” by the *Calvert Cliffs* decision and the subsequent Council on Environmental Quality regulations. Houck, *supra* note 8, at 181.

22. See Houck, *supra* note 8, at 182.

23. See *id.* at 183 n.37 (“These cases are only the beginning of what promises to become a flood of new litigation—litigation seeking judicial assistance in protecting our natural environment.” (quoting *Calvert Cliffs*, 449 F.2d at 1111)).

24. *Id.* at 182–83.

series of judicial decisions that defined NEPA's scope and answered two fundamental questions regarding an EIS: (1) When is it required? and (2) What should it contain?<sup>25</sup> The latter question formed the crux of the challenge posed by Belizean groups to the EIA prepared for the Chalillo dam project.

### B. *Environmental Assessments Go Global*

The environmental assessment has, in various forms, caught on worldwide since its introduction in the United States.<sup>26</sup> One explanation for this trend is that allowing public participation and requiring decisionmakers to use more and better information just makes sense as a means of increasing decisionmaking quality. According to this view, enlightened officials and legislatures around the globe have adopted the environmental assessment as a way to improve governance.<sup>27</sup>

Another explanation, undoubtedly, rests on *realpolitik*. As a result of public and political pressure, the World Bank, foreign aid agencies, and other international institutions have integrated environmental assessments into their internal policies.<sup>28</sup> These institutions have also made environmental assessments, and in some cases enactment of NEPA-like legislation, prerequisites for foreign assistance.<sup>29</sup> As a result, developing countries have accepted these policies along with other aid conditions, often with little capacity or motivation to implement them.<sup>30</sup>

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25. See generally Donald N. Zillman & Peggy Gentles, *Perspectives on NEPA in the Courts*, 20 ENVTL. L. 505 (1990).

26. See Andreen, *supra* note 5, at 40; see also Kevin R. Gray, *International Environmental Impact Assessment: Potential for a Multilateral Environmental Agreement*, 11 COLO. J. INT'L ENVTL. L. & POL'Y 83, 89 n.24 (2000) ("More than 100 countries have EIA systems with approximately 70 existing in developing countries. These figures do not account for the sub-state systems, which would bring the total to around 200.").

27. "No duty imposed under a framework treaty or the exhortation of a United Nations resolution has produced this result. Rather, the world has embraced EIA on its own merits." Nicholas A. Robinson, *International Trends in Environmental Impact Assessment*, 19 B.C. ENVTL. AFF. L. REV. 591, 591 (1992).

28. For example, in 1987, Secretary of State James Baker made it clear that the United States "want[ed] the World Bank and the other development banks to . . . make environmental analysis, systematically and routinely, a central part of every loan proposal." *Id.* at 592-93 ("In response to the urgings of representatives from both governments and nongovernmental organizations . . . the World Bank has adopted . . . procedures . . . modeled on NEPA and knowledge gleaned from EIA in Australia, Canada, and elsewhere. The other multilateral development banks also are putting Secretary Baker's exhortation into practice.").

29. See Andreen, *supra* note 5, at 23-24 (describing initiatives by the U.S. Agency for International Development (USAID), the World Bank, and others to improve "legal and institutional capacities of developing countries to protect the environment." This effort included assistance in drafting EIA legislation.).

30. See Nicholas A. Robinson, *Enforcing Environmental Norms: Diplomatic and Judicial Approaches*, 26 HASTINGS INT'L & COMP. L. REV. 387, 407 (2003) ("A lack of scientific and technical resources in developing nations produces a set of generic problems with the implementation of the EIA legislation that is adopted. There is a lack of capacity to facilitate public participation, a lack of professional experience with EIA among government offices, a lack of funding provided for EIA,

Environmental assessments are criticized by some as being ill-suited to developing countries on the grounds that they are too cumbersome, too costly, and impede both development and foreign investment.<sup>31</sup> Environmental assessments for large infrastructure projects can take years to complete, run into thousands of pages, and cost tens to hundreds of thousands of dollars.<sup>32</sup> Poor countries, it is argued, lack the technical expertise, financial resources, and available time to carry out such undertakings. According to this line of reasoning environmental concerns are a luxury of the rich, and process and procedural requirements should not stand in the way of the urgent development needs of developing nations.<sup>33</sup>

Such criticisms resonate with particular force within the British Commonwealth, where Great Britain and its former colonies continue a deep, but uneasy, interdependence. From one perspective, the requirement to conduct an environmental assessment of a project can be seen as nothing more than an unwelcome and unrealistic colonial imposition. Governments of former colonies generally raise the most vigorous objections to environmental assessment requirements, precisely because of the limits these requirements place on their absolute governing authority.<sup>34</sup> The idea that a government is answerable to its people for its decisions—that these decisions must be made on the basis of accurate, publicly available information, and that failure to follow required procedures can be challenged in court—is in many ways the antithesis of British colonialism. As such, the environmental assessment remains a very American, and in many ways very revolutionary, mechanism.

### C. *Belize's Environmental Protection Act and Regulations*

Belize's Environmental Protection Act (BEPA)<sup>35</sup> is the grandchild, or perhaps great-grandchild, of NEPA. BEPA is based<sup>36</sup> on the Environmental

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inadequate means of assembling environmental baseline data and a tendency toward result-oriented decision-making, favoring projects as proposed.”)

31. “Resistance to EIA still remains, as EIA has been ridiculed as a way to retard development under a lengthy process while most of the environmental impact studies are never read.” Gray, *supra* note 26, at 106 (citing N. A. Robinson, *EIA Abroad: The Comparative and Transnational Experience*, in ENVIRONMENTAL ANALYSIS: THE NEPA EXPERIENCE 679, 681 (Stephen G. Hildebrand & Johnnie B. Cannon eds., 1993).

32. EIS reports in the United States can cost even more. See Bradley C. Karkkainen, *Whither NEPA?*, 12 N.Y.U. ENVTL. L.J. 333, 340 n.31 (2004) (citing multi-million dollar costs and more than two years for “average” EIS reports at the U.S. Department of Energy).

33. *Cf.* Gray, *supra* note 26, at 106.

34. See, e.g., Robinson, *supra* note 30, at 399 (“While EIA procedures are widespread, government officials or development interests do not yet warmly embrace them. An array of forces still resists enacting—or enforcing—environmental law.”).

35. Environmental Protection Act, 2000 (BEPA), vol. VII, tit. XXXII, ch. 328 (Belize), available at <http://www.belizelaw.org/lawadmin/index2.html> (select appropriate volume, title, and chapter from left-hand menu).

36. See *The Queen v. Belize Alliance of Conservation & Non-Governmental Orgs.* (“BACONGO”), Action No. 61, ¶ 27 (Belize S. Ct. 2002), available at <http://www.belizelaw.org/>

Impact Assessment Regulations of the United Kingdom's Town and Country Planning Act,<sup>37</sup> which were introduced to comply with the EU Council Directive on environmental assessments.<sup>38</sup> The EU Directive, in turn, was highly influenced by NEPA.<sup>39</sup>

BEPA is structured much like NEPA. Like NEPA, BEPA requires the production of a detailed environmental statement for major projects, called an Environmental Impact Assessment, or EIA.<sup>40</sup> NEPA's EIS procedures require that "five core issues" be "carefully considered: the environmental impact of the action, possible adverse environmental effects, possible alternatives, the relationship between long- and short-term uses and goals, and any irreversible commitments of resources."<sup>41</sup> BEPA and its corollary regulations address these core issues in a variety of ways. For example, an EIA must "identify and evaluate the effects" of a project.<sup>42</sup> Belize's EPA also requires that an EIA contain "measures which a proposed developer intends to take to mitigate any adverse environmental effects and a statement of reasonable alternative sites (if any), and reasons for their rejection."<sup>43</sup> Reminiscent of regulations for NEPA established by the Council on Environmental Quality in the United States,<sup>44</sup> Belize's regulations further include specific requirements for the sections and related subsections of any EIA report.<sup>45</sup>

BEPA also mirrors, and in some ways extends, NEPA's aspirational goals, requiring that "[e]very project, programme or activity shall be assessed with a view to the need to protect and improve human health and living conditions and

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judgements/dec\_2002/61\_of\_2002.html ("I suspect that most of the inspiration for the provisions of Belize's Environmental Protection Act and the Regulations on the EIA is derived from the U.K. with the influence of the European Union Directives.").

37. Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999, S.I. 1999/293, sched. 4, reg. 2(1) (U.K.), available at <http://www.opsi.gov.uk/si/si1999/99029306.htm>.

38. Explanatory Note After Town and Country Planning (Environmental Impact Assessment) (England and Wales) Regulations 1999, available at <http://www.opsi.gov.uk/si/si1999/99029306.htm> (noting that the U.K. Town and Country Planning Regulations implement EU Council Directive 85/337 1985 O.J. (L 175) 5.7. at 40 (EEC) (as amended by Council Directive 97/11 1997 O.J. (L 73) 14.3. at 5 (EC))).

39. See Richard Macrory, *Principles of Judicial Review on Environmental Assessment*, 16 J. ENVTL. LAW 279, 285 (2004) ("The 1985 European Community Directive on Environmental Assessment was clearly inspired by the US provisions on environmental impact statements introduced under the 1970 National Environmental Policy Act.").

40. BEPA § 20(1) (requiring an environmental impact assessment for any "project, program or activity which may significantly affect the environment").

41. *Env'tl. Def. Fund, Inc. v. EPA*, 489 F.2d 1247, 1256 (D.C. Cir. 1973).

42. BEPA, vol. VII, tit. XXXII, ch. 328, § 20(2)(a)-(i) (2000) (Belize) (listing "human beings; flora and fauna; soil; water; air and climactic factors; material assets including the cultural heritage and the landscape; natural resources; the ecological balance; any other environmental factor which needs to be taken into account").

43. *Id.* § 20(3).

44. 40 C.F.R. §§ 1502.1-1502.25 (2007).

45. Environmental Impact Assessment Regulations, 1995, S.I. 1995/107, art. 19 (Belize), available at <http://www.doe.gov.bz/documents/legislation/EIARegs.pdf>.

the need to preserve the reproductive capacity of ecosystems as well as the diversity of species.”<sup>46</sup> NEPA’s goal of public participation is also explicitly reflected in BEPA, which requires public consultation both during<sup>47</sup> and after<sup>48</sup> the preparation of the EIA, and provides for a public hearing in certain circumstances.<sup>49</sup>

There are also a number of differences between NEPA’s EIS requirements and BEPA’s EIA requirements. Perhaps the most significant of these is that NEPA requirements extend only to major federal actions, whereas Belize requires environmental assessments for major private as well as major government projects.<sup>50</sup> In Belize, these reports are evaluated by an eleven-member interdisciplinary technical group called the National Environmental Appraisal Committee (NEAC).<sup>51</sup> NEAC consists of nine designated government officials from various agencies and two civil society representatives and is chaired by the head of Belize’s Department of Environment (BDOE).<sup>52</sup> It is charged with reviewing all EIAs, advising BDOE of the “adequacy or otherwise” of the EIA, and advising BDOE when a public hearing on an EIA is “desirable and necessary.”<sup>53</sup> In this way, NEAC centralizes many of the functions that could involve disparate federal agencies<sup>54</sup> in the United States.

Another important difference between NEPA and BEPA is that while NEPA quickly stimulated substantial litigation, no decision under BEPA was challenged in court until the Chalillo case in February 2002, nearly a decade<sup>55</sup>

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46. BEPA § 20(4). Compare with NEPA’s purpose to, *inter alia*, “encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation.” 42 U.S.C. § 4321 (2006).

47. “When making an environmental impact assessment, a proposed developer shall consult with public and other interested bodies or organizations.” BEPA § 20(5).

48. Environmental Impact Assessment Regulations art. 20, ¶ 1(f)–(g) (providing for public viewing of an EIA and comments to the DOE); *id.* art. 26, ¶ 1(c) (requiring consideration of public comments).

49. *Id.* art. 24. As discussed *infra*, whether and when to hold a public hearing were central issues in the litigation over the Chalillo dam EIA.

50. BEPA, vol. VII, tit. XXXII, ch. 328, § 20(1) (2000) (Belize) (requiring “[a]ny person intending to undertake any project, programme or activity which may significantly affect the environment” to commission an EIA and submit it to the government (emphasis added)). NEPA only requires an environmental impact statement (EIS) for “major federal actions.” 42 U.S.C. § 4332 (2)(C) (2006). NEPA’s EIS is the rough equivalent of Belize’s EIA, while an “environmental assessment” (EA) under NEPA is a less rigorous screening that is aimed at determining whether an activity is a “major federal action” and therefore triggers NEPA’s EIS requirement. 40 C.F.R. §§ 1501.3, 1501.4, 1508.9 (2007).

51. See Environmental Impact Assessment Regulations, 1995, S.I. 1995/107, art. 25 (Belize).

52. See *id.* art. 25, ¶ 2.

53. *Id.* art. 25, ¶ 1.

54. See 42 U.S.C. § 4332(2)(C) (requiring the “responsible Federal official” to prepare an environmental statement for applicable proposals for federal action).

55. The 1995 regulations were implemented under the 1992 version of BEPA. See generally Environmental Impact Assessment Regulations (Belize). The lack of previous challenges under BEPA is

after the legislation's enactment. This is hardly surprising given that in Belize there is no tradition of challenging government decisions in public, much less in court. Such challenges were virtually unthinkable under the colonial mindset instilled by the British.<sup>56</sup> Prior to Chalillo, although environmental assessments had been prepared for other projects in Belize and had undergone review by the NEAC, this process generated little, if any, controversy and took place largely out of public view.

## II. THE CHALILLO DAM PROJECT

### A. *The Chalillo Dam EIA*

The Environmental Impact Assessment for the Chalillo dam was submitted to Belize's Department of Environment in August 2001 by the Belize Electricity Company Limited, ("BECOL"), a private energy company owned by Fortis, Inc. of Newfoundland, Canada. At five volumes and more than 1,500 pages, the EIA was a mammoth production by Belizean standards.<sup>57</sup> At first glance it was also quite comprehensive, including a description of the air quality impacts of dam construction activities<sup>58</sup> and even mitigation plans for the dam workers' bathroom facilities.<sup>59</sup> The EIA was produced for BECOL by the Canadian division of AMEC, a British construction and consulting company, and paid for with a grant from the Canadian International Development Agency (CIDA).<sup>60</sup> Typical of reports produced on behalf of the project proponent, the Chalillo EIA focused largely on the benefits of the project and on the temporary construction-related impacts of the project.<sup>61</sup>

reflected in the fact that Belize's Supreme Court cited only foreign authorities on EIA law. *See The Queen v. BACONGO*, Action No. 61, ¶ 44 (Belize S. Ct. 2002).

56. The British hierarchical controls remained in place long after slavery was abolished. Otis H. King, *Labor Management Relations in Belize*, 22 T. MARSHALL L. REV. 183, 187 (1997) (citing ERIC WILLIAMS, *FROM COLUMBUS TO CASTRO: THE HISTORY OF THE CARIBBEAN, 1492-1969* (1984)).

57. BELIZE ELECTRIC CO. (BECOL), *MACAL RIVER UPSTREAM STORAGE FACILITY ENVIRONMENTAL IMPACT ASSESSMENT* (2001). The five volumes of the EIA, and other documents related to the Chalillo dam debate are available online at [http://brucebarcott.typepad.com/bruce\\_barcott/chalillobattlearchive.html](http://brucebarcott.typepad.com/bruce_barcott/chalillobattlearchive.html). The Chief Justice of Belize's Supreme Court commented on the Belize EIA's "ungainly bulk." *The Queen v. BACONGO*, Action No. 61, ¶ 38.

58. BELIZE ELECTRIC CO. (BECOL), *MACAL RIVER UPSTREAM STORAGE FACILITY ENVIRONMENTAL IMPACT ASSESSMENT: PART I MAIN REPORT 177* (2001) [hereinafter *MRUSF EIA*].

59. *Id.* at 270-72.

60. AMEC completed the EIA under a contract with CIDA which required the company to seek further construction-related contracts, potentially including the lucrative contract to build the Chalillo dam. *See* AMEC-CIDA Contract (June 1, 2001), available at [http://www.brucebarcott.com/files/amec\\_cida\\_contract.pdf](http://www.brucebarcott.com/files/amec_cida_contract.pdf) (copy of relevant portions of the AMEC-CIDA contract).

61.

It is a common practice in many countries (including developing countries) to allow the private proponent of a project or a consultant that it hires to prepare the EIA. Such an approach appears flawed. Companies will only start the EIS process once they have formulated a specific proposal that needs government approval. Since most companies will

The proposed project, called the Macal River Upstream Storage Facility (MRUSF), consisted of an approximately 50 meter high (150 foot) roller-compacted concrete dam and associated power station. The dam would be built at the Chalillo site on the Macal River in the Cayo District in western Belize. While the power station would produce a small amount of energy, the Chalillo dam was intended primarily as a storage facility for the downstream Mollejon dam, also owned by BECOL. The Macal is an extremely flashy river, meaning that during heavy rains the volume of the river increases dramatically, sometimes rising more than a hundred feet above its normal levels.<sup>62</sup> The Mollejon dam, designed as a so-called “run-of-river” dam<sup>63</sup> has a relatively low storage capacity, and could not utilize most of the water flowing past it during these heavy rain events. By storing much of this water to be released later, the Chalillo dam would increase the amount of energy that could be produced by the downstream dam. Citing a 1999 report by GE Power Systems, the Chalillo EIA identified an “immediate” need for expanded energy generation in Belize, and stated that construction of the Chalillo dam would be the “least-cost” power generation option.<sup>64</sup>

The EIA also noted potential impacts from the project and recommended mitigation measures. Much of this analysis focused on minor, short-term construction-related aspects of the project, which were unlikely to cause significant impacts in the first place or where mitigation measures were expected to prevent significant residual impacts. For instance, the EIA contained extensive discussion of toilet technologies and the alternatives for disposing of the “domestic sewage” produced by workers on the project. The EIA presented both the advantages and disadvantages of (a) conventional flush toilets, (b) composting toilets, and (c) “VIP latrines,” selecting the latter after noting that the “modern day latrine offers year round utility in a comfortable and hygienic environment.”<sup>65</sup>

By contrast, the EIA gave little emphasis to the permanent flooding of riparian habitat by the reservoir upstream from the dam, and the resulting long-

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act in their own self-interest most of the time, one can be confident that the EIA will focus primarily on what the proponent wants to do.

Andreen, *supra* note 5, at 48.

62. See *MRUSF EIA*, *supra* note 58, at 224 chart 6.10.

63. The term “run-of-river” refers to a dam that generates power from the natural flow of a river, with little or no reservoir upstream for long-term storage. In theory, such a dam should cause fewer upstream impacts than a dam with a large storage volume, because it floods a smaller area and water is not left to stagnate for as much time as in a storage dam. See CHRIS R. HEAD, *HYDROELECTRIC DAMS 3* (1999), available at <http://www.dams.org/docs/kbase/contrib/ecc078.pdf> (paper contributed to World Commission on Dams, 1999, describing the difference between run-of-river and storage dams).

64. *MRUSF EIA*, *supra* note 58, at 7. Critics of the project pointed out that the original GE Power study and the assumptions underlying its conclusion—that Chalillo would be the “least cost” energy option—were never made available to the public. See, e.g., *Aff. of Candy Gonzalez* ¶¶ 52, 55, *The Queen v. BACONGO*, Action No. 61 (Belize S. Ct. 2002), available at [http://www.stopfortis.org/Lawsuits/Action61/SupremeCourt/BACONGOaffidavits/Candy\\_Gonzalez.pdf](http://www.stopfortis.org/Lawsuits/Action61/SupremeCourt/BACONGOaffidavits/Candy_Gonzalez.pdf).

65. *MRUSF EIA*, *supra* note 58, at 270–72.

term impacts on wildlife. A summary table in the main report stated that “a few internationally recognized species of plants” and “a few locally and internationally recognized animal species” would be affected by the footprint of the project.<sup>66</sup> Three of these species are listed in the summary table: Belize’s national animal, the Central American tapir (*Tapirus bairdii*), the Scarlet Macaw (*Ara macao*, a brightly colored parrot), and the Morelet’s Crocodile (*Crocodylus moreletti*).<sup>67</sup> In assessing impacts from construction activities on these species, the report concluded that:

It is unlikely that any of these species would be physically harmed by the construction activities [of the dam]. However . . . it is likely that significant impacts could occur to these populations due to habitat alteration (e.g. clearing, grubbing) resulting from the proposed Project construction activities, therefore, measures are identified to mitigate potential effects.<sup>68</sup>

The report’s discussion of the impacts of flooding was even more meager. While acknowledging that “[t]he major effect to the terrestrial flora and fauna during operations is the flooding of habitat that is used by various species,” the report simply refers to the section on construction impacts and notes that “[i]mpounding water in the reservoir results in similar effects, but a larger geographic area (i.e. the reservoir).”<sup>69</sup>

The potential impacts on wildlife were described in more detail in a report by the Natural History Museum of London (NHM). The NHM, which maintained a research station in the area proposed for the reservoir, had been contracted to conduct wildlife studies for the EIA. Its report was, however, relegated to a later volume of the EIA and included a disclaimer by AMEC stating that “[o]pinions contained in the report are those of the Natural History Museum,” so readers “are advised to read it with the knowledge that it is a DRAFT REPORT” and to “formulate their conclusions accordingly.”<sup>70</sup> The blunt language of the NHM report made it apparent why the project proponents were motivated to include such a disclaimer. Noting that the area that would be affected was “one of the most biologically rich and diverse regions remaining in Central America,” the NHM report concluded that the dam would cause “significant and irreversible reduction of biological diversity in Belize initially at the population level but later potentially at the species level, some of the

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66. *Id.* at 16 tbl.1.3.

67. *Id.*

68. *See id.* at 188.

69. *Id.* at 227.

70. Belize Electric Co. (BECOL), Macal River Upstream Storage Facility Environmental Impact Assessment: Part 2 Support Documents – Volume II of IV at 190 (2001) [hereinafter *MRUSF EIA pt.2 vol.II*] (emphasis in original) (pages are not numbered). Aware of complaints by researchers that their work for the Mollejon EIA had been selectively edited and that the original reports were held under confidentiality agreements, the unusual NHM contract with AMEC ensured that its unedited report would be included in the Chalillo EIA. Personal Communication from C. Minty, Natural History Museum of London (April 2001).

species affected being of international importance.”<sup>71</sup> In the case of the unique Scarlet Macaw subpopulation found only in Belize, western Guatemala, and southern Mexico, the report concluded that flooding essential habitat would make it “likely that they will eventually become extirpated from Belize.”<sup>72</sup> The NHM report also emphasized that there was not enough information available to know the full extent of the dam’s environmental impacts, concluding that “much more information is required for an informed and defensible decision” whether to proceed with the project.<sup>73</sup>

Other sections of the EIA provided a physical description of the area where the dam would be built: the geography of the region, the hydrology of the river, the forest types along the river banks, area soil conditions, geology, and more. Dry and highly technical, a lay reader would hardly expect these sections of the EIA to be contentious. Yet disagreement over the dam site geology proved to be the main focus of the litigation over the EIA when it ultimately reached the Privy Council in London. As the public debate prior to the submission of the EIA and the subsequent legal challenge showed, there was almost nothing about this project and EIA that was not in dispute.

### B. *The Public Debate*

The dispute over dam site geology dated back more than two years before the EIA was completed. Dam proponents touted the “discovery” of granite in a press release—claiming that “hard bedrock” had been “found” at the proposed site.<sup>74</sup> Opponents of the project, skeptical about this “discovery”—which contradicted previous geological studies of the area—immediately disputed the suitability of the dam site in letters to the editor.<sup>75</sup>

Critics raised three major concerns about the dam site geology.<sup>76</sup> First, the region where the dam would be built is characterized by “karst” or cave-forming limestone, and includes one of the largest underground cave formations in the world.<sup>77</sup> If these formations were to connect to the dam’s upstream reservoir, much of the water stored behind the dam would leak away.

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71. C.D. MINTY, WILDLIFE IMPACT ASSESSMENT 7 (2001), reprinted in *MRUSF EIA pt.2 vol.II*, supra note 70, at 197.

72. *MRUSF EIA pt.2 vol.II*, supra note 70, at 225.

73. *Id.* at 198 (emphasis added).

74. *Extremely Hard Bedrock Found at Proposed Dam Site*, BELIZE TIMES, Apr. 4, 1999, available at [http://www.stopfortis.org/Belize\\_times/hard\\_bedrock\\_4\\_4\\_99.pdf](http://www.stopfortis.org/Belize_times/hard_bedrock_4_4_99.pdf).

75. See, e.g., Sharon Matola, Letter to the Editor, *Misleading Reports*, REPORTER (Belize), Apr. 11, 1999, available at [http://www.stopfortis.org/Reporter/misleading\\_reports\\_4\\_11\\_99.pdf](http://www.stopfortis.org/Reporter/misleading_reports_4_11_99.pdf).

76. See generally BRIAN HOLLAND, COMMENTS ON THE AMEC GEOLOGY REPORTS FOR THE PROPOSED DAM SITE AT CHALILLO, MACAL RIVER, BELIZE (2002), available at [http://www.stopfortis.org/GeologyReport1\\_30\\_02.html](http://www.stopfortis.org/GeologyReport1_30_02.html) (a geologist’s analysis prepared for BACONGO and the Natural Resources Defense Council).

77. *Id.* (noting that “the karstified limestone in this region of Belize contains the world’s 5th largest cave systems . . . Without a detailed geological map of the reservoir basin it cannot be assumed that water will not flow out of the reservoir and into the immense cavern systems known to exist in the limestone formation.”).

Second, the dam site was located near a major fault line, and numerous smaller faults and fractures were found at the dam site itself.<sup>78</sup> Third, if the foundation of the dam itself was not granite as purported by project proponents, but rather sandstone and shale, as all geological maps of the region had previously shown,<sup>79</sup> then at a minimum the dam would need to be redesigned to take these facts into account, likely raising construction costs dramatically.<sup>80</sup> In fact, failure to properly assess dam site geology is the most common cause of dam failure. Were the dam to collapse, for example, thousands of residents downstream would potentially be subjected to flooding.<sup>81</sup> Although possibly the most devastating to the viability of the project, geological concerns were not the only basis for disagreement and debate about the proposed dam.

Much of the concern over Chalillo originated in Belizeans' experience with the construction of the smaller Mollejon dam downstream.<sup>82</sup> At the local level, residents of Macal River communities and tourism businesses in the Cayo district witnessed the deterioration of water quality as a result of downstream discharges from the Mollejon dam,<sup>83</sup> and were thus apprehensive about what Chalillo would bring. At the national level, Belizeans' concern had more to do with the cost and alleged economic benefits of the project. The Mollejon project had been billed as a source of inexpensive power and the solution to Belize's energy needs, but this optimistic forecast was based on a series of miscalculations that became apparent soon after the project was commissioned in 1995. Within the first year of operation it was clear that Mollejon dam would produce much less energy than estimated by project

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78. *Id.* (stating that there were "abundant faults and fractures (joints) that affect the bedrock at Chalillo" and that the "30 kilometer long Cooma Cairn Fault located less than 1 kilometer to the west of the proposed dam site.")

79. *Id.*

80. *Id.* ("The presence and distribution of these weaker [sandstone and shale] rocks has been completely ignored by AMEC. Consequently, the AMEC documents should not be used as a basis for the design and construction of the dam."); see also INTERAGENCY COMMITTEE ON DAM SAFETY, FEMA, FEDERAL GUIDELINES FOR DAM SAFETY 30 (2004), available at <http://www.fema.gov/library/viewRecord.do?id=1578> ("Proper design of a concrete dam requires information on the foundation geological conditions and materials properties to assure its capability to support the loads of the dam and reservoir, in its natural state or as improved by foundation treatment.").

81. See INTERAGENCY COMMITTEE ON DAM SAFETY, *supra* note 80, at 1, 30 ("Throughout history, in all parts of the world, dams built to store water have occasionally failed and discharged the stored waters to inflict sometimes incalculable damage in the loss of lives and great damage to property.").

82. An article in *The Amandala*, an independent Belizean newspaper, published shortly after the Mollejon dam was commissioned, alluded to the unsavory deals that led to dam construction and argued that, instead of lowering energy costs, as promised, the Mollejon dam would likely increase them. *We Will Pay More for Juice*, AMANDALA (Belize), Sept. 10, 1995, at 1-2, available at [http://www.stopfortis.org/Amandala/pay\\_more\\_9\\_10\\_95.pdf](http://www.stopfortis.org/Amandala/pay_more_9_10_95.pdf).

83. See, Aff. of William Eaton ¶ 4, BACONGO v. DOE, Judgment Upon a Petition for a Conservatory Order, available at <http://www.stopfortis.org/Lawsuits/Action61/InjunctionatPC/WEatonfinal.pdf> (describing the impacts of the Mollejon dam on downstream water quality).

proponents.<sup>84</sup> Moreover, the cost of this mistake would be borne by the Belizean public given that the contracts between the government of Belize and the owners of the dam guaranteed payments for the total *estimated*, as opposed to realized, energy production.<sup>85</sup> These contracts also contained a number of other “very onerous”<sup>86</sup> clauses, and the Mollejon owners were exempted from taxes under a special law.<sup>87</sup> The net effect of these factors was to raise the cost of the project for ordinary Belizeans, and, accordingly, to reduce their appetite for a much larger dam promoted by many of the same company and government officials.<sup>88</sup>

Potential conflicts of interest further enhanced concern over the Chalillo dam because the proposed power generator, BECOL, and the country’s national electricity utility, Belize Electricity Limited (BEL), were both owned by Fortis, Inc. of Canada.<sup>89</sup> Where the utility would otherwise have an incentive to seek the lowest cost power available, Fortis could profit more by having BEL buy high-priced energy from its sister company, BECOL.<sup>90</sup>

A global spotlight began to shine on the Chalillo project as early as 1997 when respected scientists in the country began to express their concern about the dam’s possible effects on endangered wildlife.<sup>91</sup> Many of the biologists involved in the development of the EIA for the Mollejon project felt that their

84. The Mollejon dam produced, on average, less than half of the energy proponents claimed it would. William Ysaguirre, *Mollejon Onstream but BECOL Wants Another Dam at Vaca Falls*, REPORTER (Belize), Jan. 27, 2006, available at [http://www.stopfortis.org/Reporter/FortisWantsVaca1\\_06.html](http://www.stopfortis.org/Reporter/FortisWantsVaca1_06.html).

85. LAUNCHPAD CONSULTING, ENERGY FOR SUSTAINABLE DEVELOPMENT 34 (2003), available at <http://www.puc.bz/publications/energy%20sector%20diagnostic%20report%20final.pdf> (describing some of the terms of the 1991 Power Purchase Agreement for energy from the Mollejon dam); see also Chandrabhan Sharma, A Critical Review of the Mollejon Hydro Project, available at <http://www.cavehill.uwi.edu/bncode/belize/conference/papers/sharma.htm> (presentation at Belize Country Conference on Nov. 21–24, 2001).

86. Sharma, *supra* note 85.

87. See The Mollejon Hydroelectric Project (Exemption from Taxes and Duties) Act, 2000, vol. II, tit. VII, ch. 59 (Belize), available at <http://www.belizelaw.org/lawadmin/index2.html> (select appropriate volume, title, and chapter from left-hand menu).

88. For example, one of the main proponents of both schemes was Ralph Fonseca, who signed the contracts to build Mollejon on behalf of the utility (before it was privatized) and the contracts to build Chalillo on behalf of the government of Belize.

89. This arrangement later troubled the dissenting Lords in the Privy Council. “Although BECOL has been put forward as an independent commercial concern, it is clear from the evidence . . . that there is a very close identity of interest between [BECOL, BEL and the government of Belize].” *BACONGO v. Dep’t of Env’t* (“BACONGO v. DOE II”) [2004] UKPC 6, ¶ 87 (appeal taken from Belize) (U.K.) (Lord Walker of Gestingthorpe & Lord Steyn, dissenting), available at <http://www.privycouncil.org.uk/files/other/bacongo.jud.rtf>.

90. While some of BEL’s costs may be limited by Belize’s regulator, the Public Utilities Commission, the cost of power is generally “passed through” to the consumer. See PAUL SOTKIEWICZ, FINAL REPORT OF THE INDEPENDENT EXPERT IN THE MATTER OF THE PUBLIC UTILITIES COMMISSION INITIAL DECISION 5 (2007), available at <http://www.puc.bz/publications/Final%20Report%20061107-revised061407.pdf>.

91. See, e.g., WORLD CONSERVATION UNION, TAPIRS: STATUS SURVEY AND CONSERVATION ACTION PLAN, (Daniel M. Brooks et al. eds., 1997), available at <http://tapirs.org/action-plan/action-index.html> (select “download a zip file” hyperlink at bottom of page next to report image).

studies had been misused or distorted to promote that dam. They were also disillusioned that the supposedly “standalone” Mollejon project appeared instead to be a stalking horse for the much larger and more environmentally damaging Chalillo dam.<sup>92</sup> These scientists helped to establish the first contacts between international nongovernmental organizations (NGOs) and the nascent antidam movement in Belize led by the Belize Alliance of Conservation NGOs (BACONGO), a young umbrella organization that included nine local groups throughout the country. BACONGO worked with groups<sup>93</sup> and individuals in the United States, Canada, and England to spur a national and international debate over the dam proposal.

My involvement in the controversy began in 1999 when BACONGO members contacted the Natural Resources Defense Council (NRDC), a prominent U.S.-based environmental advocacy group, to help support the opposition to the dam in Belize and to bring international attention to the Chalillo debate. NRDC had nearly thirty years of institutional experience in public advocacy and had brought some of the earliest lawsuits under NEPA and other U.S. environmental statutes.<sup>94</sup> NRDC had also worked with groups in other countries on advocacy projects, particularly where threats to the environment in those countries were being driven by international consumer demand or other outside influences. The emergence of such multinational campaigns, like many of the multinational industrial projects that they challenged, was facilitated by the Internet and other modern tools of globalization.<sup>95</sup>

In late 1999, NRDC was in the thick of working with Mexican environmental groups on a campaign to prevent construction of a large industrial saltworks plant on a protected gray whale lagoon in Baja California, Mexico.<sup>96</sup> As the person at NRDC in charge of coordinating actions with communities and environmental organizations in Mexico on that campaign, the request from an environmental group in neighboring Belize landed on my desk.

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92. *E.g.* Personal communication with Sharon Matola, Director, Belize Zoo and Tropical Education Center (Nov. 14, 2000), and Dr. Jan Meerman, Director, Belize Environmental Consultancies (Nov. 14, 2000).

93. In addition to NRDC, these groups included, among others, the Sierra Club of Canada, Probe International, E-LAW, Defenders of Wildlife, and Friends of the Earth, U.K.. *See, e.g.*, Letter from Grainne Ryder, Policy Director, Probe International et al., to H. Stanley Marshall, President and CEO, Fortis, Inc. (Jan. 21, 2001), available at <http://www.sierraclub.ca/national/action-alert/belize-endangered/belize-pr-01-01-25.html>.

94. *See, e.g.*, *Natural Res. Def. Council, Inc. v. Morton*, 458 F.2d 827 (D.C. Cir. 1972) (ruling on a challenge by NRDC to oil and gas lease sales under NEPA).

95. *See generally* S. Jacob Scherr, *Conservation Advocacy and the Internet: The Campaign to Save Laguna San Ignacio*, in *CONSERVATION IN THE INTERNET AGE: THREATS AND OPPORTUNITIES* (James N. LeVitt ed., 2002) (documenting the importance of Internet organizing during the campaign to preserve San Ignacio Lagoon).

96. The Mexican government cancelled the saltworks project in March 2000. *See* DICK RUSSELL, *EYE OF THE WHALE: EPIC PASSAGE FROM BAJA TO SIBERIA* 608–25 (2004).

In January 2000, I traveled to Belize with Jacob Scherr, director of NRDC's International Program, to meet with BACONGO's director and key members, and to assess the potential for an international campaign to support BACONGO's efforts in Belize. It was apparent from those first meetings that Fortis and the Belizean government had shielded much of the important technical and economic information from public view. It was also clear that many Belizeans who were opposed to the dam thought it either foolhardy or futile to speak out against a project that had such strong government support. BACONGO felt, and NRDC agreed, that international attention could increase the project's transparency and give Belizeans hope that speaking out might make a difference.

The debate over the dam was already a regular staple of Belize's newspapers,<sup>97</sup> and with the involvement of NRDC and other groups in the U.S. and Canada, the topic soon gained traction in a growing number of international fora as well, from the World Conservation Congress in Amman, Jordan<sup>98</sup> to the annual shareholder meeting of Fortis, Inc. in St. Johns, Newfoundland.<sup>99</sup> Although this Article primarily focuses on the legal challenge to the Chalillo dam, the legal process and the international public debate reinforced each other and together increased the accountability of the Belizean government. In particular, throughout the legal process, the Belizean government knew that its responses to court decisions would be held up to international public scrutiny and knew that its public statements about the project could be reviewed in court.

The full chronology of the controversy is beyond the scope of this paper,<sup>100</sup> but one aspect is particularly worth emphasizing here: the debate over the Chalillo dam was not simply a philosophical disagreement about the relative value of wildlife and economic development, although this ideological conflict certainly ignited passions on both sides. Both proponents and

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97. See, e.g., StopFortis.org, More News, [http://www.stopfortis.org/More\\_News\\_StopFortis.html](http://www.stopfortis.org/More_News_StopFortis.html) (news archives of the debate over the dam) (last visited Feb. 11, 2008).

98. In October, 2000, the World Conservation Congress in Amman, Jordan (a gathering of thousands of environmental leaders from governments, nongovernmental organizations and scientific institutions worldwide, organized by the International Union for the Conservation of Nature) debated and adopted Resolution 2.86, Protection of the Macal River Valley in Belize, which urged the government of Belize to ensure a transparent and participatory EIA process and to refuse approval if the EIA did not show that the project would not cause "significant degradation or destruction of wildlife habitat." INTERNATIONAL UNION FOR THE CONSERVATION OF NATURE AND NATURAL RESOURCES (IUCN), WORLD CONSERVATION CONGRESS, PROTECTION OF THE MACAL RIVER VALLEY IN BELIZE (2000), available at [http://www.iucn.org/congress/2004/general/aman\\_resolutions/rec86.pdf](http://www.iucn.org/congress/2004/general/aman_resolutions/rec86.pdf).

99. See Pat Doyle, *Investors Raise Some Questions*, ST. JOHNS TELEGRAM (Nfld., Can.), May 17, 2001, available at [http://www.stopfortis.org/Candadian\\_press/investors\\_raise\\_questions.pdf](http://www.stopfortis.org/Candadian_press/investors_raise_questions.pdf).

100. For an in-depth and gripping narrative of the local and international campaign and the personalities involved, see BRUCE BARCOTT, *THE LAST FLIGHT OF THE SCARLET MACAW: ONE WOMAN'S FIGHT TO SAVE THE WORLD'S MOST BEAUTIFUL BIRD* (2008); see also Ari Hershowitz, *The Two Sides of Globalization*, in INTERNATIONAL GREEN POLITICS (Sabine von Meering ed., 2002) (describing the global citizens movements to protect a whale nursery in Mexico and the Macal River ecosystem in Belize).

opponents of Chalillo claimed that their position was in the best interests of Belizeans, and that the other side was distorting the facts about the project.<sup>101</sup> Both claimed that a rational decisionmaking process would vindicate their views.

So why didn't submission of the EIA—which has the theoretical purpose of providing a basis for rational and informed decisionmaking—quiet the debate over Chalillo? If anything the debate became more intense, with the EIA serving as a focal point. As NEAC prepared to issue its decision on whether to approve the EIA in November 2001, protesters filled the streets of Belmopan, Belize's capital, to oppose the dam, while Belize's Prime Minister led a counterrally, declaring Chalillo a national priority.<sup>102</sup>

On November 9, 2001, NEAC voted to give the project "environmental clearance" and Belize's Ministry of Environment issued a press release shortly afterward announcing the decision.<sup>103</sup> Instead of creating consensus, NEAC's purportedly "technical" decision on the EIA led to the first environmental lawsuit in Belize's history and the first to be heard by a judicial panel of the Privy Council in England. The debate over the dam was transformed, in large part, into a legal struggle over the environmental assessment of the dam.

### III. GOOD GOVERNANCE ON THE WAY TO LONDON

As the case followed its trajectory through the Commonwealth legal system, the courts clarified the purpose and procedures required for an EIA, much as the first NEPA lawsuits did in the United States. Superimposed on these legal issues, however, was the question whether rigorous adherence to—and judicial review of—these procedures was appropriate for a country like Belize. The ultimate resolution of the case came in an unusual 3-2 split decision of the Judicial Committee of the Privy Council in London,<sup>104</sup> the highest court in the British Commonwealth and still the court of last appeal for Belizeans. The Lords of the Privy Council articulated the two opposing views—environmental assessment as a burden on the poor, and environmental assessment as an instrument of democracy. Over the dissent's strong objections, the majority opinion, read by Lord Hoffman, agreed with Belize's government that it should not be held to the same decisionmaking standards as governments in developed countries. In dissent, Lord Walker of Gestingthorpe argued that it does Belize no favors for courts to dispense with the rule of law.

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101. See, e.g., Advertisement, *Some Basic Facts: The Proposed Chalillo Dam Project*, AMANDALA (Belize), Apr. 20, 2001, available at [http://www.stopfortis.org/Amandala/basic\\_facts\\_4\\_20\\_01.pdf](http://www.stopfortis.org/Amandala/basic_facts_4_20_01.pdf); Advertisement, *The Real Truth on Electricity, Mollejon and Chalillo*, REPORTER (Belize), Apr. 25, 2001, available at [http://www.stopfortis.org/Reporter/real\\_truth\\_4\\_25\\_01.pdf](http://www.stopfortis.org/Reporter/real_truth_4_25_01.pdf).

102. See *Chalillo Debate: The Gloves Are Off!*, REPORTER (Belize), Nov. 11, 2001, at 1, available at [http://www.stopfortis.org/Reporter/chalillo\\_debate\\_11\\_11\\_01.pdf](http://www.stopfortis.org/Reporter/chalillo_debate_11_11_01.pdf).

103. Press Release, Belize Ministry of Env't, *Chalillo Receives Environmental Clearance* (Nov. 13, 2001), available at [http://www.governmentofbelize.gov.bz/press\\_release\\_details.php?pr\\_id=1228](http://www.governmentofbelize.gov.bz/press_release_details.php?pr_id=1228).

104. See *BACONGO v. DOE II* [2004] UKPC 6 (appeal taken from Belize) (U.K.).

As described below, the path of the case on its way to London and the aftermath of the Privy Council's decision confirm the wisdom of Lord Walker of Gestingthorpe's dissent.<sup>105</sup> In the two years leading up to the decision, judicial scrutiny—though not necessarily the courts' ultimate judgments—forced the government and BECOL to repeatedly reverse course, removing one roadblock after another to transparency and government accountability. As a result of the lawsuit, for example, the government (1) reluctantly gave up attempts to avoid judicial oversight of its decision on the dam, (2) held its first public hearing on an EIA, and (3) disclosed key information related to the dam project, including a geological report on the dam site geology.

While this newfound accountability was undermined in some ways by the Privy Council's final decision, public attitudes in Belize had shifted. There was a greater willingness to challenge government decisions in public and in court. Perhaps more telling, in the first case to cite the decision, Justice Sykes of the Supreme Court of Jamaica sided with the Privy Council's dissent.<sup>106</sup>

#### A. The "Conditional" Project Approval

After it was submitted to BDOE, the Chalillo EIA was placed in libraries in Belize and, elicited in response, a number of substantive public comments, including comments on the geology of the dam site.<sup>107</sup> NEAC met on three occasions between October 24 and November 9, 2001 to discuss the EIA.<sup>108</sup> Candy Gonzalez, one of two NGO representatives on NEAC, participated in these meetings on behalf of BACONGO, and her detailed record of the proceedings formed the basis of BACONGO's subsequent legal challenge.<sup>109</sup> During its first meeting on the EIA, NEAC identified concerns and requested further information from the project proponent, BECOL.<sup>110</sup> Among other items listed in its letter to BECOL, NEAC asked for detailed information on the rock types found at the dam site.<sup>111</sup> Although the EIA stated that granite formed the site's foundation, Andre Cho, the NEAC representative from Belize's Geology

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105. A casenote on the decision similarly argues that the majority decision was legally flawed. See Francis Botchway, *Privy To Unsustainable Arguments In The Belize Dam Case*, 8 ENVTL. L. REV. 144, 144 (2006).

106. See *N. Jam. Conservation Ass'n v. Nat'l Env't & Planning Agency*, No. HCV 3022 ¶¶ 85, 86 (Jam. S. Ct. Judicature 2005), available at <http://www.jamaicansforjustice.org/docs/Pear%20Tree%20Bottom%20Judgment.doc>.

107. See *Aff. of Candy Gonzalez*, *supra* note 64, ¶¶ 12, 127.

108. See *The Queen v. BACONGO*, Action No. 61, ¶ 44 (Belize S. Ct. 2002) (by Commonwealth convention, judicial review was considered an *ex parte* proceeding before the Queen).

109. *Id.* ¶ 28 ("But for the fateful presence or, to some, fortuitous, [sic] of Ms. Candy Gonzalez, the applicant's representative on the NEAC during this body's consideration of and deliberations on the EIA for the project, most, if not all of the objections now put forward in these proceedings, might not have seen the light of day.")

110. See *Aff. of Candy Gonzalez*, *supra* note 64, ¶¶ 28, 56, 57.

111. See *id.* ¶ 57.

and Petroleum Department doubted this, observing that “the rock types identified were not likely to exist in that area.”<sup>112</sup>

A letter from BECOL confirmed the company’s opinion that the dam site was made of granite, but Mr. Cho was still not satisfied. In a visit to the site, Mr. Cho took a sample of the rock and determined that it was sandstone, a fact which he raised at the next NEAC meeting on November 8. Lord Hoffman’s majority opinion quotes the minutes of the meeting:

The member questioned the accuracy of the geological information. Sandstone is adequate for dam construction but dam design must consider this type of rock. In order to ensure that the dam does not crack, the foundation and sides would need to be anchored. [Mr. Cho] felt that the NEAC should not accept the geology information as it is inaccurate.<sup>113</sup>

In discussions the following day, engineers for BECOL insisted that the dam site was made of granite, but Mr. Cho remained unconvinced. The head of BDOE and Chair of NEAC concluded that since “the difference of opinion between geologists did not appear to affect the fact that the dam could be constructed, [t]he NEAC should, therefore, make a decision in principle as to whether a dam should be built.”<sup>114</sup> The BDOE head promised that other geologists would be asked to do another assessment and that if Mr. Cho was proven correct, “the issues with respect to adjustments of the engineering design will be addressed in the [Environmental Compliance Plan].”<sup>115</sup> NEAC took a vote that day to “conditionally” approve the EIA and to hold public hearings, which were apparently intended to explain its decision.<sup>116</sup>

NEAC’s evaluation of the EIA came to an end. Belize’s Ministry of Environment issued a press release stating that “[NEAC] wishes to advise the general public that . . . a decision was made on Friday, November 9th, 2001 to grant environmental clearance for the [Chalillo] project to proceed.”<sup>117</sup> The release further stated that the approval was conditioned on completion of an Environmental Compliance Plan, and that “[p]ublic hearings are being planned” to present the information in the EIA and the decisions of NEAC.<sup>118</sup>

NEAC’s “conditional” decision created considerable confusion in Belize. It was unclear whether this was a final decision, which would allow dam construction to proceed, or if further steps were necessary prior to construction.<sup>119</sup> Belize’s wet season was coming to an end and construction could begin in December or January, little more than a month away. It was not clear to members of the public—or even to BACONGO’s representative on

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112. BACONGO v. DOE II [2004] UKPC 6, ¶ 40 (appeal taken from Belize) (U.K.).

113. *Id.*

114. *Id.* ¶ 42.

115. *Id.*

116. See Aff. of Candy Gonzalez, *supra* note 64, ¶ 145.

117. Press Release, Belize Ministry of Env’t, *supra* note 103.

118. *Id.*

119. BACONGO v. DOE II [2004] UKPC 6, ¶¶ 26–28 (appeal taken from Belize) (U.K.).

NEAC—when the lingering questions about the dam geology would be resolved, or if they would be resolved at all before dam construction began.

Construction of the road to the Chalillo site did, in fact, start in January 2002, but inquiries to the government about who was responsible for the construction and whether it was authorized went unanswered.<sup>120</sup> As Belize's independent newspaper, *The Reporter*, described it, "While [company] officials in Belize were giving their assurance that nothing would be done until all the proper studies are complete and all the legal permits are in hand... bulldozers tore through this forest reserve, toppling trees and scarring this once placid place."<sup>121</sup>

### B. *Judicial Review and Transparency in Belize and Beyond*

Concerned that construction was already underway, and unable to get answers from the government or BECOL, BACONGO<sup>122</sup> filed for permission ("leave") to seek judicial review of the decision to approve the Chalillo dam. Obtaining leave, essentially a screening procedure, is generally the first step in Commonwealth judicial review proceedings and requires a showing that the case is arguable.<sup>123</sup> For various legal and practical reasons, it was not at all clear that BACONGO's petition would get past this initial screening and be heard by the court at all, much less traverse the entire appeals process of Belize's judicial system.

For one, judicial review in Belize was largely untested and was based on an English model that itself was evolving. Although the courts of England had reviewed and sometimes reversed the administrative decisions of government officials or agencies since at least the seventeenth century, they applied this power with varying degrees of vigor in different periods.<sup>124</sup> By the middle of the twentieth century, according to a leading text on administrative law, English courts had become so deferential that some judges felt that "the common law must be given a death certificate, having lost the power to control the executive."<sup>125</sup> Administrative law saw a revival in England beginning in the

120. *See id.* ¶¶ 156–164.

121. Bruce Barcott, *Last Flight Out*, *OUTSIDE MAG.*, May 2003, at 110 ("The government doesn't deny that a road was built; it just denies that the road has anything to do with the dam." (quoting *Fortis Jumps the Gun!*, *REPORTER* (Belize) (date unknown))).

122. BACONGO was originally joined in this challenge by Sharon Matola and Eligorio Sho (who claimed that their research of the Scarlet Macaw would be impacted by dam construction), and the Belize Ecotourism Association (which claimed that the dam would affect its members' businesses). These applicants withdrew when it became clear that BACONGO would be granted standing. *See BACONGO v. DOE*, Judgment Upon a Petition for a Conservatory Order ("BACONGO v. DOE I"), ¶ 15 (U.K. Privy Council 2003) (appeal taken from Belize), available at <http://www.privycouncil.org.uk/files/other/belize.rtf>.

123. *See* H.W.R. WADE & C.F. FORSYTH, *ADMINISTRATIVE LAW* 644 (2000).

124. *See id.* at 13–19.

125. *Id.* at 16.

1960s,<sup>126</sup> but English jurisprudence still reflects a basic reticence to interfere with executive decisions.<sup>127</sup>

In Belize, judicial review of administrative decisions was quite rare and had previously only been employed in death row cases and a small number of commercial disputes.<sup>128</sup> There had been no challenge to the government's decisions under BEPA, and there was no precedent for the standing of an organization like BACONGO.<sup>129</sup> Furthermore, there were no Belizean rules of procedure for judicial review, leaving the court to fashion an impromptu procedure modeled on the English rules.<sup>130</sup> In commencing litigation BACONGO faced an additional uncertainty. Belize follows the English rule that the losing party pays costs and attorney fees. While there is an exception for cases brought in the "public interest," this exception is decided on a case-by-case basis and only at the end of litigation, by which time the legal bills could be crushing for a nonprofit organization like BACONGO.<sup>131</sup>

Despite these uncertainties, BACONGO's members were motivated by reports of the rapid pace of construction on the road to the Chalillo site and decided to press on with the case. They filed the petition for leave to apply for judicial review with Belize's Supreme Court on February 8, 2002.<sup>132</sup>

*a. Laying the Foundations: Obtaining Leave and Establishing Standing*

Belize's Supreme Court of Judicature (Supreme Court) is established by the country's Constitution as a court of first instance with unlimited original

126. *See id.* at 17.

127. The standard of review for administrative decisions in England is, at least nominally, quite lax. In its classic formulation, known as the "*Wedensbury* principle," a decision may be set aside as unreasonable (only) if it is "so absurd that no sensible person could ever dream that it lay within the powers of the authority." *Associated Provincial Picture Houses Ltd. v. Wedensbury Corp.*, [1948] 1 K.B. 223 at 229. In practice, English courts often apply a more stringent standard of review. *See WADE & FORSYTH, supra* note 123, at 366.

128. Personal communication with Lois Young Barrow, Senior Counsel representing BACONGO in the Belize Supreme Court (Feb. 5, 2008).

129. Organizational standing had been established in England, *see e.g.*, *R v. Inspectorate of Pollution, ex p Greenpeace* [1994] 1 W.L.R. 570, but was determined on a case-by-case basis. HOUSE OF COMMONS, JUDICIAL REVIEW: A SHORT GUIDE TO CLAIMS IN THE ADMINISTRATIVE COURT, Research Paper 06/44 (2006), available at <http://www.parliament.uk/commons/lib/research/rp2006/rp06-044.pdf>.

130. *See BACONGO v. Attorney Gen.*, Action No. 61, ¶¶ 1, 39 (Belize S. Ct. 2002), available at [http://www.stopfortis.org/Lawsuits/Action61/SupremeCourtLeaveGranted61\\_of\\_2002.pdf](http://www.stopfortis.org/Lawsuits/Action61/SupremeCourtLeaveGranted61_of_2002.pdf) (granting leave to apply for judicial review and describing, at length, the need for Belizean rules of procedure for judicial review. "The forensic joust that has engaged the court for the greater part of the day tellingly in my view demonstrates the need to have a more structured and rationalized system for dealing with this type of application before me.").

131. "It is generally accepted that the English rule discourages privately funded parties from bringing meritorious claims." Thomas R. Rowe, Jr., *Indemnity or Compensation? The Contract with America, Loser-Pays Attorney Fee Shifting, and a One-Way Alternative*, 37 WASHBURN L.J. 317, 317 n.50 (1998) (quoting Herbert M. Kritzer, *Legal Fees: The English Rule*, A.B.A. J., Nov. 1992, at 54, 55).

132. *See BACONGO v. Attorney Gen.*, Action No. 61, ¶ 1.

jurisdiction over all civil and criminal matters in Belize.<sup>133</sup> Oral arguments are held in a colonial-era courthouse in Belize City,<sup>134</sup> and civil cases, including petitions for judicial review, are heard by a single justice of the Supreme Court. BACONGO's case was assigned, perhaps because of its novelty and complexity, to Chief Justice Abdulai Conteh. Among many grounds for judicial review, BACONGO argued that the EIA fundamentally misrepresented the geology at the dam site, and that BDOE could not legally approve the project on the basis of such a flawed EIA.<sup>135</sup> The group also argued that a public hearing was required on the project, and that to be meaningful, the hearing should take place *before* any decision was made so that it could serve its intended purpose of informing that decision.<sup>136</sup>

On February 28, 2002, persuaded that BACONGO had an arguable case, Chief Justice Conteh granted its request for leave and presided over the judicial review proceedings.<sup>137</sup> In granting leave, Justice Conteh implicitly accepted, and the respondents did not challenge, that BACONGO had standing to pursue the case, marking an important milestone for public interest litigants in Belize. The right to organizational standing in Belize was later underscored in the court's opinion, which quoted from an English treatise on administrative law:

[I]t can be said that today the court ought not to decline jurisdiction to hear an application for judicial review on the ground of lack of standing to any responsible person or group seeking on reasonable grounds, to challenge the validity of governmental action.<sup>138</sup>

Establishing standing and obtaining leave were just the first hurdles that BACONGO would need to clear in pursuing this case, first in the Supreme Court and then through two appeals, ultimately reaching the Privy Council in London. At each turn, the case unearthed new revelations about the dam and the government's decisionmaking process. As Lord Walker of Gestingthorpe would later describe the path that BACONGO's case had taken:

The respondents' reluctance to disclose information to BACONGO (even when it is highly material and not obviously confidential) has been a regrettable feature of this case. No doubt the respondents regard BACONGO as a most troublesome thorn in their flesh, but their unhelpful

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133. Belize Constitution Act, 2000, vol. I, tit. II, ch. 4, §§ 94, 95 (Belize), available at <http://www.belizelaw.org/lawadmin/index2.html> (select appropriate volume, title, and chapter from left-hand menu).

134. See WWW.BELIZELAW.ORG, The Supreme Court (2007), [http://www.belizelaw.org/supreme\\_court.html](http://www.belizelaw.org/supreme_court.html).

135. Amended Grounds on which relief is sought. *The Queen v. BACONGO*, Action No. 61, ¶ 10 (Belize S. Ct. 2002).

136. See *id.*

137. See *id.* ¶ 1.

138. *Id.* ¶ 2 (quoting STANLEY ALEXANDER DE SMITH, LORD WOOLF & JEFFERY JOWELL, *JUDICIAL REVIEW OF ADMINISTRATIVE ACTION* 122 (1995)).

attitude can only have tended to increase BACONGO's suspicions, and perhaps also its determination to press on with the litigation.<sup>139</sup>

*b. Belize's Supreme Court: What Decision to Review?*

Once BACONGO obtained leave for the case to be heard in the Supreme Court, it faced a basic problem in seeking judicial review. As discussed below, the government claimed it had not made any decision, and that therefore there was no decision for the court to review. Although BEPA prohibits project construction without review of an EIA and a decision by BDOE, it leaves enforcement of these prohibitions to the government.<sup>140</sup> So while construction appeared to have begun in violation of BEPA, the government's inaction created a problem for BACONGO. By claiming it had not made a decision on the project, and also not stopping the apparently illegal construction from proceeding, the government sought to immunize itself and the Chalillo project from judicial review.

This strategy revealed the first of many brazen efforts by Belize's government to thwart the rule of law in the Chalillo case, and was the first clear instance where the government eventually reversed course. In answering BACONGO's charges in Belize's Supreme Court, the government initially claimed that (1) the NEAC vote was not a decision, since it was just an advisory body,<sup>141</sup> (2) that in any case it was BDOE, and not NEAC, which was legally authorized to issue project approvals,<sup>142</sup> and (3) that BDOE had not approved the project.<sup>143</sup> When directly questioned by the Chief Justice, the attorney representing Belize's Department of Environment said unequivocally that it had not given approval for construction. As Belize's Supreme Court soon found, however, this assertion turned out to be false.<sup>144</sup>

The project developer, BECOL, apparently nervous about proceeding without official approval in light of the ongoing litigation, had obtained a letter from BDOE granting the project "environmental clearance."<sup>145</sup> Though this letter was initially not disclosed, BECOL submitted it to the court shortly after

139. BACONGO v. DOE I, Judgment Upon a Petition for a Conservatory Order, ¶ 15 (U.K. Privy Council 2003) (appeal taken from Belize).

140. See *The Queen v. BACONGO*, Action No. 61, ¶¶ 31. (noting that the "at present...preferred route for the enforcement of compliance with the Act and the Regulations on EIA, is through the criminal law.")

141. *Id.* ¶ 14.

142. The Court agreed with this argument. See *id.* ¶ 19 (holding that NEAC's decision was "not a juristic act giving rise to rights and obligations").

143. *Id.* ¶ 16.

144. See *id.* (The government's attorney "denied that the DOE ever made a decision in respect of the EIA. Presumably, he was not fully instructed and I am prepared to accept that he was not aware of the DOE's letter of 5th April 2002 to BECOL [approving the project]. This letter surfaced as a result of the fourth affidavit of Lynn Young [on behalf of BECOL] exhibiting the letter.")

145. *Id.*

the government denied its existence at oral argument.<sup>146</sup> The public release of this letter created, for the first time, a public record of the decision to approve the project and identified the government body responsible for making it. This disclosure, unremarkable for anyone accustomed to administrative records in the United States, was an extraordinary revelation in Belize. By documenting and making public its approval of the project, Belize's government became accountable for its decision before the public and in the courts.

As a first step, the approval letter provided the court with a basis to answer whether BDOE had the legal power to approve or disapprove projects under Belize's law, as opposed to simply reviewing EIAs for technical flaws. The Chief Justice ultimately decided that BDOE does have this power.<sup>147</sup> The letter also allowed the court to review whether BDOE's exercise of this power in this case was consistent with Belize's EIA requirements. In essence, by creating a record of decision—a single letter to the developer—the courts now had a basis for judicial review.

Belize's Supreme Court also scrutinized, for the first time, the government's compliance with the public hearing provisions of the EIA regulations. Prior to Chalillo, these provisions had gone virtually unnoticed. Belize had never held public hearings for a project under these regulations and few believed that this project would be any different. The regulations provide that BDOE, on the advice of NEAC, "may" require a public hearing on a project,<sup>148</sup> and sets out a list of criteria which BDOE "shall" consider in deciding whether to hold a hearing.<sup>149</sup> These criteria include the magnitude of the environmental impact, the degree of public interest and participation in the project, and the complexity of the problems involved. Following its evaluation of the Chalillo EIA, NEAC voted to hold public hearings on the Chalillo project.<sup>150</sup> BACONGO argued that a hearing on the project should be held before any final decision, given that the purpose of a public hearing is to inform the decision itself. The government contended that such a hearing could be held *after* the decision was made. In any case, as more than a year passed since NEAC's consideration of the EIA, it appeared that the government did not intend to hold a hearing on Chalillo at all.

Noting that the Chalillo project "undoubtedly" met all of the legal criteria for holding a public hearing, Chief Justice Conteh ordered the government to hold such a hearing.<sup>151</sup> Echoing the ideals of the framers of NEPA, and aware of the need for such ideals in Belize, Conteh wrote:

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146. *See id.*

147. *See id.* ¶ 21 ("This [decision to approve the project] I find would be a decision that would be *intra vires* the Act for the DOE to do.")

148. Environmental Impact Assessment Regulations, 1995, S.I. 1995/107, art. 24, ¶ 1 (Belize).

149. *Id.* art. 24, ¶ 2.

150. *See* The Queen v. BACONGO, Action No. 61, ¶ 74 (Belize S. Ct. 2002).

151. *Id.* ¶ 77.

It may well be that a public hearing may or may not affect the final outcome of the decision whether to proceed or not with the Chalillo dam project. But the public, I think, has a right to be heard . . . if the inclusive and democratic process is to mean anything, especially on such a project as the Chalillo dam, with its admittedly wide-ranging ramifications.<sup>152</sup>

The government did hold a hearing in January 2003, in San Ignacio, the town that would be most affected by the dam project. Hundreds of people attended, many of them bussed in by the government, wearing pro-Chalillo t-shirts and speaking in favor of the dam.<sup>153</sup> Opponents of the project also spoke, focusing on the EIA's geological flaws and resulting concerns about dam safety, as well as concerns about the financial contracts underlying the project. While deeply criticized by dam opponents at the time as lopsided by design,<sup>154</sup> this first public hearing under Belize's Environmental Protection Act did, in my view, show some signs of the "inclusive and democratic process"<sup>155</sup> that Chief Justice Conteh envisioned: both sides got a chance to present their views, which were later compiled in a report by the magistrate judge who presided. It was possible to imagine that, in the future, such hearings might be held on the basis of a complete EIA *before* the relevant planning decision, and could, therefore, help inform that decision.

Indeed, this was still BACONGO's hope as it pursued its appeals of the Chalillo decision. If the court would require the government to hold another public hearing *after* resolving the dispute about the geology at the dam site, that would give the Belizean public an opportunity to review and comment on plans for the dam's construction based on accurate information about the dam's foundations—arguably the very purpose of an EIA process.

*c. Upholding the Rule of Law: Appeal to the Privy Council*

Decisions of Belize's Supreme Court are subject to appeal first to the Belize Court of Appeal and then to the Judicial Committee of the Privy Council, located in London, England.<sup>156</sup> The Court of Appeal is comprised of judges selected from throughout the Caribbean who, like the original traveling circuit courts in the United States, travel between various jurisdictions and

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152. *Id.* ¶ 78.

153. See Editorial, *Public Hearing Equals Public Farce*, REPORTER, (Belize), Jan. 20, 2003, available at <http://www.threegorgesprobe.org/pi/index.cfm?DSP=content&ContentID=6370> (criticizing the hearing as "stacked" by dam proponents, but also describing the presentations by dam opponents and the universal praise for the hearing's chairman for the "fair and balanced manner which he conducted hearing").

154. Scheduled pro-dam speakers dominated the first hour of the hearing with prepared PowerPoint presentations, while opponents of the dam did not learn the format of the hearing until minutes before it began. See *id.*

155. *The Queen v. BACONGO*, Action No. 61, ¶ 78.

156. See Belize Constitution Act, 2000, vol. I, tit. II, ch. 4, § 96 (Belize).

periodically sit in Belize to hear appeals from the Supreme Court.<sup>157</sup> Appeal by right is available under most circumstances from Belize's Supreme Court to the Court of Appeal, but leave must generally be granted in order to appeal from the Court of Appeal to the Judicial Committee of the Privy Council.<sup>158</sup>

BACONGO appealed the decision of Belize's Supreme Court in January 2003 and did not have to wait long for a decision from the Court of Appeal. Oral arguments took place during the last week of March.<sup>159</sup> From the bench, immediately after arguments, the three judges of the Court of Appeal delivered their decision upholding the government's approval of the dam EIA.<sup>160</sup> In a June 2003 order, the Court of Appeal granted leave for BACONGO to appeal the case to the Judicial Committee of the Privy Council, ruling that the case was of public importance.<sup>161</sup>

The Judicial Committee of the Privy Council (Privy Council) was established in 1833 as the highest judicial authority for the British colonies.<sup>162</sup> It still serves as the last court of appeal for a number of former colonies, including Belize, though its jurisdiction continues to shrink as former colonies replace the Privy Council with a court closer to home. This history—and the distance of the court from Belize—very much affected the atmospherics of BACONGO's case when it reached the Privy Council. On the one hand, as discussed below, the colonial history of the court may ultimately have swayed the court majority to be more deferential than it might have been to a decision of the English government. On the other hand, the distance of the court from Belize and insular Belizean politics made it more plausible—to both supporters and opponents of the dam—that the court could overturn the decision to approve the Chalillo dam.

The possibility of reversal in the Privy Council prompted the government to pass a law in June 2003, shortly after BACONGO obtained leave to file its appeal, mandating the construction of the Chalillo dam “notwithstanding any judgment, order or declaration of any court or tribunal, whether heretofore or

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157. See [Belizelaw.org](http://www.belizelaw.org), Our View of the Judiciary System in Belize, <http://www.belizelaw.org/judiciary.html> (website of the Belize Attorney General, describing the structure and composition of Belize's courts) (last visited May 2, 2008).

158. Constitutional questions can be appealed as of right, and the Court of Appeal can grant leave to appeal in other cases of “general or public importance” or that otherwise should be heard by the Privy Council. See Belize Constitution Act § 104.

159. BACONGO v. DOE I, Judgment Upon a Petition for a Conservatory Order, ¶ 19 (U.K. Privy Council 2003) (appeal taken from Belize) (describing the chronology of the appeal before the Court of Appeal).

160. See *id.* Arguments in the case were held from March 24 to 28 and on March 31, 2003. The decision from the bench was issued immediately after the arguments on March 31. Author's personal observation.

161. See *id.*

162. Although the Privy Council has had both executive and judicial functions in its more than six hundred-year history, the Judicial Committee of the Privy Council was established by the Judicial Committee Act of 1833. OONAGH GAY & ANWEN REES, PARLIAMENT AND CONSTITUTION CENTER, NO. SN/PC/3708, THE PRIVY COUNCIL (2005), available at <http://www.parliament.uk/commons/lib/research/notes/snpc-3708.pdf>.

hereafter granted, issued or made.”<sup>163</sup> This law, the Macal River Hydroelectric Development Act (“Macal River Act”), was passed two months after BACONGO obtained leave to appeal from the Court of Appeal and just before the Privy Council was to hear arguments in BACONGO’s application for a preliminary injunction. It presented a direct challenge to Belize’s constitutional order. Many Belizeans had suspected that the government would ignore any adverse court ruling, but this Act went even further, preemptively announcing the government’s intentions to defy the courts on Chalillo. Ultimately, however, the government backed away from this frontal challenge when the case reached the Privy Council.

The hearing before the Privy Council took place in two stages. A hearing on BACONGO’s application for a preliminary injunction took place in July 2003, and it was followed by a hearing on the merits in December. During the July 2003 hearing, the Law Lords expressed their displeasure with the Macal River Act, and the government did its best to distance itself. Edward Fitzgerald, the English barrister representing the government, “stated that he did not rely on the 2003 Act as a reason why the Board should not grant an injunction if it thought it right to do so. He also stated that the government of Belize would obey any order of the Board.”<sup>164</sup> This simple statement ostensibly reaffirmed the government’s commitment to operating within the constitutional system and was a significant victory for the rule of law in Belize.

Following the hearing, the Privy Council denied BACONGO’s request for an injunction, but expedited the argument so as to be held before the year’s end. The justices also put off ruling on the constitutionality of the Macal River Act, but in typical understated fashion, noted that “[t]heir Lordships think it better to say no more than that the Attorney General should be in no doubt as to the seriousness of the issues potentially raised by the 2003 Act.”<sup>165</sup> The government of Belize apparently understood the message and—more surprisingly to many Belizeans—heeded it. The Act was repealed prior to the full hearing in the case in December.<sup>166</sup> While the government cynically claimed that it was repealing the Act because it had “served its purpose,”<sup>167</sup> Belizeans knew that something more profound had occurred. As Belize’s Channel 5 News editor put it:

[The Macal River Act] was described on our newscast of June thirteenth as ‘the worst piece of legislation ever passed by the House of Representatives,’ and nothing done since then has caused the news editor to

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163. Macal River Hydroelectric Development Act 2003, available at <http://www.belizelaw.org/lawadmin/index2.html>.

164. BACONGO v. DOE I, ¶ 25.

165. *Id.*

166. Press Briefing, Office of the Prime Minister (Belize), Cabinet Meeting of 11 November 2003 (Nov. 12, 2003), available at [http://www.governmentofbelize.gov.bz/press\\_release\\_details.php?pr\\_id=2356](http://www.governmentofbelize.gov.bz/press_release_details.php?pr_id=2356).

167. *Id.* (“Cabinet is satisfied that the Act has served its purpose and that the project is being implemented as planned; therefore the Act may now be replaced.”)

alter his opinion of the Macal River Hydroelectric Bill. The fact is that the sole reason the act is being repealed is that the final appeal by BACONGO to stop the project will be heard early next month by the Privy Council in London and government is afraid that the learned law lords will not only declared the law unconstitutional, but give Belmopan a sharp tongue lashing to boot.<sup>168</sup>

### C. *What's in a Name: Granite or Sandstone?*

The decision to repeal the Macal River Act helped confirm the authority of the courts. Another important confirmation of this authority, and of the potential for the courts to promote transparency in Belize, took place just days before the Privy Council's final arguments in December 2003. After more than four years of debate over the geological foundations of the dam, the government's counsel turned over to BACONGO a copy of a government-commissioned geological study, referred to as the "Cornec report" (after geologist Jean Cornec, the principal author of the report).<sup>169</sup> This report, which had been concealed by Belizean officials,<sup>170</sup> showed that the geology section of the Chalillo EIA was grossly mistaken and in particular that there was no granite at the Chalillo site.<sup>171</sup> The report also identified significant seismic fault lines near the dam site that appear to have been airbrushed out of the versions included in the EIA.<sup>172</sup>

The government commissioned the Cornec report after BACONGO raised questions about the dam site geology in the NEAC proceedings, but it was not complete until May 2002,<sup>173</sup> after BDOE granted final approval for the project. BDOE claimed, to the skeptical Law Lords, not to have been aware of the study until just before the Privy Council arguments.<sup>174</sup> At the same time, the government argued, and the majority of the Privy Council agreed, that the inaccuracies in the geological section of the EIA could be remedied as part of an "iterative process which does not stop with the approval of the EIA."<sup>175</sup>

168. *Evening Newscast: Cabinet: Chalillo Act Will Be Repealed* (Channel 5 Belize television broadcast Nov. 12, 2003), available at [http://www.channel5belize.com/archive\\_detail\\_story.php?story\\_id=11199](http://www.channel5belize.com/archive_detail_story.php?story_id=11199) (transcript).

169. JEAN H. CORNEC & CRAIG MOORE, (RE)MAPPING OF THE PROPOSED CHALILLO DAM AREA (2002), available at <http://www.stopfortis.org/CornecRemapping.pdf>.

170. BACONGO v. DOE II [2004] UKPC 6, ¶ 88 (appeal taken from Belize) (U.K.) (Lord Walker of Gestingthorpe & Lord Steyn, dissenting) (the dissent praises English counsel and solicitors for disclosing the report which had "previously been withheld").

171. See CORNEC & MOORE, *supra* note 169, at 2.

172. See *id.* at 8 ("The rationale for the removal [of a prominent fault line from an EIA map] is unknown as this fault outcrops spectacularly in the Macal river bed and left bank."); see also *Geology: Fortis/BECOL/AMEC Removed Fault Lines in Geology Maps*, STOPFORTIS.ORG, Nov. 24, 2003, [http://www.stopfortis.org/GeologyDistorted11\\_03.html](http://www.stopfortis.org/GeologyDistorted11_03.html) (displaying images of the two maps, with and without the fault line near Chalillo).

173. BACONGO v. DOE II, ¶ 105.

174. See *id.* ¶¶ 114, 116, 117 (agreeing that DOE's version of events "should not be believed").

175. *Id.* ¶ 71.

As one commentator observed, this view of the EIA process contrasts sharply with other U.K. cases (including a key case decided by Lord Hoffman in the House of Lords<sup>176</sup>) which emphasize the importance of public disclosure and public participation in the EIA process *prior* to any decision.<sup>177</sup> In distinguishing one of these English cases, Lord Hoffman stated simply that Belizean law is different, without explaining how.<sup>178</sup> Therefore, the majority opinion appears to reflect a reluctance to impose a rigorous EIA process on Belize, in spite of legal precedent:

Belize is a sovereign state, having gained its independence from the United Kingdom in 1981. It has a constitution which safeguards democracy and human rights. But the question of whether or not the dam should be built raises no issue of human rights. It is a matter of national policy which a democratically elected government can decide.<sup>179</sup>

As the dissent pointed out, however, to leave the decision up to the government alone defeats a core purpose of the EIA requirements: public participation.<sup>180</sup> Concealment of the Cornec report perfectly illustrates this problem. Despite repeated requests by BACONGO and other concerned members of the public, the government of Belize did not release the report until it was forced to do so in litigation. If BDOE's claims were to be believed, it did not know the true characteristics of the dam site foundation and could not ensure that the dam design took these characteristics into account. If BDOE had seen the report, then its refusal to make it public could only be seen as an attempt to avoid accountability. Either way, the Belizean public is not served by such government incompetence or secrecy. As Lord Walker put it:

The rule of law must not be sacrificed to foreign investment, however desirable (indeed, recent history shows that in many parts of the world respect for the rule of law is an incentive, and disrespect for the rule of law can be a severe deterrent, to foreign investment). It is no answer to the erroneous geology in the EIA to say that the dam design would not necessarily have been different. The people of Belize are entitled to be properly informed about any proposals for alterations in the dam design

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176. See *Berkeley v. Sec'y of State for the Env't* [2001] 2 A.C. 603 (H.L.) (appeal taken from Eng.) (U.K.) ("A court is therefore not entitled retrospectively to dispense with the requirement of an EIA on the ground that the outcome would have been the same or that the local planning authority or Secretary of State had all the information necessary to enable them to reach a proper decision on the environmental issues.").

177. See Botchway, *supra* note 105; see also Lord Justice Carnwath, *Judicial Protection Of The Environment: At Home And Abroad*, 16 ENVTL. LAW 315 (2004) (contrasting the opinion in *BACONGO v. DOE II* with those in *Berkeley* and other English cases dealing with environmental assessment).

178. "Their Lordships . . . only observe that the statutory background to this decision was altogether different from that which exists in Belize." *BACONGO v. DOE II* [2004] UKPC 6, ¶ 73 (appeal taken from Belize) (U.K.).

179. *Id.* ¶ 9.

180. See *id.* ¶ 118 (Lord Walker of Gestingthorpe, dissenting).

before the project is approved and before work continues with its construction.<sup>181</sup>

#### CONCLUSION

Construction on the Chalillo project went into high gear shortly after the Privy Council decision, and the dam was commissioned in 2005.<sup>182</sup> The few scientists who have visited the area since construction began report that wildlife has been severely impacted,<sup>183</sup> but it is impossible to know for sure: if the mitigation plans and follow-up wildlife studies promised during the course of the Chalillo litigation have been undertaken, none have been made available to the public. In a later court challenge, the Department of Environment admitted that some of the follow-up studies required for the Chalillo dam had not been done, but said that these problems would be remedied for the third dam now being built on the Macal River.<sup>184</sup> Meanwhile, BECOL claims that inexpensive energy from the dam is helping to balance the rising costs of oil, but Belizeans have their doubts—Belize's electricity rates are the highest in Central America and continue to climb, including a 10 percent increase announced on the day the dam was commissioned.<sup>185</sup>

It is difficult to know whether a different decision by the Privy Council would have made a difference for construction of the Chalillo dam or for the fate of the Macal River. It is possible that public input would have improved the design of the dam, or that public disclosure of the costs of redesigning the dam would have halted the project altogether. It is clear, however, from the course of the Chalillo litigation, that a rigorous, judicially enforced EIA process can have salutary effects on governance. In addition to forcing information disclosure and a public hearing, judicial review in the Chalillo case confirmed the constitutional order in Belize. Though it looked at times as if the government would allow dam construction to proceed regardless of the legal process, ultimately both the government and dam proponents deferred to the courts.

In that sense, the courts did provide an important counterbalance to executive excess, and left room for future citizen suits challenging the government. Indeed, a number of significant lawsuits challenging Belizean government decisions have been brought, with some success, since the Chalillo

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181. *Id.* ¶ 121.

182. See *Evening Newscast*, *supra* note 1. For images of the reservoir see StopFortis.org, Chalillo dam overflight, February 2006, [http://stopfortis.org/ChalilloOverflight2\\_05.html](http://stopfortis.org/ChalilloOverflight2_05.html) (last visited Feb. 11, 2008).

183. Personal communication with Sharon Matola, Director of the Belize Zoo and a leading wildlife researcher in Belize (May 2005).

184. See Adele Ramos, *C.J. Denies Vaca Dam Injunction but Grants Judicial Review*, AMANDALA (Belize), July 24, 2007, available at <http://www.amandala.com.bz/index.php?id=5894>.

185. *Evening Newscast*, *supra* note 1.

case.<sup>186</sup> In one, Belize's Supreme Court issued its first decision overturning a government decision under the Environmental Protection Act: the court ruled that the government could not allow an oil company to conduct seismic exploration in a national park without conducting an EIA.<sup>187</sup> In another, a Belizean citizens group and downstream property owners were granted leave to bring a formal challenge to the approval of a third dam on the Macal River, based on the proponents' failure to comply with the environmental conditions on Chalillo.<sup>188</sup>

There is also some indication that the Privy Council dissent will outlive the majority opinion in courts outside of Belize. In Jamaica, for example, the Supreme Court considered the Chalillo decision in an opinion overturning the approval of an EIA for hotel development along a sensitive stretch of coastline. In that case, the Jamaican government withheld a key marine biology report from the public. Referring to the Privy Council's decision in the Chalillo case, Justice Sykes wrote:

I much prefer the approach of the minority judgment to the issue than that of the majority. Concealment of material information could hardly be said to enhance good administration. Lord Walker emphasised that in the context of the Belizean legislation and Regulations the design of the dam was required to be included in the EIA and should have been subject to public consultation and public debate before approval. He noted that changes were to be made in the design but the nature of the changes had been withheld from the public.<sup>189</sup>

Justice Sykes concluded that "[c]itizens and strangers have [a] vested interest in seeing that public authorities act according to law and where they fail to do so they ought to be held accountable."<sup>190</sup>

Although the Privy Council did not hold Belizean officials accountable for their decision to approve the Chalillo dam, Belizean voters ultimately did. In February 2008, the ruling People's United Party (PUP), lost a landslide congressional election, with voters rejecting an "administration [that was] rocked by scandals over alleged sweetheart deals and financial mismanagement."<sup>191</sup> The Chalillo dam was by no means the only such sweetheart deal, but it became one of the best-known and documented, as a

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186. See, e.g., *Pub. Serv. Union of Belize v. Belize Telecomm. Ltd.*, Action No. 13 (Belize S. Ct. 2005), available at [http://www.belizelaw.org/supreme\\_court/judgements/2005/sc/civil/13\\_of\\_2005.pdf](http://www.belizelaw.org/supreme_court/judgements/2005/sc/civil/13_of_2005.pdf); *Belize Tourism Indus. Ass'n Ltd. v. Prime Minister of Belize*, Action No. 565 (Belize S. Ct. 2004), available at [http://www.belizelaw.org/supreme\\_court/judgements/2005/sc/civil/565\\_of\\_2004.pdf](http://www.belizelaw.org/supreme_court/judgements/2005/sc/civil/565_of_2004.pdf).

187. See *Sarstoon-Temash Inst. for Indigenous Mgmt. v. Forest Dep't, Ministry of Natural Res.*, Action No. 212 (Belize S. Ct. 2006), available at <http://www.elaw.org/resources/text.asp?id=3186>.

188. See Ramos, *supra* note 184.

189. *Jamaica Conservation*, No. HCV 3022, ¶ 10.

190. *Id.* ¶ 115.

191. Associated Press, *Belize's Opposition Party Wins Landslide in Congressional Elections*, INT'L HERALD TRIB., Feb. 9, 2008, <http://www.iht.com/articles/ap/2008/02/09/america/LA-POL-Belize-Elections.php> (noting that the outgoing "administration [was] rocked by scandals over alleged sweetheart deals and financial mismanagement").

result of the lawsuit brought by BACONGO, and no doubt contributed to the upswell of opposition to the existing government.

