

Ensuring environmental access rights in the Caribbean

Analysis of selected case law



UNITED NATIONS



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FOREWORD

Access to justice is central to sustainable development. Advancing the rule of law at the national, regional and international levels is essential for sustained and inclusive growth, the full realization of human rights and environmental protection. Embodied in Sustainable Development Goal 16 of the United Nations 2030 Agenda for Sustainable Development, it is also a key enabler of all other goals and targets. In addition to being a right in itself, access to justice is also a means to restore other rights that have been ignored or violated. In a context of marked inequalities, the rule of law supports better economic opportunities, provides legal certainty, secures better livelihoods and translates the voices of individuals and communities—especially those in vulnerable situations—into concrete results and actions, thus contributing to the creation of safe and peaceful societies.

The Caribbean subregion is no stranger to the empowering role of justice in sustainable development. Largely based on the common law system, Caribbean jurisdictions have been instrumental in improving the lives of their peoples and safeguarding their common environment. By upholding fundamental rights and freedoms such as access to information, participation and justice, the judges and courts of the subregion have endeavoured to contribute to positive change by delivering an accessible, efficient justice that reflects the Caribbean legal framework and, most importantly, the values, aspirations and ideals of its societies.

In an attempt to showcase the judicial developments of the Caribbean and its resolute commitment to access rights for environmental protection, the United Nations Economic Commission for Latin America and the Caribbean (ECLAC) and the Caribbean Court of Justice Academy of Law (CCJ Academy of Law)—the educational arm of the Caribbean Court of Justice—have joined efforts to prepare the present publication. It presents a brief overview of the applicable legal framework and a selection of case law from high courts of Caribbean countries, providing a synopsis of the innovative judicial treatment of access to information, public participation and access to justice in environmental matters and identifying general core elements common to most jurisdictions.

The powerful conclusions of this study are manifold. First and foremost, the Caribbean subregion has been at the forefront of the implementation of environmental access rights, even before the adoption of the 1992 Rio Declaration on Environment and Development. The many subregional and national developments highlighted in the present report attest to the remarkable ownership and engagement of Caribbean countries with regard to Principle 10 of the Rio Declaration. Second, Caribbean jurisprudence has made strong conceptual contributions through the application of common law principles. Concepts such as legitimate expectations and the right to a fair hearing or the principles of natural justice and fairness have proven to be of paramount importance in specifying (and at times expanding) the scope of access rights, even in the absence of concrete obligations under statutory law. Third, some challenges in the implementation of environmental access rights remain. Some aspects requiring particular attention are: establishing clear regulatory frameworks for access to information, ensuring adequate, timely and inclusive participation in environmental decision-making, with the active participation of all stakeholders (including the directly affected public and specific groups or communities), or tackling barriers to justice such as legal standing and costs.

The recently adopted Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters in Latin America and the Caribbean, in which the Caribbean played a particularly active role, will definitively contribute to bridging the existing gaps and furthering the implementation of environmental access rights in the Caribbean.

It is our hope that the present publication will inspire those in the Caribbean who make and apply decisions to continue progress in the implementation of environmental access rights for the benefit of our societies and our environment. As the main bulwark against disempowerment, exclusion and discrimination, judges and courts will continue to be decisive in placing equality at the heart of sustainable development and ensuring it becomes a reality for all.

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CHAPTER I

Overview of the Caribbean legal framework on environmental access rights

- A. International and regional obligations
on environmental access rights
- B. National obligations on environmental access rights

The Caribbean¹ has made significant strides in the implementation of the rights to access information, public participation and access to justice in environmental matters since these were enshrined in Principle 10 of the Rio Declaration on Environment and Development (Principle 10). Recognizing the importance of such rights for sustainable development and environmental protection, the countries of the sub-region have actively incorporated the Principle 10 tenets not only at the national level but also in regional and international commitments.

Indeed, the Caribbean was one of the pioneers in the elaboration of access rights at the national and subregional levels. The 1989 Port of Spain Accord on the Management and Conservation of the Caribbean Environment, signed by Ministers of Environment of the Caribbean three years before the 1992 Rio Declaration, already identified as strategic approaches for environmental protection the promotion of public education and awareness and the collection and dissemination of environmental information. Likewise, national efforts to give effect to the right to access information were spearheaded by countries such as Belize, which was the first in Latin America and the Caribbean to adopt a Freedom of Information Act in 1994.

The present chapter will briefly review the international, regional and national legal framework applicable to environmental information, participation and justice in the Caribbean. It will also focus on the main obligations contained in the Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters in Latin America and the Caribbean, adopted on 4 March 2018 at Escazú, Costa Rica, with the active participation of eight Caribbean countries.

A. International and regional obligations on environmental access rights

1. International agreements

References to the rights of information, participation and justice have been included in different binding and non-binding international agreements which are relevant for the Caribbean sub-region. Multilateral Environmental Agreements (MEAs) have been prolific in recognizing the interlinkages between access rights and the fulfillment of their objectives and have included specific obligations related to such rights.

The three conventions that stemmed from the 1992 Earth Summit stand out for their explicit references to the postulates of Principle 10. The United Nations Framework Convention on Climate Change (UNFCCC) and its recent Paris Agreement, include in articles 6 and 12, respectively, provisions on climate change public awareness, education, access to information and public participation². Furthermore, the Paris Agreement also establishes an enhanced transparency framework, whereby Nationally Determined Contributions (NDCs) are recorded in a public registry and the Parties shall regularly provide a national inventory report of anthropogenic emissions by sources and removals by sinks of greenhouse gases and information necessary to track progress made in implementing and achieving its NDCs³.

Similarly, the Convention on Biological Diversity (CBD) mandates countries to allow for public participation in environmental impact assessments, facilitate the exchange of relevant information and develop educational and public awareness programmes, with respect to conservation and sustainable use of biological diversity⁴. For its part, the United Nations Convention to Combat Desertification in

¹ Throughout this document, the term “Caribbean” refers to the following countries: Antigua and Barbuda, the Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname and Trinidad and Tobago.

² Article 6 of UNFCCC states that Parties shall promote and facilitate the development and implementation of educational and public awareness programmes on climate change and its effects; public access to information on climate change and its effects; and, public participation in addressing climate change and its effects and developing adequate responses, among others. Article 12 of the Paris Agreement, in turn, provides for cooperation measures to enhance climate change education, training, public awareness, public participation and public access to information, recognizing the importance of these steps with respect to enhancing actions under such Agreement.

³ See articles 4.8, 4.12 and 13 of the Paris Agreement.

⁴ See articles 12, 13, 14 and 17 of the CBD.

those Countries Experiencing Serious Drought and/or Desertification (UNCCD) contains provisions on access to information and public participation in the elaboration of national action plans and strategies, information exchange, capacity-building, education and public awareness⁵.

Other MEAs also include important provisions on access rights⁶. One of the most recent environmental treaties, the Minamata Convention on Mercury (Minamata Convention)⁷, states that information on the health and safety of humans and the environment shall not be regarded as confidential. It also establishes a public register of notifications regarding the importation of mercury and a public record of exemptions from compliance and it allows the Secretariat to make available to the public information on mercury-added products and their alternatives, processes using mercury or mercury compounds and their alternatives, as well as the number and types of facilities using mercury or mercury compounds and estimates of the quantity used annually and any other relevant information provided by the Parties. Public participation in strategies and implementation plans is also required⁸.

The Caribbean has been active in ratifying many of the aforementioned agreements. As can be seen in table 1, all Caribbean countries have ratified the UNFCCC, the CBD, the UNCCD, the Vienna Convention for the Protection of the Ozone Layer and the Montreal Protocol on Substances that Deplete the Ozone Layer. Furthermore, 12 out of the 13 English-speaking Caribbean countries have ratified the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Stockholm Convention on Persistent Organic Pollutants and the Paris Agreement (five Caribbean countries being among the first to ratify such agreement⁹).

Moreover, the Barbados Programme of Action for Sustainable Development of Small Island Developing States of 1994, the Mauritius Strategy for the Further Implementation of the Program of Action for the Sustainable Development of SIDS of 2005 and the Samoa Pathway of 2014 all placed increasing emphasis on public awareness, environmental data and information and stakeholder participation in matters such as tourism, forests, biodiversity or oceans.

The 2030 United Nations Agenda for Sustainable Development¹⁰ is equally important in adopting a holistic, balanced and comprehensive approach to development from a human rights perspective based on equality and non-discrimination. Its 17 Sustainable Development Goals and 169 targets link access rights with human rights and sustainable development. Goal 16 is specifically revealing as it expressly sets out the three rights of access (public access to information and protection of fundamental freedoms; inclusive, participatory and representative decision-making; and, equal access to justice). Moreover, countries also committed to create effective, accountable and transparent institutions and adopt non-discriminatory laws and policies for sustainable development.

Another international milestone in the field of environmental law and the application of Principle 10 was achieved when the Special Session of the United Nations Environment Programme Governing Council, Global Ministerial Environment Forum (GMEF), unanimously adopted the Guidelines for the Development of National Legislation on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Bali Guidelines)¹¹ in 2010. Resulting from a consultative process between Governments and civil society, the Guidelines establish a common understanding of the main elements to ensure access to information, participation and justice such as the right to affordable, effective and timely access to information, the opportunity for early and effective public participation of the any person principle and broad interpretation of standing in accessing environmental justice.

⁵ See articles 3, 5, 9, 10, 16, 17, 19 and article 4 of Annex III of the UNCCD.

⁶ Articles 3, 4.2.f, 4.7, 6 and 16.1, of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal; articles VIII.6-8 and XII.2 of the Convention on International Trade in Endangered Species of Wild Fauna and Flora; articles 7.2, 9 and 10 of the Stockholm Convention on Persistent Organic Pollutants; or articles 3.3 and 4.1 of the Vienna Convention for the protection of the Ozone Layer.

⁷ The Minamata Convention was adopted on 10 October 2013 and came into force on 16 August 2017.

⁸ See articles 3, 4, 5, 6, 12, 17, 18 and 20 of the Minamata Convention.

⁹ Belize, Barbados, Grenada, Saint Kitts and Nevis and Saint Lucia were among the 15 States that first deposited instruments of ratification.

¹⁰ A/RES/70/1.

¹¹ Adopted by the Governing Council of the United Nations Environment Programme in decision SS.XI/5, part A of 26 February 2010. See <http://wedocs.unep.org/handle/20.500.11822/11182> [online].

Table 1
Ratification of multilateral environmental agreements in the Caribbean

	Antigua and Barbuda	The Bahamas	Barbados	Belize	Dominica	Granada	Guyana	Haiti	Jamaica	Saint Kitts and Nevis	Saint Vincent and the Grenadines	Saint Lucia	Suriname	Trinidad and Tobago
Minamata Convention on Mercury, 2013	2016						2014		2017	2017				
International Treaty on Plant Genetic Resources for Food and Agriculture, 2001	2017						2015	2001	2006			2003		2004
Stockholm Convention on Persistent Organic Pollutants, 2001	2003	2005	2004	2010	2003		2007	2001	2007	2004	2005	2002	2011	2002
Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 1998	2010		1998	2005	2005		2007		2002	2012	2010	1999	2000	2009
United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 1994	1997	2000	1997	1998	1997	1997	1997	1996	1997	1997	1998	1997	2000	2000
Convention on Biological Diversity, 1992	1993	1993	1993	1993	1994	1994	1994	1996	1995	1993	1996	1993	1996	1996
Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, 2010	2016					2011	2014							
Nagoya - Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Biosafety, 2010	2011													
Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 2000	2003	2004	2002	2004	2004	2004	2008	2000	2012	2001	2003	2005	2008	2000
United Nations Framework Convention on Climate Change, 1992	1993	1994	1994	1994	1993	1994	1994	1996	1995	1993	1996	1993	1997	1994
Paris Agreement, 2015	2016	2016	2016	2016	2016	2016	2016	2017	2017	2016	2016	2016	2016	2018
Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, 1989	1993	1992	1995	1997	1998		2001	1989	2003	1994	1996	1993	2011	1994
Vienna Convention for the protection of the Ozone Layer, 1985	1992	1993	1992	1997	1993	1993	1993	2000	1993	1992	1996	1993	1997	1989
Montreal Protocol on Substances that Deplete the Ozone Layer, 1987	1992	1993	1992	1998	1993	1993	1993	2000	1993	1992	1996	1993	1997	1989
Convention on the Conservation of Migratory Species of Wild Animals, 1979	2007													
Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 1973	1997	1979	1992	1986	1995	1999	1977	1997	1997	1994	1988	1982	1980	1984

Source: Economic Commission for Latin America and the Caribbean on the basis of <http://treaties.un.org/>; <http://www.cms.int/>; <http://www.planttreaty.org/>; <http://www.cites.org/> and <http://www.ramsar.org/>. Updated as at 12 March 2018.

Note: Shaded cells indicate that the agreement has only been signed.

2. The Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean

Stemming from the United Nations Conference on Sustainable Development (Rio+20) in 2012, the Latin American and Caribbean region pledged to adopt a regional agreement on access to information, public participation and justice in environmental matters with the significant participation of the public and the support of ECLAC as technical secretariat¹². After a preparatory phase of two years, in November 2014 a Negotiating Committee was created with the aim of concluding such regional agreement. The Negotiating Committee met on nine occasions and was composed of 24 countries, eight of which came from the English-speaking Caribbean region: Antigua and Barbuda, Dominica, Grenada, Jamaica, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines and Trinidad and Tobago.

At Escazú, Costa Rica, on 4 March 2018, the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean was formally adopted. The agreement will be open for signature between 27 September 2018 and 26 September 2020 at United Nations headquarters in New York and is subject to the ratification, acceptance and approval of the 33 countries of Latin America and the Caribbean that sign it, and to accession any time thereafter.

The agreement adopted at Escazú is the only binding treaty resulting from the United Nations Conference on Sustainable Development (Rio+20) and the first regional environmental treaty of Latin America and the Caribbean. Its objective is to guarantee the full and effective implementation in the region of the rights of access to environmental information, public participation in the environmental decision-making process and access to justice in environmental matters, and the creation and strengthening of capacities and cooperation, contributing to the protection of the right of every person of present and future generations to live in a healthy environment and to sustainable development (article 1).

Each Party to the agreement shall be guided, *inter alia*, by the principles of equality, non-discrimination, transparency, accountability, non-regression, progressive realization, intergenerational equity and maximum disclosure, as well as by the preventive and precautionary principles (article 3).

Active and passive transparency measures are provided for in articles 5 and 6. Each Party shall ensure the public's right of access to environmental information in its possession, control or custody without mentioning any special interest or explaining the reasons for the request and shall have the right to challenge and appeal the non-delivery of the information. Competent authorities shall respond to requests as quickly as possible and within a period not longer than 30 business days from the date of receipt of the request or less if so stipulated in domestic legislation. Information shall be provided at no cost, insofar as its reproduction or delivery is not required, and if so, such costs shall be reasonable and be made known in advance, and may be waived if the applicant is deemed to be in a vulnerable situation. In addition, each Party shall guarantee, to the extent possible within available resources, that environmental information is generated, collected, publicized and disseminated in a systematic, proactive, timely, regular, accessible and comprehensible manner. Furthermore, Parties shall take steps to establish environmental information systems and pollutant release and transfer registers and encourage independent environmental performance reviews.

In terms of public participation in environmental decision-making, the public shall have mechanisms to participate in the process to issue authorizations (and revisions) of projects and activities that have or may have a significant impact on the environment. Public participation in other decision-making processes (such as plans, policies, strategies, rules and regulations) shall be promoted. Participation

¹² More information is available at: <http://www.eclac.org/en/principle10> [online].

shall take place from early stages, so that due consideration can be given to the observations of the public. Each Party shall also provide the public with the necessary information in a clear, timely and comprehensive manner and reasonable timeframes be stipulated. Public authorities shall likewise make efforts to identify the public directly affected by projects or activities that have or may have a significant impact on the environment and promote specific actions to facilitate their participation.

As for access to justice in environmental matters, each Party shall ensure access to judicial and administrative mechanisms to challenge and appeal any decision, action or omission related to access to environmental information and public participation in the decision-making process regarding environmental matters, as well as any other that affects or could affect the environment adversely or violate laws and regulations related to the environment. Considering its circumstances, each Party shall have competent entities with access to expertise in environmental matters, effective, timely, public, transparent and impartial procedures that are not prohibitively expensive, broad active legal standing in defence of the environment in accordance with domestic legislation and mechanisms to facilitate the production of evidence and for redress.

Special attention is given to persons or groups in vulnerable situations, defined as those persons or groups that face particular difficulties in fully exercising access rights because of circumstances or conditions identified within each Party's national context and in accordance with its international obligations. In this regard, guidance and assistance shall be provided to the public in order to facilitate the exercise of their access rights and each pillar contains specific provisions towards that aim. For example, Parties shall endeavour, where applicable, to ensure that the competent authorities disseminate environmental information in the various languages used in the country and prepare alternative formats that are comprehensible to such groups, using suitable channels of communication (article 6.6). Public authorities shall make efforts to identify and support persons or groups in vulnerable situations in order to engage them in an active, timely and effective manner in participation mechanisms (article 7.14). Furthermore, article 8.4 requires States to establish measures to minimize or eliminate barriers to the exercise of the right of access to justice, among others.

Moreover, the agreement is the world's first treaty to include specific provisions on environmental human rights defenders. According to its article 9, Parties shall guarantee a safe and enabling environment for persons, groups and organizations that promote and defend human rights in environmental matters, taking adequate and effective measures to recognize, protect and promote all their rights and prevent, investigate and punish any attack, threat or intimidation they suffer while exercising access rights.

The three rights of access are supported by concrete capacity-building and cooperation provisions, based on each Party's priorities and needs, including the training of authorities and civil servants, capacity-building programs, the provision of adequate equipment and resources and the promotion of education and public awareness. Furthermore, a voluntary fund to support the financing of the agreement's implementation is provided for and a Committee to Support Implementation and Compliance is established.

The Caribbean participating countries were particularly active in ensuring that the concerns and priorities of the subregion were included in the final text. One of their main successes in this regard is article 11.2, whereby Parties shall give particular consideration to least developed countries, landlocked developing countries and small island developing States from Latin America and the Caribbean. Other provisions considered fundamental by Caribbean countries were those related to the dissemination of information in cases of disasters and regional cooperation with respect to illicit activities against the environment. By means of article 6.5, each Party commits to guaranteeing that in cases of imminent threats to public health or the environment, the relevant competent authorities immediately disclose and disseminate through the most effective means all pertinent information in its possession that could help the public to take measures to prevent or limit potential damage. Parties shall also develop and implement

an early warning system using available mechanisms. For its part, article 11.5 calls on countries to promote regional cooperation and information-sharing in relation to all aspects of illicit activities against the environment, of particular importance in cases of transboundary environmental harm.

3. Subregional obligations on environmental access rights

Within the Caribbean Community (CARICOM) the 1989 Port of Spain Accord on the Management and Conservation of the Caribbean Environment, the 1991 Port of Spain Consensus of the Caribbean Regional Economic Conference and most recently the 2001 Revised Treaty of Chaguaramas all include important elements related to Principle 10 of the Rio Declaration. These three instruments, together with the CARICOM Charter of Civil Society¹³, laid solid foundations for the rights to environmental information and public engagement in environmental matters in the Caribbean region.

In the Port of Spain Accord¹⁴, the Ministers of the Caribbean Community with responsibility for environmental matters identified 14 priority issues to be addressed in the protection of the Caribbean environment including orderly land use planning, degradation of coastal and marine environment, forest and watershed management and disaster preparedness. Among the strategies to address such priorities were (i) the promotion of public education and awareness at all levels to enhance consciousness and respect for the environment; (ii) the formulation of policies and plans, including the requirement for environmental impact assessment; (iii) the collection, management and dissemination of the information critical to the development of policies, programmes and projects which must be implemented to address the identified problem areas; and (iv) the development of legislative frameworks adequate to the requirements of sound environmental management, and the required machinery for their enforcement.

In 1991, the Caribbean Regional Economic Conference, which gathered different public, social and private stakeholders, reached the Port of Spain Consensus. Such landmark agreement likewise emphasized the importance of pursuing development in collaboration in line with democratic, inclusive and participatory principles. As the document determined in the “Democratization and Social Partnership” pillar, “the democratic process enshrines the right of all citizens to participate in the formulation of policies which affect them.”¹⁵

The Revised Treaty of Chaguaramas¹⁶, adopted in 2001, also refers to environmental protection and rights. Article 65 requires that CARICOM policies be implemented in a manner that “ensures the prudent and rational management of the resources of the Member States” and shall take into account available and accessible data and environmental justice principles such as the precautionary and polluter pays principles. Article 226 further declares that nothing shall be construed as preventing the adoption or enforcement by any Member State of measures relating to the conservation of natural resources or the preservation of the environment. Article 222 also grants persons of a Party (natural or juridical) the right to appear as parties in proceedings before the Caribbean Court of Justice (CCJ).

For its part, the Organisation of Eastern Caribbean States (OECS) embedded access rights in two instruments: (i) the Saint George’s Declaration of Principles for Environmental Sustainability; and (ii) the Revised Treaty of Basseterre. The Saint George’s Declaration¹⁷ was signed by the OECS Ministers of the Environment in 2001 and sets out the broad framework structured around 21 principles to be pursued

¹³ Adopted by the CARICOM Heads of State and Government in 1997, the Charter recognizes fundamental rights and freedoms including access to information, public participation and the right to redress and remedy in articles VIII, XVII, XXIII and XXIV, among others. See: http://cms2.caricom.org/images/publications/12504/12060-charter_of_civil_society.pdf [online].

¹⁴ See http://archive.caricom.org/jsp/secretariat/legal_instruments/port_of_spain_accord.pdf [online].

¹⁵ Section III on Conclusions and Recommendations of the Port of Spain Consensus, 1991.

¹⁶ See http://cms2.caricom.org/documents/4906-revised_treaty-text.pdf [online].

¹⁷ See <http://www.oecs.org/public-resources-centre/oecs-library?task=document.viewdoc&id=273> [online].

for environmental management in the OECS region. Principles 1, 3, 4, 5 and 7 specifically relate to access rights, including stakeholder partnerships, active transparency measures such as the creation of centralized or networked national data management systems on the status of natural resources, and the meaningful and informed participation of civil society, the private sector, and local level governments and administrations in decision-making on the environment.

The Revised Treaty of Basseterre¹⁸ not only includes the environment as one of the areas of policy coordination and harmonization, but most importantly makes the Saint George's Declaration binding and, in so doing, calls for the incorporation of the "objectives, perspectives, resources, knowledge and talents of all of society in environmental management" (article 24). Furthermore, its article 5.5 clearly states that none of its provisions will preclude public participation by a Member State¹⁹.

The Convention for the Protection and Development of the Marine Environment in the Wider Caribbean Region²⁰, adopted in 1983 for the protection of the Caribbean Sea, is likewise worth noting. Although the treaty is not particularly prolific in regulating access rights (it includes some references mainly in connection with emergencies, environmental impact assessments and liability and compensation for damage resulting from pollution), its three protocols (Oil Spills²¹, Specially Protected Areas and Wildlife²² and Land Based Sources of Marine Pollution²³) go much further and do incorporate meaningful commitments in this regard.

Through the Protocol on Oil Spills, for example, Parties shall give appropriate publicity to the establishment of protected areas and endeavour to inform the public as widely as possible, of the significance and value of the protected areas and species and of the scientific knowledge and other benefits which may be gained from them (article 16). The active involvement of local communities in the planning, management and conservation of protected areas is also foreseen in articles 6 and 16. Moreover, article VII of the Protocol on Land Based Sources of Marine Pollution requires Parties to seek the participation of affected persons in Environmental Impact Assessments (EIA), and, where practicable, publish or make available relevant information obtained in this review. Furthermore, in article X, Parties commit to promoting public access to relevant information and documentation concerning pollution of the Convention area from land-based sources and activities and the opportunity for public participation in decision-making processes concerning the implementation of the Protocol.

B. National obligations on environmental access rights

1. Constitutional basis

Caribbean constitutions provide a fundamental legal basis at the national level for the protection of environmental access rights. Being the supreme law in Caribbean jurisdictions and therefore the primary source of national law, the constitutions are the necessary starting point in the review of the domestic legal frameworks. Although at present few specifically refer to environmental rights (most Caribbean countries having introduced such references in recent reforms), Caribbean constitutions have traditionally safeguarded basic civil and political rights that protect access to information, participation and justice and which are fully applicable to environmental matters.

¹⁸ See <http://www.oecs.org/lsu-resources?task=document.viewdoc&id=679> [online].

¹⁹ Article 5.5 of the Treaty of Basseterre: "Nothing in this Treaty requires a Member State to act prejudicially to the requirements of public participation and discussion which flow from good governance in a democratic society."

²⁰ See <http://www.cep.unep.org/cartagena-convention> [online].

²¹ See <http://www.cep.unep.org/cartagena-convention/oil-spills-protocol> [online].

²² See <http://www.cep.unep.org/cartagena-convention/spaw-protocol> [online].

²³ See <http://www.cep.unep.org/cartagena-convention/lbs-protocol/protocol-concerning-pollution-from-land-based-sources-and-activities> [online].

In this regard, it is common for Caribbean constitutions to ensure access to information and participation within the framework of the rights to freedom of expression, peaceful assembly and association, and to recognize the rule of law and due process as well as constitutional guarantees to uphold such rights. Examples include the Constitutions of Antigua and Barbuda²⁴, the Bahamas²⁵, Barbados²⁶, Belize²⁷, Dominica²⁸, Grenada²⁹, Saint Kitts and Nevis³⁰, Saint Lucia³¹, Saint Vincent and the Grenadines³² or Trinidad and Tobago³³. Environmental access rights could also be derived from other constitutionally recognized rights such as the right to life and health, among others³⁴.

In addition to guaranteeing such rights, some countries have made explicit reference to the environment, following a recent and increasing tendency to include the right to a clean and healthy environment in their supreme law. The Constitutions of Guyana and Jamaica are worth mentioning in this regard. Guyana's Constitution, in its article 149J, states that "everyone has the right to an environment that is not harmful to his or her health or well-being" and even foresees, in its article 25, the "*duty* to participate in activities designed to improve the environment and protect the health of the nation" (emphasis added). Similarly, the Constitution of Jamaica recognizes the right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage (Section 13(3)(l)). Other constitutional references to the environment can be found in Haiti (article 52-1 h) and Suriname (article 6) as well as in the non-independent territories of the British Virgin Islands (article 29) and the Cayman Islands (article 18).

2. Statutory basis

As a practical matter, Acts of Parliament are considered the most important source of Caribbean environmental law as they specifically address access rights generally or in connection with environmental protection and management. Information, participation and redress and remedy provisions are normally included in such laws and, as a matter of fact, these statutes have been at the center of most environmental litigation in the subregion, as can be seen from the case law included in the present document.

Three main categories of statutory laws can be distinguished for ease of review: environmental laws (whether general or sectoral), physical planning laws and freedom of information laws.

i) Environmental laws

Caribbean statutory law on environmental matters has traditionally been sectoral but it has become increasingly common for countries to enact general, comprehensive, broad-based environmental legislation which has contributed to increase cohesion and effectiveness and reduce fragmentation.

General environmental laws exist in Antigua and Barbuda, the Bahamas, Belize, Guyana, Haiti, Jamaica, Saint Kitts and Nevis, Saint Lucia, Suriname and Trinidad and Tobago (see table 2). In the

²⁴ Articles 12(2), 13, 15, 18 and 19 of the Constitution of Antigua and Barbuda.

²⁵ Articles 23(1), 24(1), 20(9), 28(1) and 104 of the Constitution of The Commonwealth of The Bahamas.

²⁶ Articles 18(8), 18(9), 20(1), 21 and 24 of the Constitution of Barbados.

²⁷ Articles 3, 12(1), 13(1) and 20 of the Constitution of Belize.

²⁸ Articles 10(1), 11(1), 16(1) and 110 of the Constitution of the Commonwealth of Dominica.

²⁹ Articles 10(1), 11(1) and 16(1) of the Constitution of Grenada.

³⁰ Articles 12(1), 13(1) and 96 Constitution of Saint Kitts and Nevis.

³¹ Articles 10(1), 11(1), 16(1) and 107 of the Constitution of Saint Lucia.

³² Articles 10(1), 11(1), 16(1) and 96 of the Constitution of Saint Vincent and the Grenadines.

³³ Articles 4(i) and (j), 5(h), 14(1), 93 and 108 of Constitution of the Republic of Trinidad and Tobago.

³⁴ See Anderson, Winston (2002), *Principles of Caribbean Environmental Law*, pages 67-74.

Bahamas³⁵, Dominica³⁶ and Saint Vincent and the Grenadines³⁷ there are also Environmental Health Services Acts, which regulate environmental matters while promoting public health.

Table 2
General environmental laws in the Caribbean

Country	Name of the law	Year of adoption (amendment)
Antigua and Barbuda	Environmental Protection and Management Act (No. 11 of 2015)	2015
Bahamas	Conservation and Protection of the Physical Landscape Act (No. 12 of 1997)	1997 (2000)
Belize	Environmental Protection Act (No. 22 of 1992)	1992 (2009)
Guyana	Environmental Protection Act (No. 11 of 1996)	1996 (2005)
Haiti	Décret portant sur la Gestion de l'Environnement	2006
Jamaica	Natural Resources Conservation Authority Act (No. 9 of 1991)	1991
Saint Kitts and Nevis	National Conservation and Environment Protection Act (No. 5 of 1987)	1987 (1996)
Saint Lucia	Land Conservation and Improvement Act (No. 10 of 1992)	1992
Suriname	Nature Conservation Act (No. 26 of 1954)	1954 (1992)
Trinidad and Tobago	Environmental Management Act (No. 3 of 2000)	2000 (2014)

Source: Economic Commission for Latin America and the Caribbean (ECLAC), based on review of national legislation.

The general environmental laws of Antigua and Barbuda, Belize, Guyana, and Trinidad and Tobago stand out in the regulation of access rights on environmental matters:

- **Antigua and Barbuda:** according to the Environmental Protection and Management Act, environmental protection shall be based on the principles of public participation in and transparency of the decision-making process, public awareness regarding the state of the environment and access to justice in environmental matters (Section 4). The Environment Department shall gather, analyze, publish and disseminate environmental data and information and there shall be an Environment Registry, which includes a register of sources of pollution (Section 7). The Act establishes detailed requirements for public comment and participation in projects and activities including public notices, a publicly-available record of the proposed action and timeframes for representations (Sections 5 and 108), as well as in plans and policies (Sections 19(5), 21, 46, 48 and 55) and laws and regulations (Section 7). Any person who is aggrieved by a violation of the Act may institute proceedings in a court of competent jurisdiction. The court may grant leave to institute proceedings to any person or group of persons who has a specific interest in the claimed violation of the Act or any other person or group of persons who can satisfy the court that the proceedings are justifiable in the public interest (Section 97).
- **Belize:** The Environmental Protection Act establishes that the Department of the Environment shall provide information and education to the public regarding the importance of protection and improvement of the environment as well as provide decision-making with the necessary information so as to achieve long-term sustainable development (Sections 4(k) and (r)). In carrying out any of his responsibilities, the Minister may (a) consult with any other Government department or agency, non-governmental organization, or any person interested in the quality of the environment or the control or abatement of environmental pollution; and (b) organize conferences of representatives of industry, labour and municipal authorities and any interested persons described above (Section 7(2)). Furthermore, when making an environmental impact assessment, a proposed developer shall consult the public and other interested bodies or organizations. The Department may make its own environmental impact assessment and synthesize

³⁵ Environmental Health Services Act (No. 4 of 1987) of the Bahamas.

³⁶ Environmental Health Services Act (No. 8 of 1997) of the Commonwealth of Dominica.

³⁷ Environmental Health Services Act (No. 14 of 1991) of Saint Vincent and the Grenadines.

the views of the public and interested bodies (Section 20). Any person who suffers or is about to suffer loss or damage as a result of conduct that is contrary to any provision of this Act or the regulations may seek an injunction from the Supreme Court (Section 40).

- **Guyana:** The Environmental Protection Act contains active and passive transparency obligations by which the Environmental Protection Agency may provide information and education to the public regarding the need for and methods of protection of the environment, improvement of the environment and the benefits of sustainable use of natural resources. It shall also provide general information to the public on the state of the environment by regular reports produced at least annually and maintain and make available to members of the public during normal working hours a register of all environmental impact assessments carried out, environmental authorizations granted and other information (Sections 4(2), 4(3) and 36). The Environmental Protection Agency shall promote public participation in the process of integrating environmental concerns in planning for development on a sustainable basis (Section 4(1)b). Moreover, the Act sets out specific requirements for public participation in activities and projects including public notices, the obligation to consult in EIAs, timeframes for representations and access to relevant information (Section 11). Any person who suffers or is about to suffer loss or damage as a result of conduct that is contrary to any provision of this Act or the regulations may seek an injunction from the High Court. (Sections 11(3) and 18(2)).
- **Trinidad and Tobago:** Pursuant to the Environmental Management Act, the Environmental Management Authority shall compile information relating to the environment and may make such information available to any person upon receipt of a written request and payment of the prescribed fee. It shall provide a written explanation of any refusal to make information available when requested by a person (Sections 17(1), (2) and (4)). In performing its functions, the Authority shall facilitate co-operation among persons and manage the environment in a manner which fosters participation and promotes consensus. The Act contains detailed requirements for public participation such as public notices, the provision of relevant information, a timeframe for submitting written comments and the maintenance of a publicly available administrative record (Sections 16(2), 28 and 29). Any application which requires the preparation of an environment impact assessment shall be submitted for public comment before any Certificate is issued by the Authority. After considering all relevant matters, including the comments or representations made during the public comment period, the Authority may issue a Certificate subject to such terms and conditions as it thinks fit, including the requirement to undertake appropriate mitigation measures (Section 35). Public participation is also provided for policies, such as the National Environmental Policy (Section 18 c) and regulations (Section 27). Any private party (including any individual or group expressing a general interest in the environment or a specific concern with respect to the claimed violation) may institute a civil action in the Environmental Commission (Section 69).

ii) Physical planning laws

Town and country planning legislation, generally also regulating Environmental Impact Assessments, likewise contains extensive references to access rights, particularly foreseeing planning registries and inviting the public to participate in consultations and make comments both in the authorization of activities and projects and in the drafting and amendment process of development plans.

Although the main objective of planning laws is the orderly development, planning and use of land, most tie such objective to environmental protection. In recent laws, such as those in The Bahamas, Saint Lucia and Trinidad and Tobago, environmental regulations occupy a central role and are embedded in the object and purpose of the Act. As a result, it is common for planning authorities to take into account

environmental considerations and concerns when exercising their functions. In some countries, such as in Trinidad and Tobago, planning and environmental functions are supervised by the same authority (currently the Ministry of Planning also oversees environmental matters). Under planning regulations, nearly all developments require planning permission. Such permission may, at times, such as in Trinidad and Tobago, be additional to the environmental permit (a developer must obtain both permission under the Town and Country Planning Act and a Certificate of Environmental Clearance and, if applicable, an EIA pursuant to the Environmental Management Act).

Caribbean planning laws normally establish planning registers, that include all planning and associated decisions and which are open to the inspection by the general public. That is the case of the laws of Antigua and Barbuda (Section 77), Barbados (Section 17(3)), Dominica (Section 84) or Grenada (Section 54), for example. Relevant information must also be proactively disclosed in the assessment of projects and activities, mainly in relation to EIA processes³⁸. Moreover, such statutes provide for planning processes that are fair by making them open, accessible, timely and efficient³⁹.

The elaboration of development plans and other planning policies and programmes also frequently include public participation provisions. In Antigua and Barbuda (Sections 9, 11, 12 and 53), the preparation of a development plan shall include proposals for obtaining representations from persons likely to be affected by or likely to wish to submit representations and views on the proposed plan during the course of its preparation and proposals for the review of the plan by sectoral agencies and private sector representatives. Adequate publicity shall be given to the draft development plan and one or more public meetings shall be held. Any person may, within eight weeks of the publication in the Gazette of the notice, make written representations on the draft development plan, which shall be considered. Further consultations may be required by the Minister. Once the plan has been approved, the substance of the plan shall be publicized in the area or areas to which it applies and copies of it shall be available for inspection at reasonable times at the offices of the Development Control Authority. Similar provisions are established in the Bahamas⁴⁰, Barbados⁴¹, Dominica⁴² and Grenada⁴³.

In the context of EIAs, public participation provisions are either regulated by law or the law authorizes their development by subsidiary legislation⁴⁴. A common prerogative in Caribbean law is to allow the authority to consult any person or body it thinks fit to discharge its functions. However, public participation is legally required in all EIAs in Belize, Dominica, Guyana and Trinidad and Tobago. In such countries, the Authority shall at least cause a public notice, invite comments and representations either in writing or orally on an application and take into account any report, representation or comment submitted or made to it. Furthermore, public consultations, meetings and hearings must also be called in some countries,

³⁸ See Section 22(1) of the Physical Planning Acts of Antigua and Barbuda and Dominica, among others. The Environmental Protection Act of Guyana even states that the EIA is a public document and that such documents must be available to the public for the duration of the project and five years thereafter (Section 11(11)).

³⁹ Planning laws in the Bahamas and Saint Kitts and Nevis.

⁴⁰ Section 17.

⁴¹ Sections 8, 9 and 27.

⁴² Sections 8(2), 10 and 11: "During the preparation of a development plan and before finally determining its content for submission to the Minister, the Authority shall take such steps as in its opinion will ensure (a) that adequate publicity is given in the area to which the plan relates to the matters which it proposes to include in the proposals; (b) that persons who may be expected to desire an opportunity of making representations to the Authority with respect to those matters are made aware that they are entitled to an opportunity of doing so; and (c) that such persons are given an adequate opportunity of making such representations. The Authority shall consider any representations made to it within the prescribed period."

⁴³ Sections 6, 15, 16 and 17.

⁴⁴ Section 14(3) of the Planning and Subdivision Act of The Bahamas, Section 14(3) states that "the Environment Minister may make Regulations providing for the procedures for public participation in the Environmental Impact Statement process". Section 25(4) e) of Grenada's Physical Planning and Development Control Act and Section 22(4)e) of Saint Lucia's Physical Planning and Development Act further add that such regulations may provide for the "public scrutiny of any report on an Environmental Impact Assessment submitted to the Authority".

such as in Belize or Trinidad and Tobago. In Jamaica and Suriname public participation during EIA is not foreseen expressly in law but is applied in accordance with guidelines⁴⁵.

Table 3
Physical planning laws in the Caribbean

Country	Name of the law	Year of adoption (amendment)
Antigua and Barbuda	Physical Planning Act (No. 6 of 2003)	2003
Bahamas	Planning and Subdivision Act (No. 4 of 2010)	2010
Barbados	Town and Country Planning Act (No. 14 of 1968)	1968
Belize	Housing and Planning Act Land Utilization Act	1947 (2000) 1981 (2000)
Dominica	Physical Planning Act (No. 5 of 2002)	2002
Grenada	Physical Planning and Development Control Act (No. 25 of 2002)	2002 (2016)
Guyana	Town and Country Planning Act (No. 24 of 1946)	1948 (1998)
Haiti	<i>Décret-loi établissant les règles spéciales relatives à l'aménagement des villes et campagnes</i>	1937 (1971)
	<i>Loi établissant des règles spéciales relatives à l'habitation et à l'aménagement des villes et des campagnes en vue de développer l'urbanisme</i>	1963
	<i>Décret sur le lotissement</i>	1977
Jamaica	Town and Country Planning Act (No. 42 of 1957)	1958
Saint Kitts and Nevis	Development Control and Planning Act (No. 14 of 2000)	2000
Saint Vincent and the Grenadines	Town and Country Planning Act (No. 45 of 1992)	1992
Saint Lucia	Physical Planning and Development Act (No. 29 of 2001)	2003
Suriname	Urban Planning Act (No. 96 of 1972)	1972
	National Planning Act (No. 89 of 1973)	1973
Trinidad and Tobago	Planning and Facilitation of Development Act (No. 10 of 2014)	2014

Source: Economic Commission for Latin America and the Caribbean (ECLAC), based on review of national legislation.

Within the framework of planning legislation, the right to appeal planning decisions is granted to those persons having an interest in the matter. Persons aggrieved by a development plan are also generally entitled to have recourse to justice to question the validity of such plan or of any provision contained therein on the grounds that it is not within the powers of the Act or that any legal requirement has not been complied with in relation to the approval, preparation or amendment of the plan.

iii) Freedom of information laws

Freedom of information laws, although general in nature, have also been key in advancing access rights in environmental matters. With the aim of giving effect to fundamental democratic principles, such as transparency, accountability and public participation, the laws grant the right to obtain access to official documents held by public authorities, including ministries, agencies and others bodies exercising public functions related to the environment.

Seven Caribbean countries currently have freedom of information legislation in force (see table 4) and several others have draft legislation⁴⁶. The main provisions of such legislation include:

- A general recognition of the right of every person to access information
- Definition of public document
- List of obligated entities

⁴⁵ Jamaica uses the NEPA Guidelines for conducting EIA (1997, revised 2007) and the NEPA Guidelines for Conducting Public Presentations (2007). In Suriname, the National Institute for Environment and Development in Suriname (NIMOS) has prepared the "Manual: The Environmental Impact Assessment Process in Suriname" (2009).

⁴⁶ Barbados, Grenada, Saint Kitts and Nevis and Saint Lucia.

- Time limits to provide information
- Regimen of exemptions
- Obligation to proactively disseminate certain information
- Appeal procedures

Taking the Jamaican Access to Information Act as an example, an official document is defined as a document held by a public authority if it is its possession, custody or control, being a public authority a Ministry, Department, Executive Agency or other agency of Government, a statutory body or authority, a Government company or any other body or organization which provides services of a public nature which are essential to the welfare of the Jamaican society. A public authority shall respond to an application as soon as practicable but not later than 30 days from the date of receipt of an application. Access to a document may be granted in different formats, such as physical inspection, provision of copies, reproduction or transcripts. A regimen of exemptions is also provided for including documents related to national security and defence, trade secrets or personal privacy. Applicants are granted the right to apply for internal review and appeal to the Access to Information Appeal Tribunal.

Table 4
Freedom of information laws in the Caribbean

Country	Name of the law	Year of adoption (amendment)
Antigua and Barbuda	Freedom of Information Act (No. 19 of 2004)	2004
Bahamas	Freedom of Information Act (No. 1 of 2017)	2017
Belize	Freedom of Information Act (No. 9 of 1994)	1994
Guyana	Access to Information Act (No. 21 of 2011)	2011
Jamaica	Access to Information Act (No. 21 of 2002)	2002
Saint Vincent and the Grenadines	Freedom of Information Act (No. 27 of 2003)	2003
Trinidad and Tobago	Freedom of Information Act (No. 26 of 1999)	1999

Source: Economic Commission for Latin America and the Caribbean (ECLAC), based on review of national legislation.

iv) Common law principles

Common law principles and concepts also shape the application of environmental access rights in the Caribbean by providing important elements that complement the aforementioned sources of environmental law.

A significant common law principle to consider is the very role of the judiciary in the judicial review process. In keeping with the separation of powers between the executive, legislative and judiciary, the courts tend to limit their action to reviewing whether a public authority has performed its functions properly, avoiding to impose its views on the merits of a decision. Therefore, the decision itself is not reviewed, but rather the process by which it was made.

The grounds for judicial review also show how interconnected can common law be with environmental cases. As outlined by Lord Diplock in *Council of the Civil Service Unions v. Minister for the Civil Service*, three are the grounds that may be alleged to consider that a public authority has exceeded its powers: illegality, irrationality, and procedural impropriety. These grounds have been fully admitted in Caribbean environmental law and as evidenced by the different cases in this book, at least one of them has been used to strike down a decision. Each ground is briefly analyzed below:

- **Illegality:** the concept of illegality covers any decisions that are not backed by law, including the administrative *ultra vires* rule. A governmental action could be overturned if the authority acted without respecting its legal powers, by omitting them or by erroneously exercising them. As a

result, a decision could be deemed unlawful should an authority fail to take into account elements which it was required to consider or take into account aspects that it should have disregarded. The failure to undertake proper public consultation or the non-provision of adequate information has been one of the main bases for illegality in Caribbean case law.

- **Irrationality:** is used to define a conduct that is “so unreasonable no reasonable body could have come to the decision” (the so-called “Wednesbury unreasonableness”⁴⁷) or “in defiance of logic and moral standards of sensible persons”⁴⁸. There is, therefore, an error of reasoning which deprives the decision of logic.
- **Procedural impropriety:** Failing to follow the correct procedure in reaching a decision is considered to fall under procedural impropriety. Such category may include any bias on the part of the decision-maker as well as breaches of natural justice.

The principles of natural justice and fairness have gained special significance in environmental cases, as regardless of the extent to which access rights are set out in statutory law, there is always a duty of authorities to act properly and fairly. Such principles create limitations to the discretionary actions of public authorities and may even impose additional obligations if the statutory procedure is insufficient to achieve justice or requires additional actions in order to prevent the aim and purpose of such legislation from being frustrated. As Lord Mustill said in the case *Reg. v Secretary of State for the Home Department, Ex parte Doofy* (1994) AC 531, the requirements of natural justice and fairness will necessarily depend on the circumstances of each case:

“Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all circumstances. [...] The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type [...] The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects [...]” [540]

The right to a fair hearing of those affected by a decision before it is taken or failure to consider representations by concerned citizens, for example, has been found to be within the principles of natural justice. As Justice Hosein outlined in *Talisman (Trinidad) Petroleum Ltd. v. e Environmental Management Authority*, such right has been applied as “a base on which to build a kind of code of fair administrative procedure,” page 20.

Another fundamental common law concept linked to natural justice is that of a “legitimate expectation.” According to Justice J. Charles in the case of *Buddie Gordon Miller & Ors v. The Minister of the Environment and Water Resources & Ors* (CV 2013-04146), a legitimate expectation is “an expectation which, although not amounting to an enforceable right, is founded on a reasonable assumption which is capable of being protected in public law. It enables a citizen to challenge a decision which deprives him of an expectation founded on a reasonable basis that his claim would be dealt with in a particular way” [23]. Whether express or implied from past practice, the terms of the representation by the decision-maker entitle the party to whom it is addressed to expect, legitimately, one of the following: (i) that a hearing or other appropriate procedures are afforded before the decision is made, or (ii) that a benefit of a substantive nature is granted or, if the person is already in receipt of the benefit, that it is continued and not substantially altered⁴⁹. The emergence of such expectation has been protected by Caribbean courts in several environmental cases, especially where there was no statutory public consultation requirement. It is embedded in fairness and generally depends on an express and unambiguous promise or regular practice.

⁴⁷ See *Associated Provincial Picture Houses Ltd. v. Wednesbury Corp.* [1948].

⁴⁸ See *Council of the Civil Service Unions v. Minister for the Civil Service*.

⁴⁹ See *Buddie Gordon Miller & Ors v. The Minister of the Environment and Water Resources & Ors*.

CHAPTER II

Core elements for ensuring environmental access rights

- A. Access to environmental information
- B. Public participation in environmental matters
- C. Access to justice in environmental matters

The establishment of the legal foundations of environmental access rights in Caribbean countries has been accompanied by an increasing and rich jurisprudence that has further guided the implementation of such rights in the sub-region. Case law and its interplay with statutory law has, thus, become fundamental to fully understand the applicable extent and scope of the rights of access to information, participation and justice. In this regard, based on the legal context, Caribbean national courts have played a crucial role in implementing Principle 10 rights more effectively in their respective jurisdictions.

The present Chapter refers to a selection of core elements for each of the access rights that have been identified from a joint reading of relevant court rulings that apply and interpret the legal framework and common law principles. Under access to environmental information, elements such as the scope of the right, the definition of environmental information, environmental registers and information to participate in environmental decision-making have been highlighted. In turn, the scope of the right, the role of public participation in Environmental Impact Assessments, participation at an early stage and reasonable timeframes, requirements for the notification of the public, consideration of their observations or specific measures for the directly affected public and specific groups are considered key in public participation. Finally, access to justice is analyzed from the perspectives of legal standing, costs, delays and alternatives to dispute resolution.

A. Access to environmental information

1. Scope of the right

Access to environmental information is premised on two main elements: the possibility that each person has to request and be provided with environmental information by the State (passive transparency) and the obligation to generate environmental information, making it available in an easy and accessible manner (active transparency).

Caribbean environmental and freedom of information laws have recognized both dimensions of the right. For example, the Environmental Management Act of Trinidad and Tobago (No. 3 of 2000) states that the Environmental Management Authority (i) may make the information relating to the environment it has compiled available to any person upon receipt of a written request and payment of the prescribed fee; and (ii) shall compile information relating to the environment⁵⁰. In the same vein, Jamaica's Access to Information Act (No. 21 of 2002) reads that (i) every person shall have a right to obtain access to an official document, other than an exempt document⁵¹; and (ii) that the public authority shall cause to be published the information specified in the First Schedule, which includes a description of the subject area of the public authority; a list of the departments and agencies of the public authority; the title and business address of the principal officer; manuals or other documents containing interpretations, rules, guidelines, practices or precedents; among others⁵².

Passive transparency is guided by the principle of maximum disclosure, whereby all environmental information in the possession of, under the control of, or in the custody of public authorities is public and presumed to be relevant. The right to freely request information without demonstrating a special interest and at no cost other than the cost of reproduction and delivery is one of the main components of access to information.

Furthermore, access shall be granted to all documents unless otherwise exempt by law. Two Jamaican cases shed light on the national exception regimes and the need to favour disclosure when

⁵⁰ Section 17 of the Environmental Management Act of Trinidad and Tobago (No. 3 of 2000).

⁵¹ Section 6 of the Access to Information Act of Jamaica (No. 21 of 2002).

⁵² *Ibid.*, Section 4.

non-disclosure is unjustified. In *Jamaica Environment Trust (JET) v The Mines and Geology Division (MDC)*, the claimant requested access to maps and documents regarding commencement and completion dates for partial mined and mined out ore bodies and certificates of completion and other documents stating the dates of reclamation, rehabilitation and restoration of the ore bodies in St. Ann and Nassau Valley. After providing the information on 79 of the 1600 ore bodies, the authority argued that the remaining maps were either not created or contained exempt material that could reveal trade secrets or information of commercial value that could be destroyed or diminished if disclosed. The Tribunal decided that such maps and documents did not contain matters exempt under the Access to Information Act. The information revealed by the maps was not wholly or entirely confidential in nature and did not have a sufficiently high degree of confidentiality so as to be considered a trade secret. Furthermore, the information was part of the mining leases that the law required to be registered, to which there was public access. The exclusive rights given to a mining lease holder also prevented any competitor to use that information to their advantage.

In a similar case, the *Jamaica Environment Trust v The National Environmental and Planning Agency*, the claimant requested information from two dolphin facilities. The veterinary reports of dolphins were not disclosed as they were considered exempt on the grounds of revealing information of commercial value, based on the objections sent by the company. The Tribunal concluded that the information should be provided to the claimant as it was not exempt. The authority had initially considered the information non-exempt and decided to deny access only after consultations with the company. The Tribunal noted that a public authority should never abdicate its responsibility to make a decision which it is required under law.

The aforementioned cases also highlighted crucial obligations with respect to passive transparency. First and foremost, the obligation of the public authority to acknowledge receipt and respond to a request as soon as possible and within the specified timeframe (30 days in the case of Jamaican law). Moreover, in its decision the authority has to duly justify any refusal or deferral of access and such action be subject to judicial or administrative review. The burden of proof is on the public authority to prove that the information is exempt.

While passive transparency has been the traditional form to access public information, there is an increased tendency by the State to proactively generate, compile and disseminate environmental information, through registers and environmental information systems, among other means (see section 3 of the present chapter).

2. Definition of environmental information

The definition of what is considered by environmental information has proven to be fundamental in determining the scope and extent to which the public is entitled to access information related to environmental matters. Environmental information covers, in essence, a broad range of topics and aspects, such as the state of the environment and its elements and information on possible adverse impacts associated with factors affecting or likely to affect the environment and human health, and issues related to environmental management.

In *Bass v. Director of Physical Planning*, the Eastern Caribbean Supreme Court⁵³ (also upheld by its Court of Appeal in the *Director of Physical Planning v. Bass*), it was precisely the interpretation of the terms “registers” and “documents” that gave rise to a dispute between a national of Saint Kitts and

⁵³ The Eastern Caribbean Supreme Court (ECSC) is a superior court of record for the Organisation of Eastern Caribbean States (OECS) including six independent states: Antigua and Barbuda, Dominica, Grenada, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines and three British Overseas Territories (Anguilla, British Virgin Islands, and Montserrat).

Nevis and the Department of Physical Planning of Nevis. Having been denied full access to inspect the Department's files and take copies in relation to an application for the development of a resort and to extract copies of all documents and plans related thereto, the appellant applied for judicial review against the authority's decision. The respondent, in turn, alleged that the plain meaning of the section at hand was that the public should have access only to the registers but not to the documents filed by an applicant in support of the application. Neither did the section give the public the right to inspect or take copies of the supporting documents, even though in practice the Director allowed persons to inspect those documents but not to take copies.

The court not only determined that the register includes the information actually recorded in the register itself and the supporting documents which must be listed in the index and form part of the register, and that the public had access to the whole register, but also that the latter had the right to take copies of all documents that comprise the register.

Without mentioning it expressly, the Eastern Caribbean Supreme Court adopted the most favourable interpretation rule, by which the right to access information is interpreted in the broadest terms possible to guarantee the right. The Court adopted a purposive approach, which aimed to give effect to the true purpose of the legislation. A rigid and literal interpretation would defeat the purposes of the Act and import absurdity into its objectives. Since the objects of the ordinance are to ensure that appropriate and sustainable use is made of all publicly owned and privately owned land in Nevis in the public interest and provide for physical planning and development control processes that are fair, open, accessible, timely and efficient, public participation was inherent to the Act. The Court claimed to be "persuaded that the meaning and intention of the Legislature was to allow public access to the Register containing all the Physical plans and documentation on which an application for permission to develop land was made." [61]

3. Environmental registers

The current trend in access to information in the Caribbean is to move from a reactionary approach to a proactive course of action, where public authorities make their records publicly available without specific requests from the public. By proactively disclosing information, the authorities also anticipate any queries that may arise by the public, and therefore, may diminish the number of requests.

Environmental and planning legislation in Caribbean countries requires authorities to establish registers containing environmental information and planning information having an environmental impact. Such registers are open to the inspection of the public. In Guyana, Section 36 of the Environment Protection and Management Act determines that the register must contain applications for environmental permits and permits, enforcement notices, records of incidents or occurrences that cause or threaten environmental harm and prosecutions for environmental offences. Jamaica's Natural Resources Conservation (Permits and Licences) Regulations 1996 require the Natural Resources Conservation Authority to keep a public register of all permits and licences granted which should be available to the public for inspection free of charge. In Grenada, the authority must maintain a register with any application for permission to develop land and any person is entitled to access the information recorded free of charge and to take copies of the information on payment of the prescribed fee (Section 54 of Grenada's Physical Planning and Development Act). Similar registers are provided for in Antigua and Barbuda⁵⁴, Barbados⁵⁵, Dominica⁵⁶ and Saint Kitts and Nevis⁵⁷.

⁵⁴ Section 77 of the Physical Planning Act of Antigua and Barbuda (No. 6 of 2003).

⁵⁵ Section 17(3) of the Town Planning Act of Barbados (No. 14 of 1968).

⁵⁶ Sections 14 and 84 of the Physical Planning Act of the Commonwealth of Dominica (No. 5 of 2002).

⁵⁷ Section 47 of the Nevis Physical Planning and Development Ordinance.

In *Bass v. Director of Physical Planning*, the court established that the public should have access to all-encompassing information on a development and that the extent of public access to said information should not be left the discretion of the authority:

“The register must be in a form that allows the public to have access to sufficient information to allow them to make a proper assessment of the development that is contemplated. How else would the public be able to determine what impact, if any, the development will have on neighbouring properties, the environment, and on “... the preservation of the natural and cultural heritage” of the island of Nevis? To achieve this objective, the information in the register cannot be limited to what the Director of Physical Planning sees fit to note in the register.” [16]

Similarly, in *St Hill v Chief Town Planner and Attorney General*, the High Court of Barbados recalled that all applications for planning permissions must be recorded in a public register within two months of their submission, emphasizing that such Register is a public one.

4. Information to participate in environmental decision-making processes

Access to information is the cornerstone of public participation in environmental decision-making. Without relevant, reliable, adequate and timely information, the public is unable to participate meaningfully and make intelligible comments, thus frustrating the ultimate aim of public participation. By ensuring that such information reaches all stakeholders involved in the process, public authorities facilitate the reaching of agreement as the public will be able to better understand the proposed project or activity and its impacts or potential impacts and can contribute to find solutions.

As expressed in *Trinidad and Tobago Automotive Dealers Association v Minister of Trade, Industry and Investment*, citing *Eon Hewitt & Ors v The Minister of Works and Transport and the Transport Commissioner of Trinidad and Tobago*,

“Proper consultation requires the ‘candid disclosure of the reasons for what is proposed’ and that the consulted parties are aware of the criteria to be adopted and any factors considered to be decisive or of substantial importance. Where the decision-maker has access to important documents which are material to its determination whose contents the public would have a legitimate interest in knowing, these documents should be disclosed as part of the consultation process” [16]

The information provided should be sufficient and adequate enough to allow the public to participate significantly and on equal terms in the decision-making process. In this sense, the *Belize Tourism Industry Association v National Environmental Appraisal Committee, Department of Environment and Belize Island Holdings Ltd.* clearly came to the conclusion that developing the EIA at the earliest stage of the process helped define its scope and, most importantly, determined the “minimum body of information that environmental authorities and stakeholders need to consider and assess, in order to arrive to a rational, well-informed decision of whether or not a proposed project is acceptable.” [35]

Several cases specifically deal with the lack of the public’s access to relevant information to participate in environmental matters⁵⁸. The Jamaican case *Northern Jamaica Conservation Association*

⁵⁸ In *Virgin Islands Environmental Council v. Attorney General and Quorum Island BVI Limited*, dealing with a claim of a group of concerned fishermen and residents opposed to the construction of a marina and golf course, the court found that the decision-maker had ignored the preponderance of scientific evidence and had not put it into the public domain.

and Others v The Natural Resources Conservation Authority and the National Environment and Planning Agency found that the consultation process was flawed as an important part of the EIA was not placed in the public domain. On that occasion, two addenda and a marine ecology report were not included in the EIA at the time when the public meeting was held. Justice Sykes stated that the consultation process was flawed as the public had not been told about that omission. “The public were led to believe that the Environmental Impact Assessment was all that there was when this was not the case [...] The public was therefore deprived of participating in the consultation process that was based on full and complete information [...]” [121]

Similarly, in another Jamaican judgment⁵⁹, the Supreme Court ruled with respect to a series of constructions and dredging projects along the Palisadoes shoreline that “the defendants fell woefully short by breaching the legal standard of consultation and the legitimate expectation that all the relevant information would be disclosed to the public before approval was given.” [93] Due to major storms that caused damages to the roadway and surroundings, a new plan was drafted after the initial EIA was presented changing the scope of the work to be completed. After such changes, an EIA was not required but the Court emphasized that the new terms and conditions under which the project would be carried out should have also been disclosed.

The non-disclosure of key full-fledged information to the public also invalidated the permit granted for the establishment of an aluminum complex in Trinidad and Tobago. In *People United Respecting The Environment (PURE) et al v Environmental Management Authority*, the fact that a Report on the Cumulative Impact Assessment was “shrouded in secrecy” and was not placed in the Administrative Record nor on the National Register amounted to a procedural irregularity that rendered the decision irrational. “It seems that it is no answer to say that the Authority had not time to place it in the public domain. [...] It seems that in respect of a factor as important as cumulative impact which could have far reaching effects on human health and safety the Authority could have on one last occasion exercised the meticulous care of which it had taken throughout the preceding two years.” [120]

The obligation to provide information on activities and projects is even more acute with respect to the directly affected communities. Such information should be sufficient and adequate and be provided proactively in appropriate terms that allow to satisfy such purpose considering the characteristics of the population. The *Belize Institute for Environmental Law v Chief Environmental Officer et al* (BZ 2008 SC 13) provides valuable insights in this regard. Having an EIA been granted for the Chalillo dam project along the Macal River in Western Belize contingent on a satisfactory Environmental Compliance Plan (ECP), the claimant alleged failure to implement and make publicly available a satisfactory Emergency Preparedness Plan (EPP) in the case of a dam break as mandated by the ECP and lack of information and participation relative to such plan. The judge coincided with this claim, and ordered that the EPP be readily updated, accessible and available, particularly to the communities in its vicinity likely to be impacted first by any possible emergency and made available in town halls and libraries, not being sufficient its posting on the Internet⁶⁰. Furthermore, there had been no consistent and reliable information on the level of mercury in fish made available to the local population as required the ECP, which could only be solved by a thorough public awareness and education programme that could include radio and local cable broadcasts, town hall meetings, meetings with officials and press releases.

⁵⁹ *Jamaica Environment Trust v Natural Resources Conservation Authority and National Environment and Planning Agency* (JM 2011 SC 121).

⁶⁰ The judge argued that “it is at present a reality of Belize and particularly in the areas that might be affected by a dam break, that not everyone is a traveler on the information super-highway that the Internet is.” [27].

B. Public participation in environmental matters

1. Scope of the right

Participation of individuals and groups in environmental decision-making and application has become essential to good administration and governance. Public engagement provides a basis for strengthening democracies, contributes to better policy making and ensures that government actions are aligned with the concerns, needs and priorities of their societies. The public is also central in finding solutions and facilitating enforcement of environmental law. By involving the public, not only do public policies gain legitimacy, but also further effectiveness, ownership and consensus.

Participatory rights in environmental matters have been progressively introduced in Caribbean law. The Guyana constitution recognized the right of all citizens to participate “in activities intended to improve the environment and protect the health of the nation” (article 25). Most framework legislation contains provisions for public awareness and participation on environmental issues and planning laws include extensive requirements for public involvement in the design, development and use of land. The importance of engaging all stakeholders in the crafting of a decision having an impact on the environment was highlighted by the Lordships of the Privy Council in *Fishermen and Friends of the Sea v. The Environment Management Authority & Anor* where it was argued that “public consultation and involvement in decisions on environmental issues are matters of high importance in a democracy.”

Some of the advantages of public participation and consultation in environmental matters were further outlined in the case *Talisman (Trinidad) Petroleum Limited v Environmental Management Authority*. According to the ruling, public participation (i) improves the understanding of issues among all parties; (ii) finds common ground and determines whether agreement can be reached on some issues; and (iii) highlights tradeoffs that must be addressed in reaching decisions. It is not a mere formality, but a process that allows the public to have a reasonable and sufficient opportunity to review, consult and comment on a specific decision.

The risks of lack of sufficient and meaningful public participation were evidenced by *Mitchell v Georges*, where the court ruled on an alleged mismanagement and wrongdoing by the then Prime Minister and Minister of Finance in the approval and financing of the construction of a marina and shipyard at Ottery Hall in Saint Vincent and the Grenadines. Some of the allegations mentioned related to the “lack of transparency and shroud secrecy which generally characterized the [project] especially in its early stages” and the “palpable absence of proper checks and balances to protect the interests of the Government and the people of Saint Vincent and the Grenadines”. The Barbados High Court came to a similar conclusion when analyzing the conditions and procedures required dealing with a planning permission request, saying that “good administration requires transparency, even where resources are limited.” [62]

Public participation in environmental matters is usually divided into participation in activities and projects, including EIA; policies, plans, programmes and strategies; and laws and regulations. Caribbean courts have been confronted with greater frequency to cases on the first two categories, but in their judicial review, have attempted to identify key defining elements and delimit the scope of public participation. In fact, it is public participation that has sparked most environmental litigation in the sub-region.

The definition of consultation has, for example, attracted the attention of Caribbean courts on numerous occasions. In *Northern Jamaica Conservation Association and JET v NRCA and NEPA*, Lord Woolf was cited to explain that consultation is not litigation⁶¹. Consultation does not require the disclosure of every

⁶¹ See also *Quorum Island (BVI) Limited and Attorney General v Virgin Islands Environmental Council* (VG 2008 CA 6).

submission or (absent a statutory mandate) all the advice received. The duty entails letting “those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response”. Lord Woolf’s train of thought accepted the proposition that “adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken.” [39]

It is likewise important to distinguish consultation from information meetings. Such differentiation was made in *All Tobago Fisherfolk Association v Tobago House of Assembly*, where the Court observed that the meetings called by the developer were not true meetings for consultation of the fishermen but only informational and unidirectional gatherings to disseminate information. It concluded that the developer (an oil company undertaking seismic studies off the coast of Tobago) had no intention to engage in meaningful dialogue with the fishermen and, as a result of the lack of public involvement, acted based on erroneous information as to whether there was fishing activity in the survey area, the number of registered fishermen and vessels operating in the area and had decided that no compensation was payable on the basis that there was no concentrated fishing activity in the survey area. [46]

Ulric ‘Buggy’ Haynes Coaching School et al. V Minister of Planning and Sustainable Development defines consultation as not only being about objection but also about representations which may consist of questions, suggestions and proposals all with a view to assisting in arriving at the best possible plan which would benefit the various interests in the community and at the same time give effect to the government’s intention. It is about a participative balanced approach. [83]

In the *Trinidad and Tobago Automotive Dealers Association* case, the characteristics of proper consultation with the interested parties was outlined as follows as adopted by other courts:

“There is no general principle to be extracted from the case law as to what kind or amount of consultation is required before delegated legislation, of which consultation is a precondition, can validly be made. But in any context the essence of consultation is the communication of a genuine invitation to give advice and a genuine consideration of that advice. In my view it must go without saying that to achieve consultation sufficient information must be supplied by the consulting to the consulted party to enable it to tender helpful advice. Sufficient time must be given by the consulting to the consulted party to enable it to do that, and sufficient time must be available for such advice to be considered by the consulting party. Sufficient, in that context, does not mean ample, but at least enough to enable the relevant purpose to be fulfilled. [...]” [19]

Public participation in plans and policies is also deemed essential for environmental governance. In *Ulric Buggy*, the High Court of Trinidad and Tobago determined that the Ministry of Planning had failed to take steps to update the development plan at least every five years, and in so ruling, examined the importance of inclusive planning and policy-making. The process “allows for transparency in the planning and development of land but more so it is a process which facilitates objections and representations from the public either through the local authority or otherwise by providing national participation in development. The opportunity given to the public [...] is an important democratic participative tool [...] In this way, the system provides for the widest form of democratic participation in the national development process.” [47]

There is no gainsaying that the duty to consult should be undertaken in compliance with the applicable legislation⁶². Non-compliance with regulations gave rise to several cases of judicial review in Caribbean countries, mainly related with the consultation procedures and timeframes. While examining the licenses and permits granted for the construction and operation of a cruise passenger destination which included a captive marine mammal facility, the Supreme Court of The Bahamas found that neither the Premises License nor the Site Plan Approval were granted or could have been granted due to several breaches in the Planning and Subdivisions Act, among others. The Town and Planning Committee gave preliminary support of an application for Site Approval without a public hearing or any environmental impact statement as was required by Sections 37(1) and 42 of the Act. The judge concluded that “there appears no evidence that a public discourse was encouraged, it seems rather such a discourse was avoided.” (*The Queen v Gray et al*) [48]

The non-fulfillment of the Chief Town Planner of Barbados’ duty to consult with a number of parties and within a specific timeframe before granting planning permission in accordance with applicable legislation was the object of judicial review in the case *St Hill v Chief Town Planner and Attorney General*. The High Court of Barbados ruled that the Chief Town Planner had no fewer than 14 days and no more than 21 days to consult with other statutory agencies, bodies or persons on applications for planning permission. The duty to consult did not cease when he or she ceases to be the decision maker. “Such consultations would inform the Chief Town Planner’s recommendation whether to approve or refuse the application in the same way that they would if he was the decision maker.” [71]

2. Obligation to undertake public participation in the absence of statutory provisions

When public participation is not required by statute in environmental matters, Caribbean courts have generally analyzed whether there was a legitimate expectation of consultation. Such legitimate expectation may arise out of official statements recognizing the need to consider the public’s concerns and views. As indicated in *Maharaj and Concerned Residents of Conupia v Minister of Planning and RPN Enterprises Limited*, the concept of legitimate expectation “enables a citizen to challenge a decision which deprives him of an expectation founded on a reasonable basis that his claim would be dealt with in a particular way” [*Behuli v Secretary of State for the Home Department* [1998] Imm AR 407, at 415 per Beldam LJ]. Although the initial burden lies on the applicant, the onus shifts to the authority once it has been proven that there was a clear and unambiguous promise in which the applicant relied to his or her detriment⁶³. In such cases, the authority is required to prove that there is an overriding public interest that justifies the frustration of the legitimate expectation.

In *Save Guana Cay Reef Association Ltd and others v The Queen and others*, the Privy Council noted that Bahamian courts were unanimous in concluding that there was such an expectation of consultation by the residents of the Cay, but that it had been adequately satisfied, mainly by two public meetings. Although in that case, the Council admitted there were some imperfections, these did not nullify the public consultation process and dismissed the appeal. The consultation process could have been improved, as the EIA could have been published earlier and a greater number of meetings held, but in

⁶² *PURE et al v Environmental Management Authority*, for instance, differentiated four “public exposure waves” in the environmental legislation of Trinidad and Tobago: (i) when the Authority publishes a notice of the proposed action in the Gazette and in one daily newspaper of general circulation; (ii) the establishment and maintenance of the Administrative Record by the Authority, which is required to be made available to the public at more than one location; (iii) the requirement of the EMA to receive written comments for at least thirty days; and (iv) the power of the EMA to hold a public hearing to receive verbal comments.

⁶³ *Francis Paponette and Others v The Attorney General of Trinidad and Tobago Privy Council Appeal No. 9 of 2010* at paragraphs 37 and 38, in *Maharaj and Concerned Residents of Conupia v Minister of Planning and RPN Enterprises Limited*.

their view “the public seems to have been given a reasonably full picture of what was proposed, with copies of documents being on offer, and the main author of the EIA being present at the meeting.” [43]

The same reasoning lay behind the *Miller and Confederation of Hunters Association for Conservation Trinidad and Tobago* and the *Gegg v Marin, Minister of Natural Resources and the Environment* judgments. In the former, the Court determined that there was a legitimate expectation of the claimants that they be consulted before the imposition of a hunting moratorium aimed at protecting the wildlife resources of Trinidad and Tobago. Being the applicants a group that would be adversely affected by the decision, they had a legitimate expectation that their right to hunt or the practice of hunting would not be unjustifiably interfered with without proper and/or adequate consultation. In *Gegg v Marin*, the revocation of permits for the construction of a marina without notification of the substance of any objections and granting the opportunity to be heard in relation thereto frustrated the claimant’s legitimate expectations. As a result, there was a breach of the claimant’s legitimate expectation that the permits would only be cancelled in accordance with their terms.

However, as it was stated in *Concerned Residents of Conupia v Environmental Management Authority and RPN Enterprises Limited*, a legitimate expectation cannot be founded on a statutory right, “arising therefore where enforceable rights have ended”. In this sense, the High Court of Trinidad and Tobago determined that the claimants could not conceive a legitimate expectation on the basis of the clear statutory right which they enjoy by virtue of Section 31 of the Environmental Management Act. This notwithstanding, the Court was of the opinion that the decision of the authority to not require a new Certificate of Environmental Clearance and to enter instead a Consent Agreement with the interested party was in conflict with the policy of public participation which is reflected in the Act and enshrined in the National Environmental Policy.

The Trinidadian and Tobagonian case *Ulric ‘Buggy’ Haynes Coaching School et al. V Minister of Planning and Sustainable Development* is especially relevant when analyzing the lack of statutory provisions requiring public participation, not so much due to the principle of legitimate expectation but rather to the principles of fairness and natural justice. In the granting of a planning permission to build a sporting complex in the Orange Grove Savannah, the High Court of Trinidad and Tobago found that the claimants as users and persons adversely affected by the decision were entitled to be consulted, particularly when the Minister had failed to update the development plan of the area in the last thirty years and in so doing, deprived the public of the opportunity to make objections as foreseen by the statute. In other words, the duty of the Minister to act fairly in the case at hand encompassed the opportunity of the claimants to engage in a genuine consultation. Citing the words of Lord Mustill in *Red v Secretary of State for the Home Department, Ex parte Doody* (1994) 1 AC 531:

“[...] Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.”

The rules of natural justice, however, do not necessarily require holding formal, oral hearings in public. In determining if the Environmental Management Authority of Trinidad and Tobago erred in law in wrongfully exercising its discretion in not holding a public hearing pursuant to Section 28(3) of the Environmental Management Act⁶⁴, the Justice determined that the EMA has a broad discretion in determining and when to hold public hearings and that there is no express provision requiring follow up

⁶⁴ *Fishermen and Friends of The Sea v The Environmental Management Authority Respondent et al.*

public hearings before granting a Certificate of Environmental Clearance as claimed by the plaintiffs⁶⁵. “It is sufficient if those affected, or likely to be affected, are put into a position that allows their views and opinions to be heard, to be ventilated fully, and that those views and opinions are considered properly in the decision-making process. There is no requirement for ongoing public debate,” underlined the ruling. The same argument was used in *Sooknanan and Fishermen and Friends of the Sea v Environmental Management Authority and Minister of Energy* (HC 813/2014) by the court in determining that there was consultation of affected persons (the fishing community) and they were given an opportunity to have their concerns addressed in three consultative sessions although not mandated by law.

At times, the Courts have found that the obligation to consult is derived from other general obligations to which the authority is bound. In *Talisman (Trinidad) Petroleum Ltd. vs. The Environmental Management Authority*, when examining the appellant’s claim that it was not given an opportunity to be heard in order to show how its scientific and technical methodology could be carried out without unacceptable environmental harm, the Environmental Commission of Trinidad and Tobago determined that an oral hearing by the Respondent was required not specifically but generally “in the discharge of the authority’s obligation to facilitate cooperation among persons and manage the environment in a manner which fosters participation and promotes consensus”. A decision-making body should, thus, not see relevant material without giving those affected a chance to comment on it and, if they wish, to controvert it⁶⁶.

Even more enlightening in this respect is the case *Northern Jamaica Conservation Authority (NJCA) et al. v. Natural Resources Conservation Authority and National Environmental Planning Agency*. Even though there was no statutory duty to consult with members of the public or any specific group on the granting of an environmental permit for the construction of a hotel at Pear Tree Bottom, the Natural Resources Conservation Authority had published guidelines promising consultations and indicating how those consultations ought to be conducted. The court held that members of the public had a legitimate expectation that consultations would be conducted in accordance with such guidelines. Furthermore, the non-disclosure of a marine ecology report prevented the public from making fully informed and intelligible comments and amounted to a breach of the said guidelines and of the legitimate expectation of the applicants. The breach of such expectation to be consulted was even more flagrant as it had been set out in writing in the agency’s guidelines.

All in all, as was outlined in *Fishermen and Friends of the Sea v the Environmental Management Authority*, and replicated in *PURE et al v Environmental Management Authority*, regardless of the differences in legal regimes, the courts are “bound to regard an inclusive democratic procedure, conferring on the public an opportunity to express its opinion on environmental issues as a ‘directly enforceable right’.”

3. Proper consultation

Regardless of whether public comment and consultation is required by law or emerges from a legitimate expectation or practice, Caribbean courts have been unanimous in demanding that if carried out, such consultation must be proper and adequate to fulfill its purpose. As the Supreme Court of Jamaica put it in *Northern Jamaica Conservation Association and JET v NRCA and NEPA*:

⁶⁵ In the case at hand, the consultation process had been accomplished in three phases (a public hearing by the Project developer; the invitation for comments on the EIA from the public; and a public meeting called by the EMA itself). However, the claimants desired a further opportunity to make representations.

⁶⁶ Similarly, in *National Trust for the Cayman Islands et al. v. the Planning Appeals Tribunal et al* the decision was considered void on the grounds of procedural fairness since the appellants were not invited to meetings and their objections not considered, frustrating their legitimate expectation.

“It is now safe to say that consultation of citizens by public bodies and authorities is now a well-established feature of modern governance. Sometimes a statute may impose a duty to consult. At other times the decision maker decides to consult where there is no statutory duty to consult. The law now requires that any consultation embarked upon must meet minimum standards. The standard is the same whether the consultation arises under statute or voluntarily undertaken by the decision maker.” [38]

An identical conclusion was reached in *Save Guana Cay Reef Association Ltd and others v The Queen and others* [33], *Trinidad and Tobago Automotive Dealers Association v Minister of Trade, Industry and Investment* [14] and *Miller and Confederation of Hunters Association for Conservation Trinidad and Tobago v Singh, The Minister of the Environment and Water Resources and Seepersad, The Chief Game Warden* [20]. In *Miller and Confederation of Hunters Association for Conservation Trinidad and Tobago*, the courts found that the consultation had been inadequate as it had been confined to a single meeting or discussion, regardless of the claimant’s requests for further audiences, without fully addressing all issues at hand. The applicants were therefore not given an adequate opportunity to express their views and objections on the matter. [21] [26]

Most rulings refer to the observations of Lord Woolf MR in *R v North and East Devon Health Authority Ex p Coughlan* [2001] QB 213, 258:

“It is common ground that, whether or not consultation of interested parties and the public is a legal requirement, if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this response; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken.”

These boundaries of proper consultation have become known as the “Gunning” or “Sedley” criteria⁶⁷.

4. The role of public participation in Environmental Impact Assessment

Environmental Impact Assessments constitute a fundamental instrument for sound environmental policy-making. Pursuant to Principle 17 of the Rio Declaration on Environment and Development, an EIA must “be undertaken for proposed activities that are likely to have a significant adverse effect on the environment and are subject to a decision of a competent national authority.” An EIA constitutes an opportunity to determine, assess and take into account environmental considerations early in the decision-making process in order to eliminate or mitigate environmental impacts.

Another primary purpose of the EIA is to enhance public participation, resulting in more open, informed and transparent decision-making processes. The relevance of EIA in environmental management has led Caribbean courts to discuss extensively the ultimate aim of EIA and its interconnections with public participation. In *R. et al v Ex parte Belize Alliance of Conservation Non-Governmental Organizations (BACONGO)*, the judge stated that “environmental impact assessment is intended to enable decision makers to make an informed choice between environmental and other objectives and for the public to be consulted” [81]. The role of the courts is not to make that critical informed choice but to ensure that the applicable rules are complied with, including consulting the public accordingly. *PURE et al v Environmental Management Authority and Jamaica Environment Trust v Natural Resources Conservation Authority and*

⁶⁷ *R v Brent London Borough Council, ex p Gunning* (1985) 84 LGR 168. These principles were submitted in legal argument by Mr. Stephen Sedley QC. Described as “prescription for fairness” in *R (Royal Brompton and Harefield NHS Foundation Trust) v Joint Committee of Primary Care Trusts* (2012) 126 BMLR 134 and specifically endorsed by Lord Wilson in Supreme Court in *R (Moseley) v Haringey London Borough Council* [2014] 1 WLR 3947.

National Environmental and Planning Agency, among others, further considered that the EIA's role was to alert both decision-makers and members of the public about the effect of the activity on the environment and the consequences to the community inherent in the carrying out or not of the activity in question⁶⁸.

Delapenha Funeral Home Limited v The Minister of Local Government and Environment, which dealt with the objections raised by residents and environmental groups against the purchase of property to build burial facilities, summarized the EIA process and the implications of public participation as follows:

"The ideal EIA would involve a totally bias free collation of information produced in a form which would be coherent, sound and complete. It should then allow the local planning authority and members of the public to scrutinize the proposal, assess the weight of predicted effects and suggest modifications or mitigation (or refusal) where appropriate. [...] The EIA should begin as early as possible when projects are being planned. Ideally, it will allow for all stakeholders, including the applicant for the permit, the statutory consultees, members of the public, and independent third parties, such as local conservation and environmentalist groups to have some input and dialogue. [...] conducting the EIA from the outset would foster greater public confidence in the regulatory and planning systems and may be the prudent course to take in the long run." [139]

The court concluded that, had the authority required or been able to require an EIA in the first place when the company had applied for the permit, the concerns of the public could have been dissipated or at least been diminished.

Public participation in EIA refers to a complete EIA and not only to partial or incomplete parts of it. The Belize Supreme Court rightfully concluded that the lack of public participation in any supplemental information and/or addenda would "defeat the purpose of the public consultation process, if it is to be a meaningful exercise, and if it is to function meaningfully as part of the decision-making process." Therefore, the public should have access to all available information, because if omitted, it would be deprived of the opportunity to comment on the very information which the process intended to encourage them to comment on and to engage their participation. "As a matter of principle it is clear that reference to an EIA for public consultation must be considered from the start, without short-cuts, as reference to a completed EIA with all information and material available to the public for consultation."⁶⁹

Members of the public should also be granted the opportunity to participate in deciding when an EIA is not required or if changes are made to the activity or project that result in the abandonment of an EIA. *Jamaica Environment Trust v Natural Resources Conservation Authority and National Environmental and Planning Agency*, clearly outlined that "if the proposed activity is modified, then even if a further EIA is not required, it should be evident that the public consultation should be extended in order to present the modified design and allow for concerns to be addressed and discussed before the permits or licenses are granted in relation to the modified design." [31-32]

However, Caribbean jurisprudence is not completely unanimous as to the ultimate objective of an Environmental Impact Assessment and how this relates to public engagement. Most case law reviewed in the present document does recognize the fundamental nature of public participation in the assessment of activities and projects. One exception to this train of thought can be found in the *Save Guana Cay Reef* case in The Bahamas, where the Privy Council resolved that the primary purpose of the EIA is to "receive expert scrutiny by the [BEST] Commission itself" and not to inform public consultation. In

⁶⁸ See also *Belize Tourism Industry Association v National Environmental Appraisal Committee, Department of Environment and Belize Island Holdings Ltd.*: [34] "It is noteworthy that an EIA, looking at both the adverse and beneficial environmental consequences of a project design on human health and natural and cultural environment, may be considered an indispensable planning tool which would enable environmental authorities and stakeholders to determine whether a proposed project is acceptable or not from an environmental standpoint."

⁶⁹ *Belize Tourism Industry Association v National Environmental Appraisal Committee, Department of Environment and Belize Island Holdings Ltd.*: [101] and [105].

the view of the Court, it is the BEST Commission that is expected to “act as a watchdog in the public interest”, not requiring the law of the Bahamas at present “the inclusive and democratic procedure [...] in which the public, however misguided or wrong-headed its views may be, is given an opportunity to express its opinion on the environmental issues.” [31]

Such an understanding led their Lordships to conclude that the failure to publish the EIA earlier did not invalidate the public consultation process, but such failure would have been more serious had the EIA been addressed primarily to the general public. This reasoning was likely conclusive in *Bimini Blue Coalition (Appellant) v The Prime Minister of The Bahamas and others* where the same Privy Council determined that a permit granted overnight to the developers in a highly controversial project to build a cruise ship terminal and a man-made island offshore, using material dredged from the sea, in North Bimini was one on which they could rely on, even if there was no consultation before its issuance. The Council limited itself to declaring that such an allegation “might be a proper issue for the judicial review proceedings, but unless and until the court held that the permit had been issued unlawfully, it remained prima facie valid and the developers were entitled to rely on it.” [22]

5. Participation at an early stage and reasonable timeframes

Another key aspect of public participation is the moment at which it takes place. States should ensure opportunities for early and effective participation in environmental decision-making and provide adequate timeframes for the public to express their views. Participation should take place when all options are open and when the public’s comments can be thoroughly considered and can influence the decision⁷⁰. In addition, participation should be present during all phases of the decision-making process such as conception, project design and implementation to fully materialize the early engagement of the public.

The Supreme Court of Judicature of Jamaica shed light on the adequate and timely participation of the public. Citing the United Kingdom decision *R v North and East Devon Health Authority Ex p Coughlan* [2001], it pointed out that a “consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose.”⁷¹

To the same conclusion arrived the High Court of Trinidad and Tobago in *Trinidad and Tobago Automotive Dealers Association v Minister of Trade, Industry and Investment* by stating that the consultation shall be conducted at a time when proposals are at a sufficiently formative stage with adequate information and time so as to allow a proper and informed response and lead to a conscientious and open minded consideration of relevant matters. [15]

In *People United Respecting The Environment (PURE) et al v Environmental Management Authority*, the Terms of Reference of an aluminum complex in Trinidad and Tobago required the developer to have public meetings before drafting the EIA, at the beginning of the process. However, the meetings were not held early, only after the draft TOR was submitted. In the judge’s view, the compound effect of the developer’s failure to hold the meeting at the start of the EIA process and the proximity of the two meetings would have operated to escape and therefore frustrate the provisions of the TOR, which required the first meeting at an early stage to “sensitize stakeholders to the project and gather stakeholders concerns, ideas and perceptions” [63]. This flaw diminished the quality of the public consultation.

⁷⁰ In *Ulric ‘Buggy’ Haynes Coaching School et al. v Minister of Planning and Sustainable Development*, the High Court noted that the decision to approve the building of a sports complex in the Orange Grove Savannah in Trinidad and Tobago was already made before public meetings were held, thereby evidencing that the product of consultation was not conscientiously taken into account by authorities and flagrantly disregarding the right to be heard of those affected. [9] [101].

⁷¹ *Northern Jamaica Conservation Association and JET v NRCA and NEPA*: [38].

Several cases have also outlined the need for adequate timeframes to allow the public to participate meaningfully. In *Belize Tourism Industry Association v National Environmental Appraisal Committee, Department of Environment and Belize Island Holdings Ltd*, the publication notice of an Addendum to the EIA failed to provide adequate time for the public to prepare its comments. The deadline to submit comments was 25 February and the notice was published on 23 February, providing only one clear day for the public to submit their comments. *Ulric 'Buggy' Haynes Coaching School et al. v Minister of Planning and Sustainable Development* likewise emphasized that sufficient time must be given by the consulting party to the consulted party to enable it to tender helpful advice and sufficient time must be available for such advice to be considered by the consulting party.

6. Requirements for the notification of the public

In order for public participation to be genuine and meaningful, the public must be notified of all relevant information on the procedures and means to participate. As outlined in *Ulric 'Buggy' Haynes Coaching School et al. v Minister of Planning and Sustainable Development*, consultations

“must start by the giving of adequate notice of the intention to consult and the date and time of the consultation. The notice must be given in a form which provides for the widest reception by those who may be potentially affected, whether by way of advertisement in the newspaper and flyers distributed to residents. The form and manner of distribution of the notice is only relevant in so far as it treats with the requirement to reach out to as many of those persons to be affected in an effort to secure sufficient participation in the process.” [99]

In *Belize Tourism Industry Association v National Environmental Appraisal Committee, Department of Environment and Belize Island Holdings Ltd. (BX 2016 SC 1)*, the Supreme Court of Belize considered that there was a breach of the EIA Regulations due to a failure to observe the publication and notice requirements contained therein during the EIA of a project proposed by a multinational cruise company to build a port, a cruise ship day resort and related amenities in southern Belize. The dispute emerged in relation with supplemental information which significantly revised the nature of the project, and on which the public should have been granted the opportunity to express its views. The Addendum to the EIA was not published in two newspapers in two consecutive weeks as required by Section 20(1) of the Belize EIA Regulations and the content of the published notice was deficient as it failed to state the name of the applicant, the times and period during which the EIA could be inspected and the date on which the EIA shall be available to the public. Although not finding that such omission fatally invalidated the consultation process in the case at hand, Justice Abel utterly disapproved of such practice and discouraged the authority to take that course in the future, should a similar situation arise.

7. Consideration of observations made by the public

The obligation of authorities to duly take into account the public's comments before adopting a decision is a basic premise to ensure meaningful participation. The result of the public participation process is generally not binding, but due consideration should be given to objections and representations made by the public. Such obligation is linked to early public participation and reasonable timeframes, as only when participation takes place in a timely manner can the comments and views of the different stakeholders be properly considered. It is also a corollary to the right of any person to present observations, information, analysis or opinions that he or she considers relevant.

Caribbean case law has repeatedly upheld the obligation to consider the observations from the public. The Jamaican case of *Northern Jamaica Conservation Association and Others v The Natural Resources Conservation Authority and the National Environment and Planning Agency* defined consultation as “the means by which the decision-maker receives concerns, fears and anxieties from the persons who might or will be affected by his decision” [40] and was categorical in saying that these concerns should be taken into account conscientiously when making his decision. *PURE et al v Environmental Management Authority* clearly stated that the decision to issue the Certificate of Environmental Clearance ought only to be made after the Environmental Management Authority has considered all relevant matters, including comments or representations made during the public comment period [34]. In *Maharaj and Concerned Residents of Conupia v Minister of Planning and RPN Enterprises Limited*, the High Court of Trinidad and Tobago recalled that a public authority should take into account all relevant considerations and no irrelevant ones [Fordham (6th Edition) at paragraph 56.1] and that the material test is “whether a consideration has been omitted which, had account been taken of it, might have caused the decision-maker to reach a different conclusion...” [Fordham (6th Edition) at page 560 paragraph 56.1.6 and *R v Parliamentary Commissioner for Administration*, ex p Balchin [1998] 1 PLR 1].

Ulric ‘Buggy’ Haynes Coaching School et al. v Minister of Planning and Sustainable Development insisted on this last point, as it reaffirmed that consultation was not only about providing information and answering questions, but also about hearing and actively considering the views of those to be affected. “If at the end of the day, the views of those affected have made no difference in the decision maker then it does not lie within the mouth of the affected persons to complain that they were not consulted so long as their views were properly considered.” [100] In the court’s opinion, in the case at hand there was no evidence of any effort to engage with the affected persons nor that the result of any possible consultation was conscientiously taken into account as the ultimate decision to approve the planning development was already made.

Another relevant case in which the courts deemed that the authority had failed to take into account relevant considerations from those directly affected is *All Tobago Fisherfolk Association v Tobago House of Assembly*. In endorsing a framework document prepared by a developer conducting seismic surveys which stated that none of the Tobago fisherfolk will be affected without permitting the opportunity to those persons to be heard on the accuracy of the information presented and which forms the basis of the decision was deemed to be in breach of procedural fairness, namely breach of the right to be heard. In so doing, the Tobago House of Assembly disregarded considerations such as the tensions which have traditionally existed between fishermen, oil companies and the defendant concerning seismic surveys off the coast of Tobago; that the map provided was not reflective of current fishing patterns around the island of Tobago; that the list of fishermen and fishing vessels was factually inaccurate or that fishermen regularly fished within the survey area. “The decision-maker therefore failed to provide an opportunity to those who may have been adversely affected by the decision, to consider and confirm the validity of the information upon which it was going to rely in making that decision and to provide feedback thereon to the Defendant.” [55]

However, consideration cannot be equated with the unreserved and unquestioned adoption and implementation of the representations of the public. The High Court of Trinidad and Tobago in *Trinidad and Tobago Automotive Dealers Association v Minister of Trade, Industry and Investment*, warned that “consultation cannot be an interminable process”. [51] “It is expected that any decision taken is one that resounds to the benefit of all citizens and accords with the principles of good governance. The authority must therefore strike a balance between stakeholder interests with the public’s best interest”. [55]

8. Specific measures for the directly affected public and specific groups

Special consideration should be given to the directly affected public and specific groups, including those in vulnerable situations, as they are placed in a disadvantaged position to either exercise their rights fully or suffer the consequences of environmental harm more directly.

One of the most significant cases where a specific group was directly affected by an activity or project was that of *Fishermen and Friends of The Sea v The Environmental Management Authority Respondent et al*. On that occasion, the court recalled that the aim of environmental legislation of Trinidad and Tobago is to achieve environmental justice and the active participation of all stakeholders, through “the fair treatment and meaningful involvement of all people regardless of race, colour, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies.” It further stated that Section 28 of the Environmental Management Act “attempts to allow affected communities more meaningful participation in decisions that affect them. It provides communities with valuable information about the potential health and environmental effects of the project. It affords persons who may be affected the opportunity to voice their concerns, views, comments and recommendations, and, correspondingly, places the Environmental Management Authority under a duty to consider what they say. These persons are, in essence, given a fair hearing.”

In the *Belize Institute for Environmental Law v Chief Environmental Officer et al* (BZ 2008 SC 13), the Supreme Court of Belize was clear in requiring the implementation of specific measures to promote greater participation of the likely-to-be-affected communities and with enhanced participation of women. The ECP of the Chalillo dam project included a public participation component, requiring the managing electric company to establish a Public Participation Committee to promote information exchange, monitor community concerns and foster dialogue with various stakeholders. Such Committee was mandated to increase the participation of women. The judge was not satisfied that there was complete or adequate compliance in this regard.

Although indigenous peoples are not prominently present in most English-speaking Caribbean countries, it is worthwhile remembering that their rights should be duly upheld should they be affected by an activity or project. An exemplary case is clearly *Sarstoon Temash Institute for Indigenous Management et al v Attorney General et al* (BZ 2014 SC 14). Having the Government of Belize authorized oil drilling and the construction of a road in the Sarstoon Temash National Park, which the Maya people also used and occupied traditionally, the question arose as to whether the permission to drill was null and void. The Supreme Court of Belize found that the Government had acted irrationally by granting the permit without the free, prior and informed consent of the indigenous Maya communities, especially in light of Belize’s international obligations under the Inter-American and United Nations human rights systems (namely the American Declaration of Human Rights and the United Nations Declaration on the Rights of Indigenous Peoples). The court also found that the Maya people had the legitimate expectation that the Government would comply with such obligations.

In addition to the aforementioned recognition of indigenous rights, the Sarstoon Temash case was also of paramount importance in establishing measures for the impacted community. The Court determined that information should be provided in an understandable and appropriate format considering the target audience, and that sufficient time should be provided to examine that information. “It does not appear to be good faith on the part of the Government or the oil company to throw a 300 plus document written in English in highly technical specific language [...] many of whom speak only Mopan/Q’eqchi language [...] and give them twenty days to digest it before the scheduled meeting.” [13]

C. Access to justice in environmental matters

The right of access to justice is the backbone of environmental access rights and environmental protection. Rights can only be effective and implementable if there are adequate and sufficient redress mechanisms to uphold them in case they are omitted or violated. Any person should, therefore, be entitled to have access to a judicial body or other autonomous, independent and impartial body or administrative procedures to challenge the legality of (i) any decision, action or omission, with respect to substance or procedure, related to the access to environmental information; (ii) any decision, action or omission, with respect to substance or procedure, related to participation by the public in environmental decision-making; and (iii) any decision, action or omission by an individual, public authority or private entity that could affect the environment or violate, with respect to substance or procedure, the environmental laws and regulations of the State related to the environment. In the context of Principle 10, access to justice has been understood broadly to encompass not only access to courts, but also to other non-judicial or administrative means and alternative dispute resolution mechanisms.

The Caribbean case law on environmental access rights analyzed in this document is, therefore, intrinsically linked to access to justice, as it is in these instances where the rights to information and participation have been safeguarded. Courts and tribunals have also been pivotal in ensuring the public's ability to seek redress and remedy for environmental harm, becoming a fundamental pillar of environmental conservation, protection and management.

1. Legal standing

Legal standing to challenge and bring proceedings in cases of violations of environmental access rights is one of the core elements in ensuring access to justice. Caribbean case law has traditionally interpreted the private interest model (whereby only those having a sufficient or relevant interest in the matter could bring an action) narrowly. However, recent cases evidence that a less restrictive approach is being adopted in environmental matters in Caribbean jurisdictions⁷². Under this tendency—also backed by legislation⁷³ and rules of procedure⁷⁴—, concerned citizens, associations and non-governmental organizations promoting environmental protection have been granted the right to initiate lawsuits on environmental issues on the grounds that their interest is relevant and sufficient.

Several Caribbean cases demonstrate the relevance and increased use of this approach. *The Queen v Gray et al* recognized that “the judicial review arena is an ever expanding one” and that the public interest arising from issues on the use of public land and seabed is glaring [6]. In *BACONGO v the*

⁷² See Anderson, Winston (2002), *Principles of Caribbean Environmental Law*, pages 118-124.

⁷³ The Judicial Review Act of Trinidad and Tobago establishes three grounds for standing in judicial review claims: (a) Personal standing (a person whose interests are adversely affected by a decision); (b) Public interest standing (a person or a group of persons if the Court is satisfied that the application is justifiable in the public interest in the circumstances of the case); and (c) ‘Good Samaritan’ standing (where a person or group of persons aggrieved or injured is unable to file an application for judicial review on account of poverty, disability, or socially or economically disadvantaged position, any other person or group of persons acting bona fide can move the Court for relief). Furthermore, the Environmental Management Act of Trinidad and Tobago states that any private party may institute a civil action in the Environmental Commission against any other person for a claimed violation of any of the specified environmental requirements and that any individual or group of individuals expressing a general interest in the environment or a specific concern with respect to the claimed violation shall be deemed to have standing to bring a direct private party action.

⁷⁴ Rule 56.2 of the Civil Rules of Procedure of the Eastern Caribbean Supreme Court establish that “an application for judicial review may be made by any person, group or body which has sufficient interest in the subject matter of the application”, which includes: (a) any person who has been adversely affected by the decision which is the subject of the application; (b) any body or group acting at the request of a person or persons who would be entitled to apply under paragraph (a); (c) any body or group that represents the views of its members who may have been adversely affected by the decision which is the subject of the application; (d) any body or group that can show that the matter is of public interest and that the body or group possesses expertise in the subject matter of the application; (e) any statutory body where the subject matters falls within its statutory limit; or (f) any other person or body who has a right to be heard under the terms of any relevant enactment or Constitution.

Department of the Environment and Another, the Judicial Committee of the Privy Council authoritatively considered a group of environmental organizations in Belize which challenged a decision to build a dam on the Macal River. Sufficient interest was also recognized in *Oceana in Belize, Citizens Organized for Liberty through Action (COLA), Belize Coalition to Save Our Natural Heritage and Minister of Natural Resources and the Environment* to the applicants. The claimants (non-governmental organizations promoting the protection of the environment and natural heritage of Belize) alleged that agreements for offshore oil exploration and drilling for petroleum made between the government and six companies were unlawful on the grounds that no environmental impact assessment was carried out before making the agreements. A public interest was likewise found justifiable in *Ulric 'Buggy' Haynes Coaching School et al. v Minister of Planning and Sustainable Development* which granted relief to a group of residents and concerned citizens denouncing the construction of a sports complex in the Orange Grove Savannah. [28]

Other enlightening cases are those of the Jamaica Environment Trust, People United Respecting the Environment (PURE) and Fishermen and Friends of the Sea in Trinidad and Tobago. The Jamaica Environment Trust, a non-profit non-governmental environmental organization in Jamaica, was granted legal standing at least on two occasions to bring judicial reviews of a highway extension and a hotel development. People United Respecting the Environment, a public spirited organization, was granted leave to apply for judicial review of a certificate of environmental clearance for the construction of an aluminum smelter at Union Village in Trinidad and Tobago. In turn, Fishermen and Friends of the Sea has been able to challenge several decisions and policies such as the Water Pollution Rules or the construction of a pipeline⁷⁵.

However, the sufficient interest test in the judicial review of environmental matters does not remain undisputed. In *Benjamin v Attorney General and the Development Control Authority*, the court ruled that there was no *locus standi* as the claimant had no rights in law based on the proceedings in relation to the construction of a multi-level car park in St. John's, Antigua and Barbuda. In the Judge's view, the plaintiff, who was a resident of the area and a Member of Parliament, was unable to show a strong enough case on the merits judged in relation to his own concerns. The fact that he was a user of a park, lived in the area and was a representative for the Constituency was of no legal consequence in this context, as he had no personal rights over the lands. The claimant had argued that the people of his constituency, the people in Antigua and Barbuda and himself had a free and unrestricted right of use and enjoyment on the park since time immemorial⁷⁶. [253]

2. Costs

The issue of costs and affordability to bring about claims can constitute a significant barrier to access environmental justice. There are two main dimensions to costs in environmental matters. First, the costs of challenging a decision, which have to do with legal and technical assistance and costs for obtaining injunctive relief. Second, the question of cost protection.

Caribbean jurisdictions have sought to address these two issues. To alleviate the costs of accessing justice, several countries have put in place mechanisms for legal aid and technical assistance. For example, there are Legal Aid Acts in Jamaica⁷⁷ and in Saint Lucia⁷⁸. Additionally, unrepresented litigants

⁷⁵ Similarly, in *Virgin Islands Environmental Council v. Attorney General and Quorum Island BVI Limited*, a coalition of local fishermen, concerned residents, scientists and environmental activists challenged the decision to grant planning approval for the construction of a marina and golf course.

⁷⁶ In an earlier ruling, *Spencer v. Attorney-General of Antigua and Barbuda*, a claim to render unconstitutional an agreement between the government and a developer for a tourist development on Guiana Island was dismissed on appeal since the applicant did not have a "relevant interest". The applicant was then a Member of Parliament and leader of the opposition and argued that the development was harmful to the ecology and contrary to the common law principles that safeguard the environment.

⁷⁷ Legal Aid Act (No. 36 of 1997) of Jamaica.

⁷⁸ Legal Aid Act (No. 6 of 2008) of Saint Lucia.

are admitted in bodies such as the Environmental Commission of Trinidad and Tobago⁷⁹. Third party litigation is also provided for in the Judicial Review Act of Trinidad and Tobago, whereby a person may move the Court for relief where any other person or group of persons who may be entitled to apply for relief are unable to do so on account of poverty, disability, or social or economic disadvantage. In *PURE et al v Environmental Management Authority*, PURE acted on behalf of a person who was economically disadvantaged and in *Fishermen and Friends of the Sea v. The Environment Management Authority & Anor*, the claimant intervened on behalf of the residents of areas adjacent to the facility who feared their health had been or was likely to be seriously affected.

Security costs constitute, undoubtedly, an additional matter to consider in environmental matters. An interesting case is *Bimini Blue Coalition Limited v Christie et al*, which in dealing with an appeal to review if the quantum awarded by the learned trial judge (\$650,000.00 Bahamian dollars) was fair and reasonable the Court of Appeal of The Bahamas brought to the fore some key elements on security costs⁸⁰. In addition to stating that the estimation of the amount to be awarded is “not exact science”, the court recognized that relief can be granted where an issue is a point of law of public importance and the effect of making the order would prevent the point of law in question from being decided. “While, like most environmental matters raised by judicial review, this case may be of public importance and has an element of public interest, it does not raise any points of law of general public importance” [13]. Nonetheless, the court did set aside the order of the learned trial judge and estimated that the appropriate award was \$315,000.00 Bahamian dollars based on the appellant’s observations and the nature of the appellant’s case, among other matters.

As for cost protection, most Caribbean countries apply the “loser pays principle”. The standard rule is therefore that where the claimant’s case is unmeritorious, costs must follow being the unsuccessful party liable for the costs of the successful party. However, there are a growing number of jurisdictions that, cognizant of the importance of the hindrance of costs to access environmental justice, are offering some level of cost order protection, mainly in matters considered of public law. For instance, costs orders may only be applied on constitutional or judicial review applications if the applicant has acted unreasonably such as provided for in Rule 56.13 of the Eastern Caribbean Supreme Court Civil Procedure Rules, Rule 56.15 (5) of the Jamaican Civil Procedure Rules or Section 7(8) of the Trinidad and Tobago Judicial Review Act.

Nonetheless, courts have discretion to award costs and may depart from the standard rule, as has happened in some environmental cases. A paradigmatic ruling in this regard is that of *Belize Tourism Industry Association v National Environmental Appraisal Committee, Department of Environment*. The court found that there were flaws in the procedure for granting an EIA for the construction of a port at the Island of Harvest Caye and a cruise ship resort on the mainline waterfront site of Malacate (mainly in the public notices and the public consultation process), but these did not render the EIA null and void. However, although the claimant had not requested to stop the project, the court considered that it had been largely and significantly successful against the defendants and ordered the defendants to pay the claimant’s costs⁸¹. In that same vein, *Sooknanan and Fishermen and Friends of the Sea v Environmental Management Authority and Minister of Energy* asserted that “any challenge involving

⁷⁹ A person who is entitled to appear before the Commission may appear in person, or be represented by an attorney-at-law, or by an agent acting on his or her behalf (Rule 11.2 of the Environmental Commission Rules of Practice and Procedure, 2001).

⁸⁰ The ruling cited the principles governing an award for security of costs laid out in United Kingdom Court of Appeal in *Keary Developments v. Tarmac Construction*. Such principles stated, inter alia, that “the Court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff’s claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defense of the claim.” Furthermore, before ordering security the court shall consider all circumstances and must refuse such order if it is probable that it would be oppressive and unfairly stifle a valid claim.

⁸¹ See *Belize Tourism Industry Association v National Environmental Appraisal Committee, Department of Environment* [140].

the environment to the extent and nature of this claim must be clothed with public interest”⁸². Though unsuccessful, the application had been neither frivolous nor vexatious and no order was issued as to costs. Other cases worth mentioning are *Scotland District Association Inc. v. Attorney General et al., R. et al v Ex parte Belize Alliance of Conservation Non-Governmental Organizations (BACONGO)* and *Virgin Islands Environmental Council v. Attorney General and Quorum Island BVI Limited*.

Similarly, in *The Environment Management Authority v. Fishermen and Friends of the Sea*, in an order to recover costs that had been imposed as a result of the unsuccessful claim of Fishermen and Friends of the Sea against the Environmental Management Authority and BP Trinidad and Tobago LLC, the Environmental Management Authority requested that the corporate veil of the organization be lifted so that the directors be held personally liable for costs failed. However, the court rejected such request on the grounds that the EMA had not applied for security for costs and the organization was a body satisfying the public interest in respect to which the litigation did not bring service and/or promote the personal interests of any of its directors.

This tendency to relieve the barriers caused by costs to bring actions in a public interest has also reached final appeal courts such as the Caribbean Court of Justice. In a number of cases, the Court has ensured that the ends of justice were met in circumstances where private entities had brought justifiable and/or partially successful claims before the court.

In *Hummingbird Rice Mills Ltd v Suriname and the Caribbean Community*⁸³, an important principle was elucidated. While making it clear that it did not intend to erode the basic principle that costs would normally follow the event it stated that:

“At this nursery stage of the development of Caribbean Community law, it is important that the burden of establishing the basic principles underpinning the Single Market should not weigh too heavily and disproportionately on private entities and thus discourage the bringing of important issues of economic integration law before the Court.”

The Claimant was successful in obtaining declaratory and mandatory orders against Suriname, but failed to obtain any order for the damages it claimed. Its claims against the Caribbean Community failed in their entirety. The Court ordered Suriname to pay 50% of the Claimant’s costs and ordered that as between the Claimant and the Community, each party should bear its own costs.

In *TCL v The Caribbean Community*⁸⁴, the Applicant was successful in obtaining one of the declaratory orders for which it had claimed, the Court considered that it had acted properly in bringing the action. It also considered that the action was important not only to the Applicant but to the entire private sector in the region to obtain the pronouncement of the Court on the matters raised. The costs order was for the Community to bear one half of the costs of the Applicant.

In *Trinidad Cement Limited v. The Competition Commission*⁸⁵, the case arose out of the first investigation undertaken by the claimant. Although after full consideration the matter was dismissed, the Court ordered that the Claimant pay 30% of the Defendant’s costs and conceded that there was justification in the commencement of the proceedings. The Court stated:

“To require the Claimant, a private entity to bear the full costs of the proceedings in these circumstances would not be warranted. It would be disproportionate to require it to bear the cost of clarifying the rules and procedures on this important aspect to the Single Market and Economy. At this fledgling stage of the Single Market and Economy, it is important that the private litigants are not discouraged from initiating process”

⁸² See *Sooknanan and Fishermen and Friends of the Sea v Environmental Management Authority and Minister of Energy* [74].

⁸³ [2012] CCJ 2 (OJ).

⁸⁴ [2009] CCJ 4 (OJ).

⁸⁵ [2013] CCJ 2 (OJ).

Another noteworthy ruling issued by the Caribbean Court of Justice where no costs were ordered was that of *Ya'axché Conservation Trust v Wilber Sabido, Chief Forest Officer, Attorney General and Belize Hydroelectric Development and Management Company Limited* ([2014] CCJ 14 (AJ)). The applicant contended that the administrator of a nature reserve was not authorized by the National Parks System Act to issue a permit to undertake hydro-electric feasibility studies given that the activity contravened the aim of the act. Although it had become an academic case where there was no live issue to be resolved between the parties (by the time the case reached the courts, the permit had expired and it had not been renewed), the Court heard the case as it considered it raised an issue of public interest involving a distinct or discrete point of statutory interpretation which has arisen in the past and may arise again in the future. The application for special leave was refused, but considering its public interest nature, no order as to the costs was awarded.

3. Delay in bringing applications for judicial review

The issue of delay seems to plague the civil justice systems in the Caribbean and it is no different in environmental law cases. The use of judicial review to assess the decision of environmental regulatory bodies is now firmly entrenched in the judicial landscape⁸⁶. The issue of undue delay has arisen in a number of cases where there had been a delay in bring the application for judicial review.

The real impact of delay and the requirements of the public interest could have different judicial views. In *Fishermen and Friends of the Sea v The Environmental Management Authority and BP Trinidad and Tobago LLC*⁸⁷, the applicants acted outside of the three months statutory time frame and a majority of the court of appeal upheld the decision of the first instance judge in deciding that the applicants had not overcome the test of substantial hardship or prejudice to third parties or detriment to good administration that would have allowed the review to proceed.

Dissenting from this view, Lucky JA held that the time ought to have been extended. His opinion was on the Judicial Review Act which allowed the time to be extended “for good reason”, the justice of appeal opined that the provision allowed complex matters of public interest and environmental concern to be fully addressed and for searching and for searching and important questions to be asked. This rule should particularly apply to the process by which the EMA granted the CEC for the development. The long-term effects of the project on communities and ecosystems of the country required prime consideration and attention, more so when they posed possible risks to health⁸⁸. This case illustrates that a delay in bringing an application can be an impediment to justice if the court is of the view that the test of substantial hardship has not been met.

Also in *Northern Jamaica Conservation Association and JET v NRCA and NEPA*⁸⁹, the application was brought within the three-month statutory time limit. It was argued that although the application was within the three-month limit, it was not prompt⁹⁰. The court rejected the view that there was undue delay and the application was granted on the grounds of third party hardship, as some 62 million USD was already spent in the construction of the hotel.

Also, the issue of delay arose with regards to the length of time it took for the application to be heard by court. The applicants filed their application for leave for judicial review on October 10, 2005, which was not heard until November 29, 2005. The rule⁹¹ states that an application for leave for judicial review

⁸⁶ Ramlogan, Rajendra (2007), *Judicial Review in the Commonwealth Caribbean*.

⁸⁷ TT (2003) C.A. 45.

⁸⁸ *Ibid* at 7 & 8 (Lucky, JA, dissenting).

⁸⁹ (Pear Tree Bottom No. 1) - Jamaica SC - HCV 3022 of 2005.

⁹⁰ Rule 56.6 (1) of the Civil Procedure Rules (“CPR”) which states that an application for judicial review must be made promptly and in any event within three months from the date when grounds for the application first arose.

⁹¹ Rule 56.4(1) Civil Procedure Rules, Trinidad and Tobago.

must be considered forthwith by the Court. Despite this, the application for leave for judicial review took over six weeks after filing to be heard which was a breach by the court.

However it has been proven that even in circumstances where an application is brought in the stipulated time frame it can still be refused on the basis of 'promptness'. As in the case of *Fishermen and Friends of the Sea v The Environment Management*⁹², the Privy Council upheld the trial judge's finding that a two month delay, where the statute required such a claim to be brought within three months, was undue delay.

In *Virgin Islands Environmental Council (VIEC) v The Attorney General and Quorum Island BVI Ltd*, the court rejected the view of undue delay⁹³ in instituting the application for judicial review, even though it was done on the last day before the statutory 6-month limitation period would have expired. The court stated that the application raises important environmental issues, which should be considered even if the delay is not satisfactorily explained.

4. Alternatives to Dispute Resolution

A major cost-reduction and time saving measure that can ease the administration of justice in environmental issues is the use of alternative dispute resolution mechanisms. Provided that there is no relinquishment of the right to access justice, alternative dispute mechanisms have proven to be extremely useful in giving response to environmental controversies, either through non-judicial means (such as conciliation, mediation or arbitration) or by providing innovative approaches to solving conflicts.

In Trinidad and Tobago, the Environmental Commission has been mandated by section 84(3) of the Environmental Management Act to encourage and promote alternative dispute resolution, which is any mechanism for resolving disputes other than by way of litigation. Mediation has been identified by the Commission as the alternative dispute resolution process best suited to resolving environmental disputes.

A number of cases are settled using mediation or Consent Orders. This is illustrated below:

- *Environmental Management Authority (EMA) v. Fizul Khan*: In 2009 The Environment Management Authority (EMA) filed a notice of Application in the Environmental Commission (EC) seeking the closure of an auto-body shop owned by Fizul Khan. By Order of the EC dated November 13, 2009, leave was granted for 2 persons to intervene as interested parties in the proceedings. Consequently all parties participated in mediation during the period 07-18, 2009. Following mediation, the parties resolved the matter through a Consent Order filed in the EC on February 2010 wherein the EMA's application was granted.
- *EMA v. Jack Farah & Company Limited (Respondent)*: On July 2009, an administrative order was issued by the Authority against the Respondent based on the Authority's finding that the Respondent was unable to resolve violations of the Act as contained in the Authority's Notice of Violation. The Notice of Violation related to the establishment of a facility for the manufacture of household products or fixtures which is a designed activity requiring a Certificate of Environmental Clearance (CEC) from the Authority which the Violator did not apply for and obtain. Following mediation between the EMA and the Respondent, this matter was resolved out of court by Consent Agreement, wherein the Respondent agreed to cease and desist from continuing the designated activity without first applying for and obtaining a CEC and to pay an administrative civil assessment penalty of \$8,159.66.

⁹² (2005) UKPC 32.

⁹³ The court still retains a residual discretion under CPR 56.5(2) to refuse leave or refuse relief at the substantive hearing where there has been undue delay and the court considers granting leave or relief would cause substantial hardship or substantial prejudice.

- *EMA v Allan Warner*: On November 2009, the EMA filed an application in the EC for the closure of a pig and rabbit farm established by Mr. Warner (the Respondent). The EMA and the Respondent later entered into mediation to discuss possible alternative methods of resolutions out of court. As a result, the parties agreed to resolve the matter by Consent Agreement. Through Consent Agreement, Mr. Warner paid the EMA an administrative civil assessment of \$22, 132.16.
- *EMA v Vinod Jadoo*: On November 2009, the EMA filed an application in the EC for the closure of an automotive repair shop, established by Vinod Jadoo (the Respondent). Subsequent to mediation between the EMA and the Respondent, the parties resolved the matter by Consent Order. The EMA's application was allowed; the Respondent was ordered to cease and desist from initiating or continuing with activities of the automotive repair garage and to pay a total administrative civil assessment of \$1500.00 to the Authority.
- *EMA v Joanne Emmanuel & Shermin Emmanuel (K's Recreation and Club)*: In this matter, mediation was held wherein the parties entered into a mediation agreement. By Consent Order entered before the Environmental Commission, the Respondents were ordered to immediately cease and desist from further violations of the Noise Pollution Control Rules (NPCR) 2001 and to pay the EMA's administrative civil assessment of costs and damages.
- *EMA v Sean Caruth*: By Consent Order entered before the Environmental Commission, Mr. Caruth was ordered to immediately cease and desist from further violation of the NPCR, to pay the EMA's administrative civil assessment of costs and damages and to hire an approved consultant to investigate the breach and make recommendations to prevent future breaches of the NPCR. The results of the said investigation were to be submitted to the EMA.
- *EMA v Ramnarine Sammy*: By Consent Order entered before the Environmental Commission, the EMA's application for the Administrative Order to be enforced was granted and the Respondent was ordered to (inter alia) cease from further violation of the NPCR and to pay the EMA's administrative civil assessment of costs and damages. Prior to the Consent Order the parties explored mediation and entered a mediation agreement.
- *EMA v. Zena Loach & Khaneraj Loach (Dread & Zen's Bar)*: By Consent Order entered into before the Environmental Commission, the Respondents were ordered to immediately cease and desist from further violations of the NPCR and to pay the EMA's administrative civil assessment of costs and damages.

CHAPTER III

Selected Caribbean case
law on access rights
in environmental matters

The present Chapter summarizes a selection of case law from high courts of Caribbean countries that has been referenced in previous chapters of this book. The cases are grouped by country and year. A brief background and summary of the facts, applicable laws, legal highlights and final decision are included for each ruling.

The complete text of the judgements is available at: <http://observatoriop10.cepal.org/en>.



Antigua and Barbuda

Case Name	Benjamin v. Attorney General Et Al
Citation	AG 2007 HC 54
Court	High Court

Background & summary

A claim was filed against the application for planning permission to construct a car park in Victoria Park in the City of St. John's by a Member of Parliament for the Constituency who also was a resident of the area. The claimant alleged that the intended constructions and grant of planning permission contravened the Physical Planning Act and Regulations as the defendants had failed to hold public consultations and request and/or consider an environmental impact assessment. It was argued that the project was unlawful and intrusive of the common rights of the people of Antigua and Barbuda and deprived them of their common rights of use and enjoyment of the park since time immemorial. For their part, the defendants stated that there was no statutory provision creating the purported right and that the claimant was not the owner of any adjoining land.

The law

- Physical Planning Act (Sections 23 and 25) and Regulations
- Civil Procedure Rules, Part 56(2)

Highlights

- [71] The short point about the legislation is that in the judgment of the court, there is no indication of the grant of right over the lands comprising Victoria Park to the claimant, the constituents of St. John's City South or the people of Antigua and Barbuda generally. Rather, what is clear is the granting of permission to use the lands.
- [105] The points to be made here are: this law at least recognises the legal possibility that land could be dedicated to the public in which case it would be exempt from planning permission. However, in these circumstances there is no evidence of dedication of land in Victoria Park to the public. This would mean that the right claimed would be inconsistent with the two statutes cited.
- [106] Given the basic difficulty encountered by the claimant in terms of grounding in 'time immemorial' and the other legal difficulties, the court agrees with the submissions made on behalf of the defendant which are to the effect that the claimant cannot successfully claim any rights at common law.
- [112] In alignment with the law, the submission identify the fact that there must be some decision or representation and that before it is implemented the person must be heard. These basic conditions must then be applied to the particular circumstance in order to make a determination as to whether or not legitimate representation is grounded.
- [114] The court agrees with learned counsel for the defendants that no evidence was adduced by the claimant to lead to the conclusion that any representation was made by any public authority in connection with the use of Victoria Park.
- [115] The other submission, though expressly differently by learned counsel, is that even if the complex is erected the use of Victoria Park for the playing of sports and other recreational activity will continue.
- [116] Therefore, it is the determination of the court that legitimate expectation does not arise since, inter alia, the use of Victoria Park will continue except in the portion identified for the execution of the complex.
- [167] On the evidence, including the definitions, the court is in no doubt that a waste water treatment plant is involved in the application for a development permit. Therefore, the requirement for an EIA is mandatory and as such neither the Authority nor the Town and Country Planner can do otherwise. And to do as they did falls under the head of illegality.
- [191] It is the view of the court that the question of the protection of the environment is one of the fundamental purposes of the Act. This is deduced from many instances in the Act where the Authority or the Town and Country Planner is required to take this factor into account. These instances have been identified. However, section 23(e) is saying, in essence, that an EIA may be ordered where there is a proposed development; other than those specified in the Third Schedule, which is likely to have significant effects on the environment having regard to a number of circumstances.
- [212] Given (a) the considerations in section 23(2), especially that which states: the extent of the changes to the environment likely to be caused by the proposed development; (b) the objective matters which faced the Authority namely, the nature of the proposed complex, the UN Plan and recommendations, the existence of underground streams in the area and questionable waste likely to be generated within the complex, it is the determination of the court that the Authority acted unreasonably or irrationally in failing to exercise its discretion under section 23(2) of the Act. Such action or inaction is not the intent of Parliament. [...]
- [227] Given the criteria advanced by Lord Clyde in *City of Edinburgh Council v. SOS For Scotland*, supra and given the action or inaction of the Authority and Town and Country Planner it is the judgment of the court that the grant of the permit is irrational or perverse, or both.
- [249] The court has already made a determination that the claimant has no rights in law based on the proceedings instituted. This fact alone undermines many of the claimant's submissions on the question of standing. In other words, because of this fact the claimant is unable to show a strong enough case on the merits judged in relation to his own concerns with it. Or to use Mr. Justice Hugh Rawlins' language the claimant is unable to show a "sufficient nexus" with the subject matter of the claim to give him standing.

Decision

The Court concluded that: (1) neither the claimant nor the people of Antigua and Barbuda and, in particular the constituents of St. John's City South, had rights over the Crown lands constituting Victoria Park whether by virtue of statute, by-laws, or other subsidiary legislation, resolution, legitimate expectation or otherwise at common law; (2) the determination of the Town and Country Planner that an EIA was not mandatory in relation to the proposed complex was contrary to the express provisions of the Physical Planning Act; (3) the failure or refusal of the Authority to exercise its discretion to require an EIA under section 23(2) of the Physical Planning Act is contrary to the express provisions of the Act; (4) the failure or refusal of the Town and Country Planner to cause the applicant, Antigua and Barbuda Development Company, to cause an environmental impact statement to be prepared is contrary to the express provisions of the Act; (5) The grant of the permission to Antigua and Barbuda Development Company is irrational or perverse. However, the claimant had no *locus standi* to institute such proceedings and the reliefs sought were denied.



Bahamas

Case Name	Save Guana Cay Reef Association Ltd and Others v. the Queen and Others
Citation	[2009] UKPC 44
Court	Privy Council

Background & summary

An appeal was lodged before the Privy Council against the Court of Appeal of Bahamas upholding the approval by the Government of the Bahamas, in principle, of a proposed large-scale development in the north-west part of Great Guana Cay, both on land and in the sea, with far-reaching economic, social and environmental consequences. One of the main issues submitted for discussion was the lack of sufficient public participation with the residents of the Cay. Two public meetings were held. However, the claimants argued that a promise of holding further follow-up meetings had been made by authorities thereat and had not been met. Furthermore, the effect of the Heads Agreement entered into between the Government and the six project developers was questioned on the grounds of irrationality and fettering of discretion.

The law

- Town Planning Act (repealed by the Planning and Subdivision Act)
- Port Authorities Act

Highlights

- [31] [...] obtaining an EIA for submission to the BEST Commission has become standard practice, but the primary purpose is to enable it to receive expert scrutiny by the Commission itself. The purpose is not (as with EIAs under European Union legislation, or the statutory provisions in force in Belize: see *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment* [2004] UKPC 6 [2004] Env LR 38) to inform public consultation. It might be preferable if that were a statutory requirement, but it is not. At present it is the BEST Commission that is expected to act as a watchdog in the public interest. The law of the Bahamas does not at present require (in the well-known words of Lord Hoffmann in *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603, 615), "The inclusive and democratic procedure . . . in which the public, however misguided or wrong-headed its views may be, is given an opportunity to express its opinion on the environmental issues."
- [32] That is not to say that the residents of the Cay had no expectation of any sort of public consultation as to the multi-million dollar investment that was going to transform their island. All the courts below accepted that the public had a legitimate expectation of consultation arising out of official statements recognising the need to take account of the residents' concerns and wishes. But taking their concerns and wishes into account does not of course mean that the plans for the development must necessarily be changed, if only because the residents' views were by no means single-minded (Ganpatsingh JA mentioned in his judgment his perception that "the community is bitterly divided between those who do and those who do not oppose the development").
- [33] If there is a legitimate expectation of consultation, it must be a proper consultation. Both sides referred in argument to the well-known observations of Lord Woolf MR in *R v North and East Devon Health Authority Ex p Coughlan* [2001] QB 213, 258 [...]
- [35] The courts below were unanimous that there was a legitimate expectation of consultation, but that it had been adequately satisfied, primarily by the two public meetings held at the schoolhouse at the Cay settlement on 9 February 2004 and 20 August 2004. Minutes were taken of both meetings and the minutes are in evidence.
- [43] These points are not without some force. It is unfortunate that the Minister did not make good her promise of a meeting. There is also some force in the point about informed consultation, but by the time of the second meeting the public seems to have been given a reasonably full picture of what was proposed, with copies of documents being on offer, and the main author of the EIA being present at the meeting. In the event the objectors seem to have obtained a copy of the EIA through the assistance of Dr Robert Silk, who obtained it from Dr Sullivan-Sealey herself, and regarded it as a good piece of work. The failure to publish the EIA earlier would have been more serious had it been addressed primarily to the general public (as with the European model of an EIA) rather than to the BEST Commission as an expert body. No doubt the process of consultation (like almost any other consultation) could have been improved on, but their Lordships consider that these imperfections fall far short of what would be needed to lead them to differ from the unanimous view of the courts below, with their experience of local conditions.

Decision

The appeal was dismissed as the Council considered that the imperfections of the consultation process did not render it inadequate and that the public had been given a reasonably full picture of what was proposed. Moreover, the signing of the Heads Agreement did not amount to the excessive exercise of official powers by the Government and involved no improper fettering of discretion.

Case Name	Bimini Blue Coalition Limited v. Christie Et Al
Citation	BS 2014 CA 92
Court	Court of Appeal
Background & summary	
<p>In the context of the judicial review actions taken by a coalition of residents and visitors challenging the construction of a cruise ship terminal and dock and the creation of man-made island offshore using material dredged from the sea in North Bimini in the Bahamas, security costs were ordered in the amount of \$600,000.00 Bahamian dollars. An appeal against the quantum ordered by the learned trial judge was filed claiming it was arbitrary, oppressive, excessive and irrational. The coalition also claimed that the amounts awarded were not in accordance with the scale of fees generally awarded in the Supreme Court, were not supported by any evidence nor calculated on a party to party basis. It was further alleged that the learned trial judge had failed to give adequate weight to the point that the substantial amount of the orders was highly likely to have the effect of preventing the appellant's judicial review application from proceeding, thereby preventing the ventilation of their concerns and setting a precedent for access to the Courts to be denied in future cases brought in the public interest.</p>	
The law	
<ul style="list-style-type: none"> - Rules of the Supreme Court - Crown Proceedings Act 	
Highlights	
<ul style="list-style-type: none"> - [24] While I am of the opinion that this matter concerns the proper administration of public and environmental law, and that the issues of interpretation, which are raised, are important; the question of how these matters affect whether or not an order for security of costs should be granted is no longer open for discussion. As already stated, this is an appeal against the quantum awarded by the learned trial judge and not an appeal of the learned trial judge's decision to order security for costs. While the appellant's case may very well fit into the definition of public interest litigation; to order security for costs in a nominal amount, as the appellant argues the public interest element of the case warrants, would make a mockery of the decision of the learned trial judge to so order and would, through the back door, render nugatory the decision to grant the same. - [28] Estimating the quantum to be awarded for security for costs is not an exact science. Having regard to the difference between the figures asked of the trial and the figures presented in the estimated Bills of Costs filed in this Court, the appellant's observations on the draft Bills, the general principles detailed in Keary Developments, the nature of the appellant's case and the conduct of the case by the appellants thus far, I estimate that the appropriate award is a global quantum of \$315,000.00; being made up of \$100,000.00 for the government's costs and \$215,000 for the developers' costs. - [13] And so, on that authority, to be considered for relief from granting security for costs the issue raised must be a point of law of public importance, and the effect of making the order would be to prevent the point of law in question being decided. Neither of those apply in this case. While this case, like most environmental matters raised by judicial review, may be of public importance and has an element of public interest, it does not raise any points of law of general public importance. That can be clearly seen from the summary of the issues in paragraph 2 above, and the declaration in paragraph 3 sought against the Developers. The issues raised are issues of construction of statutes based on the facts of this case, and there is no claim that any statutes are ambiguous and need special interpretation to guide the public generally in the future. - [14] Furthermore, there is no evidence that even if there was a point of law of general public importance, that making the order for security for costs or in this case not making the quantum negligible, would prevent it from being heard. Although not authority for this Court, in both of the environmental cases submitted by Mr. Wilson in reply namely, Pointes Protection Association v. Sault Ste. Marie Region Conservation Authority 2013 ONSCV 5323 in the Divisional Court of the Ontario Supreme Court, and Illawarra Residents For Responsible Mining Inc. v. Gujarat NRE Coking Coal Limited [2012] N.S.W.L.E.C. 259, security for costs was ordered. Nothing turns on their outcome in our context because in the latter case Court Rules expressly provided that the Court could refuse granting security for costs if it was satisfied that the action was brought in the public interest. Our Rules have no such provision. Even in those cases, however, security for costs was granted because they were not determined to be public interest cases. In the former case security of \$65,000.00 requested was reduced to \$20,000.00, and in the latter \$75,000.00 requested was reduced to \$40,000.00 taking into account , inter alia, the means of the plaintiff. 	
Decision	
<p>The appeal was allowed and the quantum ordered by the learned trial judge set aside, ordering a global sum of \$315,000.00 Bahamian dollars as security for costs. Although concluding that none of the criteria for granting relief from security costs applied (the issue raised must be a point of law of public importance and the effect of making the order would be to prevent the point of law in question from being decided) and that access to justice had not been denied, the Court found that there was a difference between the figures asked of the trial and the figures presented in the estimated bills of costs filed in the Court.</p>	

Case Name	The Queen v. Gray Et Al
Citation	BS 2014 SC 80
Court	Supreme Court

Background & summary

An environmental non-governmental organization challenged the construction and operation of a cruise passenger destination which included a captive marine mammal facility at Blackbeard's Cay off the Northern Coast of New Providence. It claimed that the preliminary support of application for site plan approval in relation to the facility was procedurally unfair because, inter alia, an Environmental Impact Statement had not been submitted and no public hearing had been held before granting the preliminary support. In addition, the facility was not compliant with the marine mammal protection legislation and the importation of dolphins was unlawful. The developer was allowed to carry out the construction and operate the captive marine mammal facility without a Premises License.

The law

- Planning and Subdivision Act, Sections 14, 36, 37 and 48
- Marine Mammal Protection Act and Marine Mammal (Captive Dolphin Facilities) Regulations

Highlights

- [6] The issue of standing was also raised at the ex parte hearing and was also resolved in the applicant's favour. The judicial review arena is an ever expanding one, and in the instant case the applicant is one of few entities that have a direct interest in the welfare of dolphins. I adopt the view of Longley, J. on standing at paragraphs 150 through 154 in *The Queen et al v. Responsible Development for Abaco (RDA) Ltd et al 2009/PUB/jrv/FP/00013*.
- [7] The case of *Onus v. Alcoa of Australia Ltd. [1981] 149 C.L.R. 27* offered in support of the respondents' position on standing is obviously an action between a private person and a limited company brought on the basis that the company was breaking the law. There was no element of public law in that case, the parties had no relationship. In the instant case the public law element is glaring as issues of the use of public land and public seabed came into play as well as the permissions granted by the executive to a private company to deal with an endangered species of mammals, all of which affect private citizens. In the circumstances the instant case is distinguishable from *Onus*.
- [39] In addition to the above the applicant has submitted that due to the nature of the development and its potential impact on the immediate environment Section 14 of the PSA requires an Environmental Impact Statement to be submitted to the Department as part of the development. Additionally section 14(3)(d) of the PSA provides that the Minister may make regulations providing for the procedures for public participation in the Environmental Impact Statement process. The section also requires the Environmental Impact Statement to be circulated to relevant referral agencies for review and comment (Section 14(4) PSA) and the Committee shall consider the Statement and comments thereon before issuing a Preliminary Support of Application (Section 14(5)).
- [40] Further, section 37(1) of the PSA requires the Committee to hold public hearings to determine applications, inter alia, where a site plan approval is required under Section 36. There is also a process prescribed to organize the public hearing under Section 42(b) and (7) of the PSA. It does not appear from the documents disclosed or from the Affidavit evidence that a public hearing was ever contemplated by the TPC.
- [48] There appears no evidence that a public discourse was encouraged, it seems rather that such a discourse was avoided.

Decision

The court determined that neither the Premises License nor the Site Plan Approval could have been granted as there was no evidence that the conditions for their issuance were met. The dolphin import licences were revoked and the respondent was ordered to remove the dolphins from the facility to an appropriate location. The approval of the Preliminary Support of Application for Site Plan was quashed and the land was to be restored to its original use and condition.



Barbados

Case Name	St Hill v. Chief Town Planner and Attorney General
Citation	BB 2016 HC 33
Court	High Court

Background & summary

A company submitted an application for planning permission to develop 210 acres of land at Six Men's State, which required permission for a change of use from agriculture, subdivision of the land into lots and the comprehensive development of the land. The Chief Town Planner refused to the permit change to the use and development of the land. The claimant contended that the process suffered from several unlawful administrative acts or omissions, including the failure to consult the Town and Country Planning Advisory Committee which was required to convene a hearing at which the applicant could be heard prior to the recommendation to the Minister of Town Planning for a decision. The Minister also acted contrary to the principles of natural justice and procedural fairness by failing or refusing to provide a report to the applicant of all the proceedings of the said committee and the circumstances under which the Minister came to an independent decision to refuse planning permission. Furthermore, he had failed to take relevant considerations into account.

The law

- Town and Country Planning Act, Sections 16, 17, 18, 19 and 20
- Town and Country Planning Regulations
- Town and Country Development Order

Highlights

- [62] It is clear, that if the Minister can appoint a person to conduct a hearing into the application, that a reasonable exercise of that power would be to appoint a person competent enough to hear the application and report accordingly. Good administration requires transparency, even where resources are limited. I find therefore that the process followed by the CTP's Office prior to submitting this application to the Minister was invalid.
- [68] Where the CTP has issued the notice in time then the application should now be before the Minister for his decision according to section 18 of the Act. Section 18 (3) provides that if either the applicant or the CTP desire to be heard the Minister may appoint a person or persons to hear the application.
- [71] Where an application has been submitted to the CTP for the granting of planning permission, section 8 of the Town and Country Planning Development Order 1972 provides that the CTP shall consult with a number of parties before granting planning permission. Having found that the process employed by the CTP was not in accordance with the Act, it is necessary to view the duty to consult accordingly. Generally, section 8 (4) of the Order provides that this consultation must be done in not less than 14 days and not more than 21 days. It would stand to reason that the CTP should submit the application to all parties whom he wishes to consult with within the period specified allowing therefore for their simultaneous consideration and thereafter reply from all of the parties within 21 days. Generally therefore, he should then make his determination on the application thereafter. This determination changes however with respect to section 18 and 19 applications in which he ceases to be the decision maker. His determination at this point would relate to submissions or recommendations which he would be entitled to make at a hearing before a person or persons appointed to hear the matter. The duty to consult does not cease because the CTP ceases to be the decision maker. In the absence of any guidelines set by the Minister being presented to the Court, the deadlines prescribed by the Act provide firm guidance as to the length of time for the CTP to consult even in applications where the Minister is the decision maker. Such consultations would inform the CTP's recommendations whether to approve or refuse the application in the same way that they would if he was the decision maker.
- [80] It is at this point and not before that the CTP should then make his recommendations, including the results of any consultation for the consideration of the person hearing the matter. Similarly, the applicant would have been able to present his application and reply to recommendations of the CTP. There is no evidence that the report of Mr. Graham was circulated thereafter but in April of the following year, 2011, the Minister advised that his decision was to refuse the application. In accordance with section 19 (9), the Minister then gave reasons for his decision which were identical to the recommendations submitted by the CTP prior to the hearing. Had the CTP submitted his recommendation at the hearing instead of prior, then at the very least it would be arguable that there was some transparency in the decision making process but in the absence of the report from the hearing and of any of the discussions therein, it is reasonable to assume that the process could be viewed as being unfair.
- [101] In summary, the Court's interpretation of the Act is as follows: [...] b) That all applications for planning permission must be recorded in a public register within 2 months of their submission and in accordance with the Act that the Register is a public one. [...] d) That the CTP has no fewer than 14 days and no more than 21 days to consult with other statutory agencies, bodies or persons on applications for planning permission. [...] j) That the duty of fairness requires full disclosure of all documents to both sides prior to the decision of the Minister. [...]

Decision

The Court concluded that the process which occasioned the refusal of planning permission was procedurally incorrect. The Chief Town Planner had acted ultra vires and the procedure followed was contrary to the Act. The applicant had the right to be heard on the application by a person or persons appointed for that purpose by the Minister and should have access to a written statement of the reasons for the decision.



Belize

Case Name	R. Et Al v. Ex Parte Belize Alliance of Conservation Non Governmental Organizations (BACONGO)
Citation	BZ 2002 SC 14
Court	Supreme Court

Background & summary

An alliance of nine environmental organizations opposed the building of dam and associated works in Chalillo along the Macal River sought relief to quash the decision of the National Environmental Appraisal Committee (NEAC) recommending conditional environmental clearance to the hydroelectric project and associated infrastructure and of the Department of Environment (DOE) granting such clearance. Both decisions were considered unlawful. The decision of the NEAC was unreasonable and failed to take into account relevant considerations while taking into account irrelevant considerations. The decision of the DOE, in turn, acted on a decision of the NEAC that was itself unlawful. The applicant contended that the EIA for the project was not accompanied by a copy of the newspaper on its submission to the DOE and informing the public and inviting them to inspect it and make comments if they desired. Furthermore, the DOE had failed to examine whether it complied with the previously agreed Terms of Reference and the EIA did not comply with various sections of the law and regulations, including deficient public participation.

The law

- Environmental Protection Act, Part V
- Environmental Impact Assessment Regulations

Highlights

- [33] The applicant has, however, chosen to come to Court to seek judicial review of the decisions it is complaining about. I had earlier at the start of this judgment, stated that it has the requisite standing to bring these proceedings. It is perhaps, easy to dismiss the applicant as a meddling busy-body, a nosey-parker with no material interest to protect. I think, however, that the applicant must be commended for valiantly taking up the cudgel on behalf of the rest of the public to try to ensure by these proceedings, compliance and conformity of the project with the provisions of the Act and the Regulations. It is the view of the Court, that this action by the applicant is indicative of a public spiritedness that deserves commendation. There are, of course, others who would charge the applicant with an agenda of its own beyond concerns for the environment. It is however, the view of the Court that the applicant, an umbrella alliance of non-governmental organizations for conservation, is exceptionally suited and positioned with sufficient interest to launch these proceedings. That said, the applicant's challenge must be set for the purposes of this review, in the context of the Act and the Regulations. Indeed, it is the provisions of these instruments that the learned attorneys for the applicant, Mr. Dean Barrow S.C. and Ms. Lois Young-Barrow S.C., have invoked to impugn the decisions of the DOE in respect of the EIA for the project.
- [36] From an analysis of the provisions of the Act and the Regulations on EIA, it appears to me that section 20 of the Act and Regulation 26, provide the whole purpose and rationale of the EIA regime. Together they constitute its *raison d'être*. As stated in *Environmental Law*, by David Woolley, John Pugh-Smith, Richard Langham and William Upton (published by Oxford University Press 2000) at p. 676: "Environmental Impact Assessment is aimed at providing the competent authorities with the relevant information to enable them to take a decision on a specific project in full knowledge of the project's likely significant impact on the environment." There is therefore, no requirement that an EIA should provide or make the proposed project's impact on the environment fail-safe, fool-proof, neutral or even minimal. The EIA regime is to ensure that the decision-makers, with open eyes, are fully apprised of the possible impact of the proposed project on the environment. Hence, the stipulation in both the Act and the Regulation, that every scheduled project requires an EIA.
- [49] Therefore, I think there is some merit in the submission of Mr. Michael Young S.C. the learned attorney for the second respondent that there is some inconsistency or irreconcilability between the subsections of Regulation 20. That is to say, there cannot be publication of the requisite newspaper notice until after the submission of the EIA to the DOE, and yet sub-regulation (2) is saying that a copy of the newspaper containing the notice should accompany the EIA! The sequencing between the submission of the EIA and, the requirement to have a copy of the newspaper accompany it, is not doable at the same time. I believe, however, that teleologically, what Regulation 20 requires and means and intends as a whole, is the publication of the fact of submission of an EIA and notice of such submission to the public, with the necessary information. And this, I am satisfied, on the evidence, was done by the developer, the second respondent, in this case.
- [69] So in all, there are three specific provisions in the Act and the Regulations intended to express the public's interest in EIAs and projects, undertakings or activities impacting on the environment. But there are differences in intent and focus of these provisions vis-à-vis the public. An analysis shows that they may be grouped into two sets: first, public consultation and participation on, and in the EIA process itself. Section 25 of the Act and Regulation 18 address this set. The second set, is public hearing, and this is the subject of Regulation 24.
- [70] The intent and focus of Regulation 24 is not the EIA itself but on any undertaking, project or activity in respect of which an EIA is required. That is to say on the project, undertaking or activity itself.
- [75] What is clear from the evidence however, is that NEAC did vote for a public hearing on the project. But this vital point seems to have been submerged under the confusion between public consultation and debate and a public hearing proper. What was not sufficiently realized, was that the public hearing proper is not on the EIA of the project, but on the project itself. And one of the three principal functions of NEAC is to advise the DOE of circumstances where a public hearing is desirable. Evidently, the root of the confusion was when the public hearing should be held. From the minutes there is reference to "a decision". It is not clear whether this refers to a decision of NEAC on the EIA or a decision on it by the DOE. There was a failure, I think, to appreciate that public consultation on the EIA is a duty on the proponent (developer) of the project, and the desirability of a public hearing, is a function of NEAC to advise on or not. This confusion or failure throttled the positive vote for a public hearing from coming through.

- [77] The project, Chalillo dam, undoubtedly meets by, any definition, all the requirements of Regulation 24(2) to warrant a public hearing. Regulation 24 is not so much concerned with the EIA of the project itself as such; but rather the factors it states that are tied with or flow from the project. Regulation 24 is silent on the procedure for the holding of a public hearing. But, I think it would not be unreasonable for the DOE to announce and state the time and place for such a hearing on the Chalillo project. This, I believe, will not be out with the provisions of either the Act or the Regulations but rather in conformity with them. Perhaps, there is need to supplement the current Regulations to provide for EIA (Inquires Procedure) Rules, to govern the conduct of public hearing on projects or activities which must have an EIA because of their effects on the environment. There are no rules at the moment. But this is no bar to holding a public inquiry as clearly the Chalillo dam project would warrant, given the considerations specified in Regulation 24(2)(a)-(c), which are all, unquestionably, present in the project.
- [78] A public hearing is not the same as public consultation on and participation in the EIA of a proposed project. 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, consonant with the provisions of Regulation 24(2), 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.

Decision

The Court found that there was material and substantial compliance with the law and regulations. Although the provisions on public hearings were overlooked, these were not so substantial to render the decisions flawed, tainted or unreasonable. While not quashing the decision, it ordered the DOE to hold a public hearing.

Case Name	Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment and another
Citation	[2003] UKPC 63
Court	Privy Council

Background & summary

An alliance of nine environmental organizations opposed the building of dam and associated works in Chalillo along the Macal River requested interlocutory injunction to halt the project. According to the claimant, the Environmental Impact Assessment required mandatory public hearings and publicity requirements which had not been met. The Environmental impact Assessment was incomplete and deficient to such a degree as to be incapable of satisfying the requirements of the Act and Regulations and the Department of the Environment had failed to direct a public hearing. The case reached the Court of Appeal of Belize, which declined to hear the application for interim relief and dismissed the substantive appeal. While judicial proceedings occurred, a Macal River Hydroelectric Development Act was passed and works had started such as the building of access roads and construction of abutments of the dam.

The law

- Environmental Protection Act, Part V
- Environmental Impact Assessment Regulations

Highlights

- [35] Counsel were agreed (in the most general terms) that when the court is asked to grant an interim injunction in a public law case, it should approach the matter on the lines indicated by the House of Lords in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504, but with modifications appropriate to the public law element of the case. The public law element is one of the possible "special factors" referred to by Lord Diplock in that case (at p 409). Another special factor might be if the grant or refusal of interim relief were likely to be, in practical terms, decisive of the whole case; but neither side suggested that the present case is in that category.
- [37] In some public law cases (such as *R (on the application of Goldsmith) v Servite Houses and Wandsworth LBC*, (2000) 3 CCLR 354) the issue is a straightforward dispute between a public or quasi-public body (in that case, a charity providing care services on behalf of a local authority) and citizens to whom the services are being provided. In such a case an injunction may be granted to the citizen, without any undertaking in damages, if justice requires that course. Swinton Thomas LJ took into consideration the public importance of the case, involving the closure of a residential care home; the very serious consequences for the elderly and infirm residents who would be moved from accommodation in which they were settled; their prospect of success at the full hearing; and the relatively short period for which the injunction would be in force pending the hearing of the appeal.
- [39] Both sides rightly submitted that (because the range of public law cases is so wide) the court has a wide discretion to take the course which seems most likely to produce a just result (or to put the matter less ambitiously, to minimise the risk of an unjust result). In the context Mr Clayton referred to the well-known decision of the Court of Appeal in *Allen v Jambo Holdings* [1980] 2 All ER 502, [1980] 1 WLR 1252, which has had the result that in England a very large class of litigants (that is, legally assisted persons) are as a matter of course excepted from the need to give a cross-undertaking in damages. However their Lordships (without casting any doubt on the practice initiated by that case) do not think that it can be taken too far. The court is never exempted from the duty to do its best, on interlocutory applications with far-reaching financial implications, to minimise the risk of injustice. In *Allen v Jambo Holdings* Lord Denning MR said (at p 1257), "I do not see why a poor plaintiff should be denied a Mareva injunction just because he is poor, whereas a rich plaintiff would get it." On the facts of that case, that was an appropriate comment. But there may be cases where the risk of serious and uncompensated detriment to the defendant cannot be ignored. The rich plaintiff may find, if ultimately unsuccessful, that he has to pay out a very large sum as the price of having obtained an injunction which (with hindsight) ought not to have been granted to him. Counsel were right to agree (in line with all the authorities referred to above) that the court has a wide discretion.

- [45] The dam site is already a very busy construction site. Access roads have been built, large numbers of trees have been felled, and the abutments of the dam have been constructed. If no injunction is granted, the work (restricted by the wet season) will continue until the appeal hearing in December. It will then be further advanced, and the total expenditure incurred will be proportionately greater. But if BACONGO succeeds on appeal, it will be for the Board hearing the appeal to determine what significance (if any) to give to the fact that the work will have been in progress for about six months rather than about two months. That would depend on the view taken by the Board hearing the appeal as to what the justice of the case requires.
- [46] Their Lordships do not accept that BACONGO has been guilty of delay in applying for interim relief. Delays have occurred, but they occurred mainly because the Court of Appeal declined to hear the application for interim relief before the hearing of the substantive appeal, and declined jurisdiction on the renewed application after the dismissal of the appeal. The application to the Board has been made promptly. The fact that work has now been proceeding on the site for two months cannot sensibly be attributed to any fault on the part of BACONGO. Nevertheless, it is a fact which has to be taken into account.
- [47] Their Lordships have concluded that the grant of an injunction at this stage would entail a greater risk of ultimate injustice than its refusal. This dispute cannot fairly be described as a clash between public and private interests. Although BECOL is in the private sector, it is very closely associated in this matter with the government of Belize (first through the warranties and indemnities in the Third Master Agreement and now also through the 2003 Act) and there are public interests of real importance on both sides of the argument. Both courts below have, although for rather different reasons, rejected BACONGO's challenge to the project. Their reasoning and conclusions have not been shown to have been ill-founded. In their Lordships' view this is not a case in which, in the absence of an undertaking in damages, it would be right to halt a major project which is of real importance to the economy of Belize.

Decision

Their Lordships considered that injunction would entail a greater risk of ultimate injustice than its refusal and, therefore, dismissed the appeal. However, *locus standi* was recognized and the Council did not accept that the claimant had been guilty of delay in applying for interim relief.

Case Name	Belize Institute for Environmental Law v. Chief Environmental Officer et al
Citation	BZ 2008 SC 13 (302 of 2007)
Court	Supreme Court

Background & summary

On 5 April 2002, the Chief Executive Officer for the Department of the Environment concluded an Environmental Compliance Plan (ECP) with a developer who had received permission to build the Macal River Upstream Storage Facility (commonly known as the Chalillo Dam). Previously, on 9 November 2001, the National Environmental Appraisal Committee had recommended approval of the Environmental Impact Assessment contingent on a satisfactory ECP. The Dam was completed, and became operational, in November 2005. A non-governmental organization working on behalf of the communities down river from the dam brought a claim alleging that the Chief Environmental Officer had neglected and failed to carry out his public duty to monitor and ensure compliance with the terms of the ECP. Specifically, it referred to: i) implementation and making publicly available a satisfactory Emergency Preparedness Plan in case of a dam break; (ii) monitoring mercury levels in fish in the river; (iii) testing water quality in the river; and (iv) providing the public with information and ensuring participation relative to the ECP. The claimant argued that the developer had failed to conduct the foreseen public hearings, no radio announcement was made of the public sessions and the public participation component (such as the establishment of a Public Participation Committee) of the ECP had not been complied with.

The law

- Environmental Protection Act, Section 20(7)
- Environmental Impact Assessment (Amendment) Regulations, 2007

Highlights

- [21] The principal complaint of the claimant under this head is lack of information on and the availability of the E[mergency] P[reparedness] P[lan] in the event of a dam break.
- [23] The heart of the claimant's case in this regard is that there is no EPP as mandated by the ECP or ready access to it and that the first defendant has neglected or failed to ensure, as it is bound to do, that BECOL, the developer and interested party in these proceedings, comply with this requirement of the ECP. The claimant avers as well that there was no adequate or proper consultation by BECOL in the preparation of the EPP and that there is an alarming lack of information about it—see for example the affidavits filed for the claimant, in particular the affidavit of Judy du Plooy dated 28th August 2007, at paras. 6, 7, 10, 12, 13, 14 and 17 and paras. 13, 16 and 17 of Godsmen Ellis' second affidavit.
- [27] Be that as it may, this plan was however posted on the internet. This I must say was on the supposition that everyone has access to the internet. It is at present a reality of Belize and particularly in the areas that might be affected by a dam break, that not everyone is a traveler on the information super-highway that the internet is. The near ubiquity of this medium does not, in my view, meet the requirements that the likely-to-be-affected communities in Santa Elena/San Ignacio and Cristo Rey and others in the vicinity of the dam be informed and know of the EPP.
- [30] Therefore, I find and hold that in order to be compliant with its ECP, the EPP for the Chalillo Dam must be readily accessible and available, particularly to the communities in its vicinity likely to be impacted first by any possible emergency flowing from its operation.
- [31] I will therefore order that a copy of the EPP for the Chalillo Dam and the early warning system in the event of a dam break be placed and made available in Town Halls and libraries in the vicinity of the Chalillo Dam. That is to say, in San Ignacio/Santa Elena, and Cristo Rey. The finalised Cayo District Flood Plan of Action (the draft of which is exhibited to Mr. Sheldon DeFour's affidavit) be also put in place with the EPP.
- [32] I further order that the Dam Break Early Warning System and the communication of this system to relay a possible Dam Break Flash Flood, should be routinely tested or stimulated to test its effectiveness, particularly between June and November each year, in order to be compliant with the ECP for the Chalillo Dam. This no doubt, will help hone the reflexes of those in charge of the EPP and the Early Warning System, as well as increasing the awareness of the communities likely to be impacted in the event of a dam break.

- [39] It cannot therefore be said from the evidence, that there has been an outright failure to monitor the level of mercury in fish in this case. But there has not been consistent and reliable information on this made available to the people in the vicinity of the Chalillo Dam and the Macal River who consume fish. They have a right to this information through advisories issued by the Department of Health.
- [40] Although I am prepared to accept the submission on behalf of the defendant and the fourth respondent BECOL, that because the programme for monitoring mercury levels in fish is a multi-agency one and involving the cooperation of the DOE, Fisheries, Public Health authorities and BECOL, it might not be a suitable case to order a mandamus, I find however, that to be ECP-compliant, the information on mercury testing and its level in fish, should be made available to the local population in the vicinity of the Chalillo Dam.
- [41] An information programme explaining the health risks associated with the consumption of fish contaminated with mercury is necessary. Such information may be disseminated through town hall meetings, press releases, meetings with health officials and radio and local cable broadcasts. This is a requirement of the ECP in this case. I am not satisfied that this was done in this case. Mr. Suknandan at para. 37 of his 2nd affidavit states that the information has not been released because the Public Health Department has not approved the release of the information. And at para. 29 he refers to a proposed information programme. Getting the necessary information out to the public is important and this is clearly mandated in the ECP.
- [55] The claimant has also taken issue with the provision by BECOL of public information, awareness and education on the project as contained in its ECP. It cannot be doubted that the construction of a dam on a major river, such as the Chalillo Dam on the Macal River in the Cayo District will excite public interest, anxiety and concerns. This is so, if only for the possible impact the project might have on the environment, lives and livelihood of the local population. There may be those among them who would view the whole enterprise with suspicion, if not outright disfavour. Yet, there may be some who would welcome it and be possibly favourably disposed toward it. Whatever the disposition may be, however, it is necessary that there be public awareness of the project and its impact on the environment and that the local population in particular, be aware of the conditions under which environmental clearance has been granted to the project.
- [64] I must agree with the claimant's contention that the clear intent of the ECP in this respect was to have a committee that would promote greater participation of the likely-to-be-affected communities and with enhanced participation of women.
- [65] I am afraid, neither the defendant nor the fourth interested party has refuted or effectively countered the claimant's case on this score. Rather the evidence, such as it is from both the defendant and BECOL, in my view, falls a long way short of answering the case of the claimant. [...]
- [69] It is for all these reasons that I am not satisfied that there was complete or adequate compliance with conditions 8.24 and 8.25 of the ECP on public awareness and education.

Decision

The Court declared that the Department of Environment was lawfully bound to oversee implementation of the ECP. It also ordered that copies of the EPP be placed and displayed in town halls and libraries and these be updated as necessary, that the developer be required to carry out public information programme explaining to the local population along the Macal River in the vicinity of the Chalillo dam, the health risks associated with high levels of mercury in fish and that a programme for public information sessions informing the general public of the EIA and its ECP be prepared and developed. The Public Participation Committee must also be constituted or reconstituted.

Case Name	Gegg v. Marin, Minister of Natural Resources and the Environment
Citation	BZ 2008 SC 27
Court	Supreme Court

Background & summary

The director of a tour and cruise services company intended to construct a marina and pier in the area of Bella Vista, Belize City and requested all the necessary permits. The proposed development sparked public concern including the objection of the Belize City Council and the Ministry of Natural Resources and Environment revoked the granted permits. The claimant stated that the decision to cancel the permits was contrary to the principles of natural justice in that he was never given prior notification of the consideration of the decision and was never given any opportunity to be heard in relation thereto. The permits had been cancelled although all of its conditions were observed, breaching the claimant's legitimate expectation that these would not be cancelled except in accordance with their terms and conditions. Furthermore, it was alleged that the authority had made a decision with improper motives, taking into account irrelevant considerations.

The law

- Environmental Protection Act, Sections 17 and 52

Highlights

- [91] In accordance with section 17(7) of the Environmental Protection Act, the Minister may suspend or revoke a permit or vary its terms and conditions where the Minister considers it advisable to do so. This is a discretionary power. In my view, this discretionary power should not be exercised without giving the claimant a fair hearing. I agree with Mrs. Badillo that the right to be heard is undeniable.
- [94] I also agree with Mrs. Badillo's submission that the exercise of a licensing function by any authority is one to which the rules of natural justice would normally apply and this includes giving of notice of the substance of any objections and giving the applicant an opportunity to respond to those objections. See the case of R v. Huntingdon District Council, Ex parte Cowan and another supra. The question is whether the applicant in this case was given the substance of any objections and given an opportunity to respond to those objections. I find as a fact above that the claimant was not served with any enforcement notices which would show the details of any contraventions of his permits.
- [109] In my view, the claimant should have had the benefit of the principle of legitimate expectation that his permits would not be cancelled except in accordance with their terms and conditions and prior to that would have been given an opportunity to respond to any breach of the conditions or given an Enforcement Notice in accordance with the Environmental Protection Act. The evidence is that the permits were revoked and there is no evidence of breach of any of the eleven conditions of the licence. In my view, the application made to expand the project is not a breach of the conditions of his permit which he had already. That application could have been denied. Exhibits C.W. '8' and C.W. '9' show that Mr. Gegg already had permission. Further, the evidence is that the applicant was not given an opportunity to state his case. He was informed of the decision made.

- [113] The third ground is that the respondent's decision to cancel the Permits was unreasonable as the power to cancel Permits was exercised for a purpose alien to that for which they were granted in that the respondent took into account irrelevant considerations. Is there evidence that the defendant took into account irrelevant considerations? Ms. Williams admitted in her evidence that (1) the strongly canvassed concern with regard to the development was a factor in coming to its decision to revoke the permits though it was not the only concern. The other considerations she stated was that (2) there was failure to pay the annual fee for the period September, 2006 – September 2007 and (3) that the development intended required the conduct of an Environmental Impact Assessment and input from the public, (4) Permit was not for modified design (5) Refusal of Belize City Council to grant trade licences. These considerations were not communicated to the claimant before the cancellation of the permit.
- [126] In my considered view, Mr. Gegg could not legally expand his project without approvals. Further, there was nothing that prevented the DOE from conducting the EIA and holding public consultations. I agree with Mrs. Badillo that the revocation of the permits were caused by inappropriate political considerations. Also, that the opposition was not justified by the people as Mr. Gegg also had the support of the people.

Decision

The defendant's decision to cancel the permits was found to be in breach of the principles of natural justice and of the claimant's legitimate expectation that his permits would have been cancelled in terms of their conditions. The Court quashed the decision for being unreasonable and motivated by inappropriate political consideration.

Case Name	Sarstoon Temash Institute for Indigenous Management et al v. Attorney General et al
Citation	BZ 2014 SC 14 (394 of 2013)
Court	Supreme Court

Background & summary

A multinational company applied for permission to engage in exploratory oil drilling in the Sarstoon Temash National Park. The Environmental Impact Assessment for the proposed project was subject to a public consultation, held by the Department of Environment on 25 October 2012. Following consultation, Maya Communities wrote to the Prime Minister, formalizing their objections to drilling in the National Park. The company was granted drilling permission on 5 April 2013 contingent on an Environmental Compliance Plan. It was also authorized to commence the construction of an access road to the proposed well site which began on 16 June 2013. The claimant objected to oil drilling inside the National park and on Maya traditional lands alleging it was contrary to Belize law and requested that any permits or licenses issued be struck down. The permit had been granted without the free, prior and informed consent of the indigenous Maya communities and breached the claimants' legitimate expectation that the Government of Belize would comply with its obligations under the United Nations Declaration on the Rights of Indigenous People and the Judgment of the Supreme Court.

The law

- National Parks System Act
- Petroleum Act
- United Nations Declaration on the Rights of Indigenous Peoples

Highlights

- [9] The permission granted by the Government of Belize to conduct road construction and commercial oil drilling within the Sarstoon Temash National Park was not ultra vires the National Park System Act or the Petroleum Act. While it is obvious that road construction and commercial oil drilling are activities which will definitely damage the pristine nature of the park, the National Parks System Act itself allows the Administrator of the park to give permission for such activities to be conducted, once the Government of Belize has decided that there are other pressing uses in the national interest e.g. commercial oil drilling to which that piece of land can be put.
- [13] I agree fully with the submissions of Counsel for the Claimants on this issue. It is clear that the Supreme Court of Belize in Maya Lands Rights case No. 1 (which has not been appealed) and in the majority judgment of the Court of Appeal in *The Attorney General of Belize v. The Maya Leaders Alliance and the Toledo Alcaldes Association on behalf of the Maya Villages of the Toledo District et. al.*, Civil Appeal No. 27 of 2010, have recognized that the Maya have rights to lands in Southern Belize based on the Maya People's traditional use and occupation of those lands. I fully understand and appreciate the argument made on behalf of the Defence that since the lands claimed by the Maya have not been demarcated, or surveyed, then it is not clear whether those lands do or do not lie geographically within or extend to the National Park. However in deciding this issue I pay heed to the points raised by Mr. Courtenay that: (1) the nature of title of Maya historical lands is not such as can be delineated by meets and bounds, as they are an agrarian nomadic people and the nature of their title is anecdotal, rooted in stories of their traditional use of the land for farming, hunting, fishing, etc.; (2) the IACHR has already found in *Maya Indigenous Community of the Toledo District v. Belize*, Case 12.053, Report No. 40/04, InterAm. C. H. R., OEA/Ser.L/V/II.122 Doc. 5 rev. 1 at 727 (2004) that the Government of Belize had violated the rights of the Maya by granting a permit without first obtaining the free, prior and informed consent of Maya when dealing with land that could fall within those claimed by them as traditional Maya Lands; (3) the judgment of Conteh CJ in Maya Lands case No. 1 plainly puts the onus of demarcating property belonging to the Maya on the Government of Belize in consultation with the Mayas. It is not for the Mayas to come and prove that their land lies within the park. It is for the Government of Belize to meet with the Mayas and make good faith attempts to arrive at a mutual understanding and agreement as to what areas of land will be demarcated as Maya Lands. The principle of "free, prior and informed consent" is one which was set out very clearly in the United Nations Declaration on the Rights of Indigenous Peoples at Article 32 [...] I agree with the submission made on behalf of the Claimants that Belize, as a member state of the United Nations which voted in favor of the United Nations Declaration on the Rights of Indigenous Peoples on 13th September, 2007 is clearly bound to uphold the general principles of international law contained therein [...].

- [13] It does not appear to be good faith on the part of the Government or the oil company to throw a 300 plus document written in English in highly technical scientific language at these indigenous people and give the agrarian Mayan communities many of whom speak only Mopan/Q'eqchi language twenty days to digest it before the scheduled meeting. I find that the failure of the Government of Belize to obtain the free, prior and informed consent of the Maya people prior to granting the concessions and permissions for the construction of a road and drilling for oil within the National Park was unlawful.
- [14] [...]The decision is irrational for the reasons stated by the Claimants that: (1) the Defendants knew that the Supreme Court and the Court of Appeal of Belize had recognized and declared the communal property rights of the 1st to 5th Claimants; (2) the Defendants knew that the concessions, permissions and licenses fell within, or were likely to fall within the Claimants' communal property; (3) the Defendants proceeded to grant the permissions and licenses or continued the concessions despite this knowledge. I would add to this the fact that the Government failed to obtain the free, prior and informed consent of the Claimants as discussed above, despite being aware of the judgments of the Supreme Court and the Court of Appeal and in so doing I find that the Government of Belize acted irrationally, especially in light of Belize's obligations to its indigenous peoples under the American Declaration of Human Rights and United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).
- [15] [...] I fully agree with the submissions made on behalf of the Claimants on this issue. In the Maya Lands case No. 1 at the Supreme Court Conteh CJ set out the rights of the Maya to lands in Southern Belize based on their ancestral title and the accompanying principle of free, prior and informed consent. This was affirmed by Morrison JA at the Court of Appeal level. In my view, legitimate expectation arises not merely from the fact that Belize is a signatory to the American Declaration of Human Rights and has ratified the treaty, but also from the fact that the Government of Belize has itself made a treaty with the Maya people in 2000 [...].

Decision

The Court found that the Government's grant of permission for both oil drilling and road construction in the National Park was irrational and unreasonable, as it was made without the free, prior and informed consent of the indigenous Maya communities. It also found that the permission constituted a breach of the legitimate expectation of the Maya Peoples that the Government would comply with their international obligations. While not striking down the permits or licenses, the Court ordered the Government to obtain free, prior and informed consent from the claimants with respect to any contract permit or licence that falls within the National Park.

Case Name	Ya'axché Conservation Trust v Wilber Sabido, Chief Forest Officer, Attorney General and Belize Hydroelectric Development and Management Company Limited
Citation	[2014] CCJ 14 (AJ)
Court	Caribbean Court of Justice

Background & summary

A non-governmental conservation organization appointed to co-manage the Bladen Branch Nature Reserve filed an application for special leave to appeal against the decision of the Court of Appeal of Belize that the National Parks System Act properly authorized the Administrator of the reserve to issue a permit a hydroelectric development company to conduct feasibility studies on a river within the reserve. The applicant argued that the object of the act was to protect biological communities or species and to maintain natural processes in the natural reserve. By the time the matter came up for trial, the permit had expired and had not been renewed.

The law

- National Parks System Act

Highlights

- [3] The question arises as to whether this Court can hear academic appeals and, if so, in what circumstances and subject to what considerations should it do so. The rules governing appeals to this Court are stated in very broad terms. Section 104 (3) of the Constitution of Belize says that "an appeal shall lie to the Caribbean Court of Justice with the special leave of the Court from any decision of the Court of Appeal in any civil or criminal matter" (emphasis added). Section 8 of the Caribbean Court of Justice Act 2010 is, in all material respects, identically worded. Notwithstanding this broad competence to entertain "any" appeal, it is an important feature of our judicial system that this Court decides disputes between the parties before it and does not pronounce on abstract or hypothetical questions of law where there is no dispute to be resolved. In general, there must exist between the parties a matter in actual dispute or controversy which this Court can decide as a live issue.
- [4] However, there is not an absolute rule that bars the hearing of a matter even if by the time the appeal reaches this Court there is no longer a live issue between the parties. Several Caribbean courts have accepted that an academic appeal may be heard if it raises an issue of public interest involving a distinct or discrete point of statutory interpretation which has arisen in the past and may arise again in the future. These circumstances approximate to those in which a final court should exercise its discretion to entertain an academic appeal as discussed by the House of Lords in *R v Secretary of State for the Home Dept, ex parte Salem* and by the Judicial Committee of the Privy Council in *Antigua Power Company v Attorney General of Antigua and Barbuda*; decisions that we find highly persuasive. For the reasons given at [3] we agree that this Court should be cautious in the exercise of its discretion to entertain an academic appeal and should in principle only do so where the question is one of public law (as distinct from private law rights disputes between parties) and where there are good reasons in the public interest to hear such an appeal. We agree with Lord Slynn of Hadley who, in delivering the judgment of the House in *ex parte Salem*, stated that an appropriate circumstance for hearing an academic appeal may be where the appeal raises a discrete point of statutory interpretation of the powers of a public authority without need for detailed consideration of the factual situation, especially where the issue is likely to arise again for resolution in the future.

- [6] There are compelling features of the present case which would make it appropriate for us to hear the appeal, though academic. This matter does not concern private law rights but rather a narrow and discrete point of public law namely the proper construction to be placed on the statutory power of the Administrator to grant authorization to conduct otherwise forbidden activities within a nature reserve. There are no complex facts to be sorted or resolved. The issue of statutory interpretation is of great significance to the protection of the environment in Belize and, in particular, the protection of areas declared for the protection under the Act such as national parks, nature reserves, wildlife sanctuaries and natural monuments and the underlying principle of the rule of law. Cases raising similar issues have occurred in the past and are likely to recur in the future. Moreover, the matter of the validity of the annual permit is unlikely to come before the ultimate court before the period of the permit is exhausted. In these circumstances we consider that we can and should hear the appeal provided that the Applicant has met the applicable standard for the grant of leave.
- [10] Accordingly, the application for special leave is refused. There shall be no order as to costs in these proceedings.

Decision

Although there was no live issue to be resolved, the Court heard the case. It was not persuaded that the applicant had made out an arguable case. The act expressly authorized the administrator to authorize activities that could have detrimental effects on the nature reserve but public law principles forbade that the power could be exercised to alter the essential characteristics of the nature reserve. The Court found that the authorization would not have the detrimental effect of undermining the essential natural of the reserve.

Case Name	Belize Tourism Industry Association v. National Environmental Appraisal Committee; Department of Environment and Belize Island Holdings Ltd.
Citation	BZ 2016 SC 1 (223 of 2014)
Court	Supreme Court

Background & summary

A multinational cruise line company planned on building a cruise tourism centre in the South of Belize. The project application was approved by the Department of Environment (DOE) and National Environmental Appraisal Committee (NEAC) following a highly critical public meeting at which an Environmental Impact Assessment submitted by the defendant was reviewed and discussed. The claimant, a non-governmental representative organization, sought judicial review of the decision and the process leading up to the decision. It alleged that the Authorities did not comply with the EIA Regulations—specifically the publication and notice requirements contained therein—in the decision-making process. No relief was claimed and no attempt was made to stop the project. However, the Court considered it could entertain the question because of its significant public interest and importance.

The law

- Environmental Protection Act
- Environmental Impact Assessment Regulations

Highlights

- [102] On a fair reading of the provisions of EIA Regulations it seems to me clear that reference to an EIA for public consultation must be reference to a completed, and not a partial or incomplete EIA (including any Consultation Report and/or Supplemental Information and/or Addenda). It seems to me that to find otherwise would seem to defeat the purpose of the public consultation process, if it is to be a meaningful exercise, and if it is to function meaningfully as part of the decision making process.
- [103] In addition, and most importantly, it seems to me that it would be defeating the expressed objective of providing the opportunity for any affected or interested person, during the prescribed period, to make objections and representations to the DOE in relation to the effects of the proposed project activity on the environment.
- [104] If the EIA is incomplete, and thereby such persons would not have, what might be important, supplemental information and material before them, because it was omitted, the effect would be that they would be deprived of the opportunity to comment on the very information which the process was designed to encourage them to comment on and to engage their participation. They might be denied the opportunity to comment and express their views on proposed project activity that may be harmful to the environment and which they may be affected by it as a result of such information being omitted. This court cannot imagine that by enacting the EI Regulations the legislature intended it to be so self-defeating.
- [105] It may be, however, that the significance of the omitted information may be fact sensitive, and a determination of whether the public consultation provision has been defeated, may therefore turn on the facts and circumstances of the individual case. But as a matter of principle it is clear that reference to an EIA for public consultation must be considered from the start, without short-cuts, as reference to a completed EIA with all information and material available to the public for consultation.
- [129] I have carefully looked at and considered the significance of the breaches which I have found and of the omitted information and all the facts and circumstances of the case generally with a view to determining what consequence should flow from my findings that the consultation process was somewhat short-circuited and shortcuts were taken, which ought not to have happened. I also considered how this court could send a message to ensure that should this situation arise in the future the NEAC would be discouraged from taking a similar course and send a clear signal that this court would frown upon this taking place. It is the hope of this court that it will not happen again in the future should such a similar situation arise. Specifically that a completed EIA with all information and material will in the future be made available to the public for consultation and that there should be full compliance with the statutory publication and notice requirements.

Decision

The Court declared that there was a breach of Regulation 20 of the Environmental Impact Assessment Regulations in that the published notice in relation to the Addendum to the EIA did not appear the required number of times in two newspapers. The content of the published notice was also deficient as it failed to state the name of the Applicant, specify the times and the period during which the EIA could be inspected and the date on which the EIA shall be available to the public and failed to provide adequate time for the public to prepare its comments. However, the decision was not vitiated or quashed. In the opinion of the Court, though the non-compliance was neither trivial nor de minimis, nor can it be condoned or countenanced, it was not so flagrant a defiance of statutory obligation as to amount to bad faith and there had been substantial and meaningful consultation.



Jamaica

Case Name	Northern Jamaica Conservation Association and JET v NRCA and NEPA
Citation	HCV 3022 of 2005
Court	Supreme Court

Background & summary

A hotel developer wished to build a 1918 room hotel in Pear Tree Bottom, an area along the northern coastline of Jamaica that is particularly rich in biodiversity and very sensitive from an ecological standpoint. Two non-governmental organizations challenged the decision to grant the environmental permit given to the developer by the Natural Resources Conservation Authority and the National Environment and Planning Agency. The applicants' position was that the authority had acted irrationally when granting the permit and that the Environmental Impact Assessment was so flawed that any decision based on it was unreasonable. Furthermore, they argued that an important part of the relevant information was not placed in the public domain and the public was not informed about this omission.

The law

- Natural Resources Conservation Authority Act, Sections 4 and 9

Highlights

- [38] It is now safe to say that consultation of citizens by public bodies and authorities is now a well established feature of modern governance. Sometimes a statute may impose a duty to consult. At other times the decision maker decides to consult where there is no statutory duty to consult. The law now requires that any consultation embarked upon must meet minimum standards. The standard is the same whether the consultation arises under statute or voluntarily undertaken by the decision maker.
- [39] Lord Woolf explained that consultation is not litigation. Consultation does not require the disclosure of every submission or (absent a statutory mandate) all the advice received. The duty entails letting "those who have a potential interest in the subject matter know in clear terms what the proposal is and exactly why it is under consideration, telling them enough (which may be a good deal) to enable them to make an intelligent response". [...] Lord Woolf accepted the proposition that "adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken".
- [40] It does not follow from this that flaws in the consultation process will necessarily mean that the decision should be quashed. It would seem to me that it depends upon the seriousness of the flaw and the impact that it had or might have had on the consultation process. Consultation is the means by which the decision maker receives concerns, fears and anxieties from the persons who might or will be affected by his decision. These concerns should be taken into account conscientiously when making his decision.
- [43] The EIA was then disseminated to the public for their comments. The public were asked to submit their comments by March 29, 2005. Mr. Smith said that the document was sent out on March 7, 2005. Miss Lee swore that she did not receive it until March 21, 2005. There is no evidence challenging this assertion and I accept it. This, in practical terms, meant that she had eight days to review a 111 page document which contained graphs, maps, references to literature, statistical and technical information [...]. This reduced the ability to secure technical advice if needed. Despite these difficulties, NJCA submitted its own response by April 18, 2005 and a joint response with JET by April 28, 2005. A public meeting was held on April 28, 2005, in Runaway Bay, St. Ann.
- [44] All this appears to be an example of a public body engaging in consultation. However it had one defect. It is common ground that a marine ecology report that should have formed part of the EIA was not submitted at the time the EIA was sent to the NRCA. The marine ecology report was also missing at the time of the public meeting. In fact, the public, other than perhaps the applicants, still do not know of the marine ecology report. The report has not been exhibited. It is said that this was an oversight. No one knows what effect it might have had on the public discussion. No one knows if a different decision would have been made had it been made public or how it would have affected the public's understanding of the project.
- [51] This omission is significant. The area under consideration is agreed to be an area that is an ecologically important area. It is located where two rivers enter the sea. There are mangroves that filter the fresh water that runs into the sea and that helps to balance the salinity of the sea so that marine life suitable to that environment can flourish. [...]
- [79] The NRCA has published guidelines indicating how public consultation ought to take place. The first level of consultation is that done by those responsible for doing the EIA. When the EIA is completed it is then disseminated for public discussion. The purpose of this is to receive responses from members of the public and interest groups which ought to be taken into account when the decision whether to grant the permit is being considered.
- [81] On the face of it, it would seem that there was adequate public consultation on the matter. It is accepted that the EIA did not have the marine ecology report as it ought to. The applicants have, since the application for judicial review was granted, learnt of the May and June addenda. It would seem to me that if there is going to be effective public discussion then all the information that ought to be disclosed must be disclosed. This is a legitimate expectation of the applicants. [62]

Decision

The court concluded that the order of certiorari should be granted quashing the decision to issue the permit. It also emphasized that consultation of citizens by public bodies and authorities was a well established feature of modern governance and stated that the public had been deprived of participating in a consultation process with complete information, which was even more significant since the proposed project affected an ecologically sensitive area. It therefore instructed the authority to reconsider its decision to grant a permit to the developer.

Case Name	Jamaica Environment Trust (JET) v. The Mines and Geology Division (MGD)
Citation	AT/MGD/2007/2
Court	Access to Information Appeal Tribunal
Background & summary	
<p>The Mines and Geology Division failed to grant access to all the information requested by an environmental non-governmental organization for maps and documents regarding commencement and completion dates for partial mined and mined out orebodies and certificate of completion and other documents stating the dates of reclamation, rehabilitation and restoration of each of the orebodies. The respondent argued that the information was not provided because it was not created or contained exempt material pursuant to Section 20 of the Access to Information Act.</p>	
The law	
<ul style="list-style-type: none"> - Access to Information Act 	
Highlights	
<ul style="list-style-type: none"> - [10] The Access to Information Act places a duty on public authorities to acknowledge receipt of every application and grant access to documents which are not exempt under the Act. The Authority has a duty to respond to the request within thirty days subject to a further extension of an additional thirty days. - [15] A trade secret must be information used in trade or business. In this case there can be no dispute as to whether the maps requested by JET are used for a trade or business, specifically that of mining companies. - [16] Notwithstanding the use of such maps for the purpose of carrying on business, the information revealed by the maps, being the location of ore bodies that have been mined out or partially mined, are not wholly or entirely confidential in nature and as such do not have a sufficiently high degree of confidentiality so as to be considered a trade secret. - [17] The maps requested by JET reveal nothing more than the areas which have been mined pursuant to the grant mining leases. The location and map of any area to be mined forms a part of the documented mining license. [...] - [18] Section 66 of the Mining Act stipulates that all mining licenses must be registered. The public is entitled to copies of or extract from any entry in a register by virtue of section 69 of the Mining Act. - [19] The right of the public to obtain access to maps showing the areas to be mined are further reinforced by the Mining Regulations which require the Commissioner of Mines to publish a notice setting out the main particulars of a mining lease once in the Gazette and once in a daily newspaper. [...] - [20] Any member of the public can readily obtain a map of the area being contemplated for mining. If maps showing areas to be mined are within the public domain then it is a fallacy to assert that maps of specific areas which have been mined are secret. Furthermore, ore bodies created through the process of open pit mining is so extensive and the visual impact so obvious and distinct that such areas cannot be shielded from the ordinary passerby. - [27] This is not a case where the request is for prospecting maps which serve to identify potential sites for orebodies. As stated previously, the only information revealed by the maps is the location of the ore bodies which have been mined out or partially mined. Where the ore bodies have been mined out, there can be no value to a competitor from obtaining such information as the mineral deposits have already been extracted. - [28] The Appellant submits that disclosure of the maps for areas partially mined or where a mining lease remains in effect, even to a competitor, will not prejudice the holder of a mining lease. The provisions of the Mining Act as stated above prohibit a competitor from mining the same area as the holder of a mining lease by virtue of the exclusive rights given to such holder. - [38] It is submitted that MGD failed to keep the appellant informed of the status of their request. JET received no response from MGD as to where a decision was taken regarding the request for an internal review and if so what was the actual decision. This effectively put JET in the position of having no documents and no knowledge as to whether the documents would be provided at all. 	
Decision	
<p>The Tribunal decided that the maps and documents requested be made available to the applicant as they do not contain any matters exempt under the Access to Information Act.</p>	

Case Name	Delapenha Funeral Home Limited v. The Minister of Local Government and Environment
Citation	JM 2008 SC 72
Court	Supreme Court
Background & summary	
<p>A funerary services company presented an application for judicial review of the decision of the Minister of Local Government and Environment ordering the cessation of the company's development of a cemetery until a full Environmental Impact Assessment (EIA) had been conducted. The company had initially been granted permission to develop the project without an EIA but residents of the community objected to the construction fearing water contamination. Since the assessments conducted revealed no threat to the underground water resources in the area, the company argued that the Minister's decision was irrational and unreasonable as it took into account irrelevant and immaterial considerations and/or failed to take into account relevant and material considerations and acted ultra vires.</p>	
The law	
<ul style="list-style-type: none"> - Natural Resources Conservation Authority Act, Sections 9, 10, 11, 12, 13 and 32 	
Highlights	
<ul style="list-style-type: none"> - [93] It is clear that section 10 of the N.R.C.A. Act empowers the N.R.C.A., at their discretion, to require an applicant for a permit or the person responsible for undertaking any construction or development to submit an E.I.A., where it is of the opinion that the activities of such construction or development are likely to have an adverse effect on the environment. - [94] I accept the respondent's submission that at the time at which the Company applied for the permit, the N.R.C.A. did not deem it necessary to require an E.I.A. as the information from the regulatory agencies (N.W.A., E.H.U.), as well as the technical opinion of NEPA, concerning the development, did not warrant such an assessment based on impacts. - [95] The respondents submit that in light of the new information received, it was possible for the N.R.C.A. to have requested the Company, responsible for construction and development of the site, to have submitted an E.I.A. A close reading of the relevant section suggests that that is correct. I agree however with the submission that section 10 is limited in scope and that the N.R.C.A. would not have been empowered to suspend the development pending the E.I.A. I can also see where what the N.R.C.A. would now have wanted provided to it would be an E.I.A. performed by an independent body, as opposed to the Company. - [113] [...] On a simple level, EIA is merely an information-gathering exercise carried out by the developer and other bodies which enables a local planning authority to understand the environmental effects of a development before deciding whether or not to grant planning permission for that proposal. On this level, however, there is little to distinguish this concept from the normal planning process under which environmental effects are a material consideration. The innovation behind the formal EIA process is the systematic use of the best objective sources of information and the emphasis on the use of the best techniques to gather that information. The ideal EIA would involve a totally bias free collation of information produced in a form which would be coherent, sound and complete. It should then allow the local planning authority and members of the public to scrutinise the proposal, assess the weight of predicted effects and suggest modifications or mitigation (or refusal) where appropriate. [...] Thus, EIA is a technique and a process. It is inanimate rather than tangible. The key point is that strictly the 'assessment' is undertaken by the local planning authority on the basis of environmental information supplied to it. This information consists in part of an environmental statement prepared by the developer (or more likely, by hired consultants) which details at least the main environmental impacts of the project and any mitigating measures which are proposed to reduce the significance of those impacts. But just as importantly it also includes other information supplied by various statutory consultees (e.g. EA, English Nature), independent third parties (such as local conservation and amenity groups), members of the public and even the local planning authority itself. Crucially, EIA is an inherently procedural mechanism. Although it is intended to be preventive (and, some would argue, also precautionary), there is nothing that requires the decision-maker to refuse a development project because negative environmental impacts are highlighted by the EM, or even to impose conditions to mitigate any such impact. It should also begin as early as possible when projects are being planned. A further, and crucial, point is that EM should be an iterative process, where information that comes to light is fed back into the decision-making process. - [139] It is clear to my mind that in this case both the N.R.C.A. and the Minister acted in good faith and had the interests of the citizenry at heart, in particular their health and safety. They had in mind protection of the environment, of the water resources in the area. Both purported to act with the precautionary principle in mind but, regrettably, the result was that the Minister responsible for the Environment acted unlawfully. This case suggests to me that one way to implement and exercise the preventive and precautionary principles may be to categorise projects such as, the instant one, projects to do with cemeteries, (because of their nature size and location) as requiring compulsory Environmental Impact Assessment before permits are granted. This will of course be in the final analysis a matter for the technocrats and legislators. As the extract from Ball and Bell on Environmental Law, referred to earlier treating with "Environmental Impact Assessment" indicates, the E.I.A. should begin as early as possible when projects are being planned. Ideally, it will allow for all stakeholders, including the applicant for the permit, the statutory consultees, members of the public, and independent third parties, such as local conservation and environmentalist groups to have some input and dialogue. Though at a cost to tax payers, conducting the E.I.A. from the outset would foster greater public confidence in the regulatory and planning systems and may be the prudent course to take in the long run. I daresay that had the N.R.C.A. required, or been able to require an E.I.A. in the first place when the Company applied for the permit, the public objection and outcry by the citizens of Ramble, may well have been quelled, or at any rate substantially diminished. 	
Decision	
<p>The Court found that the authority acted outside of its statutory powers as the Natural Resources Conservation Authority Act authorized stop orders in limited circumstances, none of which were applicable to the facts. The Minister had thus acted irrationally and unreasonably.</p>	

Case Name	Jamaica Environment Trust (JET) v National Environmental and planning Agency
Citation	AT/NEPA/2010/1
Court	Access to Information Appeal Tribunal
Background & summary	
<p>An application had been filed by an environmental non-governmental organization to the National Environmental and Planning Agency requesting veterinary reports for the Dolphin Cove facilities in Ocho Rios and Montego Bay. The Agency stated that some documents could not be disclosed on the basis of caution that it may be exempt and that it would consult a third party to determine if the document should be released. The Agency consulted the company whose information was being requested, which objected to the disclosure. Influenced by the objection of the affected party, it denied access. The claimant argued that the information was not exempt as it was so accepted by the Agency in previous communications and it had previously granted access to similar reports. The documents did not contain information concerning the commercial interests of any person or organization and contained information of no commercial value.</p>	
The law	
<ul style="list-style-type: none"> - Access to Information Act 	
Highlights	
<ul style="list-style-type: none"> - Counsel for JET submitted that, pursuant to section 32 (6)(a) of the Act, burden of proof is on NEPA as a public authority to prove that the information requested is exempt. [...] - Counsel for the respondent NEPA, readily accepted that the Act is definitive in the use of the word 'would' which is quite different from the word 'may' as used by NEPA in refusing to grant access to the information sought. - It would appear that, although NEPA had, by their letter dated 29/3/10, to Dolphin Cove, stated in part "... and must inform you that the above report is not exempt under the Act and as such can be disclosed to the public", NEPA had resiled from that position when Dolphin Cove made an objection. A public authority should never abdicate its responsibility to make a decision which it is required to make under the law, with the expectation that the Tribunal will discharge that responsibility. Where a document is not exempt under the Act, the public authority is obligated to release the document. 	
Decision	
<p>The Tribunal concluded that the information sought was not exempt under the law and should be made available to the appellant.</p>	

Case Name	Jamaica Environment Trust v. Natural Resources Conservation Authority and Natural Environment & Planning Agency
Citation	JM 2011 SC 121 (HCV 5674 of 2010)
Court	Supreme Court
Background & summary	
<p>On 16 February 2007 Jamaica's National Works Agency (NWA) submitted applications for the construction and dredging projects in the Palisadoes, an area with significant historical, ecological and cultural value. An Environmental Impact Assessment (EIA) was requested, which according to the Environmental Impact Assessment Guidelines required a public presentation is required unless the Authority deems a waiver appropriate. Two public meetings were held. Before starting work, the NWA submitted new designs and a new application in July 2009. Major storms caused increased damage to the roadway and surroundings to be worked on, requiring a new plan. This new plan changed the scope of the work to be completed. Upon review of the new application, the authority deemed that an EIA was not required and approved the new application on August 17, 2010. An environmental non-governmental organization sought a declaration that the Natural Resource Conservation Authority (NRCA) and/or the National Environment & Planning Agency (NEPA) breached their statutory duty and/or acted unreasonably or irrationally by allowing the project to proceed without having obtained all the relevant permits. Furthermore, the respondents breached the legal standard for consultation and breached the legitimate expectation that all environmental information relating to the development of Palisadoes would be disclosed to the public and the applicant before approval was granted.</p>	
The law	
<ul style="list-style-type: none"> - Natural Resources Conservation Authority Act, Section 9 - NEPA Guidelines on Environmental Impact Assessments 	

Highlights

- [31] It is clear that the EIA alerts the decision-maker and members of the public to the effects of the proposed activity. The public presentation provides additional avenue for the public to raise questions about the proposed project also for the proponent to respond and make any necessary changes to the project and the EIA report (see NEPA Screening and Scoping Process, paragraph 2.3).
- [32] If the proposed activity is modified, then even if a further EIA is not required, it should be evident that the public consultation would have to be extended in order to present the modified design and allow for concerns to be addressed and discussed before any permits or licences are granted in relation to the modified design.
- [33] When the issues are examined in light of the criteria laid down by Lord Woolf MR in *R v. North and East Devon* supra, it is clear that the defendants fell woefully short by breaching the legal standard of consultation and the legitimate expectation that all the relevant environmental information would be disclosed to the public before approval was given.
- [34] The New Design Summary as well as the later CEAC report should have been disclosed prior to any approval being granted as Mr. Knight has stated that the CEAC report 'examined the scope of the new proposed works and the resultant impact on the coastal and terrestrial environment and recommended mitigation measures.' At the least, since the new design would include the removal of the mangroves on the harbour side, (as a result of the proposed rock revetment); there should have been disclosure and adequate time given for the consideration of this activity.
- [37] I am not of the opinion that the defendants would have been required to disclose this plan as part of the consultation process. Their obligations would have been met once the modified design with any resulting environmental impact had been disclosed and the concerns of the public taken into account.
- [45] I am constrained therefore to reach the conclusion that the defendants breached the legal standard for consultation and breached the legitimate expectation that all environmental information (in particular, the Modified Design Plan and the CEAC report) relating to the development of Palisadoes would be disclosed to the public and the applicant before approval was granted.

Decision

The court granted the declaration that the NRCA and/or NEPA breached the legal standard for consultation and breached the legitimate expectation that all environmental information relating to the development of Palisadoes would be disclosed to the public and the applicant before approval was granted.



Saint Kitts and Nevis

Case Name	Anne Hendricks Bass v. Director of Physical Planning
Citation	NEVHCV 2016/0059
Court	Eastern Caribbean Supreme Court, High Court of Justice (Civil)

Background & summary

In January and February of 2016 the claimant attempted to gain access to information relating to a resort development on Nevis including the copies of a site plan, a drainage plan and an Environmental Impact Assessment. She alleged that the Nevis Department of Physical Planning acted in contravention of its functions and had denied her copies of documents relating to the application to which she was entitled. Although her agent was allowed to see the plans she was not allowed to take pictures or copies of the documents comprising that application. The Director of Physical Planning stated that in the exercise of his discretion although not mandated by law, the public was sometimes allowed to see the plans and documents of current projects but not to take copies as this was not in the Ordinance. Furthermore, the application for permission to develop land was not within the public domain and the public does not have a right of access to the documents. The claimant requested an order of certiorari to quash the decisions of the respondent denying access to information recorded in the Department of Physical Planning register related to the development and an order of mandamus to compel the respondents to provide access thereto and take copies of such information.

The law

- Nevis Physical Planning and Control Ordinance, Sections 3 and 47

Highlights

- [30] In order to determine this first Issue the Court must seek to interpret Section 47 of the said Ordinance. In so doing, the Court must ensure that it ascertains what the intention of the legislature was, at the time of the enactment. The Court usually has regard to the Literal rule of Interpretation which requires, in the interpretation or construction of an Act of Parliament the acceptance of words which are precise and unambiguous. See: *Lennox Linton vs A.G of Antigua and Barbuda-See: Sussex Peerage case*. However, where the literal interpretation of the statutory provision leads to an absurdity or yields unjust results, the Courts have from time to time utilised the rules of Interpretation. The Mischief or the Golden rule of Interpretation enables the Court to ascertain the meaning of words in order to avoid repugnance or absurdity. See: *Grey vs Pearson*. It is the general principle of Statutory Interpretation that every clause or Act must be construed in the context of, and with reference to the other clauses or sections of that statute. The Court must always seek to determine the Legislative intention.
- [31] Justice Hariprashard-Charles in the case of *Bebo Investments Ltd. vs The Financial Secretary* observed that the dominant purpose in construing a statute is to ascertain the intention of the Legislature as expressed in the statute, considering it as a whole, and in its context. The intention is primarily to be sought in the words used in the statute itself, which must, if they are plain and unambiguous be applied, as they stand however strongly it may be suspected that the result does not represent the real intention of Parliament.
- [32] In *Pinner vs Everett* Lord Reid stated this principle in the following terms; "In determining the meaning of any word or phrase in a statute, the first question is what is the natural or ordinary meaning of that word or phrase in its context in the statute. It is only when the meaning leads to some result which cannot reasonably be supposed to have been the intention of the Legislature, that it is proper to look for some other permissible meaning of the word or phrase."
- [35] Lord Scarman in the said case of *Stock vs Frank Jones (Tipton Ltd.)* stated; "If the words used by Parliament are plain, there is no room for the "anomalies" test, unless the consequences are so absurd that, without going outside the statute, one can see that Parliament must have made a drafting mistake. If words have been inadvertently used, it is legitimate for the Court to substitute what is apt to avoid the intention of the Legislature being defeated. This is an acceptable exception to the general rule that plain language excludes a consideration of anomalies (i.e.) mischievous or absurd consequences. If a study of a statute as a whole leads inexorably to the conclusion that Parliament has erred in its choice of words, the Courts can and must eliminate the error by Interpretation; but mere "manifest absurdity" is not enough; it must be an error of commission or omission which in its context defeats the intention of the Act."
- [57] I am of the respectful view that to interpret the Nevis Physical Planning and Development Control Ordinance in the way that learned Counsel for the Respondents suggest would defeat the purposes of Section 47 of the said Ordinance, and import absurdity into the objectives of the Ordinance that is contrary to its expressed language.
- [60] In my respectful view it could not be in the interests of Justice to give the section such a rigid interpretation which would possibly yield to absurdity and which would be contrary to the intention of the Legislature. It is pellucidly clear to the Court that a purposive approach as envisaged by Section 3 (2) of the Ordinance must be given to the interpretation of Section 47. I am fortified in this view, since there is nothing in the scheme of the legislation that will support the Court giving such a narrow and restrictive Interpretation. In summary, the Court is of the considered view that the case at Bar requires the application of the Golden rule of Interpretation. If this Court was to apply the austere interpretation to the section that learned counsel for the Respondents has submitted it would yield results that are repugnant to both the intention of the Parliament and to common sense.
- [61] Consequently and for the sake of completeness and emphasis, I reiterate that Section 47 of the Nevis Physical Planning and Development Ordinance must be construed in the context of and with reference to the other clauses or sections of the Ordinance. On that basis I am persuaded that the meaning and intention of the Legislature was to allow public access to the Register containing all the Physical plans and documentation on which an application for permission to develop land was made. Further the section contemplated that access to the said documents were to be made free of charge and to take copies of such information on payment of the prescribed fee.
- [66] After reviewing the evidence of the Director of Physical Planning and his subordinate staff. I have no doubt that the actions of the Director of Physical Planning severely diminished the value of the access that was given to the public by the Legislature to view and take copies of the Information on any application for permission to develop land.
- [67] In the circumstances I accept the submissions of learned Counsel Mr. Garth Wilkin and adopt a purposive approach which seeks to give effect to the true purpose of the legislation and further hold that the Director of Physical Planning's decision to restrict public access to information regarding Applications for development purposes is unlawful and illegal and in breach of Section 47 of the Nevis Physical Planning and Development Control Ordinance. Mr. Williams has acted ultra vires and reached a conclusion on an erroneous basis and interpretation of the Law.

Decision

The Court found that the Director of Physical Planning—by disallowing complete access to information recorded in the Department of Physical Planning register—acted beyond his legal power and authority, as vested by the Ordinance. By exercising his own discretion in not allowing the members of the public to view and take copies of documents forming an application for development of land, the Director was acting unlawfully. The Court also declared that Claimant was to be granted, during ordinary business hours, access to all information in the registers required to be kept by the Defendant and compelled the respondent to provide access to the claimant or any of her agents to all information related to the development and to take copies on payment of the prescribed fee.

Case Name Director of Physical Planning v Anne Hendricks Bass

Citation SKBHCVP2017/0002

Court Eastern Caribbean Supreme Court, Court of Appeal

Background & summary

In an appeal against the judgement of the Eastern Caribbean Supreme Court, High Court of Justice (Civil), Anne Hendricks Bass v. Director of Physical Planning (NEVHCV 2016/0059), that had ruled that the public had complete access to information on developments recorded in the Department of Physical Planning register, the Director of Physical Planning considered that the Ordinance should be interpreted literally being the plain meaning of the provision that the public should have access to the registers and not to the documents filed in an application in support of an application. The respondent maintained that the only reasonable interpretation of the provision was that the public has access to the register, the application for development and the supporting documents and that the public had the further right to take copies of these documents. In Court of Appeal was posed to decide on what was the information that should be in the registers and what was the extent of the public's access to information.

The law

- Nevis Physical Planning and Control Ordinance, Sections 3 and 47

Highlights

- [13] The combined effect of the preamble and section 3 makes it abundantly clear that the development of land in Nevis is not entirely a private matter even when it is taking place on land that is privately owned. The public has an interest in how land is developed on the island and the draftsman has made provision in the Ordinance for a fair, open and accessible system of approving projects for the development of land and has gone as far as to direct in subsection 2 of section 3 that the Ordinance must receive '...such purposive and liberal construction and interpretation as best ensures the attainment of its objects.' This is very powerful language and this Court would be remiss if it did not honour the draftsman's intention of not just looking at the words used in the Ordinance and interpreting them literally, but reading and interpreting them in the context of land development in Nevis as is clearly set out in the preamble and section 3. There is nothing in the remainder of the Ordinance that contradicts the clear intention in the preamble and section 3.
- [16] In relation to the content of the registers, we accept Mr. Wilkin's submission that the register must be in a form that allows the public to have access to sufficient information to allow them to be able to make a proper assessment of the development that is contemplated. How else would the public be able to determine what impact, if any, the development will have on neighbouring properties, the environment, and on "...the preservation of the natural and cultural heritage of the island of Nevis? To achieve this objective, the information in the register cannot be limited to what the Director sees fit to note in the register. A brief perusal of the register for the Development shows how unhelpful the notations in the register can be. The only real information that can be gleaned from this document is that the proposed development is for 17 condominium style buildings, six of the buildings are under construction and there is an outstanding application for fencing. There is no mention of the ongoing dispute which is before the High Court regarding environmental issues and no real details of the scope of the development.
- [17] We do not think that this was the intention of the legislation. The use of the word "information" in subsection 5 and the requirement for an index are clear indications, in the context of the general intention of the Ordinance, that the register means the information actually recorded on the register itself and the supporting documents which must be listed in the index and which form a part of the register. The learned judge was therefore correct when she found and declared at paragraph 68(d) of the judgment that the register contemplated by section 47(1) should contain the various matters set out in paragraph 68(d) of her judgment which is set out in paragraph 4 above.
- [18] We agree with and adopt the judge's categorization of the information that should be included in and form part of the register kept by the Director. As an aside, there was mention in this matter of correspondence on the Director's file. For completeness, we do not think that such correspondence forms a part of the register kept by the Director.
- [19] The other issue regarding the interpretation of section 47 is the extent of the public's access to the information on the register and their right to take copies of all the documents that comprise the register. It was suggested by Mrs. Nisbett-Brown that even if the public has the right or has been given the right to inspect the documents on the Director's file, this right does not extend to taking copies of those documents. We can find no justification for making this distinction. From a proper reading of section 47(5), once it is established, as the lower court and this Court have found, that the register includes the documents mentioned in paragraphs 4 and 17 above, the right to take copies of those documents, upon paying the prescribed fee, follows.
- [20] In all circumstances, we find that the respondent and other members of the public have a right to inspect and take copies of the register of the Development kept by the Director under section 47 of the Ordinance which register includes the supporting documents. The attempt to restrict that right to information entered in the register by the Director is in breach of the Ordinance and accordingly unlawful. The learned judge was therefore correct to grant the respondent's application in the terms set out above and there is no reason to interfere with those findings.

Decision

The Court dismissed the appeal and upheld the learned trial judge's ruling. The public has the right to inspect and take copies of the register of the development kept by the Director of Physical Planning which register includes the supporting documents.



Saint Vincent and the Grenadines

Case Name	Mitchell v. Georges
Citation	VC 2014 HC 52
Court	Privy Council

Background & summary

An appeal was lodged by a former Prime Minister and Minister of Finance of Saint Vincent and the Grenadines on the grounds of apparent bias in the conduct of a Commission of Inquiry into the failure of the construction of a marina and shipyard at Ottley Hall. The Commission was called to inquire into all the facts and circumstances of and relating to the project and role played by persons and corporate entities to establish whether or not any criminal act or offence was or may have been committed as well as whether or not there was any dereliction of duty, violation of any law, conflict of interest and/or breach of trust on the part of any Minister of Government or civil servant. The appellant argued that the interim report and other preliminary statements gave rise to an appearance of bias, did not conform to procedural fairness and breached the rules of natural justice.

The law

- Commission of Inquiry Act

Highlights

- [22] On the same date the Commission sent a Salmon letter to the appellant accompanied by a witness summons requiring him to attend to testify on 10 September 2007. It contained a number of allegations against the appellant. It identified a list of aspects of the Project in which it suggested he was aware or was involved. It also included a number of serious allegations as follows: [...]
- 10. The lack of transparency and the shroud of secrecy which generally characterized the Ottley Hall Development Project especially in its early stages and the absence of involvement of Cabinet generally and key professional civil servants in particular in the planning and financing stages.
- 11. The absence of due diligence and good governance on the part of the main persons involved in the preparatory stages of both Projects including yourself.
- 12. The palpable absence of proper checks and balances to protect the interests of the Government and people of St Vincent and the Grenadines in the Ottley Hall Development Project thus placing the Government in financial jeopardy and the NCB facing grave financial loss. [...]
- [33] The Board has reached the conclusion that, contrary to the conclusions of the courts below, the Interim Report was expressed in such terms that the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the respondent was biased such that he would not approach the remainder of the Inquiry with an open mind or, put another way, that he would not conduct an impartial Inquiry, so far as the conduct of the appellant is concerned. In reaching that conclusion the Board has considered the relevant context. It appreciates that the respondent is not presiding over adversarial proceedings but over an Inquiry. However, the Inquiry involves a detailed examination of the conduct of the appellant (among others) over a considerable period and both the Salmon letter and the Interim Report make it clear that the appellant faces serious allegations of impropriety.
- [37] In para 16 the evidence to date is said to disclose conspiracy to defraud or the obtaining of a pecuniary advantage by deception. In para 17 the principal offender is described as Dr Aldino Rolla. Reliance is placed on the following particular passages: [...]
- The evidence is that no due diligence was ever requested or conducted. In the words of the Members of the Cabinet and Parliament who have already given evidence, the person behind the projects was Sir James Mitchell, Prime Minister and Minister of Finance of St Vincent and the Grenadines. He was the moving light behind the Ottley Hall and Union Island projects and failure to properly inform and advise the members of Cabinet and Parliament is inexcusable. So too was the decision to exclude senior members of the Public Service. The decision not to so inform and to exclude them which was obviously made by Sir James Mitchell suggests that such action and deliberate failure to act in accordance with the law and his duties as a Minister of Government is tantamount to misbehaviour in public office and therefore was not, in all of the circumstances, 'the Government of St Vincent and the Grenadines'. [...]
- The Ottley Hall project had a most unfortunate beginning. The then Prime Minister and Attorney General visited Valdetarro Shipyard and publicly represented to the people of St Vincent and the Grenadines that Rolla and Valdetarro were bona fides. That was a complete misrepresentation of the true facts. That representation was made without any due diligence having been carried whatsoever. Further, there was no business plan, financial data, assessment, independent or otherwise of any of the Ottley Hall or Union Island Projects. On that the evidence is pellucid and confirmed by the Chartered Accountants who gave evidence.

Decision

The Privy Council allowed the appeal as there was a real possibility that the respondent had made up his mind by the date of the Interim Report that the appellant caused wrongdoing leading to the collapse of the project. The final report would, thus, not be impartial.



Trinidad and Tobago

Case Name	Talisman (Trinidad) Petroleum Ltd. vs. The Environmental Management Authority
Citation	EA 003 of 2002
Court	Environmental Commission of Trinidad and Tobago

Background & summary

On 8 July 2002, a company applied to the Environmental Management Authority for a Certificate of Environmental Clearance in respect of a 3-D seismic survey over a 32 square kilometre portion of an area that fell within the Nariva Swamp (partly Wet Land and Wind Belt Reserve). The Environmental Management Authority indicated that it was unable to grant the certificate applied for on the grounds that the proposed activity occurs within a swamp which is designated for inclusion in the Ramsar List of Wetlands of International importance under the Convention on Wetlands and the area was to be designated an Environmentally Sensitive Area, considered a Prohibited Area under the Forests Act and declared as a Wildlife Sanctuary under the Conservation of Wildlife Act. The Appellant filed a Notice of Appeal against such refusal on the grounds that, among others, (i) the Ramsar Convention was subscribed to by the Government of Trinidad and Tobago but had not been embodied into national law by an Act of Parliament and therefore, was not enforceable; (ii) the Forests Act and the Conservation of Wildlife Act neither contemplate nor prohibit 3-D seismic surveys; and, (iii) the Appellant was not given an opportunity to be heard in order to show how its scientific and technical methodology could be carried out without unacceptable environmental harm (breach of the Appellant's right to a fair hearing and the procedures in the CEC Rules).

The law

- Environmental Management Act, Sections 16(2) and 28
- Certificate of Environmental Clearance Rules (2001)

Highlights

- Where there is evidence of possible negative environmental impact but the applicant in its application provided the Respondent with insufficient evidence that it can properly mitigate the negative environmental impact, then the Respondent must give the Applicant an opportunity to show that it can sufficiently mitigate the negative environmental impact. If this can be demonstrated by the applicant without having recourse to an EIA then he must be allowed to so demonstrate in accordance with the audi alteram partem rule. However, where this can only be shown by an EIA, which will often be the case, then the Respondent must, in accordance with Rule 4(1)(d) notify the applicant that an EIA is required and initiate discussions with the applicant in order to prepare the terms of reference (TOR). It is important to note that the applicant cannot of his own volition prepare an EIA, as the TOR of the EIA must be agreed to by the Respondent before the EIA is conducted.
- When these principles of fairness are taken into account, it is clear that the Appellant, having been denied the opportunity to persuade or to show how it would be able to carry out the proposed activity without damaging the Swamp (especially in the absence of a prohibition against such activity), the decision to refuse in the circumstances would be fundamentally flawed.
- While the procedure under Rule 4 does not specifically provide for an oral hearing by the Respondent, it is required by Section 16(2) of the Act in the discharge of its obligation to facilitate cooperation among persons and manage the environment in a manner which fosters participation and promotes consensus. And under Rule 4 1 (c) and (d) there is provision for the issue of a CEC without an EIA or requiring an EIA. The requirement for 24 an EIA involves a full assessment of the likely impact of the proposed activity and how, by proposed or other mitigating measures any risks of harm to the environment may be eliminated or reduced to a level that is acceptable. Further, Rule 5 provides an opportunity for consultation with the Appellant in respect of a TOR as well as, where appropriate, with relevant agencies (which would include the Forestry Division) and NGOs and having exhausted the available procedures as may be applicable, by Rule 7 it is empowered to either issue or refuse a CEC. So Rules 4 and 5 do involve in accordance with Section 16(2) the application of rules of fairness, before the decision to issue or refuse the CEC under Rule 7 is ultimately made.
- That a decision-making body should not see relevant material without giving those affected a chance to comment on it and, if they wish, to controvert it is fundamental to the principle of law (which governs public administration as much as it does adjudication).
- Quite apart from the Rules, there is in conformity with the need for participation under Section 16(2) of the Act, the provision relating to Public comment and the procedure thereunder, (See Section 28 of the Act). The general advantages of public participation are, inter alia, that it:- 1. improves the understanding of issues among all parties; 2. finds common ground and determines whether agreement 20 can be reached on some of the issues; 3. highlights tradeoffs that must be addressed in reaching decisions; and 4. improves the general understanding of the problems associated with a project, as well as the overall decision-making process.

Decision

The Environmental Commission determined that the Respondent's reliance on the Ramsar Convention, the prohibitions in the Forests Act, the Conservation of Wildlife Act, and the Wetland Policy was not right in law as a basis to support its decision to refuse to issue a CEC to the Appellant and that there was a breach of the Appellant's right to a fair hearing and/or a procedural irregularity under Rule 4 of the CEC Rules.

Case Name	Fishermen and Friends of The Sea v. The Environmental Management Authority Respondent Et Al
Citation	TT 2004 HC 114 (CV 2148 of 2003)
Court	High Court

Background & summary

On 6 June 2003, the Environmental Management Authority issued a Certificate of Environmental clearance relative to the establishment of an expansion of liquefied gas producing and operation facilities at Point Fortin. A public interest body brought proceedings on behalf of areas adjacent to the facility that feared that their health had been or was likely to be seriously affected by the expansion. The claimant contended that the decision to issue the certificate was unlawful on the grounds of illegality, procedural impropriety, unreasonableness and/or irrationality. In its view, the authority had failed its statutory duty to consider all relevant matters before taking the decision and had created in favour of the residents a legitimate expectation that their concerns would be considered and addressed prior to issuing a certificate and that such certificate would not be granted until so considered and addressed. Furthermore, the authority had erred in law by not holding a public consultation in accordance with the legal requirements for further discussions in light of the written comments it received on the Environmental Impact Assessment.

The law

- Environmental Management Act, Sections 28(3) and 36
- Certificate of Environmental Clearance Rules
- National Environmental Policy

Highlights

- I am not persuaded that the EMA failed to consider all relevant matters, or that it failed to consider them properly. These reports and comments dealt with all aspects of the matters raised by FFOS and the residents, as well as other parties. Not all of the input received by the EMA was uncritical of the EIA. Indeed, reservations, some in stronger terms than others, were expressed by e.g. DNV and the Ministry of Energy. In these instances (of reservation and criticism) further input was sought and considered.
- I agree with the submissions on behalf of the EMA and ALNG. There is no evidence that the EMA surrendered its duty to any of the independent third parties commissioned to review the EIA. The evidence shows a process of assessment and determination, and that the EMA considered the advice but acted independently. It gave greater weight to some of the recommendations than others and even disregarded some of the advice provided entirely. One example is the issue of the establishment of the buffer zone. The EMA declined to follow some of the advice given on this issue and decided that it was best for this plan to be developed by ALNG. None of that, however, demonstrates any surrender of its powers, duties or functions. It is clear, therefore, that the EMA did not in any way surrender or abdicate its duties to any third party.
- The EMA has a broad discretion in determining whether and when to hold public hearings. There is no express provision requiring follow up public hearings before granting the CEC. That is left up to its discretion, and will depend on the circumstances of the case and the severity of the concerns. Follow-up procedures may be considered necessary to fulfil the intention of the section, which is to incorporate the affected community in the decision-making process by way of having this concerns and opinions. Community involvement is one manifestation of the holistic approach adopted by the Act. Environmental degradation has a human face as well; it is not limited to merely land, water and air. Communities frequently face the most severe impacts but are often the least involved in making environmental decisions that affect their well-being.
- Section 28 attempts to remedy this by allowing affected communities more meaningful participation in decisions that affect them. It also provides communities with valuable information about the potential health and environmental effects of the project. It affords persons who may be affected the opportunity to voice their concerns, views, comments and recommendations and, correspondingly, places the EMA under a duty to consider what they say. These persons are, in essence, given a fair hearing.
- In essence, it aims to achieve environmental justice, which is "the fair treatment and meaningful involvement of all people regardless of race, colour, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies."
- I do not accept that the discretion was exercised unreasonably or in a capricious manner. The public was given ample opportunity to put forward its views, suggestions and recommendations. There was no compulsion on the EMA to hold a further meeting after that of 22nd November 2002. It had further communication with FFOS, at or during which the concerns of both FFOS and the residents were clearly articulated. The matters they raised were considered; they were not ignored. The EMA did not consider that a further public meeting for the purpose of discussion was needed, whatever may or may not have been said by Mr. Parsanal at the meeting of 22nd November.
- The rules of natural justice do not necessarily require that there be a formal, oral, hearing in public. It is sufficient if those affected, or likely to be affected, are put into a position that allows their views and opinions to be heard, to be ventilated fully, and that those views and opinions be considered properly in the decision making process. There is no requirement for ongoing public debate.
- The EMA was fully aware of the serious complaints and concerns raised by the residents and the public and exercised its discretion in the manner which it considered most appropriate in the circumstances.
- There was therefore no illegality, procedural impropriety, or irrationality in not holding a second public meeting for the purpose of further discussion.
- It must be remembered that the EMA considered that the consultation process had been accomplished in three stages. First, the ALNG public meeting; second, it established the Administrative Record and comments on the EIA were invited from the public; third, the EMA held its public meeting of 22nd November 2002. There was also correspondence received from FFOS, as well as Dr. Naraynsingh-Chang's report. In those circumstances it cannot realistically be said that FFOS and the residents were not afforded the opportunity to put forward their views. Further, the evidence is that those views were in fact considered.
- I do not consider the CEC to be vague or uncertain or meaningless. The conditions inserted reflect the process of consultation, gathering of information and advice from parties considered by the EMA best placed to provide all of this, as well as consideration of the information, advice and views received. The conditions set out in the CEC are wide-ranging and address all of the concerns raised by FFOS and the residents.

- Section 36 requires the EMA to consider all relevant matters, including the comments and representations made during the public comment period. The evidence is that this was done and, also, that relevant matters were raised outside this period were also considered.
- There is nothing to satisfy me that there was any relevant information to be obtained but which the EMA did not receive, much less ask for. None at least, which would vitiate its decision or the process by which it was made.
- I have therefore come to the conclusion that the cumulative impact was considered. A "hard look" was taken, based on the information then available. That information was sufficient in all the circumstances. There was no good reason to defer the decision to a future date. The decision to issue the CEC was not irrational because of a failure to consider the cumulative impact, or to do so properly.

Decision

The Court concluded that neither the decision nor the decision-making process were illegal, irrational or procedurally improper and dismissed the motion. No denial of natural justice was found, as the claimant and the residents were all afforded the opportunity, on more than one occasion and in more than one way, to put forward their views, comments and recommendations. They had this opportunity in the full knowledge of what was set out in the EIA. The evidence was that the authority gave proper consideration to their comments in an unbiased, untainted or unaffected way.

Case Name	People United Respecting the Environment (PURE) et al v. Environmental Management Authority et al
Citation	TT 2009 HC 134 (CV 2263 of 2007)
Court	High Court

Background & summary

Two public spirited organizations applied for judicial review of the decision of the Environmental Management Authority to grant a certificate of environmental clearance (CEC) for the construction of an Aluminium Smelter plant at Union Village, La Brea. Among the main grounds of the application were a breach of the precautionary principle, flawed public consultation and omissions in the Environmental Impact Assessment rendering the decision illegal or irrational and deferral of omitted matters to be dealt with via conditions imposed in the CEC and failure to consider cumulative effects. According to the claimants, the authority had acted ultra vires in that it failed to include within the administrative record certain key documents and acted unfairly in allowing insufficient time for any meaningful consultation, permitting only a selection of invitees to participate in the consultation and failing to supervise the interested party's purported consultation with the public.

The law

- Environmental Management Act, Sections 26-31 and Sections 35-37
- Certificate of Environmental Clearance Rules

Highlights

- [1] The Claims before me have raised issues which are duo-dimensional. The first dimension is comprised of the principles of administrative law. In this regard, the Court is reminded that its function is not appellate and that it is not concerned with the merits of the decision, but is urged to focus on the decision-making process, and to strike down the decision only if the Claimant has established the presence of one of the grounds listed at s. 5 of the Judicial Review Act(d). Accordingly, it does not fall on this Court to decide whether there should be a Smelter in Trinidad and Tobago. The Court is concerned only with examining the decision of the EMA to grant Environmental Clearance and with considering whether the decision is flawed according to any grounds specified in the Judicial Review Act.
- [26] Thus, s. 28(a) requires as the first wave of public exposure, that the Authority publishes a notice of the proposed action in the Gazette and in one daily newspaper of general circulation. No issue arises as to the first wave.
- [27] The Second wave of public exposure is prescribed by s. 28(b), which required the establishment and maintenance of the Administrative Record by the Authority. The administrative record is required to be made available to the public at more than one location.
- [31] The operative words in this section are "which the authority believes..." The legislation, therefore, confers discretionary power on the EMA. The very clear consequence of this is that the Authority's selection of documents to be placed on the Administrative Record, cannot be reviewed on the ground of illegality and is reviewable only in so far as the Claimant can show that the Authority's decision would be flawed on Wednesbury grounds.
- [32] The third wave of public exposure as prescribed by s. 28(3) requires the EMA to receive written comments for at least thirty (30) days. In respect of this requirement, the Claimant complains about the brevity of the public comment period. Once again the decision of the EMA to receive written comments for any given number of days is reviewable on Wednesbury grounds as long as it is equal to or more than thirty (30) days.
- [33] The fourth wave empowers the EMA to hold a public hearing to receive verbal comments. This falls with the discretion of the EMA and is reviewable only on Wednesbury grounds. The EMA in fact held its own public meeting on the 27th May 2006.
- [34] The requirement of public exposure of the proposed development is entrenched by the requirement of s. 36, which empowers the EMA to issue the CEC. The decision to issue the CEC ought only to be made after the EMA has considered all relevant matters, including comments or representations made during the public comment period.
- [48] The leading authority on the elements of fair consultation in administrative law is R v North and East Devon Health Authority Coughlan¹¹⁹, where Lord Woolf cited R v Brent LBC Ex p Gunning¹²⁰. The very clear principles, known as the Gunning Principles, are in other words: as long as consultations are embarked upon, they must be carried out properly; this is unaffected by whether or not the requirement for consultation is statutory; proper consultations must be undertaken when proposals are at a formative stage; the persons who are being consulted must be provided with adequate reasons so as to facilitate intelligent consideration on their part and an intelligent response; The persons who are being consulted must be given adequate time.

- [51] This Court is however not only to be guided, but is indeed bound by the pronouncement of their Lordships in *FFOS v EMA (P.C.)*. Pace Learned Senior Mrs. Peake, the words of Lord Walker in *FFOS v EMA (P.C.)*, have had the effect of importing the Berkley Principle directly into our local jurisprudence. Notwithstanding the differences in the respective Legislative regimes, following *FFOS v EMA (P.C.)*, this Court is bound to regard an inclusive democratic procedure, conferring on the public an opportunity to express its opinion on environmental issues as a “directly enforceable right”.
- [58] In my view, the stipulation in the TOR for public consultation prior to the preparation of the EIA is reminiscent of the Sedly principle that consultations must be taken when the project is at a formative stage. Moreover, it is no answer to contend that this was not a requirement of statute but of the TOR which is merely a guide. According to the Sedly principles consultation, as long as it is undertaken, must be carried out properly. On the face of the facts therefore this aspect of the consultation process was flawed.
- [63] The compound effect of the developer’s failure to hold the meeting at the start of the EIA process and the proximity of the two meetings in my view would have operated to escape and therefore to frustrate the provisions of the TOR, which required the first meeting at an early stage to “sensitize stakeholders to the project and gather stakeholder concerns, ideas and perceptions....” Having done so, time must be allotted to allow stakeholder concerns to inform the data collection phase, after which the developer is required to return to the stakeholders to provide information on its findings and proposed management plans. The time was not allowed. It may very well be the case that strict compliance would have yielded no different result. However, in this regard the TOR places the stakeholder centre stage. The stakeholder must be sensitized; the developer must take into account stakeholder concerns and then return, reporting on its findings and proposed management plans. In my view, this was no minor flaw. The omission to comply with this aspect of the TOR deprived the developer of the time envisaged to take stakeholder views into account. This was a flaw which diminished the quality of public consultation.
- [87] The EIA is an information-gathering process. See Bell and Mc Gillivray *Environmental Law* (6th edition). It is a means to decision making and is not a decision-making end in itself. (Prineas). Its objective is to alert the decision-maker and members of the public to the effect of the activity on the environment.

Decision

The Court decided that the decision of the defendant was procedurally irregular, irrational and made without regard to a relevant consideration of the cumulative impact of the three related projects (the Power Plant, the Aluminium Complex and the Port Facility). The decision was quashed and remitted for the consideration of the defendant.

Case Name	Fishermen and Friends of the Sea v. Environmental Management Authority and BP Trinidad and Tobago LLC
Citation	PCA 30 of 2004
Court	High Court

Background & summary

Fishermen and Friends of the Sea unsuccessfully challenged the decisions of the Environmental Management Authority and a company all the way to the Privy Council. The Privy Council ordered that such organization pay costs. Given the non-payment, the Environmental Management Authority filed an application to recover the costs requesting that the corporate veil be lifted so that these are paid by the directors of the organization. The authority claimed that the directors should be personally liable as the organization was set-up for legal convenience and served their personal interests.

The law

- Supreme Court of Judicature Act
- Rules of the Supreme Court Order 62

Highlights

- [20] The *DYMOCKS FRANCHISE SYSTEMS* decision is to me as the locus classicus in this area. Mr Benjamin culled three (3) principles which I shall repeat here and at the same time look to the evidence to assist in my determination. (1) Cost Orders against non-parties are to be regarded as exceptional. “Exceptional” in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. Where is the evidence of this exception? As I said, Mr Benjamin did not point me to the evidence but left it to my divination. I must confer that Dr Mc Intosh’s affidavit left me unmoved.
- [21] (2) The discretion will not be exercised against “pure funders”. These are “those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course.
- [24] Thirdly, that *FFOS* was a “façade simply set up for the convenience of Gary Aboud and other members ...” There is no evidence to back up what clearly amounts to statements of opinion and not evidence to which any weight can be attached by the court. Even if the court were to grant the Order, who among the other directors should be named? There is no assistance or guidance on this issue and it seems that too much of this application has been left to the Court’s fancies. I decline to accept this invitation to proceed on a frolic of my own with no directions.
- [26] In addition, I accept that *Fishermen and Friends of the Sea* was a body satisfying the “public interest” component of the *JUDICIAL REVIEW ACT*. This is acknowledged and I daresay accepted by all concerned including the Defendants at every juncture of these proceeding. It would be foolhardy of this Court at this late stage to accept a proposition stating otherwise.
- [27] (3) There is need to identify the real party to the litigation. If the “real party” is a company director it must be shown where he cannot be regarded as acting in the interest of the company or its shareholders and creditors but in his own interest. Suffice it to say, that *EMA* provided me with no evidence that the litigation was brought to service and/or promote the personal interests of any of its directors.

Decision

The appeal was dismissed as the unsuccessful party was a public interest organization and no evidence was provided to demonstrate that the directors were a real party to the litigation. Furthermore, there was no explanation given by the authority as to why a security for costs order was not sought during the substantive proceedings.

Case Name	Miller and Confederation of Hunters Association for Conservation Trinidad and Tobago v. Singh, the Minister of the Environment and Water Resources and Seepersad, the Chief Game Warden
Citation	TT 2014 HC 131 (CV 4146 of 2013)
Court	High Court
Background & summary	
<p>On 25 September 2013, the Minister (co-defendant) amended parts of the Second Schedule of the Conservation of Wild Life Act. These amendments discontinued the granting of hunting licenses and instituted a two-year moratorium on hunting of animals and birds. The claimants applied for leave for judicial review, alleging that the amendment was unlawful, illegal, and irrational as it overrode the legitimate expectation of those engaged in a settled practice. They also claimed the amendments were illegal as they were based on a procedure that was unfair, as it lacked adequate consultation, was made without relevant considerations, and did not adequately address claimants' representations. They also claimed the decision of the Minister is irrational and unreasonable for not considering the adverse effects that it would have on the claimant.</p>	
The law	
<ul style="list-style-type: none"> - Conservation of Wild Life (Amendment) Regulation - Conservation of Wild Life Regulations 	
Highlights	
<ul style="list-style-type: none"> - [18] The respondents contend that there was adequate consultation with the applicants before the decision made by the Minister. They stated that there was public consultation, acknowledged by the applicants in their Affidavit filed on the 18th October, 2013, in addition to a request by the applicants for comments and the submission of reports on the matter. It was further submitted by the respondents that the fact that no decision was yet made was no reason for fairness to require more than was done. Good public administration requires not only finality but also that matters be dealt with at a reasonable speed: <i>R v. Monopolies and Merger Commission ex parte Argyll Group PLC</i> [[1986] 1 WLR 763, 774 C]. - [19] It could be said to be best practice, in modern thinking, that before an administrative decision is made there should consultation in some form, with those who will clearly be adversely affected by the decision. But Judicial Review is not granted for a mere failure to follow best practice. It has to be shown that the failure to consult amounts to a failure by the local authority to discharge its admitted duty to act fairly. The Minister is a person having legal authority to determine a question affecting the rights of individuals. This being so, it is a necessary implication that he is required to observe the principles of Natural Justice when exercising that authority. [Michael Fordham, <i>Judicial Review Handbook</i>, 5th Edition, paras. 60.1.3-60.1.19] - [20] In <i>R v. North and East Devon Health Authority ex parte Coughlan</i> [[2001] 1 QB 213, para. 108], Lord Woolf M.R. discussed the importance of consultation and opined: "... whether or not consultation of interested parties and the public is a legal requirement if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken." Legal standards require that a consultation exercise (1) be conducted at a time when proposals are at a sufficiently formative stage, (2) with adequate information and time to allow a proper and informed response, and (3) leading to a conscientious and open-minded consideration of relevant matters. [Michael Fordham, <i>Judicial Review Handbook</i>, 5th Edition, para. 60.6] - [21] From the evidence before me, it is clear that the respondents embarked upon consultation with the applicants and having proceeded to do so, such consultation should have been conducted properly and adequately. This duty to consult is not confined to a singular meeting or discussion but rather than which fully ventilates the matter(s) at hand. It is not disputed that the respondents convened a meeting with the applicants to discuss the proposed moratorium. Subsequent to this meeting, the applicants tried to no avail to seek audience with the Minister to discuss further issues regarding the (then) proposed moratorium. This, in my view, is inadequate consultation. There were clearly other issues that needed to be discussed and/or resolved between the parties which were not adequately addressed and ventilated. - [23] Legitimate expectation is defined as an expectation which, although not amounting to an enforceable right, is founded on a reasonable assumption which is capable of being protected in public law. It enables a citizen to challenge a decision which deprives him of an expectation founded on a reasonable basis that his claim would be dealt with in a particular way. [Ibid., para. 41.11] - [24] The terms of the representation by the decision-maker (whether express or implied from past practice) must entitle the party to whom it is addressed to expect, legitimately, one of two things: i. That a hearing or other appropriate procedures will be afforded before the decision is made, or ii. That a benefit of a substantive nature will be granted or, if the person is already in receipt of the benefit, that it will be continued and not be substantially varied. [De Smith, Woolf and Jowell, <i>Judicial Review of Administrative Action</i>, 5th Edition, para. 8-046] - [25] It is well-known that the practice of hunting has existed for centuries as a means through which persons provide for themselves and their families. This practice also pre-dates the Act and its commencement. Therefore, the applicants had a legitimate expectation, through practice, that should there be a ban on hunting, even on a temporary basis, they would be properly consulted and their opinions taken into consideration given the fact that many of them depend on hunting animals as a means of living and providing for their families. 	
Decision	
<p>The court granted leave for judicial review as the applicants were not given an adequate opportunity to put forward their view and/or objections on the matter.</p>	

Case Name	All Tobago Fisherfolk Association v. Tobago House of Assembly
Citation	TT 2014 HC 380 (CV 1602 of 2014)
Court	High Court

Background & summary

The Tobago House of Assembly expressly endorsed the contents of a document entitled “Framework for Identifying and Communicating with the Affected Users of BHP Billiton’s (BHPB) 2014 Deep Water Seismic Survey Area” submitted to the Environmental Management Authority without consultation with the claimant. The claimant, a non-profit organization representing the interests of the fishermen in Tobago, filed a claim to review this decision to endorse and requested the court to quash the decision as defendant’s endorsement supported conclusion that no fisherman in Tobago were directly and/or indirectly affected by a seismic survey that was to be conducted. The court was asked to determine whether the defendant exceeded its power by making the decision to endorse the framework for an improper purpose or failed to take into account relevant considerations or took into account irrelevant considerations in the exercise of its power.

The law

- Tobago House of Assembly Act
- Environmental Management Act, Sections 31 and 35

Highlights

- [41] This court agrees with the submission of the Defendant on this issue. It is one thing to say that the effect of the endorsement was that of a favourable consideration by the EMA of the application for the CEC but quite another to impute a fraudulent or improper motive as a consequence of that effect without more evidence. In this case the evidence does not remotely lead the court to the conclusion that the intent of the THA was to take sides in the issue and to dishonestly promote the interest of the private party BHPB. The court agrees that the endorsement was a wholly unnecessary document for the purpose of the grant of the CEC. It was not required by law neither was it requested by the EMA. Additionally, neither is there in fact a scintilla of evidence which gives rise to the inference that BHPB would have received favourable consideration because of the endorsement. It would be to stretch the limits of reasonable inference should the court so hold. In other words, to so find would be pure speculation in the absence of supporting evidence from which such a conclusion can be made. The burden on the Claimant to prove improper motive is a heavy one and it has failed to discharge that burden.
- [42] Further, and on that issue, the court accepts the evidence of the Defendant that the meetings held between the Defendant and BHPB were in respect of statistics and so the presence of the Claimant was not needed in so far as the allegation of the Claimant may have been that these meetings evidenced some sort of collusion on the part of the Defendant and BHPB. The court also accepts (as set out above) that the map provided to BHPB was one which was provided ultimately by the Ministry and that there would have been no collusion in respect of the information set out in the map. In relation to the list of fishermen and vessels provided to BHPB by the Defendant, it is a reasonable inference in the absence of other evidence that the list was inaccurate because of error in proper record keeping and not out of an attempt by the THA to interfere with the list so as to remove persons there from as this dishonest act could be of assistance to either BHPB or the THA.
- [43] In this regard the Claimant submits that the Defendant failed to consult with them and to consider their input as persons directly affected by the decision to endorse. That the Defendant failed to consider whether their members would be affected and whether there should be a mechanism for compensation contained in the framework; that they failed to consider the likely impact on fish stock in the survey area; that the Defendant is generally regarded in law to be the final authority on matters of fisheries and the environment in Tobago; that a letter emanating under its hand could be persuasive; that its powers should not be discharged in a partisan manner and ought to be discharged only after weighty consideration; that it possessed the power to request BHPB to engage in meaningful discussions with the Claimant on matters required by the EMA before endorsing the framework.
- [46] The court is somewhat taken aback by the submission of the Defendant in this regard. When read, both documents clearly show an intention by BHPB to meet with various stakeholders in the future. This means that having obtained a CEC, after obtaining an endorsement from the THA based on erroneous information as to whether there was fishing activity in the survey area and erroneous information as to the number of registered fishermen and vessels operating in the area and having decided that no compensation was payable on the basis that there was no concentrated fishing activity in the survey area, BHPB was now intending to meet with parties, figuratively after the horse had bolted. What then was to be the purpose of these meetings. Surely they could not have been for the purpose of consulting the Tobago folk about whether they fished in the area and about compensation for depletion of stock or inconvenience to their means of earning a living. These meetings could only have been for the purpose of informing the residents of the procedures involved during the survey for complaints, compensation for damage to fishing vessels or fishing equipment, non financial and financial compensation for FADS (Fish attracting devices) and a procedure for engaging directly with anyone who can show that they have historically fished in the survey area to determine if and how they are impacted by the survey. These meeting were essentially not meetings of consultation but meetings to disseminate information. Further, these post endorsement meetings were to be between BHPB and residents, not the THA. See the framework pages 2 to 5.
- [47] In this case there was in effect no public consultation prior to the endorsement of the framework. See also *R v North and East Devon Health Authority ex p Coughlan* 200 3 AER 850 at paragraphs 108 and 112.
- [48] In the court’s view therefore, the Defendant failed to take into account relevant considerations prior to endorsing the framework [...]
- [49] In the court’s view, the influence of these relevant considerations, had they been known by the Defendant, would have been material and substantial in relation to the decision as to whether to endorse the framework and would have more likely than not have resulted in a change of that decision. The court therefore finds on this basis that the power to endorse had not been validly exercised.
- [55] The rules of natural justice require that the decision maker approaches the decision making process with ‘fairness’. What is fair in relation to a particular case may differ. As pointed out by Lord Steyn in *Lloyd v McMahon* [1987] AC 625, the rules of natural justice are not engraved on tablets of stone. In this case the Defendant was in the process of making a decision which may or may not have impacted the livelihood of Tobagonians, the persons in respect of which it owes a duty and a responsibility under the provisions of the Act. It could be said that the decision maker failed to disclose the fact that it had been approached for an endorsement and that it was in the process of collecting, considering and providing relevant information in relation to that endorsement. Further that the decision maker failed to provide an opportunity to those who may have been adversely affected by the decision, to consider and confirm the validity of the information upon which it was going to rely in making that decision and to provide feedback thereon to the Defendant.

- [57] In that regard, the fisherfolk of Tobago have reposed in the Defendant the ultimate responsibility for the management of the resources which form the basis of their livelihood and contribute in no small measure to the tourist economy of the twin island. To whom much is given much is expected. A decision to endorse a framework which states that none of the Tobago fisherfolk will be affected is to endorse a process which may endanger the livelihood of the ones on whose behalf the trust is reposed without permitting the opportunity to those persons to be heard on the accuracy of the information presented and which forms the basis of the decision. The fact that the EMA does not require an endorsement for the grant of a CEC, while relevant to the harm to be suffered does not in the court's view make the potential damage so insignificant, remote or speculative so as to negate the entitlement to a fair hearing by the Claimant before the making of the decision as to endorsement. It may have equally been the case that the EMA would have in any event, asked for the views of the THA, which they were entitled to do, (see section 35(4) of the Environmental Management Act) and may have taken those views on board when deciding whether to grant the CEC. In the circumstances the Claimants were entitled to their say in relation to the framework and the information upon which it was based whether in writing or otherwise at the least. Fairness would have demanded nothing less. The court therefore finds that the decision to endorse the framework was made in breach of procedural fairness, namely breach of the right to be heard.

Decision

The Court declared that the decision to endorse the framework was made in breach of procedural fairness, namely breach of the right to be heard, and was null and void and of no effect. The defendant is also mandated to consider representations by the claimant should the defendant embark on a fresh process of deciding whether to issue an endorsement.

Case Name	Trinidad and Tobago Automotive Dealers Association v. Minister of Trade, Industry and Investment (BHARATH)
Citation	TT 2014 HC 409
Court	High Court

Background & summary

An association of dealers trading in imported foreign used motor vehicles filed for judicial review claiming the decision of the Minister of Trade, Industry and Investment in relation to the implementation of a new policy to regulate the foreign used car industry was unlawful. The Minister had failed to conduct adequate consultations with the claimant in respect of its draft revised policy to regulate the fully assembled right hand drive foreign used car industry in Trinidad and Tobago, breaching the principles of natural justice and depriving the application of its legitimate expectation.

The law

- Judicial Review Act, Section 5

Highlights

- [14] While the defendant had no statutory and/or legal obligation to engage in consultation with the claimant, the evidence clearly suggests that there was consultation. The defendant elected to engage the claimant and having done so it was therefore necessary to ensure that the consultation was adequate and that it was undertaken during the formative stages of the policy. Further the reasons for the policy had to be clearly communicated to the claimant so that an informed and careful deliberation could have been undertaken by the claimant and adequate time ought to have been afforded to the claimant, to fully consider the proposals advanced and to enable it to issue an informed response. Finally the response(s) made by the claimant should have been conscientiously considered by the defendant, before the policy was finalised.
- [15] In *Eon Hewitt & Ors v. The Minister of Works and Transport and The Transport Commissioner of Trinidad and Tobago*, CV 2011 -01631, Charles J in considering the duties of a public body to hold proper consultations with persons aggrieved by a decision held at paragraph 68 of the judgment, that legal standards require that a consultation exercise be conducted at a time when proposals are at a sufficiently formative stage with adequate information and time so as to allow a proper and informed response and lead to a conscientious and open minded consideration of relevant matters.
- [16] Further, Charles J at paragraph 69 of the said judgment noted: "Proper consultation requires the „candid disclosure of the reasons for what is proposed and that the consulted parties are aware of the criteria to be adopted and any factors considered to be decisive or of substantial importance. Where the decision-maker has access to important documents which are material to its determination whose contents the public would have a legitimate interest in knowing, these documents should be disclosed as part of the consultation process."
- [17] The Learned Judge also cited with approval at paragraph 70, the dicta of Lord Woolf M.R. in *R v. North and East Devon Health Authority ex parte Coughlan* [2001] 1 QB 213, where Lord Woolf opined as follows: "... whether or not consultation of interested parties and the public is a legal requirement if it is embarked upon it must be carried out properly. To be proper, consultation must be undertaken at a time when proposals are still at a formative stage; it must include sufficient reasons for particular proposals to allow those consulted to give intelligent consideration and an intelligent response; adequate time must be given for this purpose; and the product of consultation must be conscientiously taken into account when the ultimate decision is taken." (emphasis added)
- [18] A similar position was advanced in *R v. Secretary of State for Trade and Industry ex parte UNISON* [1996] ICR 1003, 1015 F [referred to at p. 586, para 60.6.10 of the *Judicial Review Handbook* 5th edition] where it was held that: "...fair consultation involves giving the body consulted a fair and proper opportunity to understand fully the matters about which it is being consulted and to express its views on those subjects, with the consultor thereafter considering these views properly and genuinely"

- [19] The approach in *Eon Hewitt supra* was adopted by Rajkumar J in *Irwin Hercules & Ors v. Tobago House of Assembly* (CV 2013-01738). Rajkumar J in discussing the law on consultation in administrative law cited with approval at paragraph 66 of his judgment the dicta of Webster J in *R v Secretary of State for Social Services, ex parte Association of Metropolitan Authorities* [1986] 1 All ER 164 where the Court said: "There is no general principle to be extracted from the case law as to what kind or amount of consultation is required before delegated legislation, of which consultation is a precondition, can validly be made. But in any context the essence of consultation is the communication of a genuine invitation to give advice and a genuine consideration of that advice. In my view it must go without saying that to achieve consultation sufficient information must be supplied by the consulting to the consulted party to enable it to tender helpful advice. Sufficient time must be given by the consulting to the consulted party to enable it to do that, and sufficient time must be available for such advice to be considered by the consulting party. Sufficient, in that context, does not mean ample, but at least enough to enable the relevant purpose to be fulfilled. By helpful advice, in this context, I mean sufficiently informed and considered information or advice about aspects of the form or substance of the proposals, or their implications for the consulted party, being aspects material to the implementation of the proposal as to which the Secretary of State might not be fully informed or advised and as to which the party consulted might have relevant information or advice to offer."
- [20] Having accepted that there was consultation, the Court had to consider the aforementioned authorities and make a determination as to whether the consultation which was engaged was adequate.
- [50] The Court having found that there was consultation as aforesaid, considered in detail the case of *Ex parte Coughlan* (*supra*) and considered the evidence as against the following tests: i. Were the proposals advanced at the formulative stage of the policy? ii. Were sufficient reasons upon which the proposals were premised advanced to enable a considered response? iii. Was adequate time afforded for that purpose? iv. Was the product of the consultation conscientiously considered by the defendant prior to its formulation of the policy?
- [51] The claimants and other dealers who have been registered, have enjoyed a monopoly in relation to the foreign used car industry and it is understandable that they would want the said state of affairs to continue, however, the defendant has no obligation in a free market and democratic society to implement policy that preserves, protects and/or accords with the claimant's desires and/or insular concerns. The defendant elected to engage the claimant in consultation and was bound to consider the claimant's proposals but consideration cannot be equated with the unreserved and unquestioned adoption and implementation of same.
- [52] Consultation cannot be an interminable process. In *R v. Shropshire Health Authority and Secretary of State ex parte Duffus* [1990] 1 Med LR 119 at page 223 Schiemann J (as he then was) stated: "A consultation procedure, if it is to be as full and fair as it ought to be, takes considerable time and meanwhile the underlying facts and projections are changing all the time. It is not just a question of an iterative process, which can speedily be run through a computer. Each consultation process if it produces any changes has the potential to give rise to an expectation in others, but they will be consulted about any changes. IF THE COURTS ARE TO BE TOO LIBERAL IN THE USE OF THEIR POWER OF JUDICIAL REVIEW TO COMPEL CONSULTATION ON ANY CHANGE, THERE IS A DANGER THAT THE PROCESS WILL PREVENT ANY CHANGE – EITHER IN THE SENSE THAT THE AUTHORITY WILL BE DISINCLINED TO MAKE ANY CHANGE BECAUSE OF THE REPEATED CONSULTATION PROCESS WHICH THIS MIGHT ENGENDER, OR IN THE SENSE THAT NO DECISION GETS TAKEN BECAUSE CONSULTATION NEVER COMES TO AN END."
- [53] The claimant and other used car dealers voluntarily elected to engage in the sale of foreign used cars and it is evident that this venture has been lucrative, however, their continued financial security cannot be foundation upon which any new policy governing the industry is premised. The reality faced by all road users is one of acute traffic congestion with limited new roads. The defendant has an obligation and a duty to address this situation and it is expected that any decision taken is one that resounds to the benefit of all citizens and accords with the principles of good governance. There is no evidence before this Court, that enables it to conclude that the claimant had a legitimate expectation that the monopoly it enjoyed would have continued indefinitely and the Court found that at the meeting of the 14th February 2014 the Minister made no promise or implicit representation which was clear, unambiguous and devoid of relevant qualification so as to have engendered any expectation that further consultation would have been engaged.
- [54] It is also the obligation of the government to continuously review policy for the benefit of the citizenry. In *Solar Century Holdings Ltd. And Others v. Secretary of State for Energy & Climate Change* (2014) EWHC 3677 the Court stated at paragraphs 72 and 73: "But there is no presumption that policy cannot change; on the contrary it plainly can do so and frequently does. So the issue becomes whether there can be identified a representation of sufficient certitude that the policy will not be changed regardless of surrounding circumstances. As to this a representation that a policy will continue until a specified date is not the same as a promise that it will never be changed even if circumstances change. If it were otherwise then an intention to pursue a policy for a fixed period would become set in stone and permanently unyielding to changes in relevant circumstances however compelling they might be." "And even if a sufficiently certain promise or representation has been made that a policy will continue in force and not be changed until a fixed date there is always a balance still to be struck between the retention of that policy and the strength of the (ex hypothesi) rational grounds which have arisen and which now are said by the Government to necessitate a frustration of that prior representation or promise."
- [55] In the exercise of its function, the executive ought to always act reasonably, without malice and forever mindful that it acts as a trustee, entrusted with the Nation's welfare and future. In the exercise of its wide discretion, it must therefore, always balance stakeholder interests with the public's best interest. If they fail to do so, then aggrieved persons have the option of holding it accountable when general elections are held.
- [56] Having considered the facts of this case and having also considered the *Ex parte Coughlan* tests, the Court is of the view that there was in fact adequate consultation. The consultation did in fact occur during the formulative stages of the policy and Mr. Babwah was in fact engaged in discussions on same from early January 2013 and these discussions continued throughout 2013 and into early 2014. The email correspondences between the claimant through its President and the defendant were significant and extensive and the Court is of the view that the suggestions that were made by the claimant, were in fact conscientiously considered and some recommendations were in fact incorporated into the policy.

Decision

The Court concluded that while the defendant had not statutory and/or legal obligation to engage in consultation with the claimant, there was consultation and that it was adequate and the representations of the public duly considered. The claim was therefore dismissed.

Case Name	Utric 'Buggy' Haynes Coaching School Et Al v. Minister of Planning and Sustainable Development
Citation	TT 2015 HC 198 (CV 2013-05227)
Court	High Court
Background & summary	
<p>On 8 July 2013, the claimants became aware of the plans by the Government to establish a sporting development on the Orange Grove Savannah, a public open space utilized daily by a wide cross section of the public (coaching schools, youth and retirees, among others). Several meetings were held with public officials but no full disclosure as to the scope of the project was received nor were the claimants adequately consulted considering that the decision to develop the land was already made. Furthermore, the development plan of the area had not been updated for the last thirty years, depriving them of the right to be consulted. As users and persons adversely affected by the decision, the claimants were entitled to be notified in sufficient detail in sufficient detail of any and all matters which were relevant to or received by the defendant relevant to the decision; were entitled to be afforded sufficient time to consider and prepare any response to those matters and were entitled to be afforded the opportunity to submit the responses to the defendant and to have same duly considered prior to a final determination of the application. The claimants also submitted that the need for consultation was more acute in this case because of the defendant's failure to update the development plan.</p>	
The law	
<ul style="list-style-type: none"> - Town and Country Planning Act - Environmental Management Act 	
Highlights	
<ul style="list-style-type: none"> - [28] Section 5(2) (a) and (b) of the JRA empowers the court to grant relief to a person whose interests are adversely affected by a decision or to a person or group of persons if the court is satisfied that the application is justifiable in the public interest in the circumstances of the case. In this case, the defendant makes no challenge to the locus of the claimants. The issue of whether the claimants have been adversely affected has been raised by the defendant in the context of the application of the principles of natural justice and fairness in examining the provisions of the TCPA on the issue of consultation with those adversely affected by the decision. This shall be dealt with in the context of consultation later on in this judgment. Suffice it to say, that having regard to the history of the land, in particular the user history set out above, which has not been effectively disputed, the court is of the opinion that the claimants fall squarely within the category of persons identified in both sections 5(2)(a) and 5(2)(b) of the JRA and therefore all possess the required locus to pursue this claim. - [34] So that section 7 provides for the Minister to consult with whom he thinks fit. It further provides for publication of the plan and a process for objection or representation. Should there be objection the law provides for a public inquiry. The Minister is duty bound to consider the objection or representation and the report emanating out of the inquiry before submitting the plan to parliament. In so doing adequate opportunity for objection or representation by those who are likely to be affected are canvassed prior to the approval of parliament being sought. The Minister may also consider whether he wishes to amend the plan that he originally proposed and published post objection or representation and may therefore seek consultation with a local authority but he is not obligated to consult any other person or authority or to provide further opportunities for objection and representation. - [47] The court agrees with the submission of the claimants that it could only have been the intention of parliament that the Minister comply with the requirements set out in the Act to update the plan at least once every five years. It is a process that ensures that the Parliament is kept abreast of the incremental growth in development of the lands of Trinidad and Tobago. This is an important feature of the legislation as it may be reasonably inferred that timely updates to the National Plan would in the usual course of events assist those who make the laws by way of understanding the developmental growth of the Nation and that which may be required for future development. The process also at the same time allows for transparency in the planning and development of land but more so it is a process which facilitates objections and representations from the public either through the local authority or otherwise thereby providing national participation in development. The opportunity given to the public by virtue of the legislation may not be the gravamen of sections 6 and 7 of the TCPA but is an important democratic participative tool given to the public. In this way the system provides for the widest form of democratic participation in the national development process. The failure to adhere to the lawfully enacted process will result in the deprivation of the opportunity to object or make representation or call for an inquiry by the public. The failure also circumvents Parliamentary oversight which lies at the core of sections 6 and 7. It must therefore mean that the intention of the legislation was that there be periodic amendments to the national plan in a transparent manner which lends itself to both public and Parliamentary oversight in the interest of participative national development. - [49] However, in the court's view, it is not to say that the legislature intended that there be no compliance at all. It must be that in keeping with the spirit and intent of the TCPA as far as wide public democratic participation and the inevitable growth in development were concerned, that the Minister was required to apply to the Parliament for approval of such amendments pursuant to the TCPA within a reasonable time after the deadline for so doing had expired at the latest. It is matter of practicality and common sense that the Republic of Trinidad and Tobago has witnessed tremendous development of its lands since the passage of the Act in 1960 and particularly so since 1984 (year of compliance with requirement to file a National Plan). So that it could not have been that there was no need to amend the national plan over all these years. - [55] In making its determination the court also considered whether there existed an alternate procedure which could have cured the deprivation of the opportunity for objection and representation which was lost by way of the failure to update the national plan. The evidence in that regard is set out hereafter within the discussion on Natural Justice and Fairness. Suffice it to say that the court has found as set out hereunder that no such alternative opportunity was afforded to the claimants. - [69] It is to be noted that before a court imposes a duty to consult in respect of planning permission where no such duty is prescribed by statute, it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of the legislation. In the court's view the present case falls squarely within the ambit of that principle. It is clear that the statutory framework does not provide for objections and representations in respect of applications for planning permission and so is insufficient to achieve justice in this case. It is equally clear that to require additional steps would not frustrate the purpose of the TCPA but will in fact fulfill its purpose, the claimants having been deprived of the opportunity to object or make representations in respect of an amendment to the National Plan in relation to the proposed savannah development. 	

- [73] [...] What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially an intuitive judgment. They are far too well known. From them, I derive that: - 1. Where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances. 2. The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type. 3. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. 4. An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken. 5. Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both. 6. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer.
- [82] Having therefore found that the statute does not provide adequately for a procedure to object and make representations and that there was a duty to act fairly on the part of the Minister the court should therefore enquire as to the ambit of that duty in this case in these particular circumstances, and whether on the evidence that duty was in fact fulfilled. The court wishes in so doing to be pellucid in stating that the finding of the court is not that there exists a general duty to consult when the Minister is considering whether to grant permission to develop land but that in this case, in these circumstances, having regard to all the factors identified, including but not limited to the fact that it appears on the evidence that the Ministry was aware of the public objections and the fact that the claimants were deprived of the opportunity granted to them by statute in relation to objections and representations permitted when updating the national plan and the extent of the effect that the sporting complex would have on the daily activities of these claimants, there was a duty on the Minister to act fairly when considering the application for planning permission. In so saying it is the finding of the court that that duty encompassed the grant of an opportunity to the claimants to engage in genuine consultation on at least on one occasion. It was not the duty of the Minister to consult with each and every user of the savannah but merely to provide a general opportunity to those users who wishes to avail themselves of that opportunity.
- [83] Consultation is not only about objection but is also about representations which may consist of questions, suggestions and proposals all with a view to assisting in arriving at the best possible plan which would benefit the various interests in the community and at the same time give effect to the government's intention. It is about a participative balanced approach.
- [99] That being the evidence, it is manifestly clear that there was no consultation with those to be affected. The essence of consultation is the communication of a genuine invitation to give advice and a genuine consideration of that advice. This in the court's view must start with the giving of adequate notice of the intention to consult and the date and time of the consultation. That notice must be given in a form which provides for the widest reception by those who may be potentially affected, whether by way of advertisement in the newspaper and flyers distributed to residents. The form and manner of distribution of the notice is only relevant in so far as it treats with the requirement to reach out to as many of those persons to be affected in an effort to secure sufficient participation in the process. This in the court's view is the first step in engaging in a genuine consultative process. There is no evidence before this court from the defendant as to the steps taken to entreat the community in a genuine process of consultation in that regard. To the contrary the evidence shows a reactionary approach to the concerns of the stakeholders on the part of the defendant in a piecemeal manner which itself does not in substance reflect genuine consultation.
- [100] Secondly, to achieve consultation sufficient information must be supplied by the consulting to the consulted party to enable it to tender helpful advice. Sufficient time must be given by the consulting to the consulted party to enable it to do that, and sufficient time must be available for such advice to be considered by the consulting party. The contents of the letter of the 11th September 2013, supra, adequately demonstrate the malaise in approach taken towards consultation. The said letter simply offers to provide information on the project and an opportunity to ask questions and to be provided with responses. This in no way fulfills the essence of genuine consultation. Consultation is not about providing information and answering questions. It is about hearing the views of those to be affected and actively considering their views. If at the end of the day, the views of those to be affected have made no difference to the decision maker then it does not lie within the mouth of the affected persons to complain that they were not consulted so long as their views were properly considered.

Decision

The Court declared that the defendant breached its duty to take steps to amend the development plan. Its decision to grant permission for the development was made in breach of the principles of natural justice and was null, void and of no effect. The defendant is also ordered to reconsider the application in a procedurally fair manner and specifically after genuine consultation with the claimants and other affected members of the public.

Case Name	Concerned Residents of Cunupia v. Environmental Management Authority and RPN Enterprises Limited
Citation	TT 2015 HC 259 (CV 3024 of 2012)
Court	High Court

Background & summary

A non-profit organization representing the residential communities of Cunupia sought judicial review of the decision of the Environmental Management Authority to enter into a consent agreement with a company in respect of the establishment of a concrete batching plant. Residents of the area began formal complaints leading to an investigation by the Environmental Management Authority and the sending of a Notice of Violation. The consent agreement was made following a site visit and the imposition of a fine on the company. The claimants alleged such agreement was unlawful, null and void and of no effect.

The law

- Environmental Management Act, Sections 35-40, 62-68
- Certificate of Environmental Clearance (Designated Activities) Order
- Certificate of Environmental Clearance Rules

Highlights

- [174] Even the ground of illegality was based ultimately on the right of the public to be consulted before a developer could embark on projects which caused a negative environmental impact.
- [175] Had the deponents disclosed that the batching plant was non-operational, at the time of the application for leave, the Court would undoubtedly have enquired whether the batching plant and by extension the decision of the defendant was the cause of sufferings of the claimants. The Court would have enquired whether it may have been rather the use of the land for stockpiling of aggregate that gave rise to the problems encountered by the claimants. The use of land for the stock piling of aggregate is not an activity requiring a CEC and would have been regarded as unrelated to the impugned decision of the defendant. The Court would have enquired whether an action in nuisance might have better met the needs of the claimants, and whether the claimants' action ought to have been directed to the RPN Enterprises Limited rather than at the defendant.
- [176] It is therefore my view that the Court would have treated with the application for leave very differently, had the claimants disclosed that at the critical time the concrete batching plant, though present on the land was not operational. On the principles expounded in *Brinks Mat*, the claimants have not been frank with the Court. It is therefore my view that their non-disclosure would have affected the Court's view of the issues which engaged its attention at the application for leave to apply for judicial review. The Court is therefore of the view that on that ground the application ought to be dismissed.
- [195] In the proceedings before this Court, before refusing the application of the Interested Party, the EMA indicated that no EIA was required. In my view, the direct result of this was that Section 35(5) of the Act was not activated in respect of this project and it was not required to be submitted for public comment.
- [196] The EMA then exercised its powers at Section 36 of the Act. At this stage the EMA refused the application for the CEC. In this regard, one encounters a problem of statutory interpretation, in that the EMA in considering all relevant matters, as required by Section 36, could not consider any public comments, as there were none. In my view, it is at this Section that the Court ought to proceed to employ the purposive interpretation to avoid an absurd result.
- [197] The stated purpose of the Act is sustainable development, which is the balance between environmental protection and economic development. The Act does not require the EMA to employ the big stick on every developer, but is required to respond to the application for a CEC according to the environmental impact of the proposed activity. As stated above, the application with the least environmental impact requires no CEC at all. The application with the greatest impact requires a CEC and an EIA. If Section 36(1) of the Act is seen through this lens, it must be interpreted as permitting the EMA to consider comments and representations only where they have been required by Section 35(4).
- [205] In this respect, I agree with learned Senior Counsel, Mr. Martineau, that a legitimate expectation cannot be founded on a statutory right. See early authorities on legitimate expectation such as the learning of Lord Diplock in *O'Reilly v. Mackman* [*O'Reilly v. Mackman* [1982] 3 All ER 1124] and *CCSU v. Minister for the Civil Service* [*CCSU v. Minister for the Civil Service* [1984] 3 All ER 935]. It can be seen from those authorities that a legitimate expectation arises where the impugned decision does not affect the enforceable rights of the claimant. (See Lord Diplock in *CCSU* at page 951(j)). A legitimate expectation arises therefore, where enforceable rights have ended.
- [207] I therefore respectfully agree with learned Senior Counsel for the defendant that the claimants could not conceive a legitimate expectation on the basis of the clear statutory right which they enjoy by virtue of Section 31 of the Act [Environmental Management Act, Ch. 35:05].
- [213] In summary it is my view that in its decision to enter into a consent agreement with the Interested Party, the EMA acted within its discretion as conferred by the Act. Its actions fell short of the definition of unreasonableness and the impugned decision could not be described as one which was so unreasonable that no reasonable authority would make.
- [216] In this way, it is my view that the decision of the EMA to avoid requiring a new CEC and to enter instead into a Consent Agreement with the Interested Party compromises the policy of the public participation, which is reflected in the Act and enshrined in the National Environmental Policy. It is therefore my view and I hold that the impugned decision, though otherwise flawless, was one that was in conflict with the general policy of the Act.

Decision

Although the Court considered the ground of the application ought to be dismissed due to non-disclosure (the deponents did not disclose that at the time of the application for leave, the batching plant was non-operational), it proceeded to consider the grounds of illegality, irrationality and alleged breach of a legitimate expectation. In this regard, it found that the decision to not require a new CEC and to enter into a consent agreement comprised the right of the public to be consulted.

Case Name	Sooknanan And Fishermen And Friends of The Sea v. Environmental Management Authority And Minister of Energy And Energy Affairs
Citation	H.C.813/2014
Court	High Court

Background & summary

A fisherman and a non-profit organization representing fishing communities sought to review the decision of the Environmental Management Authority to grant a Certificate of Environmental Clearance (CEC) to a petroleum company wishing to carry out a 3-Dimensional Seismic Survey in the Gulf of Paria without requiring an Environmental Impact Assessment. The claimants contended that the authority did not properly exercise its discretion nor take into consideration the impact and/or the possible effect on the fishing community and marine life. They argued that no extensive discussions or consultations with the fisherfolk had taken place and much of the information relied on by the authority was archaic and not available to the applicants or other stakeholders who would be affected by the decision.

The law

- Environmental Management Act, Section 35
- National Environmental Policy

Highlights

- [26] The preamble to the EMA Act envisions a collaborative approach, with the EMA working in tandem with the public to protect the environment. In the instant case, conversely, this has turned into a battle between two self-styled heroes of the environment who are at loggerheads, with the Interested Party supporting the EMA.
- [50] Not necessarily because certain information was considered and other information not makes does this make for a conclusion that the decision was irrational. Further there is no evidence to suggest that undue weight was given to one consideration in preference to another thereby amounting to ostensible illogicality or that the considerations led to a decision that lacked comprehensible justification. Therefore this Court finds no merit on the question of irrationality.
- [51] Furthermore, it cannot be said that the EMA acted without procedural propriety simply because of the complaint made by the Applicants that there was a breach of natural justice because they were of the opinion that there was no consultation, which has been made clear, is premised on the need for an EIA.
- [52] The submission by the Applicants is such that the duty to act fairly incorporates a duty on the part of the Respondent to give to those who may be adversely affected by the decision, namely the Applicants, an opportunity to be heard prior to the making of the decision. The Respondent says that the Applicants were in fact heard.
- [53] What is fair differs in relation to the particular case. As stated by Lord Bridge in *Lloyd v McMahon* [1987] AC 625, the rules of natural justice are not engraved on tablets of stone and "The requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates."
- [58] In response to this the Applicants, relying on the case of *Ulric 'Buggy' Haynes Coaching School v The Minister of Planning and Sustainable Development CV2013-05227*, submit that the Court is not prevented from imposing such a duty of consultation on a decision maker. Further, the Applicants have lamented throughout their evidence and submissions about the lack of "meaningful" consultation with "meaningful" effect on the part of the EMA. The question that this Court is therefore obliged to pose is - what is meaningful in whose eyes and to whose standards?
- [63] This court is satisfied that meetings held by Petrotrin with the fishing community demonstrated sufficient consultation in all of the circumstances of this case, particularly in light of this Court's finding that such consultation was not mandated by the legislation, no EIA having been required by the EMA.
- [64] Even in the absence of the requirement for an EIA, this court finds that, as per *Berkeley v Sec of State for the Environment* [2001] 2 AC 603, the Applicants were given "an opportunity to express [their] opinion on the environmental issues" by virtue of the three (3) consultative sessions held by Petrotrin.
- [65] As per *Stollmeyer J in the Atlantic LNG case*; "It is sufficient if those affected, or likely to be affected, are put into a position that allows their views and opinions to be heard, to be ventilated fully, and that those views and opinions be considered properly in the decision making process. There is no requirement for ongoing public debate."
- [66] This Court agrees with the submission of the Respondent that consultations cannot go on forever. There must be an end at some point. Therefore the Court finds that those affected persons were indeed given an opportunity to have their concerns addressed and as such there was consultation although not mandated by legislation in this instance.
- [73] The fact that the Applicants succeeded in their Leave Application, had an Interested Party apply to join the proceedings, overcame the challenge that the relief sought by them was otiose and engaged in 3 days of hearing and submissions as well as submissions on costs, all lead this court to find that this application was neither frivolous and vexatious, as referred to in section 7(8) of the JRA.
- [74] This Court also finds that any challenge involving the environment to the extent and nature of this Claim must be clothed with public interest.

Decision

The Court dismissed the claim as the authority was not mandated to consult once it determined there was no need for an EIA and the consultations carried out were deemed sufficient. However, no costs were ordered given the public interest of environmental claims.

Case Name	Maharaj and Concerned Residents of Cunupia v. Minister of Planning and R.P.N. Enterprises Ltd.
Citation	TT 2016 HC 70 (CV 2013-00804)
Court	High Court

Background & summary

Having received complaints from the first claimant and other residents of Cunupia, the Town and Country Planning Division investigated the establishment of a Concrete Batching Plant which stood on the premises of a company. In the name of the Minister of Planning and Sustainable Development, the Town and Country Planning Division refused to grant planning permission to the company for the operation of the plant. Upon an appeal by the Interested Party, the Minister overturned his first decision. The court was posed to decide on the circumstances in which a public authority can review its own decision, and when does the review of an earlier decision amount to illegality.

The law

- Town and Country Planning Act, Sections 3-8, 11, 13, 16
- Environmental Management Act, Sect. 62(f)

Highlights

- [110] Nonetheless, it seems that the words of Carnworth J ring true. It would, in my view, be contrary to the principles of good administration for a public authority to be continually changing its decision or changing its decision without good reason. Persons affected by the decision have a right to be able to rely on the certainty of administrative decisions and to make their private plans accordingly. Indeed the requirement of certainty in administrative decision-making is one of the principles which requires expeditious consideration of applications for judicial review. Thus in *O'Reilly v. Mackman* [1982] 3 All ER 1124, Lord Diplock said at page 1131: The public interest in good administration requires that public authorities and third parties should not be kept in suspense about the legal validity of a decision the authority has reached in the purported exercise of decision-making powers for any longer period than is absolutely necessary in fairness to the person affected by the decision... The statement of Lord Diplock was quoted and relied upon by Lord Goff in *Caswell v. Dairy Produce Quota Tribunal* [1990] 2 All ER 434 at 441.
- [111] In my view therefore, unless there was a change in circumstances as alluded to in *Cardiff [Rv. Cardiff]* [1998] 3 PLR 55], it is my view that it would have been wrong for the Minister to depart from his earlier decision.
- [113] In my view and according to the evidence there was no change in the circumstances of the site between March, 2012 when permission was refused and October, 2012, when the original decision was reviewed.
- [114] The site certainly remained the same. The Interested Party has asserted that it was only after the grant of planning permission that the batching plant became operational. According to the evidence there were only two differences. The first was that the EMA changed its mind. The second difference was that a different panel undertook the investigation on behalf of the Minister. The first investigation was conducted by Mr. Pariag of the TCPD, while the second was conducted by the Advisory Panel, chaired by Mr. Mooleedhar.
- [115] According to the evidence of the defendant, it is my view that both investigations followed the same paces. Both involved a site visit. The difference was that Mr. Mooleedhar sat as a virtual Court of Appeal on recommendations of Mr. Pariag.
- [116] Accordingly, it is my view that the evidence has not demonstrated that the review was based on a change of circumstances. This is manifested from the reason provided by the Minister in his letter of the 6th December, 2012 to learned instructing attorney for the claimant. The reasons resonate rather like judgment on appeal.
- [119] It follows therefore, that it is my view that there was no change of circumstances between the first decision and the review. It is my view that the Minister's reversal of his original decision was contrary to good administration and illegal, particularly in the face of an express statutory provision that his decision was final.

Decision

The Court concluded that there was no change of circumstances between the first decision and the review. It was of the view that the Minister's reversal of his original decision was contrary to good administration and illegal, particularly in the face of an express statutory provision that his decision was final.

CHAPTER IV

Final considerations

As the review of the international, regional and national commitments of countries as well as their application in the national context by their courts and tribunals has demonstrated, the Caribbean has made significant progress in the implementation of the rights of access to information, public participation and access to justice in environmental matters. In the past decades, the countries of the subregion must be commended for establishing solid legal and institutional frameworks and for further developing them in practice —many times quite vigorously— through case law even in the absence of statutory legislation or specific regulations. The latter not only follows a general regional Latin American and Caribbean trend, which aims to achieve the full implementation of such rights in a progressive manner, but most importantly, evidences the strong commitment of Caribbean countries with access rights and with the strengthening of environmental democracy for present and future generations.

Despite such visible developments, some challenges remain. Some of the main conclusions that can be drawn from the analysis made in the previous chapters and which Caribbean decision-makers and appliers may consider, are as follows:

- Enact access to information legislation where such laws do not yet exist, favouring the maximum disclosure of information to the benefit of the underlying public interest. Where such legislation is already in force, special attention should be paid to the specific characteristics of environmental information, defining it in the broadest terms possible and providing it in suitable and comprehensible formats;
- Refuse access to environmental information based on exceptional, adequate, necessary and proportional criteria. In applying the reasons of refusal, tests of public interest should be encouraged where there is a collision of rights;
- Continue to generate, compile and disseminate environmental information, placing it proactively in the public domain in an accessible and systematic manner. Publicly-available environmental registers and information systems should thus be encouraged;
- Provide the widest form of public participation in environmental decision-making processes, particularly in projects and activities having or likely to have a significant impact on the environment or health. Such public consultations should be undertaken properly and adequately, at early stages, with clear procedures, reasonable timeframes and sufficient information to enable true and effective participation;
- Pay particular attention to the directly affected public and to persons or groups in vulnerable situations, taking specific measures to enable their full exercise of access rights in conditions of equality and non-discrimination;
- Promote broad active legal standing procedures in defence of the environment, considering the public interest embedded in environmental cases;
- Establish reasonable and non-prohibitive costs to access justice both to challenge a decision and obtain injunctive relief, thereby reducing barriers to bring actions in cases of violations of access rights;
- Encourage alternative dispute resolution mechanisms by ways different to litigation due to the cost-reduction and time saving benefits;
- Establish specialized bodies or ensure access to expert advice and knowledge in resolving environmental cases, giving the singular characteristics of such cases with diffuse causes and impacts and involving highly technical and scientific matters; and

- Promote education and awareness-raising and build capacities of the duty-bearers (authorities, officials or relevant entities) and right-holders (the general public) to fully implement and exercise their access rights.

The relevance of the aforementioned challenges makes the full application of environmental access rights more necessary than ever. Access to information, public participation and access to justice are not only fundamental values of good governance and open and democratic societies, but also requirements to achieve sustainable development and environmental protection. The interconnections between access rights, human rights and environmental sustainability, all of which aim to integrate human beings into their surroundings and the decisions which affect them, constitute essential elements upon which sustainable development must be built if it is to reach all members of society.

Access rights are the bedrock of most international environmental agreed commitments, including the Paris Agreement on climate change, and of the United Nations 2030 Agenda for Sustainable Development. The latter, adopted by the United Nations General Assembly on 25 September 2015, establishes 17 Sustainable Development Goals and 169 targets linking access rights with human rights and sustainable development. Access rights permeate all of the Goals, but are expressly referred to in Goal 16. Such Goal makes explicit the commitment of States to ensure: (i) public access to information and protection of fundamental freedoms; (ii) inclusive, participatory and representative decision-making; and, (iii) equal access to justice. Furthermore, the 2030 Agenda aims to leave no one behind by ensuring that all persons -including those in vulnerable situations- can exercise their rights on a basis of equality and non-discrimination. To ensure that everyone's voice is heard, it is also necessary to consider the rights of future generations and nature when development policies are decided.

The recently adopted Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters in Latin America and the Caribbean precisely intends to address many of the aforementioned. With the agreement, Caribbean countries will not only renew their continuous commitment with access rights, human rights and sustainable development, but will also find a highly useful platform to strengthen their laws and institutions through cooperation and capacity-building under a rights-based approach.

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ANNEXES

Annex A

REGIONAL AGREEMENT ON ACCESS TO INFORMATION, PARTICIPATION AND JUSTICE IN ENVIRONMENTAL MATTERS IN LATIN AMERICA AND THE CARIBBEAN¹

**Adopted at Escazú, Costa Rica, on 4 March 2018
Opening for signature at United Nations Headquarters in New York
on 27 September 2018**

The Parties to the present Agreement,

Recalling the adoption, at the United Nations Conference on Sustainable Development, held in Rio de Janeiro, Brazil, in 2012, of the Declaration on the application of Principle 10 of the Rio Declaration, reaffirming the commitment to the rights of access to information, participation and justice regarding environmental issues, recognizing the need to make commitments to ensure proper fulfilment of those rights and declaring a willingness to launch a process for exploring the feasibility of adopting a regional instrument,

Reaffirming Principle 10 of the 1992 Rio Declaration on Environment and Development, which establishes the following: “Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided”,

Emphasizing that access rights are interrelated and interdependent, and so each and every one of them should be promoted and implemented in an integrated and balanced manner,

Convinced that access rights contribute to the strengthening of, inter alia, democracy, sustainable development and human rights,

Reaffirming the importance of the Universal Declaration of Human Rights and recalling other international human rights instruments that underscore that all States have the responsibility to respect, protect and promote human rights and fundamental freedoms for all, without distinction of any kind, including those related to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Reaffirming also all the principles of the 1972 Declaration of the United Nations Conference on the Human Environment and of the 1992 Rio Declaration on Environment and Development,

Recalling the Declaration of the United Nations Conference on the Human Environment, Agenda 21, the Programme for the Further Implementation of Agenda 21, the Declaration of Barbados and the Programme of Action for the Sustainable Development of Small Island Developing States, the Mauritius Declaration and the Mauritius Strategy for the Further Implementation of the Programme of Action for the Sustainable Development of Small Island Developing States, the Johannesburg Declaration on Sustainable Development, the Plan of Implementation of the World Summit on Sustainable Development and the SIDS Accelerated Modalities of Action (SAMOA) Pathway,

¹ The certified true copies of the Regional Agreement are available at: <https://observatoriop10.cepal.org/en/treaties/regional-agreement-access-information-public-participation-and-justice-environmental>.

Recalling also that, in the outcome document of the United Nations Conference on Sustainable Development, held in Rio de Janeiro, Brazil, in 2012, entitled “The future we want”, among the many provisions referring to Principle 10 of the Rio Declaration, the Heads of State and Government and high-level representatives acknowledged that democracy, good governance and the rule of law, at the national and international levels, as well as an enabling environment, were essential for sustainable development, including sustained and inclusive economic growth, social development, environmental protection and eradication of poverty and hunger; underscored that broad public participation and access to information and judicial and administrative proceedings were essential to the promotion of sustainable development; and encouraged action at the regional, national, subnational and local levels to promote access to environmental information, public participation in the environmental decision-making process and access to justice in environmental matters, as appropriate,

Considering United Nations General Assembly resolution 70/1 of 25 September 2015, entitled “Transforming our world: the 2030 Agenda for Sustainable Development”, by which it adopted a comprehensive, far-reaching and people-centred set of universal and transformative Sustainable Development Goals and targets, and reaffirmed its commitment to achieving sustainable development in its three dimensions —economic, social and environmental— in a balanced and integrated manner,

Recognizing the multiculturalism of Latin America and the Caribbean and of their peoples,

Recognizing also the important work of the public and of human rights defenders in environmental matters for strengthening democracy, access rights and sustainable development and their fundamental contributions in this regard,

Aware of the progress made in international and regional agreements, in domestic legislation and practice on rights of access to environmental information, public participation in the environmental decision-making process and access to justice in environmental matters,

Convinced of the need to promote and strengthen dialogue, cooperation, technical assistance, education and awareness-raising as well as capacity-building for the full exercise of access rights at the international, regional, national, subnational and local levels,

Resolved to achieve the full implementation of the access rights provided for under the present Agreement, as well as the creation and strengthening of capacities and cooperation,

Have agreed as follows:

Article 1 **Objective**

The objective of the present Agreement is to guarantee the full and effective implementation in Latin America and the Caribbean of the rights of access to environmental information, public participation in the environmental decision-making process and access to justice in environmental matters, and the creation and strengthening of capacities and cooperation, contributing to the protection of the right of every person of present and future generations to live in a healthy environment and to sustainable development.

Article 2 **Definitions**

For the purposes of the present Agreement:

- (a) “Access rights” means the right of access to environmental information, the right of public participation in the environmental decision-making process and the right of access to justice in environmental matters;

- (b) “Competent authority” means, for the purposes of articles 5 and 6 of the present Agreement, any public body that exercises the powers, authority and functions for access to information, including independent and autonomous bodies, organizations or entities owned or controlled by the government, whether by virtue of powers granted by the constitution or other laws, and, when appropriate, private organizations that receive public funds or benefits (directly or indirectly) or that perform public functions and services, but only with respect to the public funds or benefits received or to the public functions and services performed;
- (c) “Environmental information” means any information that is written, visual, audio, and electronic, or recorded in any other format, regarding the environment and its elements and natural resources, including information related to environmental risks, and any possible adverse impacts affecting or likely to affect the environment and health, as well as to environmental protection and management;
- (d) “Public” means one or more natural or legal persons and the associations, organizations or groups established by those persons, that are nationals or that are subject to the national jurisdiction of the State Party;
- (e) “Persons or groups in vulnerable situations” means those persons or groups that face particular difficulties in fully exercising the access rights recognized in the present Agreement, because of circumstances or conditions identified within each Party’s national context and in accordance with its international obligations.

Article 3 **Principles**

Each Party shall be guided by the following principles in implementing the present Agreement:

- (a) Principle of equality and principle of non-discrimination;
- (b) Principle of transparency and principle of accountability;
- (c) Principle of non-regression and principle of progressive realization;
- (d) Principle of good faith;
- (e) Preventive principle;
- (f) Precautionary principle;
- (g) Principle of intergenerational equity;
- (h) Principle of maximum disclosure;
- (i) Principle of permanent sovereignty of States over their natural resources;
- (j) Principle of sovereign equality of States; and
- (k) Principle of *pro persona*.

Article 4 **General provisions**

1. Each Party shall guarantee the right of every person to live in a healthy environment and any other universally-recognized human right related to the present Agreement.
2. Each Party shall ensure that the rights recognized in the present Agreement are freely exercised.
3. Each Party shall adopt the necessary measures, of a legislative, regulatory, administrative or any other nature, in the framework of its domestic provisions, to guarantee the implementation of the provisions of the present Agreement.

4. With the aim of contributing to the effective application of the present Agreement, each Party shall provide the public with information to facilitate the acquisition of knowledge on access rights.
5. Each Party shall ensure that guidance and assistance is provided to the public —particularly those persons or groups in vulnerable situations— in order to facilitate the exercise of their access rights.
6. Each Party shall guarantee an enabling environment for the work of persons, associations, organizations or groups that promote environmental protection, by recognizing and protecting them.
7. No provision in the present Agreement shall limit or repeal other more favourable rights and guarantees set forth, at present or in the future, in the legislation of a State Party or in any other international agreement to which a State is party, or prevent a State Party from granting broader access to environmental information, public participation in the environmental decision-making process and justice in environmental matters.
8. Each Party shall seek to adopt the most favourable interpretation for the full enjoyment of and respect for the access rights when implementing the present Agreement.
9. For the implementation of the present Agreement, each Party shall encourage the use of new information and communications technologies, such as open data, in the different languages used in the country, as appropriate. In no circumstances shall the use of electronic media constrain or result in discrimination against the public.
10. The Parties may promote knowledge of the provisions of the present Agreement in other international forums related to environmental matters, in accordance with the rules of each forum.

Article 5

Access to environmental information

Accessibility of environmental information

1. Each Party shall ensure the public's right of access to environmental information in its possession, control or custody, in accordance with the principle of maximum disclosure.
2. The exercise of the right of access to environmental information includes:
 - (a) requesting and receiving information from competent authorities without mentioning any special interest or explaining the reasons for the request;
 - (b) being informed promptly whether the requested information is in possession or not of the competent authority receiving the request; and
 - (c) being informed of the right to challenge and appeal when information is not delivered, and of the requirements for exercising this right.
3. Each Party shall facilitate access to environmental information for persons or groups in vulnerable situations, establishing procedures for the provision of assistance, from the formulation of requests through to the delivery of the information, taking into account their conditions and specificities, for the purpose of promoting access and participation under equal conditions.
4. Each Party shall guarantee that the above-mentioned persons or groups in vulnerable situations, including indigenous peoples and ethnic groups, receive assistance in preparing their requests and obtain a response.

Refusal of access to environmental information

5. If the requested information or part thereof is not delivered to the applicant because it falls under the domestic legal regime of exceptions, the competent authority shall communicate its refusal in writing, including the legal provisions and the reasons justifying the decision in each case, and inform the applicant of the right to challenge and appeal.
6. Access to information may be refused in accordance with domestic legislation. In cases where a Party does not have a domestic legal regime of exceptions, that Party may apply the following exceptions:
 - (a) when disclosure would put at risk the life, safety or health of individuals;
 - (b) when disclosure would adversely affect national security, public safety or national defence;
 - (c) when disclosure would adversely affect the protection of the environment, including any endangered or threatened species; or
 - (d) when disclosure would create a clear, probable and specific risk of substantial harm to law enforcement, prevention, investigation and prosecution of crime.
7. The exception regimes shall take into account each Party's human rights obligations. Each Party shall encourage the adoption of exception regimes that favour the disclosure of information.
8. The reasons for refusal shall be legally established in advance and be clearly defined and regulated, taking into account the public interest, and shall thus be interpreted restrictively. The burden of proof will lie with the competent authority.
9. When applying the public interest test, the competent authorities shall weigh the interest of withholding the information against the public benefit of disclosing it, based on suitability, need and proportionality.
10. Where not all the information contained in a document is exempt under paragraph 6 of the present article, the non-exempt information shall be provided to the applicant.

Conditions applicable to the delivery of environmental information

11. The competent authorities shall guarantee that the environmental information is provided in the format requested by the applicant, if available. If such a format is not available, the environmental information shall be provided in the available format.
12. The competent authorities shall respond to requests for environmental information as quickly as possible and within a period not longer than 30 business days from the date of receipt of the request, or less if so stipulated in domestic legislation.
13. Where, in exceptional circumstances and in accordance with domestic legislation, the competent authority requires more time to respond to the request, it shall notify the applicant in writing of the justification for the extension prior to the expiration of the period established in paragraph 12 of the present article. Such an extension will not exceed 10 business days.
14. In the event that the competent authority does not respond within the periods established in paragraphs 12 and 13 of the present article, paragraph 2 of article 8 shall apply.
15. When the competent authority receiving the request does not have the requested information, it shall notify the applicant as quickly as possible, indicating, if it can determine it, which authority may be in possession of the information. The request shall be forwarded to the relevant authority, and the applicant so informed.
16. When the requested information does not exist or has not yet been generated, the applicant shall be so informed, with explanation, within the periods established in paragraphs 12 and 13 of the present article.

17. Environmental information shall be disclosed at no cost, insofar as its reproduction or delivery is not required. Reproduction and delivery costs shall be applied in accordance with the procedures established by the competent authority. Such costs shall be reasonable and made known in advance, and payment can be waived in the event that the applicant is deemed to be in a vulnerable situation or to have special circumstances warranting such a waiver.

Independent oversight mechanisms

18. Each Party shall establish or designate one or more impartial entities or institutions with autonomy and independence to promote transparency in access to environmental information, to oversee compliance with rules, and monitor, report on and guarantee the right of access to information. Each Party may consider including or strengthening, as appropriate, sanctioning powers within the scope of the responsibilities of the aforementioned entities or institutions.

Article 6

Generation and dissemination of environmental information

1. Each Party shall guarantee, to the extent possible within available resources, that the competent authorities generate, collect, publicize and disseminate environmental information relevant to their functions in a systematic, proactive, timely, regular, accessible and comprehensible manner, and periodically update this information and encourage the disaggregation and decentralization of environmental information at the subnational and local levels. Each Party shall strengthen coordination between the different authorities of the State.
2. The competent authorities shall endeavour to ensure, to the extent possible, that environmental information is reusable, processable and available in formats that are accessible, and that no restrictions are placed on its reproduction or use, in accordance with domestic legislation.
3. Each Party shall have in place one or more up-to-date environmental information systems, which may include, inter alia:
 - (a) the texts of treaties and international agreements, as well as environmental laws, regulations and administrative acts;
 - (b) reports on the state of the environment;
 - (c) a list of public entities competent in environmental matters and, where possible, their respective areas of operation;
 - (d) a list of polluted areas, by type of pollutant and location;
 - (e) information on the use and conservation of natural resources and ecosystem services;
 - (f) scientific, technical or technological reports, studies and information on environmental matters produced by academic and research institutions, whether public or private, national or foreign;
 - (g) climate change sources aimed at building national capacities;
 - (h) information on environmental impact assessment processes and on other environmental management instruments, where applicable, and environmental licences or permits granted by the public authorities;
 - (i) an estimated list of waste by type and, when possible, by volume, location and year; and
 - (j) information on the imposition of administrative sanctions in environmental matters.

Each Party shall guarantee that environmental information systems are duly organized, accessible to all persons and made progressively available through information technology and georeferenced media, where appropriate.

4. Each Party shall take steps to establish a pollutant release and transfer register covering air, water, soil and subsoil pollutants, as well as materials and waste in its jurisdiction. This register will be established progressively and updated periodically.
5. Each Party shall guarantee that in the case of an imminent threat to public health or the environment, the relevant competent authority shall immediately disclose and disseminate through the most effective means all pertinent information in its possession that could help the public take measures to prevent or limit potential damage. Each Party shall develop and implement an early warning system using available mechanisms.
6. In order to facilitate access by persons or groups in vulnerable situations to information that particularly affects them, each Party shall endeavour, where applicable, to ensure that the competent authorities disseminate environmental information in the various languages used in the country, and prepare alternative formats that are comprehensible to those groups, using suitable channels of communication.
7. Each Party shall use its best endeavours to publish and disseminate at regular intervals, not exceeding five years, a national report on the state of the environment, which may contain:
 - (a) information on the state of the environment and natural resources, including quantitative data, where possible;
 - (b) national actions to fulfil environmental legal obligations;
 - (c) advances in the implementation of the access rights; and
 - (d) collaboration agreements among public, social and private sectors.

Such reports shall be drafted in an easily comprehensible manner and accessible to the public in different formats and disseminated through appropriate means, taking into account cultural realities. Each Party may invite the public to make contributions to these reports.

8. Each Party shall encourage independent environmental performance reviews that take into account nationally or internationally agreed criteria and guides and common indicators, with a view to evaluating the efficacy, effectiveness and progress of its national environmental policies in fulfilment of their national and international commitments. The reviews shall include participation by the various stakeholders.
9. Each Party shall promote access to environmental information contained in concessions, contracts, agreements or authorizations granted, which involve the use of public goods, services or resources, in accordance with domestic legislation.
10. Each Party shall ensure that consumers and users have official, relevant and clear information on the environmental qualities of goods and services and their effects on health, favouring sustainable production and consumption patterns.
11. Each Party shall create and keep regularly updated its archiving and document management systems in environmental matters in accordance with its applicable rules with the aim of facilitating access to information at all times.
12. Each Party shall take the necessary measures, through legal or administrative frameworks, among others, to promote access to environmental information in the possession of private entities, in particular information on their operations and the possible risks and effects on human health and the environment.
13. In accordance with its capacities, each Party shall encourage public and private companies, particularly large companies, to prepare sustainability reports that reflect their social and environmental performance.

Article 7**Public participation in the environmental decision-making process**

1. Each Party shall ensure the public's right to participation and, for that purpose, commits to implement open and inclusive participation in environmental decision-making processes based on domestic and international normative frameworks.
2. Each Party shall guarantee mechanisms for the participation of the public in decision-making processes, revisions, re-examinations or updates with respect to projects and activities, and in other processes for granting environmental permits that have or may have a significant impact on the environment, including when they may affect health.
3. Each Party shall promote the participation of the public in decision-making processes, revisions, re-examinations or updates other than those referred to in paragraph 2 of the present article with respect to environmental matters of public interest, such as land-use planning, policies, strategies, plans, programmes, rules and regulations, which have or may have a significant impact on the environment.
4. Each Party shall adopt measures to ensure that the public can participate in the decision-making process from the early stages, so that due consideration can be given to the observations of the public, thus contributing to the process. To that effect, each Party shall provide the public with the necessary information in a clear, timely and comprehensive manner, to give effect to its right to participate in the decision-making process.
5. The public participation procedure will provide for reasonable timeframes that allow sufficient time to inform the public and for its effective participation.
6. The public shall be informed, through appropriate means, such as in writing, electronically, orally and by customary methods, and in an effective, comprehensible and timely manner, as a minimum, of the following:
 - (a) the type or nature of the environmental decision under consideration and, where appropriate, in non-technical language;
 - (b) the authority responsible for making the decision and other authorities and bodies involved;
 - (c) the procedure foreseen for the participation of the public, including the date on which the procedure will begin and end, mechanisms for participation and, where applicable, the date and place of any public consultation or hearing; and
 - (d) the public authorities involved from which additional information on the environmental decision under consideration can be requested and the procedure for requesting information.
7. The public's right to participate in environmental decision-making processes shall include the opportunity to present observations through appropriate means available, according to the circumstances of the process. Before adopting the decision, the relevant public authority shall give due consideration to the outcome of the participation process.
8. Each Party shall ensure that, once a decision has been made, the public is informed in a timely manner thereof and of the grounds and reasons underlying the decision, including how the observations of the public have been taken into consideration. The decision and its basis shall be made public and be accessible.
9. The dissemination of the decisions resulting from environmental impact assessments and other environmental decision-making processes in which the public has participated shall be carried out through appropriate means, which may include written, electronic or oral means and customary methods, in an effective and prompt manner. The information disseminated shall include the established procedure to allow the public to take the relevant administrative and judicial actions.

10. Each Party shall establish conditions that are favourable to public participation in environmental decision-making processes and that are adapted to the social, economic, cultural, geographical and gender characteristics of the public.
11. When the primary language of the directly affected public is different to the official languages, the public authority shall ensure that means are provided to facilitate their understanding and participation.
12. Each Party shall promote, where appropriate and in accordance with domestic legislation, public participation in international forums and negotiations on environmental matters or with an environmental impact, in accordance with the procedural rules on participation of each forum. The participation of the public at the national level on matters of international environmental forums shall also be promoted, where appropriate.
13. Each Party shall encourage the establishment of appropriate spaces for consultation on environmental matters or the use of those that are already in existence in which various groups and sectors are able to participate. Each Party shall promote regard for local knowledge, dialogue and interaction of different views and knowledge, where appropriate.
14. The public authorities shall make efforts to identify and support persons or groups in vulnerable situations in order to engage them in an active, timely and effective manner in participation mechanisms. For these purposes, appropriate means and formats will be considered, in order to eliminate barriers to participation.
15. In the implementation of the present Agreement, each Party shall guarantee that its domestic legislation and international obligations in relation to the rights of indigenous peoples and local communities are observed.
16. The public authority shall make efforts to identify the public directly affected by the projects or activities that have or may have a significant impact on the environment and shall promote specific actions to facilitate their participation.
17. With respect to the environmental decision-making processes referred to in paragraph 2 of the present article, as a minimum, the following information shall be made public:
 - (a) a description of the area of influence and physical and technical characteristics of the proposed project or activity;
 - (b) a description of the main environmental impacts of the project or activity and, as appropriate, the cumulative environmental impact;
 - (c) a description of the measures foreseen with respect to those impacts;
 - (d) a summary of (a), (b) and (c) of the present paragraph in comprehensible, non-technical language;
 - (e) the public reports and opinions of the involved entities addressed to the public authority related to the project or activity under consideration;
 - (f) a description of the available technologies to be used and alternative locations for executing the project or activity subject to assessment, when the information is available; and
 - (g) actions taken to monitor the implementation and results of environmental impact assessment measures.

The aforementioned information shall be made available free of charge to the public in accordance with paragraph 17 of article 5 of the present Agreement.

Article 8**Access to justice in environmental matters**

1. Each Party shall guarantee the right of access to justice in environmental matters in accordance with the guarantees of due process.
2. Each Party shall ensure, in the framework of its domestic legislation, access to judicial and administrative mechanisms to challenge and appeal, with respect to substance and procedure:
 - (a) any decision, action or omission related to the access to environmental information;
 - (b) any decision, action or omission related to public participation in the decision-making process regarding environmental matters; and
 - (c) any other decision, action or omission that affects or could affect the environment adversely or violate laws and regulations related to the environment.
3. To guarantee the right of access to justice in environmental matters, each Party shall have, considering its circumstances:
 - (a) competent State entities with access to expertise in environmental matters;
 - (b) effective, timely, public, transparent and impartial procedures that are not prohibitively expensive;
 - (c) broad active legal standing in defence of the environment, in accordance with domestic legislation;
 - (d) the possibility of ordering precautionary and interim measures, inter alia, to prevent, halt, mitigate or rehabilitate damage to the environment;
 - (e) measures to facilitate the production of evidence of environmental damage, when appropriate and as applicable, such as the reversal of the burden of proof and the dynamic burden of proof;
 - (f) mechanisms to execute and enforce judicial and administrative decisions in a timely manner; and
 - (g) mechanisms for redress, where applicable, such as restitution to the condition prior to the damage, restoration, compensation or payment of a financial penalty, satisfaction, guarantees of non-repetition, assistance for affected persons and financial instruments to support redress.
4. To facilitate access to justice in environmental matters for the public, each Party shall establish:
 - (a) measures to minimize or eliminate barriers to the exercise of the right of access to justice;
 - (b) means to publicize the right of access to justice and the procedures to ensure its effectiveness;
 - (c) mechanisms to systematize and disseminate judicial and administrative decisions, as appropriate; and
 - (d) the use of interpretation or translation of languages other than the official languages when necessary for the exercise of that right.
5. In order to give effect to the right of access to justice, each Party shall meet the needs of persons or groups in vulnerable situations by establishing support mechanisms, including, as appropriate, free technical and legal assistance.
6. Each Party shall ensure that the judicial and administrative decisions adopted in environmental matters and their legal grounds are set out in writing.
7. Each Party shall promote, where appropriate, alternative dispute resolution mechanisms in environmental matters, such as mediation, conciliation or other means that allow such disputes to be prevented or resolved.

Article 9

Human rights defenders in environmental matters

1. Each Party shall guarantee a safe and enabling environment for persons, groups and organizations that promote and defend human rights in environmental matters, so that they are able to act free from threat, restriction and insecurity.
2. Each Party shall take adequate and effective measures to recognize, protect and promote all the rights of human rights defenders in environmental matters, including their right to life, personal integrity, freedom of opinion and expression, peaceful assembly and association, and free movement, as well as their ability to exercise their access rights, taking into account its international obligations in the field of human rights, its constitutional principles and the basic concepts of its legal system.
3. Each Party shall also take appropriate, effective and timely measures to prevent, investigate and punish attacks, threats or intimidations that human rights defenders in environmental matters may suffer while exercising the rights set out in the present Agreement.

Article 10

Capacity-building

1. In order to contribute to the implementation of the provisions of the present Agreement, each Party undertakes to create and strengthen national capacities, based on its priorities and needs.
2. Each Party, in line with its capacities, may take, inter alia, the following measures:
 - (a) train authorities and civil servants on environmental access rights;
 - (b) develop and strengthen environmental law and access rights awareness-raising and capacity-building programmes for, inter alia, the public, judicial and administrative officials, national human rights institutions and jurists;
 - (c) provide the competent institutions and entities with adequate equipment and resources;
 - (d) promote education and training on, and raise public awareness of, environmental matters, through, inter alia, basic educational modules on access rights for students at all levels of education;
 - (e) develop specific measures for persons or groups in vulnerable situations, such as providing interpreters or translators in languages other than official languages when necessary;
 - (f) acknowledge the importance of associations, organizations or groups that train the public on or raise public awareness of access rights; and
 - (g) strengthen capabilities to collect, retain and evaluate environmental information.

Article 11

Cooperation

1. The Parties shall cooperate to strengthen their national capacities with the aim of implementing the present Agreement in an effective manner.
2. The Parties shall give particular consideration to least developed countries, landlocked developing countries and small island developing States from Latin America and the Caribbean.
3. For the purposes of implementing paragraph 2 of the present article, the Parties shall promote activities and mechanisms, such as:
 - (a) discussions, workshops, expert exchanges, technical assistance, education and observatories;
 - (b) developing, sharing and implementing educational, training and awareness-raising materials and programmes;

- (c) sharing experiences of voluntary codes of conduct, guidelines, good practices and standards; and
 - (d) committees, councils and forums of multisectoral development stakeholders to address cooperation priorities and activities.
4. The Parties shall encourage partnerships with States from other regions, intergovernmental, non-governmental, academic and private organizations, as well as civil society organizations and other relevant stakeholders to implement the present Agreement.
 5. The Parties recognize that regional cooperation and information-sharing shall be promoted in relation to all aspects of illicit activities against the environment.

Article 12
Clearing house

The Parties shall have a virtual and universally accessible clearing house on access rights. The clearing house will be operated by the Economic Commission for Latin America and the Caribbean, in its capacity as Secretariat, and may include, inter alia, legislative, administrative and policy measures, codes of conduct and good practices.

Article 13
National implementation

Each Party, to the extent of its ability and in accordance with its national priorities, commits to provide the resources for national activities that are needed to fulfil the obligations derived from the present Agreement.

Article 14
Voluntary Fund

1. A Voluntary Fund is hereby established to support the financing of the implementation of the present Agreement, the functioning of which shall be defined by the Conference of the Parties.
2. Parties may make voluntary contributions to support the implementation of the present Agreement.
3. The Conference of the Parties may seek, in accordance with paragraph 5(g) of article 15 of the present Agreement, to obtain funds from other sources to support the implementation of the present Agreement.

Article 15
Conference of the Parties

1. A Conference of the Parties is hereby established.
2. The Executive Secretary of the Economic Commission for Latin America and the Caribbean shall convene the first meeting of the Conference of the Parties no later than one year after the entry into force of the present Agreement. Subsequently, ordinary meetings of the Conference of the Parties shall be held at regular intervals to be decided by the Conference.
3. Extraordinary meetings of the Conference of the Parties shall be held when the Conference deems necessary.
4. At its first meeting, the Conference of the Parties shall:
 - (a) discuss and adopt by consensus its rules of procedure, including the modalities for significant participation by the public; and

- (b) discuss and adopt by consensus the financial provisions that are necessary for the functioning and implementation of the present Agreement.
5. The Conference of the Parties shall examine and promote the implementation and effectiveness of the present Agreement. To that end:
- (a) it shall establish by consensus such subsidiary bodies as it deems necessary for the implementation of the present Agreement;
 - (b) it shall receive and consider reports and recommendations from subsidiary bodies;
 - (c) it shall be informed by the Parties of the measures adopted to implement the present Agreement;
 - (d) it may formulate recommendations to the Parties on the implementation of the present Agreement;
 - (e) it shall prepare and adopt, as applicable, protocols to the present Agreement for its subsequent signature, ratification, acceptance, approval and accession;
 - (f) it shall examine and adopt proposals to amend the present Agreement in accordance with the provisions of article 20 of the present Agreement;
 - (g) it shall establish guidelines and modalities for mobilizing financial and non-financial resources from various sources to facilitate the implementation of the present Agreement;
 - (h) it shall examine and adopt any additional measures needed to achieve the objective of the present Agreement; and
 - (i) it shall perform any other function assigned to it by the present Agreement.

Article 16
Right to vote

Each Party to the present Agreement shall have one vote.

Article 17
Secretariat

1. The Executive Secretary of the Economic Commission for Latin America and the Caribbean shall carry out the secretariat functions of the present Agreement.
2. The functions of the Secretariat shall be as follows:
 - (a) to convene and organize the meetings of the Conference of the Parties and its subsidiary bodies and provide the necessary services;
 - (b) to provide assistance to the Parties upon their request for capacity-building, including the sharing of experiences and information and the organization of activities in accordance with articles 10, 11 and 12 of the present Agreement;
 - (c) to determine, under the general guidance of the Conference of the Parties, the administrative and contractual arrangements needed to carry out its functions effectively; and
 - (d) to perform any other secretariat functions specified in the present Agreement and any other functions as determined by the Conference of the Parties.

Article 18**Committee to Support Implementation and Compliance**

1. A Committee to Support Implementation and Compliance is hereby established as a subsidiary body of the Conference of the Parties to promote the implementation of the present Agreement and to support the Parties in that regard. The rules relating to its structure and functions shall be determined by the Conference of the Parties at its first meeting.
2. The Committee shall be of a consultative and transparent nature, non-adversarial, non-judicial and non-punitive and shall review compliance of the provisions of the present Agreement and formulate recommendations, in accordance with the rules of procedure established by the Conference of the Parties, ensuring the significant participation of the public and paying particular attention to the national capacities and circumstances of the Parties.

Article 19**Settlement of disputes**

1. If a dispute arises between two or more Parties about the interpretation or application of the present Agreement, they shall seek a solution by negotiation or by any other means of dispute settlement acceptable to the parties to the dispute.
2. When signing, ratifying, accepting, approving or acceding to the present Agreement, or at any time thereafter, a Party may declare in writing to the Depositary that, for a dispute not resolved in accordance with paragraph 1 of the present article, it accepts one or both of the following means of dispute settlement as compulsory in relation to any Party accepting the same obligation:
 - (a) submission of the dispute to the International Court of Justice;
 - (b) arbitration in accordance with the procedures that the Conference of the Parties will establish.
3. If the parties to the dispute have accepted both means of dispute settlement referred to in paragraph 2 of the present article, the dispute may be submitted only to the International Court of Justice, unless the parties agree otherwise.

Article 20**Amendments**

1. Amendments to the present Agreement may be proposed by any Party.
2. Amendments to the present Agreement shall be adopted at a meeting of the Conference of the Parties. The text of any proposed amendment shall be communicated to the Parties by the Secretariat at least six months before the meeting at which it is proposed for adoption. The Secretariat shall also communicate the proposed amendment to the signatories to the present Agreement and, for information, to the Depositary.
3. The Parties shall make every effort to reach a consensus on any proposed amendment to the present Agreement. In the event that the efforts to reach a consensus fail, as a last resort, the amendment shall be adopted by a three-fourths majority vote of the Parties present and voting at the meeting.
4. An adopted amendment shall be communicated by the Depositary to all Parties for ratification, acceptance or approval.
5. Ratification, acceptance or approval of an amendment shall be notified to the Depositary in writing. An amendment adopted in accordance with paragraph 3 of the present article shall enter into force for the Parties having consented to be bound by it on the ninetieth day after the date of deposit of the instruments of ratification, acceptance or approval by at least half of the number of Parties to

the present Agreement at the time the amendment was adopted. Thereafter, the amendment shall enter into force for any other Party that consents to be bound by it on the ninetieth day after the date of deposit of its instrument of ratification, acceptance or approval of the amendment.

Article 21

Signature, ratification, acceptance, approval and accession

1. The present Agreement shall be open for signature by any of the countries of Latin America and the Caribbean included in annex 1 at United Nations Headquarters in New York from 27 September 2018 to 26 September 2020.
2. The present Agreement shall be subject to the ratification, acceptance or approval of the States that have signed it. It shall be open to accession by any country in Latin America and the Caribbean included in annex 1 that has not signed it from the day after the date on which it is closed for signature. Instruments of ratification, acceptance, approval or accession shall be deposited with the Depository.

Article 22

Entry into force

1. The present Agreement shall enter into force on the ninetieth day after the date of deposit of the eleventh instrument of ratification, acceptance, approval or accession.
2. For each State that ratifies, accepts or approves the present Agreement or accedes thereto after the deposit of the eleventh instrument of ratification, acceptance, approval or accession, the present Agreement shall enter into effect on the ninetieth day after the date of deposit by such State of its instrument of ratification, acceptance, approval or accession.

Article 23

Reservations

No reservations may be made to the present Agreement.

Article 24

Withdrawal

1. At any time after three years from the date on which the present Agreement has entered into force for a Party, that Party may withdraw from the present Agreement by giving written notification to the Depository.
2. Any such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depository of the notification of withdrawal, or on such later date as may be specified in the notification of withdrawal.

Article 25

Depository

The Secretary-General of the United Nations shall be the Depository for the present Agreement.

Article 26

Authentic texts

The original of the present Agreement, the Spanish and English texts of which are equally authentic, shall be deposited with the Secretary-General of the United Nations.

IN WITNESS WHEREOF, the undersigned, duly authorized, have signed the present Agreement.

DONE at Escazú, Costa Rica, on this fourth day of March, two thousand and eighteen.

Annex 1

- Antigua and Barbuda
- Argentina
- Bahamas
- Barbados
- Belize
- Bolivia (Plurinational State of)
- Brazil
- Chile
- Colombia
- Costa Rica
- Cuba
- Dominica
- Dominican Republic
- Ecuador
- El Salvador
- Grenada
- Guatemala
- Guyana
- Haiti
- Honduras
- Jamaica
- Mexico
- Nicaragua
- Panama
- Paraguay
- Peru
- Saint Kitts and Nevis
- Saint Lucia
- Saint Vincent and the Grenadines
- Suriname
- Trinidad and Tobago
- Uruguay
- Venezuela (Bolivarian Republic of)

Annex B

List of selected cases

	Date of Judgment	Title	Citation
Antigua and Barbuda			
1.	13 March 2007	Benjamin v. Attorney General Et Al	AG 2007 HC 54
Bahamas			
2.	17 November 2009	Save Guana Cay Reef Association Ltd and Others v. the Queen and Others	BS 2009 PC 3
3.	11 June 2014	Bimini Blue Coalition limited v. Christie Et Al	BS 2014 CA 92
4.	14 July 2014	The Queen v. Gray Et Al	BS 2014 SC 80
Barbados			
5.	25 November 2016	St Hill v. Chief Town Planner and Attorney General	BB 2016 HC 33
Belize			
6.	19 December 2002	R. Et Al v. Ex Parte Belize Alliance of Conservation Non Governmental Organizations (BACONGO)	BZ 2002 SC 14
7.	13 August 2003	Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment and another	[2003] UKPC 63
8.	30 June 2008	Belize Institute For Environmental Law v. Chief Environmental Officer Et Al	BZ 2008 SC 13
9.	September 2008	Gegg v. Marin, Minister of Natural Resources and the Environment	BZ 2008 SC 27
10.	3 April 2014	Sarstoon Temash Institute For Indigenous Management Et Al v. Attorney General Et Al	BZ 2014 SC 14
11.	31 July 2014	Ya'axché Conservation Trust v Wilber Sabido, Chief Forest Officer, Attorney General and Belize Hydroelectric Development and Management Company Limited	[2014] CCJ 14 (AJ)
12.	13 January 2016	Belize Tourism Industry Association v. National Environmental Appraisal Committee; Department of Environment and Belize Island Holdings	BZ 2016 SC 1
Jamaica			
13.	16 May 2006	Northern Jamaica Conservation Association and JET v NRCA and NEPA	HCV 3022 of 2005
14.	7 December 2007	Jamaica Environment Trust (JET) v. The Mines and Geology Division (MCD)	AT/MGD/2007/2
15.	13 June 2008	Delapenha Funeral Home Limited v. The Minister of Local Government and Environment	JM 2008 SC 72
16.	1 February 2011	Jamaica Environment Trust (JET) v National Environmental and planning Agency	AT/NEPA/2010/1
17.	13 October 2011	Jamaica Environment Trust v. Natural Resources Conservation Authority and Natural Environment & Planning Agency	JM 2011 SC 121
Saint Kitts and Nevis			
18.	25 January 2017	Anne Hendricks Bass v. Director of Physical Planning	NEVHCV 2016/0059
19.	15 June 2017	Director of Physical Planning v Anne Hendricks Bass	SKBHCVAP2017/0002
Saint Vincent and the Grenadines			
20.	18 December 2014	Mitchell v. Georges	VC 2014 HC 52
Trinidad and Tobago			
21.	1 December 2002	Talisman (Trinidad) Petroleum Ltd v. The Environmental Management Authority	No.EA3 2002
22.	22 October 2004	Fishermen and Friends of The Sea v. The Environmental Management Authority Respondent Et Al	TT 2004 HC 114
23.	16 June 2009	People United Respecting The Environment (PURE) Et Al v. Environmental Management Authority Et Al	TT 2009 HC 134
24.	5 November 2009	Fishermen and Friends of the Sea v. Environmental Management Authority and BP Trinidad and Tobago LLC	PCA 30 of 2004
25.	20 March 2014	Miller, Buddie, G.; The Confederation of Hunters Associations for Conservation Trinidad and Tobago v Singh, Ganga The Honourable Senator, The Minister of the Environment and Water Resources; Seepersad, Johnny, The Chief Game Warden	TT 2014 HC 131
26.	17 November 2014	All Tobago Fisherfolk Association v. Tobago House of Assembly	TT 2014 HC 380
27.	17 December 2014	Trinidad and Tobago Automotive Dealers Association v. Minister of Trade, Industry and Investment (BHARATH)	TT 2014 HC 409
28.	16 June 2015	Ulric 'Buggy' Haynes Coaching School Et Al v. Minister of Planning and Sustainable Development	TT 2015 HC 198
29.	7 August 2015	Concerned Residents of Cunupia v. Environmental Management Authority and RPN Enterprises Limited	TT 2015 HC 259
30.	4 March 2016	Sooknanan And Fishermen And Friends of The Sea v. Environmental Management Authority And Minister of Energy And Energy Affairs	H.C.813/2014
31.	26 April 2016	Maharaj and Concerned Residents of Cunupia v Minister of Planning and Sustainable Development; R.P.N. Enterprises	TT 2016 HC 70

Having timely and adequate access to environmental information, fostering the effective engagement of all interested parties in environmental decision-making and safeguarding access to environmental justice are important prerequisites of sustainable development. This has been reaffirmed in the 2030 Agenda for Sustainable Development and in countless multilateral environmental agreements, including the Paris Agreement on climate change. At the regional level, access rights have been further developed in the Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters in Latin America and the Caribbean, adopted at Escazú, Costa Rica on 4 March 2018.

Seeking to contribute to environmental democracy and sustainable development in the Caribbean, the Caribbean Court of Justice Academy of Law and the United Nations Economic Commission for Latin America and the Caribbean have joined forces to compile the normative foundations and judicial developments that underpin the effective enjoyment of such rights and identify the key challenges ahead. This book, the outcome of that effort, summarizes the legal frameworks applicable to Caribbean countries on environmental access rights, identifies essential common core elements for upholding such rights and reviews salient cases from high courts of the subregion in which access rights have been implemented successfully.



Economic Commission for Latin America and the Caribbean (ECLAC)
Comisión Económica para América Latina y el Caribe (CEPAL)
www.eclac.org