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ENSURING ENVIRONMENTAL ACCESS RIGHTS IN THE CARIBBEAN: ANALYSIS OF SELECTED CASE LAW

EXTRACTS

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This document is an input by the CCJ Academy of Law and ECLAC to the negotiations for the adoption of a regional agreement on access to information, participation and justice in environmental matters in Latin America and the Caribbean ("Principle 10 process" in reference to Principle 10 of the Rio Declaration on Environment and Development), of which ECLAC is Technical Secretariat. More information on the process is available at: http://www.eclac.org/en/principle10.

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I. Overview of the Caribbean legal framework on access rights in environmental matters

The Caribbean[1] 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 counties such as Belize, which was the first in Latin America and the Caribbean to adopt a Freedom of Information Act in 1994.

A. 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

[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.

CARICOM Charter of Civil Society[2], laid solid foundations for the rights to environmental information and public engagement in environmental matters in the Caribbean region.

In the Port of Spain Accord[3], 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."

The Revised Treaty of Chaguaramas[4], 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 Declaration[5] was signed by the OECS Ministers of the Environment in 2001 and sets out the broad framework structured around 21 principles to be pursued 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 Basseterre[6] 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 State[7].

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[2] 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].

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

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

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

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

[7] 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."

The Convention for the Protection and Development of the Marine Environment in the Wider Caribbean Region[8], a regional treaty 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 Spills[9], Specially Protected Areas and Wildlife[10] and Land Based Sources of Marine Pollution[11]) 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 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 in 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 that are fully applicable to environmental matters.

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).

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[8] See http://www.cep.unep.org/cartagena-convention [online]

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

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

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

2. Statutory basis

a) 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 1). In the Bahamas[12], Dominica[13] and Saint Vincent and the Grenadines[14] there are also Environmental Health Services Acts, which regulate environmental matters while promoting public health.

TABLE 1
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
The 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

[12] Environmental Health Services Act (No. 4 of 1987) of the Bahamas.
[13] Environmental Health Services Act (No. 8 of 1997) of the Commonwealth of Dominica.
[14] Environmental Health Services Act (No. 14 of 1991) of Saint Vincent and the Grenadines.

(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 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).

b) 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). Relevant information must also be proactively disclosed in the assessment of projects and activities, mainly in relation to EIA processes[15]. Moreover, such statutes provide for planning processes that are fair by making them open, accessible, timely and efficient[16].

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 Bahamas[17], Barbados[18], Dominica[19] and Grenada[20].

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15 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)).

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

17 Section 17.

18 Sections 8, 9 and 27.

19 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."

20 Sections 6, 15, 16 and 17.

TABLE 2
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	1947 (2000)
	Land Utilization Act	1981 (2000)
Dominica	Physical Planning Act (No. 5 of 2002)	2002
Grenada	Physical Planning and Development Control Act (No. 25 of 2002)	2002
Guyana	Town and Country Planning Act (No. 24 of 1946)	1948 (1998)
Haiti	*Décret-loi établissant les règles spéciales relatives à l'aménagement des villes et campagnes*	1937 (1971)
	Loi établissant des règles spéciales relatives à l'habitation et à l'aménagement des villes et des campagnes en vue de développer l'urbanisme	1963
	Décret sur le lotissement	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.

In the context of EIAs, public participation provisions are either regulated by law or the law authorizes their development by subsidiary legislation[21]. 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, 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 guidelines[22].

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.

c) 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 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 […]"

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 been applied as "a base on which to build a kind of code of fair administrative procedure."

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[21] 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".

[22] 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).

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". 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 altered[23]. 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.

[23] See Buddie Gordon Miller & Ors v. The Minister of the Environment and Water Resources & Ors.

II. Core elements for ensuring environmental access rights

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.

A. Access to environmental information

1. 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 Court[24] (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 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

[24] 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).

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."

B. Public participation in environmental matters

1. 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 detriment[25]. 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 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

[25] 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.

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 at. V Minister of Planning and Sustainable Development* is especially relevant when analyzing the lack of statutory provisions requiring for public participation, not so much due to the principle of legitimate expectation but rather 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 order 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 Act, 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 public hearings before granting a Certificate of Environmental Clearance as claimed by the plaintiffs[26] (*Fishermen and Friends of The Sea v The Environmental Management Authority Respondent et al*). "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

[26] 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.

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 it[27].

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'."

2. 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*:

> "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."

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

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[27] 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.

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" criteria[28].

3. 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 decision[29]. 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 Belize 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."

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 in my view 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". This flaw diminished the quality of the public consultation.

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 at. 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 [100] and sufficient time must be available for such advice to be considered by the consulting party.

4. 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.

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[28] 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.

[29] In Ulric 'Buggy' Haynes Coaching School et at. 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]

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 at 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

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 jurisdictions[30]. Under this tendency -also backed by legislation[31] and rules of procedure[32]-, 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 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 at. 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 pipeline[33].

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

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

31 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.

32 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.

33 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.

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 immemorial[34]. [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 Jamaica[35] and in Saint Lucia[36]. Additionally, unrepresented litigants are admitted in bodies such as the Environmental Commission of Trinidad and Tobago[37]. 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 costs[38]. 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." 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

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[34] 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.

[35] Legal Aid Act (No. 36 of 1997) of Jamaica.

[36] Legal Aid Act (No. 6 of 2008) of Saint Lucia.

[37] 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).

[38] 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. One 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 plaintiffs 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."

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 costs[39]. 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 the environment to the extent and nature of this claim must be clothed with public interest"[40]. 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*[41], 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.

3. 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.

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[39] See *Belize Tourism Industry Association v National Environmental Appraisal Committee, Department of Environment* [140].
[40] See *Sooknanan and Fishermen and Friends of the Sea v Environmental Management Authority and Minister of Energy* [74].
[41] [2012] CCJ 2 (OJ).

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.

- 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.