PROFESSIONAL DEVELOPMENT PROGRAMME:
COASTAL INFRASTRUCTURE DESIGN, CONSTRUCTION AND
MAINTENANCE

A COURSE IN
COASTAL ZONE/ISLAND SYSTEMS MANAGEMENT

CHAPTER 12
LEGISLATIVE ENVIRONMENT AND POLICY

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1.0 INTRODUCTION

Small island developing States (SIDS), such as the Organisation of Eastern Caribbean States (OECS) countries, were recognised in AGENDA 21, the action plan adopted by the international community at the United Nations Conference of Environment and Development (UNCED), the Earth Summit held in Rio de Janeiro in 1992, as “a special case both for environment and development”, and it was noted that SIDS “have all the environmental problems and challenges of the coastal zone concentrated in a limited land area.” This perspective was developed further in the Programme of Action for the Sustainable Development of Small Island Developing States (SIDS-POA), adopted at the post-UNCED Global SIDS Conference, held in Barbados in 1994, which states that “Sustainable development in small island developing States depends largely on coastal and marine resources. Their small land area means that these States are effectively coastal entities.” Consequently, in relation to SIDS, the expression Island Systems Management (ISM) is preferred by some analysts to the expression Coastal Zone Management (CZM).

Principle 11 of the Rio Declaration on Environment and Development proclaims that “States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and development context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.” With specific reference to CZM/ISM the SIDS-POA provides that, at the national level, SIDS should “Establish and/or strengthen, where appropriate, institutional, administrative and legislative arrangements for the development of integrated coastal zone management plans and strategies for coastal watersheds and exclusive economic zones and their implementation, including integration within national development plans.” The issue to be examined in this lecture is the extent to which the situation in the OECS countries complies with these imperatives, with particular reference to the subjects to be covered in the other lectures in the programme.
2.0 EXISTING LEGISLATION

2.1 Land Use Planning

All of the English-speaking countries and dependent territories in the Commonwealth Caribbean have legislation that deals with land use planning, based on British Town and Country Planning legislation. These enactments provide for the preparation of development plans, the implementation of such plans and their revision to ensure that they do not become obsolete. In varying degrees, they also make provision for public participation in the planning process. Additionally, they provide for development control, via the grant or refusal of permission for development projects, in accordance with the prescriptions of land use plans.

This legislation has been in place in most of these countries for decades, however, it is evident that it has not produced the desired results. Land use plans have been prepared for all the OECS countries. However, planning has been described as an activity which has been marginalised in the region, as land use plans have played an insignificant role in the development process and the major developments which have taken place have been carried out without reference to the guidelines set out in these plans. Indeed, in many islands, it is difficult even to locate copies of the existing plans. Except in Barbados, in the cases where plans have been prepared, there has been a failure to ensure that land use plans are revised and remain relevant to contemporary needs. This is illustrated by the scant mention of the prescriptions of land use plans in legal cases relating to the enforcement of land use planning controls in the Caribbean.

One of the reasons for this, in most of the OECS countries, has been the effective abandonment of the traditional Town and Country Planning legislation in favour of Land Development Control legislation, which is purely regulatory in nature. Under these enactments decision-making with respect to the control of development projects is placed in the hands of statutory boards, the membership of which includes persons from the private sector as well as from governmental agencies. In some cases, for example in Grenada, no provision was made for the continued administration of the Town and
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Country Planning legislation after the introduction of the Land Development Control legislation, hence the land use planning legislation is *de facto* not in force although the legislation has not been repealed. In others, for example St. Lucia, express provision has been made for the Development Control Authority to continue to administer the pre-existing land use planning legislation, however, it has fallen into disuse nevertheless.

In an era of dynamic change, the failure of planners to produce relevant and timely physical plans has done much to discredit the notion of physical planning. The causes of this failure are several, including a lack of institutional capacity and the mis-allocation of available resources between planning and development control activities, but is also due to a lack of political commitment to the process of land use planning in the region. For example, none of the plans that were prepared for the OECS countries in the mid-1970s were ever approved or explicitly endorsed by the political directorate.

A significant effort to change this situation was launched in the 1990s via the United Nations Centre for Human Settlements (UNCHS) Environmentally Sustainable Land Use Planning and Sustainable Development Project. The project involved a programme of institutional strengthening in nine OECS countries, including the preparation of comprehensive model legislation and its adaptation to the needs of each jurisdiction, the strengthening of Physical Planning Units, by upgrading human resources and information systems, as well as technical assistance for the preparation of land use plans. The results of the UNCHS project varied between the OECS countries which received international assistance, however, the model legislation was customised for several jurisdictions, either by consultants employed under the project or by the beneficiary countries themselves.

New land use planning legislation has subsequently been prepared for St. Lucia under the auspices of the United Nations Economic Commission for Latin America and the Caribbean (UNECLAC) and for Grenada on its own initiative. Although the strategy of simply customising the UNCHS model legislation has not been adopted in either
country, it served as one of the inputs to the legislative drafting process in both cases. The draft legislation in St. Lucia is the more innovative as it abandons the institutional arrangements which have become customary in OECS countries in favour of the placing responsibility for land use planning and development control in the hands of a line Ministry, as is the case in Barbados, whilst making provision for the democratisation of administration by means of the delegation of functions to branch offices to be served by advisory bodies representative of local interests. Enactment of the new legislation is said to be high on the Parliamentary agenda in both countries.

2.2 Environmental Impact Assessment (EIA)

As defined in the major multilateral agreement on the subject, Environmental Impact Assessment (EIA) means “an examination, analysis and assessment of planned activities with a view to ensuring environmentally sound and sustainable development.” The regulatory framework for EIA at the national level exists against the background of hard and soft international laws relating to EIA. Notable amongst these is Principle 17 of the Rio Declaration on Environment and Development, which provides that “Environmental Impact Assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.”

The SIDS-POA is replete with references to the need for EIAs to be undertaken, backed up by legislation, and for adequate training and human resources to be allocated for this purpose. In particular, it provides that, at the national level, SIDS should “Develop appropriate national, provincial/State and local environmental regulations which reflect the needs and incorporate the principles of sustainability, create appropriate environmental standards and procedures, and ensure their integration into national planning instruments and development projects at an early stage in the design process, including specific legislation for appropriate environmental impact assessment for both public and private sector development.”
In addition to these global agreements, there is a regional multilateral agreement, the Cartagena Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region (1981), Article 12 of which imposes on Contracting Parties, including the OECS countries, obligations in respect of the development of guidelines for EIAs and their use in the context of environmental management, as follows -

“Environmental Impact Assessment

1. As part of their environmental management policies the Contracting Parties undertake to develop technical and other guidelines to assist the planning of their major development projects in such a way as to prevent or minimize harmful impacts on the Convention area.

2. Each contracting party shall assess within its capabilities, or ensure the assessment of, the potential effects of such projects on the marine environment, particularly in coastal areas, so that appropriate measures may be taken to prevent any substantial pollution of, or significant and harmful changes to, the Convention area.

3. With respect to the assessments referred to in paragraph 2, each Contracting Party shall, with the assistance of the Organisation, when requested, develop procedures for the dissemination of information and may, where appropriate, invite other Contracting parties which may be affected to consult with it and to submit comments.”

The Cartagena Convention is implemented through the Caribbean Environmental Programme (CEP) managed by the UNEP's Regional Coordinating Unit (RCU) in Jamaica. None of the CEP's activities relating to EIA have to date been concerned with the development and harmonization of EIA legislation in the region. The only initiative to harmonize the legal framework for EIAs in the region has been undertaken by the OECS-NRMU, which has produced a model Act and Regulations for EIAs in the OECS
However, as part of the European Union-funded Lome IV Caribbean Regional Environment Project ( CREP), provision was made for a project to be undertaken by the RCU to review the status of EIA legislation in the Wider Caribbean Region and prepare a draft instrument on EIA, after engaging in a regional consultation process. The leading regional environmental non-governmental organisation, the Barbados-based Caribbean Conservation Authority (CCA), is the implementing agency for the CREP, which is scheduled to be undertaken over the next three years.

At the national level, the four largest countries in the region, Jamaica, Belize, Guyana and Trinidad & Tobago, have incorporated requirements that EIAs be submitted to regulatory authorities in the development approval process into new environmental framework legislation enacted during the 1990s. Express reference was also made to EIAs in earlier environmental framework legislation adopted by St. Kitts-Nevis in 1987. In most others, including Barbados and the OECS countries, however, EIAs are being requested under the existing development control legislation. A recent study into the EIA legislation in force in the region concluded that the situation is uneven and it is questionable whether the measures enacted to date satisfy the criterion set by the Global SIDS conference to develop ‘appropriate’ national environmental regulations. Further, whilst there appears to have been a progression from the earlier legislation to the later legislation, it does not appear that the countries in the region are learning from each other’s experience or that a model Commonwealth Caribbean EIA process is emerging.

2.3 Watershed Management

The legal framework for proper management of land resources in the region is weak, particularly in the context of vulnerability to natural disaster. Specific legislation governing soil and water conservation is scarce and generally out-dated and sound land management practices are being abandoned in some countries. In some cases old laws, such as measures which accelerate the acquisition of title to public lands by adverse possession where the land is ‘improved’ by squatters, offer indirect incentives to
environmentally unsound practices, such as the deforestation of marginal lands and the draining of wetlands for cultivation. Likewise, the legislation relating to agricultural land tenants, which is common in the region, ties the security of tenure of land tenants to a concept of ‘good husbandry’ which is not systematically based on sustainability criteria. A hopeful sign in this context is the decision of the courts in Trinidad that, as the investments made by squatters in land in the Nariva Swamp were destroying a protected area, they were not property improvements and could not give rise to an equitable interest in the land.\footnote{17}

The legal framework for forestry, wildlife and national parks and protected areas is fundamental to watershed management. The Eastern Caribbean has the distinction of having the oldest forest reserves in the western hemisphere, the Main Ridge Forest Reserve in Tobago (1764) and the Kings Hill Forest reserve in St. Vincent (1791), which were established expressly for watershed management purposes. Generally, however, the region's forestry legislation is directed at the regulation of production forestry on publicly owned lands and is weak as regards questions such as the deforestation of private land and watershed management, including the control of forest fires. Likewise, the wildlife legislation is generally concerned with the regulation of hunting and the protection of specific species, and is short on considerations of habitat conservation. In this context it should be noted that the domestic legislation in place in Caribbean SIDS is inconsistent with the obligations imposed by multilateral instruments to which many states are signatories.\footnote{18}

As regards protected areas, the situation is uneven although in many respects the situation in the OECS countries is better than that in the larger countries in the Caribbean.\footnote{19} In some countries, for example Antigua & Barbuda, Dominica and Grenada, special National Parks and Protected Areas Acts have been enacted. In others use has been made of pre-existing enactments in an effort to protect some areas. In St. Vincent and the Grenadines, for example, the Tobago Cays National Park was established, in the absence of National Parks legislation, by the declaration of the island group as a forest reserve, a
wildlife reserve and a marine reserve under three unrelated Acts. One noteworthy development is the role that NGOs, such as the National Trusts in Barbados and St. Lucia, the JCDT in Jamaica and several NGOs in Belize, have been playing in the management and development of marine and terrestrial parks and protected areas throughout the region. A number of different legal solutions are being used to mobilize financing for and confer authority on NGOs in the region for this purpose.

2.4 Coastal Conservation/Beach Management

Legal situation with respect to coastal conservation/beach management in the Eastern Caribbean is quite unusual. In the Windward Islands the State and the public generally have rights to or over a belt of land lying above the highwater mark. Additionally, many of the islands have Beach Control and/or Beach Protection legislation in place.

In Tobago, Grenada, St. Vincent and the Grenadines and Dominica, Commissioners were appointed to survey the islands after they were ceded to the English in 1763 and sell all Crown lands with specific exceptions, including such lands as would be necessary for fortifications and other military works. The land surveyors reserved a strip of land extending three chains (198 ft or 60.35m) from the high water mark, known as “the Queen’s Three Chains”, along the entire coastline for these purposes. This land was not offered for sale but was considered to be “appropriated to the use of” the owners of the contiguous plantations. The relative rights of landowners, the State and the public over lands within this reserve were spelt out, for the avoidance of doubt, in a law enacted in 1856 which provides that the said land are subject to specific reservations, including the right of the State to erect military installations or other buildings of a public nature on any part of the land without payment of compensation; and the right of road to the public through the said strip of land.

In St. Lucia there is a similar reserve, known as the “Cinquant pas de la Reine” (the Queen’s 50 paces) that extends 186 ft (56.69 m) from the high water mark. This reserve
was set aside for purposes of defence and the establishment of towns and villages in the original land surveys carried out by Lefort de la Tour in 1787, when St. Lucia was still a French colony. As the register of title in the Land Registry shows, the land within the reserve is vested in the Crown, however, the owners of the adjacent lands have been permitted to cultivate the area. Land within the reserve is leased to developers, subject to restrictive covenants; hence, Government uses a contractual mechanism to regulate development within this area.

In the some of the other OECS countries, including Dominica, Antigua & Barbuda and Anguilla, there is Beach Control legislation, which creates powers over development of the seabed within territorial waters, the foreshore and adjoining land (extending not more than fifty yards beyond the line of coastal vegetation or a village's seaward boundary). Under this legislation a licence is required for any encroachment upon or use of the foreshore or seabed (which are vested in the State), for any public purpose or in connection with any trade, business or commercial enterprise, with the exception of agricultural land use and any pre-existing rights enjoyed by fishermen or other persons. The authority in which power to grant such licences is vested must consider the public interests regarding fishing, bathing and recreation, and the future development of adjoining land, in settling the terms and conditions of any licence granted.

This legislation is very unusual in that every application for a licence must be published in the official Gazette, and a local newspaper, and the public must be afforded the opportunity of making representations in respect of the application. Additionally, every licence issued must be published in the official Gazette. The legislation provides a right of appeal to the Minister (which is not restricted to the applicant) from the decision of the relevant authority, but provides that the decision of the Minister as to whether a licence shall be granted or refused is final. The Minister may also make Regulations with respect to the form and manner of applications for licences and the grant or refusal of licences, amongst other matters. These include securing clean and sanitary conditions on the
foreshore, adjoining lands and in the sea, and the prevention of dangers to the public using these areas.

Quite different from this legislation is the Beach Protection legislation in force in some countries, including Antigua & Barbuda, Grenada, St. Vincent & the Grenadines and St. Lucia. This legislation simply regulates the removal of any sand, corals, stones, shingle or gravel from any public land, in and around the seashore and any part of the seabed. It empowers the Minister to specify beaches in respect of which the removal of material is absolutely prohibited and otherwise to grant permission for the removal of materials by individuals in reasonable quantity for their bona fide own use, or for any public purpose or for any non-public purpose subject to reasonable considerations, restrictions or limitations. Royalties may be charged for the removal of material from beaches differentiated by the type and quantity of material mined. Except in St. Vincent & the Grenadines, the administration of this legislation is in the hands of the agency responsible for public works, the principal user of beach materials, rather than an agency charged with a capacity for environmental management.

2.5 Coastal Waters/Marine Resources

The measures relating to coastal waters and marine resources are of two kinds. On one hand is the legislation providing for the management of marine resources and on the other is the legislation related to the quality of coastal waters.

Several of the OECS countries, including Antigua & Barbuda, St. Vincent & the Grenadines, and the State of Grenada, like Trinidad & Tobago, are archipelagic states and some of these have adopted special legislation, based on the Third United Nations Law of the Sea Convention (UNCLOS III), which deals with their sovereignty over the seabed, subsoil and natural resources of their internal, archipelagic and territorial waters and their sovereign rights over the natural resources of the continental shelf and exclusive economic zone. Generally, however, the management of marine resources is governed by Fisheries legislation. This is one area in which harmonisation and modernisation of the
legislation in the Eastern Caribbean has been successful and the fisheries legislation in OECs countries generally provides for matters such as mariculture and the establishment of marine reserves, as well as the regulation of fisheries. In addition some countries, such as Antigua & Barbuda and Trinidad & Tobago have adopted Marine Areas (Preservation and Enhancement) legislation. These enactments provide for the designation of marine areas, including submarine areas and any adjoining land or swampy areas which form a single ecological entity, as restricted areas, entry into and activities within which are regulated.

The discharge of wastewater, particularly untreated or inadequately treated sewage, into coastal waters is a widespread environmental problem in the Caribbean. In most countries the Public Health Acts and Water and Sewerage Acts make provisions relating to water pollution. The Public Health Acts generally deal with pollution control by means of the regulation of statutory nuisances, including the discharge of sewage and drain-water into the sea or on to the foreshore. The Water and Sewerage Acts deal with the contamination of surface water sources used for consumption and enable effluent standards to be established by means of Regulations, but this power has been under-utilized. In addition, there is an increasingly grave problem of water pollution caused by agricultural runoff. This is being addressed by the adoption of measures to control the use of pesticides and toxic chemicals in several countries. On the other hand, the abuse of pesticides, herbicides and fertilizers is being promoted indirectly by the standard conditions of contract for banana marketing in the Windward Islands, under which farmers receive part-payment in kind in the form of agricultural chemicals.

Tourism, the major economic activity in most countries, depends to a great extent on the quality of coastal and marine resources in the islands, however, the standard hotel incentive legislation in force in the region is indifferent to the adverse impacts of tourism development on these resources. Few conditionalities, other than a minimum scale of hotel plant, have been imposed on investors in return for tax holidays on income, rebates of duties on inputs, full repatriation of profits and other concessions and guarantees.
Some initiatives are underway in the region to correct this deficiency, for example, Barbados has introduced a special tax regime for the Scotland District and for three special development areas, Bridgetown, Speightstown and St. Lawrence Gap. Reference can also be made to the case of the South East Peninsula of St. Kitts, where development was preceded by environmental studies and the enactment of special legislation, although this project appears to have stagnated.

3.0 WIDER CONTEXT

The effectiveness of the existing legislation depends, not only on its content, but on a number of external factors that influence its administration and enforcement. Key amongst these institutional constraints is Government policy. For example, as mentioned previously, the actual provisions of land use planning legislation are unimportant in the absence of policy commitment to the preparation and adoption of such plans as one of the instruments for managing the development process. Whilst, at the international level, the Caribbean countries have ostensibly committed themselves to the concept of sustainable development, the domestic constituency for this approach, which requires the balancing of considerations of environment and development, is still quite limited. However, the past decade has seen an upsurge in the growth of and, as alluded to previously, some vesting of responsibility for environmental and natural resources management in national and regional NGOs.

Problems remain, however, with respect to every aspect of the implementation and enforcement of the relevant legislation, including the non-use of enabling powers to implement legislation by making subsidiary legislation. Most of the legislation involved in the process of CZM/ISM is of the traditional “command-and-control” type. This type of legislation places responsibility for the detection of breaches of the law, the apprehension of offenders, the prosecution of offences and the imposition of penalties on the relevant authorities. Factors such as a lack of a field inspection capability, forensic laboratory facilities and specialist prosecutors, as well as backlogs in the courts, and
judicial perceptions as to the importance of such matters, all constrain this process. Added to this in some countries is the problem that penalties for breaches of the law are trivial, either because they are anachronistic or because of the devaluation of the local currency following the abolition of exchange controls.

The underlying cause of this situation is the lack of adequate financial, material and human resources to carry out CZM/ISM functions, a problem that is particularly acute in some of the OECS countries where reliance often has to be placed on para-professionals to do work intended for professionals. There are, however, several interesting initiatives being tried in the Caribbean that may alleviate this situation. These include the use of sensitisation programmes for the police and judiciary by the Department of the Environment in Belize and the employment of a specialist force of “Environmental Police” to enforce existing laws by the Environmental Management Authority in Trinidad & Tobago. Provision has also been made in some countries to allow for ‘Citizen’s actions’ through which the law can be enforced by persons other than Government. Most significant has been the introduction of fiscal legislation, such as the Environmental Levy legislation in Barbados and Grenada, which introduces incentives and disincentives to certain practices.

Hence, the Caribbean countries can be said to have embarked upon, if not to have completed, the process of addressing the need recognized in AGENDA 21 for SIDS to “review the existing institutional arrangements and identify and undertake appropriate institutional reforms essential to the effective implementation of sustainable development plans, including inter-sectoral coordination and community participation in the planning process.”

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1 AGENDA 21, Chapter 17: Protection of oceans, all kinds of seas, including enclosed and semi-enclosed seas, and coastal areas and the protection, rational use and development of their resources; Section G: Sustainable Development of Small Islands.

3 Part IV: Coastal and Marine Resources, A. “National action, policies and measures” § (i).

4 Home, Robert “Transferring British Planning Law to the Colonies” TWPR 15(4) 1993


6 Digested on the website of the Caribbean Planners Network: www.eclacpos.org/planners

7 Ibid.

8 Anguilla, Antigua and Barbuda, British Virgin Islands, Dominica, Grenada, Montserrat, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines.


10 Draft St. Lucia Physical Planning and Development Bill 1999

11 Draft Grenada Physical Planning and Development Control Bill, 2001


13 Part X, National Institutions and Administrative Capacity A. “National action, policies and measures” § (vi)


18 Including CITES, the Ramsar Convention, the SPAW Protocol to the Cartagena Convention, Agenda 21 and the Biodiversity Convention, as well as the Non-binding Statement of Forest Principles accepted at UNCED
It appears that no such island-wide reserve exists in Grenada, which was the most developed of the islands at the time, as the French inhabitants were allowed to retain possession of their estates after cession.


22 28 Vict. Cap.1

23 Le Fort de Latour, Description Générale et Particulièrde de l’Isle de Sainte Lucie


25 Special Development Areas Act, 1996 [Barbados]

26 South East Peninsula Land Development and Conservation Act No.12 of 1986 [St. Kitts-Nevis]

27 Chapter 17; Section G; op.cit