



IOI Training Module: Law of the Sea and Principled Ocean Governance

Solutions Centre, UWI, Cave Hill

May 17 - 21, 2010

Caribbean Law Institute Centre, UWI, Cave Hill

CERMES, UWI, Cave Hill

International Oceanographic Institute, Canada

Marine Affairs Program, Dalhousie University

Marine Environmental Law Institute, Dalhousie
University



Thursday, 20 May 2010

9.00-10.30am

***Multilateral Environmental
Agreements on Biological Diversity:***

***Impact on Caribbean judicial
decision-making***



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Objectives

- examine the role of judicial decision-making in environmental governance
- to investigate the potential impact of treaties protecting biological diversity on Commonwealth Caribbean judicial environmental decision-making
- stimulate discussion on greater judicial use of biodiversity treaties
- introduce the wider implications of greater role for the domestic courts in MEA application



Methodology

- Distribution of state power
- The court system/systems of court
- Role of judicial decision-making
- Relevance of treaties on biodiversity
- Dualism
- Exceptions to dualism
- Legislative incorporation of biodiversity treaties
- Some Caribbean decisions
- Future impact of biodiversity treaties on the judiciary

Westminster model of government

Executive

- Policy-making
- Pre-eminence of the Prime Minister

Legislature

- Law-making
- Pre-eminence of the Prime Minister's Cabinet

Judiciary

- Law interpretation
- ***Judicial decision-making****

Separation of powers

- ***Executive*** – exclusive power in international relations e.g., to make treaties (PM, MOFA, NB: Environment Minister (St. Kitts/Nevis))
- Versus
- ***Legislature*** – exclusive power to make law binding upon persons within the territory of the state (note provisions in Antigua and Barbuda)
- Versus
- ***Judiciary*** – exclusive power to interpret and apply the law which governs **domestic** relationships (NB: CCJ)

Court system/system of courts

Lower
Judiciary

Supreme
Court

Final
Court

System of courts

Magistrate Court

Court of Appeal
High Court
*Environmental Court**

Privy Council/
*Caribbean Court
of Justice**

Caribbean environmental courts

- Environmental Commission (EC) (Trinidad and Tobago) [see also the Environmental Appeals Tribunal (EAT) (Guyana)]
- Established by Environmental Management Act 2000 [re-enactment of the EM Act of 1995] NOT Constitution
- Status of a superior court of record and “shall have in addition to the jurisdiction and powers conferred on it by this Act **all the powers inherent in such a court**”
- Jurisdiction to e.g., hear and determine:
 - Appeals from decisions and actions of the Environmental Management Agency (section 81 (5) (a))
 - Administrative civil assessments (section 66)
 - Private party actions (section 81 (5) (h) → section 69)
- Powers of High Court of Justice e.g., to compel attendance of witnesses, punish contempt, enforce its own orders
- Decisions may be appealed to the Court of Appeal; NO judicial review

EC: some controversial areas

- Relationship to jurisdiction of High Court
 - Judicial review of actions of EMA
 - Civil assessments by EC or EMA
 - *Ramlal v Maccoon (Trinidad and Tobago, Unreported, High Court, 2004)*
- Constitutionality
 - The EC composed of a full time chairman and five other members; Chairman and Deputy Chairman must be an attorney-at-law of not less than 10 years standing; others may be qualified in environmental issues, engineering, the natural sciences or the social sciences
 - Members of the Commission are appointed by the President on contract (normally 3 years) and may be removed from office by the President for inability, mis-behaviour or on the ground of any employment or interest which is incompatible with the function of a member of the Commission
 - Re-enactment of 1995 Act in EM Act of 2000.
- *Hinds v The Queen* [1977] AC 195.



Caribbean Court of Justice

- Established by treaty: Agreement Establishing the Caribbean Court of Justice, 2001
- Dual jurisdiction
- **Original jurisdiction** to interpret and apply the RTC (compulsory jurisdiction)
- **Appellate jurisdiction** i.e., final court of appeal for countries opting to accept this jurisdiction
- *Independent Jamaica Council for Human Rights (1998) Ltd. v Marshall-Burnett* [2005] UKPC 3

Theory of judicial decision-making

- Law making vs. interpretation of the law; application to individual cases
- Laws notoriously *incomplete*; always in the process of being completed in the act of adjudication
- Laws are not self-interpreting; power to interpret the law is (perhaps) as critical importance as the power to make the law
- 1717 sermon of Benjamin Hoadly of Bangor, Wales before royalty:
“Whoever has an absolute authority to interpret any written or spoken Laws; it is He, who is truly the Law-giver, to all intents and purposes; and not the Person who first wrote or spoke them”
- Warning to King George I (1717) not to give the church hierarchy a privilege role in saying what the scriptures meant, or the “Kingdom of Christ would become the Kingdom of those men”

Privileged role of judicial decision-making in biodiversity management

- Interpretation/application of constitutions, legislation, regulations, standards,
- Judicial review/supervision of actions/decisions of government/environmental regulators
 - E.g., Environmental agencies, Planning departments, Statutory powers of Ministers etc.; Fisheries department
- Effectuating governance requirements
 - Networking/notification/consultations (with public)
 - Principles (e.g., precaution and shifting the burden of proof; “cost effective measures” vs. “measures”)
 - Environmental processes (EIAs)

Influences on the privileged role: relevance of biodiversity treaties

- Use of treaties to provide rules on biodiversity existing in both international and national areas
- Generally, treaties are the most commonly used + fastest growing source of IEL. **Why?**
- More than any other source, treaties permit int'l society to tackle complex environmental problems with rapidity, specificity, adaptability
 - LOSC: 1982 → 1994; Notification Treaty: 1986 → 1986
 - IMO Conventions on Ship Safety/Ship-based pollution
 - MEA and institutional governance arrangements



Biodiversity treaties: basic features

- A frame work agreement
(WCR Cartagena 1983; CBD 1992; Climate Change 1992)
- Protocols
(Oil Spill 1983, SPAW 1990; Cartagena 2000; Kyoto 1997 (not Copenhagen))
- Annexes or Appendices
(list species or substances regulated)
- Institutional arrangement: self regulating (Conference of Parties (COP); Scientific Bodies, Panels of Experts etc.)



A few Biodiversity Conventions

- Convention on Biological Diversity, 1992;
Cartagena Protocol on Bio-safety 2000
- Convention on International Trade in Endangered
Species (CITES) 1973
- World Heritage Convention 1972
- Ramsar Convention on Wetlands 1971
("waterfowl")
- United Nations Convention on the Law of the Sea
1982
- Straddling and Highly Migratory Stocks 1995



A few (more) biodiversity treaties

- IMO MARPOL Convention 73/78
- Civil Liability Convention 1992
- Fund Convention 1992
- Supplementary Fund Protocol 2003
- Basel Convention on Trans-boundary Movement of Hazardous Wastes 1989
- Stockholm Convention on POPs 2001
- Rotterdam Convention on PIC 1998
- Aarhus Convention on Public Participation
- Climate Change Convention 1992; Kyoto Protocol 1987



Some regional bio-diversity treaties

- Cartagena Convention on Protection and Development of the Caribbean Sea 1983
- 3 Protocols to Cartagena Convention
 - Protocol to combat oil spills 1983
 - Specially Protected Areas and Wildlife (SPA) Protocol 1990
 - Protocol on Land Based Sources of Marine Pollution (LBSMP) 1999



Further refinement of biodiversity treaties

- International law judicial decision-making:
 - Arbitration
 - International Court of Justice (ICJ)
 - United Nations Tribunal on Law of Sea (UNTLOS)
 - World Trade Organization/General Agreement on Tariffs and Trade (WTO/GATT)
 - International Court of Justice (ICJ) (Original jurisdiction)

Some int'l cases on MEAs

- *Icelandic Fisheries case* (1974) ICJ Rep.3
- *United States - Restrictions on the Imports of Tuna* (Mexico v. US), (1991) (30 ILM 1991); (EC v. US), (1994) (33 ILM 839 (1994))
- *Nuclear Tests case (New Zealand v. France)* (1995) ICJ Rep 3.
- *United States - Standards for Reformulated and Conventional Gasoline Case* (WTO) 35 I.L.M. 274 (1996)
- *Gabcikovo-Nagymaros Project Case* (Hungary v. Slovakia) (1997) ICJ Rep. 7
- *Legality of the Threat or Use of Nuclear Weapons case* (1997) I.C.J. Rep (UNGA)
- *European Communities - Measures Concerning Meat and Meat Products* (Beef Hormones case) (1997) (WT/DS26/AB/R, WT/DS48/A B)



Some more int'l cases

- *United States Import Prohibition of Certain Shrimp and Shrimp Products* (May 15, 1998) WTO; (1999) Vol. 93 AJIL 507
- *Fisheries Jurisdiction (Spain v. Canada)* <http://www.icj-cih.org> (see Oxman, (1999) 93 AJIL 502
- *Southern Blue-fin Tuna Cases* (1999) 39 ILM 1359 (2000) (Australia, New Zealand v Japan)
- *Southern Blue-fin Tuna cases* ITLOS Nos. 3 & 4 (1999, 2001)
- *Mox Plant case (Ireland v United Kingdom)* (2001)
- *Swordfish case (Chile v EC)* (2002) (www.itlos.org)
- *Biotech case* (2006) WTO Panel, AB (US v EC)
- *Barbados v Trinidad and Tobago* (2006) UNTLOS
- *Guyana v Suriname* (2007) UNTLOS



MEAs and their interpretation

- International rules on biodiversity protection
- Recognize: ecosystems and related ecological processes are essential for the functioning of the biosphere in all its diversity
- Aim to: maintain maximum possible biological diversity of species of flora and fauna this helps protect e.g., those which are rare, endemic, or endangered
- Benefits: biodiversity critical for food production, health and other aspects of human survival and sustainable development

Impact of MEAs in Caribbean: Dualism

- Generally, no direct effect
- Legacy of the common law; related to constitutional arrangements for governance/separation of powers
- Dualism (separation of international vs. national legal orders)



Effect of dualism

- MEAs (and treaties generally) have no legal force in Caribbean law – cannot be applied by courts - unless and until they have been incorporated by passage of domestic legislation
- Direct effect would breach the constitutional arrangements regarding the distribution of state powers e.g., legislature monopoly on law-making
- *Council of Civil Service Union v Minister for Civil Service* [1985] AC 374

Caribbean position on bio-diversity treaties...

- Some MEAs on bio-diversity have been accepted and implemented → can influence judicial decision making
- HOWEVER many MEAs **either**
 - → not accepted
- OR
 - → accepted/ratified but not implemented incorporated by legislation into domestic law

Acceptance of Biodiversity Treaties

COUNTRY	1992 CBD	Cartagena Protocol '00	CITES	World Heritage	Ramsar / Wetlands
Antigua & B	9/3/93 r	10/9/03 r	8/7/97 a	1/11/'83 a	2/10/05
Bahamas	2/9/93 r	15/1/04 r	20/6/'79 a		7/6/97
Barbados	10/12/'93 r	6/9/02 a	9/12/'92 a	9/4/'02 a	12/4/06
Belize	30/12/'93 r	19/8/86 s	19/8/'86 s	6/11/'90 a	22/8/98
Dominica	6/4/94 r	4/8/95 a	4/8/95 a	4/4/'95 r	
Grenada	11/8/94 r	5/2/04 r	30/8/'99 a	13/8/'98 r	

Biodiversity Treaties, cont'd

COUNTRY	1992 CBD	Cartagena Protocol '00	CITES	World Heritage	Ramsar Wetlands
Guyana	29/8/94 r		27/5/'77 a	20/6/'77 a	
Jamaica	6/1/95 r		23/4/'97 a	14/6/'83 a	7/2/89
St Kitts & N	7/1/93 r	23/5/01 a	14/2/'94 a	10/7/'86 a	
St Lucia	28/7/93 a	16/6/05 a	15/12/'82a	14/10/'91r	19/6/02
St Vincent & G	3/6/96 a	27/8/03 a	30/11/'88a	3/2/'03 r	
Trinidad & T	1/8/96 r	5/10/0 a	19/1/'84 a	16/2/'05 r	21/4/93

Acceptance of MEAs on ocean biodiversity

COUNTRY	UNCLOS	Straddling Stocks	MARPOL 73/78	Civil Liability Convention
A & B	2/02/1989		29/04/1988	14/06/2000
Bahamas	29/07/1983	16/01/1997	2/10/1983	1/04/1997
Barbados	12/10/1993	22/09/2000	6/08/1994	7/07/1998
Belize	13/08/1983	14/07/2005	26/08/1995	27/11/1998
Dominica	24/10/1991		21/09/2000	31/08/2001
Grenada	25/04/1991			7/01/1998
Guyana	16/11/1993		10/03/1998	10/12/1997
Jamaica	21/03/1983		13/06/1991	6/06/1997
St K & N	7/01/1993		24/03/1998	7/10/2004
St Lucia	27/03/1985	9/08/1996	12/10/2000	20/05/2004
St V & G	1/10/1993		28/01/1984	9/10/2001
T & T	25/4/1986	13/09/2006	6/06/2000	6/03/2000

Acceptance of MEAs on Pollution Regulation and Trans-boundary Movement of Waste

COUNTRY	1989 Basel Convention	2001 Stockholm POP Convention	1998 Rotterdam Convention on PIC
Antigua & B	05/04/1993 a	10/09/2003	
Bahamas	12/08/1992 a	03/10/2005	
Barbados	24/08/1995 a	07/06/2004 a	
Belize	23/05/1997 a		20/04/2005 a
Dominica	05/05/1998 a	08/08/2003 a	30/12/2005 a
Grenada			
Guyana	04/04/2001 a		
Jamaica	23/01/1994 a		20/08/2002 a
St Kitts & Nevis	07/09/1994 a	21/05/2004 a	
St Lucia	09/12/1996 a	04/10/2002 a	
St Vincent & G	02/12/1996 a	15/09/2005 a	
Trinidad & T	18/02/1994 a	13/12/2005 a	

Acceptance of MEAs on Protection of the Atmosphere

COUNTRY	1992 Climate Change	1997 Kyoto Protocol
Antigua & Barbuda	02/02/1993 (R)	03/11/1998 (R)
Bahamas	29/03/1994 (R)	09/04/1999 (R)
Barbados	23/03/1994 (R)	07/08/2000 (R)
Belize	31/10/1994 (R)	26/09/2003 (R)
Dominica	21/06/1993 (R)	25/01/2005 (R)
Grenada	11/08/1994 (R)	06/08/2002 (R)
Guyana	29/08/1994 (R)	05/08/2003 (R)
Jamaica	06/01/1995 (R)	28/06/1994 (R)
St Kitts & Nevis	07/01/1993 (R)	
St Lucia	14/06/1993 (R)	20/08/2003 (R)
St Vincent & Grenadines	02/12/1996 (R)	31/12/2004 (R)
Trinidad & Tobago	24/06/1994 (R)	28/01/1999 (R)

MEAs accepted but not implemented

- Research
- See: “**Implementation of Maritime and Environmental Treaties in Organization of Eastern Caribbean States**” Prepared by Ocean Institute of Canada (OIC); Caribbean Law Institute Centre (UWI); OECS-Natural Resources Management Unit (1988)
- Winston Anderson, **(MEA) Implementation in the Caribbean**, (UNEP, Regional Office for Latin America and the Caribbean 2000)
<http://www.pnuma.org/deramb/publicaciones/amafinal.pdf>
- See: “**Implementation of EBM Principles in the Caribbean**” PROGOVNET Research by the UWI Environmental Law Class, 2009 and 2010 (Nikeh Smithen, Research Assistant)

MEAs accepted but not implemented

- *Some reasons for non-implementation*
- Governmental inertia (Jamaica and *Draft Fisheries Act*)
- Reliance on inappropriate legislation (too old or too general) (*Sea Food & Ting* case, 1999)
- Unawareness of acceptance conventional obligations: (e.g., 1982 UN LOSC: “generally accepted int’l rules and standards”)
- Lack of drafting resources
- Lack of domestic interest (*Sea Food & Ting* case, 1999)



Critique of dualism

- [**Advantage**]: executive cannot legislate for population without involving parliament]
- [**Disadvantage**]: lack of access by Judges to content of bio-diversity treaties (BDT) to guide/assist decision-making
- [**Disadvantage**]: lack of access to institutional and judicial refinement/further development of BDT and international environmental law



Exceptions to dualism (1)

- ***Treaty codifies customary international law***
 - *North Sea Continental Shelf cases* (1969) ICJ Rep.
 - *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 1 QB 529
 - *R. v Director of Public Prosecutions and Another ex parte Dafney Schwartz* [1976] 24 WIR 491
 - *Nicaragua v United States* [1984] ICJ Rep.

Some int'l cases discussing customary rules on biodiversity

- *Behring Sea Fur Seals Arbitration*, 1 Moore Int'l Arb Awards 755-61 (1898)
- *Trail Smelter Arbitration (US v Canada)*, (1931-1941) 3 UNRIAA 1905
- *Lake Lanoux case (Spain v. France)* (1957) 4 ILR 101
- *Nuclear Test cases (Australia v. France; New Zealand v France)* ICJ Rep. 99 (1973)
- *Phosphate Lands in Nauru case (Nauru v. Australia)* (1992) ICJ Rep. 240
- *Gabcikovo-Nagymaros Project Case (Hungary v. Slovakia)* (1997) ICJ Rep. 7



Exceptions to dualism (2)

- Matter falling within the legislative competence of Executive
 - *Post Office v Estuary Radio* ([1968] 2 QB 740)
 - Territorial limits of the state
 - Continental shelf resources (treated as minerals?)



Exceptions to dualism (3)

- *Constitutional directive*
- Art. 39 (2) of Guyana's constitution states, "In the interpretation of the fundamental rights provisions in this Constitution a court shall pay due regard to international law, international conventions, covenants and charters bearing on human rights"
- Can protection and preservation of biodiversity be regarded as a human right?



Exceptions to Dualism (4)

- Caribbean Court of Justice (CCJ)?
- Original jurisdiction to interpret and apply environmental RTC provisions (Art. 56: Natural resources; Art. 226 environmental exceptions)
- Art. 217: in original applies rules of international law:
 - e.g., treaties; custom;
 - e.g., cases from ICJ, LOSC, WTO/GATT
- Referral obligations and domestic courts
- Judgments to be enforced in Member States



Compliance with dualism # 1

- Legislative incorporation of biodiversity treaty
- Shipping Act 1994, Barbados
 - IMO Conventions on control of pollution from ships (MARPOL)
 - 1992 CLC, 1992 Fund Convention



Compliance with dualism # 2

- *Incorporation by reference*
- *E.g., The National Conservation and Environmental Protection Act 1987 as amended in 1996 (No. 12 of 1996)*
 - The 1996 Amendment lists a number of Conventions in the Fifth Schedule:
 - CITES 1973
 - UN Climate Change 1992
 - UN Convention on Biological Diversity 1992
 - Vienna Convention on Ozone Layer 1985



St. Kitts and Nevis Act (cont'd):

- Montreal Protocol 1987 to the Ozone Layer Convention
- Basel Convention on Control of Trans-boundary Movement of Hazardous Waste
- Civil Liability Convention for Oil Pollution Damage 1969 [NB: not 1992 Protocol]
- International Fund Convention for Oil Pollution Damage 1971 [NB: not 1992 Protocol]

Section 54A these treaties “**shall have the force of law in Saint Kitts and Nevis**”

Compare Incorporation by reference in Trinidad and Tobago

- Subsidiary legislation under EM Act 2000, Trinidad and Tobago
- Environmentally Sensitive Species (ESS) Rules made by the Minister under the EM Act 2000
- Rule 3 (1) (c) empowers the EMA to designate as an ESS an animal or plant “that is required to be protected for the purpose of meeting the Government’s international obligations under any of the International Conventions set out in Schedule I”



ESS Rules 2001:

- Schedule I:
- CITES, which entered into force for T&T in 1984
- SPAW Protocol, which entered into force for T&T in 1990
- Ramsar Convention on Wetlands, which entered into force for T&T in 1993
- The CBD, which entered into force for T & T in 1996
- “Any other international legal convention relating to the environment to which Trinidad and Tobago is a party”



Impact of incorporation by reference on judicial decision-making

- Implementing institutions
- All provisions of treaty, including “soft law” provisions?
- Obligations on state parties?
- Self-executing vs. non-self executing provisions: (*Sei Fujii v California* (1952) ILR 312); relationship to the doctrine of direct effect: (*Van Gend en Loos* case [1963] ECR 1)
- Constitutional implications of direct effect

Some Caribbean cases

- *Pianka v The Queen* [1979] AC 107
- *Perez v The Bahamas* [1982] AMC 2148-2151
- *Acting Chief of Police v Bryan* (1985) 36 WIR 207
- *Spencer v Canzone Del Mare* (HC, Antigua and Barbuda) (1993)
- *Scotland District Association Inc. v Attorney-General* (1996) 53 WIR 66 (CA)
- *Spencer v Attorney-General of Antigua and Barbuda* (CA, Antigua and Barbuda) (1998)

A few (more) Caribbean cases

- *Sea Food and Ting v NRCA of Jamaica* (1999) (CA)
- *National Trust for Cayman Islands v Planning Appeals Tribunal* (2000) CILR 521(HC)
- *Belize Alliance of Conservation NGOs v Department of the Environment* (2004) 64 WIR 68 (PC)
- *Aurelio Cal v Attorney General of Belize and Minister of Natural Resources and the Environment* (2007)
- *Belize Institute for Environmental Law and Policy v Chief Environmental Officer Department of the Environment* (2008)(HC)

And a few (more) Caribbean cases

- *Benjamin v Attorney General of Antigua and Barbuda* (HC, 2007)
- *Delapenha Funeral Home Ltd. v The Minister of Local Government and Environment*, (HC, Jamaica, 2008)
- *Fishermen and Friends of the Sea v (1) The Environmental Management Authority and (2) BP Trinidad and Tobago LLC* [2005] 66 WIR 358 (PC)
- *Northern Jamaica Conservation Association et al. v National Resources Conservation Authority & National Environmental and Planning Agency (No. 1)* (“*Pear Tree Bottom No. 1*”) (HC, Jamaica, 2005)
- *Talisman (Trinidad) Petroleum Limited v EMA* (EC, T&T, 2002)



And a few more...

- *People United Respecting the Environment (PURE) and Rights Action Group (RAG) v Environmental Management Authority and Alutrint Limited* (HC, T & T, 2009)
- *R v Belize Alliance of Conservation Non Governmental Organisations (BACONGO)* (2004) 64 WIR 68
- *Save Guana Cay Reef Association Limited v The Queen* (HC, Bahamas, 2007)
- *Virgin Islands Environmental Council v Attorney General and Another* (HC, BVI, 2009)



Spencer v Canzone Del Mare

- The applicant, who was a Member of Parliament of Antigua and Barbuda and Leader of the Opposition, alleged that the Chief Town Planner, acting on behalf of the Land Development Control Authority, had ordered the defendants to halt all development activities at its Coconut Hall site because the work there was environmentally unfriendly and required an environmental impact assessment, which had not been done. It was further alleged that the Prime Minister had improperly written to the developer allowing the continuation of construction. Applicant sought declaratory orders and an injunction



Scotland District Association v AG

- Involved an application by a recently formed corporation whose objective was to foster and promote the preservation and improvement of the ecologically sensitive Scotland District in Barbados. The application requested a declaration that the decision of Government to construct a sanitary landfill in the Scotland District was unlawful because:
 - (a) inconsistent with the Physical Development Plan;
 - (b) threat to underground water supply

Acting Chief of Police v Bryan

- Charges against two Americans for illegally fishing in the exclusive economic zone of the British Virgin Islands dismissed because there was inadequate evidence that the Americans were operating 'foreign fishing boats' as required under the Ordinance.
- In dismissing, the Magistrate took account of the Reciprocal Fisheries Agreement 1980 between the United Kingdom (in respect of the BVI) and the United States.
- The Treaty had been properly concluded; was public knowledge in that it had been presented to the British Parliament by the Secretary of State for Foreign and Commonwealth Affairs and had been gazetted. But never made into an Imperial Act of the UK, or extended to the BVI by Order in Council, or passed into law in the local Parliament.
- Could this treaty influence the judges in deciding whether to dismiss the charges?

NRCA v Seafood and Ting

- CITES listed the Queen Conch in Appendix II – exports require the prior grant of an export permit. The permit was not to be granted unless a Scientific Authority of the exporting state advised that the export would not be detrimental to the survival of the species and a Management Authority was satisfied that the species had not been taken/harvested in contravention of local environmental laws.
- NRCA, adopted the Jamaican Conch Fishery Management Plan, devised by The Fisheries Division (MOA) which had also established a sustainable management plan for Queen Conch including a quota system to control harvest levels and permissible exports. The decision of the Minister of Agriculture and the Fisheries Division of national and individual quotas was accepted by the NRCA and the Scientific Authority appointed by it.
- Could exporters of conch get the system overturned?



Delapenha Funeral Home v Minster of Local Government and the Environment

- Objections were raised by various environmental groups and nearby residents to the applicant's purchase of property for purpose of providing burial facilities. Applicants were concerned about leaching from the tombs/graves. NRCA "acted in good faith and in line with the precautionary principle," by issuing a "stop order". Applicants appealed the decision
 - Could the applicants succeed in in circumstances where the Court admitted that the NRCA had acted in good faith and in accordance with the precautionary principle?
 - If the applicants could succeed , what remedies could they reasonably expect?

Talisman (Trinidad) Petroleum Limited v EMA

- The EMA decided not to grant CEC for prospecting for oil/natural gas in marine areas of Trinidad and Tobago because of environmental concerns. Refused to hear arguments from the applicants that, in relation to its prospecting project, its scientific and technical methodology could be carried out without unacceptable environmental harm.
- Applicants appealed to the Environmental Commission: what result?

Virgin Islands Environmental Council v Attorney General

- A group of concerned fishermen and residents challenged the decision to grant planning approval for construction of a five star marina and golf course. Their argument was that the development would destroy a biologically important fisheries area which was a protected area within the meaning of the Fisheries Act.
- How should the court decide this case?



EIA cases

- ***Lack of proper consultation***

Northern Jamaica Conservation Association v. Natural Resources Conservation Authority and National Environmental Planning

- ***Failure to consider the cumulative effect of project on health***

People United Respecting the Environment v Environmental Management Authority



Talisman (Trinidad) Petroleum Ltd., v The Environmental Management Authority

- Talisman had been granted an exclusive licence to search and bore for and petroleum but its application for a Certificate of Environmental Clearance was refused mainly on the ground that the proposed activity would occur with the Nariva Swamp which was designated for inclusion in the Ramsar List of Wetlands of International Importance. Trinidad and Tobago's obligations under the Convention included formulating and implementing planning so as to make 'wise-use' of wetlands in accordance with the precautionary principle. The Environmental Commission accepted Ramsar Convention had been accepted by Trinidad and Tobago and mentioned in ESS
- What decision?



Conclusion (1): Summary

- Doctrine of dualism part of constitutional arrangements and must be respected
- Fully applicable in relation to treaties regarding biodiversity
- Strict application could stunt development of environmental law, esp. in Caribbean
- Reduce the gains made by new governance paradigms
- Exceptions exist to dualism and could allow Judges to have access to international jurisprudence
- MEAs may be incorporated by traditional means but also in new and novel ways



Conclusion (2): More Responsibility

- Broadens the responsibility of judges
- Greater demands with regard to legal education
 - Treaties and Law of treaties
 - International Judicial decisions and practices of institutions
- Is there a need for specialist environmental courts?
- What of the responsibility of attorneys and advocacy groups?



Conclusion (4): Recommendations

- Press ahead with legitimate avoidance of dualism:
 - Courts are key actors in enforcing environmental law
 - Exercise jurisdiction over domestic non-state actors: often polluters; exploiters of resources
- Enforcing biodiversity treaties improves nexus between domestic and international courts
- Advocate that the legislature assist process by further internalizing international environmental norms
- Greater use of judicial decision-making



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Solutions Centre

UWI Cave Hill Campus

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on Biological Diversity:*

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making*