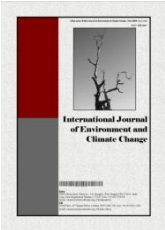

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The Arduous Journey for Environmental Justice: Trinidad and Tobago a Mirror of the Challenges Confronting the Developing World

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ABSTRACT

Environmental justice is a philosophy that has dominated environmental law since its emergence. The poor often seems to inherit the burden of poor environmental management practices. Thus, it is hardly surprising that environmental justice has emerged as a mechanism to represent the rights of the poor and vulnerable from environmental consequences of development-related decisions. In the developing world, the struggle to represent the interest of the poor and vulnerable in the environmental decision-making process primarily rests on the shoulders of Non-Governmental Organisations. Yet these organisations are often handicapped by several factors predominantly present in the developing world. This paper examines the journey of Trinidad and Tobago, a developing country, to achieve environmental justice as a microcosm of what obtains in the wider developing world.

Keywords: Environmental justice; environmental management; environmental law.

1. INTRODUCTION: ENVIRONMENTAL JUSTICE: ITS CLASSICAL MEANING

The concept of justice traditionally refers to the distribution and allocation of goods within a society [1]. Justice is also procedural, applied to law and governance. It rests heavily on principles of fairness and equity, recognition, participation, and transparency. The environmental justice movement began in the United States of America

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and is today a complex creature. In the United States of America (USA) in the 1970s, the environmental justice movement began to mobilise in response to specific cases of exposure by less fortunate groups to environmental hazards, discrimination in housing, land use, health care, sanitation services etc. It sought to sensitise the world and change the correlation between race and poverty and industrial waste and pollution facilities and sites [2]. Decisions to situate hazardous waste facilities, industrial activities, and landfills in African American communities enraged activists. Robert Bullard is one of its key activists and intellectual leaders [3]. It critiqued traditional post-industrial and post-materialist concern [4] for the environment that focused on the environmental needs of the wealthy to the detriment of those less privileged. Rev. Benjamin Chavis, then Executive Director of the United Church for Christ Commission on Racial Justice, condemned what he termed "environmental racism" in the 1987 Commission study [5] on toxic wastes that confirmed that race was the key factor in locating hazardous waste facilities in the USA [6]. President Clinton's administration was responsible for Executive Order 12898, which ruled that every federal agency must incorporate environmental justice as part of its mission. The Office of Environmental Justice was established within the Environmental Protection Agency. The Order was a victory for the environmental justice activists, and the industrial lobby has sought to limit its impact.

In the USA, environmental justice groups tend to have solid human rights and social justice identities. To date, the literature has distilled over 50 environmental themes within the environmental justice movement in the USA [7]. Activists lobby against inequality on many fronts: waste landfills and wind farm locations, land reform, the impact of forest fires, access to sanitation, drinking water quality, hazards related to mineral extraction, the lack of green space, wildlife reservations, access to urban agricultural land, environmentally safe housing, noise and air pollution, placement of transport infrastructure, flooding, access to quality food, toxic waste management etc.).

Related movements are the Brazil sem terra social movement [8], India's Chipko movement and the post-apartheid rights movements in South Africa, which Guha terms "empty-belly" environmentalism or the "environmentalism of the poor": characteristic of developing states. The latter tend to focus on distributional justice- the control and access to natural resources [9]. At the global scale, environmental justice imperatives are nestled within the agendas of myriad initiatives from food security to climate change. The latter is thus more comprehensive in scope and holds more room to incorporate ecological justice within its remit.

Environmental justice applies the values of distributional and procedural justice to the environment. Environmental justice is thus about fairness and meaningful involvement of all (especially the less privileged due to race, colour, ethnicity, age, special needs, gender, class, income, disability, etc.) in environmental policy, rule, law-making, and implementation. It is also about fairness and equity for all to enjoy environmental resources and protect them from environmental and health hazards. Environmental justice is normatively charged with principles and values that require a proactive approach to improve the plight of those less capable of defending their own environmental needs and interests.

Environmental justice is to secure what Harding [10], developing Sen's [11] "entitlements" theory, calls "environmental entitlements" or the environmental goods and services social actors have a right to control and access to secure their well-being and livelihoods. Therefore, environmental justice rests on the basic assumption that these persons are treated unfairly and unable to secure their environmental rights.

Bell [12], Walker [13] and others have reflected on the components of distributive justice – the *res* or the substance or content of justice- and how it should be measured. It involves questions of agency (who the recipients should be and who should dispense justice); substantive content (what is to be distributed- benefits and or burdens), and what principles will govern decisions to distribute in one manner or another (what measure of priority should be employed- respect for historical rights; the polluter pays principle; intra or intergenerational equity etc.).

2. THE INTRODUCTION OF ENVIRONMENTAL JUSTICE TO THE JURISPRUDENCE OF TRINIDAD AND TOBAGO

The principle of environmental justice, which has found itself in the environmental legal regime of

countries such as the USA, has embedded itself in the environmental legal regime of Trinidad and Tobago (TT) through the National Environmental Policy (NEP). The NEP is a critical component of the environmental legal regime of TT. Notwithstanding the rapid preparation of a wide range of environmental impacting national policies, the central policy for protecting the environment remains the NEP. The Environmental Management Authority (EMA), the environmental regulatory body in TT established under the Environmental Management Act, Chap.35:01 (EM Act) is required by Section 16 (1) (a) of the Environmental Management Act, "*to— (a) make recommendations for a National Environmental Policy*". The EMA's exact procedure for establishing the NEP is laid out in Section 18 of the Environmental Management Act.

> *"18(1) In furtherance of section 16(1)(a), the Board shall prepare and submit to the Minister, not later than two years after the commencement of this Act or such other time as the Minister may direct by Order, recommendation for a comprehensive National Environmental Policy (hereinafter called "the Policy") in accordance with the objects of this Act including— (a) incorporation into the Policy of provisions which seek to encourage the establishment of institutional linkages locally, regionally and internationally to further the objects of this Act; (b) an analysis of the legislative, regulatory and practical issues impacting upon the development and successful implementation of the Policy; and (c) a programme for promoting the Policy and seeking an effective commitment from all groups and citizens in the society to achieve the stated objectives in the Policy.*
>
> *In preparing its recommendations as provided in subsection (1), the Board shall develop and submit to the Minister a report which may— (a) describe the general environment and environmental conditions within Trinidad and Tobago; (b) specify the general environmental quality objectives to be achieved and maintained under the Policy; (c) describe the ecological and other balances required to be maintained for the conservation of natural resources and protection of the environment; (d) specify the elements or areas of the environment which require special protection; (e) identify specific beneficial uses of the environment to be permitted or protected by the Policy; (f) describe the indicators, parameters or criteria which will be used in measuring environmental quality; and (g) establish a programme by which the environmental quality objectives, balances, beneficial uses and protections referred to in the foregoing paragraphs are to be achieved and maintained.*
>
> *After considering the recommendations and report developed by the Board, the Minister shall cause a draft of the Policy to be— (a) prepared by the Board; and* (b) submitted for public comment in accordance with section 28. *After considering the public comments received on the draft Policy, the Board shall submit a revised draft Policy to the Minister for approval. The Policy may be revised from time to time in accordance with the procedures specified in this section. The Minister shall, within one month of the approval of any policy submitted under subsection (4), cause the policy to be laid in Parliament.*

The NEP was established to ensure that all branches of government give due consideration to the sustainable environment before any significant action transpires and aims to achieve sustainable environmental development for the present and future generations. This national policy encourages productive harmony between man and the surroundings, eliminating intentional damage to the ecological environment. The NEP fosters excellent action that protects, restores and enhances natural resources.

What is unique about the NEP is that it has the force of law and must be adhered to by all governmental entities, including the EMA.

> *Section 31 of the Environmental Management Act*
>
> *The Authority and all other governmental entities shall conduct their operations and programmes in accordance with the National Environmental Policy established under section 18.*

The statutory character of the NEP was clearly stated in Fishermen and Friends of the Sea v The Minister of Planning, Housing and the Environment, Lord Carnwath, in upholding the polluter pays principle as enshrined in the NEP, stated: "*In Trinidad and Tobago an attempt has been made to tackle such questions in a more*

methodical way through the statutory National Environmental Policy ("the NEP") as applied to charges for licenses, and, in the context of water pollution, through the Water Pollution Management Programme ("the WPMP") [14].

The NEP has been revised since its first manifestation in 1998, but it has retained its commitment to the precautionary principle, as seen in the NEP 2018.

> *Section 1.05 Furthermore, the GoRTT, all subnational actors and international ac- tors operating within the State's boundaries shall adopt/maintain, where appropriate, the features of good governance required to galvanise environmental sustainability, including but not limited to:*
>
> *11. Effective process to redress past and present environmental justice;*
>
> *Section 2.22 The GoRTT understands that the meaningful involvement of all per- sons in the development, implementation and enforcement of environmental laws and policies fosters a society of environmental stewards. More so, providing access to effective redress for environmental disputes and issues empowers individuals to take personal responsibility for an environmentally sustainable future. Accordingly, the GoRTT will: a) Encourage public participation in the development, implementation and enforcement of environmental laws, regulations, policies, management plans and programmes as far as practicably possible; b) Empower government entities with responsibility for the environment to adopt proactive measures for discovering and responding to environ- mental issues in a timely manner; c) Support the development of ADR mechanisms for addressing environmental and natural resource conflicts; d) Amend or develop new legislation, as appropriate, to facilitate expedient civil action on environmental issues; e) Empower community groups and non-governmental organisations to seek redress through litigative or ADR mechanisms; f) Support education and awareness campaigns that promote avenues for environmental redress and remedies; g) Encourage the mainstreaming of environmental laws, regulations and policies among all stakeholders with critical roles in dispensing environmental justice including but not limited to, the police service and the judiciary; h) Amend or develop new legislation, as appropriate, to establish courts dedicated to addressing environmental issues across Trinidad and Tobago; and i) ,Revise, as appropriate, environmental regulations to maintain effective financial disincentives and mechanisms for appropriate financial compensation for environmental losses.*

3. ENVIRONMENTAL JUSTICE: ENTRY INTO TRINIDAD AND TOBAGO

Three specific developmental activities pursued in TT in the first decade of the 21st century will be reviewed in the context of relevance to the whole notion of environmental justice. An outline of the circumstances giving rise to these three cases and the relevance to environmental justice

3.1 British Petroleum Trinidad and Tobago LLC (bpTT)

The EMA decided on 29 November 2001 to grant British Petroleum Trinidad and Tobago LLC (bpTT) a Certificate of Environmental Clearance for a major petroleum project with two main components - offshore and onshore. The Offshore Project included the installation of a 48" main pipeline beginning at the offshore Cassia A Platform to landfall at Rustville in Guayaguayare, the installation of the Kapok drilling platform and upgrading of the said Cassia A Platform, and other works to allow bpTT to centralise all produced fluid-handling capabilities which are currently distributed among all other platforms to a new Cassia A hub. The onshore project included the installation of a 48" pipeline (underground) from the shoreline at Rustville in Guayaguayare Bay to the receiving station at Beachfield in Guayaguayare and the modification and expansion of Beachfield Station to accept the additional pipeline, including other operational equipment, pressure and central systems. The 48" pipeline mentioned in offshore and onshore projects is in addition to a 40" pipeline, which brings natural gas offshore to onshore at Beachfield. The Beachfield Station will now accommodate the offshore natural gas in both the new 48" pipeline and the old 40" pipeline. There is an existing 36" pipeline from the Beachfield facility to Point Fortin at the Atlantic LNG Plant. This pipeline transports the natural gas from the existing offshore 40" pipeline. The only pipeline to transport to Point Fortin is the additional natural gas which would reach the Beachfield Station in the new 48"

pipeline, and the 40” pipeline is the existing 36” pipeline that passes through many human settlements from Beachfield to Point Fortin.

An action was filed by a Non-Governmental Organisation (NGO), Fishermen and Friends of the Sea (FFOS), challenging the grant of a Certificate of Environmental Clearance (CEC) by the EMA to bpTT [15]. Dr Ahmad Khan filed an expert technical affidavit on behalf of FFOS and noted in paragraph 17 of his affidavit:

> *In looking at the existing 36" pipeline route, I was provided by FFOS with an extract from the 1990 Population and Housing Census data prepared and published by the Central Statistical Office of the Government of Trinidad and Tobago together with a map of the pipeline route. I verified the information on the map with respect to the pipeline route with a map contained in the EIA submitted by bpTT for the BP Activities and formed the conclusion that the map provided by FFOS was an accurate representation of the map in the EIA. Applying the 1990 Population and Housing Census data, I found that approximately one hundred and ten thousand persons lived within two and a half kilometres on either side of the pipeline route. This means that over one hundred and ten thousand persons are at risk of death or injury due to potential explosions or fires which may arise out of a rupture, break or puncture of the 36" pipeline. I noticed that over 60 percent of the people are below the poverty line; 17 percent have no electricity; and 34 percent no household water supply.*

FFOS failed in its judicial review application as the court determined it had been unable to commence its civil suit within the statutory time frame, and there was no good reason to extend the time. The result was a denial of the opportunity to argue the environmental justice issue.

3.2 Atlantic LNG

Atlantic LNG Company of Trinidad and Tobago was the owner and operator of a facility at Point Fortin, Trinidad, to produce liquefied natural gas. It operated three liquefaction "trains" there, supported by three storage tanks and a marine loading terminal. The facility is bounded on the east and south by Point Ligoure and Fanny Village, respectively and is some 30 kilometres southwest of San Fernando, Trinidad's second-largest city. On 6th June 2003, the EMA issued to Atlantic LNG Company of Trinidad and Tobago a CEC under the provisions of Section 36 of the EM Act relative to establishing an expansion to ALNG's existing facility, which then comprised Trains I, II and III. The expansion was referred to as Train IV. The CEC was issued subject to a range of terms and conditions to take effect before and during construction and after that during operation of the facility. FFOS launched a judicial challenge on behalf of nearby impoverished lower-class neighbouring communities.

In Fishermen and Friends of the Sea v The Environmental Management Authority and Atlantic LNG Company of Trinidad and Tobago (Interested Party), [16]. Stollmeyer J accepted the role of environmental justice in the development, implementation and enforcement of environmental laws and policies.

> *The EMA has a broad discretion in determining whether and when to hold public hearings. There is no express provision requiring follow up public hearings before granting the CEC. That is left up to its discretion and will depend on the circum-stances of the case and the severity of the concerns. Follow-up procedures may be considered necessary to fulfil the intention of the section, which is to incorporate the affected community in the decision-making process by way of having these concerns and opinions. Community involvement is one manifestation of the holistic approach adopted by the Act. Environmental degradation has a human face as well; it is not limited to merely land, water and air. Communities frequently face the most severe impacts but are often the least involved in making environmental decisions that affect their well-being. Section 28 attempts to remedy this by allowing affected communities more meaningful participation in decisions that affect them. It also provides communities with valuable information about the potential health and environmental effects of the project. It affords persons who may be affected the opportunity to voice their concerns, views, comments and recommendations and, correspondingly, places the EMA under a duty to consider what they say. These persons are, in essence, given a fair hearing.*
>
> *In essence, it aims to achieve environmental justice, which is “the fair treatment and meaningful involvement of all people*

regardless of race, colour, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies.

In this instance, FFOS again lost its judicial challenge to granting environmental approval for a project, in its opinion, had significant deleterious effects on nearby communities.

3.3 The Alutrint Smelter

In 2005, the TT government approved the establishment of an aluminium complex capable of producing 125,000 metric tonnes per annum. Part of the proposed complex, the aluminium smelter, anode plant and rod mill, wire and cable plant and associated infrastructure, is to be sited on approximately 100 hectares of land at Main Site North, Union Industrial Estate in La Brea. A local joint venture company, Alutrint Limited, was formed to manage this complex's project development and ownership. Alutrint's equity ownership is 60% National Energy Corporation (NEC) and 40% Sural, a Venezuelan-based company specialising in manufacturing and retailing aluminium products. The EMA granted a CEC on April 02, 2007, to the National Energy Corporation for the construction of an Aluminium Smelting Complex by Alutrint Limited, a joint venture between the National Energy Corporation of Trinidad and Tobago and Sural, C.A. Venezuela. The decision to grant the CEC was challenged by the People United Respecting the Environment and Rights Action Group, two NGOs representing those communities that the CEC impacted, in People United Respecting the Environment and the Rights Action Group v the Environmental Management Authority and Alutrint Limited, [17]. The proposed smelting complex was bordered by lower-class neighbourhoods compromising mainly of long-term squatters. Although the issue of environmental justice was presented to the court, this was not resolved in favour of the claimants. However, the decision to grant environmental approval was overruled based on defects in the consultation process.

4. SPECIFIC CONSTRAINTS ON DISTRIBUTIVE ENVIRONMENTAL JUSTICE IN TRINIDAD AND TOBAGO: THE ROLE OF NON-GOVERNMENTAL ORGANIZATIONS

It is hardly surprising that having regard to the fact that environmental justice is borne out of the need to protect vulnerable and oppressed communities, NGOs are at the forefront of the battle. NGOs are generally defined as privately run organisations dedicated to advancing the cause of a particular group or issue. A historical review of the evolution of NGOs shows that they can be categorised into six (6) main types. First, there are welfare and relief agencies. Second, technical innovation organisations implement their projects to pioneer or improve approaches to problems. Third, public service contractors, or NGOs funded from official sources, work closely with governments in tasks such as the implementation of components of official programs. Fourth, popular development agencies are involved in activities like self-help programs and social development in general. Fifth, there are grassroots developmental organisations whose objectives are shaping a popular developmental process; contained in this category are mainly NGOs located in the developing world and drawing their membership from the poor and oppressed. Finally, advocacy groups and networks primarily engage in lobbying and educational activities. Environmental NGOs typically fall into this latter category.

NGOs have proved to be a significant contributor to the global upsurge in interest in environmentalism. Environmental NGOs appeared as early as 1865 with the Commons, Open Spaces, and Footpaths Preservation Society in the United Kingdom (UK). The latter campaigned strenuously to preserve land for reasons of amenity, particularly in urban areas. However, there can be no doubt that the last quarter of the 20th century and the start of the 21st century have witnessed an explosion in the number of environmental NGOs. Environmental NGOs do not necessarily endorse a single philosophy; their views and commitments are not homogeneous. This being the case, their objectives and manifestos for action also vary. Some NGOs work closely with official agencies and are often referred to as sell-outs by those committed to a more radical agenda because they see officialdom as part of a threat to the environment. There are also cultural differences between NGOs, which reflect the North-South division. Many NGOs in the developing world have origins in political, social justice and human rights challenges. In contrast, in the developed world, NGOs like Greenpeace were started for the purpose of opposing nuclear activities [18].

The organisational cultures of NGOs vary as well. Some can be highly bureaucratic, as are many large corporations, while others reflect

the flexibility typically associated with NGOs. NGOs differ concerning their own cultures and philosophies, but they also vary in terms of name recognition and the general social view of the acceptability of their mission in their home countries. Many NGOs in the developing world struggle to maintain their existence and must often confront hostile officials. Therefore, their situations are markedly different from those of NGOs in the developed world, which has led them to create organisational cultures suited to operating under siege.

In TT, as in most countries, NGOs play different roles in developing a culture of environmentalism. By far, FFOS is the NGO with the longest history of judicial activism on behalf of the environment. Legal proceedings pursued by FFOS dominate the judicial landscape on environmental law. This is in addition to its strong public awareness and advocacy program on environmental causes. This group was formed in 1996 out of an interest in fishing and, at that time, was known as the North Coast Fishermen. The group functioned as an unincorporated body from 1996 until 2000. The group was formed as a community-based initiative based on the United Nations model of focal point leader networks from its inception. The group organised meetings with fishing communities all along the North Coast. Those North Coast meetings quickly expanded to include other fisher communities from the Gulf of Paria and Northeast Trinidad. They all shared concerns about the consequences of the unsustainable and poorly regulated shrimp trawling sector. The group met with over eighty (80) community-based representatives from twenty-six (26) coastal communities throughout TT. At one of these meetings, in November 1996, the group adopted the name "Fishermen and Friends of the Sea". Indeed, FFOS was commended by a prominent government economic advisor for its judicial activism in the correct application of the polluter pays principle in TT. According to Terrence Farrell,

> *The Fishermen and Friends of the Sea…must be complimented for sticking to its guns on this important issue and getting the right outcome. Our society is the better for it [19].*

Unfortunately, while NGOs are expected to shoulder the burden of advancing environmental justice through the judicial mechanism of public interest litigation, they labour under severe constraints that undermine their effectiveness.

4.1 Limited Recourse to Technical Expertise

Effective public interest environmental litigation often hinges substantially on the ability of civil society to present its legal position within a sound scientific and technical standpoint. TT is a relatively small country with a population of just more than one million people. Scientific and technical professionals are not in abundance, and those present are very often engaged in earning their livelihood from work within the corporate sector. Therefore, attracting technical and scientific assistance to support public interest environmental litigation is complex. The struggle to provide technical and scientific support for public interest environmental litigation has involved a few local scientists, such as Dr Ahamad Khan [20], Dr Peter Vine and Cathal Healy-Singh [21]. One promising development in the drive to obtain scientific and technical assistance has been the work of Environmental Law Alliance Worldwide, operating out of the USA. This group has started to provide scientific and technical assistance to aid the challenges of civil society through public interest litigation to question approvals granted by the EMA. In Trinidad and Tobago Civil Rights Association v Environmental Management Authority, Alutrint Limited (Interested Party) and the Attorney General of Trinidad and Tobago [22], Staff Scientist Mark Chernaik of Environmental Law Alliance Worldwide (ELAW) submitted a written expert affidavit on behalf of the claimants in this matter. ELAW also assisted in the case of Fishermen and Friends of the Sea v Environmental Management Authority, Ministry of Works and Transport (First Interested Party) and KALL Company Limited (Second Interested Party) [23] where in the preparatory work for the filing of a judicial review claim for the grant of a CEC by the EMA for the construction of a highway close to the Aripo Savannas, a designated sensitive area with designated sensitive species, technical expertise was provided by Dr Heidi Weiskel. The need to source external technical resources at a minimal cost led to delays in the preparation of environmental litigation, which often involves the review of extensive technical documents, including Environmental Impact Assessments (EIAs).

4.2 Financial Resources

Civil society in TT faces tremendous challenges in the environmental decision-making process.

By far, the greatest challenge is the availability of funding to oppose decisions both through the public education and mobilisation process and in the Courts. Most environmental NGOs struggle financially, and the major NGOs often accept funding from the private sector, which can lead to conflict with their advocacy activities. An example of this potential conflict can be seen in the operations of PAPWT, an NGO headed by one of the foremost environmentalists in TT, Molly Gaskin. PAPWT is in the middle of an industrial estate owned by the State-owned Petroleum Company of Trinidad and Tobago Limit ("PETROTRIN"). PAPWT has acknowledged receiving funding from entities such as British Gas (Trinidad), Carib Glassworks, National Gas Company of Trinidad and Tobago Limited, Nestle and PETROTRIN [24]. It is questionable whether an NGO receiving such extensive funding from corporate sponsors can undertake the challenges of dealing with mental decision-making, especially when its sponsors may be involved. NGOs need funds to survive and pursue their environmental agenda; unfortunately, satisfying this need from corporate funding may undermine the NGO's ability to pursue environmental advocacy fearlessly and without favour.

The funding struggle is not helped because TT is generally a country where awareness of environmental issues is only now growing. Membership in civil society, especially those who are strong advocates of environmental causes and wish to challenge the State through litigation, tends to be limited. For example, FFOS' core activities are conducted by one individual. Similarly, Smelta Karavan, an NGO formed to oppose the construction of aluminium smelters in TT, had its mandate primarily driven by a few individuals. This attitude in TT is not unusual, and the lack of involvement in a more radical environmental agenda translates into an unwillingness to contribute financially to public interest environmental litigation. On the other hand, in developed countries, groups such as Friends of the Earth and Greenpeace often attract continuous funding at all levels of society. This creates a significant barrier to some civil societies launching public interest environmental litigation in developing countries.

4.3 Attacking Legal Ability of Civil Society to Challenge Environmental Approvals

A necessary element in environmental democracy is the ability to engage in judicial contests as part of the strategy to ensure that environmental decision-making properly considers essential issues. Challenging the State is most often undertaken by NGOs on behalf of members of the public. The genesis of public interest litigation lies in section 5 of the Judicial Review Act of 2000 ("JR Act") [25].

> *"Section 5 of the JR Act (1) An application for judicial review of a decision of an inferior court, tribunal, public body, public authority or a person acting in the exercise of a public duty or function in accordance with any law shall be made to the Court in accordance with this Act and in such manner as may be prescribed by rules of court. (2) The Court may, on an application for judicial review, grant relief in accordance with this Act—(a) to a person whose interests are adversely affected by a decision; or (b) to 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… (6) Where a person or group of persons aggrieved or injured by reason of any ground referred to in paragraphs (a) to (o) of subsection (3), is unable to file an application for judicial review under this Act 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 under this section for relief under this Act."*

Section 5(2) (b), the JR Act provides for public interest litigation and has been used in several environmental matters by civil society [26]. Indeed, public interest litigation has not been extensively used since the passage of the JR Act. Perhaps it has become infamous for its use in challenging the environmental decision-making process. The current Government moved swiftly to limit public interest litigation. The Judicial Review (Amendment) Bill 2005 ("the Bill") was introduced by the Government in Parliament in 2005 with the express aim of limiting the categories of persons who might apply for judicial review by repealing Section 5(2)(b) of the JR Act which vests jurisdiction in the Court to deal with public interest litigation. Due to the proroguing of Parliament in September 2005, the Bill effectively lapsed [27]; however, during the time between the laying of the Bill in Parliament and when it lapsed, a challenge was launched by an NGO attacking the decision of the Government to remove public interest litigation [28]. Justice Gobin, in her decision on the challenge, noted:

I consider that the role of the bona fide public interest litigant in a relatively young democracy such as ours is critical to the maintenance of the rule of law. This is more so at a time when for the most part the population is crippled and consumed by fear for personal safety, protection of family and property. When in this environment there are still to be found persons who are genuinely public-spirited who can emerge out of the State of paralysis to act with the intention to promote the rule of law, they ought to be encouraged. If they are shut out either on technicalities by judges or by overstepping of the executive, we may as well pave the road to tyranny. The public interest litigant is the watchdog that may yet prove to be more valuable to us as a society than the one that actually barks."

The decision of Justice Gobin was reversed at the level of the Court of Appeal in the case of the Attorney General of Trinidad and Tobago v. Trinidad and Tobago Civil Rights Association, C.A.Civ. 149/2005. According to Warner JA:

33. Public interest litigation in its purest form entered the Indian judicial process in about the year 1970. The disenchantment with the formal legal system's impact on the underprivileged led to the development of the jurisprudence of public interest litigation.

34. The genesis of that class of litigation is explained in the case of Guruvayur Devaswom Managing Committee and another v C K Rajan and others [2003] INSC 375 (14th August 2003)The Courts exercising their power of judicial review found to its dismay that the poorest of the poor, deprived, the illiterate, the urban and rural unorganized labour sector, women, children, handicapped by 'ignorance, indigence and illiteracy' and other down trodden have either no access to justice or had been denied justice. A new branch of proceedings known as 'Social Interest Litigation' or 'Public Interest Litigation' was evolved with a view to render complete justice to the aforementioned classes of persons. It expanded its wings in the course of time. The Courts in pro bono publico granted relief to the inmates of the prisons, provided legal aid, directed speedy trial, maintenance of human dignity and covered several other areas. A balance was, therefore, required to be struck. The Courts started exercising greater care and caution in the matter of exercise of jurisdiction of public interest litigation. The Court insisted on furnishing of security before granting injunction and imposing very heavy costs when a petition was found to be bogus. It took strict action when it was found that the motive to file a public interest litigation was oblique."

35. In Canada, the concept of public interest standing originated in such cases as Thorson v Canada (Attorney General), [1975] 1 S.C.R. 138, Nova Scotia (Board of Censors) v McNeil, 1975 Canll 14 (S.C.C.), [1976] 2 S.C.R. 265, Canada (Minister of Justice) v Borowski, 1981 CanLII 34 (S.C.C.), [1981] 2 S.C.R. 575 and was further explained in Finlay v Canada (Minister of Finance), 1985 CanLll6 (S.C.C.), [1986] 2 S.C.R. 607. It originated to allow individuals to sue to prevent illegal government action, or the operation of invalid legislation, even though the litigants could not demonstrate that they had a private right that was being interfered with, or that they were suffering damage peculiar to themselves, different from that of the public generally. (See Maurice v Canada Minister of Indian Affairs and Northern Development 1999 Can Lll 9147).

36. Public interest legislation was introduced in this jurisdiction by the Judicial Review Act 2000. Standing, though relaxed after the decision in IRC v National Federation of Self Employed and Small Business 1982 A C 617 is still a prerequisite. An applicant does not need to show a direct financial or legal interest to succeed, but must show a sufficient interest.

37. Counsel for the respondent's arguments that the Bill prohibits public interest litigation are self-defeating when viewed against the background of the authorities he cited. These authorities demonstrate that claimants of limited means as well as other activists, do have access to the courts. (See R (Corner House) v Trade Secretary of State for Trade and Industry – claimants were an educational research and campaign organization; [2005] 1 WLR 2600 and R v Lord Chancellor ex parte Child Poverty Action Group 1998 2 ALL ER 755 – applicants were a registered charity whose

objects included promotion of action for relief of poverty among children; R (on the application of England) v Tower Hamlets London Borough Council and others 2006 EWCA – claimant an active campaigner for the industrial heritage of Tower Hamlets. The respondents cannot therefore complain that the bill if enacted would prevent them from setting foot in the 'court room door'. (See Matthews v Ministry of Defence (2003) 2 WLR 135 Paragraph 29.)

38. The protection of the law that the respondents enjoyed was the right to apply to a court for such remedy (if any) as the law of Trinidad and Tobago gives to them.

39. In the result, I have found no violation of threatened violation of the respondents' constitutional rights. The appeal is therefore allowed, and the decision of the judge is set aside."

4.4 Finding Legal Resources

The decision of the Court of Appeal was predicated on the position that the Court seemed inclined to adopt the position that while the Bill may have the effect of limiting the statutory right to public interest litigation, this right exists independent of the Bill in the judicial practice of Trinidad and Tobago.

A major issue affecting the work of NGOs in TT has been the cost of litigation and access to expert attorneys. Very often, the planning agencies being judicially reviewed have access to State funding that allows for legal representation at the highest level. In addition, the company that benefited from the planning approval more often than not, will join the litigation as an interested party. In People United Respecting the Environment and Rights Action Group v Environmental Management Authority, Alutrint Limited (Interested Party) and the Attorney General of Trinidad and Tobago [29], Trinidad and Tobago Civil Rights Association v Environmental Management Authority, Alutrint Limited (Interested Party) and the Attorney General of Trinidad and Tobago [30], and Smelta Karavan v Environmental Management Authority, Alutrint Limited (Interested Party) and the Attorney General of Trinidad and Tobago [31], the regulatory body, the EMA, had a full team of legal officers which also included the services of a Senior Counsel (the equivalent in the English legal system to a Queen's Counsel). Additionally, Alutrint Limited, the developer, engaged its own Senior Counsel, and the Attorney-General of TT also decided to appear in the matter through Senior Counsel. All three entities also had available copious support resources from junior attorneys. Smelta Karavan and TTCRA were represented by Senior Counsels, while two junior attorneys represented PURE.

The 2017 matter of Fishermen and Friends of the Sea v Environmental Management Authority, Ministry of Works and Transport (First Interested Party) and KALL Company Limited (Second Interested Party) [32], demonstrates the hardship of obtaining legal representation. In TT, *pro bono* legal services are quite limited, particularly in the environmental field. This is especially true when most environmental litigation involves multiple State parties where lucrative legal briefs are obtained due to State entities' access to almost unlimited funds. NGOs are not as fortunate and are forced to search extensively for *pro bono* or limited fees legal services. This search for legal resources also contributes to the delay in filing legal proceedings by NGOs challenging environmental decisions.

4.5 Intimidating the Community

Engaging in public interest environmental litigation can be dangerous in the Caribbean as TT has recently acquired a strong reputation for violence.According to Carmen Sanchez*:*

> *With a steady rise in violent crime including an alarming increase in homicides, Trinidad and Tobago has overtaken Jamaica as the "murder capital of the Caribbean" …. According to the Economist, the English-speaking Caribbean, which extends from the Bahamas in the north to Trinidad & Tobago in the south, averages 30 murders per 100,000 inhabitants per year, one of the highest rates in the world. By comparison, the murder rate in both Canada and the UK is about two per 100,000. With 550 homicides in 2008, Trinidad and Tobago has a rate of about 55 murders per 100,000 making it the most dangerous country in the Caribbean and one of the most dangerous in the world [33]*.

Indeed, there is already a history of an environmental consultant being murdered in Trinidad and Tobago. As reported in 1996:

> *A prominent Trinidad businessman has been charged with murder in the death of Bryan*

> *Hobbs, an environmental consultant from Dania. Jai Ramkissoon appeared before a magistrate in Port of Spain, Trinidad's capital, Wednesday morning. The murder charge carries the penalty of death by hanging in Trinidad. Police said Ramkissoon and Hobbs quarrelled before Hobbs was shot twice in the abdomen and abandoned on a rural road in eastern Trinidad. He died in the hospital on Monday [34]*.

The situation is exacerbated when law enforcement officers have allegations of complicity concerning illegal activities that adversely impact the environment. In TT, illegal quarrying has been blamed for many environmental problems, and according to one journalist, the situation of possible police collaboration has led to an all-pervading sense of fear descending on those that are willing to confront the issue:

> *The scent of danger is getting too overbearing for many of the handful of householders in Runway Drive, off Mausica Road, Arima, within earshot of Piarco International Airport. In fact, residents in the 23 or so households in Runway Drive are seriously contemplating selling the houses they've occupied for years and taking up residence elsewhere. In the wake of the Sunday Guardian's exclusive report on December 20 of illegal quarry operators raking millions from seven massive construction material sites at Runway Drive while polluting the nearby Caroni Arena water treatment plant, residents have decided to come out in the open with their complaints….In that December 20 report, Enill's right-hand man, Minerals Division Director, Richard Oliver, had told the Sunday Guardian, based on information received, that illegally quarried material mined in Mat-ura and Vega de Oropouche was being washed at Runway Drive and sold cheaply, and that Environmental Management Authority (EMA) security officers had executed a raid at two storage sites and arrested and charged several people. Oliver had expressed fears for the safety of his staff and for his own safety because the illegal operators were being hit in the pockets to the tune of millions of dollars. But he vowed to curtail operations at another five storage sites and avert the threat of further pollution to WASA's biggest water treatment plant from the gravel washing exercise. It entails washing the offending mud into the* Carapo River *which takes it to the treatment plant a kilometre away… Householders told of seeing marked police vehicles with senior officers from Eastern and Northern Divisions entering Runway Drive several times a month, then speeding back out. They speak in hushed tones, too, of marked EMA security vehicles visiting Runway Drive and exiting the area in haste. And they say that in addition to fast becoming a dumping ground for hazardous substances, which posed a further threat to the WASA plant, there is a growing atmosphere of violence about the quarrying retailing operations….Retired school principal Farouk Khan and his wife, Afreen I Mohammed-Khan, an attorney,… unlike the neighbours, they are not afraid to speak out….Khan, 48, who is now a community liaison officer with a prominent Opposition MP…deemed it time to take a stand…. "Inside here is a law unto itself. People talk a lot of gun talk. These people have a lot of contacts. They deal with people in high places. It seems they know anything they do they can get away with it," declared a bitter Khan. He said he often saw law officers in Runway Drive. "They stare me down. I know that stare… [35]*

The few environmentalists prepared to confront the Government on decisions adversely affecting the environment have faced dire circumstances. The attacks on local environmentalists have now attained the status of actual physical violence inflicted on the few members of civil society prepared to confront the State decision-makers. Dr Peter Vine was reportedly physically manhandled in front of the media. The editor of a national daily newspaper, Raffique Shah, has expressed strong sentiments about the lack of action by the police authority on the matter.

> *Vine, who is known for dramatizing his protests, had a fishing vessel take him close to a barge being used by the surveyors. He then jumped off the pirogue, swam to the barge, and was actually helped aboard by one employee (video footage would show this). Once on deck, he appeared to be pleading with the eight-or-so men on board, to abandon their work… Suddenly, one goon grabbed Vine in a most vicious manner. Clearly a bigger man than the activist, he shoved, pushed and finally threw Vine overboard the tug…. What that goon did was assault Vine, not only with battery (as the law*

> *would say), but with anger that oozed from his quivering frame. To date, although the brutal assault was captured on video, no action has been taken by the police against the perpetrator [36]*.

In a protest led by FFOS and other fisher folk groups, violence erupted with respect to the claimed failure to ensure proper environmental impact assessment of offshore seismic activities. As reported by Mark Fraser:

> *A stand-off between protesting fisher folk and police at the Port of Spain Waterfront yesterday led to two supporting activists and a fisherman being arrested. This is the latest and most dramatic instalment in a series of planned protests by the fishing community, as they attempt to get the Government to regulate seismic testing by energy companies in local waters. This type of testing uses dynamite or air guns underwater, in the search for and assessment of oil and gas reserves with the use of soundwaves. Detained by police yesterday were Gary Aboud, head of Fishermen and Friends of the Sea (FFOS), environmentalist Cath- al Healy-Singh and La Brea fisherman, Wayne Henry…They bore placards calling on the Government and Prime Minister Kamla Persad-Bissessar to lay down the law on energy companies that have, for decades, conducted seismic underwater tests without being required to provide an Environmental Impact Assessment (EIA) or apply for a Certificate of Environment Clearance (CEC). The proceedings became heated when the gathering was refused police permission to march outside the Parliament Chamber, where they wanted to "knock on the door," Aboud said, as a symbolic gesture of their requests to the Government. The police refusal to allow the entire group to do so and subsequent orders that the gathering disperse, led to a hand-on-shoulder human barricade being formed and the group's staunch refusal to leave. After some time of bandying between the police, Aboud, Healy-Singh and several other protesters on the front line, Aboud turned to the crowd and for the third time that day, began to sing the National Anthem. The crowd joined him, causing a policeman in the lead to move into the crowd and attempt to pull Aboud out. Henry surged forward, calling out to the policeman to leave Aboud alone. This led to an immediate attempt by the police to subdue Henry and they tried to drag out of the crowd to handcuff him, Aboud and others held on to his body. Aboud was then dragged off Henry and tackled to the ground. Henry, who was standing, handcuffed, had his feet kicked out from under him by a police officer and was also taken, face down, to the ground. Aboud crawled forward and draped himself on Henry, both still singing the national anthem. More protesters, including Healy-Singh, threw themselves on Henry and Aboud, who was by then close to tears and calling out to Henry as his "brother", pleading with the police to release the 43-year-old fisherman….Following were Aboud and Healy-Singh, who were also then arrested and shoved into the back of a waiting police vehicle [37].*

It is becoming increasingly clear that the few members of civil society pre- pared to confront the State on environmental issues are not receiving the level of protection that ought to be present in a country with the democratic credentials of TT.

4.6 Risk of Costs and Bankruptcy

In the case of Fishermen and Friends of the Sea v Environmental Management Authority and BP Trinidad and Tobago LLC (Interested Party) [38], the EMA sought to drive a dagger into public interest litigation in TT by recovering costs from the unsuccessful litigation launched by FFOS. While seeking recovery of the legal cost was in itself legally justifiable, attempts to hold directors personally liable for the legal costs could only have been intended to destroy future attempts at initiating public interest litigation by environmental NGOs. Despite judges in the various stages of Fishermen and Friends of the Sea v Environmental Management Authority and BP Trinidad and Tobago LLC (Interested Party) [39] acknowledging the environmental pedigree of FFOS as a bona fide public-spirited organisation, the EMA still sought to argue that the organisation was a façade for private individuals, namely its directors, by seeking to have the directors of FFOS pay legal costs associated with the unsuccessful litigation in Fishermen and Friends of the Sea v. Environmental Management Authority and BP Trinidad and Tobago LLC (Interested Party) [40]. Justice Pemberton, in this case, saw through this thinly disguised attempt by a statutory body to quell any future attempts at challenging its decisions in unambiguous language.

Pemberton J:

> *The Claimant is a company duly incorporated under the Laws of Trinidad and Tobago. The Defendants are the Environmental Management Authority and BP Trinidad and Tobago LLC. Fishermen and Friends of the Sea (FFOS) unsuccessfully challenged the decisions of the Environmental Management Authority (EMA) and BPTT all the way to the Privy Council. Suffice it to say that the Privy Council ordered the FFOS to pay costs. These costs were taxed by the Registrar and by Allocator of 25th September 2003 the quantum of costs was notified to the parties. There has been no movement by FFOS to pay these costs. The EMA, in order to recover its costs filed an application for the directors of FFOS to pay the costs. The sole issue for my determination therefore is whether the directors of FFOS should be made to satisfy the Costs Order directed to the FFOS by the Privy Council. Thirdly, that FFOS was a "facade simply set up for the convenience of Gary Aboud and other members ..." There is no evidence to back up what clearly amounts to statements of opinion and not evidence to which any weight can be attached by the court. Even if the court were to grant the Order, who among the other directors should be named? There is no assistance or guidance on this issue and it seems that too much of this application has been left to the Court's fancies. I decline to accept this invitation to proceed on a frolic of my own with no directions. This is in stark contrast to evidence of Mr. Beddoe, a director of FFOS. "FFOS has always operated on a very limited budget. We have never asked our membership to pay fees. Our greatest resource has always been volunteerism. Over the years we have managed to attract a wide range of persons who were able to provide us with scientific advice, technical assistance, administrative and manage ment assistance, fishery expertise as well as legal advice. In addition, I accept that Fishermen and Friends of the Sea was a body satisfying the "public interest" component of the Judicial Review Act. This is acknowledged and I daresay accepted by all concerned including the Defendants at every juncture of these proceeding. It would be foolhardy of this Court at this late stage to accept a proposition stating otherwise*.

4.7 Effective Consultation

Environmental justice can only gain relevance when the public can participate effectively in the environmental decision-making process. In rendering decisions according to environmental legislation within an environmental context, an environmental decision-maker is inevitably responsible for explicitly considering the public interest [41]. It is on this foundation that public participation has occurred. Public participation is a process by which interested and affected individuals, organisations, and government entities are consulted and included in the decision-making process [42]. The public consists of a number of people reacting to a perceived interest [43]. Effective participation requires, at a minimum: (1) education about the environment and things that might affect it; (2) access to information (including the fact that information exists and is available); (3) a voice in decision-making; (4) transparency of decisional processes (by formal consideration of public input and explanation of how that input affected the decision at issue); (5) post-project analysis and monitoring, as well as access to pertinent information; (6) enforcement structures; and (7) recourse to independent tribunals for redress.

Public participation is provided for in the environmental legal regime of TT. Before 1995, there was no specialist agency dealing with environmental protection in TT. Therefore, it was hardly surprising in light of the environmental challenges facing TT that civil society looked on with much anticipation at the establishment of the EMA in 1995, with the promulgation of an entirely new legal regime to protect the environment. This legal regime recognised the importance of public participation. The Preamble to the EM Act sets out the spirit of the legislation and its intended objectives. The preamble makes it quite pellucid that public concerns are critical to developing an effective legal regime for protecting the environment.

> *Whereas, the Government of the Republic of Trinidad and Tobago (hereinafter called "the Government") is committed to developing a national strategy for sustainable development, being the balance of economic growth with environmentally sound practices, in order to enhance the quality of life and meet the needs of present and future generations; And Whereas, management and conservation of the environment and the impact of environmental conditions on*

> *human health constitute a shared responsibility and benefit for everyone in the society requiring co-operation and co-ordination of public and private sector activities;… And whereas, in furtherance of its commitment, the Government is undertaking the establishment and operation of an Environmental Management Authority to co-ordinate, facilitate and oversee execution of the national environmental strategy and programmes, to promote public awareness of environmental concerns, and to establish* an effective regulatory regime which will protect, enhance and conserve the environment…

The EM Act continues to define the general principles articulated in the preamble. The objects of the EM Act defined the public role in terms of awareness and participation.

> Section 4 of the EM Act - *(4) Objects of the Act (a) promote and encourage among all persons a better understanding and appreciation of the environment; (c) ensure the establishment of an integrated environmental management system in which the Authority, in consultation with other persons, determines priorities and facilitates coordination among Governmental entities to effectively harmonise activities designed to protect, enhance and conserve the environment…"*

The general functions of the EMA also include the role of fostering public awareness and public participation.

> *Section 6 of the EM Act - 6(1) The general functions of the Authority are to - e) promote educational and public awareness programmes on the environment.*
>
> *(2) 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, including the encouragement and use of appropriate means to avoid or expeditiously resolve disputes through mechanism for alternative disputeresolution."*

An essential aspect of the statutory regime for public participation in the decision-making process is the NEP 2018, which enshrines public participation as part of the environmental management system.

> *Section 1.05 - Public participation is critical to sustainable development and is a prerequisite for responsive, transparent and accountable governmental entities and civil society organisations. It is also acknowledged that meaningful public participation can only be attained where there are transparent public processes, and access to appropriate, timely and comprehensible information concerning the environment held by public authorities. Such information must be made widely available without imposing undue financial burdens on the applicant and with adequate protection of privacy and business confidentiality. Consequently, all* governmental *entities of Trinidad and Tobago shall, in accordance with Principle 10 of the Rio Declaration, facilitate and encourage public awareness and participation in environmental and developmental matters by making information widely available, and ensuring effective access to judicial and administrative proceedings,including redress and remedy.*
>
> *Section 2.20 The* GoRTT recognises *that empowering individuals to undertake environmentally responsible behaviour also requires systemic reinforcement of pro-environmental behaviours and knowledge. This entails continuous environmental education and public participation in environmental decision-making. It is the Government's policy that all environmental education in Trinidad and Tobago is in keeping with the goals, objectives and characterisations contained in the Belgrade Charter (1975), the Tbilisi Declaration (1977) and Chapter 36 or Agenda 21 (1992). To this end, and in keeping with SDG 4, the GoRTT will: a) Continue to introduce environmental education from pre-school school age to adulthood, for both formal and informal sectors, with the goal of providing knowledge of both local and global environmental issues as well as the skills required to enable effective public participation, decision-making and action; b) Further the integration of sustainable development concepts and the principles of this NEP into all education programmes and curricula; c) Mobilise resources and encourage partnerships among national, regional and international entities towards building public awareness and behavioural change; d) Coordinate environmental education and awareness programmes*

> *initiated by the public, private and non-governmental sectors at the national level; e) Empower public agencies to undertake environmental communication, awareness and education programmes based on local environmental issues in a manner appropriate for the target community; f) Support the development and promotion of mechanisms that provide viable solutions to environmental problems in communities; g) Ensure that mechanisms established for meaningful participation in decision-making regarding environmental and/or development issues are appropriately promoted, and made available to the public; and h) Ensure that all efforts at education, awareness-building and meaningful participation in decision-making regarding environmental and/or development issues encourage and facilitate the inclusion of marginalised groups such as indigenous peoples, the rural poor, children, youth, women, sick, disabled and elderly".*

It is necessary to see how the environmental legal regime has emerged for public participation in regulating new and significantly modified activities with the potential to affect the environment adversely through the CEC process. The CEC process allows the EMA to control the environmental impacts associated with new developments or environmental impacts associated with the significant modification of existing developments. The CEC is intended to ensure that there are limited or no environmental consequences of development activities occurring in the post-EM Act era. As expected, the CEC process has been under more intense judicial scrutiny than any other aspect of the EM Act. The critical point is that public participation is not automatically part of the CEC process. It is only applicable when an EIA is required. This gives the EMA the power to grant a CEC without requiring an EIA, thus excluding the public from the decision-making process. The danger inherent in giving the EMA discretion to dispose of an application based on information contained therein must be properly understood. It is correct that an application may be straightforward, and on the face of it, there may be no adverse environmental effects, so a CEC may be granted. However, a problem may arise when an applicant submits a detailed document (essentially an EIA) together with the application form. The EMA determines that no further information is required and thereby grants a CEC to the applicant. Imagine a situation where a person lives in a highly residential area and notices an industrial facility being constructed. The affected person visits the EMA to complain and is told that a CEC was granted for constructing and operating a hazardous waste disposal unit in their neighbourhood. They are enraged but are told that the application was complete and sufficient information was attached to it, resulting in no need for an EIA. This consequently amounts to a perversion of the spirit and intent of the EM Act. The entire EIA process can be circumvented by an unfortunate exercise of discretion by the EMA to summarily deal with an application without the benefit of a CEC.

The position of statutory public consultation as exclusively part of the EIA process is underscored by several decisions of the Courts on public consultations in the non-EIA required approval process for a CEC. In one instance, the High Court took the view that when an EIA is not required as part of the CEC approval process, there is no statutory requirement for public consultation. Still, the Court noted favourably, public consultations are done voluntarily by an applicant.

In Bhadase Sooknanan and Fishermen and Friends of the Sea v Environmental Management Authority and the Ministry of Energy [44], Kangaloo J indicated:

> *The requirement of public consultation in Trinidad and Tobago is borne out in section 35(5) of the EMA Act. This is only activated and enforced when the EMA has commissioned the preparation of an EIA in relation to the application before it….This court is satisfied that meetings held by Petrotrin with the fishing community demonstrated sufficient consultation in all of the circumstances of this case; particularly in light of this Court's finding that such consultation was not mandated by the legislation, no EIA having been required by the EMA.*

The High Court has also taken the view that the issue of public consultations outside of the EIA process is largely irrelevant as it is not statutorily required. ***In Charlotteville Beachfront Movement v Tobago House of Assembly,*** [45] Rajkumar J stated:

> *It is clear that even on the evidence of the applicants there was consultation. In this*

case the adequacy of consultation would make no difference to its outcome. The outcome is the quashing of the decisions challenged, on the basis of illegality and unreasonableness. It is therefore not necessary to consider or even comment upon whether there was adequate consultation or whether such consultation as there was is reviewable by a court on the evidence presented by the applicants, save that in the event that the EMA were to require an EIA in respect of any other activity related to the project, (a matter entirely within its sole discretion), the issue of the adequacy and content of consultation may assume relevance.

So having regard that the only chance for statutorily required public participation is when a CEC requires an EIA, this process must be examined to see how it supports environmental justice. Rule 4(1)(d) of the Certificate of Environmental Clearance Rules [46] provides that the applicant may be required to conduct an EIA in compliance with a Terms of Reference (TOR) as a condition to the determination of an application for a CEC by the EMA.

Rule 4(1)(d) of the CEC Rules states: The Authority shall, within ten working days after receipt of an application under rule 3(1) or 3(3) issue to the applicant a notice acknowledging receipt of the application and it shall –(d) notify the applicant that an EIA is required in compliance with a TOR;

The EMA prepares the draft TOR and forwards the same to the applicant, who is then made responsible for obtaining comments from stakeholders and other members of the public. This is a critical function as the quality of the TOR often determines the quality of the EIA. Rule 5(2) of the CEC Rules provides that (2) the applicant shall, where appropriate, conduct consultations with relevant agencies, non-Governmental organisations and other members of the public on the draft TOR and may, within 28 days after notification under sub-rule (1)(c), submit written representations to the Authority requesting that the draft TOR be modified and setting out how he proposes that the TOR should be modified; a reasoned justification for the proposed modifications; and a report of the consultations with relevant agencies, non-Governmental organisations and other members of the public on the draft TOR.

The EMA has interpreted Rule 5(2) of the CEC Rules of placing full responsibility on the applicant in determining the appropriate stakeholders and the manner of the consultations. The result has been varied, with some stakeholders being invited to comment on TORs while others seeming to have equal standing are ignored. Some applicants have opted for public meetings where comments can be offered on the draft TOR, while others elect to receive only comments in writing. By not laying down a set procedure for facilitating public comments on draft TORs, the EMA has unwittingly allowed a system to emerge dependent on the applicant's integrity and willingness to engage in the widest possible public consultation in the review of draft TORs.

The Court examined public consultations on the draft TOR in ***Fishermen and Friends of the Sea v Environmental Management Authority, Ministry of Works and Transport (First Interested Party) and KALL Company Limited (Second Interested Party) [47].***

Lord Carnwath:

"6. Given the importance attached by the appellants to rule 5(2), it is worth noting at this stage its relatively limited place in the procedure. The TOR is not a requirement of the Act. It appears to be no more than a preparatory step under the rules, designed to set the parameters of the EIA as between the Authority and the applicant. Although the implication is that the EIA will be prepared "in compliance with" the TOR, there is nothing in terms in the Act or the Rules to limit the consideration of the final decision on the CEC by reference to it. The requirement to consult other agencies and members of the public "where appropriate" shows that this is not a mandatory requirement in all cases; nor does it grant any general right to the public to be consulted at that stage. The implication seems to be that there may be agencies or individuals with a special interest in, or able to make a particular contribution to, setting the parameters of the EIA at an early stage. It is left to the applicant, at least in the first instance, to determine whom to consult. The responses if any are reported to the authority by the applicant; the consultees have no independent right to make representations on the draft TOR. On the other hand, the TOR process does not pre-empt in any way the rights of the public to take part in the statutory public comment

> *procedure under sections 28 and 35(5), and to have their comments taken into account in the Authority's final decision. Comment has already been made on the limited role of rule 5(2) in the EIA procedure. The Board finds it hard to envisage a case where a failure at that pre- liminary stage should be held to invalidate the final certificate, given the extensive statutory provisions for public consultation on the terms of the EIA at a later stage. If it is alleged that lack of consultation on the draft TOR led to some matter being inadequately considered, this can no doubt be raised by way of objection to the EIA. There is in any event no evidence in this case that those who took part in the later consultation were dissatisfied in any way with earlier procedures.*
>
> *It is particularly difficult for the appellant to complain, given its unexplained failure to take any part in the statutory consultation process, or to raise any complaint about the scope of the TOR (which was finalized in December 2016) at an earlier stage. Further, even at this late stage, the appellant has failed to identify which other agencies, public or private, should "appropriately" have been consulted on the draft TOR and why. More importantly it has failed to identify any defect in the draft TOR which might have been corrected by such consultations. Indeed, the emphasis of its complaints has been, not that the TOR was deficient, but that some of its requirements (on matters such as cumulative impacts) were relaxed in the final decision".*

The net effect of the decision in ***Fishermen and Friends of the Sea v Environmental Management Authority, Ministry of Works and Transport (First Interested Party) and KALL Company Limited (Second Interested Party) [48],*** is to destroy the ability of the public to influence the environmental decision-making process at the earliest stage, preparation of the TOR. Considering the issue is vulnerable to lower-income communities, compromising public participation is a further barrier to achieving environmental justice.

The second element of public participation is the ability to comment on the EIA. The EM Act provides a written public comment period with a minimum of thirty (30) days but not the outer limit.

> *Section 28 of the Environmental Management Act - 28(3) The Authority shall receive written comments for not less than thirty days from the date of notice in the Gazette…*

It would appear to be the trend for the EMA to set the time for receipt of written public comment at a minimum of thirty (30) days. Given that many of the projects in TT are energy-based (petroleum and petrochemicals), it is difficult to have large and complex EIAs reviewed within thirty (30) days. Further, there is a paucity of technical expertise in TT available and willing to examine these EIAs; therefore, significant time is spent trying to obtain such resources. Additionally, the situation is exacerbated by the fact that the review period is 30 calendar days instead of 30 working days, reducing the number of days the public may access said documents.

The matter of the adequacy of the time provided by the EMA for receipt of written comments from the public on an EIA was explored in the ***People United Respecting the Environment and Rights Action Group v Environmental Management Authority, Alutrint Limited (Interested Party) and the Attorney General of Trinidad and Tobago [49].***

Dean-Armorer J:

> *A number of issues targeted the brevity of different parts of the consultation process. At the third i**ss**ue of his submissions, Learned Senior contended that the Defendant did not allow sufficient time for meaningful consultation. The Claimants contend that the two public comment periods were too short. No ground of illegality could be established because public comment periods were within the minimum time stipulated by s. 28(3) of the Environmental Management Act. While accepting that the issues canvassed by the proposed project were both deep and numerous, the time allotted in this case cannot be regarded as unreasonable, having regard to the timetable set by the Rules. The Authority finds itself in this unenviable predicament of having to balance environmental with economic considerations, or more specifically having to balance the need of the public for thorough consultation with the developer's need to press on with the project. In my view the EMA cannot be faulted for complying with the statutory timetable.*

What the Court failed to recognise is that having regard to the constraints on accessing local technical experts to review EIAs, the application of the time frame makes it virtually impossible to find external experts and review the EIA within the minimum of thirty (30) days; another nail in the coffin of public participation and by extension, environmental justice.

The adoption further compromises the application of the statutory minimum for the written public comment period by the EMA of a position that EIAs are copyright material and therefore must be read at the Library of the EMA, thereby only allowing 10 per cent of the EIA to be photocopied according to copyrighted legislation. Fortunately, a court recently acknowledged the injustice of such a copyright claim, particularly concerning the poor, and denied the EMA the ability to apply copyright laws to EIAS.

In the matter of the Environmental Management Act Chapter 35:05 In the matter of the Copyright Act Chapter 82:80 Between Environmental Management Authority v Fishermen and Friends of the Sea Limited: [50]

Rampersad J:

> *129. Whether the decision, reasons and policy of the EMA not to allow persons to obtain or access complete copies of environmental impact assessments (whether in hard copy or digitally) and to restrict copying to no more than 10% is reasonable, rational and lawful? 129.1. No it is not.*
>
> *130. Whether the EMA can claim third party copyright as justification for not providing whole copies of an environmental impact assessment in light of its role, functions and obligations pursuant to statute and official policy? 130.1. No it cannot.*
>
> *131. Whether EMA's obligation to make information available to the public necessarily or automatically translates into a right by the public to copy documents. In particular, is it lawful or reasonable to equate making information available for viewing with having a right to copy? 131.1. In the circumstances set out above in relation to poor persons without means or persons unable to travel back and forth due to disability, personal circumstances, etc, that position is arguable as mentioned in relation to section 17. However, having regard to the finding in relation to Rule 9, the right to a copy is sanctioned.*
>
> *132. Should being able to copy amount to, or be elevated to, the status of rights? 132.1. In the context of Rule 9, yes, subject to the limitations in the Act as to what may or may not form part of the Register under Rule 3 (7) and (8). /s/*

Perhaps the main and most significant pillar of the public participation process is the discretion vested in the EMA to hold a public hearing where there is sufficient public interest.

> *Section 28(3) of the EM Act states, …if the Authority determines there is sufficient public interest, it may hold a public hearing for discussing the proposed action and receiving verbal comments.*

The EMA has made sparing use of this power, and it is undoubtedly the exception for a public hearing to be held rather than the norm. The failure to hold a public hearing constituted one of the grounds for judicial review in Fishermen and Friends of the Sea v The Environmental Management Authority and Atlantic LNG Company of Trinidad and Tobago (Interested Party) [51], where Justice Stollmeyer agreed with the views of the EMA and noted:

> *The EMA has a broad discretion in determining whether and when to hold public hearings. There is no express provision requiring follow up public hearings before granting the CEC. That is left up to its discretion, and will depend on the circumstances of the case and the severity of the concerns… The rules of natural justice do not necessarily require that there be a formal, oral, hearing in public. It is sufficient if those affected, or likely to be affected, are put into a position that allows their views and opinions to be heard, to be ventilated fully, and that those views and opinions be considered properly in the decision making process. There is no requirement for ongoing public debate.*

While the decision of Justice Stollmeyer is the current position of the law as it stands at the first instance level, it is hoped that this limited view of the public hearing by and large excludes any follow-up meeting to discuss how the public views were addressed before the taking of a

decision would not endure. Environmental justice requires the broadest possible levels of public participation so that the poor and vulnerable can have their views articulated by themselves or civil society.

4.8 The Scourge of Delay

As observed, NGOs struggle to find the technical and legal resources to launch challenges against EMA decisions that may adversely impact the environment. Judicial review challenges must be initiated promptly but no later than three months from the date of the decision being challenged. When there is a failure to act promptly and no later than three months from the date of a decision, the Court may use its discretion to grant or refuse leave for judicial review.

Judicial Review Act, Section 11 provides:

> *11(1) An application for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose unless the Court considers that there is good reason for extending the period within which the application shall be made.*
>
> *The Court may refuse to grant leave to apply for judicial review if it considers that there has been undue delay in making the application, and that the grant of any relief would cause substantial hardship to, or substantially prejudice the rights of any person, or would be detrimental to good administration.*
>
> *In forming an opinion for the purpose of this section, the Court shall have re- gard to the time when the applicant became aware of the making of the decision and may have regard to such other matters as it considers relevant.*
>
> *Where the relief sought is an order of certiorari in respect of a judgment, or- der, conviction or other decision, the date when the ground for the application first arose shall be taken to be the date of that judgment, order, conviction or decision.*

In the first major environmental litigation initiated in TT, the Court ruled that from first instance to the Privy Council, leave would be refused in the application for judicial review filed by FFOS on the basis that the application for leave was filed five months from the date of the decision in question [Fishermen and Friends of the Sea v. Environmental Management Authority and BP Trinidad and Tobago LLC (Interested Party)] [52]. The struggle to file for judicial review within the permitted time and the discretion in the Court to refuse leave for judicial review came into sharp focus in a matter where FFOS filed five days after the expiration of the three months from the date of the decision by the EMA [Fishermen and Friends of the Sea v. Environmental Management Authority, Ministry of Works and Transport (First Interested Party) and KALL Company Limited (Second Interested Party)] [53]. Justice Ramcharan refused leave based on delay for judicial review. The matter was appealed to the Court of Appeal, which on a preliminary hearing, continued an injunction initially granted by Justice Ramcharan and decided to have the refusal for leave determined by a full panel of the Court of Appeal [Fishermen and Friends of the Sea v. Environmental Management Authority, Ministry of Works and Transport (First Interested Party) and KALL Company Limited (Second Interested Party)] as per Rajkumar JA [54]. The Court of Appeal, sitting as a full panel, upheld the decision of Justice Ramcharan on the basis that there was undue delay by FFOS in bringing the judicial review application and that granting leave in the absence of promptitude and outside the three months statutory period for bringing action from the date of the decision would substantially prejudice the rights of the third party contractor and be contrary to the principle of good administration [55]. The Privy Council upheld the decision of the TT courts. Fishermen and Friends of the Sea (Appellant) v Environmental Management Authority and others (Respondents), [2018] UKPC 24.

Lord Carnwath

> *21. It is satisfied that where, as here, the proceedings would result in delay to a project of public importance, the courts were right to adopt a strict approach to any application to extend time. It was unnecessary to show specific prejudice or hardship to particular parties. There was no such competing public interest in the Abzal Mohammed case, which concerned a challenge by a police officer to an individual decision of the Police Service Commission. However, in considering whether there is good reason to extend time, there may, as Mr Knox QC for the Authority accepts, be*

some overlap between sections 11(1) and (2), so that the is- sues including the relative merits of the applicant's case, and any prejudice, public or private, may be taken into account in the overall balance....

30. The Board would add one comment on the appellant's reliance on its status as a public interest litigant. This is undoubtedly an important role, which is recognised in section 7 of the Judicial Review Act ("Leave of Court in public interest"). However, this is not in itself a reason for applying the delay rules with less rigour, particularly where, as here, there are strong competing public interests on the other side...

32. The Board doubts that it is appropriate to apply stricter standards to public interest litigators than to others, and it recognises the need to take account of the limited resources that may be available to them. However, it agrees that full weight must be given to all aspects of the public interest, that respect must be paid to the time limits laid down by the rules, and that the real substance of the complaint should be identified with reasonable precision at an early stage. The latter is important both for the court, and in fairness to the respondent who is entitled to know the case against him so that he can respond to it. It was unfortunate that the court, in this case, was faced with no less than 14 grounds of challenge, which themselves differed significantly from the four points identified in the Pre-action letter, and of which only two have been found to have weight by any of the seven judges who have considered the matter.

5. THE ROLE OF THE STATE

In TT, like many developing countries, the State is a major economic player and not merely a regulator of business activities. Thus, when the State decides to pursue a particular economic activity with much social opposition, and the State must apply to a State agency for approval, there is a clear conflict of interest that undermines the public perception of the transparency and objectivity of the approval process.

An example of the role of the State in economic activities can be found in the decision of the TT Government to construct and operate an aluminium smelter. ALUTRINT was initially established as a joint venture between wholly State-owned National Energy Corporation ("NEC") and Sural, a Venezuelan aluminium concern with NEC owning 60 per cent of ALU-TRINT's equity and Sural 40 per cent [56]. A former Prime Minister of TT, Patrick Manning, made this project a personal and powerful crusade. It was difficult to see how a State agency could have resisted the inevitable push towards establishing a State majority-owned smelter. According to Mr Patrick Manning:

> *You will not be surprised, therefore, that there has been a rise in objections to one of the projects and in fact that is just the beginning of it. The project is the aluminium smelter and particularly the one that is carded for Cedros. You notice that we have not had those objections over the aluminium smelter that is carded for La Brea - don't have those objections there and that should tell you a story. And we have also seen that particular project acting as a catalyst and a rallying point for those who have issues other than aluminium or the environment, a point around which civil society organizations can rally - we saw it in a demonstration in Cedros quite recently. And we have also seen a lot being said in the public domain about what aluminium smelters can or cannot do. And by and large, the more vocal among us - the voices that are being heard the loudest - voices that are suggesting that it is not in the national interest and that aluminium smelters do great damage to the flora and fauna surrounding it and these are things that ought not be pursued. But I would like to just remind of a biblical saying that you see in the book of proverbs, "There is gold and there are precious stones but the lips informed by knowledge are a precious jewel." Many of the lips that are speaking on this matter are not by any means informed by knowledge [57].*

The strident and aggressive tone of the former Prime Minister made it clear that little resistance would have been tolerated to this smelter project, and it certainly placed the EMA charged with responsibility for environmental clearance of this project in an invidious position [58].

Another example of the State engaging in major developmental activities can be found in the construction sector. With the high oil prices and increased revenues in the first decade of the 21st century, the government had a major construction drive. To the government's chagrin,

this led to a shortage in the supply of construction raw materials. Quarrying, at that time, and continues to be, a major environmental problem in TT, particularly affecting the country's water resources. Quarrying is one of the activities listed under the *Certificate of Environmental Clearance (Designated Activities) Order, 2001 [59]*, requiring environmental clearance from the EMA. The emerging practice is that all applications for CECs for quarrying are subject to the EIA process imposed by the EMA. This, in turn, provides the avenue for public participation and the opportunity for the public to express its views on the adverse effects quarrying has on its communities. The Government in 2007 responded by passing the *Certificate of Environmental Clearance (Designated Activities) Amendment Order* 2007 [60], an amendment stating that a CEC was only required to establish a quarry over 150 acres. The reality is that it is unusual in TT to have a quarry in excess of 150 acres. So the amendment was intended to remove the EMA's power to regulate quarrying. A newspaper article has quoted the Chairman of the EMA as stating:

> *They want the sand and gravel for construction. The problem is there's a boom in construction and there is a shortage of aggregate. You know the background on quarries, you wrote about it [61].*

As with many developing countries, the State is not only an active participant in economic activities but understandably sees itself as having a major role in facilitating economic development. The Government would often lay out its economic blueprint and identify the projects on which it is basing its developmental thrust. Similarly, when the State is a direct economic player, it is not likely to be easily deterred by a State agency in its thrust to promote specific economic activities. This is quite apparent in TT where heavy industrialisation is being promoted in light of the perceived abundance of natural gas as a source of energy. One example was the pro- motion by the Government for a massive steel plant in the face of strong opposition by environmentalists and communities near the proposed plant. The former Prime Minister Patrick Manning stated that the USD$1.2 billion steel unit proposed in the country by the Mumbai-based Essar group would proceed:

> *The construction of the steel plant proposed by the Ruias-led Essar group will begin shortly… This is an emotional issue (for) many. But when you examine the facts of the case they are not borne out by the emotion you're seeing. In fact people are shedding heat on it, not light [62].*

Another project that saw strong support from Patrick Manning and proceeded despite much opposition was the Atlantic LNG Train IV project [63]. This project generated tremendous public interest and resistance due to the public perception of adverse environmental impacts associated with the earlier trains. The CEC process experienced some delays due to public pressure to properly examine several critical issues before the CEC was granted to ALNG. ALNG was growing impatient with the process, and the then Prime Minister was a strong advocate of the Train IV project. A chronology of reported facts makes for interesting reading. Patrick Manning was reported on 07 June 2003 to have said at a post Cabinet news conference held on 05 June 2003:

> *That he expected the Cabinet to give final approval for the project next Thurs- day… he expected the certificate of environmental clearance to be granted shortly since, as far as he was aware, the partners had gone a long way towards satisfying the requirements of the EMA [64].*

It is somewhat unusual for a Prime Minister to announce that he expected a CEC to be granted shortly and that the requirements of the EMA had been met. What became even more perplexing is that the same newspaper article indicated that the Chairman of the EMA was far from satisfied with the status of the application.

> …even if Cabinet gives approval to Atlantic LNG for the construction of its billion dollar Train Four, it would not be built unless Atlantic LNG meets the EMA's environmental standards… the EMA had set clear requirements for the Atlantic LNG partners and this would not be changed, even if the project was sanctioned by Government… Unusually exhaustive time has already been spent working with the company in an attempt to bring it up to standard … specialist consultants from around the world had been brought in by the EMA to look into the matter… Atlantic LNG had not met the 'mitigated standard' which was lower than the normal standard for projects of that nature… the organization [EMA] was dispassionate about the issue and had an obligation to ensure that environmental laws

were adhered to… the EMA would not be forced into anything…. [65].

Thus, the State's role as an active player in economic activities and a facilitator of economic activities have understandably created concern with respect to the ability to nurture genuine State oversight in the environmental decision-making process. This situation is not helped by the governance structure of the EMA, which lends itself to the suspicion that it is easily manipulated and controlled by whichever political party holds the reign of power as the EMA is managed by a Board of Directors appointed by the President.

Section 6 of the Environmental Management Act

> *6(1) There is hereby established a body corporate to be known as the Environmental Management Authority, which shall be governed by a Board of Directors consisting of the persons appointed in accordance with this section.*
>
> *(2) The President shall appoint - (a) a Chairman; (b) nine other members drawn from the following disciplines or groups, namely, environmental management, ecology, environmental health, engineering, labour, community-based, organisations, business, economics, public administration, law and non-profit environmental nongovernmental organisations.*

In TT, the Office of the President is largely ceremonial, with the President being appointed by the Parliament. The vote for the appointment of a President has always favoured the political party's nominee with the majority of members in Parliament. This is the same political party that forms the Cabinet that governs the country. The convention is that when the President is given the statutory power to appoint a Board of Directors, this is done on the advice of the Cabinet. Effectively, therefore, the Cabinet receives the recommendation from the Minister with responsibility for the environment and then ratifies that decision and forwards the same to the President, whereby the President inevitably makes the recommended appointments. In a developing country, where the tradition of objectivity and transparency in public appointments is certainly underdeveloped, there is a fair degree of scepticism about whether the EMA is serving the interest of the entire society, as the interests of the Government may be of paramountconcern.

A second aspect of the EM Act that undermines the EMA's independence is the Minister's power over the actions of the EMA.

Section 5 of the EM Act

> *(5) The Minister may from time to time give the Authority directions of a special or general character in the exercise of the powers conferred and the duties imposed on the Authority by or under this Act.*

This power to issue directions of a special or general character vested in the Minister has created suspicion that the EMA can be manipulated and forced to act contrary to the public interest in the face of Ministerial directives. The State's power in appointing the Board of Directors of the EMA and the right vested in the Minister to give special and general directions to the EMA, creates an obvious conflict when the State seeks approval from the EMA.

In People United Respecting the Environment and Rights Action Group v Environmental Management Authority, Alutrint Limited (Interested Party) and the Attorney General of Trinidad and Tobago [66], it was argued that when the State was a participator in a developmental project for which environmental approval was sought from the EMA, the EMA should engage in a higher level of scrutiny. The Court rejected this argument. As per Mira Deen-Armour at p.115:

> *Saskatchewan Action Foundation for the Environment v. Saskatchewan Minister of Environment and Public Safety (1992 97 Sask. R. 1354 was cited by Dr. Ramlogan in support of his submission that greater public participation was required where Government partly owned the developer. Dr Ramlogan relied, in particular, on paragraph 37 of Saskatchewan: "Public participation in the process is all the more important because the government of Saskatchewan may have an interest direct or indirect in the advancement of a development… Accordingly, the minister being the person charged under the Act with granting approval and at the same time being a member of the government is placed in a position of potential conflict. Public participation… is important to avoid the appearance of partiality." Saskatchewan is distinguishable from the Trinidad and Tobago situation, since the Environmental Management Act*

creates an independent body for the purpose of deciding whether a certificate of environmental clearance ought to be granted. Even if members of the Authority are appointed by government, the Authority is in no way comparable to a Minister, who is a member of government. Accordingly, the government involvement in the project is not a ground, under the Environmental Management Act, for demanding more intense public participation.

A clear example of the challenges with the role of the State is seen in that of the proposed highway alongside the Aripo Savannas. The Ministry of Works and Transport (MOWT) touted a major infrastructural project to run south of the Aripo Savannas, a designated sensitive area to be executed in segments. MOWT applied for a CEC for the phase of the highway adjacent to the sensitive area. A CEC was granted on 22 June 2017, and a sod-turning ceremony was held on 26 September 2017 announcing the commencement of the project. On 29 September 2017, FFOS filed for judicial review of the decision of the EMA to grant a CEC to MOWT for the highway project on the grounds that included the failure to properly consider the biological diversity of the Aripo Savannas with its unique ecosystems and rich diversity of flora and fauna. This highway was clearly a project in which the government had a significant interest. On 25 October 2017, Mr. Rohan Sinanan, Minister of Works and Transport in the Senate spoke about the highway project that included the phase passing alongside the Aripo Savannas.

Mr. Vice-President, another major project at the Ministry of Works and Transport is the Valencia to Toco highway. In March of 2017, the route alignment and conceptual designs were undertaken for the construction of a first-class road from Valencia to Toco. At this time, they are being reviewed and the best route will be presented to the infrastructure committee very shortly and that highway, that first- class road to Toco will be a reality. But Mr. Vice-President, there has been so much talk about why is the Government building a road like that in Toco? Well, the first thing I want to say, the people of Toco are part of Trinidad and Tobago and it is time that part of the island gets its development. However, having said that, what the Government plans for that area is a fast ferry port in Toco. Mr. Vice-President, Toco is a village where you can find craft, tourism projects, a small folk museum and the Toco Composite School, good bathing, and it is a popular surfing spot between the months of October and April. However, Mr. Vice-Pres- ident, the fast-ferry port in Toco is what will bring Trinidad and Tobago much closer than where it is now. The savings alone, with a port in Toco, in terms of energy, is significant. And what we see happening into Toco is the entire eastern seaboard of Trinidad will be opened up for serious commercial activities. So, when this Government decides to do a project, we "doh" just get up in the morning and say: Let us go and do this and let us go and do that. Everything has to do with commercial development. Yes, I think Mr. Watson Duke made a case for this port. Mr. Vice-President, I am happy to announce that in July 2017, a consultant was engaged for that port in Toco and very soon we will have the conceptual designs, the layout designs and the tender document for that port. Mr. Vice-president, another major project, and these are projects that we are working on in 2017.

2.30 p.m. A lot of work has been going on in the Ministry of Works and Transport. Mr. Vice-President, the construction of the Wallerfield to Manzanil- la Highway. The total length of this highway is approximately 34 kilometres to be done in three phases: the Cumuto to Toco Main Road, the Toco Main Road to Manzanilla and the Cumuto Link Road to the Churchill Roosevelt Highway….I also want to draw the attention, Mr. Vice-President, of the House, there have been some concerns about the location of the highway passing through the protected Aripo Savannas. This project is passing almost 150 metres away from the Aripo Savannas, so this is not interfering with the protected area of the Aripo Savannas [67].

The support for this project reflects the robust approach that government tends to take when faced with judicial opposition to projects it has embraced. The Prime Minister of TT, the Honourable Dr. Keith Rowley launched a scathing attack on persons for opposing the highway project and urged his followers to raise their voices in opposition to the actions of FFOS.

One particular one, my mother and her friends buy so much cloth from him that he and he children eh have to work again in life but he know that you must not get this and that from here. And lie…Tonight I want to say to the people, where is

your voice when this is happening to you…. You remain silent and they prevail.

The reference is clearly to Jimmy Aboud, popularly dubbed the "Textile King," the father of Gary Aboud, the Secretary of FFOS.

One of the challenges confronting TT is a political desire to obtain developed world status by 2030, propelled by the energy sector. This raised the issue of whether the developmental thrust of TT is sustainable. The State assumed the role of definer and implementer of the concept of sustainable development. This eschewed any role for the public to have a voice in determining the level of sustainability. The then Prime Minister in 2006, quite succinctly explained the challenge of balancing the environment and development:

> *For us, therefore it has to be a question of sustainable development, that is to say, a balance between the requirements of development and the need to preserve as far as possible the sanctity of the environment in which we operate. It is neither one extreme nor the next. It is a judicious balance designed to improve our standard of living [68]*.

The emerging issue is who determines the balance and by what means the balance is established. In a country where the notion of environmental democracy is emerging in the face of strong opposition from the State, questions are being posed as to the role of the State in facilitating dialogue on sustainable development. The situation is not helped by a scathing denunciation by Prime Minister in 2006, describing environmentalists as "right-wing environmentalists".

> *Within recent times we have experienced a phenomenon - we have begun to experience a phenomenon - that we see in the more developed countries of the world, which is the rise of the environmental lobby. In the classic sense, the right-wing environmentalists, they are of the view that any development that disturbs the environment in any significant way, and significant is to be defined,as development that that should not be pursued [69].*

It is difficult to see how the State would show the fortitude to address environmental concerns when it stands as a regulator, facilitator, and participant in the developmental thrust of TT. TT is at the crossroads of its environmental, democratic process. The EMA was established to promote environmental management and embedded in its statutory remit were several instruments designed to encourage public participation in the environmental decision-making process. Yet, the EMA is pursuing its mandate in a manner that suggests a minimalist approach. Civil society is engaged in an uphill battle to ensure that the EMA respects environmental democracy. What is clear is that the State is perhaps the inspiration behind the approach of the EMA. Political will exercised in furtherance of economic imperatives may be influencing the attitude of EMA and the wider State machinery towards public participation in the environmental decision-making process. The challenge is to break the hegemony of State domination in the environmental decision-making process. Still, unfortunately, the portents are not yet right for confronting such State domination. This, therefore, effectively diminishes the much-vaunted ideological adherence to democracy that is the bedrock of society.

6. CONCLUSION

Environmental justice depends on the ability of vulnerable and low-income communities to defend their environment from developmental activities. In TT, these require environmental approval when there is the possibility of adverse environmental impacts. At this point, these communities depend heavily on NGOs to provide leadership in understanding their viewpoint and ensuring that the regulatory entity is sensitive to their plight. In TT, the well-documented struggles of NGOs to influence positively, the environmental approval process is anathema to environmental justice. Until there is a greater sensitivity on the part of the regulatory body and the wider State apparatus to the need for a transparent and independent approach to environmental management, NGOs in developing countries like TT will only be able to play a limited and largely ineffectual role in the journey to attainment of environmental justice. When NGOs are disempowered, vulnerable and at-risk communities are left exposed to environmental risks associated with developmental activities and the vagaries of the environmental planning process.

COMPETING INTERESTS

Author has declared that no competing interests exist.

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