

REMARKS AT LAUNCH: PRINCIPLES OF CARIBBEAN ENVIRONMENTAL LAW

The Art Museum of the Americas
201 18th Street, Washington D.C. 20006

7th December 2012

6.00pm

Hon. Mr Justice Winston Anderson, JCCJ

(Author)

Your Excellency, José Miguel Insulza, Secretary-General of the OAS

Members of Judiciaries

Members of UNEP's International Advisory Council

Members of the Executive of UNEP

Sir George Alleyne, Chancellor of the University of the West Indies

Members of the Diplomatic Corp

Mr. John Cruden, President of the Environmental Law Institute

Distinguished Ladies and Gentlemen

Good evening and welcome.

First, let me thank all the speakers, and particularly His Excellency, the Secretary-General, for those very kind and generous words. Your kindness and generosity are truly appreciated.

Thank you also to the Environment Law Institute (represented by its President Mr. John Cruden) for publishing this book. As you must all be aware, ELI is a prestigious and much sought after publisher. All aspiring authors are overjoyed and overawed to hear ELI is interested in publishing their work. Nothing else matters. I was certainly very pleased to have attracted ELI's attention and support.

Thank you also to the United Nations Environment Programme (“UNEP”), co-sponsors of this event and whose interest in this endeavor was so eloquently expressed in the words UNEP Director Mr Bakary Kante. A singular thank you to the Honorable Justice Antonio Benjamin, who with characteristic elegance and erudition spoke on behalf of the International Advisory Council, the newly created but clearly powerful voice for justice, governance and law in the field of environmental sustainability.

And finally, thank you all ladies and gentlemen for attending – my colleague judge of the Caribbean Court of Justice, Madam Justice Desiree Bernard, personal friends, and the many friends of environment whether written about in books or spoken about in the Advisory Council.

I promise not to keep you for more than a few more minutes. Actually, the truth is that I certainly don’t want to say too much about the book. After all, if I tell you what’s in it... then there is no reason for you to buy it. And I would not want Mr. Cruden to be displeased with me.

So permit me to make just a few very short points about “***Principles of Caribbean Environmental Law***”.

First and foremost the book is intended to convey the seriousness with which Caribbean jurisprudence now views the Caribbean environment. “The Islands”, as the region is often referred to in this part of the World, is typically regarded as a preferred tourist destination; a “laid-back” “no problems” tropical paradise; and a playground for the rich and famous.

Until relatively recently, the Caribbean also adopted a laissez-faire attitude towards the environment. In 1992, when the Faculty of Law approved my proposal for the inclusion of Environmental Law on its curriculum, the dissentients in the Faculty Board pointed out that there was a great paucity of legal material on the subject; in

fact, an official from the Inter-American Development Bank, Raul Branes, had just completed a study in 1991, on what he called “true” as opposed to “incidentally relevant” environmental legislation. According to the Branes criteria, the only true environmental legislation in the Caribbean in 1991 was probably the Natural Resources Conservation Authority Act of Jamaica, which had been enacted only in April of that year. The Seminal Port of Spain Accord, the first Caribbean policy statement on the environment, had been adopted only two years early, in 1989.

So, in 1992, the Faculty’s offering of Environmental Law was forced to trespass on other well established courses in order to find sufficient materials to engage the interest of the students for a full semester: Criminal Law, the Law of Torts, Administrative Law, Land Law, Trusts and Estates, and the Law of the Sea – and this approach explains much of the organization of the first half of the book.

Today, twenty years later, the picture is significantly different. Virtually all the major **multilateral environmental agreements** (“MEAs”) have been embraced by almost all Caribbean States through signature, ratification, and accession; and specific environmental elements within national jurisdictions have been designated as having international significance under such MEAs as the Ramsar Convention, World Heritage Convention, the United Nations Law of the Sea Convention, and the Convention on Biological Diversity. These conventions and designations have been supplemented by regional environmental treaty-making under UNEP’s Caribbean Environment Programme (“CEP”).

Caribbean Parliaments have generated an impressive body of legislation, regulations, institutional arrangements, and constitutional amendments touching upon many aspects of human interaction with the Caribbean environment. The regulatory regime is increasingly impressive in its spatial coverage and the growing sophistication of the tools it employs.

Caribbean courts are also increasingly being asked to resolve environmental issues. First, there have been many cases seeking clarification of the legal position and the domestic impact of international environmental law in general, and MEAs in particular, on the national law of Caribbean States.

Second, several disputes have arisen requiring the courts to examine the institutional and management structure, and the role of environmental agencies created by modern environmental legislation. How are these new institutional arrangements to be integrated into the traditional landscape of environmental management? And how are they to interface with the international regulatory arrangements in the MEAs represented, for example, by regime building at the regular meeting of the Conference of the Parties?

A third area for adjudication has been the conduct of environmental impact assessments: the qualification of the persons who conduct them; matters to be considered; the margin of discretion which resides in the government agency to approve developmental projects (and particularly tourist projects) notwithstanding likely adverse environmental impacts, etc. This is probably the greatest environmental challenge facing Caribbean decision-makers, and one that is almost always a feature of environmental litigation in the region.

Fourth, the problem of controlling governmental activity which harms the environment is as important as it is intractable. All the talk of institutional management, of planning and other environmental control, and of enforcement of EIA requirements, is not likely to be effective in the Caribbean unless the discipline thereby sought to be imposed, applies to the governments themselves. For basic reasons relating to our Constitutions and the power of the legislature, legislation regulating the use of the environment cannot be presumed to apply to the State; restriction on the State must be expressed in the regulatory regime. The dependence of the environmental agencies on the State for their financial and human resource requirements raises important issues in this regard.

A fifth matter concerns the means by which the public may participate and contribute to the management of the environment. This raises issues to do with openness, transparency

and access to justice. Caribbean courts have had to grapple with the hard issue of “standing” (the circumstances in which individuals and NGOs are accorded legal competence to bring environmental suits); and also the soft issue of “loser pays” (where unsuccessful NGOs are penalized in costs thereby discouraging future challenges). I am pleased to report that increasingly Caribbean judges are showing greater sensitivity in both of these areas: very few applicants for judicial review of environmental decision-making are now turned away for lack of standing; and in the most recent case in which the NGO lost its challenge to a proposed tourist development in a protected area in the British Virgin Islands, the court refused to penalize the NGO in costs.¹

“Principles of Caribbean Environmental Law” is intended to provide a window into the existence of these and other issues, and the extent to which they occupy the public square of debate in the Caribbean. The book hopes to be a starting point for a conversation as to how these issues may be resolved consistent with the will of the Caribbean people as expressed in the Constitution, legislation and subsidiary regulations; and consistent with the obligations undertaken by our policy-makers to the international community.

Perhaps most important, I hope that this book can also be a way-station for having that dialogue in voices familiar to the Caribbean people. After fifty years of organized legal education, it remains the case that far too often our legal discourse is conducted through the British writers of legal texts. These may have served us well in constructing a solid foundation for a stable and sound Caribbean jurisprudence, but we must now honor that past by recognizing the jurisprudential triumphs and travails of the Caribbean people in their own voices.

Perhaps no-one embodied the environmental aspirations of the Caribbean people more gracefully than did Angela Cropper of Trinidad and Tobago. Angela, a proud product of

¹ See *Virgin Islands Environmental Council v Attorney General* (HC, BVI, 2009) and *Quorum Islands (BVI) Ltd. V. Virgin Islands Environmental Council and Minister of Planning* (HCVAP, 2009/021, August 12, 2011). Note that the view has been attributed (anecdotally) to a Trinidad and Tobago NGO (Fishermen and Friends of the Sea) that there has been a dramatic decline in environmental review actions because of the application of the “loser pays” doctrine in Trinidad (see: contribution by HH Sandra Paul, EC Chairman, at ECSC JEI Seminar on Environmental Law, St. Lucia, October 2012.)

the University of the West Indies, was a titan in the field of sustainable development in the Caribbean and globally. She was instrumental in the adoption of the Port-of-Spain Accord and in working on special designation for the Caribbean Sea. She served, among other things, as: Director of Functional Cooperation at CARICOM; first Executive-Secretary of the Convention on Biological Diversity; and Head of Governance at the IUCN. At the time of her last illness she was Assistant Secretary-General of the UN and Deputy Executive Director of UNEP.

This book is dedicated to the memory of another giant among Caribbean thinkers. The late Professor Ralph Carnegie, who greatly respected and admired Angela Cropper, was himself a keen environmental law analyst and, more fundamentally, a founding father and prince of the Faculty of Law, University of the West Indies.

It is on the shoulders of pioneers such as Angela Cropper and Ralph Carnegie that *Principles of the Caribbean Environmental Law* is proud to be hoisted as an expression of Caribbean achievement, challenges and aspirations towards the environment.

The book is also a subtle acknowledgement that it is only as we, the Caribbean people, claim the right and responsibility of stewards of the Caribbean environment that we can justly assert a place at the global table of guardianship of the global environment.

Again, I am very grateful for the assistance, cooperation, and support of all those who have made this evening possible.

Thank you all very much.

Winston Anderson
7th December 2012