

Central Planning Meets the Neighborhood: Land-Use Law and Environmental Impact Assessment in Cuba

Edward Yates*

I.	INTRODUCTION	653
II.	PROJECT APPROVAL—GEOGRAPHICAL, FINANCIAL, AND INFRASTRUCTURE REVIEW.....	658
III.	GEOGRAPHICAL—LAND-USE PLANNING LAW IN CUBA	660
	<i>A. Legal Systems and Planning</i>	660
	<i>B. General Plans</i>	661
	<i>C. The Project Approval Process</i>	662
IV.	FINANCIAL—FOREIGN INVESTMENT LAW	665
V.	ENVIRONMENTAL AND SOCIO-ECONOMIC—THE EIA/ ENVIRONMENTAL LICENSE LAW	666
	<i>A. The Environmental License System</i>	667
	<i>B. Requirements of the EIA System</i>	671
	1. Scope of Activities Affected	671
	2. The Application.....	672
	3. Review of Alternatives.....	673
	4. Public Participation.....	676
	5. Decision Making and Substantive Environmental Protection.....	680
	6. Enforcement	681
VI.	CONCLUSION	682

I. INTRODUCTION

In the four decades since its Revolution, Cuba has largely stayed insulated from pressure by Western private banks and businesses and international financial institutions to pursue rapid economic expansion. This insulation was due to two factors: first, Cuba's choice to align itself,

* Senior Environmental Attorney with Tetra Tech, Inc., an international environmental consulting firm; Adjunct Professor at Golden Gate University School of Law where he teaches Land Use Regulation. Mr. Yates managed the Ocean Conservancy's participation in the Cuba-U.S. Environmental Law Exchange Program. He can be reached at eebarcos@yahoo.com.

politically and economically, with socialist countries in the Soviet bloc¹ and, second, because of the political decision by the U.S. government to first boycott, then blockage, the Cuban economy by sanctioning non-U.S. businesses that do business with Cuba.² The purpose of the U.S. government's attempt to isolate Cuba economically is to cripple the Cuban economy and force Fidel Castro from power.³ The embargo has failed miserably in this regard because Castro is still in power forty years later. Important side effects of the embargo have been to deprive U.S. companies of significant investment opportunities in Cuba and to shield Cuba from the pressure that these U.S. companies would exert over Cuban economic and environmental decision makers. The focus of this pressure would have been to adopt poorly planned economic development in cities and coastal areas that would have been profitable to certain U.S. businesses in the tourism and manufacturing sectors. Instead, Cuba has concentrated much of its development efforts on improving the quality of life for its rural residents and assuring that infrastructure and commercial development are well planned.⁴ In other words, because of its isolation, Cuba has had the "luxury" to avoid the mistakes of other Caribbean tourist destinations and to think through how it wants to achieve industrial and urban growth and improve the living conditions for its citizens.⁵

In the early 1990s, however, the collapse of the Soviet Union and termination of its subsidies to Cuba, combined with plummeting world sugar prices, sent Cuba's economy into a tailspin. In response to the economic crisis, called the "Special Period," Cuba opened its economy by encouraging investment from abroad through establishing joint ventures between state-owned Cuban corporations and foreign corporations and duty free zones in Havana.⁶ Since the onset of the Special Period, Cuba has joined other developing countries in the aggressive pursuit of foreign investment.⁷ This economic awakening

1. J.L. ANDERSON, CHE GUEVARA: A REVOLUTIONARY LIFE 496 (1997).

2. Cuban Liberty and Democracy Act of 1996, 22 U.S.C. § 6081-82 (1996).

3. Wayne Smith, *Cuba*, in GLOBAL FOCUS: A NEW FOREIGN POLICY AGENDA 1, 1-4 (Tom Barry & Martha Honey eds., 1998).

4. Interview with Carlos Rodriguez, Senior Planner, Physical Planning Institute (IPF), in Havana, Cuba (Aug. 13, 2002); Interview with Juan Herrera, Director, Havana Delegation (CITMA), in Havana, Cuba (Aug. 14, 2002).

5. Nicole Winfield, *Cuba Developing New Found Concern for Environment*, S.F. CHRON., Nov. 23, 2000, at AA6.

6. CHRISTOPHER P. BAKER, MOON HANDBOOK: CUBA 73-76 (2d ed. 1997).

7. See Oliver Houck, *Environmental Law in Cuba*, 16 J. LAND USE & ENVTL. L. 1, 42 (2000) (citing Felix Blanco Godinez, *Cuba's Tourism Industry: Sol Melia as a Case Study*, in CUBA IN TRANSITION 50, 53-55 (1998)).

brings with it intense pressure to develop its historical cities and pristine, biologically rich coasts. Along with several World Heritage sites listed by the United Nations Education and Scientific Organization, Cuba has the richest biodiversity in the Caribbean.⁸ Cuba, however, has recognized the need to conserve its natural resources and social traditions and restrain the aggressive approach to investments taken by its new partners, mostly European and Canadian multinational corporations.⁹ In fact, despite the huge annual growth—18%—in tourism, Cuba has incorporated regional, coastal, and urban planning into its strategy for economic growth in the tourism industry.¹⁰ This understanding of dangers of economic growth has recently led Cuba to draft far-reaching environmental protection legislation.¹¹

If and when the crushing U.S. embargo ends, pressure to approve even larger development projects will certainly increase. United States companies are old hands at applying political pressure to obtain permission and subsidies for profitable resource exploitation. The lobbying by these resource exploitation firms can have even more drastic consequences in developing countries.¹² This resource exploitation can threaten entire ecosystems, and potential investors, such as South Florida's Cuban-American community, are well versed in its practice. Consider the tactics employed by Florida Crystals, a large sugar cane production business owned by the Cuban-American Fanjul family. The Fanjuls make substantial political contributions and lobby fiercely to not only permit sugar cane production in areas adjacent to the Everglades, but also to obtain U.S. taxpayer subsidies for this environmentally

8. NAT'L COUNCIL FOR SUSTAINABLE DEV. (NCSD), THE NCSD SUSTAINABLE DEVELOPMENT REPORT, CUBA ch. 1.1 (1999), available at http://www.ncsdnetwork.org/global/reports/ncsd1999/cuba/english/cap1_1.htm [hereinafter NCSD Report].

The biological diversity of the Cuban archipelago stands out due to the noteworthy value of its natural environment, the great diversity of ecosystems that are present and the level of endemism of its resources. Cuba is the island with the richest biological diversity in the Antilles, due as much to the total richness of species as to the high level of endemism.

Id.; see also Peter Benchley, *Cuba Reefs*, NAT'L GEOGRAPHIC, Feb. 2002, at 44-67.

9. See Orlando Rey Santos, *Reflections on the Legislative Process of the New Environmental Law*, in CUBAN ENVIRONMENTAL LAW 11, 11-13 (Jerry Speir ed., 1999).

10. Anselmo Pages Torriente, *The Importance of Regional Planning in Tourism*, 2 PLANIFICACIÓN FÍSICA-CUBA 3-4 (2001).

11. See generally Houck, *supra* note 7, at 13-25.

12. WILLIAM ASCHER, WHY GOVERNMENTS WASTE NATURAL RESOURCES: POLICY FAILURES IN DEVELOPING COUNTRIES (1999).

devastating land use.¹³ Whether Cuba is prepared for the U.S. brand of corruption and how Cuba will approach this new pressure will be critical to efforts to protect the pristine coasts, social traditions, and abundant biodiversity of a country that is, so far, relatively unscathed by modern Western capitalism.

One of the keys to avoiding environmental degradation and socio-economic impacts from investment and development is the environmental planning and project approval process. In Cuba, this is a multitiered process in which the Foreign Ministry, the IPF, the CITMA, and local municipalities play coordinated, and surprisingly cooperative, roles in managing the approval process. While the economic review process is the first step for investors, the land-use planning project review and the environmental impact assessment (EIA) and environmental licensing processes are the basis for environmental planning in Cuba. Land-use planning has been used as a tool to regulate development in Cuba for almost forty years; the EIA process, however, is a relatively new tool. These two systems have been integrated to create the core planning process, which will determine how successful Cuba will be in trying to achieve sustainable development.

Cuba's land-use planning law is a combination of a Latin American administrative structure and socialist centralized planning. Indeed, the Central Planning Board was founded shortly after the Revolution and dictated economic decision making until 1996, when it was abolished in favor of the more modern Ministry of Foreign Investment and Economic Cooperation (MIEC).¹⁴ The EIA system is a product of the modern international environmental law movement. Cuba has merged these two environmental planning systems into a single, integrated system that currently places as much emphasis on environmental, social, and quality of life factors as it does on economic growth. This planning system has far-reaching potential to manage the investment and growth that the twenty-first century will bring to Cuba, and could potentially serve as a model for other developing nations.

This Article will argue that recent Cuban efforts to draft comprehensive and progressive environmental laws now provide a legal and moral framework to withstand the lobbying and public relations efforts that accompany massive investments from large, savvy U.S. and European developers. This Article will attempt to explain the Cuban

13. Joseph Mann, *The Fanjul Power Circle*, SUN-SENTINEL (Fort Lauderdale, Fla.), June 30, 2002, at 3F. For example, the Fanjul sugar companies donated more than \$1.2 million in "soft" money to both parties since the 1998 election cycle. *Id.*

14. See Houck, *supra* note 7, at 30.

government's project approval process in which economic, geographical, environmental, and social factors are weighed in a three-tiered planning process.

Focus will be placed on the legal framework for the project approval aspects of land-use and environmental planning, specifically the land-use planning approval process ("microlocalization") and the EIA process. For context, there will be an explanation of general plan approval and of the economic approval required under the Foreign Investment Law.¹⁵ The main analysis, though, covers the formation of the land-use planning and EIA systems, a description of their separate elements, and a critique of those areas where the planning process may still have gaps. For instance, the Cuban environmental planning system does not adequately integrate public review into the project decision-making process, a step that is typically necessary for a successful EIA process.

In describing these two planning systems, the author will compare the Cuban systems to other environmental planning processes in the Western Hemisphere, particularly those in Mexico and California. An example of the difference between the U.S. and Cuban approaches to land-use planning is that in Cuba, much more emphasis is placed on ensuring growth management, whereas in the United States, adherence to zoning restrictions is still the focus of land-use law in most municipalities. This Article will discuss the current implementation of the land-use and EIA laws and a prognosis of the future of this planning system given the potential and welcomed end to the U.S. economic embargo.

The Conclusion will discuss cultural and political limits to unbridled U.S. investment in Cuba and will explain how the Cuban land-use and EIA project approval processes provide the legal base for a development project approval system where environmental and social factors are effectively incorporated into economic decision making.¹⁶ This legal base and a continuation of Cuban political will to implement the planning system can establish an innovative framework for assisting the Cuban government in protecting its environmental, historical, and social heritage, while pursuing sustainable economic development.

15. See Ley de la Inversión Extranjera, LEY NO. 77 [Foreign Investment Law, LAW NO. 77] (1995) (Cuba).

16. This Article will focus on infrastructure or large urban development project approval, as opposed to individual property building permit approval.

II. PROJECT APPROVAL—GEOGRAPHICAL, FINANCIAL, AND INFRASTRUCTURE REVIEW

Modern land-use planning laws were first established in Cuba in 1960, only one year after the Cuban Revolution, and a decade before the first international environmental conference in Stockholm. The EIA process, however, was put into place forty years later upon passage of Law No. 81¹⁷ and Resolution No. 77/99.¹⁸ These two systems have been developed, revised, and integrated to form the backbone of the project approval process in Cuba.

Cuba's first land-use plan, "The Beautification and Enlargement of Havana," was, as its name suggests, somewhat limited in scope.¹⁹ Later, under the late-Dictator Fulgencio Batista, a National Planning Board developed the "Havana Development Plan" in 1957.²⁰ Both plans focused on economic growth and linear expansion.²¹ But there was little done in the way of systematic or growth management planning in Cuba until after the 1959 Revolution. The Cuban Revolution, of course, was a revolution in thought as well as a change in political and economic systems. Cuba's approach to planning was heavily influenced by the Communist principles of the Soviet Union, which supported Cuba's economic development efforts in the early 1960s.²² Indeed, all land was nationalized in 1961.²³

Central planning in the former Soviet Union was mainly an economic exercise limited to production goals.²⁴ In the United States,

17. Ley del Medio Ambiente, LEY NO. 81 [Environmental Law, LAW NO. 81] (1997) (Cuba), *translated in* CUBAN ENVIRONMENTAL LAW, *supra* note 9, at 21-58.

18. Reglamento del Proceso de Evaluación de Impacto Ambiental, RESOLUCIÓN NO. 77/99 [Environmental Impact Assessment Regulations, RESOLUTION NO. 77/99] (1999) (Cuba).

19. Héctor Cuervo Masoné et al., *40 años de la planificación física en Cuba* [40 Years of Physical Planning in Cuba], 1 PLANIFICACIÓN FÍSICA—CUBA 3-4 (2001).

20. *Id.* at 4. Centralized planning has traditionally been very common in Latin America, where ministries of planning, national plans, and regional planning projects are the norm. *See, e.g.*, Ministry of Planning and Cooperation in Chile, at <http://www.mideplan.cl/sitio/Sitio/> (last visited June 21, 2003); Ministry of National Planning and Political Economy in Costa Rica, at <http://www.mideplan.go.cr/> (last visited June 21, 2003); Ministry of Sustainable Development and Planning in Bolivia, at <http://www.ebrp.gov.bo/PDFS/PROGSEGMUNEBRP.PDF> (last visited June 21, 2003).

21. Masoné et al., *supra* note 19, at 4.

22. The first head of the Cuban Department of Industrialization after the Revolution was Ernesto "Che" Guevara. Che was one of the most radical of the Marxists in early revolutionary Cuba and along with Fidel Castro, pushed the Cuban government to adopt Soviet- and Mao-styled communism. ANDERSON, *supra* note 1, at 442-46.

23. David Israelson, *U.S. Blacklists Canadians—Mining Firm Targeted for Ties to Cuba*, TORONTO STAR, July 11, 1996, at A1.

24. *See generally* DON LAVOIE, RIVALRY AND CENTRAL PLANNING: THE SOCIALIST CALCULATION DEBATE RECONSIDERED (1985).

Soviet “central planning” is often used as a term to ridicule limits or regulations on industry. But in Cuba, a country known for adopting the most useful ideas of its visitors,²⁵ central planning was an idea that could be combined with Latin American, and particularly Cuban, ideas to provide long-term growth management and economic development.²⁶ The Cubans went beyond simply renaming the National Planning Board the Central Planning Board; they also incorporated a more systematic, long-term approach to economic and land-use planning. For example, housing and demographics became an area of concern and emphasis.²⁷ At times, Cuban approaches combined Soviet and Western-style planning. The results of that large-scale planning mentality can be seen in the numerous 1970s-era large apartment blocks surrounding Havana, which are similar to housing projects built in the 1970s’ urban and urban fringe areas in the former Soviet Union, Western Europe, and the United States.

In the 1970s, Cuba conducted a top-to-bottom assessment of land use and political and administrative organization, which resulted in sweeping changes, including: splitting the existing seven colonial era provinces into fourteen provinces based on population and transportation access; establishing the IPF; and converting municipal urban affairs offices into Municipal Offices of Architecture and Urban Planning.²⁸ Cuba also attempted to decentralize economic growth so that it did not follow the Latin American experience of massive investment in capital cities such as Mexico City, Mexico, and Lima, Peru, followed by unbalanced growth and massive immigration to the capital cities by the jobless in rural parts of those countries.²⁹ While Cuba did not face the political tumult, large population growth, or economic swings of the rest of Latin America in the 1970s and 1980s, its planners were very aware of the rapid growth of unmanageable, crime ridden, and polluted shantytowns in other Latin American countries.³⁰ Cuban planners integrated demographics and economics into their planning to avoid the urban problems that came with migration from rural areas.³¹

25. LOUIS A. PÉREZ JR., ON BECOMING CUBAN: IDENTITY, NATIONALITY, AND CULTURE 279 (1999).

26. Interview with Carlos Rodriguez, *supra* note 4.

27. Concepcion Alvarez Gancedo, *The Settlement System: Theory, Application and Challenges*, 2 PLANIFICACIÓN FÍSICA—CUBA 60-61 (2001).

28. See Houck, *supra* note 7, at 21.

29. FRANCIS M. DENG, UNITED NATIONS COMM’N ON HUMAN RIGHTS, INTERNALLY DISPLACED PERSON, PROFILES IN DISPLACEMENT: PERU E/CN.4/1996/52/Add.1 (1996).

30. See Interview with Carlos Rodriguez, *supra* note 4.

31. Agrarian reform was the “genesis” of the Cuban Revolution and Cuba concentrated much of its development efforts in the last forty years on improving the lot of the rural poor, so

Therefore, while the Cuban planning model owes much to Soviet central planning, Spanish colonial centralization of administrative authority, and western European notions of urban planning, it owes much more to the ideas and implementation of Cuban socialist economic thought and the pragmatic attempts to avoid the difficult problems of its neighbors.

III. GEOGRAPHICAL—LAND-USE PLANNING LAW IN CUBA

A. *Legal Systems and Planning*

Civil law systems, much like the common law systems in England and the United States, normally require legislative authority to enable government agencies to act. Civil law systems, however, are normally much less forgiving of legislative lapses, and usually require code sections that issue specific mandates before government agencies can act. Federal agencies in the United States normally have more discretion to interpret the law and act in a quasi-legislative manner to implement broadly worded laws than government agencies in civil law countries. Cuban land-use planners, however, did not wait for a legal framework to begin mapping and zoning Cuban territories and cities. Following agrarian and industrial reform in the 1960s, the Cuban government established the Central Planning Board, a national economic and land-use planning agency, in 1976. In 1985, local planning agencies, Municipal Offices of Architecture and Urban Planning, were founded. From 1976 through the 1980s, over 150 regional and general plans were prepared in Cuba.³² The long-range planning that was the hallmark of a Soviet-style command economy was applied to land-use planning. Cuban land-use planners, therefore, have had the support of the government in their use of long-range and forward-thinking growth management tools.

One advantage that Cuban planners have over their counterparts in the United States is that they do not have to worry about infringing on private property interests. In the United States, land-use planners must always be aware of the constitutional requirement that property owners be fairly compensated for the taking of their property.³³ While U.S. governmental entities have the authority to regulate land uses under their police powers, they must constantly be aware of their constitutional

urban planners may not have faced the pressures of immigrating landless peasants. See ANDERSON, *supra* note 1, at 405.

32. See Mansoné et al., *supra* note 19, at 6.

33. U.S. CONST. arts. 5, 14.

limits.³⁴ In preparing general plans and denying project approval, Cuban governmental agencies can make land-use decisions without the fear of lawsuits objecting to their actions because there are no private property interests in Cuba.³⁵

B. General Plans

By the time Cuba approved Decree No. 21, which was the prime regulatory authority for regulating land-use planning in Cuba, in 1978, the practice of land-use planning had already outstripped its original statutory authority. Decree No. 21 codified some of the practices and established the types of planning documents used in Cuba: a national plan, regional plans, urban direction plans, zoning and urban plans, and investment localization (or project location approval). The requirements for the enactment and implementation of these plans, however, were not clearly described in Decree No. 21. Following a national federal and provincial political reorganization in 1994, Decree Law No. 147 amended Decree No. 21 to clarify the administrative roles of the national and municipal offices of the IPF in preparing general and urban plans and in granting project approvals.³⁶ Decree Law No. 147 provides that the IPF prepare regional and urban plans, prepare land-use ordinances, and administrate the land-use permit approval program, or "localization."³⁷ Regional schemes generally set up a framework for local plans and identified the location of existing industrial, agricultural, and urban characteristics in a metropolitan area.³⁸ General direction plans are similar, but are focused at an urban level. These plans also require that methods for environmental protection be included.³⁹ The zoning and urban plans are substantially more detailed and are similar to what is referred to as a general plan in California.⁴⁰

Cuba has approved 80 regional and urban general plans at the municipal level and 52 regional and urban tourist area plans. Cuba has

34. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 396 (1926); see ROBERT ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS: CASES AND MATERIALS* 85-234 (2000).

35. See Winfield, *supra* note 5 (quoting the United Nations Development Program).

36. *Comite Ejecutivo del Consejo de Ministros, DECRETO-LEY NO. 147* (2000).

37. *Id.* arts. 4-6, 10.

38. *Reglamento Sobre la Planificación Física, DECRETO NO. 21* [Physical Planning Regulations, *DECRETO NO. 21*], art. 9 (1978) (Cuba).

39. *Id.* art. 12.

40. CAL. GOV'T CODE § 65300 (2002). California cities must adopt general plans with certain required elements. General plans have been analogized to a "constitution for all future developments." J. LOFTIN, *CALIFORNIA LAND USE* 173 (1994) (citing *O'Loane v. O'Rourke*, 42 Cal. Rptr. 283, 288 (1965)).

also prepared regional schemes or outlines for each of the 14 provinces.⁴¹ The City of Havana, for example, has prepared a very detailed and complex general direction plan or “*Esquema*,” which proposes a long-term economic, social, and environmental vision. For instance, the city is separated into three semi-circle zones, radiating from Old Havana. The first zone contains the historical, commercial, and residential areas. The second zone is where new industrial and residential development will be sited. The third zone is an area that will be preserved and reforested for use as a greenbelt, a recreation area, and a watershed area.⁴² There is also an urban general plan for Havana in which zoning, infrastructure, services, growth limits for neighborhoods, and environmental protection measures are all set out in detail. For example, the precise location of the urban underground and streetcar system is set out in this plan.

C. *The Project Approval Process*

The project approval process under Decree No. 21 and Decree No. 272 is referred to as “investment localization.”⁴³ Infrastructure projects, industrial plants, and tourism development projects are subject to this permitting process.⁴⁴ This project approval process is a two-step process: the first step is “macrolocalization,” in which the Ministry of Planning considers whether the proposed project is appropriate for its proposed location or whether another city, territory, or zone may be preferable.⁴⁵ Applications for macrolocalization are submitted to the IPF in the Ministry of Planning, which has substantial authority to relocate private development and public infrastructure projects to locations other than those that were proposed.⁴⁶ On its face, this power gives the government the legal authority to engage in socialist-style central planning. However, in practice, the process simply gives the planners the authority to

41. Masoné et al., *supra* note 19, at 10. Direct translations of terms used in Cuba for planning can create confusion. “*Planificación Física*” is directly translated as physical planning but it really encompasses the entire academic and policy field of economic and geographical planning. Traditionally, *planificación física* did not address environmental issues such as biodiversity or water and air quality. “*Urbanismo*” is the field of urban planning. “*Ordenamiento Territorial*,” while equivalent with the wide-ranging *Planificación Física* in many Latin American countries, is used in Cuba to denote regional planning.

42. Presentation by Architect Aracelis Garcia, Department of Physical Planning, Province of Havana (Aug. 13, 2002).

43. Comité Ejecutivo del Consejo de Ministros, DECRETO NO. 272 [Regional Urban and Planning Enforcement, DECREE NO. 272], arts. 4-25 (2001) (Cuba); DECRETO NO. 21, arts. 16-18.

44. DECRETO NO. 21, art. 33.

45. *Id.* art. 17.

46. *Id.* art. 32.

consider alternative project locations. Such authority is not substantially different from those of certain agencies in the United States, such as the California Energy Commission, which is tasked with energy planning and siting in California.⁴⁷

The second step of project approval consists of “microlocalization,” which has two steps of its own. The first step is the area study, in which technical and financial data is reviewed and approved. The second step is the microlocalization study, in which the proposal’s technical data is scrutinized with regard to its ability to comply with health and planning standards and the appropriateness of the proposed location within a given municipality.⁴⁸ The microlocalization process gives municipal IPF units substantial influence in deciding where a project will be sited within a city or province.

Microlocalization applications are submitted to the municipality’s local IPF office. Article 16 and article 37 of Decree No. 21 state that project selection should satisfy the objectives and principles of the land-use planning process, but does not specifically state that a project must comply with zoning and urban plans. Therefore, local IPF officials have a great deal of discretion in determining whether a project complies with the local land-use plan. Moreover, there is no specific regulatory process by which such a decision can be appealed by the project proponent or the public.⁴⁹ While Decree No. 21 does not require interagency consultation, the IPF and the municipal IPF units do routinely consult with CITMA regarding the environmental impacts of the proposed project. IPF municipal units consult with CITMA’s Center for Inspection and Control (CIC) at the macrolocalization level and with the local CITMA office, or “delegation,” during the microlocalization process.⁵⁰

IPF units in each municipality are charged with granting and enforcing the microlocalization permits.⁵¹ These units are authorized to fine permit violators up to 10,000 pesos and the IPF units have the power to order demolition of a noncomplying project.⁵² These enforcement mechanisms, however, are rarely carried out due to a lack of financial

47. The Warren-Alquist State Energy and Conservation and Development Act, CAL. PUB. RES. CODE § 25000-25008.5 (Deering 1993 & Supp. 2002). The Energy Commission is a “one stop” shop for determining siting of power plants and compliance by those plants with California environmental statutes. *Id.*

48. DECRETO NO. 21, art.18.

49. Presentation by Dr. Silvia Alvarez Rosell, Director, Center for Inspection and Control, CITMA (Sept. 15, 2002).

50. *Id.*

51. DECRETO NO. 21, art. 40.

52. Comité Ejecutivo del Consejo de Ministros, DECRETO NO. 272 [Regional Urban and Planning Enforcement, DECREE NO. 272], arts. 4-25 (2001) (Cuba).

and staff resources necessary for effectively reviewing permit compliance. This lack of resources also means that a large amount of homeowners and businesses do not even apply for permits when renovating or expanding their homes.⁵³ New land-use planning enforcement regulations have recently been passed, providing more enforcement tools for IPF units.⁵⁴ However, without new resources, it is doubtful if the current emphasis on general direction plan implementation will shift to the effective enforcement of existing urban general plans.

Another characteristic of the Cuban land-use planning system is the large amount of discretion given to the municipal IPF units. This ample discretion differs markedly from the adherence that local planning officials in the United States are supposed to keep with detailed zoning and building codes. In California, land-use decisions must comply with the relevant municipalities' zoning code and general plan,⁵⁵ and, if in a coastal zone, with the policies of the coastal management plan.⁵⁶ If an applicant wants to deviate from the existing general plan or zoning restriction, he normally must make a request for a variance, notify any neighbors, and submit information to the local planning board which holds a public hearing on the issue.⁵⁷ The decision in Cuba of whether to permit an activity that may not be in accordance with a general direction or urban general plans, however, does not appear to be subject to a regulatory process, to public notice requirements, or approval in court.⁵⁸

Project approval within the land-use planning process in Cuba, therefore, does not focus on zoning issues such as density, property use, and site development.⁵⁹ Rather, the Cuban land-use planning system emphasizes growth management and, in some circumstances, growth control. That a particular project does not conform exactly with the general plan does not seem as important to Cuban planners as the implementation of the general vision formulated by planners for a city or region. This emphasis on long-term plan implementation differs greatly from the prohibitive nature of land-use planning in the United States. Indeed, zoning maps in the United States are often thought of as "first

53. Interview with Juan Herrera, *supra* note 4.

54. DECRETO LEY NO. 272.

55. CAL. GOV'T CODE §§ 65850(a), 65860(a)(ii) (Deering 1987); Tupango Ass'n for a Scenic Cmty. v. County of L.A., 231 Cal. 3d 506, 517 (1974).

56. California Coastal Act of 1976, CAL. PUB. RES. CODE §§ 30200-30265.5 (Deering 1993 & Supp. 2002).

57. CAL. GOV'T CODE §§ 65090-65096 (Deering 1987 & Supp. 2002).

58. *See* City of Chicago v. Stratton, 44 N.E. 853, 854-55 (Ill. 1896); CAL. GOV'T CODE § 65009(b)(2). Article 24 of Decree No. 272 does allow appeal to the immediate supervisor of the IPF official who assessed the fine.

59. *See generally* DANIEL MANDELKER, LAND USE LAW 143-44 (1993).

offers” where cities and land developers engage in a political bargaining process. This political process makes effective use of comprehensive planning and growth management to achieve desired land-use patterns difficult in the United States. This broad vision of growth control in Cuba owes much to the socialist vision of central planning, the Latin American approaches to planning, and, perhaps, to cultural and socio-political preferences of Cubans. Skeptics of growth management⁶⁰ would do well to note the successes of the Cuban system in which forty years of experience and reassessment combined with a focus on comprehensive planning and flexibility in permitting has brought about land-use planning that does successfully forecast and provide for demographic and technological change.

IV. FINANCIAL—FOREIGN INVESTMENT LAW

The Foreign Investment Law’s primary goal is to promote and stimulate foreign investment in Cuba.⁶¹ However, unlike most economic stimulus legislation, the Foreign Investment Law, Law No. 77, contains a chapter specifically dedicated to ensuring environmental protection.⁶² Law No. 77 reflects both the socialist nature of the Cuban economic system and its movement toward encouraging private investment and privately run enterprises. Much of Law No. 77 defines the legal and financial structure of joint ventures between foreign businesses and the parastatal corporations that are entities of various Cuban ministries.⁶³ While foreign companies may operate private companies in Cuba, the Foreign Investment Law is oriented at the joint venture in which the Cuban government has substantial authority to approve financial arrangements and negotiate potentially favorable terms regarding profit sharing,⁶⁴ insurance,⁶⁵ and treatment of employees.⁶⁶

A significant component of the project negotiation and project approval process for all foreign investment is the involvement of CITMA. Chapter 16 of the Foreign Investment Law states that the MIEC

60. See ELLICKSON & BEEN, *supra* note 34, at 76 (“Skeptics of command and control regulation assert that public planners are unlikely to have the knowledge, incentives and legitimacy to succeed at comprehensive planning.”)

61. Ley de la Inversión Extranjera, LEY NO. 77 [Foreign Investment Law, LAW NO. 77] (1995) (Cuba).

62. *Id.* ch. 16 (environmental protection).

63. See *id.* ch. III (investment guarantees); *id.* ch. 5 (foreign investment); *id.* ch. VIII (negotiating and authorizing foreign investment).

64. *Id.* arts. 23-24.

65. *Id.* arts. 45-47.

66. *Id.* arts. 31-37.

will submit foreign investment project proposals to CITMA for consultation regarding a project's potential environmental impact and whether the project will require an environmental impact study (EIS) as required by the procedures controlling the granting of an environmental license.⁶⁷ Even more importantly, article 56 states that CITMA dictates the mitigation measures necessary to deal with the environmental damage caused by foreign investment projects.⁶⁸ This chapter not only confirms that CITMA is the lead agency for deciding whether or not to approve the environmental license, it also gives CITMA a critical, early role in the investment process, a role that is simply unheard of in most countries, especially the United States.⁶⁹

Agenda 21, the United Nations sponsored blueprint for sustainable development, exhorts nations to broadly consider environmental and socio-economic factors along with financial concerns; most countries, however, assess the environmental factors at a later stage, after the project has been substantially formulated.⁷⁰ The lack of interest and the lack of requirements to incorporate environmental concerns into the key economic decision-making processes has contributed greatly to the massive worldwide degradation of natural resources and human environments.⁷¹ MIEC holds clear and specific approval authority for all projects utilizing natural resources at this early stage of project approval.⁷² Yet CITMA's required statutory involvement in such an early stage of project planning gives it extensive influence at all the critical initial stages of development.

V. ENVIRONMENTAL AND SOCIO-ECONOMIC—THE EIA/ ENVIRONMENTAL LICENSE LAW

In 1997, in response to the Rio Summit's call for increased efforts by the world's governments to halt the degradation of the global environment, the Cuban National Assembly passed Law No. 81, the Environmental Law.⁷³ Law No. 81 is a framework law designed to ensure

67. *Id.* arts. 54-55.

68. *Id.* art. 56.

69. While there are exceptions such as the loan approval process funded by the Small Business Administration, most projects in the United States are privately funded and therefore their financial feasibility is not subject to government review.

70. RAUL BRANES, ASPECTOS INSTITUCIONALES Y JURÍDICOS DEL MEDIO AMBIENTE, INCLUIDA LA PARTICIPACIÓN DE LAS ORGANIZACIONES NO GUBERNAMENTALES EN LA GESTIÓN AMBIENTAL 76-79 (InterAmerican Dev. Bank ed., 1990); WORLD RES. INST., A GUIDE TO WORLD RESOURCES 2002-2004: DECISIONS FOR THE EARTH: BALANCE, VOICE AND POWER (2003).

71. BRANES, *supra* note 70, at 110-13.

72. LEY NO. 77, art. 21(2)(e).

73. *See* Santos, *supra* note 9, at 11-13.

integration of enforcement between multisectoral agencies and provide sufficient authority for governmental efforts to protect the environment.⁷⁴ Law No. 81 superseded Law No. 33, which was enacted in 1981. Although Law No. 33 was a forward framework law itself, it was not adequate to deal with the complex environmental issues of the twenty-first century.⁷⁵ Title III of Law No. 81 establishes an environmental policy and management system, which includes land-use planning, a permit system, an EIA process, a national environmental database, an inspection system, education and research, and an enforcement system.⁷⁶ While the integration of these functions into one legal framework is impressive, it is the preventative measures—the license and environmental planning processes—in the Cuban legal scheme that are the key mechanisms intended to avoid environmental harm.

A. *The Environmental License System*

Cuba's environmental planning and project approval process is centered around an old concept: the permit.⁷⁷ Cuba's environmental license system, however, is not simply an approval process for the proper environmental documentation. Rather, it is an integrated environmental permit that gives CITMA the authority to approve, reject, or modify almost all economic or infrastructure project proposals in Cuba. The environmental license system incorporates the EIA process into the license process, and uses its methodology as a structural basis for collecting data, defining issues, and assessing impacts and alternatives.⁷⁸ The Cuban project approval system goes well beyond the requirements of the first EIA system, the United States' National Environmental Policy

74. See BRANES, *supra* note 70, at 12-16. These laws, which are intended to treat environmental protection in a systematic, holistic manner, are also called "organic" or "general" laws. *Id.*

75. Santos, *supra* note 9, at 11.

76. Ley del Medio Ambiente, LEY NO. 81 [Environmental Law, LAW NO. 81] (1997) (Cuba), translated in CUBAN ENVIRONMENTAL LAW, *supra* note 9, at 21.

77. This Article uses the terms "license" and "permit" interchangeably; however, when describing the specific Cuban EIA/licensing system set out in Law No. 81, the term "licensing system" will be used. A generic discussion of a permit system will normally use the term "permit" as it is used much more prevalently in U.S. environmental law than "license."

78. Article 27 of Law No. 81 describes the permit application, EIA evaluation, and permit issuance process as an EIA. LEY NO. 81, art. 27. Article 27 states that the "process of environmental impact assessment includes: a) the application for an environmental license; b) the environmental impact study, in those cases where required; c) the evaluation itself, conducted by [CITMA]; the granting of the environmental license." *Id.* The EIA, while normally thought of as a project review process which includes consideration by the decision maker, is not usually the name one gives for the entire project approval process.

Act (NEPA),⁷⁹ and the most important international EIA guidelines adopted by the United Nations⁸⁰ and the World Bank.⁸¹ While the Cuban EIA process shares much with NEPA,⁸² NEPA is not a licensing system, *per se*, rather it is more accurately a project analysis and public disclosure process. The U.S. Environmental Protection Agency (EPA), while having a consulting role,⁸³ does not have a role in project approval. That approval lies with the federal agency enacting or permitting the project. An example of such an internal project approval is held by the U.S. Army Corps of Engineers (Corps), which approves water resource development projects under technical and financial criteria established by the national economic development program under the Water Resources Development Act.⁸⁴ The Corps also approves permits for private and public projects that dredge or fill wetlands.⁸⁵ While the Corps must comply with NEPA for both of these processes, environmental agencies such as the EPA or the U.S. Fish and Wildlife Service do not have approval authority over the project—only the Corps does. Similarly, under the California Environmental Quality Act (CEQA), the licensing entities are not environmental authorities, but are the cities or government agencies proposing or licensing an activity.⁸⁶ For example, a city licensing a new housing subdivision would be responsible for compliance with the CEQA,⁸⁷ would grant the project applicant the permit, and would enforce the terms of the permit.⁸⁸ In Cuba, CITMA, not the proposing agency, is the regulatory authority that grants the environmental approval.⁸⁹

The Cuban development project approval system actually shares more with other recently approved, progressive, Latin American

79. NEPA §§ 2-209, 42 U.S.C. §§ 4321-4347 (1998).

80. UNITED NATIONS ENV'T PROGRAMME, GUIDELINES FOR ENVIRONMENTAL IMPACT ASSESSMENT FOR DEVELOPING COUNTRIES (1988).

81. THE WORLD BANK, OPERATIONAL DIRECTIVE 4.0, Annex A: Environmental Assessment (1989). Current World Bank EIA procedures are more extensive but still lack strong substantive requirements. WORLD BANK, OPERATIONAL POLICY/BANK PROCEDURES 4.01, available at [http://Inweb18.worldbank.org/ESSO/envext.nsf/478ByDocName/Environmental Assessment](http://Inweb18.worldbank.org/ESSO/envext.nsf/478ByDocName/Environmental%20Assessment) (last visited June 26, 2003).

82. For a comparison of Law No. 81's provisions on the EIA and those in the NEPA, see Houck, *supra* note 7, at 23-38.

83. See Clean Air Act (CAA) § 309, 42 U.S.C. § 7509 (2002).

84. Water Resources Development Act of 1986, 33 U.S.C. §§ 2201—2339 (2002).

85. Clean Water Act (CWA) § 404, 33 U.S.C. § 1344.

86. CAL. PUB. RES. CODE §§ 21000-21006 (Deering 1993 & Supp. 2002).

87. CEQA Guidelines 14 CAL. CODE OF REGULATIONS § 15090 (2002). Approving agency must certify that EIRs has been complied with the CEQA.

88. MANDELKER, *supra* note 59, at 403.

89. CEQA, as opposed to NEPA, has provisions for substantive environmental protection, such as mandates to mitigate environmental impacts. These provisions will be compared to the Cuban EIA system below.

environmental planning systems than it does with NEPA and CEQA.⁹⁰ For instance, the Cuban system is more similar to the more broad reaching and potentially powerful Colombian and Mexican EIA/environmental license systems.⁹¹ Indeed, the language of the Cuban EIA law is very similar to the Mexican law, which states, “[EIA] is the process through which the Secretary [of the Mexican Ministry of Environment and Natural Resources] establishes the conditions for projects and activities that could cause ecological disequilibria or change the conditions which are established in relevant environmental protection requirements.”⁹² The Mexican law is also similar to the Cuban law in that it provides for licensing authority of all projects that may harm the environment, while also providing a list of projects that are specifically subject to the environmental license law.⁹³ While these lists may be viewed as limiting the application of the law to those projects, there is no statutory language suggesting that the lists are anything but a baseline. The list provides a starting point for new or under-staffed environmental ministries, and provides certainty to project applicants who know that these listed projects are definitely subject to the environmental license conditions.

The importance of CITMA’s role as an approval agency cannot be understated. First, incorporation of the EIA results into the decision-making process has long been one of the main deficiencies of the EIA process worldwide.⁹⁴ CITMA’s role as the approving agency and the agency tasked with protecting the environment means that the findings of the EIA will have a much better chance of being incorporated into the decision-making process. Second, enforcement of EIA mitigation conditions is another common failing of EIA systems.⁹⁵ CITMA also has the inspection and enforcement authority to ensure, potentially, that project proponent promises are kept.⁹⁶

90. Cudigo Nacional de Recusos Naturales, Ley 99 de 1993 (Colombia).

91. *Id.* arts. 49-62. General Law of Ecological Equilibrium and Environmental Protection, arts. 28-35 (1988) (Mex.) [hereinafter Mexican General Environmental Law]; Regulations of the General Law of Ecological Equilibrium and Environmental Protection regarding Environmental Impact Assessment, art. 45 (2000) (Mex.) [hereinafter Mexican EIA Regulations].

92. Mexican General Environmental Law, *supra* note 91, art. 28.

93. Mexican EIA Regulations, *supra* note 91, art. 5.

94. UNITED NATIONS ENV’T PROGRAMME, WORKSHOP ON ENVIRONMENTAL IMPACT ASSESSMENT WITH PARTICULAR FOCUS ON INTERNATIONAL COOPERATION (Environmental Economics Series Paper No. 13, 1994), available at <http://www.unep.org/unep/products/eeu/ecoserie/ecos13/ecos141.htm>.

95. *Id.*

96. DECRETO-LEY NO. 200 [DECREE LAW NO. 200], art. 5 (1999) (Cuba).

Chapters 1 and 2 of Law No. 81 refer to the land-use planning system established under Decree No. 21, which was already in effect at the time of Law No. 81's approval, and reaffirms the role of the Ministry of Economy and Planning (MEP) as the lead agency for such planning.⁹⁷ But these chapters also add a substantial duty to the MEP's role. The land-use planning system now must take into account impacts to ecosystems and communities, and the MEP is charged with closely coordinating its planning actions with CITMA.

Chapter III of Law No. 81 sets out in three short articles the basis for the environmental permitting system. Article 24 states:

All activity capable of producing significant environmental effects or that requires a specific control to conform with the requirements of existing environmental laws, will be subject to the granting of an environmental license from [CITMA], according to the conditions of that agency, which will also establish the types and kinds of such license.⁹⁸

CITMA then has licensing power over all new projects in Cuba that may have significant environmental impact, as well as many ongoing projects. Cuba does use a list system like many countries, identifying specific projects that are subject to pollution control license or EIA requirements, but it does not limit its coverage to those projects. Nor does it limit its applications to those projects that need government approval. The environmental permitting system applies to any project that would significantly alter an ecosystem or affect the local population or the environment in general.⁹⁹ The licensing/EIA system thus applies to all projects and, therefore, is one of the vehicles by which the Cuban government holds the power to make land-use and economic development decisions and dictate the conditions under which businesses and infrastructure projects operate. The environmental license/EIA system, therefore, is truly a pollution and natural resource degradation *prevention* system.

97. Ley del Medio Ambiente, LEY NO. 81 [Environmental Law, LAW NO. 81], arts. 19-23 (1997) (Cuba), *translated in* CUBAN ENVIRONMENTAL LAW, *supra* note 9, at 21.

98. *Id.* art. 24.

99. *Id.*

B. Requirements of the EIA System

1. Scope of Activities Affected

The Cuban EIA process in Law No. 81 follows the model that is generally used by international organizations¹⁰⁰ and many countries. In 1999, CITMA promulgated regulations for the implementation of the license/EIA system.¹⁰¹ The Cuban EIA process is centered around the written analysis of a project's environmental impacts. Like many such processes, there are two possible written analyses: the information required to accompany the application for the environmental license and the information that must be included in the more thorough EIS, if required. Both documents should include: a description of the project; the presentation of alternatives to the proposed project; discussion of the affected environment or existing conditions that the project will be placed into; the environmental consequences if the project is carried out; and a description of measures to mitigate the proposed project's environmental impact.

Provisions that could create confusion over which projects are covered are article 29 of Law No. 81 and article 5(b) of Resolution No. 77/99. These provisions state that an EIA can be required where there is an "expansion or modification of projects or works or existing activities" or "projects or activities in progress if they generate significant environmental impacts."¹⁰² Few EIA systems apply to projects that have already been approved, thereby subjecting the projects to constant reevaluation and possible change and closure. These provisions provide extremely wide authority to CITMA to require an EIA document at their discretion. Guidance, therefore, is needed to specify when CITMA can require an EIA document for an existing activity.

The Cuban EIA system does not require EIA documents for programs or plans as required by the NEPA,¹⁰³ and does not require regionally oriented EIA documents as required in the Mexican EIA

100. THE WORLD BANK, *supra* note 81; *see also* BARRY DALAL-CLAYTON & STEPHEN BASS, UNITED NATIONS DEV. PROGRAMME, SUSTAINABLE DEVELOPMENT STRATEGIES, ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (2002).

101. Reglamento del Proceso de Evolución de Impacto Ambiental, RESOLUCIÓN No. 77/99 [Regulations for the Environmental Impact Assessment Regulations, RESOLUTION No. 77/99] (1999) (Cuba).

102. LEY No. 81, art. 29; RESOLUCIÓN No. 77/99, art. 5(b).

103. 40 C.F.R. § 1502.4(b) (2002). It appears that Mexican law does not require land-use plans to be reviewed under the EIA law. The term "activities" subject to the EIA system is not defined, and article 32 of the regulations states that projects contemplated in land-use plans are exempt from EIA requirements. Whether this mention of land-use plans suggests that the plans themselves are not subject to an EIA is not clear.

regulations.¹⁰⁴ CITMA officials, however, have said that they have required project applicants to look at regional impacts and, on occasion, have requested that an applicant with region-wide projects, such as oil exploration and development, prepare a region-wide EIS.¹⁰⁵

An EIA, therefore, does not apply to the approval of general plans, including those drafted for coastal management under Decree Law No. 212.¹⁰⁶ Decree Law No. 212, however, does state that the land-use plans must comply with its provisions, which explicitly requires an environmental license and EIA for all projects and activities.

2. The Application

Resolution No. 77/99 specifies the substantial information required in the environmental license application, which must be submitted by project proponents to the territorial delegations or sub-offices of CITMA.¹⁰⁷ Such a requirement is similar to the requirement for an initial study under CEQA when there is uncertainty about the scale of the environmental impact.¹⁰⁸ But initial studies are brief documents with much less information required than the Cuban environmental license application. The information required in the environmental license application is almost as extensive as that required in the EIS, and suggests that many license applications are themselves detailed EIA documents, a somewhat onerous requirement for some applicants.¹⁰⁹ While the specific identification of application requirements gives clarity to applicants on what they need to include in their applications, the breadth and depth of documentation required for virtually all projects at this stage could be excessive. Further, there is a possibility that the application will become the document that is used in place of the more extensive EIS, even for large-scale projects.¹¹⁰

104. Mexican EIA Regulations, *supra* note 91, art. 10(I). Article 31 of Law No. 81 states that plans or policies for urban or industrial development do not require an environmental license. LEY NO. 81, art. 31. Article 26 provides that programs that do not have an environmental license may be suspended by CITMA. *Id.* art. 26.

105. Presentation by Dr. Silvia Alvarez Rosell, *supra* note 50.

106. Gestión de la Zona Costera, DECRETO-LEY NO. 212 [Coastal Zone Management Decree Law, DECREE LAW NO. 212] (2000) (Cuba).

107. *Id.* art. 6.

108. CAL. PUB. RES. CODE § 21080 (Deering 1953).

109. Article 15 of Resolution No. 77/99 states that the environmental license application “should” include a list of extensive information. Therefore, as opposed to the EIS, it appears that the contents of the license application are subject to the discretion of CITMA. *See* Reglamento del Proceso de Evolución de Impacto Ambiental, RESOLUCIÓN NO. 77/99 [Environmental Impact Assessment Regulations, RESOLUTION NO. 77/99] (2000) (Cuba).

110. Karen Frye et al., A Comparison of How Different Federal Agencies Comply with the National Environmental Policy Act, Presented at the Annual Meeting of the National Association

An omission of Resolution No. 77/99 at the application stage is the lack of specified, categorical exemptions for projects that simply do not need environmental analysis, as provided in NEPA and CEQA.¹¹¹ By allowing CITMA, or a line ministry, to establish these exemptions, large amounts of time, money, and paperwork can be saved.

Another area where there is little guidance for CITMA staff or for project applicants is the decision whether to require a full EIS. Article 18 of Resolution No. 77/99 simply gives CITMA the authority to require an EIS, but does not include any criteria for deciding whether a project's impacts are significant enough to warrant one.¹¹² Employees at the Cuban Coastal Ecology Research Center are currently preparing scientific criteria to determine significance, but there are currently no plans to develop regulations or guidance on the subject.¹¹³

3. Review of Alternatives

Perhaps one of the most important aspects of the EIA document is the identification of alternatives. Alternatives can be either alternative sites or alternative methods of achieving the project's purpose.¹¹⁴ An alternative method could be a smaller facility or a less intensive type of resource extraction. The alternatives assessment process is perhaps the most thorough and complicated aspect of project approval in Cuba because this is where the land-use planning, foreign investment, and environmental licensing laws all have similar but separate legal requirements that applicants must follow. Project size is first examined by the MIEC in the Foreign Investment Law approval process. MIEC looks at the financial viability of a project and its economic ramifications

of Environmental Professionals (2001), at <http://www.ttsfo.com/pub/nepa/SurveyPaper.pdf>. A survey of U.S. federal agency EIA practitioners found that the number of lengthy environmental assessments was one of the most important trends. Often environmental assessments are done to avoid the public participation requirements of the long EIS.

111. See 40 C.F.R. § 1507.3(b)(2)(ii) (2002) (providing NEPA's categorical article 15 exclusions); CEQA Guidelines 14 CAL. CODE OF REGULATIONS § 15061(b)(2) (2002) (identifying CEQA categorical exemptions).

112. See, e.g., 40 C.F.R. § 1508.28; Mexican EIA Regulations, *supra* note 91, art. 3(IX); CEQA Guidelines § 15070.

113. Interview with Dr. Celso Pazos Alberdi, Director, Coastal Ecology Research Center, in Havana, Cuba (Aug. 15, 2002). CITMA last prepared a guidance document to assist agency officials and consultants who prepare EIA documents. With the exception of suggested modes of public participation, this guidance does not include legal or policy principles regarding the Cuban EIA process but instead focuses on technical approaches to describe the affected environment and to identify potential environmental consequences of certain infrastructure projects. See CITMA, GUIAS PARA LA REALIZACION DE LAS SOLICITUDES DE CRITERIA AMBIENTAL Y LOS ESTUDIOS DE IMPACTO AMBIENTAL (2001).

114. DANIEL R. MANDELKER, NEPA LAW AND LITIGATION §§ 10-59 to 10-65 (2001).

in Cuba. This first step does, in a sense, approve the size or scale of the project. There is no specific alternatives review at this stage, and CITMA would have little information at that point to be able to judge the impacts due to the scale of a project. Nonetheless, CITMA's opinion is being requested at a very early stage of project development, and project proponents would be foolish to not at least examine alternative areas or methods when the project is resource intensive or located in an ecologically or culturally sensitive zone.

The second step in the alternatives examination process is in the macro- and microlocalization review processes described above. Like the Foreign Investment Law review process, there is no specific requirement for project proponents to present alternatives. However, microlocalization is in essence a siting process in which the IPF can not only veto a project location, but also identify location alternatives and require project applicants to consider those locations. The IPF does request information regarding traditional land-use issues such as existing services and soil suitability, but the IPF is not required to consider other environmental issues such as biodiversity and water quality. Again, CITMA has a very important advisory role at this stage in assisting the IPF in determining suitable locations for projects. CITMA is, however, somewhat limited at this point by the fact that no existing conditions or environmental consequences data on the proposed project location would have been prepared.

CITMA gets another shot at the project during the environmental licensing/EIA process. In this third stage of governmental alternatives review, a discussion of project alternatives is required during both the license application stage and in the EIS itself. There are, however, no guidelines for determining what is considered a reasonable alternative. Like the issue of significance, this is one of the most hotly contested issues between members of the public and government agencies that draft EIA documents in the United States. Hundreds of CEQA and NEPA court decisions discuss the criteria for what alternatives must be included in an EIA document.¹¹⁵ In general, an alternative should be included by the agency if it meets the project's purpose and need and is feasible.¹¹⁶ Guidance for project planners regarding what constitutes a

115. *See id.* §§ 10-50 to 10-65; MICHAEL H. REMY ET AL., GUIDE TO THE CALIFORNIA ENVIRONMENTAL QUALITY ACT 431-61 (1999).

116. *See, e.g.,* Marble Mountain Audubon Soc'y v. Rice, 914 F.2d 179 (9th Cir. 1990); Natural Res. Def. Council v. Morton, 458 F.2d 827, 833-38 (D.C. Cir. 1972); Citizens of Goleta Valley v. Bd. of Supervisors, 80 P.2d 1161 (Cal. 1990); Laurel Heights Improvement Ass'n of S.F., Inc. v. Regents of the Univ. of Cal., 746 P.2d 2778 (Cal. 1988).

reasonable alternative will give more certainty and consistency in the Cuban EIA process.

The Cuban project alternatives review process can be viewed in two ways. In a positive light, it is a coordinated process in which various agencies have the lead over their various areas of expertise and are required to consult formally with their counterparts in other interested agencies. In Cuba, this system may be more effective than in most jurisdictions. Cuban government officials appear to work collaboratively and have less of the mission-oriented competitiveness that exists between government officials in other countries.¹¹⁷ The entire review process could be thought of as a three-tier process where proposed projects receive the close scrutiny needed to avoid land-use and environmental problems. There is certainty regarding agency expertise and requirements for consultation, meaning project applicants can be reasonably certain what data and analysis they will be required to gather and submit.

However, the process, because it is a three-tier process, is also long and redundant. From the project proponent's perspective, one could expend significant resources at the first two tiers of project review and consultation with CITMA staff, only to have the project rejected at the final stage after a long, expensive, and extensive review process. Indeed, this is what happened during the application process of a joint venture company for a hotel complex on Cayo Guillermo in the Sabana-Camagüey Archipelago. In that case, the applicant, after securing investment approval and a microlocalization permit, was denied an environmental license because CITMA determined that wetland resources would be adversely effected.¹¹⁸ The process did work from the environmental perspective, but from a project proponent's perspective, it was a long road that ended in a dead end.

From the environmental protection perspective, such a complete and multitiered review process is normally thought of as a positive development. However, this three-tiered system may create a feeling of entitlement in some project proponents who believe that MIEC or IPF approval equates to final project approval. Such a feeling of entitlement could be an incentive for a project proponent to lobby government officials, thereby creating pressure to speed up, or abbreviate, the

117. This is an observation based on the author's participation in government interagency working groups in the United States, Honduras, Mexico, and Colombia. *See also* SERGE TAYLOR, MAKING BUREAUCRACIES THINK 12-140 (1984) (describing the mission-oriented mentality of government agencies and their unwillingness to recognize factors or problems that do not relate to their own mission).

118. *See* Presentation by Dr. Silvia Alvarez Rosell, *supra* note 49.

environmental license process. There is no evidence of this happening yet, but, given the lack of public oversight of the process and increased pressures to develop, such pressure could be difficult to stop in the future.

4. Public Participation

Various general provisions in Law No. 81 encourage agencies and individuals to achieve sustainable development, but there is no specific provision in Law No. 81 for public participation in the Cuban EIA process.¹¹⁹ Article 4(m) includes as a principle of sustainable development, “the participation of the community, through effective participation in decision making and the development of self-management processes aimed at protecting the environment and improving the quality of human life, is essential to attain the goals of this law.” Article 27 of Resolution No. 77/99 provides for interagency review of the EIA by those agencies with authority over natural resources, yet no specific role is given to the public or nongovernmental organizations in preparation or review of EIA documents. Articles 15 and 16 of Law No. 81 authorize the provincial legislative bodies to establish environmental standards and land-use planning mechanisms regarding matters of local concern. However, Law No. 81 does not specifically grant CITMA the rulemaking authority to require public participation in local decision making.¹²⁰

Article 4 of Resolution No. 77/99 provides that a goal of the EIA process is to examine the form in which the project causes injury to the general population, communities, or other environmental projects. The agency within CITMA that implements the EIA system in Cuba, CIC, along with CITMA’s Center for Environmental Education (CEE), do survey local residents about socio-economic conditions during their review of EIA documents.¹²¹ Also, CIC and CEE employ sociologists to work with communities, particularly when a project either requires residents of communities to be relocated to other sites, or is designed to restore a damaged or degraded environment. An example of public involvement in a project with both of these aspects is the extensive outreach and community involvement conducted for a large-scale forest and river restoration project, where both factories and communities were to be removed from the watershed and riverbanks of the Almendares

119. Houck, *supra* note 7, at 37.

120. Ley del Medio Ambiente, LEY NO. 81 [Environmental Law, LAW NO. 81], arts. 15-16 (1997) (Cuba), *translated in* CUBAN ENVIRONMENTAL LAW, *supra* note 9, at 21.

121. Presentation by Dr. Silvia Alvarez Rosell, *supra* note 50.

River in Havana.¹²² The use of sociologists and outreach specialists to obtain community opinions while projects are being planned is a sophisticated and effective way to mitigate project impacts. However, surveys and sociological analysis are a limited form of public participation in government decision making.

In general, the term “public participation” in Cuba appears to refer primarily to surveys and to participatory work in environmental restoration projects.¹²³ But there is another type of public participation that is extremely important to the EIA process: public review and comment on the analysis and decisions made by government officials. There are no requirements for this type of public participation in the Cuban EIA process. CITMA has issued policy guidelines regarding the EIA system that includes a public consultation section. These guidelines declare that it is CITMA policy to stimulate the conscious participation of citizens in decisions that concern the environment.¹²⁴ “Specific objectives” of this policy are to inform and consult with all social actors involved in the project about the environmental consequences of projects and to consult with them.¹²⁵ While there is further discussion on how public outreach and consultation will occur, the specific objectives are the only language in the guidance regarding the policy for public participation. The EIA guidelines constitute a policy document, not a legal document, and have no force of law, thereby making policy recommendations whose implementation depends on the discretion of the appropriate CITMA official managing the particular EIA project review. For instance, the public may be consulted through local legislative hearings or in meetings of labor, student, or neighbor groups.¹²⁶ The results of the surveys and local meetings should be compiled in a report and presented to the “responsible authority,” or decision maker.¹²⁷ While the policy recommendations in this policy guidance promote public participation, it is oriented at the methodology of surveying and reporting on public opinion. Also, there is no legal requirement that all interested members of the public be informed of or be allowed to comment on the project or EIA document before the project is approved. There is also no appeal mechanism for those who

122. MARTIN MIREN URIARTE ET AL., EVERYONE’S CHALLENGE, A STRATEGY FOR THE REVITALIZATION OF THE METROPOLITAN PARK OF HAVANA 28-30 (1997).

123. See NCSO Report, *supra* note 8, ch. 1.5.

124. CITMA, *supra* note 102, at 34.

125. *Id.*

126. *Id.* at 36.

127. *Id.* at 37.

wish to challenge the adequacy of the EIA documentation or fulfillment of the EIA process requirements.

There are several stages at which the public can participate in the EIA process: “scoping” or information gathering;¹²⁸ review of draft EIA documents; commenting on final project decisions; administrative review; and court appeals. The survey work done by CIC and outreach work that CEE does for environmental projects, while worth studying by government officials managing environmental restoration and community relocation projects, does not compensate for the complete lack of public participation in the review and decision-making aspects of the Cuban EIA process.

Public review and comment is a vital aspect of the EIA process for many reasons. In early stages, scoping is critical to the gathering of initial information. Scoping assists those preparing the EIA in deciding which issues are important and what aspects of those issues need greater investigation and analysis. It also helps an agency decide whether a full EIA document is needed or whether a shorter, less costly document will suffice.¹²⁹ Citizen review of draft and final EIA documents is needed to ensure that public officials are taking external, environmental issues into account. International guidelines for the EIA process recognize the importance of public participation.¹³⁰ Many of the oldest, most progressive, and most effective EIA processes require both scoping and circulation of the draft EIA documents for review by the public.¹³¹ Many jurisdictions even require the project proponent to respond to the public’s comments to ensure that the decision maker has received and considered all pertinent viewpoints.¹³²

Public consultation in the EIA process is important because it results in better designed projects which avoid costly delays, projects that are more apt to meet their objectives, and projects that are less likely to fail because the public is involved.¹³³ Also, environmental ministries in

128. See, e.g., 40 C.F.R. § 1501.7 (2002). NEPA also requires public meetings whenever they are appropriate. *Id.* § 1506.6(c); see also Mexican General Environmental Law, *supra* note 91, art. 24.

129. Christopher Wood, *Screening and Scoping*, in ENVIRONMENTAL ASSESSMENT IN DEVELOPING AND TRANSITIONAL COUNTRIES: PRINCIPLES, METHODS, AND PRACTICE 77-81 (Normal Lee & Clive George eds., 2000).

130. See UNITED NATIONS ENV’T PROGRAMME, *supra* note 80, at 6 (stating that principle 2 is to “Involve the appropriate persons and groups”).

131. CAL. PUB. RES. CODE §§ 21092-21092.6 (Deering 1993); Mexican EIA Regulations, *supra* note 91, art. 40; 40 C.F.R. § 1503.1 (2002).

132. CAL. PUB. RES. CODE § 21092.5; 40 C.F.R. § 1503.4.

133. Ron Bisset, *Methods of Consultation and Public Participation*, in ENVIRONMENTAL ASSESSMENT IN DEVELOPING AND TRANSITIONAL COUNTRIES: PRINCIPLES, METHODS, AND

many developing countries do not have the financial resources to conduct the data gathering, modeling, and monitoring required by the EIA process.¹³⁴ Public participation in the EIA process can assist environmental agencies by providing information and expertise without having to expend resources. Perhaps most importantly, public participation provides decision makers with both the information and the impetus to remove or mitigate the project's most egregious environmental and socio-economic effects.¹³⁵

A more effective approach may be to reexamine article 4 of Law No. 81 and determine whether Resolution No. 77/99 should be amended or interpreted to provide for the public participation that article 4 seems to require. Alternatively, article 27 of Resolution No. 77/99 should be reexamined to determine if it permits public participation. Article 27 provides that "consultations will be carried out with other organizations or organs that are required for the purposes of adopting a decision."¹³⁶ The CITMA policy guidance on public consultation in the EIA process¹³⁷ could be an excellent basis for regulatory guidelines that mandate the opportunity for public review, comment, and appeal prior to the final decision making by the responsible authority. Given the international consensus that an effective EIA demands public participation for effective decision making, this last sentence of article 27 may be interpreted to require public participation.

PRACTICE, *supra* note 129, at 149-50; Edward Yates, *Public Participation in Economic and Environmental Planning: A Case Study of the Philippines*, 22 DENV. J. INT'L L. & POL'Y 107, 116-17 (1993).

134. *Mala Presupuestacion O Desinterés Causaron Baja Asignación de Recurso Al IEE: Estrada*, EL CORREO, Aug. 22, 2002, at 12 (quoting the General Director of the state government Institute for Ecology of Guanajuato, Mexico, as saying that small budgets are restricting environmental planning and enforcement efforts); *see also Imposible Una Adecuada Vigilancia Forestal*, VERTIGO, Mar. 3, 2002, at 24-25 (discussing the head of the Mexican Environmental Enforcement Agency's inability to protect forests because there are not enough resources to hire prosecutors).

135. W.R. Sheate, *Public Participation: The Key to Effective Environmental Assessment*, 21 ENVTL. POL'Y & L. 3, 4 (1993).

136. Reglamento del Proceso de Evaluación de Impacto Ambiental, RESOLUCIÓN NO. 77/99 [Environmental Impact Assessment Regulations, RESOLUTION NO. 77/99], art. 27 (1999) (Cuba).

137. 120a The CITMA policy guidance on public consultation in the EIA process, *see* CITMA, *supra* note 113, could be an excellent basis for regulatory guidelines that mandate the opportunity for public review, comment, and appeal prior to decision making by the responsible authority.

5. Decision Making and Substantive Environmental Protection

The EIA practice prescribes that the findings of an EIA be taken into consideration when determining whether a project should be authorized.¹³⁸ Norman Lee, long-time observer of EIA processes internationally, points out that EIA should be integrated into and influence the decision-making process, in addition to the early planning and implementation stages. This is perhaps where the Cuban EIA process is strongest. As explained above, the EIA is part of the environmental licensing process and the same entity, CITMA, manages both.

Such a system is similar to the environmental licensing and EIA system of Mexico, where the Secretary of Environment and Natural Resources holds the power to deny a project proponent a permit to carry out the project.¹³⁹ The Secretary can also authorize and permit an activity but subject it to mitigation measures to reduce the environmental impacts.¹⁴⁰

While they can incorporate the findings of an EIA document into their decisions, a question is whether Cuban officials are permitted to make decisions in which damaging alternatives are selected or in which mitigation measures are not conditions of the environmental license. Article 31 of Resolution No. 77/99 is the operative provision regarding this issue and, therefore, may be the most important section in the Cuban EIA regulations. Article 31 states, "In all cases, the Environmental License will contain, in a clear and explicit form, the terms and conditions which should adjust the project or activity to guarantee adequate protection of the environment."¹⁴¹ How this article is interpreted is extremely important to the possibilities for substantive environmental protection.

As opposed to NEPA, which the United States Supreme Court has repeatedly stated is a procedural law,¹⁴² CEQA contains a "substantive mandate" that public agencies not approve projects with significant environmental effects if "there are feasible alternatives or mitigation measures" that can substantially lessen or avoid those effects.¹⁴³ This

138. Norman Lee, *Integrating Appraisals and Decision Making, in* ENVIRONMENTAL ASSESSMENT IN DEVELOPING AND TRANSITIONAL COUNTRIES: PRINCIPLES, METHODS, AND PRACTICE, *supra* note 129, at 162.

139. Mexican EIA Regulations, *supra* note 91, art. 45(III).

140. *Id.* art. 45(II).

141. RESOLUCIÓN No. 77/99, art. 31.

142. *See e.g.*, *Stryker's Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 227-28 (1980); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 524 (1978).

143. CAL. PUB. RES. CODE § 21002 (Deering 1993).

provision has been widely interpreted by California courts to require agencies to mitigate adverse effects or deny approval for the project.¹⁴⁴ That is, the decision-making body cannot fulfill its CEQA obligations by simply “considering” the EIA document.¹⁴⁵ It is this requirement, and its interpretations by California courts, that make CEQA not only an effective public disclosure law that allows the public to pressure decision makers, but also a law that positively requires decision makers to reduce a project’s impacts to the greatest extent possible. If the decision maker does not require these mitigation measures, he must explain why other project or public purposes are more important. This explanation, or “Statement of Overriding Considerations,” is carefully scrutinized by the public and if challenged must be found by a court to be supported by substantial evidence.¹⁴⁶ If CITMA similarly interprets article 31 to mandate adoption of mitigation measures to the greatest extent possible, the Cuban environment license/EIA system will not only be a truly progressive environmental review law, but also a substantively strong one.

6. Enforcement

Enforcement provisions for the environmental protection system are set out in Law No. 81 and include an environmental inspection system which subjects all permitted projects to inspection,¹⁴⁷ provides CITMA with the power to assess administrative penalties,¹⁴⁸ and establishes a system of civil and criminal liability.¹⁴⁹ More importantly, Law No. 81 provides CITMA with the statutory authority to enforce the permit conditions by suspending the license, thereby stopping the activity from operating.¹⁵⁰ This administrative power to stop projects goes beyond even the broad power of the Mexican Secretary of Environment and Natural Resources to sanction entities that violate the terms of the environmental license.¹⁵¹ Environmental agencies in the United States rarely have such administrative power and normally must sue the permit holders in court

144. *Sierra Club v. State Bd. of Forestry*, 876 P.2d 505, 513 (1994); *Citizens for Quality Growth v. City of Mount Shasta*, 198 Cal. App. 3d 433, 440-41 (Cal. Ct. App. 1988).

145. *Burger v. County of Mendocino*, 45 Cal. App. 3d 322, 326 (Cal. Ct. App. 1975).

146. *Koster v. County of San Joaquin*, 47 Cal. App. 4th 29, 47 (Cal. Ct. App. 1996).

147. *Ley del Medio Ambiente*, LEY NO. 81 [Environmental Law, LAW NO. 81], arts. 39-45 (1997) (Cuba), *translated in* CUBAN ENVIRONMENTAL LAW, *supra* note 9, at 21.

148. *Id.* arts. 67-69. The main enforcement of the EIA permit system (as well as other environmental laws) is set out in the recently promulgated Decree Law No. 200. *See* DECRETO-LEY No. 200 [DECREE LAW NO. 200] (1999) (Cuba) (legislative draft).

149. LEY NO. 81, arts. 70-75.

150. *Id.* art. 26.

151. Mexican EIA Regulations, *supra* note 91, arts. 55-64.

and request a mandatory injunction, which, in most circumstances, is very difficult to obtain.

While enforcement is not a focus of this Article, a newly proposed enforcement law will contribute to the willingness of project proponents to participate early and sincerely in the IPF's and CITMA's project approval processes.¹⁵²

VI. CONCLUSION

A question that runs through this Special Issue is: if the U.S. economic blockade against Cuba is lifted, will Cuba be prepared for the immense pressure that U.S. business interests will place on Cuban officials to approve projects with significant environmental and social impacts? In the context of this Article, the specific question is whether the Cuban government's development project approval system is thorough and effective enough to ensure that U.S.-funded projects comply with Cuban goals of environmental protection and growth management. I believe the answer to both questions is a wholehearted yes.

Before proceeding to the answer to these questions, however, there is the preliminary question of how quickly, and to what extent, the Cuban people and government will permit U.S. businesses to engage in business ventures, such as industrial or coastal hotel development, that could adversely affect Cuba's great biological diversity and cultural heritage. First, there can be no one more aware of the power of the U.S. government's propaganda machine than the Cuban people, who have suffered through forty years of the embargo's cruel defamation and misinformation. In addition, their recent experiences in environmental and policy exchanges with U.S. organizations, many Cuban government officials are aware of the specific influence that businesses can exert on U.S. public policy.¹⁵³ Cuban officials are aware that the future potential threats to the environmental planning system may lie not in Latin American-style corruption but instead in U.S.-style corruption where campaign contributions, mass expenditures on public relations campaigns, and lobbying can bring great pressure to bear on environmental officials.¹⁵⁴ Further, this knowledge of U.S. cultural and

152. DECRETO-LEY No. 200.

153. From 1997 through 2000, Cuban government officials, headed by policymakers at CITMA cooperated in an environmental law exchange with the Center for Marine Conservation and the Tulane University School of Law. During this exchange, Cuban attorneys met with U.S. policymakers including lobbyists, congressional staff, and general counsel at federal agencies.

154. See text accompanying note 13.

business invasions is not new in Cuba; Cuban's awareness of the drawbacks of U.S. influence in business and culture is quite well developed.¹⁵⁵ Cubans have encountered U.S. cultural and economic invasions before and will be prepared for the cultural impacts of a new invasion.

In recent years, Cuba's highly trained technical personnel have had extensive experience with large, new investments, such as those made by the Sol Melia Hotel chain and other European corporations. There have been few instances of influence peddling in Cuba, perhaps due to the pride in scientific approach to decision making that exists in Cuba. This awareness, along with the current substantial political will to withstand U.S. pressure on behalf of U.S. businesses, will provide Cuba with a bureaucratic toughness that few low-income countries believe they can afford.

This awareness of U.S. government and business pressure tactics will lay down a strong mental baseline, but it is the legal baseline for economic and environmental planning that may be more important in the long run. United States companies, even if they were invited, would have to submit their projects to Cuba's three-tiered development project approval process. First, U.S.-sponsored industrial and coastal development projects would have to be approved as joint ventures with Cuban government-owned corporations; which the MIEC has complete control over this approval process, including the preliminary planning of such projects. Through its Foreign Investment law, the Cuban government sharply scrutinizes foreign investment proposals and only approves those proposals which meet Cuban government policy goals or political needs. Many U.S.-sponsored projects may never get past the initial economic analysis.

If the Cuban government did permit U.S. companies to get through the first tier of planning and participate in such projects, the land-use and environmental planning processes ensure that projects will be thoroughly assessed for their environmental and socio-economic impacts. Careful consideration of alternatives and of the geographic location of the projects is also carried out in detail.

The land-use and environmental license laws grant Cuba's planning and environment ministries extensive and unusual authority over the approval of private and infrastructure development projects. This license power, combined with a relatively well thought out EIA process means that decision makers at environmental agencies will have the opportunity

155. PÉREZ, *supra* note 25, at 491-505.

to require consideration of alternatives and mandate the implementation of substantive mitigation measures.

Cuba's EIA laws, though, do have deficiencies. They lack specificity in areas such as how to determine appropriate alternatives and levels of significance. Even more important, the EIA regulations lack the specific component of public review, comment, and appeal that is a key to an effective and transparent development project approval process. There are also some potential problems in giving such a great amount of authority to Cuban government officials such as the broad discretion allowed to IPF staff in determining whether a project is consistent with a general plan without public oversight. While there is no public oversight of this discretion in land-use decision making, Cuba's tradition of interagency cooperation can limit abuses of it. While Cuba has general provisions that allow for public participation of government decision making, how it implements those provisions, adopts specific legal guidance, and effectively incorporates the public into decision making will greatly determine how successful the Cuban land-use and EIA processes will be.

Cuba has laid the foundation for a rule of law in project approval—a vital step in the future of dealing with corporate financial pressure. The economic, geographical, and environmental project approval process that exists in Cuba will help Cuban government officials and eventually nongovernmental groups understand and plan for the magnitude and intensity of U.S. business pressure. I am convinced that Cubans do not want to give up gains of the Revolution and will implement, enforce, and improve their environmental planning system to prevent approval of poorly planned projects and to promote development that does not damage the incredible biodiversity and natural beauty of the Cuban environment.