



## Caribbean Experts Debate Draft Competition Model Bill



### Participants and Secretariat Staff at the Meeting

*Sitting left to right:* Cheryl Thompson-Barrow (Commonwealth Secretariat), Sylva Ambris-Dick (St. Vincent and The Grenadines), Cheryl Lewis (Jamaica), Andrea McSweeney (Belize), Hyacinth Lindsay (Jamaica) and Donna Harris (St. Kitts & Nevis). *Standing left to right:* Justice Ricardo Marques (The Bahamas), Sardia Cenac (Commonwealth Secretariat), Deale Lee (St. Lucia), Sylena Mitchell (The Bahamas) and Mr. Duke Pollard (CARICOM).

The third in the series of regional expert group meetings relating to the Commonwealth draft Model Bill on Competition took place in The Bahamas on December 13 – 17, 2004. The meeting considered the views of other regional meetings and complemented them with the aim of enhancing the draft Model Bill. The experts substantively debated the core provisions of the Model Bill such as the abuse of dominant position, cartels and related core provisions which could feature in commercial agreements. They also discussed matters which are intrinsically linked to competition, and include intellectual property rights, misleading advertisement which could give rise to the violation of consumer rights. Whilst touching on the investigatory and enforcement aspects of the draft Model Bill, particular emphasis was laid on the powers

of the Competition Commission created by the Bill to administer the law. It was deemed imperative to separate the investigatory powers of the Commission from its quasi judicial functions. A merger of these powers could result in the Commission being regarded as judge and jury thus potentially making it vulnerable to challenge on various grounds.

Overall, the meeting endeavoured to be mindful of the instructions of Commonwealth Law Ministers to make the final Model Bill compliant with international standards and reflective of the interests of small and developing jurisdictions. Countries represented included Jamaica, The Bahamas, Belize, St Kitts & Nevis, St Lucia, and St Vincent and the Grenadines. The CARICOM Secretariat was also represented at the meeting.

## Contents

Caribbean Experts Debate Draft Model Bill on Competition .....	1
Developments in Law and Technology .....	2-3
Maldives Hosts Environment Seminar .....	4
Feature—Sustainable Development as an Environment Principle .....	5
Other Developments .....	6-8
Upcoming Activities .....	8

### BANGLADESH—NEW LAW TO ELIMINATE DIGITAL DIVIDE

A draft bill to combat cybercrime has been approved by the cabinet. The bill also criminalises activities such as threatening and cheating people through email and the internet. Other features of the bill include the approval of electronic signatures. At present the use of ICT in different sectors is optional and there is no legal approval of its use in any deal or contract. This would change when the bill is passed in Parliament.

ICT Minister Dr. Moyeen Khan told journalists that the law would provide a legal basis to the use of ICT in all kinds of businesses including trade, commerce, industry group and personal contracts and deals.

The business community welcomed this development which for example, would revolutionise documents such as Letters of Credit which presently take about a month to process. The law would also ensure security of email communication and internet transactions.

### CANADA—DOCTOR SUSPENDED FOR INAPPROPRIATE E-PRESCRIPTION

A doctor based in Canada has been suspended for two years – the severest penalty to date - for signing thousands of prescriptions for United States patients without seeing them face to face. He was also suspended for keeping improper records and lying to the British Columbia College of Physicians and

Surgeons, the provincial regulatory board which suspended him. The act of granting such prescriptions, usually made over the internet is not in itself illegal, but constitutes a breach of professional standards of the regulatory board which discourages doctors from signing prescriptions without meeting and fully examining patients.

Previous suspensions, albeit not of this magnitude have been made. These came as a consequence of the increasing number of United States residents trying to buy cheaper drugs from Canada which is reported to have resulted in a shortage, thus compromising the safety of Canadian drugs. The Health Minister is also pushing for Parliament to pass legislation that would restrict how Canadian doctors prescribe drugs to foreign patients and regulate Canadian pharmacies on the internet.

The President of a pharmacy mail order company has complained that this could negatively impact on his business (supplying about 250,000 US customers with prescription drugs) and has threatened to move his business abroad.

### INDIA—JUDGES URGED TO BECOME MORE TECHNOLOGY CONSCIOUS

Karnakata High Court Judge, N.K. Sodhi has urged the judiciary to be receptive to the wave of technology. He noted that the information revolution, epitomized by leaps and bounds in internet technology and usage, has changed the society in a profound manner and the “judicial system cannot afford to remain isolated from the

technological revolution in the increasing digital environment". He also noted the Law Commission's comment that "it is time that modern technological advancements which have grazed past the judiciary as an institution should be taken advantage of". The judge made specific reference to areas in need of enhancement such as the introduction of management and legal information systems (MLIS), electronic filing systems, electronic kiosks and electronic courts (e-courts).

The judge, speaking at a seminar on IT law and governance, also recommended that cyber crimes be declared as federal crimes and should be included in the list of the Seventh Schedule of the Constitution to bring those within the purview of Article 246(1). He noted the ease with which hackers could indulge in cyber terrorism and other crimes to intimidate or coerce the government, the authority or the population. He expressed concern that perpetrators of cybercrime have the benefit of anonymity with the advantages of instantaneity, accessibility and privacy – needing no weapon or tool to achieve their objectives. Further, he acknowledged that the perpetrator does not need to be in the jurisdiction where the crime is committed. He was confident that extending the rule of law to cyberspace was widely critical for electronic commerce to reach its full potential in a highly networked world.

### **NEW ZEALAND—RESTAURANT FINED FOR OUT-OF-DATE WEBSITE**

A restaurant has been fined NZ\$3000 for advertising out of date prices and dishes on its website. The owner who was also ordered to pay costs of NZ\$260, pleaded guilty to the Fair Trading Act in relation to misleading availability and menu prices over a six month period.

A Commerce Commission investigation found that many of the meals advertised on the website were not actually obtainable for order at the restaurant and others were not offered at the listed price. In some circumstances, the website prices were cheaper than the actual in-house menu. Although the owner was aware of the misrepresentations - as his attention had been drawn to this previously by a customer - no steps were taken to remove the

misleading information. The Commerce Commission Chairwoman, Paula Rebstock said in a statement that a business which chooses this form of advertisement must bear responsibility for accuracy and truth. She further noted that "it is not enough to allow the restaurant owner to say that the website is outdated for reasons of lack of time or lack of technical knowledge, especially given the growth of this form of advertising and the potential reach of the misleading information". The Restaurant Association of New Zealand said that the fine was a timely reminder for all members to update website information. The ultimate responsibility for running the website lies with the restaurant.

### **UK —SCOTLAND—RAPE CONVICTION HELD "UNSAFE" AFTER JUROR USED INTERNET DURING VERDICT DELIBERATION**

The Court of Appeal has quashed a defendant's rape conviction and ordered a retrial in a case which centred on "introduction of extraneous material into the jury room after their retirement". The defendant was convicted of rape by a jury in November 2003. Thereafter, a bailiff discovered a number of documents in the jury room which had been downloaded from internet sites. Among these were two typed documents titled "The feminist position on rape" and "Rape and the Criminal Justice System". The three senior judges ruled that the downloading of these materials contravened the "well established principles" of the administration of justice and the rule of law. The formulation of judicial guidelines is being considered in this area.

## Maldives Hosts Environment Seminar



Participants and Secretariat Staff at the Meeting

*Sitting left to right:* Cheryl Thompson-Barrow (Commonwealth Secretariat), Abdulla Kamaludeen (Acting Minister for the Ministry of Environment & Construction, Maldives), Abdullahi Majeed (Deputy Minister of the Ministry of Environment & Construction, Maldives), K D Ahmed Manik (Deputy Minister of the Ministry of Environment & Construction, Maldives). *Second row, standing left to right:* Mohamed Zuhair (Maldives), Brender Portland (St. Lucia), Gaitree Manna (Mauritius), Sandra Wint (Consultant), Sardia Cenac (Commonwealth Secretariat), Gladys Young (Jamaica), Aisath Bisham, Aminath Shirneem, Ahmed Murthazah, Ahmed Jameel (Maldives). *Third row, standing left to right:* Kim Ter (Singapore), Donald Kerslake (Samoa), Shaukath Ibrahim (Maldives), Joel Camille (Seychelles), Janmai Udit (Fiji Islands), Ariffin Ismail (Brunei Darussalam), Ahmed Nilam Mohamed (Maldives).

The Law Development Section (LDS) has begun a programme of work which seeks to assist small states of the Commonwealth to implement environmental conventions. In February, 2005 a capacity-building Seminar on Environmental Law and Policy Development was held in the Maldives. This Seminar was intended to lay the groundwork for a series of regional meetings which would be aimed at assisting member countries to implement environmental conventions and to develop a comprehensive body of environmental laws.

Representatives of the different regions of the Commonwealth were invited so as to facilitate the sharing of information and experience, and to assist LDS to determine the extent of legislative development in the field of the environment. This would therefore ensure that targeted assistance is given at the regional stage.

The meeting discussed key international environmental agreements such as the United Nations Convention on the Law of the Sea, the Climate Change Convention, the Kyoto Protocol and the Convention on Biological Diversity, as well as other relevant regional instruments.

Participants gave examples of the manner in which their countries were utilising limited resources to meet the obligations of these instruments. It was however stressed that there was a need to update and consolidate environment legislation. The meeting also noted the importance of regional co-operation for environmental management, and made recommendations for further harmonization of laws and for policy development.

Countries represented at the seminar were Brunei, Fiji Islands, Jamaica, Maldives, Mauritius, Saint Lucia, Samoa, Seychelles and Singapore.

## SUSTAINABLE DEVELOPMENT AS AN ENVIRONMENT PRINCIPLE

Developing countries' *right to development* was given formal recognition in the Rio Declaration (Principle 3). It is however clear that **“development must be expressed equitably so as to meet both developmental and environmental needs of present and future generations.”** (Birnie & Boyle, 2002)

Sustainable development, has found expression in the Rio Declaration, Agenda 21, and the Conventions on Climate Change and Biological Diversity, has been adopted by numerous governments across the Commonwealth and the wider international community as the central plank of national policy. To assist decision-makers and policy-makers at all levels, the Commission on Sustainable Development has developed indicators for monitoring progress towards sustainable development. Protected areas as a percentage of total area, abundance of selected key species, annual catch by major species, arable and permanent crop land area and consumption of ozone depleting substances, are a few of the indicators used in the context of the environment.

Small island developing states (SIDS) have been recognised as a “special case for sustainable development”, and the international community has recently renewed its commitment to supporting the sustainable development efforts of small states. (*Mauritius Declaration*) The Programme of Action for the Sustainable Development of Small Island Developing States, as further implemented by the *Mauritius Strategy*, sets out the basic principles and the specific actions which are required at the national, regional and international levels to support the efforts of SIDS.

Whilst the concept of sustainable development has not been capable of exact definition, it is clear that it calls for “more systematic consideration of the environment when decisions are made on economic, social, fiscal, energy, agricultural, transportation, trade and other policies.” (Agenda 21, Ch. 8.2) In other words, there must be the integration of environmental concerns into national decision-making.

The precautionary principle and the polluter pays principle are thought to be essential features of the broad concept which is sustainable development (*Vellore Citizen v. Union of India, 1996*). The precautionary principle provides that *“where there is a threat of serious or irreversible damage, lack of full scientific knowledge shall not be used as a reason for postponing cost effective measures to prevent environmental degradation.”* In the fragile environment of small island states in particular, the application of this principle is of paramount importance.

Whilst a cost-benefit analysis is an element of the precautionary approach as endorsed at Rio, it is imperative that the procedure for this analysis properly value environmental goods and services.

The precautionary principle may be applied through the process of environment impact assessment which is used to identify the environmental and social impacts of a project prior to decision-making. Public Participation and access to information (transparency) are here central concepts.

Sustainable development calls for participation in a still broader context by requiring the decentralisation of management to the lowest possible level, that is, at the local community level.

It is clear that the precautionary approach when properly implemented ensures *sustainable utilization*, an objective of several of the most recent environmental conventions. It is however important to emphasise that sustainable use cannot be achieved without effective conservation methods.

The second principle, the polluter pays principle requires the internalization of the costs of pollution by requiring the polluter to “pay” for the harm caused. This therefore calls for the establishment of a liability system (which may require remedial action) or a compensation mechanism. This speaks also to the need to establish a system of incentives for sustainable users (farmers, industry etc.). Sustainable development is therefore a key concept which seeks to reconcile competing priorities, and to ensure consistency and equity in long-term planning at the national level.

## OTHER DEVELOPMENTS

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### NEW ZEALAND—OVERHAUL IN PATENT LAW

A draft patent bill was issued for consultation. The draft bill brings New Zealand in line with other countries such as Australia, Britain and the United States. The bill tightens the definition of an “invention” to narrow down the broad criteria set out in the previous law. Under those criteria, the Intellectual Property Office (Iponz) can grant a patent to any new “method of manufacture”.

Under the draft bill, a new invention must also be “useful” and involve an “inventive step”. Anyone challenging this must do so after the patent has been granted and such a challenge must be made through the Court. The implications of this is that a patent can only be granted if it is certain that a judge would dismiss a challenge to it in Court. An alternative to this procedure is provided by a dispute process which allows a patent right to be challenged after it has been granted but without recourse to the Courts. In this case the Commissioner will hold a hearing and issue a judgement, which can then be challenged in Court. The Commissioner can also be petitioned to re-examine a patent before it is granted.

Similar to the current Patent Act, the new bill will continue to grant patent rights to “business processes” and software – two areas which are often a source of controversy - provided they meet the revised criteria. The Institute of Patent Attorneys welcomed the bill which was seen as meeting international standards and particularly matching relevant laws in Australia. This would simplify the process for international companies wanting to export to New Zealand.

The tightening of New Zealand’s patent laws would also mean judges ruling on intellectual property disputes could apply more case laws from other countries, since New Zealand’s definitions would be brought into line with that of those countries. The bill is said to have unique Kiwi characteristics. It envisages the creation of a Maori committee to advise the commissioner on whether an invention “is derived from Maori traditional knowledge or from indigenous plants and animals and whether the commercial exploitation of that invention is likely to be contrary to Maori values”. The Commissioner

would not be bound by the Committee’s advice. The deadlines for consultation was March 11.

### JAMAICA—GOVERNMENT TO PUSH AHEAD WITH CCJ PLAN

The government has announced that it remains committed to the establishment of the Caribbean Court of Justice (CCJ) as its final appellate Court. The announcement came after the ruling by the UK’s Privy Council that the government’s handling of the process relating to the passage of the three CCJ bills – which would have withdrawn Jamaica from the Privy Council and established the CCJ as the final Court of appeal - passed last year were unconstitutional and therefore void.

The Privy Council had ruled that to establish the CCJ as the country’s final appellate Court, without it being entrenched in the Constitution would undermine the protection given to the Jamaican people by entrenched provisions of Chapter Seven of the Jamaican Constitution. It concluded that the appropriate procedure – for amendment of an entrenched provision - should have been followed.

### TRINIDAD AND TOBAGO—CCJ HEADQUARTERS AGREEMENT SIGNED

The Foreign Minister has signed the instruments formalising assent to the Headquarters of the CCJ. This also paves the way for the Caribbean Development Bank to release the US\$100 million intended for the administration of the CCJ to the Board of Trustees to the CCJ Trust Fund. The CCJ will be officially inaugurated on the 16th April in Port-of-Spain, Trinidad and Tobago.

### ANTIGUA AND BARBUDA DEPOSITS CCJ INSTRUMENTS WITH CARICOM SECRETARIAT

The Prime Minister, Baldwin Spencer has deposited the country’s Instrument of Accession and Ratification of the CCJ with the CARICOM Secretariat. This is part of the process required in order to implementing the CCJ. The relevant instruments are the:

- Revised Agreement establishing the CCJ Trust Fund;

## OTHER DEVELOPMENTS

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- Protocol on the status, privileges and immunities of the CCJ and the Regional Judicial and Legal Service Commission
- Agreement Establishing the CCJ; and the
- Protocol to the agreement establishing the CCJ relating to the Juridical Personality and Legal Capacity of the Court.

The country has only signed up to the original jurisdiction of the CCJ. In exercising the original jurisdiction, the CCJ will be discharging the functions of an international tribunal applying rules of international law regarding the interpretation and application of the Treaty of Chaguaramas which established CARICOM. The adoption of the appellate jurisdiction is yet to take place. Such adoption would require a referendum and two-thirds majority in the House of Representatives.

### INDIA—EPO VICTORY IN NEEM PATENT CASE

The European Patent Office has upheld its earlier order to revoke patent granted on “Neem” to a US transnational Corp W R Grace. The patent relates specifically to a fungicidal produce derived from the seeds of the Neem, a tree indigenous to the Indian subcontinent.. The EPO held that the patent amounted to bio-piracy and that the process for which the patent had been granted had been actually in use in India from time immemorial, thus constituting its scientific traditional knowledge. The US transnational had patented neem-based biopesticides, including Neemix for use on food crops. Neemix suppresses insect feeding behaviour and growth in more than 200 species of insects. The neem derivatives were also used traditionally to make insect repellents, soaps, cosmetics and contraceptives. This outcome results from years of campaigning and legal challenges launched by three opponents to the patent namely the EU Parliament’s Green Party, India-based Research Foundation for Science, Technology and Ecology, and the International Federation or Organic Agriculture Movements.

Another unrelated challenge in the United States by the Indian governments has led to the revocation of a patent on another Indian plant, tumeric, the

medicinal qualities of which have been known for centuries. The challenge was accepted because India was able to show that the knowledge had been found in the Indian pharmacopoeia. In the United States, prior existing knowledge to deny a patent was accepted in terms of publication in any journal, but not knowledge known and available in oral or folk traditions. This narrow view of prior knowledge have been responsible for any number of patents for processes and products derived from biological material, or their synthesis into purer crystalline forms.

### MALAYSIA—SPECIAL COURT PROPOSED FOR IP RIGHTS

The Government has issued a document on intellectual property with a proposal to establish a special Court to deal with intellectual property cases. The proposed Court will also deal with the issue of piracy. Such disputes are presently heard by ordinary courts and it was felt that the complicated issue which often arise in these cases and the resulting significant losses potential losses necessitate a special Court with judges possessing special in-depth knowledge of IP matters. The Minister for Trade and Consumer Affairs Datuk Mohamed Shafie Apdal noted the importance of IP and said that Malaysians had a low awareness of the need to have their products patented and recognised internationally. He mentioned that little interest is shown by Malaysians in registering their patents. As a result, the producers and country of origin of goods are not getting the deserved benefit. He was happy that Malaysia however has strict enforcement laws on IP and will be collaborating with WIPO later in the year to host a regional conference on IP law enforcement.

### NAMIBIA PROPOSES LEGISLATION TO COMBAT TAX EVASION

A revision of the tax legislation is being considered by the government. This became necessary because it was found that companies and individuals have been taking advantage of loopholes in the law to evade tax in cross-border transactions, mostly with South Africa. The Minister for Finance said that profits – through excessive pricing - were being transferred, from a tax jurisdiction with a higher tax rate to

## OTHER DEVELOPMENTS

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another tax jurisdiction with a lower tax rate. The companies concerned also effected cross-border transfers through high interest loans to enterprises in other tax jurisdictions with lower tax rates. This process – where enterprises provide massive financial assistance to each other – is known as “thin capitalisation”. Thus the proposed legislation is aimed at curbing loans with inflated interest rates as a deduction for income tax purposes. The legislation is also aimed at preventing farmers who have paid their land tax from claiming it as an expense for tax deduction. Also, taxpayers who receive allowances

from their employers to buy a vehicle for official use, and receive a tax deduction for it will no longer be able to sell the vehicles without being taxed on the transaction. In this case, it was found that taxpayers had claimed the deduction and subsequently sold the vehicles. The amendment will also exempt from income tax, expatriates stationed in Namibia through technical assistance agreements with a development partner. Such expatriates will instead pay income tax in their own country. A tax tribunal will also be established by the amended legislation.

## Upcoming Activities

**29 March – 2 April 2005**

Commonwealth Regional Workshop on Law and Technology for the Africa Region  
Cape Town, South Africa

**4 – 8 April 2005**

Expert Group Meeting for the Africa Region to  
Examine the Commonwealth Draft Model Bill on Competition  
Mahé, Seychelles

**13 – 15 June 2005**

Commonwealth Seminar on Landlocked States under the  
United Nations Convention on the Law of the Sea  
Mbabane, Swaziland

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