



Environment Seminar goes to the Pacific



The third Regional Environmental Law Seminar was held in Fiji from 4 – 10 September 2006. The meeting was opened by greetings from the Attorney-General for Fiji, the Hon Qoriniasi Babitu Bale which was delivered by Solicitor-General Nainendra Nand. The Attorney-General observed that Fiji and many Pacific countries suffer from geographical isolation, and are small economically, so that sustainable development of their environment and effective conservation practices were key priorities for supporting their fragile eco-systems. The importance of appropriate implementation of environmental conventions was noted as being a matter of continuing priority in Fiji, and the various recent legislative enactments which seek to give effect to these conventions were highlighted.

The meeting sought to secure implementation of the key international and regional environmental

conventions; to encourage the development of environmental laws and policies which are in accordance with good practice, and to promote regional co-operation initiatives for environmental management.

The blend of legal and environment officers ensured that there was adequate coverage of legal, policy and enforcement issues. The meeting discussed and made comprehensive recommendations for the development of policies and laws in the areas of biodiversity conservation, coastal zone management, pollution control and the management of natural/man-made disasters.

Countries represented were Fiji Islands, Kiribati, New Zealand, Papua New Guinea, Samoa, Solomon Islands, Tonga and Vanuatu, as too, regional representatives from Maldives, St. Lucia and Trinidad & Tobago. (Please see page 3)

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INTERNATIONAL SEABED AUTHORITY AGREES TO SEPARATE REGIMES FOR SULPHIDES AND CRUSTS EXPLORATION

The Council of the International Seabed Authority has met in Kingston, Jamaica and have agreed to develop separate sets of regulations for polymetallic sulphides and cobalt-rich crusts in the seabed area. This decision followed the recommendations of the Authority's Secretary-General Satya N. Nandan. His recommendation was informed by an earlier workshop attended by members of the Legal and Technical Commission who deliberated on the technological and economic aspects of mining the two minerals. The members had agreed on issues such as the size and contiguity of blocks and areas to be relinquished with respect to sulphides. There was consequent consensus that this required minimal technical work. The priority was to separate the regulations from those for cobalt-rich ferromanganese crusts. The Secretary-General noted that this was a mechanical task which could be done by the Secretariat. Noting that the next session would be in 2007, he promised that new drafts would be available to both the outgoing and the incoming members of the commission before a final draft is prepared for circulation in advance of the 2007 session.

With regard to the regulations for cobalt-rich crusts, there were opposing views on matters such as the size of blocks to be allocated, the relinquishment procedure and the issue of equity participation. The Secretary-General noted that information and recommendations which emerged from the workshop, including new thoughts on mining selection parameters and alternative fee options, as well as a proposal put forward for amendment to

the wording of several regulations would be taken into account in preparing the new draft regulations. Many members were supportive of the Secretary-General's position and commended the Authority's work as "a demonstration of impact and relevance".

CANADA – COMPANY FOUND GUILTY FOR NON-COMPLIANCE WITH COURT ORDER

A company has been found guilty for failure to comply with a court order. The company – Canadian Horizontal Drilling Ltd - had originally been convicted under the Fisheries Act after pleading guilty to violation under that legislation which protects fish-bearing waters from the deposit of any substance that is deleterious to fish and aquatic life.

The company was commissioned by another company to install a pipeline under a Creek. During the installation, drilling mud was released into the Creek, a spawning ground for bull trout. Drilling mud is harmful to fish and destroys fish habitat. An investigation was conducted by Environment Canada – the body responsible for environmental matters - and charges were brought which resulted in the conviction of the company. The subsequent Sentencing Order had required the company to pay a penalty of C\$25,000, contribute C\$20,000 towards the Environmental Damage Fund administered by Environment Canada and comply with voluntary industry guidelines for horizontal directional drilling intended to minimise the environmental impact of these activities. In addition, the company was required to publish an article relating to the offence committed in an industry publication by the end of September 2004. The company had failed to execute this last order, hence the further charges being laid.

FIJI SEMINAR ON STUDY TOUR OF MAMANUCA ISLANDS



Participants at the Environment Seminar for the Pacific Region had the opportunity to undertake a tour of the Sigatoka Sand Dunes and Treasure/Bounty Island Marine Protected Area (Mamanuca Islands). The objective of this programme was to provide a practical demonstration of conservation initiatives which, through partnership with local communities and private enterprise, contribute to sustainable development.

The Sigatoka Sand Dunes is Fiji's first national park, and was so designated in 1989 by the Sigatoka Sand Dune National Park Declaration. The 650 hectare site, unique to Fiji and the Pacific Islands, was in 1999 recognised as a World Heritage Site, being an area of "outstanding universal value from the historical, aesthetic, ethnological or anthropological point of view" (World Heritage Convention, Article 1). The Dunes are managed by Fiji's National Trust. Delegates were given a guided tour of the Dunes via a footpath constructed by the Trust for that purpose.

The brief tour to the Green Globe certified Treasure and Bounty Islands provided an excellent illustration of partnership between Tokatoka Nakelo Community and the Board of Treasure Island Resort, which has developed an Environmental and Social Sustainability Policy so as to conserve the unique natural environment of the islands. Treasure Island and the Fisheries Department also run a program to protect endangered green sea turtles, which are bred in captivity and then tagged and released into the wild.

The study tour also allowed the group to see the fringing reef of Bounty Island. The Islands' fringing reefs have been declared tabu (no take) areas, and all activities are to be strictly regulated. The observations from the study tour of both the Sigatoka Sand Dunes; the Bounty and Treasure Island Sanctuaries; and the Bounty Island fringing reef, have allowed the meeting to observe the benefits of buttressing protected areas with the appropriate legislative framework. It was recognised that with the proper legislation in place, the necessary regulations would ensure that there would be penal and enforcement provisions to ensure that not only is an area declared "protected", but the law will have in place the necessary legislative power to secure the environment's sustainability.

These and other aspects of formulating policy and the necessary robust legislative framework were the essential themes of the week long seminar.

NEW ZEALAND – SUPREME COURT RULES AGAINST COMMON LAW POSITION

To grant or not to grant immunity to professionals for the evidence given in court especially when that evidence turned out to be false – that was the issue for consideration by the Supreme Court of New Zealand in the case of Chamberlains v Sun Poi Lai and Hilda Lorraine Lai SC 19/2005 [2006] NZSC 70. In this case, the Supreme Court ruled against the longstanding common law rule which holds that barristers have immunity for work they do in Court and other work intimately connected with in-Court work. This decision - upholding an earlier decision of the Court of Appeal - is reflective of the decision of the UK's House of Lords in a case which abolished barrister's immunity in England.

The position at common law - that such professionals would have immunity – is driven by public policy which takes the view that this is to enable people to speak freely without fear of being sued. The intention is to remove the potential deterrence from giving evidence.

ECOWAS COURT MAY CONSIDER APPLICATIONS ON INDIVIDUAL HUMAN RIGHTS VIOLATIONS

As individual human rights continue to be abused, as a consequence of conflicts in parts of West Africa there are indications that the individuals concerned may be able to apply to the ECOWAS Court of Justice (the Court) for redress. This was the pronouncement by an NGO – Open Society Initiative West Africa (OSIWA). The decision to make applications to the Court was said to arise from the ongoing violations of treaties and standards relating to human and citizenship rights particularly in Cote d'Ivoire. OSIWA's Director of Programmes, Mr Chidi Odinkalu said that the organisation had been working in collaboration with other partners to build a case for presentation at the Court. The representation of the individuals concerned was made possible by the step taken to widen access to the Court – via a Supplementary Protocol - which was previously limited to State Parties alone. The Supplementary Protocol which

became effective in January 2005 grants access to individuals and non-State entities as claimants.

In the course of OSIWA's investigations, violations such as those listed below were uncovered:

- Mass killings which came as a result of individuals being targeted because of their ethnic or racial grounds;
- Discrimination based on ethnicity and other grounds. For example, ethnics who were Ivorien nationals were de-nationalised – other nationals who had acquired Ivorien nationality were also denationalised, alongside Ivorien women married to non-Ivorien nationals.
- Confiscation of properties belonging to those who had been denationalised and expelled, and relevant documents destroyed
- Laws enacted prohibiting non-nationals from owning land. Those who already owned lands were prevented from alienating or selling them

The recourse - for those affected - would have been to the African Court on Human and People's Rights, as Cote d'Ivoire is a party to the African Court Protocol but the African Court is yet to be properly functional, hence the consideration given to applications to the ECOWAS Court. OSIWA believed that in this regard the ECOWAS Court might have "a signal role" in upholding the citizenship and human rights in the region.

HIGH COURT OF AUSTRALIA ON RIGHT TO INFORMATION

The Australian High Court in September through its decision in McKinnon v. Secretary, Department of Treasury revisited the country's 24-year-old Freedom of Information Law. That landmark decision has set a precedent which will now allow government bureaucrats the right to refuse any public requests for information on the basis of broad claims of potential harm. The High Court Justices view that "[if] one reasonable ground for the claim of contrariety to the public interest exists, even though there may be reasonable grounds the other way, the [certificate] will be beyond review. The act provides no basis for any balancing exercise."

THE LAW DEVELOPMENT SECTION OPENS HIPC CLINIC

At the Commonwealth Heads of Government Meeting in Abuja, Nigeria, in 2003, the Heads of Government recognised that the debt burden in a sovereign state constitutes a major obstacle in allocating resources to develop key socio-economic sectors. They acknowledged the need for a deeper, broader and more flexible approach to debt relief and debt cancellation in order to achieve long term debt sustainability. The Heads of Government reaffirmed their commitment to a successful Heavily Indebted Poor Country (HIPC) Initiative. They welcomed the advisory and consensus building work of the Commonwealth HIPC Ministerial Forum (CHMF) and encouraged its efforts to achieve HIPCs sustainable exit from debt. The Commonwealth Finance Ministers were also willing to mobilise support for the HIPCs to help them to tackle the difficult issue of the creditor litigation in view of the resistant behaviour of the commercial creditors to participate in the process of debt relief.

The Legal and Constitutional Affairs Division (LCAD) of the Commonwealth Secretariat has examined, through a Study, the different options that could facilitate the assistance to HIPCs to secure debt relief on their sovereign debt in distress. It was revealed that the problem can be alleviated through both the financial and legal aspects. Dealing with only one aspect will fall short of an appropriate remedy. Whilst the financial aspects will provide for the delivery of a practical guide to resolving distressed debt situation in future, the legal remedy will be a most immediate measure. The current legal instruments, practices and tools and assistance to HIPCs facing litigation or being confronted with the threat of lawsuits against their sovereign debt in distress will have to be looked as prime importance. Hence a database with all these data from all HIPCs and non HIPCs most likely to fall in debt in distress is essential.

This Study and its recommendations were presented to both the Senior Law Officials of the Commonwealth Law Ministries and the Law Ministers when they met in London in October 2004. The Study had addressed the possibility of having a Legal Clinic housed in the LCAD to provide legal advice to HIPC countries as a one Stop Legal Referral Service.

In October 2006 at the Law Ministers Meeting in Ghana the Law Ministers expressed their appreciation for the progress already made and endorsed the continuing efforts of the Commonwealth Secretariat to move as quickly as possible to render legal services to HIPC countries through the establishment of a Legal Clinic in the Commonwealth Secretariat.

The HIPC Legal Clinic is now operational since mid September 2006. A Resident Legal Adviser is operating the Clinic within the Law Development Section of LCAD. The Clinic is operating in collaboration with the Economic Affairs Division and the Special Advisory Services Division of the Commonwealth Secretariat. The Legal Adviser will be providing in house legal advice to HIPC countries or Member Countries which are facing or likely to face debt litigations. The Clinic will be dealing with requests from sovereign debtors and will assist Member countries as well as other non Commonwealth HIPC Countries where there are inter agency agreements to do so, by briefing counsel where the need arises. The Clinic intends to hold several regional seminars to create awareness of loan agreements, debt relief and restructuring and proper management of debt. The Clinic will also manage a database of loan agreements. The first regional awareness workshop for the Caribbean countries is being held in Jamaica, in November 2006 on Debt Negotiation and Debt Re-Negotiation.

On a historical aspect, many sovereign countries have got into debt litigations mostly due to lack of proper institutional capacity to deal successfully when confronted with their debts. The debts were bought by the commercial creditors on the share market and were being asked to be repaid by reluctant non participating creditors known as 'Vulture Funds'. Sovereign debtors have thus been faced with litigations and taken to Court for repayment due to creditor non participation to provide for tangible debt relief. It is to be noted that the HIPC Initiative was not a legally binding framework on creditors and did not alter the rights of the commercial creditors to retrieve repayment of their debt through legal means. Hence, a timely resolution of the problem or through alternative dispute resolution methods the economic disruption of the economy will undeniably be limited and will ensure a better growth for the economy.

It is with great endeavour that the Commonwealth Secretariat is envisaging to provide this necessary first referral point to all the HIPC countries which are at various stages of being in distress with respect to debt.

OTHER DEVELOPMENTS

NIGERIA – COPYRIGHT COMMISSION TAKES ACTION AGAINST PIRACY

The Nigerian Copyright Commission has made over thirty arrests regarding piracy. A raid of several markets was carried out in Enugu State. The video cassettes impounded – containing illegally copied music - were said to be worth over N10m. The team of copyright inspectors who carried out the raid were assisted by the police and some video clubs were shut down in the process for failing to secure appropriate licence. The Zonal Manager of the Commission, Mr Emeka Ogbonna said the raid was part of the plan on the strategic action against piracy initiated by the Commission. The arrested persons are to be arraigned before the Federal High Court.

SEVEN YEARS FOR SOFTWARE PIRACY

In one of the largest internet software piracy cases ever prosecuted, the owner of one of the biggest software piracy websites in the United States has been sentenced to over seven years in prison after pleading guilty to two counts of copyright infringement. Nathan Peterson sold copyrighted products by companies such as Microsoft and Adobe Systems at a huge discount on his site -

iBackups.net . The site was shut down in 2005, having operated for two years since 2003. In

addition Mr Peterson was also ordered to pay more than US\$5.4 million and to forfeit the proceeds of his scheme, which included homes, cars and a boat.

NEGOTIATORS MEET ON WIPO BROADCAST TREATY

Government officials have gathered in Geneva to negotiate the World Intellectual Property Organisation (WIPO) Broadcast Treaty which began many years ago as an initiative to address signal theft, following broadcasters' concerns that the international legal framework does not provide adequate protection against theft and misuse of their television and radio signals. The content of most broadcasts is protected by copyright but this is usually retained by movie studios, production companies or sports leagues, not by broadcasters who have to pay for the exclusive right to transmit

the programmes. But there is concern that this move by broadcasters may result in damaging long-term consequences for consumers, technology companies, telecommunications providers and the Internet. This is because the effect is that many new rights would be granted in some countries. These include an exclusive right of retransmission for over-the-air television signals (retransmission involves capturing a broadcast signal and re-broadcasting it without permission of the copyright holder or the original broadcaster) and more than doubling the term of protection for broadcasts to 50 years from the current 20-year term. Some concerns about the adverse consequences - which include the risk of some broadcasts never coming into public domain - are being raised at the WIPO meeting

OECS TO FORM ECONOMIC UNION

The Organisation of Eastern Caribbean States (OECS), a regional institution of nine members, has as its objective the promotion of co-operation, the achievement of the fullest possible level of harmonization of foreign policy and the promotion of economic integration among Member States: Article 3, Treaty of Basseterre. OECS Leaders, during the unveiling of the new Draft Treaty of the OECS in June 2006, signed a Declaration of Intent to form an Economic Union. OECS Chairman, the Hon. W. Baldwin Spencer, has observed that the “achievement of the OECS Economic Union will add value to the wider CARICOM initiative and our participation in the CSME.” The Member States of the OECS are Antigua & Barbuda, Dominica, Grenada, Montserrat, St. Kitts & Nevis, St. Lucia and St. Vincent & The Grenadines.

COMESA SIGNS MOU TO IMPROVE AGRICULTURAL PRODUCTION

The Common Market for Eastern and Southern Africa (COMESA) has signed a Memorandum of Understanding (MOU) with the Food Agriculture and Natural Resource Policy Analysis Network (FANRPAN). The MOU seeks to encourage the exchange of information on food, agriculture and natural resources policy and various other institutional issues relevant to sub-Saharan Africa (SSA). It also seeks to facilitate, where possible, access to relevant research and published materials on agriculture.

OTHER DEVELOPMENTS

The MOU provides the operational framework within which the two organisations will work together to strengthen the understanding of regional international trade agreements and support the formulation of national trade agreements on agriculture, support the formulation of national and regional policies, build shared market information and communication systems and establish a database and promote advocacy on farmer issues.

Both FANRPAN and COMESA agreed to cooperate with relevant national, regional, and international institutions operating within the region in the design, implementation and assessment of capacity building initiatives to achieve maximum impact on matters of common interest.

Dr Lindiwe Sibanda, Chief Executive Officer of FANRPAN, commended the signing saying it will help COMESA and FANRPAN collaborate on finding solutions to the challenges in the agriculture sector which include low productivity due to technological and policy constraints. FANRPAN's objectives include the promotion of appropriate agricultural policies in order to reduce poverty, increase food security and enhance sustainable agricultural development in Southern Africa.

PROPOSALS FOR THE REFORM OF COPYRIGHT LAW IN THE UK

The Association of Independent Music (AIM) has advanced proposals for the reform of copyright law in the United Kingdom (UK). Under these proposals, internet service providers (ISPs) would become liable for illegal file-sharing by their users. The current legislation, the Copyright, Designs and Patents Act 1988 targets peer-to-peer file sharing. Legal action is therefore taken against individuals who upload music without paying the appropriate royalties. ISPs are treated as "mere conduits" of information under the E-commerce Regulations 2002 and therefore bear no liability for the content of illegally shared music downloads, which are not hosted on their servers. David Ferguson, Chairman of the British Academy of Composers & Songwriters, said: "For too long the ISPs have shirked their responsibilities, using music as a tool to sell their own services, whilst making little effort to ensure fair payment to its creators."

Various means of charging ISPs for acting as an "intermediary" between music buyers have been

discussed. It has been suggested that this take the form of a collective licence, similar to the current radio licence in the UK. This would allow ISPs to host file-sharing for a fee that would go to record companies and musicians. AIM has observed that it wants the music industry to create a commercial relationship with any company deriving value from either the sharing or storage of music. The Chair of the discussions, Ms Alison Wenham, has said that the plans were the "most innovative potential answer" to issues in the music industry which current copyright laws do not properly address. (<http://news.bbc.co.uk/2/hi/entertainment/5172816.stm>)

FLAGS OF CONVENIENCE

Flags of Convenience increasingly become one of the ways in which fishermen are able to avoid management and conservation measures in fishing. The flag state of a fishing vessel bears responsibility for that vessel's activities, pursuant to international law. Unfortunately, some countries have exchanged that national right for financial reasons, thus allowing anyone to fly their flags and simultaneously shying away from any repercussive incidents and responsibility. Unscrupulous ship-owners have long used Flags of Convenience (FOC) to evade tax rules, licence regulations, safety standards and social requirements for the treatment of crew. In more recent years, however, as fishing fleets have increased and marine resources plummeted, FOC have increasingly been used as a means of avoiding measures taken by countries or regional fisheries organisations to manage fisheries and conserve stocks. Generally, a "flag of convenience" country is considered to be a country with what is called an open registry, which makes a business from granting its flags to all kinds of vessels, including fishing vessels, that are owned by nationals from other States. These flags of convenience countries can also include any country granting authorisation to a vessel to fly its flag as well as authorisation to fish, if that country lacks the resources (or the will) to monitor and control vessels flying its flag, especially when the fisheries being plundered do not belong to it. A very large proportion of this type of fishing could be eliminated if the loophole in international law that allows states to issue flags of convenience was closed. See <http://www.flagsofconvenience.com>.

Upcoming Activities

Environmental Legal Imperatives for Small States for the Asia Region

Kuala Lumpur, Malaysia, 2-8 October 2006

Debt Management Regional Seminar

Kingston, Jamaica, 6 – 10 November 2006

Landlocked States Meeting

Pretoria, South Africa, 5 – 7 December 2006

Commonwealth meeting of Justices and Registrars of Final/Regional Appellate Courts

Kingston, Jamaica, 22 – 25 January 2007

Barbados, 29 – 30 January 2007

Trinidad & Tobago, 1 – 2 February 2007

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