



JUSTICES AND REGISTRARS MEET IN JAMAICA



Front Row: L to R: Hon. Justice Nadon, Federal Court of Appeal, Canada; Cheryl Thompson-Barrow, Adviser & Head, Law Development Section, Commonwealth Secretariat; Hon. Justice Anderson, Supreme Court of New Zealand; Mrs. Franca Ofor, Principal Researcher, ECOWAS Court of Justice; Hon Justice Samuel Rugege, COMESA Court of Justice. **Middle Row: L to R:** Kimberley Halder, Administrative Assistant, Commonwealth Secretariat; Mr. Gavin Murphy, Editor Commonwealth Law Bulletin, Commonwealth Secretariat; Hon. Justice Kitonga, President, COMESA Court of Justice; Justice Austin L. Davis (Retired), Consultant; Hon. David Coore QC, Former Attorney General, Jamaica. **Back Row: L**

to R: Mr. Keith Sobion, Executive Director, Council of Legal Education; Mr. Christopher M Doogan, Chief Executive & Principal Registrar, High Court of Australia; Mr. Kevin Maguire, Legal Adviser, Commonwealth Secretariat; Rt. Hon. Justice Blanchard, Supreme Court of New Zealand; Mr. Andrew Hampton, General Manager, Ministry of Justice New Zealand.

The Governments of Jamaica and Barbados and the Caribbean Court of Justice played gracious hosts to a meeting of Commonwealth Final/Regional Appellate Courts recently in Jamaica, Barbados and Trinidad from January 22 – February 2. This meeting is a continuation from work mandated by Law Ministers from 2002.

Continued on page 4

Contents

Justices and Registrars Meet in Jamaica	1
HIPC Developments	2
Environment	3
Barbados hosts Justices and Registrars	4
Caribbean Court of Justices welcomes Experts	5
Feature	6
Other Developments	7

VULTURE FUNDS ARE STILL OPERATING

Re: Donegal International Ltd v/s Republic of Zambia

This February 2007, in the UK High Court of Justice, Queen's Bench Division, Commercial Court, judgment was delivered against the Zambian Government to repay its obligations under a debt agreement which it owes to a vulture fund company. The claim is made by Donegal International against the Government of Zambia for a sum of US\$42,305,026.50 together with interest. The total claim is for more than US\$55 million.

- ***The Origin of the Debt***

In 1979, the Romanian Government lent Zambia money to buy Romanian Tractors for a sum of US\$3.2 million. Subsequently Zambia was unable to pay the debt. In 1999, Romania and Zambia started negotiation to liquidate the debt for \$3 million. However, before this negotiation was finalised Romania sold the debt for less than \$4 million to Donegal International, a company based in British Virgin Islands and part owned by US based Debt Advisory International. Donegal International then sued the Zambian Government to obtain \$42 million repayment, which comprised of the debt and its interests.

- ***Confidential information***

The High Court Judge held that he found it impossible to believe that civil servants, whether of a secretarial or more senior level, were entitled to make such disclosure to a third party who was acting not for the purposes of the Zambian government

but to exploit the debt. It was concluded that indeed Donegal International had been seeking and obtaining confidential information about Zambia's debt from officers working within the Ministry. Hence information about a Zambia's debt was confidential and improperly obtained prior to and during the process of the negotiation.

- ***Jurisdiction of UK Court***

Zambia raised a first defence on the Court's jurisdiction to try the claim because Zambia is a sovereign State and is entitled to assert State Immunity in accordance to Section 1 of the State Immunity Act, 1978. However the Judge concluded that Zambia had agreed in writing that they should not be immune regarding the claim that Donegal brought in these proceedings. In addition, a Settlement Agreement, through which Donegal International acquired the debt, does not attract State Immunity. The Court highlighted an interesting point for future consideration, on the issue of immunity prevailing over assigned debt where debts are owed between States even though relating to commercial transactions.

Though the exact total of the repayment has not been finalised the Judge of the High Court decided in favour of Donegal International. It is presumed that he may not order the Zambian government to pay more than \$10 million to \$20 million. The Judge has also discharged the freezing order on the assets of the Zambian government but has however called for arguments on to why there should not a reordering of the freezing of the Zambian governments assets should Donegal International ask the court for it to be so ordered.

BRITISH COURTS TO HEAR TOXIC WASTE CASE

A British Court has agreed to hear a case involving a complaint against international oil trader, Trafigura, which is accused of illegally dumping toxic waste in the Ivory Coast. The case, which would enable the complaints of an estimated 4,000 - 5,000 people to be dealt with, will be one of the UK's largest-ever class actions. The case, which is expected to begin in early 2008, is being pursued through the British Courts as Trafigura's London branch had chartered the vessel which transported the waste, and ultimately, is thought to bear most responsibility for the alleged wrongdoing.

The complainants are seeking financial compensation for injuries suffered when poisonous slops were dumped at several open-air sites. Ten people have reportedly died since the incident. It has been asserted on behalf of the complainants that Trafigura shipped the untreated chemical waste to the Ivory Coast in the knowledge that there were no facilities to treat this waste. Trafigura has denied responsibility, stating that they had entrusted the waste to an Ivorian disposal company, Tommy, which was set up a few weeks before the ship's arrival.

A Report which was commissioned by the Ivorian Prime Minister in November 2006 said that local port, customs and district officials had been negligent and Trafigura had violated the Basel Convention by shipping toxic waste substances to a developing country. Both Ivorian and Dutch authorities have started criminal investigations into the dumping. The United Nations Environment Programme has estimated that the clean-up will cost at least \$30 million.

The Basel Convention seeks to control the movement of hazardous or toxic waste through the operation of a system of prior informed consent. There are however outright bans on the export of these wastes from developed to developing countries. Contracting parties are required to take appropriate measures to implement and enforce its provisions, including measures to prevent and punish conduct in contravention of the Convention.

CANADA PROTECTS NATURAL HERITAGE

Canada has recently announced three major achievements on its protected area agenda, namely, the protection of the world's largest freshwater lake, the doubling in size of its smallest national park and the creation of a new national park.

Lake Superior, which holds about 10 per cent of the world's supply of freshwater and more than half of the water in the Great Lakes, is the world's largest freshwater lake by surface area. By virtue of its designation, Lake Superior has become Canada's largest National Marine Conservation Area (NMCA), and the first such area to be protected under the 2002 National Marine Conservation Areas Act.

Through the acquisition of new lands, Canada's smallest national park, the St. Lawrence Islands National Park, is to double in size. It is thought that the expansion of the park will help to better preserve the ecological integrity of this ecosystem.

Tornat Mountains National Park has also been established, with the support of the Inuit people. The park, to which Inuit stewardship principles apply, was formally created when the Labrador Inuit Land Claims Agreement came into force. The park, which extends from the northern tip of Labrador to Saglek Fjord, covers some 9,600 square kilometres of Eastern Canada's arctic wilderness.

The designation of these protected areas is important insofar as it works to promote sustainable tourism while protecting the land and wildlife for the benefit of local and indigenous communities.

BARBADOS HOSTS JUSTICES AND REGISTRARS



Front Row: L to R: Hon. Justice Nadon, Federal Court of Appeal, Canada; Mrs. Franca Ofor, Principal Researcher, ECOWAS Court of Justice; Hon. Justice Kitonga, President, COMESA Court of Justice; Sir David Simmons Chief Justice, Barbados; Hon Dale Marshall, Attorney General & Minister of Home Affairs, Barbados; Maureen Crane-Scott Q.C. Registrar, Supreme Court, Barbados; Rt. Hon. Justice Blanchard, Supreme Court of New Zealand.

Middle Row: L to R: Professor Albert Fiadjoe, University of the West Indies; Mr. Gavin Murphy; Editor, Commonwealth Law Bulletin, Commonwealth Secretariat; Hon. Justice Rugege, COMESA Court of Justice; Hon. Justice Anderson, Supreme Court of New Zealand; Cheryl Thompson-Barrow, Adviser & Head, Law Development Section, Commonwealth Secretariat; Justice Austin L. Davis (Retired), Consultant; Kimberley Halder, Administrative Assistant, Commonwealth Secretariat.

Back Row: L to R: Mr. Kevin Maguire, Legal Adviser, Commonwealth Secretariat; Mr Andrew

Hampton, General Manager, Ministry of Justice New Zealand; Mr Christopher M Doogan, Chief Executive & Principal Registrar, High Court of Australia; Dr. Daouda Fall, Principal Researcher, ECOWAS Court of Justice.

Continued from page 1

They requested the Commonwealth Secretariat's Legal and Constitutional Affairs Division, to facilitate the process of information sharing among new final appellate Court establishment in commonwealth countries as well as well as collaborate with regional courts. This has been intended to exchange views and foster best practices. Commencing with an Expert Group meeting in 2003; (see http://www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B8035D9C8-6A59-448C-BF50-507DAD8B5BD5%7D_expertgroupreport2003.pdf) followed by a meeting in the newly established Supreme Court of New Zealand with the High Court of Australia from February 24 – March 2. The meetings in the Caribbean allowed all parties to

exchange information; understand the challenges and acknowledge the achievements as credible for utilisation elsewhere. This project is expected to wind up with a visit of the Justices and Registrars, as recommended, to the Judicial Committee of the Privy Council as well as to the Court of Justice of

the European Communities in Luxembourg and the International Court of Justice in The Hague. All findings and recommendations for useful guidance to Commonwealth member countries will be embodied in a text to be distributed to member states.

CARIBBEAN COURT OF JUSTICE WELCOMES DELEGATION



Front Row: L to R: Mrs Franca Ofor, Principal Researcher, ECOWAS Court of Justice; Cheryl Thompson-Barrow, Adviser & Head, Law Development Section, Commonwealth Secretariat; Hon. Mme. Justice Bernard, Caribbean Court of Justice; Rt. Hon. Justice de la Bastide, President, Caribbean Court of Justice; Hon. Justice Anderson, Supreme Court of New Zealand; Hon. Justice Nadon, Federal Court of Appeal; Canada, Kimberley Halder, Administrative Assistant, Commonwealth Secretariat.

Middle Row: L to R: Mr. Andrew Hampton, General Manager, Ministry of Justice New Zealand; Hon. Justice John, Court of Appeal, Trinidad & Tobago; Hon. Justice Mendonça, Court of Appeal, Trinidad & Tobago; Hon. Justice Rugege, COMESA Court of Justice; Mr. Gavin Murphy, Editor

Commonwealth Law Bulletin, Commonwealth Secretariat; Justice Austin L. Davis (Retired), Consultant; Hon. Justice Archie, Court of Appeal, Trinidad & Tobago; Hon. Justice Kitonga, President, COMESA Court of Justice; Mr. Kevin Maguire, Legal Adviser, Commonwealth Secretariat.

Back Row: L to R: Ms. Paul Pierre, Registrar, Caribbean Court of Justice; Hon. Justice Saunders, Caribbean Court of Justice; Hon. Justice Pollard, Caribbean Court of Justice; Hon. Justice Wit, Caribbean Court of Justice; Hon. Justice Hayton, Caribbean Court of Justice; Hon. Justice Nelson, Caribbean Court of Justice; Dr. Daouda Fall, Principal Researcher, ECOWAS Court of Justice; Rt. Hon. Justice Blanchard, Supreme Court of New Zealand; Mr. Christopher M Doogan, Chief Executive & Principal Registrar, High Court of Australia.

TOWARDS REGIONAL ARRANGEMENTS FOR TRANSIT ACCESS TO THE SEA

The right of access to and from the sea for Landlocked States has been confirmed in the 1982 United Nations Convention on the Law of the Sea (UNCLOS). Landlocked States, in order to gain access to the High Seas or to the Exclusive Economic Zone (EEZ), would ultimately be required to transit through a State or States in the region or sub-region. A Transit State is obliged, by virtue Article 125(1) of UNCLOS, to grant these Landlocked States the right of freedom of transit through its territory by all means of transport. The terms and modalities for exercising freedom of transit are to be agreed through bi-lateral, sub-regional or regional arrangements. The only Commonwealth state which is thus far party to such a sub-regional treaty is India, which has agreed transit arrangements with neighbouring Landlocked State, Nepal.

Cheryl Thompson-Barrow, Adviser & Head of the Law Development Section, has observed that, “[t]he geographical location of transit states, *vis a vis* the land-locked States of the Commonwealth, hands the Commonwealth a significant advantage to seek to elaborate the ‘terms and modalities’ required under UNCLOS.”¹ The table below is illustrative of this relationship.

<i>Land-Locked State</i>	<i>Transit land-locked State</i>	<i>Coastal State(s)</i>
Botswana		Namibia, South Africa
Lesotho		South Africa
Malawi		Mozambique, Tanzania
Swaziland		Mozambique, South Africa
Uganda		Kenya, Tanzania
Zambia	Botswana, Malawi	Mozambique, Tanzania, South Africa

The Law Development Section (LDS) has been engaged in the development of treaty templates for transit through a State and access to the EEZ of the Coastal State.. The Bi-lateral Template Treaty on transit – “Transit For Access to the Sea” - seeks to provide a starting point for negotiations between Commonwealth Landlocked, Transit and Coastal States in Africa. The treaty template, in accordance with the grant of rights of access to and from the sea for Landlocked States as contemplated by UNCLOS, provides in Article 4 that traffic-in-transit is not to be subject to any customs duties, taxes or other charges, except such transportation charges as are reasonable or are commensurate with the cost of services rendered in respect of such transit. Article 7 calls for equal treatment for ships flying the flag of the Landlocked State in the maritime ports of the Coastal State, and Article 8 provides that the Coastal State may introduce such measures or restrictions as are necessary for the purpose of protecting its legitimate interests. A Coastal States’ legitimate interests are stated to include: protecting essential security interests; protecting human, animal and plant life; and safeguarding such other interests as may be mutually agreed upon by the Contracting Parties.

The first sub-regional meeting of Coastal and Landlocked States was held in Pretoria, South Africa in December 2006. The meeting noted that there were institutional and co-operative arrangements under the South African Development Community (SADC), which may be utilised in seeking to give effect to these UNCLOS provisions. It is proposed to convene meetings in Mozambique and Zambia in May 2007 to begin the process of negotiation for transit access.

As Ms. Thompson-Barrow has noted, “...the international legal framework of UNCLOS creates a peaceful manner in which States can negotiate access and adhere to their concomitant rights and responsibilities.”² The concept of sustainable development also hereby obtains a more determinate content through the elaboration of regional co-operative arrangements which contribute to the developmental objectives of these states.

¹ Thompson-Barrow, C (2006) A Corridor for Land-locked States, *Commonwealth Law Bulletin*, 32 (1) pp. 67-71

² *ibid*

OTHER DEVELOPMENTS

INDIA REJECTS “EVERGREENING” IN PATENT

As a result of rejecting the application for patenting a “new” cancer drug, a pharmaceutical company, Novartis, has taken the government to court. Generally, patent right will be protected where the related product is new but the increasing practice of “evergreening” by pharmaceutical companies has been of concern mainly for its detrimental effects on the poor. Evergreening takes place where the pharmaceutical company makes trivial changes to existing drugs and attempt to get them re-patented in order to extend – perhaps *ad infinitum* - the length of time they are protected under intellectual property laws. The changes made by Novartis to its existing cancer drug was seen as evergreening and its application was rejected.

Although India’s patent legislation contains pro-public health safeguards, there was concern that if Novartis wins this, it would open the floodgate of litigation for other pharmaceutical companies and allow patent rights to be given broad interpretation which would result in heavy restrictions on the productions of more affordable medicines by Indian drug companies which supply many developing countries. The need to prioritise patients over patent was seen to be imperative given that the view has been expressed that the real losers will be patients, especially those persons living in poverty and are unable to afford drugs which are vital to their health. This is of particular concern to those living with HIV/AIDS. Novartis was urged to drop the case in the interest of global health. Campaigners believed it was time to promote innovation alongside access.

CANADA – COURT AWARDS MAXIMUM STATUTORY DAMAGES IN COUNTERFEITING CASE

A Montreal-based software retailer who lost in a counterfeiting case, has been ordered by the court to pay damages of C\$500,000 - to software giant Microsoft. This is the first time such maximum statutory award has been made in Canada in a counterfeiting case, since being introduced in 1997 under the relevant legislation. Awards have

previously tended to be towards the lower end of the scale.

Additional punitive damages – of C\$100,000 each - was also awarded against the retailer himself and the Company (Inter-Plus). Such award was seen by some as an attempt to address the “counterfeiting problem” in Canada is becoming significant and gaining prominence and attention. The retailer is appealing the decision.

AUSTRALIA – ANTI-POLLUTION WEBSITE CLOSED FOR BREACH OF COPYRIGHT

The website belonging to an anti-coal group in New South Wales (NSW) has been closed down following a notice - issued by the NSW Minerals Council (the Council) under the Copyright Regulations 1969. The Council complained that the content and layout infringed copyright in its own campaign. The Council had invested in a campaign whose slogan is “Life: brought to you by mining”. The anti-coal group, Rising Tide, launched a counter-campaign whose slogan is “Rising sea levels: brought to you by mining” A member of Rising Tide explained that its campaign was a response to growing public concern about coal’s contribution to climate change, and mining’s threat to underground and above ground water supplies. He accused the Council of trying to silence Rising Tide. Although, Rising Tide has reissued the website, using its own photographs and layout, the Council has lodged a second complaint. Making reference to the benefits flowing from the mining industry such as jobs, cheap electricity and export revenue, the Council denied the allegation made by Rising Tide and said that its intention was to establish a fair voice for the mining industry.

Upcoming Activities

Commonwealth HIPC Ministerial Forum Meeting Washington, USA

12 April 2007, Washington, DC

Commonwealth Meeting of Coastal and Landlocked States in Africa

21-25 May 2007, Maputo, Mozambique

28-30 May 2007, Lusaka, Zambia

Commonwealth Meeting of Final/Regional Appellate Courts

2-13 July

Luxembourg, The Hague, London

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