



COMMONWEALTH OPENS ITS HIPC CLINIC WITH FIRST SEMINAR IN THE CARIBBEAN



Participants of the Workshop

The First Regional Seminar organised by the HIPC Clinic was held in the Caribbean Region. It was held in Kingston, Jamaica from 6 to 10 November 2006. The meeting was opened by the Hon. Michael Hylton, the Solicitor General from the Attorney General's Chambers of Jamaica. The Solicitor General observed that the countries in the Caribbean region or anywhere in the world have to take care when contracting debts. Debt repayments have taken

sovereign debtors to critical stages of no return. He acknowledged that countries are facing a great challenge of understanding the meaning of debt sustainability and that Government needs to be aware of the loan contraction system so as not to fall into deeper debts again. He laid emphasis on the loan contraction process and the need to involve a greater participation of the finance and the legal ministries of a country.

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This Seminar sought to meet the mandates of the Law and the Finance Ministers as originally set out by the Heads of Government Meeting in 2003, in the Abuja Meeting. Officials from both the Legal and Finance Ministries of each country were invited to attend.

It was acknowledged throughout the meeting that this blend of officers from the two respective ministries created a highly interactive discussion. It also highlighted the importance of these two officials working together when involved in debt negotiation from an early stage. It was concluded that the present practice of sending the loan agreements to be vetted by the Attorney General's office at the last stages of the loan contraction process was not the best practice. It was unanimously agreed that whilst both officials have their own set up and understanding of the terminologies in an Agreement, their involvement at early stages even prior to approaching creditors for debt contraction was highly essential and most desirable. This would ensure the safeguarding of the interests of the country and prevent the possibility of running into the risk of litigation.

Some countries were asked to report through the medium of case studies of the experiences in their country. Case studies were presented by Grenada, Dominica Guyana and Suriname. Guyana explained how they dealt with the Paris Club Creditors as well as the commercial Creditors. Grenada and Dominica stated that their economy gained a lot from the bond restructuring process undertaken. Suriname made a presentation on the Debt Strategy policy of the

Government. It was also agreed that the office of a legal counsel within the Ministry of Finance similar to that in the Central Banks will be helpful in the whole debt and loan contraction process. It was recommended that such meetings be held on an annual basis to keep up-to-date with debt issues.

Countries represented at the seminar were Antigua and Barbuda, The Bahamas, Barbados, Dominica, Grenada, Guyana, Jamaica, St Kitts & Nevis, St Lucia, and Trinidad and Tobago. In conformity with the mandate given to the Commonwealth Secretariat to extend assistance to all Commonwealth and non-commonwealth HIPC countries, Suriname was also invited to the seminar.

HAITI REACHES DECISION POINT UNDER THE ENHANCED HIPC DEBT RELIEF INITIATIVE

Haiti has been qualified for debt relief under the enhanced Heavily Indebted Poor Country Initiative as it has reached its Decision Point this November 2006. The Republic of Haiti is the 30th country to reach its decision point. The Government of the Republic of Haiti will receive interim debt relief from certain creditors however, it will need to implement the IMF's Poverty Reduction and Growth Facility (PRGF) program and implement its Poverty Reduction Strategy (PRS) for at least one year. It will also have to implement key structural and social reforms in the areas of economic governance and debt management. Once a country is eligible for debt relief it becomes also eligible for Multilateral Debt Relief Initiative (MDRI) Assistance.

SUPREME COURT OF CANADA AMENDS RULES

The Supreme Court of Canada has enacted the *Rules Amending the Rules of the Supreme Court of Canada*. These new amendments to its Rules of Practice came into force on October 13, 2006. The Rules seek to amend the procedure on an Application for Leave to Appeal. Copies of the reasons for judgment from courts below are now to be accepted in the form of a printout from an electronic database. It is also now permissible to fax a notice of application for leave to appeal to all other parties and interveners in the court appealed from, by virtue of Paragraph 26(2)(a). Further, in terms of an Application for Leave to Appeal, the Registrar is no longer required to wait three months before sending notices for dismissal for want of prosecution. The Rules also call for amendments in relation to the computation of time, filing and service of documents, the style of cause, motions and constitutional questions. The former rules are to continue to apply to cases in which the notice of appeal was filed before 13 October, 2006, the date of coming into force of the new rules.

JAMAICA – MOVE TO ADDRESS ACCESS TO JUSTICE ISSUE

As Jamaicans must now possess an entry visa before arriving in the UK, and there is no guarantee of securing a UK visa, the government is concerned that it is no longer able to deliver to Jamaicans, their right to access justice – as guaranteed by the constitution. This is because the Judicial Committee of the Privy Council - which is located in the UK – is the final appellate court for Jamaica and some Commonwealth countries. The Caribbean Court of Justice (CCJ) was established partly to remedy this problem and since the inauguration of the CCJ, the government has passed legislation to accede to its original jurisdiction. However, the government has yet to subscribe to the appellate jurisdiction of the CCJ. A two-thirds majority of both Houses is required to realise this objective. To this effect, the government has prepared two bills to amend the constitution. The first bill would amend section 110 of the constitution to substitute the CCJ for the

Judicial Committee of the Privy Council as the country's final appellate court. The second bill would amend section 49 of the constitution to make section 110 an entrenched section. This latter amendment would require ratification by the electorate before it could become law. The government has expressed firm commitment in urgently addressing the present “intolerable situation”.

AFRICAN REGIONAL COURT SET DATE FOR KENYA'S NARC CASE

The East African Court of Justice (the Court) has heard a case brought by Kenya's ruling National Rainbow Coalition (NARC) about the country's election of its members to the East African Parliament. The respondents in the case are Kenya's Vice President, the Kenyan National Assembly Clerk and the Attorney General. The NARC has sought to stop the swearing-in of the newly elected members from Kenya to the East African Parliament. It claimed that five of its members endorsed by the Kenyan parliament were not submitted by the coalition itself. The three Member States to the East African Community – Kenya, Tanzania and Uganda – each elects nine of its lawmakers to sit in the East African Legislative Assembly (EALA) which is due to swear its newly-elected lawmakers.

The Claimants have demanded a reversal of the election process as they are aggrieved over the procedure applied in the nomination of the ruling NARC candidates. The NARC lawsuit only challenged the identities of the five members from the coalition. It did not touch upon the identities of the four remaining members elected from other political parties sitting in the Kenyan parliament. The trial has been heard *inter partes* rather than *ex partes*, as was prayed by the applicants, for in the view of the Court (as stated by the President of the Court, Justice Moiwo Ole Keiwua), “in this way, justice will be better served.”

MALAYSIA HOSTS FINAL REGIONAL SEMINAR ON THE ENVIRONMENT



The fourth and final Regional Environmental Law seminar was held in Malaysia from 2 – 8 October 2006. The Seminar was opened by greetings from the Attorney General and Minister for Justice of Malaysia, the Hon. Tan Sri Abdul Gani Patail, which was delivered by Parliamentary Draftsman, the Hon Datin Zaleha Yusof. It was observed that environmental problems are no respecters of national frontiers and that therefore cooperative and collective action was vital for the protection of the environment. He noted in particular, the effort made by ASEAN member countries to establish Transboundary Conservation Areas, and welcomed the development of further measures at the national and regional levels to support biodiversity conservation and management. It was emphasized however that continued assistance and support from developed countries for conservation efforts across the globe, through the provision of adequate financial and technical resources, was a matter of great importance.

The meeting undertook a review of the key environmental conventions, highlighting the various cross-cutting themes. Recommendations were made for the development of comprehensive environmental law and policy, noting that action was

required at both the national and regional levels. Regional Representatives from the African Region (Mauritius and Seychelles) explained the various initiatives which were being undertaken in the Indian Ocean Region, in furtherance of the recommendations produced at the Commonwealth Seminar for the African Region. Member states were also advised on the manner in which technical assistance from the Governance and Institutional Development Division of the Commonwealth Secretariat could be accessed.

A study tour to the Cameron Highlands, provided an excellent opportunity for Participants to consider the practicalities of management of eco-tourism and agricultural areas, and to review best practice. The walk through the Mossy Forest, established as a nature reserve under the Forests Act, was particularly instructive in terms of the importance of effective regulation and enforcement. The need for partnership between government, local communities and civil society to address environmental issues was also highlighted.

Countries represented were Bangladesh, Brunei Darussalam, India, Malaysia, Maldives, Pakistan, Singapore, Sri Lanka, as too, regional representatives from Mauritius and Seychelles.

COASTAL AND LANDLOCKED STATES MEET IN PRETORIA



The Law Development Section, in collaboration with the Political Affairs Division, held the first sub-regional seminar for Coastal and Landlocked States in Pretoria, South Africa from 4 – 6 December 2006. The meeting, which was attended by legal and foreign affairs officials, was opened by Ms. Cheryl Thompson-Barrow, who conceived and developed this work programme in accordance with the mandate of Law Ministers. Ms Thompson-Barrow emphasised that the Commonwealth was best placed to facilitate co-operative arrangements between Coastal and Landlocked States in Africa as every Commonwealth Landlocked State has a neighbouring Coastal State with which it may enter into negotiations for the purpose of implementing the 1982 United Nations Convention on the Law of the Sea (UNCLOS).

The meeting undertook a detailed review of the provisions of UNCLOS, focusing in particular on those provisions which relate to the rights and duties of Coastal and Landlocked States. It was noted that a Coastal State may claim from its baselines a 12nm Territorial Sea as an area of national jurisdiction and a further 12nm Contiguous Zone within which its health, fiscal, customs and pollution laws may be applied, as appropriate. The Coastal State may lay claim also to a 200nm Exclusive Economic Zone

(EEZ), within which it may exploit living and non-living resources and may take appropriate measures for the conservation and management of these marine resources. It was explained that Landlocked States who are parties to the Convention, have also been accorded rights under the Convention, which include the right of transit and the right to equitably share in the surplus living resources of the EEZ of neighbouring Coastal States in the region/sub-region. The Convention requires Coastal and Landlocked States to enter into bilateral, sub-regional or regional agreements to give effect to these treaty provisions. The Seminar accordingly sought to encourage and assist Coastal and Landlocked States of Africa to pursue arrangements for the implementation of these provisions, as they relate to transit access to the sea and the sharing of the surplus living resources of the EEZ. Participants were invited to review the Treaty Templates on Transit Access and Access to Living Resources of the EEZ, which were drafted at the (Law Development Section) Commonwealth Seminar for Landlocked States, which was held in Lesotho in November/December 2005.

Countries represented were Botswana, Lesotho, South Africa, Swaziland and Zambia. The Law Development Section was assisted in their legal presentations by Professor Stephen Vasciannie.

THE ROLE OF THE BILATERAL INVESTMENT TREATY IN DEVELOPMENT

The general expectation from foreign direct investment (FDI) is to enhance growth by incorporating new inputs and technologies into production in the recipient country. The rapid proliferation of these treaties – most notably Bilateral Investment Treaties (BITs) – is a demonstration of this expectation. The first BIT was negotiated in 1959 with Pakistan, a Commonwealth country.

The objective of a host government – in negotiating a BIT – is development. This is often matched with the objective of the investor which is to secure the maximum protection for the investment. Both objectives are commonly captured in BITs but whilst investors have consistently achieved their objectives, host government's objectives have a tendency to remain elusive. BITs vary in language mainly to address issues peculiar to the parties, but they retain commonalities such as anti-discrimination rules like national treatment and most-favoured nation (MFN) treatment. National treatment prohibits a state from treating foreign investors and their investments less favourably than national investors and their investment. MFN treatment requires a state to treat investors and investment of one country as well as it treats those of any other third country.

There is no doubt that such equality of treatment gives the foreign investor with a more sophisticated technology an upper hand. In response, the host government will use policy tools to try to address this situation. Performance requirement is one of these tools. This allows a stipulation in the BIT designed to encourage the foreign investor to do more to promote local developments through for example, employment of nationals, transfer of technology and joint ventures with local firms. Whilst host governments regard performance requirements as an important policy tool, investors tend not to share such enthusiasm as they view this tool with scepticism on the basis that it is distorting to trade. The latter position is supported by the increasing move to address investment matters in some multilateral trade agreements such as the WTO's Trade Related Investment Measures (TRIMS) Agreement. The TRIMS prohibits the use of performance requirements in specific areas. In effect therefore, agreements such as the TRIMS set a minimum standard of protection for the foreign investor. Further protection is secured during negotiations of individual BITs between the investor and the host government. This places further restrictions on the government's use of its policy tools because the protection afforded are often sweeping in nature and are done at the expense of domestic socio-economic rights and environmental standards. Such compromise in public interest has become subordinate to the investor's "right" to make profit – a right recognised when an investor sued a host government which reversed a disastrous water privatisation. It is ironic given that BITs are often concluded in the public interest. It is also to be noted that the same BITs which are concluded – yet again - in the public interest are hardly subject to public scrutiny, particularly in the host. In fact they have been referred to as the "better-kept secret" of internal economic regimes. Such scrutiny may help to determine "public interest".

To their credit, governments often use exceptions and other mechanisms to circumvent the restrictions placed on their policy tool but with limited success. There is intense competition between developing countries to attract FDI to their territories. As a result, excessive incentives tend to be given to investors sometimes with detrimental effect on the government's own interest. Some investors have been known to use up these incentives without ever properly investing in the host country before departing. There is no suggestion that incentives should be totally discarded but where incentives are given there should be claw-back provisions to ensure their withdrawal if conditions are not met.

“ALL RIGHTS RESERVED” CANNOT APPLY IN THE DIGITAL AGE

The UK's Institute for Public Policy Research (IPPR) has called for a “private right to copy” in the digital age. This would recognise the new ways people listen to music, watch films and read books. It would decriminalise the millions who break the law by copying from their CDs onto music players. The IPPR felt that copyright issues had been too driven by the music industry. Although the music industry was commended for laying emphasis on illegal distribution and not prosecuting for personal copying, the IPPR felt that this latter aspect which deals with consumer rights should be the responsibility of the government and not the music industry. Recommendations have been made in light of the recent move by government to undertake reform in this area. Noting the rapid growth of the knowledge economy and the increasing steps being taken to replace traditional manufacturing of goods with intangible assets, the IPPR's key recommendation is that any IP policy should recognise that knowledge as a private asset is subordinate to knowledge as a public resource.

MALAYSIA CRACKS DOWN ON PIRACY

Mobile phone dealers have been detained by the authorities in Malaysia for illegally downloading songs from the Internet and selling them as ring tones. Officers raided a shopping mall in Kuala Lumpur and seized laptops containing thousands of such songs. Initial investigations showed that the dealers earned about US\$163 a day from these illegal sales. If convicted of copyright infringement, they could be fined and spend up to five years in jail. The State Director for Domestic Trade and Consumer Affairs Ministry confirmed that at least one-third of some 300 mobile phone outlets in the city were involved in this illegal practice and vowed to crack down on them.

REGISTERING A COMPANY AND INTELLECTUAL PROPERTY LAW

Registering a company name, domain name or using a name in a business for a stipulated period does not constitute a right to use the name in association with a business or product. Further, the right to use such a name cannot be assumed merely because it does not appear on the website ‘Google’. Significantly, ‘Google’ recently experienced difficulties when a search failed to show the use of the word ‘GMAIL’ in relation to electronic messaging.

Businesses are prevented from using names in business by the protections afforded in accordance with intellectual property rights, that is, trade mark law and the law of passing off. The owner of a trade mark who discovers that there has been unauthorised use of their trade mark, could have to change the company name and/or changing stationary, packaging and other branding connected with the goods and services. Such changes will need to take place promptly in order to ensure that proceedings for trade mark infringement and payment of the trade mark owners’ legal costs are avoided.

On registering a trade mark, the owner acquires superior rights to those trade names that may be similar, but are not duly registered. Registering a trade mark provides an impediment to competitors who seek to use a similar trade mark. Moreover, relying on trade mark rights to prevent competitors or pirates from misusing registered trade mark rights is more cost effective than merely relying on unregistered trade marks rights and passing off.

The registered trade mark also adds further protection by preventing other businesses from using the trade mark in that it gives a business the exclusive right to use a distinctive sign in connection with their business and specific services and goods.

Examples of registrable signs include: a name, logo, scent, slogan, colour, hologram or shape. Action signs are also registrable on the condition that they are distinctive. An example of such a sign could be a rotating globe.

Upcoming Activities

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

Kingston, Jamaica
22-25 January 2007

Barbados
29-30 January 2007

Trinidad & Tobago
01-02 February 2007

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