



MOZAMBIQUE HOSTS COASTAL AND LANDLOCKED STATES MEETING



The Law Development Section (**LDS**) held the second sub-regional meeting for Coastal and Landlocked States in Maputo, Mozambique from 21 – 25 May, 2007 and Lusaka, Zambia from 26 – 29 May 2007. The meetings were hosted separately in Mozambique (a Coastal State) and Zambia (a Landlocked State) in order to ensure that all key stakeholders were duly sensitised and that all relevant interests were properly taken into account.

The first such sub-regional meeting was held in Pretoria, South Africa from 4 – 6 December, 2006. Seminars for Commonwealth Landlocked States had previously been held in Swaziland in June 2005 and Lesotho in November 2005.

The Mozambique and Zambia meetings sought to encourage and assist Coastal and Landlocked States of Africa to pursue arrangements for the implementation of the provisions of the 1982 United Nations Convention on the Law of the Sea (UNCLOS), as they relate to access to the sea and the sharing of surplus living resources of the Exclusive Economic Zone (EEZ). To facilitate the realisation of this objective, delegates were encouraged to review the Commonwealth Treaty Templates on Transit Access and Access to the Living Resources of the EEZ so as to ensure that workable provisions were reflected therein.

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HOW SOVEREIGN DEBT EVOLVES IN CRISES

A recent study by the International Monetary Fund has examined the processes which face a country in debt. The study discovered that after the provision of financial assistance to support any needed economic reforms to steer the country on to the path of recovery, certain problems oftentimes evolve. In this regard, it is acknowledged that even though the immediacy of the debt has been controlled due to the financial assistance, the country is thereafter opened up to new vulnerabilities, resulting in its powerlessness to exit from a crisis and continues to reel under the debt burden.

The IMF study indicated that based on an examination of several emerging market crises, the debt ratios of many increased and thus became difficult to enable them to emerge or reverse the situation. Indicative of these problems were the heightened rigidity of multilateral institutions regarding their debts, elevating the level of sovereign liabilities; coupled with, *inter alia*, the inherent frailty of the national financial sector.

In terms of positives, it was seen that with the adoption of appropriate policy adjustments, a restructuring of the sovereign’s liabilities as well as the existence of a favourable external environment, debt levels decline eventually.

In suggesting future mitigation of the debt burden, the study unveils that improvements in the macroeconomic policy responses working in tandem with a strengthening of the institutional framework may help.

See <http://www.imf.org/external/pubs/ft/survey/so/2007/RES057B.htm>

COLLECTIVE ACTION CLAUSES IN DEBT RESTRUCTURING

The question of reduction of the debt restructuring exercise has led to the examination of the Collective Action Clauses (CACs). CACs allow a qualified majority of bondholders to amend by vote, the terms of a bond. This is in contrast to the situation of the Unanimous Action Clauses (UACs). With the UACs, individual bondholder may stymie the process through holding out. The CACs frustrate this approach, thus allowing a speedy resolution. It is for this reason, why CACs now routinely find their way in bonds issues in such financial cities as London and Luxembourg. This inclusion is rarely seen in the United States, with the exception for New York. Questions whether the inclusion of CACs lend value to reduction of the renegotiation process are divided along varying schools of thought. Some believe that “CACs are likely to be an irrelevant dimension of debt contracts in current sovereign debt markets because of the variety of instruments utilised by sovereigns and the implicit IMF guarantee. Nonetheless, under a new international bankruptcy regime like that recently proposed by the IMF, CACs can increase significantly the cost of borrowing for sovereigns...”

See <http://www.sciencedirect.com/science..>

SADC ESTABLISHES TRIBUNAL

The Southern African Development Community (SADC) has established a Tribunal in furtherance of the SADC Treaty. Presently, SADC is a fourteen membership regional association comprised of Angola, Botswana, the Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, the Kingdom of Swaziland, United Republic of Tanzania, Zambia and Zimbabwe.

The inauguration of the Tribunal is seen as another aspect of deepening the integration process within the region. The Tribunal's membership has an equitable geographical distribution.

The position of President is held by Mozambique's Judge President Dr. Luis Mondlane. Other judges are Rigiberto Kambovo of Angola; Onkemetse Tshosa of Botswana; Isaac Mtambo of Malawi; Aringa Pillay of Mauritius; Petrus Damaseb of Namibia; Stanley Maphala of Swaziland; Frederick Were of Tanzania; Frederick Chomba of Zambia and Antonia Guvava of Zimbabwe. M.C.C. Mkandawire of Malawi is the Registrar.

The selection of the Judges was upon the advice of their respective national bodies, bearing in mind the need to satisfy the criteria for holding the highest judicial office in their individual countries.

The Tribunal has put in place measures to secure the integrity of the Tribunal by requiring the Judges to make solemn declarations that they will execute the duties of their office with the utmost impartiality and independence, observing the need to preserve the confidentiality of the proceedings of the Tribunal, pursuant to Article 5 of the SADC Protocol on the Tribunal.

The Tribunal is based in the capital Namibian city of Windhoek and seeks the resolution of any disputes within its member states while simultaneously ensuring conformity with the regional treaty and instruments of association.

It is also the role of the Tribunal to provide Advisory Opinions to the Heads of State and Government Summit, Council of Ministers and other organs of SADC. Under Article 15 of the SADC Protocol on the Tribunal, the jurisdiction of

the Tribunal will hear matters brought to it by aggrieved Member States, as well as disputes between natural or legal persons and States.

To this end, the parties to a matter before the Tribunal are able to call witnesses along with any appropriate experts for whom refunds for appearances are payable from the Office of the Registrar of the Tribunal.

There will be sanctions for failure of witnesses to appear or testify without valid reasons, commensurate with sanctions imposed by the national court of the offending witness. Oaths administered during the course of a hearing will be consistent with national oaths of the persons making such oaths.

Enforcement arrangements for any ruling of the Tribunal will be executed in line with the national arrangements of member states, as if the judgment had been made by a national Court.

"The member states concerned shall prosecute the offender before its competent court at the instance of the Tribunal," say the Rules.

Any judgment of the Tribunal will be transmitted to the parties concerned.



MS SARDIA CENAC MOVES ON

Researcher with the Law Development Section, Ms Sardia Cenac, will be leaving us at the Section and the Commonwealth Secretariat as she returns to her native St. Lucia. Ms. Cenac joined the Section in 2004 and has rendered most valuable and excellent service throughout her stay with us. Regular readers of the LAWD Newsletter will recall her contributions over the years at our missions which have been reported in this Newsletter. Ms Cenac is also credited with writing several feature articles in LAWD relating to various environment issues. Her passion for international environmental law in particular resulted in infusing the project undertakings of the Section with much enthusiasm and passion. We wish her well as she pursues other aspects of a promising legal career.

CANADA – PUBLIC CONSULTATION ON ENVIRONMENTAL ASSESSMENT OF THE CANADA-INDIA FOREIGN INVESTMENT AND PROMOTION AGREEMENT (FIPA)

A consultation document was issued in June for public comments on the Canada-India Foreign Investment and Promotion Agreement (FIPA). Such comments would include the economic, environmental and policy-making impacts on Canada as a result of the FIPA. This is in conformity with the 2001 Framework for Conducting Environmental Assessments of Trade Negotiations (the Framework) which was developed in 2001 as part of Canada's commitment to address environmental concerns. The objective of the Framework was partly to integrate environmental concerns into the negotiating process of investment agreements involving Canada and document how environmental matters are considered during negotiations. The Framework was originally intended to cover an assessment of domestic environmental implications of a new round of trade negotiations at the World Trade Organisation (WTO). A later decision was made to make the framework flexible thus covering bilateral, regional and multilateral negotiations.

The new report followed a Notice of Intent – (issued in 2005) – to conduct an environmental impact assessment. The consultation closed on 25 June. The final report will be released after concluding negotiations on the Canada-India FIPA.

KENYA – CABINET CONSIDERS NEW WILDLIFE POLICY

A new policy document on wildlife including a draft bill is being considered by the Cabinet. The new policy will govern wildlife conservation and management. It proposes a broad range of measures responding to wildlife conservation challenges including the prohibition of sport hunting. It also seeks to balance the needs of the people of Kenya with opportunities for sustainable wildlife conservation and management countrywide.

Provision is also made for compensation for the loss of human life through conflict with animals. The proposal for compensation is one million Kenyan shillings. Other compensations such as those relating to damage and destruction of property by wild animals are left to individuals and communities to be determined giving consideration to mitigating factors.”

The Tourism and Wildlife Minister, Morris Dzoro who officially received the document titled the draft Wildlife Policy and Bill, acknowledged the important role played by stakeholders in developing the policy. He believed that such cooperation was imperative if Kenya is to address the “immense threats and challenges facing wildlife conservation”. Minister Dzoro informed that approval of the document by the government will be followed by the necessary mechanisms for the developing of an implementation plan for the new policy and Bill.

OFFICIALS OF COASTAL AND LANDLOCKED STATES MEET IN ZAMBIA



The Seminar was attended by legal and foreign affairs officials, and included delegates of the core group who met in Swaziland, Lesotho and South Africa in June 2005, November 2005, and December 2006 respectively.

The attendance by legal and foreign affairs officials ensured that appropriate consideration was given to both legal and political issues. The host countries of Mozambique and Zambia had additional representation from other relevant Government Ministries and Agencies.

The meeting in Mozambique was opened by the Minister of Justice, the Hon Esperaca Mahevela on 23rd May 2007. The Hon Minister reviewed in brief the circumstances leading to the adoption of UNCLOS, and noted that “the level of adherence to the Convention and its related implementing instruments is an obvious indication of the degree of importance given to it by the world community

of nations”. Hon Mahevela observed that Mozambique was committed to honouring its obligations under the Convention.

The meeting in Lusaka, Zambia was opened on 28th May 2007 by the Permanent Secretary of the Ministry of Justice, Mrs. Gertrude Imbwae on behalf of the Hon Minister of Justice, Mr. George Kunda. The Hon Minister observed that Zambia, realising the disadvantages of being landlocked and conscious of the potential benefits to be derived, had been the second nation to sign the Convention when it was opened for signature on 7th March 1983. He observed further and stated that “the need for Zambia to domesticate the Convention had become more and more apparent as nations look to the sea as a future source of living”

The countries represented were Botswana, Kenya, Malawi, Mozambique, South Africa, Swaziland, Uganda, United Republic of Tanzania and Zambia.

LEASING – NEW CHALLENGES FOR BUSINESSES IN DEVELOPING ECONOMIES AND ECONOMIES IN TRANSITION

As the world embraces globalisation, it has become necessary for countries to create the necessary structures. This is particularly relevant for developing countries if they are to genuinely exploit the opportunities offered by globalisation. Small, medium and micro businesses constitute a significant part of the economies of these countries but they face problems such as business development services, poor investment climate and weak infrastructure. Another major problem is the lack of access to finance. The best chance of access to finance is the availability of short-term loan at extortionate rates. As a result entrepreneurs involved in businesses at these levels are not able to compete effectively as they lack the up-to-date technology needed by their businesses. As the business gradually takes a downward spiral the impact on the socio-economic position of the entrepreneur is also significant.

Leasing of equipments is one of the ways of addressing the shortcomings experienced by these businesses. Equipments which may be leased range from office equipments to factory equipments. Unlike other systems of raising capital, a down payment is not required for leasing. This allows an entrepreneur to purchase modern equipment for his/her business without significant impact on cashflow. The capital is provided by another company and the entrepreneur makes regular payment for the duration of the lease agreement. An international convention - the UNIDROIT Convention On Leasing - already exist in this area. The Convention regulates cross border leases. Although many countries have signed up to this instrument, many, especially developing countries, are yet to enact the relevant laws which will further encourage investors in making capital available. The UNIDROIT Secretariat decided to provide further assistance by developing a model law on leasing to assist those proposing to or presently in the process of drafting leasing laws. The model law covers both financial leases and operating leases to address the contemporary needs of developing economies and economies in transition. Its broad application is expected to cover not only the present needs of these markets but the likely trends in their development.

The model law is designed to provide uniform rules governing the effects of the leasing agreement (such as enforceability; the running of the supplier's duties to the lessee; priority in relation to liens and liability for death; personal injury or property damage to third parties); the performance of the leasing agreement (such as the irrevocability of the lessee's duties from the time the leasing agreement is entered into, the risk of loss under a lease; the lessee's rights in the event of damage to the leased equipment; the condition for and the consequences of, the lessee's acceptance and rejection of the leased item; the extent of the right of the parties to the leasing agreement to transfer their rights and duties thereunder; the extent of the warranties of the parties to a leasing agreement; the extent of the lessee's duty to maintain and return the leased item). There are also provisions to address default remedies which include the definition of default; the need to give notice; the measure of damages; termination of the leasing agreement and the lessor's right to recover possession and dispose of the leased item where the leasing agreement comes to an end or is terminated. In the course of deliberation on the model law, there was general recognition that parties to a lease agreement will not possess equal bargaining powers and where compensation is to be paid by a weaker party this might impact on the business. Such scenarios have been envisaged by the model law, for example where it expressly states that compensation agreed must not be "grossly excessive". The protection reflected in this area arose from the recognition that one of the rationales behind the developing of the model law is to serve as a tool for combating poverty – its use as a tool of exploitation is therefore not to be encouraged. This is important given that its focus is on micro businesses as well as small and medium enterprises.

The demand for leasing is growing but in order to achieve the objectives of leasing, the necessary mechanisms must be in place to encourage investors' confidence. Adopting the UNIDROIT model law on leasing would be a good indication that the prospects are encouraging. The Law Development Section is working with the UNIDROIT Secretariat towards the finalisation of the draft and subsequent promotion in its Member Countries.

OTHER DEVELOPMENTS

CANADA – CALL FOR NEW LAW ON IP THEFT

The Chairman of a Parliamentary Committee set up to consider the issue of counterfeiting and piracy has called for new laws to counter intellectual property theft. He considered the absence of new laws as “a serious problem for the entire country.” It was suggested that the new laws should include provisions which would give the police wider powers to seize the proceeds of counterfeit crime – as is the case with drugs. Stiffer penalties were also proposed. The proposals took into consideration the danger posed by piracy and counterfeiting activities to the health and safety of all Canadians. Reference was made to the earlier announcement in Vancouver of the seizure of about C\$2.5 million worth of high-quality fake designer apparel found in a container from China. This was compared to other counterfeited products which pose safety problems such as car parts like brake pads and air bags, electrical products, pharmaceuticals and cosmetics. RCMP Chief Superintendent, Mike Cabana gave testimony to the Committee on the seizure in 2005 of over two-and-a-half tonnes of “fake” batteries, one of which exploded on his desk with “quite a bang”.

Concern was also expressed about the fact that illicit camcording of films has taken off in Canada, partly because it is legal to bring a recording device into a movie theatre. Whilst noting the general concerns, experts such as Professor Michael Geist have advised caution on the basis that the statistics appear to be exaggerated by industry experts. Professor Geist recommended a more rigorous examination of the problem, including drawing distinctions between fake products like car brakes or batteries that could hurt consumers and counterfeit products like designer apparel that pose no safety concerns.

Meanwhile the Prime Minister Stephen Harper at a meeting with the visiting Governor of California, Arnold Schwarzenegger has informed of a proposed bill to ban movie piracy.

NIGERIA – NEW COPYRIGHT REGULATION TO COUNTER PIRACY

The Director General (DG) of the Nigerian Copyright Commission has presented the new Copyright (Optical Disc Plants) Regulation which seeks to check piracy especially from the point of production (and importation) of creative works. The DG noted that this was in response to concern about increase in piracy of copyright works following the establishment of many domestic optical discs manufacturing and duplicating facilities which has increased from two to fourteen over the past ten years.

The DG described piracy as a cancer that has eaten deep into the fabric of the nation’s intellectual component – an important component for nation building, he noted. He remarked that copyright crime exists as a stimulant to creative production and by extension paves way for access to the worldwide resources of knowledge which is necessary for advancement in various sectors of the nation’s life.

The Regulation is part of the Strategic Action Against Piracy (STRAP) launched by the former President in May 2005. STRAP is aimed at keeping track of persons engaged in manufacturing, duplicating, importing and exporting of Optical Discs in the country. The DG explained that the intention is to entrench high standards of Copyright practise amongst such persons, detecting and tracing the sources of any pirated or unauthorised products and punishing infractions perpetrated in the course of such businesses.

Measures featured in the law include administrative as well as punitive measures. These range from revocation, suspension and non-renewal of licence to fines and imprisonment.

Many artists who attended the presentation condemned piracy in its entirety and viewed it as the “worst form of criminality”. They recommended that the fight against piracy must be conducted with the same vigour as that of the fight against counterfeited drugs.

Upcoming Activities

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

July 2- 6
Luxembourg City, Luxembourg,
The Hague, Netherlands

July 9 – 13
London, UK

Meeting of Senior Officials of Law Ministries

October 1 – 3
London, UK

Meeting of Law Ministers of Small Commonwealth Jurisdictions

October 4 - 5
London, UK

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