



LCAD Hosts Law Ministers of Small Commonwealth Jurisdictions



Ministers and Attorneys General with Commonwealth Deputy Secretary-General, Florence Mugasha, at Marlborough House.

The Law Ministers of Small Commonwealth Jurisdictions have met in October (21-22) to discuss matters of common concerns. Member Countries represented include small island states of the Caribbean and Pacific, and African countries as well. Issues which were presented for considerations include the implementation of Article 76 of United Nations Convention on the Law of the Sea (UNCLOS) which deals with the extension of the outer limits of the continental shelf of Member States. Under the same convention, issues relating to land-locked and geographically disadvantaged states were also examined. These include the right of

innocent passage, right on the high seas, right of access to and from the sea and the right of freedom of transit. New rights such as the right to living resources were also addressed. The meeting also considered other areas such the implications of the convention on biological diversity and the Cartagena protocol on bio-safety on small and developing states. Poverty reduction in the context of gender and property rights also received attention. The meeting was opened by Deputy Secretary-General, Florence Mugasha and chaired by Hon. A J Nicholson, Attorney General and Minister of Justice, Jamaica.

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HIPC Ministers Meet to Consider Progress

Ministers of the Highly Indebted Poor Countries (HIPC) have met in St Kitts and Nevis in September to review developments in the implementation of its initiative and assess the progress made on recommendations from its last meeting in Freetown, Sierra Leone.

The Ministers were pleased that the number of countries which had completed implementation had risen significantly and they welcomed the understanding of the G8 governments who had agreed to extend the Sunset Clause – the deadline for fulfilling debt obligations - by two years. Consequently, they were aware that challenges persist for the countries in starting and completing the HIPC process even with the new Sunset Clause. Flexibility would therefore be needed in some cases. In view of this, the Ministers called for increased flexibility regarding the track record, arrears clearance and the use of debt relief funds for reconstruction and rehabilitation.

The Ministers were concerned about the non-participation of a number of non-Paris Club bilateral, smaller multilateral and commercial creditors in the HIPC initiative. Efforts are being made to bring these creditors on board. They regretted that some creditors had brought litigation

against a number of HIPCs. Tactics had also been applied to pressure them into making payments from funds intended for poverty reducing activities. They reiterated the need for a more pro-active approach by governments of countries where commercial creditors resided, including introduction of legal protection in their jurisdictions which ensured that HIPCs receive as a minimum, debt relief on terms equivalent to the HIPC framework. The Ministers expressed appreciation for the Secretariat's report – **Dealing with Sovereign Debt in Distress: Some Key Financial and Legal Aspects – which** explores the possible options in minimising the chances of litigation against HIPCs and suggests strategies to adopt in the event of such litigation. They endorsed the key recommendations of the report. Given the legal implications, the report was also presented to presented to the SOLM at their London meeting.

The Ministers also welcomed the framework for lending and external assistance being prepared by the World Bank and the IMF for enabling long term debt sustainability in low income countries while facilitating access to financing for the Millennium Development Goals (MDGs). They stressed that any assessment of debt sustainability must take account of the burden of domestic debt and must, among others, be conducive to growth and poverty reduction. The ministers' next meeting will be in Mozambique in 2005.

SOLM Discuss Law Developments

Senior Officials of Law Ministries (SOLM) met in London in October (18-20) to consider the activities of the Secretariat in legal areas and examine the way forward on other issues of importance to Commonwealth Law Ministers. The meeting was chaired by The Hon K C Kamalabayson, Attorney General of Sri Lanka. Countries represented at the meeting were from a broad spectrum of the regions of the 53 member countries of the Commonwealth. Matters considered are summarised as follows:

- Monitoring by LCAD and contributing to the progress of the Hague Convention on Private International Law as well as the Commonwealth Co-operation in the International Recovery of Child Support and Other Forms of family Maintenance;
- The proposed legal options of member countries which are faced with or are about to be the subject of litigation for sovereign debts (see related article on page 2).
- Provisions for the possibility of a binding obligation in the area of corporate social responsibility;
- Updates on the redraft of the model competition bill to be reflective of small and developing sectors of economies which have been unable to compete effectively;
- The recent work of the Secretariat in informing Law Ministers of global activities relating to the protection, preservation and recognition of traditional and cultural knowledge.

Other areas of note under deliberation by the SOLM included examination of:

- The enhancement provisions of the Commonwealth Harare Scheme on mutual assistance in criminal matters to encourage asset-sharing, emphasising on compensation for victims of terrorism;
- Inclusion of new provisions relating to the interception of communications (including computer communications);
- Whether or not to redraft the Commonwealth Statement relating to Basic principles of Justice for Victims of Crime with more involvement of NGOs in providing redress for victims;

- Whether the model legislation on evidence has been utilised by member countries and possible areas for future reviews which includes the interception of communications and electronic surveillance;
- The constitutional right to justice, problems of access and current trends in providing access to justice, such as pro bono work, community based legal advice, legal aid and public interest litigation, among others.
- The balance to be achieved between the need to protect personal privacy and the need to make exemption for public sectors such as law enforcement and national security agencies in order to perform their functions effectively.
- in view of the growing issue of corruption in the Commonwealth judiciaries, the need to strengthen integrity by providing protection from being exposed to attack from extraneous sources.
- implementing the WTO agreement on affordable



Senior Officials deliberating at Marlborough House.

drugs which would enable, developing countries in particular, small jurisdictions and least developed countries, with insufficient or no manufacturing capacities in the pharmaceutical sector to benefit from the agreement.

The meeting commended the work of LCAD in the various areas presented and the work of the Secretariat as a whole in its undertakings of law. They looked forward to making appropriate recommendations to Commonwealth Law Ministers at their next meeting in 2005 in Ghana.

AUSTRALIA – Senate Gets Tough on Net Porn

The Senate in August passed the Telecommunications Offences Act. Under the Act, anyone who transmit or make available child pornography or child abuse material will face up to 10 years in jail. Other offences include possessing or producing child pornography with intent to publish it on the internet and where a person who has won a child's trust uses a telecommunications service to set up a meeting with the child for sex purposes. The difficulty of the nature of porn materials are recognised and access to this would require ministerial approval.

AUSTRALIA - New Law Raises Privacy Concerns

Civil liberties group are expressing concerns over a bill being debated in Parliament which could allow authorities easy access to private, stored emails without a warrant. Under current laws, unopened emails can only be accessed if they involve serious crime or with the issuance of a telecommunications intercept warrant. However, if the new bill is passed this would not be necessary in some cases. This would raise the level of infringement of privacy and concerns are being raised about such serious threat. The government has defended the Bill on the basis that such amendment would provide clarification between government departments as to when an interception warrant was required. Also, non-police bodies such as the Competition and Consumer Commission would also benefit from access to such emails as it would be easy to police laws which include competition and investment laws.

BANGLADESH to Enact Law Leading to Electronic Business

The government has produced a final draft of a bill relating to technology. The Information Technology Bill would address issues such as electronic transaction, digital signatures, combating cyber crimes amongst others. The Bill will allow businesses

and banks to settle transaction electronically and digital signature will enable users to transfer cash online via Internet without physical movement. The preparation of the bill was widely debated and it was ensured that stakeholders' views were taken into consideration. Bangladesh already has an Information and Communication Technology (ICT) policy which had been in place since October 2002. The government is now transforming the policy into an Act to keep up with latest developments.

The business sector which has been pressing the government for such law, welcomed the development and said that apart from giving e-commerce a boost, the law will also allow law enforcement agencies to curb the growing problem of cyber crime in the country.

INDIA – New Law Threatens Privacy

The governor of Karnataka State in Southern India has announced plans to pass new regulations forcing cyber cafés to provide police with a register of names and addresses of all their clients. The law would oblige users to either produce ID or be photographed when using a webcam. The information gathered would be retained in a register for one year and would be regularly checked by the police. The governor said that such law was necessary to fight cyber crimes and terrorism. The move has however been condemned by the organisation, Reporters Without Borders which argue that this poses a threat to confidentiality as the rules do not observe the standards of a democracy in protecting personal freedoms. It further argued that the fight against terrorism and cyber crime should not lead to systematic monitoring of internet users. The law is now being put on hold following strong objections from cyber café owners.

MALAYSIA – Islamic Authority Rules Against Mobile Phone Contests

The highest Islamic authority in Malaysia, the National Fatwa Council has issued a religious decree against the practice of entering contests via mobile

phone, in which participants vie for prizes by sending short messaging service (SMS). The decree was said to have been issued on the grounds that it exploits consumers and have elements of gambling which is against the teachings of Islam. The decision was made after consultations with various bodies including state muftis, information technology experts and consumers.

NEW ZEALAND – Marketing Industry Oppose Anti-Spam Bill

The Sales and Marketing Institute of New Zealand has issued a statement to dispute the need to enact legislation on spam. It argued that businesses should be able to communicate with their customers at any time and the internet should not be treated differently from any other communications medium. Whilst accepting that spam practice is annoying, the Institute felt that it was not necessary to regulate businesses in this area since sending unwanted, unsolicited emails to customers is not conducive to responsible marketing. It believed that an anti-spam law will do nothing to stem the tide of spam from overseas.

NIGERIA – Computer Security and Protection Draft Bill Finalised

The Attorney General has announced that the computer security and protection draft bill has been completed. When passed into law, it would impact positively on the lives of all Nigerians. The proposed bill which seeks to regulate the security of computer systems and networks, deals with various issues such as unauthorised access to computer systems, access which exceeds authorisation, systems intrusion, data interference, pornography, illegal communications, vandalism, cyberterrorism, cyber-soliciting, among others. The Attorney General felt that these matters are consistent with trends in other countries. Internet Service Providers (ISPs) are under obligation to retain relevant traffic and transactional records of all activities on their networks and systems. A body is created under the bill to administer its provisions.

SRI LANKA - Legal history created with enjoining order on Web Publication

Sri Lanka made legal history when the Colombo District Court issued for the first time, an enjoining order to restrain a defendant from publishing and continuing to publish an article “Monks life in danger – Kotalawela behind the move” on a Sinhala website for a fortnight. The application was made by Mr Kotalawela, the Chairman and founder of a group of companies called Ceylinco, who claimed that the publishing of the article is defamatory. Judgment was entered against the defendant in the sum of 500 million rupees.

The Plaintiff prayed for a permanent injunction restraining the Defendant, who is the author and the webmaster of the website, “Sinhala.net” from publishing and to continuing to publish the said article in the “Sinhala.net” internet site or any other internet site operated by the Defendant.

ZAMBIA - Parliament Passes Cyber Crime Law

The parliament has unanimously passed a tough law in August to curb cyber crime. The law provides jail sentences ranging from 15 to 25 years for those convicted of computer crimes.

Parliament was unanimous in the passing of the law as there was no prior debate or objection to the law. The new law also enjoys support from the commercial sector particularly the banks who had been concerned that electronic fraud was becoming rampant in the financial sector and the provisions in the law were inadequate to deal with it. The new law would also help to curb other growing cyber crimes. The most famous cyber crime offence in the country was that of a young hacker who accessed the State House website and replaced the president’s picture with a cartoon. The case was dropped because he could not be prosecuted under the present laws.

Environmental Legal Imperatives for Small States

The Law Development Section has commenced its project on the Environmental Legal Implications for Small States of certain Multilateral Environmental Agreements. It focuses in particular, on the **1992 Convention on Biological Diversity, (CBD), the Cartagena Protocol on Bio Safety and Part V of the United Nations Convention on the Law Of the Sea.** The Section monitors recent international law developments which fit within this broad framework for biodiversity management, and which therefore contribute to achieving sustainable development.

The Cartagena Protocol on Biosafety is one of the tools for implementing the **CBD**, and is very important particularly for developing countries. It establishes an “international, legally binding framework that allows countries to make informed decisions on the import of GMOs into their country.” (Klaus Töpfer, UNEP) Since entering into force on the 11th September 2003, a further 13 Commonwealth States have ratified the Protocol; 11 of which are developing countries.

The **International Treaty on Plant Genetic Resources for Food and Agriculture** entered into force on the 29th June, 2004. Of the 55 countries that have ratified it, 11 are Commonwealth States. The Convention is important insofar as it brings into focus the fact that “agro-biodiversity is the basis for our food system today and the key to our present and future food security.” (Yap & Wright, p.72)

Plant genetic resources for food and agriculture are defined as “any genetic material of plant origin of actual or potential value for food and agriculture”. In harmony with the CBD, the treaty’s objective is the conservation and sustainable use of these resources, and the fair and equitable sharing of benefits derived from

their application. In furtherance of this objective, it creates a Multilateral System for Access and Benefit Sharing, which covers 64 major crops and forages. The Convention is important also in that it explicitly recognises Farmers’ Rights; the first such binding international agreement to do so. The treaty acknowledges that responsibility for according due recognition to farmers’ rights rests with national governments, and encourages them to take appropriate measures in this respect.

The **International Convention for the Control and Management of Ships Ballast Water & Sediments** was adopted by consensus on the 13th February, 2004 and will enter into force 12 months after the 30th ratification. Alien invasive species are noted as being one of the four greatest threats to the world’s oceans. The Convention therefore seeks to prevent, minimize and ultimately eliminate the transfer of these harmful aquatic organisms, through the control and management of ships’ ballast water and sediments.

The regulation of trade in endangered species is also an important part of biodiversity management. At the 13th Conference of the Parties to the **1993 Convention on International Trade in Endangered Species** (2-14 October, 2004), national governments have been urged to take stronger action to combat wildlife crime, in view of the Law Enforcement Expert Groups finding that the illicit trafficking of wildlife continues at high levels.

The frequent reports of the freak weather conditions being experienced in different parts of the world and particularly in the developing countries of the Commonwealth may be taken as proof of the serious negative impacts of climate change. The 1997 Kyoto Protocol on climate change may soon enter into force if the decision of the Russian cabinet to forward the Protocol to the Russian Parliament for ratification becomes a reality.

THE BAHAMAS – Halts further Tax Information Agreement

The government has decided not to enter into any more tax information exchange agreements (TIEA) until a level playing field is achieved with other OECD members. The TIEA was introduced under the cooperation arrangement with some Commonwealth member countries in order to prevent “harmful” tax competitions by OECD countries. The concerned countries had submitted that if this was to be effective there should be agreement in place which promotes genuine information exchange.

CANADA – Privacy Law not a Litigation Shield Ontario Court Held

An Ontario court has denied an attempt to refuse disclosure of information during a discovery process on privacy grounds. Canada’s privacy law contains an exception for compliance with the rules of court relating to the production of information. The case, *Clustercraft Jewellery manufacturing v Wygee Holdings* can be viewed at www.canlii.org/on/cas/onsc/2004onsc11636.html

CANADA – Company fined US\$147,000 for Obstructing Cartel Investigation

A company has been fined by an Ottawa court after pleading guilty to obstructing investigation in a cartel. The company, Morgan Crucible (a British company), admitted that it willfully provided false and incomplete evidence during an investigation into price fixing by the Canadian Competition Commission. The cartel was between manufacturers of carbon brushes and current collectors-products that transfer electrical current from wires and rails to subways, streetcars and small railway trains. In a related proceeding, Morganite Canada Corp (Morgan Crucible’s Canadian affiliate) was fined US\$ 341,000 after it pleaded guilty to charges of implementing unlawful pricing directives from its Welsh affiliate, Morganite Electrical Carbon Ltd. This fine comes in addition to the previous fine imposed on the company by the United States

government. The European Commission had also imposed fines totaling 101.44 million euro on five companies involved in the cartel. Morgan Crucible received full immunity through the leniency programme because it was the first to give information on the cartel.

JAMAICA – New Bill towards Realization of the Caribbean Court of Justice

The House of Representatives has passed the CCJ (Constitutional Amendment) Bill. The Bill is the first of three Bills relating to the establishment of the Caribbean Court of Justice (CCJ) and the removal of the jurisdiction of the UK’s Judicial Committee of the Privy Council (JCPC). Although, some felt that a referendum should have been part of the process of abolishing the right of appeal to the JCPC, the Prime Minister said that this was unjustified because the Constitution, as framed, does not require a public vote to enact legislation to repeal and replace the relevant section of the Constitution which relates to the appeals to the JCPC.

KENYA - New Law to Curb Counterfeit Products

The Government has announced plans to introduce a new law to curb the sale of counterfeit products and substandard goods in the domestic market. The law, when passed, will aggravate penalties on importers of such products. It will also seal the loopholes which are currently being used by importers and distributors of such products. This came as a result of the realisation that not only is this costing the loss of job opportunities but Kenya was also losing up to 20 million shillings in unpaid taxes. Such goods are also unfairly competition with authentic brands and this greatly undermines the achievement of the national goal of industrial transformation. Mr Michael Wawery, the Kenya Revenue Authority Commissioner General who made this announcement also warned that the international campaign against terrorism and its sources of funding is being directed towards the lucrative trade in pirated and counterfeit goods in East Africa region.

Upcoming Activities

1-5 November 2004

Law and Technology Workshop for the Pacific Region
Wellington, New Zealand

8 – 12 November 2004

Expert Group Meeting for the Pacific Region to
Examine the Commonwealth Draft Model Bill on Competition
Apia, Samoa

13 – 17 December 2004

Expert Group Meeting for the Caribbean Region to
Examine the Commonwealth Draft Model Bill on Competition
Nassau, The Bahamas

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