



## South Africa Hosts Final Law and Technology Workshop



Participants of the Workshop

The regional series of Law and Technology Workshops by the Commonwealth Secretariat relating to eGovernance, ended with this fourth and final delivery for Africa which was held in Cape Town, South Africa. The previous meetings were held in the Caribbean region in Kingston, Jamaica in November 2003; in the Asia region in Colombo, Sri Lanka in June 2004; and in the Pacific region in Wellington, New Zealand in November 2004 respectively. These Workshops have been designed to build capacity by Member Countries at both the legislative and technology levels to prepare member countries in conceptualizing eGovernance strategies and to promote the adaptation/adoption of the eGovernance model laws developed by the Secretariat and approved by Commonwealth Law Ministers in 2002.

Member Countries who require technical assistance to commence the appropriate legal framework and technology input will now need to address these concerns to the Governance and Institutional Affairs Division of the Commonwealth Secretariat.

Countries represented were Botswana, Cameroon, The Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Mozambique, Seychelles, South Africa, Swaziland, Uganda, United Republic of Tanzania, and Zambia.

The Opening Address was delivered by the Hon. Ms Bridgitte Sylvia Mabandla, Minister of Justice and Constitutional Development of the Republic of South Africa.

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### SWAZILAND – ENVIRONMENT LAW ENFORCEMENT GETS NEW TEETH

Swaziland now has a national enforcement agency to ensure that environmental laws are implemented. The recently constituted Swaziland Environment Authority (SEA) is now armed with enforcement powers; the previous board having had no such authority. The SEA can take action, which includes the power to levy fines, against private persons and companies who breach the kingdom's environmental laws.

### SOUTH AFRICA – HIGH COURT REVOKES APPROVAL FOR NUCLEAR POWER PLANT

A decision by the South African Government to grant permission to a company to build a mini-nuclear reactor was set aside by the Cape Town High Court as being "procedurally unfair". The Court accepted that the applicant, Earthlife Africa, had not been given the opportunity to be heard before the granting of the authorization. It was not deemed necessary to deal with the other issues raised by Earthlife Africa, that is, that the responsible department had not properly addressed the problems posed by nuclear waste, and that the Director-General had abdicated responsibility to properly consider safety issues by deferring to the national nuclear regulator. The Government has indicated an intention to appeal the High Court decision.

### CANADA TO MEET KYOTO TARGETS

Canada, in April, released a seven year plan to cut emissions of greenhouse gases and thereby meet its commitments under the Kyoto Protocol, which entered into force on 16 February, 2005. Large emitters such as the gas industry, mining and manufacturing sectors are to cut emissions by 45 megatons a year, under the new plan. It has been noted that the plan would also involve purchasing credits abroad from countries that are under their Kyoto targets, and for domestic measures such as helping to finance the phasing out of coal-fired power plants.

### MALAWI AND ZAMBIA DRAFT TRANS-BORDER CONSERVATION TREATY

Malawi and Zambia have drafted a treaty to guide the conservation of wildlife in protected areas close to their shared border. The treaty provides that the two nations are to promote bilateral management of ecological and cultural resources by setting up trans-frontier conservation areas (TFCAs) and promote international partnerships between government agencies and other stakeholders. It has been noted that the aim is to enhance ecosystem integrity by harmonizing wildlife management procedures and removing barriers that inhibit natural movement of wildlife. The two countries pledge to develop strategies to ensure that local communities can participate in, and tangibly benefit from, the management and sustainable use of natural

resources that occur within the TFCA. The concept of cross-order protected area management is formulated in the South African Development Community's (SADC) Protocol on Wildlife Conservation and Law Enforcement. Both Malawi and Zambia are signatories to this protocol.

### INDIA SEIZES PROTECTED SHARKS

Indian authorities in Calcutta have seized the remains of 41 endangered sharks caught in the Bay of Bengal that were to be served as delicacies in local restaurants. Authorities also arrested 14 persons in the raid. The sharks are protected under India's Wildlife Protection Act. A person convicted of killing protected animals, including sharks, can be jailed for up to seven years or fined a maximum of 25 000 rupees, or both.

### NEW ZEALAND TO UNDERTAKE OCEAN SURVEY

The New Zealand Government has embarked upon a 15 year survey of the country's ocean resources. In order to gain sovereignty over more of the continental shelf, New Zealand must investigate the sea bottom, prove its extent and lodge its submission with the UN Commission on the Limits of the Continental Shelf by 2009. The information to be gathered during this survey is noted as being important to enable New Zealand, which has the world's fourth largest exclusive economic zone, to meet its responsibilities and assert its rights in international law.

### ZAMBIA FINES COMPANY FOR POOR ENVIRONMENTAL MANAGEMENT

The Environment Council of Zambia (ECZ) has fined a company more than K8.8 million for poor environmental practices at its garage. The Company was found to be in breach of Zambia's Environmental Protection and Pollution Control Act 1990 and its subsidiary regulations, by its failure to obtain a licence to discharge effluent into the environment, to transport solid waste and to generate or store hazardous waste. ECZ has directed that the company immediately stop the indiscriminate dumping of effluent into the open

environment, and has also required the company to put in proper effluent treatment system-oil traps and to apply for the requisite licences

### FIJI TO IMPLEMENT UNCLOS AND DRAW UP MARITIME BOUNDARIES

Fiji Islands is currently seeking to review and update its national maritime zones legislation in order to make it compatible with the United Nations Convention on the Law of the Sea (UNCLOS). Such a review is important also, in that it will facilitate maritime boundary negotiations with neighbouring states. A study is also to be undertaken on the possibility for Fiji to make an extended continental shelf claim to the UN Commission on the Limits of the Continental Shelf. The Commonwealth Secretariat is assisting the Government of Fiji in these endeavours.

### EMISSIONS CREDIT UNDER PROTOCOL COULD BENEFIT FIJI

Fiji will be the first world's country to put up for sale its certified carbon emissions reduction credits under the Kyoto Protocol through an international bank.

Fiji Electricity Authority's carbon emission savings will be sold to a British energy company through a designated bank. Joe Mar, Authority chairman, said the sale was permitted under the Kyoto Protocol agreement.

Participating nations under the environmental protocol are given ceiling limits for industrial air emissions they create, after which they may purchase "credits" from nations whose emissions are below their own limits. The objective of the agreement is to substantially reduce overall world air pollution levels that may be responsible for global warming, the effects of which may have created a rise in sea levels.

Mar said Fiji met its emission targets when it constructed 2 hydroelectric plants, which would help to decrease potential carbon emissions into the atmosphere.

The Fiji authority could benefit by hundreds of thousands of dollars annually through the sale of carbon credits.

## Experts Confer on Commonwealth Draft Model Bill on Competition in Seychelles



Members of the Africa Expert Group Meeting

The fourth and final in the series of regional expert group meetings relating to the Commonwealth Draft Model Bill on Competition took place in Mahé, Seychelles on 4 – 8 April, 2005. This diverse grouping had the opportunity to express their views and share experiences in the area of competition law and policy, and to consider the views of other meetings. Their deliberations were further enhanced by contributions from representatives of the Secretariats of the Community of Eastern and Southern Africa (COMESA), the Economic Community of Western African States (ECOWAS) and UNCTAD.

The experts substantively debated the core provisions of the Model Bill such as the abuse of dominant position, cartels and related core provisions which could feature in commercial agreements. The meeting proposed substantive amendments to the draft Model Bill, taking into account in particular, the needs of vulnerable sectors of the economy. This was reflective of the instructions of Law Ministers to make the final

Model bill compliant with international standards and to duly take into account the interests of small and developing jurisdictions. Countries represented at the meeting were Botswana, Cameroon, Ghana, The Gambia, Kenya, Lesotho, Malawi, Mauritius, Namibia, Seychelles, Sierra Leone, South Africa and Swaziland.

A final meeting on Competition is to be held in London, and will bring together experts from each region so as to reach a final consensus on amendments to the Bill. Experts for this final meeting will hail from Belize, Fiji Islands, Jamaica, Kenya, Maldives, Malaysia, Mauritius, Papua New Guinea, Seychelles, Singapore and South Africa. A Report and final draft will then be formalized to be submitted to Law Ministers for their contemplation in their Meeting in Ghana in October, 2005.

## PROTECTING TRADITIONAL CULTURAL EXPRESSIONS: POLICY ISSUES AND CONSIDERATIONS FROM A COPYRIGHT PERSPECTIVE

In recent years many countries, particularly in the developing world, but also Aboriginal and local communities elsewhere, have expressed concerns that intellectual property (IP) law does not adequately protect their traditional knowledge (TK) from inappropriate use by a member of their community or other third parties. It has been suggested that inappropriate use of traditional knowledge demonstrates a lack of respect and appreciation of TK. Furthermore, this use often results in few, if any, economic benefits flowing to the holders of that knowledge.

The term TK is a wide one, and may encompass a number of subject areas such as technical innovations, knowledge of the land and other natural resources, religious beliefs, and artistic expressions. A key component of TK is generally referred to as “expressions of folklore” or more recently as “traditional cultural expressions” (TCEs). These expressions comprise literary, dramatic, musical and artistic works that generally come within the scope of copyright law provisions.

The possible application of IP law to help provide protection to TCEs reflects a convergence of two broad international themes: first, efforts to safeguard the world’s tangible and intangible cultural heritage, and how to ensure that this heritage is successfully passed on to future generations; and second, rapid changes in the world of IP in response to the increasing globalisation of trade and the widespread application of modern information-based technologies.

Industrialised countries have pushed for stronger and more harmonised national IP regimes in recent years, including greater enforcement of IP rights. In particular, the Trade-Related Aspects of Intellectual Property Rights (TRIPS) Agreement, which is the most significant international IP agreement, sets

minimum standards for member states to adhere to. Globalisation has led to growing concerns about protection of the world’s tangible and intangible heritage. Intergovernmental agencies such as the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and the World Intellectual Property Organisation (WIPO) are actively considering methods and procedures to protect TK, including TCEs. The 1970s and 1980s also saw the emergence of greater awareness and appreciation of the TK of Aboriginal and local communities and in 2000, WIPO created the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).

Debate concerning the possible application of IP law to protect TCEs is often complex and time-consuming. There is not always a common consensus of the appropriate nature and scope of IP law, including its policy objectives on the one hand, and the range of TCEs that may require protection, or even the most suitable form of protection to achieve meaningful results, on the other.

Nevertheless, a key preliminary step in seeking to identify a possible IP solution for the protection of TCEs is to have a fundamental understanding of factors such as the objective of the protection, who exactly should be protected, the scope of subject matter requiring protection, and how any new IP rights for TCEs would work together with existing IP rights and the public domain. Also relevant to this dialogue is the assessment of how to enhance protection for TCEs while at the same time allowing people to study, experience and share from one another’s knowledge, ideas and other components of culture in an appropriate fashion.

The Commonwealth Secretariat’s work portfolio will continue to take focus on these issues, particularly as they relate to small states.

### INAUGURATION OF THE CARIBBEAN COURT OF JUSTICE

The Caribbean Community celebrated the inauguration of the Caribbean Court of Justice (CCJ) in Trinidad and Tobago on 16 April. The CARICOM Secretary-General noted that the CCJ is a “critical pillar” of the Caribbean Single Market and Economy (CSME). In its original jurisdiction, the CCJ will be the final arbiter on the interpretation and application of the Revised Treaty of Chaguaramas establishing the Caribbean Community, including the CSME. In many Caribbean jurisdictions, the adoption of the CCJ’s appellate jurisdiction is yet to take place, but Governments in the Region have expressed their commitment to the establishment of the CCJ as a final appellate Court.

### BARBADOS MAY TAKE FIRST DEATH PENALTY CASE TO THE CCJ

The Barbados government may take its first death penalty case to the recently inaugurated Caribbean Court of Justice. It is possible that the government could approach that court to restore the death sentences of two individuals, which were commuted to life imprisonment by the country’s Court of Appeal in late May. The order of the court has been stayed for 21 days which gives the government sufficient time within which to make the determination as to whether to proceed to appeal. The Attorney General indicated that government was aware that whichever side was successful in the Barbados Court of Appeal, it was likely that the CCJ would have been called upon to ultimately settle the matter. With Barbados having signed on to the appellate jurisdiction of the CCJ, if the case is heard there, that decision will be final.

President of the CCJ, Michael de la Bastide, for his part has stated that the CCJ will be ready if Barbados wants it to hear the appeal involving two convicted murderers whose death sentences were commuted to life imprisonment. The President advised that the rules that will govern appeals are now being finalised and should be ready very soon. He affirmed: “They should be ready in perhaps a week to 10 days. If there is a desire to appeal ... then that will be accommodated because it will be

within the time that is fixed by the rule for appealing. We will ensure that no one is shut out because of the fact that the rules are not yet in place.”

### COURT OF JUSTICE OF ECOWAS GRANTS CIVIL JURISDICTION TO INDIVIDUAL LITIGANTS

The President of the Economic Community of West African States (ECOWAS) Community Court of Justice, Justice Hansine Donli, has encouraged citizens of the community to avail themselves of the court, whose mandate has been expanded to accommodate civil matters by individuals. There has been a recent amendment of Article 9 of the protocol establishing the ECOWAS Community Court of Justice, to demand the enforcement of their human and fundamental rights at the Court.

That amendment allows individuals or nationals of all ECOWAS countries to institute proceedings against any of the member states, or institutions of the country relating to the interpretation of the provisions of the treaty where attempts at amicable resolution have failed.

The President stated: “We are convinced that the granting of direct access to the court to community citizens, individuals and corporate bodies will facilitate the integration process and the realisation of the cardinal objectives of ECOWAS.”

### ECOWAS ANNUAL REPORT RELEASED

ECOWAS Parliamentarians recently released the annual report of 2004 in Nigeria.

The report highlighted several important areas, including the amendments to the protocol establishing the Community Court of Justice.

The overall package of proposed amendments in relation to the Court include matters such as the enhancement of the power of the court; right of access by individuals; procedures for the execution of decisions of the Court; alignment of the English version of one of the provisions of the protocols with the French version and substitutions of references to articles in the treaty of 28 May 1975 in the revised treaty of 24 July 1993.

## OTHER DEVELOPMENTS

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### TACKLING BIOPIRACY THROUGH LEGISLATION AND CO-OPERATION

It was announced in May that the Forest Research Institute of Malaysia (FRIM) and a Japanese research organisation, Nimura Genetic Solutions, want to facilitate the introduction of a law to tackle the problem of biopiracy in Malaysia, one of the world's top biodiversity countries.

Malaysia is one of the world's 12 megadiverse countries and ranks fifth in plant diversity in the Asia-Australia region. With its rich biodiversity, it is an obvious hunting ground for bioprospectors. Some bioprospectors come in illegally, posing as tourists, to collect material and take it out of the country. To prevent such biopiracy, the Association of South East Asian Nations (Asean) has drafted a Framework on Access to Genetic Resources and Benefit Sharing, which is being studied by the relevant agencies in Malaysia.

Malaysia has also prepared a draft Access and Benefit Sharing (ABS) Bill which is being reviewed to take into account the new government setup.

Malaysia's ABS Bill will promote local scientific R&D, encourage bioprospecting by the private sector and multinational companies, and enforce sharing of benefits from the use of bio-resources and traditional knowledge.

### PATENTS ORDINANCE AMENDED IN INDIA

The Patents (Amendment) Ordinance 2004 was promulgated by the Government of India and came into force on January 1, 2005. This Ordinance will extend product patents to pharmaceuticals, food and chemicals. Under this Ordinance, the rules of product patents would be notified. The Ordinance also assists in the production and marketing of patented products following the expiry of a patent by allowing legal action to be initiated by non-patentees during the life of a patent. Provisions in relation to the processing of patents have also been streamlined to reduce delays in the issue of patents.

### EU VOTES ON NEW PATENT DIRECTIVE

Members of the European Parliament are set to vote in July on a new EU directive that would ban European companies from patenting high-tech devices using new computer software.

If the vote were successful, it could affect the makers of many commonplace consumer products such as mobile phones, televisions, automobiles and washing machines.

Nevertheless, there is fear that the directive could result in the loss of thousands of jobs throughout Europe – and in particular Britain – as the directive would only apply to software used in mechanical devices in Europe, whereas countries like India, China and the United States will continue to maintain patent protection for their companies.

### NEW CASE FOR DEBT RELIEF

Argentina's debt freeze has been lifted by the US Court. One new case on which the sovereign debtors can rely upon when faced in litigation by the commercial creditors dubbed as 'Vulture Funds' is the Argentina's case ruled upon by the US Court of Appeal. The judgment was delivered on 13 May 2005. The Court of Appeal ruled that holders of defaulted debt have no rights to the bonds being held by a country at the Bank. The Plaintiffs sought to freeze the bonds so that they could collect compensation from the Argentina's government failure to honour their bonds worth US \$ 700 billion. The court lifted the freeze and allowed Argentina to proceed with its debt exchange. This order of the lower court was upheld by the Court of Appeal.

## Upcoming Activities

**25 - 29 July, 2005**

Final Expert Group Meeting on the Commonwealth Draft Model Bill on Competition  
Commonwealth Secretariat  
Marlborough House  
London

**11 – 15 September, 2005**

Commonwealth Law Conference  
Queen Elizabeth 11 Conference Centre  
London

**17 October, 2005**

Meeting of Senior Officials of Commonwealth Law Ministries  
Accra, Ghana

**18 – 21 October, 2005**

Commonwealth Law Ministers Meeting  
Accra, Ghana

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