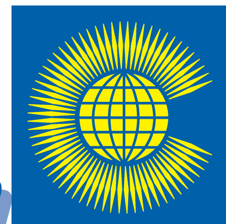
LAWDevelopment

Issues of the Commonwealth



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New Zealand Welcomes Commonwealth Delegates of Final/Regional Appellate Courts

Back Row (left to right) Hon Justice McGrath (Justice of the Supreme Court of New Zealand); Ms Cheryl Thompson-Barrow (Adviser & Head, Law Development Section, Commonwealth Secretariat); Rt Hon Justice Blanchard (Justice of the Supreme Court of New Zealand); Rt Hon Justice de la Bastide (President of the Caribbean Court of Justice); Hon Justice Nelson (Justice of the Caribbean Court of Justice); Rt Hon Justice Tipping (Justice of the Supreme Court of New Zealand); Hon Justice Anderson (Justice of the Supreme Court of New Zealand); Justice Austin Davis (Retired) (Consultant, Commonwealth Secretariat); Mr Gavin Murphy (Legal Editor, Law Development Section, Commonwealth Secretariat)

Front Row (left to right) Ms Paula Pierre (Registrar, Caribbean Court of Justice); Me Anne Roland (Registrar, Supreme Court of Canada); Ms Altine Abimiku (Personal Assistant to the President of the Court of Justice of the Economic Community of West African States); Hon Justice Donli (President of the Court of Justice of the Economic Community of West African States); Rt Hon the Chief Justice, Dame Sian Elias (Chief Justice of the Supreme Court of New Zealand); Mr Sipho Zwane SC (Registrar of the Court of Justice of the Common Market for Eastern and Southern Africa)

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The Law Development Section led a meeting of Commonwealth Presidents, Justices and Registrars of Final/Regional Appellate Courts to Wellington, New Zealand on February 20 – 24, and thereafter to Canberra, Australia on February 27 – March 2 (see page 3). Members of the Commonwealth delegation represented the Caribbean Court of Justice; the Courts of Justice of ECOWAS and COMESA and the Supreme Court of Canada.

The Ministry of Justice of New Zealand was very gracious in its hospitality and ensured that the Commonwealth group was extensively exposed to the Court system of New Zealand in general, and in particular, the workings of the newly established Supreme Court of New Zealand. The group was hosted to a luncheon and held discussions with Rt Hon the Chief Justice, Dame Sian Elias, Chief Justice of the Supreme Court of New Zealand and the Justices of the Supreme Court. Throughout the week, the Ministry of Justice arranged interactive sessions with the group and included most eminent New Zealand legal minds, members of the political directorate and policy advisors such as Sir Geoffrey Palmer, former Prime Minister and Attorney General of New Zealand; Justice Blanchard, Justice of the Supreme Court of New Zealand; Hon Rick Barker, Minister for Courts; Justices of the Court of Appeal; Mr Terence Arnold, QC, the Solicitor General; Senior Officials of the Ministry including Mr Mike Neilson Principal Advisor, Higher Courts, and Mr Andrew Hampton, General Manager, Higher Courts; and representatives of the Law Society. The group was invited to hear an appeal at the Supreme Court. All sessions focused on the challenges and benefits on new Court establishment as well as the use of technology and other innovations to secure access to justice.

The group moved to Canberra, Australia, where they deliberated during the week of February 27 – March 2. The Chief Justice of the High Court of Australia, Hon Murray Gleeson and the Justices of the High Court entertained the group at a luncheon. Sharing of ideas and experiences occurred relating to movements away from the jurisdiction of the JCPC. Australia's experience as an "older" Court, delinked from the JCPC was valuable. The group was also able to tour and be apprised of the systems in the well renowned Library of the High Court.

The Presidents and Justices were invited to sit in on an appeal with the full High Court, which was graciously accepted by the Presidents and Justices.

This project takes forward the mandates of Law Ministers which request that theCommonwealth Secretariat facilitates the exchange of information and sharing of Courts in the experiences as they remove jurisdiction from the Judicial Committee of the Privy Council. The Mandate also focuses on Regional Courts formed to adjudicate on the various treaties of association in the respective regions.

The Commonwealth team was led by the Adviser and Head, LDS of LCAD, Ms Cheryl Thompson-Barrow.

Justices and Registrars of Final/Regional Appellate Courts Visit the High Court of Australia

Back Row (left to right) Mr Gavin Murphy (Legal Editor, Law Development Section, Commonwealth Secretariat); Mr Christopher Doogan (Chief Executive and Registrar, High Court of Australia); Justice Austin Davis (Retired) (Consultant, Commonwealth Secretariat); Ms Altine Abimiku (Personal Assistant to the President of the Court of Justice of the Economic Community of West African States); Hon Justice Hayne (Justice of the High Court of Australia); Hon Justice Gummow (Justice of the High Court of Australia); Hon Justice Nelson (Justice of the Caribbean Court of Justice); Ms Cheryl Thompson-Barrow (Adviser & Head, Law Development Section, Commonwealth Secretariat); Hon Justice Heydon (Justice of the High Court of Australia); Ms Dianne Stafford (former Director, Legal & Constitutional Affairs Division, Commonwealth Secretariat); Ms Paula Pierre (Registrar, Caribbean Court of Justice);

Front Row (left to right) Hon Justice Donli (President of the Court of Justice of the Economic Community of West African States); M[e] Anne Roland (Registrar, Supreme Court of Canada); Hon Justice Crennan (Justice of the High Court of Australia); Rt Hon Justice de la Bastide (President of the Caribbean Court of Justice); Hon Justice Gleeson (Chief Justice of the High Court of Australia); Hon Justice Kitonga (President of the Court of Justice of the Common Market for Eastern and Southern Africa); Hon Justice Kirby (Justice of the High Court of Australia); Ms Petal Kinder (Court Librarian of the High Court of Australia); Mr Sipho Zwane (Registrar of the Court of Justice of the Common Market for Eastern and Southern Africa) (Story on page 2)

COMESA – PERMANENT SEAT FOR COURT OF JUSTICE

The Court of Justice of the Common Market of Eastern and Southern Africa (COMESA), the judicial organ of COMESA, has assumed its permanent seat in Khartoum, Sudan. The building was handed to the Secretary General of COMESA, Mr Erastus J.O. Mwencha, by the government. The Minister of Justice said that the handing over of the headquarters building to the Court would facilitate and support peace, security, stability and development in Sudan. The Court will continue to perform its functions which includes ensuring the proper interpretation of the provisions of the COMESA Treaty and adjudicating only in disputes between Member States

arising from the interpretation and application of that Treaty. Besides this, the Court will also adjudicate in dispute between the COMESA Secretariat and its staff. The Court has a total of 12 judges, 7 for the lower court and 5 for the Court of Appeal. The Court has been operational in Lusaka, Zambia, from the COMESA Secretariat since 1998.

GLOBAL ACTION ON FISHERIES IN THE HIGH SEAS

The UN General Assembly Working Group, meeting in February 2006, identified illegal fishing and the promotion of conservation and sustainable use of marine biodiversity as the most pressing concerns for the High Seas. It has been observed that illegal, unreported and unregulated fishing activities, "undermine sustainable fisheries, exacerbate damage to marine habitats and species, and threaten the livelihoods of responsible fishers and communities dependent on fishing."

Fishers on the High Seas have been able to exploit a loophole in the current enforcement system which allows them to register under a flag of convenience, "a flag of a country which does not enforce international maritime law strictly." Notably however, about seventy-five per cent of the High Seas are unregulated insofar as they fall outside national fishing limits.

The High Seas Task Force (HSTF) which includes fisheries ministers from the United Kingdom, Canada, Australia, Namibia and New Zealand as well as representatives of non-governmental organisations has, in a Report published in March 2006, identified means of addressing this problem, which HSTF partners are to implement immediately. The HSTF called for stricter rules on trawling, better monitoring of marine stocks and improved international co-operation to catch pirates. This is to be achieved through the development of a new global database (Global Information System on High Seas Fishing Vessels) which would help to identify illegal fishing vessels, and a new set of guidelines for Regional Fisheries Management Organisations (RFMOs). These systems are to assist national authorities and RFMOs to "detect, apprehend and sanction" those involved in these fishing activities.

UK ENVIRONMENT AGENCY STOPS ILLEGAL EXPORT OF WASTE

A UK-based company and its directors have pleaded guilty to effecting an illegal shipment of mixed municipal waste to India without prior notification to all competent authorities concerned, and without having obtained the appropriate certificate of satisfaction from the Environment Agency.

The offending shipment of "co-mingled" waste was discovered by Environment Agency officers during a ports check in March, which sought to identify any illegal exports of waste contrary to the rules of the Transfrontier Shipment of Waste Regulations 1994. The shipment had been declared to contain waste paper for shipment and recycling in India, but instead contained waste "consisting of newspaper, magazines, plastics including plastic bottles, cans, cardboard and textiles" which had been contaminated by food waste. Such "co-mingled" waste is subject to the 1994 regulations which provide that permission for their export needs to be obtained from both the UK and destination country authorities. No such permission had been granted. The company, which made savings of over £1000, by failing to comply with the regulations, was fined £6000 as a penalty under 15(1) of the 1994 Regulations, and ordered to pay £5000 costs.

A special enforcement officer for the Environment Agency commenting on the case said, "…this case shows that we will not tolerate the illegal export of waste to sites or countries where no checks have been made to ensure the waste is managed in an environmentally sound manner." (http://www.environment-agency.gov.uk/news/)

JAMAICA ACCESSES BENEFITS UNDER KYOTO

Wigton Windfarm Limited, a state owned company in Jamaica, has recently signed a Emission Reduction Purchase Agreement with the Carporacion Andina de Fomento (CAF). CAF, a multilateral development bank, is to purchase the Certified Emission Reduction on behalf of the Netherlands government.

Under the Kyoto Protocol, developed state parties are required to reduce greenhouse gas emissions

below 1990 levels. Both Jamaica and The Netherlands are parties to this agreement and may therefore, participate in the Clean Development Mechanism which allows developing countries like Jamaica to sell emissions credits to others.

The Wigton Windfarm has been certified as a Clean Development Mechanism (CDM) facility because of its proven ability to generate electricity without emitting any pollutant - among them carbon dioxide and nitrous oxide. Notably, the facility has prevented 85,000 tons of carbon dioxide from being emitted into the atmosphere. Technology Minister, Phillip Paulwell observed that the Wigton project formed part of "Jamaica's effort to pursue proper environmental management and at the same time ensuring sustainable development in the energy sector". (The Observer, Jamaica)

THE SEYCHELLES BANS SHARK-FINNING

Foreign ships licensed to fish in the territorial wasters of The Seychelles have been banned from removing fins of captured sharks, in a move to curb a flourishing global trade which threatens the survival of the species and of the marine ecosystem. Several countries, and the European Union, have banned shark-finning over the last few years.

The World Conservation Union has estimated that 65 out of 375 known shark species are threatened, largely owing to the sharking-finning trade. The fins, which are a delicacy in many parts of East Asia, are removed from live sharks which are then dumped into the sea. The Seychelles Fishing Authority observed that, "shark-finning…threatens many shark stocks, the stability of marine ecosystems, sustainable traditional fisheries, food security, dive and eco-tourism and socio-economically important recreational fisheries."

The ban only applies to foreign-owned vessels as "the vast majority of sharks taken in Seychelles' waters are caught either unintentionally as by-catch or intentionally as a targeted species by large fleets of foreign industrial purse seiners, longliners and other vessels." (www.int.iol.co.za/index) Shark fishing, where the whole of the shark is caught and traded, is still allowed and is not covered by the ban.

It is proposed however to extend the ban to Seychellois-owned fishing boats once the government finalizes the National Plan of Action on the Conservation and Sustainable Use of Sharks. The Plan seeks to ensure that sharks are fished in a manner that protects stocks for future generations.

The Seychelles Fishing Authority has confirmed that any master and operator of a foreign vessel convicted under the Regulations will be liable to a fine of 84 000 euros. The island's courts may also order the seizure of all fish caught and any fishing gear used in the violation.

BEYOND THE KYOTO PROTOCOL

It has been a year since the Kyoto Protocol entered into force in February, 2005, but discussion still rages as to the whether the Kyoto Protocol is an effective mechanism for reducing global carbon emissions. It is projected that many industrialised countries will not meet their targets under the Protocol, but the harshest penalty for default is a "deduction from the party's assigned amount for the second commitment period of a number of tonnes equal to 1.3 times the amount in tonnes of excess emissions." A significant shortcoming of the treaty therefore, is that it contains "no meaningful sanctions" for default. Environment Ministers meeting at the UN however, have recently agreed to begin a new round of negotiations to decide the shape of the Kyoto Protocol after the first phase ends in 2012. It is not however clear, what if any, new arrangements are contemplated to secure further reduction targets.

Developed and developing countries have however been seeking to secure emissions reductions through arrangements existing independently of Kyoto which promote the development and export of clean technologies to industrialising countries. The Asia-Pacific Partnership on Clean Development and Climate, in which India and Australia participate, seeks to promote and create an enabling environment for the development, diffusion, deployment and transfer of existing and emerging cost-effective, cleaner technologies and practices, through concrete and substantial cooperation so as to achieve practical results.

LAW DEVELOPMENT SECTION COLLABORATES WITH THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

Some legal terms seem designed to conceal rather than inform. 'Private international law' is one such phrase; and its alternative name, 'the conflict of laws' is no better. The movement of people from one part of the world to another, and the relationships into which they enter, naturally give rise to 'cross-frontier' legal issues. Will that marriage in Ghana under customary law be recognised in England? Will that same-sex civil partnership registered in England have any legal effect in Jamaica? And if we move from family to commercial law, suppose that a Singaporean student at an English university buys goods over the Internet from a Canadian company: if a dispute arises, which courts have jurisdiction and what law applies?

These are all questions of private international law. Commonwealth Law Ministers decided in 1977 that in tackling these issues the Commonwealth would work closely with the Hague Conference on Private International Law. Despite the word 'conference', this is an international organisation established in 1893 with 65 Member States (including nine Commonwealth countries). Since 1977, the Commonwealth Secretariat has been represented at many of the working meetings of the Conference in a collaboration which both parties have come greatly to value. In that time, the Conference has completed work on ten conventions. An important group of conventions deal with aspects of international family law: those dealing with the Civil Aspects of International Child Abduction, Inter-country Adoption, Parental Responsibility, and the International Protection of Adults. Civil procedure issues are dealt with in the conventions on International Access to Justice, and on Choice of Court Agreements. Finally there are a number of 'applicable law' conventions, setting out the law applicable to Trusts, to Contracts for the International Sale of Goods, to Succession to the Estates of Deceased Persons, and to Rights in respect of Securities held by Intermediaries. Fifteen Commonwealth countries have already become parties to one or more of those conventions, and no fewer than 33 are parties to at least one current Hague convention. Although conventions are finally settled during a Diplomatic Session of the Conference, most of the work of the Hague Conference is done through 'Special Commissions'. These prepare draft conventions - and there is much work under way on a new Convention on the International Recovery of Child Support and other Forms of Family Maintenance - and review of the working of the existing conventions, to improve administrative co-operation and seek to ensure uniform interpretation.

The emerging Child Support Convention has an obvious relevance to Commonwealth countries, since easier travel and family breakdown create a need to enforce maintenance obligations against parties living overseas. Most Commonwealth countries have statutes dating from the 1920s on the reciprocal enforcement of maintenance order which need review and replacement. The outcome of the work at The Hague will greatly assist in this process, in which the Law Development Section will play a leading part to:

- Act as a voice within the Conference's deliberations for the Commonwealth legal tradition, especially that of the common law.
- Seek to defend the interests of the small States which are so well represented in the Commonwealth.
- Disseminate the results of work at The Hague, and to assist Commonwealth governments wishing to accede to the Hague Conventions. A series of 'Accession Kits', presenting the case for accession, an analysis from a Commonwealth perspective of the Convention provisions, and an outline of implementing legislation, have been published on a number of conventions. They are now being reviewed and hopefully new editions will appear over the next few years

TK REGIMES FOR THE PACIFIC REGION

The protection of traditional knowledge (TK) continues to gain momentum, especially in developing countries. In the Pacific region two TK mechanisms have been developed. The first is the Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture and the second is The Draft Regional Framework for the Protection of Traditional Ecological Knowledge.

The first framework, developed by the Forum Secretariat creates new rights such as traditional cultural rights and moral rights. These rights arise automatically but anyone seeking to commercialise those rights would need to seek permission from the owner before such use. The framework is finalised and ready for use by member countries of the region.

The second framework is still in draft form but may soon be endorsed. It protects traditional knowledge specifically relating to biological resources and it provides for the equitable sharing of the resulting benefits.

The new rights arising from the two frameworks are intended to complement existing intellectual property rights.

INTERNATIONAL INSOLVENCY PROTECTION FOR SOVEREIGN DEBTORS

The activities of private investors - on the use of vulture fund to profit from debt crisis - is a source of concern in the international community. Debts are bought from government creditors by private investors, specifically fund managers, at heavily discounted rates. The private investors then sue the government for the due debt with full interest.

Efforts are being made to find ways to protect countries facing debt crisis so that those debts are repaid on a sustainable basis without plunging the country into poverty. A note - written by a Viennese academic, Professor Kunibert Raffer - to the IMF has been published. The note is supportive of the use of insolvency procedure to protect sovereign debtors. It also suggests ways in which this might achieved. Professor Raffer argues against the need to legislate in individual countries for such protection. Acknowledging the urgency of the matter, he noted that since many of the loan agreements are governed by either New York or United Kingdom laws, the United States and the United Kingdom could simply amend their sovereign immunities laws to void all waivers of immunity when a case begins under international insolvency procedures. This, he believes would cover present and future loan agreements. There was suggestion that in some cases amendment to the law might not be necessary. This is supported by reference to a US case where a sovereign debtor is granted protection under the debtor insolvency laws of the United States. The court took the decision because it felt that apart from the being "consistent with the law and the policy of the United States" the decision was also entirely in harmony with the spirit of bankruptcy laws recognised by all civilised nations. The decision was later reversed but only because of executive intervention which supported the position of the other party (i.e. the IMF). In view of this intervention, Professor Raffer submitted that all that is required would be a change in the policy of the executive, to avoid such intervention in the future. Professor Raffer's note is published at www.jubileeresearch.org.

THE SAN CALL FOR ACTION ON "ILLEGAL HOODIA SALES"

The San, traditional knowledge holders about the hoodia plant which has been traditionally used as an appetite suppressant, have called on governments to put an end to the "illegal and unscrupulous sales of products derived from the hoodia plant." The San have signed two profit-sharing agreements for the hoodia, but to date, have not received any revenue from the marketing of these products. The Working Group of Indigenous Minorities in South Africa have noted that this constitutes a breach of the Convention on Biological Diversity.

Upcoming Activities

8-14 May 2006

Belize City, Belize

Commonwealth Seminar for the Caribbean Region on the Implementation of International Environmental Instruments and Policy Development

19-28 June 2006

The Hague, Netherlands

Observer Representation at
The Hague Conference on Private International Law—
Meeting of the Special Commission on the
International Recovery of Child Support and
Other Forms of Maintenance

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Please send enquiries and contributions to:
Cheryl Thompson-Barrow or Margaret Bruce,
The Editors, LAWD
Tel: +44 (0)20 7747 6121
Fax: +44 (0)20 7747 6406
E-mail: lds-lcad@commonwealth.int

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