

COMMUNIQUÉ

1. Law Ministers and Attorneys General of Small Commonwealth Jurisdictions met in Marlborough House, London on 21 and 22 October 2004. Twenty-five jurisdictions were represented. The Meeting was opened by the Right Honourable Don McKinnon, the Commonwealth Secretary-General, and elected the Honourable Arnold Nicholson, Attorney General and Minister of Justice of Jamaica, as its chairperson. The meeting addressed a range of contemporary issues affecting Commonwealth small jurisdictions.

Implementation of Article 76 of UNCLOS

2. Ministers recalled that Article 76 of the United Nations Convention on the Law of the Sea 1982 enables a coastal State to extend the outer limits of its continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, and that this required a submission to the Commission on the Limits of the Continental Shelf framed in accordance with published Scientific and Technical Guidelines. They received a paper prepared by the Commonwealth Secretariat drawing attention to the deadline of 2009 for submissions, and to the prerequisite that offshore boundary disputes have been fully resolved or at least set aside in writing by each of the relevant states. The paper drew attention to the fact that the necessary preliminary desk-top study and the consideration of its findings could take between two and four years and that further surveys might be required. The meeting heard of the ongoing efforts by the Commonwealth Secretariat to increase awareness of the urgency of this issue, given the impending deadline, as well as the targeted assistance that has been provided to member countries and continues to be available.
3. Ministers commended the Commonwealth Secretariat for the paper but requested that the Annex to it be removed.
4. Ministers noted the significant scientific research that must underpin any application for the extension of the outer limits of its continental shelf, and that that research could be both time-consuming and very expensive. They also noted the complicated issues that arise when a state has a dispute with a neighbouring country. Because of these complex problems, Ministers expressed serious concerns about the approaching deadline in 2009 for submissions and were of the view that many states, in particular small states, may not be able to meet it and will be seriously prejudiced as a result.
5. Ministers recommended that:
 - (a) All Commonwealth member states, not just small states, be encouraged to lobby with the General Assembly and also with the meeting of the States Parties to UNCLOS for an extension of the impending 2009 deadline and requested the Secretariat to support those efforts as far as possible.
 - (b) The Commonwealth Secretariat should liaise with other international and regional organizations and bodies, as well as financial institutions, to facilitate funds that can be used on a state or regional level in support of submissions for an extension of the continental shelf.
 - (c) The Commonwealth Secretariat should prepare a summary of the rights and obligations in respect of an extended continental shelf under UNCLOS.

Review of the Barbados Programme of Action

6. Ministers recalled that the Plan of Implementation adopted at the World Summit on Sustainable Development held in Johannesburg in 2002 called for a review of the implementation of the Barbados Programme of Action (BPoA) for the Sustainable Development of Small Island Developing States. An International Meeting had been convened for this purpose and will take place in Mauritius in January 2005. Commonwealth Heads of Government confirmed at their meeting in Abuja in 2003 their full support for the BPoA and looked forward to the contribution of the Commonwealth and others to preparations for the International Meeting.
7. Ministers received a paper on the status of the preparations for the International Meeting. It reviewed the work of regional meetings, of the inter-regional meeting of SIDS in The Bahamas in January 2004 and the international preparatory meetings in New York facilitated by Ambassador Don MacKay of New Zealand.
8. The Attorney General and Minister of Justice of Mauritius provided the meeting with an overview of the goals and purposes of the International Meeting and an update on the status of preparations for this Meeting.
9. The meeting also received a paper from the Commonwealth Secretariat which provided an outline of the work being done to raise awareness of the vulnerability of small states, which impacts on their ability to bring about sustainable development; to argue for international commitment to actions that will further promote the sustainable development of small states and implementation of outcomes of the World Summit on Sustainable Development; and to promote an effective review process and International Meeting, ensuring that the concerns of all Commonwealth SIDS are included in the review and facilitating substantive discussions at the inter-regional and international levels.
10. Ministers welcomed the inclusion of this critical issue on the agenda and it generated much discussion. Sustainable development is not just an environmental issue but goes to the heart of all forms of development and must be considered within a whole planning process including a financial and development framework. Ministers agreed that there is a need to consider carefully how the law can be improved and enhanced to support sustainable development and emphasised the importance of having a comprehensive legal structure for this purpose.
11. The discussion covered a range of issues including the need for a coordinated relationship between economic development and sustainable development; the serious implications of natural disasters and the difficulties in recovery from them; the need for mechanisms for better and more effective insurance coverage for member states; the difficult problem of the transportation of radioactive material and critical environmental issues relating to water and sanitation.
12. Ministers recommended that Commonwealth member countries should be strongly encouraged to attend the International Meeting and to be represented at the highest level. They also requested the Commonwealth Secretariat to prepare a briefing paper about the meeting, to encourage participation, which could be placed on the Commonwealth Small States website and circulated to member countries. They urged the Commonwealth Secretariat to consider ways in which support could be provided for the further implementation of the BPoA on a national, regional and international basis and to enhance effective participation by small states in international processes that are of interest to them.

Convention on Biological Diversity and the Cartagena Protocol

13. Ministers received a paper examining those particular provisions of the Convention on Biological Diversity (CBD) and the Cartagena Protocol on Biosafety (CPB) which may impact significantly on small and developing states. Ministers were asked to consider possible recommendations including on building awareness of the need for legislative arrangements based on international obligations to maximise the benefits of these instruments for the protection of the environment and participation in the international trade of Living Modified Organisms (LMOs); to highlight the need to equally adjust structures to embrace these imperatives; and on capacity building initiatives aimed at assisting small and developing states to implement the provisions of the CBD and CPB.
14. Ministers noted that it was important that these conventions be brought to their attention so that they could better appreciate the requisite changes required to domestic law. On the general issue of implementation of international conventions and obligations, concern was expressed about the significant resource implications particularly for small states that this involved. One particular issue highlighted was the increasing obligation in various conventions to collect statistics and to report on those statistics and other matters.
15. Ministers were of the view that there needs to be a greater sensitivity on an international level to the need for the convention obligations and resulting action on implementation to be proportional to the risk involved. Otherwise small states will continue to face an unnecessary burden on very limited resources.
16. Ministers supported the paper's recommendations for action by the Secretariat to sensitise member countries to become states parties to relevant agreements; to encourage member states to further collaborate at the regional level with the aim of further harmonising their strategies pursuant to their international obligations under the pertinent environmental instruments with the ultimate aim of realising uniform enabling national legislative frameworks; and to formulate a technical assistance program to assist countries negotiate and implement international conventions/agreements and to formulate and implement national policies for sustainable development.
17. Ministers expressed concerns however about the feasibility of model laws and regulations in this particular area because of the differences in domestic situations and the very specific type of legislation and regulation that might be required.

Landlocked and Geographically Disadvantaged States under UNCLOS

18. Ministers recalled the significant role played by the Group of Land-locked and Geographically Disadvantaged States (LLGDS) in the negotiation of the UN Convention on the Law of the Sea. The resulting Convention had affirmed that ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial waters of other States (Article 17); that the high seas are open to all States, whether coastal or land-locked (Article 87) and in Part X and especially Article 125 affirmed the right of access of land-locked States to and from the sea and freedom of transit. The Convention also created a number of new rights for LLGDS: rights in respect of the Exclusive Economic Zones of other States, creating the possibility that, with respect to living resources, LLGDS may have access to the exclusive economic zones of other States (Part V); and rights in respect of the Deep Sea-bed (Part XI, and the 1994 Implementation Agreement on the Deep Sea-bed).

19. Ministers received a paper analysing these matters and seeking to identify the Commonwealth member countries which could take advantage of the new rights given to LLGDS. They noted that there were in fact no agreements in place for the sharing of surplus living resources by coastal states with LLGDS in their region, that only two states had domestic legislation on sharing, and that few LLGDS took part in the work of the Sea Bed Authority. Explanations were given of the method by which a 'surplus' was to be identified and of the nature of the obligation of a coastal state – in effect to give negotiating priority to LLGDS in its region seeking a share of the surplus.
20. Ministers asked the Secretariat to explore the feasibility of offering technical assistance to LLGDS in the Commonwealth to enable them to take full advantage of the Convention provisions.

Investment and Trade Law and Small Vulnerable Economies

21. Ministers received a paper drawing attention to the ELS programme of technical assistance covering, amongst other things, the review and modernisation of trade-related investment legislation to make it compatible with international standards and conducive to the attraction of investment, economic growth and development. New challenges were presented by the phasing-in of WTO rules prohibiting, in relation to trade in goods, domestic-sourcing requirements, trade-balancing and other measures. Export subsidies, widely defined, were proscribed subject to an exception procedure which had not been invoked by many Commonwealth countries. Ministers took note of the paper.

Arbitration under the ICSID Convention

22. Ministers noted that 24 of the Commonwealth's small jurisdictions had now signed the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States, which established the International Centre for the Settlement of Investment Disputes, and that the work of the Centre had grown markedly as a result of provisions in bilateral investment treaties.
23. The meeting received a paper examining the interpretation of Article 25(1) of the Convention which defines the jurisdiction of the Centre in terms of a 'legal dispute arising directly out of an investment', and the wide definition of 'investment' or 'investment dispute' in many bilateral investment treaties. The paper also examined the question whether an unsuccessful tenderer for a public works contract could seek arbitration under the Convention where it believed that the decision to accept another tender had been taken unfairly. Ministers noted that the question had been given a negative answer in two decisions of arbitral tribunals, in *Mihaly International Corporation v. Sri Lanka* (2002) and *Zhinvali Development Ltd v. Georgia* (2003), but that states would be well advised (subject to commercial practicability) to ensure that it is spelled out clearly in any invitation to tender or letter of intent that there is no intention to create contractual relations of any sort until and unless a contract is granted to a successful tenderer.
24. Ministers received from the Attorney General of Seychelles a further paper drawing attention to the practice adopted by a number of the ad hoc Committees appointed under article 52(3) of the Convention, in deciding to continue the stay of enforcement of awards under article 52(5) of the Convention, to require the applicant requesting such stay to provide a bank guarantee in the full amount of the award. The paper criticised this practice and drew attention to the decision in *Maritime International Nominees Establishment v Republic of Guinea* (1997) where the tribunal emphasised

the favourable position that the Award Creditor would be placed in were a bank guarantee required and the disadvantage to the Award Debtor. It held that to require the applicant for a stay to provide a bank guarantee would be to impose a one-sided change in the relative position of the parties. A requirement for a bank guarantee was not mentioned in the Convention rules, but might be justified if a party who had obtained a stay was found to be taking deliberate steps to delay the proceedings.

25. Ministers expressed their thanks for both papers.

Broadcasting Legislation and Regulation

26. The inclusion of broadcasting issues in the agenda had been suggested by a number of jurisdictions, and the meeting received a paper examining the reasons for legislation in this field. Broadcasting is powerful and persuasive, and commonly is the major source of information for the public. The right to freedom of expression did not confer a right to broadcast; but once the privilege of broadcasting had been conferred by licence that freedom could be invoked as could the limitations properly placed upon it in a democratic society. The paper reviewed the use of regulation to protect democratic, cultural, consumer and economic interests and argued the case for an independent regulator in each country.
27. The paper stimulated a wide-ranging debate in which Ministers addressed the problems caused by satellite broadcasts, especially from countries in other time-zones, the danger that broadcasts could stir up tensions between racial or religious groups, and the problems caused by certain types of religious broadcasts. There was support for the view that if broadcasters could not devise appropriate self-regulation (and it was recognised that self-regulation was seldom found in this field), standards could best be set on a Commonwealth or regional level, distanced from national political debate. It was not always possible or appropriate to establish an independent regulator in a small jurisdiction.
28. Ministers asked the Commonwealth Secretariat to continue to take an interest in these matters and to keep them on the agenda of ministerial meetings.

Human Rights and Development

29. The meeting received a paper on the human rights based approach to development, prepared by the Human Rights Unit of the Commonwealth Secretariat. This drew on United Nations material and listed the right to development as one of the rights guaranteed to all human beings.
30. Ministers emphasised their commitment to the protection of fundamental human rights, 'universal legal guarantees protecting all individuals and groups, simply by virtue of being human, against actions and omissions that interfere with fundamental freedoms and human dignity'. Their discussion reflected strongly-held concerns over some aspects of current human rights rhetoric. There was anxiety in particular over the assertion of new human rights which emerged not from considered action by all states but from organisations with no democratic mandate. Although the international conventions on social and economic rights accepted that progressive realisation of those rights must take account of the available resources, there was concern that ideals and aspirations could be too readily translated into justiciable guarantees requiring sovereign states to commit themselves to particular patterns of expenditure.

31. Ministers discussed the role of human rights courts in the interpretation of the scope of human rights. They recognised that State power had to be subjected to scrutiny as part of the system of checks and balances between the branches of government, but were concerned at the undue global influence of some regional human rights courts, as they reflected an activist approach to the interpretation of treaty obligations and were not subject to appeal to any global body.
32. The role of some human rights organisations was seen as problematic. Their work could be seen as an expression of global citizenship, but activism by unrepresentative organisations, operating in parts of the world distant from the states whose actions they sought to constrain, could create harmful disillusionment with the whole human rights movement, the overall results of which had been so beneficial.
33. The meeting emphasised the importance of these issues and asked the Commonwealth Secretariat, in consultation with Ministers, to devise a forum in which they could be further debated and clarified, and in which the governments of small jurisdictions and human rights organisations could both be represented.
34. The meeting heard of the problems being experienced by Seychelles in a current dispute.
35. Ministers noted the importance of the land issue which was in need of greater discussion in international fora.

Impact of Terrorism on Small States

36. Ministers recalled that Commonwealth Heads of Government have consistently condemned all acts of terrorism, calling for full implementation of international measures to combat terrorism with particular emphasis on United Nations Security Council Resolution 1373, and the Kingstown Declaration of Commonwealth Law Ministers. The meeting was invited to identify how best the Commonwealth Secretariat might assist further in overcoming some of the difficulties small jurisdictions encountered.
37. Ministers expressed appreciation for the assistance already provided by the Commonwealth Secretariat. They noted the extent to which fresh obligations were being imposed on small jurisdictions, not by agreed international conventions but by Security Council Resolutions and decisions of bodies such as Financial Action Task Force. There was a need for more effective lobbying to prevent small jurisdictions facing unrealistic demands on already overstretched resources, recognising that a 'one size fits all' approach was not always appropriate.
38. Matters identified as being of especial concern and on which the Secretariat could provide further assistance included the eight Special Recommendations of FATF, including that concerned with NGOs and charities, the additional reporting obligations of UNSCR 1540, and the impact of the US Patriot Act on existing bilateral treaties. Ministers heard of cooperation between jurisdictions in particular regions, and of the helpful provision of templates to assist in fulfilling reporting obligations. It would be helpful were the Secretariat to make further use of the template device. Ministers recognised that their Governments could assist each other, notably by publishing their legislation on websites.

Legal Developments including the Legal Work of the Commonwealth Secretariat

39. The paper on the activities of the Legal and Constitutional Affairs Division especially in relation to small jurisdictions was considered with Ministers commending the Commonwealth Secretariat on the extensive work carried out.

Co-operation with Partner Organisations

40. The meeting, recognising the important role of the partner organisations, was pleased to receive reports on the work of the Commonwealth Legal Education Association, the Commonwealth Magistrates' and Judges' Association, the Commonwealth Human Rights Initiative, the Commonwealth Lawyers Association, the Commonwealth Parliamentary Association and the Commonwealth Association of Public Sector Lawyers.

Future Meetings of Ministers and Attorneys General from Small Jurisdictions

41. Ministers were happy to see a continuation of the arrangement adopted on this occasion, with their meeting following immediately that of Senior Officials of Commonwealth Law Ministries.

Acknowledgements

42. The Deputy Secretary-General expressed the warm thanks of the Commonwealth Secretariat for the contributions made by all participants and to the chairperson for his skill in facilitating the work of the meeting. She expressed her thanks to the partner organisations and consultants, and to the Director and staff of the Legal and Constitutional Affairs Division.

London
22 October 2004