

ADVICE TO LAW MINISTERS FROM SENIOR OFFICIALS ON VARIOUS ISSUES

INTRODUCTION

1. Senior Officials considered various issues at their meeting in November 2001 that are not the subject of other specific reports or recommendations to Law Ministers. This paper records those matters and the views of Senior Officials.

MUTUAL ASSISTANCE BETWEEN BUSINESS REGULATORY AGENCIES

2. Senior Officials considered this issues (which had been before Ministers on various occasions since 1993) and emphasised the distinction between mutual assistance in criminal matters (the Harare Scheme on that matter being applicable to money-laundering offences, and containing particulars on the seizure of the proceeds of crime) and the role of business regulatory agencies in regulating and supervising the financial services sector. They noted the opportunities for the sharing of information between financial intelligence units through the Egmont Group, and the Statement approved by Law Ministers in Kuala Lumpur in 1996 on Mutual Assistance between Business Regulatory Agencies. The meeting considered suggestions on the possible strengthening and clarification of paragraph 6 of the Statement, but Senior Officials felt that the guidelines in the Statement remained appropriate.

3. Senior Officials recommended that this subject remain on the agenda of Ministerial meetings so that consideration can be given to the question whether the guidelines remain adequate or whether further action is needed. The Guidelines are annexed to this paper.

PROTECTION OF CULTURAL HERITAGE

4. In 1993, Law Ministers accepted a Scheme for the Protection of Cultural Heritage within the Commonwealth. The Scheme was intended to complement work on the topic in other fora, notably UNESCO and UNIDROIT. The Scheme establishes mechanisms for certifying that a protected item is lawfully exported, and for the return to the country of export of items unlawfully exported. At their 1999 Meeting Law Ministers agreed to adopt a Draft Model Bill as a guide for countries to use in enacting the necessary legislation to implement the Commonwealth Scheme on Protection of the Cultural Heritage. They noted, however, a number of issues which Senior Officials had identified as possibly needing further consideration.

5. Senior Officials reviewed the position which had been reached. They noted that the preparation of the Scheme had taken many years, and that some Commonwealth countries were, and remained, dissatisfied with its approach and would have welcomed more radical provisions for the restoration of items of cultural heritage to the country of origin. Senior Officials recognised that there was no wish on the part of Law Ministers to reopen the principles of the Scheme, and agreed to reiterate their advice to Ministers in 1999 that the Draft Model Bill in its present form is the best that can be achieved in all the circumstances.

TRIPS AND THE PROTECTION OF TRADITIONAL KNOWLEDGE

6. Senior Officials, in addressing this issue, emphasised the importance of protecting biodiversity related indigenous knowledge, but underscored the need to cooperate with other international organisations which are also working in this area. They recommended that the

Commonwealth Secretariat collate and examine the various regional and international models protecting indigenous knowledge and experiences. They further recommended that a pan-Commonwealth group of experts (comprising lawyers, trade policy, officials, scientists etc) be established to address this issue.

7. The Secretariat was unable to advance work on this request by Senior Officials during the last financial year but hopes to be in a position to so do this year. Senior Officials will be kept informed on progress with work on this issue.

MUTUAL ASSISTANCE BETWEEN BUSINESS REGULATORY AGENCIES
GENERAL PRINCIPLES, GUIDELINES AND CONSIDERATIONS:

1. That systems devised to respond to requests for assistance by counterpart regulatory authorities for the purpose of the exercise of their regulatory functions should be simple, quick and flexible and be capable of use with the minimum of formality.
2. Assistance would be provided subject to compliance by the requesting authority with appropriate conditions concerning the use, confidentiality and return of documents and information.
3. That the decision of whether or not to grant assistance in any case would be discretionary. In the exercise of this discretion the requested party could consider, among other matters, the seriousness of the alleged violation of the regulatory law, regulation or requirement; whether the assistance is obtainable by more appropriate means and, in particular, via existing channels for the provision of mutual assistance in criminal matters; issues of international law, comity and reciprocity; and the extent to which the resource costs involved would fall to be met by the requested party. Assistance may be given even though the circumstances which gave rise to the request for assistance do not constitute a violation of the laws, regulations or requirements of the requested country. However, assistance could always be denied on grounds of essential public interest.
4. That in providing for the granting of assistance for the purpose of facilitating the performance of the functions of a requesting authority as provided under the laws, regulations and requirements of the requesting country, the law of the requested country should permit (subject to appropriate civil liberties and other safeguards) a regulatory authority in that country to use appropriate powers available to it in a domestic context.

These could include inter alia:

- (a) gaining access to, or supplying, information;
- (b) obtaining information or documents from any person or entity subject to its jurisdiction; and
- (c) exercising appropriate powers of investigation or inspection.

To facilitate the exercise of the appropriate powers, the requesting authority should provide all necessary information required by the requested authority.

5. That the law of the requested country should make it possible in appropriate cases to invoke sanctions or take other enforcement proceedings in cases in which a person or entity withheld information, documents or other assistance which the regulatory authority was entitled to obtain in the context of responding to a request for assistance.
6. Countries should consider the removal of legal impediments to the spontaneous provision (subject to appropriate safeguards) of information by a regulatory authority to a counterpart authority in another Commonwealth country where that information gives rise to a reasonable suspicion of a breach of a legal provision, regulation or requirement of that party. The decision whether or not to provide such information in any particular case would be at the sole discretion of the authority in possession of it.