SUMMARY AND RECOMMENDATIONS OF THE TRAINING WORKSHOP ON BILATERAL INVESTMENT TREATIES (BITS) AND ARBITRATION HELD AT ARUSHA, FROM 16 TO 20 FEBRUARY 2015

The idea of the establishment of the African Institute of International Law (AIIL) was conceived the African Foundation for International Law in close collaboration with the Government of Tanzania.

The inauguration of the AIIL was officiated by **Hon. Dr. Mahdhi Juma Maalim**, MP, Deputy Minister for Foreign Affairs and International Cooperation of Tanzania. Other dignitaries present included:

- **Hon. Judge Abdulqawi Yusuf**, Vice President of the International Court of Justice and the President of the Curatorium of the African Institute of International Law
- **Mr. Stephen Karangizi**, Director, African Legal Support Facility
- **H.E. Egon Kochanke**, Ambassador of Germany to Tanzania
- **H.E. Ishaya Samaila Majanbu**, Ambassador of Nigeria to Tanzania
- **Mr. Tomonobu Sato**, Head of Cooperation, Embassy of Japan in Tanzania
- **Hon. Judge Vagn Joensen**, President of ICTR
- **Hon. Judge Theodor Meron**, President of UNMICT and UNICTY
- **Hon. Judge Hassan Jallow**, Prosecutor of MICT
- **Hon. Dr. Emmanuel Ugirashebuja**, President of the East African Court of Justice
- **Ms. Virginia Morris**, Secretary of the UN Advisory Committee on the Programme of Assistance in the Teaching, Study, Dissemination and Wider Appreciation of International Law
- **Mr. Daud Felix Ntibenda**, Regional Commissioner of Arusha
- **Dr. Robert Eno**, Registrar of the African Court on Human and Peoples' Rights and
- **H.E. Ambassador Sani Mohammed**, Rector of the African Institute of International Law

During the ceremony, all speakers commended the initiative to set up the Institute and recognized its importance for the development of the African continent: "Many African countries achieved their independence about 50 years ago on average, but are still far from adopting many of the international laws and legal regulations," stated **Judge Abdulqawi Yusuf**.

According to Justice Yusuf, it is now time for African states to become active participants in international law. Partially, the reason is that globalisation has forced many foreign laws to encroach into the most reserved areas previously restricted for traditional, domestic or national laws.

"Arusha was chosen to host the African Institute of International Law because the city has the highest concentration of judicial systems on the continent; starting with the East African Court of Justice (EACJ). The city is also host to the United Nations' International Criminal Tribunal for Rwanda, the African Court for People and Human Rights and is soon set to host African Court of Justice", said Judge Yusuf. He was of view that with all those legal chambers of international calibre based in Arusha it all left for a specialised inter-continental legal training institution to complement the city's position as 'The Hague of Africa'. Thus the establishment of the AIIL, which for a while will be hosted at the Arusha International Conference Centre (AICC) complex.

Inaugurating the Institute, the Deputy Minister for Foreign Affairs and International Cooperation, Dr. Mahadhi Juma Maalim, said Tanzania welcomes the noble initiative of the African Institute of International Law which will play a key role in the continent in creating deeper appreciation and understanding of international law. "AIIL will enhance Africans' knowledge and expertise in international law so that we reduce our dependency on external experts in our own matters". "There is no doubt that the African Institute of International Law will play a big role to provide Africa with well-trained human resources and Tanzania shall extend all necessary support to this initiative," he said.

All speakers acknowledged the importance of the AIIL whose establishment was endorsed by the Assembly of Heads of States and Governments of the African Union, which underscored its strategic and unique role as a Pan African institution. Similarly, the United Nations General Assembly welcomed the creation of the Institute and encouraged the UN Secretariat to cooperate with it through the Codification Division of the Office of Legal Affairs.

Among the Institutions' mandate is to promote study, research and analysis on international legal matters of particular interest and relevance to African countries and to foster the teaching and dissemination of international law in Africa and provide extensive training on Bilateral Investment Treaties (BIT) and Arbitration. AIIL will also serve to encourage and promote intellectual debate and exchanges on international legal issues of particular interest to Africa and its peoples. It will also foment the establishment of networks among African international lawyers as well as between the latter and scholars of other continents and contribute actively to the promotion and building of the rule of law in Africa, in general.

The inauguration ceremony ended with the beginning of the training which started with a discussion panel on **The Challenges of Foreign Investments in Africa (first topic),** chaired by Mr. Stephen Karangizi, Director, African Legal Support Facility, and the presenters were Professor Dr. Oliver Ruppel, Director, Development and Rule of Law Programme (DROP), Stellenbosch University, South Africa, and Professor Dr. Chris Maina Peter - Member of the International Law Commission, Dar Es Salaam University.

In his presentation, **Prof. Oliver Ruppel** touched on the fact, that many African countries have understood the necessity of mobilizing investment to ensure that it contributes to sustainable development and inclusive growth. Countries are eager to attract foreign investment but they have also become more selective. Increasing emphasis on corporate social responsibility reinforces the inclination of a new investment generation in Africa. Many countries in Africa are dissatisfied with the current investment regime. Concerns relate mostly to the (sustainable) development dimension of International Investment Agreements. Thus systematic reform and more coherent interaction between national and international

investment policies is important as they currently still focus largely on the protection of investment and the investor.

He explained the relevance of public international law and domestic investment law under an array of bilateral, regional and multilateral treaties (BITs, RECs, FTAs), alluding both to the role of the African Union (AU) framework of the New Partnership for Africa's Development (NEPAD) to accelerate economic co-operation and integration among African countries and regional investment promotion measures in RECs. Moreover he demonstrated recent domestic development using the example of South Africa and its 2013 Promotion and Protection of Investment Bill. South Africa is apparently shifting away from the use of BITs in the interest of other government policies. While BITs are being terminated foreign investors fear that they will not be accorded the same standard of protection that they would have been given under BITs since they could be negotiated in a way that suited mutual interests of the parties concerned. We have to ask ourselves the question in Africa whether we want to build walls of bridges in international investment as development requires substantial investment, which in turn demands a favorable investment climate. He pointed out the already existing investment barriers in Africa including political instability, insecurity of property rights, currency risks and the instability and uncertainty of the regulatory and policy environment. National states he said, have to balance the interest of attracting (and securing) international investment while promoting peace and security for their population. The most appropriate approach for achieving both – according to Ruppel - is adherence to and promotion of the rule of law while creating incentive structures for investors to act sustainably and to respect national social development goals, empowerment policies, labor standards, human rights and the environment.

Prof. Chris Maina exposed views related to where we come from as a continent and the challenges the latter faces with regard to investment. He stressed the importance of investment for the economic development of African countries: "they are a bridge to development if used carefully and strategically" because investors have technology and the capital. He contended that after political independence, Africa had to make one more step towards economic independence, whence the demands for changes. It is in this regard that various resolutions were adopted in favor of the developing countries. In addition, special sessions were held to discuss the New International Economic Order. He expressed a great concern that in today's globalized world, we do not see such nationalists as those at the time of independence, despite the fact that today's leaders are more educated than those of that time. In this regard, Prof. Maina is of the view that the bottom line, the most important thing in today's investment is patriotism. While he agreed that rules are needed, he opined that without the love of the country, little can be achieved. "Are we committed to the welfare and development of our people? Are we looking at long-term interests?", he asked.

Prof. Maina contended that "greasing the process (corruption)" is a sign of lack of patriotism. He drew the attention of the participants that in this training program, nobody would teach them on how to be patriotic, and he invited them to choose between patriotism and anti-patriotism. At the same time he stressed on the importance to consider domestic investors, wondering why they should not be given the same treatment as foreign investors. He also invited the participants to consider the huge increase in investment during the last decades, especially in natural resources, and to reflect on the better ways of protecting them and using them to the benefit of all citizens.

The second topic was: **Introduction and General Principles of Foreign Investment** presented by **Ms. Aurelia Antonietti** from the International Center for the Settlement of Investment Disputes (ICSID). From this presentation, participants understood that and how few areas of international law have undergone more change in the last half-century than the relationship between investors and the foreign countries in which they invest. Bilateral investment treaties (BITs), which govern the relationship between investors of one state and the government of another, have been increasingly prevalent since the 1960s. In addition to providing a number of substantive protections to international investors, many BITs provide for investor-state arbitration before the ICSID.

Ms. Aurelia Antonietti gave a detailed view of the ICSID that she defined as an international arbitration institution which facilitates legal dispute resolution and conciliation between international investors. The ICSID is a member of the World Bank Group, from which it receives funding, and is headquartered in Washington, D.C., in the United States. It was established in 1966 as an autonomous, multilateral specialized institution to encourage international flow of investment and mitigate non-commercial risks by a treaty drafted by the International Bank for Reconstruction and Development's executive directors and signed by member countries. As of today there are over 158 member countries contracting with and governing the ICSID. Contracting member states agree to enforce and uphold arbitral awards in accordance with the ICSID Convention. The center performs advisory activities and maintains several publications.

Mainly, Ms. Aurelia Antonietti provided a deep understanding on how dispute resolution clauses in BITs overwhelmingly provide for ICSID arbitration, either exclusively or as an available alternative. Consequently, the increase of BITs has seen a corresponding surge in ICSID arbitrations. The stakes in this type of arbitration are substantial, with most awards constituting hundreds of millions of dollars.

ICSID is a forum that resolves foreign investment disputes, defined as disputes ―between an investor from one country and a government that is not its own that relates to an investment in the host country. It is important to note that today ICSID arbitration generally arises in one of two ways.

In the first situation, an investor who has contracted with another private party in the host country claims that the host country has breached substantive provisions of the BIT. For example, the investor may claim that the host country expropriated an investment without compensation or did not afford the investor fair and equitable treatment. Thus, in addition to any private cause of action against the private party, an investor has a claim based on international law. In effect, the investor is initiating arbitration proceedings to which the host country has already consented, either in the BIT or in the host country's national law.

In the second situation, a dispute arises after the investor signs a contract with the host country itself or with an agency of the host country. For the purpose of this training program, these two types of foreign investment dispute were the focus of Mr. John Willems from White & Case - LLP.

The third topic was: **The Core Principles of International Investment Law**, presented by **Ms. Laura Halonen**, counsel at LALIVE – Geneva.

Ms. Laura Halonen provided an overview of the principles shaping the international law of foreign investment, as they have been defined in investment treaties and by the jurisprudence of international tribunals. She provided a deep analysis of the dispute settlement mechanisms at work in State v. State and Investor v. State Arbitration.

In her presentation, she traced the evolution of the jurisprudence and doctrinal opinion throughout history with added coverage of the BITs of a number of States. She outlined the principles behind the international law of foreign investment. The main focus was on the law governed by bilateral and multilateral investment treaties. She traced the purpose, context, and evolution of the clauses and provisions characteristic of contemporary investment treaties, and she analyzed the case law, interpreting the issues raised by standard clauses. Particular consideration was given to broad treaty-rules whose understanding in practice has mainly been shaped by their interpretation and application by international tribunals. In addition, she introduced the dispute settlement mechanisms for enforcing investment law, outlining the operation of Investor v. State arbitration.

Combining a systematic analytical study of the texts and principles underlying investment law with a jurisprudential analysis of the case law arising in international tribunals, Ms. Halonen offered a clear understanding of the principles of international investment law and arbitration.

The fourth topic was: **Investment Arbitration**, presented by **Mr. John Willems**, from White & Case - LLP

Mr. John Willems started with the object and delimitation of investment arbitration by answering the question as to why investment arbitration? He explained that in the fifties, to promote the development of non-industrialized countries, it was necessary to create framework conditions so that foreign capital could flow. It was necessary to promote investment, and for this, to give investors confidence and to secure their capital. For this purpose, contractual or financial guarantees are necessary. However, when these fail, the dispute is inevitable. To actually secure investment, it is still necessary to provide a reliable mechanism for dispute resolution.

Mr. John Willems gave a detailed explanation of the mechanism to be considered. He put that the use of state courts is not satisfactory. Wrongly or rightly, foreign investors fear the bias of the host state courts. As for those of the State of the investor, the host government will not wish to submit to the jurisdiction of another State. State justice being discarded, the only avenue remains arbitration. One could conceive a local arbitration in the host country, but it is unlikely that it provides the necessary security. Therefore, one will turn very naturally to international arbitration. One could think of an international arbitration conducted in a neutral place whose law would govern the arbitration. Better yet, one can imagine a truly international arbitration, detached from any national law and any national jurisdiction. It is this idea of a truly international arbitration that inspired the ICSID Convention signed in 1965, entered into force in 1966. To date, 159 states have signed, 150 have ratified it.

But arbitration under the ICSID Convention is not the only type of international investment arbitration. Others include arbitration under the ICSID Additional Facility that allows to use the procedure of the Centre, even when the binding conditions of jurisdiction on grounds of nationality under the Convention, are not met. In addition, certain investment contracts include conventional arbitration clauses, including arbitration clauses according to the ICC Rules or as the UNCITRAL Arbitration Rules.

For ten years, the investment arbitration is changing dramatically due to a new development: the conclusion of investment treaties. It can be bilateral treaties that guarantee investment, prohibit expropriation without compensation and provide the opportunity for any investor to establish an arbitration against the host state. The investor usually has a choice between different arbitration mechanisms, mainly arbitration under the Convention or the ICSID Additional Facility, arbitration under UNCITRAL Rules or according to the ICC Rules. As it stands, there are more than 3,000 bilateral investment treaties in the world.

It could also be multilateral treaties that contain arbitration clauses similar to those of bilateral agreements.

While historically the litigation was first found wedged in diplomatic protection, not allowing any direct link between the State and the foreign investor except in the courts of the State whose responsibility was involved, the situation has changed in favor of arbitration. This change was first made by the use of arbitration clauses in state contracts; it then considerably amplified with the admission of arbitration on “dissociated consent”, and arbitration can be triggered by the investor when the treaty of protection he is entitled to evoke by reason of his nationality provides for the principle.

Chosen for its confidentiality and criticized for its opacity, arbitration as a means of resolving disputes over investments between investors and states never ceases to catalyze heated debate.

The entry into force on 1 April 2014 of the regulations of the United Nations Commission on International Trade Law on Transparency in the Arbitration between investors and states based on treaties allows to assess the scope of this growing practice by both Conventions used mainly in investment arbitration which are, the Arbitration of the United Nations Commission for the Regulations on International Trade Law (UNCITRAL) and the Convention of the International Centre for Settlement of Investment Disputes (hereinafter under ICSID).

In any case, arbitration of investment is in a difficult situation and, as such, plays the role of a tightrope in order to achieve a delicate balance between protecting highly confidential data of the parties and the right to information of citizens, since the outcome of a dispute in which their state is involved is likely to have a significant impact on each of them. Therefore, is the establishment of transparency rule beneficial for arbitration of investment? In which direction is the investment arbitration leading? Faced with widespread criticism of the lack of clarity of the arbitral investments proceedings, it became necessary to establish transparency rules. Nevertheless, the implementation of these rules shows antagonism due to the confrontation between arbitration confidentiality and transparency.

Concerning the need for transparency rules of investment arbitration, Mr. Willem explained that traditionally arbitration as alternative dispute resolution is confidential. However, the involvement of a state as a party makes the situation delicate. As such, Mr. Willems explored and participant could understand the reasons why the investment arbitration transparency was begged and finally the approach initiated by the International Centre for Disputes Settlement of Investment for such an implementation.

About privacy versus transparency, Mr. Willems made the illustration of antagonism with the example of UNCITRAL. Second text most used in investment arbitration, the Arbitration Rules of the UNCITRAL does not, to date, contain any rule on transparency. He explained with some details that this absence has nevertheless not prevented progressive development in favor of transparency. Although the entry into force of the Regulation on transparency in treaty-based investor-State arbitration appears as a sign of evolution, its record is mixed, according to Mr. Willems.

RECOMMENDATIONS:

1. Given the importance of BITs for the development of African countries, the Institute should organize and conduct, on a regular basis, advanced courses on BITs, with special emphasis on negotiation, drafting treaties and drafting awards.

2. The participants recommended that the Institute should continue to train African arbitrators in order to ensure that Africa possesses a pool of world-renowned experts on arbitration.

3. The participants were encouraged to share their knowledge once at home (train the trainers) within the system that they work.

4. The participants were encouraged to advise their governments to effectively protect their interests for the benefits of their citizens.

5. Governments should be advised on when/where to enter into BITs and when/where not and there should be a mechanism whereby BITs clauses are regularly reviewed, and the duties and responsibilities of involved parties are spelled out with clarity.

Arusha, 20 February 2015