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ASSOCIATION FOR INTERNATIONAL ARBITRATION

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**H.E. Sir John Kaputin, Secretary-General African, Caribbean and Pacific
Group of States**

In his opening address, H.E. Sir John Kaputin set the tone and direction for the Conference: the ultimate goal was poverty alleviation through economic growth. Key elements to achieve this objective were international trade and foreign direct investment (FDI).

For effective integration of ACP countries in the global economy there had to be a fair, predictable legal order and a favourable business climate.

Legal remedies should be easily accessible and predictable. Article 98 of the Cotonou Partnership Agreement dealt with Dispute Settlement. The mechanisms foreseen involved the Council of Ministers and arbitration. The advantages of arbitration were well known. A key advantage was that lengthy court cases could be avoided.

Art 33 of the Cotonou Partnership Agreement called for legal and judicial reform in ACP member's countries. It might be expected that the Economic Partnership Agreements with the EU, EPAs, would lead significant legal reforms in these states, to achieve WTO compatibility and also towards good governance. Alternative dispute resolution mechanisms, notably arbitration and mediation, had to be taken into consideration when undertaking these reforms.

The conference organized by the Association for International Arbitration was timely and important and could help ACP countries implement systems for amicable dispute settlement.

Dr. Gaston Kenfack Douajni, President of APAA (Association for the Promotion of Arbitration in Africa (APAA)) addressed *The current state of ACP-EU arbitration in the OHADA¹ space.*

He reiterated that the partnership between the European Union (EU) and the African, Caribbean and Pacific Group States was governed by the Cotonou Agreement.

This Agreement contained a dispute settlement clause which foresaw an amicable settlement of the disputes that could arise between the EU and the African, Caribbean and Pacific States concerning the implantation of the said Agreement.

The amicable settlement of the dispute had to be submitted to the Council of Ministers or to the Committee of Ambassadors located in Brussels at the headquarters of the European Commission. If the Council of Ministers or the Committee of Ambassadors did not succeed in settling the dispute, either party might request settlement of the dispute by arbitration. In this context, each party would have to appoint an arbitrator, the Secretary General of the Permanent Court of Arbitration being the appointing authority, in the case where a party or the arbitrators already appointed failed to appoint another arbitrator or the president of the arbitral tribunal. The arbitral tribunal would apply the optional arbitration regulation of the Permanent Court of Arbitration for International Organisation and States, unless the arbitrators decided otherwise.

This dispute settlement clause was included in development contracts concluded in the ACP countries within the framework of the Cotonou Agreement.

This EU - ACP settlement of dispute clause seemed ill-adapted to the OHADA space, because of the hazards that inherent to the system and resulting from uncertainties of the deadlines/timeframes in which the amicable settlement of the dispute by the Council of Ministers or by the Committee of Ambassadors would take place.

It seemed unrealistic that arbitration administered from the European continent between parties from the OHADA space, with possible intervention from an appointing authority in The Hague (the Netherlands) could be concluded within the three months period specified by article 98 of the Cotonou Agreement.

This EU-ACP system of arbitration should therefore be replaced. The relevant clause could be replaced by one reading “*The disputes that arise between the parties concerning the implementation and/or the interpretation of the contract will be solved by amicable arrangement and if the parties cannot reach such arrangement, by arbitration according to the OHADA uniform act on arbitration or according to the OHADA Common Court of Justice and Arbitration rules of arbitration.*”

¹ On October 17, 1993, 16 African States signed a treaty known as the *Organisation pour l'Harmonisation du Droit des Affaires en Afrique* (Organization for the Harmonization of Commercial Law in Africa (The OHADA Treaty)). The 16 signatories were Benin, Burkina Faso, Cameroon, the Central African Republic, the Comoros, Congo-Brazzaville, Cote d'Ivoire, Gabon, Guinea, Guinea Bissau, Equatorial Guinea, Mali, Niger, Senegal, Chad and Togo (collectively, the Member States). The signatories to the OHADA Treaty are also members of the CFA (common currency linked to the French Franc). The Treaty left open the possibility of other African countries becoming members as the central concept of the Treaty is the promotion of African economic integration.

He called for the creation of a fund for the promotion of ADR and to enhance skills in international dispute settlement, especially international arbitration as well as ADR in Africa. Such a fund could be modelled on the fund created at the Permanent Court of Arbitration.

Finally he stressed the need for intensive capacity building on rules and institutional procedures on international dispute settlement in general and on international commercial arbitration and ADR in specific, for African professionals -- lawyers, government officials, legal practitioners and academics-- from the OHADA space.

Mr. Colin Brown, EU Directorate General for Trade, addressed *The relationship between the Cotonou and EPA dispute settlement mechanism and WTO obligations (article 21) and procedures (EPAs are expected to be WTO compatible and WTO jurisprudence on trade dispute settlement could be a guiding factor) and the legal and technical capacity constraints and needs of ACP states and regions.*

He highlighted that the EPA dispute settlement system was largely inspired by the WTO dispute settlement system. However, the timeframes were shorter than in the WTO system.

The EPA dispute settlement system contained a number of improvements over the WTO system: a requirement to offer compensation, and the assurance that appropriate measures could only be imposed after a finding of inconsistency and that a party might seek review in order to have appropriate measures removed.

The system had a number of elements of asymmetry in favour of the ACPs, related to the determination of the reasonable period of time, and in particular to the adoption of appropriate measures.

Dispute avoidance remained a main objective.

There was the need for intensive capacity building on rules and procedures of the EPA dispute settlement system for primarily government officials, but also for professionals --, legal practitioners and academics-- from the ACP member states.

Resources should be made available for such training and young professionals and academics should be encouraged and financially supported to build skills and gain practical experience in this area.

Dr. Awuku, ACP- Legal Counsel, addressed the issues of *ACP States Under Special and Differential Treatment of the WTO Dispute Settlement Mechanism*

The ACP states, many of them being least-developed country Members, had not been active participants in the WTO dispute settlement system. This low participation was not because they never had the occasion to want to enforce their rights and obligations under the WTO Dispute Settlement System but because of structural problems they faced which are related to:

- The cost of access to the dispute settlement process and their small litigation budget;
- Recognizing opportunities to use the DSU effectively required legal expertise which most of the LDC often lacked, since many maintained no permanent Geneva based WTO delegation and have rarely participated in prior GATT/WTO disputes;
- Most bias was due to LDC's lesser role in world trade, relatively under-diversified export portfolios, and smaller market size;
- Antigua and Barbuda's case highlighted the fact that suspension of concessions and other obligations were not always feasible because developing countries lacked the market size to make a credible retaliatory threat. This structural problem led the developing and least developed countries and the African Group to propose an amendment to WTO DSU Article 22 (6) to allow for collective retaliation in cases brought by developing countries against developed countries.

The use of mediation and conciliation for the settlement of disputes in international commercial business transaction had been used by both the public and the private sectors in many countries and worked well. Thus the use of alternative dispute resolution under Article 5 of the DSU, good offices, conciliation and mediation, could offer scope for solving developing countries' problems in international trade disputes. Still, the provision had not been used frequently.

On the other hand, developing countries could look at some of the problems affecting them in order to participate in a more meaningful way in the WTO dispute settlement process and address those issues at the WTO Disputes Settlement Committee to effect a change. He saw the need for wide-ranging legal assistance for ACP States in the area of dispute settlement and access to justice.

Mr. Paul-Jean Le Cannu, Legal Counsel of the Permanent Court of Arbitration spoke about *The Role of the Permanent Court Arbitration in the Settlement of Disputes in ACP-EU Relations: Article 98 of the Cotonou Agreement*

M. Le Cannu discussed the following matters:

- the method of appointment of arbitrators and the emphasis on the expeditious appointment of arbitrators in Article 98 of the Cotonou Agreement;
- the reference in Article 98 to the Secretary-General of the PCA, and whether the Secretary-General, entrusted with the task of appointing arbitrators but not explicitly referenced as the "appointing authority" in Article 98, would also be empowered to decide challenges to arbitrators;
- multiparty disputes and, in particular, the consequences of a failure to agree on the appointment of an arbitrator by multiple ACP respondent States in light of the Dutco jurisprudence;
- what States party to the Cotonou Agreement should do to benefit from the PCA's Financial Assistance Fund which is intended to help developing

countries meet part of the costs associated with the international arbitration proceedings or other means of dispute settlement offered by the PCA.

M. Le Cannu framed his discussion in light of there having not yet been an example or case showing how Article 98 of the Cotonou Agreement would be interpreted and applied. The drafting history of Article 98, which might have provided some clues as to how the provisions of Article 98 should be understood, was unfortunately not accessible prior to the conference. Any critical analysis of this clause was therefore bound to be relatively speculative.

In response to the matters raised, representatives from the ACP Secretariat pointed out that the Cotonou Agreement provided for the possibility of revising the Agreement every five years. As such, this periodic revision mechanism could be used to amend the Agreement's dispute settlement provisions. The ACP Secretariat also stated that Article 98 adequately provided for the appointment of arbitrators where there were multiple European and/or ACP States parties. To this comment, the speaker responded that where, for example, multiple ACP States were respondents and failed to agree on the appointment of an arbitrator, problematic issues similar to those raised in the Dutco case could arise.

To conclude, Mr. Le Cannu recommended that certain provisions of Article 98 of the Cotonou Agreement be revised and/or clarified, including inter alia those relating to the appointment of arbitrators in multiparty arbitrations. He also suggested making use of the Financial Assistance Fund should disputes arise under Article 98 of the Cotonou Agreement.

Mr. Justice Duke E. Pollard, Judge of the Caribbean Court of Justice presented: *Various innovative features of the CCJ and the disputes settlement procedures for the regional economic integration.*

He highlighted that from the perspective of international judicial institution building, the Caribbean Court of Justice was an innovative attempt worthy of emulation. Its innovativeness was to be found both in the method of selection of judges designed to guarantee personal and institutional independence and in its exemplary method of financing the operations of the court, which was designed to guarantee autonomy of decision-making in judicial and administrative matters. In terms of appointments to the bench, this was achieved by an apolitical Regional and Judicial Legal Services Commission (RJLSC) comprising representatives from civil society, particularly the regional bar, while the expenses of the Court were defrayed from income issuing from a Trust Fund established for the purpose. The Trust Fund was managed by apolitical trustees drawn from the private sector and civil society.

It was mentioned, that even though the arrangements for appointing the judges of the CCJ appeared adequate to secure their tenure, concern had been expressed about the vulnerability to political determination of the judiciary because of the alleged ease with which the CCJs' constituent instrument may be and several times already had been amended.

The jurisdictional reach of the Court was also unique comprising on the one hand, a municipal appellate jurisdiction and an original international law jurisdiction. In the exercise of its original jurisdiction the Court was the institutional centrepiece of the Caricom Single Market and Economy where it was mandated to employ rules of

international law to settle disputes among parties to the regime. In the determination of such disputes appropriate refinements had been made to the rules in order to ensure certainty and uniformity in the applicable law and to promote social and economic cohesion in the regime.

There was a need for intensive capacity building on rules and procedures of the CCIJ dispute for legal practitioners and academics from the member states.

Ms. Chitra Radhakishun, Manager of the UNCTAD Project on Dispute Settlement, spoke about *UNCTAD meeting the needs of developing countries in dispute settlement in international trade, investment and intellectual property*.

She pointed out that the growth of trade in goods and services and the increased flow of foreign direct investment (FDI) and technology across borders came to the fore in conjunction with the adoption of substantive legal rules on international trade, investment and intellectual property. A compliment to this process was the establishment of international or regional bodies and procedures for the settlement of disputes arising from the interpretation and application of these rules. Thus, in the last decade and a half, a large number of substantive rules had been adopted, and the number of dispute settlement bodies with their specific procedural rules was multiplied.

At the international level, the World Trade Organization (WTO) provided for a system for the settlement of trade disputes between States; the World Bank Group administered dispute settlement between States and private investors; and the World Intellectual Property Organization (WIPO) had facilities for dispute settlement between private commercial parties. And the United Nations Commission on International Trade Law (UNCITRAL), responsible for the unification of trade law and procedures, had developed rules for arbitration, mediation and conciliation of commercial disputes between private parties. In addition to the creation of international dispute settlement bodies, a growing number of regional arbitration centres, mandated to settle commercial disputes between private parties, were being created.

UNCTAD data illustrated the growing importance of dispute settlement as a feature of multilateral trade, investment and intellectual property: by the end of 2006, the cumulative number of treaty-based investment disputes had risen to at least 259, with 161 brought before the International Centre for the Settlement of Investment Disputes (ICSID) and 92 before other arbitration forums. At the WTO, the cumulative number of requests for consultation till the end of 2007 totalled 369. 137 Panel Reports were circulated, and 92 of these reports were appealed.

The growing number of bodies and rules available for the settlement of disputes arising in international trade, investment and intellectual property called for a better understanding of their jurisdiction, applicable law, *modus operandi* and decision-making so as to allow developing countries to effectively use these bodies and ensure fair and equitable use of the rules and the system. It had therefore become necessary to study, compare and evaluate them. Aware of the challenges as well as of the limited skills and knowledge of how to secure compliance with trade, investment and

technology agreements through legal channels, Governments and the private sector in developing countries had been working to build up the necessary capacity. The aim was to be able to protect their interests when disputes arise concerning commitments undertaken by them or by their trade and investment partners.

It was in response to these needs that the UNCTAD Dispute Settlement Project was launched. The project aimed at facilitating understanding of the basic rules and jurisprudence of dispute settlement in international trade, investment and intellectual property. The activities were geared towards building permanent capacity in this field in developing countries. The project sought to provide cutting-edge knowledge to its beneficiaries through its publications and its national and regional workshops. Its services on international dispute settlement were principally directed towards meeting the needs of government officials, academics, and legal practitioners in developing countries. Requests from trade associations and unions and business people in developing and least developed countries to be included in its activities, were also favourably responded to. The promotion of research on related international and regional issues was envisaged by the project as well.

In preparing training materials, organizing regional and national seminars and training trainers on rules and practice in institutionalized dispute settlement, the project drew upon the research work done by the various UNCTAD programmes. Activities were undertaken in collaboration with other international bodies such as WTO, ICSID and WIPO.

The project filled a void in certain areas and was complimentary in others. For example, the International Centre for the Settlement of Investment Disputes (ICSID) did not offer training courses on its rules and the use of its facilities. The number of training courses offered on international commercial arbitration was limited. Moreover, where available, most courses were offered by specialized institutions to targeted audiences with participation available to restricted numbers of participants. In addition, the high costs of these training courses were, if not prohibitive, limiting participation of professionals from developing countries. These factors had contributed to the appeal and success of the project, as data on its impact indicated.

From 2003 - 2008, 527 professionals from 62 countries participated in the project's capacity building and training programmes. One third of these participants were women, a positive result of active encouragement of female participation in workshops.

In 2003 the first materials on dispute settlement were made available, free of charge, on the UNCTAD website www.unctad.org/dispute. From 2003 to February 2008, close to one million electronic copies of the project materials were downloaded.

The data showed that in an era where international commercial exchanges had become increasingly rules-based and dispute settlement had become an important feature of the current multilateral trade, investment and intellectual property regimes, the UNCTAD project on Dispute Settlement in International Trade, Investment and Intellectual Property was meeting a real need of developing countries.

Mr. Srilal Perera, form the Multilateral Investment Guarantee Agency - World Bank Group, presented *Arbitration under the Convention Establishing the Multilateral Investment Guarantee Agency (MIGA) and its Mediation Services*.

Since its establishment MIGA had not been engaged in arbitration either with one of its guarantee holders or upon subrogation to a guarantee holders rights, with a host country. In its twenty year history MIGA had paid out three claims, but to reiterate, none of these claims concluded with arbitration proceedings against the host country. However, he emphasized, there were many claims type situations which engaged MIGA routinely. Because of the emphasis that MIGA placed on the projects it covered having the highest development effects, MIGA exercised as much effort as possible to avoid claims. The importance of these efforts was to ensure that projects continued to benefit the host country and the investor in mutually acceptable ways. Thus quick intervention and negotiated settlements had helped achieve this objective. The unique structure of the Agency as an international organization and as an institution of the World Bank Group also helped in depoliticizing investment disputes relating to claims and resolving them purely on technical grounds.

Many of the above factors aided the Agency to also carry out its mandate in mediating investment disputes at which it has been fairly successful.

MIGA had therefore played a key role in promoting investments into its poorest developing countries not only by providing political risk insurance but also by ensuring that long term investments beneficial to a member country's economy were sustained over time through avoidance of claims.

A participant asked whether the arbitration provisions which related to applicable law might not create confusion. The speaker stated that while it appeared to be that way until as such time as an arbitration occurred, the matter would remain of academic interest. The speaker also said that MIGA had been so successful at avoidance of claims that arbitration might not be easily anticipated.

Another participant asked whether MIGA's mediation practice was formalized and executed according to established mediation practice. The speaker said that so far MIGA's mediation practice had been extremely ad hoc and had proven to be rather successful with the only requirement being that both parties to the dispute, *i.e.*, the investor and the host state, agreed to MIGA's mediation. The speaker said that if in the future demand for MIGA's mediation grew, it was possible that rules, processes and procedures would be adopted.

Mahnaz Malik, Principal Partner MMI Law and Associate International Institute for Sustainable Development (CCIA), spoke about *the innovations introduced by the COMESA CCIA signed last year with respect to investor protection in IIAs, including the investor-state arbitration process*. Last May, the 19 COMESA members states of Burundi, Comoros, Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan,

Swaziland, Uganda, Zambia and Zimbabwe, signed the Investment Agreement for the COMESA Common Investment Area (CCIA)².

Mahnaz stated that the importance of the CCIA also stems from the fact that its provisions are carefully drafted to take account of the recent investor reliance on broad language found in provisions traditionally contained in BITs which have resulted in expansive interpretations from some arbitral tribunals. COMESA member states have had 22 claims registered against them at the International Centre for Settlement of Investment Disputes (ICSID). Her presentation identified some of the innovations introduced by the CCIA, which set it apart from the provisions found typically in BITs signed by its signatories.

Mr. Charles Claypoole, from the Law Firm Eversheds in Paris spoke about *the investment provisions of the EC-ACP Economic Partnership Agreements (EPAs) and their relationship with Bilateral Investment Treaties (BITs)*.

In this presentation he reviewed the specific provisions of the EPA relating to investment, and analyzed how these provisions might interact with bilateral investment treaties (BITs) already in force.

The EC - CARIFORUM EPA was taken as a model for the purposes of the analysis since it was the only "full" EPA that had been initialled by the time of writing.

One issue which might have important repercussions related to the extent that tribunals established under BITs (i.e., in disputes between private investors and host States) might, directly or indirectly, assume jurisdiction over disputes relating to alleged violations of EPAs.

Various ways in which this might occur were canvassed. For example, the EPA (as a treaty between States signatory to a BIT) might be considered to constitute one aspect of the applicable law in an investment arbitration (international law). Alternatively, the undertakings expressed in the EPA, for example, relating to market access, might be invoked in support of a claim for breach of the fair and equitable treatment standard in a BIT. The jurisprudence of investment arbitration tribunals regarding legitimate expectations was relevant in this respect. Thirdly, an umbrella clause of the type found in a number of BITs concluded by European and Caribbean States might be construed to permit an investment arbitration tribunal to exercise jurisdiction over claims that obligations contained in an EPA had been violated.

If any of these arguments were to succeed, this could be regarded as undermining the carefully drafted inter-State dispute resolution provisions contained in EPAs since private investors would be able to hold States to account for a perceived failure to respect their EPA commitments.

Points touched upon in the ensuing discussion included the relationship, and overlap, between investment liberalisation (the aim of the EPA) and investment protection (the purpose of the BIT), and the possible tension between the responsibility of the

² The twelfth Summit of COMESA Authority of Heads of State and Government, held in Nairobi, Kenya, on 22nd and 23rd May 2007, adopted the (CCIA).

European Commission regarding trade and investment liberalisation issues and that of the EU's member States which traditionally have had responsibility for the negotiation of BITs."

Mr. Aloysius Gng. of CEPMLP, University of Dundee, spoke about *Mineral (soft) Law in the field of ACP-EU Arbitration*. Central to his presentation was that the notion of soft law was in vogue and a paradigm shift was perhaps due. But its proliferation raised many paradoxes and perplexities.

Whilst the mining industry remains important and relevant to the ACP states, mining soft law has become more important with the emphasis on "good governance" and role of non-state actors under the Lomé Conventions. With the burgeoning number of soft law instruments in the mining industry, the applicability of soft law in general however, as Sir John Kaputin rightly pointed out remains unclear. Although the delineation between soft law and hard law however remains difficult, this is not to assert that these instruments are not important, on the contrary, soft law instruments play a number of roles even in dispute resolution. Although soft law is not binding, it should not be underestimated since it demonstrates the alternative may not be acceptable.

There are two recommendations following the discussions:

- That ACP members should continue to engage and participate in the soft law making process. However, it is suggested that a special fund be made available to specifically assist with that process. It is felt ACP member states are at a disadvantage since soft law often acts as a pre-cursor to hard law - one of the consequences of the low ACP states participation meant that the interest of ACP states are often not adequately represented in the long run.
- A special fund should be established to assist ACP states in the dispute resolution process, not only to ensure adequate legal representation, training and support, but also to promote a greater sense of cooperation and ownership in the process as a whole