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## **“LESSONS” CONFIRMED WHILE SERVING AS ARBITRATOR AND COUNSEL IN ARBITRATIONS INVOLVING AFRICA**

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In his 2001 book, *International Commercial Arbitration and African States: Practice, Participation and Institutional Development*, Dr. Amazu A. Asouzu of King’s College, London, examined the positive impacts that arbitration could have on Africa.<sup>1</sup>

At the same time, however, he identified reservations that many African nations held regarding international arbitration:

- International disputes would take place in venues outside of Africa;
- There were not enough experienced arbitrators from the region;
- Arbitration was expensive; and
- The disparities between different cultural, legal and economic systems were too great.<sup>2</sup>

Dr. Asouzu noted that these perceptions “led to a feeling of suspicion, general lack of confidence, hostility and opposition to the arbitral process.”<sup>3</sup>

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<sup>1</sup> See, e.g., AMAZU A. ASOUZU, INTERNATIONAL COMMERCIAL ARBITRATION AND AFRICAN STATES: PRACTICE, PARTICIPATION AND INSTITUTIONAL DEVELOPMENT 47–50 (2001).

<sup>2</sup> See *id.* at 49–50; Michael Tselentis QC, *International Commercial Arbitration and the Southern African Development Community*, 22 ADVOC. 31, 32 (2009).

<sup>3</sup> ASOUZU, *supra* note 1, at 412.

According to some recent statistics, such distrust recedes but slowly. As of 2013, only ten of the continent's fifty-four countries had adopted the UNCITRAL Model Law.<sup>4</sup> And though almost all countries on the continent have entered into at least one bilateral investment treaty (BIT), nearly half of them have entered into just ten or fewer BITs.<sup>5</sup>

On the other hand, there is solid evidence that international arbitration increasingly is gaining traction in Africa. Either the New York Convention, the ICSID Convention, or both, are now in force for the majority of African States.<sup>6</sup> The number of intra-African BITs is also on the rise, with 145 signed as of 2013, though not all are yet in force.<sup>7</sup> The last decades have witnessed a marked increase in ICSID proceedings involving African states as well. Having gone from six ICSID cases involving Africa in the 1970s, the numbers rose to ten cases in the 1980s and fourteen cases in the 1990s, then exploded to thirty-nine new cases between 2000 and 2009, and thirty new cases between 2010 and 2013.<sup>8</sup> Similarly, the Permanent Court of Arbitration in The Hague recently indicated that of its ninety-seven pending cases, eighteen, or approaching twenty percent, involve one or more parties from Africa.<sup>9</sup>

We have also seen an expansion of arbitration events, centers, conferences, and organizations in Africa, including:

- New LCIA and PCA offices in Mauritius following the passage in 2008 of the Mauritius International Arbitration Act;<sup>10</sup>
- The establishment of the Kigali International Arbitration Center and its International Arbitration Conference;<sup>11</sup>
- The inaugural East Africa International Arbitration Conference held in July 2014 in Nairobi;<sup>12</sup> and

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<sup>4</sup> They are Egypt, Kenya, Madagascar, Mauritius, Nigeria, Rwanda, Tunisia, Uganda, Zambia, and Zimbabwe. See *ARBITRATION IN AFRICA: A PRACTITIONER'S GUIDE* 479–80 (Lise Bosman ed., 2013).

<sup>5</sup> See *id.* at 461–62.

<sup>6</sup> See *id.* at 481–82.

<sup>7</sup> See *id.* at 449–50.

<sup>8</sup> See *id.* at 463–67.

<sup>9</sup> *PCA Holds Hearing in Mauritius*, PERMANENT CT. ARB., [http://www.pca-cpa.org/shownewsc2b2.html?ac=view&nws\\_id=416&pag\\_id=1261](http://www.pca-cpa.org/shownewsc2b2.html?ac=view&nws_id=416&pag_id=1261) (last visited Aug. 7, 2015).

<sup>10</sup> *LCIA-MIAC Arbitration Centre*, LCIA-MIAC, <http://www.lcia-miac.org/> (last visited Aug. 7, 2015); *Services Under the Mauritius International Arbitration Act*, PERMANENT CT. ARB., [http://www.pca-cpa.org/showpage9a4c.html?pag\\_id=1492](http://www.pca-cpa.org/showpage9a4c.html?pag_id=1492) (last visited Aug. 7, 2015).

<sup>11</sup> *Kigali International Arbitration Centre News and Highlights*, KIGALI INT'L ARB. CTR., <http://www.kiac.org.rw/> (last visited Aug. 6, 2015).

- The third biennial Mauritius International Arbitration Conference took place in December 2014, and in 2016 Mauritius will become the first African country to host the ICCA Congress.<sup>13</sup>

Various investment opportunities in the continent were recently front-page news items here at home as well. In the summer of 2014, the U.S.-Africa Leaders' Summit hosted by President Obama in Washington, D.C. brought together leaders of forty-five African States to discuss trade and investment.<sup>14</sup> Among other things, President Obama announced \$12 billion in new funding for the Administration's "Power Africa" initiative and \$14 billion in new investments by U.S. companies in Africa, including \$5 billion from Atlanta's own Coca-Cola.<sup>15</sup>

Following this overview of growth in African arbitration, I would like to offer a few anecdotes from my own experiences serving as counsel or arbitrator in disputes involving African States. By no means are my stories unique to Africa. They do provide, however, some confirmation from my own work with African States of four practical "lessons" I have learned that are universally applicable.

#### I. LESSON ONE: BE VERY CAREFUL IN CHOOSING YOUR LOCAL PARTNER!

In 1999, I was appointed by Tanzania Electric Supply Company (TANESCO) to hear an ICSID dispute between it and a company called Independent Power Tanzania Limited (IPTL). The arbitration focused on a Power Purchase Agreement between the two entities concerning an electricity generating facility in Tegeta, Tanzania. You may be wondering why this case landed at ICSID. TANESCO was wholly owned by the Government, and IPTL, while incorporated in Tanzania, was seventy percent owned and controlled by a Malaysian investment company named "Mechmar," which had

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<sup>12</sup> *The East Africa International Arbitration Conference, Nairobi (28th–29th July 2014) Save the Date!*, E. AFR. CHAMBER COM., INDUSTRY & AGRIC., <http://www.labfa.org/wp-content/uploads/2014/04/programme.pdf> (last visited Aug. 7, 2015).

<sup>13</sup> *See About the Mauritius International Arbitration Conference*, MAURITIUS INT'L ARB. CONF., <http://www.miac.mu> (last visited Aug. 7, 2015); *Welcome Message from the Chairman of the Host Committee of the ICCA Mauritius 2016*, ICCA, <http://www.iccamauritius2016.com/> (last visited Sept. 25, 2015).

<sup>14</sup> Michael Bloomberg & Penny Pritzker, *Obama's U.S.-Africa Forum Will Catalyze \$14 Billion in Business Deals*, FORBES (Aug. 5, 2014, 6:00 AM), <http://www.forbes.com/sites/realspin/2014/08/05/obamas-u-s-africa-forum-will-catalyze-14-billion-in-business-deals/>.

<sup>15</sup> Mark Landler, *African Leaders Sit Down With American Investors*, N.Y. TIMES (Aug. 6, 2014), <http://www.nytimes.com/2014/08/06/world/africa/african-leaders-sit-down-with-american-investors.html?module=Search&mabReward=relbias%3As%2C%7B%221%22%3A%22R1%3A10%22%7D>.

partnered with a Tanzanian engineering firm called “VIPER.”<sup>16</sup> For purposes of consenting to the jurisdiction of ICSID, the Parties had agreed that IPTL was a “foreign-controlled entity” pursuant to Article 25(2)(b) of the Convention.<sup>17</sup> The relations between Mechmar and VIPER, which I will return to in a moment, became the focal point of my “lesson” from this case.

The Tribunal issued a Final Award in 2001 with several appendices outlining the respective rights and obligations of the parties under the Power Purchase Agreement. Among other things, the parties, once those rights and obligations had been determined by the Tribunal, agreed on the resulting “Financial Model” that would determine monthly “capacity payments” TANESCO would make to IPTL.<sup>18</sup> That model was incorporated into the *dispositif* of our award.<sup>19</sup>

Seven years later, IPTL submitted an application for interpretation of our Award. TANESCO had now taken the position that the Financial Model regulating its monthly payments was invalid because it had been based on IPTL having been funded thirty percent by equity and seventy percent by debt, whereas IPTL had funded the equity portion of the project with a shareholder’s loan from Mechmar, which in turn had been funded by a loan to Mechmar from Standard Chartered Bank (SCB) in Hong Kong. IPTL disputed that this aspect of its financing should come as any surprise to TANESCO, since IPTL had disclosed all of its financial statements in the underlying arbitration which detailed its loans and shareholdings—that is, *before* TANESCO agreed to the Financial Model contained in the Award.

Behind the scenes, trouble had been brewing within IPTL for quite some time. Already in 2002, the non-controlling thirty percent Tanzanian shareholder in the joint venture, VIPER, had filed a petition to wind up IPTL. The Malaysian investor, Mechmar, responded by commencing an LCIA arbitration against VIPER to enjoin VIPER from pursuing the Tanzanian wind-up proceedings. Mechmar obtained a favorable ruling from the LCIA tribunal, the enforcement of which, however, was refused by Tanzanian courts.

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<sup>16</sup> The full corporate names are Mechmar Corporation and VIP Engineering & Marketing Limited. See *Tanz. Elec. Supply Co. Ltd. v. Indep. Power Tanz. Ltd.*, ICSID Case No. ARB/98/8, Final Award, ¶¶ 1–2, 13 (July 12, 2001), [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC578\\_En&caseId=C174](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC578_En&caseId=C174).

<sup>17</sup> *Id.* ¶ 10.

<sup>18</sup> *Id.* ¶¶ 53, 64, app. F ¶ 1.

<sup>19</sup> See *id.* ¶ 25.

Clearly aware of the shareholder disagreement within IPTL, TANESCO (the Respondent in the ICSID interpretation proceeding) argued that IPTL had no standing to file the interpretation request because VIPEM had never signed off on a corporate board resolution authorizing it to do so. It seems that the agreement between Mechmar and VIPEM gave VIPEM a degree of veto power. The parties' dispute over IPTL's right to initiate the interpretation proceeding dragged on for many months, with SCB seeking to pursue the case in place of IPTL as its assignee under the Power Purchase Agreement, which assignment had been triggered by TANESCO's not making its contractually stipulated "capacity payments" to IPTL and IPTL's consequent default on its loan from that bank. Eventually, the interpretation proceeding had to be abandoned.

SCB continued to seek to get its money back via TANESCO before two other ICSID tribunals. It failed in one case on jurisdictional grounds, but it obtained a favorable Decision on Jurisdiction and Liability in its other ICSID case against TANESCO. But, the Tribunal limited its decision to declaratory relief, however, and the Tanzanian courts have not enforced the decision.<sup>20</sup> Clearly the Malaysian investor had not foreseen that its local partner would become its adversary.

From what I understand, the saga of this case continues. According to local news sources, there is a major ongoing dispute over funds that the Government had been paying into an escrow account for IPTL under the Power Purchase Agreement during their later dispute. The Government is now conducting investigations into the allegation that senior Government officials fraudulently authorized payment of \$122 million of public funds from that escrow account to a company named Pan Africa Power, which purchased VIPEM's thirty percent share in IPTL.<sup>21</sup>

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<sup>20</sup> See Douglas Thomson, *Panel Demurs on Damages in Tanzania Power Claim*, GLOBAL ARB. REV. (Mar. 11, 2014), <http://globalarbitrationreview.com/news/article/32488/panel-demurs-damages-tanzania-power-claim/>; *ICSID Throws Out Tanzania Claim*, GLOBAL ARB. REV. (Jan. 9, 2013), <http://globalarbitrationreview.com/news/article/31072/icsid-throws-tanzania-claim/>.

<sup>21</sup> See *Donors Delay Some Aid to Tanzania Over Graft Claims*, BUS. RECORDER (Oct. 12, 2014), <http://www.brecorder.com/business-a-economy/189/1232038/>; *Dutch Lawyer Urges State to Clarify on Escrow Account*, ALLAFRICA (Oct. 23, 2014), <http://allafrica.com/stories/201410231040.html>; *IPTL Owns 'All' in BoT Escrow Account—Claim*, ALLAFRICA (Oct. 15, 2014), <http://allafrica.com/stories/201410150384.html>.

## II. LESSON TWO: SOMETIMES IT IS DIFFICULT TO GET A HOST STATE TO SETTLE, EVEN AFTER IT HAS AGREED TO DO SO

My second lesson arose in two cases. The first was an ICSID arbitration in which I served as counsel for the Claimant. The New York bank, Manufacturers Hanover Trust Company, often referred to as “Manny Hanny,” had obtained a license to operate a branch bank in an Egyptian Free Zone in 1975.<sup>22</sup> Five years later, Egypt’s General Authority for Investment and Free Zones (GAIFZ) changed its regulations so as to increase certain “added value” duty payments applicable to the bank. When Manny Hanny refused to pay the new fees, the General Authority sued the bank, and the litigation wended its way through the Egyptian court system. Ultimately, the Egyptian courts rejected Manny Hanny’s argument that they should decline jurisdiction in recognition of the ICSID Convention’s Article 26, which provides that ICSID’s jurisdiction is “to the exclusion of any other remedy.”<sup>23</sup> This argument was based on the availability to Manny Hanny of ICSID jurisdiction pursuant to a standing consent provided in Egypt’s Foreign Investment Law.

Manny Hanny called upon me to represent it before ICSID, and we proceeded to file a Request for Arbitration against both Egypt itself and the GAIFZ. Due to the failure of Egypt to appear, though the GAIFZ did, it was a year before the Tribunal could be constituted, with ICSID itself having to appoint both an arbitrator for the Egyptian Respondents and a Tribunal President.

The very next day, I submitted a request for provisional measures and temporary restraining measures pursuant to Article 47 of the ICSID Convention recommending that the Respondents cease and desist from pursuing the related municipal proceedings. The Tribunal agreed with us, recommending a suspension of the local Egyptian court proceedings, a conclusion which it later reconfirmed when we were forced to renew our request. Ultimately, the Tribunal issued a decision in 1991 upholding its jurisdiction.

Having prevailed in the jurisdictional phase of the dispute, my client and the GAIFZ agreed to settle for the amount my client had always maintained

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<sup>22</sup> *Mfns. Hanover Tr. Co. v. Arab Republic of Egypt*, ICSID Case No. ARB/89/1 (unpublished decision).

<sup>23</sup> Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 26, Oct. 14, 1966, [https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/2006%20CRR\\_English-final.pdf](https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/2006%20CRR_English-final.pdf).

was the proper one owed to the GAIFZ. That settlement became stymied, however, due to lower functionaries within the GAIFZ insisting that about \$40,000 in interest also be paid as a condition of the deal. Fortunately, a law school classmate of mine happened to be the U.S. Ambassador to Egypt at the time, and at my request he placed a call to the Prime Minister, following which that precondition disappeared and we concluded the settlement.

But that was not the end of the matter. You may recall that a decision confirming ICSID jurisdiction is not subject to annulment based on Article 52 of the Convention, which applies only to “awards,” and not to “decisions.” The Egyptian Government, therefore, was well aware that the Jurisdictional Decision in this case could not be annulled as it had lost a similar battle several years earlier, in April of 1988, in the famous “Egyptian Pyramids” or *SPP* case.<sup>24</sup> Following the jurisdictional decision in that case, Egypt had tried to file an Application for Annulment, but ICSID’s Secretary-General, Dr. Ibrahim Shihata, refused to register the Application.<sup>25</sup> So, you can imagine my surprise upon receiving a call from the Secretary of the ICSID Tribunal, Antonio Parra, after we had already settled, informing me that representatives of the Egyptian Government were in his office in Washington, DC to present an Application for Annulment in our case. It eventually came to light that two senior Egyptian civil servants who were on the verge of retirement had written themselves orders to deliver the Application so that they could visit the United States for the first, and presumably the last, time. The moral of the story: Expect the unexpected when bargaining over settlement with State officials.

The second African case that confirmed this lesson is *Foresti v. Republic of South Africa*. The dispute was highly publicized and could have turned into a true “blockbuster.” Seven Italian citizens and their Luxembourg company that mined dimensional stone—marble, granite, and the like—in South Africa had filed an ICSID claim challenging post-apartheid South African legislation requiring mining investors to sell twenty-six percent of their shareholdings to “historically disadvantaged South Africans” and ensure that forty percent of their management operations were performed by members of the same group.<sup>26</sup>

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<sup>24</sup> See *S. Pac. Properties (Middle East) Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/84/3, Award on the Merits, ¶ 24 (May 20, 1992), 8 ICSID REV. 328 (1993) (recounting details of its unpublished Decision on Preliminary Objections to Jurisdiction dated Apr. 14, 1988).

<sup>25</sup> *Id.* ¶ 26.

<sup>26</sup> *Foresti v. Republic of S. Afr.*, ICSID Case No. ARB(AF)/07/1, Award, ¶¶ 1, 56 (Aug. 4, 2010), [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1651\\_En&caseId=C90](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC1651_En&caseId=C90).

It was a case sharply posing potential conflicts between international investment law and human rights laws. The nature of the controversy attracted the attention of several non-governmental organizations, which joined the proceedings as non-disputing parties, something that resulted in some scholarship about public interest intervention in arbitration.<sup>27</sup>

In fact, however, we never reached the merits. Instead, the parties ended up cutting a deal on their own in which the Claimants would be deemed to be in compliance with the South African equity divestiture laws by signing an “Offset Agreement.” By that agreement the Claimants undertook to employ additional “historically disadvantaged South Africans” in the beneficiation of the mined stones, and to provide for a five percent employee ownership program.<sup>28</sup>

Thinking that the matter was closed, Claimants sought to discontinue the proceedings in November 2009.<sup>29</sup> The Respondent, however, refused to consent to a discontinuance, which consent was required by Article 50 of ICSID’s Additional Facility Rules, unless the Claimant would pay all of its legal fees of €5.3 million.<sup>30</sup>

What followed was a historically unique procedure in which the Tribunal was tasked with determining which party had “prevailed” in the arbitration for purposes of a costs award even though the parties had specifically withdrawn the merits from the Tribunal’s consideration. What a “Catch 22”! How could we determine the “degree” of each party’s success in the case, so as to assess costs, when our mandate now precluded us from ruling on the merits? What the Claimants must have expected to be a routine discontinuance was transformed into a three-day hearing in the Peace Palace in The Hague exclusively on costs.<sup>31</sup> Among other things, the parties raised a number of arguments about an alleged request for a bribe from a member of Respondent’s legal team to procure the Government to drop its insistence on costs.<sup>32</sup> In the end, the Tribunal ordered the Claimants to pay a small fraction of Respondent’s legal fees (€400,000 out of €5.3 million) and that was finally the

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<sup>27</sup> *Id.* ¶¶ 25–28.

<sup>28</sup> *Id.* ¶ 79.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* ¶ 81.

<sup>31</sup> *Id.* ¶ 41.

<sup>32</sup> *Id.* ¶¶ 30–31.

end of the matter.<sup>33</sup> Once again, expect the unexpected when it comes to settlement with Host States.

### III. LESSON THREE: SOMETIMES A HOST STATE CAN BE PERSUADED TO STAY ITS HAND

The next case I will address concerns a salt facility in the Ada-Songor Lagoon region of Ghana. A Ghanaian company called Vacuum Salt Products Limited appointed me to the ICSID Tribunal hearing its claims against the Government for allegedly expropriating its contractual rights in a salt-gathering facility. Because Vacuum Salt was incorporated in Ghana, jurisdiction was entirely premised on the theory that the company was “foreign-controlled,” as required by Article 25(2)(b) of the ICSID Convention, by a Greek national who had moved to Ghana in 1942 amidst World War II.<sup>34</sup> After incorporating his business, however, the foreign investor progressively had transferred eighty percent of the company shares to Ghanaian banks and private citizens.<sup>35</sup> He had retained only twenty percent of the shares and had no rights to block corporate actions or otherwise exercise managerial control over the entity.<sup>36</sup> Thus, the case became well-known as the first ICSID dispute to be dismissed for lack of jurisdiction *ratione personae*—something many people at the time considered inconceivable, based on the belief that arbitrators would never decline jurisdiction as that would be contrary to their own financial interests.

The real lesson to be taken from the Ghana case, however, relates to something less well-known. The Respondent had appointed to the Tribunal Dr. Kamal Hossain, the famous Bangladeshi jurist and statesman, and together the two of us had agreed upon Judge Sir Robert Jennings, at the time the President of the International Court of Justice (ICJ), to serve as our Tribunal President. Some time after accepting his appointment, however, Judge Jennings informed us that he would not be able to preside over any substantive oral hearings, all of which were to be held in the Peace Palace in The Hague, until he had completed his tenure as President at the ICJ, which would not occur for another sixteen months.<sup>37</sup>

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<sup>33</sup> *Id.* ¶¶ 119, 133.

<sup>34</sup> Vacuum Salt Prod. Ltd. v. Republic of Ghana, ICSID Case No. ARB/92/1, Award, ¶¶ 28, 41 (Feb. 16, 1994), 9 ICSID REV. 72 (1994).

<sup>35</sup> *Id.* ¶¶ 41–42.

<sup>36</sup> *See id.* ¶¶ 43 nn.20, 53.

<sup>37</sup> *Id.* ¶ 10.

This put us into a sticky predicament, since the Claimant already had filed a Request for Provisional Measures less than two weeks after the Tribunal had been constituted, thus requiring a hearing right away.<sup>38</sup> Judge Jennings' first instinct was to resign from the Tribunal, but we convinced him otherwise, as such an act at the time would impair the integrity of the ICSID proceeding. Instead, Dr. Hossain and I held a hearing over which I presided, based on ICSID Arbitration Rule 17, because ICSID had received my acceptance of appointment before it had received Dr. Hossain's.<sup>39</sup> This twist of fate placed me in a key role in navigating Claimant's Provisional Measures Request, which again concerned whether or not the Claimant would have to submit to municipal proceedings in Ghana relating to its cancelled project.<sup>40</sup>

To me, provisional measures clearly were required, exactly as in the Egyptian case to which I referred earlier, since ICSID jurisdiction is expressly exclusive under Article 26 of the Convention. As I tried to broker such a compromise at the hearing, a valuable lesson emerged: Sometimes a Host State may be persuaded to stay its hand. Recall that by this early stage in the arbitration, Ghana had already announced its intention to challenge the jurisdiction of the Tribunal based on the foreign Claimant's actual lack of control.<sup>41</sup> I asked counsel for Ghana whether the Respondent might be willing voluntarily to defer the local proceedings while the arbitration was pending, rather than being ordered to do so. I strongly suggested—and glanced meaningfully at Claimant's counsel while doing so—that the Claimant likely would be amenable to such an arrangement. The parties accepted the proposal<sup>42</sup> and, at least for the time being, we avoided having to rule on the provisional measures request without Judge Jennings.<sup>43</sup>

There are other cases in which a Host State has been willing to stay its hand. In *Millicom v. Senegal*, for example, the Respondent adopted a cooperative attitude and agreed to postpone local litigation in Senegalese

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<sup>38</sup> *Id.* ¶ 11.

<sup>39</sup> *Id.* ¶ 15.

<sup>40</sup> *Id.* ¶ 11.

<sup>41</sup> *Id.* ¶ 12.

<sup>42</sup> *Id.* ¶ 16.

<sup>43</sup> The Award does state that the Claimant renewed its Request for Provisional Measures, and the Tribunal declined to recommend those measures in a decision issued on June 14, 1993. *Id.* ¶¶ 18, 22. No further information on the nature of the second request or the Tribunal's ruling is provided in the Award.

courts relating to the same concession as was at issue in the ICSID arbitration.<sup>44</sup>

#### IV. LESSON FOUR: YOU MAY GET LUCKY WHEN A PROJECT FALLS APART

The last case I will discuss concerns a copper and cobalt tailings processing facility in the Katanga Province of the Democratic Republic of the Congo (DRC). Unlike the previous cases I have mentioned—all of which were ICSID cases—this was an International Chamber of Commerce (ICC) case. The three companies<sup>45</sup> listed as Claimants in our case had entered into a series of contracts permitting them to use a new metallurgical process to derive cobalt and copper from remnants (so called “tailings”) of previous extraction efforts in the DRC. The real owner, holding a majority stake in the project, was a Canadian company named First Quantum Minerals. Litigation in the DRC ensued when the Government established a Revisitation Commission to review all mining contracts between foreign investors and the DRC to ensure that Congolese mines would “fully and truly benefit” the Congolese nation. The Commission recommended repealing the decree authorizing the project, the Minister of Mines terminated the relevant contracts, and the Congolese police closed and sealed the project offices and work sites. The Claimants initiated the ICC proceedings after the High Court of Kinshasa had dismissed their claims for relief, the Court of Appeal had affirmed the dismissal, and the DRC separately had obtained a \$12 billion judgment from its courts against First Quantum’s subsidiaries for allegedly damaging the country’s reputation in the international mining world.

The Claimants first obtained an order of provisional measures from our ICC Tribunal and then were gearing up for a merits hearing when the case settled very suddenly. Having received \$1.25 billion as the price to leave the project, the Claimants had gotten one of the largest recoveries by any Claimant before an international tribunal in a dispute against a sovereign State without even establishing liability. You may be asking yourself: What brought about the Claimants’ good fortune? From where did the funds come? The driving force behind the settlement was a company from Kazakhstan named Eurasian Natural Resources Corporation (ENRC) that “magically” had succeeded to all

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<sup>44</sup> *Millicom Int’l Operations B.V. v. Republic of Sen.*, ICSID Case No. ARB/08/20, Decision on Application for Provisional Measures, ¶¶ 18, 45(b), 49(b), 52(1) (Dec. 9, 2009), [https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2832\\_En&caseId=C500](https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC2832_En&caseId=C500).

<sup>45</sup> The three companies were Congo Mineral Developments Limited (CMD), Industrial Development Corporation of South Africa Limited (IDC), and the International Finance Corporation (IFC).

of First Quantum's rights in the very same project. As part of a global settlement that would extinguish the ICC case, a parallel ICSID case,<sup>46</sup> and several ancillary court proceedings, ENRC provided the Claimants with a \$750 million cash payment along with a three-year promissory note for \$500 million.<sup>47</sup> The moral of the story? Your problem may be solved by those who may have caused it in the first place.

#### CONCLUDING REMARKS

So there you have it—the “four lessons.” I hope that this eclectic group of “war stories” has provided you with some entertainment. I conclude my remarks by repeating that the lessons emerging from these “snapshots” of my own experiences over the years with cases involving African States are by no means distinct to Africa. As I said when I began, these lessons, I can assure you, are of universal applicability. The joys and perils of an active arbitration practice remain universal regardless of the continent involved. I wish you all the very best of luck in this most fascinating and intellectually challenging field of practicing law. Thank you.

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<sup>46</sup> Int'l Quantum Res. Ltd. v. Dem. Rep. Congo, ICSID Case No. ARB/10/21, Procedural Order No. 3, ¶¶ 7–8 (Nov. 28, 2011), <http://www.italaw.com/sites/default/files/case-documents/ita1071.pdf>.

<sup>47</sup> Sebastian Perry, *First Quantum Settles Congo Claims*, GLOBAL ARB. REV. (Jan. 6, 2012), <http://globalarbitrationreview.com/news/article/30067/first-quantum-settles-congo-claims/>.