Report on the 2020 Edition of the Foreign Direct Investment Moot

December 24, 2020

Introduction Usually, there would be national oral rounds in Egypt, Ethiopia, Kenya, and South Africa. These national qualifying rounds would determine who advances to the All Africa Regional Rounds and then to the Global Round. However, like so many other things this year, this format had to be changed due to the Corona Virus as it was actually impossible to hold any sort of in-person moot. This being the case, all teams interested in participating were going to go straight to the Regional Rounds after registration.

All-Africa Regional Round/ Global Round The All-Africa Regional virtual round was to be held from 4-9 August. A place in the Global Round was on the line, and the winner would receive a 1500 USD cash prize sponsored by ***Wilmer Hale***. The Best Advocate of the Preliminary Round would receive the Noel Ferris Award and 500 USD from the ***International Academy of Trial Lawyers***. The 2020 travel subsidies sponsored by Three Crowns were rolled over to augment the 2021 fund. 11 teams from the four countries mentioned above participated in this round. Namely:

1. Africa Nazarene University
2. Ain Shams University (Faculty of Law)
3. Kenya School of Law
4. Mount Kenya University

5. Tanta University
6. University of Calabar (Faculty of Law)
7. University of South Africa
8. Strathmore University (Faculty of Law)
9. Cairo University (Faculty of Law)
10. University of Lagos
11. University of South Africa (College of Law)

After five days of hearings, ***Strathmore University*** **(Kenya)** emerged victorious in a very close final match against the ***University of Lagos*** **(Nigeria).** The ***University of South Africa*** **(College of Law)** finished in 3rd place and ***Cairo University*** **(Egypt)** finished in 4th place. These teams would proceed to the Global Round and were also the Egypt, ECOWAS, EAC and SADC Champions by virtue of their performances.

Ms. Joumana Nassar of Cairo University was adjudged to be the Best Advocate of the four preliminary rounds. Her colleague Ms. Farida Abouarab *ex aequo* with David Omondi of Strathmore University came in second place. Ms. Mdathir Timmamy of Strathmore University was the Best Advocate of the final match.

This virtual framework is expected to continue in 2021 with more improvements likely to be made in an attempt to make it more social. As regards the performances of the African teams in the global rounds, ***Strathmore University*** finished in position 32 overall considering memorial and oral scores in the preliminary rounds. In terms of their score based solely on oral pleadings in the preliminary rounds, the team finished in position 4. Thereby emerging the best African team in the competition. Watch the first and third place matches respectively using the following links. Including regional rounds, 142 teams with more than 650 team members, 300 arbitrators and 150 memorial and skeleton brief judges took part in the 2020 FDI Moot.

It is worth noting that Mr. David Omondi and Ms. Joumana Nassar were included in the top 50 advocates who participated in this round out of 242 advocates. The former emerged 13th overall with the latter coming in 22nd place. This achievement is made even more impressive by the fact that Mr. Omondi pleaded in all 4 preliminary rounds, a feat that only about a quarter of the advocates managed. In that small group, he emerged 3rd in the entire

competition. History was also made as Sau Paulo University became the first Brazilian team and the first Latin American team to win this moot. The Final can be found on the FDI Moot YouTube Channel.

Issues argued in the case Does one become an investor who has made an investment and can invoke the jurisdiction of an arbitral tribunal by virtue of an assignment? Can a state attribute the consequences of regulations it puts in place that are unfavorable to investors to an international organization? Can this be taken to go against the Fair and Equitable Treatment standard? Lastly, should an arbitrator be successfully challenged merely because they have dealt with similar issues in different cases involving different parties especially when the circumstances surrounding them are taken as a whole?

How most teams went about making their arguments Issues regarding procedure in the case Beginning first with the jurisdiction of the tribunal, most teams representing the Claimant argued that general international law and even customary international law contains no prohibition on the assignment of investment claims. Likewise, the applicable treaty in the hypothetical case, the ASNEC Energy Investment Treaty, contains no provisions directly addressing the assignment of claims thereunder. By virtue of this, it seemed rather difficult for the Respondent to make a counter argument. However, research was carried out extensively and teams found case law i.e. *Mihaly v Sri Lanka* to suggest that the rights under an investment claim are person-specific (*intuitu personae*). This means that unless the provisions of the applicable international investment agreement (IIA) somehow allow the assignment of claims, the said rights cannot be transferred in a way that would allow the assignee to comply with the jurisdictional requirements of the applicable IIA.

Moving to the challenge of the arbitrator, most teams representing the Claimant argued that the totality of circumstances surrounding Mr. Mason i.e. his comments regarding climate change on a podcast, his involvement in another case involving the ASNEC Treaty and his failure to disclose it could not lead to justifiable doubts over his impartiality alone and even more so when taken together. This is because a sum of zeros will always render zeros as stated by the tribunal in *Electrabel.* In any event, the success of such a

challenge would lead to investment arbitration becoming unworkable due to the few numbers of arbitrators. The Respondent argued that these circumstances when taken in totality do actually constitute justifiable doubts and heavily relied on the cases of *Caratube v Kazakhstan* and *Devas v India.*
Issues regarding the merits of the case The Respondent argued that it simply had no choice but to phase out the use of coal, to the detriment of coal investors in the country, as the ASNEC Directive was mandatory. This led to a very interesting discussion in my view. The Parliament of Laoc which can be said to be an organ of the state enacted a law and the state insisted that this enactment should be attributed to an international organization. This put teams in very unfamiliar territory as regard investment law because they would be relying on a commentary to make most of their arguments. Namely, one about the Draft Articles on Responsibility of International Organisations ("**DARIO**") which were adopted by the UN General Assembly in the same year. This, bearing in mind that the customary status of the DARIO is debatable at best especially given the limited practice available on the subject. Therefore, the Respondent argued that ASNEC has to rely upon its Member States' organs for implementation of its legal acts under Article 120 of the ASNEC, the latter act in such instances, in essence, as organs or agents of the international organisation. Thus, when the Laocan Parliament was adopted Law 66/2016 to implement the binding Coal Directive, it acted as a de facto organ of the ASNEC. To which the Claimant retorted, that neither Laoc nor its Parliament acted as an agent of ASNEC. Even though the Coal Directive was adopted by the ASNEC Council, both Article 120 of the ASNEC Charter and Article 18 of the Coal Directive placed implementation upon the ASNEC Member States, including Laoc. In this case, the authorities of Laoc continued to act as state organs and agents rather than those of the ASNEC, with Laoc simply retaining the overall responsibility to ASNEC.

There were numerous ways to approach the FET argument. Nonetheless, the central question was about how specific a representation should be and whether representations from government officials should be taken to be believable representations. Furthermore, does a representation mean that an investor should logically expect the laws of a state never to change?

Personal Perspective After 8 or so months of working on such a case, and

preparing for such a moot, I think most of the advocates would agree with me that dedication is of utmost important. This moot is the perfect opportunity for anyone interested in arbitration to learn about investment arbitration and international investment law in a very practical manner. It also gave me the opportunity to meet with lawyers from around the world and get their feedback on my pleadings. This was especially encouraging because this was my first international moot court competition, and I would like to think it was a good start!

Special thanks go out to the FDI Administration for organizing such a brilliant competition every year. I am looking forward to the 2021 FDI Moot Globals in Seoul. Hopefully, we will all be able to be together.

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