RESOLUTIONS, DECLARATIONS, AND OTHER DOCUMENTS

1. Memorandum of Understanding Between the Government of the Russian Federation and the Government of the United States of America on Cooperation in Antarctica (Sept. 8, 2012)
<http://www.rusemb.org.uk/foreignpolicy/329>

The United States and Russia have signed a Memorandum of Understanding for Cooperation in Antarctica ("MOU") and issued Joint Statements on Pursuing a Transboundary Area of Shared Beringian Heritage and on Enhancing Interregional Cooperation.

According to the accompanying U.S. Department of State Fact Sheet, the MOU will "[s]trengthen cooperation and significantly improve coordination of bilateral policies, science, logistics, search and rescue, training, and public outreach in Antarctica" and "reinforce cooperative activities already taking place."

The parties, guided by the Antarctic Treaty of December 1, 1959, have agreed "to consult regularly through their respective Foreign Ministries on issues of common interest concerning implementation of the Treaty and other elements of the Antarctic Treaty system," "to cooperate in the organization and conduct of joint inspections in the Treaty area under Article VII of the Treaty and Article 14 of the Protocol on Environmental Protection to the Antarctic Treaty," "to encourage organization and implementation of joint projects and programs for research and exploration of Antarctica," "to promote collaboration in scientific research and logistical and support activities between their respective national Antarctic program managers,'' and "to facilitate scientific cooperation in the Treaty area and the exchange of associated data in important areas of scientific research.''

The MOU is a non-binding instrument that "does not constitute an international agreement or give rise to any rights and obligations for the Parties under international law.''

2. Background Report on Annulment by the ICSID Secretariat Provided to Contracting States (Aug. 15, 2012)
<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDNewsLettersRH&actionVal=ShowDocument&DocId=DCEVENTS11>

On August 10, 2012, the ICSID Secretariat issued a report detailing the ICSID Convention annulment mechanism and providing empirical data on annulment proceedings. The report was prepared on the request by the Republic of the Philippines, which had asked that the ICSID Administrative Council issue clear guidelines for ad hoc committees to ensure fair and effective annulment proceedings. The Philippines referred in its request for clarification to the annulment decision in *Fraport AG Frankfurt Airport Services Worldwide v. Republic of the Philippines*, wherein the ad hoc committee annulled an award in favor of the Philippines on the ground that there had been a serious departure from a fundamental rule of procedure. According to the ad hoc committee, the tribunal in *Fraport AG Frankfurt Airport Services Worldwide* failed to give the parties an opportunity to address certain evidence submitted by the Philippines, and this amounted to a serious departure from the right to be heard and materially affected the outcome of the dispute.

The report reaffirmed that annulment is a limited and exceptional recourse, prescribed by ICSID Convention Article 52's narrowly circumscribed grounds for annulment. The report also acknowledged that while there is general agreement on the standards for annulment, there is disagreement regarding the correctness of specific decisions.

Notably, the report stressed that in ICSID's forty-seven-year history, of the 344 registered cases, which resulted in 150 awards, only six awards were annulled in full and another six were partially annulled. This means, "only 4 percent of all ICSID awards have led to full annulment and 4 percent have led to partial annulment."

* As a service to our readers we include, when available, an internet address to these documents or to their sources. Web addresses change frequently, but are correct as of the date of ILM's publication.

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As to the increase in annulment applications in the last decade, the report concluded that this increase "reflects the vastly increased number of cases registered and awards rendered at ICSID in this same period. Between 2001 and June 2012, 119 awards were issued, 36 annulment proceedings were instituted (30 percent of the cases leading to awards) and 8 awards were annulled in full or in part (7 percent awards were annulled)." Comparing this data to the data from the period between 1966 and 2001, when fewer awards were rendered, "the rate of annulment in the past 11 years is lower than the rate for all previous years."

JUDICIAL AND SIMILAR PROCEEDINGS

1. **In *Re* People's Mojahedin Org. of Iran (D.C. Cir. June 1, 2012)**
<http://caselaw.findlaw.com/us-dc-circuit/1602159.html>

The U.S. Court of Appeals for the District of Columbia has ordered the U.S. Secretary of State to make a decision within four months on the petition filed by the People's Mojahedin Organization of Iran ("PMOI") to be removed from the Foreign Terrorist Organization ("FTO") list. If the Secretary fails to either deny or grant the petition, then the Court will grant the PMOI's writ of mandamus to set aside the FTO designation.

A writ of mandamus is a common law writ "issued by a superior court to compel a lower court or a government officer to perform mandatory or purely ministerial duties correctly" (Black's Law Dictionary). Courts rarely issue the writ, which the Court here also acknowledged: "The 'issuance of the writ is an extraordinary remedy, reserved only for the most transparent violations of a clear duty to act.'"

At the heart of this case is the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which authorizes the Secretary of State to designate an entity an FTO if specific conditions are fulfilled. Once an entity is designated, its assets are frozen, its members are barred from entering the United States, and those who knowingly provide "material support or resources" to the FTO can be fined and/or imprisoned for up to fifteen years. Before 2004, the FTO designation lasted for two years; thereafter, the Secretary could either renew it or allow it to lapse. In 2004, the two-year limitation was removed, meaning that now designations do not lapse; instead, an FTO can file a petition for revocation with the Secretary to challenge the listing. The petition must include evidence showing that the relevant circumstances that led to the designation have sufficiently changed. The Secretary has 180 days to review the petition and approve or deny it on the basis of both classified and declassified information. If the petition is denied, the FTO can seek judicial review within thirty days of the denial.

In this case, PMOI filed a petition for revocation in 2008 of its 2003 designation, including in its petition the necessary evidence to demonstrate that the circumstances within the organization that led to the original designation had dramatically changed. PMOI's petition was denied in 2009, and PMOI timely petitioned the Court for review. The Court held that the procedures did not provide PMOI due process, and it directed the Secretary to provide PMOI access to unclassified documents on which she relied in her decision. However, since the July 2010 order, the Secretary has failed to provide PMOI with the additional documents. PMOI then petitioned the Court for the issuance of a writ of mandamus.

While the Court refused to immediately revoke the FTO designation "in light of the national security and foreign policy concerns," it openly criticized the government's slow progress in this case, finding "the Secretary's delay in acting on PMOI's petition for revocation . . . egregious." The Court ordered the Secretary to either deny or grant PMOI's petition no later than four months from the date of the opinion; and "if she fails to take action within that period, the petition for writ of mandamus setting aside the FTO designation will be granted."

2. **United States v. Dire (4th Cir. May 23, 2012)**
<http://www.ca4.uscourts.gov/Opinions/Published/114310.P.pdf>

In a May 23, 2012 ruling, the U.S. Court of Appeals for the Fourth Circuit ruled that Somali pirates apprehended before boarding a ship they had intended to seize could still be lawfully convicted of piracy. The case concerned 18 U.S.C. § 1651, which provides that "[w]hoever, on the high seas, commits the crime

of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life." The defendants, who were all found guilty of the crime, challenged the district court's broad reading of the statute, which did not require the robbery element. Instead, the defendants argued that the crime of piracy "has been narrowly defined for purposes of § 1651 as robbery at sea, i.e., seizing or otherwise robbing a vessel," an argument that had been upheld in *United States v. Said*, 757 F. Supp. 2d 554 (E.D. Va. 2010) (the *Said* decision was vacated and remanded on the same day that Dire was issued). Since they only boarded the vessel involuntarily after being seized and never took possession of property, they challenged their convictions and the mandatory life sentence. The Court of Appeals upheld the district court's ruling that customary international law is both evolving and a definite, knowable standard. The Court assessed this standard by reviewing international consensus, based in large part on foreign sources of law and widely accepted treaties regardless of their ratification by the United States (including the United Nations Convention on the Law of the Sea ("UNCLOS")).

On April 1, 2010, the *USS Nicholas*, a U.S. battleship disguised as a merchant ship, was attacked by Somali pirates on the high seas in the Indian Ocean. The attack began when defendants opened fire with AK-47 machine guns, while rocket-propelled grenade launchers and a ladder for their planned attempt to board the ship were also present in their skiffs. When their initial shots were returned, the pirates attempted to flee but were apprehended. Defendants were indicted on several counts, most notably for piracy, which carries a mandatory life sentence.

The District Court denied defendants' motion to dismiss the piracy charge, ruling instead that based on precedent in *United States v. Hasan*, 747 F. Supp. 2d 599, 602 (E.D. Va. 2010), the law of nations now recognizes that the crime of piracy encompasses "inter alia, acts of violence committed on the high seas for private ends." At the conclusion of trial, the jury found the defendants guilty on all counts. Defendants were sentenced to life plus eighty years. They appealed, contending that their attack on the USS Nicholas did not constitute piracy.

The Fourth Circuit upheld the lower court's finding that the relevant provision recognized an evolving standard of customary international law. The Court expressly rejected conflicting precedent in *Said*. The *Said* court had dismissed the piracy count where no taking of property was alleged, based on the premise that when § 1651 was enacted, the law of nations then defined piracy to require the element of robbery. The Court of Appeals acknowledged that at that time the law of nations limited the crime of piracy to require the element of robbery. However, it added that

> interpretation of our law would render it incongruous with the modern law of nations and prevent us from exercising universal jurisdiction in piracy cases . . . . At bottom, then, the defendants' position is irreconcilable with the noncontroversial notion that Congress intended in § 1651 to define piracy as a universal jurisdiction crime. In these circumstances, we are constrained to agree with the district court that § 1651 incorporates a definition of piracy that changes with advancements in the law of nations.

The Court also conducted a thorough analysis to arrive at the conclusion that the modern evolution of the definition of piracy under customary international law no longer specifically required robbery, stating, "We also agree with the district court that the definition of piracy under the law of nations . . . ha[s] for decades encompassed their violent conduct. That definition, spelled out in the UNCLOS, as well as the High Seas Convention before it, has only been reaffirmed in recent years as nations around the world have banded together to combat the escalating scourge of piracy."

3. Costa & Pavan v. Italy (Eur. Ct. H.R. Aug. 28, 2012)

<http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-112992>

The European Court of Human Rights has ruled in *Costa & Pavan v. Italy* that Italy violated the applicants' Article 8 right (respect for private and family life) of the European Convention on Human Rights, and it ordered Italy to pay the applicants €15,000 for non-pecuniary damage and €2,500 for costs and expenses.

The applicants, Italian nationals who both are carriers of cystic fibrosis, a serious genetic disease from which their first child also suffers, wanted to have a child by in vitro fertilization ("IVF"), which would allow them to genetically screen the embryo prior to implantation, a procedure known as preimplantation diagnosis or PID. PID is generally outlawed in Italy except for a one-off 2010 decision by an Italian court that allowed a non-sterile couple to use the PID procedure because they were carriers of muscular atrophy. Furthermore, IVF is outlawed in Italy except for sterile couples and couples where the man has a sexually transmitted disease.

The applicants complained that under the current laws in Italy, the only possibility for them to ensure that their child would not have cystic fibrosis would be to start a pregnancy by natural means and medically terminate it if the fetus tests positive for the disease. This, they claimed, amounted to discrimination as they were treated differently from sterile couples and couples where the man carried a sexually transmitted disease.

The Court concluded that the applicants' decision to resort to IVF and PID to ensure that their baby would not suffer from cystic fibrosis was a form of expression of their private and family life protected by Article 8. The Court differentiated this decision from the recent Grand Chamber judgment in *S.H. v. Austria*, wherein the Grand Chamber found that Austria's law prohibiting ovum donation for purposes of artificial procreation and sperm donation for in vitro fertilization did not exceed the margin of appreciation afforded to states. In *S.H. v. Austria*, the Grand Chamber stressed that in cases where there "is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin [of appreciation afforded to states] will be wider."

The decision is not final, and either party may request that the case be referred to the Grand Chamber.

4. United States—Certain Country of Origin Labelling Requirements (COOL), Appellate Body Report (WTO June 29, 2012)

<http://www.worldtradelaw.net/reports/wtoab/us-cool(ab).pdf>

The following is reproduced from a recent ASIL *Insight* by Joshua Meltzer, available at http://www.asil.org/insights120718.cfm.

> The WTO dispute on country of origin labeling ("COOL") requirements for imported livestock is the latest in a series of cases dealing with the Agreement on Technical Barriers to Trade ("TBT Agreement"). The Appellate Body Report was circulated on June 29, 2012. This case pitted U.S. cattlemen against large packers and food processors and raised questions about the significance of country of origin labeling when it comes to integrated and international supply chains. This Insight provides an overview of the key issues addressed by the Panel and the Appellate Body ("AB") . . . .
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> The impacts of the COOL measure on the U.S. agriculture industry have been hotly debated. On one side of the debate, meat packers, processers, and retailers argue that the integrated nature of the North American livestock market makes tracing the origin of livestock costly, and that no health differences exist between U.S., Canadian, and Mexican beef because imported meat must satisfy the same U.S. health and safety standards as U.S. meat. Supporters of COOL, such as U.S. cow and calf producers, argue that the incidence of mad cow disease ("BSE") in Canada means consumers have a health interest in knowing the origin of their meat and are willing to pay a premium for this information . . . .
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> The United States, Canada, and Mexico appealed different aspects of the Panel's decision. The AB upheld the Panel decision that the COOL measure violates the TBT Article 2.1 national treatment commitment (but for different legal reasons) and reversed the Panel's finding that the measure breaches TBT Article 2.2.

5. United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, Appellate Body Report (WTO May 16, 2012)
<http://www.wto.org/english/tratop_e/dispu_e/381abr_e.pdf>

The WTO Appellate Body ("AB") has ruled in *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* that the U.S. "dolphin safe" labeling legislation for canned tuna violates the national treatment obligations of the United States under the WTO Agreement on Technical Barriers to Trade ("TBT Agreement"). The AB rejected, however, Mexico's argument that the labeling legislation was "more trade-restrictive than necessary" to fulfill the U.S. objectives of dolphin conservation.

This AB report, along with the AB reports in *U.S.—Clove Cigarettes* and *U.S.—Country of Origin Labelling*, will help to define WTO Members' obligations when adopting technical regulations.

6. China—Measures Related to the Exportation of Various Raw Materials, Appellate Body Report (WTO Jan. 30, 2012)
<http://www.wto.org/english/tratop_e/dispu_e/394_395_398abr_e.pdf>

The following is reproduced from a recent ASIL *Insight* by Sonia Rolland, available at http://www.asil.org/insights120619.cfm.

> In February 2012, the World Trade Organization ("WTO") adopted the Appellate Body and panel reports on the China—Raw Materials dispute brought by the EU, Mexico, and the United States against Chinese export restrictions and export taxes on bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus, and zinc. The decisions offer some first impressions on the intersection between WTO law, a WTO member government's ability to regulate trade in its natural resources, and public international law norms regarding sovereignty of natural resources.
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> The panel and the Appellate Body in *China—Raw Materials* made three sets of important findings. First, they provided guidance on how exceptions to the General Agreement on Tariffs and Trade ("GATT") prohibition on export restrictions relate to general international law principles regarding sovereignty over natural resources. Second, they clarified the relationship between China's Accession Protocol and the GATT, particularly finding that China could not invoke GATT exceptions with respect to certain accession commitments that exceeded basic GATT disciplines. Third, they confirmed that the complainants could challenge temporary but renewable measures by China that operated jointly with other measures to restrict exports . . . .

7. Femi Falana v. African Union (Af. Ct. Hum. Peoples' Rts. June 26, 2012)
<http://www.africancourtcoalition.org/images/docs/afr-court/decision%20001-2011.pdf>

The African Court on Human and Peoples' Rights has ruled in *Femi Falana v. African Union* that the African Union cannot be sued before the Court on behalf of its member states and that it is not subject to obligations arising from the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights ("Protocol").

The Protocol provides that the Court's jurisdiction ratione personae is determined by Articles 5(3) and 34(6) of the Protocol. Read together, these provisions limit the Court's jurisdiction to applications filed against a state that has ratified the Protocol and made the necessary declaration to accept the Court's jurisdiction. Since Nigeria failed or refused to deposit the declaration, the applicant, a Nigerian human rights lawyer, sued the AU as the representative of "the African People and their governments."

Falana argued that he was denied access to the Court because Nigeria has not deposited the declaration required under Article 34(6) of the Protocol to accept the competence of the Court. He claimed that Nigeria's failure to deposit the necessary declaration has meant that he cannot discharge his duties as a lawyer and appear before the Court on behalf of his clients. After failing to convince Nigeria to make the declaration, he filed an application against the AU, asking the Court to declare Article 34(6) of the Protocol inconsistent with numerous human rights obligations of the African Charter on Human and Peoples' Rights.

The Court disagreed with Falana's argument that the AU "enacted and adopted the Charter and the Protocol" and can thus be "sued as a corporate community on behalf of its Member States." Instead, the Court concluded that although treaties, including the Protocol, are formally adopted by the Assembly of the Heads of State and Government of the AU, "their signature and ratification is still the exclusive prerogative of its Member States . . . . [T]he mere fact that the Protocol has been adopted by the Assembly of Heads of State and Government does not establish that the African Union is a party to the Protocol and therefore can be sued under it."

The Court went on to dismiss the claim on the basis that it lacked jurisdiction since the application was not filed against a state that has ratified the Protocol and made a declaration to accept the Court's jurisdiction.

8. **Prosecutor v. Karadzic, Decision on Accused's Motion for New Trial for Disclosure Violations (ICTY Sept. 3, 2012)**
<http://www.icty.org/x/cases/karadzic/tdec/en/120903.pdf>

The Trial Chamber of the International Criminal Tribunal for the former Yugoslavia has rejected Radovan Karadzic's motion for a new trial, finding that the accused was not prejudiced by the Prosecution's disclosure violations.

Karadzic requested that he be granted a new trial on the basis of numerous violations by the Office of the Prosecutor, including the failure to disclose 406 witness statements or transcripts of testimony that it possessed prior to the deadline for disclosure. He stressed that the Chamber made several express findings of violation of the disclosure obligation, which were "unprecedented in international criminal justice."

While the Trial Chamber agreed that "the number of violations in this case has reflected badly on the Prosecution, its knowledge of what it holds in its evidence collections and its approach to disclosure," it concluded that Karadzic has not "been prejudiced by any of these violations." The Chamber noted that it has throughout the trial ensured that Karadzic's "preparations for trial have not been prejudiced and that the disclosure violations have not compromised his right to a fair trial."

9. **Decision on Issues Related to the Proceedings Under Rule 135 of the Rules of Procedure and Evidence and Postponing the Date of the Confirmation of Charges Hearing (Int'l Crim. Ct. Aug. 2, 2012)**
<http://www.icc-cpi.int/iccdocs/doc/doc1447135.pdf>

On August 2, 2012, the International Criminal Court ("ICC") issued a ruling postponing the confirmation of charges hearing for Laurent Gbagbo, the former president of Côte d'Ivoire. Judge Silvia Fernandez de Gurmendi, ruling singly on behalf of the Pre-Trial Chamber I, ordered the delay until the resolution of the issue regarding Gbagbo's fitness to take part in the proceedings against him.

On June 19, Gbagbo's defense submitted an application for a medical evaluation, and on June 26, a panel of three medical experts was appointed to examine Gbagbo in order to evaluate his fitness to stand trial. Gbagbo's defense proposed significant redactions to the final expert report, arguing that it included information not necessary for the fitness evaluation that could be used against him at trial, as well as other irrelevant or personal information. The Prosecutor opposed the redactions to the expert report but agreed that the report would not be disclosed to the public.

The Judge agreed that some parts of the report may be redacted, but ordered the defense to narrow the scope of the redactions and ordered both sides to resubmit their observations. To allow time for both parties to comply, the confirmation was thus delayed.