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Resolutions, Declarations, and Other Documents

United States Human Rights Commitments and Pledges (Apr. 27, 2009)

[Click here for document \(approximately 2 pages\)](#)

In support of its candidacy for membership in the United Nations Human Rights Council, the Obama administration made public a document enumerating the U.S. human rights commitments and pledges.

The commitments include: 1) Commitment to advance human rights in the UN system; 2) Commitment to

continue support to human rights activities in the UN System; 3) Commitment to advance human rights, fundamental freedoms and human dignity and prosperity internationally; 4) Commitment to advance human rights and fundamental freedoms in the United States."

We [reported](#) on March 31, 2009 that the United States Department of State had [announced](#) the intent to seek a seat on the Council "with the goal of working to make it a more effective body to promote and protect human rights."

The Human Rights Council, established by the United Nations General Assembly on March 15, 2006 to replace the Human Rights Commission, is an inter-governmental body within the UN system composed of 47 States, "responsible for strengthening the promotion and protection of human rights around the globe." The "main purpose" of the Council is to address "situations of human rights violations and make recommendations on them."

The Bush administration had refused to join the new body, claiming that it lacked credibility and influence.

The elections are scheduled to take place in May, and the U.S. is running for one of the three available seats.

Inquiry Into the Treatment of Detainees in U.S. Custody (U. S. Senate Armed Services Committee, Nov. 20, 2008)

[Click here](#) for document (approximately 263 pages)

The U.S. Senate Armed Services Committee (SASC) declassified a report from November 2008, describing the involvement of high-ranking Bush administration officials in subscribing to severe and inhumane interrogation and detention procedures used by U.S. forces against terrorism suspects:

The abuse of detainees in U.S. custody cannot simply be attributed to the actions of 'a few bad apples' acting on their own. The fact is that senior officials in the United States government solicited information on how to use aggressive techniques, redefined the law to create the appearance of their legality, and authorized their use against detainees. Those efforts damaged our ability to collect accurate intelligence that could save lives, strengthened the hand of our enemies, and compromised our moral authority.

The Inquiry notes that the February 7, 2002 Memorandum, signed by President Bush, and "stating that the Third Geneva Convention did not apply to the conflict with al Qaeda and concluding that Taliban detainees were not entitled to prisoner of war status or the legal protections afforded by the Third Geneva Convention," was the root for later abuses of detainees in U.S. custody. The Inquiry specifically names high-ranking officials, including former Secretary of State Condoleezza Rice, former Secretary of Defense Donald Rumsfeld, and former Attorney General John Ashcroft, as having knowledge of and direct involvement in the implementation of the severe detention and interrogation techniques.

Judicial and Similar Proceedings

Malaysian Historical Salvors SDN BHD v. Malaysia (ICSID, Apr. 16, 2009) and Phoenix Action, Ltd. v. Czech Republic (ICSID, Apr. 15, 2009)

[Click here](#) for Malaysia decision (approximately 39 pages); [click here](#) for dissenting opinion by Judge Mohamed Shahabuddeen (approximately 21 pages); [click here](#) for Czech decision (approximately 64 pages).

Two interesting decisions were issued by two International Centre of Investment Disputes (ICSID) tribunals, clarifying the definition of "investment" within ICSID jurisprudence.

Malaysian Historical Salvors (MHS) v. Malaysia

In MHS v. Malaysia, MHS applied for annulment of a previous decision dismissing the case on the ground that the tribunal lacked jurisdiction because no investment existed, and the ICSID committee agreed, annulling the award. The committee held "that the [previous] Tribunal exceeded its powers by failing to exercise the

jurisdiction with which it was endowed by the terms of the Agreement and the Convention, and that it 'manifestly' did so" by

- 1) "fail[ing] to take account of and apply the Agreement between Malaysia and the United Kingdom defining "investment" in broad and encompassing terms but rather limited itself to its analysis of criteria which it found to bear upon the interpretation of Article 25(1) of the ICSID Convention;"
- 2) "exigently interpret[ing] the alleged condition of a contribution to the economic development of the host State so as to exclude small contributions, and contributions of a cultural and historical nature;" and
- 3) "fail[ing] to take account of the preparatory work of the ICSID Convention and... notably the decisions of the drafters of the ICSID Convention to reject a monetary floor in the amount of an investment, to reject specification of its duration, to leave 'investment' undefined, and to accord great weight to the definition of investment agreed by the Parties in the instrument providing for recourse to ICSID."

Notably, the committee was divided on the definition of what constituted an investment under the ICSID Convention. To understand the nature of MHS' unique investment, we must first consider the facts leading up to the dispute. MHS, a majority-owned British marine salvage company incorporated in Malaysia, contracted with the Malaysian government to salvage the cargo of a ship that sank in 1817 carrying antique Chinese porcelain. The contract specified that MHS would receive a portion of the proceeds (70%) from the sale of the porcelain. MHS alleges that its portion was smaller than what the contract had specified. The issue was "whether the resources spent by a company that contracted with the Government of Malaysia to salvage a shipwreck constitute an investment in that State within the meaning of Article 25(1) of the ICSID Convention."

The committee held that the previous tribunal's insistence on a monetary floor to define an investment under the ICSID Convention was unfounded and ground for annulment. Looking at the drafting papers, the committee saw no evidence that supported the previous award, and furthermore, the existence of a BIT between the parties was ground enough to grant jurisdiction under ICSID.

Mohamed Shahabuddeen, dissenting, argued the opposite, i.e. that there was strong evidence to support the idea that an investment should demonstrate a "significant contribution" in order for an ICSID tribunal to exercise its jurisdiction, and that the different approaches adopted by the committee members "mark[] a titanic struggle between ideas, and correspondingly between capital exporting countries and capital importing ones." In fact, according to Judge Shahabuddeen, "[t]here is no basis for contending that the general understanding supports the opposite principle that effect has to be given even to minor but negligible matters – unless such a reading is required by the text. There is nothing to that effect in the governing text; Article 25(1) of the ICSID Convention does not indicate the improbability of a very tiny contribution to economic development being sufficient to qualify the whole outlay as an ICSID investment. In my opinion, the concept of *de minimis* is a familiar and universal principle; it applies generally – barring a provision to the contrary."

Phoenix Action, Ltd. v. Czech Republic

A day prior to the Malaysia annulment award, another ICSID tribunal unanimously rejected in *Phoenix Action, Ltd. (Phoenix) v. Czech Republic* the argument that a contribution to development should be criteria used to ascertain an ICSID investment, because the "development of the host State is impossible to ascertain." As a result, the tribunal argued that "[a] less ambitious approach should therefore be adopted, centered on the contribution of an international investment to the *economy* of the host State, which is indeed normally *inherent in the mere concept of investment as shaped by the elements of contribution/duration/risk*, and should therefore in principle be presumed."

The dispute commenced when Phoenix, an Israeli-based company, claimed "that the continuous freezing of [its] bank accounts and the continuous seizure of documents [by the Czech Republic] as well as the Czech courts' delays in the different actions brought by Benet Praha and Benet Group [Phoenix's subsidiaries] in 2001 were part of a dispute which falls within the ambit of the ICSID Convention." The Czech Republic argued that "Phoenix's allegations as to a violation of its rights as a foreign investor fall outside the jurisdiction of the Tribunal mainly because 'Phoenix is nothing more than an *ex post facto* creation of a sham Israeli entity created by a Czech fugitive from justice, Vladimír Beno, to create diversity of nationality.'"

The tribunal dismissed the action holding that while "at first sight, the operation realized by Phoenix looks like an investment, numerous factors converge to demonstrate that the apparent investment is not a protected investment. All the elements analyzed lead to the same conclusion of an abuse of rights." Furthermore, [t]he

abuse here could be called a “*détournement de procédure*”, consisting of the Claimant’s creation of a legal fiction in order to gain access to an international arbitration procedure to which it was not entitled.” In fact, the tribunal stated, “the Claimant’s initiation and pursuit of this arbitration is an abuse of the system of international ICSID investment arbitration.” As a result, the tribunal ruled that it lacked jurisdiction to hear the case.

Gherebi v. Obama et al. (D.C.C. Apr. 22, 2009)

[Click here](#) for document (approximately 48 pages)

In a long awaited decision by the United States District Court for the District of Columbia, regarding the government’s authority to detain individuals suspected of supporting terrorist organizations, the Court “adopt[ed] the government’s standard for detention ... subject [only] to the interpretation of that standard provided by the Court.” Although the Court criticized the “ephemeral character” of the changes made by the current administration with respect to who may be detained – the new requirement is that the individual legally detainable must have “substantially” supported, rather than just supported the Taliban or al-Qaeda forces – it still held these changes to be in accordance “with the laws of war as the Court understands them.”

The Court held “as a matter of law that, in addition to the authority conferred upon him by the plain language of the AUMF, the President has the authority to detain persons who were part of, or substantially supported, the Taliban or al-Qaeda forces that are engaged in hostilities against the United States or its coalition partners, provided that the terms ‘substantially supported’ and ‘part of’ are interpreted to encompass only individuals who were members of the enemy organization’s armed forces, as that term is intended under the laws of war, at the time of their capture.”

Apostolides v. Orams (E.C.J. Apr. 28, 2009)

[Click here](#) for document (approximately 10 pages)

The European Court of Justice (ECJ) held that a judgment of a court of the Republic of Cyprus must be recognized and enforced by the other EU member states even if the judgment concerns land located in the part of the island not under effective Cypriot control.

The dispute is regarding land that once belonged to a Cypriot national (Apostolides), who was forcefully removed from it during the partitioning of the island. The land was sold to a British couple by a third party. Apostolides, who had sued the British couple in Cypriot courts and won a judgment against them, successfully asked the British courts to enforce the judgment of the Cypriot courts. The British couple appealed the order enforcing the judgment and the British High Court set it aside. Then, Apostolides appealed to the Court of Appeal (England and Wales), which referred the case to the ECJ.

The Court of Appeal asked the ECJ to clarify several questions regarding the interpretation and application of the Brussels I Regulation, dealing with jurisdiction, recognition and enforcement of judgments in civil and commercial matters. Specifically, the Court of Appeal asked the ECJ to determine whether the suspension of Community law in the northern part of Cyprus, and the location of the land disputed, have an effect on the recognition and enforcement of the judgment.

The Court started its analysis by holding that suspension of Community law in the northern area, as mandated by the Protocol Annexed to the Act of Accession, does not result in the preclusion of the application of the Brussels I Regulation to a judgment issued by a Cypriot court located in the government-controlled area, even if the land in question lies outside government’s effective control. Furthermore, while the government has no effective control over the land at issue, and thus no way of enforcing the award, the judgment should still be recognized and enforced by another Member State.

The Court concluded that “[t]he national court may refuse recognition only where the error of law means that the recognition or enforcement of the judgment is regarded as a manifest breach of an essential rule of law in the legal order of the Member State concerned.”

Briefly Noted

Hearings Begin in Tribunal over Disputed Area in Sudan (Permanent Court of Arbitration, April 20, 2009)

[Click here](#) for Abyei Arbitration Section of the Permanent Court of Arbitration website

The Permanent Court of Arbitration (PCA), a United Nations-supported international court in The Hague, began hearings to mediate a settlement over the disputed Abyei Area in Sudan, pursuant to the [Arbitration Agreement](#) signed between the Sudanese government and the Sudan People's Liberation Movement (SPLM) and deposited with the PCA on July 11, 2008.

The demarcation of Abyei is decisive for the implementation of the 2005 Comprehensive Peace Agreement, which brought to an end the north-south civil war in Sudan. The two parties, the government of Sudan and the SPLM, both claim interest in the oil-rich area.

The hearing is conducted pursuant to the Court's optional rules for "Arbitrating Disputes between Two Parties of Which Only One is a State," and unlike many arbitration proceedings before the PCA, there is broad transparency allowing the public to view the oral pleadings (see PCA Abyei website for more information).

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