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Resolutions, Declarations, and Other Documents

Resolution of the (OAS) Inter-American Juridical Committee on Essential Elements of Representative Democracy (August 12, 2009)

Click [here](#) for document in English (approximately 3 pages); click [here](#) for document in Spanish (approximately 3 pages)

The Inter-American Juridical Committee (Committee), an advisory body of the Organization of American States on international legal issues, unanimously adopted a resolution on *The Essential and Fundamental Elements of Representative Democracy and Their Relation to Collective Action Within the Framework of the Inter-American Democratic Charter*.

The Committee, referring to the Inter-American Democratic Charter (IADC), previous resolutions by the Committee and various reports by the General Secretary of the OAS, “affirm[ed] the right of every State to choose its political, economic and social system without any outside interference and to organize itself in the way best suited to it.” However, the Committee added that this right was “limited by the commitment to respect the essential elements of representative democracy and the fundamental components of the exercise of such as enumerated in the Inter-American Democratic Charter.”

Relying on the Declaration of Santiago de Chile, adopted at the Fifth Meeting of Consultations of Ministers of Foreign Affairs in August 1959, which enumerated some of the essential components of representative democracy, and the IADC, the Committee declared that “democracy does not consist only in electoral processes, but also in the legitimate exercise of power within the framework of the rule of law, which includes respect for the essential elements, components and attributes of democracy mentioned above.”

For more on the Committee’s work, visit the Committee’s official [website](#).

United Nations Register of Damage (UNRoD) Rules and Regulations Governing the Registration of Claims (June 19, 2009)

Click [here](#) for document (approximately 8 pages)

The United Nations Register of Damage Caused by the Construction of the Wall in the Occupied Palestinian Territory (UNRoD), a subsidiary organ of the General Assembly of the UN created after the International Court of Justice issued its 2004 advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory [(OPT)] and tasked with creating a record “of the damage caused to all natural and legal persons concerned as a result of the construction of the Wall by Israel in the Occupied Palestinian Territory,” has recently released its Rules and Regulations Governing the Registration of Claims.

The UNRoD Rules “apply to the submission, processing and registration of claims submitted to UNRoD under the criteria adopted by the Board [three international experts appointed by the Secretary-General of the UN] and to outreach activities undertaken by UNRoD.” Under the Rules, the 2004 ICJ advisory opinion findings, general principles of international law, and principles of due process of law will serve as “guiding principles” for the Board of Experts.

The Rules specify the filing and eligibility requirements. According to the Rules, “[a]ll natural and legal persons who sustained material damage as a result of the construction of the Wall in the OPT, including in and around East Jerusalem, may submit claims.” In addition, “[t]he Palestinian Authority may submit claims on behalf of Palestinian public institutions which have sustained material damage as a result of the construction of the Wall in the OPT, including in and around East Jerusalem.”

For more information on the technical requirements for the submission of claims and other aspects of UNRoD’s mandate, visit the official UNRoD website and/or refer to the UNRoD Rules.

Judicial and Similar Proceedings

United States Court of Appeals for the Ninth Circuit

Movsesian et al. v. Victoria Versicherung AG et al. (August 20, 2009)

[Click here](#) for document (approximately 23 pages)

The U.S. Court of Appeals for the 9th Circuit recently ruled that Section 354.4 of the California Code of Civil Procedure, which extended the statute of limitations until 2010 for claims arising out of life insurance policies issued to Armenian Genocide victims “interfere[d] with the national government’s conduct of foreign relations” and was therefore “preempted.”

The California Legislature had enacted Senate Bill 1915 in 2003, amending California’s Code of Civil Procedure and providing California courts with jurisdiction over certain classes of claims arising out of insurance policies that were held by Armenian Genocide victims, and “extend[ed] the statute of limitations for such claims until December 31, 2010.”

Vazken Movsesian (“Movsesian” or “Plaintiff”) and other class members of Armenian descent, filed a class action against Victoria Verisherung AG (“Victoria”), Ergo Verischerungsgruppe AG (“Ergo”), and Munchener Ruckversicherungs-Gesellschaft Aktiengesellschaft (“Munich Re”) seeking “damages from all three companies for breach of written contract, breach of the covenant of good faith and fair dealing, unjust enrichment, and other related claims.” Munich Re, the parent company of Victoria and Ergo, filed a motion to dismiss arguing, *inter alia*, that the class members lacked standing, that Section 354.4 was unconstitutional and that it violated its due process rights. The district court found that the Plaintiffs had standing, rejected the Defendants’ constitutionality and due process arguments, and “held that § 354.4 was not preempted under the foreign affairs doctrine.”

The Court of Appeals was asked to determine “first, whether § 354.4 is preempted under the foreign affairs doctrine; second, whether Munich Re is a proper defendant; and third, whether the Plaintiff-Appellees have standing to bring these claims.” Defendants argued “that § 354.4 is preempted under the foreign affairs doctrine in two ways: first, that it is preempted by the Claims Agreement of 1922, and the War Claims Act of 1928; and second, that it conflicts with the Executive Branch’s policy prohibiting legislative recognition of an ‘Armenian Genocide.’” As evidence for its second argument, Munich Re “point[ed] to several failed House Resolutions... [where] [e]ach time, the Administrations of President Bush and President Clinton took specific action, privately and publicly, to defeat these measures.”

Without analyzing the first argument implicating the Claims Agreement and War Claims Act, the Court held that “§ 354.4 conflicts with Executive Branch foreign policy, and thus, is preempted.”

The Court reviewed the legislative history of the resolutions mentioned and concluded that “[t]he foregoing account of negotiations between the Executive Branch and Congress, and the public statements and letters of two Presidents, clearly establish a presidential foreign policy preference against providing legislative recognition to an ‘Armenian Genocide.’”

Once the Court concluded that there was an executive foreign policy rejecting the recognition of the Armenian Genocide, the Court had to determine whether §354.4 was in conflict with that policy. The Section itself defined Armenian Genocide in words similar to the House Resolutions, a fact the Court found detrimental. The Plaintiffs argued that this subsection could be severed from the remainder of the statute, an argument the Court rejected, holding that the remainder of the law still included the words “Armenian Genocide.”

The Court also noted that the recognition of Armenian Genocide could endanger the nation as a whole and generally undermined the President’s diplomatic authority. And while the states are not prohibited from using the term “Armenian Genocide,” the Court stressed that states could not impede the foreign policy aims of the executive branch.

International Centre for Settlement of Investment Disputes

Azurix Corp. v. Argentine Republic - Decision on the Application for Annulment (ICSID September 1, 2009)

[Click here](#) for document (approximately 179 pages); [click here](#) for the original July 2006 award (approximately 164 pages)

In a recent International Centre for Investment Disputes (ICSID) annulment proceeding, the members of the *ad hoc* Committee dismissed Argentina's 2006 application to annul the July 14, 2006 arbitration award rendered by an ICSID tribunal in a dispute between Azurix Corp. ("Azurix") and Argentina.

Argentina asked the tribunal to annul the award arguing that:

- (a) under Article 52(1)(a) the Tribunal was not properly constituted;
- (b) under Article 52(1)(b) the Tribunal manifestly exceeded its powers;
- (c) under Article 52(1)(d) there had been a serious departure from a fundamental rule of procedure; and
- (d) under Article 52(1)(e) the Award failed to state the reasons on which it was based.

Azurix, a U.S. company that had invested in Argentina, instituted the arbitration in 2001 contending, *inter alia*, that Argentina was in "violation of several articles of the Treaty between the United States of America and the Argentine Republic Concerning the Reciprocal Encouragement and Protection of Investment (the "BIT")." More specifically, Azurix argued that its investment was expropriated through measures instituted by the Argentine government.

In July 2005, an ICSID tribunal unanimously decided that Argentina 1) breached Article II(2)(a) of the BIT by failing to accord fair and equitable treatment to Azurix's investment; 2) failed to accord full protection and security to Azurix's investment under Article II(2)(a) of the BIT; and 3) breached Article II(2)(b) of the BIT by taking arbitrary measures that impaired Azurix's use and enjoyment of its investment. The tribunal found that Argentina was not in breach of Article IV(1) of the BIT [the expropriation clause]. The tribunal awarded Azurix US\$165,240,753, plus interest, and ordered that each party pay for its own costs and counsel fees.

The *ad hoc* Committee, constituted to hear the annulment application reviewed in detail each of the arguments presented by Argentina, decided to dismiss the application in its entirety. The Committee also ordered each party to pay its own costs and asked that the stay of enforcement of the final award be terminated.

For more on the Committee's legal reasoning and background on the dispute, refer to the documents above.

World Trade Organization

United States – Subsidies on Upland Cotton Arbitration Decision (August 31, 2009)

[Click here](#) for the Decision of the Arbitrator on the Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement (approximately 152 pages); [click here](#) for the Decision of the Arbitrator on the Recourse to Arbitration by the United States under Article 22.6 of the DSU and Article 7.10 of the SCM Agreement (approximately 132 pages) and the [Corrigendum](#) (approximately 1 page)

The World Trade Organization (WTO) has issued two arbitration decisions in the *Upland Cotton* dispute between the United States and Brazil. The U.S. initiated the two separate arbitration proceedings pursuant to Article 22.6 of the Dispute Settlement Body (DSB) and Article 4.11 of the Subsidies and Countervailing Measures Agreement (SCM Agreement), "challeng[ing] two distinct aspects of Brazil's proposed countermeasures. The United States object[ed] first to the level of suspension of concessions or other obligations and the countermeasures proposed by Brazil. In addition, the United States claim[ed] that the

principles and procedures set forth in Article 22.3 of the DSU have not been followed by Brazil and therefore the United States request[ed] the Arbitrator to reject Brazil's request to suspend concessions with respect to TRIPS and GATS." While there are two separate decisions, the proceedings were held in parallel with the same arbitrators.

The dispute between the parties began in 2002 when Brazil lodged a complaint with the WTO against the U.S., alleging that U.S. subsidies to cotton farmers were in violation of the WTO rules. In 2004, a WTO panel determined that various types of payments and assistance to cotton farmers by the U.S. government amounted to subsidies, which in turn was in violation of the SCM Agreement. This determination was upheld by the Appellate Body (AB) in 2005. In March of 2005, the DSB adopted the AB report and recommended that the U.S. amend its legislation and come in compliance with the SCM Agreement. In 2006, alleging failure by the U.S. to implement the recommendations of the DSB, Brazil requested that a new panel be established. The new panel issued a compliance report declaring that U.S. measures were still inconsistent with the SCM Agreement, a conclusion the U.S. contested. In the meantime, Brazil requested the right to impose appropriate countermeasures to counter continued U.S. noncompliance. The U.S. objected to the measures proposed by Brazil, and on July 14, 2005 the parties agreed to arbitrate the matter.

The arbitration decisions, a clear win for Brazil, determined that "Brazil may request authorization from the DSB to suspend concessions or other obligations under the Agreements on trade in goods in Annex 1A, at a level not to exceed the value of US\$147.3 million annually." In addition, "[i]n the event that the total level of countermeasures that Brazil would be entitled to in a given year should increase to a level that would exceed the threshold described in paragraph 5.201, updated to account for the change in Brazil's total imports from the United States, then, Brazil would also be entitled to seek to suspend certain obligations under the TRIPS Agreement and/or the GATS."

For details on the reasoning adopted by the arbitrators and general information about the dispute, please refer to documents above.

Briefly Noted

German Parliament Approves Bill Allowing Germany to Ratify the Lisbon Treaty (September 8, 2009)

[Click here](#) for a detailed list of votes (approximately 17 pages); [click here](#) for the bill (approximately 4 pages); [click here](#) for the German Constitutional Court decision on the Treaty; [click here](#) for Lisbon Treaty (approximately 272 pages);

The German Parliament (Bundestag), with a majority vote in favor of new legislation enabling the ratification of the Lisbon Treaty, has brought Germany one step closer to ratifying the Treaty. On September 18, 2009, the Bundesrat (Upper House) will also have to approve the "accompanying laws" before Germany can ratify the treaty.

The treaty has faced national opposition in several countries, including Germany, Czech Republic, Poland and Ireland. In Germany, the Constitutional Court was asked earlier this year to decide whether ratification would be incompatible with the German Constitution. The Court held that as long as the German Parliament played a role in the ratification process no violation would exist.

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