

# Int'l Law In Brief



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*Developments in International Law, Prepared by the Attorney Editor of  
International Legal Materials, American Society of International Law*

January 20, 2012

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## Resolutions, Declarations, and Other Documents

## UN Security Council Resolution 2033 on Cooperation Between the United Nations and Regional and Subregional Organizations in Maintaining International Peace and Security (Jan. 12, 2012)

[Click here](#) for document (approximately 5 pages)

The UN Security Council has unanimously adopted [Resolution 2033](#), stressing the importance of taking "effective steps" to improve the relationship between the UN and other regional and subregional organizations in accordance with Chapter VII of the UN Charter. Specifically, the Security Council underscored the need to establish a more effective relationship between the UN and the African Union ("AU"), with a focus on conflict prevention and conflict resolution in Africa.

The Security Council also reaffirmed the Member States' obligation "to settle disputes and resolve conflicts in accordance with the United Nations Charter" and called on the international community to assist efforts by the AU and other regional organizations to peacefully settle disputes.

## Judicial and Similar Proceedings

### European Court of Human Rights

#### Othman v. United Kingdom (Jan. 17, 2012)

[Click here](#) for document (approximately 67 pages)

The European Court of Human Rights has ruled that the United Kingdom would violate the applicant's Article 6 right to a fair trial if it were to deport him to Jordan, where he is wanted on terrorism charges. According to the Court's [press release](#), this marks "the first time that the Court has found that an expulsion would be in violation of Article 6, which reflects the international consensus that the use of evidence obtained through torture makes a fair trial impossible."

The applicant is originally from Jordan but is currently detained in England for his suspected involvement with al-Qaeda. He arrived in the United Kingdom in 1993, where he obtained refugee status. In 2002, the applicant was detained under the U.K. Anti-Terrorism, Crime and Security Act, and after the Act was repealed in 2005, he was released on bail and made subject to a control order under the Prevention of Terrorism Act, which he appealed. During the appeal, he was also served with a notice of deportation to Jordan. (The applicant was convicted in Jordan *in absentia* for his alleged involvement in two terrorist conspiracies in 1999 and 2000. According to Jordanian authorities, he had incited his followers to plant bombs in Jordan.) The applicant appealed the deportation order, claiming that the deportation would put him at risk of torture, lengthy detention, and grossly unfair trial. The U.K. Special Immigration Appeals Commission dismissed his appeal, concluding that he would not be tortured nor experience ill-treatment because United Kingdom and Jordan concluded a series of assurances to guarantee the applicant's human rights. The Court of Appeal partially granted his appeal, finding that there was a risk that the applicant's Article 6 rights would be violated by reliance in the courts of Jordan on testimony obtained from two witnesses through torture. On appeal, the House of Lords sided with the Special Immigration Appeals Commission, holding that the existing diplomatic assurances would protect the applicant's Convention rights, including his right to a fair trial. The applicant then took his claim to the European Court of Human Rights.

The European Court of Human Rights first concluded that the diplomatic assurances between the United Kingdom and Jordan were in good faith, comprehensive, and sufficiently effective to ensure that the applicant would not be at risk of ill-treatment in Jordan, thus satisfying Article 3 guarantees against torture and ill-treatment, including return to a country where there is a risk of such treatment. As a result, the Court found that there was no violation of Article 3.

With respect to the applicant's claim under Article 5 (protection against lengthy pre-trial detention), the Court concluded that Jordan's intention to try him within fifty days of his detention would not be in violation of Article 5.

However, regarding the applicant's Article 6 claim, the European Court held that the use of evidence obtained by torture during a criminal trial would amount to a flagrant denial of justice. The Court emphasized that "in the twenty-two years since the *Soering* judgment, the Court has never found that an expulsion would be in violation of Article 6" because "flagrant denial of justice" is a stringent test of unfairness. Thus, the applicant must demonstrate more than just "mere irregularities or lack of safeguards in the trial procedures such as might result in a breach of Article 6 if occurring within the Contracting State itself." According to the Court, "[w]hat is required is a breach of the principles of fair trial guaranteed by Article 6 which is so fundamental as to amount to a nullification, or destruction of the very essence, of the right guaranteed by that Article." Put differently, the applicant has to provide "evidence capable of proving that there are substantial grounds for believing that, if he is removed from a Contracting State, he would be exposed to a real risk of being subjected to a flagrant denial of justice."

Applying this test, the Court concluded that a flagrant denial of justice would arise "when evidence obtained by torture is admitted in criminal proceedings" against the applicant. The Court found that the applicant demonstrated that there is a real risk that two individuals were tortured into providing evidence against him. This evidence, the Court ruled, if admitted, would have probative value and may be determinative in the final verdict. As a result, and without assurances from Jordan that the evidence obtained by torture will not be used, the Court concluded that the applicant's deportation to Jordan to be retried would amount to flagrant denial of justice in violation of Article 6.

### **U.S. Court of Appeals for the District of Columbia Circuit**

#### **Republic of Argentina v. BG Group PLC (Jan. 17, 2012)**

[Click here](#) for document (approximately 17 pages)

The U.S. Court of Appeals for the District of Columbia has vacated an arbitral award against Argentina on the basis that the investor commenced an international arbitration against Argentina without first filing a claim in the Argentine domestic courts, as required by Article 8(2) of the U.K.-Argentina Bilateral Investment Treaty ("BIT"). The Court concluded that "the arbitral panel rendered a decision wholly based on outside legal sources and without regard to the contracting parties' agreement establishing a precondition to arbitration."

The original dispute is between a British investor, who invested in a gas transportation and distribution company incorporated in Argentina, and Argentina. In 2003, the investor filed an arbitration against Argentina claiming that government measures taken in response to the 2001-2002 economic crisis in Argentina amounted to expropriation of the investor's investment and violated the fair and equitable treatment standard of the BIT.

During the arbitration, which took place in Washington, D.C., the investor argued--relying on an article by the former Argentine Attorney General and Minister of Justice, who had estimated that it would take six years to resolve the investor's claim in Argentina--that it would have been "senseless" to commence domestic proceedings in Argentina as required by Article 8(2) of the BIT. The investor also argued that "customary international law did not require exhaustion of local remedies, and that Article 3 of the Treaty, the Most Favored Nation Clause, obviated the requirement that it seek recourse in Argentine courts given that Argentina's investment treaty with the United States lacked such a requirement."

The arbitral tribunal rejected the investor's first argument, but nonetheless concluded, referring to Article 32 of the Vienna Convention on the Law of Treaties, that Argentina's emergency decrees had restricted access to its courts and had excluded from the renegotiation process investors like the claimant, and thus "a literal reading of the Treaty would produce an 'absurd and unreasonable result.'" On the merits, the arbitral panel **found** that Argentina had violated Article 2 of the BIT by failing to provide fair and equitable treatment to the investor's investment. The panel rejected Argentina's state-of-necessity defense under customary international law, concluding that the defense was "limited to exceptional circumstances, such as where there is a 'serious and imminent threat and no means to avoid it.'" The panel **awarded** the investor US \$185,285,485.85, plus interest, costs, and attorneys' fees.

After the award was issued, Argentina petitioned to vacate or modify it under the U.S. [Federal Arbitration Act](#). The investor filed an opposition and a cross-motion for recognition and enforcement of the award. The district court agreed with the investor, denying Argentina's petition to vacate and granting enforcement of the award. Argentina appealed.

The Court of Appeals first focused on the relevant provision of the BIT, which requires the parties, prior to initiating an international arbitration, to attempt to solve the dispute through diplomatic channels and then in the domestic courts of the party wherein the investment is located. Under the BIT, if the domestic courts fail to issue a final judgment within *eighteen* months, then the investor can commence an international arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL Rules") to resolve the dispute. Thus, the Court had to determine 1) whether the temporal requirement was intended as a precondition to arbitration by the contracting parties, and 2) if so, if the precondition was not satisfied, whether the arbitrability question is determined by the courts or by the arbitral tribunal.

With respect to the first question, the Court of Appeals, relying on U.S. Supreme Court precedent, concluded that the intent of the contracting parties (Argentina and the United Kingdom)--in this case requiring the exhaustion of domestic remedies--was determinative. Thus, the investor should have exhausted domestic remedies prior to commencing the international arbitration. With respect to the second question, the Court of Appeals ruled that because the BIT "is silent on who decides arbitrability when that precondition [on exhaustion of domestic remedies] is disregarded, . . . the question of arbitrability is an independent question of law for the court to decide." The Court concluded that the district court "erred as a matter of law by failing to determine whether there was clear and unmistakable evidence that the contracting parties intended the arbitrator to decide arbitrability where . . . [the investor] disregarded the requirements of Article 8(1) and (2) of the Treaty to initially seek resolution of its dispute" in Argentine courts.

### **U.S. Court of Appeals for the Second Circuit**

#### **Figueiredo Ferraz E Engenharia De Projeto LTDA. v. Republic of Peru (Dec. 14, 2011)**

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

Reversing the district court, the U.S. Court of Appeals for the Second Circuit has held that *forum non conveniens*--a common law legal doctrine allowing courts to refuse jurisdiction over disputes where a more appropriate forum is available to the parties--barred federal courts from exercising jurisdiction over this enforcement action. The Court found that the Republic of Peru was an adequate alternative forum because a domestic statute determining the amount of compensation available to satisfy the award was "'intimately involved with sovereign prerogative,'" and "Peruvian courts are 'the only tribunals empowered to speak authoritatively' on the meaning and operation of the cap statute."

A Brazilian company ("Figueiredo") sought the enforcement of a Peruvian arbitration award in the amount of US \$21,607,003 for the company's engineering studies on water and sewage services in Peru to which the parties agreed in 1997. In 2005, after a fee dispute arose between Figueiredo and the Peruvian government, Figueiredo commenced arbitration proceedings in Peru under the parties' 1997 agreement. An arbitral tribunal rendered an award ordering the Peruvian government to pay Figueiredo more than US \$21 million, which included approximately US \$5 million of principal damages plus accrued interest and costs. Because of a domestic law limiting the amount the Peruvian government can pay per year to satisfy a judgment against it (3% of the budget of a governmental entity in question), Figueiredo has not sought execution of the award in Peru and has so far only collected US \$1.4 million of the award, which Peru has voluntarily paid.

In January 2008, Figueiredo filed a petition in the Southern District of New York to confirm the arbitral award and obtain a judgment for US \$21,607,003. The district court rejected Peru's motion to dismiss and approved the award. Peru appealed.

The Court of Appeals first noted that the district court erred in not considering one of Peru's main arguments--i.e., that Figueiredo's claim should be dismissed because of the *forum non conveniens* doctrine. Finding that the *forum non conveniens* standards "concern both private and public interests," the Court went on to rule that the statutory cap for awards in Peru was "a highly significant public factor warranting FNS [*forum non conveniens*] dismissal." According to the Court, "there is . . . a public interest in assuring respect for a sovereign nation's attempt to limit the rate at which its funds are spent to satisfy judgments." Thus, just because Figueiredo "might recover less in an alternate forum does not render that forum inadequate."

Circuit Judge Gerard E. Lynch strongly dissented. He first noted that Figueiredo is only seeking to enforce an award

Circuit Judge Gerard E. Lynch strongly dissented. He first noted that Figueredo is only seeking to enforce an award already obtained in an international arbitration, not adjudicating the dispute on the merits. Judge Lynch concluded that "[b]y using the mechanism of *forum non conveniens* to import a substantive and self-serving provision of Peruvian law into what should properly be a summary proceeding, the majority significantly undermines the background expectations against which the parties made their contract." In fact, according to Judge Lynch, the United States, a party to the [Inter-American Convention on International Commercial Arbitration](#) ("Panama Convention"), has "committed itself to open our courts to the enforcement of international arbitral awards as if they were foreign judicial judgments. This commitment requires us to recognize and enforce international arbitral awards in the vast majority of cases."

## Briefly Noted

### UN Security Council Will Elect New ICJ Judge in April 2012 (Jan. 19, 2012)

[Click here](#) for document (approximately 1 page)

According to a [UN press release](#), the Security Council will [hold elections](#) in April 2012 to fill the new vacancy on the International Court of Justice, the principal judicial organ of the United Nations. This announcement follows the recent resignation of Judge Awn Shawkat Al-Khasawneh, which took effect on December 31, 2011. Judge Al-Khasawneh's term would have ended in February 2018.

For more information on the UN procedure to fill ICJ vacancies, please see an *Insight* by Natalya Sciemeca, available at <http://www.asil.org/insights100611.cfm>.

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