Update: Organization of American States

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2012 Reports on International Organizations

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African Union

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Website
www.au.int

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Introduction

The African Union (AU) was created as the successor to the Organisation of African Unity (OAU), the pan-African political entity that had existed since 1963. The AU’s Constitutive Act was concluded in 2000 and entered into force in July 2002. Its rather complex institutional framework, loosely based on the European Union, is comprised of the Assembly of Heads of State and Government (the Assembly), the Executive Council, the Pan-African Parliament, the African Court of Justice and Human Rights (not yet in operation), the Commission, the Permanent Representatives Committee, the Peace and Security Council, the Economic, Social and Cultural Council, the Financial Institutions (only partly established), and the Specialized Technical Committees.

The AU’s vision has been described as follows: “An integrated, prosperous and peaceful Africa, driven by its own citizens and representing a dynamic force in global arena.” Its aims and principles include unity and solidarity between African states; the defense of Member States’ sovereignty; Africa’s political and socio-economic integration; the promotion of democratic principles and institutions, popular participation, good governance, and sustainable development; the promotion and protection of human rights; and enabling the continent to play its rightful role in the global economy and in international negotiations. Currently, the AU has a membership of fifty-four states, i.e., all African countries except Morocco.

Recent Development: The Entry into Force of the Kampala Convention on Internally Displaced Persons in Africa and Repercussions for the AU
The entry into force in December 2012 of the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (the Kampala Convention), which was signed in Kampala, Uganda, on 23 October 2009, offers an opportunity to focus on a multilateral instrument negotiated under AU auspices, which attempts, on the one hand, to tackle a scourge that has plagued Africa throughout its post-colonial history and, on the other hand, to put into effect the wide ranging powers that the AU has been endowed with under its Constitutive Act. These powers center around the AU’s right, enshrined in Article 4(h) of its Constitutive Act, to intervene in the territory of any Member State when the Assembly has approved it and “grave circumstances” are present, a term defined as war crimes, genocide, and crimes against humanity.

The Kampala Convention’s origins can be traced to the 1969 Convention Governing the Specific Aspects of Refugee Problems in Africa (the 1969 Convention) and is the culmination of AU efforts starting with the 2004 Addis Ababa Document on Refugees and Forced Population Displacement in Africa, and Executive Council Decisions EX.CL/127 (V) and EX.CL/Dec.129 (V), adopted in July 2004, on the specific needs of internally displaced persons (IDPs).

IDPs are defined in Article 1 of the Kampala Convention as individuals or groups of persons who have been forced or obliged to flee or leave their homes but have not crossed internationally recognized state borders, on account of wide ranging situations, including armed conflict, generalized violence, violations of human rights, and natural or human-made disasters. Even though such persons find themselves in refugee-like situations, the fact that they remain within national frontiers does not allow them to legally qualify for refugee status, and therefore, the 1969 Convention has no application.

The Kampala Convention’s objectives are set out in Article 2. They include the promotion and strengthening of regional and national measures preventing, prohibiting, and eliminating the root causes of internal displacement, the establishment of durable solutions to internal displacement and the creation of a legal framework to protect and assist IDPs in Africa. The way the Kampala Convention has been structured, it contains obligations which are assumed not only by contracting parties (Articles 3-5, 9-13), but also obligations pertaining to international organizations and humanitarian agencies (Article 6), duties in the form of prohibitions which are attached to members of armed groups (Article 7), and obligations relating to the AU (Article 8).

According to Article 8(1) of the Kampala Convention, the AU shall have the right to intervene pursuant to Article 4(h) of the Constitutive Act. It is submitted that the wording of Article 8(1) gives the AU only a discretion on whether to intervene, whereas the AU ought to have been obliged to intervene in order to protect and assist IDPs when it is clear that the contracting party

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in question is unable or unwilling to discharge its own duties. Given that the AU has never exercised its Article 4(h) powers, despite the existence of many situations that clearly came into its ambit (the hundreds of thousands IDPs in the Darfur region is a prime example), the Kampala Convention should have made far more concrete the obligation to intervene and, by necessary implication, to interfere in the domestic affairs of recalcitrant contracting parties.

However, the AU may be forced to decide to intervene when a contracting party has submitted a relevant request pursuant to Article 4(j) of the Constitutive Act in order to restore peace and security in its interior. According to Article 8(2) of the Kampala Convention, the AU shall ‘respect’ this request and contribute towards the formation of favourable conditions for finding durable solutions to the internal displacement experienced in that state.

The general obligations of the AU under the Kampala Convention are laid down in Article 8(3) and center around the support it must give to contracting parties in protecting and assisting IDPs. In particular, the AU is mandated to strengthen its relevant institutional framework and capacity and collaborate with other international organizations, humanitarian agencies, and civil society organizations, including the African Commission on Human and Peoples’ Rights’ Special Rapporteur for Refugees, Returnees, IDPs, and Asylum Seekers, in addressing issues of direct concern to IDPs.

Article 14 of the Kampala Convention establishes a review mechanism in the form of a Conference of States Parties. However, it is not empowered to monitor whether contracting parties and the AU have given effect to their obligations but only whether the Kampala Convention’s objectives have been implemented. IDPs could lodge complaints with the African Human Rights Commission, but only to the extent that their complaint’s subject matter is covered by the African Human Rights Charter, or with any other competent international body, provided that the contracting party complained against has recognized that body’s competence to receive the complaint.

As is customary with treaties negotiated and concluded under AU auspices, fifteen ratifications by Member States were required for the Kampala Convention to enter into force. The majority of the AU membership has signed the Kampala Convention but there are still more than ten Members States (including Kenya, Sudan, and South Africa) that have chosen not to sign it.

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Conclusion

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In 2004, B.T. Nyanduga, the then African Human Rights Commission Special Rapporteur on Refugees, argued that the absence of a binding international legal regime on internal displacement was a grave lacuna in international law.\textsuperscript{4} Since then, the United Nations has continued to not show the initiative that might reasonably be expected of it (after all, this is a global problem), while the AU has been successful in adopting the Kampala Convention. The latter’s provisions, in conjunction with the powers afforded by the Constitutive Act and other relevant AU instruments, should make the AU far more assertive in dealing with the scourge of internal displacement. Time will tell whether the AU is in a position to take full advantage of this normative framework to protect and assist IDPs as they deserve.

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The Andean Community

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Website
http://www.comunidadandina.org

Keywords
Andean Community, Court of Justice of the Andean Community, arbitration

Introduction
The Andean Community was established by the Agreement of Andean Sub-regional Integration (Cartagena Agreement). In addition to its member states, namely Bolivia, Colombia, Ecuador, and Peru, the Community is composed of the “bodies and institutions of the Andean Integration System” (SIA).

The Andean Presidential Council is the central organ of the SIA. It is composed of the heads of state of the member states and issues Guidelines, through which “Andean sub-regional integration policy” is defined.

The Andean Council of Ministers of Foreign Affairs sets out the Andean Community’s foreign policy in matters of sub-regional interest. It issues Declarations and Decisions. The latter are part of the legal order of the Andean Community.

The Commission of the Andean Community is composed of plenipotentiary representatives from each of the member states. It sets out and implements “Andean sub-regional integration policy” regarding commerce and investment. It also adopts measures necessary for the fulfillment of the objectives of the Cartagena Agreement and for the implementation of the Presidential Council’s

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3 Cartagena Agreement, supra note 1, art. 5.
4 Id. arts. 11 & 12(a).
5 Id. art. 16(a).
6 Id. art. 17.
7 Id. art. 21.
8 Id. art. 22(a).
Guidelines.\textsuperscript{9} Among other things, it issues Decisions, which are part of the Andean Community legal order.\textsuperscript{10}

The Andean Parliament is the SIA’s deliberative body and is composed of “representatives chosen by universal and direct suffrage.”\textsuperscript{11} The Parliament suggests draft provisions for incorporation into Andean Community law, promotes the harmonization of domestic legislation, and examines the progress made in relation to the integration process.\textsuperscript{12}

The Court of Justice of the Andean Community (CJAC)\textsuperscript{13} is competent to rule on actions for annulment\textsuperscript{14} and non-compliance;\textsuperscript{15} issue preliminary rulings;\textsuperscript{16} decide upon requests for injunctions against “omission or inactivity” on the part of organs of the Andean Community;\textsuperscript{17} and settle disputes involving the bodies and institutions of the SIA.\textsuperscript{18} Member states are under a duty to not submit disputes arising out of the “legal system of the Andean Community” to dispute settlement other than under the 1996 Protocol.\textsuperscript{19} The CJAC’s judgments are directly enforceable in member states.\textsuperscript{20}

**Recent Developments: The Court of Justice of the Andean Community case law and its effects on the member states’ law on arbitration**

In the 2011 case of \textit{ETB S.A. v. Republic of Colombia (03-AI-2010)},\textsuperscript{21} the CJAC addressed the question of whether “Colombia…had breached [its] obligations…regarding reference of matters for preliminary ruling.”\textsuperscript{22}

The CJAC found that the Colombian Council of State failed to request a preliminary ruling in the course of proceedings for the setting aside of three arbitral awards issued against the claimant, as required by Andean Community law.\textsuperscript{23}

\textsuperscript{9} Id. art. 22(b).
\textsuperscript{10} Id. art. 17.
\textsuperscript{11} Id. art. 42, ¶ 1.
\textsuperscript{12} Id. art. 43.
\textsuperscript{13} The CJAC was established by the Treaty Creating the Court of Justice of the Cartagena Agreement. \textit{See} Treaty Creating the Court of Justice of the Cartagena Agreement, May 28, 1979 (amended by Protocol Amending the Treaty Creating the Court of Justice of the Cartagena Agreement, May 28, 1996 (entered into force Aug. 25, 1996), available at, \url{http://www.comunidadandina.org/ingles/normativa/ande_trie2.htm} [hereinafter 1996 Protocol]).
\textsuperscript{14} 1996 Protocol, \textit{supra} note 13, arts. 17-22.
\textsuperscript{15} Id. arts. 23-31.
\textsuperscript{16} Id. arts. 32-36.
\textsuperscript{17} Id. arts. 37 & 38.
\textsuperscript{18} Id. art. 38.
\textsuperscript{19} Id. art. 42, ¶ 1.
\textsuperscript{20} Id. art. 41.
\textsuperscript{22} Id. 17.
\textsuperscript{23} Id.
The Court’s reasoning can be summarized as follows:

(a) Reference to the CJAC for a preliminary ruling is a “preliminary requirement” set out by a “supranational rule…incorporated into the domestic legal order as a procedural rule of mandatory nature.” The breach of this preliminary requirement is a “flagrant violation of due process.”

(b) In proceedings that will result in a final decision from which no ordinary means of appeal are available, reference for a preliminary ruling is compulsory if matters governed by the Andean Community legal order arise. A request for reference may be made by the parties or by the judicial authority sua sponte. Referral of a question to the CJAC for a preliminary ruling entails a stay of proceedings before the domestic court or tribunal.

(c) The Colombian Council of State is a “judge of the Andean Community” by virtue of the Andean Community legal order’s principles of “primacy, autonomy, direct application, and judicial cooperation.”

(d) The concept of ‘domestic judge’, for the above purposes, extends to arbitral tribunals which are not acting ex aequo et bono. Hence, such arbitral tribunals are subject to the obligation to refer certain questions for preliminary ruling by the CJAC.

(e) Hence, in the exercise of its jurisdiction to review arbitral awards, the Council of State “ought to act as a true judge of the Andean Community” and refer relevant questions that arise in the arbitral proceedings for preliminary ruling by the CJAC, including at the enforcement stage.

(f) Colombia’s responsibility was engaged not as a result of the Council of State’s failure to request a preliminary ruling on procedural matters or on “the interpretation of Andean Community norms” in the arbitral awards under review, but rather as a consequence of the Council of State’s failure to request a preliminary ruling by the CJAC in view of the fact that the arbitral tribunal had not done so.

On August 9, 2012, the Third Division of the Contentious-Administrative Chamber of the Council of State, in three judgments in the COMCEL v. ETB S.A. cases, overturned its 2008
judgments. In those judgments the Council of State had rejected applications to set aside three 2006 arbitral awards on the basis that the defendant had failed to prove any of the grounds for setting them aside. The 2008 judgment had been challenged before the CJAC and lead to the ruling discussed above. The Third Division, mindful of the CJAC’s findings, analyzed the nature of the Andean Community legal order and its effects on the Colombian legal order, particularly on the grounds for setting aside arbitral awards under Colombian law. It concluded that failure to observe the “duty to request Preliminary Ruling on Andean Community norms applicable to the case, on the part of the arbitral tribunal which is seized of the case” is a ground for setting aside arbitral awards.

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Conclusion
The CJAC’s 2011 Judgment in the ETB S.A. v. Republic of Colombia case is of high significance for the Andean Community legal order and for Colombian arbitration law.

Although its cogency and consequences cannot be fully discussed here, it is submitted that:

(a) The rule set out in the judgment may lead to a manifestly unreasonable result, as it implies that an arbitral award of a tribunal which would have been found to be competent by the CJAC, had the tribunal referred the question of its jurisdiction to the CJAC, and in relation to which no other ground for setting aside may be invoked, may still be set aside only as a result of the tribunal’s failure to refer the question for preliminary ruling by the CJAC.

(b) The extension to arbitral tribunals of the obligation to refer questions for preliminary ruling by the CJAC is not clearly required for the protection of due process in arbitral proceedings.

(c) Existing grounds for setting aside or refusing enforcement of arbitral awards allow domestic courts to take into account applicable Andean Community law, as part of the law governing the arbitration.

(d) National authorities competent to rule on an application for setting aside or refusing enforcement of arbitral awards are in a better position than arbitral tribunals to ensure that Andean Community law is applied uniformly.

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Justice Zambrano Barrera) & No. 43.281 (unanimous opinion delivered by Justice Santofimio Gamboa) (on file with the author).

33 Id. ¶ I.4 (common to the three judgments).
34 Id. ¶ II.4 (common to the three judgments).
35 Id. ¶ II.7.3 (common to the three judgments).
(e) More importantly, the obligation of arbitral tribunals to refer for preliminary ruling by the CJAC questions of Andean Community law as to their jurisdiction is inconsistent with the “kompetenz-kompetenz principle.”

Should the CJAC return to this ruling in future cases, the scope of the obligation should be confined to matters which are not related to the competence of the arbitral tribunal.\textsuperscript{36}

\textit{Dorsch Consult Ingenieurgesellschaft v. Bundesbaugesellschaft Berlin} case, to the effect that among the “factors” taken into account in order to determine whether a body is entitled to make references to the European Court of Justice are the questions of “whether it is permanent” and “whether its jurisdiction is compulsory,” and the Nordsee v. Reederei Mond case, holding that arbitrators are not entitled to make a reference pursuant to Article 234 of the European Community Treaty. The ECJ's findings in the above decision are applicable for the purposes of Article 267 of the Treaty on the Functioning of the European Union. See Case C-54/96, 1997 E.C.R. I-4961, ¶ 23 & Case C-102/81, 1982 E.C.R. 1095, ¶ 13, respectively.

\textit{10 November 2012}
The Association of Southeast Asian Nations

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Website
www.aseansec.org

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ASEAN Economic Community, ASEAN Investment Area Council, ASEAN Comprehensive Investment Agreement, law of treaties

Introduction
For an introductory overview of the Association of Southeast Asian Nations (ASEAN) please see the December 2007 and Winter 2008/2009 Reports on ASEAN. This Report focuses on the entry into force of the ASEAN Comprehensive Investment Agreement on 19 March 2012.

The ASEAN Comprehensive Investment Agreement (ACIA) was signed on 26 February 2009. It consists of 49 Articles and two Annexes and is divided into three Sections. Section A contains Articles 1 to 27, which set out standards of treatment, among other things; Section B contains Articles 28 to 41, on investor-state dispute settlement; and Section C contains Articles 42 to 49.

Article 4 contains definitions. Sub-paragraphs (a), (c) and (d) define “covered investment,” “investment,” and “investor,” respectively. Footnote 2 to Article 4 further specifies that “[t]he characteristics of an investment include the commitment of capital, the expectation of gain or profit, or the assumption of risk.”

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2 ACIA, supra note 1, art. 45.

It must be noted that non-ASEAN investors based in ASEAN may be precluded from benefiting from protection afforded by the ACIA by virtue of Article 19, on denial of benefits. This is a further restriction with respect to the scope of protection accorded by the previous treaties in the matter.

Articles 5 and 6 provide for National Treatment and Most-Favoured-Nation Treatment (MFN Treatment), respectively. Footnote 4(a) to Article 6 excludes “investor-State dispute settlement procedures that are available in other agreements” from the scope of application of MFN Treatment. Under Paragraphs 1 and 2 of Article 6, MFN treatment ought to be accorded “in like circumstances” to “investors” and “investments,” respectively. Paragraph 3 excludes from the scope of application of Paragraphs 1 and 2 treatment accorded under “sub-regional arrangements”. Although these provisions extend National and MFN Treatment obligations to admission, the ASEAN Investment Area’s (AIA) MFN Treatment provisions are wider in scope than those of the ACIA. In particular, the AIA’s provisions, unlike the ACIA, are not confined to investors or their investments “in like circumstances”, nor do they exclude “investor-State dispute-settlement procedures that are available in other agreements” from their scope of application.

Lastly, the scope of disputes that may be submitted to arbitration is narrower than under previous agreements. Article 32(a) of the ACIA does not provide for the submission to arbitration of claims concerning admission, establishment, acquisition, or expansion of “covered investment.” Hence, the extension of National and MFN Treatment obligations to admission may be of no practical consequence as claims arising out of admission of covered investments may not be submitted to arbitration under the ACIA.

Recent Developments: Entry into force of the ASEAN Comprehensive Investment Agreement and the termination of prior ASEAN investment treaties
The ACIA entered into force on 29 March 2012. Its entry into force entailed the termination of previous ASEAN investment treaties, namely the 1987 ASEAN Investment Guarantee Agreement (IGA), the 1997 AIA Agreement, and the protocols thereto.

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4 See Rooney, supra note 1, 184.
5 See id. 177.
6 Id. 186.
The termination of a previous treaty by consent expressed in a later treaty is governed by customary rules codified in the 1969 Vienna Convention on the Law of Treaties (VCLT).

These rules are binding both on States Parties to the VCLT, as conventional international law, and on third states, as customary international law, ‘independently of’ the VCLT. On the one hand, Lao People’s Democratic Republic, Malaysia, Myanmar, the Philippines, and Vietnam are parties to the VCLT. Consequently, the rules set out in the VCLT are applicable to them as conventional international law. On the other hand, Brunei, Cambodia, Indonesia, Singapore, and Thailand are third states to the VCLT. Therefore, the rules contained in the VCLT are applicable to them only as customary international law.

Article 42(2) of the VCLT provides that the termination of a treaty “may only take place as a result of the application of the provisions of the treaty” or of the VCLT. Article 54(a) of the VCLT provides that termination “may take place … in conformity with the provisions of the treaty, or” as provided in Article 54(b). Neither the IGA nor the AIA Agreement provide for termination by mutual consent. The latter contains no provision on termination or denunciation. The former provides for a right of denunciation by giving written notice six months in advance, which could only be exercised after ten years of its entry into force. Under Article 54(b) of the VCLT, the termination of a treaty “may take place … at any time by consent of all the parties after consultation with the other contracting States.” Only ASEAN Member States are parties to the IGA, the AIA Agreement, and the ACIA and there are no other contracting states to these agreements. Hence, in accordance with the above rule, the IGA and the AIA Agreement were

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11 Cambodia signed the VCLT on May 23, 1969. Hitherto, it has neither expressed its consent to be bound by the VCLT, nor has it made its intention not to become party to the VCLT. UNITED NATIONS OFFICE OF LEGAL AFFAIRS, TREATY SECTION, supra note 10.

12 Id.


14 On VCLT Article 54(a), see Chapaux, supra note 13, 1238–239, ¶¶ 5–9.

15 IGA, supra note 9, art. XIII(2).

16 Id. art. XIII(1).

17 Cambodia is only party to the ACIA, and not to the IGA or the AIA Agreement. The other parties to the ACIA are parties to the latter two treaties.
terminated by consent of the parties “upon entry into force of” the ACIA, as provided for in Article 47(1) of the ACIA. Certain consequences of the termination of the IGA and the AIA Agreement are dealt with in Paragraphs 2 and 3 of Article 47 of the ACIA, which lay down “transitional arrangements.”

Pursuant to the rules codified in VCLT Article 70(1), the termination of a treaty:

   under its provisions or in accordance with the present Convention …

   (a) releases the parties from any obligation further to perform the treaty; [and]
   (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.

The rules laid down in sub-paragraphs (a) and (b) embody customary international law on the consequences of terminations of treaties18 and would apply to third states to the VCLT, as noted above.

The above rules only apply to the rights, obligations and legal situations of states which are parties to the respective treaty. Consequently, they do not apply to the rights, obligations and legal situations of other subjects, including investors. The latter’s position is dealt with in Article 47(3) of the ACIA. Article 47(3) provides for the right of investors of “investments falling within the ambit of” either (a) the ACIA “as well as under the ASEAN IGA” or (b) the ACIA “and the AIA Agreement” to “choose to apply the provisions, but only in its entirety, of either” the ACIA, “the ASEAN IGA or the AIA Agreement, as the case may be, for a period of 3 years” after the termination of the ASEAN IGA and the AIA Agreement.

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Conclusion

The provisions of the ACIA are more specific than the IGA and ACIA. Certain restrictions upon the protection of investors and their investments are imposed by the ACIA, particularly as to the scope of “covered investments” and investment disputes which may be submitted to arbitration.19

Hence, over the ensuing three-year transitional period, the right of investors to choose to apply provisions of either the IGA or AIA Agreement pursuant to Article 47(3) of the ACIA, while restricted to a choice as to the entirety of the chosen treaty’s provisions, may prove to be of practical significance.

16 November 2012

19 Rooney, supra note 1, at 171.
Food and Agriculture Organization of the United Nations (FAO)

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Website
www.fao.org/index_en.htm

Keywords
Rinderpest, FAO Renewal, IUU Fishing, Port State Measures

Introduction
The Food and Agriculture Organization (FAO) is a specialized agency of the United Nations that was established in 1945 with its headquarters in Rome, Italy. It is actively involved in matters relating to nutrition, food, and agriculture with the aim of achieving global freedom from hunger. At the present time it has 191 Member Nations, two associate members, and one member organization, the European Union (EU). The Conference, the FAO’s governing body, is made up of representatives of its Members and meets on a biennial basis to review global policies, approve the budget, and make recommendations. The Conference also elects the Director-General and the members of the Council, which acts as the FAO’s executive body. Beyond serving as a knowledge network, the FAO shares policy expertise with Members and provides an international forum enabling rich and poor nations to reach understandings on major food and agriculture issues.

Recent Developments: The 2011 FAO Conference and the 2009 FAO Agreement on Port State Measures to Prevent, Deter and Eliminate IUU Fishing
The 37th Session of the FAO Conference was held in Rome from 25 to 2 July 2011.\(^1\) A major outcome of the Conference was Resolution 4/2011 on Global Freedom from Rinderpest and on the Implementation of Follow-up Measures to Maintain World Freedom from Rinderpest. Rinderpest eradication has been one of the primary goals of the FAO since its creation. From

now on FAO shall undertake measures to ensure that rinderpest virus is not accidentally or deliberately reintroduced into the global environment. In addition, Members of the FAO are urged to take appropriate measures in relation to rinderpest, such as maintaining surveillance systems, implementing national contingency plans consistent with international guidance, and ensuring adequate education at the national level.

The Conference also endorsed the report of the Committee for the Follow-up to the Independent External Evaluation on the work completed in 2010-11 in the framework of the Immediate Plan of Action (IPA) for FAO Renewal. The identified actions are targeted at delivering results, functioning as ‘One Organization’, reviewing human resources, and enhancing administrative and management systems. The Council will monitor progress made with regard to the implementation of the IPA and is expected to submit a full progress report to the FAO Conference in 2013.

Furthermore, a noteworthy legal development took place at the 36th Session of the FAO Conference from 18 to 23 November 2009, when the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated (IUU) Fishing (the 2009 Agreement) was approved as an Article XIV instrument under the FAO Constitution. The 2009 Agreement will enter into force thirty days after attaining twenty-five ratifications, acceptances, approvals, or accessions, even if Members might consider to apply it provisionally pending its entry into force. It is nonetheless disappointing to note that so far only a few states and the EU have become parties.

The 2009 Agreement is the first legally binding instrument clearly and comprehensively addressing port state measures to curb IUU fishing. Former attempts to promote sustainable fishing have resulted in the 1993 FAO Compliance Agreement, the 1995 FAO Code of Conduct on Responsible Fisheries, and the 1995 UN Fish Stocks Agreement. More importantly, the 2001 FAO International Plan of Action to Prevent, Deter and Eliminate IUU Fishing provided for a commonly accepted definition of IUU fishing and expanded the elements of port state measures. However, these instruments have proved insufficient to achieve adequate results, hence leading the FAO Committee on Fisheries (COFI) to call for the development of a global binding instrument on port state measures.

The 2009 Agreement draws on a Model Scheme that was approved by COFI in 2005. It consists of ten Parts and five Annexes. Part 1 sets out the general provisions, whereas Parts 2 to 4 revolve

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3 For the time being, the Agreement has been signed by twenty-two states and the EU, but only the EU, Myanmar, Norway, and Sri Lanka have become parties. See Status Chart on the Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing, available at [http://www.fao.org/fileadmin/user_upload/legal/docs/1_037s-e.pdf](http://www.fao.org/fileadmin/user_upload/legal/docs/1_037s-e.pdf) (last visited October 10, 2012).
around actions and requirements supporting port state measures aimed at preventing illegal fish products from entering markets. Under the 2009 Agreement, fishing vessels shall provide advance notice and request authorization for access to designated ports; and port states shall conduct regular inspections onboard vessels admitted in their ports and adopt follow-up measures, such as notifying the flag state and others, and denying the vessel the use of port services. The role of flag states and the special requirements of developing states are dealt with in Parts 5 and 6. In relation to this, the 2009 Agreement provides for the establishment of an ad hoc Working Group that will periodically report and make recommendations to the Parties on the establishment of funding mechanisms, the development of implementation guidance and other issues.\(^4\) Finally, Parts 7 to 10 focus on topics ordinarily included in international agreements, such as dispute settlement, provisions relating to non-parties, monitoring, review, and assessment.

**Conclusion**

The declaration on global freedom from rinderpest may be regarded as the most outstanding outcome of the 2011 FAO Conference. This achievement was possible thanks to decades of efforts carried out at international level, specifically in the framework of the Global Rinderpest Eradication Programme that was launched in 1994 by the FAO in coordination with the World Organization for Animal Health and other institutions.

The 2009 Agreement is amongst the most substantial developments achieved by FAO in the last few years. Port state measures are acknowledged to be a cost-effective tool to foster responsible fishing, but internationally agreed binding measures have been lacking so far. Once it has entered into force, it is presumed that it will significantly assist the more effective implementation of international, regional, and sub-regional management and conservation measures of fish stocks.

10 October 2012

\(^4\) Draft terms of reference of the ad hoc Working Group under Part 6 of the Agreement were developed by a technical consultation and endorsed by COFI at its 30\(^{th}\) Session; see FAO Conference Report of the Thirtieth Session of the Committee on Fisheries, Doc FIFI/R1012 (July9-13, 2012), ¶ 54, available at http://www.fao.org/docrep/016/i2727e/i2727e.pdf.
The Global Fund to Fight AIDS, Tuberculosis and Malaria

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Website
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Keywords
Standard terms and conditions, code of conduct, incorporation by reference, UNIDROIT principles

Introduction
The Global Fund to Fight AIDS, Tuberculosis and Malaria (the Global Fund) is an international financing institution that provides monetary grants to fight AIDS, tuberculosis (TB), and malaria in low and middle-income countries. Since its creation in 2002, the Global Fund has become the main financier of programs to fight AIDS, TB, and malaria, with approved funding of U.S. $22.9 billion for more than 1,000 programs in 151 countries. To date, programs supported by the Global Fund have provided AIDS treatment for 3.6 million people, anti-tuberculosis treatment for 9.3 million people and 270 million insecticide-treated nets for the prevention of malaria.

Grants are provided to recipients under a grant agreement that sets out a framework under which monies are disbursed in a manner that rewards both proper financial management and the results achieved by the recipient (the Grant Agreement). Each Grant Agreement consists of a Face Sheet that sets outs details specific to the grant (including amount, description of the program being funded, contact details, and funding milestones), a set of standard terms and conditions (STCs),1 and an Annex A that sets out specific conditions to be met by the grant recipient, provides details on the program being funded and its objectives, and appends a detailed performance framework and budget.

* The opinions and views expressed in this article are those of the author and not those of the Global Fund.

1 According to Art. 2.1.19 (2), Comment No. 2, UNIDROIT Principles of International Commercial Contracts, Apr. 2004, available at http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf [hereinafter UDPs], “standard terms are to be understood as those contract provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party.”
Recent Developments: Amendments to the Global Fund’s STCs

This year the Global Fund amended its STCs\textsuperscript{2} for certain of its grant structures as part of an effort to improve assurance and risk management of programs supported by grant funds. The amendments included a provision\textsuperscript{3} that introduced a Code of Conduct (the Code)\textsuperscript{4} for recipients of grant monies that deals with such matters as money laundering, conflicts of interest, and responsible corporate practices. This short article will explain how the Global Fund undertook to ensure that recipients of funds, both present and future, are legally bound by the amendments to the STCs, and by the Code as well.

The STCs contain an amendment provision setting out two formalities that need to be followed when making a change to the Grant Agreement. The first is that all changes to the Grant Agreement must be in writing and signed by authorized representatives of both the recipient and the Global Fund. The second is that to be effective, amendments must be carried out through so-called “implementation letters” (ILs), which are signed by both parties. In practice, the Global Fund adheres to a third formality that is not mentioned in the amendment provision, that is, all ILs are accompanied by an updated Face Sheet, which serves to memorialize the amendment. The last Face Sheet issued supersedes the previous one, whether or not information (other than the number of the amendment) appearing on the Face Sheet has actually changed.

According to the STCs, the applicable law between the parties is stipulated to be the UNIDROIT Principles 2004 (the UDPs),\textsuperscript{5} exclusively. But does the amendment procedure just described withstand scrutiny under the UDPs, especially when the amendment incorporates by reference a code of conduct posted on the Global Fund’s website? The answer is yes.

Turning firstly to the STCs proper, conformity of the amendment procedure to the UDPs is above all ensured through the Global Fund’s effective adherence to the requirements of form for amendments that are set out in the Grant Agreement.\textsuperscript{6} Secondly, by insisting that all amendments to its Grant Agreements be carried out through an express and personal notification of the Global Fund recipients affected by such amendments, the Global Fund is guarding against the risk that it may be seen at a future date as conducting itself in a manner that could be interpreted as


\textsuperscript{3} The new provision incorporating the Code reads in part as follows: “The Principal Recipient shall comply with the Global Fund’s Code of Conduct for Recipients of Global Fund Resources, as amended from time to time and available on the Global Fund Website”.


\textsuperscript{5} These are the second of the three versions of the UNIDROIT Principles that have been published by the International Institute for the Unification of Private Law, based in Rome (the first in 1994, the third in 2010).

\textsuperscript{6} Id. art. 2.1.18 (first sentence of UDPs reads: “A contract in writing which contains a clause requiring any modification or termination by agreement to be in a particular form may not be otherwise modified or terminated.”).
inconsistent with the amendments. Thirdly, the Global Fund is cautious that its use of standard terms conform to the rules on contract formation, particularly those regarding offer and acceptance. To render the latter incontrovertible, the Global Fund obtains the countersignature on the IL of the non-drafting party—the grant recipient—at testifying that it “confirms its agreement to the amendments.” Lastly, as the recipients are being sent a complete set of STCs incorporating the amendments, the IL lists the latter, provides a summary explanation of each one, and invites the recipient to read the full document and contact the Global Fund with any questions. These precautions ensure that the amendments to the STCs cannot be considered “surprising terms” for the grant recipients, thereby ensuring their enforceability (or more precisely their opposability, as civilists would characterize the issue) against the latter.

As for the Code itself, ensuring its implementation vis-à-vis existing or future grant recipients raises the same questions as the STCs proper, with the additional element that the Code is not physically provided to the recipients but instead incorporated by reference into the STCs and made available via the Global Fund’s website. The benefits of incorporation by reference are three-fold: improved readability of the basic contractual document, flexibility regarding future amendments and environmental friendliness through a reduction in the use of paper. The UDPs – under which the Code would be characterized as just another grouping of standard terms—does not deny parties the ability to use incorporation by reference in their contracts. Moreover, the grant recipient’s countersignature on the IL provided to inform the recipient of the adoption of the Code by the Global Fund provides additional assurance that the Code’s content forms part of the scope of the contract (the champs contractuel of the parties) and is therefore enforceable against grant recipients.

Many courts have upheld the validity of provisions not spelled out in the paper-based contract but easily accessible online (as are those of the Code) and incorporated by reference into the paper portion of the contract. As is the case for the STCs proper, the sign-off by existing recipients, together with the fact that the terms of the Code are not inconsistent with those of the paper-based STCs, ought to defeat the contention that the Code’s clauses are “surprising because of their presentation” and therefore not binding for want of the counterparty’s consent.

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7 Id. art. 2.1.19 (1) (“Where one party or both parties use standard terms in concluding a contract, the general rules on formation apply…”).
8 This is the term used in the heading of Article 2.1.20 UDPs.
9 UDPs, supra note 1, art. 2.1.19 (2), Comment No. 2 (“What is decisive is not … [the STCs’] formal presentation (e.g. whether they are contained in a separate document or in the contract document itself; whether they have been issued on pre-printed forms or are only contained in an electronic file, etc.) …”).
10 Id. Art. 2.1.20 (“(1) No term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party. (2) In determining whether a term is of such a character regard shall be had to its content, language and presentation.”) (emphasis added).
Conclusion

We have discussed above the methodology used by the Global Fund to ensure that a change in its standard terms and conditions, both internal and incorporated by reference, is legally effective vis-à-vis those to which they are meant to apply. Naturally, the efficacy of the approach depends upon whether the UDPs will in the final result actually govern the contractual relationship.

Based on the commentary of the UDPs’ drafters, as well as that of other eminent authors, the STCs’ governing law clause is solid. For starters, in order to minimize ambiguities regarding the choice of law, the Global Fund uses the model clause proposed in the UDPs, but there is more: the STCs also contain an arbitration clause. Without such a clause, the prevailing view seems to be that as long as contractual disputes are settled by a national court rather than an arbitration tribunal, the UDPs can only play a suppletive role alongside the national laws, including the forum’s rules of private international law. However, it is also now widely accepted that international commercial arbitrators are not similarly required to have due regard for a specific national legal system but may exclusively apply supranational rules, such as the UDPs, to the extent the parties have chosen these as the governing law of their contract.

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11 See the Model Clause in the footnote to the second paragraph of the UDPs’ Preamble.
12 The other facet to this question, which is beyond the scope of this short article, is the jurisdictional immunity that may be enjoyed by the Global Fund under international law or otherwise.
International Centre for Settlement of Investment Disputes

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Website
https://icsid.worldbank.org

Keywords
ICSID, denunciation of ICSID Convention, law of treaties

Introduction
For an introductory overview of the International Centre for Settlement of Investment Disputes (ICSID) please see the October 2010 Report on ICSID. This Report focuses on the denunciation of the ICSID Convention by Bolivia, Ecuador and Venezuela.

Recent Developments: The Denunciation of the ICSID Convention by Bolivia, Ecuador and Venezuela
Bolivia, Ecuador and, most recently, Venezuela gave notice of their denunciation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) on 2 May 2007, 6 July 2009, and 24 January 2012, respectively. There are no reported arbitral decisions concerning these denunciations.1

The denunciation of treaties and its legal consequences are governed by international law, particularly the law of treaties. Given that the ICSID Convention falls outside the scope of application ratione temporis of the Vienna Convention of the Law on Treaties (VCLT),2 the denunciation of the ICSID Convention and its legal consequences are not governed by the VCLT, but rather by the customary law of treaties.

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Under the customary law of treaties, parties to a treaty may provide for denunciation of the treaty and denunciation takes place pursuant to the applicable provisions of the treaty. This rule is reflected in Article 42(2) of the VCLT.3

Pursuant to Article 71 of the ICSID Convention, the Convention may be denounced by written notice given to its depositary and denunciation takes effect six months after receipt of such a notice. Hence, the denunciations of the ICSID Convention by Bolivia, Ecuador, and Venezuela took effect on 3 November 2007, 7 January 2010, and 25 July 2012, respectively.

Pursuant to Article 70(2) of the VCLT, denunciation “releases” the denouncing party “from any obligation further to perform the treaty” and “does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its” denunciation. Hence, the rights, obligations and legal situations created by the execution of the ICSID Convention, and which do not arise out of consent to the jurisdiction of ICSID, are governed by Article 70 of the VCLT. These include, among other things, obligations to bear certain ICSID expenditures; grant immunities and privileges; and submit to resolution of disputes by the International Court of Justice.4

Furthermore, certain legal consequences of the denunciation of the ICSID Convention are dealt with by its Article 72. Article 72 of the ICSID Convention reads as follows:

Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.

The rule in Article 72 is extended to amendments of the ICSID Convention by Article 66(2), which concerns “rights or obligations” under the Convention “arising out of consent to the jurisdiction of the Centre given before the date of entry into force of the amendment.”

Neither Article 66(2) nor Article 72 requires that an agreement to submit a dispute to arbitration or conciliation under the aegis of the Centre, formed by consent given by the parties to the dispute, exists. The latter provision is clearer, as it refers to unilateral consent, namely consent “given by one of them.”5

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3 Gabčíkovo–Nagymaros Project, 1997 I.C.J. 62–63, ¶ 100 (Sept. 25). As to the customary character of the rule, see Marcelo G. Cohen & Sarah Heathcote, 1969 Vienna Convention, Article 42, Validity and Continuance in Force of Treaties, in THE VIENNA CONVENTION ON THE LAW OF TREATIES. A COMMENTARY 1015, 1017-18 (Olivier Corten & Pierre Klein eds., 1st ed. Oxford Univ. Press 2011). Other authors consider that the applicable rule is embodied in Article 54, VCLT. It must be noted, nonetheless, that Article 42(2) applies to termination and withdrawal and specifically refers to denunciation, whereas Article 54 only reiterates the rule set out in Article 42(2) in relation to termination and withdrawal, without referring to denunciation.

4 See ICSID Convention arts. 17, 20–24, 64, 13(1), 15(2).

5 This question cannot be fully analyzed here. Nonetheless, the preamble to the ICSID Convention specifically confines mutuality to “mutual consent by the parties to submit such disputes to conciliation or to arbitration” (last preambular para.); see Emmanuel Gaillard, The Denunciation of the ICSID Convention, 237 (No. 122) N. Y. L.J. 3
The above is without prejudice to the prohibition contained in Article 25(1) of the ICSID Convention, which is to the effect that “[w]hen the parties have given their consent, no party may withdraw its consent unilaterally.” Consent to the jurisdiction of ICSID and, in particular, to submit disputes to arbitration or conciliation, may be found in one or more instruments, including international investment agreements, domestic legislation, or specific arbitration agreements, the legal force of which is not affected by denunciation of the ICSID Convention.

Furthermore, consent to the jurisdiction of ICSID must not be confused with the position of being party to the ICSID Convention. Hence, denunciation of the ICSID Convention may not necessarily entail withdrawal of consent to the jurisdiction or to submit a dispute to arbitration or conciliation. Nonetheless, once denunciation takes effect, unilateral consent to ICSID’s jurisdiction would lead to the formation of an agreement incapable of being performed, as the jurisdiction of ICSID may not “extend” to legal disputes between a third state, such as the denouncing state once the denunciation takes effect, and a national of a State Party to the ICSID Convention.

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**Conclusion**

The denunciation of the ICSID Convention by Bolivia, Ecuador, and Venezuela raises issues that cannot be fully analyzed here. However, it may be concluded that:

a) Under Article 70 of the VCLT, these countries remain entitled to the rights and bound by obligations created by the execution of the ICSID Convention prior to its denunciation and which do not arise from consent to the jurisdiction of the Centre.

b) Their position, as well as that of their nationals, with respect to rights and obligations which arise out of consent to the jurisdiction of ICSID, is two-fold, under Article 72, ICSID Convention:

i. On the one hand, as for rights and obligations arising out of unilateral consent, prior to the denunciation taking effect, a denouncing state remains bound by its consent and nationals of other States Parties to the ICSID Convention remain entitled to the right to express their consent to ICSID’s jurisdiction. Once denunciation takes effect, the denouncing state becomes a third party to the ICSID Convention and, hence, ICSID’s jurisdiction may not “extend” to it any longer.

Thus, an agreement to submit a dispute to arbitration or conciliation under the aegis of ICSID may be formed, but would be incapable of being performed.

ii. On the other hand, rights and obligations arising out of mutual consent, in the form of operative agreements, including those formed after denunciation is notified and before it takes effect, are irrevocable, and their legal force is not affected by denunciation.

22 November 2012
The Iran-United States Claims Tribunal

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Keywords
Revision of arbitral awards, inherent powers of courts and tribunals

Introduction
The Iran-United States Claims Tribunal (the Tribunal) was established as part of the resolution of the hostage crisis which began in November 1979 and lasted for 444 days, during which 52 United States nationals were detained in their embassy in Tehran. The Tribunal’s founding document is the Claims Settlement Declaration, which was one of the declarations that constituted the Algiers Declarations. The Claims Settlement Declaration established the Tribunal to decide certain outstanding claims by nationals of one state against the government of the other (commonly referred to as the “private claims”) and certain disputes between the two governments directly. The establishment of the Tribunal recognized that litigation in national courts was no longer feasible given the crisis in relations between the two governments, and the Tribunal aimed to provide a forum for “final settlement” of claims and disputes. The Tribunal’s subject matter jurisdiction consists of commercial claims (broadly speaking) and treaty claims based on the Algiers Declarations (which, in addition to the establishment of the Tribunal, contain undertakings and agreements that were also part of the resolution of the hostage crisis). The Tribunal sits in The Hague and has been operational since 1981. The claims remaining before the Tribunal are solely between the two governments, with the “private claims” having largely been litigated in the 1980s and 1990s. The Tribunal is arbitral in nature and operates under a modified version of the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules (the Tribunal Rules). The Tribunal is composed of nine Members, three appointed by the Islamic Republic of Iran (Iran), three by the United States of America (United States), and three “third country” Members appointed by the six government-appointed Members, or failing that, a designated Appointing Authority.

1 The views and opinions express in this article are those of the author alone and do not represent the official positions of any organization or person.
Recent Developments: Decision on Revision and New Appointments

Significant events have taken place at the Tribunal in 2011 and 2012. In July 2011, the Tribunal issued its “Decision Ruling on Request for Revision by the Islamic Republic of Iran” (the Revision Decision),\(^2\) which considered whether the Tribunal had inherent power to revise its own awards. In addition, in 2011 and 2012 the composition of the Tribunal underwent changes, with several long-serving Tribunal Members stepping down and a new Secretary-General being appointed.

**Revision Decision**

The Revision Decision was issued in response to a request for revision filed by Iran on 3 August 2009, relating to a partial award issued on 17 July 2009 by the Tribunal in a multi-billion dollar claim against the United States (the Partial Award).\(^3\) Iran’s request for revision was founded upon alleged “fundamental errors in procedure” and “manifest errors of law.”\(^4\)

The procedural errors alleged by Iran included violation of due process said to arise out of the fact that the Partial Award was based on legal arguments never raised by the parties; failure by the Tribunal to act in accordance with Tribunal procedure in determining losses; and improper admission of certain evidence. The manifest errors of law were said to flow from the fact that Iran was unable to exercise its right of reply with regard to the “new” legal arguments canvassed by the Partial Award. In substantive terms, the alleged manifest errors of law related to, *inter alia*, the right to export (or rather the lack thereof). In reply, the United States emphasized that none of the potentially relevant provisions of the Tribunal Rules (i.e., Articles 35, 36, and 37) would permit the requested revision and posited that the revision request was simply an impermissible attempt to appeal and reargue the Partial Award. The United States further argued that any inherent power of the Tribunal to revise its awards applied only to situations where fraud was involved.

The Tribunal rejected the revision request. In doing so, the Tribunal recognized that there is a trend for international dispute resolution bodies to have an *express* revision power, exercisable under exceptional and limited circumstances. The Tribunal examined the jurisprudence to date on the existence of an inherent power, concluding that it is inconsistent. Until the Revision Decision, the Tribunal had itself raised the question of whether there was an inherent power of revision on several occasions but each time had left the question open. The Revision Decision

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4 *Cases Nos. A3, A8, A9, A14 & B61*, supra note 2, ¶ 2. Iran’s filing also included a request for two Tribunal Members (Mr. Arangio-Ruiz and then President of the Tribunal Mr. Skubiszewski) to recuse themselves. Mr. Arangio-Ruiz indicated that he would not recuse himself, and Mr. Skubiszewski sadly passed away on 8 February 2010, and was replaced by the current President of the Tribunal, Professor Hans van Houtte.
answered the question by considering the Tribunal Rules, the concept of inherent powers, and the Tribunal’s constitutive documents (the latter was seen as key in considering the existence of an inherent power).

Regarding the Tribunal Rules, the Tribunal considered the fact that Iran and the United States had not seen fit to include a revision provision when they modified the UNCITRAL arbitration rules for use by the Tribunal, even though there was contemporary practice whereby other international dispute resolution bodies (the International Court of Justice and the International Centre for the Settlement of Investment Disputes) did operate with such provisions. The Tribunal saw this as militating against the existence of an inherent power. The Tribunal also noted that a formal modification of the Tribunal Rules would be a more appropriate forum for considering issues attendant to revision, such as how and when an application for revision might occur.5

Regarding inherent powers more broadly (on which the Tribunal concluded scholarship was divided), the Tribunal endorsed the proposition that inherent powers stem from a “need to ensure the fulfillment of [a tribunal’s] functions.”6 The Revision Decision emphasized that determining the existence of an inherent power had to include consideration of “the particular features of each specific court or tribunal, including the circumstances surrounding its establishment, the object and purpose of its constitutive instrument, and the consent of the parties as expressed in that and related instruments.”7 Consequently, in looking to the Tribunal’s constitutive documents, the Tribunal pointed to the bargain that the Algiers Declarations (which were the result of “protracted and difficult negotiations”)8 had struck, and the fact that final settlement of claims was a “crucial feature” of that bargain.9 The Tribunal also saw cause to tread carefully in finding that it possesses inherent powers given the “strict and careful construction and application of the politically sensitive Algiers Declarations.”10

NEW APPOINTMENTS

2011 also saw the departure of the Tribunal’s long serving Secretary-General, Mr. Christopher Pinto, who was the Tribunal’s Secretary-General for thirty years. Mr. Pinto was replaced as Secretary-General by Mr. Christiaan Kröner. In 2012, two “third country” Tribunal Members, Mr. Gaetano Arangio-Ruiz and Mr. Bengt Broms also resigned. The designated Appointing Authority appointed Mr. Herbert Kronke and Mr. Bruno Simma to replace the resigning Members. 2012 also saw the departure of the long-serving U.S. appointed Member, Mr. George

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5 Id. ¶ 64.
6 Id. ¶ 59.
7 Id. ¶ 61.
8 Id. ¶ 62.
9 Id. ¶ 62.
10 Id. ¶ 63.
H. Aldrich, who had been a Member of the Tribunal since its establishment. Mr. Aldrich was replaced by Mr. O. Thomas Johnson Jr.

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**Conclusion**

Significantly for a dispute resolution body with the Tribunal’s makeup and background, the Revision Decision was unanimous. Tribunal jurisprudence has long been considered a valuable source in many areas of international law and on the operation of the UNCITRAL arbitration rules. The Revision Decision continued this tradition as the first public arbitral decision to consider the question of inherent power of revision in many years. In doing so, it undertook a comprehensive survey of the relevant jurisprudence and practice. Its statement of principles, such as the proper source for an inherent power and the imperative to consider the particular characteristics of the court or tribunal for which the power is claimed, may find broader applicability and be useful in other forums. Internally, the Revision Decision resolves a question that the Tribunal has considered on many occasions, but never conclusively answered.

Whilst the Tribunal was sad to see individuals with such long and exemplary service depart, such departures are inevitable at a dispute resolution body with over 30 years of operation. The Tribunal will no doubt welcome the ideas which new appointees may bring, whilst recognizing and carrying on the important contributions that others have made.

*November 2012*
Joint United Nations Programme on HIV/AIDS

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Keywords
HIV/AIDS, human rights, guidelines, indicators

Introduction
The Joint United Nations Programme on HIV/AIDS (UNAIDS) was established in 1994 by the United Nations (UN) Economic and Social Council to coordinate the activities of all UN agencies dealing with the AIDS pandemic. UNAIDS became operational in 1996 and is guided by a Programme Coordinating Board (PCB), with government representation from twenty-two governments from all geographic regions, eleven UNAIDS co-sponsors, and five representatives from civil society, including people living with HIV/AIDS.

Recent Developments: UNAIDS develops guidelines on monitoring of core indicators to monitor compliance with the Declaration of Commitment on HIV/AIDS
Since 2001, UNAIDS has been charged with monitoring State Parties’ national policies to ensure that they adhere to their commitments in the Declaration of Commitment on HIV/AIDS.1 In order to monitor states’ compliance effectively, UNAIDS developed Guidelines on Construction of Core Indicators.2 The Guidelines use indicators to stipulate concrete measurements for HIV prevention, treatment, care, and support. They also advise states on national commitments on leadership, allocation of resources, and specific goals to strengthen and enforce legislation,

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regulations, and other measures to eliminate all forms of discrimination against people living with HIV/AIDS. Finally, the Guidelines make provisions that protect the rights of women and members of vulnerable groups in the context of the epidemic.³

These indicators allow states to monitor and evaluate their responses to the AIDS pandemic and the effectiveness of AIDS programmes. They also form the basis for reports to UNAIDS. This reporting mechanism has enabled UNAIDS to prepare global progress reports on the pandemic every two years since 2004, thus enabling a more critical picture of the effectiveness of the global response.

A review of the original Declaration of Commitment on HIV/AIDS led, after ten years, to a new Political Declaration on HIV/AIDS in 2011 (the Declaration). This Declaration introduced new commitments and targets that State Parties hoped to achieve by 2015. At the same time, UNAIDS introduced new monitoring guidelines, including three new indicators for which countries would have to submit additional data:

[the n]umber of syringes distributed per person who injects drugs per year by needle and syringe programmes

[the p]ercentage of infants born to HIV-infected women who have received a virological test for HIV within 2 months of birth [and]

[the p]roportion of ever-married or partnered women aged 15-49 who experienced physical or sexual violence from a male intimate partner in the last 12 months.⁴

These new indicators put more emphasis on injecting drug users (whose numbers had previously been understated in the data) and on women, who are disproportionately affected by the AIDS pandemic.⁵ They also draw attention to sexual violence towards women within intimate relationships and effectively compel State Parties to provide ongoing post-natal care to women by requiring continual data on newborns.

The use of indicators on social economic rights such as the right to health has often proved controversial. There are fears that the data may be unreliable, overly subjective, and may lead to

³ Declaration of Commitment, supra note 1, 58-61.
over-simplification of problems. The UNAIDS indicators do not seem to have received extensive critical attention; however there are arguments that the indicators pay insufficient attention to adherence to anti-retroviral treatment. Further, critics maintain that some countries misrepresent data in order to give a more positive picture. However, UNAIDS encourages civil society to participate in the monitoring process and allows the use of shadow reports in cases where countries refuse to involve other actors in the compilation of data. This potentially mitigates some of the problems of misrepresentation.

The UNAIDS Report on the Global AIDS Pandemic is based on data collected from countries which submit their reports relying on these Guidelines. One hundred and eighty-six countries submitted reports to UNAIDS, representing 96% of UN Member States. This is the highest response rate of any international health and development monitoring mechanism.

Due to the non-binding nature of the Declaration and the Guidelines, UNAIDS is not in a position to enforce compliance by issuing sanctions against countries who either misreport or do not submit reports. UNAIDS’ only recourse is to name and shame such countries, which could potentially serve as a form of soft coercion.

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**Conclusion**

The Guidelines have enabled UNAIDS to reassert its importance in combating the AIDS pandemic alongside much wealthier actors such as the Global Fund. The Guidelines are now being adopted by other international health agencies to measure health progress, enabling stronger compliance from Member States whose reporting burden is thus significantly lowered.

\[12 \text{ December 2012}\]

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7 John Chalker et al., *Urgent Need for Coordination in Adopting Standardized Antiretroviral Adherence Performance Indicators*, 53 JACQUIR IMMUNE DEFIC SYNDR. 159-61(2010).
9 Construction of Core Indicators, supra note 4, 15.
11 Id. at 7.
12 For instance, five of the UNAIDS national indicators are also Millennium Development Goal (MDG’s) indicators.
Organization of American States

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Website
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Keywords
Social Charter of the Americas, Inter-American Commission on Human Rights

Introduction
The Organization of the American States (OAS) is an international organization, headquartered in Washington, DC and made up of 35 independent states from the Americas, with the goal of promoting “democracy, human rights, security, and development” in the region. In the late nineteenth and early twentieth century a number of inter-American conferences were held on various international legal and economic issues. At the ninth meeting, in Bogotá, Colombia in 1948, the modern OAS system was born with the signing of the OAS Charter. Collective security against communism became a major goal of the OAS during the Cold War and resulted in the expulsion of Cuba in 1962. Still, in the 1960s and 1970s many Latin American governments in the OAS were dictatorships rather than the democracies extolled in the OAS Charter. By the 1990s, as more Latin American nations embraced democratic reforms, the OAS became a important body for the promotion of democratic norms, economic cooperation and human rights in the Americas. Today, the General Assembly is the main organ of the OAS, where each member state is represented with a single vote. Other significant OAS bodies include the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, and the Inter-American Juridical Committee.

Recent Developments: Social Charter of the Americas Adopted; Venezuela Leaves the Inter-American Commission on Human Rights
Recently, a major rift has emerged within the OAS over the role of the inter-American human rights institutions. On 4 June 2012, the 42nd OAS General Assembly adopted the Social Charter of the Americas in Cochabamba, Bolivia, more than ten years after it was first proposed by Venezuela at the 31st General Assembly in 2001. The Social Charter of the Americas states that member governments have the responsibility to promote social and economic justice, and also

1 ORGANIZATION OF AMERICAN STATES, WHO WE ARE, http://www.oas.org/en/about/who_we_are.asp.
recognizes the contributions of indigenous peoples.\(^2\) The adoption of the Social Charter of the Americas was a victory for leftist regimes in Latin America, who see economic, cultural and social rights as essential human rights. At the same meeting, the furthest left of the leftist regimes, the ALBA (Bolivarian Alliance for the Peoples of Our Americas) bloc countries,\(^3\) attacked the current chief human rights institution of the OAS, the Inter-American Commission of Human Rights. Bolivian president Evo Morales called for the elimination of the Inter-American Commission on Human Rights, which was formed more than 50 years ago.\(^4\) Aligned governments including Ecuador, Venezuela and Nicaragua reiterated his call. Ecuadorian president Rafael Correa accused the body of inconsistently applying human rights standards.\(^5\) Human Rights Watch Director José Miguel Vivanco cautioned, however, that the governments opposing the Commission had done so because “it has touched [their] interests [and they] possess clear autocratic tendencies or are sufficiently powerful as to believe that they are entitled to not render accounts to a supervisory regional body.”\(^6\)

In September 2012, three months after the General Assembly meeting, Venezuela formally denounced the American Convention on Human Rights\(^7\) and announced its withdrawal from the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights.\(^8\) Once the withdrawal is complete, victims of human rights abuses in Venezuela will not be able to bring complaints before the court.\(^9\) International human rights advocacy groups, including Amnesty International and Human Rights Watch, have called on Venezuela to stay committed to the human rights institutions. The United Nations High Commissioner for Human Rights, Navanethem Pillay, urged Venezuela to reconsider withdrawal, commenting, “I fear that a vital layer of human rights protection for Venezuelans and potentially for other Latin Americans as

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\(^3\) ALBA member nations are Antigua and Barbuda, Bolivia, Cuba, Dominica, Ecuador, Nicaragua, Saint Vincent and the Grenadines, and Venezuela.


\(^6\) Id.


well will be stripped away if this decision is carried out, and they will be left far more vulnerable to abuses with fewer remedies available.”

The current division within the OAS is one that dates back to the founding of modern international human rights institutions. Central to the debate is disagreement over the importance of civil and political rights, or first-generation rights, versus economic and social rights, or second-generation rights. Both civil and political, and economic and social rights are codified in the United Nations Charter and the Universal Declaration of Human Rights. The OAS American Convention on Human Rights, which came into force in 1978, focuses on political and civil rights, however, the Convention was amended by the Protocol of San Salvador in 1999 to include economic, social and cultural rights.

While the attention of leftist and ABLA bloc countries’ on economic, social and cultural rights is important in developing a comprehensive inter-American human rights system, an antagonistic posture towards, or a complete withdrawal from important cooperative institutions, could threaten the future of these critical international bodies. Furthermore, second-generation rights must be realized with a strong commitment to civil and political freedoms.

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Conclusion
This year the OAS human rights institutions have faced a challenge that threatens regional human rights cooperation. The current discord stems from a long-existing division in the international human rights movement over the nature of fundamental rights, and may also signal increased autocratic movements from the ALBA bloc. Looking forward, OAS bodies must strike an appropriate balance of focus on economic, social, cultural, political and civil rights in their investigations of the most serious human rights violations. At the same time, member states must remain committed to the inter-American institutions as an important safeguard against human rights abuses in the region.

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Permanent Court of Arbitration

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**Website**

http://www.pca-cpa.org

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**Introduction**

The Permanent Court of Arbitration (PCA) is the landmark institutional product of the Hague Peace Conferences of 1899 and 1907. Based in the Peace Palace in The Hague, the PCA provides a permanent framework for the resolution of disputes involving states, state entities, intergovernmental organizations, and private entities.

The PCA’s three-part organizational structure consists of an Administrative Council that oversees its policies and budgets, a panel of potential arbitrators called Members of the Court, and the International Bureau, the PCA’s secretariat, headed by the PCA’s Secretary-General.

The International Bureau performs a variety of functions, though it is most known for the role it plays as registry in large-scale arbitrations. In addition to arbitrations, the PCA also facilitates conciliations and fact-finding commissions. The PCA’s diverse caseload reflects the breadth of the PCA’s work, encompassing territorial, treaty interpretation, and human rights disputes between states, as well as commercial and investment disputes, including those arising under bilateral and multilateral investment treaties.

**Recent Developments**

2012 was a momentous year for the PCA, during which it administered a record number of cases. Indeed, the PCA is enjoying the highest level of activity in its history. While in 2007 the PCA provided registry services in twenty-three cases, in 2012 it administered more than seventy cases. What has contributed to the more than tripling of the caseload in just five years at an institution that has been around for more than a century? Both historical factors and recent developments have precipitated this growth.

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Since it was established, the number of cases brought before the PCA has ebbed and flowed, influenced by the two World Wars and the availability of other means of dispute resolution. During its first fifteen years, the PCA administered two international conciliations and fifteen arbitrations. For approximately forty-five years following World War II, however, the PCA experienced a relative dormancy, hearing only a handful of cases until the late 1980s.

Today, the PCA’s exponential growth is in large part due to its flexible mandate, as described above, which enables it to identify and respond to new needs for dispute resolution services in the international community including, in particular, international investment disputes. The PCA’s areas of activity have also expanded throughout its history. From its creation in 1899 until the early 1930s, the PCA dealt exclusively with disputes between states. Since that time, the PCA has developed several subject-specific sets of optional rules of procedure to facilitate the peaceful resolution of disputes involving not just states, but also non-state parties, and related to varied topics such as the environment and, as of this year, outer space activities.2

The most recent boom in the PCA’s caseload also reflects the growth of international arbitration more generally, the institutionalization of what were once ad hoc arbitration proceedings, and the influence of the United Nations Commission on International Trade Law (UNCITRAL) Arbitral Rules, which apply in the majority of PCA administered cases. The UNCITRAL Arbitral Rules, approved by the UN General Assembly in 1976 as it “[r]ecogniz[ed] the value of arbitration as a method of settling disputes arising in the context of international commercial relations,” and updated in 2010, entrust the Secretary-General of the PCA with a role in constituting arbitral tribunals.3

Other initiatives specific to the PCA have also increased its accessibility to state and non-state parties. The PCA has established a Financial Assistance Fund aimed at helping developing countries meet some of the costs involved in PCA administered arbitral or other dispute resolution proceedings. To qualify for financial assistance, an applicant state must be a member state of the PCA and an aid recipient of the Organization for Economic Co-operation and Development.4 In 2008-2009, the Financial Assistance Fund helped cover costs in the PCA’s first case between a public non-state actor and a state. The case involved an intra-state boundary dispute between the government of Sudan and the Sudan People’s Liberation Army/Movement over the Abyei territory. A five-member arbitral tribunal rendered its final award in the case on 22 July 2009.

PCA membership continues to increase as well. At the end of 2012, the membership boasts 115 states. The PCA has also recently instituted Host Country Agreements with eight of its member states, facilitating access to PCA services around the world.

Finally, as mentioned above, in its most recent promulgation of new rules available to disputing parties, the Administrative Council of the PCA adopted the Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Outer Space Activities. These Rules were developed as part of an effort to address fundamental lacunae in the existing dispute resolution mechanisms of international space law. In the months since their enactment, the PCA’s Optional Rules for Arbitration of Disputes Relating to Outer Space Activities have already attracted attention from legal practitioners representing actors in outer space activities.

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Conclusion

Despite being the oldest intergovernmental organization dedicated to the peaceful resolution of international disputes, the PCA is today still situated at the forefront of developments in international arbitration. Its recent upswing in activity in many diverse areas reflects the revitalization of the field as well as the quality and breadth of services this institution provides to parties and arbitral tribunals.

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United Nations

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Website
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United Nations, General Assembly, Palestine, non-member observer state, recognition

Introduction
Article 7 of the United Nations (UN) Charter lists the principal UN organs as the General Assembly, Security Council, Economic and Social Council, Trusteeship Council, International Court of Justice, and Secretariat. Articles 10 and 11 empower the General Assembly to hold discussions and make recommendations, including on matters of peace and security. Articles 13 and 14 direct the General Assembly to promote cooperation in various fields. Under Article 15, the General Assembly is to consider reports from other UN organs. Article 16 obliges the General Assembly to carry out assignments regarding the trusteeship system. Under Article 17, the General Assembly adopts budgets for the UN. Articles 18 to 22 deal with General Assembly procedures. Unlike the Security Council when acting under Chapter VII of the Charter, the General Assembly has no power to impose binding obligations on states or other entities.

Recent Developments: Recognition of Palestine as a Non-member Observer State
While the UN Charter contains references to non-member states, there is nothing explicitly empowering the General Assembly to recognize entities as non-member states. Nevertheless, the Holy See has since 1964 been a permanent observer state with many of the powers of a member state. In 2004, the General Assembly confirmed the Vatican’s status as a permanent observer.

In 2011, the Security Council vetoed a Palestinian attempt to achieve full UN membership. In 2012, a General Assembly resolution according “Palestine” “non-member observer State status” passed by a vote of 138 countries in favor, 9 against, and 41 abstaining. The variety of countries’ explanations of their views revealed confusion on key issues. Some countries voting in favor claimed this did not amount to recognition by them of a state of Palestine. Some claimed that recognition could only be achieved through agreement with Israel. Little or no mention was made of the four classical tests for statehood posed under traditional international law, that is,
permanent population, defined territory, government, and capacity for relations with other states. The newly recognized non-member state of Palestine, having already joined the United Nations Educational, Scientific and Cultural Organization (UNESCO), may now seek to join other UN specialized agencies or treaty bodies like the International Criminal Court.

Comments by General Assembly member states revealed a variety of understandings of the resolution’s significance. Russia and China had already recognized Palestine in 1988, when the Palestine Authority declared Palestinian statehood. Finland and New Zealand declared that their votes for Palestine as a non-member state observer did not amount to recognition of Palestine.

Some delegations confused matters by referring ambiguously to the 1967 borders, without clarifying whether they meant before or after the Seven-Day War during which Israel occupied the West Bank. Palestinian President Mahmoud Abbas was very clear on this point, insisting that Palestine included all territory occupied in 1967.

Further lack of clarity was caused when Israel, Greece, and Guatemala said that Palestine would not be a state until it made peace with Israel. This was essentially the United States’ position as well.

There was little or no discussion of whether any Palestinian entity met the pre-requisites for statehood posed by traditional international law. These criteria were set forth by the United States in the Security Council on 2 December 1948, in support of Israel’s application for membership.¹

“We are all aware that under the traditional definition of a state in international law all of the great writers have pointed to four qualifications:

“First: There must be a people.
“Second: There must be a territory.
“Third: There must be a government.
“Fourth: There must be capacity to enter into relations with other states of the world.”

The question arises whether an entity not meeting these criteria can validly be recognized as a state. For example, if a group of countries purported to recognize a Roma/Gypsy state, in the absence of at least the territory requirement, such action would not be legally valid. Similarly, the territory requirement must be met in regard to Palestine.

If the entity to be recognized as Palestine’s government is the Palestine Authority, then Gaza would not be part of Palestine’s territory because Hamas, not the Palestine Authority, rules Gaza.

¹ DIGEST OF INTERNATIONAL LAW 230 (Dep’t of State Pub. 7403 1963) (quoted in 1 Whiteman).
Whether the Palestine Authority’s tenuous hold on parts of the West Bank would suffice for the West Bank to meet the territory requirement also seems doubtful.

The future is clouded in uncertainty. Britain, Denmark, France, Spain, and Sweden summoned the Israeli ambassadors to their countries on Monday, 3 December 2012, to protest Israel’s sudden plans for increased settlement construction. This reflected growing frustration with Israel’s policies on Palestine. Israel may also suffer damaging hostility among western and other countries if it withholds from the Palestine Authority payments collected by Israel on the Authority’s behalf.

Even if indefinitely denied full UN membership by Security Council vetoes, the example of the Holy See shows how Palestine might benefit from what could be called “creeping membership.” This would be a gradual process of gaining small functions over time. For the Holy See, many of the attributes of membership have been attained through a process of accretion, from observing at General Assembly, Security Council, and Economic and Social Council (ECOSOC) meetings, to participating in general debates, to raising points of order, to exercising right of reply, to circulating papers as official UN documents, and to co-sponsoring draft resolutions or decisions. Palestine’s recently accorded non-member observer status might develop in a similar fashion, whether or not Palestine satisfies the traditional criteria for statehood.

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Conclusion
The General Assembly majority’s recognition of a Palestinian entity as a non-member observer state, while accomplishing little or nothing towards peace with Israel, will enhance the stature of the Palestinians in the UN. In time, a gradual functional accretion process could elevate that entity into a de facto, if not de jure, UN member.

Those countries claiming that General Assembly recognition of an entity called Palestine as a non-member observer state is not recognition in general of the same entity as a state may be deluding only themselves.

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