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Latest Developments in Investor–State Dispute Settlement

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I. Recent trends

In 2009, the number of known treaty-based investor–State dispute settlement cases filed under international investment agreements (IIAs) grew by at least 32,[1] bringing the total number of known treaty-based cases to 357 by the end of 2009 (figure 1).[2] Of those, 202 – or 57 per cent – were initiated during the last five years (starting 2005).

Of the total 357 known disputes, 225 were filed with the International Centre for Settlement of Investment Disputes (ICSID) or under the ICSID Additional Facility,[3] 91 under the United Nations Commission on International Trade Law (UNCITRAL) rules, 19 with the Stockholm Chamber of Commerce, eight were administered by the Permanent Court of Arbitration in the Hague,[4] five with the International Chamber of Commerce (ICC) and four are ad hoc cases. One further case was filed with the Cairo Regional Centre for International Commercial Arbitration. In four cases the applicable rules are unknown so far.

In 2009, the number of countries that have faced investment treaty arbitrations grew to 81, with four countries having to respond to a dispute for the first time (Belize, Cambodia, the former Yugoslav Republic of Macedonia (with two cases) and Turkmenistan). In all, 49 developing countries, 17 developed countries and 15 countries with economies in transition have been involved in investor–State disputes so far. In 2009, Argentina, the Bolivarian Republic of Venezuela, Canada, El Salvador, Kazakhstan and the United States faced two new cases each. Most claims were initiated by investors from developed countries. At the end of 2009, only 23 cases were filed by investors from developing countries, and nine cases originated from investors headquartered in transition economies.

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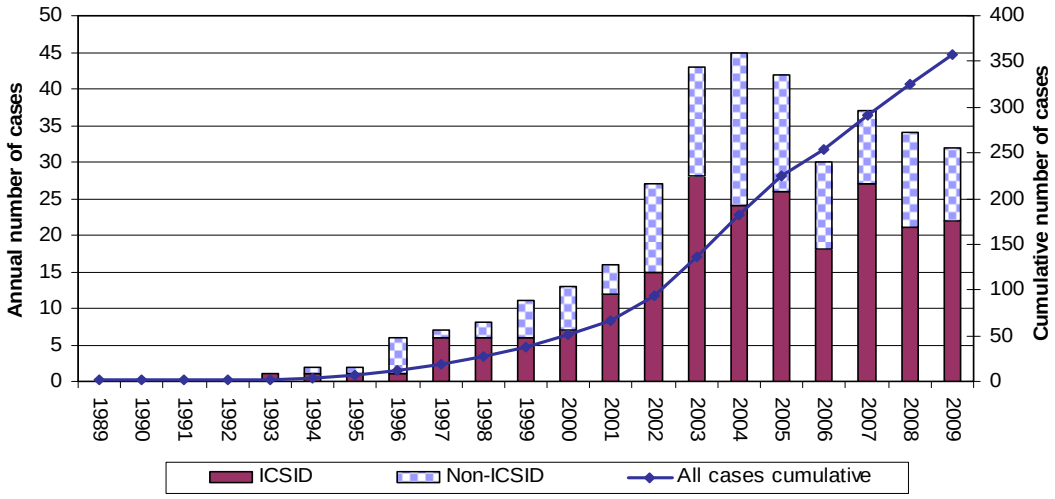
[1] Since the International Centre for Settlement of Investment Disputes (ICSID) is the only arbitration facility to maintain a public registry of claims, the total number of actual treaty-based cases is likely to be higher. This number does not include cases that are exclusively based on investment contracts (state contracts) and cases where a party has so far only signalled its intention to submit a claim to arbitration, but has not yet commenced the arbitration (notice of intent). If these latter cases are submitted to arbitration, the number of pending cases will increase.

[2] Due to new information becoming available for 2008 and earlier years, the number of total known IIA-based ISDS cases at end 2008 was revised upwards to 325 (instead of 317 as reported in the UNCTAD's 2009 IIA Monitor No. 1).

[3] For detailed information on ICSID cases and statistics, see "The ICSID Caseload – Statistics", which provides a profile of the ICSID caseload, historically and for 2009. It is based on cases registered or administered by ICSID as of 31 December 2009. http://www.worldbank.org/icsid

[4] Several cases under UNCITRAL Rules are being administered by the Permanent Court of Arbitration.

Figure 1. Known investment treaty arbitrations (cumulative and newly instituted cases), 1989–2009



Source: UNCTAD.

Forty-four decisions were rendered in 2009, including 20 awards on the merits, seven decisions on jurisdiction, four decisions on the challenge of arbitrators and three decisions on annulment. Other decisions concerned the admissibility of ancillary claims, provisional measures and settlement agreements. Of the 13 publicly available decisions rendered in 2009 on jurisdiction, tribunals have dismissed the investor's claims for lack of jurisdiction six times,[5] and of the seven publicly available decisions rendered in 2009 on the merits, tribunals dismissed the investor's claims four times.[6]

In all, by the end of 2009, 164 cases had been brought to conclusion. Out of these, 38 per cent were decided in favour of the State (62) and 29 per cent in favour of the investor (47), while 34 per cent (55) cases were settled. For 26 cases, the current state of affairs or the outcome is unknown, and 167 cases were still pending at the end of 2009.

II. Substantive issues[7]

Tribunals in 2009 rendered significant awards on issues relating to the definition of investment, most favoured nation (MFN) treatment applying to both jurisdictional and substantive matters, expropriation, compensation, fair and equitable treatment (FET) and full protection and security. The most significant awards rendered in 2009 are reviewed below.

[5] These are: *Romak v. Uzbekistan*, *Cementownia "Nowa Huta" S.A. v. Turkey*, *Azpetrol v. Azerbaijan*, *Europe Cement Investment v. Turkey*, *Empresa Electrica del Ecuador v. Ecuador* and *Phoenix Action v. Czech Republic*. The seven decisions where the tribunal affirmed its jurisdiction are: *Hulley Enterprise Limited v. Russia*, *Yukos Universal Limited v. Russia*, *Veteran Petroleum Limited v. Russia*, *Toto Costruzioni v. Lebanon*, *Pantechniki v. Albania*, *Tza Yap Shum v. Peru* and *Renta 4 v. Russia*.

[6] These were *Glamis Gold v. United States*, *Bayindir v. Pakistan*, *EDF v. Romania* and *Pantechniki v. Albania*. In three cases, the tribunal found in favour of the claimant: *Siag & Vecchi v. Egypt*, *Bernardus H Funnekotter v. Zimbabwe* and *Saipem v. Bangladesh*.

[7] A list of the reviewed cases is included in annex 2.

On the definition of "investment" for purposes of establishing the scope of application of (as well as the jurisdiction under) an investment treaty the tribunal in *Romak v. Uzbekistan* merits attention. Operating under the UNCITRAL Arbitration Rules, the *Romak* tribunal considered that "the term 'investment' under the bilateral investment treaty (BIT) has an inherent meaning (irrespective of whether the investor resorts to ICSID or UNCITRAL arbitral proceedings) entailing a *contribution* that extends over a *certain period of time* and that involves some *risk*".[8] Accordingly, despite an apparently broad definition of "investments" in the Switzerland–Uzbekistan BIT ("every kind of assets and particularly…"), the tribunal found that the claimant did not own an investment within the meaning of article 1 of the BIT as its rights were embodied in and arose out of a sales contract. The tribunal therefore dismissed the investor's claims for lack of jurisdiction.[9]

On the definition of "investment" for purposes of establishing jurisdiction under article 25 of ICSID, several decisions rendered in 2009 continue to highlight the different approaches followed by tribunals, hence contributing to the growing number of divergent awards and attendant uncertainties.

The ad hoc committee in *Malaysian Historical Salvors (MHS) v. Malaysia* annulled the sole arbitrator's award (which had rejected the investor's claim for lack of jurisdiction),[10] inter alia because the sole arbitrator had "elevated [the so-called *Salini* criteria] to jurisdictional conditions and exigently interpreted the alleged condition of a contribution to the economic development of the host state so as to exclude small contributions, and contributions of a cultural and historical nature". The ad hoc committee extensively quoted the tribunal's decision in *Biwater Gauff Ltd v. Tanzania*[11] that had argued for "a more flexible and pragmatic approach to the meaning of 'investment' … which takes into account the features identified in *Salini*, but along with all the circumstances of the case, including the nature of the instrument containing the relevant consent to ICSID".[12] It is noteworthy that, in his dissenting opinion, a member of the *MHS* ad hoc committee held that a "substantial or significant contribution to the economic development of the host state" is a necessary condition in defining investment for purposes of article 25 ICSID.[13]

The tribunal in *Phoenix v. Czech Republic*, on the other hand, appeared to favour the existence of a set of (strict) requirements that need to be satisfied in order for an ICSID tribunal to have jurisdiction *ratione materiae*. Interestingly, however, the *Phoenix* tribunal modified the list of jurisdictional requirements of the *Salini* test to exclude the controversial criterion of the "contribution to the economic development of the host state" as "impossible to ascertain" and to add that assets be invested (1)

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[8] *Romak S.A v. Uzbekistan*, PCA Case No. AA280, Award, 26 November 2009, at para. 207.
[9] *Romak*, at paras. 242–243.
[10] *Malaysian Historical Salvors Sdn., Bhd. v. Malaysia*, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007.
[11] *Biwater Gauff Ltd v. Tanzania*, ICSID Case No ARB/05/22 (United Kingdom–United Republic of Tanzania BIT), Award, 18 July 2008, para. 314.
[12] *Biwater Gauff*, para. 316.
[13] *Malaysian Historical Salvors Sdn, Bhd v. Malaysia*, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009, Dissenting Opinion of Judge Mohamed Shahabuddeen, para. 4. For a similar (flexible and pragmatic) approach see *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009, at paras. 81–86 and, in the context of a contract-based arbitration, *RMS Production Corporation v. Grenada*, ICSID Case No ARB/05/14, Award, 11 March 2009, at paras. 240–241.

bona fide and (2) in accordance with the laws of the host State.[14] The tribunal also added that "an extensive scrutiny of all these requirements is not always necessary, as they are most often fulfilled on their face, 'overlapping' or implicitly contained in others, and that they have to be analysed with due consideration of all circumstances".[15]

On the opposite side of the spectrum, the sole arbitrator in *Pantechniki v. Albania* took a sceptical view of the *Salini* criteria, emphasizing instead the importance of the definition of investment in the underlying investment treaty.[16] Moreover, the sole arbitrator referred to an "inherent common meaning" of the term "investment", which focused exclusively on (1) the commitment of resources to the economy of the host State, (2) the assumption of risk and (3) the expectation of a commercial return.[17]

On the scope of application of a treaty *ratione temporis*, three arbitral tribunals (composed of the same arbitrators) in related proceedings brought by shareholders in the Yukos company against the Russian Federation held that the protections of the Energy Charter Treaty (ECT) apply to measures adopted between 1994 and mid-October 2009[18] on the basis of the ECT's provisional application clause.[19] To recall, the Russian Federation had signed the treaty but never ratified it and in 2009 officially notified its intention not to become a contracting party to the ECT.[20]

Numerous awards have addressed the MFN treatment clause, with tribunals continuing their trend of issuing divergent interpretations.

On MFN treatment as it applies to jurisdictional matters, the tribunal in *Tza Yap Shum v. Peru* refused to permit the claimant to invoke the MFN clause in the China–Peru BIT in order to establish a jurisdictional basis for the present dispute. The tribunal argued that the specific language in the underlying treaty's jurisdictional clause "should prevail over the general wording of the MFN clause".[21] While in *Renta 4* the tribunal accepted the general proposition that MFN clauses may extend the tribunals'

[14] *Phoenix Action, Ltd v. The Czech Republic*, ICSID Case No. ARB/06/5, Award, 15 April 2009, at para. 114.
[15] *Phoenix*, at para. 115.
[16] *Pantechniki S.A. v. Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009, at paras. 36–42.
[17] *Pantechniki*, ibid., at paras. 46–49.
[18] The provisional application ended 60 days after the Russian Federation's notification (on 20 August 2009) of its intention not to become a contracting party to the treaty.
[19] Article 45(1) of the ECT reads as follows: "Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations."
[20] *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227, UNCITRAL, Interim Award on Jurisdiction and Admissibility, 30 November 2009, at paras 394–395. See also *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 228, UNCITRAL, Interim Award on Jurisdiction and Admissibility, 30 November 2009 and *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 226, UNCITRAL, Interim Award on Jurisdiction and Admissibility, 30 November 2009.
[21] *Tza Yap Shum v. Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009, at para. 216. Article 8.3 of the China–Peru BIT reads as follows: "… Any disputes concerning other matters [different from those involving the amount of compensation for expropriation] between an investor of either Contracting Party and the other Contracting Party may be submitted to the Centre if the parties to the dispute so agree."

jurisdiction beyond the scope of the underlying treaty's jurisdictional clause,[22] a majority of the *Renta 4* tribunal ultimately decided that the specific MFN clause in the Spain–Union of Soviet Socialist Republics BIT (as it is linked to FET) could not be read to enlarge the competence of the tribunal.[23]

On MFN treatment as it applies to substantive issues, the tribunal in *Bayindir v. Pakistan* relied on the MFN provision in the Pakistan–Turkey BIT to import the FET standard found in other treaties signed by Pakistan. The tribunal noted that the ordinary meaning of the applicable MFN clause shows that the contracting parties "did not intend to exclude the importation of a more favourable substantive standard of treatment accorded to investors of third countries".[24] Moreover, it noted that the fact that the FET provision referred to by the claimant pre-dates the MFN clause in the Pakistan–Turkey BIT "does not appear to preclude the importation of an FET obligation from another BIT concluded by the respondent".[25] The tribunal eventually found that the respondent had not breached the FET standard applicable through the operation of the MFN clause.

Furthermore, the *Bayindir v. Pakistan* tribunal also had to deal with an allegation of discrimination in violation of the MFN clause. In this regard, the tribunal noted that the MFN clause is not limited to regulatory treatment but it also applies "to the manner in which a state concludes an investment contract and/or exercises its rights thereunder".[26] The claimant had argued that, though there had been several other projects (some of which were run by foreign contractors) that had not been completed in time, the claimant was the only contractor to be expelled. The tribunal dismissed the MFN claim as the claimant had not been able to prove the similarity of the situations, at the level of the contractual terms and circumstances, between the several projects.[27]

On expropriation, the tribunal in *Glamis Gold* adopted an approach to defining indirect expropriation in the context of article 1110 North American Free Trade Agreement (NAFTA) that focuses on the measure's adverse impact on the value of the investment: "In the case of an indirect taking or an act tantamount to expropriation such as by a regulatory taking, however, the threshold examination is an inquiry as to the degree of the interference with the property right. This often dispositive inquiry involves two questions: the severity of the economic impact and the duration of that impact."[28] As the tribunal found that the complained of measure did not cause a

[22] *Renta 4 SVSA v. Russian Federation*, SCC Case No 24/2007, Award on Preliminary Objections, 20 March 2009, at paras. 80–101.
[23] *Renta 4*, at para. 119. This finding appears to contrast with the reading of a similarly worded MFN clause by the *Maffezini* tribunal (see *Maffezini v. Spain*, Decision on Jurisdiction, 25 January 2000).
[24] *Bayindir v. Pakistan*, Award, 27 August 2009, at para. 157.
[25] *Bayindir v. Pakistan*, at para. 160.
[26] *Bayindir v. Pakistan*, at para. 388, quoting the tribunal's Decision on Jurisdiction, 14 November 2005.
[27] *Bayindir v. Pakistan*, at para. 417.
[28] *Glamis Gold*, at para. 356. "To determine whether Claimant's investment in the Imperial Project has been so radically deprived of its economic value to Claimant as to potentially constitute an expropriation and violation of Article 1110 of the NAFTA, the Tribunal must assess the impact of the complained of measures on the value of the Project." *Glamis Gold*, at para. 358.

sufficient economic impact to the investment, the tribunal dismissed the investor's claims under article 1110.[29]

Similarly, the tribunal in *Saipem v. Bangladesh* defined the concept of indirect expropriation for purposes of article 5(2) of the Bangladesh–Italy BIT as a governmental measure resulting in "substantive" and "irreversible" deprivation of the benefit of a protected investment.[30] Furthermore, the *Saipem* tribunal rejected the respondent's argument based on claimant's non-exhaustion of local remedies, as the investor's case was one of expropriation rather than denial of justice:

> While the Tribunal concurs with the parties that expropriation by the courts presupposes that the courts' intervention was illegal, this does not mean that expropriation by a court necessarily presupposes a denial of justice. Accordingly, it tends to consider that exhaustion of local remedies does not constitute a substantive requirement of a finding of expropriation by a court.[31]

On compensation for expropriation, the tribunal in *Bernardus Henricus Funnekotter and others v. Zimbabwe* determined that the host government had failed to provide compensation (which must represent the "genuine value of the investment") in breach of the underlying BIT and thus proceeded in evaluating the damages suffered by the investors on the basis of the market value at the date of dispossession. The tribunal observed that "under general international law as well as under the BIT, investors have a right to indemnities corresponding to the value of their investment, independently of the origin and past success of their investment, as well as of the number and aim of the expropriations done".[32]

On the scope of jurisdictional clauses limiting consent to arbitration to dispute relating to the amount of compensation for expropriation the tribunal in *Renta 4 SVSA v. Russia* interpreted article 10 of the Spain–USSR BIT ("Any dispute … relating to the amount or method of payment of the compensation due under [expropriation]") to include disputes relating to whether compensation for expropriation is effectively due.[33] The *Renta 4* decision may be contrasted with two previous decisions (in *Berschader v. Russia* and *RosInvestCo UK v. Russia*) where tribunals had interpreted similar consent clauses found in other Russian BITs to exclude the tribunal's power to determine whether or not there was an expropriation.[34]

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[29] *Glamis Gold*, at para. 536. Interestingly, the *Glamis Gold* tribunal had also examined and rejected the respondent's argument that the expropriation claim was not ripe. *Glamis Gold*, at paras. 335–342.

[30] In the specific case, the residual contractual rights arising from the investments as crystallised in an ICC Award, which had been declared devoid of any legal foundation by the Bangladeshi Supreme Court. *Saipem*, Award, 30 June 2009, at paras. 127–129. For a similar approach, see *Bayindir Insaat Turizm Ticaret Ve Sanayi v. Pakistan*, ICSID Case No. ARB/03/29, Award, 27 August 2009, at para. 443.

[31] *Saipem*, Award, 30 June 2009, at para. 181.

[32] *Bernardus Henricus Funnekotter and others v. Zimbabwe*, ICSID Case No. ARB/05/6), Award, 22 April 2009, at para. 124.

[33] *Renta 4 SVSA v. Russian Federation*, SCC Case No 24/2007, Award on Preliminary Objections, 20 March 2009, at para. 19–67.

[34] *Berschader v. Russia*, SCC Case No. 080/2004, Award, 21 April 2006, at para 153 (article 10 of the Belgium–Luxembourg–USSR BIT provided as follows: "tout différend … relatif au montant ou au mode de paiement des indemnités dues en vertu de l'article 5…"); *RosInvestCo UK v. Russia*, SCC Case No. 079/2005, Award on Jurisdiction, October 2007, at paras. 115–123 (article 8 of the United Kingdom–USSR BIT reads as follows: "any legal dispute … either concerning the amount or payment

The approach in *Renta 4* has been followed in a subsequent decision in *Tza Yap Shum v. Peru*, where the tribunal concluded that:

> the words "involving the amount of compensation for expropriation" includes not only the mere determination of the amount but also any other issues normally inherent to an expropriation, including whether the property was actually expropriated in accordance with the BIT provisions and requirements, as well as the determination of the amount of compensation due, if any.[35]

On FET and minimum standard of treatment, the tribunal in *Toto Costruzioni v. Lebanon* denied its jurisdiction over the investor's claim of delays in two lawsuits before the *Conseil d'Etat* as breach of the fair and equitable standard provision in the Italy–Lebanon BIT as the claimant had not satisfied a prima facie case. More particularly, the tribunal based its decision (1) on a general reference to the lack of exhaustion of local remedies, which is required for a claim of denial of justice under customary international law[36] and (2) on the lack of prima facie evidence that the claimant had itself made use of the local remedies to shorten the procedural delays (such as the right to consult the case files and the right to request the *Conseil d'Etat* to issue its report or review the matter quickly).[37]

In *Glamis Gold v. United States*, the tribunal was confronted with the definition of FET for purposes of the minimum standard of treatment embodied in article 1105 NAFTA. The tribunal noted that the customary international law minimum standard of treatment is "a minimum standard" and "is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community", and "is not meant to vary from state to state or investor to investor".[38] The tribunal moreover emphasized that the level of scrutiny under the standard is the same as the one articulated in the 1926 *Neer* case:

> to violate the customary international law minimum standard of treatment codified in article 1105 of the NAFTA, an act must be sufficiently egregious and shocking – a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons – so as to fall below accepted international standards and constitute a breach of article 1105(1).[39]

On full protection and security, the sole arbitrator in *Pantechniki v. Albania* noted that the host State's responsibility should bear some proportion to its resources. The arbitrator quoted in approval the following recent statement by two scholars: "Although the host state is required to exercise an objective minimum standard of due

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of compensation under [expropriation provisions], or concerning any other matter consequential upon an act of expropriation".)

[35] *Tza Yap Shum v. Peru*, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009, at para. 188. Article 8.3 of the China–Peru BIT reads in relevant part as follows: "If a dispute involving the amount of compensation for expropriation cannot be settled ... it may be submitted at the request of either party to the International Centre for Settlement of Investment Disputes (ICSID)".

[36] *Toto Costruzioni*, at para. 164.

[37] *Toto Costruzioni*, at para. 167.

[38] *Glamis Gold v. United States*, Award, 8 June 2009, at para. 615.

[39] *Glamis Gold*, at para. 616.

diligence, the standard of due diligence is that of a host state in the circumstances and with the resources of the state in question. This suggests that due diligence is a modified objective standard".[40]

III. Procedural issues

In their 2009 decisions, tribunals have also dealt with procedural issues related to the rules and standards used in their arbitrations. The most significant awards rendered in 2009 are reviewed below.

On the burden of proof at the jurisdictional level, the tribunal in *Phoenix v. Czech Republic* emphasized the importance of the role that facts as alleged by the claimant play either at the jurisdictional level or at the merits level:

> "If the alleged facts are facts that, if proven, would constitute a violation of the relevant BIT, they have indeed to be accepted as such at the jurisdictional stage, until their existence is ascertained or not at the merits level. On the contrary, if jurisdiction rests on the existence of certain facts, they have to be proven at the jurisdictional stage."[41]

On the standard of proof, the tribunal in *Siag & Vecchi v. Egypt* specified that serious allegations such as fraud should be held to a high standard of proof. In particular, the respondent had based one of its jurisdictional objections on the claimants' allegedly fraudulent acquisition of his Lebanese nationality. The tribunal noted that, with regard to such a claim, "the applicable standard of proof is greater than the balance of probabilities but less than beyond reasonable doubt. The term favoured by Claimants is 'clear and convincing evidence'. The Tribunal agrees with that test."[42]

The tribunal in *Bernardus Henricus Funnekotter and others v. Zimbabwe* appears to emphasize the tribunal's duty to determine its jurisdiction. The tribunal stated that:

> in light of the importance of jurisdiction as a foundation for arbitral decisions and the special competence granted to arbitral tribunals to determine their jurisdiction, the Tribunal considers it important to address, albeit briefly, the question of jurisdiction despite the current agreement between the parties [regarding the tribunal's jurisdiction over the dispute].[43]

On provisional measures, the tribunal in *Perenco v. Ecuador and PetroEcuador* recommended provisional measures restraining the respondents inter alia from (1) demanding that Perenco pay any amounts allegedly due pursuant to the Ecuadorian legislation under review and (2) instituting or further pursuing any action to collect

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[40] *Pantechniki v. Albania*, Award, 20 July 2009, at para. 81 (quoting Newcombe and Paradell (2009). *Law and Practice of Investment Treaties.* 310).

[41] *Phoenix v. Czech Republic*, at para. 61. The tribunal in *Siag and Vecchi v. Egypt* reiterated the general rule that "the Claimant bears the burden of proof with respect to the facts it alleges and the Respondent carries the burden of proof with respect to its defences".

[42] *Siag & Vecchi v. Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, at para. 326.

[43] *Funnekotter v. Zimbabwe*, Award, 22 April 2009, at para. 94.

from Perenco any payments the respondents claimed were owed by Perenco.[44] The tribunal also invited the parties to (1) establish an escrow account where the above-mentioned amounts should be paid by the claimant and (2) agree the terms and conditions on which such account may be established.[45] The tribunal noted that "it is now generally accepted that provisional measures are tantamount to orders, and are binding on the party to which they are directed".[46]

On the annulment of an ICSID award, the ad hoc committee in *Azurix v. Argentina* reiterated the general understanding that article 52(1)(b) ICSID (annulment on grounds that the tribunal manifestly exceeded its powers) does not provide a mechanism for de novo consideration of, or an appeal against, a decision of a tribunal on its jurisdiction. It moreover specified that "the expression 'manifestly' in Article 52(1)(b) means 'obvious' rather than 'grave', and the relevant test is thus whether the excess of power 'can be discerned with little effort and without deeper analysis'".[47] The *Azurix* ad hoc committee dismissed the application for annulment in its entirety.

Interestingly, the ad hoc committee in *M.C.I. v. Ecuador* noted that the annulment mechanism is not designed to bring about consistency in the interpretation and application of international investment law. However, the ad hoc committee added that "the responsibility for ensuring consistency in the jurisprudence and for building a coherent body of law rests primarily with the investment tribunals".[48]

There have been a series of decisions on challenges to arbitrators in 2009: two decisions have sustained the challenge,[49] while two decisions have rejected the challenge.[50] In a fifth decision, the challenge was rejected but the arbitrator was asked to choose between continuing to advise Mexico and serving as arbitrator in the case.[51]

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[44] *Perenco v. Ecuador*, ICSID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009, at para. 79.
[45] *Perenco*, at para. 80.
[46] *Perenco*, at para. 74. See also *Burlington Resources v. Ecuador*, ICSID Case No. ARB/08/5, Procedural Order No. 5 on claimant's request for provisional measures, 29 June 2009.
[47] *Azurix v. Argentina*, Decision on the Application for Annulment, 1 September 2009, at para. 68.
[48] *M.C.I. v. Ecuador*, Decision on the Application for Annulment, at para. 24.
[49] *ICS Inspection and Control Services Limited v. Argentina*, UNCITRAL, Decision on Challenge to Arbitrator, 17 December 2009 (the fact that the challenged arbitrator represents the claimant in an unrelated arbitration brought against Argentina "puts him in a situation of adversity towards Argentina") and *Perenco Ecuador Limited v. Ecuador*, ICSID Case No. ARB/08/16, Decision on Challenge to Arbitrator, 8 December 2009 (the challenged arbitrator's comments made in a newspaper interview "constitute circumstances that [from the point of view of a reasonable third person having knowledge of the relevant facts] give rise to justifiable doubts as to [the arbitrator's] impartiality or independence".)
[50] *Participaciones Inversiones Portuarias SARL v. Gabonese Republic*, ICSID Case No. ARB/08/17, Decision on the Proposal to Disqualify an Arbitrator, 12 November 2009 (challenged arbitrator had sat as president of a tribunal that had ruled against Gabon in 2008) and *CEMEX Caracas Investments v. Venezuela*, ICSID Case No. ARB/08/1, Decision on the Respondent's Proposal to Disqualify a Member of the Tribunal, 6 November 2009 (challenged arbitrator, a former partner of the law firm representing the claimants in the present dispute, maintains ties to the firm in the form of an office, secretarial services and an e-mail account).
[51] *Vitto G. Gallo v. Canada*, UNCITRAL, Arbitrator Challenge Decision, 14 October 2009 ("from the point of view of a 'reasonable and informed third party', there would be justifiable doubts about [the challenged arbitrator's] impartiality and independence as an arbitrator if he were not to discontinue his advisory services to Mexico for the remainder of this arbitration [Mexico being a potential participant in the present proceedings].")

The proportion of separate or dissenting opinions submitted in 2009 is similar to that seen with regard to decisions rendered in 2008. Of the 22 public decisions rendered in 2009 by an arbitral tribunal or ad hoc committee (on jurisdiction, on the merits or on annulment), five were rendered either in toto or in part by a majority of the arbitral tribunal with a member of the tribunal submitting a dissenting opinion.[52]

On damages and costs, in at least three decisions (rendered in 2009) tribunals awarded damages to the investor. The highest damages award was granted by the ICSID tribunal in *Siag & Vecchi v. Egypt*, where the investors were awarded $74 million plus interest (compared to $230 million sought by the claimants). Two other ICSID tribunals awarded lower amounts: in *Saipem v. Bangladesh*, the investor received approx $6.3 million plus interest (original claim by investor: $6.3 million) and in *Bernardus Henricus Funnekotter and others v. Zimbabwe*, the investors received approx $12 million plus interest (original claim: $15 million). Although not yet made public, the decision in *Cargill, Incorporated v. Mexico* appears to have awarded the claimant damages in the order of $77.3 million (compared to allegedly more than $100 million claimed by the investor).

As far as the allocation of arbitration costs in ICSID annulment proceedings is concerned, the three decisions rendered in 2009 adopted a different approach compared to that of (a majority of) past decisions in which ad hoc committees had ruled that parties should share the arbitration costs in equal parts. In *MHS v. Malaysia*, *Azurix v. Argentina* and *M.C.I. Power Group v. Ecuador*, the ad hoc committees allocated the full cost of the annulment proceedings on the losing party (respectively, the Government of Malaysia, the Government of Argentina and M.C.I. Power Group), while each party was to cover its own legal costs. The allocation of the arbitration costs on the losing party was ordered both where the application for annulment was unsuccessful (*Azurix v. Argentina* and *MCI v. Ecuador*) and where it was successful (*MHS v. Malaysia*). The ad hoc committee in *Azurix v. Argentina* justified its decision as follows:

> The Committee considers that after an application for annulment by one party has proved to be entirely unsuccessful, it would risk compromising confidence in the ICSID system, and in the finality of ICSID awards, if the other party is required as of course to reimburse the unsuccessful applicant a share of the ICSID costs associated with the unsuccessful application. ... Whilst the Committee is mindful of the high importance of maintaining consistency in the ICSID jurisprudence, the Committee does not consider that an approach that it sees as wrong in principle should continue to be followed, merely for the sake of consistency with precedent.[53]

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With a total of 32 known new treaty-based ISDS claims, 2009 developments confirm that investors keep using international arbitration as a means for resolving disputes with their host countries. Interestingly, none of the known cases that were initiated in

[52] Dissenting opinions were included in *Itera International Energy v. Georgia*, *EDF v. Romania*, *Siag & Vecchi v. Egypt*, *MHS v. Malaysia* and *Renta 4 v. Russia*.
[53] *Azurix v. Argentina*, at paras. 374–375.

2009 appears to address measures that countries took in response to the financial and economic crisis.

The cases that were concluded in 2009 maintain the trend of diverging – and sometimes conflicting – awards. Moreover, five out of the 22 public decisions were rendered with one member of the tribunal submitting a dissenting opinion.[54] The resulting lack of coherence, consistency and predictability raises systemic concerns for the IIA regime. Novel issues also arise from the increasing challenges to arbitrators, with key questions relating to arbitrators' independence – or lack thereof.

IIA policymakers and negotiators are increasingly reacting to these developments. Concerns relating to high costs of arbitral tribunals, the lack of transparency and public scrutiny were addressed in recent IIAs that contain new – and more detailed – language dealing with ISDS (e.g. providing for transparency of arbitral proceedings, allowing for the consolidation of claims, facilitating the avoidance of frivolous claims or carving out certain types of cases, e.g. environment-related cases, from the scope of ISDS).[55] Moreover, some countries have revised (or are in the process of revising) those treaty provisions in their model BITs that have been subject to controversial and diverging interpretations (such as the definition of investment, FET, MFN and indirect expropriation), with a view to clarifying in greater detail the meaning and scope of these provisions and to ensure a more coherent and predictable interpretation. Other notable developments include ongoing revision processes of international arbitration rules (e.g. UNCITRAL and ICC) as well as efforts to explore the application of alternative dispute resolution (ADR) in international investment law and to develop dispute prevention policies (DPPs).

As a response to these ISDS-related challenges, UNCTAD has expanded its research and policy analysis to include ADR and DPPs[56] and is also offering technical assistance to countries wishing to use ADR and DPPs as part of their investment frameworks. UNCTAD has also contributed to current efforts in exploring the establishment of regional advisory centres on international investment law with the objective of assisting developing countries to avoid and better manage ISDS cases.

[54] This is the continuation of an emerging trend, with the proportion of separate or dissenting opinions submitted in 2009 being similar to that seen with regard to decisions rendered in 2008.

[55] UNCTAD (2009). Recent developments in international investment agreements (2008–June 2009). *IIA Monitor*. 3. UNCTAD/WEB/DIAE/IA/2009/8.

[56] See for example, UNCTAD (forthcoming 2010). *Investor-State Disputes: Prevention and Alternatives to Arbitration.* United Nations publication. New York and Geneva. See also, W&L-UNCTAD Joint Symposium on International Investment and ADR: Preventing and Managing Investment Treaty Conflict, held on 29 March 2010, in Lexington, Virginia, United States; http://investmentadr.wlu.edu/.

Annex 1. Known investment treaty claims, by defendants

Country	Cases
Argentina	51
Mexico	19
Czech Republic	16
Ecuador	15
Canada	14
Ukraine	14
United States	14
Venezuela, Bolivarian Republic of	11
Egypt	10
Poland	10
India	9
Kazakhstan	8
Russian Federation	8
Turkey	8
Georgia	7
Romania	7
Hungary	6
Bolivia, Plurinational State of	5
Jordan	5
Republic of Moldova	5
Slovakia	5
Democratic Republic of the Congo	4
Costa Rica	4
Algeria	3
Chile	3
El Salvador	3
Estonia	3
Kyrgyzstan	3
Lebanon	3
Mongolia	3
Pakistan	3
Sri Lanka	3
Albania	2
Azerbaijan	2
Bangladesh	2
Burundi	2
Dominican Republic	2
Germany	2
Ghana	2
Guatemala	2

Latvia	2
Lithuania	2
The former Yugoslav Republic of Macedonia	2
Malaysia	2
Morocco	2
Paraguay	2
Peru	2
Philippines	2
Slovenia	2
United Arab Emirates	2
Yemen	2
Armenia	1
Belize	1
Bosnia and Herzegovina	1
Bulgaria	1
Cambodia	1
Croatia	1
France	1
Gabon	1
Guyana	1
Indonesia	1
Iran, Islamic Republic of	1
Myanmar	1
Nicaragua	1
Nigeria	1
Panama	1
Portugal	1
Saudi Arabia	1
Senegal	1
Serbia	1
South Africa	1
Spain	1
Tanzania	1
Thailand	1
Trinidad and Tobago	1
Tunisia	1
Turkmenistan	1
United Kingdom	1
Uzbekistan	1
Viet Nam	1
Zimbabwe	1
Unknown	7
Total	**357**

Annex 2. List of cases reviewed

Azpetrol International Holdings B.V., Azpetrol Group B.V. and Azpetrol Oil Services Group B.V. v. Azerbaijan, ICSID Case No. ARB/06/15, Award, 8 September 2009.

Azurix Corp. v. Argentina, ICSID Case No. ARB/01/12, Decision on the Application for Annulment, 1 September 2009.

Bayindir Insaat Turizm Ticaret Ve Sanayi v. Pakistan, ICSID Case No. ARB/03/29, Award, 27 August 2009.

Bernardus Henricus Funnekotter and others v. Zimbabwe, ICSID Case No. ARB/05/6, Award, 22 April 2009.

Berschader v. Russia, SCC Case No. 080/2004, Award, 21 April 2006.

Biwater Gauff Ltd v. Tanzania, ICSID Case No ARB/05/22, Award, 18 July 2008.

Burlington Resources v. Ecuador, ICSID Case No. ARB/08/5, Procedural Order No. 5 on Claimant's Request for Provisional Measures, 29 June 2009.

Cementownia "Nowa Huta" S.A. v. Turkey, ICSID Case No. ARB(AF)/06/2, Award, 17 September 2009.

CEMEX Caracas Investments v. Venezuela, ICSID Case No. ARB/08/1, Decision on the Respondent's Proposal to Disqualify a Member of the Tribunal, 6 November 2009.

EDF (Services) Limited v. Romania, ICSID Case No. ARB/05/13, Award, 8 October 2009.

Empresa Eléctrica del Ecuador Inc. v. Ecuador, ICSID Case No. ARB/05/9, Award, 2 June 2009.

Europe Cement Investment and Trade S.A. v. Turkey, ICSID Case No. ARB(AF)/07/2, Award, 13 August 2009.

Glamis Gold v. United States, UNCITRAL, Award, 8 June 2009.

Hulley Enterprises Limited (Cyprus) v. The Russian Federation, PCA Case No. AA 226, UNCITRAL, Interim Award on Jurisdiction and Admissibility, 30 November 2009.

ICS Inspection and Control Services Limited v. Argentina, UNCITRAL, Decision on Challenge to Arbitrator, 17 December 2009.

Itera International Energy LLC and Itera Group NV v. Georgia, ICSID Case No. ARB/08/7, Decision on the Admissibility of ancillary claims, 4 December 2009.

M.C.I. Power Group L.C. and New Turbine Inc. v. Republic of Ecuador, ICSID Case No. ARB/03/6, Decision on the Application for Annulment, 19 October 2009.

Malaysian Historical Salvors Sdn, Bhd v. Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, 16 April 2009.

Malaysian Historical Salvors Sdn., Bhd. v. Malaysia, ICSID Case No. ARB/05/10, Award on Jurisdiction, 17 May 2007.

Pantechniki S.A. v. Albania, ICSID Case No. ARB/07/21, Award, 30 July 2009.

Participaciones Inversiones Portuarias SARL v. Gabonese Republic, ICSID Case No. ARB/08/17, Decision on the Proposal to Disqualify an Arbitrator, 12 November 2009.

Perenco Ecuador Limited v. Ecuador, ICSID Case No. ARB/08/16, Decision on Challenge to Arbitrator, 8 December 2009.

Perenco v. Ecuador, ICSID Case No. ARB/08/6, Decision on Provisional Measures, 8 May 2009.

Phoenix Action, Ltd v. Czech Republic, ICSID Case No. ARB/06/5, Award, 15 April 2009.

Renta 4 SVSA v. Russian Federation, SCC Case No 24/2007, Award on Preliminary Objections, 20 March 2009.

RMS Production Corporation v. Grenada, ICSID Case No ARB/05/14, Award, 11 March 2009.

Romak S.A v. Uzbekistan, PCA Case No. AA280, Award, 26 November 2009.

RosInvestCo UK v. Russia, SCC Case No. 079/2005, Award on Jurisdiction, October 2007.

Saipem S.p.A. v. Bangladesh, ICSID Case No. ARB/05/7, Award, 30 June 2009.

Siag & Vecchi v. Egypt, ICSID Case No. ARB/05/15, Award, 1 June 2009.

Toto Costruzioni Generali S.p.A. v. Republic of Lebanon, ICSID Case No. ARB/07/12, Decision on Jurisdiction, 11 September 2009.

Tza Yap Shum v. Peru, ICSID Case No. ARB/07/6, Decision on Jurisdiction and Competence, 19 June 2009.

Veteran Petroleum Limited (Cyprus) v. Russia, PCA Case No. AA 228 UNCITRAL, Interim Award on Jurisdiction and Admissibility, 30 November 2009.

Vitto G. Gallo v. Canada, UNCITRAL, Arbitrator Challenge Decision, 14 October 2009.

Yukos Universal Limited (Isle of Man) v. The Russian Federation, PCA Case No. AA 227 UNCITRAL, Interim Award on Jurisdiction and Admissibility, 30 November 2009.