Global Financial Disruptions and Investment Treaty Arbitration

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Global Financial Disruptions and Related Cases

- Mexico (1994)
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- Peru (2000)
  - *Renée Rose Levy de Levi v. Peru*
- Czech Republic (1998-2000)
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- Argentina (2001-2002)
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  - *Cyprus Popular Bank v. Greece* *
  - *Marfin Investment v. Cyprus* *

* Pending cases
** Arbitration not initiated, only notices of intent filed
Mexico (1994)

Fireman’s Fund Insurance Company v. United Mexican States, ICSID Case No. ARB(AF)/02/01, Award of 17 July 2006 ¶¶1, 49, 165, 186-197, 218

- **Fireman’s Fund Insurance v. Mexico (NAFTA Chapter 14)**
  - **Investment:** Bonds issued by a Mexican bank
  - **Measure:** Government’s refusal to carry out a bank rescue plan and to repurchase the bonds at face value
  - **Claim:** Expropriation
  - **Holding:** No expropriation
    - Claimant itself failed to meet the requirements for implementation of the rescue plan.
    - Respondent had not made any promise to repurchase the bonds at face value.
    - Because the Tribunal found no expropriation, it did not reach the question of whether the *Prudential Measures* exception under NAFTA Article 1410 applied.
Peru (2000)

Renée Rose Levy de Levi v. Republic of Peru, ICSID Case No. ARB/10/17, Award of 26 February 2014 ¶¶ 2, 34, 166, 476-478

- **Levy de Levi v. Peru (France-Peru BIT)**

  - Investment: Shareholding in a Peruvian bank
  - Measure: Take-over and liquidation of the bank due to liquidity problems and violation of banking regulations
  - Claims: Expropriation and violation of the FET standard
  - Holding: No expropriation or FET violation

  - Peru intervened in accordance with banking law and exercised “legitimate acts of police power … to provide for the competitive, solid and reliable operation of the financial and insurance systems, so as to contribute to national development.”

  - “[N]o investment treaty is an insurance or guarantee of investment success, especially when the investor makes bad business decisions.”
Czech Republic (1998-2000)

Saluka Investments B.V. v. The Czech Republic, UNCITRAL, Partial Award of 17 March 2006 ¶¶ 76, 407, 498-500

- **Saluka v. Czech Republic (Netherlands-Czechoslovakia BIT)**
  - **Investment**: Shareholding in a Czech bank
  - **Measure**: Forced administration of the bank due to mismanagement and liquidity problems
  - **Claims**: Expropriation and violation of the FET standard
  - **Holding**: Although forced administration was in accordance with Czech law, Respondent breached the FET standard by:
    - According the bank “differential treatment without a reasonable justification” as compared to other Czech-owned banks, which were bailed out, and
    - “[U]nreasonably frustrat[ing] Claimant’s good faith efforts to resolve the bank’s crisis.”
Argentina (2001-2002)

Continental Casualty v. Argentina Republic, ICSID Case No. ARB/03/9, Award of 5 September 2008 ¶ 205, 210, 221, 233-236

- **Continental Casualty v. Argentina (US-Argentina BIT)**
  - **Investment:** Shareholding in an insurance company which maintained a portfolio of invested securities
  - **Measures:** Abolition of convertibility, prohibition of transfer of funds, pesification of outstanding dollar-denominated contracts, restructuring of debt
  - **Claim:** Expropriation, violation of free transfer of funds and FET principles
  - **Holding:** Claims dismissed, except a discrete FET violation
    - Argentina’s measures were excused under the “necessary measures” exception in Article XI of the US-Argentina BIT

- Other tribunals have rejected application of Article XI in cases against Argentina (*El Paso, Enron, Sempra*)
Argentina (2001-2002)

- **Abaclat and others v. Argentina** (Italy-Argentina BIT)  
- **Ambiente Ufficio and others v. Argentina** (Italy-Argentina BIT)  
- **Alemanni and others v. Argentina** (Italy-Argentina BIT)

- **Investment:** Sovereign bonds sold to retail investors
- **Measures:**
  - Unilateral modification of payment obligations
  - Alteration of underlying legal framework
  - ‘Cram-Down’ law
  - Imposition of 75% haircut
- **Claims:** Expropriation, FET violation, impairment by unreasonable or discriminatory measures, violation of most-favored nation principle, and umbrella clause

* Case pending
Argentina (2001-2002)

- Abaclat and others v. Argentina* (Italy-Argentina BIT)
- Ambiente Ufficio and others v. Argentina* (Italy-Argentina BIT)
- Alemanni and others v. Argentina* (Italy-Argentina BIT)

  - Jurisdiction upheld in all three cases; ongoing merits phases
  
  "Investment" (Abaclat & Ambiente):
  
  - Bonds are investment under BIT and ICSID Convention “Security entitlements” (under BIT) and “contribution” (under ICSID Convention)
  - “Made in the territory of Argentina”: Funds available to Argentina contributed to economic development; particular nature of bonds transaction

  "Investment" (Alemanni):
  
  - Original assets held by underwriters are investments
  - Deferred to the merits phase a ruling on “the precise nature of the individual assets of the individual Claimants”

* Case pending
Argentina (2001-2002)

Abaclat and others v. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility of 4 August 2011 ¶¶ 323-324; Ambiente Ufficio S.p.A. and others v. Argentine Republic, ICSID Case No. ARB/08/9, Decision on Jurisdiction and Admissibility of 8 February 2013 ¶¶ 546, 551; Giovanni Alemanni and others v. Argentine Republic, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility of 17 November 2014 ¶¶ 298-300

- **Abaclat and others v. Argentina** *(Italy-Argentina BIT)*
- **Ambiente Ufficio and others v. Argentina** *(Italy-Argentina BIT)*
- **Alemanni and others v. Argentina** *(Italy-Argentina BIT)*

Holdings on *prima facie* treaty violation:

- Sovereign action to modify payment obligations constitute *prima facie* treaty violation (*Abaclat, Ambiente, Alemanni*)

  - “[T]he present dispute does not derive from the mere fact that Argentina failed to perform its payment obligations under the bonds but from the fact that it intervened as a sovereign by virtue of its State power to modify its payment obligations towards its creditors.” (*Abaclat*)

  - “[A]ssum[ing] *pro tempore* the correctness of the claimant’s factual allegations … the complaints raised by them in this arbitration are capable of constituting a breach of one or more of the provisions of the BIT.” (*Alemanni*)

* Case pending
Global Financial Crisis (2008-2009)

Deutsche Bank v. Sri Lanka (Germany-Sri Lanka BIT)

- **Investment**: Hedge contracts entered with state-owned Ceylon Petroleum Corporation

- **Measure**: Suspension of contractual payments when oil price declined steeply and unexpectedly, by the order of the Sri Lankan Supreme Court

- **Claims**: Expropriation and violation of FET standard

- **Holding**: Awarded US$60 million for expropriation and FET violation

  - Parallel contract-based proceedings by Citibank (LCIA Arbitration - dismissed) and Standard Chartered Bank (English High Court – US$166 million awarded)
Global Financial Crisis (2008-2009)


- **Ping An Life Insurance v. Belgium***(China-Belgium BIT)
  - Claimant had invested in a bank which was subjected to bailout and take-over by Respondent
  - Case pending; ongoing parallel litigation by other investors in Belgium

- **Victims of Stanford Ponzi Scheme v. United States**
  - Claim: Violation of full protection and security standard – losses could have been averted had U.S. regulators acted with due diligence but they “failed to provide even a rudimentary level of protection or legal security”

* Case pending
** Arbitration not initiated, only notices of intent filed
Indonesia (2008-2009)

- **Al Warraq v. Indonesia** (Organization of the Islamic Conference Investment Treaty)
  - **Investment**: Shareholding in Indonesian bank
  - **Claim**: Expropriation
  - **Measure**: Bailout of the bank due to mismanagement and liquidity problems
  - **Holding**: No expropriation
    - The bailout was “within discretion and authority of the government and was completely justified, particularly since [the bank] could have caused a systematic risk to the entire Indonesian financial system.”
    - Bailout was a “permissible preventive measure” under OIC Investment Treaty

- **Rizvi v. Indonesia** (UK-Indonesia BIT)
  - **Investment**: Shareholding in Indonesian bank
  - **Holding**: No jurisdiction. Claimant’s investment was not made “in accordance with the [Indonesian] laws” and thus not under BIT protection.
Poštová banka and Istrokaptal v. Greece* (Slovakia-Greece/Cyprus-Greece BITs)

- Claimants are a Slovak bank and its Cypriot shareholder
- Bank allegedly held Greek sovereign bonds
- Claims arising out of the forced haircut by Greece’s 2012 legislation that retroactively and unilaterally amended the bond terms

Cyprus Popular Bank v. Greece* (Cyprus-Greece BIT)

- Claimant, a Cypriot bank, allegedly held Greek sovereign debt.
- Claim for discrimination due to denial of access to Greek bailout funds

Marfin Investment v. Cyprus* (Cyprus-Greece BIT)

- Claimant allegedly held shares in Cyprus Popular Bank.
- Claim for loss of value of shares as a result of bank’s bailout and take-over by Cyprus

* Case pending
Thank you