

Global Financial Disruptions and Investment Treaty Arbitration

**P.R.I.M.E. Finance Annual Conference
Peace Palace, The Hague**

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Global Financial Disruptions and Related Cases

- Mexico (1994)
 - *Fireman's Fund v. Mexico*
- Peru (2000)
 - *Renée Rose Levy de Levi v. Peru*
- Czech Republic (1998-2000)
 - *Saluka Investments B.V. v. Czech Republic*
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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 Company 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. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility of 4 August 2011; *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 ; *Giovanni Alemanni and others v. Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility of 17 November 2014

- ❑ ***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. Argentine Republic, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility of 4 August 2011 ¶¶ 344, 357, 364-365, 374-376, 387; *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 ¶¶ 141, 482-487; *Giovanni Alemanni and others v. Argentine Republic*, ICSID Case No. ARB/07/8, Decision on Jurisdiction and Admissibility of 17 November 2014 ¶ 296

- ❑ ***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”

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*)

Global Financial Crisis (2008-2009)

Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2, Award of 31 October 2012

- ❑ ***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 Company of China, Limited and Ping An Insurance (Group) Company of China, Limited v. Kingdom of Belgium, ICSID Case No. ARB/12/29; Notices of Intent filed on 28-29 December 2012 in *Victims of the Stanford Ponzi Scheme v. The Government of the United States of America*

❑ ***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*****

- Alleged victims of a multi-Billion Dollar Ponzi scheme orchestrated by U.S. financier filed notices of intent to bring claims under DR-CAFTA, US-Peru TPA, US-Chile FTA and US-Uruguay BIT
- 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

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Indonesia (2008-2009)

Hesham Talaat M. Al-Warraq v. Republic of Indonesia, UNCITRAL, Final Award of 15 December 2014 ¶¶ 94, 106, 334, 526; *Rafat Ali Rizvi v. Republic of Indonesia*, ICSID Case No. ARB/11/13, Award on Jurisdiction of 16 July 2013 ¶¶ 198, 223

□ ***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.

Greece (2009-)

Poštová banka, a.s. and ISTROKAPITAL SE v. Hellenic Republic, ICSID Case No. ARB/13/8; *Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic*, ICSID Case No. ARB/14/16; *Marfin Investment Group v. The Republic of Cyprus*, ICSID Case No. ARB/13/27

- ❑ ***Poštová banka and Istrokapital 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

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