

**CENTRE FOR INTERNATIONAL
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Conference

**International Investment Agreements
(IIAs) and Financial Crises**

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General Exceptions Clauses: WTO and International Investment Agreements (IIAs) Experience

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IIAs: Bilateral Investment Treaties (BITs) and Regional Agreements

- ❑ BITs are the most common type of bilateral treaties on the “promotion and protection “ of foreign investments
- ❑ Regional economic agreements (Custom Unions, Free Trade Areas) include often Investment Chapters which mimic the structure and content of BITs: NAFTA Ch 11
- ❑ More than 3000 BITs have been made in the last 50 years
 - Although not identical, they cover the same issues and contain similarly worded standard clauses (national Models BITs)
 - They intend to remedy to the uncertainty of customary law
 - “depoliticisation” of investment disputes, no diplomatic intervention but direct investor- host State arbitration
 - Bilateral and reciprocal; no multilateral setting
 - No institutional framework to administer or update
 - Static, focused on standards of treatment
 - Heterogeneity of Signatories: little promotional effect on investments

Key Features of BITs

- ❑ Do not grant usually right to market access (making of an investment)
- ❑ Focus on detailed standards of treatment: obligations of host State as to treatment to which investors/investments from home State are entitled, and provide for settlement of disputes through direct investor - host State arbitration
- ❑ Definition of investments
 - extensive, "asset based" definitions
 - Foreign direct investments (FDI), portfolio and private are covered
- ❑ Definition of investor: "national" of the other Party (natural and legal persons)
 - direct and also indirect investments usually covered:
 - through third countries vehicles, host country companies, minority shareholding

Substantive standards

- 'Contingent' (relative) standards:
 - **Most Favoured Nation ('MFN') Treatment**
 - **National Treatment ("NT")**
- 'Non-contingent' (absolute) general standards:
 - **Fair and Equitable Treatment ('FET')**
 - **Minimum international level of protection**
 - **Full Protection and Security**
 - **Respect of Host State's contracts ("Umbrella Clause")**
- Non-contingent (absolute), specific standards:
 - **Protection in case of expropriation (compensation) incl.**
 - **indirect or measures amounting to expropriation**
 - **Right to outwards transfer of funds (profits, divestment)**
 - **Management of investments in host country**

Dispute settlement provisions

Direct Arbitration by aggrieved Foreign Investor *

(as an alternative to Host State's courts to ensure impartiality and parity):

- *at ICSID (World Bank's Centre) under Washington 1965 Convention* (bilateral administered binding int'l arbitration in a multilateral framework), or
- *international commercial arbitration (Uncitral, ICC, etc.)*

- * no need of arbitral agreement, just based on existence of BIT
- * investors have the right to initiate and select the venue
- * Host States are systematically defendants
- * no appeal, only exceptional annulment of awards (ICSID, NY Conv.)

□ State-to-State Arbitration

- only concerning State-to-State disputes under BIT

Consequences:

- hundreds of direct int'l arbitration cases and awards: case law and "precedents"
- hardly any inter-State award

Fair and Equitable Treatment

- ❑ **Host State's Actions found to breach the FET standard:**
 - denial of justice
 - lack of due process
 - frustration of "legitimate expectations" of investor (reliance on host State's "promises")
 - lack of stability of legal/business framework
 - lack of transparency
 - lack of consistency
 - harassment / coercion
 - bad faith

Actions may consist also in general measures!

- Nationalisation (expropriation)
- Regulatory measures (indirect expropriation or in breach of FET)

General Exception Clauses in BITs

❑ **No general exception clauses in most BITs**

- no equivalent of Art. XX GATT exception as to non-discriminatory measures for public morals, health, natural resources, environment
- yes exceptions for security measures (UN Sanctions)

❑ **However in BITs:**

❑ **“Non-precluded Measures” under standard US BITs**

- self-judging” invocation of the clause?

❑ **Decrease of level of protection:**

- FET “in accordance with international law” (BITs of France)
- NAFTA Commission restrictive interpretation (“Neer” 1927 formula)
- US 2004 BIT Model: non-discriminatory regulatory actions to protect legitimate public welfare objectives (health, safety, environment) do not constitute indirect expropriation “except in rare circumstances”

Non-precluded measures clause in US BITs

- *Article XI of the US-Argentina BIT:* “This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order . . . or the protection of its own essential security interests.”

- *Who decides: is the invocation self-judging by the host State?*
- *What are "public order " and "essential security interests":
also economic crisis?*
- *What is the yardstick for evaluating "necessity" (GATT art. XX or international law defense of necessity – art. 25 of ILC Articles on State responsibility?)*

Relevance of other multilateral treaties between BITs Parties

- - **IMF rules**
 - prohibiting restrictions on current payments
 - allowing capital movement restrictions
- **OECD Code on capital movements**
- **EU provisions on capital movements**
- **WTO : GATT Art. XV. 9:** exempts exchange restrictions in accordance with IMF rules
 - **GATS** General Exceptions (Art. XIV = Art. XX GATT)
 - **GATS** Security Exceptions: that a Member considers necessary for the protection of its essential security interests (iii) taken in case of war or other emergency in international relations (Art.XIV bis)
 - **GATS** Annex on Financial Services,2: Notwithstanding any other provision of the Agreement, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors...or to ensure the integrity and stability of the financial system.

- **Are BITs provisions “lex specialis” which prevail? or are BITs provisions subject to multilateral rules?**

The case of the IMF

- *Continental Casualty v. Argentina*, Award 5 September 2008 (ICSID Arb. 03/9), paras 243-245:
 - *“Avoidance of restrictions on current payments” (Art. VIII IMF), except with the approval of the Fund, is a “general obligations” of IMF members ...on the other hand capital movements may be subject to exchange controls*
 - *but “transfers “related to an investment” listed in Art. V of the US-Argentina BIT includes both current transactions and capital movements: Art V may be considered a “lex specialis ” in respect of the IMF regime and more liberal*
 - *In the IMF terminology and classification, widely accepted beyond the Fund’s ambit, the movement of capital at issue here was or would have been more specifically a short term deposit abroad, a transaction which may be subject to tighter controls than direct of portfolio investment transactions*
 - *the transfer which the Complainants complains it could not carry out because of the Corralito, namely a short-term placement out of Argentina, was not a transfer “related to an investment” protected by Art. V of the BIT*

The case of the EU

- European Court of Justice judgments of 2009: *Commission v. Austria* (C-205/06), *v. Sweden* (C-249/06), *v. Finland* (C-118/07) on the incompatibility of their pre-accession BITs (guarantee of free transfer of payments connected with an investment) with EU Treaties provisions which allow the EU to establish unilaterally, in certain circumstances, restrictions to capital movement with third countries (now Art. 64 (2), 66, 75 TFEU):
 - the absence in the BITs of any provision reserving the right to apply restrictions on capital movement which may be adopted by the EU Council *"is liable to make it more difficult or even impossible for that Member to comply with its Community obligations"*
 - *"in order to ensure the effectiveness of those provisions, measures restricting the free movement of capital must be capable, where adopted by the Council, of being applied immediately"*
 - those Bits do not reserve for the Member States the right to apply the measures in question and *"there is no international law mechanism which makes that possible"*, since renegotiation, suspension or even denunciation *"is too uncertain in its effects to guarantee that the measures adopted by the Council could be applied effectively"*

Do BITs afford protection/ exemption from actions taken in case of financial crisis?

- ❑ Limitation to current payments
- ❑ Limitation to capital transfers
- ❑ Rescue of selected (national) financial institutions (“too big to fail”)
- ❑ Sovereign defaults & debt rescheduling
- ❑ Currency redenomination

in light of BITs obligations on:

- ❑ National treatment
- ❑ Non-discrimination
- ❑ Indirect expropriation (“regulatory takings”)

but taking into account:

- ❑ Prudential measures carve-outs
- ❑ Essential interests exceptions
- ❑ Legitimate regulatory action (see also ECHR, Additional Protocol)