

17th Investment Treaty Forum

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Tensions Between International Investment Protection and Financial Stability

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Investment Protection v. Financial Stability

Purposes:

- investigating the consistency of measures adopted by States in the aftermath of the global financial crisis with their IIAs obligations

Thesis:

- the interplay of trade and investment treaties limits the number and the scope of policy tools at States' disposal

Crisis Prevention and Management Measures

To contrast the global financial crisis, States have adopted:

- protective trade measures (non-tariff barriers, subsidies)
- bailout policies
- financial stimulus packages
- financial standards
- capital controls
- (sovereign debt restructuring)

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Financial Standards

In the aftermath of the global financial crisis:

- Basel Committee: Basel III
- FSB: 12 Key Standards for Sound Financial Systems
- FSB: Non-Cooperative Jurisdictions Initiative (NCJs)

The consistency of these reforms with the host State's IIAs obligations still has to be tested

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IIAs Prudential Carve-out Provisions

Often modelled on Art. 2(a) of the GATS Annex on Financial Services. Examples:

- Art. 1410(1) NAFTA
- Art. 7.38 of the EU-Korea FTA
- Art. 20 of the US Model BIT 2004 :

Notwithstanding any other provision of this Treaty, a Party shall not be prevented from adopting or maintaining measures relating to financial services for prudential reasons, including for the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial services supplier, or to ensure the integrity and stability of the financial system (14). Where such measures do not conform with the provisions of this Treaty, they shall not be used as a means of avoiding the Party's commitments or obligations under this Treaty. [...]

(14) It is understood that the term "prudential reasons" includes the maintenance of the safety, soundness, integrity, or financial responsibility of individual financial institutions.

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IIAs Prudential Carve-Outs

Interpretation issues:

- What is the ordinary meaning of "prudential"?
(Financial standards as benchmarks? What about measures targeting NCJs?)
- What is the purpose of the prudential carve-out
"Chapeau"?
(Art. 20 of the US Model BIT 2004)

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IIAs Prudential Carve-Outs

- Does a necessity test always apply?
(Art. 20 US-Uruguay BIT ≠ Art. 7.38 of the EU-Korea FTA)
- Cross-fertilization from investment arbitration to the GATS dispute settlement?
(*Fireman's Fund v. Mexico*; *Saluka Inv. v. Czech Rep.*)

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Capital Controls

Capital controls on inflows and outflows are back in the toolkit of Governments:

- Stiglitz Report
- UN Conference on the World Financial and Economic Crisis – Outcome Document
- IMF Staff Position Note 2010

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IIAs and Capital Controls

Investors may claim that capital controls amount to:

- indirect expropriation
- breach of the free transfers provision
- breach of the FET standard

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IIAs and Capital Controls

Treaty safeguards:

- Prudential carve-out clause?
- Balance of Payments clause (BoP) ≠ essential security clause

International customary law defences:

- State of necessity
- Monetary sovereignty

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Sovereign Debt Restructuring (SDR)

Lack of a single international regime for SDR:

- Paris Club (+ London Club)
- Bonds' collective action clauses (CACs)
- ICSID arbitration?
(*Abaclat and others v. Argentina, Decision on jurisdiction and admissibility, Aug 2011*)

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IIAs and SDR

Do IIAs cover government bonds?

yes → broad definition of investment in the IIA
(but uncertainties related to the Salini test)

no → portfolio investments or sovereign debt securities
specifically excluded
(Art. 838 Canada-Colombia FTA; Art. 2.1 Colombia Model BIT)

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IIAs and SDR

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partially → special provisions on SDR
(Art. 10.18 Peru-US FTA)

Dispute settlement only if:

- NOT a negotiated restructuring
(less than 75% of bondholders consented to the SDR)
- and only for violation of NT and MFN

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US IIAs Typical Features

US trade and investment treaties usually feature:

- a prudential carve-out provision
 - an essential security clause (but NOT a BoP clause)
 - a special treatment of sovereign debt
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- 250 economist Statement to Obama administration
 - review of the US 2004 Model BIT and US IIAs

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Policy Recommendations

To find a better balance between investment promotion and protection and global financial stability:

- negotiation of prudential carve-out provisions
- negotiation of BoP safeguard clauses
- removal of sovereign bonds and SDR from the scope of IIAs (NO mass claims)