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FINANCIAL REGULATION ON ICSID CASES

REGULAÇÃO FINANCEIRA NOS CASOS DO ICSID

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ABSTRACT: The goal of this paper is to examine a group of cases dealing with financial regulation and settled under the International Centre for the Settlement of Investment Disputes – ICSID. This will be achieved through a descriptive approach to the cases and of an analytical approach to the underlying regulatory issues. Part One brings an overview of the international state responsibility doctrine, as well as of the main features of financial regulation and of the ICSID system. Its purpose is to show how international elements influence both the substantive and the procedural aspects of these disputes. Part Two will present the facts and findings of several international investment arbitration tribunals. It will focus on the issues of financial regulation emerging in disputes between foreign investors and host countries. Part Three provides an analytical framework for the study of these cases. It draws from Ole Spiermann's conceptualizations of the state within the context of international adjudication. It sets out how international investment arbitration embodies Ole Spiermann's classification of international law of coexistence and of cooperation. Part Four delves into some specific fields of financial regulation and relates them to the general standard of fair and equitable treatment. This approach aims at exemplifying how financial regulation may present itself in these cases. Part Five brings a summary of the issues discussed, indicating some emerging trends, and the author's concluding remarks.

Keywords: ICSID. Financial Regulation. Arbitration.

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RESUMO: O objetivo desta pesquisa é examinar um grupo de casos relacionados à regulação financeira e julgados no âmbito do *International Centre for the Settlement of Investment Disputes – ICSID*. A metodologia utilizada consiste em um enfoque descritivo dos casos e um enfoque analítico das questões regulatórias subjacentes. A primeira parte apresenta um panorama geral da doutrina internacional sobre a responsabilidade do Estado, assim como as principais características da regulação financeira e do sistema do ICSID. Seu propósito é o de demonstrar a forma pela qual elementos materiais e processuais destas controvérsias são fortemente influentes por os elementos internacionais. Na segunda parte se apresentam os fatos e as conclusões de vários tribunais arbitrais internacionais de investimentos. O foco desta parte será nas questões da regulação financeira que surgem nas controvérsias entre os investidores estrangeiros e países receptores. A terceira parte fornece um modelo analítico para o estudo dos casos, com base nas conceituações de Ole Spiermann a respeito do Estado no contexto da adjudicação internacional. Nesta parte se expõe como a arbitragem internacional de investimento encarna a classificação de Ole Spiermann em direito internacional da coexistência e da cooperação. A quarta parte se aprofunda em algumas questões específicas da regulação financeira examinadas nos casos selecionados e as relaciona com o princípio geral de tratamento justo e equitativo. Este enfoque tem por objeto exemplificar o quão amplamente a regulação financeira pode se apresentar em tais casos. Na quinta parte, apresentam-se um resumo das questões examinadas, algumas tendências, e as observações finais do autor.

Palavras-chave: ICSID. Regulação Financeira. Arbitragem.

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1. INTRODUCTION

Financial regulation is fast-changing and affects a great number of areas of law. Since it covers a large industry, it entails ample litigation. What is more, different spheres of national, supranational and international law influence financial regulation's purposes, from financial stability to consumer and investor protection. It is tackled by national administrative law, on a binding hard law basis,

but regulators and supervisors have increasingly adopted international standards with a soft law approach. Financial disputes thus may be highly complex. That is the case when disputes arise from policies implemented by states to react to or prevent systemic crises. These litigations may trigger multi-party and multi-contract repercussions, with unpredictable knock-on effects on third parties using the same standardized instruments (GOLDEN; WERNER, 2015, p.3).

Some of these disputes have and continue to be brought for arbitration under the International Centre for the Settlement of Investment Disputes – ICSID. Being a multilateral convention expanded by a network of bilateral treaties and private contracts, the ICSID settles investor-state disputes within a traditional approach in international law. Tribunals analyze a broad range of state actions – administrative, legislative or judicial in nature. Those actions are judged against a broad range of international standards of investor treatment. Treaties into which states have entered grant several layers of protection to foreign investors and cover one of the most typical fields in international law (NOLTE, 2002. p. 1097).

The goal of this paper is to examine a group of cases dealing with financial regulation and settled under the International Centre for the Settlement of Investment Disputes – ICSID. This will be achieved through a descriptive approach to the cases and of an analytical approach to the underlying regulatory issues. Part One brings an overview of the international state responsibility doctrine, as well as of the main features of financial regulation and of the ICSID system. Its purpose is to show how international elements influence both the substantive and the procedural aspects of these disputes. Part Two will present the facts and findings of several international investment arbitration tribunals. It will focus on the issues of financial regulation emerging in disputes between foreign investors and host countries. Part Three provides an analytical framework for the study of these cases. It draws from Ole Spiermann's conceptualizations of the state within

the context of international adjudication. It sets out how international investment arbitration embodies Ole Spiermann's classification of international law of coexistence and of cooperation. Part Four delves into some specific fields of financial regulation and relates them to the general standard of fair and equitable treatment. This approach aims at exemplifying how financial regulation may present itself in these cases. Part Five brings a summary of the issues discussed, indicating some emerging trends, and the author's concluding remarks.

2. STATE RESPONSIBILITY, FINANCIAL REGULATION AND THE ICSID SYSTEM

2.1. OVERVIEW OF STATE RESPONSIBILITY

Alien protection as treaty obligation. The *United Nations' Draft Articles on Responsibility of States for Internationally Wrongful Acts* is a good starting point for an overview of state responsibility. Pursuant to Article 2, actions or omissions attributable to a state under international law which constitute a breach of an international obligation are deemed internationally wrongful. Whilst this definition is broad enough to encompass state-to-state situations, it also covers international standards of alien protection. Moreover, the *Articles* are not restrictive as regards to the subject-matter analysis of what states may take upon themselves as being their own international obligations. Instead, they allow for ample space for a large collection of state activities which may interfere with aliens' legal interests. Therefore, the *Articles* are compatible with the idea that alien protection may no longer be a matter of courtesy among states, or simply customary law. State responsibility as construed on the *Articles* is well-matched for elevating alien protection to be more than national treatment or an international minimum standard – often it can be a privately actionable treaty obligation.

International law remedy to damage. The cases examined in this paper exemplify trends of treaty-based alien protection in the financial sector. Disregarding issues of jurisdiction and merits, such trends seem to be compatible with the conceptualization of state responsibility carried out by the *Articles*. Foreign investors generally seek remedies when states' actions give cause to damages. They do so constrained by the law applicable and by burden of proof standards. Within the network of bilateral investment treaties, international law and international adjudication have been an option in bringing such claims.

Damage as a condition to international wrongfulness. While some scholars have pointed out to the fact that the *Articles* destroyed the conceptual unity of international law by eliminating damage as a condition for the wrongfulness of a state act (PELLET, 2010, p. 11), others take a more pragmatic approach. This approach argues that "the [*Articles*'] provisions on reparation in general, and compensation in particular, have been frequently referred to by arbitral Tribunals in investment protection disputes" (CRAWFORD; OLLESON, 2015, p. 418). Tribunals have relied on the *Articles* as well for settling issues of attribution of minor entities' acts to central governments.¹ That reliance is "unproblematic, as it is not obvious that the content of the responsibility owed to an investor (or at least those rules relating to the manner in which compensation is to be quantified) differ from those applicable in the context of inter-State responsibility" (CRAWFORD; OLLESON, 2015, p. 418).

States' right of expropriating. At least in theory, international investment law and general principles of international responsibility of states should be

¹ The *Articles* rely on decades of high level scholarly work leading to its final content. But it is neither a ratified treaty, nor a simple document of political implications released by a circumstantial majority in a UN General Assembly. They boast of an increasing popularity in international adjudication. See *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2. p. 75

consistent. As in the case of general international law, international investment law does not hinder the right of states to cause severe economic deprivation to aliens, including the pursuance of expropriation objectives. Investment law seeks to set the conditions under which this right can be exercised with legitimacy. Such conditions are generally accepted as involving public purposes, non-discrimination, due process and compensation. They come to the fore in direct expropriations, by way of change in ownership, as well as in indirect expropriations, in which a material expropriation is achieved circumventing proper transfers of title. The consequences of expropriation in international law constitute an interesting analytical floor. Above this floor, one can assess other actions by means of which states interfere less severely with the protection of aliens – a common circumstance in the financial sector, as case-law illustrates.

Conceptualizing the legal argument. International adjudication prompts a range of conceptualizations. For a thorough understanding of international adjudication, one could refer to broad questions such as, what is a state and how law mediates the relationship between sovereign states. Ole Spiermann, delving into the entire case law of the Permanent Court of International Justice, has proposed a categorization of how international legal argument plays a role in determining a case's decision. He argues that such a description could be useful in understanding the inner workings both of other international courts in general and that of the ICSID system (SPIERMANN, 2005, p. 74, p. 393-397). Spiermann models international law as bearing a residual and complementary nature to national law. In his view, international adjudication would produce results in international law in line with a double structure. Within this structure, the variable legal argumentation depends on whether the case relies either on what he calls international law of coexistence or international law of cooperation. The third part

of this article inserts selected ICSID disputes on financial regulation in Spiermann's model.

2..2. Overview of the financial regulation

Scope of financial regulation. One of the main purposes of financial regulation, especially after the crisis of 2008, is to promote and ensure financial stability, whilst protecting consumers and investors. States are expected to achieve this goal without destroying value for financial institutions' shareholders and thus subtracting from the economy the players responsible the important role of "channeling funds from the economy's positive savers to the negative savers" (GORTSOS, 2017, p. 21). The objectives set by authorities across the globe are implemented by means of interventions carried out in a vast number of areas of law. To mention but a few, financial regulation reaches contract law and other fields of private law, such as company law, insolvency and bankruptcy law, including accounting and auditing law, civil law and securities law. It is strikingly present also in public law. It also encompasses administrative procedure law, auditing regulation, tax law and anti-money laundering. It affects different areas of the business of financial institutions, such as governance and client protection, and it aims at ensuring appropriate levels of liquidity and solvency by specific capital requirements.

Decision-makers in financial regulation. Financial regulation is implemented by a broad group of decision-makers on the international and national levels. One may consider the G-20, the Financial Stability Board and the standard setting organizations, such as the Basel Committee on Banking Supervision, the International Organization of Securities Commissions, the International Association of Insurance Supervisors. They all engage in relevant aspects of financial regulation, with specific functions and policy objectives. In this

framework, the G-20 Summit outlines regulatory tasks and aims, mandating the international standard setters to draft “soft” standards which the G-20 members are expected to transpose into national hard law. The Financial Stability Board then evaluates the standard adherence across national jurisdictions.

Fields in which financial disputes arise. Financial institutions being frequently global institutions, financial regulation very often deals with state/foreign investor relationship. Serving international clients and investors is indeed the core business of several institutions. It comes to no surprise that disputes among these stakeholders are frequent. Clients and investors may sue or be sued by financial institutions for various reasons. States themselves are no exception to these conflicts, despite special immunities in this field which might result in less cases of international responsibility of states, as compared to other areas of state action.

Underlying conflicts in investment arbitration. Investment arbitration deals with a narrow set of cases arising from financial institutions and other economic agents’ cross-border activities. In many instances these cases follow rules specific enough to set them apart, if not from other modalities of arbitration, at least from litigation before national courts. More than the conflict between the *legal position* of the parties, investment arbitration often poses a conflict between the *legal orders* parties deem to be applicable to the dispute. This is the reason why in this field foreigners may be granted rights which nationals themselves would not benefit from. Indeed, much before investment arbitration took its current form and reached its current volume, scholars have dealt with this issue. According to a traditional view in international law, granting certain rights to foreign investors should not be seen as a discriminatory approach of a state to its own citizens. It is rather a recognition that nationals and aliens may differ in their corresponding

rights and remedies *vis-à-vis* states (GARCIA-AMADOR, 1958, p. 429-430), an idea which still may resonate well outside the European internal market context.²

Crises as an element of the financial system. An international legal basis for states' actions. It is often argued that crises are a constitutional element of capitalism and that the financial sector is especially susceptible to them (REGLING, 2017).³ While this paper will not investigate the correctness of such an assertion – nor, what would be better, investigate the measures that should or should not be taken given such an assumption –, it may be easily noticed how crises have triggered states to react to imposing financial regulation. Crises have also led states to take direct action – arguably with a very sound legal basis in international law – subsequently leading to arbitration disputes.⁴ A traditional source of international law, the General Agreement on Trade in Services (GATS), contains specific rules on the liberalization of financial services. It expressly provides, though, that states may lawfully affect foreign investors by taking “measures for

² “With regard to cross-border investments, the Commission [is seeking] the adoption of an interpretative Communication to provide guidance on existing EU rules for the treatment of cross-border EU investments, and (concurrently) the launching of an impact assessment with a view to setting out an adequate framework for the amicable resolution of investment disputes (taking in particular into account the fact that bilateral investment treaties between Member States set varying standards of treatment outside the EU legal framework for cross-border investment within the single market and are, thus, incompatible with EU law) (GORTSOS, 2017, p. 164).

³ If not an empirically demonstrated principle, the view that crises are somewhat natural is shared by authorities. The Managing Director of the European Stability Mechanism, asked about the perspective that ESM might play a role not only of creditor, but also of administrator of reforms within European continent said: *So gibt es ein zunehmende Konzens, dass in der nächste Krise, die hoffentlich nicht so bald kommt, aber wir wissen dass in unserer Marktwirtschaftssystem gibt es ab und zu Krise, dass in so einer nächsten Krise der Internationaler Währungsfonds nicht mehr die Rolle spielen soll, die er in den letzten Jahren gespielt hat.* REGLING, Klaus. Interview to the Hessischer Rundfunk aired on 07 October 2017.

⁴ Claims of human rights violations in those cases were harshly criticized. “Government action taken in many states in response to this crisis has involved extensive new regulation of the financial sector and increased state ownership of individual private banks. Many investors have objected, arguing that this governmental action constitutes nationalization of their investments. Not only are investors claiming that standard investor protections are engaged by these actions, but more innovative arguments are also being developed. Corporate investors are now adopting rights-oriented terminology and have described government financial rescue packages as a breach of their human right to ‘peaceful enjoyment of possessions’” (MILES, 2013, p. 83-84).

prudential reasons, including for the protection of investors, depositors, policyholders or persons to whom a fiduciary duty is owed by a financial service provider, or to ensure the integrity and stability of the financial system” (Article 2 of the Annex on Financial Services). Distinguishing national crises from international ones, in finance, requires different criteria than pursuing the same task in law. The interconnectedness of global financial markets by itself would probably make any strict notion of national crises sound obsolete. Nevertheless, insofar as one foreign treaty-protected investor is affected by any state action related to a local crisis, one can argue that one must deal with a crisis of international law.⁵ The cases discussed in this paper fall or purport to fall in this latter category.

2.3. Overview of the ICSID system

Investor treatment under the ICSID system. The ICSID was created by a multilateral convention and exerts its jurisdiction also by means of a network of bilateral investment treaties. Its cases generally tackle standards of treatment granted by states to foreign investors and therefore fall within a subfield of international economic law. Itself constituting international law, the jurisdiction of the ICSID usually is present irrespective of a direct, contractually-based, relationship between the investor and the states. Therefore, ICSID cases may involve general policies adopted by states on an *erga omnes* basis. They comprise regulations and supervisory practices, as well as individual acts against investors, such as enforcement acts, commercial dealings or administrative measures. Depending on the specific treaty provisions, an arbitrator or a panel will assess

⁵ Because the relationship between the financial institution and the state usually develops and is settled under traditional categories of national law, some commentators suggest that those disputes could be deemed international only in an “institutional” sense (LAMM; HELLBECK; RIESENBERG, 2015, p. 243).

whether such action violates the standards of fair and equitable treatment, protection and security, arbitrary and unreasonable or discriminatory measures, most favored nation treatment, national treatment, transfer of funds, umbrella clause and expropriation. Arguably, the standards found in investment treaties aim at establishing a minimum and at times universal content for states' actions in certain international situations. On a case-by-case basis, arbitral Tribunals will examine if an investor should be granted compensation for state actions deemed to have violated the applicable bilateral investment treaty.

The notion of investment in international investment arbitration. Treaty interpretation in investment arbitration cases often relates to the qualification of the investment. A conceptual requirement is usually made to restrict treaty protection only to certain types of investment. Owing to an intricate network of investments in their core business, the fulfillment of this requirement is not trivial for financial institutions. A generalization can be made in the sense that investment treaties generally are intended to attract long-term foreign direct investment, as opposed to short-term portfolio investment.

Types of investment. The duality of long-term and short-term investments matters because treaty provisions normally pose no restriction as to the nature of the business carried out by the investors, whereas financial instruments may and often are used with a long-term view. Therefore, the threshold to qualify as an investment, "barring specific exclusion in the relevant treaty," is usually met "for financial products, including those acquired on the secondary market" (RIVKIN; FRIEDMAN, 2015, p. 117). More clearly, there exists a protected investment as well if the foreign investor carries out business on a permanent basis within the financial sector. Still, some of the transactions made through the financial system by financial institutions themselves or by their clients might not *per se* qualify as a treaty-protected investment.

The elements of investment. Even outside the financial sector, the qualification of investment has been subject to more than literal treaty interpretation. Given that there is no convention definition for what constitutes an investment protected under international investment law, certain Tribunals have attempted to capture an inherent meaning to the concept of investment. The so-called 'Salini criteria' are frequently accepted as such. These account for a contribution of assets, a duration for the investment, a risk undertaken by the investor and a contribution to the economic development of the host state by the overall project.⁶

Rationale for Bilateral Investment Treaties - BIT's. Models to explain the relationship between foreign investors and host states and the appeal of BIT's often point to the obsolescing feature of whatever bargain the former have managed to strike with the latter, in terms of the applicable legal framework, once the investment matures. Since the concessions states usually make at this stage operate on the national law level, the international law safe haven offered by BIT's is supposed to act as a stabilizing factor for political risk. By agreeing to have future disputes settled in accordance to international law, in an international arbitration, states create a legal basis for foreign investors which radically differs from the common experience foreign investors have when dealing with national law and national courts.

⁶ The importance of this approach leads Tribunals to take the test even when other grounds are deemed sufficient to conclude that there is no investment under the applicable treaty. "The Tribunal, by majority, believes that an analysis applying the "objective" test, as pleaded by the Parties, would lead to the same conclusion with respect to Poštová banka GGBs as the Tribunal reached in its analysis of the "subjective" test under the BIT. The members of the Tribunal who conclude that, if the Tribunal were to analyse the GGB interests in light of the "objective" test – contribution, duration, risk – the Claimants would not have an investment under the ICSID Convention, would place particular emphasis on the following circumstances". Poštová banka and Istrokapital v. Greece Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic (ICSID Case No. ARB/13/8). p. 110.

The BIT legal order. Bound by such strict constraints, states convey an enhanced level of trust onto foreign investors seeking a friendly legal environment into which sink costs involved in long-term projects. This is achieved, so goes the model, by the "BIT legal order" even in cases where ruling political classes and investors do not engage directly in any sort of *quid pro quo* previously to the investment. Aaron Broches, a direct participant of the creation of the ICSID under the auspices of the World Bank, recognized: 'it was necessary to leave some freedom to the Contracting States to interpret in good faith the principal concept laid down in the Convention' [that States cannot invoke national law to violate international law] (*apud* SPIERMANN, 2005, p. 74).

State responsibility and investment arbitrations. Investor-state arbitration typically offers a study in state responsibility and the treatment of aliens is one prominent example of its broad scope. The content, if any, of the principle of an international minimum standard of treatment which would be binding on all states continues to be hotly debated. Merely interested observers might ask if this principle is consistent enough to form a reliable source of case-law. Enthusiasts point to how the ample recognition and application of this principle would be a stimulus for investments. Critics draw attention to how it jeopardizes states' regulatory reach. One might easily appreciate where such passion stems from when taking ICSID cases at a closer inspection. They offer treaty-based international jurisdiction access to foreign investors *in lieu* of traditional diplomatic protection to discuss the legitimacy of actions. Thus states can no longer expect to be judged against the background of their own sovereignty. Moreover, they allow for pecuniary reparation instead of *restitutio in integrum* and sheer political sanctions by the home state. In the financial industry, as in other sectors, this combination has a significant impact.

3. FACTUAL BACKGROUND OF THE SELECTED CASES

Chapter overview. This chapter seeks to highlight the pertinent aspects of financial regulation underlying the cases in several ICSID tribunals. It does not purport to examine in detail the *modus operandi* of investment law and its implications, both procedural and substantive, for the international law theory.

3.1. 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)

The investors had a stake at Fortis Group, a financial institution with entities listed in the Belgian, Dutch and Luxemburgish markets. Following Lehman Brothers' collapse, in September 2008, rumors hit the markets that the Belgian banking arm of the Group, FBB, was in financial distress and would proceed to a rights issue to raise capital. Other banks were reluctant to provide FBB with overnight interbank loans. In a matter of days, the three governments took several actions which eventually led the claimants, Chinese institutional investors who had built up the largest shareholding individual position in FBB, to file an arbitration against Belgium.

Initially, the Belgian government injected capital in the Belgian arm by means of a forced capital increase and the acquisition of 49.93% stake in the business. As the crisis persisted, a couple of days later the governments decided to acquire all the assets of the Group. Meanwhile, the Belgian government engaged in negotiations with BNP Paribas, a French bank, to which the majority of the government's stake was later sold. Combined with the dilution of their stake at FBB, the claimants argued that the agreement between BNP Paribas and the Belgium government resulted in an expropriation of their interests in FBB. This was unlawful, *inter alia*, because (a) Belgium failed to afford the claimants'

investments the required standard of protection in regard to their legitimate expectations; (b) Belgium failed to adopt more adequate alternatives to the interventions at FBB; (c) Belgium failed fairly and fully to compensate the claimants in connection with the interventions; and (d) Belgium failed to afford the claimants and their investments due process in its administrative decision-making.

This case did not have a decision on the merits for a technical reason, temporal in nature. The relevant BIT in force at the material time of the facts was different to the BIT in force at the time the dispute was notified.⁷

3.2. *Fedax N.V. v. The Republic of Venezuela*, ICSID Case No. ARB/96/3

This case was decided in March 1998. The investors held promissory notes against the Republic of Venezuela which had been assigned to them by way of an endorsement originating from a company that provided services to the government. Venezuela defaulted on the payments on the principal and on the interest, but after the arbitration proceeding had started the country acknowledged the debt and ultimately the parties reached settlement. However, deciding on the objections raised to its jurisdiction, the Tribunal had to clarify whether the debt claim constituted an investment. Venezuela argued that no capital flow had occurred as to constitute a foreign direct investment and that the promissory notes would not amount to a capital markets transaction which could have constituted a portfolio investment. The Tribunal based its decision to deem the notes an investment and therefore to recognize jurisdiction on the grounds

⁷ “In the view of the Tribunal there is nothing in the wording of the 2009 BIT to justify on the basis of its express language, or on the basis of an implication or inferences, that the more extensive remedies under the 2009 BIT would be available to pre-existing disputes that had been notified under the 1986 BIT but not yet subject to arbitral or judicial process.” *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). p. 56.

that the notes explicitly stated the possibility of transferability to other holders. It also pointed out to the fact that the notes were denominated in US dollars, an indication that foreign investors were targeted when they were issued.

3.3. Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2

The investor based its claim on a contract called Hedging Agreement. This contract constituted a derivative through which *Deutsche Bank* offered to a 100% State-owned Sri Lankan petroleum company, CPC, financial protection from the impact of rising oil prices. The formula for calculating the payments under the agreement provided for bilateral parameters depending on the performance of an underlying asset. "Where the Monthly Oil Price was greater than the Strike Price, Deutsche Bank was obliged to [make payments to] CPC". On the other hand, "where the Monthly Oil Price was lower than the Strike Price, CPC was obliged to [make payments]." During the execution of the contract, proceedings before the Supreme Court and the Central Bank of Sri Lanka questioned the legality of the agreement. Ultimately it resulted in a "stop-payment order" for CPC. Upon CPC's failure to meet what Deutsche Bank considered to be CPC's contractual obligations, the bank availed itself of an early termination of the agreement. It subsequently filed an arbitration. The Tribunal found that it had jurisdiction for the dispute and that the Bank's claims were admissible. On the merits, the Tribunal found that Sri Lanka's actions constituted a violation of the fair and equitable treatment and expropriation standards.

3.4. Eudoro Armando Olguín v. Republic of Paraguay (ICSID Case No. ARB/98/5)

With the intention of funding a business venture in the food sector, Super Snacks, the Claimant made several deposits of dollars in a financial institution in Paraguay, La Mercantil. In exchange for these deposits he received investment

instruments (securities) providing for the payment of interest and bearing the signature of an officer at the Central Bank of Paraguay. Later on, an outbreak of an economic crisis affected the country's financial system, leading La Mercantil to suspend its operations and cease honoring its payments. During the relevant period, Paraguay changed its legislation pertaining financial institutions for which the Central Bank had taken a "dissolution decision". It included, only partially, the Claimant's deposits on a protection scheme. From a scheme "aimed at the payment of holders of savings accounts, with deduction of the legal reserves corresponding to the savings accounts", in which Mr. Olguín would not be compensated, the country's new system "guarantee[d] payment of the deposits consisting of monetary deposits (...) up to the equivalent of the monthly minimum wage times one hundred per account". Given the limitation on the guarantee, the Claimant could not recover fully his deposits.

He filed an arbitration on several. These claims were rejected. The Tribunal found that the signatures could not create a liability for Paraguay. They served registering purposes only. The Tribunal also pointed out that the Claimant "had his reasons (which this Tribunal makes no attempt to judge) for investing in that country, but it is not reasonable for him to seek compensation for the losses he suffered on making a speculative, or at best, a not very prudent, investment". The Tribunal also rejected the argument for discrimination, pointing out to the fact the Mr. Olguín had actually been included in the new compensation scheme, as well as the expropriation claim, since there was no evidence of the deposits being taken by the Paraguayan state.

3.5. Capital Financial Holdings Luxembourg S.A. v. Republic of Cameroon (ICSID Case No. ARB/15/18)

The basis for this arbitration is the investor's claim that his investment in a Cameroonian bank was subject to sequestration and ultimately was unduly expropriated as a result of a governmental intervention. The intervention was followed by the imprisonment of the Claimant's beneficial owner. A rather peculiar situation of this case refers to the fact that besides the actions Cameroonian national authorities, supervisory competences over the bank were exercised on a supranational level by the *Commission Bancaire de l'Afrique Centrale (COBAC)*, an arm of the *Banque des Etats de l'Afrique Centrale*.⁸ The bank had originally been licensed by the COBAC, which at a later relevant point assessed and imposed conditions to a shareholder's restructuring set up by the Claimant with other foreign strategic investors. As the restructuring failed, the Cameroonian Ministry of Finance requested COBAC to designate a provisional manager in replacement of the Claimant's representative in the bank. The jurisdictional issues of the case led the Tribunal to examine its competence *ratione voluntatis* (on the requirement that there should be a conciliation phase prior to arbitration); *ratione personae* (on the fulfillment of the requirements for the Claimant's alleged Luxemburgish nationality); and *ratione materiae* (on the qualification of an investment in accordance to the treaty). The Tribunal considered the Claimant passed the first test, but not the others. It therefore did not reach a decision on the merits.

⁸ COMMISSION Bancaire de l'Afrique Centrale. **Supervision Bancaire.** "Les Etats de l'Afrique Centrale ont perçu très tôt la nécessité de contrôler l'activité bancaire en s'engageant " à harmoniser leurs politiques relatives à l'exercice de la profession bancaire, au contrôle des établissements financiers ainsi qu'à la distribution et au contrôle du crédit " (art. 14 de la Convention du 22 novembre 1972). Il fut ainsi attribué à la BEAC de larges compétences en ce domaine." Available at: <https://www.beac.int/index.php/supervision-bancaire>. Accessed: 28 Feb. 2018.

3.6. Ceskoslovenska obchodni banka, a.s. v. Slovak Republic (ICSID Case No. ARB/97/4)

This dispute involved a complex set of the rights and obligations of the Czech Republic and Slovakia *vis-à-vis* Ceskoslovenska obchodni banka - CSOB, within its restructuring and privatization process, following the dissolution of the former Czechoslovakia. The operation was structured in three phases. The first one started under the aegis of the Czechoslovak government, when part of the bank's assets, then a state-owned entity, was transferred to the government of the two republics to be formed, taking into account the proportion of the respective populations. The second phase, preparatory to the privatization, included the capital increase of CSOB, and the creation of two collection agencies, one Czech and one Slovak, for which part of the bank's assets would be transferred. To implement this second phase, a consolidation agreement was concluded between the Ministry of Finance of the Czech Republic, the Ministry of Finance of Slovakia and CSOB. In the third phase, with the actual privatization, it was determined that at least 51% (fifty-one percent) of the remaining State participation would be divested to an investor, which later happened.

Slovakia's liability in this case derives from the Consolidation Agreement concluded during the second phase of the operation. By this and other specific agreements, the bank transferred to two Collection Agencies - one Czech and the other Slovak, both having as their sole shareholders the respective Ministries of Finance - risky assets relating to non-performing loans. In CSOB's book, these assets were replaced by payments to be made by those agencies with funds that the bank itself had lent them. At the same time, the then-created Slovak Collection Agency would be responsible for recovering the risk loans, with CSOB managing and ensuring payments. For that purpose, many employees were made available to the agency. The central point of the dispute emerged in the

Consolidation Agreement, in that the Czech Republic and Slovakia had taken responsibility for covering the damages incurred by the respective Collection Agencies. CSOB took action against Slovakia for the reduction of its rights, under the Loan Agreement to the Collection Agency, caused by Slovakia's failure to comply with the Consolidation Agreement. The Claimant was awarded a compensation on the basic grounds that the Consolidation Agreement constituted a binding instrument under Czech private national law.

3.7. CDC Group plc v. Republic of Seychelles (ICSID Case No. ARB/02/14)

Investment arbitration under the ICSID may arise not only by means of a general applicable bilateral treaty, but also in fulfillment of an arbitration clause in a contract. The *CDC* case is an example of an even more specific situation: the respondent state was not itself party to the contract, but rather acted as a guarantor of a defaulting loan agreement entered into by the foreign financial institution and a domestic public utility corporation. The loan aimed at funding an energy project which proved to be unsuccessful. Upon the state's refusal to pay back the loan, the company filed for arbitration. During the proceedings, the parties agreed on the jurisdiction of the Tribunal and the fulfillment of the concept of an "investment". On the merits, the respondent claimed that CDC was itself liable for the default, since it had advised the corporation on the viability of the project.

The award indicated that the state's claim, that there was an "emerging jurisprudence" in international law favoring its position, was unsubstantiated by actual arguments. The Tribunal settled the matter under English law, as provided by the contract. The award relied on English case-law: (i) to determine the effects of CDC's appraisal of the contract; (ii) to establish the existence of a duty of care for CDC; and (iii) to qualify whether there was an inequality of bargaining power.

In these three analyses the award relied on English case-law as a parameter for contract interpretation. The Tribunal took into consideration that there should be a difference “between a lender making an appraisal or study of a project for *its own purpose* in deciding whether it will make a loan and making an appraisal or study of a project *for the benefit of the borrower*”. CDC’s claims were accepted and the Republic of Seychelles filed unsuccessfully for an annulment of the award. On the annulment proceeding, the state claimed that the Tribunal applied English law incorrectly – not in the sense that matter should be settled under international law, or even in accordance to its own national law, but rather that there were other judgments of the English courts that were more appropriate for the issue. This too was rejected.

3.8. Guardian Fiduciary v. Macedonia Guardian Fiduciary Trust, Ltd, f/k/a Capital Conservator Savings & Loan, Ltd v. Macedonia, former Yugoslav Republic of (ICSID Case No. ARB/12/31)

No decision on the merits was reached in this case. The Tribunal found it had no jurisdiction *ratione personae* to adjudicate on the dispute, since the claimant could not adequately prove it was a national of a contracting state. Only scant reference is made by the Tribunal to the facts of the case, but they clearly illustrate an important field of financial regulation: the use of financial institutions for money-laundering schemes. The Claimant was a foreign trustee company and financial services provider operating in Macedonia through a local bank. It argued that the State of Macedonia was liable for the damages caused during the proceedings that followed a money-laundering investigation in the United States. The investigations led the Macedonian authorities to close the accounts of the Claimant at the local bank and the imprisonment of one of its directors.

3.9. Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic (ICSID Case No. ARB/13/8)

The Tribunal found it had no jurisdiction over the dispute, but it delved into the legal aspects of the Greek financial crisis in connection to Greek bonds held by investors and in many other relevant elements of the financial markets. In 2010, whilst the Greek crisis was unfolding under the auspices of several international actors, most notably the European Central Bank and the International Monetary Fund, the first Claimant bought in the secondary market *interest in series* of those bonds (not the bonds directly) with different maturities and no collective action clauses.⁹ Those interests were held at a Luxembourgish financial services provider in which they were treated as fungible, with clients not having rights to the securities themselves, but only their economic value.

The bonds were subject to Greek law¹⁰ and had initially been issued to specific entities – “participants”. These participants then laid the grounds for other actors to operate, the “primary dealers”, which were responsible for providing specialized services in the government securities market. In 2011, the aggravated fiscal situation of the Greek government led the International Monetary Fund to call for the so-called Private Sector Involvement solution – a “polite

⁹ These clauses are part of the guidelines issued by the International Monetary Fund for public debt management and are thus defined: “Collective action clauses (CACs) define majority-voting procedures to alter the financial terms of the outstanding debt instruments and can limit the incentive or ability of individual creditors to initiate litigation against the debtor, in case of a sovereign debt restructuring. They may help to bring about a more orderly and prompt restructuring, which in turn could also help governments reduce the large macroeconomic costs that might ensue if they are unable to restructure unsustainable debts in an orderly and predictable fashion.” INTERNATIONAL Monetary Fund. **Guidelines for Public Debt Management**. Available at <https://www.imf.org/en/Publications/Policy-Papers/Issues/2016/12/31/Revised-Guidelines-for-Public-Debt-Management-PP4855>. Accessed at: 23 Feb. 2018. p. 23

¹⁰ The Tribunal describes the interplay of different entities in the following manner: the Greek Government issued the [bonds] through the Bank of Greece System to the Participants in the System and the Participants paid the consideration due to Greece. Participants in turn delivered the [bonds] to the Primary Dealers, who provided the funds for the acquisition. Primary Dealers, in turn, sold the [bonds] in the secondary market. Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic (ICSID Case No. ARB/13/8). p. 16.

circumlocution”, in the words of the Tribunal, “for requiring private holders of government debt to accept some reduction in the principal or the interest, or both, due on the debt”. In 2012, together with European authorities, the Greek government and representatives of bondholders laid the ground for an agreed solution which culminated in the Greek Bondholder Act – Law 4050/2012. This Act provided for the change in conditions of certain bonds, including the ones involved in this arbitration, if a double requirement were met: “participation of at least one half of the aggregate outstanding principal amount of all eligible titles, and vote in favor of the exchange of at least two thirds of the aggregate principal amount of participating [bonds]”. The sovereign debt restructuring which ensued involved an exchange of the qualifying bonds for a combination of new bonds and of European Financial Stability Facility Notes.

The first Claimant’s board rejected those conditions. As a matter of fact, since before the enactment of the Greek act, and on the request of the National Bank of Slovakia, its national regulator, the first Claimant had booked the Greek bonds through an assignment to its main shareholder, the second Claimant. Up until then, those bonds were considered “zero risk” and against them no capital was to be held., a situation the Slovakian authorities wished to respond to. The Tribunal, referring to the ‘Salini criteria’, discussed the concept of investment. It also discussed temporal issues argued by the parties in relation to the facts and the allegedly applicable bilateral investment treaties. It concluded on formal grounds it had no jurisdiction.

3.10. Continental Casualty Company v. Argentine Republic (ICSID Case No. ARB/03/9)

The economic crisis underwent by Argentina in the beginning of the years 2000 entailed a series of interventions in the financial sector.¹¹ The Tribunal summarized them in the following manner: “measures that blocked deposits (temporary bank freeze), severely curtailing the right to withdraw money”; “measures that prohibited the transfer of funds abroad and their exchange in freely convertible and transferable currencies”; “measures that terminated the peso convertibility and its pegging to the U.S. dollar at the fixed exchange rate 1:1”; “measures that rescheduled term deposits and reduced interest rates”; “pesification (that is forced conversion) of outstanding dollar-denominated contracts and private or governmental debt, at a rate of 1.40 peso for each nominal U.S. dollar as to the latter and financial deposits, while in all other cases conversion occurred at par”; “default on and unilateral rescheduling of governmental debt”.¹²

A major line of defense argued by Argentina was the principle of necessity under international law. The Tribunal assessed this defense for each group of measures and considered it was applicable to the greater part of the issues. It found that Argentina violated the BIT fair and equitable treatment standard only when restructuring its governmental debt. In the Tribunal’s view, “Argentina’s financial situation was evolving towards normality when the LETEs were

¹¹ Discussing the same background, see *Daimler Financial Services AG v. Argentine Republic* (ICSID Case No. ARB/05/1) and *Ambiente Ufficio S.p.A. and others v. Argentine Republic* (ICSID Case No. ARB/08/9).

¹² “As to the LETEs [Treasury Bills], Argentina offered to restructure them through Decree 1735/04 in December 2004 by offering a swap of these securities, as well as of several others also in default, against newly issued securities, specifically GDP-linked derivative instruments. CNA did not accept this conversion, since it would have received in exchange “only U.S.\$ 0.30 per dollar and would have been required to waive its rights” and to accept long maturities on bonds from a Government “that had demonstrated its willingness to repeatedly default on its debt.” *Continental Casualty Company v. Argentine Republic* (ICSID Case No. ARB/03/9) p. 66.

restructured, [and thus] Argentina cannot avail itself in this respect of the alternative defense based on state of necessity in customary international law.”

3.11. Alasdair Ross Anderson and others v. Republic of Costa Rica (ICSID Case No. ARB(AF)/07/3)

The Claimants, 137 Canadian individuals, “assert separate and distinct claims against Costa Rica for injuries to their alleged individual investments owing to various breaches of domestic and international law. According to the facts of the case, the Claimants placed deposits – amounting to a “form of participation in an enterprise” – with individuals (the Villalobos brothers) operating on behalf of a licensed entity by the Costa Rican governmental financial regulatory agency under the supervision of the Central Bank. A set of investigations carried out by local and Canadian authorities revealed that the Villalobos brothers were running a Ponzi scheme. As a result, the brothers were arrested, the assets seized, and the license of the entity was cancelled. Upon a subsequent criminal conviction for fraud, some depositors filed civil complaints for compensation in Costa Rican courts. The Claimants chose to sue Costa Rica instead. Claimants argued that “by failing to provide proper vigilance and governmental regulatory supervision over the national financial system, [Costa Rica] had injured their investments in violation of the BIT provisions regarding full protection and security, fair and equitable treatment, due process of law, and protection against expropriation.” The Tribunal accepted the objection *ratione materiae* regarding the non-fulfilment of the investment requirement, “on the ground that the Claimants did not own or control investments in accordance to the law of Costa Rica”.

3.12. Rafat Ali Rizvi v. Republic of Indonesia (ICSID Case No. ARB/11/13)

By the end of the procedural phase of this arbitration, the Tribunal passed a decision on the bifurcation of the analysis of the claims.¹³ It assessed only the jurisdictional objection raised by the Respondent. In this analysis the Tribunal concluded that the investment made by the Claimant “was not granted admission in accordance with the Foreign Capital Investment Law of Indonesia, as required by BIT Article 2(1) and therefore does not fall within the scope of the BIT.” Be that as it may, as the Tribunal made several remarks on the Indonesian legislation setting out the principles for admission of foreigners in the banking sector, it touched one of the cornerstones of financial regulation, the licensing activities carried out by authorities.¹⁴

¹³ “The Tribunal’s enquiry at this stage is limited to ‘a question of law, that is, the meaning of BIT Article 2(1), with particular attention to the meaning of the phrase *granted admission in accordance with the Foreign Capital Investment Law No. 1 of 1967 or any law amending or replacing it.*’ This question of law is distinct from the merits of the Claimant’s case. In addition, any evidence regarding the question whether the Claimant complied with provisions of Indonesian law in respect to admission of his investment is distinct from the evidence relating to the merits of the Claimant’s claims.” Rafat Ali Rizvi v. Republic of Indonesia (ICSID Case No. ARB/11/13. p. 9.

¹⁴ “Thus, the evidence before the Tribunal establishes that Bank Indonesia took the three regulatory steps on which Claimant relies, although Claimant overstates the significance of a ‘fit and proper’ test that was performed by virtue of his role as President Commissioner of CIC, not as a shareholder, as a step-in admission of his stated investment. Claimant has not established that Bank Indonesia took these three steps in awareness of Claimant’s shareholding in the investment. That is an important deficiency in his contention that Bank Indonesia’s approvals, which apply equally to foreign and local investors, amount to a grant of admission of his stated investment. On the examination of the documentation before the Tribunal and having regard to the fact that in this procedure under Rule 41(1) it is for the Claimant to establish that such admission as was required was granted, the Tribunal’s conclusion is that it has insufficient evidence before it that the Claimant’s investment was “granted admission in accordance with” the FCIL”. Rafat Ali Rizvi v. Republic of Indonesia (ICSID Case No. ARB/11/13. p. 56.

3.13. KT Asia Investment Group B.V. v. Republic of Kazakhstan (ICSID Case No. ARB/09/8)

The Tribunal found it had no jurisdiction over the dispute, but made a comprehensive analysis of several points of financial regulation. The case arose from the acquisition by the national government, through a national welfare fund, of a 75.1% stake in BTA Bank, a Kazakh bank. The acquisition followed an injection of capital by the government and a compulsory share issue. The parties dispute whether this acquisition amounted to a forced nationalization of the Claimant's own stake in BTA, or whether, given certain irregularities allegedly carried out in the bank affecting its balance sheet, the prudential regulatory requirements justifying the measure – for the benefit of the depositors – were met. The jurisdictional issue which ultimately convinced the Tribunal concerned the investment qualification. The Tribunal found that the contribution, duration and risk criteria, in accordance to the Salini test, were not met.

The Tribunal ascertained the following facts. The beneficial owner of the Claimant engaged in intense political activity in Kazakhstan. He occupied high posts in the central administration and founded a political party that eventually made strong opposition to the government. This individual served time in prison for criminal charges that, in his view, were fabricated by the government. By ceding to international pressure by NGO's and some Western governments, according to the Claimant's allegations, the Respondent came to release him from prison; but maintained an overall politically-driven persecutorial ambiance against him. This led the Claimant to opt for complex corporate structures, and even failure of disclosure his stake as beneficial owner of a majority interest in BTA.

4. AN ANALYTICAL FRAMEWORK FOR THE UNDERSTANDING OF THE SELECTED CASES

Chapter overview. With an overview of main facts of the cases, one is able now to take a step back to broaden the analytical framework necessary to fully appreciate the repercussions of these disputes. As indicated before, this analysis considers Ole Spiermann's conceptualizations of the state within the context of international adjudication; and their role in designing two forms of international law related to the notions of coexistence and cooperation. It seeks to determine how arbitration embodies these two forms and how it relates to financial regulation.

Spiermann's view on the international legal argument. Ole Spiermann's analytical framework highlights the need to conceptualize states to understand how they may undertake international commitments. A single concept for state, according to Spiermann, would not be enough to explain the whole range of state actions in international adjudication. Spiermann distinguishes *three* concepts of state engaging in *two* forms of international law according to *two* structures. The *conceptions* are: (i) a state acting as a national sovereign; (ii) a state acting as an international sovereign; and (iii) a state acting as an international subject. The *forms* are: (i) international law of coexistence; and (ii) international law of cooperation. The *structures* are: (i) basic; and (ii) and dynamic.¹⁵ When conceived

¹⁵ In Spiermann's own words: "One of the two structures, the basic structure, advances from the national principle of self-containedness (and the conception of the state as a national sovereign) to the international law of coexistence (still mainly the conception of the state as a national sovereign); the line dividing the two categories reflects national lawyers' needs for a common legal system that supplements the several national legal systems in respect of issues involving conflicting state interests (thus also based on the conception of the state as a national sovereign). The other, dynamic structure advances from the international law of cooperation (and, at least as a starting-point, the conception of the state as an international law subject) to the residual principle of sovereignty (the conception of the state as a national sovereign), the dividing line being generated by treaty making (reflecting the conception of the state as an international sovereign)" (SPIERMANN, 2005, p. 106).

as a national sovereign, a state can engage in legal relations with other states choosing its own criteria up to the point that its interests collide with those of other states. Spiermann describes as international law of coexistence that which mediates such set of legal relations. A second concept of state would be that of an international subject. Here the state binds itself to international commitments whether because of an interest in cooperating with other states in particular areas, whether because it manifests a politico-social intention. Ruling that sort of legal relation is international law of cooperation (SPIERMANN, 2005, p. 393-397).

The interplay of international law of coexistence and cooperation in international financial disputes. The financial disputes settled through the ICSID system offer an interplay of international law of coexistence and cooperation. They reflect international law of coexistence, on the one hand, in the bilateral or multilateral dimension of alien protection. States are national sovereigns entitled to act according to their own law for in regard to foreigners in their territory. Their interest, though, in protecting their own nationals abroad drives them to protect nationals of other states in their own territory. Conversely, states bear an international law sovereignty and accept international law as binding in matters of cooperation. Albeit with some caveats relating to the need of national transposition of standards, there is a prominent role in financial regulation for international cooperation among states, and particularly among regulators and supervisors.¹⁶

A historical perspective for financial disputes. The rise of cooperation among regulators and supervisors is a more recent development in a long-standing series of historical cases. International arbitration has produced over the

¹⁶ The prominence of regulators in leading the actions which eventually are brought to an arbitration has led, not surprisingly, to these authorities being summoned to take part in the arbitration proceedings. The Governor of the Central Bank of the Seychelles, for instance, appeared in a hearing as witness for the *CDC* case.

centuries a rich jurisprudence of specific disputes over financial issues. Although the position of different states and their nationals was not always clearly distinguishable,¹⁷ historical cases share the essence of the ICSID arbitrations. Take, in the field of debts, private or sovereign, the recovery of debts held by British merchants against citizens or inhabitants of the United States, in 1794 (STUYT, 1939, p. 2). One should also refer to the discussion over the discharge of the interest due on the Dutch debt in favor of the French government, in 1815 (STUYT, 1939, p. 22); and to the claims of British subjects against Haiti for, among others, loans, in 1890 (STUYT, 1939, p. 166). Specific issues arising from bank deposits qualified a case of Chile against France, in 1892 (STUYT, 1939, p. 181), and also against Great Britain and Peru, in 1894 (STUYT, 1939, p. 187).

International law of coexistence in international investment arbitration. In Spiermann's sense, international law of coexistence does not explain by itself why states engage in BIT's providing for such a broad avenue for international investment arbitration. But the extralegal reasons driving states to sign such treaties – primarily the increase of investment on the state's own jurisdiction – do seem to fall within the notion of interest of the state. An interest of the state will be present even if that interest is not limited to a mere anticipation of how other states will behave in similar, and mutually relevant, situations – that is to say, when it comes to the treatment of nationals abroad. Spiermann's description is useful in highlighting that foreign investors' disputes – not only the financial ones – ultimately require from adjudicators the understanding that states are not only concerned with the fullest application of their national law. They are also concerned with how other states will behave in mutual situations of foreign investment. The dimension of international law of coexistence derives from the

¹⁷ For an analysis of diplomatic protection, see GARCIA-AMADOR, 1958, p. 426-442.

reality that there is a plurality of states¹⁸; and that foreign powers, with little *ex ante* control by other states, may harm the interests of nationals engaged in cross-border activities. The main principle underpinning the development of an international standard of protection for such cases lies in the recognition that states are sovereigns in how to deal with cross-border activities when they fall within the state's jurisdiction.

International law of cooperation in international investment arbitration.

The notion of international law of cooperation has a much narrower applicability for international investment arbitration. It depends more on the content and the nature of the dispute than it does on the dispute settlement mechanism or on the general obligations that state may accord to foreign investors in general. The financial sector, however, with which the cases selected for this study relate, is highly influenced by that dimension of international law of cooperation. States' interest in cooperating in several fields of financial regulation is noticeable in harmonizing efforts intended to avoid regulatory arbitrage by financial institutions and to promote a systemic method of preserving the stability of global financial markets. Other objectives of cooperation play an equally relevant role in financial regulation. Take capital allocation in jurisdictions that require funding from jurisdictions with excess capital in search of returns. What is more, several policies implemented on the national level for financial purposes originated in international bodies such as those in orbit of the Financial Stability Board.

Limitations of investment arbitration case-law in shaping international financial regulation. To say that investment arbitration case-law plays an

¹⁸ "In addition to being 'basic', the international law of coexistence may be seen as 'static'. Its scope is not the result of a law-making process but is derived from facts, namely the existence of a plurality of states" (SPIERMANN, 2005, p. 70).

important role in financial regulation would raise a couple of questions, if not downright objections. It is unclear how many fields of financial regulation are present in such disputes and which percentage of the overall topics they represent. It is equally uncertain how impactful such decisions are in shaping future trends of regulation or of behavior of states and economic agents of the financial sector. They are as a rule individual claims whose effects do not extrapolate to the policy level of financial regulation – and thus will not necessarily cause the state or the financial institution to act in any way differently from the *status quo* prior to the dispute. Finally, it seems safe to assume that such disputes, however grand the sums of money involved, still pale in comparison to the overall size of the international financial sector.

The case for the relevance of international investment arbitration in financial disputes. There is no indication that the treaties underlying investment international adjudication will recede in a significant level, nor that behavior of the parties will be such that fewer conflicts will arise. In fact, the risk and cost involved in arbitration, even when conflicts are not brought to adjudication, may operate as a regulatory chilling effect.¹⁹ On the other hand, companies following a global strategy will be constantly challenged by the variances in the cost of capital in different jurisdictions (MOOSA, 2002, p. 220). This scenario is likely to attract ever more creative and cross-border financial solutions and, hence, international financial players. These players' fierce competition for the global

¹⁹ “Given the current state of flux, it is unsurprising that researchers are largely preoccupied with analyzing arbitral awards. However, it is important that scholars recognize that many conflicts between investors and States will never reach the stage of formal arbitration proceedings. Arbitration is a high-risk, high-cost option for both governments and investors. In contrast, the threat of arbitration is cheap and potentially very effective, even in cases where experts might predict that a State would be successful if it took its chances with a tribunal” (TIENHAARA, 2011, p. 627).

market share, in turn, creates intense cross-border activities which feedback the risks for international disputes.

Advantages of international investment arbitration for the settlement of financial disputes? Against this background, one is left with the question of determining whether the BIT legal order offers better solutions for financial disputes than other adjudication systems, specially the one provided by national courts. The author acknowledges the lack of a sound comparative basis in this study to answer that question. Arguing for a broader use of arbitration in the financial industry, some scholars point to the fact that these disputes may involve “multi-jurisdictional conflicts of law often compounded by competing policy interests that might potentially be misunderstood or not fully appreciated by domestic courts in a particular jurisdiction” (GOLDEN; WERNER, 2015, p. 8). As a matter of logic, a general comparison between the adjudication provided by national courts and international arbitration does not indicate what are the areas of financial regulation which are fully justiciable and the question of whether there are areas in which states’ actions should be treated with more deference, whatever the adjudication system might be.

Limitations of substantive protections regarding financial activities. Commentators have pointed out to the fact that “substantive protections are not, for the most part, specialized regime applicable only to financial disputes” (LAMM; HELLBECK; RIESENBERG, 2015, p. 246). Furthermore, the argument goes that “participants in financial disputes before investor-State Tribunals cannot ignore case law interpreting and applying the provisions of BITs and FTAs in other types of investment disputes” (LAMM; HELLBECK; RIESENBERG, 2015, p. 247). One has also warned that “in spite of rough similarity between the substantive protections contained in different investment treaties, careful analysis of each particular provision in the applicable treaty is essential” (LAMM; HELLBECK;

RIESENBERG, 2015, p. 247-248). Thirdly, these authors have warned that “while most investment treaties contain virtually no substantive protections that apply in financial disputes exclusively, certain investment treaties do contain exceptions and carve-outs that specifically exempt certain categories of financial disputes from one or more of their substantive protections” (LAMM; HELLBECK; RIESENBERG, 2015, p. 248). As a matter of fact, the international regime for financial services, as posited by the GATS, sets forth specific grounds for states’ actions being presumably lawful under international law. As long as those actions are based on prudential reasons or intend to ensure the integrity and stability of the financial system, states would have a safe harbor under WTO law – which does necessarily means investment law.²⁰

Chapter summary. Financial disputes on ICSID cases display a mix of alien protection and financial regulation. Therefore, they are fit for Spiermann’s description of international law of coexistence and cooperation. Despite its limitations in shaping financial regulation as such, international investment arbitration remains relevant under a regulatory chill model. On a procedural level, it is a scholarly contention that arbitration offers more expertise for certain issues of financial dispute, as opposed to national courts. On a substantive level, adjudication by international arbitration in financial disputes may be constrained by the margin states have to implement national policies in the financial sector, specially for prudential reasons.

5. FIELDS OF FINANCIAL REGULATION DISCUSSED ON THE SELECTED CASES

²⁰ “Investor-State tribunals have taken different points of view as to whether WTO law should be consulted in the interpretation of national treatment provision in BIT’s and FTA’s” (LAMM; HELLBECK; RIESENBERG, 2015, p. 268).

Chapter overview. This section depicts the fields of financial regulation touched upon by the selected cases. It is divided into: Contracts in general; Sovereign Debt; Derivatives; Deposit Guarantee Schemes; Resolution of financial institutions; Capital Requirements; Money Laundering; and Expropriation. The resulting collection hardly provides an illustration as to why financial institutions need to be regulated as they are. But by gathering factual material in the field of financial disputes, this collection offers an overview of how some elements of financial regulation are interpreted on the specific issue of compensating foreign investors for damages caused by states. The final part of this chapter points to the standard of fair and equitable treatment as a possible bridge between the yet too separate fields of investment arbitration and financial regulation.

Contracts. Different scenarios for their use. Counterparty trust in financial instruments and services is pivotal to financial regulation. Financial systems are inherently unstable for “lenders want liquidity, but borrowers want long-term contracts” (PARTNOY, 2015. p. 81). From this basic antagonistic position, states and other actors involved in financial international adjudication have used contracts in diverse contexts to establish a set of rights and obligations. Loans are a typical case, but even here one finds dissimilarities. It might be that a contract provides for a direct loan given by a firm to a government in the form of bonds, as in the *Poštová banka, a.s. and Istrokapital SE* case. One may face an indirect loan crystallized in an assignment of a promissory note, as in the *Fedax N.V.* case.²¹

²¹ A State has been found liable for violating its obligations to accord fair and equitable treatment to an investor in a proper classical banking operation. “According to the Banks’ case, the Banks’ investment was the aggregate of (i) the Loan initially extended to ESVA in 1989, (ii) the Guarantee issued by Estrôbprom (of which RAS Ookean was the legal successor) which secured the payments under the Loan Agreement, (iii) the Payment Agreement and (iv) the Mortgage Contract, the last two rescheduling and further securing the payments due to the Banks”. *Okko Pankki Oyj, VTB Bank AG and Sampo Bank PLC v. The Republic of Estonia* (ICSID Case No. ARB/04/6) p. 16.

Contracts may also be used for indirect loans given to a distinct entity, with the government acting as a guarantor, as in the *CDC Group plc* case. It might also be that the contract – or a contract-like instrument – is used to set how a firm will provide loan services until then provided directly by the state or a state-owned entity, as in the *Ceskoslovenska obchodni banka*. Other less classic, but still traditional financial service may also give rise to disputes, as in the hedging agreement of the *Deutsche Bank* case.

Contracts. Different effects according to their nature. One question about these contracts is whether arbitral Tribunals have attached any special effect either to the fact that there were financial in nature, or to the fact that they were government-related. Without an ample basis for comparison, it is hard to say whether Tribunals have somehow disfigured any features that financial contracts were supposed to have. This remains an interesting point for future further inspection. It is possible to say, though, that at least on one occasion a Tribunal accepted that precisely because the borrower was a state, and because the borrowing itself was made under special international circumstances, the contract would not constitute a protected investment and could not be binding in an international sense. Under *Poštová banka, a.s. and Istrokapital SE*, bondholders of countries going through a similar crisis as Greece may therefore expect to be subject to unilateral modifications without treaty standards serving as a basis for compensation.

Contracts. Different scopes of applicability of the law. Since there is no unity of object in financial contracts relevant for international adjudication, one can expect that there should be no unity in the applicable law for those cases either. An initiative in international law for the substantive regulation of contracts, the United Nations Convention on Contracts for the International Sales of Goods expressly “does not apply to sales of stocks, shares, investment securities,

negotiable instruments or money" (art. 2, *d*). Should the solution be applying national law, then again *The Hague Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary* has a fairly narrow scope and has been ratified only by the United States, Switzerland and Mauritius. In the *CDC* case, a dispute of an English investor operating in the Seychelles was governed, as a matter of contractual provision, by English law. However, art. 42 (1) of the ICSID Convention itself, on providing for the applicable law to govern the dispute, establishes that lacking a choice by the parties, "the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws)".

Contracts. Negotiating positions. The binding effect of international financial contracts brought to investment arbitration may be superseded by different lines of argument. In the *CDC* case, the Tribunal had to rule whether an alleged difference in the bargaining power of the parties would invalidate the agreement. Even though scholars have built elaborate theoretical models to explain the relationship of investors and host states under the light of their bargaining powers (AHRONI, 2010, p. 54-56),²² the Tribunal has focused on the

²² A traditional model suggests that investors' greater leverage at the beginning of the cycle of investment shifts into a submission to the interests of the state on later stages. This is no longer consensus. "Today, MNEs are major engines of both international trade and investment. The so-called obsolescing bargain model (Vernon 1971), is also much less relevant as a picture of the world today. The advantages of MNEs today are less based on factors vulnerable to rapid obsolescence and more on their capability to innovate, generate new technologies, and manage knowledge across a global network. The MNE is therefore welcomed as a major engine of development in a knowledge-based global economy. The product life cycle theory is also obsolete, as are descriptions of organization of the MNE such as that portrayed by John Stopford and Luis Wells (1972) and the idea that firms internationalize in a gradual process and in incremental stages over a long period of time (Johanson and Vahlne 1977, 1990)" (AHARONI, 2010, p. 54-56).

strict provisions of the contract and the lack of evidence that they might have been tainted by abuse of power by the investor.²³

Sovereign debt. Cross-border examples. Sovereign debt is a huge business for governments around the world. It is estimated to total 63 trillion dollars and in some countries, it reaches up to 239% of GDP.²⁴ It does not limit itself to national investors buying national debt. Developed countries and emerging markets alike have historically tapped the international markets for bonds denominated in foreign currencies. Data available for the period of 1993-2000 suggests this tapping may vary from 10% to 30% of the overall market (CLASSESENS; KLINGEBIEL; SCHMUKLER, 2017, p. 42). From time to time and region to region, defaults occur.²⁵ The international aspects of such defaults, other than the foreign currency denomination, which poses an extra burden on the defaulting state, may also go beyond the sheer difference in the nationality of the bondholder. Commonly, the applicable law for the bond is, for all purposes other

²³ “Neither the Loan Agreement nor the Guarantee fall within this statement of principle. There is nothing unfair in the terms of the Loan Agreement or the Guarantee. The Republic suggests that the provision for an “unconditional” guarantee was unfair. In the light of the provisions of the 1993 Loan Agreement, the Guarantee and the evidence, the unconditional guarantee was an appropriate commercial term for the protection of the lender. There is no suggestion of pressure brought to bear by CDC for its own benefit. The initiative for the transaction came from the Republic which wanted funding for the gas turbine which it wished to buy for the project. CDC was accommodating the Republic’s wishes or commercial terms. On the evidence, CDC was not seeking to induce the Republic to enter into an improvident transaction for CDC’s benefit.” CDC Group plc v. Republic of Seychelles (ICSID Case No. ARB/02/14), p. 20.

²⁴ BUSINESS INSIDER UK. **Here’s what the world’s \$63 trillion in government debt looks like.** Available at: <http://uk.businessinsider.com/heres-what-the-worlds-63-trillion-in-government-debt-looks-like-2017-10?r=US&IR=T>. Accessed: 10 Dez. 2017.

²⁵ “The frequency of international debt crises raises troubling questions. Are international capital markets deficient? Is government debt different from other kinds of debt? Why do the same countries appear on the default list repeatedly? One view is that some governments find it easy to borrow but hard to repay due to weak domestic institutions and political systems. Since governments still enjoy powerful immunities from enforcement and “gunboat diplomacy” is out of fashion, lenders”. (SCOTT; GELPERN, 2016, p. 1.241).

than its authorization and execution, foreign law.²⁶ Jurisdiction to rule any dispute, even outside the scope of ICSID, tends to be a form of arbitration.

Sovereign debt. International policy implications. The policy considerations for the financial regulation of sovereign debt are various. Contributing to financial stability and transparency, as well as reducing the external vulnerabilities of countries are two of the main aims of the Guidelines for Public Debt Management issued by the International Monetary Fund. This management process seeks to establish and execute a strategy “to raise the required amount of funding at the lowest possible cost over the medium to long run, consistent with a prudent degree of risk”.²⁷ For the issuance itself, which occurs at the typical financial venue of the capital markets, countries will arguably be better off in terms of pricing the more they are able to demonstrate that the legal framework for the operation is as stable as possible. This will chiefly be achieved by governing law and jurisdiction clauses.

Sovereign debt. Impact of BIT's. Treaty-based protection for investors enhance whatever shield they might already have obtained in the bond provisions themselves, and, according to some scholars, it might even confer more

²⁶ Bonds issued by Argentina and registered before the American Securities Exchange Commission, for instance, have the following clause: “The New Bonds will be, and the Indenture is, governed by and construed in accordance with the laws of the State of New York, except with respect to the authorization and execution of the New Bonds and the Indenture by and on behalf of Argentina, which shall be governed by the laws of Argentina. Available at: <https://www.sec.gov/Archives/edgar/data/914021/000119312517081458/d314222d424b3.htm>. Accessed: 24 Feb. 2018. Very similarly, a Brazilian bond has the following clause: “The fiscal agency agreement, the warrant agreement, the debt securities and the warrants will be governed by, and interpreted in accordance with, the laws of the State of New York, without regard to any conflicts-of-laws principles that would require the application of the laws of a jurisdiction other than the State of New York. The laws of Brazil will govern all matters concerning authorization and execution of the securities by Brazil.”. Available at: <https://www.sec.gov/Archives/edgar/data/205317/000119312512003284/d276237d424b5.htm>. Accessed: 24 Feb. 2018.

²⁷ INTERNATIONAL Monetary Fund. **Guidelines for Public Debt Management** Available at: <https://www.imf.org/en/Publications/Policy-Papers/Issues/2016/12/31/Revised-Guidelines-for-Public-Debt-Management-PP4855>. Accessed: 23 Feb. 2018. p. 5.

legitimacy as to how disputes will be settled.²⁸ Treaty provisions do not purport to create a new policy for sovereign debt. In fact, asserting ICSID jurisdiction in that area may be much more pressing for lenders than it is for borrowers, “since governments still enjoy powerful immunities from enforcement and ‘gunboat diplomacy’ is out of fashion” (SCOTT; GELPERN, 2016, p. 1.241). Conversely, the international nature of ICSID arbitral awards is ripe for establishing a peculiar set of enforcement incentives, in that a violation of the ICSID Convention “could jeopardize a sovereign respondent’s future access to World Bank, IMF or other public funding” (CHAISSÉ, 2015, p. 327).

Sovereign debt. Features of the relationship with creditors. In the *Poštová banka and Istrokapital* case, the Tribunal found that “sovereign debt, as indebtedness of a sovereign State, has special features and characteristics”: it finances general government operations; it is an instrument of monetary and economic policy, as a surrogate for hyperinflation and taxation, as it is considered, for political reasons, to be at zero risk by regulators; it functions under a high degree of political influence and risk, including internal and external factors; and it is secured only by “full faith and credit given by the State”, without strict seniority safeguarding bondholders from dilution caused by subsequent new issuances. To the Tribunal, sovereign debt “impact at the local and international levels makes it an important tool for the handling of social and economic policies of a State. It cannot, thus, be equated to private indebtedness or corporate debt.” Against this background in which a differentiation between the claimants’ holdings and the general concept of investment under bilateral treaties was at

²⁸ “The rules governing investor treaty arbitration do value several mechanisms associated with process legitimacy. Although this incorporation is neither complete nor, arguably, entirely successful, it does indicate the degree to which these design elements are held in high regard and broadly utilized. It also offers more specific ideas for incorporating features associated with legitimacy claims into a potential future sovereign debt restructuring mechanism” (LIENAU, 2016, p. 197).

least a possible choice, the Tribunal clarified that the wording of the applicable treaties did not provide for a broad notion of investment. The only reference to bonds was clearly set for corporate bonds (debentures); and, furthermore, the cases of other investment arbitrations in which sovereign debt was considered investment were possible only under a specifically distinct treaty wording. The Tribunal pointed to the fact that although the approval of the prospectus for the issuance falls upon national authorities, the features of bonds enable ample trading at the secondary market in different jurisdictions, specially by means of the activities of clearing houses that centralize certain transactions for their clients.

Derivatives. A significant asset class also used by governments. The derivatives market has entered the investment arbitration scope in *Deutsche Bank vs. Sri Lanka*. It has entered rather modestly, one might argue, considering the damages involved a tad more than 60 million US dollars and that the overall derivative market is estimated to reach something between \$544 trillion dollars and \$ 1.2 quadrillion dollars.²⁹ Not surprisingly, derivatives have attracted immense attention following the 2008 crisis, mostly due to its extent use by financial institutions and its inherent potential for systemic risk.³⁰ In the context

²⁹ VISUAL CAPITALIST. **ALL of the World's Money and Markets in one Visualization**. Available at: <http://money.visualcapitalist.com/worlds-money-markets-one-visualization-2017/>. Accessed: 10 Dez. 2017.

³⁰ "In September 2009, G-20 Leaders agreed in Pittsburgh that: All standardized OTC [over the counter] derivative contracts should be traded on exchanges or electronic trading platforms, where appropriate, and cleared through central counterparties by end2012 at the latest. OTC derivative contracts should be reported to trade repositories. Noncentrally cleared contracts should be subject to higher capital requirements. We ask the FSB and its relevant members to assess regularly implementation and whether it is sufficient to improve transparency in the derivatives markets, mitigate systemic risk, and protect against market abuse." FINANCIAL Board Stability. **OTC. Derivatives Market Reforms. Progress report on Implementation**. Available at: http://www.fsb.org/wp-content/uploads/r_110415b.pdf. Accessed at: 12 Feb. 2018. See the Dodd Frank Act in the United States and the European Market Infrastructure Regulation.

of international adjudication, the use of derivatives by governments was not found to be essentially different to a situation involving only private parties.

Derivatives. Systemic risk and specific contractual obligations. A key takeaway of *Deutsche Bank* is that financial contracts may fall within the concept of investment for the purposes of jurisdiction in investment arbitration. But apart from the structural challenges imposed by the large-scale use of derivatives, which is one of the main targets of the financial regulation emerging from the financial crisis and leading to the mandatory use of central counterparties, specific contractual obligations related to these challenges may arise in financial disputes. A mere consideration of the allegations advanced in the *Deutsche Bank* case exemplifies this statement. According to the Central Bank of Sri Lanka, in performing the hedging agreement, the bank failed in several important aspects. It failed to provide adequate information about the product and its inherent risks; failed to carry out adequate credit risk assessment; failed to fulfill its obligations pertaining the downside risk of the contract; failed to provide adequate information on the modification of the risks and of the market conditions; and failed to be transparent with respect to risks and other parameters pertaining the underlying contract. In sum, a derivative contract would impose special duties to the Bank as a means of protecting the government.

Derivatives. One can perceive the impact of international investment adjudication in the financial sector by considering that these allegations should not be assessed against the background of the Central Bank's own interpretation of the contract and of Sri Lankan law. They are to be – or, in any case, might end up being – assessed by the international standard of fair and equitable treatment instead. The Tribunal considered that the investigation leading to the Central Bank's findings was improperly motivated; that the Government acted in bad faith; that there was a lack of transparency and due process and that the Central

Bank acted in excess of its powers. In other words: the Tribunal interpreted national law in a different manner than national authorities.³¹

Deposit guarantee schemes. Individual rights in the context of public competences. Deposit guarantee schemes were discussed at the *Olguín* case. On the policy level, even though the certificates factually disputed had features considered to be different to regular bank deposits, the *Olguín* decision assessed what could be construed as Paraguay's deposit guarantee scheme. As such, it touched on one of the cornerstones of financial regulation. Such schemes are put in place to protect small depositors and to act as buffer mechanism should a bank crisis prompt unusual withdrawal activity (GORTSOS, 2016, p. 3-4). Although designed to be "ex ante safe devices", in the sense of making depositors certain of compensation, deposit guarantee schemes usually have a limited level of protection, in the sense that not the entirety of the deposits are covered (GORTSOS, 2016, p. 8). The external circumstances of the dispute matter for its limited conceptual significance. Transpiring in South America in the early 90's, the case could hardly be expected to bring discussions under the same category of international cooperation seen in financial regulation following bank crises in south Europe a couple of decades later. However, the basic question raised in the case still resonates: should a state undertake so poorly its banking competences as to trigger deposit guarantee schemes, will it have failed its treaty obligations towards foreign investors? This question was asked as well at the *Alasdair Anderson* case, but there a lack of jurisdiction was found on the grounds that the deposits did not constitute an investment.

³¹ "The Stop-Payment Order does not mention on which legal basis it is issued. Mr. Nanayakkara testified that it was based on Section 46 of the Banking Act. However, this Section does not confer to the Central Bank the power to suspend a contract entered into by a bank but only to take necessary measures in order to guarantee the soundness of the banking system. The Central Bank therefore acted in excess of its powers." *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2. p. 108.

Licensing of financial institutions. International standards for the action of national authorities. The activities of financial institutions generate a degree of systemic risk which has led states – supervisory authorities in particular – to intense collaboration in the last years. Both the creation and the extinction of financial institutions are subject to specific governmental activities. Licensing before national authorities is an ordinary requirement for financial institutions and a somewhat standardized procedure among different jurisdictions. Licensed institutions benefit from a higher level of trust among third parties, an argument investors use in their cases (*Olguín* and *Alasdair Ross Anderson*). The licensing procedure may itself be a cause for a treaty violation (*Rafat Ali Rizvi* and *Capital Financial Holdings Luxembourg* cases). As peculiarities in national legislation allow for regulatory arbitrage, Tribunals also assess whether the corporate structure of the investor reflects any degree of artificiality (*Capital Financial Holdings Luxembourg* case).

Resolution of financial institutions. International standards for the action of national authorities. An international response to systemic risk in the banking sector is found on the Basel III reforms. One of the main drivers for actions in this realm is the political agenda of avoiding that bailouts of failing institutions be funded by taxpayers.³² The legislation enacted for the resolution of banks, guided by the aim of reducing the probability and the impact of failures, ultimately provides for direct intervention of authorities in relevant parts of the institutions' business. National and foreign authorities might have to collaborate if the

³² “The objective of an effective resolution regime is to make feasible the resolution of financial institutions without severe systemic disruption and without exposing taxpayers to loss, while protecting vital economic functions through mechanisms which make it possible for shareholders and unsecured and uninsured creditors to absorb losses in a manner that respects the hierarchy of claims in liquidation”. FINANCIAL Stability Board. **Key Attributes of Effective Resolution Regimes for Financial Institutions**. 15 October 2014. p. 3. Available at: http://www.fsb.org/wp-content/uploads/r_141015.pdf. Accessed: 26 Feb. 2018.

institution's activities abroad so require. For an international investment dispute to arise it suffices that the investor's claims be grounded on applicable BIT standards. Those were the claims at the *Ping An* case, at which no decision on the merits was reached.³³

Capital requirements. Liquidity and solvency as essential features of financial institutions. Capital requirements are geared mostly at banks and insurance undertakings and aim at ensuring appropriate levels of liquidity and solvency. Harmonized approaches for determining the necessary capital requirements for such institutions are fostered by international standard setters and implemented at the national level. A delicate balance and/or overlap affecting institutions with cross-border activities is likely to occur, such as in the *Poštová banka* case. The *Ping An* case also displayed how capital requirements may serve as the grounds for governmental intervention at the shareholders' structure of a company. Impositions in this field may go up to the point of a change of control following a forced capital increase. From the financial regulatory point of view, states can enforce capital requirements in such an extreme fashion, both as a means of protecting depositors in failing institutions, as well as to prevent a contagion to other players in the banking and insurance sector. Seen through the lenses of alien protection provided for in a BIT, the same action may trigger compensation if it entails a direct or indirect expropriation.

Money laundering. Collaboration of authorities to ensure the good standing of assets. Financial regulation imposes a great deal of anti-money laundering measures on financial institutions. They are intended to respond to

³³ Still pending, the *Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic* (ICSID Case No. ARB/14/16) brings forth an alleged "lack of equal treatment to the claimant in relation to other banking institutions operating in Greece, including denial of access to the mechanisms available for liquidity and capital support, such as the refusal of Greece's Central Bank to grant emergency liquidity assistance to Laiki's Greek branch, Marfin Egnatia Bank." According to: <http://investmentpolicyhub.unctad.org/ISDS/Details/587>. Accessed at: 8 Mar. 2018.

the use of financial institutions in situations of covert introduction of illegally acquired assets into the legitimate economy with the aim of disguising their illegal origin. Escalation of money laundering schemes to political hot issues in the global arena are quite common.³⁴ The international background for much of the regulation in this area relates to the activities carried out by the Financial Action Task Force, FATF, an inter-governmental body responsible for issuing recommendations for international standards. Disputes arising in this area generally relate to enforcement on a national level, typically by means of supervisory actions. Cross-border implications, however, are ostensible. This affects both the activities themselves generating the criminal proceeds, as well as in that offshore structures probably remain as one of the favorite tools for money laundering. The *Guardian Fiduciary*, albeit without a decision on the merits, illustrated yet another element of the international arena in anti-money laundering initiatives: the intergovernmental collaboration. The investigations were carried out by American authorities, but the bank accounts were frozen in Macedonia. Similarly, in the *Alasdair Ross Anderson* case, Canadian authorities initiated the investigations on the legality of the deposit taking activities carried out by the Villallobos brothers in Costa Rica.

Expropriation. The baseline for the protection of foreign investors. Expropriation cases constitute a major part of investment disputes. A general rule of thumb is that international law does not prohibit a state of expropriating alien property or rights. It merely tries to set the conditions according to which this act is deemed legitimate. The legitimacy test will be based on principles such as public purpose, non-discrimination, due process and compensation. Still, failure

³⁴ FINANCIAL Times. **LATVIAN crisis illustrates limits of ECB's reach.** London, 21 Feb. 2018. Available at: <https://www.ft.com/content/17140e9e-165a-11e8-9376-4a6390addb44#myft:my-news:grid>. Accessed at: 21 Feb. 2018.

in that test does not invalidate under international law the state's act to the point of creating to the investor the right of being granted the *status quo ante*. It shifts the standard of pecuniary compensation, which may vary from being full, prompt and adequate, on the legitimate low-end, to accounting from lost profits, on the illegitimate high-end.³⁵ Indirect and creeping expropriation both raise treaty obligations issues as well – unless one is dealing with an express treaty exclusion, indirect and creeping expropriations equate to the most traditional sort of expropriation.

Expropriation. A view for financial disputes. In the financial sector, there have been cases in which expropriation allegations were circumscribed to investments in financial products and specific transactions, like in the *Deutsche Bank* case, but also cases in which a stake in a financial business was itself the target for government taking, as in the *Ping An* and the *KT* cases. In the former case, shareholders of a bank, for instance, are in a different position than the bank's creditors.³⁶ In the *Valle Verde* case, a pending dispute relates "to the alleged expropriation of *Casa Propria Entidad de Ahorro y Préstamo*, C.A ("*Casa Propria*"), as well Valle Verde's capital contribution and/or funds held for investment in *Casa Propria*". Another line of argument concerns alleged supervisory failures, like in the *Alasdair Anderson* and *Olguín* cases.³⁷

³⁵ Scholars have suggested the following steps in approaching expropriation cases: first, one must determine whether an expropriation has occurred, that is to say, whether an economic deprivation has taken place; second, one must determine the lawfulness of the taking (LAMM; HELLBECK, RIESENBERG, 2015, p. 263).

³⁶ "In international law, the general rule is that creditor claims that are affected incidentally by governmental measures, such as a nationalization or insolvency proceedings, do not give rise to an international claim. A nationalization of a bank, for instance, has only an incidental effect on the bank's creditors, and does not generally trigger State responsibility of the government concerned" (WAIBEL, 2010, p. 452).

³⁷ The *Olguín* tribunal rejected this argument very firmly: "The Tribunal, despite numerous efforts, was unable to understand the Claimant's reasoning on attempting to equate the loss of money Mr. Olguín suffered to an expropriation. In the latter, a person is deprived of property through an action to take ownership of that property by the State, which logically, contracts an

The fair and equitable standard as a means of protecting of investors.

Probably the broadest standard in investment arbitration theory is advanced by the fair and equitable treatment clause. Said to be the most significant and general of the standards of treatment, this clause is usually associated with the notion of good faith and due process. It protects the legitimate expectations of the investor regarding the overall stability and transparency of the legal framework of the host country even when state actions do not amount to the economic deprivation of the investor's interests.³⁸ The term of art *fair and equitable treatment* is also found in other contexts, most specially on the *Objectives and Principles of Securities Regulation* issued by the International Organization of Securities Commissions (IOSCO).³⁹

The fair and equitable standard as a means of validating states' financial policies. The case being that this standard is intended to protect investors, international financial matters are such that the logic behind the standard may also be applied in favor of states. Take, for instance, the *Continental* Tribunal. In assessing Argentina's argument for the international necessity – and therefore legality – of measures taken in response to the economic crisis, a rather causal approach was taken to accept Argentina's exclusion of liability under international

obligation to pay its price. In this case, it cannot be said that the Paraguayan State had appropriated the investment made by Mr. Olguín, which was lost due to the crisis suffered by La Mercantil and by the Paraguayan financial system in general.” Eudoro Armando Olguín v. Republic of Paraguay (ICSID Case No. ARB/98/5, p. 186-187).

³⁸ “Under the regime of a bilateral investment treaty, changes in the host State's legislation would be examined primarily against the standard of fair and equitable treatment. The legislative framework existing at the time of the investment will often be the basis for legitimate expectations of the investor. Any drastic change in that framework, that seriously affects the investment, is likely to constitute a breach of the BIT's fair and equitable treatment standard” (SCHREUER; MALINTOPPI; REINISHC, 2009, p. 592).

³⁹ INTERNATIONAL Organization of Securities Commission. **Objectives and Principles of Securities Regulation**. Principle 17: Holders of securities in a company should be treated in a fair and equitable manner. Available at: <https://www.iosco.org/library/pubdocs/pdf/IOSCOPD323.pdf> Accessed: 7 Jan. 2018. p. 8.

law. In the Tribunal's view, "the most likely means to avoid the crisis and the measures adopted to face and overcome it, would have been to adopt different policies years before, against the advice and support that Argentina was receiving from the outside". In other words: avoiding the crisis would have violated Argentina's legitimate expectations.

The fair and equitable standard as a tool for multilayered governance for financial regulation? If both investors and states may benefit from the standard of a fair and equitable treatment, a theoretical tool for assessing financial regulation may indeed emerge right out of practical experience. When referring to the decision-makers in financial regulation, it was pointed out how different spheres of law and standards creation interact globally. Scholars term this as a multilayered governance⁴⁰ and highlight the obvious challenge of ensuring a "harmonization of the rule-making process". One proposition is to tackle the ever fast-changing financial sector by bringing to such process the inputs of delegated experts (WEBER, 2015, p. 44), an idea which reflects the search for independence and expertise at the very core of the ICSID system.

Chapter summary. The issues of financial regulation discussed in international investment arbitration are done so as a purely lateral topic. In practical terms, though, when a Tribunal decides whether it should grant an

⁴⁰ "In a multilayered governance concept, the scope of financial activities, the importance of regulatory objectives, and the levels of supervisory activities could serve as criteria for assessing how financial regulation should be allocated to the different regulatory bodies in financial markets. On such a basis, standards could be a key to establishing multilayered governance as they allow for flexible adaptation of internationally agreed rules to national or regional particularities. If the partly existing dichotomy between hard law and soft law can be overcome along the lines set out herein and if the concept of multilayered governance can be realized an adequate legal framework for international financial markets can be achieved. Therefore, the efforts of the 'legislators' (in a wide sense) should go into the direction of aligning the present (international and national) statutory legal sources with the growing body of informal lawmaking. The more such alignment can be effected, the less financial law will suffer from a systemic failure" (WEBER, 2015, p. 45).

investor a compensation or not, it analyses how the state has enacted, implemented and interpreted its financial regulation. The selected cases demonstrate that the number of relevant fields in financial regulation now part of the international investment arbitration horizon is significant.

6. SUMMARY, TRENDS AND CONCLUSION

The background of state responsibility. The common ground for the cases discussed in this paper draws from the development of state responsibility in international law providing for alien protection as actionable treaty obligation for foreign investors. In this subset of state responsibility, contrary to a broader approach by the *United Nations' Draft Articles on Responsibility of States for Internationally Wrongful Acts*, damage emerging from a state action is a condition for granting a remedy to foreign investors in international law. States' expropriating rights under international investment law suffer minimal restriction, although a legal argument arises on the investors' compensation rights.

The background of financial regulation. States pass regulations on several areas of law promote financial stability and market integrity, as well as of protecting consumers and investors. Decision-makers in this field are internationally-oriented, with regulators and supervisors combining a soft law approach on core standards and a hard law approach on national implementation. Very often disputes in the financial sector involve states. Not only different legal positions are confronted in these cases. Investment arbitration will often pose a matter of confronting legal orders in a context of national and international crises.

The background of the ICSID system. The ICSID system relies on a multilateral convention and on a network of bilateral treaties to establish a set of rights in favor of foreign investors meeting specific criteria of investments in a

host state. Generally accepted criteria for such investments denote a contribution of assets, a given duration, a risk undertaken by the investor and a contribution to the economic development of the host state. The rationale for BIT's is to signal an improvement in the host state's handling of political risk. Following this rationale, states create a separate legal order and a jurisdictional basis for the settlement of disputes. On that account, arbitrations under the ICSID cover many trends in the study of international state responsibility.

The background of investor-state disputes in the financial sector. Investment arbitrations' input on financial regulation may still be very limited, but they do cover some areas of interest for this field. Expropriation claims in finance, for instance, are virtually unlimited. One should also highlight their impact on the configuration of several contracts relevant for the financial sector, including derivatives. They have also dealt with issues of capital requirements, of deposit guarantee schemes, anti-money laundering, licensing and resolution of financial institutions.

Profile of the parties and disputes. These disputes are not uniform in the profile of the parties. Both individuals and companies sought remedy against certain states actions. Household names, with global reach and world-wide branding power, stand to get awards on an equal foot as in individual investors. States themselves appear usually as regulators or supervisors, but also as clients of financial institutions. Developing countries as well as advanced northern European countries have act as respondent. Crises-related cases dominate the nature of the disputes, but mere contractual obligations often meet jurisdictional requirements.

Conclusion. An agenda for international investment arbitration in the financial sector. The selected cases pose questions which, according to Ole Spiermann's theoretical construct, reflect both international law of coexistence

and international law of cooperation. This is one of the reasons why these cases might deserve an agenda of their own in future academic works. It is possible to state that the scope of such disputes, by itself broad, may reach ever larger horizons. States' actions in this field stand against somewhat vague treaty provisions. Even when Tribunals do not pass a decision on the merits, they refer to how the underlying issues approach or distant themselves from the concept of investment for treaty-protection purposes. Tribunals also refer quite often to other awards in international investment arbitration, a feature that is likely to compound over time the reach of case-law. The number of pending cases labelled as "finance" at the docket of the ICSID, significantly higher than that of cases already concluded, suggests this effect.

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