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The Global Financial Crisis And International Economic Law

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Motivation

- Lawyers have been slow to explore the potential violations of international economic law so far
- Are there international law restrictions for states in times of crisis?
- What are the most likely venues for disputes and which treaties form the legal basis?
- Caveat: Measures are a moving target; for now mainly parliamentary laws giving great discretion to executive branch; implementing measures/decisions have to be awaited!



Overview

- Procedural Issues
- International Trade Law
 - GATS
 - Subsidies and Countervailing Measures
- International Investment Law
 - How does it work?
 - OECD National Treatment Instrument
 - Treaties of Friendship, Commerce and Navigation
 - Bilateral Investment Treaties/RTA with Investment Chapters
 - National Treatment
 - Fair and Equitable Treatment
 - Exceptions
- Conclusion and Outlook

Procedural Issues

- Likelihood for bringing a claim
 - Trade Law: State-to-State, but unilateral measures like CVD more likely than multilateral avenue (DSB)
 - Investment Law: Investor-to-State (in BITs)
- Investment Law: more likely
 - Scope of Protection: broader, policy space smaller than an trade law
 - No political filter
 - Hard enforceable remedies

↪ Focus on Investment Law

International Trade Law

■ GATS

- Financial Services Measures: included in principle
- But prudential carve-out applies most likely (but good faith limits)

■ SCM Agreement

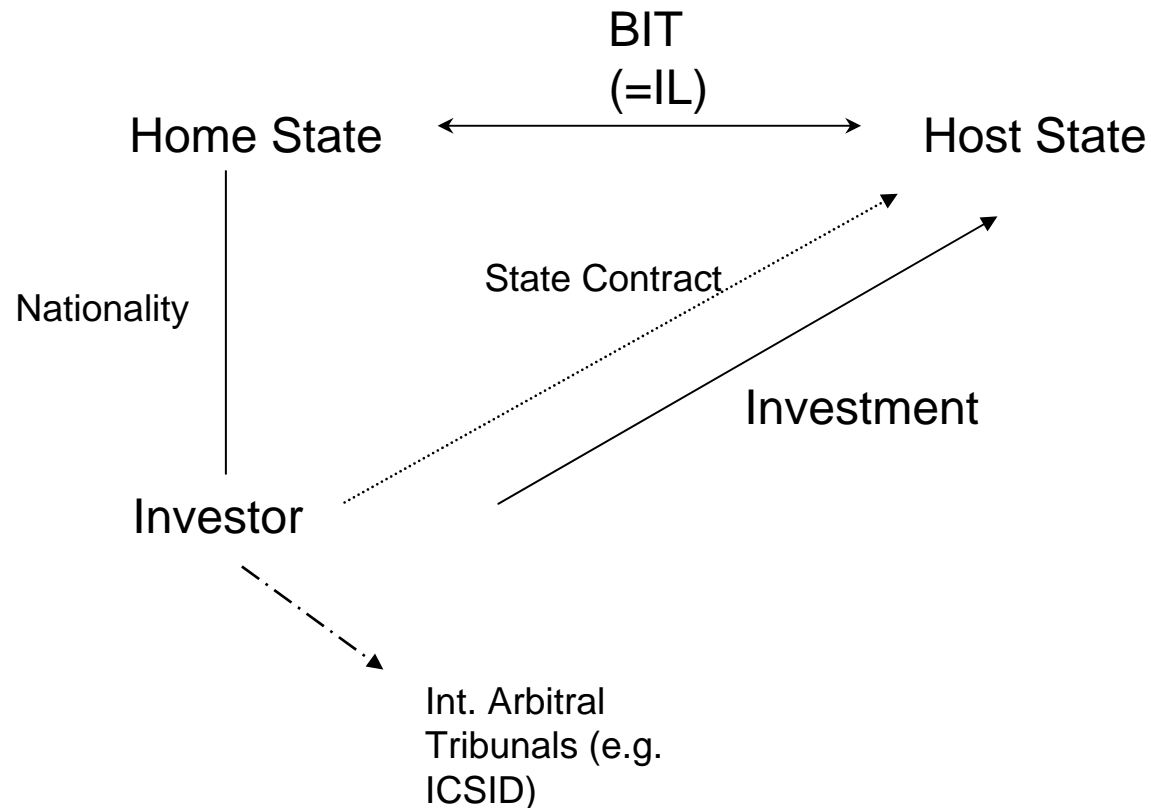
- Measures most likely to be actionable measures (non-actionable non-existent anymore)

■ NAFTA

- Financial Services (Ch. 14): prudential carve-out most likely to apply

International Investment Law (I)

How does it work?



International Investment Law (II)

- OECD National Treatment Instrument
 - Non-binding
 - But: conveys common understanding of NT of OECD States by classifying measures as exceptions to NT
 - May be used for interpretational clarity in investment disputes
- Treaties of FCN
 - Between OECD States; have NT provisions
 - but litigation only state-to-state (except US: self-executing ⇒ investors may litigate before US Courts)
 - otherwise: ICJ

↳ Success on the merits is likely, but procedural hurdles

International Investment Law (III)

- **Bilateral Investment Treaties**
 - Mostly not between OECD states
 - US/Can BITs more restrictive than EU BITs
- **National Treatment**
 - proscribes “less favourable treatment” of a foreign investor that stands “in like circumstances” or in “like situations” with a domestic actor
 - Comparator for “in like circumstances”? competition-based reading of national treatment
 - What is “less favourable treatment”? De iure and de facto
 - Is adverse purpose of the state needed or is effect enough? Jurisprudence is not uniform

International Investment Law (IV)

- How likely is the merit of litigation?
 - Comparator: “like circumstances” (+) for financial industry and e.g. automotive industry
 - “less favorable”:
 - De iure: if origin-neutrality is not guaranteed; e.g. if branches are excluded (e.g. Australia, Ireland, Germany) (+)
 - De facto: depends much how laws are applied, but market test applicable
 - Effects: less favorable enough
 - Purpose: depending on what “rational” ground tribunals accept unequal treatment e.g. on the grounds of systemic risk (CH), substantial business activity (USA)

↳ Success on the merits is likely

International Investment Law (V)

■ Fair and Equitable Treatment Standard

- Discriminatory
- Due Process
- Intransparency

↳ Success on the merits is not likely

■ Exceptions

- Prudential Carve-Outs for Financial Services (NAFTA, US/Can BITs)
- National Security Exceptions: rather unlikely to be accepted (cf. Argentina)

Summary of Legal Instruments and Success of Legal Action

Legal Instruments	Features				
	State to State Dispute Settlement	Investor to State Dispute Settlement	Specific Exceptions	General Exceptions (such as security)	Likelihood of successful action, judged by substantive law
Trade Law					
GATS	WTO	---	Prudential Carve-Out for Financial Services		-
SCM Agreement	WTO	---	---	---	+
Investment Law					
OECD National Treatment	---	---	Notification requirement (none for the measures taken)	---	-
FCN Treaties	ICJ	---			+
BITs and NAFTA (Investment)	ICSID; UNICTRAL	ICSID; UNICTRAL	Some (US, Can for Financial Services)	Some (US, Can: newer BITs self-judging)	+

Conclusion and Outlook

- BITs/Treaties of FCN seem to be the most likely venue
- National Treatment is the norm most likely to be violated
- National Security Exceptions are unlikely to be accepted
- International Investment Law seems the more likely legal venue for restricting States in protectionist tendencies than International Trade Law
- Open question: is the law correctly so strict?