# Whither the New Financial Crisis Claims?

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This month, the British Institute of International and Comparative Law (BIICL) is hosting a roundtable discussion on the global financial crisis and international investment arbitration.

By many accounts, the present global economic nosedive seems to be giving rise to an up-tick in some forms of international arbitration and litigation. Financial institutions are suing one another over unravelling credit transactions, and resource companies are seeking to get out from under unfavourable contracts.

So, it's no surprise that the heads of some international arbitration centres are sounding bullish

But the jury (or tribunal) remains out when it comes to investor-state arbitrations, particularly those arising under investment protection treaties. No one knows whether we will see another wave of investment treaty claims like the one that buffeted Argentina earlier this decade.

With so many erstwhile free-marketers belatedly embracing the state, and jockeying for a government bail-out, investment treaty claims may seem a rather counter-intuitive (or even churlish) business move. But, is this why we've seen few signs of financial crisis-related investment treaty claims?

Probably not.

Indeed, some of the claims arising out of past financial crises have been spawned by government interventions and bail-outs – albeit ones that were alleged to have been handed out in an uneven and discriminatory fashion. (In Saluka v. Czech Republic, the Dutch subsidiary of a Japanese bank was awarded damages due to the Czech Republic's failure to treat foundering financial institutions on a comparable basis.)

Of course, even where potential claimants seek to pin losses on a government, they may face mandatory waiting periods under investment treaties – 3, 6, 12 months – before arbitration proceedings can be initiated.

While some foreign investors have sought to dispense with such waiting periods through the invocation of the Most-Favoured Nation obligation – and a nod to treaties which do not prescribe such lengthy pre-arbitration formalities – a recent ICSID ruling in the Wintershall case may give some pause to investors looking to use MFN arguments to fast-track their arbitration claims.

In view of the procedural steps set out in investment treaties, there is likely to be a time-lag before new financial crisis claims materialize.

So, if foreign shareholders of a down-on-its-luck financial institution want to lock horns with a sovereign Government, they can't just trigger a treaty claim at the drop of a hat.

Of course, even when claims do get filed, they don't always need to be disclosed to the public. Much depends upon the arbitral rules used to bring a claim; with ICSID's public docket contrasting sharply with the more opaque commercial arbitration processes.

(A decade after the Russian financial crisis of the late 1990s, only slivers of information have leaked out about investor-state claims initiated against the Russian Federation. Close scrutiny of law firm publicity materials reveals that foreign bondholders initiated international treaty arbitrations; and a recent, unrelated, arbitration ruling refers to one of these cases (the Nomura claim) in passing.)

So, it is entirely possible that the cataclysmic events of the last few months – including the sometimes haphazard crisis-management by governments – might give rise to treaty-claims against states.

Going forward, as governments respond in a protectionist fashion to these turbulent times, we might also expect to see foreign investors trying to challenge local-purchasing requirements via the use of investment treaties.

Until such claims arise, one might spend time studying the many arbitrations spawned by the earlier Argentine crisis for some lessons. The sometimes conflicting approaches adopted in these cases warrant their own post – or perhaps even their own textbook.