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Financial Disputes in International Courts

INTRODUCTION

International adjudication in finance has a long history tracing back to the various Mixed Claim Commission’s disputes against defaulting sovereigns in the early 20th century.1 So far, the large majority of international financial disputes have been adjudicated in national courts under private international law,2 or in EU courts under the complex regulatory machinery of EU financial and monetary law.3 International financial disputes adjudicated under public international law are, in this context, a more rare and recent phenomenon that has yet to be analysed in its complexity. In recent years, a few studies have discussed the few sovereign debt restructuring disputes arbitrated in international investment tribunals,4 the small number of cases concerning capital control and currency and,5 more recently, the WTO dispute Argentina – Financial Services.6 No study, however, has comprehensively analysed the emerging area of international litigation on financial regulation and supervision.7 This study, for the first time, shines a light on this important aspect of international

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economic law and provides a detailed empirical analysis of the broader phenomenon of international financial disputes in international courts.

The issue of dispute settlement in financial regulation has been overlooked for a long time by the international financial law literature, which mostly focused on the problems of coordination and compliance with international standards. This lack of attention has to do with the absence of a binding international law framework for financial regulation that clearly prevents any form of adjudication. Yet, international financial regulation is not immune from international disputes. First of all, financial regulators do argue over the correct implementation of standards and bilateral agreements. Most of these discussions, though, are conducted informally behind the curtains of Transnational Regulatory Networks (TRNs) and rarely become public. One exception, though, was the well-publicized regulatory dispute between the EU and US regulators over the regulation of OTC derivatives. Secondly, international finance does not involve only state-to-state relations, but also the relationships between regulators and private parties.

Regulatory and supervisory actions such as the implementation of new standards, the bailout or resolution of insolvent banks, or the imposition of fines do affect retail and institutional financial investors, which are actually more protected than regulators under international law. It is precisely this area of international financial relations that has given rise to an increasing number of disputes. This essay will show that the last twenty years – and the period between 2008-2016 in particular - have witnessed an increase in international cases concerning domestic regulatory measures and supervisory decisions, mostly arbitrated in international investment tribunals. As I will demonstrate in Section II of this essay, as of 2017, they account for more than two-thirds of the 105 international financial disputes initiated in the various international courts surveyed. Besides investment arbitrations, these include disputes litigated in the WTO Dispute Settlement Mechanisms (DSM), and human rights courts.

This essay, for the first time, maps the evolving landscape of international adjudication in finance and tries to assess the importance of those tribunals as a source of discipline for the financial system.

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11 In the period covered by this essay there were: 36 disputes concerning regulatory or supervisory measures, 35 disputes concerning the resolution or insolvency of a financial institution, and 34 disputes concerning contractual issues and/or non-strictly supervisory or regulatory measures. See, Section II
In doing so, this essay analyses, based on empirical evidence, a few critical issues such as the effectiveness of prudential carve-outs in protecting financial sovereignty, the reasons behind the claimants’ decision to sue in an international court, and the implications of this phenomenon from a financial stability perspective.

At the outset, it is important to delimit the perimeter of the research. International finance encompasses a broad range of areas and measures, from sovereign debt to money laundering that can affect both private parties as well as states. The scope of this research is to investigate to what extent regulatory sovereignty is affected by international law and the role of international courts in this process. Thus, private international litigation – a commercial case between two international parties adjudicated by domestic courts based on private international law or municipal law – which inevitably forms the bulk of international litigation in finance is excluded from the scope of the analysis. This research will only deal with state measures affecting the financial sector or financial instruments litigated under public international law (excluding European Union law).

This article should be viewed as an exploratory exercise to map the main implications of the rise of international litigation, rather than a definitive account of its problems and prospects. Given the novelty of the subject, there are many open questions that still need to be fully discussed and analyzed. The author’s hope is to shine some light on possible future areas of research. The essay is structured in five main parts. Section I of this article analyses the scope and mechanisms of judicial review of supervisory measures in domestic law and international law. Section II presents the empirical analysis of financial regulatory disputes in international courts from 1990 to 2016, focusing specifically on the WTO DSM, international investment tribunals, and human rights courts. Section III and IV discuss the main implications of regulatory litigation, with particular attention given to the reasons behind this surge, the costs and benefits in terms of supervisory governance and financial stability, and its consistency with the previous literature. Section V concludes by proposing regulatory reforms and suggesting potential areas of future research.

1. ACCOUNTABILITY IN INTERNATIONAL FINANCE

Before entering into the empirical analysis of international financial disputes, it is worth explaining what makes finance so special when it comes to the accountability of financial sector supervisors and, more in general, the availability of judicial protection against a government’s financial measure. This specificity informs the domestic and, especially, the international legal frameworks concerning judicial review, and is key to understanding the recent increase in international regulatory litigation.

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A. Domestic Judicial Review Mechanisms

The financial services sector is among the most regulated segments in the economy. To guarantee financial stability and market integrity, financial institutions and traders are subject to a myriad of licensing and regulatory requirements and are objects of constant supervision by the competent agencies. Not surprisingly, supervisory authorities command unique powers in order to implement their statutory mandates. Their powers are a function of the agencies’ needs to intervene quickly and promptly to address a situation that might quickly escalate into a full-blown crisis. These include the right to conduct inspections, suspend or remove managers, impose (sometimes huge) fines, designate a firm as systemically important, require additional capital, change the corporate structure or the business model of the firm, declare the firm insolvent and apply all the resolution measures deemed necessary under the particular circumstances.

Given their critical role as the guardian of the financial system, financial supervisors are usually structured as independent agencies, and enjoy a higher degree of freedom compared to other government agencies. This means that the level of accountability to which they are subjected suffers from certain limitations. First, supervisors enjoy a wide room of discretion in the way they formulate their recommendations to financial institutions or implement financial policies. For instance, the supervisor’s determination of the liquidity or solvency position of a bank is usually very difficult to challenge and, in many countries, can be appealed only through the agency’s internal review mechanism. Because of the moral hazard and confidentiality problems typical of finance, some policies such as emergency liquidity assistance or bank resolution are expressly vaguely formulated to give a wider room of maneuver to regulators during crises and cannot be appealed. Second, as stated in Principle 2 of the Basel Core Principles on Banking Supervision, supervisors

20 Basel Core Principles, Principle 2
cannot be liable for the actions taken in the course of their mandate, and must be able to perform their
duties with the guarantee that they will not be sued.21

Yet, financial regulators and supervisors do not operate in a total legal vacuum and a minimum
level of accountability procedures is usually guaranteed. For instance, supervisors establish
preferential channels of communication with financial institutions by issuing consultation papers and
by organising face-to-face meetings with individual financial institutions and industry associations to
exchange views on regulatory developments.22 More importantly, supervisors must be accountable
to courts for the exercise of their statutory mandate. The right to take an administrative body to court
is considered a fundamental principle of public law in most countries and is reflected in the Basel
Core Principles that require supervisors to be accountable through a transparent framework for the
discharge of their duties.23

The domestic judicial review mechanisms vary among jurisdictions, but they usually entail an
internal appeal procedure, which can then be challenged in Court subject to some limitations. In Hong
Kong, decisions of the securities regulator can be appealed to the Securities and Futures Appeal
Tribunal, which is independent from the regulator, and can be further challenged in the Hong Kong
Court of Appeal.24 In the US, in matters of banking supervision, some of the decisions of the Office
of the Comptroller of the Currency (OCC) can be appealed to the competent Deputy Controller or the
OCC Ombudsman, while the rest can be appealed to the Federal Deposit Insurance Corporation’s
Supervision Appeals Review Committee.25 In the European Union, domestic judicial review
mechanisms exist in parallel with wider EU-mechanisms.26 In the United Kingdom, for instance, all
financial institutions and traders subject to the decisions of the Financial Conduct Authority and
Prudential Regulation Authority have the right to refer the decisions to the Upper Tribunal’s Tax and
Chancery Chamber. The Chamber is composed by senior judges with substantial financial services
expertise and has wide powers, as appellant parties can bring witnesses, cross-examine evidence, and
challenge the version of the authorities.27

21 Robert J. Dijkstra, ‘Is limiting Financial Supervisory Liability a Way to Prevent Defensive Conduct? The Outcome of
a European Survey’, 43 European Journal of Law and Economics 59 (2017); Robert J. Dijkstra, ‘Liability of financial
regulators: Defensive conduct or careful supervision?’, 10 Journal of Banking Regulation 269 (2009); Donal Nolan, ‘The
22 Basel Committee on Banking Supervision, ‘Report on the impact and accountability of banking supervision’ (2015),
33-34
23 Basel Core Principles, Principle 2 (Essential Criterion 3)
24 HM Treasury, ‘Review of Enforcement Decision-Making at the Financial Services Regulators’ (December 2014), 38
25 Federal Deposit Insurance Corporation, Guidelines for Appeals of Material Supervisory Determinations, available at
https://www.fdic.gov/regulations/laws/sarc/sarcguidelines.html
(2011); Gijsbert Ter Kuile, Laura Wissink and Willem Bovenschoten, ‘Tailor-made Accountability within the Single
27 HM Treasury, above n 24, 37
The legal bases of this judicial review vary but they should include the procedural legitimacy of the measure taken and, to a more limited extent, the substantive reasonableness of the decision. The former ensures that the procedures followed by the supervisory agencies in formulating their decisions do not violate the rules of fairness and due process required by the law. The latter entails the legality of the decision based on the substantive rules governing the measure at stake, which can be the issuance of a license or the decision to resolve a near-insolvent bank.

The substantive legality review is necessarily more constrained by the large margins of discretion that supervisors enjoy in making their determinations due to the peculiar regulatory problems discussed before. In addition, given the lack of expertise of judges on regulatory issues, most of the time, they are hesitant to quash a decision. Hence, courts typically exercise their authority just to guarantee the basic due process and fairness of the regulatory actions.28

The accountability issues described above do not arise, however, when it comes to challenging the legality of a new financial regulation or when the government breaches a private financial contract with an investor. In both cases, there are, in principle, no specific limits to the right of interested parties to bring the government to local courts compared to what would normally be available under the standard domestic administrative review mechanisms. The only actual limitation is with regard to international financial contracts subject to specific choice of law and choice of forum clauses under private international law.

B. Accountability in International Finance Law

The situation is partially different when we move to the public international law sphere. The judicial accountability mechanisms present in domestic law are not easily reflected in international financial law, which, on the other hand, does not benefit from a cohesive and structured international regulatory framework. Indeed, on the one hand, there is no binding international agreement designed specifically to provide international legal standing to international financial investors or regulators in matters of financial policy. On the other hand, domestic financial measures are nonetheless sometimes covered by international agreements on trade, investment, and human rights that do provide standing to states and individuals. Are precisely these latter international agreements that form the legal bases for the claims discussed in this essay.

Since the late 1970s, there has been progressive push for international regulatory and supervisory cooperation in finance. Most of this cooperation takes place through bilateral Memoranda of Understanding between bank supervisors on the supervision and resolution of cross-border banks, international regulatory standards such as Basel III, or general statements of principles such as the

28 Hüpkes, Quintyn, and Taylor, above n 18
IOSCO Objectives and Principles of Securities Regulation. Yet, outside of the European Union, this complex and variegated body of law is structured on the absence of legalization; for this reason, financial standards are commonly defined as “soft laws”. The soft nature of these instruments entails three fundamental characteristics. First, with very few exceptions, those standards are not very detailed; this is to make sure that regulators can fit them to the specificities of their financial system. Second, they are non-binding in order to allow national regulators to decide if and how to transpose them into binding national law. Third, they do not rely on an independent adjudicatory mechanism to interpret them and solve regulatory disputes. It is not surprising, in this regard, that there is no actual specific dispute resolution mechanism for finance. From a litigation viewpoint, and for what concerns this essay, this means that international disputes between regulators can only be argued behind the scenes of TRNs, while firms and individuals cannot use the standards to sue the foreign regulator in an international court.

Yet, finance has not been completely left out of the perimeter of binding international law. Since 1995, the WTO General Agreement on Trade in Services (GATS) provides a very detailed regulatory framework to govern the liberalization of the services sectors among its members that includes also financial services. The WTO framework on financial services, which is further specified in the GATS Annex on Financial Services, sets certain limitations on the regulators’ ability to intervene in the services sector whenever the measure is considering impacting negatively international trade. The same regulatory framework, which is often replicated in Free Trade Agreements covering services, also provides a mechanism to settle disputes among states. The effect of the GATS and FTA is, however, diminished by the use of “carve-outs” clauses explicitly excluding domestic economic policies from the scope of application of the treaty. The most famous clause dealing with financial stability is Article 2 of the GATS Annex on Financial Services, most commonly known as the “prudential carve-out”.

Moreover, financial measures are often covered by the increasingly complex network of International Investment Agreements. Even though, IIAs do not specifically target financial measures,

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31 Sydney J. Key, The Doha Round and Financial Services Negotiations, (Washington: AEI Press, 2003);
33 Mitchell, Hawkins and Mishra, above n 6, 796-801.
they nevertheless set general standards of treatment for the investment – such as prohibition of non-discrimination, fair and equitable treatment, or freedom of repatriation of capital - that limit the ability of the host government to intervene in the financial sector. As we will discuss in this essay, IIAs offer fertile grounds for financial investors wishing to challenge a government measure as they provide an arbitration mechanism that gives standing to private parties against the host state. Having said that, also IIAs sometimes contains escape clauses that protect the sovereign rights of the host country to intervene in the financial sector. This can be done through prudential carve-outs,\(^\text{34}\) or emergency clauses that safeguards the state in the case of an unforeseeable emergency or a pressing need to protect the public interest.\(^\text{35}\)

Finally, financial measures are also indirectly covered by international human rights law.\(^\text{36}\) This is because the various human rights conventions in force around the world contain provisions that protect individuals against basic violation of law that include, among others, the violation of the right of property and the violation of the right of due process. In the context of finance, these two provisions can become a weapon in the hand of individuals wanted to challenge the decision of financial authorities, especially when these are not based on a standard judicial procedure or when they affect the value of a financial investment.

II. EMPIRICAL ANALYSIS

With the above framework in mind, we now turn to the empirical analysis of international adjudication. The objective of this study is to fill this hole in the literature and create a comprehensive map of all the cases litigated in international courts and tribunals involving a financial measure. Those measures can be classified under two distinct categories. The first category concerns government measures taken by the state in its role as financial regulator and supervisor. They form the bulk of challenged measures, and broadly encompass the issuance of decrees imposing new regulatory

\(^{34}\) Mitchell, Hawkins and Mishra, above n 6, 796-801.


requirements for banks or traders, supervisory decisions imposing fines or penalties on market participants, decisions on the granting of new banking or trading licenses, measures by Central Banks in their role as lenders of last resort, or measures concerning the resolution and insolvency of a financial institution.\textsuperscript{37} The second category concerns government measures affecting a financial contract to which the state is a party. These measures affect a minority of the disputes, and they mostly concern sovereign debt contracts.

Since the research covers all disputes initiated in an international court, it is important to say that not all of them resulted in a decision on merits (see Figure 4). To ensure a more careful analysis, I have delimited the temporal ambit of the research only to the cases adjudicated after 1995, the year of establishment of the WTO. The period between 1995 to 2016 is exemplary in many ways, as it has seen the hype of financial globalisation, the rise of international regulatory networks as the main hub for regulatory cooperation in finance, as well as the phenomenon of international investment arbitration.\textsuperscript{38} To create a comprehensive database, I have examined the records of all international courts and tribunals that could potentially adjudicate a financial measure with the exception of the European Union and EFTA courts. The exclusion of the EU from the analysis is motivated by the “specificity” of the EU in terms of institutional architecture, political and economic dynamics, as well as its legal framework.

The analysis showed that international litigation involved only three types of courts: international investment tribunals, the WTO DSM, and human right courts. Below, I summarise the main findings for each court.

**A. International Investment Tribunals**

International investment law is the area with the largest number of cases. In the period covered by the investigation, there have been 60 reported investment disputes affecting the financial sector.\textsuperscript{39} While disputes in financial services have increased over time, they are nonetheless in par with a more general trend that sees a progressive increase in the number of investment disputes initiated. From the table below, we can see that the percentage of financial services disputes compared to the total disputes initiated in investment tribunals is almost constant around 6 to 9 percent for each period


\textsuperscript{38} Key, above n 31; Brummer, *Soft Law and the Global Financial System*, above n 30

\textsuperscript{39} I used the UNCTAD Investment Dispute Settlement Navigator for my research: Financial and Insurance Activities, available at [http://investmentpolicyhub.unctad.org/ISDS](http://investmentpolicyhub.unctad.org/ISDS). According to the UNCTAD database, there are 68 disputes affecting the financial sector. However, 9 of them did not fall into the categorisation I proposed as they were only indirectly affecting a financial instrument and were therefore excluded.
considered. The same trend can be seen also with regard to services sector disputes in general, whose percentage varies between 60 to 79 percent of the total disputes.

**Figure 1: Comparison Between Investment Disputes in Financial Services, Services Disputes, and Total Disputes**

![Comparison Between Investment Disputes in Financial Services, Services Disputes, and Total Disputes](image)

The more interesting results, however, concern the rise of regulatory disputes. To show this, I have classified the disputes into four groups, based on the underlying measure challenged: 1) contractual disputes concerning the violation of contractual commitments by the sovereign, such as the restructuring of a sovereign bond; 2) supervision disputes, which concern a supervisory measure affecting a financial institution, such as the decision of a bank supervisor to remove a bank’s CEO or to impose fines; 3) resolution and insolvency disputes, which deal with a range of measures adopted in the context of a crisis. These might include the provision of emergency liquidity assistance, the write-down of shares or debt securities, the forced selling or nationalization of the institution, and its wind-down; 4) “other’ disputes, which include government measures affecting the life of a financial institution but that are not motivated by a regulatory or commercial reason. Such measures broadly include, the privatization of the financial sector, expropriations in the context of war, or broad emergency measures during a crisis.

As we can see from table 1 below, supervision and resolution/insolvency disputes take the lion share and are significantly on the rise. I now comment on each group.

**Contractual Disputes** Given the prominence of sovereign bond litigation in the international economic law literature, one would expect to see a higher percentage of sovereign debt disputes.
However, they represent only 5 of the 14 cases concerning a financial contract. The rest are purely financing issues concerning derivatives, promissory notes – such as *Fedax v Venezuela*\(^{40}\), the very first investment dispute on financial services - or other financing schemes. As expected, some of the sovereign bond litigation relates to the Argentine Republic’s 2000 economic crisis and subsequent default. Here, a trilogy of sovereign debt restructuring disputes - *Abaclat*,\(^{41}\) *Ambiente Ufficio*,\(^{42}\) and *Alemanni*\(^{43}\) – brought sovereign bonds into the spotlight of the investment arbitration world. Sovereign bonds restructuring was also litigated in the context of the Greek quasi-default in *Poštová banka, a.s. and Istrokapital SE v. Hellenic Republic*\(^{44}\) and, more recently, in *Gramercy v Peru*, albeit with regard to municipal bonds and without a default in the background.\(^{45}\)

**Supervision** This area of litigation concerns measures taken by supervisory agencies in the context of their market oversight and enforcement mandate (as opposed to measures taken in the context of a financial stability mandate). Measures include, the revocation of banking licenses, the closure of bank accounts for anti-money-laundering reasons, the removal of managers, or alleged negligence by the supervisory authorities in carrying out their supervisory mandate. As can be seen from the table, such litigation is significantly on the rise. Notable among it is the 2007 *Anderson v Costa Rica* case, which concerns the alleged failure of the government to provide proper vigilance and governmental regulatory supervision over the national financial system.\(^{46}\) An analysis of the supervisory disputes shows that, in most cases, the subject of the dispute is not the regulation itself but rather the allegedly discriminatory behaviour of the supervisory authorities or fundamental denial of justice. Exemplary in this regard is the 2015 case *Dawood Rawat v Mauritius* in which the supervisory actions by the government of Mauritius were allegedly done for political and personal reasons. The claims included the allegation that the Mauritian authorities illegally appointed special administrators who revoked the banking license of Bramer Banking Corporation and misappropriated the institution as well as several related entities, thereby taking control, and the subsequent sale of their assets to state-owned companies and third parties.\(^{47}\)

**Resolution/Insolvency** The measures falling into this category concern solely the intervention by supervisory agencies, resolution agencies, or the Treasury to address the liquidity or insolvency crisis

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\(^{40}\) *Fedax N.V. v. The Republic of Venezuela* (ICSID Case No. ARB/96/3), Award on 9 March 1998

\(^{41}\) *Abaclat and others v Argentine Republic* (ICSID Case No ARB/07/5), Decision on Jurisdiction and Admissibility (4 August 2011);

\(^{42}\) *Ambiente Ufficio S.p.A. and others v. Argentine Republic* (ICSID Case No. ARB/08/9);

\(^{43}\) *Giovanni Alemanni and others v Argentine Republic* (ICSID Case No ARB/07/8)

\(^{44}\) *Poštová Banka, a.s. and Istrokapital SE v The Hellenic Republic* (ICSID Case No. ARB/13/8), Award, 9 April 2015 (dismissed on jurisdictional grounds)

\(^{45}\) *Gramercy Funds Management LLC, Gramercy Peru Holdings LLC, Gramercy Investment Advisors LLC and Gramercy Advisors LLC v. the Republic of Peru* (claimant notice to commence arbitration, 1 February 2016)

\(^{46}\) *Alasdair Ross Anderson et al v. Republic of Costa Rica* (ICSID Case No. ARB(AF)/07/3), Award on 19 May 2010

\(^{47}\) *Dawood Rawat v. The Republic of Mauritius* (PCA Case 2016-20), Notice of Arbitration and Statement of Claim on 9 November 2015
of an individual bank or a group of banks. Similar to supervisory measures, litigation regarding resolution and insolvency is notably on the rise. The leading case in this domain is *Saluka v Czech Republic*,48 which dealt with the treatment of a foreign bank during a crisis for the very first time. Another important dispute is the 2014 case *Cyprus Popular Bank Public v. Greece*, which challenged the allegedly discriminatory provision of emergency liquidity assistance – commonly known as Lending of Last Resort (LOLR) – by the Greek Central Bank.49 The denial of LOLR prevented the claimant from receiving much needed cash for the bank’s Greek branches and, ultimately, forced it to wind down under the terms of the painful Troika’s Cyprus EUR 10 billion bailout. Another example is the 2012 case *Saab v Cyprus*, in which the claimants, the ultimate owners of FBME Bank Limited, contested the resolution action imposed on the bank by the host supervisory and resolution authority, the Central Bank of Cyprus.50 The forced selling of the foreign bank’s branch caused a pecuniary loss to the owners. Litigation in the context of bank crises did not occur only in Europe. In South-East Asia, the *Al Warraq v Indonesia* case involved the allegedly discriminatory treatment of the main shareholder of Bank Century following its very controversial bailout by the Indonesian supervisor, the Indonesia Central Bank.51 Moreover, South America provides a prime example with the 2010 case *De Levi v Peru*. This dispute revolved around the allegedly unfair resolution of Banco Nuevo Mundo by the Peruvian supervisor.52

**Other** This category features disputes that arose out of broad political, institutional, or economic changes which nonetheless affected a financial institution. Among them are the recent disputes that occurred out of the Russian annexation of Crimea – *Oschadbank v Russia* and *Privatbank v Russia* – in which the Russian government was accused of the unlawful expropriation of two Ukrainian banks.53 Another substantive group of cases concerns claims arising out of emergency legislation, currency conversion or capital controls, and its impact on portfolio investors. Notable among them are *Continental Casualty v Argentina*, 54 and *Gruslin v Malaysia*.55 Finally, the claim in - *Eureko v Poland* – relates to the impact of privatization measures on financial investors.56

The analysis above provides important background facts to better understand the impact of investment law on financial policy and leads to several preliminary hypotheses. First, the role played

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48 *Saluka Investments BV v Czech Republic* (Saluka Investments BV v Czech Republic), UNCITRAL, Partial Award (17 March 2006)
49 *Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic* (ICSID Case No. ARB/14/16)
50 *Ayoub-Farid Saab and Fadi Saab v. Cyprus*, Decision on Jurisdiction on 10 September 2015
51 *Hesham T. M. Al Warraq v. Republic of Indonesia*, UNCITRAL, Award on 15 December 2014
52 *Renee Rose Levy de Levi v Peru* (Levi v Peru) (ICSID Case No. ARB/10/17), Award, 26 February 2014
53 *Oschadbank v The Russian Federation; PJSC CB PrivatBank and Finance Company Finilon LLC v. The Russian Federation* (PCA Case No. 2015-21)
54 *Continental Casualty Company v. The Argentine Republic* (ICSID Case No. ARB/03/9), Award on 5 September 2008
55 *Philippe Gruslin v Malaysia* (ICSID Case ARB/99/3), Award on Jurisdiction on 28 November 2000
56 *Eureko BV v Poland*, (IIC 98, 2005), Partial Award and Dissenting Opinion on 19 August 2005, Ad Hoc Tribunal (UNCITRAL)
by international investment law in financial services has changed radically since the 1990s. Before 2008, there have been very few disputes concerning the reorganization of financial institutions or other supervisory interventions. Until then, most cases focused on contractual claims or emergency legislation. However, from 2008 onwards, most litigation concerned supervisory, or resolution and insolvency measures. Since the year 1990, there have been 35 disputes related to supervisory actions, of which 22 involved bank recovery or restructurings. The remaining lawsuits dealt with “standard” supervisory interventions such as removal of managers, forced closures due to money laundering or crime, and corporate controls. The sharp rise in disputes, and the progressive transfer of the burden of saving banks from taxpayers to bondholders through bail-ins suggests that these are the likely areas of focus for litigation in the coming years.57 From 2008 onward, 29 out of 37 investment disputes involving the financial sector dealt with supervisory measures – which represents 78% of the total number of disputes. If we compare this with the seven disputes identified from 1990 to 2007, this illustrates a 175% percent increase. Second, it is important to note that, unlike in other sectors, financial services did not have disputes on discriminatory changes in the regulatory landscape (such as tougher capital requirements for foreign subsidiaries) that were common in other areas such as the tobacco or energy industries.58 Third, it is noteworthy that emerging economies and developing countries form the large majority of respondent states. At the same time, Basel Committee and Financial Stability Board members have been very rarely challenged. Indeed, at the date of the initiation of the dispute, a respondent was a BCBS member in only 12 cases.59

Figure 2: Breakdown of Challenged Measures in Investment Tribunals by Type

59 Until 2009, the Basel Committee on Banking Supervision had 9 Members (Belgium, Canada, France, Germany, Italy, Japan, Luxembourg, the Netherlands, Spain, Sweden, Switzerland, the United Kingdom, and the United States). The current membership comprises representatives of supervisory agencies from 28 countries. The list is available here http://www.bis.org/bcbs/membership.htm
B. WTO Dispute Settlement Mechanism and FTA Courts

With only two disputes to date – China - Payments 60 and Argentina - Financial Services 61 - international trade law has remained more insulated from international litigation on financial services. International trade law includes both the WTO General Agreement on Trade in Services (GATS) Annex of Financial Services, as well as any Free Trade Agreement (FTA) with a financial services component. 62 From a legal perspective, a financial regulatory measure falls under international trade law only if a treaty member has included financial services in its schedule of commitments. 63 In principle, any state measure that negatively affects the supply of a financial service from one member to the other is subject to the scrutiny of international trade law and can be challenged under the WTO DSM (for violation of the GATS) or the dispute settlement mechanism available in the FTA. Challenged measures might include domestic regulations discriminating between “like” domestic or foreign financial service suppliers, imposition of quotas on market access for banks, insurance or


63 See, Key, above n 31
securities firms, or other measures that impede or render the supply of a financial service by a foreign
firm more difficult.64

The very first element that emerges from this analysis is that international trade law is extremely
effective in keeping financial regulatory disputes at bay.65 Out of the 177 disputes culminated in a
panel report at the WTO in the 1995-2016 period, only two concern financial regulatory matters.66
Despite the numerous calls in the international economic law literature for the inclusion of financial
standards into the scope of the GATS, at present, financial policy remains well separated from
international trade law.67 In this regard, the “prudential carve-out” is proving to be a bastion against
litigation on financial regulations, which probably discourages potential litigants from even thinking
about launching a dispute. As I will explain in the next section, this is probably due to the diverse
political economy of trade litigation, which is more effective in filtering complaints from the private
sector that will ultimately go to litigation. Finally, and so far, there is no indication that a dispute on
financial services has been initiated against a Basel Committee Member. This might suggest that
regulatory disputes can best be dealt with under TRNs.

C. Human Rights Courts

Human rights courts are another avenue for financial disputes. Since 1995 there have been 43 disputes
involving a financial measure, most of which connected to a regulatory or supervisory measure. Yet,
it is important to note that, unlike international investment courts, the amount of financial cases
adjudicated in human rights courts is extremely negligible if we compare to the huge volume of cases
heard. The sole European Court of Human Rights indeed heard more than 18000 cases in the 21years
period considered.68

Researching regulatory disputes in human rights courts proved to be a particularly challenging
task due to the large volume of cases heard every year by the applicable courts, the difficulty of
filtering the disputes concerning a financial measure, and the fact that Courts publish their documents
in different languages. To keep the search manageable, I have filtered the cases published in English,
Spanish and French. As for the three human rights courts - European Court of Human Rights

64 Bart De Meester, Liberalization of Trade in Banking Services – An International and European Perspective
(Cambridge: Cambridge University Press 2014); Federico Lupo-Pasini, ‘Movement of Capital and Trade in Services:
Distinguishing Myth from Reality Regarding the GATS and the Liberalization of the Capital Account’, 15 Journal of
International Economic Law 79 (2012)
International Economic Law 171 (2017); Louise Johannesson and Petros Mavroidis, “The WTO Dispute Settlement
66 To be noted that in the same period, if we consider the complaints that did not go beyond the consultations phase, the
number of new disputes is 522. See, Leitner and Lester, ibid, at 172-176
67 See, Panourgias, above n 32; Regis Bismuth, ‘Financial Sector Regulation and Financial Services Liberalization at the
68 See European Court of Human Rights HUDOC Database, at https://hudoc.echr.coe.int/eng
(ECtHR); Inter-American Court of Human Rights (IACtHR); African Court of Human and People’s Rights (ACtHR) - relevant cases were predominantly detected from the ECtHR, with only one case from the ACtHR. This is perhaps unsurprising given the ECtHR has heard thousands of cases more than the other two younger courts. Given that the ECtHR takes the lion share of the cases, I will focus on ECtHR disputes.

Human rights courts operate under very different legal bases compared to international trade or investment tribunals. First, before a claim can be taken to the ECtHR, all domestic remedies must have been exhausted. This means that ECtHR increasingly serves for constitutional review. The substantive rights discussed within the ECtHR cases are from the European Convention on Human Rights (ECHR). However, only a few of them are relevant for financial disputes. These are the right to a fair trial (Article 6), the right to an effective remedy (Article 13), prohibition of discrimination (Article 14), just satisfaction (Article 41), and protection of property (Article 1 of Protocol 1). In the cases found, arguments concerning Articles 13 and 14 are minimal and often dismissed by the Court. The arguments most relevant are those regarding Article 1 of Protocol 1 ECHR, the most common ground under which claimants will seek just satisfaction for financial loss following a supervisory or regulatory decision. In this context, however, the Court has interpreted the right very strictly as it requires that “the deprivation of property must be lawful, in the public interest and must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights.” With Article 6(1) cases, the primary claim is that the domestic tribunal or court did not award the claimant a fair trial. The European Court is typically only looking at whether the domestic system is fair and is not otherwise replacing its decision substantively.

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69 The Inter-American and African courts also operate under a slightly different system whereby the respective Commissions - Inter-American Commission on Human Rights and African Commission on Human and People’s Rights - have often made a recommendation to the State on the matter at issue first, and then work with them to fulfil that recommendation; this seems to reduce the need for action to the court. Also, the Inter-American court can only receive petitions from the Inter-American Commission or the States’ parties, which again reduces case law substantially.

70 European Convention on Human Rights, Article 35


72 Article 14 is not a stand-alone right. That means that a claimant can only argue that the state has violated his right to discrimination if the matter falls within the ambit of another right within the Convention, whether breached or not.

73 On the violation of property rights in bank insolvencies and resolutions, see Alexander, above n 7

74 Velikovi and Others v Bulgaria, ECtHR, No 43278/98, Final Judgment (2007), paras 159-192
The analysis of the disputes confirms the trend seen in investment law whereby the bulk of cases appertain to measures adopted by supervisory authorities in the context of bank insolvencies. It is interesting to note that, compared to international investment law, disputes in human rights courts involve a higher number of individual depositors, often discussing cases of more limited pecuniary value. This is probably due to the easier access to human rights courts and the lower cost of legal representation. Notably, there is a group of disputes regarding the collapse of the Bulgarian and Czech financial sectors. Most of these involve claims of procedure; more specifically, remedies against the administrative decision concerning the imposition of compulsory administration and the subsequent decisions by administrative and judicial bodies. See, *Credit and Industrial Bank v The Czech Republic*[^75], *International Bank for Commerce and Development and Others v Bulgaria*[^76], or *Capital Bank v Bulgaria*[^77]. Another group of cases, *Reisner v. Turkey*, *Knick v Turkey*, and *Cingilli Holding A.S. v. Turkey* involve the collapse of Demirbank, once the fifth largest bank in Turkey[^78]. The African Court on Human Rights has only received one case, *Kamdem Roger v Member States of the Inter-African Conference on Insurance Markets*, which deals with the supervisory decision by the Inter-

[^75]: *Credit and Industrial Bank v the Czech Republic*, ECtHR, No 29010/95, Final Judgment (21 October 2003)
[^76]: *International Bank for Commerce and Development AD and Others v Bulgaria*, ECtHR no. 7031/05
[^77]: *Capital Bank AD v Bulgaria*, ECtHR N0 49429/99, Final Judgment (24 November 2005)
[^78]: *Reisner v Turkey*, ECtHR No 6815/09, Judgment on 14 December 2015; *Knick v Turkey*, ECtHR No 53138/09, Judgment on 7 June 2016; *Cingilli Holding A.S. and Cingillioğlu v. Turkey*, ECtHR No 31833/06 and 37538/06, Judgment on 14 December 2015
African Conference on Insurance Markets to suspend the managers of an insurance company and to put it under liquidation.\textsuperscript{79} Again, in this case, the Court denied its competence to hear the dispute.

Furthermore, there are several cases dealing with post-privatisation measures adopted following armed conflicts or economic crisis, which affect bank deposits of individuals and corporations; for instance, \textit{Suljagić v Bosnia and Herzegovina} and \textit{Trajkovski v Macedonia}.\textsuperscript{80} Another set of identified cases involved the loss of deposits due to mismanagement or fraud. In those disputes, the claimant usually contends a lack of proper supervision by the competent authorities, as in \textit{M.N. v Bulgaria}.\textsuperscript{81} In \textit{Shestakov v Russia}, which concerns the loss of savings in a Russian bank following the bank’s insolvency during the 1998 financial crisis in Russia.\textsuperscript{82}

At other times, the issue was purely contractual such as the failure of companies to reimburse a loan or the failure of the state to enforce a judgment in favour of the bank acting as the claimant. Exemplary in this regard is \textit{Moscow Narodny Bank Limited v Russia}.\textsuperscript{83} There are also a few cases on sovereign bonds, a group of which concerns the compensation for the defaults of the Tsarist debt issued prior to the Russian revolution.\textsuperscript{84} The dispute revolved around the compensatory adjustment agreed between Russia and France, which deprived bondholders of much of their immovable property. A more recent case, \textit{Mamatas and Others v Greece}, relates to sovereign debt restructuring in the context of the Greek sovereign debt crisis.\textsuperscript{85}

Before concluding, it is essential to mention a few further observations. First, the relatively low number of disputes compared to international investment arbitration has likely to do with the fact that numerous key financial centres such as Japan, South Korea, Singapore, Mainland China, Hong Kong, and the United States are not members of any human rights court. Second, as in the previous cases, BCBS and Financial Stability Board members are very rarely challenged in human rights disputes. Indeed, at the date of the initiation of the dispute, the respondent was a BCBS member in only a quarter of the cases.

\section*{III. PRELIMINARY FINDINGS}

Following the analysis of adjudication patterns in international courts, it is important to shine light on a few broader implications of this phenomenon. Three issues in particular are worth discussing.
First, to what extent tribunals are effective in disciplining financial regulators. Second, the factors influencing international regulatory dispute settlement and, in particular, the notable rise of international regulatory disputes over the past ten years. Third, the reasons behind the choice of court and, more specifically, the very low number of cases litigated in state-to-state tribunals.

A. Are These Tribunals a Source of Discipline for the Global Financial System?

The very first question we should address is to what extent the rise of international regulatory disputes is actually an effective way to influence domestic financial policies; other words, whether tribunals do exert discipline on financial policymaking. In answering this question, I will also look at the effectiveness of prudential carve-outs, necessity clauses and other security exceptions in safeguarding financial sovereignty. Before entering into a detailed analysis, it is essential to underline that the assessment only yields preliminary results, as half of the disputes initiated after 2008 — many of which concern supervisory or insolvency measures - are still pending.

To answer the above question, I have divided the outcomes of all disputes into six categories (Figure 4): A) dispute still pending; B) dispute discontinued for unknown reasons before a decision was reached; C) dispute settled privately; D) decision in favor of the state for lack of jurisdiction; E) decision in favor of the state on merits; F) decision on merits in favor of the claimant or investor.

From the analysis emerges that — after discounting pending disputes - only 35% of cases result in a positive outcome for the claimant either because the dispute was won on merits or because of a settlement. This relatively low level of success, especially if compared to the general higher percentage of success in WTO or investment disputes, suggests that tribunals are still playing a limited role in global financial policymaking. This is in line with what we have seen so far at the domestic level, where the level of judicial review is still limited. Moreover, their role is further limited by their inability to influence or change policies and regulations. Indeed, unlike the WTO DSM, human rights and investment courts can only order compensations. Moreover, the very high number of disputes blocked at the jurisdiction phase — especially in human rights courts - shows that tribunals are still very reluctant to take up the role of guardians of the financial system. This is the result of the filtering role exerted by the strict admissibility criteria used in human rights courts and investment treaties.

The deference towards regulators can be explained by looking at the role of carve-outs and other exceptions. In the context of WTO law, for instance, the prudential carve-out demonstrated to be a fundamental obstacle to the initiation of disputes. Given the secrecy surrounding the pre-consultation phase of the DSM, it is difficult to guess how many claims on financial measures were brought

86 See Johannesson and Mavroidis, above n 65
forward and settled before formally reaching the WTO. Yet, given that no disputes concerning financial services stopped at consultation stage had been formally registered, it is safe to assume that the carve-out has worked effectively as a deterrent. In this regard, as I will explain later, we have to remember that the initiation of a WTO dispute is much more difficult than in international investment or human rights law as member states have the right to filter complaints that will eventually be brought to the DSM.

A very different question is whether the recent Panel and Appellate Body rulings in *Argentina – Financial Services* will open the way for new bolder litigation under WTO law. 87 This 2012 case brought by Panama against Argentina challenged the latter’s adoption of various regulatory measures in the capital and insurance markets that affected negatively the cross-border trade in financial services between the two countries. The importance of the dispute lies in the fact that this was the very first WTO dispute concerning prudential regulation and, above all, the first case in which the 2013 Panel and the 2015 Appellate Body had the opportunity to rule on the application of the prudential carve-out. 88 As the current jurisprudence stands, financial regulators have now the obligation to demonstrate the rationale between a regulatory or supervisory measure and its prudential or financial stability objective. Even though the Panel and the AB confirmed the scope of the carve-out, this partial opening to financial litigation in the WTO might nonetheless encourage other countries to use the DSM to challenge regulatory measures that affect their traders.

**Figure 4: Outcome of the Disputes**

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87 Mitchell, Hawkins and Mishra, above n 6,
88 Sydley Austin, “WTO Ruling Clarifies Flexibility in Member Governments’ Regulation of Financial Services” (6 April 2016); Mitchell, Hawkins and Mishra, above n 6, at 801-806
On the other hand, in the area of international investment law, only in three out of the 60 cases the applicable Bilateral Investment Treaty (BIT) contained a prudential carve-out or another similar clause excluding financial measures from the scope of the treaty. The absence of carve-outs probably explains why there was a surge in financial regulatory disputes over the past eight years, as complaining parties were not immediately confronted with what would have otherwise become a potentially devastating challenge for them. Yet, even though the government’s powers to regulate, supervise or maintain the stability of the financial sector was a key element in all disputes, very rarely did it emerge as a defense raised by the host state; most notably in *Fireman’s Fund v Mexico* where the prudential carve-out was indeed included in the applicable treaty.\(^{89}\) Similarly, only rarely the principle of necessity or essential interests were used as a defense – and mostly with regard to the Argentinian bonds cases.\(^{90}\) Most of the substantive litigation, on the contrary, has focused on the interpretation of fair and equitable treatment standards and non-discrimination.

In the European Convention on Human Rights there are no provisions comparable to the “prudential carve-out”. Nonetheless, the combination of very strict criteria of admissibility to the merits, safeguards contained in the treaty, and a state-favoring jurisprudence of the Court, has ensured that only less than half of the disputes could proceed to the merit phase.\(^{91}\) With regard to the admissibility criteria of the Court, applications were sometimes considered inadmissible as the applicant had not exhausted all remedies available domestically (a fundamental condition to accede to the Court), or because the claimants had no grounds under domestic law enabling them to bring the dispute before the domestic courts with reasonable chances of success. In other instances, the applicants did not demonstrate to have been subject to an “unfair hearing” and be deprived from their right of a fair trial. The Court’s jurisprudence has also developed a set of principles allowing states a large margin of appreciation when it comes to protecting a State’s essential interest. For instance, Article 1 of Protocol 1 (Protection of Property), permits derogation to the essential right of property when it is in the public interest or to secure the payment of taxes, as long as it is done under the conditions provided for by general principles of international law.\(^{92}\) This has proved to be very relevant when it comes to claims concerning financial losses of a bank’s creditors following the institution’s insolvency or resolution. This made it very difficult for creditor haircuts to be considered a violation of personal property.

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89 *Fireman’s Fund Insurance Company v. The United Mexican States* (ICSID Case No. ARB(AF)/02/1)

90 See above, notes 41, 42, 43

91 For an overview of the criteria of admissibility at the ECtHR see, European Court on Human Rights, “Practical Guide on Admissibility Criteria” (2014)

B. What Drives International Financial Dispute Settlement?

A second important question is what explains the trend in financial regulatory litigation. At the outset, it is essential to clarify that international financial dispute settlement is, undeniably, a complex phenomenon that cannot be encapsulated in one single characterization and would probably require individual analyses for each area of law. Regulatory disputes on bank supervisory measures are based on very different legal and economic underpinnings compared to disputes on contractual claims or breaches of fundamental principles of constitutional law. Moreover, the procedural requirements, the level and type of remedies, and the legal bases to initiate a dispute are different from court to court; this inevitably influences claimants’ decisions to litigate. Nonetheless, there are elements in common among all disputes.

1. External Factors

First, there is an obvious link between international financial disputes and macroeconomic or financial crises in most cases. This is self-evident with regard to resolution or insolvency related disputes. However, drastic changes in the economic environment of the host state, often requiring the adoption of emergency measures, also affect the rights of private parties, who then decide to sue. The macro-economic environment, for instance, explains most sovereign debt litigation. There is equally a large economic literature that associates a worsening macroeconomic environment to financial crises.93 For instance, the crises in Argentina, Greece, Cyprus, Russia, Spain and Portugal have all led to a surge in bank insolvencies. There is a relationship between the economic environment and the decision to sue. On many occasions, respondent states are engaged in multiple disputes within the same period of time. For example, Russia was involved in seven different ECtHR cases and one investment dispute in the period from 1999 to 2004. On the other hand, it is surprising to see that a few countries that experienced widespread banking crises – Ireland, Spain, and Portugal – were not touched by litigation at all. Thus, a question worth exploring for future research is why disputes were concentrated in a few countries and not in others.

A second factor is, undoubtedly, the increased use of international investment arbitration as a mechanism to address economic disputes. According to UNCTAD data, the number of initiated arbitrations quadrupled from 10 to 40 per year from 2000 to 2005, with another 50% increase from 2011 to 2016 and an average of 60 disputes per year.94

94 UNCTAD, Investment Dispute Settlement Navigator (accessed on 13 February 2017), available at http://investmentpolicyhub.unctad.org/ISDS/FilterByYear
Third, regulatory developments in financial supervision after the global financial crisis touched heavily on the existing rights of financial creditors, which often had to suffer very painful haircuts.\textsuperscript{95} This is not unusual as financial regulation tends to sacrifice the rights of individuals when necessary to safeguard the stability of the broader financial system. Yet, the toughening of supervisory powers and the increase in the level of supervisory fines, very likely contributed to the surge of regulatory disputes.

2. The Need for Increased Legal Protection

However, looking at the background of the disputes, the respondent states, and the substantive claims, it becomes clear that, most probably, the key factor motivating litigants to pursue legal action against regulators was the need to obtain a judicial review of the supervisory decision or some sort of financial compensation. In this light, the rise of regulatory disputes can be considered a simple manifestation of the demands of increased legal protection by individuals and firms that cannot be satisfied under domestic law because of the limits in the supervisor’s accountability mechanisms. It is not surprising, then, that the large majority of disputes were brought to private-state dispute settlement mechanisms and litigated based on private rights of action in international law.\textsuperscript{96} Even though the ECtHR and international investment arbitration target very different violations of international law and work based on very different procedural rules, they nonetheless have lower barriers of access than state-state dispute settlement mechanisms.\textsuperscript{97} Moreover, both courts offer damages or compensation, which allow claimants to recover the costs of the dispute.\textsuperscript{98} In addition, the legal frameworks of human rights and international investment law are particularly well suited for international financial disputes as they are able to perfectly tackle the destructive impact of state measures on individual property and the inherent ambiguity in the decision-making and judicial review process in finance.\textsuperscript{99}

The need for international judicial review derives from two main factors. On the one hand, firms and investors are increasingly uncomfortable with the limitations in the domestic judicial review mechanism available to challenge supervisory measures. Given the amount of money on the line in the context of a bank restructuring or insolvency decision, or the recent very high fines imposed by supervisors, it is understandable that shareholders try every possible option to challenge the

\textsuperscript{95} See, Alexander, above n 7
\textsuperscript{97} This, however, does not include the much higher cost of litigation in international investment arbitration.
\textsuperscript{98} On the role of damages, see, Robert Cooter and Daniel Rubinfeld, ‘Economic Analysis of Legal Disputes and Their Resolution’, 37 Journal of Economic Literature 1067 (1989);
\textsuperscript{99} See, Athanasiou, above n 26, 26-28
supervisor’s decision.\textsuperscript{100} Indeed, the cardinal principle of the economics of litigation posits that litigation is always the default option for parties, which is exerted only when out-of-court settlement is not possible, too burdensome, or expensive. In simple terms, a claimant will generally file a lawsuit when the expected costs of litigation will outweigh the costs on not doing so.\textsuperscript{101} Moreover, a simple principle of political economy suggests that those who are to lose the most by a decision – such as simple depositors or bondholders – will do everything possible to recover their losses. The same argument applies to sovereign debt or contractual disputes even though they are often initiated by a wider and more dispersed group of claimants.\textsuperscript{102} It is inevitable that, in these situations, creditors will look to international courts as a way to bypass the limitations of domestic law.

On the other hand, data suggest that international investors also use international courts to address a fundamental lack of good governance in the host supervisors’ regulatory and decision-making process. More specifically, claimants use international courts to get judicial relief against what they perceive as politicised, non-transparent, or arbitrary supervisory decisions. Indeed, the data shows that only a small number of disputes involve OECD or Basel Committee members. They are required to comply with minimum supervisory standards, including a certain degree of independence from the government. Most of the respondent states do not have appropriate accountability mechanisms in place able to offer a credible review of the measure challenged. In some cases, there are reasons to assume that internal political dynamics influence the supervisory agency.\textsuperscript{103} Looking at the legal basis and factual background of the disputes, we can see that for the large majority of them the issue was either: (i) a discriminatory or arbitrary decision of the supervisory authority, as well illustrated in \textit{Dawood Rawat v Mauritius};\textsuperscript{104} (ii) or, more rarely, a broader collapse of the supervisory system of the country due to a crisis or privatization measures, as in \textit{Anderson v Costa Rica}\textsuperscript{105} or \textit{Trajkovski v Macedonia}.\textsuperscript{106} The use of international courts as “courts of last resort” to obtain a judicial review of the decision can be seen in particular with regard to human rights litigation in the ECtHR, where most disputes concern the violation of the fundamental right of due process and the right of property.

\begin{itemize}
\item \textsuperscript{102} Julian Schumacher, Christoph Trebesch and Henrik Enderlein, “What Explains Sovereign Debt Litigation?”, 58 Journal of Law and Economics 585 (2015)
\item \textsuperscript{104} \textit{Dawood Rawat v. The Republic of Mauritius} (PCA Case 2016-20), Notice of Arbitration and Statement of Claim on 9 November 2015
\item \textsuperscript{105} Alasdair Ross Anderson et al v. Republic of Costa Rica (ICSID Case No. ARB(AF)/07/3), Award on 19 May 2010
\item \textsuperscript{106} \textit{Trajkovski v Macedonia}, ECtHR No 53320/99, Decision of Jurisdiction on 7 March 2002
\end{itemize}
C. The Irrelevance of State-to-State Litigation

One of the main findings of this research is that state-to-state regulatory litigation is a very rare occurrence. State-state dispute settlement is a very common way of litigating international disputes that relies on the espousal of a claim by the home state, which then litigates on behalf of its citizens against another state. This mechanism is particularly common in international trade, as the WTO DSM and virtually all dispute settlement mechanism in FTAs rely on state-to-state litigation. It is also common in many regional courts, public international law courts and, increasingly, in the new generation of international investment agreements. In the present study, however, the only state-to-state court where disputes were found was the WTO DSM. The irrelevance of state-to-state litigation can also be seen in the context of EU financial law, which is nonetheless outside the scope of this study. Despite the higher number of cases litigated in the Court of Justice or in the EFTA Court, the number of state-state disputes is negligible compared to private-state disputes. This is likely due to the fact that the EU Commission or the EFTA Secretariat often takes the role of appellant on behalf of the injured members.

The question, then, is: why is state-to-state litigation almost non-existent in international finance? One possible reason is that, in the WTO context, the prudential carve out is undoubtedly extremely effective in keeping financial regulation outside of the scope of the WTO Agreements. Moreover, the combination of Articles 1(3)(b)(c) of the GATS and Article 1(b) of the GATS Annex on Financial Services that excludes monetary and other macroeconomic policies from the ambit of application of the GATS prevents sovereign debt disputes from being litigated under WTO law.

More generally, the limited appeal of state-state litigation has to do with the actual type of claims and the remedies available that ultimately reduce the interest of private claimants in lobbying their governments to initiate the dispute. State-State is a two-steps process. First, individual firms have to invest time and money in convincing their governments that the potential benefits of initiating a dispute are higher than the costs in terms of reputation, risks of retaliations, and lawyers’ fees. Only if they are successful at that will their government start the official procedures. With this in mind, WTO litigation is extremely useful when the main interest of the complaining party is to remove a regulatory, tax, or administrative barrier to trade, thereby permitting a return to the situation

108 For instance, in the infamous EFTA v Iceland dispute, the EFTA Surveillance Authority took the Icelandic government to court together with the UK and Dutch government as third parties.
of fair competition that reflects what was envisaged in the Schedule of Commitments.\textsuperscript{111} In the context of finance, however, international regulatory disputes – those where the complaining party’s main objective is to remove or change a regulatory measure applicable across the board to all firms and individuals in the respondent’s financial system - are better dealt with by TRNs. The soft law literature gives a good insight as to why regulatory disputes are not made for international litigation.\textsuperscript{112} Regulators might fear peer-pressure or might need to maintain good relationships with other regulators. Another possible explanation is that regulators do not want to litigate regulatory and supervisory matters in public due to the need to maintain secrecy over critical supervisory data.

Conversely, based on the available data, it seems the main objectives of the complaining parties are often to revert an unjust supervisory decision that has caused a financial loss to the firm, or to enforce a contract, or to obtain compensatory damages when these two options are not possible. International trade tribunals, however, are not suited for these objectives as they do not envisage compensatory damages. In the cases analyzed, this means that the pecuniary losses suffered by the individual firm or investor would not be compensated.\textsuperscript{113}

Thus, given the lobbying costs and amount of time required to convince a government to initiate a dispute, there are actually very little incentives for private parties in doing so.\textsuperscript{114}

IV. PROBLEMS AND PROSPECTS

A very different question that must be addressed is whether the trend in international litigation is a positive development for the global financial system and its legal architecture. This is not an easy question to answer as it can be approached from different angles. There is a voluminous political scientific and legal literature that has examined the role and functions of international courts.\textsuperscript{115} This study is focused primarily at two issues: domestic governance, and financial stability.

\textsuperscript{111} Schwartz and Sykes, above n 109
\textsuperscript{113} Sykes, above n 96
The analysis above showed a robust correlation between the decision of a party to bring a dispute to an international court and an insufficient level of legal protection in domestic law. Allowing parties to challenge a domestic measure in international courts, however, could be a double-edged sword. On the one hand, deciding the scope of judicial review for supervisory measures is a complex task that requires striking a delicate balance between the competing needs to guarantee market stability and the protection of fundamental rights. Thus, it should not be the objective of international law to create a chink in the armour of financial regulation to allow investors to bypass supervisory standards. This would be inefficient and potentially lead to instability. On the other hand, a basic principle of natural justice and due process necessarily demands some level of accountability for supervisors, as required also by the BCBS Core Principles. Thus, a supervisory decision based on political motives or taken outside the mandate of the local authority should have the opportunity to be reversed. If there is a role for binding international law in finance, it is precisely to guarantee a minimum standard of judicial review. In this light, there are two main issues we have to consider. First, whether international adjudication incentivises better financial governance. Second, whether the current adjudicatory system is appropriate to deal with the specificities and the economic needs of international finance from a legal and procedural perspective.

A. International Courts and Domestic Governance

There is a strong argument in support of international courts as means to incentivize better domestic governance and raise it to the minimum standard required under international law. The economics of international adjudication show that international law can drive states’ behaviour towards a global Pareto-optimal level. The conventional wisdom holds that the remedial system that usually goes alongside the adjudicatory function of international courts raises the costs of deviating from international law. In this regard, both international investment tribunals and human rights courts can order the losing party to pay damages or compensations to the claimant. Given the often very high amount of compensation requested by the claimants, and the high compliance rate with the

116 Athanasiou, above n 26, 33-35
117 Moremen, above n 96
118 This will equally depend on the level of openness of the financial system, its level of participation in TRNs, and the broader domestic institutional and legal framework.
tribunal’s decision by the losing party, it is safe to argue that this remedial system would indeed incentivise better domestic governance.

In addition, international courts increase the reputational losses from non-compliance with international treaties. The reputational mechanisms embedded in international courts and the threat of damages might help supervisors in adopting fairer and more stable regulatory decisions. First, tribunals disseminate information among the parties of the dispute thereby increasing the likelihood of a mutually agreed solution. Second, tribunals act as a megaphone to the world with regard to the behaviour of the respondent state. This in turns creates fundamental reputational consequences for the state in question among its peers and also among the broader international financial community. The negative consequences clearly augment when the tribunal has the power to demand the payment of compensatory damages or the removal of the challenged measures and the establishment of the status-quo-ante. Conversely, a tribunal that rules in favour of the respondent state could reinforce the supervisor’s good reputation and give a positive signal to the international community. The reputational function of tribunals is particularly important in this context if we consider that most respondent states are not TRNs members and, as such, do not benefit from peer-review and institutional mechanisms that these organisations offer.

B. The Limits of the Current System

Provided that international courts can sometimes compensate a deficit of legal protection and potentially improve domestic financial governance, the next issue would be the question on how to reconcile the benefits of international adjudication with the specific needs of global finance. In this regard, it is obvious that despite the essential function of protecting fundamental rights, the current system presents some critical aspects that need to be addressed.

The first problem concerns the overlapping jurisdictions of international courts and the peculiar risks that forum shopping presents for international finance. This danger is particularly acute with regard to claims involving supervisory and insolvency measures challenged in international investment and human rights courts. The proliferation of international courts is a relatively recent

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121 UNCTAD, “Investor State Dispute Settlement: A Sequel”, UNCTAD Series on Issues in International Investment Agreements II (2014), 156
123 Guzman, “International Tribunals”, above n 115
124 Ibid, 181
125 On this, see Brummer, Soft Law and the Global Financial System, above n 30
126 Most respondent states are, however, subject to the IMF-World Bank Financial Stability Reports
127 WTO law is less relevant when it comes to forum shopping due to the nature of litigation relying on states and the role of the prudential carve-out which keeps financial regulatory disputes at bay. This could nonetheless change if, going forward, WTO panels would interpret carve-outs more loosely thus incorporating financial standards into WTO law.
phenomenon in international law that nonetheless affects most areas of international relations, from trade to environmental law.\textsuperscript{128} There is a wide array of literature that analyses the social costs arising from the proliferation of international tribunals.\textsuperscript{129} These include increased litigation costs and potential waste of resources, use of oppressive litigation tactics, the danger that inconsistent rulings might undermine the legitimacy in the system, avoidance of double jeopardy and lack of finality of rulings. Among them, the dangers of oppressive litigation tactics and the absence of regulatory certainty are the most critical for international finance.

Oppressive litigation is a well-known problem in international finance, especially in sovereign debt, where prolonged legal battles often leads to suboptimal debt restructuring.\textsuperscript{130} A few hedge funds have indeed learned how to use strategic litigation tactics obtain incredibly high returns on their sovereign bonds.\textsuperscript{131} The rise of forum shopping could extend the dangers of oppressive litigation beyond sovereign debt and affect other areas of finance. The risk is particularly acute with regard to cross-border bank insolvencies with regard to the application of the bail-in tool.\textsuperscript{132} The distribution of financial instruments across a dispersed group of investors will enhance the opportunities for vulture funds to collect distressed debt in the secondary market and then use the available network of treaties to bring the supervisor to court with the hope of extracting a better deal in the context of the restructuring procedure.\textsuperscript{133} The risks of prolonged regulatory disputes will increase market uncertainty.

The second problem concerns the substantive applicable law, which simply does not respond to the needs of financial regulation and supervision. There is no doubt that a blatant violation of due process – for instance, the unjustified imprisonment of a bank’s CEO for political reasons or the forced nationalisation of a bank – would certainly fall under the purview of the European Convention of Human Rights or a Bilateral Investment Treaty and, hence, justify the submission of the case to the ECtHR or investment arbitration. Yet, it is also accepted that, outside of a few specific scenarios, those two bodies of laws – and the WTO Agreements to a certain extent – are not made to deal with the specificities of finance, which responds to very different underlying logics.

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\item \textsuperscript{130} W. Mark C. Weidemaier and Anna Gelpert, ‘Injunctions in Sovereign Debt Litigation’, 31 Yale Journal on Regulation 189 (2014)
\item \textsuperscript{131} Jonathan I. Blackman and Rahul Mukhi, ‘The Evolution of Modern Sovereign Debt Litigation: Vultures, Alter Egos, and Other Legal Fauna’, 73 Law and Contemporary Problems 47 (2010), 53
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\end{itemize}
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For instance, the principle of non-discrimination is a bedrock of human rights, investment, and WTO laws. In two important disputes, *De Levi v Peru* and *Cyprus Popular Bank Public. v. Greece*, the discriminatory treatment given to foreign banks by the host country authorities were at the center of the legal debate. In finance, however, discrimination operates in a very different way compared to trade or investment law. In the context of a bankruptcy, the different treatment accorded to different classes of investors is fundamental to achieve a successful bankruptcy. Moreover, a discrimination between “like” investors based on their nationality is not unusual and, sometimes, necessary to prevent a run on the banks or maintain fiscal stability. The same logic applies to the principle of due process, which must necessarily be interpreted differently in finance. This is because the judicial review and accountability mechanisms are reduced to ensure a swift supervisory settlement and guarantee certainty to financial markets. Finally, the right of property suffers from essential limitations in finance as financial markets are, by their nature, more exposed to financial risks. In the context of an insolvency, the decision of a supervisor to write down the liability of the financial institution is sometimes necessary to prevent a potential worsening of the crisis. Distributional trade-offs between different classes of creditors or between creditors of different banks are not unusual as they are motivated by the broader need to maintain the stability of the financial system.

The third problem concerns the procedural rules of the tribunals, which are simply not made to accommodate the needs of international finance. First, regulatory litigation requires speed procedures in order to minimize uncertainty in the market. In many international courts, however, litigation could last for years. Most importantly, regulatory litigation requires expert judges able to navigate the complexities of regulatory policies and to understand how sophisticated financial instruments work. International courts might not have the expertise required to adjudicate complex financial disputes potentially worth billions of dollars. In the context of international economic law, the issue could be tackled by requiring financial disputes to be judged only by finance experts, as this appears to be the trend in the new generation of trade agreements. For instance, in the Trans-Pacific Partnership (TPP) draft Agreement, there are important safeguards in the event of investment disputes involving financial regulatory measures, including provisions regarding the financial expertise of potential arbitrators. Most significantly, the Agreement allows prudential measures to be immediately be

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134 See, *De Levi v Peru*, above n 52; *Cyprus Popular Bank Public. v. Greece*, above n 49
removed from an investor-State arbitration proceeding and be resolved through a separate, State-to-State arbitration between relevant TPP governments, rather than in an investor-State proceeding.\textsuperscript{138}

In summary, the current adjudicatory system presents fundamental flaws, as it was not designed to deal with the specificities of finance in terms of substantive applicable law as well as procedural rules. If the arguments in favour of international adjudication are nonetheless strong enough, as I believe they are, it is time to consider the establishment of an adjudicatory system for international finance that responds precisely to the needs of financial markets and governments. Only by giving the right platform to investors and foreign states to channel their claims, will it become possible to litigate regulation in an efficient and safe way. Given the complexity of the topic, further research is suggested on this issue.\textsuperscript{139}

\section*{V. CONCLUDING REMARKS}

The research showed that international financial disputes are a reality of current international economic law, albeit still very limited in their effectiveness as vector of regulatory change. Private claimants avail themselves of the opportunities offered by international investment and human rights law to try to obtain the judicial relief that they cannot obtain under domestic law. This is due to the limitations in the accountability mechanisms of supervisory authorities, or contractual strategies that reduce the effectiveness of enforcement actions, or because of a fundamental lack of good domestic governance. Having said that, the relatively low level of success of claimants shows that international courts are still very reluctant to take an active role as “guardians” of the financial system.

International dispute settlement in finance, nevertheless requires handling with care as not all disputes should be adjudicated in international courts. Indeed, while on the one hand there are clear benefits in having an additional level of adjudication to target gross violation of due process or other fundamental standards of good governance, on the other hand, there are substantive risks in having international courts to assess the merits of individual supervisory decisions. Moreover, the current system whereby human rights and investment law tribunals adjudicate on complex financial issues is particularly dangerous as the substantive applicable law and the procedural rules are not made for the complexities of financial disputes.

\textsuperscript{138} United States Trade Representative, Transpacific Partnership Agreement – Financial Services.

\textsuperscript{139} See, Federico Lupo-Pasini, \textit{The Logic of Financial Nationalism}, above n 9