The Promotion of Transfer-of-Funds Liberalisation across International Economic Law

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INTRODUCTION

This article examines an important aspect of the ongoing hybridization of contemporary international economic law. The formerly clear-cut body of international law on capital and exchange controls, once exclusively enshrined in the Articles of Agreement of the International Monetary Fund (IMF Agreement),¹ the constitutive treaty of the International Monetary Fund (IMF), and in decisions, interpretations and resolutions of the IMF’s Board of Governors and its Executive Board, has been replaced by a multi-faceted framework of rules emerging from all three traditional pillars of international economic law: international trade, foreign investments, and money. At a time of strong financial integration, the picture is rendered further complex by powerful economic incentives faced by states to liberalise international flows of capital and current payments, as a result of which the remaining formal state competences in this field have become to a large extent hollow.

This article begins by situating existing IMF rules on capital and exchange controls in their historic and political context showing that, by their very nature, these multilateral rules on key regulatory powers in the realm of money are located at the intersection of international trade, investment, and monetary law (Part 1). Subsequently, the article looks briefly at the Organisation for Economic Co-operation and Development’s (OECD) work on liberalising international capital movements and the economic incentives towards liberalisation that arise from eurocurrency markets (Part 2). The article’s core section analyses transfer-of-funds provisions in bilateral investment treaties (BITs) as an increasingly important material source of international monetary law (Part 3). Finally, the article looks at the promotion of transfer-of-funds liberalisation in a contemporary key sector of international monetary law lato sensu which is embedded in the WTO legal framework: trade in financial services (Part 4).

1. **Exchange and Capital Controls Under the IMF Agreement: The Intersection of International Trade, Investments, and the Related Flows of Capital and Payments**

At the end of World War Two, one of the most important challenges in the process of fostering global economic recovery was to restore international trade, which at the time was essentially trade in goods, thereby restoring peaceful interactions between former allies and enemies alike. As was well recognized by the architects of the Bretton Woods system, one cannot effectively liberalise international trade if the liberalisation of the corresponding payments does not keep pace. This intrinsic unity and the experience of the past would logically have advocated the creation of a one-stop shop, in other words, to entrust a single international organisation with the various challenges arising from the linkages between trade and money. Under the constraints of political feasibility a different approach was chosen: the IMF was put in charge of overseeing the international monetary regime; the liberalisation of international trade was given to the International Trade Organization (ITO) (with only the General Agreement on Tariffs and Trade (GATT) entering into force on a provisional basis) and, more recently, to the World Trade Organization (WTO).

Under IMF Article VIII:2(a), the main multilateral provision for freeing the means of payments for international trade, IMF members are prohibited from imposing restrictions on the making of payments and transfers for current international transactions without approval of the Fund. It is important to point out, as phrased by Deborah Siegel, that:

> The 'making' of payments and transfers refers to outflows, such as payments for imports of goods and services. [Article VIII:2(a)] does not apply to receipts from exports (although these are also current international transactions). For example, it does not require a member to seek approval for a rule mandating that receipts of foreign exchange must be repatriated and sold in the banking system for local currency within a specified time period.

In order to provide guidance on the correct application of the important rule in IMF Article VIII:2(a), the IMF has defined what constitutes an exchange restriction. This definition, set forth in a 1960 decision by the IMF Executive Board, relies entirely on a technical criterion asking 'whether [a measure] involves a direct governmental limitation on

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3 The commercial wars between the two world wars, for example, were not only fought via the imposition of exorbitant tariffs but relied also heavily upon competitive currency devaluations and a massive use of capital and exchange controls.


5 After conclusion of the Uruguay Round and entry into force on 1 January 1995 of the Marrakesh Agreement Establishing the World Trade Organization, signed on 15 April 1994.

6 For a detailed analysis of the terms of the provisions contained in Articles VIII and XIV of the IMF Agreement, see Deborah Siegel, 'Legal Aspects of the IMF/WTO Relationship: The Fund’s Articles of Agreement and the WTO Agreement' (2002) 96 The American Journal of International Law 561, 584-90.

7 Ibid 586, original emphasis.