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Host States' Monetary Sovereignty Within the Construct of Bilateral Investment Treaties

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Abstract

This article considers assertions of the diminution of the monetary sovereignty of host states when they sign bilateral investment treaties. It discusses monetary transfer provisions in the model BITs of South Africa and Egypt and how their construction can affect states' rights to regulatory autonomy in mitigating financial crises. This has become imperative in light of recent discussions on the possibilities for a systemic overhaul of BIT provisions, by pushing back against the diminution of host states' sovereignty in order to respond to the force of globalization. Achieving this would require reform of existing model BITs to introduce appropriate exceptions in order to ensure policy space to protect the public interest.

Keywords

Monetary sovereignty, bilateral investment treaties, transfer of funds, South Africa, Egypt

INTRODUCTION

The past few decades have seen the majority of developing and transition countries move from inward-looking industrialization strategies to a foreign direct investment (FDI) assisted approach to economic development.[1] FDI is often accompanied by the movement of proprietary assets such as technology, managerial ability, corporate governance and access to networks connecting foreign markets. It is also expected to facilitate competition between domestic firms, hopefully increasing efficiency.[2] As the global economy continues to expand amid turbulent economic conditions, foreign investors are becoming more sophisticated about how they plan investments and resolve disputes. In this regard, bilateral investment treaties (BITs) play a dominant role at the initial stages of investment, in the structure of the investment and in ensuring

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1 G Sirr, J Garvey and LA Gallagher "Bilateral investment treaties and foreign direct investment: Evidence of asymmetric effects on vertical and horizontal investments" (2017) 35/1 *Development Policy Review* 93 at 93.

2 R Falvey and N Foster-McGregor "North-south foreign direct investment and bilateral investment treaties" (2018) 41/1 *World Economy* 2 at 2.

that commercial benefits are maximized if there are difficulties with the investment.[3] BITs are thus signed between two countries in order to encourage, promote and protect investments between them.[4]

For the purpose of this discussion, this article operates from the premise that FDI is an important element in economic development.[5] FDIs are unambiguously positive from the standpoint of economic growth.[6] Judging from their actions, many developing countries have embraced these claims. Thus, they have opened up their markets through BITs, among other actions. Whether or not FDI through multinational corporations is an optimal instrument of development remains a moot idea.[7] Further, whether BITs have been effective in promoting FDI presents another controversy.[8] However, this article refrains from joining the debate on the effectiveness of BITs in promoting economic development.

Within the context of promoting an interconnected and global economy, BITs have become popular, with states signing over 50 agreements each year. BITs have become the predominant way in which states regulate international investments.[9] A recent estimate by the UN Conference on Trade and Development (UNCTAD) puts the total number of BITs signed worldwide at 2,901, while the total in force is 2,343.[10] BITs are often interpreted as mechanisms for overcoming commitment problems between a foreign investor and a host state in order to generate mutual benefits. In this regard, a state promises not to infringe the rights of foreign investors in order to encourage more investments and invariably to foster development.[11] Here, states trade credibility for sovereignty, as international investment law restricts the regulatory conduct of states to an unusual extent through compulsory international adjudication. BITs have become so powerful that they are now tools to challenge a host state's regulations that conflict with a foreign

3 S Franck "The legitimacy crisis in investment treaty arbitration: Privatizing public international law through inconsistent decisions" (2005) 73/4 *Fordham Law Review* 1521 at 1525.

4 R Desbordes and V Vicard "Foreign direct investment and bilateral investment treaties: An international policy perspective" (2009) 37/3 *Journal of Comparative Economics* 372 at 372.

5 JM Nathan "Crisis, conditions, and capital: The effect of International Monetary Fund agreements on foreign direct inflows" (2004) 48/2 *Journal of Conflict Resolution* 194 at 201.

6 J Crystal "Sovereignty, bargaining and the international regulation of foreign direct investment" (2009) 23/3 *Global Society* 225 at 226.

7 Ibid.

8 E Neumayer and L Spess "Do bilateral investment treaties increase foreign direct investment to developing countries?" (2005) 33/10 *World Development* 1567 at 1567.

9 T Allee and C Peinhardt "Evaluating three explanations for the design of bilateral investment treaties" (2014) 66/1 *World Politics* 47 at 50.

10 UNCTAD Investment Policy, available at: <https://investmentpolicy.unctad.org> (last accessed 2 December 2020).

11 A van Aaken "Perils of success? The case of international investment protection" (2008) 9/1 *European Business Organization Law Review* 1 at 3.

investor's economic interest.[12] BITs enshrine broadly and vaguely framed standards of protection.[13] These standards constitute the yardstick against which the acts of the host state are measured in order to determine its liability to foreign investors under international law.[14] State sovereignty is called into question through legal claims brought by foreign investors alleging breach of promised commitments when the investors' return becomes antithetical to the sovereign's role in the regulation of economic affairs;[15] for example, the growing trend of foreign investors challenging sensitive legislative actions that ordinarily fall within the purview of states has legitimised states' concerns.[16]

Economic globalization and the increasing integration of financial markets have severely constrained formal state competencies in monetary and financial matters.[17] There is increasing regulation on capital movement, most of it originating from international or supranational bodies. This has been followed with the transformation of laws and norms to conform to international standards; the law in turn is metamorphosing internal sovereignty.[18] Investment regulation is constantly evolving from one conceptual framework to another, hence adjusting the process of economic liberalization to the political conceptions and societal aspirations of any given period. However, as shown in investment disputes, the timing of legislation may not always meet public demands and the need for a state to exercise its sovereignty to promote and protect economic growth become an issue.[19]

The deepening regulation of the international economic sphere by legal constructs and the intrusion of what was once termed "sovereign prerogative" are, however, frustrating to many national leaders because they prevent them from effectively meeting their constituents' needs as they wish.[20] Thus, globalization is frequently discussed alongside national sovereignty, in the context

12 C Martini "Avoiding the planned obsolescence of modern international investment agreements: Can general exception mechanisms be improved" (2018) 59/8 *Boston College Law Review* 2877 at 2878.

13 CD Zimmermann "The concept of monetary sovereignty revisited" (2013) 24/3 *European Journal of International Law* 797 at 799.

14 J Kleinheisterkamp "Investment treaty law and the fear for sovereignty: Transnational challenges and solutions" (2015) 78/5 *Modern Law Review* 793 at 793.

15 J Thaliath "Bilateral investment treaties and sovereignty: An analysis with respect to international investment law" (2016) 5/2 *Christ University Law Journal* 1 at 3.

16 DM Oruaze "Rebalancing international investment agreements in favour of host states" (2018) 60/2 *International Journal of Law and Management* 453 at 469.

17 Zimmermann "The concept of monetary sovereignty", above at note 13 at 802.

18 S Picciotto "Linkages in international investment regulation: The antinomies of the draft multilateral agreement on investment" (1998) 19/3 *University of Pennsylvania Journal of International Economic Law* 731 at 735.

19 L Choukroune "Judging the state in international trade and investment law: Why, how and what for?" in L Choukroune (ed) *Judging the State in International Trade and Investment Law: Sovereignty Modern, the Law and Economics* (2016, Springer) 1 at 2.

20 JH Jackson "Reflections on international economic law" (1996) 17/1 *University of Pennsylvania Journal of International Economic Law* 17 at 24–25.

of rendering borders obsolete or eroding national sovereignty. In particular, it is argued that, in a globalized economy, governments have no alternative but to adopt neoliberal policies of privatization and deregulation.[21] Although there are no quantifiable data to describe the impact of foreign investment by multinational corporations on the nation-state-based international order, what is apparent is that sovereign governments have lost their historic monopoly to formulate and administer economic policies, essentially to conduct state to state relations as they deem fit. This sacrifice is premised on the likelihood that mutual corporation with other states will be instrumental in achieving a wider policy objective in the national economy and other spheres of government.[22] This is very evident in situations of economic crisis. Host states could be deterred from implementing legitimate public policies when such policies have the potential to impact foreign investors' economic interests.[23] The economic crisis that engulfed Argentina in late 2001 has unveiled a new legal subject with serious potential to constrain state autonomy in mitigating the adverse effects of such a crisis. In this example, foreign investors invoked treaty provisions to challenge the regulatory measures implemented by Argentina in the aftermath of its economic crisis, resulting in claims against Argentina and the awarding of significant monetary compensation to the claimant investors. Cases that emerge from such crisis engage a treaty exception that is rarely adjudicated upon in international law; this offers a timely and unique opportunity to assess the importance of the treaty clause and defences (monetary transfer provisions) that arise directly out of financial crisis claims.[24]

Formal recognition of the right of a state to regulate has largely been considered as a positive development with regard to making the international investment regime more balanced and giving arbitral tribunals guidelines against restricting the state's regulatory space. Yet, the right of a state to regulate remains largely unstudied.[25] In light of this, this article has two lines of enquiry. The first discusses the right of a state to regulate for economic purposes, while the second seeks to assess whether the BIT provisions on transfer of funds have the capacity to impinge on the right of a state to regulate and how corresponding issues from this can be addressed. Against this backdrop,

21 J Quiggin "Globalization and economic sovereignty" (2001) 9/1 *The Journal of Political Philosophy* 56 at 56.

22 SD Cohen "Multi-national corporations versus the nation-state: Has sovereignty been outsourced?" in SD Cohen (ed) *Multinational Corporations and Foreign Direct Investment: Avoiding Simplicity, Embracing Complexity* (2007, Oxford University Press) 233 at 236.

23 Martini "Avoiding the planned obsolescence", above at note 12 at 2878.

24 J Kurtz "Adjudging the exceptional at international investment law: Security, public order and financial crisis" (2010) 59/2 *International and Comparative Law Quarterly* 325 at 326.

25 G Charalampos "The right to regulate in international investment law and the law of state responsibility: A Hohfeldian approach" (3 May 2017) *SSRN*, available at: <https://ssrn.com/abstract=2962686> (last accessed 10 November 2020).

the article examines the model BITs of South Africa and Egypt with a focus on the treaty clause on transfer of funds from the standpoint of the objective of preserving regulatory spaces to mitigate financial crises in light of contemporary international practices. The model BITs of South Africa and Egypt are examined because they tilt more towards protecting foreign investors' rights at the expense of preserving states' regulatory rights.

MONETARY SOVEREIGNTY AND THE INTERNATIONAL REGULATION OF ECONOMIC TRANSACTIONS

Historically, sovereignty was associated with four major characteristics. First, a sovereign state enjoys supreme political authority. Secondly, it is capable of regulating movements across its borders. Thirdly, it can make foreign policy choices and, lastly, it is recognized by other states as an independent entity to be free from foreign intervention.[26] Though never absolute, these components together offered a predictable world order.[27] Until now, the essence of the concept of sovereignty has continued to be defined within the parameters of the supremacy and independence of states in respect of their internal affairs, subject only to recognized limitations imposed by law.[28] Monetary sovereignty is part of a state's sovereignty and signifies the power to issue and regulate money within a specified territory.[29] In a dictum in the *Serbian and Brazilian Loans* cases, the Permanent Court of International Justice stated that, "it is indeed a generally accepted principle that a state is entitled to regulate its currency".[30] This statement is widely accepted as expressing the notion of "monetary sovereignty".[31] Monetary affairs, one of the last bastions of national sovereignty, is at the centre of a worldwide debate.[32] Monetary monopoly of the state has been questioned in recent years with arguments that it is on the verge of erosion due to voluntary surrender and the limitations caused by globalization, and economic and financial developments in past decades.[33] The transfer of specific sovereign powers to multilateral institutions has been

26 JH Jackson "Traditional Westphalian sovereignty controls: Outmoded and discredited" in W Shan, P Simons and D Singh (eds) *Redefining Sovereignty in International Economic Law* (2008, Bloomsbury Publishing) 1 at 5.

27 Ibid.

28 CD Zimmermann *A Contemporary Concept of Monetary Sovereignty* (2013, Oxford University Press) at 7.

29 C Herrmann and C Dornacher *International and European Monetary Law: An Introduction* (2017, Springer International) at 13.

30 Zimmermann "The concept of monetary sovereignty", above at note 13 at 798–99.

31 T Trevis "Monetary sovereignty today" in M Giovanoli (ed) *International Monetary Law: Issues for the New Millennium* (2000, Oxford University Press) 111.

32 T Cottier, RM Lastra, C Tietje and L Satragno *The Rule of Law in Monetary Affairs* (2014, Cambridge University Press) at 1; E Baltensperger and T Cottier "The role of international law in monetary affairs" (2010) 13/3 *Journal of International Economic Law* 911 at 912.

33 Herrmann and Dornacher *International and European Monetary Law*, above at note 29 at 14.

understood to erode or at least limit the sovereignty of individual member states.[34]

The regulatory powers of a state fall within the conceptual scope of monetary sovereignty: the right to create money by issuing currency; the right to conduct monetary policies; the right to conduct an exchange rate policy; the right to decide upon the appropriate amount of current and capital account convertibility (through the imposition of exchange controls); and the organization of financial regulation and supervision.[35] As an expression of state sovereignty, international law has always provided broad leeway to a state's monetary sovereignty with respect to funds transfer and convertibility. Thus, nothing in general international law prevents host states from organizing their monetary systems according to their own requirements.[36] Under article 2(7) of the UN Charter, money falls within the domestic jurisdiction of states; therefore, a state that devalues its currency or restricts its currency's availability for transfers abroad or takes certain measures that affect foreign creditors does not as a matter of customary international law (in the absence of any express treaty obligations) commit an international wrongful act for which it could be held responsible.[37] Basically, this means that every state has sovereignty over its currency and over exchange transactions involving that currency. Therefore, any act by the state to impose exchange restrictions would not incur international responsibility. Following from this, if a state's right over its currency is certain, the issue arises as to what extent has international law made exceptions to this rule.

States do not incur international responsibility by reason of their currency policy, except where a breach of treaty obligations occurs. This international law responsibility has developed to an extent that indicates substantial encroachment of the monetary sovereignty of many states and may in the course of time lead to the recognition by customary international law of restrictions on monetary sovereignty.[38] As a result of treaty obligations, many states have a responsibility to give effect to implications of exchange control and restrictions imposed by other states; where such obligations exist, it is a matter of public policy that the courts of the state that accepted them must decipher them.[39] This leads us to examine numerous treaties that in the past few decades have led to far-reaching effects on the development of monetary and economic sovereignty. The contemporary exercise of various sovereign powers in the realm of money is subject to both legal and economic constraints. The constraints on the exercise of monetary sovereignty

34 Ibid.

35 Cottier et al *The Rule of Law*, above at note 32 at 3–4.

36 C Kern "Transfer of funds" in M Bungenberg, J Griebel, S Hobe and A Reinisch (eds) *International Investment Law* (2015, Hart) 870 at 872.

37 FA Mann "Money in public international law" (1949) 26 *British Yearbook of International Law* 259 at 260.

38 Id at 292.

39 Ibid.

stem from international law and treaties, notably the 1944 International Monetary Fund (IMF) Articles of Agreement (otherwise known as the Fund Agreement or Articles of Agreement) and bilateral investment treaties.[40] Both are discussed below.

The IMF Articles of Agreement

Under customary international law, every country had sovereignty over its currency and usage. It could impose restrictions on transactions involving its currency without incurring international responsibility.[41] Thus, before the introduction of the Articles of Agreement, the capital mobility policies of most countries were determined by an open market, the forces of demand and supply, and domestic political and economic forces. Even the gold standard policy that guided many countries before the First World War was based on a decentralized system of regulatory harmonization and supplemented by soft laws. Most governments were reluctant to enter binding international legal instruments because they feared constraints on their sovereignty.[42]

There has been an explosion in the development of international rules of monetary conduct, which can be attributed to the lessons learnt from the Second World War. The political economy of the interwar period required states to exercise economic protectionism, thus restricting the cross-border flow of capital. Gradually, domestic factors replaced the gold standard as the rules of the game.[43] Economic nationalism in the form of protectionism prevailed throughout Europe in 1870 and peaked during the interwar period. States during this period enacted policies to reduce imports and improve their economic positions at the expense of others. A consequence of these policies led to the reduction in world trade supply; this in turn led to reduced demand for goods, high unemployment, decreased population and ultimately the Great Depression of the 1930s.[44] For monetary policy makers, the lessons learnt from the interwar years were that economic prosperity required credible exchange rate commitments, and open and non-discriminatory economic arrangements. International legalization of monetary affairs was therefore imperative to inspire private actors to trade and invest across national bor-

40 CD Zimmermann "The concept of monetary sovereignty revisited" (2013) 24/3 *European Journal of International Law* 797 at 803.

41 A Kolo "Transfer of funds: The interaction between the IMF articles of agreement and modern investment treaties: A comparative law perspective" in SW Schill (ed) *International Investment Law and Comparative Law* (2010, Oxford University Press) 345 at 348.

42 Ibid; CC Lichtenstein "International jurisdiction over international capital flows and the role of the IMF: Plus ça change" in Giovanoli (ed) *International Monetary Law*, above at note 31, 61.

43 F Ghodoosi "The limits of free movement of capital: The status of customary international law of money" (2014) VII/1 *Northwestern Interdisciplinary Law Review* 287 at 293.

44 KJ Vandevelde "Sustainable liberalism and the international investment regime" (1988) 19/2 *Michigan Journal of International Law* 373 at 378.

ders.[45] The development of public international law of money has its roots in the Articles of Agreement. Initiating an era of monetary co-operation among sovereign states and working towards establishing a stable exchange rate in the interest of world trade, the IMF has established well-defined rules for participating states that bring about concomitant restrictions on their sovereignty in currency matters:[46] a development that is now supplemented by other multilateral treaties, such as the Convention for European Economic Co-operation, the General Agreement on Tariffs and Trade (GATT) and a number of bilateral investment treaties.[47]

One of the main aims of the Articles of Agreement is to eliminate foreign exchange restrictions that hamper the growth of world trade.[48] Article IV stipulates that one of the mandates of the IMF is "to promote stability by fostering orderly underlying economic and financial conditions and a monetary system that does not tend to produce erratic disruptions".[49] The main purpose of the system was to facilitate the exchange of goods, services and capital among countries. To this end, controls that were once under the sovereignty of national governments now had to be justified to the international community and only condoned to the extent that was necessary.[50] Article VIII(2) of the Articles of Agreement sets out important obligations that should regulate the conduct of external monetary affairs.[51] The Articles of Agreement prohibit restrictions on payment and transfers for current international transactions, with a "transitional" provision (article XIV) allowing a member to maintain restrictions that were in place before it joined the IMF.[52] However, the obligation to permit transfers does not apply to international capital transfers that do not qualify as payment for current account transactions (article VI(3)).[53] The effect of the obligations found in VII(2) was a constraint on the unfettered

45 BA Simmons "The legalization of international monetary affairs" (2000) 54/3 *International Organization* 573 at 573.

46 Mann "Money in public international law", above at note 37 at 265–66; Z Motala "Free trade, the Washington consensus, and bilateral investment treaties the South African journey: A rethink on the rules on foreign investment by developing countries" (2017) 6/1 *American University Business Law Review* 31 at 32.

47 Ibid.

48 Q Liu "Transfer of funds in China-US BIT negotiations: Comparing the Articles of Agreement to the IMF" (2012) 11/1 *Journal of International Trade Law* 6 at 7.

49 J Haynes "Overseeing the international financial and monetary system: A critical analysis of the International Monetary Fund's article iv surveillance mandate" (2012) 6/4 *Law and Financial Markets Review* 292 at 292.

50 Simmons "The legalization of international monetary affairs", above at note 45 at 578.

51 Articles of Agreement of the IMF, available at <https://www.imf.org/external/pubs/ft/aa/index.htm> (last accessed 10 November 2020).

52 DE Seigel "Legal aspects of the IMF / WTO relationship: The fund's Articles of Agreement and the WTO agreements" (2002) 96/3 *The American Journal of International Law* 561 at 565.

53 Art XXX(d) of the Articles of Agreement differentiates between capital and current account transactions by listing in a non-exhaustive manner examples of payments that do not qualify as capital account transactions: Kolo "Transfer of funds", above at note 41 at 349.

sovereign right of member states with respect to exchange controls; restrictions on the making and transfer for current account transactions were discouraged except as provided in article VII(3)(b) and article XIV(2). In other words, member states undertook to make available to persons within their jurisdiction foreign exchange to settle all legal international transactions and not to restrict currency transfers in a manner that would inhibit or increase the costs of making payment.[54]

The IMF does not have formal jurisdiction over capital controls, but can significantly influence their use. In practice, the IMF urges its members, through technical assistance and as part of the conditionality attached to its various lending facilities, to remove capital controls if need be. This approach is hinged on the belief that liberalizing capital flows was just as beneficial as freeing trade flows and the related current account payments.[55] IMF lending involves a certain level of policy conditions. Conditionality in this sense covers the IMF-supported programmes (structural and macroeconomic policies) and the specific tools used to monitor progress towards goals outlined by the country in cooperation with the IMF. Conditionality helps with balance of payment problems without resorting to measures that are inimical to a state's prosperity at the national and international level, and at the same time safeguards IMF resources by ensuring that a country's economy is sufficiently stable to repay the loan obtained from the IMF. However, responsibility lies on the member country to select and implement policies to make the IMF-supported programme successful.[56] Article V(3) of the Articles of Agreement differentiates the mandatory and special policies that the IMF has to adopt for its members to access its facilities. The mandatory facilities available to members are known as "credit tranche policies". They are meant to aid short adjustment plans and are subject to certain conditions that are dependent on the volume of the tranche. Under the IMF's policy lines, drawings from its accounts are legally regulated by arrangements.[57] These arrangements are not legally binding international agreements but decisions of the IMF's Executive Board to approve a request by a member state (article V3(C)). The request is made by a letter of intent, stating the need for assistance and an adjustment programme (article V3(B)(ii)).[58]

IMF conditionality serves a "carrot and stick" function, which has the positive effect of strengthening the credibility of the adjustment programme among investors and reducing the problems that result from the availability of financial aids. This approach has been critiqued because of its means of

54 Ibid.

55 CD Zimmerman "The promotion of transfer of funds liberalisation across international economic law" (2011) 12/5 *Journal of World Investment and Trade* 725 at 729.

56 IMF "IMF conditionality", available at: <https://www.imf.org/en/About/Factsheets/Sheets/2016/08/02/21/28/IMF-Conditionality> (last accessed 10 November 2020).

57 Herrmann and Dornacher *International and European Monetary Law*, above at note 29 at 54.

58 Id at 55.

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undermining state sovereignty and democratic process. In response to this critique, a revision of the IMF guidelines on funding (which requires structural adjustment programmes and the adoption of desirable economic and fiscal or monetary policies) now specifies that the concept of conditionality has to be realigned with national ownership and also tailored to the need of each individual member state.[59] In some cases (for example, in Iceland, Latvia and Ukraine), rather than making it a condition that developing nations should liberalize their capital accounts as part of an IMF country programme, the IMF recommended and approved controls on outflows.[60]

In both practice and theory, the IMF has changed its orthodox thinking about capital controls and now endorses the re-regulation of cross-border finance.[61] After the global financial crisis in 2008, the IMF re-evaluated its stance on capital account liberalization; it not only recommended that the liberalization of capital accounts be gradual and sequenced, but it also recognized that temporary capital controls could be part of the transition to eventual capital account liberalization.[62] The IMF is now of the view that capital controls should only be used after a nation has reached a certain threshold of economic development and that they should be gradual and sequenced. The guideline on the use of controls on capital outflows suggests that they should be avoided if possible and only considered in a crisis or near crisis situation.[63] The realignment of the IMF's position on capital control by acknowledging its positives failed to displace the belief that capital freedom was desirable in the long-term. This prevailing belief in the long-term desirability of liberalization led the IMF, instead of ascribing disorderly liberalization as being responsible for financial instability, to carve out exceptions for the use of controls on outflows in crisis situations and embed them in a normative framework that constitutes capital freedom as desirable in the long run. Today, the IMF generally does not question the desirability of capital freedom, but it is willing to accommodate exceptions to it.[64] However, the urgent need to attract capital in the form of FDI, given the low availability of capital in most countries, has continued to steer it towards the need for investment liberalization.[65]

59 Id at 57–59.

60 KP Gallagher "The IMF, capital controls and developing countries" (2011) 46/19 *Economic and Political Weekly* 12 at 13.

61 KP Gallagher "Ruling capital: The new International Monetary Fund view of the capital account" in KP Gallagher (ed) *Ruling Capital* (2015, Cornell University Press) 124.

62 Id at 126–27.

63 JM Chwieroth and JMM Chwieroth *Capital Ideas: The IMF and the Rise of Financial Liberalization* (2010, Princeton University Press) at 224–25.

64 Ibid.

65 B Matthias, J Koniger and P Nunnenkamp "FDI promotion through bilateral investment treaties: More than a bit?" (2010) 146/1 *Review of World Economics* 147 at 148.

In addition to the Articles of Agreement, BITs and arbitration awards have evolved as significant material sources in regulating international monetary transactions.[66] These international frameworks are discussed below.

Bilateral investment treaties

Considering that the Articles of Agreement only cover the protection of current international transactions and not capital transfers, it is understandable when foreign investors consider that the IMF only provides limited protection. Investor protection is not the explicit purpose of the IMF regime and this has spurred the development of transfer of funds provisions in other international investment agreements, such as BITs.[67] Most BITs provide a higher level of protection in respect of capital and exchange controls than that which is traditionally obtained in the IMF. One of the substantive provisions on investment protection in BITs is the requirement for the free transfer or repatriation of funds; this right constitutes an increasingly important source of international monetary law. Considering the economic importance for foreign investors to benefit from investment operations abroad and to enjoy the associated benefits from them, transfer provisions relating to funds are considered to be necessary in the promotion of BITs.[68]

The freedom to transfer investment-related funds to and from the host state is at the core of international investment law. It evidences a liberalized investment regime. It recognizes that foreign investors should be allowed not only to transfer funds to the host country to fund their investment but also to repatriate the connected profits and, in the case of divestment, both the principal and any capital gains.[69] Whereas it is generally accepted under customary law that host states are free to determine the rules in investment treaties, the widespread inclusion of specific clauses on the freedom to transfer funds in BITs shows that an investment-friendly climate will require a transfer regime that is more favourable to the foreign investor: a regime that limits the right of the host state to regulate the transfer as it exists under customary international law. Thus, BITs have restricted host states' freedom in a significant but not uniform manner by allowing the transfer of funds, with or without restrictions.[70] Although most investment treaties include transfer of funds provisions, the wording and scope of such clauses

66 Zimmermann *A Contemporary Concept*, above at note 28 at 38.

67 Id at 49.

68 A de Luca "Transfer provisions of BITs in times of financial crisis" (2014) 23/1 *The Italian Yearbook of International Law Online* 113 at 114–15.

69 A Viterbo *International Economic Law and Monetary Measures: Limitations to States' Sovereignty and Dispute Settlement* (2012, Edward Elgar) at 238.

70 R Dolzer "Transfer of funds: Investment rules and their relationships to other international agreements" in M Giovanoli and D Devos (eds) *International Monetary and Financial Law: The Global Crisis* (2010, Oxford University Press) 533.

and their application can differ from one treaty to another, with particular reference to the substantive aspects.[71] Their content and requirements may differ, as each treaty strikes its own balance between a home country's desire to obtain guarantees on the repatriation of investment related funds and concerns about the impact such repatriation of funds can have on balance-of-payments and monetary reserves.[72]

Two sets of interests are normally at stake in balancing the substantive provisions of these clauses: the interest of a host state in monitoring and controlling public reserves; and the ability of foreign investors to transfer profits from the host state, which may be one of the fundamental purposes when an investor decides to invest overseas in the first place.[73] As a result of finding a balance between these two interests, no standard language exists in the transfer of funds clause.[74] A typical monetary transfer provision in a BIT is, however, bound to identify the "transfer" or "payment" to which the provision applies and also the conditions governing such transfers, such as whether the transfer can be made promptly and what foreign exchange transfers should be made. Monetary provisions in BITs are known to cover both capital and current transfers.[75]

MONETARY TRANSFER PROVISIONS IN BITs AND THE POLICY SPACE TO MITIGATE ECONOMIC CRISES

Economic crises provide a context as to what extent states have turned to "nationalism" to address economic difficulties.[76] During economic crises, investment arbitration is used when discussions have failed between parties and the government has less choice within which to manoeuvre. In hard economic times, governments face strong pressure from their citizens and institutions, and they often make recourse to market interventions. Market intervention basically aims to help domestic interests, but this comes with negative effects for foreign investors' rights and interests.[77] Thus, foreign direct investment does not always yield a desired result; while the immediate contribution of FDI to balance of payments may be positive, its long-term

71 de Luca "Transfer provisions of BITs", above at note 68 at 115.

72 Viterbo *International Economic Law*, above at note 69 at 44.

73 A Turyn and FP Aznar "Drawing the limits of transfer provisions" in M Waibel (ed) *The Backlash Against Investment Arbitration: Perception and Reality* (2010, Kluwer Law International) 51 at 52.

74 Id at 53.

75 Current transfers relate to transfers that emanate from the income derived from investments, while capital transfers relate to transfer of funds following the liquidation or sale of an asset connected to investments. See P Ranjan and P Anand "The 2016 model Indian bilateral investment treaty: A critical deconstruction" (2017) 38/1 *Northwestern Journal of International Law and Business* 1 at 38.

76 C Dupont and T Schultc "Do hard economic times lead to international legal disputes? The case of investment arbitration" (2013) 19/4 *Swiss Political Science Review* 564 at 564.

77 Id at 566.

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effect is often negative because of the high import content of foreign firms and profit remittances.[78] One of the capital control measures that will be considered in this context is restricting the repatriation of profits and transfer of capital during economic crises. It may be helpful to refer to this as an aftermath desire to respond to a crisis.[79] In the event of an economic crisis, a host state may be concerned about the depletion of funds due to profit remittances and the adverse effect that may have on the economy. Therefore, it will want to maintain its monetary sovereignty, by not curtailing its discretion to adopt measures (including exchange rate restrictions) to deal with economic problems.[80] To balance this approach, different countries have adopted different transfer clause models to address any potential conflict that may arise.

One approach is to guarantee a free transfer that is unrestrained by domestic or economic circumstances in the host state.[81] With this approach, treaties do not provide exceptions to address issues arising from balance of payment problems that may require the imposition of exchange restrictions. An opposite approach is to subject the free transfer to the host state's exchange laws, which would be unconstrained by economic circumstances or international obligations under treaties such as the Articles of Agreement.[82] A third, intermediate, approach is to provide for exceptions to the general rule on transfer of funds for measures taken during times of economic difficulty, provided that such measures are in consonance with the IMF Articles of Agreement (or World Trade Organization Agreement).[83] The fourth approach, which has similarities to the first, not only subjects the right to transfer funds to the domestic legislation of host states imposed during balance of payment difficulties, in a manner consistent with the Articles of Agreement, but also insulates such measures from third party scrutiny.[84]

The general challenge with the guarantee on the transfer of funds is striking a balance between foreign investors' rights to enjoy the benefits of their investment and the state's right to its monetary sovereignty. Many treaties contain absolute statements protecting the right of repatriation, which is unrealistic in view of the fact that problems will arise when a contracting party has exchange shortfalls necessitating currency controls. This absolutism in treaties is created in the over-zealous belief that such situations will not occur.[85] Most

78 K Mohamadieh "Challenges of investment treaties on policy areas of concern to developing countries" (2019) 17 *Investment Policy Brief* 1 at 2.

79 A Yianni and C de Vera "The return of capital controls" (2010) 73/4 *Law and Contemporary Problems* 357 at 357.

80 A Kolo and T Walde "Capital transfer restrictions under modern investment treaties" in A Reinisch (ed) *Standards of Investment Protection* (2008, Oxford University Press) 205 at 214.

81 Ibid.

82 Id at 215.

83 Ibid.

84 Id at 216.

85 M Sornarajah *The International Law on Foreign Investment* (2010, Cambridge University Press) at 207.

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BITs between developed countries are usually well thought out, in the sense that they are quick to provide exceptions or carve out niches to exclude certain services from the effects of treaty obligations. This signifies forethought, deep legal insight and a level of analysis that eludes developing countries. These characteristics are, however, less apparent in developing countries, due to their resource constraints and their limited experience with these types of investment rules.[86] Investment rules under the treaties of most capital-exporting states make allowance for the use of temporary controls as a safeguard. For example, BITs of major exporting states, such as those negotiated by Japan, China, Canada and the European Union, either have "carve outs" for host-country legislation on capital controls or allow for temporary safeguards on inflows and outflows to prevent or mitigate financial crises.[87]

Several developing countries have bought into the free trade and investment ideology by signing a number of BITs with developed countries, which have proven to be quite detrimental to the developing countries. This is because developed countries enter into mutually beneficial relationships because they have achieved a particular level of development and have parity with similar levels of sophistication. Developing countries like South Africa that have adopted the mantra of free trade in different circumstances, such as extreme inequality and abject poverty, have undermined their ability to nuance their economic policy choices to deal with domestic issues.[88] An analysis of the provisions of the BITs that South Africa has concluded over the years points to the fact that there was no change or improvement in the country's approach to negotiating and signing BITs. The provisions contained in these agreements have stayed the same. The exception is the BIT concluded with Canada. The different wording and carve out in that provision did not even originate from South Africa; rather, it was due to Canada's insistence on including these clauses in the BIT because of its policy position.[89] With respect to mitigating balance of payment problems, there are concerns that this may prohibit the use of measures to prevent financial bubbles and subsequent crises. In effect, if a country does restrict any form of capital flow, it can be subject to investor / state arbitration, whereby the government of the host state will pay for the "damages" accrued by the foreign investor.[90] The monetary transfer provisions in article 6 of South Africa's model BIT provide for an unconditional transfer of investment related payments and returns at the

86 LE Peterson "Bilateral investment treaties and development policy-making" (November 2004, International Institute for Sustainable Development), available at: <https://pravo.hse.ru/data/2012/10/05/1244483607/READER_Bilateral%20Investment%20Treaties%202004.pdf> (last accessed 10 November 2020).

87 Ibid.

88 Motala "Free trade", above at note 46 at 33.

89 EC Schlemmer "An overview of South Africa's bilateral investment treaties and investment policy" (2016) 31/1 *ICSID Review* 167 at 172.

90 KP Gallagher "Losing control: Policy space to prevent and mitigate financial crises in trade and investment agreements" (2011) 29/4 *Development Policy Review* 387 at 387.

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market rate of exchange applicable on the date of transfer; in the absence of such a rate, the applicable rate would be the most recent exchange rate applied to inwards investment or, for the conversion of currencies into special drawing rights, whichever is more desirable for the investor.[91] Similarly, article 6 of the Arab Republic of Egypt's model BIT provides for a free transfer of incomes derived from investment related payments without delay in freely convertible currencies, subject only to existing laws and regulations.[92] The implication of these BIT provisions is that any form of capital control is likely to run contrary to South Africa and Egypt's international obligations.

The Asian and Russian financial crises in 1998 and the Argentine crisis in 2001 raised a host of questions in international investment law with regard to the power of host states to impose capital controls that are inconsistent with multilateral[93] and BIT obligations.[94] Despite the IMF's recommendation that capital controls be used in certain circumstances, it noted that the new advice could clash with its members' trade and investment treaty commitments and recommended establishing safeguards granting nations the right to regulate using capital controls without being in conflict with other international obligations.[95] In cases of extreme balance of payment difficulties, it could be argued that the general doctrine of necessity in customary international law suspends the treaty obligation to permit repatriation, at least until the situation improves. Transfer of funds has not received much attention from many investment tribunals. The Argentine financial crisis dealt with this issue, but the arbitral awards remain inconclusive as to when the defence of necessity is likely to succeed.[96] Host states' conduct based on measures taken that prejudice foreign investors during times of economic crisis has been challenged under a number of BITs.[97] This same issue has come to the fore again in light of recent economic crises affecting a number of states.[98]

91 "International investment agreements navigator" (UNCTAD investment policy hub), available at: <https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements> (last accessed 10 November 2020).

92 Ibid.

93 Seigel "Legal aspects of the IMF / WTO relationship", above at note 52 at 570–71; B Adrian and C Roulet "Capital controls on inflows, the global financial crisis and economic growth: Evidence for emerging economies" (2013) 2 *OECD Journal: Financial Markets Trends* 29 at 30.

94 A Kolo and T Walde "Economic crises, capital transfer restrictions and investor protections under modern investment treaties" (2008) 3/2 *Capital Markets Law Journal* 154 at 154.

95 Gallagher "Ruling capital", above at note 61 at 130.

96 Sornarajah *The International Law*, above at note 85 at 207.

97 S Harout "Five years later: The CMS award placed in the context of the Argentine financial crisis and the ICSID arbitration boom" (2007) 38/3 *The University of Miami Inter-American Law Review* 667 at 667–68.

98 G Sacerdoti "BIT protections and economic crises: Limits to their coverage, the impact of multilateral financial regulation and the defence of necessity" (2013) 28/2 *ICSID Review* 351 at 351.

One of the first cases in which the issue of free transfer was first considered was *Genin v Estonia*.[99] The claimant, Genin, raised many issues including, but not limited to, the revocation of its banking licence, which it argued violated different clauses in the US-Estonia BIT, including the clause providing for the free transfer of investments. The tribunal ruled that the claimant's argument failed to show a violation of the BIT or other principles of international law enshrined in it. Nevertheless, the tribunal failed to provide analysis of the free transfer provisions.[100]

In *Biwater Gauff v Tanzania*,[101] the claimant argued that certain measures taken by the host state resulted in a lack of value of the investment and therefore amounted to a violation of the right to transfer of funds. The tribunal rejected this argument. It ruled that the BIT clause that provides for transfer of funds is not a guarantee that investors will have funds to transfer. Instead it guarantees transfers, subject to the conditions stated in the clause, only if the investors have funds to transfer in the first place. The tribunal found that no currency restriction or other measures that imprisoned the investor's funds had taken place. Biwater Gauff's claims were therefore unfounded.[102]

Similarly, in *CMS Gas v Argentine Republic*,[103] the claimant claimed that Argentina had unlawfully restricted the free transfer of funds in violation of the Argentina-US BIT. This claim was, however, later withdrawn in the claimant's reply.[104] In general, the tribunal considered whether the emergency measures taken by the Argentinean government could be covered by the doctrine of necessity, which informs the understanding of essential security interest and exists to assist countries in dealing with crises. The tribunal in this case did not consider Argentina's economic situation to be severe enough to justify the invocation of article 25 of the International Law Commission, which has been widely accepted as the representative formulation of the necessity doctrine in customary international law.[105] Not much can be understood from these cases in terms of the functionality of a transfer of funds clause during economic crises; parallels are drawn because they all have a bearing on the after effect of economic measures taken by states in the exercise of their right to regulate. A lesson to learn is that issues can be raised from a transfer of funds clause where there is a (potential) breach.

The Argentine case in which the issue of free transfer provisions was substantially addressed is *Continental Casualty Company v Argentine Republic*.[106] The claimant, Continental Casualty Company, alleged breaches of its rights

99 *Alex Genin and Others v Republic of Estonia* (ICSID case no ARB/99/2).
100 Turyn and Aznar "Drawing the limits", above at note 73 at 54.
101 *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania* (ICSID case no ARB/05/22).
102 Dolzer "Transfer of funds", above at note 70 at 534.
103 ICSID case no ARB/01/8.
104 Turyn and Aznar "Drawing the limits", above at note 73.
105 AK Kent and R Harrington "A state of necessity: International legal obligations in times of crises" (2012) 42/1 *Canadian Review of American Studies* 65 at 67–69.
106 ICSID case no ARB/03/9.

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as a foreign investor under the Argentine-US BIT. The claimant argued that Argentina's "restrictions on transfers" out of its territory, rescheduling of cash deposits, "pesification" of US dollar deposits and other measures had led to a significant loss in value of its financial assets.[107] The tribunal concluded that Argentina was excused from responsibility by virtue of the defence under article XI of the Argentina-US BIT and that the measures adopted were necessary to respond to its economic crisis (except the claim pertaining to Particular Treasury Notes,[108] which will not be considered in detail as it does not apply to the current discussion). At stake in this case was the transfer of mature US dollar term deposits from Argentina to a third country. The funds in question were held by the Argentina subsidiary, CNA ART, of Continental Casualty; being a US company, the latter parent company was covered as an investor under the Argentina-US BIT. A decree issued by Argentina in 2001 had prohibited the withdrawal and transfer of funds in question from banks. Continental Casualty submitted that a transfer would have avoided a dramatic devaluation of its funds. Argentina argued that the claim by the US parent company under article 5 of the BIT was not covered because the funds were held by the subsidiary and not the parent company. Argentina further referred to an emergency clause contained in article XI of the BIT, which served to excuse whatever measure it had adopted to address its economic crisis, and argued that the GATT, General Agreement on Trade in Services and Articles of Agreement all contained applicable standards, which allowed restrictions following Argentina's balance of payment difficulties, consistent with monetary sovereignty as recognized by international law.[109] The tribunal found no violation of the BIT, because the transfer was not related to an investment in the first place.[110]

Argentina's legal approach goes further to raise deeper structural questions about the rights of states to respond to extraordinary situations such as economic crises. Argentina had invoked the non-precluded measures clause of its BITs and asserted that the doctrine of necessity in customary international law precludes the wrongfulness of its actions.[111] The tribunal considered whether the measures in contention violated article IV(1) of the Argentina-US BIT, dealing with expropriation. In a broader context, it considered whether article XI of the BIT, containing the exception, was applicable in the circumstances. The tribunal distinguished expropriation measures from measures that limit property for reasons of public interest. On the one hand were measures that are considered expropriation because of their material

107 Turyn and Aznar "Drawing the limits", above at note 73 at 57.

108 Ibid.

109 Dolzer "Transfer of funds", above at note 70 at 535.

110 Ibid

111 WW Burke-White "The Argentine financial crisis: State liability under BITs and the legitimacy of the ICSID system" (2008) 3/1 *Asian Journal of WTO and International Health Law and Policy* 199 at 205.

impact on property, which are only legitimate if they were adopted for public purpose without discrimination. For example, the outright deprivation of ownership and limitations regarding property, such as suppressing or interfering with one or more key features of the property, and other acts are considered to be expropriation because of their substantial impact on the effective rights of property.[112]

On the other hand are limitations on the use of property, which fall within typical government regulation of property. Such limitations are mostly inevitable and are imposed in order to ensure that the rights of others are protected or in the general public interest. These kinds of restrictions are not considered expropriation in any form and do not require indemnification in so far as they are not made in a discriminatory manner. With respect to a state's sovereign right to establish its monetary system, the tribunal found that fixing exchange rates, determining a foreign exchange mechanism and maintaining deposits denominated in a foreign currency fall within the monetary sovereignty of each state. The policies fall under the second category of "limitations" stated above.[113] The tribunal generally recognized that certain regulatory restrictions imposed on property rights in the public interest are not compensable expropriation.[114]

CMS v Argentina and *Continental Casualty v Argentina* present divergent awards because of the different interpretative approaches adopted by the tribunals that decided them. In *CMS*, the tribunal drew on article 25 of the Articles of State Responsibility to inform its understanding of the essential security provision.[115] Meanwhile in *Continental Casualty*, the tribunal read the essential provision to apply to a broader array of state actions beyond customary law, maintaining that the provision shifts the burden of state actions in exceptional situations to the foreign investor. Article XI of the Argentina-US BIT was construed as a specific provision limiting the general investment protection obligations bilaterally agreed by contracting parties and it should not be conflated with a plea of necessity under general international law.[116] The two approaches assign varying latitudes of state discretion to the essential security provision, leading to the different decisions demonstrated by the tribunals' awards despite the fact that the cases had identical facts.[117] However, a more realistic approach would be to adopt a treaty exemption that adequately addresses economic crises and balance of payment issues.

Generally, a key question following these crises concerns the legal duty of states to comply with capital repatriation obligations in an investment treaty

112 Turyn and Aznar "Drawing the limits", above at note 73 at 60.

113 Ibid.

114 Ibid.

115 WJ Moon "Essential security interests in international investment agreements" (2012) 15/2 *Journal of International Economic Law* 481 at 482 and 488.

116 Id at 487.

117 Id at 482.

in the face of an actual or threatened economic or financial crisis. Recent economic situations show that economic emergencies can happen anywhere, even in well situated financial systems or states. At times of economic crisis, certain measures may be necessary to address the crisis situation. A possible range of measures may be far-reaching, having wider implications for both the national economy and the legal obligations of foreign investors. States may be required to confiscate property or intervene in existing legal agreements in the public interest.[118]

Countries that fear the economic disruption that accompanies capital flows may be tempted or constrained to impose capital controls on international capital movement. The use of capital controls has become highly controversial and hotly debated. Inconsistency in the desire to control capital movements and the desire to attract inbound FDI has received limited attention, despite its relevance to policy makers and foreign investors.[119] Profit repatriation restrictions that accompany capital controls can reduce effective returns to foreign investment by preventing foreign investors from repatriating their profits to the extent that they would do if the restrictions were not in place.[120] It is even more deleterious when such a right is guaranteed in the first place and breached afterwards, as the imposition of capital controls can lead to multiple issues under international law.

Restricting capital flows is one of the most controversial policies a country can adopt, given two theoretical approaches. First is that any government has two essential interests: the desire to retain investors' interest; and the desire to maintain state autonomy, which leads the government to prefer the maintenance of capital controls to liberalization, ie the use of policy autonomy to reduce the risk of currency and financial crisis. The second interest leads governments to satisfy the dictates of their constituents. Although complimentary, these two interests are often in conflict, presenting a policy dilemma.[121] Where states have committed to the liberalization of funds and free movement of capital through treaty provisions, their monetary sovereignty is circumscribed. It is based on this, that concerns have been raised regarding the diminution of monetary sovereignty by BITs.

ADJUDGING MONETARY SOVEREIGNTY IN THE CONTEXT OF INVESTMENT TREATIES

A financial crisis is a good example of an extraordinary event that may require the invocation of the doctrine of necessity. Yet public international law is

118 C Binder and A Reinisch "Economic emergency powers: A comparative law perspective" in Schill (ed) *International Investment Law*, above at note 41, 503.

119 MA Desai, CF Foley and JR Hines Jr "Capital controls, liberalization and foreign direct investment" (2006) 19/4 *The Review of Financial Studies* 1433 at 1438.

120 Id at 1433.

121 Q Li and DL Smith "The dilemma of financial liberalization: State autonomy and societal demands" (2002) 64/3 *The Journal of Politics* 764 at 765.

insufficiently clear to give economic emergency defences the due consideration they deserve.[122] The emergency measures show tension between two competing strands: a state's sovereignty within its borders; and that states owe one another obligations to accord their citizens (including foreign investors who have spent monies and energy) treatments that are in consonance with the basic tenets of law. This results in a conflict of powers in matters that fall within the exclusive domain of states.[123]

In the realm of money, states are undeniably subject to increasingly consensual limitations and powerful constraints to what were formerly competencies within the exclusive jurisdiction of the state. However, this does not imply that states have relinquished their monetary sovereignty as such. In the case of the SS Wimbledon in 1923, the Permanent Court of International Justice was quick to emphasize that the conclusion of a treaty does not mean that the state undertakes to perform or refrain from performing a particular act that would cause it to relinquish its sovereignty.[124] The act of entering into international agreements is an attribute of state sovereignty itself.[125] Regulatory flexibility in international law exists whereby a state need not enter into an investment treaty at all; circumscribing this freedom by means of a BIT is itself a manifestation of the state's regulatory capacity. Even after assuming an international obligation, a state retains its ability to renegotiate, terminate or simply choose to default on its international obligations.[126] Following this argument, where lies the assertion that BITs, mutually consented to, are impediments to state sovereignty? Is this not contradictory?

One may wonder if the discussions on sovereignty should even be accorded attention in the first place, seeing that treaties are, by their nature, voluntary. If we are to go by this argument, one may risk ignoring an important point about developing countries having no choice but to enter into treaties because it was the "proper thing to do". Economic globalization exerts a strong influence on the outcomes of BITs; "for many of the world's weakest and most dependent states, the inclusion of International Centre for the Settlement of Investment Disputes (ICSID) clauses within BITs is not so much of a choice than a requirement".[127] Signing investment treaties was just one way to facilitate the calculability of western business in foreign countries; since developing countries were not expecting a sudden outflow of capital towards the

122 M Parish "On necessity" (2010) 11/2 *The Journal of World Investment and Trade* 169 at 169.

123 Ibid.

124 Zimmermann "The concept of monetary sovereignty", above at note 13 at 804.

125 Ibid.

126 T Aikaterini *The Right to Regulate in International Investment Law* (2014, ProQuest Dissertations Publishing) at 33.

127 T Allee and C Peinhardt "Delegating differences: Bilateral investment treaties and bargaining over dispute resolutions provisions" (2010) 54/1 *International Studies Quarterly* 1 at 23.

developing world, investment treaties represented an asymmetric consensus and therefore were one-sidedly extended to developing countries.[128]

Opponents of the view of the delimitation of the nation-state hegemony by the aftermath of foreign investments believe that large corporations and state governments were potentially useful to each other even though they contained features that were antagonistic to each other. To them, states that have even the most ineffectual government also have the unequivocal authority to block the entrance of any foreign investor that is not welcomed. In most instances, it is the foreign investors that turn to the host government for assistance and not the other way round. It is important to acknowledge that the host state has significant leverage against foreign investors. They are sovereigns and this connotes that they have the power to regulate within their sovereign territory as well as having a monopoly on the legitimate use of force. If the host state ultimately decides to pass laws that are adverse to investments, the foreign investors have no way of resisting them, since foreign investors / multi-national corporations (MNCs) must have completed the initial capital investment and the host state may no longer need the capital sunk as much as it did at the outset.[129]

Therefore, a government can force a foreign investor to leave by either tightening regulatory controls or raising the costs of doing business, among other things, and / or, with respect to foreign investors or MNCs, applying the sanction of nationalization to accept conditions or policies from states that may prove to be unfavourable to the foreign investors. To this extent, MNCs serve as a means for government to exert and enhance national power; they affirm sovereignty rather diminish it. Governments have used their power to integrate their states into the global economy and admit foreign investors because internationalization and strong economic performance are statistically intertwined. If integration is chosen rather than imposed, where then lies the question of states being rendered impotent by foreign investors?[130] Because the state has the supreme decision-making authority, it is rarely affected by external factors. Treaties derive their power from the explicit consent of contracting states. They are only functional for as long as states are willing to cooperate; they can be renegotiated, denounced or withdrawn. If there are reputational costs from overtly breaching a treaty, a state can always renegotiate with the other contracting state.[131] Denunciation is a unilateral act of withdrawal from an agreement; states are not usually permitted to denounce BITs during the initial stage for which they are in force. However,

128 NM Perrone "The governance of foreign investment at a crossroad: Is an overlapping consensus the way forward?" (2015) 15/1 *Global Jurist* 1 at 3.

129 GK Foster "Investors, states and stakeholders: Power asymmetries in international investment and the stabilizing potential of investment treaties" (2013) 17/2 *Lewis and Clark Law Review* 363 at 366.

130 Cohen "Multinational corporations versus", above at note 22 at 243.

131 EA Posner and AO Sykes *Economic Foundations of International Law* (2013, Harvard University Press) at 70.

this period is relatively short (ten to 15 years). It is also possible for a BIT to be terminated; when this happens, termination is usually followed by a survival period during which the provisions of the agreement continue to apply. This period lasts from ten to 20 years.[132] In other words, a treaty can be revoked; since states retain the power to decide an issue or choose a policy, the ultimate power to do so resides with them. On the rare occasions that parties intend exit from treaties to be barred or expressly barred, the delegation of power by states can be either revoked or renegotiated as a matter of international law. Therefore, where revocable, treaty membership represents the acceptance of temporary limits on the exercise of sovereign powers; sovereignty is not implicated, since membership is revocable.[133]

What is clear, however, from these differing opinions and the theoretical underpinning of international law is that, where an international investment agreement or formal treaty enshrines its members' commitments to a certain set of policies, a change in those policies not only has domestic ramifications, but also constitutes a breach of international obligations. The reactions of investors to macro-economic measures taken during the Argentine financial crisis reveal the limitations that consensual law of foreign investment imposed on domestic public policy manoeuvring.[134] Thus, signing an international treaty on FDI already impacts sovereignty.[135] The obligations imposed by these treaties are by their nature legally binding and raise the costs and difficulties of actual commitment violations. For instance, failure to adhere to these treaty commitments will lead to reputational harm for contracting states and as such will affect their future conduct within the international law regime.[136]

CONCLUSION

It is problematic that a state may not adopt legitimate regulatory laws to advance public interests if those laws will deplete the corporate benefits for a foreign entity.[137] In view of this problem, this article recognizes the fact that parties to a BIT can always renegotiate or even withdraw from a treaty, and that the international investment regime does not promote efficiency in every facet. However, it postulates that properly crafted and interpreted

132 K Tienhaara "Once BITten, twice shy? The uncertain future of 'shared sovereignty' in investment treaty arbitration" (2011) 30/3 *Policy and Society* 185 at 192.

133 K Raustiala "Rethinking the sovereignty debate in international economic law" (2003) 6/4 *Journal of International Economic Law* 841 at 847.

134 OE Garcia-Bolivar "Sovereignty vs investment protection: Back to Calvo" (2009) 24/2 *ICSID Review* 464 at 469.

135 J Crystal "Sovereignty, bargaining and the international regulation of foreign direct investment" (2009) 23/3 *Global Society* 225 at 228.

136 R Brewster "Unpacking the state's reputation" (2009) 50/2 *Harvard International Law Journal* 231 at 232.

137 Motala "Free trade", above at note 46 at 49.

treaty provisions can reduce a wide range of inefficiencies that would otherwise arise.[138] The objective of contemporary international investment law is to promote economic development through FDI by increasing the security of foreign investment.[139] The solution to the problems likely to arise from the conflict between a treaty obligation and foreign investor's interests is therefore to create room for optimal interpretation of treaty texts to serve the common interest of both parties to the BIT.

A country's perception of the associated benefits from FDI must therefore be balanced against the perceived loss of political, economic and cultural autonomy associated with greater foreign ownership of the host economy.[140] Therefore, a benchmark for future BIT negotiations should place emphasis on the object and purpose of the treaty (the driving force behind their original conclusion), so as to be able to limit the effect of BITs on national sovereignty. This helps to circumscribe the power of adjudicators to resort to an overly strict or literal interpretation of the rules of investments.[141] Going forward, model BITs should have carve out niches that identify exact areas that are necessary to be excused from BIT obligations or liability. Striking a sustainable balance between investment liberalization and protection, and a set of defined public values through exceptions that takes into consideration other public international obligations, will definitely go a long way in shoring up weakening stakeholder confidence in the investment regime.

CONFLICTS OF INTEREST

None

138 AO Sykes "The economic structure of international investment agreement with implications for treaty interpretation and design" (2019) 113/3 *American Journal of International Law* 482 at 483–84.

139 BMJ Szewczyk "*Sempra Energy International v Argentine Republic*" (2011) 105/3 *The American Journal of International Law* 547 at 553.

140 Crystal "Sovereignty", above at note 6 at 228.

141 J Kleinheisterkamp "Investment treaty law and the fear for sovereignty: Transnational challenges and solutions" (2015) 78/15 *Modern Law Review* 793 at 803.