The consistency of capital flow regulation under the US Model BIT, 2012 *vis à vis* the IMF and the WTO*

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Submitted by

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To: Hector R. Torres, IMF

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TABLE OF CONTENTS

LIST OF ABBREVIATIONS

2012 BIT	US Model BIT, 2012
Annex	GATS Annex on Financial Services
BIT	Bilateral Investment Treaty
BoP	Balance of Payment
CFM	Capital Flow Measure
ECJ	European Court of Justice
ECT	Energy Charter Treaty
EWM	Early Warning Model
FCL	Flexible Credit Line
FET	Fair and Equitable Treatment
GATS	General Agreement on Trade in Services
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreement
IMF	International Monetary Fund
LoI	Letter of Intent
MFN	Most Favorite Nation
NAFTA	North American Free Trade Agreement
NT	National Treatment
OECD	Organization for Economic Co-operation and Development
PCO	Prudential Carve Out
SBA	Stand By Arrangement
TISA	Trade in Services Agreement
TTIP	Trans-Atlantic Trade and Investment Partnership
TTP	Tran-Pacific Partnership
UMP	Unconventional Monetary Policy

UNCITRAL	United Nations Commissions of International Trade Law
UNCTAD	United Nations Conference on Trade and Development
URR	Unremunerated Reserve Requirement
USFCC	United States Foreign Claims Commission
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

EXECUTIVE SUMMARY

This study addresses the incongruence in the need for capital flow measures ("CFMs") as perceived by the IMF and their permissibility under international investment agreements ("IIAs") and the WTO regime. CFMs would be essential to contain the effects of volatile capital flows – episodes of which may well be imminent as countries retract unconventional monetary policies and withdraw excess capital, making such analysis relevant.

In analysing the degree the permissibility of CFMs, this study focusses on the provisions of the US Model BIT, 2012 and the WTO GATS Agreement. With regard to the latter, this study finds that the GATS Agreement (pertaining to the capital account in exclusion to the GATT) allows for significant flexibilities with mandatory reference to the statistical analysis of the IMF. Separate from such flexibilities, the GATS also permits prudential measures with respect to financial services. However, the width of such '*prudential carve-out*' and the degree to which it would draw from/be influenced by IMF prescriptions remains unclear.

With respect to the US Model BIT, 2012 ("2012 BIT") this study finds that although a specific reference to the IMF remain lacking, there exist flexibilities permitting CFMs in limited circumstances. Specifically with respect to financial services, the 2012 BIT allows for a 'prudential carve-out', matching the GATS provision verbatim, and also a modified dispute resolution procedure as an additional safeguard.

In addition, the 2012 BIT specifically curtails the guarantee of free transfers by giving precedence to host state laws relating to, *inter alia*, securities, futures, options and derivatives. Separately, the 2012 BIT also contains a 'self-judging' essential security exception which would permit a broad range of CFMs if invoked in an economic crisis.

However, the above flexibilities under the 2012 BIT may not operate ideally owing to interpretive knots in currently prevailing jurisprudence further compounded by the conspicuous lack of precision on the need and timing for CFMs in a given economy.

Even so, the 2012 BIT is not as restrictive *qua* CFMs as certain other IIAs. Indeed, the only evident restriction on CFMs under the 2012 BIT is with respect to prudential/preventive CFMs impacting sectors other than financial services (which restriction is arguably similar in scope to that under the WTO regime).

INTRODUCTION

This study charts and compares capital flow regulation across *a)* the Articles of Agreement of the International Monetary Fund ("IMF Articles"), *b)* international investment agreements ("IIAs") (specifically the US Model BIT, 2012 ("2012 BIT")) and *c)* the GATT and the GATS agreements administered by the World Trade Organization ("WTO").

(i) The issue in brief

Revisiting the above norms is important in the wake of increased global liquidity as a consequence of unconventional monetary policies ("UMPs") used extensively in recent years. Though deployed successfully in restoring markets post the 2008 crisis, however, UMPs have generated spillovers and the prospect of their retraction (*i.e* receding liquidity) may well engender further adverse spillovers. It is in containing such spillovers that capital flow measures ('CFMs') may prove to be vital.[1]

The negative spillovers of UMPs due to increased global liquidity may broadly be identified as *a)* exacerbation of iniquitous wealth distribution and *b)* inflation of financial asset prices rather than an increase in aggregate demand – affecting exchange rates and trade disproportionately. The prevailing circumstance is further compounded by the prospect of unevenly receding capital due to the retraction of UMPs and the 'normalization' of monetary policy.

Receding capital across borders, especially from countries exposed to massive capital inflows in recent times,[2] may engender episodes of volatile capital flows and consequent unwanted market outcomes.[3] Given the delicate scenario and the multiple possible triggers to a crisis, CFMs would be vital in minimizing the adverse fall-outs of such tensions and would help in preventing the recurrence and spread of financial crises.[4]

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[1] See, Hector Torres, 'Cross-Border Spillovers and International Policy Co-ordination' (Fifteenth Jacques Polak Annual Research Conference: "Cross-Border Spillovers", Washington DC, November, 2014)

[2] Sukhdave Singh, 'Spillovers from global monetary conditions: recent experience and policy responses in Malaysia' (2014) BIS Papers No. 78, 232 - 236 , <http://www.bis.org/publ/bppdf/bispap78o.pdf> accessed 11 December 2014

[3] Kevin Gallagher, 'Regulating Global Capital Flows for Development' (2012) No. 68 G-24 Policy Brief <http://www.ase.tufts.edu/gdae/Pubs/rp/Gallagher_G24_PB_68.pdf> accessed 24 November 2014

[4] Rosa Maria Lastra & Geoffrey Wood, 'The Crisis of 2007/09: Nature, Causes and Reactions' (2010) 13(3) J. Int. Economic Law 531; Palais-Royal Initiative, 'Reform of the International Monetary System: A Cooperative Approach for the Twenty First Century' (2011) <http://global-currencies.org/smi/gb/telechar/news/

This need for CFMs has been endorsed, *inter alia*, by state practice,[5] a UN General Assembly Resolution,[6] and by the IMF in *a)* a revised scope of surveillance (which factors developments in the capital account too),[7] and *b)* an institutional view recognizing the role of CFMs in preserving macroeconomic stability.[8]

Indeed, the IMF, in stark contrast to its previous position, now accepts the role of CFMs, in limited circumstances, to counter 'risks that could undermine financial stability and sustainable growth at the national and global level'.[9]

However, this heightened awareness on the need for CFMs is not adequately reflected in the legal landscape of IIAs, which in guaranteeing the freedom of capital transfers may restrict the policy space needed to enact CFMs. Such restriction would thus conflict with the IMF mandate of preserving macroeconomic stability.

This would be most pronounced when the IMF would endorse CFMs for countries facing an economic crisis,[10] - such as in the case of Latvia and Iceland in recent times - while IIA obligations of such countries may prohibit CFMs.[11] Similar conflicts may exist in context of numerous other states which resorted to CFMs in the aftermath of the 2008 financial crisis.

The conflict has also been formally recognized by the European Court of Justice ("ECJ"), albeit in a slightly different context, which declared certain IIAs entered into by Austria, Sweden and Finland as incompatible with the mandatory regulatory space to be retained to employ CFMs in the event of an EC recommendation.[12]

Rapport_Camdessus-integral.pdf> accessed 24 November 2014; Charles P Kindleberger & Robert Z. Aliber, *Manias, Panics and Crashes: A History of Financial Crisis* (5th edn, Wiley, 2005) 289-90

[5] IMF , 'Annual Report on Exchange Arrangements and Exchange Restrictions' (2010) <https://www.imf.org/external/pubs/cat/longres.cfm?sk=23953.0> accessed 12 November, 2014; In the wake of the crisis, countries such as Iceland, Ukraine, Brazil, Peru, Indonesia, South Korea, Thailand, Argentina and Russia have employed CFMs

[6] UNGA Res 64/190 (19 February 2010) UN Doc A/RES/64/190 para. 12; Joseph Stiglitz *et al*., 'Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System' UN Conference on the World Financial and Economic Crisis and its Impact (United Nations, 2009) para. 89

[7] IMF, Executive Board Decision No. 13919-(07/51), 'Bilateral Surveillance over Members' Policies' (2007) para. 4 ("Decision on Bilateral Surveillance")

[8] IMF, 'The liberalization and management of capital flows: an institutional view' (2012) ("Institutional View"); IMF, 'The Fund's Mandate - An Overview' (2010) para. 14

[9] Institutional View, Annex 1

[10] Institutional View, para. 45

[11] Art. VI, China – Latvia BIT (2006); Art. XIV, Energy Charter Treaty (1998) ("ECT")

[12] Case C-205/06 *Commission* v. *Republic of Austria* [2009] ECJ; Case C-249/06, *Commission* v. *Kingdom of Sweden* [2009] ECJ; Case C-118/07, *Commission* v. *Republic of Finland* [2009] ECJ

The U.S Model BIT, 2012 ("2012 BIT"), the focus of this study, is a significant point of reference for textual analysis as similar text finds reflection across the IIA universe.[13] Though some consider the 2012 BIT as representing a careful balance between investor and sovereign interests,[14] ongoing negotiations based on its text, such as the proposed Tran-Pacific Partnership ("TTP"), the Trans-Atlantic Trade and Investment Partnership ("TTIP") and the proposed US - China BIT reveal significant friction on the understanding for the need for CFMs.[15]

Significantly, and preceding the institutional view of the IMF in 2012, the 'G - 20' countries too concluded that CFMs may constitute part of a broader approach to protect economies from volatile capital flows.[16] So while there seems to be a broad consensus on the utility of CFMs, their understanding in the prevailing legal landscape represents uncertainty and probable conflict. This is the topic of analysis for the present study.

(ii) The format of the present study

The present study is divided into two sections. The first section charts the contours of capital flow regulation across IIAs (focussing on the 2012 BIT), the WTO regime and the IMF Articles. The second section analyses the potential conflict of the above norms and tests possible incongruence in applying them to possible scenarios employing CFMs.

The study ends with a report on the findings with respect to the policy restrictiveness of the 2012 BIT *qua* the liberty of states to enact CFMs, the potential conflict (if any) in the interface amongst different norms and the possibilities to resolve such conflict.

[13] José E. Alvarez, 'The Evolving BIT' in Ian A. Laird and Todd J. Weiler (eds), *Investment Treaty Arbitration and International Law* (Juris, 2010) 1, 12
[14] Jeremy Sharpe and Lee Caplan, "United States" in Chester Brown (ed.), *Commentaries on Selected Model Investment Treaties* (Oxford, 2013) 757 ("Chester Brown, 2013")
[15] 'Leaked TPP Draft Text on Investment Reveals Debate on Capital Controls, Inside U.S Trade' (NewsStand, 15 June 2012) < http://www.ase.tufts.edu/gdae/Pubs/news/GallagherInsideUSTrade_June2012.pdf> accessed 11 December, 2014; Xiang Ren and Qiao Liu, 'Transfer of Funds in China US BIT Negotiations: comparing the Articles of Agreement of the IMF' (2012) 11(1) JITLP 6; Simon Johnson and Jeffrey J. Schott, 'Financial Services in the Transatlantic Trade and Investment Partnership' (2013) Peterson Institute for International Economics PB 13-26, 4
[16] Institutional View, Annex 1 - 'G20 Coherent Conclusions for the Management of Capital Flows Drawing on Country Experiences' (October, 2011) para. 2

SECTION - I

THE REGULATION OF CAPITAL FLOWS ACROSS IIAS, THE IMF ARTICLES AND THE WTO

This section, divided into three parts, traces the regulation of capital flows across *a)* IIAs (focussing on the 2012 BIT), *b)* the IMF Articles and *c)* the WTO framework, respectively. At the end of each part the analysis therein is reduced into a tabular summary.

PART I - CAPITAL FLOW REGULATION UNDER THE 2012 BIT

The content of the 2012 BIT, now in its fourth generation,[17] is substantially similar to its previous (2004) version.[18] Based on text matching the 2012 BIT, the US has concluded 13 IIAs thus far.[19] A tabular comparison showing the US Model BIT's evolving text is at **Annex - 1**.

On the permissibility of CFMs under extant US IIAs, the US Treasury has asserted that there exists regulatory 'flexibility for (host state) governments to mitigate risks that can accompany large swings in capital flows'.[20] Further calls to define this 'flexibility', pointing to a conspicuous lack of a 'Balance of Payment' ("BoP") safeguard and a reference to the IMF in the 2012 BIT, remain unanswered.[21]

Certain commentators note that the absence of a specific BoP safeguard would prevent a state from taking policy measures in the event of a crisis.[22] However, opposing views observe that general exceptions (the customary international law defence of 'necessity' and the treaty

[17] The US Model BIT has evolved over four versions 1984, 1994, 2004 and 2012; Chester Brown, 2013, 760

[18] Kenneth Vandevelde, 'A comparison of the 2004 and the 1994 US Model BITs: Rebalancing Investor and Host Country Interests', in Karl P. Sauvant (ed), *Yearbook on International Investment Law and Policy: 2008 – 2009* (2009) 283, 283-7

[19] See, Chester Brown, 2013, 761, The US has signed a total of approximately 60 IIAs with investment chapters to date. While BITs have been concluded with Uruguay and Rwanda, FTAs have been concluded with Australia, Chile, Columbia, Korea (South), Morocco, Oman, Panama, Peru and Singapore and a regional agreement with Canada and Mexico, and another regional agreement with Costa Rica, El Salvador, Gautemala, Honduras, Nicaragua and the Dominican Republic of CAFTA-DR

[20] Letter by Timothy F. Geithner, Secretary of the Treasury to Ricardo Hausmann, Director, Harvard University Center for International Development, Department of the Treasury, Washington D.C (12 April 2011)

[21] Letter of Barney Frank and Sander M Levin (US Congress Representatives) to Timothy Geithner, Secretary of Treasury (23 May 2012); Compare with Art. 2104 NAFTA which contains a specific BoP safeguard with reference to the IMF

[22] Kevin P. Gallagher, "U.S. BITs and financial stability" in Karl P. Sauvant *et. al.* (ed.), Columbia FDI Perspectives No. 19 (2010) para. 2 <http://ccsi.columbia.edu/files/2014/01/FDI_19.pdf> accessed 12 December 2014; Deborah E. Siegel, "Capital Account Restrictions, Trade Agreements, and the IMF in Pardee Center Task Force Report, "Capital Account Regulations and the Trading System: A Compatibility Review" (Boston University, 2013) 67, 69

'essential security interest' exception) would allow for policy space to enact CFMs in the event of a BoP crisis, despite the lack of a specific BoP safeguard.[23]

Uncertainty over this 'flexibility' is highlighted by the contested nature of ongoing US IIA negotiations, as stated above, on the issue of CFMs. These negotiations may well lead to outcomes resembling the US - South Korea FTA, 2012 or the US - Singapore FTA, 2012, both of which contain carefully drafted exceptions permitting CFMs in limited circumstances.[24]

The regulatory contours of the 2012 BIT with respect to capital flows is analysed hereunder. For comparison, a study demonstrating possible variations in comparable provisions across IIAs is extracted at **Annex - 2**.

(i) Portfolio investments under the 2012 BIT – covered?

Certain IIAs exclude portfolio investments from the definition of 'investment', explicitly or implicitly.[25] However, most contemporary IIAs include portfolio investments in employing a broad asset based definition of an 'investment'.[26]

Art. 1 of the 2012 BIT contains an asset based definition which *a)* requires the existence of direct or indirect control, *b)* requires the commitment of capital and the expectation of gain/assumption of risk and *c)* contains an illustrative list enumerating equity participation, bonds, debts, debenture, futures and derivatives - thereby including portfolio investments.[27]

Importantly, 'investment' under the ICSID Convention has been traditionally filtered using factors such as duration, regularity of profit/return, risk, commitment and contribution to development,[28] - perhaps impliedly excluding speculative short-term capital flows. However,

[23] Alejandro Turyn and Facundo Perez Aznar, "Drawing the Limits of Free Transfer Provisions" *in* Michael Waibel, Asha Kaushal et. al. (eds.), *The Backlash against Investment Arbitration* (Kluwer, 2010) 51, 71
[24] Art. 1, Annex 11 G, US - Republic of Korea FTA (2012); Annex 15-A read with Side Letter dated 6th May 2003, US - Singapore FTA (2004)
[25] Art. 45, EFTA - Mexico FTA (2000); While the US - Canada FTA (1988) had excluded portfolio investments, it was superseded by Art. 1139 NAFTA which includes portfolio investments
[26] UNCTAD 'Scope and Definition: A Sequel' (UN Press, 2011) UNCTAD/DIAE/IA/2010/2, 21
[27] Art. 1 read with footnote 1, 2012 US BIT
[28] See, Christoph H. Schreuer, 'The ICSID Convention: A commentary', (2001) 11 ICSID Review – Foreign Investment Law Journal, 372; *Fedax* v. *Republic of Venezuela* ICSID ARB/96/03 (11 February 1997); *Salini Costruttori SpA and Italstrade SpA* v. *Morocco* ICSID ARB/00/4 (23 July 2001)

this interpretative filter under the ICSID convention stands diluted with tribunals giving precedence to treaty definitions over this interpretative check under the ICSID.[29]

(ii) The freedom of 'transfers' and the permissibility of CFMs

In guaranteeing cross-border financial flows, most IIAs contain a provision on 'transfers'.[30] Classifying broadly, such guaranteed protection to transfers may either be *a)* absolute,[31] *b)* subject to host state's law,[32] or *c)* subject to any necessary measures in a crisis.[33] In terms of the latter possible exceptions, only a few IIAs contain a specific BoP safeguard,[34] and even fewer contain a BoP safeguard with a reference to the IMF.[35]

Art. 7 of the 2012 BIT, the provision on transfers, reflects the strong US policy in favour of free transfers,[36] - covering both, financial inflows and outflows – and enumerates an illustrative category of which includes interest, dividends, profits, contributions to capital etc..[37] However, it is subject to the following exceptions:

a) The equitable, non-discriminatory and good faith application of host state laws relating to, inter alia, the issuing, trading or dealing in securities, futures, options, or derivatives. *(Art. 7(4)(b))*

b) The application of measures relating to financial services for prudential reasons to ensure the stability and integrity of the financial system, provided such measures are not used to avoid a party's commitments under the 2012 BIT. *(Art. 20(1) read with footnote 18)*

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[29] See, David A.R. Williams QC and Simon Foote "Recent developments in the approach to identifying an 'investment' pursuant to Article 25(1) of the ICSID Convention" *in* Chester Brown & Kate Miles (ed.) *Evolution in Investment Treaty Law and Arbitration* (Cambridge, 2011) 42, 63 ("Chester Brown & Kate Miles")

[30] See, Michael Waibel, "BIT by BIT - The Silent Liberalization of the Capital Account" in Christina Binder, Ursula Kriebaum *et al.*, *International Investment Law for the 21st Century - Essays in the Honour of Christoph Schreur* (Oxford, 2009) 498; Andrew Newcombe and Lluis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer, 2009) 399

[31] Art. 14, ECT; Abba Kolo & Thomas Walde, 'Economic Crisis, Capital Transfer Restrictions and Investor Protection under modern investment treaties' (2008) 3(2) Capital Markets L.J 154 ('Abba Kolo and Thomas Walde')

[32] Art. 6(1), China-Botswana BIT (2000); Art. 7(1), Korea-Malaysia BIT (1988)

[33] Abba Kolo and Thomas Walde, 154; Dolzer and Schreur, *Principles of International Investment Law* (Oxford, 2008) 193-94 ("Dolzer and Schreur")

[34] Art. 6, French Model BIT, 2006; Art. VI, Italy Model BIT, 2003; Art. 72, Japan - Mexico Economic Partnership Agreement (2005); Art. 20, Japan - Peru BIT (2008)

[35] Art. 2104, NAFTA; Art. 15 Framework Agreement on ASEAN Investment Area, 1998; Art. 195:5 EU Chile - Association Agreement (2002); Art. VII, UK - Ireland BIT (1980); Art. 8, France - Mexico BIT (1998); Art. 4 OECD Liberalization Code

[36] Free transfer of capital have been characterized as 'a mainstay of US international investment agreements': Hearing on Opening Trade in Financial Services, Trade and Technical Committee on Financial Services, 108th Congress 196 (Statement of John B Taylor, Under Secretary, International Affairs) ("Taylor Testimony")

[37] Art. 7(1), 2012 BIT

(Borrowed verbatim from Para. 5(a) of the Annex on Financial Services of the GATS, perhaps signifying intended congruence with the WTO on financial services.[38] *A footnote further clarifies 'prudential regulation' to include the 'soundness and integrity' of individual financial institutions as well as the 'operational integrity of payment and clearing systems'.)*

c) The application of general non-discriminatory measures taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies. *(Art. 20(2)(a) read with footnote 19)*

(As clarified in the footnote, this exception does not cover measures that expressly nullify or amend contractual provisions that specify the currency of denomination or the rate of exchange of currencies)

Thus, though not containing a specific BoP safeguard, the 2012 BIT allows adjustment mechanisms consistent with the freedom of transfers using monetary policy (changes in international reserves, interest rates and exchange rates) and fiscal policy.[39]

Significantly, claims based on the transfers provision have seldom been decided upon.[40] And in the few claims that have been adjudicated,[41] only one, against a measure prohibiting repatriation of profits and mandating that they be re-ploughed into the domestic sector, has been upheld.[42]

THE ABSOLUTE FREEDOM OF TRANSFERS UNDER THE ENERGY CHARTER TREATY

In contrast to the 2012 BIT's guarantee to the freedom of transfers, which provides exceptions to accommodate the monetary and fiscal policy measures, certain other IIAs such as the Energy Charter Treaty ("ECT") contain absolute guarantees thereby greatly restricting policy space for host-states. For instance, Iceland's measures on capital flows, endorsed by the IMF, could be subject to claims based on Art. 14 of the ECT which guarantees the freedom of transfers without specific exceptions. If such a claim would come to pass against Iceland, it would demonstrate the conflict for Iceland would

[38] Art. 20(1) & (7), 2012 BIT; *Continental Casualty Company* v. *The Argentine Republic*, ICSID Case No ARB/03/09 (5 September 2008) para. 192 ("Continental Casualty")
[39] Taylor Testimony, 193
[40] See, *CMS Gas Transmission Company* v. *The Republic of Argentina* ICSID Case No. ARB/01/8 (12 May 2005) ("CMS"); *Pan American LLC* v. *The Argentine Republic* ICSID Case No. ARB/03/13 (27 July 2007); *Philippe Gruslin* v. *Malaysia* ICSID Case No. ARB/99/3 (27 November 2000); *Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil* v. *The Republic of Estonia*, ICSID Case No. ARB/99/2 (25 June 2001); *Joy Mining Machinery Limited* v. *Arab Republic of Egypt*, ICSID Case No. ARB/03/11 (6 August 2004)
[41] *Metalpar S.A. and Buen Aire S.A. v. The Argentine Republic* ICSID Case No. ARB/03/5 (6 June 2008) para. 178 - 179 ("Metalpar"); *Biwater Gauff (Tanzania) Ltd.* v. *United Republic of Tanzania*, ICSID Case No. ARB/05/22 (24 July 2008) para. 735; *Continental Casualty* para. 245
[42] *Achmea B.V* v. *Slovakia* UNCITRAL 2013-12 -N.2 (20 May 2014) para. 96, 286

then possibly be, all at once ***a)*** required to impose IMF endorsed CFMs, which may well ***b)*** comply with Iceland's obligations as a signatory to the OECD Code of Liberalization of Capital Movements,[43] while ***c)*** violating the near absolute guarantee of free transfers under the ECT. It may however be noted that the ECT does contain an exception allowing states to take measures to protect *'essential security interests'* which would perhaps justify Iceland's IMF endorsed CFMs (as discussed later).[44]

Would the IMF endorsement of CFMs, in the absence of other IIA exceptions, be a defence to an alleged breach of the freedom of transfers? It has been observed that in the absence of a specific reference to the IMF, the IIA obligations would prevail as being *lex specialis* and may therefore not operate as a defence to IIA violations.[45]

The answer may perhaps be a little different if the IMF endorsement was to be made in a period of economic crisis - and though this question was directly framed by the tribunal in *Continental Casualty*, in context of the Argentinian crisis, it remained unanswered.[46] It may be relevant to note, at this stage, that the governing law of the 2012 BIT is not just the treaty itself but all of 'international law' as well.[47]

It has been observed that practically no treaty grants an absolute right to make transfers to investors and that terms on which such freedom is guaranteed is subject to modification in time as a consequence of the external financial position or of changes in the policies of countries.[48]

(iii) CFMs violating the National Treatment standard

Art. 3 of the 2012 BIT providing protection against discrimination - the national treatment ("NT") provision, is contingent on *a)* the existence of *'like'* circumstances, *b)* with respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other

[43] Art. 4 & 7(c), ECT
[44] Art. 24(3), ECT
[45] Abba Kolo,"Transfer of Funds: the Interaction between the IMF Articles of Agreement and Modern Investment Treaties: a Comparative Law Perspective" in Stephan W. Schill, *International Investment Law and Comparative Public Law* (Oxford, 2010) 374; *Continental Casualty* para. 244
[46] *Continental Casualty* para. 244 - 245: 'This conclusion makes it unnecessary for the Tribunal…to examine...whether in view of the…crisis.…Argentina was allowed, notwithstanding its obligations under [the] BIT to introduce the exchange restrictions based … on the IMF Agreement or under customary international law…'
[47] Art. 30(1), 2012 BIT
[48] Dolzer and Schreur 193; Giorgio Sacerdoti, The Source and Evolution of International Legal Protection for Infrastructure Investments Confronting Political and Regulatory Risk, (2008) 5(7) CEPMLP Internet Journal, <www.dundee.ac.uk/cepmlp/ journal/html/vol5/article5-7a.html> accessed 27 September, 2014

disposition of investments and *c)* in the host state territory.[49] In providing for 'establishment', the NT provision thus also guarantees market access (pre-entry approach) for investors.[50]

An NT violation would likely occur when employing CFMs such as taxes on capital inflows/outflows, unremunerated reserve requirements ("URRs") and minimum stay requirements which by nature have a discriminatory impact on foreign investors.[51] Notably, CFMs on fresh inflows would also be subject to scrutiny for the NT provision guarantees market access (pre-entry approach) in extending its application to the 'acquisition' and 'establishment' of investments.

However, there exists the possibility to exclude NT protection in arguing that cross-border and domestic capital flows are not *'like'* if covered by different regulatory regimes in the host state.[52] Indeed, this distinction based on the difference in applicable regulatory regimes is a position taken by the US itself in the past.[53]

(iv) CFMs violating the Fair and Equitable Treatment standard

Art. 5 of the 2012 BIT, guaranteeing fair and equitable treatment ("FET") to investments/investors, stands independent from other obligations under the treaty,[54] and is explicitly clarified to mean the minimum standard of treatment for aliens under customary international law.[55]

Of the many recognized limbs of FET, CFMs would likely be assailed on the grounds of *a)* the frustration of an investor's 'legitimate expectations', *b)* the lack of stability of a

[49] Art. 3, 2012 BIT
[50] Art. 3, 2012 BIT; Matthias Herdegen, *Principles of International Economic Law* (Oxford, 2013) 381
[51] See, Jonathan D. Ostry *et al*., 'Managing Capital Inflows: What tools to Use?" IMF Staff Discussion Note 11/06 (2011) 11 ("Ostry *et. al.* 2011"); Nicolas E. Magud, Carmen M. Reinhart *et al*., 'Capital Controls: Myth and Reality – A portfolio Balance Approach' 2011 WP 11-7 Peterson Institute of International Economics 27 – 31 ("Magud, Reinhart *et al.* 2011")
[52] *United Parcel Service of America Inc.* v. *Government of Canada* UNCITRAL 46 ILM 922 (24 May 2007) paras. 117 – 18
[53] *Grand River Enterprises Six Nations Ltd.* v. *United States of America* UNCITRAL (Rejoinder of United States) (3 May 2009) 62; Chester Brown 2013, 778
[54] Art. 5(3) 2012 BIT
[55] Art. 5(3) read with Annex A, 2012 BIT; NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions (31 July 2001); Stephen Vasciannie 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (2000) British Ybk Intl L 99

legal/business framework, *c)* the violation of a specific commitment and *d)* the obligation to act in good faith.[56]

An FET challenge is predicated on numerous factors such as the promises held out by the host state, reliance on such promise, the state of the economy, investor prudence, proportionality, transparency, risk assessment, the host country's right to regulate etc.[57] Also, while the degree of discrimination would be a relevant factor for assessment, it would not be absolutely prohibited by the FET standard.[58]

Cumulatively, all of the above represent a high threshold thereby making it difficult to find an FET violation. Indeed, the string of awards dealing with measures enacted by Argentina in context of an economic crisis, posit that only violations of specific commitments or abrupt, unreasonable and/or far-reaching changes to specific legal frameworks would be a breach of an FET standard.[59]

(v) CFMs amounting to expropriation

A CFM would probably never amount to an outright seizure/taking of title (direct expropriation) and must therefore be analysed as possible indirect expropriation nullifying the value of an investment - depending on multiple factors representing a high threshold.[60]

Art. 6 of the 2012 BIT pegs protection against indirect expropriation to the customary minimum standard and defines indirect expropriation as an action (or a series of actions) with an effect equivalent to direct expropriation requiring case specific factual enquiry on the measure's *a)* economic impact, *b)* interference with reasonable investment backed expectation and *c)* character.[61]

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[56] See, Ioana Tudor *The fair and equitable treatment standard in the international law of foreign investment* (Oxford, 2008) ("Tudor 2008")
[57] Nick Gallus, 'The Fair and Equitable Treatment Standard' in Chester Brown & Kate Miles 223; *Total S.A.* v. *The Argentine Republic* ICSID Case No. ARB/04/01 (27 December 2010) para. 164, 323,324 ("Total")
[58] *Methanex Corporation* v. *United States of America* UNCITRAL (3 August 2005) para. 14
[59] Jose E Alvarez & Gustavo Topalian, 'The Paradoxical Argentina Cases' (2012) 6(3) World Arb. and Med. Rev. 491
[60] Newcome and Paradell 323, 367; Giorgio Sacerdoti 'BIT Protections and Economic Crisis: Limits to their Coverage, the Impact of the Multilateral Financial Regulation and the Defense of Necessity' (2013) 28(2) ICSID Review 351, 355-56 ("Sacerdoti, 2013")
[61] Para. 4 Annex B, 2012 BIT; *Glamis Gold, Ltd.* v. *The United States of America*, UNCITRAL (8 June 2009) para. 356-357

Indeed, CFMs enacted by Argentina during the 2001 crisis were not found to be amounting to indirect expropriation,[62] - and were instead found to be regulatory measures of general application.[63]

In effect, only an indefinite blockage of repatriation of funds rendering the currency valueless and the investors incapable of commercial dealings would amount to indirect expropriation.[64] Such measures may also include an absolute and unyielding restriction on portfolio investors from repatriating capital/interest or a forced conversion of assets from a foreign currency into a domestic currency.[65]

The US Foreign Claims Commission ("USFCC") in the *Chobady Claim* stated the traditional US stance in holding that exchange restrictions in response to an economic crisis did not eliminate ownership and were not confiscatory.[66] Similarly, in the *Evanoff Claim*, the USFCC observed that 'a prohibition against transfer of funds outside of a country is an exercise of sovereign authority which, though causing hardship to non-residents having currency on deposit within the country, may not be deemed a "taking" of their property….'.[67]

(vi) CFMs as 'non precluded' measures and the customary defence of 'necessity'

Certain IIAs contain overarching exceptions providing that a party is *'not precluded'* from taking measures *'it considers necessary'* to protect its *'essential security interests*'.[68] Art. 18 of the 2012 BIT, for instance, allows host-states to take such 'non-precluded' measures 'self-judged' to be necessary to protect essential security interests - thereby allowing discretion to invoke such exception subject only to a universal 'good faith' requirement.[69]

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[62] Newcome and Paradell 357; *LG&E* v. *Argentine Republic* ICSID Case No. ARB/02/1 (3 October 2006) para 198 ("LG&E"); Anna Maria Viterbo *International Economic Law and Monetary Issues: Limitations to States' Sovereignty and Dispute Settlement* (Edward Elgar, 2012) 277 ("Viterbo 2012")

[63] CMS *Gas Transmission Company* v. *The Republic of Argentina* ICSID Case No. ARB/01/8 (12 May 2005) para. 25 ("CMS"); *Total* para. 197

[64] Abba Kolo and Thomas Walde (2008) 172

[65] Viterbo 2012, 273

[66] Josef Chobady, Claim No. HUNG – 20 Foreign Claims Settlement Commission of the US 187

[67] George Evanoff, Claim No. Bul. 1, 005 Foreign Claims Settlement Commission of the US 2

[68] Art. 25, International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, (2001) 2 Y.B. Int'l L. Comm'n 87, 154 ("Draft Articles"); Andrea Bjorklund 'Economic Security Defences in International Investment Law' (2009) 1 Int'l Inv. Law and Policy Ybk (2009) 479; William W. Burke White & Andreas Von Standen, 'Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties' 48 VA. J. Int'l L. (2008) 307, 318 ("Burke White & Von Standen")

[69] Burke White & Von Standen 374, 376-77, 382; Art. 26, Vienna Convention on the Law of Treaties (1969) 1155 U.N.T.S. 331 ("VCLT")

Separately, customary international law also allows necessity of measures taken to safeguard an 'essential interest' as a defence to allegations of treaty breach.[70] Notwithstanding certain textual commonality, the treaty defence and the customary defence are different in as much as:

a) the treaty exception suspends the operation of the treaty while the customary defence applies once a breach of treaty obligations has been found;[71]

b) the treaty exception justifies all measures 'necessary' to protect 'essential security interests' while the customary defence requires that the measures 'necessary' to protect 'essential interests' qualify the conditions under Art. 25 of the Draft Articles;[72]

c) the treaty exception allows for greater policy space and operates as *lex-specialis* compared to the customary defence;

d) the treaty exception also suspends the requirement of compensation for damaged caused due to measures taken under it while the customary defence does not expressly protect against the requirement of compensation.[73]

However and as regards the operation of the treaty exception, some commentators have questioned whether core obligations, such as the NT and MFN obligations, would stand suspended too.[74]

Current arbitral jurisprudence converges on the point that necessary measures taken in an economic crisis may be protected by the treaty exception as well as the customary defence - however, it is not clear what the threshold circumstance should be to qualify for each *i.e* the gravity of the economic crisis.[75]

The difficulty in identifying such threshold circumstance is compounded by the fact that there may be disagreement on when an economic crisis exists at all – for it may manifest in

[70] Art. 25, Draft Articles
[71] *CMS Gas Transmission Company* v. *The Republic of Argentina* ICSID Case No. ARB/01/8 (25 September, 2007) para. 129 ("CMS Annulment"); *Sempra Energy International* v. *The Argentine Republic*, ICSID Case No. ARB/02/16 (29 June 2010) para. 200 – 203 ("Sempra Annulment")
[72] *CMS Annulment* para. 130; *Sempra Annulment* para. 198-99
[73] Art. 27, Draft Articles, Burke White & Von Standen 386; Sacerdoti (2013) 382; *CMS Annulment* para. 133
[74] Sacerdoti (2013) 382: "An open issue is whether the admissibility of emergency measures in case of crisis as derogation from BIT specific commitments relieves the host State also from respecting general obligations such as non-discrimination (national and MFN treatment)."
[75] J. Salacuse, *The Law of Investment Treaties* (Oxford, 2010) 345; August Renisch, *Necessity in Investment Arbitration* 41 (2010) Netherlands Ybk Int'l L 146; *CMS* para. 319, 355; *LG&E* para. 253

different ways (BoP crisis, capital account crisis, currency crisis, solvency crisis etc.) with ideological differences in the criteria used to identify them.[76]

THE THRESHOLD TO DETERMINE AN ECONOMIC CRISIS UNDER AN IIA

Current jurisprudence posts that the required threshold 'gravity' of an economic crisis depends on whether the treaty exception is invoked or the customary defence. If the customary defence be employed, then the economic crisis would need to be extremely grave - and in the nature of an existential threat i.e the political and economic survival of the state itself.[77] However, if the treaty exception be employed then an economic crisis could be found based on plural effect based criteria arising from a negation of the central tenets of a country's economic life – i.e it would not be required that a situation of total economic collapse or a catastrophe have occurred for a finding of an economic crisis.[78]

Current arbitral jurisprudence may also trap host-states in a paradox in as much as a) preventive prudential measures in the absence of a crisis would be subject to challenge under IIAs,[79] while b) if the state does not take preventive measures then it may well be responsible for contributing to the crisis thereby disqualifying itself from the customary defence (Art. 25(2)(b) Draft Articles) and perhaps also the treaty defence.[80]

At its core, the problem is one of identifying the existence or imminence of an economic crisis. The solution may well lie in the realm of econometric analysis as suggested by the growing literature on early warning models ("EWMs"). If a universally accepted EWM were to evolve, it would not only afford mathematical certitude in affixing the actual period of a crisis but would also provide authoritative pronouncement on its 'imminence' thereby justifying preventive prudential measures.[81]

As for the measure itself, if the customary defence be invoked, the host state measure would need to satisfy the multiple requirements under the Draft Articles.[82] Indeed, and except for

[76] Diane A Diserto, *Necessity and National Emergency Clauses: Sovereignty in Modern Treaty Interpretation* (Martinus Nijhoff, 2012) 149
[77] *CMS* para. 355; *LG&E* para. 257
[78] *Continental* para. 180
[79] *Continental* para. 229
[80] *Suez, Sociedad General de Aguas de Barcelona S.A* v. *the Argentine Republic* ICSID Case No. ARB/03/17 (30 July 2010) para. 242; *Continental* para. 234; Alberto Alvarez-Jiminez, The Great Recession and the New Frontiers of International Investment Law: The Economics of Early Warning Models and the Law of Necessity (2014) 17(3) J. Int. Economic Law 517, 538 ("Jiminez 2014"); *Continental Casualty* para. 234 - 36
[81] See, Jiminez 2014
[82] Burke White & Von Standen (2008) 321

one,[83] tribunals ruling on the Argentinian crisis and importing the elements of customary law into the treaty exception, concluded that Argentina itself had contributed to the crisis,[84] that different measures could have been adopted,[85] and that the measures taken were not 'necessary'.[86]

However, if the treaty exception were to be invoked independently, the only requirement would be that the measure be 'necessary' *i.e* contribute materially to the realization of its legitimate aims – balancing its goals with its restrictive impact.[87] An application of this standard in the context of the Argentinian crisis, borrowing parallel external jurisprudence (such as from the GATT), found the Argentinian measures to be valid and justified.[88]

[83] *LG&E* para. 257
[84] *El Paso Energy International Company* v. *The Argentine Republic* ICSID Case No. ARB/03/15 (31 October 2011) para. 656 ("El Paso"); *National Grid* v. *Argentina* UNCITRAL (3 November 2008) para. 262
[85] *Sempra Energy International v. The Argentine Republic*, ICSID Case No. ARB/02/16 (28 September 2007) para. 350 ("Sempra"); *CMS* para. 323
[86] *CMS* para. 331 *; Sempra* para. 388
[87] *Continental* para. 196
[88] *Continental* para. 192 - 93

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CAPITAL FLOW REGULATION UNDER THE 2012 BIT

OBLIGATION	QUALIFICATIONS/LIMITATIONS	SPECIFIC EXCEPTIONS/EXCLUSIONS & COMMENTS
Transfers (Art. 7) - to permit all transfers (inflows as well as outflows) in freely usable currency, freely and without delay. Transfers include contributions to capital, profits, interest etc.	The 'transfer' must be related to covered investment Freely usable currency to be subject to the prevailing market exchange rate	Non-discriminatory laws relating to insolvency, trading or dealing in securities/derivatives, financial reporting, judicial or administrative proceedings etc. (Art. 7(4)) With respect to financial services (having the same meaning as Para. 5(a) of the GATS Annex on Financial Services) - a verbatim copy of the GATS prudential carve out applies (Art. 20(1))
National Treatment (Art. 3) - to accord investments/investors treatment no less favourable including pre- establishment rights to investment	Limited to 'like circumstances' Only with respect to establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investment	The US, in previous arbitrations, has espoused that the applicability of different legal regimes to different investment within the same sector may preclude a finding on 'like circumstances'
Standard of Treatment (Art. 5) - to treat investments in accordance with customary international law, including fair and equitable treatment and full protection and security	Bound to the international law minimum standard of treatment for aliens under customary international law An independent standard - does not depend on the breach of another provision	'Annex A' to the 2012 BIT clarifies that the international law minimum standard 'results from a general and consistent practice of States that they follow from a sense of legal obligation' Non - discriminatory measures of general application taken in pursuit of monetary and exchange rate policy (Art. 20(2))
Expropriation (Art. 6) - to not expropriate a covered investment except for a public purpose, without discrimination and with compensation	Indirect expropriation would depend on the measure's economic impact, degree of interference with investor expectations and the character of the measure	Bound to the customary international law standard General non-discriminatory regulatory actions in the ends of public welfare *e.g* public health, safety and environment.
Essential Security Exception (Art. 18)	Allows host states to take measures considered necessary to protect essential security interests. This is a *'self-judging'* general exception, separate from the customary international law defence of necessity, suspending treaty obligations with respect to necessary measures to protect essential security interests. In good faith exercise, it permits discriminatory measures and shields against compensation liability.	

PART II - THE REGULATION OF CAPITAL FLOWS UNDER THE IMF REGIME

Though the regulation of the capital account under the IMF Articles is left to the discretion of member states,[89] the IMF Articles allow for regulating capital flows in limited circumstances. Also, the IMF may discuss capital account policies on certain occasions in the framework of bilateral consultations too.[90] The ways in which the IMF Articles may positively regulate the capital account are discussed in this part, as below.

(i) Indirect regulation of capital flows when approving restrictions on the current account

The authority of the IMF over current account transactions (with the objective of their liberalization) also provides for authority to approve restrictions on current transfers in the event of *a)* a BoP crisis, *b)* for reasons of national or international security and *c)* when a member state's currency is declared scarce by the IMF.[91]

Approvals for restrictions in the case of a BoP crisis are guided by the necessity, non-discrimination and the temporariness of such restrictions.[92] The separate power to exercise a 'no-objection' for national/international security reasons is generally used by IMF members seeking to implement economic sanctions pursuant to UN Security Council Resolutions.[93]

As the definition of 'current transactions' under the IMF extends to certain transactions that could be considered 'capital' in the context of IIAs, the IMF may thus restrict capital flows (due to a definitional overlap) when approving restrictions over current transactions for any of the above reasons.[94]

(ii) Requiring CFMs in a BoP crisis

When financing a member in a BoP crisis,[95] the resources of the IMF have traditionally been made available on conditions ('conditionality') to safeguard the use of IMF's resources.[96]

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[89] Art. VI(3), IMF Articles
[90] Art. IV(3)(b), IMF Articles; IMF, Recent Experiences in Managing Capital Inflows Cross-Cutting Themes and Possible Policy Framework (14 February 2011) para. 6
[91] Art. VIII(2)(a), IMF Articles
[92] IMF Executive Board Decision No. 1034-(60/27), 'Art. VIII and Art. XIV' (1 June 1960)
[93] IMF Executive Board Decision No. 144-(52/51), 'Payments Restrictions for Security Reasons: Fund Jurisdiction' (14 August 1952)
[94] Art. XXX(d)(2-3), IMF Articles; UNCTAD, 'Transfer of Funds', (2000) Series on issues in international investment Agreements, UNCTAD/ITE/IIT/20, 12; See, Deborah E. Seigel, "Using Free Trade Agreements to Control Capital Account Restrictions: Summary of Remarks on the Relationship to the Mandate of the IMF" (2004) 10 ILSA J Int'l & Comp L 297 ("Seigel 2004")
[95] Art. I(v) - (vi) IMF Articles; IMF Executive Board Decision No. 71-2 (26 September 1946) p. 257
[96] Erik Denters, *Law and Policy of IMF Conditionality* (Kluwer, 1996) 7, 26; Art. I(v), V(3), IMF Articles

The framework for such conditionality is to be found in the IMF Articles read with the Guidelines on Conditionality ("IMF Guidelines").[97]

Conditionality allows the IMF in a BoP crisis to endorse restrictions on capital transfers. In practice too, the IMF has often supported economic programmes of members that included controls on capital inflows (for instance, by applying performance criteria on external borrowing) and on capital outflows.[98]

Separately, when lending resources to a member, Art. VI(1) of the IMF Articles allows the IMF to 'request' that member to 'exercise controls to prevent' the use of the fund resources for a large or sustained outflow of capital.[99] Indeed, the possibility of such 'request', which has never been made by the IMF to date,[100] is also acknowledged under the WTO framework.[101]

Thus, despite the fact that the IMF structure was designed to regulate only current account transactions, there exists the possibility of the IMF 'approving', 'requiring by way of an SBA' or 'requesting' a restriction on capital flows - giving rise to potential conflict with IIA provisions which may mandate otherwise.[102] Significantly, and despite the variance in language, all the above mechanisms would have the unique legal character of IMF 'conditionality'.[103]

- *The legal character of conditionality and the evolving nature of IMF lending*

The 'conditionality' used by the IMF which may represent possible capital account restrictions represents soft law.[104] This is borne out from the IMF Guidelines which posit that fund arrangements are not international agreements and that contractual connotations are to be avoided in such arrangements.[105] This unique legal character of 'conditionality' is

[97] Art. V(3), IMF Articles; IMF Executive Board Decision No. 12864 – (02/102), 'Guidelines on Conditionality' (2002)
[98] IMF, 'The Fund's Role Regarding Cross-Border Capital Flows' (15 November 2010) 50
[99] Art. VI(1), IMF Articles; Seigel (2004); IMF Executive Board Decision No. 1238-(61/43) 'Use of Fund's Resources for Capital Transfers' (1961)
[100] James M. Boughton, The IMF and the Force of History: Ten Events and Ten Ideas That Have Shaped the Institution, (2004) IMF Working Paper WP/04/75, 4 - 5
[101] Art. XI(2), GATS
[102] See, Seigel (2004)
[103] See, Seigel (2004)
[104] J. Gold, Intepretation, *The IMF and International Law* (Kluwer, 1996) 352 ("Gold 1996"); R.M Lastra, *Legal Foundations of International Monetary Stability* (Oxford, 2006) 410; J Gold, "The Stand By Arrangement of the International Monetary Fund" (IMF, 1970) 7
[105] IMF Executive Board Decision No. 12864 - (02/102), 'IMF, Guidelines on Conditionality' (2002) para. 9 ("Guidelines on Conditionality, 2002")

significant for it characterizes the nature of IMF norms and consequently affects the potential legal conflict. In the absence of a specific mention therefore, arbitral tribunals would perhaps look at IMF prescriptions as an aid in factual assessment rather than a legal norm to be harmonized.

'Conditionality' in an IMF programme is usually manifest in programme documents - the standard format containing *a)* a letter of intent ("LOI") reflecting the unilateral policy intent of the member, and *b)* a stand by arrangement ("SBA") which contains the express conditions (performance criteria, for instance), but not amounting to an 'international agreement'.[106]

Though an analysis of the intent and meaning of each discrete condition contained in the programme documents may reveal some conditions to be more contractual than others,[107] in general an SBA may be classified as a 'decision' of the IMF, while a letter of intent ("LOI") as a declaration of the member's intentions.[108]

Separate from the above mode of operations and the associated conditionality (the framework of which has been updated),[109] a recent breakthrough in the lending mechanism has been the 'Flexible Credit Line' ("FCL") under which precautionary *ex ante* financing may be provided by the IMF to countries with strong fundamentals (this pre-requisite amounting to a kind of *ex-ante* conditionality).[110]

'Conditionality' under the FCL is achieved on strict pre-qualification criteria which includes, amongst others, a capital account dominated by private flows, absence of bank solvency problems and sound monetary policy.[111] At the core of its assessment/criteria, the IMF must have confidence in the qualifying member's policies and its ability to take corrective measures when needed.[112]

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[106] Erik Denters, *Law and Policy of IMF Conditionality* (Kluwer, 1996) 106; Art. V(3)(a), IMF Articles; J. Gold, *Legal and Institutional Aspects of the International Monetary System – Selected Essays* (IMF, 1984) 173; Art. XXX(b), IMF Articles; IMF Decision No. 10464 – (93/130), 'Stand-by and Extended Arrangements - Standard Forms' (1993); IMF Executive Board Decision No. 6056-179/38, 'Guidelines on Conditionality' (1979)
[107] Gold 1996, 398
[108] Eva Reisenhuber, *The International Monetary Fund under Constraint* (Kluwer, 2001) 263
[109] IMF Executive Board Decision No. 14280 (09/29), 'Conditionality Governing the Use of Fund Resources' (2009)
[110] Institutional View, 42
[111] IMF, 'Factsheet - The IMFs Flexible Credit Line (FCL)' (IMF, 2014); Sean Hagan 'Reforming the IMF' in Giovanoli, Mario, and Diego Devos (eds.) International Monetary and Financial Law: The Global Crisis (Oxford University Press, 2010) 40 60; IMF Executive Board Decision No. 14280 (09/29), 'Conditionality Governing the Use of Fund Resources' (2009)
[112] IMF, 'Questions and Answers - Reforms of Lending and Conditionality Frameworks' (2013)

The prohibition from enacting CFMs under the IIA framework may thus potentially conflict with the IMFs pre-qualification requirement in as much as it curtails a member's abilities to take corrective measures when needed. In such cases however, where members would not qualify for the FCL due to a restricted policy space, the IMF retains its traditional modes of lending premised on *ex-post* conditionality.

This 'soft' nature of IMF conditionality may lead to the result that a host-state, in the absence of a specific provision referring to the IMF, would not be able to rely on IMF prescriptions as a concrete justification for its use of CFMs.

CAPITAL FLOW REGULATION UNDER THE IMF ARTICLES

CAPITAL REGULATION UNDER IMF ARTICLES	QUALIFICATIONS/LIMITATIONS	COMMENTS
Approval to restrict transfers to settle current transactions Art. VIII(2) - IMF may 'approve' or 'not object to' restrictions on current transfers in certain circumstances (which may impliedly restrict capital transfers due to an overlapping definition)	Must be necessary, non-discriminatory and are justified as long as the circumstance continues. They may only affect those 'capital transfers' (as understood under IIAs) which overlap with the definition of 'current transfers' under the IMF articles. Only in the event of a BoP crisis, for reasons of international security or when a member state's currency is declared scarce.	The IMF Articles define current transfers under Art. XXX(d) as four broad categories. In specific the categories listed in Art. XXX(d)(2) and Art. XXX(d)(3) may be taken to include proceeds of direct investment, payment of interest on foreign held bonds and loans which are generally understood as elements of the capital account – and are therefore identifiable as the category affected by the definitional overlap.
Requiring capital account regulation under 'conditionality' Art. I(v) and V(3) – The IMF may adopt policies on the use of its general resources by way of stand-by or similar arrangements	'Conditionality' may only be required in exchange for financing a member state/making the resources of the fund available to a member state.	Conditionality, due to its nature, may not afford sufficient legal traction to a member to justify it as an obligation owed to the fund and thereby a defence. However, since conditionality would operate only in the event of IMF funding – it may well perhaps evidence a crisis depending on circumstance.
Requesting a member to exercise capital controls Article VI(1) – The IMF may request a member to exercise capital controls.	A request may only be made to prevent a member from using the resources made available by the IMF to meet a large or sustainable outflow of capital – allowing thereby a leakage of fund resources and nullifying the utility of such IMF lending in the first place.	The possibility of such request is acknowledged under the GATS too, however, such request has not been made to date and is further unlikely, given the high threshold set by the IMF to the phrase 'large and sustained'.

PART III - THE REGULATION OF CAPITAL FLOWS UNDER THE WTO FRAMEWORK

Under the WTO, both the GATT and the GATS Agreements complement and defer to the design of the IMF, permitting regulatory flexibility over exchange rates and capital flows while ensuring that their abuse does not negate the objectives of the WTO framework.[113]

The GATT operates in close co-ordination and statistical deference to the IMF in allowing member states to address a BoP crisis using exchange restrictions and trade restrictions (equivalent to restrictions on current transfers).[114] While the GATT concerns itself with trade and monetary restrictions affecting the current account only,[115] the GATS regulates both current and capital flows to the extent they affect specific service commitments undertaken by member states.[116] Even so, it has been observed that the term "exchange restrictions" used under Art. XV.9(a) of the GATT may well be used to enforce capital controls in restricting access to foreign exchange.[117]

Separately, certain GATS provisions, such as the 'prudential carve-out' applicable specifically to trade in financial services, are drafted in an (often deliberately) ambiguous manner – which makes it difficult to ascertain their actual content.[118] On such issues relevant to capital flows, WTO members continue to grapple with uncertainty in the absence of a consensus.[119] Nevertheless, an understanding of the norms governing capital flow under the GATS is as below.

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[113] Michael J Trebilock and Robert Howse, *Regulation of International Trade* (Routledge, 2005) 158, 362; Art. III.5, Agreement establishing the WTO (1994); WTO - IMF Agreement (1996)

[114] Art. XII, XIV and XV, GATT; Deborah E. Seigel, Legal Aspects of the IMF/WTO Relationship: the Fund's Articles of Agreement and the WTO Agreements (2002) 96(3) Am. J. Int'l L. 561 ("Seigel 2002"); WTO Decision by the General Council, 'Understanding on the Balance of Payments Provisions of the General Agreements on Tariffs and Trade' (1994)

[115] Art. XII, XV GATS; Viterbo 2012, 206

[116] Art. XI, GATS

[117] Hector R. Torres, "Capital Controls can smoothen Trade Tensions" in Pardee Center Task Force Report, *Capital Account Regulations and the Trading System: A Compatibility Review* (Boston University, 2013) 35,37

[118] See, Henrik Horn, Giovanni Maggi *et. al.*, 'Trade Agreements as Endogenouly Incomplete Contracts' (2006) National Bureau of Economic Research Working Paper No 12745; Fredrico Lupo Pasini, 'Movement of Capital and Trade in Services: distinguishing myth from reality regarding the GATS and the liberalization of the capital account' (2012) 15(2) J. Int. Economic Law 581("Pasini 2012"); Gabriel Gari, "Capital Controls, GATS disciplines and the need for a more coherent global economic governance structure" (2014) Queen Mary University of London, Legal Studies Research Paper No. 171/2014 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2386507> accessed 12 December, 2014 ("Gari 2014")

[119] See, WTO, Minutes of Committee on Trade in Financial Services meetings held on 27/06/12 (S/FIN/M/74), and on 5/12/12 (S/FIN/M/75); Gari 2014

(i) The extent of capital flow liberalization under the GATS

Art. XI of the GATS prohibits members, in relation to their specific commitments, from restricting international transfers for current transactions or capital transactions subject to *a)* measures taken in accordance with the IMF Articles and *b)* in the event of serious BoP difficulties as provided under Art. XII.[120]

The extent of capital liberalization required is set forth under 'footnote 8' to Art. XVI:1 which mandates free movement of capital for *a)* services covered under Mode 1 (cross-border trade), if cross border movement of capital is an *essential part of* the service itself and *b)* for service covered under Mode 3 (commercial presence), if the movement of capital into its territory is *related to* such service.[121]

Importantly, though a member may limit market access or national treatment obligations in its sector specific schedule of commitments,[122] limitation on the obligations on capital transfers contained under 'footnote 8' are impermissible as these are minimum non-negotiable obligations.[123]

Though at times it may be difficult to classify a service as Mode 1 or Mode 3,[124] commitments under Mode 1 would generally cover a majority of financial services such as lending services, accepting deposits and trading financial instruments which are dependent on the free cross border movement of capital.[125] CFMs such as minimum stay requirements or URRs would violate GATS obligations on financial services which may, subject to a member's scheduled commitments, require cross border capital flow.[126]

Commitments under Mode 3 would require a state to permit 'related' transfers of capital *i.e* the financial resources necessary for a foreign supplier to establish a commercial presence in the territory of the member state.[127] Although the obligation explicitly covers only inflows,[128] it may well be argued that even capital outflows are covered by implication.[129] Thus, CFMs

[120] Art. XI & XII, GATS
[121] Art. XVI read with Footnote 8, GATS
[122] Art. XX, GATS
[123] WTO Secretariat Background Note, 'Financial Services' S/FIN/W/73 (2010) para. 20
[124] WTO Secretariat Background Note, 'Cross-Border Supply (Modes 1 & 2)' S/C/W/304 (2009), para. 9 - 10
[125] See, Aan Van Aaken & Jurgen Kurtz, 'Prudence or Discrimination? Emergency Measures, the Global Financial Crisis and International Economic Law' (2009) 12(4) J. Int. Economic Law 859
[126] Gari 2014, 15
[127] Pasini 2012, 600
[128] Art. XVI read with Footnote 8, GATS
[129] Gari 2014, 16

such as taxes, discriminatory prudential regulation *etc.* targeting capital inflows may violate market access or national treatment commitments made under Mode 3.

(ii) The obligation of National Treatment under GATS

The NT obligation under the GATS, which members are at liberty to commit to, is contingent on *a)* '*likeness'* and *b)* the existence of less favourable treatment. *'Likeness'* would require that the service suppliers concerned supply the same service,[130] while *'less favourable treatment'* would mean discriminatory conditions of competition.[131] Thus the obligation of NT, though not prohibiting CFMs, requires their effect to be non-discriminatory.[132]

Although a footnote clarifies that the NT obligation would not cover inherent competitive disadvantages resulting from the 'foreign character' of the relevant services/service suppliers,[133] it is unlikely that the 'foreign character' of portfolio investment and the possible 'inherent competitive disadvantage' of potential CFMs would be a permissible derogation from the NT obligation.

(iii) Financial services under the GATS and the prudential exception

Relevant to this study, the GATS also contains an Annex on Financial Services (Annex), as a structural complement, and an Understanding on Commitments in Financial Services ("Understanding") which sets out model framework obligations for financial services.

The Annex, which clarifies the application of the GATS to the financial services sector defines financial services as including 'any service of a financial nature offered by a financial service supplier of a member' along with an illustrative list of financial services.[134]

With respect to financial services, the Annex excludes from the GATS, activities *a)* conducted by a central bank /monetary authority in pursuit of monetary and exchange rate policies, *b)* pursuant to the statutory social security and public retirement plans, and *c)* conducted by a public entity using/depending on the financial resources of the government.[135]

[130] See, WTO, Canada – Certain Measures Affecting the Automotive Industry (11 February 2000) WT/DS139/R, WT/DS142/R
[131] Art. II.2 GATT; Art. XVII GATS
[132] Gari 2014, 16
[133] Art. XVII read with Footnote 10, GATS
[134] Art. 5.1 read with the Annex on Financial Services, GATS
[135] Para. 1(b) Annex, GATS

The above exclusions may be read as allowing for prudential regulations by public authorities to be excluded from the GATS framework altogether - enabling CFMs such as URRs to be imposed by a monetary authority.[136]

Separately, the Annex contains a 'prudential carve out' ("PCO") for financial services which enables members, notwithstanding any GATS obligations, to take measures for prudential reasons including the protection of investors, depositors, policy holders…'.[137] Significantly, the language of the PCO has been borrowed verbatim in the prudential exception contained in the 2012 BIT.[138]

The PCO has only recently been invoked for the first time as a defence by Argentina, in a dispute yet pending, against allegations of, *inter alia*, discriminatory and unfavourable *a)* restrictions on trading in financial instruments, *b)* approval requirements when repatriating profits and *c)* minimum capital requirements in the insurance sector.[139]

However, in the absence of prior jurisprudence, the scope of the PCO remains uncertain,[140] and subject only to academic commentary.[141] A summary of the prevailing commentary on the operational ambit of the PCO is as below:

a) For a measure to be covered under the PCO, it must be reasonably related to the regulatory goal, based on objective and transparent criteria and not be more burdensome

[136] WTO Council for Trade in Services and Committee on Trade in Financial Services, 'Financial Services: Background Note by the Secretariat' S/C/W/312, S/FIN/W/73 (2010) para. 25; Patrick Low, Aditya Matoo *et al.*, Opening Markets in the Financial Services and the Role of the GATS (1997) WTO Special Studies 3
[137] Para. 2(a) Annex on Financial Services, GATS
[138] Art. 20(1), 2012 BIT
[139] WTO *Argentina – Measures Related to Trade in Goods and Services* WT/DS - 453 (pending, panel composed on 11 November 2013)
[140] A suggestion by Australia to clarify the meaning of 'prudential' received mixed responses by other WTO Members. The EC, for instance, agreed that it was useful to discuss the subject but that it was too ambitious to develop a definition. See, Committee on Trade in Financial Services, 'Report of the Meeting held on 25 May 2000', (2000) S/FIN/M/26 paras. 21 - 34. Japan has stated that 'Members should be cautious in embarking on a discussion that might limit the right of each Member to take regulatory measures for prudential reasons in an appropriate and timely manner; Also see, Council for Trade in Financial Services Special Session, Report of the Meeting held on 3 - 6 December, 2001' (February, 2002) S/CSS/M/13 para. 267; Juan Marchetti, 'The GATS Prudential Carve Out' in Panagiotis Delimatsis and Nils Herger (eds), *Financial Regulation at the Crossroads – Implications for Supervision, Institutional Design and Trade* (Kluwer, 2010) 279, 293
[141] Apostolos Gkoutzinis, International Trade in Banking Services and the Role of the WTO: Discussing the Legal Framework and Policy Objectives of the General Agreement on Trade in Services and the Current State of Play in the Doha Round of Trade Negotiations (2005) 39(4) Int'l Lawyer 877, 902-3

that necessary.[142] It need not be 'necessary' and may even be discriminatory *vis* à *vis* foreign elements which are not of equal systemic importance.[143]

b) While the objective of the measure would depend on its design, architecture and structure,[144] the adequacy of the measure would depend on external corroboration with the IMF or the Basel Committee standards.[145] Regard must be had, as under the analogous GATS Art. VI, to 'relevant international organizations'.[146]

c) Since nothing in the PCO indicates otherwise, 'measures for prudential reasons' may include day-to-day regulation (such as taxes, URRs etc.) as well as preventive and crisis management instruments.[147] The measure should be analysed on the basis of its relation to financial stability, structure, application and the relevant facts/circumstances.[148]

d) As a matter of practice, many WTO members have re-affirmed the freedom to adopt prudential measures pursuant to the PCO in their schedule of commitments - reiterating that 'they would apply in any event'.[149] Such entries would perhaps operate as 'safety valves' in case of narrow interpretation of the PCO in the future.[150]

(iv) Obligation in respect of payments and transfers - deference to the IMF

GATS Art. XI:2, which details the 'payments and transfers' obligations for members, with respect to their scheduled commitments, allows for restrictions on capital transactions in the event of *a)* a BoP crisis under Art. XII (to be determined in accordance with the IMF) or *b)* upon a request by the IMF.[151]

Art. XII, in allowing for capital controls, remains contingent on a BoP crisis or an external financial difficulty, requiring the restriction to be, *inter alia*, non-discriminatory amongst members, consistent with the IMF Articles, temporary, proportionate and subject to

[142] WTO Council for Trade in Services, 'Financial Services Background Note by the Secretariat' (1998) S/C/W/72 para. 41
[143] Bart De Meester, The Global Financial Crisis and Government Support for Banks: What Role for the GATS?" (2010) 13(1) J. Int. Economic Law 27, 61 ('De Meester 2010'); Carlo Maria Cantore, 'Shelter from the Storm': Exploring the Scope of Application and Legal Function of the GATS Prudential Carve-Out' (2014) 48(6) J.W.T 1223, 1234 ('Cantore 2014')
[144] WTO, *Chile Taxes on Alcoholic Beverages – Report of the Appellate Body* (13 December 1999) WT/DS87/AB/R paras 62, 71 - 72
[145] Panagiotis Delimatsis and Pierre Sauve, 'Financial Services Trade After The Crisis: Policy and Legal Conjectures' (2010) 13(3) J. Int. Economic Law 837, 846; Regis Bismuth, Financial Sector Regulation and Financial Services Liberalization at the Crossroads: The Relevance of International Financial Standards in WTO (2010) 44(2) J.W.T 489, 496
[146] Cantore 2014, 1241; Art. VI:5(b), GATS
[147] Cantore 2014, 1239; De Meester 2010, 59
[148] WTO, *Japan-Taxes on Alcoholic Beverages – Report of the Appellate Body* (4 October 1996) WT/DS11/AB/R 29
[149] Rudolf Adlung, Peter Morrison *et al*., FOG in GATS Commitments – Why WTO Members should care (2013) 12 World Trade Rev. 1, 15
[150] Cantore 2014, 1226
[151] Art. XI(2) - XII, GATS

assessment by the Committee on BoP restrictions.[152] Although it is uncertain whether Art. XII permits restrictions only on capital outflows,[153] certain authors posit that capital outflows are included by implication.[154]

Further, though the WTO has consistently deferred to the IMF when an impugned measure is covered under a provision explicitly referring to the IMF,[155] the Appellate Body in *Argentina – Textiles*, in finding that the impugned GATT provision therein did not require IMF consultation, observed nevertheless that 'it might have been useful for the Panel to have consulted with the IMF on the legal character of the relationship or arrangement between Argentina and the IMF'.[156]

This is important for it suggests that the legal character of IMF obligations may not have sufficient traction to justify derogation from WTO obligations unless a specific IMF reference were to be found in the WTO provision covering the impugned measure.[157]

[152] Art. XII (2) – (6), GATS
[153] WTO Secretariat Background Note 'Exceptions and Balance of Payments Safeguards' (2002) WT/WGTI/W/137, 16
[154] Pasini 2012, 607; Decision on Bilateral Surveillance
[155] See, WTO, *Dominican Republic-Measures Affecting the Importation and Internal Sale of Cigarettes – Report of the Appellate Body* (25 April 2005)WT/DS302/AB/R; WTO, *India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products – Report of the Appellate Body* (23 August 1999) WT/DS90/AB/R
[156] WTO, *Argentina Measures affecting imports of footwear, textiles, apparel and other items - Report of the Appellate Body* (27 March 1998) WT/DS56/AB/R para. 86 ("*Argentina – Footwear")*
[157] *Argentina - Footwear* para. 65, 69

CAPITAL FLOW REGULATION UNDER THE GATS AGREEMENT

OBLIGATION	QUALIFICATIONS/LIMITATIONS	SPECIFIC EXCEPTIONS/EXCLUSIONS & COMMENTS
Payments and Transfers (Art. XI) - to not restrict capital transactions inconsistently with its specific commitments	A member state should have committed to market access commitments under Mode 1 and Mode 3 services or made a specific commitment relating to capital flows regarding Mode 2 or Mode 4 services	Upon 'request' by the IMF (presumably under Art VI.1 of the IMF Articles) Measures countering a BoP crisis and external financial difficulties or threat thereof. Such exceptional measure to be consistent with the IMF Articles and the statistical findings and assessment of the IMF (Art. XII)
Market Access and Capital Flow (Art. XVI:1 – Footnote 8) - to allow cross border movement of capital 'essential' to a Mode 1 service and to allow 'related' transfers of capital into its territory in a Mode 3 service	In the case of Mode 1 commitments, only where such movement of capital is 'essential' In the case of a Mode 3 commitments, only 'related movement of capital into its territory'	For financial services as defined in the Annex to Financial Services –states' may enact prudential regulation for reasons such as the protection of investors, policy holders etc. to ensure the integrity and stability of the financial system Member states are free to, and extensively do, introduce specific limitations to commitments (market access) on services including financial services
National Treatment (Art. XVII) – to accord to services and service suppliers of any other Member treatment no less favourable than that to its own services or service suppliers	In keeping with scheduled commitments Limited to measures 'affecting the supply of services' Limited to 'like services and service suppliers' Inherent competitive disadvantages resulting from the foreign character of the services is not covered	Member states are free to, and extensively do, introduce specific limitations and conditions in the schedule of commitments relating to National Treatment
General Exceptions (Art. XIV)	Subject to the chapeau requirements (*i.e* non-arbitrariness/unjustifiable discrimination/disguised restriction), a party may adopt or enforce any measures necessary to, *inter alia*, maintain public order when a threat is posed to one of the fundamental interests of society or necessary to secure compliance with laws consistent with the GATS	
Security Exceptions (Art. XIVbis)	Member states may invoke the self-judging security exception by claiming a measure as necessary to protect essential security interests in times of emergency in *'international relations'*. Such measure may be discriminatory and would be subject to scrutiny only on the basis of a 'good faith' application and its relation to its object	

SECTION - II

CONFLICT OF NORMS GOVERNING CAPITAL FLOWS AND THEIR INTERACTION

This section, dived into two parts, seeks to *a)* characterize the potential conflict amongst the norms charted in the previous section and *b)* apply such norms to possible CFMs across different scenarios. The latter exercise shall bring into relief the incongruence amongst the norms governing capital flows and shall tabulate the summary of such analysis in a table at the end.

PART I - CONFLICT OF NORMS GOVERNING CAPITAL FLOWS *QUA* CFMS

Though this part seeks to characterize the conflict of norms on the issue of CFMs, it must be stated at the very outset, that prescriptions under the *sui generis* legal regime of the IMF have been stated to not amount to *'international obligations'*,[158] notwithstanding arguments to the contrary.[159] IMF prescriptions on capital flows as charted above (all of which share the *sui generis* nature of IMF 'conditionality') may therefore not amount to a 'norm' under international law as they would not partake the functional character of a 'norm'.

This is significant for it implies that *a)* conflicts with possible IMF prescriptions (on capital flows) may not be subject to rules governing conflict of norms under public international law and *b)* IMF prescriptions may not be overarching justifications or defences before arbitral tribunals in the absence of a specific reference to them or greater clarity on the legal relationship they create.[160]

In their current legal form, IMF prescriptions may serve more as evidence/statistical justification for CFMs rather than a parallel international obligation to be harmonized. The regulatory norms under WTO or IIAs may therefore not defer to the IMFs prescription unless expressly required. Even so, this part attempts to characterize the conflict (*even if only in principle*) and summarizes the rules governing such conflict under public international law.

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[158] Guidelines on Conditionality, 2002 para. 9; J. Gold 1996, 352; Rosa Maria Lastra, *Legal Foundations of International Monetary Stability* (Oxford, 2006) 410

[159] Gabriel Garcia, 'Understanding IMF Stand-By Arrangements from the Perspective of International and Domestic Law: The Experience of Venezuela in the 1990s' (3rd Biennial Global Conference, Society of International Economic Law, 2012) < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2091204> accessed 12 December 2014

[160] *Argentina - Footwear* para. 65, 86

(i) Preventing interpretation and the resolution of conflict

As already stated, the potential for the conflict of norms *qua* CFMs is most pronounced in an economic crisis where CFMs may be endorsed by the IMF while being prohibited by an IIA. The WTO regime, in such circumstances and depending on the provision attracted, provides for deference to the statistical assessment of the IMF.

Notwithstanding the heightened possibility of such conflict in an economic crisis, a conflict may also exist in normal circumstances where CFMs, recognized by the IMF as an important prudential policy tool,[161] may not be employed by a host-state due to IIA restrictions.

Thus, both in times of emergency and otherwise, an individual state could be subject to opposing prescriptions under the IMF and IIA regimes, setting the stage for potential conflict.[162] The degree of such conflict would depend on *a)* the justification for CFMs in a given circumstance - a difficult econometric exercise,[163] and *b)* the flexibility, width and the threshold of IIA exceptions permitting such CFMs.

To the extent the flexibilities of an IIA would accommodate CFMs, a conflict could perhaps be prevented.[164] It would be in the incongruence between the two *i.e* the point at which the need to deploy CFMs is not recognized by IIA flexibilities that an irreconcilable conflict would exist.

A pre-requisite to such conflict would be the exhaustion of interpretative rules in aid of reconciling such conflict. In attempting to prevent such conflict, the following interpretive principles would be relevant:

a) Art. 31(3)(c) of the VCLT, as has been used by arbitral tribunals in the past to borrow external justification,[165] posits that treaty interpretation must take into account 'relevant rules of international law applicable in relations between the parties'. As a codification of customary international law, this provision may well require an arbitral tribunal to take

[161] Institutional View, para. 18, 31
[162] See, Joost Pauwelyn, *Conflict of Norms in Public International Law – How WTO Law Relates to other Rules of International Law* (Cambridge, 2003) 175 ('Pauwelyn 2003')
[163] Institutional View, para. 47
[164] Pauwelyn 2003, 175
[165] *Saluka Investments BV v. Czech Republic* UNCITRAL (17 March, 2006) para. 254-255; See, Diane A. Desierto, Conflict of Treaties, Interpretation, and Decision-Making on Human Rights and Investment During Economic Crises (2013) 10(1) TDM 1, 73; *Micula and Ors.* v. *Romania*, ICSID Case No. ARB/05/20 (24 September 2008) para. 86 - 88

into account IMF prescriptions as a 'relevant rule' when interpreting IIA flexibilities thus providing for systemic integration.[166]

b) Though not prescribed by the VCLT, its interpretive rules allow considerable space for *'analogical reasoning'* and tribunals often draw analogies from other legal disciplines relying on textual and functional similarities.[167] Thus WTO jurisprudence, which allows for statistical deference to the IMF, would likely influence IIA flexibilities having common text (such as the PCO) thereby reconciling possible conflict.[168]

However, in the event the above principles would fail to reconcile opposing norms, crystallizing irreconcilable conflict, the following rules would be relevant to determine which norm would prevail in the event of such incompatibility:

a) This principle of *'lex posterior'*, as a conflict resolution rule, posits that the treaty later in time over the same subject matter would prevail - as codified under Art. 30 of the VCLT.[169] An IMF prescription recommending CFMs (being in the *sui generis* nature of conditionality) would not be an 'international agreement' later in time *vis* à *vis* the IIA obligations on transfers.

b) The principle of *'lex specialis'*, though not embodied under the VCLT, posits that the more specific treaty supersedes the more general treaty.[170] Indeed, the tribunal in *Continental Casualty* observed that the provision on transfers would be *'considered a lex-specialis in respect of the IMF regime and more liberal than the latter*".[171]

In the event of a conflict therefore, IIA obligations would prevail over IMF prescriptions as being later in time and more specific. Arguing to the contrary would be difficult as it would require *a)* IMF prescriptions, notwithstanding their *sui generis* 'soft' character, to be capable of conflicting with and superseding IIA norms, and *b)* IMF prescriptions to create fresh rights/obligations between its members (to qualify as *lex-specialis*/*lex-posterior*) – notwithstanding that IMF prescriptions create only vertical rights between the IMF and the member and not horizontal rights between members.[172]

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[166] See, Campbell McLachlan, 'The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention', (2005) 54 Int'l & Comp. L.Q. 279

[167] Anthea Roberts, Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System (2013) 107 AJIL 45, 51; *Mondev Int'l Ltd.* v. *United States* (ICSID-NAFTA) (11 October, 2002) para. 144; *Total S.A.* v. *Argentina* ICSID Case No. ARB/04/1 (27 December 2010) para. 128-34; *Corn Products Int'l, Inc.* v. *Mexico* (ICSID Case No. ARB(AF)/04/01(15 January, 2008) para. 161-79; *Methanex Corp.* v. *United States* (UNCITRAL-NAFTA) (15 January, 2001) para. 29-34; *Continental Casualty* para. 192

[168] Art. 20(1), 2012 BIT; Art. 33(3), Canada - China BIT (2012)

[169] Seyed Ali Sadat and Akhavi, *Methods of Resolving Conflicts between Treaties* (Martinus Nijhoff, 2003) 212

[170] Oliver Dorr, Kirsten Schmalenbach (ed.), *Vienna Convention on the Law of Treaties: A Commentary* (Springer, 2012) 506

[171] *Continental Casualty* para. 244

[172] Claus D. Zimmerman, *A Contemporary Concept of Monetary Sovereignty* (Oxford, 2013) 131 - 32

PART II - APPLYING THE 2012 BIT TO POSSIBLE COUNTRY SCENARIOS EMPLOYING CFMS

The purpose of testing CFM scenarios on the touchstone of the 2012 BIT is to help identify the erosion, if any, of host-state regulatory space. As CFMs fashioned by states and consequent claims under IIAs would be intensely fact specific, the examples taken below are generic and broadly representative of CFMs in possible country scenarios.[173]

(i) Prudential CFMs on capital inflows in the absence of an economic emergency

CFMs have been increasingly used to control exposure to volatile capital inflows as prudential measures - at times acknowledged approvingly in IMF country consultations.[174] Commonly employed price based CFMs to control capital inflows are in the form of URRs, taxes on inflows or minimum stay requirements.[175] As *'residency-based'* CFMs, all of them would be *prima facie* discriminatory towards foreign investors and investments.

However, it must be noted that such prudential CFMs on capital inflows, though they may be acknowledged approvingly by the IMF, would not be backed by an IMF prescription (as IMF prescriptions on capital flows would be activated only in exchange of lending which in turn would be contingent on a crisis) thereby not giving rise to a legal conflict

- ANALYSIS UNDER THE PROVISIONS OF THE 2012 BIT

a) NT VIOLATION *(ART. 3)*: The above CFMs would be discriminatory as they would adversely impact the capacity of similarly situated investors to establish, acquire, expand and manage investments in the host state territory. However, it could be argued that such CFMs, covered under discrete and separate legal regimes in the host state, may not qualify the test of *'likeness'* thereby precluding a NT violation.

b) TRANSFERS VIOLATION *(ART. 7)*: The above CFMs would be a violation of the guarantee to the freedom of transfers and would not be permitted under the specific exceptions thereunder (requiring them to be non-discriminatory),[176] for they would be residency based.

[173] For an excellent account of CFMs employed in specific country scenarios, see, Magud, Reinhart *et al.* 2011 27 - 31
[174] IMF, 'Mexico Art. IV Consultations' Country Report No. 11/250 (July, 2011); IMF, 'Chile Art. IV Consultations' Country Report No. 12/267 (September, 2012)
[175] Ostry *et. al.* 2011, 28; For instance, Columbia employed a 40% URR on capital inflows in 2007 which was increased to 50% in May, 2008. A two year minimum stay requirement was also implemented on inward FDI
[176] Art. 7(4)(b), 20(2)(a), 2012 BIT

However, such measures, only to the extent they relate to financial services, may be valid as a prudential measure in the ends of stability and integrity of the financial system.[177] Though the content of the prudential exception remains indeterminate, it may be understood as allowing for discriminatory prudential measures *vis à vis* foreign elements which are not of equal systemic importance.[178]

c) FET VIOLATION *(ART. 5)*: To the extent the above CFMs on inflows would affect/encumber existing investments they would not likely qualify threshold factors required for violating FET - the standard being pegged to the minimum standard of protection under customary international law.[179]

d) EXPROPRIATION *(ART. 6)*: To the extent the above CFMs on inflows would affect/encumber existing investments, it is unlikely that it would have the extreme effect of rendering an existing investment valueless which is the threshold for finding an indirect expropriation.[180]

e) ESSENTIAL SECURITY *(ART. 18(2))*: Invoking this wide *'self-judging'* exception would require a state of crisis and a preventive prudential measure would hardly be justifiable on the grounds of *'essential security'*. This, more so, as the economic indicators predicting a crisis remain uncertain and indeterminate.

- FINDINGS

A CFM on inflows in the nature of URRs, a tax on inflows or a minimum stay requirement, would be a violation of the NT standard under the 2012 BIT.

However, to the extent they impact 'financial services', they would likely qualify the 'prudential exception' under the 2012 BIT - which shares text (and inherent uncertainty) with the GATS PCO.

To the extent the CFMs affect the non-financial sector, such as minimum stay requirements on FDI in non-financial sectors, they would likely violate the NT and the transfers provision of the 2012 BIT. It may however be argued that the CFMs were enacted under a discrete and separate regulatory regime thereby precluding a finding on *'likeness'*.

(ii) CFMs on capital outflows in the event of an economic crisis

CFMs on capital outflows, at times IMF endorsed,[181] have also been employed by certain countries in recent times to contain financial crises.[182] Commonly employed non-residency

[177] Art. 20(1) read with footnote 18, 2012 BIT
[178] De Meester 2010, 61
[179] *Methanex v. United States*, UNCITRAL (3 August 2005) para. 14
[180] *Glamis Gold, Ltd. v. The United States of America* UNCITRAL (8 June 2009) para. 9, 356-357
[181] Auden Groenn, Maria Walling Fredholm, 'Baltic and Icelandic Experiences of Capital Flows and Capital Flow Measures' (IMF, 2013) 11, 15

based controls on capital outflows would be in the nature of prohibiting the conversion and transfer of domestic currency assets and limiting bank withdrawals.[183] In contrast, residency based CFMs on outflows, which would be *prima facie* discriminatory, would be in the nature of mandatory waiting periods for foreign investors to transfer proceeds from domestic securities or taxes on the transfer of proceeds.[184]

In the event of a crisis, however, the endorsement of such measures by the IMF would probably be much more concrete - by way of conditionality, or otherwise, - thereby setting the stage for a potential norm conflict between IMF prescriptions and the 2012 BIT (presuming the 'soft' nature of IMF prescriptions to be amounting to a 'norm') . However, to the extent that the *'essential security'* exception under the 2012 BIT would apply, it would operate to suspend all BIT obligations in the event of a crisis.

As for the crucial determination regarding the existence of the economic crisis rising to the level of an 'essential security' interest,[185] current jurisprudence would require a consideration of *a)* an objective criterion (the difficult statistical point where IMF reports would prove helpful) with *b)* a certain margin of appreciation to the state.[186]

Also, though certain commentators note that arbitral tribunals do not refer to the IMF when making such determination of economic crisis,[187] this study observes to the contrary that certain tribunals dealing with the emergency measures enacted by Argentina, relied on IMF reports to reach a conclusion as to the state of economic necessity pleaded by Argentina.[188]

- ANALYSIS

a) NT VIOLATION *(ART. 3)*: Non-residency based CFMs on outflows would not likely be found to be a NT violation as they would affect both domestic and foreign investments alike. However, residency based CFMs on outflows such as taxes on proceeds or waiting periods would likely violate the NT standard. Once again, on the pre-requisite of *'likeness'* it would be open to the host state to contend that the alleged discriminatory CFMs operated in a different legal regime altogether.

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[182] IMF, Liberalizing Capital Flows and Managing Outflows (2012) 36 - 38 ("IMF Managing Outflows 2012")
[183] IMF Managing Outflows 2012 40
[184] IMF Managing Outflows 2012 40
[185] Salacuse, Jeswald W. *The Law of Investment Treaties* (Oxford, 2010) 345
[186] *Continental Casualty* para. 181
[187] Asif H. Quereshi, 'A Necessity Paradigm of 'Necessity' in International Economic Law' 41 (2010) Netherlands Ybk Int'l L 127
[188] *Continental Casualty* para. 127; *El Paso* para. 657; *Metalpar* para. 193

b) TRANSFERS VIOLATION *(ART. 7)*: Would stand suspended in the event of an economic crisis. However, to the extent such discriminatory CFMs impact financial services, even if in economic crisis where the essential security exception would apply, they could perhaps be further justified and allowed as a prudential measure in the ends of the stability and integrity of the financial system *(Art. 20(1) read with footnote 18)* – borrowing its jurisprudence from the GATS.[189]

c) FET VIOLATION *(ART. 5)*: Would stand suspended in the event of an economic crisis.

d) EXPROPRIATION *(ART. 6)*: Would stand suspended in the event of an economic crisis.

e) ESSENTIAL SECURITY *(ART. 18(2))*: As the CFMs would be employed in the event of an economic crisis they would likely be covered under the 'self-judging' essential security exception - especially if the IMF were to endorse the existence of the crisis and the CFMs employed.

- FINDINGS

All forms of CFMs in the event of an economic crisis would be justifiable under the wide 'self-judging' essential security exception. The invocation of the essential security exception would be subject only to a 'good faith' review by a tribunal which - if the CFM be endorsed by the IMF - would likely pass muster. CFMs impacting financial services in specific would be doubly protected both under the essential security exception as well as the prudential exception of the 2012 BIT.

Similar to the above analysis on the 2012 BIT, such discriminatory CFMs would be permissible under the GATS in the situation of an economic crisis based on *a)* the specific BoP safeguard under Art. XII (with specific reference to the IMFs assessment) and *b)* under the PCO (for financial services) subject to the scheduled commitments of a member.

[189] Cantore 2014, 1239; De Meester 2010, 59

PERMISSIBILITY OF CFMS UNDER THE 2012 BIT AND THE WTO

POSSIBLE CIRCUMSTANCES		CFMS IMPACTING 'FINANCIAL SERVICES'	CFMS IMPACTING SECTORS OTHER THAN 'FINANCIAL SERVICES'
ECONOMIC EMERGENCY ESTABLISHED	DISCRIMINATORY CFMS *(residency based)*	**2012 BIT – Permissible,** as *a)* necessary to protect essential security interests (Art. 18(2)) and *b)* as prudential measures (Art. 20(1)) **WTO – Permissible,** as *a)* upon IMF request (Art. XI), *b)* as BoP exception (Art. XII), *c)* as necessary to protect essential security interests (Art. XIV(bis)) and *d)* as prudential measures (Annex, Para. 5(a))	**2012 BIT – Permissible,** as *a)* necessary to protect an essential security interest (Art. 18(2)) **WTO – Permissible,** as *a)* upon IMF request (Art. XI), *b)* as BoP exception (Art. XII), *c)* as necessary to protect essential security interests (Art. XIV(bis))
	NON-DISCRIMINATORY CFMS *(non- residency based)*	**--PERMISSIBLE**, AS ABOVE-- (Discrimination does not affect the applicable exceptions detailed above permitting CFMs)	**--PERMISSIBLE**, AS ABOVE-- (Discrimination does not affect the applicable exceptions detailed above permitting CFMs)
ECONOMIC EMERGENCY NOT ESTABLISHED	DISCRIMINATORY CFMS *(residency based)*	**2012 BIT – Permissible,** as a prudential measure (Art. 20(1)) [subject to authoritative interpretation] **WTO – Permissible,** as a prudential measure (Annex, Para. 5(a)) [subject to authoritative interpretation]	**2012 BIT – Impermissible,** as it would be an NT violation **WTO – Impermissible,** as it would be an NT violation (subject to the host state's scheduled commitments)
	NON-DISCRIMINATORY CFMS *(non- residency based)*	**2012 BIT – Permissible,** as *a)* measure of general application in pursuit of monetary and exchange rate policy (Art. 20(2)) and *b)* equitable measure relating to securities, futures, options, derivatives, bankruptcy, insolvency, rights of creditors etc. (Art. 7(4)) **WTO – Permissible,** as a prudential measure (Annex, Para. 5(a)) [subject to authoritative interpretation]	**2012 BIT – Permissible,** as *a)* measure of general application in pursuit of monetary and exchange rate policy (Art. 20(2)) and *b)* equitable application of laws relating to securities, futures, options, derivatives, bankruptcy, insolvency, rights of creditors etc. (Art. 7(4)) **WTO – Impermissible,** as it would violate the guarantee of transfers under Art. XI and market access obligations *(Art. XVI:1(Footnote 8))*, subject to any specific exceptions chosen by a member in its scheduled commitments.
***** The threshold for an economic emergency would be the independent treaty standard and not the 'higher' customary law standard.***			

CONCLUSION

1) **The 'self judging' essential security exception under Art. 18(2) of the 2012 BIT allows for a broad range of CFMs (including discriminatory CFMs) in the event of an economic crisis.** This would encompass all categories of economic crisis, including a BoP crisis, notwithstanding that specific categories of crises (such as a BoP crisis) may not be enumerated. The operation of such treaty exception would suspend treaty obligations and compared to the customary defence, it would be *lex-specialis* and would have a lower threshold.

2) **There is no conclusive criterion to determine when a crisis may amount to an 'essential interest' under the customary defence or an 'essential security interest' under the treaty exception.** Broadly, the customary defence threshold would depend on factors evidencing a threat to the economic or political existence of a state,[190] while the treaty exception would depend on the consequences of adverse influences on central economic tenets of the state.

3) **The indeterminacy of thresholds is compounded by the fact that no accepted econometric models exist to determine the existence of a crisis or the imminent threat of one.** There exists neither a detailed imperative to follow a mathematical/scientific standard in determining the existence/timeline/ threat of crisis nor a consensus on what such standard could be. However, and even in the absence of an explicit reference to IMF (as across most IIAs), certain tribunals have looked to the IMF reports to determine the existence of a crisis.[191]

4) **An incorporation of econometric standards (such as EWMs) to determine the existence or the imminent threat of crisis is a systemic requirement for certainty and congruence in the use of CFMs.** Especially in light of the potential 'trap', where preventive prudential measures would violate IIA obligations while not taking such measures would contribute to the crisis thereby disqualifying applicable

[190] However, the ICJ has noted, in context of finding a state of necessity, that a peril far into the future but established to be inevitable, could perhaps be considered imminent and thereby establish a state of necessity. This allows room to stretch the 'necessity' defence as also the treaty exception till the point where an economic crisis becomes imminent. *Gabčíkovo-Nagymaros Project* (*Hungary* v. *Slovakia*) (Merits) (1997) [54] <http://www.icj-cij.org/docket/files/92 /7375.pdf> accessed 12 December, 2014

[191] *Continental Casualty* para. 127; *El Paso* para. 657; *Metalpar* para. 193

exceptions, it would be necessary for IIA parties to negotiate common independent standards or borrowing from established institutional standards such as the IMF.

5) **For financial services in specific, the 2012 BIT borrows the 'prudential carve out' of the GATS and affords significant latitude to employ CFMs as prudential measures.** Though understood to be allowing for discriminatory CFMs - both, in times of crisis and prudential otherwise - the text of the PCO has never been formally interpreted. Verbatim text contained in the GATS PCO has recently been invoked by Argentina as a defence and a panel ruling is expected by mid-2015.[192] Clarification on the text of the PCO text would also be timely for similar text appears in the draft Trade in Services Agreement (TISA).[193]

6) **In context of financial services, the 2012 BIT provides an additional safeguard in terms of customized and conservative dispute resolution procedures.** The flexibility on financial regulation is augmented by specific and modified dispute resolution procedures with safeguards such as *a)* mandatory negotiations between the financial authorities of each state and *b)* arbitration of issues not settled by negotiation by a tribunal with expertise on financial services.[194] Certain other IIAs posit that disputes on financial services could only be decided by *'state-state'* tribunals.[195]

7) **CFMs would not be permitted under the 2012 BIT in the event *a)* the CFMs are discriminatory, *b)* an economic crisis does not exist and *c)* the CFMs impact sectors other than non-financial services.** Such CFMs would be covered by neither the prudential exception nor the essential security exception, and would most likely be found to violate the 2012 BIT. However, non-discriminatory CFMs applying laws relating to, *inter alia*, issuing or dealing in securities, futures, options or derivatives would be permitted under separate and specific exceptions.

[192] WTO *Argentina – Measures Related to Trade in Goods and Services* WT/DS – 453 (pending, panel composed on 11 November 2013)
[193] Art. X.17, Financial Services Annex, Trade in Services Agreement (TISA) <htpps://wikileaks.org/tisa-financial/#start> accessed 12 December, 2014. The TISA would cover 50 countries and 68.2% of world trade in services. The US and the EU are the main proponents of the proposed agreement, the negotiations of which are not publicly available.
[194] Art. 20(2)-(3), 2012 BIT
[195] Art. 33(3), Canada-China BIT (2012)

8) **The design of CFMs recommended by the IMF greatly lessens the potential of conflict with the 2012 BIT.** The IMF stance on CFMs envisages, *inter alia*, that they be fashioned as proportionate and temporary measures to be effective. Such elements would largely align them with the permitted flexibilities under the 2012 BIT, reducing the possibility of conflict.[196]

9) **With respect to WTO norms governing capital flows, the possibility of conflict is reduced due to express references to the IMF across relevant provisions.** Even so, some cautious commentators suggest that the expression '*at the request of the fund*' under GATS Art. XI.2 be clarified to accommodate IMF recommendations under bilateral surveillance and the 'conditionality' associated with lending.[197]

10) **The provision across IIAs guaranteeing the freedom of transfers, has rarely been adjudicated upon, and a breach has been found only once thus far.** The guarantee to the freedom of transfers has not been an active ground of challenge thus far and the only example of a breach has been a recent award which found a mandatory requirement to re-plough profits as a breach of the transfers provision.[198]

11) **In the absence of an agreement on econometric standards, IIA negotiators could work towards a mandatory reference to IMF's statistical analysis for arbitral tribunals when judging the need/adequacy of CFMs.** Recognizing the statistical analysis of the IMF as a point of reference would help integrate the standards to be followed when employing CFMs with the existing WTO regime thereby reducing the overall risk of conflict.

12) **IIA negotiators could further work towards clarifying the scope of the prudential exception regarding *a)* its equivalence to the WTO PCO and *b)* the possibility of widening its application to sectors beyond the financial services sector.** This would be in aid of understanding the width of the prudential exception and further negotiations on widening its application would address the only part where the 2012 BIT is evidently policy restrictive *i.e* prudential discriminatory CFMs impacting sectors other than financial services.

[196] IMF, Recent Experiences in Managing Capital Inflows – Cross Cutting Themes and Possible Policy Framework (14 February 2011) para. 9; IMF Managing Outflows 2012, para.63
[197] Pasini 2012, 618
[198] *Achmea B.V* v. *Slovakia* UNCITRAL (20 May 2014) para. 96, 286

ANNEX - 1

This table charts the text of comparable provisions across all four versions of the US Model BIT *i.e* in 1984, 1994, 2004 and 2012. Separate from charting the evolution, it also provides a ready reference to the relevant provisions of the 2012 BIT (as analysed in the study) while also demonstrating its similarity with the previous (2004) version.

1984	1994	2004	2012
Article – I (Definitions) "investment" means every kind of investment in the territory of one party owned or controlled, directly or indirectly by nationals or companies of the other party, such as equity, debt and service an investment contracts; and includes: i.) Tangible and intangible property, including rights, such as mortgages, liens and pledges; ii.) A company or shares of stock or other interests in a company or interests in the assets thereof. iii.) A claim to money or a claim to performance having economic value and associated with an investment; "return" means an amount derived	**Article – I (Definitions)** "investment" of a national or company means every kind of investment owned or controlled directly or indirectly by that national or company, and includes investment consisting or taking the form of: i.) a company; ii.) shares, stock, and other forms of equity participation, and bonds, debentures, and other forms of debt interests in a company;	**Article – I (Definitions)** "freely usable currency" means "freely usable currency" as determined by the International Monetary Fund under its *Articles of Agreement*. "investment" means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include: …. (b) shares, stock, and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans;*	**Article – I (Definitions)** "freely usable currency" means "freely usable currency" as determined by the International Monetary Fund under its *Articles of Agreement*. "investment" means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include: …. (b) shares, stock, and other forms of equity participation in an enterprise; (c) bonds, debentures, other debt instruments, and loans;*

from or associated with an investment, including profit; dividend; interest; capital gain; royalty payment; management, technical assistance or other fees; or returns in kind;		(d) futures, options, and other derivatives; * Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.	(d) futures, options, and other derivatives; * Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.
Article IV (Transfers) 1. Each Party shall permit all transfers related to an investment to be made freely and without delay into and out of its territory. Such transfers include: (a) returns; (b) compensation pursuant to Article III; (c) payments arising out of an investment dispute; (d) payments made under a contract, including amortization of principal and accrued interest payments made pursuant to a loan agreement; (e) proceeds from the sale or liquidation of all or any part of an investment; and (f) additional contributions to capital for the maintenance or development of an investment. 2. Except as provided in Article III paragraph 1, transfers shall be made in a freely convertible currency at the prevailing market rate of exchange on the date of transfer with respect to	**Article V (Transfers)** 1. Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include: (a) Contributions to capital; (b) Profits, dividends, capital gains, and proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment; (c) interest, royalty payments, management fees, and technical assistance and other fees, (d) payments made under a contract, including a loan agreement; and (e) Compensation pursuant to Article III and IV, and payments arising out of an investment dispute. 2. Each Party shall permit transfers	**Article 7: Transfers** 1. Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include: (a) contributions to capital; (b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment; (c) interest, royalty payments, management fees, and technical assistance and other fees; (d) payments made under a contract, including a loan agreement; (e) payments made pursuant to Article	**Article 7: Transfers** 1. Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include: (a) contributions to capital; (b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment; (c) interest, royalty payments, management fees, and technical assistance and other fees; (d) payments made under a contract, including a loan agreement; (e) payments made pursuant to Article

spot transactions in the currency to be transferred. 3. Notwithstanding the provisions of paragraphs 1 and 2, either Party may maintain laws and regulations (a) requiring reports of currency transfer; and (b) imposing income taxes by such means as a withholding tax applicable to dividends or other transfers. Furthermore, either Party may protect the rights of creditors, or ensure the satisfaction of judgments in adjudicatory proceedings, through the equitable, non-discriminatory and good faith application of its law.	to be made in a freely usable currency at the market rate of exchange prevailing on the date of the transfer. 3. Each Party shall permit transfers to be made in a freely usable currency at the market rate of exchange prevailing on the date of transfer. 4. Each Party shall permit returns in kind to be made as authorized or specified in an investment authorization, investment agreement, or other written agreement between the Party and a covered investment or a national or company of the other Party. 5. Notwithstanding paragraphs 1 through 3, a Party may prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to; (a) Bankruptcy, insolvency or the protection of the rights of creditors; (b) Issuing, trading or dealing in securities; or (c) Ensuring compliance with orders or judgments in adjudicatory proceedings.	5 [Minimum Standard of Treatment](4) and (f) and Article 6 [Expropriation and Compensation]; and payments arising out of a dispute. 2. Each Party shall permit transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer. 3. Each Party shall permit returns in kind relating to a covered investment to be made as authorized or specified in a written agreement between the Party and a covered investment or an investor of the other Party. 4. Notwithstanding paragraphs 1 through 3, a Party may prevent a transfer through the equitable, non-discriminatory, and good faith application of its laws relating to: (a) bankruptcy, insolvency, or the protection of the rights of creditors; (b) issuing, trading, or dealing in securities, futures, options, or derivatives; (c) criminal or penal offenses; (d) financial reporting or record keeping	5 [Minimum Standard of Treatment](4) and (f) and Article 6 [Expropriation and Compensation]; and payments arising out of a dispute. 2. Each Party shall permit transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer. 3. Each Party shall permit returns in kind relating to a covered investment to be made as authorized or specified in a written agreement between the Party and a covered investment or an investor of the other Party. 4. Notwithstanding paragraphs 1 through 3, a Party may prevent a transfer through the equitable, non-discriminatory, and good faith application of its laws relating to: a. bankruptcy, insolvency, or the protection of the rights of creditors; b. issuing, trading, or dealing in securities, futures, options, or derivatives; c. criminal or penal offenses;

		of transfers when necessary to assist law enforcement or financial regulatory authorities; (e) or ensuring compliance with orders or judgments in judicial or administrative proceedings.	d. financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; e. or ensuring compliance with orders or judgments in judicial or administrative proceedings.
Article II (NT, MFN & FET) 1. Each Party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty. Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the Annex. Moreover, each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the Annex, and to limit such exceptions to a minimum. Any future exception by either Party shall not apply to investment existing in that sector or matter at the time the	**Article II (NT, MFN & FET)** 1. With respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of covered investments, each Party shall accord treatment no less favourable than that it accords, in like situations, to investments in its territory of its own nationals or companies of a third country (hereinafter 'national treatment') or to investments in its territory of nationals or companies of a third party (hereinafter 'most favoured nation treatment'), whichever is most favourable (hereinafter 'national and most favoured nation treatment'). Each Party shall ensure that its state enterprises, in the provision of their goods and services, accord national and most favoured nation treatment to covered investments. 2. (a) A Party may adopt or maintain exceptions to the obligations of	**Article 3: National Treatment** 1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. 2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. 3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the treatment accorded, in like circumstances, by that regional level of	**Article 3: National Treatment** 1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory. 2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. 3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the treatment accorded, in like circumstances, by that regional level of government to natural persons

exception becomes effective. The treatment accorded pursuant to any exceptions shall not be less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country, except with respect to ownership of real property. Rights to engage in mining on the public domain shall be dependent on reciprocity. 2. Investments shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law. Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. Each Party shall observe any obligation it may have entered into with regard to investments. 3. Subject to the laws relating to the entry and sojourn of aliens, nationals of either Party shall be permitted to enter and to remain in the territory of the other Party for the purpose of establishing, developing, administering or advising on the operation of an investment to which	paragraph 1 in the sectors or with respect to the matters specified in the Annex to this Treaty. In adopting such an exception, a Party may not require the divestment, in whole or in part, of covered investments existing at the time the exception becomes effective. (b) The obligations of paragraph 1 do not apply to procedures provided in multilateral agreements concluded under the auspices of the World Intellectual Property Organization relating to the acquisition or maintenance of intellectual property rights. 3. (a) Each Party shall at all times accord to covered investments fair and equitable treatment and full protection and security, and shall in no case accord treatment less favourable that that required by international law. (b) Neither Party shall in any way impair by unreasonable and discriminatory measures the management, conduct, operation, and sale or other disposition of covered investment. 4. Each Party shall provide effective	government to natural persons resident in and enterprises constituted under the laws of other regional levels of government of the Party of which it forms a part, and to their respective investments. **Article 4: Most Favored Nation Treatment** 1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory 2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. **Article 5: Minimum Standard of Treatment** 1. Each Party shall accord to covered investments treatment in accordance with customary international law,	resident in and enterprises constituted under the laws of other regional levels of government of the Party of which it forms a part, and to their respective investments. **Article 4: Most Favored Nation Treatment** 1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory 2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. **Article 5: Minimum Standard of Treatment** 1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable

they, or a company of the first Party that employs them, have committed or are in the process of committing a substantial amount of capital or other resources. 4. Companies which are legally constituted under the applicable laws or regulations of one Party, and which are investments, shall be permitted to engage top managerial personnel of their choice, regardless of nationality. 5. Neither Party shall impose performance requirements as a condition of establishment, expansion or maintenance of investments, which require or enforce commitments to export goods produced, or which specify that goods or services must be purchased locally, or which impose any other similar requirements. 6. Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment agreements, investment authorizations and properties. 7. Each Party shall make public all laws, regulations, administrative practices and procedures, and adjudicatory decisions that pertain to or affect investments.	means of asserting claims and enforcing rights with respect to covered investments. 5. Each Party shall ensure that its laws, regulations, administrative practices and procedures of general application, an adjudicatory decisions, that pertain to or affect covered investments are promptly published or otherwise made publicly available.	including fair and equitable treatment and full protection and security. 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide: (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law. 3. A determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this	treatment and full protection and security. 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide: (c) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and (d) "full protection and security" requires each Party to provide the level of police protection required under customary international law. 3. A determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this

8. The treatment accorded by the United States of America to investments and associated activities under the provisions of this Article shall in any State, Territory or possession of the United States of America be the treatment accorded therein to companies legally constituted under the laws and regulation of other States, Territories or possessions of the United States of America.		Article. 4. Notwithstanding Article 14 [Non-Conforming Measures](5) (b) [subsidies and grants], each Party shall accord to investors of the other Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife. 5. Notwithstanding paragraph 4, if an investor of a Party, in the situations referred to in paragraph 4, suffers a loss in the territory of the other Party resulting from: (a) requisitioning of its covered investment or part thereof by the latter's forces or authorities; or (b) destruction of its covered investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation, the latter Party shall provide the investor restitution, compensation, or both, as appropriate, for such loss. Any compensation shall be prompt, adequate, and effective in accordance with Article 6 [Expropriation and Compensation](2) through (4),	Article. 4. Notwithstanding Article 14 [Non-Conforming Measures](5) (b) [subsidies and grants], each Party shall accord to investors of the other Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife. 5. Notwithstanding paragraph 4, if an investor of a Party, in the situations referred to in paragraph 4, suffers a loss in the territory of the other Party resulting from: a. requisitioning of its covered investment or part thereof by the latter's forces or authorities; or b. destruction of its covered investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation, the latter Party shall provide the investor restitution, compensation, or both, as appropriate, for such loss. Any compensation shall be prompt, adequate, and effective in accordance with Article 6 [Expropriation and

		mutatis mutandis. 6. Paragraph 4 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 3 [National Treatment] but for Article 14 [Non-Conforming Measures](5)(b) [subsidies and grants].	Compensation](2) through (4), *mutatis mutandis*. 6. Paragraph 4 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 3 [National Treatment] but for Article 14 [Non-Conforming Measures](5)(b) [subsidies and grants].
Article III Expropriation 1. Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except for a public purpose; in a non-discriminatory manner; upon payment of prompt adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(2). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known; include interest at a commercially reasonable rate from the date of expropriation; be paid without delay; be fully realizable; and be freely transferable at the	**Article III Expropriation** 1. Neither Party shall expropriate or nationalize a covered investment either directly or indirectly through measures tantamount to expropriation or nationalization ("expropriation") except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II(3). 2. Compensation shall be paid without delay; be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken ("the date of expropriation"); and be fully realizable and freely transferable. The fair market	**Article 6: Expropriation and Compensation** 1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except: (a) for a public purpose; (b) in a non-discriminatory manner; (c) on payment of prompt, adequate, and effective compensation; and in accordance with due process of law and Article 5 [Minimum Standard of Treatment](1) through (3). 2. The compensation referred to in paragraph 1(c) shall:	**Article 6: Expropriation and Compensation** 1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except: (d) for a public purpose; (e) in a non-discriminatory manner; (f) on payment of prompt, adequate, and effective compensation; and in accordance with due process of law and Article 5 [Minimum Standard of Treatment](1) through (3). 2. The compensation referred to in paragraph 1(c) shall:

prevailing market rate of exchange on the date of expropriation. 2. A national or company of either Party that asserts that all or part of its investment has been expropriated shall have a right to prompt review by the appropriate judicial or administrative authorities of the other Party to determine whether any such expropriation has occurred and, if so, whether such expropriation, and any compensation therefore, conforms to the principles of international law. 3. Nationals or companies of either party whose investments suffer losses in the territory of the other Party owing to war or other armed conflict, revolution, state of national emergency, insurrection, civil disturbance or other similar events shall be accorded treatment by such other Party no less favourable than that accorded to its own nationals or companies or to nationals or companies of any third country, whichever is the most favourable treatment, as regards any measures it adopts in relation to such losses.	value shall not reflect any change in value occurring because the expropriatory action had become known before the date of expropriation. 3. If the fair market value is denominated in a freely usable currency, the compensation paid shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment. 4. If the fair market value is denominated in a currency that is not freely usable, the compensation paid -- converted into the currency of payment at the market rate of exchange prevailing on the date of payment -- shall be no less than: (a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus (b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.	(a) be paid without delay; (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("the date of expropriation"); (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and (d) be fully realizable and freely transferable. 3. If the fair market value is denominated in a freely usable currency, the compensation referred to in paragraph 1(c) shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment. 4. If the fair market value is denominated in a currency that is not freely usable, the compensation referred to in paragraph 1(c) – converted into the currency of payment at the market rate of	(a) be paid without delay; (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("the date of expropriation"); (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and (d) be fully realizable and freely transferable. 3. If the fair market value is denominated in a freely usable currency, the compensation referred to in paragraph 1(c) shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment. 4. If the fair market value is denominated in a currency that is not freely usable, the compensation referred to in paragraph 1(c) – converted into the currency of payment at the market rate of

		exchange prevailing on the date of payment – shall be no less than: (a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus (b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment. 5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with the TRIPS Agreement. ** To be interpreted in accordance with Annex A and B (binding the standard to the minimum international standard and prescribing additional detail in the case of the indirect expropriations.	exchange prevailing on the date of payment – shall be no less than: (a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus (b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment. 5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with the TRIPS Agreement. ** To be interpreted in accordance with Annex A and B (binding the standard to the minimum international standard and prescribing additional detail in the case of the indirect expropriations.

ARTICLE X (Security Exception / Non Precluded Measures) 1. This Treaty shall not preclude the application by either Party of measures necessary in its jurisdiction for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests. 2. This Treaty shall not preclude either Party from prescribing special formalities in connection with the establishment of investments, but such formalities shall not impair the substance of any of the rights set forth in this Treaty.	**Article XIV (Non Precluded Measures)** 1. This Treaty shall not preclude a Party from applying measures necessary for the fulfilment of its obligations with respect to the maintenance or restoration or international peace or security, or the protection of its own essential security interests. 2. This treaty shall not preclude a Party from prescribing special formalities in connection with covered investments, such as a requirement that such investments be legally constituted under the laws and regulations of that Party, or a requirement that transfers of currency or other monetary instruments be reported, provided that such formalities shall not impair the substance of any rights set forth in this Treaty. **Exceptions** 1. The Government of the United States of America may adopt or maintain exceptions to the obligation to accord national treatment in the sectors or with respect to the matters specified	**Article 18: Essential Security** Nothing in this Treaty shall be construed: 1. to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or 2. to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.	**Article 18: Essential Security** Nothing in this Treaty shall be construed: 1. to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or 2. to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

	below: "…." 2. The Government of the United States of America may adopt or maintain exceptions to the obligation to accord national and most favoured nation treatment to covered investments in the sectors or with respect to the matters specified below: "fisheries…,banking, insurance, securities and other financial services"		
-----	-----	**Art. 20: Financial Services** **(extracted below)**	**Art. 20: Financial Services** **(verbatim copy of the 2004 version, as extracted below)**

Art: 20: Financial Services

1. Notwithstanding any other provision of this Treaty, a Party shall not be prevented from adopting or maintaining measures relating to financial services for prudential reasons, including for the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial services supplier, or to ensure the integrity and stability of the financial system.[199] Where such measures do not conform with the provisions of this Treaty, they shall not be used as a means of avoiding the Party's commitments or obligations under this Treaty.

2. (a) Nothing in this Treaty applies to non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies. This paragraph shall not affect a Party's obligations under Article 7 [Transfers] or Article 8 [Performance

[199] It is understood that the term "prudential reasons" includes the maintenance of the safety, soundness, integrity, or financial responsibility of individual financial institutions

Requirements] [200]

(b) For purposes of this paragraph, "public entity" means a central bank or monetary authority of a Party.

3. Where a claimant submits a claim to arbitration under Section B [Investor-State Dispute Settlement], and the respondent invokes paragraph 1 or 2 as a defense, the following provisions shall apply:

(a) The respondent shall, within 120 days of the date the claim is submitted to arbitration under Section B, submit in writing to the competent financial authorities[201] of both Parties a request for a joint determination on the issue of whether and to what extent paragraph 1 or 2 is a valid defense to the claim. The respondent shall promptly provide the tribunal, if constituted, a copy of such request. The arbitration may proceed with respect to the claim only as provided in subparagraph (d).

(b) The competent financial authorities of both Parties shall make themselves available for consultations with each other and shall attempt in good faith to make a determination as described in subparagraph (a). Any such determination shall be transmitted promptly to the disputing parties and, if constituted, to the tribunal. The determination shall be binding on the tribunal.

(c) If the competent financial authorities of both Parties, within 120 days of the date by which they have both received the respondent's written request for a joint determination under subparagraph (a), have not made a determination as described in that subparagraph, the tribunal shall decide the issue left unresolved by the competent financial authorities. The provisions of Section B shall apply, except as modified by this subparagraph.

(i) In the appointment of all arbitrators not yet appointed to the tribunal, each disputing party shall take appropriate steps to ensure that the tribunal has expertise or experience in financial services law or practice. The expertise of particular candidates with respect to financial services shall be taken into account in the appointment of the presiding arbitrator.

(ii) If, before the respondent submits the request for a joint determination in conformance with subparagraph (a), the presiding arbitrator has been appointed pursuant to Article 27(3), such arbitrator shall be replaced on the request of either disputing party and the tribunal shall be reconstituted consistent with subparagraph (c)(i). If, within 30 days of the date the arbitration proceedings are resumed under subparagraph (d), the disputing parties have not agreed on the appointment of a new presiding arbitrator, the Secretary-General, on the request of a disputing party, shall appoint the presiding arbitrator consistent with subparagraph (c)(i).

[200] For greater certainty, measures of general application taken in pursuit of monetary and related credit policies or exchange rate policies do not include measures that expressly nullify or amend contractual provisions that specify the currency of denomination or the rate of exchange of currencies.

[201] For purposes of this Article, "competent financial authorities" means, for the United States, the Department of the Treasury for banking and other financial services, and the Office of the United States Trade Representative, in coordination with the Department of Commerce and other agencies, for insurance; and for [Country], [ ].

(iii) The non-disputing Party may make oral and written submissions to the tribunal regarding the issue of whether and to what extent paragraph 1 or 2 is a valid defense to the claim. Unless it makes such a submission, the non-disputing Party shall be presumed, for purposes of the arbitration, to take a position on paragraph 1 or 2 not inconsistent with that of the respondent.

(d) The arbitration referred to in subparagraph (a) may proceed with respect to the claim:

(i) 10 days after the date the competent financial authorities' joint determination has been received by both the disputing parties and, if constituted, the tribunal; or

(ii) 10 days after the expiration of the 120-day period provided to the competent financial authorities in subparagraph (c).

4. Where a dispute arises under Section C and the competent financial authorities of one Party provide written notice to the competent financial authorities of the other Party that the dispute involves financial services, Section C shall apply except as modified by this paragraph and paragraph 5.

(a) The competent financial authorities of both Parties shall make themselves available for consultations with each other regarding the dispute, and shall have 180 days from the date such notice is received to transmit a report on their consultations to the Parties. A Party may submit the dispute to arbitration under Section C only after the expiration of that 180-day period.

(b) Either Party may make any such report available to a tribunal constituted under Section C to decide the dispute referred to in this paragraph or a similar dispute, or to a tribunal constituted under Section B to decide a claim arising out of the same events or circumstances that gave rise to the dispute under Section C.

5. Where a Party submits a dispute involving financial services to arbitration under Section C in conformance with paragraph 4, and on the request of either Party within 30 days of the date the dispute is submitted to arbitration, each Party shall, in the appointment of all arbitrators not yet appointed, take appropriate steps to ensure that the tribunal has expertise or experience in financial services law or practice. The expertise of particular candidates with respect to financial services shall be taken into account in the appointment of the presiding arbitrator.

6. Notwithstanding Article 11(2) [Transparency – Publication], each Party shall, to the extent practicable,

(a) publish in advance any regulations of general application relating to financial services that it proposes to adopt;

(b) provide interested persons and the other Party a reasonable opportunity to comment on such proposed regulations.

7. The terms "financial service" or "financial services" shall have the same meaning as in subparagraph 5(a) of the Annex on Financial Services of the GATS.

ANNEX - 2

This following is an extract from UNCTAD document on Investment Policy Framework for Sustainable Development (UNCTAD – IPFSD), 2012 which has an excellent typography of the variations in content across comparable provisions in the IIA universe. The provisions chosen are those which were considered relevant to the issue of transfers and CFMs. These are expected to be in aid of a comparative reference with the provisions of the US Model BIT 2012, the flexibilities of which may be placed in context using the range charted by the IPFSD.

Definition of Investment ...sets out the types of investment covered by the treaty.	a) Offer coverage of any tangible and intangible assets in the host State (through an illustrative/open-ended list) directly or indirectly owned/controlled by covered investors. b) Compile an exhaustive list of covered investments and/or exclude specific types of assets from coverage, e.g: - portfolio investment - sovereign debt instruments - commercial contracts for the sale of goods or services - assets for non-business purposes - intellectual property rights not protected under domestic law c) Require investments to fulfil specific characteristics, e.g. that the investment: - involves commitment of capital, expectation of profit and assumption of risk - involves assets acquired for the purpose of establishing lasting economic relations - must be made in 'accordance with host country laws and regulations' - delivers a positive development impact on the host country (i.e. Parties could list specific criteria according to their needs and expectations).	A traditional open-ended definition of "investment" grants protection to all types of assets. It may have the strongest attraction effect but can end up covering economic transactions not contemplated by the Parties or investments/assets with questionable SD contribution. It may also expose States to unexpected liabilities. States may want to tailor their definition of investment to target assets conducive to SD by granting protection only to investments that bring concrete benefits to the host country, e.g. long-term capital commitment, employment generation etc. To that effect, the Parties may wish to develop criteria for development-friendly investments. A treaty may further specifically exclude certain types of assets from the definition of "investment" (e.g. portfolio investment – which can include short-term and speculative investments – intellectual property rights that are not protected under domestic legislation).

Exclusions from the Scope ....carve out specific policy areas and/or industries from the scope of the treaty	a) No exclusions b) Exclude specific policy areas from treaty coverage, e.g.: - subsidies and grants - public procurement - taxation c) Exclude specific sectors and industries from treaty coverage, e.g.: - essential social services (e.g. health, education) - specific sensitive industries (e.g. cultural industries, fisheries, nuclear energy, defence industry, natural resources).	The broader a treaty's scope, the wider its protective effects and its potential contribution to the attraction of foreign investment. However, a broad treaty also reduces a host State's policy space and flexibility and ultimately heightens its exposure to investor's claims. States can tailor the scope of the agreement to meet the country's SD agenda. By carving out specific policy areas and sectors/industries from treaty coverage, States preserve flexibility to implement national policies, such as industrial policies (e.g. to grant preferential treatment to domestic investors or to impose performance requirements), or to ensure access to essential/public services.
National Treatment (NT) ....protects foreign investors/investments against discrimination vis-a-vis domestic investors	a) Prohibit less favourable treatment of covered foreign investors/investments vis-a-vis comparable domestic investors/investments, without restrictions or qualifications. b) Circumscribe the scope of the NT clause (for both/all Contracting Parties), noting that it, e.g.: - subordinates the right of NT to a host country's domestic laws - reserves the right of each Party to derogate from NT - does not apply to certain policy areas (e.g. subsidies, government procurement). c) Include country specific reservations to NT, e.g. carve-out: - certain policies/measures (e.g. subsidies and grants, government procurement, measures regarding government bonds) - specific sectors/industries where the host countries wish to preserve the	NT guarantees foreign investors a level-playing field vis-a-vis comparable domestic investors and is generally considered conducive to good governance. Yet under some circumstances, and in accordance with their SD strategies, States may want to be able to accord preferential treatment to national investors/investments (e.g. through temporary grants or subsidies) without extending the same benefits to foreign-owned companies. In this case, NT provisions need to allow flexibility to regulate for SD goals. For example, countries with a nascent/emerging regulatory framework that are reluctant to rescind the right to discriminate in favour of domestic

	right to favour domestic investors - certain policy areas (e.g. issues related to minorities, rural populations, marginalized or indigenous communities) - measures related to companies of a specific size (e.g. SMEs). d) Omit NT clause.	investors can make the NT obligation "subject to their domestic laws and regulations". This approach gives full flexibility to grant preferential (e.g. differentiated) treatment to domestic investors as long as this is in accordance with the country's legislation. However, such a significant limitation to the NT obligation may be perceived as a disincentive to foreign investors. Even more so, omitting the NT clause from the treaty may significantly undermine its protective value. There can be middle ground between full policy freedom, on the one hand, and a rigid guarantee of non-discrimination, on the other. For example, States may exempt specific policy areas or measures as well as sensitive or vital economic sectors/industries from the scope of the obligation in order to meet both current and future regulatory or public-policy needs such as addressing market failures (this can be done either as an exception applicable to both Contracting Parties or as a country-specific reservation).
Fair and Equitable Treatment (FET) .....protects foreign investors/investments against, e.g. denial of justice, arbitrary and abusive treatment	a) Given an unqualified commitment to treat foreign investors/investments "fairly and equitably" b) Quality the FET standard by reference to: - minimum standard of treatment of aliens under customary international law (MST/CIL) - international law or principles of international law. c) Include an exhaustive list of State obligations under FET, e.g. obligation not to	FET is a critical standard of treatment: while it is considered to help attract foreign investors and foster good governance in the host State, almost all claims brought to date by investors against States have included an allegation of the breach of this all-encompassing standard of protection. Through an *unqualified* promise to treat investors "fairly and equitably", a country provides maximum protection for investors but also risks posing limits on its policy space, raising its

	- deny justice in judicial or administrative proceedings - treat investors in a manifestly arbitrary manner - flagrantly violate due process - engage in manifestly abusive treatment involving continuous, unjustified coercion or harassment - infringe investors' legitimate expectations based on investment-inducing representations or measures. d) Clarify (with a view to giving interpretative guidance to arbitral tribunals) that: - the FET clause does not preclude States from adoption good faith regulatory or other measures that pursue legitimate policy objectives. - the investor's conduct (including the observance of universally recognized standards, see section 7) is relevant in determining whether the FET standard has been breached - the country's level of development is relevant in determining whether the FET standard has been breached - a breach of another provision of the IIA or of another international agreement cannot establish a claim for breach of the clause. e) Omit FET clause.	exposure to foreign investors' claims and resulting financial liabilities. Some of these implications stem from the fact that there is a great deal of uncertainty concerning the precise meaning of the concept, because the notions of "fairness" and "equity" do not connote a clear set of legal prescriptions and are open to subjective interpretations. A particularly problematic issue concerns the use of the FET standard to protect investors "legitimate expectations", which may restrict the ability of countries to change policies or to introduce new policies that – while pursuing SD objectives – may have a negative impact on foreign investors. Several options exist to address the deficiencies of *unqualified* FET standard, each with its pros and cons. The reference to customary international law may raise the threshold of State liability and help to preserve States' ability to adapt public policies in light of changing objectives (except when these measures constitute manifestly arbitrary conduct the amounts to egregious mistreatment of foreign investors), but the exact contours of MST/CIL remain elusive. An omission of the FET clause would reduce States' exposure to investor claims, but foreign investors may perceive the country as not offering a sound and reliable investment climate. Another solution would be to replace the general FET clause with an exhaustive list of more specific obligations. While agreeing on such a list may turn out to be a challenging endeavour, its exhaustive nature would help avoid unanticipated and far-reaching interpretations by tribunals.

Expropriation .....protects foreign investors in case of dispossession of their investments by the host country	a) Provide that an expropriation must comply with/respect four conditions: public purpose, non-discrimination, due process and payment of compensation. b) Limit protection in case of indirect expropriation (regulatory taking) by - establishing criteria that need to be met for indirect expropriation to be found - defining in general items what measures do not constitute indirect expropriation (non-discriminatory good faith regulations relating to public health and safety, protection of the environment, etc). - clarifying that certain specific measures do not constitute an indirect expropriation (e.g. compulsory licensing in compliance with WTO rules). c) Specify the compensation to be paid in case of lawful expropriation: - appropriate, just or equitable compensation - prompt, adequate and effective compensation, i.e. full market value of the investment ("Hull formula"). d) Clarify that only expropriations violating any of the three substantive conditions (public purpose, non-discrimination, due process), entail full reparation.	An expropriation provision is a fundamental element of an IIA.IIAs with expropriation clauses do not take away States' right to expropriate properly, but protect investors against arbitrary or uncompensated expropriations. Contributing to a stable and predictable legal framework, conductive to foreign investment. IIA provisions typically cover "indirect" expropriation, which refers to regulatory takings, creeping expropriation and acts "tantamount to" or "equivalent to" expropriation. Such provisions have been used to challenge general regulations with an alleged negative effect on the value of an investment. This raises the question of the proper borderline between expropriation and legitimate public policy making (e.g. environmental, social or health regulations). To avoid undue constraints on a State's prerogative to regulate in the public interest, an IIA may set out general criteria for State acts that may (or may not) be considered an indirect expropriation. While this does not exclude liability risks altogether, it allows for better balancing of investor and State interests. The standard of compensation for lawful expropriation is another important aspect. The use of terms such as "appropriate", "just" or "fair" in relation to compensation gives room for flexibility in the calculation of compensation. States may find it beneficial to provide further guidance to arbitrators on how to calculate

		compensation and clarify what factors should be taken into account.
Transfer of Funds ....grants the right to free movement of investment- related financial flows into and out of the host country	a) Grant foreign investors the right to freely transfer any investment-related funds (e.g. open ended list) into and out of the host country. b) Provide an exhaustive list of types of qualifying transfers. Include exceptions (e.g. temporary derogations): - in the event of serious balance-of-payments and external financial difficulties or threat thereof - where movements of funds cause or threaten to cause serious difficulties in macro-economic management, in particular, related to monetary and exchange rate policies. Condition these exceptions to prevent their abuse (e.g. application in line with IMF rules and respecting conditions of temporality, equity, non-discrimination, good faith and proportionality) c) Reserve the right of host States to restrict an investor's transfer of funds in connection with the country's (equitable, non-discriminatory and good faith application of its) laws, relating to, e.g.: - fiscal obligations of the investor/investment in the host country - reporting requirements in relation to currency transfers - bankruptcy, insolvency, or the protection of the rights of creditors - issuing trading, or dealing in securities, futures, options, or derivatives - criminal or penal offences (e.g. imposing criminal penalties) - prevention of money laundering - compliance with orders or judgments in judicial or administrative proceedings.	IIAs virtually always contain a clause regarding investment-related transfers. The objective is to ensure that a foreign investor can make free use of invested capital, returns on investment and other payments related to the establishment, operation or disposal of an investment. However, an unqualified transfer-of-funds provision significantly reduces a host country's ability to deal with sudden and massive outflows or inflows of capital, balance-of-payments (BoP) difficulties and other macroeconomic problems. An exception increasingly found in recent IIAs allows States to impose restrictions on the free transfer of funds in specific circumstances, usually qualified by checks and balances (safeguards) to prevent misuse. Countries may also need to reserve their right to restrict transfer if this is required for the enforcement of the Party's laws (e.g. to prevent fraud on creditors etc.), again with checks and balances to prevent abuse.
Public Policy Exceptions ....permit public policy	a) No public policy exceptions. b) Include exceptions for national security measures and/or measures related to the maintenance of international peace and security:	To date few IIAs include public policy exceptions. However, more recent treaties increasingly reaffirm States' right to regulate in the public interest by introducing general

measures, otherwise inconsistent with the treaty, to be taken under specified, exceptional circumstances	c) formulate the exception as not self-judging (can be subject to arbitral review) d) formulate the exception as self-judging e) Broaden the exception by clarifying that national security may encompass economic security f) Limit the exception by specifying: - that the exception only relates to certain types of measures, e.g. those relating to trafficking in arms or nuclear non-proliferation; or taken in pursuance of States' obligations under the UN Charter for the maintenance of international peace and security - that it only applies in times of war or armed conflict or an emergency in international relations g) Include exceptions for domestic regulatory measures that aim to pursue legitimate public policy objectives, e.g. to: - protect human rights - protect public health - preserve the environment (e.g. biodiversity, climate change) - protect public morals or maintain public order - preserve cultural and/or linguistic diversity - ensure compliance with laws and regulations that are not inconsistent with the treaty - allow for prudential measures (e.g. to preserve the integrity and stability of the financial system) - ensure the provision of essential social services (e.g. health, education, water supply) - allow for broader safeguards, including on developmental grounds (to address host countries' trade, financial and developmental needs) - prevent tax evasion - protect national treasures of artistic, historic or archaeological value (or	exceptions. Such provisions make IIAs more conducive to SD goals, foster coherence between IIAs and other public policy objectives, and reduce States' exposure to claims arising from any conflict that may occur between the interests of a foreign investor and the promotion and protection of legitimate public-interest objectives. Exceptions allow for measures, otherwise prohibited by the agreement, to be taken under specified circumstances. General exceptions identify the policy areas for which flexibility is to be preserved. A number of features determine how easy or difficult it is for a State to use an exception. To avoid review of the relevant measure by a court or a tribunal, the general exception can be made self-judging (i.e. the necessity/appropriateness of the measure is judged only by the invoking State itself). This approach gives a wide margin of discretion to States, reduces legal certainty for investors and potentially opens possibilities for abuse. In contrast, exceptions designed as not self-judging imply that in case of a dispute, a court or tribunal will be able to determine whether the measure in question is allowed by the exception. In order to facilitate the use of exceptions by States, the provision may adjust the required link between the measure and the alleged policy objective pursued by the measure. For example, instead of providing that the measure must be "necessary" to achieve the policy objective, the

	"cultural heritage"). h) Prevent abuse of the exceptions by host States: - provide that "exceptional" measures shall not be applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or investors, or a disguised restriction on international trade or investment - choose the appropriate threshold which an "exceptional" measure must meet, e.g. the measure must be 'necessary' (indispensable) to achieve the alleged policy objective, or be "related" (making a contribution) to this policy objective.	IIA could require that the measure be "related" to the policy objective. Finally, in order to prevent abuse of exceptions, it is useful to clarify that "exceptional" measures must be applied in a non-arbitrary manner and not as disguised investment protectionism.

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