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Book Review: *Capital Controls and International Economic Law* by Bryan Mercurio
(Cambridge University Press, 2023) 213 pp, £95 hb

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This excellent new book is one for which scholars of international economic law have been waiting for some time. Of all the sub-fields of international economic law, monetary relations and the role of the International Monetary Fund (IMF) are among the least explored in legal academic literature. As author Bryan Mercurio rightly points out, much of the research into capital flow management (CFM) has been conducted by economists and in some case political scientists, particularly in the aftermath of the global financial crisis of 2008. The orthodox, 20th Century view that unrestricted capital movement is presumptively beneficial to the global economy has been walked-back considerably in recent years. Capital flight has severely de-stabilized many economies around the world, just as ‘hot money’ is viewed with much suspicion as a legitimate foundation for lasting economic growth. In principle currencies should be freely exchangeable, enabling money to be channelled to its most productive uses, but controls are often needed, in some cases on an emergency basis. As this book thoughtfully informs us, international law appears to have (slowly) adapted to this reality, enabling countries to take steps to keep money within their borders, provided that this is not done in a protectionist, anti-competitive manner. While investigation into the economic and political dimension of capital controls is needed, the very important questions of law have largely been left not only unanswered, but often unasked. This task is fulfilled in the book’s second and most valuable half, the first having been left to review existing debates on CFM found in the financial and economic literature. This material, although familiar to many and pitched at a justifiably simplistic level, is essential because it establishes vital context for the legal analysis that is the book’s main contribution.

Capital Controls and International Economic Law addresses the gap in legal literature on CFM, confronting IMF’s status as an agent within public international law. In so doing it critiques whether its gradual shift of focus towards acceptance and in some cases encouragement of capital controls is lawful. Drawing upon analogies in public international

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law and state responsibility, Mercurio concludes that the IMF's change in policy is legally valid under the customary international law doctrine of implied powers developed in International Court of Justice caselaw and assumed by the IMF partially in response to a general lack of good practice in relation to cross-border capital movements.

In a brilliantly systemic format, turning away from the IMF, Mercurio sets out the spheres of international economic law which are applicable to CFM, dissecting each one in turn. He begins with international trade and the WTO's General Agreement on Trade in Services (GATS), outlining how the Financial Services Annex broad provisions on prudential measures enable states to enact measures which restrict capital movements. Here he touches on the *Argentina—Financial Services* dispute, wherein the panel, albeit through obiter dicta, reasons that CFMs should fit under the GATS Financial Services Annex exception for prudential measures, which are to be broadly construed. Mercurio memorably describes the judgement in *Argentina—Financial Services* as one which “demonstrates an awareness of the trade regime as part of a larger, integrated world system.”

Acknowledging the important role of preferential Free Trade Agreements in CFMs, the author examines relevant provisions contained in the services chapters of key instruments, including the Comprehensive Progressive Trans-Pacific Partnership (CPTPP) and the Regional Comprehensive Economic Partnership (RCEP). Here he notes variable but generally permissive language, often built upon direct references to IMF obligations, which expands signatory parties' ability to control currency flows. This section yields one of the book's critical insights. Paradoxically it tends to be the FTAs concluded by developing countries that are the most restrictive in terms of CFM – the very countries that are likely the most needful of such measures because of their economic instability.

The final part of the book explores the role of international investment law in addressing states' ability to enact CFM policies. Making use of the increasingly popular data analytics on the contents of International Investment Agreements (IIAs), Mercurio observes that modern investment agreements, especially those concluded since 2017, tend to contain broad exceptions enabling states to enact CFMs for various purposes, including balance of payments difficulties. This leads to a discussion of international investment law jurisprudence which the author takes the reader through a case at a time, with particular attention to the well-known Argentina cases. The author picks out relevant commentary from tribunal

decisions rather than attempting to craft a general interpretive theory, as one is evidently lacking. An obvious but necessary point is made here – the legal analysis contained in investment arbitration tribunals tends to be limited and, in some cases, incomplete, leaving questions regarding the scope of a state’s capacity in relation to responses to economic emergency for example, unanswered.

Capital Controls and International Economic Law is a critical, original piece of legal scholarship that has been much needed. To be fair, a large portion of it repeats some of the author’s own preexisting work as he has been active in this area for several years, something which he concedes. In that sense the book represents a consolidation of several projects that have been presented in a manner that is greater than the sum of its parts. It would have been interesting if the book, a rather slender volume, had cast its net somewhat wider and explored the related issue of competitive currency devaluation, another important trade and investment-distortive policy that the IMF has charged itself with policing, often unsuccessfully. It is moreover unfortunate that the UK-EU Trade and Cooperation Agreement (TCA) was not considered as it contains extensive commitments on capital movements as well as temporary safeguard measures and is far more significant than the Comprehensive Economic Partnership Agreement (CETA) between the EU and Canada. Some further discussion of the proliferation of financial committees as elements of FTAs (such as the TCA) could have shed light on how the balancing of CFMs as policy tools which inhibit trade/investment might be handled. Furthermore, while the IMF remains the world’s dominant organization for the coordination of policy on capital movement, something might have been said of the potential future role of the Asian Infrastructure Investment Bank (AIIB) or the New Development Bank (NDB) in this sphere. The author might also have taken a philosophical turn and explored issues in relation to the meaning and significance of financial sovereignty as a component of statehood. Similarly, a digression into digital currencies (noting recent IMF pronouncements in that area) and CFM would not have been irrelevant.

As a key yet tangential insight, in persuasively arguing that CFMs are generally permitted under international economic law, Mercurio hinted at the role that CFMs may have played in the de-fragmentation of international economic law itself. CFMs are a policy phenomenon that have been broached by the discipline’s two main constituent sub-fields (trade and investment) as well as its lesser ones (monetary relations, via the IMF, and development, as seen in some of the FTAs of developing countries as well as the material on economic crisis management). As each of these sub-fields appears to be converging, in their

own way, towards greater flexibility in relation to CFMs, *Capital Controls and International Economic Law* may provide some (possibly unintended) evidence that a common understanding of how to balance liberalization with attendant social concerns has been reached in relation to this particular kind of measure, one which touches on all elements of an increasingly disparate discipline of study.