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Tackling Currency Manipulation with International Law: Why and How Currency Manipulation should be Adjudicated?

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ABSTRACT: *The protracted international dispute on currency manipulation has exposed the weakness of the contemporary international economic law framework in regulating the sovereign intervention on foreign exchange rate. The legal mandate of the WTO on currency manipulation remains questionable and the IMF fails to display authority over the currency regime of its members. Because a state's control on the value of its currency has long been considered as a sovereign right, regulating a state's currency regime is a daunting legal challenge. While arguing that the widespread notion of treating currency manipulation as a countervailable subsidy is wrong, this paper demonstrates that a suspected currency manipulation can be and should be adjudicated under the collaborative mandates of the IMF and the WTO. The IMF has the mandate to determine whether a state's currency intervention constitutes an illegal currency manipulation and the WTO has the mandate to adjudicate on the legality of a state's currency exchange regime based on the IMF's finding of manipulation. The bridge between the two agreements is Article XV(4) of the GATT, which prohibits frustrating the intent of the IMF Agreement with a trade action.*

1. INTRODUCTION

Currency manipulation is one of the most contentious topics of today's trade dispute. After years of dispute with the United States of America ('US'), People's Republic of China ('China') has finally abandoned its long-maintained fixed exchange rate regime in June of 2010, by de-pegging the value of *renminbi* ('RMB')[1] from the US dollar ('USD') and returning to a managed float exchange rate regime.[2] Not quite satisfied with the pace of the

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[1] The Renminbi is the official currency of China, consists of the primary unit yuǎn, and the subunits jiǎo (one tenth in value of the yuán) and fēn (one tenth in value of the jiǎo). While the official abbreviation of the Renminbi is the CNY (Chinese Yuan), this paper will use the more commonly used abbreviation 'RMB'.

[2] *See* 'Monetary Policy Analysis Group of the People's Bank of China', *China Monetary Policy Report Quarter Two*, (28 Sept. 2010) at 18-20, *available at* www.pbc.gov.cn/image_public/UserFiles/english/upload/File/China%20Monetary%20Policy%20Report%20Quarter%20Two,%202010%20.pdf. *See also* Michael M. Phillips and Ian Talley, 'Global Leaders Welcome China's Yuan Plan', *Wall St. J.*, June 21, 2010, *available at* http://online.wsj.co

RMB's appreciation, the US Senate approved the Currency Exchange Rate Oversight Reform Act of 2011 (hereinafter 'Currency Bill'), which, once becomes a law, would practically allow the US government to take certain unilateral measures against China's currency regime.[3] The recent development in the international dispute over China's exchange regime which finally resulted in China's voluntary reforming of its regime and the US Senate's passing of the Currency Bill indicates that it has been the art of politics and diplomacy, not the rule of law, which prevailed. In an ideal standpoint, the victory of politics and diplomacy over the rule of law is nothing to be celebrated. As some of the premier minds of economics have observed, a market has to be governed by the rule of law in order to realize all the gains of trade.[4] To promote security, predictability, and equity, international economic relations should be governed by an effective and consistent international rule.[5]

The protracted exchange rate dispute between China and the US[6] has created numerous economic and legal discussions. The discussions have not only nurtured scholarly foundation of the international economic law in the fields of foreign exchange rate control, but also exposed the weakness of the contemporary international legal system in regulating sovereign currency intervention. While there is no authoritative answer as to whether China's currency exchange regime constitutes a 'currency manipulation',[7] the international community has learned that no international institution seems to have the adequate mandate to effectively adjudicate and regulate currency manipulation. Two of the most influential institutions in today's international economic relations, the World Trade Organization ('WTO') and the International Monetary Fund ('IMF') have played very little role in the exchange rate dispute between China and the US. The legal mandate of the WTO on currency manipulation remains questionable and the IMF fails to display authority over the currency regime of its members.[8]

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m/article/SB10001424052748704365204575316512609162050.html?mod=WSJ_Markets_LeadStory.

3 S. 1619, 112th Cong. (as passed by Senate, 11 Oct. 2011).

4 Ronald Coase, *The Firm, the Market and the Law* (reprint of 1960 article), chapter 5, as quoted by John Jackson, 'Global Economics and International Economic Law', 1 *J. Int'l Econ. L.* 1, 4 (1998).

5 Peter Van Den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, at 32-35 (2nd ed. 2008).

6 *See among others,* Hiram Reisner, 'Trump Says Not Labeling China Currency Manipulator 'Inconceivable'', *Newsmax*, 29 Dec. 2011, *available at* www.newsmax.com/TheWire/trump-china-currency/2011/12/29/id/422423; Jason Miks, 'China Warns US of Trade War', *The Diplomat*, 12 Oct. 2011, *available at* http://the-diplomat.com/china-power/2011/10/12/china-warns-us-of-trade-war/; 'Yuan Edges Up vs Dollar; US Adds Pressure for More Yuan Rise', *Reuters*, 29 June 2011, *available at* http://economictimes.indiatimes.com/markets/forex/yuan-edges-up-vs-dollar-us-adds-pressure-for-more-yuan-rise/articleshow/9035609.cms; Doug Palmer and Paul Eckert, 'China Official Rejects U.S. Complaints on Currency', *Reuters*, 24 Mar. 2010, *available at* www.reuters.com/article/2010/03/24/us-usa-china-idUSN239690720100324.

7 The author recognizes that there are many plausible arguments against branding China as a 'currency manipulator'. Moreover, China is not the only country undervaluing its currency. The currencies of Hong Kong, Malaysia, Singapore, Republic of China (Taiwan), and Japan have all been undervalued by 14 to 35 percent, in estimation. *See* Robert E. Scott, Economic Policy Institute, Policy Memorandum # 164, 'Currency Manipulation – History Shows that Sanctions are Needed' (2010), *available at* www.epi.org/publication/pm164. The US-China example will nonetheless be used heavily in this paper, because it is representative of the international dispute on currency manipulation.

8 In April 2010, at the height of the trade tension between the US and China over China's currency exchange regime, the WTO Director-General Pascal Lamy stated that he was 'extremely cautious whether currency manipulation is a form of protectionism because a WTO rule on the issue has never been tested' and the politically correct answer is that 'it's not a question for [WTO], but a question for [IMF]', because 'that's where legally the mandate for currency surveillance is'. *See* Doug Palmer, 'WTO Chief Lamy Tiptoes Around China Currency', *Reuters*, 22 Apr. 2010, *available at* http://uk.reuters.com/article/2010/04/22/china-currency-wto-idUKN22200598

Even scholars, who are less bound by the problem of practicability, have been mostly reluctant in approving the WTO's jurisdiction over systematic currency undervaluation by a state.[9]

The WTO's silence on the issue of currency manipulation can cause serious future problem as it may be regarded as the WTO's passive surrender of jurisdiction on the issue. In a sense, a practice of not bringing a suspected currency manipulation to the WTO's Dispute Settlement Body ('DSB') has already been established. States are now more likely to rely on means other than the WTO adjudication, such as diplomatic or political pressure, to resolve currency dispute. In the process, states will inevitably implement more unilateral measures in order to strengthen their leverage. Such practice would undoubtedly tarnish the integrity of the WTO system, let alone the principle of the rule of law in the contemporary international economic relations.

The purpose of this paper is to examine the overall legality of systematic currency undervaluation by a sovereign state under the perspective of international law, and propose a legally viable option to adjudicate a suspected currency manipulation in order to effectively restore the rule of law in the sovereign control of foreign exchange rate. At first, this paper demonstrates that regulating a state's currency regime is a daunting legal challenge, because a state's control on the value of its currency has long been considered as a sovereign right of a state. Thereafter, this paper argues that the widespread notion of treating currency manipulation as a countervailable subsidy is wrong, and that the issue of currency manipulation should be tackled by the existing international rules on currency exchange arrangement. Finally, this paper explains how a suspected currency manipulation can be adjudicated under the collaborative mandates of the WTO and the IMF.

2. RULES THAT GOVERN CURRENCY MANIPULATION

2.1. Monetary Sovereignty and the IMF Agreement

As a fundamental rule of international law, a state has total authority over its territory and nationals.[10] Because a state retains nearly complete control over its internal affairs, as sovereign right, it may regulate any economic activity within its territory. Accordingly, under the customary principle of monetary sovereignty, sovereign states have long been enjoying

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20100422. The IMF had repeatedly stated that it believes that the RMB is substantially undervalued and something has to be done to fix such problem over time. *See* Sewell Chan, 'I.M.F. Chief Steps Into Dispute Over China's Currency Policy', *N.Y. Times*, 7 Oct. 2010, *available at* www.nytimes.com/2010/10/08/business/global/08currency.html. But it has been largely ineffective in pressing China to appreciate the value of the RMB. *See* Sewell Chan, 'I.M.F. Doesn't Press China on Currency', *N.Y. Times*, 9 Oct. 2010, *available at* www.nytimes.com/2010/10/10/business/global/10imf.html.

[9] *See generally, among others,* Paul V. Sharobeem, 'Biting the Hand that Fees Us: A Critical Analysis of U.S. Policy Trends Concerning Chinese Currency Manipulation', 19 *Fla. L. Rev.* 697 (2007); Robert W. Staiger & Alan O. Sykes, ''Currency Manipulation' and World Trade', *Stan. L. & Econ. Olin Working Paper* No. 363 (2008) at 4, *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1151942 (download the article); and Dukgeun Ahn, 'Is the Contemporary Chinese Exchange-Rate Regime 'WTO-Legal'?' *VoxEU.org* (Apr. 16, 2010), *available at* www.voxeu.org/index.php?q=node/4867.

[10] Belina Anderson, 'Unilateral Trade Measures and Environmental Protection Policy', 66 *Temp. L. Rev.* 751, 772 (1993).

exclusive right to create, determine the value of, and regulate their own currency.[11] In Articles 1 and 2(1) of 1974 Charter of Economic Rights and Duties of States,[12] the United Nations General Assembly resolved, '[e]very state has the sovereign and inalienable right to choose its economic system … [e]very state … shall freely exercise full permanent sovereignty … over its wealth, natural resources and economic activities'.[13]

Although controlling the value of a currency generally falls within the inherent right of a state, a state's sovereign right can be voluntarily waived or restricted. If a state has accepted an international obligation encumbering its inherent right, the state is bound by such obligation. Because of the relatively short history of international economic law, only rudimentary level of customary law has been developed in the field of international economic relations,[14] and most multilateral economic obligations are provided under the treaty laws of the IMF and the WTO. As of January 2012, 187 states have accepted the terms and conditions of the Articles of Agreement of the International Monetary Fund ('IMF Agreement')[15] to become the members of the IMF[16] and 157 states have accepted the terms and conditions of the Marrakesh Agreement Establishing the World Trade Organization[17] and all the multilateral trade agreements annexed thereto (hereinafter collectively, 'WTO Agreements')[18]

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[11] *See* Frederick Alexander Mann, *The Legal Aspect of Money*, at 460-478 (Oxford, 5th ed. 1992) (1953); *Emperor of Austria v. Day and Kossuth* (1861) 2 Giff 628; *Juilliard v. Greenman*, 110 U.S. 421 (1884); and *Payment of Various Serbian Loans Issued in France* (Fr. V. Yugo.), 1929 P.C.I.J. (ser. A) No. 20 (July 12); Michael Waibel, 'Retaliating against Exchange-Rate Manipulation under WTO Rules', *VoxEU.org* (16 Apr. 2010), *available at* www.voxeu.org/index.php?q=node/4881.

[12] 1974 Charter of Economic Rights and Duties of States, G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, U.N. Doc. A/9631 at 50 (Dec. 12, 1974)(hereinafter, 1974 Charter).

[13] Because Article 2(2) of the 1974 Charter was widely objected by most developed states with free market economy, there is a view that Article 2(2) of the 1974 Charter cannot be given much legal importance. *See* the arbitration award, *Texaco Overseas Petroleum Co./California Asiatic Oil Co. v. Government of the Libyan Arab Republic*, Jan. 19, 1977, 17 I.L.M. 1 (1978) at para. 84-90. In fact, the spirit of Article 2(2) of the 1974 Charter, which sets forth a sovereign state's right to regulate, supervise or nationalize foreign investment, has been diluted by the widespread ratification of bilateral investment treaties, particularly under the auspice of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Mar. 18, 1965, 17 U.S.T. 1270. However, Articles 1 and 2(1) of the Charter seem to be the declaratory statements of an international consensus as they correspond with the customary concept of monetary sovereignty, and the common practice of the states.

[14] The only meaningful area of customary law in the field of economic law is about the responsibility of a state to the economic losses of aliens and foreign investors within the territory of the state. *See* Lori F. Damrosch et al., International Law – Cases and Materials at 1012 (4th ed. 2001), at 1573. Even this area of customary international law, however, has largely been codified into treaty laws with the ratification of numerous bilateral investment treaties and free trade agreements (section on investor-state dispute).

[15] The Articles of Agreement of the International Monetary Fund, 4 Dec. 1945, 60 Stat. 1401, 2 U.N.T.S. 39, as amended through 28 June 1990.

[16] *See* Factsheet: 'The IMF at a Glance', *available at* www.imf.org/external/np/exr/facts/glance.htm. Note that twenty member states of the IMF have not accepted the obligations of Articles VIII(2) 'Avoidance of Restrictions on Current Payments', VIII(3) 'Avoidance of Discriminatory Currency Practices', and VIII(4) 'Administration of Restrictions' of the IMF Agreement. The twenty states are: Islamic Republic of Afghanistan, Albania, Angola, Bhutan, Bosnia and Herzegovina, Burundi, Eritrea, Ethiopia, Iraq, Lao People's Democratic Republic, Liberia, Maldives, Myanmar, Mozambique, Nigeria, Sao Tome and Principe, Somalia, Syrian Arab Republic, Tuvalu, and Turkmenistan. *See* IMF Members' Quotas and Voting Power, and IMF Board of Governors, *available at* www.imf.org/external/np/sec/memdir/members.aspx.

[17] Marrakesh Agreement Establishing the World Trade Organization, 15 Apr. 1994, 1867 U.N.T.S. 154, 33 I.L.M. 1144.

[18] The multilateral trade agreements annexed to the Marrakesh Agreement Establishing the World Trade Organization are (1) Multilateral Agreements on Trade in Goods (or the General Agreement on Tariffs and Trade 1994), (2) General Agreement on Trade in Services, (3) Agreement on Trade-Related Aspects of Intellectual Property Rights, and (4) Understanding on Rules and Procedures Governing the Settlement of Disputes.

to become the members of the WTO.[19] Considering that there are 196 states in the world,[20] and the fact that most of the sizable economies are the members of both institutions,[21] the scope of restriction provided by the obligations under the mandates of the IMF and the WTO is crucial in addressing the legality of a state practice of currency manipulation.

The purpose of the IMF includes promoting exchange stability, maintaining orderly exchange arrangements among members, and avoiding competitive exchange depreciation.[22] The WTO is required to cooperate with the IMF with respect to any exchange problems that falls within the jurisdiction of the IMF,[23] and consult fully with the IMF when dealing with problems concerning exchange arrangements.[24] In such consultations, the WTO must 'accept all findings of statistical and other facts presented by the [IMF] relating to foreign exchange, monetary reserves and balances of payments, and … accept the determination of the [IMF] as to whether action by a [WTO member] in exchange matter is in accordance with the [IMF Agreement]'.[25] As such, a state's waiver on its right to make exchange arrangement principally comes from the IMF Agreement, not from the WTO Agreements. Considering its nature as an exchange rate control, a currency manipulation should be regulated under international rules on exchange arrangement, particularly under the IMF Agreement which works as a limited waiver to the monetary sovereignty of each IMF member state.

2.2. Agreement on Subsidies and Countervailing Measures

2.2.1. Overview

Although the IMF Agreement is the most important and probably the only source of international law directly restricting a state's monetary sovereignty, the IMF does not possess an effective tribunal to adjudicate the alleged violation of the IMF Agreement by its member states. In turn, opponents of currency undervaluation sought for an easier alternative independent from the IMF Agreement – the Agreement on Subsidies and Countervailing

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[19] The WTO expanded its membership to 153 states by 23 July 2008, with the joining of Cape Verde. *See* Understanding the WTO: The Organization – Members and Observers: www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm. Four more states, i.e., Vanuatu, Russia, Montenegro, and Samoa have been subsequently admitted to the WTO membership, subject to their ratification. *See* WTO: 2011 NEWS ITEMS, WTO Welcomes Vanuatu as a New Member (26 Oct. 2011), *available at* www.wto.org/english/news_e/news11_e/acc__26oct11_e.htm. *See also* WTO: 2011 NEWS ITEMS, Ministerial Conference approves Russia's WTO Membership (16 Dec. 2011), *available at* www.wto.org/english/news_e/news11_e/acc_rus_16dec11_e.htm; WTO: 2011 NEWS ITEMS, WTO Membership of Montenegro and Samoa Approved (17 Dec. 2011), *available at* www.wto.org/english/news_e/news11_e/acc_wsm_17dec11_e.htm.

[20] As of 3 January 2012, the US recognizes 195 states in the world as having effective statehood. *See* Bureau of Intelligence and Res., U.S. Dept. of St., *Fact Sheet: Independent States in the World*, *available at* www.state.gov/s/inr/rls/4250.htm. The US and many of the states in the world do not recognize Taiwan as a state due to an extremely sensitive political and diplomatic issue with China. Considering Taiwan's economic significance and the fact that it has been a member of the WTO since 1 January 2002, Taiwan is treated as a state for the purpose of this paper.

[21] Currently, the largest economy outside the WTO membership is the Islamic Republic of Iran. *See* Shayerah Ilias, 'Iran's Economic Conditions: U.S. Policy Issues', Congressional Research Service Report for Congress (22 Apr. 2010), *available at www.fas.org/sgp/crs/mideast/RL34525.pdf*. At the time of the report, Iran and Russia were the two largest economies outside the WTO membership. Iran is a member of the IMF. *See supra* note 16, IMF Members' Quotas and Voting Power, and IMF Board of Governors.

[22] Article 1.3 of the IMF Agreement.

[23] Article XV(1) of the General Agreement on Tariffs and Trade. Full citation of the General Agreement on Tariffs and Trade is provided at note 67.

[24] Article XV(2) of the General Agreement on Tariffs and Trade.

[25] *Id.*

Measures ('SCM Agreement') under the auspice of the WTO.

In fact, most of the legal debates over currency manipulation focus on whether the misalignment of currency exchange rate should be treated as a countervailable subsidy, and there is a growing sentiment in the US to treat China's currency undervaluation as a prohibited export subsidy.[26] Considering how an undervalued exchange rate economically works as an import tax and an export subsidy, application of countervailing duty may seem to be a natural solution for trade problems caused by devalued exchange rates.[27] If a currency manipulation is in fact found as an illegal subsidy, a WTO member state harmed by the manipulation would be able to impose countervailing duty on the imports from the manipulator, based on the SCM Agreement.

Under the SCM Agreement, for a government action to qualify as a subsidy, a financial contribution by a government or by any public body needs to be conferred,[28] or there needs to be any form of income or price support in the sense of Article XVI of the GATT 1994.[29] In addition, a benefit must thereby be conferred.[30] Even if a financial contribution, or an income or price support is considered as a subsidy, it will not be automatically deemed illegal. Under Articles 1.2 and 2 of the SCM Agreement, only the subsidies specific to an enterprise, industry, or group of enterprises or industries within the jurisdiction of the granting governmental authority are deemed illegal. In sum, a governmental action is deemed an illegal subsidy under the SCM Agreement if (i) there is governmental or other public *financial contribution* under Article 1.1(a)(1) of the SCM Agreement or *income/price support* under Article XVI of GATT; (ii) there is conferred *benefit* arising from such financial contribution or income/price support;[31] and (iii) the subsidy is *specific* to certain enterprise or industry.[32] For the purpose of this paper, only financial contribution and specificity elements are discussed below.[33]

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[26] On 9 June 2010, the former US Trade Representative Robert E. Lighthizer, said at the US-China Economic and Security Review Commission, '…the US government should treat currency manipulation as a subsidy … the [US] should officially designate China as a currency manipulator … and bring a WTO case on the grounds that currency manipulation is a prohibited export subsidy'. On 28 September 2011, the former US Assistant Treasury Secretary C. Fred Bergsten wrote in the New York Times, '[t]he artificially low value of the renminbi … amounts to a subsidy on Chinese exports and a tariff on imports from the [US] and other countries'. More comments treating the state practice of currency undervaluation as a subsidy can be found at the United States Senate Democrats, 'Economists Agree: China's Currency Manipulation Contributes to U.S. Jobs Crisis' (4 Oct. 2011), *available at* http://democrats.senate.gov/2011/10/04/economists-agree-china%E2%80%99s-currency-manipulation-contributes-to-u-s-jobs-crisis/; in September 2010, the US House of Representative passed HR 2378: The Currency Reform for Fair Trade Act. The bill provides a formula by which the US Department of Commerce can brand a state a 'currency manipulator', and treat an undervaluation of a currency as a subsidy. Once a state is branded as a currency manipulator, countervailing duties may be imposed on imports from the offending state. The bill did not pass the Senate in 2010. The Currency Bill of 2011 also requires administrative action against states that fail to correct currency misalignment. This bill also treats currency undervaluation as a countervailable subsidy. *See supra* note 3.

[27] *See* Ahn, *supra* at note 9.

[28] Article 1.1(a)(1) of the SCM Agreement.

[29] Article 1.1(a)(2) of the SCM Agreement.

[30] Article 1.1(b) of the SCM Agreement.

[31] *Id*.

[32] Article 2 of the SCM Agreement.

[33] While the requirements for 'financial contribution', the 'income/price support', and 'specificity' are all elaborated in the text of the WTO Agreements, no detailed requirement of 'benefit' is elaborated in the WTO Agreements. Instead, the requirement of 'benefit' has been elaborated through a series of WTO case law. In general, the Appellate Body explained that a 'benefit' exists when a governmental financial contribution makes the

2.2.2. Proving 'financial contribution' or 'income/price support'

Article 1.1(a)(1) of the SCM Agreement provides a list of financial conducts by a government or public body that can be considered as financial contribution: (i) a government practice involving direct transfer of funds, potential direct transfer of funds or liabilities; (ii) forgoing or not collecting any government revenue that is otherwise due (e.g., fiscal incentives such as tax credits); (iii) provision of goods or services other than general infrastructure or purchase of goods by the government; or (iv) making payments to a funding mechanism, or entrusting or directing a private body to carry out one or more of the type of functions illustrated from (i) to (iii) above. The above listed activities are the only activities that can be considered as 'financial contribution' under the SCM Agreement.[34] Based on the list, it seems quite obvious that currency undervaluation does not constitute a financial contribution under the SCM Agreement. Some have argued that 'financial contribution' exists, at least in the case of China's currency exchange regime, because a 'direct transfer of funds' is involved when a Chinese bank exchanges the USD for the RMB for their exporters at the Chinese Government's administered exchange rate.[35] This is a noteworthy argument in the case of China's currency regime, because China had once implemented its currency exchange regime by requiring foreign exchange transactions to occur at a government-determined exchange rate rather than at a market-determined rate,[36] in addition to implementing other conventional methods of currency intervention.[37] Ordinarily, however, exchange of currencies by banks does not directly cause undervaluation of currency. As will be discussed more in the following section, currency intervention by a government is normally conducted through purchase or sale of a state's currency in the foreign exchange market. Sometimes currency intervention is even conducted through the issuing of large quantity of its own currency, in the form of quantitative easing. If banks merely exchange a currency for another currency based on already-manipulated market exchange rate, such exchange of currencies cannot be deemed as the financial contribution in the sense of identifying a subsidy.

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recipient better off than it would otherwise have been absent that contribution. More specifically, a 'benefit' is deemed to exist if the financial contribution is provided on terms that are more advantageous than those that would have been available to the recipient of the market. *See* Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377 at para. 157. Assessment of benefit in reality involves a complicated problem of proving the causation between 'financial contribution' and 'benefit'. In any case, proving the 'benefit' element of a financial contribution or income/price support is a fact-oriented task and should be done on case-by-case basis.

34 The plain language of Article 1.1(a)(1) of the SCM Agreement illustrates that the four broad examples provided thereunder are exhaustive, as indicated by the usage of the abbreviation 'i.e. (id est)'. An unappealed WTO panel decision also ruled that the list provided in Article 1.1(a)(1) is an exhaustive list. *See* Panel Report, *United States – Measures Treating Export Restraints as Subsidies*, WT/DS194/R and Corr.2, adopted 23 August 2001, DSR 2001:XI, 5767.

35 *See* Benjamin Blasé Caryl, 'Is China's Currency Regime a Countervailable Subsidy? A Legal Analysis Under the World Trade Organization's SCM Agreement', 45 *J. World Trade* 187, 195 (2011).

36 Timothy C. Brightbill & John R. Magnus, 'China's currency regime is legitimately challengeable as a subsidy under ASCM rules', *VoxEU.org* (16 Apr. 2010), *available at* www.voxeu.org/index.php?q=node/4960; and Elizabeth L. Pettis, 'Challenging Chinese Currency Manipulation as a Subsidy under the WTO Subsidies and Countervailing Measures Agreement', *ExpressO* (2011) at 5-6, *available at* http://works.bepress.com/elizabeth_pettis/1 (download the article).

37 Other conventional methods of currency intervention by a state include purchase or sale of a currency in the foreign exchange market. What makes China's currency regime different in this regard is the duration and amount of the money involved. It is estimated that China has had purchased more than 2.2 trillion USD in foreign exchange reserve between 2001 and 2011. *See* Pettis, *id*.

Article 1.1(a)(2) of the SCM Agreement and Article XVI of the GATT also treat a form of income or price support as a subsidy if such support operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into a member state's territory. Because the list of financial contributions specified in Article 1.1(a)(1) of the SCM Agreement is an exhaustive list, Article 1.1(a)(2) of the SCM Agreement and Article XVI of the GATT may provide a better chance of successfully treating currency undervaluation as a subsidy. Article 1.1(a)(2) of the SCM Agreement and Article XVI of the GATT seem to provide a definition of financial contribution comprehensive enough to cover even currency undervaluation. Because the term 'income or price support' has never been interpreted by the DSB, it is difficult to make a prediction on the outcome of a case based on the relevant provisions. In any case, a currency undervaluation must satisfy the specificity requirement of Article 2 of the SCM Agreement in order to be deemed as an illegal subsidy.

2.2.3. Proving 'specificity'

Overall read of Article 2 of the SCM Agreement indicates that the specificity of a subsidy can exist if the subsidization is made on 'certain enterprises'.[38] This is a very hard standard to satisfy for an undervaluation of currency, because currency exchange regime of an intervening state applies to every individual, firm, industry, and enterprise holding the undervalued currency or located within the territory of such state.[39] Article 2.1(C) of the SCM Agreement allows labeling an otherwise non-specific subsidy as a specific subsidy based on disproportionately concentrated actual usage of the subsidy by certain enterprises, even if the subsidization does not seem to favor certain enterprise on its face. This provision expands the scope of specificity, and raises a question whether currency undervaluation subsidizes exporters, the biggest beneficiary of currency undervaluation. But currency undervaluation almost equally benefits most domestic market players by placing them in an advantageous position against imported goods in terms of pricing. Even under the standard of Article 2.1(c), any argument attempting to prove specificity of currency undervaluation is likely to fail. However there is a way to shift the burden of disproving specificity to the state undervaluing its currency.

The element of specificity is automatically presumed to exist if a subsidy is 'prohibited subsidy'.[40] The prohibited subsidy under Article 3 is a subsidy that is contingent, in law or in fact, upon export performance. Article 3.1(a) provides that the contingency requirement can be satisfied even if export is one of several other conditions for the grant of subsidy. In other words, a subsidy may still be export contingent as long as it is granted contingent upon exportation, even if the subsidy is also available in some circumstances that do not involve exportation.[41] Annex I of the SCM Agreement provides an illustrative list of export subsidies that are prohibited under Article 3. Among the listed subsidies, Annex I(b) 'currency retention

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[38] *See* Articles 2.1(a), 2.1(c), 2.2, and footnote 2 of Article 2.1(b) of the SCM Agreement.
[39] *See* Sharobeem, *supra* note 9 at 716.
[40] *See* Article 2.3 of the SCM Agreement.
[41] *See* Appellate Body Report, *United States – Tax Treatment for 'Foreign Sales Corporations' – Recourse to Article 21.5 of the DSU by the European Communities,* WT/DS108/AB/RW, adopted 29 January 2002, DSR 2002:I, 55 at para. 119.

schemes or any similar practices which involve a bonus on export' and Annex I(j) 'the provision by governments of export … programmes against increases in the cost of exported products or of exchange risk programmes' are often cited as relevant provisions.[42] Some have argued that one way to benefit from currency undervaluation is to export, and thus exportation is a necessary condition for receipt of the subsidy under Annex I of the SCM Agreement.[43] However, treating a state practice of currency undervaluation as a prohibited subsidy, even under the purview of Annex I of the SCM Agreement, is stretch of logic. The term 'retention' under Annex I(b)'s 'currency retention scheme' ordinarily refers to a private exporter's right to retain a portion of its foreign exchange earnings, notwithstanding a general rule to surrender such earnings to a designated bank.[44] As a general rule, a currency retention scheme is irrelevant to the undervaluation of currency. Treating currency manipulation as an exchange risk program under Annex I(j) provides a better argument, since constant maintenance of certain exchange rate may work as an exchange risk hedging. But currency regime of a state derives from its inherent right of monetary sovereignty, and any international obligation that may encumber such sovereign right should be interpreted conservatively. Exchange risk hedging is only one of several other functions of currency undervaluation and often merely incidental or subordinate to other economic policies central to a state's economic/monetary sovereignty. It seems unlikely the obligations under the SCM Agreement were intended to apply on currency undervaluation of a state, and the words of the SCM Agreement does not seem to provide any direct legal restrictions on the exercise of a state's currency power.

To conclude, a state action of undervaluing its own currency is unlikely to meet at least one, if not all, of the requirements of illegal subsidy, and should probably not be regarded as an illegal subsidy under the purview of the SCM Agreement. Therefore, any plan of tackling currency manipulation, at least under the contemporary multilateral framework, should involve the IMF.

3. ADJUDICATION OF CURRENCY MANIPULATION

3.1. Identity of Currency Manipulation

3.1.1. Legality of currency undervaluation in general

Tackling the systematic currency undervaluation of a state must begin with the identification of 'illegal' currency undervaluation, or 'currency manipulation'. Article IV of the IMF Agreement specifically indicates that the IMF Agreement permits fixed exchange rate system

[42] *See*, among others, China Currency Coalition, 'The Section 301 Petition' (9 Sept. 2004) at 55. The Section 301 Petition is a petition submitted by a group of US industrial, service, agricultural, and labor organizations seeking elimination of the Chinese currency undervaluation to the United States Trade Representative, requesting an action be taken under Section 301(a) of the Trade Act of 1974 (19 U.S.C. §§ 2411 et seq.), *available at* www.aflcio.org/issues/jobseconomy/manufacturing/iuc/upload/petition.pdf.

[43] *See* Caryl, *supra* note 35 at 218.

[44] *See* Deborah E. Siegel, 'Legal Aspects of the IMF/WTO Relationship: The Fund's Articles of Agreement and the WTO Agreements', 96 *Am. J. Int'l L.* 561, 617 (2002). The surrendered foreign exchange earnings would then be exchanged for local currency by the recipient bank.

under which the value of one currency is pegged to the value of another currency.[45] Under the IMF Agreement, all states are allowed to apply the exchange rate regime of their choice, fixed or flexible.[46]

As a matter of fact, the participants of the original Bretton Woods System in 1944, including the US and some of the major economic powers at that time, adopted an adjustable fixed exchange rate system.[47] Under the Bretton Woods System, the US had maintained the price of gold fixed at 35 USD per ounce, and other participating states had pegged the price of their respective currencies in terms of USD and intervened in foreign exchange market by keeping the exchange rate from moving more than 1 percent above or below the fixed value.[48] With the end of the Bretton Woods System most of the major developed countries have shifted from fixed exchange rate system to more flexible exchange rate system, but many developing countries still maintain fixed or at least managed floating exchange rate system.[49] In fact, majority of the member states of the IMF adopt exchange rate policies other than the freely flexible exchange rate regime, or the 'free float'.[50]

Flexible foreign exchange rates can facilitate the achievement of internal balance and other economic objectives of a state by helping the state to achieve external balance easily and automatically.[51] On the other hand, flexible exchange rates can reduce volume of international trade and investment, and thus may more likely lead to destabilizing speculation and inflation, because they introduce a degree of uncertainty not present under fixed rates.[52] As such, it would be rather reasonable for a state to adopt fixed exchange rate system if it believes that fixed exchange rates would serve its economic needs better.[53] In legal perspective, because the IMF Agreement does not generally prohibit governmental control of currency value, each IMF member state still retains general right to undervalue its currency.

Adoption of a fixed exchange rate had been, and to a great extent still is, a matter of sovereign choice. Therefore, as a general rule, a state intervention on foreign exchange rate of its currency is not *per se* illegal 'currency manipulation'.

[45] Article IV(2)(b)(i) of the IMF Agreement states, '[u]nder an international monetary system of the kind prevailing on January 1, 1976, exchange arrangement may include … the maintenance by a member of a value for its currency in terms of … another denominator, other than gold, selected by the member'.

[46] IMF, 'Surveillance over Exchange Rate Policies', attached to Decision No. 5392-(77/63), adopted on 29 April 1977.

[47] Dominick Salvatore, *Introduction to International Economics* at 414 (2nd ed. 2010).

[48] *Id*., at 429.

[49] *See generally*, Rupa Duttagupta, Gilda Fernandez & Cem Karacadag, *From Fixed to Float: Operational Aspects of Moving Toward Exchange Rate Flexibility*, IMF *Working Paper* (2004), *available at* www.imf.org/external/pubs/ft/wp/2004/wp04126.pdf; Francesco Caramazza & Jahangir Aziz, 'Fixed or Flexible? Getting the Exchange Rate Right in the 1990s', *Economic Issues* No. 13 (1998), *available at* www.imf.org/external /pubs/ft/issues13/index.htm.

[50] By 2006, only 14 percent of the IMF member states have adopted free float exchange rate system. *See* Charles W. L. Hill, *International Business: Competing in the Global Market Place* at 355 (8th ed. 2011).

[51] *See* Salvatore, *supra* note 47 at 399.

[52] *Id*.

[53] Some even argue that while governments can or should generally leave the 'goods market' to the invisible hand, it has to be a major player in the 'financial market'. *See* Junning Cai, 'Currency Manipulation versus Currency Account Manipulation' (October 2005) at 5-6, *available at* http://ssrn.com/abstract=834487 (download the article).

3.1.2. Definition of illegal currency manipulation

Not every currency intervention is allowed under the IMF Agreement. Article IV(1)(iii) of the IMF Agreement stipulates, '[each member] shall avoid manipulating exchange rates or the international monetary system in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage over other members'. This provision is composed of two important elements: (i) prohibited means of 'manipulating exchange rate' and (ii) prohibited end of gaining 'unfair competitive advantage over other members'. Neither of the two elements is defined in the IMF Agreement.

In 2007, the Executive Board of the IMF adopted 2007 Decision on Bilateral Surveillance over Member's Policies ('2007 IMF Decision')[54] which provided some clarification to the wordings of Article IV(1)(iii) of the IMF Agreement.[55] Paragraph 2(a) and 2(b) of the Annex of the 2007 IMF Decision states, 'manipulation of the exchange rate is only carried out through policies that are targeted at – and actually affect – the level of an exchange rate … manipulation may cause the exchange rate to move or may prevent such movement' and a member is deemed to be in violation of Article IV(1)(iii) if the IMF determines both that 'the member is engaged in a [currency policy] for the purpose of securing fundamental exchange rate misalignment in the form of an undervalued exchange rate *and* the purpose of securing such misalignment is to increase net exports'(emphasis added). In sum, currency manipulation is an illegal currency undervaluation implemented by an IMF member state, targeted at gaining unfair competitive advantage over other IMF members by increasing the net export of the implementing state.

3.2. Limitation of the IMF Mandate and the Collaboration between the IMF and the WTO

In practice, currency manipulation can occur through almost any policy that influences the foreign exchange rate.[56] In general, however, a state intervention on currency exchange rate is conducted by the purchase or sale of the state's currency in the foreign exchange market, typically through its central bank.[57] More specifically, purchases involve the exchange of a state's foreign currency reserves for its own currency,[58] while sales involve the exchange of the state's own currency for a foreign currency.[59] Governments implement currency intervention for various purposes. While fixed exchange rate regime, a protracted currency

[54] Decision of the Executive Board of the International Monetary Fund, 'Bilateral Surveillance over Members' Policies' (15 June 2007), *available at* www.imf.org/external/np/sec/pn/2007/pn0769.htm#decision.

[55] Unlike the Board of Governors, consisting of representative (governor) from each IMF members, the Executive Board of the IMF does not, by itself, possess the power to make binding clarification of the IMF Agreement. However, as per Articles XII(2) and XII(3) of the IMF Agreement, the Board of Governors may delegate its powers to the Executive Board, subject to the limitations provided under Article XII(2)(b) of the IMF Agreement.

[56] *See* Bryan Mercurio and Celine Sze Ning Leung, 'Is China a 'Currency Manipulator'? The Legitimacy of China's Exchange Regime Under the Current International Legal Framework', 43 *Int'l Law*. 1257, 18 (2009).

[57] *See* Office of Int'l Affairs, U.S. Dept. of Treas., 'Report to Congress on International Economic and Exchange Rate Policies' (Feb. 2011) at 28, *available at* www.treasury.gov/resource-center/international/exchange-rate-policies/Documents/Foreign%20Exchange%20Report%20February%204%202011.pdf.

[58] *Id*.

[59] *Id*. This position was reconfirmed by the US Department of Treasury's December 2011 report to the US Congress. *See* Office of Int'l Affairs, U.S. Dept. of Treas., 'Report to Congress on International Economic and Exchange Rate Policies' (27 Dec. 2011), *available at* www.treasury.gov/resource-center/international/exchange-rate-policies/Documents/FX%20Report%202011.pdf.

intervention targeted at maintaining certain exchange rate against another currency, can be directed at promoting export-led growth of a state's economy by providing more favorable exchange terms to the exporters,[60] fixed exchange rates can also be adopted to eliminate trade uncertainties or prevent inflations by reducing speculations in foreign exchange markets.[61] Because a fixed exchange rate regime normally serves multiple purposes, it is difficult to brand a state practice of fixing its own currency value against another currency as *per se* illegal currency manipulation, targeted at 'securing fundamental exchange rate misalignment in the form of an undervalued exchange rate for the purpose of increasing net exports'.[62] In recognition of the foregoing, the Executive Board of the IMF made it clear that it will respect IMF members' monetary sovereignty by stipulating in Part II of the 2007 IMF Decision, '[the IMF will] respect the domestic social and political policies of members', and in making a determination of currency manipulation the IMF will, 'pay due regard to the circumstances of members … [m]embers are presumed to be implementing policies that are consistent with the [IMF Agreement] … when … a question arises as to whether a particular member is implementing policies consistent with the [IMF Agreement]', and the IMF 'will give the member the benefit of any reasonable doubt, including with respect to an assessment of fundamental exchange rate misalignment'.[63] Furthermore, the decision making process in the IMF is governed by power-based politics, not by rule-based jurisprudence. At the IMF, a member state's voting power at the Board of Governors, the highest authority of the IMF, is directly related to the member's assigned quota.[64] Taking a collective measure against a state's currency undervaluation, even if it is determined that the state's currency practice indeed constitutes a currency manipulation, would be a difficult task under the auspice of the IMF, especially if the suspected currency manipulator is a powerful and influential economic player.

On the other hands, the WTO dispute settlement system provides for the most effective tribunal for international trade disputes. With its compulsory jurisdiction over all WTO members' trade relations[65] and the virtually automatic adoption of its panel or the Appellate

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[60] John D. Greenwald, 'At the End of a Long Trade Policy Road', 45 *Tex. Int'l L.J.* 157, 166 (2009).

[61] *See* Dominick Salvatore, *International Economics* at 699-705 (8th ed., Wiley, John & Sons: 2004). Elimination of trade uncertainties would promote international trade and investment.

[62] Paragraph 2(b) of the Annex of the 2007 IMF Decision.

[63] Paragraph 15 of the 2007 IMF Decision elaborates elements of currency manipulation by providing seven developments which the IMF will consider in assessing a possible currency manipulation: (i) protracted large-scale intervention in one direction in the exchange market; (ii) official or quasi-official borrowing that either is unsustainable or bring unduly high liquidity risks, or excessive and prolonged official or quasi-official accumulation of foreign assets, for balance of payments purposes; (iii) (a) the introduction, substantial intensification, or prolonged maintenance, for balance of payments purposes, of restrictions on, or incentives for, current transactions or payments, or (b) the introduction or substantial modification for balance of payments purposes of restrictions on, or incentives for, the inflow or outflow of capital; (iv) the pursuit, for balance of payments purposes, of monetary and other financial policies that provide abnormal encouragement or discouragement to capital flows; (v) fundamental exchange rate misalignment; (vi) large and prolonged current account deficits or surpluses; and (vii) large external sector vulnerabilities, including liquidity risks, arising from private capital flows.

[64] *See* Articles III and XII of the IMF Agreement.

[65] *See* Article II of the Marrakesh Agreement Establishing the World Trade Organization and Article 1.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes. Full citations of these agreements are provided at notes 17 and 66, respectively.

Body decision,[66] the DSB boasts one of the most effective, if not the most effective, international tribunals in the world. An effective legal remedy, if any, should be found under the purview of the WTO Agreements. Because an issue of currency undervaluation falls within the jurisdiction of the IMF, the DSB is required to make full consultation with the IMF, and accept all findings of the IMF regarding such issue, as per Article XV(2) of the General Agreement on Tariffs and Trade ('GATT').[67] To facilitate this cooperation, the IMF and the WTO have entered into the Agreement between the International Monetary Fund and the World Trade Organization ('IMF-WTO Agreement').[68] Under the paragraph 8 of the IMF-WTO Agreement, the DSB may request the IMF to inform in writing whether a member state's exchange measure is consistent with the IMF Agreement. Therefore, once a panel or the Appellate Body of the DSB decides to review an alleged currency manipulation, it may request the IMF to examine and determine whether a currency manipulation has indeed occurred. The reference to the IMF under the IMF-WTO Agreement refers to the Executive Board of the IMF,[69] an administrative body much smaller and efficient than the Board of Governors. A review initiated pursuant to the DSB's request under the IMF-WTO Agreement will prompt a definitive answer from the Executive Board of the IMF on whether a state's currency intervention constitutes a currency manipulation or not, and based on such finding, the panel or Appellate Body may make an effective adjudication against the alleged currency manipulation.

3.3. Frustration of the WTO Agreements

3.3.1. Overview

Even if the WTO is willing to regulate an alleged currency manipulation, it must have a proper mandate to do so. The only WTO provision that explicitly deals with exchange arrangement is Article XV of the GATT, titled 'Exchange Arrangements'. Article XV(4) of the GATT states, '[c]ontracting parties shall not, by exchange action, frustrate the intent of the provisions of [the WTO Agreements], nor, by trade action, the intent of the provisions of the [IMF Agreement]'. The meaning of the 'frustrating the intent' is further defined in the Ad Article XV of the GATT. At the minimum, the frustration of intent means the 'appreciable departure from the intent of' the GATT or IMF Agreement.[70]

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[66] *See* Articles 16.4 and 17.14 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, 15 Apr. 1994, 1869 U.N.T.S. 401, 33 I.L.M. 1226. A panel or the Appellate Body decision is adopted automatically unless such adoption is barred by the consensus of the WTO member states.

[67] General Agreement on Tariffs and Trade 1994, 15 Apr. 1994, 1867 U.N.T.S. 187, 33 I.L.M. 1153.

[68] Agreement between the International Monetary Fund and the World Trade Organization, 9 Dec. 1996, reprinted in *Selected Decisions and Selected Documents of the International Monetary Fund* (2000) at 705. *Also available at* www.imf.org/external/pubs/ft/sd/index.asp?decision=11381-(96/105)_2.

[69] *See* Siegel, *supra* note 44 at 569. In the IMF, the terminology 'reference to the IMF means formal contact on an institutional level, and in the context of relations with other international organizations, refers to the Executive Board'. Under Article XII(2)(b) of the IMF Agreement, '[t]he Board of Governors may delegate to the Executive Board authority to exercise any powers of the Board of Governors, except the powers conferred directly by this Agreement on the Board of Governors'. Under Article XII(3)(a), it is stated, '[t]he Executive Board shall be responsible for conducting the business of the [IMF], and for this purpose shall exercise all the powers delegated to it by the Board of Governors'.

[70] ANNEX I of the GATT, Ad Article XV.

3.3.2. Frustration of the WTO Agreements

There is a view that Article XV(4) does not apply on currency manipulation, because a technical interpretation of the IMF Agreement draws a conclusion that the term 'exchange action' includes 'exchange policies' but does not include 'exchange rate policies'.[71] Under this view, exchange policies refer to the governmental control on the physical conversion of local currency into foreign currency, and thus, the term 'exchange action' would only encompass matters such as liberalization of payments or convertibility, and not foreign exchange rate control.[72] However, this argument is based on either circumstantial evidence or documents outside of the WTO Agreements. The IMF Agreement, while closely linked to the GATT, is not a part of the WTO Agreements. It would be premature to call the wording 'exchange action' in Article XV of the GATT to completely preclude the issue of currency manipulation based on some circumstantial evidences.

The plain language of Article XV(4) of the GATT seems clear and comprehensive enough to cover currency manipulation. Any interpretation contrary to this plain meaning would require the reading of outside sources, and technical and broad interpretation of the wordings of both the GATT and the IMF Agreement. Article 31 of the Treaty Convention provides '[a] treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their context and in the light of its *object* and *purpose*'(emphasis added), and further provides in its Article 32 that recourse may be had to supplementary means of interpretation only when the ordinary meaning of the treaty leaves the meaning ambiguous or obscure or leads to a result which is manifestly absurd or unreasonable. The *ordinary meaning* of Article XV(4) of the GATT seems pretty straightforward, especially when looking at the *object* and *purpose* of the provision. The focus of Article XV(4) is not only on the term 'exchange action', but also on the sentence 'frustrating the intent of the provisions of the GATT or IMF Agreement', which is what the provision ultimately intends to prevent. If an act of currency manipulation frustrates the provisions of the GATT or the IMF Agreement, it will be awkward to conclude that the action does not fall under the scope of Article XV(4) solely because some circumstantial evidences indicate that the seemingly comprehensive term 'exchange action' does not somehow cover 'exchange rate policy'.

Under the definition of 'frustration of intent' in Ad Article XV of the GATT, however, currency manipulation does not seem to be an exchange action that *frustrates* the intent of the GATT. In a broad sense, currency manipulation may seem to frustrate the overall intent of the GATT and WTO Agreements. The preambles of the GATT and the Marrakesh Agreement Establishing the World Trade Organization both emphasize the desire to substantially reduce tariffs and other barriers to trade in international commerce, because substantial reduction of tariff and non-tariff barriers to market access is the key instrument of the WTO in achieving

[71] *See* Waibel, *supra* note 11.
[72] Erik Denters, 'Manipulation of Exchange Rates in International Law: The Chinese Yuan', *ASIL Insights* (Nov. 2003), *available at* www.asil.org/insigh118.cfm; *see also* Catharina E. Koops, 'Manipulating the WTO? The possibilities for Challenging Undervalued Currencies under WTO Rules', *Amsterdam Center for Int'l L. Res. Paper Series* (3 Mar. 2010) at 7, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1564093 (download the article).

its overall objectives.[73] Currency manipulation can be regarded as a form of non-tariff barrier which makes foreign imports more expensive in the domestic market.[74] In this regard, an act of currency manipulation may dilute the fundamental value the WTO seeks to preserve. However, ruling currency manipulation illegal based on such broad interpretation and abstract consequence would face a serious legal challenge, especially since controlling the value of a currency falls within the sovereign right of a state. Because a waiver to a state's sovereign right should not be made implicitly without convincing evidence that the state's accepted international obligation actually includes such waiver, an argument relying on the frustration of the intent of the GATT is unlikely to succeed in challenging the currency manipulation of a state.

3.3.3. Frustration of the IMF Agreement

Alternatively, currency manipulation may be considered as the prohibited trade action frustrating the intent of the IMF Agreement. Article IV(1)(iii) of the IMF Agreement specifically provides that its members shall 'avoid manipulating exchange rates or the international monetary system in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage over other members'. The 'unfair competitive advantage over other members', realized through currency exchange rate manipulation within the meaning of Article IV(1)(iii) of the IMF Agreement, must be a trade advantage. This assumption is confirmed by Paragraph 2(b) of the Annex of the 2007 IMF Decision, which states that an IMF member will only be considered to be manipulating exchange rates in order to gain an unfair competitive advantage over other IMF members if the IMF determines both that '(A) the member is engaged in these policies for the purpose of securing fundamental exchange rate misalignment in the form of an undervalued exchange rate and (B) the purpose of securing such misalignment is to increase net exports'. According to this, a currency undervaluation will not be labeled as a 'currency manipulation' unless its purpose is to increase 'net exports'. If an action is targeted primarily at increasing net export of a state, such action should be considered as a trade action even if the action achieves its goal of increasing the net export through an exchange rate misalignment. As much as the term 'exchange action' should be interpreted in accordance with its ordinary meaning, the term 'trade action' should also be interpreted in accordance with its ordinary meaning in the light of its object and purpose. The context of Article XV(4) of the GATT suggests that the scope of the term 'trade action' is comprehensive enough to cover the IMF provided definition of 'currency manipulation'. To restate, once the IMF determines certain action as manipulation of exchange rate, such action not only violates Article IV of the IMF Agreement, but also Article XV of the GATT, because currency manipulation is a trade action frustrating the intent of the IMF Agreement, which is prohibited under Article XV(4) of the GATT.

Under Article XXIII of the GATT, a WTO member state may refer a matter to the DSB when a benefit accruing to it under the WTO Agreements is being impaired or nullified by the

[73] *See* Bossche, *supra* note 5, at 402.
[74] Between tariff and non-tariff barriers, the basic principle of the WTO system prefers tariff. *See* Appellate Body Report, *Turkey – Restriction on Imports of Textile and Clothing Products*, WT/DS34/AB/R (22 Oct. 1999) at para. 9.63.

failure of another WTO member to carry out a WTO obligation. Article 3(8) of the Understanding on Rules and Procedures Governing the Settlement of Disputes[75] further provides that where there is an infringement of the obligations assumed under the WTO Agreements, the action is considered prima facie to constitute a case of nullification or impairment. To conclude, a WTO member allegedly injured by another member's currency manipulation may institute a lawsuit before the DSB for the violation of Article XV(4) of the GATT. The incumbent panel may then request, under the IMF-WTO Agreement, the Executive Board of the IMF to find whether the respondent member's currency regime constitutes a currency manipulation. Based on such finding, the DSB may effectively render a ruling under the DSU.

4. CONCLUSION

Under international law, a state enjoys freedom to issue currency and general right to determine the value of that currency.[76] As an inherently sovereign act, any domestic regulation on currency exchange control is, in principle, a domestic measure falling within a state's municipal power.[77] However, the nature of exchange rate is the value of one currency against another currency.[78] A state control of its own currency flow within its own territory may be a domestic matter, but pegging the currency's value to a foreign currency may bring an extraterritorial consequence, thus making it an international matter. However, the IMF and the WTO, two of the most relevant international institutions, have been silent on the issue of currency manipulation amid the heated and prolonged dispute between the US and China. Continued such silence would eventually invite implementation of unilateral measures by the states allegedly injured by the manipulation, tarnishing the integrity of the rule-based international economic relations. As the panel in *United States – Shrimp* case[79] found, unilateral measures threaten the security and predictability of trade relations under a multilateral framework. To avoid such setback, any issue of currency manipulation should be adjudicated under the modern international economic law, particularly under the auspice of the DSB.

The IMF and the WTO can already exercise their jurisdictions over currency manipulation without additional mandate. The IMF has the mandate, upon the request of the WTO or at its own motion, to determine whether a member state's currency intervention constitutes an illegal currency manipulation, while the WTO has the mandate to adjudicate on the legality of a member state's currency exchange regime based on the IMF's finding of manipulation. The bridge between the two agreements is Article XV(4) of the GATT, which

[75] *See supra*, note 66.
[76] *See* Asif H. Qureshi & Andreas Ziegler, *International Economic Law* (2nd ed., London: Sweet & Maxwell: 2007) at 156.
[77] Charles Proctor, 'USA v. China and the Revaluation of the Renminbi: Exchange Rate Pegs and International Law', *Eur. Bus. L. Rev*. 1333, 1336 (2006).
[78] Michael Mussa, 'IMF Surveillance over China's Exchange Rate Policy', Conference Paper, Peterson Institute for International Economics (19 Oct. 2007) at 8, *available at* www.iie.com/publications/papers/mussa1007.pdf.
[79] Panel Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/R (May 15, 1998), as modified by Appellate Body Report WT/DS58/AB/R (12 Oct. 1998).

prohibits frustrating the intent of the IMF Agreement with a trade action. The IMF and the WTO have already made a binding agreement which would facilitate the coordination process. Through collaboration, the IMF and the WTO can tackle the dreaded currency manipulation. Soon or later, the issue of currency manipulation would be brought before the DSB. When the time comes, the DSB should adjudicate the case, providing a clear and convincing guideline on currency manipulation in collaboration with the Executive Board of the IMF, thereby restoring the rule of law in the state practice of controlling foreign exchange rate.