Is Currency Undervaluation a Subsidy: US Law and Practice and the WTO Compatibility

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On 4 February 2020, the Department of Commerce (Commerce) adopted revised Regulations Regarding Benefit and Specificity in Countervailing Duties Proceedings after reviewing solicited comments. Soon after, the Commerce initiated countervailing investigations against Vietnamese passenger vehicle tires and Chinese twist ties, and for the first time imposed preliminary countervailing duties (CVDs) against these two countries based on currency undervaluation. This article considers the revised regulations, two CVD investigations and their WTO-compatibility. We argue that views on whether or not currency undervaluation constitutes a subsidy reflect divergences between the US and other negotiating parties during the Uruguay Round on the definition of a subsidy. Whereas currency undervaluation does confer benefits to producers and exporters, it does not fulfill the criteria of 'financial contribution' and specificity as laid down in the Subsidies and Countervailing Measures (SCM) Agreement; thus the CVD decisions of the Commerce are WTO-incompatible.

Keywords: Currency undervaluation, Countervailing duties, subsidy, specificity, financial contribution

1 INTRODUCTION

On 28 May 2019, the Department of Commerce (Commerce) issued *the Modification of Regulations Regarding Benefit and Specificity in Countervailing Duty Proceedings: Proposed Rules and Request for Comments* and invited comments.[1] After considering the comments, the Commerce amended current regulations governing anti-dumping and countervailing duty by modifying 19 CFR 351.502 (specificity of domestic subsidies) and adding 19 CFR 351.528 (determination of currency undervaluation and benefit). According to Commerce, the modifications 'clarify

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1 Modification of Regulations Regarding Benefit and Specificity in Countervailing Duty Proceedings, 84 Fed. Reg. 24406 (28 May 2109).

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how Commerce will determine the existence of a benefit when examining a subsidy resulting from currency undervaluation and clarify that companies in the trade goods sector of the economy can constitute a group of enterprises for purposes of determining whether a subsidy is specific'.[2] Soon after the amended regulations came into force on 6 April 2020, Commerce initiated countervailing investigations against passenger vehicle tires originating from Vietnam and twist ties from the People's Republic of China (the PRC), and issued preliminary reports on 10 November[3] and 1 December 2020.[4]

The amended regulation on countervailable subsidies and subsequent countervailing investigations point to a longstanding divergence between the US and other negotiating parties during the Uruguay Round on the definition of a subsidy. The amended regulation also makes it possible for international trade companies to be treated as a group for determining the 'specificity' of a subsidy, which calls into question the WTO compatibility of the regulation. In this context, this article aims to examine the main elements of the amended regulation as applied in the cases of Vietnamese passenger vehicle tires and Chinese twist ties, and to evaluate their WTO-consistency.

This article is organized as follows. Following this introduction, section ii examines the amended regulation on countervailable subsidies and subsequent countervailing investigations. Section III situates the US' amended regulation and subsequent investigations in the context of the scholarly debates on currency undervaluation as a form of subsidy, and the history of Uruguay Round negotiations on the definition of a subsidy. It then explores whether scholarly debates and negotiating history may shed light on the WTO-compatibility of recent US practices. Section IV concludes.

2 US' REVISED RULES AND SUBSEQUENT COUNTERVAILING INVESTIGATIONS

Sovereign states and economies are recognized as possessing the right to decide the value of their own currencies.[5] However, countries may be

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[2] Modification of Regulations Regarding Benefit and Specificity in Countervailing Duty Proceedings, 85 Fed. Reg. 6031 (4 Feb. 2020).

[3] Passenger Vehicle and Light Truck Tires From the Socialist Republic of Vietnam: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination With Final Antidumping Duty Determination, 85 Fed. Reg. 71607 (10 Nov. 2020), [hereinafter 'Decision Memorandum for Vietnamese Tires'].

[4] Twist Ties From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination With Final Antidumping Duty Determination, 85 Fed. Reg. 77167 (1 Dec. 2020).

[5] Alexandra Esmel, *Currency Wars: The Need for International Solutions*, 43 Denv. J. Int'l L. & Pol'y 403, 404 (2015).

incentivized to unduly undervalue the exchange rate thereof to enhance trade surpluses.[6] At the level of international law, such behaviour is discouraged. Article IV of the Articles of Agreement of the International Monetary Fund expressly states that countries shall avoid 'manipulating exchange rates … … to gain an unfair competitive advantage over other members'.[7] Decisions made by the Executive Board of the International Monetary Fund (IMF) in 2007 and 2012 have further clarified the above provision.[8] Therefore, states' monetary sovereignty is not unlimited; it is expected that currency devaluation policies will be implemented only in pursuit of legitimate domestic public purposes and not to unfairly impair other countries' rights and benefits.

In the past two decades, this issue has taken central stage due to the PRC's foreign exchange rate policy.[9] While international organizations, particularly the IMF and WTO, were expected to deal with PRC's currency manipulation, these two institutions have failed to effectively tackle trade distortions arising from the manipulation of currency exchange rates.[10] As a result, other powerful market economy countries, especially the US, have launched unilateral and bilateral actions aiming at redressing the trade distorting effects of currency manipulation. For example, at the insistence of the US, the issue of currency manipulation was included in the United States-Mexico-Canada Agreement (USMCA) to prohibit parties from participating in competitive devaluation.[11] The US has also tackled the issue through its domestic legal system by treating currency undervaluation as a countervailable subsidy. In this section, we examine new amendments to US countervailing duty (CVD) regulations and Commerce's findings and applications of new CVD regulations in two CVD investigations related to currency undervaluation: Vietnamese passenger vehicle tires and Chinese twist ties.

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6 Marc Auboin & Michele Ruta, *The Relationship Between Exchange Rates and International Trade: A Review of Economic Literature* 3 (WTO Econ. Research and Statistics Div. Working Paper No. ERSD-2011-17 2011).

7 Bretton Woods Agreement, 27 Dec. 1945, 2 U.N.T.S. 39, 60 Stat. 1401, as amended 30 Apr. 1976, 29 U.S.T. 2203, T.I.A.S. No. 8937 (entered into force 1 Apr. 1978), Art. IV.1(iii).

8 *IMF Executive Board Adopts New Decision on Bilateral and Multilateral Surveillance Over Members' Policies*, International Monetary Fund (30 July 2012), https://www.imf.org/en/News/Articles/2015/09/28/04/53/pn1289.

9 *See* Robert W. Staiger & Alan O. Sykes, *'Currency Manipulation' and World Trade* (NBER Working Paper Series No 14600, Dec. 2008).

10 *See* Jonathan E. Sanford, *Currency Manipulation: The IMF and WTO* (Congressional Research Service No. 228 Jan. 2658, 2011).

11 Agreement between the United States, the United Mexican States, and Canada, Art. 33.4, 30 Nov. 2018, https://ustr.gov/trade-agreements/free-tradeagreements/united-states-mexico-canada-agreement/agreement-between.

2.1 Amended regulations on countervailable subsidies to treat currency manipulation as a subsidy[12]

Currency manipulation by non-market economies is of great concern to the US as it boosts offending countries' currency account surpluses and enhances the competitiveness of their exports relative to US manufacturers.[13] However, whether the CVDs will be used as a trade remedy tool against imports from countries the US Department of Treasury (the Treasury) considers currency manipulators has been debated intensely. Before the amended regulations were promulgated, both the Tariff Act of 1930 and Commerce's CVD regulations failed to remedy the distortionary effects of currency manipulation. For this reason, Commerce previously refrained from investigating claims concerning the relationship between undervalued currencies and subsidies due to the difficulty of proving currency manipulation given the statutory requirements for initiating a CVD investigation.

There has been growing support for Commerce examining whether currency undervaluation ought to be deemed a prohibited export subsidy – especially for imports from non-market economies, such as China.[14] For example, in 2010, then US Trade Representative Robert E. Lighthizer indicated that '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'.[15] A similar perspective was shared by former US Assistant Treasury Secretary C. Fred Bergsten, who stated 'the artificially low value of the renminbi amounts to a subsidy on Chinese exports and a tariff on imports from the United States and other countries'.[16]

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[12] Notably, the concept of 'subsidy' had long been undefined in the US legal system because the US perceived that any attempts to articulate a definition of subsidy would create loopholes. It was not until 1994 that the Uruguay Round Agreement Act and subsequent regulations were enacted to incorporate the SCM Agreement's definition of the term 'subsidy' into the US domestic law. However, the different understanding and interpretation regarding the constituting elements of subsidy still triggered a series of disputes between the US and other countries. *See* e.g., Gilbert Gagne & Francois Roch, *The USA-Canada Softwood Lumber Dispute and the WTO Definition of Subsidy*, 7(3) World Trade Rev. 547 (2008). *See also* Uruguay Round Agreements Act, 19 U.S. C. § 251 (1994).

[13] Laurence Howard, *Chinese Currency Manipulation: Are There Any Solutions?*, 27(2) Emory Int'l L. Rev. 1215, 1216–1217 (2013).

[14] Haneul Jung, *Tackling Currency Manipulation with International Law: Why and How Currency Manipulation Should Be Adjudicated*, 9 Manchester J. Int'l Econ. L. 184, 189 (2012).

[15] Robert E. Lighthizer, *Testimony Before the US-China Economic and Security Review Commission: Evaluating China's Role in the World Trade Organization Over the Past Decade* (2010), https://www.uscc.gov/sites/default/files/6.9.10Lighthizer.pdf.

[16] C. Fred Bergsten, *Missed Opportunities on Trade and Jobs*, Peterson Institute for International Economics (30 Sept. 2011), https://www.piie.com/blogs/realtime-economic-issues-watch/missed-opportunities-trade-and-jobs.

Currency manipulation exacerbates US trade deficits, and so, with a view to addressing that gap, in 2019 Commerce proposed modifying regulations on the interpretation of 'specificity' and 'benefit' in CVD investigative proceedings to address currency manipulation. The resulting rule modifications were enacted in 2020.

Regarding specificity, 19 CFR 351.502 was modified by the addition of a new paragraph (c), which reads: '*Traded goods sector.* In determining whether a subsidy is being provided to a ""group"" of enterprises or industries within the meaning of section 771(5A)(D) of the Tariff Act of 1930, the Secretary normally will consider enterprises that buy or sell goods internationally to comprise such a group'.[17] According to this paragraph, enterprises engaging in international trade may be treated as 'a group of enterprises' for the purpose of specificity. This approach to defining specificity can be traced to Commerce's Policy Bulletin 10.1 issued in 2010, which points out that state-owned enterprises are eligible to satisfy the requirement of 'a group of enterprises' within the meaning of section 771(5A)(D) of the Tariff Act of 1930.[18] This new paragraph offers a clear definition of 'a group' of enterprises/industries – a positive step towards dealing with the issue of 'specificity' when determining whether an undervalued currency benefits a specific group of enterprises or industries.

The element of 'benefit' is addressed by 19 CFR 351.528. Paragraph (a)(1) of the new Regulation specifies that the Secretary of Commerce will normally consider 'whether a benefit is conferred from the exchange of United States dollars for the currency of a country under review or investigation under a unified exchange rate system only if that country's currency is undervalued during the relevant period'.[19] In other words, only when the US has made an affirmative finding that a country's currency is undervalued will an investigation into whether a specific group is benefiting proceed. Notably, when making such a determination, government actions related to the exchange bear great weight. In assessing whether government actions are involved, the degree of transparency of actions that can modify the exchange rate will be considered; in contrast, relevant monetary and credit policies promulgated by an independent monetary authority of the investigated country are normally excluded from the evaluation.[20]

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17 19 C.F.R. § 351.502 (2020).

18 *Specificity of Subsidies Provided to State-Owned Enterprises*, Import Administration Policy Bulletin (2010), https://enforcement.trade.gov/policy/PB-10.1.pdf.

19 19 C.F.R. § 351.528 (a)(1) (2020).

20 19 C.F.R. 351.528 (a)(2) (2020): 'In assessing whether there has been such government action, the Secretary will not normally include monetary and related credit policy of an independent central bank or monetary authority. The Secretary may also consider the government's degree of transparency regarding actions that could alter the exchange rate'.

In examining the existence of currency undervaluation due to governmental manipulation for the purpose of benefit analysis, Commerce will calculate the gap between the investigated country's real effective exchange rate (REER) and the equilibrium REER – which is the REER that 'achieves an external balance over the medium term that reflects appropriate policies'.[21] Once the US Commerce department has determined that a currency is being deliberately undervalued, it will proceed to examine the difference between 'the nominal, bilateral US dollar rate consistent with the equilibrium REER', and 'the actual nominal, bilateral dollar rate during the relevant time period, taking into account any information regarding the impact of government action on the exchange rate' so as to determine the extent of the benefit.[22] Once such a difference has been identified, the amount of the benefit enjoyed by each investigated firm is measured by calculating 'the difference between the amount of currency the firm received in exchange for the US dollars and the amount of currency that firm would have received' absent government intervention in exchange rates.[23] Hence, in general, the degree of benefit generated by the currency manipulation is equal to the excessive amount of domestic currency received by a firm due to undervaluation.

2.2 Countervailing investigations against vietnamese passenger vehicle tires and chinese twist ties

2.2[a] *Countervailing Investigation Against Vietnamese Passenger Vehicle Tires*

Shortly after modification of the US CVD regulations, Commerce imposed a preliminary CVD on car and truck tires from Vietnam on the grounds that the undervalued 'Vietnamese dong' conferred benefits on producers and exporters of passenger vehicles and light truck tires and thus constituted a countervailable subsidy. This was the first time that Commerce applied the new US CVD regulations and treated another country's currency devaluation as a subsidy.

In the Vietnamese tire investigation, Commerce examined the criteria set forth in the new US CVD regulations and established that currency undervaluation maintained by the Vietnamese government constituted a form of financial contribution which conferred benefits to Vietnamese producers of passenger vehicles and light truck tires with a specific scope of application. First, regarding the requirement of financial contribution, it was determined that by directing state-owned commercial banks (Vietinbank and Vietcombank) to offer foreign currency

[21] 19 C.F.R. 351.528 (a)(1) (2020).
[22] 19 C.F.R. 351.528 (b)(1)(ii) (2020).
[23] 19 C.F.R. 351.528 (b)(2) (2020).

exchange services at undervalued rates, the Vietnamese government was effectively making financial contributions to Vietnamese exporters.[24]

Second, Commerce preliminarily found that the subsidy met the requirement of specificity under the new CVD regulations because only the group of Vietnamese industries or enterprises engaging in international transaction were entitled to enjoy the undervalued currency exchange rate. In order to support this position, the authority investigated the data regarding the currency flows of the US dollar into Vietnamese dong during the investigation period and confirmed that the vast majority of such inflows originated from good exports. Hence, the US Commerce concluded that Vietnam's program of currency undervaluation is de facto specific because it applies to a certain group of the Vietnamese exporters buying or selling goods internationally.[25]

Third, turning to the question of whether the benefits originated from the currency undervaluation are granted to Vietnamese exporters, Commerce firstly consulted with the Treasury to identify the existence of the gap between Vietnam's REER and the equilibrium REER during the period under investigation in accordance with the new US CVD regulations. The Treasury affirmed that due to the Vietnamese government's actions, the Vietnamese dong was undervalued by 4.7% relative to the US dollar.[26] Based on the Treasury's findings, Commerce then preliminarily determined that currency devaluation conferred a benefit on Kumho Tire (Vietnam) Co., Ltd. and Sailun (Vietnam) Co., Ltd. and calculated the countervailable subsidy rates at 10.08% and 6.23% to each company respectively in 2019.[27]

This preliminary determination was later upheld by Commerce, which rendered its affirmative final determination in the CVD investigation of Vietnamese tires case in May 2021. Commerce concluded that in this case, Vietnamese exporters received a financial contribution originating from an undervalued Vietnamese dong, and that this benefit arose at the direction of the Vietnamese government, which entrusted its state-owned and commercial banks to provide financial contributions in the form of direct transfers of funds. Moreover, Commerce further reaffirmed that the requirement of de facto specificity was met as the Vietnamese currency program was predominately used by Vietnamese goods exporters.[28]

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[24] Decision Memorandum for Vietnamese Tires, at 20–22.

[25] *Ibid.*, at 23–24.

[26] Letter from Department of Treasury to Department of Commerce (24 Aug. 2020), https://www.omfif.org/wp-content/uploads/2020/08/Treasury-letter-to-ADCVD-case-C-552-829-Vietnam.pdf.

[27] Decision Memorandum for Vietnamese Tires.

[28] Passenger Vehicle and Light Truck Tires From the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination, 86 Fed. Reg. 28566 (Dep't of Commerce 27 May 2021), and accompanying Issues and Decision Memorandum (PVLT Tires From Vietnam IDM).

2.2[b] *The Preliminary Countervailing Investigation Against Chinese Twist Ties*

The US has long accused China of manipulating currency policy to gain unfair advantages in international trade, thus it is unsurprising that Chinese exports were targeted under the new US CVD regulations. On 23 November 2020, a month after the abovementioned Vietnamese case, Commerce issued its second preliminary determination which imposed countervailing duties against Chinese twists ties to offset subsidies that Chinese exporters received arising from the undervaluation of Chinese Renminbi (RMB).[29]

Commerce applied the same analytical framework set forth in the new US CVD regulations to examine whether Chinese exporters of twists ties are subsidized by the Chinese government via currency exchange rate manipulation. Regarding the financial contribution, Commerce affirmed the undervaluation of RMB was the result of manipulation by Chinese government through 'influencing the interest rates of RMB-denominated assets that trade offshore, changing the reserve requirement for foreign exchange derivatives trading, and directing the timing and volume of forward swap sales and purchases by China's state-owned banks'.[30] As for the element of benefit, the Treasury claimed that China's currency undervaluation program resulted in suppressing the value of the RMB by 5%.[31] On the basis of these preliminary findings, Commerce imposed 10.54% countervailing duties to offset the resulting competitive advantage enjoyed by Chinese twist tie producers. Aside from the decision itself, it is worth noting that due to the opacity of China's currency exchange rate management regime, instead of establishing its findings on empirically-derived data, Commerce and Treasury alternatively assessed the RMB's undervaluation 'based on available evidence, taking into account any information regarding government action on the exchange rate and considering China's degree of transparency regarding such action.'[32]

The preliminary determination regarding currency undervaluation as a countervailable subsidy has since been overturned by the Biden Administration. On 17 February 2021, Commerce opted to not offset the undervaluation of the RMB as it found the preliminary determination lacked a complete and thorough analysis of the effects of Chinese currency undervaluation and whether these

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[29] Twist Ties From the People's Republic of China: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination With Final Antidumping Duty Determination, 85 Fed. Reg. 77167 (1 Dec. 2020). [hereinafter 'Decision Memorandum for Chinese Twist Ties'].

[30] Brett Fortnam, *Commerce: Chinese 'Twist Ties' Benefit from Undervalued RMB in CVD Case*, 38(47) Inside US Trade (27 Nov. 2020).

[31] Decision Memorandum for Chinese Twist Ties, at 23.

[32] Fortnam, *supra* n. 30.

constitute a countervailable subsidy under new US CVD regulations. Hence, Commerce decided to 'defer making a finding with respect to the countervailability of currency exchanges for this final determination'.[33] Given that Commerce decided to withhold judgment regarding the countervailability of currency devaluation in this case, it effectively decided to exclude this program from the final calculation of the subsidy rate enjoyed by Chinese twists ties producers.[34]

2.3 Summary

The new US CVD regulations and subsequent CVD investigations demonstrate the intention of the US to crack down on other nations' currency manipulations. As former Commerce Secretary Wilbur Ross stated, 'The Department of Commerce will continue to use the legal tools at our disposal to aggressively counter currency undervaluation and other unfair subsidies, further ensuring a level playing field for American businesses and workers'.[35] By treating currency undervaluation as a countervailable subsidy, the US could exert pressure on exporting countries engaged in currency manipulation to revise their policies.

The US policy of treating other countries' currency undervaluation as a type of subsidy has triggered intense opposition from Vietnam and China. For example, the commercial office of the Chinese Embassy in the US has objected to the US's assertation and argued that China has long refrained from intervening in foreign exchange markets, as has also been acknowledged by the IMF. Furthermore, China contends that the US is not entitled to unilaterally determine whether a country's currency is deliberately undervalued and that treating 'undervalued currencies as a countervailable subsidy will bring a significant risk to the multilateral trading regime and the international monetary system'.[36] Indeed, the legality of currency manipulation under the WTO legal system, and whether CVDs are a legitimate tool to address such practices have long been debated. The next section will move from the US domestic context to the international level and ascertain whether the new US CVD regulations find support under international law:

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[33] US Department of Commerce, *Memo Made by James Maeder, Deputy Assistant Secretary for Antidumping and Countervailing Duty Operations*, https://enforcement.trade.gov/frn/summary/prc/2021-03514-1.pdf.

[34] *Ibid*.

[35] Josh Zumbrun, *US Puts Tariffs on Chinese Twist-Ties*, Wall St. J. (25 Nov. 2020), https://www.wsj.com/articles/u-s-puts-tariffs-on-chinese-twist-ties-11606329434.

[36] *Ibid*.

3 WTO-COMPATIBILITY IN LIGHT OF EXISTENT WTO LAW AND JURISPRUDENCE

3.1 Scholarly debates on the legality of currency undervaluation

On the international level, the legal debates over currency undervaluation focus on the boundary between the right of sovereign states to decide their exchange rates and undue currency manipulation, and the deficiencies of current international rules and mechanisms, including those of the IMF and WTO, in proposing some effective approach to redress the issue. For example, Jung (2012) addresses the illegality of currency manipulation under international law and argues that joint efforts should be undertaken by the IMF and WTO. Specifically, the IMF should have the mandate to determine the existence of currency manipulation, and that the WTO is therefore entitled to adjudicate the legality of a Member's currency policy in accordance with the IMF's finding.[37] Esmel (2015) maintains that while the concept of 'monetary sovereignty' is recognized and remains a useful tool, especially for developing countries seeking economic growth, competitive currency devaluations inevitably undermine the international trade order and world economy. Therefore it is essential to strengthen the enforcement of existing international regulations (i.e., the laws of IMF and WTO) regarding currency exchange programs to prevent countries from abusing their monetary sovereignty.[38] In contrast to the view of the general public, which intuitively believes the international community finds currency devaluation undesirable, Staiger and Sykes (2008) clarify the theoretical relationship between currency policy and international trade, and suggest that the international effect of currency undervaluation is complex, and hence any claims aiming to provide a legally sound basis for adopting anti-dumping or countervailing duties against currency manipulation should be considered carefully.[39]

Numerous scholarly works address the PRC's policy of currency devaluation. For instance, Bergsten (2011) highlights the global imbalances and negative effects on the US economy that have been attributed to the significant and artificial undervaluation of the RMB. He proposes a set of policy options for the US administration, including declaring the PRC a 'currency manipulator' and urging the PRC not to intentionally undervalue the RMB.[40] Notably, unlike conventional perspectives regarding the PRC's currency exchange program, Howard (2012) challenges the assumption that China is manipulating its currency and argues that the negative impacts of state currency policy have less to do with

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37 Jung, *supra* n. 14.
38 Esmel, *supra* n. 5.
39 Staiger & Sykes, *supra* n. 9, at 32.
40 C. Fred Bergsten, *The Need for a Robust Response to Chinese Currency Manipulation – Policy Options for the Obama Administration Including Countervailing Currency Intervention*, 10 J. Int'l Bus. & L. 269 (2011).

individual states and more to do with the general inefficiency of contemporary global trade rules. Howard warns that any unilateral action taken by other countries in response to the PRC's currency policy would be ineffective and might do more harm than good, and suggests that a new international consensus and regulations are needed to tackle the issue.[41]

Numerous studies discuss the legality of currency manipulation under WTO law. Hudson et al. (2011) stress that currency undervaluation might not constitute an export subsidy under the SCM Agreement unless a broad understanding of the definition of 'financial contribution' is accepted. Hence the legality of imposing countervailing duties against currency undervaluation under the WTO law depends upon the panel/AB's interpretation of the SCM Agreement.[42] Zimmermann (2011) also examines whether the misalignment of currency exchange rates should be considered a countervailable subsidy and therefore be subject to legal scrutiny under the SCM Agreement. He concludes that the adoption of an undervalued exchange rate is unlikely to be challenged as an export subsidy as currency manipulation does not meet any of the requirements stipulated in the SCM Agreement.[43] Pettis (2011) and Lima-Campos & Gaviria (2012), on the contrary, maintain that currency undervaluation constitutes an actionable subsidy under the SCM Agreement. Pettis also notes that neither the IMF nor WTO dispute settlement mechanism constitute effective fora for affected countries to seek remedy. Hence, this issue may be better resolved through some political fora, such as the meeting of G-20 or IMF or WTO negotiations.[44]

As noted above, while there are endless legal and policy debates concerning currency manipulation, the present discussions have not yet addressed any concrete measure, in this case CVD measures, adopted by a WTO Member to offset the effect of currency manipulation. Pursuant to the SCM Agreement, if currency undervaluation is treated as an illegal subsidy, a Member whose domestic industry is negatively impacted is empowered to levy CVDs on the import products from the manipulating Member. Nevertheless, if the currency undervaluation does not fall within the scope of the illegal subsidy under the WTO, then the imposed Member may challenge the legitimacy of the imposed CVDs and charge the imposing country with deviating from its legal obligations under the WTO.

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41 Howard, *supra* n. 13.

42 Gregory Hudson et al., *The Legality of Exchange Rate Undervaluation Under WTO Law* (Centre for Trade and Economic Integration Working Paper, CTEI-2011-07).

43 Claus D. Zimmermann, *Exchange Rate Misalignment and International Law*, 105(3) Am J. Int'l L. 423 (2011).

44 Elizabeth L. Pettis, *Is China's Manipulation of Its Currency an Actionable Violation of the IMF and/or the WTO Agreements*, 10 J. Int'l Bus. & L. 281 (2011). Aluisio de Lima-Campos & Juan Antonio Gaviria, *A Case for Misaligned Currencies as Countervailable Subsidies*, 46(5) J. World Trade 1017 (2012).

In determining whether a Member's measure is a prohibited subsidy, the WTO adjudicators examine whether the action at issue (1) constitutes a financial contribution; (2) confers a benefit; and (3) is specific.[45] To elaborate further, according to Article 1.1(a)(1) of the SCM Agreement, a Member's measure qualifies as a 'subsidy' if there are financial contributions or certain income and price support that are conferred by government agencies or by public bodies[46]; and furthermore, the benefit must be conferred accordingly.[47] The existence of subsidy itself does not automatically constitute a breach of the SCM Agreement. Importantly, only if the scope of the subsidy is applied to a specific enterprise, industry, or group of enterprises or industries within the jurisdiction of the granting Member may a unilateral CVD be imposed under WTO law.[48] The legality of currency manipulation under the WTO, determined by whether it fulfills the elements including 'financial contribution', 'benefit' and 'specificity' as stipulated in the SCM Agreement, are discussed below. Before addressing these three criteria, it is important to revisit the debates between the US and other countries during the Uruguay Round as these may shed light on the issue:

3.2 Debates between the US and other countries during the uruguay round on 'financial contribution'

The definition of a regulated subsidy under international trade law was being debated long before the establishment of the WTO. Prior to the Uruguay Round, General Agreement on Tariffs and Trade (GATT) Article XVI, VI, and the Tokyo Round Subsidies Code were the primary disciplines pertaining to multilateral subsidies and countervailing measures. Nonetheless, none of these legal instruments defined what constitutes a 'subsidy'. As a result, countries accustomed to implementing their own definitions of subsidy under their domestic regulations and subsequently sought recourse to countervailing measures to offset the subsidy granted to the specific individuals or entities. Without a uniform definition, countervailing measures could be imposed arbitrarily by the importing countries to distort international trade and negatively impact advances in multilateral trade liberalization.[49] Hence, during the Uruguay Round, the Negotiating Group on Subsidies and Countervailing Measures was established, and the

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[45] More academic discussions, *see* Peter Vanden Bossche, *The Law and Policy of the World Trade Organization—Text, Cases and Materials* 568–571 (2d ed. 2008).

[46] Agreement on Subsidies and Countervailing Measures, § 1.1(a)(1), 15 Apr. 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14. [hereinafter SCM Agreement].

[47] SCM Agreement Art. 1.1(b).

[48] Zimmermann, *supra* n. 43, at 451.

[49] *See* Gagne & Roch, *supra* n. 12, at 550.

participants of the Group reiterated the importance of coming up with a definition of 'subsidy'.[50] For example, as the European Communities stressed, '[T]he key issue upon which the resolution of all other open questions is predicated is the definition of a subsidy.[51]' Likewise, Canada also warned that '[U]nilateral interpretations due to lack of agreement on the concept of a subsidy have caused uncertainty and trade conflicts'.[52]

During negotiations on the definition of subsidy, the question of whether to introduce the concept of 'financial contribution' as an essential criterion for determining the existence of a subsidy drew intense debate among the participating countries in the Negotiating Group. The negotiation history of the Article 1 of the SCM Agreement reveals two divergent perspectives on this issue. One was the group represented by the European Community and Canada, which contended that the concept of financial contribution should be perceived as an essential element in determining the existence of a subsidy and interpreted in a restrictive manner. The introduction of financial contribution underlines the necessary link between a countervailable subsidy and the taxation function of government.[53] Countries in this group further suggested that the element of 'financial contribution' significantly contributed to differentiating real subsidies arising from the financial contribution of the government, and other nebulous benefits accruing to the recipient.[54] In addition, countries in this group indicated that the exact content of financial contribution should be precisely articulated. For instance, Canada held the view that 'while virtually any government action could be construed as having possible effects on production and trade, there need to be some outside limits on the scope of government activity that can be considered to be a subsidy and subject to countervail'.[55] In other words, these countries believed that using precise language to define the terms 'financial contribution' is needed so as to prevent the full universe of government actions from being considered as a subsidy.

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[50] *See* Patrick J. McDonough, *Subsidies and Countervailing Measures,* in *The GATT Uruguay Round: A Negotiating History (1986–1992)* Vol. I: Commentary 803, 819–821 (Terence P. Stewart ed., 1993).

[51] GATT Secretariat, Negotiating Group on Subsidies and Countervailing Measures Meeting of 1–2 June 1987, GATT Doc. MTN.GNG/NG10/W/7 (10 June 1987).

[52] GATT Secretariat, Statement made by Canada at the Negotiating Group meeting of 28–29, June 1988, Negotiating Group on Subsidies and Countervailing Measures, GATT Doc. MTN.GNG/NG10/W/22 (7 July 1988).

[53] GATT Secretariat, Subsidies and Countervailing Measures, at 9, GATT Doc. MTN. GNG/NG10/W/4 (28 Apr. 1987).

[54] Committee on Subsidies and Countervailing Measures, EEC Memorandum on US Final Countervailing Duty Determinations on European Steel Exports, GATT Doc. SCM/35 (21 Oct. 1982).

[55] GATT Secretariat, Statement made by Canada at the Negotiating Group meeting of 28–29, June 1988, Negotiating Group on Subsidies and Countervailing Measures, GATT Doc. MTN.GNG/NG10/W/22 (7 July 1988).

The US, in contrast, opposed introducing 'financial contribution' as the constituent element of 'subsidy'. In the US domestic legal system, countervailable subsidies were defined as 'formal' and 'enforceable' government measures 'which directly led to a discernible benefit being provided'.[56] From the perspective of the US, a government measure should be perceived as a 'subsidy' solely on the ground that the benefits are conferred, regardless of the nature of the measure.[57] In other words, the 'effect' of the government action is the sole factor that shall be concerned. In negotiations on the SCM Agreement during the Uruguay Round, the US insisted the concept of 'subsidy' be 'any government action or combination of actions which confers a benefit on the recipient firm(s)',[58] without examining the nature of the government measure. The rationale for the US was that the inclusion of the terms 'financial contribution' would inappropriately exclude certain government measures that might in effect confer benefits to recipient exporters and have detrimental effects on competing domestic industries. The US understanding of subsidy was incongruent with the European Community and other GATT Contracting Parties, which, as mentioned earlier, proposed that not every sort of government action that conferred a benefit to the specific manufactures would fall within the scope of countervailable subsidy.

In the end, European Community and Canadian negotiators won greater support during the Uruguay Round and so Article 1 of the SCM Agreement speaks to financial contributions by Members' government agencies or relevant public bodies as a necessary element of the definition of a subsidy within the WTO. In *US – Export Restraints*, the Panel traces the negotiation history and affirms that the element of financial contribution was intentionally included with a view to specifying which kind of government measures conferring benefits to recipients fall within the scope of 'subsidy' under the SCM Agreement.[59] Similarly, the Appellate Body in *US – Softwood Lumber IV* also noted, '[N]ot all government measures capable of conferring benefits would necessarily fall within Article 1.1(a). If that were the case, there would be no need for Article 1.1(a), because all government measures conferring benefits, *per se*, would be

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[56] Uruguay Round Agreements Act, Statement of Administrative Action, H.R. Doc. No. 103–316, vol. 1, at 926 (1994).

[57] *See* e.g., Committee on Subsidies and Countervailing Measures, Communication from the United States concerning Subsidy Determinations on Certain Carbon Steel Products, GATT Doc. SCM/36 (27 Oct. 1982). There, it is noted that the DOC, to determine whether respondents had received subsidies within the meaning of the US CVD law, sought to determine 'whether or not respondents have received directly or indirectly an economic benefit'.

[58] GATT Secretariat, Elements of the Framework for Negotiations – Submission by the United States, s. II.2(a), GATT Doc. MTN.GNG/NG10/W/29 Nov. 2022, 1989.

[59] Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, paras 8.65 & 8.73, WTO Doc. WT/DS194/R (29 June 2001).

subsidies'.[60] Tracing the negotiation history of this Article, one better understands the rationale for the US in treating currency manipulation as a countervailable subsidy. Nonetheless, the question arises as to whether currency manipulation meets the criterion of financial contribution and satisfies other elements under SCM Agreement, as will be examined below.

3.3 Is currency undervaluation a countervailable subsidy? – the legality of new US CVD regulations under the WTO

3.3[a] *Misalignment of Currency Exchange Rate as a 'Financial Contribution' or 'Income/Price Support'?*

Article 1.1(a)(1) of the SCM Agreement offers an exhaustive list[61] of government actions which could be treated as providing a 'financial contribution'. These include (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.[62]

Of these measures, some argue that currency devaluation should be deemed a kind of 'direct transfer of funds' as banks of the Member in question offer a service – exchanging the importing country's currency for its own currency – to the exporting firms at a misaligned exchange rate and hence more domestic currency is made available to the exporters than they otherwise would receive at market exchange rates.[63] However, the main weakness of this argument is that the policy of currency manipulation is not designed and implemented by the banks. Its weakness is particularly acute when the banks offering currency exchange are private or commercial banks. Even in the case of state-owned banks, it should be also noted that the final SCM Agreement was not written to catch all government measures conferring benefits as subsidies; rather, only those constituting

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60 Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, fn 35, WTO Doc. WT/DS257/AB/R (19 Jan. 2004).

61 The Panel in *US – Export Restraints* concluded that the list provided under SCM Art. 1.1 (a) is indeed finite. Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, para. 8.73, WT/DS194/R (29 June 2001). *See also* Panel Report, *United States – Preliminary Determinations with Respect to Certain Softwood Lumber from Canada*, para. 7.24, WT/DS236/R (1 Nov. 2002). *See also* Vanden Bossche, *supra* n. 45, at 562.

62 SCM Agreement Art. 1.1(a)(1).

63 de Lima-Campos & Gaviria, *supra* n. 44, at 1024–1025. *See also* Hudson et al., *supra* n. 42, at 9 & 46.

financial contributions should be subject to SCM Agreement.[64] Thus, the concept of financial contribution is not about its effects, but about its nature.[65] In the case of currency undervaluation, any additional amount of domestic currency exchanged by banks and received by the exporters is based on manipulated market exchange rates set by the manipulating Member; in other words, this exchange of currencies cannot be considered a 'direct transfer of funds' for the purpose of the determination of a subsidy.[66]

The definition of financial contribution has not been modified in the new US CVD Regulation. Hence, the scope and concept of the term refer to the Uruguay Round Agreement Act (URAA) and section 771(5)(D) of the Tariff Act of 1930. Under these two Acts, the term financial contribution includes: (i) the direct transfer of funds, such as grants, loans, and equity infusions, or the potential direct transfer of funds or liabilities, such as loan guarantees, (ii) foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income, (iii) providing goods or services, other than general infrastructure, or (iv) purchasing goods, all of which are basically corresponded to the text of SCM Agreement. In the final determination of *Vietnamese passenger vehicle tires* case, Commmerce reasoned that the program of currency devaluation implemented by the Vietnamese government qualified as a situation of 'direct transfer of funds' because Vietnamese exporters of tires can receive extra Vietnamese dong directly for exchanging US dollars at an undervalued rate, which satisfies the definitions of 'transfer' (i.e., 'a conveyance, passing or exchange of something from one person to another') and 'funds' (i.e., 'money or some monetary resource').[67] Moreover, this financial contribution was offered by two Vietnamese national banks (i.e., Vietinbank and Vietcombank), both of which fall within the scope of 'authority' under the section 251 of URAA. Commerce therefore concluded that the devaluation of the Vietnamese dong constituted a 'financial contribution'. However, such a conclusion relies on an expansive interpretation of the terms 'direct transfer of funds', which might not be supported by the WTO jurisprudence. While it is true that the Appellate Body in both *Japan – DRAMs (Korea)* and *US – Large Civil Aircraft (2nd complaint)* affirmed that examples of 'direct transfers of fund' listed in Article 1.1(a)(1)(i) of the SCM

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64 Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, para. 8.65, WTO Doc. WT/DS194/R (29 June 2001). Appellate Body Report, *United States – Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, fn 35, WTO Doc. WT/DS257/AB/R (19 Jan. 2004).

65 Panel Report, *United States – Measures Treating Exports Restraints as Subsidies*, Para.. 8.38, WTO Doc. WT/DS194/R (29 June 2001).

66 Zimmermann, *supra* n. 43, at 448.

67 Passenger Vehicle and Light Truck Tires From the Socialist Republic of Vietnam: Final Affirmative Countervailing Duty Determination, at 13, 86 Fed. Reg. 28566 (Dep't of Commerce 27 May 2021).

Agreement are illustrative in nature, these 'nevertheless provides an indication of the types of transactions intended to be covered by the more general reference to "direct transfer of funds"',[68] the terms must still be read in context. Since the extra Vietnamese dong exchanged from the US dollar incurred from currency devaluation is neither a grant, loan nor equity infusion under Article 1.1(a)(1)(i), it appears that Commerce erred in treating currency exchange program to be a type of direct transfer of fund and mistakenly concluded that a financial contribution exists.

While it would be problematic to treat currency devaluation as a 'direct transfer of funds', some scholars contend that currency undervaluation may be a form of income or price support in the sense of GATT Article XVI, as provided by Article 1.1(a)(2) of SCM Agreement.[69] Via the provision of additional domestic currency by manipulating currency exchange rates, exporting enterprises receive an unfair competitive advantage of over other firms which produce similar products. Hence, directly or indirectly, there is support for an increase of exports, or reduction of imports, of such products into a Member's territory. This argument seems to be relatively promising for those who perceive currency undervaluation as a subsidy under the SCM Agreement as the terms 'income or price support' have yet to be interpreted and analysed by the WTO adjudicators. As a result, such general and treaty languages leave a certain amount of room to incorporate currency undervaluation:

3.3[b] *The Currency Undervaluation as a 'Benefit' Conferred to the Recipients?*

Even if financial contribution or income/price support are attributed to currency devaluation, according to the SCM Agreement Article 1.1(b), the benefit must be conferred to the recipient to establish that the currency exchange program is a subsidy under the SCM Agreement. Past WTO jurisprudence has found that a government action confers a 'benefit' within SCM Agreement Article 1.1(b) if it makes the recipient 'better off' than it would otherwise have been, that is, if it is provided on terms more advantageous than those available to the recipient on the market.[70] In other words, the existence of benefit could be identified if special and

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[68] Appellate Body Report, *United States – Measures Affecting Trade in Large Civil Aircraft – Second Complaint*, para. 614, WTO Doc. WT/DS353/AB/R (12 Mar. 2012). *See also* Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, para. 251, WTO Doc. WT/DS336/AB/R (28 Nov. 2007).

[69] SCM Agreement Art. 1.1(a)(2).

[70] Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, paras 157–158, WTO Doc. WT/DS70/AB/R (2 Aug. 1999); Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, paras 702–708, WTO Doc. WT/DS316/AB/R (18 May 2011); Appellate Body Report, *Japan – Countervailing Duties on Dynamic Random Access Memories from Korea*, para. 172, WTO Doc. WT/DS336/AB/R (28 Nov. 2007).

favourable treatment – not available through commercial channels – is given to private enterprises by Member State governments.[71]

In the case of the *Vietnamese Passenger vehicle tires*, Commerce applied the amended CVD Regulation and evaluated the 'benefits' conferred on the exporters as a result of a currency undervaluation through calculating the difference between the domestic currency received by investigated firms exchanged from the US dollars on the basis of manipulated exchanged rate, and original amount of currency the investigated firms would have gained without the government currency manipulation. Commerce then concluded that a benefit does exist in this case. Through applying the 4.7% undervaluation rate of the Vietnamese dong reported by the Treasury, Commerce identified the gap between the amount of currency the firm received in exchange for USD and the amount of currency that firm would have received in the absence of that gap. Based on such difference, Commerce estimated the benefits in this case by aggregating 'the total benefits in USD based on the sum of these individual transactional during the period of investigation.'[72]

While such approach is grounded on the fact that these exporters enjoy a price advantage over US producers, some research questions whether the benefit is actually bestowed because of the undervalued currency from the perspective of economic implications. Based on economic analysis, Staiger and Sykes demonstrate that an undervalued currency fails to generate benefits for the exporters as purchasers benefit from lower product prices, not sellers, if exports are priced in the producer's currency.[73] Furthermore, if the imports of certain materials are needed as part of the production process, then the undervalued exchange rate would conversely increase costs for producers. Hence, conclusions cannot be drawn regarding the effect of currency devaluation via the approach adopted by Commerce because it is difficult to distinguish between, and predict the effects of these interactions on product prices and therefore, whether the benefits are conferred to exporters.

However, in our view, it seems not impossible to articulate the misaligned currency as a countervailable subsidy under the SCM Agreement. The WTO jurisprudence's emphasis on the existence of a more favourable condition offered by governments of Members than that would otherwise have been available indeed leaves a gray area in the area of currency manipulations. For instance, in the case at hand, by artificially devaluating its own currency value, the Vietnamese government enables exporters to reduce the price of their products, which offers the Vietnamese firms significant advantages over their US competitors. Moreover,

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71 *See* Daniel C. K. Chow, *Can the United States Impose Trade Sanctions on China for Currency Manipulation*, 16 Wash. U. Global Stud. L. Rev. 295, 321 (2017).

72 Decision Memorandum for the Vietnamese Tires, at 25.

73 Staiger & Sykes, *supra* n. 9, at 32.

with regards to the issue of calculating exact amount of benefit that received by the exporters, the Appellate Body in *US-Soft Lumber IV* also affirmed that Members are entitled to select 'any method that is in conformity with the "guidelines" set out in Article 14 [of the SCM Agreement]'.[74] Hence, even if the currency policy is implemented worldwide and thus no comparison can be made between international and domestic market, Members can still use econometric methodology to calculate the benefits arising from the misalignment currency, provided that such method is reasonable and appropriate.[75] In sum, the legitimacy of the approach of estimating the benefit stipulated in the new CVD regulations may still be in line with the SCM Agreement.

3.3[c] *Is the Currency Devaluation by Exporting Members Specific?*

Article 2 of the SCM Agreement indicates that a subsidy is specific if its application is limited to 'certain enterprises'[76] in the jurisdiction of the granting authority. In *US – Upland Cotton* case, the Panel ruled that in the context of Article 2 of the SCM Agreement, an 'industry' or 'group of industries' may be generally understood 'by the type of products they produce'.[77] The Appellate Body in *US – Anti-Dumping and Countervailing Duties (China)* further added that 'the term "certain enterprises" refers to a single enterprise or industry or a class of enterprises or industries that are known and particularized'.[78] Furthermore, Article 2 provides principles to be applied for defining the scope of the concept of 'industry' in a given context, including whether (a) the granting authority explicitly limits access to the subsidy to eligible enterprises or industries, (b) the objective criteria is established with regard to the eligibility of receiving the subsidy, and (c) other factors that should be also taken into account if the subsidy may be de facto specific in particular case despite any appearance of non-specificity resulting from the principles laid down in subparagraphs (a) and (b).[79] In sum, whether a subsidy meets the requirements of specific prescribed in the SCM Agreement Article 2 should be assessed on a case-by-case basis.

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74 *See* Appellate Body Report, *United States – Final Countervailing Duty Determination With Respect to Certain Softwood Lumber from Canada (US – Softwood Lumber IV)*, para. 91, WTO Doc. WT/DS257/AB/R (17 Feb. 2004).

75 *See* de Lima-Campos & Gaviria, *supra* n. 44, at 1030–1032.

76 The scope of 'certain enterprises' under SPS Agreement Art. 2 includes an enterprise or industry or group of enterprises or industries.

77 Panel Report, *United States – Subsidies on Upland Cotton*, paras 7.1139, 7.1140, 7.1142 & 7.1143, WTO. Doc. WT/DS267/R (8 Sept. 2004).

78 Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 373, WTO Doc. WT/DS379/AB/R (25 Mar. 2011).

79 SCM Agreement Art. 2.

In addition to the above criterion for determining the specificity, pursuant to SCM Agreement Article 2.3, the element of specificity would also be presumed to be satisfied if a subsidy falls under SCM Agreement Article 3, including any subsidies contingent upon, in fact or in law, export performance (namely 'export subsidy' or 'prohibited subsidy'). Annex I of the SCM Agreement further offers an illustrative list which exemplifies certain governmental actions that are tantamount to export subsidies.[80] The export subsidies, according to Article 3 of the SCM Agreement, are prohibited. And if a subsidy is deemed as an exported subsidy, the complaint does not need to demonstrate the existence of adverse effect caused by the export subsidies on its own industry in the WTO dispute settlement proceeding.[81]

As has being illustrated in the previous section, Commerce reached the conclusion that the currency devaluation by the Vietnamese government is specific because this kind of subsidy is 'predominantly used by the group of enterprises constituting the traded goods sector'.[82] Commerce investigated that:

> the vast majority (71.94 %) of USD inflows coming into Vietnam during the period of investigation [POI] came from goods export. As a result, result, we preliminarily determine that enterprises that buy or sell goods internationally are the predominant users of the GOV's currency undervaluation subsidy, and, therefore, this program is de facto specific.[83]

The application of new CVD Regulation in the case of the *Vietnamese passenger vehicle tires*, which perceives the currency manipulation as being de facto specific which specifically grants to the exports of goods, might be challenged to be WTO-inconsistent. Commentators who question currency devaluation to be specific contend that as a government measure available to all firms and individuals, it is difficult to argue that the currency devaluations implemented by a Member is specific to an individual recipient or group of enterprises with similar characteristic.[84] In view of this, even if currency undervaluation confers certain benefits to exporters, it is neither illegal nor actionable under the SCM Agreement.[85]

In contrast, many scholars are of the view that currency devaluation may constitute the export/prohibited subsidy under SCM Agreement Article 3.1(a) because the currency devaluation in effect confers benefits to a limited scope of

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80 SCM Agreement Annex I.
81 SCM Agreement Art. 3.1(a). *See also* Zimmermann, *supra* n. 43, at 444.
82 Decision Memorandum for the Vietnamese Tires at 22–24.
83 *Ibid*., at 24.
84 Richard Weiner et al., *US Commerce Department's Recent Decision to Impose Duties for Currency Manipulation Raises World Trade Organization Concerns*, Sidley Austin (1 June 2021), https://www.sidley.com/en/insights/newsupdates/2021/06/us-commerce-departments-recent-decision-to-impose-duties-for-currency-manipulation.
85 *See* Chow, *supra* n. 71, at 321–322. *See also* Robert Staiger & Sykes, *supra* n. 9, at 32.

producers who are exporting their products overseas.[86] Most importantly, in response to the critique regarding the overly broad concept of 'traded good sector' used by Commerce, scholars refer to the analysis made by the Panel in *US – Definitive Anti-dumping and Countervailing Duties on Certain Products from China* and manifest that the element of specificity would not be excluded solely because the fact that exporters are usually a group of enterprises comprising a diverse range of activities.[87] Specifically, the currency undervaluation program may be implemented as a 'currency retention schemes involving a bonus on export' within the SCM Agreement Annex I Item (b),[88] or an exchange risk programme within SCM Agreement Annex I Item (j),[89] and thus is de jure and de facto export contingent.[90]

This article submits that even assuming Commerce's determinations regarding the existences of financial contribution and benefit are upheld, whether the undervalued currency exchange rates in such cases *Vietnamese passenger vehicle tires* and *Chinese twist ties* fall within the scope of 'export subsidy' needs further discussions for the following reasons. First, when we investigate footnote 4 of the SCM Agreement Article 3.1(a), it states: 'The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision'.[91] Hence, the existence of such a factual contingency upon export performance requires more detailed examination. Second, currency devaluation seems not perfectly fit in the concept of 'currency retention scheme' under the SCM Agreement Annex I Item (b) because currency retention refers to an industry or enterprise's own right to hold certain amount of its foreign currency earnings, hence it is stretch of logic to argue that the currency devaluation falls within the scope of currency retention scheme.[92] Perceiving the currency devaluation as an exchange risk programme under Annex I Item (j) of the SCM Agreement might be a relatively persuasive argument as it might be viewed as a form of exchange risk hedging for exporters. Nonetheless,

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86 Benjamin Blase 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, 218 (2011).

87 Panel Report, *US – Definitive Anti-dumping and Countervailing Duties on Certain Products from China*, paras 9–38-40, WTO Doc. WT/DS379/R (22 Oct. 2010).

88 SCM Agreement Annex I(b) 'Currency retention schemes or any similar practices which involve a bonus on exports'.

89 SCM Agreement Annex I(j) 'The provision by governments (or special institutions controlled by governments) of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the cost of exported products or of exchange risk programmes, at premium rates which are inadequate to cover the long-term operating costs and losses of the programmes'.

90 de Lima-Campos & Gaviria, *supra* n. 44, at 1034. *See also* Catharina E. Koops, *Manipulating the WTO? The Possibilities for Challenging Undervalued Currencies Under WTO Rules*, at 6 (2010 Research Paper Series, Amsterdam Center for International Law) (2010), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1564093.

91 SCM Agreement Art. 3.1(a), Fn 4.

92 Jung, *supra* n. 14, at 192.

exchange risk hedging is not the primary aim and function of a devaluation of currency policy. No evidence from the *Travaux Préparatoires* reveals that the definition of exchange risk programme under the SCM Agreement Annex I Item (j) extends to the regulation of the exercise of state's currency power. All in all, it is still an unresolved issue regarding whether Commerce's determination concerning the element of 'specific' can satisfy the legal standard of 'contingency in fact upon export performance' under the SCM Agreement.[93]

4 CONCLUSION

The Commerce's decisions to revise its CVD regulations on the possibility for treating currency undervaluation as a subsidy, and on specificity, and its subsequently decisions to impose CVDs against Vietnamese passenger vehicle tires and Chinese twisted ties have aroused concerns among its trading partners and impacted international trade law. These two CVD investigations are the first of their kind, and their consistency with WTO law remains unclear. In this article, we examine key elements of the US amended regulations and look at the two CVD decisions. We argue that the question of whether currency undervaluation constitutes a subsidy is reflective of debates during the Uruguay Round negotiations, namely, the criterion of 'financial contribution' in the definition of a subsidy. We conclude that pursuant to current rules under the SCM Agreement, Treasure's belief that currency undervaluation confers benefits on exporters does not satisfy the financial contribution and specificity requirements. Therefore, Commerce's CVD decisions may not pass scrutiny by a WTO judiciary once a complaint is brought to before the WTO dispute settlement mechanism. Given the legalistic and technical nature, CVDs under the SCMA are not a good instrument for tackling currency undervaluation.

[93] Similar perspectives, *see* Weiner et al., *supra* n. 84.