

**“THE LAW WORKS ITSELF PURE”:
THE FRAGMENTED DISCIPLINES OF GLOBAL TRADE AND MONETARY
COOPERATION, AND THE CHINESE CURRENCY PROBLEM**

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I. INTRODUCTION

This working paper considers the controversy over the Chinese yuan¹ - the primary unit of account of the Renminbi or “RMB”, the official currency of the People’s Republic of China.² The People's Bank of China's (PBC's) currency valuation interventions have been the subject of international disagreement, not least between the United States and China. Others, such as Brazil, have also drawn critical attention to the issue.³ But while the problem has arisen in the context of trade and is therefore framed as a trade dispute – be it in terms of “cheap goods” or unlawful subsidization⁴ - the larger question concerns the extent to which the issue is addressed by our global rules under the Bretton Woods framework for the regulation of both trade and monetary cooperation.

The debate is ostensibly legal, or at the very least takes place under the colour of law. However, there is scant trade regulation under existing rules. This does not mean the answer automatically lies under a different set of international rules; given the fragmented disciplines of international economic law. There is even less that the International Monetary Fund (IMF) can do in terms of the actual enforcement of legal discipline. Here, disciplinary fragmentation means the issue is likely to fall between the cracks; unlike the more familiar problem in international economic law of overlapping, or competing authority – i.e. of having too much incoherent regulation, as opposed to too little regulation.⁵ This is the familiar problem of gaps – *lacunae* - in international law, leading to a professional lawyers’ phenomenon which I here call “rule tolerance”.

¹ With the usual caveat, I am indebted to Joel Trachtman and Patrick Low for so generously sharing their thoughts with me.

² See March Benitah, “China's Fixed Exchange Rate for the Yuan: Could the United States Challenge It in the WTO as a Subsidy?”, *ASIL Insights*, October 2003.

³ Matthew Dalton, “WTO to Examine Complaint on Yuan”, *Wall Street Journal*, 16 November 2011; Joe Leahy, “US Seeks Pact with Brazil over Renminbi”, *Financial Times*, 8 February 2011.

⁴ Leahy, “US Seeks Pact”, *op. cit.*; Keith Bradsher, “Washington Asks WTO to Examine Chinese Aid”, *International Herald Tribune*, 8-9 October 2011.

⁵ See, e.g., “Conclusions of the Work of the Study Group on the Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law 2006,” adopted by the ILC at its Fifty-eighth session, A/61/10 (2006), paragraph 51; *Yearbook of the International Law Commission* (2006), Vol. II, Part Two; Tomer

Making the currency issue actionable under the WTO Subsidies and Countervailing Measures (SCM) Agreement is difficult because that shoe does not quite fit; resulting instead in some highly strained interpretations of trade law. Equally, the mandatory rules under the IMF Articles of Agreement are few, as befits a tradition of soft monetary rules. One exception is a core “anti-manipulation” rule which we will return to. Yet framing dissatisfaction over China’s currency interventions as a “manipulation” (i.e. monetary cooperation) problem recalls a man equipped with a hammer, for whom all things resemble a nail. The legal meaning of “currency manipulation” is unclear. Furthermore, it is not an anti-manipulation rule *per se*, but rather a rule against manipulation *with* the deliberate intent of affecting a nation’s terms of trade (i.e. by increasing net exports).⁶ Yet economists face an equally difficult time marking out the correlation between currency volatility and the sorts of assumed trade effects which China’s critics say its currency policies entail.⁷ Another difficulty is the lack of a proper adjudicatory mechanism in relation to controversies over international monetary policy.

This chapter surveys and compares the rules and regimes for trade and monetary cooperation against the backdrop of persistent calls for unilateral action against Chinese goods, especially during that period from 2009 to 2010 when China intervened to maintain an undervalued yuan and during which it became an electoral issue in the United States. The central arguments in this chapter are that (a) the rules governing trade and monetary cooperation “tolerate” a wide scope of discretion in currency policies; (b) under trade law, tolerance does not however mean that China’s trading partners are not constrained by trade rules in the national responses they may wish to adopt, and that (c) national action in response to China’s currency policies which ought to be permitted is one which is not only “tolerated” by existing global rules but which is also justified by the kinds of rule-arrangements we have.

Without counseling action against or attempting to defend China, this chapter argues that of all the trade law arguments which are available, anti-dumping action is what the global legal framework is most likely to permit. I also argue that there are defining features of how we argue about law which trade lawyers should take seriously, and which should confine any national response to China to such action. This chapter therefore denies two propositions - that the global trading system is wholly bereft of a response to the currency issue, and that all sovereign action would automatically be an abuse of global trading rules.

II. CALLS FOR UNILATERAL ACTION AGAINST UNFAIR TRADE

Difficulties with global rules, coupled with domestic protectionist pressures in the current global economic climate, have led to calls throughout the past decade for unilateral action by the United

Broude, “Fragmentation(s) of International Law,” in Tomer Broude & Yuval Shany (eds.), *The Shifting Allocation of Authority in International Law* (Oxford: Hart, 2008), 99; C.L. Lim & Henry Gao, “The Politics of Competing Jurisdictional Claims in WTO and RTA Disputes”, in Tomer Broude, Marc L. Busch & Amelia Porges (eds.), *The Politics of International Economic Law* (Cambridge: Cambridge, 2011), 282.

⁶ See further, the 2007 Decision on Bilateral Surveillance that the IMF’s Executive Board, 15 June 2007.

⁷ See “The Relationship between Exchange Rates and International Trade: A Review of Economic Literature”, Note by the Secretariat, WT/WGTDF/W/57, 27 September 2011 and also “The Relationship between Exchange Rates and International Trade: A Short Update of Recent Economic Literature. Note by the Secretariat, WT/WGTDF/W/65, 18 July 2012. See further, the discussion by An Hertogen, “The Forgotten GATT Articles on Exchange Rates”, PEPA/SIEL Conference, January 2012, on file.

States – principally, unilateral rules to block Chinese goods in circumstances where China is not seen to be “playing fair”.⁸ The argument for unilateral action takes place against the backdrop of ineffective – or what is perceived to be ineffective – global regulation. There are “gaps in the rules”. Thus, even a nation which believes in international rules may need to resort to self-help. More so, if it involves “self-defence”.⁹

At the same time, international economic lawyers have tended to focus their writings on what the rules say. To the extent that they find the rules uncertain, these writings underscore the apparent permissibility of the PBC’s policies and also the fact that unilateral action may be permissible where it doesn’t otherwise contravene the rules. International lawyers routinely “tolerate” unilateral, sovereign action in such a manner where, as here, our fragmented legal regimes – the WTO and the IMF – are incapable of providing practical guidance. “Tolerance” may not be the exact right word. I use it here only to denote professional acceptance of the limits of legal rules, and – as I shall argue further, below – acceptance that there are ‘gaps’ in the law where specific issues fall through the cracks between the fragmented, yet sometimes overlapping, regimes which characterize the discipline international economic law. A further reason which makes such tolerance bearable to the lawyer’s professional sensibilities may be that if unilateral action incentivizes or even compels international consultation and negotiation, and prompts authoritative rule interpretation or legislation (i.e. the creation of new treaty rules in the longer run), legal practitioners in the field might yet ask if that would be such a bad thing from the viewpoint of the international legal order.

In a sense, the debate is as old as that between the natural lawyers who would not *confine* all that we would call “law” to that which may be traced to the voluntary consent of sovereigns to international rules,¹⁰ and so-called legal positivists who would.¹¹ If so, it requires us to come up with a further justification for unilateral action beyond saying that the rules have run out. In any event, thinking about whether unilateral action may ever be *normatively justified* should be familiar to international economic lawyers. A clear example may be found in the writings of the late Robert Hudec. His writings sought out the strength of moral-political justification for a range of unilateral trade devices which were the subject of heated public debate. These ranged from anti-dumping to anti-subsidy action against foreign goods, to the search for a normative justification for “Section

⁸ Bradsher, “Washington Asks WTO”, *op. cit.*

⁹ For raising the argument of “self-defence” in these contexts, see Robert Hudec, “Thinking about the New Section 301: Beyond Good and Evil.” In *Aggressive Unilateralism: America’s 301 Trade Policy and the World Trading System*, Jagdish Bhagwati and Hugh T. Patrick eds. (Ann Arbor: University of Michigan Press, 1990).

¹⁰ See (e.g.) Francisci de Victoria, *De Indis et de Iure Belli Relectiones*, Ernest Nys ed., John Pawley Bate transl. (Washington DC: Carnegie, 1917), “First Reflectio of the Reverend Father, Brother Franciscus de Victoria, On the Indians Lately Discovered” (hereinafter, “First Reflectio”), 115: “...the law of nations (*jus gentium*), which either is natural law or is derived from natural law...What Natural reason has established among all nations is called the *jus gentium*”, 151. Hence custom is evidence, but not a source, of law (“And, indeed, there are many things in this connection which issue from the law of nations, which, because it has a sufficient derivation from natural law, is clearly capable of conferring rights and creating obligations”, 153); positive law being subordinate to natural law (“And if there were any human law which without any cause took away rights conferred by natural and divine law, it would be inhumane and unreasonable and consequently would not have the force of law”, 152).

¹¹ Cf. Alberico Gentili, *De Jure Belli Libri Tres*, John C. Rolfe transl., with an introduction by Coleman Phillipson (Oxford: Clarendon, 1933), Vol. 2, Book I, Ch. 1, 8: “The law of nations which is that which is in use among all nations of men, which native reason has established among all human beings, and which is equally observed by all mankind. Such a law is natural law. *The agreement of all nations about a matter must be regarded as a law of nature*” (my emphasis).

301” in the United States.¹² Hudec’s underlying concern in all these instances was seemingly constant – when, if ever, would it be *justified* to act unilaterally? Today, the issues raised by the currency issue are similar to those confronted in Hudec’s search for a justification – if any - for anti-dumping action, anti-subsidy action and Section 301 action.

In short, there is a currently a close search in international economic law writing for a way forward where existing international rules do not seem adequate, and the prospect of unilateral sovereign action has again raised its head.¹³ Yet there is no suggestion of a regulatory free-for-all, implying that all manner of unilateral, sovereign responses may be permissible. This raises the question of when, and *what sorts of, national responses to China’s currency policies would be permissible under international law*. That is the only question addressed in this chapter, as opposed to whether action should be taken against China at all or, if so, what strategies would be legally most advantageous.

III. THE CHINESE CURRENCY ISSUE

Since 2005, the Chinese RMB has been pegged to a basket of currencies comprising the US dollar, the Japanese Yen and the Euro.¹⁴ The PBC has the power to intervene in the currency markets. It does so by buying and selling, principally the US dollar, in the international currency market. The PBC’s stated purpose is to maintain the RMB’s exchange rate, a legitimate aim, but the claim that the PBC’s exchange rate policies are maintained strictly in accordance with purely domestic imperatives has nonetheless drawn a critical response.¹⁵ Its critics claim that the PBC is, in reality, taking exchange action against the US dollar with the intent of keeping the RMB at an artificially low rate – i.e. to promote China’s exports and/or restrict imports - while, at the same time, building up China’s foreign reserves.¹⁶ It is alleged that China intervened to prevent its currency from appreciating between 2009 and the first half of 2010, causing its reserves to swell by US\$540 billion over an 18-month period.¹⁷

The controversy involves a difficulty in distinguishing between the pursuit of a legitimate domestic policy, and allegations of currency manipulation with the aim of boosting China’s export performance and terms of trade. Two distinct sets of rules - embodied in China’s IMF obligations (particularly under Article IV of the IMF Articles of Association) and its WTO obligations – both

¹² Robert Hudec, “Mirror, Mirror on the Wall: The Concept of Fairness in U.S. Foreign Trade Policy”, in Robert E. Hudec, *Essays on the Nature of International Trade Law* (London: Cameron May, 1999), 227; Hudec, “Thinking About the New Section 301”, *op. cit.*

¹³ See (e.g.) Joel Trachtman, “Yuan to Fight About It: The WTO Legality of China’s Exchange Rate Regime”, VOXEU e-book, edited by Simon Evenett, 10 April 2010. Robert W. Staiger & Alan O. Sykes, “‘Currency Manipulation’ and World Trade”, (2010) 9 *World Trade Rev* 583; Bryan Mercurio & Celine Sze Ning Leung, “Is China a ‘Currency Manipulator’?: The Legitimacy of China’s Exchange Regime under the current International Legal Framework”, (2009) 43 *International Lawyer*, 1257; Hertogen, “The Forgotten GATT Articles”, *op. cit.* For a slightly earlier but near contemporaneous piece, see Raj Bhala, “Virtues, the Chinese Yuan and American Trade Empire”, (2008) 38 *Hong Kong L.J.* 183.

¹⁴ Prior to 2005 it was pegged to the US dollar, but under pressure from the Bush Administration in 2005, it was allowed to float within a narrow band enabling it to rise by 21 per cent; “Renminbi (Yuan)”, *New York Times, Global Edition*, Times Topics, 18 October 2012, available online at:

<http://topics.nytimes.com/top/reference/timestopics/subjects/c/currency/yuan/index.html>.

¹⁵ This is also the “standard defence”, typically accepted by the IMF without question; see Jonathan E. Sanford, “Currency Manipulation: The IMF and WTO”, CRS Report for Congress, 28 January 2011.

¹⁶ Trachtman, “Yuan to Fight About It”, *op. cit.*

¹⁷ “Renminbi (Yuan)”, *New York Times*, *op. cit.*

appear to apply. The next section offers a brief summary of the two bodies of rules, and discusses their differences. The section following that discusses how unilateral action (e.g. by the US) may be viewed under these separate legal regimes.

IV. THE “TRADE” AND “MONETARY COOPERATION” METHODS OF LEGAL ANALYSIS COMPARED

(a) Monetary Cooperation: The International Monetary Fund

Under Article I of the IMF Articles of Agreement, the purposes of the IMF include the following:

- (ii) To facilitate the expansion and *balanced growth of international trade*, and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy.
- (iii) To promote *exchange stability*, to maintain orderly exchange arrangements among members, and *to avoid competitive exchange depreciation*.
- (iv) To assist in the establishment of a *multilateral system of payments* in respect of current transactions between members and in the *elimination of foreign exchange restrictions* which hamper the growth of world trade.
- (v) To give confidence to members by *making the general resources of the Fund temporarily available to them* under adequate safeguards, thus providing them with *opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity*.

Article I(ii) reflects a belief on the part of the framers of the Bretton Woods system in the importance to “employment, income and development” of international trade. Equally important is a global system for trade payments.¹⁸ Here, the IMF had originally been intended to administer a system of freely convertible currencies,¹⁹ using fixed exchange rates.²⁰ The thinking was that the enhanced ability of traders to predict both the convertibility of a currency and its value would facilitate trade payments which would, in turn, facilitate trade.²¹ For this system to work, Article I(v) also provides for a system of “temporary” IMF loans for Members facing balance-of-payment difficulties.²²

For our purposes, it is Article I(iii)’s reference to the need to “avoid competitive exchange depreciation” which goes directly to the heart of the Chinese currency issue. It reflects the experience of the inter-war period, during which competitive depreciations in order to boost a

¹⁸ As we shall see below, hence Article I(iv)’s reference to the establishment of a “multilateral system of payments”.

¹⁹ Hence Article I(iv)’s reference to “the elimination of foreign exchange restrictions”.

²⁰ Hence, Article I(iii)’s reference to “exchange stability”.

²¹ John W. Head, *Losing the Global Development War* (Leiden: Nijhoff, 2008), 105-106.

²² *Id.*, 106.

nation's trade terms reflected a policy best summed up idiomatically: beggar thy neighbour and the Devil take the hindmost.

The key provision which had maintained the fixed currency value (so-called "par value") system for the currencies of its Members was Article IV. As it originally stood, it was based on a variation of the Gold Standard. Broadly speaking, the US dollar was pegged to gold and other currencies were pegged to the US dollar. Members were generally prohibited from revaluing their currencies by more than one per cent without IMF authorization. Article IV(3) as it stood imposed a duty on Members to collaborate with the Fund to "avoid exchange alteration". Under the amended Article IV today, however, IMF members are now free to choose their own currency arrangements. The history to this is that, during the 1970s, exchange rate policies reverted to a high level of discretion in sovereign decision-making by IMF Members in events taking place after the United States unilaterally announced on 15 August 1971 that the dollar will no longer be pegged to gold. Article IV was, in due course of time, amended.²³

According to the Smithsonian Agreement in the Autumn of 1971, a system of "central rates" had originally been envisaged instead, together with a devaluation of the US "dollar to gold" rate while other major currencies were to appreciate against the dollar. Fixed exchange rates would be preserved, but with wider margins for deviation. Following Britain's departure from the Smithsonian Agreement, by 1973 all the major currencies were in a float. The par value system had been relegated to history.²⁴ The so-called "Second Amendment" to the IMF Articles in 1978 now contains the version of Article IV which we have today.²⁵

It is worth noting that the Committee of Twenty had originally proposed a further alternative – a system of "symmetry". This envisaged a system where excessive surpluses and deficits were *equally* to be avoided. This would have obligated "surplus countries" to import more, stimulate domestic demand, revalue their currencies.²⁶ That such a system was not adopted shows that what we have today under Article IV was the result of deliberate policy choice. The obligations of a surplus country under the "symmetry" proposal would have reflected precisely the measures which China has now been subjected by way of moral pressure to adopt in light of its massive trade surplus. The point, as Professor Andreas Lowenfeld has so carefully described it, is that the IMF Members chose otherwise, in favour of sovereign freedom. Some pegged their currencies against Special Drawing Rights, some against the dollar, and some against each other while floating together.²⁷ Nations such as the United States, Japan, Canada and the United Kingdom have since moved to a system of "managed" or "dirty floats" (i.e. as opposed to having freely floating currency regimes),²⁸ as has China since 2005 under pressure from the Bush Administration.

Legally speaking, there is nothing wrong with the PBC intervening to manage the value of the Chinese currency. The argument that the PBC is engaging in internationally wrongful behavior has to proceed a little further; by drawing our attention to the language of Article IV(1)(iii)'s current "anti-manipulation" rule. It states that IMF members "*shall avoid* manipulating exchange rates or the

²³ *Id.*

²⁴ Andreas Lowenfeld, *International Economic Law*, 2d ed. (NY: Oxford, 2008), 625-627.

²⁵ *Id.*, 633; see, more generally, 629-637 for an excellent account of the events leading to (and the effects of) the Second Amendment.

²⁶ *Id.*, 629-630.

²⁷ *Id.*, 634.

²⁸ *Id.*

international monetary system in order to prevent effective balance of payments adjustment *or to gain an unfair competitive advantage over other members*” (emphasis added). The allegation against China is that the PBC is manipulating exchange rates “*to gain an unfair competitive advantage over other members*”. Thus, a judgment about that correlation needs to be made in applying that rule, and as we shall see below Professors Staiger and Sykes have questioned that correlation. “Unfairness” is another difficult criterion which involves the making of a moral value judgment.²⁹

A trade lawyer if called upon to interpret this rule against the backdrop of the professional trade lawyer’s sensibilities may be tempted to distinguish between “manipulation” which may not be *per se* wrongful, and manipulation judged against what trade lawyers call an “aims and effects” test.³⁰ One reason “manipulation” *per se* may not be wrongful lies in the risk of overbreadth for treating it otherwise. IMF Member States do routinely intervene in the currency markets. Talking about the possible need to look at “aims and effects” would not be just a fanciful way of discussing the meaning of the rule in Article IV(1)(iii). Clearly the history of Article IV has led to a preference by IMF members to leave themselves a large degree of discretion in managing exchange rates. To the extent that many of them tend to intervene in the currency markets, such intervention may be said to amount to “manipulation”. To be clear, it is not much of an answer for China to say that “Everybody does it”, even if China may be fully justified in saying so. One way around the problem is to note that, so far as the Framers of the Articles were concerned, there must be something more than “manipulation defined as simple intervention”. Accordingly, should the United States choose to design a national response to currency manipulation by, for example, imposing countervailing duties on Chinese goods, such currency interventions by China must still be shown to have been intended to have and/or produce the effect of having an unfair advantage in international trade.³¹ This was the approach taken in the Currency Manipulation Prevention Act, which was proposed in the US

²⁹ See further, for the nature, interpretation and application of such rules generally, W.J. Waluchow, *Inclusive Legal Positivism* (Oxford: Clarendon, 1994).

³⁰ See Joel Trachtman & Amelia Porges, “Robert Hudec and Domestic Regulation: The Resurrection of ‘Aims and Effects’”, (2003) *Jo World Trade* 783.

³¹ Other aspects of the language of Article IV(1), which I here highlight, support this reading that the anti-manipulation “rule” (i.e. “shall...avoid”) does not exist in a vacuum:

Recognizing that the essential purpose of the international monetary system is to provide a framework that facilitates the exchange of goods, services, and capital among countries, and that sustains sound economic growth, and that a principal objective is the continuing **development of the orderly underlying conditions that are necessary for financial and economic stability**, each member undertakes to collaborate with the Fund and other members to assure orderly exchange arrangements and **to promote a stable system of exchange rates**. In particular, each member shall:

- (i) endeavor to direct its economic and financial policies toward the objective of fostering **orderly economic growth with reasonable price stability, with due regard to its circumstances**;
- (ii) seek to promote stability *by fostering* orderly underlying economic and financial conditions and **a monetary system that does not tend to produce erratic disruptions**;
- (iii) 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; and
- (iv) **follow exchange policies compatible with the undertakings under this Section**.

House of Representatives in 2003.³² Section 6(1) defined currency manipulation as the manipulation of exchange rates by a country *in order to gain an unfair competitive advantage as stated in Article IV of the Articles of Agreement of the International Monetary Fund*.

The principal difficulty with the “soft law regime” of international monetary cooperation, however, is that the IMF Articles do not provide for binding dispute resolution. Article IV(3) only states that the IMF can oversee compliance. Thus unilateral action, ostensibly taken to implement IMF obligations, would appear to be subject to even greater “tolerance” under IMF rules than would necessarily be the case under global trade rules.

(b) Global Trade Rules: The World Trade Organization

In principle, tolerance would have no place under world trade rules (i.e. under the GATT 1994) wherever there is a clearly applicable rule (i.e. in both content and scope) prohibiting particular trade conduct. The task is to identify a clear, prohibitive rule. The usual complaint that the Chinese currency is undervalued involves saying that, as a result, Chinese goods become artificially cheap in exchange rate terms. In other words, an undervalued currency is an “exchange subsidy” which distorts the price of Chinese exports.

(i) “Currency Dumping”

Brazil appears to have proposed a novel form of “exchange rate anti-dumping measure”) by referring to “currency dumping”,³³ but this is not currently a known legal concept. It is however more than mere shorthand for saying that China’s currency interventions would provide *moral* justification for national trade remedy action (since dumping is not illegal under WTO rules). It could be, and probably is, taken to mean that currency manipulation should *lawfully* be taken account of in calculating dumping margins (i.e. in identifying sales at less than normal value).³⁴

According to this argument, the PBC’s policies should be taken into account in national anti-dumping investigations. To the extent this may be permissible under GATT-WTO rules (i.e. the rules of the Anti-Dumping Agreement), it would not amount to unilateral but permissive action. Article 2.4 of the Anti-Dumping Agreement merely requires, indeed it demands, a “fair comparison”. And goes on, with my emphasis, to add that:

Due allowance shall be made in each case, on its merits, for differences which affect price comparability, *including* differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and *any other differences which are also demonstrated to affect price comparability*.

³² H. R. 3269 8/10/2003.

³³ Joe Leahy, “Brazil to Seek New Arms for Currency Battle”, *Financial Times*, 19 September 2011; Diana Kinch, “Brazil Files Currency Dumping Complaint in WTO”, *Dow Jones Newswire*, 15 November 2011. This is based on a proposal of 20 September 2011 (WT/WFTDF/W/56), submitted to the WTO’s Working Group on Trade, Debt and Finance; see “Brazil Pushes Forward with Currency Discussion at the WTO”, *Bridges Weekly Trade News Digest*, vol. 15, no. 32, 28 September 2011. This was a follow-up to an earlier Brazilian proposal in May 2011, proposing that the WTO should examine the impact of fluctuating rates on international trade; *id.* See further: “The Relationship between Exchange Rates and International Trade: A Review of Economic Literature”, Note by the Secretariat, WT/WGTDF/W/57, 27 September 2011; “The Relationship between Exchange Rates and International Trade: A Short Update of Recent Economic Literature. Note by the Secretariat, WT/WGTDF/W/65, 18 July 2012.

³⁴ Another way of reading press reports of Brazilian statements may be to say that what Brazil really means is unlawful subsidization, not dumping. If so, the discussion below on anti-subsidy law will apply instead.

This is perhaps the strongest case for saying that the PBC's policies violate national trade laws -i.e. for saying that it justifies internationally lawful national trade remedy action.³⁵ There are two aspects to be aware of. The first is Article 2.4.1 of the Anti-Dumping Agreement which states in part that: "Fluctuations in exchange rates shall be ignored *and in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation.*" (my emphasis) However, the italicized portion suggests that the requirement that fluctuations should be ignored does not preclude taking currency misalignment or manipulation into account, but is instead intended to facilitate commercial certainty and trade. The opening words of that provision appear to support this interpretation: "When the comparison under paragraph 4 requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale." Secondly, Article 2.4.1 as a whole speaks of fairness, and the question that arises is whether it could mean the same thing as the reference to an "unfair" trade advantage in Article IV(1)(iii) of the IMF Articles.

We will come back to the relationship between the GATT and IMF Articles. Suffice to note for now that "fairness" is the ghost in the machine – be it in interpreting the IMF's anti-manipulation rule for its effects on trade or in determining the correct dumping margin calculation in light of the PBC's policies.

The anti-dumping route was the approach taken in the proposed Currency Exchange Rate Oversight Reform Act of 2007 (S 1607).³⁶ Curiously, this approach has not been subjected to much scrutiny in the current debate; probably because it does call for unilateral action in the first instance whereas the weight of professional opinion appears to weigh in favour of "tolerance" – i.e. against such action. At the very least, it calls for a "unilateral redefining of the rules"³⁷ although I would still distinguish that from unilateral action (i.e. extra-legal action). It remains, as at end 2011, a component of the proposed Currency Exchange Rate Oversight Reform Act 2011 (S. 1619).³⁸

(ii) *Anti-Subsidy Law*

The main way in which the Chinese currency issue seems to have been characterized however is by thinking about it as a kind of unlawful subsidization.³⁹ Anti-subsidy law, contained principally in

³⁵ Bhala, "Virtues", *op. cit.*, 248.

³⁶ *Id.*, 247. See also the proposed Currency Exchange Rate Oversight Reform Act 2010, "Bipartisan Group of Senators Unveils New Legislation to Crack Down on Unfair Currency Manipulation by Countries Like China", Press Release, Office of Senator Jim Webb, 16 March 2010; and in 2011, the proposed Currency Exchange Rate Oversight Reform Act 2011 (S. 1619), "Currency Exchange Rate Oversight Reform Act 2011 (S. 1619) Legislative Bulletin", DPCC Press Release, 3 October 2011. At the time of writing, this latest proposal continues to languish in the House of Representatives; see (e.g.) "Brown Leads 21 Senators in Calling on Speaker Boehner Not to Adjourn until the House Passes Bipartisan China Currency Bill", Office of Senator Sherrod Brown, Press Release, 20 September 2012. For the "bevy of Bills" since 2000, see Bhala, "Virtue", *op. cit.*, 232.

³⁷ Bhala, *id.* Under Title VII of the Tariff Act 1930 in the United States, "export price" and "constructed export price" in the determination of sales lower than fair value are governed under USC §1677a, while "normal value" is governed under USC §1677b. USC §1677(35) defines "dumping margin". The focus of any amendment should be on the definition of export price/constructed export price – i.e. an amendment of USC §1677a. See further, Bhala, *id.*, 247-248.

³⁸ Currency Exchange Rate Oversight Reform Act 2010 (S. 1619) Legislative Bulletin", *op. cit.*

³⁹ Currency Exchange Rate Oversight Reform Act 2010, *op. cit.*; Robert E. Lighthizer, "Evaluating China's Role in the World Trade Organization over the Past Decade", Testimony before the US-China Economic and Security Review

the WTO SCM Agreement would look to two categories of subsidization: (a) unlawful (Art. 3) and (b) actionable (Art. 5) subsidies. The SCM Agreement requires subsidization to be unlawful or actionable as a pre-condition to the imposition of countervailing duties. However, there is genuine doubt whether China's currency policies can be framed – from a legal viewpoint - as a subsidy in the first place notwithstanding that this is how it is primarily viewed.⁴⁰

For it to amount to subsidization in the first place, that policy will have to be framed as a “*financial contribution*” pursuant to Article I.1(a)(1). But where there is (i) no real or potential direct transfer of funds involved (through some sort of grant, loan or equity infusion),⁴¹ (ii) government revenue is not foregone which otherwise would be due,⁴² (iii) the government (i.e. the PBC) is not providing goods or services other than the general available infrastructure within which Chinese economic activity takes place,⁴³ and (iv) the Chinese Government is not making payments to a funding mechanism, or is otherwise entrusting or directing a private entity to carry out any of the functions just referred to in (i)-(iii),⁴⁴ the requirements of Article I.1 of the SCM Agreement would not be met.

The argument here is that the Chinese government is providing *renminbi* at an artificially low cost to exporters – i.e. it is providing a service, specifically an exchange service – at less than “fair” value. Unless this argument can be cast in terms of Article I.1(a)(1), there would be no “subsidy” at the outset.

It might also be asked whether, *where there clearly is a benefit* (under Article I.1(b) of the SCM Agreement) conferred by a trade distorting measure,⁴⁵ a “financial contribution” would need to be shown. The jurisprudence of the GATT-WTO has nonetheless been against such a broad reading. The point was tested in *US – Export Restraints* where the US argued that by virtue of the distortive effect of Canadian export restraints, the US was justified in imposing countervailing duties.⁴⁶ In that case, export restraints conferred a benefit on Canadian producers (i.e. it had a production relocation effect), but the difficulty lay in showing that there was a financial contribution. The United States defended itself in that case and lost on the basis that in construing the requirement that a benefit should have been conferred, it would be justified in looking at the *effects* of

Commission, 9 June 2010 (calling China's policy “currency manipulation” and stating that such manipulation is “a prohibited export subsidy”).

⁴⁰ Robert E. Lighthizer, Testimony before the US-China Economic and Security Review Commission, *op. cit.*

⁴¹ See *Canada – Export Credits and Loan Guarantees for Regional Aircraft*, Panel Report, WT/DS222/R, 19 February 2002.

⁴² See *US – Tax Treatment of “Foreign Sales Corporations”*, Appellate Body Report, WT/DS108/AB/R, 24 February 2000 (hereinafter, *US – FSC*)

⁴³ See *US- Final CVD Determination with Respect to Certain Softwood Lumber from Canada*, Panel Report, WT/DS257/R, 29 August 2003.

⁴⁴ This is the so-called “anti-circumvention” device where governments might otherwise do that which they are prohibited to do (i.e. through the private sector), see the “Hynix case”, involving Korea's challenge to US countervailing duties imposed as a result of an alleged Korean bailout of Hynix Semiconductors by entrusting or directing the bailout to private actors – *US- CVD Duties Investigation on Dynamic Random Access Memory Semiconductors from Korea*, Appellate Body Report, WT/DS296/AB/R, 20 July 2005. See further, Joseph F. Francois & David Palmeter, “US-CVD Investigation of DRAMS”, (2008) 7 *World Trade Rev* 219 .

⁴⁵ The converse case is that in *Canada – Measures Affecting the Export of Civilian Aircraft*, Appellate Body Report, WT/DS70/AB/R, 20 August 1999 (hereinafter, “Canada-Aircraft”), ¶ 154 where the Appellate Body ruled that “cost to Government” alone does not establish a benefit, which must be independently established.

⁴⁶ *United States—Measures Treating Exports Restraints as Subsidies*, Panel Report, WT/DS194/R, 29 June 2001 (hereinafter *US—Export Restraints*).

the restrictions.⁴⁷ This litigation loss now haunts a further attempt to impose a broad reading of the SCM Agreement.

According to the panel, export restrictions could not be seen as a subsidy according to Article I:1. Doing so would deviate too much from the principles of the agreement. Firstly, as stated in subparagraph (iv) of Article I:1, for a subsidy to be proven it is not sufficient that government intervention has led to a particular result. A financial contribution must still be shown, by reference to a distinct act of the government. A restriction on exports alone is not sufficient to satisfy this condition.⁴⁸ Secondly, while the Panel agreed that the purpose of the SCM agreement was to curtail market distortions caused by sovereign intervention, not every intervention which might in theory distort trade would necessarily comprise a “subsidy”. Taking such a broad approach would result in the replacement of the “financial contribution” requirement altogether with any government action that could be understood to be a trade-distorting subsidy.⁴⁹ Finally, when looking at the negotiation history of the SCM Agreement, the Panel noted that the term “financial contribution” had been included precisely in order to prevent the countervailing of benefits from any and all government measures. Hence the panel rejected an approach that would merely focus on conferred benefits at the expense of giving an independent meaning to the term “financial contribution”.⁵⁰

Let us assume that argument can be made out that there is a financial contribution via an exchange subsidy, and that there is also a benefit. Even so, a subsidy is either (a) *prohibited* such as where it is *contingent upon export performance* or upon the use of domestic over imported goods (Art. 3.1), or (b) it may be *actionable* where it causes adverse effects to the interests of other members (Art. 5). In the latter case – i.e. actionable subsidies – the subsidy must also be *specific enough* for the purposes of Art. 2 of the SCM Agreement, whereas an export subsidy is automatically deemed under Article 2.3 of the SCM Agreement to be specific.

In seeking to show a *prohibited export subsidy*, it also needs to be shown that the PBC’s policies are “contingent upon” in the sense of being “conditional” or “dependent” upon export performance.⁵¹ This would be the case even if what we would be looking for is so-called *de facto* contingency - i.e. *evidence* that the policy has a “close connection with” export performance, in the absence of a written measure which defines the recipients of the “subsidy”.⁵² As we shall see, the mere fact that an undervalued currency may have helped China boost its exports during the recent global economic recession, and may even have been intended to do so, would not automatically make such policies contingent in the sense of being dependent upon export performance. Putting aside the difficulty of proving the motivations underlying the PBC’s policies, Footnote 4 to the SCM Agreement states that: “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”.

⁴⁷ See Luca Rubini, *The Definition of Subsidy and State Aid: WTO and EC Law in Comparative Perspective* (Oxford: Oxford, 2009), at 109 *et seq.*

⁴⁸ *US-Export Restraints*, *op. cit.*, ¶ 8.34.

⁴⁹ *Id.* ¶¶ 8.62-.63.

⁵⁰ *Id.* ¶ 8.73.

⁵¹ Trachtman, “Yuan to Fight About It?”, *op. cit.* For the WTO jurisprudence, see (e.g.) *Canada – Aircraft*, *op. cit.*, ¶ 166.

⁵² *Australia – Subsidies Provided to Producers and Exporters of Automotive Leather*, Panel Report, WT/DS126/R, 16 June 1999, ¶ 9.55.

Thus, aside from the need to show that there has been the grant of a subsidy (i.e. the requirements of a “financial contribution” and ensuing “benefit”), the subsidy must be “tied to”⁵³ a certain “actual or anticipated exportation or export earnings”.⁵⁴ The meaning of this requirement was clarified in the *Canada-Aircraft* case. There, the Appellate Body ruled that such subsidy must be *limited to, or restricted to* certain export conditions.⁵⁵ Herein lies the real difficulty. It would seem that, at best, the case against China is the other way round; the commercial (i.e. export) performance of Chinese manufacturers is dependent upon PBC policies. The Appellate Body added the following qualifier: “It does not suffice to demonstrate solely that a government granting a subsidy *anticipated* that exports would result”.⁵⁶ In a later phase in that litigation, the Appellate Body reiterated that view: “we have...stated that it is not sufficient to show that a subsidy is granted in the *knowledge*, or with the anticipation, that exports will result”, but that at most the “export orientation of the recipient” may be taken into account as a relevant fact.⁵⁷

Any attempt to pursue a claim against China on this ground, or to defend countervailing duties, must therefore show *more than* that the PBC anticipated or knew that its policies will (also) result in higher export earnings. As it stands currently, the argument seems to be that the way the subsidy (extra *renminbi*) is received is if a Chinese exporter exports for foreign currency. However, the subsidy is also available to other persons holding dollars. This raises the question of whether the subsidy so far as exporters are concerned is, as a result, not contingent. We return to this in the discussion of the *US-FSC* case, below.

Alternatively, the claim could be made the PBC’s policies would constitute an actionable subsidy, whether or not it is an export subsidy. Here, the SCM Agreement requires a subsidy to be “specific”, in order for it to be actionable. The difficulty lies in saying that the PBC’s currency policies are specific to an enterprises or industry, or group of enterprises and industries.⁵⁸ Indeed, the allegation is that it boosts all Chinese exports of whatever kind. It is precisely this specificity rule which the proposed Currency Exchange Rate Oversight Reform Act 2011 (S. 1619) targets as an unnecessary “bright line” rule, in the apparent belief that the US Commerce Department has been too conservative in its reading of the specificity rule.⁵⁹ Specificity must be proven in the case of actionable subsidies, but is assumed where it can be said that an export subsidy is involved. We have already seen that it would, on the face of it, be difficult to argue that the PBC’s policies amount to an export subsidy, *even* if it could be said to amount to a subsidy. The Framers of the Currency Exchange Rate Oversight Reform Act 2011 have, in this regard, mounted a further argument; relying instead on the Appellate Body’s ruling in the *US – FSC* case.⁶⁰ While there are no specifics on their precise thinking, there is mention of such reliance and we may surmise what the argument would actually look like.

⁵³ *US – Subsidies on Upland Cotton*, Appellate Body Report, WT/DS267/AB/R, ¶ 572.

⁵⁴ *Canada – Aircraft*, *op. cit.*, ¶ 169.

⁵⁵ *Id.*, ¶ 171.

⁵⁶ *Id.* (my emphasis)

⁵⁷ *Canada – Aircraft (Article 21.5 – Brazil)*, WT/DS70/AB/RW, ¶¶ 48, 51 (my emphasis).

⁵⁸ Trachtman, “Yuan Fight About It?”, *op. cit.*, See also *US – Final Countervailing Duty Determination with respect to Certain Softwood Lumber from Canada*, Panel Report, WT/DS257/R, 29 August 2003, ¶¶ 7.119-7.122.

⁵⁹ “Currency Exchange Rate Oversight Reform Act 2011 (S. 1619) Legislative Bulletin”, DPCC Press Release, 3 October 2011.

⁶⁰ *Id.*

In the *US – FSC* case, the Appellate Body did not discuss specificity as such, but the United States had argued that, in order to be contingent upon export performance, the impugned measure – the US Foreign Sales Corporation (FSC) Tax – cannot benefit exporters and non-exporters alike which in that case it did.⁶¹ The Appellate Body ruled that this, however, did not preclude the tax from being a prohibited export subsidy where it applies to exporters.⁶² Thus, reasoning further from that conclusion, just because the PBC’s policies benefit exporters and importers alike does not make it non-specific. This ruling weighs in favour of treating the PBC’s policies as an exchange subsidy to exporters.

However, the Obama Administration – without entering into specific details – has urged caution stating that it wanted “to make sure the legislation wouldn’t violate World Trade Organization rules”.⁶³ Similarly, the views expressed by international economic lawyers have been skeptical. That is probably correct, on balance. Even if the point about the *US – FSC* case is correct, it does not get around the need to establish a subsidy – i.e. a financial contribution.

The jury is out on whether an anti-subsidy argument will succeed. A “financial contribution” needs to be found, and it may or may not be found through arguing that what the PBC has done is to provide such a contribution through an exchange subsidy. Specificity needs to be established, and if it is to be done by saying that specificity is to be deemed to exist because what is involved is an export subsidy, then the subsidy would still have to be shown to be an export subsidy over and above the fact that exporters benefit. It may not suffice to point out that the law does not preclude the argument from succeeding just because non-exporting industries also benefit. It certainly does not suffice to show, merely, that the PBC could have anticipated the benefit to exporters. Doubt about whether anti-subsidy action can be taken against China counsels rule-based “tolerance” towards the PBC’s policies.

V. DISCIPLINARY FRAGMENTATION AND “RULE-TOLERANCE”, DISTINGUISHED FROM DISCIPLINARY FRACTURE AND RULE ABDICATION

During the pre-Judicature Act era in Ireland, Lord Killanin, then Chief Justice of the Common Pleas, advised plaintiffs who had technicality on their side but no merit to bring themselves before the Barons of the Exchequer; for these barons were very technical. If a plaintiff has merit instead but not technicality, they should go to the Common Pleas. But if plaintiffs have neither, they should just proceed to the Queen’s Bench for there is no knowing what the judges there will do.⁶⁴ Were His Lordship alive today to comment on the Chinese currency, the first category would have commended itself in support of the IMF as the right forum, the second for choosing the WTO, and the third for unilateral, sovereign action.

Alan Greenspan has called the PBC’s policies “the definition of currency manipulation”,⁶⁵ suggesting that the issue falls within the purview of the IMF.⁶⁶ Recall that Article IV’s “anti-

⁶¹ *US – FSC*, *op. cit.*, ¶¶ 110, 114-115.

⁶² *Id.*, ¶ 119.

⁶³ Jared A. Favole, “Obama Urges Caution on Currency Bill”, *Wall Street Journal*, 7 October 2011. See also Alan Beattie, “China Currency Bill on Path to Conflict After Senate Vote”, *Financial Times*, 7 October 2011.

⁶⁴ Edward Marjoribanks, *Edward Carson QC* (Edinburgh: Emslie, 2011), at 25.

⁶⁵ Mark Drajem, “Greenspan Says China Currency Mistakenly Used to Boost Jobs”, *Bloomberg*, 17 June 2011.

manipulation” rule is effectively the only “hard law” rule which is framed in imperative terms (i.e. “shall...avoid...”). In the absence of any other equally hard rule, the Chinese currency issue must be forced within it. But this has, understandably, not been the position of the Obama Administration, even if observers have argued that it should not be inferred that the Administration does not consider China a currency manipulator simply because it has avoided calling it such.⁶⁷ The real reason may be that while China devalued the yuan from 2009 to the first half of 2010 – i.e. at the height of the crisis - from the summer of 2010 onwards, the yuan was allowed to rise again in the wake of inflationary pressures in China. The IMF too has shifted its stance, by reclassifying the Chinese currency as being merely “moderately undervalued” in contrast with its conclusion that the currency was “substantially undervalued” at the start of the crisis.⁶⁸ This fact was observed by Barrack Obama when expressing caution over passage of the proposed Currency Exchange Rate Oversight Reform Act 2011.⁶⁹ It seems that moral suasion behind the scenes may have had an effect, just as a similar problem with Japan two decades ago had led to the Plaza and Louvre Accords.

Trachtman also suggests taking the issue out of the WTO altogether – i.e. to the IMF, although he does not say so expressly – yet Bhala damns the IMF with faint praise and only counsels seeking a formal decision of the IMF Executive Board as that can only help but could hardly hinder subsequent WTO litigation.⁷⁰ Staiger and Sykes have also pointed out the IMF’s bias against confrontation,⁷¹ but more importantly the ineffectiveness of its primary sanction – i.e. cutting a People’s Republic of China, which already has trillions of reserves off, from access to IMF funding.⁷² They also argue that there is no precedent for the application of IMF rules in such a situation, although this is probably not strictly true.⁷³

As for taking the issue to the WTO, this is what Brazil has done; raising the issue before the Working Group on Trade, Debt and Finance. In contrast, Bhala has counseled WTO litigation as an action befitting a responsible nation which believes in - and ought to promote - the rule of law in international affairs.⁷⁴

Is it not the duty of a courageous trade empire to assume the risks of legal uncertainty, litigate key issues, and thereby enhance the rule of law...

Trachtman counsels against this; saying the United States will likely lose (a view apparently shared in the White House);⁷⁵ or that litigation would just take too long, even assuming the United States wins.

What Trachtman, Hertogen and Bhala all seem to accept is that trade rules do not clearly weigh against China. But, in the heat of public political debate, that message should not be confused with the total absence of trade rule regulation – i.e. that “anything goes”. Instead, the ambiguity of trade rules means that while some such as Hertogen have highlighted the importance of discussions at the WTO, others like Trachtman have gauged the strength of any proposed litigation which will

⁶⁶ Sanford, “Currency Manipulation”, *op. cit.*

⁶⁷ “U.S. Declines to Say China Manipulates its Currency”, *New York Times*, 27 November 2012.

⁶⁸ “Renminbi (Yuan)”, *op. cit.*

⁶⁹ Favole, “Obama Urges Caution”, *op. cit.*

⁷⁰ Bhala, “Virtue”, *op. cit.*, 224-228.

⁷¹ Staiger & Sykes, *op. cit.*, 27.

⁷² *Id.*, 28.

⁷³ *Id.*, 27-28. For the “Swedish case” in 1980, see Lowenfeld, *op. cit.*, 636.

⁷⁴ Bhala, “Virtue”, *op. cit.*, 221.

⁷⁵ Beattie, “China Currency Bill”, *op. cit.*

inevitably follow American trade remedy action accordingly. Yet others such as Staiger and Sykes question the assumed correlation between currency policies and their assumed trade effects; like Bhala and Tractman, they are critical of suggestions for unilateral trade remedy action not simply because of the rules, but because there is no normative justification for doing so.

It may be argued, however, that trade rule-tolerance of China's currency policies is accompanied by the very opposite of one importance sense of disciplinary fragmentation. Fragmentation is typically viewed as involving overlapping and competing sites of rule governance – of too many regulators, as opposed to too little regulation. In the present case, not only is trade regulation ineffectual, so too is the regime for international monetary cooperation. Furthermore, we need not share in pessimism about the asymmetric treatment which trade law hands to China's and its other trading partners' rights. Anti-dumping action is one answer, and more will be said in the Conclusion below. It is also unclear why such little credence has been given to the IMF's role in the writings surveyed.

The Currency Exchange Rate Oversight Reform Act 2011 rightly envisages a role for the IMF in the context of national trade remedy action. According to the proposed Act, trade remedy action will be premised on the IMF's views about currency misalignment. The reason for skepticism, according to Staiger and Sykes, is that the sort of currency misalignment addressed by the IMF is not what GATT-WTO rules contemplate. If true, the picture that emerges is not fragmentation in the sense of competing and overlapping regimes, but of a *fractured international economic order*, with gaps in between, disassociated and mismatched parts. But this is not the case. GATT Article XV:4, mentioned earlier, is a provision which clearly contemplates a strong linkage between the IMF's work and the WTO's.

Trachtman has drawn an analogy with the nullification and impairment clause, and applies a specific assumption about the correct benchmark for measuring a denial of the legitimate expectation of China's trading partners. First, Article XV:4 speaks of a frustration of the intent of the GATT provisions not (or at least, not directly of) the legitimate expectations of China's trading partners.⁷⁶ But even if that is what is meant, and Trachtman may yet be correct, saying the benchmark is the yuan rate in 2001 may be difficult. It could be like saying the benchmark for showing a surge of imports justifying safeguard action is the tariff rate of the safeguard user in 1947. There is at least a question about the appropriate, normative benchmark. China's dollar peg was removed in 2005, the yuan rose, then in 2009 to 2010 it was considered to have been significantly undervalued before rising again. While the currency issue has been a live issue since China's accession, the crisis and ensuing devaluation is what has most recently reignited the controversy in the run-up to an Election Year. What the Currency Exchange Rate Oversight Reform Act 2011 seems to do is different, which is to signify the role of the IMF in taking any trade action but it does not appear to hinge on GATT Article XV:4 which prohibits exchange action which frustrates the intention of the GATT, and trade action which frustrates the intention of the IMF Articles.

We should not underestimate the central role of the IMF. In the context of GATT Article XV:4 especially, the relationship between the IMF and the then still-born ITO was discussed in earnest at the Geneva Conference. This led to the delegates at Havana choosing substantial deference to the

⁷⁶ That the nullification and impairment clause may have independent force of application to the currency issue is another matter. See GATT Art. XXIII:1(b), and Art. 26.1 of the Dispute Settlement Understanding. One argument may be that currency devaluations affect *ad valorem* tariffs and thereby nullify or impair benefits under GATT Art.II (tariff bindings).

IMF.⁷⁷ Notwithstanding the accuracy of Bhala's view that if that provision is disputed, the WTO panel or Appellate Body would appear to have the final word on its legal interpretation, and to that extent is not "bound" by the IMF's views.⁷⁸ Article XV: 4's difficulty, particularly when read in the context of its Ad Note, is as follows.

Assuming that the PBC's policies constitute exchange action, could they also comprise trade action? Arguably, it is only where they do that the IMF Articles are brought into the interpretation of Article XV:4. What is beyond doubt is that the GATT Framers contemplated, and GATT practice confirms the application of IMF disciplines even to those GATT Contracting Parties who were not IMF Members – i.e. the IMF Articles would somehow apply to GATT Contracting Parties where the "trade" action of a Contracting Party violates the intent of the IMF Articles.⁷⁹ What remains uncertain is the role of the IMF when "exchange" action violates the GATT-WTO. It would appear from its drafting history, that the intention was to carve out the respective spheres of the GATT's and the IMF's authority where an "exchange" (as opposed to trade) action is involved.

Yet the question concerning the IMF/GATT-WTO relationship extends beyond interpreting Article XV:4. As we have seen in discussing the anti-dumping option, is "fairness" in Article 2.4 of the Anti-Dumping Agreement to be read in conjunction with Article IV(1)(iii) of the IMF Articles' anti-manipulation rule?

VI. CONCLUSION

Franciscus de Victoria was one of the earliest international lawyers to argue that when the rules run out, States are free to do what they like.⁸⁰ In the early part of the 20th Century, the Permanent Court of International Justice also had occasion to decide that in the absence of a prohibitive rule, State are at liberty to act.⁸¹ The danger today is that where trade regulation and the rules on monetary cooperation fall somewhat short, the impression created is that of a regulatory free-for-all. This would be misleading. Countervailing subsidies as a response to the PBC's policies will most likely be unlawful. Anti-dumping action which takes currency misalignment (and therefore the linkages between IMF and WTO regulation) into account could yet survive WTO scrutiny.

⁷⁷ Douglas A. Irwin, Petros C. Mavroidis & Alan O. Sykes, *The Genesis of the GATT* (Cambridge: Cambridge, 2008), 155-156; John H. Jackson, *World Trade and the Law of GATT* (Charlottesville: Michie, 1969, 693 *et seq.*

⁷⁸ In other words, in the case of true conflict/regime fragmentation in the sense of overlapping and competing international authorities; Bhala, *op. cit.*, 224-225. However, it might be asked if Article XV:2 imposes an obligation on all Contracting Parties (i.e. WTO Members) to accept the determinations of the Fund as to whether an exchange action violates the IMF Articles. If so, a true conflict would arise only where trade action is involved which is said to violate the intent of the IMF Articles under Article XV:4. An exchange action which violates the intent of the GATT falls squarely within the WTO's jurisdiction.

⁷⁹ Jackson, *op. cit.*, 486 *et seq.* Article XV:2 appears to impose an obligation on the Contracting Parties as a whole, and does not specifically proscribe exchange action which violates the intent of the GATT and trade action which violates the intent of the IMF Articles.

⁸⁰ de Victoria, *De Indis*, First Reflectio, 151 ("everything is lawful which is not prohibited or which is not injurious or hurtful to others in some other way").

⁸¹ "*The Case of the S.S. Lotus*", P.C.I.J. Reports, Series A(1927), No. 10., 18 ("The rules of law binding upon States ... emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed").

Attempts to invoke provisions like GATT Article XV:4 or to peg trade action against IMF surveillance findings of currency misalignment speak against the view that a regulatory free-for-all results when the rules run out. Broader principles, sometimes more implicit than we like, play a role. At the very least, they indicate, even if they do not compel,⁸² how the legal-professional viewpoint should address situations of legal uncertainty.

Recent writing on the history of international law has tried to cast light on how the discipline competed with an eighteenth century rival - economic science as a competing body of understanding about the management of international affairs.⁸³ It serves as a useful reminder that “we are not alone”. Imagine a conversation between an economist working in the WTO and a lawyer. Imagine the reactions of the economist to the assertion that that unilateral, sovereign action is permissible in the absence of prohibitive international rules; and that this is so even if we accept that unilateral action is generally to be shunned. The economist might ask if the international trade lawyer does not believe in Smith and Ricardo anymore, or if the lawyer has some special insight which the economist proclaims does not yet exist in how currency misalignment disadvantages trade.⁸⁴

I have sought to argue that, here at least, the normative prescriptions of international law do not run out so easily. While recognizing that economists would generally find the notion of unilateral action against China in the absence of trade rule-violation abhorrent for its welfare reducing effect, international lawyers too are not so unaware of these dangers of unilateral action. It is probably no co-incidence that the writers surveyed in this chapter have invariably weighed against unilateral action. Why?

Unilateral action in light of legal uncertainty is abhorrent because even if anti-subsidy or anti-dumping action against China were to be lawful, trade lawyers know to look not only for rules, but the best view of the rules⁸⁵ – i.e. their normative justification.

We can test this thought further.

Let us just assume, for the sake of illustration, that it would be harder to make out an anti-subsidy argument than an anti-dumping argument, and that anti-dumping action would most likely be lawful whereas anti-subsidy action would most likely be unlawful (we could just as easily reverse the examples). We can then point out that since WTO Members have also chosen to recognize that dumping is unfair, it would probably be “inappropriate” to calculate a dumping margin which took no account of currency interventions. But if that were all, that normative justification would *in principle* apply to anti-subsidy action too. We might then reason further that since even “harmful” forms of unilateral action could incentivize the trading nations of the world to “repair” any “gaps” in the law through further litigation or law-making, unilateral, countervailing duties too would be justifiable on the basis that using countervailing duties would end up improving the scope and depth of trade law regulation. Particularly if there is already an accepted moral-political justification – a fairness-based consideration - for anti-dumping and anti-subsidy action, then does it really matter if

⁸² In an “all-or-nothing” fashion – see Ronald Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), 24-25

⁸³ Martti Koskenniemi, “The Advantage of Treaties: International Law in the Enlightenment”, (2009) 13 *Edinburgh Law Review* 27, 64-67.

⁸⁴ See “The Relationship between Exchange Rates and International Trade: A Review of Economic Literature”, Note by the Secretariat, WT/WGTDF/W/57, 27 September 2011. See also “The Relationship between Exchange Rates and International Trade: A Short Update of Recent Economic Literature. Note by the Secretariat, WT/WGTDF/W/65, 18 July 2012.

⁸⁵ Ronald Dworkin, *Law's Empire* (Cambridge MA: Belknap, 1986).

the law supports one form of unilateral action, but probably not another? Such an argument goes too far, for it would involve illegality under the present rules, as well as welfare reducing effects. “Rule-tolerance”, in the sense of admitting gaps in legal regulation, is therefore different from countenancing harmful rule-breaking. The reason we have rule tolerance, or admit that the currency issue involves reading the darker pages of the GATT text, is because global law matters. Nineteenth century fears of Russian circumvention of U.S. sugar tariffs by subsidizing Russian exporters led to the first anti-subsidy rules,⁸⁶ but – still relying on our hypothesis that anti-subsidy law does not, today, permit action against China - deciding upon unilateral trade remedy action at that time did not have to contend with global rule-breaking. The situation is different today, with the existence of the Subsidies and Countervailing Measures Agreement. Assuming that such countervailing duty action would be unlawful, proposing unilateral action would be to propose conscious law-breaking.

In contrast, anti-dumping action – we are still assuming its legality - would not be “unilateral” sovereign action at all but “legally permissible” action. To the extent that anti-dumping action based on fair value comparisons is a familiar part of trade law regulation – i.e. how we justify the rules of trade regulation - it is also to that extent normatively justifiable. Put simply, if global anti-dumping rules allow for trade remedy action against China, then the conventional political-morality of the GATT-WTO also supports it.⁸⁷

In the end, rule tolerance and the fragmented nature of the discipline suggests that we do not ignore evaluations of the best moral-political course of action when venturing into virgin areas of regulation, drawing from our experience of trade law’s past. Doing so here suggests a response under anti-dumping law, or even under anti-subsidy law – both of which appear clothed in sufficient legal permission and grounded in fairness based considerations. If this impression proves to be incorrect in later litigation brought by China, China may bring the matter to WTO dispute resolution and greater rule-clarity will only result. Indeed, China itself could consider taking similar action against its trading partners, if not now then possibly in the future. That is how our system works, and how trade law works itself pure.⁸⁸

⁸⁶ Peter D. Ehrenhaft, *Remedies Against Unfair Int'l Trade Practices*, SF24 ALI-ABA 203.

⁸⁷ I am therefore not engaging those who would say that anti-dumping action is never morally justified; see Hudec, “Mirror, Mirror”, *op. cit.*

⁸⁸ *Omychund v. Barker* (1744) 26 Eng. Rep. 15, 24; 1 A. and K. 22, 23 (*per* Lord Mansfield).