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CURRENCY WARS: THE NEED FOR INTERNATIONAL SOLUTIONS

ALEXANDRA ESMEL*

I. INTRODUCTION

In the context of globalisation, economic development has become a priority area of cooperation and, it goes without saying, that sovereign states must make the most of the international market for that purpose. The international market has created an interconnectedness of states' economies beyond borders, and that interconnectedness also takes into account their respective currencies. In the current *"globalised market,"* it is a matter of common sense that after an international transaction must follow an international payment. That international payment cannot occur without taking exchange rates into account. The exchange rate determines the ratio at which a unit of the currency of one country can be exchanged for that of another country, and thereby, the value of the currency relative to another or to a certain value.

In international monetary policy, there are three main types of exchange rates: a floated exchange rate, a fixed exchange rate, and a pegged exchange rate.[1] By the end of the Bretton Woods system of fixed exchange rates (currencies being pegged to the value to the gold), the floated exchange rate regime became the reference.[2] The floated exchange rate system, also known as the flexible exchange rate, is the system in which the value of the currency keeps fluctuating in accordance with the foreign exchange market led by the forces of supply and demand.[3] Nowadays, however, there is no such "perfect" floated exchange rate system. The main currencies of the world all apply a managed float, i.e., it is usual for states to intervene in the foreign exchange market to influence the value of their currency.[4] Governments can interfere with the exchange rate and maintain a

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1. IMF, *Classification of Exchange Rate Arrangements and Monetary Policy Frameworks*, (June 30, 2004), https://www.imf.org/external/np/mfd/er/2004/eng/0604.htm (last visited Sept. 30, 2015).

2. Benjamin J. Cohen, *Bretton Woods System*, USCB, http://www.polsci.ucsb.edu/faculty/cohen/inpress/bretton.html (last visited June 19, 2015).

3. For an overview of exchange rates, *see generally* IMF, *Fixed or Flexible? Getting the Exchange Rate Right in the 1990s*, 13th Economic Issues (Apr. 1998), http://www.imf.org/external/pubs/ft/issues13/issue13.pdf *adapted from* IMF, *Exchange Rate Arrangements and Economic Performance in Developing Countries*, World Economic Outlook (Oct. 1997), https://www.imf.org/external/pubs/ft/weo/weo1097/pdf/octweo04.pdf.

4. Libby Rittenberg & Tim Tregarthen, MACROECONOMICS PRINCIPLES 633 (vol. 1 2012).

currency value through the action of its central bank.[5] The rate at which the domestic currency can be exchanged determines the price of products abroad. Exchange rates are therefore of utmost importance in price competition.

Accordingly, the determination of an exchange rate policy will set the strategy for the growth of the domestic economy. An exchange rate regime, whether fixed or floated, impacts the economy of the country in the following ways: "(a) price stability; (b) domestic financial stability and robustness; (c) external and internal balances; and (d) economic growth/development."[6]

Articles 1 and 2(1) of the Charter of Economic Rights and Duties of States 1974 states that "every State has the sovereign and inalienable right to choose *its economic system* . . ." and "every State has and shall freely exercise *full permanent sovereignty*, including possession, use and disposal, over all its wealth, natural resources and economic activities."[7] One may naturally infer that such "full permanent sovereignty" includes the monetary sovereignty of that state.

The International Monetary Fund ("IMF") defined monetary sovereignty of one country by the right to issue currency, that is, coins and banknotes that are legal tender within its territory; the right to determine and change the value of that currency; and the right to regulate the use of that currency or any other currency within its territory."[8] In this definition, the second right—the right to determine and change the value of that currency—reflects the role of the state in interfering with its currency value and that is the whole essence of currency valuations and exchange rates.[9] In a fixed or pegged exchange rate system, the government fully exercises that right to determine the value of its currency.[10] The question arises when a country acts upon the valuation of its currency (undervaluation or overvaluation relatively to other currencies)[11] to boost its economy to the detriment of other countries. That sovereign right is also exercised by countries when they intervene in the foreign exchange market.

One the one hand, when a state exercises its monetary sovereignty and purposely undervalues its currency, it protects its domestic industries—especially those exporting—from foreign competition. It attracts foreign direct investment and influences the market prices of its goods and services. Due to the reduction of the production costs relatively to that of other countries, the exchange rate

5. For the purpose of this article, a "central bank" shall refer to the monetary institution that monitors the money supply and the state's currency.

6. ROBERTO FRENKEL & MARTÍN RAPETTI, CONCISE HISTORY OF EXCHANGE RATE REGIMES IN LATIN AMERICA 3 (CEPR 2010), http://www.cepr.net/documents/publications/exchange-rates-latin-america-2010-04.pdf.

7. Charter of Economic Rights and Duties of States, GA Res. 3281(xxix), UN GAOR, 29th Sess., Supp. No. 31, ch. 2, art. 1 & 2, at 4 (1974).(emphasis added).

8. François Gianviti, *Current Legal Aspects of Monetary Sovereignty*, in CURRENT DEVELOPMENTS IN MONETARY AND FINANCIAL LAW 3, 4 (International Monetary Fund 2008).

9. *Id.*

10. *See* JOSEPH E. GAGNON WITH MARC HINTERSCHWEIGER, FLEXIBLE EXCHANGE RATES FOR A STABLE WORLD ECONOMY 12-3 (2011). *See also* IMF, supra note 3.

11. *See* FRENKEL & RAPETTI,*supra* note 6.

interferes with the market value the product.[12] Consequently, it might give a significant boost to its economic development. On the other hand, one must keep in mind the interconnectedness of the international market, as the undervaluation of one currency is the overvaluation of another, bringing along all of its economic detrimental effects.

The *raison d'être* of a state is to bring peace and security of life to the people under its realm.[13] Economic development has always been *a priori*, the legitimate goal of every state. That being said, can one criticize a country for pursuing an economic policy it considers best suited for the interest of its country, but damaging to that of another? What keeps a country from devaluing its currency for the sole purpose of gaining a competitive edge, whether because of an "imposed" overvalued currency or simply to improve its economy? Past currency wars were all triggered by domestic economic crisis, bad domestic policies, or weak domestic monetary reserves that ended up having an effect on other countries.[14] They all started within the realm of one state before having consequences for the global monetary system.[15]

This paper focuses on the existence of solutions that International Economic Law is currently able to bring to this recurring problem. Its structure shall be twofold. The first section shall identify the problems of currency wars, i.e. monetary sovereignty and its influence on economic development. Evidence clearly suggests that an undervalued currency is beneficial to the economy of a state. This section will pinpoint the competitive aspect of currency values via a comparison of undervalued and overvalued currency, and their respective use of monetary sovereignty. The second section of this paper will put forward the claim that multilateral institutions must circumscribe the maneuvering of currency values, whether legally or politically.

II. CURRENCY VALUATION AND MONETARY SOVEREIGNTY

International payments are only made possible thanks to the convertibility of one currency into another in application of the exchange rate. That exchange rate is the primary tool used by traders across the world to identify their real profits or losses when they buy or sell products on an international level with prices set in a

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12. 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).

13. Benedict de Spinoza, *THEOLOGICO-POLITICAL* TREATISE 70 (1670) (explaining the notion of "*pax vitaeque securitas*").

14. *See* Barry Eichengreen, *The British Economy Between the Wars*, ECONOMETRICS LABORATORY UC BERKELEY (2002), http://eml.berkeley.edu/~eichengr/research/floudjohnsonchaptersep16-03.pdf (covering England in 1927 and 1964); James Rickards, CURRENCY WARS: THE MAKING OF THE NEXT GLOBAL CRISIS (2011) (discussing the Great Depression in the U.S. and across Europe in the 30s).

15. Justin Kuepper, *Currency Wars and How They Start*, ABOUT MONEY, http://internationalinvest.about.com/od/foreigncurrencies/a/Currency-Wars-And-How-They-Start.htm (last visited June 21, 2015).

different currency.[16] The balance of payment of a country registers the country's transactions with the rest of the world.[17] It is composed of the current account (international transactions) and the capital account (in and out financial flow of the state).[18] The capital and current accounts must balance each other, and when they do not, the state faces a trade deficit or trade surplus.

In practice, a country will run a trade deficit if it imports more than it exports, or spends more than it earns. Similarly, a country will run a trade surplus if it exports more than it imports or earns more than it spends. Due to the fact that the international market is one single market, a country's trade deficit is always mirrored with another country's trade surplus. In the foreign exchange market, a currency value is "weak" or "strong", "overvalued" or "undervalued" only relatively to another currency.

A product price on the international market[19] is influenced by relative currency values. From that follows that currency values are paramount in determining a country's export competitiveness. This competitive aspect of currency values is perfectly illustrated by the undervaluation of the Chinese Renminbi ("RMB"), the overvaluation of the African CFA Franc in the 1990's, and the use of their respective monetary sovereignty in that matter.

A. China

China has taken a progressive turn after the economic reform of 1978, from a typical socialist, centrally planned economy to a liberalised economy characterised by a significant export market. Since 2013, it is the world's second largest economy and the world's largest trading power, with a total international trade value of US $3.87 trillion.[20]

Before the economic reform of 1978, China restricted foreign exchanges to a large extent.[21] The economic reform introduced a market exchange rate alongside a fixed exchange rate. It was only in 1994 that China abolished the dual system and officially established a managed floating exchange rate, which equated a peg to the U.S. dollar (the US dollar being subjected to a floating exchange rate).[22]

In July 2005, China moved from a managed floating exchange rate to a gradual managed valuation, whereby the exchange rate is determined with

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16. *See* GAGNON, *supra* note 10.

17. Thomas Oatley, INTERNATIONAL POLITICAL ECONOMY: INTERESTS AND INSTITUTIONS IN THE GLOBAL ECONOMY 224 (4th ed. 2010).

18. *See* Gianviti, *supra* note 8.

19. The author's personal deduction is that a product prince is a price at which it will be sold by the trader and bought by foreign consumers.

20. Garry White, *China trade now bigger than US*, TELEGRAPH (Feb. 10, 2013, 11:03 AM), http://www.telegraph.co.uk/finance/economics/9860518/China-trade-now-bigger-than-US.html.

21. Clem Tisdell, *Thirty Years of Economic Reform and Openness in China: Retrospect and Prospect* 1 (School of Econ., Univ. Of Queensland, Working Paper No. 51, 2008).

22. Jingtao Yi, *Changes in China's exchange rate policy and future policy options*, 2 CHINA POL'Y INST. 2, 8 (2005).

reference to a basket of currencies.[23] China's Central Bank, the People's Bank of China, influences the exchange rate to adjust the position of the balance of payments and the level of international reserves. The RMB is adjusted *vis-a-vis* inflation differences with major trading partners: differences between inflation target, expected inflation in major trading partners, and so forth.[24] This control of the currency value was key to their success as, in 2008, it resulted in a RMB dollar value increase by roughly 20%, a bilateral monthly trade surplus of US$17.5 billion with the United States, and accumulated foreign reserves of U.S. $1.9 trillion, equating almost 20% of the United States' public debt.[25] By gradually allowing an exchange rate flexibility, China succeeded in stimulating foreign exchange activities and adapted it to its own economical and institutional readiness.

For many developing countries, pegging a currency to a certain value is very appealing, as it allows the control of the inflation rate and brings stability to the value of the currency. It is therefore no surprise to see that the U.S. dollar, the Euro, and the Pound Sterling, presumably strong and stable currencies, are frequently used as referential currencies.[26] The People's Bank of China managed to artificially undervalue the Chinese RMB using currency controls and sterilization operations (i.e. when monetary authorities try to offset the impact of capital flows).[27] It is widely recognized that the market can never be perfect and the government via the Central Bank must intervene to correct it. However, considering the current account of China, a standard fixed exchange rate model could have never given those results. It is the policy of buying foreign assets that gave rise to the U.S. $2.4 trillion of foreign currency reserves in China. In the absence of the sterilization of the foreign exchanges inflows, such an undervaluation of the exchange rate could result in an increase in the domestic money supply, which could undo the inflation protection and with it the trade surplus.[28]

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23. *See* Rittenberg, *supra* note 4, at 842-3.

24. Rupa Duttagupta et al., MOVING TO A FLEXIBLE EXCHANGE RATE: HOW, WHEN AND HOW FAST? 3 (2006).

25. Christoph Herrmann, *Don Yuan: China's 'Selfish' Exchange Rate Policy and International Economic Law*, EUR. Y.B. INT'L ECON. L. 1, 33 (2010).

26. *See* Hu Xiaolian, *Three Characteristics of the Managed Floating Exchange Rate Regime*, PEOPLE'S BANK OF CHINA (Jul. 22, 2010, 9:45), http://www.pbc.gov.cn/publish/english/956/2010/20100727144604944489252/20100727144604944489252_.html. For examples of currencies pegged to the U.S. dollar, the Euro, and the Pound Sterling, *see, e.g., United States Dollar*, OANDA, http://www.oanda.com/currency/iso-currency-codes/USD (last visited Sept. 2, 2015); *Euro*, OANDA, http://www.oanda.com/currency/iso-currency-codes/EUR (last visited Sept. 2, 2015); *United Kingdom Pound*, OANDA, http://www.oanda.com/currency/iso-currency-codes/GBP (last visited Sept. 2, 2015).

27. Christopher J. Neely, *The Difference Between Currency Manipulation and Monetary Policy*, 5 ECON. SYNOPSES 1, 1 (2011).

28. Brian Scarfe, *China's monetary and exchange rate policy and the global economy*, EASTASIAFORUM (Oct. 15, 2011), http://www.eastasiaforum.org/2011/10/15/china-s-monetary-and-exchange-rate-policy-and-the-global-economy/.

The IMF confirmed in its Report for the 2006 Article IV consultations[29] that "movement in the renminbi's real value over a considerable period of time has not been in line with most fundamental factors that are generally considered to be important in determining the exchange rate's real value... All of these developments point to the currency as being undervalued."[30]

Undoubtedly, China's engine of growth is the export of its goods and services. International trade and exports, in particular, have been recognised as the weapon of choice for developing countries to gain economic growth.[31] In this regard, the undervalued exchange rate and the attraction of foreign direct investment ("FDI") have brought many benefits to their economy since 2005. The lower is the value of the RMB, the better it is for exports denominated in RMB. The importance of exchange rate takes all its sense here.

As explained above, buying goods in country A where the currency is overvalued is more expensive than in country B where the currency is undervalued. That is because it requires more units of currency A (overvalued currency) to buy the same product in country B (with the undervalued currency). Therefore, the cheap exports of Chinese products in the world market have tremendously helped the economic growth of the country but also decimated the international and regional competition.

In this regard, states' economies based on exports, and in particular exports of manufactured and processed goods, have suffered a decrease in demand in their countries. The costs of production in China are cheaper and manufacturers make profits from exports and the sale of goods and services, which explains the expansion of their export market. Conversely, in the United States, the overvaluation of the dollar (relatively to the RMB) makes the exports and the sale of goods and services competitively harder. The undervaluation of the Chinese currency is consequently directly transposable in international competition matters. The link between their monetary policy to artificially keep the RMB undervalued allow them to lower their firms' cost of production in key industries relatively to the world prices and flood foreign markets of their exports.

Besides, this currency valuation also has a political dimension. As explained above, the sterilization of the foreign market inflows while maintaining a desired ratio with the U.S. dollar has contributed to the very large Chinese current account surpluses. The undervaluation is determined in accordance with the balance of the current account, yet a trade surplus occurs when the value of exports is higher than that of imports.

In terms of figures, China recorded a trade surplus with the rest of the world of U.S. $49.8 billion in August 2014.[32] China has had a bilateral surplus with the

29. IMF, *People's Republic of China: 2006 Article IV Consultation*, at 17, IMF Rep. No. 06/394 (2006).

30. *Id.*

31. *Millennium Development Goals: Trade and Development*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_E/coher_e/mdg_e/development_e.htm (last visited June 21, 2015).

32. Mark Magnier & Richard Silk, *China's Trade Surplus Hits New High: Trade Surplus*

United States since the late 1980's, and since 2003, it has become the largest source of the trade deficit of the United States.[33] In theory, a justifiable trade surplus represents three months equivalent of imports, and clearly China (and many others) has exceeded that limit.[34]

Having excess reserves in its current account allows China to buy the assets of other countries, including the United States, from which it owns the most debts.[35] Purchasing the debt of other countries gives the buyer a degree of political influence, and indeed, when China is buying U.S. bonds, by definition it is a debt security.[36] The excess reserves correspond to a certain freedom of choice (reinvest in labor forces or the economy in general) that debtor nations do not necessarily have because of their debts and inherent obligations to repay.

It results from the foregoing developments simply that the valuation of one currency in an international monetary system will have consequences on the currency of other states. States that need to expand their exports must improve their competitiveness with regards to China, and that can also be done by depreciating their currencies value against the RMB (keeping in mind that the RMB is somewhat pegged to the U.S. dollar).

In February 2008, the Managing Director of the IMF, Dominique Strauss-Kahn, stated that, "On exchange rate policy, we welcome the authorities' objective of allowing greater flexibility over time. However, we encourage a faster pace of appreciation that would be helpful for addressing China's key economic challenges and would also contribute to preserving global economic stability."[37] Clearly, it is no easy thing to require a country to change the exact policy that resulted in its economic rise. Keeping strict control of the exchange rate has been very advantageous for China, to the detriment of other countries; they have exercised their monetary sovereignty to the fullest. The IMF recommends China move back to an equilibrium exchange rate, but the unilateral attempts of the Unites States expresses the absence of multilateral actions on the issue.[38]

Nevertheless, as I will develop in the following section, weak financial

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Widened to Record of $49.8 Billion, WALL ST. J. (Sept. 8, 2014), http://www.wsj.com/articles/chinas-exports-grew-9-4-in-august-1410143041.

33. Center for Strategic & International Studies, *China Balance Sheet: Trade Imbalance*, http://csis.org/files/media/csis/pubs/080916_cbs_1_tradeimbalance.pdf.

34. *See* IMF, *Assessing Reserve Adequacy*, (Feb. 14, 2011) [hereinafter *Assessing Reserve Adequacy*]; *see also Import Cover*, THE ECONOMIST (Aug. 12, 2010), http://www.economist.com/node/16793524.

35. *Major Foreign Holders of Treasury Securities*, U.S DEPT. OF TREASURY, http://www.treasury.gov/ticdata/Publish/mfh.txt (last visited June 15, 2015).

36. *See What Is a Bond?*, WALL STREET JOURNAL, http://guides.wsj.com/personal-finance/investing/what-is-a-bond/ (last visited Sept. 2, 2015) *adapted from* DAVE KANSAS, COMPLETE MONEY & INVESTING GUIDEBOOK (Wall Street Journal ed., 2005).

37. Press Release, Statement by IMF Managing Director Dominique Strauss Kahn at the Conclusion of his Visit to China, IMF No. 08/26 (Feb. 15, 2008), https://www.imf.org/external/np/sec/pr/2008/pr0826.htm

38. Michael Mussa, *IMF Surveillance over China's Exchange Rate Policy*, PETERSON INST. FOR INT'L ECON. 1, 62 (2007), http://www.iie.com/publications/papers/mussa1007.pdf.

capabilities and little monetary sovereignty, can substantially affect their competitiveness and economic development.

B. CFA Franc Countries

The CFA Franc is the currency of fourteen African countries, it was officially created on December 26, 1945 when France ratified the Bretton Woods Agreements, with the view of restoring the French monetary authority.[39] CFA Franc formerly stood for *Franc des Colonies Françaises d'Afrique* (Franc of the African French Colonies), in reference to the colonial ties between France and those countries.[40] In 1958, it became *Franc de la Communauté Française d'Afrique* (Franc of the French Community of Africa) and after the process of decolonization, it became widely known as the *Franc de la Communauté Financière Africaine* (Franc of the African Financial Community).[41] More precisely, the Franc CFA is actually the title of two distinct currencies: the Central African CFA franc and the West African CFA franc.[42] While they both have legal tender in their respective regions, they are not interchangeable.

The Central African CFA franc zone is composed of six independent states: Cameroon, Central African Republic, Chad, Republic of Congo, Equatorial Guinea, and Gabon.[43] These countries have all been members of the same economic union since 1964: the *Communauté Économique et Monétaire de l'Afrique Centrale* (Economic and Monetary Community of Central African States or "CEMAC").[44] The Central African CFA Franc is issued by the *Banque des Etats d'Afrique Centrale* (Bank of the Central African States or "BEAC").[45] Likewise, the West African CFA Franc zone is composed of eight independent states: Benin, Burkina Faso, Côte d'Ivoire, Guinea Bissau, Mali, Niger, Senegal, and Togo.[46] These countries have all been members of the same economic union since 1962 (reformed in 1994): l'*Union économique et monétaire ouest-africaine* (the West African Economic and Monetary Union or "UEMOA").[47] The West

39. Jean-Claude Tchatchouang, *The CFA Franc Zone*, *in* 2 THE OXFORD HANDBOOK OF AFRICA AND ECONOMICS: POLICIES AND PRACTICES 114, 114, n. 1 (Celestin Monga & Justin Yifu Lin eds., 2015); Kazuhiko Yago, *The IMF and France (1944-1960): A "Cooperative Game" in the Bretton Woods System*, *in* HISTORY OF THE IMF: ORGANIZATION, POLICY, AND MARKET 147, 147, 149 (Kazuhiko Yago et al. eds., 2015).

40. PETER KENEN & ELLEN MEADE, REGIONAL MONETARY INTEGRATION 93 n.39 (2007)

41. *Id.*

42. IMF, *What is the CFA franc zone ?*, https://www.imf.org/external/pubs/ft/fabric/backgrnd.htm (last visited Sept. 24, 2015).

43. *Central African Economic and Monetary Community*, INT'L DEMOCRACY WATCH, http://www.internationaldemocracywatch.org/index.php/central-african-economic-and-monetary-community (last visited June 21, 2015).

44. *Knowing the CEMAC*, ECON. AND MONETARY COMM. OF CENTRAL AFRICA, http://www.cemac.int/apropos#apropos (last visited June 21, 2015).

45. *History BEAC*, BANQUE DES ETATS DE L'AFRIQUE CENTRALE, https://www.beac.int/index.php/beac/organisation/128-histoire-de-la-beac (last visited June 21, 2015).

46. *Convert United States Dollar to West African Franc*, THE MONEY CONVERTER, http://themoneyconverter.com/USD/XOF.aspx (last visited June 21, 2015).

47. *West African Economic and Monetary Union*, OFFICE OF THE U.S. TRADE REP.,

African CFA Franc is therefore issued by the *Banque Centrale des Etats d'Afrique de l'Ouest* (Central Bank of the West African States or "BCEAO").[48] The CFA Franc zone worked as a currency union with a peg to the French Franc until January 1, 1999, and has been pegged to the Euro since that time.[49]

The monetary cooperation between those fourteen African countries and France follows four principles:

> (1) [a] fixed exchange rate parity between the CFA Franc and the Euro. . .; (2) [a]n unlimited guarantee by the French Treasury for the convertibility of the CFA franc into euro at the fixed exchange rate at the Paris Stock Exchange. . .; (3) [t]he centralisation of the members' net foreign reserves at the two central banks and the obligation to deposit half of these reserves in an operations account ("*compte d'opérations*") at the French Treasury; and (4) [f]ree capital movements within the CFA franc zone and with France.[50]

This currency regime is simply an exchange rate arrangement between those fourteen countries and France. It is important to recall that these arrangements are based on a legal, institutional, and political framework meant to create a currency union, France not being a party to it. France, however, has seats on the Boards of Governors of the Regional Banks and thereby participates in the monetary policies of these two currency unions.[51] More importantly, the monetary policies with regards to the exchange rate are set up by the Regional Banks, the BCEAO, and the BEAC, but these institutions are totally independent from the national authorities while they are linked to France.[52]Consequently, and in contrast to what was previously seen with China, which also uses a "fixed" exchange rate (pegged to a basket of currencies), the member countries of the UEMOA and CEMAC do not have monetary policies of their own.[53]

Still, the peg to a strong and stable currency can be beneficial for a developing economy. The parity between the French Franc and the CFA Franc

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https://ustr.gov/countries-regions/africa/regional-economic-communities-rec/west-african-economic-and-monetary-union-uemoa (last visited June 21, 2015).

48. *History CFA Franc*, BCEAO, http://www.bceao.int/Histoire-du-Franc-CFA,55.html (last visited June 21, 2015) [hereinafter *History CFA Franc*].

49. *The CFA franc and the euro : Give Us our notes*, THE ECONOMIST (Feb. 7, 2002), http://www.economist.com/node/977304.

50. Martin Hallet, *The Role of the Euro in Sub-Saharan Africa and in the CFA Franc Zone*, 347 ECON. PAPERS 1, 6 (2008).

51. Patricia Pollard, *A Look Inside Two Central Banks : The European Central Bank and the Federal Reserve*, 85 FED. RES. RESERVE BANK OF ST. LOUIS REV., 11, 13, n. 7 (Jan./Feb. 2003), https://research.stlouisfed.org/publications/review/03/01/Pollard.pdf.

52. Edgardo M. Favaro, *Using Regional Institutions to Improve the Quality of Public Services*, WORLD DEV. REP. 2011 1, 3 (2010), http://web.worldbank.org/archive/website01306/web/pdf/wdr%20background%20paper_favaro_0.pdf.

53. Antoine Roger Lokongo, *How France Fincancially Enslaves 14 African Countries*, THE REUNION BLACK FAMILY (May 1, 2012, 1 : 50 PM), http://www.reunionblackfamily.com/apps/blog/show/14615033-how-france-financially-enslaves-14-african-countries.

remained constant from 1949 until 1994. In 1994, it was devalued by 50% to 1 FF=100 FCFA, which corresponds to 1 EUR=655.957 FCFA, since the Euro replaced the French Franc ("FF") at the beginning of 1999.[54]The fixed exchange rate regime, and thereby the convertibility of the CFA Franc, has provided the region with currency stability against other strong currencies and price stability with very low inflation in the long term, compared to countries outside of the currency union and the monetary arrangement. This is all the more relevant in countries with an economy strongly based upon the exports of agricultural products.[55] Moreover, the fixed exchange rate has been critical to attract foreign investors (higher investment per GPD in these countries than any non-CFA Franc African country) impacting positively the current account balance.

Thus, over two decades, from the 1960s to the mid-1980s, the CFA Franc zone has brought higher growth and development in these regions compared to that of non-CFA Franc zone of the continent. To give a point of impact, the growth of Côte d'Ivoire was above that of Korea in the 1960s.[56] Unfortunately, this very well organized and structured fixed exchange rate system turned against its participants by the early 1980s. Changes in the world markets at that time, such as the 1973 oil price crisis, the depreciation of the French Franc against the dollar, and general fluctuations in the foreign exchange market while the currency value remained the same in accordance with the fixed exchange rate, have led the Members of the CFA Franc zone to a protracted overvalued currency, especially with regards to the purchasing power of the currency.[57] Due to the fixed exchange rate system, they could not adjust to the international changes and keep in pace with their competitors.

The currency value of the CFA fluctuated independently of the choice of the members of the monetary union. On January 12, 1994, the French Franc was devalued and CFA Franc consequently lost 50% of its value.[58] The sharp devaluation, although necessary in those developing countries, led to significant price changes that they were not ready to welcome.

The absence of adjustment of the CFA Franc countries towards foreign markets changes led to an overvaluation of the CFA Franc, which severely affected their competitiveness and led to an economic recession. According to many specialists, "[t]he CFA Franc's fixed exchange rate is pegged to the euro and overvalued to shield French companies from euro depreciation."[59] Similarly,

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54. *See History CFA Franc*, *supra* note 48.

55. Shengenn Fan et al., *Setting Priorities for Public Spending for Agricultural and Rural Development in Africa*, 12 IFPRI POLICY BRIEF 1, 3 (2009), http://cdm15738.contentdm.oclc.org/utils/getfile/collection/p15738coll2/id/28249/filename/28250.pdf.

56. Aloysius Ajab Amin, *Long-Term Growth in the CFA Franc Zone Countries* 29 (UNU-WIDER, Working Paper, 2000).

57. Lucio Sarno & Mark P. Taylor, *Purchasing Power Parity and the Real Exchange Rate*, 49 IMF STAFF PAPERS 65, 65 (2002).

58. David Leland Dibley Exchange Rate Arrangements in the CFA Franc Zone: Alternatives to Fixed Parity 26 (Apr. 8, 1997) (unpublished M.S. thesis, Michigan State University).

59. Sanou Mbaye, *Time for franc zone to overhaul currency system*, TAIPEI TIMES (Apr. 11,

during the 2008 financial crisis, and especially in regards to the Euro, the risk of sudden devaluation was on everybody's lips in West Africa.[60]

There is a general consensus that an overvalued exchange rate regime impedes growth on the long term.[61] In the CFA Franc countries, the overvalued currency rendered exports much less competitive, especially with neighboring African countries.[62] One must keep in mind that the geopolitical map changes over time, and while it was true that France—and Europe in general—were at one time the number one economic partner of these countries, nowadays trade with Asian countries and non-CFA Franc countries is increasing.[63]

The currency's overvaluation had a major impact on the competitiveness of the Franc-zone countries, especially with developing economies, which performances depend on very few parameters.[64] The difficulty in diversifying their economies (mostly based on primary product export) was worsened by the currency overvaluation, which impeded them to create value to their products and develop.[65] While they all experienced high rate of growth in the 1960s and 1970s, the fixed exchange rate system did not provide the necessary framework to face external shocks.[66]

Simply, CFA Franc members could not depreciate their currency alone. The absence of independent monetary policies meant to fix the issues particular to these economies made it even worse. The interaction of the shocks with internal policy response is much more important than the shocks themselves.[67] Clearly, not being able to make this exchange rate regime work for the specificity of their economies led the CFA Franc countries to suffer from their own monetary policy.

It is a widely accepted conclusion that an overvalued exchange rate leads to loss in economic efficiency, higher inflation, and lower GDP growth. This being said, should the CFA Franc zone countries have adopted a mercantilist monetary policy? Adjustment of the exchange rate was much needed even necessary, in the legal sense, considering that eminent economists compared the overvaluation period to the Great Depression of 1929.[68] In terms of political power, mostly drawn from the importance of foreign reserves as it has been demonstrated before with China, the continent has very little. At the end of 2002, Africa, as a whole,

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2012), http://www.taipeitimes.com/News/editorials/archives/2012/04/11/2003530030.

60. Howard J. Shatz & David G. Tarr, *Exchange Rate Overvaluation and Trade Protection, in* DEVELOPMENT, TRADE, AND THE WTO, 17, 17 (Bernard M. Hoekman et al. eds., 2002).

61. John Williamson, *DO DEVELOPMENT CONSIDERATIONS MATTER FOR EXCHANGE RATE POLICY?, IN* CURRENT ACCOUNT AND EXTERNAL FINANCING (Kevin Cowan et al. eds., 2007).

62. Dibley, *supra* note 58, at 25.

63. Hallet, *supra*, note 50, at 4.

64. MICHIEL KEYZER ET AL., WTO, AGRICULTURE, AND DEVELOPING COUNTRIES: THE CASE OF ETHIOPIA 19 (2000) ("The EU imports almost all agricultural products from Africa free of duty, and for minerals and metals the tariffs are very low.").

65. Mbaye, *supra* note 59, ¶ 7.

66. Dibley, *supra* note 58, at 28.

67. *See* Rupa Duttagupta et al. *Moving to a Flexible Exchange Rate: How, When and How Fast?*" 38 Economic Issues 1 (2005), http://www.imf.org/external/pubs/ft/issues/issues38/ei38.pdf.

68. Shatz, *supra* note 60, at 4.

held reserves of U.S. $69 billion, which corresponded to 3.1% of global holdings.[69]

The current account diagram of the CFA Franc States shows a trade deficit, meaning these countries are debtors.[70] Moreover, the CFA Franc States have to surrender 50% of their foreign exchange reserves to the French Treasury as a guarantee of the CFA franc's limited convertibility.[71] Conversely, Nigeria, which is not part of the CFA Franc zone, recently changed its foreign reserves in the Chinese currency.[72] This move was welcomed by trading partners and reflects the use monetary sovereignty as a trade strategy.[73]

A rapid understanding of the situation in China and in the CFA Franc countries can lead one to assume that an undervalued currency is to be preferred for developing countries seeking growth. While that holds true to a certain extent, a comparison of these two situations highlights even more the importance of adjusting the exchange rate to the fluctuations of the foreign exchange market and the particularities of its own economy.

Consequently, there are a certain number of countries that are tempted to intentionally touch upon their currency value simply to prevent their appreciation in response to competitive weak foreign currencies. As stated earlier, currency devaluation is another relative appreciation of another currency and its inherent detrimental effects. The general consensus seems to be that an overvalued currency impedes growth on the long term[74] and that reciprocally an undervalued currency is beneficial to an export-led growth.[75] The latter propounds consideration of the importance for a country to be able to adjust its currency value, e.g. through its exchange rate to the fluctuations of the foreign exchange market and the particularities of its own economy.

A currency value is an important component of monetary sovereignty and a state's economic independence. All the same, one can never deny the sovereignty of a state. However, 192 states, all exercising their sovereignty on an international component, will cause some hurdles on the international scene. For example, since 2009, Brazil has been at the center of capital movements that hindered its

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69. Hallet, *supra* note 50, at 2.

70. Average current accounts of the communities: Cameroon, Central African Republic, Chad, Republic of Congo, Equatorial Guinea, and Gabon & Benin, Burkina Faso, Côte d'Ivoire, Guinea Bissau, Mali, Niger, Senegal, and Togo, Between Jan. 2006 and Jan. 2012, http://www.tradingeconomics.com/[ADD COUNTRY NAME]/current-account.

71. Sanou Mbaye, *Decolonizing the Franc Zone*, PROJECT SYNDICATE (Apr. 5, 2012), https://www.project-syndicate.org/commentary/decolonizing-the-franc-zone [hereinafter *Decolonizing*].

72. Maria Levitov, *Nigeria Central Bank to Move More Currency Reserves in Yuan*, BLOOMBERG BUSINESS (Jan. 28, 2014), http://www.bloomberg.com/news/articles/2014-01-28/nigeria-central-bank-to-shift-reserves-into-yuan-from-dollars.

73. Fion Li & Sophie Leung, *Nigeria Plans to Buy Yuan as Soon as Possible, Sanusi Says*, BLOOMBERG BUSINESS (Sept. 7, 2011), http://www.bloomberg.com/news/articles/2011-09-07/sanusi-says-nigeria-plans-to-get-yuan-to-10-of-reserves-soon-as-possible.

74. Williamson, *supra*, note 61, at 480.

75. Ho-don Yan & Cheng-lang Yang, *Does an Undervalued Currency Merit Economic Growth ? – Evidence from Taiwan*, 1 PANOECONOMICUS 37, 38 (2011), http://www.doiserbia.nb.rs/img/doi/1452-595X/2012/1452-595X1201037Y.pdf.

competitiveness.[76] Low interest rates in Europe and the United States led to an increase in foreign direct investment as well as portfolio investment in Brazil.[77] Investors were allured by the higher interest rates in Brazil to engage in carry trades with the Brazilian Real (selling a currency with a lower interest rate and using the gains from that sale to invest in the Brazilian Real, which has a higher interest rate).[78] The monetary expansion policies of the United States and Europe led the Brazilian Real to appreciate, up to 37% against the dollar in 2009.[79] A strong Brazilian Real affected Brazilian exports towards the United States, but also with China (as the Chinese RMB maintains a currency peg with the U.S. dollar).[80] Brazil's bilateral trade balance with the United States collapsed in the same period.[81] In 2010, Mr. Guido Mantega, Finance Minister of Brazil, started talking of a "currency war."[82] In 2012, the President of Brazil used the podium of the U.N. General Assembly session to express, in the same line of her Finance Minister, that

> Central banks in developed countries have continued to make use of expansionist monetary policy, which causes imbalances in exchange rates. The ensuing artificial appreciation of the emerging countries' currencies makes them lose market space, which further deepens the global recession.[83]

The sharp decline of the Brazilian competitiveness, largely due to objective economic fundamentals, led the country to implement capital controls to regulate the appreciation of their currency.[84] Various programs followed to support its

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76. *See* MARCOS CHAMON & MARCIO GARCIA, CAPITAL CONTROLS IN BRAZIL: EFFECTIVE? 6-10 (2014), https://www.imf.org/external/np/res/seminars/2014/arc/pdf/chamon_garcia.pdf.

77. Economic Commission for Latin America and the Caribbean, *Foreign Investment in Brazil and the International Financial Markets*, 6, LC/BRS/DT.014 (Feb.1998), http://www.cepal.org/publicaciones/xml/0/6730/lcbrsdt014.pdf.

78. SPECIAL Report: EMERGING MARKETS 23 (BYN Mellon 2014), http://www.bnymellonwealthmanagement.com/Resources/documents/perspectives/fullhtml/emerging-markets-special-sept-2014.pdf.

79. Matthew Bristow & Benjamin Bain, *Brazil Real Posts Longest Losing Streak in 8 Weeks After Tax*, BLOOMBERG BUSINESS (Oct. 19, 2010), http://www.bloomberg.com/news/articles/2010-10-19/brazil-steps-up-action-in-currency-war-even-as-mantega-seeks-ceasefire; *See also*, MONETARY POLICY REPORT 17 &22 (Banco Central de Chile 2009), http://www.bcentral.cl/eng/publications/policies/pdf/mpr122009.pdf.

80. WAYNE MORRISON & MARC LABONTE, CHINA'S CURRENCY: ECONOMIC ISSUES AND OPTIONS FOR U.S TRADE POLICY 16 (Congressional Research Service 2008), http://fas.org/sgp/crs/row/RL32165.pdf.

81. *Trade in Goods with Brazil*, UNITED STATES CENSUS BUREAU, https://www.census.gov/foreign-trade/balance/c3510.html#2008 (pointing out the collapse in April, May, June, and July of 2008) (last visited Sept. 24, 2015).

82. *Brazil Warns of World Currency War*, THE TELEGRAPH (Sept. 28, 2010), http://www.telegraph.co.uk/finance/economics/8029560/Brazil-warns-of-world-currency-war.html.

83. H.E. Dilma Rousseff, President, Federative Republic of Brazil, Opening of the General Debate of the 67th Session of the United Nations General Assembly (Sept. 25 2012).

84. Anton Korinek, *Capital Controls and Currency Wars*, 4-5 (University of Maryland 2012). *See also* Andrew Flowers, *Capital Controls Gain Currency in Today's Global Economy,* 13 EconSouth 32 (2011), https://www.frbatlanta.org/regional-economy/econsouth/11q3/11q3-summary-capital-

exports, one of them being the *Bigger Brazil Plan*, which clearly consists of protecting the national industry and its market from foreign competition.[85] The set of measures adopted by Brazil are certainly protective in nature, but necessary (according to the Brazilian government) to defend its automobile industry, which was affected by the appreciation of the Real against the dollar.[86] In 2013, the European Communities requested consultations with Brazil regarding tax advantages provided to domestic industries.[87] The "currency war" of Mantega turned into a trade dispute—and it will not be the last.

III. THE "LAWS OF CURRENCY WAR"

There have already been two waves of competitive devaluations in the past, also known as currency wars in 1931-1936 and 1967-1987.[88]

The "Tripartite Agreement," an agreement between Great Britain, the United States, and France, resolved the first currency war.[89] Interestingly, the United States' version of the text states that

> [i]t [The U.S. government] trusts that no country will attempt to obtain an unreasonable competitive exchange advantage and thereby hamper the effort to restore more stable economic relations which it is the aim of the three Governments [The United States, England and France] to promote.[90]

However, it must be noted that the text also includes an exception to this pledge of mutual respect of the international monetary system:

> The Government of the United States must, of course, in its policy toward international monetary relations *take into full account the requirements of internal prosperity*, as corresponding considerations will be taken into account by the Governments of France and Great Britain; it welcomes this opportunity to reaffirm its purpose to continue the policy which it has pursued in the course of recent years, one constant object of which is to maintain the greatest possible equilibrium in the system of international exchange and to avoid to the utmost extent the creation of any disturbance of that system by American monetary

controls.aspx.

85. Measures Announced under the Bigger Brazil Plan, http://www.jmcti.org/kaigai//Latin/2011/2011_10/2011_10_B01.pdf.

86. Joe Leahy, *Brazil hits imported cars with tax increase*, THE FINANCIAL TIMES (Sept. 16, 2011), http://www.ft.com/intl/cms/s/0/d051c68c-e086-11e0-bd01-00144feabdc0.html#axzz3eCFh357c.

87. Request for Consultations by the European Union, *Brazil – Certain Measures Concerning Taxation and Charges*, WT/DS472/1 (Jan. 8, 2014).

88. Rickards, *supra*, note 14, at ch. 4 -5.

89. Elliott Orsillo, *Exporting Unemployment Through Currency Wars*, SEEKING ALPHA (Jan. 31, 2013, 1 :03 PM), http://seekingalpha.com/article/1147181-exporting-unemployment-through-currency-wars.

90. *Monetary Stabilization; September 25, 1936*,¶5 LILLIAN GOLDMAN LAW LIBRARY (2008), http://avalon.law.yale.edu/20th_century/usmu001.asp.

action. . .[91]

The requirement of internal prosperity to respect the newly established system is pivotal because it subjects the respect of this international agreement to domestic considerations. It was an armistice, a *cessez-le-feu*,[92] not a solution to competitive devaluations.

All the same, the second currency war was resolved by the Plaza Accord of 1985, under which Central Banks of the state parties agreed to take coordinated actions on the currency markets to the betterment of international trade and the international monetary system as a whole.[93]

The past two currency wars were triggered by domestic factors, which lead one state to disrupt the "normal" flow of international economics and trade. Competitive devaluations might help the economy of a state in the short-term, but in the long-term, it harms the global economy and encourages protectionism and other trade barriers.[94] More importantly, greater currency volatility deteriorates the predictability and security of international trade, which in turn reduces benefits for importers and exporters around the world.

Clearly, currency valuation matters for growth and exchange rates affect international trade whether it is directly, indirectly, positively, or negatively. Some argue that while it may be selfish to purposely devalue its currency, it is lawful and in the case of China, the State is pursuing the economic policy it deems appropriate for its country for the time being.[95]

The question is to know whether or not such an important element of trade is circumscribed by rules—meaning restricting the right to determine and change the value of the currency (although enshrined in the concept of monetary sovereignty) for the purpose of gaining unfair advantages. International law allows each state to

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91. *Id.* ¶2 (emphasis added).

92. Commission Decision Relating to a Proceeding under Art. 81 of the EC Treaty (Sept. 29, 2004), Case COMP/C.37.750/B2, 10, http://ec.europa.eu/competition/antitrust/cases/dec_docs/37750/37750_87_1.pdf.

93. WORLD ECONOMIC OUTLOOK : SURVEY BY THE STAFF OF THE INTERNATIONAL MONETARY FUND 53-9 (International Monetary Fund 1989).

94. *See* Puneet Pal Singh, What is a currency war and are we heading for one?, BBC NEWS (Feb. 15, 2013), http://www.bbc.com/news/business-21469301("[C]ompetitive devaluation of currencies, a scenario where various nations try to devalue their currencies in an attempt to gain an advantage over each other."); Mehreen Khan, *Global currency wars: why China's devaluation is a peace offering misunderstood by the world*, (Aug. 22, 2015) http://www.telegraph.co.uk/finance/economics/11813076/Global-currency-wars-why-Chinas-devaluation-is-a-peace-offering-misunderstood-by-the-world.html (". . .'competitive devaluation' where major economies jostle to steal export shares, export deflationary pressures, and pull up their barriers.").

95. Christoph Herrmann, *Don Yuan: China's "Selfish" Exchange Rate Policy and International Economic Law*, EUROPEAN Y.B INT'L ECON. L. 31,32 (2010), https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fwww.springer.com%2Fcda%2Fcontent%2Fdocument%2Fcda_downloaddocument%2F9783540788829-c1.pdf%3FSGWID%3D0-0-45-835315-p173815045&ei=3PyNVau1I86xogSq4LjYCQ&usg=AFQjCNFBJHQA6KrJyQ355xaII7dSB7pWgw&sig2=lVDEAzBgk2IcOr2AXedPsw&bvm=bv.96783405,d.cGU.

change the value of its currency;[96] if it is true that every international transaction is followed by an international payment, an unregulated international monetary system can lead to substantial imbalances and bring us back to the geopolitical games of the last century. Regulations are much needed when currency valuation affects trade partners.

As this paper shall demonstrate, these institutions do not lack the competence to deal with this issue; however, their respective powers on exchange rate manipulation go as far as what the Member Countries endowed them with.

A. The International Monetary Fund

The IMF is an international organization created pursuant to the Bretton Woods Conference in 1945.[97] Today it has a membership of 188 countries.[98] According to its establishing agreement: the IMF Articles of Agreement, the main purpose of the IMF is to promote international monetary cooperation through a permanent institution that provides the machinery for consultation and collaboration on international monetary problems.[99] The IMF is undoubtedly the specialist when it comes to balance of payments, exchange arrangement, exchange rate stability, the liberalisation of payments, and more generally, the surveillance of the international monetary system.[100] Hence, the exchange rate issue is clearly a subject matter the IMF was meant to deal with.

Members of the IMF have accepted the obligations set in the Articles of Agreement, which includes obviously their monetary sovereignty.[101] They do so as a party to the international financial system.

Besides, the IMF Articles of Agreement in its Article VIII imposes "*General Obligations*" on its members that include among others, the ability to touch upon their currency value.[102] Precisely, Article 1(iii) of the IMF Articles of Agreement

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96. G.A. Res. 3281 (XXIX) Art. 2, ¶ 2(a), U.N. Doc A/RES/29/3281 (Dec. 12, 1974). *See also* Gianviti, *supra* note 8.

97. *Cooperation and reconstruction (1944-71)*, INTERNATIONAL MONETARY FUND, https://www.imf.org/external/about/histcoop.htm.

98. *See IMF Members' Quotas and Voting Power, and IMF Board of Governors*, INTERNATIONAL MONETARY FUND, https://www.imf.org/external/np/sec/memdir/members.aspx.

99. IMF, *Articles of Agreement of the International Monetary Fund*, art. I(i) (Apr. 28, 2008), https://www.imf.org/external/pubs/ft/aa/pdf/aa.pdf [hereinafter Articles of Agreement].

100. Deborah E. Siegel, *Legal Aspect of the IMF/WTO Relationship: The Fund's Articles of Agreement and the WTO Agreements*, 96 AM. J. INT'L L. 561 563 (2002), https://www.imf.org/external/np/leg/sem/2002/cdmfl/eng/siegel.pdf.

101. UNCTAD XIII Pre-Conference Event: Policy Dialogue: Redefining the Role of the Government in Tomorrow's International Trade, Session 2, 30 (Mar. 26-27, 2012), http://unctad.org/meetings/en/SessionalDocuments/ditc_dir_2012d2_deLima-Campos.pdf.

102. *See* Articles of Agreement, *supra* note 99, at art. VIII. §§2-3 & 7.

> Section 2. Avoidance of restrictions on current payments
>
> (*a*) Subject to the provisions of Article VII, Section 3(*b*) and Article XIV, Section 2, no member shall, without the approval of the Fund, impose restrictions on the making of payments and transfers for current international transactions.
>
> (*b*) Exchange contracts which involve the currency of any member and which are contrary to

states that the maintaining of orderly exchange arrangement among members and the avoidance of competitive exchange depreciation is one of the objectives of the institution.[103]

Regarding exchange arrangement, the Article VI:1(iii) of the IMF Articles of Agreement states that Members shall "avoid manipulating exchange rates or the international monetary system in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage over other members."[104] Clearly, the aforesaid article governs unilateral exchange rate intervention. This is a "hard"[105] obligation at the center of the IMF Articles of Agreement. Undoubtedly, that provision applies the Chinese case and it is also what the African CFA Franc Countries were not able to do for their own competitive advantage.

To establish the violation of Art IV:1(iii) of the IMF Articles of Agreement, there first must be a manipulation of exchange rates.[106] Second, the currency policy must be pursued in order to gain an unfair competitive advantage.[107] Manipulation is by definition an action by which a person or a situation is controlled or influenced in a skillful manner. [108] *In casu*, manipulation occurs via

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the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be unenforceable in the territories of any member. In addition, members may, by mutual accord, cooperate in measures for the purpose of making the exchange control regulations of either member more effective, provided that such measures and regulations are consistent with this Agreement.

Section 3. *Avoidance of discriminatory currency practices*
No member shall engage in, or permit any of its fiscal agencies referred to in Article V, Section 1 to engage in, any discriminatory currency arrangements or multiple currency practices, whether within or outside margins under Article IV or prescribed by or under Schedule C, except as authorized under this Agreement or approved by the Fund. If such arrangements and practices are engaged in at the date when this Agreement enters into force, the member concerned shall consult with the Fund as to their progressive removal unless they are maintained or imposed under Article XIV, Section 2, in which case the provisions of Section 3 of that Article shall apply.

Section 7. *Obligation to collaborate regarding policies on reserve assets*
Each member undertakes to collaborate with the Fund and with other members in order to ensure that the policies of the member with respect to reserve assets shall be consistent with the objectives of promoting better international surveillance of international liquidity and making the special drawing right the principal reserve asset in the international monetary system.

Id.

103. *Id.* at art. I(iii).
104. *Id.* at art. IV(1)(iii).
105. *Assessing Reserve Adequacy*, *supra* note 34.
106. Articles of Agreement, *supra* note 99, at art. IV(1)(iii).
107. *Id.*
108. *Manipulate*, OXFORD DICTIONARIES, http://www.oxforddictionaries.com/us/definition/american_english/manipulate?q=manipulation#manipulate_23.

the actions of the Central Bank buying or selling foreign currencies to influence the value of their own currency, e.g. quantitative easing.[109]

It is very important to understand the link between an undervalued exchange rate regime and a trade account. For example, in cases of exchange rate undervaluation, a government's central bank purchases foreign currencies at an undervalued rate but does not engaged in the sale of the local currency.[110] As a result, it accumulates a trade surplus.

The manipulation criterion set in Article IV:1(iii) must remain an objective assessment of the actions of the government. The Annex of the 2007 Decision of the Executive Board of the IMF clarified the concept of manipulation of the exchange rate as actions "only carried out through policies that are targeted at—and actually affect—the level of an exchange rate."[111] Moreover, in the landmark decision of 1977,[112] the Executive Board of the IMF set guiding rules regarding currency manipulation, namely that "'protracted large-scale intervention in one direction in exchange markets' might constitute evidence of currency manipulation."[113] In that sense, a currency valuation that does not reflect the economic and financial conditions of the country might fall under the scope of the Article IV(iii) if it transpires a behavior of the exchange rate that appears unrelated to underlying economic and financial conditions.[114] Therefore, a country can be found manipulating its currency when its central bank is intervening in foreign exchange markets to stimulate exports.

Secondly, it will be very difficult to prove the intent to gain unfair competitive advantage, and therefore to find a member in violation of Article IV(1)(iii) of the IMF Articles of Agreement. As discussed previously, the currency valuation has impacts on development and economic growth. The legitimacy of engaging in the manipulation of its own currency seems countered by the legality of monetary sovereignty under the IMF policy rules. Members of the IMF have restrained their monetary sovereignty with regards to currency valuation and only to the extent that it is unfair.[115]

The IMF Articles of Agreement does not prohibit currency manipulation to

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109. Robert E. Scott, *Stop Currency Manipulation and Create Millions of Jobs*, ECONOMIC POLICY INSTITUTE (Feb. 26, 2014), http://www.epi.org/publication/stop-currency-manipulation-and-create-millions-of-jobs/.

110. Enzo Cassino & Michelle Lewis, *Currency Intervention: The Profitability of Some Recent International Experiences* RES. BANK N.Z. ANALYTICAL NOTE SERIES 1, 4 (June 2012), http://www.rbnz.govt.nz/research_and_publications/analytical_notes/2012/AN2012_3.pdf.

111. *IMF Executive Board Adopts New Decision on Bilateral Surveillance Over Members' Policies*, INTERNATIONAL MONETARY FUND (June 21, 2007), http://www.imf.org/external/np/sec/pn/2007/pn0769.htm.

112. *Id.*

113. JONATHAN E. SANFORD, CURRENCY MANIPULATION: THE IMF AND WTO 2 (Congressional Research Service 2011), http://assets.opencrs.com/rpts/RS22658_20110128.pdf.

114. *Review of the 1977 Decision on Surveillance over Exchange Rate Policies – Preliminary Considerations*, INTERNATIONAL MONETARY FUND (June 28, 2006), https://www.imf.org/external/np/pp/eng/2006/pc.pdf.

115. Articles of Agreement, *supra*, note 99, at art. IV(1)(iii).

gain competitive advantages; Article IV:1(iii) of the IMF Articles of Agreement sets a threshold—the unfairness of such manipulation.[116] From the start, it is a subjective assessment; the intent behind a currency policy is therefore very difficult to prove. According to Friedman's Profits Test, the combination of "buying low and selling high" implies that if the central bank succeeded in stabilizing the exchange rate, then its operations would be profitable.[117] However, in a case of currency misalignment, the government not only searches to stabilize the exchange rate, but also to undervalue its own currency.[118]

The IMF plays the role of the watchdog of the international monetary system. To do so, it implements a "surveillance" of the exchange rate policies of its member countries in accordance with Article IV of the IMF Articles of Agreement. The IMF Decision 1977 decision of the Executive Board on Bilateral Surveillance comprises the core principles on exchange rate policies.[119] There are five principles: Principles A to C were adopted in 1977, Principle D was added in 2007, and Principle E was added in 2012, stating

> A. A member shall *avoid manipulating exchange rates* or the international monetary system in order to prevent effective balance of payments adjustment or *to gain an unfair competitive advantage over other members.*
>
> B. A member should intervene in the exchange market if necessary to counter disorderly conditions, which may be characterized inter alia by disruptive short-term movements in the exchange rate of its currency.
>
> C. Members should take into account in their intervention policies the interests of other members, including those of the countries in whose currencies they intervene.
>
> D. A member should *avoid exchange rate policies that result in balance of payments instability.*
>
> E. A member should seek to avoid *domestic economic and financial policies that give rise to domestic instability.*[120]

Special attention should be given to Principle E, dated from 2012, as it includes domestic considerations and the decisions taken by a state within its jurisdiction, affecting its financial stability.[121] By doing so, the IMF attacks the origins of domestic policies targeted at influencing the international trade and the international monetary system.

116. *Id.*

117. Cassino, supra note 111 ; Michelle Lewis, *Currency Intervention: The Profitability of Some Recent International Experiences*, RES. BANK N.Z. ANALYTICAL NOTE SERIES ISSN 2230-5505, 1, 4 (June 2012).

118. *Id.* at 9 & 18.

119. *IMF Executive Board Adopts New Decision on Bilateral and Multilateral Surveillance*, INTERNATIONAL MONETARY FUND (July 30, 2012), https://www.imf.org/external/np/sec/pn/2012/pn1289.htm.

120. *Id.* at part II,¶14.(emphasis added).

121. *Id.*

Furthermore, the Annex of the 2007 decision of the Executive Board of the IMF observed that the intent is proved when "the member is engaged in these policies for *the purpose of securing fundamental exchange rate misalignment in the form of an undervalued exchange rate* and *the purpose of securing such misalignment is to increase net exports*."[122]

The wording of the decision does not seem to be meant for legal proceedings; "[T]he purpose of securing fundamental exchange rate misalignment" and "the purpose of securing such misalignment is to increase net exports" can hardly be proven beyond reasonable doubt as required by the IMF,[123] all the more since the effect and intent of a measure must be disassociated. Indeed, the IMF political nature is made to put the stress on "dialogue and persuasion," nothing coercive *per se*.[124]

Still, in a pragmatic business world, it cannot be denied that, in this case the two are intertwined, one must always keep in mind that the main component of a violation of Article IV(1)(iii) of the IMF Articles of Agreement is the "manipulation." Therefore, the intent of gaining unfair competitive advantages must take into account the effects of the so called governmental measure but also the circumstances surrounding it. It is not surprising that a developing country artificially devalue its currency to address economic imbalances while it is, at the same time, *de facto* granting it competitive advantages.

The IMF Articles of Agreement are definitely the "*lex specialis*" on the subject matter; however, the decisions of the IMF are political not legal—the voting system is based on the proportion of the financial contributions of its members, a majority between 70% and 85% is required to take sanctions.[125] The financial institution is not a judicial body, and therefore does not provide an enforcement mechanism.

B. The World Trade Organisation

1. **Jurisdiction and Competence**

As developed before, international trade in recent history has been the principal tool of development, but more importantly, the tool to bond sovereign countries through fair economic relations. That bond is also translated by interdependency between sovereign countries, which makes it difficult for them to resort to irreversible and violent means to settle their disputes. The WTO was

122. *Id*.at Annex Article IV, Section (1)(iii),¶2(b) (emphasis added).

123. *Id.*

124. *What We Do*, INTERNATIONAL MONETARY FUND, https://www.imf.org/external/about/whatwedo.htm; *see also Integrated Surveillance Decision*, INTERNATIONAL MONETARY FUND (Sept. 30, 2013) ("The ISD continues to emphasize the collaborative nature of surveillance, the importance of dialogue and persuasion, the need for candor and evenhandedness, and the importance of paying due regard to country circumstances.").

125. ALUISIO DE LIMA-CAMPOS, A CASE FOR MISALIGNED CURRENCIES AS COUNTERVAILABLE SUBSIDIES, 33 (UNCTAD 2012), http://unctad.org/meetings/en/SessionalDocuments/ditc_dir_2012d2_deLima-Campos.pdf.

created in this context, and more than an international forum of negotiations, it fulfils the expectations of bringing security and predictability in international economic relations via the rule of law. The idea of reciprocal and mutually advantageous arrangements between the contracting parties is at the core of the organisation.[126]

Not only that, the preamble of the WTO agreement sets as one of its objective to develop and maintain an integrated, more viable and durable multilateral trading system.[127] According to Article 2 "the WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement."[128] These Annexes include among others the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("ADA Agreement"), the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), the Agreement on Agriculture, the Agreement on Safeguards, and so forth. They are referred to as the covered agreements.[129]

The WTO is known for having the most effective enforcement system in international law.[130] The dispute settlement system of the WTO allows each of its members to abide by the rules or force other members to do so in virtue of the covered agreements.[131] It follows from the foregoing that the WTO should be the forum to cope with exchange rates tribulations.

The dispute settlement system of the WTO plays an important role in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members

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126. Marrakesh Agreement Establishing the World Trade Organization, pmbl., Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement] (stating "Resolved, therefore, to develop an integrated, more viable and durable multilateral trading system encompassing the General Agreement on Tariffs and Trade, the results of past trade liberalization efforts, and all of the results of the Uruguay Round of Multilateral Trade Negotiations.").

127. *Id.*

128. *Id.* at art. II, ¶ 1 (stating "The WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to this Agreement.").

129. *See* Marrakesh Agreement *supra* note 126, at Annex 1A.

130. Pascal Lamy, WTO Director General, Address before the Eur. Soc'y of Int'l L.: The Place and Role of the WTO (WTO Law) in the International Legal Order 1, 3 (May 19, 2006), https://www.wto.org/English/news_e/sppl_e/sppl26_e.htm.

131. *See* Understanding on Rules and Procedures Governing the Settlement of Disputes art. 1, 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401

> The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding (referred to in this Understanding as the 'covered agreements'). Recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements.

Id.

under the covered agreements.[132]

Ignoring the threat of currency manipulations on fair international trade would be fatal to the multilateral system. The United States is already making moves on its own to effectively tackle the currency issue. The negotiations on the regional mega agreement between the United States and the European Union will probably tackle the issue, as United States' representatives call for "strong and enforceable foreign currency manipulation disciplines" in the trade agreement.[133] Some even propose to include exchange rate provisions in United States' trade agreements.[134]

It is true that the Tokyo, Uruguay, and Doha Rounds of the organization failed to address the issue of currency misalignment and their effects on trade in the WTO covered agreements; therefore, they do not refer to the monetary sovereignty of its members. Nevertheless, the second currency war left the contracting parties with no choice but to acknowledge the important link between trade and currency values. Following the Tokyo Round in 1973, an official declaration stated that:

> [T]he policy of liberalizing world trade cannot be carried out successfully in the absence of parallel efforts to set up a monetary system which shields the world economy from the shocks and imbalances which have previously occurred. The Ministers will not lose sight of the fact that the efforts which are made in the trade field imply continuing efforts to maintain orderly conditions and to establish a durable and equitable monetary system.[135]

Moreover, there are provisions of the WTO that can be directly applied, or be interpreted to apply, to the impacts of exchange rates manipulation on trade. For example, the WTO Appellate Body in the Shrimp case had to decide whether or not the term "exhaustible natural sources" in Art. XX of the GATT 1994 was limited to "mineral or non-living natural resources" only.[136] The WTO Appellate Body in this case interpreted the treaty in an evolutionary manner and stated that "the words of Article XX(g), 'exhaustible natural resources,' were actually crafted more than 50 years ago. They must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and

132. See *id.* at Annex 2, art. 3, ¶ 2.

> The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.

Id.

133. C. Fred Bergsten, *Addressing Currency Manipulation through Trade Agreements*, PETERSON INST. FOR INT'L ECON. 1, 1 (2014).

134. WAYNE M. MORRISON & MARC LABONTE, CHINA'S CURRENCY POLICY: AN ANALYSIS OF THE ECONOMIC ISSUES 15 (Congressional Research 2013).

135. The Tokyo Declaration, Sept. 14, 1973, GATT/1134 (1975).

136. Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, ¶¶ 127-8, 131, WT/DS58/AB/R (adopted Nov. 6, 1998) [hereinafter *US-Shrimp*].

conservation of the environment."[137]

Moreover, the WTO can work in pair with the IMF and rely on the IMF expertise on the international monetary system as prescribed in Art XV:2 of the GATT 1994.[138] The jurisdiction or the competence of the WTO Dispute Settlement Board ("DSB") is therefore not an obstacle.

In case of a currency war, the best defence is still the attack. Exchange rate fluctuations have an impact on trade, and the profits driven by international trade are the one reason states decide to touch upon their currency values. The WTO has jurisdiction if the currency valuation discussed above can be identified in its covered agreements.

2. The GATT 1994 in conjunction with the IMF Articles of Agreement

Article XV of the GATT 1994 concerns exchange arrangements. Exchange arrangements are understood as "the multilateral rules on currency exchange systems that are administered by the IMF and codified in the Articles of Agreement of the IMF, as well as arrangements that may be made between the WTO and one of its Members if that is not also a member of the IMF."[139] That definitely includes exchange rate arrangements. The IMF Annual Report on exchange arrangements and exchange restrictions stated that theses exchange rate arrangements are classified on the basis of the degree to which the exchange rate is determined by the market rather than by official action.[140]

Article XV is the most explicit provision regarding currency valuations in the GATT 1994 and it creates the bridge between the IMF and the WTO.[141] With regards to currency valuation, two provisions of Article XV are of particular relevance: Article XV:4 and Article XV:9.

The Article XV:4 of the GATT 1994 states that, "[c]ontracting parties shall not, by exchange action, frustrate the intent of the provisions of this Agreement, nor, by trade action, the intent of the provisions of the Articles of Agreement of the International Monetary Fund."[142] The application of this Article is therefore twofold; it depends on the classification of the measure at hand. Such classification has never been established in practice by a WTO Dispute Panel. The member states never decided on how to distinguish between trade and exchange actions.[143] For the purpose of the reasoning of this paper, trade and exchange actions will be interpreted in line with their ordinary meaning as well as with

137. *Id.* ¶ 129.

138. Exchange Arrangements ¶ A(2), Oct. 30, 1947, General Agreement on Tariffs and Trade art. XV, 55 U.N.T.S. 194 [hereinafter GATT EA].

139. Andrew Mitchell & Elizabeth Sheargold, *GATT Art. XV: Exchange Arrangements*, 5 GEORGETOWN BUS., ECON. & REG. L. RES. 1, 3 (2009).

140. ANNUAL REPORT ON EXCHANGE ARRANGEMENTS AND EXCHANGE RESTRICTIONS 4 (International Monetary Fund 2012).

141. *See* GATT EA, *supra* note 138.

142. *Id.*¶ 4.

143. *Id.* (providing no distinction between trade and exchange actions).

definitions given by other international organizations.[144]

With regards to exchange actions, when a member chooses an exchange arrangement that involves pegging its currency to the currency of another member, it has also been understood that the "exchange arrangement" includes not only the currencies being used, but also the rate being used for this purpose.[145] Moreover, an exchange action encompasses the monetary policy of the WTO Members to fix its currency value at a certain level, and therefore applies to the exchange rate.[146] In that sense, the actions of the government upon exchange rate could constitute exchange actions. Trade actions concern the domestic or cross-border flow of goods and services, so there is no doubt that the actions of the government upon exchange rate leading to an undervalued or overvalued currency, a trade deficit, or a trade surplus have an impact on the cross border flow of goods and services. Hence, Article XV:4 possibly refers to currency valuation. The violation of that article of the GATT 1994 is contingent upon the frustration of the GATT 1994 or and the IMF Articles of Agreement.[147]

According to the preamble of the GATT 1994, the purpose of the Agreement is the "substantial reduction of tariffs and other trade barriers and the elimination of preferences, on a reciprocal and mutually advantageous basis."[148] The reduction of tariffs and non-tariff barriers are at the core of the GATT 1994. In this regard, John Maynard Keynes stated in 1931 with regards to the Gold Standard that subsidies and tariffs altogether have an equivalent effect to currency devaluation: "Precisely the same effects as those produced by a devaluation of sterling by a given percentage could be brought about by a tariff of the same percentage on all imports together with an equal subsidy on all exports."[149]

Subsidies are regulated under WTO Law by the GATT 1994 and the SCM Agreement. The GATT 1994 expressly refers to the danger of subsidization of exports to which currency valuation leads. Indeed, the Second Report on Anti-Dumping and Countervailing Duties states that "the word 'subsidy' covered not only actual payments, but also measures having an equivalent effect."[150] The Article XVI of the GATT 1994 states that

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144. Vienna Convention on the Law of Treaties art. 31, May 23, 1969, 1155 U.N.T.S. 340 (stating "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.") .

145. Sean Hagan, *Article IV of the Fund's Articles of Agreement: An Overview of the Legal Framework*, INT'L MONETARY FUND 1, 5 (2006), http://www.imf.org/external/np/pp/eng/2006/062806.pdf.

146. JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT (Lexis Law 1969).

147. GATT EA, *supra* note 138, ¶ 4 (stating "Contracting parties shall not, by exchange action, frustrate the intent of the provisions of this Agreement, nor, by trade action, the intent of the provisions of the Articles of Agreement of the International Monetary Fund.").

148. Marrakesh Agreement, supra note 126, at pmbl.

149. John S. Chipman, *Protection and Exchange Rates in a Small Open Economy*, 11 R. DEV. ECON. 1, 1 (2007) (quoting John Maynard Keynes's Addendum to the Macmillan Report to the British Parliament).

150. Anti-dumping and Countervailing Duties ¶ 3, Oct. 30, 1947, General Agreement on Tariffs and Trade art. VI, 55 U.N.T.S. 194 [hereinafter GATT ACD].

> [t]he contracting parties recognize that the granting by a contracting party of a subsidy on the export of any product may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives of this Agreement.[151]

A currency misalignment can be a financial contribution for the purpose of the SCM Agreement when the government's practice involves a direct transfer of funds or potential direct transfers of funds or liabilities.[152] Moreover, if one looks upon Article XVI of the GATT 1994 dealing with subsidies[153] it results that the classification of a purposely undervalued currency as a subsidy goes against the efforts of the Members of the WTO to achieve a balanced trading system and respect the provisions of the GATT 1994.

Similarly, an undervalued exchange rate will have an influence on the export price of the product. According to Article 2 of the Anti-Dumping Agreement:

> a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.[154]

In a similar vein, Article II of the GATT 1994 states in its point b. that:

> [t]he products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided therein.[155]

There are possible identifications of a currency undervaluation as a practice of dumping or as a subsidy as it appears that they involve the similar trade distorting consequences. Moreover, according to the addendum of Article XV, the word "frustrate is intended to indicate, for example, that infringements of the letter of any Article of this Agreement by exchange action shall not be regarded as a violation of that Article if, in practice, there is no appreciable departure from the intent of the Article."[156]

Nevertheless, Article XV:9 of the GATT 1994 states that "nothing in this

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151. Subsidies ¶ 2, Oct. 30, 1947, General Agreement on Tariffs and Trade art. XVI §B ¶ 2, 55 U.N.T.S.194 [hereinafter GATT Subsidies].

152. Agreement on Subsidies and Countervailing Measures art. I, 3, Oct. 30, 1947, General Agreement on Tariffs and Trade, 55 U.N.T.S. 194 [hereinafter GATT SCM].

153. GATT Subsidies, *supra* note 151.

154. GATT ACD, *supra* note 150, at ¶ 2.1.

155. Schedules of Concessions art. II, ¶ 1(b), Oct. 30, 1947, General Agreement on Tariffs and Trade art. II, 55 U.N.T.S. 194 [hereinafter GATT Schedules].

156. GATT EA, *supra* note 138, ¶ B(1).

Agreement shall preclude the use by a contracting party of exchange controls or exchange restrictions in accordance with the Articles of Agreement of the IMF."[157] In other words, Article XV:9 works as an exception clause and minimize the GATT 1994 or the IMF Articles of Agreement as set in Article XV:4 of the GATT 1994. As such, the country involved in exchange controls and exchange restriction would have to prove that it is not violating the provisions of the IMF Articles of Agreement.[158] This shift of the burden of proof might be beneficial to the injured party. However, it supports the idea that the GATT 1994 does not touch upon the monetary sovereignty of its members.

All in all, there is more than one argument supporting the frustration of the intent of the GATT 1994. Despite the subjective terms employed, it is a matter of common sense that if a purposely undervalued exchange rate sets other members in an unfair, nonreciprocal competitive position, it will deny the years of negotiations done to reach an effective and reliable international trade system. Still, the question whether or not the GATT 1994 or the WTO as a legal institution requires its members not to competitively influence the value of their currency remains unanswered.

3. Enforcement

It results from the foregoing that a WTO adjudication could be based on Article XVI of the GATT 1994 along with the SCM Agreement, as well as Article VI of the GATT 1994 along with the ADA and secondly on Article XV:4 of the GATT 1994. However, no matter which legal provision it is based on, such a case will bring about issues of international monetary policies, issues over which the Panel may seek the advices and expertise of the IMF.

The need for consultations with the IMF in affairs related to the international monetary system highlights the competence schism between the IMF and the WTO. The consultation duty stems from Article XV:2 of the GATT 1994 which states that:

> In all cases in which the CONTRACTING PARTIES are called upon to consider or deal with problems concerning monetary reserves, balances of payments or foreign exchange arrangements, *they shall consult fully with the International Monetary Fund. In such consultations, the CONTRACTING PARTIES shall accept all findings of statistical and other facts presented by the Fund* relating to foreign exchange, monetary reserves and balances of payments, and shall accept the determination of the Fund as to whether *action by a contracting party in exchange matters is in accordance with the Articles of Agreement of the International Monetary Fund*, or with the terms of a special exchange agreement between that contracting party and the CONTRACTING PARTIES."[159]

157. Id. ¶ A(9).
158. Articles of Agreement, *supra* note 99, at art. I-XXXI.
159. *See* GATT EA, *supra* note 138. (emphasis added).

Moreover, according to Article 13 of the Dispute Settlement Understanding ("DSU"), "Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate."[160] These two articles do not mention an obligation of the Panel to seize to consult the IMF. Article XV:2 of the GATT 1994 refers to the "CONTRACTING PARTIES" duty to consult the IMF.[161] It would be very illogical that a political institution comes to decide a legal outcome over legal texts to which it is not a party.

The case law of the WTO on several occasions considered the IMF participation as discretionary but not dispositive of the legal dispute at hand. In the *India Quantitative* case, regarding trade restriction to safeguard the balance of payments (i.e. in the scope of expertise of the IMF), the WTO sought information and advice from the IMF based on Article 13 of the DSU.[162] As required by Article 11 of the DSU, the Panel "critically assessed," as it would do in an *amicus brief*, the information given and compared it to those provided by the Reserve Bank of India, another expert in the field.[163] All the same, in the Argentina-Footwear case, Argentina contented that the Panel breached Article 11 of the DSU by not making an objective assessment of the matter before it; the Panel did not consult the IMF.[164] The Appellate Body in that case found that the decision to consult the IMF was under the discretion of the Panel.[165]

Therefore, the Panel ought to seek information and advice whenever it is appropriate to do so. In *casu*, the IMF being the expert of the international financial or monetary system, it must be involved in the proceedings. However, its role remains discretionary and can never supersede that of the WTO Dispute Panel.[166] The same goes for adjudications based on Article XV:4 of the GATT 1994, as it expressly mentions a frustration of the IMF Articles of Agreement as constitutive of a breach of the GATT 1994.[167] Therefore, if a member of the WTO decided to bring a claim against another member based on the provision of the GATT 1994, it should not be slowed down procedurally or hampered by the IMF; it can only be aided by the expertise of the IMF. As long as the currency undervaluation is identifiable through the provisions of the GATT 1994, the WTO

160. DSU, *supra* note 131, at art. 13.

161. *See* GATT EA, *supra* note 138.

162. Panel Report, *India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, 93, WT/DS90/R (Apr. 6, 1999) [hereinafter India - Measures Affecting Imports].

163. *Id.* at 111.

164. Appellate Body Report, *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, ¶¶ 13-14, WT/DS56/AB/R (adopted Apr. 22, 1998).

165. *Id.* ¶ 84.

166. India - Measures Affecting Imports, *supra* note 162, at 133-4 (Panel considering IMF consultation discretionary, not dispositive).

> [W]hether or not the provisions of Article XV:2 extend to panels, the Panel has the responsibility of making an objective assessment of the facts of the case and the conformity with GATT 1994, as incorporated into the WTO Agreement, of the Indian measures at issue, in accordance with Article 11 of the DSU.

Id.

167. GATT EA, *supra* note 138, ¶ A(4).

ought to play its role as an effective enforcement system.

A WTO Dispute Panel can only innovate in introducing these issues in the provisions of the GATT 1994, as it has done in the past with the preamble of the WTO Agreement. Nevertheless, it must be highlighted that the provisions of the GATT 1994, whether about the dumping practice or the export subsidy, were hardly meant to apply to exchange rate misalignment. It is also worth noting that overvalued currencies are not mentioned even tacitly in the covered agreements. A currency undervaluation can be identified "through" some provisions of the GATT 1994, but not directly. Subsidies and dumping are one of the consequences of a currency undervaluation, but these can only be solved having a holistic approach to the currency undervaluation issue and that is whether a country can or not exercise its monetary sovereignty to that extent.

The loophole in the GATT 1994 is appalling especially since this is the challenge of the future,[168] the WTO as the multilateral democratic institution ought to "take the bull by the horns" and deal with the pragmatism of the world economy.

IV. CONCLUSION

There are three observations to take away from this paper.

First, currency valuation as embedded in the monetary sovereignty of a state is the backbone of economic prosperity. As it has been demonstrated in the case study of China and the CFA Franc countries, the ability to control or to adapt to currency valuations is of paramount importance for developing economies. The case study established that China is exercising to the fullest its monetary sovereignty by artificially maintaining the RMB at an undervalued rate while the African CFA Franc countries are subjected to the fluctuation of Franc/Euros. China succeeded in using this currency valuation to develop its economy while African CFA Franc countries, by reason of a weak international monetary policy and monetary sovereignty, had to suffer the consequences of an overvaluation. Developed economies are presumably strong enough to balance those external shocks. Some monetary policies as the use of protracted quantitative easing can only be implemented if the state has the capacity to do so. As a result, the monetary sovereignty of a state is at the core of any reasonable economic policy.

Second, while the monetary sovereignty of a country is at the core of any reasonable economic policy, it must be reckoned that engaging in competitive devaluations is a downward spiral that the world should prevent and not trigger. Currency manipulation in the form of competitive currency devaluation is deleterious to the world economy. Increasing the volatility of currencies will undermine the predictability and security of international trade relations, which in turn have serious adverse consequences on all sides.

Third, international economic law does tackle the issue of currency

168. Pascal Lamy, WTO Director General, Opening Address for WTO Seminar: We Need an International Monetary System which Facilitates International Trade 1, 3 (Mar. 27, 2012).

manipulation and deals with the consequences of a protracted currency undervaluation. Some are identifiable through the legal provisions of the GATT 1994, however, the right to do so *per se,* is not a notion tackled by the GATT 1994. The WTO does not touch upon the monetary sovereignty of its members. Subsidies and dumping are facets of a currency undervaluation; therefore, the covered agreements can only deal with the tip of the iceberg but that could send a message on the legality of the policies of origin.

Exchange rate valuations as unilateral measures threaten international trade relations and can impair a state's benefits from its WTO membership. Disputes should be adjudicated under the modern international economic law, particularly under the auspice of the Dispute Settlement Body of the WTO. The IMF is the international political institution, and even though it cannot meet the demands of an member injured by an undervalued currency via an enforcement mechanism, it covers substantially exchange arrangements. The IMF's Article IV expressly mentions the "manipulation of exchange rate to gain unfair competitive advantages."[169] The IMF Articles of Agreement and the IMF Board of Executive decisions on exchange rates touch upon the monetary sovereignty of its members. Better, it prohibits the abuse of such monetary sovereignty and attempts to avoid situations leading to currency manipulation.

The IMF economic literature and more importantly the Decision of the Executive Board 2007 and 2012 have clarified that sentence.[170] The presence of such provisions —Article IV and Article VIII of the IMF Articles of Agreement— means that there is a limit to the intervention of one state upon its exchange rate: unfairness.[171] However, and again, it does not reach the point where it is possible to engage with certainty in the identification of such manipulation especially with regards to the "intent to gain unfair competitive advantages."[172] The IMF expressly mentions in its Articles of Agreement the interdiction to manipulate its own currency for unfair competitive purposes but it does not give the means to go towards a successful legal proceeding.[173]

Therefore, as far as state's monetary sovereignty is concerned, as long as nothing efficiently and expressly affects that right to determine and change the value of their currency, currency wars are bound to happen. International economic law has not failed to develop solutions to deter the use of currency devaluation for unfair competitive purposes. These solutions exist and can be developed further; their enforcement is, however, yet to be seen. *Quod erat demonstratum.*

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169. Articles of Agreement, *supra* note 99; at art. IV.

170. *IMF Executive Board Adopts New Decision on Bilateral and Multilateral Surveillance Over Members' Policies*, INTERNATIONAL MONETARY FUND (July 30, 2012), https://www.imf.org/external/np/sec/pn/2012/pn1289.htm.

171. Articles of Agreement, *supra* note 99, at art. IV.

172. *Id.*

173. *Id.*