Deploying WTO Trade Remedies to Combat the Structural Unfairness of the Eurozone

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ABSTRACT:

This article explores the unfairness resulting from the Eurozone's monetary framework which has led to a structurally undervalued euro, provided virtually unlimited financing to Eurozone producers and violated international banking principles relating to risk mitigation, to the detriment of other countries. It suggests that multilateral trade remedies may be applied to address the resulting imbalance. These consist of WTO disciplines on subsidies and dumping as well as IMF rules on exchange rate stability. The article highlights some of the difficulties in using WTO trade rules to combat currency manipulation, suggesting that a plausible way forward would be for the EU's trade partners to negotiate specific commitments in FTAs which would facilitate subsidy and dumping claims in order to achieve a resolution to the systemic disadvantage suffered by firms competing with Eurozone exports on world markets.

KEYWORDS: Eurozone, currency manipulation, subsidies, dumping, IMF, WTO, international banking

I Introduction

The framework underpinning the Eurozone[1] results in potentially significant trade distortions, which could attract response from disaffected trade partners under the disciplines of the World Trade Organization (WTO) relating to subsidies and dumping. With is structurally undervalued currency and cheap credit, manufacturers in the Eurozone are able to undercut prices on the world market, unfairly damaging their competitors operating in countries with monetary arrangements which align with global rules on fiscal responsibility.

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[1] The member states in the Eurozone are Austria, Belgium, Cyprus, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Slovakia, Slovenia, and Spain. Denmark opted out. Bulgaria, Croatia, the Czech Republic, Hungary, Poland, Romania and Sweden are not in the Eurozone. The UK, while it was an EU member, opted out of the euro.

Senior officials in the US government cautioned in recent years that Germany, in particular within the Eurozone, takes advantage of the grossly undervalued euro to exploit the US and other trading partners.[2] This is reflected in the large trade surplus enjoyed by Germany relative to the US and other trading partners, such as the UK. This view is shared by various economists who assert that Germany has encouraged policies in the Eurozone based on the expansion of debt, particularly in the southern Eurozone states, that have led to a weaker currency – given all Eurozone states are required, as the zone is constructed, to be self-financing. Not every state can keep at pace with the zone and stay within tolerable levels of debt. Germany's current account surplus persists because of the extraordinary levels of debt in the south. Others disagree, holding that northern European states such as Germany chose to adopt the euro in order to strengthen European political integration and that the observed devaluation of the euro is largely the consequence of the exceptional circumstances which led to euro debt crisis, magnified in recent months by the Covid-19 epidemic. Even according to this more moderate view, Germany's competitiveness is a structural feature of membership in the Eurozone, which results in a situation where the real exchange rate, meaning Germany's price level relative to Eurozone members as expressed in the common currency, takes longer to adjust to shocks and crises than would be the case in a floating system.[3] Regardless of the motivation, clearly the fragility of the debt-ridden Eurozone has led to an undervalued currency. Indeed there is strong evidence of this, leading many to conclude that exporters in the Eurozone are exploiting the situation to gain the upper hand in trade.[4]

The undervaluation of the euro is the consequence of the monetary and financial architecture of the Eurozone, which leaves the financing of members at a solely local level whilst deciding monetary issues at a unified, Eurozone, level. Simply put, this setup means that the fiscal arrangements within the Euro are highly risky and inconsistent with international rules on banking stability in that the framework regards Eurozone member state debt as risk-free, which it is not due to the fact that the monetary levers are not under the control of each state but instead are subject to zone-wide arrangements that leave each state relying on hoped-for cooperation from the other members if their debt levels become too high. Because of this mistreatment under the international banking rules, the Eurozone system is left systemically

[2] S Donnan, 'Trump's top trade adviser accuses Germany of currency exploitation,' The Financial Times (31 Jan 2017) (referring to a quote from Peter Navarro, Director of Trade and Manufacturing Policy)
[3] J Zettelmeyer, 'Is Germany a currency manipulator?' Peterson Institute for International Economics (1 February 2017)
[4] D Blake, 'The UK is the Eurozone's dumping ground' Briefings for Brexit (13 April 2020)

undercapitalised, under-collateralised and illiquid. Banks operating within the Eurozone are not required to mitigate their own risk by issuing top-up capital to counteract the situation, which is a position that affords them a competitive advantage in global markets. The US and the UK, along with most other developed economies, mitigate the risk for themselves and the rest of the world, but to the detriment of their competitiveness and that of businesses based within their territories. Crucially for the purposes of this article, this arrangement therefore gives the Eurozone states an unfair competitive trade advantage. The structurally undervalued euro, as well as the fiscal arrangements within the Eurozone that effectively subsidise (predominantly) northern Eurozone producers by providing unlimited financing to their (generally southern) Eurozone purchasers, accords exporters from within the Eurozone a considerable advantage in trade to the detriment of their overseas competitors, manifest by dumping of products at below their normal value.

This article explores how international economic law, specifically the law of the World Trade Organization (WTO), as well as the rules of the International Monetary Fund (IMF) arguably provide redress for the trade unfairness which results from these features of Eurozone and the euro currency. Firms from outside the Eurozone are being harmed by a financial system which accords an unfair advantage to Eurozone-based firms, illegitimately strengthening their competitive capacity in international trade. The article suggests that there are three potential spheres of WTO law which are potentially breached by the Eurozone set-up. These consist of the imposition of anti-subsidy countervailing duties, anti-dumping duties, and possibly also a claim for impairment of benefits for failure to cooperate with IMF rules, pursuant to the General Agreement on Tariffs and Trade (GATT). While the multilateral disciplines provided under WTO law to address currency manipulation are perhaps poorly suited to this purpose, there is a potential to provide a more robust framework for rectifying the unfair trade element of monetary policy through provisions in bilaterally-negotiated free trade agreements (FTAs) concluded with the European Union (EU) in the future.

The structure of this article is as follows: Part 1 will examine the unfairness inherent in the workings of the Eurozone in more detail and by reference to its impact on trade in the form of an undervalued currency and readily available credit. Part 2 will examine the potential trade remedy for this situation through WTO disciplines on subsidies whereas Part 3 will consider the use of WTO anti-dumping rules. Part 4 will explore the role of the IMF in conjunction with the WTO in redressing the resulting unfairness for trading partners. Noting the difficulties in controlling currency manipulation through the WTO's existing system, Part 5 of article will

conclude with some recommendations for including currency manipulation provisions in bilateral free trade agreements (FTAs).

II The Structural Unfairness of the Eurozone

Monetary policy of the Eurozone is tied to the manner in which banking is conducted, and it has a distorting effect on the approach taken towards the management of risk. Competence over the prudential regulation of banking is generally shared between the EU and its Member States.[5] EU prudential rules, such as the capital requirements regulation and directive that reflect Basel III standards, designed to mitigate risk within the international banking sector, are adopted by the European Council on the basis of proposals from the European Commission.[6] In 2014, banking supervision became an exclusive competence of the EU for the 19 Member States participating in Eurozone. Since then, significant banks within the Eurozone are directly supervised by the European Central Bank (ECB), while the supervision of less significant banks is delegated to national competent authorities. The European Court of Justice has rightly described this arrangement as decentralized because it is not a distribution of competences between the ECB and the national authorities in the performance of the prudential tasks, as specified in Article 4(1) of the Single Supervisory Mechanism Regulation,[7] part of the legislative framework underpinning the Eurozone. Yet, despite the creation of the banking union within the Eurozone, EU external representation in financial matters is poorly organized.[8]

Turning to the euro currency itself, the authority to issue euro banknotes rests with the ECB, as stipulated in Article 128 of the Treaty on the Functioning of the European Union (TFEU), which states as follows:

1. The European Central Bank shall have the exclusive right to authorise the issue of euro banknotes within the Union. The European Central Bank and the national central banks may issue such notes. The banknotes issued by the European Central Bank and the national central banks shall be the only such notes to have the status of legal tender within the Union.

[5] The legal basis of the Capital Requirements Directive (CRD IV, Directive 2013/36/EU, OJ 2013 L 176/27) is Article 53.1 of the TFEU.
[6] The legal basis of the Capital Requirements Regulation (CRR, Regulation (EU) 575/2013, OJ 2013 L 176/27) is Article 114 of the TFEU
[7] See General Court, Case C-450/17 P Landeskreditbank Baden-Württemberg v. ECB (2019)ECLI:EU:C:2019:372; Case T-122/15; Landeskreditbank Baden-Württemberg v. ECB (2017) ECLI:EU:T:2017:337
[8] A Viterbo, 'The European Union in the Transnational Financial Regulatory Arena: The Case of the Basel Committee on Banking Supervision' 22 Journal of International Economic Law 205 (2019)

2. Member States may issue euro coins subject to approval by the European Central Bank of the volume of the issue. The Council, on a proposal from the Commission and after consulting the European Parliament and the European Central Bank, may adopt measures to harmonise the denominations and technical specifications of all coins intended for circulation to the extent necessary to permit their smooth circulation within the Union.

The primacy of the ECB in issuing currency is further reflected in Article 16 of the Protocol on the Statute of the European System of Central Banks and of the European Central Bank, which states:

The Governing Council shall have the exclusive right to authorize the issue of banknotes within the Community. The ECB and the national central banks may issue such notes. The banknotes issued by the ECB and the national central banks shall be the only such notes to have the status of legal tender within the Community. The ECB shall respect as far as possible existing practices regarding the issue and design of banknotes.

That this power rests with the ECB is important because it means that, unlike sovereign states such as the Bank of England or the Federal Reserve of the United States, the member states of the Eurozone are unable to control the issuer of their currency, the ECB, which is run by a committee answerable to the member states, but not by any one single member state. Normal sovereign states need never default on their debt since they can always print more money to repay them. Eurozone member states, by contrast, are not sovereign and they rely on hoped-for collaboration with other Eurozone states if they are at risk of default. Despite this, EU law and regulation wrongly assumes that Eurozone member state debt is 'sovereign' debt in the sense that it is for the UK or the US. This is crucial because sovereign debt is used as the underpinning for the financial market – as the most liquid form of asset, available as collateral or a store of value in all foreseeable circumstances. There is no such sovereign debt within the Eurozone. Instead, EU law is treating member debt collectively as sovereign to fill the gap and provide a liquid asset for its financial system. This creates massive unmanaged financial systemic risk within the Eurozone since the riskiness of Eurozone member state debt is not being captured by the regulatory regime – and is instead being denied. As a result, the Eurozone's financial sector is under-capitalised, under-collateralised and less liquid than it should be.[9] The arrangements run contrary to the intention behind the international Basel III

[9] Ibid.

rules on controlling financial risk, which require that banks' risk exposures are backed by a high quality capital base.[10] In essence, the Eurozone has been left largely free to operate without regard to the level of systemic risk its structure places on the private entities which use it and are exposed to it (directly or indirectly)The ECB itself plays a central role in buying up the debt and assets, however this achieves only a partial debt mutualisation, concealing the Eurozone's failure to provide for the genuine pooling of Eurozone member state debt.

The problem was recently identified by the German Constitutional Court, which held that the ECB's issuance of currency, in effect quantitative easing, must be proportional to the aim sought, whether it is the control of inflation or the resolving of a shortage of liquidity in member states such as Italy.[11] The court ordered the German government and parliament to ensure that the ECB carried out a 'proportionality assessment' of its vast purchases of government debt to ensure that their 'economic and fiscal policy effects' did not outweigh its policy objectives, and threatened to block new bond-buying unless the ECB did so within three months. At the time of writing, this ruling was formally criticized in a statement by the European Court of Justice, setting the stage for a EU constitutional crisis.[12] The bond-buying programme of the ECB has been the source of much controversy in Germany, where it is often suggested that the central bank has exceeded its mandate by illegally financing governments and exposing taxpayers to potential losses.[13] While Germany may object to the ECB's profligate approach to debt, this enables it to achieve a reduction in the price of its exports on world markets to the benefit of its exports. Yet, Germany and other northern Eurozone member states are not 'paying' for the euro currency by putting their balance sheets at risk, in contravention of Basel III's edict 'to capture major on- and off-balance sheet risks'[14] because they do not stand jointly and severally behind the fiscal arrangements that underpin the currency.

In addition to the devaluation of currency, the Eurozone's framework facilitates another practice which creates a trade distortion with respect to the competing firms from outside the

[10] Basel III: A Global Regulatory Framework for More Resilient Banks and Banking System, December 2010 (rev June 2011) At [8]. The ECB's participation in the Basel Committee on Banking Supervision is based on Article 23 and Article 6(1) of the Statute of the European System of Central Banks (ESCB).
[11] BVerfG, Judgment of the Second Senate of 05 May 2020 - 2 BvR 859/15
[12] Press Release Following the Judgment of the German Constitutional Court of 5 May 2020, Press Release No. 58/20, Luxembourg, (8 May 2020)
[13] M Arnold and T Stubbington, 'German court calls on ECB to justify bond-buying programme' Financial Times (5 May 2020)
[14] Above n 10 at [11]

Eurozone. The Eurozone's Trans-European Automated Real-time Gross settlement Express Transfer system (known as TARGET2),[15] grants virtually unlimited support for Eurozone producers by providing loans to their Eurozone-based buyers. Much as the central banks of Eurozone member states borrow from the ECB on the basis of bonds which will never be redeemed, under this arrangement, private banks in the Eurozone are able to borrow heavily from their member states' central banks . These private banks in turn provide cheap credit to their domestic buyers from Eurozone-based manufacturers, allowing those manufacturers to absorb their costs in intra-Eurozone sales and to be more competitive in their international exports than their competitors operating in countries without such structural flaws.

From the above it is clear that the Eurozone does not operate fairly on global markets compared to states which maintain genuinely sovereign-backed currencies and bear the associated burdens in terms of debt management and liquidity, as required under international rules. This arrangement facilitates considerable and persistent international trade surpluses being achieved by certain Eurozone states, notably Germany. This article will now consider potential trade remedies available under international law, specifically the law of the WTO, which could be used to redress the imbalance caused by the monetary policies described above. The first of these are rules controlling subsidization.

III Subsidies

There is plausible argument that the advantages engendered by the euro, largely benefitting of German manufacturers, constitutes an illegal subsidy, deserving response through a countervailing duty which corresponds to the extend of the advantage incurred. Some commentators believe that an undervalued exchange rate, or currency manipulation, constitutes an export subsidy and is therefore deserving of retaliation.[16] On the other hand, it is often argued that currency manipulation, and indeed monetary policy generally, is extraneous to the remit of the WTO, even as it impacts on trade. This is because states need the ability to manage their macroeconomic policy and because any ensuing trade distortions in terms of cheaper

[15] Decision of the European Central Bank of 24 July concerning the terms and conditions of TARGET2-ECB (ECB/2007/7) (2007/601/EC). Under Article 14.1 of TARGET2 rules the Central Banks are exempt from any liquidity limits.

[16] A Mattoo and A Subramanian, 'Currency Undervaluation and Sovereign Wealth Funds: A New Role for the World Trade Organization', 32 The World Economy 1135 (2009)

exports are likely offset by the cost of more expensive imports, many of which are used as inputs in finished exported goods.[17] It is often pointed out that global supply chains, dependant as they are upon inputs from multiple countries priced in various currencies, may mitigate the trade distortions caused by exchange rate misalignment, although the degree of such an effect is uncertain.[18]

Most commentators agree that currency manipulation, typically associated with that of China, is not applicable to current WTO rules on subsidies because the relevant discipline, the Agreement on Subsidies and Countervailing Measures (ASCM) is quire narrow in scope.[19] Yet some have persuasively argued that there is a possibility that artificially low currencies could amount to a subsidy and therefore violate the ASCM.[20] This view is shared by the US Department of Commerce, which recently announced that it intends to impose countervailing duties on products which benefit from unfair currency 'subsidies.'[21]

The ASCM seeks to establish a balance between the legitimate needs of the governments to support its economy while preventing it from causing a trade injury to the industries of importing countries. But the ASCM prevents only those trade-distorting measures, meaning government actions, which qualify as subsidies under its terms. For a government measure to be a subsidy, the ASCM has a three-part test. First, the alleged subsidy has to be a 'financial contribution.' Second, it must confer a 'benefit.' Lastly, it has to be 'specific.' Whether or not the distortions resulting from the Eurozone satisfy these tests is uncertain.

Taking each of these requirements in turn, first, the 'financial contribution' be in the form of direct transfer of funds, the provision of goods and services and the foregoing of revenue that is otherwise due, or any form of income or price support by a government or public body.[22] The purchase of debt by the ECB is arguably a 'direct transfer of funds' under Article 1.1(a)(1)(i) of the ASCM in that the ECB transfers euros to member state banks in exchange

[17] R Steiger and A Sykes, 'Currency "manipulation" and world trade' World Trade Review Volume 9, Issue 4 583-627 (October 2010)
[18] C Yu, Currency Manipulation and WTO Laws: Should the Anti-Dumping Mechanism Be Entirely Dumped? Journal of World Investment and Trade 20:6 891 (2019) at 3
[19] V Thorstensen, C Muler & D Ramos, 'Exchange Rate Measures: Who Judges the Issue—IMF or WTO?' 18 Journal of International Economic Law 117 (2015)
[20] E.g., A. de Lima-Campos and J A Gaviria, 'A Case for Misaligned Currencies as Countervailable Subsidies' 46 Journal of World Trade 1017 (2012) and B B Caryl, 'Is China Currency Regime a Countervailable Subsidy? A Legal Analysis Under the World Trade Organization's SCM Agreement', 45 Journal of World Trade 187 (2011)
[21] US Department of Commerce, 'Department of Commerce Issues Final Rule for Countervailing Unfair Currency Subsidies', 4 February 2020; https://www.commerce.gov/news/press-releases/2020/02/department-commerce-issues-final-rule-countervailing-unfair-currency (accessed May 2020)
[22] ASCM, Art 1.1(a)

for essentially worthless debt, meaning that it will never be collected and therefore imposes no financial burden on the firms which end up making use of it. Moreover, exporters within the Eurozone enjoy a competitive advantage vis-à-vis their foreign competitors because their buyers can obtain tax-supported financing, enabling them to access capital more cheaply than other suppliers can on the open market in their respective countries. Such governmental assistance arguably fits within the definition of subsidy in the ASCM under Article 1 as a 'form of income or price support' and also as a 'direct transfer of funds' which yields a benefit which would not be available under normal market conditions. It should be recognized that the list of 'financial contributions,' as outlined Article 1.1(a) of the ASCM is exhaustive. Still, the concept of financial contribution is evidently wide. WTO panels have found financial contributions to include interest reductions and deferrals and debt forgiveness[23] and export insurance guarantees along with the purchase of corporate bonds.[24] According to the Appellate Body, the 'cost to government' is irrelevant to the analysis of financial contribution, as this does not necessarily confer a benefit.[25] Most crucially for the purposes of evaluating the euro's framework as a subsidy is the statement that certain currency and exchange measures qualify as either 'financial contributions' or 'income or price support' in Article 1.1(a) of the ASCM. Moreover, the ASCM's Illustrative List of Export Subsidies specifically includes 'b) currency retention schemes and any similar practices which include a bonus on exports.' These appear to contemplate advantages conferred by currency-oriented policies adopted by central banks.

Instead of a WTO member state seeking to demonstrate that there has been a financial contribution under Article 1.1(a)(1) of the ASCM, the architecture of the Eurozone may also be depicted as form of income or price support within the meaning of Article XVI of the GATT as referenced under Article 1.1 (a)(2) of the ASCM. This provision of the GATT includes 'income or price support' as a 'subsidy…which operates directly, or indirectly to increase exports of any product from, or to reduce imports of any product into [a Member's] territory.' As noted above, the ASCM expressly includes 'income or price support' as described above in its definition of subsidy,[26] however the phrase 'income or price support within the meaning of Article XVI of the GATT' has never been interpreted by a WTO panel in relation to the ASCM

[23] Panel Report, Korea - Measures Affecting Trade in Commercial Vessels, WT/DS273/R (adopted 11 April 2005); and Panel Report, Japan - Countervailing Duties on Dynamic Random Access Chips from Korea, WT/DS336/R (adopted 17 December 2007)

[24] Panel Report, European Communities - Countervailing Measures on Dynamic Random Access Memory Chips from Korea, WT/DS299/R (adopted 3 August 2005)

[25] Appellate Body Report, Canada – Aircraft, WT/DS70/AB (adopted 29 August 1999)

[26] ASCM Art. 1.1

Agreement. Consequently it may be unlikely that a WTO panel would rely on this concept to support the conclusion that a subsidy exists under ASCM Article 1.1(a).[27] On the other hand, a WTO panel may view the framework of the Eurozone as functionally equivalent to the listed currency measures because arrangement accords a 'bonus on exports' by undervaluing the euro with regards to other proper sovereign-backed currencies such as the US dollar or the pound sterling. It is noteworthy that the ASCM's Illustrative List of Export Subsidies also includes: 'k) the grant by governments (or special institutions controlled by and/or acting under the authority of governments) of export credits at rates below those which they actually have to pay for the funds.' The cheap financing available through the TARGET2 system resembles an export credit in that serves the purpose of augmenting exports, although it is available generally to firms throughout the Eurozone irrespective of export behaviour. This tension touches upon some of the issues in relation to specificity, to be discussed below. It is important to recognize that the final determination that the Eurozone's framework constitutes a prohibited export subsidy is not dependent upon a finding that various aspects of the regime, such as the TARGET2 system or the purchasing of debt by member state central banks, correspond precisely to the ASCM's Illustrative List of export subsidies. However, such a finding would be useful because subsidies coming under purview of the Illustrative List are by definition prohibited, as opposed to merely actionable. As will be explained further below, under the ASCM, actionable subsidies require the additional step of the complaining member identifying an injury, whereas prohibited subsidies are presumptively injurious.

Having considered the 'financial contribution' component of the definition of a subsidy, the second requirement under the ASCM is that a 'benefit' must be conferred.[28] The ASCM does not define this term 'benefit,' however, according to the Appellate Body, this phrase indicates that the recipient should 'in fact receive something.'[29] The Appellate Body further outlined that a 'benefit' exists when a government financial contribution makes the recipient 'better off' than it would otherwise have been, absent that contribution.[30] This necessitates the establishment of a counter-factual – what would the situation have been had it not been for the government action? In *Canada – Aircraft*, the Appellate Body clarified that the basis for determining whether a recipient is better off is the marketplace. This requires an investigation into whether the recipient has received a financial contribution on terms more favourable than

[27] Caryl above n 20
[28] ASCM, art 1.1(b)
[29] Appellate Body Report, Canada- Aircraft at [154]
[30] Appellate Body Report, Canada - Aircraft, at [157]

those available to the recipient on conventional commercial terms. To the extent that the euro is undervalued relative to what it would be if it were sovereign-backed like other currencies, it would seem as though Eurozone exporters, especially in Germany, which would maintain a higher valued currency on its own were it outside the Eurozone,[31] do receive a benefit. This is so because, first, German goods would be cheaper in foreign markets than they would be if Germany was using a currency which was genuinely backed by its own central bank, as the Deutschmark was.

Second, through the TARGET2 system, German companies receive financing at below market rates, as credit markets are conventionally understood in countries operating under Basel prudential rules, such as the United States or the United Kingdom. A WTO panel may further find that the Eurozone's cheap credit regime, which has the added benefit of undermining the value of the euro, provides German exporters a 'service' within the meaning of ASCM Article 1.1(a)(1)(iii). Accordingly, the 'benefit conferred' would exist because the financing is provided for less than adequate remuneration. Article 14(d)of the ASCM goes on to illustrate that the adequacy of remuneration shall be ascertained in relation to prevailing market conditions for the good or service in question in the country of provision or purchase. This includes price, quality, availability, marketability, transportation and other conditions of purchase or sale. The complainant in a WTO dispute, perhaps the US or the UK, would likely need to show that there is or would be a real value of the currency in Germany, were it properly sovereign-backed. Or, it would need to demonstrate the extent of credit that should or would be available from private banks in that country, along with interest rates, were it not for the favourable TARGET2 regime. This would be difficult counter-factual to establish given that the Eurozone has existed for more than two decades and it pervades all aspects of monetary policy in Germany and the other 18 Eurozone member countries.

A WTO panel could equally conclude that the Eurozone architecture provides a benefit to exporters, notably those in Germany, in the form of a 'direct transfer of funds,' 'revenue foregone,' or 'income or price support.' Here the calculation of 'benefit conferred' would be the difference between the current and actual value of the euro were the currency to be properly sovereign-backed, again was the case of the Deutschmark in the context of German exporters, or 'absent the government's intervention.' In this case the governmental intervention is the disconnected monetary arrangements currently in place throughout the Eurozone. These may

[31] Blake above n 4

perhaps more aptly be described as a 'non-intervention' in that they do not provide for adequate capitalization and other risk controls as do other currency issuing central banks throughout the world.

The chapeau of Article 14 of the ASCM states that any method used to calculate benefit must be consistent with Article 14's guidelines for four types of financial contributions. Unfortunately the guidance provided in Article 14 is of limited help for an analysis of the Eurozone framework. Still, following guidance found in Article 14(b), the benchmark for determining the benefit of an undervalued currency could be analogized to what the euro would be worth if it were market-determined. This may be analogized to the way normal currencies are valued when the issuing bank fully backs them, as in the case of the US dollar and the pound sterling. In *Canada - Aircraft*, the Appellate Body underscored that the appropriate benchmark for the benefit analysis is 'the marketplace.'[32] The panel in *US - Softwood Lumber III* expanded on this view, holding that the appropriate benchmark for the benefit analysis under Article 14(d) is the prevailing market conditions for the good or service in question in the country of provision or purchase,[33] not those of a hypothetical undistorted or perfectly competitive market.[34] The Appellate Body in *US - Softwood Lumber IV* interpreted the chapeau of Article 14 as not preventing the use of a benchmark other than private market prices. This indicates that complaining WTO members may disregard commercial 'market' prices and rely on an alternative benchmark when the government's predominant role in the market has distorted prices – guidance which appears to contemplate subsidies which may arise in the context of non-market economies. As will be suggested below, there is a plausible case to be made that the Eurozone fits this description. Still, when a complainant uses a benchmark other than private prices in the country of provision, the benchmark chosen must relate to the prevailing market conditions in that country and it must reflect price, quality, availability, marketability, transportation and other conditions of purchase or sale, as required by Article 14(d).

In *US - Softwood Lumber IV*, the Appellate Body established the possibility of the complaining WTO member investigating beyond the subject country for an alternative benchmark, which hints at the surrogate price method, to be discussed further below in the section on dumping. The Appellate Body in that case was, however, unable to complete the

[32] Appellate Body Report, Canada - Aircraft, at [157]
[33] Panel Report, US - Softwood Lumber II, WT/DS264/R (adopted 13 April 2004) at [7.44]
[34] Ibid, [7.44] and [7.50]

requisite analysis to determine whether the alternative benchmark that had been used by the complainant was sufficiently related to the prevailing market conditions in the allegedly subsidizing case. In *US - Antidumping and Countervailing Duties on Certain Products from China*, the panel upheld the complainant's rejection of in-country private prices and interest rates in the respondent country as benchmarks for various inputs and preferential lending. It noted that the complainant made reasonable case-by-case findings that the respondent, China, played a dominant role in each of the respective domestic markets. This resulted in Chinese prices and interest rates being significantly distorted and unsuitable as benchmarks. The panel rejected China's argument that the pricing of various inputs do not relate or refer to the prevailing market conditions in China, finding that the complainant, the US, had made best efforts to establish a sufficiently close approximation of an undistorted counterfactual situation.[35] From the above it can be seen that a WTO panel would need to determine how to perform the analysis of benefit as it applies to the Eurozone financial architecture and exporters, especially from Germany, which are the most dominant on world markets. The benchmark selected would likely determine the outcome of whether the panel would view this regime as a countervailable subsidy.

Turning to the third and final criteria under the SCM, the subsidy must be 'specific.'[36] This means that the subsidy must be provided to certain enterprises either by law *(de jure*), meaning that it is specified in legislation or other regulation, or by the government in fact *(de facto*) meaning that the subsidy can be discerned from the factual nexus despite not being mentioned expressly in any law. The ASCM presumes subsidies to be non-specific, therefore, specificity must be ascertained on the basis of positive evidence. Establishing 'specificity' in terms of the beneficiaries of the Eurozone would be challenging. Such a broad group of enterprises as German manufacturers would almost certainly not be deemed *de facto*-specific under ASCM Agreement Article 2.1(c) because there is nothing in the Eurozone's framework which indicates that this group is the intended beneficiary. Indeed there are many private enterprises throughout the Eurozone which would benefit from cheap financing irrespective of their export profile. Still, WTO case law suggests that the concept of 'industry' here is to be broadly construed, covering situations where a diverse array of goods are produced.[37] ASCM Article 2.1(c) requires that 'the extent of diversification of economic activities' in the alleged

[35] Panel Report, United States — Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/R (adopted 25 March 2011)
[36] ASCM, Art 2.1
[37] Panel Report, United States – Certain Softwood Lumber from Canada, WT/DS257/R, (adopted 17 Feb 2004)

subsidizing state be taken in account in determining *de facto* specificity. The Eurozone's economy is significantly diversified, and many disparate industries and firms, receive the benefit of the currency subsidy, undermining a claim of *de facto* specificity under Article 2.1(c)i. In this regard it is noteworthy that the panel in *US - Softwood Lumber II* found that the complainant had satisfied the requirement that the extent of economic diversification had been taken into account through their statement that the vast majority of companies and industries in the respondent state did not receive the benefits under the programs.[38] Again it would seem as though any subsidy provided by the Eurozone's monetary framework would appear to be sufficiently broadly available throughout the Eurozone economy as not to benefit a particular limited group of producers of certain products, suggesting that it is not *de jure*-specific to any enterprise, industry, or group.[39]

Specificity may be presumed if the subsidy is contingent on export and export contingency can itself be demonstrated on the face of the measure – meaning the legislation or regulation. Although there are many EU regulations that establish and maintain the Eurozone, there is no explicit requirement in any such laws or regulations that the subsidy is tied to export performance. It is important to recognize, however, that the Appellate Body in *Canada - Autos* indicated that a subsidy can be *de jure* export contingent without such words being used. Instead, such conditionality can be derived by necessary implication from the words actually used in the measure.[40] Footnote 4 to Article 3.1(a) of the ASCM states that export contingency is satisfied when the 'granting of a subsidy… is in fact tied to actual or anticipated exportation or export earnings.' In *Canada - Aircraft*, the Appellate Body observed that, when attempting to prove *de facto* export contingency that there is no single legal document which will demonstrate, on its face, that a subsidy is contingent in fact upon export performance. Instead, the contingency must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy, none of which on its own is likely to be decisive in any given case.[41] Likewise, the panel in *Australia - Automotive Leather II* established that the language of footnote 4 of the ASCM required it to examine all the facts concerning the grant or maintenance of the challenged subsidy. The panel also held that the specific facts to be considered will vary on a case-by-case basis.[42] In other words, a common sense, holistic

[38] Ibid at [7.125]
[39] See Panel Report, US - Upland Cotton, WT/DS267/R (adopted 21 March 2005) at [7.1142]
[40] Appellate Body Report, Canada - Certain Measures Affecting the Automotive Industry, WT/DS139 & 142/AB/R (adopted 19 June 2000) at [100]
[41] Canada – Aircraft above n 39 at [167]
[42] Australia – Automotive Leather, WT/DS126/R (adopted 25 May 1999) at [7.90]

approach should be taken in the evaluation of the link between the benefit and the requirement of the firm to engage in export.

It would be necessary for a complainant to show that under the Eurozone's currency regime the granting of the subsidy is in fact tied to exportation; the subsidy is contingent, as one of several conditions, upon export performance. Yet, footnote 4 to ASCM Article 3 states that '[t]he mere fact that a subsidy is granted to enterprises that export shall not for that reason alone be considered to be an export subsidy with the meaning of this provision.' This could suggest that a currency regime with an undervalued exchange rate, by itself, is no more a prohibited export subsidy than any other aspects of a beneficial economic climate, such as favourable income tax rates.

In *United States – Tax Treatment for Foreign Sales Corporations (US-FSC)*, it was held that a subsidy may still be export contingent, even if it is available in some circumstances that do not involve exportation.[43] In other words, the benefit engendered by the euro's undervaluation as well as the readily available financing from the ECB could constitute a prohibited subsidy under WTO rules even if non-exporters benefit from the exchange rate. Accordingly, a panel might not view that export contingency can be derived from the actual words of the Eurozone's enabling legislation, in the sense of *de jure* export contingency, because such laws do not require that the euro be undervalued for the purpose of stimulating German exports, nor that capital be readily made available. Still, from the ruling in *US - FSC*, it would probably be more difficult for a panel to determine that, based on all of the facts, exportation is not one of several conditions in order to receive the currency subsidy.[44] If a WTO panel ascertains that the Eurozone constitutes a subsidy under ASCM Article 1 by establishing that there has been a 'financial contribution' and 'benefit', then it is likely that the panel will find that *de facto* export contingency, and therefore specificity, exists. This determination would obviate the complainant from demonstrating specificity, meaning the targeting of the benefit to an identifiable set of designated beneficiaries, which would be difficult in the context of the Eurozone and the advantages it accords to German manufacturers.

As noted earlier, the ASCM prevents certain subsidies outright, which it terms 'prohibited', and permits others unless an 'injury' can be proven – known as 'actionable' subsidies. Unlike prohibited subsidies, which are contingent on export, actionable subsidies are

[43] Panel Report, United States – Tax Treatment for Foreign Sales Corporations, WT/DS108 (adopted 20 March 2000)
[44] Caryl above n 20

identified through their adverse trade impact. A subsidy is actionable when it is specific,[45] as outlined above, and it is causes adverse effect[46] to another member in the form of 'injury' or a threat of an injury, 'nullification or impairment' of benefits accruing directly or indirectly; or 'serious prejudice' or a threat of serious prejudice to the interests of another member. In terms of remedies, where a WTO-illegal subsidy is found, the offending member is required to remove the subsidy immediately, with a slightly longer time frame in the case of an actionable subsidy than a prohibited one. If the offending WTO member fails to remove the subsidy, those countries which have been injured by it (with injury presumed in the case of export-contingent subsidies) are authorized to impose tariffs equivalent to the level of the subsidy to offset the harm suffered. The quantum of the subsidy is ascertained by reference to the benefit received by the relevant firm within the domestic economy of the subsidizing state.[47] In the case of the subsidization within the Eurozone, the countervailing duty would likely comprise tariffs on various German goods. Injury is determined by evaluating the volume of subsidized imports and their effect on prices in the domestic market for 'like' products, and the consequent impact of these imports on the domestic producers of such products.[48]

Demonstrating the likeness between two products is a cornerstone of WTO analysis, notably non-discrimination rules under the GATT. For the purposes of injuries caused by subsidies, the panels and Appellate Body have clarified that 'domestic industry' refers to the producers of 'like' products. In *United States-Lamb,*[49] both the panel and the Appellate Body recognized that the 'domestic industry consists only of producers that have output of like or directly competitive products.' This means that the determination of domestic industry must be made in respect of the products which have a 'like or directly competitive' relationship and not the processes which are used to produce the relevant goods, consistent with one of the National Treatment tests found in GATT Article III.

When assessing 'serious prejudice' under the ASCM, the complainant must establish that the subsidy displaces or impedes[50] imports of a 'like' product of another member into the market of the subsidizing member or exports of a 'like' product of another member from a third-country market. Alternatively, it can be shown that the subsidized product significantly

[45] ASCM, art 2
[46] ASCM, art 5
[47] ASCM, art 14
[48] ASCM, art 15.1
[49] Appellate Body Report, United States-Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia, WT/DS177/AB/R, WT/DS178/AB/R (adopted 16 May 2001)
[50] ASCM, art 6.3(a) and (b)

undercuts the price of a like product of another WTO member[51] or that there is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity as compared to the average share it had before the subsidization occurred.[52] It is important to recognize that the meaning of 'likeness' set out in the GATT departs from that which is outlined in Article 15.1 of the ASCM. Art 15.1 of the ASCM states: 'the term "like product" shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.' It is not clear how the variability of 'likeness' should be approached under the ASCM. The ASCM defines 'like product' as 'identical i.e. alike in all respects' and when the products are not alike in all respects, then the products are 'like' if they have 'characteristics closely resembling' each other. In *Indonesia-Autos,*[53] the panel defined 'characteristics closely resembling' as being quite narrow. It would seem as though the panel's decision here indicates that the meaning of 'like product' under the ASCM is broader than under the National Treatment obligation of Article III:2 of the GATT. This suggests that countervailing duties could be imposed on a wide range of Eurozone products.

To conclude the assessment of the applicability of the WTO subsidies disciplines to the advantages conferred by the euro's devaluation coupled with inexpensive financing, there are a number of challenges which this remedy would present. Chief among these are the difficulty in establishing that the advantages conferred by the Eurozone would satisfy the 'specificity' requirement. While the undervalued euro may benefit Germany exporters, it is an advantage conferred broadly across many firms rather than a specific enterprise or industry. Even if the subsidy is found to be specific, it may be difficult to prove its adverse effects in the form of establishing a causal link between the measure and 'injury' or 'serious prejudice' caused. This uneasy coverage of currency manipulation the by the ASCM may be one of the reasons for the absence of associated disputes at the WTO.

The matter could be rectified going forward by presenting more detailed rules in the subsidies provisions of FTAs concluded with the EU. Rather than attempting to manipulate the existing terminology used in the ASCM, an FTA could simply declare that currency

[51] ASCM, art 6.3(c)
[52] ASCM, art 6.3(d)
[53] Panel Report, Indonesia-Certain Measures Affecting the Automobile Industry, WT/DS54/R, WT/DS59/R (adopted 23 July 1998)

depreciations as well as financing arrangements resulting from inadequately capitalized currencies may be viewed as actionable subsidies, necessitating the demonstration of ensuing injury to foreign industry, as in the case of the current ASCM. Importantly, though, failure to adhere to international banking principles regarding risk, as captured by the Basel III regime, would represent a presumptive indication of subsidization, precluding the need to demonstrate benefit or specificity.

The second potential cause of action to be pursued through the WTO against the Eurozone, anti-dumping, will be explored next.

IV Dumping

The euro's artificial undervaluation arguably constitutes dumping because the price of EU-produced goods ends up being lower abroad as a consequence of exchange rates with the pound, the US dollar and other currencies which are valued accurately. The Eurozone's internal financing arrangements with low interest rates, providing buyer support within the Eurozone and therefore indirect support to Eurozone sellers. These sellers are able to sell their products at artificially low export prices to purchasers non-EU countries. Goods produced in certain Eurozone member states, especially Germany, are unnaturally cheaper on world markets than they should be.

It has been suggested that currency devaluation resembles dumping with respect to its impact on global trade because it grants price advantages to exporting firms.[54] Dumping and currency manipulation yield the same result, namely a lower exporting price which grants the exporting firms unfair advantages in international trade. On the other hand, the remedy of anti-dumping, as contained in multilateral WTO disciplines, is normally thought to have been designed to address firm-level rather than state-level activities. Commentators have likewise cautioned that dumping is a matter of firms' product pricing decisions, which are irrelevant to the macro-level governmental measures that lead to exchange rate misalignment.[55] However, as others point out, this narrow view of dumping is not supported by legal texts or practice. There is nothing in the GATT or the Anti-Dumping Agreement (ADA) which suggests that

[54] Yu, above n 18

[55] C D Zimmermann, 'Exchange Rate Misalignment and International Law' (2011) 105 American Journal of International Law 423 and RW Staiger & A O Sykes, '"Currency manipulation" and World Trade' 9 The World Trade Rev 583 (2010)

private firms are the only actors involved in dumping practice. Elements beyond the export firms' practices, such as monetary policy, can also contribute to such price discrimination. In the case of the Eurozone, an artificial currency low export prices coupled with access to cheaper capital from Eurozone banks fosters an environment in which dumping is possible.

Anti-dumping investigations conducted pursuant to WTO rules focus only on whether there is a lower export price, not how the lower price is achieved. They do not exclude circumstances where currency undervaluation or internal Eurozone arrangements are the cause of the lower price. Footnote 2 to paragraphs 2 and 3 of GATT Article VI, which deals with dumping, states that currency practices can in certain circumstances 'constitute a form of dumping by means of a partial depreciation of a country's currency.' The application of anti-dumping duties to underpriced Eurozone exports, for example, is arguably justifiable because the WTO's primary concern is not the existence of currency manipulation itself because this is not unlawful under WTO law. Rather it is the trade distortion caused by the lower export price and from the Eurozone's internal arrangements, notably low-cost financing, which facilitates it. The spirit of the ADA is consistent with such an understanding, which is not to categorically prohibit dumping but to allow the injured member to take actions against those causing or threatening material injury to its domestic industries.

Article VI of the GATT outlines that dumping occurs when products of one state are introduced into the commerce of another state at less than the normal value of the products. Much as with subsidies, this practice harmful to firms in the importing state because they cannot withstand the low-priced foreign competition and tend to lose market share. They may eventually disappear entirely, allowing the foreign firm to take hold of the market and sell at monopolistic prices. WTO Members may act against this practice through the imposition of duties against the relevant products if the dumping causes or threatens material injury to an established industry or materially retards the establishment of a domestic industry. Art 3 of the ADA, which enlarges the GATT, outlines that a determination of injury 'shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.' The anti-dumping duty must not be punitive, meaning that it must not exceed the dumping margin. This is the difference between the normal value and the export price of the product. Importantly under WTO anti-dumping rules, anti-dumping investigations by domestic authorities only focus on whether there is a lower export price rather than how the lower price is formed. They

do not exclude circumstances where currency devaluation is also a cause of the lower price. Therefore if an anti-dumping duty is imposed to offset the price advantage of the exporting firm, it may also offset the impact of currency devaluation.[56]

The complainant in a WTO dispute must establish that 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.[57] The evidence needed to demonstrate injury resulting from the dumping involves an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.[58] Likeness will be established following principles derived from Article III of the GATT, as discussed above in relation to subsidies. As a concept, 'likeness' is highly indeterminate, allowing for significant discretion by the national authorities which conduct investigations.[59] If a comparable price is not available, the investigating authority in the complaining state may use the highest comparable price of like products exporting to a third country as the substitution price, or it may construct the normal value through its own calculations according to the cost of producing and selling the product plus reasonable profits (the 'constructed value'). Each of these three methods arrive upon the normal value based on the price of like products in the exporting country.

If a suitable third country cannot be found by which to assess the normal value of the dumped product from the Eurozone, there is an alternative 'constructed' value method specified in Article 2.4 of the ADA for assessing dumping margins. In this method, the country conducting the dumping investigation hypothesizes what the normal price in the domestic market should be based on the cost of inputs as well as administrative expenses allowing for reasonable profits. However, this methodology can become complicated because it would involve an elaborate counterfactual hypothesis assessing how much the euro should truly be worth in Germany (and other beneficiary Eurozone states) in terms of what it could buy, which might be equated with the historic Deutschmark. It would also involve assessing the price of products without the Eurozone member-state-sponsored financing arrangements. Finally, it will be difficult to find the evidence for the true cost of inputs in the Eurozone. The constructed

[56] Yu above n 18 at 11
[57] ADA, art 2.1.
[58] ADA, art 3.1.
[59] S Lester, B Mercurio, A Davies, *World Trade Law: Text, Cases and Materials* (Hart, 2018) at 523

value method is very rarely used because of these complexities. It is associated with situations where there is a special relationship between the importer and the exporter, yielding uncertain pricing evidence. The method was used in *EU - Biodiesel* when the European Union imposed antidumping duties on various biodiesel products from Argentina. Constructed value was implemented to calculate the dumping margin based on the fact that the biodiesel market in Argentina was heavily regulated by the government. The investigation authority in the EU accordingly refused to refer the records kept by the Argentinean producers to ascertain the costs of soybeans, the main raw material. Instead, the complainant used an adjusted international price, asserting that the domestic price of soybeans was suppressed by Argentina's export tax system and therefore did not reflect the true value of raw materials.[60] Similarly, the constructed value method was also used against Russia by the Ukraine because the cost of energy inputs in Russian goods was artificially low because the price of energy was regulated.[61]

In addition to these conventional methods of calculating the dumping margin, there is also a special method, namely the 'surrogate price' method, outlined in Article 2.2 of the ADA. This may be used for exporting countries which have accepted to be treated as non-market economy in their accession protocols.[62] Where WTO members have made additional commitments regarding their market status, as in the case of China's Accession Protocol, the Appellate Body may authorize these as situations where the surrogate price can be directly applied without consideration of the exporting country's actual domestic prices because they are presumed to be non-market determined.[63] This circumstance is illustrated in the ad note to Article VI:1 of the GATT, which allows investigation authorities in complainant states to depart from the normal ways of assessing dumping margins if the export country has a substantially complete monopoly of its trade and where all domestic prices are fixed by the state,[64] a predicament which renders conventional price comparisons between domestic and foreign markets problematic. Differential treatment for non-market economies in anti-dumping investigations is justified because prices of goods in those countries are not determined by the normal market rules of supply and demand but are the result of government interventions, leading to distortions in which domestic prices do not reflect the real value of products.

[60] Appellate Body Report, European Union: Anti-Dumping Measures on Biodiesel from Argentina, WT/DS473/AB/R (adopted 6 October 2016) at [19]
[61] Appellate Body Report, Ukraine — Anti-Dumping Measures on Ammonium Nitrate, WT/DS493/AB/R (adopted 12 September 2019)
[62] See Appellate Body Report, EC-Fasteners (Article 21.5 China), WT/DS397/AB/R (adopted 21 February 2016)
[63] E.g. EU – Biodiesel above n 60; EC-Fasteners, ibid
[64] GATT ad note 2 to Article VI Paragraph 1

While typically associated with China, the surrogate price method may be appropriate for goods imported from the Eurozone because, at least with respect to its monetary policy and the undercapitalized euro, the Eurozone does not operate as a genuine market economy in that its currency lacks sovereign backing and is in a very real sense, illusory rather than a meaningful signifier of wealth or value. Unquestionably the EU would object to this classification because it is clear that the ECB views the Eurozone a market economy as evident in the ECB's constituting statute: 'The ESCB shall act in accordance with the principle of an open market economy with free competition, favouring an efficient allocation of resources, and in compliance with the principles set out in Article 119 of the Treaty on the Functioning of the European Union.'[65] Indeed, the market-oriented nature of the EU is arguably one of is self-defining characteristics.

Putting aside the suitability of the surrogate price method to the Eurozone, some more comments on the application of the method should be made. A standard method is to select a market-economy country which is in a similar developmental stage with the export country as the surrogate country. The complainant state would then use the price for like products in that country to construct the normal value. If there are no like products in the chosen surrogate country, the complaining member may evaluate the price of each input in producing the product in that country. Indeed, it seems as though there is not one specific method of surrogate pricing, rather it will be highly case dependant for each instance of alleged dumping. The surrogate price method has primarily been used by the US and the EU in claims brought against China. For example, in *US – AD/CVD (China)*, the United States commenced anti-dumping investigations on a wide range of products from China.[66] In the case of alleged currency manipulation indicating the operation of a non-market economy, the normal value of the product would be assessed by reference to what it is in a third country which is not a currency manipulator.

The surrogate price method for calculating dumping margins is arguably more appropriate to calculated dumping as practiced by Eurozone exporters because is no identifiable 'normal value' of product's domestic price because of the inherent nature of the euro itself. Although the euro is freely traded on global currency markets, since it is

[65] Article 2 Protocol (No 4) On the Statute of the European System of Central Banks and of the European Central Bank

[66] Panel Report, United States: Definitive Anti-Dumping and Countervailing Duties on Certain Products from China, WT/DS379/R (adopted 22 October 2010)

undercapitalized and illiquid in a manner that derogates from international banking principles, its face value is a contrivance resulting from the systemic and unimpeded issuance of debt from a central bank which lacks genuine sovereign support. It is not market-determined in the sense that the US dollar or pound sterling. As the consequence of this arrangement, the resulting effect on prices in Eurozone goods sold overseas is a negative, meaning advantageous one. Prior to setting prices in the foreign currency of its export destination, a German exporter will set its price for those goods in euros, with the price based on the total cost of the product including the cost of raw materials, manufacturing and administration along with the expected profit. The firm will then convert the price to US dollars or pounds sterling via the current exchange rate. The disconnected financial arrangements throughout the Eurozone 'intervenes' in such a way that the euro is devaluated, resulting in one pound sterling is worth more euros. The price of the export product in pounds sterling ends up lower than the price without the currency devaluation.

Under the domestic price method and the constructed value method of dumping calculation, there will always be a need to engage in currency conversion. This is because normal values are established based on the domestic prices or costs inside the Eurozone while the export price is in pounds sterling or some other foreign currency. Following the rules set out in the ADA, to ensure a fair comparison the normal values in euros will be converted to pounds sterling with the same exchange rate being applied on the date of sale.[67] The complaining authority will not take into consideration whether it views the exporting state's currency as devalued or accurate. The exchange rate used for conversion will be the same as the one actually adopted by the exporter (taking into account any devaluation) rather than what the complainant state believes is the fair value of that currency. Importantly, the component of the price decrease which was caused by the exchange rate misalignment will not be additionally counted in the dumping margin, nor will it ultimately feature in any anti-dumping duties imposed as a consequence. This omission highlights the advantage of using the surrogate price method in anti-dumping calculations. It can offset the decline in price caused by currency devaluation.[68]

In a surrogate price anti-dumping calculation, the complaining state will select a market economy which is in the same development stage as the Eurozone, or more specifically

[67] ADA, art 2.4.1

[68] G Hudson, P Bento de Faria and T Peyerl, 'The Legality of Exchange Rate Undervaluation under WTO Law' (2011) The Graduate Institute Centre for Trade and Economic Integration Working Paper CTEI-2001- 07 at 73

Germany as there is a discrepancy in economic, if not developmental, status across the Eurozone. The complainant country will use the price of like products or the price of the inputs in that country as normal values to arrive upon the surrogate price. The surrogate price will be converted to the currency of the complaining state (the importing state) and will not influenced by the devaluation of euro. Consequently, when compared with the price of a like good in the importing state, the dumping margin will appear larger. But crucially, it will take into account the exchange rate misalignment, eliminating the price advantage caused by the devaluation of the export currency, as well as any additional dumping with may be in place irrespective of the currency rate misalignment.

In *EU-Biodiesel*, the Appellate Body clarified that Article 2.2 of the ADA does not specify precisely what evidence an authority may use in constructing a surrogate price. This decision indicates that the investigating authority in the complainant state is not prohibited from relying on information other than that contained in the records kept by the exporter or producer, including both in-country and out-of-country evidence. But this should not be taken to mean that an investigating authority may simply substitute the costs from outside the country of origin for the cost of production in the country of origin.[69] Following this interpretation, Article 2.2 permits an investigating authority to take into account prices outside the country of origin of the relevant goods as information to determine the costs of production. However the investigating authority must still ascertain the normal value based on the costs in the country of origin rather than a third-country price, provided that the records kept by the production companies reasonably reflect the actual costs. This decision is important in that it discourages the use of market distortion as an excuse to construct normal value with surrogate country prices. [70]

The surrogate price method for assessing dumping margins is not without controversy. China formally requested the US to cease using the 'surrogate country' in calculating anti-dumping margins and has instigated two WTO disputes on this point.[71] Indeed, there is legitimate concern that surrogate price method has been abused in some circumstances. WTO panels and the Appellate Body have found various instances of this practice lacking in legal basis, as in the *EU – Biodiesel* case, or have excessively compensated for any distortions.

[69] EU – Biodiesel, above n 60 at 43
[70] Yu above n 18
[71] See WTO, 'China Files WTO Complaint Against US, EU Over Price Comparison Methodologies' (12 December 2016)

Clearly the surrogate price method in anti-dumping investigations entails the risk that the complainant will select third countries that are not at the same level of economic development as that of the country being investigated. This could be even more problematic in the case of the Eurozone where incorporates several different economies, each of which are at different levels of economic strength if not necessarily different levels of development.

Given the fact that currency manipulation by governments resembles the behaviour of non-market economies, it has been persuasively argued that the WTO disciplines on dumping should be amended through footnote to GATT Article VI:1 to allow applying the surrogate price method in the anti-dumping investigations against imports from countries which are identified as currency manipulators through cooperation with the IMF. Currency manipulation, it is claimed, should be regarded as deserving of special treatment like that of the non-market economy in the anti-dumping rules, allowing an investigation authority to use a third-country price as the normal value to determine the dumping margin. [72] The proposal effectively operates as an enforcement mechanism of Article IV of the IMF Articles of Agreement,[73] to be discussed further below. Some consultation with the IMF could help legitimize this process, as could the provision of more detailed guidance on how third countries are selected as pricing surrogates.[74]

While a modification of multilateral WTO disciplines to allow the surrogate price method to be used to calculate dumping margins where there has been currency manipulation would be difficult to imagine, it is conceivable that such a provision could be included bilateral FTAs. Indeed there is a strong argument to be made that future FTAs with the EU should specify that normal prices of goods will be ascertained by reference to prices in countries which operate normal, meaning properly sovereign-backed currencies.

The next section will consider the potential to use the breach of IMF rules relating to currency exchange and balance of payments as a way of addressing the trade imbalance ensuing as a consequence of the distortive framework of the Eurozone.

V IMF Rules - Exchange Rates, Balance of Payments

[72] Yu above n 18
[73] Ibid at 20
[74] Ibid generally

In addition to possible breaches of WTO disciplines on subsidies and dumping, there are two facets of IMF rules which appear to be violated by the Eurozone system and which could yield remedial recourse for disaffected countries. The Eurozone framework, including the undervalued euro, could breach Germany's obligations under Article IV(1)(iii) of the IMF's Articles of Agreement which prohibits IMF members from manipulating their currency for the purposes of gaining an unfair advantage in trade. In this regard, the IMF 2007 Decision on Bilateral Surveillance over Members' Policies specifies that the purpose of gaining 'unfair competitive advantage' is to 'increase net exports.'[75]

Unfortunately, the practical consequences of breaching of IMF rules, including those on currency manipulation, are limited. IMF members can have their voting rights suspended or, in extreme cases, they can be expelled from the IMF. However, any such step is normally taken due to persistent non-payment of IMF loans rather than the maintenance of an artificial currency for the purposes of gaining the upper hand in trade. This is why it is often thought that it is through collaboration with the IMF that the WTO is best able to discipline currency manipulation. This is especially because it can be difficult to establish the link between subsidization, meaning the intentional undervaluation of currency, and ensuing trade distortions,[76] as noted earlier.

The IMF's surveillance activities often contain trade policy issues. Ways to reduce barriers to trade often feature in its policy advice and its loan conditionality. IMF surveillance reports regularly provide vital contributions for the WTO's own Trade Policy Reviews, which evaluate its member countries' trade policies. While IMF engages in surveillance, it cannot compel a country to change its exchange rate. It also cannot order commercial foreign exchange dealers to change the prices at which they trade currencies. The IMF does offer economic advice and discuss how modifications in its member countries' exchange rates could be advantageous. The IMF is also forum where members can urge each other to modify their exchange rate procedures. The WTO and IMF agreed in 1996 that they would communicate with each other about matters of mutual interest. WTO dispute settlement panels are specifically excluded from this agreement to communicate, however the agreement states that the IMF shall inform the WTO, including its dispute settlement panels, when the WTO is

[75] IMF, 'Bilateral Surveillance over Members' Policies' (adopted 15 June 2007) Executive Board Decision 13919-(07/51), Annex Article IV, Section 1(iii) and Principle A at [2(b)]

[76] See e.g. H Jung, 'Tackling Currency Manipulation with International Law: Why and How Currency Manipulation Should Be Adjudicated' 9 Manchester Journal of International Economic Law' 184 (2012)

considering exchange measures within the IMF's jurisdiction in order to determine whether such measures are consistent with the Articles of Agreement of the IMF. The IMF further agreed that it would inform the WTO about any decisions it had made approving any restrictions a country might impose on international payments, discriminatory currency practices, or other measures aimed at preventing a large or sustained outflow of capital.

Article XV of the GATT requires all WTO members to co-operate with the IMF with regard regards to currency exchange and valuation issues. This obligation is also a rather tenuous obligation in terms of its practical legal consequences. The GATT, like all WTO rules, is enforceable through the WTO's Dispute Settlement System, mandating the removal of the illegal measure, in this case the artificial currency. In this regard it must be noted that GATT Article XXIII states as follows:

> 1. If any contracting party should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of (a) the failure of another contracting party to carry out its obligations under this Agreement, or (b) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or (c) the existence of any other situation,

'Any other situation' has the potential to encompass unfair monetary policies, such as those which result in currency devaluation or inexpensive credit. Likewise, GATT Article IV indicates that countries should seek, in their foreign exchange and monetary policies, to promote orderly economic growth and financial stability and they should avoid manipulation of exchange rates or the international monetary system to prevent effective balance of payments adjustment or to gain unfair competitive advantage over other members. Some countries assert that their exchange rate policies are not in violation of Article IV because they are not seeking to gain competitive advantage, even though this may be the result, but rather to stabilize the value of their currency in order to prevent disruption to their domestic economic system. Regarding the obligation to cooperate with the IMF on currency exchange rates outlined in Article XV of the GATT, were such a violation to be found, this could permit the suspension of equivalent negotiated trade concessions (tariff reductions) if the illegal measure is not removed in a timely fashion, or retaliatory tariffs.

As with subsidies and dumping, it would be difficult to calibrate the extent of the lawful retaliation as a response to the EU's non-cooperation with the IMF on currency exchange matters through the euro. It is therefore unsurprising that there have been no cases in which

remedies have been authorized by the WTO based on a breach of this provision of the GATT. Still, this does not mean that such a claim would be impossible. In fact, the significant trade distortions arising from the Eurozone system could be an appropriate situation to call for use of Article XV, perhaps in conjunction with the ASCM or the ADA. Commentators have suggested that Article XV may be violated indirectly where the intent of another provision of WTO is breached, such as for example the dumping or subsidies disciplines.[77] In this way the duty of cooperation with the IMF may bolster the arguments in favour of the Eurozone regime as constituting dumping or an illegal subsidy, even if Article XV itself may not be violated.

Finally, the financial risks inherent in the Eurozone may further be characterized as a balance-of-payment problem. Without the freedom to adjust nominal exchange rates between Eurozone member states, inflation in Germany and deflation elsewhere in the Eurozone is required to balance the Eurozone economy by changing the real exchange rates between member states. Several Eurozone member states, such as Spain and Italy, maintain significant current account deficits. Such states, which are members of the IMF in their own right, are at permanent risk of defaulting on their borrowings, unable to raise capital as if they were sovereign. In order to maintain balance of payments equilibrium across the Eurozone, as required by the IMF under Article IV(1)(iii), Germany engages in a capital account transfer to the indebted nations on a regular and ongoing basis as occurs in unitary and fully federal states, like the US. Greece, Italy and several other Eurozone countries, have a balance of payments disequilibrium, relying on Germany to provide the liquidity necessary to support their public expenditures. The Eurozone is consequently at constant risk of a significant internal balance of payment crisis because of its fixed nominal exchange rates, arguably another transgression of IMF rules.

Such breach is relevant because it supports the inclusion of material in a bilateral FTA to curtail these kinds of monetary practices, possibly attracting sanction in the form of increased duties on exported goods where injury is demonstrated. This would be directly actionable under the FTA's dispute settlement procedure, giving some force to IMF obligations which have heretofore been largely advisory.

VI Conclusion

[77] See e.g. J Trachtman, comment on International Economic Law and Policy Blog (20 April 2010)

This article drew attention to the unfair trade advantages conferred by the Eurozone system which, due to the illiquid nature of the euro currency which lacks genuine sovereign backing, has resulted in an undervalued currency as well as the ready availability of capital in a manner that does not exist in countries using genuine currencies and which transgresses international norms on banking established by the Basel Committee. German manufactures in particular are granted a considerable edge over their foreign competitors because of this situation, an imbalance which has not gone unnoticed by international commentators. The article argued that WTO disciplines on subsidies and dumping may afford a plausible remedy for disaffected foreign states. Both come with difficulties, notably in relation to the demonstration of specificity in the context of subsidies and the establishment of normal value in the case of dumping. The Eurozone's monetary policy quite likely violates the principles of the IMF, with limited latitude to bring a claim on this basis through various provisions of the GATT. While legal challenges to the Eurozone through WTO law could prove successful, trade-oriented complaints grounded in benefits associated with the euro's framework would carry much greater weight were specific provisions included in FTAs concluded bilaterally with the EU. Such provisions would clarify that artificial devaluation of currencies in violation of international banking rules are presumptively indicative of subsidization. They would also assure the availability of the surrogate price method for calculating dumping in countries which actively in currency misalignment. Finally, they would also render breaches of IMF obligations, including exchange rate stability and balance of payments, directly actionable under the FTA.

In this regard it is useful to consider Chapter 33 of the new United States Mexico Canada Agreement (USMCA), a regional preferential trade agreement which affirms the parties' commitments to IMF obligations relating to currency stability but, importantly, further requires parties to make monthly disclosures regarding exchange rates and balance of payments data. This chapter also mandates the establishment of a committee that meets annually to review exchange rate issues between the parties. Commentators have already observed that the inclusion of this chapter sets an important precedent in the treatment of currency manipulation as a component of trade in bilateral trade agreements. These provisions should be expected in future US FTAs, although resistance is expected from future trading partners because of the

perception that the control of currency manipulation could encroach on state's economic sovereignty.[78]

In an FTA with the EU commitments such as that of Chapter 33 of the USCMA would effectively place the EU on notice that trading partners take the trade effects of the Eurozone's currency manipulation seriously. In the context of an EU FTA, a currency committee could operate as a forum through which pressure is placed on the Eurozone either to reform the euro's monetary system by fully backing the currency, or, if coupled with provisions on subsidies and dumping outlined above, to be prepared to make continuing compensatory payments to redress the unfair imbalances it currently creates in the form of countervailing or anti-dumping duties. The standardization of such commitments in FTAs could ultimately work in the EU's favour by protecting EU exporters against unfair currency practices of other states, such as China. It could also help bring about badly needed resolution to the euro's grave debt crisis.

[78] S Segal, 'USMCA Currency Provisions Set a New Precedent' Center for Strategic and International Studies (5 October 2018) (accessed May 2020)