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CURRENCY MANIPULATION: THE TALE OF MISSED JURISDICTION AND NO REGULATION

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I. INTRODUCTION

In today's world, rich in technological advancements and new ways of thinking, the global market has never been as navigable or easily accessible.[1] Commercial and technological developments allow for goods, services, and payments to be transferred from one nation to another faster than ever.[2] This has benefitted the global trade market and the international players within, as the modernization of the trade market has allowed nations who never had the opportunity to trade goods efficiently the chance to do so.[3] The opportunity to transfer payment over the internet, the flight of goods and services across the world, as well as other advances in technology have opened channels of international trade that had not been available to some countries as recently as even twenty years ago.[4]

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[1] WORLD TRADE ORG., *World Trade Report 2018*, https://www.wto.org/english/res_e/publications_e/world_trade_report18_e.pdf (last visited Nov. 8, 2021).

[2] *See id.*

[3] *Id.* at 16.

[4] *See id.*

Trade between nations has never been more prevalent nor more innovative than it is right now.[5] Prior to the inception of modern nations, the most efficient form of transportation was by sea or major roads that connected the various trading partners. This form of trade took significantly longer to distribute goods and receive payment. However, present day banking institutions and technological advances allow money and goods to be exchanged in mere minutes.[6] This is a great feat for humankind, as efficiency has prevailed; however, there are drawbacks to this fast-moving trade platform as well. Even though technology can transport goods quicker and deliver commerce within seconds, it can also move fraudulent goods and commerce within seconds.[7] To monitor these fraudulent conveyances and misdeeds, the global market had to be monitored to protect people and countries from being negatively impacted.[8]

In 1944, amid the fighting of World War II, the United States held an economic conference and invited forty-three other nations to Bretton Woods, New Hampshire.[9] The purpose of this conference—now known as the Bretton Woods Conference—was to set forth a strategic path to achieve global market equilibrium by setting grounds for oversight.[10] The goal was to lay out a plan to create a uniform set of guidelines to best effectuate efficiency.[11] This plan would eventually form the World Trade Organization ("WTO"), the World Bank, and

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5 Daniel F. Spulber, *Innovation and International Trade in Technology*, 138 J. ECON. THEORY 1, 1 (2008).

6 *See* Tom Groenfeldt, *Payments are Moving to Real-Time Around the World, the U.S. Plays Catch-Up*, FORBES MAGAZINE (Oct. 10, 2018 12:39 PM), https://www.forbes.com/sites/tomgroenfeldt/2018/10/10/payments-are-moving-to-real-time-around-the-world-the-u-s-plays-catch-up/?sh=570e57cf3a33.

7 *See* Tom Groenfeldt, *Will Faster Payments Lead to Faster Fraud*, FORBES MAGAZINE (Feb. 4, 2020 12:27 PM), https://www.forbes.com/sites/tomgroenfeldt/2020/02/04/will-faster-payments-lead-to-faster-fraud/?sh=7dd335e3948a.

8 *Id.*

9 RICHARD PEET, UNHOLY TRINITY: THE IMF, WORLD BANK AND WTO at vii (Zed Books, 2d ed. 2009).

10 *Id.*

11 *Id.*

the International Monetary Fund ("IMF") (collectively, "Global Agencies").[12]

The vision was to have these organizations monitoring the international trade platform and resulting currency exchanges, thereby protecting the market and the members themselves from potential unfair trade practices.[13] The Global Agencies were originally created to help regulate markets and trade channels by limiting governmental intervention to promote free markets.[14] A country's government may be susceptible to unfair trade practices to promote their own self-interest, which would come at the detriment of the global economy. Many foreign leaders and governments have been accused by other countries of trying to defraud trade partners through discriminatory price tactics, currency manipulation, or other market-inhibiting acts.[15] Although the Global Agencies have done relatively well at ending other illicit acts, currency manipulation has not been tracked or enforced and has consequently slipped past the watchful eye of these organizations.[16] In the current global economy, numerous countries have allegedly

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12 *Id.*

13 *Id.* at 32 ("[T]he Bretton Woods institutions, the international financial institutions (IFIs) designed to regulate international economic relations in such a way that the world would never again suffer the threat of total disruption.").

14 *See* Daniel C.K. Chow, *Can the United States Impose Trade Sanctions on Chain for Currency Manipulation?*, 16 WASH. U. GLOB. STUD. L. REV. 295, 312 (2017) ("A basic goal of the WTO is to promote free trade and to discourage or eliminate government intervention into the market because this creates a distortion that undermines free trade.").

15 *See* Ursala Scollo, *Peru imposes anti-dumping tariffs on biodiesel imports from Argentina*, REUTERS, (Oct. 26, 2016 3:31 PM), https://www.reuters.com/article/us-peru-biodiesel-argentina/peru-imposes-anti-dumping-tariffs-on-biodiesel-imports-from-argentina-idUSKCN12Q2OD; s*ee also* Josh Zumbrun, *U.S. Finds Vietnam Manipulated Currency*, WALL. ST. J., (Aug. 25, 2020 4:26 PM), https://www.wsj.com/articles/u-s-finds-vietnam-manipulated-currency-11598380399; Ben Dooley & Choe Sang-Hun, *Japan Imposes Broad New Trade Restrictions on South Korea*, N.Y. TIMES, (Aug. 1, 2019), https://www.nytimes.com/2019/08/01/business/japan-south-korea-trade.html ("South Korea's president, Moon Jae-in, condemned the move, which he said was aimed at sabotaging South Korea's economy as it struggles with slowing growth.").

16 Jonathan E. Sanford, *Currency Manipulation: The IMF and WTO* http://congressionalresearch.com/RS22658/document.php?study=Currency+Manipulation+The+IMF+and+WTO (last visited Nov. 4, 2021).

manipulated or purposely devalued their own currency. Despite such accusations, these regulating agencies have done little to curb such behavior.[17] To fend for themselves, politicians—including former U.S. presidents Donald Trump and Barack Obama—have considered self-created sanctions against countries believed to have manipulated their currency.[18] However, the United States is not responsible for overseeing the global trade market or investigating currency manipulation on a global level—that is the job of the international regulators.[19]

This article will provide a comparative study of the evergreen issue of currency manipulation within our global trade market. Section II will address the history and background of currency manipulation, the ongoing issues that have arisen, and some of the countries that have taken part in this illicit economic act. This section will demonstrate the shift in participating nations from the initial manipulative countries which shaped the market to those who have become more prominent players in market manipulation today. Section II will then further discuss the history of the international regulatory organizations that purport to monitor and oversee this type of economic malfeasance: the International Monetary Fund and the World Trade Organization.[20] This section will describe the history of each organization, the articles of membership of each, and pinpoint the specific section in which currency manipulation was deemed illegal. It will also explore the shortcomings of each organization in terms of actual oversight and briefly discuss how the U.S. Treasury Department (hereinafter, "U.S. Treasury" or "Treasury") has supplanted the aforementioned organizations and taken a larger role in preventing currency manipulation through its preparation and analysis. Finally,

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17 Vera Thorstensen, *The 'Missing Link' between the WTO and the IMF*, 16 J. INT'L ECON. LAW 353, 377 (2013) ("Criticisms of both the IMF and the WTO handling of the situation are growing between countries suffering the consequences of what has come to be recognized as a 'currency war'.").

18 *See* Chow, *supra* note 14, at 301.

19 *See* Joseph E. Gagnon, *Combating Widespread Currency Manipulation*, PETERSON INST. FOR INT'L ECONS., https://www.piie.com/sites/default/files/publications/pb/pb12-19.pdf (last visited Nov. 4, 2021).

20 The World Bank does not regulate these types of transactions.

Section III will analyze which international entity—the International Monetary Fund or World Trade Organization—is best suited to be the chief monitoring organization and oversee the currency manipulation problem at issue. The true underlying issue of the global economic market is: if this problem is so widespread and so many countries have been accused of manipulating their own currencies, why have the IMF and the WTO not taken corrective actions to stop these manipulative practices? Neither entity has given a definitive answer on this, but it is important to keep that in mind when reading the rest of this paper.

Through this paper, I make the novel argument that the IMF is better equipped to police this issue. I do this by asking three specific questions: (1) which organization, as it stands right now, is the most equipped to police this issue of currency manipulation?; (2) what does that organization need to do to better itself in order to more adequately protect its member nations from the evils of currency manipulation for trade advantage?; and (3) what remedy would be most appropriate for the injured member nation and what punishment would be best to deter future countries from manipulating its currency in the future, thus throwing the global market out of equilibrium?

II. BACKGROUND

Imagine a world where a country can purposely deflate the value of its currency to gain a competitive edge. Now imagine that this world also had two major global agencies that could act against this type of egregious trade act, yet neither does. It sounds more like a dystopian movie or television show plot with conspiracies and shadow governments, but the truth is, this is the world we live in currently.

As the international community becomes more cohesive and technological, it allows for more nations to engage in the extensive global trade market.[21] Countries can be involved in this market in a variety of ways, most commonly, the importation or exportation of

[21] *See* Nadia E. Nedzel, *Antidumping and Cotton Subsidies: A Market-Based Defense of Unfair Trade Remedies*, 28 NW. J. INT'L L. & BUS. 215, 272 (2008).

goods, services and resources.[22] Importation is defined as the act of receiving goods into a country from a foreign country.[23] Exportation is defined as the act of sending goods created in a country to another nation.[24] In simple terms, the country that is receiving the goods of another, is the importer, while the country that is sending the goods is the exporter. At a macro level, this is how the global economy works. One country pays for the goods, services, or resources of another, and in return for the monetary value, the exporter gives the importer the goods that were bargained for.

One may ask why countries would want to trade with one another, and how does that work on a global scale? Countries ally themselves with trade partners that have resources or manufacturing capabilities they do not have.[25] Take for example, the beneficial trade partnership between Ethiopia and China. Ethiopia has a large export business of coffee, as they have the natural resources to provide coffee beans to the rest of the world.[26] China imports Ethiopia's coffee beans and in return, provides Ethiopia with machinery and aircraft materials because those are manufactured goods that China can produce cheaper or with better quality than the rest of the world.[27] Trade partners are extremely important in the global marketplace as they allow countries that have a competitive advantage on bountiful resources to acquire other assets from a trade partner that is rich in other assets.[28]

These trade partners can exchange goods and services for other goods and services, not just currency, known as a "payment in

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22 *See* Reem Heakal, *What Is International Trade?*, INVESTOPEDIA (Feb. 18, 2021), https://www.investopedia.com/insights/what-is-international-trade/.

23 *Importation*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The bringing of goods into a country from a foreign country.").

24 *Exportation*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The act of sending or carrying goods and merchandise from one country to another.").

25 *See* Brad McDonald, *Back to Basics: Why Countries Trade,* INT'L MONETARY FUND (Dec. 2009), https://www.imf.org/external/pubs/ft/fandd/2009/12/pdf/basics.pdf.

26 *Ethiopia (excludes Eritrea) Trade Summary 2018,* WORLD BANK, https://wits.worldbank.org/CountryProfile/en/Country/ETH/Year/LTST/Summary (last visited Nov. 5, 2021).

27 *Id.*

28 *See* McDonald, *supra* note 25.

kind," or "barter exchange" by the IRS.[29] However, in most trading situations, the exports and imports are unlikely to have equivalent exchange values, so the difference would have to be paid for with cash. For instance, in the Ethiopia and China example, because an aircraft is significantly more costly than the average cost for coffee beans, Ethiopia would need to pay China the cash equivalent for its product in addition to the exported value of its coffee beans. This system allows a nation to accept goods and cash for another country's good or service.[30]

When nations decide to trade with one another they can choose to do so for an economic benefit or because the importing nation does not have access to the resource at hand. If the countries are trading for economic benefit, they must consider the exchange rate, shipping and transportation fees, and governmental pressures.[31] However, the economic benefit derived versus benefit from a comparative substitute is a country's most important consideration.[32] If Country A will provide a good that Country B needs, and Country A is the only country that provides this good or service, then Country B will trade with Country A regardless of price. However, when Country C supplies a relatively similar substitute or starts to manufacture the a less expensive or better quality product, the global trade market can become extremely competitive from the "threat of substitute."[33] These various threats may cause countries to feel the

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[29] *See Topic No. 420 Bartering Income,* INTERNAL REVENUE SERV., https://www.irs.gov/taxtopics/tc420 (last visited Nov. 5, 2021) ("A barter exchange is an organization whose members contract with each other (or with the barter exchange) to exchange property or services.").

[30] *See* Sang Man Kim, *The Fraud Exception in a Documentary Credit (or Letter of Credit) Under Korean Law*, 136 BANKING LAW J. 10 (2019) (showing through the use of tables from South Korea's trade association data that cash is the primary use of payment methods for importation and exportation of goods).

[31] *See* Michael E. Porter, *How Competitive Forces Shape Strategy*, HARV. BUS. REV. (March 1979), https://hbr.org/1979/03/how-competitive-forces-shape-strategy.

[32] *See id.*

[33] Michael Porter, a famous economist, theorized that in order to analyze competition within a market, one must look at five "forces" to fully analyze the market. The five forces that Porter mentions is: bargaining power of suppliers, bargaining power of buyers, industry rivalries, threat of new entrants and the threat

need to manipulate their currency to gain a competitive advantage over the rest of the market.

Although paying with cash—or on margin, to be paid later with cash—is the preferred method of payment, countries can exploit this bartering system by manipulating the currency used in the transaction. By devaluing their own currency with complex trading structures in the foreign exchange market, countries can gain an unfair competitive advantage. This notion of currency manipulation is an ageless, hot button issue that will continue to occur unless these international agencies formulate and enforce a comprehensive set of policing guidelines.[34]

Janet Yellen, the former United States Federal Reserve Chair under President Barack Obama said:

> Currency manipulation is not something I think is easy to define. The best definition I would offer, and I think this is the definition generally agreed by the G7, is that it's policies, particularly direct intervention in foreign exchange markets, that's [sic] deliberately intended to alter currency values to affect a country's competitive position and its trade flows.[35]

Yellen's discussion of this global economic problem admits that there is no clear and concise definition of currency manipulation,[36] attaching a sense of uncertainty to the global market.[37] Manipulation is a global crisis that has been formulating for nearly a century across the globe. When most individuals, experts, and reporters discuss

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of substitutes. The threat of substitutes is part of "horizontal competition" and analyzes the ease of using another product or good that is similar. In a global context, the issue becomes substituting one nation's product for another's due to factors that the buyer must determine. The threat of substitute is always prevalent and a reason why countries try to differentiate their product from others. *See id.*

[34] *See* Sanford, *supra* note 16.

[35] Dollar & Sense Podcast, *Janet Yellen on Monetary Policy, Currencies, and Manipulation,* BROOKINGS (Feb. 19, 2019), https://www.brookings.edu/podcast-episode/janet-yellen-on-monetary-policy-currencies-and-manipulation/.

[36] *Id.*

[37] *See* Sanford, *supra* note 16.

manipulation, most of the discussion focuses on developing or developed Asian economies like China, Japan, and South Korea.[38] These Asian markets are frequently targeted and accused of manipulating their currencies. However, just because these nations bear the brunt of the accusations does not mean they are alone in this trade malpractice.[39]

A. The Intersection of Global Trade and Currency Manipulation

Trade between two trade partners with the same currency constitutes a "simple transaction"; the monetary value requested is exchanged for the desired goods or services and both partners walk away from the deal on equal footing. But, when two trade partners enter into a bargain for a good or service in different currencies, they must agree to terms in one or the other currency. Although the seller's currency is usually the agreed upon purchasing currency, that could change based on its purchasing power.[40] For a country to import goods, it must sell off—or exchange—its currency and buy the currency of the other trade partner in a process known as foreign—or international—exchange.[41]

Many facets of the international economic sector affect foreign exchange rates, including—but not limited to— interest rates, differing monetary policy, and inflation.[42] While these items all affect exchange rates on a macroeconomic level, in reality, a country's government can also affect exchange rates. When a country chooses this path of

[38] *See* William Mauldin, et. al., *U.S. Designates China as Currency Manipulator*, WALL ST. J. (Aug. 5, 2019 10:47 PM), https://www.wsj.com/articles/chinas-currency-weakening-escalates-trade-war-11565027431; Peter T. Kilborn, *Taiwan and Korea are Said to Impede U.S. Trade Effort*, N.Y. TIMES (Oct. 25, 1988), https://www.nytimes.com/1988/10/25/business/taiwan-and-korea-are-said-to-impede-us-trade-effort.html.

[39] *See* Gagnon, *supra* note 19.

[40] *Purchasing Power*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The amount that a unit of money can buy.").

[41] *Foreign Exchange*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The activity of making international monetary transactions; esp., the conversion of one currency to that of a different country.").

[42] *See* Eric A. Posner & Alan O. Sykes, *International Law and the Limits of Macroeconomic Cooperation*, 86 S. CAL. L. REV. 1025, 1047 (2013).

malfeasance, it sells off its own currency and thus devalues it on the foreign exchange market.[43] Consequently, the manipulator gains more value for the products than they would have if the currency were at par value. A country can do this for many reasons, among them, to gain an unfair trade advantage over trade partners by lowering the value of its currency.

Conversely, when a government then buys the trade partner's currency, its value increases and thus creates an artificial spread between the currencies not present at the start of the transaction.[44] This creates a basic supply and demand problem within the Foreign Exchange market.[45] The demand for the manipulated currency will diminish but the supply will be greater, lowering the value of the manipulated currency and inflating the value of the foreign currencies.[46] In theory, all observers of the market should be able to see how this manipulation can be dangerous to an economy and promotes unfair trade practice. Typically, when people think of currency manipulators, China seems to be the main country that comes to mind, when in reality, many countries have committed this unfair

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43 Selling currency off into the market creates more supply than demand for that specific currency. As supply increases and demand decreases, the price of the currency will decrease. Thus a country who sells off its currency will create more supply in the market, and as a result will yield a lower price for its currency.

44 In this context, a spread refers to the difference in value between the two currencies in question. When a country manipulates the currency, the spread is no longer based on economic theory of supply and demand, but instead, artificially altered based on manipulation.

45 Supply and demand on the Foreign Exchange market—where currencies are bought and sold—works the same as the stock market, or any marketplace that sells goods or services. As the supply of these currencies increase—that is, the number of available currency "contracts" that are available for buyers to invest in—the lower the price will be. However, the more that demand increases and the supply decreases, the price will increase. This standard supply and demand notion is consistent in essentially every market, including the Foreign Exchange market.

46 This follows the basic law of supply and demand in economics, the higher the demand of a commodity the higher the price will be. Conversely, the higher the supply and lower demand, the lower the price will be.

trade practice.[47] Currency manipulation occurs throughout the world for different reasons—not all being malicious in nature.[48]

The most common manipulated currencies are the United States Dollar and the European Union's Euro.[49] These two economic safe havens are usually the victims of currency manipulation because of their economies' success and vast trading networks.[50] However, very little has been done by the international regulatory agencies to curb this behavior.[51]

B. History of Currency Manipulation

Currencies—or their ancient equivalencies—have been traded and valued since the days of ancient, biblical times.[52] The true

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47 Laurence Howard, *Chinese Currency Manipulation: Are There Any Solutions*, 27 EMORY INT'L L. REV. 1215, 1223 (2013); *see also* Gagnon, *supra* note 19 (listing not only China, but Japan, Switzerland, Israel, Taiwan, Singapore, the OPEC countries, and a few other Asian Developing countries).

48 Some countries manipulate their currency short-term in order to give their economy a quick stimulant, in hopes of the economy stabilizing. *See Currency Devaluation and Revaluation*, N.Y. FED. RESERVE (Sep. 2011), https://www.newyorkfed.org/aboutthefed/fedpoint/fed38.html.

49 *See* Gagnon, *supra* note 19.

50 Jonathan Watson, *What Makes A Safe Haven Currency*, FOREIGNCURRENCYDIRECT (Apr. 23, 2020), https://feedreader.com/observe/currencies.co.uk/blog%2Fwhat-makes-a-safe-haven-currency%2F%3F+itemId=8739638982 ("A safe haven currency is a currency which is deemed a safer place to invest in and hold funds, relative to other riskier investments. In times of economic uncertainty, it's typical to see safe haven currencies rise in value, as investors move towards these to reduce the risk of losing money."). *See also International Comparison: GDP 1990-2019* WORLD BANK, https://data.worldbank.org/indicator/NY.GDP.MKTP.PP.KD?locations=US-CN-EU (last visited Nov. 8, 2021) (During the span of 1990-2017, US and EU were the two largest economies. Recently, China has surpassed them to have the largest economy in the world.)

51 *See* Sanford, *supra* note 16.

52 CHARLES GARDANO & CHARLES R. GEISST, ENCYCLOPEDIA ON AMERICAN BUSINESS HISTORY 169 (2014). Prior to true currencies coming to form to represent economic interests, individual barters were identified to represent a certain value within certain forums. Similar to countries in today's economy, each country—and sometimes even county—valued different items at different values

beginning of foreign exchange trading is believed to have started in 1880, when the gold standard was implemented across the global economy.[53] Under this standard, each currency was valued by its backing in gold. This was the beginning of what would become the Foreign Exchange market. Although the valuing and trading—sometimes even bartering—of other commodities occurred throughout history, the most vital alterations and advances in the currency market occurred post World War II when the United States Dollar became the major currency of the system.[54] The dollar's value—and subsequently gold's value—then became the standard of valuation.[55]

After the Bretton Woods Conference of 1944, the market became saturated with trading platforms, which made currency trading easier. During this time, technological advances—including the telephone and additions to the telegraph—allowed easier trading of all financial instruments, including currencies.[56] The advancement in technology caused increased volume and made trading significantly faster on an international scale.[57] Global technological advancement also caused some speculation as to whether some currencies were being valued outside the 1% par value cushion that the Bretton Woods agreement laid out.[58] The most notable currencies that exceeded par

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and that is reflected in today's currency market. It is reflected in the difference in value based on geographic area and time period, amongst other economic factors.

53 The Gold Standard, adopted in the late 1800s, is likely the first global valuation agreement adopted worldwide. This standard based all forms of international currency off of the value of gold, instead of the valuing each currency off of one another like it is today—in almost all circumstances. Niall Ferguson, The Ascent of Money 57 (2008).

54 *See* GARDANO & GEISST, *supra* note 52, at 169 (highlighting the Bretton Woods Conference of 1944).

55 *Id.*

56 *See* Alexander J. Field, *The Telegraphic Transmission of Financial Asset Prices and Orders to Trade: Implications for Economic Growth, Trading Volume, and Securities Market Regulation*, 18 RSCH. ECON. HIST. 145, 152-53 (1998).

57 *See id.*

58 *See* Robert E. Scott, *Currency Manipulation—History Shows That Sanctions Are Needed*, ECON. POLICY INST. (Apr. 29, 2010), https://www.epi.org/publication/pm164/. The Bretton Woods agreement states that each member nation would have to create a par value for each currency, however, if the par value exchange rates get over 1% of the original agreed upon

valuation were the Euro and the Japanese Yen in the 1960s when the European Union and Japan started to competitively devalue their respective currencies to the United States' frustration.[59] By 1971, the Nixon Administration had enough of these economic misdeeds and shut down the gold standard program that had been agreed to at the Bretton Woods Conference. Thus, the original agreement containing the rigid 1% par value cushion was eliminated in favor for a more flexible exchange rate option.[60] After this act by the U.S. government, the International Monetary Fund investigated this type of trade practice and started amending some of its bylaws to protect its members from these unfair trade practices.[61]

Since the mid-1970's, many countries have been accused of manipulating their own currency. The list of countries that the United States has suspected of manipulating currencies since the year 2000 includes not only countries from Asia, but also Switzerland, Saudi Arabia, Turkey, and Germany.[62]

C. The IMF, WTO, and U.S. Treasury Department

Throughout the course of global trade history, two main agencies have regulated the exchange of goods and the currencies used to trade between countries: the International Monetary Fund and the World Trade Organization. Both organizations were formed post World War II, each with its own distinct history and purpose.

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value it could cause fundamental disequilibrium. The IMF would then be able to involve themselves to correct the infraction, and could go as far as withdrawing membership to that country if needed.

59 *Id.*

60 *Id.*

61 *See* Sanford, *supra* note 16.

62 Brad W. Setser & Dylan Yalbir, *Tracking Currency Manipulation*, COUNCIL ON FOREIGN RELATIONS (Oct. 7, 2020 8:00 AM), https://www.cfr.org/article/tracking-currency-manipulation.

1. Bretton Woods Conference

During World War II, the global economy was in disarray.[63] The world's superpowers were spending heavily on war supplies, but after the war ended, the world had to build itself again,[64] which led to the post-World War II economic expansion.[65] However, prior to this global economic "boom," in 1944, the United States held a conference comprised of forty-four nations to discuss the future of the global economy.[66] This conference would become known as the Bretton Woods Conference of 1944.[67] The Bretton Woods Conference attendees included some of the world's major economic powers but did not include any of the Axis power countries.[68] The conference marked the first chance for the global economic leaders to gather and discuss how to regulate the international market and advance free trade.[69]

The meeting churned out what would become the regulatory centerpiece of the current international trade platform, the regulation of the market, and the largest fiduciary system in the world. During the Bretton Woods Conference, three integral organizations were created: the International Monetary Fund, the International Bank of Reconstruction and Development—which would later become the World Bank—and the International Trade Organization.[70] The IMF was thought to be the strongest of the three created organizations.[71]

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63 LARRY ALLEN, THE GLOBAL ECONOMIC SYSTEM SINCE 1945 at 11 (2005).

64 *Id.*

65 Also referred to as the "Golden Age of Capitalism."

66 *See* GARDANO & GEISST, *supra* note 52, at 169.

67 Originally referred to as the United Nations Monetary and Financial Conference.

68 Kurt Schuler & Mark Bernkopf, *Who Was At Bretton Woods?*, CTR. FIN. STABILITY (July 1, 2014), http://www.centerforfinancialstability.org/bw/Who_Was_at_Bretton_Woods.pdf (showing the countries like the United States, Canada, United Kingdom, Soviet Union, France and China were in attendance, but countries like Germany, Italy and Japan were all not invited to the event).

69 *See* ALLEN, *supra* note 63, at 23.

70 International Trade Organization was the earliest stage that would eventually become the World Trade Organization. *See* PEET, *supra* note 9, at 36 .

71 *See* PEET, *supra* note 9, at 42.

These organizations would stand alone, free of political pressure from individual countries, to regulate international trade channels, currencies, and funds,[72] establishing the beginning of international trade regulations.[73]

2. History and Purpose of the International Monetary Fund

The International Monetary Fund (IMF) is an international agency that provides financial monitoring for its 189 members. The IMF describes itself as an organization that promotes global monetary cooperation, secures stability in global markets, and facilitates international trade.[74] The IMF's main responsibility is to observe global financial markets, while creating a set of rules for its members to follow.[75] Pre-World War II conditions necessitated the IMF's creation.[76] Prior to World War II, countries could arbitrarily place trade sanctions and tariffs on any country of their choosing.[77] During this time, there was no international regulatory organization with the authority to monitor these sanctions or tariffs.[78] The newly formed IMF had two strict goals that it was to accomplish: oversee the fixed exchange rates agreed upon by foreign nations, and provide short-term capital relief to help balance foreign currency payment discrepancies.[79] At its inception, the IMF implemented a "quota system."[80] This quota system distributed voting power to its members in proportion to their

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72 *Id.* at 3.

73 *See* ALLEN, *supra* note 63 at 23.

74 *The IMF at A Glance*, INT'L MONETARY FUND, https://www.imf.org/en/About (last visited Nov. 5, 2021).

75 *See* Jeffrey S. Beckington & Matthew R. Amon, *Competitive Currency Depreciation: The Need for a More Effective International Legal Regime*, 10 J. INT'L BUS. & LAW 209, 245 (2011).

76 *See* PEET, *supra* note 9, at 32.

77 *See* Chow, *supra* note 14, at 315.

78 *Id.*

79 *See* PEET, *supra* note 9, at 57-58 (showing that Article I of the Agreement conveyed the IMF's purpose, "to facilitate the expansion and balanced growth of international trade and to contribute thereby to the promotion and maintenance of high levels of employment and real income and to the development of the productive resources of all members as primary objectives of economic policy.").

80 *Id.* at 53.

perceived economic contributions.[81] Although this system has caused unrest with some of the smaller member nations, the system is still in place in the current IMF Agreement.[82]

For the next few decades, the IMF executed its tasks and maintained governance over the global financial markets, monitoring the fixed exchange rates and balancing payments.[83] In turn, membership increased to nearly universal participation.[84] However, the IMF's focus changed when, in 1971, the United States broke from the gold standard, devaluing the U.S. dollar and throwing global trade into a frenzy.[85] The IMF amended its Articles of Agreement, imploring its members to promote economic growth and financial stability while refraining from manipulating their currencies.[86] This new role that the IMF carved out for itself shifted the focus away from its original Bretton Woods responsibilities and provided more discretion for the fund to self-govern.[87]

In 1978, well after the United States officially removed itself from the gold standard, the IMF amended Article IV of its Agreement to state its new power to protect the global market from manipulation, thus expanding the scope of the IMF.[88] The new amendment forbade members from purposely devaluing their currency to gain an unfair trade advantage.[89]

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81 *Id.* (showing that the first iteration of the IMF was not a system that voted by pure democracy—one country, one vote—but that the voting would be proportional to each nation's perceived contributions based on what the other member's believed was appropriate due to the size and economic prowess).

82 Articles of Agreement of the IMF art. 3, §1, 60 Stat. 1401, 2 U.N.T.S. 39.

83 *See* Sanford, *supra* note 16.

84 *Id.*

85 *Id.*

86 *See* Thorstensen, *supra* note 17, at 366.

87 *Id.* at 363 ("There was a shift in emphasis from being primarily an international monetary institution focusing on issues such as exchange rate stability and convertibility, to becoming an international financial institution, with a broader array of responsibilities . . . The evolution of the role of the Fund over the past three decades has affected the practice of conditionality and the exercise of surveillance.").

88 *See* Sanford, *supra* note 16.

89 IMF, Annual Report 1978 (Apr. 1978) ("Section 1 of Article IV and principle A of the surveillance decision require that members 'avoid manipulating

During this time, the IMF suspected some members of manipulating currency but declined to issue sanctions because nothing in the articles suggested a remedy to this disallowed act.[90] Once again, in 2007, the IMF made a new amendment to Article IV, which added that "[a] member should avoid exchange rate policies that result in external instability."[91] This new amendment considers market instability resulting from currency devaluation a breach of the Articles of Agreement.[92] However, a major enforcement issue exists with both the 1978 and the 2007 Article IV amendments. What is the punishment for a member who engages in this manipulation and either gains a competitive advantage over the global trade market or causes market instability? The IMF is silent on this issue and the Articles of Agreement do not specify a punishment to those members who breached the agreement.

3. History and Purpose of the World Trade Organization

The World Trade Organization (WTO) describes itself as the "only global international organization dealing with the rules of trade between nations" with a mission to "help producers of goods and services, exporters, and importers conduct their business." [93] Like the IMF, the WTO, was, in part, also created during the 1944 Bretton Woods Conference, which saw the formation of the International Trade Organization (ITO)—later becoming the WTO.[94]

The ITO, while technically created at Bretton Woods in 1944, never actually came into existence because it was vehemently opposed

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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.'").

[90] *See* Sanford, *supra* note 16.

[91] *Id.*

[92] *Id.*

[93] *What Is the WTO?,* WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Nov. 9, 2021).

[94] *See* PEET, supra note 9, at 36 ("[A]nd an International Trade Organization (ITO), which came into being only as the General Agreement on Tariffs and Trade (GATT), but much later became the WTO.").

by Congress.[95] The United States Congress believed that the ITO was too weak on foreign trade and did not promote the type of free trade that Congress desired.[96] Congress also opposed the implementation of the ITO because the United Nations controlled the to-be-formed organization.[97] The United States, empowered by its economic dominance, opposed potential sanctions and trade monitoring from the United Nations, which Congress believed might threaten U.S. national interests.[98]

However, in 1947, after a coalition of countries met in Havana, Cuba, the General Agreement on Tariffs and Trade ("GATT") was created.[99] The "Havana Charter" replaced the Bretton Woods ITO formation, and reasoned that the GATT was created out of economic necessity for tariff concessions.[100] The goal of the GATT was to stop nations from applying tariffs and sanctions on countries for any reason, and the ITO, through GATT's implementation, became the oversight organization of the global trade network.[101]

The early principles of the GATT were to regulate trade of goods under laissez-faire principles, which implied that the ITO—and later the WTO—would be hands off, yet still monitor factors to promote free and fair international trade.[102] These practices, in turn, lowered the number of tariffs placed on foreign nations.[103] The GATT

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95 *Id.* at 181.

96 *Id.*

97 *See* PEET, supra note 9, at 181; *see also* UNITED NATIONS, *Overview*, https://www.un.org/un70/en/content/history/index.html (last visited Nov. 9, 2021) (The United Nations is an international governing body founded in 1945 that regulates and monitors global security, peace, climate change, sustainable development, human rights, etc., but not global trade and especially not currency manipulation.).

98 PEET, supra note 9, at 181.

99 *See* Beckington & Amon, *supra* note 75, at 223.

100 Joost Pauwelyn, *The Transformation of World Trade*, 104 Mich. L. Rev. 1, 13 (2005) (". . . [E}conomic need to keep intact a negotiated balance of tariff concessions.").

101 *See* Chow, *supra* note 14, at 302.

102 *See* PEET, *supra* note 9, at 182 ("The GATT regulated trade in goods (physical commodities) using agreed-upon principles of liberalization, equal market access, reciprocity, non-discrimination and transparency.").

103 *Id.*

was intended to negotiate and limit obscene tariffs, as the member countries did not want to have economic instability that was seen prior to World War II.[104] By the end of the 1970s, there were 102 members, and the role of the GATT was expanding to include non-tariff barriers to trade and adopting language on subsidies and countervailing duties.[105] Although the role of the GATT—and subsequently ITO—was expanding past solely tariffs, the shift in the IMF's Articles of Agreements started to impede on the importance of GATT. Due to the IMF's new agreement, and GATT's late action regarding unfair trade practices—as the 1970s was a time when large economies started using unfair trade practices to get ahead of competitors—GATT failed.[106]

During the 1970s, when the IMF started amending its Articles of Agreement among its members, the GATT started to fall by the wayside. By GATT becoming less relevant, it marked the beginning of the end for the International Trade Organization.[107] The financial crisis that came about during this time was also a shock to the world and the global trade market needed a strong central monitoring organization unfound at the moment.[108] The IMF gained more power and added a few more provisions supporting the global trade system, but there was still a hole that needed to be filled.

As the geopolitical climate changed and more conservative fiscal policy ensued in major global economies such as the United States, the United Kingdom, West Germany, and other large markets, the free enterprise trade-related organizations became popular again.[109]

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104 *Id.* at 181.

105 *Id.* at 184.

106 *See* Sanford, *supra* note 16 (showing that the United States, some European Countries, and some larger Asian markets were attempting to manipulate their currency for the benefit of their trade market, including when the IMF caught the United States manipulating the dollar, thus throwing the global economy in a frenzy.).

107 *See* ALLEN, *supra* note 63, at 12.

108 *See* PEET, *supra* note 9, at 184..

109 *Id.*

This gave rise to the idea of a new and enduring monitoring regulatory body and thus, the World Trade Organization was created.[110]

By 1986, the GATT was essentially dead and negotiations took place for a new centralized international trade agency. The Uruguay Conference began in 1986 and conferred to create the WTO.[111] While negotiations lasted nearly ten years, the main objective was that this new organization would not solely focus on tariffs as the GATT and ITO did in years prior.[112]

These negotiations spurred three agreements. The first, and seemingly most important agreement, was the General Agreement on Trade in Services. This structured agreement implored that members would agree to work together to expand worldwide economic development, regulate their own supplies and services, and incorporate developing countries into the economic forefront of the global trade market.[113]

The second agreement was the Agreement on Trade-Related Aspects of Intellectual Property Rights,[114] and the third agreement was the Agreement on Trade-Related Aspects of Investment Measures.[115] Although both of these provisions are important to the overall global

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110 *Id.* at 185-6.

111 *Id.* at 185.

112 *Id.*

113 *Id.* at 186 ("First, the establishment of a multilateral framework of principles and rules aimed at progressive liberalization might enable an expanding trade in services that contributed to worldwide economic development. Second, WTO members, and particularly developing countries, would still need to regulate their supplies of services to meet national policy objectives. And third, developing countries should be helped to play a more complete part in world trade in services, particularly through strengthening the capacity, efficiency and competitiveness of their domestic services.").

114 *Id.* at 187 (Allowing for protection of international intellectual property rights across borders, as this was not protected under the old ITO or GATT formats, so this new wave of protections was a must for the members during negotiations).

115 *Id.* at 189 (This provision deals with investment issues through international trade and puts responsibility on the nations themselves to govern their own investment practices, such as procurement of enterprise and other investment related activity).

community, they are of no import to the issue of currency manipulation.

While the WTO does not seem to directly monitor currency manipulation, it might through the provision on subsidies.[116] Under this definition of "subsidy," one could infer that the manipulation of a nation's currency would be covered under this definition, and thus under the jurisdiction of the WTO.[117] This will be discussed further in the below section of this paper.

4. The History of Oversight by the U.S. Treasury

Historically, both the WTO and IMF have not acted on policing this trade malpractice as actively as one would hope, but the U.S. Treasury does designate countries that it believes have manipulated its currency. This practice started in the United States in 1988, when President Reagan signed the Omnibus Foreign Trade and Competitiveness Act into existence.[118] The Secretary of the Treasury must prove two factors to designate a country as a currency manipulator. First, the country must have "material global current account surpluses."[119] Second, the country in question "must have significant bilateral trade surpluses with the United States."[120] Notably,

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116 Gilbert Gagne, *The US-Canada softwood lumber dispute and the WTO definition of subsidy*, 7 WORLD TRADE REV. 547, 549 ("[M]ost states have held that the concept of subsidy should be defined as a 'government financial contribution' that confers a 'benefit' on firms and that is 'specific'. This position was indeed reflected in the first multilaterally agreed upon definition of subsidy.").

117 *Id.*

118 Omnibus Foreign Trade and Competitiveness Act, 22 U.S.C. § 5304(b) ("The Secretary of the Treasury shall analyze on an annual basis the exchange rate policies of foreign countries, in consultation with the International Monetary Fund, and consider whether countries manipulate the rate of exchange between their currency and the United States dollar for purposes of preventing effective balance of payments adjustments or gaining unfair competitive advantage in international trade.").

119 *Id.*

120 *Id.*

these factors—internal designations made by the U.S. Treasury—have no authority behind them.[121]

Since the inception of the Omnibus Foreign Trade and Competitiveness Act, the U.S. Treasury has designated three countries as manipulators: South Korea, Taiwan, and China—Taiwan and China being designated manipulators in multiple years.[122] India has come close on multiple occasions but has not met the threshold needed for the requisite number of consecutive months to qualify as a designee for currency manipulation.[123] More recently, the U.S. Treasury has added multiple names to the ever-growing list of suspicious currency manipulators.[124] In 2019, the Treasury determined that ten major trading partners warranted placement on the watchlist: China, Germany, Ireland, Italy, Japan, Korea, Malaysia, Singapore, Switzerland, and Vietnam.[125]

Because the WTO and the IMF have different definitions and expectations for currency manipulators, Janet Yellen's observation that the definition of currency manipulation is too ambiguous and diluted has created longstanding confusion over the governance and the

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121 Yen Nee Lee, *The US and China are Dragging Currencies into Their Escalating Fight. Here's What You Need to Know*, CNBC (Aug. 6, 2019 4:29 AM), https://www.cnbc.com/2019/08/06/us-china-trade-war-currency-manipulator-tag-after-yuan-passes-7-level.html (detailing the process to happen if the Treasury does declare a country a currency manipulator; the Treasury would have to make negotiations with that manipulator and then come to an agreement. If no agreement can be reached, then the Treasury would have to submit a "complaint" to the IMF. This showcases that the Treasury has essentially no authority under the Omnibus Foreign Trade and Competitiveness Act, and these factors are strictly for internal usage.).

122 Elias Glenn, *Asian Economies Escape 'Manipulator' Tag, But Expect More Pressure on Trade*, REUTERS (Apr. 15, 2017 2:27 AM), https://www.reuters.com/article/us-usa-currency-asiapac-idINKBN17H04O.

123 Ira Dugal, *India Back on U.S. Treasury's Currency Manipulator Watchlist*, BLOOMBERGQUINT (Dec. 16, 2020 10:13 PM) https://www.cnbctv18.com/economy/explained-us-retains-india-in-currency-manipulator-watch-list-9000481.htm.

124 *Treasury Releases Report on Macroeconomic and Foreign Exchange Policies of Major Trading Partners of the United States,* U.S. DEP'T OF TREASURY (Jan. 13, 2020), https://home.treasury.gov/news/press-releases/sm873.

125 *Id.*

definition of currency manipulation.[126] Despite the confusion, the U.S. Treasury decided to take on this challenge and monitor the global market.

The Omnibus Foreign Trade and Competitiveness Act of 1988 was the first iteration of U.S. market monitoring, signed into law during the Reagan administration to police the global markets and protect the United States from unfair trade advantages.[127] After the bill was signed into law, the Treasury Department wasted no time in developing a factor system and determined that South Korea and Taiwan both manipulated their currencies.[128]

By the mid 1990's the U.S. Treasury had added China to the list of currency manipulators.[129] As time progressed, the Treasury Department expanded its criteria determining currency manipulation. Throughout the entire history of monitoring by the IMF, WTO, and the U.S. Treasury, the United States has sanctioned more countries than both the IMF and WTO combined, even though the United States has been monitoring for less time than either of these international organizations. The United States has declared three nations—South Korea, Taiwan, and China—multiple time

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126 Dollar & Sense Podcast, *Janet Yellen on Monetary Policy, Currencies, and Manipulation,* BROOKINGS (Feb. 19, 2019), https://www.brookings.edu/podcast-episode/janet-yellen-on-monetary-policy-currencies-and-manipulation/.

127 Dept. of Treasury, REPORT TO CONGRESS: MACROECONOMIC AND FOREIGN EXCHANGE POLICIES OF MAJOR TRADING PARTNERS OF THE UNITED STATES, 3 (May 2019) ("Under Section 3004 of the 1988 Act, the Secretary must: 'consider whether countries manipulate the rate of exchange between their currency and the United States dollar for purposes of preventing effective balance of payments adjustments or gaining unfair competitive advantage in international trade.'" Omnibus Foreign Trade and Competitiveness Act, 22 U.S.C. § 3004).

128 William Mauldin, et. al., *U.S. Designates China as Currency Manipulator*, WALL ST. J., (Aug. 5, 2019), https://www.wsj.com/articles/chinas-currency-weakening-escalates-trade-war-11565027431; Peter Kilborn, *Taiwan and Korea are Said to Impede U.S. Trade Effort*, N.Y. TIMES, (Oct. 25, 1988), https://www.nytimes.com/1988/10/25/business/taiwan-and-korea-are-said-to-impede-us-trade-effort.html.

129 Robert E. Scott, *Currency Manipulation—History Shows That Sanctions are Needed*, ECON. POL'Y INST. (Apr. 20, 2010) https://www.epi.org/publication/pm164/.

offenders.[130] Since the inception of both the IMF's and WTO's jurisdiction over the market, the organizations have sanctioned a total of zero countries.[131] Despite stories that manipulation has run rampant through Asian markets, struggling European markets, OPEC countries, and even economic strongholds, like the United States and the European Union, neither the IMF nor the WTO have ever sanctioned anyone.[132] They have raised levels of suspicion and even initiated some investigations, but neither entity has sanctioned any one member nation for devaluing its currency.[133] This inaction speaks volumes to either the high threshold of these two entities or a clear lack of jurisdictional foundation, which has allowed many countries to exploit these lax rules. In contrast, the U.S. Treasury Department has a factor test to determine the manipulation of a currency.[134]

By today's standards, the United States Treasury Department determines whether it believes a country has intentionally manipulated its currency by weighing many factors. The non-exhaustive list of factors include trade account imbalances, current account imbalances, foreign exchange intervention, currency developments, exchange rate practices, foreign exchange reserve coverage, capital controls, and monetary policy.[135] While not determinative, these factors guide the Treasury Department when it reviews U.S. trade partners.

The Treasury's role was thus expanded in 2015, when Congress passed the Trade Facilitation and Trade Enforcement Act of 2015 ("2015 Act").[136] Under the 2015 Act, the Treasury Secretary was given the authority to closely monitor the economic trends of many trading partners and "conduct enhanced analysis of and engage[] with

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130 *US Currency Manipulator: South Korea, Taiwan, China were Previously Tagged*, THE STRAITS TIMES, https://www.straitstimes.com/asia/east-asia/us-currency-manipulator-south-korea-taiwan-china-were-previously-tagged (last visited __).

131 Scott, *supra* note 129.

132 *See* Sanford, *supra* note 16.

133 *Id.*

134 U.S. DEP'. OF TREASURY, REPORT TO CONGRESS: MACROECONOMIC AND FOREIGN EXCHANGE POLICIES OF MAJOR TRADING PARTNERS OF THE UNITED STATES 3 (MAY 2019).

135 *Id.*

136 *See generally* 19 USC § 4301.

those partners if they trigger certain objective criteria that provide insight into possibly unfair currency practices."[137]

Under the 2015 Act, the Treasury established three key thresholds for a few of the aforementioned criteria. First, the time period to monitor was widened from a four month interval to a six-month interval. Second, the scope also encapsulated additional countries because the Treasury lowered the threshold for Percent of GDP in the Material Account Surplus and Persistent Intervention within Foreign Markets, subjecting more trading partners to scrutiny for manipulation.[138] The Treasury Department's broadened scope allows it not to merely falsely accuse countries of manipulation, but to exonerate more parties while assessing potential threats not covered in one of the original category thresholds. Finally, the most important criteria change supporting this claim is the shift from only examining the United States' twelve largest trade partners to any trade partner with more than $40 billion worth of trade with the United States. The threshold for the Treasury under the 1988 Act was to review the economic transactions of the U.S.'s twelve largest trade partners. The 2015 Act instead based investigations on the dollar amount traded between the foreign nation and the United States.[139] Under this new threshold, twenty-one countries qualified for this $40 billion search as opposed to $12 billion.[140]

If the United States is trying to make more of an effort to stop the manipulation of currency, why are the two international organizations not? The IMF creates the data that the United States Treasury Department uses to determine which countries manipulate its currency, however, the IMF is silent on the subject.[141] This paper will explore what the International Monetary Fund and the World Trade Organization can do, where the appropriate policing power

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137 *See* REPORT, *supra* note 134.

138 *Id.* (Meaning that the country had more positive current accounts showing that the country had more exports than imports. The previous threshold was three percent, but was moved to one percent after this bill was enacted).

139 *Id.* at 3-4.

140 *Id.*

141 *See* infra note 153.

should vest, and what should be the appropriate punishment for countries found to have manipulated their currencies.

III. ANALYSIS

The overlapping yet underwhelming response towards monitoring currency manipulation, causes a significant amount of unfair transactions to go unnoticed. This underwhelming monitorization is also worrisome because there is no retributive process to deter a country from continuing to act in the same manner. The United States has acted under its own legislation and at the advice of the Treasury, but it cannot impose global sanctions, injunctions, or monetary fines. The best the United States can do is issue its own sanctions on the country and label it a manipulator. However, these actions lack bite. This article will explore three important questions the future of our international trade market: (1) which international organization facilitates the main policing power when analyzing fraudulent acts against a trade partner by purposely manipulating one's currency?; (2) what does this organization need to do in order to protect other members from experiencing this level of unfair trade practices?; and (3) what is the appropriate punishment for member countries who have manipulated their currencies?

A. Which International Organization Should Be The Main Policing Power When It Comes To Defrauding A Trade Partner Through The Use Of Manipulating One's Currency?

In theory, both of these agencies have the authority to work together, and will have to when the agencies have a specific jurisdictional issue. In the United States, there are an abundance of agencies that address situations specific to their purpose and, often, their jurisdictions overlap.[142] To illustrate, consider the example of international drug trafficking. When drugs are moved over a border and come into the United States many agencies are involved in the investigation and prosecution of the smugglers, including the Drug Enforcement Agency ("DEA"), the Federal Bureau of Investigations

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142 Susan W. Brenner, Article: *Cyber-Threats and the Limits of Bureaucratic Control*, 14 MINN. J.L. SCI. & TECH., 137, 189 (2013).

("FBI"), Immigration and Customs Enforcement ("ICE"), and Border Patrol, among others. Even though this drug trafficking case is within the jurisdiction of all four of these member agencies, one has the jurisdictional power. The DEA will have the enforcement and investigative jurisdiction over the other agencies and will take lead.

In a vast international trade market composed of different agencies that monitor and regulate the specific niches within the market, two organizations that stand above the rest: the IMF and the WTO.[143]

Reading both organization's mission statements would support that each organization has some type of jurisdiction over this issue. The WTO is in control of overseeing the global trade market while the IMF is the monitoring organization of global economics. This makes for a perfect intersection of jurisdiction when analyzing the particulars of each organization. Currency manipulation, by any standard of definition, is the purposeful policymaking or action of lowering a country's economic value—through currency—relative to another's, to gain a competitive advantage over a trade counterpart in the international market. This is exactly the type of intersection the above drug trafficking problem illustrates.

When reviewing which organization should be the lead organization dealing with these issues, specific factors should be considered. The factors to consider should be: (1) which International Organization ("IO") has the most member nations; (2) whose mission more directly correlates with the issue at hand; (3) which organization has the requisite data in place to protect its members; (4) which entity, based on its agreements, is most willing to take on this global issue;

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143 *IMF Mission Statement*, INT'L MONETARY FUND, https://in.one.un.org/who-we-are/imf/ ("The IMF's fundamental mission is to help ensure stability in the international system. It does so in three ways: keeping track of the global economy and the economies of member countries; lending to countries with balance of payments difficulties; and giving practical help to members."); *WTO In Brief,* WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr_e.htm (last visited Nov. 9, 2021) ("In brief, the World Trade Organization (WTO) is the only international organization dealing with the global rules of trade. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible.").

and (5) which entity has the retributive power in place to hold members accountable for the breaches to its agreements.

1. Which International Organization Has More Members Sufficient to Broaden the Outreach?

Because the primary monitoring organization must be able to oversee and protect as many member nations as possible, member outreach, though not a determinative factor, is vitally important to the chosen organization's ability to enforce currency manipulation regulations.

However, there are drawbacks with this as well. The more members of an IO, the more likely a member could get lost in the masses, thus a smaller member's economic devaluation may be harder to spot than one with massive economic contribution.[144] Moreover, the data collected from each member would need to be verified, thus creating more work for this international police force. The question posed is whether an International Organization with more members becomes less efficient. The answer is likely to be no. These international organizations are extremely efficient in policing the global networks for other types of malfeasance, but have been remised in their duties to enforce manipulation efforts and standards.

While these Global Agencies both have well over 100 member nations, both agencies still provide accurate reports and are able to oversee the market through the data that is collected. These Global Agencies even work collaboratively and share data across agencies, and taking data from their larger member nations such as the United States.

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[144] Member nations like the United States—with an IMF estimated GDP per capita of $22 trillion—would be easier to catch devaluing its currency due to the number of speculators who watch their every move and rely on their data to support other members. But countries like Chad—with an IMF GDP per capita of $10 billion—will likely be harder to spot as a currency manipulator because less countries rely on Chad than they do on the U.S. and as such the IMF has so many members to manage that smaller countries may end up being lost in the dataset.

The International Monetary Fund, as of October 2020, has 191 member nations that have agreed to its terms.[145] The World Trade Organization only has 164 member nations that have agreed to its charter.[146] Although not determinative, the IMF's larger member base favors it to become the centralized authority of currency manipulation.

2. Which International Organization's Mission Most Directly Correlates With The Issue At Hand?

An International Organization's mission is not determinative either, but it is similar to the American court system's usage of legislative intent.[147] Where one IO does have a mission more congruent with policing currency manipulation, then that IO would be more likely to take on that responsibility. The overall goals of these two international agencies are to protect the global market, albeit from different angles.

The IMF looks to protect the market by encouraging fair economic activity through the collection and usage of data to make sure that members are not being exploited economically[148] In support of encouraging fair economic activity, the IMF mission statement states "[t]he IMF's fundamental mission is to help ensure stability in the international system. It does so in three ways: keeping track of the global economy and the economies of member countries. . . ."[149] The

[145] *List of Members*, INT'L MONETARY FUND, https://www.imf.org/external/np/sec/memdir/memdate.htm (last visited Nov. 9, 2021).

[146] Members and Observers, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Nov. 9, 2021).

[147] Legislative intent looks to what the legislature intended. This public policy rationale is used by courts try to piece together the original meaning behind the law. When this policy rationale is used, the court looks to who the legislature was intending to protect, from what types of actions, and whether those intentions were supported through various court opinions and other legislative acts.

[148] The IMF uses their data as benchmarks and when countries move outside of a specified numerical range, then the IMF is alerted to the breach of the normal range and the IMF may look to investigate as to why the country is outside of its normal range.

[149] *Supra* note 143.

member countries of the IMF are monitored to make sure that any type of international transaction is fair from an economic standpoint.

The IMF's mission and goal is different than the WTO's, which is "to ensure that trade flows as smoothly, predictably and freely as possible."[150] Unlike the IMF, who specifies how it plans to create fair markets in its mission statement, the WTO takes a more general route and promises to ensure free and fair trade in the international marketplace. However, it does not provide any particulars. This would lead one to believe that the WTO would not truly investigate an economic issue like currency manipulation unless it was told to do so.

The breadth of the WTO's mission statement does not support the WTO focusing its effort and time on the issue of currency manipulation. In contrast, the IMF's very specific mission statement describing international economic fairness within trade markets does pose a foundational mission statement that would support why it should govern this issue.

3. Which International Organization Has The Requisite Data In Place?

The ability to rely on one's own data is crucial to a regulatory body's success. Both agencies have advanced data sets as evidenced by both the IMF and WTO websites. In order to better police the international currency market, either agency would have to consider the data that each collects, as this would make it much easier to identify which countries would be currency manipulators.

The World Trade Organization's vast data provides accurate information from member—and even non-member—nations, aggregated and organized regionally.[151] The data can be separated by country and year with the most important dataset showing indicators, which show international trade statistics, tariff indicators, import and

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[150] *Id.* ("In brief, the World Trade Organization (WTO) is the only international organization dealing with the global rules of trade. Its main function is to ensure that trade flows as smoothly, predictably and freely as possible.").

[151] For example, the European Union.

export data.[152] While this information is important to the global trade market, nothing in these sets actually proves currency manipulation. Instead, these data points only show trading statistics. While impressive, the WTO's data may not be vital to the specific currency manipulation problem.

In contrast, the International Monetary Fund has considerable data points dealing with specific economic information. The IMF publishes data discussing IMF lending, exchange rates and other economic indicators—seemingly more in line with the data needed to provide accurate monitoring of currency manipulation.[153]

This begs the question: if the IMF already has this data readily available, why has the IMF not held their member nations accountable? Unfortunately, this answer has not been officially answered. However, it is likely due to both Global Agencies lacking follow-through provisions and having overlapping oversight, which causes many of these important issues to fall through the cracks. Further, the United States Treasury Department makes use of IMF data in their allegations of currency manipulation.[154] While this is not determinative, it is a ringing endorsement to the international community that the IMF has the tools and the datasets to address this issue.

4. Which International Organization Has The Express Language In Their Agreements?

Members are largely bound to agreements to which they consent and sign. Thus, agreements featuring language related to currency manipulation are more naturally suited to host the policing function. This factor heavily relies on the plain language construction of the agreement.[155] A country participating in dubious activities can

152 *WTO Data —Information on Trade and trade Policy Measures, World Trade Organization*, WORLD TRADE ORG., https://stats.wto.org/ (last visited Nov. 9, 2021).

153 *IMF Data*, INT'L MONETARY FUND, https://www.imf.org/en/Data (last visited Feb. 22, 2022).

154 *See supra* note 134.

155 Plain language is another American court system public policy rationale. Plain language is usually used when viewing a statute. A judge will read the words directly put in without any intent or background to see if the language of the statute speaks specifically to the issue at hand.

fall back on the argument that it had no idea that it was breaching its contractual duty if that duty is not explicitly mentioned in the agreement the country signed.

Article IV of the IMF's Articles of Agreement specifies that a member nation should not participate in any act that could create market instability. The member nations, under Article IV must "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."[156] This explicit mention of manipulation secures the assent of its member nations to adhere to this law. The 2007 amendments have furthered this cause by prohibiting manipulation that causes market disequilibrium.[157] Because the IMF explicitly included these amendments in the Articles of Agreement, the member nations need not infer them and must avoid manipulating exchange rates.

Unlike the IMF, the WTO Agreements do not mention policing or regulating currency markets, nor do the agreements explicitly mention currency manipulation. One may ponder where the implied authority comes from when discussing currency markets, and currency manipulation and how the WTO factors in. Many have speculated from WTO decisions that subsidies constitute currency manipulation as they help countries promote their national exports.[158]

The World Trade Organization created a full provision, called "The Agreement on Subsidies and Countervailing Measures" dedicated to subsidies and how they would be regulated and monitored.[159] This section defines subsidies as well as specifics,

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156 Articles of Agreement of the IMF art. 4, §1(iii) 60 Stat. 1401, 2 U.N.T.S. 39.

157 *See* Sanford, *supra* note 16.

158 *Id.*; Beckington & Amon, *supra* note 75, at 216 (Describing the process of manipulating one's currency means that the manipulating country will pay less for the products in foreign currency and thus increasing the value of the export will be significantly more in their home currency. This shifts the value of the country's net exports.).

159 Agreement on Subsidies and Countervailing Measures art. 1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A [hereinafter SCM Agreement].

prohibitions, remedies available, actionable versus nonactionable subsidies and other provisions that help shape the discussion of the WTO's stance on the issue.[160] A subsidy is the intervention of a country's government in the normal business of a corporation, nation, or within a personal transaction.[161] Subsidies include tax breaks to global companies as well as government loans and grants to a private entities.

However, in this agreement one can read currency manipulation as a subsidy of a government which tries to devalue their own currency to gain extra monetary value from their trade partner. This can be seen in the Actionable Subsidies section. This section of the WTO Agreement states, "[n]o Member should cause, through use of any subsidy referred to in paragraphs 1 and 2 of Article 1, adverse effects to the interests of other Members,. . . ."[162] After this general overview, the provision explains many specifics about how one member can use a subsidy to effect the importation or exportation of another.[163] In this long list of examples, one suggests that it is actionable if a member uses a subsidy for unfair treatment and allows another member to be disadvantaged.[164] However, this provision never mentions "currency," "devaluation," "manipulation," or anything of the sort.[165] However, the argument can be made that manipulation by one's government to purposely devalue its currency would economically disadvantage another member.

Among all the examples, there is a "catch-all" provision that states that if the member nation can show that "the existence of serious prejudice should be determined on the basis of the information submitted to or obtained by the panel . . ." then the WTO will hear the claim and investigate it themselves, potentially leading to adjudication.[166] This provision allows for an actionable subsidy if the nation can prove that it was seriously prejudiced by the action of its

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160 *Id.*
161 *Id.*
162 *Id.*
163 Beckington & Amon, *supra* note 75, at 229.
164 SCM Agreement, *supra* note 159.
165 *Id.*
166 *Id.* (ellipses added).

trade partner. There is ample argument that the manipulation of one's currency could disadvantage a party and as such the party would likely want to bring suit to the WTO panel.[167]

However, despite the examples of the provision, there is no certainty that the WTO includes currency manipulation within its agreements. Based on a WTO settlement case, some legal analysts theorized that currency manipulation could be included as a prohibited subsidy but it is far from a definitive plain language reading.[168] Because the WTO has not discussed whether a subsidy creates liability for currency manipulation, this broad reading of subsidy creates confusion amongst its members.

Although some argue that the WTO's definition implicitly creates liability for currency manipulation, it is never mentioned, nor has it been theorized by any adjudicative or international organization. However, the IMF does have plain language that specifically discusses its intention to monitor the currency market. So, member nations of the IMF shall be bound by this membership duty to not take part in this illicit act. This difference in definitiveness, showcases the intent of the IMF to be the IO to monitor and punish those who manipulate their own currency.

5. Which International Organization Has The Requisite Power To Punish Its Breaching Members?

For an International Organization to successfully combat currency manipulation, it must have a process to seek some form of repayment or restitution for the victims and enforce penalties on the guilty party. It must have some system intact to send a complaint or other factual dispute to start an investigation. To deter future currency

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167 *See* Chow, supra note 14 ("The basic argument is that the devaluation of China's currency, the RMB ('Renminbi' or 'people's currency'), against the U.S. dollar (USD) harms the United States by creating a trade distortion that benefits China at the expense of the United States.").

168 *See* Sanford, *supra* note 16. (citing WTO, Dispute Settlement 108: United States—Tax Treatment for "Foreign Sales Corporations").

manipulation, countries fear that some type of penalty will be imposed against them if they do not follow the rules of the agreements.

While the IMF satisfies many of the aforementioned factor criteria, it does not have a system in place to seek punishment and restitution for another member's wrongdoing. This causes a bit of angst because what is the purpose of the agreements if there is no punishment for the breach of such duties? This likely has to do with the overall inception of the IMF. The IMF's mission statement says that they are there for oversight and facilitation for the exchange of goods, services, and capital. This does not allude to a belief that they will punish those who wrong other members. Although, because they are a governing and international regulatory body with rules, it would make sense that the IMF would have some type of remedial measures.

In contrast, while the WTO does not mention currency manipulation by name, it is inherently included within the Agreement on Subsidies and Countervailing Measures and which includes remedial mechanisms.[169] Within the Actionable Subsidies section of this agreement, there is a subsection on remedies.[170] If one of the actionable subsidies seriously prejudices another member, the WTO panel investigates and can utilize actionable remedies against the breaching party, through a system of panel requests and panel reports based on the WTO's findings.[171]

The availability of monetary compensation is a difference between the IMF and WTO functionality. The remedies offered by the WTO start with offering the two parties a chance to negotiate their differences before advancing to a dispute proceeding.[172] If those negotiations do not satisfy the aggrieved party, they can move for a dispute proceeding, which the panel would investigate the situation

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169 SCM Agreement, *supra* note 159.

170 *Id.*

171 *Disputes By Agreement, Subsides and Countervailing Measures*, WORLD TRADE ORG.,
https://www.wto.org/english/tratop_e/dispu_e/dispu_agreements_index_e.htm?id=A20 (last visited Jan. 18, 2022) (listing various claims brought before the WTO to make an adjudication on whether there was unfair trade practices occurring, thus breaching the SCM).

172 SCM Agreement, *supra* note 159.

and gather relevant evidence.[173] After the evidence is gathered, the two parties will consult with one another to try to work out the fundamental differences within sixty days.[174] Where the parties fail to come to agreement, the Dispute Settlement Body ("DSB") of the WTO will compose a panel to review this dispute within fifteen days after the sixtieth day expires.[175] The panel will then submit the results of its decision within 120 days of the date of composition.[176] The DSB opinion can be disputed and appealed but, if that appeal is denied or the judgement affirmed, the winning party of the suit is awarded monetary compensation for the damage incurred or for the suit fees and slander.[177] Arbitration is also allowed under this provision, but it must be approved and meet statutory guidelines.[178]

6. Totality of the Circumstances Conclusion

Based on the totality of the circumstances, both the IMF and the WTO could handle the responsibility of policing this market. However, the IMF is more equipped as it stands in its current state. The International Monetary Fund has more members, and as such the outreach and reporting numbers from the IMF's data would be more complete than that of the WTO's. Further, the IMF's mission statement also aligns with the issue handoff currency manipulation in that it aims to ensure economic stability by keeping track of the global economy and the economy of its members.

The third factor considered the comprehensiveness of each IO's dataset. The IMF had the more comprehensive dataset, as evidence by United States Treasury Department use thereof in its own calculations and investigations. The fourth factor considered which organization mentions currency manipulation in their membership agreements as a matter of plain language, which also weighed in favor

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173 *Id.*

174 *Id.*

175 *Id.*

176 *Id. See as an example* Panel Report, *United States – Anti-Dumping and Countervailing Duties on Ripe Olives from Spain*, WTO Doc. WT/DS577/9 (Dec. 12, 2021).

177 SCM Agreement, *supra* note 159.

178 *Id.*

of the IMF. Although one could make an argument for why the subsidies mentioned in the WTO agreements could include currency manipulation, Article IV of the IMF's Articles of Agreement explicitly mentions this issue by name. The final factor considered which international organization has the power to enforce punishment on its members and seek restitution for the victims of this economic crime, which weighs in favor of the WTO as its enforcement procedures exceed those of the IMF.

B. What Can The IMF Do Better to Protect Members from Unfair Trade Practices?

The IMF should be the main policing power for monitoring currency manipulation, but for it to do so the Articles of Agreement must be improved. While the IMF is well equipped as it currently stands, the IMF should take initiative to produce reports similar to the United States Treasury. Further, the IMF must amend its Articles of Agreement to implement a system for member nations to state grievances and for breaching members to be punished.

Foremost, the IMF should publish an annual list informing its members who is suspected of currency manipulation. These members would be put on notice that the governing body is investigating them, providing a deterring effect. This start would mirror the approach of the United States Treasury which, since 1988 has put those nations on notice that if they continued performing this economic malfeasance and problematic behavior, the United States would enact trade embargos and stop transacting business with those nations.

If the IMF implemented an annual report naming problem nations and showing their findings, it would also allow nations that have done business with these problematic members to ensure that their transactions were not disadvantaged. This would allow for a restoration of balance and oversight to this long undervalued issue. There would also be a deterrence factor for the member nations who were purported and accused of manipulating its currency.

The second improvement would be to add an adversarial process in which member nations that have been wronged can bring actions against the manipulative party. The World Trade Organization has well-designed adversarial proceedings with multiple steps to bring forth an action against another member. Unlike a simple published report, a set of adversarial proceedings would need to be established through an amendment of the Articles of Agreement.[179] This would likely meet some pushback but it would seem that most countries would vote in approval of this amendment because no country wants to be subject to economic exploitation.

An adversarial system would greatly benefit not just the member nations who are following the rules set forth by Article IV but the global market in entirety. Without the threat of currency manipulators repeatedly practicing this unfair trade practice, the IMF could take a stand and protecting the market. The adversarial system should start with simple negotiations—similar to the WTO's first step—with the IMF council playing the role of facilitator. However, if this fails, the best way to proceed is to have the accusatory member nation proceed to an adversarial hearing with evidence. The most likely outcome from these proceedings would be settlement offerings. Nevertheless, having a step-by-step procedure to attain restitution for the damages that these unfair trade practices would cause would be a step forward for the IMF. These procedures would need to be worked into the Articles of Agreement and would likely take time to implement and perfect. This would create a large deterring effect for any country to not take part in this economic illegality. Challenges in implementing this solution include pushback in amending the IMF's Articles and determining appropriate remedies.

C. Remedy and Punishment for Currency Manipulation

The remedies that arise out of the newly-formed adversarial proceedings must be harsh enough to deter the breaching member

[179] The process to amend the Articles of Agreement for member nations is to have 85% of voting power to vote in favor of the amendment. Voting power is determined by Special Drawing Rights. As mentioned previously, the IMF currently has 189 members. In 2020, to pass an amendment, more than 85% of voting rights must vote to approve an amendment. 85% of the voting power is somewhere around 113-117 countries. An example is the United States has 16.74% of all the voting rights of the IMF, while the United Kingdom only has 4.85% of voting rights. If both countries voted in favor of an amendment, with just those two countries the amendment would have over 20% approval.

nation but not overly harsh to the point that nations do not want to vote in favor of the amendment. There should also be tiers differentiating between first time and repeat offenders.

The first question is, what remedy should be available to the injured member? Most simply, the injured party should be able to recover monetary ramifications for the damage done. This would be in line with most civil penalties in international cases that levy fines and tariffs, which are paid to the injured party. The amount of this fine would have to be determined by an impartial and disinterested panel of IMF representatives. The policy here is to protect the economic interest of those members who have been wronged while economically deterring the members who are committing the wrongdoings.

There must be a tier system of penalties for those who have committed wrongdoings in the past compared to first time offenders. For first time offenders, the fines shall be paid to the members that have been wronged and to the IMF. For additional infractions, fines should escalate and possibly include other penalties.

After the initial infraction, there is a legitimate argument that the member nation does not pay any mind to the rules set forth in Article IV, which prohibits the manipulation of currency. This continual disobedience should result in the suspension of that member nation. China, for example, has been accused and suspected of manipulating the Chinese Yuan since the United States Treasury has started reporting its findings.[180] Under the new framework the first time China was found to have manipulated its currency, the IMF would implement two fines: a compensatory fine to make its trade partners whole and a retributive fine to pay to punish the country. The next time China is found to have manipulated currency, there is a suspension from the IMF for a certain period of time, on top of an escalating fine. This would deter countries from continuing offenses because the IMF provides many services to its member nations.[181] If

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[180] *See generally* Chow, supra note 14.

[181] There are many benefits for being a member of the IMF including, but not limited to: access to economic policy information of other member nations; giving the opportunity to influence and suggest alternative economic policies for other members; access to technical assistance in banking, economic affairs, and

after that suspension was finished the country continued to break the rules of law provided in Article IV, the suspension would be for longer or even indefinite.

IV. CONCLUSION

The global economy has had regulatory bodies oversee it for the past eighty years, including the International Monetary Fund, the World Trade Organization, and in a more minor role, the World Bank. These organizations that were created back in 1944 have overseen the market and have regulated it from a global perspective.[182] However, despite all these organizations' oversight, there was a currency manipulation issue that was being exploited to the detriment of other nations.

The currency manipulation issue that arose from the lapse in oversight caused a windfall of unfair trade practices. However, the Nixon administration sought to put an end to these practices by having the United States "fight fire with fire" and the administration started manipulating the United States dollar. This forced the IMF's hand into amending Article IV to specifically combat currency manipulation. However, even with this specific language, this problem was never correctly dealt with by the IMF or its counterpart, the WTO. This hesitancy to combat this issue head on has caused a problem in the international community, namely the United States because members feel taken advantage of without any plan to combat it in the future.

After analyzing the totality of the circumstances, and despite the adversarial proceedings system within the WTO, the IMF is the superior choice for oversight. The IMF has a larger membership that will allow for more countries to follow this rule of law. The IMF's purpose and mission is more conducive for overseeing the issue at hand than the WTO's is. The data that the IMF has and uses is much more conducive than the WTO's to combat this problem, as evidenced

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exchange information; financial support in times of economic instability; and increased opportunity for trade and investment.

182 WTO's first iteration was created at the Bretton Woods Conference, the actual WTO was not created until the late twentieth century.

by the United States Treasury's use. Finally, the plain language of the IMF's Articles which prohibit currency manipulation is preferable to the WTO's inferential prohibition. These factors taken into consideration suggest that the IMF is better suited to oversee the issue of currency manipulation. However, the IMF is not perfect and needed to alter itself to become better.

In order to become a more complete regulatory IO overseeing this economic issue, the IMF needs to improve its agreements. The first step would be to issue annual reports detailing potential offenders. The second improvement would be to amend the Articles of Agreement establish a procedure for adversarial hearings and remedies so that the injured party can receive restitution and retributive punishments can be held against the guilty parties. Although this amendment may be difficult from a political standpoint, it is crucial to making sure that currency manipulation is regulated and enforced.