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ORIGINAL ARTICLE

US Surveillance of Foreign Currency Exchange and Macroeconomic Practices

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Abstract

This article focuses on the manner in which the US identifies the exchange rate and macroeconomic policies of its key trading partners and the policy advice it gives to them, when according to the US set criteria the trading partner's exchange rate and macroeconomic policies contribute to the US trade deficit. The article focuses on the US apparatus that is set in two different pieces of US legislation concerned essentially with currency manipulation mainly from the perspective of the WTO and IMF legal regimes. The paper concludes that although the US regime concerns currency manipulation, and is implemented to address a compliance void under the IMF and WTO procedures, it is flawed and that the Reports prepared under the US legislation are not qualitatively enlightening.

Keywords: Currency manipulation; IMF; WTO; US surveillance; currency exchange; macroeconomic policies

1. Introduction

The phenomenon of currency exchange manipulation has been of concern both in political and academic discourse as far back as the competitive devaluations during the Great Depression of the 1930s and the subsequent establishment of the IMF[1] in 1945 to regulate the exchange rate practices of members of the IMF. In the same vein, in the regulation of the relationship between exchange rates and fair competition in international trade, GATT 1994 has provisions that focus on the impact of the level playing fields in international trade, including mutually reinforcing provisions in relation to the IMF mandate.[2] The IMF now focuses on exchange rates through the normative prisms of a discretionary exchange rate system, implemented mainly through regular annual country-specific surveillance exercises.[3] This focus forms an important mandate of the IMF. Of late, exchange manipulation has been the subject of US concern due to its preoccupation with its trade deficit, in particular in relation to China.[4] To this end, the US has been operating a surveillance apparatus since 1988 in parallel with that of the IMF involving the monitoring of exchange and macroeconomic practices of other States of concern to US trade. Clearly, international trade and exchange rates have a causal relationship, which is addressed to varying

*I am grateful to the anonymous referees of this article for their valuable suggestions.

[1]Article 1 and IV of the Articles of Agreement of the IMF 1945 and its subsequent amendment in 1978 as it concerns the regulation of exchange rates.

[2]Article XV of GATT 1994 and the Agreement on Subsidies and Countervailing Measures.

[3]Article IV of IMF Articles of Agreement and IMF EB Decision No.15203-(12/72), 18 July 2012.

[4]In August 2019, China was declared a currency manipulator under Section 3004 of the US Omnibus Trade and Competitiveness Act of 1988. This designation lasted until January 2020. Previously, China had been declared similarly in 1994. See Rappeport, A. *The New York Times*, 13 January 2020.

degrees both in the IMF and the WTO. The US legislation is a symptom of the disaffection with the IMF and WTO order as it concerns exchange rates.

Herein a critical legal focus is set out of the US surveillance apparatus. To this end, the relevant US legislation is examined along with the US monitoring and enforcement actions. This examination is set mainly against the backdrop of US obligations, generally under the IMF and the WTO. The focus in this paper is not on the nature of the IMF or the WTO apparatus, as these apparatus pertain to currency manipulation. There is ample focus on these as it is.[5] The nature and the efficacy of the disciplines in the IMF and WTO with respect to currency manipulation are of course relevant in shedding light on the US motivation for setting up its own unilateral machinery for managing currency manipulation.[6] Briefly, IMF disciplines with respect to currency manipulation, including the process involved in their enforcement, are considered inadequate. Moreover, the reference in the GATT 1994 to the authority of the IMF in this sphere is considered to be a hindrance to the capacity of the WTO to respond to currency manipulation. However, this criticism of the Bretton Woods institutions, whether or not warranted, does not displace the need to focus on the US legislation in its own right against the backdrop of the general disciplines of the IMF and WTO. If, for the sake of argument, the disciplines in the IMF and WTO, with respect to the management of currency evaluation, are considered to be flawed, this does not render the other disciplines in these institutions, including their overall architecture, irrelevant. Indeed, in a legal appraisal of the US legislation, the WTO and IMF disciplines on currency manipulation themselves are in a sense not relevant other than for the purposes of comparison and shedding light on the motivation for the US legislation. This article inevitably draws more on the IMF than the WTO given the primacy of the IMF in this field; and the fact that the US legislation does not merely focus on currency manipulation stricto sensu but also that phenomenon in the context of foreign macroeconomic policy and practices. To reiterate this article is not intended to focus on what the scope and possibilities of IMF and WTO disciplines are with respect to the management of currency manipulation practices, this work is concerned with the US legislation and practices.

2. The US Legislation on Currency Manipulation and Macroeconomic Practices

There are two sets of US legislation mandating a focus on foreign country currency practices, including relevant macroeconomic policies. The Omnibus Trade and Competitiveness Act of 1988 (the 1988 Act) is a piece of legislation focussing on currency manipulation from a narrow standpoint, whereas the later legislation the Trade Facilitation and Trade Enforcement Act of 2015 (the 2015 Act), has a wider focus on currency practices so as include currency manipulation amongst other currency practices (sections 701–702).

2.1 The 1988 Act

The 1988 Act sets out three provisions dealing with the obligations of the US President multilaterally and bilaterally, including the setting up of reporting requirements to assist the President in the discharge of his obligations.

[5]See, for example, Thorstensen, V. et al. (2015) 'Exchange Rate Measures: Who Judges the Issue – IMF or WTO?', *Journal of International Economic Law* 0, 1–20; Bergsten, C.F. and J.E. Gagnon (2012) 'Currency Manipulation, the US Economy, and the Global Economic Order', Policy Brief, Peterson Institute for International Economics; de Lima-Campos, A. et al. (2012) 'A Case for Misaligned Currencies as Countervailable', UNCTAD XIII Pre-Conference Event Policy Dialogue: Redefining the Role of the Government in Tomorrow's International Trade.

[6]I am grateful to an anonymous reviewer of this article for prompting me to include in this article this background to the US legislation on currency manipulation, including writings that critique the IMF and the WTO in this respect.

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2.1.2 The President's Mandate under the 1988 Act

With respect to multilateral negotiations under Section 3004 (a), the US President:

> shall seek to confer and negotiate with other countries- (1) to achieve– (A) better coordination of macroeconomic policies of the major industrialized nations; and (B) more appropriate and sustainable levels of trade and current account balances, and exchange rates of the dollar and other currencies consistent with such balances; and (2) to develop a program for improving existing mechanisms for coordination and improving the functioning of the exchange rate system to provide for long-term exchange rate stability consistent with more appropriate and sustainable current account balances[7].

This endeavour on the face of it seems fine. But it bypasses the IMF as a forum for raising initiatives although the IMF was specifically set up for this purpose. Even if it is accepted that the IMF has failed in its calling with respect to managing the currency manipulation practices of its members, it is incumbent on its members – in particular the US, given its command of its share of the weighted voting in the IMF – to work harder within the IMF and to try and understand with humility the alternative stand-points of other members, in particular to see the extent to which they can be accommodated in achieving the common goals of the IMF. If the US can make a decision to take a unilateral path, it can also take a decision to take a multilateral path. It is easy for the US to take a unilateral approach and justify that from its own utilitarian perspective but the bigger question is whether this is a rational approach that takes into account the concerns of all members and the long-term development of the international economic order. A coordinated macroeconomic policy amongst major industrialized groups can have an impact on the economies of non-major industrialized nations. In an interconnected world, it is questionable if it is appropriate to exclude a large group of nations in multilateral macroeconomic policy coordination. For example, a coordinated negative approach to quantitative easing can have an undesirable impact on investment flows in developing countries. Be that as it may , the major industrialized nations are important in the impact they have on the international economy and such an opportunity under the US legislation can indeed be availed with the US as a focus to discuss its macroeconomic policies including any suggestion of the 'weaponization' of the dollar and the replacement of the dollar by some other reserve 'currency', not subject to any form of potential or actual US politicization as a medium of exchange. Moreover, of note here, in so far as exchange rate policy is concerned, States have agreed to follow exchange policies compatible with the undertakings set out under Article IV Section 1 of the Articles of Agreement of the IMF. Under this section, apart from the reference to manipulation of exchange rates in the context of effective balance of payments adjustment, there is no reference to 'appropriate and sustainable levels of trade and current account balances, and exchange rates of the dollar and other currencies consistent with such balances'[8]. Incidentally, 'sustainable levels' here is not a reference to 'sustainable development', in fact such a desideratum is consistent with the unsustainable use of the world's resources. The IMF[9] and the WTO[10] have both embraced the 2030 Sustainable Development goals.

[7]Section 3004 (a) of the 1988 Act.

[8]Section 3004 (a) (1) (B) of 1988 Act.

[9]See 'Population Sustainable Development Goals', *Population Matters*, www.imf.org/en/Topics/SDG (last visited August 2020).

[10]See WTO (2018) 'Mainstreaming Trade to Attain the Sustainable Development Goals Geneva', www.wto.org/english/res_e/publications_e/sdg_e.htm#:~:text=%22Mainstreaming%20trade%20to%20attain%20the,SDGs%2C%20just%20as%20it%20did (Last visited March 2021).

2.1.3 The Mandate for Bilateral Negotiations for the US Secretary of Treasury under the 1988 Act

With respect to bilateral negotiations under Section 3004 (b), the US 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. If the Secretary considers that such manipulation is occurring with respect to countries that (1) have material global current account surpluses; and (2) have significant bilateral trade surpluses with the United States, the Secretary of the Treasury shall take action to initiate negotiations with such foreign countries on an expedited basis, in the International Monetary Fund or bilaterally, for the purpose of ensuring that such countries regularly and promptly adjust the rate of exchange between their currencies and the United States dollar to permit effective balance of payments adjustments and to eliminate the unfair advantage. The Secretary shall not be required to initiate negotiations in cases where such negotiations would have a serious detrimental impact on vital national economic and security interests; in such cases, the Secretary shall inform the chairman and the ranking minority member of the Committee on Banking, Housing, and Urban Affairs of the Senate and of the Committee on Banking, Finance and Urban Affairs of the House of Representatives of his determination.[11]

It will be noted here, first, that the annual analysis of exchange rate policies focuses on all foreign countries. Second, the analysis involves establishing a *mens rea* for the manipulation for the purposes of preventing effective balance of payments adjustments or gaining unfair competitive advantage in international trade.

Third, whilst there is a requirement for consultation with the IMF, the analysis and consideration is ultimately the function of the US Secretary of Treasury. There is no obligation set to take on board the IMF perspective. This is reinforced by the mandate given to the Secretary of the Treasury to initiate negotiations with foreign countries found to be wanting independently of the IMF if necessary. Thus, US perspective on the Chinese exchange rate has been at variance with that of the IMF. However, the Fund has been powerless in the face of the weight of the US. Be that as it may, the determination under the legislation, as much as the legislation itself, raises questions of consistency with obligations of the US under the IMF. The US has, as have other members of the IMF, given the role of oversight of the international monetary system to the IMF as per Article IV. 3 (a) of the IMF Articles of Agreement as follows:

> The Fund shall oversee the international monetary system in order to ensure its effective operation, and shall oversee the compliance of each member with its obligations under Section 1 of this Article.[12]

Where a member engages in oversight activity unilaterally, this undermines the role of the IMF – indeed, it may even result in a conflict with IMF oversight operations and insights. In the same vein, if the US engages unilaterally with a member contrary to the IMF prescriptions, it would be non-compliant with its obligations to collaborate with the IMF under Article IV Section 1. Under this provision, there is a requirement that '*each member undertakes to collaborate with the Fund* and other members to assure orderly exchange arrangements and to promote a stable system of exchange rates' (emphasis added).[13] Furthermore, the authority to determine

[11]Section 3004 (b) of the 1988 Act.

[12]Article IV. 3 (a) of the IMF Articles of Agreement.

[13]Article IV Section 1 of the Articles of Agreement of the IMF.

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currency manipulation rests solely with the Fund alone.[14] The significance of this 'authority' is twofold. First, the US has accepted this authority as part of its obligations as a member of the IMF. Second, the location of this authority as such is indispensable to an objective determination of a currency manipulation. The obligation to cooperate with the Fund is also reinforced under Article XV Sections 1 and 2 of the GATT 1994. If this determination of currency manipulation were to be at the behest of individual members of the IMF concurrently, the very integrity of the policy underpinning the prohibition on currency manipulation would be undermined with any country levelling a claim against another of currency manipulation informed by subjective and varied criteria to that of the IMF.

Fourth, the US has in its sights not only a country that is engaging in currency manipulation but also in ensuring currency rate adjustments in cases where 'manipulation is occurring with respect to countries that (1) have material global current account surpluses; and (2) have significant bilateral trade surpluses with the United States'[15]. Neither of these conditions partake of the IMF definition of currency manipulation,[16] nor are they symptomatic of currency manipulation in themselves. The discourse amongst economists as to the relationship between these two conditions and currency intervention is not clear and is divided.[17] The US use of a monetary technique to induce a trade restrictive objective brings its legislation into the domain of a disguised restriction in international trade. Moreover, where these two conditions coincide with currency manipulation as the sole basis for a US instigated adjustment, an asymmetrical and discriminatory approach to the enforcement of currency manipulation would result – not to mention that the US approach assumes it is appropriate to analyse a bilateral relationship of currencies in clinical isolation with other currencies (including reserve currencies) and trading relationships.

Fifth, there is no clear criteria to discern the exchange rate that would 'permit effective balance of payments adjustments and to eliminate the unfair advantage'.[18] There is no clear criteria to determine the precise degree of currency misalignment with the actual market exchange rate. Such ambiguity may or may not also exist within the IMF. However, if this is the case, it is no justification to replicate it here.

Sixth, the discretion afforded to the US Secretary of the Treasury to treat countries differently to the US if 'a serious detrimental impact on vital national economic and security interests would ensue'. This is a curious provision that allows for a wide measure of political discretion to come into play. The logic, including the causal relationship between manipulation of exchange rates, balance of trade surpluses/current account surpluses, and the restraint on counter measures to correct these perceived maladies informed by national economic/security interests, is not very apparent.

[14]See IMF Executive Board Decision No. 15203-(12/720, 18 July 2012, Annex paragraphs 1–2: 1. Article IV, Section 1(iii) of the Fund's Articles provides that members shall 'avoid manipulating exchange rates or the international monetary system in order to prevent effective balance of payments adjustment or to gain an unfair competitive advantage over other members'. The language of this provision is repeated in Principle A contained in Part II of this Decision. The text set forth below is designed to provide further guidance regarding the meaning of this provision. 2. A member would only be acting inconsistently with Article IV, Section 1(iii) if the Fund determined both that: (a) the member was manipulating its exchange rate or the international monetary system and (b) such manipulation was being carried out for one of the two purposes specifically identified in Article IV, Section 1(iii).

[15]Section 3004 (b) of 1988 Act.

[16]Article IV Section 1 (3) and Executive Board Decision No. 15203-(12/720, 18 July 2012.

[17]See for example Sheikh, A. and I. Weber (2020) 'The US–China Trade Balance and the Theory of Free Trade: Debunking the Currency Manipulation Argument', Working Paper Series No. 505, Political Economy Research Institute, University of Massachusetts, Amhurst, USA; Nelson, R.M. (2018) 'Debates over Exchange Rates: Overview and Issues for Congress', US Congressional Research Service, 22 June 2018; Vaitilingam, R. (2019) 'Does Currency Manipulation Explain US Trade Deficits?', *Chicago Booth Review*, 29 June 2019, https://review.chicagobooth.edu/economics/2019/article/does-currency-manipulation-explain-us-trade-deficits (last visited August 2020).

[18] Section 3004 (b) of 1988 Act.

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2.1.4 Reporting Requirements under the 1988 Act

With respect to the reporting requirements, the Secretary of the US Treasury is to prepare a written report annually 'on international economic policy, including exchange rate policy' as per Section 3005 of the 1988 Act. The initial report is to be followed by an update six months later. The report is to reflect the following content:

> Each report submitted under subsection (a) shall contain– (1) an analysis of currency market developments and the relationship between the United States dollar and the currencies of our major trade competitors; (2) an evaluation of the factors in the United States and other economies that underline conditions in the currency markets, including developments in bilateral trade and capital flows; (3) a description of currency intervention or other actions undertaken to adjust the actual exchange rate of the dollar; (4) an assessment of the impact of the exchange rate of the United States dollar on – (A) the ability of the United States to maintain a more appropriate and sustainable balance in its current account and merchandise trade account; (B) production, employment, and noninflationary growth in the United States; (C) the international competitive performance of United States industries and the external indebtedness of the United States; (5) recommendations for any changes necessary in United States economic policy to attain a more appropriate and sustainable balance in the current account; (6) the results of negotiations conducted pursuant to section 3004; (7) key issues in United States policies arising from the most recent consultation requested by the International Monetary Fund under article IV of the Fund's Articles of Agreement; and (8) a report on the size and composition of international capital flows, and the factors contributing to such flows, including, where possible, an assessment of the impact of such flows on exchange rates and trade flows.[19]

The range of considerations to be focused upon here are an appropriate basis of analysis for a country. However, the focus on the 'impact of the exchange rate of the United States dollar on – (A) the ability of the United States to maintain a more appropriate and sustainable balance in its current account and merchandise trade account; (B) production, employment, and noninflationary growth in the United States; (C) the international competitive performance of United States industries and the external indebtedness of the United States' is itself a focus on the US dollar exchange rate and the degree to which it can be adjusted/manipulated to achieve US targets as per A, B, and C. The concern here is that in an analysis of a foreign currency exchange rate manipulation, the degree to which the US dollar could be manipulated to achieve desirable US macroeconomic targets is factored in.

2.1.5 Conclusion – 1988 Act

In sum, there is no transparent focus here on the meaning of currency manipulation, leaving the US considerable scope to bring pressure on third countries to serve its political and economic interests. If as a consequence of the US actions under this legislation, currency adjustments that have no basis in sound economic analysis are inflicted upon third countries, and that result in a form of 'currency exchange manipulation' by the US, there is a call for an examination of the US actions under the WTO Agreement on Subsidies.[20] In the same vein, Article XV Section 3 of GATT 1994 prohibits a WTO member through 'exchange action', to 'frustrate the intent of the provisions of' the GATT 1994 or 'by trade action, the intent of the provisions of the Articles of

[19]Omnibus Trade and Competitiveness Act of 1988, Section 3005.

[20]See for an explanation as to whether currency undervaluation can constitute a prohibited subsidy de Lima-Campos, A., and J.A. Gaviria Gil (2012) 'A Case for Misaligned Currencies as Countervailable', UNCTAD. https://unctad.org/meetings/en/SessionalDocuments/ditc_dir_2012d2_deLima-Campos.pdf (last visited August 2020).

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Agreement of the International Monetary Fund'. The exchange adjustment required by the US of a third country can be construed as 'exchange action' attributable to the US.[21]

2.2 The 2015 Act – Enhanced Engagement with Major Trading Partners

The 2015 Act, Title VII is entitled 'Engagement on Currency Exchange Rate and Economic Policies'. In particular, Section 701 focuses on the 'Enhancement of engagement on currency exchange rate and economic policies with certain major trading partners of the United States'. The enhancement involves the following. First, the Secretary of the US Treasury is to compile a report on a regular basis with respect to the currency exchange rate and economic policies of certain major trading partners of the United States. Each report is to contain information on (i) US major trading partners as follows:

> (I) that country's bilateral trade balance with the United States;
> (II) that country's current account balance as a percentage of its gross domestic product;
> (III) the change in that country's current account balance as a percentage of its gross domestic product during the 3-year period preceding the submission of the report;
> (IV) that country's foreign exchange reserves as a percentage of its short-term debt; and
> (V) that country's foreign exchange reserves as a percentage of its gross domestic product; and
> (ii) an enhanced analysis of macroeconomic and exchange rate policies for each country that is a major trading partner of the United States that has – (I) a significant bilateral trade surplus with the United States; (II) a material current account surplus; and (III) engaged in persistent one-sided intervention in the foreign exchange market.[22]

This is a more elaborate list of elements to focus on than those set out in the 1988 Act. In particular, those major trading partners who satisfy the three conditions in Section 701 (ii) (I)–(III) above are the subject of enhanced analysis of their macroeconomic and exchange rate policies. In the 1988 Act, only the first two conditions trigger more interest. These have already been commented upon. The 2015 Act adds 'persistent one-sided interventions' assuming there is evidence of this. There are no thresholds set out in the legislation itself for these three conditions. However, the US Treasury added to this in 2019 as follows:[23] First, the US will 'assess all US trading partners whose bilateral goods trade with the United States exceeds $40 billion annually'. Second, the three thresholds in the criteria have been increased as follows:

> (1) A significant bilateral trade surplus with the United States is one that is at least $20 billion. (2) A material current account surplus is one that is at least 2 percent of gross domestic product (GDP). (3) Persistent, one-sided intervention occurs when net purchases of foreign currency are conducted repeatedly, in at least 6 out of 12 months, and these net purchases total at least 2 percent of an economy's GDP over a 12-month period.[24]

In relation to the third condition, the following further elaboration is proffered: 'Other patterns of intervention, with lesser amounts or less frequent interventions, might also meet the criterion depending on the circumstances of the intervention.'[25]

[21]See for an interpretation of Article XV of the GATT 1994, Thorstensen, V., C. Muller, and D. Ramos (2015) 'Exchange Rate Measures: Who Judges the Issue – IMF or WTO?', *Journal of International Economic Law* 0, 1–20. See also on the difficulties of interpretation of 'exchange action', including the scope for its interpretation GATT L/332/Rev.1 and Addenda, adopted on 2, 4, and 5 March 1955, 3S/170, 196, para. 2.0.

[22]Trade Facilitation and Trade Enforcement Act of 2015, Section 701 (a) 2 (A).

[23]US Treasury Department's Semi-Annual Report to Congress, 'Macroeconomic and Foreign Exchange Policies of Major Trading Partners of the United States', October 2017. Hereinafter referred to as 'Report'.

[24]May 2019 Report.

[25]October 2017 Report.

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There is no apparent clear explanation for these particular thresholds in terms of their relevance specifically to currency manipulation and unfair competitive advantages. It is clear however that these thresholds have been identified to ensure the capture of the maximum number of trading partners of interest to the US. Thus, it is stated:

> In 2016, the $20 billion bilateral trade surplus threshold captured almost 80 percent of the value of all trade surpluses with the United States, while the 3 percent current account threshold captured more than three fourths of the nominal value of global current account surpluses.[26]

The trade surplus only pertains to trade in goods not services. The explanation given by the US Treasury, set out in a footnote of the various Reports, for this speaks for itself!

> Given data limitations, Treasury focuses in this Report on trade in goods, not including services. The United States has a surplus in services trade with many economies in this report, including Canada, China, Japan, Korea, Mexico, Switzerland, and the United Kingdom. Taking into account services trade would reduce the bilateral trade surplus of these economies with the United States.[27]

It is not clear how difficult the data limitations are to overcome. Certainly, omitting services could be said to be like the US practice of zeroing that has the desired trade effect. Moreover, such evidential concerns have not prevented the US from proceeding certaintywhen it is to its advantage. Thus, not all countries are transparent for various reasons about the frequency and degree of currency interventions, but this has not prevented the US from including it as a criterion for evaluating its trading partners for enhanced evaluation.

Second, the enhanced analysis for each country should include:

(i) a description of developments in the currency markets of that country, including, to the greatest extent feasible, developments with respect to currency interventions;
(ii) a description of trends in the real effective exchange rate of the currency of that country and in the degree of undervaluation of that currency;
(iii) an analysis of changes in the capital controls and trade restrictions of that country; and
(iv) patterns in the reserve accumulation of that country.[28]

It will be noted (i) and (ii) are descriptive only, whereas (iii) and (iv) involve analysis. Moreover, there is no reference to 'currency manipulation' for the purposes of 'preventing effective balance of payments adjustments or gaining unfair competitive advantage in international trade'. And the 'real effective exchange rate' is not informed by the economic fundamentals of the country but in accordance with a statutory definition determined with reference to 'a weighted average of bilateral exchange rates, expressed in price-adjusted terms'. In sum, the 2015 Act simply sets out a set of macroeconomic variables, which, if found to exist, are in the US interest.

Third, is a requirement of both the 1988 and 2015 legislation that the US Treasury make available semi-annual reports on the foreign exchange policies of the major trading partners of the United States. Under the 2015 Act, this involves compiling a Monitoring List. A country meeting at least two of the three criteria is placed on the Monitoring List. Once on the List, it will remain on it for two consecutive Reports. Furthermore, under the Trump administration, a trading

[26]October 2017 Report.
[27]See, for example, October 2017 Report.
[28]Trade Facilitation and Trade Enforcement Act of 2015, Section 701 (a) 2 (B).

partner has been placed on the Monitoring List 'that accounts for a large and disproportionate share of the overall US trade deficit even if that economy has not met two of the three criteria from the 2015 Act'.[29] Under the 2015 Act in April 2017, the List comprised of China, Japan, Korea, Taiwan, Germany, and Switzerland; and in October 2017 the List comprised of China, Japan, Korea, Germany, and Switzerland. No major partner was found wanting under the 1988 Act in 2017. In 2018, China, Japan, Korea, Germany, Switzerland, and India were on the 2015 List. No major trading partner was found wanting in 2018 under the 1988 Act. Following the revised thresholds by the Treasury of the criteria under the 2015 Act, in May 2019 the following countries were on the List, China, Japan, Korea, Germany, Italy, Ireland, Singapore, Malaysia, and Vietnam, although no major partner of the US was found wanting in terms of the 1988 Act. However, in August 2019 China was found wanting under the 1988 Act. The 2020 List comprised of China, Japan, Korea, Germany, Italy, Ireland, Switzerland, Singapore, Malaysia, and Vietnam with no country found wanting under the 1988 Act, China having been removed under the 1988 Act as a manipulator in 2020 following a US–China agreement. In sum, the list of countries on the Monitoring List under the 2015 Act has been growing from six in 2017 to ten in January 2020.

Fourth, based on the Report prepared, the President, through the US Secretary of Treasury, is to engage in bilateral negotiations with the trading partner for whom an 'enhanced analysis of macroeconomic and currency exchange rate policies' has been prepared.[30] The negotiations involve impressing upon the trading partner the following:[31]

(A) urge implementation of policies to address the causes of the undervaluation of its currency, its significant bilateral trade surplus with the United States, and its material current account surplus, including undervaluation and surpluses relating to exchange rate management;
(B) express the concern of the United States with respect to the adverse trade and economic effects of that undervaluation and those surpluses;
(C) advise that country of the ability of the President to take action under subsection (c); and/or
(D) develop a plan with specific actions to address that undervaluation and those surpluses.

It will be noted here too that the narrative of a bilateral trade surplus is conflated with undervaluation. Moreover, given that both exchange rates and a bilateral trade surplus are expressions of a relationship between two economies, there is no reference to the actions that could be taken on the US side of this relationship. The negotiations are about what the trading partner should do – there is no scope with respect to the propriety and correctness of the determinations made through the enhanced analysis. The full cost of the re-orientation of the relationship is to be borne by the trading partner under the ever presence of US threats.

2.2.1 Remedial Actions under 2015 Act

Section 701 subsection (c) is titled Remedial Actions. It sets out the range of options available at the disposal of the President, if there is a determination that the country in question has 'failed to adopt appropriate policies to correct the undervaluation and surpluses' as follows:

(A) Prohibit the Overseas Private Investment Corporation from approving any new financing (including any insurance, reinsurance, or guarantee) with respect to a project located in that country on and after such date.

[29] October 2017 Report.
[30] Trade Facilitation and Trade Enforcement Act of 2015, Section 701 (b) 1.
[31] Ibid.

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(B) … prohibit the Federal Government from procuring, or entering into any contract for the procurement of, goods or services from that country on and after such date.
(C) Instruct the United States Executive Director of the International Monetary Fund to call for additional rigorous surveillance of the macroeconomic and exchange rate policies of that country and, as appropriate, formal consultations on findings of currency manipulation.
(D) Instruct the United States Trade Representative to take into account, in consultation with the Secretary, in assessing whether to enter into a bilateral or regional trade agreement with that country or to initiate or participate in negotiations with respect to a bilateral or regional trade agreement with that country, the extent to which that country has failed to adopt appropriate policies to correct the undervaluation and surpluses described in subsection (b)(1)(A).[32]

This is an assorted list of possible remedial actions of varying degree of effectiveness. Paragraph A could involve the hindering of foreign investment given that it includes insurance and guarantees. This could affect investment agreements or chapters in the Free Trade Agreements between the US and other countries depending on the provisions of those agreements. Paragraph B would need to be considered against the background of the WTO Government Procurement Agreement including in particular (Article IV non-discrimination, and Article XVIII), to which the US is a party. This prohibition is however qualified by two specific provisions. First, the prohibition may not be applied 'in a manner that is inconsistent with United States obligations under international agreements'. And, second, the prohibition may not apply where 'such prohibition would subject the taxpayers of the United States to unreasonable cost'. Paragraph C assumes that US has ownership of the IMF and can through its Executive Director force any decision on the membership of the IMF. This is not the case despite the weighted voting system in the IMF and the US command of the veto with respect to certain important decisions. The US can only exhort the Fund to act in a certain manner. Moreover, in any event the conceptions of IMF and US 'currency manipulation' are at variance. Paragraph D can involve the US either inflicting trade agreements on third countries; or undoing binding existing international commitments undertaken by the US. .

Generally the requirement to take remedial actions can be waived at the behest of the President if 'the President determines that taking remedial action under paragraph (1) would – (i) have an adverse impact on the United States economy greater than the benefits of taking remedial action; or (ii) would cause serious harm to the national security of the United States'.[33]

2.2.2 Advisory Committee on International Exchange Rate Policy under the 2015 Act

Finally, to assist the US Secretary of Treasury, an Advisory Committee on International Exchange Rate Policy has been set up.[34] The US President has an important say in the composition of this Committee. This, prominence of the executive branch in the organization of the US monetary policy in the sphere of foreign exchange rates – underlined as it is with the involvement of the President and US Treasury Secretary in both the 1988 and 2015 legislation – is to be contrasted with the received wisdom in the IMF and the practice of many Central Banks to accord autonomy and independence to such organs in the making of monetary policy decisions, thus insulating them from the vicissitudes of domestic politics – at any rate when this is focused exclusively internally.[35] There are surely sound reasons why this paradigm of Central Bank operations should

[32]Section 701 subsection (c) of the 2015 Act.
[33]19 US Code § 4421 (C) (2).
[34]Trade Facilitation and Trade Enforcement Act of 2015, Section 702.
[35]See for instance 'Central Bank Accountability, Independence, and Transparency', IMFBLOG, 25 November 2019, https://blogs.imf.org/2019/11/25/central-bank-accountability-independence-and-transparency/ (last visited August 2019).

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have relevance to US monetary policy (including the exchange rate) functions as it relates to the domain of foreign monetary/exchange rate policy making. Moreover, the US Reports themselves are littered with the mantra that foreign exchange interventions should be exceptional; and a fortiori, that the foreign exchange system should essentially be market drive. The market prescription is about the insulation of foreign exchange management from external considerations.

3. The Reports of the US Treasury Macroeconomic and Foreign Exchange Policies of Major Trading Partners of the United States

The US Treasury has issued Macroeconomic and Foreign Exchange Reports since the 1988 Act came into effect.[36] Over the years, however, the Reports seem to have grown in length and information. From this focus, the Reports since October 2017 to January 2020, set out on the US Treasury website, are used as the basis of some observations on the US practice of monitoring the exchange rate practices of foreign countries. The Reports contain analysis and conclusions under both the relevant US Acts.

4. International Agreements

US concern, with respect to the manipulation of currency exchange finds expression not only in the 1988 and 2015 Acts but also at the time of writing in two international agreements.

The first agreement is the USMCA,[37] which is concerned with the regulation of exchange rates in the framework of a free trade agreement (see in Chapter 33, titled 'Macroeconomic Policies and Exchange Rate Matters'). It mainly sets out in hortatory terms an affirmation/reiteration on the one hand of obligations set out in Article IV of the IMF Articles of Agreement. On the other hand, it could be seen to be departing from the IMF system in that it calls for a market determined exchange rate, whereas the exchange rate system advanced in the IMF for members is a discretionary system of exchange rates, giving the members the choice as to whether, for example, they want to have a fixed, or a floating exchange rate system. Although the market exchange rate could in the long run necessitate a readjustment of the fixed exchange rate system. Equally, Chapter 33 preserves the autonomy of the States in the monetary/fiscal and related fields as it affects exchange rates. The Chapter has binding obligations relating to transparency and reporting with respect to interventions in the exchange rates and exchange reserves. Finally, it sets up a Macroeconomic Committee with a mandate for the coordination of macroeconomic policies of the parties to the USMCA to meet on a regular basis, provide a basis for bilateral consultations, and with respect to the transparency obligations of the dispute settlement system under USMCA.

In sum, Chapter 33 has been set up as a template for inclusion in other free trade agreements (FTAs). As such, it calls for some scrutiny. First, the normative framework involves a collective appreciation of macroeconomic and exchange rate policies unlike the approach adopted in the 1988 and 2015 Acts. This is of course a commendable approach although somewhat diminished by the inclusion of bilateral consultations. Second, the inclusion of the Chapter 33 genre of clauses in FTAs generally could cause pockets of bilateral/regional macroeconomic and exchange rate regimes that depart from the multilaterally agreed IMF framework. They could also raise questions under Article XV (4) of GATT 1994, in particular if they frustrate the intent of any of its provisions. Third, a bilateral/regional approach to macroeconomic and exchange rates could impact on third parties. Does such an approach displace IMF oversight of such

[36] Not all the Reports, however, seem to be available in electronic form on the US Treasury website. Thus, in the April 1989 Report there is a reference to Korea and Taiwan having been found to have manipulated their currencies as set out in the October 1988 Report. This Report is not available electronically.

[37] Agreement between the United States of America, the United Mexican States, and Canada (2019) – the renegotiated North American Free Trade Agreement (NAFTA).

cooperation? Elsewhere this author has written at length on this.[38] First, to note is that IMF law applies to these arrangements independently of the reference to it in them. Second, the IMF is obligated to cooperate 'within the terms' of its agreement with other international organizations such as the WTO. This is reinforced by the obligation under Article XV of GATT 1994 that GATT Contracting parties 'shall not, by exchange action, frustrate' the intentions of the provisions of GATT 1994. Moreover, the Guidelines approved under an IMF Executive Board decision state:

> The Fund, given its responsibilities in the rates, can contribute to assessing issues of coherence between macroeconomic and trade policies. The Fund can also contribute to greater policy coherence by taking into account in its work the concerns of the WTO in the trade area.[39]

Third, the Fund has a wide mandate 'to oversee the international monetary system in order to ensure its effective operation' including compliance with Article IV Section 1 obligations (which include the obligation to avoid manipulating exchange rates).[40]

The second normative US innovation is to be found in the US/China Economic Trade Agreement 2020.[41] Chapter 5 of this is titled 'Macroeconomic Policies and Exchange Rate Matters and Transparency', and mirrors somewhat Chapter 33 of USMCA. The parties reaffirm obligations set out in the IMF and G 20 Communiqués, and emphasize a market determined exchange rate. The Chapter also has a transparency provision set out in obligatory terms. The substantive provisions are accompanied by an enforcement mechanism under the Agreement's general Bilateral Evaluation and Dispute Resolution Arrangement. Of note, Chapter 5 focus on transparency does not refer specifically to the reporting of currency exchange interventions, although Chapter 33 of USMCA does.

In sum, both Chapter 33 USMCA and Chapter 5 US/China are mainly reaffirmation of existing IMF obligations on exchange rates with transparency related obligations. The UMCA however has a more developed coordinating mechanism for macroeconomic and exchange rate policy coordination. Both these instruments are not at the moment the subject of the kind of criteria set out in the US 1988 and 2015 legislations. The agreements however as discussed above undermine the role of the IMF as the principal multilateral organization charged with the oversight of exchange rates and macroeconomic coordination.

5. Substantive Issues

Generally, US focus on exchange rates and macroeconomic coordination raises two important substantive questions. First, the criteria under the 2015 Act focus on certain countries for enhanced analysis only if their trade exceeds certain thresholds.[42] These thresholds mainly calibrate exports to the US for the purposes of triggering US monitoring leading potentially to the imposition of certain sanctions. Such a calibration can amount to a quantitative restriction under the WTO and as such triggers its jurisdiction. Article XI of GATT 1994 reads in the relevant part as follows:

> 1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted

[38] See Qureshi, A.H. (2018) 'International Legal Aspects of 'Monetary' Relations in North East Asia', *Contextualising International Law in Northeast Asia*. Oxford, UK: Hart, Chapter 5.

[39] IMF EB Decision No. A-9786-(93/20) as amended.

[40] Article IV Section 3 of the IMF Articles of Agreement.

[41] Economic and Trade Agreement between the Government of the United States of America and the Government of the People's Republic of China 2020.

[42] See May 2019 Report.

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> or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.[43]

The criteria triggering US interest is a restriction under Article XI of GATT 1994 for the following reasons. First, it is a clear enunciation of a US policy that considers a certain level of exports to the US as being objectionable on the grounds that are not justifiable under the WTO. Second, it has a chilling effect[44] on those countries caught under this calibration. Third, it results in the countries involved having to engage with the US in the provision of certain information with respect to their exchange rates and to discuss their macroeconomic policies. Fourth, this engagement or non-engagement can involve the country being castigated as a 'currency manipulator', or being placed under what is essentially a 'negative' monitoring list. Finally, the countries are the subject of macroeconomic policy advise proffered by the US under a cloud of potential sanctions.

Moreover, such a targeting of certain countries alone is discriminatory and contrary to the GATT 1994 Most-Favoured-Nation principle. Article I of GATT specifically refers to 'any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties'. There is here an 'advantage' that countries trading with the US, whose trade is not above a certain threshold, are receiving, which advantage is not being accorded unconditionally to the countries under the monitoring list.

Second, there is much ado by the US about publication of foreign-exchange interventions by its major trading partners in the Reports of the US Treasury. Some countries on the US Monitoring List have acceded to the US pressure and agreed to publish their foreign exchange interventions, e.g., Korea from 2019. Notable examples of countries that have not agreed are China and Switzerland, although China has agreed in the US/China 2020 Phase One agreement to publish 'relevant data' that could shed light on interventions, but not specifically foreign exchange interventions. The question of a-priori transparency in foreign-exchange interventions of course has a prudential aspect set in confidentiality informed by its impact on the market. Leaving this aside, there is here a question as to whether there could conceivably be sound justifications for being opaque on grounds of national security? In the WTO, there is a national security exception under Article XXI of GATT 1994 that permits non-disclosure by a 'contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests'. In the IMF, a member is obligated to provide certain information necessary for the Fund's activities under Article VIII Section 5 of the IMF Articles. However, the Fund has interpreted, with respect to exchange restrictions, Articles VIII and XIV as permitting a Member to impose exchange restrictions for the preservation of national and international security.[45] There is no general security exception as such spelt out in the IMF Articles of Agreement, and the Executive Board Decision that refers to national security is focused on exchange restrictions, without reference to disclosure of information in relation to interventions in the foreign exchange market. Is it possible then to interpret Fund law as allowing data on currency intervention, even if post-facto, to be withheld on national security grounds?[46] There are sound reasons for suggesting that the Fund law allows for non-disclosure of currency interventions on security grounds. First, the Fund's Executive Decision on currency restrictions on national security

[43]Article XI of GATT 1994.

[44]Panel Report, United States Trade Act of 1974, Sections 301–310, paras. 7.88–7.90; Panel Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, Second Recourse to Article 21.5 of the DSU by the Philippines, T/DS/371/RW2 (2019), para. 7.164.

[45]See IMF Executive Decision Decision No. 144-(52/51), 14 August 1952.

[46]Needless to say, disclosure that would hamper the objective of the intervention in the first place (leaving aside national security concerns) would not be forthcoming nor expected.

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grounds is a generous interpretation of the Articles, in contrast to the stricter WTO national security exception, in particular as it has now been interpreted.[47] A member merely has to notify the Fund if it considers in its judgement that there is a national security reason for the imposition of the restriction. The reasons for the national security exception, as stated in the EB Decision, are not intrinsic to currency restrictions however. The Fund set out the following reasons for its decision:

> The Fund does not, however, provide a suitable forum for discussion of the political and military considerations leading to actions of this kind. In view of the fact that it is not possible to draw a precise line between cases involving only considerations of this nature and cases involving, in whole or in part, economic motivations and effects for which the Fund does provide the appropriate forum for discussion.[48]

Given this rational, it can be argued that this decision or its underlying direction extends and/or can be extended to foreign currency exchange interventions in particular given that foreign currency interventions can deliver the same impact as a currency restriction. The same reasoning is embedded in the Fund's EB Decision on Surveillance,[49] wherein with respect to currency manipulation, a member is given the benefit of reasonable doubt with respect to representations made by the member with regard to its exchange rate policies. Second, the furnishing of data on currency interventions is conspicuously absent in the albeit non-exhaustive list of information required under Article VIII Section 5. Third, the defence of necessity under Customary International Law (CIL),[50] which is available for national security, is not displaced by any of the Articles of Agreement of the IMF. Moreover, the Fund law is to be interpreted as per Article 31 (3) (c) of the Vienna Convention. for example to take into account the defence of necessity under CIL.

There may be a case for withholding information on currency interventions, especially in extreme circumstances. First, a country with large reserves in a reserve currency such as the dollar may have an interest in preserving the value of those reserves in relation to its own currency given the amounts at stake. Second, economic and political rivalry, including trade wars, may create a circumstance of distrust, particularly when there are no codes governing the manner in which a leading reserve currency that the rest of the world avails of is managed.[51] This is underlined by the fact that there is international concern that a leading reserve currency has been understood to have been weaponized and/or as having the capacity to be weaponized.[52] In such circumstances, States may well feel inclined to respond in kind to a weaponization of a reserve currency through covert currency interventions. Third, transparency in foreign exchange interventions could result in a country self-incriminating itself on a number of fronts.

Against this background, the US insistence on transparency in foreign exchange interventions undermines the basic right of a State not to disclose information on grounds of national security as per IMF and WTO regimes, not to mention Customary International Law. In sum, the US unilateral insistence on such disclosures does not comfortably sit with international norms.

6. Due Process Aspects

A number of observations may be made with respect to the process involved in the US surveillance of foreign currency exchange and macroeconomic practices. First, the threshold criteria set

[47] Panel Report, *Russia – Measures Concerning Traffic in Transit*, WT/DS/512 (2019).

[48] IMF Executive Decision Decision No. 144-(52/51), 14 August 1952.

[49] EB Decision No. 15203-(12/72), 18 July 2012.

[50] Article 25 of the ILC Draft Articles on State Responsibility.

[51] See this author 'International Legal Aspects of 'Monetary' Relations in Northeast Asia', in *Contextualizing International Law in Northeast Asia*. Oxford, UK: Hart, pp. 147–155.

[52] See Sen, J. (2019) 'The Weaponization of the Dollar: Policy Options for Small Countries', LSE Ideas! www.lse.ac.uk/ideas/Assets/Documents/updates/LSE-IDEAS-Weaponisation-Dollar.pdf (last visited August 2020).

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by the USTR under the 2015 legislation is the subject of change without advance notice. Thus, the goal posts seem to have changed suddenly in May 2019. Second, where data on foreign currency interventions are not available to the US, the determinations are made based on estimates. It would be reasonable to assume that these are generally over-estimates even though the Reports state they may be under or over. Estimates can be the basis for placing the burden of proof on the other side in the sphere of taxation when the State has an incomplete account of a taxpayer. However, the use of such a mechanism in international relations amongst sovereign States, in particular when the consequences can be serious for individuals in an economy, is unfortunate. Third, the process of evaluation lacks a structure for independent and objective evaluation of economic data based on the possibility of fair input by all the parties concerned.

Fourth, the criteria set under the 2015 Act is fundamentally flawed, leaving aside questions of compatibility with International Law. The objective of the Act is to identify a relevant pool of countries of 'significance' to the US and whose currency exchange rate and macroeconomic policies could have an unfair advantage for US competitors and US balance of payments. Nevertheless, any trading partner regardless of the criteria set can be the subject of US interest as stated variously in the Reports:

> As a further measure, this Administration will add and retain on the Monitoring List any major trading partner that accounts for a large and disproportionate share of the overall US trade deficit even if that economy has not met two of the three criteria from the 2015 Act.[53]

This gloss on the criteria not only raises questions about compatibility with the 2015 legislation itself, but partakes of arbitrariness. It begs the question as to the purpose of the criteria set in the Act and the thresholds grafted upon it by the US Treasury.

Moreover, the criteria enunciated in the legislation with respect to exchange rates and macroeconomic policies of third countries is fundamentally flawed given that the whole analysis is not arbitrary and derives from the prisms of trade and exclusively from the US balance of trade. An important premise of the legislation is so flawed that it calls into question the very validity of the Act in terms of the due process involved in its enactment.

Fifth, and related, the criteria focus on interventions in the foreign exchange market in terms of frequency and amounts. However, what is significant is not the frequency or amounts but the actual impact on the foreign exchange rates of the interventions. Sixth, a balance of payments is a relationship between a country and the rest of the world or in this case with certain countries. It is a relationship that has two dimensions: the US and the other trading partner. The analysis requires a thorough a look at US policies on exchange rates and its macroeconomic polices, as well as those of the trading partner. This also involves consideration of the US dollar as a leading reserve currency and the advantages this entails for the US economy and the management of its macroeconomic policies. Alas the reports are short in their analysis of the US in these respect. Seventh, reliance on the IMF in the reports is eclectic – designed to suite the US analysis, and absent when it is not convenient or short, for example in the case of China. Seventh, the US focus is on the balance of trade as it relates to trade in goods alone. This is acknowledged in a footnote[54], including the fact that in some cases the overall balance may well be different if services are factored in. The absence of a thorough analysis of the services sector in the discourse on balance of payments has the effect of skewing the conclusions. Eighth, the focus is on a country's foreign exchange reserves in relation to GDP and as a percentage of short-term debts. These are certainly the elements that feature in the discourse on the adequacy of currency reserves. However, it is to be noted that the size of a population can be a factor in informing the demand

[53]May 2019 Report.

[54]See the Reports of the US Treasury between October 2017 to January 2020.

for reserves.[55] Finally, the Reports contain repeated references to historic practices; for example, that China and Korea have a long history of undervaluation. Yet the historical antecedents are not important to an objective analysis of what is taking place currently. Moreover, this copy paste approach from past Reports casts a negative light on the quality of the analysis in the Reports generally.

7. US Policy Advice to Countries on its Monitoring List

The US policy advice is focused on reducing its trading partner's export surplus with the US, in goods. To this end, the US presumes to give advice to the countries on its Monitoring List as to how (1) the country might generate internal demand to capture the 'exports' within the country; (2) reduce its foreign currency reserves; and (3) increase market access for US goods, for instance by eliminating restrictive practices and subsidies. Thus, the US advises countries to implement fiscal reforms, in particular reducing taxes, having broad tax bases, and increasing public sector spending, for example by expanding the social safety net in health care, unemployment, and pensions. Similarly, there is focus on monetary policy, in particular limiting interventions in the currency market to 'truly exceptional circumstances of disorderly market conditions'.[56] In fact, the US Treasury has interpreted Section 3004 of the 1988 Act as giving authority to analyse:

> a broad range of factors, including not only trade and current account imbalances and foreign exchange intervention (criteria under the second piece of legislation …), but also currency developments, the design of exchange rate regimes and exchange rate practices, foreign exchange reserve coverage, capital controls, monetary policy, and trade policy actions, as well as foreign exchange activities by quasi-official entities that may be undertaken on behalf of official entities, among other factors.'[57]

This covers a very broad range of considerations that touch upon the mandate of the IMF and the WTO (including consistency with those regimes) and also raises questions as to the conformity of this interpretation with the 1988 Act itself. In this advice, there is no critical self-evaluation. The macroeconomic focus on others is essentially from the US trade deficit perspective. There is no reference to the IMF advice to these countries that would-be set-in IMF surveillance exercises of these countries. The advice touches on important State macroeconomic reins from a standpoint of US self-interest.

8. Conclusion

In conclusion, the level of US focus on certain vital macroeconomic variables of a third country is significant and the potential call for adjustments to be made by the third country can be wide ranging and intrusive. The focus of the two pieces of relevant legislation on other country's exchange rate regime is essentially US trade interest centred, lacking a sound economic basis whilst challenging and undermining existing multilateral institutions, the rule of International Economic Law, and due process at the level of the management of foreign economic relations as it affects third countries and the residents of those countries. It is far from clear if this is a process that is really about ensuring a level playing field in international competition. The entire enterprise reeks of politics!

[55]See for example Arslan, Y. and C. Cantu (2019) 'The Size of Foreign Exchange Reserves,' in Bank for International Settlements (ed.), *Reserve Management and FX Intervention*, Vol. 104, pp. 1–23. Bank for International Settlements.

[56]See for example advice to Korea in all the Reports between 2017 to 2020.

[57]See for example January 2020 Report.

Finally, does such a legal perspective serve any purpose? After all the Trump administration was widely understood not to care about deferring to the Rule of International Economic Law. It is as yet not clear whether the Biden administration will follow this approach. However, the two Acts considered herein pre-date the Trump administration and, therefore, the critique here is not of a passing phenomenon. Moreover, scholarship calls for a rigorous analysis and legal exposition for the annals of history. Legal analysis serves not only to account for, to challenge, but also to shame and condemn.

Elements of the US legislation raise questions both under the IMF and WTO law. Indeed, they even raise questions about the adequacy of these institutions in managing such issues. This article is not intended as a legal opinion, rather it is a modest scholarly contribution. Therefore, the questions whether a legal claim should be made given the issues raised in this article and under which institution they should be raised are questions that need not be spelt out here.

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