

# Legal Implications of U.S. CVD on Tires and Undervalued Currency in the WTO's SCM\*

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## Abstract

**Purpose** – This paper examines whether the imposition of countervailing duties by the United States on undervalued foreign currency is legally consistent with the WTO's SCM Agreement.

**Design/methodology** – The study uses a methodology that involves analyzing relevant WTO agreements, prior panel reports, Appellate Body decisions, and other legal documents.

**Findings** – The findings suggest that to impose countervailing duties, certain legal requirements must be met, including financial contribution, benefit, and specificity. The paper also notes that when calculating the benefits of undervalued foreign currency, losses from import activities due to currency undervaluation must be considered. Additionally, classifying all exports to the US under specific industries or business groups is likely to be inconsistent with the SCM Agreement.

**Originality/value** – Even the US countervailing measures on exchange rate subsidies may not comply with WTO regulations due to incorrect calculation of benefits and a lack of specificity, however, it suggests that when intervening in the foreign exchange market, the measures should aim to achieve only minimum policy goals.

**Keywords:** Countervailing duty, SCM Agreement, Currency manipulation, Specificity

**JEL Classifications:** F13, F14, K33, M16

## 1. Introduction

Export subsidies are government policy tools used to encourage the export of goods and discourage the import of goods on the domestic market. These subsidies are provided through direct financial contributions, such as tax relief for exporters, low-interest rate loans, payments, or government-financed international advertising. While export subsidies can increase the competitiveness of domestic exporters on the global market, they may also result in higher prices for domestic consumers compared to foreign ones.

Most subsidies linked directly to exports are prohibited under WTO regulations, with exceptions for least-developed countries. Despite this, the US has recently introduced foreign currency exchange rate-related regulations to strengthen protectionism. The US government has argued for over a decade that China's intervention in the foreign exchange market should

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be regarded as a subsidy and resolved through countervailing tariffs. In 2015, the US introduced the Bennet-Hatch-Carper amendment bill, which allows the imposition of countervailing duties on exports to the US that are undervalued due to currency manipulation.

In April 2020, the US Department of Commerce (DOC) revised the contents that can impose offset tariffs on undervalued currency within the trade remedy system. The DOC found that Vietnamese car and light truck tires exported to the US are unfairly subsidized due to undervaluation of the Vietnamese currency. Currency manipulation is a major concern for policymakers and analysts, as it can harm the US current account deficit and cause job losses. Many experts agree that Vietnam is deliberately weakening the value of its currency to maintain its export-led growth strategy. Legal analysis based on industry comments on the CVD rule was researched by Jaemin Lee (2020)<sup>1</sup>. Furthermore, the current WTO regime is facing many challenges due to its limitations in dealing with exchange rate policies.

This paper aims to analyze whether the US countervailing duty measures related to the artificial decline in the value of the Vietnamese currency meet the legal requirements for subsidies stipulated in WTO regulations.

The second section reviews relevant literature on countervailing duty and related issues. The third section covers the export of Vietnamese tires and the US countervailing duty calculation in accordance with WTO Agreement and US laws. The fourth section analyzes major issues related to legal requirements by comparing WTO rules and cases. Finally, the fifth section presents the conclusions of this study.

## 2. Literature Review

The intricate realm of Countervailing Duties (CVD) has elicited a broad spectrum of exploration within academic research. Over the years, scholars have delved into multifaceted dimensions that underpin the operation and implications of CVD mechanisms. Noteworthy among these is the seminal work of Baldwin and Steagail (1994), who plunged into the intricate economic underpinnings shaping decisions made by the International Trade Commission during the 1980s. This exploration encompassed the application of injury provisions embedded in the U.S. antidumping, countervailing duty, and safeguard laws, delineating the interplay of economic factors within the regulatory framework.

Sykes (2003), in a significant contribution to the literature, embarked on an analytical journey spanning the trajectory of the World Trade Organization/General Agreement on Tariffs and Trade (WTO/GATT) mandate since its inception. This enduring discourse has been intrinsically tied to the identification of government activities that yield disproportionate advantages, coupled with strategies to mitigate their impact. The central theme of balancing and addressing unacceptable advantages forms the crux of Sykes' meticulous exploration.

Lee (2010) assumed the mantle of scrutinizing the complex terrain of subsidies, particularly honing in on the dual conditions stipulated within the WTO subsidy agreement. Financial contributions and the bestowal of benefits emerge as pivotal components, dissected with

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<sup>1</sup> A Story Half Told—Selective Benefit Assessment in the New US CVD Rule for Exchange Rates, *Journal of International Economic Law*, Volume 23, Issue 4, December 2020, Pages 907–928, <https://doi.org/10.1093/jiel/jgaa030>

precision. Notably, Lee's examination extended beyond theoretical paradigms, encompassing practical manifestations within WTO dispute resolution practices. The focal point of his inquiry encompassed regulations within the WTO system and offsetting mechanisms. This intricate analysis unveiled the subject of controversy surrounding the establishment of the subsidy concept prior to its formal definition. Lee's pioneering work provided a theoretical scaffold, primed to empower countries such as Korea to adeptly navigate subsidy-related contentions, right from the stage of identifying their existence.

A parallel avenue of exploration surfaced in Kim's (2010) meticulous study, which dived into the convoluted commercial disputes straddling Korea and the United States, specifically in the context of countervailing duties. With laser-like precision, Kim dissected the rulings and the bedrock upon which the Government's Countervailing Duty Act of the USA is anchored. Through this lens, Kim unveiled the intricate layers of jurisdictional dynamics and their implications for cross-border economic relationships.

Cho's (2013) analytical foray into countervailing duties on products stemming from non-market economies added a distinct facet to the literature. His analysis scrutinized the labyrinthine challenges embedded in setting standards for determining the presence of benefits. Additionally, the definitions and scope of public bodies implicated in subsidy payments were intricately navigated. By probing the WTO panel and the report of the Appellate Body (AB), Cho delineated how beneficiary determinations hinge on distorted market dynamics, primarily influenced by government interventions. Yet, the study underscored the dearth of guidance provided by the AB, particularly pertaining to the analytical methodologies and elements requiring elucidation during the investigative phase. Cho's insights extended to the intricate web of Sino-U.S. relations, underscoring the potential for disputes in cases where non-market economies are implicated, such as Vietnam, Uzbekistan, and other nations.

Nyamwaya's (2019) meticulous reflection ushered the discussion toward a nuanced assessment of jurisdictional responses to the impediments impeding the efficacy of subsidies and countervailing measures. This comprehensive survey traversed the measures implemented by jurisdictions to harmonize the influence of these mechanisms while safeguarding international trade policies. Central to Nyamwaya's exploration was an unraveling of the specific conditions meticulously pondered before invoking subsidies and countervailing measures. This study provided a panoramic vista into the operational intricacies and global ramifications of countervailing measures.

In a groundbreaking stride, Slattery (2019) penetrated the realm of subsidies with a focus on their intersection with the SCM Agreement. The unique trajectory of Slattery's exploration unveiled subsidies with the potential to violate the very tenets of the SCM Agreement. Notably, the spotlight shone on subsidies tethered to export contingency, raising the novel prospect of legal actions against them. This revelation carried profound implications for fossil fuel subsidies, urging governments to reassess their support structures.

Wang and Choi (2021) examined the application of the U.S. Trade Preference Expansion Act (TPEA) of 2015, which empowers the DOC to adjust dumping margins under specific market conditions. Focusing on steel products from Korea, the paper assesses the consistency of the DOC's calculation, employing regression analysis, with WTO rules. The analysis extends data collection from 10 to 18 years, encompassing different steelmaking capacities. Findings reveal potential inconsistencies with WTO Antidumping Agreement Article 2.2 and

2.2.1.1, which stipulate cost calculations based on exporter records. Even if consistent, the DOC's calculated margin using a 10-year dataset significantly diverges from an 18-year projection and similar methodologies applied to other countries, raising concerns about margin reliability. The inflated dumping margin approach through regression analysis, aside from contravening WTO rules, yields unstable and unreliable outcomes. Choi (2023) uses the difference-in-differences methodology to assess the impact duties on imports. The study suggests the need for a domestic legal framework to combat circumvention activities and advocates for a unified circumvention rule within the WTO to enhance predictability in global trade.

Jung (2020) harkened back to the historical development of WTO rules governing subsidies and countervailing duty measures. Amidst a backdrop of complex U.S.-China relations, Jung dissected pivotal subsidy disputes and their ramifications. This journey illuminated the historical backdrop underpinning the current U.S. countervailing duty framework, casting its shadow over prospective countervailing duty measures in Korea. Jung's foresight resonated as an imperative, envisioning a trajectory aimed at averting future disputes through advanced deliberation of the contextual factors and their potential impact on actual investigations and disputes. It embarks on a discourse by drawing attention to the inadequacies of the prevailing framework enshrined within the Agreement on Subsidies and Countervailing Measures (ASCM). The interwoven complexities of the contemporary global economy, where production threads traverse multiple countries and the intertwined influence of collective actions and market failures loom large, serve as a backdrop to the challenges confronted. In this intricate landscape, WTO members grapple with a dearth of essential information required to forge a shared comprehension of the emergent zones necessitating new rules and their optimal formulation. This predicament beckons a crucial question: How does the WTO uphold its relevance in the twenty-first century's dynamic and interdependent landscape?

It advocates for the establishment of novel rules, urging a hiatus in the unilateral thrust and instead propelling deliberations steeped in bilateral and tripartite negotiations. A pivotal aspect of this journey rests in cultivating a more profound comprehension of subsidies and countervailing measures. This quest becomes the cornerstone of sustaining the WTO's resonance within a shifting economic paradigm.

The engagement segues into an exploration of authors who have contributed their insights to the discourse surrounding subsidies and countervailing measures. This academic choir is heralded by Nelson (2021), who draws from Ruggie's theory of liberalism and economic policy to illuminate the intricate landscape governing the transition toward a novel regime for addressing subsidies. This perspective delves into both the political and economic openings and challenges that this paradigm shift entails.

Supriyo's (2021) contribution serves as a spotlight on the multifaceted impact wielded by subsidies and countervailing measures. This comprehensive analysis extends its embrace to encapsulate the inherent limitations and the varied strains of subsidies that populate the landscape. A critical point of emphasis is the emergency context that legitimizes the application of subsidies, primarily as tools of resuscitation for national economies that find themselves ensnared by the clutches of economic crises.

The discourse then seamlessly transitions into the realm of a comparative vista, where economic data, encompassing trade balances, inflation, exchange rates, and foreign exchange

reserves from Vietnam, other Asian countries, and the United States, take center stage. Amidst this array of analysis, Dapice (2021) offers a brief yet discerning review of monetary regime theories. Within this expansive tapestry, the Treasury's evaluation of Vietnam's currency is dissected, shedding light on the rationale underpinning its classification as a currency manipulator by the United States. Park and Kim (2021), in an astute legal analysis, scrutinize proposed amendments to federal regulations, postulating countervailing duties on the undervalued Renminbi (RMB). This endeavor is underscored by an exploration of countermeasures, spanning both multilateral and bilateral conduits, aimed at fortifying the underpinning of the often-vulnerable multilateral system.

An ongoing debate emerges concerning whether the realm of devalued exchange rates nestles within the contours of WTO's subsidies and countervailing duties negotiations. Subsequently, the discourse unfolds into a meticulous dissection of how the imposition of exchange rate tariffs is enmeshed within the remit of the WTO's overarching framework for subsidies and countervailing measures.

As the passage crescendos to a contemplative climax, it unfolds into a realm wherein currency valuations take the limelight. A plethora of methodologies and approaches are summoned to assess the complex terrain of currency valuation. The journey commences with a direct approach, involving the estimation of fair-value real exchange rates by leveraging their theoretical determinants. These calculations find a home within models such as the Dynamic Equilibrium Exchange Rate (DEER) model, a vessel tailored to gauge the long-term influence of variables such as productivity and terms of trade upon exchange rates. Nevertheless, a caveat emerges in the form of these models' inability to ascertain if these valuations harmonize with both internal and external balance.

Another path is paved through estimating exchange rate valuations vis-à-vis those in harmony with current account balances, calibrated to manifest medium-term equilibrium within the global economic milieu. These calculations harness lower-frequency data, rendering the outcomes statistically robust and resilient to volatility due to the integration of slower-moving macroeconomic variables. A star within this constellation is the Fundamental Equilibrium Exchange Rate (FEER) model, which endeavors to gauge the impact of factors like domestic and external demand gaps and lagged Real Effective Exchange Rates (REERs) upon current accounts. Through this intricate framework, the underpinning current account compatible with closed domestic and external demand gaps is unearthed.

It casts a spotlight on the International Monetary Fund's (IMF) meticulous application of both methodologies. The direct examination of the Real Effective Exchange Rate (REER) and its examination through the prism of current accounts, encapsulated within the External Balance Assessment (EBA), serves as a comprehensive construct for assessing the misalignments and quantitative ramifications of exchange rates.

In essence, this multi-faceted literary exploration reveals the pulsating heart of countervailing duties and subsidies, casting a spotlight on the intricate fabric of economic policies, legal regulations, and their harmonization within the global tapestry of trade relations. Through meticulous exploration and analysis, this passage weaves together a vivid mosaic reflecting the complexities, challenges, and prospects intrinsic to the sphere of countervailing duties and subsidies.

### 3. Exchange Rate Assessment Methodology Review

#### 3.1. Methodology<sup>2</sup>

The GERAF framework is built upon an empirical model used to determine the current account equilibrium for 51 countries, which collectively represented 91% of the global GDP in 2018. This analysis spans the years from 1986 to 2018. The model employs a panel-corrected standard error approach to estimate how various factors influence the current account balances. These factors are grouped into four categories: cyclical factors, macroeconomic fundamentals, structural underpinnings, and policy variables.

GERAF introduces an innovative concept known as the “inertia gap” to improve the accuracy of current account evaluations. It does so by taking into account the dimension of official reserve holdings. While countries with substantial net foreign assets often have higher current account balances, this might not always be appropriate for nations with significant official reserve holdings, which indicate a need for precautionary external safeguards. The inertia gap adjusts the impact of net foreign assets on the established current account norms by excluding official reserves from the overall calculation. This ensures that surplus imbalances are assessed based solely on private net foreign assets.

The remaining components of the GERAF norm and gap analysis follow the same approach as that used in Cubeddu et al.'s 2019 study. The baseline GERAF specification is expressed as follows:

$$\left(\frac{CA}{GDP}\right)_{i,t} = \alpha + \beta_{cyc} X_{i,t}^{cyc} + \beta X'_{i,t} + \delta Z'_{i,t} + \gamma P'_{i,t} + \varepsilon_{i,t} \quad (1)$$

where  $X_{i,t}^{cyc}$  denotes the vector of cyclical factors,  $X'_{i,t}$  denotes the vector of macroeconomic and structural fundamentals,  $Z'_{i,t}$  denotes the (lagged) net foreign asset position, and  $P'_{i,t}$  denotes the vector of policy variables (set at their observed values). Here,  $\alpha$  denotes the regression constant and  $\varepsilon_{i,t}$  represents the regression residual (zero mean, normally distributed, and assumes an AR (1) process). Using the model coefficients, predicted current account values can be denoted as:

$$\left(\frac{\widehat{CA}}{GDP}\right)_{i,t} = \widehat{\alpha} + \widehat{\beta}^{cyc} X_{i,t}^{cyc} + \widehat{\beta} X'_{i,t} + \widehat{\delta} Z'_{i,t} + \widehat{\gamma} P'_{i,t} \quad (2)$$

This can also be expressed in terms of deviations between observed and desired policy levels (the latter denoted as  $P_{i,t}^{*}$ ), as well as the deviation between the observed net foreign asset position and the adjusted net foreign asset position (the latter denoted as  $Z_{i,t}^{X'}$ ):

$$\left(\frac{\widehat{CA}}{GDP}\right)_{i,t} = \underbrace{\widehat{\beta}^{cyc} X_{i,t}^{cyc}}_{\text{Cyc. component}} + \underbrace{\widehat{\alpha} + \widehat{\beta} X'_{i,t} + \widehat{\delta} Z_{i,t}^{X'}}_{\text{Cyclically adjusted CA norm}} + \underbrace{\widehat{\gamma} P_{i,t}^{*} + \widehat{\delta} (Z'_{i,t} - Z_{i,t}^{X'})}_{\text{Inertia gap}} + \underbrace{\widehat{\gamma} (P'_{i,t} - P_{i,t}^{*})}_{\text{Policy gap}} \quad (3)$$

Cyc. component	Cyclically adjusted CA norm	Inertia gap	Policy gap
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<sup>2</sup> Treasury letter 2020. The evaluation and conclusion of the Department of the Treasury (Treasury) regarding 19 C.F.R. 351.528(a) and (b)(1) in relation to Commerce's countervailing duty (CVD) investigation of an alleged subsidy pertaining to currency undervaluation in C-552-829 on passenger vehicle and light truck tires from the Socialist Republic of Vietnam.

The methodology used in GERAf involves an empirical model of current account determinants, which forms the foundation of the approach. This model is applied to a panel series of 51 countries, which together comprise 91% of the world's GDP in 2018. The period covered by the analysis is 1986-2018. The key drivers of current account balances are identified and broken down into four groups: cyclical factors, macroeconomic fundamentals, structural fundamentals, and policy variables.

One distinctive aspect of GERAf is the “cyclically adjusted current account norm.” This benchmark represents the theoretical current account balance achievable under the assumption that policies are aligned with their intended levels. It takes into account adjusted net foreign asset positions and considers macroeconomic and structural factors while isolating cyclical influences. This allows for a more accurate assessment of the current account balance, factoring out the effects of economic cycles, output gaps, and fluctuations in commodity terms of trade.

To convert current account gaps into Real Effective Exchange Rate (REER) gaps, GERAf employs country-specific semi-elasticities. These semi-elasticities measure the sensitivity of the current account to changes in the REER and are tailored to the characteristics of each country.

$$\eta_{CA} = \frac{\frac{\Delta(\frac{CA}{GDP})}{\Delta REER}}{REER} \quad (4)$$

Following the CGER-inspired approach outlined in Cubeddu et al. (2019), it is assumed that exchange rate adjustment occurs through the trade balance ( $TB$ ). The trade balance semi-elasticity can be estimated as

$$\eta^{TB} = \eta^x s^x - \eta^m s^m \quad (5)$$

where  $\eta^x$  ( $\eta^m$ ) is the elasticity of export (import) volume with respect to the REER,  $s^x$  ( $s^m$ ) is the share of nominal exports (imports) to GDP.

$\eta^x$  and  $\eta^m$  are assumed to be common to every country and, as in Cubeddu et al. (2019), they are calibrated to -0.11 and 0.57 respectively.  $s^x$  and  $s^m$  are calculated for every country by averaging the share of exports and imports to GDP, respectively, over 2010-19. Intuitively, the formula shows that the more open an economy, the larger the semi-elasticity in absolute terms and thus the more responsive the trade balance to a change in the REER.

The conversion from CA gap to REER gap is then:

$$REER_{gap} = \frac{CA_{gap}}{\eta_{TB}} \quad (6)$$

Note that this semi-elasticity is used to convert the total current account gap into the total REER gap and current account gaps due to specific policy distortions into the REER gaps due to those distortions.

**Table 1.** GERAF Current Account Model: Baseline Specification

<b>Cyclical factors</b>	
Output gap #	-0.370***
Commodity TOT gap	0.273***
<b>Macroeconomic Fundamentals</b>	
Trade openness/GDP #	0.018***
L. NFA/GDP	0.039***
L. NFA/GDP * (Dummy if L.NFA/GDP < -60%)	-0.015
L.Output per worker, relative to top 3 economies	0.037*
Real GDP growth, forecast in 5 years #	-0.231**
Safe asset index	-0.065***
<b>Structural Fundamentals</b>	
<i>Demographic block</i>	
Old-age dependency ratio #	-0.121***
Population growth #	- 0.616*
Prime savers share #	0.207***
Life expectancy at prime age #	- 0.006***
Life expectancy at prime age # * Future	0.015***
OADR	
Institutional/political environment (ICGR-12) #	-0.080***
Oil and natural gas trade balance * Resource temporariness #	0.300***
<b>Policy Variables</b>	
Cyclically-adjusted fiscal balance (instrumented)	0.537***
L.Public health spending/GDP #	-0.267*
<i>FX Intervention</i>	
FXI/GDP (instrumented)	0.682***
I/GDP (instrumented) # * K openness	-0.509**
Detrended private credit/GDP #	-0.097***
<i>Capital Controls</i>	
L.Relative output per worker * K openness	0.039
L.demeaned VIX * K openness	0.033**
L.demeaned VIX * K openness * Safe asset index	-0.057
Constant	-0.022***
	(0.000)
Observations	1,273
Number of countries	51
R-squared	0.385

"L." denotes variables expressed using a one year lag. "#" denotes variables expressed relative to the annual world GDP-weighted average. P-values in parentheses. Standard errors are robust to heteroscedasticity, autocorrelation and cross-sectional dependence. Regression includes a panel-wide AR (1) correction to control for potential autocorrelation in the dependent variable.

\*\*\*, \*\*, \* next to a number indicate statistical significance at 1, 5 and 10 percent, respectively. Source: U.S. Treasury staff calculations.



### 3.2. Case Study

The case discussed here focuses on Vietnam's tire market, which has seen significant growth in recent years, with an average annual growth rate of 17.8%. Vietnam exports its rubber tires to a total of 153 markets, with the US being its largest export market, accounting for more than half of its exports. The growth in Vietnam's tire market is driven by factors such as increased production for car assembly, expansion of fleet size, and easy availability of natural rubber. With a wide range of tire offerings for different vehicle segments, Vietnam has created healthy competition in the US tire market.

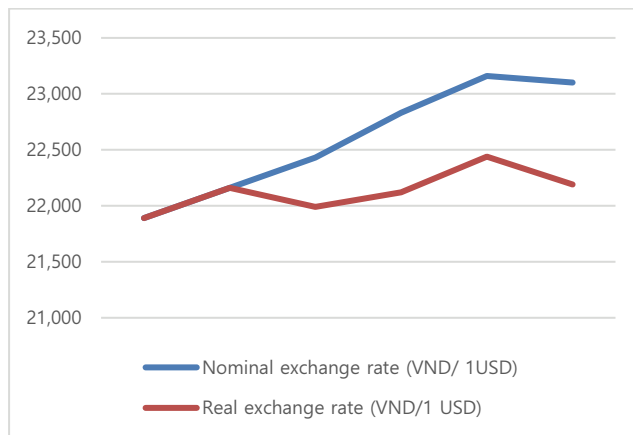
However, according to a report by the Treasury Department, Vietnam bought foreign exchange worth 22 billion USD from the state in 2019, which includes buying through the Bank of Vietnam. This led to an increase in the exchange rate, and Vietnam's real GDP fell between 3.5% and 4.8%.

To analyze the impact of Vietnam's tire exports on its current account, it would be necessary to look at the country's trade balance, which is the difference between exports and imports. If Vietnam's tire exports exceed its imports of rubber and other inputs necessary for tire production, it would have a positive impact on its current account. However, the impact of foreign exchange purchases on the current account also needs to be considered.

Moreover, the methodology discussed earlier can be applied to analyze Vietnam's current account position. The cyclical factors, macroeconomic and structural fundamentals, and policy variables that impact Vietnam's current account can be estimated using the panel-corrected standard error model for the country. The cyclical component of the predicted current account can also be estimated, and the inertia gap can be used to adjust the contribution of net foreign assets to the current account norms by stripping out official reserves from the total net foreign asset stock. Finally, the semi-elasticity can be used to transform the current account gap into a REER gap.

Overall, the case of Vietnam's tire market highlights the importance of considering the impact of exports on a country's current account position and the need to analyze the underlying factors that contribute to the current account balance.

**Fig. 1.** Vietnam's exchange currency 2015-2020



**Source:** International Monetary Fund, International Financial Statistics.

The Treasury's argument is that Vietnam's purchase of foreign exchange from the State, including through the Bank of Vietnam, had the effect of pushing up the exchange rate of the Vietnamese dong (VND) relative to the US dollar (USD). This means that the nominal exchange rate of 23,224 VND to a dollar in 2019 did not reflect the true value of the VND relative to the USD. The Treasury estimates that the real exchange rate was about 1,090 VND lower than the nominal rate, which implies that the VND was overvalued. This overvaluation could have negative consequences for Vietnam's economy, such as making its exports more expensive and less competitive in international markets. The US accuses Vietnam of strong productivity growth with the rise of the FIE sector, coupled with much higher inflation than its trading partners, that Real Effective Exchange Rate (REER) has appreciated significantly from 2010 to 2015, it increased by 22% and has remained broadly stable from 2015 to present. The Dong was mostly flat against the dollar in 2019, while the Normal Effective Exchange Rate (NEER) gained 1.7% and 2.2% respectively compared to the first 11 months of 2019. The most recent IMF assessment indicates that the Dong was undervalued by 8.4% on a true 2018 basis.<sup>3</sup>

Vietnam does not publish data on foreign exchange interventions. However, Vietnamese authorities have reliably informed the Ministry of Finance that net foreign exchange purchases were 0.8% of GDP in the four quarters to the end of June 2019. Vietnam intervened under both direction during these 4 quarters, authorities sold foreign exchange in the second half of 2018 with financial turmoil in several major emerging markets leading to a pullback from small emerging markets and create downward pressure on many emerging market currencies, including the Dong. As global financial conditions eased and holiday-related remittances increased in early 2019, authorities turned to foreign exchange purchases, with net buying in the first half of 2019 significantly higher net foreign exchange sales for the previous six months. The Treasury called on the authorities to increase the timeliness and transparency of data on foreign exchange reserves, interventions and foreign exchange balances. The US believes that Vietnam's foreign exchange reserves have been below the qualifying level for several years. For example, during a period of currency market stress in 2015, reserves fell to \$29 billion, equivalent to 1.9 months of imports.

This table shows that the real exchange rate is essentially stable against the dollar, compared with the 2016 value and the 2020 value. Therefore, the real value of the Dong does not cause large fluctuations in the US trade surplus. However, the overall trade surplus, and especially the bilateral deficit with the United States, has increased significantly from 2015 to 2020. The cause of this situation is the move of the United States to impose tariffs. The relationship with China's exports, coupled with rising wages in China, has caused many exporters, especially not only corporations in Asia but also many other corporations around the world, to move some most of their products to Vietnam. Since 2015, FDI inflows have increased from about half a billion USD a month to more than 1 billion USD a month. Many of these FDI exports are destined for the US markets.<sup>4</sup>

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<sup>3</sup> The United States Trade Representative Executive Office of the President (2021). Report on Vietnam's Acts, Policies, and Practices Related to Currency Valuation, *Section 301 Investigation*.

<sup>4</sup> David.D (2021), Vietnam's currency management: theory, practice and reality, Harvard Kennedy School, Ash Center, Harvard University, Cambridge, Massachusetts, USA

### 3.3. DOC Countervailing Measures

The investigation was initiated by the DOC to determine if manufacturers in Vietnam were receiving unfair subsidies. This investigation was prompted by a recommendation from the American Steel Workers Association, and the products from Vietnam being investigated for dumping and anti-subsidy practices were passenger car tires and light trucks.

According to the conclusion of a preliminary investigation released by the DOC in mid-January of this year, just a few days before President Joe Biden's administration came to power, Vietnamese exporters were found not to have dumped tires at below-market prices into the US. In contrast, the other investigated partners were all alleged to have engaged in such practices. However, in its final decision, the DOC confirmed that automobile and light truck tires imported from Vietnam were indeed unfairly subsidized due to the undervalued Dong currency.

**Table 2.** Final decision of subsidy rates

Exporter/ Producer	Subsidy rates
Kumho Tire (Vietnam)Co., Ltd	7.89%
Sailun (Vietnam)Co., Ltd	6.23%
All Others	6.46%

**Source:** Federal register

DOC has made a preliminary determination of the dumping margin for Vietnamese tire exporters, which ranges from 0% to 22.30%. Tires imported from Vietnam by Kenda Rubber (Vietnam) Co. Ltd., Sailun Group (Hong Kong) Co. Ltd, Sailun Tire Americas Inc., Bridgestone Corp., Bridgestone Tire Manufacturing Vietnam LLC, Kumho Tire (Vietnam) Co. Ltd., and Yokohama Rubber Co. Ltd. have not been subject to taxation. However, other enterprises that did not fully cooperate with the investigation agency have been imposed a tax rate of 22.30%.

Based on the investigation conclusion, the DOC has decided to impose a countervailing tax on automobile tires from Vietnam. Specifically, tires from Kumho Tire (Vietnam) Co. Ltd. will be taxed at a rate of 7.89%, tires from Sailun (Vietnam) Co. Ltd. at 6.23%, and tires from other manufacturers in Vietnam at 6.46%.<sup>5</sup>

## 4. Legal Analysis for US Measure Consistency with SCM

### 4.1. Financial contribution

The SCM Agreement contains a definition of the term “subsidy”. The definition contains three basic elements, (i) a financial contribution (ii) by a government or any public body within the territory of a Member (iii) which confers a benefit. In order to measure to be interpreted as subsidy, it has to meet the definition of “financial contribution” addressed in the article 1.1 of the SCM Agreement.

<sup>5</sup> US department of Commerce (2021), Issue and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Passenger Vehicle and Light Truck Tires from Socialist Republic of Vietnam.

- a) A government (or a public body) provides directly either funds, goods, services, or foregoes income due; or
- b) (b) A government participates indirectly by channeling payments through a private body. Payments genuinely attributable to private entities only, meaning that they are not in some way attributable to a government or public body—cannot constitute a “financial contribution” for purposes of determining the existence of a subsidy under the SCM Agreement.<sup>6</sup>

A new federal rule announced this year in the United States allows the DOC to consider currency undervaluation as a factor in imposing countervailing duties on a trading partner. US Code chapter 4 Tariff Act of 1930 Sec 771.5. (D) describes the financial contribution term.

*The term “financial contribution” means (i) The direct transfer of funds, such as grants, loans, and equity infusions, or the potential direct transfer of funds or liabilities, such as loan guarantees, (ii) foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income, (iii) Providing goods or services, other than general infrastructure, or (iv) Purchasing goods.”*

Vietnamese authorities strictly manage the value of the Dong. Since January 2016, the State Bank of Vietnam (SBV) has allowed the Dong to float +/- 3% against a basket of currencies within the previously established trading range, with the reference rate set update every day. Based on the cross-rate between the Dong and the currencies in the basket, the SBV still seems to be managing the Dong more closely against the US dollar than any other reference, and in very rare cases, the Dong has reached the trading margin. The Dong was mostly flat against the dollar in 2019, while the NEER and REER gained 1.7% and 2.2% respectively compared to the first 11 months of 2019. The most recent IMF assessment indicates that that the Dong was undervalued by 8.4% on a true 2018 basis.<sup>7</sup>

Even though, the DOC finds that currency undervaluation is in the nature of ‘financial contribution’, it was difficult to prove the consistency under article 1.1 of the SCM Agreement. Currency undervaluation does not belong to any of the categories stated in Article 1.1. However, there are some circumstances in which a lower valuation can be considered a financial contribution. Subject to Article 1.1(a)(1)(ii), goods or services provided by the government may constitute a financial contribution. If the WTO considers the Vietnamese government’s foreign currency conversion as a service or direct money transfers because Vietnam banks charges an exporter preferential fee for facilitation of the exchange of dollars to Dong. In this case, currency undervaluation can be interpreted as a financial contribution.

#### 4.2. Benefit

Article 14 of the WTO stipulates the evaluation of specific benefits, which means evaluating economic benefits by comparing the commercial conditions granted to beneficiaries in transactions in question with ordinary market conditions or market practices. Benefits were interpreted in SCM Article 14 as the relevant context as below.

<sup>6</sup> WTO Agreement On Subsidies and Countervailing Measures

<sup>7</sup> International Monetary Fund (2019). Vietnam: Staff report for the 2019 Article IV Consultation.

(a) Government provision of equity capital shall not be considered as conferring a benefit, unless the investment decision can be regarded as inconsistent with the usual investment practice.

(b) A loan by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan.

(c) A loan guarantee by a government shall not be considered as conferring a benefit, unless there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee...<sup>8</sup>

The analysis in the previous sections shows that it is not clear whether a financial contribution can be found when the government intervenes in the foreign exchange market. Even if a financial contribution can be found, it is essential that exchanges are beneficial to the recipient, SCM Article 1.1(b) stated that when and if the financial contribution has made the recipient “better off” than it would otherwise have been, absent that contribution.<sup>9</sup>

Regarding the benefit requirements, the DOC recognized that benefits exist when currency is undervalued in countries using the single exchange rate system, and the DOC basically stipulated that it should request an evaluation and conclusion from the Treasury. US Code chapter 4 Tariff Act of 1930, Sec 771.5. (E) Benefit conferred.

*A benefit shall normally be treated as conferred where there is a benefit to the recipient, including (i) in the case of an equity infusion, if the investment decision is inconsistent with the usual investment practice of private investors, including the practice regarding the provision of risk capital, in the country in which the equity infusion is made, (ii) in the case of a loan, if there is a difference between the amount the recipient of the loan pays on the loan and the amount the recipient would pay on a comparable commercial loan that the recipient could actually obtain on the market, (iii) in the case of a loan guarantee, if there is a difference, after adjusting for any difference in guarantee fees, between the amount the recipient of the guarantee pays on the guaranteed loan and the amount the recipient would pay for a comparable commercial loan if there were no guarantee by the authority, and (iv) in the case where goods or services are provided, if such goods or services are provided for less than adequate remuneration, and in the case where goods are purchased, if such goods are purchased for more than adequate remuneration<sup>10</sup>.*

However, it was clearly noted that the DOC may make a different judgment from the Treasury if there is a reasonable reason through the full text. In addition, the DOC determines whether the currency is undervalued by comparing the REER and the equilibrium REER. It was added that the calculation of offset table benefits will be considered according to the size

<sup>8</sup> Canada Aircraft (Appellate Body), p155, EC and certain members States- Large Civil Aircraft (Appellate Body), 972-5, Canada- Renewable Energy (Appellate Body), p5.163.

<sup>9</sup> Canada Aircraft (Appellate Body), p157, confirmed by US- Large Civil Aircraft (2nd complaint), (Appellate Body), p662.

<sup>10</sup> For purposes of clause (iv), the adequacy of remuneration shall be determined in relation to prevailing market conditions for the good or service being provided or the goods being purchased in the country which is subject to the investigation or review. Prevailing market conditions include price, quality, availability, marketability, transportation, and other conditions of purchase or sale.

of the US dollar exchanged for its own currency through the donor authorities during the survey period, but noted that the size of the benefits will be determined by specific circumstances.

Many revisions are related to the benefit requirements, which seem to reflect the criticism of the ambiguity of the regulations as well as the support of the revision. In a large framework, the draft regulations and the position are the same, but the provisions on how to calculate benefits are much more specific than before, and the provisions directly specify that benefits are recognized only if the government's actions affect currency undervaluation. At the same time, it is worth noting that the DOC has sufficient discretion to insert the phrase "normal" in all provisions so that it can access them in any way depending on the situation. In order to determine whether there are benefits, the DOC first reviews whether the entire country is undervalued, and then presents a two-step approach to determine whether there are benefits for individual companies.

CFR § 351.528(a) stipulates how to determine the undervaluation of currency. It basically stipulates analyzing the gap between the real effective exchange rate and the balanced real effective exchange rate. Second, it stipulates that the government's intervention in the currency undervaluation is recognized as a benefit. It stipulates the method of calculating the gap between the real effective exchange rate and the equilibrium real effective exchange rate. Therefore, the DOC acknowledged that there are various methods for this in the final regulation text, and confirmed that there is discretion to use the above various methods depending on the investigation situation. The fact that the DOC stated in the article that benefits can only be recognized when there is government intervention in currency undervaluation can be seen as a result of reflecting opinions received during the opinion gathering period. However, there may be various actions of the government in relation to monetary policy, but the Ministry of Commerce only said that it would be materialized through future investigations as to what extent it could be viewed as government intervention in currency undervaluation. CFR § 351.528(b) stipulates how to calculate the size of specific benefits in the event of currency undervaluation. In principle, it is stipulated that the difference between the nominal US dollar rate that meets the equilibrium real effective exchange rate and the actual nominal US dollar exchange rate during the relevant period is considered as a benefit, but the impact of government actions related to the exchange rate. Furthermore, in calculating specific benefits for individual companies, it basically stipulates that the difference between the domestic currency that would have been received and the domestic currency actually received without the currency undervaluation is based on the US dollar exchange volume of individual companies.

On the issue of whether monetary subsidies are beneficial to Vietnamese manufacturers and exporters, the DOC has essentially adopted an analysis provided by the Treasury. In line with the new monetary regulations, the DOC has solicited opinions from the Treasury on whether the Dong is undervalued. The Treasury explained that in 2019 there was a gap between Vietnam's REER and the medium-term external equilibrium real effective exchange rate that reflects policies consistent with appropriate, namely, balanced REER.<sup>11</sup> The Treasury

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19 CFR § 351.528 - Exchanges of undervalued currencies

(a) Currency undervaluation -(1) In general. *The Secretary normally will consider whether a benefit is conferred from the exchange of United States dollars for the currency of a country under review or investigation under a unified exchange rate system only if that country's currency is undervalued during the relevant period. In determining whether a country's currency is undervalued,*

found that the Vietnamese government's actions on the exchange rate had a 4.7% undervaluation effect of the Dong against the dollar. The IMF estimated that Vietnam's currency was undervalued by 8.4% in 2019.<sup>12</sup> Since then, the Treasury has made regular reports based on three criteria, including (i) bilateral goods trade surplus with the US of at least 20 billion USD, (ii) Current account surplus equivalent to at least 2% of GDP, (iii) One-way and prolonged intervention in the foreign currency market, represented by net buying of foreign currencies for at least 6 months in a 12-month period with a total net buying of foreign currencies in 12 months equivalent to at least 2 % GDP. When a country meets all three of these criteria, the US will label it a currency manipulator and further steps are taken.

However, the balance of trade surplus between Vietnam and the US is over 20 billion USD, but why that is and importantly, where does that surplus come from? Firstly, after Vietnam and the US normalized relations, especially when the US also planned to join the Trans-Pacific Partnership (TPP), the US-Vietnam relationship was developed very quickly. Second, the increase in trade relations is mainly due to FDI enterprises with foreign capital, including medical enterprises from the US, EU and other countries. FDI enterprises in the territory of Vietnam produce goods and export them under the label "Made in Vietnam". Obviously, of Vietnam's total exports, up to 70% come from FDI enterprises, and most exports to the US are more than 80%. Besides, the problem is that the company under investigation not only earns US dollars in exporting goods to the US, but even they have to convert Vietnamese Dong to US dollars in importing or buying raw materials which is priced in US dollars to serve their production of the product. The DOC needs to calculate the size of foreign exchange flows from exported products during the undervalued currency investigation period, deducting the value of imported raw materials purchased by U.S. dollars to clarify the difference in currency valuation. According to statistics of the General Department of Vietnam Customs, the currency used in payment for import and export goods is still the US dollar, accounting for over 90%.

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*the Secretary normally will take into account the gap between the country's real effective exchange rate (REER) and the real effective exchange rate that achieves an external balance over the medium term that reflects appropriate policies (equilibrium REER). (2) Government action. The Secretary normally will make an affirmative finding under paragraph (a)(1) of this section only if there has been government action on the exchange rate that contributes to an undervaluation of the currency. In assessing whether there has been such government action, the Secretary will not normally include monetary and related credit policy of an independent central bank or monetary authority. The Secretary may also consider the government's degree of transparency regarding actions that could alter the exchange rate.*

- (b) Benefit (1) In general. *Where the Secretary has made an affirmative finding under paragraph (a)(1) of this section, the Secretary normally will determine the existence of a benefit after examining the difference between: (i) The nominal, bilateral United States dollar rate consistent with the equilibrium REER; and (ii) The actual nominal, bilateral United States dollar rate during the relevant time period, taking into account any information regarding the impact of government action on the exchange rate. (2) Amount of benefit. Where there is a difference under paragraph (b)(1) of this section, the amount of the benefit from a currency exchange normally will be based on the difference between the amount of currency the firm received in exchange for United States dollars and the amount of currency that firm would have received absent the difference referred to in paragraph (b)(1) of this section. (c) Information sources. In applying this section, the Secretary will request that the Secretary of the Treasury provide its evaluation and conclusion as to the determinations under paragraphs (a) and (b)(1) of this section.*

<sup>12</sup> Macroeconomic and Foreign Exchange Policies of Major Trading Partners of the United States, U.S. DEPARTMENT OF THE TREASURY OFFICE OF INTERNATIONAL AFFAIRS January 2020



**Table 3.** Summary comparison of WTO and US code for Subsidy

WTO SCM	US Tariff Act of 1930
<p>Article 1 Definition of a Subsidy</p> <p>1.1 For the purpose of this Agreement, <b>a subsidy shall be deemed to exist if:</b></p> <p>(a)(1) <b>there is a financial contribution by a government or any public body</b> within the territory of a Member (referred to in this Agreement as "government"), i.e. where:</p> <p>(i) a government practice involves a <b>direct transfer of funds</b> (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);</p> <p>(ii) <b>government revenue that is otherwise due is foregone or not collected</b> (e.g. fiscal incentives such as tax credits);</p> <p>(iii) <b>a government provides goods or services</b> other than general infrastructure, or <b>purchases goods</b>;</p> <p>(iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;</p> <p>or</p> <p>(a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;</p> <p>and</p> <p><b>(b) a benefit is thereby conferred.</b></p> <p>1.2 <b>A subsidy as defined in paragraph 1 shall be subject to the provisions of Part II or shall be subject to the provisions of Part III or V only if such a subsidy is specific in accordance with the provisions of Article 2.</b><sup>13</sup></p>	<p>Sec.771(5) Countervailable subsidy</p> <p>(A)In general</p> <p>Except as provided in paragraph (5B), <b>a countervailable subsidy is a subsidy described in this paragraph which is specific</b> as described in paragraph (5A).</p> <p>(B)Subsidy described</p> <p>A subsidy is described in this paragraph in the case in which <b>an authority—</b></p> <p>(i)<b>provides a financial contribution,</b></p> <p>(ii)provides any form of income or price support within the meaning of Article XVI of the GATT 1994, or</p> <p>(iii)makes a payment to a funding mechanism to provide a financial contribution, or entrusts or directs a private entity to make a financial contribution, if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments,</p> <p><b>to a person and a benefit is thereby conferred.</b></p> <p>For purposes of this paragraph and paragraphs (5A) and (5B), the term "authority" means a government of a country or any public entity within the territory of the country.</p> <p><b>(D)Financial contribution</b></p> <p>The term "financial contribution" means—</p> <p>(i) <b>the direct transfer of funds</b>, such as grants, loans, and equity infusions, or the potential direct transfer of funds or liabilities, such as loan guarantees,</p> <p>(ii) <b>foregoing or not collecting revenue that is otherwise due</b>, such as granting tax credits or deductions from taxable income,</p> <p>(iii) <b>providing goods or services</b>, other than general infrastructure, or</p> <p>(iv) <b>purchasing goods.</b><sup>14</sup></p>

Source: Lee(2021)

### 4.3. Specificity

For specificity, the SCM agreement states that a subsidy is specific when it is limited to certain enterprises. Article 2 of the SCM Agreement do stipulate that countervailing subsidies

<sup>13</sup> WTO Agreement On Subsidies and Countervailing Measure

<sup>14</sup> United States-Title VII Of The Tariff Act Of 1930



must be specific to a group of businesses or industries. Article 2.1(c) of the SCM Agreement requires the investigating authority to consider certain factors in proving *de facto* specificity, including the use of the subsidy scheme for certain enterprises and predominant use by certain businesses.

The WTO dispute cases also showed that the term “specific” is limited to certain enterprises. The Appellate Body (AB) has interpreted the term several enterprises in this context to mean “known and specialized” enterprises.<sup>15</sup> In the AB of the US- Upland Cotton where it is understood as certain enterprises is a single enterprise or industry or a class of enterprises or industries that are known and particularized.<sup>16</sup> Thus, certain enterprises refers to a specific and known industry or group of industries which were grouped together by kinds of products they manufacture.

However, the new US CVD rule which defines the concept of “specific” is sufficiently broadly. The DOC has defined groups as businesses that buy or sell internationally, so there are no specific criteria such as certain products and industries. Thus, the new rule conflicts with WTO rules on specificity because it does not meet the criteria set forth in the SCM Agreement. In addition, other conditions may be considered that currency undervaluation was a *de facto* prohibited subsidy. If currency undervaluation constitutes a prohibited subsidy of legally contingent upon export performance, it is considered specific under WTO rules.<sup>17</sup> Footnote 4 of Article 3.1(a) of the SCM Agreement states that the criterion to be met when a subsidy is granted is associated with actual or expected exports or income from exports. It could be argued that exchange rate policy is tied to exports because for exchange rate policy to work, products must be traded internationally.

In addition, the DOC has for a long time maintained that the alleged monetary subsidy by Vietnam does not meet the legal requirement of “specificity” under the US CVD law. However, the DOC reversed its position after amending the provisions related to the CVD procedure instead of changing the statutory criteria of the CVD law. Furthermore, one could argue that currency undervaluation was not mentioned in the illustrated list of export subsidies under Annex I of the SCM Agreement. Whether an area of traded commodities makes sense in practice is a very fierce legal debate. As noted in footnote 4, the SCM Agreement, this standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings. The mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.<sup>18</sup>

The DOC refuted the second argument by stating that it had determined that a specific portion of the USD inflows had gone into the traded commodities sector. In addition, the DOC also noted that it had previously found that state-owned enterprises constitute a group, which it deemed “known and special” as the commercial goods sector. The DOC's preliminary determination on specificity was also challenged on the grounds that treating exporters as a group was contrary to previous DOC practice. That plan is topped off by

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<sup>15</sup> Appellate Body Report, USA - Countervailing Measures for Certain Hot Rolled Flat Steel Products from India, WT/DS436/AB/R (December 8, 2014), para. 4,376.

<sup>16</sup> WT/DS267/R, Panel Report, US – Upland Cotton, p. 7.1142 and 7.1151

<sup>17</sup> Modification of Regulations Regarding Benefit and Specificity in Countervailing Duty Proceedings. 85 FR 6031 (4 February 2020) (effective as of 6 April 2020) p. 6039

<sup>18</sup> SCM Agreement – Article 3- Footnote 4

treating exporters as a group intended to seek domestic subsidies under section 771 (5A) of the Act.

*(A) In general. A subsidy is specific if it is an export subsidy described in subparagraph (B) or an import substitution subsidy described in subparagraph (C), or if it is determined to be specific pursuant to subparagraph (D). (B) Export subsidy. An export subsidy is a subsidy that is, in law or in fact, contingent upon export performance, alone or as 1 of 2 or more conditions. (C) Import substitution subsidy. An import substitution subsidy is a subsidy that is contingent upon the use of domestic goods over imported goods, alone or as 1 of 2 or more conditions. (D) Domestic subsidy. In determining whether a subsidy (other than a subsidy described in subparagraph (B) or (C)) is a specific subsidy, in law or in fact, to an enterprise or industry within the jurisdiction of the authority providing the subsidy, the following guidelines shall apply<sup>19</sup>:*

DOC acknowledges its previous comments and views, but nevertheless concludes that it has the right to change its position, provided that such change is approved full explanation.

The second important finding concerns whether a currency is undervalued and how the amount of undervalued currency is measured. To make this finding, the DOC relied on analysis published by the Treasury in August 2020, using the Treasury's Global Exchange Rate Assessment Framework, which itself relies heavily on a model developed by the IMF. However, while Treasury's methodology provides the framework for the model, much of the underlying data on which the model is built, and indeed certain parameters of the model was not disclosed. It could be argued that the DOC disclosed not only the model used by the Treasury but also the underlying data, and should have included that information in administrative records. The DOC responded that disclosure of all Treasury data is not required by subsidy regulations. To back up its argument, DOC noted that it used findings from other agencies without including the underlying data on file.

Third, it could be raised questions about the specific methodology used by the Treasury and by the DOC to determine undervaluation. One key argument is that other undervalued models have produced mixed results, including that the VND has been depreciated. DOC has

<sup>19</sup>(i) *Where the authority providing the subsidy, or the legislation pursuant to which the authority operates, expressly limits access to the subsidy to an enterprise or industry, the subsidy is specific as a matter of law.*  
(ii) *Where the authority providing the subsidy, or the legislation pursuant to which the authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, the subsidy is not specific as a matter of law, if*

*(I) eligibility is automatic,*

*(II) the criteria or conditions for eligibility are strictly followed, and*

*(III) the criteria or conditions are clearly set forth in the relevant statute, regulation, or other official document so as to be capable of verification.*

*For purposes of this clause, the term "objective criteria or conditions" means criteria or conditions that are neutral and that do not favor one enterprise or industry over another.*

(iii) *Where there are reasons to believe that a subsidy may be specific as a matter of fact, the subsidy is specific if one or more of the following factors exist:*

*(I) The actual recipients of the subsidy, whether considered on an enterprise or industry basis, are limited in number.*

*(II) An enterprise or industry is a predominant user of the subsidy.*

*(III) An enterprise or industry receives a disproportionately large amount of the subsidy.*

*(IV) The manner in which the authority providing the subsidy has exercised discretion in the decision to grant the subsidy indicates that an enterprise or industry is favored over others*

made a preliminary determination that the traded commodity is not balanced or mainly uses foreign currency conversion based on IMF data on USD inflows into Vietnam. DOC determines that this criterion is in compliance with the law for determining factual specificity under Article 2.1(c) of the WTO ASCM and Section 771 (5A)(D)(iii) of the Tariff Act 1930.

Preliminary finding of specificity was challenged for a number of reasons, the most important of which was that the merchandise trade sector was too broad to constitute a business group "specific". In fact, the members of the barter sector come from many different industries, so the subsidy is effectively diffused throughout the economy. Furthermore, entities that buy or sell goods internationally are not known or particularized as required by WTO case law. DOC refutes the first argument by claiming that it is not necessary to have common characteristics such as membership in a particular industry to form a group.<sup>20</sup>

Therefore, the actual export provision must be substantiated by facts, and which facts need to be taken into account will depend on the circumstances of a specific case. However, currency undervaluation is not listed in Annex 1 of the SCM Agreement which lists an illustrative list of export subsidies. Therefore, counter-currency undervaluation invoking the DOC's new countervailing duty rule is inconsistent with the SCM Agreement.<sup>21</sup>

#### 4.4. Implications for South Korea's Potential CVD measures

The US Treasury has been monitoring South Korea's currency activities and has kept it on the watch list for currency manipulating countries. However, South Korea currently only meets one of the three criteria set out in the 2015 Act, which means that it could be removed from the monitoring list if it can demonstrate that its improvements against the criteria are durable. The country's economy currently only meets the current account surplus criterion, with a surplus of 4.7% of its GDP. The Treasury has welcomed South Korea's publication of a detailed report on its foreign exchange market interventions, but it has also urged the authorities to limit currency intervention to exceptional cases.

There is a high likelihood that the US will impose countervailing tariffs on South Korea due to its undervalued currency, following Vietnam's recent designation as a currency manipulator. It is important for South Korea to prepare for this possibility, particularly since the Biden administration may continue to designate currency manipulators and impose tariffs. The US current account and trade deficit have been expanding recently, and this increases the possibility of further designation in the future. South Korea needs to continue efforts to

<sup>20</sup> (a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific.

(b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or condition governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification.

(c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy program by a limited number of certain enterprises, predominant use by certain enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy program has been in operation.

<sup>21</sup> SCM Agreement – Article 3 (Jurisprudence)

increase exchange rate transparency and prevent excessive trade surplus with the US to avoid further designation.

It is also necessary to determine the issue of exchange rate subsidies for undervaluation of currency through multilateral discussions at the WTO, rather than through bilateral trade sanctions. Cooperation with the IMF on matters related to national external sector evaluation and macroeconomic policy is also important.

## 5. Conclusion

This article delves into the intricate legal considerations encompassing proposed revisions to U.S. federal regulations, specifically targeting countervailing duties in connection with the undervalued Vietnamese Dong. At the core of this analysis lies the WTO's SCM Agreement, which outlines the three pivotal components characterizing a subsidy: a financial contribution, a government or public body as the origin of this contribution, and the bestowal of a benefit. It's imperative that all three facets are concurrently present for a subsidy to be recognized, and meeting the legal requisites of financial contribution, benefits, and specificity is pivotal to invoking the imposition of countervailing duties.

Within the realm of benefits, the DOC derives its stance from the Treasury's conclusions, asserting that the Vietnamese government's interventions within the foreign exchange market fuelled currency undervaluation, thereby endowing export businesses with advantages. However, it's noteworthy that the Vietnamese government's interventions primarily aimed at preserving financial stability rather than conferring benefits to export endeavors. Additionally, considering the requirement to convert Dong to U.S. dollars for raw material importation, the DOC must factor in the resultant losses during import activities while calculating the benefits yielded from an undervalued currency during export transactions.

Turning attention to the concept of specificity, the DOC's findings suggest that subsidies exhibited specificity within the traded goods sector. Nevertheless, this assessment overlooks the intricate web of USD capital flow encompassing areas like exportation of services, portfolio investments, direct investments, and overseas earnings. The absence of these considerations challenges the notion of specificity. Furthermore, due to the broad scope of the merchandise trade sector, designating all export groups to the United States into distinct industries or business groups straddles the risk of violating the SCM Agreement's provisions on specificity.

In a holistic perspective, the U.S.'s countervailing measures concerning exchange rate subsidies are poised to encounter hurdles when aligning with the SCM Agreement's legal requisites. Notably, the areas susceptible to challenges include the precise computation of benefits and the establishment of specific legal prerequisites. It is pertinent to note that any form of intervention within the foreign exchange market must remain confined to achieving minimal policy objectives, lest it traverse the bounds of compliance with the agreement.

In essence, the deliberations unearthed in this article amplify the intricate dynamics governing international trade, bringing to the forefront the symbiotic interaction between economic policies, legal mandates, and global cooperation. The nuanced terrain of countervailing duties and subsidies necessitates an equilibrium between regulatory precision and the evolving complexities of contemporary economies, ultimately steering the course toward equitable trade practices and international economic stability.

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