THE FAIR CURENCY ACT OF 2007:
QUESTIONS AND ANSWERS
(April 2007)

What changes does the Fair Currency Act (FCA) make in U.S. law?

The FCA improves U.S. trade laws in the following several ways:

1. The countervailing duty law is applied equally to all countries, including non-market-economy countries;

2. Exchange-rate misalignment due to protracted undervaluation by a government of its currency is deemed a prohibited export subsidy that is countervailable under the countervailing duty law;

3. Exchange-rate misalignment is included as a condition to be considered with respect to market disruption by reason of imports from China; and

4. The requirements for the U.S. Department of the Treasury's semi-annual reports on currency manipulation are modernized.

A. *CHANGES TO THE COUNTERVAILING DUTY (CVD) LAW*

What is the U.S. countervailing duty law?

Since 1897 when the first U.S. countervailing duty law was passed, this statute has provided for the imposition of additional duties on imports into the United States for the purpose of counteracting any unfair competitive advantage that foreign manufacturers or exporters have enjoyed on the manufacture or export of their products from subsidies bestowed by the foreign government.

What are the roles of the U.S. Department of Commerce and the U.S. International Trade Commission in the administration of the U.S. countervailing duty law?

In a bifurcated process, the U.S. Department of Commerce calculates the extent to which imports into the United States have benefited from countervailable subsidization, while the U.S. International Trade Commission determines whether the subsidized imports are materially injuring or threatening to materially injure the U.S. domestic industry involved. If both agencies make affirmative determinations, a countervailing duty order against the imports is published.

Who may petition for relief under the U.S. countervailing duty law?

In order to have legal standing to file a countervailing duty petition, U.S. companies and workers must produce a product that is like (that is, either identical to or most similar in characteristics and uses with) the imports in question.

How does the U.S. countervailing duty law relate to the Agreement on Subsidies and Countervailing Measures (SCM Agreement) of the World Trade Organization (WTO)?

The U.S. countervailing duty law implements in U.S. domestic law the international legal obligations of the United States that are set forth in the WTO's SCM Agreement. If another WTO country disagrees with that implementation, it may invoke dispute settlement at the WTO to resolve the matter. If dispute settlement is decided against the United States in a given case, the United States is charged with bringing its measures into conformity with the WTO's provisions.

How does an injured American industry obtain relief under the countervailing duty law?

U.S. companies and workers engaged in producing manufactured goods or agricultural products in the United States, which are like the imported products that are alleged to be (a) subsidized and (b) causing or threatening material injury to their industry, may file a countervailing duty petition. The U.S. Department of Commerce conducts an investigation to determine whether the subject imports are receiving and benefiting from countervailable subsidies provided by the exporting country's government. The U.S. International Trade Commission conducts an investigation to determine whether the subsidized imports have caused or threaten to cause material injury to the U.S. domestic industry. If both countervailable subsidization and import-related injury are found, a countervailing duty order is issued by the U.S. Department of Commerce, and countervailing duties equal to the net subsidies are imposed by U.S. Customs to offset the injurious, unfair subsidization.

How long does it take, once a petition has been filed, before a CVD order is published?

The parallel investigations by the U.S. Department of Commerce and the U.S. International Trade Commission can last as long as 205 to 430 days.

Are countervailing duties punitive?

No. As noted above, countervailing duties are meant to offset injurious, unfair subsidization. It is the U.S. Department of Commerce that calculates the amount of the countervailable subsidization. If this subsidization is significant under the statute, a countervailing duty in the amount of that subsidization is assessed and collected by U.S. Customs from the U.S. importer for entries of the subject merchandise at the direction of the U.S. Department of Commerce. The concept underlying this system is that U.S. importers may continue to import the subsidized product, but either must pay the countervailing duty to negate the injurious effects and unfairness of the subject imports' subsidization or import non-subsidized merchandise from another source. By the same token, the United States is not dictating that the foreign government cease the subsidization, but, consistent with the SCM Agreement of the WTO, is simply acting to counter the injurious, unfair subsidization if the foreign government chooses to persist in

granting the countervailable subsidies. Once the subsidization has been offset by a countervailing duty, trade in the subsidized good is deemed to be fair.

When do countervailing duties take effect?

Following an affirmative preliminary injury determination by the U.S. International Trade Commission and an affirmative preliminary subsidy determination by the U.S. Department of Commerce, importers of record must either post a bond or make a cash deposit of the estimated amount of countervailing duties with U.S. Customs. After an affirmative final subsidy determination and then an affirmative final injury determination by the agencies, importers of record no longer have the less stringent option of posting a bond and must make a cash deposit of the estimated amount of countervailing duties. Final countervailing duty liability for past entries of subject merchandise is determined by the U.S. Department of Commerce in subsequent annual reviews, and the updated calculation of the subsidy amount also sets the cash deposit rate of estimated countervailing duties for future entries until the next annual review is completed.

How long do countervailing duties remain in effect?

The duration of a countervailing duty order and how long countervailing duties continue to be assessed and collected depend upon the facts in each case. The statute provides for several types of administrative reviews, each of which can lead to revocation of the countervailing duty order and cessation of the imposition of countervailing duties on subsequent entries of the affected merchandise. Thus, a countervailing duty order will be revoked partially or completely (1) if a foreign producer or exporter and its foreign government are able to establish in three consecutive annual reviews by the U.S. Department of Commerce that the countervailable subsidization has ceased or is no longer significant for whatever reason (such as termination of the subsidy programs by the foreign government or a decision by the foreign producer or exporter not to avail itself of the subsidies); (2) if, in a sunset review (conducted automatically every five years by the U.S. Department of Commerce and the U.S. International Trade Commission), it is found that countervailable subsidization or resultant material injury to the U.S. industry is not likely to continue or resume if the order is revoked; or (3) if a changed-circumstances review by one or the other agency at the request of any interested party concludes that the order is no longer needed (as when the last company in a U.S. industry goes out of business).

Are the countervailing duty rates adjusted during the life of a countervailing duty order?

Yes, countervailing duty rates can be adjusted. Interested parties – including the foreign government, exporters, and importers as well as petitioners – have the right to request an annual review by the U.S. Department of Commerce for this purpose of entries over the prior year. If a particular subsidy practice has increased or decreased, the countervailing duty rate will be adjusted accordingly.

Aren't countervailing duty orders a form of protectionism?

No. It is actually countervailable subsidies themselves, most flagrantly export-contingent subsidies, that are protectionist by virtue of their hampering healthy, unimpeded trade that is responsive to the dictates of the marketplace. Countervailable subsidies have long been recognized as distortive of supply and demand, destructive of fair competition, and incompatible with free trade. Inefficient industries sustained by governmental subsidies prosper at the expense of fit, otherwise competitive companies that are not subsidized. Far from being protectionist, therefore, countervailing duties serve as a legitimate, internationally accepted mechanism to correct the imbalances that protectionist subsidies generate.

Would there be any special procedures or requirements under the FCA for a currency complaint compared to other subsidy investigations?

No. An allegation of an undervalued currency would be investigated and decided in the same way as any other prohibited export subsidy. The FCA simply establishes statutorily that exchange-rate misalignment (defined as the undervaluation of a foreign currency as a result of protracted large-scale intervention by or at the direction of a governmental authority in the exchange market) is a subsidy due to its being a governmental financial contribution that benefits the recipient and is a prohibited countervailable export subsidy due to its being export-contingent. In the course of a countervailing duty proceeding, it would remain for the U.S. Department of Commerce to measure the extent of any exchange-rate misalignment based upon the factual circumstances of the given case.

Isn't the FCA's treatment of exchange-rate misalignment a form of China-bashing?

No. By its terms, in keeping with the Most-Favored-Nation (MFN) principle of the WTO's General Agreement on Tariffs and Trade (GATT), the FCA's section on subsidies pertains in a non-discriminatory manner to undervalued exchange-rate misalignment by <u>any</u> member state of the WTO, not just by China and not just by non-market-economy countries. It addresses an unfair practice <u>per</u> <u>se</u>, not any particular trading partner. Equally with all other WTO members, China bound itself under public international law to the WTO's multilateral SCM Agreement when China joined the WTO in December 2001. Furthermore, in accord with the SCM Agreement, in its protocol of accession China agreed to terminate all of its export-contingent subsidies as well as certain other subsidies by the time of its entry into the WTO in December 2001. The FCA's provisions treating undervalued exchange-rate misalignment as a prohibited countervailable export subsidy are designed to implement in U.S. domestic law the WTO's public international legal rules that are understood to authorize the countervailing of such export-contingent currency undervaluation.

Isn't the FCA's designation of exchange-rate misalignment as a prohibited countervailable export subsidy unfair to American consumers?

No. Export-contingent subsidies that are granted only if a foreign company exports its products are universally recognized as having no redeeming quality as far as the global trading system is concerned. It is for this reason that export-contingent subsidies are not only countervailable (as are some domestic subsidies that are not tied to exportation), but also – except as provided in the WTO's Agriculture Agreement – are prohibited by the WTO's SCM Agreement. While it is generally assumed that a product that has qualified for an export-contingent subsidy is sold at a price discounted by the amount of the export subsidy, that pass-through of the export subsidy in the form of a lower price for the export will not occur if the exporter decides to enjoy the proceeds of the export subsidy in some other way. In this situation, the subsidy serves only to boost the revenues of the foreign producer with no benefit to American consumers. Furthermore, even if the export subsidy is passed through by the exporter in the form of a reduced price for the exported product, any advantage gained by American consumers is short-term at best. As observed earlier, governmental subsidization of exports carries the longer-term risks of propping up inefficient companies in the exporting country. When the negative repercussions of this artificial support include injury to U.S. companies and workers, revenues and jobs are lost at considerable cost to the U.S. economy and national security. In the final analysis, American consumers and consumers everywhere are best served through healthy competition by unsubsidized companies that are competitive on their own merits. When weaker competitors use artificial advantages to injure stronger competitors, the consumer loses.

Is there a strong case that exchange-rate misalignment is a prohibited countervailable export subsidy under the WTO's rules?

Yes. The question of whether exchange-rate misalignment is a prohibited countervailable export subsidy has never been the subject of dispute settlement at the World Trade Organization, and so it is not possible to know with certainty what a dispute settlement proceeding's outcome on this issue of first impression would be. Nevertheless, the WTO's SCM Agreement is very clear as to what criteria must be satisfied for a measure to be deemed a prohibited countervailable export subsidy, and there are very solid grounds for concluding that exchange-rate misalignment meets these criteria. In particular, as next discussed in turn with reference to Articles 1, 2, and 3 of the SCM Agreement, exchange-rate misalignment meets the three WTO legal tests for a prohibited export subsidy: it (1) entails a governmental financial contribution that (2) bestows a benefit upon the recipient, and so is a subsidy, and (3) is specific and so a countervailable subsidy by virtue of being contingent upon exportation.

First, is there a financial contribution by the foreign government?

Yes. A governmental financial contribution takes place when a foreign government engages in protracted large-scale intervention in the exchange market by requiring that foreign currency in its territory be converted at an undervalued rate into its national

currency. In the case of China, for example, its intervention in the exchange market since 1994 has resulted in an undervaluation of the yuan by an estimated 40 percent or more. In effect, the Chinese government's sterilization of massive quantities of U.S. dollars has prevented market forces from increasing the value of the yuan vis-à-vis the U.S. dollar. Rather than a rate of exchange of approximately 8 yuan to the U.S. dollar, the rate of exchange should be approximately 5 yuan to the U.S. dollar. As a practical matter, therefore, for every U.S. dollar exchanged in China, the Chinese government ensures that the exporter receives 8 yuan rather than 5 yuan. The differential of 3 more yuan per U.S. dollar constitutes a clear financial contribution by the Chinese government.

Second, is there a benefit to the exporter?

Yes. To continue the example involving China, when an exporter in China exchanges its earned U.S. dollars for yuan, the additional 3 yuan received for each U.S. dollar are a clear benefit to the Chinese exporter.

Third, is the subsidy derived from exchange-rate misalignment contingent upon exportation of the product?

Yes. Again with respect to the instance of China, the Chinese company can only enjoy the benefit of the Chinese government's financial contribution of 3 yuan per U.S. dollar by exporting merchandise from China and being paid in U.S. dollars for that merchandise.

But how does this arrangement satisfy the WTO's test that, to be prohibited, a subsidy must be "specific" and tied to exports and not generally available?

Article 2.3 of the SCM Agreement provides, "Any subsidy falling under the provisions of Article 3 shall be deemed to be specific." Export subsidies such as misaligned exchange rates fall under Article 3, which prohibits "subsidies contingent, in law or in fact, whether solely or as one of several other conditions, upon export performance . . . ." (footnote omitted.)

How can exchange-rate misalignment be contingent upon exportation when all conversions between an undervalued foreign currency and the U.S. dollar are made at the same rate of exchange, whether the transaction pertains to exportation or not?

Using China as an illustration, it is true that all conversions between the yuan and the U.S. dollar are made at the yuan's undervalued rate, such as when U.S. companies invest in China and Chinese companies invest in the United States or when U.S. tourists visit China and Chinese tourists travel to the United States. The fact remains, however, as a practical matter that a Chinese company is not eligible for this subsidy on the basis of yuan-denominated sales in the Chinese home market, but must export its products to the United States, be paid in U.S. dollars, and then in compliance with Chinese law exchange those U.S. dollars into yuan. Only in this manner can a Chinese company benefit from the yuan's undervaluation. The same is true when U.S. tourists buy goods and pay for

services in China, because payment requires conversion of the U.S. dollar into yuan at the government-determined exchange rate. Under national income accounting norms, the Chinese company that provides the goods or services to the U.S. tourist effectively is exporting to the United States, albeit the U.S. tourists are at the time of the transactions temporarily in China. From the standpoint of the SCM Agreement, the conclusion that exchange-rate misalignment is an export-contingent subsidy is reinforced by at least two dispute settlements at the WTO, one involving subsidization of cotton and the other concerning reduced corporate income taxes, in which the WTO's Appellate Body found the export-contingent nature or clear tying of the subsidies to exportation was not dissolved when non-exporters also were given the subsidies.

Does exchange-rate misalignment constitute governmental provision of a non-countervailable service or good that falls under the heading of general infrastructure?

No. As the U.S. Department of Commerce indicated in its final rule in 1998 implementing the countervailing duty sections of the Uruguay Round Agreements Act, governmental financial contributions to the general infrastructure include the provision of such services and items as interstate highways and bridges, schools, health care facilities, sewage systems, port facilities, libraries, and police protection that are for the public good and broad societal welfare of a country, region, state, or municipality and that are available to all citizens or to all members of the public. As a macroeconomic policy, exchange-rate misalignment is a governmental financial contribution that does not directly build up a community's basic, functional features of the kinds just recounted and is accessible to just those persons who are in a position to deal with foreign currencies.

How does the FCA direct the U.S. Department of Commerce and the U.S. International Trade Commission to calculate the extent of exchange-rate misalignment?

The FCA would authorize the U.S. Department of Commerce and the U.S. International Trade Commission to measure the amount of exchange-rate misalignment by "develop{ing} and apply{ing} an objective methodology that is consistent with widely recognized macroeconomic theory." There are a number of standard techniques that are employed by academicians, policy analysts, and the International Monetary Fund (IMF) itself to determine whether a currency is misaligned. One standard technique, purchasing power parity, creates a ratio between two currencies by quantifying how much of each one would be required to purchase a given basket of goods in each country in a particular period. Another common approach relies on the changes in foreign currency reserves, money supply, and other factors. Whatever methodology were followed, the FCA would require the U.S. Department of Commerce and the U.S. International Trade Administration to rely on "publicly available and reliable data." The IMF's monthly publication, "International Financial Statistics," would be one such source of data.

Why wouldn't any government, including the United States today, be guilty of exchange-rate misalignment?

As commented upon earlier, the FCA defines exchange-rate misalignment as undervaluation of a foreign currency <u>*as the result*</u> of protracted large-scale intervention

by or at the direction of a governmental authority in the exchange market. This definition, which draws upon the IMF's standards, is intended to exclude the sort of episodic undervaluation of a currency due to the normal workings of the exchange market and discrepancies in cyclical macroeconomic conditions. Thus, modest intervention by a government to moderate sudden swings in its currency would not be considered as exchange-rate misalignment.

Is there a consensus by legal and academic experts on whether or not exchange-rate misalignment is a prohibited countervailable export subsidy?

Not surprisingly, given that this issue is one that has not been the subject of dispute settlement at the WTO, there is no consensus on whether exchange-rate misalignment is a prohibited countervailable export subsidy. By the same token, critics of this approach do not agree as to which of the SCM Agreement's criteria for such a subsidy (i.e., governmental financial contribution, benefit, and export-contingency) might not be met.

Is dispute settlement at the WTO likely to occur in the event that the FCA is enacted and exchange-rate misalignment is statutorily treated as a prohibited countervailable export subsidy?

If a challenge were made "as such" (arguing that the provision violates the SCM Agreement no matter how applied) or "as applied" in a particular case, we believe that the FCA would be found to meet all the requirements of the WTO.

Are there instances in which the U.S. Department of Commerce has been the first to countervail subsidy practices based upon its interpretation of the WTO's SCM Agreement and subsequently been upheld in its interpretation in dispute settlement at the WTO?

Yes.

For example, in a CVD proceeding involving imports of DRAMS into the United States from South Korea, private banks in South Korea had supported domestic producers of DRAMS by means of loans, equity investment, and debt forgiveness. Based upon evidence of the role played by the South Korean government, the U.S. Department of Commerce determined that these transactions were carried out by the private South Korean banks as the result of entrustment or direction by the South Korean government and so constituted governmental financial contributions within the meaning of the SCM Agreement. In dispute settlement at the WTO initiated by South Korea, this interpretation of the SCM Agreement by the U.S. Department of Commerce was upheld.

As a second example, in another CVD proceeding regarding Canadian softwood lumber, the U.S. Department of Commerce was confronted with the issue of what benchmark to use in order to ascertain whether and, if so, to what extent stumpage prices by the government in Canada conferred a benefit under the SCM Agreement. In relying upon U.S. stumpage prices rather than Canadian stumpage prices to resolve this question, the

U.S. Department of Commerce explained that the available evidence indicated that private stumpage prices in Canada were distorted because the Canadian government's role in providing stumpage rights was predominant in the Canadian market and effectively determined the stumpage prices charged by private suppliers in Canada. In dispute settlement at the WTO initiated by Canada, this interpretation by the U.S. Department of Commerce that in at least certain circumstances it is permissible to look for a benchmark outside the exporting country to another country, including the importing country, was affirmed.

B. *CHANGES TO SECTION 421(b)*

Why was Section 421(b) enacted into law in the United States?

In its protocol of accession to the WTO, China expressly agreed to a transitional product-specific safeguard mechanism against market disruption. It permits WTO members to increase tariffs or impose other restrictions on imports from China that are a significant cause of market disruption. Section 421(b) of the Tariff Act of 1974, as amended, implements in U.S. domestic law this international legal commitment by China. Thus, this portion of the FCA is the only part that is specific to China.

How does a proceeding under Section 421(b) work?

Investigations by the U.S. International Trade Commission under Section 421(b) can be commenced as the result of (1) a petition by the U.S. domestic industry, (2) a request by either the President or the U.S. Trade Representative, (3) the resolution of either the House Ways and Means Committee or the Senate Finance Committee, or (4) the Commission's own motion. The Commission's investigation determines whether there has been market disruption to a U.S. domestic industry by reason of imports from China. If the determination is in the affirmative, the Commission also recommends to the President an appropriate remedy. From the time an investigation begins until the proclamation of relief, a proceeding under Section 421(b) takes approximately 150 days.

What sort of remedy can be imposed as the result of a Section 421(b) investigation?

If the President concurs with the Commission's finding of market disruption, the President may increase a duty or impose an import restriction on the subject merchandise from China.

How long can a remedy under Section 421(b) remain in effect?

The President can discontinue relief at any time, but in all cases the measures must be removed within 12 years of China's accession to the WTO, that is, by December 10, 2013.

Doesn't the FCA unduly restrict the President's discretion to weigh the national interest?

No. The FCA does not in any way alter or restrict the discretion given by the statute to the President, who would retain the power to grant relief in the form of the U.S. International Trade Commission's recommendation, to alter the recommended relief, or to deny any relief.

What would happen under the FCA in a Section 421(b) investigation if China were an important source of a good also produced in the United States that was critical to the national security of the United States?

The FCA would add a requirement to Section 421(b) that the U.S. International Trade Commission would request and receive guidance in writing from the U.S. Secretary of Defense within fifteen days after an investigation's initiation as to whether or not the subject imports from China were like or directly competitive with articles produced by a U.S. domestic industry that are critical to the defense industrial base of the United States. In that case, if market disruption were found and relief were granted, the FCA would prohibit the Secretary of Defense from procuring, directly or indirectly, the subject imports from China, unless the President were to determine and certify to the Congress in the particular investigation that waiver of this provision was in the national security interests of the United States. So, if Chinese imports were damaging a critical U.S. industry, the U.S. Department of Defense would be prohibited from using them, and non-defense imports would be subject to relief measures. However, if the Chinese goods were deemed necessary to U.S. national security, the Secretary of Defense could procure them without restriction.

C. *CHANGES TO SEMI-ANNUAL REPORTS ON FOREIGN CURRENCIES BY THE U.S. DEPARTMENT OF THE TREASURY*

What changes to the statute would the FCA make?

Under current law, the Secretary of the Treasury must prepare and submit to Congress semi-annual reports on whether any other countries are manipulating the rate of exchange between their currency and the U.S. dollar for purposes of preventing effective balance-of-payments adjustments or gaining unfair competitive advantage in international trade. If so, the Secretary of the Treasury is required (with the exception next noted) to initiate negotiations with each such country on an expedited basis bilaterally or at the International Monetary Fund to ensure correction of the problem by means of regular and prompt adjustments by the other country of the rate of exchange. Negotiations are not required, however, if the Secretary of the Treasury determines that negotiations would have a serious detrimental impact on vital national economic and security interests and so informs Congress. This statute implements in U.S. law Article IV:1(iii) of the IMF's Articles of Agreement. Both Article IV and the existing statute are interpreted as requiring a showing of intent by the government involved to prevent effective balance-of-

payments adjustment or to gain an unfair competitive advantage over other members of the IMF by means of currency manipulation.

The FCA would direct the Secretary of the Treasury to include in the semi-annual reports consideration of fundamental misalignment of exchange rates as well as currency manipulation by other countries. The FCA defines fundamental misalignment as a material sustained disparity between the observed levels of an effective exchange rate for another country's currency and the corresponding levels of an effective exchange rate for that currency that would be consistent with fundamental macroeconomic conditions based upon a generally accepted economic rationale. The FCA would also amend the present statute by elaborating on what subjects and issues should be addressed in the semi-annual reports, including instances of consideration by the U.S. Department of Commerce and the U.S. International Trade Commission of exchange-rate misalignment in trade cases, and would retain the Secretary of the Treasury's discretion not to go forward with negotiations as to currency manipulation and fundamental misalignment if doing so would have a serious detrimental impact in the Secretary of the Treasury's judgment on vital national economic and security interests.

What is the difference between fundamental misalignment and currency manipulation?

While fundamental misalignment of a currency and a failure by the foreign government to acknowledge or take timely and effective steps to correct fundamental misalignment can be seen as a form of currency manipulation, fundamental misalignment does not strictly require a showing that the foreign country's government intentionally is keeping its currency in fundamental misalignment for the purpose of preventing effective balance-of-payments adjustment or gaining an unfair competitive advantage in international trade. On the other hand, currency manipulation within the meaning of Article IV:1(iii) of the IMF's Articles of Agreement does mandate a showing of such intent by the foreign country's government. As a matter of monetary policy, given their similarities it is sensible that review and analysis of both currency manipulation and fundamental misalignment of foreign currencies be considered in the Treasury Department's semi-annual reports with an eye toward remedial negotiations as appropriate.

What is the difference between fundamental misalignment and currency manipulation, on the one hand, and exchange-rate misalignment, on the other hand?

Fundamental misalignment can mean that a foreign currency is for any reason either overvalued or undervalued compared with the effective exchange rate that would be consistent with fundamental macroeconomic conditions based upon a generally accepted economic rationale. Exchange-rate misalignment arises only when a foreign currency is undervalued as a result of protracted large-scale intervention by or at the direction of a governmental authority in the exchange market. In addition, whereas fundamental misalignment and currency manipulation are akin to one another from the standpoint of monetary policy, exchange-rate misalignment as a matter of trade policy does not require any showing that the foreign government intentionally maintains a misaligned exchange

rate so as to prevent effective balance-of-payments adjustment or to gain an unfair competitive advantage in international trade. The foreign government's intent in this regard is irrelevant for purposes of international trade agreements and U.S. trade law.

Why are these different concepts necessary?

When a country deliberately, manipulatively undervalues or overvalues its currency contrary to Article IV:1(iii) of the IMF's Articles of Agreement or fails to take sufficient steps in a timely manner to redress its fundamentally misaligned currency, negotiations are warranted from a monetary perspective to encourage the country's government to adjust its currency to reflect realistically the balance of basic supply and demand in the market. At the same time, when undervalued exchange-rate misalignment is present, corrective steps from a trade perspective are warranted in the form of countervailing duties and other relief to offset injurious imports. A currency that is undervalued, therefore, can be *both* a monetary problem within the frame of reference of the IMF and a trade problem within the frame of reference of the WTO. This hybrid nature justifies provision in U.S. domestic law for negotiations on the monetary side and countervailing duties and other relief on the trade side. Implementation of one or the other or both of these remedies, as the facts and circumstances in a given instance warrant, consequently is appropriate and not inconsistent with the international legal rights and obligations of the United States. By contrast, the treatment of currency undervaluation either as strictly a monetary problem or as strictly a trade problem to be addressed separately by the IMF or the WTO, rather than confronted as effectively as possible by both institutions in tandem, would wrongly ignore the far-reaching effects that currency undervaluation has in both the monetary and trade contexts. Without a CVD remedy, injured industries have no recourse unless and until diplomatic processes are undertaken and produce positive results. By the same token, if revaluation is secured through diplomatic means, the CVD remedy can be adjusted accordingly.

D. *POLICY ISSUES*

Isn't the FCA an attempt to legislate foreign governments' currency policies?

No. Under the IMF's Articles of Agreement, each member country may choose how to value its currency vis-à-vis other members' currencies. A member is neither required to let its currency float freely nor prohibited from pegging its currency's value against another currency. However, as relevant and seen earlier, each member of the IMF must refrain from manipulating its currency for purposes of preventing effective balance-of-payments adjustment or gaining an unfair competitive advantage in international trade. By treating exchange-rate misalignment as a prohibited countervailable export subsidy and as a factor to be weighed in favor of finding and providing relief against market disruption by imports into the United States from China, the FCA actually supports, and does not detract or vary from, the IMF's ground rules. Recognizing that undervaluation of a foreign currency can have adverse trade ramifications for the United States, whether or not the requisite manipulative intent can be established under the IMF's Article IV:1(iii), the FCA does not attempt to legislate or dictate a foreign country's currency

policies, but simply makes clear that a logical consequence of a foreign country's currency policies under international and U.S. domestic trade law – if those policies lead to injurious exchange-rate misalignment – is that the United States will impose countervailing duties to nullify the unfair competitive advantage that results. In this connection, it is also important to keep in mind that China and, indeed, WTO member countries, have committed to terminate all prohibited export subsidies.

Some governments lack the institutions and policy tools to allow a free-floating currency. Isn't the FCA unfair to them?

No. As commented above, the IMF's Articles of Agreement recognize the right of each country that is a member of the IMF to decide how to value its own currency, but also require each member to maintain the value of its currency at levels that do not prevent effective balance-of-payments adjustment and that do not create an unfair competitive advantage in international trade. Each IMF member, therefore, is free to value its currency under a hard-peg regime, a floating regime, or some intermediate regime such as a type of soft peg or a tightly managed float. Once having made the choice that it deems is best suited to its circumstances, however, a country is constrained to take whatever steps – such as revaluation in the case of a hard-pegged currency – are necessary to avoid currency manipulation within the meaning of the IMF's Article IV:1(iii). In addition, a country that is a member of the WTO is also constrained not to resort to prohibited export subsidies and so should avoid exchange-rate misalignment as well, again by whatever steps are necessary. Based as it is upon the international legal obligations of the United States and its trading partners, the FCA is not unfair to any country in treating exchange-rate misalignment as a prohibited countervailable export subsidy. Whatever exchange regime a country selects for itself, there are means available to that country to uphold its international legal commitments not to engage in either currency manipulation or exchange-rate misalignment.

But hasn't the WTO agreed that the IMF has jurisdiction over disputes involving exchange measures pursuant to Article XV of the General Agreement on Tariffs and Trade?

No, not in circumstances in which a country engages in exchange-rate misalignment that constitutes a prohibited countervailable export subsidy under the SCM Agreement. Such a measure is trade action that falls under the jurisdiction of the WTO to redress. On the other hand, if a country's undervaluation of its currency is done for purposes of preventing effective balance-of-payments adjustments or gaining unfair competitive advantage in international trade, currency manipulation results under the IMF's Articles of Agreement. Currency manipulation is an exchange measure that falls under the jurisdiction of the IMF to address.

In effect, a country that is a member of the WTO is obligated under the WTO's agreements not to undervalue its currency in a way that results in a prohibited countervailable export subsidy. At the same time, that country also is obligated as a member of the IMF under the IMF's Articles of Agreement not to undervalue its currency