CHINA'S EXCHANGE RATE MANIPULATION: WHAT SHOULD THE UNITED STATES DO?

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I. INTRODUCTION

If China and U.S. trade continue on their present course, a trade war seems likely.[1] Chinese exporters have benefited tremendously at the expense of American goods.[2] In August 2011 alone, the U.S. imported $37 billion in goods from China, while only exporting $8 billion.[3] Treasury Secretary Timothy Geithner accused China of currency manipulation and was unhappy with progress on the yuan.[4] Any problems with China trade relations could hurt an already struggling global economy.[5] One of the most important aspects of free trade agreements is that they hinge on a level playing field, and American workers are not currently playing on one.[6] According to President Obama, the United States needs to make sure our prices "are not artificially inflated."[7]

China's power in the global economy is significant: it accounts for a quarter of the world's population, it is armed with nuclear weapons,[8] and it is rapidly expanding in terms of gross domestic product (GDP).[9] Isolating or ignoring China realistically is not an option, but Americans are at a large disadvantage in important industries.[10]

1. Sewell Chan, *Pressure Grows in U.S. Over China's Currency,* THE N.Y. TIMES, (Mar. 16, 2010), http://www.nytimes.com/2010/03/17/business/17yuan.html.

2. *Id.*

3. *U.S. Trade in Goods with China*, U.S. CENSUS BUREAU: FOREIGN TRADE, (November 8, 2011), http://www.census.gov/foreign-trade/balance/c5700.html.

4. *See* Deborah Solomon, *Q&A: Geithner on the Economy, Tax Cuts and China,* THE WALL STREET JOURNAL, (Sept. 12, 2010), http://blogs.wsj.com/economics/2010/09/12/qa-geithner-on-the-economy-tax-cuts-and-china.

5. Michael Martina, *China: Currency law would hurt U.S. jobs growth*, REUTERS, Oct. 10, 2011, http://www.reuters.com/article/2011/10/10/us-china-usa-currency-idUSTRE7991FC20111010.

6. *See* Chan, *supra* note 1.

7. Mark Landler, *Currency Dispute Likely to Further Fray U.S.-China Ties,* THE NEW YORK TIMES, (Feb. 3, 2010), http://www.nytimes.com/2010/02/04/world/asia/04diplo.html.

8. THOMAS LUM & DICK K. NANTO, CONG. RESEARCH SERV., RL 31403, CHINA'S TRADE WITH THE UNITED STATES AND THE WORLD CRS–2 (2007).

9. Qiang Xiaoji, *China's GDP Grows 11.1% in H1*, CHINA DAILY, July 7, 2010, http://www. chinadaily. com.cn/bizchina/2010-07/15/content_10109811.htm.

10. LUM & NANTO, *supra* note 8.

This Comment is broken into four parts. The first part describes the history of U.S. trade relations with China, the current state of the law between the countries, and the economic impact from currency manipulation. The second part describes what international laws China may have broken by manipulating currency and the most recent proposed U.S. laws. The third part describes what the United States should do to fix the trade situation with China. The fourth part concludes this Comment.

II. U.S. RELATIONS WITH CHINA

A. Background

Since 1979 China has introduced major economic and trade reforms which have transformed the nation into the world's fastest growing economy.[11] Once the U.S. and China reestablished diplomatic relations in early 1979, trade between the two nations increased tremendously.[12] The United States provided China with most-favored-nation (MFN) status in 1980.[13] That MFN status created heavy controversy following the Tiananmen Square protests of 1989.[14] However, generally MFN status is aligned more with American trade and tariff restrictions than with human rights.[15] President Clinton explicitly rejected determining MFN status based on human rights.[16] Many, including the AFL-CIO, viewed President Clinton's renewal of MFN status critically, stating "profits, not people, matter most."[17] Nevertheless, China's MFN status continued and became permanent in 2000.[18]

11. WAYNE M. MORRISON, CONG. RESEARCH SERV., RL 33536, CHINA-U.S. TRADE ISSUES 1 (2011).

12. *Id.*

13. *Id.*

14. *See, e.g.*, Elizabeth J. Perry, *Most-Favored-Nation Status and the Political Potential of Chinese Labor*, at 2, *available at* http://depts.washington.edu/pcls/documents/research/Perry_ MostFavoredNation.pdf.

15. *Id.*

16. *Id.*

17. *Id.*

18. MORRISON, *supra* note 11, at 1. The most-favored-nation status was renamed "permanent normal trade relations" (NTR) status in 1998.

In 1993, China amended its constitution and declared that the promotion of a "socialist market economy" was the ultimate goal for China's foreign trade.[19] In November 2001, China officially joined the World Trade Organization (WTO).[20] China's admission to the WTO was carefully negotiated, with the full protocol covering thousands of lines of tariffs and specific agreements covering approximately 1500 pages.[21] Conditions for China to enter the WTO included sharp decreases in tariffs; tariffs of industrial products, for instance, were lowered from 35% to 17% in a period of five years.[22]

China differs from most advanced economies because it does not have a market-based floating exchange rate.[23] Between 1994 and July 2005, China pegged its currency at about 8.28 yuan to the dollar.[24] Originally, the international trade arena viewed this exchange rate policy favorably.[25] "In July 2005, China appreciated the [yuan] to the dollar by 2.1% and moved to a 'managed float' based on major foreign currencies."[26] From July 2005 to July 2009, the dollar-yuan exchange rate went from 8.27 to 6.93 yuan per dollar, while the Chinese government made large-scale purchases of U.S. dollars.[27] However, once the global financial crisis became apparent, the Chinese government

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19. Thomas Yunlong Man, *National Legal Restructuring in Accordance with International Norms: GATT/WTO and China's Foreign Trade Reform*, 4 IND. J. GLOBAL LEGAL STUD. 471, 479 (1997).

20. *China officially joins WTO,* CNN, Nov. 11, 2001, http://edition.cnn.com/2001/WORLD/asiapcf/central/11/10/china.WTO/index.html.

21. Penelope B. Prime, *China joins the WTO: How, Why and What Now?,* 37 BUSINESS ECONOMICS 26, 27 (2002).

22. GREGORY C. CHOW, CHINA'S ECONOMIC TRANSFORMATION 78 (2d ed. 2007).

23. MORRISON, *supra* note 11, at 20.

24. *Id.*

25. Daniel Griswold, *Protectionism No Fix for China's Currency,* CATO INSTITUTE, June 25, 2005, *available at* http://www.cato.org/pub_display.php?pub_id=3946. *See, e.g.*, Jian-Guang Shen, *China's Exchange Rate System after WTO Accession: Some Considerations,* BOFIT ONLINE, at 5 (2001), *available at* http://www.suomenpankki.fi/bofit_en/tutkimus/seminaarit/tiistai/Documents/ bon1701.pdf (stating that "the underdeveloped state of China's financial markets and ongoing need for improving corporate governance, currency stability and avoidance of adverse impacts of capital flows should remain central policy objectives for years to come").

26. MORRISON, *supra* note 11, at 20.

27. *Id.*

halted its gradual appreciation of the yuan and has kept the yuan-dollar exchange rate relatively constant since July 2009 at 6.83.[28]

Aside from currency manipulation, U.S. disputes with China include intellectual property rights,[29] payment processing,[30] steel duties,[31] U.S. poultry,[32] and toys.[33] Many times the U.S. has brought, and won, cases against China for violating its WTO commitments.[34] However, while these cases are important, they do not address the fundamental causes that create the U.S.-China trade deficit.[35]

B. Economic Impact of Currency Manipulation

The U.S. economy has fallen into a depression during a global recession, contrasted with the booming Chinese economy. As of October 2010, the unemployment rate in the United States was 9.6%.[36] Meanwhile, China's unemployment rate was last reported at 4.2%.[37] The United States' GDP growth was 3.1% in 2005, 2.7% in 2006, 2.1% in 2007, 0.4% in 2008, and -2.4% in 2009.[38] Meanwhile, China's GDP growth was 11.3% in 2005,

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28. *Id.*

29. *See* Panel Report, *China-Measures Affecting the Protection and Enforcement of Intellectual Property Rights,* WT/DS362/R (Jan. 26, 2009).

30. Mark Drajem & Peter Eichenbaum, *U.S. Goes After China at WTO as Pressure Mounts from Congress,* BLOOMBERG, Sep. 16, 2010, http://www.bloomberg.com/news/2010-09-15/u-s-set-to- file-wto-complaints-against-china-as-pressure-grows-over-trade.html.

31. *Id.*

32. *See generally* Panel Report, *United States-Certain Measures Affecting Imports of Poultry From China*, WT/DS392/R (Sep. 29, 2010).

33. Eric S. Lipton & David Barboza, *As More Toys Are Recalled, Trail Ends in China,* N.Y. TIMES, June 19, 2007, http://www.nytimes.com/2007/06/19/business/worldbusiness/19toys.html.

34. Daniel M. Slane, *US-China Economic and Security Review Commission* (2010), at 55, *available at* http://www.uscc.gov/annual_report/2010/annual_report_full_10.pdf.

35. *Id.* at 60.

36. Bureau of Labor Statistics, *The Employment Situation—October 2010, USDL-11-0271,* at 1 (Dep't of Labor).

37. *China's unemployment down to 4.1% at end of Q3*, XINHUA NEWS, Oct. 22, 2010, http:// news.xinhuanet.com/english2010/china/2010-10/22/c_13570193.htm.

38. *GDP growth (annual %),* THE WORLD BANK, *available at* http://data.worldbank.org/ indicator/NY.GDP.MKTP.KD.ZG.

12.7% in 2006, 14.2% in 2007, 9.6% in 2008, and 9.1% in 2009.[39] China recently surpassed Japan as the world's second-largest economy,[40] and it is projected that China will pass the U.S. as the world's biggest economy as early as 2030.[41] Many economists are critical of the excessive growth of China's GDP in recent years, and view worldwide inflation as a strong possibility in coming years.[42]

One of the factors in measuring GDP is net exports. When a country is exporting more goods than it is importing, the GDP increases as the country is producing more goods than it is importing.[43] The U.S. imports significantly more goods from China than it exports.[44] In 2005 alone, the U.S. ran a trade deficit with China at $201 billion.[45]

Most experts believe that China's currency is undervalued relative to the dollar; however, there exists a major dispute on the exact amount of the undervaluation.[46] Some legislators have suggested that China has undervalued its currency by as much as 40%.[47] The Alliance for American Manufacturing reports that the currency manipulation "destroyed some 68,000 jobs in

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39. *Id.*

40. David Barboza, *China Passes Japan as Second-Largest Economy*, N.Y. TIMES, Aug. 16, 2010, at B1, *available at* http://www.nytimes.com/2010/08/16/business/global/16yuan.html.

41. *Id.*

42. *See* Brian Bremner, *Is China Growing Too Fast for Comfort?,* BLOOMBERG BUSINESSWEEK, July 18, 2006, http://www.businessweek.com/globalbiz/content/jul2006/gb20060718_426870.htm.

43. *See generally* U.S. Bureau of Econ. Analysis, A GUIDE TO THE NATIONAL INCOME AND PRODUCT ACCOUNTS OF THE UNITED STATES, http://www.bea.gov/national/pdf/nipaguid.pdf (last visited Oct. 2011).

44. *Trade With China: 2010,* U.S. CENSUS BUREAU, *available at* http://www.census.gov/ foreign-trade/balance/c5700.html#2010 (last modified Feb. 11, 2010).

45. LUM & NANTO, *supra* note 8, at CRS-1.

46. JIANHUAI SHI, INTERNATIONAL FINANCIAL ISSUES IN THE PACIFIC RIM: GLOBAL IMBALANCES, FINANCIAL LIBERALIZATION, AND EXCHANGE RATE POLICY 71 (Takatoshi Ito & Andrew K. Rose eds., 2008).

47. Karen Workman, *Congressmen favor bill aimed at Chinese currency manipulation,* THE OAKLAND PRESS, Oct. 14, 2010, http://www.theoaklandpress.com/articles/2010/10/14/news/local_news/doc4cb66acb1da80903626119.txt?viewmode=default.

Michigan" alone.[48] Other reports suggest that the United States could have lost as many as 2.4 million jobs from currency manipulation.[49] Some researchers also view currency manipulation as detrimental to China.[50] Thus, while its economy is currently booming, the excessive growth is viewed by many as dangerous.[51]

It is unclear that if China actually were to allow its currency to shift with exchange rates whether the effect would be to lower the gross imbalance of trade. Elasticity of U.S. exports and elasticity of U.S. imports appear to be different.[52] This is known as the Houthakker-Maggee effect.[53] Consistently, the elasticity of foreign imports is far less than in the case of American imports.[54] Thus, a direct 40% increase in the value of the yuan might not create the impact that many congressmen believe it would create.

Economists are not settled on whether a trade imbalance is a bad thing for a country. Nobel Prize-winning Milton Friedman argued that trade deficits are not necessarily important because high exports raise the value of currency and vice versa for imports.[55] Friedman has pointed out in the past that a large trade deficit signaled that the country's currency was strong and desirable.[56] This view has been quite accurate when comparing

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48. *Id.*

49. Doug Palmer, *China Trade Blamed for 2.4 Million lost US jobs*, REUTERS, Mar. 23, 2010, http://www.reuters.com/article/idUSN238294820100323.

50. *See, e.g.*, Cori O'Donnell, *Focusing on China's Currency Manipulation Won't Jumpstart U.S. Economy*, WEALTH WIRE, Oct. 18, 2011, http://www.wealthwire.com/news/global/2068 (explaining that allowing value of Yuan to strengthen, as opposed to artificially weakening through manipulation, would "help out the Chinese consumer market").

51. *See* Bremner, *supra* note 42 (noting that the current growth in China is unsustainable and could lead to disastrous results).

52. John D. Greenwald, *At the End of a long Trade Policy Road,* 45 TEX. INT'L L.J. 157, 162 (2009).

53. *Id.*

54. *Id.* (Quoting Lawrence H. Summers, The U.S. Current Account Deficit and the Global Economy, Lecture for the Per Jacobsson Lecture Series 4–5 (Oct. 3, 2004), *available at* http://www.perjacobsson.org/2004/100304.pdf).

55. *See* MILTON FRIEDMAN & ROSE FRIEDMAN, FREE TO CHOOSE: A PERSONAL STATEMENT 41 (1980).

56. *See id.* at 41–42.

the weakening U.S. dollar to the euro and other currencies,[57] and as the U.S. dollar has weakened, the trade gap decreased as exports have increased.[58] But a Friedman analysis falls apart when a country deliberately tries to control its currency price.[59]

When China joined the WTO, member countries viewed China as a developing nation.[60] China, as a developing nation, has relied heavily on exports.[61] Perhaps doubts still remain as to whether China's economy can handle a fully free-floating currency system, causing these actions.

Chinese officials are also concerned with China's banking system. Chinese banks are predominantly state-owned and are called upon to make low-interest loans without risk assessments.[62] The Chinese have effectively been saying that they want to go to a flexible system, but their banking system cannot withstand it.[63] Congress has acknowledged that on some level this is true.[64] America loses credibility when Americans tell the Chinese that they just need to privatize their banks and open up their whole exchange rate system. This loss of credibility comes from the current financial troubles of U.S. banks, as well as the Asian financial crisis, which was caused by the privatization and opening up of many Asian nations' exchange rate systems.[65] For example, "South Korea and

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57. Eric Weiner, *Is a Weak Dollar Really so Terrible?,* NPR, Oct. 3, 2007, http://www.npr.org/ templates/story/story.php?storyId=14901181.

58. Timothy R. Homan, *U.S. Economy: Trade Gap Shrank as Exports Increase,* BLOOMBERG BUSINESSWEEK, Nov. 10, 2010, http://www.businessweek.com/news/2010-11-10/u-s-economy-trade-gap-shrank-as-exports-increase.html.

59. *See* MORRISON, *supra* note 11, at 47–48.

60. Statement of Long Yongtu H.E. Vice Minister, at the Meeting of the Working Party on the Accession of China (July 4, 2001) *available at* http://wto.org/english/news_e/news01_e/wpchina_ longstat_17sept01_e.htm.

61. Joanne Ellul, *Cracks in the China*, MONEY MARKETING, Oct. 11, 2011, http://www. moneymarketing.co.uk/investments/cracks-in-the-china/1039084.article.

62. *Id*.

63. Report to the Congress on International Economic and Exchange rate policies, Hearing Before the S. Comm. on Banking, Housing, and Urban Affairs, (2005) (testimony of John Snow, Sec'y Treasury).

64. *See* U.S. TREASURY DEP'T, REPORT TO THE CONGRESS ON INTERNATIONAL ECONOMIC AND EXCHANGE RATE POLICIES 2011, at 12.

65. *The Treasury Department's Report to Congress on International Economic and Exchange Rate Policy (IEERP) and the U.S.-China Strategic Economic Dialogue,* 110th

Thailand opened their short term capital accounts prematurely, and eventually . . . when they started going south [there was no] regulatory capacity to keep people from making those bad decisions [and then there was] trouble."[66] This is a misstep China wishes to avoid.[67]

China benefits from buying U.S. treasuries for several reasons. Only the U.S. dollar bond market possesses the size and liquidity to absorb China's dollar holdings.[68] Most developing economies lack broad bond markets in their domestic currency,[69] a problem often referred to as "original sin."[70] A 10% drop in the value of China's dollar holdings would result in a loss of about 3% of China's GDP.[71] Secretary Clinton acknowledged that

> in order to start exporting again to its biggest market, namely the United States, the United States has to take some very drastic measures with this stimulus package, which means we have to incur more debt. . . . It would not be in China's interest if we were unable to get our economy moving again. So, by continuing to support the American Treasury instruments, the Chinese are recognizing our interconnection.[72]

China's economy heavily relies on exports.[73] Revaluing the yuan would impact not just China's trade with the U.S., but its entire economy. Any significant appreciation of the renminbi (another way to refer to the yuan) could erode China's export competitiveness.[74] Wen Jiabao, China's premier, has said he

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Cong. 52 (2007) (hereinafter *SED Hearing 110–905*) (statement of Albert Keidel).

66. *Id.* at 52–53.

67. *Id.* at 53.

68. *See* Slane, *supra* note 34, at 32.

69. RONALD I. MCKINNON, EXCHANGE RATES UNDER THE EAST ASIAN DOLLAR STANDARD: LIVING WITH CONFLICTED VIRTUE 5 (2005).

70. *Id.*

71. *Id.* at 33.

72. *Clinton Hails China's Continued Investment in US*, BREITBART, Feb. 22, 2011, http://www. breitbart.com/article.php?id=D96GE6RO0&show_article=1.

73. Ellul, *supra* note 61.

74. Ye Xie, *Wen Says 20% Gain in Yuan Would Cause Social Upheaval,* BLOOMBERG, Sep. 23, 2010, http://www.bloomberg.com/news/2010-09-22/wen-says-

"cannot imagine how many Chinese factories will go bankrupt, how many Chinese workers will lose their jobs, and how many migrant workers will return to the countryside" should China acquiesce to demands for a 20 to 40% gain.[75] Wen added that such a tactic would lead China to suffer a major social upheaval.[76] Wen has also made a point in the past against United States "buy American" rules in the U.S. stimulus plan.[77] "If a country only buys products that it produces itself, and forbids the import of other countries' products without reason, this suggests a move to trade protectionism," Chinese Communications Minister Chen Deming stated.[78]

China has pointed its finger back at the United States. Hu Xiaolin, a deputy governor of the People's Bank of China says the "yuan doesn't have a key role to play in rebalancing bilateral trade between the United States and China" and encouraged Americans to save more.[79] Other researchers say quite the opposite, finding that "China's exchange rate does matter."[80]

On June 21, 2010, China signaled that it would be willing to operate under a more flexible exchange rate policy.[81] Afterwards, the yuan rose 0.8% against the dollar.[82] Pressure from the United States, the European Union, and Russia, as well as concerns about domestic inflation possibly played roles in China's decision.[83] Perhaps this is the beginning of the end of China's currency practices, but China has avoided addressing the underlying issue in the past by allowing the yuan to

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investment-structure-is-main-cause-of-trade-imbalance-with-u-s-.html.

75. *Id.*

76. *Id.*

77. Dexter Roberts, *China Worried After Lending 'Huge Amount' to U.S.*, BLOOMBERG BUSINESSWEEK, Mar. 13, 2009, http://www.businessweek.com/globalbiz/content/mar2009/ gb20090313_131621.htm.

78. *Id.*

79. Rebecca Blumenstein et al., *China Deflects Pressure for Yuan Rise*, WALL ST. J., *available at* http://online.wsj.com/article/ SB10001424052748703467004575462900655707516.html.

80. *See* WILLIAM R. CLINE, PETERSON INST. OF INT'L ECON., RENMIBI UNDERVALUATION, CHINA'S SURPLUS, AND THE US TRADE DEFECIT 6 (2010).

81. *Id.* at 1.

82. *Id.*

83. *Id.*

appreciate and then holding it steady for an extended period of time.[84] It has still not been changed to the degree that many researchers believe is an accurate portrayal of the yuan.[85]

The Chinese economic system has been heavily influenced by the history and culture of China. A persistent theme in Chinese culture is the need to protect the established system from both external and internal threats.[86] For example, the Chinese built the Great Wall of China in an attempt to keep out northern invaders.[87] While the Great Wall seemed impermeable and provided protection from northern invasion for a while, even it was breached due to a general's treachery.[88] More recently, China still remembers how its people were treated shamefully by supposed friendly foreign powers in the nineteenth century.[89] Thus today, the Chinese government owns all the country's land and controls all leasing.[90] This ensures that China's productive assets cannot be exploited by foreigners.[91]

The consumer culture in China is also a large obstacle holding back both countries. Americans benefit from having a national safety net (social security, Medicare, and unemployment benefits) if an individual's financial security falls apart. However, in China there is no social security net to protect the average citizen.[92] Thus, many Chinese households save a large percentage of their earnings as a precaution for a future emergency.[93]

One of the arguments often used against a country adopting a market-based exchange rate is the dreaded "Dutch disease."[94]

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84. *See Id.*

85. *Id.* at 6–7.

86. HANDLE JONES, CHINAMERICA: THE UNEASY PARTNERSHIP THAT WILL CHANGE THE WORLD 130 (2010).

87. *Id.* at 29–30.

88. *Id.*

89. *Id.* at 159.

90. *Id.*

91. *Id.*

92. *See* CLINE, *supra* note 80, at 6.

93. *Id.*

94. LUIZ CARLOS BRESSER PEREIRA, GLOBALIZATION AND COMPETITION: WHY SOME EMERGING COUNTRIES SUCCEED WHILE OTHERS FALL BEHIND 148 (2010).

> The Dutch disease, or the curse of natural resources, is the chronic overvaluation of a country's exchange rate caused by the exploitation of abundant and cheap resources whose commercial production is consistent with an exchange rate clearly more appreciated than the average exchange rate that makes tradable goods industries economically viable using state-of-the-art technology.[95]

Economists who believe in the Dutch disease view it as a market failure.[96] They feel that the only way that the "Dutch Disease" could happen is if an economic "sector that uses a country's natural resources is substantially more productive than the corresponding sector in other countries."[97] China, unlike countries who suffer from the Dutch disease, needs to import enormous amounts of raw materials. In fact, the United States and China are the largest consumers of raw materials.[98]

Generally, the U.S. government favors having a 'strong' dollar.[99] Contrary to the American view, the Japanese, Europeans, and Chinese all have taken positions in favor of currency weakness.[100] In addition to exports, the euro's strength is feared by its travel industry because it raises the cost for foreign tourists.[101] However, both Europe and the United States usually do not intervene to control currency strength.[102]

Economists have taken varying views regarding the implications that this manipulation can cause. Dr. E.J. Mishan believes that many economists confine their analysis to the economic effect on populations in the trading countries "when regarded as *consumers* only[,] disregarding the possible negative effects of international trade when populations are perceived to contain workers."[103] "[O]ne tacit assumption necessary to ensure

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95. *Id.* at 149.

96. *Id.* at 148.

97. *Id.* at 150.

98. *See* JONES, *supra* note 86, at 197.

99. JEFF THREDGOLD, ECONAMERICA: WHY THE AMERICAN ECONOMY IS ALIVE AND WELL . . . AND WHAT THAT MEANS TO YOUR WALLET 163 (2007).

100. *Id.* at 162.

101. *Id.* at 163.

102. *Id.*

103. E.J. MISHAN, THIRTEEN PERSISTENT ECONOMIC FALLACIES 4 (2009).

net gains from trade between countries," he says, "is that no significant dislocation occurs in the economies of such trading countries."[104] "Unless . . . workers . . . are equally adept in the relevant industries, and can move costlessly from one area to another, such tacit assumption is unwarranted."[105] Mishan's thoughts present an economic problem with respect to China's currency manipulation. Although the costs of Chinese goods are kept down with currency manipulation, any cost of dislocating American workers to other jobs is ignored by most economists.[106] As China allows its currency to reach an accurate market value, job dislocation may happen again as China's currency reflects free-market principles.[107]

III. U.S.-CHINA LAW AND CURRENCY MANIPULATION

It has been hard for the United States to follow just what China plans to do with its currency.[108] The Obama administration has been unwilling to label China a currency manipulator in the Treasury's semi-annual report.[109] The IMF, as well, has stated that "a number of others disagreed with the staff's assessment of the level of the exchange rate, noting that it is based on uncertain forecasts of the current account surplus."[110]

Prior to 1994, China provided "one exchange rate for some companies and some ministries, and . . . a different exchange rate for another."[111] This was the situation that led to the

104. *Id.*

105. *Id.*

106. *See Id.*

107. *Id.*

108. *See* Yves Smith, *China's Renminbi Announcement: A Big Headfake,* ROUBINI GLOBAL ECONOMICS, June 20, 2010, http://www.roubini.com/emergingmarkets-monitor/259097/ chinalllslrenminbilannouncementllalbiglheadfake.

109. *See, e.g.*, Greg Robb, *Treasury Does Not Call China Currency Manipulator,* FOX BUS., Feb. 24, 2011, http://www.foxbusiness.com/markets/2011/02/04/treasury-does-china-currency-manipulator/.

110. INT'L MONETARY FUND, IMF EXECUTIVE BOARD CONCLUDES 2010 ARTICLE IV CONSULTATION WITH CHINA, PIN No. 10/100 (2010), *available at* http://www.imf.org/external/np/ sec/pn/2010/pn10100.htm.

111. *Id.* A clear case of manipulation is when a country has multiple exchange rates. *SED Hearing 110-905*, *supra* note 65, at 52.

Treasury to single them out for currency manipulation.[112] However, in 1994 China unified its currency system and eliminated the different rates.[113]

In the background of these trade relations is China's growing military capabilities.[114] While China has not engaged in major external hostilities since the Vietnam War, their military capabilities are gaining ground.[115] In 2007, Beijing launched a missile that destroyed a communications satellite and then kept silent for twelve days before admitting it took place.[116] More recently, China unveiled a prototype stealth fighter.[117]

A. Congress

Although the Secretary of the Treasury Timothy Geithner has accused China of manipulating its currency,[118] it remains to be seen what action the United States will take. While currency manipulation raises eyebrows in the media and in Washington D.C., an important question is whether or not it violates current international law. The hard talks against China's currency manipulation appear to be paying large dividends to Obama, as China recently agreed to a $45 billion trade deal with the United States, including a purchase of 200 Boeing airplanes, which could create 235,000 United States jobs.[119] While this looks great on paper as a deal with the Chinese government, this number is significantly smaller when compared to the number of

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112. *Id.*

113. *Id.*

114. Drew Thompson, *Think Again: China's Military,* Mar. 2010, FOREIGNPOLICY.COM, http://www.foreignpolicy.com/articles/2010/02/22/think_again_chinas_military.

115. *Id.*

116. *See China Confirms Anti-Satellite Missile Test*, THE GUARDIAN, Jan. 22, 2007, http://www.guardian.co.uk/science/2007/jan/23/spaceexploration.china.

117. Jennifer Rizo, *With Gates in the country, China stealth fighter takes first flight,* CNN, Jan. 11, 2011, http://articles.cnn.com/2011-01-11/world/china.stealth.gates_1_stealth-fighter-test-flight-gates?_s=PM:WORLD.

118. Michael M. Phillips, *U.S. Stance on the Yuan Gets Tougher*, THE WALL ST. J., Jan. 23, 2009, at A7, *available at* http://online.wsj.com/article/SB123266930430108055.html.

119. *China to buy 200 Boeing aircraft,* BBC NEWS, Jan. 19, 2011, http://www.bbc.co.uk/news/business-12229585.

jobs that America may be losing in the total trade deficit.[120] Hearings before Congress on China's currency have become an item with regularity in recent years.[121]

Unlike other countries, China was admitted to the WTO before implementing the usual preconditions, and only had to commit to implement the legislation at a later time.[122] Currently, the WTO "conducts an annual review of China's implementation progress: the Transitional Review Mechanism (TRM)."[123] Congress has acknowledged that they encouraged China to become a member of the WTO for two main reasons along with a secondary objective: to benefit from China's rapidly growing market, to provide a place to take disputes, and additionally, to encourage China to play a greater role in international organizations that play by the rules.[124] When Congress met in 2003, they largely deferred to the TRM as a good justification for their conclusion that China was not in full compliance of WTO commitments, and they expected it to improve in the following years.[125]

In 2005, the talks in Congress began to pick up steam. For instance, Senator Charles Schumer stated that he was "not willing to settle for just a revaluation of 5 or 10 percent" and that "[t]he Chinese have to let their currency float. It is a tenet

120. *See* Palmer, *supra* note 49 and accompanying text.

121. Rebecca Christie & Mark Drajem, *Geithner Says China Needs to Allow 'Significant' Yuan Gains*, BLOOMBERG.COM (Sep. 16, 2010), http://www.bloomberg.com/news/2010-09-16/geithner-says-china-needs-to-allow-significant-sustained-gains-in-yuan.html; *US House Panel Sets Hearing on China Trade Concerns*, REUTERS (Oct. 18, 2011), http://www.reuters.com/article/2011/10/18/us-usa-china-trade-idUSTRE79H6WR20111018; Letter from Dave Camp et al., House of Representatives Comm. On Ways and Means, to Timothy Geithner, Sec'y of Treasury, Hillary Clinton, Sec'y of State, Gary F. Lock, Sec'y of Commerce, and Ron Kirk, United States Trade Rep. (May 6, 2011), *available at* http://waysandmeans.house.gov/UploadedFiles/SDE_letter.pdf.

122. *Is China Playing by the Rules? Free Trade, Fair Trade, and WTO Compliance: Hearing before the Congressional-Executive Commission on China,* 108th Cong. 61 (2003) (prepared statement of Charles W. Freeman III, Deputy Assistant U.S. Trade Representative for China).

123. *Id.*

124. *Id.* at 4–5.

125. *Id.* at 7–9.

of free trade."[126] The chairman of the Committee, Richard Shelby, said that members of Congress "were disappointed to hear that once again Treasury had failed to make a currency manipulation determination. [Congress] thinks [Secretary Snow] punted."[127] Thus, the Treasury did not label China as a currency manipulator, because it felt "that a peg or intervention does not meet the definition of currency manipulation."[128] Nevertheless, the committee did acknowledge that China's banking system could not withstand a flexible system.[129] Snow conceded that "if current trends continue without substantial alteration, China's policies will likely meet the technical requirements of the statute for designation as a currency manipulator."[130]

In 2007, Treasury Secretary Paulson reasserted that "no major trading partner of the United States met the technical requirements for currency manipulation during the first half of 2006."[131] Secretary Paulson admitted that "unfortunately, we do not always have a level playing field" but recognized that "trade with China right now benefits both of our countries."[132] The Secretary-Treasurer of the AFL-CIO, Richard Trumka, described the situation as resembling the movie Groundhog Day:

> Every year, I come up and testify on the importance of these economic issues, the effect that they have on workers throughout this country. Every year the trade deficit worsens, more jobs are lost, and the economic pressure on workers and the middle class continues to grow. And every year, someone from the administration comes up here, agrees completely with everything that we say, responds with pledges of increased dialog,

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126. *The Report To the Congress On International Economic and Exchange Rate Policies: Hearing on S. Hrg. 109-505 before the Comm. on Banking, Housing, and Urban Affairs,* 109th Cong. 5 (2005) [hereinafter *S. Hearing 109-505*] (statement of Senator Charles E. Schumer).

127. *See S. Hearing 109-505*, *supra* note 126, at 1 (statement of Chairman Richard C. Shelby).

128. *Id.* at 15.

129. *See id.* at 9 (statement of Senator Paul S. Sarbanes).

130. *See SED Hearing 110-905, supra* note 65, at 10.

131. *See id.* at 5.

132. *Id.* at 12.

engagement and cooperation.[133]

Nevertheless, much of the Congressional talks acknowledged that the Strategic Economic Dialogue (SED) was a good idea and would further economic goals of both countries.[134] The SED allows the American government to speak to China at the highest levels regarding economic concerns.[135] In preparation for the SED, the Chinese decided to widen the daily trading band on the renminbi from 0.03 to 0.05%, hardly providing a real impact.[136]

In May, the chief global economist of Morgan Stanley had five potential risks for the course of action the United States was moving towards:

> Number one, sanctions on China could raise the cost of imports and that would be the functional equivalent of a tax on American consumers. Number two, sanctions on China would raise the cost of foreign components and inputs for U.S. multinationals that could lead to higher inflation and would be a tax on corporate America. Number three, sanctions on China could lead to a sharply weaker dollar, as we would be hitting a major buyer of dollar denominated assets in international capital markets. Number four, because of dollar weakness, sanctions on China could lead to sharply higher real long-term interest rates in the United States. Number five, because of all of the above, trade sanctions on China could tip an already weakened U.S. economy into recession. . . . You in Congress, I think, should be less concerned about last year's 232 billion bilateral trade deficit with China and more concerned about America's 836 billion multilateral trade deficit with the entire world in 2006.[137]

Perhaps this long trend of concessions is why Paul Krugman has taken a very vocal stance against our Chinese currency

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133. *Id.* at 41.

134. *Id.* at 31–32.

135. *Id.* at 6.

136. *See* CommStock Trading Ltd., *China Boosts Yuan Flexibility Against Dollar,* May 21, 2007, http://www.ecommstock.com/E_n/WeeklyStrategy_e.asp?TextID=161.

137. *See* CLINE, *supra* note 80, at 35.

policy.[138]

Our legislature seems to be taking a more aggressive stance as well. Schumer has introduced the "Currency Exchange Rate Oversight Reform Act of 2010."[139] The Act is written generally and can be applied to any nation that is a member of the IMF.[140] The proposed Act changes the question from one of "manipulation" to one of "fundamental misalignment."[141] "Fundamental misalignment" means "a significant and sustained undervaluation of the prevailing real effective exchange rate, adjusted for cyclical and transitory factors, from its medium-term equilibrium level."[142] Not only would China fall under "fundamental misalignment," but it would likely be a country that falls under "priority action" under the bill. The Act states "the Secretary shall designate a currency . . . for priority action if the country that issues the currency is engaging in protracted large-scale intervention in the currency exchange market."[143]

After ninety days, a country designated for "priority action" who fails to "adopt appropriate policies, or take identifiable action, to eliminate the fundamental misalignment" will be subject to United States actions.[144] These actions include, *inter alia*, "prohibit[ing] the procurement by the Federal Government of products or services from the country."[145] After a year, it states that "[t]he United States Trade Representative shall request consultation in the World Trade Organization with the country regarding the consistency of the country's actions with its obligations under the WTO agreement."[146] Additionally,

138. Krugman claims that our policy against China currency manipulation has amounted to the United States telling China "stop it right now." Paul Krugman, *Paul Krugman: China's Currency Manipulation Harms U.S.,* N.Y. TIMES, Sept. 13, 2010, at A31, *available at* http://www.nytimes.com/ 2010/09/13/opinion/13krugman.html?ref=paulkrugman.

139. S. 3134, 111th Congress (2010).

140. *Id.* § 101(3).

141. *Id.* § 101(5).

142. *Id.*

143. *Id.* § 103 (a)(3).

144. *See id.* § 105(a).

145. *See id.* § 105(a)(2)(A).

146. *See id.* § 106(a).

"[t]he Secretary shall consult with the Board of Governors of the Federal Reserve System to consider undertaking remedial intervention in international currency markets."[147] While the latter obligation only requires the Secretary to consider intervention, the former obligation is mandatory by the use of the word "shall." By including a mandatory consultation with the WTO Agreement, the question posed to the WTO is whether China's actions violate their WTO obligations.

B. General Agreement on Tariffs and Trade Article XV

1. Background

The General Agreement on Tariffs and Trade (GATT) primarily governs WTO obligations.[148] Article XV, entitled "Exchange Arrangements," contains nine paragraphs and would be the best provision to succeed under a WTO dispute.[149] While the terms presume familiarity with international finance, at the time of drafting, the concepts Article XV embodies were widely understood, particularly among politicians.[150] Article XV of the GATT has an interesting relationship with the International Monetary Fund (IMF), as there have been members of the WTO who were not members of the IMF.[151] Specifically, Article XV(2) of the GATT states

> that when disputes between signatory countries involve questions about balance of payments, foreign exchange reserves, or exchange arrangements, GATT countries shall "consult fully with the [IMF]" and shall accept the IMF's determination as to matters of fact and as to

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147. *See id.* § 106(a)(2)(A).

148. World Trade Organization, *Principles of the Trading System,* WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Oct. 19, 2011).

149. *See* RAJ BHALA, MODERN GATT LAW: A TREATISE ON THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1169 (2005).

150. "Examples of manipulation at the time—actual or feared—included devaluing an exchange rate (to make exports less expensive and imports more expensive), maintaining multiple exchange rates (to make imports more expensive), and requiring a license to exchange local into foreign currency to pay for imports (and thereby discourage importation)." *Id.*

151. *Id.*

> whether a country's exchange arrangements are consistent with its obligations under the IMF Articles of Agreement.[152]

But the real action which relates to the China-U.S. conflict is in paragraph 4:

> (4) Contracting parties shall not, by exchange action, *frustrate* the intent of the provisions of this Agreement, nor, by trade action, the intent of the provisions of the Articles of Agreement of the International Monetary Fund.[153]

One concern voiced at the meeting was over deciding the meaning of "frustrating the intent of provisions," which led to an interpretive note being added to the GATT.[154] This note establishes "that infringements of the letter of any Article of this Agreement by exchange action shall not be regarded as a violation of that Article if, in practice, there is no appreciable departure from the intent of the Article."[155]

Many believe that it is "highly unlikely, if not impossible, to enforce rights and obligations under Article XV(4)."[156] Since the GATT founding in 1947, Article XV(4) has figured into GATT practice only once, in 1952.[157] At that time, France issued a protest concerning a Greek tax on certain imported goods.[158] Initially, Greece eliminated the tax, but in late 1951, replaced it with a new "contribution" meant to counteract the substantial depreciation of the Greek *drachma*.[159] The new contribution taxed foreign currency used in transactions to pay for imported merchandise and was collected by the Bank of Greece when a

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152. STAFF OF THE U.S.-CHINA ECON. AND SEC. REV. COMM'N, 111TH CONG. 2010 REPORT TO CONGRESS 56 (2010).

153. General Agreement on Tariffs and Trade, art. XV(4), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194,[hereinafter GATT].

154. JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 482 (1969).

155. GATT, *supra* note 153, annex I, art. XV(4); *see also* JACKSON, *supra* note 154, at 483.

156. Bryan Mercurio & Celine Sze Leung, *Is China a "Currency Manipulator"?: The Legitimacy of China's Exchange Regime Under the Current International Legal Framework,* 43 INT'L LAW. 1257, 1288 (2009).

157. *See* BHALA, *supra* note 149, at 1174.

158. *Id.*

159. *Id.* at 1174–75.

Greek importer paid for imported goods.[160] The contribution amount would fluctuate according on how "useful and necessary the merchandise was judged by the Greek Government."[161]

The French delegation argued that this was an "internal tax" in violation of Article III(2) as there was no corresponding tax on domestic products.[162] The United Kingdom argued that it was a "charge" under Article II.[163] Greece defended the contributions, saying it was "indispensable to cover the constantly widening gap between the official exchange rates of the *drachma* in relation to foreign currency and the effective purchasing power of the drachma."[164] However, this still left open the question of "whether the action of the Greek Government constituted frustration by exchange action of the intent of the provisions of Article III of the General Agreement."[165]

The GATT Panel did "not feel that sufficient information [was] available at the . . . time as to the nature of the tax system or method of its application to enable a determination to be made as to whether it falls within the terms of Article III, or constitutes additional charges under Article II."[166] Additionally, the court left open the question of "whether any question arose under Article XV(4)."[167]

While Greece conceivably had several different defenses to its actions, these possibilities never materialized.[168] Thus, in 1953, Greece decided to devalue its currency by 50 per cent, repeal the "contribution," which brought the case to a close.[169] Conceivably, Greece could have argued that Article XV(9) acts as a shield from a GATT suit. GATT Article XV(9) states that

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160. *Id.*

161. *Id.*

162. *Id.* at 1175.

163. *Id.*

164. *Special Import Taxes Instituted by Greece,* (Nov. 3, 1952), GATT B.I.S.D. (1st Supp.) at 49 (1953).

165. *Id.* at 50.

166. *Id.*

167. *Id.* at 51.

168. *See* BHALA, *supra* note 149, at 1175.

169. *Id.*

"[n]othing in this Agreement shall preclude . . . the use by a contracting party of exchange controls or exchange restrictions in accordance with the Articles of Agreement of the International Monetary Fund . . ."[170] At the Ninth Session of the Contracting Parties, a subgroup considered the relationship between GATT and the IMF.[171] The group decided against a proposal to add an Interpretive Note stating that Article XV(4) controls in the event of a conflict in the General Agreement.[172] Thus, there is no clear indication on whether paragraph 4 or 9 control in a conflict.[173] Therefore, Greece could have argued that it conforms to IMF Articles, and it would thus be immune from suit under GATT.[174] Similarly, China could argue that they are immune from suit under GATT so long as they conform to IMF Articles. This is why the International Monetary Fund is such a vital piece to the Chinese currency situation.

While giving no authoritative precedent for United States and Chinese policy makers to determine their current situation, important lessons can be learned from this case. First, Greece ultimately repealed the tax.[175] Second, while it is unclear that the dispute with France influenced Greece to repeal the tax, WTO adjudication should be considered a very important weapon in the United States arsenal in negotiating with China.

2. Exchange Action

Under Article XV(4), the GATT suggests there must be a determination of whether the action is based on exchange action or based on trade action.[176] While there is little dispute history in this area of the law, a sub-group during a review session in 1954 addressed the language of Article XV(4).[177] The sub-group found that "in many instances it was difficult or impossible to define clearly whether a government measure is financial or

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170. GATT, *supra* note 153, art. XV(9).

171. *See* JACKSON, *supra* note 154, at 485.

172. *See* BHALA, *supra* note 149, at 1175.

173. *Id.*

174. *Id.*

175. *Id.*

176. WORLD TRADE ORGANIZATION, GUIDE TO GATT LAW AND PRACTICE 435 (1995).

177. *Id.*

trade in character and frequently it is both."[178] The Sub-Group noted that the division of work between the parties and the Fund was in practice "based on the technical nature of government measures rather than on the effect of these measures on international trade and finance."[179]

China's exchange rate policy likely falls under "exchange action." The drafters intended the term "exchange action" to be very broad.[180] In fact, some have argued that there does not seem to be any basis to reject outright the possibility that "exchange action" might include exchange rate policy.[181] On the other hand, "trade action" would not only have to be interpreted broadly like "exchange action," but the language suggests that the "action" must be one of trade.[182] Although China's handling of the exchange rate likely has an effect on trade, the drafter's words say "trade action" and calling an exchange rate policy a trade action does not comport with common sense. Based on the Sub-Group's notes, the "technical nature" of the exchange rate policy would look at capital movements, rather than the "effect" the policy has on trade balance.[183] Therefore, it seems more likely that this action would be categorized as an exchange action in a WTO dispute.

3. "Frustrates the Intent of the Provisions"

If the WTO perceives this action as an exchange action, then the next question would be whether it "frustrates the intent of the provisions" of the GATT.[184] Commentators are sharply divided as to whether China's exchange rate actions "frustrate" the intent of any GATT provisions.[185] However, Article XV(4) does not require "exchange action" that would "frustrate" the

178. *Id.*

179. *Id.*

180. Jorge Miranda, *Currency undervaluation as a violation of GATT Article XV(4),* in THE US-SINO CURRENCY DISPUTE, NEW INSIGHTS FROM ECONOMICS, POLITICS AND LAW 119 (Simon Evenett ed., 2010).

181. *Id.* at 121.

182. *Id.*

183. *See id.*

184. Mercurio & Sze Leung, *supra* note 156, at 1286.

185. Miranda, *supra* note 180, at 122–23.

intent of all GATT provisions.[186] Reading Article XV(4) in such a way that would make the provision always unenforceable, contradicting the canons of construction[187] and could not have been what the drafters intended. A violation of Article XV(4) would be triggered whenever the intent of at least one GATT provision is frustrated through "exchange action."[188]

While it would be helpful to know exactly what the drafter's intended when creating the GATT, there is no statement of intent in the GATT. When interpreting an agreement, the plain language of the agreement is generally conclusive. But because the plain language suggests that Article XV look at the "intent of the provisions" of the GATT[189], legislative history, GATT policy, and other methods of determining the founder's intent must come in to play.

When GATT was drafted many recognized "that currency par value manipulation and exchange controls could be used to protect domestic markets against imports . . . [or to make] exports cheaper relative to foreign goods."[190] In 1945, the U.S. Congress protested heavily against the foreign use of currency par value manipulation and exchange control when it agreed to United States participation in the GATT.[191] Previously, the United States had negotiated the ability to terminate a trade agreement if the currency imbalance between the signing countries became substantial enough to negatively affect domestic industry or commerce.[192]

When China was first joining the WTO, the international world viewed China's pegged currency favorably.[193] Some commentators have suggested that a currency that was approved of at one point in time could not frustrate the intent of

186. *Id.* at 122.

187. BHALA, *supra* note 149, at 1171–75 (2005) (outlining the cases and amendments that have shaped interpretation of Article XV(4)).

188. *Id.* at 1172.

189. *Id.*

190. JACKSON, *supra* note 154.

191. *Id.* at 479.

192. 91 CONG. REC. 4, 886 (1945).

193. *See* Prime, *supra* note 21, at 26.

the provisions of the GATT.[194] But this largely ignores the reality of exchange rates as supply and demand can change over time.

China's currency practices likely frustrate the intent of several provisions of the GATT. For instance, Article VI recognizes "that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry . . ."[195] Specifically, the U.S. manufacturing industry has lost significant jobs to China.[196] Article VI discusses in an interpretive note how "multiple currency practices can in certain circumstances constitute a subsidy to exports . . . or can constitute a form of dumping."[197] While Article VI does not spell out "intent," it does "condemn" causing material injury to an established industry.[198] Therefore, China's currency practices likely frustrate what provisions in Article VI condemn.

This still leaves largely unanswered the question of whether China can use paragraph 9 as a shield against a WTO claim. The drafters specifically left this question open, and the WTO could say that because paragraph 4 is the more specific provision, canons of construction suggest that specific should govern general.[199] Furthermore, the IMF's rules changed drastically since Article XV's adoption and the Bretton Woods time period that adopted the GATT. For instance, at the time of Article XV's adoption, IMF rules covered an area of law by requiring par value systems that is now left largely uncovered.[200] While the WTO could go either way with this issue, good policy and canons of construction dictate that the WTO should declare that paragraph 9 does not act as a shield in

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194. BHALA, *supra* note 149, at 1175.

195. GATT, *supra* note 153, art. VI(1).

196. *See* LUM & NANTO, *supra* note 8 (showing the growing number of imports from the China in the manufacturing industry).

197. GATT, *supra* note 153, at annex I art. VI.

198. *Id.* art. VI(1).

199. Morales v. Trans World Airlines, 504 U.S. 374, 384 (1992).

200. WORLD TRADE ORGANIZATION, GUIDE TO GATT LAW AND PRACTICE 262 (1995).

paragraph 4 cases.[201]

The GATT is disfavorable to subsidies.[202] Federal Reserve Chairman Ben Bernanke has described China's currency policy as an effective subsidy.[203] It has long been said that any discussion about subsidies is incomplete if exchange rates are not mentioned.[204] Article XVI of the GATT was the original provision that addressed subsidies and provides some governing rules, but it is neither clear nor comprehensive and the SCM Agreement has effectively supplanted those provisions.[205] Therefore, instead of turning to Article XVI, many commentators look towards the SCM Agreements to determine whether China's actions can be considered a subsidy under the GATT.[206]

4. WTO Agreement on Subsidies and Countervailing Duties

It seems highly unlikely the United States could prove that China violated the SCM Agreement. In order to violate the SCM Agreement, China's exchange rate policy must be a subsidy under Article 1.[207] In order for something to be regarded as a subsidy, there must (1) be financial contribution by a government, (2) a benefit be conferred, and (3) the subsidy must be specific.[208] Difficulties arise for the U.S. with respect to (1) and (3) under the SCM agreement, which makes bringing an SCM Agreement claim a poor choice.[209]

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201. BHALA, *supra* note 149, at 1175.

202. KENNETH W. DAM, THE GATT-LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 132 (1970).

203. Doug Palmer & Lucia Mutikani, *China yuan a subsidy, needs to rise, Bernanke says,* REUTERS, July 21, 2010, http://www.reuters.com/article/2010/07/21/us-usa-china-bernanke-idUSTRE66K68X20100721.

204. DAM, *supra* note 202, at 133.

205. ANDREW T. GUZMAN & JOOST H.B. PAUWELYN, INTERNATIONAL TRADE LAW 406 n.1 (2009).

206. CHING CHEONG & CHING HUNG YEE, HANDBOOK ON CHINA'S WTO ACCESSION AND ITS IMPACTS 66 (2003).

207. *Id.* at 69 n.62.

208. *See* GUZMAN & PAUELYN, *supra* note 205, at 408–15.

209. *Id.* at 409–12 (providing a case where the U.S. unsuccessfully brought an SCM Agreement claim because it could not meet the first prong, requiring a financial

First, Article 1 of the SCM Agreement contains a closed list of financial contributions, and exchange rate valuations do not feature on this list.[210] It would therefore be very difficult to show that exchange rates should count as a financial contribution.

Second, China's exchange rate policy is not specific to any industry.[211] Some have suggested that "the specificity test is only intended to avoid absurd results like countervailing the benefit arising from truly public goods provided by governments (such as police protection and public highways)."[212] Article 2 lays out what the drafters meant by specificity.[213] Unlike the "intent" of the provisions of GATT Article XV, the plain text in Article 2 of the SCM should govern. Regarding specificity, the SCM Agreement looks at "[w]here the granting authority . . . explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific."[214] It is very difficult to argue that the benefits of China's exchange action are limited to certain enterprises or industries, as required by Article 1.[215] Therefore, the requirements of specificity and the definition of subsidy create difficult problems in a case under the SCM Agreement.[216]

5. *International Monetary Fund Rules*

The IMF, which should be one of the most important

contribution by the government—the case also noted that the U.S. generally operates on a worldwide basis which would constitute a failure of the third prong, specificity).

210. World Trade Organization, Agreement on Subsidies and Countervailing Measures art. 1, http://www.worldtradelaw.net/uragreements/scmagreement.pdf [hereinafter SCM Agreement].

211. *See generally* Morris Goldstein & Nicholas Lardy, *China's Exchange Rate Policy Dilemma*, 96 AM. ECON. REV. 422 (2006) (describing China's current exchange rate policy and the challenges it creates for the global community).

212. John Magnus & Timothy C. Brightbill, *China's Currency Regime is Legitimately Challengeable under ASCM Rules in* THE US-SINO CURRENCY DISPUTE: NEW INSIGHTS FROM ECONOMICS, POLITICS AND LAW 147, 149 (Simon J. Evenett ed., 2010).

213. SCM Agreement, *supra* note 210, art. 2.

214. *Id.* art. 2.1(a).

215. Dukgeun Ahn, *Is the Chinese Exchange-Rate Regime "WTO-Legal"*, *in* THE US-SINO CURRENCY DISPUTE: NEW INSIGHTS FROM ECONOMICS, POLITICS AND LAW 139, 142 (Simon J. Evenett ed., 2010).

216. *Id.*

organizations in this dispute, has largely proven unhelpful. For several years, the IMF was unwilling to consider China a currency manipulator if the United States was unwilling to do so.[217] When the IMF instituted a policy using language of "fundamentally misaligned," it backed away from the language because it was too specific and "proved an impediment to effective implementation."[218]

The Bretton Woods system were implemented by establishing the U.S. dollar as the system of fixed, but variable, exchange rates.[219] This system came under stress in the 1960s, and "was replaced by a system of floating exchange rates among the major currencies."[220] The argument for a floating exchange rate is that they are more efficient, stabilize private speculation, and create flexibility in achieving adjustments in international cost and price competitiveness when domestic wages and prices are stuck.[221] Under the Bretton Woods system of fixed exchange rates, IMF rules required countries to maintain a par value of the national currency.[222] Amendments abolished these obligations in the IMF Articles in the 1970s.[223] Currently, Article IV contains the principal IMF rule regarding competitive devaluation.[224]

Article IV(1)(iii) of the IMF Articles states that each member shall "avoid manipulating exchange rates or the international monetary system in order to prevent effective balance of payments adjustment or to gain an unfair competitive

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217. *See SED Hearing 110-905, supra* note 65, at 42.

218. Int'l Monetary Fund [IMF], *The 2007 Surveillance Decision: Revised Operational Guidance*, at 1, (June 22, 2009), *available at* http://www.imf.org/external/np/pp/eng/2009/062209. pdf.

219. U.S. TREASURY DEP'T, STATEMENT OF TREASURY SEC'Y JOHN W. SNOW ON THE REPORT ON INTERNATIONAL ECONOMIC AND EXCHANGE RATE POLICIES, app. II, JS–4250 (2006) *available at* http://www.treas.gov/offices/international-affairs/economic-exchange-rates/pdf/Appendix_2.pdf.

220. *Id.*

221. PETER ISARD, EXCHANGE RATE ECONOMICS 190 (1995).

222. Michael Waibel, *Retaliating Against Exchange-Rate Manipulation under WTO Rules in* THE US-SINO CURRENCY DISPUTE, NEW INSIGHTS FROM ECONOMICS, POLITICS AND LAW 133, 134 (Simon Evenett ed., 2010).

223. *Id.*

224. *Id.*

advantage over other members[.]"[225] China's compliance with Article IV(1)(iii) hinges on 2 things: (1) whether it "manipulate[es] exchange rates" and (2) whether it does so "in order to gain an unfair competitive advantage over other members."[226] China would likely be found in violation of Article IV(1)(iii) in an IMF proceeding.

The article gives no definition of manipulating exchange rates. However, the IMF Executive Board has adopted, in an Annex, a clarification on manipulation: "'Manipulation' of the exchange rate is only carried out through policies that are targeted at—and actually affect—the level of an exchange rate. Moreover, manipulation may cause the exchange rate to move or may prevent such movement."[227] Some commentators have suggested that manipulation requires a currency to move. This, however, would go directly against the IMF Executive Board's clarification of manipulation.[228] China's currency manipulation more likely than not "actually affect[s]" the exchange rate by the IMF's own admissions, that China's currency is "substantially undervalued."[229]

For China to violate IMF Article IV, China must manipulate its currency "in order to gain an unfair competitive advantage over other members."[230] The Annex suggests that "[i]n that regard, a member will only be considered to be manipulating exchange rates in order to gain an unfair competitive advantage over other members if the Fund determines both that: (A) the member is engaged in these policies for the purpose of securing fundamental exchange rate misalignment in the form of an

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225. Articles of Agreement of the International Monetary Fund, art. IV(1)(iii), July 22, 1944 [hereinafter IMF].

226. *See generally* Chee Yoke Ling & Celine Tan, *China Criticizes IMF Decision on Exchange-Rate* Surveillance, THIRD WORLD NETWORK (July 2, 2007), *available at* http://www.twnside.org.sg/title2/finance/twninfofinance070701.htm (describing China's reaction and apprehensions about IMF Article IV(1)(iii)).

227. Christoph Hermann, *Don Yuan: China's Selfish Exchange Rate Policy and International Economic Law*, 2010 EUR. Y.B. OF INT'L ECON. L. 31, 44.

228. *Id.*

229. Allison Jackson, China's yuan 'substantially' undervalued: IMF, www.livemint.com (Oct. 22, 2011 7:38 PM), http://www.livemint.com/Articles/PrintArticle.aspx?artid=2F8828F6-6447-11E0-8B6F-000B5DABF613.

230. IMF, *supra* note 225, art. IV(1)(iii).

undervalued exchange rate and (B) the purpose of securing such misalignment is to increase net exports."[231] Furthermore, the Fund suggests that "[a]ny representation made by the member regarding the purpose of its policies will be given the benefit of any reasonable doubt."[232] While the IMF 2007 Decision does not bind the IMF in disputes,[233] it does give some guidance.

Proving China's purpose for fixing an exchange rate creates difficulties in an IMF action. However, these difficulties are not insurmountable. If China blames its banking system for China's undervalued currency, the IMF would have to go against its findings regarding the stability of Chinese banking to find in favor of China.[234] Based on the most recent IMF findings, China would probably have to give a reason other than banking for its purpose of pegging the yuan.[235] The U.S. patiently waited 7 years for stability in China's banking so that China could revalue its currency, and IMF findings suggest that banking is now stable enough for at least *some* level currency revaluation.[236] Perhaps in years past, China would be capable of casting "reasonable doubt" by blaming its banking sector, but the IMF has stated that "over time, job gains, particularly in the service sector, will outweigh near-term losses and the benefits to the Chinese people from a stronger currency will far outweigh

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231. *IMF Executive Board Adopts New Decision on Bilateral Surveillance Over Members Policies,* PIN No. 07/69, INTERNATIONAL MONETARY FUND (June 21, 2007), http://www.imf.org/ external/np/sec/pn/2007/pn0769.htm#decision.

232. *Id.*

233. Waibel, *supra* note 222, at 134.

234. *See* People's Republic of China: Staff Rep. for the 2010 Article IV Consultation, International Monetary Fund, IMF Country Rep. No. 10/38, July 2010, at 16 (July 9, 2010) (stating that "At this point, the banking system looks well-placed to withstand a significant deterioration in credit quality. Profitability is solid, most banks meet the regulatory requirements of being well capitalized, large banks are subject to a capital surcharge, and provisioning levels are being increased.").

235. *Id.* at 4, 16 (showing that China pegged the yuan (renminbi) during the global financial crisis, however, pegging is no longer necessary since the banking system can now withstand significant deterioration).

236. *Id.* at 16; *see generally China's Banking System*, CHINAKNOWLEDGE.COM (Nov. 10, 2011), http://www.chinaknowledge.com/Business/CBGdetails.aspx?subchap=4&content=15 (explaining the shift from the People's Bank of China to the China Banking Regulatory Commission in 2003).

the costs."[237] The IMF would contradict itself by viewing Chinese currency manipulation with "reasonable doubt" despite its findings that the benefits "far outweigh the costs."[238]

6. United States Economic Options

Countries whose currency is extremely overvalued face problems with exports without export subsidies.[239] "If . . . one currency is substantially overvalued, the disparity in exchange rates may . . . create a distortion of competition, and export subsidies by the country with the overvalued exchange rate may be regarded . . . as a move away from this distortion."[240]

One way to eliminate an export subsidy is by adjusting exchange rates.[241] For example, India devalued the rupee by 36% in 1966 with the intent to eliminate export subsidies.[242] Unfortunately, there was still little incentive to export, and India eventually brought export subsidies back for certain goods.[243]

The United States and China are currently in a similar situation in that one party has created a distortion of competition from exchange rates.[244] One option the United States would have would be to implement export subsidies.[245] This would only fix part of the problem, however, because America would still be impacted by goods imported from China.

Perhaps the most influential economic policy adopted by leading economists in favor of action includes creating "temporary across the board tariffs" on Chinese imports.[246] In 1971, Nixon responded to an overvalued dollar by imposing a

237. People's Republic of China, *supra* note 234, at 28.

238. *Id.*

239. DAM, *supra* note 202, at 133.

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.*

244. *See supra* Part II.

245. *See* DAM, *supra* note 202, at 133.

246. Paul Krugman, C. Fred Bergsten & Robert E. Scott, *Panel II: Chinese Currency Manipulation: The case for change in U.S. policy,* ECONOMIC POLICY INSTITUTE (Mar. 12, 2010), http://epi.dreamhosters.com/media/100312/flv/p2d-p.html.

10% across the board import surcharge and asked countries to revalue currencies.[247] Japan and the European community ultimately revalued their currencies.[248] Tariffs are widely accepted as an instrument of trade protectionism, and China would undoubtedly argue that America is adopting protectionist strategies against China.[249] But any argument that China is being protectionist must address the IMF's report stating that China's currency is undervalued.[250]

A third alternative, proposed by Warren Buffet in 2003, would issue "import Certificates (ICs) to all U.S. exporters in an amount equal to the dollar value of their exports."[251] Buffet uses an extremely simple scenario where two countries exist: Thriftville and Squanderville.[252] In these countries, there is only one product, food, and each inhabitant can produce enough food to sustain himself by working eight hours a day.[253] Thriftville begins working sixteen hours a day, and Squanderville buys food from Thriftville in exchange for IOUs.[254] Eventually Thriftville begins purchasing land in Squanderville ends up owning the whole country.[255] The United States has been producing more than we consume, and that amount is equal to our trade deficit.[256] Buffet fears that we have turned in to Squanderville, which is why he wants to create trade balance.[257] Under Buffet's plan, whenever an American exporter sold $1 million goods to a foreign country, they would receive 1 million ICs, which could then be sold to a foreign country or an importer.[258] In order to

247. *Id.*

248. *Id.*

249. *Id.*

250. *See* People's Republic of China, *supra* note 234, at 3.

251. Warren E. Buffet, *America's Growing Trade Deficit Is Selling the Nation Out From Under Us. Here's a Way to Fix the Problem—And We Need to Do It Now.*, FORTUNE, Nov. 10, 2003, at 106, *available at* http://www.berkshirehathaway.com/letters/growing.pdf.

252. *Id.*

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

import $1 million goods, an importer would then need 1 million ICs. Buffet's proposal, while creating trade balance, has not been commonly adopted by economists.[259]

The last option would be for the United States to devalue its currency. The IMF has previously suggested that it may be the United States who has overvalued their currency.[260] The United States could devalue its currency by printing more money or using other methods to increase the money supply.[261] However, when increasing the money supply, there is always a danger of creating hyperinflation.[262] Maybe the United States could print money in small amounts without significantly raising dangers of inflation, but it seems that there are better options available to the United States.[263] Tariffs and subsidies have a history of encouraging foreign countries with undervalued currencies to revalue.[264]

IV. WHAT SHOULD THE UNITED STATES DO?

A. *Create a Long-Term Plan for China*

There should be no more important issue to current lawmakers than China's currency manipulation. Unlike most political issues, there has largely been a bipartisan consensus that *something* must be done.[265] Also unlike most political issues, the budgetary cost to fix the yuan's pricing is minimal.[266] America can learn something from the way the Chinese have handled their economy. China has utilized a five year plan

259. *See id.*

260. *IMF says dollar 'overvalued' on currency markets,* THE ECONOMIC TIMES, Oct. 28, 2010, *available at* http://articles.economictimes.indiatimes.com/2010-10-28/news/27575120_1_dollar-currency-competitive-devaluation.

261. *See id.*

262. Paul Toscano, *The Worst Cases of Hyperinflation,* CNBC (Feb. 14, 2011), http://www.cnbc.com/id/41532451/The_Worst_Hyperinflation_Situations_of_all_time.

263. Jeanne Sahadi, *Why the U.S. can't inflate its way out of debt*, CNNMONEY (Mar. 23, 2010), http://money.cnn.com/2010/03/10/news/economy/inflation_debt/index.htm.

264. Policy Memorandum #164 from Econ. Policy Inst. (Apr. 28, 2010), *available at* http://www.epi.org/publication/pm164.

265. *See supra* Part III.A.

266. *See* Krugman, Bergsten & Scott, *supra* note 246.

system that has been viewed overall as a success.[267] Similarly, the United States should adopt a long-term plan, open to scrutiny by China, towards giving China strong incentives to remove its protectionist currency policies.

One of the central criticisms in the United States policy in this matter has been a lack of central voice.[268] A long-term plan would give the United States a central voice. With a central voice, China will be forced to decide whether it prefers going through WTO proceedings and tariffs, or yuan revaluation.[269]

The bipartisan Currency Exchange Rate Oversight Reform Act[270] is a great step in the right direction, but there are significant weaknesses to it as a long-term plan. First, the United States would be bringing a case before the IMF or WTO without actually alleging that China is manipulating their currency. The Act only requires China to "fundamentally misalign" their currency,[271] but any IMF action would require manipulation, while any WTO action would require at least frustrating the intent of the provisions of the GATT and possibly require manipulation as well.[272] The "fundamentally misalign[ed]" language resembled the language the IMF adopted in the Interim Guidance for the 2007 Decision.[273] In 2009, the IMF moved away from the use of specific terminology, because it discouraged clear and candid discussions.[274] The United States must at least label China as a currency manipulator to help in

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267. *See* Alan Wheatley, *Japan's Past Draws China Off Course*, THE NEW YORK TIMES, Jan. 3, 2011, *available* at http://www.nytimes.com/2011/01/04/business/global/04inside.html.

268. *See SED Hearing 110-905*, *supra* note 65, at 31.

269. *US Senators Ratchet up Pressure on Yuan Amid Economic Woes*, CHINADAILY (Mar. 17, 2010), http://www.chinadaily.com/cn/china/2010-03/17/content_9603690.htm.

270. *China Currency Bill Clears Key Hurdle in US Senate*, CNBC (Oct. 3, 2011), http://www.
cnbc.com/id/44763447/China_Currency_Bill_Clears_Key_Hurdle_in_US_Senate.

271. Currency Exchange Rate Oversight Reform Act of 2011, S. 1619, 112th Cong. § 2(6)(2011).

272. *See* JONATHAN E. SANFORD, CONG. RESEARCH SERV., RS22658, CURRENCY MANIPULATION: THE IMF AND WTO (2010).

273. Int'l Monetary Fund [IMF], *The 2007 Surveillance Decision: Revised Operational Guidance,* at 1 (June 22,2009), *available at* http://www.imf.org/external/np/pp/eng/2009/062209.pdf.

274. *Id.* at 3.

any IMF dispute.

Second, while the United States needs a time-line, the order in which the Act proposes would do more harm to trade than necessary. For instance, in 90 days after declaring a country a "priority action," the President "shall prohibit the procurement by the Federal Government of products or services from the country."[275] It would be more economical to file a WTO dispute claim before instituting policies that harm trade.[276] A WTO dispute only possesses the transaction costs of the dispute, whereas the Federal Government prohibiting trade purchases from China would have a direct impact on trade.[277] Disputes in the WTO generally take a year to fifteen months to resolve.[278] If China were to see a time-line that started with a WTO resolution and ended with the United States placing barriers to balance trade, it would make sense for China to revalue their currency. It would also give China a year to fifteen months to plan for revaluation, whereas penalties under the Currency Exchange Rate Oversight Reform Act would begin rather quickly.

B. Label China as a Currency Manipulator

The United States owes it to itself to get a formal ruling from the WTO and IMF on China currency manipulation. In order to do this, it needs to allege that China is a currency manipulator.[279] This is a boundary that the United States has been unwilling to cross. But Hufbauer, one who is suggesting that the United States could not win in an Article XV(4) case against China, still says "that trade remedy measures, sought in the WTO or under U.S. laws, can best be justified as levers to

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275. Currency Exchange Rate Oversight Reform Act of 2011, S. 1619, 112th Cong. § 6(a)(2011).

276. *See* WORLD TRADE ORGANIZATION, 10 BENEFITS OF THE WTO TRADING SYSTEM 3 (2008).

277. *See id.* at 10.

278. *A Unique Contribution*, WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_ e.htm (last visited Oct. 25, 2011).

279. *US currency bill 'a serious breach of WTO rules',* BUSINESS TIMES, Oct. 13, 2011, *available at* http://properties.btimes.com/my/articles/currybill/Article.

prompt more forceful IMF action and focus Beijing's attention on the currency question."[280]

This will not be the last time that currency questions will need to be addressed by the United States, WTO, and IMF. It is critical to get a ruling regarding Article XV of the GATT and Article IV of the IMF Articles, because China will not be the last country that attempts to use its currency to gain an advantage over our economy. A ruling by the WTO and IMF regarding currency would make clear whether the United States and other countries should seek to amend trade rules regarding currency.

By bringing an IMF dispute, China must articulate reasons not just for choosing to peg its currency, but where China chose to peg its currency.[281] Right now, China exchange rate policy is a black box and can continue indefinitely for years to come.[282] In an IMF dispute, China could articulate reasons for its exchange rate policy or China could keep its reasons confidential.[283] If China chooses to articulate the reasons for its exchange rate policy, it gives the U.S. additional leverage if China does not follow its own exchange rate policy in the coming years. If China chooses to keep its reasons confidential, China risks losing the dispute by only claiming it is not manipulating its currency for the purposes of increasing net exports and giving no justification. It also seems unlikely China can still get away with blaming its banking system, as even the IMF has noted that the banking system looks quite stable.[284]

Not only does seeking a ruling by the WTO make sense for future currency problems, but there is a substantial chance that either the WTO or IMF rule in America's favor. It would be poor policy for both institutions to rule in China's favor, because that would encourage nations to implement protectionist exchange rates. Countries rely on the WTO and IMF to give neutral

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280. Gary Clyde Hufbauer & Claire Brunel, *The US Congress and the Chinese Renminbi*, *in* DEBATING CHINA'S EXCHANGE RATE POLICY 219 (Morris Goldstein & Nicholas R. Lardy, eds 2008).

281. *See* IMF, *supra* note 225, art. IV § 3(b).

282. *Independent Monetary Policy is Vital for China*, ECONOMIC OBSERVER NEWS (Nov. 9, 2010), http://www.eeo.com.cn/ens/Observer/editorial/2010/11/09/185318.shtml.

283. *See* IMF, *supra* note 225, art IV § 3(b).

284. People's Republic of China, *supra* note 234, at 16.

decisions for disputes,[285] and not giving a definitive ruling on currency would be a clear abdication of the organization's duties.

C. Place Duties on Chinese Imports

If the WTO and IMF rule in favor of China, duties on Chinese imports should be implemented. While there are several economic options that the U.S. may try,[286] placing duties on imports has a history of encouraging foreign nations to revalue their currencies. A long-term plan that results in implementing duties after a fifteen month WTO dispute gives China time to reconsider its position on the exchange rate.

The United States is giving an enormous incentive to China to maintain an inadequate banking system and undervalued currency, as their export-driven economy has gone through enormous prosperity and been isolated from recession.[287] In contrast, America should be giving incentives for China to revalue its currency. The long-term plan gives China a political incentive to revalue the yuan. China can avoid any further U.S. confrontation by revaluing their currency. If the U.S. brings an action before the WTO and IMF, it gives China a legal incentive to revalue. Finally, duties on Chinese imports give China an economic incentive to revalue the yuan. If their exports decrease due to a U.S. duties, it makes little sense economically for China to continue its currency policy.

V. CONCLUSION

China is not to blame for the United States recession, but a substantial part of the trade deficit can be traced to China and

285. The WTO states that "[a]greements, including those painstakingly negotiated in the WTO system, often need interpreting. The most harmonious way to settle these differences is through some neutral procedure based on an agreed legal foundation. That is the purpose behind the dispute settlement process written into the WTO agreements." *What is the World Trade Organization?,* WTO, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm (last visited Oct. 3, 2011).

286. *See supra* Part III.B.

287. C.H. Kwan, *Irrational exuberance on China's economy*, RESEARCH INSTITUTE OF ECONOMY, TRADE & INDUSTRY, *available at* http://www.rieti.go.jp/en/miyakodayori/023.html (last visited Oct. 25, 2011) (article forthcoming in THE STRAITS TIMES).

its exchange rate.[288] Historically, countries have often recovered from recession in large part due to net exports.[289]

China is manipulating its currency at the expense of the United States. The U.S. should create a long-term plan to force China to revalue its currency. There was a time to talk to China, but that time has passed. The U.S. has patiently waited for over 7 years, and the problem has only gotten worse. The U.S. must give China an incentive to remove its protectionist currency policies. A long-term plan should give China political, legal, and ultimately, economic incentives if they refuse to revalue their currency.

While it is less clear that the United States has a remedy in international law, it has a good chance at prevailing under GATT Article XV, because what China is doing is exactly what the provision was written into the GATT to prevent. Additionally, the U.S. could prevail under IMF Article IV. A dispute that results in favor of China still has enormous benefits to the U.S. in terms of precedent. This will not be the last currency dispute in the international community, and it only makes sense to see if international laws must be amended.

In order to seek a remedy in international law, the U.S. must label China as a currency manipulator. While the bipartisan Currency Exchange Rate Oversight Reform Act is a step in the right direction, the IMF has moved away from using "fundamental misalignment" of currency as a label. As a result, the U.S. must label China as a currency manipulator to bring an IMF action that holds a substantial chance of success.

If political and legal responses fail, the U.S. should move to economic responses. While there are several economic options available, tariffs and subsidies have a history of successfully encouraging trading nations with undervalued currencies to revalue. One should never underestimate the power of American private enterprise, but Chinese protectionism is not giving American private enterprise a chance to compete. The legislature and the executive owe it to American businesses to

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288. MORRISON, *supra* note 11.

289. *The Economic Outlook*, CONG. BUDGET OFFICE (Jan. 2010), http://www.cbo.gov/ftpdocs/ 108xx/doc10871/Chapter2.shtml.

act on this before we turn into Squanderville.