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CAN THE UNITED STATES IMPOSE TRADE SANCTIONS ON CHINA FOR CURRENCY MANIPULATION?

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ABSTRACT

Anti-China critics argue that the People's Republic of China (PRC or China) engages in a long-standing and intentional pattern of currency manipulation that artificially devalues the Chinese currency, the Renminbi (RMB or "people's currency") versus the USD. The devaluation of the RMB makes Chinese goods less expensive to the U.S. consumer as they need to exchange fewer dollars for the same amount of RMB used to purchase Chinese imported goods. At the same time, U.S. goods are more expensive to the Chinese consumer as they need to use more RMB to exchange for the same amount of USD needed to purchase U.S. goods. This devaluation of the Chinese currency results in China exporting more goods to the United States and the United States exporting fewer to China. This pattern leads to an increase in the U.S. trade deficit with China, which has already reached a massive $319.28 billion in 2015, by far the largest U.S. trade deficit with any individual trading partner. A trade deficit of this size has many negative consequences for the United States, such as closed factories, lost jobs, and stagnant wages.

China's currency manipulation is another instance, according to the anti-China critics, of how China conducts international trade to the detriment of the United States. One of the most prominent anti-China critics, newly-elected President Donald Trump, promises to impose punitive tariffs of 45% on all Chinese imports to offset the effects of China's currency manipulation. Should such a measure become enacted, it would cause shock waves around the world and could possibly plunge the world into a trade war between the United States and China with costly ramifications for every corner of the globe.

This article examines the main arguments that China's currency manipulation justifies the U.S. imposition of trade sanctions. A detailed legal analysis reveals that China's currency manipulation violates no

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legal obligations under the World Trade Organization, hereinafter referred to as "WTO." As a result, the United States cannot lawfully impose trade sanctions on China consistent with the WTO. If the United States imposes such sanctions, China will likely be able to successfully challenge the sanctions in the WTO and win a WTO decision requiring the United States to withdraw the sanctions. The article then argues that a different set of strategies is needed to deal with China's sharp tactics in international trade, as exemplified in the United States' recent strategy in creating mega-free trade agreements such as the Trans-Pacific Partnership.

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I. INTRODUCTION

Critics argue that the United States should impose trade sanctions on all imports from the People's Republic of China ("PRC" or "China") due to unfairly low prices caused by China's currency manipulation.[1] These arguments have raged on for at least a decade[2] in political circles in the United States and have served as the basis for several unsuccessful attempts at national legislation[3] that could have led to import sanctions on China. Calls for sanctions on China seem to reemerge with renewed vigor and bellicosity in every presidential or other high office election cycle, including last year's, when the tone became even more strident than usual.[4] Trade sanctions on China may have a certain superficial populist appeal especially in the heat of a political campaign by appealing to masses of workers feeling left behind by China's economic ascendancy, but do these arguments used by ambitious politicians withstand the test of vigorous legal analysis? The purpose of this article is to examine whether these arguments for trade sanctions are consistent with the legal requirements of the World Trade Organization, hereinafter referred to as "WTO," the basic legal framework that governs all trade in goods between WTO members, including China and the United States.[5] If these arguments cannot withstand a rigorous legal analysis, they should be abandoned and new strategies should be pursued.

The basic argument is that the devaluation of China's currency, the

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1. *See House Overwhelming Passes Trade Sanctions Bill Aimed at China,* THE HUFFINGTON POST (Sept. 29, 2010, 11:20 PM), http://www.huffingtonpost.com/2010/09/29/house-china-trade-sanctions-bill-passed_n_744688.html (bill authorizes trade sanctions against China for currency manipulations).

2. *See* Stephen S. Roach, *China's Currency Manipulation: A Policy Debate*, WORLD AFFAIRS (Oct. 12, 2012), http://www.worldaffairsjournal.org/article/china's-currency-manipulation-policy-debate-0 (noting that the first trade bill proposed against Chinese currency manipulation was proposed in 2005).

3. *See, e.g.,* Currency Reform for Fair Trade Act, H.R. 2378, 111th Congress (2009) (requiring the Department of Commerce to investigate foreign government currency practices as a countervailable subsidy); Trade Facilitation and Trade Enforcement Act of 2015, S. 1269, 114th Congress (2015) (requiring the initiation of a countervailing duty investigation if an interested party petitions for an investigation); American Trade Enforcement Effectiveness Act, H.R. 2523, 114th Congress (2015) (attempting to loosen requirements and standards related to countervailing duty investigations); and Currency Undervaluation Investigation Act, S. 433, 114th Congress (2015) (also requiring the initiation of a countervailing duty investigation if an interested party petitions for an investigation). With the exception of the Trade Facilitation and Trade Enforcement Act of 2015, none of these pieces of legislation passed into law.

4. *See* Gabby Morrongiello, *Donald Trump Wants a 45 percent Tax on Chinese Imports*, WASH. EXAMINER (Jan. 17, 2016, 2:17 PM), http://www.washingtonexaminer.com/trump-wants-a-45-percent-tax-on-chinese-imports/article/2579850 (45% tax is a response to China's currency manipulation).

5. *See infra* Part III.

RMB ("Renminbi" or "people's currency"), against the U.S. dollar (USD) harms the United States by creating a trade distortion that benefits China at the expense of the United States.[6] Since all goods today are purchased with currency—the barter system having all but disappeared—the currency of one country must be exchanged for foreign currency to pay for international sale of goods in all export-import transactions.[7] For example, Chinese exporters who sell goods to the United States receive Chinese currency, the RMB[8] as payment for the goods. U.S. importers must exchange U.S. currency for RMB through China's banks in order to pay for Chinese imports.[9] China's devaluation of the RMB means that fewer USD need to be exchanged for the same amount of RMB in the purchase of Chinese goods.[10] As a result, U.S. consumers need to use fewer USD to purchase the same amount of Chinese goods, making Chinese goods less expensive to the U.S. consumer.[11] Cheaper Chinese goods increase demand, so Chinese imports into the United States also increase.[12] By contrast, for the Chinese consumer the effect of the devaluation of the RMB against the USD is the opposite: more RMB need to be exchanged for the same amount of USD, making U.S. goods more expensive to the Chinese consumer.[13] More expensive U.S. goods will drive down demand, so fewer U.S. goods will be imported into China.[14] The overall effect of this devaluation is that U.S. consumers will purchase more goods from China, and Chinese consumers will purchase fewer goods from the United States.[15] In other words, China will sell more goods to the United States

6. *See* Carlos Tejada, *Five Things to Know About China's Currency Devaluation*, WALL ST. J.: L. BLOG (Aug. 11, 2015, 11:57 PM), http://blogs.wsj.com/briefly/2015/08/10/5-things-about-chinas-currency-devaluation/.

7. *See* DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL TRADE LAW: PROBLEMS, CASES, AND MATERIALS 44 (2d ed. 2012).

8. *See id.* at 45.

9. *See id.*

10. *See* COLLINS DICTIONARY OF BUSINESS (C. Pass ed., 3d ed. 2005), for the definition of devaluation.

11. *See id.*

12. *See id.*; *see also* Adam J. Flood, *In Supporting the National Export Initiative, Do the Commerce Departments Proposed Changes to Anti-Dumping and Countervailing Duty Trade Laws Truly Implement a Global Initiative or Art they an Isolated Enforcement?*, 19 CURRENTS: INT'L TRADE L.J. 25, 35 (stating that undervaluing of the Chinese currency results in less expensive Chinese goods for U.S. consumers while driving up the price of American made goods. Therefore, the demand for the cheaper Chinese goods over U.S. made goods increases.)

13. *See id*; *see also* Duncan Hewitt, *How Will China's Yuan Devaluation Affect Chinese Consumers' Taste For Imported Goods?*, INT'L BUS. TIMES (Aug. 13, 2015, 11:10 AM), http://www.ibtimes.com/how-will-chinas-yuan-devaluation-affect-chinese-consumers-taste-imported-goods-2052203.

14. *See* Flood, *supra* note 12.

15. *See* Flood, *supra* note 12.

and the United States will sell less to China.[16]

From a trade perspective, currency manipulation further enlarges the U.S. trade deficit with China[17] and conversely increases the Chinese trade surplus with the United States.[18] In 2015, the U.S. trade deficit reached a record $365.7 billion.[19] A breakdown of this figure indicates that the United States sold $116.2 billion in exports to China while purchasing $481.9 billion imports (nearly one half trillion dollars) from China.[20] In other words, China is earning $365.7 billion more in trade with the United States than the United States is earning with China. In even more stark terms, China is becoming $365.7 billion richer in trade with the United States every year while the United States is losing the same amount in trade with China. Of course, the United States receives social benefits in the form of consumption and presumably happier consumers, but the overall economic relationship is that the United States is falling further and further behind in its trading relationship with China. Critics also argue that the influx of Chinese made goods displaces U.S. made goods, leading to the loss of millions of U.S. jobs and to the lowering of wages for jobs that remain.[21]

As China generates more and more revenue from the United States, China is growing richer and more powerful economically vis-à-vis the United States. Moreover, rather than using this extra revenue to purchase more U.S. goods and reciprocating in trade with the United States by buying U.S. made goods, China is instead "hoarding" by using the revenue earned to purchase U.S. treasury bonds from the United States government.[22] Bonds are debt instruments of the United States government, so China is in essence lending money to the United States. As the U.S. bond represents a share of the U.S. economy, China owns more

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16. *See* COLLINS DICTIONARY OF BUSINESS, *supra* note 10; *see also* Julie Makinen and Samantha Masunaga, *Why China's Devaluation of the Yuan Matters so Much*, L.A. TIMES (Aug. 12, 2015, 9:20 AM), http://www.latimes.com/business/la-fi-china-devalues-yuan-20150811-htmlstory.html.

17. *See* C. Fred Bergsten and Joseph Gagnon, *Currency Manipulation, the US Economy, and the Global Economic Order*, PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS (2012), https://piie.com/publications/policy-briefs/currency-manipulation-us-economy-and-global-economic-order.

18. *See* CHOW, *supra* note 7, at 47-48.

19. *See* Terence P. Jeffrey, *$365,694,500,000: U.S. Merchandise Trade Deficit With China Hit Record in 2015*, CNSNEWS.COM (Feb. 9, 2016, 12:54 PM), http://cnsnews.com/news/article/terence-p-jeffrey/365694500000-merchandise-trade-deficit-china-hit-record-2015.

20. *Id*.

21. Danielle Kurtzleben, *Report: U.S. Lost 2.7 Million Jobs to China in 10 Years*, U.S. NEWS (Aug. 24, 2012, 5:10 PM), http://www.usnews.com/news/articles/2012/08/24/report-america-lost-27-million-jobs-to-china-in-10-years (citing currency manipulation as one cause of job loss and lower wages).

22. *See* CHOW, *supra* note 7, at 46. This is another way of saying that China is saving its earnings instead of spending them.

and more of the United States.[23]

China loans to the United States by buying U.S. government bonds, which gives the United States more money to spend and allows the United States to avoid painful measures such as raising revenue through increasing taxes on consumers.[24] China's loans to the United States are of unprecedented historic proportions. China held $1.24 trillion in U.S. Treasury securities in 2014,[25] while the U.S. Gross National Product in 2015 was $18.496 trillion.[26] China now owns 20.6% of all U.S. Treasury securities as of June 2015.[27] By one measure, China owns 14% of the annual American economy. In plain terms, the United States is indebted to China for $1.24 trillion, giving China great leverage. The United States faces the possibility of an economic crisis if China decides to redeem all of its bonds at once and demand payment.

Perhaps even more worrisome, the extra disposable income available to U.S. consumers by not having to pay more taxes is not being used to save and invest but to buy even more cheap Chinese goods. This creates a never-ending cycle of increasing debt and money-borrowing from China that makes the United States ever more indebted to China.[28] As the U.S. government goes into ever increasing debt with China, the U.S. government is also losing economic leverage to China, due to China's ownership of U.S. bonds. In turn, China can become bolder in its demands on the United States in political matters around the world.

Anti-China critics argue that China's currency manipulation is a key tool to gain political and economic power over the United States. By devaluing the RMB, China is able to further gain financial and political power over the United States.[29] These critics further charge that this type of currency manipulation is an unfair trade practice and that the devaluation of the RMB constitutes an illegal subsidy (further explained in the next section). The critics argue that the United States has the legal

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23. *Id.* at 47-48.

24. *Id.* at 48-49.

25. WAYNE MORRISON, CONG. RESEARCH SERV., CHINA-U.S. TRADE ISSUES 18, (2015) https://fas.org/sgp/crs/row/RL33536.pdf.

26. *See GNI (current US$)*, WORLD BANK, http://data.worldbank.org/indicator/NY.GNP.MKTP.CD?locations=US (last visited Feb. 27, 2017).

27. *See* U.S. DEP'T OF TREASURY, REPORT ON FOREIGN PORTFOLIO HOLDINGS OF U.S. SECURITIES 18 (2016), http://ticdata.treasury.gov/Publish/shl2015r.pdf.

28. *See* CHOW, *supra* note 7, at 47 (by purchasing U.S. capital assets, China is increasing the demand for U.S. dollars, making U.S. exports more expensive, driving down demand for U.S. exports and creating "an endless cycle in which the trade deficit with China continues to increase with no end in sight.").

29. *See* CHOW, *supra* note 7, at 47-48.

right under U.S. and international trade laws to respond by the imposition of a countervailing duty: an additional tariff to neutralize China's trade advantage.[30] Newly-elected President Donald Trump has proclaimed he will impose additional across-the-board tariffs of 45% on all Chinese goods (on top of existing tariffs), which will offset the subsidy that is created by the currency devaluation.[31] The countervailing duty will then help to decrease the mushrooming trade deficit.[32] While similar arguments have been repeated with regularity for the past decade, this argument has taken on even more vehemence and bravado in 2016.[33]

This article argues that this strategy—that the United States should impose trade sanctions on China for currency manipulation—cannot withstand rigorous legal scrutiny under the WTO.[34] An analysis of the WTO texts indicates that trade sanctions in the form of countervailing duties for China's currency manipulation are illegal.[35] Moreover, as a trade strategy argument, the position has additional serious risks.[36] The imposition of sanctions for currency manipulation on China could expose the United States to the same treatment from many of its trading partners, since the United States engages in what can also be considered to be currency manipulation by intervening in the currency markets for USD.[37] In other words, the use of trade sanctions against China for currency manipulation may open the door for the same treatment from China and other countries. This consequence alone is a strong argument for not imposing trade sanctions. The reasons why trade sanctions, despite their populist appeal, are not a viable U.S. option can be summarized as follows.

First, despite the simplistic rhetoric that appeals to populist sentiments, China's currency manipulation does not constitute an actionable subsidy under WTO law.[38] In terms of administering its agreements, the WTO is a body that follows technical laws and regulations, not a body that follows policy, sentiment, or public opinion. The technical analysis of a subsidy under the relevant WTO rules does not encompass currency

30. *See* C. Fred Bergsten, *Currency Manipulation: Why Something Must be Done*, FORBES (Feb. 25, 2015), http://www.forbes.com/sites/realspin/2015/02/25/currency-manipulation-why-something-must-be-done/#209e677f31c8 (countervailing duties must be imposed to offset effects of China's currency manipulation).

31. *See* Morongiello, *supra* note 4.

32. *See id.*; *see also* Bergsten, *supra* note 30.

33. *See* Morongiello, *supra* note 4.

34. *See infra* Part III.

35. *Id*.

36. *See infra* Part IV.

37. *Id*.

38. *See infra* Part III.

manipulation.[39] While currency manipulation might have some similar economic effects as subsidies, that argument is based on policy and not a valid legal argument that can successfully be presented before the WTO Dispute Settlement Body. The WTO General Agreement on Tariffs and Trade (GATT)[40] and the WTO Subsidies and Countervailing Measures Agreement (SCM or SCM Agreement)[41] govern the use of countervailing duties against illegal subsidies. Nothing in the GATT or the SCM Agreement encompasses currency manipulation as an actionable offense.[42]

Second, some seventy years ago nations held a conference in Bretton Woods, New Hampshire near the end of the Second World War to establish a triumvirate of multilateral institutions to govern world trade and finance once the war was concluded.[43] Among the institutions were a World Bank (to provide lending to poor countries),[44] an International Trade Organization (ITO) (to lower barriers to trade),[45] and the International Monetary Fund (IMF) (to create discipline in the use of international exchange rates).[46] The ITO never came into existence due to the opposition from the U.S. Congress; however, the GATT 1947 was established to provide a jump-start to lower tariffs in the post-war era.[47] The structure of these institutions and their legal texts indicates that it is the IMF, not the GATT/WTO, that is the proper institution to deal with exchange rates and currency manipulation.[48] The most important consequence of this tripartite structure is that, while these institutions are related, the IMF and the GATT/WTO are separate legal institutions with their own governing structures and measures for dealing with violations or inconsistencies with their governing agreements, the IMF Articles of Association and the myriad WTO agreements.[49] This has the paramount

39. *Id*.

40. *See generally* General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Texts: The Results of the Uruguay Round of Multilateral Trade Negotiations 17 (1999), 1867 U.N.T.S. 187, 33 I.L.M. 1153 (1994) [hereinafter "GATT 1994"].

41. *See generally* Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, The Legal Text: Results of the Uruguay Round 231 (1999), 1869 U.N.T.S. 14. [hereinafter "SCM"]; *see also infra* Part III.

42. *See infra* Part III.

43. *See* CHOW, *supra* note 7, at 18.

44. *Id.* at 19; *see also Bretton Woods-GATT, 1941-1947,* U.S. DEP'T OF STATE, OFFICE OF THE HISTORIAN, https://history.state.gov/milestones/1937-1945/bretton-woods.

45. *See* CHOW, *supra* note 7 at 18; *see also* U.S. DEP'T OF STATE, *supra* note 44.

46. *See* CHOW, *supra* note 7 at 19-21*; see also* U.S. DEP'T OF STATE, *supra* note 44.

47. *Id.* at 18, 26-28.

48. *See* CHOW, *supra* note 7, at 19-21; *see also infra* Part IV.

49. *See infra* Part IV.

consequence that a violation of the articles of the IMF cannot serve as a basis for the imposition of trade sanctions under the GATT/WTO.[50] This follows because the GATT/WTO and the IMF are separate legal entities that do not have interconnecting or dependent legal obligations.[51] The IMF and WTO independently decide how to handle violations of their agreements. While the GATT/WTO and IMF work together, nothing in the founding articles of any of these institutions authorizes using sanctions under one organization (the WTO) to punish countries for violating the obligations of another (the IMF). This is a form of "cross-retaliation" that must be specifically authorized by an agreement between the two institutions. Of course, any "cross-retaliation" assumes that the IMF would find a violation, i.e. that China is a currency manipulator, a finding that the IMF has never made in the entire seven decades of its existence.[52] If the United States has a complaint about China's currency manipulation, the proper forum in which to raise it is in the IMF. Historically, the IMF has no enforcement power,[53] leaving the United States few options as further explained below. The IMF contemplates discussions to voluntarily resolve currency issues.

Third, the United States itself often intervenes in currency markets to buy USD to prop up the dollar and engages in other currency transactions for the purposes of assuring stability in the U.S. financial system.[54] To be sure, unlike China, the United States does not peg the USD to a basket of foreign currencies, but China could argue the United States' many monetary policies and market interventions to buy U.S. currency is also a form of currency manipulation subject to countervailing duties imposed by China on imports of U.S. made goods. Threats by the United States to impose countervailing duties as a remedy for currency manipulation may simply open up the United States to retaliation in kind from China as well other Asian nations. The claim that China is engaging in currency manipulation may lead to a series of new problems for the United States that might offset the advantage of imposing trade sanctions on China for

50. *Id*.

51. *Id*.

52. *See* Claus D. Zimmermann, *Exchange Rate Misalignment and International Law*, 105 AM. J. INT'L L. 423, 455 (2011).

53. The IMF has the following powers: surveillance, the ability to offer technical assistance, and the ability to engage in research and statistics. Nothing is mentioned concerning enforcement powers. *See What the IMF Does,* INTERNATIONAL MONETARY FUND, http://www.imf.org/external/work.htm.

54. *See U.S. Foreign Exchange Intervention,* FEDERAL RESERVE BANK OF NEW YORK, https://www.newyorkfed.org/aboutthefed/fedpoint/fed44.html (discussing U.S. intervention in foreign currency markets when in the view of U.S. monetary authorities exchange rates do not accurately reflect fundamental market conditions and there is a need to slow rapidly changing exchange rate moves).

currency manipulation.

This article will explore each of these themes in the parts that follow. Part II will discuss the global system of exchange rates. Part III will follow with a technical analysis of the WTO Subsidies and Countervailing Measures Agreement and whether currency manipulation qualifies as a subsidy. In Part IV, the article will discuss the role of the IMF in dealing with currency manipulation. Part V will discuss the slippery slope of the U.S. argument that currency manipulation is a subsidy and how this might expose the United States to the consequences of its own arguments. Part VI will offer some concluding observations about what possible measures the United States might adopt in light of China's on-going currency manipulation.

II. THE MODERN INTERNATIONAL SYSTEM OF EXCHANGE RATES

A. The Modern System of Exchange Rates

In most international sale of goods transactions today, the buyer of goods pays the seller in the seller's currency. A U.S. buyer of Chinese goods will need to use USD to buy RMB to pay for the goods.[55] Similarly, a Chinese buyer of U.S. goods will use RMB to buy USD to pay for goods imported from the United States.[56] The exchange rate for USD to RMB thus becomes a crucial part of the international sales transaction as it affects the price of the goods.

At one time, exchange rates were fixed in accordance with the gold standard. One standard unit of gold was exchangeable for one bank note. However, when England found itself in danger of no longer being able to exchange gold for bank notes, it abandoned the gold standard in 1931. Other nations soon followed suit.[57] Today, exchange rates for currencies in the international monetary are usually determined by a system in which the rates are allowed to "float" in currency exchanges, i.e., the rates are determined by the free market forces of supply and demand.[58] For example, if there is a high demand for U.S. goods, then there is also a high demand for USD needed to purchase those goods. The demand for U.S.

55. *See id*. at 45.

56. *See id.* (discussing how RMB is used to purchase US dollars to buy goods from the United States).

57. *See* Jacob Goldstein and David Kestenbaum, *Why We Left the Gold Standard*, NPR (April 11, 2011 4:28 PM), http://www.npr.org/sections/money/2011/04/27/135604828/why-we-left-the-gold-standard.

58. *See* CHOW, *supra* note 7, at 45.

currency will mean greater purchases of USD using foreign currency and the greater demand for the USD will drive up the price of the dollar vis-à-vis foreign currencies exchanged for USD.[59] The higher the demand, the higher the prices for USD in foreign currency will become; in other words, the dollar appreciates against the foreign currency.[60] This means larger amounts of foreign currency will be needed to purchase the same amount of dollars needed to purchase U.S. imports of goods; as a result, U.S. goods become more expensive for the foreign consumer. For example, suppose that the exchange rate for USD to RMB is 1:6. This means that a consumer in the United States will obtain 6 RMB for 1 USD or that a Chinese consumer will need to use 6 RMB in order to obtain 1 USD. Let us also assume that the price of the product is 10 USD. Assuming a 1:6 USD to RMB exchange rate, the cost to the Chinese consumer to buy the product is 60 RMB, which is exchanged to 10 USD that is paid to the account of the U.S. seller. If the product becomes popular and there is a high demand for it among Chinese consumers, then the high demand for USD will result in banks requiring more RMB to be exchanged for USD. As a result, USD appreciates: it becomes more expensive and the exchange rate might now become 1:10 USD to RMB. Now 10 RMB will need to be exchanged for 1 USD or the product now costs 100 RMB to the Chinese consumer as a result of the appreciation of the dollar. The product has just increased significantly in price for consumers in China, due to the high demand for the product and the appreciation of USD.

The float contains a built-in self-correcting mechanism for reaching an equilibrium in trade balances.[61] The appreciation of the USD means that the price of U.S. goods and services will also increase, which will tend to drive down demand.[62] Chinese consumers who were willing to purchase the U.S. product for 60 RMB might balk at paying 100 RMB for the same product. The appreciation of the dollar might lead to less demand on the part of the Chinese consumer for the product and a corresponding lower demand for USD.[63] The dollar should then depreciate as a result.[64] Similarly, the appreciation of the dollar (and the depreciation of the RMB) means that Chinese products become cheaper to the U.S. consumer who now has to pay fewer dollars to purchase the same amount of goods and

59. *See* Reem Heakal, *Currency Exchange: Floating Rate vs. Fixed Rate*, INVESTOPEDIA, http://www.investopedia.com/articles/03/020603.asp (last visited Feb. 27, 2017).

60. *See* CHOW, *supra* note 7, at 45.

61. *See* CHOW, *supra* note 7, at 45.

62. *See* Anandi Sahu, *Balance of Trade*, REFERENCE FOR BUSINESS, http://www.referenceforbusiness.com/encyclopedia/Assem-Braz/Balance-of-Trade.html (last visited Feb. 27, 2017).

63. *See id.*

64. *See id.*

services from China.[65] A depreciation of the RMB from 1:6 USD to RMB to 1:10 USD to RMB means that a U.S. consumer who had to spend 10 USD to purchase a Chinese product worth 60 RMB can now spend 10 USD to purchase a Chinese product worth 100 RMB. As a result, demand among U.S. consumers might increase for inexpensive Chinese imports and the U.S. might purchase more goods and services from China as a result.[66] The United States will begin to import more cheap Chinese goods.[67] Over time, however, the use of dollars to purchase RMB and the greater demand for the RMB will then lead to the appreciation of the RMB in relation to the dollar; the high demand drives up the price of the RMB, at which point more dollars will be needed to purchase the same amount of RMB[68] as the RMB appreciates and the USD depreciates. U.S. consumers will begin to buy fewer Chinese imports and the U.S. trade deficit will begin to decrease. The USD to RMB exchange rate might then adjust to perhaps back to the original rate of 16 or a similar rate. Over time, exchange rates tend to balance out due to supply and demand for products. Ultimately, supply and demand determines exchange rates, absent interventions in the market that create distortions.

In the real world, changes in exchange rates affect trade balances. If China were to devalue its currency, the result is that its goods become less expensive to the U.S. consumer and the United States will then import more goods from China.[69] At the same time, goods from the United States would become expensive to consumers in China and China would import fewer U.S. exports.[70] This is the crux of the criticism by opponents of China's currency manipulation: China artificially devalues its exchange rate in order to create or increase a favorable trade balance in China's favor.[71] China gains in the trading relationship with the United States by earning revenue and becoming wealthier while the United States spends more than it is earning in its trade with China, becomes less wealthy, and must borrow money from China to sustain its level of consumption; ultimately, the U.S. economy cedes to China and becomes more dependent on Chinese loans.[72] As with any debtor who owns large sums to a creditor,

65. *See* CHOW, *supra* note 7, at 45.
66. *Id.* at 45.
67. *See* Kim Hjelmgaard, *Yuan and You: How China's Devalued Currency Affects U.S. Consumers*, USA TODAY (Aug. 12, 2015, 10:14 AM), http://www.usatoday.com/story/money/business/2015/08/12/yuan-and-you-how-chinas-devalued-currency-affects-us-consumers/31524925/.
68. *See* CHOW, *supra* note 7, at 45; *see also* Flood, *supra* note 12.
69. *See* CHOW, *supra* note 7, at 45-47; *see also* Flood, *supra* note 12.
70. *Id.* at 45-47.
71. *See* Morrongiello, *supra* note 4.
72. *See* CHOW, *supra* note 7, at 45-48.

the United States might need to make political concessions to China, as China's increasing ownership of the United States economy gives China greater leverage over the United States.[73]

B. China's Refusal to Allow the RMB to Float as a Form of Currency Manipulation

Floating exchange rates tend to contribute to the equilibrium in trade balances, but China does not allow its currency to float.[74] Rather, China "pegs" its currency to the USD and a small basket of other international currencies.[75] China has given a number of reasons for this approach, mostly based on the argument that China's financial system is too unstable to be subjected to floating exchange rates.[76] Rather, China sets an exchange rate by government fiat that it determines to be the appropriate rate of exchange.[77] Under pressure from the United States and its other trade partners, China has recently allowed its currency to fluctuate within greater margins and to be pegged against a "basket of foreign currencies" containing the USD and other foreign currencies.[78] However, China can change and lower its peg at any time.

The core of the U.S. dissatisfaction with China's currency system is the claim maintained by many economists and politicians that China's currency exchange rate is consistently undervalued, reaching a peak undervaluation of 30-40% in 2007.[79] As recently as 2013, the U.S. Treasury stated that the RMB was significantly undervalued, although it

73. *Id.* at 48.

74. *Id.* at 45.

75. *See* Keith Bradsher, *China to Track Renminbi Based on Basket of Currencies*, THE N.Y. TIMES (Dec. 11, 2015), https://www.nytimes.com/2015/12/12/business/international/china-to-track-renminbi-based-on-basket-of-currencies.html. *See also,* CHOW, *supra* note 7. At one point, China fixed its currency entirely to the USD but now pegs the RMB to a basket of currencies including the USD, the Euro, the Japanese Yen, and the South Korean Won with a smaller portion of the basket consisting of the British pound, the Thai Baht, the Russian Ruble, and the Australian dollar. The basket is dominated by the USD, Euro, Japanese Yen and South Korean Won, with a smaller proportion made up of the British Pound, Thai Baht, Russian Ruble, Australian Dollar, Canadian Dollar and Singapore Dollar.

76. *See* Simon Wilson, *Will China Float its Currency?,* MONEYWEEK (Dec. 3, 2010), http://moneyweek.com/currencies-china-renminbi-dollar-peg-47718/ (concerns about rising unemployment and inflation are reasons given by Chinese government for refusing to allow its currency to float).

77. *See* Bradsher, *supra* note 75.

78. The RMB was pegged exclusively to the USD until 2015. *See* Tim Worstall, *China Drops the Yuan's Strict Peg to the USD*, FORBES (Dec. 12, 2015, 10:01 AM), http://www.forbes.com/sites/timworstall/2015/12/12/china-drops-the-yuans-strict-peg-to-the-us-dollar/#2f5bfbbc461e.

79. *See* Bob Davis, *Undervalue/Overvalue: The Great Yuan Debate Continues*, WALL ST. J.: J. BLOG (May 13, 2014, 5:45 AM), http://blogs.wsj.com/chinarealtime/2014/05/13/undervalueovervalue-the-great-yuan-debate-continues/.

did not identify an exact figure.[80] This announcement was made before China enacted a 2% devaluation of the RMB in August 2015, which sent shock waves around the world.[81] Since the Chinese government sets the exchange rate for the RMB, China can set the rate at below-market rates, which in effect devalue the currency. In other words, economists first calculate what the exchange rate would be if the RMB were allowed to float; the PRC pegged rate is then compared to the hypothetical floating or market rate of exchange. It can then be determined if the pegged rate is higher or lower than the market rate. If the pegged exchange rate is lower than the market rate, then China is in effect devaluing its currency.

President Trump seems to argue that China's official RMB exchange rate is 45% percent below a market exchange rate for the RMB.[82] This means that as a result of China's fixed currency rate, the RMB is currently devalued by about 45% percent. Today, China maintains an exchange rate of 6.65 RMB to 1 USD. Assuming a 45% devaluation, a market rate of exchange should be about 2.9 RMB to 1 USD. The practical effect of this devaluation is that U.S. consumers are buying almost 7 RMB of Chinese goods for 1 USD whereas they should be buying about 2.9 RMB worth of Chinese goods for 1 USD. A Chinese made refrigerator imported into the United States and priced at 5,000 RMB costs the U.S. consumer about 750 USD at the prevailing rate of exchange but would cost 1,720 USD at the "real" rate of exchange without the devaluation of the RMB. Such a significant price difference captures the anger of anti-China critics. The response, at least according to President Trump, is to impose an extra tariff (a countervailing duty) of 970 USD on the Chinese imported refrigerator to neutralize the price advantage of the devaluation. This is the "real" price of the refrigerator based on the market rate of exchange if the rate were allowed to float. No doubt this massive countervailing duty will anger China and cause major repercussions throughout the entire global trading community, as China would likely seek to divert their exports that would have gone to the United States to other countries that will not impose similar duties. If these countries follow suit and impose 45%

80. *See U.S. Treasury: Chinese Currency Still 'Significantly Undervalued,'* VOA (Oct. 31, 2013, 12:20 AM), http://www.voanews.com/content/us-treasury-china-currency-still-significantly-undervalued/1780475.html.

81. *See* Christopher Balding, *Putting China's 2% RMB Devaluation in Context,* THE NANFANG (Aug. 15, 2015, 8:59 AM), https://thenanfang.com/putting-chinas-2-rmb-devaluation-in-context/ (arguing that the devaluation sent shock waves around the globe and portends future devaluations); *see also* Julie Makinen and Samantha Masunaga, *Why China's Devaluation of the Yuan Matters so Much*, L.A. TIMES (Aug. 12, 2015), http://www.latimes.com/business/la-fi-china-devalues-yuan-20150811-htmlstory.html.

82. *See* Morrongiello, *supra* note 4.

countervailing duties on the same product to avoid a glut of Chinese imports diverted from the United States, a global economic slowdown could ensue as inventory becomes stockpiled. Note, moreover, that the proposal is to impose a 45% tariff on *every* Chinese import. The consequences of such a move could be greatly disruptive to world trade.

On the flip side, anti-China critics argue that Chinese consumers are paying about 45% percent more for U.S. goods than they would otherwise have to pay if the RMB were allowed to float, so China imports fewer U.S. goods into China. The overall effect of the pegged rate is an increase in the volume of China's imports into the United States and a decrease in the volume of U.S. exports to China. The pegged rate also means that the U.S. trade deficit with China is larger (perhaps by as much as 45% percent) than what it would otherwise be under a floating rate. The U.S. trade deficit with China has a number of harmful effects for the United States, including loss of jobs, factories that must be shut down because they cannot compete, and depressed wages for those jobs that survive.[83] These effects are causing great anger among the general public and some politicians.[84]

83. *See* Bergsten, *supra* note 30.
84. *See* Daniel C.K. Chow, *How the United States Uses the Trans-Pacific Partnership to Contain China in International Trade*, 17 Chi. J. Int'l L 370, 389 (2017).

C. *Currency Devaluations as a Temporary Measure to Deal with Balance of Payment Problems*

Temporary currency devaluations are a common method by which countries that are experiencing balance of payment problems can find an emergency solution to avoid an economic crisis.[85] A balance of payment problem occurs when a nation lacks foreign currency with which to pay debts owed to a foreign creditor.[86] Suppose a country has purchased a large volume of imports or a nation has borrowed funds from a foreign country to deal with a putative national emergency.[87] For various reasons, the borrowing nation may lack the funds to repay the loan or to pay for the imports.[88] A key crop in the nation destined for export may have failed so the nation may have adopted imprudent fiscal policies,[89] while problems of government corruption and waste may have led to the disappearance of funds, or the government may have used funds on wasteful and unproductive public works. The debtor nation tightens its belt and suffers austerity measures; it could print more money to pay its debts but this would only lead to inflation or hyperinflation, which would only worsen the crisis.[90] Failure to repay debts in foreign currency could lead to a financial crisis if the nation goes into default and no other nation is willing to lend it funds. This could lead to famine, anarchy, chaos, and regime change. As a temporary measure, the nation might devalue its currency to stimulate exports in order to obtain foreign currency to pay off its debts and avoid a national disaster. This infusion of additional revenue from increased exports may be the temporary jolt needed to assist a country in the throes of an economic crisis and allow it to survive the crisis until other measures become available.

China's use of currency devaluations, however, cannot be considered to be a temporary measure to deal with a financial crisis, but appears to be a permanent feature of China's long-term national policies. This is evidenced by China's long-term use of the pegged currency rate, not as one time measure, but as a permanent national policy that has persisted for

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85. For example, Argentina (and some other South American countries) regularly intervened in its currency markets to deal with various economic crises. See *LG&E Energy Corp., et al. v. Argentine Republic*, 46 I.L.M. 40 (2007), ICSDI Case No. ARB/02/1. In fact, Argentina's currency and other financial problems were so severe that Argentina has been in a state of emergency in the twentieth century for greater periods than it has not.

86. *See* CHOW, *supra* note 7, at 20.

87. *Id.* at 20.

88. *Id.* at 20.

89. *Id.* at 20.

90. *Id.* at 20.

over a decade.[91] As a result, China's U.S. currency reserves have rocketed to become by far the world's largest at $3.66 trillion, more than the combined reserves of the four runner ups: Japan, the European Union, Saudi Arabia, and Switzerland.[92] Chinese central banker Zhou Xiaochuan has admitted that China's currency reserves have exceeded the reasonable level that China.[93] If China is not amassing currency reserves to deal with balance of payment problems (the traditional reason for devaluing currencies to amass currency reserves), then China is engaged in using a long-term set of policies of foreign currency accumulation to serve other policy needs.

Critics charge that currency devaluation is part of China's mercantilist policies that advise economic growth through growth in exports while protecting the Chinese economy from import competition.[94] Mercantilist policies promote export driven growth at the expense of trading partners.[95] An economy that derives growth from exports will need policies that promote exports and this is a key role played by China's currency policies. A different set of PRC policies provides protection from import competition so the combination is a potent one: encourage exports while, at the same time, erect barriers to import competition to protect domestic industries.[96] Together these two sets of PRC policies are designed to promote rapid economic growth of China's industries and its economy at the expense of China's competitors. China's exports grow, supported by government policies, while China's domestic industries grow protected by domestic policies against foreign competition.[97] Both China's export and domestic industries are protected by favorable government policies from the forces of free competition.[98] Other countries that do not have the benefit of such interventionist government policies are unable to offer the same protections to their export and importing industries and cannot keep pace with China's growth.

D. Currency Manipulation and Subsidies

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91. *See* Morrison, *supra* note 25, at 14 (noting the decade long accumulation of U.S. foreign currency reserves by China).

92. *See* Gwynn Guilford, *China's Central Bank now has $3.66 Trillion in Foreign Reserves: Where'd it Come From?*, QUARTZ (Oct. 15, 2013) http://qz.com/135340/chinas-central-bank-now-has-3-66-trillion-in-foreign-reserves-but-whered-it-come-from/.

93. *See* CHOW, *supra* note 7, at 46.

94. *See Is China Mercantilist?,* THE NATIONAL BUREAU OF ECONOMIC RESEARCH, http://www.nber.org/digest/dec05/w11306.html (last visited Feb. 27, 2017).

95. *See* Morrison, *supra* note 25.

96. *Id.*

97. *Id.*

98. *Id.*

Anti-China critics contend that China's currency manipulation is a type of unfair trade practice that exposes China to trade sanctions in the form of increased tariffs imposed on Chinese imports that enter the United States. As elaborated above, some critics charge that Chinese imports enjoy a 30-45% percent price advantage created by China's devaluation of its currency. This price advantage has the same effect as a subsidy, long prohibited by Article XVI of GATT 1947,[99] the original article on subsidies, and later elaborated in the 1994 WTO Agreement on Subsidies and Countervailing Measures.[100]

A simple definition of a subsidy is a financial payment by a government to domestic firms to encourage exports (other types subsidies also exist).[101] A subsidy is considered to be a trade distortion because it is an intervention, caused by government action, in the free market. A basic goal of the WTO is to promote free trade and to discourage or eliminate government intervention into the market because this creates a distortion that undermines free trade.[102] Free trade and competition between firms that enjoy success in trade is achieved through market efficiencies. Firms that produce high quality goods more efficiently and at a lower cost will succeed in international trade to the detriment of their weaker competitors. Government intervention into the market distorts efficiencies because the intervention gives weaker firms an advantage based on an artificial assistance, not based on intrinsic efficiencies of the firm. Take the classic example of a government export subsidy. In its simplest form, a government provides a payment to a firm to export a product to a foreign market.[103] Let us suppose that the Chinese government makes a payment of 50 USD on each product exported to the United States. The payment of 50 USD lowers the cost of production of the export and the exporter is now able to pass on the savings to the U.S. consumer by charging a lower price by the amount of 50 USD. This lower price provides a competitive advantage that has nothing to do with the efficiencies of the exporter, but is a result of the financial contribution or assist by the Chinese government. The subsidy not only helps an inefficient producer but also

99. *See* General Agreement on Tariffs and Trade art. XVI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

100. *See* SCM, *supra* note 41, art. 3.

101. SCM, *supra* note 41, arts. 1-4.

102. *See Understanding the WTO: Basics*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (discussing the goal of the WTO to achieve free trade).

103. This is an example of an export subsidy, considered to be the most harmful of subsidies and strictly prohibited under SCM Article 4.

harms more efficient producers in the United States that are unable to compete on price due to the 50 USD subsidy given by the Chinese government. These firms are harmed and may be driven out from the market. At this point, the Chinese company can raise its prices or lower the quality of the goods, both of which produce the same result: the U.S. consumer and U.S. industry are harmed. This scenario is why some subsidies are viewed as predatory and illegal as an unfair trade practice; it distorts free trade and can produce harm to the multilateral trading system to consumers and domestic industries alike.[104]

Anti-China critics argue that the effect of China's currency devaluation of the RMB has the same or similar economic effect as a subsidy. By using an artificially low exchange rate, the Chinese government is intervening in the market by allowing fewer USD to be exchanged for RMB so that the U.S. consumer is paying less for the Chinese import. The price advantage for the less expensive Chinese import is not created by market efficiencies of the firm but by government intervention. As one remedy for an illegal subsidy is the imposition of a countervailing duty that offsets the effect of the subsidy,[105] the argument by anti-China critics is that the same remedy should apply in the case of Chinese currency manipulation: a countervailing duty of 45% on all Chinese imports should be imposed to offset the effect of the subsidy.[106] The countervailing duty is an extra tariff that will increase the cost of the Chinese import to the U.S. consumer by 45% to its "real" price and will level the playing field for U.S. goods and U.S. businesses.

III. TRADE SANCTIONS FOR SUBSIDIES UNDER THE WORLD TRADE ORGANIZATION

A. Tariffs and Trade Sanctions

To understand how trade sanctions are imposed under the World Trade Organization, it is necessary to understand the history of the WTO and its predecessor organizations. In the 1930s, the period leading up to the Second World War, nations had unlimited discretion to impose trade sanctions on goods from other nations at any level and at any time.[107] No international legal organization or system existed that had authority to

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104. The example given in the text of an export subsidy is widely considered to be the most harmful of all types of subsidies and is considered to be illegal *per se* under the WTO. *See* SCM, *supra* note 41, art. IV.

105. SCM, *supra* note 41, art. 4.

106. *See* Morrongiello, *supra* note 4.

107. *See* CHOW, *supra* note 7, at 18.

limit trade sanctions.[108] In the absence of an international regime such as the WTO, nations could impose any level of trade sanction at any time and the only recourse for a trade sanction imposed by one nation on another was tit-for-tat: retaliatory sanction in return.[109] This was clearly an unsatisfactory and dangerous state of affairs, as nations began to use trade tactics that led to ever-higher tariffs, which created insurmountable trade barriers, a hostile trading environment, and hostile relations.[110] The United States was a leading proponent of trade sanctions as evidenced by the Smoot Hawley Tariff Act of 1930, which imposed tariffs that averaged 53% of the value of imports.[111] Such draconian tariffs were viewed as an attempt to prevent trade but still achieved this objective.[112] The draconian tariffs engendered mistrust and ill will among nations as they viewed each other as adversaries, not as allies.[113] A lesson from this chaotic period is that when nations view each other with hostility in their economic relations, military conflict is often not too far behind.[114] One of the results of the Second World War was that nations wanted to put into place multilateral institutions that would avoid the economic conflict that contributed to the Second World War.[115] Near the end of the war, as it became clear that Germany and Japan would be defeated, a group of nations led by the United States met at a conference in Bretton Woods, New Hampshire to establish a multilateral framework to prevent the disastrous economic policies that contributed to the global catastrophe created by the Second World War from occurring again.[116]

One of the Bretton Woods Institutions, the GATT 1947, was established expressly for the purposes of putting a limit on the power of nations to impose trade sanctions on other nations without justification.[117]

108. The Bretton Woods conference established the triumvirate of modern international financial institutions (the WTO, the World Bank, the IMF), which had no precedent in history. CHOW, *supra* note 7, at 18.

109. The WTO has strict rules that must be satisfied before a nation can impose a trade sanction. CHOW, *supra* note 7, at 448-450 (discussing U.S. implementation of WTO antidumping procedures). Without the discipline of the WTO, nations could simply impose any type of trade sanction they wished. Under the WTO, a nation suffering from an illegal trade sanction has recourse to the WTO system for the settlement of trade disputes. CHOW, *supra* note 7, at 63.

110. *See* CHOW, *supra* note 7, at 18 (discussing the mutual use of draconian tariffs to prevent trade, leading to mounting economic and political tensions and contributing to the eruption of the Second World War).

111. *See* CHOW, *supra* note 7, at 18.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 26.

The GATT sought, as a major goal, to end the ability of nations from arbitrarily imposing trade sanctions in the form of high tariffs on other nations. The GATT 1947 (and later the WTO established in 1995) viewed arbitrary and unpredictable tariffs as creating an unworkable system for world trade. The founders of the GATT 1947 did not seek to immediately eliminate all tariffs; they were political realists and accepted that some level of tariffs had to be permitted under the GATT 1947, as a matter of historical necessity.[118] The most common form of tariff is the *ad valorem* tariff, which is expressed as a tax on a percentage of the value of the import, i.e. 5% of the value of the import, usually imposed on the actual price paid of the import at the port of entry before the import can enter the internal market.[119]

As the public debates concerning China's currency manipulation and China's other trade issues focuses on tariffs, most of the discussion below focuses on tariffs that are imposed as an added trade sanction under the WTO. We start with a basic trade rule contained in GATT Article II.[120] Under GATT Article II:1(b), each GATT /WTO country (including the United States) establishes a GATT schedule with tariff rates for all goods.[121] These tariff schedules are reached after long rounds of negotiations in which agreement on mutually acceptable schedules is reached with all other GATT/WTO members.[122] Each GATT member makes an "offer" of its tariff schedule to all GATT members on all tariffs to be charged on imports and then negotiates with every other member of the GATT/WTO on all tariffs until an agreement is reached on mutually satisfactory tariffs.[123] These negotiations can take years and are on-going.[124] Once agreement on a GATT schedule is reached, the nation's

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118. *Id.* at 26.

119. CHOW, *supra* note 7, at 180. This is known as the *ad valorem* tariff, expressed as a percentage of the value of the import. Other tariffs are a specific tariff, i.e. a flat rate, a mixed tariff that combines aspects of the *ad valorem* tariff and the specific tariff. Finally, a popular tariff is the tariff rate quota, which imposes one tariff for the in-quota amount (i.e. up to a certain quantity of imports) and a higher amount for the out-of quota amount (i.e. above the designated amount for the in-quota rate). There are other types of trade barriers but the tariff is by the far the most popular and so is the main focus of the discussion in the text.

120. See GATT 1994, *supra* note 40, art. II.

121. *Id.*, art. II:1(b).

122. *Goods Schedules: Members' Commitments*, WORLD TRADE ORGANIZATION (Aug. 18, 2016), https://www.wto.org/english/tratop_e/schedules_e/goods_schedules_e.htm ; *see also* CHOW, *supra* note 7, at 182 (GATT "tariff schedules are usually reached after lengthy negotiations with all other WTO members.").

123. *See* ANWARUL HODA, TARIFF NEGOTIATIONS AND RENEGOTIATIONS UNDER THE GATT AND THE WTO: PROCEDURES AND PRACTICES 12 (2001); *see also GATT Bilateral Negotiating Material by Round*, WORLD TRADE ORGANIZATION, https://www.wto.org/english/docs_e/gattbilaterals_e/indexbyround_e.htm (last visited Mar. 13, 2017).

124. CHOW, *supra* note 7, at 49-50.

GATT schedule is then attached under GATT Article II:1(a) to the GATT Agreement as an official annex that becomes part of the GATT/WTO.[125] Once a nation's GATT schedule with a tariff rate for all imports are established, the nation's GATT schedule cannot be modified without undergoing some elaborate and lengthy procedures.[126]

Under GATT Article II:1(b), a nation cannot impose tariffs that exceed the tariffs on its GATT schedule.[127] In other words, the tariffs are "bound," i.e. subject to a ceiling above which the tariff cannot exceed.[128] If a nation imposes a tariff above the "bound" rate, the nation is in violation of GATT Article II:1(b) and must withdraw the tariff or else face consequences under the GATT dispute settlement system, which has proven to be an effective dispute resolution mechanism. The dispute settlement system includes, among other remedies, the ability of the WTO to authorize trade sanctions against the offending country.[129] After the initial tariff schedules were established in 1947, GATT countries engaged in a series of multilateral rounds of negotiations to further reduce tariffs.[130] By all accounts, GATT tariff negotiations have been a resounding success and current tariff rates are far below their historical highs.[131]

The most significant aspect of GATT Article II:1(b) is that it establishes a bedrock principle of international trade that abolishes the ruinous chaos and anarchy that existed prior to the Second World War. From the GATT 1947 onward, tariffs to be imposed on imports are bound by a ceiling in a nation's GATT schedule; tariffs cannot exceed the ceiling by any amount, no matter how *de minimis*, without violating a fundamental WTO legal obligation.[132] Moreover, tariffs cannot be

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125. *See* GATT 1994, *supra* note 40, art. II:1(a).

126. *See id.*, art. XXVIII (Modification of Schedules). The modification of an applicant's GATT schedule requires undergoing a negotiating process with all of the original WTO members that agreed to the applicant's GATT schedule as well as any other members so designated by the WTO membership as having an interest in the modification. The negotiations must be conducted I according with time period specified by a two thirds vote of the WTO membership and are subject to the achievement of goals within strict mandatory time guidelines within the overall time period. *See* art. XXVII: 1, 3(a),-(b), 4(a)-(d), 5. *See also* CHOW, *supra* note 7, at 182 ("[N]o WTO member may act unilaterally to change its tariff bindings, but must follow a complicated procedure.").

127. *See* Chow, supra note 7, at 182 ("GATT Article II:1(a) and II:1(b) provide that a member cannot impose a tariff that is higher than provided for in tis tariff schedule.").

128. *Id*. (discussing how GATT Article II "bind" nations to "ceilings" on tariffs).

129. *Id.* at 68.

130. *Id.* at 50-51.

131. *Id.* at 180.

132. GATT 1994, *supra* note 40, art. II:1(b); *see also* Report of the Appellate Body, *Argentina-Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WTO Doc. WT/DS/AB/R at ¶ 46 (March 27, 1998) ("A tariff binding in a Member's Schedule provides an upper limit on the amount of duty that may be imposed …. The Principal obligation in the first sentence of Article II:1(b)

disguised as some other type of charge to evade the bound rate.[133] The starting presumption is that all tariffs are absolutely bound by the GATT tariff ceiling.[134] No tariff (or a disguised tariff) exceeding the GATT schedule can be imposed;[135] if an additional tariff is to be imposed, it can be done so only in exceptional circumstances and only if the importing nation can satisfy the burden of proving the additional tariff is an established exception, as set forth in certain provisions of the GATT or the WTO Agreement on Subsidies and Countervailing Measures.[136] The clear presumption is in favor of the GATT rate and exceeding the GATT rate through increased tariffs in the form of sanctions is only exceptionally permitted.[137] In the case of the United States, the applicable GATT Schedule is contained in the Harmonized Tariff Schedule of the United States (HTSUS).[138] As the U.S. GATT schedule, the HTSUS sets the ceiling on all tariffs that can be lawfully imposed on foreign imports. No tariff can be imposed by the United States on Chinese imports that exceed the HTSUS rate, unless the United States carries the burden of justifying the additional tariff based upon a text of the WTO.[139]

B. Tariff Sanctions for Currency Manipulation

The justification offered by the United States for the extra tariff above

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. . . requires a Member to refrain from imposing ordinary customs duties in excess of those provided in the Member's Schedule.")

133. GATT Article II:1(b) states that other than being subject to the GATT bound tariffs, imports "shall be exempt from ordinary customs duties in excess of those set forth [in the GATT schedule]. Such products shall also be exempt from all other duties or charges of any kind . . . . "). The last phrase exempting imports from all other duties or charges of any kind prevents nations from circumventing the ceiling imposed on all import tariffs by the member's GATT schedule by referring to additional tariffs as other duties or charges. GATT 1994, *supra* note 40, art. II:1(b).

134. *Id.*

135. *Id.*

136. For the purposes of this article, the most important exception is the imposition of countervailing duties to offset the effect of an illegal subsidy. *See* GATT 1994, *supra* note 40, art. XVI; *see also* SCM, *supra* note 41, arts. 1-3 (setting forth the requirements of an illegal subsidy). There are also other exceptions, most notably the general exceptions provision in GATT 1994, art. XX, a very important provision, but a discussion of Art. XX is beyond the scope of this article.

137. This rule can be gleaned from the structure of the GATT. Article II:1(a)-(b) set ceilings on the import tariff while other provisions of the GATT and its related agreements, authorized additional tariffs in the form of trade sanctions only if certain strict conditions are met. For example, Article I of the WTO Antidumping Agreement states: "An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement."

138. *See* U.S. INT'L TRADE COMM'N, PUBL'N NO. 4622, HARMONIZED TARIFF SCHEDULE OF THE U.S. (2016).

139. For example, in the case of a countervailing duty to offset the effect of an illegal subsidy provided to an imported good, the U.S. must demonstrate that the subsidy meets the requirements of SCM Articles 1-3 in order to justify the imposition of the countervailing duty.

the tariff set forth in the United States GATT schedule is based on GATT Article XVI,[140] the original subsidies article that was elaborated in the 1994 WTO Subsidies and Countervailing Measures Agreement.[141] If the United States can prevail on this argument then the extra tariff, which President Trump says should be as high as 45%,[142] can be justified and permitted under the WTO. In other words, the United States will be able to impose a 45% countervailing duty across the board on *every single Chinese import that enters the United States.*[143] Whether this is a legal possibility depends on an analysis of the relevant texts of the WTO.

C. GATT Article XVI and the WTO Subsidies and Countervailing Measures Agreement

In assessing the legal arguments below, it is necessary to begin with the premise that the WTO General Council, the permanent standing membership of the WTO and its highest body, wears different hats. Wearing its hat as the Dispute Settlement Body that resolves trade disputes, the WTO General Council is a body that review opinions of WTO panels and the Appellate body that are highly technical, decided after painstaking parsing and exegesis of the legal texts of the WTO.[144] The WTO Dispute Settlement Body is not concerned with social or economic policies that may have a similar or equivalent legal effect to illegal measures, such as prohibited subsidies. That currency manipulation may have some effects that are similar to subsidies will carry no weight with the WTO; the issue is one of law in a dispute settlement proceeding, not policy. Rather, the technical legal issue for the WTO is whether China's currency manipulation meets the definition of a subsidy as defined in the WTO Subsidies and Countervailing Measures Agreement so as to justify the imposition of countervailing duties on Chinese imports.

The relevant provision of the SCM Agreement, which elaborates the original GATT XVI on countervailing duties, defines a subsidy in relevant

140. GATT 1994, *supra* note 40, art. XVI. This was the original article recognizing the availability of anti-dumping duties and countervailing duties to offset the unfair trade practices of dumping and subsidies. The WTO subsequently believed that it was necessary to elaborate on GATT 1994, art. XVI and so passed two new agreements the WTO Anti-Dumping Agreement and the WTO Subsidies and Countervailing Measures Agreement. As the SCM Agreement is much more elaborate, the discussion in the text focuses on the SCM.

141. *See* SCM, *supra* note 41.

142. Morrongiello, *supra* note 4.

143. *Id*.

144. The technical nature of WTO panels and Appellate Body opinions are apparently to any reader of these opinions. *See generally* CHOW, *supra* note 7.

part as follows:

> Article 1
>
> Definition of a Subsidy
>
> 1.1. For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) There is a financial contribution by a government or any public body within the territory of a Member . . . i.e. where:
>
> (i) a government practice involves a direct transfer of funds (e.g. grants, loans, and equity infusion), potential direct transfers of funds or liabilities (e.g. loan guarantees);
>
> (ii) government revenue that is otherwise due is foregone or not collected (e.g. fiscal incentives such as tax credits);
>
> (iii) a government provides goods or services other than general infrastructure, or purchases goods;
>
> (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense differs from practices normally followed by governments.
>
> and
>
> (b) a benefit is thereby conferred.[145]

An actionable subsidy under the SCM is subject to unilateral action in the form of the imposition of a countervailing duty by the importing country on the subsidized imports.[146] Such relief is based on whether a subsidy is found. The key issue is whether currency manipulation fits within the definition of a subsidy.

1. "Financial Contribution"

A reading of SCM Article 1 indicates that its purpose is to prohibit governments from making a "financial contribution," i.e. a payment (in the form of a direct transfer of funds, grants, loans and equity infusion, loan guarantees) to a firm. The key prohibition is against payments, i.e. the

145. SCM, *supra* note 41, art. 1.
146. *Id.* art. 19.1.

transfer of funds directly or indirectly by the government to the firm. That is the crux of a subsidy as defined in the SCM.

No payment from a government to a firm is involved in a devaluation of currency. Devaluation is a government economic policy used to manage a country's foreign currency reserves, balance of payment obligations, and financial stability.[147] Devaluation affects the flow of currency within the nation as a means of payment and in countries abroad.[148] There are no payments directly or indirectly from the government to the firm.

SCM Article 1.1(a)(iii), set forth above, deserves special discussion. This provision refers to a subsidy as government revenue that is otherwise foregone. One could make the argument that a devaluation of the Chinese currency is revenue foregone to Chinese banks since fewer dollars are needed for currency exchange for RMB. But SCM Article 1.1(a)(iii) is not concerned just about revenue not collected by the government. This provision is designed to capture the situation where a private business firm owes the government money, taxes, or debts and the government forgoes the money, i.e. does not collect it *from* the firm. In other words, SCM Article 1.1(a) presupposes that the private firm owes revenue to the government and that the government forgives the debt owed. The forgiveness is a type of subsidy. If a company owes the China $50 million and the PRC government forgives the debt, the forgiveness has the same effect as the firm receives a payment of $50 million from the PRC government. The key concept is the government gives the payment to the firm or the government forgives the obligation owed by the firm to the government, which has exactly the same economic effect. The failure by Chinese banks to collect additional funds from foreign buyers exchanging foreign currency for RMB is not revenue that would be otherwise collected by the government from the firm. No debt or revenue due from the Chinese firm to the Chinese government is forgiven. The Chinese firm never owed any debts or taxes to the Chinese government in the first place.

2. *A "Benefit" is Conferred*

A second requirement of a subsidy is contained in Article 1.1(b) above.

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147. *See* COLLINS DICTIONARY OF BUSINESS, *supra* note 10, for the definition of devaluation.

148. *Id.* ("The effect of a devaluation is to make IMPORTS (in the local currency) more expensive, thereby reducing import demand, and EXPORTS (in the local currency) cheaper, thereby acting as a stimulus to export demand.").

A subsidy must confer a "benefit."[149] In this context, a "benefit" means that the private firm is gaining an advantage that is not otherwise available on the market. For example, the government makes a gratuitous payment to a private firm, the government buys goods from the firm at above market prices, does not collect taxes owed by the firm, or forgoes a loan or debt owed by the private firm; none of these is a normal business practice available on the market in the ordinary course of business. In other words, the government is giving special and favorable treatment to the private firm, the type of help that is not available through normal commercial channels. The government is intervening into the market place and is creating a market distortion, i.e. a benefit not earned by the efficiencies of the firm but by the largess of the government. None of these elements exists in the case of currency devaluation. By definition, currency devaluation does not create a special benefit available to a selected few that is generally not available on the market.[150] To the contrary, the currency devaluation is available to every firm or individual on the market dealing with foreign currency. Because no benefit beyond what is available on the market is conferred, no benefit exists within the meaning of SCM Article 1.1(b). Without a benefit conferred, no subsidy exists under SCM Art. 1.1(b).

3. "Specificity"

A third requirement of a subsidy is that it must be "specific."[151] The requirement of specificity is explicitly set forth in SCM Article 2: a subsidy must be "specific to an enterprise or industry or group of enterprises of industries (referred to in this Agreement as 'certain enterprises')."[152] The reason for the requirement of specificity is that all governments provide general infrastructure services to their constituents as part of their sovereign functions. For example, governments build highways, roads, bridges, parks, and other public works that benefit the public. These works confer services that are provided to private firms to carry out their businesses as well as to members of the public who use the same public works for business or non-business reasons. The public works do not distinguish between users, as these are public goods available to all.

149. SCM, *supra* note 41, art. 1.1(b).

150. A currency devaluation is an adjustment of the exchange rate of the domestic currency versus the foreign currency. *See supra* Part III.C. This exchange rate would be available to any business or person that wishes to obtain foreign currency in the country of devaluation.

151. SCM, *supra* note 41, art. 2.

151. *Id.* art. 1.

152. *Id.* art. 2.

If these public infrastructure works were to be considered subsidies, then governments that provide subsidies all the time and all public works could be subject to countervailing subsidies. The result would seem unacceptable.

In order to distinguish general infrastructure from prohibited subsidies, the SCM requires that the public work or infrastructure must be specific to an industry or group of enterprises and not available to the general public.[153] For example, a government might build a bridge or a road for the exclusive use of a private factory. Now this infrastructure becomes a subsidy that is specific to the factory. The road also confers a benefit as the factory would have to build such a road on its own if the government did not do so. Under these circumstances, the infrastructure could be treated as a subsidy, and the cost of providing a replacement work could represent the amount of the subsidy that is subject to the imposition of a countervailing duty.

China's currency devaluations, however, do not meet this definition of specificity. No one can argue that China's currency devaluations are specific to a single enterprise or group of enterprises.[154] Rather, the devalued currency exchange rates are available to all firms and individuals. Subsidies that are not specific are not illegal or actionable under the SCM.[155]

If currency devaluations do not meet the definition of a subsidy under the SCM, then there is no justification the imposition of a countervailing duty on all Chinese goods imported into the United States. Any imposition of such a countervailing duty would be illegal under the SCM and would be subject to being struck down by the WTO Dispute Settlement Body.

IV. THE IMF IS THE PROPER FORUM IN WHICH TO ASSERT A CLAIM OF CURRENCY MANIPULATION

A second argument that the SCM cannot be used to impose countervailing duties on currency manipulation can be traced from the history and the design for the triumvirate of multilateral financial

153. *See supra* notes 148 and accompanying text

154. One might be able to make an argument, if supported by the evidence, that a large number of export firms use currency devaluations. For example, suppose that it is possible to show that 70% of all export firms use the lower currency exchange on a regular basis. At this point, one might find that this is a de facto specific subsidy. Even if such a case could be made, however, there is still the problem that the government has made no financial contribution as required by SCM Article 1 so the argument that a subsidy exists still fails.

155. SCM, *supra* note 41, arts. 1-2.

institutions set in place more than seventy years ago at the conference in Bretton Woods, New Hampshire.[156] When the United States and other nations met at the Bretton Woods Conference, they had a specific plan for the new economic order for the post-war period. The GATT was to liberalize trade in goods and to lower trade barriers to jumpstart the global trade in goods.[157] The World Bank was to lend money for the reconstruction of Europe and to least developing countries.[158] It was left to the International Monetary Fund to deal with currency issues, including the issue of currency devaluation.[159] In the period before the Second World War, nations engaged in a vicious series of currency devaluations that harmed their trading partners. The IMF was intended to curb these devaluations as part of its work of dealing with currency manipulations.[160] In its initial charge, the IMF was to encourage the free convertibility of currencies through the use of stable exchange rates, discourage currency devaluations, and provide loans and technical assistance so as to aid countries in their balance of payment problems.[161] Disputes between nations concerning currency devaluations were to be resolved by dialogue.

Article IV:1 of the Articles of the Agreement of the IMF states that members "shall avoid manipulating [currency] exchanges in order to gain an unfair advantage over other members."[162] Note the precatory language "shall." In the entire history of the IMF, no country has ever been found to be a currency manipulator in violation of this provision.[163] This history has led one commentator to argue that this provision is "soft law," i.e. an aspirational goal, not a binding rule of law.[164] Given this history, it seems

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156. *See* CHOW, *supra* note 7, at 18-21.

157. *Id.* at 26.

158. *Id.* at 19.

159. *Id.* at 19-21.

160. Beyond affecting trade balances, currency devaluations can have serious harmful effects on the nation holding the devalued currency. Devaluations were a real problem in the period prior to War World II, and the IMF was tasked with controlling the harmful effects of devaluations. Here is an example of how harmful devaluations can be:

> If Country B is holding large amounts of Country A's currency and Country A suddenly devalues its currency by 50 percent, Country B's holdings of Country A's currency immediately deceases in value by one-half and Country B may feel cheated. Assume that the original exchange rate for A's currency in B's currency is 1:1 so that one unit of A's currency can be exchanged for one unit of B's currency. If Country A devalues its currency by 50 percent, the exchange rate for A's currency becomes 2:1 so that two units of A's currency must now be exchanged for one unit of B's currency. Country B's holdings of A's currency have just decreased by half.

CHOW, *supra* note 7, at 20 & n.9.

161. *See* CHOW, *supra* note 7, at 20-21.

162. Articles of Agreement of the IMF, Art. 4, 60 Stat. 1401, 2 U.N.T.S. 39.

163. *See* Claus D. Zimmermann, *Exchange Rate Misalignment and International Law*, 105 AM. J. INT'L L. 423, 426 (2011).

164. *See id.*

unlikely that the IMF will find China guilty of currency manipulation.

Even if the IMF finds China to be to a currency manipulator, that conclusion would not justify the imposition of countervailing duties by the United States. This is made clear by GATT Article XV:2, which elaborates the relationship between the GATT/WTO and the IMF:

> In all cases in which the contracting parties are called upon to consider or deal with problems concerning monetary reserves, balances of payments or foreign exchange arrangements, they shall consult fully with the International Monetary Fund. *In such consultations, the contacting parties [the GATT parties] shall accept all findings of statistical and other facts presented by the Fund relating to foreign exchange, monetary reserves and balances of payments, and shall accept the determination of the Fund as to action by a contracting party in exchange matters is in accordance with the Articles of Agreement of the International Monetary Fund…*(emphasis added).[165]

GATT Article XV: 2 indicates that it is the IMF, not the GATT/WTO, which was given authority over currency exchange issues. The domain of the IMF is currency regulations and whereas the domain of the GATT is trade in goods. The argument that the United States should use the SCM Agreement to impose countervailing duties on China for currency manipulation has no basis in the texts of the WTO or in its historical origins. Imposing countervailing duties would be using the enforcement powers of one organization, the GATT, to enforce matters that are within the jurisdiction of an entirely different organization with a different mandate, the IMF. To create this arrangement, there must be an agreement authorizing "cross retaliation." There is no existing agreement between the IMF and the WTO for "cross retaliation," and thus no legal basis on which such an arrangement can be justified.

The IMF's authority over currency issues creates a problem for the United States because the IMF lacks any enforcement powers. The IMF is limited to working with countries in resolving currency disputes through promoting dialogue, surveillance, technical assistance, and persuasion.[166] The IMF can also provide loans and technical assistance to help countries make their payment obligations.[167] Other than these powers, the IMF has

165. GATT 1994, *supra* note 40, art. XV:2.

166. *See About the IMF*, INTERNATIONAL MONETARY FUND, http://www.imf.org/external/about.htm (last visited November 11, 2016).

167. *See id.*

no other authority to deal with currency issues.[168]

V. RETALIATION FOR U.S. SANCTIONS FOR CURRENCY MANIPULATION

Even if the United States is able to impose trade sanctions in the form of countervailing duties on China for currency manipulation, China might retaliate in kind. China is not the only country that intervenes in currency markets. The United States also intervenes in currency markets on a regular basis by buying up USD in order to prop up the dollar from devaluation and to maintain stability in financial markets.[169] Interventions by the United States are common monetary measures that almost all nations engage in and are within the domain of the IMF.[170] This was one of the reasons for including currency regulations in the IMF, not the GATT; no one wants a trade war every time a nation intervenes in a currency market.

The United States could argue that its actions are different from China's since the United States is not pegging the USD to a basket of currencies in the way that China does and the United States does not systemically devalue its currency in order to support exports. But when trade disputes erupt, these types of distinctions are not going to be persuasive, especially to countries that have been unfairly targeted for especially harsh treatment. Once the United States opens the door by arguing that currency manipulation constitutes a subsidy, the same argument will be applied against the United States, even though there might be some differences in how the United States intervenes in the currency market. Whatever the merits of the U.S. argument for the imposition of countervailing duties on imports from China, there is a high likelihood that an across-the-board tariff of 45% will be met with a fierce and angry response by China leading to the possibility of a trade war between the world's two largest economies that could destabilize the world. Other Asian countries might also wish to exploit the opportunity to impose countervailing duties against the United States in order to avoid trade imbalances with the United States.

In pressing the currency manipulation argument against China, the United States risks opening itself up to retaliatory measures and a costly diplomatic dispute with China and possibly with other countries. This risk alone is a practical reason that cautions against the use of trade sanctions for currency manipulation.

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168. *See id.*
169. *See* FEDERAL RESERVE BANK OF NEW YORK *supra* note 54.
170. *See supra* Part IV.

VI. CONCLUSION

The argument that the United States should impose trade sanctions on China to offset its currency manipulation is not supported by a sound legal basis.[171] The text of the WTO does not support such a remedy, the architecture of the post-war set of financial institutions does not support it, and as a matter of trade policy (aside from questions of legality), imposing trade sanctions would be a risky move.[172] The question that arises for the United States is what responses are available if countervailing duties are not lawful.

At the outset, let us first dispense with the unrealistic options, such as amending U.S. trade federal law to authorize for the use of countervailing duties against Chinese imports for currency manipulation. The United States is a member of the WTO and has a legal obligation to implement WTO obligations into U.S. law.[173] Changes in federal law that are inconsistent with the SCM, the GATT and other WTO agreements are illegal, as they will be rejected in the WTO dispute settlement system.[174] Any attempts to evade WTO law by changing domestic laws would be futile and would be immediately struck down in the WTO dispute settlement system.[175] Let us also be clear that there is no realistic possibility of amending the GATT/WTO agreements to allow for the use of countervailing duties against China for currency manipulation. Changes to the GATT/WTO and the SCM require the unanimous consent of all GATT/WTO members.[176] China's opposition alone would be sufficient to defeat such efforts.[177] Equally quixotic would be suggesting that the Articles of the IMF be amended or reinterpreted so that the "soft law" against currency manipulation becomes "hard law" to be backed by newly created IMF sanctions. History indicates the IMF lacks the political will to find nations guilty of currency manipulation.

171. *See supra* Part III.

172. *Id.*

173. *See generally* Marrakesh Agreement Establishing the World Trade Organization, Art 16.4, Apr. 15, 1994, 1869 U.N.T.S 14, 33 I.L.M. 1144 (Stating that members of the WTO, which include the United States, will ensure their domestic policies and laws conform with the annexed agreements entered into through their membership in the WTO).

174. *See* CHOW, *supra* note 7, at 63-68.

175. *Id.* at 63-68.

176. The WTO operates on the basis of the principle of consensus, i.e. decisions are made with the consent of all members. *See* Marrakesh Agreement Establishing the World Trade Organization, Art. 9.1., Apr. 15, 1994, 1869 U.N.T.S. 14. "The WTO shall continue the practice of decision-making by consensus followed under the GATT 1947." *Id.*

177. China's opposition would be alone sufficient to destroy the consensus required under Art. IX:1. *See generally* CHOW, *supra* note 7, at 169.

A new strategy that the United States seems to have adopted is to create new mega-free trade agreements at a level below the WTO agreements. A preeminent example is the Trans-Pacific Partnership ("TPP"), which was negotiated by the United States with its members while deliberating excluding China.[178] The TPP imposes WTO plus obligations and there is no reason why similar mega-free trade agreements, drafted without China's participation, could not include restrictions on currency manipulations. Once the free trade agreements are concluded, then China could be allowed to join, but it must accept all of the provisions in the agreement, including currency manipulation provisions. The United States drafted the TPP because it felt that China had not lived up to its WTO obligations.[179] The same approach might work with currency obligations on the grounds that China has also not lived up to its IMF obligations. In other words, the United States might be able to remedy the oversight in the Bretton Woods Conference by using regional free trade agreements to impose "IMF plus" discipline on currency manipulation. To remedy defects or oversights in the IMF, the GATT, and the WTO is to create binding legal obligations in multilateral treaties (i.e. at a level below the supranational level of WTO agreements). The "IMF plus" obligations could treat currency manipulation as an unfair trade practice equivalent to a subsidy and open to sanctions, such as the imposition of a countervailing subsidy. The carrot for joining such an agreement is increased trade opportunities for China as in the case of the TPP;[180] the stick is "WTO plus" and "IMF plus" obligations that close loopholes that have existed since 1947.

In pursuing an "IMF plus" strategy, similar to the "WTO plus" strategy exemplified by the TPP, the United States needs to proceed on the basis that China is a sharp competitor that will press the rules of international trade and any loopholes to their limits in order to exploit all advantages in its favor.[181] China sees nothing wrong with this approach and is unapologetic about it; after all, China sees itself as playing by rules largely written by the United States in its role as the major driving force behind

178. *See generally* Chow, *supra* note 84.

179. *See id.* at 374; *see also* WAYNE MORRISON, CONG. RESEARCH SERV., RL33536, CHINA-U.S. TRADE ISSUES 20 (2015) (stating that China has a mixed record in implementing WTO obligations and listing specific examples of instances when the U.S. has challenged Chinese policies as failing to fulfill WTO obligations).

180. *See* Chow, *supra* note 84, at 375 (noting that the TPP, like all preferential trade agreements, will "increase trade among [its] members" and that not being a member of the TPP could lead to losses in trade opportunities).

181. *See generally* Daniel C.K. Chow, *Why China Established the Asia Infrastructure Investment Bank*, 49 VAND. J. OF TRANSNAT'L L. 1255 (2016) (discussing how China is inflicting a decisive defeat in international trade on the United States).

the Bretton Woods institutions. The United States needs to proceed on the basis that trade relations between the two countries have become a high stakes game of moves and countermoves by two countries that treat each other more like adversaries than allies. The goal of each is to gain strategic advantage at the expense of the other in order to secure its role as the leading global trading power of the twenty-first century.[182183]