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China's Foreign Currency Regime: The Kagan Thesis and Legalification of the WTO Agreement

M. Ulric Killion*

INTRODUCTION

"Softness controlling hardness" (xian feili sheng).¹

The economy of the People's Republic of China (China) has grown dramatically over the past decade; so much that China now has a large trade surplus over the United States.² Just over ten years ago, in 1993, the United States imported \$31.5 billion in goods and services from China and its trade deficit was \$22.7 billion.³ Seven years later, in 2000, the United States imported \$100 billion in goods and services from China resulting in a trade deficit of \$88.8 billion.⁴ By February 2004, the U.S. Department of Commerce announced that the U.S. trade deficit had, in 2003, increased to a staggering \$124 billion.⁵ The

* M. Ulric Killion, Visiting Professor of International Law, Shanghai International Studies University, Shanghai, P.R.C. I would like to thank Rong Jin (Jinan University) for her initial reading and comments regarding the first draft. A special acknowledgement is also owed to the Minnesota Journal of Global Trade for their professionalism in the editing and publication of this Article.

1. See Sun Hianyun, *A Brief Introduction About Taijiquan*, China Taijiquan.com, at <http://www.chinataijiquan.com/en/en/sun/A%20Brief%20Introduction%20about%20Taijiquan1.htm>.

2. See Dan Ackman, *China Not the New Japan-Yet*, Forbes.com (Sept. 2, 2003), at http://www.forbes.com/2003/09/02/cx_da_0902topnews_print.html (last visited Sept. 15, 2004).

3. *Id.*

4. *Id.*

5. See Robert E. Scott, *Soaring Imports of Oil and Chinese Goods Drive Trade Deficits to New Record*, TRADE PICTURE (Econ. Pol'y Inst.), Aug. 13, 2004, http://www.epinet.org/content.cfm/webfeatures_econindicators_tradepict20040813. ("China has refused to increase the value of its currency, which has expanded the trade gap. China's intransigence has also made it more difficult for other Asian nations to allow their currencies to rise.")

Department of Commerce attributed the growth of the U.S.-China trade deficit to China's pegged yuan.⁶

The controversy surrounding China's foreign currency exchange regime came to light long before the release of the 2004 Commerce Department Report. The issue of China's pegged yuan comprised a large part of the debate, which surrounded China's accession to the World Trade Organization (WTO) on December 7, 2001.⁷ As China's application to the WTO was put under scrutiny by WTO members, the United States, and other countries intensified their criticism of China's qualifications and expressed displeasure that the Chinese yuan had been pegged at about 8.28 since 1995,⁸ and had barely fluctuated since.⁹

6. See *id.* The Chinese government has prevented the price of its currency, the "yuan," from fluctuating according to supply and demand, but rather it artificially fixed the yuan's price at a certain level.

7. See WTO Ministerial Conference, *Accession of the People's Republic of China: Decision of 10 November 2001*, WTO Doc. WT/L/432 (Nov. 23, 2001) (entered into force Dec. 11, 2001) [hereinafter *Accession of China to WTO*]; see also *Marakesh Agreement Establishing the World Trade Organization* [hereinafter *WTO Agreement*], *THE LEGAL TEXTS: THE RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS*, 1867 U.N.T.S. 154, 33 I.L.M. 1144 (1994).

8. See David DeRosa, *Commentary: Pushing the Wrong Button on the Yuan*, *INT'L HERALD TRIB.: THE IHT ONLINE*, Oct. 13, 2003, <http://www.iht.com/articles/113420.html>; see also 149 CONG. REC. 121, S11161 (daily ed. Sept. 5, 2003) (statement of Sen. Schumer), available at <http://thomas.loc.gov/cgi-bin/query/z?c108:S.1586>. Congress makes the following findings:

(1) The currency of the People's Republic of China, the yuan, is artificially pegged at a level significantly below its market value. Economists estimate the yuan to be undervalued by between 15 percent and 40 percent or an average of 27.5 percent.

(2) The undervaluation of the yuan makes exports from the People's Republic of China less expensive for foreign consumers and makes foreign products more expensive for Chinese consumers. The effective result is a significant subsidization of China's exports and a virtual tariff on foreign imports, leading the People's Republic of China to enjoy significant trade surpluses with its international trading partners. The United States trade deficit with China has widened from \$57,000,000,000 in 1998 to \$103,000,000,000 in 2002, resulting in an aggregate deficit with China of over \$396,000,000,000 for that 5-year period.

(3) China's undervalued currency and the United States trade deficit with the People's Republic of China is contributing to significant United States job losses and harming United States businesses. In particular the United States manufacturing sector has lost over 2,600,000 jobs since March 2001, which accounts for approximately 90 percent of the total United States job losses.

(4) The Government of the People's Republic of China has intervened in the foreign exchange markets to hold the value of the yuan within an artificial trading range. China's foreign reserves are estimated to be over

These countries charged China with thereby engaging in unfair and discriminatory trade practices.¹⁰

Despite enhanced market access of U.S. companies to China's mainland market following China's accession to the WTO, the U.S. trade deficit has not been reduced.¹¹ As the 2004 Commerce Department Report indicates, the U.S. trade deficit with China only continues to grow. In fact, the 2004 Commerce Department report figures do not even account for sales of U.S. affiliates in China. The report therefore underestimates the actual level of commercial engagement between China and the United States.¹² Had the figures included sales of U.S. affiliates in China with figures of sales by companies in the mainland United States, the deficit would have been even larger.¹³

This climate of growing U.S. deficits and shrinking U.S. profits in its trade with China breeds potential problems between Washington and Beijing.¹⁴ Most disconcerting is that

\$345,000,000,000 as of June 2003, and have increased at a level higher than that of any other country.

(5) China's undervalued currency and the Chinese Government's intervention in the value of its currency violates the spirit and letter of the world trading system of which the People's Republic of China is now a member.

(6) The Government of the People's Republic of China has failed to promptly address concerns raised by the United States and the international community regarding the value of its currency.

(7) Article XXI of the GATT 1994 (as defined in section 2(1)(B) of the Uruguay Round Agreements Act (19 U.S.C. 3501(1) (B))) allows a member of the World Trade Organization to take any action which it considers necessary for the protection of its essential security interests. Protecting the United States manufacturing sector is essential to the interests of the United States.

Id.

9. See Ackman, *supra* note 2.

10. The charge against China is that a pegged yuan undervalues U.S. currency, gives an unfair advantage to Chinese manufacturers at a cost of U.S. jobs, and increases the U.S.-China trade deficit. See 149 CONG. REC. S11161 (daily ed. Sept. 5, 2003) (statement of Sen. Schumer); 149 CONG. REC. S.11187 (daily ed. Sept. 8, 2003) (statement of Sen. Lieberman); *Asian Currencies: Fear of Floating*, ECONOMIST, Jul. 10, 2003, http://www.economist.com/PrinterFriendly.cfm?Story_ID=1912021 ("[As early as July 2003], John Snow, America's treasury secretary, the International Monetary Fund and the Bank for International Settlements [had] all called for a stronger yuan.")

11. See Joseph P. Quinlan, *Ties That Bind*, FOREIGN AFF., Jul./Aug., 2002, at 116-17.

12. *Id.*

13. *Id.*

14. *Id.*; see also *White House Opposes Congressional Moves to Punish China*, tdctrade.com, at <http://www.tdctrade.com/alert/us0323c.htm> (last visited Sept. 15, 2004) (reporting that the punitive tariff measure proposed by Senator Schumer is

U.S. politicians are failing to fully understand the dynamics of U.S. – China trade relations and are mistakenly formulating a unilateral protectionist backlash against China.¹⁵ Rather than resorting to the multilateral WTO Dispute Settlement Body (DSB) to settle its qualms with China, the United States has been influenced by domestic politics to make largely unilateral and protectionist responses to China's acts.¹⁶ Election year poli-

faced with criticisms from U.S. trade associations that the sanction would violate the United States's WTO commitments and could lead to a massive retaliatory tariff on U.S. exports).

15. See Quinlan, *supra* note 11.

16. See *Focus: Escalating Pressure on Yuan Revaluation*, CHINA DAILY (H.K. ed.), Nov. 4, 2003, http://www.chinadaily.com.cn/en/doc/2003-11/04/content_278165.htm [hereinafter *Focus: Escalating Pressure on Yuan Revaluation*].

September 1 - In his Labor Day speech, President Bush expresses his willingness to push for the convertibility of some foreign currency.

September 2 - Treasury Secretary John Snow chooses to sit on the fence in his IMF speech, saying a free-floating Yuan is good for China's central bank and will help China's economy withstand both internal and external shocks.

September 3 - UNITE, a union representing 250,000 apparel, textile, laundry and distribution workers, announces a grassroots lobbying campaign to slow the surge of Chinese imports.

September 5 - The US Senate passes Resolution 1586 to demand currency negotiations with China within 180 days under threat of introducing sanctions.

September 10 - House Resolution 3058 is proposed to curb what it terms "China's currency manipulation". The Treasury Secretary is asked to assess the situation and impose an additional tariff if necessary.

September 11 - A Senate hearing is held on US-China relations.

September 26 - Senate Resolution 219 is passed to encourage China to establish a market-based valuation of the Yuan.

October 1 - The House Committee on Financial Services discusses the opening of China's financial market.

October 2 - Congress receives Bill 3328, which requests the revocation of normal trade relations with China.

October 3 - The US-China Business Council issues its assessment of China's WTO compliance.

October 16-17 - A House committee holds a hearing to discuss China's role in the world economy and its trade commitments.

October 20 - The US Senate proposes Resolution 1758 asking the Treasury Secretary to report on "China's currency manipulation".

October 21 - The US Congress holds a hearing on reassessing US-China economic ties.

October 31 - the US Treasury Department report said that China is not

tics in 2004 further exacerbated the extremity of U.S. protectionism and unilateralism.¹⁷

China itself has also been perpetuating hostilities between the United States and China. Specifically, it has not been particularly accommodating toward steps taken by the United States and other countries to negotiate the terms of its controversial currency exchange rate. China has repeatedly heeded the advice of these countries to float its rate only to quickly change its position and return its currency to a peg. In 2003, China agreed to abide by President Bush's request that China float its exchange rate¹⁸ by announcing that it would indeed adjust China's exchange rate to a float.¹⁹ On October 30th of that year, China seemed to take further steps to fulfill its goal when it announced that it would boost the value of the yuan by up to fifteen percent in order to prevent its economy from overheating.²⁰ China took further action by offering concessions to U.S. manufacturers, such as increasing limits on how much a foreign traveler can buy from banks, other capital control adjustments, reducing subsidies or tax incentives to exporters, and agreeing to buy U.S. Treasury bonds with dollars earned through the trade surplus.²¹ On March 3, 2004 however, China wound back the clock by reverting to a pegged yuan.²² China's currency re-

manipulating its currency to gain unfair trade advantages. However, Snow said the Bush administration would continue to keep up its diplomatic pressure on China to drop its tight peg to the dollar.

Id.

17. *Id.*; see also DeRosa, *supra* note 8 ("How is China supposed to have manipulated—that is the term used in the U.S. Senate—the exchange rate when that rate does not change? In Washington, it seems that anything flies if it helps win an election.").

18. For general background information about U.S. manufacturers' lobbying efforts against China's fixed currency exchange rate and President Bush's stance, see generally Marc Benitah, *China's Fixed Exchange Rate for the Yuan: Could the United States Challenge it in the WTO as a Subsidy?*, ASIL INSIGHTS, ¶ 1, (Oct. 2003), at <http://www.asil.org/insights.htm>.

19. See *China to Revalue Yuan by 10-15%*, FIN. EXPRESS, Oct. 31, 2003, at http://www.financialexpress.com/fe_full_story.php?content_id=45167 [hereinafter *China to Revalue Yuan*].

20. See *id.*

21. Ackman, *supra* note 2.

22. *China Restates Policy on Keeping Yuan Rate*, INT'L HERALD TRIB. at <http://www.iht.com/articles/508560.html> ("China's central bank on Wednesday reaffirmed its policy of keeping the yuan's fixed exchange rate, a day after the U.S. Federal Reserve chairman, Alan Greenspan, warned that buying dollars to support the peg might cause the economy to overheat."); *China Has No Plan to Revalue Yuan Soon*, CHINA DAILY, http://www.chinadaily.com.cn/english/doc/2004-03/08/content_312672.htm (last visited Mar. 8, 2004) ("Deputy governor Li Ruogu of the People's

mains pegged to this day.

The U.S. – China trade dispute brings up a more dire issue than whether the U.S. charges against China were justified.²³ At issue is that the unilateral approach taken by the United States exceeded the parameters of an ordinary trade dispute and has had far-reaching ramifications on the legitimacy of multilateral trade and the WTO regime.²⁴ On the trade front, U.S. actions exemplified by the U.S. dispute with China are starting to parallel the growing U.S. unilateralism and hegemony in its use of military force and in global politics. U.S. policymakers must move away from this unilateralist model of international trade relations in order to spare the future of U.S. relations with the rest of the world, including China.²⁵

This Article explores the issue of the use of growing U.S. unilateral power in the context of the China pegged yuan controversy. Specifically, it analyzes the justification of the use of unilateral acts in international relations according to the Kagan Thesis.²⁶ The analysis focuses on the danger of U.S. unilateral power vis-à-vis the Kagan Thesis and how it poses a threat to and undermines the power and authority of the WTO and governance of international trade. Finally it addresses how U.S. unilateralism presages legalification (*Verrechtlichung*) of the WTO agreement.²⁷

Part I of this Article addresses the issue of China's pegged foreign currency exchange rate. Next, it explains the requirements for compliance with the General Agreement on Tariffs and Trade (GATT 1947)²⁸ and elaborates on the WTO provisions

Bank of China, the central bank, said on Sunday China has no plan to revalue the yuan in the near future and believes the pegged currency is correctly valued.”)

23. See DeRosa, *supra* note 8; 149 CONG. REC. 121, S11161 (daily ed. Sept. 5, 2003) (statement of Sen. Schumer), available at <http://thomas.loc.gov/cgi-bin/query/z?c108:S.1586>.

24. See *Focus: Escalating Pressure on Yuan Revaluation*, *supra* note 16.

25. See *id.*

26. See generally ROBERT KAGAN, OF PARADISE AND POWER—AMERICA AND EUROPE IN THE NEW WORLD ORDER 3 (Vintage Books 2004) [hereinafter KAGAN THESIS]. The Kagan Thesis first appeared in Robert Kagan, *Power and Weakness, Why the United States and Europe See the World Differently*, POL. REV., June/ July 2002, available at <http://www.policyreview.org/JUN02/kagan.html>.

27. For the definition of “legalification,” see generally Symposium Program, *Erdgasliberalisierung in Österreich* (Sept. 26–27, 2002), available at <http://www.sattler.co.at/pdf/symposion.tagungsmappe.pdf> (noting that legalification (*Verrechtlichung*) is upgrading a mere agreement without legal quality to an authoritative instrument of law) [hereinafter Legalification Definition].

28. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT 1947].

that proscribe consequences of unfair trade and unfair competition. Finally, Part I explains the Kagan Thesis, U.S.-China trade policy, and the concept of legalification.

Part II of this Article analyzes the issue of the U.S. pursuance of “hard” rather than “soft” globalization as arguably manifested in its seemingly drastic and politically motivated responses to drops in value of the dollar.²⁹ It also discusses U.S. foreign policy in terms of “hard globalization”; activist trade policy; and the Kagan Thesis of unilateralism, if not Hobbesian multilateralism.³⁰ In doing so, it juxtaposes U.S. unilateral policies, multilateral trade, and the WTO regime. This Article concludes with a discussion of the growth of Kagan-thesis type taxonomy, causes of legalification, and resulting danger presented to the future of multilateral trade, the WTO regime, and the governance of international trade.³¹

I. THE CHINA-YUAN-CONTROVERSY AND GLOBAL TRADE

A. THE PEGGING OF THE CHINESE YUAN

The National Association of Manufacturers, the American Farm Bureau, and the AFL-CIO are among the most vocal American opponents of the pegged yuan.³² These and other groups complain that the yuan’s fixed peg undervalues U.S. currency by as much as forty percent.³³ They argue that an undervalued dollar in turn gives an unfair advantage to Chinese manufacturers at the cost of jobs for American workers.³⁴

The essence of the U.S. argument against a pegged yuan is

29. See, e.g., DeRosa, *supra* note 8; *Focus: Escalating Pressure on Yuan Revaluation*, *supra* note 16; Eric Denters, *Manipulation of Exchange Rates in International Law: The Chinese Yuan*, ASIL INSIGHTS, ¶ 3, (Nov. 2003), at <http://www.asil.org/insights/insigh118.htm>.

30. See KAGAN THESIS, *supra* note 26, at 3–4.

31. See generally Liesbet Hooghe & Gary Marks, *Types of Multi-Level Governance*, CAHIERS EUROPEENS DE SCIENCES PO (Dept. Pol. Sci., U. N.C. at Chapel Hill), June 2002, available at http://www.portedeurope.org/publications/cahiers/cahier_3_2002.pdf.

32. See Ben Craig & Owen Humpage, *The Myth of a Strong Dollar Policy*, 22 CATO J. 417, 417 (2003).

33. See 149 CONG. REC. 121, S11161 (daily ed. Sept. 5, 2003) (statement of Sen. Schumer); Benitah, *supra* note 18; U.S.-CHINA ECON. AND SEC. REVIEW COMM’N, 2004 REP. TO CONGRESS, at 4, available at http://www.uscc.gov/researchreports/2004/04/annual_report.pdf.

34. See *China to Revalue Yuan*, *supra* note 19.

that, by pegging the yuan to the dollar, China unfairly perpetuates a comparative cost advantage it has over the United States in the manufacturing sector.³⁵ Comparative advantage theory assumes that countries benefit by focusing on what they can produce most efficiently.³⁶ In terms of global trade, efficient scales of operations, and more customers, most companies realize that the bigger the market, the greater their potential.³⁷ Liberal trade, which fosters an unrestricted flow of goods, services and productive inputs, multiplies rewards for companies that produce the best products at the best prices.³⁸ The latter, however, is contingent on free trade operating without the constraint of protectionism.³⁹

U.S. allegations of Chinese protectionist practices arise from observations that “[w]hen the dollar weakens against the euro and the yen, the yuan also weakens by roughly the same proportion.”⁴⁰ The effect of this parallel devaluation in currency is that “U.S. consumers will not find Chinese-produced goods to be any more expensive today” than before the devaluation occurred.⁴¹ Under this scenario, many U.S. factories will close and many U.S. jobs will consequently be lost, resulting in widespread resentment against China.

Despite the diversity of groups in the United States that argue against the pegged yuan, their arguments are very simi-

35. See Richard N. Block, et al., *Economic Perspectives on International Labor Standards*, 11 MSU-DCL J. INT’L L. 417, 419 (2002):

Traditionally, economists have referenced the “factor cost model” when discussing international trade. Specifically, the theory suggests that countries should specialize in the production of goods in which they can produce at least cost [T]heorists take into account a country’s productive factor endowments, including land, capital, labor and climate. In applying the factor cost model, economists compare the costs of production of each product both within and between countries. When a jurisdiction has the capability to produce a particular product at least cost compared to other jurisdictions, it is said to have an “absolute advantage.” Meanwhile, that country is said to have a “comparative advantage” in a certain product if it can produce that output cheaper relative to other products within its boundaries.

Id.

36. See also WANG YI, *GATT & WTO—LAW AND RULES FOR WORLD TRADE* 4–6 (Beijing Publishing House of Law 1998).

37. *Id.*

38. *Id.*

39. *Id.*

40. See Marshall Auerback, *The Economic Costs of American Imperialism*, X5 JPRI CRITIQUE, ¶ 2 (Jun. 2003), at http://www.jpri.org/publications/critiques/critique_X_5.html.

41. *Id.*

lar.⁴² One common argument is that the U.S. currency is weakened due to large fiscal and trading deficits, which partially result from the pegged yuan.⁴³ According to this argument, pegged currencies of developing countries such as China do not help alleviate deficits as do the euro and the yen, which have “floating” exchange rates that are permitted to rise against the dollar.⁴⁴ Under this argument, a pegged Chinese yuan conversely contributes to a devalued dollar.⁴⁵

There are divergent views on whether China should float or peg its foreign currency. The viewpoints include: (1) a viewpoint that deems a float premature; (2) a separate viewpoint that recommends a float; and (3) another viewpoint that alters the peg by a one-time revaluation. According to these viewpoints, China’s initial refusal to float its foreign currency exchange may be justifiable.

Those who recommend that China should not yet float its currency base their arguments on the problems emanating from “China’s underdeveloped financial sector, partially reformed banking industry, and vulnerable state-owned enterprises.”⁴⁶

42. Samplings of other complainants regarding the Chinese yuan are organizations offering comments on relevant topics and issues for discussion in the working group established at the April 21, 2004 meeting of the U.S.-Joint China Commission on Commerce and Trade. See Transcript of Hearing, U.S.-China Joint Commission on Commerce and Trade Working Group on Structural Issues, International Trade Administration Import Administration, Department of Commerce (June 3, 2004), at 173, 187–88, available at <http://ia.ita.doc.gov/download/us-china-jcctwg/hearing-transcript-06-03-2004.pdf>. Some of these organizations were the Specialty Steel Industry of North America (SSINA) and the National Council of Textile Organizations (NCTO). See Letter from the National Council of Textile Organizations, to the Honorable James J. Jochum, Assistant Secretary for Import Administration, U.S. Department of Commerce (May 19, 2004), available at <http://ia.ita.doc.gov/download/us-china-jcctwg/comments/ncto-jcctwg-cmt.pdf>; Letter from the Specialty Steel Industry of North America, to the Honorable James J. Jochum, Assistant Secretary for Import Administration, U.S. Department of Commerce (May 19, 2004), available at <http://ia.ita.doc.gov/download/us-china-jcctwg/comments/ssina-jcctwg-cmt.pdf>.

43. See Jackie Horne, *China Growth Controls Face Interest Rate Dilemma*, Finance Asia, at <http://www.financeasia.com/AllAuthors.cfm?Author=Jackie%20Horne&email=jackie%2Ehorne%40financeasia%2Ecom> (Dec. 16, 2003) (subscription required to access site) (on file with author) (quoting Fitch Ratings China economist Brian Coulton and reporting that other currencies need to rise against the dollar to help manage the dollar’s decline but only the euro and the yen are sharing in the burden of the dollar’s weakness, not the yuan or the won).

44. *Id.*

45. *Id.*

46. Jennifer Chang & Rod Tyers, *Trade Reform, Macroeconomic Policy and Sectoral Labour Movement in China*, AUSTL. NAT’L U. WORKING PAPERS IN ECON. AND ECONOMETRICS No. 429, at 25 (Aug. 2003) (internal footnote omitted), available at <http://ecocomm.anu.edu.au/research/papers/pdf/wp429.pdf>; see also Carol Graham,

The banking industry is currently undergoing reforms and its problems affect the economy as a whole. Moreover, it suffers from deep-rooted problems such as low degree of commercialization, distorted incentives, high ratio of bad loans, government ownership, inefficient management, and other problems.⁴⁷ China wishes to keep its foreign exchange rate pegged because the relaxation of capital controls or exchange rate is thought to further weaken the Chinese economy,⁴⁸ and to create a risk of large-scale capital outflows and sharp currency depreciation in response to bad news from China's banking and economic sector.⁴⁹ The Chinese choose to ignore recommendations to float the exchange rate and keep it pegged,⁵⁰ because they believe that an acceleration of reforms would be more beneficial to China's economic growth than if they were to float the rate.⁵¹

The second view regarding China's currency is that China should float rather than peg its currency. The significance of this viewpoint in light of China's accession to the WTO concerns China's integration into the international trade regime and to what extent China should control its capital flows, foreign direct investment (FDI), and exchange rate volatility.⁵² Supporters of

Strengthening Institutional Capacity in Poor Countries: Shoring up Institutions, Reducing Global Poverty, BROOKINGS INST. POLICY BRIEF No. 98, at 3–4 (2002), available at <http://www.brook.edu/dybdocroot/comm/policybriefs/pd98.pdf>.

47. See Yi Gang, *China's Accession to the WTO and the Opening and Reform of Financial Services*, in CHINA: ACCESSION TO THE WTO AND ECONOMIC REFORM 209 (Wang Mengkui ed., Foreign Language Press Beijing 2002).

48. See Chang & Tyers, *supra* note 46, at 21, 22–25.

49. See Morris Goldstein, *Adjusting China's Exchange Rate Policies*, INST. INT'L ECON. WORKING PAPER No. WP-04.1, at 45 (2004), available at <http://www.iie.com/publications/wp/2004/wp04-1.pdf>.

What makes the Snow proposal inappropriate for China's present circumstances is the still fragile state of the Chinese banking system . . . Given the unhappy experience of many of its neighbors during the Asian financial crisis, China is understandably reluctant to risk repeating that outcome. Instead, it would rather phase-in the liberalization of its capital account according to the progress made in strengthening the banking system.

Id.

50. While Chang and Tyers maintain that "China's macroeconomic policy regime has reduced economic performance relative to its theoretical potential," they do not "advocate the immediate elimination of capital controls and the adoption of a floating exchange rate." See Chang & Tyers, *supra* note 46, at 25.

51. See *id.*; DEPT. OF TREASURY, REP. TO CONGRESS ON INT'L ECON. EXCH. RATE POLICIES (2004), ¶¶ 8–9, <http://www.treas.gov/press/releases/js1335.htm> (hereinafter 2004 REP. TO CONGRESS ON INT'L ECON. EXCH. RATE POLICIES) ("Since 1994, when it unified its exchange rates and adopted its current pegged exchange rate system, the Chinese economy has grown rapidly, as has China's participation in world trade.").

52. See Yin-Wong Cheung et al., *The Chinese Economies in Global Context: the Integration Process and Its Determinants*, U. CAL. SANTA CRUZ CTR. FOR INT'L ECON.

this viewpoint base their argument on a statistical study, which suggests that China's financial and real integration with the rest of the world is contingent upon FDI and exchange rate volatility. According to this view, it is therefore likely that China will move, at least in the intermediate run, towards a floating rate, rather than maintaining a pegged rate.⁵³

A third view recommends a one-time revaluation of the yuan, with an appreciation of twenty to twenty-five percent.⁵⁴ Supporters of this view assert that a one-time revaluation will convert China's global account surplus into a manageable deficit, readily financed by foreign direct investment (FDI) and private capital.⁵⁵ They do not recommend floating, and opening of capital accounts, due to needed reforms in the banking sector and the Asian financial crisis.⁵⁶

B. THE ALLEGED VIOLATION OF WTO STANDARDS

The WTO administers multilateral trade rules. The underlying philosophy behind multilateralism is the idea that a combination of open markets, non-discrimination, and global competition creates conditions that are most conducive to the national welfare of all nations.⁵⁷ Conversely, unilateralism, which is synonymous with Hobbesian multilateralism,⁵⁸ is characterized by minimal consultation and involvement with other nations.⁵⁹ Unilateralism emphasizes the right of sovereignty—the right of

PAPER No. 03'16, at 19–21 (June 16, 2003), available at <http://repositories.cdlib.org/sccie/03-16>.

53. *Id.* at 21.

54. See C. Fred Bergsten, *Speeches, Testimony, Papers: The Exchange Rate of the Won*, Institute for International Economics, at <http://www.iie.com/publications/papers/bergsten1003-2.htm> (last visited Sept. 16, 2004); see also Alexander S. Dumke et al., *The China Energy Market: Risk Analysis*, U. SYDNEY. CTR FOR INT'L RISK, at 10 (Nov. 2002), at <http://www.econ.usyd.edu.au/download.php?627> (referring to the yuan as “the renminbi”).

55. See Bergsten, *supra* note 54.

56. See *id.*

57. See Moana Bhagabati, *Regionalism vs. Multilateralism Debate*, HINDU BUS. LINE, at 5, Mar. 28, 2001, <http://blonnet.com/2001/03/28/stories/042820mo.htm>.

58. See Mikkel Vedby Rasmussen, ‘9-11’: *Globalization, Security, and World Order*, DANISH INST. OF INT'L AFF. WORKING PAPER No. 2002/2, at 17–21 (2002), available at <http://www.dupi.dk/webdocs/wp200202.pdf> (discussing the relationship between a “Hobbesian moment” and “ontological insecurity”).

59. Nicholas Berry, *The Many Sources of U.S. Unilateralism*, Center for Defense Information Asia Forum, at <http://www.cdi.org/asia/fa081301.html> (Aug. 13, 2001) (“Unilateralism can be defined as a process of policy making within a tight group of national decision makers who disregard foreign perspectives and thus produce policies serving narrow national interests.”).

a nation to select policies as determined by individual preferences and situational exigencies.⁶⁰

The multilateral-unilateral dichotomy is addressed by the WTO rules. WTO rules do not prescribe free trade. Rather, various substantive and procedural norms prescribe a code of conduct that makes trade a multilateral issue.⁶¹ The WTO trade regime has a multilateral rule-oriented, rather than results-oriented, approach to international governance of trade.⁶² The WTO's multilateral rule-oriented approach is highlighted by the principle that countries should conduct trade on a non-discriminatory basis. This principle is embodied in the Most Favored Nations (MFN) clause and the national treatment obligation.⁶³ The non-discrimination and economic equality norms of MFN treatment require member countries to give equal treat-

60. Erik Beukel, *Multilateralism vs. Unilateralism: The International Political Economy of the Trade/Environment Nexus*, INST. OF INT'L RELATIONS, U. OF B. C. WORKING PAPER No. 22, at 3, available at <http://www.iir.ubc.ca/pdffiles/webwp22.pdf>.

61. *Id.* at 4.

62. *Id.*

63. GATT 1947, *supra* note 28, art. I (outlining most favored-nation treatment). The principle of national treatment under Article III prohibits internal taxes and other internal measures that discriminate against imports. GATT 1947, *supra* note 28, art. III. This obligation requires that countries treat foreign goods no less favorably than equivalent domestically produced goods. *Id.*; see also JOHN H. JACKSON, *THE JURISPRUDENCE OF GATT & WTO—INSIGHTS ON TREATY LAW AND ECONOMIC RELATIONS* 57–58 (Cambridge University Press 2002).

Trade without discrimination is embodied in the most-favored-nations clause, at GATT 1947 article I, providing that trade must be conducted based on non-discrimination, and the national treatment article, at GATT 1949, article III, National Treatment on Internal Taxation and Regulation, requiring that once goods enter a market they must be treated no less favorably than equivalently domestically produced goods (Disguised protection also prohibited). However, more particularly, the rules concerning fair trade and fair competition, generally, address dumping, subsidies and countervailing duties.

Id.

With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

GATT 1947, *supra* note 28, art. I.

ment to economic transactions originating in, or destined for, other countries that are entitled to the benefit of this norm.⁶⁴ Exceptions to this rule are permitted only when special circumstances exist, such as customs unions, regional trading arrangements (RTAs), or free trade area agreements (FTAs), and special conditions for developing countries and economies.⁶⁵

The MFN non-discrimination requirement of Article I and the resulting norm of economic equality are important because they establish a basis by which member states can bring unfair unilateral trade regulations of other member states before the DSB as a multilateral issue.⁶⁶ Under GATT dispute settlement procedures, WTO panels and reports were established, thus eliminating a party's ability to block the adoption of panel reports.⁶⁷ The dispute settlement procedures thereby further narrow the scope of unilateral acts that can be taken by states. For various reasons, China's pegged yuan controversy is considered a violation of WTO standards that can be brought before the DSB.

The WTO criterion for an actionable subsidy is a finding of a requisite contribution that benefits a specific Chinese industry.⁶⁸ A requisite contribution normally consists of some form of payment or price support for the industry.⁶⁹ The difficulty in

64. JACKSON, *supra* note 63, at 58.

65. GATT 1947, *supra* note 28 arts. XXXVI–XXXVIII, XXIV.

66. Beukel, *supra* note 60, at 4; JACKSON, *supra* note 63, at 384.

67. Beukel, *supra* note 60, at 4 (citing BERNARD HOEKMAN & MICHEL KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM—FROM GATT TO WTO*, at 44 (1996)).

68. See URUGUAY ROUND AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES, Articles 1–9, [hereinafter WTO SCM Agreement]. A subsidy must be “specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as ‘certain enterprises’).” *Id.*, art. 2.1.

69. Article 1.1 of the WTO SCM Agreement deems a subsidy to exist if:

(a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as “government”), 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 illus-

fulfilling this requirement is to be able to link the pegging of the yuan to a direct benefit to the industry in the form of payments and price supports.⁷⁰ The International Monetary Fund (IMF), through its Articles of Agreement at Article IV, has primary jurisdiction over foreign exchange rate policies, and prohibits unfair advantage by currency manipulation.⁷¹

While a challenge could be mounted against China based upon Article XV, paragraph 4, of the GATT 1994,⁷² which bars participating members from using "exchange rate action" to frustrate the intent of the WTO Agreement,⁷³ as long as China's exchange rate policy is in conformity with the IMF Agreement,⁷⁴ such a dispute will not be subject to jurisdiction of the WTO DSB. Under such circumstances, the DSB is precluded from determining whether the yuan is being manipulated or being grossly overvalued.⁷⁵ The pegged yuan is therefore currently not considered to be in violation of the IMF Agreement and

trated 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;

or

(a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;

and

(b) a benefit is thereby conferred.

Id. art. 1.1(a).

70. *Id.*, arts. 1.1(a) & 2(b), ("[A] benefit is thereby conferred."); *see also*, Benitah, *supra* note 18, ¶ 2 (asserting that a lack of a currency exchange market in China, in which the value of the yuan is determined by supply and demand, attenuates arguments that the yuan is manipulated for the benefit of a specific industry).

71. ARTICLES OF AGREEMENT OF THE INTERNATIONAL MONETARY FUND [hereinafter IMF Agreement], art. IV sec. 3(a) ("The Fund shall oversee the international monetary system in order to ensure its effective operation, and shall oversee the compliance of each member with its obligations under Section 1 of this Article.").

72. GATT 1947, *supra* note 28, art. XV ("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.").

73. *See* Benitah, *supra* note 18, ¶ 2.

74. *See* IMF Agreement, *supra* note 71, art. IV sec. 3(a).

75.

Any question of interpretation of the provisions of this Agreement arising between any member and the Fund or between any members of the Fund shall be submitted to the Executive Board for its decision. If the question particularly affects any member not entitled to appoint an Executive Director, it shall be entitled to representation in accordance with Article XII, Section 3(j).

Id. art. XXIX, *Interpretation*, (a).

GATT.⁷⁶ Rather, China's currency regime is considered to be *prima facie* in compliance with the IMF agreement. Therefore, China may maintain its currency exchange regime as it deems appropriate.⁷⁷ China, however, is not precluded from being brought before the IMF and GATT for manipulating its currency for purposes of unfair competition. The problem of proving such manipulation is the IMF's lack of dispute settlement procedure and the prerequisite of IMF action before issues of currency exchange can be brought before the DSB.⁷⁸

The findings of the Senate in the Fair Currency Enforcement Act of 2003 at sections 2 (18) and (19) on the other hand, do offer a basis upon which action can be taken against China. According to this Act, manipulations of currency by undervaluation are actionable subsidies and countervailing measures distorting fair competition.⁷⁹ In addition, the Fair Currency Enforcement Act of 2003 at Sections 2 (16) and (17)⁸⁰ also incorpo-

76. See Denters, *supra* note 29, ¶ 3; see also IMF Agreement, *supra* note 71, art. IV sec. 2(b)–(c). In particular, Article IV, sec. 2 (c), reads:

To accord with the development of the international monetary system, the Fund, by an eighty-five percent majority of the total voting power, may make provision for general exchange arrangements without limiting the right of members to have exchange arrangements of their choice consistent with the purposes of the Fund and the obligations under Section 1 of this Article.

IMF Agreement, *supra* note 71, art. IV sec. 2(c).

77. IMF Agreement, *supra* note 71, art. IV sec. 2 (b)–(c).

78. See Denters, *supra* note 29, ¶ 3; IMF Agreement, *supra* note 71, art. XXIX, *Interpretation*, (a) (noting that Article XXIX of the IMF Agreement "is not intended to settle disputes between members as a WTO dispute settlement panel might resolve a trade dispute").

79. The Fair Currency Enforcement Act of 2003 requires negotiation and appropriate action with respect to certain countries that engage in currency manipulation and the relevant portions read as follows:

(18) Deliberate currency manipulation by nations to significantly undervalue their currencies also may be interpreted as a violation of the Agreement on Subsidies and Countervailing Measures of the World Trade Organization (as described in section 101(d)(12)) of the Uruguay Round Agreements Act, which could lead to action and remedy under the World Trade Organization dispute settlement procedures.

(19) Deliberate, large-scale intervention by governments in currency markets to significantly undervalue their currencies may be a nullification and impairment of trade benefits precluded under Article XXIII of the General Agreement on Tariffs and Trade, and subject to remedy.

Fair Currency Enforcement Act, S. 1592, 108th Cong. § 2 (2003).

80.

(16) Article IV of the Articles of Agreement of the International Monetary Fund prohibits currency manipulation by a member for the purposes of

rates Article IV of the IMF agreement. Section 2 (16) of the Fair Currency Enforcement Act, however, more broadly defines the prohibited acts of the IMF Articles of Agreement as “protracted large-scale intervention in one direction in the exchange market.”⁸¹ The exchange rate frustrating the intent of the IMF and GATT is also addressed in section 2(17) of the Fair Currency Enforcement Act as “exchange action,” not “exchange rate action,” as it appears in the IMF and GATT.⁸²

The shortcoming of the Fair Currency Enforcement Act is that it is inconsistent with previous Treasury Department inquiries into China’s foreign exchange rate regime.⁸³ The Treasury Department, as required by the Omnibus Trade and Competitiveness Act of 1988, has annually analyzed the exchange rate policies of China including China’s pegged yuan, which has been a problem since 1994.⁸⁴ Under this Act, the Treasury Department seeks to determine whether China manipulates the currency exchange rate between the yuan and the dollar for purposes of preventing effective balance of payments adjust-

gaining an unfair competitive advantage over other members, and the related surveillance provision defines ‘manipulation’ to include ‘protracted large-scale intervention in one direction in the exchange market.’

(17) Under Article XV of the Exchange Agreements of the General Agreement on Tariffs and Trade, all contracting parties ‘shall not, by exchange action, frustrate the intent of the provisions of this Agreement, nor by trade action, the intent of the Articles of Agreement of the International Monetary Fund.’ Such actions are actionable violations. The intent of the General Agreement on Tariffs and Trade Exchange Agreement, as stated in the preamble of that Agreement, includes the objective of ‘entering into reciprocal and mutually advantageous arrangements directed to substantial reduction of tariffs and other barriers to trade, and currency manipulation may constitute a trade barrier disruptive to reciprocal and mutually advantageous trade arrangements.’

Id.

81.

No member shall engage in, or permit any of its fiscal agencies referred to in Article V, Section 1 to engage in, any discriminatory currency arrangements or multiple currency practices, whether within or outside margins under Article IV or prescribed by or under Schedule C, except as authorized under this Agreement or approved by the Fund. If such arrangements and practices are engaged in at the date when this Agreement enters into force, the member concerned shall consult with the Fund as to their progressive removal unless they are maintained or imposed under Article XIV, Section 2, in which case the provisions of Section 3 of that Article shall apply.

IMF Agreement, *supra* note 71, art. VIII sec. 3.

82. See Fair Currency Enforcement Act, S. 1592, 108th Cong. §§ 2 to 7 (2003).

83. See DeRosa, *supra* note 8; see also S. 1586, 108th Cong. (2003).

84. See Omnibus Trade and Competitiveness Act, 22 U.S.C. §§ 5304–5305 (1988).

ments, or for gaining an unfair competitive advantage in international trade.⁸⁵ In Treasury Department reports to Congress on International Economic and Exchange Rate policies, Treasury Secretary Snow reported that while China has pegged its currency since 1994 at 8.28 to the dollar, this practice does not meet the criteria in the Trade Act to warrant formal sanctions.⁸⁶

C. THE IMPLICATIONS OF LEGALIFICATION (*VERRECHTLICHUNG*)

Legalification (*Verrechtlichung*) is the upgrading of a mere agreement without legal quality to an authoritative instrument of law.⁸⁷ The possibility of legalification brings to light the problem of transitioning to the WTO, and integrating the GATT 1947,⁸⁸ and its successive trade negotiation rounds,⁸⁹ such as the Uruguay Round agreements (GATT 1994),⁹⁰ into a single authoritative legal system.⁹¹

The WTO dispute settlement system is the crowning piece of judicialization in modern international trade relations, because the presence of binding third party enforcement makes the WTO the most judicialized international organization currently in existence.⁹² Judicialization is semantically distinguishable from legalization.⁹³ Legalization is the process of making laws, or the legislative process of law making, whereas, judicialization, as a derivative of the term judicial, refers to court-like procedures, such as international dispute settlement

85. *Id.*

86. *See, e.g.*, 2004 REP. TO CONGRESS ON INT'L ECON. EXCH. RATE POLICIES, *supra* note 51, ¶ 9;

DEPT. OF TREASURY, REP. TO CONGRESS ON INT'L ECON. EXCH. RATE POLICIES (2003), *available at* http://banking.senate.gov/_files/Ex_report.pdf (hereinafter 2003 REP. TO CONGRESS ON INT'L ECON. EXCH. RATE POLICIES); DEPT. OF TREASURY, REP. TO CONGRESS ON INT'L ECON. EXCH. RATE POLICIES (2002), *available at* <http://www.ustreas.gov/press/releases/reports/update2002fxreport.pdf> (hereinafter 2002 REP. TO CONGRESS ON INT'L ECON. EXCH. RATE POLICIES).

87. *See* Legalification Definition, *supra* note 27.

88. *See generally* GATT 1947, *supra* note 28, arts. I-XXXVIII.

89. *See* World Trade Organization, *Pre-WTO Legal Text*, at http://www.wto.org/english/docs_e/legal_e/prevto_legal_e.htm.

90. Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, 1867 U.N.T.S. 14, 33 I.L.M. 1143 (1994).

91. PETER MALANCZUK, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 231 (Routledge 7th ed. 1997).

92. Dirk De Bièvre, *International Institutions and Domestic Coalitions: The Differential Effects of Negotiations and Judicialization in European Trade Policy*, EUROPEAN U. INS. (EUI) WORKING PAPER SPS No. 2003/17, at 10 (2003), *available at* <http://www.iue.it/PUB/sps2003-17.pdf>.

93. *Id.* at n.8.

or domestic quasi-review procedures.⁹⁴ The dispute resolution mechanism of the WTO, the DSB,⁹⁵ lends to judicialization, not legalization, because it handles trade disputes on a case-by-case basis. It is here that one witnesses why the WTO may represent the crowning piece of judicialization in international trade relations. Jurisprudence of international trade serves as a genuine hope for governance in international trade by creating authoritative rule making that “encompasses making, implementing and adjudicating rules.”⁹⁶

The legalization-judicialization dichotomy, however, does not clearly provide sufficient meaning for legalification. Legalification poses greater implications for legal systems. It carries a harsher penalty for international intergovernmental organizations such as the WTO, because the process of legalification can be described in terms of obligation, precision, and delegation resembling a legal rule; establishing a legal institution is deemed as a halt to future development.⁹⁷ Under legalification, a WTO regime of residual importance, therefore, would have numbered days as a vehicle for trade liberalization. The challenge of instituting an effective, wider global governance mechanism therefore is that trade policy agendas require a well-functioning multilateral rule-based trading system.⁹⁸ The need for an effective trade governance mechanism presents the critical concern of whether the WTO regime will constitute no more than the upgrading of a mere agreement without legal quality to an authoritative instrument of law.⁹⁹

In terms of the WTO, judicialization and a rules-oriented approach to trade disputes serve as an antithesis to mere legalification. A prime example of legalification and its attendant problems was present in the functioning of the WTO's predecessor, GATT 1947. The WTO is one of the most sophisticated international legal systems in international law due to the existence of a multilateral WTO dispute settlement mechanism.¹⁰⁰

94. *Id.*

95. See WTO Agreement, *supra* note 7, Annex 2 [hereinafter Understanding on Rules and Procedures Governing the Settlement of Disputes].

96. Hooghe & Marks, *supra* note 31, at 3 n.2.

97. FRIEDRICH V. KRATOCHWIL, *RULES, NORMS AND DECISIONS: ON THE CONDITIONS OF PRACTICAL AND LEGAL REASONING IN INTERNATIONAL RELATIONS AND DOMESTIC AFFAIRS*, Ch. 7 (Cambridge University Press, 1989).

98. See Hon. Clement J. Rohee, *Multilateralism at the Crossroads*, Address at the Annual WTO Public Symposium, Geneva 3-4 (May 25-27, 2004), available at http://www.wto.org/english/tratop_e/dda_e/symp04_paper_rohee_e.doc.

99. Legalification Definition, *supra* note 27.

100. Dana T. Blackmore, *Eradicating the Long Standing Existence of a No-*

The WTO completely replaces GATT 1947 and gives it enforcement power.¹⁰¹ The problem with GATT 1947 was that its negotiation and consensus based dispute resolution system did not promote greater compliance with GATT rules.¹⁰² The WTO DSU, which is the backbone of WTO system,¹⁰³ offers a more efficient, dependable, and rules-oriented system, rather a negotiation/consensus system, for resolving trade disputes within a multilateral framework.¹⁰⁴

D. UNITED STATES-CHINA TRADE POLICY

Motivations for activist trade policy can be divided into four groups: revenue—governments' collection of income by taxing trade; mercantilism—a belief that imports are bad and exports are good; trade barriers, implemented for agricultural and industrial development; and finally, trade policy, as a means of redistributing income.¹⁰⁵

The latter two motivations reflect politics and protectionism.¹⁰⁶ Protectionism is arguably good politics.¹⁰⁷ Protectionist

Precedent Rule in International Trade Law—Looking Toward Stare Decisis in WTO Dispute Settlement, 29 N.C. J. INT'L L. & COM. REG., 487, 488 (2004).

101. *Id.* at 488–89.

102. *Id.* at 489; see also JACKSON, *supra* note 63, at 403–05.

In the GATT, there is no explicit indication of a “consensus practice,” and the word “consensus” is not used. The reason that the consensus practice developed was partly the uneasiness of governments about the loose wording of GATT decision-making powers, particularly that in GATT Article XXV. Partly because of this uneasiness, the practice developed of avoiding strict voting In the practice of GATT, however, the word “consensus” was not defined In the WTO Charter, however, consensus is defined (at least for some purposes).

Id.

103.

The Dispute Settlement Understanding (DSU) is the legal text that spells out the rules and procedures for settling disputes in the WTO. It contains 27 articles, is a legally binding negotiated agreement among all the WTO member governments, and is the ultimate means of enforcing the WTO's trade rules. That makes it the backbone of the multilateral trading system.

Blackmore, *supra* note 100, at 489 (citing WTO Review of the Dispute Settlement Understanding, at http://www.wto.org/english/thewto_e/minist_e/min99_e/english/about_e/19dis_e.htm).

104. Blackmore, *supra* note 100, at 490.

105. BERNARD M. HOEKMAN & MICHEL M. KOSTECKI, *THE POLITICAL ECONOMY OF THE WORLD TRADING SYSTEM THE WTO AND BEYOND* 21 (2nd ed. Oxford University Press 2001).

106. *Id.*

107. *Id.*

policy, however, results in an inequitable redistribution of income, in which some segments of society gain at the expense of other groups.¹⁰⁸ Protectionist trade policy especially benefits interest groups.¹⁰⁹ Special interest groups, such as auto manufacturers, steel companies, the textile industry, and others, have much to gain from seeking the aid of government in protecting them from foreign competition.¹¹⁰ The downside of protectionist legislation, however, is that it results in higher consumer prices.¹¹¹ A protectionist policy that benefits a small number of producers at the expense of a large number of consumers creates a threat to free trade.¹¹² The philosophy of international trade theory and comparative advantage seeks to maximize consumption and welfare through free trade and by economic modeling.¹¹³ The inherent dangers of an activist trade policy and resulting protectionism are that groups that seek protectionist policies are willing to offer political support to incumbent government challengers during elections as a *quid pro quo*.¹¹⁴

U.S. trade policy is predominately shaped by Congress, which has a greater proclivity towards protectionism than the President. Congressional representatives are more likely than the president to be swayed by the demands of local constituents in their quests to seek re-election.¹¹⁵ Local constituents are swayed by special interest groups such as non-governmental organizations (NGOs), which disseminate information and opinions about world events, and bring to the attention of constituents what would otherwise be seemingly innocuous events.¹¹⁶

108. *Id.*

109. *Id.*

110. Robert W. McGee, *The Philosophy of Trade Protectionism, Its Costs and Its Implications*, 26 GEO. WASH. J. INT'L L. & ECON. 539, 541 (1993) ("As Vilfredo Pareto succinctly put it in 1927: 'A protectionist measure provides large benefits to a small number of people, and causes a very great number of consumers a slight loss. This circumstance makes it easier to put a protection measure into practice.'").

111. *Id.* at 542.

112. *Id.*

113. See Block, *supra* note 35, at 422 (discussing arguments in favor of international labor standards and noting how tying international trade privileges to higher labor standards could improve the welfare of the citizens of a country) (internal footnotes omitted).

114. HOEKMAN & KOSTECKI, *supra* note 105, at 22.

115. Ka Zeng, *Trade Structure and the Effectiveness of America's "Aggressively Unilateral" Trade Policy*, INT'L STUDIES ASSOC. (ISA) CONVENTION PAPERS, at 36 n.9 (2002), available at <http://www.isanet.org>.

116. Jeremy Rabkin, *Is National Sovereignty out of Date?*, HAL CLOUGH LECTURE FOR 2000 (Inst. Pub. Aff., Melbourne, Vict., Austl.), at 5, 9–10, available at <http://www.ipa.org.au/pubs/Currentisdocs/Clough00.pdf> (discussing sovereignty and

One problem of interest groups is that not all interest groups were born equal: lower information and organization costs set smaller groups apart from larger ones. All interest groups, however, are instrumental in influencing politics such that their acts indirectly produce protectionist national and international laws and regulations.¹¹⁷ The strength of special interest groups becomes even more apparent when they are compared to the dispersed general interest displayed by the consumers, the general public, and taxpayers, who interact in the realm of trade.¹¹⁸

Non-economic factors such as the influence of special interest groups played a critical role in determining the timing of China's accession to the WTO.¹¹⁹ Prior to China's accession, the Chinese economy was generally perceived to be a transitioning economy: a socialist economy transitioning to a socialist market economy. The economic growth of transition economies has historically been linked to the foreign policies of member states of the Organization for Economic Co-operation and Development (OECD), especially that of the United States.¹²⁰

The United States was slow to grant China unconditional Most Favored Nation (MFN) status.¹²¹ This hesitancy on the part of the United States can be traced back to the Jackson-Vanik Amendment to the 1974 Trade Act. This Act prohibited the grant of unconditional MFN status to non-market econo-

supernational authority).

117. Ernst-Ulrich Petersmann, *The Transformation of the World Trading System Through the 1994 Agreement Establishing the World Trade Organization*, 6 EUR. J. INT'L L., 1, 11-12 (1995), available at <http://www.ejil.org/journal/Vol6/No2/art1.pdf>.

118. *Id.*

119. See Frederick M. Abbott, *China's Accession to the WTO*, ASIL INSIGHTS, ¶¶ 1-5, (Jan. 1998), at <http://www.asil.org/insights/insigh13.htm>; see also Alan Wm. Wolff, A U.S. Vision of Liberalization of Trade and Investment, Remarks Before the Trilateral Forum (U.S.-Japan-China) in Tokyo, Japan (Dec. 14, 1996), available at <http://www.dbtrade.com/publications/191189a.htm>.

120. See HOEKMAN & KOSTECKI, *supra* note 105, at 21-22; ORG. FOR ECON. CO-OPERATION AND DEV. (OECD), *Overview of the OECD: What is it? History? Who Does What? Structure of the Organization?*, at http://www.oecd.org/document/18/0,2340,en_2649_201185_2068050_1_1_1_1,00.html (noting that the OECD's role has been "to build strong economies in its member countries, improve efficiency, hone market systems, expand free trade and contribute to development in industrialised as well as developing countries.") (last visited Sept. 26, 2004).

121. See James A. Dorn, *Time to Repeal the Jackson-Vanik Amendment*, Cato Institute, <http://www.cato.org/dailys/07-19-99.html> (Jul. 19, 1999) (discussing the annual debate over China's trade status); see also Wayne M. Morrison, *China and the World Trade Organization*, CRS REP. FOR CONG. (Cong. Res. Serv., Library of Cong.), Nov. 19, 2001, at 4-5, available at <http://fpc.state.gov/documents/organizations/6560.pdf>.

mies, which did not allow free emigration.¹²² Between 1974 and the United States's grant of MFN and permanent normal trade relations status to China, China and other non-market economies had to renew their MFN status annually, subject to review by the president and congressional approval.¹²³ China had difficulty obtaining MFN status because of the United States's insistence that China improve its human rights record and make changes to its foreign policy such as in its relations with Taiwan.¹²⁴ United States protectionist policy resulting from U.S. domestic politics played a key role during this pre-accession period.¹²⁵ Congressional Democrats voted in accord with the wishes of trade unions that blamed U.S. job losses on Chinese competition.¹²⁶ Congressional Republicans were also not free from the influence of special interest groups.¹²⁷ They were concerned with winning votes of conservative religious groups, which were critical of China's birth control record and Communist legacy of denying religious freedom and liberties.¹²⁸ In the grand scheme of things, U.S. trade policy has been a reflection

122. Vladimir N. Pregelj, *The Jackson-Vanik Amendment: A Survey*, CRS REP. FOR CONG. (Cong. Res. Serv., Library of Cong.), Sept. 20, 2000, at 2–3, available at http://www.usvtc.org/Documents/CRS%20Reports/CRS_Jackson-Vanik.pdf (last visited Sept. 13, 2004).

123. *Id.* at 5.

124. See Dorn, *supra* note 121; Kerry Dumbaugh, *China-U.S. Relations: Current Issues for the 108th Congress*, CRS REP. FOR CONG. (Cong. Res. Serv., Library of Cong.), Jul. 25, 2003, at 1–8, available at www.fas.org/man/crs/RL31815.pdf (last visited Oct. 9, 2004).

Taiwan remains the most sensitive and complex issue in Sino-U.S. relations. Beijing maintains it has the option to use force should Taiwan declare independence from China, . . . U.S. policy toward Taiwan has been shaped by the three U.S.-China communiqués, the Taiwan Relations Act (P.L. 96-8), and the so-called “Six Assurances.”

Id. at 8–9.

125. See, e.g., HOEKMAN & KOSTECKI, *supra* note 105, at 21–22, 404; David M. Lampton, *Ending the MFN Battle*, 8 NBR ANALYSIS No. 4, at 7–9 (Nat'l Bureau of Asian Res. 1997).

126. See HOEKMAN & KOSTECKI, *supra* note 105, at 21–22, 404; Joseph Kahn, *Last-Ditch Effort by 2 Sides to Win China Trade Vote*, N.Y. TIMES, May 23, 2000, at A1 & A14.

127. See President Bill Clinton, Remarks Regarding China: Florida's New Market of Opportunity Program at Airport Hilton Tampa, Florida (Jul. 31, 2000) (transcript available at <http://www.hongkong.usconsulate.gov/uscn/wh/2000/073101.htm>).

128. See HOEKMAN & KOSTECKI, *supra* note 105, at 21–22, 404; 146 CONG. REC. S8132-01, S8132-02 (daily ed. Sept. 7, 2000) (statement of Sen. Wellstone), 2000 WL 1269130, 2000 WL 1269166 (arguing for Religious Freedom Amendment to H.R. 4444 by authorizing extension of nondiscriminatory treatment to the People's Republic of China).

of the wishes of domestic constituencies and lobbyists.¹²⁹

Most problematic is the U.S. use of foreign trade policy as a tool in rewarding its foreign allies and punishing its enemies.¹³⁰ Since 2000, countries that have been subject to total or near-total restrictions include Burma, Cuba, Iran, Iraq, Libya, North Korea, Sudan, and Yugoslavia.¹³¹ The Jackson-Vanik Amendment, Section 402(a) of the Trade Act of 1974, manifests this reward/punishment nature of U.S. foreign policy.¹³² The goal of the amendment is “to assure the continued dedication of the United States to fundamental human rights.”¹³³ In light of the growing protectionist acts taken by the United States against China, the decision of the U.S. Congress to grant permanent MFN status to China represented a victory for the international trade system.¹³⁴

E. THE KAGAN THESIS

Robert Kagan, in what is known as the “Kagan Thesis,” describes the United States as possessing unique strengths, making the world unipolar,¹³⁵ and accounts for an increasing U.S.

129. Sam Vaknin, *Analysis: The Jackson-Vanik Debate*, United Press International, at <http://www.upi.com/view.cfm?StoryID=29052002-105921-5171r> (May 29, 2002).

130. *Id.*; see also Ted Galen Carpenter, *Eagle in the China Shop: The Economic Consequences of U.S. Global Meeting*, in *ECONOMIC CASUALTIES: HOW U.S. FOREIGN POLICY UNDERMINES TRADE, GROWTH, AND LIBERTY* 5–6 (Daniel T. Griswold & Solveign Singleton eds., Cato Inst., 1999) (discussing use of trade embargos for purpose of advancing Washington’s foreign policy agenda).

131. CATO INST., *CATO HANDBOOK FOR CONGRESS: POLICY RECOMMENDATIONS FOR THE 107TH CONGRESS* 634 (2001), available at <http://www.freetrade.org/pubs/handbook/hb107-61.pdf> [hereinafter *CATO HANDBOOK FOR CONGRESS*].

132. See Vaknin, *supra* note 129; James Dorn, *To Promote Trade, Repeal Jackson-Vanik*, Center for Trade Policy Studies, at <http://www.freetrade.org/pubs/articles/jd-7-14-99.html> (last visited Sept. 18, 2004) (“That amendment was designed to deny most-favored-nation (MFN) trade status to communist countries, notably the Soviet Union, in order to encourage more open emigration.”).

133. See Pregelj, *supra* note 122, at 2–5 (“Although the introductory sentence of the Jackson-Vanik amendment mentions ‘the continued dedication of the United States to fundamental human rights,’ its operative provisions condition the restoration of the access of an NME country to the covered benefits solely on the country’s freedom-of-emigration policy.”) (emphasis in original); see also Vaknin, *supra* note 129, at 4 (“President Clinton tacitly admitted as much when he publicly decoupled trade policy from human rights in 1994.”).

134. See, e.g., HOEKMAN & KOSTECKI, *supra* note 105, at 21–22, 404; *CATO HANDBOOK FOR CONGRESS*, *supra* note 131, at 633.

135. See Charles Krauthammer, *The Unipolar Moment*, *FOREIGN AFF.* 1990/1991, at 23, 24 (discussing the unipolarity of America). *But see* Samuel P. Huntington, *The Lonely Superpower*, *FOREIGN AFF.*, Mar./Apr. 1999, at 36. Con-

tilt toward unilateralism rather than multilateralism.¹³⁶ According to this view, strong countries are attracted to unilateral options, while weak countries will seek refuge in multilateralism. This model is thought to typify the European weakness in international relations. The Kagan Thesis primarily addresses the growing transatlantic divide between the United States and the European Union.¹³⁷ In terms of international relations, the Kagan Thesis specifically addressed a growing divergence between foreign policy perspectives of the United States and Europe.¹³⁸ Robert Kagan justified unilateralism as follows:

Americans are powerful enough that they need not fear Europeans, even when bearing gifts. Rather than viewing the United States as a Gulliver tied down by Lilliputian threads, American leaders should realize that they are hardly constrained at all, that Europe is not really capable of constraining the United States.¹³⁹

II. THE KAGAN THESIS AND LEGALIFICATION OF THE WTO

It has been suggested that the dispute concerning China's currency exchange regime will eventually be resolved by resorting to diplomacy and politics.¹⁴⁰ This suggestion thereby attributes a minor role to the rule of law and jurisprudence of international trade. It may be true that a diplomatic or political solution is the preferred solution. The ramifications of a diplomatic solution, however, are far-reaching in terms of international law and trade, especially in that Western countries' visions of new world-order are likely to collide with those of non-Western countries. Specifically, there is an inherent danger

versely, Samuel P. Huntington argues that the world is a three-part hybrid, consisting of the unipolar, bipolar and multipolar, identified as a "*uni-multipolar system* with one superpower and several major powers." *Id.* at 36. (emphasis in original).

136. See John Van Oudenaren, *Unipolar Versus Unilateral*, POLY REV., Apr./May 2004, at 63, 65.

137. See KAGAN THESIS, *supra* note 26, at 3-4 ("The reasons for the transatlantic divide are deep, long in development, and likely to endure.").

138. See *id.* at 4 ("When it comes to setting national priorities, determining threats, defining challenges, and fashioning and implementing foreign and defense policies, the United States and Europe have parted ways."). A growing divide is historically attributed to the end of the Cold War. *Id.* at 20-21.

139. *Id.* at 102.

140. See Denters, *supra* note 29, ¶ 1 (discussing that a "bipartisan group of senators urged the Congress to adopt legislation that allows for 'appropriate action' if the negotiations with China regarding its undervalued currency and currency manipulation are not successful").

that countries may read and respond to the China controversy in politically motivated ways.¹⁴¹

One potential danger is unilateralism and Hobbesian multilateralism.¹⁴² There is a current trend toward “soft” globalization, globalization through multilateral means, in response to political solutions in international controversies. This trend is especially strong among developed countries according to economists such as Joseph Stiglitz, the retired vice-president of the World Bank. According to Stiglitz, “globalisation doesn’t work. It doesn’t work for the poor, it doesn’t work for the environment, [and] it doesn’t work for the stability of the global economy.”¹⁴³

When the United States filed a complaint with the WTO against China on March 19, 2004 over a tax policy,¹⁴⁴ it took a “soft globalization” approach, resorting to rule of law, and the multilateral WTO regime rather than hard globalization.¹⁴⁵ This filing was a positive step on the part of the United States,¹⁴⁶ because it represented a step toward much needed

141. See *Focus: Escalating Pressure on Yuan Revaluation*, *supra* note 16 (“With international attention focused on China’s currency exchange rate, trade issues between China and the US have been quickly politicized and oversimplified to fit the needs of politicians.”).

142. See *America’s Image Problem Complicates War on Terror*, Detroit News.Com, at <http://www.detnews.com/2004/editorial/0403/21/a16-95232.htm> (Mar. 12, 1999) [hereinafter *America’s Image*] (“Throughout Europe and the Middle East, anti-American sentiment is growing, according to an international survey by the Pew Global Attitudes Project, primarily due to the invasion of Iraq.”).

143. Mireille Delmas-Marty, *Justice for Sale*, LE MONDE DIPLOMATIQUE, Aug. 2003, ¶ 2 http://mondediplo.com/2003/08/03marty?var_recherche=Mireille+Delmas-Marty.

144. On March 24, 2004, the U.S. filed a request for Consultation regarding China’s value-added tax (VAT) on integrated circuits (ICs) in China. See *China – Value-Added Tax on Integrated Circuits: Requests for Consultations by the United States*, WTO Doc. WT/DS309/1 G/L/675 S/L/160 (Mar. 23, 2004), available at http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members_e.htm.

145. See Dai Yan, *Last-Minute US Request Clouds Talks, Delays Deal*, CHINA DAILY, Mar. 20, 2004, at 1, http://www.chinadaily.com/cn/english/doc/2004-03/20/content_316471.htm (“The US complaint, filed on Thursday, was the first against China since it joined the WTO in late 2001. The complaint says a tax break for domestically manufactured semiconductors gives them an unfair advantage over imports.”).

146. See *U.S., China Resolve Chip Dispute*, CNN.com, July 9, 2004, at <http://www.cnn.com/2004/BUSINESS/07/08/china.trade.reut/>.

The settlement brought a swift close to the World Trade Organization complaint filed March 18 against China, the first such suit against Beijing since it joined the WTO in 2001 In mid-June, the government said the gap in the current account balance, the broadest measure of U.S. trade with the rest of the world, grew to \$144.9 billion in the first quarter. The

true multilateralism in all relations with China. This need was especially marked after the politically motivated U.S. responses to the decrease in the value of the dollar,¹⁴⁷ and the Treasury Department report to the U.S. Congress on China that “[s]erious engagement with China on these issues will continue.”¹⁴⁸ The Treasury Department report may prognosticate a continuing flurry of political and economic responses and continuing unilateral acts in trade in response to the China controversy.

In the United States, the dialogue on international relations has been dominated by debates between neo-realists and neo-liberalists¹⁴⁹ regarding whether international relations policies manifesting unilateralism¹⁵⁰ have a rightful place in the jurisprudence of international trade.¹⁵¹ The survival and growth of the multilateral trade regime, jurisprudence of international trade, governance of international trade and the WTO, is critical to China, the United States and the world, because free trade benefits all participating countries.¹⁵²

The United States has long pursued a unilateral trade policy, backed by retaliatory threats of invoking Section 301 of United States Trade Law.¹⁵³ Despite having superior power and

U.S. trade deficit with China alone reached a record high \$124 billion in 2003 and is expected to widen this year.

Id.

147. See *Focus: Escalating Pressure on Yuan Revaluation*, *supra* note 16.

148. See 2003 REP. TO CONGRESS ON INT'L ECON. EXCH. RATE POLICIES, *supra* note 86, at 8–9.

149. See Beukel, *supra* note 60, at 4; see also Banu Bayramglu Lise, *Climate Politics and International Institution: Supporters of Global Environmental Cooperation*, Address at the Symposium on “Is Globalization Overpowering Democracy: The Challenge for Ecology, Economy and Culture” at Prague – Villa Lanna (June 12–16, 2001), <http://www.uek.cas.cz/GlobDem/FT-bayramglu.htm> (“Today the field of International Relations is dominated by the contemporary debate between the neorealist perspective and neoliberal institutionalist approach and the debate has been elevated to a new level.”).

150. KAGAN THESIS, *supra* note 26, at 8 (“As for the United States, there is nothing timeless about the present heavy reliance on force as a tool of international relations, nor about the tilt toward unilateralism and away from a devotion to international law.”).

151. JACKSON, *supra* note 63, at 120 (“In fact, an argument can be made that the GATT jurisprudence which now exists—almost 200 reported cases—is the largest significant body of case law experience developed for a major multilateral treaty of broad purpose and application.”).

152. See MALANCZUK, *supra* note 91, at 231.

153. See Zeng, *supra* note 115, at 1.

[T]he American Federation of Labor-Congress of Industrial Organizations (AFL-CIO) . . . published a piece of news on its website, declaring that it had handed in a petition to the US trade representative Robert Zoellick in the hope that the government would use the ‘Section 301 of US trade law’

bargaining resources, the success of a unilateral trade policy has been uneven.¹⁵⁴ This uneven record results because countries such as China, Brazil and India, which are heavily dependent on the U.S. export market, are more resistant to unilateral negotiation tactics than developed countries such as Canada, the European Union, and Japan, which are less dependent on the U.S. export market.¹⁵⁵ Assuming, *arguendo*, that there is a weak case for violating trade by manipulating currency (yuan), there is an inherent danger to accusatory conduct, which is lacking in substantial basis, and is pursued by aggressive unilateral trade policy. The majority of the world views the United States as engaging in such activity and thereby adopting a Kagan Thesis approach in its international trade relations.¹⁵⁶

Whenever the United States invokes protectionism, other countries perceive the United States as exercising unilateral power, resembling unilateralism, as espoused by the Kagan Thesis.¹⁵⁷ The United States has often taken this unilateral

to stop China 'artificially keeping labor cost low.'

Will 'Section 301' Affect Chinese Economy, PEOPLE'S DAILY ONLINE, Apr. 7, 2004, at http://english.peopledaily.com/cn/200404/06/eng20040406_139607.shtml.

154. See Zeng, *supra* note 115, at 1.

155. See *id.*

This pattern is not readily explicable in terms of traditional realist theories, which on the basis of nations' underlying raw power balances, would predict that on average American coercive diplomacy ought to work better with countries whose raw material power should have put them in a more disadvantaged position vis-à-vis the United States.

156. See Beukel, *supra* note 60, at 14; Stephen F. Szabo, *Power and Hubris*, 2002 AM. INST. FOR CONTEMP. GERMAN STUDIES 1, <http://www.aicgs.org/c/power.shtml>.

Kagan's thesis is that Europeans and Americans no longer share a common view of the world because they don't share a common view on the role and desirability of power. In short, the Europeans are the victims of their own successful project of European integration. The creation of the European Union, has left them, in Kagan's view, living in a Kantian world of perpetual peace, while the United States makes it all possible with its policing of the Hobbesian world outside, which would otherwise threaten this harmonious utopia.

Id.

157. See KAGAN THESIS, *supra* note 26, at 99.

The problem is that the United States must sometimes play by the rules of a Hobbesian world, even though in doing so it violates Europe's postmodern norms . . . It must support arms control, but not always for itself. It must live by a double standard. And it must sometimes act unilaterally, not out of a passion for unilateralism but only because, given a weak Europe that has moved beyond power, the United States has no choice but to act unilaterally.

route rather than using the WTO Dispute Settlement Body (DSB)¹⁵⁸ for resolving trade disputes based upon the norm of economic equality.¹⁵⁹

Unilateralism and Hobbesian multilateralism threaten the future growth and prosperity of a U.S. economy and the WTO multilateral trade regime. Free trade and free trade agreements, on the other hand, produce bi-directional benefits; promote growth and prosperity in U.S.-China trade; promote transparency, fairness and openness in trade regimes across the board; make a positive contribution to strengthening the rule of law; and enhance the national welfare of all nations.¹⁶⁰

The benefits of multilateralism are many, especially in terms of multilateral and liberalized trade. For example, multilateral trade agreements ensure a non-discriminatory approach with potential mutual benefits for all parties. "They reduce trade distortions and simplify administration."¹⁶¹ Furthermore, reduction in tariff and non-tariff barriers brings significant benefits to nations. Multilateral reductions in tariffs allow domestic-produced products to compete more effectively in foreign markets and reduce the prices that domestic consumers pay for foreign imports. Under this model, foreign competition can also put pressure on domestic producers to reduce prices. Similarly, measures easing non-tariff restrictions on international trade expand domestic access to foreign markets and allow more foreign-produced goods to reach domestic industries and consumers. Increased international specialization allows for larger-scale and more efficient production in some industries. Increased competition also encourages technological development. Increased availability of lower-priced foreign goods reduces in-

Id.

158. See generally Understanding on Rules and Procedures Governing the Settlement of Disputes, *supra* note 95, art. 2; see also Blackmore, *supra* note 100, at 491-94.

159. See, e.g., JACKSON, *supra* note 63, at 57-58; *Focus: Escalating Pressure on Yuan Revaluation*, *supra* note 16; Denters, *supra* note 28; DeRosa, *supra* note 8.

160. See, e.g., ORG. FOR ECON. COOPERATION AND DEV. (OECD), ENABLING GLOBAL TRADE: DEVELOPING CAPACITY THROUGH PARTNERSHIP 5-7 (2002), available at http://www.oecd.org/searchResult/0,2665,en_2649_201185_1_1_1_1_1,00.html; Bilateral Trade Relations: China, Europa-European Commission, at http://www.europa.eu.int/comm/trade/issues/bilateral/countries/china/index_en.htm; Bhagabita, *supra* note 57.

161. See INT'L CHAMBER OF COM., *Regional Trade Agreements and the Multilateral Trading System*, Doc. No. 103/226 final EN, http://www.iccwbo.org/hom/statements-rules/statements/2002/Regional%20trade%20agreements_multilateral%20trading%ssystem.asp (Nov. 27, 2002).

flationary pressures and allows governments to pursue expansionary economic policies. Multilateral trade also brings the direct benefits of increased exports and cheaper imports. Without multilateral trade governed by a strong WTO regime, nations are “forced to deal with [each other] individually.”¹⁶²

In addition, multilateral trade creates even more direct political benefits. Multilateralism, not unilateralism, encourages highly visible, cooperative efforts on the part of the world’s market-oriented economies to devise solutions to joint problems. A successful multilateral trade regime encourages cooperation among nations in solving other problems.¹⁶³ New geopolitical and economic realities are forcing actors in the international arena to see the common interests in harnessing the benefits of globalization.¹⁶⁴

Unilateral political dynamics have a disruptive effect on the bi-directional sharing of mutual benefits and increase transaction costs of WTO integration.¹⁶⁵ Unilateral acts by the United States exhaust resources that could be diverted to more domestic issues such as the equilateral redistribution of income.¹⁶⁶ Unilateral acts also appear to increase transaction costs such as costs of negotiating, drafting, and enforcing contracts,¹⁶⁷ particularly in light of empirical evidence suggesting that unipolar U.S. trade acts and unilateral trade negotiations pursuant to unilateral trade policy have been virtually ineffective.¹⁶⁸ Kagan

162. See Alice M. Rivlin, Director of the Congressional Budget Office, Statement Before the Northeast-Midwest Senate Coalition 4 (Apr. 4, 1979) (transcript available at <http://www.cbo.gov/showdoc.cfm?index=5213&sequence=0>).

163. *Id.*

164. See Hon. Rohee, *supra* note 98, at 3, 5.

165. See generally Dieter Schmidchen et al., *Conflict of Law Rules and International Trade: A Transaction Costs Approach*, CTR. FOR THE STUDY OF LAW AND ECON., DISCUSSION PAPER 2004-1, at 5, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=545763 (Mar. 2004).

The core question of transaction cost economics, as a part of New Institutional Economics, is how transaction costs influence social interaction and productive activities. It analyses how institutions economize on transaction costs that may reduce, or even completely discourage, socially desirable activity. . . . Transaction costs are the costs of negotiating, drafting and enforcing contracts. They include search and information costs, bargaining and decision costs, policing and enforcement costs and, moreover, the efficiency losses that result when conflicts are not perfectly resolved.

Id. (internal citations omitted).

166. See HOEKMAN & KOSTECKI, *supra* note 105, 21–22.

167. See Schmidchen, *supra* note 165, at 25 (arguing that “the transaction costs of international business can be reduced by a workable international legal order”).

168. See Zeng, *supra* note 115, at 3–6, 20–29.

Thesis type taxonomies frustrate the potential benefits of multilateralism and a strong WTO regime.

There are other costs accompanying unilateral acts, especially in U.S. international relations.¹⁶⁹ Notwithstanding costs of an expanding military budget resulting from such policies, the costs are many and diverse, directly and indirectly affecting the American populace in numerous ways.¹⁷⁰ Unilateral U.S. trade policy and its attendant trade sanctions have been unsuccessful as weapons of foreign policy and have harmed the interests of the United States in the world. In addition, trade sanctions have deprived American companies of business opportunities, punished domestic consumers, and hurt poor and vulnerable people in target countries.¹⁷¹ A U.S. foreign policy that seeks to punish a country with its unilateral acts by withholding exports of farm products, computers, or oil-drilling services, will result in terrible effects for the United States and other countries, which will find other global suppliers standing ready to fill the gap.¹⁷² Failed examples of U.S. unilateral trade policy include the 1961 Cuba embargo, which failed to influence the government of Fidel Castro, and the May 1997 Executive Order banning most new American investment in Burma, which failed to persuade the regime in Rangoon to cede its power to the opposition party, and then they won the 1990 national elections.¹⁷³

Most importantly, the U.S. grant of MFN status to China despite its refusal to improve its human rights record and normalize its relations with Taiwan reflects the ineffectiveness of

169. See Robert Kagan & William Kristol, *The Present Danger*, NAT'L INTEREST, Spring 2000, at 57.

170. See Carpenter, *supra* note 130, at 3-4.

The economic costs alone, paid by the American people, to maintain Washington's hegemonic policy have been substantial and pervasive. For example, the demands of that role require a large and expensive military establishment. Despite the end of the cold war, U.S. military spending (currently at \$270 billion per year) dwarfs that of other industrialized countries. Japan spends just \$42 billion and Germany a mere \$27 billion. Each American must pay more than \$1,000 a year to support the military; the burden for each German or Japanese is about \$320. The opportunity cost to American taxpayers-and to the American Economy-is considerable, and has been for many decades.

Id.

171. See CATO HANDBOOK FOR CONGRESS, *supra* note 131, at 637.

172. See *id.* at 631; Nicolas R. Lardy, *Normalizing Economic Relations with China*, 8 NBR ANALYSIS No. 4, at 19-20 (Nat'l Bureau of Asian Res. 1997).

173. See CATO HANDBOOK FOR CONGRESS, *supra* note 131, at 631.

trade sanctions as a tool in pressuring China to comply with U.S. wishes.¹⁷⁴ From Cuba to China, and other target nations, U.S. trade sanctions have not successfully changed the conduct or behavior of target nations. As witnessed by U.S. trade policy toward China, domestic politics, foreign policy, international relations, and American nationalism¹⁷⁵ will often override multilateral trade issues and the WTO trade regime.¹⁷⁶

When other nations emulate the United States and similarly take unilateral, as opposed to multilateral, routes to resolve conflicts, international relations will have a proclivity to be dominated by a state's strength as measured in material power sources such as economic and military power, rather than a rule-based system.¹⁷⁷ This type of unilateral measure is an example of Kagan-Thesis type taxonomy and its attendant unilateralism.¹⁷⁸

174. See HOEKMAN & KOSTECKI, *supra* note 105, at 21–22.

175. See generally KAGAN THESIS, *supra* note 26.

Nor was America's post-Cold War turn toward a more nationalist approach to foreign policy simply the product of a rising Republican Right. Realist international relations theorists and policymakers, the dominant intellectual force in the American foreign policy establishment, also pushed the United States back in the direction of a more narrow nationalism. They decried what Michael Mandelbaum famously called the "international social work" allegedly undertaken by the Clinton Administration in Bosnia and Haiti.

Id. at 82–83.

176. See Carpenter, *supra* note 130, at 5–6; C. Fred Bergsten, *Muzzling Our Economic Negotiators*, WASH. POST, Sept. 10, 2003, at A19.

Treasury Secretary John Snow returned home apparently empty-handed from his publicized visit to Asia last week. China rejected any rise in the value of its currency against the dollar now, pledging only to let it float more freely at some undefined point in the distant future. Japan would not agree to let its currency move upward either, and in fact resumed intervention to weaken the yen as soon as the secretary left Tokyo . . . This was not the first time that short-term foreign policy concerns trumped U.S. economic interests within the administration.

Id.

177. See Beukel, *supra* note 60, at 12, 15–16.

178. See KAGAN THESIS, *supra* note 26, at 8.

But if it were literally true that the United States could not act unilaterally, we wouldn't be having a grand transatlantic debate over American unilateralism. The problem today, if it is a problem, is that the United States *can* "go alone," and it is hardly surprising that the American superpower should wish to preserve its ability to do so. Geopolitical logic dictates that Americans have a less compelling interest than Europeans in upholding multilateralism as a universal principle for governing the behavior of nations . . . For Europeans, ideals and interests converge in a world governed according to the principle of multilateralism. For Americans,

Unilateralism poses the problems of the unattainable goal of purely egalitarian decision-making rules.¹⁷⁹ On the continuum of multilateral versus unilateral trade, there is no genuine one-to-one relationship between multilateralism and rule governance. Instead, there is an imbalance of power that is marked by a state's unilateral actions and dominated by states possessing greater material sources (economic and military) than others do.¹⁸⁰ Unilateral political dynamics, ultimately, will produce a more power-based system rather than a system of free trade.¹⁸¹

The debate between realists and neo-liberalists in international relations also threatens free trade.¹⁸² Specifically, the West-centric and Eurocentric taxonomies¹⁸³ of neo-realism, neo-liberalism, and development theory (dependency theory) seem to condemn China and the developing countries to subservience, or worse, "a state of progressive impoverishment and dependence from which only prolonged struggle or revolutionary change provides an outlet."¹⁸⁴ Developing countries often perceive that their development agendas are being bypassed in the WTO for rules benefiting the rich and powerful. In the face of realists viewing world power as unjustly distributed and casting against genuine multilateralism, an issue facing the WTO is whether multilateralism can temper the negative effects of power politics

they do not converge as much.

Id. at 39 (emphasis in original).

Fischer stands near one end of the spectrum of European idealism. But this is not really a right-left issue in Europe. Fischer's principal contention—that Europe has moved beyond the old system of power politics and discovered a new system for preserving peace in international relations—is widely shared across Europe In the "postmodern world," writes Cooper, "*raison d'état* and the amorality of Machiavelli's theories of statecraft . . . have been replaced by a moral consciousness" in international affairs. American realists might scoff at this idealism.

Id. at 56–57 (internal footnotes omitted).

179. See Beukel, *supra* note 60, at 3.

180. See *id.* at 3 & n.6 ("Theories on international relations usually assume that 'egalitarian' refers to equality between states.") (internal citations omitted).

181. See *id.* at 3.

182. See KAGAN THESIS, *supra* note 26, at 27, 39, 56–57.

183. See Douglas Lemke, *Development's Influence on War*, INT'L STUDIES ASSOC. (ISA) CONVENTION PAPERS, ¶ 2 (2002), <http://www.isanet.org/noarchive/lemke.html> (quoting Stephanie Neuman's statement that "mainstream IR Theory— (classical) realism, neorealism, and neoliberalism—is essentially Eurocentric theory, originating largely in the United States and founded almost exclusively on what happens or happened in the West.").

184. See Louise Fawcett, *Conclusion: With the Third World, in THE THIRD WORLD BEYOND THE COLD WAR CONTINUITY AND CHANGE* 245 (Louise Fawcett & Yezid Sayigh eds., Oxford University Press 1999).

and accommodate the poor and weak.¹⁸⁵ Moreover, the effect of unilateral political dynamics is not contingent on either the relative weakness or strength of the U.S. accusation against China, but rather, because free international trade benefits all countries involved while unilateral acts do not.¹⁸⁶

The basic philosophy underlying the Bretton Woods system is the theory of comparative advantage,¹⁸⁷ which was originally developed by David Ricardo and John Stuart Mill.¹⁸⁸ Ricardo and Mill applied the market theory of Adam Smith to international trade.¹⁸⁹ Comparative advantage assumes that liberalized foreign trade and resulting international division of labor creates benefits for participating national economies.¹⁹⁰ A vision of a new world order is one with reduced barriers to trade and money transactions, and greater market access as means to promote a greater level of employment, thus increasing real income and optimizing production factors.¹⁹¹ Notwithstanding the debate concerning sovereignty,¹⁹² traditional international trade theory uses economic modeling to maximize consumer and producer welfare.¹⁹³

The United States should be wary of engaging in unilateral acts because it risks being labeled a rogue state in terms of international trade.¹⁹⁴ To avoid such classification, it should employ more multilateral efforts such as those offered by DSB in resolving trade disputes.¹⁹⁵ Unilateral political dynamics dis-

185. See Hon. Rohee, *supra* note 98, at 4.

186. Weng Li Cheng et al., *A Ricardian Model with Endogenous Comparative Advantage and Endogenous Trade Policy Regimes*, CID WORKING PAPER No. 12, at 1, 19–21 (Ctr. for Int'l Dev. at Harvard U. 1999), available at <http://www2.cid.harvard.edu/cidwp/012.pdf>.

187. See Block, *supra* note 35, at 419 (“Traditionally, economists have referenced the ‘factor cost model’ . . . [.] Specifically, the theory suggests that countries should specialize in the production of goods in which they can produce at least cost . . . [T]heorists take into account a country’s productive factor endowments, including land, capital, labor and climate.”).

188. See MALANCZUK, *supra* note 91, at 223.

189. See *id.*

190. See *id.*

191. See *id.*

192. See *id.* at 224 (stating that notwithstanding commitments to international organizations set forth in U.N. Charter at Articles 1(3), 55(a) and (b), and 56, liberal principles of the Bretton Woods Institutions often conflict with the sovereign equality of states).

193. See Block et al., *supra* note 35, at 419–21.

194. See KAGAN THESIS, *supra* note 26, at 29–30, 60 (discussing rogue states and the axis of evil, and describing Iraq, North Korea, Iran, and Libya as dangerous, unpleasant, and even “evil”).

195. See Understanding on Rules and Procedures Governing the Settlement of

rupt the world trade system, especially the WTO regime. Such action also enhances the possibility of legalification of the WTO Agreement, attenuation of trade agreement experiences, such as unilateral negotiation tactics,¹⁹⁶ and frustration of the ability of a strong global institution like the WTO to enforce a wider regulatory agenda.¹⁹⁷

When the United States attempted to resolve China's manipulation of the yuan through the use of its 301 mechanism rather than resorting to the DSB, it thereby overshadowed and weakened the functional power of the DSB.¹⁹⁸ When attempts at consultations failed, Section 301 of the Trade Act of 1974 required the U.S. Trade Representative to use dispute settlement procedures under applicable trade agreements, i.e., the DSB.¹⁹⁹ A problem of Section 301 is that while it recognizes that alleged violations of the WTO Agreement are governed by the DSB,²⁰⁰ it also mandates unilateral acts in its mandatory retaliation action provision.²⁰¹ Section 301 and the exception to the mandatory retaliation action provision regarding the WTO lends itself to unilateral acts. Mandatory retaliation actions under Section 301 can only be waived if a WTO dispute settlement panel finds that an act, policy, or practice, such as the pegging of the Chinese yuan does not violate or deny U.S. rights under a trade

Disputes, *supra* note 95, arts. 2, 4–5.

196. See Zeng, *supra* note 115, at 3–6, 17–20 (arguing that the application of Section 301 threat tactics against China was not successful).

197. For an example of such frustration, see Rabkin, *supra* note 116, at 8–10 (expressing hostility toward international pressure on sovereignty and stating that “[sovereign states] have no great obligation to go along, just for the sake of building international solidarity”).

198. For statutory language of Section 301 measures, see 19 U.S.C. §§ 2411–2419 (1988) (relating to relief from foreign import restrictions and export subsidies). For a brief overview of Section 301 measures, see Bruce Odessey et al., *An Overview of U.S. Trade Law*, USIA J. ¶¶ 8–9 (Jun. 1997), at <http://usinfo.state.gov/journals/ites/0697/ijee/ej7f&f.htm> (explaining that section 301 of the Trade Act of 1974 is the primary U.S. law used to enforce rights for U.S. corporations under trade agreements).

199. See Odessey, *supra* note 198, ¶¶ 8–9 (stating that if after this step the dispute remains unresolved, the USTR may take other actions, including suspension of trade agreement's concessions, imposition of duties or other import restrictions, and imposing fees or restrictions on services, and that a section 301 case can be initiated either by a domestic petition or by the USTR on its own initiative).

200. See 19 U.S.C. § 2411(a)(2) (stating that the USTR is not required to take action if the Dispute Settlement Body is involved).

201. See *id.* § 2411(a)(1) (stating that if the USTR determines that a foreign government is violating or denying U.S. rights or benefits under a trade agreement, or its acts, policies, or practices are unjustifiable and burden or restrict U.S. commerce, Section 301 requires retaliation unless an exception applies).

agreement.²⁰² A failure to pursue WTO DSB remedies precludes the waiver, thereby justifying U.S. unilateral trade acts. While the WTO DSB may allow the United States to obtain international authorization to retaliate in appropriately filed trade disputes, the WTO otherwise restricts the use of unilateral measures in trade disputes.²⁰³

The Kagan Thesis appropriately conceptualizes this instance of U.S. international relations policy. By abiding by the Kagan Thesis, U.S. foreign relations have created a “bad guy” world image. This image was further strengthened by U.S. unilateral acts in the context of the war in Iraq.²⁰⁴ Hobbesian multilateralism has farther-reaching applications, including the United States’s relationship with the developing world, and countries such as China, which are experiencing robust economic growth amidst legal and economic reform.²⁰⁵

Assuming that the Kagan Thesis is accurate, protectionist based accusations against China, such as the one brought by the United States, exemplify a unipolar exercise of economic, rather than military power. The U.S. attempt to coerce China into floating its exchange rate reflects unilateralism on the part of the United States, which stems from its use of economic and political, rather than military, force. This type of military unilateralism fits with what Kagan describes as a willingness to bypass United Nations Security Council approval in initiating acts of war and a willingness to go it alone.²⁰⁶

The WTO General Council’s (GC) decision on the Doha Agenda work program, the “July package,” agreed upon on August 1, 2004, analogously presented another example of power politics.²⁰⁷ The “July package” was meant to restart trade ne-

202. See *id.* § 2411(a)(2) (describing the circumstances that waive the mandatory retaliation requirement if the DSU is involved).

203. See *supra* notes 60–65 and accompanying text.

204. See *America’s Image*, *supra* note 142 (reporting that “throughout Europe and the Middle East, anti-American sentiment is growing. . . primarily due to the invasion of Iraq”).

205. See *8% GDP growth forecast for 2004*, CHINA DAILY, Nov. 11, 2003, http://www1.chinadaily.com.cn/en/doc/2003-11/06/content_278919.htm.

206. See Amy E. Eckert & Manooher Mofidi, *Doctrine or Doctrinaire—The First Strike Doctrine and Preemptive Self-defense Under International Law*, 12 TUL. J. INT’L & COMP. L. 117, 119 (2004).

207. See WTO General Council, *Doha Work Programme: Decision Adopted by the General Council on 1 August 2004*, WTO Doc. WT/L579 (Aug. 2, 2004), available at http://www.wto.org/english/tratop_e/dda_e/draft_text_gc_dg_31july04_e.htm (containing frameworks and other agreements designed to focus the negotiations and raise them to a new level).

gotiations following a failed 2003 Cancun summit.²⁰⁸ Developing countries took issue with the July framework negotiations, claiming that they deviated from traditional negotiations between developing and developed countries and the result was effectively a ministerial declaration that is not backed by any ministerial meeting. Representatives of developing countries fear that the “July package” may create an unwanted precedent because only forty trade ministers were present, with some one hundred absent. They also fear that the GC improperly bypassed the ministerial conference by taking action at the July GC meeting, and charging that the GC meeting supplanted the need for a ministerial meeting. The gravest fear is that the GC may become the *de facto* supreme institution for WTO decision-making. Some developing countries are also hailing the GC’s decision as another triumph for the major superpowers, particularly the United States.²⁰⁹

Similarly, in the instance of the U.S.-China yuan controversy, the United States elected to bypass the international organ that is the WTO dispute mechanism. In this instance, the United States failed to avail itself of the DSB,²¹⁰ and instead employed coercive economic and political pressure. Specifically, it used unilateral negotiation tactics pursuant to unilateral trade policy, which are outside the parameters of the WTO dispute resolution mechanism.²¹¹

Such unilateral acts are violations of the WTO norm of economic equality.²¹² The inherent danger of the U.S. employment of unilateral actions for purposes of favorably resolving trade disputes is that unilateral actions unnecessarily challenge and threaten the legitimacy of the WTO as an international inter-governmental organization. They also threaten the jurisprudence of international trade and threaten to *legalificate* the WTO Agreement. Kagan Thesis taxonomies produce retrograde effects lending to legalification. As a result, the powers and po-

208. See World Trade Organization, *Day 5: Conference Ends Without Consensus*, at http://www.wto.org/english/thewto_e/eminis_e/min03_14sept_e.htm. (last visited Sept. 20, 2004).

209. Walden Bello & Aileen Kwa, *WTO: G 20 Leaders Succumb to Divide-and-Rule Tactics: The Story Behind Washington's Triumph in Geneva*, Focus on the Global South, (Aug 10, 2004), at <http://www.focusweb.org/main/html/Article408.html?POSTNUKESID=00db2c0a6acab4e66fb491227cf7fba2>.

210. See generally Understanding on Rules and Procedures Governing the Settlement of Disputes, *supra* note 95, arts. 1–17.

211. See Zeng, *supra* note 115, at 29–30.

212. See JACKSON, *supra* note 63, at 57–58.

tential of the WTO DSB will eventually be retrograded to the status of its predecessor, GATT, with a similar watered-down deterrent effect.²¹³

In terms of GATT or the WTO, the critical issue is ascertaining the line between governmental measures that are often taken for legitimate domestic policy reasons, and measures so predatory in nature that the international trading system should no longer tolerate them.²¹⁴ The question of unilateralism is not well regulated by either GATT or the WTO. Consequently, such dilemmas result in a challenge to the jurisprudence of international trade.²¹⁵ The United States cannot benefit by partaking in unilateralism, and engaging in unilateral negotiation tactics pursuant to unilateral trade policy.²¹⁶

U.S. protectionism can be linked to domestic politics²¹⁷ and the 2004 presidential elections.²¹⁸ U.S. protectionism can also be attributed to earlier Clinton administration policies, which are still in force to a substantial degree under the Bush administration.²¹⁹ The Kagan Thesis posits that policies of the Clinton and Bush administrations rested on a common and distinctive American assumption that the United States was the indispensable nation, in that the United States seeks to defend and advance a liberal international order.²²⁰ The Clinton administration initially entered office talking about assertive multilateralism, but ended up talking about America as the indispensable nation.²²¹

213. See *Blackmore*, *supra* note 104, at 489.

214. See *JACKSON*, *supra* note 63, at 118.

215. See *id.*

216. See *Zeng*, *supra* note 115, at 2–3.

217. See *Focus: Escalating Pressure on Yuan Revaluation*, *supra* note 16.

218. See *id.*

219. See, e.g., KAGAN THESIS, *supra* note 26, at 6–7; Marcus Noland, *China and the International Economic System*, INST. FOR INT'L ECON. WORKING PAPER No. 95-6, ¶ 7 (1995), at <http://www.iie.com/publications/wp/1995/95-6.htm> (“Thus the overarching goals of United States economic policy toward China are to promote political and economic liberalization within China (which the Clinton Administration explicitly views as linked), integrate China into global institutions, and pursue US commercial interests (which the Administration largely identifies as exporters’ interests).”); Bates Gill & Nicholas Lardy, *China Searching for a Post-Cold War Formula*, BROOKINGS REV., Fall 2000, at 15, 16–18 (stating that the promotion of political and economic liberalization is contingent upon securing China’s full compliance with global trading system rules).

220. See KAGAN THESIS, *supra* note 26, at 94.

221. See *id.* at 52 (“The lessons for Americans, including the top officials in the Clinton Administration, was that even with the best intentions, multilateral action could not succeed without a significant element of American unilateralism, an American willingness to use its overwhelming power to dominate both war and di-

Despite differences between neo-realists and neo-liberalists,²²² both groups share an overriding interest of promoting political and economic liberalization.²²³ U.S. foreign policy accordingly links itself to a quest for a Kantian perpetual peace.²²⁴ Kagan described this peace as having been actually attained to a certain extent by the European Union in its strategies of legalism and multilateralism.²²⁵ He described Europeans as favoring peaceful responses to crisis, favoring persuasion to coercion; more ready to appeal to international law, international conventions and international organizations; and most importantly, trying to employ commercial and economic ties as means to bind nations together.²²⁶

The end of the Cold War and the rise of globalization seemed to point toward a new utopian international reality, “[w]here—as different scholars predicted—history, geography, and ideology would become things of the past, subsumed in a new, highly interpenetrated and interconnected international order.”²²⁷ The utopian vision of a new international order parallels the idealistic thinking that followed the First and Second World Wars.²²⁸ This utopian vision is commonly known as the

plomacy when weaker allies hesitated.”).

222. *IR Paradigms, Approaches, and Theories*, IR Theory Web Site, at <http://www.irtheory.com/know.htm> (last visited Sept. 26, 2004) (defining Neoliberal as encompassing “those theories which argue that international institutions play an important role in coordinating international cooperation” and Neorealism as follows):

Essentially, a systemic, balance of power theory developed by Kenneth Waltz in which states do not seek to maximiz[e] power, but merely balance it. And because the international system is regarded as anarchic and based on self-help, the most powerful units set the scene of action for others as well as themselves.

Id.

223. See Lise, *supra* note 149, ¶¶ 4–6 (“Today the field of International Relations is dominated by the contemporary debate between the neorealist perspective and neoliberal institutionalist approach.”).

224. See IMMANUEL KANT, PERPETUAL PEACE 10–23 (Lewis White Beck ed., Bobbs-Merrill 1957) (1853).

225. See KAGAN THESIS, *supra* note 26, at 57 (arguing that “Europeans have stepped out of the Hobbesian world of anarchy into the Kantian world of perpetual peace,” and that “the United States solved the Kantian paradox for the Europeans”). Kagan generally attributes this solution to the Cold War, American buildup of military power, defense of Europe and what he terms a free ride in terms of global security for Europe. See *id.* at 54–57.

226. See *id.* at 5.

227. See Fawcett, *supra* note 184, at 1.

228. See *id.* (“[T]he end of a major war, even a ‘cold’ one, not unnaturally gives rise to hopes for the evolution of a just, peaceful, and prosperous international order.”).

Democratic Peace Thesis. The Democratic Peace Thesis is the tenet that says that “democracies do not fight each other.”²²⁹ The Democratic Peace Thesis also evolved into cosmopolitan democracy, further evolving into models of world peace, democracy, equality and justice.²³⁰

The Democratic Peace Thesis presents the question of whether there is a nexus between free trade and the Democratic Peace Thesis or Kant’s perpetual peace.²³¹ Moreover, assuming *arguendo* that a casual relation exists, one must ascertain whether the Democratic Peace Thesis more readily comes to fruition through either neo-realism or neo-liberalism.

Cosmopolitan law, in conjunction with international law, provides states with incentives to moral commitments, and facilitates the “spirit of commerce” to promote peace, not war.²³² Cosmopolitan law fills the gap between traditional international law, which applies primarily between nation-states, and domestic constitutional law that regulates relations between a state and its own citizens.²³³

Liberal economic theory and its attendant comparative advantage theory posit that cosmopolitan ties evolve from cooperative international divisions of labor and free trade.²³⁴ Economies are better off than they would have been under autarchy, acquiring incentives to avoid breaking economic ties.²³⁵ Open markets, as a corollary of free trade, are contingent on the assumption that the next set of transactions will be determined by legal rights and agreed upon prices, and not by coercion. Thus avoiding military conflicts among liberal states or “enhancing

229. See generally Kant, *supra* note 224, at 10–23; Benjamin Solomon, *Kant’s Perpetual Peace: A New Look at This Centuries-Old Quest*, 5.1 ONLINE J. OF PEACE AND CONFLICT RESOLUTION, ¶ 106 (Summer 2003), at http://www.trinstitute.org/ojpcr/5_1solomon.pdf.

230. See Solomon, *supra* note 229, ¶ 106.

231. See James Lee Ray, *Does Democracy Cause Peace?*, 1 ANN. REV. POL. SCI. 27, 43 (1998) (“The empirical evidence in favor of the proposition that democratic states have not initiated and are not likely to initiate interstate wars against each other is substantial.”).

232. See Michael W. Doyle, *Liberal Internationalism: Peace, War and Democracy*, Nobelprize.org, ¶ 6, at <http://nobelprize.org/peace/articles/doyle/html> (discussing cosmopolitan sources of liberal peace).

233. See generally Pauline Kleingeld, *Kants politischer Kosmopolitismus*, in 5 ANN. REV. L. ETHICS (1997), <http://www.str2.jura.uni-erlangen.de/JRE/vol05/a5-klein.htm>.

234. See Block et al., *supra* note 35, at 419–21.

235. See WEBSTER’S NEW TWENTIETH CENTURY DICTIONARY OF THE ENGLISH LANGUAGE 126 (2nd ed. 1983) (defining autarchy as “economic self-sufficiency as national policy; getting along without goods from other countries”).

each other's security by means of alliance" naturally results in economic interdependence.²³⁶

Moreover, international economic interdependence lessens the need for governmental planning of production and distribution.²³⁷ As a result, foreign states become less responsible for outcomes.²³⁸ The international market thereby evolves into a greater interdependence of commerce and the international contacts of state officials, who, ultimately, serve as lobbyists for mutual accommodation.²³⁹ Merchants of commerce and trade accordingly create interests in favor of accommodation, while offering a variety of solutions to any potential challenges to this relationship.²⁴⁰ A combination of trust, property rights, and mutual expectation of the rule of law makes economic and non-economic disputes easier to resolve.²⁴¹ These cosmopolitan sources of liberal peace, such as democracy, cosmopolitan law, international law, international markets, and free trade foster cosmopolitan ties lending to multilateralism, not unilateralism.²⁴²

Liberal institutions, liberal ideas, and transnational ties function as important factors to promote sustained liberal peace by encouraging the traits of liberal polities and economies together.²⁴³ It is in this manner that a Kantian perpetual peace comes to fruition. In conjunction with empirical evidence indicating that democratic states are not likely to initiate wars against each other,²⁴⁴ there appears to be a causal relationship between free trade and the Democratic Peace Thesis or Kantian perpetual peace.

The only viable means for reaching the vision of world peace or the perpetual peace envisioned by Kant is through multilateralism, not unilateralism, or Hobbesian multilateralism. The United States's unilateral actions in trade will ultimately have damaging effects on the economies of both the United States and China, including international relations and the quest for

236. Doyle, *supra* note 232, ¶ 7 ("The interdependence of commerce and the international contacts of state officials help create crosscutting transactional ties that serve as lobbies for mutual accommodation.") (internal footnote omitted).

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.*

242. Doyle, *supra* note 232, ¶¶ 7-8.

243. *Id.* ¶ 6.

244. See Ray, *supra* note 231, at 37-39 (summarizing various scholarly studies on the history of military conflicts).

Kantian perpetual peace. There seems to be a consensus among neo-liberals, such as those espoused by the European Union, that world peace in modern times is contingent on multilateralism, not unilateralism or Hobbesian multilateralism.

The goals of the Bretton Woods Institutions,²⁴⁵ of U.S. foreign policy, and of the WTO are indistinguishable. All promote political and economic liberalization on a worldwide scale.²⁴⁶ U.S. foreign policy and its emphasis on political liberalism may seem distinguishable from the goal of promoting free trade by multilateral trade rules. Nevertheless, U.S. foreign policy parallels the goals of neo-liberalism, a European Union, and the original foundational goals and policies of the Bretton Woods Institutions.²⁴⁷

As a testimony to the Kagan Thesis, the experiences of the European Union parallel that of China, in that it too experienced the threat of unipolar U.S. unilateral acts.²⁴⁸ Now, both the European Union and non-European Union powers such as China, struggle against a supposed hegemonic power, the unipolar United States.²⁴⁹

International conflict and division frustrates the goals of multilateralism, disappointing the "spirit of commerce" and trade. The Kagan Thesis operates as an antithesis to genuine multilateralism and "soft" globalization. As an antithesis of multilateralism and "soft" globalization, it prognosticates and exacerbates international conflict, including U.S.-E.U. relations and relations between developing and developed nations. A problem of the Kagan Thesis is an expressed espousal of unilateralism that justifies and prophesizes continued U.S. unipolarity. The Kagan Thesis and its scriptures of neo-realism, power politics, and unilateralism contribute to a division among nations on a worldwide scale, which is contrary to aspirations of multilateralism.

The earlier failure of the WTO meeting in Seattle and the

245. See MALANCZUK, *supra* note 91, at 223–25.

246. See Noland, *supra* note 219, at 7–14.

247. See MALANCZUK, *supra* note 91, at 223–25.

248. See KAGAN THESIS, *supra* note 26, at 40 ("From the European perspective, the United States may be a relatively benign hegemon, but insofar as its actions delay the arrival of a world order more conducive to the safety of weaker powers, it is objectively dangerous.")

249. See Carey Schofield & Michael Smith, *EU Force Will Not Need NATO, Says French Military Chief* (Mar. 28, 2001), News.Telegraph, at <http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2001/03/28/wforc28.xml>; Michael Wines, *In Letter to Bush, Putin Urges Wider U.S-Russian Cooperation*, N.Y. TIMES, Jan. 25, 2001, at A5 (discussing the alliance of Russia with China and India).

failure of the 2003 Fifth Ministerial Conference of the WTO exemplify the failure of genuine multilateralism and “soft” globalization, and legalification. At Cancun, much needed trade negotiations collapsed because countries could not come to a consensus and nearly brought a collapse to the Doha Development Agenda.²⁵⁰ Chairman Luis Ernesto Derbez attributed a lack of consensus to members remaining entrenched, particularly on the “Singapore issues” of trade and investment, trade and competition policy, trade facilitation, and transparency of government procurement.²⁵¹ The “Singapore issues” are significant because they represent a growing division between developed countries and developing countries. They also signify the implications of an invocation of unilateralism and “hard” globalization, as demonstrated by developed countries and economies in their insistence on a WTO treaty on foreign investment.²⁵² The Kagan Thesis analogously presents the same dangers in that it promotes unilateralism, and “hard” globalization, thereby threatening legalification of the WTO agreement.

New geopolitical forces and economic realities affecting developing countries and economies create the need for a “new”

250. See *Conference Ends Without Consensus*, *supra* note 208, at ¶¶ 2–3.

251. See generally World Trade Organization, *International Conference on Financing for Development: Statement by Mr. Ouedraogo*, WTO Deputy Director-General to the Final Preparatory Committee, 14–25 January, New York, USA, at http://www.wto.org/english/news_e/news02_e/ouedraogo_stat_fin&dev_conf_e.htm. For more information on “Singapore issues,” see C. Rammanohar Reddy, *Decision Time on Singapore Issues at WTO*, HINDU, Jul. 28, 2003, <http://www.hinduonnet.com/thehindu/2003/07/28/stories/2003072803001200.htm>.

These “new” or “Singapore” issues, so called because they first entered the WTO agenda at the 1996 Singapore ministerial conference, were included in 2001 in the agenda of the Doha round of trade talks only after tense negotiations between the European Union, which for years has been demanding a WTO treaty on foreign investment, and India, which has been leading the resistance to an expansion of the role of the WTO. A compromise then pushed a final decision to the Cancun WTO conference. According to the Doha ministerial declaration, which has now become the subject of differing legal interpretation, “negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that Session on modalities of negotiations.”

Id.

252. See KAGAN THESIS, *supra* note 26, at 54–57; Romano Prodi, President of the European Commission, Speech on “Europe and Peace” at the University of Ulster, ¶ 10 (Apr. 1, 2004) (transcript available at http://europa-eu-un.org/articles/lt/article_3372_lt.htm); Patrick J. Garrity, *Old Europe, New Europe: A Review of Robert Kagan, Of Paradise and Power: America and Europe in the New World Order*, 2003 CLAREMONT INST., ¶¶ 1–3, at <http://www.claremont.org/writings/030219garrity.html>.

multilateralism, as opposed to Hobbesian multilateralism. Eventually, the concerns of developing countries will have to be addressed in a manner that they perceive as more fair, just and democratic.²⁵³ During the post-Cancun period and the July GC meeting, the G20 group of developing nations has arisen as a possible key player for developing countries in trade relations.²⁵⁴ The G20 was thought to have broken a monopoly over trade negotiations held by the United States and the European Union.²⁵⁵ This equilibrium between trade powers in WTO negotiations may be only temporary, however, because many developing countries are not included in the G20. Power politics and the marginalization of developing countries remain an ongoing concern of the WTO and Doha Development Agenda.²⁵⁶

The need for genuine multilateralism and “soft” globalization are apparent. More specifically, it is a question of what positive roles developed countries and economies, the OECD group, and especially, the United States, all play in promoting a “new” multilateralism and reducing the negative effects of power politics and Hobbesian multilateralism.²⁵⁷

In addition, other countries, including developing countries, may take the lead from U.S. unilateral trade policy and increasingly engage in unilateralist trade approaches. There would, as a result, be an increase in protectionist trade activities, attended by a corresponding increase in protectionist activities such as anti-dumping and anti-subsidy cases. In recent years, the WTO has witnessed an increase in protectionist trade activ-

253. Amitav Acharya & Richard Stubbs, *The Asian Pacific Region in the Post-Cold War Era Economic Growth, Political Change, and Regional Order*, in *THE THIRD WORLD BEYOND THE COLD WAR CONTINUITY AND CHANGE* 118 (Louise Fawcett & Yezid Sayigh eds., Oxford University Press 1999).

254. Spawned by the G7 in 1999, the informal G20 collaboration began as an international talking shop dedicated to maintaining global financial stability, and five years later, the group's size has lent it a voice in official discussions of international monetary issues. See John Kirton, *What is the G20?*, University of Toronto, at <http://www.g7.utoronto.ca/g20/g20whatisit.html> (noting that the G-20's initial 18 country members were, in addition to the G7, Argentina, Australia, Brazil, China, India, Mexico, Russia, Saudi Arabia, South Africa, South Korea, and Turkey); see also G-20 MEXICO, *G-20 Background Information*, at <http://www.hacienda.gob.mx/g20-2003/background.html> (last visited Sept. 23, 2004).

255. See Bello & Kwa, *supra* note 209, ¶¶ 1-4.

256. See Walden Bello, *D-Day for the WTO*, Focus on the Global South, at <http://www.focusweb.org/trade/html/Article248.html?POSTNUKESID-17852af03b423593> (last visited Sept. 27, 2004) (discussing the imbalance of bargaining powers and noting that WTO trade negotiations have been historically dominated by the U.S and the E.U.).

257. See Hon. Rohee, *supra* note 98, at 4-5.

ity, especially in anti-dumping measures undertaken by developing countries and economies such as China, South Korea, Brazil, and Mexico.²⁵⁸ An increase in protectionism by developing countries, however, only followed earlier anti-dumping measures of developed countries such as Australia, Canada, the European Union, and the United States, who attempted to restrain imports from developing countries.²⁵⁹

The United States is not solely responsible for an invocation of power politics, unilateralism, and “hard” globalization into the international trade arena. Other developed countries and economies that possess a great deal of economic and military material sources also play power politics.²⁶⁰ Nations that possess relatively greater strength in material sources simply have greater capability for employing power politics. The logical extension of this argument is not necessarily that less culpable nations with relatively less strength in material sources are excluded. An increasing use of trade sanctions by developing countries and economies also exacerbates problems of power politics, unilateralism and “hard” globalization in international trade. Genuine multilateralism depends on the interaction of both developed and developing countries.²⁶¹

Nonetheless, the United States bears a special responsibility. Important responsibilities attach to a nation such as the United States, which possesses hegemonic power, adopts Hobbesian multilateralism, and considers itself as “the” indispensable nation. Following the failed Cancun summit of the WTO, the United States failed to understand the prevailing geopolitical forces and economic realities of international trade. That is, nations are more willing to resist U.S. unipolarity and unilateralism. In contrast, multilateralism promotes nations more read-

258. See Hidetaka Yoshimatsu, *The Political Economy of Antidumping in Japan*, 6 J. OF ASIA PACIFIC ECON. 22, 22–23 (2001); WTO Committee on Anti-Dumping Practices Semi-Annual Reports Under Article 16.4 of the Agreement, WTO Doc. G/ADP/N/98/Add.1/Rev.2 (Apr. 16, 2004), available at http://docsonline.wto.org/gen_search.asp?searchmode=simple; World Trade Organization., *WTO Secretariat Reports Significant Decline in New Anti-Dumping Investigations* (May 2, 2003), at http://www.wto.org/english/news_e/pres03_e/pr339_e.htm (stating that forty of the 149 initiations during the second semester of 2002 were reported by developed countries).

259. See Yoshimatsu, *supra* note 258, at 23.

260. See generally Beukel, *supra* note 60, at 6, 12, 17 (discussing that high-income countries' tendency to demand strict environmental conditions in trade agreements with less affluent nations is likely to be confronted by reactions against globalization and “a need to demonstrate national identity”).

261. See Hon. Rohee, *supra* note 98, at 5.

ily willing to engage a unipolar United States. As a result, when the U.S. Trade Representative signaled a continuing commitment to a unilateralist approach in trade by announcing that the United States would place greater emphasis on negotiating bilateral treaties with “can do” nations, the “cannot do” nations and the WTO regime were implicitly labeled as prospective future victims of U.S. unipolarity and unilateral trade policies,²⁶² thereby reaffirming the United States’s commitment to Kaganism and unilateral trade policies.

U.S. unilateral trade policy and unilateral trade negotiation tactics, which manifest “hard” globalization, create circumstances under which the legalification of the WTO regime becomes an effective tool for governance of global trade. These circumstances ensue because U.S. unilateral tactics undermine the authority of the WTO regime by relegating it to a state of residual importance. In conjunction with other developed countries and developing countries taking similar unilateral action in response to Kagan Thesis type taxonomies, U.S. unilateral trade policy will eventually contribute to the relegation of the WTO regime into a legal body possessing neither legal quality nor constituting an authoritative instrument of law, legalification (*Verrechtlichung*).

CONCLUSION

*The United States cannot move out of history and be at the same time its most authentic contemporary expression.*²⁶³

In future relations with China, one only hopes that the United States and other developed countries and economies will respect the WTO DSB mechanism for resolving international trade disputes. Using the DSB is a far better option than avoiding rule of law and the jurisprudence of international trade in

262. See Bello & Kwa, *supra* note 209, ¶ 4. Generally, the divide between “can do” and “cannot do” or “won’t do” nations represents the divide between developed and developing country members of the WTO, especially regarding the “Singapore issues.” See Press Release, Office of United States Trade Representative, USTR Robert B. Zoellick, Trade Talks Collapse Over Unwillingness of Some to Negotiate (Sept. 14, 2003), <http://usinfo.org/wf-archive/2003/030915epf116.htm>.

263. See Mohamed Sid Ahmed, *The Kagan Thesis (3)—Beyond Fukuyama and Huntington?*, AL-AHRAM WEEKLY ON-LINE No. 602 (Sept. 11, 2002), <http://weekly.ahram.org.eg/2002/602/op3.htm> (discussing Robert Kagan’s conceptualization of present-day international relations).

resolving trade disputes.²⁶⁴ Otherwise, true multilateralism can only be promoted by a more “soft” globalization, rather than “hard” globalization.

A resolution of the China-yuan-controversy is not dependent on whether China justifiably or unjustifiably pegs, rather than floats, its foreign currency rate. A resolution will also not be based on inwardly directed theories in economics and politics, such as domestic policies, which reflect American nationalism. A resolution of the controversy will not turn on whether China violated the GATT or WTO rules.²⁶⁵ An eventual resolution of this controversy must necessarily focus on preserving and strengthening the world trade system, by lending efficacy, not legalification (*Verrechtlichung*), to the WTO Agreement. A unilateral U.S. trade regime fails to avail itself of the WTO dispute resolution mechanism and thereby lends to legalification, not efficacy, of the WTO Agreement.

For China, the United States, and other nations, growth and prosperity is directly related to policies in international relations and international trade relations, which favor multilateralism. Growth is moreover linked to the exclusion of more inwardly directed nationalistic, domestic-centered foreign policies.²⁶⁶ The historic link between trade and foreign policy in developed countries and economies is best evidenced by U.S. trade policy, which is best exemplified by the Jackson-Vanik Debate. This debate reflected legislation, which yielded to domestic constituencies and lobbyists who sought trade policy and protectionism as an answer to a struggling economy.²⁶⁷ In the Jackson-Vanik Debate, domestic constituencies and lobbyists such as the AFL-CIO sought to influence trade policy and protectionism. Such lobby groups were also influential on March 19, 2004, when they sought to compel the U.S. Trade Representative to use Section 301 of the Trade Act for purposes of both influencing trade policy and encouraging protectionism.²⁶⁸ The United States offered hope for multilateralism by rejecting the request of the AFL-CIO to investigate alleged violations of work-

264. For examples of the consequences of not using the DSB, see World Trade Organization, *Conference Ends Without Consensus*, *supra* note 208, ¶ 2; Reddy, *supra* note 251.

265. See *Focus: Escalating Pressure on Yuan Revaluation*, *supra* note 16 (discussing the U.S.'s tendency to pursue remedies outside of the WTO regime, such as politically and economically-based coercion).

266. See HOEKMAN & KOSTECKI, *supra* note 105, at 21–22.

267. See *id.*

268. See *Will 'Section 301' Affect Chinese Economy?*, *supra* note 153, ¶ 1.

ers' rights in China and currency manipulations.²⁶⁹

A requisite for successful multilateral trade is a successful WTO agenda, and a WTO Agreement that provides an effective mechanism to govern international trade. U.S. unilateral trade policy is not a *fait accompli*. The alternative to unilateralism is multilateralism, or “[s]oftness controlling hardness.”²⁷⁰ Genuine multilateralism necessitates that the United States strive for a more *emic*, in conjunction with *emit*,²⁷¹ understanding of Sinism for purposes of promoting “soft” globalization and multilateralism in both international relations and international trade relations. Empirical evidence indicating a failure in U.S. unilateral trade negotiation tactics in countries such as China, Brazil, and India,²⁷² suggests that eventually, multilateralism will prevail over unilateralism in international trade relations. This triumph of multilateralism will represent “soft” globalization’s inevitable victory over “hard” globalization. Moreover, one hopes that in both international trade relations and in response to a Treasury Department announcement that “serious engagement with China on these issues will continue,”²⁷³ one will always find, “[s]oftness controlling hardness.”²⁷⁴

269. See Dai Yan & Hu Qihua, *Officials, Analysts Hail US Trade Move*, CHINA DAILY (Apr. 30, 2004), http://www.chinadaily.com.cn/english/doc/2004-04/30content_327581.htm.

270. See Sun Jianyun, *supra* note 1.

271. See generally Alan S. Kaye, *An Interview with Kenneth Pike*, 35(3) CURRENT ANTHROPOLOGY 291, 291–298 (June 1994).

272. See Zeng, *supra* note 115, at 13, 20–21.

273. See 2003 REP. TO CONGRESS ON INT’L ECON. EXCH. RATE POLICIES, *supra* note 86, at 8–9.

274. See Sun Jianyun, *supra* note 1.

