

Trump's Year-One Trade Policies: Belligerent Rhetoric - But Still Unsettled*

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1. Year-One's Score

It has been one year since President Trump took office. He came to office riding a tide of anti-trade rhetoric as one of the most protectionist candidates ever to have won an election. Trade was clearly a major issue, which is quite rare in presidential politics. The recently concluded WTO Ministerial Conference in Buenos Aires achieved no significant accomplishments.¹ During the conference, the United States Trade Representative (“USTR”) Robert Lighthizer made unsettling and acrimonious statements.

The WTO is losing its essential focus on negotiation, and is becoming a litigation-centered organization Too often members seem to believe they can gain concessions through lawsuits they could never get at the negotiating table It's impossible to negotiate new rules when many of the current ones are not being followed.²

Ominously, a few weeks after the Buenos Aires ministerial conference, on the first

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anniversary of President Trump's inauguration. the administration submitted to Congress its report on China's WTO compliance.³ It stunningly stated:

It seems clear that the United States erred in supporting China's entry into the WTO on terms that have proven to be ineffective [T]his mechanism (the WTO dispute resolution system) is not designed to address a situation in which a WTO member has opted for a state-led trade regime ...⁴

Even more ominously, a few days after the conclusion of the Buenos Aires ministerial conference, President Trump announced his first major trade remedies decision. He authorized safeguard tariffs on washing machines and solar products aimed at South Korea and China.⁵ This decision might very well mark a turning point that seriously begins implementation of the president's belligerent rhetoric. On the other hand it may not. At this point it is unclear. More trade remedy cases are pending.⁶ Future actions will be more determinative.

President Trump's recent speech to the World Economic Forum at Davos merely restated his long-standing call for greater trade enforcement actions (and for greater investment into the US.). President Trump said: "We will enforce our trade laws and restore integrity to our trading system."⁷ But there was no explicit condemnation of China or the WTO. While Trump did not espouse a return to the American leadership in the global system, he did announce a possible reconsideration of the Trans-Pacific Partnership ("TPP").

Most recently, in his first State of the Union Address President Trump directly addressed global trade but only in five surprisingly short sentences. He neither announced any new trade actions, nor lambasted the global trading system or its institutions or specific countries. Interestingly, President Trump seemingly narrowed his concerns primarily to protecting American intellectual property rights through trade enforcement. President Trump simply stated:

The era of economic surrender is totally over ... We will work to fix bad trade deals and negotiate new ones ... And we will protect American workers and American intellectual property through strong enforcement of our trade rules.⁸

What can be then be said about the US trade policy after one year of the Trump administration? First, there were some international highlights related to global

trade and business during the first year of the Trump administration. They are:

- The U.S. withdrew from the Trans-Pacific Partnership and opposes granting market economy status to China.⁹ No new WTO case has been filed by the U.S. The OECD agreed on a global tax avoidance treaty, and the U.S. refused to sign it.¹⁰
- There was no U.S. withdrawal from the WTO or its dispute-resolution system. However, the Trump administration has made constant complaints about them.¹¹ The administration has focused on protecting U.S. sovereignty and rejecting so-called expansive interpretations made by the WTO and, in particular, by its Appellate Body.¹²

Second, the US neither declared China to be a currency manipulator, nor imposed a border tax on its exports. The USTR is assessing Section 232 (national security) action against China for its domestic steel and aluminum policies¹³ and those relating to the mandatory transfer of intellectual property rights under Section 301. The International Trade Commission (“ITC”) recommended safeguard action against China and South Korea under Section 201 concerning solar panels and washing machines and President Trump announced the imposition of safeguard duties.¹⁴ Responding to this, South Korea and China promptly filed new cases against the US in the WTO.¹⁵ The US Department of Commerce also authorized a subsidy duty on Canadian lumber.¹⁶

2. Observations

A. WTO

In this regard, my observations are as follows. Not much international action has taken place, as opposed to diffused proposals and extensive rhetoric. Rather, more domestic trade remedy proceedings against China have been initiated and threatened. However, only recently have safeguard duties been imposed in one case. No real significant action against the WTO or its dispute-resolution system has taken place, either. In fact, in recent cases, the US continues to win as both a complainant and a respondent. For example, in a case involving Boeing, the WTO reversed its state subsidies ruling in favor of the US.¹⁷ The WTO upheld the US labeling regulations for tuna in a compliance case introduced by Mexico.¹⁸

Also, the US won a WTO case brought against it by Indonesia concerning the US antidumping duties.¹⁹ Canada has recently filed two new cases against the US contesting duties on lumber imports²⁰ and broadly attacking the US trade remedies system.²¹ The US is expected to contest them. From 1995 to 2017, the US has been a complainant in 115 cases and a respondent in 130 cases at the WTO. It has won a huge majority of them as complainant and a majority of all cases. The US has been involved in nearly half of all WTO cases.²² Clearly, it is the greatest user of the dispute-resolution system.

B. NAFTA

NAFTA renegotiation is moving along bitterly. The US opposes the dispute resolution procedures (Chapters 11 and 19) providing for investor-dispute panels and national appeals from dumping and subsidy determinations.²³ Some actions on trade in the Department of Commerce and the ITC - such as a Commerce Department subsidies ruling against Canada's Bombardier - have taken place. Reliance on administrative trade remedies has increased significantly. This includes rare reliance on national security (Section 232)²⁴ and retaliation (Section 301). There was a 16-year high on private corporate actions (79 new investigations by the Department of Commerce) in 2017, undoubtedly inspired by the administration's anti-trade rhetoric.²⁵ More such actions are expected. However, interestingly, the ITC recently ruled against Boeing and for Bombardier when it determined that Boeing was not injured.²⁶

C. Comments

The grave decline in cases brought to the WTO compared to other presidential administrations is historic.²⁷ (None have been brought by the Trump administration.)

Congressional action concerning the Committee on Foreign Investment in the United States ("CFIUS")²⁸ seems imminent. In addition, implementation of the new tax legislation concerning global taxation of multinational corporations is proceeding.²⁹ Tightening foreign investment rules, especially those relating to Chinese investment in the technology sector, and taxing multinationals and their overseas profits seem to be about right, but caution is needed. Europeans have already warned the US that various tax provisions, such as an excise tax on

purchases by the American firms from their subsidiaries, may violate the WTO obligations.³⁰

The economic need of foreign direct investment for state economic development is great. States want foreign investment. CFIUS - the interagency committee of the federal government that reviews the national security implications of foreign investment in the US companies or operations - should not become a disincentive for foreign investors.³¹

A growing divide already exists between the federal government and the states over such investment. State governors, including most Republican ones from agricultural states, strongly support greater trade and foreign investment considering it the key to competing successfully in the global economy.

3. The Bottom Line

The administration's noise and tone are quite unsettling. Failure by the administration to act more forcefully so far is undoubtedly a result of the clash of domestic interests. But the rhetoric and posturing (over national sovereignty, unilateral measures, bilateral trade deals, sanctions, and trade deficits) are already impacting trade flows and diminishing the American standing in the global system. This is occurring even as domestic and global economies and public markets are rebounding significantly. Hopefully, these trade noises and recent actions are not an overture to really harmful policies.³²

Most distressing, however, is the administration's lack of leadership in negotiating newer trade rules and its opposition to litigating existing trade disputes. Trade Representative Lighthizer's recent commentary, which criticized the WTO as now being 'litigation-centered,' at the WTO Ministerial Conference is truly baffling.³³ The US was pushing for a rules-based global system throughout the postwar era. It was the principal architect of this system during the Uruguay Round in the early 1990s. The American held the view that negotiated rules must be litigated and enforced when a dispute exists. Otherwise, what is the sense of negotiating them?

This was also one of the main reasons that the WTO was subsequently approved by Congress. Most importantly, why not litigate important trade issues today, especially when diplomatic negotiations of those issues are stalled? The role

for judicial determinations in the trade world should not be restricted because the negotiation of newer, more complex rules has been slowed. This is like telling the Supreme Court and the federal judiciary to stop deciding cases because Congress is unable to address newer issues. Indeed, this is precisely the time when judicial determinations are needed the most to resolve disputes over trade issues, even in light of the inability to formulate or legislate newer rules.

Lighthizer comes from the old world of protecting legacy industries such as steel; he does not have a sense of the importance of moving ahead with newer technological issues of trade, such as blockchain,³⁴ data flows, ecommerce, and artificial intelligence. He is a captive of the old era and not an advocate for embracing the newer digital era and its future. The American leadership in both developing newer rules for global trade and litigating existing concrete and complex cases cannot be abrogated. This should be one of the primary aims in the current US trade policy.

President Trump's well-known disregard for rules stem in part from his years of unrelenting real estate litigation and real estate transactions. Such experience, including dealing principally with only two parties to real estate contracts, have undoubtedly colored his administration's disdain for multilateral rules and institutions, espousal of unilateral actions, and policies in favor of bilateral trade deals. This disdain reflects President Trump's disdain for domestic rules and institutions.

The impact of President Trump's trade actions on the US role in the postwar world order seems most worrisome. China and the EU are the ones moving to fill the leadership gap. Most recently, the EU and Japan signed a huge bilateral trade agreement.³⁵ The TPP nations have finalized their pact.³⁶ (The US might now want to rejoin.) The US has not renegotiated or entered into any new bilateral agreements. Its renegotiations with Canada, Mexico and South Korea continue with a multitude of problems. There are no new negotiations with the EU concerning trade and investment.

4. Conclusion

The US is increasingly isolationist and parochial, reminding one of the 1930s in terms of the pre-Cordell Hull days of the Great Depression. Trump's revisionist

view of the US national interests is different from other presidents since World War II. These views are moving away from active engagement and moving toward being more isolationist and nationalist. Even the term 'America First' has its origins in the isolationism of the US in the 1930s. The 'America First' policy today abandons the American architecture of the postwar world and its leadership. We will soon know if 'America First' will mean 'America Alone.' Current policy creates more uncertainty and promotes disorder. That is not good.

The administration's recently released national security strategy merely restates President Trump's view on weaponisation of trade, stronger trade enforcement, and his belligerent trade rhetoric.³⁷ It moves trade to the center of national security policy and views more explicitly China as a strategic rival, not merely a trade competitor. However, this strategy otherwise breaks no new ground. It presents neither coherent policy nor consistency. The next few months will see if President Trump's rhetoric and minimal actions so far will turn into something worse, i.e., real Trumpian trade wars.

President Trump's nihilistic efforts are those of an international cowboy, rebranding, unfortunately, the earlier stereotype of the Ugly American. Reflecting the views of his tribal and nativist base in the US, the traditional Republicans and their support of international trade have inexplicably fallen away and are complicit in the humiliation of America's leadership and greatness.

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