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THE WTO: THE OTHER SIDE OF THE TRADE WAR

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The World Trade Organization was launched by the United States in 1990 leading up to the 1994 Marrakech Conference with the goal of opening economies and increasing world trade flows. The mechanism was the arbitration tribunals. Now with the process of globalization in retreat, it has made these tribunals inoperative and is dismantling the multilateral body. created for that purpose is being dismantled. The president of the United States, for the last two years, has sabotaged the appointment of the judges of the court of appeals of the same WTO, a body that is used if one of the parties is dissatisfied with the initial arbitration decision. Between January 1995 and December 2019, 592 cases have been filed with the WTO; 120 decisions have been made in the court of appeals, covering 162 of those cases. The rest were abandoned or decided outside the WTO. As of early December 2019, the United States had 124 cases before the WTO as a complainant and 155 cases in complaints against them in a universe of 31 complaining countries. The European Union has 194 cases as complainant and 86 in complaints against them in a universe of 18 countries complaining against them. China has 21 cases as complainant and only 44 cases in complaints against them in a universe of 4 countries in complaints against them.² Closing the WTO courts makes sense for the country against which there are more complaints from more countries, and which also does not believe in free trade. It also does not believe that there is legitimate jurisprudence outside its country, because of the principle of exceptionality.

The new Washington policy

The old Washington policy was focused on making its power felt through the use of financial resources in multilateral organizations and by exerting economic or military pressure when it came to countries. In Latin America it has been the promoter of coups d'état in alliance with the military in the region in the era of the "security and development" doctrine and later, in the era of "democracy and human rights", it directly

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² https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

intervened militarily in Nicaragua, Grenada and Panama. At the beginning of the 21st century this in Latin America varied to constitutional coups, as in Paraguay, Brazil and Honduras. The coup in Bolivia is a cross between a constitutional coup and a military reinforcement, similar to that of the 1950s.

In the rest of the world it operates with a different logic. In this paper we attempt to present what is called the new American strategic policy, summarized in an article by Colby and Mitchell of *Foreign Affairs*. (January/February 2020). The essence of the argument is that "The United States is preparing for a new era, marked not by undisputed U.S. dominance, but by a rising China and a vengeful Russia that seeks to undermine U.S. leadership and reform global policy in its favour." To get out from under this quagmire she has published her policy guidelines in the *2017 National Security Strategy*.³ It has four pillars: *PILLAR I: Protect the American people, the country, and the American way of life. PILLAR II: Promote American prosperity. PILLAR III: Preserve peace through force. PILLAR IV: Advance American influence.* Finally, there is *The Strategy in a Regional Context*.

The letter of introduction signed by President Trump says "The United States faces an extraordinarily dangerous world, filled with a wide range of threats that have intensified in recent years. When I came into office, rogue regimes were developing nuclear weapons and missiles to threaten the entire planet. Radical Islamist terror groups were flourishing. Terrorists had taken control of vast swaths of the Middle East. Rival powers were aggressively undermining American interests around the globe. At home, porous borders and unenforced immigration laws had created a host of vulnerabilities. Criminal cartels were bringing drugs and danger into our communities. Unfair trade practices had weakened our economy and exported our jobs overseas. Unfair burden-sharing with our allies and inadequate investment in our own defense had invited danger from those who wish us harm. Too many Americans had lost trust in our government, faith in our future, and confidence in our values."

The strategy for regaining lost leadership is that they do what they think is in their best interest and that the rest of the world accepts it. It puts the American government first. The strategy to regain the United States' presence in the world has four pillars. The fourth pillar says "The United States must lead and engage in the

³ <https://www.whitehouse.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf>

multinational arrangements that shape many of the rules that affect U.S. interests and values. A competition for influence exists in these institutions. As we participate in them, we must protect American sovereign- and advance American interests and values.”

Specifically, on the WTO, the text says: "The United States will continue to play a leading role in institutions such as the International Monetary Fund (IMF), World Bank, and World Trade Organization (WTO), but will improve their performance through reforms. These reforms include encouraging multilateral development banks to invest in high-quality infrastructure projects that promote economic growth. We will press to make the WTO a more effective forum to adjudicate unfair trade practices.”

In this fourth pillar there is at least one precedent with the WTO. With the World Bank and the IMF it does not need to exert pressure because it appoints the managing directors, it has veto power, and it is ultimately the Treasury that decides who is lent to and who is not. It has set reforms in motion in the past to shift lending from project based to policy based lending and has managed to incorporate agenda items. That's what the veto power installed since creation is for. They are not going to allow that to be lost or China to gain positions within it. Just remember that Washington's policy on the IMF/WB is defined in Congress in the committee of the Financial Services Committee of the U.S. House of Representatives, also known as the House Banking Committee and formerly known as the Banking and Currency Committee, which defines the funds the U.S. government allocates annually to the IMF and World Bank. It is not the central bank as in the rest of the world. This committee has a Subcommittee on National Security, International Development and Monetary Policy. The members of this subcommittee are those who deal with the Washington-based agencies. The implication of this is that decisions about contributions to the IMF and WB are made with U.S. national security considerations. That's why it doesn't matter what Trump says now about those institutions. That subcommittee will never allow the U.S. to lose its veto power. Nor will they give up their control privileges, some European countries that are double counted because they are uniquely represented as countries, and as members of the European Union as a whole: Britain, France and Germany. In contrast, at the WTO, a United Nations body, all members have one vote and no veto is possible.

In Pillar IV it says "The United States supports the peaceful resolution of disputes under international law but will use all of its instruments of power to defend

U.S. interests and to ensure common domains remain free.” This means that, if rulings under international law affect the interests of the United States, it will use all its instruments of power to defend its interests.

According to Marcelo Olarreaga of the University of Geneva, "If you ask me what I think the strategy of the U.S. administration today is to get rid of the WTO because then the United States can do whatever it wants... It wants to impose the rules of the United States on all countries.”⁴ This could leave as a dispute resolution mechanism the courts of the Southern District of New York, which were used in the landmark *Elliot v. Argentina* case, with Judge Griesa.⁵ This would be absolute unilateralism. The impartiality or in any case the perception of impartiality that an arbitration tribunal must have would be lost.

The sabotage of the WTO's appeal courts by the United States has been going on for a long time, since G.W. Bush to the present. The appellate court should have seven judges, but under Presidents George W. Bush, Barack Obama and Donald Trump - new judges have been prevented from being appointed to protest against the functioning of the WTO because they insist on its principle of exceptionality and that the US Constitution does not allow a foreign court - in this case the appellate judges - to replace a US court.⁶ Everything indicates that if they thought that the WTO would be an instrument of global domination, it did not work out and it was a boomerang. "Although statistically the U.S. wins most of the cases it files, it is also statistically accurate that it loses most of the cases filed against it when the issue is the use of trade remedies." ⁷

The appellate court is an integral part of the WTO's rationale which in Article 3.2 of the Agreement on Rules and Procedures Governing the Settlement of Disputes states: "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations

⁴ <https://www.npr.org/2018/10/02/653570018/u-s-blocks-appointments-of-new-judges-to-world-trade-organization>

⁵ <http://datos-bo.com/Economia-a-Finanzas/Analisis/Los-fondos-buitres-y-el-horrendo-antecedente-Elliot>

⁶ <https://www.dw.com/en/world-trade-organization-in-trouble-what-you-need-to-know/a-51592575>

⁷ https://www.wto.org/english/news_e/news18_e/ddgra_18dec18_e.htm

and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.”

American frustration with the speed of Chinese innovation and the size of its trade deficits fuelled a reaction against the multilateral body. The underlying argument is that China copies American inventions and thus violates the TRIPS agreement. On 23 March 2018, the United States requested consultations with China on certain measures relating to the protection of intellectual property rights, arguing that the measures appeared to be incompatible with Articles 3, 28(1)(a) and (b) and 28(2) of the TRIPS Agreement. This was immediately followed by China's first complaint against the United States (see below). That complaint was in the process of being resolved and everything indicated that it would be averse to the United States.

While that complaint was being discussed, on September 30, 2018, after a U.S. campaign to block the appointment and renewal of judges on both courts, dispute resolution and appeals, it prevented the renewal of one judge whose term expired that day, leaving three. The terms of two others ended on 10 December 2019, leaving Chinese judge Hong Zhao alone in office until the end of her term in November 2020. She cannot take on any cases alone because three judges are required to rule on appeals.⁸ The WTO, with that, ceased to exist for the practical purposes of the case. The trade war now has no brakes. Neither China, nor the United States, nor anyone else has anywhere to complain about trade arbitrariness. Since international trade contracts are made in U.S. dollars, this leaves the American courts as the natural candidates to replace the WTO tribunals.

What appears to be the case is that the Americans are bad losers and worse competitors. At the time the WTO was paralyzed, there was a proposal for reform signed by 100 countries. They did not accept it and simply boycotted the appointments of new judges, leaving a toothless institution.

The original American problem with China

The underlying problem in the discord with China, then reflected in US policy towards the WTO, began:

⁸ <https://www.reuters.com/article/us-usa-trade-wto-idUSKCN1LC190>

...in the early months of 2003, very soon after taking power, Hu and Wen laid the foundations for much greater economic intervention by Beijing than the United States and other WTO members had anticipated when they ushered China into the trade body. The importance of many of these actions would be recognized only in retrospect; the institutions created under Hu and Wen's leadership garnered little notice abroad at the time.

One of these institutions was the State-owned Assets Supervision and Administration Commission (SASAC), which took centralized control over the national government's shares of 196 of the biggest state-owned enterprises. These companies were corporate behemoths—PetroChina, China Mobile, Dongfeng Motors, and Sinopec, for example—that competed fiercely in private markets and issued much of their stock to global investors. But with the power to appoint (and remove) executives at many of these companies and a mandate to “maintain and improve the ... competitive power of the State economy,” SASAC was a completely novel instrument of economic management, even in a world where such state enterprises exist in many countries.⁹

The problem with this is that it places on the world stage an economic model of state intervention in the economy that contradicts the Western model of perfect markets and non-intervention. This is aggravated if we consider that the West, with its uninterrupted markets, has a growth rate of one third that of China. Worse still, these huge Chinese public companies have private shareholders and their shares are sold on Western markets. It is a Keynesian model of public enterprise, British style, but in the 21st century it is anathema to libertarians who ideologically think that all forms of intervention are communism. A communist scheme would not allow private interests because there is no private property, but that does not matter in contemporary American ideological discourse.

China shows a viable development scheme and a model that others can follow with the blessing of the international community in the WTO. That is the basic problem. On top of that they beat her in the competition. That is why what is at stake in the tariff negotiations is not tariffs but libertarianism, which China will not agree to in any way.

⁹ <https://foreignpolicy.com/2019/10/04/the-untold-story-of-how-george-w-bush-lost-china/>

The second issue at stake is who will dominate future high-tech industries, according to the USTR. China is determined to upgrade its industrial base in 10 strategic sectors by 2025, including aerospace, robotics, semiconductors, artificial intelligence and new energy vehicles.¹⁰ Putting the two concerns together, the result is that China's massive support for state-owned enterprises makes it difficult for U.S. companies to compete in the marketplace. For these reasons the United States would be losing the technological battle, in the logic of the White House and its ideologues.

What the US had at stake in the WTO

China has 21 cases as complainant and only 44 cases in complaints against them in a universe of 4 countries with complaints against them. Of the 21 cases as complainants, it has open and prepared for adverse rulings in a long list of claims for dumping since 2007. However, since 2018 the tension has risen. First was China's demand for certain measures on steel and aluminium products in April 2018. This was on April 4, 2018, that China requested consultations with the United States regarding certain tariff measures on Chinese goods that were allegedly to be implemented through section 301-310 of the US Trade Act of 1974. It then filed a request for renewable energy measures in August 2018. On 23 August 2018, China requested consultations with the United States regarding certain tariff measures allegedly imposed by the United States on certain goods from China. China claimed that the measures appeared to be inconsistent with Articles I:1, II:1(a) and II:1(b) of GATT 1994; and Article 23 of the DSU. China then sued for a safeguard measure on imports of crystalline silicon PV products in 2019.

Finally, on 2 September 2019, China requested consultations with the United States regarding the tariff measures imposed by the United States on certain goods originating in China. China again claimed that the measures appeared to be inconsistent with Articles I:1, II:1(a) and II:1(b) of GATT 1994; and Articles 23.1, 23.2(a), 23.2(b) and 23.2(c) of the DSU. The last American reaction before the freezing of the arbitration mechanism was on September 12, 2019, when the United States asked the Chairman of the CSD to circulate a communication indicating that it took note of the additional tariffs imposed by China. The communication indicated that, in the

¹⁰ <https://www.reuters.com/article/us-usa-trade-china-talks-explainer/explainer-u-s-china-trade-talks-where-they-are-and-whats-at-stake-idUSKCN1TL24M>

consultations, the United States looked forward to hearing China's basis for imposing these additional tariffs. The communication concluded that the United States accepted China's request to enter into consultations and was prepared to set a mutually convenient date for the consultations.

Since the trade war was initiated unilaterally by the United States in violation of all GATT agreements and all international legal standardization agreements, it had no chance of winning any of these disputes and therefore, if the concept of "commons" is twisted into one that includes international trade, following the reasoning in Pillar IV of the national security strategy paper, "The United States supports the peaceful resolution of disputes under international law, but will use all its instruments of power to defend U.S. interests and to ensure that the commons remains free." The instrument of power she selected was not to renew the judges and to paralyze the court of disputes, leaving only two options; not to resolve the disputes or to use her own courts as the valid ones to resolve them. While the post-WTO solution is being sought, there is a space for unilateral acts without a space for complaints. It opens the door for a spiral of measures, as the one taken against Argentine aluminium, on December 2, 2019, for example.¹¹ The problem for those countries that have the United States market as a preferential market is that it has become an unreliable partner. The tariff against steel and aluminium means to protect their wheat and soybean exporting farmers who cannot compete with the wheat and soybean exports from Brazil and Argentina. It is not an intra-branch tariff on steel and aluminium dumping. With this lack of reasoning it is not possible to have certainty when signing a trade agreement with that country.

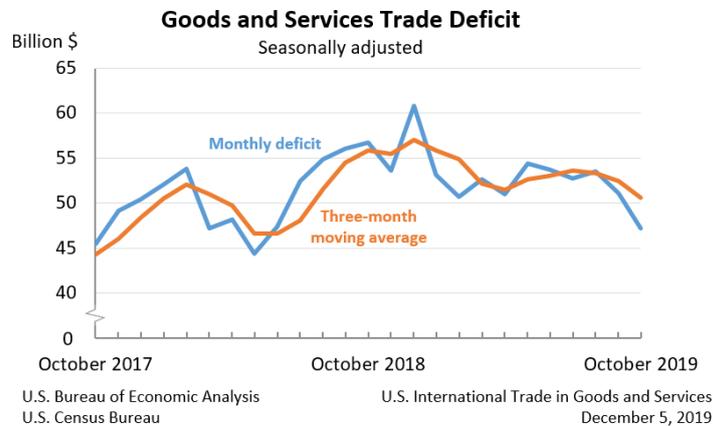
Previously, on March 23, 2018, Trump imposed a 25 percent tariff on steel imports and a 10 percent tariff on aluminium but granted temporary exemptions to Canada, Mexico, Brazil, the EU, Australia and Argentina. By May 2018, Argentina had succeeded in having the country excluded from the tariff protection measure and agreed to the duty-free entry of 180,000 tons of steel and aluminium per year. The argument was the exchange rate.

The reasoning is that cheaper products of any kind sabotage the market for other American products. Thus, a tariff on anything can be used as a retaliatory measure

¹¹ <https://www.cronista.com/economiapolitica/Trump-anuncio-que-repone-aranceles-al-acero-y-al-aluminio-de-Argentina-y-Brasil-20191202-0040.html>

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against anything else. The principle of retaliation and symmetry has been broken. American tariffs are a ballistic measure that would like to protect the United States from its problems of competitiveness, excessive imports and stagnant exports, in a trade war against the world.



Along the way it has taken away the dynamics of international trade and the growth of the rest of the world that is related to manufacturing export growth.

The underlying American problem

An example of the American problem is reflected in the lawsuit against Airbus Industries for the subsidies it receives from the European Union. With this she wanted to avoid facing the technological problem of Boeing, which manufactured some planes that will not fly again soon, according to experts.¹² In any case, the lawsuits against Airbus Industries obviate the fact that the aircraft manufacturers have a concentrated oligopoly (Boeing, Airbus, COMEC), which without an international trade regulator will set the prices it wants, and that they all live off military contracts with the Government. Boeing dominated the sale of airplanes until they ran into trouble in 2013 with the 787 model that caught fire in Boston and Narita. The initial lawsuit against French aeronautical developments began in 1999 when the United States sued the French government for granting, with the approval of the European Commission, "a loan, on preferential and non-commercial terms, in the amount of 140 million francs (21 million dollars), to be disbursed over three years for a project in which Sextant will develop a flight management system adapted to Airbus aircraft."¹³

¹² <https://www.reuters.com/article/us-boeing-737max-production/boeing-crisis-escalates-as-planemaker-halts-737-production-after-two-crashes-idUSKBN1YK18Q>
https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm

¹³ https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds173_e.htm

This was followed by a demand in 2004 for subsidies provided by the European Commission to Airbus Industries which include "the provision of design and development finance to Airbus companies ("launch aid"); the granting of subsidies and government goods and services to develop, expand and improve Airbus' manufacturing facilities for the development and production of the Airbus A380; the provision of loans on preferential terms; the assumption and write-off of debt resulting from the launch and other financing for the development and production of large civil aircraft; the provision of capital injections and grants; the provision of loans and grants for research and development in support of the development of large civil aircraft, directly for the benefit of Airbus, and any other measures involving a financial contribution to Airbus companies. The subsidies in question include those relating to the entire Airbus product family (from the A300 to the A380). The United States also notes that certain planned start-up aid for the A340 and the A380 appear to be illegal export subsidies, in breach of certain provisions of Article 3 of the SCM Agreement. The United States is further concerned that the measures appear to be causing adverse effects to the United States in a manner contrary to Articles 5 and 6 of the SCM Agreement'.

The Boeing 787 project began at the same time, in 2003, and it was anticipated that the cost of its development would be much higher than initially estimated. The project took three years longer than planned and was done on the basis of offshoring. It is within this framework that the lawsuit against Airbus was opened against its new projects. In other words, Boeing's technological problems were protected by a lawsuit against its direct competitor. This, however, did not solve the technological problems at the time the product reached the market. The Boeing 787 suffered two fires, brake problems, fuel leaks, and had to be suspended for a season while manufacturing defects were fixed. Says Denning of Forbes "As serious as these problems may seem, they are but symptoms of a deeper disease that has been eating away at the U.S. economy for decades. Outsourcing raises critical issues that can affect the survival of entire companies, entire industries, and ultimately the economy." ¹⁴

A study by Pisano and Shih on the loss of competitiveness of American industry due to outsourcing and the review of the role of the State in technological innovations clearly shows the degrees of government intervention in technological development.

¹⁴ Steve Denning , <https://www.forbes.com/sites/stevedenning/2013/01/17/the-boeing-debacle-seven-lessons-every-ceo-must-learn/#7387887115c1>

While the U.S. has perhaps the most market-oriented economy in the world, federal and, to a lesser extent, state governments have long played a central role in supporting technological innovation. In the early twentieth century, the agricultural experiment stations created by state governments were instrumental in spawning innovations like hybrid corn that enormously boosted agricultural productivity. In the 1950s and 1960s, the Department of Defense spurred innovation in semiconductors through procurement and targeted research programs. In the 1960s through the 1980s, DOD- and NASA-sponsored research contributed heavily to building American science and engineering capabilities in chip design, aeronautics, and satellite communications.

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Washington has long been the main supporter of basic research in the U.S. and a major provider of funding for applied research. No country, in fact, has invested more in basic research since the end of World War II than the United States, and three-quarters of the funding has come from the federal government. Through such agencies as the National Science Foundation and the National Institutes of Health, Washington has spent an inflation-adjusted total of \$1.2 trillion since 1953.¹⁵

The role of the state in innovation in the United States is unquestionable, and it is questionable to judge your competitor for receiving subsidies when you provide them. The latest ruling against Airbus in October 2019 for subsidies from the European Commission opened the door for the United States to apply tariffs on products from Germany, France, Spain and Britain for 7.5 million dollars a year. However, this does not improve the competitive position of American products, their technology or quality. It does impact on prices. The discovery is that sometimes the purchasing decision is not about price but about quality. Cars and airplanes are an example.

Finally, from a realist approach, on this horizon, it makes sense for the United States to use its own courts to apply the principle of power, as was done in the case of the financial controversy in the Argentina vs. Elliot case. The decision to lock up the WTO tribunals is a State decision that accompanies the trade war and that generally favours its interests, but also allows it to fight its weakened hegemony in the trade

¹⁵ <https://hbr.org/2009/07/restoring-american-competitiveness>

arena. From the point of view of the global political economy, it plays against concentrated hegemonic displacement by more institutional power and by ignoring the multilateral agreements that it previously promoted. From the production angle, it will not solve its technological problems, but will continue to blame the rest of the world for its deficits, as it has been doing since the 1980s. Trying to stop China from intervening in its economy and become a model of economic development different from the American one could be unsuccessful, more in light of the American external and fiscal deficit, its lack of growth and the concentration of income visible from abroad. Conversely, from an idealist angle, China's stance of trying to maintain multilateralism and to become a model is its best bet. The future of the global order lies in between both positions, as long as a clear leader does not emerge.