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CREATING UNCERTAINTY

Stuart Malawer: One year in -- Trump's trade legacy

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By Stuart Malawer

It has been nearly 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. So, in light of the recently concluded WTO Ministerial Conference in Buenos Aires, which achieved no significant accomplishments, and the truly unsettling, acrimonious comments by U.S. Trade Representative Robert Lighthizer, who left a day early, what can be said about U.S. trade policy after almost one year of the Trump administration?

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First, consider some international highlights related to global trade and business during the first year of the Trump administration:

- **The U.S. withdrew from the Trans-Pacific Partnership and opposes granting market economy status to China. No new World Trade Organization case has been filed by the U.S. The Organization for Economic Cooperation and Development agreed on a global tax avoidance treaty — and the U.S. refused to sign it.**
- **There was no U.S. withdrawal from the WTO or its dispute-resolution system. However, the Trump administration has made constant complaints about them. 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.**

Second, consider some U.S. domestic highlights related to global trade and business:

- **The U.S. did not declare China to be a currency manipulator and did not impose a border tax on imports to the U.S. The U.S. trade representative is assessing Section 232 (national security) action against China for its domestic steel policies and those relating to mandatory transfer of intellectual property rights under Section 301 (retaliation).**
- **The International Trade Commission (ITC) is considering taking safeguard action against China under Section 201 concerning solar panels and washing machines. The Department of Commerce authorized countervailing duties on Canadian lumber.**

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Here are my observations:

Not much international *action* has taken place — as opposed to diffused proposals and extensive rhetoric — but significantly more domestic trade remedy proceedings against China have occurred.

No real significant action against the WTO or its dispute-resolution system has taken place. In fact, in recent cases, the U.S. 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 U.S. The WTO also upheld U.S. labeling regulations for tuna in a compliance case introduced by Mexico, and the U.S. won a WTO case brought against it by Indonesia concerning U.S. antidumping duties. Canada has recently filed a new case

against the U.S contesting duties on lumber imports.

From 1995 through 2017, the U.S. 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 U.S. has been involved in nearly half of all WTO cases. Clearly, it is the greatest user of the dispute-resolution system.

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NAFTA renegotiation is moving along bitterly.

Some actions on trade in the Department of Commerce and the U.S. International Trade Commission — such as Commerce Department subsidies rulings against Canada's Bombardier aviation company and Canadian lumber — have taken place.

Reliance on administrative trade remedies has increased significantly, including self-initiated actions by the Department of Commerce. These trade actions include a novel reliance on national security — and a 16-year high in private corporate actions, undoubtedly inspired by the administration's anti-trade rhetoric.

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The grave decline in cases brought to the WTO compared to other presidential administrations is historic. (None have been brought by the Trump administration.) The review of trade practices by the U.S. trade representative has not yet resulted in any significant unilateral actions.

Congressional action concerning the Committee on Foreign Investment in the United States (CFIUS) seems imminent as well as implementation of the new tax rules concerning global taxation. Tightening foreign investment rules, especially those relating to Chinese investment, and taxing multinationals seems to be about right, but caution is needed; Europeans have already warned the U.S. that various tax provisions, such as an excise tax on purchases by U.S. firms from their subsidiaries, may violate WTO obligations.

The economic need for foreign direct investment for state economic development is great. States want foreign investment. CFIUS, an inter-agency committee of the United States government that reviews the national security implications of foreign investments in U.S. companies or operations, should not become a disincentive for foreign investors.

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

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What's the bottom line?

The administration's noise and tone are quite unsettling. The rhetoric and posturing (over national sovereignty, unilateral measures, bilateral trade deals, sanctions, and trade deficits) are already impacting trade flows and diminishing

the standing of the U.S. in the global system. This is occurring even as domestic and global economies are rebounding.

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 in Buenos Aires is truly baffling.

The U.S. was the country that pushed for a rules-based global system throughout the postwar era, and it was the principal architect of this system during the Uruguay Round in the early 1990s. The U.S. 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 important, 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 ones.

Lighthizer comes out of the old world of protecting legacy industries, such as steel and semiconductors, and does not have a sense of the importance of moving ahead with newer technological issues about trade, such as blockchain and artificial intelligence. He's a captive of the old era and not an advocate for embracing the newer digital era and its future.

U.S. leadership in developing newer rules for global trade and in litigating existing concrete and complex cases cannot be abrogated. It should be one of the primary aims in current U.S. trade policy.

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President Trump's well-known disregard of rules, stemming in part from his years of unrelenting real estate litigation, undoubtedly colors his administration's disdain for multilateral rules and institutions and its espousal of unilateral actions in global affairs.

The impact on the role of the U.S. in the postwar order seems most worrisome. China, Japan, and the European Union are the ones moving to fill the leadership gap. Most recently, Japan and the EU signed a huge bilateral trade agreement.

The U.S. 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 U.S. 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 more nationalist.

It abandons the American architecture of the postwar world and its leadership. It

creates more uncertainty and promotes disorder. That's not good.

The administration's recently released national security strategy merely restates President Trump's belligerent trade rhetoric. It moves trade to the center of national security policy. But this strategy otherwise breaks no new ground. There are the same trade complaints: unfair trade, violations of U.S. sovereignty, disparagement of multilateral institutions, and a need for greater trade enforcement.

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 U.S., the traditional Republicans and their support of international trade have inexplicably fallen away and are complicit in the humiliation of America's historical leadership and greatness.

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