
What's Behind the WTO Crisis? A Marxist Analysis

Rémi Bachand*

Abstract

The main objective of this article is to explore the background of the World Trade Organization's (WTO) Dispute Settlement Body (DSB) crisis using Marxist, neo-Marxist or, at least, Marxist-influenced theories of political economy and international relations. Its purpose is twofold. First, to propose an interpretation of the actual WTO crisis that will address alternative interpretations' gaps. Second, to advance theoretical inputs founded on Marxist or Marxist-influenced writing in political economy, inputs which could be useful elsewhere in critical studies in international law. At the root of the crisis lies the functioning of neoliberalism (understood as the regime of accumulation promoted by US-dominant classes) and the institutions it uses to regulate itself, to deal with contradictions that hurt its capacity to produce profit, and to allow capital accumulation. One of the most important of these institutions, at the international level, is the WTO. We argue that neoliberalism's incapacity to continuously provide, since the Asian crisis in 1997, a satisfying rate of profit to US capitalists (and to Western capitalists in general, even if our argument focuses on the former) lured it into a crisis. Since the WTO's main function is to prevent neoliberalism from being hurt by contradictions that would limit its capacity to provide profits allowing capital accumulation, it was inevitable that one day or another, the struggle faced by the latter would also drag the former down in an institutional crisis.

1 Introduction

At the time of its creation in 1995, two of the main functions of the World Trade Organization (hereinafter WTO or 'the Organization') were to 'provide the forum for negotiations among its Members concerning their multilateral trade relations'; and to 'administer the Understanding on Rules and Procedures Governing the Settlement

* Professor of International Law, Département des sciences juridiques, member of the Centre d'études sur le droit international et la mondialisation (CÉDIM), Université du Québec à Montréal, Canada (bachand.remi@uqam.ca). The author wants to thank Sarah Gouin for her help during the redaction of the manuscript. The ideas of this article have been presented at Carleton University (Canada), at Université Aix-Marseille (France), at Université Libre de Bruxelles (Belgium) and at Université de Liège (Belgium).

of Disputes’ (hereinafter ‘WTO Understanding’).¹ The latter function has been carried out by the Dispute Settlement Body (DSB)² that has been described as the ‘crown jewel’³ and the ‘central pillar of the multilateral trading system’.⁴

Yet, the achievement of both functions has been compromised in recent years. On the one hand, the first has been having a rough time since at least 1999. That year, some member countries were hoping to launch the ‘Millennium Round’ at the Seattle Ministerial Conference, notwithstanding some important emerging conflicts between the Members of the Organization. First, so-called ‘developing countries’ increasingly felt that they were the losers of the Uruguay Round and that they had had to give a lot for a deceptive reward. For example, they were quick to realize that the agreement on agriculture and the agreement on textiles and clothing were far from giving them access to the developed countries’ market, which was one of their reasons for acceding to the WTO.⁵ They were also very upset by the United States’ attempt to include environmental and labour dimensions into the Organization, fearing (probably with reason) that they could serve protectionist goals.⁶ Second, the ‘Green Room’ method of negotiation, where only a small number of countries was invited to draft official texts that were then submitted to the rest of the Members (that were under pressure to accept them) was another irritant for them.⁷ In parallel, who can forget the ‘Battle of Seattle’ where some tens of thousands of activists attended (sometimes violently) to mobilizations organized in the streets of Seattle? Finally, not only was the so-called Millennium Round not launched, but members even failed to adopt a ministerial declaration.⁸ Obviously, they finally succeeded in launching the ‘Doha Round’ in November 2001⁹ – two months after 9/11 in a ‘you’re either with us, or against us’ context as stated by the US President.¹⁰ Now, as the Persian proverb says, the ‘mountain has brought forth a mouse’. As soon as at the following Ministerial Conference, held in Cancún in September 2003 (largely considered as having been a ‘failure’¹¹), third-world countries began to form coalitions that had

¹ WTO, Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, 1867 UNTS 154, Arts. III.2 and III.3.

² WTO, Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 33 ILM 1197, 15 April 1994 (‘WTO Understanding’).

³ Creamer, ‘From the WTO’s Crown Jewel to Its Crown of Thorns’, 113 *American Journal of International Law Unbound* (2019) 51; T. Payosova, G. C. Hufbauer, and J. J. Schott, ‘The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures’, Policy Brief, 18–5 (2018), at 1.

⁴ Bahri, ‘“Appellate Body Held Hostage”: Is Judicial Activism at Fair Trial?’, 53 *Journal of World Trade* (2019) 293, at 293.

⁵ Reis, ‘Têxtil e vestuário’, in W. O. Barral (ed.), *O Brasil e a OMC* (2nd ed., 2003) 115.

⁶ K. A. Jones, *The Doha Blues: Institutional Crisis and Reform in the WTO* (2010), at 36–37.

⁷ *Ibid.*, at 86–98.

⁸ International Centre for Trade and Sustainable Development, ‘Seattle Fails to Launch New Round; WTO Ministerial Negotiations Suspended’, 3 *BRIDGES* (1999) 1.

⁹ WTO, Ministerial Declaration, WT/MIN(01)/DEC/1, WT/MIN(01)/DEC/1, 14 November 2001.

¹⁰ K. Hopewell, *Breaking the WTO: How Emerging Powers Disrupted the Neoliberal Project* (2016), at 74.

¹¹ Baldwin, ‘Failure of the WTO Ministerial Conference at Cancun: Reasons and Remedies’, 29 *World Economy* (2006) 677.

huge effects on the negotiations.¹² Overall, the negotiations were so conflictual and unsuccessful that it is now common to talk about the 'death of the Doha Round'.¹³ In response, more and more states have turned towards bilateral and regional economic partnerships. The recent conclusion of such agreements, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership or the Comprehensive Economic and Trade Agreement between the European Union and Canada, as well as the long-lasting negotiation of the Regional Comprehensive Economic Partnership led by China and including 16 Asian and Oceanian states, are probably the best examples of this trend.¹⁴

On the other hand, the challenge faced by the 'settlement of disputes' function is more recent, but potentially more dramatic. The first aspect of what can, without exaggeration, be qualified as the 'crisis of the DSB' began to be publicly visible in 2011 when the Obama administration informed the US sitting member of the Appellate Body (AB) of the DSB that it would not support her re-appointment because of constant decisions by the AB that were perceived as being contrary to US interests.¹⁵ The Obama administration repeated its offence in 2016 when it also refused to support the re-appointment of the Korean AB member, also because of its displeasure relating to some decisions during his tenure.¹⁶ These episodes put so much pressure on the AB members to render decisions in conformity with US interests – as was seemingly the US intention – that a former AB member did not hesitate to speak of a 'campaign of intimidation'.¹⁷ With the appointment of President Trump and his team to the White House, the tactics were pushed to yet another stage when the administration decided to block the nomination (governed by the consensus rule, that requires that 'no Member, present at the meeting when the decision is taken, formally objects to the proposed decision'¹⁸) of new AB members. As a result, as of December 2019, the AB does not count enough members to continue its work (three members shall serve on every case and only one remains).¹⁹ Another aspect of this scourge is what is felt by many as an important lack of respect for the substantial rules of WTO agreements. Two examples can be given in this regard. First is the obstinacy to use the so-called 'zeroing' method²⁰ even if the AB has considered it inconsistent with antidumping rules over

¹² Hopewell, *supra* note 10; Hussain, 'After Cancún: G21, WTO, and Multilateralism', 11 *Journal of International and Area Studies* (2004) 1.

¹³ Donnan, 'Trade Talks Lead to "Death of Doha and the Birth of a New WTO"', *Financial Times* (*Fin. T.*) (2015) 4; Office of the United States Trade Representative (USTR), 2018 Trade Policy Agenda and 2017 Annual Report (2018), at 29 (stating the 'the Trump Administration will not negotiate off the basis of the [Doha Development Agenda] mandates or old DDA texts and considers the Doha Round to be things of the past').

¹⁴ Gantz, 'The TPP and RCEP: Mega-Trade Agreements for the Pacific Rim', 22 *Arizona Journal of International and Comparative Law* (2016) 57.

¹⁵ J. Bacchus, 'Might Unmakes Right', CIGI Papers no. 173 (2018), at 11; P. Blustein, 'China Inc. in the WTO Dock: Tales from a System under Fire', CIGI Papers no. 157 (2017), at 11–13.

¹⁶ Bacchus, *supra* note 15, at 11.

¹⁷ *Ibid.*

¹⁸ WTO, Agreement Establishing the World Trade Organization, 1867 UNTS 154, 33 ILM 1144, 15 April 1994, n. 1.

¹⁹ WTO Understanding, *supra* note 2, Art. 17.1.

²⁰ P. C. Mavroidis, *The Regulation of International Trade* (2016), vol. 1, at 86–88.

10 times since 1998. Second is the recent use of the ‘security exception’ to impose important tariffs on imported steel and aluminium without a credible explanation on how it is related to fissionable material, to traffic in arms, ammunition or goods of military use, or if the measure has been taken ‘in time of war or other emergency in international relations’ as stipulated in the relevant article of the GATT.²¹

The main objective of this article is to explore what is behind this behaviour and the WTO’s DSB crisis (the first aspect of the crisis – one that concerns negotiations – will not be addressed here). A simple – if not simplistic – answer lies in the turpitude of the US Presidency, but such an explanation sets aside the fact that the US attitude began under the Obama administration, perhaps even the second Bush administration. Other traditional explanations (seen in Section 2) found in academic literature and official statements also leave us unsatisfied. Our hypothesis is that only the use of political economy allows us to understand the background of the crisis. Specifically, this article will articulate its argument around the current state of neoliberalism as a regime of capital accumulation and the role of the WTO in its stabilization and its promotion.

2 Traditional Explanations of the Crisis

The limited scope of this article makes it impossible to be exhaustive, but it can be argued that the main explanations of the crisis can be divided into two categories. The first are mainly found in the Office of the US Trade Representative (USTR) official documents and statements and emphasize technical, institutional and almost apolitical problems (Section 2.A). The second are more relational and concern the interplay between China and the WTO (Section 2.B). As will be demonstrated, nearly all of these answers to the crisis are at best incomplete, at worst problematic.

A Institutional, Technical and Apolitical Explanations

The first type of interpretation focuses on technical²² defects of the DSB. This kind of explanation is at the core of the official criticisms of the USTR against the DSB. Even accepting the relevance of *some* of these criticisms, it is, at best, hard to admit that they can justify actions radical enough to put the functioning and the relevancy of the ‘crown jewel’ of the Organization in danger.

There are essentially six criticisms falling in that category. First, the USTR expresses concerns regarding the length of AB rulings that have regularly overcome the 90-day delay planned in the WTO Understanding.²³ Second, it complains that AB members regularly continue to sit and hear appeal even after their mandate has come to an end if the case was appealed before that moment, contrarily to its interpretation of the

²¹ WTO, General Agreement on Tariffs and Trade, 30 October 1947, 55 UNTS 194, Art. XXI.

²² Bahri, *supra* note 4, at 296.

²³ USTR, *supra* note 13, at 24–25; WTO, Agreement on the Implementation of Article VI of GATT 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 15 April 1994, 1868 UNTS 201, Art. 17.5 (‘WTO Article VI Agreement’).

WTO Understanding.²⁴ Third, it is concerned by the tendency of the AB to issue *obiter dicta* on issues that are not needed to solve particular cases on which they have to rule.²⁵ The fourth criticism concerns the review, by the AB, of panel fact-finding and of member's domestic law conclusions while it should limit itself to 'issues of law covered in the panel report and legal interpretations developed by the panel'.²⁶ The fifth criticism concerns the AB practice to treat its report as binding precedents, thus creating a sort of jurisprudence.²⁷ Finally, they have long criticized (since 2002 at least) AB decisions to 'add[] or diminish[] U.S. rights or obligations by not applying the WTO Agreements as written'.²⁸

It is not easy to understand why the USA considers these concerns as being so crucial that it is willing to put the very AB functioning at risk.²⁹ For example, is it not curious that a common law country disagrees with the idea that a tribunal-like instance considers itself as being almost legally linked by its precedents? Considering that the DSB 'is a central element in providing *security and predictability* to the multilateral trading system',³⁰ is it not normal that the AB avoids changing its interpretations on each and every case, and that panels feel constrained to follow its jurisprudence? Cannot *obiter dicta* be useful to achieve these goals of security and predictability? Will the refusal of the USA to designate new members of the AB not result in making the procedures even longer? Is the practice to permit AB members to sit until the end of cases they have been named on even after the termination of their mandate not a good idea to avoid longer procedures? Moreover, the USA may be unsatisfied by some DSB decisions, but is it not normal in a legal system that a legal subject sometimes wins and sometimes loses cases? That it disagrees with some tribunal's interpretations? Finally, let us assume that some of their criticisms (for instance, the one concerning the AB review of panel fact-finding and of members' domestic law conclusions) are legitimate; it seems hardly conceivable that they are important enough to pose such a threat to the functioning of the Organization. In other words, these explanations fall short of convincing that they are the reasons motivating the US attack against the WTO and its DSB.

B *The WTO Is Not Fit to Deal with Chinese-Like Economies*

The second type of interpretation is related to China and the way the WTO and its DSB are (un)able to deal with the structure of its economy. These explanations are more relational, more political and, in our view, closer to the real background of the crisis. The starting point of this position is well represented by Mark Wu's influential article that argues that 'the WTO rules, as written, are not fully equipped to handle the range

²⁴ USTR, *supra* note 13, at 25–26.

²⁵ *Ibid.*, at 26–27.

²⁶ *Ibid.*, at 27–28; WTO Article VI Agreement, *supra* note 23, Art. 17.6.

²⁷ USTR, *supra* note 13, at 28.

²⁸ *Ibid.*, at 23.

²⁹ J. Lehne, *Crisis at the WTO: Is the Blocking of Appointments to the WTO Appellate Body by the United States Legally Justified?* (2019), at 29–105.

³⁰ WTO Article VI Agreement, *supra* note 23, Art 3.2 (emphasis added).

of economic problems associated with China's rise'.³¹ To defend his thesis, Wu uses the concept of 'China, inc.' to designate the way the Chinese economy works. Here is how Wu summarizes his description of 'China, inc.', a model characterized by various contradictions:

The Party-state oversees a more complex set of formal mechanisms for controlling important activity than its counterparts in any other major economy in the world. But despite possessing this power, it has decided that its long-term interests are best served not by always rewarding its cronies, as governments in state capitalist societies elsewhere do, but instead by allowing the market in many sectors to determine winners and losers. This type of political economy arrangement is highly unusual. Even with all-powerful Party-state, the private sector outperforms [State-owned enterprises] and plays a key role in driving growth. Such an arrangement is sustainable because the Party-state retains an impressive array of formal and informal mechanisms to entwine private enterprises into its web.³²

For Wu, 'China, inc.' represents a challenge to the WTO and its DSB because the Organization's rules have not been conceived with such an economic organization in mind. Wu gives the example of the difficulty of determining if a Chinese entity is an extension of the state,³³ a central aspect of the determination of a subsidy.³⁴ He also targets difficulties in authenticating whether China is a market economy, a determining factor in anti-dumping procedures.³⁵

At first glance, the issues underlined by Wu also seem to be technical (and apolitical in a certain way). Indeed, the problem seems to lie in the indeterminacy of the rules that provoke unpredictability. Wu's issues take another, more political turn when put in relation with some highly controversial AB decisions that partially gave reason to China³⁶ and India³⁷ against the USA on issues related to the implication of the state in the economy (and how said economy is organized) and are justified by these undetermined rules.³⁸ These decisions are at the core of the USTR official criticism of the WTO, which recently recognized that, in its view, the Organization:

³¹ Wu, 'The China, Inc. Challenge to Global Trade Governance', 57 *Harvard International Law Journal* (2016) 261, at 265.

³² *Ibid.*, at 284.

³³ *Ibid.*, at 265.

³⁴ WTO, Agreement on Subsidies and Countervailing Measures, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 15 April 1994, 1869 UNTS 14, Art 1.1(a)(1).

³⁵ WTO Article VI Agreement, *supra* note 23.

³⁶ WTO, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China – Report of the Appellate Body*, Doc. WT/DS379/AB/R, 11 March 2011 ('*Anti-Dumping and Countervailing Duties*'); WTO, *United States – Countervailing Duty Measures on Certain Products from China – Report of the Appellate Body*, Doc. WT/DS437/AB/R, 18 December 2014.

³⁷ WTO, *United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India – Report of the Appellate Body*, Doc. WT/DS436/AB/R, 8 December 2014.

³⁸ For more details, see Ding, "'Public Body' or Not: Chinese State-Owned Enterprise", 48 *Journal of World Trade (J. World Trade)* (2014) 167; Du, 'State-Owned Enterprises in the WTO Law: An Analysis of United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China', in Q. Liu and W. Shan (eds), *China and International Commercial Dispute Resolution* (2015) 306.

is not well equipped to handle the fundamental challenge posed by a non-market economy like China. China has no fear of WTO dispute settlement, even as it continues to embrace a state-led, mercantilist approach to the economy and trade that is fundamentally incompatible with the open, market-based approach expressly envisioned and followed by other WTO Members.³⁹

Thus, the real issue is not the indeterminacy of the rules determining whether or not a Chinese entity is a public body; or whether or not China is a market economy. The problem is that the WTO's rules were not written (and the WTO's legal system was not designed) to be able to force China to structurally change its economy. This interpretation is strengthened by the fact that even without any radical changes, China is generally able to comply with the DSB's rulings when it is on the losing side of a decision (actually, they comply much more than the US when they lose a case⁴⁰). Indeed, if the rules were efficient enough to force China to make structural changes, China would be unable to comply without doing so.

These types of interpretations focus on two targets to explain USTR dissatisfaction: China's economy and the WTO institutional structure. They also rest on two premises. First, there is one good economic model, the US model (with some permissible variables), and other nations should copy it. Particularly, the Chinese model is far too different to be tolerated. Second, the WTO should get China on the right track and if it is unable to do so, it is because it suffers some institutional dysfunctions. The problem, but also the irony, of this position is that its declared objective is to force China to give up an economic model that proved to provide more long-term growth than the one it 'should' adopt; a model that is at the origin of the most rapid economic development in the history of humanity.⁴¹ One can therefore legitimately ask why China should radically change the structure of its economy if the latter provides better results than the model it is asked to copy and if, moreover, it is able to function while generally staying in conformity with WTO rules (or, at least, conforming to the DSB's rulings when it loses a dispute). Another question follows: why are the USA so prone to force China to change its economic model for one that is less effective than the one it actually has? This question remains unchallenged if one stays with an analysis that only puts the blame on China and the WTO. Yet, in our view, it is necessary to extend one's investigation to the USA if one wants to really understand the background of the WTO crisis.

3 Alternative Explanation: Some Theoretical Inputs

The alternative interpretation offered by this article relies on Marxist, neo-Marxist or, at least, Marxism-influenced theories of political economy (PE) and international

³⁹ USTR, 2019 Trade Policy Agenda and 2018 Annual Report (2019), at 26. See also 'USTR Says WTO Reform Efforts Fail to Address Root of the Problem: China', *Inside U.S. Trade* (2 February 2019), available at <https://insidetrade.com/daily-news/ustr-says-wto-reform-efforts-fail-address-root-problem-china> (by subscription).

⁴⁰ Blustein, *supra* note 15, at 3; Yongding, 'Can China and the United States Avoid a Full-Blown Trade War?', in H. Jiming and A. S. Posen (eds), *US-China Economic Relations: From Conflict to Solutions—Part II* (2019) 7, at 7.

⁴¹ B. Naughton, *The Chinese Economy: Adaptation and Growth* (2nd ed., 2018), at 1.

relations (IR). Its objective is twofold. First, to propose an interpretation of the actual WTO crisis that will address alternative interpretations' gaps underlined in the previous section. Second, to advance theoretical inputs founded on critical writing in PE, inputs which could hopefully serve for other purposes. To achieve this goal, the next section will summarize a theoretical framework proposed more extensively elsewhere.⁴² This section is divided into three subsections. First, we will recall the important contribution of the neo-Gramscian school of IR on the role of international organizations (such as the WTO) in the construction and the reproduction of hegemony in a world order (Section 3.A). We will then explore two important critical approaches in PE (the French *théorie de la régulation* and the social structure of accumulation theory) that showed the relevance of analysing the specific form taken by capitalism (and not only its general characteristics) to grasp the functioning of a social order (Section 3.B). Lastly, we will turn towards some of Marx's and Marxist scholars' writing that posits that profit and capital accumulation is ultimately the main rationale for capitalism and that the fall of the rate of profit is a problem that needs to be addressed quickly (Section 3.C).

A Neo-Gramscian School of IR

Drawing on Italian activist and intellectual Antonio Gramsci, the neo-Gramscian school of IR strives to explain the development and reproduction of a social order. Specifically, it focuses on the reason for which social classes that are disadvantaged and exploited by a social order nevertheless adhere to it without attempting to reverse it. Gramsci qualifies this situation by using the concept of 'hegemony' which designates, among other things, the capacity of a dominant group to convince, using ideological procedures, other groups that a social order is good for them even if this is not objectively the case. Transposing this analysis at the global level, Robert Cox explains that hegemony:

... means dominance of a particular kind where the dominant state creates an order based ideologically on a broad measure of consent, functioning according to general principles that in fact ensure the continuing supremacy of the leading state or states and leading classes but at the same time offer some measure or prospect of satisfaction to the less powerful.⁴³

Criticizing the focus put by mainstream approaches in IR, Cox claims that hegemony is not essentially the supremacy of the leading state(s), but of the dominant classes of these state(s).⁴⁴ Moreover, coming from the Marxist's tradition and emphasizing the economic aspect of any social organization, he argues that hegemony 'is an order within a world economy with a dominant mode of production which penetrates into all countries and links into other subordinate modes of production'.⁴⁵ In other words,

⁴² Bachand, 'Taking Political Economy Seriously: *Grundriss* for a Marxist Analysis of International Law', in P. O'Connell and U. Özsü (eds), *Research Handbook on Law and Marxism* (forthcoming 2021).

⁴³ R. W. Cox, *Production, Power, and World Order: Social Forces in the Making of History* (1987), at 7.

⁴⁴ Cox, 'Gramsci, Hegemony and International Relations: An Essay in Method', 12 *Millennium* (1983) 162, at 171.

⁴⁵ *Ibid.*

hegemony is the capacity of the dominant classes of the dominant state(s) to expand, reproduce and legitimize the mode of production that is favourable to their interests.

Cox sees an important relation between international organizations (and institutions) and hegemony. In his mind:

International institutions and rules are generally initiated by the state which established the hegemony. At the very least they must have that state's support. The dominant state takes care to secure the acquiescence of other states according to a hierarchy of powers within the inter-state structure of hegemony.⁴⁶

More precisely, they have many roles in the reproduction of hegemony:

(1) [T]hey embody the rules which facilitate the expansion of hegemonic world orders; (2) they are themselves the product of the hegemonic order; (3) they ideologically legitimate the norms of the world order; (4) they co-opt the elites from peripheral countries and (5) they absorb counter-hegemonic ideas.⁴⁷

Stephen Gill, Cox's colleague at York University, adds an interesting dimension to these roles. With the concept of 'new constitutionalism' that is supported by international organizations, he refers to

... political and legal reforms to redefine the political via a series of precommitment mechanisms. These include constitutions, laws, property rights and various institutional arrangements, designed to have quasi-permanent status. A central objective of new constitutionalism is to *prevent future governments* from undoing commitments to a disciplinary neoliberal pattern of accumulation.⁴⁸

The important aspect underlined by Gill is the capacity of international organizations to exclude from the political discussion, from what is commonly sensed as 'possible', some aspects that are incompatible with the social order promoted by the dominant groups and social classes. Globally, the neo-Gramscian contribution is useful to emphasize the link between an international organization and a specific social order based on the reproduction of dominant social classes' interests. Hence, an international organization (it is at least true for the most important of them) cannot be understood if not situated inside the political and economic order to which it belongs. It is also presumably the case that when this order is not functioning well any longer, the international organization will also enter into crisis, or be radically transformed.

B *Théorie de la régulation and Social Structure of Accumulation Theory*

The second theoretical contribution comes from two PE approaches that touched on the same global issue and produced rather similar analyses, while using dissimilar conceptual frameworks. The French *théorie de la régulation* and the American social

⁴⁶ *Ibid.*, at 172.

⁴⁷ *Ibid.*

⁴⁸ Gill, 'Constitutionalizing Inequality and the Clash of Globalizations', 4 *International Studies Review* (2002) 47, at 48.

structure of accumulation theory (SSAT) both start from the premise that apart from some very general elements (for example, the private property of means of production; and the separation of the latter from labour, etc.), capitalism can take various forms of organization. Moreover, each of these forms needs specific (some legal, some not) institutions to solve the problems that will invariably emerge for capital accumulation. In other words, and to quote SSAT theoretician David Kotz:

The [*école de la régulation*] and the SSAT seek to explain long-run patterns of capital accumulation by analyzing the relation between the capital accumulation process and a set of social institutions which affect that process. The central idea is that crucial features of the trajectory of the capital accumulation process, over a long time period, are the product of the supporting role played by a set of social institutions.⁴⁹

Then, they both use a ‘two steps’ methodology to grasp their object, the first step consisting of analysing what the *école de la régulation* calls ‘regime of accumulation’ (or ‘regime of growth’) and that refers to a pattern of regularities ensuring stable accumulation of capital,⁵⁰ or, in the words of SSAT adherents, ‘the capital accumulation process itself (the profit-making activities of individual capitalists)’.⁵¹ This first step then concerns how capital is accumulated and focuses on ‘organization of production and of relation between labour and capital’, the organization of social demand for what is produced or how economic gains are distributed between classes, etc.⁵²

The second step relates to a ‘mode of regulation’ that supports and legitimizes the regime of accumulation. It is constituted by ‘institutional forms’ whose functions are notably to ‘reproduce the fundamental social relations of the mode of production’ and to ‘pilot’ the reproduction of the regime of accumulation.⁵³ To explain their argument, the SSAT claim that capitalism is ‘an inherently conflictual system’ but that its contradictions

can be attenuated through the construction of sets of institutions that mitigate and channel class conflict and stabilize capitalists’ long-run expectations. Institutions in this sense are conceived of broadly and can be economic, political, ideological, or cultural in character. [...] [These institutions] are mutually compatible and generally supportive of each other as well as supportive of the accumulation process.⁵⁴

Joining this assessment to our earlier analysis of the neo-Gramscians, we may now deduce that hegemony does not simply represent the expansion of a ‘mode of production’ (as Cox claims) but of the ‘regime of accumulation’ that is adopted by the

⁴⁹ Kotz, ‘A Comparative Analysis of the Theory of Regulation and the Social Structure of Accumulation Theory’, 54 *Science & Society* (1990) 5, at 7.

⁵⁰ M. Aglietta, *Régulation et crises du capitalisme* (2nd ed., 1997); R. Boyer, *La théorie de la régulation: une analyse critique* (1986), at 46.

⁵¹ D. M. Gordon, R. Edwards and M. Reich, *Segmented Work, Divided Workers: The Historical Transformation of Labor in the United States* (1982), at 25.

⁵² R. Boyer, *Économie politique des capitalismes: théorie de la régulation et des crises* (2015), at 40–52 (translation by the author).

⁵³ Boyer, *supra* note 50, at 54 (translation by the author).

⁵⁴ McDonough, Reich and Kotz, ‘Introduction: Social Structure of Accumulation Theory for the 21st Century’, in T. McDonough, M. Reich and D. M. Kotz (eds), *Contemporary Capitalism and Its Crises: Social Structure of Accumulation Theory for the 21st Century* (2010) 1, at 2.

dominant classes of the dominant state(s) because it is felt that it is the best one to defend their interests. In fact, international organizations on which Cox and Gill focus may be interpreted as being part of what the *école de la régulation* calls the 'mode of regulation'. Their function becomes clearer with the input of the SSAT and the *école de la régulation*: to ensure the efficiency, the legitimacy and the permanency of the regime of accumulation.

C *The Importance of the Rate of Profit and the Counteracting Factors to Its Fall*

Our last theoretical influence comes directly from Marx, who explained that the inevitable change in the organic composition of capital (that is the relation between constant capital⁵⁵ and variable capital⁵⁶) implies a tendency of the rate of profit to fall,⁵⁷ a phenomenon that Marx strongly associates with overproduction and over accumulation of capital.⁵⁸ For Marx, this fall is only a long-term tendency because of the existence of some counteracting factors that can be put in play to countervail the fall of profit. Marx enumerates six of these counteracting factors: the intensification of labour exploitation, the reduction of wages, the cheapening of the price of elements of constant capital, the relative surplus population, foreign trade (to which we can associate foreign investment) and the increase in share capital (that will here be associated to financialization⁵⁹).⁶⁰

The theoretical explanation for the law of the tendential fall in the rate of profit is controversial, even though some authors continue to defend it and use it in a somewhat convincing way.⁶¹ Now, even without defending Marx's theoretical explanation, many Marxist-oriented authors put the evolution of the rate of profit (and generally its fall) at the core of their work.⁶² For us, the usefulness of this type of analysis is that evolution of the rate of profit is obviously an essential part of capitalism, whose single aim is to ensure capital accumulation.

Geographer David Harvey's *New Imperialism* offers a particularly important contribution for any international lawyer wishing to understand the link between capitalism

⁵⁵ That is that part of capital that turns into 'raw material, the auxiliary material and the instruments of labour': K. Marx, *Capital: A Critique of Political Economy* (1976), vol. 1, at 317.

⁵⁶ Essentially the labour, see Marx, *supra* note 55.

⁵⁷ K. Marx, *Capital: A Critique of Political Economy* (1981), vol. 3, at 317–338.

⁵⁸ *Ibid.*, at 349ff.

⁵⁹ In the following pages, the indebtedness, understood as present markets' openness to be paid in the future, will be included in what will be called 'financialization'. This inclusion and relative modification of Marx's counteracting factors list is justified by the important role played by banks in the financialization per se (the 'increase in share capital') and in indebtedness, but also by the close association between these two phenomena.

⁶⁰ Marx, *supra* note 57, at 339–348.

⁶¹ M. Roberts, *The Long Depression* (2016).

⁶² A short list should include: G. Arrighi, *The Long Twentieth Century: Money, Power, and the Origins of Our Times* (2010); R. Brenner, *The Boom and the Bubble: The US in the World Economy* (2003); *What Is Good for Goldman Sachs Is Good for America: The Origins of the Present Crisis* (2009); G. Duménil and D. Lévy, *The Crisis of Neoliberalism* (2013).

and international law. In this book (as well as elsewhere), Harvey develops a theory of ‘capital fix’. As he explains:

The central point of this argument concerned a chronic tendency within capitalism, theoretically derived out a reformulation of Marx’s theory of the tendency for the rate of profit to fall, to produce crises of overaccumulation. Such crises are typically registered as surpluses of capital (in commodity, money, or productive capacity forms) and surpluses of labour side by side, without there apparently being any means to bring them together profitably to accomplish socially useful tasks. [...] Since it is the lack of profitable opportunities that lies at the hearth of the difficulty, the key economic (as opposed to social and political) problem lies with capital. If devaluation is to be avoided, then profitable ways must be found to absorb the capital surpluses.⁶³

Capital has to find solutions to face this fall of opportunities and the fall of the rate of profit. Harvey introduces the double meaning of the concept of ‘fix’:

A certain portion of the total capital is literally fixed in and on the land in some physical form for a relative long period of time (depending on its economic and physical lifetime). [...] The spatio-temporal ‘fix’, on the other hand, is a metaphor for a particular kind of solution to capitalist crises through temporal deferral and geographical expansion. [...] The production of space, the organization of wholly new territorial divisions of labour, the opening up of new and cheaper resources complexes, of new regions as dynamic spaces of capital accumulation, and the penetration of pre-existing social formation by capitalist social relations and institutional arrangements (such as rules of contract and private property arrangements) provide important ways to absorb capital and labour surpluses.⁶⁴

Hence, with the theory of ‘capital fix’, Harvey develops Marx’s own concept of ‘counteracting factors’ (a concept we will continue to use in the following pages), underlying the necessity for capital to find strategies to face its inherent contradictions. The importance of this theoretical finding is that many counteracting factors can be put at work with the help of international law and international organizations.

Put together, the ideas of this section lead us to propose the following conclusion. Capitalism is wrought with strong and inherent contradictions that have the long-term tendency to bring down the rate of profit. Even if the theorization proposed by Marx of this fall has not been explicitly accepted by all, several authors have factually shown its existence and its implications. The sustainability of the rate of profit is an important, if not the *main* aspect of a regime of accumulation,⁶⁵ and when a fall occurs, the regime of accumulation must react. In such a situation, the function

⁶³ D. Harvey, *The New Imperialism* (2005), at 87–88.

⁶⁴ *Ibid.*, at 115–116.

⁶⁵ This emphasis on the rate of profit obviously differs from the works of famous French economist Thomas Piketty whose last book focuses (in continuation with *Le capital au XXI^e siècle*) on inequalities and subsequently on large differences between incomes and, more importantly, on properties and different assets possessed by different groups of the population. These ontological distinctions should not be considered to be irreconcilable insofar as the evolution of inequalities, as Piketty himself shows, is directly linked to different aspects of the regime of accumulation, such as its legal organization and its ideological justification (if we use a neo-Gramscian interpretation of the ‘regime of accumulation’ concept). Moreover, this conclusion seems to be confirmed by the fact that Piketty’s periodization is the same as ours and shows that inequalities declined during the Fordist regime of accumulation and rose (without surprise) in the neoliberal period. See T. Piketty, *Capital et idéologie* (2019).

of a mode of regulation (to use the concept of the *école de la régulation*) is actually to find ways to operationalize enough counteracting factors to re-establish a satisfying rate of profit, at least for leading state(s)' dominant classes. Finally, if we follow the neo-Gramscian argument and admit that the purpose of international organizations is to promote the well-functioning of a regime of accumulation (and consequently the sustainability of the rate of profit), we can conclude that an international organization's (and especially one with economic functions like the WTO) existence is linked with its capacity to put the counteracting factors at work to ensure that the dominant classes of the leading state(s) can rake satisfying profit. Consequently, if it is not able to achieve this goal, one can predict that, one day or another, its very existence will be challenged.

4 USA–China Relationships: Not a Trade War but a Shock of Regimes of Accumulation

The proposed theoretical framework leads us to a deeper analysis of the current characteristics of the world economy, but also of the current dominant economy's regime of accumulation. As will be shown, some of the main characteristics of the present period appeared around 1997 when the Asian crisis put an end to the optimism that prevailed during the previous 15 years. Nevertheless, the particularities of the contemporary era have been exacerbated to such a level since 2012 or 2013 that we can, at the very least, consider that this moment produced a sub-period – if not a brand-new era – of the post-Asian crisis period.

The last 20 years or so (and, *a fortiori*, the period since 2012) largely call into question the future sustainability of the US regime of accumulation and neoliberalism. Yet, given that the main function of an international organization like the WTO is to promote and reproduce the regime of accumulation corresponding to the interests of the dominant classes of the dominant state(s), the question also directly challenges the relevance and the existence of the organization. Section 4 will address these issues beginning with an analysis of the main specificities of the global economy and the US regime of accumulation since 1997, putting a special emphasis on the last six or seven years (Section 4.A). This will lead us to underline two particular problems for the US that are the direct result of these characteristics (Sections 4.B and 4.C). The section will conclude with our thesis on the background of the crisis of the WTO and its future (Section 4.D).

A Characteristics of the Global Economy and the US Regime of Accumulation Since 1997

'Thanks' to neoliberalism, the 1982–1997 era was characterized by a sense of optimism on the part of US capitalists and average rates of profit following an upward trend after the crisis of the prior decade and a half (even if they remained globally rather low in comparison with the 1945–1965 period). This optimism was particularly present after 1990. This positive feeling was at the origin of the creation of the

WTO as a forum for the organization and development of multilateral trade. However, the Asian crisis that began in 1997 provoked a radical change of mood and signalled the beginning of a new chapter for the USA and the global economy. This new period was marked by a succession of economic and financial crises emerging all around the world, and by a great instability in the rate of profit of US enterprises.

By many accounts, even if the liberalization of capital markets adopted under the Washington consensus influence was the main facilitator of the Asian crisis,⁶⁶ the latter was foremost a crisis of overproduction and over-accumulation in Asia and at the global level.⁶⁷ Indeed, being at the core of the new world centre of capital accumulation and enjoying favourable conditions because of the pegging of some of their currencies with the undervalued US dollar, Asian countries' production and investments in means of production exploded during the 1990s. However, when the prices of manufactured goods began to slip, it became evident that there were far too many production capacities for the available markets in these countries, let alone in the global economy generally. When the dollar started to strengthen after the so-called 'Reverse Plaza Accord' of 1995, the situation began to deteriorate and became catastrophic in 1997 when more than USD 20 billion fled the region.⁶⁸

The importance of this crisis cannot be underestimated. It pushed Japan back into a recession that had already lasted for the largest part of the 1990s, and it quickly expanded to the rest of the world, striking some countries such as Russia (that defaulted on its debt in 1998), Brazil (1999), Turkey (2000) and Argentina (2001) with rare violence. Then, in parallel to the Asian crisis and its global repercussions, the Dotcom Crash hit the United States as the Nasdaq Composite (largely made up of information technology companies) lost almost 80% of its value between March 2000 and October 2002.⁶⁹ This last crisis, it is to be noted, was the result of a large financial bubble that had been formed in parallel (and in compensation) with a constant fall of the US enterprises rate of profit since 1997. Globally, these crises were symptomatic of the first characteristic of the period: the multiplication and the repetition of important financial and economic crises.

This overall context in the wake of the Asian crisis and its expansion worldwide logically contributed to the fall in consumption around the world – a situation that consequently exacerbated overproduction and over-accumulation. Indeed, enterprises were less and less able to sell all they could produce and were increasingly struggling to find good opportunities to invest with satisfying returns.⁷⁰ Obviously, profits suffered. In the USA, profits dropped from 7.8%⁷¹ in 1997 to an almost historical low of 3.9%

⁶⁶ S. Gindin and L. Panitch, *The Making of Global Capitalism: The Political Economy of American Empire* (2012), at 311. E. Stiglitz, *Globalization and Its Discontents* (2002).

⁶⁷ Brenner, *supra* note 62. B. Foster and F. Magdoff, *The Great Financial Crisis: Causes and Consequences* (2009).

⁶⁸ D. McNally, *Panne globale: crise, austérité et résistance* (2013), at 106–107.

⁶⁹ Brenner, *supra* note 62, at 248.

⁷⁰ D. Kotz, *The Rise and Fall of Neoliberal Capitalism* (2017), at 141–144.

⁷¹ There are many debates among economists concerning the proper way to calculate the rate of profit. We used a simple method consisting of dividing the profits before tax of non-financial corporate businesses by their private non-residential fixed assets. See Bureau of Economic Analysis, National Income and Product Account, table 1.14, line 37; National Date, Fixed Assets, table 4.1, line 37, available at: https://apps.bea.gov/iTable/index_nipa.cfm. Now, one has to admit that the gaps in this formula do not take into

in 2001. To answer that situation, some strategies corresponding to some of Marx's counteracting factors to the fall of the rate of profit – the financialization and indebtedness – were then used by Washington. First of all, the Federal Reserve reduced its interest rates substantially while new, more flexible (but also more dangerous) types of mortgage were developed.⁷² An important result of these actions was that people who were not formerly able to have access to credit to purchase a house were now allowed to obtain mortgages.⁷³ This new situation created a boom in the housing sector and residential investment.⁷⁴ In parallel, new financial instruments were created, evenly helping to boost the benefits in the financial (and, albeit indirectly, in the non-financial) sector.⁷⁵ In the short term, these interventions were of great help to US capitalism. The profit rates of non-financial corporate business (before tax) quickly recovered to reach 10.4% in 2006, which was the highest average since 1966. Nevertheless, it also provoked a surplus of 'junk bonds' and created a new bubble that was inevitably called to burst imminently. This new situation was the root of the subprime crisis that violently hit the USA and world economy by 2008. Unsurprisingly, this crisis provoked an important fall in the rate of profit which slipped (once again) to 6.0% in 2009. Once more, the crisis quickly affected the global economy and major crashes emerged in countries already fragile for many reasons such as Portugal, Spain, Ireland and Greece.

A comparison of the answers brought by the USA (and other Western states) and China gives a good indication of the philosophical basis of their respective regime of accumulation. The USA, on the one hand, counted on massive public help from their dominant classes, an intervention whose main mechanisms were '(1) loans to banks; (2) recapitalization; (3) asset purchase; and (4) state guarantees for bank debts or even for the entire balance sheet'.⁷⁶ This strategy had the subsequent and important political impact of fuelling the anger of populations and pushing them in to the arms of 'populist' movements. China, on the other hand, relied on Keynesian strategies⁷⁷, betting that the spending of public money would help to reactivate its economy. Thus, Beijing launched a CNY 4 trillion (USD 586 billion) plan that included major investment in infrastructure, the extension of health insurance coverage, the expansion of the national high-speed rail network, as well as state-funded discounts to help rural families buy household appliances.⁷⁸

account the various ways in which enterprises can legally organize themselves to hide or to shield their assets with the goal of avoiding taxation. Considering this lack of transparency, however, we postulate that our method provides sufficient insight to render it relevant. On the 'legal coding' that allows such veiling from taxation. See K. Pistor, *The Code of Capital: How the Law Creates Wealth and Inequality* (2019).

⁷² Kotz, *supra* note 70, at 130–141; Sarmehmet Duman, 'A Theoretical Framework for the Analysis of the Current Global Economic Crisis: The Financial Market and the Real Economy', 25 *Economic and Labour Relations Review* (2014) 240.

⁷³ Foster and Magdoff, *supra* note 67, at 50–51.

⁷⁴ Duménil and Lévy, *supra* note 62, at 39.

⁷⁵ *Ibid.*, at 106–112; Pistor, *supra* note 71, at 77–107; Y. Varoufakis, *The Global Minotaur: America, Europe, and the Future of the Global Economy* (updated ed., 2013), at 113–145.

⁷⁶ J. A. Tooze, *Crashed: How a Decade of Financial Crises Changed the World* (2018), at 167.

⁷⁷ Varoufakis, *supra* note 75, at 162.

⁷⁸ Tooze, *supra* note 76, at 243–246.

All in all, even if US capitalism appeared to have recovered in 2012 (with rates of profit reaching 9.0% that year), some of the European countries have not completely recovered yet at the moment of writing, over 10 years after the beginning of the subprime crisis.

This brief summary thus helps us to understand two of the main characteristics of the 1997–2012 period. First, this decade and a half has been struck by a repetition of economic and financial crises that had a variety of effects on the US and global economy. It first affected the average income and, consequently, consumption. This logically exacerbated the situation of overproduction and over-accumulation, as explained above.⁷⁹ Inevitably, this context negatively affected rates of profit, forcing capitalists to find counteracting factors to reverse this grim situation. This leads us to the second characteristic, which is the significant ups and downs in the rate of profit in the USA. For example, as we have seen, benefits before tax for non-financial enterprises passed from an almost historical low of 3.9% in 2001, then rose to the very respectable level of 10.4% only five years later (in 2006), before falling again to 6.0% in 2008, and so on. Globally, financialization and indebtedness have been important counteracting factors to react against periodic falls of benefit. Solutions to inadequate profits in the context of a productive economy included investing capital in speculative markets, and counting on delayed payment through credit to sell goods, services and real estate. Nevertheless, this logic came with its own negative effects and the booms and bubbles it produced generally ended in crises, usually with destructive social costs. In other words, financialization and indebtedness have not been a miracle cure, but only solutions to *defer in time* the structural problem of the overall fall in the rate of profit.

US capitalism nonetheless recovered relatively quickly after the subprime crisis, particularly if we compare its situation to that of other traditional capitalist countries. Indeed, with a rate of profit reaching 9.0%, the year 2012 can be seen as the moment when US non-financial corporate business had recovered from the recession.⁸⁰ At the global level, however, the recovery has been slower and weaker.⁸¹ All in all, and as much as we can judge with a short seven-year hindsight, this moment may be qualified as the beginning of a new sub-period – if not of a new era by itself – for global capitalism and for US capital accumulation.

Now, US official recovery from the Great Recession must be put into perspective. After having reached a peak in 2012 (9.0%), the rates of profit began a slow but continuous drop until 2018 (6.6%). Unsurprisingly, financialization and indebtedness now appear (once again) as strategies to compensate the falling benefits in the productive economy, with all the risks they bring. Indeed, experts are expressing growing concerns about the increased corporate debt and the deterioration of the quality of credit,⁸² as well as the increased weight of the student loan debt,⁸³ to name only two

⁷⁹ Kotz, *supra* note 70, at 141ff.

⁸⁰ 'US Starts on Long Road to Recovery', *Fin. T.* (11 March 2012) 8.

⁸¹ 'Fragile Eurozone Begins to Emerge from Worst Recession', *Fin. T.* (13 August 2013).

⁸² S. Çelik, G. Demirtaş and M. Isaksson, *Corporate Bond Markets in a Time of Unconventional Monetary Policy – OECD* (2019); 'Carry That Weight', *Economist* (16 March 2019) 19; 'Business and the Next Recession', *Economist* (22 February 2020) 61; 'Corporate Bonds and Loans Are at the Centre of a New Financial Scare', *Economist* (14 March 2020) 57.

⁸³ Griffin, 'U.S. Student Debt May Be a Crisis Now. Soon It Will Be a Catastrophe', *Bloomberg* (17 October 2018), available at www.bloomberg.com/news/articles/2018-10-17/the-student-loan-debt-crisis-is-about-to-get-worse.

examples. More and more of them are inclined to express their fear about a future recession that could be aggravated by the impossibility of utilizing some of the tools used after the 2008–2009 crash (the interest rate's lowering, for instance) to attenuate the latter effects and accelerate the recovery.⁸⁴ Even if some of the traditional statistics appear to be positive (the percentage of unemployment, the economic growth rate, etc.), turmoil is presumably not over for US capitalists, no more than their need to find new ways to operationalize counteracting factors to the fall of the rate of profit. Taking into account all the uncertainties since the 1997 crisis, some critical economists have begun to ask whether neoliberalism is still able to guarantee stable profits and capital accumulation for US capitalists, and claim that the 2008 crash was not a crisis *within* neoliberalism (or neoliberal capitalism) as much as a crisis *of* it.⁸⁵

The US economy's apparent recovery is only one aspect that allows us to say that the 2012–2013 years introduced a turning point for the global economy. Other elements concern China. An important clarification must be made at this point. The 2012–2013 period did not bring a radical or structural change in the Chinese regime of accumulation as much as it represented the political uncovering of some economic tendencies. To accurately grasp what happened at that time, one has to understand the rise of the Chinese economy and the transformation of its regime of accumulation.

The Chinese opening to the world economy dates back to the 1970s. For a long time after that, China relied on cheap labour and an export-led economic model (rather than a regime of accumulation based on internal consumption)⁸⁶ to integrate the international markets. By the mid-1990s, specific development strategies helped China not only in becoming 'the assembly centre for IT and Internet related consumer goods on a global scale', but also in 'showing signs of replacing Japan and South Korea in a set of key manufacturing sectors as the leading regional economic powerhouse'.⁸⁷ By this time, however, Chinese comparative advantages began to fall as the labour costs became more expensive. The Chinese economy then began to experience the same kinds of problems faced by US capitalists and explained earlier: capital over-accumulation, overproduction⁸⁸ and a fall in the rate of profit.⁸⁹

⁸⁴ 'The Next Recession', *Economist (Special Report: The World Economy)* (13 October 2018). At the time of finishing the final version of this article (end of March 2020), the COVID-19 pandemic was dragging the markets into a new turmoil. They are experiencing their worst moments since 2008, if not before. Notwithstanding the importance of the current crisis, the interpretation of the events proposed by this article is that the COVID-19 is only an accelerator and an amplifier of a crisis that was already due to happen in the near future.

⁸⁵ Delgado, 'Crisis general capitalista: ¿Crisis final del neoliberalismo?', in D. Castillo Fernández and M. Gandasegui, *Estados Unidos: más allá de la crisis* (2012); Duménil and Lévy, *supra* note 62; Kotz, *supra* note 70; 'End of the Neoliberal Era?', *New Left Review* (2018) 29.

⁸⁶ Zhigang, Vercueil and Boyer, 'A Growth Model with Chinese Characteristics: Interview with Yuan Zhigang by Julien Vercueil et Robert Boyer', *Revue de la régulation* (2017) 1, at 2.

⁸⁷ Zhang, 'Chinese Capitalism and the Maritime Silk Road: A World-Systems Perspective', 22 *Geopolitics* (2017) 310, at 316.

⁸⁸ *Ibid.*, at 317–8.

⁸⁹ M. Li, *China and the Twenty-First-Century Crisis* (2016); Li, 'Profit, Accumulation, and Crisis: Long-Term Movement of the Profit Rate in China, Japan, and the United States', 50 *Chinese Economy* (2017) 381.

Like other economies in that situation, China was forced to find ways to operationalize some counteracting factors. A classical factor was financialization.⁹⁰ Another consisted of ‘expanding the geographical and spatial dimension of capital accumulation, through incorporating new natural resources, new markets and labour into a capitalist system based on the emerging power’s preferred rules of the game’.⁹¹ This strategy required new markets to export produced merchandise and – assumedly more importantly – Chinese capital. This led to the ‘going out’ strategy affirmed in 2000.

The geographical expansion of China’s capitalism had to go further though, and a more affirmative and decisive policy was needed. This happened by 2012–2013 when Xi Jinping was named General Secretary of the Communist Party of China (2012) and President of the People’s Republic of China (2013). The arrival of President Xi can be seen as a turning point in our narrative because of the kind of leadership he brought and the importance he gave to Chinese economic expansion, its characteristics exemplified by the ‘One Belt, One Road’ (OBOR) initiative, whose objective is to expand Chinese influence around the world, which was launched a few months after his nomination at the Presidency of the Republic.⁹² Obviously, for our narrative, the main aspect remains the economic expansion.⁹³ Outside of the specific OBOR project, a fast-growing economic presence of China in Latin America⁹⁴ and Africa⁹⁵ has also been strongly supported by Xi. Official trade and investment statistics can give a better idea of the rapid expansion of China since the middle of the 1990s, and in particular since the arrival of Xi Jinping. China was the exporter of only 2.5% of the world trade of merchandise in 1993. This percentage quickly rose to 11.1% in 2012, falling to 12.7% in 2018 after a high of 13.7% in 2015. In comparison, US exports dropped from 12.6% to 8.7% during the same time span.⁹⁶ In terms of foreign direct investments outflow, the increase is even more striking: it went from 0.5% in 1997 to 6.4% in 2012 and to 8.7% in 2017, with a peak of 13.3% in 2016.⁹⁷

Before analysing the consequences of the rapid Chinese emergence and its impact on the US economy, we must underline a last characteristic of the contemporary period. While it is not economic, its specificity derives from the 2008 crisis and has an important effect on our proposition, as will be seen later. In his monumental book *Crashed*, Adam Tooze links the populist movement that surged all around the world in the last

⁹⁰ Zhang, *supra* note 87, at 318.

⁹¹ *Ibid.*, at 319.

⁹² T. Miller, *China’s Asian Dream: Empire Building along the New Silk Road* (2017).

⁹³ Blanchard and Flint, ‘The Geopolitics of China’s Maritime Silk Road Initiative’, 22 *Geopolitics* (2017) 223.

⁹⁴ K. Gallagher, *The China Triangle: Latin America’s China Boom and the Fate of the Washington Consensus* (2016); E. Pastrana Buelvas and H. Gehring (eds), *La proyección de China en América Latina y el Caribe* (2017).

⁹⁵ D. Brautigam, *The Dragon’s Gift: The Real Story of China in Africa* (2009) (for an overview of the pre-Xi era); P. R. Carmody, *The New Scramble for Africa* (2nd ed., 2016), esp. ch. 3.

⁹⁶ WTO, *World Trade Statistical Review 2013* (2013); WTO, *World Trade Statistical Review 2016* (2016); WTO, *World Trade Statistical Review 2018* (2018).

⁹⁷ United Nations Conference for Trade and Development (UNCTD), *World Investment Report 2001* (2001); UNCTD, *World Investment Report 2014* (2014); UNCTD, *World Investment Report 2017* (2017); UNCTD, *World Investment Report 2018* (2018).

few years with the Subprime crisis and the ensuing governmental reaction. For Tooze, the negative effects of the crisis and the following austerity on the welfare state and on the economic and social condition of people all around the world (and notably in Western countries), as well as the perceived arrogance of bankers (who distributed huge profits to their directorate shortly after being saved with colossal amounts of public money) and cosmopolitan elites, had an important political outcome: the rise of populism movements in Europe, the USA and elsewhere.⁹⁸ Hence, they could be understood as causing several events, such as the election or the impressive electoral results of right-wing populism in the USA, France, Germany, Hungary, Brazil and elsewhere; the rise of xenophobic nationalism in Europe and in too many other countries around the globe; the upsurge of movements like the French *gilets jaunes*; Brexit; or the popularity of some left-wing politicians such as Bernie Sanders or Jean-Luc Mélançon. In summary, the crisis and its management appear as a turning point for the population being increasingly inclined towards a *dégagiste* attitude with regards to the old economic and political elite. If, from our point of view, the emergence of left-wing politicians and social movements is good news, it is not clear at all that nationalists and other right-wing organizations will not be more successful in the end.

B Impact of China on the US Regime of Accumulation

The description made in Section 4.A showed us that the current situation does not appear catastrophic at first glance for US capitalists. However, with rates of profit so volatile for at least the last 20 years, and falling since 2013, strategies and tools are needed to operationalize the counteracting factors to answer to the fall of the rate of profit. It is important to consider, however, that many are slowly becoming unavailable, a situation that is exacerbated by China's expansion, as we will demonstrate by revisiting Marx's counteracting factors one by one.

To begin with, emerging populism renders two important counteracting factors more and more dangerous to use for the bourgeoisie. The extensive use of the growing intensity of the exploitation of labour and of the reduction of wages (or any other means that could downgrade people's living conditions) could easily facilitate the rise in popularity of 'anti-elite' political leadership, be they left-wing (hopefully) or (probably more likely) right-wing oriented. The same can be said about the growth of relative overpopulation seen as the creation of an industrial army of labour. This counteracting factor can intervene in two ways: immigration or forcing people outside of the labour market (for several reasons such as age, disabilities, health problems, personal histories preventing from finding and keeping an adequate job or even imprisonment) to integrate said market. For one thing, the rise of immigration may prove difficult in a right-wing and xenophobic nationalist context. For another, introducing new (national) workers in to the labour market should put wages under pressure, an effect that can also fuel populist enthusiasm.

Another counteracting factor is the increase of capital stock, theorized by Marx, or what we have called financialization, giving that concept a broad enough definition to

⁹⁸ Tooze, *supra* note 76.

include indebtedness. Now, as history (and our last 20-year narrative) suggests, this counteracting factor may easily become a part of the problem more than a genuine solution. Indeed, the main effects it produced have often served only to defer in time the fall of the rate of profit, and to produce bubbles that create crises when they explode. Now, for the most dominant and predatory capitalists, these crises could ultimately be useful since they tend to destroy and undervalue some pre-existing capital, then resolve over accumulation and overproduction issues. Still, it is doubtful that the bourgeoisie and capitalist governments will intentionally provoke crises with such an objective.

This leaves us with only two available counteracting factors: the cheapening of elements forming variable capital (such as raw material, energy, etc.) and the discovery of new markets by way of foreign trade and direct investments. This is where China's (and other emerging economies') incredible expansion enters into the game. It is inevitable that the markets won by China to sell its production markets are consequently lost by the USA and other traditional capitalist countries (unless of course they fight and offer cheaper prices for their products). Equally, China's investments worldwide affect US capitalists' opportunities negatively. Lastly, important projects developed by China in raw materials and in energy sectors to lower the price of variable capital also represent options taken from competitors. To summarize, China's and other emerging countries' worldwide economic expansions have important and negative effects on the realisation of some of the only counteracting factors still available to US capitalists to face the extremely volatile rate of profit prevailing since 1997. This is actually an important finding. Indeed, even with the help of some counteracting factors, the profits provided by the US regime of accumulation in the last 20 years have been, at best, unstable. One can then ask how the regime of accumulation will evolve given that the counteracting factors have proven to be progressively more difficult to operationalize (notably because of China's economic presence worldwide) or have shown that they were more problematic than genuinely efficient in the long run.

C China's Regime of Accumulation as a Model for Other Countries

Another important reason why the USA sees China as a threat to its regime of accumulation concerns the possibility that the Chinese regime of accumulation may become a model for other (third-world) countries and distract them from neoliberalism, the regime of accumulation representing the interests of the US capitalist class. There are a few interrelated characteristics of the Chinese regime of accumulation that must be underlined to appreciate this argument.

The first concerns the organization of non-financial state-owned enterprises (SOEs). Unlike most economies that also comprise public enterprises, Chinese SOEs are controlled by a single actor, the State-Owned Assets Supervision and Administration Commission (SASAC), which is the "ownership agency" entitled to exercise the government's ownership rights' over SOE.⁹⁹ Being de facto under the control of the Communist Party, the main goals conducting SASAC management integrate political

⁹⁹ Naughton, *supra* note 41, at 348.

(that is, the state's interest) rather than merely economic elements.¹⁰⁰ Another aspect concerns their integration into larger business groups that include different actors that perform different functions. At the top of this organization figures a 'core company' that is 'a holding company wholly owned by SASAC'¹⁰¹ and that

... lays down the group's development strategies and coordinates the relationships among member subsidiaries. It also plays a vertical coordination role between the state and group members by transmitting policy downward to member firms and information and advice upward to the state.¹⁰²

Other actors of the group include a 'listed company' whose shares are generally listed on different stock markets; a finance company that is a 'non-bank financial institution that provides an expanding range of financial service for group members' and that 'allows flexible management of financial resources across member companies';¹⁰³ and a 'research institute' that 'engage[s] in applied research related to the group's products and production processes' and that sometimes 'offer[s] graduate-degree awarding programs approved by the state'.¹⁰⁴ It is not only the day-to-day management of SOE that is policy-oriented (and not only driven by profits and a market logic), but also the general pattern of their organization and interrelation with other economic actors. This integration of different actors under a sole direction also allows the development of broader management strategies that may imply sacrifices for an actor if it signifies greater benefits for the group at large.

Yet, state ownership does not automatically imply the negation of all economic competition, and the Chinese government refused to give monopoly rights to SOEs. Indeed, even in the priority sectors identified by the government (defence, energy, telecommunication, etc.), the party-state elected to create a certain amount of business groups (generally between three and five) with the explicit objective of fostering competition between them as a factor of efficiency.¹⁰⁵ Obviously, this competition is not confined to SOE business groups, but is also fuelled by private-sector enterprises that take such an important role in the Chinese economy that they can even sometimes 'prevail over a SOE in domestic markets and emerge as the state's "national champion"'.¹⁰⁶ Now, one should note that although groups compete on the national market, they are encouraged to collaborate in projects abroad with the aim of enhancing their overall competitiveness against foreign competitors.

Another original feature of the Chinese economy is that state control and leadership are not confined to SOEs but also affect private enterprises. For example, state-owned banks can finance private enterprises; the state participates in the coordination

¹⁰⁰ Wu, *supra* note 31, at 272.

¹⁰¹ Lin, 'A Network Anatomy of Chinese State-Owned Enterprises', 16 *J. World Trade* (2017) 583, at 585.

¹⁰² *Ibid.*

¹⁰³ *Ibid.*, at 586.

¹⁰⁴ *Ibid.*

¹⁰⁵ Du, 'China's State Capitalism and World Trade Law', 63 *International and Comparative Law Quarterly* (2014) 409, at 420–421.

¹⁰⁶ Wu, *supra* note 31, at 282.

of some economic sectors or in the economic activity of some regions; and it will also, from time to time, buy equity in private businesses.¹⁰⁷ This dualistic strategy comprising promoting the market's competition and state control 'have created one of the world's most dynamic and globalized private sectors'.¹⁰⁸ Lastly, one should note that the banking sector is (without surprise) also under state control. Indeed, the main banks are controlled by Central Huijin, the state entity that exercises a role similar to that of a shareholder. Among its functions, it can order banks to use their funds to finance projects corresponding to political objectives of the state.¹⁰⁹ Then, in the banking sector as in the non-financial one, economics are subordinated to politics.

Overall, one can describe the Chinese economy as having 'a diversity of regimes of property and an inter-capitalist competition under a strong state leadership'.¹¹⁰ Obviously, these characteristics are in strong opposition with the strict separation between economics and politics promoted by neoliberalism.¹¹¹ Even if, in some contexts, it can be beneficial to the national bourgeoisie (as is apparently the case in China), it is also contrary to the interests of the US and other imperialist countries' dominant social class for which this separation is essential to the maximization of their rate of profits when investing and trading abroad. Indeed, transnational capital has no interest in seeing its economic activities serving goals other than the pure search for profit and capital accumulation. Yet, setting aside any political advantage, the economic success of the Chinese design is real. To use Du's words:

It is unrealistic today to uphold the simplistic and pessimistic view of Chinese SOEs as industrial and commercial dinosaurs fit only for dismemberment or bankruptcy. Modern corporate governance systems have been established in Chinese SOEs, some of which can rival the best private companies in the world.¹¹²

Because of its success, the Chinese regime of accumulation could easily become a model for others, third-world countries in particular. Obviously, it would signify a radical shift away from neoliberalism, a regime of accumulation that is favourable to foreign capital and that the USA and other imperialist states have successfully imposed for a few decades, thanks notably to international organizations such as the International Monetary Fund, the World Bank group and, of course, the WTO.

D The WTO: Not Able to Defend and Promote the US Regime of Accumulation Anymore

To offer our own explanation, we must recall two aspects of our theoretical framework. The first is Robert Cox's claim¹¹³ that the function of international organizations

¹⁰⁷ *Ibid.*, at 283.

¹⁰⁸ McNally, 'Rebalancing the Economy, Refurbishing the State: The Political Economic Logic of Sino-Capitalism in Contemporary China', *Revue de la régulation: capitalisme, institutions, pouvoirs* (2017), at 3.

¹⁰⁹ Wu, *supra* note 31, at 274.

¹¹⁰ Nogueira, 'Estado e capital em uma China com classes', 22 *Revista de economia contemporânea* (2018) 1, at 10.

¹¹¹ Q. Slobodian, *Globalists: The End of Empire and the Birth of Neoliberalism* (2018).

¹¹² Du, *supra* note 105, at 417.

¹¹³ See Section 3.A.

is to ensure the creation and reproduction of hegemony. To be more accurate, they serve, if we follow his argument, to defend and to expand the 'mode of production' (we elected to substitute this term for the concept of 'regime of accumulation' that appears to be more appropriate for our means) of the dominant social classes of the dominant state. Joining this idea with the *école de la régulation* and social structure of accumulation theory writing¹¹⁴ according to which a regime of accumulation needs some regulation institutions to help resolve its contradictions (and ensure profits and capital accumulation to dominant social classes), we can conclude that the Geneva organization's function in the US hegemonic order is to make sure that neoliberalism works well enough to provide a satisfying rate of profit for US capitalists.

Going in that direction, Kristen Hopewell shows that the WTO's creation participated in a shift in global governance from 'embedded liberalism' to neoliberalism¹¹⁵ and was slated to be an important part of that governance. Using the conceptual framework developed earlier, we can infer that the WTO was thus given a regulation function that was to ensure the operationalization of counteracting factors to the fall of the rate of profit for US capitalists. Now, as we have seen, the US rate of profit has been extremely unstable in the last two decades and Chinese expansion (and that of other 'emerging countries') allows one to predict that the situation could easily worsen in the future. Consequently, it should come as no surprise that the crisis that has been striking neoliberalism for the last 20 years may also result in a crisis of the organizations that are supposed to manage its contradictions, especially the WTO. Concretely, this organization seems unable to fulfil its regulatory function anymore, which is to ensure US capitalists a good rate of profit and opportunities to operationalize enough counteracting factors to negate its fall.

To go further, we now need to return to Stephen Gill's claim that the function of an international organization is to limit political and economic possibilities. It is to exclude, in other words, options that are incompatible with the social order promoted by the hegemon from what is possible and achievable.¹¹⁶ Effectively, the WTO was created to play such a role. Indeed, promoting liberalization of goods and services, protecting (notably intellectual) property rights and attacking subsidies (in non-agriculture sectors), just to give a few examples, all serve to severely reduce state interventions into the economy and to circumscribe or at least to strongly impede the turn towards an alternative model to neoliberalism.

In conformity with this, when China adhered to the WTO in 2001, there was a strong hope from other Members that it would adopt important economic reforms. A single example should be enough to show this optimism. Since other WTO Members feared that the Chinese economic structure gave it advantages in the short term, its protocol of accession included some particular ways to determine price comparability under anti-dumping rules,¹¹⁷ as well as to identify and determine the subsidy benefit

¹¹⁴ See section 3.B.

¹¹⁵ Hopewell, *supra* note 10, at 56–58. See also A. Lang, *World Trade Law after Neoliberalism: Re-Imagining the Global Economic Order* (2011).

¹¹⁶ See Section 3.A.

¹¹⁷ WTO, Protocol on the Accession of the People's Republic of China, Doc. WT/L/43, 23 November 2001, Part I, Art. 15(a).

under the Agreement on subsidies and countervailing measures.¹¹⁸ Interestingly though, these provisions were expected to end the moment China could establish itself as a market economy or, '[i]n any event [...] 15 years after the date of accession'.¹¹⁹ After that delay, China was expected to have sufficiently changed its economy so that such a rule would not be needed any more. Yet, and unfortunately for these other Members, the changes were not what they expected. To quote Andrew Lang:

the expectation of its most important trading partners was evidently that its economic system would evolve in the direction of marketization, perhaps at an accelerated rate. However, economic reform in China has in fact taken place in an experimental and unexpected manner, with the result that the emergent form of market capitalism appears to Western eyes as an unfamiliar hybrid, often termed 'State Capitalism'.¹²⁰

Actually, their discontent comes not only from the objective and observable fact that the WTO has been unable to force China to radically change its regime of accumulation the way it wanted; it is also related to some (controversial) AB rulings concerning the implication between state and economy.

Thus, in the famous *USA – Anti-Dumping and Countervailing Duties* case, the AB had to determine whether determination that an entity is owned or controlled by the government is enough to conclude that it is a 'public body' in terms of Article 1.1(a)(1) of the Agreement on Subsidies and Countervailing Measures. Should it be the case, any financial contribution by the entity would be reputed as being a subsidy. Going against the panel's ruling and the US argument, the AB offered a nuanced decision, explaining that it considered:

[T]he concept of 'public body' as sharing certain attributes with the concept of 'government'. A public body within the meaning of Article 1.1.(a)(1) of the *SCM Agreement* must be an entity that possesses, exercises or is vested with governmental authority. Yet, just as no two governments are exactly alike, the precise contours and characteristics of a public body are bound to differ from entity to entity, State to State, and case to case. Panels or investigating authorities confronted with the question of whether conduct falling within the scope of Article 1.1.(a)(1) is that of a public body will be in a position to answer that question *only by conducting a proper evaluation of the core features of the entity concerned, and its relationship with government in the narrow sense.* [...]

We stress, however, that, apart from an express delegation of authority in a legal instrument, *the existence of mere formal links between an entity and government in the narrow sense is unlikely to suffice to establish the necessary possession of governmental authority.* Thus, for example, *the mere fact that a government is the majority shareholder of an entity does not demonstrate that the government exercises meaningful control over the conduct of that entity, much less that the government has bestowed it with governmental authority.* In some instances, however, where the evidence shows that the formal indicia of government control are manifold, and there is also evidence that such control has been exercised in a meaningful way, then such evidence may permit an inference that the entity concerned is exercising governmental authority.¹²¹

¹¹⁸ *Ibid.*, Part 1, Art. 15(b).

¹¹⁹ *Ibid.*, Part 1, Art. 15(d).

¹²⁰ Lang, 'Protectionism's Many Faces', 44 *Yale Journal of International Law* (2019) 1, at 5.

¹²¹ *Anti-Dumping and Countervailing Duties*, *supra* note 36, §§ 317–318 (emphases added).

Thus, the AB stated that states could sometimes intervene in the economy without fearing systematically being in violation of WTO rules. For the AB, states could then own an economic entity without automatically turning its financial contribution into subsidy. This decision legitimized, to a certain extent, the Chinese regime of accumulation. More importantly, it also legitimized a *Chinese type* of the regime of accumulation, confirming that other countries could emulate it without systematically violating WTO rules.

This is extremely important for two reasons. First, being unable to force China to abandon its regime of accumulation means that Chinese enterprises can continue to rely on a regime of accumulation that proved to be more efficient in many respects than neoliberalism. It means that these enterprises will likely continue to take markets and to block investment possibilities from US capitalists. Second, other countries (notably 'emerging' countries like India) could be inspired by China's regime of accumulation and develop a model more efficient than neoliberalism but also (at least relatively) incompatible with it. In doing so, they will also represent a constraint to the possibilities of operationalizing countervailing tendencies, and a constraint to the rate of profit. Already struggling, neoliberalism could well turn out to be unable to overcome such events.

5 Conclusion

In Section 2 of this article, we underlined some of the most common explanations for the WTO crisis. The first one, essentially defended by the US administration, targets some technical problems (the extended length of the AB procedures, the so-called *obiter dicta* issued by the latter, its habits to use its precedents as binding for future cases, etc.). We criticized the accuracy and relevance of the flaws underlined but also argued that even if we agreed with them, it would be difficult to admit that they are important enough to represent a threat to the functioning, if not the existence, of the 'crown jewel' of the WTO. The second type of analysis targets China and explains that the WTO's problem is that it is unable to 'deal' with such an economy. We have admitted that this thesis targets an actor (China) that is actually central to the crisis, but we have argued that it nevertheless falls short of explaining the deeper causes of the Chinese issues. These deeper causes must indeed be found in political economy and in the current and specific way that capital accumulation is organized at the global level and in the hegemonic economy, the USA.

Political economy and the hypothesis of the importance of international institutions for the reproduction of a regime of accumulation can provide relevant information about some of the causes of the current WTO crisis. For instance, they can give insights into the various strategies (such as the promotion of regional, rather than multilateral agreements, or even protectionism) adopted by different branches of capitalists of a country like the USA in order to push their divergent and sometimes conflicting interests. More specifically, in light of our problematic, political economy can point towards the role played in recent years by the BRICS coalition that renders

difficult, if not impossible, the conclusion of new multilateral agreements that can contribute to the perpetuation of neoliberalism. These elements are obviously relevant, but this article has argued that there is a deeper, more structural cause to the crisis.

At the root of the crisis lies the functioning of neoliberalism (understood as the regime of accumulation promoted by US dominant classes since the 1980s) and the institutions it uses to regulate itself, to deal with contradictions that hurt its capacity to produce profit and to allow capital accumulation. One of the most important of these institutions, at the international level, is the WTO. We argued that neoliberalism's incapacity to continuously provide, since the Asian crisis in 1997, a satisfying and stable rate of profit to US capitalists (and to Western capitalists in general, even if our argument focuses on the former) lured it into a crisis. Since the WTO's main function is to prevent neoliberalism from being hurt by contradictions that would limit its capacity to provide profits allowing capital accumulation, it was inevitable that one day or another, the struggle faced by neoliberalism would also drag the WTO down into an institutional crisis.

Thus, China is not the problem *per se*. It is part of the problem only because its regime of accumulation fosters a worldwide economic expansion that itself forces neoliberalism and US capitalism to deal with its contradictions. It is also part of the problem because its success, in some respects, could become a model to emulate for other third-world countries, a situation that would exacerbate neoliberalism issues. Finally, to those who associate the WTO to the current 'trade war' between China and the USA, we reply that they may be right to think that there is a trade war. But it is not a trade war between two countries. It is a trade war between two regimes of accumulation: one currently emerging and another that is evidently struggling.