

Biden Foreign Trade Policy: The Return to Multilateralism?

by Aldo Ligustro

Abstract: La politica estera commerciale di Biden: il ritorno al multilateralismo? – The election of Joe Biden as President of the United States in November 2020 generated high hopes for a rapid return to active and loyal multilateral cooperation and, in particular, the revitalization of transatlantic relations, which had become difficult under the previous administration. However, the widespread favour with which Biden’s debut in foreign policy was welcomed decreased significantly starting from the second half of 2021 due to episodes that risked to undermine cohesion among Western Countries and to cast shadows on the coherence between the various strategic objectives declared by the USA. One of the areas in which the expectations generated by Biden’s inauguration as President of the USA were most disappointed and in which it seems more difficult to get rid of Trump’s “legacy” is that relating to the US international trade relations, even within the WTO. In this area, Biden’s policy still shows a substantial continuity with his predecessor’s choices on some major points that are triggering the most serious crisis ever faced by the WTO since its inception.: 1) the continued recourse to protectionist practices of dubious compatibility with WTO rules; 2) hostility towards the WTO dispute settlement system (in particular towards the WTO Appellate Body, whose activities have been completely paralyzed since December 10th 2019) and contestation of the overall institutional structure of the WTO and its functioning. Beyond the justifications the USA gave officially, the real reasons for this boycott may lie on the fact that a multilateral system based on the rule of law placing small and large States on the same level and guaranteeing greater equality among them, is not currently considered very practical for the economic and strategic interests of a great power like the USA.

Keywords: Trump, America First, America is Back, WTO, WTO’s Appellate Body, MC13, protectionism, “Buy American”.

1. Biden Foreign Policy: From America First to America Back... and Forth

Prior to this conference, I covered President Joe (Joseph) R. Biden’s foreign policy in an initial attempt to evaluate the first semester, and then the first year of his office.

The results of this survey are reported in two editorials in this Review written in mid and late 2021 and entitled respectively 1) *America is Back: the Biden presidency and the new world “order”*;¹ 2) *America is Back ... to America*

¹ A. Ligustro, *America is Back: la presidenza Biden e il nuovo “ordine” mondiale*, in *DPCE Online*, 2, 2021, XI ff.

*First? US foreign policy in the first year of Biden presidency, between breaks and continuity with the Trump era.*²

These titles aimed both to capture and emphasize the shift – in the world public opinion or at least in Western Countries and US allies one – from strong and optimistic expectations in the turn around that would occur in US foreign policy, compared to the Trump era, to a significant reduction of these hopes.

The former reaction was determined by the fact that, as is well known, since taking office in the White House on January 20th, and even earlier, during both the electoral campaign and in the transition period between election day and the oath swearing in, on several occasions Biden has expressed his firm intention to make a radical change, compared to his predecessor, (also) to the US foreign policy. After all, just like every previous Democratic president after Thomas Woodrow Wilson, he was expected to govern by abiding respecting both covenants and the rule of law. The slogan “America is Back”, in contrast to Donald Trump’s “America First” and “Make America Great Again” (MAGA), has announced the promise of a rapid return to loyal and active multilateral cooperation and, in particular, the revitalization of transatlantic relations, which had become difficult under the previous administration, as well as a renewed commitment to the protection of human rights and democratic principles around the world.

These intentions were continuously reaffirmed during the first five months of the new presidency. Biden’s tour in Europe, between June 10th to 16th 2021, was his first mission abroad and was an opportunity to fully define the “new global strategy” of the United States together with European allies and other major Western partners, based on the opposition between democracies and totalitarianisms and on the desire to regain the political and moral leadership of the West.³

This “strategic offensive” aroused great expectations in the Western world, where it was generally welcomed as an initiative of undoubted significance and success, both for the overall impact on international relations and for the important programmatic commitments, some of which, in some cases, were even immediately tangible.

One may think, for instance, to the joint project of a *Shared G7 Agenda for Global Action*, launched at the G7, to put an end to the pandemic, reinvigorate national economies and protect the planet or, furthermore, some other decisions adopted during the first half of his term.

A very important signal was Biden’s decision to re-enter the Paris Agreement on climate change of December 12th 2015 – which was announced immediately after his own election (Trump had exited that Agreement in 2017). Another important signal was to revoke the withdrawal from the World Health Organization, which has been announced by Trump in April 2020 and set to take effect in 2021. Equally

² Id., *America is Back ... to America First? La politica estera statunitense nel primo anno di presidenza Biden, tra cesure e continuità con l'era Trump*, in *DPCE Online*, 4, 2021, XI ff.

³ The tour touched four milestones: the G7 meeting, held in Cornwall from 11th to 13th; the summit of the Atlantic Alliance in Brussels on 14th; the meeting with the leaders of the institutions of the European Union, in Brussels, the following day; and, finally, also a “face-to-face” meeting with the President of the Russian Federation Vladimir Putin held in Geneva on June 16th.

emblematic of Biden's multilateral turning point and his intention to relaunch his Country's cooperation within the international organizations was the US action within the UN. On June 19th 2021 the 193 members of the General Assembly confirmed António Guterres as Secretary General by acclamation after the Security Council had ruled in favour of the Portuguese diplomat's second term with decisive US support.

However, the widespread favour with which Biden's debut in foreign policy was welcomed significantly decreased starting from the second half of 2021, due to some episodes that risked undermining cohesion within the Western coalition and casting shadows on the same coherence between the various strategic objectives declared by the United States.

We refer, in particular, to the "Afghan disaster". Biden's decision to withdraw American troops by the symbolic deadline of September 11th, after 20 years of commitment since the beginning of the military intervention following the attack on the Twin Towers in New York on September 11th 2001, and which paved the way for a rapid defeat of the military institutions of the Afghan State governed by President Ghani and the establishment of the Islamic Emirate of Afghanistan under the dramatic conditions that deeply shook the world in August last year, was perfectly in line with the choice of disengagement in the Country that had already been decided by Trump.

Moreover, the decision was *de facto* unilaterally adopted by the United States. This situation has affected the US relations with its Western allies and, in particular, with those engaged in Afghanistan with their contingents in military missions, a commitment that cost the lives of many soldiers of various nationalities.

Nor was it simply a reaction to the "institutional treatment" due to the lack of consultations on the decision to end the military occupation, following the lack of involvement in the 2020 Trump-era negotiations in Doha with the Taliban.

The *vulnus* created, especially with European Countries, was more profound, concerning both the emergence of doubts on the effective ability of the USA to support its allies and the observation of a substantial divergence with respect to the effective weight to be attributed to the values of democracy and human rights in its foreign policy.

As if that were not enough, a few weeks after the Afghan catastrophe, the "submarine crisis" further disturbed US-EU relations: in September 2021 the conclusion of the security treaty called "AUKUS pact" (an acronym for Australia, United Kingdom and United States), in the Indo-Pacific area was announced by the United States, the United Kingdom and Australia. Its main aim was to contain Beijing's ambitions in the area and prevent its military dominance.

The initiative irritated other NATO Member states, since they were excluded, as well as the EU institutions. The harshest reaction came from France, which has strong interests in the Pacific area and two million of its French citizens who reside in overseas territories, as the AUKUS Agreement blew up the purchase of French submarines which had been previously agreed with the Canberra government, for 32 billion euros.

Diplomacy soon took its course and, after the necessary consultations, peace was soon made between all the parties involved. However, these

events seem to have left deep traces in the relations between the two sides of the Atlantic and also within the European continent. It seemed that Biden prefers to give priority to Anglo-Saxon allies rather than those of continental Europe – in continuity with Trump – and that, after Brexit, the United Kingdom is pursuing with determination the design of a geopolitical strategy based on a preferential axis with the US and the Countries of the former British Empire, leaving out the EU.

This is happening despite the constraints deriving from the common NATO membership of many of the EU members. In the meantime, the need to form a common front against Russia after the beginning of the aggression against Ukraine seems to have once again strengthened these ties and the cooperation with many other non-NATO Countries.

Even before the conflict began, the Biden Administration coordinated extensively with its European and NATO allies in the attempt to think of a coherent response to Russia's threats against Ukraine. However, assessing the real extent of Biden's "multilateralist turn" compared to his predecessor's in the light of what has happened overall in these first two years of his mandate, a univocal picture is not obtained. Our impression is actually, to quote someone else's expressions, of a "temperate restoration of international law,"⁴ or of "a cautious return to internationalism".⁵

There is a striking change of style between the two Presidents in the way of relating in international newsrooms. Biden has adopted a more measured diplomatic tone than his predecessor (at least towards his allies and within international institutions). This may be important if it is true that, as they say, it's the tone that makes the music! Even in their substantial action, a clear difference in personality, style and sense of responsibility emerges.

"President Biden does not set out to systematically dismantle everything associated with his predecessor. Unlike "Terminator Man" Trump, who tried to undo anything Obama did, Biden is too careful, thoughtful, bipartisan, rational, and too respectful of the rule of law to follow Trump's vengeful path. This is especially likely given Biden's overriding goal of uniting a pathologically divided nation".⁶

All this has not led to a radical break with the past in any sector of his foreign policy, the one that was expected. Indeed, in many key areas this inevitably comes under not only international conditioning, but also under some strong internal structural constraints, such as a resistant federal judiciary, defendant federal officials, and limits on expeditious review of federal regulations.⁷

Also decisive is the lack of the so-called "Congress Unity", i.e. the possibility for the President to control both legislative chambers. In this regard, it is already excellent news that the last mid-term elections held on November 2022 did not lead to the "red tide" that the polls heralded,

⁴ J.E. Alvarez, *Biden's International Law Restoration*, ciprod01//production/N/NYI/53-2/NYI205 (x), 523 ff.

⁵ R.C. Engel and T. Hansen, *The United States: A Cautious Return to Internationalism*, in S. Ülgen et al., *Rewiring Globalization*, Washington D.C., 2022, 37 ff.

⁶ J.E. Alvarez, *Biden's International Law Restoration*, 525.

⁷ *Ibidem*.

resulting in a prevalence of Republicans in both the House of Representatives (where they have now the majority with 221 seats) and the Senate (where Democrats held 51 seats out of 100). However, the conditioning of having to deal terms with the opposition in many situations remains.

2. Biden Foreign Trade Policy and Trump's legacy

One of the areas in which the expectations generated by Biden's inauguration as President of the USA have been most disappointed and in which it seems more difficult to get rid of Trump's "legacy" is that relating to the foreign trade policy of the US. To understand it better, it must be framed in a broader dimension, that of the former presidential term, between 2016 and 2020.

In determining both the structure and the functioning of the system of international trade relations, the attitude of the US, the leading nation of the world economy, has always been decisive (at least after the Second World War) but, in substance, rather fluctuating compared to multilateralism. To limit ourselves to the history of recent decades, after being the main promoter of the *Uruguay Round* in the 1980s (the round of multilateral negotiations which led to the transition from GATT 1947 to the WTO in 1995), the USA contributed to renewing the push towards the liberalization of international trade on a global scale at the beginning of this century with the launch of the *Doha Round* in 2001. This was also used as a strategy to contain international terrorism, which had become a global threat with the attack on the twin towers in New York on September 11th, 2001.

At the basis of this will was the belief that generalized economic growth, conveyed by such a liberalization, would have deprived terrorism of fertile ground, which certainly finds nourishment in situations of poverty. This drive has gradually diminished over time.

Already in the early 2000s, Republican President George W. Bush (2001-2009) began to question the multilateralism of previous democratic administrations, considering it counterproductive for the protection of US interests. Afterwards, with the economic-financial crisis that began in 2008, the United States, together with other Countries, adopted the so-called "competitive liberalization" policy which focused both on the negotiation of bilateral and regional free trade agreements and on the protection of foreign investments, deemed suitable to "selectively" guarantee greater protection of national interests.

However, it was Donald Trump's presidency (2016-2020) that decisively placed the "America First" principle at the centre of US trade policy and pursued it with an aggressive unilateralism which was confirmed by a frontal attack to the WTO system through various measures, without sparing other international organizations and international offices.⁸ In particular, it is important to think at the imposition or tightening of duties

⁸ See A. Ligustro, *La politica commerciale del Presidente Trump: bilancio dei primi cento giorni*, in *DPCE Online*, 3, 2017, 165 ff.; J. Bacchus, *Might Unmakes Right. The American Assault on the Rule of Law in World Trade*, Centre of International Governance Innovation, Paper n. 173, May 2018.

in various commercial sectors (for example the aluminium and steel ones which are considered strategic), almost always in violation of the WTO rules (just recently the news of an official condemnation of these measures in the WTO appeared),⁹ and the contestation¹⁰ and boycott of the resolution system of disputes, which have been paralyzed since December 2019, due to the lack of consent of the US to the appointment of new members of the Appellate Body after the expiry of the mandate of those already in office. This boycott was actually initiated during the Obama Administration.

For the pursuit of the “competitive liberalization” policy and the protection of US economic interests, in fact, it was more efficient to replace the multilateral framework of the WTO (and also the plurilateral one, limited to regional or in any case smaller groups of States), with new bilateral agreements: the 2017 withdrawal from the negotiations on the Trans-Pacific Partnership (TPP) project and the slowdown imposed on the already difficult negotiations that have been in progress since 2013, related to the Transatlantic Trade and Investment Partnerships (TTIP), are two examples worth of mention.

In other cases, it was a question of revising pre-existing agreements in more favourable way to US interests. This is what happened when NAFTA – the North American Free Trade Agreement with Mexico and Canada – was abolished and replaced by USMCA, the US-Mexico-Canada Agreement, effective since July 1st, 2020.¹¹

3. Biden Foreign Trade Policy and the (unkept) promise of a return to multilateralism

The changing of the guard in the US presidency on January 20th 2021 generated an expectation in the world of a rapid return to loyal multilateral cooperation, even within the WTO. Indeed, initially the choices of the new administration seemed to go precisely in this direction. After taking office,

⁹ On December 9th, the WTO circulated the Panels reports in the parallel cases brought in 2018 by China, Norway, Switzerland and Türkiye in “United States – Certain Measures on Steel and Aluminium Products” (DS544, DS552, DS556 and DS564). The Panels find the measures at issue contrary to Articles I:1, II:1, and XI:1 GATT 1994. Therefore, they find that the inconsistencies of these measures with the WTO rules are not justified under the “Security Exception” provided for in Art. XXI(b)(iii) of the GATT 1994, as claimed by the United States. It should be emphasized that, far from distancing himself from Trump's measures, in an official statement, released by all the media, Biden openly condemned the WTO decision, affirming the legitimacy of the measures then adopted by Trump. He reiterated that “Biden Administration is committed to preserving U.S. national security by ensuring the long-term viability of our steel and aluminium industries, and we do not intend to remove the Section 232 duties as a result of these disputes”: Statement from the United States Trade Representative (USTR) Spokesperson Adam Hodge, December 9th, 2022. See A. Ligustro and M. Buccarella, *L'Organizzazione Mondiale del Commercio (OMC) condanna i dazi di Trump su acciaio e alluminio, ma Biden condanna l'OMC*, DPCE Online, 1-2023.

¹⁰ See V. Di Comite, *Il ritorno al protezionismo: i dazi statunitensi, la reazione dell'UE e la crisi dell'OMC*, in *Le organizzazioni internazionali fra crisi del multilateralismo ed iniziative di neo-protezionismo*, OIDU, numero speciale, 2020, (www.rivistaoidu.net), 54 ff.

¹¹ See M. Buccarella, *Dal NAFTA all'USMCA: cambiare tutto perché nulla cambi?*, in DPCE, 1, 2019, 299 ff.

Biden did not hesitate to give his assent to the appointment of the Nigerian Ngozi Okonjo-Iweala as the new Secretary of the Organization (the first woman, and the first African, to direct the Geneva institution). It had been blocked since September 2020 and took place in February 2021.

This choice was interpreted as a clear geopolitical signal to revitalize multilateralism and to show the willingness to restore the US influence in Africa since the previous administration had shown their lack of interest in such matter. Also, this choice was interpreted as a way to move in opposition to the pervasive Chinese expansionism in this continent, destination for growing investments in the last twenty years, which have become even more extensive with the pandemics.

During the Trump era, US-EU relations had been jeopardised by continuous economic and trade wars, including but not limited to the Countries belonging to the WTO. Thanks to Biden, instead, the relations have improved considerably. To mention an example, his offer to agree on a *Global Minimum Tax*, originally made at the G7 meeting in June 2021 and effectively translated in October of the same year into an agreement that sets a minimum rate of 15% for the taxation of multinational companies and will become effective starting from 2023.

As regards the relations within the WTO, the *Boeing-Airbus* dispute (one of the longest disputes in the WTO, the “eternal arm wrestle” between the US and the EU)¹² was closed during the first half of Biden’s presidency and the huge tariffs applied to each other by the US and the European Union were removed so not to penalize the subsidies granted by each of them to respective aeronautical industries.

At the end of October 2021, another serious burden of the Trump era was finally closed: the dossier on steel and aluminium import duties imposed in 2018 by the US on European products (however, the duties remained in place for other States, including China). At the same time, with the establishment of the US-EU Trade and Technology Council, close bilateral cooperation has started on new technological fields of global interest, such as artificial intelligence and cyber security.

Finally, on December 3rd, 2021, shaking up the substantial stalemate of the *Doha Round*, the round of multilateral negotiations launched twenty years ago, an important result was finally achieved with the conclusion of an agreement (currently between sixty-seven States) which aims to facilitate the exchange of services. Further important results were obtained with the MC12 “Geneva Package”, the package of agreements signed on the 12th Ministerial Conference of the WTO held in Geneva on 12th - 17th June 2002 with the aim of providing concrete answers in the trade field to major challenges facing the world today. They concern fisheries subsidies, the WTO response to the pandemic, food insecurity, e-commerce and other issues, and an ambitious program of institutional reforms, in which the US is called upon to play a decisive role.

The innovations introduced by Biden in the US foreign trade policies are quite important but still unsatisfactory. Biden’s policy still shows

¹² See M. Buccarella, *Airbus vs Boeing: tra i due litiganti il terzo gode*, DPCE Online, 3, 2019, 2301 ff.; Id., *Il caso Airbus-Boeing: una nuova tappa della guerra dei dazi tra USA e UE*, in DPCE Online, 1, 2020, 1045 ff.

substantial continuity with his predecessor's choices on some fundamental points that are determining the most serious crisis ever faced by the WTO since its birth. These are mainly the following issues: 1) the continued recourse to some protectionist practices of dubious compatibility with the WTO regulations; 2) hostility towards the WTO dispute settlement system and contestation of the overall institutional structure of the WTO and its functioning.

3. 1. Biden's protectionism

As far as the first point is concerned, Biden Administration has reported the worsening of some protectionist measures previously taken by Trump. This happened in the public procurement field, just to provide an example, through an extension of the "Buy American" principle which requires to give preference to US products and services rather than to foreign ones. On March 7th 2022, the Federal Acquisition Regulatory Council (FAR Council) issued a final rule increasing home contents requirement for Federal government procurements governed by Buy American Act (BAA). The FAR Council issued the final rule pursuant to President Biden's Executive Order of January 25th, 2021 (EO 14005) which outlined the Biden Administration policy that the US government procurement should "maximize the use of goods, products, and materials produced in, and services offered in, the United States".

The recent adoption of the *Inflation Reduction Act* (IRA), the main US climate law, goes in the same direction and risks triggering a new trade war with the European Union. IRA, in fact, provides a very generous economic and tax breaks (it is a 369 billion plan) also based on the "Buy American" in favour of a series of key industrial sectors for the ecological transition, starting from electric cars and semiconductors.¹³

The biggest fear for Europe is that the benefits promised by Biden will drain investments and raw materials away from the Old Continent. Markets would rearrange themselves looking up to the USA, damaging the European transition and the competitiveness of European companies. The European Commission has responded threatening a countermove which involves a reform of the internal regime of the subsidies aimed at introducing similar advantages for producers in Europe. When this work is closed (December 2022), there is an attempt to resolve the conflict in a meeting of the EU-US Trade and Technology Council, the outcome of which is difficult to predict. In the meantime, considering such regulations incompatible with fundamental WTO principles – especially the principle of the most favoured nation treatment (Art. I of GATT 1994) and that of national treatment (Art.

¹³ See for an overview of these measures *Biden Administration Increases Domestic Content Requirements under Buy American Act, Enhances Price Preferences for Domestic "Critical" Sectors*, in *US Multilateral Trade Policy Developments*, 1 ff. <https://www.whitecase.com/insight-alert/biden-administration-increases>, J. Bordoff, *America's Landmark Climate Law. The Inflation Reduction Act must spur virtuous competition, not vicious protectionism*, *Finance & Development*, December 2022, 35 ff.

III of GATT 1994)¹⁴ –, the EU, as well as other Countries, including China, announced their intention to file a complaint with the WTO. The United States, on the other hand, defend the full legitimacy of these measures.¹⁵

3. 2. Biden and the WTO

The dispute resolution mechanism has always been considered the “Crown Jewel” of the WTO system, a model to look up to, due to its ability to constantly resolve a very large number of disputes, which is not matched by similar international institutions. Now, however, since December 10th 2019 it has almost completely paralyzed and risks collapse.¹⁶ The block on the appointment of the members of the Appellate Body (AB) in charge of the second level of judgment has not yet ceased after it being enforced by the US in May 2016. To block any proceeding, it is therefore sufficient for each of the dispute parties to challenge the first instance judgment (the Panel report). However, it is a question of being confined to a sort of dead-end “limbo”, considering, on the one hand, the impossibility of its immediate approval by the Dispute Settlement Body, and on the other hand, the blocking of the second degree proceeding.

Not only is this conduct in line with that of the Trump presidency, but also with that of Barak Obama (January 20th 2009 - January 20th 2017). In fact, he was the first to start this “war” in 2016, even though this is often forgotten. The concerns about the performance of this institution are detailed in the February 2020 *Report on the Appellate Body of the World Trade Organization* issued by the Office of the US Trade Representative, Katherine Tai.

The US mainly accuses some jurisprudential guidelines of the Appellate Body which would constitute a strength of the system on the basis of a largely shared assessment, as it would help guarantee the coherence and authority of the interpretation of the WTO rules and thus greater legal certainty.

According to the last three US Administrations, on the other hand, the Appellate Body would have made a completely unreasonable use of its skills trespassing “quasi-normative” functions (in the direction of a progressive development of substantive and procedural law) and “advisory” (given the tendency to also pronounce on matters that are not strictly necessary for the resolution of the cases being examined), undermining state sovereignty.

¹⁴ In particular, under WTO rules, subsidies that have the effect of substituting the imports of WTO members with domestic production are prohibited *per se*. For an analysis of the IRA in the light of WTO law see L. Hyo-young, *The U.S. Inflation Reduction Act (IRA) of 2022: Issues and Implications*, IFANS Focus, Upload Date 2022-11-14, <https://www.ifans.go.kr/knda/com/fileupload/FileDownloadView.do?>; Ch. Benoit, *The Inflation Reduction Act Sparks Trade Disputes: What Next?*, *American Affairs*, 68 ff. More generally on subsidies in the energy sector and the WTO see A. Valeriani, *Renewable energy subsidies and WTO law*, *iusinitinere.it*, July 19th 2019.

¹⁵ See *U.S. Government Procurement and International Trade*, Congressional Research Service, Report R47243, September 19th, 2022, <https://crsreports.congress.gov>.

¹⁶ See, *ex multis*, G. Sacerdoti, *Lo stallo dell’Organizzazione Mondiale del Commercio davanti alla sfida di Trump: difficoltà passeggiare o crisi del multilateralismo?*, in *DPCE*, 1, 2018, V ff.

Moreover, this “creative jurisprudence” would tend to be to the detriment of the United States. Statistical data, which very often see them as successful in the proceedings in which they are involved, however contradict this accusation.

Another complaint expressed by the United States is that proceedings tend to last too long, especially the executive phase, which is too complex and cumbersome. This does not ensure a rapid execution of the judgments. With respect to this problematic aspect of the functioning of the system, one can easily argue that blocking it is certainly not the best solution.

Beyond the justifications officially given by the United States, one may think that the real reasons for this boycott lie elsewhere. The suspicion is that a system based on the rule of law and on binding judgments, which places small and large States on the same level and guarantees greater equality between them, is not currently considered very practical for the interests of an economic-commercial power like the USA. Rather, Countries like this would prefer to use more peace-making methods (which in any case constitute an important, but not exclusive, aspect of the current WTO litigation system, notoriously of a “mixed” nature)¹⁷ and direct negotiations with the counterparties where it is better to enforce their negotiating weight.

The ostracism of the US also ends up conditioning the entire functioning of the organization, of which they are asking for a profound reform, which however is impossible to achieve as long as they continue to elude a coherent and serious commitment to this effect in the negotiating sphere. Several representatives of the Biden Administration have repeatedly made general statements in favour of a resumption of multilateralism and close cooperation with other WTO members. But the United States has not yet set a complete and detailed American agenda for the WTO.¹⁸

It is certainly good news that in MC12 WTO Members agreed for the first time to undertake a comprehensive review of the WTO functions to ensure the organization is able to respond more effectively to challenges of the multilateral trading system. Director-General Okonjo-Iweala said the decision reflects the “widespread recognition that the WTO core functions need to be updated and improved”. Ministers committed members to work on reforming the organization to enhance all its functions through an open, transparent and inclusive process with the aim of submitting possible reform proposals at the 13th Ministerial Conference (MC13) to be held before the end of 2023. However, it is difficult to predict whether it will be possible to converge on a shared project by that date, given the variety of proposals presented so far by the States. With respect to this goal, the fact that “there is a bipartisan consensus within the US that while the world has changed,

¹⁷ On the WTO dispute settlement system, its nature and characteristics see, *ex multis*, A. Ligustro, *Le controversie tra Stati nel diritto del commercio internazionale: dal GATT all'OMC*, Padova, 1996; Id., *La soluzione delle controversie*, in P. Picone, A. Ligustro, *Diritto dell'Organizzazione mondiale del commercio*, Padova, 2002, 575 ff.

¹⁸ See A.W. Wolff, *U.S. Trade Policy, the WTO, and Reframing Trade Priorities*, WTO Public Forum, September 29th 2022, <https://www.piie.com/.../us-trade-policy-wto-and-reframing-trade-priorities>.

the WTO has not”¹⁹ is certainly not a good prerequisite for the revitalization of a “strong” WTO.²⁰

Concerning the WTO dispute settlement system, ministers also agreed to start talks on how to address the concerns in order to ensure a fully functioning system by 2024. This means that the system will effectively be blocked for two more years and that the WTO dispute settlement mechanism is in serious danger of falling back into the GATT 1947 system, in which a losing party to a panel could prevent the adoption of a report by exercising its power of veto when that report was placed on the agenda for approval by the 1947 GATT Council. Nor has the *Multi-Party Interim Appeal Arbitration Arrangement* (MPIA) created on April 30th 2020 on a proposal from the European Union been able to provide a viable alternative based on Art. 25 of the Dispute Settlement Understanding (DSU).²¹ Only a few States have joined it and the US (or Countries like Japan, India, Russia) are not among those.²²

4. Conclusion: A return ... to what?

¹⁹ J.E. Alvarez, *Biden's International Law Restoration*, 542. Somewhat pessimistic about the prospects of the ongoing negotiations is also C. VanGrasstek, *Trade after Trump: Can the Biden Administration Shore up the Eroding Foundations of American Leadership?*, EUI Working Paper RSC 2021/17, available in open access in Cadmus, <https://cadmus.eui.eu>.

²⁰ Let us omit to comment, but it is in any case appropriate to report the point of view of the rival Countries of the USA with respect to their WTO policy, which is clearly highly critical. Just to mention an example, according to a representative of the Russian Academy of Sciences, the dominant desire of Biden Administration “is to transform the WTO into an international economic mechanism to strategically contain China and openly oppose Russia by politicizing the WTO and taking measures that pave the way for the complete dismantling of the rules-based multilateral trading system”: A.M. Menshikova, *Position of Joe Biden's Administration on the World Trade Organization*, in 92 *Herald of the Russian Academy of Sciences* 6, 529 ff.

²¹ Art. 25 of the Dispute Settlement Understanding (DSU) provides for expeditious arbitration within the WTO as an alternative means of dispute resolution. The MPIA operates under the WTO framework. It is based on the usual WTO rules applicable to appeals, but also contains some novel elements to enhance procedural efficiency. It is not intended to supplant the WTO's Appellate Body. This is a stopgap measure. As soon as the Appellate Body is again able to operate, appeals will be brought before the Appellate Body. See *ex multis*, E. Baroncini, *Resorting to Article 25 of the DSU to Overcome the WTO Crisis on the Appellate Body: The EU Proposal for an Interim Appeal Arbitration*, in *DPCE Online*, 4, 2019, 2313 ff.; Id., *The EU and the Multi-Party Interim Appeal Arbitration Arrangement (MPIA) – A Contingency Tool to Save the WTO Appellate Stage*, in B. Barel, A. Gattini (eds), *Le prospettive dell'export italiano in tempi di sfide e crisi globali. Rischi e opportunità*, Torino, 2021, 83 ff.; C. López-Jurado Romero de la Cruz, *El papel de la UE como garante del estado de derecho en relación con el sistema de solución de diferencias de la OMC*, in *Revista de Derecho Comunitario Europeo*, 4, 2021, 869 ff.

²² There are currently 25 Parties to the MPIA (52 Parties considering all the 27 EU Member States): Australia; Benin; Brazil; Canada; Chile; China; Colombia; Costa Rica; Ecuador; European Union; Guatemala; Hong Kong; Iceland; Macao; Mexico; Montenegro; New Zealand; Nicaragua; Norway; Pakistan; Peru; Singapore; Switzerland; Ukraine and Uruguay.

Summarising the above mentioned, it is evident that many aspects of the foreign trade policy of the forty-sixth President of the United States of America have undermined the international image of the Country and shaken the confidence of the partners, especially European ones, which have been rather disappointed by the expectations created at the beginning of Biden presidency. The end of the initial “honeymoon” has now generated in many of them the belief of a substantial continuity with the foreign policy of the previous US Administration. This belief was fostered by the joke attributed to the former French Foreign Minister Le Drian, according to which “Joe is a Donald without Twitter”.

The joke may sound funny but it certainly expresses an excessive and ungenerous judgment, just like the initial enthusiastic reactions towards Biden were certainly excessive. As someone said, Biden’s foreign policy can rather be seen, in general and in the specific area of economic and trade relations, as a “mixed box” with “pale lights” and “long shadows”.²³

The change of pace on some important aspects of Trump’s foreign policy is evident and indisputable, even if the change is more contained than expected. The disappointment for the substantial American disengagement from the multilateral economic cooperation system must not make us forget Biden’s abandonment of the trade wars previously waged against the European Union in line with the fundamental geopolitical orientations aim to strengthen the alliance of Western Countries to oppose China’s expansionism (the centrality of the competition with China is shared both by Democrats and Republicans in the Biden as well as in the Trump era, even in a Country as deeply torn as the current USA is after the Capitol Hill events).²⁴ This approach requires a complex and coordinated strategy that is not always, however, pursued consistently.

With regard to US-China relationship, compared to Trump’s aggressive policy, Biden seems to be pursuing a policy of dialogue and confrontation at the same time. A timid glimmer of dialogue reopened at the last G20 meeting held in Bali, Indonesia, in November 2022. The Presidents of the two Countries, Biden and XI Jinping, met after a long period of mutual accusations and affirmed the need for common cooperation on a range of issues, such as WHO reforms to handle future pandemics, or the contrast of climate change.

But in the field of economic and trade relations, given the nature and dimension of the current China’s growth, the confrontation with Beijing seems inevitable even for the Biden Administration.

So, after some initial softening, the policy of combating Chinese competition has resumed through high customs tariffs on imports of products from, and restrictions and controls on exports to China, especially in a number of strategic technology sectors. The latest case, the so-called “chip war”, started with news restrictions on sales of semiconductors implemented on October 2022. These products are vital for the development

²³ R. Alvaro, *Biden’s Foreign Policy Casts a Long Shadow*, JOINT Brief n. 8, www.jointproject.eu.

²⁴ V. Mishra, *From Trump to Biden, Continuity and Change in the US’s China Policy*, ORF Issue Brief No. 577, September 2022, Observer Research Foundation, <https://policycommons.net/artifacts/2656627/from-trump-to-biden>.

of artificial intelligence, supercomputers, and other critical technologies. It is understandable, therefore, that China promptly reacted to US measures by initiating a WTO dispute complaint with a request of consultations circulated to WTO members on December 15th.

To contain China, Biden seems to understand, better than Trump, how important the support and collaboration of his traditional allies is. This implies, for example, that Biden Administration will likely continue to hinder Western Countries' collaboration with China's Belt and Road Initiative (BRI). On the other hand, it could be induced to restart attempts to conclude with these Countries the alternative trade and investment agreements blocked by Trump, including the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (TPP-11) and the ancient and ambitious project of a bilateral trade agreement with the EU, the *Transatlantic Trade and Investment Partnership* (TTIP), despite persistent opposition from the progressive wing of the Democratic Party.²⁵

However, as already seen, in the meantime Biden has not hesitated to risk a new trade war with the European Union following the adoption of the *Inflation Reduction Act* (IRA), the climate law that risks inflicting serious damage on European companies. Moreover, after publication, on December 9th, 2022, of the WTO panel reports that condemned the duties imposed by Trump on steel and aluminium products, Biden did not distance himself from his predecessor, but instead condemned the WTO decision in the name of protecting US national security.²⁶ So another point of continuity with Trump (for someone unexpected)²⁷ in using national security for populist and protectionist policies: “there are aspects of Trumpism that may long outlast Trump himself”.²⁸

It had evidently been too naive to believe that a change of President could be enough to obtain a radical overturning of the strategic lines of a superpower such as the United States, which depend on complex historical factors and processes, and not on individuals. It may be true that a superpower is never “multilateralist” but rather “hegemonic”; and multilateralism is therefore never an end in itself but it can be a useful tool to better “manage” allies.

Compared to Trump, Biden would simply understand the importance of “listen to them more” to get their support for his strategic goals. His foreign policy does not appear to be based on abstract commitments to multilateralism but on the simple premise that this will bring more benefits for the USA, for Americans and for US business.

²⁵ See Ch. Scherrer, *Biden's Foreign Economic Policy: Crossbreed of Obama and Trump?*, in 1 *International Review of Public Policy* (2022), <https://journals.openedition.org/irpp/2398>.

²⁶ A. Ligustro and M. Buccarella, *L'Organizzazione Mondiale del Commercio (OMC) condanna i dazi di Trump su acciaio e alluminio, ma Biden condanna l'OMC*, quoted above in footnote 9.

²⁷ See for example St.S. Malewer, *Biden, National Security, Law & Global Trade: Less Subterfuge & More Strategy in the New Era of Crisis*, in 1 *China & WTO Rev.*, 185 (2021).

²⁸ C. VanGrasstek, *Trade after Trump*, 25.

If this is true, perhaps those who said that “more than a restoration of international law, Biden’s policy seems to be only the return of what is normal behaviour for the United States”,²⁹ are right.

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²⁹ J.E. Alvarez, *Biden's International Law Restoration*, 571.