

Biden Foreign Trade Policy: A New Deal for Protectionism

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Abstract: *La politica di Biden sul commercio estero: un New Deal per il protezionismo* - 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 2019) and contestation of the overall institutional structure of the WTO and its functioning; 3) the rivalry with China.

Keywords: Trump; Harris; America First; America is Back; WTO; Protectionism; "Buy American"; China

1. Biden Foreign Trade Policy: a Brief Look Back at the First Half of his Presidency

In the last DPCE conference on the first two years of the Biden presidency² and in some previous writings published by DPCE,³ we described the progressive evolution (or rather involution) of President Biden's trade policy from a program of relaunching multilateralism towards, instead, a substantial return to the protectionism and the unilateralism that had characterized the policy of his predecessor, President Donald Trump (2017-2020). By the end of 2022, however, hopes that Biden's initial promises would be at least partially implemented had not been completely dashed.

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² A. Ligustro, *Biden Foreign Trade Policy: The Return to Multilateralism?*, in *DPCE Online*, 2023, 1554 ff.

³ A. Ligustro, *America is Back: la presidenza Biden e il nuovo "ordine" mondiale*, in *DPCE Online*, 2, 2021, XI ff.; 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.

Today, at the end of 2024, we can make a final assessment of Biden's policies in this area. But let us first take a brief look back at the first half of his presidency.

As is well known, since taking office in the White House on January 20, 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 10 and 16, 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.⁴

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 12, 2015 – which had been 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 had been announced by Trump on April 2020 and set to take effect in 2021. Equally 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 19, 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

⁴ The tour touched four milestones: the G7 meeting, held in Cornwall from June 11 to 13; 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 16.

Western coalition and casting shadows on the same coherence between the various strategic objectives declared by the United States. We will limit ourselves here to recalling some of the most important episodes, referring for more details to what has already been said at the conference on the Biden presidency in 2022.⁵

We refer, in particular, to the “Afghan disaster” (Biden's *de facto* unilateral decision to withdraw US troops from Afghanistan in September 2021), and to the “submarine crisis” brought about by the conclusion in September 2021 of the Indo-Pacific security treaty known as the “AUKUS pact” – an acronym for Australia, the United Kingdom and the United States – which irritated the other NATO member states, and especially the European countries, since they were excluded.

Diplomacy soon took its course and, after the necessary consultations, peace was 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 preferred 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.

By the end of 2022, therefore, at least on the European side, the impression had been created that Biden had not achieved the radical break with the past and the “multilateralist turn” from his predecessor that was expected in any area of his foreign policy.⁶ This is true in general. But more specifically, one of the areas where the expectations raised by Biden's inauguration as US president have been most disappointed, and where it seems most difficult to get rid of Trump's “legacy”, is that of US foreign trade policy. We will focus on this aspect in our report in order to provide a final assessment of Biden's policy during his entire term comparing it with the term of Donald Trump. And such a comparison could also be useful for “reading” the future, as Donald Trump is once again the Republican candidate in the upcoming elections and his economic “recipes” are likely to be reintroduced into US politics if he is re-elected.

2. The Legacy of Trump Foreign Trade Policy

As a preliminary remark, it should be noted that the attitude of the United States, the leading nation in the world economy (at least since the Second World War), has always been decisive in determining both the structure and the functioning of the system of international trade relations, although it has tended to fluctuate with regard to multilateralism.

To confine ourselves to the history of the last few decades, after being the main proponent of the Uruguay Round in the 1980s (the round of multilateral negotiations that led to the transition from the GATT of 1947 to the WTO of 1995), the US helped to renew the push for the liberalisation of international trade on a global scale at the beginning of this century with the launch of the Doha Round in 2001.

Already in the early 2000s, Republican President George W. Bush (2001-2009) began to question the multilateralism of previous democratic

⁵ A. Ligustro, *Biden Foreign Trade Policy: The Return to Multilateralism?*, cit.

⁶ See 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.

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 liberalisation” 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.

The culmination of this trend, however, has been the administration of Donald Trump, which has decisively placed the “America First” principle and the protection of the US economic interests at the centre of US trade policy and pursued it with an aggressive unilateralism. To implement this policy, Trump has used a number of tools. In brief, these have included: internal (subsidies) and external (tariffs) protectionist measures, which have often led to economic wars with trading partners, especially China, considered the main “competitor” on world markets; the boycott of the multilateral trade system represented by the World Trade Organization (WTO) and its dispute settlement system, and also the boycott of regional and plurilateral agreements in favour to bilateral agreements more favourable to the interests of the United States.

3. Biden’s Way to Protectionism

Undoubtedly, there is a striking change in style between Trump and Biden in the way they deal in international relations. Biden has adopted a more measured diplomatic tone than his predecessor, at least with allies and in international institutions. During the Trump era, even US-EU relations have been shaken by continuous economic and trade wars. Instead, thanks to Biden, these relations have improved considerably.

However, like the Trump administration, Biden has shown himself to be very attached to the myth of a manufacturing comeback in the United States.⁷ In fact, in the Biden administration, the idea is circulated that the current model of trade agreements violates the “social contract” because it pits workers in one country against workers in another, as returns to capital increase while returns to labor decrease. Over the past three years, US Trade Representative Katherine Tai and National Security Advisor Jake Sullivan have worked to articulate a “worker-centered trade policy”.⁸ To this end, Biden has not hesitated to maintain or even strengthen some of the protectionist measures previously adopted by Trump. This happened, for example, in the area of public procurement. Indeed, one of President Biden’s first actions was to issue an Executive Order⁹ extending and maximizing the “Buy American” principle contained in the Buy American Act,¹⁰ which

⁷ So Th.J. Schoenbaum, *The Biden Administration’s Trade Policy: Promise and Reality*, in *Ger. Law J.*, 24, 1, 2023, 102 ff., 105.

⁸ About the Biden administration’s “trade theory” see T. Sutton, M. Williams, *A New Horizon in U.S. Trade Policy. Key Developments and Questions for the Biden Administration*, American Progress, Report March 14, 2023; S.A. Aaronson, *Despite Attempts at Reinvention, Biden Trade Policy Remains Protectionist. The White House should adopt a more consultative approach*, in *CIGI - Centre for International Governance Innovation*, June 5, 2024; P.E. Harrell, *Time to Reset the U.S. Trade Agenda*, Washington, DC, 2024 (text downloadable at CarnegieEndowment.org).

⁹ Executive Order 14005, *Ensuring the Future is Made in All of America by All of America’s Workers*. 86 Fed. Reg. 7475 (Jan. 25, 2021).

¹⁰ (BAA) 41 U.S.C. §§ 8301-8305.

generally requires US products and services to be given preference over foreign products and services by agencies of the federal government.

The Biden administration's public procurement policy then merges with the industrial policy enacted by Congress through a legislation aimed at heavily subsidising key sectors of the US economy. The American Rescue Plan Act of 2021 provides about USD 40 billion in industrial subsidies; the Infrastructure and Jobs Act, also of 2021, adds about USD 1.2 trillion; the Chips Act of 2022 adds USD 252.7 billion in subsidies for semiconductor chip technology; and, finally, the Inflation Reduction Act (IRA), also of 2022, the main US climate bill, provides very generous economic and tax incentives (it is a USD 369 billion plan), also based on "Buy American", in favour of a number of key industrial sectors for the ecological transition, starting from electric cars and semiconductors.¹¹

All these measures have created new tensions and the risk of trade wars with some of the US's main partners, including the European Union, which consider them incompatible with fundamental WTO principles: especially the principle of the most favoured nation treatment (Art. I of GATT 1994); that of national treatment (Art. III of GATT 1994), the Agreement on Subsidies and Countervailing Measures (SCM)¹² and, as far as the "Buy American" principle is concerned, also the WTO Government Procurement Agreement (GPA).¹³ The United States, on the other hand, defend the full legitimacy of these measures.¹⁴

As a result, the EU and other countries, including China, have announced their intention or actually decided (China)¹⁵ to file a complaint before the WTO. In addition, the European Commission has responded by announcing a reform of the internal subsidy system to introduce similar benefits for European manufacturers, particularly in the "clean tech" sector.¹⁶ But the trend is more general. In fact, we are witnessing a generalised race to subsidise national industries, which risks posing a serious threat to the

¹¹ For an overview of these measures see *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>.

¹² 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?>; J. Bordoff, *America's Landmark Climate Law. The Inflation Reduction Act must spur virtuous competition, not vicious protectionism*, in *Finance & Development*, December 2022, 35 ff. More generally on subsidies in the energy sector and the WTO see A. Valeriani, *Renewable energy subsidies and WTO law*, *iusiniter.it*, July 19, 2019.

¹³ The WTO Government Procurement Agreement is a plurilateral agreement binding only on those WTO members that specifically sign or accede to it. The GPA was negotiated and approved in 1994, but the current version was concluded on March 30, 2012. There are actually 21 parties to the GPA, including the US and the EU.

¹⁴ See *U.S. Government Procurement and International Trade*, Congressional Research Service, Report R47243, September 19, 2022, <https://crsreports.congress.gov>.

¹⁵ See WTO, DS623, *United States - Certain tax credits under the Inflation Reduction Act*. Consultations requested by China on March 16, 2024; panel requested on July 26, 2024 and established on September 23, 2024.

¹⁶ See V. Di Comite, *L'impatto dell'Inflation Reduction Act nelle relazioni commerciali tra Stati Uniti ed Unione europea nel contesto del diritto dell'Organizzazione Mondiale del Commercio*, in *DPCE Online*, 1, 2023, 1545 ff.; D. Kleimann *et. al.*, *How Europe should answer the US Inflation Reduction Act*, in *Bruegel. Policy Contribution*, 4, 2023/February 2023 (www.bruegel.org).

resilience of the multilateral system of rules guaranteed by the WTO, which, as we shall see, is already shaken by a deep crisis.

Another protectionist tool systematically used by Trump, but widely adopted by Biden, is tariffs. Using the authority delegated to him by Congress according to relevant national legislation,¹⁷ President Donald Trump (who described himself as “tariff man”) has made unprecedented use of his executive powers and, ignoring the norms of international law in favour of unilateral action under US law, has issued a large number of measures that have imposed protectionist tariffs. Some of these measures were condemned in the first instance by the relevant WTO dispute settlement bodies (the panels) because they were found to be contrary to more than one provision of the GATT (the General Agreement on Tariffs and Trade). But their rulings were not adopted because, as we shall see, the WTO dispute system is currently paralysed at the post-panel stage.

President Biden did not substantially change this line, but only mitigated it, sometimes selectively negotiating a softening of Trump’s actions with Western allies, especially the EU and the UK. To give one example, the *Boeing-Airbus* dispute (one of the longest disputes in the WTO, the “eternal arm wrestle” between the US and the EU)¹⁸ was closed, at least provisionally,¹⁹ 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. In other cases, Biden has instead taken a tough stance, echoing the nationalist spirit of his predecessor. The tariffs on steel and aluminium imports under Section 232 of the Trade Expansion Act of 1962 are a case in point. After publication, on December 9, 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.²⁰ So another point of continuity with

¹⁷ Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862, confers open-ended authority on the President to take action to protect national security. Sections 201 and 301 of the Trade Act of 1974 permits the United States to take unilateral action against countries whose acts or practices the USTR (United States Trade Representative) finds unjustifiably impede or burden the foreign commerce of the United States.

¹⁸ See M. Buccarella, *Airbus vs Boeing: tra i due litiganti il terzo gode*, in *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.

¹⁹ On June 2021, the EU and the US announced a suspension of Airbus-Boeing tariffs by both sides for five years and set up a working group to find a permanent solution to the dispute.

²⁰ On December 9, 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 found the measures at issue contrary to Articles I:1, II:1, and XI:1 GATT 1994. Therefore, they considered that the inconsistencies of these measures with the WTO rules was not justified under the “Security Exception” provided for in Art. XXI(b)(iii) of the GATT 1994, as claimed by the United States. 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 aluminum 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 9, 2022. See A. Ligustro, M. Buccarella,

Trump (for someone unexpected)²¹ in using national security for populist and protectionist policies: «there are aspects of Trumpism that may long outlast Trump himself».²²

4. Biden and the WTO: a Final Requiem for Multilateralism?

As mentioned above, the biggest disappointment for many US partners and allies with regard to Biden's foreign concerns his relationship with the WTO. The expected reversal, or at least correction, of Trump's boycott policy in favour of a revival of multilateralism did not take place, although the first decisions of his presidency seemed to go in this direction.

For example, after taking office, Biden did not hesitate to approve the appointment of Nigerian Ngozi Okonjo-Iweala as the organization's new Director-General (the first woman and the first African to head the Geneva institution). Her election had been blocked since September 2020 and took place in February 2021. This choice was interpreted as a clear geopolitical signal to revitalise multilateralism and to show the willingness to restore US influence in Africa, since the previous administration had shown its lack of interest in this matter. This choice has also been interpreted as a way of opposing the omnipresent Chinese expansionism in this continent, destination of growing investments over the last twenty years, which have become even more extensive with the pandemic (Covid-19).

Moreover, relations with European partners, which had often been strained during the Trump presidency, immediately improved. We have already reported on the "temporary solution" to the *Boeing-Airbus* dispute. At the end of October 2021, another serious burden of the Trump era was finally resolved: the dossier on steel and aluminium import duties imposed by the US on European products in 2018 (although the duties remained in place for other countries, 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 3, 2021, shaking up the substantial stalemate of the *Doha Round*, the round of multilateral negotiations launched twenty years ago, an important result was achieved with the conclusion of the Trade Facilitation Agreement, an agreement 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 June 12-17, 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.

L'Organizzazione Mondiale del Commercio (OMC) condanna i dazi di Trump su acciaio e alluminio, ma Biden condanna l'OMC, in *DPCE Online*, 1, 2023, 1529 ff.; Id., *The WTO Condemns Trump's Tariffs on Steel and Aluminium, but Biden Condemns the WTO*, in *Journal of World Trade*, 58, 1, 2024, 131 ff.

²¹ See for example St.S. Malewer, *Biden, National Security, Law & Global Trade: Less Subterfuge & More Strategy in the New Era of Crisis*, in *China & WTO Rev.*, 1, 2021, 185 ff.

²² 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>.

However, Biden showed substantial continuity with his predecessor's choices on the fundamental issue at the heart of the most serious crisis the WTO has faced since its inception: hostility to the WTO's dispute settlement system and challenge to the WTO's entire institutional structure and functioning. 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 10, 2019 it has almost completely paralyzed and risks collapse.²³ 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, and on April 26 of this year (2024), for the 75th time, the United States blocked a request by 130 WTO members for filling the vacancies at the AB. To block any proceeding, it is therefore sufficient for each of the dispute parties to challenge the first instance judgment (the Panel report). However, this inevitably leaves the procedure in a kind of "limbo" with no exit, given the impossibility of immediate approval by the Dispute Settlement Body (DSB) on the one hand, and the blocking of the second-instance procedure on the other. Not only is this conduct in line with that of the Trump presidency, but also with that of Barak Obama (January 20, 2009 - January 20, 2017). In fact, he was the first to start this "war" in 2016, even though this is often forgotten. The reasons for US hostility towards the Appellate Body are set out in the *Report on the Appellate Body of the World Trade Organization* issued in February 2020 by the Office of the US Trade Representative, Katherine Tai.²⁴

In particular, the US criticises some of the jurisprudential guidelines of the Appellate Body, which, on the basis of a broadly shared assessment, would be a strength of the system because they would help to ensure coherence and authority in the interpretation of WTO rules and thus greater legal certainty.

On the contrary, according to the last three US administrations, the Appellate Body would have used its powers in a totally inappropriate manner, trespassing on "quasi-normative" or "law-making" functions (in the direction of a progressive development of substantive and procedural law) and "advisory" functions (given the tendency to pronounce even on matters that are not strictly necessary for the resolution of the cases under consideration), undermining national sovereignty and usurping the competences of the Ministerial Conference and the General Council, which,

²³ See, *ex multis*, G. Sacerdoti, *Lo stallo dell'Organizzazione Mondiale del Commercio davanti alla sfida di Trump: difficoltà passeggiere o crisi del multilateralismo?*, in *DPCE*, 1, 2018, V ff.; Id., *Sopravviverà l'Organizzazione Mondiale del Commercio alla sfida di Trump? Riflessioni sulla crisi del multilateralismo, un «global public good» da difendere*, in *DPCE*, Numero Speciale, 2019, 685 ff.; M. Wagner, W. Zhou, *WTO Dispute Settlement System: Just Another Victim on the Road to Tomorrow's GATT?*, in *ILA Reporter*, available in <http://ilareporter.org.au/2019/07/>; L. Borlini, G. Sacerdoti, *Systemic Changes in the Politicization of the International Trade Relations and the Decline of the Multilateral Trading System*, in *Ger. Law J.*, 24, 1, 2023, 17 ff.; A. Ligustro, *Il sistema del commercio multilaterale e i suoi nemici*, in *Itinerari della comparazione. Scritti in onore di Giuseppe Franco Ferrari*, Milano, 2023, 805 ff.

²⁴ *The 2020 USTR Report on the World Trade Organization Appellate Body of the World Trade Organization*. For a comment on this document see, *ex multis*, N. Boschiero, *The Challenges for the Multilateral Trading System and for the WTO Dispute Settlement Mechanism*, in N. Boschiero, *US Trading Policy, China, and the World Trade Organization*, New York, 2023, 142 ff.

pursuant to the Agreement Establishing the WTO, Article IX.2, are the only bodies that can adopt interpretations of WTO agreements. Such behaviour would also be contrary to Article 3.2 of the WTO's Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) according to which «Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements». In other words, the United States considers that the Appellate Body was never intended to function as a supreme court of international trade, deciding legal questions whose solutions are not clearly provided for in the WTO agreements. They also believe that the Appellate Body's powers should be reduced so that difficult cases are referred to the DSB, acting as the WTO Council, or to the Ministerial Conference.

Until this happens, the United States will continue to boycott new appointments to the Appellate Body, preventing it from functioning.²⁵ Moreover, the US administration also stigmatises that this “creative jurisprudence” and “judicial activism” would tend to be to the detriment of the United States.²⁶

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 ready 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 official justifications put forward by the United States, one might think that the real reasons for this boycott lie elsewhere. The suspicion is that a system based on the rule of law and binding judgments, which places small and large states on an equal footing and guarantees greater equality between them, is not currently considered functional for the interests of an economic-commercial power like the US. Rather, such countries prefer to use more peacemaking methods (which are in any case an important, but not exclusive, aspect of the current WTO dispute settlement system, which is notoriously “mixed” in nature)²⁷ and direct negotiations with counterparts, where they can better assert their bargaining power.

The ostracism of the United States will also ultimately affect the entire functioning of the organization, whose profound reform they call for, but which will be impossible to achieve as long as they continue to evade a consistent and serious commitment to it in the negotiations. For a long time, in fact, the United States has avoided to set a complete and detailed American agenda for the WTO, and it was not until the 12th Ministerial

²⁵ *The 2020 USTR Report on the World Trade Organization Appellate Body of the World Trade Organization*, cit.

²⁶ The 2020 USTR Report on the World Trade Organization Appellate Body points out that a quarter of all disputes at the WTO have challenged US laws or measures. A total of 155 disputes have been against the United States, and around 90 per cent of these have resulted in a finding that a US law or measure was inconsistent with WTO obligations.

²⁷ 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.; M. Matsushita, Th.J. Schoenbaum, P.C. Mavroidis, M. Hahn, *The World Trade Organization. Law, Practice, and Policy*, 3th Ed., Oxford, 2015, 83 ff.; L. Choukroune, J.J. Nedumpara, *International Economic Law. Text, Cases and Materials*, Cambridge, 2022, 412 ff.; P. Van den Bossche, W. Zdouc *The Law and Policy of the World Trade Organization: Text, Cases, and Materials* 5th Ed., Cambridge, 2022, 164 ff.

Conference (CM12) in 2022 that WTO members agreed for the first time to undertake a comprehensive review of the WTO's functions to ensure that the organization is able to respond more effectively to the challenges facing 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).

However, the negotiations failed to achieve this goal, and the deadline for the end of the reform process was further postponed. In fact, the Abu Dhabi Ministerial Declaration adopted at the end of the 13th Session of the Ministerial Conference, held in Abu Dhabi from February 26 to March 2, 2024, deferred to the next Ministerial Conference for an update on reform work.²⁸

The delay also concerns the reform of the dispute settlement system. In this regard, the 12th Ministerial Conference had agreed to begin discussions on how to address the problems in order to ensure a fully functioning system by 2024. However, the Declaration on Dispute Settlement Reform adopted in Abu Dhabi merely recalled «the commitment made at our Twelfth Session to engage in discussions with a view to having a fully functioning dispute settlement system accessible to all Members by 2024» and instructed «officials to accelerate discussions in an inclusive and transparent manner, building on progress already made, and to work on outstanding issues, including those related to appeal/review and accessibility, with a view to achieving the goal by 2024, as set out in MC12».

However, it now seems impossible to agree on a common draft even by that date, given the diversity of proposals submitted by States. In any case, analysis of the texts published so far already provides some clear indications of the possible outcome of the negotiations. This is the Consolidated Text referred to in Mr. Molina's Report (the first "facilitator" for the negotiations on dispute settlement reform, now replaced from April 2024 by Ambassador Dwarka-Canabady of Mauritius) discussed in the Special meeting of the General Council on February 14, 2024.²⁹

First of all, no progress seems to have been made on the reform of the appellate procedure: the relevant paragraph of the report (Title III, No. 12: «Appeals and Review Mechanism») is still empty (apart from the laconic wording: «work in progress»), while, not surprisingly, work on the diplomatic elements of the dispute settlement system is more advanced and is expected to be strengthened (Title I, Chapter I: «Alternative Dispute Settlement and Arbitration»).

At the same time, it is intended to clarify and delimit the scope of the "adjudicators" discretionary power in interpreting the law through the prescription of «Guidelines for Adjudication» (Title V). In particular, it is required that «Adjudicators shall focus on what is necessary to resolve the dispute, including through the exercise of proper judicial economy», and, in so doing, they «shall limit their reasoning only to that which is necessary to

²⁸ WTO, Abu Dhabi Ministerial Declaration, March 4, 2024, WT/MIN(24)/DEC, par. 4.

²⁹ WTO, February 16, 2024, JOB/GC/385.

support their findings and conclusion».³⁰ The principle of precedent is outlawed: «This means that a previous report that interprets or applies a provision of the covered agreements does not have binding force in respect of a subsequent dispute. Each adjudicator bears the responsibility to develop its own interpretation of a provision of the covered agreements applying customary rules of interpretation of public international law as required by Article 3.2 of the DSU».³¹ Furthermore, as if to control the work of the adjudicating bodies, complex procedures are envisaged to discuss the legal interpretations accepted in the respective reports, involving all relevant bodies *ratione materiae* and the creation of a new body, the Advisory Working Group, conceived as «a mechanism for WTO Members to discuss, build consensus and provide guidance on legal interpretations developed by adjudicators».³²

It is clear from this reconstruction that there is little chance of reviving the two-tier adjudication process which is likely to remain blocked for a long time to come, if not abolished. This stalemate inevitably also affects the first instance, since the impossibility of completing all the stages of the procedure ends up discouraging States from resorting to the dispute settlement mechanism, as seems to be demonstrated by the progressive decrease, year after year, in the number of complaints lodged, while there is an inevitable increase in the number of cases settled through direct negotiations between the parties to the dispute.³³ Not even the Multi-Party Interim Arbitration Arrangement (MPIA) - an attempt to preserve the WTO's two-tier dispute settlement procedure in the absence of the Appellate Body - which was established on April 30 at the suggestion of the European Union, is able to provide a viable alternative on the basis of Article 25 of the Dispute Settlement Understanding (DSU). Not all Member states have joined it (there are currently just over 50 considering all 27 EU Member states) and the US (or countries such as Japan, India, Russia) are not among them.³⁴

5. The US Alternatives to WTO: Bilateral, Regional and Plurilateral Free Trade Agreements

As mentioned above, in the pursuit of his “competitive liberalisation” and the protection of US economic interests, President Trump had shown impatience not only with the multilateral framework of the WTO, but also with the constraints arising from regional or plurilateral agreements, preferring to replace them with new bilateral relationships: the withdrawal from the Trans-Pacific Partnership (TPP) negotiations in 2017 and the slowdown in the Transatlantic Trade and Investment Partnership (T-TIP)

³⁰ Consolidated Text Referred in Mr. Molina's Report, cit., Title V, Chapter II, «Focus on What is Necessary to Resolve the Dispute», par. 1-2.

³¹ Consolidated Text Referred in Mr. Molina's Report, cit., Title V, Chapter III, «No Precedential Value of Past Reports».

³² Consolidated Text Referred in Mr. Molina's Report, cit., Title VI, Chapter II, «Advisory Working Group», par. 3.

³³ For more details, see G. Sacerdoti, *The WTO and its Dispute Settlement System in 2021 and the Outlook after MC12* in June 2022, Bocconi Legal Studies Research Paper Series Number 415161.

³⁴ See, *ex multis*, E. Baroncini, *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.

negotiations with the European Union, which have been ongoing since 2013, are two examples.

In other cases, it has been a matter of revising pre-existing agreements in a way that is more favourable to US interests. This is what happened when NAFTA – the North American Free Trade Agreement with Mexico and Canada – was repealed and replaced by USMCA, the United States-Mexico-Canada Agreement, which has come into force on 1 July 2020.³⁵

On this point too, Biden has softened but not reversed his predecessor's policy. It should be recalled that during the Bush and Obama presidencies, the United States approved some 12 bilateral trade agreements and initiated negotiations on the Trans-Pacific Partnership (TPP). But since 2016, with the start of Trump's presidency, enthusiasm for trade agreements seems to have gradually dissipated not only among Republicans but also Democrats.³⁶

Since taking office, Biden has also stated that negotiating new FTAs would not be a priority for his administration (of the various trade negotiations underway in 2020, only those between the US and Kenya have been successful). This position reflects the prevailing political climate in the US, where FTAs have long been seen as antithetical to the "pro-worker" trade policies that Biden has proclaimed in continuity with his predecessor. Similarly, Biden was very positive about the USMCA, the Trump administration's main trade initiative, believing that its rules of origin would be better able than those of the previous NAFTA to protect the North American market from trade with third countries to the benefit of US workers.

However, better than Trump, Biden realised the importance of support and cooperation from traditional US allies, also in terms of containing China's trade and economic expansionism and preventing Western countries from cooperating with some of China's major projects, such as the Belt and Road Initiative (which involves some 68 countries, 65 per cent of the world's population, including many economic and security allies of the US), or the Regional Comprehensive Economic Partnership Agreement (signed with 14 other countries that, together with CINA, account for about 30 per cent of world trade). As a result, he has resumed 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* (CPTPP, initially abbreviated as TPP-11, came into force in 2018 for eleven Asia-Pacific countries) and the old and ambitious project of the *Transatlantic Trade and Investment Partnership* with the EU.

The political significance of the Biden administration's trade policy is clear. As some have observed,³⁷ it is using free trade agreements as an engine for economic growth but also as a weapon to win the competition with China by cutting political and economic ties between it and the democratic nations in North America, Asia and Europe.

³⁵ See M. Buccarella, *Dal NAFTA all'USMCA: cambiare tutto perché nulla cambi?*, in *DPCE*, 1, 2019, 299 ff.

³⁶ So S.A. Aaronson, *Despite Attempts at Reinvention, Biden Trade Policy Remains Protectionist*, cit., 3.

³⁷ Th.J. Schoenbaum, *The Biden Administration's Trade Policy: Promise and Reality*, cit., 117.

6. Biden and China: between Rivalry and “De-Risking” Strategy

Speaking of China, at the beginning of his term, compared to Trump’s aggressiveness, Biden certainly tried to pursue a policy of dialogue and confrontation at the same time. A tentative glimmer of dialogue was rekindled at the G20 meeting 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 reaffirmed the need for joint cooperation on a number of issues, such as WHO reforms to deal with future pandemics or combating 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 was inevitable even for the Biden Administration (and, after all, the centrality of competition with China has long been shared by both Democrats and Republicans in both the Biden and Trump eras, even in a country as deeply divided as the current United States).³⁸

Thus, after some initial softening, the policy of combating Chinese competition has resumed. Although Biden has criticised the Section 301 tariffs imposed by Trump, he has taken no action to repeal them maintaining or even tightening high customs tariffs on imports of products from, and restrictions and controls on exports to China, especially in a number of strategic technology sectors, as the case of the so-called “chip wars”, which began in October 2022 with a series of severe restrictions on the sale of semiconductors adopted under the Chips and Science Act.³⁹ These products are known crucial to the development of artificial intelligence, supercomputers and other critical technologies.

More recently, there is talk of a “general technology war” between China and the United States (and beyond), which has been sparked in particular by Beijing’s launch of the “Made in China 2025” industrial policy, a state-led industrial policy that aims to make China dominant in global high-tech manufacturing sectors, as new-generation information technology, high-end computerised machines and robots, aerospace, high-

³⁸ US-China relations have not always been so strained. For several decades until the beginning of this century, China’s economic rise has been viewed as benign by the United States and the West. After being welcomed into international economic institutions such as the WTO, it became the world’s second largest economy and the United States’ largest trading partner. Most US policymakers assumed that China would eventually adopt American values of liberal economics and democracy. In the second decade of this century, however, China increased its autocratic governance, state-centred economy, and human rights abuses. Its growing military power clashed with the United States’ vision of a free and open Indo-Pacific region and increasingly threatened Taiwan’s self-rule status. Meanwhile, the United States itself was changing. Liberal values of free trade and democracy were being trampled on by key political leaders in the country. Donald Trump, after winning the 2016 presidential election, pursued the nationalist and populist economic and international policies we have come to know. Trump and his advisers treated China with open contempt, broking with the bipartisan consensus in favour of engagement and dialogue rather than confrontation with China. The Trump administration called out China specifically on trade, citing the large deficit in goods trade with it, as well as China’s discriminatory trade barriers, forced technology transfer and domination by state-owned enterprises. In this sense, see again, almost *verbatim*, Th.J. Schoenbaum, *The Biden Administration’s Trade Policy: Promise and Reality*, cit., 118. For a broader reconstruction of US-China relations, see N. Boschiero, *US Trading Policy, China, and the World Trade Organization*, cit., 39 ff.

³⁹ 15 U.S.C. & 4651; *Symposium on Gregory Shaffer, Governing the Interface on U.S.-China Trade Relations*, 116 *AJIL, Unbound*, February 14, 2021. All the papers contributing to the symposium are available in www.cambridge.org/core/journals/american-journal-of-international-law.

tech maritime equipment and ships, advanced technology and equipment for rail transport, new energy and energy-saving vehicles (e.g. electric vehicles), energy equipment, agricultural equipment and technology, biopharma and high-tech medical equipment. These technologies are key to the so-called “fourth industrial revolution”. With MIC 2025, China aims to become a world leader in the technologies essential to this revolution. Once again, the US reaction was not long in coming, leading to a new escalation in its trade war with China. This response is articulated in various measures typical of the arsenal of protectionism, as the imposition or tightening of tariffs on Chinese products. However, the Biden administration’s policy towards China has increasingly focused on the so-called “de-risking strategy”, i.e. the need to reduce US dependence on China through preference programmes and trade agreements, rather than relying mainly on tariffs. This again means the development of coordinated strategies with allied nations, particularly the EU and Japan, to create alternative global production chains and to counter Chinese (allegedly) unfair practices.

It is curious to observe that this conflict has some somewhat paradoxical aspects.

The Biden administration tends to frame his anti-China strategy described above as one of reviving multilateralism, explicitly understood as the united front of North American, European and Asia-Pacific economies aimed at ensuring that China plays by the rules of international trade. Together with the countries of these regions, it also declares its intention to define a strategy for the reform of the WTO.⁴⁰ But this is an idea of multilateralism that could be described as “selective” or “à la carte”.

Somewhat paradoxically, China’s response is also based on the defence of multilateralism and respect for the rule of law, i.e. full compliance with the WTO agreements, as a weapon to counter US trade measures against it, which it in turn considers generally unfair or illegal, accusing the United States of continuing in recent years to violate WTO rules and obligations, to generalise national security and to politicise and weaponise economic and trade issues.⁴¹ To the same end, China continues to make extensive use of the dispute settlement system despite its limited functioning. The United States, in turn, responds with mirrored counter-charges⁴² and with cross-complaints before the WTO by relying on a disputes settlement system that they themselves condemned to paralysis.

7. Conclusion: What Future for US Foreign Trade Policy? A Few Brief Considerations

The above analysis confirms and reinforces the judgment we expressed in evaluating Biden’s foreign trade policy in the first half of his presidency.

It is evident that many aspects of Biden foreign trade policy have undermined the US image abroad and shaken the confidence of the

⁴⁰ See *A Multilateral and Strategic Response to International Predatory Economic Practices: Hearing Before the Subcomm. on Multilateral Int’l Dev., Multilateral Insts., And Int’l Econ., Energy, And Env’t Pol’y of the Comm. on Foreign Rels. U.S. Senate, 115th Cong.* 8–17 (2018) (Statement of Matthew P. Goodman and S. Chair in *Political Economy*, Center for Strategic and International Studies, Washington, DC).

⁴¹ See *China’s 2024 Report on WTO Compliance of the United States*, released by China’s Ministry of Commerce, [news.cgtn.com › news › 2024/09/12](https://news.cgtn.com/news/2024/09/12).

⁴² See the *USTR Releases Annual Report on China’s WTO Compliance* of February 23, 2024, [ustr.gov › ustr-releases-annual-report-chinas-wto-compliance](https://ustr.gov/ustr-releases-annual-report-chinas-wto-compliance).

partners, especially European ones, which have been rather disappointed by the expectation created at the beginning of Biden presidency that it would take new initiative to support the multilateral trading system and the respect of international trade law.

The end of the initial “honeymoon” period has led many of them to believe that there is a substantial continuity with the foreign policy of the previous US administration, which has now been definitively confirmed: constrained by economic and political considerations and giving priority to urgent domestic concerns, the Biden administration’s international trade policy is basically a continuation of the protectionist, nationalist-populist trade policy of his predecessor.⁴³

At this point, and in conclusion, one might ask whether, given the current presidential election campaign, we can expect changes in US foreign trade policy from the next president.

It is clear that from Republican candidate Donald Trump we can only expect a return to the “original formula” of “America First”, based on a more protectionist stance that isolates domestic industries by increasing tariffs on imported goods and seeking to renegotiate trade agreements in favour of American interests, as well as a “decoupling” from China and a possible “appeasement” with Russia.

From current vice-President and Democrat presidential candidate Kamala Harris, should she win the election, is expected to maintain the Biden Administration’s approach to global trade, taking a cautious yet firm stance on China, balancing strategic competition with selective cooperation and maintaining his “de-risking” approach. Rather than “decouple” from China, as Trump has proposed, Harris will similarly seek to maintain and enhance US domestic economic and technological strength by promoting diversified and resilient global supply chains. Moreover, with no clear end in sight to the Russia-Ukraine conflict, a future Harris administration is likely to maintain and possibly expand on the Biden administration’s firm stance on Russia, characterised by stringent sanctions on over 4,000 entities following Russia’s invasion of Ukraine.⁴⁴

However, it is possible to discern some slight differences between Biden and Harris.⁴⁵ The first difference is a greater focus on environmental, social and labour protections. Before being chosen as Joe Biden’s running mate in 2020, Kamala Harris had criticised trade agreements such as the Obama administration’s Trans-Pacific Partnership (TPP) and the North American Free Trade Agreement (NAFTA), rechristened USMCA, for lacking sufficient labour and environmental protections. And a constant call for greater attention to these areas in US trade policy has characterised all four years of his vice-presidency, and will therefore remain central even if she wins a presidential term. A second point concerns the WTO. Kamala Harris has a good relationship with the current Director-General of the World Trade Organization, Ngozi Okonjo-Iweala, whom she met frequently

⁴³ So Th.J. Schoenbaum, *The Biden Administration’s Trade Policy: Promise and Reality*, cit., 123 f. See also A. Alvaro, *Biden’s Foreign Policy Casts a Long Shadow*, JOINT Brief n. 8, www.jointproject.eu; 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>.

⁴⁴ So, almost *verbatim*, L. Abad *et al.*, *U.S. Trade Policy under presidential candidates Kamala Harris and Donal Trump. A Comparative Review*, September 27, 2024, kpmg.com/us.

⁴⁵ See ICAS – Institute for China-America Studies, *Kamala Harri’s View on Politics, Economic, and Trade*, ICAS TnT Dispatch, August 9, 2024 – 1.

during the Covid-19 pandemic to coordinate common strategies with the White House on its trade implications. A positive working relationship between the two could lead to greater US engagement on trade and reform of the organization. At a time when the US is blocking new appointments to the organization's Appellate Body, which limits the WTO's ability to arbitrate trade disputes, this is a fact of some importance. But will it be enough to guarantee the return to multilateralism expected at the start of Biden's term?

It would obviously be naive to believe that a change of president is sufficient to determine a radical reversal in the strategic lines of a superpower like the United States, which depend on complex historical factors and processes, 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 can be a useful tool to better "manage" allies. Compared to Trump, Biden has certainly understood the importance of "listening to them more" in order to gain their support for his strategic objectives. His foreign policy has not been based on an abstract commitment to multilateralism, but on the simple premise that this will bring greater benefits to the United States, Americans and American companies. Barring any surprises, this will not be much different under a future Harris presidency.

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