

# Foreword to US Trade Policy, China, and the World Trade Organization

*Paolo Davide Farah*<sup>1</sup>

In *US Trade Policy, China, and the World Trade Organization*, Nerina Boschiero addresses a key topic in contemporary international economic law and global governance. By focusing on a turning point in global politics and the shaping/framing of trade policy in the US – the election of President Donald Trump sheds light on the tumultuous process of the reshaping of global governance. The crisis of multilateralism has been discussed at length in academia and mainstream media. However, little attention has been paid to how the US is reacting to the rise of China in the global order, in practical terms. In particular, focus remains on the realm of trade. This book highlights how the path taken by the US, with a trade policy at the service of national security, has serious consequences for the global economy. While Biden seems more cautious<sup>2</sup> to engage in trade wars, most of the measures implemented by Trump are still in place. This is especially true of tariffs on imports. As explained in the author’s preface, at the time the first draft of this book was nearing completion, a US Presidential election took place. The election of President Joe Biden provided her with the unique opportunity to revisit American trade policy. This was accomplished through the creation of a work that “straddled two US presidencies”. Boschiero added an entirely new Chapter 1. This chapter was devoted to the analysis of President Biden’s 2021 Trade Agenda. It examines whether the agenda covering international economic law, international law, and global institutions would (and to what

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2 According to the Congressional Research Service, President Biden is in the process of reviewing actions taken by the Trump Administration. Further, he “has initiated a new investigation”. Congressional Research Service, ‘Section 232 of the Trade Expansion Act of 1962’ (Congressional Research Service, Updated 4 November 2021) 1 <<https://sgp.fas.org/crs/misc/IF10667.pdf>> (accessed 11 December 2021).

extent) reverse previous unilateralist America first-based approaches to trade. Boschiero highlights that, regrettably, the six focal points upon which Biden has developed his trade strategy appear to be inspired by an even stronger “protectionist” attitude, when compared to those enacted by the Trump Administration. But this might be also justified by power dynamics and consequences of the problematic political changes in China and the world towards a reinvigorating authoritarianism and nationalism against liberalism and open society principles.

A trade vision aimed at bending to other political goals denotes an innovative and interesting approach to the relationship between trade and society. As described in the book, Section 232 of the Trade Expansion Act of 1962 allows the President of the United States to restrict imports based on national security grounds. This is one of the tools enabling the president’s unilateral authority to decide on trade matters without preliminary checks of Congress or the United States International Trade Commission. Shifting control to *ex-post* and to the formal reporting of the president to Congress is justified by the urgency of actions that the president needs to apply in such trade matters. It is also justified by the priorities of political power aimed at reducing the role of Congress in trade policy. The re-discovery of Section 232 and the departure from the previous administrations’ more open approach to solving trade disputes displays the resurgence for the US to address trade in a unilateral manner. For example, the departure and distancing from the previous recurring reliance on existing international mechanisms such as the Dispute Settlement of the World Trade Organization (WTO) highlights this policy shift from the more multilateral approach. It also identifies deficiencies of the current system and its partial inability to adapt to changing power relations in the world order. Only after the establishment of the WTO was it possible for the international community to shift trade disputes from a bilateral to a multilateral level and to bridge different approaches of managing the global economy. This was often accomplished by “forcing” Global South countries to adopt Global North standards. In light of the WTO crisis and its inability to fully address peculiarities of China’s trade strategy, it is interesting to see how the Trump Administration moved its focus to a tool that sought to avoid mediation or negotiation. This was especially true in instances where China was involved. After reviewing Section 232 and Section 301 in detail, Chapter 2 of the book assesses the rationale behind Trump’s trade policy and seeks to bring factors that brought a deteriorating relationship between the US and other trade partners to light. First, the chapter characterizes such measures as “disguised safeguards”. Thus, these would be considered as inconsistent with WTO rules. Focus then shifts to the reaction of trade partners and legal arguments invoked to exercise lawful retaliation. At the time of this writing, only disputes with Mexico, Canada, and the EU have been resolved. It is also important to note that the removal of tariffs was used by the US toward the renegotiation of NAFTA and other trade agreements. These were key priorities of the Trump Administration. While trade disputes with close allies have been settled, the same is not true for those with China.

Even though a trade agreement (Phase One trade deal) between the US and China was signed in 2019, relations are deteriorating further.

After a brief analysis of the provisions of Phase One, Boschiero notes that this deal has been a “failure”, thus far. Many topical points of debate between China and the US, such as subsidies, have been left out of the agreement. The initial aim of the deal was to reduce further escalation of the US–China trade war. The possibility of a Phase Two being added to the deal is highly unlikely in the current context of global affairs. Biden is facing renewed tension with China. These are no longer limited to trade matters but have now broadened in scope to include foreign policy disputes. For example, the Taiwan disagreement and concerns for human rights with the signing of the Uyghur Forced Labor Prevention Act that was passed in 2021. As noted in the chapter, the Phase One trade deal calls for the creation of a strong “dispute resolution system”, whose aim is to ensure a prompt and effective implementation and enforcement at the bilateral level. Such a system is currently *outside* of the WTO multilateral system. Boschiero’s conclusion is that the US should approach China more carefully. Past lessons and the experience of the WTO in the first years from China’s accession and during the negotiation process could help here. There is great urgency to reform and address trade policy at the global level. Non-trade concerns and global challenges should be integrated within trade policies. So far, these have mainly been devoted to liberalization and the removal of tariffs. It also brings up a point in Boschiero’s analysis on the US’ utilization of trade policy as a tool to advance national interests and counteract the rise of China. Even if started by Trump, the focus on US advancement and protection of national industries and workers is still a key “political” focus of Biden. As Katherine Tai, the current United States Trade Representative, pointed out, trade policy should, “champion the rights and interests of our workers in those industries, while also creating new standards to combat the harmful industrial policies of China and other countries that undermine our ability to compete”.<sup>3</sup>

In Chapter 3, “The Economic and Legal Reasons Underlying the US–China Rivalry and the Consequences for the WTO System”, Boschiero contends that the two main rationales behind the shift in Trump’s trade policy are: 1) the rise of China in the global market and 2) the large amount of debt that the US owes to China. The idea of aligning China by leveraging trade obligations and neoliberal ideology with the priorities of the West did not work as expected. While committing to a more liberalized and market friendly environment, the country is still governing and managing trade in a manner that is considered suspicious for Western trade partners. Boschiero analyzes this trend in light of

3 ‘Remarks of Ambassador Katherine Tai Outlining the Biden-Harris Administration’s “Worker-Centered Trade Policy”’ (*United States Trade Representative*) <<http://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2021/june/remarks-ambassador-katherine-tai-outlining-biden-harris-administrations-worker-centered-trade-policy>> (accessed 17 January 2022).

the economic and financial crisis and low-profile stance of Obama on trade policies. The steady decline of manufacturing jobs in mature economies, along with a restructuring of the global supply chain, are potential factors to weigh in the shift of trade policy priorities. This approach is not limited to the US, however. Recently, the EU followed a similar path with a more pragmatic stance on China's investment in its member states. Unfair state practices and the influence of the state over the private economy,<sup>4</sup> along with the tendency to formally comply with trade obligations without reforming the functioning of the national economy, remain key problems. Such issues are under scrutiny in both academia and public debate. State-Owned Enterprises (SOEs) and their regulation under the Agreement on Subsidies and Countervailing Measures (ASCM) are one of the key issues to be faced by the global economy. The concept of public body, which used to assess whether and how Chinese state practices are compliant with the multilateral trading regime, has been a major point of conflict between China and the US SOEs have been under a process of reform since the acceptance of China as a member to the WTO, which was initially viewed as a major achievement of the organization.<sup>5</sup> Scholars point out how the reform process remains incomplete to date, partially resulting from the naïve view of the WTO on the topic.<sup>6</sup> SOEs are also major actors in China's Belt and Road Initiative. They seek to promote and advance Chinese national interests abroad by combining foreign with trade policy. Instead of downsizing, as expected by the US, SOEs remain central in the Chinese agenda.

The WTO's position on the topic is rather vague and ambiguous. Diverging and partially conflicting interpretations exist within the WTO on a state's interference in the market. To fill this gap, several bilateral and regional trade agreements seek to clarify obligations of the state in regard to SOEs. They also sketch tentative definitions of them. China recently signed the Bilateral Free Trade Agreement, but this does not cover the issue of SOEs. Even if there is an increasing consensus on strengthening the regulation of SOEs, mainly in Global North countries, Boschiero points out that reaching this goal in the near-term is highly unlikely. This resolution will remain as such until overcoming the WTO's existential crisis. In this viewpoint, SOEs will mostly be addressed by countries that share a similar position on the topic or when one of the two, as in the case of *EU Vietnam*, could impose regulatory aspects on another country.

Boschiero then expands the issue of state interference in the market with an analysis of the concept of the non-market economy (NME) and its treatment

4 Paolo D. Farah and Davide Giacomo Zoppolato, 'Public Ownership and the WTO In a Post-Covid-19 Era: From Trade Disputes To a "Social" Function' (2022) 125 *West Virginia Law Review*.

5 Paolo D. Farah, 'Five Years of China's WTO Membership' (2006) 33 *Legal Issues of Econ. Integration* 263; Paolo Davide Farah and Elena Cima (eds), *China's Influence on Non-Trade Concerns in International Economic Law* (Routledge 2016).

6 Nicholas R. Lardy, *The State Strikes Back: The End of Economic Reform in China?* (Peterson Institute for International Economics 2018); Farah and Zoppolato (n 4).

under the WTO. For the author, the treatment of NMEs and the recognition of China as a market economy are ambiguous in the WTO. In both subsidies and NME, we can see how diverging relations between the state and the economy are also fueling tensions due to a lack of clarity in the law. China took a political rather than legal stance on market economy status. Instead of reforming and aligning with WTO obligations, the country leveraged on economic power to persuade partners to acknowledge its market economy status. Against this background, Boschiero expounds the tension between attempts of the WTO to universally regulate different economic systems with rising importance at the global level of countries that have a different view of what the role of the state in the market should be. Further, this section reviews the more proactive stance of selected countries to counteract China. Recently, the EU implemented screening mechanisms and began using different methodologies in calculating duties to reduce the influence of China in the common market. This was also done to protect domestic companies from foreign acquisitions. The intention here is clear. Instead of approaching the issue at the multilateral level, states tend to focus on the national or regional level. In turn, this mitigates the ability of the WTO to solve trade disputes. The dispute over methodologies employed by the EU in applying countervailing duties on China is just one example. Even if it is still pending, this issue will not be settled in a timely manner because unfavorable rulings for the EU would increase political tension.

Boschiero highlights how the WTO is both unable and unwilling to solve these sensitive issues. Chapter 4, titled “The Challenges for the Multilateral Trading System and for the WTO Dispute Settlement Mechanism” addresses the lack of trust in the multilateral trading regime. Even if the WTO remains the best tool to address trade disputes, it has been weakened by the very country that is pushing for further trade liberalization. By vetoing the Appellate Body members’ appointments, the US is putting the functioning of the dispute settlement on hold. Trump’s trade policy is not totally disconnected from previous administrations, however. Chapter 4 analyzes US concerns against the WTO Appellate Body. Most of them are not new tactics initiated by Trump, but were already raised by previous administrations. This is then studied through the lens of “judicial overreach” problems in WTO findings. The argument is further grounded by the claim that ABs’ reports should be considered as a legal “precedent”. The US’ strategy could be aimed at bringing the whole system to a GATT 1947 era. In this context, trade disputes were largely resolved through negotiations that were based on the economic power of the disputing parties. Another possible option could be to restore the DSS to what was originally agreed upon in 1995. In any case, what is clear is that panel decisions cannot be adopted under the current system. Therefore, they are not binding unless the losing party renounces to an appeal “into the void”. Various attempts to tackle this unprecedented AB crisis and make the organization’s rulings binding are advanced by other WTO members. The EU’s initiative to preserve an independent two-tier dispute settlement through the

establishment of a parallel procedure for arbitration under DSU Article 25 and the enactment of a new legal system of commercial countermeasures to enforce this right under the WTO are also analyzed. The compatibility of this new enforcement mechanism with public international law and its role in a case of “regime failure” within the WTO’s *lex specialis* self-contained regime is noted in the closing section.

Chapter 5, “The Controversial Legal Characterization of US Section 232 Actions as National Security Measures”, analyzes the US’ recourse to national security exceptions under GATT XXI and its alleged “self-judging nature”. This is suggested by the wording of the clause in the chapeau of Article XXI (b). In this respect, Boschiero assesses the US’ opposition to the conclusions reached by the landmark WTO panel ruling in *Russia – Measures Concerning Traffic in Transit*. The ruling clarified many important matters relating to this provision and their political nature. Before this, contrasting views existed amongst WTO members. The panel approach, which was reinforced by the subsequent report in the *Saudi Arabia-IPRs* case, along with various members’ reactions to it are taken into consideration. These approaches are considered against the complicated backdrop of national security exceptions. Such exceptions are framed as inextricably linked to trade and economic matters. Boschiero also updated her analysis to cover latest events at the WTO level, following the recent aggression by the Russian Federation to the sovereign and independent state of Ukraine. This was accomplished by outlining recent US and other Western allies’ legislation that withdrew MNF treatment for Russian and Belarusian imports. Whether the Russian Federation will choose to resort to the WTO dispute settlement is yet to be seen. If they do so, they would likely argue that the US and its allies violated their WTO obligations. Western countries, however, would likely rebut that retaliatory measures would be justified under GATT Security Exception (Article XXI). This is in line with Ukraine’s notification to the WTO General Council in order to justify its decision to enact a complete economic embargo on Russia. Chapter 5 closes with a brief evaluation of the evolving nature of the current security exceptions embodied into the WTO multilateral system. Their challenges to the future world economic order are also discussed. These are issues that are not limited to the US and China. Most nations are dealing with the pressing issue of how to better protect themselves from adverse impacts of another nation’s economic policies. Many are also concerned with crafting mechanisms to respond to cybersecurity concerns and other global threats to their respective national security. The analysis distinguishes between an “expanded” conception of national security that equates with *economic self-sufficiency and competitiveness* in international economic law (to be rejected) and other threats that encompass a broad range of *non-military focused factors*.

The conclusion summarizes many shortcomings of former President Trump’s “America first” policy in trade. These are analyzed in terms of both the US economy and – in the long term – for the global trading system and the wealth of the world economy. Unfortunately, these trade policies have

negatively impacted the US economy through measures like unilateral tariffs and counter-tariffs adopted by traditional US allies. Additionally, these are not likely to be erased during the Biden Administration. Boschiero argues that providing more *flexibility* to governments to protect their domestic industries when seriously harmed and an increased policy space for defensive measures (combined with bilateral and plurilateral negotiations) would benefit all countries. It is also argued that it would increase leverage against China. Serious efforts are also needed to establish new *coordinated measures* that have the capacity to address charged political and economic landscapes in the contemporary era. In line with the imperative of “international legality”, these efforts should rely on the responsibility and role of supranational bodies. These are currently the only regulatory mechanisms for containing arbitrary and sovereign abuses.

This book is a great addition to gLAWcal’s Routledge Book Series on Transnational Law and Governance.<sup>7</sup> The topics covered in this book are relevant, not only to the series on “Transnational Law and Governance”, but also to its series on “Global Law and Sustainable Development”, which are both published by Routledge Publishing (New York/London). In fact, gLAWcal – Global Law Initiatives for Sustainable Development, an independent non-profit research organization and think tank ([www.glawcal.org.uk/](http://www.glawcal.org.uk/)) attempts to shed new light on NTCs issues through research, policy analysis, and advocacy. These issues include good and global governance, human rights, right to water, rights to food, social, economic and cultural rights, labor rights, access to knowledge, public health, social welfare, consumer interests and animal welfare, climate change, energy, environmental protection and sustainable development, product safety, food safety, and security. All of these values are directly affected by global expansion of world trade and should be upheld to balance the excesses of globalization. The entire book has been processed through external peer-review and editorial review. In addition to the series editor, three gLAWcal scientific committee members have reviewed the final manuscript of this book.

The book covers how trade policies are being captured by foreign policy and how they should be crafted to face the increasing complexities of the global economy. Boschiero skillfully assesses these changes. In particular, the focus on how traditional Great Powers are responding to the increasing political significance of Global South countries provides insight on future development.<sup>8</sup> The book highlights needed reforms that should be taken at both the WTO level

7 For other relevant contributions in the field included in the gLAWcal book series, see Paolo Davide Farah and Elena Cima (eds), *China’s Influence on Non-Trade Concerns in International Economic Law* (Routledge 2016); Angelica Bonfanti (ed.), *Business and Human Rights in Europe: International Law Challenges* (Routledge 2019); Jernej Letnar Čeranič, *Corporate Accountability under Socio-Economic Rights* (Routledge 2019), and Régis Bismuth, Jan Dunin-Wasowicz, and Philip M. Nichols (eds), *The Transnationalization of Anti-Corruption Law* (Routledge 2021).

8 For a review of positive contributions of Global South countries to sustainable development, see: Kirk W Junker and Paolo Farah (eds), *Globalisation, Environmental Law and Sustainable Development in the Global South: Challenges for Implementation* (Routledge 2022).



and in global governance institutions. These reforms should seek to address the needs and priorities of countries that are disrupting the ways in which the relationship between the state, the market, and national citizens has been framed.<sup>9</sup> While challenging the system has provided new ways of addressing global governance, China has created policies that could benefit a new round of reforms while simultaneously undermining multilateralism.<sup>10</sup> This solid and well developed analysis of Boschiero sheds new light on future steps that should be taken to solve the Doha Round's issues under the WTO. It also highlights how the existing system is not able to address these challenges. The conceptual and theoretical lens of neoliberalism and the utility of more trade for more trade without social concerns is also under attack. However, this could be an enabler for a more attentive approach to the inclusion of non-trade concerns in international economic law.<sup>11</sup> The legal lens that is employed through this research has the capacity to put innovative elements of Trump's trade policy alongside the trajectory of the US market in the international order. Beside the aggressive tones of the previous administration, it explains core elements that influence Biden's Administration. Realistically, these can be a key component of the reforms, or the future lack thereof in the WTO. In addition, the WTO and other global governance institutions are not the only *fora* where it is possible to address global challenges.<sup>12</sup> While continuing to construct bridges in trade and the WTO system, transnational law could be an equally effective outlet to refocus our attention on the tremendous difficulties ahead.

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- 9 For an overview of possible reforms within global governance institutions after the financial crisis, see: Antonio Segura Serrano, *The Reform of International Economic Governance* (1st edn, Routledge 2016) <<https://www.taylorfrancis.com/books/9781315553603>> accessed 16 July 2020.
- 10 Paolo Davide Farah, 'Trade and Progress: The Case of China' (2016) 30 *Columbia Journal of Asian Law* 51; Farah and Cima (n 5).
- 11 Paolo D Farah, 'Foreword to Global Values and International Trade Law' in Csongor István Nagy, *Global Values and International Trade Law* (Routledge 2021).
- 12 An interesting case is the transnationalization of the anti-corruption regime see: Régis Bismuth, Jan Dunin-Wasowicz, and Philip M. Nichols (eds), *The Transnationalization of Anti-Corruption Law* (Routledge 2021).



NERINA BOSCHIERO

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• TRANSNATIONAL LAW AND GOVERNANCE •  
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# US Trade Policy, China, and the World Trade Organization

The last four years of the past decade have been “anni horribiles” for International Economic Law in general and in particular for the World Trade Organization, since its inception in 1995 the guarantor of the world multilateral trade system. The increasing trade tensions, a high level of US security tariffs on steel and aluminum, the US boycott of the WTO Appellate Body, the US–China “trade war” and the reasons underlining it, only aggravated a disastrous worldwide economic situation at a time of tremendous global health and societal emergency, due to the persistent devastating spread of the COVID-19 pandemic. The book critically discusses the most salient past US administration’s unilateralist and protectionist practices. At the same time investigating the new Biden Administration’s trade approaches in order to assess whether the precedent trade trajectory is likely to continue, or there is hope of reviving the US commitment to the rule-based multilateral trading system. The book’s goal consists in distilling from current legal events the reasoning that might help the next generations in obtaining what the world needs most. These are a conscious and voluntary return to multilateralism, the search of new forms of effective global cooperation, better trade policies, a more equitable globalization, sound legal arguments, and solid economic reasons to combat rising nationalisms. If enacted, these elements hopefully would contribute to defeating new risks of political conflict and long-lasting “trade wars”. The book will be helpful to students and scholars in international and trade law, political science, and also professionals working in international and EU institutions.

**Nerina Boschiero** is Professor of International Law. She has been the Dean of Faculty of Law at the University of Milan (2014–2021), where she teaches International Law, Private International Law, and International Sustainable Development Law. She activated a new international program (LLM in Sustainable Development) entirely taught in English, and a new PhD (truly international) on Law, Ethics, and Economics on Sustainability.

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# Preface

I wrote this book during one of the worst periods experienced by the whole humanity since the Second World War. The very first pages of this book have been written (in a terrible silence, interrupted only by heart-breaking sirens of ambulances) in a small Milanese home studio during the several months of the strict lock-down (or stay-at-home) order imposed by the Italian government, due to the widespread pandemic of coronavirus that has dramatically hit my city (Milan), my region (Lombardy), my country (Italy), the very first in Europe, with a devastating intensity from late 2019 and that – as of late March 2022 – has already caused more than six million deaths at the global level.<sup>1</sup>

During that period, in late 2019 early 2020, I was struck by the impressive parallelism between the *then* US president (Mr Trump's) trade policies and the first reactions of major Western countries (including the US) to the growing and spreading of the virus all over the world, when an effective vaccine had not yet been discovered and the risk of new waves of this contagious disease were more credible than ever. All of us witnessed a rising of highly protectionist/nationalist attitudes, ranging from the abuse of unilateral trade remedies (the US recourse to Sections 232, 201, 301, to robustly assert US rights all over the world), to slogans like “putting America first”, various “my country first” approaches that (not by chance) mirrored strong attitudes toward “vaccine nationalisms”, a selfish race by the most developed and wealthy countries to sign agreements with pharmaceutical manufacturers to supply their *own populations* with vaccines, ahead of them becoming available for other countries. All this, in the flat denial of fundamental needed concepts such as “common/public goods”, as COVID-19 vaccines ought to be characterized and treated.<sup>2</sup>

1 WHO, ‘Naming the Coronavirus Disease (COVID-19) and the Virus that Causes It’, [https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-\(covid-2019\)-and-the-virus-that-causes-it](https://www.who.int/emergencies/diseases/novel-coronavirus-2019/technical-guidance/naming-the-coronavirus-disease-(covid-2019)-and-the-virus-that-causes-it). According to the WHO, as of 18 March 2022, there had been 464,809,377 confirmed cases of COVID-19 globally, including 6,062,536 deaths; a total of 10,925,055,390 vaccine doses had been administered; see WHO Coronavirus (COVID-19) Dashboard, <https://covid19.who.int/> (last accessed 20 March 2022).

2 Nerina Boschiero, ‘Covid-19 Vaccines as Global Common Goods: An Integrated Approach of Ethical, Economic Policy and Intellectual Property Management’, *Global Jurists*, 1–54.

The idea of the book was exactly to distill from an in-depth legal analysis of the events that has brought the world to experience in the last three years a double, strictly intertwined, health and economic crisis, the legal reasoning that might help the next generations in obtaining what we do need most: i.e., a conscious and voluntary return to multilateralism; the search of new forms of efficient global cooperation; better trade policies; a more equitable globalization; sound and solid legal and economic arguments to oppose rising nationalisms, political conflicts, and continuous “trade wars”.

Although the central message of the book has not changed, many events occurred over the last two and half years. At the time this book was almost finished, a new US presidential election took place, bringing an important political reversal with the election of Mr Biden as new democratic US president from January 2021 onwards. This event provided me with the unique opportunity to re-visit American trade policy straddling two different US presidencies. I, therefore, updated the analysis in order to verify if, and to what extent, the previous US unilateralist/nationalist trade policies has changed under the new “President Biden’s 2021 Trade Agenda”. I, consequently, added to the book an entire new Chapter 1. After a brief *resumé* of the most salient features of the US trade policy under the presidency of Mr Trump, the book dedicates a specific section to the analysis of the main points of the new Biden trade agenda. Regrettably, the general conclusion is that the new Biden Administration has so far shown, till now, no real willingness to remove or reverse major policies of the Trump Administration, even if the book outlines some encouraging signals in favor of multilateralism in sectors like climate change, transatlantic relationships, and public health. The most impressive change of path taken by the new democratic administration concerns the fight against the still ongoing global pandemic. The Trump Administration consistently blocked the proposal, formally advanced in late 2019 by South Africa and India, to waive IPRs for COVID-19 vaccines and treatments.<sup>3</sup> By contrast, under the new democratic administration, the US is finally ready to prioritize human lives over global Pharma corporates’ profits. On 16 March 2022, the World Trade Organization Director-General, Ngozi Okonjo-Iweala, welcomed the breakthrough among four major WTO Members – India, South Africa, the European Union, and

3 In late 2019 and early 2020, when the pandemic was already widespread, there were no vaccines or medicines to effectively prevent or treat COVID-19 worldwide. India and South Africa expressed their deep concern, as new diagnostics, therapeutics, and vaccines for COVID-19 start to be developed, on how these will be made available promptly, in sufficient quantities, and at affordable prices to meet *global demand*, outlining several reports about intellectual property rights (not only patents but also other IPRs) hindering, or potentially hindering, the timely provisioning of affordable medical products to patients. See South Africa and India, ‘Communication on Waiver from Certain Provisions of the TRIPS Agreement for the Prevention, Containment and Treatment of COVID-19’, WTO official document no. IP/C/W/669.

the US – on a waiver of the Trade Related Intellectual Property agreement for the production of vaccines against the COVID-19 pandemic.<sup>4</sup>

Finally, I cannot omit that on 24 February 2022, Russian President, Mr Vladimir Putin, launched a full-fledged military invasion of Ukraine in patent violation of the most basic principles of the UN Charter, an operation that – euphemistically – he labeled a “special military operation” against a sovereign and independent state.<sup>5</sup> The overall aim of this military aggression is not entirely clear: It might consist in gaining military control over several parts of its territory (the peninsula of Crimea, already illegitimately annexed in 2014, and the territory of Donbass which includes the two separatists regions of Donetsk and Luhansk in eastern Ukraine, formally recognised as “independent” by the Russian Federation after the invasion); or, more ambitiously, it might consist of the military conquest of all Ukraine’s ports and accesses to the Black Sea. Finally, the very ultimate goal could be to bring a regime change in this country. What will be the final results of Russian military intervention are still not known, since the military operations (along with an astonishing number of war crimes and crimes against humanity already documented and reported all over Ukraine) are not yet terminated at the time I decided to issue the final version of my book, due to the fierce resistance of Ukraine’s army and citizens and relevant *defensive* military support provided to it by NATO members.

Obviously, commenting on this aggression falls well beyond the scope of the present book and will remain open for scholarly debate long into the future. And yet it is beyond any doubt that it will have huge impacts on most, if not all, the trade policy issues addressed in this book. In response to the invasion of Ukraine, the West has already implemented an impressive and unprecedented number of economic sanctions and export controls on a raft of technologies to cut Russia off from the world’s financial arteries and the global economy.<sup>6</sup> Particularly interesting, for the purposes of the legal analysis developed in this book, are the countermeasures already adopted or announced at the WTO

4 Director-General Ngozi Okonjo-Iweala, ‘WTO DG Okonjo-Iweala Welcomes Breakthrough on COVID-19 Vaccine Waiver’, 16 March 2022, [www.wto.org/english/news\\_e/news22\\_e/dgno\\_16mar22\\_e.htm](http://www.wto.org/english/news_e/news22_e/dgno_16mar22_e.htm). See also ‘Statement from USTR Spokesperson Adam Hodge on the WTO TRIPS Waiver Discussions’, 15 March 2022, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/march/statement-ustr-spokesperson-adam-hodge-wto-trips-waiver-discussions>. For more details on the reached compromise see Ashleigh Furlong, ‘The EU, South Africa, India and the U.S. Have Reached a Compromise on a Waiver on Intellectual Property Rights for Coronavirus Products’, [www.politico.eu/article/compromise-reached-on-covid-19-vaccine-intellectual-property-rights-waiver/](http://www.politico.eu/article/compromise-reached-on-covid-19-vaccine-intellectual-property-rights-waiver/).

5 Russia did not just violate any rule of international law, but the *jus cogens* prohibition on the use of force, closely linked to the concept of aggression, for which the UN General Assembly adopted on 14 December 1974 a definition in its Resolution 3314 (XXIX).

6 ‘United States, European Union, and G7 to Announce Further Economic Costs on Russia’, 11 March 2022, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/11/fact-sheet-united-states-european-union-and-g7-to-announce-further-economic-costs-on-russia/>.

level. The US, together with G7 Leaders (from Canada,<sup>7</sup> France, Germany, Italy, Japan, and the United Kingdom, as well as the European Union), have already decided to revoke Russia's WTO 'Most Favored Nation' (MFN) status over its invasion of Ukraine.<sup>8</sup> Stripping Russia of its favored nation status paves the way to raise tariffs and apply additional import bans, export restraints, and other trade restrictions on a wide range of Russian goods that are generally prohibited in trade relations among the 164 member countries of the WTO. This solution is a practical and sound alternative to the most challenging attempt to try to expel or at least suspend Russia from the WTO, not an easy task and a very delicate diplomatic challenge to muster.<sup>9</sup> Although there is a remote possibility that the Russian Federation spontaneously withdraw from the WTO, the most likely scenario is that it will choose to resort to the WTO dispute settlement, arguing that the US and its allies have violated their WTO obligations. This would beg the question whether WTO members could invoke the WTO Security Exceptions, arguing that Russia's violation of international law (particularly the superior values of international peace and security) is also a violation of the principles and purposes of the WTO, sufficient to justify the removing of its trade privileges.<sup>10</sup>

In addition, the analysis developed in Chapter 2 of this book on the extensive use of US unilateral tariffs might be affected in the near future by sudden changes in US trade policy in respect to various reactions to the Russian

7 Canada was the first country to remove most favored nation status for Russia. See 'Order Withdrawing the Most-Favoured-Nation Status from Russia and Belarus', Customs Notice 22-02, Ottawa, 3 March 2022. The purpose of this Customs Notice is to withdraw the entitlement to MFN Tariff from all goods that originate in Russia or Belarus. See, Department of Finance Canada, 'Canada Cuts Russia and Belarus from Most-Favoured-Nation Tariff Treatment', 3 March 2022, [www.canada.ca/en/department-finance/news/2022/03/canada-cuts-russia-and-belarus-from-most-favoured-nation-tariff-treatment.html](http://www.canada.ca/en/department-finance/news/2022/03/canada-cuts-russia-and-belarus-from-most-favoured-nation-tariff-treatment.html).

8 Steve Holland and Andrea Shalal, 'U.S., G7 Allies may Strip Russia of "Most Favored Nation" Status', 11 March 2022, [www.reuters.com/business/biden-call-an-end-normal-trade-relations-with-russia-increased-tariffs-russian-2022-03-11/](http://www.reuters.com/business/biden-call-an-end-normal-trade-relations-with-russia-increased-tariffs-russian-2022-03-11/); Noelle McElhatton, 'EU Considers Suspending Most Favoured Nation Status for Russia at WTO', 4 March 2022, [www.export.org.uk/news/597891/EU-considers-suspending-Most-Favoured-Nation-status-for-Russia-at-WTO.htm](http://www.export.org.uk/news/597891/EU-considers-suspending-Most-Favoured-Nation-status-for-Russia-at-WTO.htm); 'U.S. Legislation on MFN Withdrawal for Russia (and Belarus) May Finally Be Moving Forward', <https://ielp.worldtradelaw.net/2022/03/us-legislation-on-mfn-withdrawal-may-finally-be-moving-forward.html>; 'United States, European Union, and G7 to Announce Further Economic Costs on Russia', 11 March 2022, [www.whitehouse.gov/briefing-room/statements-releases/2022/03/11/fact-sheet-united-states-european-union-and-g7-to-announce-further-economic-costs-on-russia/](http://www.whitehouse.gov/briefing-room/statements-releases/2022/03/11/fact-sheet-united-states-european-union-and-g7-to-announce-further-economic-costs-on-russia/); Sarah Anne Aarup and Barbara Moens, 'Removing Russia's Trade Privileges — What You Need to Know', 11 March 2022, Politico, [www.politico.eu/article/remove-russia-trade-privilege-what-need-know/](http://www.politico.eu/article/remove-russia-trade-privilege-what-need-know/).

9 James Bacchus, 'Boot Russia from the WTO', 28 February 2022, [www.wsj.com/articles/boot-russia-from-the-wto-world-trade-organization-putin-international-economic-sanctions-tariffs-legal-authority-11646092051](http://www.wsj.com/articles/boot-russia-from-the-wto-world-trade-organization-putin-international-economic-sanctions-tariffs-legal-authority-11646092051), pointing out that no specific WTO provision relates to expelling a member. Expulsion would be possible under Article X of the WTO agreement, however, if two-thirds of the WTO's current 164 members vote to alter the agreement. If Russia were to refuse to accept the changes, then there will be the need of a three-fourths vote to expel the Russian Federation.

10 *Infra*, Chapter 5, para 5.6.

aggression adopted by its (previous) targets with regard to the Russian invasion of Ukraine. While the transatlantic relationship will for sure improve,<sup>11</sup> any speculation about the future development of China's relations with the US is much more difficult. While the arguments advanced in Chapter 3 on the economic and legal reasons underlying the still ongoing US–China rivalry will probably remain in the years to come, things can change in the near future according to the different scenarios that could materialize. A possible Chinese's military and economic support of the Russian Federation, aimed at helping Russia to evade the extensive Western sanctions, would surely induce a stiffening of US and its allies' punitive reactions. China will face additional unilateral trade measures and possibly be subject to heavy secondary sanctions. There will be no phases two or three of the US–China trade agreement commented on in Chapter 2. Conversely, should China undertake the challenging task to mediate between the belligerent parties and to be actively engaged in diplomatic negotiations to put pressure on the Russian leadership, there will be potential improvements in US–China relations. Whether China would decide to follow this path, and more importantly, whether it has enough leverage, remains to be seen.<sup>12</sup>

Overall, and without any intention to dwell more into the global crisis fueled by the Russian aggression against Ukraine, it is sufficient for the purpose of the book to note that the decision made by several member states to turn to the WTO in such a dramatic global situation, in order to counteract the negative effects of global challenges, means that the WTO still maintains a meaningful and a steady place in the global governance and in the future of international economic law.<sup>13</sup> Further, all these events can possibly be characterized as potential and powerful social and political agents that might be able to graft important and fundamental changes in integration processes. The Russian aggression against Ukraine has, for instance, put in motion an impressive *coordinated chain of coercive measures* that will for sure contribute to the further development of the obligations established by the Draft Articles on Responsibility of States and International Organizations for the protection of collective interests.<sup>14</sup>

This book is dedicated to those who did not survive, to the many that helped at the extent of their capabilities, but also to those who (luckily) spent this suspended time thinking about how to make creative seeds able to help humanity in the future to make the necessary improvements toward higher objectives. Only men can start a rebirth for humanity, on which my inexhaustible hope for a better future is based.

Nerina Boschiero  
August, 2022

11 *Infra*, Chapter 1, para 2.5.

12 *Infra*, Chapter 2, para 2.5.

13 Steve Charnovitz, 'A WTO if You Can Keep It', (63) *QIL-Questions International Law*, 95.

14 See Article 41 of International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, 2001, and Article 42 of International Law Commission, Draft Articles on the Responsibility of International Organizations, 2011.



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A special thought is always reserved to Tom, my perennial source of inspiration.

# List of Abbreviations

AB	Appellate Body
ACT	Access to COVID-19 tools
AD	antidumping investigations
APA	Administrative Procedure Act
ARIO	Draft articles on the responsibility of international organizations
ASR	Draft Articles on Responsibility of States for Internationally Wrongful Acts
ASEAN	Association of Southeast Asian Nations
ASP	Assembly of States Parties (of the ICC)
AU	African Union
AUKUS	Agreement between the government of Australia, the government of the United Kingdom of Great Britain and Northern Ireland, and the government of the United States of America for the exchange of naval nuclear propulsion information
BAA	Buy American Act
BIS	US Bureau of Industry and Security
BIT	bilateral investment treaty
BRI	Belt and Road Initiative
BWS	Bretton Woods System
C.I.T.	US Court of International Trade
CAI	China-EU Comprehensive Agreement on Investment
CBAM	Carbon Border Adjustment Mechanism
CBD	UN Convention on Biological Diversity
CCP	Chinese Communist Party
CERP	centre for economic policy research
CFIUS	Committee on Foreign Investment in the United States
CJEU	Court of Justice of the European Union
COE	Council of Europe
COVAX	COVID-19 Vaccine Global Access
COVID-19	Coronavirus disease
CPTPP	Comprehensive and Progressive Trans-Pacific Partnership Agreement

CSL	Data Security Law of the People's Republic of China
CSVP	crystalline silicon photovoltaic product
CVD	countervailing duty investigations
DSB	Dispute Settlement Body
DSS	WTO dispute settlement system
DST	Digital Services Tax
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
ECB	European Central Bank
ECJ	European Court of Justice
EEA	European Economic Area
E-RMB	digital yuan
EP	European Parliament
EU	European Union
FAO	Food and Agriculture Organization
FDI	foreign direct investment
FIRRMA	US Foreign Investment Risk Review Modernization Act of 2018
FTA	free trade agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GAVI	Global Alliance for Vaccines and Immunisation
GDP	gross domestic product
GI	geographical indication
HRC	Human Rights Committee
HRL	human rights law
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICSID	International Centre for the Settlement of Investment Disputes
IEL	international economic law
IHR	International Health Regulations
IIA	international investment agreement
ILC	International Law Commission
ILO	International Labour Organization
IMF	International Monetary Fund
IO	international organization
IPRS	intellectual property rights
ISA	Investor-State arbitration
ISDS	International State Dispute System
ITC	US International Trade Commission
ITO	International Trade Organization
JEEPA	Japan-EU Partnership Agreement
KORUS	United States-Korea Free Trade Agreement
MEA	multilateral environmental agreement

MES	Economy Market Status
MENA	Middle East/North Africa region
MFN	most favored nation
MIC	middle-income country
MNC	multinational corporation
MPIA	Multiparty Interim Appeal Arbitration Agreement
MS	member state
NAFTA	North American Free Trade Agreement
NATO	North Atlantic Treaty Organization
NDCS	nationally determined contributions
NGO	non-governmental organization
NME	Non-Market Economy
NPC	Committee of the Chinese National People's Congress
NTC	non-trade concern
ODA	Official Development Assistance
OECD	Organisation for Economic Co-operation and Development Partnership
PBOC	People's Bank of China
PCIJ	Permanent Court of International Justice
PGS	public goods
Phase One Agreement	Economic and Trade Agreement Between the United States of America and The People's Republic of China
PIPL	Personal Information Protection Law of the People's Republic of China
PTA	plurilateral trade agreement
R&D	research and development
RCEP	Regional Comprehensive Economic Partnership
RMB	Renminbi
RTA	Regional Trade Agreement
S&DT	special and differential treatment
SASAC	State-owned Assets Supervision and Administration Commission of the State Council
SC	Security Council
SCM	Agreement on Subsidies and Countervailing Measures
SDG	Sustainable Development Goal
SECTION 232	Section 232 of the Trade Expansion Act of 1962
SECTION 301	Section 301 of the Trade Act of 1974
SECTION 303	Section 303 of the Defense Production Act of 1950
SGA	WTO Safeguards Agreement
SOE	state-owned enterprise
STE	state trading enterprise

SWIFT	Worldwide Interbank Financial Telecommunication
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
TPNW	Treaty on the Prohibition of Nuclear Weapons
TPP	Trans-Pacific Partnership
TRIPS	The Agreement on Trade Related Aspects of Intellectual Property Rights
TTIP	Trans-Atlantic Trade and Investment Partnership
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCITRAL	UN Commission for International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNESCO	UN Educational, Scientific and Cultural Organization
UNGA	UN General Assembly
UNTC	United Nations Treaty Collection
URAA	Uruguay Round Agreements Act
US	United States of America
USD	US dollar
USDOC	US Department of Commerce
USITC	US International Trade Commission
USMCA	US-Mexico-Canada Trade Agreement
USTR	United States Trade Representative
VCLT	Vienna Convention on the Law of Treaties
WHA	World Health Assembly
WHO	World Health Organization
WTO	World Trade Organization

# 1 The US Trade Policy Straddling Two Presidencies

## 1.1 Introduction

The last four years of the previous decade have been “anni horribiles”, or horrible years, for International Economic Law. In particular, the World Trade Organization (WTO) has suffered the most as they run the economic world system. Since its inception, the multilateral trade system has provided the basis for economic growth around the world by ensuring free and fair trade between nations. Second, it has been noted that the system,

has been the guarantor of trade at times of growing tensions and the backbone of the international system of economic governance. Even at a time of the harshest economic conditions during the great recession, it has helped avert recourse to the trade wars that have fueled economic decline in the past.<sup>1</sup>

Since the WTO was established in 1995, its membership has steadily increased. Today, its members represent a trade volume that accounts for 98 percent of the world’s total. In the past two decades, world merchandize exports have increased from \$4.3 trillion USD in 1994 to \$17.7 trillion USD in 2017. This increase has been credited with, “lifting hundreds of millions of people out of poverty around the world and significantly raising the living standards of citizens of relevant countries and regions.”<sup>2</sup> In 2018, the global merchandize exports of WTO members totaled \$19.09 trillion USD. However, this value only grew by 10.0 percent, which was down from 10.7 percent in 2017. Compared to the trade in commercial services that recorded strong growth for the second year,

1 EU Concept Paper, WTO Modernization (28 June 2018), [https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc\\_157331.pdf](https://trade.ec.europa.eu/doclib/docs/2018/september/tradoc_157331.pdf).

2 China’s Proposal on WTO Reform, Communication from China, [https://docs.wto.org/dol2fe/Pages/FE\\_Search/FE\\_S\\_S009-DP.aspx?CatalogueIdList=254127&CurrentCatalogueIdIndex=0](https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?CatalogueIdList=254127&CurrentCatalogueIdIndex=0), citing the World Trade Statistical Review 2018; see also EU Concept Paper, WTO Modernization (n 1).

## 2 *The US Trade Policy Straddling Two Presidencies*

rising by 8 percent, world merchandise trade was significantly lower than the 4.6 percent growth recorded in 2017.<sup>3</sup>

According to past WTO's Director-General Roberto Azevêdo:

This loss of momentum is partly due to increasing trade tensions and historically high levels of trade restrictions. The WTO's latest trade monitoring report confirms that trade-restrictive measures are on the rise. Trade covered by import-restrictive measures recorded in the last trade monitoring report is estimated at US\$ 339.5 billion. If trade is to pick up in 2019–20, trade tensions must be resolved.<sup>4</sup>

The “trade war” launched by the Trump Administration has aggravated an already disastrous global economic situation. The system has been unable to recover from past crises like the Great Recession. This has also taken place during a global health emergency. The extremely rapid spread of the COVID-19 pandemic has caused an impressive number of worldwide confirmed cases and confirmed deaths.<sup>5</sup> It is important to note that pandemics aggravate economic crises and can lead to prolonged economic recession. What is required to remedy this instability are pro-active, responsible, large-scale, and coordinated measures spanning policy areas. These efforts will support sustainable and equitable global recovery. Trade policies around the world hold relevance in response to this catastrophic pandemic. This remains true since they affect the terms upon which imported medical supplies enter into commerce. This type of trade occurs, for example, through means like import taxes (tariffs), quotas, and public procurement regulations. Governments should immediately suspend all unilateral restrictions on imported medical supplies to comply with their fundamental obligations. These obligations are anchored in human rights and WTO law (Doha Declaration on TRIPS Agreement and Public Health),<sup>6</sup> to address public health risks, and avoid needless measures that harm people.<sup>7</sup>

At a general level, the former WTO Director-General has made express references to the deepest crisis that the multilateral trading system has ever faced. This crisis has resulted from the recent uptick in unilateral and protectionist

3 See World Trade Statistical Review 2019, [www.wto.org/english/res\\_e/statis\\_e/wts2019\\_e/wts2019chapter01\\_e.pdf](http://www.wto.org/english/res_e/statis_e/wts2019_e/wts2019chapter01_e.pdf).

4 World Trade Statistical Review 2019 (n 3) 5.

5 Official Public Service Announcement on Coronavirus from the World Health Organization. WHO Coronavirus (COVID-19) Dashboard, (last visited 15 March 2022), <https://covid19.who.int>.

6 Declaration on the TRIPS Agreement and Public Health, WT/MIN(01)/DEC/2 (20 November 2001).

7 On COVID-19, see *infra* Chapter 2; Roojin Habibi, Gian Luca Burci, Thana C. de Campos, Danwood Chirwa, Margherita Cinà, Stéphanie Dagron, et al., ‘Do not Violate the International Health Regulations during the COVID-19 Outbreak’, *The Lancet* (13 February 2020), [www.thelancet.com/journals/lancet/issue/current](http://www.thelancet.com/journals/lancet/issue/current); WHO *International Health Regulations, WHA 58.3* (2nd ed. World Health Organization Geneva 2005); Updated WHO advice for international traffic in relation to the outbreak of the novel coronavirus 2019-nCoV (27 January 2020), [www.who.int/ith/2019-nCoV\\_advice\\_for\\_international\\_traffic/en/](http://www.who.int/ith/2019-nCoV_advice_for_international_traffic/en/); Global Trade Alert 2020, [www.globaltradealert.org/](http://www.globaltradealert.org/).



practices that have been imposed. These practices have put the current system of free trade in serious danger. This has led to countermeasures and (re)negotiations of trade deals outside the WTO, as well as (in parallel) the blockage (on 10 December 2019) of the WTO Appellate Body (AB). The stalemate in the AB resulted from the loss of its three-member quorum. This loss is a byproduct of the US' ongoing refusal to approve the appointment of new AB members to replace those whose terms of office were expiring. As a hegemon, the US has maintained this gridlock for several years, citing its right to exercise veto powers. Refusal to appoint has also withheld necessary budget allocations for the function of this fundamental judicial body. This paralysis has the devastating effect of depriving the WTO dispute resolution regime of the advantages that exist under the binding nature of the AB. This stalemate, however, is expected to continue until WTO member states reach a deadlock. This deadlock will focus on the inability to agree on an effective structural intervention in the functioning of the WTO dispute settlement system (DSS). DSS also requires an extensive reassessment of the AB's role and functioning.<sup>8</sup> Temporary solutions could be expected to result in WTO member countries' reliance upon further unilateral trade sanctions against members who appeal any Dispute Settlement Body (DSB) decisions to a "non-functioning" AB. These moves are intended to stymie any WTO litigation. This outcome undoubtedly equates to an unfortunate (more than 20 year) step backward in global economic governance. It also carries risks that threaten the stability of the world political order. Such risks could have negative effects on global efforts to attain the Sustainable Development Goals of the United Nations post-2015 Development Agenda (2030 Agenda).<sup>9</sup>

The reasoning developed in this book is not aimed at addressing all the issues at the root of the present crisis, the ongoing marginalization of the WTO and its various inefficiencies, or the kind of reforms necessary within the WTO to remedy this crisis. Additionally, the aim of this piece is not to answer the central question of whether a meaningful place for the WTO exists in the future of economic law.<sup>10</sup> While nearly everyone agrees that the multilateral trade system is in urgent need of change, it is *in primis* for the WTO members

8 See Giorgio Sacerdoti, 'The Challenge of Re-establishing a Functioning WTO Dispute Settlement System' (20 April 2020), [www.cigionline.org/articles/challenge-re-establishing-functioning-wto-dispute-settlement-system](http://www.cigionline.org/articles/challenge-re-establishing-functioning-wto-dispute-settlement-system).

9 Resolution 70/1, Transforming our World: the 2030 Agenda for Sustainable Development, adopted on 25th September 2015 by the UN General Assembly, [www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A\\_RES\\_70\\_1\\_E.pdf](http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf).

10 For some answers to these questions, see the various academic contributions in 'In Clinical Isolation. Is there a Meaningful Place for the World Trade Organization in the Future of International Economic Law?' (2019) *Questions of International Law, Zoom-out* (63) 1 ff, introduced by Paolo Turrini and Angelica Bonfanti; Giorgio Sacerdoti, 'The Challenge of Countering Politicization of Trade Relations and Revitalizing the Multilateral Rule-based System', Introduction for *J. World Trade* 2021 (21 March 2021); Marianne Schneider-Petsinger, 'Reforming the World Trade Organization', 11 September 2020, [www.chathamhouse.org/2020/09/reforming-world-trade-organization](http://www.chathamhouse.org/2020/09/reforming-world-trade-organization).

to foresee the necessary reforms. This can possibly be achieved by following the traditional practice of decision making through *consensus*, and to agree upon (among themselves and after extensive consultations) “on the basis of mutual respect, broad participation and dialogues on equal footing”.<sup>11</sup>

Some have argued that all three of the WTO’s functions (providing a negotiation forum to further liberalize global trade by establishing new rules, strictly monitoring national trade policies, and adequately resolving disputes between its members) have not been able to deliver any significant improvements<sup>12</sup> since the launch of the Doha Development Round 21 years ago. This approach focused on central issues such as agriculture, development, and rules to bestow world trade benefits on developing countries.<sup>13</sup> Because of this, the Doha Development Round has been declared definitively “dead”.<sup>14</sup> Others agree that remarkable progress and achievements have been made in the field of trade liberalization and facilitation. Largely, they argue that this has been achieved through bilateral and regional agreements that address issues key to global trade. Issues like digital trade and e-commerce are the most prominent in this argument since they are integral to the field’s contemporary adaptations.

What is still missing at the systemic level is a concurrent opinion on the measures necessary to guarantee the stability of a multilateral rules-based global trading system by seriously addressing issues such environmental sustainability and sustainable economic growth; how to better handle China’s trade policies and practices like state-owned enterprises<sup>15</sup> and industrial subsidies; the problem of an agreed definition of what constitutes a “developing country”. The desire to reform this system originates from broader geo-strategic developments that have changed the world’s economic landscape in the last 25 years.<sup>16</sup>

## 1.2 A Brief Summary of US Trade Policy under President Donald Trump

As previously mentioned, the aim of this book is far less ambitious than investigating the current challenges faced by the WTO. It strives, instead, to explain that all current discussions regarding the WTO’s future are unimaginable without first considering the US trade agenda brought forth by the Trump Administration<sup>17</sup> and its motto “America First”. Critical to this are

11 See EU Concept Paper, WTO Modernization (nn 1–2).

12 [www.wto.org/english/tratop\\_e/tradfa\\_e/tradfa\\_e.htm](http://www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm).

13 Steve Charnovitz, ‘A WTO If You Can Keep It’ (2019) *Questions of International Law, Zoom-out* (10) 5.

14 James Bacchus, *The Willing World: Shaping and Sharing a Sustainable Global Prosperity* (Cambridge University Press 2018) 102–103.

15 Paolo D. Farah and Davide Giacomo Zoppoloto, ‘Public Ownership and the WTO In a Post-Covid-19 Era: From Trade Disputes To a “Social” Function’ (2022) 125 *West Virginia Law Review*.

16 According to the EU concept paper (n 1) “since 1995 the world has changed; the WTO has not”.

17 Peter Tobias Stoll, ‘A Washington Wake-up Call and Hybrid Governance for World Trade’ (2019) *Questions of International Law, Zoom-out* (10) 59–81.

the understanding of international trade as a “zero-sum” game and the placing of national security interests at the forefront of trade policy. This has been used to justify heavy tariffs imposed on China and other close partners like the European Union, Canada, and Japan.

In 2016, President Donald Trump told Americans: “Ladies and Gentlemen, it’s time to declare our economic independence once again”.<sup>18</sup> Less than two years later, the Trump Administration began fulfilling that promise and launched a new era in US trade policy. This new trade agenda was driven by “a pragmatic determination to use the leverage available to the world’s largest economy to open foreign markets, obtain more efficient global markets and fairer treatment for American workers”.<sup>19</sup> It rested on five major pillars: Supporting US national security, strengthening the US economy, negotiating “better trade deals”, resorting to aggressive enforcement of US law, reforming the multilateral trade system on the premise that trade agreements should be “temporary”, and “abandoned or varied, as experience and circumstances shall dictate”.<sup>20</sup>

### ***1.2.1 The Extensive Recourse to (Unilateral) Trade Tariffs***

As a result, the global economic landscape has undergone profound changes. This book explores only some of the major systemic challenges to the WTO system posed by this new pragmatic and flexible US trade policy. The approach taken by this administration focuses heavily on US national interests and disrupts the existing dispute settlement mechanism. First, it will address two of most recent tools of this “aggressive” (namely *unilateral*) American enforcement agenda, which are intended to be consistent with, and supportive of, US national security strategy.<sup>21</sup> Investigations requested by the Trump Administration under *Section 232 of the Trade Expansion Act of 1962* and *Section 301 of the Trade Act of 1974* were intended to address unfair foreign practices affecting US exports of goods or services. These investigations rested on the President’s belief that “[a] strong economy protects the American people, supports our way of life, and sustains American power”. According to the US, it cannot preserve national sovereignty “without a strong domestic economy at home and without a

18 See the full transcript of President Donald Trump’s speech, [www.politico.com/story/2016/06/full-transcript-trump-job-plan-speech-224891](http://www.politico.com/story/2016/06/full-transcript-trump-job-plan-speech-224891).

19 See Office of the United States Trade Representative (USTR), 2018 Trade Policy Agenda and 2017 Annual Report (hereinafter USRT 2018 Trade Policy Agenda) 2, <https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20FINAL.PDF>

20 President Donald Trump’s speech (n 18).

21 USRT 2018 Trade Policy Agenda (n 19) 2: “Accordingly, we also have an aggressive trade enforcement agenda designed to prevent countries from benefiting from unfair trading practices. We will use all tools available – including unilateral action where necessary – to support this effort” (emphasis added); William A. Kerr, “Aggressive Unilateralism” – The New Focus of US Trade Policy’, *The Estey Journal of International Law and Trade Policy*, Vol. 21 2020, 1–17.

strong domestic support for open markets”.<sup>22</sup> Tariffs played a central role in the Trump trade agenda. This is exemplified by the wide use of statutory authority to employ massive trade measures, and threats thereof, to renegotiate trade agreements to make trade adjustment policies.

At the WTO level, the resort to the so-called Section 232 and Section 301 sanctions represents a dramatic rejection of one of its fundamental principles. The disregard of the principle concerning the prohibition of unilateral interpretation and enforcement of WTO law was previously unheralded. The core principles of the WTO are the members’ commitment to a multilateral system of dispute resolution through judicial adjudication and the duty to refrain from retaliating against other members’ alleged WTO law breaches until they have been adjudicated by a neutral proceeding.<sup>23</sup> Both US measures appear to be *prima facie* inconsistent with WTO rules and are in violation of Articles I and II of the WTO’s General Agreement on Tariffs and Trade (GATT). The victim might retaliate once the requested dispute panel declares that violation(s) took place; by the way, in principle only with WTO-authorized countermeasures of an equivalent amount of trade concessions.<sup>24</sup> This conclusion calls into question the legality of the targeted WTO members’ reactions to the US’ misbehavior by imposing retaliations under US Section 232 and Section 301 and the recourse to unilateral sanctions. Under WTO law, the rule declares that in order to remedy a violation, only the prevailing member in a claim may take measures equivalent to the amount that its benefits have been nullified and impaired. This is the case unless the respondent complies with the ruling.<sup>25</sup>

At the time of the wrongfully imposed sanctions under US Section 232 and Section 301 (March 2018) against various US allies and China, arguments in favor of the legitimacy of unilateral retaliations by the affected WTO members have been advanced in doctrine, based on the argument that the US tariffs are simply “disguised safeguard tariffs” for which an affected country can exercise

22 The White House, ‘National Security Strategy of the United States of America’ (December 2017) 17, <https://trumpwhitehouse.archives.gov/wp-content/uploads/2017/12/NSS-Final-12-18-2017-0905.pdf>.

23 Panel Report, *United States – Sections 302-310 of the Trade Act of 1974*, WT/DS152/R, adopted on 22 December 1999, paras 7.71–7.92; Rachel Brewster, ‘The Trump Administration and the Future of the WTO’ (2019) 44 *Yale Journal of International Law Online* 4; Rachel Brewster, ‘Rule-Based Dispute Resolution in International Trade Law’ (2006) 92 *Vanderbilt Law Review* 251, 265–269.

24 For a list of what have been defined as “systemic flaws” of the Dispute Settlement Understanding of the WTO as compared to the international regime of state responsibility, see the comment of Joseph Weiler, ‘Black Lies, White Lies and Some Uncomfortable Truths in and of the International Trading System’, EJIL:Talk! (25 July 2018), [www.ejiltalk.org/black-lies-white-lies-and-some-uncomfortable-truths-in-and-of-the-international-trading-system/](http://www.ejiltalk.org/black-lies-white-lies-and-some-uncomfortable-truths-in-and-of-the-international-trading-system/).

25 GATT Article XXIII; Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 22.4, 15 April 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2.

lawful retaliation rights under GATT Article XIX:3(a).<sup>26</sup> Various panels have been established to settle ongoing controversies. Nonetheless, an August 2018 AB ruling on safeguarding GATT XIX (released in August 2018) called into question this conclusion.<sup>27</sup> The AB has, in fact, stated that in order to qualify as a WTO safeguard, a tariff increase “must be designed to prevent or remedy serious injury to the Member’s domestic industry caused or threatened by increased imports” of the product.<sup>28</sup> Under current measures, it appears that the terms to US recourse may lack those prerequisites.<sup>29</sup> Therefore, it might conclude that the affected WTO members’ retaliations are illegal and in violation of the WTO rules, namely GATT Articles I and II.<sup>30</sup> The Trump Administration has lodged various WTO cases against members’ retaliations under Section 232.<sup>31</sup> If the US would prevail in these challenges, the members that have immediately retaliated could be judged in violation of WTO requirements.

Interestingly enough, the US has not brought a case against China’s Section 301 retaliations, notwithstanding the fact that China immediately retaliated against the US’ unilateral measures. This retaliation occurred before its three cases lodged against US Section 301 tariffs<sup>32</sup> were decided.<sup>33</sup> The October 2018 US WTO complaint against China, lodged against URST for violation of Articles 3 and 28 of TRIPS Agreement, has been suspended since June 2019. This complaint arose from concerns of China’s alleged theft and forced transfers of US technology.<sup>34</sup>

26 Steve Charnovitz, ‘EU Can Retaliate Immediately against Trump’s Metal Tariffs’, *International Economic Law and Policy Blog* (2 March 2018), <https://worldtradelaw.typepad.com/ielpblog/2018/03/eu-can-retaliate-immediately-against-trumps-metal-tariffs.html>; Zhiyao L. Lu, Jeffrey J. Schott, ‘How Is China Retaliating for US National Security Tariffs on Steel and Aluminum?’, *Peterson Institute for International Economics* (9 April 2018), <https://www.piie.com/research/piie-charts/how-china-retaliating-us-national-security-tariffs-steel-and-aluminum>; Chad P. Bown et al., ‘China’s Retaliation to Trump’s Tariffs’, *Peterson Institute for International Economics* (22 June 2018), [www.piie.com/blogs/trade-and-investment-policy-watch/chinas-retaliation-trumps-tariffs](http://www.piie.com/blogs/trade-and-investment-policy-watch/chinas-retaliation-trumps-tariffs).

27 Appellate Body Report, *Indonesia – Safeguard on Certain Iron and Steel Products*, WT/DS490, 496, adopted 27 August 2018, para 5.60.

28 *Ibidem*; see *infra* Chapter 5.

29 See *infra* Chapter 2, para 2.2.

30 Steve Charnovitz, ‘Grading Trump’s China Trade Strategy’, *GWU Law School Public Law Research Paper No. 2019-26 16-17*, <https://ssrn.com/abstract=3393083> (last visited on 30 October 2020).

31 *Infra* Chapter 2, para 2.2.

32 See DS543: *United States — Tariff Measures on Certain Goods from China*; WT/DS543/R, Panel Report, *United States—Tariff Measures on Certain Goods from China*, adopted on 15 September 2020, under appeal on 26 October 2020.

33 *Infra* Chapter 2, paras 2.3; 2.4.

34 DS542: *China — Certain Measures Concerning the Protection of Intellectual Property Rights*, World Trade Organization, [www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds542\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds542_e.htm).

**1.2.2 The Trade War with China**

On 13 December 2019, the US and China finally released the text of an *Economic and Trade Agreement* that aims to avoid future WTO challenges regarding ongoing trade disputes between the two parties.<sup>35</sup> The agreement was signed in January 2020, along with provisions on a *Phase One* trade deal that requires structural reforms and other changes to China's economic trade regime. This deal stipulated that reforms must encompass areas of intellectual property,<sup>36</sup> technology transfer, agriculture, energy sector, financial services, currency, and foreign exchange. The deal does not address other "structural issues" and long-standing US complaints like distortive subsidies and anti-competitor behavior of Chinese state-owned enterprises. These, however, were all issues left for a "second phase" of talks to be included in a second agreement. Consistent with the two sides' projections, China committed itself to a two-year import of no less than \$200 billion USD of US goods and services. This was in addition to amounts imported in 2017 from four broad categories. The Phase One deal also includes a commitment by China that it will make substantial additional purchases of US goods and services in the coming years. China's increased imports of US goods and services in 2020, 2021, and beyond, should mainly contribute, as requested by President Trump, to a significant rebalancing of the US–China trade relationship. This will be accomplished by lowering the US' bilateral trade deficit with China. Prior to this, the deficit stood at \$380 billion USD. The US, in return, has agreed to modify its Section 301 tariff actions in a significant way.<sup>37</sup>

Forecasts to the new US–China Trade Agreement are not at all favorable. We will discuss this trade deal later.<sup>38</sup> In theory, the deal should have ended more than 18 months of trade war. Even if it is too early to declare it dead, China's willingness and ability to fulfill its commitments have already appeared unrealistic in the first quarter of 2020. To complicate matters further, renewed and virulent political frictions among these two great powers should be mentioned. These tensions are a direct consequence of the global

35 The text is published at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/january/economic-and-trade-agreement-between-government-united-states-and-government-peoples-republic-china>; see the Fact Sheet of the Agreement at <https://ustr.gov/sites/default/files/US-China-Agreement-Fact-Sheet.pdf>. *Infra* Chapter 1, para 1.3.

36 Steps have been made in China to better align the national regulatory framework with the TRIPS. See: Paolo Davide Farah and Elena Cima, 'China's Participation in the World Trade Organization: Trade in Goods, Services, Intellectual Property Rights and Transparency Issues', *El comercio con China: oportunidades empresariales, incertidumbres jurídicas* (Tirant lo Blanch 2010) <<https://archive-ouverte.unige.ch/unige:135649>> accessed 19 May 2021; For an analysis of the difficult links between IPRs and human rights: Paolo D. Farah and Riccardo Tremolada, 'Conflict between Intellectual Property Rights and Human Rights: A Case Study on Intangible Cultural Heritage' (2015) 94 *Oregon Law Review* 125.

37 *Supra* n 34.

38 *Infra* Chapter 2, para 2.5.

coronavirus pandemic, coined as the “China virus”.<sup>39</sup> Other Chinese legislative measures that were heavily blamed on China by the Trump Administration are also a major proponent of these tensions. On 30 May 2020, Trump announced that he intended to terminate his country’s relationship with the World Health Organization (WHO). He added that the United States would redirect all US funds intended for the agency to other global-health projects.<sup>40</sup> According to President Trump, the WHO has been too lenient with China by intentionally ignoring reports that COVID-19 was spreading between people in Wuhan, China, in December 2019. He also concludes that the WHO allegedly colluded with China to hide the extent of the coronavirus crisis. He also asked to have an independent probe to study how the pandemic was handled globally. In addition, he requested a specific evaluation of the WHO’s response to COVID-19.<sup>41</sup>

The Trump Administration has also announced new sanctions against Chinese and Hong Kong officials that were “directly or indirectly involved in eroding Hong Kong’s autonomy” along with financial institutions that engage in significant transactions with them. This resulted from the direct imposition on 28 May 2020, by China to provide Hong Kong a national security legislation.<sup>42</sup> This decision opposed measures adopted by Hong Kong’s institutions as provided under Hong Kong’s Basic Law and the Sino-British Joint Declaration.<sup>43</sup> The White House’s declaration that Hong Kong is “no longer autonomous from China” means that its preferential trade treatment will be revoked. It is imperative to note that this preferential treatment was contingent on Hong Kong maintaining its autonomy.<sup>44</sup>

39 [www.washingtonpost.com/politics/trump-takes-direct-aim-at-china-as-known-us-infections-double-and-criticism-mounts/2020/03/19/6df10828-6a06-11ea-abef-020f086a3fab\\_story.html](https://www.washingtonpost.com/politics/trump-takes-direct-aim-at-china-as-known-us-infections-double-and-criticism-mounts/2020/03/19/6df10828-6a06-11ea-abef-020f086a3fab_story.html).

40 White House, ‘Remarks by President Trump on Actions Against China, National Security & Defense’ (30 May 2020), <https://trumpwhitehouse.archives.gov/briefings-statements/remarks-president-trump-actions-china/>.

41 See, on this proposal, the final solution adopted by the WHO on the pandemic: WHO, COVID-19 response, A73/CONF/1 Rev.1 (18 May 2020), [https://apps.who.int/gb/ebwha/pdf\\_files/WHA73/A73\\_CONF1Rev1-en.pdf](https://apps.who.int/gb/ebwha/pdf_files/WHA73/A73_CONF1Rev1-en.pdf).

42 Remarks by President Trump on Actions Against China (n 39).

43 S.1838 – Hong Kong Human Rights and Democracy Act of 2019, 116th Congress (2019–2020), [www.congress.gov/bill/116th-congress/senate-bill/1838/text](https://www.congress.gov/bill/116th-congress/senate-bill/1838/text).

44 Remarks by President Trump on Actions Against China (n 39). On 30 October 2020, China requested consultations with the US regarding certain measures concerning the “origin marking requirement” applicable to goods produced in Hong Kong. Trump claimed that these measures appear to be inconsistent with Articles I:1, IX:1 and X:3(a) of the GATT 1994; Articles 2(c), 2(d) and 2(e) of the Agreement on Rules of Origin; and Article 2.1 of the TBT Agreement. Notwithstanding the US’ claim that its decision to withdraw its preferential trade treatment to Hong Kong is considered *beyond the jurisdiction of any WTO panel*, being a measure necessary to the protection of US “essential security interests”, a WTO panel on this dispute has been composed on 29 April 2021. See DS597: *United States — Origin Marking Requirement*, [www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds597\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds597_e.htm).



Ultimately, China responded by rejecting all charges and accusing the US of illegal interference in its domestic affairs. As for the commitments under the Phase One Agreement, it has been calculated that, in the end, China purchased only 57 percent of the total US goods and services exports that it had committed to buy.<sup>45</sup>

### **1.2.3 *The Relationship with the WTO and Its Dispute Resolution System***

The US–China agreement establishes a strong “dispute resolution system” whose aim is to ensure a prompt and effective implementation and enforcement at the governmental level, yet “outside” the WTO multilateral system. This path is in line with the persistent US’ blockage of the WTO AB. In February 2020, the Office of the United States Trade Representative (URST) Ambassador, Robert E. Lighthizer, finally published a comprehensive Report on the Appellate Body of the WTO. This report tallied 174 pages and summarized all the concerns expressed by the US for over 20 years. Particularly, these concerns focused on dispute settlement systems of the World Trade Organization, its Appellate Body, and the reasons why it has not functioned according to the rules agreed by the US and other WTO members in 1995.<sup>46</sup> The report will be the object of analysis in Chapter 4. Whether Trump’s strategy aims at bringing the whole world back to a GATT 1947–era system, with trade disputes largely resolved through negotiations and solutions based on the economic power of the disputing parties, or whether he is simply trying to restore the DSS to what it had agreed to in 1995,<sup>47</sup> is an open and fraught question still to be answered. The final outcome could result in a global order without an organized or centralized dispute settlement system. Here, trade disputes would not be adjudicated by international institutions but would be governed by binding, compulsory “third-party” dispute settlements. This unfortunate outcome could bring national trade policies to the verge of ending a rule-oriented mechanism at the mercy of unilateral measures.

45 See Chad P. Bown, *US-China Phase One Tracker: China’s Purchases of US Goods*, Peterson Institute for International Economics (PIIE), 11 March 2022, [www.piie.com/research/piie-charts/us-china-phase-one-tracker-chinas-purchases-us-goods](https://www.piie.com/research/piie-charts/us-china-phase-one-tracker-chinas-purchases-us-goods).

46 USTR, ‘Report on the Appellate Body of the World Trade Organization’ (February 2020), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/february/ustr-issues-report-wto-appellate-body>.

47 Office of the United States Trade Representative (2018), ‘Statement of the United States by Ambassador Dennis Shea at the 14th WTO Trade Policy Review of the United States of America’, 17 December 2018, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2018/december/statement-united-states-ambassador>.

### 1.2.4 The National Security's Narrative

The Trump Administration has justified its tariff measures on steel and aluminum imports by claiming they were taken for “national security reasons”. The previous US administration argued that, even if its trade measures are considered inconsistent with US obligations under the GATT, they are *beyond the jurisdiction of a WTO panel* because the US considers the measures to be necessary for the protection of its “essential security interests”. This is pursuant to GATT Article XXI, the so-called “national security exceptions”.<sup>48</sup> A hallmark of the Trump Administration has been a very broad approach to national security concerns in trade policy, to promote and defend national interests, and to produce beneficial geopolitical results.<sup>49</sup> In 2017, the White House declared that “economic security is national security”.<sup>50</sup> The political assertion that large sections of a WTO member’s economy should be considered free from the scrutiny of rules appears a blatant rejection of “the multilateral authority over trade policy”.<sup>51</sup> This conclusion does not carve-out the problem of the *justifiability* of Article XXI’s exception for “essential security interests”, and that of the legal standards for its interpretation and application. The outcomes of the highly controversial and ongoing disputes at the WTO could have serious implications for the credibility of, and faith in, the global rules-based system. The outcome and repercussion from disputes relating to the 26 April 2019 US Section 232 Actions of the landmark Russia Panel Report (and in the following panel in Qatar’s dispute with Saudi Arabia)<sup>52</sup> will be analyzed in Chapter 5.

### 1.2.5 The Attitude Toward Preferential Trade Agreements

At a broader level, the Trump Administration has repeatedly expressed skepticism toward multilateral trade agreements, including those negotiated under the WTO.<sup>53</sup> Trump has stated a clear preference for negotiating bilateral free trade agreements (FTAs). One of President Trump’s first decisions was to withdraw the US from the proposed Trans-Pacific Partnership (TPP). This agreement was later signed on 15 November 2020 as the Regional Comprehensive Economic Partnership (RCEP).<sup>54</sup> In addition to refusing to

48 *Infra* Chapter 5.

49 See, on the concept of “geo-economics”, Robert Blackwill and Jennifer Harris, *War by Other Means* (Harvard University Press 2017).

50 National Security Strategy of the United States of America, (December 2017), (n 22).

51 Rachel Brewster, ‘The Trump Administration and the Future of the WTO’ (n 23).

52 Panel Report, *Saudi Arabia — Measures Concerning the Protection of Intellectual Property Rights*, circulated on June 2020 and subject to a pending appeal, *infra* Chapter 5, para 5.4.

53 According to the USTR 2018 Trade Policy Agenda (n 19) 2. See Chapter 2, para 2.3.

54 See <https://rcepsec.org/>. The agreement includes the ten member states of the Association of South-east Asian Nations (ASEAN) (Brunei, Cambodia, Indonesia, Laos, Malaysia, Myanmar, the Philippines, Singapore, Thailand, Vietnam) and its six FTA partners (Australia, China, India, Japan, New Zealand, and Republic of Korea).

be a party in this mega-regional trade agreement in the Pacific Basin area, the Trump Administration also stalled negotiations with the EU on the proposed Trans-Atlantic Trade and Investment Partnership (TTIP) launched in 2013.<sup>55</sup>

A stunning draft of the Trump Administration's bill titled, "United States Fair and Reciprocal Tariff Act", was leaked in May 2018.<sup>56</sup> If approved by Congress, this bill would give the president unilateral power to disregard two basic principles of the WTO trade system. The Most Favored Nation status and the Tariff Ceilings that each WTO member had agreed to in previous multilateral negotiations would be affected. This path would imply a practical withdrawal from the multilateral trade system by one of its founding members with no acknowledgment of the consequences that would result in the WTO legal order. Recently, and apart from the continuous threats to withdraw the US from the WTO, the Trump Administration has threatened to veto the WTO's annual budget. This comes while the US remains the largest contributor to this budget and has planned to charge higher tariffs (agreed to by US previous administrations) on certain products in respect of which US trading partners have much higher tariffs than the US (like European cars and Indian motorcycles).<sup>57</sup>

At the regional level, the Trump Administration has negotiated a new US–Mexico–Canada Trade Agreement (USMCA) to replace the North American Free Trade Agreement (NAFTA). This new agreement was signed

55 *Infra* Chapter 2, para 2.3. On the role of these (and other) mega-regional trade agreements and their impact on the WTO system, see Joost Pauwelyn, 'New Trade Politics for the 21st Century', (2008) 11 *Journal of International Economic Law* 559; Richard Baldwin, '21st Century Regionalism: Filling the Gap between 21st Century Trade and 20th Century Trade Rules' (2011) [https://www.wto.org/english/res\\_e/reser\\_e/ersd201108\\_e.pdf](https://www.wto.org/english/res_e/reser_e/ersd201108_e.pdf); Joseph H. Weiler, 'The WTO: Already the Promised Land?' in A. Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012) 418; Richard Senti, 'Regional Trade Agreements: "Stepping Stones" or "Stumbling Blocks" of the WTO?' in M. Cremona et al. (eds), *Reflections on the Constitutionalisation of International Economic Law: Liber Amicorum for Ernst-Ulrich Petersmann* (Brill 2014) 441; Ernst-Ulrich Petersmann, 'Transatlantic Free Trade Agreements: Lack of EU Leadership for Reforming Trade and Investment Law?' (2016) 30 *Revue internationale de droit économique* 455; Chad P. Bown, 'Mega-Regional Trade Agreements and the Future of WTO' (2016) Council of Foreign Relations Paper Series, <https://www.piie.com/commentary/speeches-papers/mega-regional-trade-agreements-and-future-wto>; Bernard Hoekman and Petros C. Mavroidis, 'Twin Crisis in the WTO, and no Obvious Way Out' (2019) *Questions of International Law, Zoom-out* (63) 113: "The increasing shift to bilateral, regional and plurilateral forms of cooperation will have an impact on WTO dispute settlement even if the AB were to be reconstituted. The WTO has not managed to add much to its legislative arsenal since its creation [...] The legislative function of the multilateral trading system is [...] well, in crisis".

56 [www.documentcloud.org/documents/4568881-United-States-Fair-and-Reciprocal-Tariff-Act.html](http://www.documentcloud.org/documents/4568881-United-States-Fair-and-Reciprocal-Tariff-Act.html).

57 Bryce Baschuk, (2019), 'U.S. Raises Prospect of Blocking Passage of WTO Budget', Bloomberg, 12 November 2019, [www.bloomberg.com/news/articles/2019-11-12/u-s-is-said-to-raise-prospect-of-blocking-passage-of-wto-budget](http://www.bloomberg.com/news/articles/2019-11-12/u-s-is-said-to-raise-prospect-of-blocking-passage-of-wto-budget); Bryce Baschuk and Jenny Leonard, (2020), 'U.S. Weighs Higher Tariff Ceilings in Bid for More Sway Over WTO', Bloomberg, 12 February 2020, [www.bloomberg.com/news/articles/2020-02-12/u-s-weighs-higher-tariff-ceilings-in-bid-for-more-sway-over-wto](http://www.bloomberg.com/news/articles/2020-02-12/u-s-weighs-higher-tariff-ceilings-in-bid-for-more-sway-over-wto).

on 30 November 2018.<sup>58</sup> According to various economic studies, it will not bring any substantial advantages to the US economy and will result in small net losses in US output and employment. It also includes stricter rules of origin designed to advantage American business.<sup>59</sup> Similarly, according to a renowned economic institution – the Peterson Institute for International Economics – the new US–Korea FTA<sup>60</sup> had added nothing commercially, except to force Korea to accept new US national security restrictions that limit Korean steel exports.<sup>61</sup> The main advantages obtained by the US in the US–Japan deal seem to rely on recouping the benefits for US farm exporters that were lost when President Trump dropped out of the TPP agreement. This exists alongside minor mirror obligations adopted in the USMCA digital trade deal.<sup>62</sup> The Trump Administration also reached a new agreement with Japan in 2019, which is not a *comprehensive* free trade agreement, but is focused on market access for certain agricultural and industrial goods with plans to pursue subsequent negotiations for an expanded free trade agreement.<sup>63</sup>

The overall impression is that Trump trade deals have not been able to improve US access to foreign markets when compared to previous agreements.<sup>64</sup> This is

58 Agreement between the United States of America, the United Mexican States and Canada (2018), USMCA <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between>. The USMCA became enforceable on 1 July 2020. See Thomas Schoenbaum, ‘The Art of the Deal and North American Free Trade: Advantage for the U.S.?’ (2020)14 *Ohio State Business Law Journal* 100.

59 United States International Trade Commission, U.S.–Mexico–Canada Trade Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors, April 2019, Publication Number: 4889 [www.usitc.gov/publications/332/pub4889.pdf](http://www.usitc.gov/publications/332/pub4889.pdf), 1–369; Dan Ciuriak, Ali Dadkhah, and Jingliang Xiao, ‘Quantifying CUSMA: The Economic Consequences of the New North American Trade Regime’, C.D. HOWE Institute, Working Paper (25 July, 2019), [www.cdhowe.org/sites/default/files/attachments/research\\_papers/mixed/Working%20Paper-Ciuriak-Dadkhah-Xiao-2019.pdf](http://www.cdhowe.org/sites/default/files/attachments/research_papers/mixed/Working%20Paper-Ciuriak-Dadkhah-Xiao-2019.pdf) (last visited on 30 October 2020).

60 US–Korea Free Trade Agreement (2007), <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta>; see also Jaemin Lee, ‘Commercializing National Security? National Security Exceptions’ Outer Parameter under GATT Article XXI’ (2018) 13 (2) *Asian Journal of WTO & International Health Law and Policy* 277–310; Pallavi Arora, ‘Will Tariff Wars Unravel the Multilateral Trading System?’, *Voelkerrechtsblog* (1 October 2018), <https://voelkerrechtsblog.org/will-tariff-wars-unravel-the-multilateral-trading-system/>.

61 Jeffrey J. Schott and Euijin Jung, ‘18–22 KORUS Amendments: Minor Adjustments Fixed What Trump Called “Horrible Trade Deal”’, Peterson Institute for International Economics (November 2018), <https://www.piie.com/publications/policy-briefs/korus-amendments-minor-adjustments-fixed-what-trump-called-horrible>.

62 Jeffrey J. Schott, ‘Reinventing the Wheel: Phase One of the US–Japan Trade Pact’, Peterson Institute for International Economics (27 September, 2019), [www.piie.com/blogs/trade-and-investment-policy-watch/reinventing-wheel-phase-one-us-japan-trade-pact](http://www.piie.com/blogs/trade-and-investment-policy-watch/reinventing-wheel-phase-one-us-japan-trade-pact).

63 *FACT SHEET on U.S.–Japan Trade Agreement*, <https://ustr.gov/about-us/policy-offices/press-office/fact-sheets/2019/september/fact-sheet-us-japan-trade-agreement>. A Federal Register Notice (84 FR 72187) was issued on 30 December 2019, to implement the Agreement. Its enforceability was limited to dates after 1 January 2020.

64 United States International Trade Commission, ‘Economic Impact of Trade Agreements Implemented under Trade Authorities Procedures’, 2021 Report, June 2021, <https://www.usitc.gov>.

mainly due to foreign retaliations against US exports. Retaliations have largely been in response to US protectionist trade measures that have hurt important sectors of exports by raising the production costs for US manufacturers reliant on foreign inputs. The US currently holds preferential access to markets that constitute 9 percent of the global gross domestic product (GDP). By comparison, the EU has access to 20 percent, Canada to 57 percent, and Mexico to 56 percent.<sup>65</sup>

In conclusion, Under the Trump Administration the US has ceased to play, for better or worse, the hegemon leadership's role in international economic matters/relations that it played during the latter half of the previous century.<sup>66</sup>

### **1.3 President Biden's 2021 Trade Agenda: Will It Really Change Course?**

The Biden Presidency began in January 2021. In a speech at the Graduate Centre at CUNY in New York, Joe Biden laid out his foreign policy vision "for America to restore dignified leadership at home and respected leadership on the world stage".<sup>67</sup> On that occasion, Joe Biden announced that "America is back" and that – as the new US Democratic President – he,

will advance the security, prosperity, and values of the United States by taking immediate steps to renew our own democracy and alliances, protect our economic future, and once more place America at the head of the table, leading the world to address the most urgent global challenges.<sup>68</sup>

On paper, this announcement seems a real change of pace in respect to Trump's strategy that long undermined and eroded international law and its institutions' legitimacy and efficacy.<sup>69</sup>

65 Guy Erb and Scott Sommers, 'Biden's Trade Policy and Free Trade Areas,' Washington International Trade Association, 8 April 2021, [www.wita.org/blogs/bidens-trade-policy/](http://www.wita.org/blogs/bidens-trade-policy/). Edward Alden, *Failure to Adjust: How Americans Got Left Behind in the Global Economy*, Council on Foreign Relations (Rowman & Littlefield 2020), explaining why the US' political consensus in support of trade liberalization has collapsed, and how to correct the course. For a critique of FTAs, see: 'Memorandum on U.S. Trade and Manufacturing Policy,' Economic Policy Institute, 24 November 2020, which called for "a freeze on negotiating new trade agreements", [www.epi.org/publication/memorandum-on-u-s-trade-and-manufacturing-policy/](http://www.epi.org/publication/memorandum-on-u-s-trade-and-manufacturing-policy/).

66 'What happened to the American Century? An Autopsy of the Last Decades of American Global Leadership', 98 *Foreign Affairs*, July–August 2019, [www.foreignaffairs.com/issue-packages/2019-06-11/what-happened-american-century](http://www.foreignaffairs.com/issue-packages/2019-06-11/what-happened-american-century); Thomas J. Schoenbaum, *The Biden Administration's Trade Policy: Promise and Reality*, (2023) *German Law Journal*, vol. 24. 01, 102–124.

67 See 'The Power of America's Example: The Biden Plan for Leading the Democratic World to Meet the Challenges of the 21st Century', 11 July 2019, <https://joebiden.com/americanleadership/>.

68 Joseph R. Biden, 'Why America Must Lead Again. Rescuing U.S. Foreign Policy After Trump', *Foreign Affairs*, March/April 2020, [www.foreignaffairs.com/articles/united-states/2020-01-23/why-america-must-lead-again](http://www.foreignaffairs.com/articles/united-states/2020-01-23/why-america-must-lead-again).

69 Gregory Shaffer and David L. Sloss, 'Introduction to the Symposium of the Biden Administration and the International Legal Order', 115 *American Journal of International Law (AJIL) Unbound*, 2021, 40. For a very recent and deep analysis of the Biden's new trade agenda, see Thomas Schoenbaum (n 66).

### **1.3.1 Rescuing US Foreign Policy After Trump in Specific Areas, to Meet Global Challenges**

In trying to answer the question: What would President Biden's new discursive rhetoric mean for the international legal order, it seems easy to conclude that he will use his presidential power to advance liberal and social-democratic values, both internally and internationally. Biden has announced that he will take decisive steps to reverse the Trump Administration's, "cruel and senseless policies" in areas like as asylum and refugee policies, migration flows, US military operations, conflicts of interest, dark money, rank corruption, and the criminal justice system.<sup>70</sup>

At the international level, the idea is to strengthen "the coalition of democracies that stand with us around the world", in order to bring back "democracy" to the global agenda.<sup>71</sup> Second, Biden's promise to place the US "back at the head of the table" clearly implies the necessity in his agenda to reverse the Trump trade wars launched against traditional friends and allies of the US. This, however, is in order to be able to work with them again, to mobilize collective action to meet the global threats of this century, including the renewed threat of nuclear war, mass migration, the disruptive impact of new technologies, climate change, and infectious diseases. Thereby, the Biden Administration immediately decided to remedy these much-criticised Trump policies. The administration sought to achieve this by reinvigorating and reengaging with international law and the institutions previously targeted. In one of his first acts as president, Biden retracted his predecessor's decision to withdraw from the WHO and appointed Dr Anthony Fauci as head of the National Institute of Allergy and Infectious Disease.

Fauci will now represent the US on the world body's executive committee. This decision implies a very important consequence: That the US was immediately recommitted to being a full participant in this organization, and thus, would fulfill its financial obligations to the agency. The WHO annual budget of about \$2.4 billion USD is contributed by its member states. In 2019, before it stopped paying, the US provided the WHO with \$419 million USD. This totals to about 20 percent of the agency's total budget. In addition to re-joining the WHO, President Biden also announced the US' participation in the COVID-19 Vaccine Global Access (COVAX) Facility and the donation of any surplus vaccines to the global effort.<sup>72</sup> Second, Biden has signed an executive order to have the US re-join the Paris climate agreement.<sup>73</sup>

70 Joseph R. Biden (n 67): "As a nation, we have to prove to the world that the US is prepared to lead again—not just with the example of our power but also with the power of our example".

71 *Idem* (n 67).

72 <https://eu.usatoday.com/story/news/health/2021/01/22/scientists-applaud-biden-decision-rejoin-world-health-organization/4243377001/>.

73 Acceptance on Behalf of The United States of America: 'I, Joseph R. Biden Jr., President of the United States of America, having seen and considered the Paris Agreement, done at Paris on Decem-

During his candidacy, he made a bold pledge to cut all greenhouse gas emissions from the nation's electricity sector by 2035 and to make the country carbon-neutral by 2050. This would be accomplished through investments in renewable energy sources like wind and solar.<sup>74</sup> The Biden Administration also promised to directly engage with the leaders of major carbon-emitting nations to persuade them to join the US in making more ambitious national pledges to address the climate crisis. This commitment includes US pressure on China – the world's largest emitter of carbon.<sup>75</sup> The goal is to stop subsidizing coal exports and outsourcing pollution to other countries by financing billions of dollars' worth of fossil-fuel energy projects through their Belt and Road Initiative.<sup>76</sup> On 8 February 2021, the US announced that it would re-join the United Nations Human Rights Council, overturning another of the Trump Administration's moves to exit multilateral organizations and international agreements. President Biden instructed the State Department "to re-engage immediately and robustly" with the body as part of his administration's commitment to pursuing a foreign policy centered on democracy, human rights, and equality utilizing multilateral tools.<sup>77</sup> On 2 April 2021, President Biden revoked Executive Order 13928 on "Blocking Property of Certain Persons Associated with the International Criminal Court (ICC)", ending the threat and imposition of economic sanctions and visa restrictions in connection with the court. This is a policy Trump imposed because of the court's decision to launch investigations on US conduct in Afghanistan.<sup>78</sup> The sanctions imposed by the previous administration against ICC Prosecutor Fatou Bensouda and Phakiso Mochochoko, the Head of the Jurisdiction, Complementarity and Cooperation Division of the Office of the Prosecutor, have been lifted.

On the issue of nonproliferation and nuclear security, the Biden Administration has announced the US' willingness to rejoin the historic Iran nuclear deal. This was negotiated under the Obama-Biden Administration and later abandoned by President Trump. This was subject to enforcement once it was demonstrated that Iran had returned to strict compliance with the deal and the US had renewed its commitment to diplomacy by working with its allies to strengthen and extend it. The Biden Administration's

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ber 12, 2015, do hereby accept the said Agreement and every article and clause thereof on behalf of the United States of America.' Done at Washington this 20th day of January, 2021. JOSEPH R. BIDEN JR., [www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/paris-climate-agreement/](http://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/paris-climate-agreement/).

74 Paolo Davide Farah and Elena Cima, 'WTO and Renewable Energy: Lessons from the Case Law' (2015) 49 *J. World Trade* 1103.

75 For an overview of the steps made by China, see: Paolo Davide Farah and Elena Cima (eds), *China's Influence on Non-Trade Concerns in International Economic Law* (Routledge 2016) 10–58.

76 *Infra* (n 83).

77 [www.nbcnews.com/politics/joe-biden/biden-administration-rejoin-u-n-human-rights-council-another-reversal-n1256997](http://www.nbcnews.com/politics/joe-biden/biden-administration-rejoin-u-n-human-rights-council-another-reversal-n1256997).

78 See Stefano Silingardi, 'The U.S. Sanctions Against ICC Personnel: Just an Aberration Attributable to a Now-Defunct, Populist Regime?', in *Diritto penale contemporaneo* 2/2021, 205–219.



desire to restore US historic partnerships also extended to NATO. This organization has been depicted as an alliance of values and liberal democratic ideals at the very heart of the US' national security interests. Biden has announced his willingness to do more to lead efforts *to reimagine* this alliance for the future and expand its capability to counter Russian aggression and take on new non-traditional threats. Among these threats are: Weaponized corruption, cyber theft, and new challenges in space and on the high seas. In addition, and contrary to Trump, who has often bashed this organization and reportedly threatened to withdraw from the alliance, NATO has become a key pillar of the Biden administration's response to the recent Russian invasion of Ukraine. Forced to push back against the Soviet influence in Europe during the Cold War, a reinvigorated and revived NATO has come to the forefront of the agenda as an issue of this *hot* war against Ukraine. Furthermore, its members seem more united than ever to counter a great power adversary and to prevent interstate war on the European continent. Historically, US power has been one of the biggest guarantors of the alliance. According to the US, the Biden Administration deserves praise for how it has handled this crisis and shepherded NATO to respond to Russian aggression.

Some of Biden's trade policy agendas, unthinkable under the Trump Administration, appear highly positive in efforts to reestablish the credibility and influence of the US in the world. Particularly, the strong focus on environmental and climate policy and the promotion of social justice, democracy, and human rights as common global goals are important. More importantly, this is not just rhetoric: President Biden quickly followed his words with effective actions.

### ***1.3.2 A Foreign Policy for the Middle Class: Trump's Protectionist Policies Are Here to Stay?***

In order to project normative leadership on the global stage, the Biden Administration should also be able to repudiate Trump policies on trade. This means, besides rejecting the populist and nationalistic rhetoric of Trump, to be proactive in adopting measures to reverse the course on several important international trade policy issues. Among these priorities, the Biden Administration should restore effective cooperative relations with trading partners. For example, this could be achieved by: 1) removing unilateral tariffs on steel and aluminum that were imposed on a wide range of countries and justified by national security concerns, 2) normalizing trade relationships between China and US by negotiating a real end to their respective trade war, 3) returning to negotiate free trade agreements (FTAs) with traditional allies and attempting to join mega-regional agreements like the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), and 4) returning to rule-based trading relationships through the WTO by ending the US boycott of the WTO Appellate Body.



Many observers have already pointed out various foregoing economic and political constraints facing the Biden Administration in formulating trade policy.<sup>79</sup> With regard to the first, apart from a persistent US macroeconomic model that makes huge trade deficits unavoidable (in 2020 the US trade deficit in trade in goods reached \$915.8 billion USD, topping \$1 trillion USD at the end of 2021) and constitutes significant constraints on the adoption of liberalized trade policies, the Biden Administration faces severe domestic (microeconomic) constraints. The country has gone through a severe recession, further exacerbated by the pandemic. Economic inequality has reached the highest level since the Great Depression of the 1930s. US manufacturing jobs have steadily declined since 1940. In June 2021, manufacturing employment was estimated at 12.318.<sup>80</sup> Many economists and politicians from both parties have blamed liberalization of international trade and investment law for this decline. Others have put the blame on different causes like better technology, which means the need of fewer workers. Other attributions include the move of American workers in service industries and an inadequate American educational system that is unable to adequately prepare for high-skilled jobs.<sup>81</sup>

The following analysis shows how it is unrealistic to advocate Biden's complete repudiation of many of the Trump Administration's policies and practices. Anticipating its 2021 Trade Agenda, Biden made clear in a speech after his election<sup>82</sup> that he has chosen not to expose his new trade policy initiatives as related to the international economic order, international law, and institutions, but to connect them to the pressing domestic problems. The premise is that "Economic security is national security" and that trade policy "has to start at home", by strengthening the US' greatest asset – its middle class. This would counter abusive economic practices and permit American business to compete on a fair playing field to reduce inequality.<sup>83</sup> In his plan titled *Build Back Better*,<sup>84</sup> President Biden committed his administration to a new wave of worker power and an economy that serves the dignity of the hard-working people who make it run. He promised huge investments to bring back Americans to work in good-paying jobs. He also made a promise to meet four national challenges: Building a stronger industrial and innovation base so the future is made in America, building sustainable infrastructure and a clean energy future, building a stronger economy, and advancing racial equity across

79 *Supra* n 54; *infra* n 80.

80 Data source: U.S. Bureau of Labor Statistics; FRED economic data, <https://fred.stlouisfed.org/series/MANEMP>.

81 Thomas J. Schoenbaum (n 66); Stephen J. Rose, 'The Truth about Trade and Job Losses', 18 March 2016, <https://washingtonmonthly.com/2016/03/18/the-truth-about-trade-and-job-losses/>.

82 *Supra* (n 76).

83 *Ibidem*.

84 *Build Back Better* is President Biden's three-part agenda to rescue, recover, and rebuild the country. It includes three plans: The American Rescue Plan; The American Jobs Plan; The American Families Plan, [www.whitehouse.gov/build-back-better/](http://www.whitehouse.gov/build-back-better/).

the board. In his other *Plan to Ensure the Future Is “Made In All Of America” by all of America’s Workers*, Biden developed a comprehensive manufacturing and innovation strategy along six lines: 1) buy American, 2) make it in America, 3) innovate in America, 4) invest in all of America, 5) stand up for America, 6) supply America.<sup>85</sup>

All the proposed trade measures appear justified as a legitimate reaction to Trump’s main manufacturing and innovation strategy that, according to the Democrats, has worked only for corporate executives and private companies. All of these measures, however, appear to be inspired by a “protectionist” philosophy even stronger than Trump’s.

With the “Buy American: Make ‘Buy American’ Real and Make a Historic Procurement Investment in American Products, Services, and Transportation of Goods”,<sup>86</sup> Biden has made a national commitment to make his promise real, not just rhetoric. The basic idea of this plan is to advance the Buy American Act (BAA), passed by the Congress almost 90 years ago. This would support American products and jobs, instead of foreign industries and foreign jobs. This would tighten domestic content rules for purpose of federal procurement (from the 51 percent of the materials used to produce domestically to the 55 percent to require more American content) and cracking down on waivers for Buy American requirements. Biden said he will invest \$400 billion USD in his first term in additional federal purchases of products made by American workers, the largest mobilization of public investments in procurement, infrastructure, and R&D since World War II. This commitment will cover steel, cement, concrete, building materials and equipment, medical supplies, and pharmaceuticals. At least 23 percent of federal contracts will be awarded to small businesses.

The “Make it in America” commitment puts a special focus on the backbone of American manufacturing, which are small and medium-sized companies. This would occur through specific incentives, additional resources, and new financing such as manufacturing tax credits that promote revitalizing, renovating, and modernizing existing facilities. This approach holds a special focus on the American auto industry.

With the “Innovate in America” plan, Biden is proposing to accelerate research and development (R&D investment to \$300 billion USD over four years). This would generate millions of jobs and secure US leadership in the most critical and competitive new industries and technologies while also creating more middle-class jobs. The challenge is that China is on track to surpass the US in R&D in key industries, including battery technology, artificial intelligence, 5G, biotechnology,<sup>87</sup> and clean vehicles.

85 The Biden Plan to Ensure the Future is “Made In All Of America” by all of America’s Workers <https://joebiden.com/made-in-america/>.

86 Joe Biden for President: Official Campaign Website, <https://joebiden.com/made-in-america/>.

87 Farah and Cima, *China’s Influence on Non-Trade Concerns in International Economic Law* (n 74) 491–502.

“Invest in all of America” aims to ensure that all new federal training and education for manufacturing and innovation jobs reach all communities (including women and communities of color), including rural and urban areas. If equitably allocated, these investments will provide wider opportunities throughout the US.

“Stand Up for America” pursues a pro-American worker tax and a trade strategy that includes a number of steps: a) aggressive trade enforcement actions against China or any other country seeking to undermine American manufacturing through unfair practices (including currency manipulations, anti-competitive dumping, state-owned company abuses, and unfair subsidies), b) confront foreign efforts to steal American intellectual property (from cyberattacks to forced technology transfer), c) address state-sponsored cyber espionage against American companies, d) establish a “claw-back” provision to force companies to return public investments and tax benefits when they close down jobs in the US and send them overseas, e) apply a carbon adjustment fee to countries that fail to meet their climate and environmental obligations, and f) reverse tax policies that encourage companies’ outsourcing, confronting tax havens.

Finally, “Supply America” is Biden’s pillar to strengthen American resilience by bringing critical supply chains back to the US. This is an imperative as evidenced by the COVID-19 pandemic and the shortage of essential products.

In trade policy, former US President Donald Trump and his Democratic successor, Joseph Biden, hold differences that are considerably less pronounced. Biden’s plans, listed above, reveal an aggressive nationalist industrial policy. In Biden’s Trade Agenda there is likely to be an important amount of continuity with Trump’s trade policy. The cornerstone of it was the belief that the US needs a worker-based approach to trade, aimed at reshoring national supply chains, the recourse to subsidies, tax incentives, ample government funding to rebuild US domestic manufacturing capacity. With regard to these issues there is little hope that US, under the new presidency, will return to its long-standing commitment to open trade and deep economic integration.

On 1 March 2021, the USTR delivered President Biden’s *2021 Trade Agenda* and 2020 Annual Report to Congress.<sup>88</sup>

### ***1.3.3 A Worker-Centric Trade Policy***

The *worker-centered trade policy* would have repercussions in the international context as well. It seems inevitable, for example, that the executive order mandating “Buy American” by federal government entities will collide with US obligations under the WTO Government Procurement Agreement. Other tensions could materialize if the administration reviews labor obligations under existing trade agreements to promote stronger and enforceable standards that

88 <https://ustr.gov/sites/default/files/files/reports/2021/2021%20Trade%20Agenda/Online%20PDF%202021%20Trade%20Policy%20Agenda%20and%202020%20Annual%20Report.pdf>.

protect workers' rights. The Biden Administration has already shown the willingness to use the full range of trade tools to fight forced labor and exploitative labor conditions while increasing transparency and accountability in global supply chains. In order to prevent countries from gaining competitive advantages through the violation of workers' rights and unfair trade practices, the new president has imposed import restrictions on various products from China's Xinjiang region. Here, the Chinese government is accused of detaining hundreds of thousands of ethnic Uyghur Muslims in what the US State Department has labeled a "genocide".<sup>89</sup>

### ***1.3.4 Addressing China's Coercive and Unfair Economic Trade Practices Through a Comprehensive Strategy***

China is at the very top of Biden's trade agenda. This is in perfect harmony with Trump's US-China policy. The main differences in the policies seem to rest on Biden's conviction that "addressing the China challenge will require a comprehensive strategy and more systematic approach than the piecemeal approach of the recent past",<sup>90</sup> and in a closeness with the EU's own vision of China as, simultaneously, "(in different policy areas) a cooperation partner, a negotiation partner, an economic competitor and a systemic rival".<sup>91</sup>

As to the "systemic rivalry" with China, the Biden Administration recognized that "China's coercive and unfair trade practices harm American workers, threaten our technological edge, weaken our supply chain resiliency, and undermine our national interests".<sup>92</sup> China's detrimental unfair trade practices that continue to harm US workers and businesses include

China's tariffs and non-tariff barriers to restrict market access, government-sanctioned forced labor programs, overcapacity in numerous sectors, industrial policies utilizing unfair subsidies and favoring import substitution,

89 [www.politico.com/news/2021/06/21/biden-solar-ban-china-forced-labor-495330](https://www.politico.com/news/2021/06/21/biden-solar-ban-china-forced-labor-495330), 21 June 2021. The new trade priorities outlined in the new Agenda are: Tackling the COVID-19 Pandemic and Restoring the Economy, A Worker Centric Trade Policy, Putting the World on a Sustainable Environment and Climate Path, Advancing Racial Equity and Supporting Underserved Communities, Addressing China's Coercive and Unfair Economic Trade Practices Through a Comprehensive Strategy; Partnering with Friends and Allies, Standing Up for American Farmers, Ranchers, Food Manufacturers, and Fishers, Promoting Equitable Economic Growth Around the World, Making the Rules Count. Only a few of these priorities are of interest for the present analysis, to the extent that they further illustrate where key similarities with the Trump Administration are likely to lie in the Biden Agenda.

90 Biden's 2021 Trade Agenda ( n 87): "The Biden Administration is conducting a comprehensive review of U.S. trade policy toward China as part of its development of its overall China strategy".

91 European External Action Service, 'EU-China Relations Factsheet', Brussels, 20 June 2020, [https://eeas.europa.eu/topics/external-investment-plan/34728/eu-china-relations-factsheet\\_en#:~:text=For%20the%20EU%2C%20China%20is, on%20our%20values%20and%20interests](https://eeas.europa.eu/topics/external-investment-plan/34728/eu-china-relations-factsheet_en#:~:text=For%20the%20EU%2C%20China%20is, on%20our%20values%20and%20interests).

92 *Supra* n 87.

and export subsidies (including through export financing), coercive technology transfers, illicit acquisition and infringement of American intellectual property, censorship and other restrictions on the internet and digital economy, and a failure to provide treatment to American firms in numerous sectors comparable to the treatment Chinese firms receive in those sectors in the United States.<sup>93</sup>

These charges against China are exactly the same as mentioned by the previous administration in 2017 in the Report to Congress on China's WTO Compliance.<sup>94</sup> Regarding this vast range of unfair trade practices, the Biden Administration has announced to be (analogous to Trump) committed to use *all available tools* to counter them. Biden's self-announced tough approach to China's anti-competitive trade behavior will inevitably have implications. In particular, the US unilateral tariffs on thousands of products imported from China levied by the Trump Administration will maintain strict compliance.

The Biden Administration has announced that it will make transformative investments at home in American workers, infrastructure, education, and innovation necessary to enhance US competitiveness and put the US in a stronger position. The goal of this is to address challenges arising out of Chinese economic policies. In April 2021, the *US Innovation and Competition Act* was passed in the Senate. This act aimed at strengthening US leadership in critical technologies through basic research focus areas like artificial intelligence, high performance computing, advanced manufacturing, and the commercialization of those technologies to businesses in the US. It was also designed to improve national competitiveness in science, research, and innovation to support the national security strategy and growth in domestic manufacturing.<sup>95</sup> The intuitive reasoning of this legislation, along with the "Innovate in America" plan, lies in the impressive advance of China in new technologies. For example, China has excelled in internet-based artificial intelligence, data centers, big data, cloud computing, robotics, the Internet of Things, 5G networks, and biomedical engineering. These investments have all been heavily supported by the Chinese government. Digitalization has been at the very heart of China's economic and health recovery from the pandemic. This approach has shaped a new domestic economy and altered the future path of foreign relations.<sup>96</sup> Chinese digital developments began to attract global attention around 2015, following the launch of the Made in China 2025 plan. This outlined China's

93 *Ibidem*.

94 China 2017 WTO Report.pdf (ustr.gov). For an assessment of China's participation in the WTO, see: Paolo D. Farah, 'Five Years of China's WTO Membership' (2006) 33 *Legal Issues of Econ. Integration* 263.

95 S.1260 – United States Innovation and Competition Act of 2021, [www.congress.gov/bill/117th-congress/senate-bill/1260](http://www.congress.gov/bill/117th-congress/senate-bill/1260).

96 Alessia Amighini and Paolo Magri (eds), 'China After COVID-19 Economic Revival and Challenges to the World', ISPI, 2021; 'XI's Agenda', *Foreign Affairs*, 25 June 2021, [news@foreignaffairs.com](mailto:news@foreignaffairs.com).

ten-year industrial policy aimed at transforming ten core Chinese industries into world leaders in their respective sectors.<sup>97</sup> This plan also included a specific focus on domestic autonomy in key emerging technologies by expanding R&D and production capabilities in sectors critical to national security.<sup>98</sup> Since economic power can easily translate into military power, and “economic security is national security”, US–China trade relations are “strategic” on the technological frontier.<sup>99</sup> This conclusion bears significant consequences at the level of national security issues’ debate.

In addition to trade issues, the new US Democratic Administration has already clearly shown its willingness to openly criticize and sanction China’s increasingly autocratic domestic stance and assertive foreign policy.<sup>100</sup> In particular, China has asserted its influence in its relationship to expansionism in the Indo-Pacific region, its land reclamation in the South China Sea, its increasing authoritarian crackdown in Hong Kong and Taiwan, and the widespread human rights abuses of the Chinese government’s forced labor program that targets several ethnic and religious minorities in the country. In sum, the Biden Administration has imposed broader sanctions against Chinese officials and companies than the Trump administration. By picking up where Trump left off, Biden has shown only one notable difference with the previous administration’s trade war against China, its ability to get more US allies to go along with his policy. Since March 2021, the EU, the UK, and Canada coordinated sanctions with the US against China.<sup>101</sup>

### ***1.3.5 Partnering with Friends and Allies to Repair Partnerships and Alliances: But ... Mainly for Holding China Accountable***

In full discontinuity with the previous administration, the new US president has declared that he will enhance cooperation with US partners, allies, and other like-minded countries. The question is: To do what? The answer is: Not so much in order to craft an ambitious joint trade agenda or make substantial progress on WTO reform, but rather, to strengthen the US position and gather US partners to shape the international system to compete with authoritarian powers. This is to be accomplished by addressing systemic trade challenges from China in a coordinated or complementary way to better compete in the international arena. In Biden’s 2021 Trade Agenda, it is stated that it

97 Farah and Zoppolato (n 15) 35.

98 *Infra* Chapter 2, para 2.

99 Gregory Shaffer, ‘Governing the Interface of US-China Trade Relations’, Legal Studies Research Paper Series No.2021-19, University of California, Irvin School of Law, freely download from SSRN, 40 ff.

100 ‘Farewell to “America First”? Trade Policy under Joe Biden’, 16 June 2021, <https://english.bdi.eu/article/news/farewell-to-america-first-trade-policy-under-joe-biden/>.

101 More information on China - EU Sanctions ([europeansanctions.com](http://europeansanctions.com)) (last visited on 04 February 2023).

will coordinate with friends and allies to pressure the Chinese Government to end its unfair trade practices and to hold China accountable, including for the extensive human rights abuses perpetrated by its state-sanctioned forced labor program. In addition, the trade agenda will seek to collaborate with friends and allies to address global market distortions created by industrial overcapacity in sectors ranging from steel and aluminum to fiber optics, solar, and other sectors to which the Chinese Government has been a key contributor.<sup>102</sup>

The US goal to realign with traditional EU partners in strategic competition against China is not an easy task. First, trade has been one of the transatlantic areas most affected in the four years of the Trump Administration. This includes, but is not limited to, the imposition of Section 232 tariffs on European steel and aluminum, the threat to impose unilateral tariffs on auto industries, and the use of extraterritorial sanctions against European entities. In order to align domestic economic interests with foreign economic goals, to the benefit of both, thus moving from rhetoric to real progress, the Biden Administration must first assure Europeans that his domestic policies will not be detrimental to European companies operating in the US. Particularly, his domestic “Buy American” plan, along with the other, heavily US worker-centered, plans for economic recovery like “Make All in America” to maximize “the use of goods, products, materials produced in, and services offered in, the United States”, as well as the “Invest in All of America” plan. Generally speaking, all of Biden’s prospective actions are able to give rise to other trade frictions. An emphasis on purchases of US-origin goods could run afoul of US WTO non-discrimination obligations. What the US views as “investments” in its manufacturing facilities could be viewed by trading partners as subsidies,<sup>103</sup> and so on.

Second, the new administration must seek to resolve the so called “key bilateral trade irritants” with the EU.<sup>104</sup> An example of that approach is the conclusion of a 17-year-long disagreement in the Boeing-Airbus dispute. Regarding this, a resolution was reached on 15 June 2021.<sup>105</sup> Another underlying trade friction between the US and the EU regards digital taxes. Following a 2019 investigation on the French Digital Services Tax (DST),<sup>106</sup> the United States Trade Representative (USTR) threatened significant tariffs in retaliation against France. USTR ultimately announced Section 301 Investigations

102 *Supra* n 87.

103 Eric Emerson, Jeffrey Weiss, Amy Lentz, Claire Schachter, Zachary Simmons, and Luke Tillman, ‘The US Trade Agenda in the Biden Administration’ 10 November 2020, [steptoe.globaltradeblog.com](https://steptoe.globaltradeblog.com).

104 ‘Transatlantic Relation after Biden’s 100 Days’, 6 May 2021, <https://carnegieendowment.org/2021/05/06/transatlantic-relations-after-biden-s-first-100-days-pub-84472>.

105 See: [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_21\\_3001](https://ec.europa.eu/commission/presscorner/detail/en/ip_21_3001).

106 This tax is deemed to apply to business groups operating within the digital economy, and to tax revenues, rather than profits, where, under normal protocols, corporate taxes apply to profits.



into policies in nine countries and the European Union.<sup>107</sup> USTR found that the DSTs adopted by Austria, India, Italy, Spain, Turkey, and the United Kingdom were subject to action under Section 301 because they discriminated against US digital companies, were inconsistent with principles of international taxation, and burdened US companies. These new investigations could lead to another round of unilateral US tariffs.<sup>108</sup>

The European Union has not yet adopted, nor implemented, the DSTs that were under consideration when US Section 301 investigations were initiated. Accordingly, USTR has terminated investigations against the EU without further proceedings. The European Digital Tax, which was among the financing sources of the European Next Generation program, has been perceived as an *interim tax* to discourage the proliferation of ineffective national measures.<sup>109</sup> It has also been viewed as an instrument of pressure on the US. For his part, less than three months after taking office, President Joe Biden raised hopes of a major breakthrough in the global tax system. He promised to reverse US tax policies that encourage outsourcing and also promised “to end incentives in the Trump tax giveaway that allow multinationals to dramatically lower taxes on income earned overseas and to allow the largest, most profitable companies to pay no tax at all.”<sup>110</sup> Biden committed himself and his administration to confront global tax secrecy and evasion by, “taking on individuals and businesses that stash their profits in tax havens to avoid paying their fair share”. He has also tightened anti-inversion rules that the Obama Administration enacted. Trump has sought to weaken these proposals.<sup>111</sup> Turning away from decades’ worth of economic orthodoxy that prioritized a neoliberal world vision, the new administration submitted a proposal at the OECD to force big companies to pay taxes where they make profits, rather than in low-tax jurisdictions chosen to minimize tax payments. This also established a global minimum tax rate that works with the world’s biggest economies. Compared to legislative actions in recent years, this a notable step in the return of the state’s role in the economy. This is the case even if it maybe too early to declare that the set of free market economic policy reforms, widely known as the Washington Consensus, has come to an end.<sup>112</sup> Biden’s proposal to the OECD has led to a multilateral agreement that the judging of historical importance is not excessive.

107 <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/march/ustr-announces-next-steps-section-301-digital-services-taxes-investigations>.

108 ‘USTR Announces Next Steps of Section 301 Digital Services Taxes Investigations’, 26 March 2021, <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/>.

109 The Italian digital tax was expected to raise 700 million Euros in revenue in 2020, but it stopped at only 233.

110 *Supra* n 87.

111 *Ibidem*.

112 ‘If the Washington Consensus was Really Over, What Would that Look Like for Development Strategy?’, *Developing Economics*, 24 June 2021.