EU Trade Policy between Constitutional Openness and Strategic Autonomy

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From 'strategic autonomy' to 'open strategic autonomy' in the 2021 EU Trade Policy Review – questioning the added value of the qualifier 'open' – legal exploration of 'openness' in EU external trade – identification of constitutional norms of 'openness' in the Treaties – strong constitutional preference for openness – discretion for trade liberalisation and multilateralism and international cooperation but strict obligation for compliance with international law – reviewing recent EU trade instruments in light of these norms – rise in unilateral trade policy instruments adopted since 2021 in pursuit of open strategic autonomy – instruments seeking to restore reciprocity in international trade relations – instruments using access to the internal market as a lever for achieving global sustainability goals – instruments preserving EU security through trade – problematic tensions with international law – very limited 'openness' in 'open strategic autonomy'.

INTRODUCTION

The EU's 2021 Trade Policy Review transposed the concept of 'strategic autonomy' from the security into the trade domain, turning it into the new 'policy choice' and 'mind-set for decision-makers'.[1] For the purpose of trade policy, the notion of 'open' was added to 'strategic autonomy' with a view to avoiding the

[1]Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Trade Policy Review – An Open, Sustainable and Assertive Trade Policy*, COM(2021) 66 final, p. 4.

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unwanted label of protectionism from the outset.[2] For the conception of 'strategic autonomy', however, the add-on of 'openness' seems to have changed very little. In the realm of both security and trade policy, (open) strategic autonomy is essentially defined as the EU's endeavour to cooperate multilaterally and internationally whenever it can and its ability to act unilaterally whenever it must.[3] In recent practice, the 'must' apparently outweighs the 'can'. The turn towards strategic autonomy has led to the adoption of a panoply of unilateral instruments, including in the fields of trade and investment.[4] In the face of growing EU unilateralism, what is the impact of adding 'open' to 'strategic autonomy'? Is it purely rhetoric or does it have broader legal and policy implications?

This article examines open strategic autonomy from a legal perspective by studying the constitutional underpinnings of openness. It aims to make a twofold contribution to the existing literature in EU external trade law and policy. By being the first study to examine 'openness' in EU external trade from a constitutional perspective, it aims to add an original facet to the existing literature on the EU's foreign relations objectives. The article further provides a first classification and 'big picture' legal analysis of the EU's new unilateral trade instruments. By way of example, it offers a more in-depth study of a couple of these instruments with a view to highlighting potential conflicts with the EU's constitutional objective to strictly observe international law.

The article argues that openness emerges as an underlying theme from the Treaty norms on multilateralism and international cooperation, trade liberalisation, and international law compliance, and that a policy designed in pursuit of 'open' strategic autonomy ought to be informed by these constitutional norms of openness. Yet, the instruments adopted under the banner of open strategic autonomy do not reflect the constitutional preference for openness, thus rendering the policy formulation of 'open strategic autonomy' largely misleading and rhetorical. This could cause conflict in the international arena, as some of the

[2]In the words of the High Representative: 'We don't want to be protectionists, but we have to protect ourselves'. *See* European Council on Foreign Relation, 'Sovereign Europe, Hostile World: in Conversation with HRVP Josep Borrell', 21 December 2020, https://ecfr.eu/event/sovereign-europe-hostile-world-in-conversation-with-josep-borrell-hrvp/, visited 10 November 2023. *See also* T. Gehrke, 'EU Open Strategic Autonomy and the Trappings of Geoeconomics', 27 *EFAR Special Issue* (2022) p. 61 at p. 62.

[3]*See* e.g. European Commission, *An Open, Sustainable and Assertive Trade Policy: Open Strategic Autonomy,* https://ecfr.eu/event/sovereign-europe-hostile-world-in-conversation-with-josep-borrell-hrvp/, visited 11 December 2022.

[4]Editorial Comments, 'Keeping Europeanism at Bay? Strategic Autonomy as a Constitutional Problem', 59 *CMLR* (2022) p. 313 at p. 314. For EU unilateral instruments in the field of trade *see below.*

EU's new unilateral instruments appear to be in conflict with international and/or WTO law.

The article is structured as follows. It starts with a brief explanation of the policy notion of (open) strategic autonomy. It then explores the notion and legal role of openness in EU external relations by mapping out elements of openness deriving from the Treaties. In light of these constitutional norms of openness, the article reviews the EU's trade policy instruments since the adoption of open strategic autonomy. Against that background, it evaluates the extent to which certain new unilateral trade instruments are problematic, especially in view of the EU's constitutional commitment to uphold international law.

Policy concept of (open) strategic autonomy

The concept of 'strategic autonomy' is not new in EU jargon. However, the new attributes it has recently acquired and the way it has been operationalised have made it the target of much criticism.[5] Strategic autonomy originally developed in the realm of the EU's Common Security and Defence Policy, in the context of a debate on the desirability of autonomous military actions.[6] The term then was employed in the broader EU Common Foreign Security Policy to refer to the EU's ambition to promote peace and security within and beyond its borders, through close collaboration with partners and neighbours.[7] Not long after that, the power rivalries between the US and China triggered yet another understanding of 'strategic autonomy', concerned with the EU's vulnerability and the safeguarding of its economic interests and values.[8] As trade policy developed into an essential geopolitical tool amid trade wars and declining multilateralism, 'strategic autonomy' came to gain centre stage in the EU's renewed trade strategy.[9] Unlike for other policies, however, 'strategic autonomy' mutated into a new notion, where it is preceded by the qualifier 'open'. At first sight, the juxtaposition of 'openness' and 'strategic autonomy' appears to create an oxymoron. The leading narrative in EU policy circles, however, is that the

[5]Editorial Comments, *supra* n. 4.

[6]D. Fiott, 'Strategic Autonomy: Towards "European Sovereignty" in Defence?', 12 *European Union Institute for Security Studies Brief* (2018); *see also* J. Borrell, 'Why European Strategic Autonomy Matters', 3 December 2020, https://www.eeas.europa.eu/eeas/why-european-strategic-autonomy-matters_en, visited 10 November 2023.

[7]N. Helwig and V. Sinkkonen, 'Strategic Autonomy and the EU as a Global Actor: The Evolution, Debate and Theory of a Contested Term', 27 *EFAR* (2022) p. 3.

[8]Borrell, *supra* n. 6; Helwig and Sinkkonen, *supra* n. 7.

[9]S. Meunier and K. Nicolaidis, 'The Geopoliticization of European Trade and Investment Policy', 57 *Journal of Common Market Studies* (2019) p. 103; L. Schmidtz and T. Seidl, 'As Open as Possible, as Autonomous as Necessary: Understanding the Rise of Open Strategic Autonomy in EU Trade Policy', 61(3) *Journal of Common Market Studies* (2023) p. 834.

two are mutually supportive.[10] Openness is necessary for autonomy and autonomy is necessary to safeguard openness.

EU policy papers, however, do not reveal *how* 'openness' safeguards 'autonomy' and vice versa. In fact, it is hard to discern the added value of the qualifier 'open' for 'strategic autonomy' because EU policy papers draw no distinction between the conceptions of (open) strategic autonomy in the fields of trade and security. The 2021 EU Trade Policy Review presents 'open strategic autonomy' as a response to the need for the EU to 'manage interdependence' while 'assertively defending its interests'.[11] Open strategic autonomy entails 'cooperating multilaterally wherever we can, acting autonomously wherever we must'.[12] Put this way, 'open strategic autonomy' is not too different from the definition of 'strategic autonomy' provided by the Council of the European Union in its Plan on Security and Defence, according to which 'strategic autonomy' is 'the ability to act and cooperate with international and regional partners wherever possible, while being able to operate autonomously when and where necessary'.[13]

As stated above, this article questions the added value of the qualifier 'open', and argues that the trade instruments adopted by the EU in the context of this new 'open strategic autonomy' are far from reflecting the aim of openness. In order to make such an argument, we develop a concept of openness by first asking how the law understands openness in EU external trade policy, before contrasting it with this new policy context.

Constitutional norms of openness

Taking as a starting point the addition of 'open' to strategic autonomy, this section seeks to unpack openness and asks: what is 'openness' in EU external trade policy

[10]Schmidtz and Seidl, *supra* n. 9.

[11]C. Cagnin et al., *Shaping and Securing the EU's Open Strategic Autonomy by 2040 and Beyond* (Publications Office of the European Union 2021).

[12]European Commission, *supra* n. 3; *see also* 'cooperating multilaterally wherever we can, acting autonomously wherever we must' in 'Remarks by Executive Vice-President Dombrovskis at the press conference on the fostering the openness, strength and resilience of Europe's economic and financial system', 19 January 2021, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_21_161, visited 10 November 2023; and 'Open strategic autonomy is a mindset which means we act together with others, multilaterally, or bilaterally, wherever we can. And we act autonomously wherever we must', S. Weyand, Comments on Trade Talks Podcast, 17 January 2021, https://tradetalkspodcast.com/podcast/148-the-eus-new-trade-policy-with-sabine-weyand-of-dg-trade/, visited 10 November 2023.

[13]Council of the European Union, 'Implementation Plan on Security and Defence (14392/16)', 14 November 2016, https://www.consilium.europa.eu/media/22460/eugs-implementation-plan-st14392en16.pdf, visited 10 November 2023.

from a legal perspective? From a methodological perspective, the legal exploration of openness in EU external trade policy is unprecedented and therefore not without challenges. Legal literature on EU external relations has studied openness by focusing on, *inter alia*, questions of transparency, access to documents or involvement of the public, but not in relation to EU external trade policy.[14] This gap in the literature may be explained by the fact that 'openness' is not expressly mentioned in EU primary law. Despite the ostensible silence, 'openness' in fact emerges as an underlying theme from Treaty norms enshrined above all in Articles 3(5) and 21 TEU, which contain the EU's external relations objectives. As will be further argued below, these provisions display a constitutional preference for multilateral and international cooperation over unilateralism, trade liberalisation over protectionism, and a mandate to comply with international law. Although openness cannot be considered a constitutional norm in its own right, it acquires heightened significance because it emerges from a joint reading of EU foreign policy objectives. As Larik has extensively argued, EU foreign policy objectives are legally binding norms of constitutional rank, belonging to 'the norm category of constitutional objectives as well as of the foreign affairs constitution of the Union'.[15] In addition to being comparable to national constitutional objectives, they have always featured prominently in the founding Treaties, including in the (failed) Constitutional Treaty.[16] In various cases, the European Court of Justice has referred to the binding force of external relations objectives and confirmed that the EU institutions are bound to actively pursue them.[17] The Court, however, limited this binding nature in a number of ways, recognising the

[14]*See*, *inter alia*, J. Organ, 'EU Citizen Participation, Openness and the European Citizens Initiative: the TTIP Legacy', 54 *CMLR* (2017) p. 1727; P. Delimatsis, 'TTIP, CETA, and TiSA Behind Closed Doors: Transparency in the EU Trade Policy', in S. Griller et al. (eds.), *Mega-Regional Trade Agreements: CETA, TTIP, and TiSA: New Orientations for EU External Economic Relations* (Oxford University Press 2017); A. Alemanno and O. Stefan, 'Openness at the Court of Justice of the European Union: Toppling a Taboo', 51(1) *CMLR* (2014) p. 97; D. Curtin and P. Leino-Sandberg, 'Openness, Transparency and the Right of Access to Documents in the EU', in-depth analysis for the PETI Committee (European Union 2016).

[15]J. Larik, *Foreign Policy Objectives in European Constitutional Law* (Oxford University Press 2016) p. 126, 169.

[16]Ibid.

[17]ECJ 21 February 1973, Case 6/72, *Continental Can*, ECLI:EU:C:1973:22, para. 25; ECJ 3 December 1996, Case C-268/94, *Portugal* v *Council*, ELCI:EU:C:1996:461, para. 23; ECJ 3 September 2009, Case C-166/07, *Council* v *Parliament (International Fund for Ireland)*, ECLI:EU:C:2009:499, para. 45.

impossibility of attaining them fully.[18] The EU institutions are thus given wide discretion but are nonetheless expected to actively pursue these objectives.[19]

Against this background, the following text examines the constitutional norms underpinning the quest for 'openness' in EU trade policy, namely multilateralism and international cooperation, trade liberalisation, and compliance with international law. We ask to what extent the trade instruments that the EU adopted as part of its new 'open' strategic autonomy integrate these norms. Their joint reading helps us understand and portray the legal underpinnings of 'openness' in the realm of trade, which should arguably be reflected in the practical implementation of a policy that expressly qualifies itself as (also) being 'open'. In this way, we will set the ground for an assessment of the impact of the addition of 'open' on EU trade policy (*see further* next section).

Openness to multilateralism and international cooperation

The constitutional commitment to multilateralism and international cooperation is the first element that we identify as feeding into the concept of openness in EU external relations. Article 21 TEU expects the EU to promote international cooperation by: (1) developing relations and building partnerships with third countries;[20] and by (2) seeking 'multilateral solutions to common problems', through the development of relations and partnerships with international, regional or global organisations.[21] The objective is to create 'an international system based on stronger multilateral cooperation', including within the framework of international organisations, such as the United Nations.[22] In addition, the catalogue of objectives of the EU's external action are to be pursued and achieved through 'a high degree of cooperation'.[23] Taken together, these articles reveal a constitutional preference for a multilateral approach.[24] The EU being a creature of multilateralism, openness to multilateralism and international cooperation may be viewed as existential to the EU. Indeed, Article 21(1) TEU provides that the EU's action on the international scene 'shall be guided by the

[18]ECJ 21 June 1958, Case 8/57, *Groupement des hauts fourneaux et aciéries belges* v *High Authority*, ECLI:EU:C:1958:9, p. 253.

[19]Insofar as this is within the limits of their competencies, consistent with the structural principles of the EU legal order, and within the bounds of what is internationally feasible. *See* Larik, *supra* n. 15, p. 168-173.

[20]Art. 21(1) TEU (second sentence).

[21]Art. 21(2)(h) TEU.

[22]Art. 21(1) TEU (second sentence).

[23]Art. 21(2) TEU.

[24]T. Ramopoulos, 'Article 21 TEU', in M. Kellerbauer et al. (eds.), *The EU Treaties and the Charter of Fundamental Rights* (Oxford University Press 2019).

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principles which have inspired its own creation'.[25] Historically, multilateral action has been the preferred mode of governance for the EU's foreign policy and 'a common thread' of the EU's external action.[26] Van Vooren and Wessel even speak of a 'methodological imperative' incumbent upon the EU to pursue its external action through a multilateral approach based on the rule of law.[27] To the extent that pursuing multilateralism is not internationally feasible,[28] pursuing bilateralism may be seen as a second best option and as a form of cooperation falling in the understanding of openness, albeit not a norm explicitly mentioned in the Treaties.

The constitutional commitment to multilateralism and international cooperation is, however, not absolute. It is possible to identify some implicit restrictions to this mandate which fall outside our understanding of openness. First, the Treaties do not expressly ban unilateralism, which therefore escapes any positive or negative connotation.[29] The scope of the EU's Common Commercial Policy in fact includes measures to protect trade, such as anti-dumping and countervailing measures, which are unilateral in nature.[30] Second, there is no hierarchy amongst different EU foreign policy objectives. The EU is expected to pursue coherence in its external action, which requires a careful balancing act when objectives are in conflict.[31] In some instances, such a balancing act may reveal that limitations to the objectives of multilateral and international cooperation are justified in light of the benefits gained from the unilateral pursuit of a different objective (e.g., security or environmental protection). Third, Article 21(1) TEU provides that relations and partnerships should be built with countries and organisations that 'share the principles' laid down in the first sentence of the article, *inter alia*, human rights, democracy, and the rule of law. In doing so, the Treaties themselves qualify the objective to cooperate multilaterally and internationally.

On balance, Article 21 TEU underpins the EU's commitment to international cooperation and multilateralism, which is considered here as a constitutional norm feeding into the concept of openness in EU foreign policy. Importantly,

[25]Art. 21(1) TEU (first sentence).

[26]G. de Búrca, 'The EU as a Legal Power in Global Governance?', in B. Van Vooren et al. (eds.), *The EU's Role in Global Governance: The Legal Dimension* (Oxford University Press 2013); Ramopoulos, *supra* n. 24.

[27]B. Van Vooren and R.A. Wessel, *EU External Relations Law: Text, Cases and Materials* (Cambridge University Press 2014) p. 12.

[28]*See supra* n. 19.

[29]J. Odermatt, 'Convergence through EU Unilateralism', in E. Fahey (ed.), *Framing Convergence with the Global Legal Order: The EU and the World* (Hart Publishing 2020).

[30]Art. 207(1) TFEU.

[31]M.E. Cañamares, '"Building Coherent EU Responses": Coherence as a Structural Principle in EU External Relations', in M. Cremona (ed.), *Structural Principles in EU External Relations Law* (Hart Publishing 2018).

despite a clear constitutional preference for multilateralism and international cooperation over unilateralism, the Treaties do not ban unilateralism. The Treaties leave broad discretion to the EU policy-makers to defect from the constitutional commitment to international cooperation and multilateralism.

Openness to trade liberalisation

The commitment to trade liberalisation is another constitutional feature that feeds into the concept of 'openness'. [32] Trade openness, or *openness to trade*, now finds its constitutional foundations in EU primary law. Article 21(2)(e) TEU prescribes that the EU should 'encourage the integration of all countries into the world economy, including through the progressive abolition of restrictions on international trade'. This is echoed in Article 206 TFEU, which includes a commitment to contribute to the development of world trade, the (progressive) removal of restrictions on international trade and the lowering of customs and other barriers.[33] While previous Treaties formulated this objective in aspirational language, some scholars have gone as far as arguing that the Treaty of Lisbon effectively elevates the pursuance of trade liberalisation to an obligation.[34] Moreover, 'free and fair trade' features among the values and interests listed in Article 3(5) TEU, which the EU is expected to uphold and promote in its relations with the wider world. Finally, as per Article 21(1) TEU, the EU should develop relations and build partnerships with third countries – something which the EU has done over time chiefly (albeit not only) through trade and association agreements and trade preferences schemes. As Larik observes, international trade liberalisation is not usually found in national constitutions and is unique to the EU: trade liberalisation is one of the first objectives to be codified in founding Treaties, reflecting the historical origins of the EU as an economic project.[35] The Treaty of Lisbon reaffirms and elevates trade openness as a general objective for the EU's external action.

Yet, the Treaty of Lisbon presents trade liberalisation not only as an end in itself but also as a means of achieving other non-economic goals, through measures promoting free trade as well as measures limiting trade.[36] Indeed,

[32]Art. 207(1) TFEU.

[33]Art. 205 TFEU.

[34]Compare Art. 131(1) TEC 'aim to contribute to' with Art. 206 TFEU 'shall'. *See* M. Cremona, 'A Constitutional Basis for Effective External Action? An Assessment of the Provisions on EU External Action in the Constitutional Treaty' (EUI Working Papers LAW No. 2006/30) p. 29.

[35]J. Larik, 'Good Global Governance through Trade: Constitutional Moorings', in J. Wouters et al. (eds.), *Global Governance through Trade: EU Policies and Approaches* (Edward Elgar 2015) p. 54-56.

[36]M. Cremona, 'The Union's External Action: Constitutional Perspectives', in G. Amato et al. (eds.), *Genesis and Destiny of the European Constitution* (Bruylant 2007) p. 1213.

openness to trade liberalisation is once again not an absolute objective. As put by Cremona, the objective of trade liberalisation is subject to institutional policy choices.[37] Unlike multilateralism and international cooperation (where limitations were rather implicit), the Treaties expressly restrict the objective of trade liberalisation. First, Article 206 TFEU does not call for a swift and full but a 'progressive' removal of barriers to trade.[38] The extent to which the 'progressive' liberalisation of trade barriers requires the reduction of tariff and trade barriers – and in turn prohibits the adoption of instruments that establish such barriers – may thus be debated.[39] Second, and most importantly, the degree of trade liberalisation ought to be balanced against other values.[40] Article 205 TFEU sets the legal framework for this balancing act. It provides that, on the international scene, the Union shall pursue the objectives of the Union's external action laid down in the TEU and be guided by its principles. Article 207(1) TFEU reiterates that external trade policy should be conducted 'in the context of the principles and objectives of the Union's external action'.[41] According to settled case law, Article 207(1) TFEU cannot be interpreted as prohibiting the EU from enacting any measure liable to affect trade with non-member countries.[42] The objective of contributing to the progressive abolition of restrictions on international trade can thus not compel the institutions to liberalise imports from non-member countries where to do so would be contrary to the interests of the Union.[43] Opinion 2/15 recently confirmed the constitutional mandate of EU policy-makers to integrate sustainability into external trade policy.[44] This reasoning arguably applies to other values stipulated in Articles 3(5) and 21 TEU, including security.[45] Third, the

[37]M. Cremona, 'Structural Principles and their Role in EU External Relations Law', in Cremona (ed.), *supra* n. 31, p. 9.

[38]A. Dimopoulos, *EU Foreign Investment Law* (Oxford University Press 2011) p. 160-161.

[39]For two contrasting viewpoints *see* e.g. Dimopoulos, *supra* n. 38, p. 160-161; and M. Krajewski, 'The Reform of the Common Commercial Policy', in A. Biondi et al. (eds.), *EU Law after Lisbon* (Oxford University Press 2012) p. 295.

[40]*See* e.g. free and fair trade (Art. 3(5) TEU); social market economy (Art. 3(3) TEU); harmonious development of trade (Art. 205 TFEU) etc. *See* Krajewski, *supra* n. 39, p. 295.

[41]Art. 207(1) TFEU provides that EU trade policy 'shall be conducted in the context of the principles and objectives of the Union's external action'.

[42]*See*, *inter alia*, ECJ 19 November 1998, Case C-150/94, *United Kingdom* v *Council of the European Union*, ECLI:EU:C:1998:547; ECJ 5 May 1981, Case 112/80, *Firma Anton Dürbeck* v *Hauptzollamt Frankfurt am Main-Flughafen*, ECLI:EU:C:1981:94.

[43]*UK* v *Council*, *supra* n. 42, para. 67.

[44]ECJ 16 May 2017, Opinion 2/15, *FTA with Singapore*, ECLI:EU:C:2017:376.

[45]Art. 3(5) TEU.

Treaties do not ban protectionism, at least when understood as the (re-) establishment of barriers to trade.[46] As a result, the integration of constitutional non-trade objectives (e.g. sustainability, security) into the EU's trade policy may justify a restriction of the objective to (progressively) liberalise trade set out in Article 206 TFEU.

Overall, while it is possible to identify a clear constitutional preference of balanced trade liberalisation over protectionism, the Treaties provide for wide discretion to restrict the objective of trade liberalisation in order to pursue non-trade values.

Openness to international law

Finally, we find openness in EU external relations to also be connected with the duty to respect international law. While this is a separate principle on its own, we consider it as qualifying and giving further meaning to the concept of openness emerging from the treaty provisions on EU external action. According to Article 21 TEU, the Union's external action shall be guided by '*respect* for the principles of the United Nations Charter and international law' (emphasis added) (Article 21(1) TEU) and aim at the consolidation and support of 'the principles of international law' (Article 21(2)(b) TEU). This is in addition to Article 3(5) TEU, whereby the EU shall 'contribute' to 'the strict observance and the development of international law, including respect for the principles of the United Nations Charter'.[47] We argue that Articles 21 and 3(5) TEU reflect a constitutional mandate for the EU to be 'open' to international law.

We understand 'openness to international law' as 'compliance' of EU foreign policy instruments with international law. In this sense, we depart from the legal literature on the relationship between EU law and international law that has studied 'openness to international law' by discussing the extent to which the European Court of Justice is receptive to it, ready to apply it to resolve disputes, incorporate it into the EU legal order, or give direct effect to it *within* the EU legal order.[48]

[46]As mentioned above, the scope of the Common Commercial Policy as defined in Art. 207(1) TFEU includes the adoption of unilateral trade defence instruments, such as anti-dumping and anti-subsidy measures, which are trade restrictive in nature.

[47]*See further* also E. Kassoti and R.A. Wessel, 'The Normative Effect of Article 3(5) TEU: Observance and Development of International Law by the European Union', in P. García Andrade (ed.), *Interacciones entre el Derecho de la Unión Europea y el Derecho Internacional Público* (Tirant lo Blanch 2022).

[48]As discussed in J. Odermatt, 'The Court of Justice of the European Union: International or Domestic Court?', 3 *Cambridge Journal of International and Comparative Law* (2014) p. 696. Space precludes a detailed examination of the literature on the relationship between international law and EU law, but *see*, *inter alia*, J. Odermatt, *International Law and the European Union* (Cambridge University Press 2021); T. Molnár, *The Interplay between the EU's Return Acquis and International Law* (Edward Elgar 2021); P. Eeckhout, 'The Integration of Public International Law in EU Law:

In the context of the EU's external action, Article 3(5) TEU provides an obligation to 'comply' with international law. This understanding derives not only from Article 21 TEU, but also from Article 216(2) TFEU, according to which Treaties concluded by the EU are binding on the EU institutions and its Member States. As remarked by Chamon, Wessel and Kassoti, and Bosse-Platière, Article 3(5) TEU appears to introduce an internal constitutional justification for the EU's compliance with international law, as opposed to what might be perceived as an external obligation imposed by international law onto the EU, foreign to the EU's own constitutional charter.[49] And while pre-Lisbon case law already maintained that the EU should act in line with international law,[50] in *Air Transport Association of America*, the Court expressly relied on Articles 3(5) and 21(1) TEU to affirm that the EU, when adopting an act, 'is bound to observe international law in its entirety, including customary international law, which is binding upon the institutions of the European Union'.[51] Although the normative force of Article 3(5) TEU remains contested,[52] the provision stipulates as a minimum – and irrespective of its 'legal bite' – a mandate *not* to breach international law.

At the same time, Article 3(5) TEU does not appear to forbid the pursuance of other EU values that may come at the expense of 'strict' observance of international law. As the *Kadi* saga has famously shown, the EU's compliance with international law can be trumped by other constitutional principles and

Analytical and Normative Questions', in P. Eeckhout and M. López-Escudero (eds.), *The European Union's External Action in Times of Crisis* (Hart Publishing 2016); A. Rosas, 'The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue', 1 *European Journal of Legal Studies* (2007); J. Klabbers, 'Völkerrechtsfreundlichkeit? International Law and the EU Legal Order', in P. Koutrakos (ed.), *European Foreign Policy* (Edward Elgar 2011).

[49]Kassoti and Wessel, *supra* n. 47; M. Chamon, 'The Court's Opinion in Avis 1/19 regarding the Istanbul Convention' *EU Law Live* (2021) p. 7; I. Bosse-Platière, 'The Ambivalent Clarification of the Effects of International Conventional and Customary Law in the European Union: Air Transport Association of America', in G. Butler and R.A. Wessel, *EU External Relations Law: The Cases in Context* (Hart Publishing 2022). On the external imposition, *see* AG Hogan 11 March 2021, Opinion 1/19, *Opinion pursuant to Article 218(11) TFEU*, ECLI:EU:C:2021:198.

[50]*See*, *inter alia*, ECJ 24 November 1992, Case C-286/90, *Anklagemyndigheden* v *Peter Michael Poulsen and Diva Navigation Corp*, ECLI:EU:C:1992:453; ECJ 16 June 1998, Case C-162/96, *A. Racke GmbH & Co.* v *Hauptzollamt Mainz*, ECLI:EU:C:1998:293.

[51]Grand Chamber 21 December 2011, Case C-366/10, *Air Transport Association of America and others* v *Secretary of State for Energy and Climate Change*, ECLI:EU:C:2011:864, para. 101; *see also* Art. 216(2) TFEU. It must be noted, however, that this case came to be known as a prime example where international law instruments were not successful in challenging EU acts, here a directive concerned with environmental protection: Odermatt (2014), *supra* n. 48, p. 707-710.

[52]R. Dunbar, 'Article 3(5) TEU a Decade On: Revisiting "Strict Observance of International Law" in the Text and Context of Other EU Values', 28(4) *Maastricht Journal of European and Comparative Law* (2021) p. 479; Kassoti and Wessel, *supra* n. 47, p. 19; Editorial Comments, *supra* n. 4.

objectives.[53] Article 3(5) TEU contains a number of values of the EU's external action whose pursuance may be at odds with the strict observance of international law. This was also the case in the above-mentioned *Air Transport* case, which involved a trade-off between compliance with international law and pursuance of the objective of environmental protection.[54] This line of case law, however, is relatively limited, suggesting that non-compliance with international law will only be allowed when fundamental EU values are at stake, e.g. breaches of fundamental rights. Unlike in the cases of unilateralism and protectionism, there appears to be a lot less room for balancing. And while the Treaties set out (more or less explicit) restrictions on openness to trade liberalisation and multilateralism, the mandate to 'be open to international law' in EU external relations is backed by a clear obligation, in Article 216(2) TFEU, requiring the EU to comply with the agreements it enters into.

To conclude, EU foreign policy instruments that breach international law not only contravene international law but also breach an EU constitutional norm which we identified as contributing to the concept of openness in EU external relations, namely Article 3(5) TEU, read in conjunction with Article 216(2) TFEU. As a result, EU policy instruments that are likely in breach of international law are considered here as falling short of reflecting alleged policy aims of openness.

Openness to multilateralism and international cooperation in recent EU trade practice

The previous section underlined that the Treaties display a constitutional preference for multilateral and international cooperation over unilateralism, and trade liberalisation over protectionism. In addition, the Treaties stipulate a 'hard' obligation to strictly observe international law, which leaves very limited room to deviate from international agreements the EU agreed to adhere to. In view of the express intention to design an EU trade policy in pursuit of 'open' strategic

[53]J. Larik, 'The Kadi Saga as a Tale of "Strict Observance" of International Law: Obligations Under the UN Charter, Targeted Sanctions and Judicial Review in the European Union', 61(1) *Netherlands International Law Review* (2014) p. 23.

[54]Even though some were more sceptical as to the noble normative aim and saw it as 'flagrant unilateralism, plainly illegal under international law', *see* Dunbar, *supra* n. 52, p. 494, referring to B.F. Havel and J.Q. Mulligan, 'The Triumph of Politics: Reflections on the Judgment of the Court of Justice of the European Union Validating the Inclusion of Non-EU Airlines in the Emissions Trading Scheme', 37 *Air & Space Law* (2012) p. 3. A contemporary example, albeit not in the field of trade policy, is the Carbon Border Adjustment Mechanism. *See* E. Pander Maat, 'The Carbon Border Adjustment Mechanism and the Challenge of Being a "Good" Climate and Trade Actor', in E. Fahey and I. Mancini, *Understanding the EU as a Good Global Actor* (Edward Elgar 2022) p. 141.

autonomy, one would assume that recent trade practice reflects the constitutional preference for multilateralism and international cooperation and trade liberalisation. At the very least, one would expect the EU's latest trade policy instruments to be carefully designed to comply with international law.

With that in mind, the next part of this article reviews EU trade instruments that have been planned or adopted since 2021 – i.e., the year in which open strategic autonomy became the paradigm of EU trade policy – against the above-defined constitutional norms of openness. In doing so, it enquires whether the added value of the qualifier 'open' is reflected in trade practice, and whether there are any emerging conflicts between law and practice. This section examines the EU's recent trade practice in light of the EU's constitutional commitment to multilateral and international cooperation. The objectives of trade liberalisation and compliance with international law are further discussed in the next sections.

Decline of multilateralism and international rules-based cooperation

The previous section showed that the Treaties convey a strong methodological preference to tackle global problems multilaterally.[55] However, in the field of trade, the viability and efficacy of multilateralism has been dwindling for many years. There has not been a significant reform of the WTO since 1994. In addition, its 'crown jewel', the WTO Appellate Body, has been dysfunctional since 2016 with the USA blocking appointments of new Appellate Body members.[56] The EU has been an active promoter of the Multiparty Interim Appeal Arbitration Arrangement that may be used as an alternative means to resolve WTO disputes that are appealed by a member in the absence of a functioning Appellate Body.[57]

Despite its declared commitment towards multilateral trade, the EU has not relied on multilateralism as the main form of trade governance for over a decade. In response to the lack of reform progress in the WTO, the EU adopted a bilateral trade agenda in 2006. The agenda promoted a strategic use of bilateralism, especially with Asian trading partners.[58] Although the Treaties consider bilateralism as the

[55]A. Bradford, 'Foreword', in Fahey, *supra* n. 29.

[56]*See* e.g. P.J. Kuijper et al., 'From the Board: The US Attack on the WTO Appellate Body', 45(1) *Legal Issues of Economic Integration* (2018) p. 1.

[57]*See* e.g. E. Baroncini, 'The EU Approach to Overcome the WTO Dispute Settlement Vacuum: Article 25 DSU Interim Appeal Arbitration as a Bridge Between Renovation and Innovation', in M. Lewis et. al. (eds.), *A Post-WTO International Legal Order* (Springer 2020) p. 115.

[58]Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Global Europe: Competing in the World', COM(2006) 567 final, p. 8-9. *See further* M. Cremona, 'Guest Editorial: Negotiating the Transatlantic Trade and Investment Partnership (TTIP)', 52 *CMLR* (2015) p. 351.

'second best option' after multilateralism, the EU's focus on forming rules-based partnerships with third countries remains reflective of its objective to promote international cooperation. Since 2006, the EU has signed and/or concluded trade agreements with Korea, the Andean countries, Ukraine, Moldova, Georgia, Canada, Japan, Singapore, Vietnam, the UK, and New Zealand. Bilateral trade negotiations were recently concluded with Chile and are currently ongoing with Australia, Indonesia, and India.[59] But the increasing geopolitical tensions have had adverse effects on the EU's bilateral trade policy. The European Parliament voted to suspend the ratification of the Comprehensive Agreement on Investment with China,[60] Austria rejected the new EU-Mercosur trade agreement,[61] and EU-US trade relations have been soaring since the death of Transatlantic Trade and Investment Partnership. It is improbable that the new Trade and Technology Council will revive EU-US trade relations as it is widely viewed as a declaratory tool incapable of triggering substantive rules-based outcomes.[62]

Overall, and despite some cooperative efforts, the Commission's political efforts to enhance the EU's global trade agenda are thus slowing. At the same time, one can observe an unprecedented rise of unilateralism in EU trade policy. As a result, the depiction of the EU as the 'lone ranger of the global legal order'[63] is arguable no longer accurate, at least not in the field of trade.

Rise of unilateralism

The rise of geopolitical tensions has resulted in a move away from the rules-based trading system towards a power-based trade environment.[64] In its 2021 Trade Policy Review, the Commission noted that the increasing geopolitical tensions imply 'growing unilateralism, with the consequent disruption or bypassing of multilateral institutions'.[65] Considering the constitutional mandate to facilitate openness towards multilateralism and international cooperation, one may have

[59]For an overview of existing and planned EU FTAs *see* https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/negotiations-and-agreements_en, visited 10 November 2023.

[60]European Parliament, 'MEPs Refuse Any Agreement with China whilst Sanctions Are in Place', Press Release, 20 May 2021, https://www.europarl.europa.eu/news/en/press-room/20210517IPR04123/meps-refuse-any-agreement-with-china-whilst-sanctions-are-in-place, visited 10 November 2023.

[61]Regierungsprogramm, 'Aus Verantwortung zu Österreich', 2020-2024, p. 113, 125: https://www.bundeskanzleramt.gv.at/dam/jcr:7b9e6755-2115-440c-b2ec-cbf64a931aa8/RegProgramm-lang.pdf, visited 10 November 2023.

[62]*See* e.g. E. Fahey et al., 'Transatlantic Relations: What's Next for the Trade and Technology Council?', *The State of the Union Conference* (2022).

[63]E. Fahey, 'Introduction: On Framing Convergence of the EU with the Global Legal Order', in Fahey, *supra* n. 29, p. 1.

[64]Schmitz and Seidl, *supra* n. 9, p. 8.

[65]*Trade Policy Review*, *supra* n. 1, p. 1.

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expected the EU to counteract the trend towards unilateralism by placing a clear focus on reinvigorating multilateral and expanding bilateral trade relations. At the very least, the 'methodological imperative'[66] to pursue external action through a multilateral approach based on the rule of law would suggest an open and active opposition by the EU to any developments that 'disrupt' or 'bypass' rules-based international legal orders. Yet, the adoption of the EU's Trade Policy Review in 2021 had the opposite effect: the EU has seemingly accepted the global trend away from multilateralism and international cooperation and focused on setting-up a unilateral toolbox in various policy fields, including trade. Table 1 classifies unilateral EU trade policy instruments that have been announced and/or adopted since 2021 in pursuit of open strategic autonomy.

Table 1. Unilateral EU trade policy instruments designed in pursuit of open strategic autonomy

		Legal purpose		
		Reciprocity	Sustainability	Security
Legal basis	**External Trade (Art. 207 TFEU)**	• International Procurement Instrument		• FDI Screening Regulation • Revised Trade Enforcement Regulation • Export Control Regulation • Anti-Coercion Instrument • Revised Blocking Statute
	External and Internal Trade (Art. 114 and 207 TFEU)	• Foreign Subsidies Regulation		
	Internal Legal Bases (Art. 50 and 114 or 192 TFEU)		• Carbon Border Adjustment Mechanism • Corporate Sustainability Due Diligence Directive • Deforestation Regulation	

Table 1 shows that the EU's latest unilateral trade instruments fulfil three different goals. A first group of instruments seeks to restore reciprocity in international trade relations. A key instrument in this category is the recently adopted International Procurement Instrument, which aims to limit foreign companies' access to the EU procurement market if their respective governments do not offer reciprocal market access to EU tenders.[67] It empowers the Commission to

[66]Van Vooren and Wessel, *supra* n. 27.

[67]Art. 1(1) second and third sentence, Regulation (EU) 2022/1031 of the European Parliament and of the Council of 23 June 2022 establishing an International Procurement Instrument, OJ L 173, 30.6.2022, p. 1.

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investigate and confirm a market imbalance and to adopt price adjustment measures against tenders from the targeted country, or to exclude such tenders from the EU procurement market altogether.[68] One could argue that the International Procurement Instrument pursues openness by pressing third states to reduce market access barriers regarding government procurement. As the Instrument ultimately enables the Commission to reduce access to the EU procurement market for 'non-equivalent' third states, one may, however, also make the opposite claim. Indeed, the International Procurement Instrument was initially rejected by the Council because it was viewed as being overly protectionist.[69] A second unilateral EU instrument that seeks to restore international reciprocity is the Foreign Subsidies Regulation.[70] The Regulation empowers the Commission to, first, determine the existence of a foreign subsidy and its distortive effect on the internal market, and, second, to impose balancing and redressive measures.[71]

A second group of EU unilateral instruments aims to use access to the internal market as a lever for achieving global sustainability goals. Despite being based on 'internal' legal bases, such as Article 114 TFEU (internal market) or Article 192 TFEU (environment), these instruments have a direct effect on global supply chains and trading flows. The Carbon Border Adjustment Mechanism is perhaps the most well-known example in this second category of unilateral instruments.[72] This mechanism aims to combat carbon leakage in the EU's Emission Trading System by requiring EU importers to acquire allowances for their imported goods corresponding to the price they would have paid if the good had been produced in the EU.[73] The proposed Corporate Sustainability Due Diligence Directive similarly seeks to manage manufacturing conditions in third countries without regulating beyond EU borders.[74] It requires large EU companies to conduct human rights and environmental due diligence along their supply chains.[75] Due

[68]*See esp.* Arts. 5 and 6 of the International Procurement Instrument, *supra* n. 67.

[69]M. Szczepański, 'EU International Procurement Instrument' (2022) European Parliament Briefing, PE 649.403, p. 6.

[70]Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on foreign subsidies distorting the internal market, OJ L 330, 23.12.2022, p. 1.

[71]Arts. 3-4; 6-7 of the Foreign Subsidies Regulation, *supra* n. 70.

[72]Regulation 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism, OJ L 130, 16.5.2023, p. 52.

[73]*See* recitals 21-24 of the Regulation establishing a carbon border adjustment mechanism, *supra* n. 72.

[74]Proposal for a Directive of the European Parliament and the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, 23.2.2022, COM/2022/71 final.

[75]Arts. 4-8 of the proposed Corporate Due Diligence Directive, *supra* n. 74.

diligence is also at the heart of the Deforestation Regulation.[76] With a view to minimising the EU's contribution to global deforestation and, ultimately, greenhouse gas emissions, it lays down mandatory due diligence standards on all operators that place forest-risk commodities on the EU internal market (specifically cattle, cocoa, coffee, oil palm, rubber, soya, and wood).[77]

The last group of EU unilateral instruments aims at preserving EU security through trade. Since 2021, the EU has planned or adopted no less than five trade-security instruments on the basis of Article 207(2) TFEU. The first trade-security instrument is the Revised Trade Enforcement Regulation.[78] The Regulation is a direct response the US-driven paralysis of the WTO Appellate Body in 2019.[79] It empowers the EU to adopt countermeasures if a trading partner disables either WTO or FTA dispute settlement proceedings.[80] It is here labelled as a security instrument because it is essentially about defending the EU's interests vis-à-vis third states, most notably the United States, by means of stricter enforcement rules.[81] The second unilateral 'trade-security' instrument is the Foreign Direct Investment Screening Mechanism.[82] Although this mechanism became operational before the adoption of the 2021 Trade Policy Review, it has been expressly framed as an instrument in pursuit of open strategic autonomy.[83] It establishes a coordination mechanism between the EU and the Member States for screening foreign investments that are likely to affect public security and public order. [84] A third unilateral trade-security instrument is the recently revised Export

[76]Regulation 2023/1115 of the European Parliament and of the Council on the making available on the Union market as well as export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, OJ L 150, 9.6.2023, p. 206.

[77]*See further* G. Marín Durán, 'Editorial: Towards Reducing the EU's Global Deforestation Footprint?', 27 *European Foreign Affairs Review* (2022) p. 437.

[78]Regulation (EU) 2021/167 of the European Parliament and of the Council of 10 February 2021 amending Regulation (EU) No 654/2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules, OJ L 49, 12.2.2021, p. 1.

[79]Recital 3 of the Trade Enforcement Regulation, *supra* n. 78.

[80]Art. 1(3), (4) of the Trade Enforcement Regulation, *supra* n. 78.

[81]The 'security dimension' of the regulation can also be observed in the wording of Commissioner Valdis Dombrovskis: 'The European Union must be able to *defend* itself against unfair trading practices. These new rules will help *protect* us from those trying to take *advantage of our openness* . . .' (emphasis added). *See* https://ec.europa.eu/commission/presscorner/detail/en/IP_21_601, visited 10 November 2023.

[82]Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, OJ L 79I, 21.3.2019, p. 1. The instrument became fully operational in 2020.

[83]Commission, Press Release, 'EU Foreign Investment Screening Mechanism becomes Fully Operational', 9 October 2020.

[84]Art. 3 Foreign Direct Investment Screening Regulation, *supra* n. 82.

Control Regulation, which governs the export of dual-use goods, software, and technology.[85] A fourth trade-security instrument is the Anti-Coercion Instrument.[86] This instrument seeks to equip the EU with the capacity to react to economic coercion of the EU and/or its Member States, including through countermeasures.[87] A fifth – and so far final – trade-security instrument is the planned revision of the EU Blocking Statute.[88] The proposed Revised Blocking Statute may be viewed as the flipside of the Anti-Coercion Instrument as it aims to counter 'the effects of the unlawful extra-territorial application of third-country unilateral sanctions to EU individuals and entities'.[89]

Despite their different aims and functions, the EU's recent unilateral instruments approach multilateralism and international cooperation in a very similar fashion. Several instruments are a direct response to the failure of multilateralism, and especially the lack of institutional and substantive WTO reform. This is, *inter alia*, the case for the Revised Trade Enforcement Regulation, the Foreign Subsidies Regulation, and the Carbon Border Adjustment Mechanism. Despite addressing global problems unilaterally and not multilaterally,[90] most instruments recall the objective to promote international cooperation in their first recitals.[91] But that ambition is scarcely reflected in substance. Most instruments do not legally require the EU to cooperate internationally. Some contain best effort clauses, leaving the intention and degree of cooperation at the discretion of the EU institutions and/or the Member States. For example, the Anti-Coercion Instrument stipulates that the Commission 'shall provide adequate opportunity for consultations' with the concerned third state, 'shall engage in such consultations expeditiously' and 'explore

[85]Regulation (EU) 2021/821 of the European Parliament and of the Council of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items (recast), OJ L 206, 11.6.2021, p. 1.

[86]Regulation (EU) 2023/2675 of the European Parliament and of the Council of 22 November 2023 on the protection of the Union and its Member States from economic coercion by third countries, OJ L, 7.12.2023.

[87]Art. 8 in conjuncture with Annex I of the Anti-Coercion Instrument, *supra* n. 86.

[88]On the revision process *see* https://finance.ec.europa.eu/eu-and-world/open-strategic-autonomy/extraterritoriality-blocking-statute_en, visited 10 November 2023.

[89]Communication from the Commission to the European Parliament, the Council, the European Central Bank, European Economic and Social Committee and the Committee of the Regions, 'The European economic and financial system: fostering openness, strength and resilience', 19.1.2021, COM(2021) 32 final, p. 19.

[90]Against the express wording of Article 21(1),(2)(h) TEU. *See supra* n. 21 and the accompanying section in the main text.

[91]*See*, *inter alia*, recital 1 of the International Procurement Instrument, *supra* n. 67; recital 2-4 of the Carbon Border Adjustment Regulation, *supra* n. 72; recital 1 of the proposed Corporate Sustainability Directive, *supra* n. 74; recital 2 of the Foreign Direct Investment Screening Regulation, *supra* n. 82; recitals 1-4 of the Anti-Coercion Instrument, *supra* n. 86.

options' with the third state, provided that the latter 'enters into consultations with the Union in good faith'.[92] While the Commission shall raise the matter in relevant international fora, it is not obliged to exhaust available international remedies, including international dispute settlement, before imposing unilateral trade sanctions against the targeted country. Similarly, the Export Control Regulation stipulates that the Commission and the Member States shall 'where appropriate' maintain dialogue, that 'may' lead to the negotiation of agreements on the mutual recognition of export control standards for dual used goods.[93] The strongest commitments to cooperation are contained in the Deforestation Regulation and the International Procurement Instrument. The former requires the Commission and interested Member States to 'engage in a coordinated approach with producer countries ... concerned by this Regulation ... through existing and future partnerships, and other relevant cooperation mechanisms to jointly address deforestation and forest degradation' and to 'engage in international bilateral and multilateral discussion on policies and actions to halt deforestation'.[94] The Commission will 'take account' of such partnerships and their implementation by third countries as part of the benchmarking exercise under Article 29 of the Regulation.[95] In the benchmarking process, the Commission shall notify the concerned country and invite it to submit a response.[96] The benchmarking itself, however, remains a unilateral exercise. The latter requires the Commission to invite the targeted third country to submit observations and to enter into bilateral consultations.[97] Yet, it remains fully up to the Commission to suspend its investigation, even where the third country has taken satisfactorily corrective actions.[98]

The emergence of numerous unilateral trade instruments mainly equipped with best-effort clauses on international cooperation arguably mark a directional change in EU trade policy away from 'the common thread' of multilateralism[99] and towards autonomous external action. That autonomous action is also strategic. Few instruments were designed as a response to powerful geopolitical players, such as the US and China (e.g. the Revised Trade Enforcement Regulation, the International Procurement Instrument or the Anti-Coercion Instrument). Moreover, most instruments expressly stipulate that the EU institutions may only resort to unilateral countermeasures if it is 'in the interests of

[92]Art. 6(1), (2) of the Anti-Coercion Instrument, *supra* n. 86.
[93]Art. 29 of the Revised Export Control Regulation, *supra* n. 72.
[94]Art. 30(1),(4) of the Deforestation Regulation, *supra* n. 76.
[95]Art. 30(1) in conjunction with Art. 29(4)(b) of the Deforestation Regulation, *supra* n. 76.
[96]Art. 29(6), (7) of the Deforestation Regulation, *supra* n. 76.
[97]Art. 5(2) of the International Procurement Instrument, *supra* n. 67.
[98]Art. 5(6)(a) of the International Procurement Instrument, *supra* n. 67.
[99]de Búrca, *supra* n. 26.

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the European Union'.[100] The 'trade-sustainability' instruments (second category) may be viewed as exceptions. They were not, or at least not mainly, designed in response to a global player but in response to a global problem, most notably climate change. They do also not tie an EU response, e.g. financial penalties, to the 'interest' of the EU and/or its Member States. And the Deforestation Regulation shows that the field of trade-sustainability might open up more avenues for encouraging multilateral and international cooperation through unilateral action, albeit then, largely, on EU terms. In this regard, the 'trade-sustainability' instruments are 'strategic' in nature, as they essentially seek to 'shape international standards' in line with EU (constitutional) norms.[101]

Overall, the EU's new unilateral trade instruments thus pursue EU strategic interests autonomously, at the expense of openness towards multilateralism and international cooperation. The claim of EU policymakers that 'strategic autonomy' and 'openness' are mutually reinforcing paradigms can therefore not be observed here. In light of the constitutional preference for multilateralism and international cooperation over unilateralism, one could have – at the very least – expected equal emphasis on 'openness' and 'autonomy' in EU trade practice. By contrast, we observe a dwindling focus on (re-)building international trade agreements, on the one hand, and the emergence of a unilateral trade strategy that does not require the parallel pursuit (let alone exhaustion) of international remedies, on the other. As was argued in the previous section, the Treaties leave broad room to balance the objectives of multilateralism and international cooperation against other constitutional objectives, in particular sustainability.[102] Therefore, the directional change towards an autonomous and/or strategic trade policy as such does not breach primary law. The intensity with which the EU pursues its autonomous trade agenda is nevertheless striking, especially when considering the constitutional preference for multilateralism and international cooperation that seemingly informed the EU policy-makers' declared intention to design a trade strategy in pursuit of 'open' strategic autonomy in the first place.

Openness to trade liberalisation in recent EU trade practice

In international trade, unilateralism is commonly associated with protectionism, at least when the latter is understood as the (re-)establishment of trade barriers.[103]

[100] *See e.g.* Arts. 8(1)(b),(c) and (10), in conjunction with Art. 9 of the Anti-Coercion Instrument (*supra* n. 86); Arts. 1 b), 9 a) of the Revised Trade Enforcement Regulation (*supra* n. 78); Art. 8 of the Foreign Direct Investment Screening Regulation (*supra* n. 82); Art. 6(1) International Procurement Instrument (*supra* n. 67).

[101] *Trade Policy Review*, *supra* n. 1, p. 17.

[102] *See supra* n. 43 and n. 44 and the accompanying section in the main text.

[103] *See* e.g. P. J. Wells, 'Unilateralism and Protectionism in the World Trade Organization', 13 *Journal of International Trade Law and Policy* (2014) p. 222.

In congruence with its constitutional objective of gradual trade liberalisation, the EU was unequivocally opposed to protectionism for many years. The Commission's 2006 trade agenda almost bluntly stated that 'Europe must reject protectionism'.[104] The 'external priority' of the EU's trade agenda at the time was gradual trade liberalisation through a growing network of free trade agreements.[105] Unilateralism was viewed critically. As was mentioned above, the 2012 proposal for an International Procurement Instrument was even rejected by the Council because some Member States feared 'the risk of escalating trade protectionist measures'.[106] In the face of growing geopolitical pressures, the EU institutions have apparently changed their views about the relationship between unilateralism and protectionism. Although the EU's bilateral trade network continues to expand, albeit at a slower rate, the 'defence' or 'protection' of EU strategic interests and values by means of unilateral instruments has apparently become the 'external priority' of the EU's trade agenda since 2021.

The latest EU unilateral instruments indubitably restrict international trade. It is therefore not surprising that they were labeled as protectionist by third states and the media.[107] Arguably, however, the EU's new trade instruments refine the meaning and use of protectionism in EU trade policy. Originally, EU unilateral measures were adopted to protect the internal market from international trade distortions, such as dumping and subsidies. These measures were principally defined and triggered on economic grounds (think, for example, of the calculation of dumping or subsidy margins). Conversely, the EU's latest unilateral instruments – at least those in pursuit of sustainability or security – show that the need to protect the internal market no longer arises from economic grounds alone, and counteractions are no longer determined purely on the basis of economic criteria. EU trade policy and access to the internal market are used as gateways for pursuing EU strategic interests. It is about 'safeguarding [the EU's] position in the world', including through norm export.[108]

As was explained above, the Treaties expressly restrict the objective of trade liberalisation.[109] The need to pursue the Common Commercial Policy in tandem with the principles and objectives of EU external action is expressly stipulated in Article 207(1) TFEU and has been framed as a legal requirement by the Court. EU primary law therefore allows limiting trade liberalisation for the pursuit of

[104]Global Europe: Competing in the World, *supra* n. 58, p. 4.

[105]Ibid., p. 2.

[106]Szczepański, *supra* n. 69.

[107]*See* e.g. H. von der Burchard et al., 'Here Comes European Protectionism', *Politico*, 17 December 2019; or A. Hancock, 'EU's Trading Partners Accuse Bloc of Protectionism over Carbon Tax Plan', *Financial Times*, 17 December 2022.

[108]*Trade Policy Review*, *supra* n. 1, p. 26.

[109]*See supra* n. 40 and the accompanying section in the main text.

non-trade values, such as sustainability, a level playing field, or security. From a policy perspective, the framing of trade policy as a 'unique lever',[110] including through the establishment of market access barriers and/or trade sanctions, nevertheless marks a sharp directional change.

Openness to international law in recent EU trade practice: the case of the Anti-Coercion Instrument

As the EU's latest unilateral trade instruments (re-)build trade barriers and/or facilitate the use of countermeasures, they naturally raised legal questions about compliance with international law in general, and WTO law specifically. The above-mentioned presumption that policy instruments designed in pursuit of 'open' strategic autonomy would, at the very least, uphold international (economic) law was thus instantaneously challenged. It is beyond the scope of this article to discuss the compatibility of all of the instruments listed in Table 1 with international law.[111] The fact that several of the EU's new unilateral trade instruments raise serious concerns about compliance with international law can be demonstrated by focusing on selected cases, such as the Anti-Coercion Instrument (this section) and the revised Trade Enforcement Regulation (next section).

The Anti-Coercion Instrument 'aims to ensure an effective, efficient and swift Union response to economic coercion. It especially aims to deter the economic coercion of the Union or a Member State and to enable the Union, as a last resort, to counteract economic coercion through Union response measures.'[112] The Regulation is a novelty in international (economic) law and practice. International law does not establish a right to be free of economic coercion, and freedom from economic coercion is not listed as a lawful justification in the WTO Agreements.

[110] *Trade Policy Review*, *supra* n. 1, p. 1.

[111] Apart from the mentioned examples, concerns about the compliance with WTO law have been raised in particular for the Carbon Border Adjustment Mechanism, supply chain due diligence, the foreign subsidies regulation and the deforestation regulation. *See further* e.g. V. Crochet and M. Gustafsson, 'Lawful Remedy or Illegal Response? Resolving the Issue of Foreign Subsidization under WTO Law', 20 *World Trade Review* (2021) p. 343; I. Venzke and G. Vidigal, 'Are Unilateral Trade Measures in the Climate Crisis the End of Differentiated Responsibilities? The Case of the EU Carbon Border Adjustment Mechanism (CBAM)', 51 *Netherlands Yearbook of International Law* (2022) p. 187; J. Bäumler, 'Germany's Supply Chain Due Diligence Act: Is It Compatible with WTO Obligations?', 25 *Zeitschrift für Europarechtliche Studien* (2022) p. 265 (similar considerations apply to the Corporate Sustainability Due Diligence Directive); Marín Durán, *supra* n. 77; G. Marín Durán., 'Editorial: EU Carbon Border Adjustment Mechanism: Key Issues Going Forward', 26(4) *European Foreign Affairs Review* (2021), p. 499.

[112] Recital 8 of the Anti-Coercion Instrument, *supra* n. 86.

Most countries, including the USA, China, Australia, and Canada, do not possess a dedicated anti-coercion instrument.[113]

The adoption of a dedicated Anti-Coercion Instrument by the EU, let alone one that includes countermeasures, therefore naturally raises questions about international law compatibility. The Anti-Coercion Instrument addresses these questions explicitly by stipulating that the EU will 'always [be] acting within the framework of international law' when using its new instrument (recital 7). Article 1(3) of the Anti-Coercion Instrument adds that 'any action taken under this Regulation shall be consistent with the Union's obligations under international law and conducted in the context of the principles and objectives of the Union's external action'. Article 1(4) further specifies that the Regulation 'applies without prejudice ... to international agreements concluded by the Union, as well as to actions taken thereunder that are consistent with international law, in the area of the common commercial policy ....' Lastly, Article 11(2)(h) of the Anti-Coercion Instrument stipulates that the EU shall take 'any other relevant criteria established in international law' into account when designing countermeasures. Yet, these provisions do not stipulate *how* the application of the instrument can be squared with international law, or *which criteria* must be taken into account when designing countermeasures.

A closer look at the Anti-Coercion Instrument shows that it may in practice be difficult to ensure that the adoption of countermeasures by the EU in response to alleged anti-coercive conduct by third states will be compliant with either public international or WTO law.

Compliance with international law

As stated above, public international law does not establish a right for states to be free of economic coercion.[114] There is a more general prohibition on coercion contained in the customary law principle of non-intervention.[115] The 1970 UN General Assembly Resolution on Friendly Relations stipulated that various forms of coercion may violate the principle of non-intervention, including economic coercion.[116] In its famous *Nicaragua* judgment, the International Court of Justice appeared to confirm that the definition of intervention includes methods of

[113]Commission Staff Working Document, Impact Assessment Report, 8.12.2021, SWD(2021) 371 final, p. 15.

[114]A. Tzanakopoulos, 'The Right to be Free from Economic Coercion', 4 *Cambridge Journal of International and Comparative Law* (2015) p. 616.

[115]Art. 2(4) UN Charter. *See further* e.g. M. Jamnejad and M. Wood, 'The Principle of Non-Intervention', 22 *Leiden Journal of International Law* (2009) p. 345.

[116]United Nations General Assembly Resolution 2625 (XXV) of 24 October 1970.

coercion other than the 'particularly obvious' one, i.e. military force.[117] The Court, however, ultimately concluded that the trade embargo imposed by the US on Nicaragua did not breach the principle of non-intervention. Methods of economic coercion hence do not automatically breach customary international law: they must be evaluated on a case-by-case basis, and there is a high threshold for economic methods of coercion to qualify as a wrongful intervention.[118] If that threshold is met, the affected state may, *inter alia*, respond to the coercive act with countermeasures, in accordance with Article 49 ff. of the International Law Commission's Draft Articles on State Responsibility (ILC Articles).[119]

The Anti-Coercion instrument posits that economic coercion is a violation of international law. Pursuant to the Regulation,

> economic coercion exists where a third country applies or threatens to apply a third-country measure affecting trade or investment in order to prevent or obtain the cessation, modification or adoption of a particular act by the Union or a Member State, thereby interfering in the legitimate sovereign choices of the Union or a Member State.[120]

The Regulation further states that the Commission, when assessing an alleged anti-coercive measure, shall take certain criteria 'into account'[121] (including e.g. intensity, duration, magnitude etc.) without, however, establishing a qualitative (e.g. 'long' duration, 'severe' damage etc.) or a quantitative (e.g. minimum duration, minimum damage etc.) threshold for economic methods of coercion. The definition of economic coercion under the Anti-Coercion Instrument is thus wider than the definition of economic coercion as wrongful intervention under public international law. There is hence a threat that the EU will adopt countermeasures under its new Anti-Coercion Instrument against third state measures that do not qualify as wrongful intervention in public international law, thereby breaching the latter. For example, the Commission qualified as economic coercion a 'silent' Indonesian import block of alcoholic spirits that only lasted for about a year, encompassed a small portion of EU imports, and caused merely €5.9 million in damage.[122] An import ban of such a low magnitude apparently does not constitute

[117]ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v *United States of America),* Merits, Judgment. ICJ Reports 1986, p. 14, para. 205.

[118]*See* Jamnejad and Wood, *supra* n. 115, p. 371. *See also* F. Baetens and M. Bronckers, 'The EU's Anti-Coercion Instrument: A Big Stick for Big Targets', *EJIL Talk*, 19 January 2021, https://www.ejiltalk.org/the-eus-anti-coercion-instrument-a-big-stick-for-big-targets/, visited 10 November 2023.

[119]While the ILC Articles are not binding in terms of a treaty, they are widely viewed as customary international law. *See further* J. Crawford, 'State Responsibility', *MPEIL* (2006) para. 65.

[120]Art. 2(1) of the Anti-Coercion Instrument, *supra* n. 86.

[121]Art. 2(2) of the Anti-Coercion Instrument, *supra* n. 86.

[122]Impact Assessment, *supra* n. 113, p. 12.

a 'wrongful intervention' under public international law, even if one were to assume that international law has evolved since the 1986 Nicaragua judgment.[123]

In view of the explicit mandate to only take action consistent with international law enshrined in Article 1(3),(4) of the Regulation, one may wonder whether the EU could in practice adopt countermeasures in cases such as the 'silent' Indonesian import ban. Given that Article 1(3) in particular does not further specify how and when compliance with international law is reached, it appears unlikely that the provision will act as a 'final frontier', preventing the adoption of countermeasures in cases that fall within the Regulation's scope of application (Article 2 of the Anti-Coercion Instrument). In the absence of more precise criteria that ensure that the application of the Anti-Coercion Instrument is consistent with international law, such as precise qualitative and/or quantitative criteria setting out a high threshold for classifying economic measures as coercion, the Instrument could be used in instances that do not constitute a wrongful intervention, which would breach international law.

Compliance with WTO law

Even if the third state's act qualifies as economic coercion under international law, the recourse to unilateral countermeasures by the EU could raise concerns under WTO law. If the coercive act in question (also) breaches WTO law, it could be argued that the EU must launch a dispute before the WTO judiciary before resorting to unilateral (counter)measures. The WTO Dispute Settlement Understanding constitutes *lex specialis* in relation to the general international law provisions on countermeasures (Article 55 ILC Articles). Article 23.1 of the Dispute Settlement Understanding stipulates that disputes falling within the ambit of the WTO Agreements can only be settled in accordance with the rules and procedures stipulated in the Dispute Settlement Understanding. The panels in *US–Shrimp* and *Canada–Aircraft Credits and Guarantees* underlined that Article 23.1 of the Dispute Settlement Understanding 'stresses the primacy of the *multilateral* system and rejects unilateralism as a substitute for the procedures foreseen in [the Dispute Settlement Understanding].'[124] The procedures foreseen in the Dispute Settlement Understanding furthermore require the authorisation of countermeasures by the Dispute Settlement Body (Article 23(2)(c) Dispute Settlement Understanding). The panel in *US–Certain EC Products* underlined that 'Article 23.2(c) prohibits any suspensions of concessions or other obligations

[123] *See also* Baetens and Bronckers, *supra* n. 118.

[124] Panel Report, *US–Shrimp*, WT/DS58/R, 15 May 1998, para. 7.43. *See also* Panel Report, *Canada–Aircraft Credits and Guarantees*, WT/DS222/R, 28 January 2002, para. 7.170.

. . . , prior to a relevant [Dispute Settlement Body] authorization'.[125] The recently launched WTO disputes by Australia and Canada illustrate that the existing multilateral structures can be used to respond to alleged economic coercion.[126] That belief appears to be shared by the EU: in December 2022, the EU requested two WTO panels against China, essentially alleging that China has applied 'discriminatory and coercive measures'[127] against Lithuanian exports as a response to Lithuania's deepened ties with Taiwan.[128]

In the future, the EU may simply rely on the Anti-Coercion Instrument without (first) using the existing multilateral structures to respond to alleged economic coercion. Despite being labelled as a measure of last resort, the Anti-Coercion Instrument does not require the EU to exhaust available multilateral and international remedies before resorting to unilateral countermeasures.[129] Recital 12 of the preamble of the Regulation merely specifies that the EU shall use WTO dispute settlement 'where appropriate'. It is also unclear (and arguably unlikely) that the aforementioned Article 1(4) of the Regulation, which stipulates that the Anti-Coercion Instrument applies 'without prejudice' to inter alia the WTO Agreements, in practice means that the EU will generally exhaust the remedies available to it under WTO law. According to the Commission, WTO disputes only deal with the WTO-inconsistency of the matter and not with the separate infringement of customary international law that lies in the coercive act and intention.[130] The Anti-Coercion Instrument has thus been designed on the *premise* that methods of economic coercion, and the responses thereto, partially fall outside the scope of WTO law. Against this background, it is likely that the EU will not exhaust multilateral remedies before triggering the Anti-Coercion

[125]Panel Report, *US–Certain EC Products*, WT/DS165/R, 17 July 2000, para. 6.37.

[126]*See China–AD/CVD on Barley (Australia)*, WT/DS598; and *China–Measures Concerning the Importation of Canola Seed from Canada*, WT/DS589.

[127]European Commission, Press Release, 'EU Requests Two WTO Panels against China: Trade Restrictions on Lithuania and High-tech Patents', 7 December 2022, https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7528, visited 10 November 2023.

[128]China–Measures concerning trade in goods and services, WT/DS610; China–Enforcement of intellectual property rights, WT/DS611.

[129]Art. 2(2)(e) of the Anti-Coercion Instrument requires the EU to 'take account' of whether the third state, before the imposition of countermeasures, has sought to settle the dispute within international or multilateral fora. While the third state's initiative to bring the matter before international or multilateral dispute settlement bodies might hence prevent the measure from falling within the scope of the regulation (for the time being), it does not require the EU – after having qualified a third state's measure as coercion in accordance with Art. 2 – to exhaust available international and/or multilateral remedies before acting unilaterally. Art. 6(1)(b), read in conjunction with recital 20, merely requires the Commission to explore submitting the matter to international adjudication.

[130]Impact Assessment, *supra* n. 113, p. 15.

Instrument and that, as a consequence, countermeasures adopted under the Anti-Coercion Instrument will not be authorised by the Dispute Settlement Body. In a subsequent case on the legality of EU countermeasures adopted without Dispute Settlement Body authorisation, the EU may not be able to rely on the ILC Articles as a justification. WTO panels and the Appellate Body are reticent to accept legal grounds other than the ones expressly stipulated in the WTO Agreements as lawful justifications and are hostile to unilateral countermeasures adopted outside the framework of the Dispute Settlement Understanding.[131]

In sum, the adoption of countermeasures under the Anti-Coercion Instrument is thus likely to clash with WTO law by: (1) circumventing the WTO dispute settlement process; and/or (2) justifying such measures on grounds other than those specified in the WTO Agreements. One may once again ask whether the requirement to act consistently with international law (Article 1(3) of the Regulation), to apply the Regulation 'without prejudice' to the WTO Agreements (Article 1(4) of the Regulation), or to take international legal criteria into account when designing countermeasures (Article 11(2)(h) of the Regulation), would ensure that countermeasures will only be adopted within, and thus be compliant with, the framework of WTO law. Given that the Regulation has apparently been designed on the premise that methods of economic coercion partially fall outside the scope of WTO law, and that WTO-inconsistent responses can be justified on grounds other than those foreseen in WTO law, it is, however, unlikely that the EU will in fact exhaust multilateral remedies before adopting countermeasures. Waiting for the multilateral system to 'bite' would also question why a unilateral response mechanism is needed in the first place. It is therefore likely that the EU will eventually have to defend its (counter-)measures before the WTO judiciary.

Openness to international law in recent EU trade practice: the case of the revised trade enforcement regulation

Similar legal concerns arise for the Revised Trade Enforcement Regulation. The scope of the revised instrument includes situations where a trade dispute is blocked. At present, the WTO Appellate Body is unable to hear cases as a result of the United States' blockage of new appointments (WTO Appellate Body Crisis). As a result, dispute settlement at the WTO has become dysfunctional, as the

[131] *See further* G. Marceau and J. Wyatt, 'Dispute Settlement Regimes Intermingled: Regional Trade Agreements and the WTO', 1 *Journal of International Dispute Settlement* (2010) p. 67 at p. 74; and W. Weiß and C. Furculita, 'The EU in Search for Stronger Enforcement Rules: Assessing the Proposed Amendments to Trade Enforcement Regulation 654/2014', 23(4) *Journal of International Economic Law* (2020) p. 865 at p. 874 ff.

concerned member may simply appeal cases 'into the void'. As was mentioned above, the EU, amongst others, has set up a Multiparty Interim Appeal Arbitration Arrangement to overcome this impasse.

The Revised Trade Enforcement Regulation may come into to effect in situations where a WTO member that does not participate in the Multiparty Interim Appeal Arbitration Arrangement appeals a dispute into the void. Pursuant to the newly added paragraph 3(aa), the Regulation now also applies following the circulation of a panel report upholding, in whole or in parts, the claims brought forward by the Union, if an appeal before the Appellate Body cannot be completed and if the third country has not agreed to participate in the Multiparty Interim Appeal Arbitration Arrangement. The Revised Enforcement Regulation hence empowers the EU to unilaterally respond in technically ongoing WTO proceedings, including through countermeasures.[132] As for the Anti-Coercion Instrument, the Commission justifies the recourse to unilateral countermeasures on the basis of public international law, namely Article 49 ff. ILC Articles. The previous section showed that the general public international law concept of countermeasures is difficult to square with WTO law, particularly with Articles 23(1) (primacy of multilateral dispute settlement) and 23(2)(c) (requirement for Dispute Settlement Body authorisation of countermeasures) of the Dispute Settlement Understanding. The Commission nonetheless opines that the Revised Trade Enforcement Regulation is fully compatible with international law.[133] The Commission recognises that a party is not relieved from fulfilling its obligations under any pertinent dispute settlement procedure (Article 50(2)(a) ILC Articles) and that the rules of international dispute settlement constitute *lex specialis* in relation to the general international law on countermeasures (Article 55 ILC Articles). However, the Commission argues that the right of the injured party to resort to countermeasures in accordance with international law revives when the responsible party acts in bad faith. Sending appealed WTO panel reports into the void would constitute such an act of bad faith, justifying the recourse to unilateral responses under the Revised Trade Enforcement Regulation.

Yet, as Weiß and Furculita argue, it cannot be assumed that any WTO member appealing a panel decision into the void automatically acts in bad faith.[134] Pursuant to Article 16(4) of the Dispute Settlement Understanding, WTO members have a right to appeal the panel report. Members may continue to

[132]Art. 4 Revised Trade Enforcement Regulation, *supra* n. 78.

[133]Proposal for a Regulation of the European Parliament and of the Council, amending Regulation (EU) No 654/2014 of the European Parliament and of the Council concerning the exercise of the Union's rights for the application and enforcement of international trade rules, COM/2019/623 final, p. 4. *See also* Commission declaration on compliance with international law, OJ C 49, 12.2.2021, p. 3.

[134]Weiß and Furculita, *supra* n. 131, p. 876.

exercise that right with the sincere hope that the Appellate Body crisis will be solved soon. A different (or 'bad') intent will be difficult to prove – except perhaps for the US, who is responsible for the blocking the appointment of Appellate Body members. Neither can it be argued that WTO members refusing to participate in the Multiparty Interim Appeal Arbitration Arrangement act in bad faith, as it is in their sovereign choice not to ratify a new international treaty. Provided that 'bad faith' cannot be demonstrated, the adoption of unilateral countermeasures in technically ongoing WTO dispute settlement procedures is therefore arguably contrary to both international law (Articles 50(2)(a), 55 ILC Articles) and WTO law (Articles 23(1), 23(2)(c) Dispute Settlement Understanding). The adoption of unilateral EU countermeasures against a WTO member other than the US that has appealed a panel report into the void might thus breach international law, and by inference Article 3(5) TEU.

Conclusion and outlook

Constitutional norms of openness offer important guidance for the development of EU trade policy. The addition of 'open' to 'strategic autonomy' should not remain a mere rhetorical qualifier and policy-makers should take account of constitutional preferences for some policy choices over others. The analysis, however, has shown that the trade instruments adopted following the Trade Policy Review and in the pursuit of open strategic autonomy create tensions with the constitutional norms of openness in EU external trade and represent a move away from these constitutional preferences set out in the Treaties.

The question then arises as to how far the EU can go with such a departure. On the one hand, we find that the constitutional preference for openness is not absolute. The Treaties leave broad discretion to EU policy-makers to balance openness (trade liberalisation, multilateralism and international cooperation) and the pursuit of other values (e.g. sustainability, security). This discretion allows policy-makers to choose where to strike a 'middle-ground' between openness and autonomy, at a time of global geopolitical tensions. On the other hand, there appears to be much less discretion on openness to international law (i.e. strict observance of international law) which emerges from the Treaties as an enforceable legal obligation. Severe doubts arise as to the compatibility of the application of some unilateral EU trade instruments with international law. This is problematic since non-compliance with international law could have consequences under both EU law (potential invalidity of the instrument) and international law (liability).

In the face of the decline of multilateralism in trade, the EU's response needs to be weighed against alternatives. The intensity with which the EU strives for 'strategic autonomy' through unilateralism – and the price it is willing to pay both

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externally (lacking emphasis on re-building global institutions, increasing distrust amongst trading partners) and internally (actions that do not reflect constitutional preferences) – arguably requires re-thinking. In light of the tensions that recent EU trade instruments raise with the Treaties, this article calls for a need to rebalance the policy preference to attain 'open strategic autonomy' against legal parameters of openness.

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