

1 Introduction

1.1 The Mission of This Book: Scrutinizing the New EU Trade Policy against Its Legal Constraints

This book analyses the EU trade policy's turn towards stronger enforcement and ensuring a level playing field, which the European Commission adopted in its most recent trade policy review communication of February 2021 on an 'open, sustainable and assertive trade policy'.¹ Thereby, the EU redefined its trade policy based on the model of 'open strategic autonomy', which, in the eyes of the Commission, is meant to combine benefitting from a rules-based trade system with protecting against unfair and abusive practices. The reorientation undertakes to assertively enforce the EU's existing bilateral and multilateral trade rights against its trade partners, as well as to level the playing field of competition between domestic and foreign undertakings in the internal market, and externally as regards labour rights and sustainability. Admittedly, the trade policy review indicates more policy objectives than the one on increasing the EU's capacity to enforce its trading rights, and lists six areas of action.² But the last one, on stronger implementation and enforcement, is particularly explicit and elaborate, much more than the others, and clearly sets out a detailed programme of policy initiatives and legislative action³ (for a detailed analysis of the communication, see Section 2.1). What is really new according to our assessment is that the Commission places a new and determined focus on implementation and enforcement of trading rights, including strengthened powers to

¹ European Commission, Trade Policy Review – An Open, Sustainable and Assertive Trade Policy (Trade Policy Review), COM(2021) 66 final, 18 February 2021.

² *ibid.*, pp. 10 f. ³ *ibid.*, pp. 19–21.

advocate its interests more forcefully, and wants to ensure the EU's actorness in trade relations in order to justify continued, albeit conditioned, openness. Thus, the trade policy review not only takes up an evolving awareness in the EU for a greater need for trade enforcement and transfers the EU Global Strategy's pragmatist turn into trade policy with a new impetus, but also comes as a response to most recent fundamental changes in trade politics of its trading partners (for a more detailed discussion, see Sections 1.2 and 2.2). The new trade policy extends the EU's capacities of responding effectively to trade measures of others, and so will increase its deterrence power. It is embedded in its search for strategic autonomy in its external relations with a view to expand the EU's ability for autonomous determination of its common foreign policy. Gaining more 'sovereignty' – that is, independence and self-determination – also in its external economic presence is an expression of a new global, geostrategic orientation of the EU and its policies which intends to address current world challenges.⁴

In implementing the ensuing new trade policy, the EU tabled several legislative proposals to amend or adopt enforcement tools in order to ward off what it perceives as unfair treatment.⁵ The legislative projects and new approaches to sustainability, labour, and dispute settlement (which will be dealt with in detail in Parts II and III) grant the EU new powers and instruments to defend itself against unfair trade practices and, if necessary, to restore a level playing field, particularly in terms of competition in the EU's internal market. The projects and initiatives envisioned in the trade policy review communication, however, trigger internal and external reservations. Internally, the consequences of the new approach for the EU internal separation and balance of powers and the institutional balance between the EU institutions are debated. The new legislation will give the Commission considerable new powers which not only lead to trade restrictions but may imply considerable

⁴ Milan Babić, Adam Dixon, and Imogen Liu, 'Goeconomics in a Changing Global Order', in Milan Babić, Adam Dixon, and Imogen Liu (eds.), *The Political Economy of Goeconomics* (Cham: Palgrave Macmillan, 2022), pp. 12 f; Luuk Schmitz and Timo Seidl, 'As Open as Possible, as Autonomous as Necessary' (2023) 61(3) JCMS 834–852 at 841; Tobias Gehrke, 'EU Open Strategic Autonomy and the Trappings of Goeconomics' (2022) *European Foreign Affairs Review* Special Issue 61–78 at 68 ff.

⁵ Frank Hoffmeister, 'Do Ut Des oder Tit For Tat? – Die Europäische Handelspolitik Angesichts Neuer Herausforderungen aus den USA und China', in Christoph Herrmann (ed.), *Die Gemeinsame Handelspolitik im Europäischen Verfassungsverbund* (Baden-Baden: Nomos, 2020), p. 94.

consequences for trade and even beyond, specifically general foreign relations with third countries, whereas it actually is for the Council to determine foreign policy and, in cooperation with the European Parliament, to shape trade policy so that it should be their competence to decide about the use of instruments that could produce considerable foreign trade and policy effects.⁶ Given its enlarged policy leeway, demands for more accountability and democratic control of the Commission rise. Externally, the EU could be blamed for neglecting its multilateral, rule-oriented policy stance and imitating power politics in the US or Chinese style.⁷ It could be seen to start merely paying lip service to multilateralism by picking and choosing those commitments that are in its interest while preparing tools for disrespecting the others. The new robustness of the EU's trade policy approach entails increased capacities for autonomous, even unilateral behaviour which might be perceived as a threat undermining the credibility of the EU's support for multilateralism, its compliance with international law, and its reform efforts in the WTO,⁸ going 'against previously dominant ideas of free trade and multilateralism'.⁹ It might put at risk EU trading interests in the long run, as other countries might emulate what the EU does. The EU could be blamed for adding to the current severe contestation of multilateral trade rules, and international law in general, thus exposing the international rules-based trade order to additional stress and contributing to a further demise of rule of law in international relations.¹⁰ The 'last big defender of rules-based open trade' may be seen to fall and 'give

⁶ See e.g. the results of the open public consultation on a EU anti-coercion instrument (https://web.archive.org/web/20220712213138/https://trade.ec.europa.eu/doclib/docs/2021/september/tradoc_159792.pdf), replies to question 18.

⁷ For the 'Trumpian Turn', see Gabriel Felbermayr, 'A Trumpian Turn in EU Trade Politics and the Silence of Germany', 2018 EconPol Opinion 6 (www.econpol.eu/opinion_6), with regard to the modernization of anti-dumping rules.

⁸ For these, see Jan Wouters and Akhil Raina, 'The European Union and Global Economic Governance: A Leader without a Roadmap?', in Julien Chaisse (ed.), *Sixty Years of European Integration and Global Power Shifts: Perceptions, Interactions and Lessons* (London: Hart Publishing, 2020), pp. 198 ff.

⁹ Sjoerre Couvreur, et al., 'The Good Geopolitical Trade Actor? The European Union's Discursive Justification of the Anti-Coercion Instrument' (2022) *Journal of Political Science* Special Issue 133–147 at 136.

¹⁰ For the current contests of multilateralism in the WTO as a challenge to the international rule of law, see Vineet Hegde, Jan Wouters, and Akhil Raina, 'The Demise of the Rules-Based International Economic Order?' (2020) Leuven Centre for Global Governance Studies, Working Paper 224, 8 ff.

up on the concept of free trade' with the new trade policy.¹¹ The EU appears to be aware of this criticism as it tries to juxtapose its new trade policy orientation on the weaponization of trade by other countries.¹² With regard to its new Anti-Coercion Instrument (ACI),¹³ for example, which allows the Commission to impose sanctions on third countries allegedly coercing the EU or a Member State to adopt or stop policies which is their own sovereign choice to determine, the European Commission justifies the new legislation by claiming that it allegedly preserves EU autonomy in policymaking from third countries that use trade as a weapon to unduly, even illegally, interfere with the sovereignty of others.¹⁴ The EU represents itself as a victim of other states' protectionism and interventionism in the EU's policy choices and presents its new ACI as a legitimate response, with it being portrayed as a protection against breaches of international law. Thus, the EU claims to respond only to illegalities of others, and to do so merely in a defensive approach using lawful means.¹⁵ It defends its self-perception as a good actor. One may, however, contest this presentation of the ACI, as this instrument has at least the capacity also to be used in an offensive way, all the more so considering that the assessment of what a coercive practices by a third country actually implies is far from simple, because the concept is vague.¹⁶ The EU commitment to multilateralism and international law has a long tradition in political terms, and is also a constitutional obligation for the EU by virtue of Articles 3 (5), 21 (2) TEU, and 216 (2) TFEU, which the CJEU appears to be willing to enforce,

¹¹ Barbara Moens and Hans van der Burchard, 'Europe First: Brussels Gets Ready to Dump Its Free Trade Ideals', www.politico.eu/article/ursula-von-der-leyen-joe-biden-trade-europe-first-brussels-gets-ready-to-dump-its-free-trade-ideals/.

¹² Commission Proposal for a Regulation on the protection of the Union and its Member States from economic coercion by third countries, COM(2021) 775 final, pp. 1–3, 26; Impact Assessment Report Accompanying the document Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union and its Member States from economic coercion by third countries (Impact Assessment Report), 8 December 2021, SWD(2021) 371 final, 5, p. 14.

¹³ See 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 EU 2023 No. L 2675, 7 December 2023.

¹⁴ Impact Assessment Report, SWD(2021) 371 final, 9, p. 49 f.

¹⁵ See Couvreur, et al., 'The Good Geopolitical Trade Actor?' (2022), 141 f.

¹⁶ See *ibid.*, 143. Article 2 ACI Regulation 2023/2675 defines economic coercion to refer to a situation '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'.

particularly in trade policy.¹⁷ The new robustness may jeopardize this, as the new tools, much more than ever, seek not only to emphasize the EU's interests but also to enforce them more assertively, and could, therefore, conflict with the EU's obligations also under international law. These internal and external concerns are interrelated, as parliamentary scrutiny allows for greater transparency of EU politics and increased control of the EU executive. Intensified Commission accountability may be a useful way of ensuring that the new powers in EU trade policy are not employed for measures that represent violations of international obligations, in particular with regard to the rules-based international trade order, or even amount to blatant protectionism. As the internal concerns have been dealt with elsewhere, albeit briefly,¹⁸ the book's focus will be on evaluating and assessing the new turn in the EU's trade policy towards a more assertive enforcement of its trade rights and more robust representation of its interests (the last, as will be shown in Chapter 2, is actually what signifies what EU calls safeguarding 'a level playing field') in view of its impact on the EU's obligations deriving from its multilateral stance and its international legal obligations.

Even though the EU confirms its intention to abide within the limits of international law in its new trade policy legislation, whether the EU has succeeded insofar deserves closer inspection and is far from trivial. The reason for this is that the new legislation introduces quite novel tools such as an instrument against coercion, a monitoring mechanism regarding the competition distortion caused by third-country subsidies, or a carbon border mechanism intended to compensate for the burden on intra-Union trade resulting from carbon tax, all of which represent instruments for adopting countermeasures in response to other states' behaviour for which there hardly is an international example. Furthermore, these novel tools raise complex questions as to their compatibility with WTO law in particular. Also, there currently are no international precedents or clear pertinent rules having been worked out by international institutions or courts. And even if the black letter of the new provisions is in conformity with international law (due to sometimes rather general disclaimers of compatibility with international law

¹⁷ See CJEU, Cases C-104/16 P, *Council v Front Polisario* [2017] ECLI:EU:C:2016:973; C-266/16, *Western Sahara Campaign UK* [2018], ECLI:EU:C:2018:118; C-66/18, *Commission v Hungary (Enseignement supérieur)* [2020] ECLI:EU:C:2020:792, and Chapter 3 for more details.

¹⁸ Wolfgang Weiß, 'The EU's Strategic Autonomy in Times of Politicization of International Trade: The Future of Commission Accountability' (2023) *Global Policy* (Suppl. 3) 54–64.

present in the new legislation, reflecting the intention of the EU not to intentionally breach international law), its implementation and application in concrete cases might have to observe certain limits to avoid sliding into protectionism, besides the political problem of escalation and counteraction by trade partners. The new tools may bring to the fore an inherent contradiction embodied in the new trade policy review: While the Commission confessed to the significance of multilateralism and confirmed the EU trade policy's openness and engagement on the international scene and support for cooperation,¹⁹ the new tools give the Commission the capacity to behave autonomously and even unilaterally (i.e. without considering trade partners' interests), if not protectionist, which puts its openness and cooperative approach hitherto in serious question. Concepts such as resilience or security, which feature prominently in the 2021 trade policy review,²⁰ have previously been associated with protectionist tendencies.²¹ Thus, the policy review induces concerns for the EU's future credibility with regard to its defence of multilateralism. As has been observed, there is a 'fine line' between more robust and assertive representation and enforcement of own interests on the one hand and protectionism on the other; whether this line is crossed will also depend on the assessment of the reaction of trade partners and on the broader, still developing economic and security policy context of EU trade policy.²²

Therefore, the present book takes up the research question of whether the implementation of the new trade policy reorientation of the EU resulting in the adoption of new legislation and approaches is compliant with its international legal commitments, and beyond, with its multilateral orientation rooted in constitutional obligations. It pursues a comprehensive legal analysis and assessment of the new EU tools developing novel or amending existing enforcement and level playing field legislation and of the related legal constraints to EU trade policy flowing from EU constitutional law and international law (i.e. WTO, EU FTA, climate protection rules, and general international law on treaties and counter-measures). The book exemplifies the inherent tensions the EU as a

¹⁹ Trade Policy Review, COM(2021) 66 final, p. 6.

²⁰ Resilience is referred to sixteen times, and security nine times, in the Trade Policy Review.

²¹ Thomas Jacobs, et al., 'The Hegemonic Politics of Strategic Autonomy and Resilience' (2023) *JCMS* 3–19 at 5.

²² Sophie Meunier, 'The End of Naivety: Assertiveness and New Instruments in EU Trade and Investment Policy' (2022) *EUI Global Governance Programme*, Policy Brief issue 2022/55, p. 8.

principled pragmatist in external relations has to face, and analyses the limits, flexibilities, and broader implications of the new EU trade policy. In this way, it adds to the broader discussion of the demise (or not) of the rule of law in international relations,²³ with a view to EU trade policy. Thereby, it contributes to identifying solutions in conformity with the EU's support for a multilateral rules-based order and commitment to respect public international law. The results allow to determine the legal scope for a more robust EU trade policy in line with international law and deepen the understanding of how trade policy can evolve in the light of the challenges it faces.

1.2 Roots, Causes, Context: From 'A Stronger Europe' via 'Open Strategic Autonomy' towards an 'Open, Sustainable and Assertive Trade Policy'

The turn towards more robustness in trade policy did not begin in 2021; it has recent roots, current causes, and contemporary context, which will be briefly recalled here. First of all, the turn reflects a more pragmatic, realist, and resilient policy approach which started in the EU's Global Strategy on Foreign and Security Policy of June 2016 for a 'Stronger Europe' that reflected a conflict-prone external policy environment and fed geopolitical thinking into the EU's external relations approaches.²⁴ The EU's Global Strategy, while paying tribute to promoting a 'rules-based global order' with multilateralism as a key principle, amidst existential crises around the globe, complemented its more traditional value-based approach with geopolitical realism and flexibility. Hence, the EU initiated a pragmatist turn²⁵ and became a 'principled pragmatist'.²⁶ The Global Strategy used the term *strategic autonomy* several times, particularly with

²³ See Heike Krieger, Georg Nolte, and Andreas Zimmermann (eds.), *The International Rule of Law: Rise or Decline?* (Oxford: Oxford University Press, 2019); Luis M. Hinojosa-Martínez and Carmela Pérez-Bernárdez (eds.), *Enhancing the Rule of Law in the EU's External Action* (Cheltenham, Northampton: Elgar Publishing, 2023).

²⁴ Heather Conley, 'The Birth of a Global Strategy Amid Deep Crisis' (2016) 51(3) *The International Spectator* 12–14.

²⁵ Shared Vision, Common Action: A Stronger Europe – A Global Strategy for the European Union's Foreign and Security Policy, 2016, pp. 7 f, 39 ff, https://eeas.europa.eu/archives/docs/top_stories/pdf/eugs_review_web.pdf.

²⁶ Ana Juncos, 'Resilience as the New EU Foreign Policy Paradigm: A Pragmatist Turn' (2017) 26(1) *European Security* 1; Nathalie Tocci, 'The Making of the EU Global Strategy' (2016) 37 *Contemporary Security Policy* 461–472.

regard to the required EU independence in security and defense issues; soon, discussions about European sovereignty developed,²⁷ with the recent initiative of Commission President Ursula von der Leyen for a European Sovereignty Fund.²⁸

This more realist and tentatively geopolitical approach first became translated into trade policy at the highest level in a statement of the European Council in June 2019 on the New Strategic Agenda 2019–2024 which called for ‘an ambitious and robust trade policy ensuring fair competition, reciprocity and mutual benefits’ both at the WTO and in bilateral relations,²⁹ from which emerged the more geopolitical new ‘open, sustainable and assertive trade policy’.³⁰

Secondly, of pivotal significance to date was the advent of the new European Commission under von der Leyen striving for being more geopolitical.³¹ In her political guidelines for the European Commission 2019–2024,³² and her first mission letter to the Trade Commissioner,³³ strengthening the enforcement of trade rules features prominently. At the start of the discussion and consultation on the new direction of EU’s trade policy in June 2020, the central leitmotif of ‘open strategic autonomy’ (which was used for the first time by the then Trade Commissioner Phil Hogan in a speech at a G20 meeting on 14 May 2020³⁴ and then again on 27 May 2020 in a Commission

²⁷ Scott Lavery, Sean McDaniel, and Davide Schmid, ‘European Strategic Autonomy’, in Babić, Dixon, and Liu (eds.), *The Political Economy of Geoeconomics* (2022), pp. 60 ff.

²⁸ Thierry Breton, ‘A European Sovereignty Fund for an industry “Made in Europe”’, Blog of Commissioner Thierry Breton, 15 September 2022, https://ec.europa.eu/commission/presscorner/detail/en/statement_22_5543.

²⁹ European Council, ‘A New Strategic Agenda 2019–2024’, pp. 4, 6 (www.consilium.europa.eu/media/39914/a-new-strategic-agenda-2019-2024.pdf).

³⁰ For its greater geopolitical inclination compared to previous more normative trade policy, see Couvreur, et al., ‘The Good Geopolitical Trade Actor?’ (2022), 134 f.

³¹ For the ‘geopolitical Commission’, see Ursula von der Leyen, Speech in the European Parliament Plenary Session, Strasbourg, 27 November 2019, https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_19_6408.

³² Ursula von der Leyen, Political Guidelines for the Next European Commission 2019–2024, ‘A Union That Strives for More’, <https://data.europa.eu/doi/10.2775/101756>.

³³ See Ursula von der Leyen, ‘Mission Letter to Phil Hogan, Commissioner for Trade’, 1 December 2019, https://commissioners.ec.europa.eu/system/files/2022-12/mission-letter-phil-hogan-2019_en.pdf.

³⁴ Intro Remarks by Commissions Phil Hogan at Second G20 Extraordinary Trade and Investment Ministers Meeting. See also Patrick Holden, ‘Regional Integration and Trade in the Era of COVID-19: A First Look’, UNU-CRIS Working Paper Series, September 2020, p. 11, <https://cris.unu.edu/sites/cris.unu.edu/files/WP20.3%20-%20Holden.pdf>.

Communication³⁵) was coined in order to signify that the EU should continue reaping the benefits of the international rules-based trade order by focusing on implementation and enforcement issues, while having the right tools in place to protect itself from unfair, hostile, or uncompetitive practices.³⁶ The ‘open strategic autonomy’ (which will be looked at more closely in Section 2.1.3). is intended to balance and combine the fundamental openness of the EU’s markets with protection for its people and businesses. This implies the EU’s ability to take the enforcement of trade rules into its own hands even more than it has done before and to assert the EU’s rights to enforce greater reciprocity. Adding the adjective ‘open’ to the existing term ‘strategic autonomy’ might have meant to underline that the new policy was not intended to develop into protectionism.³⁷

Thirdly, the shift towards a more robust policy formulation, oriented toward the assertive representation of the EU’s own economic as well as non-economic (regarding sustainability and labour rights) interests, was strongly stimulated in the area of trade relations by the EU’s need to respond to far-reaching changes in the trade environment in recent years. Trade relations and trade governance, while being subject to NGO, trade union, and (parts of) civil society criticism already since the 1990s in view of the WTO and since around 2013 with regard to EU FTA negotiations,³⁸ lately have been facing an unprecedented level of simultaneous economic, institutional, political, and technological challenges such as the contested state of the WTO and its rules; the rise of unilateralism and protectionism; the greater salience of climate change, public health, and digitalization for trade governance; and the increasing geoeconomic orientation of trade powers such as China and the United States (for more, see Section 2.2). The most recent of these challenges to international trade regulation, before the trade policy review was formulated, was the COVID-19 pandemic in 2020–2021, which gave additional weight to public health issues and supply security in regulating international trade. The variety, severity, and simultaneity of the current challenges to the global environment for trade and the current pace of change appear

³⁵ European Commission, ‘Europe’s Moment: Repair and Prepare for the Next Generation’, COM(2020) 456 final, 13.

³⁶ European Commission, ‘A renewed trade policy for a stronger Europe. Consultation Note’, 16 June 2020, 3, 8.

³⁷ See Lavery, McDaniel, and Schmid, ‘European Strategic Autonomy’ (2022), p. 71 f.

³⁸ Sangeeta Khorana and Maria Garcia, ‘Introduction’, in Sangheta Khorana and Maria Garcia (eds.), *Handbook on the EU and International Trade* (Cheltenham, Northampton: Edward Elgar Publishing 2018), pp. 7 f.

unprecedented compared to the last seventy years. The global economic order, the whole world order actually, as we know it is changing drastically as the transatlantic US hegemony in political, technological, and economic terms comes to an end, in particular with China rising to an almost equal power.³⁹ The liberal economic order faces unprecedented hurdles and contests, and so does the EU trade policy, which has to find ways to respond to them.⁴⁰ The multilateral trading system has regulated international trade relationships and provided relative stability for decades since World War II with the establishment of the Bretton Woods institutions and the reform of GATT 1947 by the introduction of the WTO in 1994. The order established by these institutions currently is under severe threat, in particular the functioning of the WTO. Multilateral trade institutions have been put in profound danger. As multilateral negotiations are stalled, by and large, bilateral or plurilateral trade agreements appear as the only propelling force. The WTO dispute settlement mechanism, the former ‘jewel of the crown’, has been strangled by the US blockage of appointment of new Appellate Body members.⁴¹ Protectionist measures are rising, not least as a consequence of the economic nationalism of ‘Trumponomics’,⁴² alleged national security reasons, and the economic turmoil following the spread of coronavirus.⁴³ A further challenge to the present system of multilateral trade regulation is posed by the enormous and still rising economic importance of China and its more recent global aspirations that gained new momentum with the Russian war against Ukraine as China instigates attempts to install an alternative to the Western-driven international order.⁴⁴ World trade is confronted with systemic challenges

³⁹ G. John Ikenberry, ‘The End of Liberal International Order?’ (2018) 94(1) *International Affairs* 7; John J. Mearsheimer, ‘Bound to Fail: The Rise and Fall of the Liberal International Order’ (2019) 43(4) *International Security* 7; Dilip Hiro, *After Empire: The Birth of a Multipolar World* (New York: National Books, 2010), pp. 13 ff.

⁴⁰ Antonina Bakardjieva Engelbrekt, et al., *The European Union in a Changing World Order* (Cham: Palgrave Macmillan, 2020).

⁴¹ Geraldo Vidigal, ‘Living without the Appellate Body: Multilateral, Bilateral and Plurilateral Solutions to the WTO Dispute Settlement Crisis’ (2019) 20(6) *JWIT* 862–890.

⁴² Stephen Moore and Arthur B. Laffer, *Trumponomics: Inside the America First Plan to Revive Our Economy* (New York: St. Martin’s Press, 2018).

⁴³ See WTO, ‘Report on G20 Trade Measures’, June 2020, pp. 2, 32 ff.; WTO, ‘Report on G20 Trade Measures’, November 2020, pp. 3, 31 ff.; Louise Curran, Jappe Eckhardt, and Jaemin Lee, ‘The Trade Policy Response to COVID-19 and Its Implications for International Business’ (2021) 17(2) *Critical Perspectives on International Business* 252–320.

⁴⁴ See the declaration to the 2023 XV BRICS Summit Johannesburg, <https://brics2023.gov.za/2023/07/05/summit-declarations/>.