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EUROPEAN POLICY ANALYSIS

Open Strategic Autonomy – New challenges for the EU's Common Commercial Policy

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Summary

The world and the world economy are not the same today as they were after the fall of the Iron Curtain. The economic rise of China and its challenge to the US's superpower status, but also the twin green and digital transition have a significant impact on the global economic order. Around the world, industrial policies and significant state subsidies are used to address these challenges. Economic relations are, thus, becoming less shaped by liberal market efficiency gains and global value chains than by strategic alliances, decoupling, and containment of adversaries.

The EU's response to these geoeconomic challenges comes under the heading of "open strategic autonomy": trying to preserve independent policy space and reducing factual dependencies, while remaining committed to an open multilateral trading system based on the rule of law. It requires squaring the circle politically under constraints from both EU and international law.

In this analysis, Professor Christoph Herrmann examines the development of Open Strategic Autonomy as a policy concept guiding this Zeitenwende and sheds some light on the legal challenges this presents for EU trade policymaking.

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1. The trade policy environment of the 2020s – The times, they are changing!

"*[W]e are not naïve free traders.*"[1] These words of Jean-Claude Juncker, then president of the European Commission, ushering in an era of strategic interests shaping the EU's trade policy in 2017, echo loudly in today's trade policy parlance in which geoeconomics and the "weaponisation of everything"[2] are trend-defining buzzwords. Germany's Federal Minister for Economic Affairs and Climate Protection, Robert Habeck, quoted them as recently as October 2022.[3]

Not too long ago, the global economy appeared to be on a different trajectory. The fall of the Iron Curtain, the end of Soviet communism, German reunification, the Treaty of Maastricht[4] with the aim of establishing the Economic and Monetary Union in three stages, the establishment of the World Trade Organization (WTO), the increasing privatisation and liberalisation of services of general interest and other state enterprises, the emergence of the Internet economy, the "new economy", the economic transformation and opening in China; all left the global economic outlook seemingly without genuine alternatives to (social) market economy, open world trade and free markets. As such, the 1990s were a time of radical change, proclaimed by some as the "end of history".[5] By the end of the decade, however, the end to the "end of history" was already becoming apparent: the Asia crisis (1997), followed by the Russia crisis (1998/99), the failure of negotiations on a Multilateral Agreement on Investment within the OECD (1998), the Seattle protests against the WTO Ministerial Conference (1999), and the bursting of the dotcom bubble (2000).[6] The succeeding decade – the "noughties" – was marked by the attacks of 9/11, the "war on terror", the subprime mortgage crisis and the ensuing global financial crisis (2007), which led almost seamlessly into the euro sovereign debt crisis (2009). Climate change, increasingly perceived as a climate crisis or climate catastrophe, runs parallelly and permanently.

In 2012, *Xi Jinping* assumed the presidency of China (now for life) with the aim of making China the leading global and economic power. The "Belt and Road Initiative" (BRI)[7] and the "Made in China 2025"[8] industrial strategy are the geoeconomic[9] instruments that come with massive state-backed overseas investment in infrastructure and acquisitions of key technologies. A side effect of China's emergence as a leading economic power has been the significant increase in its share of global CO2 emissions, largely offsetting efforts to reduce emissions in the "old" industrialised parts of the world. At the same time, China is benefiting from the electrification of, for example, passenger transport and power generation, as this reduces Chinese dependence on oil- and gas-exporting countries (and thus on the sea lanes in the South

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1 Juncker's State of the Union Address 2017, <https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_17_3165> (last accessed on 24.10.2022).

2 Mark Galeotti *The Weaponisation of Everything* (Yale University Press, 2022); see also Nicholas Mulder *The Economic Weapon* (Yale University Press, 2022).

3 "Eine offene Marktwirtschaft ist keine naive Marktwirtschaft" ("Germany is and will remain an open investment location [but it is not] naive") as also quoted by Anna Cooban and Chris Stern, "Germany blocks sale of chip factory to China over security fears", CNN, 10 November 2022, available at <https://edition.cnn.com/2022/11/09/tech/germany-blocks-chip-factory-sale-china/index.html> (last accessed 27.2.2023).

4 OJ 1992 C 191/1, Treaty on European Union.

5 Francis Fukuyama *The End of History and the Last Man* (Maxwell Macmillan, 1992).

6 e.g. Naomi Klein *No Logo* (Flamingo, 2000); Josef Stiglitz *Globalization and its Discontents* (Norton, 2002).

7 See OECD, "China's Belt and Road Initiative in the Global Trade, Investment and Finance Landscape", *OECD Business and Finance Outlook 2018* (2018) available at <https://doi.org/10.1787/26172577> (last accessed on 24.10.2022).

8 See Jost Wübbeke, et al., "Made in China 2025 – The Making of a High-tech Superpower and Consequences for Industrial Countries", *Merics Papers on China* (2016) available at <https://merics.org/sites/default/files/2020-04/Made%20in%20China%202025.pdf> (last accessed on 24.10.2022).

9 On the notion "geoeconomic" and its various meanings see Robert Blackwill and Jennifer Harris *War by Other Means: Geoeconomics and Statecraft* (Harvard University Press, 2016); Joachim Klement *Geo-economics: The Interplay between Geopolitics, Economics, and Investments* (CFA Institute, 2021); Mark J Munoz (ed.) *Advances in Geoeconomics* (Routledge, 2017); Mikael Wigell, Sören Scholvin, Mika Aaltola (eds.) *Geo-economics and Power Politics in the 21st Century* (Routledge, 2019).

China Sea). Last but not least, certain raw materials are also increasingly seen as critical, not only for the production of semiconductor chips and other consumer products, but also to achieve the transition to climate neutrality.[10] Nevertheless, many of them are still supplied to the EU solely from China – like 98% of rare earth elements.[11]

The US–China relations are dominated by concerns over jobs being lost to China, China's technological rise, and the tightening of US export control laws to prevent a possible military conflict in the Western Pacific or the South China Sea. The challenges facing the EU are quite different but invariably greater. In particular, the EU has to manage the twin transition of decarbonisation and digitalisation, bring the Balkan states – tempted by Chinese investment – closer to the EU and prevent a flare-up of ethno–religious–political conflicts in the area, moderate an escalating territorial conflict between EU member Greece and Turkey, the constant threat of new waves of migration and, last but not least, Russia's war of aggression against Ukraine with all its geoeconomic consequences. Managing this foreign policy agenda is complicated by unresolved internal crises: the rule of law crisis; the national debt burden and the management of the Corona pandemic; and finally the UK's exit from the EU (Brexit).[12]

From the "end of history" in the 1990s to the end's own demise today, this contribution sketches out how the EU responds to the geoeconomic challenges of the 2020s with a variety of new trade policy instruments (2) and, by doing so, potentially exposes itself to legal scrutiny under its own constitutional order and WTO law (3). It concludes by pointing to more fundamental changes necessary in order for the EU to formulate a truly *common* foreign policy (4).

2. The EU's response to the geoeconomic challenges

The strategic challenge posed by the People's Republic of China has not gone unnoticed in the EU. More than 20 years after China's accession to the WTO, there is scarcely a piece of trade legislation that does not relate to China.[13] They are all part of a greater shift towards a strategic trade policy of the EU, designed to safeguard its independence as well as the protection of its values and interests.

2.1 Trade policy strategy

Whether it was the sale of the port of Piraeus to the Chinese shipping company COSCO, the award of the contract for the construction of the Pelješac Bridge to the China Road and Bridge Corporation or the takeover of the Augsburg-based robot manufacturer KUKA by the Chinese group Midea, it quickly became clear that the new Chinese industrial strategy could cause considerable disruption to the internal market – and even to other policy areas such as the Common Foreign and Security Policy (CFSP). At the same time, transatlantic relations deteriorated significantly during Donald Trump's presidency (2017–2021) due to the dispute over steel tariffs and the US blockade of the WTO dispute settlement process, as well as the failure of negotiations on a transatlantic free trade area.

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[10] European Commission, "Critical Raw Materials Resilience: Charting a Path towards Greater Security and Sustainability", COM(2020) 474 final.

[11] ibid.

[12] In more detail on the changes in the trade policy environment, Till Müller-Ibold and Christoph Herrmann, "Die Entwicklung des Europäischen Außenwirtschaftsrechts (2020–2022)" (2022) 22 *Europäische Zeitschrift für Wirtschaftsrecht* 1029.

[13] E.g. EPRS, "Proposed Anti-coercion Instrument" (Briefing PE 729.299) available at <https://www.europarl.europa.eu/RegData/etudes/BRIE/2022/729299/EPRS_BRI(2022)729299_EN.pdf> (last accessed 25 February 2023); European Commission, Proposal for a Regulation of the European Parliament and of the Council on foreign subsidies distorting the internal market, COM(2021) 223 final, 51; European Commission, Amended proposal for a Regulation of the European Parliament and of the Council on the access of third-country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries, COM(2016) 34 final, 2.

Although the EU's new global CFSP strategy,[14] adopted in 2016, explicitly postulates the goal of *strategic autonomy* its content has yet to be clearly outlined. The European Commission's Communication *EU–China – A Strategic Outlook*[15] of March 2019 unequivocally identifies the challenges that China's economic rise and its industrial policy strategies pose for the EU and formulates corresponding policy responses. These include inter alia the areas of public procurement law, third country subsidies, investment, and export controls. The Commission further emphasises the need for a balanced and reciprocal opening of markets, as well as a need to ensure a *level playing field* and European competitiveness. The new Commission elected in 2019 under President Ursula von der Leyen positioned itself explicitly as a "geopolitical Commission". In her first keynote speech in November 2019, the Commission President spoke of the need for the EU to learn the "language of power".[16] With regard to the EU's geo-economic challenges, this includes both a stronger European industrial policy, for example in the field of battery[17] or semiconductor manufacturing,[18] and a more robust defence against third country influence by amending or complementing competition law and trade policy instruments, as set out in the 2020 Industrial Policy Strategy[19] and its 2021 update.[20]

This also links to Europe's strategic autonomy in trade policy. In its review of the Trade Policy Strategy 2021[21] and the update of the Industrial Strategy 2021, and with reference to its Communication "Europe's hour – repairing the damage and opening up prospects for the next generation" of May 2020,[22] the Commission consistently refers to the guiding principle of the EU's "open strategic autonomy" (OSA) and elaborates on it. The OSA includes:

- Resilience and competitiveness to strengthen the EU economy;
- Sustainability and fairness, reflecting the need for the EU to act responsibly and fairly;
- Assertiveness and rules-based cooperation, demonstrating on the one hand the EU's preference for international cooperation and dialogue, but on the other hand also its willingness to fight unfair practices and use autonomous instruments when necessary to pursue its interests.[23]

The latter "autonomous instruments" are particularly important for trade policy practice – and sometimes raise issues of both EU law and international economic law.[24]

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[14] Shared Vision, "Common Action: A Stronger Europe – A Global Strategy for the European Union's Foreign and Security Policy" (2016) available at <https://www.eeas.europa.eu/sites/default/files/eugs_review_web_0.pdf> (last accessed on 20 December 2022).

[15] European Commission, Joint Communication to the European Parliament, the European Council and the Council on EU-China – A strategic outlook, JOIN (2019) 5 final.

[16] Ursula von der Leyen, Europe address – Dr Ursula von der Leyen President-elect of the European Commission – Allianz Forum (Pariser Platz), Berlin, available at <https://ec.europa.eu/commission/presscorner/detail/en/speech_19_6248> (last accessed on 20 December 2022).

[17] European Commission, Proposal for a Regulation of the European Parliament and of the Council concerning batteries and waste batteries, repealing Directive 2006/66/EC and amending Regulation (EU) No 2019/1020, COM(2020) 798 final.

[18] European Commission, Proposal for Regulation of the European Parliament and the Council establishing a framework of measures for strengthening Europe's semiconductor ecosystem (Chips Act), COM(2022) 46 final.

[19] Communication from the European Commission, "A New Industrial Strategy for Europe", COM(2020) 102 final.

[20] Communication from the European Commission, "Updating the 2020 New Industrial Strategy: Building a Stronger Single Market for Europe's Recovery", COM(2021) 350 final.

[21] Communication from the European Commission, "Trade Policy Review – An Open, Sustainable and Assertive Trade Policy", COM(2021) 66 final.

[22] Communication from the European Commission, "Europe's Moment: Repair and Prepare for the Next Generation", COM(2020) 456 final.

[23] Commission, *op cit.* (n 21).

[24] See Samed R Sahin, "Die Handels- und Investitionspolitik der Europäischen Union im Zeichen 'Strategischer Autonomie'", (2021) 8 *Europäische Zeitschrift für Wirtschaftsrecht* 348; see also with further references Müller-Ibold and Herrmann, *op cit.* (n 12) 1031, esp. fn 5.

2.2 Autonomous instruments

The EU's legislative activity in the area of trade policy has increased considerably in recent years. Given the limited scope of this paper, only a few of the key legislative projects that fall under the heading of open strategic autonomy can be briefly presented here. In summary, the EU has significantly expanded and sharpened its trade policy "arsenal" or is in the process of doing so.[25]

2.2.1 Adaptation of existing trade defence instruments

The "traditional" *trade defence instruments* (TDIs), i.e. anti-dumping and countervailing duties, serve to maintain an international *level playing field* and thus prevent unfair trade practices as well as anti-competitive practices, i.e. dumping and subsidies.[26] Both types of instruments must comply with WTO law and, where applicable, additional rules in free trade agreements or customs unions (unless they are completely excluded there).[27] When China joined the WTO in 2001, special rules and transition periods were agreed for the application of the relevant WTO rules to China, some of which expired after 15 years in December 2016.[28] Even before that, the Commission had repeatedly attempted to reform the EU's basic regulations,[29] but failed to secure the necessary majorities in the Council.[30]

In 2017 and 2018, the Commission presented a "modernisation package"[31] that introduced a number of adjustments,[32] including a new methodology for calculating normal value in anti-dumping investigations regarding imports from countries where state intervention in markets distorts prices, and the possibility for higher tariffs to be imposed by partially removing the so-called *lesser duty rule*. The amendments also made it possible to consider the costs of complying with environmental or labour protection agreements. According to recital 4 of the Modernisation

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[25] More detailed and with in-depth references provided, see Christoph Herrmann and Till Müller-Ibold, "Die Entwicklung des Europäischen Außenwirtschaftsrechts 2018–2020", (2021) 3 *Europäische Zeitschrift für Wirtschaftsrecht* 97; Müller-Ibold/ and Herrmann, *op cit.* (n 12); Till Müller-Ibold and Christoph Herrmann, "Die Entwicklung des Europäischen Außenwirtschaftsrechts" (2020–2022)" (2022) 23 *Europäische Zeitschrift für Wirtschaftsrecht* 1085.

[26] See European Commission, "Trade Defence – Ensuring a level playing field", available at <https://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146391.pdf> (last accessed 26 February 2023); Christoph Herrmann, "Das Verwaltungsrecht der handelspolitischen Schutzinstrumente" in Jörg P Terhechte (ed) *Verwaltungsrecht der Europäischen Union*, 2nd ed. (Nomos, 2022) 1185.

[27] See Fabian Bickel *Customs Unions in the WTO – Problems with Anti-Dumping* (Springer, 2021).

[28] Folkert Graafsma and Elena Kumashova "*In re* China's Protocol of Accession and the Anti-Dumping Agreement: Temporary Derogation or Permanent Modification?" (2014) 9(4) Global Trade and Customs Journal 154.

[29] Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union [2016] OJ L176/21; Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union [2016] OJ L176/55.

[30] On the legislative procedure, see Frank Hoffmeister, "Modernising the EU's Trade Defence Instruments: Mission Impossible?" in Christoph Herrmann, Bruno Simma, and Rudolf Streinz (ed) *Trade Policy Between Law, Diplomacy and Scholarship*: *Liber amicorum in memoriam Horst G. Krenzler* (Springer, 2015) 365; Wolfgang Müller, "The EU's Trade Defence Instruments: Recent Judicial and Policy Developments" in Marc Bungenberg, *et al.* (eds) *European Yearbook of International Economic Law* 2017 (Springer, 2017) 205.

[31] European Commission Press Release, "The EU is changing its anti-dumping and anti-subsidy legislation to address state induced market distortions", 4 October 2017 available at <https://ec.europa.eu/commission/presscorner/detail/en/MEMO_17_3703> (last accessed 26 February 2023).

[32] See Till Müller-Ibold and Christoph Herrmann, "Die Entwicklung des Europäischen Außenwirtschaftsrechts" (2018) 18 *Europäische Zeitschrift für Wirtschaftsrecht* 749, 753 ff; Wolfgang Müller, "The EU's New Trade Defence Laws: A Two Steps Approach" in Marc Bungenberg, *et al.* (eds) *The Future of Trade Defence Instruments* (Springer, 2018) 45; extensively Patricia Trapp *The European Union's Trade Defence Modernization Package* (Springer, 2022).

Regulation,[33] relevant international standards, such as ILO conventions and multilateral environmental regulations, "should be taken into account, where appropriate". Although the legal obligation to take sustainable development concerns into account remained weak,[34] the Modernisation Regulation presented a clear step towards linking trade defence to the OSA's principle of sustainable development. Indeed, in the imposition of anti-dumping duties the Commission did subsequently consider the competitive advantage of Chinese producers arising from less stringent environmental requirements.[35] It seems that the opportunity to link anti-dumping strongly to the OSA's principle of sustainability and fairness was not yet seized, but the first step was taken.

At the enforcement level, the EU Commission has also tightened the reins and broken new ground by imposing duties on imports from Egypt to offset subsidies from China ("third country subsidies"), and has subsequently continued this practice in other cases.[36] The legality of this measure was recently confirmed by the General Court.[37] Finally, the appointment of a Chief Trade Enforcement Officer is generally intended to strengthen the enforcement of the EU's treaty-based and autonomous trade rules in the sense of a more "robust" trade policy.[38] Whilst still rooted in the realm of "traditional" trade policy instruments that are governed by WTO rules, these policy changes try to fine-tune the trade policy arsenal more to the "China challenge" and tackle particular situations that are the result of China's industrial policies.

2.2.2 Tightening of export controls

While export controls are a geoeconomic instrument used intensively by the US in its relations with China, the EU is constrained in specific ways by its primary legal framework. On the one hand, until the Lisbon Treaty, trade in services (which can also be subject to export controls, e.g. as assistance) was not under the exclusive competence of the EU. On the other hand, under Article 4(2), second and third sentences TEU, the protection of national security is a matter for the Member States. The control of trade in arms, ammunitions and war material is therefore largely (though not entirely[39]) excluded from the obligations of Union law, as is evident from Article 346(1)(b) TFEU. However, the EU is responsible for regulating trade in so-called "dual-use goods".[40] The relevant regulation[41] creates a Europe-wide system of export control in which

[33] Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union [2017] OJ L 338/1.

[34] Pieter Van Vaerenbergh, "The EU's Commitment to Social and Environmental Standards in its Modernised Trade Defence Instruments" (2022) 4 *Zeitschrift für europarechtliche Studien* 843, 846.

[35] Commission Implementing Regulation (EU) 2022/191 of 16 February 2022 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China [2022] OJ L 36/1, paras. 469-470; see also Van Vaerenbergh, *op cit.* (n 34).

[36] E.g. Commission Implementing Regulation (EU) 2022/433 of 15 March 2022 imposing definitive countervailing duties on imports of stainless steel cold-rolled flat products originating in India and Indonesia and amending Implementing Regulation (EU) 2021/2012 imposing a definitive anti-dumping duty and definitively collecting the provisional duty imposed on imports of stainless steel cold-rolled flat products originating in India and Indonesia, [2022] OJ L88/24; see Herrmann and Müller-Ibold (2021), *op cit.* (n 25) 102, Müller-Ibold and Herrmann, *op cit.* (n 25) 1087.

[37] Joined Cases T-480/20 and T-540/20, *Hengshi Egypt Fiberglass Fabrics and Jushi Egypt for Fiberglass Industry v Commission Judgments* [2023] ECLI:EU:T:2023:90.

[38] European Commission, "Chief Trade Enforcement Officer" available at <https://policy.trade.ec.europa.eu/enforcement-and-protection/chief-trade-enforcement-officer_en> (last accessed on 20 December 2022); see also Wolfgang Weiß and Cornelia Furculita, "The EU in Search for Stronger Enforcement Rules: Assessing the Proposed Amendments to Trade Enforcement Regulation 654/2014" (2020) 23(4) Journal of International Economic Law 865, 866.

[39] Joined Cases C-284/05, C-294/05, C-372/05, C-387/05, C-409/05, C-461/05 and C-239/06. *Commission v Finland, Sweden, Germany, Italy, Greece* and *Denmark* [2009] ECLI:EU:C:2009:778.

[40] Case C-83/94 *Leifer and Others* [1995] ECLI:EU:C:1995:329, para. 11.

[41] 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, [2021]OJ L 206/1.

the Member States continue to have the decisive decision-making powers. With its amendment in September 2021 after about ten years of preparatory work,[42] it did not only considerably expand export controls under EU law[43] but also strengthened the Union's grasp on the trade in goods that might endanger its geopolitical resilience in the long run. Yet, making more aggressive use of export controls and restrictions may also backfire, when China follows the example in the fields where it has a particular leverage, such as with regard to critical raw materials like lithium or components needed in the solar industry.

2.2.3 Amendment to the trade remedies regulation

The Treaty of Lisbon introduced an important structural provision for trade policy in Article 207(2) TFEU, the importance of which for the interinstitutional relations is still sometimes misunderstood.[44] According to this provision, the Parliament and the Council, acting in accordance with the ordinary legislative procedure, shall adopt the regulations laying down the framework for implementing the common commercial policy (CCP). Previously, the European Parliament had no say at all in EU trade policy, as provided for in primary law.[45] However, such a right was not intended to apply to all measures, which were often very technical and related to individual cases, but only to the "framework". As a result, on the one hand, implementing powers have been largely transferred to the Commission (including for matters that previously had to be decided by the Council, e.g. in the area of TDI) and the comitology procedure has been applied to trade policy in this respect. This does not change too much with a view to the practice of adopting trade remedies or legal challenges against it, but it reflects a certain perception of de-politicisation of the administration of trade remedies in the noughties. On the other hand, it also necessitated the introduction of a "framework" and thus a legal basis in secondary law for the many different individual measures that trade policy entails. While not being uncontested,[46] according to the correct legal opinion also prevailing in the institution's practice,[47] the adoption of individual measures on the basis of Article 207(2) TFEU is no longer possible, or if it is possible, then only through the ordinary legislative procedure, which is often impracticable.

The increase in customs duties, which is regularly used as a retaliatory measure in the context of trade disputes ("suspension of concessions"), therefore required a legal basis,[48] which was created in 2014 with the so-called Trade Retaliation or Trade Enforcement Regulation.[49] The blockade of the WTO Appellate Body by successive US administrations has rendered the Appellate Body non-functional, meaning that any WTO

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[42] Going back to the European Commission's 2011 Green Paper, COM(2011) 393 final.
[43] Karolien Vandenberghe, "Dual-Use Regulation 2021/821: What's Old & What's New in EU Export Control" (2021) 16(9) *Global Trade and Customs Journal* 479.
[44] Angelos Dimopoulos, "The Common Commercial Policy after Lisbon: Establishing Parallelism Between Internal and External Economic Relations?" (2008) 4 *Croatian Yearbook of European Law and Policy* 101, 126–128.
[45] *ibid.* 123; Rudolf Streinz, Christoph Ohler, and Christoph Herrmann *Der Vertrag von Lissabon zur Reform der EU,* 3rd ed. (Beck, 2010) 152 ff.
[46] Thomas Cottier and Lorena Trinberg, "Art. 207" in Hans Von der Groeben, Jürgen Schwarze, and Armin Hatje, Europäisches Unionsrecht: EUV/AEUV, 7th ed. (Beck, 2015), para. 66.
[47] Streinz, Ohler, and Herrmann, *op cit* (n 45) 152; Till Müller-Ibold, "Common Commercial Policy After Lisbon: The European Union's Dependence on Secondary Legislation" in Marc Bungenberg and Christoph Herrmann (eds) *Common Commercial Policy after Lisbon* (Springer, 2013) 145, 158 ff.; Wolfgang Weiß, "Art. 207" in Eberhard Grabitz, Meinhard Hilf, and Martin Nettesheim (eds) *Das Recht der EU – AEUV*, 77th ed. (Beck, 2022), para 113; Michael Hahn, "Art. 207" in Christian Calliess and Matthias Ruffert (eds) *EUV/AEUV*, 6th ed. (Beck, 2022) 1955, para. 97 ff.
[48] Not least because of Art. 52 (1) Charter of Fundamental Rights of the EU.
[49] Regulation (EU) No 654/2014 of the European Parliament and of the Council of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules and amending Council Regulation (EC) No 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization [2014] OJ L 189/50.

member can avoid a panel report against it from being adopted by the Dispute Settlement Body (DSB) simply by appealing the report "into the void"[50]. Under the WTO Dispute Settlement Understanding (DSU), this hinders the authorisation of a withdrawal of concessions to coerce the losing member to comply with the adverse "ruling" of the panel. Following an amendment to the Trade Enforcement Regulation[51] in 2021, Art. 3 aa now provides for the suspension of concessions and the imposition of retaliatory tariffs where the EU has successfully brought a case against another WTO member before a WTO panel but the losing member appeals "into the void" (as well as in Art. 3 bb for comparable situations in dispute settlement proceedings under bilateral trade agreements). One could argue that the expansion of trade remedies to circumvent the WTO dispute settlement procedure deviates from the purported "renewed […] multilateralism"[52] as part of the OSA. Yet, the commitment is not unconditional. It emphasises the "EU's preference for international cooperation and dialogue, but also its readiness to combat unfair practices and use autonomous tools to pursue its interests where needed."[53] Furthermore, the EU has also created – with trading partners – the Multi-Party Interim Appeal Arbitration (MPIA) mechanism[54] which reflects its commitment to openness and multilateralism.

2.2.4 Framework for investment screening

A number of Member States have had instruments to control or block foreign investment for years or even decades.[55] As of 2022, 18 out of 27 EU Member States have introduced an investment screening mechanism and seven more are in the legislative process discussing to do so.[56] At the beginning of the millennium, Germany first introduced a sector-specific investment control, which applies to the industrial sectors covered by the exemption under Art. 346(1)(b) TFEU.[57] In 2009, a cross-sectoral general control of third-country investment was introduced, but it initially applied only to holdings of 25% or more and was relatively weak.[58] However, with the transfer of exclusive competence for foreign direct investment to the EU by the Lisbon Treaty, this control was exposed to doubts under EU law in two respects: on the one hand, in terms of competence[59] (for

[50] Joost Pauwelyn, "WTO Dispute Settlement Post 2019: What to Expect?" (2919) 22(3) *Journal of International Economic Law* 297, 303.

[51] 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 [2021] OJ L 49/1.

[52] European Commission, "Europe's moment: Repair and prepare for the next generation", COM(2020) 456 final.

[53] European Commission, "Trade Policy Review – An Open, Sustainable and Assertive Trade Policy", COM(2021) 66 final, 5.

[54] https://wtoplurilaterals.info/plural_initiative/the-mpia/.

[55] As of 2008, all 39 OECD countries already had some sort of limited foreign investment control in place with respect to critical infrastructure, see OECD, "Protection of 'critical infrastructure' and role of investment policies relating to national security", May 2008, available at: <https://www.oecd.org/daf/inv/investment-policy/40700392.pdf> (last accessed 23 February 2023), 7; see also Jonathan Bonnitcha, "The return of investment screening as a policy tool", IISD Analysis (2020) available at <https://www.iisd.org/itn/en/2020/12/19/the-return-of-investment-screening-as-a-policy-tool-jonathan-bonnitcha/> (last accessed 23 February 2023).

[56] European Commission, "Second Annual Report on the screening of foreign direct investments into the Union", COM(2022) 433 final, 9; from September 2023 onwards, Estonia will be the 19th Member State actively screening FDI, see Piibe Lehtsaar, Vladislav Leiri, and Jürgen Adamson, "Estonia will start screening foreign investments from September 2023", Sorainen (2023), available at <https://www.sorainen.com/estonia-will-start-screening-foreign-investments-from-september-2023/> (last accessed 23 February 2023).

[57] Elftes Gesetz zur Änderung des Außenwirtschaftsgesetzes und der Außenwirtschaftsverordnung vom 23. Juli 2004 (BGBl. 2004 I 1859).

[58] Dreizehntes Gesetz zur Änderung des Außenwirtschaftsgesetzes und der Außenwirtschaftsverordnung vom 18. April 2009 (BGBl. 2009 I 770).

[59] Wenhua Shan and Sheng Zhang, "The Treaty of Lisbon: Half Way toward a Common Investment Policy" (2010) 21(4) *European Journal of International Law* 1049, 1061; Christoph Herrmann, "Die Zukunft der Mitgliedstaatlichen Investitionspolitik nach dem Vertrag von Lissabon", (2010) 6 *Europäische Zeitschrift für Wirtschaftsrecht* 207, 211.

the related case of bilateral investment *protection agreements* of the member states with third countries, the EU had deemed re-delegation of competence necessary in 2012 in the so-called "Grandfathering Regulation"[60]), and, on the other hand, in terms of compatibility with the free movement of capital, which also applies to third countries.[61]

These doubts ultimately made it risky for Member States to tighten control – which was nevertheless deemed necessary, not least because of cases such as the Chinese takeover of KUKA. A joint letter from Germany, France, and Italy in 2017 led the Commission to propose the adoption of the *Investment Screening Regulation*[62] in March 2019.[63] This regulation – based on Art. 207(2) TFEU – partially delegates – even if not as explicitly as the "Grandfathering Regulation" – the competence for investment screening back to the Member States (insofar as it is not already their responsibility under Art. 4(2) TEU, Art. 65 TFEU and Art. 346(1)(b) TFEU). By specifying the criteria of "security or public order" as grounds for justification with factors like artificial intelligence (Art. 4(1)(b)) or personal data (Art. 4(1)(d)), the regulation goes beyond the traditional criteria recognised by case law of the Court of Justice on the fundamental freedoms. Applying the OSA concept to this area of trade policy therefore allows for a gradually widening of the terms "security or public order" that are traditionally interpreted restrictively in the EU legal order.[64] Whereas purely economic purposes were never recognised as suitable means of justifying restrictions on fundamental freedoms,[65] more arguments in favour of industrial policy considerations start to emerge. This would, however, mark the beginning of a slippery slope towards protectionism, filling security-related exception clauses with economic ends in disguise of resilience and independence. Whether this deviation from the stricter case law of the Court of Justice – in particular on the free movement of capital – is permissible, is disputed, as is the question of whether the Investment Screening Regulation also covers capital transactions (or only establishments).[66]

In Germany, the Regulation was used as an opportunity to reform the existing screening mechanisms.[67] Investment screening has been significantly tightened, both in terms of the wording of the law and the ordinance, and in terms of enforcement practice.[68] In October 2022, the effects of these changes were vividly illustrated

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[60] Regulation (EU) No 1219/2012 of the European Parliament and of the Council of 12 December 2012 establishing transitional arrangements for bilateral investment agreements between Member States and third countries [2012] OJ L 351/40.

[61] Aurdrone Steiblyte and Jonahan Tomkin, "Article 63 TFEU" in Manuel Kellerbauer, Marcus Klamert, and Jonathan Tomkin (eds) *The EU Treaties and the Charter of Fundamental Rights: A Commentary* (Oxford University Press, 2019), para 5; Christoph Herrmann, "Europarechtliche Fragen der deutschen Investitionskontrolle" (2019) 3 *Zeitschrift für Europarechtliche Studien* 429, 439.

[62] 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 [2019] OJ L 79l/1.

[63] Teoman M Hagemeyer-Witzleb and Steffen Hindelang, "Recent Changes in the German Investment Screening Mechanism in Light of the EU Screening Regulation" (2021) 2(2) *Central European Journal of Comparative Law* 39, 42; Herrmann, *op cit.* (n 61) 459, especially fn. 141.

[64] Case C-54/99 Église de scientologie [2000] ECLI:EU:C:2000:124, para. 17.

[65] e.g. Case C-39/11 *VBV – Vorsorgekasse AG* [2012] ECLI:EU:C:2012:327, para 29.

[66] Stephan Schill, "The European Union's Foreign Direct Investment Screening Paradox: Tightening Inward Investment Control to Further External Investment Liberalization", (2019) 46(2) *Legal Issues of Economic Integration* 105, 117–120; Herrmann, *op cit.* (n 61) 441 ff.; Steffen Hindelang and Teoman M Hagemeyer, "Enemy at the Gates?" (2017) 22 *Europäische Zeitschrift für Wirtschaftsrecht* 882, 885 ff.; Marcus Klamert and Stefan Bucher, "Investment Screening in der EU" (2021) 8 *Europäische Zeitschrift für Wirtschaftsrecht* 335, 340.

[67] The German investment screening mechanism is regulated in the Foreign Trade and Payments Act ("AWG") and the Foreign Trade and Payments Ordinance ("AWV"), both made available in an unofficial English translation by the Federal Ministry for Economic Affairs and Climate Action at <https://www.gesetze-im-internet.de/englisch_awg/index.html> and <https://www.gesetze-im-internet.de/englisch_awv/>, respectively; the reform was introduced by the Erstes Gesetz zur Änderung des Außenwirtschaftsgesetzes und anderer Gesetze vom 10. Juli 2020 (BGBl. 2020 I 1637).

[68] Hagemeyer-Witzleb and Hindelang, *op cit.* (n 63).

by the highly publicised (partial) bans on the acquisition of part of the port of Hamburg and two chip companies by Chinese investors.[69] Further tightening of the German and European legal framework is on the agenda, including ideas for the screening of outbound investments.[70] This is one of the areas where the OSA concept is most vividly visible. It directly addresses the problem of strategic acquisitions of undertakings and technologies by third country investors and allows for decisions that openly mix security and industrial policy rationales.

2.2.5 Public procurement

At the international level, public procurement law is governed by the plurilateral Agreement on Government Procurement (GPA) respective lists of concessions).[71] Traditionally, EU procurement law has gone beyond this by granting bidders from non-GPA contracting parties free access to the EU procurement market, even if their home markets do not offer market access to EU bidders.[72] This unilateral openness, which goes beyond international treaty obligations, can now be made subject to reciprocity. The *International Procurement Instrument* (IPI), based on an initial proposal from 2012, entered into force on 29 August 2022.[73] In a three-step procedure, bidders from third countries can now be denied access to public contracts in the EU if the third country itself discriminates against market access in its public procurement law.[74]

In addition, the Regulation on Third Country Subsidies Distorting the Internal Market (FSR), which was adopted at the end of November 2022, contains notification obligations in public procurement procedures if a bidder has received financial contributions of at least EUR 4 million from a third country and the estimated value of the contract exceeds EUR 250 million (Art. 27 et seq. FSR). The possible responses range from obligations on the part of the bidder to the Commission prohibiting the award of the contract.[75] In particular in relation to China, the IPI (and the respective FSR provisions) will play a key role. If China is not willing to open its own procurement market, the EU will have the power to make bids by Chinese companies – e.g. for major infrastructure construction contracts – a lot more difficult if not impossible. It is in this respect that both the IPI and the FSR form part of the EU's response to protect itself against economic coercion and unfair trade practices, placing themselves at the heart of OSA.[76]

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[69] Christoph Herrmann, "Hamburger Hafenrundfahrt im Regierungsviertel", Verfassungsblog 25 October 2022, available at https://verfassungsblog.de/hamburger-hafenrundfahrt-im-regierungsviertel/ (last accessed on 26 February 2023); BMWK, "Chipfabrik Elmos darf nicht an chinesischen Investor verkauft werden – Bundeskabinett untersagt Verkauf", Press release, 9 November 2022, available at <https://www.bmwk.de/Redaktion/DE/Pressemitteilungen/2022/11/20221109-chipfabrik-elmos-darf-nicht-an-chinesischen-investor-verkauft-werden.html> (last accessed 26 February 2023); see also Louis Westendarp, "Germany vetos Chinese chip plant takeover", POLITICO.eu, 9 November 2022, available at <https://www.politico.eu/article/germany-vetos-chinese-chip-plant-takeover/> (last accessed 26 February 2023).

[70] Christoph Herrmann and Tim Ellemann, "Weder Festung Europa, noch Gefängnis Europa", Verfassungsblog, 29 November 2022 available at <https://verfassungsblog.de/weder-festung-europa-noch-gefangnis-europa/> (last accessed 26 February 2023).

[71] Robert D Anderson and Sue Arrowsmith, "The WTO Regime on Government Procurement: Past, Present and Future" in Sue Arrowsmith and Robert D Anderson (eds) *The WTO Regime on Government Procurement* (Cambridge University Press, 2011), 3.

[72] Kamala Dawar, "The 2016 European Union International Procurement Instrument's Amendments to the 2012 Buy European Proposal: A Retrospective Assessment of Its Prospects" (2016) 50 (5) *Journal of World Trade* 845, 846–848.

[73] Regulation (EU) 2022/1031 of the European Parliament and of the Council of 23 June 2022 on the access of third-country economic operators, goods and services to the Union's public procurement and concession markets and procedures supporting negotiations on access of Union economic operators, goods and services to the public procurement and concession markets of third countries (International Procurement Instrument – IPI) [2021] OJ L 173/1.

[74] Dawar, *op cit.* (n 72) 145.

[75] Marc Bungenberg, Christoph Herrmann, and Till Müller-Ibold, "Introduction" (2022) 3 *Zeitschrift für Europarechtliche Studien* 421, 422; Caspar Ebrecht, "Foreign Subsidies Regulation and EU International Procurement" (2022) 3 *Zeitschrift für Europarechtliche Studien* 487, 491; Dawar, *op cit.* (n 72) 145–147.

[76] See also Luuk Molthof, Dick Zandee, and Giulia Cretti, "Unpacking open strategic autonomy – From concept to practice", Clingendael Report (2021) available at <https://www.clingendael.org/sites/default/files/2021-11/Unpacking_open_strategic_autonomy.pdf> (last accessed 23 February 2023) 12.

2.2.6 Foreign subsidies

The FSR is an even more comprehensive response to the distortions of competition in the internal market that can result from subsidies in third countries. The green transition, in particular, imposes huge costs on undertakings and may lead to significant competitive disadvantages between economies. Decarbonisation as well as digitalisation shift demand from fossil fuels and heavy machinery to natural resources necessary for electrification and batteries, as well as computer chips – areas in which China has enormous market power. Furthermore, the ongoing fundamental economic transformation makes undertakings race for market shares in new technologies, in order to secure lasting dominance and advantages. Last but not least, the transformation to renewable energies requires enormous investments at a time where traditional fossil technologies are still significantly less costly. Subsidies are attractive policy tools for governments to tackle these challenges and play, therefore, a key role in industrial policies in China, but also in market economies. The recent Inflation Reduction Act in the US is a case in point, as well as the Net Zero Industry Act in the EU. Whilst a subsidy race *between* EU member states is prevented by the EU State aid regime, no comprehensive rules are in place for international trade. The WTO legal framework is only applicable to subsidies for goods traded, but not for services or for investments or participation in public tender procedures.

The Investment Screening Regulation allows state aid to be considered as a form of state control, which in turn can be understood as a threat to security and public order (Art. 4(2)(a) Investment Screening Regulation). However, this decision is left to the Member States. It only applies to acquisitions of companies and is ultimately not aimed at protecting competition, but public order and security (possibly "enriched" by industrial policy considerations, which also tend to run counter to the logic of competition law).

The FSR, on the other hand, deals with three constellations: Mergers (Art. 17 et seq. FSR), public procurement procedures (Art. 26 et seq. FSR) and other constellations which are modelled on the repressive *ex officio* state aid control (Art. 7 et seq. FSR). It thus closes the gap between EU state aid law, which only applies to aid granted by Member States, and anti-subsidy law under foreign trade law, which only applies to imports of goods. Both procedurally and substantively, the concepts of foreign trade law, competition law and state aid law get intermingled.[77] As a geoeconomic tool, the FSR allows the EU Commission to scrutinise foreign acquisitions of EU undertakings as well as subsidised bidding in large infrastructure projects. Combined with the IPI and the Investment Screening, the FSR significantly enhances the capacity of the EU to limit Chinese influence within the internal market.

2.2.7 Economic coercion

The so-called "Anti-Coercion Instrument" (ACI)[78] has not yet been adopted at the time of writing, but is still under discussion in the trilogue. With this instrument, the EU wants to counter economic coercion by third countries against individual Member States or the EU as a whole. It is designed to protect EU and Member States' sovereign decision-making processes. One example concerns China's ban on imports of Lithuanian products or products containing parts and components from Lithuania due to the opening of a Taiwanese representative office in the Lithuanian capital Vilnius at the end of 2021. Although the EU has initiated WTO dispute settlement proceedings against this measure,[79] the WTO dispute settlement procedure

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[77] Patricia Trapp, "The Procedural Framework of the Proposal for a Regulation on Foreign Subsidies" (2022) 3 *Zeitschrift für Europarechtliche Studien* 495, 497 ff.; Till Müller-Ibold, "The Draft Foreign Subsidies Regulation" (2022) 3 *Zeitschrift für Europarechtliche Studien* 431, 434 ff.; Wolfgang Weiß, "Die Kommissionsaufsicht über Subventionen aus Drittstaaten von Amts wegen im Vergleich zur Beihilfenaufsicht" (2022) 11 *Europäische Zeitschrift für Wirtschaftsrecht* 507; Ullrich Soltész, "'Game changer' für die M&A-Praxis: Die Verordnung über Drittstaatensubventionen" (2022) 8 *Neue Zeitschrift für Kartellrecht* 425.

[78] European Commission, 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, COM(2021) 775 final.

[79] *China – Measures Concerning Trade in Goods and Services*, Request for the establishment of a panel by the European Union, WT/DS610/8, 9 December 2022, available at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/610-8.pdf&Open=True> (last accessed on 20 December 2022).

is very lengthy before retaliation is possible.[80] With the Appellate Body currently paralysed, it is furthermore impossible to know whether any panel report can ultimately be adopted by the DSB. The ACI, on the other hand, allows economic retaliation without prior WTO or FTA dispute settlement. The only requirement is that a third country must be found to be exerting undue economic pressure and attempts must be made – unsuccessfully – to remove this pressure through negotiations or other means.[81] In a similar vein to the trade remedies amendment, the ACI shows the difficult interplay between the diverging pillars of OSA. On the one side, the EU aims at strengthening the multilateral rule-based system. On the other, it finds itself facing geopolitical actors steering away from this once shared understanding. Hereby, the EU appears to find a middle ground and each new instrument – like the ACI – must be reviewed individually with respect to the balance struck.

2.2.8 Carbon border adjustment mechanism

While not directly attributable to the concept of OSA, the Carbon Border Adjustment Mechanism (CBAM), which was agreed in December 2022, is nonetheless related to it.[82] Under this mechanism, imported products from particularly emission-intensive industries (iron and steel, cement, aluminium, fertilisers, electricity and hydrogen) will under certain circumstances be subject to the costs that would have been incurred in the production of these goods under the EU Emissions Trading Scheme (ETS), unless comparable pricing is applied in the home country. In return, the free allocation of emission allowances to the industries concerned will end as part of the reform of the EU ETS, which was also agreed politically shortly before Christmas 2022.[83] As a consequence, CBAM addresses the competitive disadvantage that EU producers face in domestic markets, but not vis-à-vis third country or world markets. It remains to be seen whether this will be enough to prevent production being relocated to countries where there is no comparable CO2 pricing. At the same time, the G7 countries have established a Climate Club to bring together ambitious countries in the fight against climate change.[84]

3. The problems of open strategic autonomy under Union and world trade law

The transformation of the CCP from a mere *window of the customs union* to a geoeconomic foreign trade policy aimed at defending and disseminating the values and interests of the EU raises numerous questions, both in terms of Union law and international economic law, only a few of which can be addressed here.

3.1 The open strategic autonomy under the EU's constitutional order

In the "*Rechtsgemeinschaft*" (*Hallstein*), an EU based on the rule of law, legislation, and the enforcement of EU law by the Union institutions

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[80] Arie Reich, "The effectiveness of the WTO dispute settlement system: A statistical analysis", EUI Working Papers LAW 11/2017 (2017) 20 ff.; see also the explanation in Wolfgang Weiß, Christoph Ohler, and Marc Bungenberg, *Welthandelsrecht*, 3rd ed. (Beck, 2022) 117 ff.

[81] Chien-Huei Wu, "The EU's Proposed Anti-Coercion Instrument: Legality and Effectiveness", (2023) 57(2) *Journal of World Trade* 297, 305; Freya Baetens and Maco Bronckers, "The EU's Anti-Coercion Instrument: A Big Stick for Big Targets", EJIL:Talk!, 19 January 2022, available at <https://www.ejiltalk.org/the-eus-anti-coercion-instrument-a-big-stick-for-big-targets/> (last accessed on 26 February 2023).

[82] On 13 December 2022, political agreement was reached between the Council and Parliament in the trialogue, see European Parliament, "Deal reached on new carbon leakage instrument to raise global climate ambition", Press Release, available at <https://www.europarl.europa.eu/news/en/press-room/20221212IPR64509/deal-reached-on-new-carbon-leakage-instrument-to-raise-global-climate-ambition> (last accessed on 20 December 2022).

[83] See Council of the EU, "EU climate action: Provisional agreement reached on Carbon Border Adjustment Mechanism (CBAM)", Press Release, 13 December 2022, available at <https://www.consilium.europa.eu/en/press/press-releases/2022/12/13/eu-climate-action-provisional-agreement-reached-on-carbon-border-adjustment-mechanism-cbam/> (last accessed 26 February 2023).

[84] "G7 Statement on Climate Club", 28 June 2022, available at <https://www.g7germany.de/resource/blob/974430/2057926/2a7cd9f10213a4819244929 42dd660a1/2022-06-28-g7-climate-club-data.pdf> (last accessed on 20 December 2022); "G7 countries establish climate club", available at <https://www.bmwk.de/Redaktion/EN/Pressemitteilungen/2022/12/20221212-g7-establishes-climate-club.html> (last accessed on 20 December 2022).

are subject to comprehensive legal and, if necessary, judicial control.[85] In the first place, there is always the question of whether the EU – in relation to the Member States – is competent to take certain measures at all. Any encroachment on the competences of the Member States renders secondary Union law unlawful.[86] In certain EU member states, such as Germany, such a measure could be challenged before the Federal Constitutional Court in the context of ultra vires review.[87] Additionally, Union secondary law must be compatible with the primary law overall. In this context, fundamental freedoms and rights naturally play a prominent role in the case of encroachments on economic freedoms.[88] Finally, Union law must be compatible with the objectives, values, and interests entrusted to the EU (Art. 2, 3, 4(2), 21 TEU, 205, 206 TFEU) and coherent as a whole (Art. 7 TFEU).

For trade policy, this has always meant that judicial review of the objectives of concrete measures against the requirements of primary law is practically impossible, because they are too disparate, partly contradictory and, of course, never all achievable at the same time.[89] In this respect, the institutions have a margin of discretion that can easily support the various geoeconomic emphases of OSA. According to Art. 3 (5) TEU, the "Union shall uphold and promote its values and interests and contribute to the protection of its citizens". Obviously, values and interests are not the same and do not always lend themselves easily to a coherent policy approach. Whilst a human rights-based policy would possibly restrict trade in goods from Xinjiang significantly, the need to import products needed for solar power installations from the very same region may be without alternative, given the circumstances.

Nevertheless, the objectives are by no means insignificant for the assessment of the individual instruments under EU law, since they determine whether the instrument in question is based on the appropriate legal foundations. The CCP has always been the subject of much controversy and jurisprudence, not least because of its early exclusivity established by the Court of Justice and the lack of parliamentary involvement prior to the Lisbon Treaty.[90] With Opinion 1/94[91] on the WTO Agreement the Court had ended the original dynamic approach to the CCP[92] that allowed EU trade policy to be adopted to the need of international commerce. In its post-Lisbon jurisprudence – notably in Opinion 2/15[93] on the competence of the EU to conclude the Trade and Investment Agreement with Singapore – the Court has returned to a somewhat more generous reading of the scope of the CCP. The increasingly geoeconomic orientation of trade policy nevertheless raises concerns: the more these trade policy *instruments* move away from a primarily trade policy *objective*, the more difficult it becomes to rely on Article 207(2) or, in the case of agreements, (3) TFEU.

In particular, the ACI, allowing for the imposition of what can only be termed as "sanctions light", is questionable because of its strong foreign policy character. In fact, the instrument appears to

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[85] Franz C Mayer, "Europa als Rechtsgemeinschaft", WHI – Paper 8/05 (2005) available at <https://www.rewi.hu-berlin.de/de/lf/oe/whi/publikationen/whi-papers/2005/whi-paper0805.pdf> (last accessed on 26 Febuary 2023).

[86] Rudolf Streinz *Europarecht*, 11th ed. (C F Müller, 2019) para. 550.

[87] Bundesverfassungsgericht, *Lissabon* [2009] BVerfGE 123, 267, para. 241; see Jürgen Bast, "Don't Act Beyond Your Powers: The Perils and Pitfalls of the German Constitutional Court's Ultra Vires Review" (2014) 15(2) *German Law Journal* 167, 168–171.

[88] Martin Höpner and Christine Haas, "Ist der Unionsgesetzgeber an die Grundfreiheiten gebunden?" (2022) *Europarecht* 165; Walter Frenz, "Grundfreiheiten und Grundrechte", (2002) *Europarecht* 603; see also broadly Vassilios Skouris, "Fundamental Rights and Fundamental Freedoms: The Challenge of Striking a Delicate Balance" (2006) 17(2) *European Business Law Review* 225.

[89] Case C-150/94 *United Kingdom v Council* [1998] ECLI:EU:C:1998:547, para. 67.

[90] Among others Case C-178/03 *Commission v Parliament and Council* [2006] ECLI:EU:C:2006:4, paras 40 *et seq*; Case C-411/06 *Commission v Parliament and Council* [2009] ECLI:EU:C:2009:518, paras 30 *et seq*; Opinion 2/00 *Cartagena Protocol* [2001] ECLI:EU:C:2001:664; Christoph Herrmann, "Die EG-Außenkompetenzen im Schnittbereich zwischen internationaler Umwelt- und Handelspolitik", (2002) 10 *Neue Zeitschrift für Verwaltungsrecht* 1168.

[91] Opinion 1/94 [1994] ECLI:EU:C:1994:384.

[92] Dimopoulos, *op cit.* (n 44) 108–109.

[93] Opinion 2/15 *EUSFTA* [2017] ECLI:EU:C:2017:376.

sidestep the cumbersome unanimity requirement and the two-stage nature of Articles 75 and 215 TFEU that burdens the EU in the application of its – typologically unclear – competence for foreign policy under the CFSP. The Investment Screening Regulation is another example, as it has to deal with Member State measures falling into the exclusive competence of the Union for the CCP, but are based on national or public security concerns, the responsibility for which remains a prerogative of the Member States. Generally, the more trade policy instruments are motivated by geoeconomic concerns, the more likely it is that they are problematic with a view to the exclusive Union competence under Art. 207 TFEU.

3.2 The open strategic autonomy from the perspective of WTO law

The EU is committed to the international *rule of law* (see only Art. 21 (1) TEU) and repeatedly proclaims the necessity of a rule-based order, especially in the area of world trade. Explicit disregard or non-recognition of rulings by WTO dispute settlement bodies as "wrong" or "unlawful" – as the US government allowed itself to do shortly before Christmas 2022 with regard to a panel report on the US Section 232 – is therefore regularly avoided by the EU. However, the attitude of the Court of Justice, which rejects the direct effect of WTO law in the EU legal order and recently "dwarfed" the exceptions accepted in the so-called *Nakajima/Fediol* ruling,[94] allows the EU institutions to commit a calculated violation of international law.

Of the instruments described above, the ACI and CBAM, in particular, as well as the reform of the Trade Retaliation Regulation, raise WTO concerns, but the EU's anti-subsidy practice vis-à-vis third country subsidies is not without problems either. The ACI is particularly problematic regarding the circumvention of the WTO dispute settlement procedure (Art. 24 DSU) and the questionable recourse to general principles of international law on retaliation in the context of the WTO.[95] The same concerns apply to the Trade Retaliation Regulation after its recent amendment.[96] The CBAM, on the other hand, is a de facto tariff-equivalent charge that is likely to fall foul of several of the core WTO commitments, such as Art. II GATT, and the selectively applied exceptions raise questions in light of the non-discrimination standards of national treatment in Art III:2 and the most-favoured-nation principle in Art. I:1 GATT.

Overall, one gets the impression of a realistic turn in EU trade policy. It is true that there is always an effort to ensure that the design and explanation of instruments are in line with international law. At the same time, the EU is increasingly entering the grey area of international law – especially WTO law – in order to avoid being completely helpless in the face of sometimes blatant violations by third countries. From the point of view of trade policy, this is understandable and perhaps indispensable for the evolving "sovereignty of Europe" that the OSA concept occasionally alludes to.[97] Whether it serves the international legal order in the medium to long term remains to be seen.

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[94] Case C-21/14 P *Rusal Armenal* [2015] ECLI:EU:C:2015:494; The CJEU traditionally held that neither the WTO agreements nor the dispute settlement reports have direct effect in EU law, except in two situations: (a) the CJEU reviews the legality of an EU measure under WTO law if the measure directly refers to the WTO law (Case C-191/82 *Fediol* [1983] ECLI:EU:C:1983:259); or (b) the EU legislature intended to implement a particular WTO obligation (Case C-69/89 *Nakajima* [1991] ECLI:EU:C:1991:186), see in more detail Kristiyan Stoyanov, "Three Decades of the Nakajima Doctrine in EU Law: Where Are We Now?" (2021) 24(4) *Journal of International Economic Law* 724.

[95] Danae Azaria, "Trade Countermeasures for Breaches of International Law Outside the WTO" (2022) 71(2) *International and Comparative Law Quarterly* 389.

[96] Christoph Herrmann and Caroline Glöckle, "Der drohende transatlantische 'Handelskrieg' um Stahlerzeugnisse und das handelspolitische "Waffenarsenal" der EU", (2018) 12 *Europäische Zeitschrift für Wirtschaftsrecht* 477, 482; Jens Brauneck, "Kann ein neuer EU-Multilateralismus das WTO-Recht bestimmen?", (2019) 10 *Europäische Zeitschrift für Wirtschaftsrecht* 397, 403 ff..

[97] e.g. European Commission, "2020 Strategic Foresight Report – Charting the course towards a more resilient Europe", COM(2020) 493 final, referring to "Europe's economic sovereignty" (p. 19) and "technological sovereignty" (p. 30, 34).

4. Conclusion

Changing times demand different policy responses. The OSA concept and the numerous autonomous instruments that are being added to the EU's trade policy toolbox under this heading, indeed strengthen the capability of the Union to deal with the challenges brought about by increased geoeconomic conflicts, the twin transition, as well as the systemic rivalry by China. Yet, trade policy alone will not be sufficient to ensure that the EU preserves its autonomy to pursue a foreign policy in line with the Union's interests and values. The instruments described above may play a significant role. More action is needed, though, and the Commission has put forward further initiatives under the heading of a "Green Deal Industrial Plan".[98] Besides a significant adaptation of the EU State aid regime to the green transition challenges, it also features trade elements, in particular in the proposed Critical Raw Materials Act.[99]

Yet, the geoeconomic reorientation of the EU's trade policy is not unproblematic from a legal point of view. Whilst the Lisbon Treaty has indeed created the primary legal basis for a coherent and effective EU foreign economic policy, including a reorientation towards geoeconomic aspects, fundamental problems of competence allocation, policy orientation and decision-making remain, albeit in a new guise. This is not so much a question of the dichotomy between "trade" and "investment protection" agreements, which was triggered by the ruling of the Court of Justice in Opinion 2/15. Rather it appears that the European Union still lacks a suitable primary law framework for the formulation of a coherent and effective, genuinely *common* foreign policy,[100] which could then also make use of the trade policy instruments that undoubtedly fall within the exclusive competence of the EU. This would encompass not only respecting the prerogatives of the Member States in the pursuit of their public security and order, and in particular their national security, but also extend to developing a concept of a common security and public order, as well as an EU security, which could serve as a yardstick, for example, in an investment screening procedure. Until this succeeds, the EU's geoeconomic "voice of power" will be audible, but will remain delicate and weak. From an international economic law point of view, at least some of the tools the EU has found to be useful are in a grey area. Not only is the EU internationally bound by the WTO agreements and other international treaties. Respect for international law and multilateralism are also constitutional values under EU law. Yet, as the Court of Justice has repeatedly held: Union law does not require the institutions to obey international law under all circumstances. It is the geoeconomic turn of our times where the denial of direct effect by the Court has its merits.

At the same time, the loading of trade policy with security arguments and the – for the time being – indispensable increase of the Member States' role that entails in what traditionally is an exclusive competence of the Union, also endangers the internal market. Similarly, as, for example, in the field of State aid, the more or less rigid use of instruments, such as investment screening by the Member States, may quickly become a national industrial policy instrument. Indications for that kind of thinking were clearly visible in the German discussion about the investment of COSCO in the Hamburg port, where several commentators pointed to similar engagements of COSCO in other EU ports. For the EU, the task is not only to strengthen the commercial policy arm of the EU's open strategic autonomy, but to also make sure that this does not come at costs for the integrity of the internal market.

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[98] European Commission, "A Green Deal Industrial Plan for the Net-Zero Age", COM(2023) 62 final.
[99] Proposal for a Regulation of the European Parliament and of the Council establishing a framework for ensuring a secure and sustainable supply of critical raw materials and amending Regulations (EU) 168/2013, (EU) 2018/858, 2018/1724 and (EU) 2019/1020, COM(2023) 160 final.
[100] On this, see also Streinz, *op cit.* (n 86), para 1336.