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 action[3] (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, 'Geoeconomics in a Changing Global Order', in Milan Babić, Adam Dixon, and Imogen Liu (eds.), *The Political Economy of Geoeconomics* (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 Geoeconomics' (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] Sjorre 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 countermeasures). 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 turn[25] 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 2020[34] 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.

Communication[35]) 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/.

caused by the Chinese form of state capitalism and state-led economic system allegedly leading to unfair competition. Concerns about the systemic issues raised by China are widespread among nations. China's conscious geostrategic and geoeconomic behaviour systematically expands its world market position and exerts pressure on WTO members to respond by behaving geostrategically and geoeconomically themselves. China's specific economic model affects the very foundations of the international trade order. With the advent of the WTO and in particular its judicialized dispute settlement with an ensuing compulsory implementation phase, trade relations and resulting disputes had been perceived – quite commonly – as legalized and depoliticized, but this perception of trade rules is changing fundamentally nowadays. In this context, the new EU trade policy seeks to significantly expand the EU's room for manoeuvre in this area of policy and to gain more autonomy by strengthening the enforcement of its trade rights within both multilateral and bilateral settings and by ensuring more assertively, including unilaterally, the representation of its interests in order to protect its economy from unfair trade practices. Furthermore, the new turn aligns trade policy with the EU's general political priorities in the areas of sustainability, climate change, the digital economy, and economic and political security. The European Commission is thus outlining the trade policy consequences of its central political projects, first and foremost the European Green Deal.[45]

Finally, the recent reorientation of trade policy echoes a longer-standing trend. The new EU trade policy redefinition summarizes and confirms a reorientation of trade policy practice already present since several years before 2019, as trade policy had been refocused on a more effective implementation and enforcement of trade rules and the benefits they bring to market access for the EU industry. After enforcement had not been a priority in EU trade policy,[46] things started changing as of 2012 when what later became the so-called Trade Enforcement Regulation 654/2014[47] was proposed, which regulates the exercise of EU

[45] European Commission, Communication on the European Green Deal, COM(2019) 640 final.

[46] Simon J. Evenett, 'Paper Tiger? EU Trade Enforcement as If Binding Pacts Mattered' (2016) New Direction, The Foundation for European Reform, pp. 17–39; Marise Cremona, 'A Quiet Revolution: The Common Commercial Policy Six Years after the Treaty of Lisbon' (2017) Report No. 2, Swedish Institute for European Policy Studies, p. 56.

[47] Regulation (EU) 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

rights for the enforcement of international trade rules under WTO law and bilateral trade agreements and provides for the 'appropriate instruments to ensure the effective exercise of the Union's rights under international trade agreements'[48] and when a reform of trade defence instruments was initiated with a view to their greater effectivity.[49] In 2015, the European Commission's Communication 'Trade for All' announced that it will step up the enforcement and implementation of the EU trade rights and ensure that its partners live up to their promises, including for the benefit of small businesses, consumers, and workers.[50] In this Communication, effectiveness of trade policy was identified as one of its three key objectives, alongside transparency and value orientation,[51] and the Commission committed itself to producing annual FTA implementation reports, six of which have already been published since 2016.[52] Effective implementation of trade policy then became one of four strategic objectives of the European Commission for 2016–2020.[53] Strengthening the enforcement of trade rules also was and still is a core issue in the debate on how to improve the implementation of trade and sustainable development (TSD) chapters in EU FTAs, that the EU had negotiated since 2010 into its FTAs and whose improvement was already part of a 2018 '15 point action plan'.[54] The policy shift also engendered changes on institutional level, as, for example, since 2018, the

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 (Trade Enforcement Regulation), OJ EU 2014 No. L 189/50, 27 June 2014.

[48] See Trade Enforcement Regulation, Preamble, recital 2.

[49] Modernisation of Trade Defence Instruments. Adapting trade defence instruments to the current needs of the European economy, COM(2013) 191. See also Section 2.1.2.

[50] European Commission, Trade for All: Towards a More Responsible Trade and Investment Policy, COM(2015) 497 final, 15-17.

[51] ibid, p. 10 ff.

[52] FTA Implementation Report 2016, COM(2017) 654 final; FTA Implementation Report 2017, COM(2018) 728 final, FTA Implementation Report 2018, COM(2019) 455 final, FTA Implementation Report 2019, COM(2020) 705 final; FTA Implementation Report 2021, COM(2021) 654 final. Since 2022, the Report is called Implementation and Enforcement Report, COM (2022) 730 final.

[53] European Commission, DG Trade, 'Strategic Plan 2016-2020', 12 https://commission.europa.eu/system/files/2018-01/trade_sp_2016_2020_revised_en.pdf.

[54] FTA Implementation Report 2017, p. 39; For the Action Plan see NonPaper of the Commission Services, Feedback and Way Forward on Improving the Implementation and Enforcement of Trade and Sustainable Development Chapters in EU Free Trade Agreements, 26 February 2018; FTA Implementation Report 2018, p. 26.

Commission has been making use of bilateral dispute settlement mechanisms on several occasions,[55] including for solving a labor dispute under the EU–Korea FTA. In July 2020 finally, a Chief Trade Enforcement Officer was appointed on a position officially created already at the end of 2019. This position is in particular responsible for monitoring and enforcing trade agreements, including sustainable development (i.e. environmental and labour) obligations, overseeing EU trade defence work, and coordinating dispute settlement procedures.[56]

All in all, the most recent reorientation of trade policy points to a more geopolitical EU trade policy than ever before. The geopolitical thinking of the Global Strategy for a 'Stronger Europe' became implemented and expanded in trade policy,[57] and new instruments thereof were put in place which also reflect a turn towards a geoeconomic stance.[58]

1.3 Methodology

The present analysis of the new turn in the EU trade policy focuses on an exploration and assessment of its consequences for the EU's multilateral stance and commitment to international law and respect for its international, in particular trade law, obligations. Hence the research is pivotally approaching its topic from a legal point of view. Consequently the research methods used are legal doctrinal ones that survey and assess the

[55] For more on these disputes, see European Commission, 'Disputes under Bilateral Trade Agreements' https://policy.trade.ec.europa.eu/enforcement-and-protection/dispute-settlement/bilateral-disputes_en /; Cornelia Furculita, 'The Time of PTA Dispute Settlement Mechanisms Might Have Come', in Manfred Elsig, Rodrigo Polanco, and Peter Van den Bossche (eds.), *International Economic Dispute Settlement: Demise or Transformation?* (New York: Cambridge University Press, 2021), pp. 442–469; Cornelia Furculita, *The WTO and the New Generation EU FTA Dispute Settlement Mechanisms: Interacting in a Fragmented and Changing International Trade Law Regime* (Cham: Springer, 2021), pp. 20 ff.

[56] See European Commission, 'Chief Trade Enforcement Officer', https://policy.trade.ec.europa.eu/enforcement-and-protection/chief-trade-enforcement-officer_en/.

[57] See also Couvreur, et al., 'The Good Geopolitical Trade Actor?' (2022), p. 137 f; Jan Orbie, 'EU Trade Policy Meets Geopolitics' (2021) 26(2) *EFARev* 197–202; Sophie Meunier and Kalypso Nicolaidis, 'The Geopoliticization of European Trade and Investment Policy' (2019) *JCMS* 103–113 at 106 ff; Schmitz and Seidl, 'As Open as Possible' (2023) 841.

[58] For more on this, see Sections 2.1.3 and 2.2, and Henrique Choer Moraes and Mikael Wigell, 'Balancing Dependence: The Quest for Autonomy and the Rise of Corporate Geoeconomics', in Babić, Dixon, and Liu (eds.), *The Political Economy of Geoeconomics* (2022), p. 39 f; Lavery, McDaniel, and Schmid, 'European Strategic Autonomy' (2022), pp. 69 ff; Clara Weinhardt, Karsten Mau, and Jens Hillebrand Pohl, 'The EU as a Geoeconomic Actor? A Review of Recent European Trade and Investment Policies', in Babić, Dixon, and Liu (eds.), *The Political Economy of Geoeconomics* (2022), p. 109 f.

legal content of the new EU rules adopted in the implementation of the trade policy review 2021, with a view to tensions, even collision and conflicts between EU legislation/legal acts and international law, particularly WTO law.[59] The legal interpretive doctrinal methodology for such endeavour is reflected in the customary rules of interpretation of public international law, which have been codified in Article 31 Vienna Convention on the Law of Treaties (VCLT)[60] and which are applicable also to WTO law and its dispute settlement (see Article 3.2 DSU[61]). Accordingly, international rules are to be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. Thus, grammatical-textual, contextual-systematic, and teleological approaches must be employed to the interpretation of international rules,[62] and these approaches also apply to the interpretation of EU law. For EU, primary law stems from international legal instruments. The founding treaties of what is today is EU, and all subsequent reforms, took the legal form of an international agreement entered into by the EU Member States. Even though EU law has developed considerably and establishes a genuine multi-level system of exercising public powers, which is detached and autonomous from both general international and domestic law, these rules on interpretation still apply, all the more as they also reflect the interpretive methodology within domestic legal orders.[63] There are, nevertheless, differences, first, with regard to the exact weight given to the different interpretative approaches, and second, with regard to the specific aspects of an interpretative approach. Whereas in domestic systems, preparatory texts might play an important role as they inform about the legislator's intent, and hence are the basis for a historic interpretation of rules in consideration of the legislator's intention, preparatory documents in international law only play a minor role. Under Article 32 VCLT, preparatory work is a supplementary means of interpretation

[59] For the notion of conflict of rules, see Erich Vranes, 'The Definition of "Norm Conflict" in International Law and Legal Theory' (2006) 17(2) *EJIL* 395–411.

[60] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 U.N.T.S. 331; (1969) 8 ILM 679; UKTS (1980) 58.

[61] Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401, 33 I.L.M. 1226 (1994).

[62] For more detail, see Andrea Bianchi, Daniel Peat, and Matthew Windsor (eds.), *Interpretation in International Law* (New York: Oxford University Press, 2015).

[63] Stefan Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent* (Tübingen: Mohr Siebeck, 2001), pp. 1295 ff.

only. In EU law, the preparatory documents for EU Treaties initially had no relevance in the CJEU case law in their interpretation, but this has changed in more recent times.[64] The Court, for example, relied on preparatory work of the Maastricht Treaty for the interpretation of Article 125 TFEU.[65] As the deliberations in the Convention that drafted the EU Constitutional Treaty (that became the basis for the subsequent Lisbon Reform Treaty) were made publicly available, there is even more room now for considering *travaux preparatoires*. As regards the interpretation of EU secondary law, consideration of preparatory documents is interpretive practice, and this practice by the CJEU appears to use preparatory documents merely for confirming an interpretation developed from terminological, systemic, and teleological approaches,[66] hence comparable to the legal value of *travaux preparatoires* under Article 32 VCLT. EU law has additional specific interpretive methods at its disposal. One important peculiarity of EU law interpretation is the method the CJEU developed with regard to the EU multilingualism setting out guidelines for the practical application of the principle of linguistic equality against the background of the requirement of uniform interpretation in case of linguistically divergent textual versions.[67] Another one is the highly purposive approach that gives the teleological interpretation a particular weight in interpreting EU law,[68] to which we will revert in a moment.

In order to correctly assess the new legal instruments and their capacity for conflict with international legal obligations, it is necessary for a legal review as undertaken in this book to consider the political developments and the legislator's intentions that led to their adoption, even

[64] Koen Lennaerts and José A. Gutiérrez-Fons, 'To Say What the Law of the EU Is: Methods of Interpretation and the European Court of Justice' (2013) EUI Working Papers AEL 2013/9, pp. 19 ff.

[65] CJEU, Case C-370/12, *Thomas Pringle v Government of Ireland and Others* [2012] ECLI:EU:C:2012:75, para. 135. Other examples are CJEU, Case C-583/11 P, *Inuit Tapiriit Kanatami and Others v Parliament and Council* [2013] ECLI:EU:C:2013:625, para. 50, 59; Case T-18/10, *Inuit Tapiriit Kanatami and Others v Parliament and Council* [2011] ECR II-05599, para. 49.

[66] CJEU, Case C-104/96, *Coöperatieve Rabobank "Vecht en Plassengebied" v Minderhoud* [1997] ECR I-07211 para. 25 ff; Karl Riesenhuber, '§ 10 Die Auslegung', in Karl Riesenhuber (ed.), *Europäische Methodenlehre*, 4th ed. (Berlin, München, Berlin: De Gruyter, 2021), para. 27 f.

[67] See CJEU, Case 283/81, *Srl CILFIT and Lanificio di Gavardo SpA v Ministry of Health* [1982] ECR 03415, para. 18; Lennaerts and Gutiérrez-Fons, 'To Say What the Law of the EU Is' (2013), pp. 8–13; for more specifics of interpreting EU law, see ibid 5.

[68] Admittedly, neither the CJEU recognizes a fixed hierarchy between the methods of interpretation, but there seems to be a certain preponderance of the teleological method. In comparison, see Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent* (2001), pp. 388 f, 1297.

beyond the interpretative approach based on preparatory materials just mentioned. Otherwise, the legal appraisal of new rules in view of international obligations might be influenced from a wrong stance as to which intentions and motivations stand behind the new rules. This is all the more relevant in case of sometimes vague rules that may lend themselves to different interpretations. In order to assess the potential for conflict between EU rules and international obligations correctly, it is necessary not only to grasp the broadness of possible understandings from an analysis of a legal rules' textual formulation and context but also to consider the legislator's ideas and conceptions informative of the rules' rationale and purpose, as required by the interpretive methodology explained earlier in the chapter. Considering the purpose of a rule is particularly relevant in the interpretation of EU law because the CJEU's interpretations are considerably driven by a teleological, purposive approach taking care of the *effet utile* of EU rules, which is a methodical response to the EU's multi-level character and its autonomy.[69] The Court employs even a 'meta-teleological'[70] – that is, systemic – approach which not so much focuses on the particular objectives of a specific instrument or provision of EU law as takes much more account of the overall purpose, sometimes even the 'constitutional telos'[71] of the EU in light of which rules of EU law are conceptualized.[72] This specific interpretive approach thus may be particularly prone to induce tensions, even to give rise to conflict between EU provisions and EU's international legal obligations.

Taking account of the legislator's conceptions and motivations in the interpretation of EU law hence has two avenues in the legal interpretive methodology. First, it is part of the contextual interpretation insofar as the legislator's intentions are reflected in the preambular recitals to the

[69] See Stephen Brittain, 'Justifying the Teleological Methodology of the European Court of Justice: A Rebuttal' (2016) 55 *Irish Jurist* 134–165 at 135 ff; Lennaerts and Gutiérrez-Fons, 'To Say What the Law of the EU Is' (2013) p. 24; Duncan Pickard, 'Judicial Interpretation at the European Court of Justice as a Feature of Supranational Law' (2017) 20 European Union Law Working Papers.

[70] Miguel Poiares Maduro, 'Interpreting European Law: Judicial Adjudication in the Context of Constitutional Pluralism' (2007) 1(2) *European Journal of Legal Studies* 137–152 at 140 f.

[71] Poiares Maduro, 'Interpreting European Law' (2007) 140.

[72] See e.g. CJEU, Case C-583/11 P, *Inuit Tapiriit*, para. 50: 'in accordance with the Court's settled case-law, the interpretation of a provision of European Union law requires that account be taken not only of its wording and the objectives it pursues, but also its context *and the provisions of European Union law as a whole*' (emphasis added).

EU legislative act.[73] According to Article 31 (2) VCLT,[74] preambles form part of the context and also set forth the object and purpose of a treaty, thus helping in establishing the ordinary meaning of a provision.[75] Albeit the preambles do not establish obligations per se, their interpretative role reflecting the legislative intent has also been recognized in EU law.[76] Second, taking account of the legislator's conceptions and motivations is part of a historic approach insofar as preparatory documents can be considered in determining the legislator's intention. Proposals and similar preparatory work are not part of the context as they are not part of the law.[77] However, one must bear in mind that Commission documents such as proposals and White Books do not necessarily reflect EU legislators intentions fully.[78] Hence, these approaches will be employed with regard to each EU legal act adopted in implementing the new trade policy individually, but as they all have been enacted as an expression of the new trade policy reorientation, this reorientation and the idea and vision behind it has first to be introduced and explored, reflecting the background for the detailed analyses subsequently done in this book. That's why Chapter 2 of this book is dedicated to a brief analysis and description of the evolution of EU Trade policy, insofar as is relevant for the determination of the EU Open Strategic Autonomy's meaning and relevance for trade policy and its redirection in the trade policy review of 2021 (see Section 2.1.), as well as the external political, economic, technological, and institutional changes, developments, and challenges that had instigated the change in EU trade policy, and to which it intends to respond

[73] In contrast, Karl Riesenhuber, '§ 10 Die Auslegung' (2021) para. 35, sees them as part of the historic interpretative approach.

[74] Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, in force 27 January 1980, 1155 U.N.T.S. 331; (1969) 8 ILM 679; UKTS (1980) 58.

[75] Makane Moïse Mbengue, 'Preamble', in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2008), https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1456.

[76] For more, see Tadas Klimas and Jūratė Vaičiukaitė, 'The Law of Recitals in European Community Legislation' (2008) 15(1) *ILSA Journal of International and Comparative Law* 1–33. According to Pechstein and Drechsler, preambles are an integral part of the legal act, providing information about the purpose of the legislation and do not fall under the scope of historical interpretation; Matthias Pechstein and Carola Drechsler, 'Die Auslegung und Fortbildung des Primärrechts', in Karl Riesenhuber (ed.), *Europäische Methodenlehre: Handbuch für Ausbildung und Praxis*, 4th ed. (Berlin, München, Boston: De Gruyter, 2015) 181–208, p. 197, para. 32.

[77] CJEU, Case C-441/93, *Panagis Pafitis and others v Trapeza Kentrikis Ellados A.E. and others* [1996] ECR I-01347, para. 43.

[78] Karl Riesenhuber, '§ 10 Die Auslegung' (2021), para. 28.

(see Section 2.2). As this chapter is based significantly on existing analyses in political science, economics, and international relations, it will be rather descriptive, but nevertheless it is necessary and unavoidable, as it paints the grand vision (giving context and rationale) standing behind the individual legislative instruments and legal acts, in which their interpretation must be embedded.

Admittedly, identifying the conception of the legislator in adopting certain rules and schemes is not an easy task. One may find diverse approaches, imaginations, and expectations among lawmakers when asked about the idea behind a legislative rule and the consequences thereof, even if there is a general agreement on the grand vision behind it. As the authors are lawyers, they prefer therefore to look at official documents, draft, proposals, and memoranda that accompanied a legislative process from the beginning until the adoption of the legal text, instead of asking individual representatives of the EU's institutions involved in lawmaking. Hence, this study is based – in addition to the legal methodology of interpreting statutory laws and conceptualizing the meaning of a legal rule (which may be based on preconceptions about its rationale; that's why Chapter 2 is so important) – on an exploration of official EU and WTO documents whichto understand, compare, and assess also lies within the research competence of legal scholars, as it is a text-based endeavour. This approach might be blamed for being rather descriptive, but we contend that even the study of mere official documents allows for assessments and findings about developments in a given policy field and for motivations and drivers standing behind them. This seemingly non-doctrinal approach is relevant in particular for the research presented in Chapter 2, and is part of the legal doctrinal research approach employed in this book insofar as rules have to be interpreted in view of their object and purpose, identifying which requires evaluation of the relevant documents.

1.4 Outline, Structure, and Core Results of the Book

The book explores the legal consequences of the new EU's trade policy focus (with a view also to their political implications) and determines the constraints and flexibilities available for the EU's search for Open Strategic Autonomy. This requires, first of all, as reasoned in earlier sections, setting the scene for such an analysis of the new turn by briefly recalling the evolution of the EU trade policy and the drivers behind the recent reorientation. Part I, consisting of Chapters 2 and 3, is dedicated to

this. Chapter 2 deals with a look at the past, present, and prospect of the EU trade policy, which is a necessary starting point as a preparation for a correct understanding of what the EU intends and to what it responds in the trade policy review and the subsequently adopted legislative acts and other instruments. This is pivotal to fully grasp the comprehensive scope and breadth of the new approach and the correct perception of these acts and instruments will be relevant for the subsequent legal interpretation and analyses. Afterwards, as a second preliminary step undertaken in Chapter 3, one has to determine the internal and external constraints flowing from international law (derived in particular from WTO law, EU FTAs, and international law on countermeasures and climate protection) and EU constitutional law (in particular Articles 3 (5), 21 TEU, and 206 (2) TFEU). The latter also need to be analysed in view of the extent to which the EU Court of Justice might internalize the limits established by international law. International and EU constitutional rules are the legal benchmark and yardstick against which the new tools and instruments have to be assessed in order to identify the room of manoeuvre for EU trade policy flexibility strived for by the concept of Open Strategic Autonomy.

Then, considering the identified constraints and flexibilities, the new tools and instruments of the renewed trade policy to ensure more assertive enforcement and representation of EU's trade rights and interests will be introduced and analysed in detail. Additionally, their broader implications for the EU and the international trade system will be explored. For this reason, Part II is dedicated to a thorough analysis of the new tools for a stronger enforcement of the EU's trade rights and interest, whereas Part III deals with the tools for more assertive representation of EU interests and values.

Our analysis will show, as we finally conclude in Chapter 11, that even though the new instruments were generally designed with international obligations in mind, with some recognizing potential conflicts with international norms but relying on general customary rules on countermeasure or derogations and justifications, and others trying to limit the scope of application of the legislation, there are several instances where, for example, the amended Trade Enforcement, the International Procurement Instrument (IPI),[79] and the CBAM

[79] 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

Regulation[80] conflict 'as such' with procedural and substantive WTO norms, which prompts the need for legislative modifications. Even more cases were identified in which the instruments have the capacity for violating core WTO norms depending on the way they are applied. In other cases, non-application of the EU legislation is necessary to avoid conflict with specific rules of EU FTAs. Furthermore, the way the Commission applies the ACI could also be decisive in terms of its legality under customary international law on countermeasures, besides its legality under international trade rules. Thus, the Commission must pay utmost attention in its implementation of the new legislation and the new international approaches to ensure compliance with constitutional principles consecrating respect for EU's international obligations and its dedication to multilateralism. The majority of the instruments also bear such risks as the escalation of trade conflicts, deteriorating the competitiveness and market access of EU companies on external markets, or the emulation by other states of EU behaviour, which then contributes to further erosion of multilateral rules.

Regarding legislative modifications, generally, we propose that the instruments should be designed with respect to conditions required of countermeasures imposed under ILC Draft Articles, especially if those provisions are intended to be used as a justification for departure from multilateral and bilateral trade provisions as it is in the case of the Trade Enforcement Regulation. In case of the Anti-Coercion Instrument (ACI),[81] the instrument should be amended to specify not only in preambular language but also in the main text that response measures would be allowed only against serious cases of interferences to ensure that, in line with international customary norms and the ACI itself, the non-performance of EU international obligations takes place only against an internationally wrongful act. Second, the ACI should be amended to completely avoid the imposition of response measures in case of simultaneous alleged breaches of more special trade rules, unless trade justifications can be lawfully invoked in the bilateral context to justify

access of Union economic operators, goods and services to the public procurement and concession markets of third countries, OJ EU 2022 No. L 173/1.

[80] Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism, OJ EU 2023 No. L 130/52, 16 May 2023.

[81] 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.

substantive violations. Furthermore, the ACI could be amended to explicitly allow the imposition of internationally lawful measures to provide an internal legal basis for doing so. The IPI's scope should be modified to reflect the conditions of the pertinent derogations contained in pertinent international trade rules. Furthermore, while advancing its climate ambitions, the EU legislators should not include additional CBAM rules on export rebates and should not disregard the EU´s related international commitments, such as the CBDR principle of *inter alia* the Paris Agreement.

Despite our critique, some of the analysed instruments may even contribute towards the credibility of the EU's multilateral stance. The MPIA might foster a solution to the WTO dispute settlement reform, and the EU action plan for TSD enforcement offers a valid legal basis for potential imposition of sanctions.