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# The EU's Turn to 'Strategic Autonomy': Leeway for Policy Action and Points of Conflict

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## Abstract

*In a world marked by intensifying geopolitical rivalries, supply chain vulnerabilities and disruptive technological change, ensuring 'strategic autonomy' is now an avowed goal of numerous European Union (EU) policy initiatives. This article seeks to facilitate an assessment of this 'policy turn' by developing a taxonomy of associated objectives and by illuminating points of conformance and conflict with EU and international law. The EU Treaties offer a robust legal basis for a stronger-values orientation in external relations, for policies designed to rebalance reciprocity in pursuit of geo-economic ambition and for the pursuit of technological leadership within the EU Treaties' level-playing-field legal foundation. Yet there is a thin line to collisions with international (trade and investment) law, notably where value prioritization, technological preferences or geopolitical concerns are tantamount to discrimination or invite protectionist policy choices. Employment of coercive tools in a unilateral fashion questions the legal default of multilateralism and openness. Persistent strategic diversity within the Union hinders 'institutional autonomy', particularly where unanimity voting makes intergovernmentalism the predominant mode of cooperation. The findings shed light on how the evolving geopolitical environment leads to a recalibration of EU external relations between protection and openness, independence and interdependence, unilateralism and multilateralism and power and rules.*

## 1 Introduction

Geopolitical rivalry, technological disruption and economic independence are anything but new challenges in European Union (EU) policy-making. European integration has not been short of strategic narratives and leitmotifs that integrate diverse economic, social or technological ambitions in tandem with explicit commitments to international competitiveness, growth and sustainability. Accordingly, geo-economic and geopolitical ambitions have been – implicitly or explicitly – elements of EU policy

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regimes. The 2002 Lisbon Strategy, for example, sought to make the EU ‘the most competitive and dynamic knowledge-based economy in the world, capable of sustainable economic growth [and] shaping change in a manner consistent with its values’.<sup>1</sup> In a similar vein, the Europe 2020 Strategy urged the EU to overcome its ‘structural weakness in a fast moving world’ while promoting ‘competitiveness’ and ‘smart, sustainable and inclusive growth’.<sup>2</sup> These are but two examples of the EU’s perennial pre-occupation with the global competitiveness of its economy, along with its desire to export European values.<sup>3</sup> Furthermore, the pursuit of these aims has frequently engendered new legal tensions, both in external relations as well as with respect to the EU’s internal legal architecture – by way of example, EU trade defence mechanisms designed to bolster international competitiveness have run into conflicts with international law obligations;<sup>4</sup> human rights advocacy in the context of trade agreements has met with third-country resistance;<sup>5</sup> ‘economic patriotism’ has motivated barriers to cross-border mergers and acquisitions, thus conflicting with free market principles;<sup>6</sup> and European efforts to consolidate capabilities in the area of defence policy have been significantly complicated by the existing institutional Treaty framework.<sup>7</sup>

The (re-)emergence of strategic autonomy – commonly defined as the EU’s ability to make decisions independently while taking into account its own interests and values<sup>8</sup> – has been propelled by three major trends – namely, the intensifying great-power rivalry between the USA and China, which has altered the geopolitical landscape for the EU; the disruption associated with the rapid pace of digital transformation; and the European economic dependence on foreign countries, engendering vulnerability on account of the security of the supply in core goods and technologies.<sup>9</sup> Policy-makers are increasingly confronted with the need to defend the EU and its interests in a global context, not only in the struggle to dominate new technologies and remain

<sup>1</sup> European Council, Presidency Conclusions, Lisbon, 23–24 March 2000.

<sup>2</sup> Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth’, Doc. COM(2010)2020, 3 March 2010.

<sup>3</sup> A. Bongardt and F. Torres, ‘The Competitiveness Rationale, Sustainable Growth and the Need for Enhanced Economic Coordination’, 45 *Intereconomics* (2010) 136.

<sup>4</sup> E. A. Vermulst, ‘Modernization of the EU’s Trade Defence Instruments and the Law of Unintended Consequences’, 7 *Global Trade and Customs Journal (GTCJ)* (2013) 202.

<sup>5</sup> T. Dolle, ‘Human Rights Clauses in EU Trade Agreements: The New European Strategy in Free Trade Agreement Negotiations Focuses on Human Rights: Advantages and Disadvantages’, in N. Weiß, and J. M. Thouvenin (eds), *The Influence of Human Rights on International Law* (2015), 213.

<sup>6</sup> R. J. Ahearn, *Europe: Rising Economic Nationalism?* (2006).

<sup>7</sup> P. Koutrakos, *The EU Common Security and Defence Policy* (2013), at 5–21; P. Järvenpää, C. Major and S. Sakkov, ‘European Strategic Autonomy: Operationalising a Buzzword’, International Centre for Defence and Security’, *International Centre for Defence and Security* (October 2019).

<sup>8</sup> With marginal semantic variations, see European Council, ‘A New Strategic Agenda 2019–2024’, available at [www.consilium.europa.eu/media/39914/a-new-strategic-agenda-2019-2024.pdf](http://www.consilium.europa.eu/media/39914/a-new-strategic-agenda-2019-2024.pdf); Lavery, McDaniel and Schmid, ‘European Strategic Autonomy: New Agenda, Old Constraints’, in M. Babić, A. Dixon and I. Liu (eds), *The Political Economy of Geoeconomics: Europe in a Changing World* (2022) 57, at 58; F. Arteaga *et al.*, ‘Appropriate Level of European Strategic Autonomy’, November 2016, at 8.

<sup>9</sup> On the origin of European Union (EU) strategic autonomy in the domain of defence and its diffusion of the concept into other areas, see S. Lavery, S. McDaniel and D. Schmid, *supra* note 8, at 60–63; R. García Pérez, ‘Strategic Autonomy of the European Union: A Perspective’, in E. Conde *et al.* (eds), *The Routledge Handbook of European Security Law and Policy* (2020) 81.

economically competitive but also – and perhaps just as crucially – in the ideological arena.<sup>10</sup> Indeed, the need to protect European values in areas such as climate protection, human rights and data privacy have been imparted with new urgency in recent years.<sup>11</sup> In light of increasing geopolitical pressures, the watchword of 'strategic autonomy' has risen to ascendancy in numerous policy domains, including economic, technology and trade policy, as vividly illustrated by the European Commission's 2021 Strategic Foresight Report, which identifies 10 areas in which the EU should strengthen its 'strategic autonomy'.<sup>12</sup> As a policy orientation, strategic autonomy has spawned numerous disagreements, not only with regard to the general direction of policy but also in relation to legal questions. In response to the criticism that strategic autonomy represents a form of 'economic nationalism',<sup>13</sup> EU policy-makers have hastened to explain that 'autonomy is not protectionism; quite the opposite' – an assertion that necessitates artful qualification.<sup>14</sup> To head off protectionist concerns, policy-makers now frequently speak of 'open strategic autonomy',<sup>15</sup> which seems to be the new semantic trick to assuage trade-restrictive concerns and to signal continuity in the virtuous role of the EU at the helm of an open and free global economy.<sup>16</sup>

This article explores the legal dimensions of strategic autonomy, including, in particular, the legal basis and leeway furnished by the Treaties for this policy shift and the tensions it engenders in international law. In view of the ambivalent meanings and blurry contours of the concept, a legal analysis is plagued by 'too many variables', which renders the legal compatibility analysis inherently difficult depending on the translation of the concept into context-specific policy implementation. This analysis deals with this ambivalence on two levels: first, the analysis refines the wide definition of strategic autonomy towards a definitional taxonomy by distinguishing three motivational categories: the furtherance of European values, the pursuit of European economic interests and the desire to ensure security. Each of these motivational categories can be assessed in relation to relevant legal frameworks, including the Treaties and international law, which brings more granularity to the legal analysis compared to the otherwise vague definition of strategic autonomy. Second, in seeking to sketch

<sup>10</sup> N. Tocci, 'European Strategic Autonomy: What It Is, Why We Need It, How to Achieve It', *Istituto Affari Internazionali*, 26 February 2021.

<sup>11</sup> G. Grevi, 'Strategic Autonomy for European Choices: The Key to Europe's Shaping Power', European Policy Centre Discussion Paper (2019).

<sup>12</sup> 2021 Strategic Foresight Report: The EU's Capacity and Freedom to Act, Doc. COM(2021) 750 final (2021).

<sup>13</sup> D. Gros, 'The Siren Song of Strategic Autonomy', *Project Syndicate* (7 October 2019), available at <https://www.project-syndicate.org/commentary/risk-of-european-economic-nationalism-by-daniel-gros-2019-11>.

<sup>14</sup> European Council, 'Strategic Autonomy for Europe: The Aim of Our Generation', speech by President Charles Michel to the Bruegel think tank, 28 September 2020, available at [www.consilium.europa.eu/en/press/press-releases/2020/09/28/1-autonomie-strategique-europeenne-est-l-objectif-de-notre-generation-discours-du-president-charles-michel-au-groupe-de-reflexion-bruegel/](http://www.consilium.europa.eu/en/press/press-releases/2020/09/28/1-autonomie-strategique-europeenne-est-l-objectif-de-notre-generation-discours-du-president-charles-michel-au-groupe-de-reflexion-bruegel/).

<sup>15</sup> European Commission, A Renewed Trade Policy for a Stronger Europe Consultation Note, 16 June 2020, available at [https://www.astrid-online.it/static/upload/comm/0000/commue\\_trade-policy-review\\_consultation-note.pdf](https://www.astrid-online.it/static/upload/comm/0000/commue_trade-policy-review_consultation-note.pdf).

<sup>16</sup> T. Gehrke, 'Treading the Trade Needle on Open Strategic Autonomy', in N. Helwig (ed.), *Strategic Autonomy and the Transformation of the EU* (2021) 87, at 91.

out the diverse legal ramifications of strategic autonomy, the aspiration of this discussion will, on the one hand, highlight the legal room for manoeuvre furnished by the EU Treaties, and, on the other, address points of friction with EU primary law as well as potential conflicts with international law – in particular, with trade and investment law. In other words, this study does not aim to give a binary judgement on the legality of the concept of strategic autonomy. Rather, it acknowledges that strategic autonomy is amenable to multiple meanings and diverse policies and highlights – with reference to the motivational categories – both leeway and barriers that policy-makers face when specifying concrete policy action as emanations of strategic autonomy.

The objectives currently subsumed under the broader rubric of strategic autonomy are marked by inherent tensions to varying degrees: first, there is a rebalancing of reciprocity by shifting the EU's traditional default to market openness to a more restrictive stance that insists on equivalent rights and market access.<sup>17</sup> This defensive economic stance, put in place through a new anti-subsidy regime and procurements rules, follows the reciprocity logic of international law. Second, while openness is a central tenet of the EU's economic policy, some recent initiatives – such as the investment screening mechanism and anti-coercion and enforcement instruments – are coercive and unilateral means going beyond reciprocity, not only leading to potential conflict with the EU's international obligations under investment and trade law but also potentially spawning retaliatory countermeasures by third countries.<sup>18</sup> This potential for external frictions is also clearly evident in relation to measures that seek to 'export' European values abroad, such as the sustainability that promotes the Carbon Border Adjustment Mechanism (CBAM).<sup>19</sup> Third, while the development of European industrial alliances and the easing of state aid rules are motivated by the desire to compete with Chinese and American technological dominance, this creates tensions with the EU's commitment to free market principles and non-discriminatory practices, as enshrined in the EU Treaties, as illustrated by the EU's response to the US Inflation Reduction Act.<sup>20</sup> Finally, the vertical division of competences within the EU as well as the EU's internal diversity naturally undermine the formation of a consistent policy vision. Fragmented preferences are particularly pronounced in the domain of foreign and security policies as well as in trade policies.<sup>21</sup> Bold strategic autonomy ambitions must cope with the institutional boundaries oscillating between supranationalism and intergovernmentalism.

With strategic autonomy remaining a political concept migrating dynamically in various policy areas, propelled by the recent pandemic crisis and the Russian war against Ukraine, this study combines descriptive stocktaking of the legal patterns of strategic autonomy and an exploration of the normative boundaries to the concept. Section 2 briefly discusses the conceptual blurriness of strategic autonomy as a term

<sup>17</sup> See section 3.B.1.

<sup>18</sup> See section 3.B.2.

<sup>19</sup> Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism (Text with EEA relevance), OJ 2023 L 130/52.

<sup>20</sup> Inflation Reduction Act, 16 August 2022, 136 Stat. 1818. See section 3.C.1.

<sup>21</sup> See section 3.C.2.

and posits a 'taxonomy by objective' in order to make the rationales for strategic autonomy amenable to legal assessment. Section 3 turns to explore three different policy rationales underpinning strategic autonomy: the value-driven dimension; the geo-economic turn; and the security dimension. This section highlights the specific legal and institutional implications of the policy tools being developed in pursuit of strategic autonomy. Section 4 uses this insight to elucidate as a conceptual framework the inherent tensions between strategic ambitions and the EU's normative tenets, tensions that will require case-by-case reconciliation and balancing as legislators develop and deploy policy instruments.

Taken together, the various sections offer a mixed picture of strategic autonomy as a viable policy rationale from a legal perspective. The policy shift does not necessarily depart abruptly from the EU's traditional approach of normative power. The EU Treaties offer some leeway for value-based reorientation and regulatory choices. They offer a margin of manoeuvre for the EU to recalibrate its external relations between protection and openness; independence and interdependence; unilateralism and multilateralism; and a reliance on power and rules. While EU external relations were committed for a long time to the same normative virtuousness that rejected power politics in EU internal relations, the evolving geopolitical environment has forced the EU to manage a delicate balancing act between the pursuit of legitimate self-interests and a faithfulness to its 'normative DNA'.

## 2 The Blurry Contours of Strategic Autonomy

While the notion of 'strategic autonomy' is now increasingly cited as a guiding doctrine by EU policy-makers, the term does not rest on a solid or clear-cut theoretical foundation.<sup>22</sup> In point of fact, the term owes its popularity to its practical versatility as a slogan that can be invested with various meanings, depending on specific circumstances, as the EU confronts a range of geopolitical challenges.<sup>23</sup> To be sure, the rise of the concept as a tool in political discourse masks its conceptual ambiguity in multiple respects. Perhaps most crucially, the term has no clearly defined scope as it embraces a multiplicity of perspectives and interpretations, not least due to unresolved tensions between underlying dichotomies, such as 'independence' and 'interdependence'. While the EU's competitive disadvantages in strategic sectors have been a main driver of the rise of strategic autonomy as a concept – in tandem with such goals as making Europe more 'resilient' and 'future-proof'<sup>24</sup> – it is far from clear how strategic autonomy is to be understood as a concept that informs operational decision-making. Indeed, the term is often conflated with various notions, including sovereignty,

<sup>22</sup> S. Lavery, S. McDaniel and D. Schmid, *supra* note 8, at 64; R. García Pérez, *supra* note 9, at 87.

<sup>23</sup> 'Keeping Europeanism at Bay? Strategic Autonomy as a Constitutional Problem', 59 *Common Market Law Review* (2022) 313, at 315.

<sup>24</sup> C. Cagnin *et al.*, *Shaping and Securing the EU's Open Strategic Autonomy by 2040 and Beyond* (2021), at 1, available at [publications.jrc.ec.europa.eu/repository/handle/JRC125994](https://publications.jrc.ec.europa.eu/repository/handle/JRC125994); L. Molthof, D. Zandee and G. Cretti, *Unpacking Open Strategic Autonomy from Concept to Practice: Clingendael Report*, November 2021, at 10.

independence, unilateralism and even autarky. Accordingly, it is often pressed into service in connection with a broad range of disparate strategic goals, including decarbonization, a lower reliance on foreign energy imports, ‘digital sovereignty’, a first-mover advantage in the setting of global standards, more robust defence capacities, a resilient financial sector and greater economic competitiveness.<sup>25</sup>

This conceptual vagueness is additionally confounded by the strong divergence between EU member state preferences in the domain of strategic policy.<sup>26</sup> In particular, EU Member States are at odds concerning the degree of autonomy that the EU should strive to achieve. One can discern four main factions in the present debate.<sup>27</sup> Protectionists emphasize political independence, self-reliance as a response to concerns over security of supply and the importance of globally competitive firms, and also favour sanctions to discipline foreign powers. Marketers stress the importance of free trade and of ensuring a level playing field in the internal market and the benefits of a globalized division of labour. Intergovernmentalists favour security and defence policy remaining in national hands and oppose institutional changes that would transfer additional competences to the EU level. Supranationalists, by contrast, underscore the EU’s role as a global geopolitical actor and advocate greater centralization, particularly in the domains of defence and security.

Scholars in various fields have sought to offer a more precise definition of strategic autonomy.<sup>28</sup> If we take the EU’s status as an autonomous legal order as a starting point, from a legal perspective, strategic autonomy can be defined as the ability of EU citizens to determine the laws by which they are governed.<sup>29</sup> Such approaches place a key emphasis on Treaty-based objectives and values, as channelled through the policy instruments of the EU Treaties. Other definitions have emphasized the ‘managerial dimension’ of strategic autonomy as an act of balancing between countervailing forces.<sup>30</sup> To be sure, in a globalized economy with global threats, no state or actor can or should be completely independent; the security and economic development of the EU inherently remain reliant on multilateral cooperation. Yet, at the same time, as recent crises have revealed – from the Covid-19 pandemic to Russia’s war against Ukraine – geopolitical interdependencies also give rise to vulnerabilities, from supply chain disruptions to foreign technological dominance.<sup>31</sup> Closely linked to such considerations are definitions that stress the notion of ‘economic resilience’ – that is, ensuring that the EU does not fall (too far) behind in the economic and technological

<sup>25</sup> ‘Keeping Europeanism at Bay’, *supra* note 23, at 316.

<sup>26</sup> S. Lavery, S. McDaniel and D. Schmid, *supra* note 8, at 64.

<sup>27</sup> P. Tamma, ‘EU’s Industrial Policy Stalls before Takeoff’, *Politico* (25 February 2021); L. Molthof, D. Zandee and G. Cretti, *supra* note 24, at 10.

<sup>28</sup> The political science literature has been pioneered by giving contours to the concept of strategic autonomy. See E. Ryon, ‘European Strategic Autonomy: Energy at the Heart of European Security?’, 19 *European View* (2021) 238, at 239; S. Lavery and D. Schmid, ‘European Integration and the New Global Disorder’, 59 *Journal of Common Market Studies (JCMS)* (2021) 1322.

<sup>29</sup> ‘Keeping Europeanism at Bay’, *supra* note 23, at 315.

<sup>30</sup> C. Cagnin *et al.* *supra* note 24, at 1.

<sup>31</sup> S. Lavery, S. McDaniel and D. Schmid, *supra* note 8, at 72.



race with the USA and China.<sup>32</sup> Finally, broader definitions seek to capture the multiple dimensions and objectives vested in strategic autonomy by referring to it as an umbrella for policies that protect, provide and project.<sup>33</sup> From this perspective, strategic autonomy protects by ensuring self-sufficiency and less reliance on foreign governments; provides by shoring up domestic economic and political conditions; and projects by promoting developments internationally that are conducive to EU interests and values.

### 3 A Taxonomy by Objectives and Their Legal Implications

With strategic autonomy lacking clear conceptual contours as shown above, a promising approach is to develop a definitional taxonomy that differentiates by objectives in order to shed light on the legal implications of the concept of strategic autonomy. Even if there may be differences between policy objectives and legislative objectives, the policies employed in the pursuit of strategic autonomy must ultimately translate to corresponding legal frameworks and/or actors. Indeed, when determining the scope of EU competences, the Court of Justice of the European Union (CJEU) follows a teleological, or purpose-driven, approach. Starting from the identification of EU ambitions and objectives, the CJEU interprets EU competences as extending to activities that allow these objectives to be realized.<sup>34</sup> In addition, a proportionality review requires that the content and scope of EU action may not go beyond what is necessary to achieve the objectives of the EU Treaties (such as Article 5, paragraph 4 of the Treaty on European Union [TEU]).<sup>35</sup> In this way, with competence division and proportionality review thus depending on the legislative objectives, an understanding of strategic autonomy that is organized by objectives would appear to be a promising springboard for clarifying points of correspondence and conflict with the EU Treaties.

Strategic autonomy initiatives can typically be assigned to one of three motivational categories: (i) to further European values, with a particular emphasis on sustainability, including the aspiration to structure geopolitical relations in line with the EU's value priorities; (ii) to promote European economic interests, including defensive actions to prevent unfair competition as well as offensive coercive and unilateral action; and (iii) to ensure security, not only in the military and defence domain but also

<sup>32</sup> R. Csernaton, 'The EU's Rise as a Defense Technological Power: From Strategic Autonomy to Technological Sovereignty', *Carnegie Europe* (2021); Tocci, *supra* note 10, at 25.

<sup>33</sup> N. Helwig, 'EU Strategic Autonomy: A Reality Check for Europe's Global Agenda', FIIA Working Paper no. 119 (2020), at 12, available at [https://www.fiaa.fi/wp-content/uploads/2020/10/wp119\\_strategic\\_autonomy-2.pdf](https://www.fiaa.fi/wp-content/uploads/2020/10/wp119_strategic_autonomy-2.pdf).

<sup>34</sup> Case C-720/112, *Pringle v. Ireland* (EU:C:2012:756), para. 53; Case C-62/17, *Gauweiler and Others v. Bundestag* (EU:C:2015:400), para. 46; S. Douglas-Scott, *Constitutional Law of the European Union* (2002), at 261.

<sup>35</sup> Treaty on European Union (TEU), OJ 2010 C 83/13.

when it comes to undue economic or technological dependence on foreign powers.<sup>36</sup> Each of these motivational categories can be assessed in relation to relevant legal frameworks, including the EU Treaties and international law. This analysis seeks to elucidate the legal basis for each category of motivation under the EU Treaties and international law and, in doing so, to show how policy may conform or conflict with the existing legal frameworks.

## A The Value Dimension of Strategic Autonomy

The discussion of ‘values’ in relation to strategic autonomy is often related to the much-touted ‘geopolitical turn’ in EU foreign policy.<sup>37</sup> ‘Strategic autonomy’ is broadly deployed to refer to the EU’s ability to set priorities and make decisions in an independent fashion in matters of security and foreign policy and, by extension, to establish and enforce international rules in contrast to obeying the rules set by others.<sup>38</sup> The current emphasis on values stems in part from growing international competition and the need for the EU to confront competitors in a pragmatic manner that goes beyond its mere reliance on rule-based frameworks. Accordingly, ‘strategic autonomy’ implies the opposite of being a rule-taker subject to strategic decisions imposed by other great powers, whether the USA, China or Russia.<sup>39</sup> References to Europe’s ‘geopolitical awakening’<sup>40</sup> or calls for Europe to exhibit an ‘appetite for power’<sup>41</sup> are manifestations of a broader shift in the discourse concerning the ‘forcefulness’ of EU conduct in the international arena.<sup>42</sup>

### 1 External and Internal Dimension for a Values-based Recalibration of EU Policies

The EU Treaties grant significant leeway for the pursuit of value-based policies. Article 3, paragraph 5 of the TEU calls for the Union to promote human rights, international law and the Charter of the United Nations in ‘its relations with the wider world’. Under Article 2 of the TEU, the Union is tasked with preserving its values and interests and,

<sup>36</sup> For similar accounts, see T. Gehrke, ‘EU Open Strategic Autonomy and the Trappings of Geoeconomics’, 27 *European Foreign Affairs Review* (EFAR) (2022) 61; C. Weinhardt, K. Mau and J. Hillebrand Pohl, ‘The EU as a Geoeconomic Actor? A Review of Recent European Trade and Investment Policies’, in M. Babić, A. D. Dixon and I. T. Liu (eds), *The Political Economy of Geoeconomics: Europe in a Changing World* (2022) 107, at 111.

<sup>37</sup> M. Vallin *et al.*, ‘Europe and the World: Boosting International Academic Cooperation in a Time of Geopolitical Tension and Polarization’, 31 *European Journal of Public Health* (2021) 929; S. Lehne, ‘How the EU Can Survive in a Geopolitical Age’, *Carnegie Europe*, February 2020.

<sup>38</sup> R. García Pérez, *supra* note 9, at 81–82; W. Koeth, *Member States and EU Agreements: Is It Really National Parliaments That Are Standing in the Way of EU Strategic Autonomy?* (2021), at 3.

<sup>39</sup> B. Lippert, N. von Ondarza and V. Perthes, ‘European Strategic Autonomy’, German Institute for international and Security Affairs Research Paper no. 4, March 2019, at 5.

<sup>40</sup> M. Bergmann, ‘Europe’s Geopolitical Awakening’, *Foreign Affairs* (20 August 2020), available at <https://www.foreignaffairs.com/articles/europe/2020-08-20/europes-geopolitical-awakening>; S. Meunier and K. Nicolaidis, ‘The Geopoliticization of European Trade and Investment Policy’, 57 *JCMS* (2019) 103.

<sup>41</sup> Josep Borrell, during the Munich Security Conference Panel, EU must develop ‘appetite for power’, Borrell says, *Reuters* (16 February 2020), available at <https://www.reuters.com/article/us-germany-security-europe-idUSKBN20A0BX>.

<sup>42</sup> N. Helwig, ‘Strategic Autonomy and the EU as a Diplomatic Actor’, in N. Helwig, *supra* note 16, 69, at 79.



under Article 21, paragraph 2 of the TEU, with guarding its security, independence and integrity. Notably, 'strategic autonomisation' is thus both free and bounded at the same time, with values left vague and wide, with binding EU policies to realize these goals and values.<sup>43</sup>

EU external policies informed by ethical or moral values are clearly not a novel practice. The EU's self-image as a 'normative power' has traditionally conveyed the ambition to seek the proliferation of values rather than material advantages or interests.<sup>44</sup> In this connection, trade agreements have frequently been used as a means of promoting sustainable development in various parts of the world.<sup>45</sup> The wide discretion furnished by the EU Treaties has permitted trade policy to be harnessed for a variety of objectives unrelated to trade. The Treaty of Lisbon explicitly established a link between trade policy and European values.<sup>46</sup> Today, most EU bilateral or regional free trade agreements are subject to the conditionality of human rights. Human rights clauses typically oblige the parties to agreements that 'confirm their attachment to democratic principles, human rights and fundamental freedoms, and the rule of law'.<sup>47</sup> While the proliferation of values thus connects to previous practice, strategic autonomy brings about a gradual change with its call to fortify the EU's value base in external relations – in particular, for the stronger protection of sustainability concerns and to promote climate-protection standards, adherence to human rights and the rule of law.<sup>48</sup>

By way of example, the EU Commission president Ursula von der Leyen announced the formation of a geopolitical Commission that would pursue key values such as climate protection and sustainability.<sup>49</sup> There is no general legal impediment to making external relations subject to sustainability considerations. Article 3, paragraph 5 of the TEU explicitly calls on the EU to contribute to 'sustainable development' and the 'protection of human rights' in its 'relations with the wider world'. Similarly, Article 21 of the TEU, which governs external relations, explicitly establishes the promotion of democracy and human rights as foreign policy objectives. Furthermore, Article 205 of the Treaty on the Functioning of the European Union (TFEU) extends these objectives to other policy areas – namely, trade policy, international cooperation and

<sup>43</sup> B. Lippert, N. von Ondarza and V. Perthes, *supra* note 39, at 15.

<sup>44</sup> I. Manners, 'Normative Power: A Contradiction in Terms?', 40 *JCMS* (2002), 235.

<sup>45</sup> T. Gehrke, *supra* note 16, at 99; A. Poletti, D. Sicurelli and A. Yildirim, 'Promoting Sustainable Development through Trade? EU Trade Agreements and Global Value Chains', 51 *Italian Political Science Review/ Rivista Italiana Di Scienza Politica* (2021) 339.

<sup>46</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community 2007, OJ 2007 C 306; M. Cremona, 'Human Rights as a Value of EU Trade Policy', in M. Balboni and C. Danisi (eds), *Human Rights as a Horizontal Issue in EU External Policy* (2021) 161; J. Wouters and M. Ovádek, 'Human Rights in EU Trade Policy', in J. Wouters and M. Ovádek (eds.), *The European Union and Human Rights: Analysis, Cases, and Materials* (2021), 646.

<sup>47</sup> I. Zamfir, 'Human Rights in EU Trade Agreements', July 2019, at 4, available at [www.europarl.europa.eu/RegData/etudes/BRIE/2019/637975/EPRS\\_BRI\(2019\)637975\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2019/637975/EPRS_BRI(2019)637975_EN.pdf).

<sup>48</sup> N. Helwig, 'Introduction: The EU's Choices in Advancing Strategic Autonomy', in N. Helwig, *supra* note 16, 15, at 23.

<sup>49</sup> U. Von der Leyen, 'A Union That Strives for More: My Agenda for Europe', in *Political Guidelines for the Next European Commission 2019–2024* (2019), at 17.

humanitarian aid.<sup>50</sup> The EU Treaties thus clearly advocate a values-based approach to international relations.

The novel turn in EU policies assigns a particularly strong emphasis to protecting the environment as a core element of a broader sustainability concept, with various legislative initiatives designed to promote not only the decarbonization of the EU (for example, the EU Green Deal)<sup>51</sup> but also the development of foreign trading partners (for example, the CBAM). While environmental protection does not enjoy the status of a ‘super-value’ or ‘trumping principle’,<sup>52</sup> environmental protection has evolved significantly as an objective – from the ambition enshrined in Article 3 of the TEU to a transversal concept of the EU’s legal order interpreted jointly on the basis of Article 3 of the TEU, Article 191, paragraph 2 of the TFEU and Article 37 of the Charter of Fundamental Rights.<sup>53</sup> In this connection, Articles 191 and 192, paragraph 1 of the TFEU explicitly refer to the external dimension by giving competence to promote ‘measures at the international level to deal with regional or worldwide environmental problems’. On this legal basis, environmental protection has gradually become a high priority concern in the EU’s relations with other countries.<sup>54</sup>

The effort to promote environmental protection in external relations shares points of interconnection with the regulation of the EU’s internal market. Specifically, by virtue of the size of the EU’s internal market and its existence as a single regulatory jurisdiction, the EU is able to exert pressure internationally when it comes to the determination of environmental standards. Accordingly, it is argued that the more the EU can set strong standards internally, the better it can advance its values internationally.<sup>55</sup> However, a legal limitation in this area is that internal competence may not be trumped by geopolitical objectives. Accordingly, considerations related to strategic autonomy may not undermine the regulatory arrangements set forth under Article 114 of the TFEU. Since this provision traditionally has played an important role in the further development of EU environmental policy,<sup>56</sup> it is also likely to underpin geopolitical ambitions in the area of sustainability – namely, by furnishing a basis for setting internal standards that ultimately could become global standards. The EU’s desire to act as a leader in the domain of climate policy – an avowed aim of the EU Green Deal – is illustrative of such ambition, with ‘standard-setting endeavours’

<sup>50</sup> Treaty on the Functioning of the European Union (TFEU), OJ 2016 C 202/47.

<sup>51</sup> Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions The European Green Deal, Doc. COM(2019) 640 final, 11.12.2019.

<sup>52</sup> T. Hayward, *Constitutional Environmental Rights* (2005), at 129–130.

<sup>53</sup> Charter of Fundamental Rights of the European Union, OJ 2012 C 326/02; A. Sikora, ‘European Green Deal: Legal and Financial Challenges of the Climate Change’, 21 *ERA Forum* (2021) 681, at 686.

<sup>54</sup> A. Sikora, *Constitutionalisation of Environmental Protection in EU Law* (2020).

<sup>55</sup> A. Bradford, *The Brussels Effect: How the European Union Rules the World* (2020); N. Helwig, *supra* note 33, at 12.

<sup>56</sup> G. Majone, ‘The Rise of Statutory Regulation in Europe’, in G. Majone (ed.), *Regulating Europe* (1996) 47, at 74; H. Deters, ‘European Environmental Policy at 50: Five Decades of Escaping Decision Traps?’, 29 *Environmental Policy and Governance* (2019) 315.

founded on Article 114 of the TFEU, ranging from eco-design requirements<sup>57</sup> and EU green bond standards<sup>58</sup> to sustainable corporate governance.<sup>59</sup> In the technological sphere, the Artificial Intelligence Act is yet another example of geopolitical standard setting that has Article 114 of the TFEU as its basis.<sup>60</sup> Building on the General Data Protection Regulation (GDPR), the Artificial Intelligence Act seeks to establish harmonized rules regarding artificial intelligence in the EU's single market while also influencing the regulation of artificial intelligence globally.<sup>61</sup> In this way, we find that internal standard setting is an increasingly important vehicle for the pursuit of strategic autonomy, as strong internal standards can be leveraged internationally to foster multilateral alignment that furthers European interests and values.<sup>62</sup>

## 2 Values Enforcement: Soft versus Hard, Private versus Public

Legal distinctions can be drawn between 'soft' and 'hard' geopolitical ambitions. 'Soft' forms of value promotion are characterized in particular by a lack of coercion. This includes the adoption and exportation of EU rules as a form of 'soft geopolitical power' in a manner that boosts the autonomy of the EU and promotes its standards to a global scale without seeking to compel other countries to align with EU values and without necessarily undermining its openness.<sup>63</sup> From this perspective, EU strategic autonomy is not primarily concerned with the supremacy of European values in the sense that it seeks to persuade other powers, such as China, to adopt European perspectives on human rights and the rule of law. Rather, in this soft version of value enforcement, the EU's ambition is to shape international rules (for example, climate agreements, technological regulations, data privacy) such that when EU citizens are subject to international rules, these rules align with EU values. Regarding data privacy, for example, the EU is less concerned about changing the state-controlled model to which Chinese citizens are subject or the private enterprise-centred model for US consumers.<sup>64</sup> Rather, the EU aims to uphold its model of tightly regulated data privacy.<sup>65</sup>

<sup>57</sup> Proposal for a Regulation of the European Parliament and of the Council Establishing a Framework for Setting Ecodesign Requirements for Sustainable Products and repealing Directive 2009/125/EC, Doc. COM(2022) 142 final 2022/0095, 30.3.2022.

<sup>58</sup> Proposal for a Regulation of the European Parliament and of the Council on European Green Bonds, Doc. COM(2021) 391 final, 6.7.2021.

<sup>59</sup> Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Doc. COM(2022) 71 final, 23.2.2022.

<sup>60</sup> Proposal for a Regulation of the European Parliament and of the Council Laying Down Harmonised Rules on Artificial Intelligence (Artificial Intelligence Act) and Amending Certain Union Legislative Acts, Doc. COM(2021) 206 final, 21.4.2021.

<sup>61</sup> L. Molthof, D. Zandee and G. Cretti, *supra* note 24, at 18.

<sup>62</sup> N. Helwig, *supra* note 33, at 23.

<sup>63</sup> L. Molthof, D. Zandee and G. Cretti, *supra* note 24, at 18; K. Majcher, 'Open Strategic Autonomy': Towards the Geopoliticisation of EU Competition Law?' *Kluwer Competition Law Blog* (20 November 2020), available at <http://competitionlawblog.kluwercompetitionlaw.com/2020/11/20/open-strategic-autonomy-towards-the-geopoliticisation-of-eu-competition-law/>.

<sup>64</sup> This largely reflects different societal and economic models. See E. U. Petersmann and A. Steinbach, 'Neo-Liberalism, State-Capitalism and Ordo-Liberalism: "Institutional Economics" and "Constitutional Choices" in Multilevel Trade Regulation', 22 *Journal of World Investment and Trade (JWIT)* (2021) 1.

<sup>65</sup> N. Helwig, *supra* note 42, at 79.

Similarly, the aforementioned Artificial Intelligence Act pursues the overreaching goal of ensuring that new technologies are developed and function in a human-centred way according to EU values.<sup>66</sup>

In contrast to ‘soft’ value enforcement, value-enforcing instruments that create obligations or even economic disadvantages for non-compliant states and companies are coercive in nature and thus prone to trigger conflict. The international promotion of sustainability is one important concern at present. The CBAM, a core component of the EU Green Deal, will place a carbon tariff on the importation of certain goods from outside the EU, although various legal, economic and political controversies remain unresolved.<sup>67</sup> Given the potential for the CBAM to significantly disrupt trade or trigger retaliatory measures by other states, it has aroused vocal opposition, especially in the international trade community.<sup>68</sup> Legal concerns relate primarily to potential violations of the non-discrimination principles of the World Trade Organization (WTO).<sup>69</sup> The CBAM example illustrates that the imposition of obligations internationally can foster resistance to value enforcement, even when the imposition of such obligations clearly falls under the EU’s regulatory competence internally.<sup>70</sup> In this way, even when climate leadership has a clear basis in the EU Treaties, unilateral and coercive action has a strong potential to call forth international resistance. Human rights are yet another high-ranking value that the EU seeks to promote in the international arena. A traditional approach in this regard has been to incorporate ‘value conditionality’ into bilateral agreements. However, when it comes to major geopolitical competitors with adverse human rights records, such as China and Russia, the EU has often been criticized for failing to take a stronger line in trade relations. This criticism was raised with the signing of the EU-China Comprehensive Agreement on Investment,<sup>71</sup> which contains weak human rights commitments.<sup>72</sup>

An alternative to enforce values in state-to-state relations and a more coercive avenue for geopolitical value enforcement is to hold private actors, particularly multinational companies, liable for non-alignment with EU values. The proposed Corporate Sustainability Due Diligence Directive lays down new obligations for large companies to ensure that their activities and those of upstream suppliers comply

<sup>66</sup> L. Molthof, D. Zandee and G. Cretti, *supra* note 24, at 18.

<sup>67</sup> G. M. Durán, ‘EU Carbon Border Adjustment Mechanism: Key Issues Going Forward’, 26 *EFAR* (2021) 499.

<sup>68</sup> Joint Statement issued at the conclusion of the 30th BASIC Ministerial Meeting on Climate Change, hosted by India on 8 April 2021, available at [www.gov.za/nr/speeches/joint-statement-issued-conclusion-30th-basic-ministerial-meeting-climate-change-hosted](http://www.gov.za/nr/speeches/joint-statement-issued-conclusion-30th-basic-ministerial-meeting-climate-change-hosted).

<sup>69</sup> R. Leal-Arcas, M. Faktaufon and A. Kyprianou, ‘A Legal Exploration of the European Union’s Carbon Border Adjustment Mechanism’, 31 *European Energy and Environmental Law Review* (2022) 223; on the World Trade Organization (WTO) climate waiver, see J. Bacchus, ‘The Content of a WTO Climate Waiver’, Centre for International Governance Innovation Papers no. 204 (2018).

<sup>70</sup> The EU’s CBAM builds on the TFEU, *supra* note 50, Art. 192, para. 1.

<sup>71</sup> European Commission, EU and China reach agreement in principle on investment, Press Release, 30.12.2020, available at [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_20\\_2541](https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2541).

<sup>72</sup> N. Helwig, *supra* note 42, at 77.

with human rights and environmental sustainability criteria.<sup>73</sup> It establishes a corporate duty 'to identify, prevent, mitigate and account for external harm resulting from adverse human rights and environmental impacts' in internal operations and in the operations of business partners.<sup>74</sup> Adopting a similar approach, the EU revised its regulation on the export control of dual-use goods and technologies with a view to promoting human rights, which imposes behavioural duties on private actors through secured value chains.<sup>75</sup> The EU has also established a global human rights sanctions regime,<sup>76</sup> which enables the EU to target individuals and entities – including state and non-state actors – associated with serious human rights violations, no matter where they have occurred. This approach – that is, value enforcement through the imposition of obligations on private actors – extends to another core area of strategic autonomy: digital sovereignty. The EU aims to reconcile 'freedom' and 'security' with measures that foster 'principled big tech', including, in particular, the taxation of digital services and assertive antitrust enforcement in the digital arena, in combination with the GDPR for safeguarding personal data.<sup>77</sup> While these instruments stem from divergent policy areas, they are united in their focus on furthering value-based regulation.

We are thus presented with a picture of intensified value enforcement through various channels, including the use of conditionality-based agreements to encourage value alignment in the international community, despite the well-known limitations such as 'big power' resistance as well as the limited conditionality bite.<sup>78</sup> To be sure, the EU Treaties offer broad leeway (and obligation) for external relations to be governed to a greater extent by value concerns, and, as mentioned, the regulation of the internal market represents a key vehicle for implementing standards that can be leveraged to further this new geopolitical orientation. In relation to private actors, the EU has used the legal basis furnished by the EU Treaties to impose obligations on companies that can be enforced with punitive measures. In this way, the rights enjoyed by private companies are being increasingly hedged in by multinational regulatory regimes, diligence obligations pertaining to sustainability standards and associated sanction mechanisms. As a general rule, the pursuit of promoting sustainability, human rights or European notions of digital sovereignty is a legitimate and Treaty-based objective in the proportionality review of intrusions into company freedoms.

<sup>73</sup> Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, Doc. COM/2022/71 final, 23.2.2022.

<sup>74</sup> *Ibid.*, at 4, Explanatory Memorandum.

<sup>75</sup> Council Regulation 428/2009, OJ 2009 L 134/1.

<sup>76</sup> Council Regulation 2020/1998, OJ 2020 L 410/1.

<sup>77</sup> A. K. Jakobsson and M. Stolz, 'Principled Big Tech: European Pursuit of Technological Autonomy', in N. Helwig, *supra* note 16, 105, at 113.

<sup>78</sup> M. Bronckers and G. Gruni, 'Retooling the Sustainability Standards in EU Free Trade Agreements', 24 *Journal of International Economic Law (JIEL)* (2021) 25; R. Nouredine, 'Normative Power Europe and in Field of Human Rights: Is the EU a Force for Good in the World?', 8 *Australian and New Zealand Journal of European Studies* (2016) 111.

## B The ‘Geo-economic Turn’ in Strategic Autonomy

The economic dimension of strategic autonomy builds on the perception that the liberal international order upon which the EU was founded is being challenged by increasing unilateralism and protectionism on the part of foreign powers, thus generating various political and economic tensions.<sup>79</sup> Similar to the policy shift in the proliferation of values (from normative power to value enforcement), the pursuit of EU interests has become more central in the deployment of EU external policies. Specifically, the EU defends its economic interests not only by rebalancing reciprocity in its economic relations but also by actively pursuing unilateral and coercive measures.

Traditionally, the EU has countered economic pressures by relying on multilateral governance frameworks. This approach was rooted in the EU’s commitment to ‘effective multilateralism’; the multilateral system is recognized as a cornerstone of European ‘security and prosperity’.<sup>80</sup> Yet with the intensifying rivalry between the USA and China, multilateral frameworks are less capable of hedging in aggressively self-interested economic policy or duplicitous non-compliance with established rules, as is evident in multiple domains. The WTO’s rules on government subsidies, for example, fail to consider the many, often opaque, ways in which the Chinese government subsidizes industry.<sup>81</sup> A multilateral compromise on how to govern global trade in data, services and investment also appears to be a forlorn hope.<sup>82</sup> And the USA has been increasingly brazen in the pursuit of its economic interests. The Trump and Biden administrations, for example, have ‘weaponised interdependence’<sup>83</sup> by blocking the appointment of new members to the WTO’s Appellate Body, effectively paralysing this body’s multilateral dispute settlement function.<sup>84</sup> This veritable ‘crisis in multilateralism’ undermines the Union’s identity and role as an international actor reliant on functioning rule-based cooperation across national divides.<sup>85</sup>

We will discuss how the EU has been responding to this development along two axes. First, there has been a recalibration of reciprocity, with *quid pro quo* arrangements taking a more prominent role in trade policy. This has been accompanied by a retreat from the previous EU practice of prioritizing the openness of the single market to external actors. Second, various measures are being pursued that seek to leverage the EU’s political and economic power to advance EU interests through unilateral approaches that go beyond mere reciprocity.

<sup>79</sup> European Commission, European Security Strategy 2003, 12.12.2003, at 37; N. Tocci, *supra* note 10, at 9.

<sup>80</sup> European Council, A Secure Europe in a Better World: European Security Strategy, Brussels, 12 December 2003; N. Helwig, *supra* note 42, at 74.

<sup>81</sup> C. P. Bown and J. A. Hillman, ‘WTO’ing a Resolution to the China Subsidy Problem’, 22 *JIEL* (2019) 557.

<sup>82</sup> T. Gehrke, *supra* note 16, at 94.

<sup>83</sup> H. Farrell and A. L. Newman, ‘Weaponized Interdependence: How Global Economic Networks Shape State Coercion’, 44(1) *International Security (IS)* (2019) 42.

<sup>84</sup> T. Gehrke, *supra* note 16, at 94; Petersmann and Steinbach, *supra* note 63.

<sup>85</sup> N. Koenig, ‘The EU as an Autonomous Defence Actor’, in N. Helwig, *supra* note 16, 53, at 57.



## 1 Rebalancing Reciprocity

Although trade defence instruments have undergone various reforms to augment their protection of the EU's economic interests,<sup>86</sup> market principles continue to be respected unevenly; China, in particular, engages in extensive market-distorting intervention. While the EU has a regulatory regime that restricts state aid and seeks to ensure non-discriminatory public procurement, a persistent deficiency has been the lack of remedies when non-EU subsidies distort investment or market activities, facilitate the acquisition of EU companies or distort public procurement bidding. To address this gap in trade defence, the EU Commission has sought to acquire expanded powers that would allow it, among other things, to block subsidized firms from acquiring European companies.<sup>87</sup> This new tool enables the Commission to investigate and combat distortions to competition caused by the subsidy practices of non-EU countries since such practices – for example, through state-owned enterprises – may place EU companies that are subject to EU state aid rules at an unfair disadvantage.<sup>88</sup> While this empowerment of the Commission could give rise to conflicts with trade and investment rules,<sup>89</sup> the reciprocity element lies in extension of EU state aid rules to foreign competitors operating in Europe in order to create a more level playing field for EU firms. In a similar vein, in the domain of public procurement, the EU's market opening in the past has remained highly unbalanced, and the plurilateral approach through the WTO's Government Procurement Agreement has proven ineffective in maintaining a level playing field.<sup>90</sup> With the recently adopted International Procurement Instrument,<sup>91</sup> the EU is able to compel third countries to grant EU firms reciprocal procurement market access. If reciprocity is denied, the EU can limit non-EU companies' access to the EU public procurement market.

These initiatives represent an effort to 'rebalance' reciprocity. A hallmark of the legal order governing relations between sovereigns since the inception of the Westphalian order, reciprocity has been a particularly salient aspect of the trade agreements signed

<sup>86</sup> J. Cornelis, 'The EU's Modernization Regulation: Stronger and More Effective Trade Defence Instruments?', 13 *GTCJ* (2018) 539.

<sup>87</sup> Regulation of the European Parliament and of the Council on Foreign Subsidies Distorting the Internal Market, Doc. PE-CONS 46/22, 16.11.2022, at 17.

<sup>88</sup> J. Modrall, 'The EU Anti-Subsidy Regulation Enters Trilogue Negotiations: New Obligations for Multinationals Coming into Focus', *Kluwer Competition Law Blog* (10 May 2022), available at <http://competitionlawblog.kluwercompetitionlaw.com/2022/05/10/the-eu-anti-subsidy-regulation-enters-trilogue-negotiations-new-obligations-for-multinationals-coming-into-focus/>.

<sup>89</sup> N. Kar, 'EU Tools Addressing Foreign Subsidies: The Trade Law Nexus, and Could They Backfire?', *Linklaters Blog* (21 May 2021), available at [www.linklaters.com/en/insights/blogs/linkingcompetition/2021/eu-fsrs/eu-foreign-subsidies-regulation-series/eu-tools-addressing-foreign-subsidies-the-trade-law-nexus-and-could-they-backfire](http://www.linklaters.com/en/insights/blogs/linkingcompetition/2021/eu-fsrs/eu-foreign-subsidies-regulation-series/eu-tools-addressing-foreign-subsidies-the-trade-law-nexus-and-could-they-backfire) (arguing that most-favoured-nation obligations and the unequal treatment of service suppliers and investors in the EU compared to foreign competitors might violate national treatment commitment under the WTO).

<sup>90</sup> Agreement on Government Procurement 1994, 1869 UNTS 508; C. R. Yukins and J. S. Schnitzer, 'GPA Accession: Lessons Learned on the Strengths and Weaknesses of the WTO Government Procurement Agreement', 7 *Trade Law and Development Journal* (2015) 89.

<sup>91</sup> European Parliament, International Public Procurement Instrument: Securing Fairness for EU Firms, 9 June 2022.

in the past decades.<sup>92</sup> The CJEU has consistently emphasized reciprocity as a condition for maintaining a proper balance of rights and obligations between large economic powers and has adjudged a lack of reciprocity as grounds for denying the direct effect of international rules.<sup>93</sup> However, in practice, EU (trade) policy has often deviated from strict reciprocity by accepting non-reciprocal market access and law enforcement. Relations with China furnish a key example. Survey data show that Chinese companies face fewer obstacles to market access and are treated much more fairly in Europe than their European counterparts are in China.<sup>94</sup> As part of the push for strategic autonomy, the EU is set to abandon its acceptance of asymmetric relations. This will include assuring a more level playing field for European firms in their competition with foreign companies as well as calls for third countries to implement market reforms that ensure reciprocal treatment of European companies, especially those operating in China.<sup>95</sup> One would be mistaken, however, to see this as an abrupt volte-face. The rebalancing of reciprocity has been an EU endeavour at least since the launch of the Trade for All strategy in 2015, which explicitly announced the EU's desire for more balanced trade relations with its partners.<sup>96</sup> Full reciprocity also remains an important goal for trade agreements with countries that have enjoyed preferential access to the European market as a form of development assistance.<sup>97</sup> Thus, we find that the push for strategic autonomy also encompasses an emphasis on greater reciprocity, in part through the adoption of new instruments and in part through reforming existing ones.

## 2 Coercion and Unilateralism

While reciprocity entails various instruments that could be labelled 'defensive' in nature, given their goal of ensuring equal access to markets and comparable competitive conditions, various policy tools that have a disciplinary and coercive function – that is, they rely on the unilateral imposition of power – are also being avidly discussed under the rubric of strategic autonomy. Accordingly, strategic autonomy does not only extend to initiatives that aim to further European interests by relying on the reciprocal design of economic relations but also includes policy action that seeks to

<sup>92</sup> F. Parisi and N. Ghei, 'The Role of Reciprocity in International Law', 36 *Cornell International Law Journal* (2003) 93. On reciprocity in relation to strategic autonomy, see J. H. Pohl, 'Strategic Autonomy as a Means to Counter Protectionism', 22 *ERA Forum* (2021) 183, at 187–188.

<sup>93</sup> A. Steinbach, 'EC Liability for Non-compliance with Decisions of the WTO DSB: The Lack of Judicial Protection Persists', 43 *Journal of World Trade* (2009) 1047; with respect to the WTO, see Case C-149/96, *Portugal v. Council* (EU:C:1999:574), paras 42–47.

<sup>94</sup> EU Chamber of Commerce in China, 'Shanghai: The European Union Chamber of Commerce in China', European Business in China Position Paper no. 2013/2014 (2013).

<sup>95</sup> M. Esteban, 'Reciprocity: The New Mantra of the EU's Trade Strategy towards China', Barcelona Centre of International Affairs Paper no. 11/2016 1 Nov. 2016 at 83, available at [www.cidob.org/en/articulos/monografias/different\\_glances\\_at\\_eu\\_trade\\_policy/reciprocity\\_the\\_new\\_mantra\\_of\\_the\\_eu\\_s\\_trade\\_strategy\\_towards\\_china](http://www.cidob.org/en/articulos/monografias/different_glances_at_eu_trade_policy/reciprocity_the_new_mantra_of_the_eu_s_trade_strategy_towards_china).

<sup>96</sup> European Commission, Trade for All towards a More Responsible Trade and Investment Policy, Doc. COM(2015) 497 final (2015).

<sup>97</sup> *Ibid.*, at 30.

rely on European economic and political might in order to advance European geoeconomic aspirations.<sup>98</sup> This 'rediscovery' of 'power politics' has the potential to create friction with the principles of open markets and market-based efficiency guiding international trade and investment rules.<sup>99</sup>

More specifically, offensive autonomy underpins the policy efforts to enhance trade-rule enforcement and to counter foreign government coercion. With the WTO's dispute settlement regime in a state of paralysis, the EU has equipped itself with a tool to enforce its claims unilaterally. The reformed Enforcement Regulation, which has been in place since February 2021, allows the EU to adopt countermeasures when it obtains a favourable ruling from a dispute settlement panel of the WTO and when the other party fails to cooperate on the adjudication of the dispute.<sup>100</sup> Failure to cooperate in dispute resolution may lead to the levying of tariffs or the restriction of the applicability of intellectual property rights. While the Enforcement Regulation replaces multilateral dispute resolution by punishing (and deterring) non-cooperative conduct, the new Anti-Coercion Instrument (ACI) goes one step further by paving the way for unilateral EU action to deter and counteract coercive measures by third countries.<sup>101</sup> Intended as a means of discouraging economic coercion, the tool applies when third countries use measures related to trade or investment as a coercive means to influence the behaviour of EU Member States. As a countermeasure, various trade restrictions may be imposed.<sup>102</sup> The unilateral and coercive character of the ACI is novel, as disciplinary restrictions may be imposed regardless of the reciprocal balance of rights and obligations that otherwise exists between the trading partners. Formally, the measures must comply with the EU's international obligations and international law.<sup>103</sup> However, concerns arise as to the ACI's basic compatibility with WTO rules. The instrument empowers the EU to act and suspend concessions unilaterally, without any ruling on the matter and without the authorization of the WTO's Dispute Settlement Body.<sup>104</sup> By circumventing multilateral bodies for dispute settlement, the EU could be accused of infringing upon its WTO commitments. Potential non-comparability with countermeasure law under public international law has also been voiced as a concern.<sup>105</sup>

The 'geo-economic redesign' of industrial policy is yet another element of strategic autonomy in its more offensive permutations. The intensifying competition

<sup>98</sup> A. Roberts, H. Choer Moraes and V. Ferguson, 'Toward a Geoeconomic Order', 22 *JIEL* (2020) 655.

<sup>99</sup> G. Gertz and M. M. Evers, 'Geoeconomic Competition: Will State Capitalism Win?', 43 *Washington Quarterly* (2020) 117; T. Gehrke, *supra* note 16, at 92.

<sup>100</sup> Council Regulation 2021/167, OJ 2021 L 49, at 1–5.

<sup>101</sup> Proposal for a Regulation of the European Union and of the Council on the protection of the Union and Its Member States from Coercion by Third Countries (Anti-Coercion Instrument), Doc. COM(2021) 775 final, 8 December 2021.

<sup>102</sup> *Ibid.*, Art. 2.

<sup>103</sup> *Ibid.*, at 10, preamble.

<sup>104</sup> Kommerskollegium National Board of Trade Sweden, The EU Proposal for an Anti-Coercion Instrument (2022), at 28.

<sup>105</sup> D. Raju, 'Proposed EU Regulation to Address Third Country Coercion: What Is Coercion?', *EJIL:Talk* (6 January 2022), available at [ejiltalk.org/proposed-eu-regulation-to-address-third-country-coercion-what-is-coercion](http://ejiltalk.org/proposed-eu-regulation-to-address-third-country-coercion-what-is-coercion).

between the USA and China and its knock-on effects have led some to call for stronger European companies that can operate on a global scale. While calls for ‘European champions’ that are major global players in crucial industries are far from novel,<sup>106</sup> growing geopolitical rivalries have imparted such calls with new urgency. The question of whether competitive conditions within the single market are sufficient for such companies to arise, or whether more targeted industrial policy is necessary, transcends the scope of this discussion.<sup>107</sup> However, the crux of this debate centres on whether the potential distortions to competition that result from targeted industrial policy should be accepted given the geopolitical stakes at play, not least the importance of achieving market share in strategically important industries.<sup>108</sup> In merger control, for example, the EU competition authority has shown no willingness to entertain controversial industrial policy that favours the relaxation of merger rules in order to create ‘European champions’, as illustrated vividly by the blocked Alstom-Siemens merger.<sup>109</sup>

More recent initiatives in this area driven by the geo-economic logic include the proposed ‘industrial alliances’ at the European level and the Important Projects of Common European Interest (IPCEI).<sup>110</sup> Both of these initiatives endorse active industrial policy with public financing support as a legitimate means of competing with multinationals that benefit from domestic aid.<sup>111</sup> The IPCEI scheme foresees budgetary differentiation based on the national financial contributions of participating Member States for enterprises under their jurisdiction. Legally, the pursuit of ‘geo-economic objectives’ is not a valid exception for state aid, one that would justify a ‘European Inflation Reduction Act’ in response to the US countermodel that discriminatorily favours US domestic industry.<sup>112</sup> However, Article 107, paragraph 3(b) of the TFEU empowers the Commission to allow Member States to design and implement national investment measures that address important market failures or societal challenges that could not otherwise be remedied. This legal provision offers significant interpretive leeway.<sup>113</sup> Nevertheless, key challenges for the single market’s level playing field result from differences between the Member States in relation to their fiscal space and economic development. At the same time, companies differ significantly in relation to their technical and administrative capabilities.

<sup>106</sup> J. Hayward, *Industrial Enterprise and European Integration: From National to International Champions in Western Europe* (1995).

<sup>107</sup> F. Bulfone, ‘The Political Economy of Industrial Policy in the European Union’, MPIfG Discussion Paper no. 20/12 (2020).

<sup>108</sup> N. Tocci, *supra* note 10, at 20.

<sup>109</sup> Case M.8677, *Siemens/Alstom* (EU:C:2019:0602).

<sup>110</sup> Communication from the Commission Criteria for the Analysis of the Compatibility with the Internal Market of State Aid to Promote the Execution of Important Projects of Common European Interest, Doc. 2021/C 528/02, C/2021/8481, OJ 2021 C 528, at 10–18.

<sup>111</sup> S. Meunier and J. Mickus, ‘Sizing Up the Competition: Explaining Reform of European Union Competition Policy in the COVID-19 Era’, 42 *Journal of European Integration* (2020) 1077.

<sup>112</sup> C. Caulcutt, ‘France Hits Back at America with Green Industry Plan’, *Politico* (4 January 2023).

<sup>113</sup> D. Ferri, ‘The Role of EU State Aid Law as a “Risk Management Tool” in the COVID-19 Crisis’, 27 *European Journal of Risk Regulation* (2020) 1.

Accordingly, preferential treatment would inherently favour particularly large and economically strong Member States and companies.<sup>114</sup> To be sure, the IPCEI scheme is reflective of a broader effort by the European Commission to overhaul its state aid rules in various respects and allow targeted intervention to address societal challenges and market failures. Revised guidelines make it easier for Member States to provide financing when the market is failing to deliver desired results.<sup>115</sup> Similarly, the Commission may approve state aid if potentially negative effects on competition may be outweighed by progress towards achieving targets prescribed by European climate law.<sup>116</sup>

Overall, the current policy shift deviates from past practice in two important aspects. First, the mantra of multilateralism is no longer *de rigueur* and has been supplanted by approaches that are unilateral in nature or that rely on coercive mechanisms rather than merely adjusting reciprocity. While multilateralism remains formally a guiding principle, the EU has been increasingly endorsing regional and bilateral trade and investment policies as suitable alternatives to multilateralism – a trend, it should be noted, that is not entirely new.<sup>117</sup> The extent to which coercive mechanisms such as trade enforcement rules or the ACI give rise to conflicts in international law (that is, due to a circumvention of multilateral dispute settlement or unilateral 'suspension of applicable international obligations')<sup>118</sup> remains dependent on the proportionate use of such instruments in response to injury caused by third countries. In the design of these instruments, legislators have sought to ensure that their application will be consistent with the Union's obligations under international law.<sup>119</sup> However, in part because the Commission has significant leeway to determine the nature and severity of the coercive measures, one clear risk is that targeted countries will engage in retaliatory measures, triggering a conflict that escalates in severity. Finally, internal market concerns arise from a reorientation of industrial policy that revives the narrative of European Champions or of a 'security-of-supply' narrative that justifies discriminatory state aid regimes in an effort to reduce dependence in core technologies, particularly from systemic rivals such as China. This inevitably brings concerns to the fore of compatibility with the level-playing-field rationale of state aid rules.<sup>120</sup>

<sup>114</sup> A. Eisl, 'Important Projects of Common European Interest (IPCEIs) as a New Form of Differentiation: An Analysis of Their Challenges for the European Single Market', EU Integration and Differentiation for Effectiveness and Accountability Policy Paper no. 18, February 2022, at 8.

<sup>115</sup> Communication from the Commission on Guidelines on State Aid to Promote Risk Finance Investments, Doc. 2014/C 19/04, 22 Jan. 2014.

<sup>116</sup> Communication to the Commission on the Approval of the Content of a Draft for a Communication from the Commission on the Guidelines on State Aid for Climate, Environmental Protection and Energy 2022', 18 Feb. 2022, Annexes, paras 68, 71.

<sup>117</sup> T. Renard, 'Partnerships for Effective Multilateralism? Assessing the Compatibility between EU Bilateralism, (Inter-)Regionalism and Multilateralism', 29 *Cambridge Review of International Affairs* (2016) 18.

<sup>118</sup> Union Response Measures pursuant to Articles 7 and 8, 26 Oct. 2012, Annex I.

<sup>119</sup> Anti-Coercion Instrument, *supra* note 101, Art. 1.

<sup>120</sup> Pang, 'The Siemens/Alstom Merger Case: How European Merger Policy Respond to Global Competition', 1 *Dublin Law and Policy Review* (2020) 33.

### C The Security Dimension of Strategic Autonomy

A third dimension of strategic autonomy pertains to ‘security’ in its various manifestations, including, but not limited to, the ability to protect and operate critical infrastructure as well as in relation to defence and military issues, broadly driven by the desire to enhance independence in technological and security matters.<sup>121</sup> As the EU struggles to steer profound change processes (including digital transformation and climate change), ‘security’ is a watchword that is increasingly informing a broader range of issues, including digital rights, health care, energy and green technologies. Europe’s current energy supply crisis, which followed fast on the heels of the COVID pandemic, has spotlighted the vulnerabilities that can result from international interdependencies.<sup>122</sup> Beyond long-standing fears of being outpaced in the domain of technological innovation, the EU has become increasingly uncertain of the reliability of its partners in the domains of defence and security policy, which the EU has traditionally ‘outsourced’ in large measure to the USA. The US isolationist turn under President Donald Trump amplified the realization that the EU could not always count on the USA as it had in the past, spurring a reconsideration of this transatlantic relationship and calls for greater autonomy in the domain of security policy.<sup>123</sup> While these concerns gave rise to multifaceted autonomy discussions revolving around the military expenditure of the EU Member States, EU-NATO relations, the Strategic Compass for Security and Defence,<sup>124</sup> the European Peace Facility or the development of the European defence industrial base, this article is particularly concerned with the institutional dimension of security policy.

At the intersection of strategic autonomy and the broader domain of security, one can productively distinguish between three different subdomains: (i) technological leadership and security-of-supply concerns; (ii) institutional autonomy in the EU’s decision-making in security matters; and (iii) cyber security as an illustration for potential conflicts with international law.

#### 1 Technological Leadership and Security-of-Supply Concerns

Technology and innovation have far-reaching implications for state power across a range of dimensions – military, economic and normative.<sup>125</sup> The goal of achieving technological leadership in key industries is far from specific to Europe; rather, it represents a long-term aspect of strategic planning in many countries. The term ‘technological autonomy’ is now being deployed with increasing frequency to refer

<sup>121</sup> R. Bellanova, H. Carrapico and D. Duez, ‘Digital Sovereignty and European Security Integration: An Introduction’, 31 *European Security* (2022) 337.

<sup>122</sup> K. Majcher, *supra* note 63.

<sup>123</sup> S. Lavery, S. McDaniel and D. Schmid, *supra* note 8, at 66.

<sup>124</sup> Council of the European Union, A Strategic Compass for Security and Defence, Doc. 7371/22, 21 March 2022.

<sup>125</sup> E. Sinkkonen and V. A. Sinkkonen, ‘A Multi-dimensional View of US-China Great-Power Competition’, in N. Helwig, *supra* note 16, 27, at 29; U. Friedman, ‘The New Concept Everyone in Washington Is Talking About’, *The Atlantic* (6.8.2019), available at [www.theatlantic.com/politics/archive/2019/08/what-genesis-great-power-competition/595405/](http://www.theatlantic.com/politics/archive/2019/08/what-genesis-great-power-competition/595405/).



to EU efforts to achieve or preserve its leadership role in important technological domains. European planners, for example, have announced the goal of making the 2020s Europe's 'Digital Decade' through the development of forward-looking standards and the targeted promotion of research and development. The overarching goal is to have 'mastery and ownership of key technologies' in Europe, including 'quantum computing, artificial intelligence, blockchain, and critical chip technologies'.<sup>126</sup> The increasing interconnectedness of the physical and political world only augments the geopolitical relevance of information technology (IT) and communications infrastructure. The control of communications infrastructure is increasingly being used as a geopolitical tool – the banning of Russia from the SWIFT interbank messaging system, an action previously taken against Iran in 2012, is just one example of this development. Indeed, the 'weaponization' of the SWIFT system is part of a broader trend in which Western powers have been leveraging long-standing trade arrangements and communications networks – a legacy of their (former) hegemony – as a tool to place pressure on foreign governments.<sup>127</sup>

The EU has developed various instruments that seek to expand European control over critical technologies and infrastructure as well as promote EU technological leadership (such as the IPCEI framework, export controls, the EU toolbox for 5G security and the GAIA-X digital infrastructure project). While these initiatives all have their own specific legal implications, the EU's 'investment screening' framework – the Foreign Direct Investment (FDI) Screening Regulation – is particularly noteworthy as it causes frictions with international investment law.<sup>128</sup> The framework was adopted in response to a state-directed investment campaign launched by China to acquire European technology firms. The investment screening framework seeks to ward off Chinese investment in line with the insight that China is 'an economic competitor in the pursuit of technological leadership, and a systemic rival promoting alternative models of governance'.<sup>129</sup> Like other instruments that seek to promote strategic autonomy, investment screening mechanisms have already existed for some time.<sup>130</sup> However, growing geopolitical rivalries and increasing technology-related national security concerns have further stimulated their use.

As the criteria of 'security' and 'public order' figure prominently in the screening-based assessment of FDI, such mechanisms are inherently at odds with EU Treaty-based principles of market openness. Whether or not an investment is likely to affect security or public order is decided by the Member States and the Commission based on

<sup>126</sup> U. von der Leyen, 'Speech by President-elect von der Leyen in the European Parliament Plenary on the Occasion of the Presentation of Her College of Commissioners and Their Programme', 27.11.2019, available at [https://ec.europa.eu/commission/presscorner/detail/en/SPEECH\\_19\\_6408](https://ec.europa.eu/commission/presscorner/detail/en/SPEECH_19_6408).

<sup>127</sup> A. K. Jakobsson and M. Stolz, *supra* note 77, at 111; H. Farrell and A. L. Newman, 'Weaponized Interdependence: How Global Economic Networks Shape State Coercion', 44 *IS* (2019) 42, at 67.

<sup>128</sup> Council Regulation 2019/452 (FDI Screening Regulation), OJ 2019 L 79I/1 (as amended by Commission Regulation 2020/1298, 13 July 2020).

<sup>129</sup> European Commission, 'EU-China: A Strategic Outlook', 12 March 2019, at 1, available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A52019JC0005>.

<sup>130</sup> G. Dimitropoulos, 'National Security: The Role of Investment Screening Mechanisms', in J. Chaisse, L. Choukroune and S. Jusoh (eds), *Handbook of International Investment Law and Policy* (2020) 1.

how the investment will impact critical infrastructure and technology. In this connection, attention is given as to whether prior activities have affected security or public order in a member state.<sup>131</sup> As a rule, FDI rules and procedures are supposed to be non-discriminatory in relation to third countries,<sup>132</sup> yet, in practice, investors from certain countries – for example, China or Russia – are likely to face increased scrutiny.<sup>133</sup> In this way, we find inherent tensions between the principle of market openness and security concerns. Trade-offs would appear to be unavoidable in a world of ‘weaponized interdependence’.

The legal repercussions of the modified FDI screening regime become evident when one considers the countervailing tendencies exhibited by domestic and international investment law.<sup>134</sup> On the one hand, the EU has reinstated the right of Member States to scrutinize planned foreign investment in line with domestic security considerations. On the other hand, bilateral and multilateral investment agreements have shaped the scope of foreign investment reviewability through international law. This has limited the jurisdiction of domestic courts while providing for the application of public international law, in addition to the host state’s domestic law.<sup>135</sup> At the same time, the new FDI screening regime largely leaves the concept of ‘security’ unspecified, entailing a broad range of possible considerations to be employed by Member States, such that the investment Treaties concluded at the EU level are faced with an increasingly heterogeneous application of the terms under the investment agreements. Only a small share of investment agreements contain exceptions with respect to essential security interests or national security, sometimes by reference to, or with the incorporation of, the exceptions recognized under WTO law.<sup>136</sup> Even if these exceptions could potentially provide a defence in an investor-state dispute settlement claim against a ‘security’-motivated investment screening process, the expanded opportunities to invoke security considerations under the FDI screening regulation could lead in many cases

<sup>131</sup> See FDI Screening Regulation, *supra* note 128, Art. 4, para. 2.

<sup>132</sup> *Ibid.*, Art. 3(2).

<sup>133</sup> F. Röhling and U. Salaschek, ‘The Foreign Investment Regulation Review: EU Overview’, *The Law Reviews* (18 October 2021), available at <https://thelawreviews.co.uk/title/the-foreign-investment-regulation-review/eu-overview>.

<sup>134</sup> J. H. Pohl, ‘The Impact of Investment Treaty Commitments on the Design and Operation of EU Investment Screening Mechanisms’, in S. Hindelang and A. Moberg (eds), *Yearbook of Socio-Economic Constitutions 2020: A Common European Law on Investment Screening* (2020) 725, at 725; Z.T. Chan and S. Meunier, ‘Behind the Screen: Understanding National Support for a Foreign Investment Screening Mechanism in the European Union’, 17 *Review of International Organization* (2022) 513.

<sup>135</sup> G. R. Elgueta and B. Mauro, ‘The Paradoxical Relationship between “Foreign Direct Investment Screening” and International Investment Law: What Role for Investor-State Arbitration?’, *Kluwer Arbitration Blog* (30 April 2020), available at <http://arbitrationblog.kluwerarbitration.com/2020/04/30/the-paradoxical-relationship-between-foreign-direct-investment-screening-and-international-investment-law-what-role-for-investor-state-arbitration/> (arguing, however, that this tension only leads to foreign investors claims under international investment law where the applicable international investment agreement grants foreign investors a right of establishment and refuses to accord to the host state full discretion (though with the good faith limit) to invoke the national security exception).

<sup>136</sup> T. Voon and D. Merriman, ‘Incoming: How International Investment Law Constrains Foreign Investment Screening’, 24 *JWIT* (2022) 1; T. Voon, ‘The Security Exception in WTO Law: Entering a New Era’, 113 *AJIL Unbound* (2019) 45.

to the 'discriminatory treatment' of foreign investors, thus triggering arbitration to resolve purported violations of investment agreements. Accordingly, the application of the FDI screening regulation will depend on relevant domestic laws and policies and will be agreement specific, fact specific and perhaps even tribunal specific.<sup>137</sup> Given the variance in the security concerns of Member States, we can thus expect a rise in the number of cases heard by investment arbitration tribunals and an increasingly heterogeneous jurisprudence.

Trade and investment rules may also inhibit autonomy pursuit in the field of energy supply. With Russia's war against Ukraine pulling energy security in the focus of autonomy concerns, the EU has sought to end reliance on Russian energy as a strategic priority. However, international economic law may pose impediments to reducing dependence and promote diversification in the supply of energy. While the liberalization of energy trade and the promotion and protection of energy investments have long been viewed as being necessary to achieve energy security, the EU's current departure from Russian gas supply shows that international trade and investment regimes may contribute to locking states into existing dependencies by constraining strategies aimed at reducing these dependencies through diversification and nationalization.<sup>138</sup> WTO law may erect obstacles to the pursuit of infrastructure diversification strategies in the supply of natural gas. In *EU – Energy Sector*, the WTO panel found a violation of the provisions of the General Agreement on Tariffs and Trade (GATT) caused by the EU's infrastructure policy that increased its transport capacity for non-Russian gas and decreased capacity for Russian gas.<sup>139</sup> The panel considered the associated reduced competitive opportunities for Russian gas vis-à-vis other sources to be discriminatory and unjustified under the GATT's general exceptions regime.<sup>140</sup>

Likewise, investment Treaties make it difficult to reduce energy dependence through nationalization and diversification strategies. Some agreements, such as the Energy Charter Treaty (ECT), explicitly exclude expropriation from their essential security exception.<sup>141</sup> The narrowing of domestic policy scope follows the traditional liberal investment theory that motivated the EU's initial proposal for the ECT in 1994, which emphasized the cost efficiency of the energy supply and reducing regulatory risks.<sup>142</sup> In hindsight, the Russian practice of weaponizing energy has shown the perils of such a limited perspective on energy security. Indeed, the WTO panel in *EU – Energy Sector* recognized that foreign governments may use their foreign-controlled gas pipeline system operators to prevent importing states from diversifying their sources of supply

<sup>137</sup> T. Voon and D. Merriman, *supra* note 136.

<sup>138</sup> A. Boute, 'Weaponizing Energy: Energy, Trade, and Investment Law in the New Geopolitical Reality', 16 *American Journal of International Law* (2022) 740, at 741.

<sup>139</sup> *European Union and Its Member States – Certain Measures Relating to the Energy Sector (EU – Energy Sector) – Report of the Panel*, 8 October 2018, WT/DS476/R; General Agreement on Tariffs and Trade 1994, 55 UNTS 194.

<sup>140</sup> *EU – Energy Sector*, *supra* note 139, paras 7.1300–7.1301.

<sup>141</sup> Energy Charter Treaty 1994, 2080 UNTS 95, Art. 24.

<sup>142</sup> C. Bamberger, 'Overview', in T. Waelde (ed.), *The Energy Charter Treaty: An East-West Gateway for Investment and Trade* (1996) 1, at 1.

so as to maximize gas exports.<sup>143</sup> The success of the EU's efforts to gain autonomy through energy diversification depends a great deal on how trade and investment law are interpreted to account for energy security interests for the purpose of justifying trade and investment restrictions.<sup>144</sup>

## 2 'Institutional Autonomy'

European reliance on the USA in matters of defence policy has a long history that is intimately connected to the geopolitical order that emerged at end of World War II.<sup>145</sup> British and French aspirations to maintain strategic independence from the USA in this new environment expired at the very latest with their 'chastening' in the 1956 Suez crisis. Under the umbrella of US hegemony, (Western) Europe ultimately evolved into a quasi-appendage of US power in relation to defence policy.<sup>146</sup> Accordingly, European economic integration has not been accompanied by a corresponding integration in terms of military capabilities. Against the backdrop of divergent national experiences and perspectives, the Union still lacks a clear set of preferences that could inform a homogenous approach to 'strategic autonomy' in matters of defence. To be sure, the development of 'European strategic autonomy' on defence issues will depend in no small part on identifying and encouraging common policy priorities and viewpoints. Yet this is only a first step.<sup>147</sup>

The term 'institutional autonomy' draws attention to the need for appropriate governance structures and decision-making processes that will allow Europe to overcome its institutional fragmentation and weakness in this domain. Enhanced European strategic autonomy is inextricably tied with the constitutional set-up and its potential development between deepening, differentiation and reversal. The intergovernmental principle grants every member state a veto in the Common Foreign and Security Policy (CFSP); no state can be forced into foreign policy positions or actions against its will. The CFSP necessitates consensual approaches, making it much more difficult to develop a clear and robust policy vision. Indeed, the need for unanimity renders the CFSP slow, indecisive and susceptible to blockades by individual Member States. At the same time, growing unilateralist tendencies within the EU – which are in part attributable to divergent member state loyalties vis-à-vis the USA, Russia and China – have been acting as a centrifugal force.<sup>148</sup>

However, even if demand to extend qualified majority voting is a perennial issue in the debate on the EU's ability to act, gridlock in the domain of the CFSP is not

<sup>143</sup> EU – Energy Sector, *supra* note 139, para. 7.1174.

<sup>144</sup> A. Boute, *supra* note 138, at 742.

<sup>145</sup> J. Howorth, 'European Defence Policy between Dependence and Autonomy: A Challenge of Sisyphean Dimensions', 19 *British Journal of Politics and International Relations* (2017) 13.

<sup>146</sup> N. Tocci, *supra* note 10, at 10.

<sup>147</sup> C. O. Meyer, 'Theorising European Strategic Culture: Between Convergence and the Persistence of National Diversity', CEPS Working Document no. 204 (2004), available at [http://aei.pitt.edu/6634/1/1126\\_204.pdf](http://aei.pitt.edu/6634/1/1126_204.pdf).

<sup>148</sup> B. Lippert, von N. Ondarza and V. Perthes, *supra* note 39, at 9.

inevitable under the current EU Treaties.<sup>149</sup> One path to qualified majority voting leads via the *passerelle* clause specifically for the CFSP (Article 31(3) of the TEU), allowing the European Council to unanimously decide to extend qualified majority voting to specific fields within the CFSP. Based on the *passerelle* clause, the Commission proposed three issues where qualified majority voting could be initiated: the EU's common position on human rights issues in international fora, sanctions policy and the decision to conduct civilian missions.<sup>150</sup> However, the main limitations of the *passerelle* approach are its inapplicability to decisions with military or defence implications and an emergency brake (Article 31(2) of the TEU), whereby any member state can object to a decision being taken by qualified majority voting for 'vital and stated reasons of national policy'. Consequently, the *passerelle* clause has never been used hitherto.

Nor has the potential of Article 44 of the TEU been tapped yet, which allows the Council to unanimously entrust the implementation of a mission or operation to a group of willing and able Member States that would then agree among themselves on its management. Recent political initiatives have sought to pursue Article 44 of the TEU for the Strategic Compass for Security and Defence by committing to 'decide on practical modalities for the implementation of Article 44' by 2023. Likewise, 'enhanced cooperation' within the CFSP (Article 20, paragraph 1, of the TEU) has never been used. Once established, the members joining this enhanced cooperation can agree among themselves to switch to a qualified majority (Article 333 of the TFEU).<sup>151</sup> While all the foregoing paths require unanimity to initiate the turn to a qualified majority further down the road, 'constructive abstention' under Article 238, paragraph 4 of the TFEU allows the abstaining member not to apply the decision but accepts that it commits to the Union.

This instrument has been applied with respect to the European Peace Facility, enabling delivery of lethal and non-lethal military assistance to Ukraine while allowing countries constructively abstaining to contribute to non-lethal supply only.<sup>152</sup> Finally, the 'enabling clause' (Article 31, paragraph 2 of the TEU) permits Member States to decide by qualified majority in predefined cases, including, in particular, the implementation of a previously unanimous decision by the European Commission or Council. The enabling clause was used in the field of EU sanctions, with the Council occasionally agreeing on the amendment of sanction listings by qualified majority in the past.<sup>153</sup> While members have made scant use of these avenues in the past, the

<sup>149</sup> R. A. Wessel *et al.*, 'The Future of EU Foreign, Security and Defence Policy: Assessing Legal Options for Improvement', 26 *European Law Journal* (2020) 371.

<sup>150</sup> European Commission, A Stronger Global Actor: A More Efficient Decision Making for EU Common Foreign and Security Policy: Communication to the European Council, the European Parliament and the Council, Doc. COM (2018) 647 final, 12 September 2018, at 1; see also European Commission, State of the Union Address by President von der Leyen at the European Parliament Plenary, Brussels, 16 September 2020.

<sup>151</sup> J. Mintel and N. von Ondarza, 'More EU Decisions by Qualified Majority Voting – but How?', SWP Comment no. 61, October 2022.

<sup>152</sup> N. Koenig, Towards QMV in EU Foreign Policy, 14 October 2022, at 7.

<sup>153</sup> Council of the European Union, Summary Record Extraordinary Meetings of the Permanent Representatives Committee, Doc no. 7282/22, 16 March 2022.

Russian invasion of Ukraine and the return of enlargement as a realistic option are factors fuelling the discussion on the extension of qualified majority voting, institutionally documented by the formation of the ‘Group of Friends on Qualified Majority Voting in Common Foreign and Security Policy’.<sup>154</sup>

The relationship between the European External Action Service (EEAS) and the European Commission is yet another source of institutional friction that undermines coherent defence and foreign policy. The EEAS always had an ambiguous standing, wedged between the more sovereign national diplomatic services and the economically potent Commission. Its main function in the political process lies in preparing and chairing most of the CFSP working groups and being involved in the work of the EU High Representative. While the TEU formally assigns the High Representative as the vice-president of the Commission to be in charge of ‘ensuring the consistency of the Union’s external action’ (Article 18, paragraph 4), in practice, the EEAS and the High Representative have very little coordinating power over the influential regulatory and trade-related portfolios of the Commission that increasingly shape the EU’s external profile.<sup>155</sup>

Stronger supranational trends are nevertheless visible in the defence industry, thanks to the Commission’s activities in this area, including its establishment of the European Defence Fund (EDF) and a Directorate-General for Defence Industry and Space (DG DEFIS).<sup>156</sup> Given that the EU Treaties prohibit the use of the EU’s budget for operative expenditures with military and defence implications (Article 41, paragraph 2 of the TEU), the creation of the EDF within the EU’s multi-annual budget was a major innovation. Circumventing these legal hurdles, the Commission based the EDF on Article 173 of the TFEU, referring to the EU’s role in fostering industrial competitiveness. It thereby exported the Community method to the EDF, marginalizing the role of relevant intergovernmental institutions – namely, the European Defence Agency and the EEAS.<sup>157</sup>

### 3 External Conflicts: The Cybersecurity Dimension

While the term ‘institutional autonomy’ is used to draw attention to the EU’s internal institutional barriers to uniform strategic autonomy in defence matters, the domain of cyber-security policy is illustrative to highlight potential frictions with international law. Cyber security blends technological security and ideological considerations. In the wake of the security debate surrounding the 5G standard, concerns have arisen that European vulnerabilities will be exacerbated by the deployment and control of crucial technologies by non-EU actors.<sup>158</sup> Accordingly, the EU’s new Cybersecurity Strategy

<sup>154</sup> Joint Statement of the Foreign Ministries on the Launch of the Group of Friends on Qualified Majority Voting in EU Common Foreign and Security Policy, 4 May 2023, available at [www.auswaertiges-amt.de/en/newsroom/news/-/2595304](http://www.auswaertiges-amt.de/en/newsroom/news/-/2595304).

<sup>155</sup> N. Helwig, *supra* note 42, at 81.

<sup>156</sup> P. Haroche, ‘Supranationalism Strikes Back: A Neofunctionalist Account of the European Defence Fund’, 27 *Journal of European Public Policy* (JEPP) (2020) 853.

<sup>157</sup> N. Koenig, *supra* note 85, at 62.

<sup>158</sup> A. K. Jakobsson and M. Stolz, *supra* note 77, at 119.



underlines that cyber security is an important component of strategic autonomy and thus seeks to strengthen the EU's leadership and strategic capacities in this domain.<sup>159</sup> Clear points of divergence are apparent between the EU's values-based approach and the competing Chinese vision. China has sought to establish national control over the Internet by restricting the free flow of information and services.<sup>160</sup> This approach is fundamentally at odds with the principle of a free and open Internet that has shaped the Western approach to Internet regulation.<sup>161</sup> In this way, the underlying conflict stems from divergent ideological positions concerning the proper role of state power in regulating communications.

Opposing perspectives on Internet and technology governance also lie at the heart of the EU's new cyber-security sanctions regime,<sup>162</sup> undeniably adopted with China in mind.<sup>163</sup> The new regime empowers the EU to impose economic sanctions for IT-based malicious activities. In imposing such sanctions, the EU is leveraging a domain of international law that, with few exceptions – most notably, the *Budapest Convention on Cybercrime*<sup>164</sup> and the not-yet-in-force African Union's *Convention on Cyber Security and Personal Data Protection*<sup>165</sup> – does not have clearly defined rules for cyberspace.<sup>166</sup> Moreover, the sanction mechanism has the potential to cause conflict with other areas of international law.<sup>167</sup> First, such sanctions may be incompatible with obligations under WTO law. Cyber sanctions may include broad prohibitions on economic relations with sanctioned entities. They are thus tantamount to import/export restrictions, which are prohibited under WTO rules.<sup>168</sup> Second, cyber sanctions imposed on individuals may encroach on fundamental human rights – in

<sup>159</sup> Council, Draft Council Conclusions on the EU's Cybersecurity Strategy for the Digital Decade, 9 March 2021.

<sup>160</sup> A. Segal, 'China's Vision for Cyber Sovereignty and the Global Governance of Cyberspace', in N. Rolland (ed.), *An Emerging China-centric Order: China's Vision for a New World Order in Practice*, NBR Special Report no. 87 (2020) 85, available at [www.nbr.org/wpcontent/uploads/pdfs/publications/sr87\\_aug2020.pdf](http://www.nbr.org/wpcontent/uploads/pdfs/publications/sr87_aug2020.pdf).

<sup>161</sup> A. K. Jakobsson and M. Stolz, *supra* note 77, at 120.

<sup>162</sup> Council Regulation 2019/796, OJ 2019 L 129I, at 1–12.

<sup>163</sup> Council of the EU, China: Declaration by the High Representative on behalf of the European Union urging Chinese authorities to take action against malicious cyber activities undertaken from its territory, Press Release, 19.7.2021, available at [www.consilium.europa.eu/en/press/press-releases/2021/07/19/declaration-by-the-high-representative-on-behalf-of-the-eu-urging-china-to-take-action-against-malicious-cyber-activities-undertaken-from-its-territory/](http://www.consilium.europa.eu/en/press/press-releases/2021/07/19/declaration-by-the-high-representative-on-behalf-of-the-eu-urging-china-to-take-action-against-malicious-cyber-activities-undertaken-from-its-territory/).

<sup>164</sup> Convention on Cybercrime, ETS No. 185, 1 July 2004.

<sup>165</sup> African Union Convention on Cyber Security and Personal Data Protection, 27.6.2014, available at [https://au.int/sites/default/files/treaties/29560-treaty-0048\\_-\\_african\\_union\\_convention\\_on\\_cyber\\_security\\_and\\_personal\\_data\\_protection\\_e.pdf](https://au.int/sites/default/files/treaties/29560-treaty-0048_-_african_union_convention_on_cyber_security_and_personal_data_protection_e.pdf).

<sup>166</sup> A. Chayes, *Borderless Wars: Civil Military Disorder and Legal Uncertainty* (2014), at 138; Schmitt, 'Cybersecurity and International Law', in R. Geiß and N. Melzer (eds), *The Oxford Handbook of the International Law of Global Security* (2021) 661.

<sup>167</sup> H. Moynihan, *The Application of International Law to State Cyberattacks: Sovereignty and Non-Intervention*, December 2019, at 3–6, 8–36; I. Bogdanova and M. V. Callo-Müller, 'Unilateral Cyber Sanctions: Between Questioned Legality and Normative Value', 54 *Vanderbilt Journal of Transnational Law* (2021) 911.

<sup>168</sup> I. Bogdanova, 'Targeted Economic Sanctions and WTO Law: Examining the Adequacy of the National Security Exception', 48 *Legal Issues of Economic Integration* (2021) 171, at 176.

particular, property rights and the right to due process.<sup>169</sup> Notably, violations of the ‘fair and equitable treatment’ principle and other standards of treatment prescribed by international investment agreements appear possible if sanctions restrict the use of an investor’s property or prohibit transactions with sanctioned parties.<sup>170</sup> Third, the sanctions could be incompatible with the customary international law principle of state immunity if they entail freezing the assets of government bodies.

In this way, the effort to promote strategic autonomy in the domain of security policy entails a modification of state aid rules and ongoing controversies in relation to the relaxation of competition law; a sharpening of existing instruments with protectionist tendencies (for example, through discretionary investment screening); and the creation of new restrictive instruments (for example, the cyber-security sanctions regime). Clearly, ‘compartmentalized protectionism’ and ‘weaponized interdependence’ have the potential to trigger conflicts at various levels within the internal market and in international law. Discriminatory practices, such as the picking of winning technologies in industrial policy, conflict with the level-playing-field principle that informs state aid prohibitions and competition law, and security considerations and discriminatory practices in foreign direct investment screening are likely to lead to international investment disputes. Moreover, technological leadership ambitions in cyber security will create conflicts with trade and investment obligations. From an institutional perspective, the goal of furthering institutional autonomy is at loggerheads with the issue of competence allocation between the EU and its Member States, a point of friction that will impair the easy adoption of a pan-European stance on issues of foreign policy and defence.

## 4 Conflicting Aspects of Strategic Autonomy and Their Reconciliation

As discussed in the previous section, the EU is pursuing a range of objectives under the broader umbrella of strategic autonomy, adopting concrete policies to prevent coercion and market distortions to fair competition, to promote environmental sustainability and human rights and to enhance security and protect critical infrastructure. The tailoring of these policies is crucially informed by a reassessment of the proper balance between ‘interdependence’ and ‘independence’, a reassessment that has been spurred in no small measure by recent geopolitical developments. As the effort to promote ‘strategic autonomy’ is motivated by divergent policy objectives that are occasionally at cross purposes, there is a need to holistically consider and reconcile policy initiatives across the domains of economics, technology, the environment and security. At the same time, the new policy objectives must be balanced against principles that, if no longer sacrosanct, nevertheless remain highly salient, including multilateralism, openness and rule-based conduct. Ultimately, however, a large hurdle to the

<sup>169</sup> I. Bogdanova and M. V. Callo-Müller, *supra* note 167, at 937.

<sup>170</sup> *Ibid.*, at 952.

effective implementation of strategic autonomy is likely to be posed by the fragmented nature of the Member States' strategic priorities across various domains.

The foregoing analysis has spotlighted five fundamental areas of legal concern that will require careful balancing. Some of these conflicts are symptomatic of change in the EU's commitment to specific normative tenets. Other conflicts will require careful negotiation to ensure coherence between policy efforts. Given the broad range of potentially conflicting rights, obligations and principles, EU policy-makers will need to conduct rigorous proportionality assessments on a case-by-case basis. First, the discriminatory and prohibitive practice entailed by the prioritization of certain values will need to be reconciled with the conventional non-discriminatory and non-protectionist tenets of the EU's legal framework. To the extent that the EU promotes sustainability in its various guises (for example, climate protection, human rights) or establishes benchmarks for international adoption (for example, through the CBAM or bilateral agreements), they must be weighed against the EU's commitments to non-discrimination and free market principles. While the EU's legal framework furnishes a strong basis for advancing environmental concerns (see, for example, Article 3 of the TEU), a basis that is further enhanced by an explicit competence to act (Article 191 of the TFEU) and an imperative to consider environmental concerns in a cross-cutting manner (Article 11 of the TFEU), it nevertheless remains true that specific policy actions with an external effect – for example, a border regime subjecting imports to carbon dioxide standards – must conform with international trade and investment obligations, which prohibit discrimination and protectionism. In this way, the stricter pursuit of European values will entail greater political and legal conflict, due to the pursuit of 'discriminatory' ends.

Second, strategic autonomy is at cross purposes with the EU Treaties' commitment to openness, multilateralism and international cooperation, by instilling elements of insularity, unilateralism and confrontation. Finding the right mix between openness and protection – between a commitment to alliances and self-reliance – will be the central challenge faced by the EU in its pursuit of greater strategic autonomy.<sup>171</sup> Europe's legal architecture allows for the geopolitical motivation of trade and regulatory rules, a stronger invocation of Treaty-based values and a rebalanced reciprocity in external economic relations. At the same time, freedom of action to tailor policy will be partially restricted by economic principles that only permit state intervention when conducted in pursuit of legitimate and proportionately applied policy concerns – for example, to ward off FDI that represents a security threat. The proper balancing of trade-offs will require the EU to make sure that its investment initiatives, adjustments to state aid rules, application of competition law and industrial alliances nevertheless maintain a level playing field and accord with the free market imperatives of the EU's primary law. Non-multilateral alternatives in external relations have always existed,<sup>172</sup> but they remain legally fraught and contentious – for example, when

<sup>171</sup> N. Helwig, *supra* note 33, at 25.

<sup>172</sup> A. Steinbach, 'The Trend towards Non-Consensualism in Public International Law: A (Behavioural) Law and Economics Perspective', 27 *European Journal of International Law* (2016) 643.

unilateral coercive action is taken rather than using WTO dispute settlement proceedings. Unilateralist elements are also inherent in the new investment screening tool, which aims to accommodate national security concerns, with limitations resulting from the international trade and investment agreements to which the EU and Member States are party.

Third, a perennial conflict that accompanies strategic autonomy is that between rule-based and power-based stances. The EU has long eschewed power politics in foreign relations, maintaining a strong commitment to a rule-based order of cooperation and dispute settlement.<sup>173</sup> A counter-example is the USA, which has not refrained from ‘wielding a big stick’ in relations with foreign countries, particularly in more recent decades, albeit at considerable cost to the multilateral legal order, as illustrated by the paralysis in the WTO’s dispute settlement procedure.<sup>174</sup> In response to the aggressive pursuit of national interests by the USA and China, the EU has significantly expanded its arsenal of trade controls and sanction mechanisms. This marks a shift from the EU’s traditional role as an advocate of rule-based arrangements, expanding the scope for the unilateral pursuit of European interests. Political scientists have been critical of this shift given that the EU’s very existence is premised on the notion of rule-based cooperation.<sup>175</sup> Given the many references in the EU Treaties to the rule of law (for example, the preamble and Article 2 of the TEU) and international law (Article 3, paragraph 5 of the TEU), adherence to a rule-based order is a cornerstone of the EU’s constitutional make-up.

A fourth area of conflict arises from the tension between the desire for more independence and the Treaty-based commitment to an open economy and market rules. Through its legal architecture and cooperative stance in external relations, the EU has promoted global market forces, increasing the interconnectedness of national economies, introducing sophisticated divisions of labour on a global scale and creating markets in response to the supply and demand for local goods and services.<sup>176</sup> Interdependence has thus been the inevitable (and desirable) consequence of global trade and the EU Treaties’ removal of internal and (to a lesser extent) external trade barriers.<sup>177</sup> Economic interdependence was long viewed as contributing to peace, as conflict entails mutually harmful disruptions to international exchange. Europe’s commitment to economic openness has only wavered in light of more recent geopolitical and geo-economic concerns. Yet the EU Treaties do not oblige the EU to maintain a commitment to free market principles at all costs. Rather, the Treaties allow the EU to compete for technological leadership and to safeguard security of supply for critical

<sup>173</sup> J. Larik, ‘The EU’s Global Strategy, Brexit and “America First”’, 23 *EFAR* (2018) 343.

<sup>174</sup> E. U. Petersmann and A. Steinbach, *supra* note 63.

<sup>175</sup> T. Palm, Normative Power and EU Strategic Autonomy, August 2021; N. Helwig and V. A. Sinkkonen, ‘Strategic Autonomy and the EU as a Global Actor: The Evolution, Debate and Theory of a Contested Term’, 27 *EFAR* (2022) 1; E. Sinkkonen and V. A. Sinkkonen, *supra* note 125, at 49.

<sup>176</sup> Blanke, ‘The Economic Constitution of the European Union’, in H.-J. Blanke and S. Mangiameli (eds), *The European Union after Lisbon* (2012) 369; Steinbach, ‘EU Economic Governance after the Crisis: Revisiting the Accountability Shift in EU Economic Governance’, 26 *JEPP* (2019) 1354.

<sup>177</sup> Europe 2020: A Strategy for Smart, Sustainable and Inclusive Growth, Doc. COM(2010)2020, 3 March 2010, at 5.

commodities, goods and services. The EU Treaties' objectives – for example, to secure human health (Article 9 of the TFEU) and to safeguard the Union's 'fundamental interests, security and independence' (Article 21, paragraph 2(a) of the TEU) – furnish a legal basis for such policy goals, with the corresponding instruments vested in competences to conduct industrial policy, the CFSP or state aid law. However, the more strategic autonomy entails government intervention in the economy (for example, through private sector subsidies or exceptions under state aid rules), protectionist measures (for example, through discriminatory investment screening) or sanctions (for example, cyber-security sanctions), the more it risks colliding with other Treaty commitments, including free market principles and fundamental rights or competition-protecting rules.

The fifth and final source of conflict in implementing strategic autonomy is the dichotomy between supranationalism and intergovernmentalism – that is, between the overarching interests of the Union and the preferences attributable to individual Member States. The concept of strategic autonomy masks the fact that strategic cultures vary across Member States.<sup>178</sup> The way in which Member States view their dependence on foreign powers is intimately connected to historical experience, economic factors and security concerns. For instance, Member States diverge on how assertively the EU should pursue strategic autonomy in response to Chinese human rights violations.<sup>179</sup> The same goes for their willingness to accept international trade law violations as a consequence of the CBAM. This corresponds more broadly to the conflict between 'protectionists' and 'free marketers'. Export-reliant Member States find it difficult to accept calls for the re-shoring of critical industries and for a more value-based trade policy that relies on greater EU protectionism and market intervention.<sup>180</sup>

Diversity must be reconciled with another pivotal dimension of strategic autonomy: 'institutional autonomy'. Institutional autonomy requires that governance structures and decision-making processes be in place if the Union and the Member States are to arrive at a sufficiently consensual vision of strategic autonomy. Geo-economic and geopolitical challenges encompass aspects of technology, security and defence policy, thus transcending the Commission's exclusive prerogative in trade policy. Enhanced European strategic autonomy is inextricably tied to a country's constitutional make-up.<sup>181</sup> Majority voting is permissible in a number of policy areas of importance for the development of strategic autonomy. Among the core policy areas discussed above, common trade policy, the regulation of the internal market, environmental policy, cyber strategy and the redirecting of industrial policy are all subject to qualified majority voting, which is why these policy fields implicitly tolerate a certain degree

<sup>178</sup> A. Skolimowska, *The European Union as a 'Normative Power' in International Relations. Theoretical and Empirical Challenges* (2015).

<sup>179</sup> R. Emmott and A. Koutantou, 'Greece Blocks EU Statement on China Human Rights at U.N.', *Reuters* (18 June 2017), available at [www.reuters.com/article/us-eu-un-rights/greece-blocks-eu-statement-on-china-humanrights-at-u-n-idUSKBN1990FP](http://www.reuters.com/article/us-eu-un-rights/greece-blocks-eu-statement-on-china-humanrights-at-u-n-idUSKBN1990FP); N. Helwig *et al.*, *Nordic-Baltic Perspectives on European Sovereignty and Strategic Autonomy: A Northern Agenda for an Open and Secure Europe*, May 2021.

<sup>180</sup> N. Helwig, *supra* note 33, at 13.

<sup>181</sup> B. Lippert, N. von Ondarza and V. Perthes, *supra* note 39, at 9.

of heterogeneity. In other areas of strategic autonomy, the interests of the Union and the Member States may coincide, such as in the Commission's power to screen foreign direct investment that is likely to affect projects or programmes of 'Union interest', while at the same time allowing Member States to define their own security concerns.

This tension remains most pronounced in the CFSP, whose intergovernmental and decentralized design reflects strategic cultures that diverge with regard to international cooperation and threat perceptions.<sup>182</sup> Given the legal ceiling of the unanimity requirement, the trade-off between inclusivity and legitimacy, on the one hand, and efficiency and action, on the other, is increasingly unsatisfactory as it prevents the EU from effectively asserting its interests and values.<sup>183</sup> Supranationalists have therefore pushed for extending qualified majority voting to a limited number of areas, including civilian crisis management.<sup>184</sup> However, steps towards greater institutional autonomy have been hampered by the tension between not only intergovernmentalism and supranationalism but also Atlanticism and Europeanism.<sup>185</sup> Atlanticists remain sceptical about a stronger decoupling from the USA in connection with a protectionist agenda and emphasize the value of the transatlantic alliance for European security interests. Europeanists, in turn, highlight the importance of supporting military capabilities in the EU through defence industry policies and stronger European military collaboration.<sup>186</sup>

## 5 Conclusion

As a geopolitical actor long belittled as naïve by scholars who subscribe to realist currents in international relations, the EU's global reputation has stemmed in no small part from its recognition as a 'normative power'. In this role, EU policy approaches have typically been informed by normative standards rather than by power considerations or material advantage.<sup>187</sup> In this way, power politics have not come easy to the EU, certainly in part because the continent's own post-war success was built on multi-lateral cooperation and compromise as well as a rejection of jingoist interstate competition. It was this normative framework at home that determined the EU's stance towards the rest of the world through enlargement, trade, development policies and external relations more generally.<sup>188</sup>

It emerges from the analysis that the lack of conceptual contours of the new guiding doctrine injects a degree of ambivalence to the legal analysis, an ambivalence that makes strategic autonomy a popular and versatile policy tool that can be invested with

<sup>182</sup> N. Helwig, *supra* note 33, at 24.

<sup>183</sup> B. Lippert, N. von Ondarza and V. Perthes, *supra* note 39, at 9.

<sup>184</sup> N. Koenig, 'Qualified Majority Voting in EU Foreign Policy: Mapping Preferences', *Policy Brief* (2020), available at <https://www.delorscentre.eu/en/publications/detail/publication/qualified-majority-voting-in-eu-foreign-policy-mapping-preferences>.

<sup>185</sup> S. Lavery, S. McDaniel and D. Schmid, *supra* note 8, at 64.

<sup>186</sup> N. Helwig, *supra* note 33, at 26.

<sup>187</sup> I. Manners, 'Normative Power: A Contradiction in Terms?', 40 *JCMS* (2002) 235.

<sup>188</sup> I. Manners, *The Concept of Normative Power in World Politics*, May 2009, at 2.



context-specific meanings. This analysis has refrained from applying a legality benchmark against one uniform definition of strategic autonomy, thus acknowledging that the versatility of the concept contains too many variables to render a legality judgement. Rather, a legal analysis assessing leeway and barriers benefits from focusing on the rationale underpinning the various shifts across policy fields, as discussed above. The furtherance of European values, the promotion of European economic interests and the desire to ensure security in various dimensions offer the motivational benchmark of strategic autonomy, which can be built on various Treaty-based values and instruments.

Russia's military offensive in Ukraine has further propelled the pursuit of strategic autonomy. It has fuelled not only theoretical debate and calls for policy changes emphasizing the EU's compelling need for more autonomous abilities in defending values, safeguarding economic interests and enhancing security,<sup>189</sup> but has also ushered in concrete policy actions and autonomy implementation that may have long been seen as politically inconceivable. Driven by security-of-supply concerns, the EU has rapidly become independent from Russian energy supplies and redirected efforts away from market-driven dependence to security-centred diversification. The goal of reducing dependence has driven the EU's more general push towards a EU-based production of key technologies, notably through the EU Net Zero Industry Act,<sup>190</sup> in an obvious attempt to reduce dependence from China – a turn that risks being economically inefficient and undermining a trade regime rooted in the notion of comparative advantages.<sup>191</sup> Autonomy endeavours in security and defence have moved from lip service to concrete action, propelling the shift from a paradigm of crisis management operations abroad to an approach based on territorial defence and dissuasion.

Germany's *Zeitenwende* has become the shorthand for a broader trend of European countries boosting their defence budgets. Indications of autonomy endeavours can also be traced in the adoption of the Strategic Compass for Security and Defence in March 2022, confirming the willingness of Member States to strengthen their political military commitment to building a European defence and establishing the European Defence Industry Reinforcement through Common Procurement Act,<sup>192</sup> which incentivizes EU Member States to buy European, fostering common procurement. The much-avowed request for qualified majority voting as 'institutional autonomy' is unlikely to soon become the default voting rule in CFSP matters, but the formation of like-minded states may offer a hint to the shift towards qualified majority through the

<sup>189</sup> From the rich think tank literature, see A. Burni *et al.*, Progressive Pathways to European Strategic Autonomy, March 2023; D. Zandee, Open Strategic Autonomy in European Defence: What Countries Must Do, December 2022.

<sup>190</sup> Proposal for a regulation of the European Parliament and of the Council on establishing a framework of measures for strengthening Europe's net-zero technology products manufacturing ecosystem (Net Zero Industry Act), COM(2023) 161, 16 March 2023.

<sup>191</sup> N. Poitiers *et al.*, The EU Net Zero Industry Act and the Risk of Reviving Past Failures, 9 March 2023.

<sup>192</sup> Proposal for a Regulation of the European Parliament and of the Council on establishing the European defence industry Reinforcement through common Procurement Act, COM(2022) 349 final, 19 July 2022.

avenues of differentiated integration permitted under the EU Treaties.<sup>193</sup> In pursuit of technological leadership and safeguarding the security of supply, sustainability concerns have liaised with protectionist industrial policy where the US Inflation Reduction Act (IRA) and the EU's policy response tend to be openly WTO incompatible (like the IRA) or to relax state aid restrictions in a discriminatory and market-hostile fashion that risks affronting other countries and undermining the global-level playing field.

This analysis has highlighted that strategic autonomy does not necessarily imply abandonment of the EU's historical approach of using normative power in international relations. Insofar as strategic autonomy aims to expand the acceptance of European values, there is no shrinking from the moral dimension of policy. Quite the contrary. Furthermore, the EU Treaties provide significant leeway for the pursuit of concrete policies that are informed by the broader goal of achieving strategic autonomy. The strengthening of sustainability in its various dimensions enjoys a strong legal underpinning, in relation to both internal regulation and external relations (despite the potential conflicts with international law, discussed above). The recalibration of reciprocity in the domain of international relations, such that it is applied more rigorously in economic and trade relations, can be rightly viewed as a strengthening of the normative orientation rather than as its displacement by a belligerent *Realpolitik*. Yet this does not come as a legal *carte blanche* to implement any kind of strategic autonomy. The vagueness and versality of the concept may give political shelter to the pursuit of policies incompatible with EU law or international law, with some of the potential frictions highlighted above.

While a more stringent insistence of reciprocity is thus a natural extension of the EU's tradition as a normative power, there is a thin line between such an insistence and violations of international law and/or the subversion of the founding EU principles. Protection versus openness; interdependence versus independence; unilateralism versus multilateralism; reliance on power versus reliance on rules – this analysis has sought to spotlight the various frictions that strategic autonomy may produce, not only in relation to long-standing normative tenets but also endogenously within the concept itself, in part due to the broad range of policy contexts to which it is applied.<sup>194</sup> Implementation on a case-by-case basis will show whether conflicts with WTO law, international investment agreements, state aid rules or fundamental rights will materialize and trigger global competitors to take countermeasures. However, so long as the EU employs its toolbox of instruments in a proportionate manner while also favouring multilateral over unilateral approaches, as well as market-based rather than interventionist solutions, strategic autonomy is not necessarily destined to engender insurmountable or excessively disruptive legal frictions.

<sup>193</sup> Joint Statement of the Foreign Ministries on the Launch of the Group of Friends on Qualified Majority Voting in EU Common Foreign and Security Policy, 4 May 2023, available at [www.auswaertiges-amt.de/en/newsroom/news/-/259530](http://www.auswaertiges-amt.de/en/newsroom/news/-/259530). See section 3.C.2.

<sup>194</sup> T. Gehrke, *supra* note 16, at 101.