

Is the EU's Trade Policy Aligning with America's Trade Policy?

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A core principle of the liberal international order (LIO) established by Europe and the United States (US) after World War II was separating security from economic issues as much as possible. However, since 2016 this has become increasingly untenable. A more protectionist, hawkish, and less multilateral US has questioned aspects of the LIO and America's natural alignment with the European Union (EU) and others under the World Trade Organization's (WTO's) rules of trade. The EU has simultaneously recognized the need to better protect its market and interests with new, assertive trade instruments. Placed in the context of a fragmenting international order and intense domestic debates on trade and globalization, this article assesses the extent to which the EU is aligning its trade policy with that of the US. It argues that the EU has adopted a more geostrategic and realist-based trade policy, while retaining its normative preference for multilateralism, thus leaving in place several differences vis-à-vis the US, while also raising new points of disagreement. Although China is a common challenge for both allies, the US may also find itself on the receiving end of a more assertive EU. The article discusses the implications for transatlantic relations, the LIO and rules-based trade.

Keywords: liberal international order, European Union, United States, trade strategy, trade, transatlantic relationship, trade instruments, trade and technology council, WTO

1 INTRODUCTION

Both European and American trade policies have traditionally been anchored in the liberal international order (LIO) established after World War II. The focus was on separating security from economic issues as much as possible. While the LIO became more complex over the years, it provided an order where a liberal trade paradigm – under the assumption that economic interdependence resulting from

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trade is positive for both economic efficiency and peace – could flourish.¹ One of the current challenges to the transatlantic relationship is the crisis in the LIO. While its causes, impact and consequences remain contested – reflecting diverse theoretical and analytical approaches – there is consensus that part of the crisis is driven by a decline in multilateralism and norm adherence in international trade.² Various forms of protectionism are increasingly prevalent, and used for geopolitical ends. Over the past decade, a more protectionist, hawkish, and less multilateral United States (US) has emerged, questioning aspects of the LIO and its natural alignment with the European Union (EU) and others under the World Trade Organization's (WTO's) rules of trade. The EU – the strongest defender of multilateralism – has also recognized that it needs to better protect its market and interests in an international environment increasingly reliant on power rather than common rules. We thus ask, to what extent is EU trade policy following America's path? Is EU trade policy aligning with that of the US? What differences remain? What are the implications for the LIO, the WTO, and transatlantic relations?

To address these questions, this article analyses the EU's trade policy, including its 2021 trade strategy, vis-à-vis US trade policy. The assessment looks at trade strategy, underlying paradigm(s), and trade instruments. We find that while the EU has adopted a more realist and strategic approach, it retains significant continuation with past strategies. This means several differences with the US also remain. While developing and adopting more trade policy instruments to secure its interests and values in an increasingly challenging international environment, the EU prefers a multilateral, rules-based order. Much of its strategy is defensive; except for revamping the WTO, the EU prefers a reactive rather than pro-active role. In addition, while the EU is increasingly willing to directly confront China's rule breaking practices, it is not prepared to adopt the explicit anti-China position the US prefers. Finally, we propose that where there is re-alignment around a more realist

¹ A. Roberts et al., *Toward a Geoeconomic Order in International Trade and Investment*, 22 J. Int'l Econ. L. 655–676 (2019). Conversely, a realist paradigm views interdependence as a risk because dependence can be weaponized. While market-led allocation of resources, the pursuit of absolute gains, and the application of trade policy instruments to enforce agreed rule are hallmarks of a liberal trade paradigm, a paradigm with state-led allocation of resources and the pursuit of relative benefits, where policy instruments are used for structural, geopolitical ends intended to achieve relative security gains, is realist. These paradigmatic differences are important for international commerce and for the transatlantic relationship. We also recognize that 'transatlantic' can refer to North America and Europe (the EU plus all non-members), but this article uses 'transatlantic' in reference to the EU and the US.

² For example Y. S. Lee, *Weaponizing International Trade in Political Disputes: Issues Under International Economic Law and Systemic Risks*, 56(3) J. World Trade 405–428 (2022); J. Slawotsky, *The Weaponization of Human Rights in US-China Trade Policy: Impacts and Risks*, 56(4) J. World Trade 547–570 (2022); W. Moreland, *The Purpose of Multilateralism a Framework for Democracies in a Geopolitically Competitive World*, Brookings Institution (Sep. 2019), https://www.brookings.edu/wp-content/uploads/201909FP_20190923_purpose_of_multilateralism_moreland.pdf (accessed 3 May 2022).

policy mix, this might not be unequivocally good for the transatlantic relationship, nor more broadly for the LIO.

The next section provides an overview of the fragmentation of the LIO, of which the rules-based international trading system is a part. The third section discusses American trade policy, emphasizing its convoluted and shifting domestic cross-party alignments, resurgent protectionism grounded in domestic concerns, the use of trade for geopolitical goals, and its unenthusiastic approach to multi-lateralism. Having contextualized developments, we thereafter assess the EU's trade policy, with a focus on whether its 2021 trade strategy, the Trade Policy Review – An Open, Sustainable and Assertive Trade Policy (hereinafter OSA) represents a convergence or alignment with the US. Included in this assessment is an initial evaluation of how a new transatlantic initiative, the Trade and Technology Council (TTC), affect the EU's trade policy and transatlantic relations. The last section concludes.

2 THE FRAGMENTATION OF THE LIO

We start from the premise that the transatlantic economic order is challenged by the fragmentation of the LIO. Economic relations need a modicum of trust and the latter is easier to ensure when partners work under common rules. A departure from these rules would therefore create uncertainty and less trust, leading to a higher probability of conflict. This section focuses on how the fragmentation of the LIO affects governance, at least on trade matters.

Fragmentation is taking place in normative, power-political and organizational ways: there is pushback against liberal universalism, spheres of influence are back, along with calls for the on-shoring and nearshoring of some supply chains. To be sure, fragmentation is not restricted to the trade domain – it applies to varying degree across different political and economic dimensions. At the same time the fragmentation of the LIO is hard to pinpoint – the LIO itself is remarkably malleable.³ It has existed and evolved in various iterations. In the economic dimension alone, there are notable differences between the order built by liberal states during the gold-standard era, the 'embedded' post-War liberal order,⁴ and its disembedded, globalized version from the 1980s onwards.⁵ This malleability has led some scholars to search for the core, necessary features of any LIO. Ikenberry

³ B. Buzan, & G. Lawson, *The Global Transformation: History, Modernity and the Making of International Relations* (Cambridge University Press 2015).

⁴ J. Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36(2) *Int'l Org.* 379–415 (1982).

⁵ B. Jahn, *Liberal Internationalism: Historical Trajectory and Current Prospects*, 94(1) *Int'l Aff.* 43–61 (2018). Compare D. Rodrik & S. Walt, *How to Build a Better Order Limiting Great Power Rivalry in an Anarchic World*, 101(5) *Foreign Aff.* 144–155 (2022).

has identified a ‘cluster of five convictions’ that all LIOs must possess: (1) openness to trade and exchange; (2) a ‘loosely rules-based set of relations’; (3) security cooperation, which might or might not include alliances or a formal system of collective security; (4) the idea that reform is possible and that ‘power politics can be tamed – at least to some extent’; and finally (5) the expectation that states will move ‘in a progressive direction, defined in terms of liberal democracy’.⁶ However, which of these traits are attributes of liberalism, or more properly of any kind of order, is disputed.⁷ Acharya, assessing the empirical accuracy of the aforementioned characteristics, concludes that some of the claims ‘while not unfounded, are selective and exaggerated’.⁸ Others are even more dismissive, referring to the ‘myth of the liberal international order’.⁹

The lack of a unified definition of the LIO requires us to define a baseline against which to assess the claim of fragmentation. In the early 1990s, the end of the Cold War unleashed a process of globalization, whereby the institutional and normative arrangements of the West spread globally, expanding and deepening in the process. They expanded while incorporating new members and carrying an aspiration for universality; they deepened because new norms were added to expectations about state behaviour, and these were sometimes more intrusive than a strictly Westphalian, at-the-border reading of the United Nations (UN) Charter. A geographically bounded liberal multilateralism (LIO I) was replaced by an aspirational universal, post-national liberalism (LIO II).¹⁰ In the field of trade, this led to the establishment of the WTO in 1995, which reformed the General Agreement on Tariffs and Trade (GATT) and added the General Agreement on Trade In Services and the Trade-Related Aspects of Intellectual Property Rights, while establishing a stronger dispute settlement mechanism. It is this ‘high-water mark’ of the LIO that we claim is fragmenting.¹¹

There are two inter-related ways in which this state of affairs has factored into EU debates: the perceived lack of (US) leadership, and competition between great powers. European observers and practitioners have long been aware of the risks to the LIO and EU foreign policy stemming from a leadership vacuum left by a declining US. Tocci has made this case most strongly, arguing that, in different

⁶ G. J. Ikenberry, *The End of Liberal International Order?*, 94(1) Int’l Aff. 11 (2018).

⁷ J. J. Mearsheimer, *Bound to Fail: The Rise and Fall of the Liberal International Order*, 43(4) Int’l Sec. 11 (2019).

⁸ A. Acharya, *The End of American World Order* 5 (John Wiley & Sons 2018); see also Q. Huang, *The Pandemic and the Transformation of Liberal International Order*, 26(1) J. Chinese Pol. Sci. 1–26 (2021).

⁹ G. Allison, *The Myth of the Liberal Order: From Historical Accident to Conventional Wisdom*, 97 Foreign Aff. 124–133 (2018).

¹⁰ T. A. Börzel & M. Zürn, *Contestations of the Liberal International Order: From Liberal Multilateralism to Postnational Liberalism*, 75(2) Int’l Org. 282–305 (2021).

¹¹ Quote in C. A. Crocker, *The Strategic Dilemma of a World Adrift*, 57(1) Survival 10 (2015).

ways, ‘both the Barack Obama and the Donald Trump administrations can be viewed as post-imperial presidencies’.¹² Obama believed in the LIO, but not in the capacity of the US to ‘sustain it alone’, which led to the ‘conviction that such order could be maintained only by redistributing responsibilities around the world’.¹³ The phrase ‘leading from behind’ became the symbol of a ‘perceived lack of will to lead in international affairs’.¹⁴ On the other hand, Donald Trump believed in US power, but lacked any attachment to the LIO. President Obama – taking office in January 2009, just after the failed Doha Round – tried to isolate China by negotiating mega-regional agreements with allies, both Asian (Transpacific Partnership, or TPP) and European (Transatlantic Trade and Investment Partnership, or TTIP). However, the Trump administration rejected this policy of deepening trade liberalization with allies, replacing it with one of confrontation with both China and traditional allies; the goal was no longer for everyone to gain from trade, but for the US to benefit more than the rest, to ‘beat the cheaters’ in a zero-sum game.¹⁵ Hence, US power was to be used to ‘extort maximum benefit from the system’, and ‘if the price to be paid was the wrecking of the United Nations (UN), of the WTO or of the North Atlantic Treaty Organization, so be it’.¹⁶

At the other end of the power transition, China’s Belt and Road Initiative (its signature, yet opaque, foreign policy endeavour), has yielded some economic success and increased political influence across Asia and Africa, but it is equally much an attempt at ‘absorbing excess manufacturing capacity, putting its accumulated savings to use, and securing inputs for its manufacturing sector’.¹⁷ Though the Belt and Road Initiative constitutes a long-term threat to US and European influence in Asia and globally, China is not ready to fill the global leadership gap created by a retreating US, partly because China is a ‘selective stakeholder’ that cherry-picks ‘which responsibilities to take based on a narrow cost-benefit analysis’ as regards multilateral norms.¹⁸ Its ‘Dual Circulation’ strategy (expanding domestic demand and production of key resources, lessening reliance on foreign products, along with boosting exports) signals its ‘hedged integration’ in the global economy¹⁹; put differently, it is ‘an attempt to recalibrate its engagement with

¹² N. Tocci, *Framing the EU Global Strategy. A Stronger Europe in a Fragile World* 14 (Routledge 2021).

¹³ *Ibid.*, at 15.

¹⁴ J. Massie & J. Paquin, *America’s Allies and the Decline of US Hegemony* 7 (Routledge 2020).

¹⁵ Compare D. Mutz, *Winners and Losers: The Psychology of Foreign Trade* (Princeton University Press 2021).

¹⁶ Tocci, *supra* n. 12, at 15.

¹⁷ J. J. Lew et al., *China’s Belt and Road Implications for the United States*, Council on Foreign Relations, Independent Task Force Report No. 79, 10 (Mar. 2021).

¹⁸ E. Kirchmer, *The Role of China in Transatlantic Relations*, in *The Making of European Security Policy: Between Institutional Dynamics and Global Challenges* 146 (R. Haar et al. eds, Routledge 2021).

¹⁹ J. Blanchette & A. Polk, *Dual Circulation and China’s New Hedged Integration Strategy*, Centre for Strategic and International Studies Blog (24 Aug. 2020).

the world so that it feels less threatened by the world outside'. On trade matters, China has 'effectively maintained control on foreign investment, involving forced transfers of technology, uneven protection of intellectual property and state subsidies for its firms that have caused gluts in the supply of commodities such as steel'.²⁰ In sum, the shift from a unipolar to a multipolar international system has challenged the capacity of the LIO to provide governance, both on trade matters and more generally.

Keohane as well as Snidal claim that a limited group of key states can substitute for declining hegemony, but hegemonic stability theorists see a fragmented distribution of power as one prone to conflict.²¹ Farrell and Newman have described the current situation as the weaponization of interdependence, where 'unprecedented levels of interdependence' coexist with 'continued jockeying for power',²² thus, the capacity to 'grant or deny access to networks underlies several of the most important contemporary geopolitical competitions'.²³ This, according to Leonard, is the 'age of unpeace', an 'unstable, crisis-prone [situation] of perpetual competition and endless attacks between competing powers',²⁴ that stops short of war because such attacks play out not 'on the land, air and seas', but on the very drivers of interdependence 'the internet, border controls, technology supply chains and [the] financial system'.²⁵ Roberts et al. make a similar point, arguing that the technological war between the US and China is the main driver of the shift in the LIO.²⁶ Unsurprisingly, 'In a more realist global economy, powers feel less comfortable with accepting closer economic interdependence and are more concerned with national autonomy'.²⁷ While the EU has sought to safeguard its internal market without losing access abroad, with the goal of 'making interdependence feel safe again',²⁸ the US wants to protect American supremacy and technological sovereignty at all costs in its confrontations with China.²⁹

²⁰ Kirchner, *supra* n. 18, at 146.

²¹ R. Keohane, *After Hegemony: Cooperation and Discord in the World Political Economy* (Princeton U Press 1984); D. Snidal, *The Limits of Hegemonic Stability Theory*, 39(4) *Int'l Org.* 579–614 (1985).

²² H. Farrell & A. Newman, *Weaponized Interdependence: How Global Economic Networks Shape State Coercion*, 44(1) *Int'l Sec.* 43 (2019). Former EU ambassador to the US, David O'Sullivan, noted that 'we are moving back into a great power world'. Jean Monnet Centre of Excellence Keynote (Carleton University 21 Sep. 2021).

²³ J. Battaleme, *Perils for Medium and Minor Powers from the Weaponization of Interdependence*, 2, Paper presented at the Council of Councils Regional Conference (Paris 17–19 Nov. 2019).

²⁴ M. Leonard, *The Age of Unpeace: How Connectivity Causes Conflict* 6 (Random House 2021).

²⁵ *Ibid.*, at 5.

²⁶ Roberts et al., *supra* n. 1.

²⁷ T. Gehrke, *EU Open Strategic Autonomy and the Trappings of Geoeconomics*, 27 *Eur. Foreign Aff. Rev.* 66 (2022).

²⁸ Leonard, *supra* n. 24, at 18.

²⁹ A. González & N. Véron, *EU Trade Policy Amid the China-US Clash: Caught in the Cross-Fire?*, Peterson Institute for International Economics Working Paper 19-13, 4 (2019). Compare A. Tooze, *Whose Century*, 42(15) *London Rev. Books* 1–10 (2020).

It is in this context, of a fragmented LIO and the weaponization of interdependence, that we assess the transatlantic trade relationship, focusing on Europe's trade policy alignment with the US, and bilateral disagreements.³⁰

3 US TRADE POLICY

The history of US commerce is one of domestic contestation and politicization of trade and trade agreements.³¹ Tariffs were the main source of federal revenue until 1913, and remained the object of political contestation and bargaining thereafter, always impacting foreign economic policy, and often in relations with Europe. While the US has been instrumental in upholding the LIO and the rules-based trading system established after WWII, the past decade has meant a (re)turn toward using trade for geo-economics aims. Globalization and trade re-emerged as contentious politics domestically under President Obama, and deep and complicated cross-party scepticism about globalization, international trade, and especially trade agreements, now prevails.³²

President Obama had a mixed record on trade, expressing a desire for US leadership in the multilateral trading system, but failing to support those efforts. Three free trade agreements (FTAs) with small Latin American countries – negotiated for foreign policy reasons – were ratified after several years' delay and partial renegotiations. However, ratification of the TPP agreement (which included some market opening in the US) crashed into a wall of labour union and (predominantly) Democratic congressional opposition.³³ These groups argued that TPP would undercut American wages, something candidate Donald Trump promulgated widely. President Trump then formally withdrew from the TPP and the Paris Accord, started tariff wars with China, and imposed tariffs on steel and aluminium from friends and foes alike. Continuing his predecessor's policy of blocking reappointments or renewals of any WTO appellate body (AB) member, Trump also expressed a preference for returning to a power-based GATT-system and imposed a partial export ban on semiconductors. The US-Mexico-Canada Agreement (replacing the North Atlantic Free Trade Agreement, NAFTA) was approved only after Trump threatened to otherwise pull out of NAFTA (the move was legally questionable but politically salient), while extensive labour provisions (including a minimum wage on auto workers, a rapid labour response mechanism,

³⁰ For a discussion on how China, US and Japan weaponized trade see Lee, *supra* n. 2, at 405–428; The weaponization of interdependence means 'everything became war'. R. Brooks, *How Everything Became War and the Military Became Everything: Tales from the Pentagon* (Simon and Schuster 2016).

³¹ D. Irwin, *Clashing Over Commerce: A History of US Trade Policy* (U of Chi Press 2017); D. C. Johnson, *The Wealth of a Nation* (Oxford U Press 2018).

³² Johnson, *supra* n. 31, at 23; Mutz, *supra* n. 15.

³³ TTIP negotiations were stalling by fall 2016, so Trump did not need to formally end negotiations.

and changes to Mexican labour laws) were included as concessions to pass the Democrat-controlled House of Representatives. Trump, for whom China was the main target, also referred to Europe as a ‘threat’ and a ‘foe’ that was ‘taking advantage’ of the US.³⁴

Biden entered office as a staunch Atlanticist on security issues, but with a mixed congressional track-record on trade. He reached out to traditional allies, initiated a rapprochement with Europe (EU and the UK), embraced dialog in international organizations, and has employed a more conciliatory rhetoric than his predecessor – but there was nonetheless a great deal of continuity from the previous administration. The Biden administration’s change was more rhetorical than substantive. It has kept the tariffs on Chinese imports, remained aloof on WTO AB reforms, strengthened ‘Buy American’ provisions in federal contracts, and created a director of Made in America in order to significantly reduce waivers to ‘Buy American’ provisions.³⁵ European allies have also expressed frustration at a perceived lack of leadership and vision in US trade policy.³⁶

Biden’s Trade Representative, Katherine Tai, has also followed in the footsteps of her predecessor (Robert Lighthizer) in downplaying multilateralism and FTAs. Referring to the latter as ‘a 20th century tool’ Representative Tai insists there are more effective ways of helping workers and promoting American interests since FTAs tend to generate ‘considerable backlash ... from our own people about concerns regarding the offshoring and outsourcing of American jobs’.³⁷ Biden’s ‘foreign policy for the middle class’ is intended to reach those who feel left behind by globalization, but also reflects bipartisan support for a protectionist ‘trade policy for the middle class’.³⁸ FTAs, tariff reductions and market access are no longer a US priority – ‘polite protectionism’ now reigns.³⁹

³⁴ BBC, *Donald Trump: European Union Is a Foe on Trade* (15 Jul. 2018), <https://www.bbc.com/news/world-us-canada-44837311> (accessed 3 May 2022).

³⁵ White House, *President Biden to Sign Executive Order Strengthening Buy American Provisions, Ensuring Future of America Is Made in America by All of America’s Workers*, Statement (25 Jan. 2021); Federal Acquisition Regulation: Amendments to the FAR Buy American Act Requirements, 87 Fed. Reg. 12780 (7 Mar. 2022). These restrictions on public contracts affect allies, especially European firms, since firms from non-market economies are already prevented from bidding. Though not yet published, foreign bidders will also face up to a 30 % penalty on public procurement contract bids vis-à-vis American firms, a proposal initially presented by President Trump.

³⁶ S. Aarup, *‘All Talk and No Walk’: America Ain’t Back at the WTO*, Politico (23 Nov. 2021).

³⁷ K. Tai, *Testimony of Ambassador Katherine Tai Before the Senate Finance Committee Hearing on the President’s 2022 Trade Policy Agenda* (31 Mar. 2022). This is raising concerns among the remaining Congressional free-trade advocates of both parties. Two dozen Republican senators wrote a letter to Tai in early May 2022, encouraging a focus on market access, including FTAs.

³⁸ A. Posen, *The Price of Nostalgia. America’s Self-Defeating Economic Retreat*, 100(3) Foreign Aff. 28–43 (2021). Though ‘The bond between multilateralism and Washington always has been less robust than some would desire’. Moreland, *supra* n. 2, at 5.

³⁹ J. Bacchus, *Biden and Trade at One Year: The Reign of Polite Protectionism*, CATO Policy Analysis 926 (2022).

The roots of these changes are anchored in the domestic American debate, which reflects perceptions of global structural changes.⁴⁰ Globalization and free trade was supposed to make Americans better off while expanding democracy, as H.R. McMaster, former national security advisor to President Trump, explained, ‘We believed that the arc of history guaranteed the primacy of our free and open societies over closed authoritarian systems, and of course, we thought great power rivalry was a relic of the past’.⁴¹ The perception now is that others have taken advantage of the US. Pundits and politicians across political parties, including Presidents Obama, Trump, and Biden, promote the idea that as long as the playing field is ‘levelled’ Americans can beat anyone, leaving ‘fair trade’ to mean ‘America wins while others lose’.⁴² There are entrenched narratives of blaming others, ‘they produce’ and ‘take our jobs’, along with ‘imports bad – exports good’, all of which resonate with labour unions, manual labourers, and far-right supporters alike.⁴³ Using protectionist rhetoric Donald Trump tapped a receptive populace, including districts with high labour unionization, to win in 2016.⁴⁴ Biden’s 2020 campaign was based on levelling the playing field, while touting American labour. The result of politicians in both parties frequently touting managed trade and mercantilist policies,⁴⁵ is broad-based, cross-party support for protectionism in the name of ‘America first’ and for policies subsidizing and protecting American businesses and jobs.⁴⁶

In 2022, American support for rules-based institutions relies less on their effectiveness in promoting fundamental values than their ability to satisfy domestic interests and geopolitical goals (e.g., limiting China’s influence in Asia). The Trump and Biden administrations have both attempted to manage trade through government-decreed quantitative purchases rather than agreeing to regulations and trade agreements and letting market forces prevail. Antidumping and countervailing duties, purchasing agreements, tariff rate quota arrangements, import bans, export controls and industrial policies have been used bluntly to not only counter

⁴⁰ A. Poletti & L. Zambernardi, *Declining Hegemony and the Sources of Trump’s Disengagement from Multilateral Trade Governance: The Interaction Between Domestic Politics and the International Political Economy*, 59 *Int’l Pol.* (2021), <https://doi.org/10.1057/s41311-021-00346-9>.

⁴¹ G. Bade, *Biden’s Trade Team: RIP Globalization*, Politico (5 May 2022).

⁴² Mutz, *supra* n. 15; W. Reinsch, *Statement on Trade Guys Podcast* (7 Apr. 2022).

⁴³ Mutz, *supra* n. 15; M. Lovely, *Sanctions, Russia’s War, and the Future of Trade*, Trade Winds Webinar at Peterson Ins. Int’l. Econ. (20 Apr. 2022).

⁴⁴ D. Mutz, *Status Threat, Not Economic Hardship, Explains the 2016 Presidential Vote*, 115(19) *Proc. Nat. Acad. Sci.* 4330–4339 (2018); Mutz, *supra* n. 15; S. L. Morgan, *Status Threat, Material Interests, and the 2016 Presidential Vote*, 4 *Socius: Soc. Res. Dynamic World* 1–17 (2018).

⁴⁵ Bacchus, *supra* n. 39.

⁴⁶ Posen, *supra* n. 38; M. Younis, *Sharply Fewer in U.S. View Foreign Trade as Opportunity*, Gallup (31 Mar. 2021); G. Bade, *‘Lay Out the Strategy’: Corporate America Grows Impatient on Biden’s China Trade Review*, Politico (16 Aug. 2021). Congress has a shrinking plurality of pro-trade Republicans, and even fewer such Democrats.

perceived unfair trade practices and protect domestic producers and providers, but also to discriminate against foreign competitors, reduce trade deficits, garner political influence abroad, alter state or regime behaviour, and increase national security. Russia's invasion of Ukraine, and China's tacit support, certainly amplified the trade–security nexus (e.g., on dual-use exports), but there is broad-based domestic support for employing offensive, proactive trade tools, including tariffs, at times with little consideration for their effects on economic growth, bilateral trade ties, or multilateralism.⁴⁷

4 EU TRADE POLICY

Developments in EU trade policy since 2016 signal a progressive alignment with the realist, trade-as-foreign-policy paradigm dominant in the US, while also trying to preserve and strengthen the status quo (meaning a rules-based system). This balancing act could be beneficial as well as challenging for the transatlantic relationship. A more aligned transatlantic approach could counter Chinese attempts at political influence, regulatory expansion, and standard setting, while the EU's continued normative preference for rules-based, liberalized trade may help the transatlantic partners reinvigorate the WTO-centred trading system.⁴⁸ However, since many transatlantic preferences and policies still differ, a more strategic and assertive EU could also employ its trade instruments against the US.

Though the EU has continuously pursued a liberalizing trade agenda,⁴⁹ this has been balanced with 'measures designed to cushion the domestic economy from external disruptions', in order to ensure a domestic margin of manoeuvre to preserve political and social stability – what Ruggie coined 'embedded liberalism'.⁵⁰ The EU's first Trade Commissioner (Pascal Lamy, 1999–2004) saw the role of trade policy as 'managing globalization'(MG), where trade policy included a variety of trade and non-trade objectives, such as multilateralism, social justice and sustainable development.⁵¹ MG encompasses the ideas and goals of both the embedded

⁴⁷ Bacchus, *supra* n. 39; C. Bown & K. Russ, *Biden and Europe Remove Trump's Steel and Aluminium Tariffs, but It's Not Free Trade*, Peterson Institute for International Economics (11 Nov. 2021), <https://www.piie.com/blogs/trade-and-investment-policy-watch/biden-and-europe-remove-trumps-steel-and-aluminum-tariffs> (accessed 3 May 2022).

⁴⁸ See P. Garcia-Duran & L. J. Eliasson, *Was the European Union's 2021 Trade Strategy a Critical Juncture?*, 27 *Eur. J. Foreign Aff.* 4 (2022).

⁴⁹ J. Orbie & F. De Ville, *Impact of the COVID-19 Crisis on EU Trade Policy: Our Five Cents to the Debate*, United Nations University Inst. Compar. Reg'l Integration Stud. (2020); A. Dür, L. Baccini, & M. Elsig, *The Design of International Trade Agreements: Introducing a New Data Set*, 9(3) *Rev. Int'l Org.* 353–375 (2014).

⁵⁰ Ruggie, *supra* n. 4, at 405.

⁵¹ S. Meunier, *Managing Globalization? The EU in International Trade Negotiations*, 45(4) *J. Common Mkt. Stud.* 905–926 (2007). The paradigms discussed here are explained in F. De Ville & G. Siles-Brügge, *The Role of Ideas in Legitimizing EU Trade Policy: From the Single Market Programme to the Transatlantic Trade and Investment Partnership in Handbook on the EU and International Trade* 243–262 (S. Khorana &

liberalism and fair-trade paradigms, and has influenced EU trade policy to varying degrees over the years. While the relative influence of the MG and neo-liberal paradigms on EU trade policy since then is debatable,⁵² there is consensus that the policy was predominantly neoliberal, at least until the European Commission presented its new trade strategy in 2021.

The OSA signifies the inclusion of trade into the mainstream ‘strategic autonomy’ narrative prevalent in Brussels. Discussing goals for the EU’s foreign and security policy the 2016 EU Global Strategy defined the term as the ‘ability to act and cooperate with international and regional partners wherever possible, while being able to operate autonomously when and where necessary’.⁵³ The High Representative of the EU for Foreign Affairs and Common Security Policy said in 2020 that strategic autonomy means that the EU needs to learn to speak the language of power and have the ‘capacity to act autonomously when and where necessary and with partners wherever possible’.⁵⁴ The OSA refers to changing geopolitics, preventing over-dependence, and ensuring the EU’s capacity to take autonomous decisions. Acknowledging that ‘Global uncertainty is on the rise fuelled by political and geo-economic tensions’ and ‘Instead of international cooperation and multilateral governance, there is growing unilateralism’, the EU now ‘will need to operate in a new multipolar global order marked by growing tensions between major players [where] the EU needs to equip itself with tools to operate in a more hostile international environment if necessary’.⁵⁵ Charles Michel, president of the European Council, explains that strategic autonomy ‘means more resilience, more influence. And less dependence’.⁵⁶

The inclusion of trade policy in the ‘strategic autonomy’ narrative signals a clear shift towards a new balance between fair trade and geopolitics; between labour and sustainability, and trade as a foreign policy tool (realist). The EU now

M. García eds, Edward Elgar 2018) and assessed in L. J. Eliasson & P. Garcia-Duran, *New Is Old? Managed Globalization and the EU’s Open, Sustainable, and Assertive Trade Policy*, Paper presented at RECONNECT workshop, Leuven (15–16 Oct. 2021).

⁵² P. Garcia-Duran, L. J. Eliasson, & O. Costa, *Managed Globalization 2.0: The European Commission’s Response to Trade Politicization*, 8(1) Pol. Governance 290–300 (2020); L. Drieghe & D. Potjomkina, *EU’s Value-Based Approach in Trade Policy: (Free) Trade for All?*, 5(1) Global Aff. 63–72 (2019); De Ville & Siles-Brügge, *supra* n. 51 (2018). T. Jacobs et al., *The Hegemonic Politics of ‘Strategic Autonomy’ and ‘Resilience’: COVID-19 and the Dislocation of EU Trade Policy*, 61(1) J. Common Mkt. Stud. 3–19 (2022).

⁵³ European External Action Service, *Shared Vision, Common Action: A Stronger Europe A Global Strategy for the European Union’s Foreign And Security Policy* 8, 16 (Jun. 2016).

⁵⁴ J. Borrell, *Why European Strategic Autonomy Matters* (12 Mar. 2020), https://eeas.europa.eu/headquarters/headquarters-homepage/89865/why-european-strategic-autonomy-matters_en (accessed 3 May 2022).

⁵⁵ European Commission, *Trade Policy Review – An Open, Sustainable and Assertive Trade Policy*, 1, 8 COM (2021) 66 final.

⁵⁶ Speech at *Masters of Digital 2021* online event (3 Feb. 2021), <https://www.consilium.europa.eu/en/press/press-releases/2021/02/03/speech-by-president-charles-michel-at-the-digital-europe-masters-of-digital-online-event/> (accessed 3 May 2022).

explicitly recognizes several threats to an international trading system where common rules (WTO) may no longer apply. In response it has proposed new trade defence instruments to safeguard its equilibrium, while emphasizing its willingness to unilaterally oppose and punish non-market principles and undemocratic practices, even absent the (heretofore) requisite WTO ruling.

In line with this appraisal of the context, the Commission has been proposing the recalibration of old trade instruments and the approval of new instruments as summed up in Table 1. The resulting trade toolbox includes new instruments with different aims.⁵⁷ While some aim to ensure a level playing field (the Foreign Subsidy Instrument and the International Procurement Instrument, as well as the Chief Trade Enforcement Officer)⁵⁸ and sustainability (the CBAM), there are for

Table 1 The EU Trade Toolbox

<i>Recalibration</i>	<i>New</i>
Trade Defence Instruments, in force since 2017	Anti-Coercion Act, proposed in December 2021
Enforcement Regulation, in force since 2021	Foreign Subsidy Instrument, proposed in May 2021
Export Controls, in force since 2021	International Procurement Instrument, first proposed in 2012, revised proposal in 2016 (Council resumed discussions in 2019)
Corporate Due Diligence, proposed in 2022	Chief Trade Enforcement Officer, in force since 2021 Investment Screening, in force since 2020 Carbon Border Adjustment Mechanism (CBAM), proposed in July 2021

Sources: F. Erixon et al., *The New Wave of Defensive Trade Policy Measures in the European Union: Design, Structure, and Trade Effects*, European Centre For International Political Economy Occasional Paper n.4 (2022); F. De Ville, *The European Union's unilateral turn in trade policy*, Paper presented at the ECPR Joint Sessions, Edinburgh, 19–20 Apr. 2022.

⁵⁷ F. Erixon et al., *The New Wave of Defensive Trade Policy Measures in the European Union: Design, Structure, and Trade Effects*, European Centre for International Political Economy Occasional Art. n.4 (2022).

⁵⁸ See e.g., M. Tokas, *Playing the Game: The EU's Proposed Regulation on Foreign Subsidies*, 56(5) J. World Trade 779–802 (2022); S. Y. Sato, *'EU's Carbon Border Adjustment Mechanism: Will It Achieve Its Objective(s)?*, 56(3) J. World Trade 383–404 (2022), <https://kluwerlawonline.com/journalarticle/Journal+of+World+Trade/56.3/TRAD2022015>.

the first time instruments that respond to security aims (aside from the classic export control of dual-use products). These include the Anti-Coercion Regulation and the Investment Screening Mechanism; the Foreign Subsidy Instrument also aims to protect the EU from ‘economic attacks’.⁵⁹ In other words, the new toolbox of the Commission, when completed, will include specific security instruments, evidencing a shift in policy instruments. In particular, the EU’s Anti-Coercion Regulation fills a gap in the EU that is covered in the US by the broad-ranging section 301 of the Trade Act of 1974, which ‘gives the USTR, at the direction of the president, broad authority to respond to unfair trade practices, including violations of trade agreements, or “an act, policy, or practice of a foreign country” that is unreasonable or discriminatory and burdens or restricts United States commerce’.⁶⁰

Despite the turn towards a more strategic policy, OSA also reflects the EU’s desire to be a status quo power in trade. The pursuit of ‘strategic autonomy’ is qualified with the intent that trade remain as open and free as possible.⁶¹ The Commission’s preference for how the world ought to be remains intact: the best scenario would be a functioning WTO at the heart of a multilateral, rules-based trading system. In such scenario, the EU could ensure resilience without significant government support and intervention, ‘Given the right conditions, companies are able to ramp up global production and distribution, particularly if they can rely on open supply chains, supported by stable, predictable and transparent trading rules’.⁶² The need for open markets is accompanied by an insistence that ‘international cooperation, multilateralism and the rules-based order ... are critical to the EU’s interests’.⁶³

In other words, ensuring ‘strategic autonomy’ does not mean a wholesale change in EU trade policy. Promoting free and fair trade remains the EU’s preference. For some scholars this merely indicates that the Commission has been able to reinvent its rhetoric to preserve the dominance of the neo-liberal paradigm. Others find evidence that the MG and trade-as-foreign policy paradigms

⁵⁹ Compare F. De Ville, *The European Union’s Unilateral Turn in Trade Policy*, Paper presented at the ECPR Joint Sessions, Edinburgh (19–20 Apr. 2022).

⁶⁰ I. Manuk, *Court Ruling Questions Tariff Process, but Procedural Flaws Remain in Place*, Council on Foreign Relations Blog (6 Apr. 2022).

⁶¹ European Commission, *supra* n. 55, at 7.

⁶² *Ibid.*

⁶³ ‘the EU is the world’s largest trader of agricultural and manufactured goods and services and ranks first in both inbound and outbound international investments’; trade ‘is at the centre of Europe’s economic prosperity and competitiveness’. and ‘in 2024, 85% of the world’s GDP growth is expected to come from outside the EU’. European Commission, *supra* n. 55, at 1, 3, 6.

are at the core of the policy.⁶⁴ In any case, the shift towards trade-as-foreign-policy in the EU is less evident than in the US, where geopolitical and geo-economic goals are firmly anchored in trade policy.

Moreover, most of the strategy is defensive; except for revamping the WTO, the EU prefers a reactive rather than pro-active role. De Ville explains how the purpose of most instruments, including the anti-coercion one, is to deter.⁶⁵ The EU's instruments are designed to provide leverage, whereas US has bluntly employed tariffs for (asserted) national security reasons and used domestic protectionist measures to discriminate against foreign firms; although the US is also reviewing and updating its own trade defence tools to make them 'fit for today's economy' (including new export controls and stricter investment screening).⁶⁶ The latter are primarily aimed at China. The EU recognizes, but refrains from explicitly mentioning, China, and is responding to an international context which is – partially – the result of American actions.

The re-alignment of the EU's trade policy, where material interests balance normative goals amidst a more strategic use of trade, may also challenge the transatlantic relationship. In fact, the US (and not only China, Russia or Turkey) may be at the receiving end of the new instruments of the EU trade toolbox. The countries most affected by the instruments created as retaliatory measures against coercion and unfair trade practices are likely to be those with significant volumes of trade and economic interdependence with the EU, but that do not follow the same rules as the EU or with whom the EU wants to maintain the current level of competitiveness.⁶⁷ Moreover, the EU's proposal for corporate due diligence is a precedent-setting endeavour which is extensive in its aspiration, yet vague, and there is no American equivalence.⁶⁸ It is part of the EU's attempts to address sustainability and human rights concerns within trade, and as it focuses on large firms (many of which are American), this may cause disagreements with the US. The TTC success regarding common rules in key issues would therefore be contingent to prevent conflict between the partners.

⁶⁴ Eliasson & Garcia-Duran, *supra* n. 51; L. Schmitz & T. Seidl, *Protecting, Transforming, and Projecting the Single Market Open Strategic Autonomy and Digital Sovereignty in the EU's Trade and Digital Policies*, Working Paper (2022), <https://osf.io/preprints/socarxiv/wjb64/>.

⁶⁵ F. De Ville, *The European Union's Unilateral Turn in Trade Policy*, Paper presented at the ECPR Joint Sessions, Edinburgh (19–20 Apr. 2022).

⁶⁶ Tai, *supra* n. 37.

⁶⁷ Erixon et al., *supra* n. 57, at 3–4.

⁶⁸ European Commission, *Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937*, COM (2022) 71 final.

5 COMMON RULES? THE TTC

While strengthening its own trade instruments, the Commission proposed the TTC in 2020 as an opportunity to work with the US to address the multiple challenges facing the rules-based international trading system.⁶⁹ The TTC could be viewed as a tool the partners have agreed to use to design new common trade rules (including the reform of the WTO), where ‘The aim will be to jointly maximise opportunities for market-driven transatlantic collaboration, strengthen our technological and industrial leadership and expand bilateral trade and investment’.⁷⁰ The TTC’s success or failure will significantly affect the transatlantic partnership and therefore the LIO.

Compared to previous attempts at institutionalized cooperation, the TTC is explicitly aimed at coordination and cooperation, not an integrated marketplace or FTA. Both partners agree that the TTC should focus on novel areas where regulations and standards are being developed, and avoid many long-standing transatlantic areas of disagreement. The TTC is to ‘[l]ook for solutions that respect our common values ... while we are still the most influential regulators, both the EU and the US face increasing standard competition from third country actors. Where both sides agree, the world usually follows’.⁷¹ The TTC’s flexible and prudent design indicates that the partners have learned from TTIP’s failure and are aware of their continued differences and disagreements.⁷² Young shows that while previous attempts at transatlantic regulatory harmonization have largely come to naught, both the EU and the US are concerned about China’s activism in international standard setting bodies and China’s ‘regulatory challenge’ generally.⁷³ The TTC’s focus on emerging technologies could thus prove more productive than past endeavours. To this effect, work is conducted across ten working groups where values are aligned and regulations are being developed on either side of the Atlantic (*see* Table 2).

⁶⁹ European Commission, *Joint Communication to the European Parliament, the European Council, and the Council. A New EU-US Agenda for Global Change*, 2 Dec. 2020 JOIN (2020) 22 final.

⁷⁰ *Ibid.*

⁷¹ *Ibid.*

⁷² E. Bryan et al., *Putting the Band Back Together Again – Can TTTC Revive Transatlantic Economic Cooperation?*, European Centre for International Political Economy (28 Oct. 2021), <https://www.youtube.com/watch?v=DJBpxZBMjdI> (accessed 3 May 2022).

⁷³ A. Young, *EU-US Relations: Regulatory Conflict and Cooperation*, in *Routledge International Handbook on Transatlantic Relations* (E. Fahey ed., Routledge 2023).

Table 2 *TTC Working Groups*

<i>TTC Working Group</i>	<i>Topics</i>
Technology Standards Cooperation	Artificial intelligence, Internet of Things, biotechnology, pharmaceutical products, medical devices, additive manufacturing, robotics, blockchain, other emerging technologies
Climate and Clean Technologies	Climate energy, and environmental initiatives that involve trade and technology
Secure Supply Chains	Semiconductors, batteries, critical minerals, active pharmaceutical ingredients
Information, Communications, and Technology Sector (ICTS) Security and Competitiveness	Data security standards; secure, resilient and diverse telecommunications; and Information, Communications, and Technology (ICT) infrastructure supply chains, 5G/6G.
Data Governance and Technology Platforms	Responsibility of technology platforms, content regulation, targeted advertising and use of big data
Misuse of Technology Threatening Security and Human Rights	Counter cyber threats and technology used to violate human rights; address those conducting information /disinformation operations
Export Control Cooperation	Align export controls, improve information sharing and assess risk for sensitive and emerging technologies, including surveillance technologies impacting human rights
Investment Screening Cooperation	Improve information-sharing for screening of inbound foreign investment
Promoting Small and Medium Enterprises (SME) Access to and Use of Digital Technologies	Empower SMEs to reach more clients, ensure digital technologies benefit underserved communities
Global Trade Challenges	Trade policy towards non-market economies, avoid new technical barriers to trade with each other, trade and labour, other

Source: C. Bown & C. Malmström, *What is the US-EU Trade and Technology Council? Five things you need to know*, Peterson Institute for International Political Economy (21 Sep. 2021), <https://www.piie.com/blogs/trade-and-investment-policy-watch/what-us-eu-trade-and-technology-council-five-things-you>

Based on previous attempts at transatlantic cooperation, domestic concerns about globalization, and the changing geopolitical dynamics, the parties needed to achieve some early concrete results to show the value of this new endeavour. One concrete development was the role the TTC played in coordinating sanctions, especially export controls, on Russia after its invasion of Ukraine.⁷⁴ However, the unity provided by Putin's invasion of Ukraine is 'bounded' and divisions between the partners will return.⁷⁵ The Declaration on the Future of the Internet (May 2022) also started with discussions in TTC groups.⁷⁶ Continued coordination on strategically important goods and processes in supply chains and export controls (beyond arms and dual-use products) would signal to both domestic groups and international partners and competitors that shared values can translate into specific policies and concrete results.⁷⁷

TTC success should not be taken for granted. Taking a tougher approach toward China on climate, human rights, cyber, and territorial expansion, enjoys domestic public support on both sides of the Atlantic, and negative European views of China are almost at American levels.⁷⁸ However, a convergence of views on China as a 'strategic competitor', and domestic support for coordinating policies vis-à-vis third countries, does not equate to support for bilateral agreements. While most of the discussions in TTC working groups addressing misuse of technology, regulations, human rights and investment screening explicitly or implicitly address concerns with China, the Commission also rejects the idea that the TTC is an anti-China institution.⁷⁹ The EU prefers to see the TTC as a way to coordinate the

⁷⁴ *Inside U.S. Trade Daily Report* (14 Mar. 2022); José W. Fernandez, *U.S. Under Secretary of State for Economic Growth, Energy, and the Environment at US Chamber of Commerce, American & Nordic Business Perspectives on the U.S.-EU Trade and Technology Council* (4 May 2022).

⁷⁵ J. Shapiro, *From Strategic Thinking to Strategic Action: The EU's Quest for Autonomy in a World Ruled by Geopolitics*, CIDOB conversation (9 May 2022), <https://www.youtube.com/watch?v=ujhFN3gek2w> (accessed 2 Oct. 2022).

⁷⁶ Trade Winds, *Next Steps for US-EU Trade and Tech Cooperation*, Peterson Institute for International Economics Webinar (18 May 2022), <https://www.piie.com/events/next-steps-us-eu-trade-and-tech-cooperation> (accessed 2 Oct. 2022).

⁷⁷ While the TTC presented a brief list of small achievements its second meeting in May, 2022 (including on subsidies, discussed below), most working groups were still developing agendas. European Commission, *CDS Meeting on the EU-US Trade and Technology Council* (11 May 2022), https://policy.trade.ec.europa.eu/events/csd-meeting-eu-us-trade-and-technology-council-2022-05-11_en (accessed 2 Oct. 2022).

⁷⁸ Pew Research Centre, *Spotlight on Views of Trade in the US, EU and Japan* (26 Sep. 2018), <https://www.pewresearch.org/global/2018/09/26/spotlight-on-views-of-trade-in-the-u-s-eu-and-japan/> (accessed 2 Oct. 2022); Pew research Centre, *Unfavorable Views of China Reach Historic Highs in Many Countries* (6 Oct. 2020), <https://www.pewresearch.org/global/2020/10/06/unfavorable-views-of-china-reach-historic-highs-in-many-countries/> (accessed 2 Oct. 2022); D. Reynié, *Freedoms at Risk: The Challenge of the Century A Global Survey on Democracy in 55 Countries*, Community of Democracies (2022), <https://community-democracies.org/freedoms-at-risk-the-challenge-of-the-century-a-global-survey-on-democracy-in-55-countries/> (accessed 2 Oct. 2022).

⁷⁹ Trade Winds, *supra* n. 76.

transatlantic relationship, focusing on areas where the transatlantic partners can lead, and thereafter preferably take joint proposals into a multilateral forum.⁸⁰

On the issue of state-owned enterprises, for example, the EU concurs with China that it is not ownership per se, but rather subsidies, that should be addressed. The US, with few State Owned Enterprises (SOEs) or enterprises with state investments, focus on the SOEs themselves. The U.S. Innovation and Competition Act, which passed the Senate with large bipartisan support, had an entire section entitled ‘Meeting the China Challenge’. The bill explicitly targeted China on financial services, investments, and SOEs; it redefined subsidies and modified anti-dumping reporting requirements. The legislative proposal failed for unrelated reasons in 2022, but revealed the extent of anti-China sentiments, and it may return in future Congresses. This will raise further concerns in Europe that WTO reforms on subsidies may prove impossible to achieve.

In fact, the EU and the US have increased state support for select domestic sectors while seeking to avoid a bilateral subsidy race. The pandemic, changing geopolitical concerns, and domestic disgruntlement, led both the US and the EU to reconsider supply chain resilience and import dependence in select sectors; there is renewed appetite for industrial policies, including subsidies.⁸¹ As part of efforts to increase domestic production both partners have announced significant state-backed investments and subsidies in upscaling semi-conductor manufacturing over the next few years (with approximately USD 50 bn and EUR 42 bn respectively, though some will be in the form of matching private investments). Their respective policies are, however, anchored in different debates. In the US, it centres around reshoring and ‘friend-shoring’ (encouraging firms to invest in reliable partners). In contrast, the European Commission and the European Parliament have both made clear that supply chain disruptions and Russia’s war in Ukraine are reasons to accelerate, complete, and ratify new FTAs – Europe’s version of ‘friend-shoring’. At the TTC meeting in May 2022, the partners issued a declaration stating that they would try ‘to avoid subsidy races by advancing common goals for incentives granted in respective territories’ and to limit subsidies to what is ‘necessary, appropriate and proportionate for public policy objectives’ and to include ‘an exchange of information regarding such incentives on a reciprocal basis’.⁸²

Both parties want to support domestic businesses and enforce an agreed rulebook at the WTO,⁸³ but differ greatly on what this entails. The EU believes

⁸⁰ Sabine Weyand, Director General, DG Trade, on Trade Winds, *supra* n. 76.

⁸¹ Tai, *supra* n. 37.

⁸² US Department of Commerce, *U.S.-EU Joint Statement of the Trade and Technology Council*, Press Release (16 May 2022).

⁸³ White House, *U.S.-EU Summit Statement* (15 Jun. 2021).

that ‘A fragmented trading system based on power relations will harm everybody and benefit no one’,⁸⁴ and that you need a functioning WTO, since ‘in a geopolitical world ... [you] ... can’t have a rules-based system without a functioning dispute system’.⁸⁵ The US is more comfortable with power politics and has longstanding concerns about the WTO dispute settlement system (DSS). Both the Bush and Obama Administrations considered the WTO AB too judicial, too expansive in scope, and insufficiently deferential to domestic investigations; both refused to support reappointment of the American members of the Body. President Trump then blocked both reappointments and new members, bringing the WTO’s body to a standstill in December 2020.

The EU shares some American concerns, such as ensuring that arbitrators only rule on the issue at hand, not accepting previous cases as precedents, and ensuring that all rulings are made within stipulated time frames.⁸⁶ However, the EU wants use of the national security exemption (Article 21) to be extremely limited, while the US deems this to be solely a national determination. In 2020, seventeen WTO members, led by the EU, agreed to the Multi-Party Interim Appeal Arbitration Arrangement (MPIA), as a temporary replacement for the AB.⁸⁷ The US refuses to join, leaving the AB no closer to a long-term solution.

While Biden eased trade frictions with Europe over steel and aluminium tariffs, as well as subsidies to their respective airline industries, he has remained vague on WTO reforms, other than wanting a more flexible, less judicial body, much like Trump.⁸⁸ Details of what the US would accept remains unclear, frustrating partners’ diplomats who argue there has been ‘no engagement’, ‘no discussion whatsoever’.⁸⁹ The WTO’s DSS, which is well-regarded across institutions and parties in the EU, finds little love anywhere in Washington DC, where scepticism of multilateral institutions is widespread.⁹⁰

⁸⁴ *Euractiv*, *EU Warns of Deep Divisions at WTO, Urges Reform* (17 Sep. 2021).

⁸⁵ I. Garcia-Barcero, *Keynote Speech. Between Interests and Values: The Future of EU Trade Policy* (Amsterdam 13 May 2022).

⁸⁶ M. Linscott, *For WTO Reform, Most Roads Lead to China. But Do the Solutions Lead Away?*, Atlantic Council, Blog (17 Mar. 2021); European Commission, 2021 Annex.

⁸⁷ WTO, *Multi-party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU*, addendum to *Statement on a Mechanism for Developing, Documenting and Sharing Practices and Procedures in the Conduct of WTO Disputes*, JOB/DSB/1/Add.12 (30 Apr. 2020).

⁸⁸ Bacchus, *supra* n. 39. These agreements (a ‘truce’ on airplane subsidies and a tariff rate quota ‘arrangement’ on steel) were incompatible with WTO obligations, meaning both the EU and the US, though the former more than the latter, have problems with actions contradicting their rhetoric.

⁸⁹ Aarup, *supra* n. 36.

⁹⁰ The US proposed an AB with exemptions for domestically decided trade remedies and unilateral national invocations of WTO ‘security exceptions’ (Art. XXI) knowing these were unacceptable to most other members, including the EU. See E. Petersmann, *Transatlantic Economic and Legal Disintegration?*, in *Handbook on Transatlantic Relations* (E. Fahey ed. Routledge 2023).

Lastly, the fragmentation of the digital economy, and data transfer, is another transatlantic challenge. The EU's General Data Protection Regulation (2016) and Digital Market Act (criticized in the US as 'anti-American'); China's new April 2022 Personal Information Protection Law (PIPL), various state-level private laws in the US, and the Court of Justice of the EU's 2021 rejection of the 2016 transatlantic Privacy Shield (used by firms to transfer data) have resulted in a myriad of conflicting regulations on privacy and data transfers. This increases pressure on firms to 'venue shop' a regulatory framework, while discriminating against SMEs who can't afford the legal and administrative costs to ensure multi-jurisdictional compliance. Details on the new Trans-Atlantic Data Privacy Framework are still lacking, but they are guaranteed to be challenged in the EU. A new rejection by the Court of Justice of the EU would not only devastate transatlantic data flows, but also hamper standard setting for cross-jurisdictional data flows.

6 IMPLICATIONS FOR TRANSATLANTIC TRADE AND THE LIO

This article has assessed two aspects of potential transatlantic trade policy convergence. One is the EU's trade strategy alignment vis-à-vis US trade strategy, the second specific trade policy instruments. We have found signs of re-alignment in both cases: there is an identifiable shift by the EU towards a more realist-based trade strategy, and the EU's development of new trade defence instruments signals a realization that in a world where trade rules are continuously challenged, and the future of the main arbiter (WTO) is in doubt, the EU is willing to act assertively and independently when necessary. While it 'rejects protectionism' the EU has made clear that – just like the US – it will 'pursue our own interests, in particular vis-à-vis China which we consider as a competitor, a partner and a systemic rival'.⁹¹ However, there remains important differences with the US: the EU still insists that a DSS is critically important in a world of power-politics, and thus prefers a return to a WTO-centred rules-based system. The US appears more comfortable with a power-based system focused on bilateral ties and reciprocity. Moreover, EU trade defence instruments are primarily defensive, they are explicitly written to avoid targeting specific third countries and to be WTO-compatible.

This partial re-alignment should be interpreted with caution. Deeper transatlantic interdependence and agreed reforms can be mutually beneficial and good for the stability of the international trading system. However, in the context of a

⁹¹ European Council, *Oral Conclusions Drawn by President Charles Michel Following the Informal Meeting of the Members of the European Council in Brdo pri Kranju, Slovenia* (6 Oct. 2021).

fragmenting LIO, where geo-economic concerns permeate trade policy, suspicion of interdependence across the Atlantic may return, with either side willing to employ trade policy instruments against the other in order to limit dependence. For the EU's re-alignment to be positive for the transatlantic partnership, and for the partnership to thrive, both the US and the EU must – at minimum – agree to treat each other as trusted partners whose products are not a threat to national security, and to not weaponize trade against one another. Language to this effect was inserted by the EU in the May 2022 TTC draft conclusions, but the US insisted on its removal, signalling a preference for retaining this option.

On the other hand, the remaining differences in emphases and preferences may be good for the transatlantic relationship to the extent that at least one of the partners is less willing to adopt an aggressive geo-economic turn. Though compromise will be required of the EU, it may be able to convince the US of the value of an international arbiter, and with both partners prepared to use retaliatory measures against coercive and unfair trade practices by third countries, the latter may in turn see value in returning to a reformed WTO.⁹²

The TTC creates a space to manage the evolution of the transatlantic economic relationship. It can serve as a confidence building venue, and it can lead to deeper interactions between regulators from the US and the EU. It can help manage risks and deescalate potential transatlantic relationship in the face of measures taken vis-à-vis other trading partners. In other words, it can help insulate US-EU trade relations from a more realist, zero-sum world.

However, institutions can only go so far in shaping transatlantic relations. The fragmentation of the LIO takes place against the backdrop of a multipolar international system that challenges the capacity of the West to set the rules of the game in international trade. Such challenges can also foster cooperation between the US and the EU. In a scenario of competitive regional orders, where the West (to include Oceania, Japan, North America) has to adapt to being a large, pluralistic economic block that can shape international trade norms only when it pools its power, the EU and the US are default partners. However, this is not an assured development. Domestic debates on globalization and trade differ, as do perceptions of external threats, resulting in divergent policy preferences in many areas. If the two are unable to effectively cooperate on trade matters, incentives will grow to pursue separate paths and to respond differently to external threats in a conflict-prone international environment. That would not benefit either transatlantic partner, nor the rules-based international trading system.

⁹² T. Xinquan & R. Wolfe, *Reviving the Negotiation Function of the WTO: Why the Onus Falls on the Three*, in *Rebooting Multilateral Trade Cooperation: Perspectives from China and Europe Major Powers* 29–44 (B. Hoekman, T. Xinquan & R. Wolfe eds, CEPR Press 2021).

