The implications of strategic autonomy for EU trade agreements: wider but less deep, and more confrontational towards WTO principles?

Wolfgang Weiß and Cornelia Furculita*

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Abstract

With the advent of a multipolar world, international trade relations have come under strain. In 2021, the EU responded with a policy shift towards open, sustainable, and assertive trade. Recent challenges have prompted the EU to broaden the scope of strategic autonomy in trade agreements beyond the initial goal of strengthening TSD chapters. The EU has adopted more flexible approaches, which have led to the relaxation of TSD chapter substance and enforcement in recent agreements. Furthermore, the urgent need to boost economic security and competitiveness as part of strategic autonomy has led to the addition of new or expanded chapters on topics such as energy, raw materials, bilateral safeguards, and subsidies. This has been accompanied by a renewed informalization and soft law-ization of trade relations in investment partnerships. Another development is the EU's willingness to deviate from its adherence to multilateral rules and WTO founding principles. Thus, when assessing the consequences for bilateral and multilateral trade policy, the EU's pursuit of greater strategic autonomy has emerged in two strands. The first involves shifting towards more flexible and relaxed ambitions for trade agreements to adapt to increased competition in establishing bilateral trade agreements and to ensure undistorted trade. As a result, EU trade agreements have become "wider but less deep". The second involves a preparedness to relax traditional conceptions of WTO principles.

A. Introduction

Following a 2020 announcement and the 2021 communication on an open, sustainable and assertive trade policy, open strategic autonomy became a key topic also for EU trade policy.[1] With this shift came a stronger focus on enforcement and robust representation of interests and values, leading to a more geoeconomic approach of the EU moving from reaction to proaction and "systematic deployment" of its toolbox.[2] As the 2021 communication[3] pivotally focused on autonomous trade instruments, its consideration of strategic autonomy in trade agreements was largely limited to deliberations about strengthening the enforcement of trade and sustainable development (TSD) chapters and WTO reform. However, the challenges of a multipolar world and the resulting trade governance frictions, which have led to weaponised dependence and the increased securitisation of trade, have prompted the

1 For a brief history of the mention of EU strategic autonomy before 2020 see *Martins/Raube/Biedenkopf*, Navigating a conundrum: open strategic autonomy, the EU and the EU-Mercosur Association agreement, European Politics and Society (forthcoming), available at: https://www.tandfonline.com/doi/full/10.1080/23745118.2025.2601962 (7/7/2026), p. 3.

2 *European Commission*, Joint Communication to the European Parliament and the Council, JOIN(2025) 977 final, p. 1.

3 *European Commission,* Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2021) 66 final.

EU to expand the meaning of strategic autonomy also for trade agreements beyond the strengthening of TSD chapters. The EU intensified its pursuit of entering into new FTAs, stabilizing its trade relations and market access against the background of proliferating market closures and entry barriers instigated in particular by the US Trump administrations, even intensifying since 2025. The EU Council expressed the need for more FTAs to "prevent other actors from filling the current geopolitical vacuum" and to liaise with partner countries to build bridges, rather than erect new tariffs or other trade barriers.[4]

As this paper will show, first analyses suggest that the EU has had to adopt more flexible approaches in its trade negotiations. Consequently, the substance of the TSD disciplines and the hard enforcement of TSD chapters pursued have been relaxed in recent agreements. Additionally, the new agreements' provisions enshrining flexibility for EU partners could undermine autonomous trade rules such as the CBAM.

Furthermore, the EU's urgent need to boost economic security and competitiveness as part of strategic autonomy has given rise to new or expanded chapters on matters such as energy and raw materials, bilateral safeguards and subsidies. This has been accompanied by a renewed informalisation and soft law-isation of trade relations in investment partnerships.

The bilateral Turnberry Deal with the US illustrates the latter point, but also another development. The EU may be willing to deviate from its adherence to multilateral rules and founding principles, particularly those of the WTO. The Turnberry Deal clearly violates the Most Favoured Nation (MFN) principle and tariff concessions as it does not meet the WTO requirements for free trade areas. In addition, the EU is actively encouraging discussions about new MFN interpretations and increased freedom for unilateral actions, as demonstrated by its steel action plan, in tension to its WTO reform objectives announced in the annex to the 2021 communication.

Thus, when assessing the consequences for bilateral and multilateral approaches, the EU's pursuit of greater strategic autonomy may have emerged in two strands. The first involves a shift towards more flexible and relaxed ambitions for (still) 'wider and (no longer) deeper' trade agreements in order to adapt to increased competition in establishing free trade agreements (FTAs) and to ensure undistorted trade. The second is a preparedness to relax traditional conceptions of WTO principles.

In what follows, we will first take a look at the changes in more recent trade agreements, compared to the promises of the 2021 communication (B.). We will explore the TSD chapters and disciplines on raw material and energy trade, as well as those that establish a level playing field. Next, we will address the new trend of the informalization of trade and investment relations (C.). Finally, we will turn

4 *Martins/Raube/Biedenkopf,* Navigating a conundrum: open strategic autonomy, the EU and the EU-Mercosur Association agreement, European Politics and Society (forthcoming), available at: https://www.tandfonline.com/doi/full/10.1080/23745118.2025.2601962 (7/7/2026), p. 8.

to the EU's new willingness to act in greater confrontation with WTO law and principles (D.).

B. Widening, but not deepening trade agreements

Analyses of the most recent EU FTAs demonstrate that the pursuit of strategic autonomy in CCP had an impact on the shape of EU FTAs. As strategic autonomy brought to the fore specific policy objectives of greater EU resilience against exploiting EU dependence in trade relations and more (economic) security in value chains, in particular in the area of energy and critical raw materials supply, as well as a stronger EU capacity for counteracting what the EU perceives as unfair trade, EU FTAs have been amended by expanding disciplines on subsidies and safeguards, and by new raw materials and energy trade chapters. Hence, EU FTAs cover more issues, and while the new chapters share similarities, they differ in detail, sometimes greatly, apparently corresponding to the diverse needs and interests of the parties.

I. Sustainable and Assertive Bilateral EU Trade Policy?

In its 2021 Trade Policy Review, the Commission vowed to provide ambitious trade and sustainable development chapters in its trade agreements and to strengthen the enforcement of trade and sustainable development (TSD) commitments.[5] Further, according to a review of the 2018 '15-point action plan' for TSD in trade agreements conducted in 2022, 'EU trade agreements should be more effective and expeditious in bringing change on the ground'.[6] As a result of the 2022 TSD review, the Commission proposed strong substantive commitments with respect to multilateral environmental and labour commitments, to further align TSD enforcement with the general state-to-state dispute settlement mechanism (DSM), to extend the compliance stage to disputes under the TSD chapter and to include the possibility to impose sanctions as a last resort in instances of serious violations of International Labour Organization (ILO) fundamental principles and rights at work and of the Paris Agreement as essential elements of the agreements.[7] Additionally, EU trade agreements should also work hand-in-hand with other policy instruments, including EU unilateral instruments such as the Carbon Border Adjustment Mechanism

5 *European Commission,* Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2021) 66 final, pp. 12, 13.

6 *European Commission*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2022) 409 final, p. 6.

7 *European Commission*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2022) 409 final, pp. 2, 11.

(CBAM)[8] and the EU Deforestation Regulation (EUDR),[9][10] and not undermine them.

1. Substantive TSD Commitments

As the Commission promised an open, *sustainable* and assertive trade policy in its 2021 Trade Policy Review based on the concept of open strategic autonomy,[11] this section will look into the depth of substantive commitments included in EU's recent FTAs. TSD chapters have been regularly included in EU's FTAs since 2011, containing a set of standard provisions that relate especially to climate protection and labour rights.[12] Thus, EU FTAs regularly include commitments to implement multilateral environmental and labour agreements, particularly the Paris Agreement and ILO Conventions, as well as obligations with respect to the exercise of domestic environmental and labour laws.[13] Finally, EU FTAs also include commitments or aspirational clauses with respect to specific areas such as gender equality, biological diversity, sustainable management of forests, fisheries and aquaculture, wildlife conservation, or responsible business conduct.

When it comes to the implementation of ILO Conventions, the EU-Mercosur Interim Trade Agreement (iTA)[14] and EU-Australia FTA[15] enshrine the parties' commitment to 'effectively implement' ILO conventions that they ratified. EU-In-

8 Regulation (EU) 2023/956 establishing a carbon border adjustment mechanism, OJ L 130 of 16 May 2023, p. 52.

9 Regulation (EU) 2023/1115 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, OJ L 150 of 9 June 2023, p. 206.

10 *European Commission*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2022) 409 final, p. 3.

11 *European Commission,* Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2021) 66 final, p. 4.

12 *Bronckers/Gruni*, JIEL 2021/1, p. 25; *Harrison/ Paulini*, JIEL 2024/4, p. 724.

13 *Eckes/Krajewski*, How Sustainable is the EU-Mercosur Agreement?, available at: https://old.caneurope.org/content/uploads/2025/04/Legal_analysis_sustainability_EU-Mercosur_Agreement.pdf (7/7/2026), p. 16; *Espa/Tokas*, EFARev 2025/SI, p. 16; *Hoffmeister/Siemer*, ZEuS 2024/3, p. 273.

14 Interim Agreement on Trade Between the European Union, of the One Part, and the Common Market of the South, the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Oriental Republic of Uruguay, of the Other Part (EU-Mercosur iTA), OJ L 2026/184 of 27/2/2026, Art. 18.4 (2). The iTA is the part of the EU-Mercosur Partnership Agreement (EMPA), which can be concluded by the EU alone on the basis of its exclusive competences, and which has been provisionally applied since May 2026, whereas the EMPA is a mixed agreement.

15 EU-Australia FTA, Art. 18.3 (5), https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/australia/eu-australia-agreement/text-agreements_en (7/7/2026). The text of the agreement was published by the parties and may undergo further modifications.

dia FTA, however, contains a more ambiguous provision, establishing that parties 'shall implement' the ratified ILO Conventions 'in good faith, as per its domestic law and procedure'.[16] Thus, the agreement with India circumscribes this commitment only to an obligation of good faith and only according to its own domestic law and procedures. Depending on the interpretation of this qualifier, India could be entitled to invoke its domestic laws and procedures as a reason for non-implementation. While the invocation of such a reason for the non-performance of ILO conventions would not be allowed under Art. 27 of the Vienna Convention on the Law of Treaties (VCLT),[17] the provision included in EU-India FTA in this respect is likely to lack added value.

Additionally, EU FTAs contain commitments with respect to the implementation of internationally recognized core or fundamental labour principles and rights at work even if the parties have not ratified the respective ILO convention.[18] All three analysed agreements use the word 'shall' to indicate an obligation with respect to the implementation of ILO fundamental labour principles, with EU-Mercosur and EU-India agreements additionally including 'effectively implement' and, respectively, 'respect […] in good faith'.[19] While the last two agreements establish a higher bar for the eventual assessment of a party's compliance with its commitment, the labour dispute under EU-Korea FTA showed that even without additional qualifiers apparently strengthening the obligation,[20] the commitment in EU-Australia FTA is likely to be interpreted as a hard commitment requiring actual implementation.

The analysed EU FTAs also contain provisions with respect to ratifying fundamental ILO conventions, which are, however, drafted in a hortatory language. Thus, under the agreements with Mercosur countries and Australia, parties make an obligation of 'best endeavours'[21] to only 'make continued and sustained efforts'

16 EU-India FTA, Art. 16.3 (5), https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/india/eu-india-agreements/text-agreements_en (7/7/2026). The text of the agreement was published by the parties and may undergo minor modifications that should not affect the present analysis.

17 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679.

18 *Hoffmeister/Siemer*, ZEuS 2024/3, p. 275.

19 EU-Mercosur iTA, Art. 18.4 (3), OJ L 2026/184 of 27/2/2026; EU-India FTA, Art. 16.3 (2), https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/india/eu-india-agreements/text-agreements_en (7/7/2026); EU-Australia FTA, Art. 18.3 (2), https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/australia/eu-australia-agreement/text-agreements_en (7/7/2026). It is to be noted that the 1998 ILO Declaration on Fundamental Principles and Rights at Work was amended in 2022 to add a fifth fundamental right to the list, that of 'a safe and healthy working environment'. Given that the main text of the EU-Mercosur iTA was negotiated before that date, it lists only the four fundamental rights contained in the 1998 version.

20 Report of the Panel of Experts, EU-Korea FTA, 20 January 2021, para. 196.

21 As shown by the Report of the Panel of Experts under EU-Korea FTA, 20 January 2021, para. 277. For criticism see *Tyc*, Acta Universitatis lodziensis, Folia Iuridica 2024/2 p. 123.

towards ratifying.[22] Yet, unlike some EU countries, Australia has already ratified all ten fundamental ILO conventions including the ones added to the list in 2022.[23] The EU-India FTA contains an even softer commitment to 'make efforts, in good faith, towards the ratification […] in a promotional, flexible manner and in accordance with domestic laws'.[24] Therefore, India enjoys flexibility in that respect and could invoke its own domestic law for non-ratifying ILO fundamental conventions.

Leaving the question of essential elements to be treated in Section 3 below, EU FTAs also contain commitments regarding Multilateral Environmental Agreements (MEAs). The EU-Australia FTA and the EU-Mercosur iTA read together with Annex 18-A to it, enshrine a strong commitment of the parties to 'effectively implement' their MEAs, as well as the Paris Agreement and the Nationally Determined Contributions (NDCs) included therein.[25] The EU-India FTA, nevertheless, uses a more ambiguous and softer language. Thus, with respect to MEAs to which signatories are parties, they have only agreed that they 'shall *strive* to fulfil [the] obligations, as per national circumstances'.[26] In the case of the UN Framework Convention on Climate Change (UNFCCC) and the Paris Agreement, the parties to the EU-India FTA committed to 'implement' them without adding the more specific requirement to do so *effectively*.[27] Although the agreement with India includes a less strong language when it comes to the Paris Agreement, the determination of what would amount to an *effective* implementation could also pose difficulties, especially since the Paris Agreement contains no obligations of result.[28] Still, even without requiring achievement of a specific result, the use of the term 'effective' could be interpreted as imposing at least a best efforts obligation to achieve Paris goals and the NDCs.[29]

22 EU-Mercosur iTA, Art. 18.4 (4), OJ L 2026/184 of 27/2/2026; EU-Australia FTA, Art. 18.3 (3), https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/australia/eu-australia-agreement/text-agreements_en (7/7/2026).

23 For more see ILO, Ratifications by country, https://normlex.ilo.org/dyn/nrmlx_en/f?p=1000:11001 (7/7/2026).

24 EU-India FTA, Art. 16.3 (3), https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/india/eu-india-agreements/text-agreements_en (7/7/2026).

25 EU-Mercosur iTA, Art. 18.5 (2), 18.6 (2), Annex 18-A, para. 13, OJ L 2026/184 of 27/2/2026; EU-Australia FTA, Arts. 18.5 (2), 18.6 (2), https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/australia/eu-australia-agreement/text-agreements_en (7/7/2026).

26 EU-India FTA, Art. 16.5 (2), https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/india/eu-india-agreements/text-agreements_en (7/7/2026).

27 EU-India FTA, Art. 16.6 (1) https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/india/eu-india-agreements/text-agreements_en (7/7/2026).

28 *do Amaral Jr/Martins Martes* in: Bungenberg et al. (eds.), p. 407; *Eckes/Krajewski*, How Sustainable is the EU-Mercosur Agreement?, available at: https://old.caneurope.org/content/uploads/2025/04/Legal_analysis_sustainability_EU-Mercosur_Agreement.pdf (7/7/2026), p. 12.

29 *Bronckers/Gruni*, JIEL 2021/1, p. 29.

As established in the beginning of this section, EU FTAs also regularly include obligations with respect to the exercise of domestic environmental and labour law. First, the analysed EU FTAs recognize the parties' right to regulate domestically in the TSD field.[30] Nevertheless, while the agreements with Mercosur and Australia establish that the level of protection and domestic legislation *shall* be consistent with the parties' multilateral labour and climate commitments,[31] the agreement with India contains only a hortatory language using the expression 'shall *endeavor* to be consistent (emphasis added)' with the international commitments.[32] Second, as well as other EU FTAs, the ones analysed contain non-regression clauses, that prohibit parties to weaken domestic labour or environmental legislation.[33] The EU-Australia agreement mandates, first, that parties 'shall not weaken or reduce the levels of protection' and, second, that they 'shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental or labour law'.[34] The EU-Mercosur iTA and Annex 18-A to it, however, draft the first prong in a more lax language using the verb 'should'.[35] The agreement with India has an even more aspirational language, requiring parties to only 'make efforts towards ensuring that it does not weaken or reduce the levels of protection'.[36] Finally, all three agreements include strong non-enforcement clauses,[37] providing that each party 'shall not, through a sustained or recurring course of action or inaction, fail to effectively enforce' its environmental or labour legislation.[38] All three agreements subject the non-regression and non-enforcement clauses to a link to trade.

30 EU-Mercosur iTA, Art. 18.2 (1), first sentence, OJ L 2026/184 of 27/2/2026; EU-India FTA, Art. 16.2 (1), first sentence, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/india/eu-india-agreements/text-agreements_en (7/7/2026); EU-Australia FTA, Art. 18.2 (1), https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/australia/eu-australia-agreement/text-agreements_en (7/7/2026).

31 EU-Mercosur iTA, Art. 18.2 (1), second sentence, OJ L 2026/184 of 27/2/2026; EU-Australia FTA, Art. 18.2 (1), https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/australia/eu-australia-agreement/text-agreements_en (7/7/2026).

32 EU-India FTA, Art. 16.2 (1), second sentence, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/india/eu-india-agreements/text-agreements_en (7/7/2026).

33 *Bronckers/Gruni*, JIEL 2021/1, p. 30; *Mitchell/Munro*, ICQL 2023/1, p. 35.

34 EU-Australa FTA, Art. 18.2 (3), https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/australia/eu-australia-agreement/text-agreements_en (7/7/2026).

35 EU-Mercosur iTA, Art. 18.2 (3), (4), Annex 18-A, para. 2, OJ L 2026/184 of 27/2/2026.

36 EU-India FTA, Art. 16.2 (3), (4), https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/india/eu-india-agreements/text-agreements_en (7/7/2026).

37 *Bronckers/Gruni*, JIEL 2021/1, p. 30; *Hoffmeister/Siemer*, ZEuS 2024/3, p. 273.

38 EU-Mercosur iTA, Art. 18.2 (5), OJ L 2026/184 of 27/2/2026; EU-India FTA, Art. 16.2 (5) https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/india/eu-india-agreements/text-agreements_en (7/7/2026); EU-Australia FTA, Art. 18.2 (4), https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/australia/eu-australia-agreement/text-agreements_en (7/7/2026).

Except for the non-enforcement clause of the EU-Australia FTA, which imposes the objective condition that non-enforcement be 'in a manner affecting trade and investment',[39] in other cases it is merely a condition of intent.[40] Conditioning upon mere intent without actual effects would be a less stringent standard,[41] but as shown by the panel report in the EU-Korea labour dispute, the effects test could also be interpreted less strictly due to the 'contextual setting of sustainable development' offered by the FTA.[42]

EU-Mercosur iTA and EU-Australia also include strong commitments with respect to biodiversity and wildlife conservation, forest management, fisheries and aquaculture, and women's economic empowerment.[43] EU-India FTA, however, mostly uses aspirational language or limits the scope of commitments in these fields by conditioning them to be 'as per its domestic law and procedure'.[44]

Thus, although the 2021 Trade Policy Review promised a sustainable and assertive trade policy, the analysis above indicates that, in practice, the EU has implemented a more flexible approach to TSD substantive commitments. For example, albeit with some differences, the commitments included in the agreements with Australia and Mercosur are in many respects stronger and more ambitious than those in the EU-India FTA. Thus, it seems that in the wake of the increased weaponisation and unilateralisation of international trade, the EU is looking to create more alliances, even at the cost of its strive towards a more assertive sustainability. But even in the case of the stronger commitments, the question arises whether they are matched by similarly strong enforcement mechanisms.

2. Aligning TSD enforcement with the General DSM

The EU has been traditionally including special cooperative mechanisms for the FTA TSD chapters, which allow a panel of experts, in case of failed consultations,

39 EU-Australia FTA, Art. 18.2 (3), https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/australia/eu-australia-agreement/text-agreements_en (7/7/2026).

40 EU-Mercosur iTA, Art. 18.2 (3)-(5), OJ L 2026/184 of 27/2/2026; EU-India FTA, Art. 16.2 (3)-(5), https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/india/eu-india-agreements/text-agreements_en (7/7/2026); EU-Australia FTA, Art. 18.2 (4), https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/australia/eu-dsm -agreement/text-agreements_en (7/7/2026).

41 *Bronckers/Gruni*, JIEL 2021/1, p. 31.

42 Report of the panel of Experts under EU-Korea FTA 20 January 2021, para. 93.

43 EU-Mercosur iTA, Arts. 18.7 (2) (b), 18.8 (2), 18.9 (2), Annex 18-A, paras. 15, 35-37, 43, OJ L 2026/184 of 27/2/2026; EU-Australia FTA, Arts. 18.4 (2), 18.7 (3) (c), 18.8 (2), 18.9 (3) (a), 18.10 (3), https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/australia/eu-australia-agreement/text-agreements_en (7/7/2026).

44 See, for example, EU-India FTA, Arts. 16.4 (3), 16.7 (2), 16.8 (3), 16.9 (3), https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/india/eu-india-agreements/text-agreements_en (7/7/2026).

to examine the matter and issue a non-binding report without the possibility to impose countermeasures in case of non-compliance.[45] The opportunity of introducing sanctions for TSD enforcement was extensively debated elsewhere.[46] Therefore, the present paper does not ponder on what type of dispute settlement is better designed for TSD enforcement, but rather whether the EU lived up to the objective that it established itself.

The EU-New Zealand FTA,[47] for which negotiations were concluded about a week after the Commission unveiled its plan of TSD enforcement strengthening,[48] subjects the TSD chapter to the general DSM, including to the general compliance stage rules, and envisages the possibility to impose sanctions in limited cases.[49] Thus, EU-New Zealand FTA allows the imposition of temporary remedies in case of disputes related to violations of ILO core labour rights or actions or omissions that materially defeat the object and purpose of the Paris Agreement.[50] These provisions set the expectation that similar or at least somewhat comparable enforcement rules will become the standard in other new EU FTAs.

Yet, with the change in geopolitical context, the announced approach became more of an idealistic target than an implemented practice. The EU-Mercosur iTA provides a cooperative approach to TSD enforcement[51] akin to the ones included in agreements concluded before the revised trade policy. While the cooperative approach might be successful in TSD enforcement as shown by the EU-Korea FTA labour dispute,[52] the iTA failed to deliver on aligning this mechanism with the general DSM. As the Mercosur bloc clearly rejected the traditional sanction-based approach,[53] it seems that the EU weighed in favor of signing an agreement with a cooperative mechanism of TSD enforcement, rather than not signing an agreement at all.

45 *Weiß/Furculiță*, pp. 247–248; *Hoffmeister/Siemer*, ZEuS 2024/3, p. 279.
46 For example, *Marx/Ebert/Hachez*, Politics and Governance 2017/4, p. 50; *Harrison and others*, WTRev 2019/4, p. 652; *Bronckers/Gruni*, JIEL 2021/1, p. 41; *Marín Durán*, in: Wessel et al. (eds.), pp. 269–270.
47 Free Trade Agreement between the European Union and New Zealand (EU-New Zealand FTA), OJ L 2024/866 of 25 March 2024.
48 Key elements of the EU-New Zealand trade agreement, https://policy.trade.ec.europa.eu/news/key-elements-eu-new-zealand-trade-agreement-2022-06-30_en (7/7/2026).
49 For more see *Weiß/Furculiță*, pp. 264–265; *Carrillo*, pp. 19–24; *Espa/Tokas*, EFARev 2025/ SI, p. 24.
50 EU-New Zealand FTA, Art. 26.16 (2), OJ L 2024/866 of 25 March 2024.
51 EU-Mercosur iTA, Arts. 18.15-18.17, OJ L 2026/184 of 27/2/2026. For more see *Eckes/Krajewski*, How Sustainable is the EU-Mercosur Agreement?, available at: https://old.caneurope.org/content/uploads/2025/04/Legal_analysis_sustainability_EU-Mercosur_Agreement.pdf (7/7/2026), p.23.
52 The cooperative mechanism used in that instance was generally appraised (*Weiß/Furculiță*, p. 260; *Marín Durán*, in: Wessel et al. (eds.), p. 272; *Eckes/Krajewski*, How Sustainable is the EU-Mercosur Agreement?, available at: https://old.caneurope.org/content/uploads/2025/04/Legal_analysis_sustainability_EU-Mercosur_Agreement.pdf (7/7/2026), p. 24; *Baroncini*, in: Baroncini (ed.), p. 200).
53 *Espa/Tokas*, EFARev 2025/SI, p. 27; *Lehmen/Vidigal,* EFARev 2025/SI, p. 97.

Although the agreement with Mercosur has been criticized the most when it comes to TSD enforcement,[54] it is the EU-India FTA that departs not only from the most recent proposed approach, but also from the cooperative one used by the EU starting with the conclusion of EU-Korea FTA, provisionally applied since 2011.[55] Thus, the TSD chapter of EU-India FTA is excluded from the general DSM and provides only the possibility to conduct consultations between the parties at different levels (TSD Committee, Joint Committee, Ministerial level).[56] Accordingly, by agreeing to incorporate this mechanism in its agreement with India, the EU not only renounced its most recent ambition to strengthen the TSD enforcement mechanism, but it even backtracked on its previous cooperative approach that provided non-binding panel of experts reports. Rightly so, the EU has been warned of the negative impact of trying to win a race to the bottom or of trying to counteract US actions by engaging in international agreements that contradict its own principles.[57]

In contrast, the most recently announced EU-Australia FTA, similar to the EU-New Zealand FTA, subjects the TSD chapter to the general DSM, while enshrining some special norms for TSD dispute settlement, such as seeking the view of domestic advisory groups of civil society, taking into account information from the ILO, or special lists of panelists.[58] Moreover, as in case of the agreement with New Zealand, it explicitly envisages the possibility of sanctions in case of violations of ILO core labour rights or any act or omission that materially defeats the object and purpose of the Paris Agreement.[59]

54 For example, *Harrison/Paulini*, 'The Trade and Sustainable Development Chapter in the EU Mercosur Association Agreement: Is it fit for purpose?', available at: https://www.clientearth.org/media/rs5enobx/the-trade-and-sustainable-development-chapter-in-the-eu-mercosur-association-agreement-ext-en.pdf (2/6/2026); *do Amaral/Martins Martes*, in: Bungenberg et al. (eds.), p. 408; *Eckes/Krajewski*, How Sustainable is the EU-Mercosur Agreement?, available at: https://old.caneurope.org/content/uploads/2025/04/Legal_analysis_sustainability_EU-Mercosur_Agreement.pdf (7/7/2026), pp. 1–27.

55 Free trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, OJ L 127 of 14/5/2011, p. 6.

56 EU-India FTA, Arts. 16.16-16.19, 17.2 (2) (i), https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/india/eu-india-agreements/text-agreements_en (7/7/2026).

57 *Ståhl*, 'What's missing in the new EU-India trade deal? Workers' rights', available at: https://euobserver.com/19473/whats-missing-in-the-new-eu-india-trade-deal-workers-rights/ (7/7/2026).

58 EU-Australia FTA DSM, Art. 24.2, 24.4 (6) & (7), 24.7 (1) (b), https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/australia/eu-australia-agreement/text-agreements_en (7/7/2026).

59 EU-Australia FTA DSM, Art. 24.17 (9) (a), https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/australia/eu-australia-agreement/text-agreements_en (7/7/2026).

3. Essential Elements Clauses as a Basis for Sanctions

Leaving aside the question of effectiveness of sanctions to ensure compliance with TSD provisions found in international agreements, especially the Paris Agreement,[60] this section will look into another legal basis for them that was announced as being part of the EU's new approach to TSD enforcement – essential elements clauses.

According to Art. 60 (1) of the VCLT, a party may terminate or suspend a treaty in whole or in part in case of a 'material breach' of a treaty. According to paragraph (3) (b) of the same VCLT article, a material breach consists in 'the violation of *a provision essential to the accomplishment of the object or purpose of the treaty* (emphasis added)'. By invoking such an express provision which designates the treaty elements that are essential, a party would be entitled to temporarily suspend the treaty in whole or in part without going through the lengthy dispute settlement procedures.[61]

As shown above, the EU-Australia FTA, without expressly designating ILO core labour rights and the Paris Agreement as essential elements, does so implicitly by allowing trade remedies in the case of any act or omission that materially defeats the object and purpose of the Paris Agreement, in language evoking Art. 60 (4) (b) VCLT. The Commission claims that the EU-Mercosur Partnership Agreement (EMPA) includes an essential elements clause permitting the suspension of the agreement in the case of a serious breach of, or withdrawal from the Paris Agreement.[62] Nevertheless, according to the submitted agreement text for a proposal for a Council Decision, only the obligation that 'each Party shall remain a party, in good faith, of the UNFCCC and its Paris Agreement' constitutes an essential obligation.[63] Although the agreement explicitly allows its partial or full suspension in case

60 For more see *Marín Durán*, in: Wessel et al. (eds.), pp. 269–270; *Eckes/Krajewski*, How Sustainable is the EU-Mercosur Agreement?, available at: https://old.caneurope.org/content/uploads/2025/04/Legal_analysis_sustainability_EU-Mercosur_Agreement.pdf (7/7/2026), pp. 10, 12.

61 *Espa/Tokas*, EFARev 2025/SI, p. 26.

62 Factsheet EU-Mercosur on Key facts about the agreement, https://ec.europa.eu/commission/presscorner/detail/en/fs_24_6269 (7/7/2026); EU and Mercosur sign historic and ambitious partnership, https://ec.europa.eu/commission/presscorner/detail/en/ip_26_113 (7/7/2026).

63 *European Commission*, Annex to the Proposal for a COUNCIL DECISION on the conclusion, on behalf of the European Union, of the Partnership Agreement between the European Union and its Member States, of the one part, and the Common Market of the South, the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Oriental Republic of Uruguay, of the other part, COM(2025) 357, Art. 7.7 (3) & (2). EU-Mercosur iTA also references the same provisions of EMPA as essential elements (Art. 23.6(2)).

of 'serious and substantial violations of the essential elements',[64] the clause only contains the obligation to remain a party in good faith and does not mention the obligation to implement the agreement.[65] The qualifier 'in good faith' could be interpreted as showing that even without withdrawal, the party should genuinely engage in respecting the agreement and not only formally being a party.[66] While such an interpretation is not precluded, it is certainly not warranted, leaving a great degree of uncertainty. Unilateral interpretation of a single party, particularly the EU in this case, has no authoritative legal value, as only *all* the parties can adopt mandatory interpretations by consensus or at least by tacitly accepting it.[67] The formulation of this 'essential elements' clause has been broadly criticized for its seemingly narrower and less ambitious scope, appearing to cover only the obligation to remain a party to the Paris Agreement.[68] Accordingly, the actual importance of this clause and its efficiency in preventing MERCOSUR countries from disregarding their climate commitments is highly questionable.[69]

Unlike the EU-Australia and EU-Mercosur agreements, which incorporate 'essential elements' clauses (with various scope and clarity), the EU-India FTA does not raise the Paris Agreement, the UNFCCC, or ILO core labour rights to the level of essential elements of the agreement. Therefore, in the case of a breach of this agreement, there would be no possibility to impose sanctions against India.[70]

64 *European Commission*, Annex to the Proposal for a COUNCIL DECISION on the conclusion, on behalf of the European Union, of the Partnership Agreement between the European Union and its Member States, of the one part, and the Common Market of the South, the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Oriental Republic of Uruguay, of the other part, COM(2025)357, Art. 30.4 (3).

65 Such commitment is contained in Art. 7.7 (1), but it is not covered by the 'essential element' clause.

66 *Eckes/Krajewski*, How Sustainable is the EU-Mercosur Agreement?, available at: https://old.caneurope.org/content/uploads/2025/04/Legal_analysis_sustainability_EU-Mercosur_Agreement.pdf (7/7/2026), pp. 11–12.

67 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, Art. 31 (2) (3); *Villiger*, p. 429, para. 15.

68 *Eckes/Krajewski*, How Sustainable is the EU-Mercosur Agreement?, available at: https://old.caneurope.org/content/uploads/2025/04/Legal_analysis_sustainability_EU-Mercosur_Agreement.pdf (7/7/2026), pp. 2, 9, 11–12; *Rudloff and others*, 'A comprehensive analysis of the updated trade part of the EU-Mercosur Partnership Agreement', Study Requested by the INTA committee, https://www.europarl.europa.eu/RegData/etudes/STUD/2025/754477/EXPO_STU(2025)754477_EN.pdf (7/7/2026), p. 22.

69 *Harrison/Paulini*, The Revised EU-Mercosur Trade Deal: Does it Adequately Address Trade-Environment-Development Interlinkages?, available at: https://www.ejiltalk.org/the-revised-eu-mercosur-trade-deal-does-it-adequately-address-trade-environment-development-interlinkages/ (7/7/2026).

70 See also *van der Ven*, The EU-India FTA: A new model linking trade, climate and industrial policy?, available at: https://borderlex.net/2026/01/30/the-eu-india-fta-a-new-model-linking-trade-climate-and-industrial-policy/ (7/7/2026).

4. The Rebalancing Mechanisms

To ensure a truly sustainable trade policy, the FTAs should not only include enforceable TSD commitments, but they should also support and not undermine other TSD measures.[71] However, the EU-Mercosur FTA came under fire when it included a so-called 'rebalancing mechanism' that could undermine the EU's regulatory autonomy in using these instruments against FTA parties.[72] Moreover, the EP's resolution asking for a European Court of Justice (ECJ) Opinion on the EMPA and iTA also flags the institution's concerns about this mechanism.[73]

The rebalancing mechanism refers to what is known in WTO law as non-violation complaints regulated by Art. XXIII:1 (b) GATT. Thus, besides claiming that a measure violates the agreement, the non-violation claims introduce the possibility to initiate dispute settlement proceedings before a panel against a measure that allegedly 'nullifies or *substantially* impairs any benefit […] under the covered provisions in a manner adversely affecting trade between the parties, whether or not such measure conflicts with the provisions (emphasis added)'.[74] In case the panel report finds nullification or impairment without violation, the defending party is recommended to make a mutually satisfactory adjustment, such as agreeing on a compensation, without having to withdraw the measures.[75] Nevertheless, in case of no agreement between the parties, the complainant could impose temporary remedies, such as the suspension of concessions until the measure has been withdrawn or amended 'so as to eliminate that nullification or substantial impairment'.[76]

71 See *European Commission*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2022) 409 final, p. 3.

72 See, for example, *Eckes/Krajewski*, How Sustainable is the EU-Mercosur Agreement?, available at: https://old.caneurope.org/content/uploads/2025/04/Legal_analysis_sustainability_EU-Mercosur_Agreement.pdf (7/7/2026), p. 2; *Couveinhes Matsumoto/Robert,* Analysis of the "Rebalancing Mechanism" of the EU-MERCOSUR Free Trade Agreement, available at: https://www.veblen-institute.org/IMG/pdf/vf-june_2025_-_analysis_of_the_rebalancing_mechanism_of_the_eu-mercosur_free_trade_agreement.pdf (7/7/2026), p. 6; *Harrison/Paulini*, The Revised EU-Mercosur Trade Deal: Does it Adequately Address Trade-Environment-Development Interlinkages?, available at: https://www.ejiltalk.org/the-revised-eu-mercosur-trade-deal-does-it-adequately-address-trade-environment-development-interlinkages/ (7/7/2026).

73 *European Parliament*, Motion of Resolution, B10-0060/2026, pt. 2. The issue of compliance of the rebalancing mechanism with the invoked articles is out of scope of the present paper.

74 EU-Mercosur iTA, Art. 21.4 (b), OJ L 2026/184 of 27/2/2026, evoking Art. XXIII:1 (b) GATT.

75 EU-Mercosur iTA, Art. 21.14 (10) (c), OJ L 2026/184 of 27/2/2026.

76 EU-Mercosur iTA, Art. 21.20 (10) (b), OJ L 2026/184 of 27/2/2026. Still, the treatment should be 'meaningfully more favourable' than that accorded prior to the entry into force of the agreement (Art. 21.20 (7)).

While non-violation claims are not a novel instrument, having been included in GATT as well as other agreements,[77] it was flagged as being problematic particularly in the case of the EU-Mercosur iTA. The EU-UK TCA also contains a rebalancing mechanism that, however, was included in a very specific context of a Member State leaving the Union, with the aim to safeguard the equivalent high standards of protection that the parties had at the time of the agreement's conclusion.[78] The rebalancing mechanism included in the iTA, however, was a key demand of the Mercosur countries,[79] who asserted that because of EU's unilateral sustainable instruments adopted after the first political agreement reached between the parties, the balance of concessions was modified.[80] Thus, it seems that the rebalancing mechanism was a requirement of Mercosur countries,[81] which claimed victory in the end.

The term 'measure' is worded broadly and, as also implied by the WTO past cases,[82] it covers even measures that could be potentially justified under general or special exceptions, such as health or sustainability measures. Still, since the rebalancing mechanism is modelled on WTO non-violations complaints that were rarely used[83] and only tailored against unforeseeable measures,[84] the Commission claimed that it would only concern measures that could not have been expected

77 See *Couveinhes Matsumoto/Robert,* Analysis of the 'Rebalancing Mechanism' of the EU-MERCOSUR Free Trade Agreement', available at: https://www.veblen-institute.org/IMG/pdf/vf-june_2025_-_analysis_of_the_rebalancing_mechanism_of_the_eu-mercosur_free_trade_agreement.pdf (7/7/2026), p. 8.

78 *Grieger*, Rebalancing Mechanisms in EU Trade Agreements, available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2026/785692/EPRS_BRI(2026)785692_EN.pdf (7/7/2026), p. 3; *Hoffmeister/Siemer*, ZEuS 2024/3, pp. 279–280; *Couveinhes Matsumoto/Robert,* Analysis of the "Rebalancing Mechanism" of the EU-MERCOSUR Free Trade Agreement, available at: https://www.veblen-institute.org/IMG/pdf/vf-june_2025_-_analysis_of_the_rebalancing_mechanism_of_the_eu-mercosur_free_trade_agreement.pdf (7/7/2026), p. 12.

79 *Harrison/ Paulini*, The Revised EU-Mercosur Trade Deal: Does it Adequately Address Trade-Environment-Development Interlinkages?, available at: https://www.ejiltalk.org/the-revised-eu-mercosur-trade-deal-does-it-adequately-address-trade-environment-development-interlinkages/ (7/7/2026).

80 *Grieger*, Rebalancing Mechanisms in EU Trade Agreements, available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2026/785692/EPRS_BRI(2026)785692_EN.pdf (7/7/2026), p. 4.

81 *Boadle,* Brazil says EU deforestation rules hamper Mercosur trade deal negotiation, available at: https://www.reuters.com/world/americas/brazil-says-eu-deforestation-rules-hamper-mercosur-trade-deal-negotiation-2023-11-08/ (7/7/2026).

82 WTO Appellate Body, *European Communities – Measures Affecting Asbestos and Asbestos Containing Products,* Report of 12 March 2001, WT/DS135/AB/R, paras. 188–189.

83 The WTO jurisprudence has expressly established that they 'should be approached with caution and should remain an exceptional remedy' (WTO Appellate Body, *European Communities – Measures Affecting Asbestos and Asbestos Containing Products,* Report of 12 March 2001, WT/DS135/AB/R, para. 186). For more see *Pogoretskyy*, GTCJ 2025/5, pp. 265–266.

84 WTO Panel, *Japan – Measures Affecting Consumer Photographic Film and Paper*, Report of 22 April 1998, WT/DS44/R, paras. 10.76–10.77.

when the agreement was concluded.[85] Indeed, according to the WTO jurisprudence, a measure introduced before the conclusion of the agreement, clearly contemplated in and connected to an earlier measure,[86] or one that addresses a specific public policy concern envisaged in Art. XX GATT (general exceptions)[87] would be considered foreseeable and not subject to non-violation complaints. Accordingly, adopted Regulations such as EUDR or CBAM, or even new sustainability measures in line with EU's climate policy would be considered foreseeable under this interpretation. The EU-Mercosur agreement could be said to even impose stricter conditions, as it refers to a *substantial* impairment, which could theoretically further limit the successful invocation of the mechanism.[88]

The invocation of the WTO jurisprudence to interpret the iTA rebalancing mechanism, however, is problematic for two reasons. First, the definition of 'measure' contains a footnote explicitly clarifying that it covers 'legislation that has not been fully implemented at the conclusions of the negotiations',[89] thereby potentially subjecting to the non-violation claims even the EUDR and CBAM, which were not fully implemented at the time of conclusion.[90] Second, while the agreement enshrines the obligation to take into account relevant WTO jurisprudence, it does so only for obligations that are identical to WTO ones.[91] The iTA rebalancing mechanism, however, is not identical to non-violation complaints, there being differences in the language used. For example, iTA contains the addition that the impairment should be substantial, but at the same time it does not provide that the benefit nullified or impaired could be indirect[92] or that the measure at issue could impede 'the attainment of any objective of the Agreement'. For these reasons, it cannot be precluded that the FTA panel will find measures such as EUDR or CBAM as being covered by

85 The upgraded EU-Mercosur agreement – what is new compared to the 2019 agreement https://circabc.europa.eu/ui/group/09242a36-a438-40fd-a7af-fe32e36cbd0e/library/86fb1930-16ed-4ac6-af25-5e0ad0d0c816/details?download=true (7/7/2026), para. 8.

86 WTO Panel, *Japan – Measures Affecting Consumer Photographic Film and Paper*, Report of 22 April 1998, WT/DS44/R, para. 10.79.

87 WTO Appellate Body, *European Communities – Measures Affecting Asbestos and Asbestos Containing Products,* Report of 12 March 2001, WT/DS135/AB/R, para. 8.291.

88 *Eckes/Krajewski*, How Sustainable is the EU-Mercosur Agreement?, available at: https://old.caneurope.org/content/uploads/2025/04/Legal_analysis_sustainability_EU-Mercosur_Agreement.pdf (7/7/2026), p. 16.

89 EU-Mercosur iTA, fn. 1 to Art. 1.3 (k), OJ L 2026/184 of 27/2/2026.

90 See criticism by *Eckes/Krajewski*, How Sustainable is the EU-Mercosur Agreement?, available at: https://old.caneurope.org/content/uploads/2025/04/Legal_analysis_sustainability_EU-Mercosur_Agreement.pdf (7/7/2026), p.16; *Couveinhes Matsumoto/Robert,* Analysis of the 'Rebalancing Mechanism' of the EU-MERCOSUR Free Trade Agreement, available at: https://www.veblen-institute.org/IMG/pdf/vf-june_2025_-_analysis_of_the_rebalancing_mechanism_of_the_eu-mercosur_free_trade_agreement.pdf (7/7/2026), p. 11; *Grieger*, Rebalancing Mechanisms in EU Trade Agreements, available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2026/785692/EPRS_BRI(2026)785692_EN.pdf (7/7/2026), p. 7.

91 EU-Mercosur iTA, Art. 21.13 (2), OJ L 2026/184 of 27/2/2026.

92 *Eckes/Krajewski*, How Sustainable is the EU-Mercosur Agreement?, available at: https://old.caneurope.org/content/uploads/2025/04/Legal_analysis_sustainability_EU-Mercosur_Agreement.pdf (7/7/2026), p. 16.

the rebalancing mechanism. Even the uncertainty as to whether these instruments could be subject to non-violation claims could have a negative impact on EU's regulatory autonomy. Thus, it could hamper the application of existing instruments and exert a regulatory chill on the EU legislator, which may be concerned about potential future compensation tied to the adoption of new sustainable initiatives.[93] Still, given that without a finding of violation the measure does not have to be withdrawn, that the compensation has to be agreed by the parties, and that in case of no compensation, the complainant still needs to offer the treatment meaningfully more favourable than before the agreement,[94] this risk seems to be quite low.

Seemingly inspired by the EU-Mercosur agreement, the EU-India FTA dispute settlement chapter also includes a rebalancing mechanism.[95] Considering that other EU FTAs,[96] including the agreement with Australia announced most recently, do not contain similar mechanisms, it is logical to conclude that the EU-Mercosur agreement inspired other countries to make similar demands during negotiations. Accordingly, the effects of the Mercosur agreement might be even broader, potentially setting a negative precedent for future negotiations. However, the rebalancing mechanism included in the EU-India FTA is likely to pose considerably fewer concerns with respect to its threat to sustainability, as it is expected to cover only foreseeable measures. The two reasons mentioned above, particularly the extensive interpretation of the term 'measure' and the requirement of identity between obligations to take into account past WTO jurisprudence,[97] are absent in the agreement with India. Furthermore, it contains a special Annex dedicated to the CBAM containing commitments of dialogue, cooperation, and exchange of information to ensure its application.[98] Hence, the rebalancing mechanism included in EU-India FTA does not seem to jeopardize EU's trade policy sustainability.

5. Interim Conclusion

While the EU-Australia FTA might be hailed for its strong substantive commitments, a matching enhanced TSD enforcement mechanism and possibility to impose sanctions in certain cases, it should be assessed together with EU agreements re-

93 *Eckes/Krajewski*, How Sustainable is the EU-Mercosur Agreement?, available at: https://old.caneurope.org/content/uploads/2025/04/Legal_analysis_sustainability_EU-Mercosur_Agreement.pdf (7/7/2026), p. 18; *European Parliament*, Motion of Resolution, B10-0060/2026, pt. H.

94 EU-Mercosur iTA, Arts. 21.14 (10) (c), 21.20 (7), OJ L 2026/184 of 27/2/2026.

95 EU-India FTA, Art. 17.2 (1) (b), https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/india/eu-india-agreements/text-agreements_en (7/7/2026).

96 Except the EU-UK TCA addressed above (text accompanying n 78).

97 EU-India FTA, Arts. 1.3 (p), 17.24 (2), https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/india/eu-india-agreements/text-agreements_en (7/7/2026).

98 EU-India FTA, Annex 14-A, https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/india/eu-india-agreements/text-agreements_en (7/7/2026).

cently concluded with Mercosur and India to be able to conclude whether the EU managed to deliver on its commitment towards sustainable assertiveness in its bilateral agreements. When appraised together, they show that EU's bilateral trade policy is not necessarily sustainable nor assertive, but rather that the EU is flexible and ready to accept its partners' conditionalities if this is what it takes for an agreement to be delivered. Even if EU-Mercosur iTA is also ambitious in terms of its substantive commitments, its enforcement mechanism fails to match them. Furthermore, the EU-India FTA strikes neither with the robustness of its substantive commitments nor with that of its enforcement mechanism. Thus, the agreements with Mercosur countries and India include (to different degrees) weak TSD enforcement mechanisms, vague or no 'essential elements' clauses, and rebalancing mechanisms potentially undermining EU's autonomous measures. Accordingly, there is no uniform approach adopted by the EU in its recent FTAs with major economic partners towards the TSD commitments and the assertiveness of their enforcement. Moreover, the inclusion of rebalancing mechanisms that could only remotely undermine other EU unilateral TSD instruments might set a negative precedent and inspire other partners to seek similar or other concessions.

The inclusion of strong substantive commitments and robust enforcement in EU FTAs or lack thereof might not necessarily have an actual impact on the sustainability measures of the parties. Nevertheless, they send the message both internally and externally, that in light of the changing geopolitical landscape, the EU is ready to relax some of its commitments for the sake of swiftly concluding agreements with partners across the globe.

II. Energy and Raw Materials Trade

The new energy and raw materials disciplines of EU FTA have a clear motivation: As export restrictions on critical raw materials increased more than five-fold, particularly by China, India, Argentina, Russia, Vietnam and Kazakhstan,[99] while global and also EU demand is on rise, the EU is in need of counteracting new trade barriers in order to stabilize its supply security, not least by diversifying its sources of supply and strengthening sustainability capacities. Security of supply is an objective which has already led to a new EU raw materials policy with an increased focus on ensuring and diversifying supplies; the previous approach of (merely) addressing export restrictions was not sufficient.[100] Access to sustainable resources is a strategic security question for the EU's Green Deal,[101] which has increasingly impacted the

99 *Costa/Barbé*, in: Costa and others (eds.), p. 270.

100 See *European Commission,* Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions COM(2023) 165 final. For a brief description of the EU's emerging raw materials policy since 2008 see *Vlaskamp*, in: Costa and others (eds.), pp. 155 ff.

101 *European Commission*, Communication from the Commssion to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2020) 474, p. 1.

EU trade discourse.[102] Additionally, as the WTO rules on export restrictions are increasingly disregarded, not least due to the paralyzed AB, the EU has to search for other, bilateral ways and rules to address this protectionism.

While the EU's FTAs had included limitations on export restrictions quite early, mostly in the form of a general ban against export taxes and duties, which applied to all goods,[103] the EU had later started to introduce more specific provisions on energy and raw material trade, and finally managed to integrate specific energy and raw materials chapters, as announced in the 2015 trade policy communication on Trade for All,[104] although with exceptions (EU Mercosur). Regarding their substance, while the EU succeeded in integrating in many cases tighter disciplines on export restrictions sharing many similarities, one cannot state, however, that the EU succeeded in enshrining a ban against all sorts of export restrictions or distortions. Some trading partners managed to still maintain capacities for export duties. Despite, the EU intensifies cooperation with other countries to gain better and more sustainable access to raw materials, and to promote sustainability in their extraction and processing.[105]

The *EU FTA with New Zealand*, already in force since 2024,[106] contains a quite expansive Chapter 13 on Energy and Raw Materials which has a broad scope of application ratione materiae as it applies to "energy goods", "hydrocarbons", "raw materials" and "renewable energy" (see Art. 13.3). Chapter 13 sets out its objective, its principles in Art. 13.2 (i.e. parties' sovereign right to determine whether areas within its territory, exclusive economic zone and continental shelf, are available for exploring for and producing energy goods and raw materials; and their right to adopt, maintain and enforce measures necessary to secure the supply of these goods and materials). It bans import and export monopolies and export pricing, foresees disciplines for domestic pricing (Arts. 13.4-13.6) and minimum requirements for authorisations for exploration or production of energy goods and raw materials (Art. 13.7), and non-discriminatory access to energy transmission and distribution

102 *Laurens*, IDOS Policy Brief 2025/32, p. 3.
103 For a brief overview see *Crochet/Zhou*, JIEL 2024/1 pp. 155 f.
104 European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM (2015) 497 final. Apparently, the 2016 EU Kazakhstan Enhanced Partnership and Cooperation Agreement, OJ L 29 of 4/2/2016, p. 3, was the first to contain, in its Title III, a Chapter 9 on Raw Materials and Energy, which, however, does not restrict export duties or taxes (see Art. 17) and does not contain significant restrictions on dual pricing (Art. 139).
105 See *Amighini and others,* Global Value Chains: Potential synergies between external trade policy and internal economic initiatives to address the strategic dependencies of the EU, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2023/702582/EXPO_STU(2023)702582_EN.pdf (7/7/2026), p. 82 for these demands for the EU's raw material policy.
106 EU-New Zealand FTA, OJ L 2024/866 of 25/3/2024.

infrastructure (which includes pipelines)[107] for renewable electricity (Art. 13.10). Finally, the Chapter lists many areas for closer cooperation between the parties.

The *EU Interim Trade Agreement with Chile* includes a similarly expansive Chapter 8 on Energy and Raw Materials which as well has a broad scope of application ratione materiae as it applies to "energy goods", "hydrocarbons", "raw materials" and "renewable energy" (see Art. 8.3). The provisions also recognize the sovereign right to determine whether areas within its territory, as well as in the exclusive economic zone, are available for exploration, production and transportation of energy goods and raw materials, and reaffirm the parties' right to regulate within their respective territories in order to achieve legitimate policy objectives. The Chapter contains similarly intense substantive disciplines, but with divergences from the EU NZ FTA in detail: it bans import and export monopolies, dual pricing (with an exception for emerging industries subject to conditions set out in Annex II which establish safeguards for the EU,[108] this exception led Chile to operate a dual price scheme for lithium),[109] and discrimination in the granting of authorisations for exploration and production of energy goods and raw materials, and foresees non-discriminatory access to energy transport infrastructure (not limited to renewables, Arts. 8.9 and 8.10). It provides for the application of the disciplines on technical barriers to trade, in particular its ban against unnecessary technical barriers, under Chapter 9 also to trade in energy goods and raw materials (Art. 8.12). Finally, the Chapter also identifies several areas for closer cooperation between the parties.

The new *EU Mexico* Global Agreement contains a Chapter 5 on Raw Materials (which is less comprehensive than Chile's). The rules again confirm each party's "sovereign right to determine whether areas are available for exploration and production of raw materials in its territory" and the right to impose restrictions (i.e. the right to adopt, maintain and enforce measures necessary to pursue legitimate public policy objectives, such as securing the supply of raw materials, protecting the environment or public health). Import or export monopolies and higher export prices ("by means of any measure") are banned. Finally, the parties agree on cooperation in this area. The Agreement also provides for a confirmation of the right to regulate in the energy sector, which includes "the ownership and management of all hydrocarbons in the subsoil of their respective territory".

107 Under WTO Law, it is subject to debate whether the freedom of transit under Art. V GATT comprises transport of energy through pipelines. See *Cavalcanti and others*, The Regulation of the International Energy Trade: Fuels and Electricity, available at: https://www.fiesp.com.br/indices-pesquisas-e-publicacoes/the-regulation-of-the-international-energy-trade/ (7/7/2026), p. 221.

108 See Art. 8.5 and Annex II, providing inter alia that export restrictions may not adversely affect the capacity of the EU to source raw materials from Chile, and the EU being granted MFN treatment.

109 Chile's preferential pricing scheme offers lithium at a preferential price to companies that produce in Chile in order to promote higher-value processing domestically. See *Dünhaupt/Gräf/Jiménez/Jungmann*, available at: https://www.ipe-berlin.org/fileadmin/institut-ipe/Dokumente/Working_Papers/D%C3%BCnhaupt_et_al_WP_251_Final.pdf (7/7/2026), pp.16 ff.

Also the most recent *EU Mercosur* Partnership Agreement EMPA and the iTA contain some reference to eased EU access to energy and raw materials, but it does not contain a specific Raw Materials Chapter. Within the ITA's Chapter 2 on Trade in Goods, Art. 2.9 of the iTA provides for a ban on export duties, with some exceptions by reference to Annex 2-B on Export Duties. This annex allows – within some restrictions – export duties on raw materials (mainly agricultural products, but also coal and crude oil; Brazil enjoys the broadest exception)[110] which are set out in detail therein. Thus, the iTA does not completely ban export duties, but still allows some of them under strict rules. As Brazil enjoys the broadest exceptions, export duties are permitted for 23 critical raw materials and for 9 strategic raw materials.[111] In this way, Brazil could ensure policy space, whereas the EU has the chance to be treated preferentially if Brazil introduces export duties.[112] The Mercosur iTA also contains a Chapter 18 on TSD, whose Annex (Annex 18-A) provides some rules on sustainable value chains for energy transition and cooperation in sustainable fuels. According to para. 31 of the Annex 18-A to the TSD Chapter, "the Parties will collaborate in designing initiatives that boost sustainable and resilient interregional value chains. Such value chains should favour investment and industrial development in raw material-producing countries, with a view to increasing the value added locally and promoting job creation. Among others, the Parties will prioritize consideration of the joint development of sustainable interregional markets and value chains in strategic sectors". Under para. 33, "the Parties will collaborate regarding the aforementioned sectors including in the following aspects: (a) facilitation and promotion of investments that foster local addition of value in production chains in raw material-producing countries; (b) provision of technical and other support for projects that contribute to the creation of interregional value chains". In para. 47, the Parties agree on the importance of interregional cooperation, inter alia, in "sustainable biofuels, including ethanol and biodiesel, sustainable aviation fuel (SAF) and renewable fuels of non-biological origin", in order to achieve their TSD objectives under Chapter 18.

The most recently completed negotiations to the *EU Indonesia Comprehensive Economic Partnership Agreement (CEPA)* provide in its Chapter 14 on Raw Materials disciplines in great similarity with the above-mentioned agreements, as regards objectives, principles, authorisations, and access to infrastructure. But it contains the least strict rules with regard to export duties: Art. 14.14 provides for a ban on dual pricing with the exception of export duties, taxes or charges permissible under Art. 2.6 in Chapter 2 on National Treatment and Access for Goods. Art. 2.6.1 in principle bans "any duty, tax or other charge of any kind imposed on, or in connection with, the exportation of a good to the other Party; or any internal tax or other

110 For Argentina and Uruguay see Section C, for Brazil see Section D, no. 2 of Annex 2-B.

111 *Rudolff/Stoll/Mensah/Ahmad/Sultan*, A comprehensive analysis of the updated trade part of the EU-Mercosur Partnership Agreement, available at: https://www.europarl.europa.eu/RegData/etudes/STUD/2025/754477/EXPO_STU(2025)754477_EN.pdf (7/7/2026), p. 30.

112 See Section D, no 3. of Annex 2-B.

charge on a good exported to the other Party that is in excess of the tax or charge that would be imposed on like goods when destined for domestic consumption". However, Art. 2.6.2 provides for exceptions, which in particular relate to measures adopted or maintained prior to 13 July 2025; but there are tariff-, tax- and other charges-free quota for goods set out in Annex 2-B (crude or refined palm oil, vegetable oils). Thus, Indonesia still retains its right to restrict exports, which reflects the growing negotiating power of resource rich countries. It is astonishing that Indonesia could save its restrictive export measures in the negotiations with the EU as the EU fell victim of this practice and had previously won a WTO panel case against Indonesia.[113]

III. Level Playing Field

The EU is strategically interested in safeguarding fair competition. Over time, the instruments employed for this purpose have expanded[114] as the instruments used by trading partners to gain competitive advantages have become more sophisticated. The first layer of rules to combat unfair competition were the agreement provisions on competition law,[115] which increasingly include more detailed regulations on domestic subsidies. Another layer was the addition of TSD chapters to new-generation EU FTAs, analysed in detail in Section I., that not only establish high levels of protection for labour and the environment but also avoid undermining the level playing field by lowering standards and resulting competitive advantages. These rules reflect the EU's efforts to reshape the framework conditions for international competition in the context of globalization so that they align more closely with the EU's values, interests, and regulatory standards ("fair trade"). Thus, by employing such rules, the value orientation of EU policies, including trade policies, aligns also with the objective of preventing competitive advantage.[116] Accordingly, sustainability provisions serve a double role. The competition rationale behind these rules is most evident in the EU-UK Trade and Cooperation Agreement (TCA),[117] which has an entire and very comprehensive chapter dedicated to the level playing field. While non-regression clauses were analysed in Section I.1) as substantive TSD commitments, the TCA clearly classifies them also as level playing field norms. Thus, the TCA contains expansive non-regression provisions aimed at preventing

113 Cf. WTP Panel, *Indonesia – Measures Relating to Raw Materials*, Report of 30 November 2022, WT/DS592/R.

114 Thus, the concept of level playing field gained traction in EU FTAs, *Gillis*, JWT 2021/5, pp. 716, 724 ff., 733.

115 The competition law specific disciplines in the EU's FTAs provide for some common standards in addressing competition distortive behavior of domestic undertakings, but lack means for enforcement and thus are seen to be mere fine-sounding declarations of intent, *Fröhlich*, pp. 167 ff., 200.

116 *Gillis*, JWT 2021/5, pp. 733 ff.

117 Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part, 2021 OJ L 149 of 30/4/2021, p. 10.

regulatory competition in various policy areas. The rules in Part 2, Heading One, Title XI, "A Level Playing Field for Open and Fair Competition and Sustainable Development," aim to ensure that the level playing field between Brussels and London remains comparable and that the UK does not set lower standards in social affairs, labour, competition, and environmental protection. The proximity of the UK to the EU explains this chapter's extensive scope. Arts. 387.2 and 391.2 of the TCA establish the regulatory standards in effect on December 31, 2020, particularly in the areas of labour and social affairs, as inalienable, and thus go far beyond typical contents of the TSD Chapters.[118] Such non-regression clauses were first used by the US.[119]

Besides such new rules, also the more traditional area of trade defence has not remained unaffected. The traditional EU recipe for ensuring fair competition in external trade relations are trade defence instruments to protect against dumped or subsidised imports, or to protect against rapidly increasing imports by adopting safeguard measures. Admittedly, the latter (i.e. safeguard measures) do not respond to (nor are conditioned upon) the existence of unfair trade practices, but still are tools to be used to fend of imports in order to protect domestic industry. The search for strategic autonomy reflects not only in trade enforcement, but also in a renewed awareness for economic security, as demonstrated by the rebranding of the DG Trade to “DG Trade and Economic Security”. Bilateral agreements do not remain unaffected. The proliferation of provisions on subsidies and bilateral safeguards in EU FTAs has gained pace, as will be shown in what follows.

1. Bilateral Subsidies’ Disciplines

The EU's FTAs increasingly contain more stringent subsidy disciplines than the WTO's anti-subsidy rules. These disciplines are comprehensive in scope, covering services, and a few also provide for ex-ante scrutiny.[120] By establishing subsidy disciplines in a bilateral FTA that surpass the WTO's ASCM requirements, the EU may be able to address the trade-distorting effects of subsidies granted by FTA partners. However, an analysis of the EU's FTAs shows that this development is not straightforward. While some FTAs, not only older ones, have subsidy disciplines that more or less reflect WTO ASCM standards, almost all of the new generation of

118 TSD Chapters, as shown in Section B.1.1), provide an obligation not to weaken or reduce environment or labour protection afforded in domestic laws by waiving or derogating from them, see Art. 13.7 EU Korea FTA or Arts. 23.4 and 24.4 CETA. Such disciplines do not fix the domestic standards at a certain level; they are not a ban of regression. For an arguably initial step in this direction in the EU Japan EPA, see *Gillis*, JWT 2021/5, p. 730. The same more ambitious approach can be noticed in newer agreements such as EU-New Zealand FTA, Art. 19.2 (4), OJ L 2024/866 of 25 March 2024 and EU-Australia FTA, Art. 18.2 (3), https://policy.trade.ec.europa.eu/eu-trade-relationships-country-and-region/countries-and-regions/australia/eu-australia-agreement/text-agreements_en (7/7/2026).

119 *Mitchell/Munro*, ICLQ 2023/1, p. 35.

120 *Gillis*, JWT 2021/5, p. 721.

FTAs tighten domestic subsidy control disciplines beyond WTO standards, albeit to a diverse degree. Generally speaking, the subsidies commitments in the EU agreements are more explicit and demanding, the closer an agreement is meant to align a third state to the EU internal market and its rules,[121] and the more recent an agreement has been concluded, but this is a very rough generalization. Older agreements before 2006 – with significant exceptions in some of the EU's Stabilisation Agreements and the Agreement on the European Economic Area (EEA Agreement),[122] which emulates in its Art. 61 f (Part IV, Chapter 2 on State Aid) the EU state aid rules with regard to their effects on trade between the Contracting Parties[123] and which transfers the review to the EFTA Surveillance Authority – by and large only contain rather general subsidies disciplines reflecting WTO standards and fail to ensure effective enforcement mechanisms.[124] The trade agreements concluded after the Global Europe communication of 2006 are rather diverse in their subsidies disciplines. Some only refer to the WTO ASCM, while others do not address subsidies at all, apart from a – still significant – heightened transparency requirement, and others enshrine rather detailed subsidies' disciplines beyond WTO standards.[125]

The *EU Ukraine Association Agreement*,[126] one of the deep and comprehensive free trade agreements the EU concluded with certain third countries in its neighborhood, contains some provisions on subsidies that to a very large part reflect the EU's state aid rules in Art. 107 TFEU, see in particular Arts. 262 (3) e) and 264 EU–UA AA. Art. 262 (3) e) imports the EU rules on exceptions as laid down in the EU block exemption regulations and sectoral and horizontal EU state aid rules. Art. 264 provides that in the interpretation of the EU–UA AA's substantive state aid rules, the criteria arising from the application of Arts. 106, 107, and 93 TFEU, including the relevant jurisprudence of the CJEU, as well as relevant EU secondary legislation, frameworks, guidelines, and other administrative acts in force, must be used as sources of interpretation. The state aid review in the Ukraine had to be attributed to a newly established 'operationally independent authority which is entrusted with the powers necessary for the full application of Art. 262' (Art. 267 (1) EU–UA AA). In case of a dispute between the EU and Ukraine over the latter's implementation of its commitments (including those flowing from the state aid chapter), the EU–UA AA provides for dispute settlement by an ad hoc arbitration panel (Art. 306), preceded by consultation. Before the panel can decide, the interpretation of those provisions that emulate EU state aid law must be referred to the CJEU (Art. 322),

121 *Hoffmeister*, in: Heger/Gourdet (eds.), p. 131. See also *Guillard*, pp. 326 ff.
122 Annex to the Decision of the Council and the Commission of 13 December 1993 on the conclusion of the Agreement on the European Economic Area between the European Communities, their Member States and the Republic of Austria, the Republic of Finland, the Republic of Iceland, the Principality of Liechtenstein, the Kingdom of Norway, the Kingdom of Sweden and the Swiss Confederation, OJ L 1 of 3/1/1994, p. 3.
123 Art. 62 ff EEA Agreement, OJ L 1 of 3/1/1994, p. 3.
124 For an analysis of the subsidies provisions in the older agreements see *Neumann*, pp. 28 ff.
125 *Neumann*, pp. 96–98.
126 OJ L 161 of 29/5/2014, p. 3.

whose ruling is binding on the arbitration panel. The proximity of these rules to EU state aid can be explained by Ukraine's candidacy for EU membership.

This applies also to other agreements, like the association agreement with *Moldova* and the Stabilisation and Association Agreements (SAA) with the Western Balkan states such as *Serbia*[127] containing in-depth subsidy disciplines, which also provide for procedures and institutions that establish review of the trading partner's subsidies and deal with the consequences of their violation. They allow for EU unilateral measures despite the competence attributed to the domestic authority, but requires first consultation with the SAA Council or at least the lapse of a waiting period of thirty working days after referring an alleged incompatibility to consultation with the SAA Council.

The most comprehensive disciplines with rather elaborated WTO+ rules on subsidies and their control were enshrined in the *EU UK TCA*, as mentioned above. Their substantive subsidies disciplines reflect EU state aid rules, provide for the control of the granting of subsidies by authorities in the treaty partners (which meant for the UK the duty to establish a competent one), for which the TCA contains explicit requirements. Art. 363 ff TCA provides for specific subsidy rules that also oblige the UK to have national subsidy controls. Subsidy monitoring under Art. 371 TCA has to be transferred to an operationally independent authority. Furthermore, the TCA established monitoring and enforcement rules and mechanisms in Art. 368 ff. It inter alia foresees consultations in case of negative effects on trade or investment between the parties (370 TCA), remedial measures (374 TCA) and independent dispute settlement (375 TCA) in case of non-compliance with those rules. These rules stipulate that a party may first request explanations if a subsidy granted by the other party has a negative effect (Art. 370 (1) TCA). Then follow consultations in the Trade Specialised Committee on Level Playing Field for Open and Fair Competition (Art. 370 (4) TCA), in order to reach a 'mutually satisfactory solution' (Art. 370 (5) TCA). Art. 374 (3) TCA allows the imposition of remedial measures within sixty days if a subsidy actually has or could have a '*significant* negative effect on trade or investment between the Parties'. Thus, the TCA allows unilateral measures in case of breach of the TCA's anti-subsidy rules. The remedial measure is subject to arbitration (Art. 374 (9) TCA), which, however, has no suspensive effect. In addition, there is a general rebalancing mechanism for the whole of Title XI, applicable to all of its chapters, in Art. 411 TCA, whereby a party may implement 'appropriate rebalancing measures' whenever 'significant divergences' in the areas covered by Title XI (i.e. also subsidy control) arise which lead to 'material impacts on trade or investment between the Parties' (Art. 411 (2) TCA). The rebalancing measures can be answered by countermeasures by the other party (Art. 411 (3) lit. c) TCA). This mechanism allows each side to directly sanction a more than insignificant deviation from the TCA subsidy standards. Hence, the TCA establishes very detailed review and counteraction mechanisms with regard to the parties'

127 Art. 73 ff., Stabilisation and Association Agreement with Serbia, OJ L 278 of 18/10/2013, p. 16.

subsidies and their effect on the 'trade and investment between the Parties' which go far beyond WTO standards and make space available for the EU's pursuit of open strategic autonomy in case it perceives the UK to undermine the level playing field with the EU.

Compared to those FTAs, the most recent ones of the new generation contain less stringent disciplines on subsidies, which, however, usually go beyond WTO provisions, but to diverse degrees: The *EU Canada* Comprehensive Economic and Trade Agreement (*CETA*), contains in its Chapter 7 some rules on subsidies, which more or less imitate pertinent WTO rules. It also includes a general consultation commitment (Art. 7.3 CETA) which foresees consultations if one Party considers that a subsidy or support 'may adversely affect its interests'. While these consultations are running, a party may seek additional information on a subsidy, such as its policy objective, amount, and any measures taken to limit the potential distortive effect on trade. Based on the consultations, the responding party shall endeavour to eliminate or minimize any adverse effects of the subsidy on the other party's interests. These rules establish a particular consultation mechanism; the general dispute settlement provisions of Chapter 29 CETA are not applicable (Art. 7.9 CETA).

The subsidies commitments in Chapter 12 of the Economic Partnership Agreement between the *EU and Japan (JEPA)*[128] (as well as in the FTAs with other Asian countries such as Singapore, Vietnam and Korea)[129] however, go significantly further. They expand the scope of the subsidies disciplines to include services trade.[130] They expand the list of prohibited subsides to include unlimited guarantees and subsidies to ailing companies which introduces EU state aid thinking (Art. 12.7 JEPA).[131] There is an additional clause in Art. 12.6 (5) JEPA regarding consultations. Specifically, after the sentence (comparable to what one finds in CETA) '[i]f the requesting Party, after the consultations, still considers that the subsidy has or could have a significant negative effect on its trade or investment interests under this Chapter, the requested Party shall accord sympathetic consideration to the concerns of the requesting Party', the parties added a new clause: 'Any solution shall be considered feasible and acceptable by the requested Party.'

128 Agreement between the European Union and Japan for an Economic Partnership, OJ L 330 of 27/12/2018, p.3.

129 See *Neumann*, p. 105. Singapore and Vietnam FTA expand the scope of the subsidies disciplines to include services, see *Neumann*, p. 107.

130 *Boschiero/Silingardi*, German Law Journal 2023/1, p. 166; *Reinhold/Schellhaas*, in: Bungenberg/Heinrich (eds.), mn 1022.

131 EU Korea FTA, Art. 11.11, OJ L 127 of 15/11/2011, p. 6; EU Singapore FTA, Art. 11.7 (2), OJ L 294 of 14/11/2019, p. 3; EU Vietnam FTA, Art. 10.9 EU, OJ L 186 of 12/5/2020, p. 3.

The EU-Singapore FTA (in Annex 11-A) and Art. 10.4 EU Vietnam FTA – like other Asian-EU FTAs – prescribe requirements for subsidies to be legal which closely reflect EU state aid rules.[132]

Other most recent EU FTAs provide for disciplines on subsidies more stringent than WTO law, in particular by prescribing conditions for granting subsidies, but stay behind reflecting EU state aid standards: The *EU-Mercosur iTA* in Art. 16.1 as well reminds the parties that they may grant subsidies provided they are necessary to achieve a public policy objective, and that they acknowledge that certain subsidies have the potential to distort the proper functioning of markets and undermine the benefits of trade liberalisation. Art. 16.2 then provides for cooperation on multilateral and regional level, in order to seek effective coordination of the parties' positions and proposals regarding subsides within WTO framework, to explore ways to improve transparency regarding subsidies, and exchange information on the functioning of their subsidy control systems.

In the *EU-Indonesia CEPA*, the Mercosur subsidies principles (contained in Chapter 13 on Competition) are complemented by adding the sentence "in principle, subsidies granted to enterprises should not be granted by a Party when they are likely to distort markets" (see Art. 13.7). Art. 13.10 provides for transparency about subsidies granted.

In conclusion, the brief analysis above demonstrates that EU FTAs have diverse subsidy rules. This is very understandable given that the level of development, the purpose of an FTA, the proximity of the FTA partner, and the use of subsidies varies greatly.[133] Despite relatively broadly proliferated important improvements compared to WTO standards regarding transparency, almost all of them, even most recent ones, lack effective enforcement mechanisms (which may be surprising due to the focus of EU CCP on enforcement since 2015).[134] Not all FTAs provide for consultations in case of diverging perceptions. As shown, only few of the agreements prescribe the creation of domestic subsidy scrutiny mechanisms, i.e. the EU-UK TCA, the EEA, and some earlier association agreements. However, many of them go beyond WTO subsidy disciplines because they prescribe conditions for lawful or for prohibited subsidies (WTO+). Beyond this, pursuing strategic autonomy would require a broader and deeper proliferation of EU state aid scrutiny in EU FTAs to substitute for trade remedies that might otherwise be applied. However,

132 See *Reinhold/Schellhaas*, in: Bungenberg/Heinrich (eds.), mn 1029; *Boschiero/Silingardi*, German Law Journal 2023/1, p. 167, even opine that most other recent EU FTAs bring about the same effect of making subsidies dependent on legitimate policy grounds by other means, such as general exception clauses.

133 *Boschiero/Silingardi*, German Law Journal 2023/1, p. 164.

134 See *European Commission,* Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions Commission, COM(2015) 497 final; *European Commission,* Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2021) 66 final, pp. 17–21.

strategic autonomy has not yet resulted in stronger and more effective subsidy disciplines.

2. Bilateral Safeguards

Besides rules on global safeguard measures which more or less verbatim repeat the WTO rules of the Agreement on Safeguards, the EU FTAs also provide for bilateral safeguards. The disciplines on bilateral safeguards have been amended in recent FTAs. EU FTAs traditionally contain rules on trade remedies and in particular safeguard clauses to allow the parties to react if in case of the reduction or elimination of trade barriers or tariffs the economy faces problems due to an instant increase of imports. The need for specific rules in FTAs can be explained by the fact that the level of trade liberalization foreseen in an FTA goes beyond the WTO level which causes a heightened need for safeguard rules: Safeguard measures allow FTA parties to escape from their liberalizing obligations in order to give a partner's industry temporary relief from competition to adjust to changed import levels. Such provisions do exist even though their WTO compatibility in view of the exigencies of Art. XXIV GATT for regional trade agreements is subject to controversy, with some scholar opining that Art. XXIV GATT prohibits trade remedies in the bilateral trade relations of the FTA partners.[135]

The following overview of bilateral safeguard provisions in the most recent EU FTAs show their convergence, but also their differences. The proliferation of bilateral safeguard provisions in EU FTAs had also an impact on autonomous trade legislation as the EU in 2019 adopted a general, horizontal legislative instrument for implementing FTA bilateral safeguard provisions (which became Regulation 2019/287),[136] altering the previous habit of adopting FTA specific safeguard regulations.[137]

Art. 5.15 of the *EU Indonesia CEPA* allows a party, in case, as a result of the reduction or elimination of a customs duty under this Agreement, any good from the other party is being imported in such increased quantities, in absolute terms or relative to domestic production, and under such conditions as to cause[138] or threaten to cause serious injury to a domestic industry,[139] to adopt safeguard measures, but only

135 See *Gobbi Estrella/Horlick* JWT 2006/5, p. 944.
136 Regulation (EU) 2019/287 implementing bilateral safeguard clauses, OJ L 53 of 22/2/2019, p. 1.
137 See *European Commission*, Proposal for a Regulation of the European Parliament and of the Council COM(2018) 206, p. 1.
138 Still no mention is made of a non-attribution requirement in EU FTAs, as was the approach even before the EU new generation FTAs, see *Crawford/McKeagg/Tolstova*, in: Acharya (ed.), p. 260.
139 This FTA and the subsequently explained EU FTAs use the language established with the EU Korea FTA bilateral safeguard provisions. The EU Korea FTA was the first one of the new generation agreements. Previously, the formulations used in the EU FTA's bilateral safeguard clauses were slightly different, see *Crawford/McKeagg/Tolstova*, in: Acharya (ed.), p. 251.

during the transition period. These measures may suspend further reduction of tariffs or increase the tariff again to the applied MFN tariff level or the base rate specified in the Annex, whichever is the lesser. Art. 5.16.5 provides some procedural conditions and limitations for the adoption of safeguards, inter alia with regard to the duration (three years, maximum of five years in total). Art. 5.17 addresses provisional measures. Under Art. 5.18, the party adopting the safeguard shall agree with the other party on trade liberalizing compensation in the form of equivalent concessions, the failure of which gives the other party a right to suspend concessions. If the safeguard measure conforms with the CEPA rules, the latter right can only be employed three years after the start of the lawful safeguard measure.

Also Art. 7.10 of the *EU India FTA* provides the possibility for bilateral safeguard measures under exactly the same requirements, i.e. where a good is imported into the territory of the other party in such increased quantities, in absolute terms or relative to domestic production, and under such conditions that the imports of such product from the other Party cause or threaten to cause a serious injury to domestic producers. The safeguard measure consists in the suspension of the further reduction of the tariffs rate of the product concerned or an increase of the tariff rate to the MFN rate at the time of the measure or the MFN rate at the time of entry into force of the agreement, whichever is the lesser. Arts. 7.11, 7.17 ff foresee procedural requirements and other limitations; for example, safeguards can only have a duration of two years, and can only be extended once for another two years. Art. 7.12 provides for provisional measures. Art. 7.13 addresses compensations for safeguard in the form of suspending equivalent trade concessions.

The *Global Agreement with Mexico* provides for bilateral safeguard rules in Chapter 2 on Trade Remedies. According to this Chapter's Art. 10, a party may take safeguard measures in the form of suspension of concessions under almost identical requirements and limitations as set out in the EU India FTA. The same similarity exists with regard to provisional measures (Art. 11) and compensations (Art. 12). The procedural exigencies are comparable, too, see Art. 16 ff.

The *EU FTA with New Zealand* also contains provisions on bilateral safeguard measures in its Chapter 5 Section D and they are similar to the ones in the agreements with Mexico and India (Art. 5.8). Again, slight differences occur as regards duration of a safeguard measure (see Art. 5.9), and procedural rules (Art. 5.13 ff).

The *EU Mercosur iTA agreement* provides for disciplines on bilateral safeguard in a dedicated Chapter 9 comprising comparatively detailed rules. Chapter 9 distinguishes between vehicles and other goods. Annex 9-A regulates safeguards on vehicles. As regards the other goods, Chapter 9 largely follows the approach described above, but with slight differences e.g. as regards the possibility for extending safeguard measures beyond the initial two years (see Art. 9.9 requiring evidence that the domestic industry is adjusting) or detailed rules on confidentiality (Art. 9.12) and public notices (Art. 9.16 f). The Chapter also foresees a consultation with the other party before a definitive safeguard measure be adopted (Art. 9.19). These rules also apply to agricultural goods (termed sensitive products), for which the EU had promised to the MS to provide for specific safeguard rules based on the ITA provisions on bilateral safeguards.

The differences of the agreement-specific safeguard provisions are set out in the Annex to the Regulation 2019/287 mentioned above. This Annex shows that the agreement specific provisions became longer with time. They provide for different maximum durations of investigations and measures, or for specific rules on the protection of outermost regions of the EU (starting with EU NZ and EU Chile agreements). The Mercosur Agreement will lead to an agreement specific EU regulation which will also comprise special rules for the adoption of safeguards for agricultural goods ("sensitive products" listed in an Annex). Those agriculture-specific rules will fasten procedures and will contain a simplified trigger for adoption of agricultural safeguards by establishing a prima facie evidence assumption: An increase of 5% of volume or decrease of 5% of import price (compared to three years average) are evidence of serious injury or threat thereof.[140] Whether the pursuit of strategic autonomy might raise the instances in which bilateral safeguards provisions, which have hardly been used so far,[141] will be employed more often to adopt bilateral safeguards, remains to be seen. Even though the figure of traditional trade defence measures (antidumping and antisubsidy) is steadily growing,[142] the figure of EU safeguard measures under WTO rules remains very low, with the EU

140 See Art. 6 (3) and (4) of the future Regulation of the EP and the Council implementing bilateral safeguard clauses of the EU Mercosur EMPA and ITA, see Regulation (EU) 2026/687 implementing the bilateral safeguard clauses of the EU-Mercosur Partnership Agreement and the EU-Mercosur Interim Trade Agreement for agricultural products, OJ L 2026/687 of 19/3/2026.

141 *Andersen*, in: Gaines/Olsen/Sorensen (eds.), pp. 472 f. reports only three EU cases from 1995 until 2011, and they were based on WTO safeguard rules, and not bilateral ones. *Vermulst/Graafsma*, GTCJ 2018/9, p.t 374, Annex 1, list 9 global EU safeguard measures.

142 At the end of 2024, 199 EU trade defence measures were in place, up from 182 in 2023, 177 in 2022, 163 in 2021 and 133 in 2018. These cases pertain to anti-dumping or anti-subsidy measures, apart from the one safeguard measure adopted on steel in response to the US additional tariffs on steel and aluminium. The Commission also reported that in 2024, a record number of new investigations was initiated (33), compared to an annual average of 12. The Commission reported in 2022 a nearly 40% increase since 2018, with more than twice as many investigations having been started in 2023 compared to 2022. 41st Annual Report from the Commission to the European Parliament and the Council of 6 September 2023 on the EU's Anti-Dumping, Anti-Subsidy and Safeguard activities and the Use of Trade Defence Instruments by Third Countries targeting the EU in 2022, *European Commission,* Report from the Commission to the European Parliament and the Council, COM(2023) 506 final, p. 2. For the other figures see also the annual Commission reports on trade defence measures, *European Commission*, Report from the Commission to the European Parliament and the Council, COM(2025) 428 final; *European Commission,* Report from the Commission to the European Parliament and the Council, COM(2024) 413 final.

steel safeguards the only global measure adopted for years.[143] One of the reasons for the EU's only sporadic use of global safeguards rests in the fact that all safeguard measures challenged before the WTO dispute settlement haven been found inconsistent with WTO law.[144] That the Appellate Body (AB) is inactive since 2019 has, however, not led to an increase in EU safeguards.

C. Informalisation of Trade and Investment Relations

Traditionally, EU trade and investment relations are regulated by formal international agreements. Within the existing framework of international agreements, of course informal instruments such as declarations, arrangements or memoranda of understanding may be used to clarify details of the bilateral relations, supplement them, or prepare amendments and other formal, legally binding acts relevant for the bilateral trade relations. Outside established treaty relations, soft-law instruments are increasingly employed as alternative, new tools for shaping international relations.

This process of informalisation has already begun in the past and stretched far beyond trade and investment policy.[145] However, it appears to have accelerated with the EU's pursuit of strategic autonomy and competitiveness. The 2025 Competitiveness Compass for the EU indicates the need for new ways to come to deeper partnerships. One can observe this in the area of investment relations with a particular focus on ensuring security of supply in the raw materials sector necessary for the EU's green and digital transition. The EU enters into strategic partnerships in the raw materials sector with a view to accelerate its access to critical minerals. In implementing the 2020 Action Plan on Raw Materials, the EU has been establishing Strategic Partnerships on Sustainable Raw Materials Value Chains with resource-rich countries since 2021. The means to this end are Memoranda of Understanding (MoU) agreed between the EU and the government of a third country at the level of international relations. Its character under international law, in particular their binding effect is far from clear. In some cases, MoU explicitly exclude obligations under international law, as well as the granting of special preferences or exclusivity between the partners. In any event, the mutual commitments in the MoU are

143 The Commission adopted them already in July 2018, as the Trump additional tariffs obviously would lead to more steel (and alloy) imports into the EU. See Commission Implementing Regulation (EU) 2019/159 imposing definitive safeguard measures against imports of certain steel products, of 31 January 2019, OJ L 31 of 1 February 2019, p. 27, providing for tariff free quotas and an additional tariff of 25%. As these safeguards will end in June 2026, new policy measures have to be adopted, see *European Commission* Proposal for a Regulation of the European Parliament and of the Council, COM(2025) 726, currently in trilogue.

144 *Vermulst/Graafsma*, GTCJ 2018/9, p. 355.

145 See *Ronconi/Nicolosi*, European Foreign Affairs Review 2026/1 pp. 127 f.; *Andrade*, in: Santos Vara/Sánchez-Tabernero (eds.), pp. 115 f.

deliberately kept non-binding. They thus constitute an instrument of the EU's 'raw materials diplomacy'.[146]

The advantage of MoUs over binding agreements lies in their flexibility, adapability and speed, which stem from their bypassing of formal procedures,[147] as well as the absence of clear obligations. However, this absence of clear obligations also constitutes a disadvantage. As the commitments are rather vague and non-binding, soft law gives the parties significant discretion in meeting them.[148]

These memoranda on Strategic Partnerships began with Ukraine and Canada; Namibia and Kazakhstan followed in 2022, then Argentina, Chile, Zambia, Congo and finally Greenland in 2023. Serbia joined in 2024. The memoranda aim to integrate raw material value chains between the EU and the partner country and contain – with considerable differences in detail – guidelines for cooperation and development. By balancing mutual interests, the objective is to identify shared benefits, so that the partnership results in an increasing contribution to the EU's supply. This requires the identification of joint projects, increased research and innovation to improve the starting conditions in the partner countries, and adherence to high sustainability standards in the projects as well as throughout the entire raw materials value chain. In this way, the EU aims to establish stable and resilient supply relationships by committing to local value creation in the partner countries by establishing sustainable processing capacities on the ground, combined with technology transfer and the training of local workers. Its attainment requires the involvement of EU investors. The incentive to increase local value creation appears to be a key lever for persuading partner countries to cooperate with the EU in the area of raw material extraction and export, to refrain from imposing trade barriers – at least vis-à-vis the EU – and thus to breathe life into the partnerships.[149] A partnership is implemented through jointly developed roadmaps in which specific cooperation projects are identified. They thus fulfil functions that supplement existing rules of international law, or are agreed with states with which no agreements currently exist.

The MoUs allow a better balance of the parties' diverse interests so that they can be tailored more specifically to the exporting countries' requirements and objectives. The EU-Namibia MoU for example directs the partnership towards sustainability and green hydrogen and puts a special emphasis on Namibia's devel-

146 *Tröster/Papatheophilou/Küblböck*, Strategic Autonomy meets Global Dependency: Instruments and Implications of the EU's Raw Materials Policy with Third Countries, available at: https://doi.org/10.60637/2025-bp36%0A (7/7/2026), p. 8.

147 However, there is an interinstitutional arrangement between Council, Commission and High Representative on procedures for non-binding instruments, Document ST 15367/17, which sometimes is not complied with and which does not provide for any kind of EP involvement whatsoever. See *Ronconi/Nicolosi*, European Foreign Affairs Review 2026/1, p. 135.

148 *Ronconi/Nicolosi*, European Foreign Affairs Review 2026/1, p. 140.

149 See in this regard the findings of the study EU Strategic Partnerships by TE Transport & Environment, https://www.transportenvironment.org/articles/eu-strategic-partnerships-for-a-resilient-and-sustainable-supply-of-raw-materials (7/7/2026), pp. 22 ff.

opment needs and an increase in local value creation. In contrast, the EU–Canada Strategic Partnership on Raw Materials connects Canadas rich resources with the EU's interest in circular economy.

In a similar way of – as the Commission terms it – "alternative forms of engagement",[150] since recently the EU also engages in non-binding Clean Trade and Investment Partnerships,[151] the first of which was entered into with South Africa in March 2025. They complement EU FTAs and are tailored to the EU and the third country's business interests. As the name indicates, the agreement with South Africa evolves around investment and clean energy transition, respective skills and technology, and on developing strategic industries along the entire supply chain.[152] This kind of partnerships are intended to combine specific trade and investment rules and investment, as well as regulatory cooperation into a "single whole-of-government partnership".[153]

The use of MoUs (not only by the EU, but also by the US and China and others) has proliferated as new flexible tools for cooperation in particular with the aim of diversifying and hence securing supply against the backdrop of rising geopolitical risks. MoUs are a more flexible and faster alternative to an elaborated FTA or BIT and hence are preferred as an informal framework for cooperation on critical minerals and clean energy.[154]

Despite – or due to – these advantages, their impact is uncertain: For example, the MoU between EU and DR Congo led to academic programs which may not contribute to securing supply in the medium term. As mentioned, MoU often use vague language in their commitments and lack robust implementation arrangements, nor do they provide transparency insofar.[155] Furthermore, the memoranda contain no commitments whatsoever to refrain from trade barriers or export restrictions for raw materials. The choice of partner countries is questionable. The Congo, for instance, is a fragile state and raises concerns regarding standards in its small-scale mining sector, casting doubt on the sustainability objectives.[156] Also the

150 Statement by Executive Vice President Dombrovskis at the Foreign Affairs Council (Trade) press conference, https://ec.europa.eu/commission/presscorner/detail/en/statement_24_3027 (7/7/2026).

151 For this new tool see *European Commission*, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, COM(2025) 85.

152 *Jütten*, Clean trade and investment partnerships, available at: https://www.europarl.europa.eu/RegData/etudes/BRIE/2025/769576/EPRS_BRI(2025)769576_EN.pdf (7/7/2026), p. 4.

153 *European Commission*, Communication, 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, COM(2025) 30, pp. 13.

154 *Baršauskaitė and others*, International Trade and Investment Agreements and Sustainable Critical Minerals Supply, IISD Report available at: https://www.iisd.org/system/files/2025-04/trade-investment-agreements-critical-minerals.pdf (7/7/2026), p. 55.

155 *Baršauskaitė and others*, International Trade and Investment Agreements and Sustainable Critical Minerals Supply, IISD Report available at: https://www.iisd.org/system/files/2025-04/trade-investment-agreements-critical-minerals.pdf (7/7/2026), p. 55.

156 *Kuhn*, Wirtschaftsdienst 2024/7, pp. 494 ff.

Clean Trade and Investment Partnerships suffer from lack of binding commitments and concrete timelines for their implementation.[157] Finally, the new informality is blamed for lacking scrutiny, in particular by the EP, and transparency.

Thus, it can be concluded that the new turn towards informality engenders systemic challenges for the accountability and legitimacy of EU governance of external relations through soft law instruments.[158] The above examples also demonstrate that the use of soft law for new partnerships goes beyond merely clarifying technical details of a bilateral relationship, as was the traditional function of soft law. Instead, it significantly develops this relationship with a view to new aspects and progressively furthers key policy objectives of the EU, which can be observed particularly in the area of clean trade and critical raw material supply.[159] One possible justification is that the political issues addressed in the MoUs may not lend themselves to formal, legally binding commitments.[160]

D. Towards a new unilateralism in its WTO context?

Another new trend of the EU in its international trade relations may become a renewed, strengthened unilateralism in establishing international relations, which partly overlaps with the above-mentioned informalisation. As a result, the EU may be perceived to be ready for acting contrary to foundational WTO principles, or preparing for their change.

I. The EU US Turnberry Deal: silently breaching WTO rules

One of the most important informal, soft-law arrangements of recently is the EU US trade arrangement concluded by handshake between Commission President von der Leyen and US President Trump on 27 July 2025 in Scotland.[161] The deal was agreed under pressure from the reciprocal sweeping tariffs announced by the US in April 2025 and the risk of spiraling countermeasures. The parties agreed on the broad outlines of a trade deal, which then was published on 21 August 2025 as a Joint Statement.[162] The US has implemented its commitments through executive

157 See the critique by Business Europe, https://www.bilaterals.org/?business-views-on-clean-trade-and&lang=en (7/7/2026).

158 This is still a concern even though the Court confirmed that relying on soft law does not relieve EU institutions of their duty to comply with the principles of institutional balance and conferred powers. See *Ronconi/Nicolosi*, European Foreign Affairs Review 2026/1, p. 137. The CJEU has not yet addressed minimum procedural standards and the role of EP in the adoption of soft law.

159 *Ronconi/Nicolosi*, European Foreign Affairs Review 2026/1, pp. 132, 140 f.

160 *Ronconi/Nicolosi*, European Foreign Affairs Review 2026/1, p. 138.

161 For its soft law character see *Bäumler/Evers*, Transatlantic Law Journal 2026/1, p. 16.

162 European Commission, Joint Statement on a United States-European Union framework on an agreement on reciprocal, fair and balanced trade, https://policy.trade.ec.europa.eu/news/joint-statement-united-states-european-union-framework-agreement-reciprocal-fair-and-balanced-trade-2025-08-21_en (7/7/2026).

orders,[163] while the EU is implementing the deal through two ordinary legislative acts.

1. Introducing the Deal

The Deal provides for an 'all-inclusive' US tariff rate of 15 per cent on EU goods (instead of the 10 per cent general tariff increase imposed by Trump up to that point and the previously threatened further 20 per cent); where existing US tariffs exceed 15 per cent, they remain in force. Exemptions from the general 25 per cent additional tariffs on cars and car parts (added to the existing 2.5 per cent, making 27.5 per cent, which corresponds to approximately 500 million euros per month), such as those granted to the United Kingdom through a duty-free quota, could not be secured. However, the US intends to reduce tariffs on cars to 15 per cent once the EU implements the agreement reached. Furthermore, the general, increased US tariffs of currently 50 percent remain in place for steel and aluminium from the EU. In this respect, only further efforts have been promised. For natural resources not available in the US, including cork, chemical raw materials, generic medicines and their components, and aircraft, US tariffs remain at the previous rates. This list is to be expanded.

In return, the EU committed to completely abolish tariffs on all US industrial goods (two-thirds of imports from the US were already tariff-free), which will result in a loss of revenue of just under €5 billion. Furthermore, the EU must ensure that its companies invest an additional US$600 billion in the US by 2028, purchase US$750 billion worth of energy and US$40 billion worth of AI chips. In addition, the EU committed to purchase weapons in the US and grant preferences to certain US agricultural products through duty-free quotas. The preference for lobsters, which has been in place since 2021 and was due to expire on 31 July 2025, will be continued and extended to lobster products. The EU has also promised to address US concerns regarding the impact of a host of EU legislative acts on US companies, particularly with regard to US digital companies.[164] Numerous details of the July agreement still had to be worked out subsequently between the administrations, as the US and the EU interpreted the understanding reached differently.[165]

163 Presidential Executive Order, Further Modifying The Reciprocal Tariff Rates, https://www.whitehouse.gov/presidential-actions/2025/07/further-modifying-the-reciprocal-tariff-rates/ (7/7/2026); Presidential Executive Order, Modifying The Scope Of Reciprocal Tariffs And Establishing Procedures For Implementing Trade And Security Agreements, https://www.whitehouse.gov/presidential-actions/2025/09/modifying-the-scope-of-reciprocal-tariffs-and-establishing-procedures-for-implementing-trade-and-security-agreements/ (7/7/2026).

164 Joint Statement on a United States-European Union framework on an agreement on reciprocal, fair and balanced trade, https://policy.trade.ec.europa.eu/news/joint-statement-united-states-european-union-framework-agreement-reciprocal-fair-and-balanced-trade-2025-08-21_en (7/7/2026), paras. 10–12, 17, 18.

165 *Glöckle*, ZASA 2025/8, p. 438.

The US has made no concessions or tariff reductions whatsoever in return for these new trade advantages, to the opposite. The deal provides for unilateral, asymmetrical benefits in favour of the US, designed to avert the 20 per cent tariffs on EU imports originally announced by Trump on 2 April 2025 – the so-called 'Liberation Day'. The agreement therefore does not comply with the WTO's principles of mutually beneficial tariff reductions, as it is – contrary to what it says ("reciprocal, fair and balanced trade") – neither reciprocal nor fair.[166]

2. Lacking WTO conformity

In addition to Art. II GATT (as the requirements for the US renegotiating tariff schedules under Art. XXVIII GATT have not been met), the trade deal violates the WTO's most-favoured-nation (MFN) principle enshrined in Art. I:1 GATT, as the EU is not to claim the more favourable terms enjoyed by other WTO members under their agreement with the US, such as the United Kingdom, nor does the EU grant the same tariff treatment to other trade partners. The justification put forward by the EU as a trade agreement under Art. XXIV GATT also fails to hold water: There is no binding agreement under international law to begin with, and the requirements of Art. XXIV GATT are not met. Art. XXIV:5 (b) GATT on FTAs, would be the logical justification. However, Commission representatives themselves clearly recognized that the Turnberry deal does not comply with Art. XXIV conditions.[167] In its report for the Regulations implementing the deal, the EP's International Trade Committee (INTA) also admitted that: '[t]he most-favoured-nation principle has clearly been disregarded in the Joint Statement'.[168] Furthermore, the US Trade Representative Jamieson Greer has even suggested that the so-called Turnberry system is to replace the WTO,[169] thereby indicating no intention to even try to justify the agreement under any WTO provision.

Although the interpretation of Art. XXIV GATT has sparked over the past decades probably one of the biggest debates in international trade law literature,[170] its application to the Turnberry deal seems uncontroversial. For an agreement to qualify as an FTA, according to Art. XXIV:8 (b) GATT, duties and other restrictive

166 For the US Trump administration's plan on fair and reciprocal trade, https://www.whitehouse.gov/fact-sheets/2025/02/fact-sheet-president-donald-j-trump-announces-fair-and-reciprocal-plan-on-trade/ (7/7/2026).

167 *Gijis*, EU concedes trade deal with Trump falls short of WTO rules, available at: https://www.politico.eu/article/eu-concedes-trade-deal-with-us-donald-trump-falls-short-of-wto-rules-sabine-weyand/ (7/7/2025).

168 European Parliament, Report on the proposal for a regulation of the European Parliament and of the Council on the adjustment of customs duties on the import of certain goods originating in the United States of America and opening of tariff quotas for imports of certain goods originating in the United States of America A10-0069/2026.

169 Op-Ed by Ambassador Jamieson Greer: Why We Remade the Global Order, https://ustr.gov/about/policy-offices/press-office/press-releases/2025/august/op-ed-ambassador-jamieson-greer-why-we-remade-global-order (7/7/2026).

170 *Lockhart,*in: Mitchell (ed.) p. 220; *Islam/Alam*, Netherlands International Law Review 2009/1, p. 4.

regulations of commerce should be '*eliminated* on *substantially all the trade*'. While it was not fully established whether it should be a quantitative, qualitative or both threshold,[171] the Turnberry deal would not pass either of them. The deal, which is asymmetrical, removes duties on industrial goods only from the United States, the EU imports being subject to a 15% tariff on the majority of sectors. Therefore, it simply does not eliminate duties on EU imports from any sector. Nor can the Turnberry deal be classified as an interim agreement necessary for the formation of an FTA under Art. XXIV:5 (c) GATT, as it should have included a plan and schedule leading to the formation of an agreement complying with the FTA conditions within a reasonable period of time.[172] No such plan or schedule was included in the announcement.

Moreover, for a measure to be justified under Art. XXIV GATT, according to WTO jurisprudence, the formation of the agreement would be prevented if the measure was not allowed.[173] Subjecting EU products to a 15% tariff was clearly not necessary for the formation of an FTA that requires elimination of duties. Moreover, the tariffs that breach the bound tariffs to which the US committed under Art. II:1 GATT, do not facilitate trade between the parties, but in fact 'roll back on Members' rights and obligations under the WTO covered agreements', a type of measures that cannot be justified under Art. XXIV GATT.[174] In fact, the Turnberry deal resulted in a raise of US tariffs compared to the pre-reciprocal tariff rates. This could be even argued as going against the purpose of FTAs, which is to facilitate trade between the constituent territories enshrined in Art. XXIV:4 GATT informing the rest of the articles.[175] Moreover, albeit without establishing a separate obligation, but only the relevant context for paragraph 5,[176] Art. XXIV:4 GATT refers to FTAs as 'voluntary agreements'. The voluntary participation of the EU in the Turnberry deal could be questioned, considering the threat of economic coercion that the EU

171 *Cottier/Foltea*, in: Bartels/Ortino (eds.), p. 48; Although WTO Appellate Body, *Turkey – Restrictions on Imports of Textile and Clothing Products,* Report of 22 October 1999, WT/DS34/AB/R, para. 49, stated that 'the term 'substantially' in the context of subparagraph 8(a) appears to provide for both qualitative and quantitative components'.

172 Obligation elaborated in the Understanding on the Interpretation of Art. XXIV of the General Agreement on Tariffs and Trade 1994. For more see *Bartels*, World Trade Review 2009/2, p. 339.

173 WTO Appellate Body, *Turkey – Restrictions on Imports of Textile and Clothing Products,* Report of 22 October 1999, WT/DS34/AB/R, para. 46.

174 WTO Appellate Body, *Peru – Additional Duty on Imports of Certain Agricultural Products,* Report of 20 July 2015, WT/DS457/AB/R, paras. 5.115–5.116.

175 WTO Appellate Body, *Turkey – Restrictions on Imports of Textile and Clothing Products,* Report of 22 October 1999, WT/DS34/AB/R, para. 57.

176 WTO Appellate Body, *Turkey – Restrictions on Imports of Textile and Clothing Products,* Report of 22 October 1999, WT/DS34/AB/R, para. 57.

has been subjected to due to the so-called 'reciprocal tariffs'.[177] Some authors have even considered whether Art. 52 of the Vienna Convention on the Law of Treaties (VCLT),[178] establishing that a treaty concluded as a result of threat or use of force is void, could be interpreted as covering also economic coercion.[179] However, the Turnberry deal is only a non-binding instrument that does not qualify as a treaty, to be covered by the norms of the VCLT.[180] Furthermore, the EU had its special instrument designed to allow it to react more assertively in case of economic coercion – the Anticoercion Instrument (ACI),[181] but it decided not to use it in this instance to avoid further escalation in a geopolitical frail context. The implementation of the Turnberry Deal is, therefore, blatantly contrary to WTO rules, and the security justification claimed by the US under Art. XXI GATT does not hold either.[182] The deal has not been subjected to dispute settlement by any other WTO Member. Its legality could be discussed during EU's next WTO Trade Policy Review or in the Committee on Regional Trade Agreements (CRTA), albeit the parties have not notified the deal to be considered by the Committee,[183] but this would have little repercussions for the deal. Regardless of whether the deal is challenged by others or not, its mere existence poses a threat to the multilateral trade order.

However, given the global situation, the EU has had no sensible alternative but to bow to Trump's dictates. At stake were not only an escalation leading to a further deterioration in the EU's trading conditions,[184] but also the US's role in NATO and in the war in Ukraine, as well as the – already limited – influence of European states on Trump's peace efforts there.[185] This rationale, however, cannot justify the Turnberry Deal under Art. XXI GATT for the EU as there is neither an emergency in relations with the US (apart from a continuous deterioration) nor a link of the

177 Reciprocal tariffs suspended for a period of 90 days during which countries, including the EU had the chance to give in the pressure and reach bilateral deals, as it happened with Turnberry (Presidential Executive Order, Modifying Reciprocal Tariff Rates to Reflect Trading Partner Retaliation and Alignment, https://www.whitehouse.gov/presidential-actions/2025/04/modifying-reciprocal-tariff-rates-to-reflect-trading-partner-retaliation-and-alignment/ (7/7/2026).

178 Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 8 I.L.M. 679.

179 *Schmalenbach*, in: Dörr/Schmalenbach (eds.), pp. 942–944; *Tzanakopoulos*, Cambridge Journal of International and Comparative Law 2015/3, pp. 621–622.

180 *Schmalenbach*, in: Dörr/Schmalenbach (eds.), pp. 42–43.

181 Regulation (EU) 2023/2675 on the protection of the Union and its Member States from economic coercion by third countries, OJ L 2023/2675 of 7 December 2023.

182 *Herrmann/Weigand*, ZASA 2025/5, pp. 247 f.

183 WTO, *Transparency Mechanism for Regional Trade Agreements*, Decision of 14 December 2006, WT/L/671, 18 December 2006.

184 For the Turnberry Deal's background of increased US tariff announcements, see *Reinhold*, Avoiding the Turnberry Trap, available at: https://verfassungsblog.de/avoiding-the-turnberry-trap/ (7/7/2026).

185 See EU and US publish Joint Statement on transatlantic trade and investment, https://ec.europa.eu/commission/presscorner/detail/en/ip_25_1973 (7/7/2026).

asymmetrical tariff reduction to the EU's security interests.[186] Strategic autonomy, let alone European sovereignty, is nowhere to be found here. Furthermore, given the vague nature of certain general pledges of good conduct, the EU cannot rely on Trump to abide by the agreement. His latest threats of tariffs in response to the Commission's €2.95 billion antitrust fine against Google[187] demonstrate that he will have no difficulty in exploiting the EU's alleged non-compliance for further threats and measures when the opportunity arises.

Besides these commitments on tariffs and commerce between EU and US, the Joint Statement also engenders some aspects of cooperation, as expressed in the following quotes:

> The parties want to cooperate on ensuring secure, reliable, and diversified energy supplies, including by addressing non-tariff barriers that might restrict bilateral energy trade (para. 5).
> With respect to steel, aluminium, and their derivative products, the EU and the US intend to consider the possibility to cooperate on ring-fencing their respective domestic markets from overcapacity, while ensuring secure supply chains between each other, including through tariff-rate quota solutions (para. 3).
> Cooperation on standards plays a crucial role in enhancing the transatlantic marketplace (para.8).
> Both agree to commit to strengthen cooperation and action related to the imposition of export restrictions on critical mineral and other similar resources by third countries (para. 14), and agree to strengthen economic security alignment to enhance supply chain resilience and innovation by taking complementary actions to address non-market policies of third parties as well as cooperating on inbound and outbound investment reviews and export controls, as well as duty evasion. This includes addressing non-market practices, unfair competition, and lack of reciprocity in public procurement with respect to third countries. The

186 The European Parliament has alluded to this justification in its 6th Amendment proposed in its first reading of the Commission's proposal for a regulation implementing the Turnberry Deal, *European Commission*, Proposal for a Regulation of the European Parliament and of the Council, (COM)2025, 471 final, see https://www.europarl.europa.eu/doceo/document/TA-10-2026-0096_EN.html (7/7/2026). The EP proposed adding the following recital: "In view of Russia's war of aggression against Ukraine, as well as other conflicts in the Union's neighbourhood that undermine the security of the Union and its citizens, it is imperative for the Union to maintain and further strengthen its partnership with a key ally at a time when such relations are of critical importance. In that exceptional context, the Union is required to adopt extraordinary and temporary measures, duly justified under Art. XXI of the GATT (Security Exceptions). However, such unilateral measures should not set a precedent and should remain strictly exceptional, proportionate and time-limited, reflecting their specific nature as actions justified on security grounds." This amendment has not found entry in the finally adopted regulation.

187 *Parry*, The EU fined Google and Trump threatened to retaliate. Now what?, available at: https://www.politico.eu/article/eu-google-donald-trump-us-president-social-media-tech/ (7/7/2026).

United States and the European Union will cooperate on further implementation measures (para. 19).

From this language one may infer that the Turnberry Deal also represents a "joint industrial and economic security compact" that considers certain coordination of industrial strategies and shielding of certain sectors, "repurpose[ing] trade for economic security, industrial coordination and geopolitical alignment".[188] However, one should recall that the language used in the above quotes is vaguer than that used with regard to tariff commitments. Furthermore, the Trump administration is not inclined towards strategic cooperation and building alliances with the EU. Therefore, such allegations/ascriptions reflect too positive an assessment of the Turnberry Deal. In contrast, the above objectives of cooperation reflect a shared interest in addressing certain barriers to trade, but they cannot be taken as a promise of joint EU-US endeavours in this direction. They merely indicate areas in which the parties might continue discussions with a view to developing shared views and opportunities for cooperation.

3. Interim Conclusion

Irrespective of how one may assess the Deal's cooperative aspects, the Deal signals the EU's willingness to depart from founding principles of the WTO such as MFN and the restrictions for bilateral trade deals which were introduced in Art. XXIV GATT in order to avoid bilateral deals harmful to the other WTO members. The Deal expresses the parties' readiness to, at least, supplement multilateralism by bilateral arrangements and transactional approaches and to amend traditional trade rules by arrangements for greater economic resilience and security, potentially discriminating against other WTO members. Instead of treating resilience or security purposes as exceptions, they form the building bloc for new rules. The EU is thus signaling that it is prepared to enter into trade agreements which, whilst not entirely supplanting the trust in fair competition and the principle of a level playing field that underpin WTO rules, at least supplement them with instruments of active state interventionism in the pursuit of non-economic objectives,[189] in order to compensate for weaknesses in the EU's competitiveness through measures with specific trading partners that are geared towards aspects of economic security, such as the safeguarding and diversification of supply chains, protecting domestic industries perceived as security relevant. One might clearly learn that geopolitics has become more important also for negotiating EU trade agreements than WTO principles of multilateralism and economic insights in the benefit of undistorted trade.

188 *Bäumler/Evers*, Transatlantic Law Journal 2026/1, p. 17. They opine that the deal even "centers on the coordination of industrial strategies and […] collaborative supply chains". This assessment greatly exaggerates the significance of those parts of the deal and the effect of the deal's coordinative and collaborative language.

189 See also *Bäumler/Evers*, Transatlantic Law Journal 2026/1, p. 17.

II. WTO MFN Reform

One aspect of a new unilateralism is the EU's suggestion within the WTO on a reformed MFN principle, which may be seen to be related to its conclusion of the Turnberry Deal with the US. The MFN principle is a cornerstone of international economic law and a fundamental rule and obligation towards all other WTO members guiding international trade relations. Due to MFN treatment, international trade can harvest the benefit of international labour division and of the most effective allocation of production factors. The trade treatment accorded to one member is accorded to all on a non-discriminatory basis, immediately and unconditionally. The US critique of this principle states that the MFN principle was *"unsuitable for this era"*[190] as there no longer is an equilibrium of commitments between members. A one-size-fits-all policy that requires treating all WTO members equally no longer is seen to be adequate for ensuring a fair, market-oriented competition. Instead the U.S. pursues policy space for different, discriminatory treatment to address trade imbalances, overcapacity, and counteract policies not directly related to trade.

Similarly, in an article published by Financial Times, Trade Commissioner Maroš Šefčovič suggested that MFN might not be fit for the purpose anymore, as it might have become 'a straitjacket that cements the status quo and enables free riding'.[191] Thus, in January 2026, the EU presented a proposal for WTO reform, calling for fairer trade relations, as WTO rules may no longer reflect significant changes in the global trade landscape since its inception in 1995. The balance of concessions agreed upon in 1995 "was not meant to be static, but to evolve", but this has hardly happened, leaving the balance of 1995 intact and out of touch with contemporary trade realities.[192] From this results a growing mismatch between the rules and today's trade realities, especially since WTO rules cannot address the increasing interference of states in their domestic economies. The EU perceives an increasing imbalance in the rights and obligations of members. Ultimately, the EU calls for fairness and has identified a "need for an overall rebalancing" due to a discrepancy between some members' share of global trade and their openness to imports from other members. MFN, a fundamental trade principle, is seen to be no longer functional when understood in the traditional way because it cannot ensure a level playing field. Tariffs remain fixed at levels agreed upon under different circumstances. MFN only allows identical treatment for all WTO members. It does not enable the policy space required to readjust the balance of rights and obligations perceived necessary to re-establish reciprocity among members and create more balanced levels of openness.

190 US submission on WTO reform, WT/GC/W/984, 15 December 2025. For a comment see *Lester*, The U.S. Argument for Limiting MFN, available at: https://ielp.worldtradelaw.net/2025/12/the-u-s-argument-for-limiting-mfn/ (7/7/2026).

191 *Šefčovič*, The WTO needs an overhaul. We must question whether the 'most favoured nation' principle remains fit for purpose, available at: https://www.ft.com/content/2ff1d4ce-4d63-4776-8e8c-ace6b3509f24 (7/7/2026).

192 EU Submission on the WTO reform, WT/GC/W/986, 21 January 2026, sub 2.

The EU's idea might bring back to life the old idea of conditional MFN, ie. low tariffs are agreed and granted to members that grant equal access to their markets, suggesting a shift away from blanket, unconditional MFN application for all for free. In other words: The traditional commitment to MFN should be tied much more closely to reciprocity, as confirmed by the US approach[193] (which, however, must be criticized for its objective of allowing blanket discrimination among members).[194] Under multilateral GATT rules, MFN was granted unconditionally. Among the earliest cases to express this was the Belgian Family Allowances case where the GATT panel decided that making granting more favourable treatment among trading partners depending on conditions relating to regulatory standards violated Art. I GATT 1947.[195] Hence, WTO law is based on regulatory diversity among members, and the differences basically must not be addressed by discriminatory treatment.[196] Attaching certain conditions to granting trade preferences such as MFN tariffs in the end would reflect the same approach as the one underlying the EU's level playing field policy of the EU's most recent FTAs (see above). The LPF policy requires the EU's trade partners to implement certain regulatory standards and minimum requirements in order to gain market access or other FTA preferences. The same logic would now be applied to the WTO level.

The EU's suggestions are perceived to make room for the "more variable geometry"[197] approaches indicated in the above-mentioned Commission's submission to the WTO. In WTO terms this would mean more plurilateral agreements that do not depend on unanimity within the WTO as they cannot be blocked by a single member. In the end this could mean more "club approaches among like-minded countries, where benefits are only available to participants, on a reciprocal basis". Formally a rules-based order would be maintained, but on substance, the negotiation power of the big blocs could prevail again in negotiations, as the big blocs would choose with whom to cooperate. It leads to much more flexible bilateral or plurilateral trade negotiations, which to name "multilateralism" might not express reality, as there is no comprehensive cooperation under equal or at least similar terms/conditions with all WTO members. "The world has indeed changed."[198]

In addition, when analysed together with the Turnberry Deal, the EU's MFN reform proposal seems even more problematic for the multilateral rules based order.

193 See US submission to the WTO General Council, Further Perspectives on the WTO Reform, WT/GC/W/998, 23 March 2026.

194 *Bacchus*, The Most-Favored-Nation Principle Still Matters, available at: https://www.cato.org/commentary/most-favored-nation-principle-still-matters# (7/7/2026).

195 GATT Panel, *Belgian Family Allowances*, Report adopted by the Contracting Parties, 7 November 1952, G/32 – 1S/59.

196 See *Tokas,* JIEL 2024/3, p. 560.

197 *Spisak*, WTO Reform after Youndé: What next fort he multilateral trade order?, available at: https://www.cer.eu/insights/wto-reform-after-yaound%C3%A9-what-next-multilateral-trade-order (7/7/2026).

198 *Spisak*, WTO Reform after Youndé: What next fort he multilateral trade order?, available at: https://www.cer.eu/insights/wto-reform-after-yaound%C3%A9-what-next-multilateral-trade-order (7/7/2026).

The same two states signing the Turnberry deal are the ones proposing the reform of the MFN. Even if EU's intention to launch a discussion on MFN reform might be genuinely made in good faith,[199] it might deal a serious blow to the WTO. Thus, the EU seems to support now the US narrative criticizing the principle and, at the same time, the organization as a whole. Furthermore, EU's MFN reform proposal has been cited multiple times by a further US Communication on WTO Reform that denounces the principle and claims that throughout history it has been constantly breached and weakened through multiple exceptions.[200] However, lately, the US has been *the* Member violating the principle in the most flagrant way by imposing reciprocal tariffs and agreeing to bilateral deals similar to the Turnberry one. Therefore, undermining the MFN rule might be particularly convenient for a country that has been violating it.[201] The question arises whether the US claim that countries have been constantly disregarding Art. XXIV GATT conditions[202] allows the Turnberry deal parties to engage in the same criticized practice. Simply blaming others for ignoring a rule, does not warrant others to engage in the same illicit conduct. According to International Law Commission (ILC), by subsequent practice parties can interpret an agreement but not modify it.[203] Even if supposedly the interpretation of the 'substantially all' standard from Art. XXIV GATT could be interpreted more broadly, it could not be eliminated. Moreover, for an authentic interpretation to be ascertained based on subsequent practice, such practice must be consistent and at least accepted by *all* the parties.[204] Even if disregard of Art. XXIV GATT requirements might be widespread as the US alleges, there is no general acceptance of such infringements.[205] Thus, these documents clearly show that there is no subsequent practice under general international law that would interpret or indirectly modify Art. XXIV requirements to allow departures from it.

199 Borlini calls EU proposal 'constructivist' (*Borlini*, Three Powers, Three Visions, One Fragile System, available at: https://iep.unibocconi.eu/publications/commentaries/three-powers-three-visions-one-fragile-system (7/7/2026)).

200 Communication from the United States, Further Perspectives on WTO Reform, WT/GC/W/998, 23 March 2026, paras. 34–51.

201 *Wolff*, Prying open Pandora's box by scrapping MFN, available at: https://www.piie.com/blogs/realtime-economics/2026/prying-open-pandoras-box-scrapping-mfn (7/7/2026).

202 Communication from the United States, *Further Perspectives on WTO Reform*, WT/GC/W/998, 23 March 2026, para. 42.

203 *ILC*, Draft conclusions on subsequent agreements and subsequent practice in relation to the interpretation of treaties, Yearbook of the International Law Commission, 2018, Vol. II, Part Two, Conclusion 7 (3).

204 *Dörr*, in: Dörr/Schmalenbach (eds.), p. 599.

205 Questions regarding the FTA compliance with Art. XXIV GATT appear during country Trade Policy Reviews (Trade Policy Review, European Union, Addendum, WT/TPR/M/395/Add.1, 8 May 2020, pp. 449–450; Trade Policy Review, United States, Addendum, WT/TPR/M/434/Add.1, 14 March 2023, p. 57). Art. XXIV conformity is also analysed in documents developed for and as a result of discussions during CRTA (for example, *EU – Chile Implementation Report*, Joint Submission by the Parties on the Trade Pillar of the EU-Chile Association Agreement, WT/REG164/R/I, 6 November 2014, p. 6; Brazil explicitly questioned the deal between US and UK in CRTA, Note on the Meeting of 17 June 2025, WT/REG/M/113, 3 July 2025, para. 9.2).

Moreover, challenging the general usefulness of this principle that is perceived as the bedrock of WTO, could easily mean challenging the existence of the WTO itself. As Petros Mavroidis wrote: 'It is hard to imagine a WTO without MFN.'[206] Thus, EU's MFN reform proposal is likely to be perceived as a repudiation of multilateralism itself and of its commitment to openness to the multilateral rules-based order.

Finally, one might ask how such new approach in understanding MFN combines with the EU's traditional tactic of enshrining MFN in its bilateral trade/investment agreements. Establishing MFN in bilateral agreements has the capacity of ensuring that future bilateral FTAs of the EU's partner country with third countries will not undermine the preferences granted to the EU. MFN clauses are intended protect the EU "against relative losses vis-à-vis strategic competitors that may conclude a (better) FTA with an EU trading partner in the future".[207] This objective may no longer be attainable in the context of a new "bespoke" MFN principle. The two approaches conflict as an MFN principle that only applies to countries having made comparable concessions cannot by default, without further ado, be extended to apply to other trade relations.

III. Unilateralism in steel trade

In response to US steel and aluminium imports "additional tariffs" since 2018,[208] the EU as well adopted a unilateral safeguard measure under Regulation 2015/478[209] in order to counteract the risk for trade diversion/deflection and resulting import surge. Due to an increase in protectionist measures adopted by third countries global excess production was directed towards the EU's open internal market. As the EU became the main destination for steel resulting from the global excess production, negative effects for domestic steel production had to be avoided. The Commission adopted the safeguards already in July 2018, as the Trump additional tariffs obviously could lead to more steel (and alloy) imports into the EU.[210] The EU safeguards provided for tariff free quotas and an additional tariff of 25%, and they

206 *Mavroidis*, It's the End of the World (TO) as We Know it, available at: https://ielp.worldtradelaw.net/2026/04/its-the-end-of-the-world-to-as-we-know-it/ (7/7/2026).

207 *Weinhardt/Mau/Hillebrand Pohl*, in: Babic et al. (eds.), p. 119. They show, however, that EU practice does not implement them so that in effect they currently remain useless. See *Weinhardt/Mau/Hillebrand Pohl*, in: Babic et al. (eds.), pp. 122, 128.

208 The US duties to imported steel are based on Section 232 of the US Trade Expansion Act of 1962.

209 Regulation (EU) 2015/478 on common rules for imports, OJ L 83 of 27 March 2015, p. 16.

210 See Commission Implementing Regulation (EU) 2019/159 imposing definitive safeguard measures against imports of certain steel products, OJ L 31 of 1 January 2019, p. 37. Commission Implementing Regulation (EU) 2024/1782 of amending Implementing Regulation (EU) 2019/159, including the prolongation of the safeguard measure on imports of certain steel products, OJ L 2024/1782 of 24 June 2024.

were subject to severe doubts about their WTO compliance.[211] The EU justified the safeguards by referring to three unforeseen developments (i.e. increasing global steel overcapacity, increased use of trade restrictive and trade defence measures on steel, and the US tariffs) which had led to an increase in imports that threatened the EU industry with serious injury.

As these safeguards end in June 2026 and can no longer be extended, new policy measures have had to be adopted by the EU. The Commission therefore proposed in October 2025 a permanent response by reducing the tariff-free import volumes by 47 percent to circa 18.3 million tonnes a year (this volume is based on import volumes in 2013) and doubling the level of out-of-quota *ad valorem* duty to 50%.[212] The free-of-duty tariff quotas for each of the steel product categories are listed in Annex I, and the pertinent specific volumes for each category is set out in Annex II. The EU justifies the new regulation by stating that "[w]ith the new regulation the EU steel industry will be better protected to deal with the challenges posed by structural global overcapacity."[213]

A unilateral change of EU steel tariff concessions is a clear violation of Art. II:1 GATT (the EU's rate for steel is 0%) unless the EU finds a justification. In order to be WTO compliant in the adoption of the new rules, the EU pursues a re-negotiation of (steel) tariffs as provided in Art. XXVIII GATT.[214] Art. XXVIII:4 GATT allows the renegotiation of tariff concessions of a WTO member such as the EU. It is however subject to doubt whether the extension of safeguards beyond the eight years limit provided in the WTO Agreement on Safeguards (see its Ar. 7.3) can be justified by a renegotiation under Art. XXVIII GATT. For, Art. 7.5 of the WTO

211 See WTO Panel, *European Union – Safeguard Measures on Certain Steel Products,* Report of 29 April 2022, WTO/DS595/R. Panel held that the European Commission had not established that the increase in imports had taken place "as a result of" the unforeseen developments. Accordingly, the Panel found that the definitive safeguard measure was inconsistent with Art. XIX:1(a) GATT in this regard. The Panel agreed that the European Commission had not identified in its published reports the obligations whose effect resulted in the increase in imports, and accordingly found that the definitive safeguard measure was inconsistent with Art. XIX:1(a) in this regard. The Panel found that the European Commission's finding of a threat of serious injury was not "based on facts" as required by Art. 4.1(b) of the Agreement on Safeguards. In response, the EU amended the Regulation by adopting Commission Implementing Regulation (EU) 2023/104 which adds the reasoning included in the Annex of the Regulation to Regulation 2019/159 and which supplements the findings made in the original investigation.

212 See *European Commission,* Proposal for a Regulation of the European Parliament and of the Council COM(2025) 726. In order to avoid circumvention, the regulation will engender an innovation regarding rules of origin. According to Art. 3, at the moment of importation the country has to be identified in which the steel used in the production of the product was melted and poured, meaning the original location in which raw steel and iron is initially produced in liquid form and subsequently cast into its first solid state.

213 Steel overcapacity: agreement on measures to protect EU steel market, https://www.europarl.europa.eu/news/en/press-room/20260413IPR40607/new-measures-to-protect-eu-steel-market-from-global-overcapacity (7/7/2026).

214 See for the Commissions explanation of the proposal, https://ec.europa.eu/commission/presscorner/detail/en/ip_25_2293 (7/7/2026).

Agreement on Safeguards clearly provides that a new safeguard cannot be imposed on the same product for a period equal to the duration of the previous safeguard.

Irrespective of this, the procedures provided in Art. XXVIII GATT must be respected and requires negotiations before the new tariffs are adopted by the WTO member. Art. XXVIII:1 GATT foresees that members can change their concessions on the first day of each three-year period, the first period beginning on 1 January 1958 (which means that the next three-year period now starts 1 January 2027), provided that the changing member negotiated and came to an agreement with the members having a negotiation right (i.e. those with which the binding was originally negotiated and those that are considered to have a "principal supplying interest"); additionally, the member must also consult other members having "a substantial interest" in the concession. Likewise, in Art. XXVIII:4 GATT, which contains the possibility to change concessions at any time (irrespective of the three-year periods under Art. XXVIII:1 GATT), the member must enter into negotiations. In contrast to this procedural stipulation, in its announcement of the proposal, the Commission communicated that it will "swiftly engage with affected EU trading partners under the Art. XXVIII GATT procedure regarding this change to the EU's WTO tariffs, with a view to offering them country specific allocations", once the Commission receives a mandate from the Council.[215] Recital 14 of the regulation states that the EU will open negotiations under Art. XXVIII GATT "in parallel to the ordinary legislative procedure" that the proposal is subject to.[216] This clarifies that the negotiations had not taken place when the proposal was tabled, and that the new legislation will come into force irrespective of whether the EU enters into negotiations or reaches an agreement. In a press release of 13th April 2026, the Commission reports that in parallel to the legislative procedure on the proposed regulation, "the Commission is negotiating with trading partners under the General Agreement on Tariffs and Trade (GATT) Art. XXVIII proceedings".[217]

Further procedural requirements under Art. XXVIII:1 and :4 require a notification of intention to enter into negotiations six to three months before the start of the three-year period, or an authorization by the WTO General Council.

Admittedly, Art. XXVIII:3 GATT provides that if the negotiations fail, the member can still change its concessions. The other members then are entitled to raise their own concessions affecting a similar amount of trade.

In terms of substance, Art. XXVIII:2 requires the members to endeavour to maintain a general level of reciprocal and mutually advantageous concessions not less favourable to trade than that prior to such negotiations. Thus, the other mem-

215 Commission proposes plan to protect EU steel industry from unfair impacts of global overcapacity, https://ec.europa.eu/commission/presscorner/detail/en/ip_25_2293 (7/7/2026). For the Commission proposal for a negotiating mandate from the Council see *European Commission*, Recommendation for a Council Decision, COM(2025) 727 final.

216 See *European Commission,* Proposal for a Regulation of the European Parliament and of the Council, COM(2025) 726 final.

217 Commission welcomes political agreement on new EU steel measure, https://ec.europa.eu/commission/presscorner/detail/en/ip_26_803 (7/7/2026).

bers are able to demand reduced tariffs for other goods to compensate for trade loss caused by the new EU regulation. The EU would be required to offer lower tariffs on other goods to balance the increase in steel tariffs.[218]

Another requirement for tariff rate quotas (resulting from negotiations under Art. XXVIII GATT) was established by the AB: the TRQ must be administered in a non-discriminatory manner due to Art. XIII GATT.[219]

Already the fulfilment of the above-mentioned procedural stipulations until 1 July 2026, the envisaged date of entry into force of the regulation is subject to doubt. There appears to be no WTO General Council authorization under Art. XXVIII:4 GATT, as the negotiations are still running, and the start of the three-year period in early 2027 will not be awaited by the EU. Thus, the proposal will likely enter into force before the procedures of Art. XXVIII can be completed.[220]

As regards substance, the EU regulation will not meet the non-discrimination requirement for TRQ of Art. XIII GATT because there is no clarity about the exact allocation of the quota to the WTO members (under Art. 4 of the regulation, this is entrusted to a future implementing act). The criteria for quota allocation indicated in Art. 4 (whether the country at hand has a free trade agreement with the EU, concluded an agreement with the EU when negotiating under Art. XXVIII GATT, is part of an agreement or understanding to address overcapacity as well as the EU's need for diversification of supply) do not reflect the requirements of Art. XXVIII.[221]

Irrespective of WTO compliance, one must also doubt whether the EU acts in conformity with its FTAs if also FTA trade partners become subject to the new permanent steel trade restrictions. The COM announced that "in view of the close and unique integration into the EU's internal market under the EEA Agreement, exports from Norway, Iceland, and Liechtenstein will not be subject to tariff quotas or duties",[222] which means that the others will be.

What about other trade partners covered by FTAs? There are usually no specific rules on steel trade, meaning the low or zero tariffs adopted under FTA tariff liberalisation apply to it. Consequently, the new tariffs on imports of steel above the TRQ will contradict the trade rules of the FTAs, and Art. XXVIII GATT does not

218 The EU confirmed this to be a mandatory obligation, see WTO Panel, *European Union – Measures Affecting Tariff Concessions on Certain Poultry Meat Products,* Report of 28 March 2017, WT/DS492/R, paras. 7.242–7.243.

219 WTO Appellate Body, *European Communities – Measures Affecting the Importation of Certain Poultry Products,* Report of 13 July 1998, WT/DS69/AB/R, para. 102.

220 See also *Crochet/Zhou*, Guest Post: Too Big To Fail: The EU Steel Industry, Art. XXVIII of the GATT 1994 and the EU's Free Trade Agreements, available at: https://ielp.worldtradelaw.net/2025/10/guest-post-too-big-to-fail-the-eu-steel-industry-article-xxviii-of-the-gatt-1994-and-the-eus-free-trade-agreements/ (7/7/2026).

221 See also *Crochet/Zhou*, Guest Post: Too Big To Fail: The EU Steel Industry, Article XXVIII of the GATT 1994 and the EU's Free Trade Agreements, available at: https://ielp.worldtradelaw.net/2025/10/guest-post-too-big-to-fail-the-eu-steel-industry-article-xxviii-of-the-gatt-1994-and-the-eus-free-trade-agreements/ (7/7/2026).

222 See Art. 1bis regulation and https://ec.europa.eu/commission/presscorner/detail/en/ip_25_2293 (7/7/2026).

justify a departure from these obligations. While the EU plans to invoke bilateral safeguard clauses to raise tariffs above the level agreed under the FTA (See Art. 4bis regulation), these clauses contain certain restrictions and may not justify permanent safeguard measures. Often, they limit the level of bilateral safeguard measures to the Most Favoured Nation (MFN) duty in place before the FTA came into force, and in the case of steel this was usually 0%. In addition, the other FTA partner may be entitled to adopt balancing measures. In the EU UK TCA, for example, the safeguard clause in Art. 773 TCA would allow the UK to adopt equivalent rebalancing measures. As the steel exports from the UK to the EU as significant, the regulation in the end may significantly undermine the TCA.[223]

In conclusion, the new steel regulation and its associated tariffs and TRQs raise significant concerns regarding both WTO law and EU FTA provisions. This new unilateralism adds to other instances where the EU has been criticized for adopting legislation that disregards its FTA commitments, as was the case with its Carbon Border Adjustment Mechanism and the Deforestation Regulation.

E. Conclusion

The above analyses could demonstrate that the shift towards strategic autonomy also in trade and investment policy did not only have repercussions towards the adoption of more autonomous, unilateral legislative instruments as announced by the 2021 communication on an open, sustainable and assertive trade policy, but also impacted on external trade and investments relations. Insofar, the implications are ambivalent as one might have expected a more robust pursuit of the EU's interests and values. What we could find, instead, was greater flexibility and adaptation on the side of the EU to the conditionalities of its trade partners, even though the new geoeconomic context that has again considerably evolved since 2021 with ever more arbitrary use or threat of tariffs and trade defence instruments from the US side, changed not only the EU approach but also perceptions in the EU's trading partners, to the effect that formerly hesitant negotiations such as with India or Mercosur picked up speed. But in order to come to terms with negotiations, the EU itself had to prepare for more flexibility and reluctance in projecting its ideas and values on its trading partners. This could be demonstrated the most clearly with regard to TSD chapters, where only few met the earlier promises of more demanding substance and more effective enforcement. Other FTA chapters showed considerable variance, too. Under the perspective of strategic autonomy, one would have expected a broader and deeper proliferation of EU state aid scrutiny in EU FTAs to substitute for trade remedies that might otherwise be applied. However, strategic autonomy has not yet resulted in deeper and more effective subsidy disciplines. Hence, the context and the political motivations of the EU's trade partners

223 See https://www.hsfkramer.com/notes/crt/2025-10/the-new-eu-proposal-for-regulating-iron-and-steel-import (7/7/2026).

shaped the negotiation outcomes in the same way as the EU's genuine objectives and assessment on the need for greater market openness.

Another development in the implementation of strategic autonomy is the increased use of informal instruments. Besides raising EU constitutional level challenges to the accountability and legitimacy of EU governance of external relations, this shift towards informality demonstrates that soft law is not merely used to clarify technical details. Rather, it significantly develops external relations with new aspects and progressively furthers key EU policy objectives, such as clean trade and critical raw material supply. While the political issues in these areas may not lend themselves to formal agreements, the use of informality raises the question of whether strategic autonomy can be achieved in this manner.

Finally, the pursuit of strategic autonomy in international trade relations seems to bolster the EU's readiness to engage in trade arrangements and present proposals that conflict with core WTO principles and regulations, such as tariffs and most-favored nation obligations. This is evident in the Turnberry Deal, the EU's MFN proposal at the WTO, and the new steel tariffs.

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