# Towards a ‘security-centred’ energy transition: balancing the European Union’s ambitions and geopolitical realities

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# Towards a 'security-centred' energy transition: balancing the European Union's ambitions and geopolitical realities

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## ABSTRACT

The European Union (EU) faces a pressing, multi-level energy crisis propelled by the perfect storm of Russia's war in Ukraine and rapidly progressing climate change. As a result, the EU is scrambling to ensure it has sufficient energy supplies for the foreseeable future while reinventing its energy strategy in the long term. Since the EU is at a critical juncture for squaring EU energy security with European and international legal commitments, this article surveys this radical shift and its consequences. It analyses new EU-wide crisis-response tools and ad hoc bilateral arrangements with third countries against existing legal commitments. Recent developments are only the beginning of a much larger re-evaluation of core notions of the 'trade-energy security' nexus. To decarbonize, the EU must move towards a 'security-centred' energy transition, premised on 'security first, compliance second'. This requires reassessing the notion of 'protectionism' in geopolitically sensitive areas and the current division of energy competences between the EU and its Member States.

## INTRODUCTION

The European Union (EU) is confronted by a pressing, multi-level energy crisis propelled by the perfect storm of Russia's war in Ukraine and rapidly progressing climate change.[1] As a result, the EU is scrambling to ensure it has sufficient energy supplies for the foreseeable future, while the trading block is simultaneously reinventing its energy strategy in the long term. Although this crisis poses significant challenges, it has also forced the EU to find unprecedented and creative solutions, some of which will be highlighted in this article (eg the creation of an EU Gas Purchasing Platform, the EU ban on Russian seaborne crude oil, and capping the price of oil and petroleum products to third countries, together with G7+ partners, as well as entering into new energy partnerships).[2] EU energy regulation and policy have become a moving target since

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[1] See generally, AA Marhold, 'Responses of International Legal Academia to the Russian Invasion of Ukraine' (2023) 36 Leiden Journal of International Law 487–494.

[2] European Commission, Press Release, 'G7 Agrees Oil Price Cap: Reducing Russia's Revenues, while Keeping Global Energy Markets Stable', 3 December 2022 and 'Ukraine: EU and G7 Partners Agree Price Cap on Russian Petroleum Products', 4 February

February 2022. EU governments, policymakers, and the public are presented with new challenges almost every week in connection with weaning themselves off Russian fossil fuels.[3] In all likelihood, there will be unprecedented developments within European energy law and policy in the coming months and years.[4] At present, we may not see the wood for the trees. But the EU has 'pressed reset' on its energy policy, and the contingency plans we are putting in place now will likely lay the foundations for European energy security regulation for decades.

Since we are at a critical juncture to square EU energy security with European and international legal commitments, this contribution attempts to capture some elements of this radical shift and its consequences in a dynamic manner. After briefly reflecting on the EU's internal energy market and energy security ambitions from the 1990s until the Russian invasion, the paper will analyse several recent steps the EU has taken through newly developed Union-wide crisis-response tools and ad hoc bilateral arrangements with third countries against existing legal commitments. These were taken with three goals in mind: to (i) secure its energy supply; (ii) navigate away from one dominant supplier, Russia; and (iii) decarbonize the EU as soon as is realistically possible.[5] This contribution only discusses a selection of crisis response tools, ie the main tools that have impacted the external trade dimension of EU energy security. Several of these regulatory initiatives may run contrary to most of the footings of the EU internal (energy) market and WTO rules, whose inherent values were accepted for decades. What is more, the geopolitical realities have had paradoxical consequences for the EU. On the one hand, the invasion has forced EU's energy security policy to reinvent itself in ground-breaking ways. Simultaneously, there is competition with third countries, such as the USA and Japan with regard to the green technology shift and the limits imposed within the EU by State Aid rules. On the other, continuing fossil fuel dependency and shared competences on energy between the EU and its Member States, constrain the extent to which the Union can take a strong stance against the bloc's dependency on Russian fossil fuels.

This contribution concludes that current developments are likely only the beginning of a much larger re-evaluation of some of the core notions of the 'trade-energy security' nexus. It argues that the EU must move towards a 'security-centred' energy transition, implying that European energy policy should be designed with 'security first, compliance second' in mind while decarbonizing energy supply. This is against the background of the EU competing in a rapidly changing global market, as green industrial policy goes beyond mere considerations of energy security and decarbonization but incorporates a strong competition component. The EU should not shy away from revisiting challenging themes, such as reassessing the notion of 'protectionism' when it concerns cross-border trade in geopolitically sensitive areas in an age of geo-economic fragmentation and reconsidering the implications of the current division of competences between the Union and its Member States in its energy policy.[6]

2023 (all accessed 5 October 2023); note that while oil and petroleum products were banned by the EU, natural gas, and LNG were not, in what has been called the 'glaring exception' in European Union's sanctions', see Ben McWilliams and others, 'The EU can Manage without Russian Liquified Natural Gas', Bruegel Policy Brief Issue ń16/23 |1 June 2023. However, natural gas imports to Europe have fallen by 80 per cent compared to prior to the invasion.

[3] Starting with a steady decrease in Russian gas supplies to Europe following the invasion, the EU crisis response in relaxing EU state aid rules, the perils surrounding the Zaporizhzhia nuclear power plant and sabotage of the ever-controversial Nord Stream I and II gas pipelines.

[4] Coinciding with (unilateral) policies as part of the EU Green Deal, as well as the EU Open Strategic Autonomy; see also generally Tobias Gehrke, 'EU Open Strategic Autonomy and the Trappings of Geoeconomics' (2022) 27 European Foreign Affairs Review 61–78.

[5] Note that the notion of 'energy security' as discussed in this contribution uses the term as interpreted by the International Energy Agency. This notion includes short-term aspects, such as the ability of the energy system to react promptly to sudden changes in the supply-demand balance, and long-term considerations, ie timely investments to supply energy in line with economic developments and environmental needs, see IEA, 'Energy Security – Reliable, Affordable Access to All Fuels and Energy Sources' <https://www.iea.org/topics/energy-security> (accessed 5 October 2023).

[6] Consider how this would fit into the current policy of 'Open Strategic Autonomy', see Gerhke (n 4); on geo-economic fragmentation, see IMF, *Geoeconomic Fragmentation and the Future of Multilateralism* (IMF, Washington, 2023).

## PRIOR TO THE RUSSIAN INVASION: CORNERSTONES OF THE EU INTERNAL ENERGY MARKET AND TENSIONS WITH WTO LAW

For the past three decades, the goal of the European internal energy market has been the gradual liberalization of energy exploration, transmission, and supply of the electricity and gas sectors.[7] The underlying idea was that opening the energy sectors was a logical, though more challenging, extension of implementing the European single market for goods and services, ultimately benefiting the market and EU consumers. Additionally, the Union was convinced that for energy security purposes, it was pertinent to have fully interconnected markets for electricity and gas.[8]

### *EU internal energy market law: three decades of liberalization working towards decarbonization*

The breaking-up of the traditionally highly nationalized energy markets of the EU Member States could only take place progressively, first by barring the restriction on cross-border energy flows between Member States, followed by increasingly progressive legislative packages to 'unbundle' electricity and gas networks.[9] In essence, these legislative packages forced the break-up, legal and ownership separation, of various aspects of the value chain of energy trade: exploration, transmission, and sale. In practice, this implied that the Union's major energy companies had to separate these activities and ensure that these separate elements were not part of the same undertaking. The third energy package was the most advanced of these legislative packages, which introduced the 'full ownership unbundling' (FOU) of the market.[10] While the implementation of FOU was not without its challenges, delays and exceptions, the EU and its Member States were largely convinced that the liberalization of the gas and electricity sectors was serving the greater good of a competitive and open energy market, one that would also free up the supply side, allowing both different players and types of (cleaner) energy to enter the system.[11] As of the third energy package onward, subsequent energy packages started to increasingly focus on preparing the European energy system for decarbonization, as part of continuously balancing the trilemma of competition, decarbonization, and security of the European internal energy market. Notwithstanding these ambitions for the EU internal energy market, pursuant to Article 194 of the Treaty on the Functioning of the European Union (TFEU), energy has always remained a shared competence between the EU and its member states.[12] This implies that both the Union and its member states are able to legislate and adopt legally binding acts. Member states can exercise their own competences where the EU does not exercise them (or has chosen not to exercise them). According to the principle of subsidiarity set out in Article 5 TFEU, the EU, in the area of non-exclusive competences, may act only if the objective of a proposed action cannot be sufficiently achieved by the member states, but could be better achieved at the EU level.[13] For energy specifically, the practical implications are, for instance, that all the measures that can be taken in the context of the establishment and functioning of the internal market, 'shall not affect a Member State's right to determine the conditions for exploiting its

[7] See for a discussion AA Marhold, *Energy in International Trade Law* (CUP 2021) 188–195.

[8] Several gas disputes between Russia and Ukraine in the mid-2000s highlighted this need: Slovakia and Hungary without gas for weeks during the winter, AA Marhold, 'The Russo-Ukrainian Gas Disputes, the Energy Charter Treaty and the Kremlin Proposal – Is There Light at the End of the Gas Pipe?' (2011) 3 *Oil, Gas & Energy Law Journal* (OGEL) Special issue on Cross-Border Pipelines, 14.

[9] Directives 2003/54/EC for electricity and 2003/55/EC for gas, OJ 2003 L 176.

[10] The 2019 Clean Energy Package is geared towards greening the energy system and making it ready for demand-response measures.

[11] Challenges include various degrees of implementation; missed implementation deadlines and a lack of infrastructure investments.

[12] Article 194 Treaty on the Functioning of the European Union (TFEU).

[13] Article 5 TFEU (n 12).

energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192(2)(c).'[14]

Also, from the 1990s onward, European countries in parallel started to realize the seemingly promising benefits of increasingly integrating former socialist and Soviet countries into the European energy system. This was one of the underlying rationales of the Energy Charter Treaty (ECT), whose mission was to incorporate these countries into the global energy market by providing foreign investors with investment protection while preparing these economies for WTO accession.[15] It would be a mistake, however, to assume that energy trade between Europe and (former) Soviet countries only started taking place after the fall of communism in 1989. In fact, Soviet natural gas was flowing into (what was then) West Germany from 1973 onwards.[16] In fact, the USSR–Europe energy trade flow was one of the main global energy trade arteries, and the Energy Charter Treaty was also designed to secure the flow (the famous access to markets in exchange for access to resources of the 1991 European Energy Charter conference).[17]

In the following decades, a progressive interdependence developed, as (several) Western European countries were convinced that projects such as the Nord Stream I (and later the far more controversial Nord Stream II) would be a win–win for EU economies and Russia. While various EU Member States had diverging approaches to cooperation with Russia in the area of energy, the German notion of 'Wandel-durch-handel' (freely translated as 'Change through Trade') perhaps best illustrates the period up until the Russian invasion.[18] From 2000–2014, the EU imported around 45 per cent of its natural gas from Russia, which dropped to 8 per cent by May 2023.[19] Although there had been several gas transit disputes between Ukraine and Russia throughout the 2000s that left Eastern EU Member States (ie Hungary and Slovakia) in the cold, the Western EU Member States in particular were convinced that their energy cooperation with Russia was an optimal solution to the EUs energy security of supply.[20] The first cracks in this self-inflicted dependency realistically started to appear after the 2014 Russian annexation of Crimea. This did not stop several EU countries (chiefly Germany, but also the Netherlands and the UK via then Royal Dutch Shell) from pursuing the Nord Stream II pipeline, and most EU countries did not cease to import Russian oil and natural gas.[21]

Wary of another major challenge, climate change, the EU as of the mid-1990s onwards has also been progressively making efforts to decarbonize the European economy. The Commission

[14] Article 194.2 and Article 192(2)(c) (environment) TFEU (n 12).

[15] The Energy Charter Treaty (18 April 1998) 2080 UNTS 100; The future of the Energy Charter Treaty, is, during the writing of this article, unclear, not in the least due to the criticism that the treaty is outdated in terms of living up to the commitments under the Paris Agreement, see eg J Tropper and K Wagner, 'The European Proposal for the Modernisation of the Energy Charter Treaty – A Model for Climate-Friendly Investment Treaties?' 23 Journal of World Investment and Trade 813, 814; Also see A Daszko, 'The Energy Charter Treaty at a Critical Juncture: Of Knowns, Unknowns and Lasting Significance' (2023) (in this issue) 4.

[16] Amongst others driven by German Chancellor Willy Brandt's *Ostpolitik* and the 1970s energy crisis; Extensions of the Yamal, Druzhba and Soyuz gas pipelines to Eastern Europe made this possible, see DW Arthur Sullivan, 'Russian Gas in Germany: A 50-year relationship' (3 September 2022) <https://www.dw.com/en/russian-gas-in-germany-a-complicated-50-year-relationship/a-61057166> (accessed 8 October 2023) and Karin Bennhold, 'The Former Chancellor Who Became Putin's Man in Germany', *NY Times* (23 April 2022) < https://www.nytimes.com/2022/04/23/world/europe/schroder-germany-russia-gas-ukraine-war-energy.html> (accessed 8 October 2023); See in this light also the discussion on the 'primacy and availability and security' dominating energy governance in JE Viñuales, *The International Law of Energy* (Cambridge University Press, 2022) 23–25.

[17] See 1991 European Energy Charter, Title 1—Objectives. In the decades before that, it was access to resources in exchange for access to foreign currency by the USSR (Eurodollars).

[18] Originally developed as part of the *Ostpolitik*, as mentioned earlier (n 16).

[19] See Politico, EU balks at adding Russian gas pipeline ban to sanctions package (16 May 2023) <https://www.politico.eu/article/eu-balks-add-russia-natural-gas-pipeline-ban-sanctions-package-g7/> (accessed 8 October and International Energy Agency, 'How Europe can cut natural gas imports from Russia significantly in a year' (3 March 2022) https://www.iea.org/news/how-europe-can-cut-natural-gas-imports-from-russia-significantly-within-a-year (accessed 8 October 2023).

[20] From the start, Eastern EU member states such as Poland and the Baltics have been much more sceptical towards creating an energy depedency on Russia, see e.g. FS Larrabee, 'Russia, Ukraine and Central Europe: The Return of Geopolitics' (2010) 63(2) Journal of International Affairs, 22, 43–48.

[21] See Ost-Ausschuss, 'Klare Mehrheit für Fertigstellung von Nord Stream 2' (20 May 2021) https://www.ost-ausschuss.de/de/PM%20Umfrage%20Forsa%20NS2 (accessed 8 October 2023).

has introduced binding targets for Member States for the share of renewables in their energy mix as of 2009 through the Renewable Energy Directive.[22] Targets were provided for EU Member States separately, assessing what was realistically attainable for each Member State. In 2017, following the Third Energy Package, the 'Clean Energy Package' was introduced, geared toward energy efficiency and attempting to integrate 'demand-response' to the European electricity grid.[23] As of 2019, the EU started to position itself as a global frontrunner in the area of sustainable development and the green energy transition by introducing the EU Green Deal in 2021, a political strategy aimed at a net-zero carbon economy by 2050.[24] As part of this, in November 2023, a revised Renewable Energy Directive was adopted, which no longer sets targets for the Member States separately, but for the Union as a whole.[25] It sets the overall binding EU target for renewable energy at 42.5 per cent by 2030. To this end, it is imperative to, in the long run, not only balance but try to solve the trilemma of energy security, decarbonization, and decentralization to ensure a steady energy supply that is as 'clean' as possible. This also emphasizes how energy security inevitably contains a 'sustainability' dimension. For energy supply to be secure, energy systems must also be sustainable in the long run, not depending on finite and polluting resources. Before the Russian invasion of Ukraine, the EU was well on its way to presenting the most ambitious climate plans of any global, regional trading block. The Carbon Border Adjustment Mechanism (CBAM), whereby EU-based importers of energy-intensive commodities such as steel, cement and aluminium, must pay an additional border tax, calculated on the embedded emissions of the good in question, is an integral part of the EU Green Deal.[26] The Green Industrial Plan, unveiled in February 2023, would provide the necessary incentives to further the EU's climate ambitions, while ensuring that the EU works towards a green industrial policy that can compete globally (given the US Inflation Reduction Act and Chinese subsidies).[27]

### *EU internal energy market ambitions and tensions with WTO obligations*

It would be an oversimplification to assume that the EU—Russia energy trade was without issues prior to the invasion. Much to the contrary, after the first Nord Stream I gas pipeline became operational in 2011, Russia started exploring opportunities to lay a second pipeline, the Nord Stream II.[28] From the start, Russia started objecting to EU energy regulations mandating it to comply with EU gas regulations, in particular ownership unbundling in connection with the follow up Nord Stream II.[29] It challenged these regulations, including Article 11 of the Gas Directive (certification) EU Third Energy Package (also known as the so called 'Gazprom

[22] Directive 2009/28/EC of the European Parliament and the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ I, 140, 5June 2009, 16–62.

[23] It is more geared towards accommodating 'prosumers', ie those that simultaneously consume and produce energy (eg by solar panels).

[24] See the discussion in L Hancher, 'EU Energy Governance – Moving Targets and Flexible Ambitions between Opacity and Opportunism?' (2022) 41 Yearbook of European Law 162, 177-178.

[25] Directive (EU) 2023/2413 of the European Parliament and of the Council of 18 October 2023 amending Directive (EU) 2018/2001, Regulation (EU) 2018/1999 and Directive 98/70/EC as regards the promotion of energy from renewable sources, and repealing Council Directive (EU) 2015/652.

[26] Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 establishing a carbon border adjustment mechanism (Text with EEA relevance); CBAM is hotly debated in connection with issues around WTO compatibility, amongst other issues (such as widening the gap between developed and developing countries).

[27] European Commission, 'A Green Industrial Plan for the Net-Zero Age' Brussels 1.2.2023 COM(2023) 62 final; United States Inflation Reduction Act of 2022 (IRA).

[28] See V Chornyi and AA Marhold, 'Chapter IX – The Contested Legal and Political Landscape of Nord Stream 2 – In Uncharted Waters' in MM Roggenkamp and C Banet (eds), *European Energy Law Report—Vol XIV* (Intersentia, Antwerp, Cambridge 2021) 171, 172; The Nord Stream II pipeline was sabotaged in September 2022 beyond repair.

[29] See generally Chornyi and Marhold (n 28).

clause'), both at the political level, and in a legal case brought to the Court of Justice of the European Union (CJEU).[30] The various aspects of essentially the same core issue, Russian objections to unbundling, were litigated in three arenas: at the CJEU, in investment arbitration under the ECT and, as discussed below, before the WTO.[31] In essence, Russia was reluctant to break up vertically integrated operations of the state-owned energy company Gazprom, and in this way forfeit control over the company's operations in the EU.

Russia filed a WTO dispute against the EU in 2015.[32] It claimed that several aspects of Third Energy Package legislation contradicted WTO rules. A panel report was issued in 2018.[33] While the EU Third Energy Package was found not to be in breach of several core aspects, Russia won on crucial points pertinent to EU energy security. First and foremost, third-country certification pursuant to Article 11 of the Gas Directive was considered contrary to Article II:1 and XVII of the GATS.[34] Under this Article, non-EU energy infrastructure owners were required to be certified by the National Regulatory Authorities of the respective Members States and the Commission as not posing a risk to EU energy security.[35] The panel deemed the requirements of the 'Gazprom-clause' on non-EU Transmission System Operators (TSOs) for gas discriminatory. Second, the EU had taken measures to limit the quantity of Russian gas (the OPAL-capacity cap), to ensure that one supplier did not dominate a major interconnector gas pipeline. The panel decided that the EU's capacity cap on the OPAL pipeline, connecting the now sabotaged Nord Stream pipeline with the gas network in Central Europe, constituted a quantitative restriction, in breach of Article XI:1 of the GATT.[36] Last but not least, the panel found that Projects of Common Interest, ie EU Commission measures to promote certain energy (gas) infrastructure projects (those with Norway) to the detriment of others (those with Russia), were inconsistent with Article III:4 (National Treatment) and I:1 (Most-Favoured Nation) of the GATT.[37]

In the latter case, the EU attempted—unsuccessfully—to invoke the Article XX(j) GATT ('essential to the acquisition or distribution of products in general or local short supply') exception to justify its measures supporting certain gas infrastructure projects over others, arguing that natural gas was at risk of becoming in local short supply.[38] Citing the Appellate Body report in *India—Solar Cells*, the panel did not go along with this defence. It motivated its decision by arguing that natural gas was not enough to be *'at risk'* of becoming a good in local short supply.[39] Rather, the good must be in *actual* short supply when instituting the measure. Following the publication of the Panel Report in 2018, both parties decided to appeal the case (into the void).[40]

What we can extrapolate from the case is that WTO rules do not allow a Member to (i) treat non-EU energy infrastructure entities less favourably than EU entities; (ii) restrict gas imports from particular members to decrease its dependency on them; or (iii) favour certain energy

[30] CJEU, Order of the General Court (Eighth Chamber) in Case T-526/19, *Nord Stream 2 AG v European Parliament and Council of the European Parliament*, paras 116 and 124.

[31] ibid; *Nord Stream 2 AG v European Union*, Notice of Arbitration in accordance with art 3 of the Arbitration Rules of the United Nations Commission on International Trade Law 1976 (the UNCITRAL Rules) and art 26(4)(b) of the Energy Charter Treaty (Notice of Arbitration), paras 40, 47, and 49.

[32] *European Union and Its Member States—Certain Measures Relating to the Energy Sector (EU—Energy Package)*, report of the panel, WT/DS476/R, 10 August 2018.

[33] Panel Report under appeal on 21 September 2018 (appealed 'into the void').

[34] *'Certification will not put at risk the security of supply of the Member State and the Community'*, art 11 Directive 2009/73/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for the internal market in natural gas and repealing Directive 2003/55/EC [2009] OJ L211/94 (hereinafter the Gas Directive); Regulation (EC) No 715/2009 of the European Parliament and of the Council of 13 July 2009 on conditions for access to the natural gas transmission networks and repealing Regulation (EC) No 1775/2005 [2009] OJ L211/36 (EU Gas Directive); See *EU—Energy Package* (n 32) para 7.1254.

[35] ibid.

[36] *EU—Energy Package* (n 32) paras 7.976–7.977. The OPAL interconnector is connected to the now-defunct Nord Stream I.

[37] *EU—Energy Package* (n 32) para 7.1312.

[38] ibid para 7.1336.

[39] See the panels summary of AB in *India-Solar Cells* in *EU—Energy Package* (n 32) Report of the panel, paras 7.1331–7.1335.

[40] See (n 32).

infrastructure projects for energy security purposes and diversification of energy supplies without resorting to justifying such measures under the available exceptions.[41] One may argue that in the current geopolitical landscape, the conclusions drawn by the panel, even more now than before the Russian invasion, lead to highly unfavourable outcomes for the EU in practice.

The case highlighted wider problematic issues with regard to how international trade rules may interact with geopolitically sensitive areas. In this case, it concerned the EU's measures to guarantee its energy security, by arguably 'discriminating' against certain suppliers. *EU—Energy Package* demonstrated that WTO rules are inflexible with regard to geopolitically sensitive, network-bound, a-typical, non-manufactured good sectors such as cross-border natural gas trade. It may, however, as will be discussed below, be conceivable that discriminating against certain suppliers at the expense of trade liberalization may be the only way out of an uncomfortable (and dangerous) relationship of energy dependency. Some may argue a similar Catch-22 arises for decarbonizing our energy systems. In essence, you need an industrial policy to reduce unwanted dependencies and to decarbonize quickly. But, in all likelihood, such industrial policies can be protectionist and discriminatory. This creates a fundamental problem with the underlying idea of the WTO system, that of comparative advantage, and the urgent need for the energy transition. The bigger question is how to deal with this reality in a structural manner and reconcile it with existing notions on which the system of trade liberalization has been built. It may be unavoidable to reconsider the premises on how some core rules of the multilateral trading system play out in practice for strategically sensitive areas such as the gas and electricity sector, raw materials, and sensitive technology.[42]

It is imaginable that if a similar case such as *EU—Energy Package* was ever to be litigated at the WTO today (post-invasion), the outcomes could differ. First and foremost, the EU's Article XX(j) GATT defence may be reconsidered, as the argument could convincingly be made that natural gas is in *actual* local short supply at present, not merely at 'risk of becoming in local short supply'. Secondly, it is not inconceivable that the 'nuclear option', the invocation of Article XXI(b)(iii) Security Exception of the GATT or the public order of the GATS may be a more straightforward way out for the EU under the current circumstances. These remain solutions on defences, which do not comprehensively address the structural problem of the unsuitability of the WTO legal framework to offer the required flexibility in geopolitically sensitive areas, such as energy security.[43]

## GEOPOLITICAL REALITIES: RECONSIDERING CORE DIMENSIONS OF EU ENERGY LAW AND POLICY FOLLOWING THE INVASION—EMERGENCY TOOLS

Fast forward to February 2022, and we find ourselves at the dawn of a new geopolitical era. The Russian invasion of Ukraine was a wake-up call that the EU must detox from its dependency on Russian fossil fuels as soon as possible and diversify supplies to (more) reliable suppliers while at the same time decarbonizing and reducing demand by the Union as soon as possible.[44]

In quick succession, the EU rolled out measures aimed at diversifying away from Russia as a dominant energy supplier, while developing multifaceted strategies to guarantee its long-term energy supply. While some initiatives, such as the EU Gas Buying Platform, have thus far been successful, other initiatives may have more mixed results and uncertain futures. An example is

[41] Marhold (n 7) 198 ff.

[42] Think of subsidies in the WTO Canada—Renewable Energy case, but also local content requirements (LCR) in the renewable energy sector (India and USA, respectively).

[43] Other areas that face similar issues are strategic raw materials and dual-use technologies.

[44] See European Commission, 'REPowerEU: Joint European Action for more affordable, secure and sustainable energy' Strasbourg, 8.3.2022 COM(2022)108 final; See also, Y Zhang, 'International Law in the China-Russia Energy Partnership: Mapping the Partnership-based Relational Approach' (in this issue), 10.

the massive state aid across the EU to households during the EU energy crisis.[45] While this aid is necessary from a social security point of view, it also amounts to problematic fossil fuel subsidies that keep existing dependencies afloat. Moreover, the energy partnerships the EU has hastily entered into post-invasion should also be regarded with caution, as these may relieve short-term supply problems but may not be the preferred answer in terms of geopolitical dependencies on fossil fuels in the long term.

The legal tensions illustrated by *the EU—Energy Package* discussed in the section above can be seen in a new light through the lens of the various crisis response measures the Union was forced to take. Two remarks are in place here. First, it is questionable to what extent the measures discussed further are compatible with the principles of the internal market and WTO law, as they exist in their current form. Indeed, compliance with multilateral trade rules may not be the EU's main concern in these times of crisis, in times of war and with a WTO that may be on the brink of hibernation.[46] Nevertheless, this is an angle that must be kept in mind as the rule of law is important, and (the option of returning to) multilateralism should not be abandoned in the long run. Secondly, they force us to reconsider to what extent competition and free market principles are realistically attainable or should even be the main focus of the EU energy market at present, or whether the EU should conceive energy policy as part of a new industrial policy in line with open strategic autonomy and a general de-risking of its trade relations.[47] This also begs more uncomfortable questions on whether competition and free market principles are consistent with pursuing energy security, sustainability and possibly, social justice. Handling these concerns through exceptions only may lead to unfavourable outcomes.

### *EU* ad hoc *emergency tools following Russia's invasion*

The unprecedented emergency measures the Union has resorted to since the Russian invasion, have energy security as a paramount goal for the years to come, preceding the liberalization of the EU energy market, or, in some instances, even reversing it. Thus far, this approach has successfully secured an energy supply for the foreseeable future. While sustainable development and energy transition goals remain important and attempted to be seamlessly integrated into EU energy policy, they are currently treated flexibly and, at times, put on the backburner in favour of short-term energy security.

Following the Russian invasion, the EU has bundled its measures under the so-called 'REPowerEU Plan'.[48] EU broadly speaking, the Union's measures mitigating the energy crisis triggered by the Russian invasion of Ukraine are: diversifying supply (in the form of import bans and newly concluded bilateral partnerships, reducing demand, new gas storage rules, collective purchasing of energy (via the newly set up AggregateEU platform), reducing bills for European households and businesses, strengthening EU solidarity, and investing in infrastructure.[49] Multifaceted strategies can be grouped into various categories, eg reconsidering what type of energy is considered 'sustainable', focusing on different energy sources (eg hydrogen strategy), financial

[45] See European Commission, 'EU Action to Address the Energy Crisis' https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/eu-action-address-energy-crisis_en#diversifying-our-supply (accessed 8 October 2023).

[46] Reuters, 'At WTO, growing disregard for trade rules shows world is fragmenting October 3 2023′ <https://www.reuters.com/business/wto-growing-disregard-trade-rules-shows-world-is-fragmenting-2023-10-02/> (accessed 8 October 2023).

[47] See G7 Hiroshima Leaders' Communiqué, 20 May 2023, stating: 'We are taking concrete steps to coordinate our approach to economic resilience and economic security that is based on diversifying and deepening partnerships and de-risking, not de-coupling' https://www.whitehouse.gov/briefing-room/statements-releases/2023/05/20/g7-hiroshima-leaders-communique/ (accessed 8 October 2023).

[48] See (n 44) and European Commission, 'REPowerEU' <https://commission.europa.eu/strategy-and-policy/priorities-2019-2024/european-green-deal/repowereu-affordable-secure-and-sustainable-energy-europe_en> (accessed 29 October 2023).

[49] See European Commission, 'EU Action to Address the Energy Crisis' (n 45); A Boute, 'Energy Justice in Times of Crisis: Protection of Consumers and Market-Based Renewable Energy Investments' (in this issue) (2023) 00 Journal of International Economic Law, 1, 5–6.

measures to ensure a fairer division of profits, entering into new energy partnerships with third countries, and curbing energy demand.[50]

This section discusses a selection of the most pertinent energy security measures the Union has taken: (i) the G7 EU import ban on Russian oil and refined petroleum products (ii) the establishment of a Gas Buying Platform; and, (iii) ad hoc bilateral arrangements with third countries to diversify supplies.

### *EU import ban Russian oil and refined petroleum products and G7 price cap*

In June 2022, the EU agreed to impose a partial embargo on Russian seaborne crude oil by December 2022.[51] As an extension of the EU ban, the so-called international Price-Cap Coalition headed by the G7 and Australia added a price cap for Russian-origin crude oil.[52] A further price cap on seaborne petroleum products (diesel and fuel oil) was introduced in February 2023.[53] For the cap to be effective, it must be adjusted regularly. In practice, the bans amount to a total import ban on Russian crude oil by the EU but allow European operators to transport Russian oil to third countries if the price remains below the cap. It is hard to assess whether the price cap is effective. Some argue that Russian oil revenues are likely to increase due to constant hikes in crude prices and the reduced discount on its own oil.[54]

Under normal circumstances, such an import ban maintained by the EU and its Member States, as well as a price cap by the non-EU members of the G7 would likely amount to an unjustifiable violation of the laws of the WTO in the form of a *de jure* import restriction inconsistent with Article XI.I of the GATT.[55] While multilateralism, and thereby the relevance of the WTO, is now seriously questioned, in the unlikely event that Russia challenges these measures before the panel, the EU could arguably justify such a ban under the guise of the national security exception of Article XXI (b)(iii).[56] The EU would, however, have to argue that the connection between the measure and the 'emergency in international relations' is sufficiently connected.[57]

### *EU gas buying platform*

In April 2022, the Union set up the EU Energy Platform, whereby it intends to act on behalf of the member states to purchase and divide natural gas across the EU.[58] It is set up as a

> 'voluntary coordination mechanism that plays a key in pooling demand, coordinating infrastructure use, negotiating with international partners and preparing for joint gas and hydrogen purchases'[59]

One of the most important features is a 'joint purchasing mechanism', through which the Commission intends to introduce a demand aggregation tool that will support EU countries in

[50] ibid.
[51] European Commission, 'G7 Agrees Oil Price Cap: Reducing Russia's Revenues, while Keeping Global Energy Markets Stable' (3 December 2022).
[52] German Federal Foreign Office, 'Statement of the G7 and Australia on a Price for Cap for Seaborne Russian Crude Oil' (2 December 2022).
[53] European Commission, Ukraine: EU and G7 partners agree price cap on Russian petroleum products.
[54] *Financial Times*, 'Russia Dodges G7 Price Cap on most of its Oil Exports', 24 September 2023.
[55] GATT Article XI.1.
[56] B Hoekman, PC Mavroidis and DR Nelson, 'Non-economic Objectives, Globalisation, and Multilateral Trade Cooperation', VOX.eu (11 September 2023).
[57] See the reasoning of the panel in WTO, DS512, *Russia—Measures Concerning Traffic in Transit* (*Ukraine v Russian Federation*) paras 7.124–7.125.
[58] European Commission, EU Energy Platform—AggregateEU: 'AggregateEU, is the Commission flagship initiative under the EU Energy Platform, to implement demand aggregation and support more coordinated purchase of natural gas at European level. It is operated by the service provider, Prisma European Capacity Platform GmbH.'
[59] ibid.

reaching their storage targets.[60] The Platform works based on regional groups and aims to replace Russian gas with gas and liquefied natural gas (LNG) from 'reliable suppliers'.[61] The concrete tasks of Platform are presently to coordinate the filling of gas storage facilities while also laying the ground for introducing partnerships on hydrogen.[62] Regarding the joint purchasing mechanism, the idea is that both EU Member States and countries from the European Energy Community (including Ukraine) group together their gas import needs to see offers on that basis. By forming a 'gas purchasing consortium' together with European energy companies, it wants to ensure more equal access to 'new suppliers, international markets and negotiating weight to European importers. Russian supply sources will be excluded'.[63] While it concerns a 'voluntary' mechanism, some elements are mandatory for EU member states (for at least 15 per cent of storage filling obligations). In May 2023, the Commission announced that it attracted more than 1.34 billion cubic metres (bcm) of natural gas in its first joint gas purchasing tender, surpassing the 11.6 bcm demanded by EU companies to guarantee its security of supply.[64] The Platform attracted bids from 25 supplying global companies. In essence, it could be said that this new form of tendering has been a success for the EU to meet its natural gas needs and guarantee its energy security. But will this be a new form of states acting as wholesale buyers? Many questions remain.

It is first and foremost unclear what kind of 'legal animal' the EU Energy Platform is or will turn out to be or how it fits into existing EU internal market and international trade law structures. In terms of WTO law, one could ask whether the platform could somehow be conceived as fitting within the definition of a State Trading Enterprise in the sense of GATT Article XVII. If this is the case, such an enterprise should 'act in a manner consistent with the general principles of non-discriminatory treatment prescribed in this Agreement for governmental measures affecting imports or exports by private traders.'[65]

One important question is whether the Platform is conceived as a long-term or ad hoc short-term tool. The Commission is itself understandably aware that Platform may run afoul of internal market rules by pre-emptively stating that when forming a consortium of this kind, there should be a rapid decision on the inapplicability of state aid and competition Articles 101 and/or 102 TFEU.[66] Although the practical operation of the Platform and more detailed rules on its functioning have to be developed, it is obvious that the EU realizes that leaving energy security to the forces of the market is not an option at present. Rules on state aid to the energy sector have been relaxed significantly in the EU post-invasion, making it eg possible for Member States to 'bail out' energy giants, and support industry and consumers. While this is understandable given the current geopolitical circumstances, several important legal issues cannot be ignored in this respect. This, for instance, concerns the consistency of loosened EU State Aid rules with subsidy rules under the Agreement on Subsidies and Countervailing Measures. The second issue is that relaxed State Aid rules in energy will often amount to qualifying as a fossil fuel subsidy, as the aid provided is disproportionality given to the fossil fuel industry and private consumers consuming fossil fuels.

[60] European Commission Communication to the Parliament, 'Energy Emergency - preparing, purchasing and protecting the EU together' Strasbourg, 18.10.2022.
[61] Emergency regulation (n 60) [1]. Note that what is 'reliable supplier' remains undefined.
[62] ibid.
[63] Emergency regulation (n 60) under 1.
[64] European Commission News Announcement, 'EU Energy Platform: EU Attracted over 13.4 bcm of Gas in First Joint Gas Purchasing Tender' (16 May 2023).
[65] art XVII.1(a) GATT.
[66] arts 101 and 102, Treaty on the Functioning of the European Union.

### *Ad Hoc Bilateral Arrangements*

Finally, the EU is hastily scrambling to secure fossil fuel supplies from elsewhere by concluding Memoranda of Understanding (MoUs) with other third countries: be it a trilateral MoU with Egypt and Israel, an MoU with Azerbaijan, additional gas deals with Algeria, Angola, Nigeria and Senegal, as well as additional LNG guarantees from the USA.[67]

The trilateral MoU between the EU, Egypt, and Israel does not contain hard obligations in terms of fossil fuel supplies. Still, they lay a foundation of intensified cooperation with regard to fossil fuel supplies.[68] What is striking is that the Preamble to this MoU perfectly illustrates the tightrope the EU must walk on in balancing its energy security in the wake of a war on European soil, while squaring this with preventing a climate emergency. Justifying its natural gas imports from the region, it states:

> Emphasising the importance of regional cooperation between natural gas producing and consuming countries to support the security of the energy supply;
>
> Recalling the objectives defined under the Paris Agreement that the Sides have ratified and that defines their commitment to reducing greenhouse gas emissions;
>
> Acknowledging that natural gas shall continue to play an important role in terms of energy consumption and electricity generation in the European Union until 2030, after which its use in the European Union will decline in line with its climate neutrality commitment by 2050;[69]

The EU concluded gas deals with Saudi Arabia, UAE, Algeria, and Azerbaijan.[70] Under the new Azerbaijan MoU, for instance, Azerbaijan commits to double the capacity of the Southern Gas Corridor to deliver at least 20 bcm of natural gas annually.[71]

In terms of the law, it is questionable whether the deals for imports of natural gas are concluded on a Most Favoured Nation (MFN) basis, certainly vis-à-vis Russia whose seaborne imports are banned in connection with the war in Ukraine. But more fundamentally, the long-term risks of this strategy must be considered, while these partnerships are understandable to prevent the Union from running out of energy in the short run in the wake of its crisis. The EU remains highly dependent on fossil fuel imports, and this will not diminish overnight. Prioritizing the supply of cheap fossil fuels regardless of the country that supplies them is not a viable long-term strategy in the current geopolitical landscape. At the time of finalizing this contribution, we find ourselves in November 2023, with the conflict between Israel and Hamas destabilizing the region and rising tensions between Israel and Egypt. Can the EU afford to rely on fossil fuels from these countries, which, moreover, may find it challenging to constructively cooperate at present?[72] Other countries that the EU is keen to import fossil fuels from, likewise, may not be stable countries or natural European allies (such as Azerbaijan or Saudi Arabia).

[67] See Memorandum of Understanding on Cooperation Related to Trade, Transport and Export of Natural Gas to the European Union between the European Commission, Egypt and Israel (15 June 2022); Memorandum of Understanding on a Strategic Partnership between the European Union and the Republic of Azerbaijan in the field of Energy (18 July 2022); European Parliament Briefing July 2023, 'EU Energy Platform – Facilitating joint purchases of gas'.

[68] EU-Egypt-Israel MoU s 1 (*Affordable, Stable and Secure Natural Gas Supply)* and *Section 2 (Implementation)*.

[69] EU-Egypt-Israel MoU, Preamble; note: Many countries are struggling with the balance of decarbonization and energy security, see H Gao and W Zhou, 'Competition Amongst Purposes: The Chinese Experience in the Governance of Climate Change and Energy Transition' (in this issue), 14.

[70] See the excellent tool developed by the ECFR, EU Energy Deals Tracker <https://ecfr.eu/special/energy-deals-tracker/> (accessed 8 October 2023).

[71] European Commission, 'EU and Azerbaijan Enhance Bilateral Relations, Including Energy Cooperation' (Press Release 18 July 2022).

[72] See the discussion in S Lokenberg, G Cretti and L van Schaik, 'A Tale of Two Dependencies' (2023) 28 *European Foreign Affairs Review* 417, 528–536.

It is hard to say to what extent the EU emergency tools discussed above are long-term measures. They could change and adapt to what the crisis demands in the coming year. Certain is that they do not neatly fit within existing WTO and EU law frameworks, notwithstanding the withering importance of the former.[73]

### *The added challenge of shared energy competences in the EU*

A complicating factor is the shared competence on energy between the Union and the Member States. This makes it particularly challenging to ensure everybody is on board with any Union-wide measure that affects the energy mix of a Member State.[74] For it is within the rights of the member states to determine that mix, including in their contracts with third countries (hence the exceptions that have been made on Russian sanctions for several EU Member States, such as Hungary and Slovakia). Pursuant to Article 194(2) TFEU, each member state has the right 'to determine the conditions for exploiting its energy resources, its choice between different energy sources and the general structure of its energy supply…'[75] This explains why the EU, while on one hand taking unprecedented action to wean off Russian energy, cannot legally constrain individual member states from entering into contracts with Russia's state-owned company Gazprom. Indeed, these countries have continued to conclude long-term contracts with Gazprom since February 2022.[76]

Tensions between EU member states' energy policies, as well as between the Union and its Member States are inherent to the institutional design of the Union. Questioning or interpreting the division of competences in the EU in a different light remains a sensitive subject. Unless the Union decides to exercise its energy competence more proactively, voting in the European Union changes to majority voting, energy becomes an exclusive competence of the EU, or the EU transforms into a federation (the latter two scenarios are improbable in the near future), the complicated (and frustrating) nature of energy policy between the Union and its Member States will remain.

## TOWARDS 'SECURITY-CENTRED' ENERGY TRADE REGULATION IN THE EU (AND BEYOND?)

For decades, the EU energy market was targeted towards liberalization and decarbonization, and with good reason. The Russian invasion should not mean that the EU should abandon these long-term goals. However, there is an argument to be made for working towards a 'security-centred' energy transition in the EU while at the same time ensuring the EU remains competitive globally and does not lose out in the green technology shift.

### (Energy) Security first, EU and WTO compatibility second

Both the EU and WTO leave ample space for regulating matters pertaining to security. But two issues are challenging in this respect: first, if WTO members wish to regulate matters that pertain to energy security in a way that violates WTO obligations (for instance by banning imports from one particular supplier, Russia, or favouring imports of another), venturing into the exception is the default option to defend such measures. Second, and more important, however, is that Article XX GATT general exceptions must also meet the chapeau. With regard to energy security measures that violate WTO rules, as they may be purposefully discriminatory (and for good reason), this may be a high threshold to meet. Imagine that the EU wants to ban Russian natural

[73] See (n 42).
[74] art 194.2 TFEU.
[75] art 194(2) TFEU.
[76] Hungary and Austria have renewed contracts with Gazprom, see Euronews, 'Austria imports of Russian gas hit pre-war levels, exceeding aid to Ukraine' (12 July 2023) and Politico, 'Hungary signs new gas deal with Gazprom' (31 August 2022).

gas from its market completely. If challenged, it may try to, for instance, invoke the public morals exception of paragraph (a) of Article XX GATT. Based on *Brazil—Retreaded Tyres,* one would have to look at the objective, what the risk is you are trying to protect yourself from and whether the measure contributes to pursuing a particular objective.[77] An objective in this case could for instance be 'Russia is violating peremptory norms'. Or, 'Russia threatens European security'. Or both. And how to be consistent if you have multiple objectives?[78] The issue of consistency will likely pop-up. As *EC—Seals* has demonstrated, it is hard to be consistent when it concerns public morals. If we look at the first hypothetical objective, it would likely fail under the chapeau vis-à-vis other WTO members that EU is importing natural gas from and that may likewise violate jus cogens. In other words, differential treatment between various WTO Members may be necessary for a variety of legitimate objectives in securing the EU's energy. But differential treatment is often equated with protectionism in the case law and the GATT Article XX chapeau may not necessarily catch this.[79]

In those instances, resort to the 'nuclear option' in Article XXI iii b) exception is more likely to succeed. That is in principle possible, as there is established precedent to litigate the article by now. And national security issues, including those pertaining to supply security, may sometimes trump market values.[80] However, the drawback of Article XXI is that it can also attempt to hide a lot of protectionism under the guise of national security.

However, this also begs the bigger question of whether it may be a worthy exercise to view the notion of 'protectionism' in international trade in a new light. In this day and age, when the geopolitical paradigm is shifting, we should ask whether the traditional broad notion of protectionism as differential treatment still works in strategically sensitive sectors, such as global energy trade, raw materials, and dual-use technologies. The argument here is that protectionism as conceived in the GATT in 1947 is perhaps too 'black-and-white' and does not leave enough space for the shades of grey in a time of trade fragmentation and the emergence of regional trading blocks that at times must be 'protectionist' to de-risk their trade relations and safeguard their economic security.[81]

For now, it seems inevitable that the EU must move towards a 'security-centred' energy trade regulation. While some may say that global energy trade has always been 'security-centred', this would disregard the opportunistic and dangerous dependencies created over the last century in Europe and globally. 'Security-centred' here implies that when designing European energy policy, both in its grand architecture and its concrete energy trading amongst EU Members States and non-EU members, dimensions of energy security (long-term, meaning including the concept of decarbonization, and short-term, the readiness to deal with supply shocks) should take precedence over compliance with core international trade rules and EU internal market law. Some may find this a radical idea, but this is de facto already happening in practice, illustrated by the emergency tools applied by the EU. It is not to say that multilateral trading rules or EU internal market law should be disregarded. But it could imply the following: For WTO rules, the notion of protectionism in connection to strategic sectors (energy, but also beyond, ie raw materials and sensitive technology) should be carefully re-evaluated and creatively interpreted. Discrimination in some of these sectors seems unavoidable—and the question is whether the

[77] Appellate Body Report, *Brazil—Retreaded Tyres*, para. 145.
[78] See the discussion in Appellate Body Reports, *EC—Seal Products*, paras. 5.192–5.193.
[79] See the discussion how the WTO Appellate Body has dealt with its case law in on this with respect to art III:4 GATT by P.C. Mavroidis, *The Regulation of International Trade* (MIT Press, 2016) Chapter 7.6.
[80] See the discussion on the relationship between trade and security in HG Cohen, 'Nations and Markets' (2020) 23 Journal of International Economic Law 793, 800–801 and M Pinchis-Paulsen, 'Let's Agree to Disagree: A Strategy for Trade-Security' (2022) 25 Journal of International Economic Law 527,529–533.
[81] See the discussion on how the challenges facing the trade (and investment) regime impact international economic law in A Roberts, 'Risk, Reward and Resilience Framework: Integrative Policy Making in a Complex World' (2023) 26 Journal of International Economic Law 233, 262–265.

legal space a WTO member has in those instances should limited to defences or security exceptions. The current impasse of the multilateral trading system is discouraging. Still, it could perhaps also be used effectively to 'test' the ground with regard to new and controversial unilateral policies deployed by the various trading blocks, such as the Carbon Border Adjustment Mechanism and the US Inflation Reduction Act.[82]

While the EU is a far cry from becoming a federation, 'security-centred' energy trade regulation from the perspective of EU law would also mean not shying away from avoiding talking about the elephant in the room: certain problematic aspects of shared competences on energy between the EU and its Member States and how this may negatively affect the EU's energy security. While there are good reasons that competences in the area of energy between the Union and its Member States are shared, as it concerns vital sectors, closely tied to a state's industrial policies and touching its permanent sovereignty over natural resources, complicated discussions on what the implications are when some Member States chose to trade energy with certain countries should not be avoided. The implications of shared competences in energy should be re-examined, leaving separate Member States enough space to determine their own energy mix, while at the same time ensuring that the Union can develop policies that de-risk the energy future for the whole Union.

## CONCLUSION

This contribution argues that the EU must turn to a 'security-centred' energy transition after exploring manners in which it must balance its legal ambitions for its International Energy Market and geopolitical realities due to the Russian invasion of Ukraine. While the Union's original goals are to decentralise the European energy market for gas and electricity while realizing the green energy transition and decarbonize the Union as soon as possible, emergency measure have forced the Union to try and reconcile its ambitious goals with short term needs. The EU's larger energy ambitions connected to decentralization do not, per se, run counter to multilateral trade rules. However, certain rules are problematic when they affect trade in geopolitically sensitive sectors, such as (though not exclusively) energy. The panel report in the *EU—Energy Package* case has shown that the EU finds itself between a rock and a hard place when it wants to ban energy imports from suppliers it wishes to decrease dependency on while at the same time not providing space to diversify away from one supplier in favour of others. Finally, the contribution discussed the geopolitical realities of several energy security emergency tools the EU used in connection with the Russian invasion. While some of these tools, such as the EU wholesale-buying coordination of natural, the price cap on natural gas and the ban on Russian crude imports, are pioneering and may lead to creative long-term solutions, it remains to be seen how these fit within EU and WTO rules. These findings justify re-evaluating the notion of 'protectionism' in international trade and how it may apply to trade flows that affect geopolitical dependencies.

[82] See (n 28).