

The Unilateral Turn in EU Trade Policy? The Origins and Characteristics of the EU's New Trade Instruments

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The introduction of over half a dozen unilateral European Union (EU) trade policy instruments in the past few years seems to represent a major shift to the EU's previous focus on bilateral and multilateral avenues. This article investigates the origins of the recent unilateralization of EU trade policy and the main characteristics of the new instruments. What are the new instruments' goals and why does the EU introduce them now? We identify six key determinants of this trend: the rise of state interventions, increasing sustainability ambitions, a more adverse geopolitical context, the paralysis of the multilateral trading system, the resistance to bilateral trade agreements and changing preferences within key Member States. The instruments can be divided in three clusters focused on competitiveness, sustainability, and security. They share to a larger or lesser degree five key features: reciprocity, deterrence, built-in engagement, extension of internal policies, and the pursuit of international public goods. Our analysis points at a unilateral turn with EU characteristics, offering a framework for studying trade unilateralization in comparative perspective.

Keywords: EU, Trade Policy, Unilateralization, Geopoliticization, Bilateralism, Multilateralism, Sustainability

1 INTRODUCTION

When the European Commission (EC) reviewed its trade strategy in early 2021 it put the concept of 'open strategic autonomy' front and centre.¹ Two years later, the most prominent manifestation of this new strategy is the introduction of more than half a dozen new unilateral trade instruments, which make access to the

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¹ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Trade Policy Review – An Open, Sustainable and Assertive Trade Policy*, COM(2021) 66 final (18 Feb. 2021).

European Union (EU) market dependent on economic, sustainability or security conditions or policies in third countries.² This has led to anger among third countries and accusations of hidden protectionism or even regulatory imperialism.³

Leaving aside a normative assessment for the moment, this ‘turn’ of the EU towards unilateral trade instruments is remarkable. The European Union has long prided itself on being the most enthusiastic supporter of progressive liberalization through the multilateral trading system built around the World Trade Organization (WTO) and has been recognized by the academic community as the most ardent liberal multilateralist.⁴ Of course, after the attempt to further liberalize trade through a new multilateral negotiation in Doha had failed, the EU had reinforced an extensive bilateral trade agenda.⁵ But these preferential trade agreements (PTAs) were justified by the Union as building blocks towards multilateral liberalization.⁶ Even the EU’s traditional trade defence instruments – anti-dumping, anti-subsidy, and countervailing duties – have been portrayed as serving the goal of multilateral free trade, by offering guarantees to otherwise potential domestic opponents of liberalization that they can be protected against unfair trade or an unexpected surge in imports.⁷ When the EU has used trade to promote sustainable development abroad, it long did this through cooperative chapters in PTAs and by giving developing countries who implement international agreements on human rights, labour, and environmental protection better access to the EU market.⁸

² For other discussions of the EU’s new unilateral trade instruments in response to the open strategic autonomy paradigm, see European Centre for International Political Economy, *The New Wave of Defensive Trade Policy Measures in the European Union: Design, Structure and Trade Effects*, ECIPE Occasional paper No. 4 (2022); T. Gehrke, *EU Open Strategic Autonomy and The Trappings of Geoeconomics*, 27(Special issue) Eur. For. Aff. Rev. 61 (2022), doi: 10.54648/EERR2022012; S. Bauerle Danzman & S. Meunier, *Ordering Economic Statecraft: Prospects for Global Cooperation Amidst the European Union’s Geo-economic Turn*, J. Com. Mkt. Stud. (forthcoming); F. Hoffmeister, *Strategic Autonomy in the European Union’s External Relations Law*, Paper Presented at the Leiden-London seminar (2022).

³ B. Moens & K. Mathiesen, *Trade Partners See Red Over Europe’s Green Agenda*, Politico (16 Jan. 2023), <https://pro.politico.eu/news/158492> (accessed 18 May 2023).

⁴ For example A. Van den Hoven, *Assuming Leadership in Multilateral Economic Institutions: The EU’s ‘Development Round’ Discourse and Strategy*, 27 W. Eur. Pol. 256 (2004), doi: 10.1080/0140238042000214900; J. L. Mortensen, *The World Trade Organization and The European Union*, in *The European Union and International Organizations* 94 (K. E. Jorgensen ed., Routledge 2008).

⁵ For example G. Koopmann & M. Wilhelm, *EU Trade Policy in the Age of Bilateralism*, 45 *Intereconomics* 305 (2010), doi: 10.1007/s10272-010-0350-7.

⁶ Compare R. Leal-Arcas, *Proliferation of Regional Trade Agreements: Complementing or Supplanting Multilateralism*, 11 *Chi. J. Int’l L.* 597 (2010).

⁷ B. Hoekman & M. M. Kostecki, *The Political Economy of the World Trade System: The WTO and Beyond* 303 (Oxford University Press 1999).

⁸ On cooperative chapters in preferential trade agreements, see e.g., J. Harrison, M. Barbu, C. Liam, B. Richardson & A. Smith, *Governing Labour Standards Through Free Trade Agreements: Limits of the European Union’s Trade and Sustainable Development Chapters*, 57 *J. Com. Mkt. Stud.* 260 (2019), doi: 10.1111/jcms.12715. On granting developing countries better access to the EU market, see e.g., L. Bartels, *The WTO Legality of the EU’s GSP+ Arrangement*, 10 *J. Int’l Econ. L.* 869 (2007), doi: 10.1093/jiel/jgm035.

With the introduction of the new unilateral instruments discussed in this article, the EU now makes not just preferential but also 'normal' access to the Union market conditional upon economic, sustainability and security conditions and policies in third countries. Why has the EU recently felt the need to expand its unilateral toolbox with several new instruments? What are the main objectives and characteristics of these instruments? The remainder of this article aims to offer some insights to these questions. This will allow us to assess to what extent this unilateralization represents a deviation from the EU's traditional promotion of multilateralism and liberalization in its trade policies.

The article is structured as follows. The next section provides a comprehensive overview of the key drivers of the EU's turn towards unilateral instruments. Section three briefly discusses these new instruments and groups them into three categories according to their primary objective. Section four reviews the main characteristics of these new instruments with the aim of assessing how they relate to the EU's traditional multilateral free trade orientation. Section five concludes and offers suggestions for further research.

2 DRIVERS OF THE UNILATERAL TURN

We argue that the turn towards unilateral trade instruments by the EU cannot be reduced to a single cause. We witness a bundle of new instruments being launched in a very short time span. Therefore, we think the term 'turn' is justified: not because the EU has completely abandoned multilateral and bilateral trade negotiations nor because the EU has never used unilateral instruments before, but because it is *suddenly* introducing *several* unilateral instruments for *various* purposes, as we explain below.⁹ This unilateralization has not come about easily. Some of the instruments now adopted had been first proposed over a decade ago, but until recently the conditions for their adoption were apparently not met. Only the combination of six interrelated factors led to this bundle of unilateral trade instruments. The first three can be seen as causal drivers. The challenges of state interventions, sustainability and geopolitical upheaval led the EU to seek stronger trade responses. The latter three can be perceived as intermediate variables, which mediate between the causes and the EU's unilateral trade response. The shifting political economic preferences within the EU made finding sufficient internal support for these new instruments possible. The paralysis of the WTO and the difficulties to conclude ambitious bilateral agreements made the use of unilateral instruments seem more legitimate as responses to the new economic, sustainability and security challenges.

⁹ An early, but isolated unilateral trade instrument can be seen for example in the Forest Law Enforcement, Governance and Trade Action Plan in 2003.

2.1 THE RISE OF STATE INTERVENTIONS

A key driver for the introduction of new unilateral trade instruments is frustration among EU policy-makers over the rise of state interventions in third countries, and of China's state capitalist economy in particular. As in the US, there was hope in the EU that the accession of China to the WTO in 2001 would accelerate its transformation towards a liberal market economy. By now, EU policy-makers and observers agree that the liberalization of China has stagnated, if not reversed, since Xi Jinping became president in 2013.¹⁰ In China itself, market access is often restricted or made conditional upon establishing joint ventures or transferring technology. Outside of China, including on the EU market, businesses are regularly faced with Chinese competitors who benefit from state support, often in subtle and opaque ways. This already led to politicization within the EU over traditional trade defence measures against China in the first decade of the twenty first century.¹¹ In response to internal divisions in the Union over how to react to Chinese competition, Commissioner Mandelson proposed in 2006 to reform the EU's trade defence instruments in a liberal way, but this attempt was blocked by regular users of trade defence instruments.¹² Then a new series of salient trade defence cases where China succeeded in exercising divide-and-rule tactics vis-à-vis EU Member States¹³ led to a new reform proposal by the European Commission in 2013 with a more assertive emphasis. This attempt, spearheaded by then Trade Commissioner De Gucht, was first halted by liberal Member States,¹⁴ before finally being adopted in 2017, in order not to emasculate the EU's trade defence policies against China after the latter's non-trade market economy status in the WTO had lapsed.¹⁵

But even the EU's modernized trade defence instruments were increasingly seen as insufficient to respond to competition from China, which was climbing up the value ladder without opening up its economy. Under Xi's tenure the Chinese Communist Party (CCP) strengthened its grip on the economy and developed

¹⁰ See e.g., A. Pepermans, *Chinese Mercantilism: The case of EU-China Relations*, PhD dissertation submitted at Free University Brussels to obtain the degree of doctor in political science (2020).

¹¹ See e.g., T. Heron, *European Trade Diplomacy and the Politics of Global Development: Reflections on the EU-China 'Bra Wars'*, 42 *Gov't & Opp'n* 190 (2007), doi: 10.1111/j.1477-7053.2007.00218.x.

¹² D. De Bièvre & J. Eckhardt, *The Political Economy of EU Anti-dumping Reform*, ECIPE Working paper No. 3 (2010).

¹³ A. Pepermans, *The Huawei Case and What It Reveals About Europe's Trade Policy*, 21(4) *Eur. Foreign Aff. Rev.* 536 (2016), doi: 10.54648/EERR2016043; A. Pepermans, *The Sino-European Solar Panel Dispute: China's Successful Carrot and Stick Approach Towards Europe*, 13 *J. Cont. Eur. Res.* 1394 (2017), doi: 10.30950/jcer.v13i4.831; J. Eckhardt, *Law and Diplomacy in EU-China Trade Relations: A Historical Overview*, in *Law and Diplomacy in the Management of EU-Asia Trade and Investment Relations*, 58 (C.-H. Wu & F. Gaenssmantel eds, Routledge 2019).

¹⁴ F. Hoffmeister, *Modernising the EU's Trade Defence Instruments: Mission Impossible?*, in *Trade Policy Between Law, Diplomacy and Scholarship* (C. Herrmann, B. Simma & R. Streinz eds, Springer 2015).

¹⁵ F. Hoffmeister, *The Devil Is in the Detail: A First Guide to the EU's New Trade Defence Rules*, in *Law and Practice of the Common Commercial Policy* 335 (M. Hahn & G. Van der Loo eds, Brill Nijhoff 2020).

ambitious industrial policy plans to upgrade the manufacturing capabilities of the country in technology-intensive sectors, most notably in the 'Made in China 2025' strategy of 2015.¹⁶ While in the first decade of the twenty first century, China was a competitor for low-technology, labour-intensive industry, and an export destination for capital-intensive, mid-technology sectors, in the second decade this pattern was reversing, and China was now also challenging the more advanced European economies.¹⁷ Besides the announcement of ambitious plans by the CCP, several mind-focusing events have affected the perception of economic relations with China in the EU. Particularly significant has been the acquisition of the German world-famous robot company Kuka by the Chinese Midea Group in late 2016, which raised concerns within the German economic establishment.¹⁸ Two years later, the EC blocked the merger of the French company Alstom and the German company Siemens. This merger was, according to its supporters, necessary to allow the new European mega-rail company to compete with the Chinese firm China Railway Rolling Stock Corporation (CRRC), the world's largest train-maker.

These cases led to a sequence of initiatives that stimulated the unilateral turn. In January 2019 the Federation of German Industries (Bundesverband der Deutschen Industrie, BDI) published a policy paper on China titled 'Partner and systemic competitor – How do we deal with China's state-controlled economy?'. In this paper, it called for several of the new instruments discussed in this article.¹⁹ In February 2019, the French and German governments published a joint 'Manifesto for a European industrial policy fit for the 21st Century',²⁰ also proposing several of the instruments that would later be introduced.²¹ The following month, in March 2019, the EC and the High Representative published a joint communication 'EU-China – A strategic outlook',²² which designated China as not only a cooperation and negotiating partner

¹⁶ See e.g., A. Malkin, *Made in China 2025 as a Challenge in Global Trade Governance: Analysis and Recommendations*, CIGI Papers No. 183 (2018).

¹⁷ On the evolution of the complementarity of trade structures between China and EU Member States, see F. De Ville, 'Naïve No Longer? The Hardening of EU Trade Policy Discourse and Practice Towards China and Its Limits', Paper presented at the Politicogenetmaal 2019, Antwerp University (Jun. 2019).

¹⁸ See e.g., G. Chazan, *German Angst Over Chinese M&A*, Financial Times (9 Aug. 2016).

¹⁹ BDI, *Partner and Systemic Competitor: How Do We Deal With China's State-Controlled Economy?* (10 Jan. 2019), <https://english.bdi.eu/publication/news/china-partner-and-systemic-competitor/> (accessed 18 May 2023).

²⁰ Bundesministerium für Wirtschaft und Energie, *A Franco-German Manifesto for a European Industrial Policy Fit for the 21st Century* (2019), https://www.bmwi.de/Redaktion/DE/Downloads/F/franco-german-manifesto-for-a-european-industrial-policy.pdf%3F__blob%3DpublicationFile%26v%3D2 (accessed 18 May 2023).

²¹ 'Taking into greater consideration the state-control of and subsidies for undertakings within the framework of merger control', 'ensure the full implementation of the recently agreed European foreign investment screening framework', 'an effective reciprocity mechanism for public procurement with third countries', 'fight against trade distorting practices including excessive subsidies to industry'.

²² European Commission and HR/VP, Joint Communication to the European Parliament, the European Council and the Council, *EU-China – A Strategic Outlook*, JOIN(2019) 5 final (12 Mar. 2019).

but also an economic competitor and a systemic rival. This document referred again to several of the new trade policy instruments, which would also be included in the Commission's 'A new industrial strategy for Europe' Communication from 2020.²³

2.2 INCREASING SUSTAINABILITY AMBITIONS

A second key driver of the introduction of unilateral trade instruments is the EU's increased ambition in sustainability policies. Since the US' failure to ratify the 1992 Convention on Biological Diversity and the 1997 Kyoto Protocol, the EU has presented itself as the global leader in the fight against biodiversity loss and in particular against climate change.²⁴ Starting in 2005, the EU's cap-and-trade system, the emissions trading scheme (ETS), has been the cornerstone of its climate policies.²⁵ In 2020, the EU ramped up its climate ambitions with the European Green Deal, which was translated a year later in a package of legislative proposals under the 'Fit for 55' banner.²⁶ With this policy framework, the EU aims to become the first major climate neutral economy by the middle of the century and has set an intermediate target of reducing net greenhouse gas emissions by at least 55% by 2030. The EU's reinforced climate ambitions have led to a significant increase in the price of emission allowances within the ETS from less than EUR 10 per metric ton of CO₂ until the beginning of 2018 to over EUR 100 in February 2023. This has heightened the risk of and concern for 'carbon leakage',²⁷ whereby energy-intensive firms would shift production from the EU to third countries where they do not have to buy emission permits or pay equivalent carbon taxes, which would undermine the objective of reducing global carbon emissions and would lead to deindustrialization in the Union. The risk of carbon leakage thus constitutes a driver for the EU to adopt unilateral trade instruments. The EU's hope is that these instruments provide an incentive to third countries to strengthen their sustainability policies and therefore compensate for the lack of enforcement capabilities in United Nations Framework Convention on Climate Change.

²³ European Commission, 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, *A New Industrial Strategy for Europe*, COM(2020) 102 final (10 Mar. 2020).

²⁴ See H. Walker & K. Biedenkopf, *The Historical Evolution of EU Climate Leadership and Four Scenarios for Its Future*, in *EU Climate Diplomacy* 33 (S. Minas & V. Ntousas eds, Routledge 2018).

²⁵ L. N Haar & L. Haar, *Policy-Making Under Uncertainty: Commentary Upon the European Union Emissions Trading Scheme*, 31 *Energy Pol'y* 2615 (2006), doi: 10.1016/j.enpol.2005.07.003.

²⁶ European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: 'Fit for 55': *Delivering the EU's. 2030 Climate Target on the Way to Climate Neutrality*, COM(2021) 550 final (14 Jul. 2021).

²⁷ A. Antoci, S. Borghesi, G. Iannucci & M. Sodini, *Should I Stay or Should I Go? Carbon Leakage and ETS in an Evolutionary Model*, 103 *Energy Econ.*, 105561 (2021), doi: 10.1016/j.eneco.2021.105561.

2.3 A MORE ADVERSE GEOPOLITICAL LANDSCAPE

Largely driven by the escalating technology and trade conflict between the United States and China, the global trading system has evolved towards a 'geoeconomics (dis)order'.²⁸ This geo-politicization of trade, whereby trade policy is seen as inextricably linked to security and foreign policy objectives, has also affected the European Union directly and indirectly.²⁹ Shots fired in the US-China trade war hit the EU as a bystander, like when Chinese exports targeted by additional tariffs imposed on national security grounds (or pretexts) risk being deflected towards the EU, leading it to adopt (safeguard) measures itself.³⁰ The United States, the EU's main security ally, has also insisted that the Union and its Member States take trade and investment measures to avoid that China would exploit interdependencies. A prominent example is US pressure on EU Member States to block Huawei from winning contracts in building 5G infrastructure. On a more abstract level, the geopolitical trade discourse and behaviour of others have lowered the threshold for the EU to think, talk and act similarly. It has empowered EU actors favouring stronger trade instruments to use the more threatening geopolitical landscape to claim that the EU cannot be naïve. Once a geopoliticization cycle starts and some great powers start to see trade through a geopolitical lens and take measures aimed at protecting and promoting their relative position in the global economy, it becomes difficult for other powers not to respond in kind.³¹

As a result, when the new von der Leyen European Commission took office in 2019 the Commission President stated that she wanted to lead a 'geopolitical Commission'. This ambition has only been reinforced in the wake of the covid pandemic when the EU's reliance on imports of facemasks and other critical personal protective equipment became clear. Moreover, the Russian invasion of parts of Ukraine and the subsequent reciprocal sanctions between the EU and Russia, have made abundantly clear to all the obvious dangers of overreliance on a potential rival for critical supplies.

2.4 SHIFTING INTERNAL POLITICAL-ECONOMIC POSITIONS

The previous drivers have contributed to an internal shift in the politico-economic positions of public and private actors in the EU. In the past, attempts at reforming

²⁸ A. Roberts, H. Choer Moraes & V. Ferguson, *Toward a Geoeconomics Order in International Trade and Investment*, 22 JIEL 655 (2019), doi: 10.1093/jiel/jgz036.

²⁹ S. Meunier & K. Nicolaidis, *The Geopoliticization of European Trade and Investment Policy*, 57 J. Com. Mkt. Stud. 103 (2019), doi: 10.1111/jcms.12932.

³⁰ See S. Goulard, *The Impact of the US-China Trade War on the European Union*, 12 Global J. Emerging Mkt. Econ. 56 (2020), doi: 10.1177/0974910119896642.

³¹ See T. Gehrke, *Geoeconomics: How Great Power Competition Is Transforming the Global Economy*. PhD dissertation submitted at Ghent University to obtain the degree of doctor in political science (2022).

the EU's traditional trade defence instruments or at introducing new ones were blocked by Member States that were concerned this would threaten their export interests.³² Export-oriented firms, business organizations and governments used to push back against a more assertive EU trade policy, because they feared this would result in a protectionist response in kind by state capitalist economies. They often got support from ideologically liberal Member States like the United Kingdom or Scandinavian countries.

In the meantime, the position of key private and public actors has changed significantly. With Brexit, the unofficial leader of liberal Member States in the Council disappeared.³³ German businesses and its government have evolved from a key obstructor of unilateral trade instruments to one of the major champions.³⁴ As mentioned before, it was the BDI that published the very critical report on China before the European Commission and the High Representative followed with a very similar communication. The switch in the position of the German industry and government (and other export-oriented businesses and Member States) can be explained by their disappointment about market access to state capitalist economies and concern about competition from businesses from these countries on world markets. While these state capitalist economies were seen as an interesting outlet for German manufacturing products in the first decade of the twenty first century, in the meantime they are perceived more and more as competitors in the sectors in which German firms excel. Exporting firms hope that a more assertive EU trade policy will at last significantly open the lucrative Chinese market. European small open economies, which remain most sceptical about a more assertive EU trade policy, may prefer unilateral trade instruments in response to economic, sustainability and security challenges over relaxing the EU's own state aid rules, because the latter also risks distorting the internal market to their disadvantage.

2.5 ADDRESSING THE PARALYSIS OF THE WTO

Not dissimilar to the trajectory of European integration itself, global trade integration has led to concerns about externalities and unfair competition. For long, the EU has tried to solve these problems by integrating them into the multilateral

³² See e.g., Y. Bollen, F. De Ville & J. Orbie, *EU Trade Policy: Persistent Liberalization, Contentious Protectionism*, 38 J. Eur. Pub. Pol'y 279 (2016), doi: 10.1080/07036337.2016.1140758.

³³ See F. De Ville & G. Siles-Brügge, *The Impact of Brexit on EU Trade Policy*, 7 Pol. & Governance 7 (2018), doi: 10.17645/pag.v7i3.2102.

³⁴ See E. Schneider, *Germany's Industrial Strategy 2030, EU Competition Policy and the Crisis of New Constitutionalism: (Geo-)Political Economy of a Contested Paradigm Shift*, 28 New Pol. Econ. 241 (2022), doi: 10.1080/13563467.2022.2091535.

trading system.³⁵ The EU has tried to complete the WTO 'in its own image'. The WTO is seen as having an incomplete architecture, lacking strong provisions on competition, government procurement, investment as well as labour and environmental protection. In the 1940s, the parties failed to seize the opportunity to establish an International Trade Organization (ITO) that would have included provisions on these issues.³⁶

With the aim of completing the world trade regime, the EU proposed at the first Ministerial Conference (MC) of the WTO in Singapore in 1996 that the Organization should start working on developing stronger rules on investment, competition, government procurement and trade facilitation, collectively known as the 'Singapore issues', as well as on labour and environmental protection. However, the inclusion of these issues in the WTO's working agenda was strongly opposed by developing countries.³⁷ This conflict contributed to the failure to launch a new multilateral trade round in Seattle in 1999. Two years later a new round was launched in Doha. At the fifth WTO MC in Cancun in 2003 negotiations 'spectacularly collapsed'³⁸ over developing countries' opposition to start negotiating on the Singapore Issues. The Doha Round became completely stuck in the Summer of 2008. After its negotiating function broke down with the failure of the Doha Round, also the WTO's other main function, dispute settlement, became paralysed in 2019 after the United States refused to (re-)appoint judges to the WTO Appellate Body. The pursuit of plurilateral agreements and of WTO reform has yet failed to break the multilateral deadlock.³⁹

2.6 LIMITATIONS OF AND RESISTANCE TO BILATERAL AGREEMENTS

The breakdown of the Doha Round led the EU to pursue a new generation of PTAs.⁴⁰ These agreements include chapters on competition, investment, and government procurement. But these PTAs cannot fully compensate for the lack

³⁵ See F. De Ville, *EU Trade Policy as the Continuation of Internal Market Policies by Other Means*, CLEER Working Papers No. 4 (2013).

³⁶ See S. Woolcock, *The ITO, the GATT and the WTO*, in *The New Economic Diplomacy: Decision Making and Negotiation in International Economic Relations* (S. Woolcock & N. Bayne eds, Routledge 1988).

³⁷ See e.g., S. J. Evenett, *Five Hypotheses Concerning the Fate of the Singapore Issues in the Doha Round*, 23 *Oxford Rev. Econ. Pol'y* 392 (2007), doi: 10.1093/oxrep/grm025.

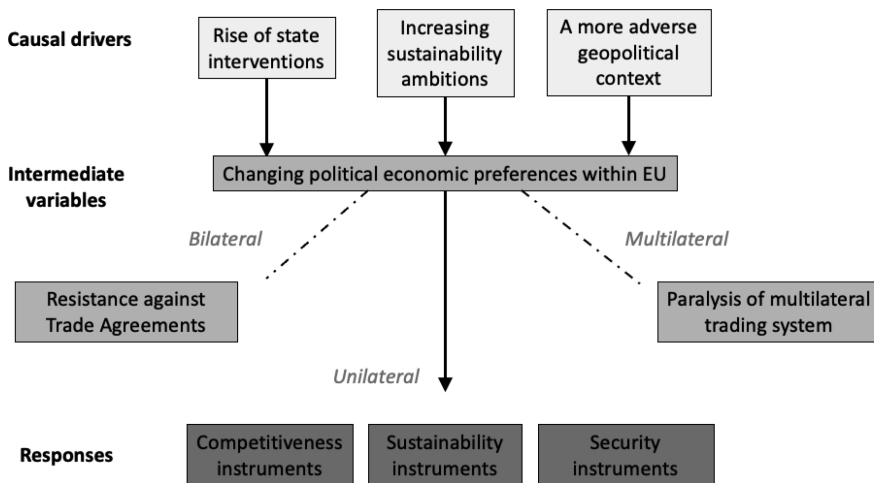
³⁸ W. A. Kerr, *Singapore Issues*, in *Handbook on the EU and International Trade* 367, 372 (S. Khorana & M. Garcia eds, Edward Elgar 2018).

³⁹ See B. Hoekman & P. C. Mavroidis, *WTO Reform: Back to the Past to Build for the Future*, 12 *Global Pol'y* 5 (2021), doi: 10.1111/1758-5899.12924.

⁴⁰ See e.g., A. R. Young, *Liberalizing Trade, Not Exporting Rules: The Limits to Regulatory Co-ordination in the EU's 'New Generation' Preferential Trade Agreements*, 22 *J. Eur. Pub. Pol'y* 1253 (2015), doi: 10.1080/13501763.2015.1046900.

of multilateral agreements. The EU does not have trade and/or investment agreements with some of its most important trading partners and economic competitors, and attempts to conclude agreements with the United States, Brazil or China have shown that this is not necessarily easier than multilateral negotiations. Moreover, competition provisions in PTAs have been assessed as ‘lack[ing] detail and enforceability’⁴¹ and the same applies to labour and environmental provisions in sustainable development chapters in PTAs.⁴² In addition, the negotiation and ratification of bilateral trade agreements has increasingly been politicized, as expressed for example in the Stop the Transatlantic Trade and Investment Partnership (TTIP) and Comprehensive Economic and Trade Agreement (CETA) campaigns. The failure to make multilateral rules on competition, procurement, investment and labour and environmental protection, the slow and difficult progress of bilateral negotiations, and where these agreements are concluded, the difficulty to enforce provisions on these issues seem to leave unilateral measures as a last resort. In comparison with bilateral agreements, unilateral measures also have the advantage that they can be applied to all trading partners.

Figure 1 The EU’s Unilateral Turn: Causal Drivers, Intermediate Variables, and Responses



⁴¹ V. Demedts, *Which Future for Competition in the Global Trade System: Competition Chapters in FTAs*, 49 J. World Trade 407, 435 (2015), doi: 10.54648/TRAD2015017.

⁴² See e.g., Harrison et al., *supra* n. 8.

3 BRIEF INTRODUCTION TO THE NEW INSTRUMENTS

For our discussion of the new instruments, we group them into three categories according to their main objective: the pursuit of competitiveness, sustainability, or security.⁴³ We recognize that the EU may have mixed motives for several instruments (e.g., promoting sustainability *and* levelling the competitive conditions between EU and foreign firms), but think that grouping the instruments according to their primary motivation adds analytical clarity.

3.1 COMPETITIVENESS INSTRUMENTS

The first set of instruments has the primary objective of balancing competitiveness ('levelling the playing field') between EU firms (and workers) and third country firms on the European and foreign markets. They follow from a concern that the EU is more open towards foreign firms and more competition-enforcing towards its own firms than third countries are and that this causes competitive disadvantages to EU firms.

The *international procurement instrument* (IPI)⁴⁴ allows the EU to restrict non-EU companies' access to European public procurement markets if such companies' home governments do not grant access to their public procurement markets to EU firms on an equivalent basis. Hence, the main goal of the instrument is to promote reciprocity in public procurement liberalization between the EU and third countries, preferably by encouraging third countries to increase their openness to EU bidders for government contracts. The IPI has been adopted by the European Parliament and the Council in June 2022. It had been long in the making. The IPI was first proposed by the European Commission ten years earlier, in March 2012.⁴⁵

The *foreign subsidies regulation*⁴⁶ (FSR) gives the European Commission the opportunity to examine if non-EU companies that are participating in public procurement tenders or in mergers and take-overs on the internal market have

⁴³ ECIPE 2022, *supra* n. 2, use the same category descriptions. See also J. Chaisse & G. Dimitropoulos, *Special Economic Zones in Economic Law*, 24 J. Int'l Econ. L. 229–257 (2021), doi: 10.1093/jiel/jgab025. The authors propose classic unilateralism, embedded unilateralism, sustainability unilateralism and national security unilateralism as categories.

⁴⁴ *Regulation (EU) 2022/1031 of the European Parliament and of the Council of 23 June 2022 on the Access of Third-Country Economic Operators, Goods and Services to the Union's Public Procurement and Concession Markets and Procedures Supporting Negotiations on Access of Union Economic Operators, Goods and Services to the Public Procurement and Concession Markets of Third Countries (International Procurement Instrument – IPI)*, OJL 173 (30 Jun. 2022).

⁴⁵ See Bollen, De Ville & Orbie, *supra* n. 32.

⁴⁶ *Regulation (EU) 2022/2560 of the European Parliament and of the Council of 14 December 2022 on Foreign Subsidies Distorting the Internal Market*, OJL 330/1 (23 Dec. 2022).

been granted distortive subsidies from a non-EU government. If the Commission finds that a company has benefited from a subsidy, that this distorts competition in the internal market, and that the effect on the EU overall is negative, it can impose preventive or remedial measures: prohibiting the award of a public contract or a merger or acquisition, or imposing fines on the third-country firm. The regulation has been adopted by the Council and Parliament in June 2022.

3.2 SUSTAINABILITY INSTRUMENTS

The second set of trade measures aims to limit the potential negative impacts of goods and services that are consumed in the EU or of the international conduct of businesses with significant presence in the EU. These externalities include human rights, labour rights and the environment and can be addressed by regulating the trade flows that enable them. Conversely, the regulation of the access to the EU's internal goods and services market is a means for the Union to influence the sustainability policies of third countries.

The *carbon border adjustment mechanism* (CBAM) is a leading example, focusing on CO₂ emissions.⁴⁷ The measure will require EU importers of certain CO₂ emission-intensive products to buy emission permits equivalent to the price that would have been paid if the product had been produced in the EU. The tax that has already been paid for CO₂ emissions in third countries are deductible from the price of CBAM-permits required for imports into the EU. CBAM would be phased-in gradually and at the same pace as free emission permits for the covered emission-intensive sectors in the EU would be phased out. Like the IPI, talks on a CBAM have a long history in the EU. The mechanism was first proposed in 2008 by the French government,⁴⁸ but the idea was blocked by liberal Member States and Directorates-General in the European Commission. However, twelve years later it was proposed by the European Commission as an indispensable part of the European Green Deal, to protect the integrity of the EU's climate policies, avoid carbon leakage, and encourage third countries to increase their climate ambitions. The European Parliament and the Council reached an agreement on the CBAM regulation in December 2022 and approved it in April 2023.⁴⁹

⁴⁷ *Regulation (EU) of the European Parliament and of the Council of Establishing a Carbon Border Adjustment Mechanism*, 2021/0214 (COD) (2021).

⁴⁸ J. Wiers, *French Ideas on Climate Trade Policies*, *Carbon & Climate L. Rev.* 18 (2008), doi: 10.21552/CCLR/2008/1/31.

⁴⁹ *Regulation (EU) 2023/956 of the European Parliament and of the Council of 10 May 2023 Establishing a Carbon Border Adjustment Mechanism*, OJ L 130, 52–104 (16 May 2023).

The *regulation on deforestation-free products*⁵⁰ (or EU deforestation regulation, EUDR) aims to address the EU's externalities on the climate and biodiversity globally by reducing deforestation linked to the consumption of high-risk products such as soy, beef, palm oil, timber, coffee and cacao. The regulation sets mandatory due diligence rules for companies that place these products on the EU market or export them from the EU. Companies should prove that there is only a negligible risk that the products, which they place on the EU market, have contributed to deforestation. In December 2022, the European Parliament and the Council reached an agreement on this regulation.

The *directive on corporate sustainability due diligence*⁵¹ (CSDD) also aims to encourage sustainable and responsible behaviour by European enterprises. Companies will be required to identify, prevent, and mitigate externalities from their conduct on human and labour rights or the environment. These requirements will not only apply to companies' own activities, but also to those of their subsidiaries and other firms within their supply chains. These obligations will apply to EU companies and non-EU companies with minimum levels of Union employment and/or turnover, with lower thresholds for certain high-impact sectors. Non-respect of these obligations may result in sanctions. Victims of damages that could have been avoided with appropriate due diligence measures will be able to take legal action against companies. After difficult internal negotiations, the Council adopted its position on the directive in December 2022, while at the time of writing (May 2023) the European Parliament is about to adopt its position in plenary, after which inter-institutional negotiations will start.

3.3 SECURITY INSTRUMENTS

A final set of instruments aims to ensure that trade interdependence does not threaten the security interests of the European Union or its Member States.

The *foreign direct investment screening framework*⁵² (FDISF) sets up a mechanism for information-sharing and cooperation between Member States and the European Commission on inward investments that may compromise European

⁵⁰ *Proposal for a Regulation of the European Parliament and of the Council on the Making Available on the Union Market as Well as Export from the Union of Certain Commodities and Products Associated With Deforestation and Forest Degradation and Repealing Regulation (EU) No 995/2010, COM/2021/706 final (2021).*

⁵¹ *Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937, COM/2022/71 final (2022).*

⁵² *Regulation (EU) 2019/452 of the European Parliament and of the Council of 19 March 2019 Establishing a Framework for the Screening of Foreign Direct Investments into the Union, OJ/L 791 (21 Mar. 2019).*

security or public order interests. The framework allows the Commission and the Member States to issue opinions on investments threatening the security or public order or undermining a project of interest to the whole EU. While it sets certain requirements for investment screening, the Member States maintain the autonomy to decide on whether to adopt or modify a national screening mechanism, as well as whether a specific investment should be allowed on their territory. The regulation establishing the framework has been adopted after a swift legislative process in March 2019 and fully applies since October 2020.⁵³

The *anti-coercion instrument* (ACI)⁵⁴ aims to protect the European Union's and the Member States' interests and policy choices against unwarranted interference from non-EU countries. If a third country uses economic coercion, by applying or threatening to apply trade or investment measures to pressure the Union or Member States (not) to make a particular policy choice, the EU will try to end this coercion through engagement with the third country and, if necessary, by imposing countermeasures. The Council and European Parliament reached a political agreement on the ACI after difficult trialogue negotiations in March 2023.

4 KEY CHARACTERISTICS OF THE NEW INSTRUMENTS

In this section, we move to identifying key characteristics of the EU's new unilateral instruments. In general, the European Union frames the instruments through the concept of 'open strategic autonomy', the new *leitmotiv* for its overall trade policies. This implies that the goal is still to have as open markets as possible, while preserving sufficient autonomy for EU policy choices where necessary. The EU stresses that the new instruments neither have an express goal of decoupling the European economy from other economies, nor of radically reshoring (strategic) industries or jobs back to the EU. More specifically, we argue that we can identify five key logics or characteristics that are to a greater or lesser extent present in the new unilateral instruments: reciprocity, deterrence, built-in engagement, internal policy extension and pursuit of international public goods. We find that the instruments fulfil these characteristics to different degrees, as visualized in Table 1.

⁵³ Z. T. Chan & S. Meunier, *Behind the Screen: Understanding National Support for a Foreign Investment Screening Mechanism in the European Union*, 17 Rev. Int'l Org. 513 (2022), doi: 10.1007/s11558-021-09436-y.

⁵⁴ *Proposal for a Regulation of the European Parliament and of the Council on the Protection of the Union and its Member States from Economic Coercion by Third Countries*, COM/2021/775 final (2021).

Table 1 Summary of the Key Characteristics of the New Unilateral Instruments

EU's new unilateral instruments		Competitiveness instruments		Sustainability instruments			Security instruments	
		IPI	FSR	CBAM	EUDR	CSDD	FDISF	ACI
EU's relationship with the third country	Reciprocity Mutual rights and obligations between EU and third country	YES	YES, BUT	YES	YES, BUT	YES	NO	NO
	Deterrent Preferably not to be used	YES	YES	NOT REALLY	NOT REALLY	NOT REALLY	NOT REALLY	YES
	Built in engagement with third country/ party	YES	YES, BUT	NOT REALLY	NOT REALLY	NOT REALLY	YES, BUT	YES
	Extension of EU policies EU's internal rules are also applied in EU's external relations	YES	YES	YES	YES, BUT	YES	NOT REALLY	NO
Policy rationale	International public goods Implement objectives of international treaties	YES, BUT	YES, BUT	YES	YES	YES	YES, BUT	YES, BUT

4.1 RECIPROCITY

The first logic in the EU's design and justification of the instruments is the pursuit of reciprocity. Reciprocity implies that the EU expects third country governments to apply the same rules as the EU applies to its Member States and companies. The competitiveness instruments attempt to encourage third countries to liberalize their procurement markets (IPI) and to end distortive subsidies (FSR) in par with

European policies, to ensure equal competition on EU and foreign markets. The same applies *mutatis mutandis* to sustainability instruments. With CBAM, the EU hopes to encourage third countries to introduce climate policies and a CO₂ price as high as the EU's.

Reciprocity as an angle of observation may however also reveal an important vulnerability in some of the EU's new instruments. The EU may indeed be a global leader in CO₂ emission reductions (CBAM) and in the openness of its procurement markets (IPI) but may nevertheless be seen to do worse compared to other countries in refraining from subsidizing its own farmers and some industrial sectors (FSR), or in asserting political pressure on third countries with the leverage of its massive internal market (ACI). As for biodiversity (EUDR), rainforests and other biodiversity hotspots are not divided equally between the EU and third countries, including because of historical deforestation trends.⁵⁵ The EU also does not limit screening of inwards investment to countries who reciprocally screen incoming European investment (FDISF).

Moreover, in a more radical sense of reciprocity, would the EU also accept to follow more stringent third country standards? The reciprocity that we observe thus does not appear fully consistent. The EU risks being exposed to accusations of double standards and similar reciprocity measures being applied by third countries. In that scenario, the EU's unilateral instruments do not produce the desired reciprocal openness, but may incite a spiral of reciprocal protectionism.

4.2 DETERRENCE: IMPOSING MEASURES AS A MEANS OF LAST RESORT

A second, somewhat counter-intuitive characteristic of several instruments is that the EU would in fact prefer *not* to use them. These measures are designed to act as a deterrent: they should prevent (in)actions of third countries or firms for fear of consequences, and hence help achieve the EU's underlying policy objective. This is clearest for the ACI, which aims to avoid foreign interference in the pursuit of a legitimate policy goal by the EU or its Member State(s). If successful, the EU would never have to resort to countermeasures. The same reasoning can be applied to the competitiveness measures: the aim is to deter third countries from distorting free competition.

The sustainability instruments can be less productively characterized as deterrents. On the one hand, these measures are rather offensive: they aim at a positive policy change in third countries towards targets that the EU has set. Through the CSDD, for example, the EU aims to incentivize EU-based companies to better

⁵⁵ T. M. Brooks et al., *Global Biodiversity Priorities*, 313(5783) *Sci.* 58–61 (2006), doi: 10.1126/science.1127609.

guarantee the respect of human, labour and environmental rights throughout their value chains, and to indirectly spur third country governments to improve conditions in these areas. The same applies to the EUDR with regard to forest conservation.

4.3 BUILT-IN OPPORTUNITIES FOR ENGAGEMENT

A third key characteristic is that several instruments foresee engagement with third countries or firms before measures kick in. Of the EU measures under analysis, the European Commission has explicitly been given discretion on whether or not to act in the IPI, FSR and ACI instruments, as well as the leeway for seeking a negotiated solution. The IPI foresees (Article 5) the possibility of consultations between the EU and a third party to eliminate the alleged third-country measure or practice. Under the FSR, an undertaking may make commitments to remedy the distortion that the foreign subsidies may cause on the internal market (Article 6). Under the ACI, the procedure foresees (Article 5) the Commission engaging with the third country concerned in e.g., direct negotiations, mediation or international adjudication to first see if the economic coercion can be ended without counter-measures.

For the EU to successfully counter claims of protectionist intent, the cooperative efforts it takes by virtue of these provisions will need to be sincere. Effective consultations prior to unilateral actions are a pre-requisite for the measures' WTO compliance.⁵⁶ Furthermore, the three sustainability instruments CBAM, EUDR and CSDD have limited explicit support to offer on this account beyond any discussions that may take place in assessing the fulfilment of the EU's stringent requirements. The instruments are thus found wanting on this characteristic.

4.4 EXTENSION OF THE EU'S INTERNAL POLICIES

A fourth characteristic is the extension of the EU's internal policies to other countries to internalize extraterritorial externalities. For the competitiveness instruments, the EU's internal market rules on state aid are extended to aid from third country governments to companies participating in procurement or acquisitions in the EU. In CBAM, for the actual CO2 footprint of the EU to be reduced, the CO2 emissions of products produced *and* consumed in the EU need to be included across their entire life cycles. Otherwise, externalities of EU consumption would be borne by countries other than the EU itself. The rationale of CBAM can thus

⁵⁶ *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R, paras 165–166 (1998).

partially be explained with this logic: extending the EU's ETS outside of the Union's borders. Similarly, the CSDD and EUDR extend the strong protection of human, labour and environmental rights and of forests, respectively, across the entire value chain. The caveat on EUDR is that the country risk benchmarking system foreseen in the regulation may make requirements more burdensome for imports from some (especially developing) countries than others.

The extension from the internal to the external dimensions of governing public goods has thus also clear limits. When the environmental and social externalities are not evenly distributed across the supply chain, the extension may in fact lead to a disparate outcome. The burden is predominantly carried by the third country or actor falling under the external aspect of the policy, not the domestic actor within the internal policy. A possible step too far in this type of extraterritoriality – eco-imperialism, opponents might say – would be to extend the EU measures to activities where the proxy to the EU is missing altogether. For the security instruments, a parallel in internal EU policies is largely absent.

4.5 THE PURSUIT OF GLOBAL PUBLIC GOODS

A fifth and final characteristic is the pursuit of global public goods rather than more narrowly pursuing EU economic interests. The Union justifies the instruments as promoting fair and open competition (in government procurement (IPI) and public subsidization (FSR)) that would benefit all countries, climate mitigation to achieve the global community's UNFCCC targets (CBAM), the global protection of forests (EUDR), and the respect of labour and human rights (CSDD) that are seen as universal minimum norms. Even the protection of a state's security (FDISF) and sovereignty (ACI) may be understood as global public goods. The EU's objectives are thus not primarily presented as industrial policy tools to promote technological leadership or employment in the EU. Still, it cannot be denied that the latter outcomes could be a side-effect, and may be a hidden motivation of some EU actors, in virtually all of the instruments. Moreover, in line with the reciprocity and deterrent characteristics, if third countries change policies only in activities affecting the EU, this would suffice to escape EU measures without benefitting the rest for the globe.

5 CONCLUSIONS

In its 2021 trade strategy, the European Commission framed itself as a 'credible supporter' of multilateralism and defended at the same time the introduction of

'autonomous measures' as core objective of trade policy for the medium term.⁵⁷ Only two years later, the EU has proposed or introduced more than half a dozen unilateral trade instruments. Given the strong focus on bilateral and multilateral avenues of the previous 'Global Europe' strategy from 2006 and the 'Trade for All' strategy of 2015, this relative shift in emphasis in EU trade policy from multilateral and bilateral to unilateral instruments is remarkable. We argue that this unilateralization of EU trade policy is the result of six interrelated drivers: the rise of state interventions, increasing sustainability challenges, a more adverse geopolitical context, the paralysis of the multilateral trading system, resistance to bilateral trade agreements and changing preferences within key Member States of the EU. Whereas the rise of state interventions, increased sustainability ambitions, and a more adverse geopolitical context are the underlying causal drivers, the paralysis of the multilateral trading system, the resistance to bilateral trade agreements and changing political economic preferences within the EU enabled the choice to respond with unilateral trade instruments.

The newly introduced instruments can be clustered in three distinct categories according to their main objectives. The IPI and FSR are aiming primarily to improve the position of European companies in international competition. The CBAM, the regulation on deforestation-free products, and the directive on CSDD are mainly striving for attaining increased sustainability ambitions. The FDISF and ACI are targeting security-related interests of the EU and its Member States.

This unilateral turn of EU trade policy has some specific European characteristics. The potential trade-restrictive impact of implementing the measures is portrayed by the EU as 'transitional' towards the first-best option of free and sustainable trade.⁵⁸ The closing of the EU market is seen as a means not as an end in itself. This contrasts with recent trade policies of some other countries, and most notably the US, who's openly expressed goal seems to be to keep a technological advantage, towards China in particular, as well as to re-shore industrial jobs to the US. We identified five key characteristics in the design and in the EU's justification of the instruments: (1) they emphasize reciprocal openness between the EU and its trading partners, (2) they are trusted to have a deterrent effect, (3)

⁵⁷ *Communication from the Commission, supra n. 1.*

⁵⁸ European Commission, *Communication on Trade Policy Review – An Open, Sustainable and Assertive Trade Policy*, COM(2021), 66 notes, at 8: the EU's 'strategic autonomy encompasses – assertiveness and rules-based cooperation to showcase the EU's preference for international cooperation and dialogue, but also its readiness to combat unfair practices and use autonomous tools to pursue its interests where needed'. Similarly in European Commission, *Communication of May 2020 'Europe's Moment: Repair and Prepare for the Next Generation'*, COM(2020) 456, 2: 'We will strengthen our strategic autonomy while preserving the benefits of an open economy'; as well as in the European Council Conclusions of 1–2 Oct. 2020, para. 3: 'achieving strategic autonomy while preserving an open economy is a key objective of the Union'.

they include possibilities for third countries or firms to engage with the EU before the instrument is applied, (4) they extend the internal market logic to third countries, (5) they underline the EU's self-perception as a 'global force for good'.⁵⁹

Various potential inconsistencies in the instruments become apparent when they are plotted against these five characteristics (see Table 1). The competitiveness instruments come closest to reflecting all these characteristics, on the condition that we qualify free competition as a global public good. While the sustainability instruments can be said to most clearly pursue global public goods as integrated in the UN Sustainable Development Goals, they also impose EU targets offensively and automatically on third countries and companies. The security instruments lack corresponding regulation inside the EU, and the characteristic of reciprocity. As the cliché goes, the proof of the pudding will be in the eating. Especially for those instruments where the EU – and the Commission in particular – has discretion on whether or not to act, the eventual evaluation will depend on how this discretion is used. Nevertheless, our analysis has shown that we can detect a notable unilateral turn in EU trade policy, with specific European characteristics. We hope our framework offers inspiration for analysis of new unilateral instruments developed by other actors as well, possibly in a comparative perspective.

⁵⁹ Our analysis is to some degree in line with another recent conceptual framework that distinguishes between 'constructive, deconstructive and reconstructive unilateralism' in the EU's new trade policy instruments, see G. Vidigal, *The Unilateralization of Trade Governance: Constructive, Reconstructive and Deconstructive Unilateralism*, 50(1) *Legal Issues of Econ. Integration* (2023). This systematization of Vidigal stems from an earlier description of A. O. Sykes, *Constructive Unilateral Threats in International Commercial Relations: The Limited Case for Section 301*, 23(2–3) *L. & Pol'y Int'l Bus.* (1992). Our analysis indeed corroborates that the EU's instruments are not merely constructive vis-à-vis the multilateral trading system: they go beyond proportionate countermeasures in enforcing international trade law obligations. They fall rather firmly in the reconstructive category: trading rules are modified but in pursuit of internationally-accepted policy objectives. We find on the other hand only limited traces of deconstruction – the complete abandonment or challenging of existing legal norms and institutions – in the EU's new unilateral instruments.