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EU TRADE GOVERNANCE

Assessing Prometheus?

edited by
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Abstract

This e-book draws its origin from a High-Level Policy dialogue that took place on January 10-11, 2024, in Turin and reproduces some of its contributions. The goal is to provide concepts and perspectives to better understand the current evolution of EU trade policy and the governance role the EU plays and could play in international trade affairs. The authors speculate on the EU's action in an increasingly geopolitical world, its relation with multilateralism and the World Trade Organisation ("WTO"), the evolution of Preferential Trade Agreements ("PTAs"), in particular with respect to sustainability issues, the increasing use of unilateral or "autonomous" instruments. Far than offering a final assessment, which is both difficult and premature, the e-book offers a rich food for thought. What emerges is the ambivalent nature of current EU trade policy, both innovative and controversial, which makes it alike to the mythological figure of Prometheus and what it represents.

Keywords

EU, WTO, multilateralism, trade policy, governance

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Luca Rubini is Associate Professor of International Law at the University of Milan and Faculty Member of the Center for Transnational Legal Studies in London. Previously he held positions at the Law Schools of the Universities of Turin, Birmingham and Leicester. Sometime in the past he served as legal secretary in the cabinet of Advocate General Jacobs at the European Court of Justice. Luca has law degrees from the Catholic University, Milan, and King's College London.

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Elisa Baroncini[1]

Introduction

EU trade policy is characterized by the constant effort to respect and promote sustainable development as significantly advanced and articulated in the sustainable development goals (SDGs) of the 2030 Agenda,[2] with special attention

1 This contribution is also part of the activities for the Jean Monnet Module "Reforming the Global Economic Governance: The EU for SDGs in International Economic Law (Re-Globe)" funded by the European Union.

2 A/RES/70/1, *Transforming our World: the 2030 Agenda for Sustainable Development*, Resolution adopted by the General Assembly on 25 September 2015. On the 2030 Agenda see, *ex multis*, Banketas and Seatzu (2023): Huck (2022).

to strengthening the international rule of law.[3] At the bilateral level, the EU pursues its trade agenda of openness, sustainability and assertiveness[4] through the new generation of trade agreements (TAs) - free trade agreements (FTAs) or preferential trade agreements (PTAs)[5] within the "Global Europe: Competing in the World" strategy,[6] which was significantly enhanced and most authoritatively consolidated with the Lisbon Treaty.[7] The new EU TAs, carrying out the common commercial policy in alignment with the values of the EU international action codified in Articles 3, para. 5, and 21 TEU[8], are among the most innovative and relevant tools in the field of International Economic Law, where trade and investments are reconceived to be major drivers of sustainability.[9]

Beyond significantly extending and deepening economic integration among the contracting parties by comparison to the WTO system, the new EU TAs feature ambitious chapters focused on trade and sustainable development

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3 Cf. Hinojosa-Martínez and Pérez-Bernádez (2023).

4 See COM(2021), *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*, Brussels, 18 February 2021. For an updated analysis of the EU trade policy see, *inter alia*, Weiß and Furculita (2024).

5 The International Economic Law (IEL) agreements concluded by the EU, in particular after the entry into force of the Lisbon Treaty, are often referred to as free trade agreements (FTAs). Technically, in IEL, an FTA is a treaty establishing a free trade area through the elimination of tariff and non-tariff trade barriers among the FTA contracting parties. When the agreement adds to the elimination of internal trade barriers the adoption of a common custom tariff vis-à-vis third countries, that agreement creates a customs union. The expression "preferential trade agreement" (PTA) includes both types of IEL agreements. Within the WTO system, PTAs are very commonly referred to also as "regional trade agreements" (RTAs), as preferential agreements were originally stipulated basically among countries belonging to the same region, to promote stability and economic integration within a specific geographical area. In the wide net of trade agreements of the EU, only the Association Agreement with Turkey set up a customs union. However, since the entry into force of the Lisbon Treaty, the purpose of the IEL agreements is to set up a free trade area, or an economic partnership. On these aspects see Stoll and Xu (2022), 312-322.

6 *COM(2006) 567, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions – Global Europe: Competing in the World - A Contribution to the EU's Growth and Jobs Strategy*, Brussels, 4 October2006.

7 On the Lisbon Treaty cf Rubini and Trybus (2012).

8 On the values of the EU international action see Casolari (2021); Cremona (2018); Manchin, Puccio and Yildrim (2024).

9 For an overview of the new EU TAs within a general analysis of PTAs see Claussen and Vidigal (2024); Claussen, Elsig, Polanco (2025); Griller, Obwexer and Vranes (2017); Remondino (2023) 149–186.

(TSD Chapters).[10] They include articulated institutional mechanisms for their functioning, with several specialized intergovernmental bodies and arbitration panels/groups of experts to settle disputes. Additionally, civil society plays an important role in the monitoring and implementation of the TAs, through the setting up of the domestic advisory groups (DAGs) and civil society dialogue mechanisms.[11] Private parties are also significantly empowered in the new EU PTAs through the increasing references to corporate social responsibility found in the preambles and specific provisions of those treaty instruments.[12]

Recently, the EU has activated the bilateral dispute settlement mechanisms (DSMs) of the new TAs. The reports issued so far[13] consistently emphasize issues related to sustainability. Notably, the Korea - Labour Commitments case specifically focuses on enforcing certain provisions of the TSD Chapter within

10 On the EU TSD Chapters cf. Hradilová and Svoboda (2018) 1019-1042; Kuang (2021) 1031-1068.

11 See Martens and Potjomkina and Orbie (2020).

12 See e.g. the Preamble of the EU-Canada Comprehensive Economic and Trade Agreement (CETA), where the Parties encourage "enterprises operating within their territory or subject to their jurisdiction to respect internationally recognised guidelines and principles of corporate social responsibility, including the OECD Guidelines for Multinational Enterprises, and to pursue best practices of responsible business conduct" (Council Decision (EU) 2017/37 of 28 October 2016 on the signing on behalf of the European Union of the Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, *OJEU* 2017, L11/1). See also Article 13.10, para. 2, lett. e) of EU-Viet Nam FTA: "... the Parties ... in accordance with their domestic laws or policies agree to promote corporate social responsibility, provided that measures related thereto are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties or a disguised restriction on trade; measures for the promotion of corporate social responsibility include, among others, exchange of information and best practices, education and training activities and technical advice; in this regard, each Party takes into account relevant internationally agreed instruments that have been endorsed or are supported by that Party, such as the Organisation for Economic Co-operation and Development Guidelines for Multinational Enterprises, the United Nations Global Compact and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy" (Council Decision (EU) 2019/753 of 30 March 2020 on the conclusion of the Free Trade Agreement between the European Union and the Socialist Republic of Viet Nam, *OJEU* 2020, L186/1).

13 They are the following three panel reports: *Ukraine - Wood Export Bans, Restrictions Applied by Ukraine on Exports of Certain Wood Products to the European Union*, Final Report of the Arbitration Panel established pursuant to Article 307 of the Association Agreement between Ukraine, of the one part, and the European Union and its Member States, of the other part, 11 December 2020; *Korea - Labour Commitments*, Panel of Experts Proceeding Constituted under Article 13.15 of the EU-Korea Free Trade Agreement, Report of the Panel of Experts, 20 January 2021; *SACU - Poultry Safeguards, Southern African Customs Union – Safeguard Measure Imposed on Frozen Bone-In Chicken Cuts from the European Union*, Final Report of the Arbitration Panel, 3 August 2022.

the EU-South Korea Free Trade Agreement.[14] After a brief presentation of the key aspects of the TAs procedures dealing with the complaints raised by the contracting parties, this chapter will highlight those sustainability issues in the contentious proceedings triggered by the EU.

The dispute settlement mechanisms of the new EU TAs

The trade agreements of the EU have always included dispute settlement mechanisms (DSMs). They initially featured very basic procedures, while the models of the new EU Trade Agreements are significantly more structured.[15] The recent DSMs vary depending on the type of obligations they address. If the disputes involve trade liberalization rules, the dispute settlement mechanism tends to be more assertive while constantly looking for a diplomatic solution to the case. When dealing with complaints related to the TSD chapters, most trade agreements advance an inclusive and informed process. Such a promotional approach also contemplates an adjudicatory phase, nevertheless privileging dialogue and cooperation for the capacity building of the defending party on environmental and social standards.[16]

The DSM handling grievances concerning free trade rules for goods and services is similar to the WTO proceedings. Hence, the disputants have first to enter into good faith consultations, and, if the latter fail, the complaining party may ask for the establishment of an arbitration panel of independent experts. The adjudicators have to interpret the TAs provisions "in accordance with customary rules of interpretation of public international law, including those codified in the Vienna Convention on the Law of Treaties";[17] and the final panel report has to outline "findings of fact, the applicability of the relevant provisions and the basic rationale for any findings and recommendations".[18] Should the panel report not be respected within a reasonable period of time, and a compensation arrangement not be reached, the aggrieved party is entitled to suspend TA's obligations "at a level equivalent to the nullification or impair-

14 Council Decision 2011/265/EU of 16 September 2010 on the signing, on behalf of the European Union, and provisional application of the Free Trade Agreement between the European Union and its Member States, of the one part, and the Republic of Korea, of the other part, *OJEU* 2011, L127/1.

15 For a complete overview of DSMs in EU trade agreements see Garcia-Bercero (2006).

16 For these aspects see Espa (2024); Nedumpara (2022).

17 Article 14.16, Rules of interpretation, of the EU-Korea FTA.

18 Article 15.6, Terms of Reference of the Arbitration Panel, of the EU-Vietnam FTA.

ment caused by the violation".[19] It is also important to emphasize that WTO rules take precedence over the EU TAs obligations. The bilateral trade agreements, in fact, state that "nothing in [the TAs] require ... [the Parties] to act in a manner inconsistent with their obligations under the WTO Agreement".[20] Additionally, an arbitration panel has also to "take into account relevant interpretations in panel and Appellate Body reports adopted by the [WTO Dispute Settlement Body]".[21] To ensure consistency between the bilateral treaty regime and the WTO system in the event of amendment of any multilateral rule incorporated by the Parties in their trade agreement, the EU and its partner are also required to engage in consultations. Following such a review, "the Parties may, by decision in the Trade Committee, amend this Agreement accordingly".[22] It is thus clear that the EU TAs have not been conceived as a tool to depart from the legal framework of the WTO system. Both contracting parties and panelists are, in fact, demanded to ensure that the bilateral framework remains coherent with and supportive of the multilateral one, being the GATT/WTO system a traditional and very strong priority of the EU external policies.[23]

There are three main differences between the EU TAs dispute settlement rules and the multilateral trading system: they do not provide for the adoption of the dispute proceedings stages and results by a political body as the WTO Dispute Settlement Body (DSB), nor do they set up an appellate procedure, thus looking for binding solutions of trade complaints within a more stringent timing, and the possibility of submitting amicus curiae briefs to the arbitration panel is explicitly permitted. In fact, interested natural or legal persons, established in the territory of a Party and independent from the governments of the Parties, are "authorized to submit amicus curiae briefs to the arbitration panel".[24] Pursuant to the Rules of Procedure annexed to the new TAs, the amicus curiae briefs have to be filed within a short time after the establishment

19 Article 29.14, Temporary remedies in case of non-compliance, para. 13, of the EU-Canada CETA.

20 Article 16.18, para. 2 of the EU-Singapore FTA. See Council Decision (EU) 2018/1599 of 15 October 2018 on the signing, on behalf of the European Union, of the Free Trade Agreement between the European Union and the Republic of Singapore, *OJEU* 2018, L267/1.

21 Article 21.16 of the EU-Japan Economic Partnership Agreement (EPA). See Council Decision (EU) 2018/1907 of 20 December 2018 on the conclusion of the Agreement between the European Union and Japan for an Economic Partnership, *OJEU* 2018, L330/1.

22 Article 16.3, entitled "Evolving WTO Law", of the EU-Vietnam FTA.

23 On the relation of PTAs with the WTO system see Baroncini (2017).

24 Article 14.15 of the EU-Korea FTA.

of the arbitration panel, "concise and ... directly relevant to a factual or a legal issue under consideration by the arbitration panel".[25] Furthermore, the amicus curiae submissions "shall contain a description of the person making the submission, whether natural or legal, including its nationality or place of establishment, the nature of its activities, its legal status, general objectives and the source of its financing, and specify the nature of the interest that the person has in the arbitration proceedings".[26]

The rules of the dispute settlement mechanism of the TSD Chapters provide for a significantly greater engagement of civil society. The chapters on trade and sustainable development set up "Domestic Advisory Group(s) on sustainable development (environment and labour) with the task of advising on the implementation of [the TSD] Chapter".[27] DAGs are formed by various representatives of civil society, including "independent representative organisations ... in a balanced representation of environment, labour and business organisations as well as other relevant stakeholders".[28] The first step of the TSD proceedings is the request for consultations by a contracting party. The object of such a request may be "any matter of mutual interest arising under [the TSD] Chapter, including the communications of the Domestic Advisory Groups",[29] which have to advise the Committee on Trade and Sustainable Development (CTSD, or TSD Committee), on a regular basis, on the implementation of the new EU TAs, also highlighting their difficult aspects so that a contracting party may consider the DAGs analysis as a valid basis to lodge a complaint. The soft approach of TSD proceedings implies, of course, that "[t]he Parties shall make every attempt to arrive at a mutually satisfactory resolution of the matter".[30] If direct consultations cannot settle the case diplomatically, and "a Party considers that the matter needs further discussion, that Party may request that the Committee on Trade and Sustainable Development be convened to consider the [issue]".[31] Likewise, the intergovernmental body has

25 Paragraph 40 of Annex 15 A – Rules of Procedure, EU-Vietnam FTA.

26 Paragraph 45 of Annex 29 A – Rules of Procedure for Arbitration, EU-Canada CETA.

27 Article 13.12, para. 4 of the EU-Korea FTA.

28 Article 13.12, para. 5 of the EU-Korea FTA.

29 Article 13.14, para. 1 of the EU-Korea FTA.

30 Article 13.14, para. 2 of the EU-Korea FTA.

31 Article 13.14, para. 3 of the EU-Korea FTA.

to "endeavour to agree on a resolution of the matter",[32] and the TSD Committee, as well as each contracting party, may seek the advice of the DAGs, which "may also submit communications on [their] own initiative" to the Parties or the Committee.[33] Should the impossibility of satisfactorily addressing the matter through government consultations persist, a party may move onto the next stage of the special TSD dispute settlement mechanism, that of convening a panel of experts.[34] As the TSD environmental and social standards are those expressed by the ILO and the relevant multilateral environmental organisations or bodies, collaboration and coherence with those international fora are looked after and guaranteed by the duty of the contracting parties to "ensure that the resolution [of the matter] reflects the activities of the ILO or relevant multilateral environmental organisations or bodies".[35] To achieve such coherence, both the parties and the panel "can" or "should seek information and advice" from those organisations or bodies.[36] In the adjudicatory phase, information and advice from the DAGs remain relevant, as the group of experts has to look for the position of civil society on the dispute it has to consider. Once the report is issued by the panel, "[t]he Parties shall make their best efforts to accommodate advice or recommendations of the Panel of Experts on the implementation of this Chapter", while "[t]he implementation of the recommendations of the Panel of Experts shall be monitored by the Committee on Trade and Sustainable Development".[37]

The promotional approach of TSD proceedings described here is thus evident, as the defending party has an obligation of best efforts, not of result, to implement the recommendations of the panel report, and the lack of implementation is not sanctioned by any penalty or suspensions of bilateral obligations.

Lately, the Commission proposed that the enforcement proceedings for the TSD rules be strengthened.[38] The very recent EU-New Zealand FTA thus

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32 *Ibid*.

33 See Article 13.14, para. 4 of the EU-Korea FTA.

34 See e.g. Article 13.15 of the EU-Korea FTA.

35 Article 13.14, para. 2 of the EU-Korea FTA.

36 See Articles 13.14, para. 2, and 13.15, para. 1 of the EU-Korea FTA.

37 See Article 13.15, para. 2 of the EU-Korea FTA (emphasis added).

38 COM(2022) 409, *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, The Power of Trade Partnerships: Together for Green and Just Economic Growth*, Brussels, 22 June2022, pp. 11-12.

extends the possibility to apply trade sanctions if a contracting party fails to comply with a panel report finding it has a) seriously infringed the ILO fundamental principles and rights at work, or b) failed "to comply with obligations that materially defeat the object and purpose of the Paris Agreement on Climate Change".[39] Of course, sanctioning a country that struggles to respect core values may predictably not improve the respect of those values. Therefore, constant dialogue in common bodies and with all the interested actors should be maintained in the daily management of the EU TAs, making all the required efforts to avoid complaints, or, when engaged in a dispute, to observe a constructive approach so as to achieve a fair solution, leaving the possibility of suspending concessions in TSD complaints as an extrema ratio looming at the horizon.

The first three panel reports within the EU TAs dispute settlement mechanisms

To date, three reports have been delivered regarding complaints filed within the EU TAs dispute settlement mechanisms. On 11 December 2020, the Arbitration Panel notified the Parties and the EU/Ukraine Trade Committee of its final report on the Ukraine - Wood Export Bans case. The Panel determined that the two challenged Ukrainian laws were incompatible with Article 35 of the EU-Ukraine Association Agreement (AA). Moreoever, the 2015 total ban on exports of all unprocessed wood, could not be "justified under Article XX(g) of the GATT 1994, as made applicable to the Association Agreement by Article 36 of the AA (General Exceptions) ... [since] that export ban ... [was] not 'relating to the conservation of exhaustible resources ... made effective in conjunction with restrictions on domestic production or consumption'".[40] By contrast, the 2005 export ban on ten rare and valuable wood species of low commercial use was justified under the plant life or health protection exception of Article XX(b) of the GATT 1994 "as made applicable to the Association Agreement by Article 36 of the AA ... as a measure 'necessary to protect....plant life', taking also into account relevant provisions of Chapter 13 of the AA on

39 COM(2022) 409, cit., p. 12. See Article 26.16, para. 2, let. b) of the EU-New Zealand FTA (Council Decision (EU) 2024/244 of 27 November 2023 on the conclusion, on behalf of the Union, of the Free Trade Agreement between the European Union and New Zealand, *OJEU* L, 2024/244, 28.2.2024).

40 *Ukraine – Wood Export Bans* Panel Report, para. 507.

trade and sustainable development".[41]

A few weeks later, on 20 January 2021, the group of experts appointed in the Korea - Labour Commitments case gave its decision recommending Korea to bring its Trade Union and Labour Relations Adjustment Act (TULRAA) into conformity with the principles of freedom of association enshrined in the 1998 ILO Declaration on Fundamental Principles and Rights at Work, recalled in Article 13.4, para. 3 of the EU-Korea FTA and expressly reformulated therein. Korea had, therefore, to revise the TULRAA extending the definition of worker to self-employed, dismissed and unemployed persons; recognizing trade unions also having non-workers among their members, and allowing non-members of a trade union to be elected as union officials. With reference to the obligation to make "continued and sustained efforts towards ratifying the fundamental ILO Conventions",[42] the Panel considered that the Korean practice was slow, its efforts were "less than optimal", and that there was "still much to be done".[43] Nevertheless, the group of experts overall concluded that Korea made "tangible, though slow, efforts",[44] and it was thus respecting the legal standard set out in the last sentence of Article 13.4.3 of the EU-Korea FTA.

The panel report in the SACU - Poultry Safeguards dispute was the last one to be delivered, on 3 August 2022. It concerned a safeguard measure imposed by the Southern African Customs Union (SACU) on EU imports of frozen chicken cuts. The Arbitration Panel found that the safeguard measure breached Article 34 of the EU-Southern African Development Community Economic Partnership Agreement (EU-SADC EPA)[45] because "it was not related to a product that 'is being imported' (given the time lapse between the determination, provisional measure, and definitive measure), and ... it exceeded

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41 *Ibid*. See European Commission, *The History of the EU-Ukraine Dispute on Wood Export Bans – Memo*, 12 December 2020.

42 Article 13.4, para. 3, second sentence of the EU-Korea FTA.

43 *Korea - Labour Commitments* Panel Report, para. 291. On this panel report see Boisson de Chazournes and Lee (2022); Sun Han (2021); Keon and Rammila (2021); Nissen (2022); Novitz (2022); Zhao (2022).

44 *Korea - Labour Commitments* Panel Report, para. 287.

45 See Council Decision (EU) 2016/1623 of 1 June 2016 on the signing, on behalf of the European Union and provisional application of the Economic Partnership Agreement between the European Union and its Member States, of the one part, and the SADC EPA States, of the other part, *OJEU* 2016, L250/1.

'what is necessary to remedy or prevent the serious injury or disturbances'"[46].

Civil Society, non-trade values, scope and binding force of TSD provisions in the EU TAs case law

The case law developed thus far in the bilateral dispute settlement mechanisms of the new EU TAs is already expressing some relevant sustainability features in the interpretation and application of the trade agreements. The EU litigation strategy reflects the targets indicated in the reviews proposed for the EU trade policy, promoting the EU TAs' enforcement to give credibility to the new ambitious tools in the context of constant cooperation and involvement of stakeholders and civil society in their implementation. In the present section of the chapter, attention will be devoted to the contributions given within the panel proceedings to the "sustainability revolution"[47] of the new EU TAs.

1. Amicus curiae and domestic advisory groups

As already reported, the importance of the contribution of stakeholders, more generally of any interested subject, has been expressly highlighted and acknowledged in the text of the new EU TAs. The practice of the three panels established thus far is aligned with this clear institutional policy choice on the participation of civil society through amicus curiae submissions in the proceedings.[48] The working procedures of the adjudicating bodies were closely similar: they foresaw the right of "[a]ny natural person of a party or a legal person established in the territory of a party that is independent from the governments of the parties"[49] to file their amicus curiae submissions before the groups of experts within a short period of time from their establishment - around 20 days - and they asked for terse documents addressing legal or factual aspects of the

46 *SACU – Poultry Safeguards* Panel Report, para. 371.

47 This expression is borrowed from Claussen and Vidigal (2024).

48 See European Commission, *Procedural information related to EU-Korea dispute settlement on Labour*, 19 December 2019; European Commission, *Arbitration Panel Established on Ukraine's Wood Export Ban – Deadline for Submissions*, 4 February 2020; European Commission, *Arbitration Panel Established in the Dispute Concerning the Safeguard Measure Imposed by SACU on Imports of Poultry from the EU*, 8 December 2021.

49 See European Commission, *Arbitration Panel Established in the Dispute Concerning the Safeguard Measure Imposed by SACU*, cit., at p. 1.

dispute,[50] and presenting the amici, their interest in participating to the complaint, and their source of financing.

The concrete use by stakeholders of the amicus curiae tool became more and more relevant as each panel proceedings progressed. It had a marginal role in the Ukraine – Wood Export Bans case: the arbitration body received only one amicus curiae submission "by the non-governmental organization 'Ukrainian Association of the Club of Rome' ... in Ukrainian language ... [that] was informally translated into English by the Arbitration Panel" and included in the record of the proceedings, while "neither of the Parties referred to it in their submissions".[51] Instead, in Korea - Labour Commitments, six institutions and 22 individuals presented amicus curiae briefs.[52] Even if the Group of experts did not summarize the content of each submission, it considered them with "full regard"[53] and underlined their relevance, in particular those filed by trade unions, to assess the scope and application of some parts of the contested Korean legislation.[54] The Arbitration Panel of the SACU – Poultry Safeguards case recorded three amicus curiae submissions and decided to reserve an ad hoc space in its report to present the main points raised in the amicus briefs - all put forward by meat producers and traders' associations - and the comments by the disputants on them.[55] Through this drafting technique, clear emphasis was placed on the role that amici curiae can play in enabling a solution to the complaint which is taken in the most informed setting.

In Korea - Labour Commitments, the Group of Experts also enhanced the DAGs' role in implementing and upholding workers' fundamental rights under the TSD Chapter. Considering the evidence brought by the disputants

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50 The Working Procedures of the *Korea – Labour Standards* case indicated that the amicus curiae submissions had not to be "longer than 15 pages including any annexes". See European Commission, *Procedural information related to EU-Korea dispute settlement on Labour*, cit., at p. 2.

51 *Ukraine – Wood Export Bans* Panel Report, para. 10.

52 See Appendix, lett. B) of the *Korea - Labour Commitments* Panel Report.

53 *Korea - Labour Commitments* Panel Report, para. 99.

54 See *Korea - Labour Commitments* Panel Report, paras. 160 and 236, and, in particular, para. 204, where the group of experts reported the testimony of the Korean Teachers and Education Workers' Union, "demonstrat[ing] ... the seriousness of the practical impact of [the Korean legislation pursuant to which] ... an already registered trade union can lose its legal status under the TULRAA if it permits dismissed or unemployed workers to be or remain members of the union: '[t]he Korean Teachers and Education Workers' Union (KTU) was informed of its decertification ... because nine out of its 60 000 members were dismissed workers'".

55 *SACU – Poultry Safeguards* Panel Report, Section III, *Amicus Curiae* Submissions, paras. 72-87.

as "competing",[56] and thus not adequate to find the Korean certification procedure for the establishment of trade unions as incompatible with the obligations to "respect ..., promote ... and realise ..., in their laws and practice, the principles concerning freedom of association",[57] the Panel urged both disputants to clarify this particular EU claim following up on the obligations they have under Article 13.12 of the EU-Korea FTA to designate domestic "contact point[s] with the other Party for the purpose of implementing this Chapter" and establish the DAGs "with the task of advising on the implementation" of TSD provisions. The Group of Experts thus recommended that the question on the Korean discipline for setting up trade unions "be referred to [the] consultative bodies established under Article 13.12 of the EU-Korea FTA for continued consultations".[58] While the EU allegations were not sufficient to condemn Korea on that particular claim, the Panel wisely chose not to consider the issue settled but left it open by charging also the DAGs to continue discussing whether the Korean procedures regarding the establishment of trade unions respected, in law and practice, the principles on freedom of association for workers. The central role of civil society and the cooperation of the contracting parties with it - fundamental features of the institutional structure of the new EU TAs and pillar on which the full and appropriate implementation of the treaty rules is based - are therefore presented by the Group of Experts as a core element to be enacted and respected by the EU and its partner.

2. Scope and binding force of the TSD provisions

In Korea - Labour Commitments, the defendant argued that the Panel did not have jurisdiction as the EU complaint "raised 'aspects relating to labour ... as such, without any established connection with trade between the EU and Korea...'".[59] This claim by Korea allowed the Group of Experts to clarify an essential aspect of the scope of the TSD obligations enshrined in Article 13.4.3

56 *Korea - Labour Commitments* Panel Report, para. 255.

57 *Korea - Labour Commitments* Panel Report, para. 256. See also Article 13.4, para. 3 of the EU-Korea FTA.

58 *Korea - Labour Commitments* Panel Report, para. 258, emphasis added.

59 *Korea - Labour Commitments* Panel Report, para. 56.

of the EU-Korea FTA:[60], i.e. whether the duty to respect the fundamental rights and principles at work recalled by the 1998 ILO Declaration and its Follow-up, along with the commitment to ratify the fundamental ILO Conventions extend beyond any potential trade impact on the EU-Korea relationship. The Panel considered that Article 13.4.3 "falls within the '(e)xcept as otherwise provided' clause of Article 13.2.1".[61] In fact, "it is not legally possible for a Party to aim to ratify ILO Conventions only for a segment of their workers: the ILO does not permit ratification subject to reservations ... It defies the clear logic of Article 13.4.3 to state otherwise ... [Therefore i]t is not appropriate, or even possible, to apply the limited scope bounded by 'trade-related labour' to the terms of Article 13.4.3, as proposed by Korea".[62] The Group of Experts further reinforced this relevant finding highlighting that the new structure of the EU TAs clearly makes sustainable development measures "a constitutive element"[63] of those agreements, thus promoting a new evolving concept of trade:

> ... the Parties have drafted the Agreement in such a way as to create a strong connection between the promotion and attainment of fundamental labour principles and rights and trade. The various international declarations and statements referred to in the EU-Korea FTA ... have been referenced by the Parties to show that decent work is at the heart of their aspirations for trade and sustainable development, with the 'floor' of labour rights an integral component of the system they commit to maintaining and developing. In the Panel's

60 According to this provision: "The Parties, in accordance with the obligations deriving from membership of the ILO and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its 86th Session in 1998, commit to respecting, promoting and realising, in their laws and practices, the principles concerning the fundamental rights, namely:
(a) freedom of association and the effective recognition of the right to collective bargaining;
(b) the elimination of all forms of forced or compulsory labour;
(c) the effective abolition of child labour; and
(d) the elimination of discrimination in respect of employment and occupation.
The Parties reaffirm the commitment to effectively implementing the ILO Conventions that Korea and the Member States of the European Union have ratified respectively. The Parties will make continued and sustained efforts towards ratifying the fundamental ILO Conventions as well as the other Conventions that are classified as 'up-to-date' by the ILO".

61 *Korea - Labour Commitments* Panel Report, para. 68. Article 13.2.1 of the EU-Korea FTA says that *"[e]xcept as otherwise provided in this Chapter*, this Chapter applies to measures adopted or maintained by the Parties *affecting trade-related aspects of labour ... and environmental issues* in the context of Articles 13.1.1 and 13.1.2" (emphasis added).

62 *Korea - Labour Commitments* Panel Report, paras. 67-68, emphasis added.

63 This is how the *Korea - Labour Commitments* Panel Report is commented by Vidigal (2022). See also Borowicz and Daugeliene (2023).

> view, *national measures implementing such rights are therefore inherently related to trade as it is conceived in the EU-Korea FTA.*[64]

Korea also contended that the TSD Chapter was not legally binding,[65] the 1998 ILO Declaration recalled in Article 13.4.3 "may not, as a matter of law, impose any binding obligations on ILO members",[66] and "the term 'will' in the last sentence of Article 13.4.3 ... is 'more akin to a declaration of intent than an obligation'".[67] The Group of Experts unequivocally stated that the recalled TSD provision has a legally binding nature. Article 13.4, para. 3, concluded the Panel, produces "a ... commitment on both Parties in relation to respecting, promoting and realising the principles of freedom of association as they are understood in the context of the ILO Constitution" by reaffirming "the existing obligations of the Parties under the ILO Constitution" which also creates "separate and independent obligations under Chapter 13 of the Agreement" through the incorporation of the ILO obligations.[68] Furthermore, with reference to the ratification of the fundamental ILO Conventions, the Panel found that the wording of the last sentence of Article 13.4, para. 3,[69] generates "an obligation of 'best endeavours'", which means that "the standard against which the Parties are to be measured is higher than undertaking merely minimal steps or none at all, and lower than a requirement to explore and mobilise all measures available at all times".[70]

3. Emphasizing the sustainability nature of the EU TAs

The Ukraine – Wood Export Bans and SACU – Poultry Safeguards cases were about the interpretation of traditional trade rules. However, in both cases, the panelists notably and correctly emphasized the sustainability context and purpose that now defines the new EU TAs. This aligns with the findings of the Group of Experts in Korea – Labour Commitments, which identified the domestic sustainability measures related to environmental and social standards "inherently related to trade".[71]

In Ukraine – Wood Export Bans, the central question addressed by the Ar-

64 *Korea - Labour Commitments* Panel Report, para. 95, emphasis added.

65 See *Korea - Labour Commitments* Panel Report, para. 49.

66 *Korea - Labour Commitments* Panel Report, para. 120.

67 *Korea - Labour Commitments* Panel Report, para. 262.

68 *Korea - Labour Commitments* Panel Report, para. 107.

69 See *supra* the text of Article 13.4, para. 3 of the EU-Korea FTA reported in footnote 58.

70 *Korea - Labour Commitments* Panel Report, para. 277.

71 *Korea - Labour Commitments* Panel Report, para. 95.

bitration Panel was whether the measures attacked by the European Union were protectionist measures in favour of the Ukrainian woodworking and furniture industry, or could be justified as necessary for or related to the sustainable management of Ukrainian forests, and useful to curb intensive deforestation, which is likely to have serious consequences for the ecosystem. In its legal reasoning, the Arbitration Panel emphasized that the disputants agreed on the non-trade values claimed with reference to the attacked Ukrainian measures: "it is undisputed by the Parties that the interests protected by the 2005 export ban, that is, the restoration of forests (reforestation and afforestation) more generally and the preservation of rare and valuable species more specifically, ... are 'fundamental, vital and important in the highest degree'".[72] The adjudicators also remarked that the EU "agreed ... that the preservation from extinction of any wood species is a legitimate interest of high importance".[73] Furthermore, the Arbitration Panel qualified the TSD Chapter of the EU-Ukraine AA, i.e. Chapter 13, as "relevant context"[74] to interpret the provisions of Title IV of the AA on trade and trade-related matters, thus concluding that

> the requirement to interpret Article 36 of the AA harmoniously with the provisions of Chapter 13 comports with admitting that a highly trade restrictive measure such as an export ban may still be found necessary within the meaning of Article XX(b) of the GATT 1994, as incorporated into Article 36 of the AA. The Arbitration Panel considers that the provisions of Chapter 13 (in casu, Article 290 on the right to regulate[75] and Article 294 on trade in forest products[76]) serve as relevant context for the purposes of 'weighing and balancing' with more flexibility any of the individual variables of the necessity test, considered individually and in relation to each other.

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72 *Ukraine – Wood Export Bans* Panel Report, para. 308.

73 *Ibid*.

74 *Ukraine – Wood Export Bans* Panel Report, para. 253.

75 Pursuant to Article 290, para. 1, of the EU-Ukraine AA, headed as "Right to regulate", "[r]ecognising the right of the Parties to establish and regulate their own levels of domestic environmental and labour protection and sustainable development policies and priorities, in line with relevant internationally recognised principles and agreements, and to adopt or modify their legislation accordingly, the Parties shall ensure that their legislation provides for high levels of environmental and labour protection and shall strive to continue to improve that legislation".

76 According to Article 294, headed "Trade in forest products", of the EU-Ukraine AA, 2[i]n order to promote the sustainable management of forest resources, Parties commit to work together to improve forest law enforcement and governance and promote trade in legal and sustainable forest products".

> In casu, as a consequence, the high trade restrictive effect inherent to an export ban cannot be considered to automatically outweigh the other elements to be taken into account in weighing and balancing the factors relevant to an assessment of the "necessity" of the measure.[77]

Likewise, in SACU – Poultry Safeguards, which was about the compatibility of some safeguard measures with the EU-SADC EPA, the Arbitration Panel clarified at the beginning of its findings that it "ha[d] taken note of the objectives of [the Economic Partnership Agreement] ... in terms of sustainable development", further spelling out that those purposes "ha[d] informed its analysis" of the complaint.[78] It thus reconstructed the EPA mission as

> aim[ing] not only at freer trade and greater economic relations between the EPA parties ... [considering these goals as] means to achieve a broader objective of encouraging sustainable development in the SADC region. ... Article 1 EPA (entitled 'Objectives') focuses on the development of SADC States, be it in view of the eradication of poverty (Article 1(a)), improved state capacity (Article 1(d)), or stronger economic growth (Article 1(e)). The expected mutually-beneficial relationship between trade and development is further expressed in Chapter II of the EPA, entitled 'Trade and sustainable objectives', and operationalised through a repeated commitment to 'cooperation' between the EPA parties [79].

The Arbitration Panel consequently interpreted the EU-SADC EPA trade rules without "falling into excessive formalism ... in view of the EPA's developmental nature" as "excessive formalism is not in keeping with the object and purpose of the EPA, its developmental character, and the nature of trade remedies as, ultimately, enhancing free trade".[80]

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77 *Ukraine – Wood Export Bans* Panel Report, para. 332, emphasis added.

78 See *SACU – Poultry Safeguards* Panel Report, para. 89, emphasis added.

79 *SACU – Poultry Safeguards* Panel Report, para. 167, emphasis added.

80 *SACU – Poultry Safeguards* Panel Report, para. 324, emphasis added.

The highlighted sustainability approach in the two above considered reports - formally developed under the ordinary dispute settlement mechanism for the trade pillar of the new EU TAs - anticipated, perhaps inspired, was encouraged by and/or influenced the debate which led to the 2022 Commission's communication "to further enhance the contribution of trade agreements to sustainable development".[81] This policy document promotes the "mainstreaming [of] TSD objectives throughout trade agreements",[82] rejecting an interpretation of the EU TAs that limits the consideration of non-trade values uniquely to the chapters dedicated to trade and sustainable development.

Conclusions

Our brief analysis reveals the very complex and challenging structure set up by the EU to reconceive trade agreements as a tool to enhance fairness and equilibrium, environmental protection and social progress while pursuing trade liberalization. The EU approach is in line with the sustainability nature also of the WTO,[83] and it has been mirrored in the initial case law of the new EU TAs as the panels have correctly interpreted both trade and TSD rules.

The European Union places great importance on the support of civil society in promoting, monitoring, and enforcing trade agreements. One sig-

81 COM(2022) 409, cit., p. 1.

82 COM(2022) 409, cit., p. 7.

83 In fact, as it clearly emerges from the Preamble of the WTO Agreement, the mission of the multilateral trading system is to promote a model of *sustainable* economic development: trade liberalization is the means to "raising standards of living", so that free trade has to be pursued "while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment ... enhance[ing] the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development". The case law of the WTO Appellate Body has constantly underlined this distinctive feature: "[t]he words of Article XX(g), 'exhaustible natural resources' ... must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment. While Article XX was not modified in the Uruguay Round, the preamble attached to the WTO Agreement shows that the signatories to that Agreement were, in 1994, fully aware of the importance and legitimacy of environmental protection as a goal of national and international policy. The preamble of the WTO Agreement -which informs not only the GATT 1994, but also the other covered agreements- explicitly acknowledges 'the objective of sustainable development' ... This concept [Sustainable Development] has been generally accepted as integrating economic and social development and environmental protection" (Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products (US-Shrimps)*, WT/DS58/AB/R, adopted 6 November 1998, para. 129 and footnote 107). On the relation between sustainable development and the WTO system see *inter alia* Zhao (2025).

nificant tool for this purpose is the Single Entry Point (SEP).[84] According to its Operational Guidelines, "domestic advisory groups ..., NGOs formed in accordance with the laws of any EU Member State [and c]itizens or permanent residents of an EU Member State" may lodge TSD complaints also representing "similar entities or organisations located in the partner country" of the EU.[85] Together with the traditional institutional actors in the governance of the global economy, stakeholders and civil society should always prefer a collaborative approach when deciding to file a complaint, although now it is emerging also for the EU TAs the possibility of sanctioning serious violations within TSD proceedings. Sanctions have to remain an extrema ratio, while the EU should engage on the international scene to reach that "high degree of cooperation in all fields of international relations" which is one of the values at the basis of its international action.[86]

The wise strategy chosen by the EU in the first case law of the new EU TAs needs to be preserved as it contributed to achieving fair panel reports. Together with private parties, the EU should continue to promote sustainability in the global economy with a constructive dialogue aiming at encouraging shared prosperity in general, and, for developing countries, the most fruitful capacity building for the respect of universal values. All these efforts have also to be constantly implemented in a context of full transparency. In this way, other actors may be inspired by the EU's good practice; and, in case of questionable approaches, informed discussion will take place, that may lead to fair solutions.

84 See the official website of the European Commission.

85 See European Commission, *Operating Guidelines for the Single Entry Point and Complaints Mechanism for the Enforcement of EU Trade Agreements and Arrangements*, December 2023, p. 2.

86 See Article 21, para 2 TEU.

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