Regional Trade Adjudication and the Rise of Sustainability Disputes: Korea—Labor Commitments and Ukraine—Wood Export Bans

Vidigal, G.

DOI
10.1017/ajil.2022.34

Publication date
2022

Document Version
Final published version

Published in
American Journal of International Law

INTERNATIONAL DECISIONS

EDITED BY JULIAN ARATO

REVIEW ESSAY

REGIONAL TRADE ADJUDICATION AND THE RISE OF SUSTAINABILITY DISPUTES: *KOREA—LABOR COMMITMENTS* AND *UKRAINE—WOOD EXPORT BANS*

By Geraldo Vidigal[*]

Interstate litigation under regional trade agreements (RTAs) appears to have taken off once again. After a decade (1995–2006) in which the dispute settlement system of the World Trade Organization (WTO) operated in parallel with litigation under RTAs, the period between 2007 and 2017 saw the WTO dispute settlement system attract virtually all interstate trade disputes.[1] This trend has recently and rapidly reversed. Since 2018, states have publicly invoked dispute settlement or pre-dispute settlement provisions of RTAs seventeen times, resulting in four RTA panel reports.[2]

Part of the explanation is institutional. The ability of the WTO system to resolve disputes with finality has been significantly hampered in the absence of an operational Appellate Body since the end of 2019.[3] WTO members have continued to bring disputes under the WTO Dispute Settlement Understanding (DSU) and fourteen WTO panels have issued reports since 2020. However, the DSU entitles WTO members to appeal from panel reports. Without an Appellate Body to hear appeals, eleven of these disputes were appealed "into

* Assistant Professor at the University of Amsterdam; Senior Fellow at the Berlin/Potsdam Interdisciplinary Research Group "International Rule of Law – Rise or Decline?" I thank Amy Porges, Simon Lester, Kathleen Claussen, Ignacio García Bercero, Ilaria Espa, and the editors for remarks on earlier versions of this Essay.

[1] Geraldo Vidigal, *Why Is There So Little Litigation Under Free Trade Agreements? Retaliation and Adjudication in International Dispute Settlement*, 20 J. INT'L ECON. L. 927 (2017). The only two interstate RTA disputes adjudicated during the latter period were brought under the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR). Informe Final del Grupo Arbitral, Costa Rica v. El Salvador—Tratamiento Arancelario a Bienes Originarios de Costa Rica, CAFTA-DR/ARB/2014/CR-ES/18 (Nov. 18, 2014), *available at* http://www.sice.oas.org/tpd/usa_cafta/Dispute_Settlement/CAFTADR_ARB_2014_CR_ES_18.pdf (in Spanish); Final Report of the Panel, Guatemala—Issues Relating to the Obligations Under Article 16.2.1(a) of the CAFTA-DR (June 14, 2017), *available at* https://ustr.gov/issue-areas/labor/bilateral-and-regional-trade-agreements/guatemala-submission-under-cafta-dr.

[2] See Table 1 and Table 2. I adopt a broad notion of "invocation," which considers not only formal pre-dispute settlement consultations but also consultations under provisions alternative to available state-to-state litigation. Other than knowledgeable individuals, this research has relied on documents and information gathered by Amy Porges (*available at* https://www.porgeslaw.com/rta-disputes) and Simon Lester (*available at* https://www.worldtradelaw.net/databases/ftacomplaints.php).

[3] Since 2017, the United States has blocked all proposals to appoint persons to the Appellate Body. The expiry of the terms of its members led the Appellate Body to become non-operational from December 11, 2019. The Appellate Body did issue three "post-demise" reports on appeals that were pending at the time it became non-operational.

https://doi.org/10.1017/ajil.2022.34 Published online by Cambridge University Press

the void," with no final adjudication foreseen. Only one of these panel reports was adopted without appeal.[4]

RTA adjudication seems to be filling some of the gap. With 354 RTAs currently notified to the WTO, it is in fact the previous lack of resort to RTA adjudication that is surprising. Four post-2018 RTA panel reports have been issued so far, in *Ukraine—Wood Export Ban*,[5] *Korea—Labor Commitments*,[6] *Canada—Tariff Rate Quota (TRQ) Allocation*,[7] and *United States—Safeguards on Solar Products*.[8] Besides the question of where parties file their claims—when they can choose at all—this raises the question of what new elements and challenges will present themselves before RTA panelists. In particular, as discussed below, over half of RTA disputes already involve so-called "deep" provisions in trade agreements, which go beyond developing on WTO commitments and set disciplines for various areas of domestic regulation.[9]

This Essay focuses on one new issue for RTA panels in some of the "deeper" agreements: how to interpret the relationship between the RTA rules on traditional topics (and especially long-established, WTO-equivalent trade commitments), on the one hand, and the more innovative "trade and sustainable development" (TSD) obligations, found in dedicated chapters in many contemporary RTAs, on the other hand. TSD chapters usually feature commitments by states to adopt and enforce legislation promoting environmental conservation and labor rights, with some agreements reaching further on issues ranging from Indigenous rights and gender equality to animal welfare.

Beyond the question of their interpretation, TSD chapters challenge RTA panels to consider how far the addition of sustainability obligations reconfigures the very object of trade agreements and/or requires reconsidering their scope. In this Essay, I argue that the two reports in which TSD provisions have been invoked thus far diverge on this core question. In *Korea—Labor Commitments*, the panel suggested that TSD chapters alter the center of gravity of trade agreements, making sustainability an element integral to the "trade" pursued by the EU–Korea Free Trade Agreement (FTA). By contrast, the panel in *Ukraine—Wood*

[4] Panel Report, Mexico—Definitive Countervailing Measures on Olive Oil from the European Communities, WT/DS341/R (adopted Oct. 21, 2008), *at* https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds341_e.htm. At the time of writing, the panel report in *European Union—Safeguard Measures on Certain Steel Products (Turkey)* was set for adoption; the one in *Turkey—Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products* was under appeal before a DSU Article 25 arbitrator.

[5] Final Report of the Arbitration Panel, Restrictions Applied by Ukraine on Exports of Certain Wood Products to the European Union, para. 507 (Dec. 11, 2020), *available at* https://trade.ec.europa.eu/doclib/docs/2020/december/tradoc_159181.pdf. Throughout this Essay, WTO-style short references will be used for RTA disputes. Given that each RTA is a distinctive agreement, the full titles of RTA disputes, besides being lengthy, have no uniform style. Similarly, I will refer to these agreements generically as "RTAs," and to RTA adjudicators, which have agreement-specific and sometimes chapter-specific names, generically as "panels." For the full references, see Table 1.

[6] Report of the Panel of Experts, Panel of Experts Proceeding Constituted Under Article 13.15 of the EU-Korea Free Trade Agreement (Jan. 20, 2021), *available at* https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159358.pdf.

[7] United States-Mexico-Canada Agreement (USMCA) Panel, Final Panel Report, Canada—Dairy TRQ Allocation Measures, CDA-USA-2021-31-010 (Dec. 20, 2021).

[8] Panel, Final Report, United States—Crystalline Silicon Photovoltaic Cells Safeguard Measure, USA-CDA-2021-31-01 (Feb. 1, 2022), *available at* https://ustr.gov/sites/default/files/enforcement/USMCA/Chapter%2031%20Disputes/Final%20Report%20USMCA%20solar.pdf.

[9] Claudia Hofmann, Alberto Osnago & Michele Ruta, *The Content of Preferential Trade Agreements*, 18 WORLD TRADE REV. 365 (2019).

https://doi.org/10.1017/ajil.2022.34 Published online by Cambridge University Press

Export Ban interpreted away the tectonic-shifting potential of the TSD commitments in the EU–Ukraine Association Agreement (AA).

Below, I briefly survey all (publicly raised) post-2018 RTA disputes and examine more closely the panel reports in *Korea—Labor Commitments* and *Ukraine—Wood Export Ban*. While analyzing ostensibly unrelated issues, both panels were required to address the impact of TSD commitments on the broader normative framework set up by their respective RTAs. I propose that these two panels diverge on the basic question of the extent to which the integration of TSD commitments alters the very nature of a trade agreement.

* * * *

The year 2018 marked the turning point for resort to RTA adjudication. Since then, parties to RTAs have publicly invoked dispute settlement or pre-dispute settlement provisions of RTAs seventeen times.[10] Nine of the seventeen disputes were brought by a party seeking to enforce traditional trade commitments. Of these, the sole dispute involving a "deep commitment" was *Korea—Competition Hearings*.[11] The United States requested consultations with South Korea, under the United States-Korea Free Trade Agreement (KORUS), claiming that the Korea Fair Trade Commission (KFTC) had failed to offer U.S. companies their due process rights in competition hearings held by the KFTC under Korea's Monopoly Regulations.[12]

The other eight are TSD disputes: the requesting party challenged what it saw as non-compliance with a TSD commitment. Procedural avenues for pursuing TSD claims can vary, including within a single RTA. In each of these eight cases, the invoking party both (1) used a procedure within the RTA to claim that the other party was violating its TSD commitments; and (2) either resorted to or had at its disposal a procedural avenue, within the RTA, to seek compulsory adjudication of its claims.[13]

Out of the eight TSD disputes, five were brought under the United States–Mexico–Canada Agreement (USMCA). Three involved demands by the United States that Mexico review the labor situation in specific plants under the USMCA Rapid Response Mechanism (*Mexico—General Motors Facility in Silao*,[14] *Mexico—Tridonex Facility in Matamoros*,[15] and *Mexico—Panasonic Facility in Reynosa*).[16] A third, *United States—Labor Rights in the Agricultural, Protein Processing and Packing Industries*, involved a request by Mexico for a "space for cooperation" regarding alleged non-compliance with United States

[10] This considers as a single dispute Canada's two claims regarding the U.S. safeguards on solar products, the first a request for consultations under NAFTA (Global Affairs Canada, Request for Consultations with Respect to the Imposition of a Global Emergency Action (July 23, 2018), *at* https://can-mex-usa-sec.org/secretariat/pubs/consult/2020-12-22.aspx), the second the USMCA dispute leading to the USMCA panel report (*supra* note 8).

[11] Office of the U.S. Trade Representative (USTR) Press Release, USTR Pursues Competition-Related Concerns Under the U.S.-Korea Free Trade Agreement (July 9, 2019), *at* https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/july/ustr-pursues-competition-related.

[12] Consultations were held in 2019. *Id.*

[13] This count thus includes claims under the USMCA's Rapid Response Mechanism (RRM) for labor rights protection in specific plants, as well as under various provisions allowing "consultations" or "cooperation," whether or not as a specific requirement to resort to adjudication.

[14] USTR, Request for Review (May 12, 2021), *available at* https://ustr.gov/sites/default/files/assets/usmca/USTR%20USMCA%20RRM%20Req%20Mex%20for%20posting2.pdf.

[15] USTR, Request for Review (June 9, 2021), *available at* https://ustr.gov/sites/default/files/enforcement/USMCA/Tridonex%20Request%20for%20Review%202021-06-09%20-%20for%20web%20posting.pdf.

[16] USTR, Request for Review (May 18, 2022), *available at* https://ustr.gov/sites/default/files/Panasonic%20Request%20for%20Review%20-%20Signed.pdf.

https://doi.org/10.1017/ajil.2022.34 Published online by Cambridge University Press

labor laws, in particular vis-à-vis migrant workers.[17] Finally, in *Mexico—Porpoise Protection*, the United States requested "environmental consultations" under USMCA, seeking enforcement by Mexico of measures to protect the critically endangered vaquita porpoise, caught as by-catch during the fishing of the also-endangered totoaba fish.[18]

The other three TSD disputes were initiated outside of USMCA. In *Peru—Forest Protection Agency*, the United States alleged that Peru was violating its obligation, under the U.S.–Peru Trade Promotion Agreement,[19] to ensure the independence of the Peruvian forestry protection agency.[20] In *Korea—Fishing Activities*, the United States claimed that Korea was violating its obligation under KORUS to follow conservation and management measures adopted by the Commission for the Conservation of Antarctic Marine Living Resources (CCAMLR),[21] by failing to sufficiently sanction Korean vessels engaging in illegal fishing activities.[22] And, in *Korea—Labor Commitments*, the EU argued that South Korea was in violation of its labor obligations under the TSD Chapter of the EU-Korea FTA.[23] Additionally, as discussed below, *Ukraine—Wood Export Ban* was initiated as a trade dispute; Ukraine's invocation of the TSD Chapter, however, had the potential to put TSD commitments at the center of the dispute.

Of the eight TSD disputes, only *Korea—Labor Commitments* reached the stage of third-party adjudication, leading to a panel report. Of the other seven disputes, two are ongoing and five were settled or discontinued without adjudication. Notably, in all six settled TSD disputes, the conduct object of the invocation of the RTA was modified to the satisfaction of the invoking party.

The tables below summarize these disputes, divided into "Trade" (Table 1) and "TSD" (Table 2) disputes. The significance of TSD disputes (eight out of seventeen) suggests a change in key aspects of these trade agreements: what they are for, what type of interests they promote, and what types of conduct are covered by their obligations.

* * * *

[17] Ambassador of Mexico to the United States Press Release, Press Release No. 004/2021 (May 12, 2021), *at* https://embamex.sre.gob.mx/eua/index.php/en/press-releases/78-press-releases-2021/1807-the-government-of-mexico-proposed-a-space-for-cooperation-in-the-framework-of-the-usmca-regarding-the-lack-of-compliance-with-labor-laws-in-the-agricultural-and-protein-processing-and-packing-industries-in-the-united-states. This dispute probably has the weakest claim among all seventeen to being a "dispute" in the traditional sense. Article 23.13 allows a party to initiate a "Cooperative Labor Dialogue," with specific requirements, deadlines, and expected deliverables. Mexico chose instead to invoke the vaguely worded Article 23.12, which provides loosely that USMCA parties "may develop cooperative activities."

[18] USTR Press Release, USTR Announces USMCA Environment Consultations with Mexico (Feb. 10, 2022), *at* https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/february/ustr-announces-usmca-environment-consultations-mexico. On the same facts, see USMCA Secretariat of the Commission for Environmental Cooperation, *Vaquita Porpoise* – Article 24.28(1) Notification, A24.28/SEM/21-002/59/ADV (Apr. 1, 2022).

[19] United States-Peru Trade Promotion Agreement (signed Apr. 12, 2006, entered into force Feb. 1, 2009).

[20] USTR Press Release, USTR Requests First-Ever Environment Consultations Under the U.S.-Peru Trade Promotion Agreement (PTPA) (Jan. 4, 2019), *at* https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/january/ustr-requests-first-ever.

[21] USTR Press Release, USTR to Request First-Ever Environment Consultations Under the U.S.-Korea Free Trade Agreement (KORUS) in Effort to Combat Illegal Fishing (Sept. 19, 2019), *at* https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/september/ustr-request-first-ever.

[22] Free Trade Agreement Between the Republic of Korea and the United States of America (KORUS), Art. 20.2, Annex 20-A (rev. Jan. 1, 2019).

[23] *Korea—Labor Commitments*, *supra* note 6, para. 61.

https://doi.org/10.1017/ajil.2022.34 Published online by Cambridge University Press

TABLE 1.
– DISPUTES AND PRE-DISPUTE PROCEDURES UNDER RTAS SINCE 2018

Short Reference	Agreement	Invoking Party	Initiated	Status
United States—Steel and Aluminum Tariffs[24]	NAFTA	Canada	6.1.2018	Negotiated outcome
United States—Safeguards on Solar Products	NAFTA/USMCA	Canada	7.23.2018(12.22.2020)	Panel report issued
Ukraine—Wood Export Ban	EU–Ukraine AA	European Union	1.16.2019	Panel report issued
Korea—Competition Hearings	KORUS	United States	3.15.2019	Negotiated outcome
Southern African Customs Union (SACU)—Chicken Safeguards[25]	EU–SADC EPA	European Union	6.14.2019	Panel proceedings ongoing
Canada—TRQ [Tariff Rate Quota] Allocation	USMCA	United States	12.9.2020	Panel report issued
Algeria—Restrictions on Trade[26]	EU–Algeria AA	European Union	3.19.2021	Panel proceedings ongoing
United States—Automotive Rules of Origin[27]	USMCA	Mexico, Canada	8.20.2021	Panel proceedings ongoing
Canada—TRQ Allocation (CPTPP)[28]	CPTPP	New Zealand	12.5.2022	Consultations ongoing

[24] Global Affairs Canada, Request for Consultations Pursuant to Article 2006 of NAFTA (June 1, 2018).

[25] Request for the Establishment of an Arbitration Panel by the European Union (Apr. 21, 2020), *available at* https://trade.ec.europa.eu/doclib/docs/2020/april/tradoc_158717.pdf.

[26] European Commission, Note Verbale (June 24, 2020), *available at* https://trade.ec.europa.eu/doclib/docs/2020/november/tradoc_159037.pdf; European Commission, Note Verbale (Mar. 19, 2021), *available at* https://trade.ec.europa.eu/doclib/docs/2021/april/tradoc_159529.pdf.

[27] Secretaría de Economía, México solicita el establecimiento de un panel de solución de controversias del T-MEC (Jan. 6, 2022), *at* https://www.gob.mx/se/prensa/mexico-solicita-el-establecimiento-de-un-panel-de-solucion-de-controversias-del-t-mec.

[28] Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), Request for Consultations by New Zealand, Canada – Dairy TRQ Allocation Measures (May 12, 2022), *available at* https://www.mfat.govt.nz/assets/Trade-General/WTO-Disputes/Request-for-consultations-by-New-Zealand-regarding-Canadas-allocation-of-dairy-TRQs-under-CPTPP.pdf.

TABLE 2.
– DISPUTES REGARDING TSD COMMITMENTS

Short Reference	Agreement	Invoking Party	Initiated	Status
Korea—Labor Commitments	EU–Korea FTA	European Union	12.17.2018	Panel report issued
Peru—Forest Protection Agency	U.S.–Peru FTA	United States	1.4.2019	Challenged conduct modified
Korea—Fishing Activities	KORUS	United States	9.19.2019	Challenged conduct modified
Mexico—General Motors Facility in Silao	USMCA	United States	5.12.21	Course of remediation agreed
Mexico—Tridonex Facility in Matamoros	USMCA	United States	7.9.2021	Course of remediation agreed
United States—Labor Rights in the Agricultural, Protein Processing and Packing Industries	USMCA	Mexico	5.12.2021	No further development
Mexico—Porpoise Protection	USMCA	United States	2.10.2022	None/Factual record[29]
Mexico—Panasonic Facility in Reynosa	USMCA	United States	5.18.2022	Ongoing

[29] The preparation of a factual record was a recommendation from the Secretariat of the USMCA Commission for Environmental Cooperation, in parallel proceedings following an (earlier) submission by non-governmental organizations. *See* note 18 *supra*.

The disputes in *Korea—Labor Commitments* and *Ukraine—Wood Export Ban* provide two views on trade and sustainable development. Each required its panel to establish how TSD commitments impact, and are impacted by, the trade agreement within which they are inserted, altering the very scope of the "trade" that RTAs seek to foster and regulate. The parallels between the cases emerge despite evident differences in the underlying facts, legal bases, and claims. Thus, although a direct comparison between their approaches and conclusions is inapposite, the juxtaposition of their findings on this issue highlights the alternative understandings of the impact of TSD provisions on RTAs.

In the first of these disputes, *Korea—Labor Commitments*, the EU claimed that Korea had failed to abide by two types of labor commitments in the EU–Korea RTA: the obligation to respect the principle of freedom of association of workers and the obligation to make continued and sustained efforts toward ratifying the fundamental conventions of the International Labor Organization (ILO). Both commitments appear in Article 13.4.3 of the TSD Chapter. That Article requires, first, "respecting, promoting and realizing" fundamental labor rights of workers, in particular their freedom of association. Second, "mak[ing] continued and sustained efforts toward ratifying the fundamental ILO Conventions,"[30] four of which Korea had not ratified—seven years after the parties had started provisionally applying the FTA and three years after it had entered into force.

A key interpretative question before the panel was whether the incorporation of sustainability obligations within trade agreements limits their scope. Korea argued that the purely internal failure to adopt or enforce labor policies could not constitute a violation of TSD obligations. Given their existence within a trade agreement, Korea argued, these commitments would only be violated if encroachments upon labor rights or environmental conservation were shown to be "trade-related." This view was supported by the provision setting up the scope of the TSD Chapter, which clarified that the chapter applied "to measures adopted or maintained by the Parties affecting trade-related aspects of labour, and environmental issues."[31]

Korea contended that, in light of this formulation, a party claiming a violation of TSD obligations was required to demonstrate a connection between the violation of the labor or environmental provision invoked and foreign trade. A similar finding had been adopted by the earlier (2017) CAFTA-DR panel in *Guatemala—Labor Commitments*, regarding a (differently worded) provision in the Labor Chapter of CAFTA-DR. Pointing to the difficulty of demonstrating a connection between specific instances of violation of labor rights and the trade between the parties, that panel had declined to find an RTA violation in the dispute before it, even after identifying a series of failures by Guatemalan courts to enforce Guatemala's labor laws.[32]

The panel in *Korea—Labor Commitments* rejected this argument. It considered that the TSD Chapter's scoping provision in the EU-Korea FTA, which circumscribed the Chapter's commitments to "trade-related aspects" of labor and environmental issues, was qualified by the proviso "[e]xcept as otherwise provided." The panel noted that, contrary

[30] *Korea—Labor Commitments*, *supra* note 6, paras. 55, 61, 102, 261.

[31] *Id.*, paras. 56, 62 (quoting EU–Korea FTA, Art. 13.2, OJ L 127/6 (May 14, 2011), *available at* https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=OJ%3AL%3A2011%3A127%3ATOC) (footnoted omitted)).

[32] *Id.*, para. 58 (referring to CAFTA-DR Panel Report in *Guatemala—Labor Commitments*, *supra* note 7, in particular paras. 428, 501).

https://doi.org/10.1017/ajil.2022.34 Published online by Cambridge University Press

to other provisions in the TSD Chapter,[33] Article 13.4.3 itself did not refer to trade, and simply obliged the parties to incorporate certain principles "in their laws and practices."

This argument by the panel seems unpersuasive. Although different wordings used in different provisions plausibly indicate a difference in meaning, Article 13.4.3 does not provide that it constitutes an exception to the scoping provision. In order to ground its view that the EU did not need to demonstrate the "trade-relatedness" of the labor violations, the panel in *Korea—Labor Commitments* went beyond the text of the FTA and affirmed an intrinsic connection between TSD commitments and the parties' agreement to trade liberalization.

The panel supported its view with two arguments. First, it found that Article 13.4.3 committed the parties, directly and through references to ILO Conventions, to labor rights having a "universal scope," reasoning that this universal scope would be incompatible with limiting the application of these commitments to a subset of workers, such as those directly involved in international trade.[34] This suggests that, in referring to multilateral norms of universal scope, parties to RTAs could be making the multilateral norms an integral part of their TSD commitments, at least as instruments that panels can use to interpret the RTA's obligations.

The second argument made by the panel has even broader implications. It found that the combination of a TSD Chapter, references to sustainable development in the FTA's preamble and provisions, and the commitment to adhere to international instruments promoting labor rights, created "a strong connection between the promotion and attainment of fundamental labour principles and rights and trade . . . [so that] national measures implementing such rights are therefore inherently related to trade as it is conceived in the EU-Korea FTA."[35]

The *Korea—Labor Commitments* panel thus went beyond finding that the specific violation claimed by the EU did not require a demonstrable connection to international trade. It inferred from the integration of TSD commitments into the FTA what can be described as a change in the object and purpose of the agreement as a whole, a general reorientation of the FTA potentially permeating the interpretation of all of its provisions. In TSD-oriented RTAs, it would seem, the trade commitments entered into by the parties include commitments to adopt and enforce sustainable development measures—as a constitutive element rather than an add-on. This would make violations of TSD commitments inherently "trade-related," rendering unnecessary any additional evidence of a connection.

The second dispute to be highlighted, *Ukraine—Wood Export Ban*, initially involved a more typical trade dispute. The complainant (the EU) challenged, under the EU-Ukraine AA, trade-restrictive measures that the respondent (Ukraine) sought to justify on environmental grounds. The measures challenged were a complete ban on the export of timber and sawn wood of ten wood species, imposed since 2005, and a ten-year temporary ban on exports of all unprocessed timber, adopted in 2015.[36] What brought the sustainability provisions to the fore was Ukraine's argument that the TSD Chapter fundamentally altered the procedural and substantive normative framework of the dispute, in two ways.

[33] Article 13.7 of the EU–Korea FTA, *supra* note 31, expressly limits violations to a party' s weakening of its labor and environmental standards "affecting trade or investment between the [p]arties."

[34] *Korea—Labor Commitments*, *supra* note 6, para. 65.

[35] *Id.*, para. 95.

[36] *Ukraine—Wood Export Ban*, *supra* note 5, paras. 73–77.

https://doi.org/10.1017/ajil.2022.34 Published online by Cambridge University Press

Jurisdictionally, Ukraine argued, any dispute regarding "trade in forest products" should be adjudicated by a TSD panel, established under Chapter 13, rather than a trade panel under Chapter 14.[37] Substantively, Ukraine contended, a TSD chapter affected the interpretation of the AA's trade disciplines, requiring interpreters to privilege the parties' regulatory autonomy over their trade obligations. Ukraine pointed out that the EU made its claim "as if it were arguing under the [the General Agreement on Tariffs and Trade (GATT)] 1994."[38] Instead of applying the rule-exception dynamic developed in WTO adjudication, Ukraine proposed, the panel should apply the specific provisions of the TSD Chapter, whose Article 290 established both a "right to regulate" and an obligation to legislate "high levels of labour and environmental protection."

On the jurisdictional issue, the EU-Ukraine AA does provide that, for "any matter" arising under the TSD Chapter, the parties "shall only have recourse" to the TSD-specific dispute settlement procedures.[39] However, the EU argued—and the panel agreed—that the "matter" of the dispute is determined by the complainant's claims. The EU's claim was that Ukraine's export ban violated Article 35 of the AA, located in the Chapter on "National treatment and market access for goods." As a result, the dispute settlement provisions applicable to trade obligations, not the ones specific to the TSD Chapter, were applied.[40]

This is relevant both because TSD panelists are required to have expertise in TSD matters and because their reports do not include binding rulings but mere "advice or recommendations," which "[p]arties shall make their best efforts to accommodate." By contrast, trade panels issue "rulings" that must be complied with.[41] In other words, if Ukraine's ban had been found by a TSD panel in violation of the AA, Ukraine would be under only a best-efforts obligation to "accommodate" the advice and recommendations of the panel. Despite the seemingly mandatory scoping language of the TSD Chapter, the *Ukraine—Wood Export Ban* panel read the treaty as ultimately giving claimants the option of pleading violations of trade obligations before a trade panel.

On the interpretative value of the TSD Chapter, the panel started out by stating that this chapter meant that the AA "strikes a balance between the regulation of purely trade matters and the taking into account of non-trade and environmental concerns in the AA that is different from GATT 1994."[42] At the same time, this alleged difference did not subsequently affect either the panel's conclusions or its reasoning. The panel reasoned that TSD provisions did not provide "self-standing or unqualified exceptions that could justify measures that are per se in breach" of trade obligations.[43] The applicable defense to trade violations was Article 36, which incorporates into the AA Article XX of the GATT.[44] The TSD provisions, the

[37] *Id.*, paras. 89, 93.

[38] *Id.*, para. 222.

[39] EU–Ukraine Association Agreement, Art. 300(7), OJ L 161/3 (May 29, 2014), *available at* https://trade.ec.europa.eu/doclib/docs/2016/november/tradoc_155103.pdf.

[40] *Ukraine—Wood Export Ban*, supra note 5, paras. 132–33.

[41] EU–Ukraine AA, *supra* note 39, Arts. 301, 311.

[42] *Ukraine—Wood Export Ban*, *supra* note 5, para. 242.

[43] *Id.*, para. 251.

[44] EU–Ukraine AA, *supra* note 39, Article 36 reads: "Nothing in this Agreement shall be construed in such a way as to prevent the adoption or enforcement by any Party of measures in accordance with Articles XX and XXI of GATT 1994 and its interpretative notes, which are hereby incorporated into and made an integral part of this Agreement."

https://doi.org/10.1017/ajil.2022.34 Published online by Cambridge University Press

panel found, had interpretative value as "context" relevant for the interpretation of trade commitments.[45]

When it came to applying these commitments, however, the contextual value of TSD provisions does not seem to have affected either the legal tests applied or the balance between trade obligations and the right to regulate as established in WTO law. The panel essentially followed the steps established over the years by the WTO Appellate Body to assess trade-restrictive measures under Article XX of the GATT, using similar legal standards (but see below).[46] The panel went as far as stating that, given that Ukraine failed to comply with one of the requirements for the successful invocation of GATT Article XX(g),[47] "the invocation by Ukraine of provisions of Chapter 13 ('Trade and Sustainable Development') are basically irrelevant in respect of possible justifications of the ban under the Agreement."[48]

* * * *

A key aspect of the new wave of litigation under regional trade agreements is that, in over half of the disputes (nine of seventeen), the claims concerned "deep commitments," challenging the application of domestic laws and regulations without a specific connection to international trade in the sense of movement of goods across borders.[49] More strikingly, other than in *Korea—Competition Hearings*, all of these disputes concerned TSD commitments.

Five were labor disputes. Of these, *Korea—Labor Commitments, Mexico—General Motors Facility in Silao, Mexico—Tridonex Facility in Matamoros*, and *Mexico—Panasonic Facility in Reynosa* concerned essentially workers' rights to freedom of association and collective bargaining. In the fifth, *United States—Labor Rights in the Agricultural, Protein Processing and Packing Industries,* Mexico reported non-compliance with labor laws in these industries, including with "the right to organize and negotiate collectively," as well as low wages, unpaid wages, and the lack of overtime payment.

The three environmental disputes, all initiated by the United States, referred to specific RTA commitments: by Peru to maintain an independent forestry agency;[50] by Korea to comply with regulations issued by a marine life conservation commission;[51] and by Mexico (although the press release is vague on legal claims) to adopt a number of measures for the conservation of endangered species.[52] In both types of the TSD claims, although the underlying economic activities often include an external trade component, the claims themselves all relate to labor and environmental issues arising entirely within the domestic sphere.

[45] *Ukraine—Wood Export Ban*, *supra* note 5, para. 251.

[46] *Id.*, paras. 332, 467.

[47] This is the requirement the measures for conservation of exhaustible natural resources be "made effective in conjunction with restrictions on domestic production or consumption."

[48] *Id.*, para. 467.

[49] The RRM provisions apply to every "facility in the territory of a Party that: (i) produces a good or supplies a service traded between the Parties; or (ii) produces a good or supplies a service that competes in the territory of a Party with a good or a service of the other Party" in "a sector that produces manufactured goods,8 supplies services, or involves mining." USMCA, *supra* note 7, Art. 31-B.15.

[50] U.S.-Peru FTA, *supra* note 20, Art. 18.3.4; Annex 18.3.4(h)(iii).

[51] KORUS, *supra* note 22, Art. 20.2; Annex 20-A, 1(e).

[52] The request mentions USMCA, *supra* note 7, Arts 24.4.1, 24.8.4, 24.18.1, 25.21, 24.22.4. *See also* the Secretariat document in note 18 *supra*.

https://doi.org/10.1017/ajil.2022.34 Published online by Cambridge University Press

This makes the findings by the panel in *Korea—Labor Commitments* potentially crucial for future disputes on sustainability commitments. The experience of *Guatemala—Labor Commitments* made clear that demonstrating that shortcomings in domestic law enforcement have a specific connection to trade in goods may be extremely difficult, even where the complaining states represent over 50 percent of a state's international trade. Following the view of the *Korea—Labor Commitments* panel, unless a specific connection is required by a provision, the expression "trade-related" in TSD commitments will have the same relevance for the extent of a state's obligations—none—that it has had in disputes under the WTO's Agreement on *Trade-Related* Aspects of Intellectual Property Rights (TRIPS) and Agreement on *Trade-Related* Investment Measures (TRIMs) (emphasis added).

This finding appears to give effect to an evolution in the meaning of "trade." The substantial reduction in border barriers over the last decades has meant that trade discussions increasingly focus on how domestic regulation affects competitive relations. In international agreements, "trade" increasingly goes beyond the goods that move across borders and encompasses broader questions of polycentric economic governance.[53] The inclusion in trade agreements of commitments on labor and environmental sustainability suggests that the parties consider the underlying issues as trade-related, and the fulfillment of these commitments —whether for alignment on specific values or to ensure a "level-playing field"—an integral part of their objectives in economic integration.

The alternative understanding in *Ukraine—Wood Export Ban* offers a different path, more restrictive of the TSD enterprise. Despite praising the importance of the TSD Chapter, this panel ultimately did not derive, from its existence or from its provisions, any consequences for the parties' trade obligations.

It is true that WTO jurisprudence had already enlarged the horizon of trade agreements to give effect to sustainability concerns. The Appellate Body consistently inferred from the context of, exceptions to, and overall normative environment surrounding, WTO obligations the existence of distinct "purposes and objects" of WTO Agreements,[54] including, side by side with trade obligations, a "right to regulate" in the pursuit of legitimate objectives.[55] This jurisprudence usually ensures broad regulatory freedom for WTO Members to adopt virtually any trade-restrictive environmental measure, provided that the measure (1) demonstrably or credibly contributes to its stated objective and (2) does not arbitrarily or unjustifiably discriminate

[53] See the evolutionary interpretation by the International Court of Justice of the term "commerce" ("comercio") in a treaty. Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicar.), Judgment, 2009 ICJ Rep. 213, 244 (July 13), *available at* https://www.icj-cij.org/public/files/case-related/133/133-20090713-JUD-01-00-EN.pdf.

[54] Appellate Body Report, United States—Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, at 18 (Apr. 29, 1996), *at* https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/2ABR.pdf&Open=True.

[55] Appellate Body Report, United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products, WT/DS381/AB/R, para. 174 (May 16, 2012) *at* https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/381ABR.pdf&Open=True; Appellate Body Report, European Communities—Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/AB/R, WT/DS401/AB/R, para. 5.125 (May 22, 2014), *at* https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/400ABR.pdf&Open=True.

https://doi.org/10.1017/ajil.2022.34 Published online by Cambridge University Press

against other WTO members.[56] Thus, the panel in *Ukraine—Wood Export Ban* could have given effect to the TSD Chapter without substantively departing from WTO jurisprudence.

On the other hand, the reasoning of the panel arguably deviated from this effects-oriented WTO jurisprudence, and to the detriment of the respondent. The panel gave significant weight to what it saw as indicators of protectionist intent, including a three-year lag between the prohibition of exports and the adoption of restrictions on domestic consumption[57] and documents where the development of Ukrainian industry was mentioned as a benefit of the export ban.[58] If subjective protectionist intent provides the relevant benchmark, a measure may be found to breach the RTA even when it contributes to its stated objective and is applied without any discriminatory effects—a significant step back with respect to the WTO jurisprudence that safeguards regulatory space by permitting objectively justifiable, non-discriminatory measures.

This in turn raises perhaps the most significant issue, which is whether the dispute should have been heard by a different panel, required to have "expertise on the issues covered by th[e TSD] Chapter."[59] Without subscribing to the dubious view that interpretation hinges on whether the interpreter is a "sustainability expert" or a "trade expert," there undoubtedly is a difference between framing a dispute as primarily about legitimate regulation and framing it primarily as about bilateral trade. When the interaction between these two elements of contemporary international economic agreements is at stake, it seems logical to demand that adjudicators are specifically aware of the implications of their findings for the freedom of parties to enact and maintain non-discriminatory regulation.

In the end, the type of economic integration that RTAs promote, and their acceptability to states, will depend on whether TSD commitments are viewed as self-contained add-ons to trade liberalization agreements or as integral elements of a broader legal framework. RTA panels can be expected to adopt divergent views of the precise scope and effect of TSD commitments and other new provisions. While divergence is not necessarily a problem, RTA panels must remain aware of the authority their findings will carry. Without guidance from an authority akin to the WTO Appellate Body, RTA panels will be required to interpret wholly new provisions, taking into account their specific wording and seeking to make sense of their wider, and increasingly fragmented, normative context. Their ability to make sense of this normative framework in an acceptable manner, with an eye to the broader implications of their findings, will determine whether these RTA panels, beyond their increased activity, will be able to fill the gap left by the crisis in WTO dispute settlement and help establish a stable normative environment for twenty-first century global economic relations.

doi:10.1017/ajil.2022.34

[56] This is evident in particular from: Appellate Body Report, Brazil—Measures Affecting Imports of Retreaded Tyres, WT/DS332/AB/R, para. 151 (Dec. 7, 2007), *at* https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/DS/332ABR.pdf&Open=True.

[57] *Ukraine—Wood Export Ban*, *supra* note 5, para. 462.

[58] *Id.*, para. 463.

[59] EU–Korea FTA, *supra* note 31, Art. 13.15(3).