University of Birmingham
Edgbaston, Birmingham, B15
2TT, United Kingdom

University of Birmingham Dubai
Dubai International Academic City
P.O. Box 341799, Dubai

Institute of European Law Working Papers

Paper: 01/2025

"EU Trade Governance: Assessing Prometheus"

Dr Luca Rubini (University of Milan and University of Birmingham)

- **How to cite**: (Full citation). DOI: 10.25500/epapers.bham.00004421

Institute of European Law
Birmingham Law School
University of Birmingham
Edgbaston
Birmingham B15 2TT
United Kingdom

For more information on the IEL, see Birmingham.ac.uk/IEL

2025 IEL Annual Lecture, Birmingham Law School, 27th November 2025

"EU Trade Governance: Assessing Prometheus"

Dr Luca Rubini (University of Milan and University of Birmingham)

"... Προμηθέα, ποικίλον αἰολόμητιν..."
"... clever Prometheus, full of various wiles ..."
(Hesiod, *Theogony*, lines 510-511, 700 BC circa)

Abstract

This lecture will focus on EU trade governance in these turbulent and exceptional times. It will use EU action in the fields of industrial policy and competitiveness, and the fight of climate change as case-studies. The first case-study will focus on the recent EU initiatives with respect to subsidies, in particular the Foreign Subsidy Regulation (FSR) and the reconstruction of trade remedies to tackle transnational subsidies. The second case-study will concentrate on the extension of the Emissions Trading System (ETS) beyond the EU via the Carbon Border Adjustment Mechanism (CBAM). Drawing on the Greek myth of Prometheus, the lecture will enquire whether the EU action in these fields has been 'clever' but at the same time 'full of various wiles' - as the Greek mythological figure was believed to be. Ultimately, these two rich and salient case-studies will enable a broader assessment of recent EU trade policy, its innovations as well as its side-effects and difficulties.

1. Leit-motiv, motivation, background

This lecture will focus on EU trade governance in these turbulent and exceptional times. I will use EU action in the fields of industrial policy, competitiveness, and the fight of climate change as case-studies. More specifically, the first case-study will refer the recent EU initiatives with respect to subsidies, in particular the Foreign Subsidy Regulation (FSR) and the reconstruction of trade remedies to tackle transnational subsidies. The second case-study will concentrate on the extension of the Emissions Trading System (ETS) beyond the EU via the Carbon Border Adjustment Mechanism (CBAM).

Drawing on the Greek myth of Prometheus, the lecture will enquire whether the EU action in these fields has been 'clever' and, at the same time, 'full of various wiles' - as the Greek mythological figure was believed to be.

Ultimately, at least this is my idea, these two rich and salient case-studies will enable a broader assessment of recent EU trade policy, its innovations as well as its side-effects and difficulties. This lecture will also enable me to put together various strands of research that I have carried out in the last 10-to-15 years.

Prometheus is a symbol of ambivalence. He is "Pro – Metheus" - the "fore-thinker" -, the one that brought to humanity all the arts and sciences as well as the means of survival; the one that brought them (back) fire, the key element to cook food and cremate the dead.

He is, however, also the one that, because of his theft, Zeus punished and, through him, all mankind. There are various consequences of his behaviour (and the Godly punishment). On the one hand, he was nailed to a mountain in the Caucasus, with an eagle endlessly eating his liver which constantly replenished itself (see Hesiod, *Theogony*, lines 521-525). On the other hand, he unsuccessfully warned his brother Epimetheus ("Epi – Metheus" - "the one with hindsight") not to marry Pandora (the first woman) who brought with her the famous box containing all evils and misfortunes that eventually spread to affect humanity (Hesiod, *Works and Days*, lines 90-105). Interestingly, the story goes that only hope stayed in the box (Hesiod, *Works and Days*, line 96).

Leaving the misogynist flavour of the story aside, I do see many similarities between the ambivalence underlying this myth and the activity of the EU in the trade field.

In recent times, Brussels has become a normative powerhouse brokering ambitious trade agreements, which encompass various "new generation" chapters, and adopting unilateral – or "autonomous" – instruments to tackle a variety of goals from ensuring a level playing field from government subsidies to avoiding carbon leakage, from protecting human rights to keeping third countries' economic coercion at bay. Inevitably, these measures, many of which are doubtlessly innovative (and may thus be tagged as prime examples of "fore-thinking"), touch on third countries' interests and have attracted controversies and even disputes.

The EU is playing at different levels – multilateral, preferential and unilateral – in an increasingly unstable world where geopolitics is becoming key, and the foundations of the liberal arrangement set up after WWII are put into question.

As you all know, this process of destabilisation has been exacerbated since the return of Donald Trump as President of the US. The epitome of this crisis is offered by two interlinked events – on the one hand the infamous "Liberation day" (April 4) and its "reciprocal tariffs", on the other hand the so-called negotiations that followed this dramatic move.

The leitmotiv of this lecture, and the use of the myth of Prometheus as a vivid image of the forces at play when one looks at the EU action in this complex scenario, both draw their origin from a High-Level Policy dialogue that took place on January 10-11, 2024, in Turin, and which eventually materialised in an e-book published by the European University Institute (EUI). I was lucky enough to attract Ms Cecilia Malmström, former Trade Commissioner between 2014 and 2019, and Mr Ignacio Garcia-Bercero, at the time of the event in charge of multilateral affairs and trade strategy of the at the time DG Trade of the Commission. The line-up included also prominent former EU and WTO officials, and legal and economic experts.

These are the leit-motiv, motivation and the background of the lecture. Let's now move to and briefly analyse the first case-study.

2. First case-study: industrial policy and subsidies

The first case-study focuses on the recent EU initiatives with respect to subsidies, in particular the Foreign Subsidy Regulation (FSR) and the reconstruction of trade remedies, most notably the EU Basic Anti-Subsidy Regulation (ASR), to tackle transnational subsidies.

Governmental subsidies are inherently controversial and ambivalent. Throughout history, they have always generated controversy and represent one of the most difficult issues to regulate in international economic law. The scenario has become even more complex in recent years because "new" types of subsidies have emerged. I am in particular referring to various forms of cross-border or trans-national subsidies, that is financial contributions that are not provided by governments to entities within the jurisdiction but to enterprises or industries in another jurisdiction.

Why support companies in other countries? Cross-border support may be given to facilitate investment, activity or production abroad. In some cases, this foreign financial support benefits producers of goods which are then exported to third countries.

The motivation for this cross-border financing may be best understood if we appreciate that nowadays production takes place all along Global Value Chains (GVCs), that is the process is fragmented into various bits and pieces, each located in different jurisdictions. For a variety of reasons, multinationals design production processes globally. Governments do intervene in this process by regulating, facilitating and attracting investment and production. In the case in issue in our lecture, also by financing investment and production abroad.

This type of cross-border support has become a key policy issue in international trade, especially after the coming into effect of the New Silk Road or Belt and Road initiative by China. This massive investment and infrastructure strategy has involved significant transfers of economic resources from Chinese entities to many other economic operators in other countries. Data refer to a strategy that involves more than 150 countries, 75% of the world's population and half of global GDP. This massive political, economic and financial strategy surely impacts economic interests of other countries that do not partake the strategy.

Unfortunately, and this is the crux of the legal issue, the laws that we have, at both international and domestic levels, were crafted with different types of government intervention in mind, that is traditional 'within jurisdiction' support. Utopia supports Utopian companies within Utopia; not Utopia provides financial support to companies outside its borders.

This is true for WTO subsidy laws (GATT 1947; Tokyo Round Subsidy Code 1979; WTO ASCM 1995) but also for domestic laws that regulate competition, public procurement or the imposition of trade remedies on subsidised imports.

The dramatic success of China's economy after its accession to the WTO in 2001 has, however, multiplied claims of unfair competition and allegations that currently available rules – both at the global and EU level – would not suffice in regulating these concerns.

So, we have a new problem, but we have laws that are largely old and silent on this problem – that is these new forms of cross-border subsidisation. All the ingredients to make of this a great case-study of current geopolitical times are there: huge economic and political interests, a global strategy, a new policy problem, old laws.

Against this problematic scenario, and in the absence of multilateral action, the EU took the lead. Incidentally, we should remember that one of the main manifestations of EU geopolitical power is that of "norm-generation". The attraction of the EU internal market de facto generates a leverage which leads to the export of its norms and standards abroad. This happens via trade deals the EU has been concluding with several other countries in the world, or de facto in the shape of adaptation of other countries' regulatory systems to the EU (the so-called "Brussels effect").

To appreciate the EU action vis-à-vis other countries' subsidies, however, we need to go back to the late 2010s to identify, if you wish, an event that acted as catalyser of the EU action in the field. The alarm bell was distinctly heard on occasion of the high-profile *Alstom-Siemens* merger investigation. Famously, the EU Commission rejected the proposed merger because it would have distorted competition within the internal market.

This rejection caused a huge uproar. A common criticism was that the Commission was **myopic**. It should have duly taken into account the fact that *Siemens* and *Alstom* had to face the strong competition of Chinese companies and, in particular, of the *China Railway Rolling Stock Corporation (CRRC)*, a State-owned enterprise allegedly benefiting from significant State support. (According to the *Global Trade Alert* database, the CRRC would have received annual subsidies amounting to US dollars 2485 million in 2016, 1653 millions in 2017 and 2063 millions in 2018.)

The key legal issue was that these support measures would not be subject to any discipline even remotely comparable to that in force in the EU or, in any event, capable of keeping any distortion on international trade and competition in check. Think for example of EU merger laws: as the case had shown, it was not that evident that subsidisation of international competitors should be considered, or think of WTO laws on subsidies which, equally, do not easily capture subsidisation for investment.

In few weeks the French and German governments published the *Franco-German Industrial Policy Manifesto* ("*A Franco-German Manifesto for a European industrial policy fit for the 21st Century*", 19 February 2019). They argued that there was a need to re-direct European industrial policy (suggesting even the possibility of amending EU merger laws with the introduction of a final veto power of EU Commission's assessments by Member States) and the need to adopt measures to specifically tackle the anti-competitive practices of foreign governments.

Few weeks after the *Franco-German Industrial Policy Manifesto* the European Council charged the Commission with a review of all laws in the rule-book regulating foreign subsidisation. On 17th June 2020, the day after publishing its consultation note for *A Renewed Trade Policy* (which features at its very core the notion of 'open strategic autonomy'), the Commission presented its *White Paper on Foreign Subsidies*. This consultation document focuses on subsidies granted by foreign governments to companies established or active in the EU internal market. More specifically, the White Paper mostly addresses those subsidies granted to facilitate the acquisition of an EU target or the participation in public procurement procedures in the EU.

The Commission suggested the introduction of four different 'modules' or tracks to tackle different scenarios. The explicit premise of this proposal for law reform was an alleged regulatory gap: the said distortions would not be tackled by existing international and EU rules (WTO disciplines, EU competition, merger, State aid, trade remedy, public procurement and FDI provisions). Hence, the need for action. Following a public consultation, the EU Commission presented a proposal for Regulation to the European Parliament and the Council which, after review and few changes, was adopted and came into force in January 2023 and became fully operational in that year.

Foreign direct investment assisted by government's support is not a new topic.
I remember working on it in 2007-2008 when I was lucky enough to join Gary Hufbauer and colleagues of the Peterson Institute in Washington D.C. to write an issue paper for the United States Council Foundation on *Investment Subsidies for Cross-Border M&A: Trends and Policy Implications*. The issue was whether the current laws – American, European and international – enabled the regulation of cross-border mergers where certain State-owned or State-subsidised entities (such as Sovereign Wealth Funds) put bids to take over target companies in other countries. The painstaking review of all these laws led to the conclusion that there was a gap in the rule-book. The proposal was the negotiation of an international "compact" to regulate these bids.

Interestingly, more than 10 years later, in preparing their proposal for Foreign Subsidy Regulation, the European Commission heavily relied on this paper. If you peruse the EU Regulation and compare it with the key elements of the proposed "compact", it is clear that the EU Commission significantly used it as a model.

Now – what is this FSR doing?

In essence it 'extends' the application of EU State aid laws to subsidies granted *by* foreign countries. More precisely, it sets up a regulatory mechanism – and remedies – that, *mutatis mutandis*, reflects the key standards of control of EU State aid laws. In so doing, it is simply aimed at levelling the playing field between European and non-European companies receiving subsidies.

What strikes observers is that the EU seems to have chosen to follow a **unilateral course** of action to address real or perceived asymmetries in subsidy regulation. The EU has traditionally addressed regulatory diversity and asymmetries (vis-à-vis the 'EU standard') through negotiating and concluding trade agreements (and it is without doubt the major actor in this field). In other words, and accounting for its clear leverage, the EU has always sought to resolve these differences, and address competitiveness concerns, through consensus with the interested parties. What the EU is doing with the FSR is to act unilaterally. And this was one of the first high-profile unilateral policy tools that the Commission started to propose exactly around that period of time.

How is this FSR structured?

The regulation applies in those cases where there is a "foreign subsidy", i.e. third-country financial contributions conferring benefits to "undertakings engaging in an economic activity in the EU internal market."

If we have such a subsidy, there are three tracks of procedure: two are notification-based, one is ex officio. This means that in the first two scenarios the Commission can only investigate following notifications from private parties and respectively from those companies that intend to put a bid to buy a target company or to participate in public procurement proceedings in the EU internal market.

Obviously, there are minimum thresholds in terms of amount of financial contributions within a given span of time, minimum turnover thresholds of target companies or value of public procurement. The third, final track is not reliant on notifications. The Commission would be empowered to act to investigate any other foreign subsidy which may distort the EU internal market.

The Regulation provides for a range of structural and non-structural remedies including, for instance, the repayment of the subsidy, divestment of certain assets, reduction of capacity or market presence, offering access to a certain infrastructure or prohibition of a certain market behaviour, or, in the case of notifiable transaction, the prohibition of the subsidised concentration or the award of the public procurement contract to the subsidised bidder.

The most interesting provisions, though, and the ones which are currently attracting more attention concerning the standards of assessment, that is of the standards that the EU Commission will have to apply in order to determine whether there are any distortions and, if so, whether these are somewhat justifiable because of any redeeming feature of the foreign subsidy.

I am referring in particular to Articles 4, 5 and 6 of the regulation. While Article 5 is in fact not really problematic, because it sets for cases where there are presumptions of distortions (where "a foreign subsidy is most likely to distort"), the attention should be focused on Articles 4 and 6.

Article 4 reads that

> "a distortion in the internal market shall be deemed to exist where a foreign subsidy is liable to improve the competitive position of an undertaking in the internal market and, where, in doing so, that foreign subsidy actually or potentially negatively affects competition in the internal market."

That is the standard. Then the provision hastens to add:

> "a distortion in the internal market shall be determined on the basis of indicators, which can include, in the particular, the following".

What follows is a list of factors that are typically found in the EU practice and case-law on EU State aid, that is:

- the amount and nature of the subsidy,
- the situation of the undertaking, including its size, the markets or sectors concerned,
- the level and evolution of economic activity of the undertaking on the internal market, and,
- finally, the purpose and conditions attached to the foreign subsidy as well its use on the internal market.

Let me move now to the other provision, the one on the balancing test, before providing a bit of comment.

As I said, Article 6 includes the so-called balancing test. In particular, the discretionary power of the Commission to balance the negative effects of a foreign subsidy in terms of distortion in the internal market (as determined on the basis of Articles 4 and 5) against – and I quote

> "the positive effects on the development of the relevant subsidised economic activity on the internal market, while considering other positive effects of the foreign subsidy such as the broader positive effects in relation to the relevant policy objectives, in particular those of the Union."

Anybody conversant with EU State aid law and practice may easily detect the origin of the language of all these provisions which underwent some change during the legislative process, especially the article on the balancing test.

Why?

The biggest issue is that, while we have a direction with respect to the type of assessment that the Commission will carry out in making their determination on the negative and positive effects, we don't really have any real clue about their methodology.

In cases such as these ones, I always use the metaphor of a recipe.

The list of the ingredients to use is reasonably clear (admittedly, not fully clear with respect to the "policy objectives" to consider in the balancing). What is definitely missing though is a precise indication of the quantities of the various ingredients and of the procedure to follow in preparing the meal.

This gap was perceptively picked up by the Hansen Report of the European Parliament which called on the Commission to develop guidelines for assessing the distortive nature of subsidies and on the application of the balancing test. This suggestion was followed up in the regulation and the Commission is currently working on those. There was a consultation this Summer and the final guidelines should be seeing the light very soon.

The European Parliament also suggested other important changes in three different directions, which all start from the premise that this measure is unilateral.

- First, the possibility for the Commission to engage with the non-EU country in a dialogue without prejudice to the outcome of a specific case
- Secondly, where a third country has in place a subsidy control mechanism that is equivalent to that of the EU, both in law and in practice, foreign subsidies provided by such countries may be considered as unlikely to be distortive, and, as such, exempted from the regime
- Thirdly, if multilateral rules as effective as the proposed framework are agreed on, they will repeal the EU Regulation.

All these changes are now taken on board in the final version of the Regulation.

As evidence that the EU is increasingly becoming a "regulatory innovator", it is interesting to mention the interest generated across the Atlantic for the FSR. This led to a recent change in US antitrust law and in the introduction of a pre-merger notification to disclose any subsidies received from "foreign entities or governments of concern" (FTC rule, effective February 10, 2025, implementation of Merger Filing Fee Modernization Act of 2022).

Going back to the initial allegory of the myth of Prometheus – here we can certainly see a "clever Prometheus" in action, the EU is quick not only in identifying a problem but, through a transparent and thorough policy process, in introducing an innovative legal tool to tackle the problem. What should be particularly lauded is the emphasis in creating a system which is as much grounded, open and fair as possible. The best evidence that this is good innovation is given by the imitation game generated – with the US policy-makers following with interest the genesis of the regulation and then following suit.

But, as in the myth of Prometheus, there are also negative side effects. Since its inception, the FSR has mostly been enforced vis-à-vis China. In particular, the majority of in-depth reviews (3 out of 5) and all *ex officio* investigations initiated by the Commission have involved Chinese companies. This perceived focus on China has led to political tension. On January 9, 2025, the Chinese Ministry of Commerce (MOFCOM), concluded an investigation, and found that the FSR and the Commission investigations opened in 2024 against Chinese companies constitute "trade and investment barriers" and stated its intention to pursue bilateral negotiations and other appropriate measures to urge the EU to modify its FSR practices, ensuring that Chinese companies can invest and operate in the EU fairly and without discrimination.

So far for foreign subsidies.

But there are also other forms of cross-border subsidies that have been causing head-aches in the Western world lately. Once again, the concern spans out from China's Belt and Road Initiative and focuses on those transnational financial contributions to enterprises located outside the Chinese jurisdiction that produce goods that are then exported into other markets, say the EU internal market or the US.

What is the legal issue?

Many countries have had, in some cases for more than one hundred years, specific trade remedies to counter the negative effects of subsidised imports injuring their domestic industry. These remedies are called countervailing duties and are constituted of an extra-tariff imposed on these goods. The goal and effect of this extra-tariff is to compensate for the unfair advantage of the subsidy and thus to re-establish a level playing field.

If we already have a pretty established remedy, what is the problem then?

The problem is that countervailing duties apply to subsidies and traditionally subsidies are a "within jurisdiction" scenario. In other words, you have Utopia granting subsidies to Utopian companies or industries within Utopia - not in England or in France or in Germany. This is not the common understanding of subsidies, these are the types of subsidies that have been dealt with for centuries now.

Once again, it is the EU – Prometheus to take the lead.

Since April 2019 the European Commission started to receive complaints about financial contributions granted by the Chinese government and benefiting producers in other countries, most notably in Egypt and Indonesia. After investigating, it determined that cross-border financial contributions amounted to countervailable subsidies and imposed tariffs on products coming from Egypt (glass fibre) and Indonesia (steel).

From the point of view of legal analysis, the first issue the EU Commission had to determine was whether the applicable legal definitions of subsidy (the one of the EU Basic Anti-Subsidy Regulation and the WTO one) can cover so-called transnational subsidies.

These definitions regulate financial contributions granted "by the government". The important legal language here is "by the government". The EU Commission focused on this language (which can be found in both the relevant EU and WTO provisions) and construed it through public international law, and in particular to Article 11 of the Draft Articles on State Responsibility of the International Law Commission.

Article 11 permits to "attribute" to a State conduct of another actor "if and to the extent that the State acknowledges and adopts the conduct in question as its own."

This means that Indonesia and Egypt could respectively be considered accountable under EU and WTO trade laws for having "pro-actively sought or induced" [Indonesia], or "acknowledged and adopted" [Egypt] as its own subsidies granted by another country [China] for the benefit of producers within their own territory.

Now – this legal strategy is extremely ambitious and high-risk. Even more so because the Commission is 100% relying on this legal re-construction only. It does not even try to follow the usual, traditional path of exploring whether the ordinary meaning and the context of the legal provisions, all set within the object and purpose of the laws, enable covering these new forms of transnational subsidies. It is all about using the international law rules of State attribution to interpret trade laws. To be sure, this is not new, especially in the WTO case-law of the Appellate Body (if you wish, the world trade court). But this approach has been harshly criticised by many and is arguably one of the technical mistakes that have eventually led to the US pulling the plug of the Appellate Body.

I suppose you are now asking yourself – and me – what was the reaction of the adjudicating bodies, if any? Did they validate the approach and conclusion of the Commission? Now - while the steel regulations (Indonesia) were challenged before the WTO Dispute Settlement, the glass fibre regulations (Egypt) were challenged before the EU General Court and, on appeal, the European Court of Justice.

Let's move to Luxembourg first.

All judicial actors – General Court, Advocate General and European Court of Justice - fully confirmed the Commission's interpretation of EU law and concluded that this interpretation was also clearly permissible under WTO subsidy law. But interestingly, they dodged the assessment of the ambitious and high-risk track of the international rules on responsibility. They exclusively focused on the trade-law provisions and the already mentioned traditional tools of interpretation (literal, contextual, teleological). Incidentally, in doing so, they came out with extraordinary readings of the law, especially WTO law, which strikes any trade lawyer for their self-assuredness and frankly legal mistakes.

What about the WTO Dispute Settlement?

Here, the Panel approached the legal issue both ways – first, by analysing the applicable legal provisions of WTO law and coming out with an orthodox interpretation (completely opposite to that of the EU adjudicators), and then by focusing on the Commission international law-based theory.

As regards the former, the WTO Panel reading of the WTO provisions is perfectly **orthodox**. They (rightly) underline that the rationale itself of having a definition is justified by the huge effort and compromise reached by the negotiators to pinpoint only certain forms of governmental interventions as possible subsidies. This means that WTO subsidy laws have a "closed nature" and, in themselves, they cannot cover transnational subsidies.

The Panel then moved to the innovative theory of the Commission-Prometheus and took a Solomon's decision. While repeatedly highlighting that it was not deciding on or expressing any opinion on the general issue of whether state-to-state attribution is permissible under WTO subsidy laws (and, importantly, not excluding that, "under certain circumstances", this might be the case), it specifically focused on the precise standard used by the EU Commission to attribute Chinese financial contributions to Indonesia, and, in particular, on the fact that Indonesia "pro-actively sought" or "induced" the Chinese government to give money. With respect to this specific test, the Panel rejected the Commission's construction.

Now – these findings are very recent (the Panel report came out on October 2, 2025). Hence, the jury is still out to make sense of these findings, on whether they are legally warranted and, most importantly, on what could their implications be.

The EU (Commission) may have lost the battle but, perhaps, won the war. To be sure, they lost the specific case but the WTO Panel a) expressly accepted the possibility of using the rules on attribution to interpret WTO subsidy laws and address the legal issue of transnational subsidies, and b) clearly stated that, "under certain circumstances", their legal assessment might be different.

Once again, the EU-Prometheus took the lead in addressing transnational subsidies, once again, others, and in particular the US, followed suit. Following a consultation started in 2023, the US DOC has recently changed their administrative law, the CVD rule, and in particular amended the so-called "transnational subsidy rule", introduced way back in the early 1980s, and whereby the DOC was not permitted to countervail transnational subsidies – NB: some examples of frankly exotic transnational subsidies had already been complained about in 1982 but the US Doc was quick in rejecting the possibility to countervail them.

Clearly, China and those countries that, along the Belt and Road initiative, are benefiting from Chinese contributions may not be happy of these actions. But, frankly, this is part of the legal-political game. You have winners, you have losers. What is most interesting is that the Chinese massive investment abroad is being matched by similar initiatives of the other major players (G7 & co) that are carrying out massive investment abroad. It is just time before their action will too attract transnational subsidy claims.

As a very final note to the first case-study, it is interesting to note how in the first case has introduced new legal instruments to tackle Chinese subsidies, in the other it has stretched the current laws to do so. In both cases, we have seen Prometheus in action.

That said, there is another side of the coin in this battle for industrial policy and competitiveness. All scenarios and instruments analysed so far concern "defensive" measures adopted by the EU to contrast mostly Chinese subsidisation. What we have been witnessing simultaneously is the "proactive" side of EU law and policy, i.e. the increasing flexibility in giving the green light to Member States' own subsidies to their companies and industries. To a very strong anti-subsidy practice corresponds a very strong pro-State aid practice. Partly, this trend towards relaxing EU State aid control can be traced back to the great financial crisis of 2008 but then, crisis after crisis, the Commission has relaxed the rule-book (just to give you a basic stats: currently, roughly 90% of State aid measures are legal). While facing significant opposition (internally in the EU Commission and in the EU, with many Member States objecting to this lax approach) this seems to be one of the signature features of current EU State aid laws.

Perhaps, another shape of Prometheus in action, where, honestly, I can mostly see and anticipate negative effects.

3. Second case-study: climate change and trade

The second case-study will concentrate on the extension of the Emissions Trading System (ETS) beyond the EU via the Carbon Border Adjustment Mechanism (CBAM).

Clearly, the background to this case-study is the ominous challenge posed by climate change. This is clearly a massive environmental and health emergency. It is scientifically proved that the large majority of emissions come from anthropogenic activities and from corporations in particular.

The general background scenario is one where, while global awareness has increasingly gained traction, governmental action has often lagged behind. Renewables have certainly increased dramatically but not as much as to supplant fossil fuels - the main cause of climate change. From a legal perspective, the general framework has increasingly been tightened up with commitments being given but compliance has not always been up to the standard and the deployment of financial resources, in particular to adapt to the already present negative consequences of climate change in various parts of the globe, has not been sufficient.

An interesting phenomenon that has taken place, lacking real action from the top to the bottom, has been the flurry of domestic climate change litigation – hence action from the bottom. Let me refer you to the excellent research carried out by Jolene Lin and Jacqueline Peel on the topic. (The quartet of international courts' advisory opinions on States' obligations on climate change that recently came out is likely to produce further legal ammunition to domestic litigants.)

But, going back to the policies to tackle climate change, economics 101 is suggesting that, whenever you have a negative externality (and environmental pollution is a textbook example), you need to introduce policies to internalise the externality. One of these is taxation, in the form of a carbon taxation.

An alternative is setting-up a market-based mechanism. While the EU cannot claim to be the forerunner in this respect (the Gold medal goes to California), it can certainly be credited for having established the biggest market-based system to tackle carbon emissions in the world, the Emissions Trading System (ETS) with a start in 2005. Using another jargon, this is a Cap-and-Trade (CAP) system.

An ETS consists of three main elements:

(i) a cap for total emissions from covered sectors (or a restriction of emissions related to a pre-specified level of inputs or outputs);
(ii) rights or allowances or permits to emit GHGs; and
(iii) a market for trading the allowances.

In other words, an ETS should create incentives to be more efficient, in particular with respect to the emissions you produce. Why? Because if you pollute less you can cash in on your efficiency by selling the extra permits that you have at the end of the year to those that are not as efficient as you.

Any action to internalise environmental externalities, if it is not carried out globally, may create two different types of side-effects.

On the one hand, the companies that are subject to the new climate rules may incur extra costs and hence may be less competitive in global markets, in particular inasmuch as they face competition from companies based in jurisdictions that have no equivalent mechanisms to internalise the carbon externalities ("competitiveness concerns").

On the other hand, the fact itself that the mechanism to internalise externalities may be costly and that other jurisdictions don't have it, may create **incentives** on companies based in the first jurisdictions to relocate to the second jurisdictions. From a global perspective, this would mean that the climate issue is not sorted out because emissions would continue being produced, although in another jurisdiction. This scenario is called "carbon leakage".

The presence of these two side effects of any policy trying to internalise environmental externalities caused by climate change - competitiveness and carbon-leakage concerns – has to be properly accounted for by any legislator. It is exactly to tackle these side effects, which have been debated since the early times of the ETS, that the EU has recently introduced another regulation, that supplements the 'internal mechanism' of the ETS with an 'external mechanism': the Carbon Border Adjustment Mechanism (CBAM). Let me add a little bit more of contextual information.

The goal and the logic are clear.

To avoid carbon-leakage risks, we need to ensure that, at least with respect to competition taking place within the EU internal market, all producers there internalise the relevant carbon cost. While EU products do so since their producers are by and large subject to the EU ETS, this does not happen for those foreign products that are imported into the EU internal market. Hence, the idea is to impose on those imports an obligation to buy emissions certificates similar to those bought by EU installations. Very much like in the case of the EU Foreign Subsidy regulation, what we have here is an 'extension' of one key EU policy to third countries and their products inasmuch as they enter the EU internal market.

I leave aside here the analysis of the many difficulties raised by this system. Let me just mention a few of them. How do you calculate the carbon cost incorporated in imports? How do you take into account – because you should do this –the policies of internalisation that are in force in the countries of origin? How do you compensate the particularly high energy costs (and hence emission costs) of energy-intensive industries? (For many years, the solution was to allocate "free" permits or allowances to these industries and to grant them aid for "indirect emissions costs". But, after many years, the pressure is on getting rid of this free allocation – currently this is set for 2034 - and this aid – to finish in 2030. But as seen now there are new geopolitical pressures to support the EU industry and tackle the issue of high energy costs. How will you do this? By allowing subsidies to energy intensive industries? By keeping free allowances? By – and this is an option on the table – exempting energy-intensive-produced products that are exported from the EU from the ETS? Note that the US have already countervailed imports from the EU for benefiting from free allowances.)

I am leaving aside the discussion of all these issues which are clearly important and difficult.

What I want to concentrate on, in my continuous EU-Prometheus parallel, is obviously the highly innovative nature of the EU ETS (and also on its CBAM), which is once again evidenced by the carbon-copy policies taking place in various parts of the world and which very often are modelled on the EU.

And, most importantly, on the negative sides of EU policies. In the case of CBAM, significant criticism came out from those countries that export to the EU internal market and that, before CBAM, were enjoying (for various reasons) a competitive advantage vis-à-vis EU products.

Now – the elephant in the room here is a fact. We live in a world where independent States trade with each other but by and large their own regulatory systems are different in all respects – each country has its own laws and regulations and standards on environmental, health and safety, social security, tax, company law etc. Each country has its own economy and different cost-revenue-structures. In other words, from the competitiveness point of view, we are all uneven. It is a story as old as the world that, when countries start to import/export, trade with each other, these differences come out, and claims about unfair competition are levied. And unfairness is like beauty – it is in the eye of the beholder!

In the specific case of the CBAM, obviously the complaints are coming from those countries that have laxer environmental (in this case: climate) standards and where companies face lower costs.

It is interesting to note in this respect that the narrative put forward by the EU is particularly strong, pro-active, some even say "imperialist". The EU says:

> "Climate change is a problem, it is a global problem. We therefore need global solution that avoid carbon leakage risks. We cannot simply go on our own. If there is no global standard, we will leverage on our EU internal market and force those that trade within our market to adopt our standard."

It is argued that there is a principle in international environmental law which refers to the "common but differentiated responsibilities" for climate change. Hence, differences and variations in the action to fight climate change should be accepted. The CBAM is levelling all – with no real distinction based on differentiated responsibilities (but only perhaps on the existence and effectiveness of similar abatement systems). The concerns and complaints of these third countries are well-known and suggestions have been made to better interface the CBAM with other systems and, from the key financial point of view, to re-direct all (or at least part) of the revenue that is generated by the purchasing of permits towards those countries that are particularly lagging behind in climate mitigation efforts, especially LDCs (this possibility is currently subject to review).

Once again, the EU-Prometheus, "clever and full of wiles".

As a final note, it is interesting to mention the very recent COP 30 and the seeming acceptance that, in the face of a challenge as vital as climate change, countries do and can take "unilateral action". Far from prohibiting unilateral action (which would frankly have been impossible) or even discouraging it (which would similarly have been very difficult), the final document of 22 November 2025 simply calls for the respect of non-discrimination and avoidance of disguised trade restrictions (thus mimicking the chapeau of GATT Article XX and inadvertently evoking the rich and important WTO case-law in this respect), and also calls for cooperation and deliberation among all stakeholders, including, interestingly, the ITC, the UNCTAD and WTO (which, we believe, may too interrogate the WTO Appellate Body's jurisprudence on international dialogue and due process). In particular, at the very end of the document, we can read that the Conference of the Parties

> 56. *Reaffirms* that Parties should cooperate to promote a supportive and open international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them better to address the problems of climate change and *also reaffirms* that measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade;
>
> 57. *Requests* the subsidiary bodies to hold a dialogue at their sixty-fourth, sixty-sixth (June 2027) and sixty-eighth sessions (June 2028), with the participation of Parties and other stakeholders, including the International Trade Centre, the United Nations Conference on Trade and Development and the World Trade Organization, to consider opportunities, challenges and barriers in relation to enhancing international cooperation related to the role of trade, taking into account paragraph 56 above, *decides* to exchange experiences and views on related matters at a high-level event in 2028 and *requests* the subsidiary bodies to present a report summarizing the discussions at the high-level event; ….

4. Assessment and conclusions

It is time for conclusions.

I wanted to provide you with both a background analysis and a snapshot of the current action of the EU as far as external trade is concerned. To do so, I have used two case-studies. The first on industrial policy and subsidies. The second on climate change and trade.

What are the main take-aways of this analysis?

First, we live in a very complex world, in very turbulent times. Crisis after crisis, overlapping with each other, and happening very fast. This makes it difficult to react, especially for an entity that is not unitarian State and has all its complex governance, political and legal paraphernalia.

Mario Draghi in his recent report on the competitiveness of the EU internal market has complained loud and clear about the inadequacies of the current institutional and legal-political framework of the EU which is in stark contrast to the need for fast action in terms of innovation that is needed in current times.

In the press conference where the report was presented he clearly said that if no action is adopted fast, the EU will die – not immediately but in a slow agony.

In the most recent iteration of his thinking, while accepting a prize in Spain few weeks ago, he talked of the need to move forward with "pragmatic federalism".

(Incidentally, it looks obvious to me, as one that spent almost 25 years in this country, and 15 in Birmingham, that this action should necessarily involve the UK too, as a natural and close companion to the EU. The challenges are global and alike partners should work closely.)

Secondly, against a complex world, with multiple and overlapping challenges, not only are, as already said, the institutional frameworks old, but also the substantive laws and the policy tools at our disposal – which were largely created (often incrementally) in different times, in a different world.

Thirdly, against a complex world, and old institutions and laws, there is a need for urgent, and often joined, action.

In this lecture I have tried to analyse and emphasise few tools the EU is currently adopting which show a high degree of ambivalence. On the one hand, they are clearly innovative, bold, at times perhaps even visionary. On the other hand, since they are by their own nature unilateral (or, using a different language, preferred in Brussels policy circles, "autonomous"), they inherently have the potential to cause frictions.

Once again, the Ancient Greeks, one of the solid basis of Western civilisation, gave us a myth to hang on, and ponder, that of Prometheus, "clever Prometheus, full of wiles", the prototype of ambivalence, a perfect example for the ambivalent times we live in.