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'Kind of Green'. The U.S. Proposal to Advance Sustainability through Trade Rules and the Future of the WTO

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Introduction

On 17 December 2020, the United States (US) circulated a draft Ministerial Conference Decision aimed at addressing the imbalance in the existence and enforcement of fundamental environmental protection standards among the members of the World Trade Organization (WTO).[1] The proposal, entitled *Advancing Sustainability Goals through Trade Rules to Level the Playing Field*, would address such imbalance by making the enactment and enforcement of environmental standards below a certain level of environmental protection an 'actionable subsidy' under the WTO Agreement on Subsidies and Countervailing Measures (ASCM) and allowing other members to impose duties to offset the benefits received by the subsidized industry. The proposal appears perfectly in line with the long-time concerns expressed by the US towards differential environmental practices, addressed

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[1] Draft Ministerial Decision, *Advancing Sustainability Goals through Trade Rules to Level the Playing Field*, WT/GC/W/814, 17 December 2020.

since the adoption of the North American Free Trade Agreement (NAFTA) with a group of provisions generally known as the 'Pollution-Haven Package', later reproduced in a vast number of regional agreements. Unlike these provisions, however, which merely prohibit the parties to a treaty from lowering their environmental standards to attract trade or investment—reflecting what is known among environmental lawyers as the principle of non-regression—the recent US proposal would require a determination of what can be considered an 'acceptable' standard of environmental protection, thus impinging on countries' regulatory sovereignty, and would ultimately expand the breadth of members' possible trade remedies to include a means of addressing another country's lack of environmental regulation or enforcement of environmental rules by equating such a situation to a subsidy. While the proposed approach is likely to stir old debates between countries with different levels of environmental protection, it does offer a window of opportunity to go even further than the mere integration of the principle of non-regression in the WTO machinery. By doing so, the proposal could have implications that reach far beyond a potential reform of the text of the ASCM to involve the future of the whole Organization.

The Proposal Unpacked

The US proposal addresses the role that the ASCM could play in making trade and trade law more sustainable from an unprecedented perspective. While the Agreement has been at the centre of heated debates on the relationship between trade and the environment, most of the arguments have concentrated on the need and opportunities to include exception clauses in the text of the Agreement to allow members to introduce measures in support of their 'green' industries. Rather than directly helping countries' 'green' measures by providing a way to escape ASCM rules, the US is suggesting 'punishing' those countries that do not uphold certain fundamental levels of environmental protection, adding their practices to the list of actionable subsidies, under Article 5 of the Agreement.

Actionable subsidies are permissible under WTO law so long as they do not negatively harm the trade interests of other countries. When this happens, other countries have the choice between a multilateral route (adjudication) or taking unilateral actions under the review of domestic authorities against the other government's subsidy through the imposition of countervailing duties. Countervailing duties are known, together with antidumping duties and safeguards, as 'trade remedies'. These measures consist, essentially, of increasing the price of goods imported from abroad by imposing duties on them to eliminate the unfair advantage arising from a subsidy given by a State to its exporters. The underlying idea of the US proposal is that "industries located in certain countries benefit from weak or unenforced environmental laws and regulations by not being required to incur, and properly

internalize, the costs of preventing or remediating environmental damage resulting from their production processes"[2] and thus gain an unfair competitive advantage, comparable to that obtained by subsidized industries.

A first difficulty lies in the fact that not all measures that confer a seemingly unfair advantage can be qualified as (actionable) subsidies, at least under WTO law. As a matter of fact, to be treated as an actionable subsidy, the action of not enacting or not enforcing environmental laws should first fall under the scope of application of the ASCM, which defines, at Article 1, what constitutes a subsidy for the purposes of the Agreement itself. Subsidies are defined as a 'financial contribution' by a government or public body by which 'a benefit is thereby conferred'. While it could very well be argued that the failure to enact or enforce environmental laws confers a benefit to a given industry, showing that such failure qualifies as a direct financial contribution could prove more challenging. And this is undoubtedly an important question that will need to be addressed once the proposal is discussed by trade ministers at a ministerial conference—and the US has already made their position clear in this regard by specifying that "the value of a subsidy is not the cost of the subsidy to the granting government but the benefit received by an industrial entity."[3]

There is hardly any doubt that the US proposal approaches the question of 'greening' the ASCM from an unconventional perspective. It is no longer about resurrecting the long-dormant "green box" in Article 8 of the Agreement nor about introducing a brand new exception in a text that, surprisingly, lacks one. The focus of the proposal is instead on the role that can be played by trade remedies to advance sustainability goals through trade rules. On the surface, with this proposal, the US seems to be finally joining the new environmental and sustainability initiatives launched in Geneva by a number of WTO members. At the same time, the choice of focusing on trade remedies seems hardly accidental. One should not forget that the Trump administration has never shied away from proclaiming its belief that US trade remedy laws have been undermined and threatened by the WTO, and in particular by the Appellate Body. This naturally begs the question as to what extent the proposal is for genuine environmental purposes or whether it is simply aimed at protecting certain domestic industries through the expansion of the breadth of members' possible trade remedies. A question that is fueled by the recognition that even measures that may appear for all purposes 'green'—such as countervailing duties imposed on subsidies that take the form of weak or unenforced environmental standards—might not necessarily be that 'green'. On the one hand, as has been suggested by the US in its proposal, such measures could perform clear environmental protection functions, from promoting

[2] Ibid.
[3] Ibid.

stronger environmental standards and enforcement to encouraging the proper internalization of environmental costs, and thereby correct policies that create transaction-specific market inefficiencies. On the other hand, the US might be seen as hiding protectionist intents as they benefit the domestic industry, increasing its competitiveness and productivity.

Levelling the Playing Field or Eco-Imperialism? Digging up an Old Question

This is not the first time the US adopts a similar position vis-à-vis differential—and in particular low—environmental standards. Already in the early 1990s, lower environmental practices were seen as conferring 'unfair' trade advantages on producers from countries with lower environmental standards and it was argued that maintaining low environmental standards allowed domestic producers to incur lesser costs and was therefore comparable to a subsidy or dumping practice. This position was explained with extreme clarity by US Senator Boren in the context of the adoption of the *International Pollution Deterrence Act*:

> "We can no longer stand idly by while some US manufacturers, such as the US carbon and steel alloy industry, spend as much as 250 percent more on environmental controls as a percentage of gross domestic product than do other countries...I see the unfair advantage enjoyed by other nations exploiting the environment and public health for economic gain when I look at many industries important to my own state of Oklahoma…"[4]

This position was generally shared by environmentalists in the industrialized world, who further feared that their own countries would then be forced by political pressure to lower their own environmental protection standards in order to remain competitive. Or else, that industries would relocate to countries with lower environmental standards leading to a snowballing race to the bottom. On the opposite side of the debate, developing countries regarded these arguments as mere excuses and continued labelling unilateral sanctions as clear examples of 'green protectionism' and 'eco-imperialism' or, in other words, as developed countries' newly found way to impose their own preferences and values on the less developed world.[5]

[4] International Pollution Deterrence Act of 1991. Statement of Senator David L. Boren, Senate Finance Committee, October 25, 1991.
[5] Daniel C. Esty, *Greening the GATT* (1994) (Peterson Institute for International Economics) 181-192.

While the attempt to qualify lower environmental standards as subsidies was not successful in the context of the Uruguay Round of negotiations that established the WTO in 1995, the US, as well as many other—mostly industrialized—countries have turned to the bilateral and regional track to address the issue of differential environmental practices. This model was pioneered by the NAFTA negotiators and represented the core of the so-called 'Pollution-Haven Package', the introduction of which was the result of deepening fears that US and Canadian companies would relocate their operations to Mexico, where environmental standards were lower, thus having detrimental effects on the Mexican environment, and that the US and Canada would then lower their own environmental standards to keep companies at home leading to a snowballing race to the bottom.[6]

Throughout the years, following NAFTA's example, the 'Pollution-Haven Package' has become a constant and essential component of regional trade agreements, often with reference to both trade and investment: next to the recognition of the parties' regulatory sovereignty—which is the prerogative to establish their own levels of (environmental) protection as well as to modify their (environmental) laws and policies accordingly—the parties commit not to lower their environmental standards to encourage trade or investment. According to Article 24.4.3 of the latest trade agreement signed by Canada, Mexico, and the US, better known with the acronyms of the three countries as USMCA,

> "…the Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protection afforded in their respective environmental laws. Accordingly, a Party shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, its environmental laws in a manner that weakens or reduces the protection afforded in those laws in order to encourage trade or investment between the Parties."[7]

Provisions of this kind, while aimed at addressing the same 'problem' as the US proposal—that of the competitive advantage provided by lower environmental standards—do not encroach on countries' regulatory sovereignty: they leave each country free to choose the level of environmental protection they intend to ensure on their territory, provided they do not lower it over time, perfectly embodying the aforementioned principle of non-regression. On the contrary, qualifying lower environmental standards as 'actionable subsidies', able to trigger the possibility for trading partners to impose

[6] Robert Housman, 'The North American Free Trade Agreement's Lessons for Reconciling Trade and the Environment' (1994) 30 Stanford Journal of International Law 379.
[7] United States-Mexico-Canada Agreement, 10 December 2019, Art. 24.4.3.

countervailing duties, directly impinges on each country's own sovereignty over any resources management and pollution control decisions. And while some countries may see the adoption of sanctions as an effective way to 'level the playing field', others may regard them as an expression of disapproval of a country's environmental behaviour by forcing compliance with more acceptable standards. Moreover, enforcing this provision would necessarily require setting what constitutes the threshold of fundamental standards of environmental protection, evoking the old-time question of what can be considered an 'acceptable' level of pollution or environmental degradation and who gets to decide.

A Window of Opportunity for the Principle of Non-Regression (and Much More)

What the US proposal and provisions like Article 24.4.3 of USMCA have in common is the prohibition of any recession of environmental law or existing levels of environmental protection, summarized in the principle of non-regression.[8] The idea of non-regression is old in international environmental law. It can already be found in Principle 1 of the Stockholm Declaration on the Human Environment, which recognizes man's responsibility "to protect and improve the environment for present and future generations," so as to avoid regressing in relation to existing levels of environmental protection. It has slowly become one of the core principles of international environmental law, which can be found in a wide variety of multilateral environmental agreements. One example is the Paris Agreement, which clarifies that, while States are now free to choose their level of ambition in terms of emissions reduction targets, the level—expressed through the so-called nationally determined contributions or NDCs—will always have to reflect each country's highest possible ambition and, when revised every five years, can only be increased and never lowered.[9] The principle has even found its way in the many attempts to create an overarching treaty regulating the global environment, from the ambitious Draft International Covenant on Environment and Development developed in 1995 by the International Union for the Conservation of Nature (IUCN) all the way to the Draft Global Pact for the Environment. The latter, which owed its origin to the work of environmental law experts coming from different parts of the world, aimed at strengthening international environmental governance and protection with a binding treaty that would gather and crystallize the fundamental principles of international environmental law. Among these principles, deemed fundamental, is the principle of non-regression, included in Article 17 of the Draft Pact, which calls on the Parties to "refrain from allowing activities or

[8] Michel Prieur, 'Le principe de non régression en droit de l'environnement, condition du développement durable' (2013) Revue Africaine de Droit de l'Environnement 17.
[9] Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104, Art. 4(3).

adopting norms that have the effect of reducing the global level of environmental protection guaranteed by current law."[10]

This principle has now found its way into international investment law since its first formulation in Article 1114 of NAFTA. Throughout the years and all the way to USMCA—and others among the most recent free trade agreements—this formulation has become more precise and binding: the term 'should' in the original NAFTA evolved into 'shall strive to' and finally to 'shall' in USMCA. At the same time, the latter allows for the application of binding state-state dispute settlement procedures and the adoption of economic countermeasures in the event of violation of such principle.[11] Motivated by the desire to mitigate the possibility of failing to enact or enforce environmental laws as a source of competitive advantage and, as clearly explained by the EU, to further sustainable development goals through international economic law instruments, provisions of non-regression have been multiplying: while they were largely absent until the late 2000s, with a few exceptions, they can now be found in a large number of international investment agreements, negotiated by over 130 countries, and they have become a permanent feature in the international investment law landscape.[12]

Thanks to formulations like the one in Article 24.4.3 of USMCA, the principle of non-regression has been extended to both investment and trade. However, it has not yet infiltrated international trade law in the same way it has international investment law. All of this could effectively change should the US proposal be accepted with the adoption of a ministerial decision at the earliest ministerial conference this year. If adopted, such a decision could serve as a vehicle not only to integrate the principle of non-regression in the corpus of WTO law, but also to introduce the observance of an 'acceptable' standard of environmental protection as a condition for compliance with WTO rules. The implications of such an integration could be wide-ranging for the relationship between trade liberalization and environmental protection. To start, it would indicate a drastic change in the traditional free-trade approach towards regulatory diversity: rather than focusing on the 'danger' that countries would set their environmental regulations and standards 'too high', thereby creating obstacles to the free flow of commerce, the US proposal stems from the fear—traditionally shared by environmentalists—that countries would instead be tempted to set their regulations and standards 'too low', externalizing harms onto others and ultimately harming the environment. More broadly, it would represent a significant development of the traditional approach to the relationship between international trade and the environment, as it abandons the view that the environment should enter trade agreements only

[10] Draft Pact for the Global Environment, Art. 17.
[11] Andrew D. Mitchell & James Munro, 'No Retreat: An Emerging Principle of Non-regression from Environmental Protections in International Investment Law' (2019) 50 Georgetown Journal of International Law 626, 649.
[12] Ibid., 653.

through narrow exceptions, but rather through the clear formulation of environmental principles. As a result, such environmental principles—such as the principle of non-regression—could influence and shape the interpretation and application of trade provisions as well as other 'environmental' provisions already present in the text of WTO agreements, as has happened in investment law cases.[13] More importantly, it could suggest that the WTO and the legal framework it administers represent the right forum to address the long-lasting trade and environment debate—or at least a promising candidate.

Conclusions: A (Green) Future for the WTO?

The US proposal begs several important technical questions—such as whether it would be possible to frame the classification of the failure to enact or enforce environmental laws within the existing architecture of the ASCM—as well as political ones—with regard to the more or less genuinely 'green' motives behind the proposal itself. Yet, the proposal does so much more than that. It raises questions that go much further than the reform of the WTO's subsidies discipline, opening a window on the very future of the Organization itself. First, it is worth noting the forum where the proposal has been presented: the *Structured Discussions on Trade and Environmental Sustainability* launched on 20 November 2020 by a group of members including, among others, the EU, Australia, Canada, Japan, Mexico, Costa Rica and Senegal. The Discussions are of particular importance in that they seem to convey the idea that the WTO would be the place to deliver progress on issues related to trade and sustainability. This new-found approach marks a stark departure from many years of mistrust and skepticism as to the role that the Organization could have played in this regard. Just two decades ago, a former WTO Director-General, Renato Ruggiero, proclaimed, while reflecting on the events that had unfolded in Seattle in November 1999, that the WTO "cannot be allowed to gradually drift away from its trade vocation. It would serve neither the WTO nor any other cause if it were to pretend it could offer solutions to every non-trade issue."[14] And this view was shared by many, who believed that the WTO was no place to discuss environmental matters. Now, a growing number of signs (e.g., negotiations on a WTO Framework on Investment Facilitation for Sustainable Development[15]) seem

[13] Adel A Hamadi Al Tamimi v. Sultanate of Oman, ICSID Case No. ARB/11/33, Award (Nov. 3, 2015).
[14] Roberto Ruggiero, 'Reflections After Seattle' (2000) 24(9) Fordham International Law Journal 9, 11.
[15] See Makane Moïse Mbengue, 'Facilitating Investment for Sustainable Development: It Matters to Africa?' (2018) 222 Columbia FDI Perspectives; Jansen Calamita, 'Multilateralizing Investment Facilitation at the WTO: Looking for the Added Value' (2020) 23(4) Journal of International Economic Law, 973-988; Karl Sauvant, 'Enabling the Full Participation of Developing Countries in Negotiating an Investment Facilitation Framework for Development' (2020) 275 Columbia FDI Perspectives.

to point precisely to the contrary, that is to the Organization itself as a forum where progress on making trade work for a variety of non-trade concerns is not only possible but even desirable.

One should also not overlook the backdrop against which these events are unfolding. The country that is advancing the proposal, asking for the adoption of a ministerial decision, is the same country that has been blocking new appointments to the Appellate Body since mid-2017, leaving what had been for many years the WTO's 'crown jewel' without a quorum to hear new appeals. Although the proposal puts a lot of emphasis on the possibility of imposing countervailing duties as a reaction to a country's failure to enact or enforce environment laws—once such failure is regarded as an actionable subsidy—another possible response other countries have in such cases is resorting to the multilateral route of bringing a dispute to the WTO, challenging the alleged subsidy. Moreover, countervailing duties themselves, just like any trade remedy, can be challenged by the member affected by them, once again through adjudication. How can this proposal be squared with the US demonstration of distrust towards the Appellate Body, and the WTO dispute settlement mechanism as a whole? Could (or should) we read into it a show of faith not just towards the WTO as a forum to address trade and environment questions but also towards the integrity and value of the international trading system as a whole? The change of administration in the US—accompanied by a change in the attitude towards multilateralism—opens a brand new chapter in the story of the World Trade Organization, and the opportunities to 'green' and 'revitalize' it are more and more within reach.

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