Another Thing Spiking in America in 2022: Harm to the WTO

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Electric Cars | Environment | Trade Law

Friends of the World Trade Organization (WTO) experienced some distress during the US government's 2017-2020 cycle. They did not expect American disrespect for the WTO and its rules to reach a new, much-higher watermark in the current cycle. But that has occurred. Responsive commentary has been curiously low-volume so far, perhaps because of "outrage fatigue" and perhaps because the latest U.S.

affront to the WTO is in the form of an environmental measure. Some additional volume is appropriate, because American harm to the WTO enterprise has spiked with the enactment of an electric vehicle (EV) provision in the 2022 budget reconciliation bill known as the Inflation Reduction Act (IRA).

Sitting alongside other EV-related provisions in IRA is one that makes generous purchase subsidies, aimed at promoting transition from gas-powered to electric vehicles, available only in respect of EVs assembled in North America. This incentive is delivered through the tax system rather than at point-of- sale as in the case of the 2009 "Cash for Clunkers" program, but it changes a vehicle's effective purchase price on a dollar-for-dollar basis.

This measure is quite explicitly WTO-inconsistent. It violates National Treatment (GATT Art. III) as it accords to imported EVs treatment less favorable than that accorded to like domestically-assembled EVs. It violates MFN (GATT Art. I) as it accords to EVs assembled in the territory of other WTO Members treatment less favorable than that accorded to EVs assembled in Canada/Mexico. And in regard to the WTO's subsidy rules, it makes access to a consumption subsidy contingent on the purchaser choosing a domestically-assembled rather than imported EV; this is one of two types of subsidies that WTO rules categorically prohibit.

US officials may believe that these discriminatory aspects were necessary politically, in order to get an EV incentive passed. That argument may get some (limited) traction in the court of public opinion, but it will be useless in the event of a legal challenge if the United

States seeks to justify its GATT breaches by invoking GATT Art. XX. Compressing the analysis quite a bit, the core problem is that the nationality-based element makes this measure a less, not more, potent consumer incentive for transitioning to EVs. It therefore interferes with, rather than being essential to, the articulated US objective of spurring transition. So even if the EV measure could be provisionally justified under one of the GATT Art. XX indents (not guaranteed), it would plainly fail the test imposed by the GATT Art. XX chapeau. The nationality-based trade-restrictive element is not only unnecessary; alternative measures lacking this element would contribute more strongly to meeting the claimed objective.

These WTO legal considerations were and are well-known to the officials who worked on the IRA in the administration and on Capitol Hill. They did not blunder into a WTO breach. During prior U.S. government cycles, enactment of such a provision would have been hugely improbable. Chairs, Ranking Minority Members and Committee Staff at the Senate Finance and House Ways & Means committees have always regarded it as their obligation to call out, and try to purge, any WTO-inconsistent elements of pending legislation long before the time of floor consideration. When WTO-inconsistent proposals have somehow worked their way into bills that cleared one or both chambers, that fact has ordinarily been considered to justify a veto threat or a veto. As a result, it has long been possible to proudly observe that the United States does not knowingly and intentionally put new WTO-breaching legislation into effect. It might sound mundane, not a proper subject for giving out medals, but this is in fact one of the key ways that international trade agreements deliver value over

time to the countries that have negotiated and approved them. The agreements act as a filter on new measures and help to ensure that applied trade policies at the national level generally evolve in a liberal, rather than illiberal, direction.

That didn't happen here. The EV provisions in question were largely authored by Majority committee staff in consultation with administration officials. The filters not only didn't filter; they wrote the bill.

You don't have to feel any particular way about climate change, or about government leadership in promoting an EV transition, to appreciate that this is significant.

No national public conversation has ever occurred in America about carbon control and the WTO. In the commentariat, some have long insisted that WTO rules were incompatible with timely/effective carbon control action, and would have to be either rewritten or simply breached. Others have contended that it makes sense to discover how much effective action we can achieve WTO-consistently, and negotiate internationally for additional "policy space" only if events prove that to be necessary. One could imagine a US administration using its convening and bully pulpit powers to turn that academic debate into something larger and more accessible … with a view to achieving at least more predictability and ideally some level of public understanding and acceptance.

Again, that didn't happen here. If Congress even momentarily considered WTO-consistent EV incentives, it left no record of that consideration. The same is true of the administration. The result was a knowing, explicit,

legislated breach of the WTO's most central non-discrimination obligations.

Could this really be worse than what happened during the USG's last cycle? Let's compare. Apart from periodic Presidential insults and tweeted ad *hominem* attacks, WTO supporters had three main grievances.

The US administration implemented Section 232 import relief on steel/aluminum and when challenged at the WTO invoked a GATT Art. XXI defense; many saw the latter as a clearly unacceptable stretch of the national security exception. The US administration also asserted that access to the GATT Art. XXI defense is self-judging; while this stance reflected longstanding conventional wisdom, at least in the United States, some WTO supporters saw actually articulating it before a panel as an "anti-WTO" thing to do.

Comment: With the "self-judging" argument having been rejected in a separate WTO case, the US 232 measures may be held ineligible for a GATT Art. XXI defense. How the United States responds in that scenario could have systemic implications. The acts already taken – applying 232 measures, invoking GATT Art. XXI, and contending that a GATT Art. XXI claim is non-justiciable – are not especially harmful to the WTO itself and do not reflect a high level of disrespect for the Organization's rules. Also, this whole endeavor was a purely administrative action by the United States, attracting much more opposition than support on Capitol Hill. (And it has been left in place, which by now means affirmatively embraced, by the current US administration.)

The US administration implemented Section 301 tariffs on products from China, consciously exceeding tariff

bindings (hence breaching WTO rules) with respect to products of that country.

Comment: I look at this as taking a bilateral fight out to the parking lot, with the result (among other things) that there ought to be less damage to breakable furnishings inside the building. It is unfortunate that things have deteriorated so significantly, but there was not a particularly WTO-friendly path for this confrontation to follow. The US-China trade relationship is effectively no longer WTO-based. The possibility that would happen to a particular bilateral relationship has always existed – see the Uruguay Round Statement of Administrative Action on Section 301(b) – and indeed is baked into the WTO treaty structure which recognizes that any Member can breach particular obligations and accept WTO authorized countermeasures of equivalent commercial effect. No country would have joined a WTO which did not, or purported not to, allow such tactics. The US administration did not contend that its actions were WTO-consistent, and therefore did not express disrespect for (any or all of) the WTO's substantive rules. Also, and again, this whole endeavor was and remains a purely administrative action.

My purpose here is not to try to get inside anyone's head and, for example, compare one US President's actual quantum of respect for the WTO (and its rules) with another's. Rather, the point is that objectively, the US government as a whole has now inflicted more damage on the WTO in the current cycle. Public comment so far (scant as noted above) has tended to focus on the combination, i.e., the fact that the current USG has both embraced the WTO-disrespecting actions of the prior one and enacted the EV provision. They see

this as signaling that parochialism in US trade policy is not temporary and that statements of American dedication to multilateralism cannot be relied upon.

I think this account, accurate enough in its punch-line, understates the EV provision's significance. Yes, disrespect for international obligations was already above historical norms, but the EV provision represents what Bridge players call a jump-shift. Unlike prior US actions, it is a body-blow to the WTO for many reasons but two especially: (1) because it was consciously enacted by the USG's two political branches acting in concert, and (2) because it so clearly signals that the USG does not consider WTO-consistency as a relevant filter when new policy and legislation are being developed. Nothing we might do (or might have done) administratively in regard to AB appointments, or in regard to a particular bilateral trade relationship, or in regard to "national security"-based trade restrictions in a couple of sectors, could be as systemically impactful.

That the offending measure is an environmental one should not make WTO supporters (among whom I count myself) any less concerned. The WTO rules pertinent to behind-the-border measures apply to – and codify guardrails for – environmental just as much as other types of measures. Environmentally themed protectionism is not necessarily more virtuous than other sorts of protectionism. Most important, WTO-indifference displayed in one context cannot easily be limited to that context; it broadcasts a wider message. A WTO whose core substantive rules a major founding Member displays no compunction about explicitly violating, in enacting new legislation, is a WTO with little potential to deliver value by shaping national behavior.

WTO flouting of course has never been an exclusively American pastime, and just during the time period being discussed there have been some priceless non-US examples. In a world where the United States can get blamed for just about anything regardless of its actual degree of responsibility, one hears charges that the national officials involved were simply walking through a door that America had swung open. If you subscribe to that narrative, then you should be especially worried because with the EV provision we have now quadrupled the width of that open door.

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The opinions expressed are his own and do not reflect the views or interests of any of his clients or the Washington International Trade Association.

This piece originally appeared at the IELP blog, linked here.

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