

GOING GREEN UNDER THE BIDEN PLAN THREATENS CANADIAN INTERESTS

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There's need for some kind of pragmatic solution based on bilateral collaboration and mutual interest, writes Lawrence Herman.

By Lawrence L. Herman, November 15, 2021

President Joe Biden's engagement in the UN Climate Change Conference (COP26) and his administration's plans for meeting carbon reduction targets under the 2015 Paris Agreement has earned the Americans some needed international political capital. The problem is that part of that capital amounts to a direct assault on Canada's rights under the Canada-US-Mexico Trade Agreement (CUSMA).

That assault comes with a bill before Congress that includes measures to stimulate American-based production of electric vehicles (EVs) through a system of preferential tax credits and domestic content requirements.[\[i\]](#)

This will be the cause of much friction at the Biden-Trudeau-Lopez Obrador meeting in Washington on November 18, when Canadian and Mexican leaders will be weighing in strongly with their concerns. So far, however, nothing reported seems to have altered Biden's EV tax credit plans.

Because so much of the Canada-US trading relationship hinges on the automotive sector, with the two countries' industries being tightly integrated and where a large number of Canadian industries and Canadian jobs are at stake, these kinds of discriminatory

automotive preferences, possibly more so than some of the other Buy American policies, would be hugely damaging

This fact was evident in the tough and frankly unpleasant trade negotiations with the Trump administration in 2017-2018, where a successful outcome was only secured with agreement on the automotive parts of the deal. In the end, CUSMA guaranteed duty free trade for qualifying Canadian vehicles and parts, safeguarding the continuing health of the integrated North American industry and of those Canadian jobs that were directly at risk from American protectionism.

Biden's EV tax credit proposals infringe those treaty guarantees and, if the bill is passed, will almost certainly lead in a [legal challenge](#) by Canada. There have been representations by the Canadian trade minister, both to the Executive branch and to Congressional leadership, complaining in strong terms that these proposals directly violate American obligations, not only under CUSMA but under the World Trade Organization (WTO) Agreement as well.[\[ii\]](#)

At a general level, this latest Canada-US clash also illustrates one of the main challenges facing the international trading order – how to reconcile national environmental laws, including carbon reduction measures under the UN Climate Change Convention and the 2015 Paris Agreement, with the WTO's market-oriented rules that are embodied in trade deals such as CUSMA. Broadly speaking, the two regimes have divergent objectives, one on reducing global warming, the other on keeping global markets open by, among other things, prohibiting discriminatory measures favouring domestic industries.

The unanswered legal question is how far WTO-type trade rules go in allowing national carbon reduction measures that have a discriminatory component, like preferences for domestic EV manufacturers. The problem is that global trade rules – like non-discrimination and prohibition of preferences for local industries – were mostly put together in an era when governments weren't thinking much about the environment, let alone confronting today's urgent climate change crisis.

For these reasons, the WTO Agreement, to take a case in point, doesn't address environmental issues in any specific way. Rather, environmental issues are handled by way of narrowly drawn "general exceptions" that permit environmental protection measures provided they aren't disguised protectionist devices and are demonstrably shown to be "necessary" to protect human life or health.[\[iii\]](#)

Over the last couple of decades, particularly with the climate change crisis, there's been a re-assessment of what these exceptions countenance when it comes to the environment. The better view today is that trade rule orthodoxy gives way where legitimate net zero carbon measures are concerned, even where those favour domestic producers at the expense of imported products.

Chapter 24 of CUSMA contains a robust set of environmental provisions, some of the most advanced in international trade law. But the qualification, as already mentioned, is that as exceptions to free trade obligations, those environmental measures cannot be disguised protectionist devices that shield domestic producers from competing imported products, even if ostensibly directed to carbon reduction or meeting Paris Agreement objectives.

CUSMA also contains hard-fought rules that determine whether an automotive product is truly North American and qualifies for duty free entry and other benefits of the agreement. As a major part of the deal, automotive products from any of the three CUMSA parties have a legal right to those benefits if they meet these re-cast origin thresholds. Nothing in Chapter 4 or any other part of CUSMA allows the US to apply discriminatory preferences like tax credits or deny those benefits to otherwise qualifying products.

Leaving aside political arguments about the spirit of CUSMA and the value of collaboration in meeting net zero carbon targets, the legal question facing any dispute panel will come down to whether the proposed tax credits fit within the general exceptions. Given comments and statements accompanying those bills, there's enough evidence of protectionism in their design to put them offside both the WTO Agreement and American CUSMA obligations.^[iv] A CUSMA or WTO legal dispute will take years to reach conclusion, however.

If the hyped-up Biden-Trudeau partnership [declaration](#) of February 2021 has any credibility, it's that unilateral actions are to be avoided and that the two countries will take "aligned and accelerated policy actions" to achieve a zero-emissions vehicle future. It means there's need for some kind of pragmatic solution based on bilateral collaboration and mutual interest.

Unfortunately, the stark reality of US domestic politics enters the picture, with the EV initiative combined with a host re-packaged Buy American policies being the hallmarks of Biden's presidency. It means that the Canadian embassy in Washington has to continue with its advocacy and that Mr. Trudeau and Canadian ministers still have serious, high-level arm-twisting to do, both at the White House and in the Democratic caucus at the other end of Pennsylvania Avenue.

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Notes

[i]As of writing, on November 12, 2021, Congress approved an [infrastructure spending package](#) of US\$1 trillion. However, a companion bill, the US\$1.75 trillion *Build Back Better Act*, which includes tax credits for purchases of American built EVs, has been stalled. Predictions are that this part of the package will be [passed](#) later this month.

[ii] As reported by *Reuters* on October 22, 2021, Trade Minister Ng sent a letter to both the administration and US lawmakers that the credits, if approved, “would have a major adverse impact on the future of EV and automotive production in Canada.” As well, ambassadors from Canada, Japan, Germany, France, the E.U. and a host of other countries have written to Congressional leaders complaining about the proposal. See <https://insidetrade.com/daily-news/mexico-eu-japan-others-voice-concern-about-proposed-us-ev-tax-credit>.

[iii] These “general exceptions” come under the GATT (Article XX) and which have been incorporated into the WTO Agreement and CUSMA under Article 32.1. Recourse to these exceptions have historically been looked at coldly by WTO trade panels and in scores of bilateral and regional disputes under trade agreements that apply basic WTO rules. Trade annals are overflowing with decisions that have struck down subsidies and other preferences, no matter how well intentioned.

[iv] The August 5, 2021 White House [fact sheet](#) on the EV policy contains statements that go far beyond protecting the environment, including bolstering the domestic supply chain and a range of other objectives, including bolstering American industry in the face of Chinese competition.