

A Power Move in the Solar Trade Arena? How the Inflation Reduction Act's Preference for Domestically Produced Solar Products May Conflict with International Trade Rules.

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I. INTRODUCTION

When the Inflation Reduction Act (“IRA”)—described as “the most important climate action in U.S. history”—was passed in August of 2022, it came as a surprise not only to the citizens of the United States, but also to key Senators who helped pass the legislation.¹ In the past decade, the United States had seemingly abdicated its role as a global leader in addressing climate change.² When this law, with a title that has little to do with environmental legislation, burst onto the world stage, it signaled that the United States’ was working to reclaim its role as a global leader in the climate policy arena.³ Still, the law became the subject of some international controversy because of its implications on international trade.⁴ Among these are the IRA’s

1. Silvio Marcacci, *The Inflation Reduction Act is the Most Important Climate Action in U.S. History*, FORBES (Aug. 2, 2022), <https://www.forbes.com/sites/energyinnovation/2022/08/02/the-inflation-reduction-act-is-the-most-important-climate-action-in-us-history/?sh=74dbdd8a434d>; Taiyler S. Mitchell, *Joe Manchin says he kept quiet on the surprise Inflation Reduction Act because he ‘didn’t want to disappoint people again’*, INSIDER (July 21, 2022), <https://www.businessinsider.com/joe-manchin-quiet-inflation-reduction-act-didnt-want-disappoint-people-2022-7>.

2. See, e.g., Nathan Hultman and Samantha Gross, *How the United States can Return to Credible Climate Leadership*, BROOKINGS (Mar. 1, 2021), <https://www.brookings.edu/research/us-action-is-the-lynchpin-for-successful-international-climate-policy-in-2021/>.

3. Alice C. Hill & Madeline Babin, *What the Historic U.S. Climate Bill Gets Right and Gets Wrong*, COUNCIL ON FOREIGN RELS. (Aug. 17, 2022), <https://www.cfr.org/in-brief/us-climate-bill-inflation-reduction-act-gets-right-wrong-emissions> (“The IRA will go a long way toward restoring the United States’ credibility as a global leader on climate.”).

4. See, e.g., Justin Worland, *Why the World Is Protesting America’s Climate Plan*, TIME (Jan. 15, 2023), <https://time.com/6247230/inflation-reduction-act-global->

preference for domestically manufactured solar products.

While the IRA contains the largest investment ever made by the U.S. government toward climate action, it also contains subsidies for clean energy that have been deemed as “green protectionism” by some, because these subsidies reward *domestically* produced renewable energy products.⁵ Specifically, the IRA includes in its provisions a ten percent bonus tax credit for solar products that incorporate domestically produced products.⁶ Yet, favoring domestic products at the expense of foreign products is a violation of the General Agreement on Tariffs and Trade (“GATT”).⁷ The GATT prohibits nations from implementing policies that favor their own products at the expense of international products, a practice known as the “national treatment principle.”⁸ The IRA violates this principle by rewarding a credit for domestic production of solar and renewable energy products. Still, the GATT does allow for exceptions to this principle under Article XX.⁹ In order to determine whether a policy can qualify for an Article XX exception, the World Trade Organization (“WTO”) employs a “two-part test.”¹⁰ Part I analyzes whether the policy fits within a listed exception.¹¹ There are two relevant exceptions that the IRA *may* qualify for: (1) an exception for policies that are “necessary to protect human, animal or plant life or health” and (2) an exception for policies that are “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.”¹² Part II of the “two-part test” analyzes whether the policy complies with the *Chapeau* of Article XX, specifically analyzing

response-climate-trade-protectionsim/.

5. *Inflation Reduction Act of 2022*, DEP'T OF ENERGY, [https://www.energy.gov/lpo/inflation-reduction-act-2022#:~:text=The%20Inflation%20Reduction%20Act%20\(IRA,putting%20the%20United%20States%20on](https://www.energy.gov/lpo/inflation-reduction-act-2022#:~:text=The%20Inflation%20Reduction%20Act%20(IRA,putting%20the%20United%20States%20on) (last visited Mar. 10, 2023); Aruna Chandrasekhar et al., *Media Reaction: US Inflation Reduction Act and the Global 'Clean-Energy Arms Race'*, CARBON BRIEF (Mar. 2, 2023) <https://www.carbonbrief.org/media-reaction-us-inflation-reduction-act-and-the-global-clean-energy-arms-race/>.

6. Inflation Reduction Act of 2022, H.R. 5376, 117th Cong. §13101(g).

7. PATRICIA BIRNIE & ALAN BOYLE, *INTERNATIONAL LAW & THE ENVIRONMENT* 697 (Oxford University Press, 2nd ed. 2002).

8. Meyer, *infra* note 61.

9. BIRNIE & BOYLE, *supra* note 7, at 701.

10. SUNDARAM, *infra* note 63; *WTO Rules and Environmental Policies: GATT Exceptions*, WTO, https://www.wto.org/english/tratop_e/envir_e/envt_rules_exceptions_e.htm (last visited Apr. 14, 2023) [WTO, *GATT Exceptions*].

11. *Id.*

12. General Agreement on Tariffs and Trade Art. XX, ¶ (b)-(g) (July 1986) [hereinafter GATT].

whether the policy is an “arbitrary or unjustifiable discrimination between countries where the same conditions prevail” or if it is “a disguised restriction on international trade.”¹³ The question becomes: does the IRA satisfy this two-part test and, therefore, qualify for exceptions to the GATT? If it does not qualify for exceptions, what implications does this have? This note argues that the IRA violates Article III of the GATT and will likely not satisfy Part I of two-part test, and it also may not satisfy Part II of the test. If a challenge to the IRA is brought before the WTO, the implications of a successful challenge could include commensurate tariffs, if approved by the Dispute Settlement Body (“DSB”), and similar trade barriers enacted by other countries in the international arena.¹⁴ The international implications of the IRA are important: global cooperation to ensure the quickest ramp up of renewable energy is crucial to addressing climate change and meeting the goals of the 2015 Paris Climate Agreement.¹⁵

This note will proceed as follows: Part II will summarize the IRA and provide an overview of the global solar disputes in the years preceding the IRA. Part III will describe the relevant international trade rules, focusing on the WTO and the GATT. Part IV will analyze whether the IRA violates the GATT, and whether the IRA qualifies for an exception under Article XX of the GATT. Part V will discuss the remedies and international legal implications of the IRA. And Part VI will offer a conclusion. The issue of whether the IRA violates international trade laws is important: international trade affects how quickly nations can scale-up their renewable energy resources, which will impact their policy responses to climate change. If domestic preferences for solar panels are found to violate international law, then this could result in more retaliatory trade barriers being implemented in the renewable energy market (and generally, less restrictions on trade results in more economically efficient outcomes). And addressing the climate crisis will require international cooperation, even in the sphere of international trade.

13. SUNDARAM *infra* note 63; WTO, *GATT Exceptions*, *supra* note 10.

14. *The Process — Stages in a Typical WTO Dispute Settlement Case*, WTO, wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s10p1_e.htm (last visited Apr. 14, 2023) [hereinafter *The Process*].

15. See, e.g., *The Paris Agreement*, U.N., <https://www.un.org/en/climatechange/paris-agreement> (last visited Apr. 14, 2023).

II. BACKGROUND OF THE IRA AND GLOBAL SOLAR DISPUTES

A. THE INFLATION REDUCTION ACT

The IRA, signed into law by President Biden on August 16, 2022, has been hailed as a game changer for U.S. climate policy.¹⁶ The U.S. Environmental Protection Agency described it as “the most significant climate legislation in U.S. history.”¹⁷ The law is broad in scope, as it aims to incentivize “green industries and subsidize eco-friendly consumer purchases.”¹⁸ It invests approximately 400 billion dollars in federal funding toward clean energy development.¹⁹ It also aims to rapidly scale up “clean generation” in the electricity sector, with domestic clean energy generation predicted to skyrocket.²⁰ Because of all these investments in clean energy, the law will drive down carbon emissions: U.S. greenhouse gas emissions will likely fall to 40 percent below 2005 levels by 2030.²¹

The IRA works by using “carrots” to drive down carbon emissions, such as by providing tax credits and other financial incentives for clean energy development, as opposed to using “sticks,” such as by pricing carbon or placing limits on pollution.²² Some of these “carrots” include tax incentives for electric vehicles, funding for domestic farmers and rural communities for emissions reductions, and approximately 135 billion dollars for clean energy tax credits to

16. Kathryn Watson, *Biden Signs Inflation Reduction Act into Law, Sealing Major Democratic Victory on Climate, Health Care and Taxes*, CBS NEWS (Aug. 16, 2022), <https://www.cbsnews.com/live-updates/biden-signs-inflation-reduction-act-into-law-climate-health-care-taxes/>.

17. *The Inflation Reduction Act*, EPA (Jan. 25, 2023), <https://www.epa.gov/green-power-markets/inflation-reduction-act> [hereinafter EPA, *The IRA*].

18. Matteo Wong, *The Climate Movement Wanted More than the IRA. Now What?*, THE ATLANTIC (Sept. 28, 2022), <https://www.theatlantic.com/science/archive/2022/09/inflation-reduction-act-climate-investments-criticism/671584/>;

19. *The Inflation Reduction Act: Here's What's in It*, MCKINSEY & COMPANY (Oct. 24, 2022), <https://www.mckinsey.com/industries/public-and-social-sector/our-insights/the-inflation-reduction-act-heres-whats-in-it>.

20. Larsen et al., *A Turning Point for US Climate Progress: Assessing the Climate and Clean Energy Provisions in the Inflation Reduction Act*, RHODIUM GROUP (Aug. 12, 2022), <https://rhg.com/research/climate-clean-energy-inflation-reduction-act/> (finding that the IRA will scale up “clean generation to supply as much as 81% of all electricity in 2030.”).

21. *Id.*

22. Jason Bordoff, *America's Landmark Climate Law*, FIN. & DEV. MAG., INT'L MONETARY FUND (Dec. 2022), <https://www.imf.org/en/Publications/fandd/issues/2022/12/america-landmark-climate-law-bordoff>.

increase renewable energy production, among other policy changes.²³ With respect to the clean energy tax credits, the IRA focuses on the “four R’s” of electricity decarbonization: it “reinvigorates” clean energy capacity generation by modifying and extending both the Production Tax Credit (“PTC”) and the Investment Tax Credit (“ITC”); it “retains” our current clean energy capacity, it “retires” fossil fuel capacity generators, and it “retrofits” other fossil fuel capacity generators by updating the 45Q tax credit, which incentivizes carbon capture technology.²⁴ Focusing on solar, the IRA’s modifications of the PTC and ITC give the solar industry more flexibility to qualify for the tax credits: before the IRA was passed, the solar industry relied more on the ITC, which provides a 30 percent tax credit to the renewable energy facility the year it is put in place (and is not based on the amount of energy produced).²⁵ After the IRA, the solar industry can now benefit from the PTC, which provides a tax credit of 2.6 cents per kilowatt hour of energy produced, and this credit can be used every year over the course of ten years.²⁶ Researchers predict that the IRA’s updates to the tax credits will not only increase solar energy production, but will—along with other measures in the IRA—“drive clean energy generation to the highest levels the US has seen in the modern era.”²⁷

The IRA also aims to reinvigorate the domestic, clean-energy manufacturing sector by establishing “domestic content requirements.”²⁸ In general, a domestic content requirement provides

23. Fred Krupp, *The Biggest Thing Congress Has Ever Done to Address Climate Change*, ENV’T DEF. FUND (Aug. 12, 2022), https://www.edf.org/blog/2022/08/12/biggest-thing-congress-has-ever-done-address-climate-change?ub_tg=372&ub_o=26&ub_cta=4&utm_source=google&utm_campaign=edf_ira_upd_pmt&utm_medium=ad&utm_id=1666800788&gclid=Cj0KCQiAx6ugBhCcARIsAGNmMbijHMH5y6GyLXIKk1pW335Z_Wuc-24744RjcGv-Mpos-VMJYm8xyt8aAmKKEALw_wcB&gclsrc=aw.ds.

24. Larsen et al., *supra* note 20; *FACT SHEET: Four Ways the Inflation Reduction Act’s Tax Incentives Will Support Building an Equitable Clean Energy Economy*, DEP’T OF TREASURY, <https://home.treasury.gov/system/files/136/Fact-Sheet-IRA-Equitable-Clean-Energy-Economy.pdf> (last visited Mar. 10, 2023) (discussing the changes to the Production Tax Credit and the Investment Tax Credit).

25. Kelly Pickerel, *The Basics of ITC vs. PTC for the Solar Industry*, SOLAR POWER WORLD (Oct. 17, 2022), <https://www.solarpowerworldonline.com/2022/10/the-basics-of-itc-vs-ptc-for-the-solar-industry/>.

26. *Id.*

27. Larsen et al., *supra* note 20.

28. Ariel Debin & Ryan Roberts, *Domestic Content Requirements of the Inflation Reduction Act: Basic Requirements, Qualification Analysis, and Lingering Questions*, JD SUPRA (Feb. 2, 2023), <https://www.jdsupra.com/legalnews/domestic-content-requirements-of-the-5954792/>. “Domestic content requirements” may also be referred to as “local content requirements.” See *Local Content Requirements Impact the*

a financial incentive to domestic or local producers of a good, which then places foreign producers of that good at a disadvantage.²⁹ The IRA utilizes domestic content requirements in an attempt to rebuild the U.S. solar manufacturing sector, which was substantially hurt a decade ago, as will be discussed below.³⁰ Specifically, the IRA states that:

“[A]ny qualified facility which satisfies the requirement under subparagraph (B)(i), the amount of the credit determined under subsection (a) . . . **shall be increased by an amount equal to 10 percent of the amount so determined.**

...

“(iii) MANUFACTURED PRODUCT.—For purposes of clause (i), the manufactured products which are components of a qualified facility upon completion of construction shall be deemed to have been produced in the United States if not less than the adjusted percentage (as determined under subparagraph (C)) of the total costs of all such manufactured products of such facility are attributable to manufactured products (including components) which are **mined, produced, or manufactured in the United States.**”³¹

Essentially, the IRA provides a 10 percent bonus tax credit for renewable energy facilities if they meet the domestic content requirements.³² These domestic content requirements are met if **“all the steel and iron, and a specified portion of manufactured products, that are components of the facility, are produced in the United States.”**³³ While these domestic content requirement

Global Economy, OECD <https://www.oecd.org/trade/topics/local-content-requirements/> (last visited Mar. 30, 2024) [hereinafter *Local Content Requirements*].

29. See *Local Content Requirements*, *supra* note 28 (“The term ‘localisation barriers to trade’ applies to a range of measures that favour domestic industry at the expense of foreign competitors.”).

30. See discussion *infra* Section II.B.

31. Inflation Reduction Act of 2022, H.R. 5376, 117th Cong. §13101(g) (2022) (emphasis added).

32. See Debins & Roberts, *supra* note 28.

33. Stephen Watson, *Inflation Reduction Act Provides Major Tax Incentives for Public Power*, NORTON ROSE FULBRIGHT, (Oct. 11, 2022), <https://www.nortonrosefulbright.com/en-us/knowledge/publications/20e136f1/inflation-reduction-act-provides-major-tax-incentives-for-public-power>; see also Debins & Roberts, *supra* note 28, (predicting that a facility can meet the domestic content requirements if it ensures (1) that “100% of

incentives will surely be sought after by solar producers, it is worth noting that this is likely “only a modest incentive.”³⁴ This is because the IRA “only raises the value of the tax credit by 10% (and the tax credit itself only covers part of the cost of the project).”³⁵ Yet even if it is only a modest incentive, these domestic content requirements—in addition to other domestic content requirements in the IRA— have been criticized by other nations as a form of “green protectionism.”³⁶ Yet even if these are protectionist, some may argue they are necessary to rebuild a domestic industry that took a hit from cheap international imports.

B. PAST INTERNATIONAL TRADE DISPUTES OVER DOMESTIC PREFERENCES FOR SOLAR PRODUCTION

An examination of the history of the global solar industry and its international trade disputes can help explain why the United States’ domestic solar industry was severely hampered in the mid-2000s, and why the IRA has tried to bolster the domestic industry through these domestic content requirement incentives.

Initially, the United States was the global leader in solar cell and panel production.³⁷ However, in the past decade, China has become the dominant producer of solar photovoltaic (“PV”) panels, outpacing the United States, Europe, and Japan.³⁸ There are several reasons for this. First, China invested heavily in its domestic solar manufacturing sector: it invested approximately 50 billion U.S. dollars in its solar industry and implemented “industrial policies” to further develop that

any iron/steel products that are components of the ‘facility’ [are] produced in the United States” and (2) that “40% of the total cost of all ‘manufactured products’ that are components of the entire ‘facility’ [are] produced in the United States.”).

34. See Trevor Houser et al., *Relay Race, not Arms Race: Clean Energy Manufacturing Implications of the IRA for the US and EU*, RHODIUM GROUP (Feb. 28, 2023), <https://rhg.com/research/clean-energy-manufacturing-ira-us-eu/>.

35. *Id.*

36. See, e.g., Aruna Chandrasekhar et al., *Media Reaction: US Inflation Reduction Act and the Global ‘Clean-Energy Arms Race’* CARBON BRIEF (Mar. 2, 2023) <https://www.carbonbrief.org/media-reaction-us-inflation-reduction-act-and-the-global-clean-energy-arms-race/> (highlighting certain countries criticizing the domestic content requirements pertaining to electric vehicles).

37. See Shannon Osaka, *How ‘USA-First’ Failed the Solar Industry*, GRIST (May 19, 2022), <https://grist.org/energy/solar-tariffs-were-supposed-to-save-the-us-solar-industry-did-they-work-auxin/>.

38. SPECIAL REPORT ON SOLAR PV GLOBAL SUPPLY CHAINS 7 IEA (Aug. 2022), <https://iea.blob.core.windows.net/assets/d2ee601d-6b1a-4cd2-a0e8-db02dc64332c/SpecialReportonSolarPVGlobalSupplyChains.pdf>.

industry and achieve economies of scale.³⁹ Second, China's aggressive push to bolster its solar industry likely included trade secret theft: in 2014 the Justice Department charged five Chinese nationals for stealing valuable technological trade secrets on how to successfully manufacture solar panels and sensitive pricing information from a German-based solar company, SolarWorld AG.⁴⁰ The stealing of these secrets likely allowed Chinese companies to further push cheap solar products into the U.S. market, which undercut domestic U.S. solar production.⁴¹

While China's growing dominance in the field of solar manufacturing resulted in lower costs for solar panels, it also led to a decline in U.S. domestic solar production, even as U.S. solar panel *installation* increased (due in part to the cheaper panels).⁴² This rise in China's cheap solar panel output is generally considered one of the causes of the decline in U.S. solar manufacturing, as demonstrated by the solar company Solyndra's infamous failure (which was due, in part, to this glut in solar panels).⁴³

For at least the past decade, the United States has implemented trade policies that aim to protect the domestic market for solar products from this influx of inexpensive international solar products. In May 2012, the United States placed "punitive tariffs" on Chinese solar panels because China was "unfairly dumping [selling large quantities at a low price] their goods into the American market."⁴⁴ In

39. *Id.*

40. Sam Frizell, *Here's What Chinese Hackers Actually Stole from U.S. Companies*, TIME (May 20, 2014), <https://time.com/106319/heres-what-chinese-hackers-actually-stole-from-u-s-companies/>.

41. *SolarWorld Seeks Probe into Claims of Chinese Cyber-Spying*, REUTERS (July 1, 2014), <https://www.reuters.com/article/usa-trade-solar/solarworld-seeks-probe-into-claims-of-chinese-cyber-spying-idUSL2N0PC2F820140701> (stating, for example, that "[o]ne hacker is alleged to have stolen cost and pricing information from SolarWorld in 2012, when the company was engaged in a trade dispute over Chinese competitors selling goods in the U.S. market below their cost of production.").

42. Evan Halper, *How Joe Manchin's Change of Heart Could Revive the U.S. Solar Industry*, WASH. POST (July 30, 2022), <https://www.washingtonpost.com/business/2022/07/30/climate-solar-manchin-china/> (stating that China's "cheap [solar] products drove the closure of many American solar plants"); Osaka, *supra* note 37 (stating that while "domestic [solar] manufacturing had already plummeted . . . [i]nstallations, however, soared, thanks to the low-cost technology available abroad.").

43. MARKET DYNAMICS THAT MAY HAVE CONTRIBUTED TO SOLYNDRA'S BANKRUPTCY, CRS 3-4 (2011), <https://crsreports.congress.gov/product/pdf/R/R42058/3> (discussing China and Taiwan's increasing solar capacity additions in the international market for solar panels, as demonstrated in Figure 2).

44. Mark Wu & James Salzman, *The Next Generation of Trade and Environment Conflicts: The Rise of Green Industrial Policy*, 108 NW. U.L. REV. 401, 404 (2014).

2018, then-President Donald Trump placed tariffs on solar panel imports, which primarily targeted Chinese-manufactured solar panels due to the country's large volume of exports.⁴⁵ On February 4, 2022, President Biden extended these Trump-era solar tariffs with some modifications. And later that year, in May of 2022, the U.S. Department of Commerce began investigating whether China was attempting to avoid U.S. tariffs by "funneling components" of solar products through Malaysia, Thailand, Cambodia, and Vietnam.⁴⁶ This investigation appears to have had large effects on the U.S. solar installation sector by discouraging solar panel imports: the CEO and president of a solar association told reporters that "[this] investigation alone is wiping out a decade of solar job growth . . . It's stunning."⁴⁷ And in December of 2022, the Department of Commerce issued its preliminary findings, concluding that China was in fact circumventing U.S. tariffs.⁴⁸ This will likely have wide-ranging implications for the international solar market, as the tariffs on these solar products are upwards of 250 percent, and China "controls more than 80 percent of solar panel production."⁴⁹ This timeline demonstrates the U.S. has been interested in strengthening the domestic production of solar for at least the past decade. Thus, the IRA's favoring of domestic solar production is aligned with this policy trend.

The push to reinvigorate the United States' domestic solar production industry can also be attributed in part to other policy movements. There has been a broad movement in the United States to prioritize domestic manufacturing: during the 2020 campaign, the presidential candidates from both political parties, Joe Biden and Donald Trump, favored increasing domestic manufacturing.⁵⁰ And a

45. RALPH H. FOLSOM, *INTERNATIONAL TRADE LAW, INCLUDING BEYOND TRUMP*, IN A NUTSHELL 444 (West Academic, 8th ed. 2021).

46. Fred Bever & Eric McDaniel, *Solar Projects Are on Hold as U.S. Investigates Whether China Is Skirting Trade Rules*, NPR (May 11, 2022), <https://www.npr.org/2022/05/11/1097644931/solar-panels-solar-power-u-s-investigate-s-china-trade-rules>.

47. *Id.*

48. Press Release, Department of Commerce, Department of Commerce Issues Preliminary Determination of Circumvention Inquiries of Solar Cells and Modules Produced in China, <https://www.commerce.gov/news/press-releases/2022/12/departement-commerce-issues-preliminary-determination-circumvention>.

49. Evan Halper, *Federal Probe Finds Big Solar Firms Flouted Trade Rules*, WASH. POST (Dec. 2, 2022), <https://www.washingtonpost.com/business/2022/12/02/commerce-investigation-solar-industry-tariffs/>.

50. Emma Cosgrove, *Biden and Trump Envision Similar Supply Chains — But Different Paths to Get There*, INDUSTRYDIVE (Oct. 16, 2020),

2021 poll found that U.S. consumers want the government to purchase products manufactured domestically.⁵¹ In addition, there are also national security and energy independence concerns regarding importing solar energy panels: it is better from a national security perspective to not rely heavily on foreign nations to provide materials necessary for renewable energy production.⁵² These broader policy shifts toward domestic production can also help explain why the domestic content requirements were added into the IRA.

Finally, the United States isn't the only country that has attempted to protect its own market for renewable energy production. In 2009, the Canadian province of Ontario enacted a "feed-in tariff" ("FIT") scheme, which ensured that producers of renewable energy in that province would receive a relatively high fixed price for their production of wind or solar power, provided that they met certain local content requirements: that a certain percentage of equipment is "manufactured in Ontario."⁵³ Japan, the European Union, and the United States all challenged these domestic content requirements at the WTO, claiming that they unfairly advantaged domestic production of renewable energy at the expense of foreign production (specifically, that the FITs violated Article III of the GATT, among other claims).⁵⁴ Both the DSB panel and the WTO Appellate Body ruled in favor of Japan, the European Union, and the United States on the claim that Canada's FITs violated Article III.⁵⁵ Canada has taken measures to comply with this ruling, by removing domestic content requirements for large renewable producers and lowering the requirements for smaller producers, but some domestic content

<https://www.supplychaindive.com/news/biden-trump-supply-chains-reshoring-inventory-trade-tariffs/587152/> (stating that the presidential candidates both had "plans to encourage more domestic manufacturing").

51. Timothy Aeppel & Chris Kahn, *Americans Want the Government to Buy U.S.-Made Goods, Even if They Cost More*, REUTERS (Mar. 30, 2021), <https://www.reuters.com/article/us-usa-economy-madeinusa-poll/americans-want-the-government-to-buy-u-s-made-goods-even-if-they-cost-more-idUSKBN2BM1DA>.

52. See, e.g., Halper, *supra* note 49 (stating that "China's domination over the solar supply chain also poses an ever-growing threat to America's energy independence and financial health.").

53. Steve Charnovitz & Carolyn Fischer, *Canada—Renewable Energy: Implications for WTO Law on Green and Not-So-Green Subsidies*, 14 WORLD TRADE REV. 177, 179–80 (2015); Shamsiah Ali Oettinger, *WTO Hearing: Canada Defends its FITS*, PV MAGAZINE (Mar. 30, 2012), https://www.pv-magazine.com/2012/03/30/wto-hearing-canada-defends-its-fits_10006288/.

54. *Canada — Measures Relating to the Feed-in Tariff Program*, WTO Doc. WT/DS426 (June 5, 2014).

55. Charnovitz & Fischer, *supra* note 53, at 181.

requirements still exist.⁵⁶

III. BACKGROUND OF INTERNATIONAL TRADE RULES: THE WTO AND THE GATT

Signed in 1947, the GATT is a major multilateral international trade treaty which regulates trade among 153 countries.⁵⁷ The goal of the GATT is the “the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce.”⁵⁸ In 1995, the WTO was created to implement the GATT, and the organization serves as the primary global institution that regulates trade between nations.⁵⁹ The WTO “implements the [GATT], provides a forum for negotiating additional reductions of trade barriers and for settling policy disputes, and enforces trade rules.”⁶⁰

Among the many priorities of the WTO, two of its most important are to implement the “most favored nation” (“MFN”) principle and the “national treatment” principle. The MFN principle is contained in Article I of the GATT and states that a nation must treat all importing nations the equally—it cannot favor one nation’s goods over another’s.⁶¹ Still, this principle has been “largely gutted” because of other trade agreements that have since been implemented between

56. *Id.* (“On 5 June 2014, Canada informed the DSB that the government of Ontario had complied with the DSB recommendations and rulings by (1) no longer subjecting large renewable electricity procurements to domestic requirements and (2) significantly lowering the domestic content requirements for small and microFIT procurement of wind and solar electricity under the FIT Program. Nevertheless, as of mid-August 2014, the Ontario Power Authority website states that microFIT contracts continue to require domestic content.”).

57. *GATT/WTO*, DUKE UNIV. SCH. OF L., RSCH. GUIDES (Oct. 2017), <https://law.duke.edu/lib/research-guides/gatt/> [hereinafter *GATT/WTO*].

58. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (As a note: after the GATT was enacted, the “unofficial, de facto” organization that implemented the GATT was also (confusingly) known as the “GATT.”); *What is the World Trade Organization?* WTO (2023), https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm. [hereinafter *WTO, What is the WTO?*].

59. BIRNIE & BOYLE, *supra* note 7, at 697; WTO, *What is the WTO?* *supra* note 58.

60. *GATT/WTO*, *supra* note 57.

61. Timothy Meyer, *The Political Economy of WTO Exceptions*, 99 WASH. UNIV. L. REV. 1299, 1311 (2022) (“Perhaps no provision was as central to the GATT, the WTO’s precursor, as the MFN obligation. The GATT’s drafters enshrined the obligation in Article I, reflecting in part the United States’ desire to take apart the preferential trading system that European countries had maintained in favor of their former colonies prior to World War II.”).

nations.⁶² The second principle, national treatment, is contained in Article III of the GATT and holds that nations cannot favor their own domestic products at the expense of international products.⁶³ Under this principle, nations should treat international products as favorably as they treat their own products. The national treatment principle is at the heart of the issue behind the IRA's domestic content requirements: the IRA specifically *favours* U.S. manufactured products, seemingly at the expense of international products.

Still, the GATT does contain exceptions to these principles. Under Article XX, the GATT lists "conditional exceptions to GATT obligations."⁶⁴ These exceptions permit nations to violate their GATT obligations if their violations of trade policies have the purpose of promoting various societal goals, including environmental goals.⁶⁵ There are two primary exceptions that fall within this "environmental" category: exceptions (b) and (g).⁶⁶ The GATT's Article XX states:

"Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

...

(b) necessary to protect human, animal or plant life or health;

...

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption."⁶⁷

62. *Id.*

63. *Id.*; BIRNIE & BOYLE, *supra* note 7, at 699.

64. BIRNIE & BOYLE, *supra* note 7, at 701.

65. *Id.*

66. It is important to note that "the word 'environment' is not used" in GATT's Article XX exceptions. *Id.*

67. GATT, *supra* note 12.

Article XX is intended to be read broadly and to be a “balancing provision.”⁶⁸ It weighs one nation’s needs to protect its own interests through trade regulation with the goals of reducing unnecessary trade barriers and promoting trade.

In practice, if a nation violates either the MFN principle under Article I or the national treatment principle under Article III, then the nation which is being treated unfairly (or any member nation) can call for the DSB to convene and resolve the trade dispute.⁶⁹ The DSB has the power to: “establish panels, adopt panel and Appellate Body reports, maintain surveillance of the implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements.”⁷⁰ When a dispute is brought before the DSB, it will first require that countries consult with each other to see if the dispute can be resolved without WTO involvement.⁷¹ The DSB will then appoint a panel of experts “from different countries who examine the evidence and determine who is right and who is wrong.”⁷² The panel creates a report which will eventually become a ruling from the DSB.⁷³ Countries can appeal this report to the Appellate Body, who can “uphold, modify or reverse” the report.⁷⁴ The DSB then has thirty days to accept or reject the Appellate Body’s report.⁷⁵ As discussed below, this DSB process has been used recently to settle disputes surrounding the international trade of solar products.

When the DSB analyzes a dispute, it will generally use a “two-tier” test to determine whether a country’s actions are acceptable under the GATT.⁷⁶ The first part of this test is to determine whether the policy at issue falls within one of the GATT exceptions listed in Article

68. JAE SUNDARAM, *WTO LAW AND POLICY; A POLITICAL ECONOMY APPROACH* 205 (2022).

69. Faten Sabry, *The Development and Effectiveness of the WTO’s Dispute Settlement Body*, 10 MICH. ST. UNIV. DET. COLL. L. J. INT’L L. 521, 521 (2001).

70. *Id.*, at 524 (citing Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiation, Annex 2, art. II, Office of the U.S. Trade Representative (1993)).

71. *Understanding the WTO: Settling Disputes, A Unique Contribution*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Apr. 14, 2023).

72. *Id.*

73. *Id.* (noting panel reports are almost always adopted by the DSB: “rulings are automatically adopted unless there is a consensus to reject a ruling—any country wanting to block a ruling has to persuade all other WTO members (including its adversary in the case) to share its view.”).

74. *Id.*

75. *Id.*

76. SUNDARAM, *supra* note 68 at 205; *WTO, GATT Exceptions*, *supra* note 10.

XX.⁷⁷ The second part of the test is to determine whether the policy complies with the “opening clauses of Article XX” (which is also called the Article’s “*Chapeau*”).⁷⁸ Specifically, whether it is an “arbitrary or unjustifiable discrimination between countries where the same conditions prevail” or if it is “a disguised restriction on international trade.”⁷⁹ If the trade policy is either of these things, then it fails the second part of the test.⁸⁰ As discussed next, it appears unlikely that the IRA’s preference for domestically manufactured solar products will pass this two-part test.

IV. ANALYSIS

A. THE IRA LIKELY VIOLATES THE NATIONAL TREATMENT PRINCIPLE UNDER THE GATT ARTICLE III

It appears that the IRA’s preference for domestically made solar products may violate the United States’ Article III obligations under the GATT’s “national treatment” principle (discouraging nations from treating their own domestic production of goods and services more favorably than international goods and services).⁸¹ Past WTO and/or GATT decisions indicate that a subsidy favoring domestic products violates Article III of the GATT. In *Italian Discrimination Against Imported Agricultural Machinery*, the GATT found that an Italian subsidy which favored agricultural machinery made in Italy violated Article III of the GATT.⁸² Specifically, this policy “enabled the [Italian] Ministry of Agriculture and Forestry to grant special credit terms *inter alia* for the purchase of Italian agricultural machinery,” meaning that those who wanted to get a loan for purchasing agricultural machinery would get better terms if they purchased Italian-made machinery.⁸³ The GATT Panel suggested to the GATT contracting parties that “it would be appropriate for them to make a recommendation to the Italian Government . . . to draw the Italian Government to the adverse effects on United Kingdom exports of agricultural machinery”—thus implying that these Italian subsidies had violated the national

77. SUNDARAM, *supra* note 68 at 205.

78. *Id.* at 205–06 (citing Panel Report, *United States – Standard for Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R, (adopted May 20, 1996)).

79. *Id.* at 206.

80. *Id.*

81. Meyer, *supra* note 61, at 1311.

82. Report of the Panel, *Italian Discrimination Against Imported Agricultural Machinery*, ¶ 1, L/833 - 7S/60 (Oct. 23, 1958).

83. *Id.* at ¶¶ 2–5.

treatment principle in Article III.⁸⁴

In a more recent case, *United States — Certain Measures Relating to the Renewable Energy Sector*, the WTO examined a challenge brought by India regarding whether different U.S. states' renewable energy policies discriminate against international renewable production, in violation of the GATT's Article III.⁸⁵ The dispute focused on renewable energy policies from Washington, California, Montana, Connecticut, Michigan, Delaware, and Minnesota which contain state-specific domestic content requirements.⁸⁶ The WTO panel found that "offering financial incentives for the use of domestic products, but not for the use of imported products, modified the conditions of competition to the detriment of imported products," and thus violated Article III's national treatment principle.⁸⁷ The United States appealed the decision, and India also notified the DSB that it intends to cross-appeal, but there is still no decision from the Appellate Body on this case.⁸⁸

Like both the Italian subsidy and the United States' state-specific policies that favor domestic renewable production, the IRA also clearly favors domestic renewable products over international products: in order to receive the ten percent tax credit, solar producers must meet domestic content requirements.⁸⁹ Article III of the GATT prohibits this kind of activity, as it "requires Member states to treat imports from other member nations similarly to all 'like' domestic goods."⁹⁰ A WTO panel will likely rule on the IRA the same way they ruled on these two previous cases: the domestic content requirements for renewables likely violates Article III of the GATT. If the IRA violates Article III, then it must fit within one of the Article XX exceptions and within the spirit of the *Chapeau* to remain in

84. *Id.* at ¶ 25.

85. Panel Report, *United States—Certain Measures Relating to the Renewable Energy Sector*, WTO Doc. WT/DS510/8 (adopted June 27, 2019), https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds510sum_e.pdf.

86. *Id.*

87. *Id.*

88. Vyoma Jha, *The Politics of Renewables: Lessons for International Economic Dispute Settlement from Renewable Energy Disputes*, in INTERNATIONAL ECONOMIC DISPUTE SETTLEMENT: DEMISE OR TRANSFORMATION? 297, 304 (Manfred Elsig et al. eds., Cambridge Uni. Press 2021) ("On 15 August 2019 . . . the United States notified the DSB of its decision to appeal on certain issues of law and legal interpretations; while on 20 August 2019, India too notified the DSB of its decision to cross-appeal. They are currently in a queue of pending appeals . . .").

89. See EPA, *The IRA*, *supra* note 17; Watson, *supra* note 16.

90. Rick A. Waltman, Esq., *Renewable Energy Development for WTO Member Nations*, 14 SANTA CLARA J. INT'L L. 543, 546 (2016).

compliance with the GATT.

B. PART ONE OF THE TWO-PART TEST: THE IRA LIKELY DOES NOT QUALIFY FOR ARTICLE XX EXCEPTIONS UNDER SUBSECTIONS (B) AND (G).

The first step of the “two-part test” is to determine whether the IRA’s preference for domestically manufactured solar products falls within GATT’s Article XX exceptions. In the case of the IRA, the applicable exceptions are (b) and (g): it qualifies for an exception if it is either “necessary to protect human, animal or plant life or health” (under subsection (b)), or “relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption . . .” (under subsection (g)).⁹¹

It appears likely that the WTO will not find that the IRA qualifies for an exception under subsection (b). Subsection (b) allows countries to implement policies that would otherwise violate the GATT—in the case of the IRA, to implement policies that favor domestic over international products—and still remain in compliance with their GATT obligations.⁹² When a panel interprets if a policy qualifies for an Article XX(b) exception, one of the issues is whether the underlying policy is *necessary* to “protect human, animal or plant life or health.”⁹³ In the WTO’s *Tuna-Dolphin I* case, the panel explained that the term “necessary” means that a policy is the only “reasonably available” policy that the country has to pursue its goals—that there are no other GATT-consistent policies that the country could implement that are “reasonably available.”⁹⁴ This is a narrow interpretation of “necessary,” and WTO panels have “consistently favored” this interpretation.⁹⁵ However, this standard isn’t impossible to meet. In the *Brazil – Retreaded Tyres* case, Brazil implemented a policy where it banned imports of “retreaded tyres” (essentially old, worn-out tires that get a new tread)⁹⁶ and placed other fines on these tires.⁹⁷ Brazil

91. GATT, *supra* note 12.

92. DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 1276 (3rd ed. 2007).

93. GATT, *supra* note 12.

94. HUNTER ET AL., *supra* note 12, at 1276 (citing Panel Report, *United States – Restrictions on Imports of Tuna*, WTO Doc. (DS21/R - 39S/155) (Sept. 3, 1991), https://www.wto.org/english/tratop_e/dispu_e/gatt_e/91tuna.pdf).

95. HUNTER ET AL., *supra* note 12, at 1277.

96. For more information about retreaded tires, see *Retreads*, CALRECYCLES, <https://calrecycle.ca.gov/tires/products/types/retreads/> (last visited Apr. 8, 2024).

97. Panel Report, *Brazil – Measures Affecting Imports of Retreaded Tyres*, WTO

claimed this was necessary because retreaded tires wore out quicker than newer tires, and discarded tires are breeding grounds for mosquitos and other disease-carrying insects—banning these tires from imports would decrease the overall amount of tires, which would lead to improved environmental and health outcomes.⁹⁸ The Appellate Body found that this policy was provisionally “necessary”: the Appellate Body balanced the improved health and environmental outcomes resulting from this policy with its resulting restrictions on trade, and it found that there were no “reasonably available” alternatives to this policy.⁹⁹ As discussed below, the Appellate Body upheld the panel’s finding that the policy violated the *Chapeau* of the agreement, so the ban did not qualify for an Article XX exception.¹⁰⁰

In the case of the IRA, it appears that the domestic content requirements will not meet a narrow definition of “necessary” to qualify for an exception under subsection (b). While the U.S. could argue that the IRA’s domestic content requirements increase renewable energy production (albeit domestically), which in turn addresses climate change—which is a threat to “human, animal, or plant life or health”—there are likely other “reasonably available” policies to increase renewable energy production that do not violate the GATT. For example, the U.S. could simply offer that same ten percent tax bonus credit to both domestic and international products (i.e., without the domestic content requirement). While the WTO will still engage in a balancing test, the IRA’s preference for the *domestic* production of renewable energy is likely too far removed to be considered an action which is “necessary” to protect human, animal, or plant life.¹⁰¹ Thus, the IRA likely does not qualify for an Article XX(b) exception.

Similarly, the WTO will likely find that IRA’s preference for

Doc. DS332 (adopted Dec. 17, 2007), https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds332sum_e.pdf.

98. *Campaign Update: WTO Brazil Retreaded Tires Trade Dispute*, CTR. INT’L ENV’T L., <https://www.ciel.org/project-update/brazil-retreaded-tires/> (last visited Mar. 31, 2024).

99. *Brazil — Measures Affecting Imports of Retreaded Tyres*, UN ENV’T PROGRAMME, <https://leap.unep.org/countries/br/national-case-law/brazil-measures-affecting-imports-retreaded-tyres> (last visited Mar. 31, 2024).

100. *Id.*

101. WTO, *GATT Exceptions*, *supra* note 10 (stating that the Appellate Body of the WTO will consider multiple factors to determine whether the policy is *necessary* to protect human, animal, or plant life—some of these factors include “the contribution made by the environmental measure to the policy objective, the importance of the common interests or values protected by the measure and the impact of the measure on international trade.”)

domestic solar products does not fall within the Article XX(g) exemptions. Subsection (g) permits policies that are “relating to the conservation of *exhaustible* natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption . . .”¹⁰² In the context of the IRA, the United States could make a tenuous argument: the IRA protects an exhaustible natural resource—clean air—by subsidizing and thus increasing renewable energy production (again, albeit domestically), which can displace fossil fuel production in the United States and thus lead to cleaner air within the United States.

There are a few issues with this argument. While subsection (g)’s “relating to” provision is less stringent than subsection (b)’s “necessary” provision (the WTO has held that “for a measure to be ‘related to’ the conservation of an exhaustible resource, it need not be ‘necessary’”¹⁰³), the IRA’s preference for domestically produced renewable products still may not meet this lower standard. For example, in *Canada — Measures Affecting Exports of Unprocessed Herring and Salmon*, the panel “interpreted the phrases ‘relating to’ and ‘in conjunction with’ in Article XX(g) to mean ‘primarily aimed at.’”¹⁰⁴ In this case, the panel found Canada’s export ban on certain native fish was not “primarily aimed at” conserving the fish (which the panel classified as an exhaustible natural resource).¹⁰⁵ The panel determined this by looking at a number of factors, including that the policy only prohibited the export of salmon and herring in their “unprocessed form” (as opposed to generally prohibiting their export) and that the policy only restricted *international* exports (it did not address domestic imports).¹⁰⁶

In the case of the IRA, it appears that its goals are primarily to

102. General Agreement on Tariffs and Trade art. XX(g), Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194, https://www.wto.org/english/res_e/booksp_e/gatt_ai_e/art20_e.pdf (emphasis added).

103. HUNTER ET AL., *supra* note 92, at 1281 (citing Panel Report, *United States – Standards For Reformulated and Conventional Gasoline*, WTO Doc. WT/DS2/AB/R, (adopted May 20, 1996)).

104. Brandon Bowen, *The World Trade Organization and Its Interpretation of the Article XX Exceptions to the General Agreement on Tariffs and Trade, in Light of Recent Developments*, GA. J. INT’L & COMP. L. 181, 185 (2000) (citing Panel Report, *Canada — Measures Affecting Exports of Unprocessed Herring and Salmon*, WTO Doc. L/6268 - 35S/98, (adopted Mar. 22, 1988), https://www.wto.org/english/tratop_e/dispu_e/gatt_e/87hersal.pdf).

105. *Id.*

106. Panel Report, *Canada — Measures Affecting Exports of Unprocessed Herring and Salmon*, ¶ 4.7, WTO Doc. L/6268 - 35S/98 (adopted Mar. 22, 1988), https://www.wto.org/english/tratop_e/dispu_e/gatt_e/87hersal.pdf.

reinvigorate the clean energy economy through subsidies and tax incentives.¹⁰⁷ In addition, while the WTO has previously found that clean air *is* an exhaustible natural resource, the IRA's domestic content requirements likely are not "primarily aimed at" clean air conservation.¹⁰⁸ Because it appears that the IRA is not implementing this domestic content requirement in a way that it is "primarily aimed at" conserving clean air, it likely doesn't qualify for an exception under subsection (g). So, The IRA likely does not pass the first part of the "two-tier" test.

The IRA likely will fail the first part of this two-part test because the domestic content requirements are not "necessary" for addressing climate change and protecting "human, animal or plant life or health," and thus it does not qualify for the exception under Article XX(b). And while the domestic content requirements may have the effect of conserving clean air (an exhaustible natural resource according to the Appellate Body), the requirements don't appear to meet the standard of "primarily aimed at" conserving clean air. So, the IRA likely doesn't qualify for an exception under Article XX(g). The IRA therefore likely fails the first part of the two-part test.

C. PART TWO OF THE TWO-PART TEST: THE IRA LIKELY VIOLATES THE
"SPIRIT OF THE CHAPEAU"

The second part of the "two-part test" asks whether a policy violates the *Chapeau* of the Article XX. Specifically, it asks whether the policy is an "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or if it is "a disguised restriction on international trade."¹⁰⁹ The point of the *Chapeau* is to "ensure that Article XX exceptions are not abused."¹¹⁰ Essentially, countries cannot act in bad faith by attempting to use these exceptions to evade their GATT obligations. For example, in the *Brazil Retreaded Tyre* case discussed above, the Appellate Body found that Brazil's ban on imported retreaded tyres violated the *Chapeau* of the GATT, as it prohibited international imports *except from* countries in MERCOSUR

107. See, e.g., Wong, *supra* note 18.

108. *United States — Standards for Reformulated and Conventional Gasoline*, WTO Doc. DS2 (adopted May 20, 1996), https://www.wto.org/english/tratop_e/dispu_e/cases_e/1pagesum_e/ds2sum_e.pdf; HUNTER ET AL., *supra* note 92, at 1279 (discussing the *Reformulated Gasoline* case and stating that "[t]he Appellate Body . . . note[d] that clean air is an exhaustible resource").

109. GATT Article XX, *supra* note 58.

110. HUNTER ET AL., *supra* note 12, at 1284.

(a trading bloc composed of numerous South American countries).¹¹¹ Because Brazil allowed imports from these nations and not others, the import ban appeared to be enforced arbitrarily and thus violated the *Chapeau*.¹¹² In the case of the IRA, it appears that the domestic content requirements do not allow for much discretion in enforcement; either renewable energy producers qualify for the tax credit by sourcing their products domestically, or they do not.¹¹³ It also may not appear to be disguised as a restriction on international trade: it still allows for the import of internationally manufactured renewable products, but it doesn't provide the same bonus tax credit incentive to purchase those products.¹¹⁴

V. REMEDIES AND INTERNATIONAL LEGAL IMPLICATIONS

If the IRA is in violation of the GATT, then this may open the United States up to possible complaints by other member nations, which will likely be resolved by the WTO's DSB.¹¹⁵ However, there is an important, practical caveat here: some scholars have expressed serious concern about whether WTO's Appellate Body is even properly functioning at the moment, due to blocked appointments and indefinite delays in appeal rulings.¹¹⁶ Still, if a challenge to the IRA is brought to the WTO, the WTO explains that its "preferred solution is for the countries concerned to discuss their problems and settle the dispute by themselves."¹¹⁷ And if a solution is not worked out between countries, one consequence may be that the WTO recommends modifications to the IRA so that it will more closely comply with the

111. UN ENV'T PROGRAMME, *supra* note 98; *Mercosur: South America's Fractious Trade Bloc*, COUNCIL ON FOREIGN RELATIONS (Dec. 17, 2021), <https://www.cfr.org/backgrounder/mercosur-south-americas-fractious-trade-bloc> (providing background on MERCOSUR and describing it as "an economic and political bloc originally comprising Argentina, Brazil, Paraguay, and Uruguay.").

112. UN ENV'T PROGRAMME, *supra* note 98.

113. Inflation Reduction Act of 2022, H.R. 5376, 117th Cong. § 13101(g).

114. *Id.*

115. See *Understanding the WTO: A Unique Contribution*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm (last visited Mar. 14, 2024).

116. Simon Lester, *Ending the WTO Dispute Settlement Crisis: Where to from Here?* INT'L INST. FOR SUSTAINABLE DEV. (Mar. 2, 2022), <https://www.iisd.org/articles/united-states-must-propose-solutions-end-wto-dispute-settlement-crisis> (discussing the politics surrounding the functioning of the Appellate Body: "[The WTO's] appeals mechanism is not functioning because the United States blocked appointments to the Appellate Body, which has led to most panel reports being appealed 'into the void' and leaving the dispute unresolved.").

117. WTO, *supra* note 115.

GATT's goals.¹¹⁸ In practice, this seems unlikely to occur—the general political gridlock in the U.S. Congress would likely make any revision to a statute difficult, let alone a revision that would take away a tax credit for *domestic* producers (which are among Congress's constituents).¹¹⁹ However, there are potential consequences for failing to implement the WTO recommendations: for example, if the DSB's recommendations aren't followed by one country within a set reasonable time frame, "the complainant may ask the DSB for permission to impose trade sanctions against the respondent . . ."¹²⁰ So, if the U.S. lost a GATT challenge on the IRA's domestic content requirements, and if the U.S. also failed to implement any recommendations from the DSB, then the challenging country could impose reciprocal tariffs on the U.S. (with the DSB's permission) and still be in compliance with the GATT. So, if the IRA violates the GATT, and if the U.S. does not follow a potential DSB's recommendation, then there could be a trend of increasing trade barriers in the international market for renewable energy products.

Moreover, even if there is no GATT challenge to the IRA, just the presence of these domestic content requirements may lead other countries to implement similar measures to protect their own domestic production of solar products. This outcome may impede the ramp up of solar and other renewable energy technologies necessary to reduce our reliance on fossil fuels and transition to a green economy. Before the IRA was passed, the Solar Energy Industries Association ("SEIA") stated that the solar trade disputes between the U.S. and China could be a contributing factor to the decreased solar production forecasts for 2022 and 2023.¹²¹ Trade disputes have already been deemed one of the factors that may slow (but not stop) the IRA's ramp up of U.S. solar production.¹²² One journalist has offered a prediction of what could happen if there are increasing trade barriers in the international market for clean energy: "[A] scenario

118. SUNDARAM, *supra* note 68, at 205 ("Commentators note that (i) where measures introduced by Member States were found to be inconsistent with Article XX by the [Dispute Settlement Body (DSB)], such measures were subsequently modified as per directions of the DSB and were not challenged any further . . .").

119. See, e.g., Jacob Bronsther & Guha Krishnamurthi, *Congress Is Dysfunctional. History Shows It Won't Change Anytime Soon*, WASHINGTON POST (Feb. 9, 2023), <https://www.washingtonpost.com/made-by-history/2023/02/09/congress-dysfunction-polarization-gridlock/>.

120. *The Process*, *supra* note 14

121. Bever & McDaniel, *supra* note 46.

122. Brian Eckhouse, *Even \$370 Billion in US Incentives Won't Solve All of Solar's Struggles*, BLOOMBERG (Jan. 27, 2023), <https://www.bloomberg.com/news/articles/2023-01-27/solar-energy-market-issues-remain-even-after-ira-incentives>.

might be that the United States, Europe, East Asia and China each builds its *own* domestic supply chain for zero-carbon technologies, and that none of these chains achieves sufficient scale to bring down long-term costs.¹²³ If other nations similarly protect their own renewable energy markets, then the global ramp up of renewable energy may be slower and more expensive than if the trade barriers were lowered. The IRA's domestic content requirements therefore have broader international implications than simply violating the GATT—these requirements may signal more trade disputes to come with respect to renewable energy.

Conclusion

The IRA—the most important piece of climate change legislation to date— may violate international trade law by preferencing domestic production of solar productions over international production, which is likely a violation of the GATT Article III and is unlikely to qualify for an exception under Article XX(b) or (g). A violation of the GATT means that the IRA may be challenged by a WTO member nation and face review from the DSB, with the potential of having to adjust the law to come into compliance with the GATT or facing commensurate tariffs from the challenging country. The U.S. may also face other international trade repercussions from the IRA's domestic preference for solar energy, such as other nations enacting similar domestic content requirements, limiting the international trade of solar products, etc. To address the climate crisis, the international community will need to quickly scale up renewable energy production. The IRA's potential violation of the GATT serves as a reminder to the international community: we should ensure that our national policies to address climate change work in harmony with international goals to scale up renewable energy. The climate crisis is a global crisis. We can bring about a brighter future if we use trade rules to encourage a global ramp up of renewables.

123. Robinson Meyer, *These Tiffs Over Electric Vehicles Are Not What They Seem*, N.Y. TIMES (Apr. 7, 2023), <https://www.nytimes.com/2023/04/07/opinion/electric-vehicles-europe-trade-wars.html>.