

# THE ELECTRIC VEHICLES DILEMMA: THE INFLATION REDUCTION ACT, INTERNATIONAL TRADE LAW, AND U.S.-KOREA ECONOMIC DIPLOMACY

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*The Inflation Reduction Act (IRA) is a bold, comprehensive industrial policy that awards extensive subsidy to expedite the clean energy transition and inspire innovation. The final assembly provision of the IRA requires that an electric vehicle (EV) must be assembled with all necessary parts in North America to qualify for \$7,500 tax credit. This domestic production requirement spurred a full-scale trade dispute and led foreign governments and automakers to vigorously lobby Washington, D.C. for an exemption. South Korea’s economic diplomacy serves as a particularly informative case study of a foreign government’s lobbying efforts to exert influence throughout the U.S. legislative and rulemaking process. Although the final assembly requirement engendered a national political crisis in Seoul, the country was forced to rule out mounting a legal challenge against the IRA through the World Trade Organization (WTO) Dispute Settlement Body, due to its lack of a functional Appellate Body and chronic delays in proceedings. Amidst the mounting opposition to the final assembly requirement from crucial U.S. allies, the Biden administration was also presented with a unique dilemma throughout the Department of the Treasury rulemaking for the IRA: should it honor the unambiguous text or find creative interpretive strategies to make concessions to its allies’ demands? This Note shows that the IRA has led governments to question the role of the free trade principles and instead turn to ad hoc political agreements—as opposed to WTO litigation—for trade dispute resolution.*

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#### INTRODUCTION

Smiles, cocktails, and a congratulatory spirit were in order at the Seoul Grand Hyatt Hotel. As a highlight of his Asian tour in May 2022, the U.S. President Joe Biden held a joint press conference with Hyundai Motor Group Chairman Chung Eui-Sun and celebrated Hyundai's announcement that the company would invest \$10.5 billion to construct a new electric vehicle (EV) factory in Savannah, Georgia and develop advanced automotive technology in the United States.<sup>1</sup> President Biden praised the strength of the bilateral alliance between South Korea and the United States, touting Hyundai's investment as "another prime example of how that partnership—and innovation, expertise, and values that drive both the Korean and American people—are delivering for the world."<sup>2</sup> Biden also expressed his gratitude to

1. Sarah Chea, *Hyundai's U.S. Investment Commitments Double to \$10.5 Billion*, KOREA JOONGANG DAILY (May 22, 2022), <https://koreajoongangdaily.joins.com/2022/05/22/business/industry/korea-hyundai-hyundai-motor/20220522162920102.html> [https://perma.cc/3JXE-QZQX]; Trevor Hunnicut and Heekyong Yang, *Hyundai Motor Troup to Invest More Than \$10 Billion in U.S. up to 2025*, REUTERS (May 22, 2022), <https://www.reuters.com/business/autos-transportation/hyundai-motor-group-invest-5-billion-us-through-2025-2022-05-22/> [https://perma.cc/B4MQ-LBRU].

2. President Joe Biden, Remarks by President Biden on Hyundai's Investments in Savannah, Georgia (May 22, 2022), <https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/05/22/remarks-by-president-biden-on-hyundais-investments-in-savannah-georgia> [https://perma.cc/T8YH-HP8Z].

Hyundai and vowed that “We will not let you down.”<sup>3</sup> Yet four months later, Hyundai learned that a new U.S. law would disqualify every EV that the company sells in the United States from receiving an existing \$7,500 government tax credit, and the automaker scrambled to lobby the Biden administration to amend the niche provisions included in the President’s landmark Inflation Reduction Act (“IRA”).<sup>4</sup> Why did President Biden reverse course and let Hyundai down?

The IRA’s requirement that final assembly of all EVs must occur within North America to qualify for the \$7,500 tax credit has caused nothing short of an international outcry—not only from the United States’ competitors like China, but also from its closest allies, including the European Union, Japan, and South Korea, all of which vowed to challenge the Act. Such threats of litigation have merit, since the World Trade Organization (WTO) is certain to find that the IRA’s EV provisions violate national treatment obligations.<sup>5</sup> As a result, the law created a serious dilemma for the Biden administration, which was compelled to weigh vigorous calls to create an exemption from trading partners against the difficulty of exercising interpretive discretion with unambiguous statutory language. Secretary of Treasury Janet Yellen captured the U.S. government’s conundrum well, noting that, “I’ve heard a lot about the concerns about Koreans and Europeans about these rules, and we’ll certainly take them into account, [but] legislation is what it is.”<sup>6</sup> Simply put, because the statute plainly requires final assembly in North America, Secretary Yellen reiterated that “we have to implement the law that was written” and the Department of the Treasury (“Treasury”) can only “listen to their concerns and see what was in the range of the feasible as we implement the rules.”<sup>7</sup> In fact, this obstacle resulted from a deliberate textual construction that reflected legislative intent. As a product of a closed-door negotiation between Senators Chuck Schumer and Joe Manchin, the drafters of the IRA neglected concerns from the Democratic ranks about the burden

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3. *Id.*

4. Michael Wayland, *Hyundai Says Biden’s New EV Tax Credit Rules Deal ‘Astronomical’ Blow to Business*, CNBC (Oct. 19, 2022, 8:44 PM), <https://www.cnbc.com/2022/10/19/hyundai-bidens-ev-tax-credit-rules-deal-astronomical-blow-to-business.html> [<https://perma.cc/4YNV-VPLC>].

5. General Agreement on Tariffs and Trade art. III, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

6. Ari Natter & Christopher Condon, *Yellen Tempers Expectations for Major EV Tax-Credit Tweaks*, BLOOMBERG (Oct. 24, 2022, 1:52 PM), <https://www.bloomberg.com/news/articles/2022-10-24/yellen-tempers-expectations-for-major-ev-tax-credit-tweaks> [<https://perma.cc/4X4U-Z9SR>].

7. *Id.*

that the new provisions would impose on automakers and adopted the most stringent forms of sourcing and domestic production requirements that Manchin demanded.<sup>8</sup>

This Note also traces the political dialogue regarding the IRA in South Korea and explores how a U.S. domestic policy created a ripple effect in Seoul that is now synonymous with a national sensation that embroiled the novice South Korean President Yoon-Suk Yeol in vitriolic hearings, foreign policy gaffes, and resulted in unanimous passage of a National Assembly of the Republic of Korea resolution repudiating the IRA.<sup>9</sup> EV is an industry that is vital to Korea's economic interest, and Hyundai Motor Group—which owns Hyundai and Kia—reported consistent growth and ranked second in U.S. EV sales for the first three quarters of 2022 before the introduction of the IRA.<sup>10</sup> In response to the U.S. law that could cripple its automakers' competitiveness, the South Korean government and Hyundai took swift action and deployed sophisticated lobbying tactics to pressure the Biden Administration to add a transition period or exemption for Korean automakers.<sup>11</sup> Such extensive government engagement ultimately bore fruit and led the Treasury to issue favorable guidance that awards the \$7,500 commercial clean vehicle tax credit for leased EVs, which are not obligated to meet the final assembly requirement.<sup>12</sup> By studying primary sources drawn from both the United States and South Korea, this Note interweaves the U.S. legislative and administrative rulemaking process with the reactive diplomacy and domestic policymaking efforts in Seoul. The IRA also offers insights into how foreign countries understand U.S. law at home and in turn deploy creative lobbying strategies to shape the policy discourse in Washington, D.C. and agency interpretations of legislation. Although the new guidance from

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8. Emily Cochrane & Annie Karni, *After Clash, Manchin and Schumer Rushed to Reset Climate and Tax Deal*, N.Y. TIMES (July 28, 2022), <https://www.nytimes.com/2022/07/28/us/politics/manchin-schumer-climate-tax-deal.html> [https://perma.cc/39JT-VEN9].

9. In-hwan Jung, *Korean Legislative Committee Adopts Resolution Denouncing US EV Tax Credit Snub*, HANKYOREH (Aug. 31, 2022, 5:17 PM), [https://english.hani.co.kr/arti/english\\_edition/e\\_international/1056968.html](https://english.hani.co.kr/arti/english_edition/e_international/1056968.html) [https://perma.cc/W6FS-EAMJ].

10. Michael Herh, *Hyundai Motor Group Takes 2nd Place in U.S. EV Market*, BUSINESSKOREA (Dec. 1, 2022, 2:23 PM), <http://www.businesskorea.co.kr/news/articleView.html?idxno=105192> [https://perma.cc/2NKG-XRL5].

11. Ari Natter et al., *Hyundai Lobbies US to Ease EV Rule That Hurts Foreign Carmakers*, BLOOMBERG (Oct. 19, 2022, 9:38 AM), <https://www.bloomberg.com/news/articles/2022-10-18/hyundai-pleads-case-to-ease-us-rule-on-evs-saying-sales-at-risk> [https://perma.cc/ZLP2-7CFR].

12. I.R.S. Notice 2023-9 (Dec. 29, 2022) [hereinafter *Commercial Clean Vehicles*]; I.R.S. FS-2022-42, at 9 (Dec. 2022) [hereinafter FAQ] (discussing leased vehicles).

the Treasury appears to be a happy compromise, the IRA will remain a thorny issue in public and international discourse for years to come—in fact, Senator Manchin already pledged to introduce legislation that “further clarifies the original intent of the law and prevents this dangerous interpretation from Treasury from moving forward.”<sup>13</sup> Concluding with a cautionary note, this Note argues that the United States must recognize its allies’ increasing disillusionment with the IRA and their plans to institute similar subsidy programs that deliberately mimic the EV provision and provide exclusive benefits to support their domestic manufacturers.<sup>14</sup>

In addition to inspiring a heated political dialogue, the IRA dispute is also significant because it hints at a paradigm shift in how WTO member states resolve trade disputes and litigate foreign laws through the WTO Dispute Settlement Body (DSB). Despite the iron-clad legal claims that are likely to prevail at the WTO, South Korea and the European Union have maintained that a WTO challenge was a last resort, and instead made a conscious decision to prioritize arriving at a political agreement with the United States as a solution.<sup>15</sup> States today are presented with novel questions about trade disputes, especially because the WTO DSB suffers from significant delays in proceeding and still does not have a functioning Appellate Body (“AB”) that can enforce the decisions.<sup>16</sup> For example, what value does the WTO serve if the members know that they would likely win, but are

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13. Press Release, U.S. Senate Comm. on Energy & Nat. Res., Manchin Urges Treasury to Pause Implementation of EV Tax Credits (Dec. 29, 2022), <https://www.energy.senate.gov/2022/12/manchin-urges-treasury-to-pause-implementation-of-ev-tax-credits> [<https://perma.cc/WQU6-W4EL>].

14. Gavin Bade & Steve Overly, ‘It Was All About the United States’: Democrats Unrepentant as Allies Fume over Trade Rules, POLITICO (Dec. 9, 2022, 4:30 AM), <https://www.politico.com/news/2022/12/09/trade-rules-democrats-inflation-tax-00073138> [<https://perma.cc/UL9D-GBBY>]; Jae-hyuk Park, Korea Could Cut Subsidies for Imported EVs in Retaliation Against US IRA, KOREA TIMES (Jan. 1, 2023, 2:53 PM), [https://www.koreatimes.co.kr/www/tech/2022/12/419\\_342692.html](https://www.koreatimes.co.kr/www/tech/2022/12/419_342692.html) [<https://perma.cc/J6KP-V4UD>].

15. Andy Bounds, EU Accuses US of Breaking WTO Rules with Green Energy Incentives, FIN. TIMES (Nov. 6, 2022), <https://www.ft.com/content/de1ec769-a76c-474a-927c-b7e5aeff7d9e> [<https://perma.cc/L5W9-PD7E>]; Press Release, Republic of Korea, Ministry of Trade, Industry and Energy, (Seolmyeongjaryo) Jeongbuneun Mi IRA Gwallyeon WTO Deung Tongsangbunjaeng Haegyedoljeolcha Chaksu Yeobureul Gyeoljeonghan Ba Eopseum ((설명자료) 정부는 美 IRA 관련 WTO 등 통상분쟁 해결절차 착수 여부를 결정할 바 없음 [(Explanatory Material) The Government Did Not Decide to Pursue Dispute Settlement, Including a WTO Challenge, About the U.S. IRA] (Nov. 3, 2022), <https://www.korea.kr/news/pressReleaseView.do?newsId=156534557> [<https://perma.cc/NX7Z-LSUK>].

16. Bernard M. Hoekman et al., *Informing WTO Reform: Dispute Settlement Performance, 1995-2020*, 55 J. WORLD TRADE 1, 29 (2021); Jennifer Hillman, *A Reset of the World Trade Organization’s Appellate Body*, COUNCIL ON FOREIGN RELS. (Jan.

dissuaded from litigation due to such practical concerns about the arbitral tribunal? What recourse, if any, can states pursue if another state refuses to comply with the panel or AB's decision? And going forward, will ad hoc political resolutions—as opposed to WTO litigation or multilateral talks—be the norm for resolving complex trade disputes?

This Note is organized as follows: Part I offers a statutory analysis and explores the legislative intent and context that underlie the EV tax credit provisions. Special attention is drawn to the Treasury's rulemaking for the IRA provisions and comments from foreign governments and automakers. Part II outlines reactions from U.S. domestic automakers, most of whom stood to make significant gains from the IRA. Part III considers how the EV tax credit provision would fare under a WTO challenge and argues that the DSB would find that the domestic production requirement violates multilateral trade rules. Part IV tracks the political dialogue about the final assembly requirement in Korea. Part V considers the impact of foreign governments' lobbying on the Treasury's Notice announced in December 2022.<sup>17</sup> Lastly, Part VI assesses the implications of the IRA debate on the WTO, international trade rules, and relationship between the United States and its allies.

## I.

### STATUTORY CONTEXT AND INTENT

#### A. Overview

The Inflation Reduction Act of 2022 is one of the most comprehensive spending bills to pass Congress in recent history.<sup>18</sup> An omnibus legislation designed to fulfill a diverse scope of goals and programs, the IRA bill appropriates nearly \$437 billion and promises to reform taxes, combat climate change, create manufacturing jobs at

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14, 2020), <https://www.cfr.org/report/reset-world-trade-organizations-appellate-body> [<https://perma.cc/9649-UMHN>].

17. *Commercial Clean Vehicles*, *supra* note 12; FAQ, *supra* note 12.

18. Jeff Stein, Maxine Joselow & Rachel Roubein, *How the Inflation Reduction Act Might Affect You — and Change the U.S.*, WASH. POST (Aug. 15, 2022, 9:58 PM), <https://www.washingtonpost.com/us-policy/2022/07/28/manchin-schumer-climate-deal/> [<https://perma.cc/WHK6-J9NU>] (“The legislation Democrats muscled through the Senate on Sunday would represent one of the most consequential pieces of economic policy in recent U.S. history — though still far smaller than the \$3 trillion the Biden administration initially sought.”).

home, and lower healthcare and drug costs.<sup>19</sup> The basic premise of the statute is that, by bolstering the Internal Revenue Services' ("IRS") tax enforcement capability, imposing a fifteen percent corporate minimum tax, and cutting the cost of prescription drugs, the federal government can significantly increase revenue and, in turn, invest in sustainability, clean energy, manufacturing jobs, and the expansion of Medicare benefits and Affordable Care Act Marketplace coverage plans.<sup>20</sup> Because the Act would result in a dramatic growth of federal revenue, the Congressional Budget Office estimates that the IRA will reduce the federal deficit by nearly \$305 billion over the course of the next decade.<sup>21</sup> Furthermore, the IRA represents the largest legislative effort to combat climate change in U.S. history. The Department of Energy estimates that the Act will lead to a forty percent decrease in greenhouse gas emissions—bringing emissions below levels from the year 2005—by the year 2030.<sup>22</sup>

Signed into law on August 16, 2022, the IRA is a culmination of President Biden's Build Back Better and Made in America campaign pledges.<sup>23</sup> To pass Congress, the Act was forced to undergo painstaking negotiations and compromises. Indeed, the IRA is inherently partisan legislation and no Republican congressperson from either chamber of Congress voted for the Act.<sup>24</sup> Even the Democrats were largely divided on the merits of Biden's economic plan, and it took more than a year and a half for the Administration to consolidate the members of the President's party to support the IRA that had originally been introduced in 2021.<sup>25</sup> In the Senate, Majority Leader Chuck Schumer could

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19. STAFF OF S. DEMOCRATIC MAJORITY, 116TH CONG., SUMMARY: THE INFLATION REDUCTION ACT OF 2022 (2022), [https://www.democrats.senate.gov/imo/media/doc/inflation\\_reduction\\_act\\_one\\_page\\_summary.pdf](https://www.democrats.senate.gov/imo/media/doc/inflation_reduction_act_one_page_summary.pdf).

20. *Id.*

21. CONG. BUDGET OFF., ESTIMATED BUDGETARY EFFECTS OF H.R. 5376, THE INFLATION REDUCTION ACT OF 2022 (2022), [https://www.cbo.gov/system/files/2022-08/hr5376\\_IR\\_Act\\_8-3-22.pdf](https://www.cbo.gov/system/files/2022-08/hr5376_IR_Act_8-3-22.pdf), at 3.

22. U.S. DEPT. OF ENERGY, OFF. OF POL'Y, DOE/OP-0018, THE INFLATION REDUCTION ACT DRIVES SIGNIFICANT EMISSIONS REDUCTIONS AND POSITIONS AMERICA TO REACH OUR CLIMATE GOALS (2022), [https://www.energy.gov/sites/default/files/2022-08/8.18%20InflationReductionAct\\_Factsheet\\_Final.pdf](https://www.energy.gov/sites/default/files/2022-08/8.18%20InflationReductionAct_Factsheet_Final.pdf), at 1.

23. Mike Scott, *ESG Watch: Biden Flies Solo with 'Made-in-America' Climate Legislation*, REUTERS (Aug. 31, 2022, 9:18 AM), <https://www.reuters.com/business/sustainable-business/esg-watch-biden-flies-solo-with-made-in-america-climate-legislation-2022-08-31> [<https://perma.cc/MS82-VZF9>]; Tristan Bove, *Biden's Massive Manufacturing Push is Working and U.S. Companies Have Already Committed \$200 Billion to New Projects*, FORTUNE (Apr. 14, 2023), <https://fortune.com/2023/04/17/biden-manufacturing-chips-companies-spending-200-billion/> [<https://perma.cc/K2MH-HY8E>].

24. H.R. 5376, 116th Cong. (2022) (enacted).

25. *Id.*

only persuade Senator Joe Manchin, a staunch opponent of climate change and tax reform efforts, to support the Act after months of exhaustive negotiations. In fact, the Democratic leadership was forced to make exacting concessions to Manchin and delete crucial provisions funding universal childcare, paid family and medical leave, and tax benefits for low-income Americans.<sup>26</sup> To ensure passage, the Democrats were also compelled to accept Senator Kyrsten Sinema's last minute demands to fund drought resiliency programs in Arizona and ease tax requirements for fund managers, corporations, and private equity firms.<sup>27</sup> On August 7, the Senate bill passed 51-50 with the help of Vice President Kamala Harris' tie-breaking vote.<sup>28</sup> The House bill subsequently passed after a 220-207 vote with no Republican support.<sup>29</sup>

### B. Statutory Analysis

The EV tax credit was established by the Energy Improvement and Extension Act, which was signed into law in October 2008.<sup>30</sup> The law defined "new clean vehicle(s)," which were eligible to receive the tax credit, and provided more specifically that "any new qualified plug-in electric drive motor vehicle with a gross vehicle weight rating of not more than 10,000 pounds" is eligible to receive up to \$7,500 in tax credit, which a taxpayer can individually claim by filing a form to the IRS along with their tax return.<sup>31</sup> Until the passage of the IRA, Congress had not made any significant modification to the EV credit provisions, apart from decreasing the cap for the credit phase-out from 250,000 vehicles sold to 200,000 vehicles in 2009.<sup>32</sup>

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26. Tony Romm & Jeff Stein, *Manchin Says He Won't Support New Climate Spending or Tax Hikes on Wealthy*, WASH. POST (July 15, 2022, 11:53 AM), <https://www.washingtonpost.com/us-policy/2022/07/14/manchin-climate-tax-bbb> [https://perma.cc/H4EF-KAXE].

27. Emily Cochrane, *Sinema Agrees to Climate and Tax Deal, Clearing the Way for Vote*, N.Y. TIMES (Aug. 4, 2022), <https://www.nytimes.com/2022/08/04/us/politics/sinema-inflation-reduction-act.html> [https://perma.cc/XK6C-3HH8]; *Sinema-Shaped Inflation Reduction Act Signed into Law*, U.S. SENATOR KYRSTEN SINEMA (Aug. 16, 2022), <https://www.sinema.senate.gov/sinema-shaped-inflation-reduction-act-signed-law> [https://perma.cc/HMV8-S95H].

28. H.R. 5376.

29. *Id.*

30. Energy Improvement and Extension Act of 2008, Pub. L. No. 110-343, § 205, 122 Stat. 3765.

31. *Id.* at 3835–36; *Credits for New Clean Vehicles Purchased in 2023 or After*, IRS, <https://www.irs.gov/credits-deductions/credits-for-new-clean-vehicles-purchased-in-2023-or-after> [https://perma.cc/9LQU-DTM3].

32. American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 1141, 123 Stat. 115, 326.



In contrast, the IRA introduces dramatic regulatory changes for the automotive industry and adds stringent domestic production requirements as a condition to receiving the \$7,500 tax credit. First, the critical minerals used in an EV battery must be recycled in North America or extracted or processed “in the United States or in any country with which the United States has a free trade agreement in effect.”<sup>33</sup> Before 2024, forty percent of critical minerals must meet the sourcing requirement, and the required proportion of critical minerals gradually increases to sixty percent by 2025, seventy percent by 2026, and eighty percent after 2026.<sup>34</sup> Second, fifty percent of battery components used in an EV vehicle must be “manufactured or assembled in North America” by 2024.<sup>35</sup> The battery sourcing requirement also incrementally increases to sixty percent by 2024, seventy percent by 2026, eighty percent by 2027, ninety percent by 2028, and one hundred percent by 2028.<sup>36</sup> Furthermore, the critical minerals used in an EV battery or parts component of a battery must not be “extracted, processed, or recycled” by a “foreign entity of concern,” which currently denotes Russia, China, Iran, and North Korea, as designated in the Infrastructure Investment and Jobs Act.<sup>37</sup>

The most important provision for this research is section 13401(b), titled “Final Assembly,” that amends section 30D(d) of the Internal Revenue Code of 1986 and adds a requirement that “the final assembly of which occurs within North America” to the existing statutory definition of a qualifying “new clean vehicle.”<sup>38</sup> Simply put, the IRA requires that the final assembly of a vehicle occur within North America for an EV to receive the tax credit, and defines final assembly as, “the process by which a manufacturer produces a new clean vehicle at, or through the use of, a plant, factory, or other place from which the vehicle is delivered to a dealer or importer with all component parts necessary for the mechanical operation of the vehicle included with the vehicle, whether or not the component parts are

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33. Inflation Reduction Act of 2022, Pub. L. No. 117-169, § 13401, 136 Stat. 1818, 1956.

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 1957; The Infrastructure Investment and Jobs Act defines “a foreign entity of concern” to include those that are “owned by, controlled by, or subject to the jurisdiction or direction of a government of a foreign country that is a covered nation (as defined in section 2533c(d) of title 10, United States Code).” Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 40207, 135 Stat. 429, 963. The United States Code designates North Korea, China, Russia, and Iran as covered nations. *See* 10 U.S.C. § 2533c(d).

38. Inflation Reduction Act § 13401, *supra* note 33, at 1954.

permanently installed in or on the vehicle.”<sup>39</sup> Unlike the critical minerals and battery component requirements, the final assembly requirement applies prospectively, not from 2024, but rather immediately upon the date of the statute’s enactment—August 16, 2022.<sup>40</sup> In sum, the three provisions governing EVs impose significant economic and regulatory burden on the automakers, which are forced to immediately restructure global supply chains, find alternative raw materials, and build assembly and manufacturing capabilities in North America in order to receive the full \$7,500 tax credit.

It must be highlighted that Democratic legislators expressed concerns about the stringent EV provisions once the Act was presented to the Senate. In fact, Senator Debbie Stabenow of Michigan, a state that boasts the largest auto production output in the country, characterized the proposed EV-related provisions as “a very cumbersome, unworkable credit once the full restrictions set in.”<sup>41</sup> Stabenow unsuccessfully advocated for last minute tweaks that would provide more leeway for automakers to comply with the EV tax credits requirements and expressed concern that “[o]nce these are implemented, none of the auto companies will be able to offer that credit to consumers. You would need multiple years down the road before that can happen.”<sup>42</sup> However, the Democrats understood that their margin for success was thin and largely chose to proceed with Manchin’s version of the bill, leading Senator Sheldon Whitehouse to aptly tweet that “[t]his [IRA vote] is so delicately balanced that ANY amendment, even a ‘good’ one, risks upsetting the balance –so look forward to a lot of ‘no’ votes on things we would ordinarily want.”<sup>43</sup> The challenge was compounded by the fact that the text of the IRA remained a secret until July 27, 2022 when Manchin and Schumer reached an agreement through closed-door negotiations; because Senate adjourned for summer recess

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39. *Id.*

40. MOLLY F. SHERLOCK, CONG. RSCH. SERV., IN11996, CLEAN VEHICLE TAX CREDITS IN THE INFLATION REDUCTION ACT OF 2022 1-3 (2022).

41. David Shepardson, *Automakers Press U.S. Senator Manchin for Changes to EV Tax Credit Proposal*, REUTERS (Aug. 2, 2022, 5:32 PM), <https://www.reuters.com/article/usa-autos-tax-credit-idCAKBN2P81XB> [<https://perma.cc/E58T-XVEW>].

42. Ari Natter & Erik Wasson, *Democrats at Odds Over EV Tax Credit in Manchin-Schumer Bill*, BLOOMBERG (Aug. 3, 2022, 3:21 PM), <https://www.bloomberg.com/news/articles/2022-08-03/democrats-at-odds-over-ev-tax-credit-in-manchin-schumer-bill> [<https://perma.cc/9DVK-FE3Z>].

43. Stephanie Lai, *Senate Holds All-Night ‘Vote-a-Rama,’ with Democrats’ Agenda at Stake*, N.Y. TIMES (Aug. 7, 2022), <https://www.nytimes.com/2022/08/07/us/politics/senate-vote-a-rama-democrats.html> [<https://perma.cc/WNU8-7GN8>].

on August 7, the Democrats were forced to fast track a \$700-billion, 755-page spending bill in just two weeks after its introduction.<sup>44</sup>

Most importantly, Manchin refused to entertain any amendment to the EV provisions and responded that Congress should “tell [automakers] to get aggressive and make sure that we’re extracting in North America, we’re processing in North America and we put a line on China. I don’t believe we should be building a transportation mode on the backs of foreign supply chains. I’m not going to do it.”<sup>45</sup> Since the Senate Democrats had no choice but to accept Manchin’s adamant positions about the EV tax credits, the final legislation maintained the battery component, critical minerals, and final assembly requirements, and the IRA passed in the Senate merely two weeks after the Schumer-Manchin agreement. This expedited timeline prevented industry stakeholders, foreign governments, and automakers from analyzing the omnibus legislation in time to provide input in the hopes of shaping the text of the Act in their favor. This lack of opportunity to influence the legislative process would in Washington later result in an acrimonious political contention in South Korea.

### C. Rulemaking and Comments to the Treasury Notice

Federal agencies had made plans to implement the tax credit provision even before the IRA passed Congress. On August 16, the Treasury and IRS published guidance clarifying that “effective immediately after enactment of the Inflation Reduction Act (after August 16, 2022), the tax credit is only available for qualifying electric vehicles for which final assembly occurred in North America.”<sup>46</sup> The Department of Energy also published a list of twenty-six EVs that met the North America final assembly requirement; however, eight popu-

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44. Laura Weiss, *Tax Bill’s Electric Vehicle Credit Limits Discouraging to Some*, ROLL CALL (Aug. 4, 2022, 5:00 AM), <https://rollcall.com/2022/08/04/tax-bills-electric-vehicle-credit-limits-discouraging-to-some/> [https://perma.cc/8JYM-3GGT]; Burgess Everett & Marianne Levine, *Manchin’s Latest Shocker: A \$700B Deal*, POLITICO (July 27, 2022, 7:32 PM), <https://www.politico.com/news/2022/07/27/manchin-schumer-senate-deal-energy-taxes-00048325> [https://perma.cc/4Y8J-D2CD]; Evan Halper, *Carmakers Say the Climate Bill Sets Impossible Targets*, WASH. POST (Aug. 3, 2022, 9:00 AM), <https://www.washingtonpost.com/business/2022/08/03/tax-credits-ev-manchin/> [https://perma.cc/8K8D-5HXX]; Tony Romm, *Senate Opens Debate on Biden Backed Inflation Reduction Act*, WASH. POST (Aug. 6, 2022, 11:56 PM) <https://www.washingtonpost.com/us-policy/2022/08/06/senate-vote-consider-climate-ira/> [https://perma.cc/8YRB-ZF7X].

45. Shepardson, *supra* note 41.

46. U.S. DEP’T OF TREASURY, FREQUENTLY ASKED QUESTIONS ON THE INFLATION REDUCTION ACT’S INITIAL CHANGES TO THE ELECTRIC VEHICLE TAX CREDIT (2022), <https://home.treasury.gov/system/files/136/EV-Tax-Credit-FAQs.pdf>.

lar models, including Tesla Model 3, S, X, Y, GMC Hummer, and Chevrolet Bolt already surpassed the cap of 200,000 EV tax credits and were thus ineligible for the tax credit.<sup>47</sup> An overwhelming majority of eligible vehicles were produced by American manufacturers and only five vehicles produced by foreign automakers—Audi Q5, BMW 330e, BMW X5, Nissan Leaf, and Volvo S60—met the final assembly requirement.<sup>48</sup>

On October 5, the Treasury and IRS issued notices seeking public comments to guide the agencies' implementation of the IRA's climate and clean energy tax incentives.<sup>49</sup> In particular, Notice 2022-46, titled "Consumer Vehicle Credits," collected more than eight hundred public comments that provided input on whether additional "guidance [is] needed to clarify the definition of the term 'final assembly' in § 30D(d)(5) or the area included in the term 'North America' for purposes of § 30D(d)(1)(G)" by November 4.<sup>50</sup> Actively engaging in the comments process, foreign governments attempted to persuade the Biden Administration to apply the broadest possible interpretation of the statute and even suggested that the Treasury implement proposals entirely unsubstantiated by the text of the IRA. For example, South Korea called on the United States to define "final assembly" to "[require] minimum processes to take place in North America" and provide a grace period to "certain companies engaged in defined investment commitments in the United States."<sup>51</sup> The European Union did not shy from calling the final assembly provision a discriminatory measure and requested "a general waiver or exception for EU produced clean vehicles that would otherwise qualify."<sup>52</sup> Both the European Union's call for a "waiver or exception for EU produced clean vehicles" and Korea's proposals for "minimum processes" and grace

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47. Electric Vehicles with Final Assembly in North America, U.S. DEP'T OF ENERGY, <https://afdc.energy.gov/laws/electric-vehicles-for-tax-credit> [<https://perma.cc/DV28-BYAN>].

48. *Id.*

49. U.S. DEP'T OF TREASURY, TREASURY, IRS OPEN PUBLIC COMMENT ON IMPLEMENTING THE INFLATION REDUCTION ACT'S CLEAN ENERGY TAX INCENTIVES (2022), <https://home.treasury.gov/system/files/136/FactSheet-Implementing-IRA-Climate-CleanEnergy-TaxIncentives.pdf>.

50. I.R.S. Notice 2022-46, 2022-43 IRB 18 (Oct. 5, 2022), <https://www.irs.gov/pub/irs-drop/n-22-46.pdf>.

51. Gov't of Republic of Korea, Comment Letter for I.R.S. Notice 2022-46 Request for Comments on Credits for Clean Vehicles, at 1 (Nov. 7, 2022), <https://www.regulations.gov/comment/IRS-2022-0020-0700> [<https://perma.cc/28V3-CUMW>].

52. Delegation of the European Union, Comment Letter for I.R.S. Notice 2022-46 Request for Comments on Credits for Clean Vehicles, at 5 (Nov. 7, 2022), <https://www.regulations.gov/comment/IRS-2022-0020-0774> [<https://perma.cc/26EE-5R42>].

period for “certain companies engaged in investment commitments in the United States” are constructed proposals that have no textual basis in the IRA.

International automakers and trade associations also submitted comments to vigorously protest the IRA and advocate for an exemption. Of particular importance is the comment from Hyundai Motor Group, which appealed to the fact that the company “made a binding and irrevocable commitment” to the Georgia factory, and frankly admitted that none of the company’s EVs can comply with the final assembly requirement until 2025, when the plant will be completed.<sup>53</sup> The auto conglomerate asked that the Treasury and IRS institute an additional transitional period or entirely waive the final assembly requirement for “transitioning entities,” referring to “EVs manufactured by such entities which have begun constructing EV and/or battery manufacturing facilities in the United States before the date of enactment of the IRA, August 16, 2022.”<sup>54</sup> Following suit, the Korean Automobile Manufacturers Association proposed that the Treasury create special exception provisions allowing automakers currently building EV manufacturing capacity in the United States to be excused from the EV provision until 2026; it also recommended that the agency add “in the case of any motor vehicle sold after December 31, 2025” as a qualifying language to the final assembly requirement.<sup>55</sup> Rivian and Subaru also criticized the final assembly provision while the German Association of the Automotive Industry (VDA), a trade association representing BMW, Daimler, and Volkswagen, lamented the lack of a transition period and advocated for a waiver.<sup>56</sup> In its final clean vehicles credit guidance issued in December, the Treasury would ultimately neglect the foreign automakers’ comments because the statute

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53. Hyundai Motor Grp., Comment Letter for I.R.S. Notice 2022-46 Request for Comments on Credits for Clean Vehicles, at 2–3 (Nov. 7, 2022), <https://www.regulations.gov/comment/IRS-2022-0020-0752> [<https://perma.cc/L7G3-L8PQ>].

54. *Id.* at 3.

55. Korean Auto. Mfrs. Ass’n, Comment Letter for I.R.S. Notice 2022-46 Request for Comments on Credits for Clean Vehicles, at 2 (Nov. 7, 2022), <https://www.regulations.gov/comment/IRS-2022-0020-0657> [<https://perma.cc/3BN2-CHVY>].

56. German Ass’n of the Auto. Indus., Comment Letter for I.R.S. Notice 2022-46 Request for Comments on Credits for Clean Vehicles, at 4 (Nov. 7, 2022), <https://www.regulations.gov/comment/IRS-2022-0020-0739> [<https://perma.cc/LB6G-SMYC>]; Rivian Auto., Comment for I.R.S. Notice 2022-46, at 8 (Oct. 25, 2022), <https://www.regulations.gov/comment/IRS-2022-0020-0570> [<https://perma.cc/R9G9-KFSR>]; N. Am. Subaru, Comment Letter for I.R.S. Notice 2022-46 Request for Comments on Credits for Clean Vehicles, at 2 (Nov. 7, 2022), <https://www.regulations.gov/comment/IRS-2022-0020-0662> [<https://perma.cc/7FKV-HGAM>].

plainly requires that qualifying vehicles must be “manufactured or assembled in North America” without providing room for textual ambiguity or language about a transition period or waivers that the stakeholders could expend as leverage.<sup>57</sup>

## II.

### FOREIGN OPPOSITION AND PERMISSIBILITY UNDER WTO RULES

It is no surprise that China already threatened to file a WTO complaint and accused the IRA of violating most-favoured-nation (MFN) treatment and national treatment rules.<sup>58</sup> But what is striking about the IRA debate is the vocal opposition from the United States’ closest trading allies, including South Korea, the European Union, China, and Japan, that contested the final assembly requirement and announced plans to litigate the Act through the WTO.<sup>59</sup> Negotiated with the goal of achieving “substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international commerce,” the General on Tariffs and Trade 1994 (GATT) governs the WTO and binds the organization’s 164 members with obligations to ensure that their domestic measures comply with the multilateral trade rules.<sup>60</sup> As things stand, the IRA is unlikely to withstand a WTO challenge grounded on the GATT and is almost certain to be found to violate the national treatment and most favored nations rules that underpin the multilateral international trade regime. Under the GATT, “states are internationally responsible for the conduct of enterprises

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57. Inflation Reduction Act § 13401, *supra* note 33, at 1956.

58. *China’s Commerce Ministry Says US Anti-Inflation Bill’s EV Provisions May Violate WTO Rules*, GLOBAL TIMES (Sept. 22, 2022, 8:47 PM), <https://www.globaltimes.cn/page/202209/1275909.shtml> [<https://perma.cc/CR52-6B7V>].

59. See John Valero & Jillian Deutsch, *EU Is Assessing If US Inflation Act in Breach of WTO Rules*, BLOOMBERG (Sept. 10, 2022, 8:26 AM), <https://www.bloomberg.com/news/articles/2022-09-10/eu-is-assessing-if-us-inflation-act-in-breach-of-wto-rules#xj4y7vzkg> [<https://perma.cc/C8JM-QYHA>] (“We have concerns about a number of discriminatory elements in this Inflation Reduction Act which puts requirement for local content, for local production . . . So we are assessing if it’s in line with WTO requirements and with government procurement agreement.”); Doug Palmer, *Japan “Deeply Concerned” About U.S. Electric Vehicle Tax Credit*, POLITICO PRO (Sept. 1, 2022, 1:39 PM), <https://subscriber.politicopro.com/article/2022/09/japan-deeply-concerned-about-u-s-electric-vehicle-tax-credit-00054526> [<https://perma.cc/Y6AL-B8MD>] (“we are deeply concerned about the measure as Japan and the U.S. are now advancing discussions on more resilient supply chains. We also have a doubt about its WTO conformity. We have been conveying our concerns to the U.S. government through all possible channels and will continue to do so along with other partners including EU.”).

60. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

they own and/or control, and such conduct is thus subject to basic anti-protectionist norms, above all that of non-discrimination between domestic and imported products (National Treatment) as well as between the products of different GATT Contracting Parties (MFN).<sup>61</sup> Under the GATT Article III(4), national treatment is violated if it is established “(i) that the imported and domestic products are ‘like products’; (ii) that the measure at issue is a ‘law, regulation, or requirement affecting the internal sale, offering for sale, purchase, transportation, distribution, or use’ of the products at issue; and (iii) that the treatment accorded to imported products is ‘less favourable’ than that accorded to like domestic products.”<sup>62</sup> Although Article III(4) is recognized as a fundamental obligation, Article XX on general exceptions does provide limited grounds on which states can be excused from the GATT trade obligations.

The IRA’s EV tax credit provisions plainly violate the national treatment rule. First, both EVs assembled abroad and finally assembled in North America are “like products” since there is no remarkable disparity in the products’ properties, nature, and quality, end-use, and consumers’ tastes and habits.<sup>63</sup> Although the AB has maintained that the “like products” can be determined through a case-by-case analysis, it will be difficult for the United States to argue that the physical properties or consumers’ draw to foreign-assembled vehicles that had competed well in the U.S. market and fully qualified for government-sponsored tax credit until August 2022 have undergone a dramatic decline to warrant differential treatment. The final prong of “treatment no less favorable” is the most salient factor for Article III(4) analysis and prohibits domestic measures from affecting the competitive equality of opportunities between the domestic and imported like products.<sup>64</sup> Simply put, the IRA creates material differences in competitive conditions by imposing discriminatory obligations that create a \$7,500 price disparity between the like and domestic products. Developing a full-scale EV manufacturing capability in the United States is not a

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61. Rob Howse, *Disciplining State Capitalism under International Economic Law: Non-Discrimination vs. Competitive Neutrality*, in *STATE CAPITALISM AND INTERNATIONAL INVESTMENT LAW* 67, 68 (Panagiotis Delimatsis et al. eds., 2023).

62. Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5.99, WTO Doc. WT/DS401/AB/R (adopted June 18, 2014).

63. Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶¶ 85, 101, WTO Doc. WT/DS135/AB/R (adopted Apr. 5, 2001) (detailing the approach for analyzing “likeness” developed and followed by the Appellate Body).

64. Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 135, WTO Doc. WT/DS161/AB/R (adopted Jan. 10, 2001).

feat that can be achieved overnight; 2023 or 2025—or in BMW’s case, 2030—is the earliest date by which international automakers can start production in North America and comply with the final assembly requirement.<sup>65</sup> Until then, imported automakers’ competitiveness will materially diminish since they can only persuade consumers to purchase their EVs by foregoing subsidy that their domestic competitors can receive with relative ease.

Although the United States can make a general exceptions claim for Article XX in the case that the IRA is found to be impermissible, the case law is not in its favor given that “[t]o date, WTO Members have been successful only twice in justifying otherwise GATT-inconsistent measures under Article XX of the GATT 1994.”<sup>66</sup> More importantly, the WTO has never held that any localization, domestic content, or “friend-shoring” provision falls within a permissible exception in its history. For example, *India–Solar Cells* rejected India’s argument that domestic content requirements for solar power developers falls under Article XX(j) which provides an exception for domestic measures “essential to the acquisition or distribution of products in general or local short supply.”<sup>67</sup> The AB held that Article XX(j) applies only when “the quantity of ‘available’ supply from both domestic and international sources in the relevant geographical market is insufficient to meet demand” and the condition of short supply is “expected not to last indefinitely.”<sup>68</sup> Similarly, Turkey’s localization requirement for pharmaceutical products failed to meet an exception for a regulation “necessary to protect human, animal, or plant life or health” under Article XX(b).<sup>69</sup> The *Turkey—Pharmaceutical Products* WTO Arbitral Tribunal additionally found that the exception only applies if the domestic measure is explicitly “taken to” primarily fulfill a public health objective and cannot be “designed to” achieve other ulterior industrial goals.<sup>70</sup>

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65. Michelle Ma, *Companies Are Finally Investing in Making EVs in the US. Here’s a Running List*, PROTOCOL (Nov. 4, 2022, 12:52 PM), <https://www.protocol.com/climate/ira-ev-tax-credits-us> [<https://perma.cc/22WG-8HD9>].

66. PETER VAN DEN BOSSCHE & WERNER ZDOUC, *THE LAW AND POLICY OF THE WORLD TRADE ORGANIZATION* 603 (5th ed. 2022).

67. GATT, *supra* note 60.

68. Appellate Body Report, *India—Certain Measures Relating to Solar Cells and Solar Modules*, ¶¶ 5.70–5.71, 6.4, WTO Doc. WT/DS456/AB/R (adopted Oct. 14, 2016).

69. Arbitrators’ Report, *Turkey—Certain Measures Concerning the Production, Importation and Marketing of Pharmaceutical Products*, ¶¶ 6.87, 6.93–6.103, WTO Doc. WT/DS583/ARB25 (July 25, 2022).

70. *Id.*



Under such adversarial precedents, it is doubtful that the IRA can meet any Article XX exception. First, the IRA would contravene Article XX(j) since it is not a domestic measure addressing domestic or international shortage of EVs. Furthermore, the IRA's progressive final assembly as well as domestic content requirements are not time-barred and impose indefinite obligations. An Article XX(b) claim is also likely to fail. Just as the Arbitral Tribunal in *Turkey—Pharmaceutical Products* found that Turkey's public health objectives were pretextual based on records showing other purposes and implementation of the localization law, the WTO will likely find that the IRA is not "taken to" protect human, animal, or plant life or health based on ample evidence showing that the IRA fulfills other purposes such as onshoring, containing China, and rebuilding U.S. manufacturing industry.<sup>71</sup> More importantly, the AB has never accepted environmental concerns as a valid Article XX justification, and rejected domestic content requirements for the sustainable energy sector in *India—Solar Cells*.<sup>72</sup> The Biden administration may attempt to bypass Article XX by drawing from the Agreement on Subsidies and Countervailing Measures (SCM),<sup>73</sup> another WTO treaty that governs the use of permissible subsidies instead, and argue that the AB previously recognized that governments can introduce subsidies to fulfill crucial environmental interests, such as "reducing reliance on fossil fuel energy sources and promoting the generation of electricity from renewable energy resources" consistent with the IRA.<sup>74</sup> However, this exception only applies to "situations where governments intervene to create markets that would otherwise not exist" and therefore would do little to aid the case of the United States that boasts a thriving EV market.<sup>75</sup>

### III.

#### U.S. AUTOMAKERS' REACTION

Distinguishing domestic from foreign automakers can be an elusive task. Each manufacturer operates a highly complex supply chain that sources components and assembles products across the globe. Of

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71. *Id.* at ¶¶ 6.98, 7.6–7.9.

72. *India—Solar Cells*, *supra* note 68, at ¶¶ 6.4–6.5.

73. Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 [hereinafter SCM].

74. Appellate Body Report, *Canada—Certain Measures Affecting the Renewable Energy Generation Sector*, ¶ 5.186, WTO Doc. WT/DS412/AB/R (adopted May 24, 2013).

75. *Id.* at ¶ 5.185.

note, Ford, Stellantis, and General Motors (GM) comprise the American Automotive Policy Council, a trade association, and their vehicles produced in the United States represented seventy-five percent of their total sales (as of 2018).<sup>76</sup> As it can be expected, the three brands are some of the largest beneficiaries of the IRA. On the IRS' most-up-to-date list of qualifying vehicles for 2023, GM, Stellantis, Ford, Rivian, Audi, BMW, Nissan, Tesla, Volkswagen, and Volvo each have at least one vehicle that meets the North America final assembly requirement.<sup>77</sup> This list excludes major imported automaker brands, including Hyundai, Jaguar, Kia, Mazda, Mercedes-Benz, Mitsubishi, Subaru, and Toyota, which have entered into a written agreement with the IRS to become a "qualified manufacturer," but do not yet have any model that complies with the statutory change.<sup>78</sup> Both international and domestic brands, which produce multiple qualifying EVs, announced large-scale investment in U.S. production after the IRA had been signed into law. Since August 2022, Ford, GM, Hyundai, Toyota, Honda, BMW, Nissan, Volkswagen, Kia, and Mazda have all announced large-scale investment plans to expand or develop EV manufacturing capacity in the United States.<sup>79</sup>

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76. *Domestic Consumption & Production*, AM. AUTOMAKERS, <https://www.americanautomakers.org/domestic-consumption-production> (last visited Apr. 15, 2023) [<https://perma.cc/X5CH-Y4XT>].

77. *Manufacturers and Models for New Qualified Clean Vehicles Purchased in 2023 or After*, INTERNAL REVENUE SERV., <https://www.irs.gov/credits-deductions/manufacturers-and-models-for-new-qualified-clean-vehicles-purchased-in-2023-or-after> (last visited Apr. 15, 2023) [<https://perma.cc/NT85-AP8J>].

78. *Id.*

79. *FACT SHEET: President Biden's Economic Plan Drives America's Electric Vehicle Manufacturing Boom*, WHITE HOUSE (Sept. 14, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/14/fact-sheet-president-bidens-economic-plan-drives-americas-electric-vehicle-manufacturing-boom/> [<https://perma.cc/FD8T-R2BY>]; David Shepardson, *BMW Invests \$1.7 Bln to Build Electric Vehicles in U.S.*, REUTERS (Oct. 19, 2022, 7:39 PM), <https://www.reuters.com/business/autos-transportation/bmw-investing-17-bln-build-electric-vehicles-us-2022-10-19/> [<https://perma.cc/48Q3-4UFT>]; Jim Henry, *VW Starts Building Electric Vehicles in U.S. Plant: Just-in-Time Production*, FORBES (Oct. 21, 2022, 1:04 PM), <https://www.forbes.com/sites/jimhenry/2022/10/21/vw-starts-building-electric-vehicles-in-us-plant-just-in-time-production/?sh=4014f76437ee> [<https://perma.cc/SK74-YVZY>]; Joseph White, *Nissan Plans EVs for Mississippi, Scouts for a U.S. Battery Plant*, REUTERS (Feb. 17, 2022, 1:08 PM), <https://www.reuters.com/business/autos-transportation/nissan-will-build-two-electric-vehicles-its-mississippi-plant-2022-02-17/> [<https://perma.cc/CZ63-MJUN>]; Hans Greimel, *Mazda Will Invest \$11B into Electrification in Catch-Up Plan*, AUTO. NEWS (Nov. 22, 2022), <https://www.autonews.com/automakers-suppliers/mazda-will-invest-11b-electrification-catch-plan> [<https://perma.cc/Z3U6-YB76>]; Umar Shakir, *Kia Plans to Build EVs in the US to Comply with New Federal Tax Credit*, VERGE (Sept. 21, 2022, 10:58 AM), [www.theverge.com/2022/9/21/23364927/kia-ev-manufacture-us-tax-credit-hyundai](https://www.theverge.com/2022/9/21/23364927/kia-ev-manufacture-us-tax-credit-hyundai) [<https://perma.cc/QG3T-Q28H>].

The IRA's clean energy provisions overwhelmingly favor U.S. automakers, which have superior production and sourcing capabilities in North America. Still, even American automakers have expressed serious reservations about developing production capacity capable of meeting the statutory requirements without delay. In a statement, GM noted that "we are encouraged by the framework set forth in the legislative text," but maintained that "some of the provisions are challenging and cannot be achieved overnight."<sup>80</sup> Stellantis warned that "the practical elimination of near-term incentives for American customers joining the shift to electrified vehicles may threaten the pace of change required to achieve a meaningful transition to sustainable mobility."<sup>81</sup> Rivian, an EV startup, lamented that the Act will remove "the rug out from consumers considering purchase of an American-made electric vehicle."<sup>82</sup> The Alliance for Automotive Innovation (AAI), a trade association representing both domestic and international automakers, characterized the IRA as a "missed opportunity at a crucial time" and predicted that the Act will "jeopardize our collective target of 40-50 percent electric vehicle sales by 2030."<sup>83</sup> However, it deserves emphasis that, unlike their foreign counterparts, the U.S. automakers appear to be more concerned about the critical minerals and battery component requirements than the final assembly requirement. In their comments to the Treasury, Tesla and Ford provided detailed suggestions for interpreting the domestic sourcing rules, but simply stated that there is no need for any further guidance on the final assembly requirement.<sup>84</sup> John Bozzella, the President of the AAI, further underscored that seventy percent of EVs sold in the United States would be ineligible for the tax credit as a direct result of the IRA's battery component and critical mineral requirements.<sup>85</sup>

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80. Press Release, General Motors, GM Statement on the EV-Related Provisions of the Inflation Reduction Act (Aug. 2022), <https://news.gm.com/newsroom.detail.html/Pages/news/us/en/2022/aug/0801-evstatement.html> [<https://perma.cc/P3CE-ALZW>].

81. Wayland, *supra* note 4.

82. *Id.*

83. Press Release, All. for Auto. Innovation, Auto Innovators Statement on Inflation Reduction Act (Aug. 7, 2022), <https://www.autosinnovate.org/posts/press-release/auto-innovators-statement-on-inflation-reduction-act> [<https://perma.cc/JC7B-JK5H>].

84. Tesla, Inc., Comment Letter for I.R.S. Notice 2022-46 Request for Comments on Credits for Clean Vehicles, at 6 (Nov. 7, 2022), <https://www.regulations.gov/comment/IRS-2022-0020-0759> [<https://perma.cc/3HXN-FAWR>]; Ford Motor Co., Comment Letter for I.R.S. Notice 2022-46 Request for Comments on Credits for Clean Vehicles (Nov. 7, 2022), <https://www.regulations.gov/comment/IRS-2022-0020-0677> [<https://perma.cc/QKS5-5BX5>].

85. John Bozzella, *What If No EVs Qualify for the EV Tax Credit? It Could Happen*, ALL. FOR AUTO. INNOVATION (Aug. 5, 2022), <https://www.autosinnovate.org/>

## IV.

## SOUTH KOREA'S REACTION: A CASE STUDY

## A. Overview

South Korea is one of the most vocal opponents of the IRA and utilized both threats of litigation and diplomatic pressure in hopes of persuading the Biden administration to provide an exemption for Korean manufacturers. The IRA caused an immediate, public uproar and led a senior official within the administration to characterize the U.S. policy as a “betrayal.”<sup>86</sup>

Korea ranks fourth in global car production and the auto industry constitutes thirteen percent of the country's gross domestic product (GDP).<sup>87</sup> Hyundai and Kia are the eleventh and sixteenth leading global automakers and boast a gross revenue of \$102.8 billion and \$61 billion, respectively.<sup>88</sup> For the first three quarters of 2022, the two companies made up four percent and five percent of the U.S. EV market respectively; since Hyundai and Kia are both under the ownership of Hyundai Motor Group, their combined EV sales would rank second in market share, only trailing behind Tesla with sixty-five percent, and ahead of Ford with seven percent.<sup>89</sup> In the global EV market, excluding China, the two automakers fared even better and ranked second in EV sales with fourteen percent of the market share, trailing behind Tesla with twenty-seven percent as of August 2022; furthermore, LG Energy Solutions, SK Innovation, and Samsung SDI, all of which were affected by the IRA's battery component and critical minerals provisions, are all ranked within the top six global EV battery manufacturers, and each make up twenty, six, and five percent of global production.<sup>90</sup>

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posts/blog/what-if-no-evs-qualify-for-the-ev-tax-credit [https://perma.cc/6X4H-UN9T].

86. Jeong-Ho Lee & Heejin Kim, *South Korea Sees 'Betrayal' in Biden's Electric Vehicle Push*, BLOOMBERG (Sept. 1, 2022, 10:00 PM), <https://www.bloomberg.com/news/articles/2022-09-02/south-korea-sees-betrayal-in-biden-s-electric-vehicle-push> [https://perma.cc/97QG-6KE3].

87. Statista Rsch. Dep't, *Estimated Passenger Car Production in Selected Countries in 2021*, STATISTICA (Feb. 3, 2023), <https://www.statista.com/statistics/226032/light-vehicle-producing-countries> [https://perma.cc/CA7J-2S3Q].

88. Paolo Confino, *Here Are the 20 Biggest Automakers in the World*, FORTUNE (Aug. 12, 2022, 10:00 AM), <https://fortune.com/2022/08/12/20-biggest-car-companies-world-fortune-global-500> [https://perma.cc/8EQD-6YTV].

89. Herh, *supra* note 10.

90. June Yune, *Hyundai Is Catching Up with Tesla in the Global EV Race: The Weak Korean Currency is Helping the Carmaker Absorb Rising Battery and Component Costs*, FIN. TIMES (Aug. 23, 2022), <https://www.ft.com/content/78e1e150-02ba-404d-b2a1-3780279ec4b1> [https://perma.cc/HSY3-NVSJ]. *S. Korean EV Battery*

Given its vitality to the national economy, and the recent EV boom that inspired Elon Musk to tweet that “Hyundai is doing pretty well,”<sup>91</sup> it comes as no surprise that the Korean government, trade associations, and Hyundai engaged in a collective interagency lobbying campaign in Washington, D.C. to press Congress and the Biden administration for a dilatory measure. Bolstered by threats of litigation through the WTO or United States-Korea Free Trade Agreement (KORUS FTA),<sup>92</sup> the Korean government’s lobbying efforts succeeded in mobilizing U.S. political allies, such as Senator Raphael Warnock, Representative Buddy Carter, and Governors Doug Ducey and Larry Hogan, and played a pivotal role in persuading the Biden Administration to issue a favorable guidance for the commercial clean vehicles tax credit. However, the IRA also evolved into a source of domestic political contention for President Yoon Suk-yeol and raised questions about the administration’s foreign policy competence.

#### *B. The First Month: Initial Agency Response*

Whether the Yoon administration has adequately monitored and reacted to the IRA before its passage in Congress is a contested political issue. Once the IRA was signed into law, however, the chief cabinet members immediately protested the final assembly requirement by engaging with comparable U.S. officials while also announced that the Administration was reviewing filing for a WTO complaint. Three days after the IRA passed Congress, the Minister of Foreign Affairs Park Jin spoke with the U.S. Secretary of State Antony Blinken, and highlighted that the suspension of EV tax credits may violate WTO’s MFN rule as well as the KORUS FTA.<sup>93</sup> The Ministry of Foreign Affairs also promptly sent a proposal asking the Biden administration to temporarily delay the application of the IRA for Korean automakers until 2025, by which time Hyundai’s EV factory in Georgia would be fully

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*Makers’ Market Share Dips in 2022*, YONHAP NEWS AGENCY (Jan. 4, 2023, 10:44 AM), <https://en.yna.co.kr/view/AEN20230104005200320> [<https://perma.cc/VM2M-CBE3>].

91. Elon Musk (@elonmusk), TWITTER (June 17, 2022, 2:53 PM), <https://twitter.com/elonmusk/status/1537870974703607810> [<https://perma.cc/9UC5-CQL7>].

92. United States-Korea Free Trade Agreement, S. Kor.-U.S., Mar. 15, 2012, <https://ustr.gov/trade-agreements/free-trade-agreements/korus-fta/final-text>.

93. Eungjin Park, Parkjin, Mi Blinkeone Jeonhwa. . . “Han jeongicha Bojogeum Jeoe, Munje Itda” 박진, 美 블링컨에 전화... “韓전기차 보조금 제외, 문제 있다” [Park Jin, Calls U.S. Blinken . . . “Issue with Excluding Korean Electric Vehicles from Tax Credit”], NEWS 1 KOREA (S. Kor.) (Aug. 21, 2022, 6:19 PM), <https://www.news1.kr/articles/4778940> [<https://perma.cc/UG25-JQHG>].

operational.<sup>94</sup> In addition, Prime Minister Han Duck-soo stated that the government would prefer to address the issue by coming to a diplomatic consensus, but confirmed that a WTO complaint remains on the table.<sup>95</sup> Prime Minister Han also took a jab at Biden's Made in America agenda, comparing the IRA with President Donald Trump's trade policy and emphasizing that "[i]f we look at two years of President Biden's policies, it is difficult to say that [the United States has] fully transitioned from the past America First policies."<sup>96</sup> The striking statement suggests that the South Korean leadership perceives Biden's trade policies to be as equally hostile and protectionist as those of Trump.

The Korean Ministry of Trade, Industry, and Energy has steered the government's policy response<sup>97</sup> and has served as arguably the most important institutional player in the IRA dispute. Although the agency is led by the Minister of Industry, the Ministry also houses the Minister for Trade, who is empowered to serve as the chief negotiator and representative for trade issues. Minister of Industry Lee Chang-yang took the lead in building a coalition of adversely affected countries and underscored that the government may collaborate with Germany and the European Union on a potential WTO complaint.<sup>98</sup> The legal grounds for a dispute may be different for Korea than for other nations, however. Other countries opposing the final assembly requirement have characterized the IRA as a discriminatory treatment in violation of the WTO rules, whereas Korea has also persistently cited the KORUS FTA transgressions. In a National Assembly hearing held on August 29, 2022, Minister Lee warned that the IRA issue is unlikely to be resolved in the U.S. Congress until the midterm election and clarified that "[t]he Korea-U.S. FTA regulations require us to

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94. Hyojung Kim, Oegyo2chagwan "IRaE Modeun Ganeunghan Daeung . . . 2025nyeonkkaji Jamjeongjochi Jean" 외교2차관 "IRA에 모든 가능한 대응...2025년까지 잠정조치 제한"[*Second Vice Minister for Foreign Affairs "Every Possible Response to the IRA . . . Suggested Transitional Period Until 2025"*], YONHAP NEWS (S. Kor.) (Aug. 30, 2022, 2:07 PM), <https://www.yna.co.kr/view/AKR20220830100500504?input=1195m> [<https://perma.cc/975M-D7G8>].

95. Hyewon Han, Hanchongri "Inpeullegamchukbeop, Piryohamyeon WTO Pandan Badeul Sudo Itda" 한총리 "인플레이감축법, 필요하면 WTO 판단 받을 수도 있다"[*Prime Minister Han "IRA, May Receive WTO Judgement if Necessary"*], YONHAP NEWS (S. Kor.) (Aug. 25, 2022, 3:00 PM), <https://www.yna.co.kr/view/AKR20220825103800001?input=1195m> [<https://perma.cc/B8Z9-KW9V>].

96. *Id.*

97. Joyce Lee & Heekyong Yang, *S.Korea Seeks Cooperation with EU over U.S. Inflation Reduction Act*, REUTERS (Aug. 24, 2022, 11:07 PM), <https://www.reuters.com/business/skorea-seeks-cooperation-with-eu-over-us-inflation-reduction-act-2022-08-25> [<https://perma.cc/XYZ9-G6UE>].

98. *Id.*

choose between the Korea-U.S. FTA or WTO procedures. We have to compare the two, but if we choose to go through the WTO procedures, we may cooperate with Japan and EU countries.”<sup>99</sup> While closely monitoring the U.S. political climate, the Ministry of Industry also immediately dispatched the government’s first IRA-response delegation to meet with Deputy U.S. Trade Representative (USTR) Sarah Bianchi as well as senior officials from the Department of Commerce, State, and Treasury.<sup>100</sup> The delegation reported that the USTR promised to strengthen the bilateral trade partnership and “remain in close contact about [the final assembly requirement] for the next couple of weeks.”<sup>101</sup>

Every agency action presented here occurred within two weeks following the IRA’s enactment. This illustrates not only the gravity of the issue for South Korea, but also the strength of its coordinated interagency response. The government’s response can be described as bifurcated. Senior cabinet officials have not shied away from announcing that the government may initiate a WTO complaint and accusing the IRA of contravening the KORUS FTA and WTO obligations. Simultaneously, agencies also proactively sought a diplomatic breakthrough and communicated their grievances to U.S. Secretary of State Blinken and Deputy USTR Bianchi.<sup>102</sup> As Prime Minister Han and Minister Lee’s statements suggest, the government has conceded that passing an amendment through Congress is likely unattainable due to the 2022 midterm election results and declared that the government would instead prioritize persuading the Biden administration to issue guidance and rulemaking that reflect Korean manufacturers’ interests.<sup>103</sup> Here, each Korean government response reflects a nuanced understanding of the U.S. political climate as well as consideration for forming a partnership with other countries opposed to the

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99. Byung-yeul Baek, *Korea to Challenge US over Validity of Inflation Reduction Act*, KOREA TIMES (Aug. 30, 2022, 8:36 AM), [https://www.koreatimes.co.kr/www/tech/2022/08/419\\_335211.html](https://www.koreatimes.co.kr/www/tech/2022/08/419_335211.html) [<https://perma.cc/P958-MH9V>]; Sangdon Park, 이창양 산업장관 “美인플레이션 감축법, 한미 FTA 위반 소지 높아” [*Industry Minister Lee Chang-Yang: “U.S. IRA, Likely to Violate KORUS FTA”*], YONHAP NEWS (S. Kor.) (Aug. 29, 2022, 12:09 PM), <https://www.yna.co.kr/view/AKR20220829077151003?input=1195m> [<https://perma.cc/LNM2-5DJH>].

100. Nanyoung Kim, Inpeulle Gamchukbeop Daeung’ Migeuppa Daepyodan, USTR Budaepyo Myeondam ‘인플레이션 감축법 대응’ 美급과 대표단, USTR 부대표단 답[*Emergency ‘IRA Response’ Delegation Meets with USTR Deputy Representative*], NEWSIS (S. Kor.) (Aug. 31, 2022, 8:40:41), [https://newsis.com/view/?id=NISX20220831\\_0001996451&cID=10101&pID=10100](https://newsis.com/view/?id=NISX20220831_0001996451&cID=10101&pID=10100) [<https://perma.cc/5LSR-G78K>].

101. *Id.*

102. *Id.*; Park, *supra* note 93; Baek, *supra* note 99.

103. Han, *supra* note 95; Baek, *supra* note 99.

statute. However, the government has not challenged Biden's Build in America agenda or demanded an outright repeal of the EV tax credit provision. The underlying assumption seems to have been that the best course of action is to advocate for an exemption, which would still compel Hyundai to make a multi-billion-dollar investment in the United States, rather than challenge the measure and entirely reject Biden's agenda.

In September 2022, senior cabinet members continued to visit Washington, D.C. and voice their concerns to their U.S. counterparts. On September 7, Korean Minister for Trade Ahn Dukgeon travelled to Washington, D.C. and met with the USTR Katherine Tai, White House Director of National Economic Council Brian Deese, and members of both chambers of Congress. After the talks, Minister Ahn explained that finding an immediate solution would be difficult even after the midterm election since the IRA is now the law, and announced that Korea plans to instead prioritize ensuring that its interests are reflected in the upcoming Treasury rules and guidance.<sup>104</sup> The USTR conveyed a somewhat more optimistic outlook and simply reported that the conversation reaffirmed the importance of partnership between the two countries and "Ambassador Tai listened closely to the [Republic of Korea]'s concerns about the electric vehicle (EV) provisions of the Inflation Reduction Act of 2022 and the two committed to open an engagement channel on these issues."<sup>105</sup> The following week, First Vice Minister of Foreign Affairs Cho Hyun Dong and Second Vice Minister of Foreign Affairs Lee Dohoon met with U.S. National Security Advisor Jake Sullivan; Deputy Secretary of State Wendy Sherman; Under Secretary of State for Economic Growth, Energy, and the Environment Jose Fernandez; Ranking Member of the House Foreign Affairs Subcommittee on Asia, the Pacific, and Central Asia Steve Chabot, and Representative Jimmy Gomez.<sup>106</sup> Vice Minis-

104. Ara Cho, Andeokgeun Tongsanggyoseopbonbujang "Jeongicha Bojogeum Chabyeol Gwallyeon, Ibeonju IRA Silmu Hyeopsang" 안덕근 통상교섭본부장 "전기차 보조금 차별 관련, 이번주 IRA 실무 협상" [*Trade Minister Ahn "Pertaining to EV Tax Credit Discrimination, Will Start Negotiations on IRA This Week,"*] AJU BUS. DAILY (S. Kor.) (Sept. 13, 2022, 4:22 PM), <https://www.ajunews.com/view/20220913161641481> [<https://perma.cc/4VGU-BAB2>].

105. Press Release, U.S. Trade Representative, Readout of Ambassador Katherine Tai's Meeting with Korea's Minister for Trade Ahn Dukgeun (Sept. 7, 2022), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/september/readout-ambassador-katherine-tais-meeting-koreas-minister-trade-ahn-dukgeun> [<https://perma.cc/A2T8-9KJB>].

106. Yurim Lee, Ogyobu 1•2Chagwan Yeonswae Bangmi . . .IRA Daemi Seoldeuk Chongryeok 외교부 1·2차관 연쇄 방미...IRA 대미 설득 총력 [*Foreign Affairs First, Second Vice Ministers Consecutively Visit U.S. . . . Goes All Out on Persuasion*



ter Cho reported that National Security Advisor Sullivan was receptive to the government's proposals and asked to "continue the dialogue between the United States and South Korea to minimize harms to [Korean] companies."<sup>107</sup>

### C. President Yoon's Initiatives and Political Controversy

Once it became clear that there was no sign of a speedy resolution from the United States, President Yoon included the issue in his talking points and added force to the government's lobbying efforts. After the IRA became law, governors and senior representatives from U.S. states, Indiana, Georgia, Arizona, and Maryland, and Canadian provinces, Alberta and Ontario, visited Seoul and met with EV automakers and battery producers, including Hyundai, Samsung SDI, and LG Energy Solution, in hopes of persuading Korean manufacturers to invest and build factories in their states.<sup>108</sup> Such visits provided an ideal opportunity for the government to communicate the adverse impact of the EV tax credit changes, and President Yoon encouraged U.S. governors to directly protest the final assembly requirement to the federal government. For example, Yoon met with Arizona Governor Doug Ducey and urged him to "try to make sure that our companies can enjoy the same benefits as U.S. companies without discrimination within the state government."<sup>109</sup> In response, Governor

for IRA], EDAILY (S. Kor.) (Sept. 14, 2022, 4:13:16 PM), <https://www.edaily.co.kr/news/read?newsId=02994646632460120&mediaCodeNo=257&OutLnkChk=Y> [https://perma.cc/T6HF-ABVX]; Kyungeun Park, Oegyo1chagwan, Migugmu Bujanggwan·gukgaanbobojwagwan Manna IRA Uryeo Jeondal 외교1차관, 美국무부장관·국가안보보좌관 만나 IRA 우려 전달 [First Foreign Affairs Vice Minister, Meets with U.S. Deputy Secretary of State and National Security Advisor and Conveys Concerns About IRA], SEOUL ECON. DAILY (S. Kor.) (Sept. 16, 2022, 7:22:25 AM), <https://www.sedaily.com/NewsView/26B3HT7EWD> [https://perma.cc/XWF6-8UMV].

107. Yujin Kim, Oegyo1chagwan "IRA Hanguk Jeongicha Chabyeol Uryeo Jeondal" 외교1차관 "IRA 한국 전기차 차별 우려 전달" [First Foreign Affairs Vice Minister, "Conveys Concerns about IRA's Korean EV Discrimination"], KYUNGHYANG SHINMUN (S. Kor.) (Sept. 16, 2022, 1:51 PM), <https://www.khan.co.kr/politics/defense-diplomacy/article/202209161220001> [https://perma.cc/YLR6-J5NC].

108. Sunbong Park, Bungmi Jujisadeuri Yeonio Hanguk Chajeun IyuttK-Baeteorit Yuchi Gyeongjaeng? 북미 주지사들이 연이어 한국 찾은 이유... 'K-배터리' 유치 경쟁? [Reason North American Governors Visit Korea One After Another . . . Competition for Hosting 'K-Battery?'], KYUNGHYANG SHINMUN (S. Kor.) (Sept. 4, 2022), <https://www.khan.co.kr/economy/auto/article/20220904155200> [https://perma.cc/4PEY-X9QD].

109. Munkwan Kim, Yoon, Mi Aerijona Jujisa Jeopgyeon. . . "Uri Giop IRAe Uryeo, Chabyeol Eopge Noryeokhaedalla" "尹, 美 애리조나 주지사 접견... "우리 기업 IRA에 우려, 차별 없게 노력해달라" [Yoon, Meets with U.S. Arizona Governor . . . "Our Companies Concerned about IRA, Endeavor to Ensure No Discrimination"], CHOSUN BIZ (S. Kor.) (Sept. 2, 2022, 8:44 PM), <https://biz.chosun.com/policy/>

Ducey expressed hopes for an increased Korean investment in Arizona and promised to “ensure that Korean companies operating in America are entitled to equal benefits without discrimination through the Arizona state government as well as members of U.S. Congress.”<sup>110</sup> Known as a keen ally to Seoul and “Korean son-in-law” for his marriage to a Korean American, Maryland Governor Larry Hogan also met with Yoon and assured that the Treasury would come to a compromise on the IRA provision after the midterm election.<sup>111</sup> Upon his return to the United States, Governor Hogan promptly sent a letter to President Biden expressing concerns about the IRA “that have been expressed to me repeatedly by elected and business leaders representing our strongest Asian allies.”<sup>112</sup> In particular, Hogan’s letter explicitly highlighted that U.S. law would disqualify Hyundai from tax credits even after the company announced a multibillion-dollar investment in Georgia and called on the Administration to adopt regulatory modification, waivers, exemptions, and delayed implementation for “companies with commitments to invest in the [United States], or for allies with whom we have standing trade agreements.”<sup>113</sup>

Although Governor Hogan’s letter may serve as the evidence of effective lobbying strategies, what followed was a foreign policy debacle for President Yoon. Having never served as an elected official, Yoon had no prior foreign policy experience and was widely criticized for “Pelosi passing,” a popular pejorative term denoting his purported refusal to meet with Speaker Nancy Pelosi when she visited Seoul last August. Despite a spokesperson’s insistence that the President could not meet with the Speaker because he was on vacation, the move was largely perceived as an effort to assuage China, and controversy grew after it was reported that Yoon watched a play in Seoul on the day of Pelosi’s visit.<sup>114</sup> Yoon’s last-minute decision to speak with Pelosi over

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politics/2022/09/02/XRF5DXO6ZZH37MAQGVLKFXU7Y/?utm\_source=naver&utm\_medium=original&utm\_campaign=biz [https://perma.cc/CD88-TUKF].

110. *Id.*

111. Sang-ho Song, *Maryland Gov. Hogan Expects ‘Compromise’ over Controversial Law on Inflation After Midterm Elections*, YONHAP NEWS AGENCY (Sept. 17, 2022, 1:32 PM), <https://en.yna.co.kr/view/AEN20220917001500325> [https://perma.cc/LE53-EYRQ].

112. Press Release, Off. of Governor Larry Hogan, *Governor Hogan Sends Letter to President Biden Asking for Action to Address Inflation Reduction Act Provisions That Hurt Consumers and Threaten Access to Electric Vehicles* (Sept. 20, 2022), <https://hoganarchive.maryland.gov/2022/09/20/governor-hogan-sends-letter-to-president-biden-asking-for-action-to-address-inflation-reduction-act-provisions-that-hurt-consumers-and-threaten-access-to-electric-vehicles/> [https://perma.cc/82MX-FEPP].

113. *Id.*

114. Min Joo Kim, *South Korea’s President Skips Nancy Pelosi Meeting Due to Staycation*, WASH. POST (Aug. 4, 2022, 8:21 AM), <https://www.washingtonpost.com/>

the phone as a result of mounting political pressure did little to salvage his reputation.<sup>115</sup> After leaving for the United Kingdom and the United States to attend the funeral of Queen Elizabeth II and the United Nations General Assembly, Yoon subsequently failed to attend the Queen's lying in state ceremony as a result of heavy traffic in London, which further drew criticism from the opposition party and National Assembly.<sup>116</sup> Diplomatic gaffes continued once the Office of the President announced that South Korea and Japan would hold a summit for the first time in three years, but Japan quickly contradicted the news and corrected that there was no agreement for a meeting between Yoon and Japanese Prime Minister Fumio Kishida.<sup>117</sup> Although Yoon abruptly joined a meeting that Kishida attended without any prior agreement and the two heads of state engaged in conversation for more than thirty minutes, the ad hoc meeting does not appear to have been particularly fruitful. Rather, *Asahi Shinbun*, a major Japanese newspaper, reported that Kishida "was angry because he actually said he would not meet" with Yoon and "the prime minister showed little interest in the sit-down session."<sup>118</sup>

Similar gaffes undermined Yoon's opportunity to meet with Biden and personally advocate for a solution. Once coordinating scheduling for an official summit turned out to be difficult, the two leaders briefly spoke at a reception following the Global Fund Seventh

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world/2022/08/04/nancy-pelosi-south-korea-president-staycation [https://perma.cc/CDV6-MHDX].

115. Mitch Shin, *South Koreans Question President Yoon's Decision to Skip Meeting with Pelosi*, DIPLOMAT (Aug. 4, 2022), <https://thediplomat.com/2022/08/south-koreans-question-president-yoons-decision-to-skip-meeting-with-pelosi> [https://perma.cc/W2AG-FT3H]; Christian Davies & Song Jung-a, *South Korean President Snubs Nancy Pelosi as China Tensions Rise*, FIN. TIMES (Aug. 4, 2022), <https://www.ft.com/content/73d0ce63-0b2a-47d7-9d97-9ecf367ef924> [https://perma.cc/CWV2-EHJP].

116. Heather Chen et al., *Hot Mic Catches South Korean Leader Yoon Suk Yeol Swearing About US Lawmakers*, CNN (Sept. 23, 2022, 3:20 AM), <https://www.cnn.com/2022/09/23/asia/south-korea-yoon-suk-yeol-hot-mic-profanity-rant-intl-hnk/index.html> [https://perma.cc/Z8XZ-AFM9]; Justin McCurry, *South Korea President Criticised over Gaffes at Queen's Funeral and UN*, GUARDIAN (Sept. 23, 2022, 5:18 AM), <https://www.theguardian.com/world/2022/sep/23/south-korea-president-criticised-over-gaffes-at-queens-funeral-and-un-yoon-suk-yeol> [https://perma.cc/2NM4-EZKF].

117. Hyung-jin Kim, *S. Korea, Japan Differ over Summit Plan Amid History Dispute*, ASSOCIATED PRESS (Sept. 15, 2022), <https://apnews.com/article/united-nations-general-assembly-biden-south-korea-fumio-kishida-f6f74523ca34b9b266dca583f0113dd8> [https://perma.cc/GX3S-FMR8].

118. Keishi Nishimura, *Kishida, Yoon Not on Same Page in Awkward First Meeting in U.S.*, ASAHI SHIMBUN (Sept. 23, 2022, 4:28 PM), <https://www.asahi.com/ajw/articles/14725922> [https://perma.cc/J82J-RK2N].

Replenishment Conference held in New York.<sup>119</sup> The United States and South Korea offered competing accounts of this “forty-eight second chat” between Yoon and Biden. The Korean Office of the President reported that Yoon communicated Korea’s concerns about the IRA and Biden agreed to continue deliberations, characterizing the conversation as “the two leaders’ explicit expression of their willingness to cooperate represents progress.”<sup>120</sup> In contrast, the White House report of the conversation is terse at best and does not make any reference to the IRA.<sup>121</sup> Although there is no record of the informal encounter, it is indeed doubtful that a conversation that lasted less than a minute was sufficient for Biden and Yoon to share a meaningful discussion about the IRA, liquidity facilities program, currency stabilization, and deterrence of North Korean proliferation as the South Korean Office of the President would later claim.<sup>122</sup> At the same event, Yoon became the subject of global ridicule when a hot mic caught him uttering, “It would be so humiliating for Biden if these idiots don’t pass it in Congress,” alluding to how Congress may block Biden’s \$6 billion pledge to the Global Fund.<sup>123</sup> The careless remarks resulted in nothing short of political crisis in Seoul, and attenuated already tenuous public support for Yoon. After his diplomatic trip, Yoon’s approval rating plummeted to twenty-four percent—the President’s lowest polling result since his tenure began in May 2022—and the three leading causes

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119. Haye-ah Lee, *Yoon, Biden Meet Briefly in New York*, YONHAP NEWS AGENCY (Sept. 22, 2022, 8:23 AM), <https://en.yna.co.kr/view/AEN20220922002100315> [<https://perma.cc/F3AF-YVU9>].

120. Mi-na Kim, *Yoon, Biden Come Away from 48-Second Chat with Different Conclusions*, HANKYOREH (Sept. 23, 2022, 5:10 PM), [https://english.hani.co.kr/arti/english\\_edition/e\\_international/1059896.html](https://english.hani.co.kr/arti/english_edition/e_international/1059896.html) [<https://perma.cc/J7WM-9QUC>].

121. Press Release, White House, Readout of President Joe Biden’s Meeting with President Yoon Suk Yeol of the Republic of Korea (Sept. 21, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/21/readout-of-president-joe-bidens-meeting-with-president-yoon-suk-yeol-of-the-republic-of-korea> [<https://perma.cc/8VME-4LCX>].

122. Press Release, Office of the President (S. Kor.), Hanmi Jeongsang Gan Hwandam Gyeolgwa *한미 정상 간 화답 결과*[Result of the Korea-U.S. Summit] (Sept. 23, 2022), <https://www.korea.kr/news/presidentView.do?newsId=148906229> [<https://perma.cc/8D3Y-JPGT>].

123. Amy B. Wang & Min Joo Kim, *South Korean President Overheard Insulting U.S. Congress as ‘Idiots.’* WASH. POST (Sept. 22, 2022, 11:06 PM), <https://www.washingtonpost.com/politics/2022/09/22/yoon-biden-congress-idiots> [<https://perma.cc/TV7S-QCFV>]. It should be noted that there is a large room for ambiguity in translating Yoon’s profanity and, for this reason, The Guardian translated the statement to “How could Biden not lose face if these fuckers do not pass it in Congress” while CNN translated it to “it would be so embarrassing for Biden if those fuckers at the National Assembly don’t approve this [bill].” McCurry, *supra* note 116; Chen et al., *supra* note 116.

of disapproval were reported to be diplomacy, inexperience, and careless remarks.<sup>124</sup>

#### D. IRA Motion and the National Assembly's Response

As the majority party in the legislature, the left-leaning (Korean) Democratic Party criticized inadequate diplomatic efforts of the People Power Party (which President Yoon leads) through hearings and parliamentary audits. Independent of the initiatives driven by the executive branch, the National Assembly members, some of which joined Trade Minister Ahn's trip to Washington, D.C., functioned as key players in shaping the political dialogue and personally communicated grievances about the EV provisions to USTR Katherine Tai, Senator Tom Carper, Chair of the House Committee on Ways and Means Richard Neal, Ambassador to South Korea Philip Goldberg, and the congressional delegation to South Korea led by Representative Stephanie Murphy.<sup>125</sup> Furthermore, Speaker Kim Jin-pyo of the Korean Democratic Party held a press conference with CNN, the New York Times, TIME, and NBC reporters and denounced the IRA as an "overly ambitious law aimed at winning the U.S. midterm election and contradicting norms such as national treatment as well as fundamental principles of the KORUS FTA and WTO."<sup>126</sup> In addition, the previous presidential candidate and leader of the Democratic Party Lee Jae-myung sent a letter to President Biden, Vice President Harris, Secre-

124. *Yoon's Approval Rating Sinks to Lowest Level After Hot Mic Incident: Poll*, YONHAP NEWS AGENCY (Sept. 30, 2022), <https://en.yna.co.kr/view/AEN20220930004100315> [<https://perma.cc/L3XW-HM26>]; NAT'L ELECTION SURVEY DELIBERATION COMM'N, Hanguk Gaeleop Deilri Opinieon 한국 갤럽 데일리 오피니언 [Gallup Korea Daily Opinion], at 15 (S. Kor.) (2022), [https://www.nesdc.go.kr/files/result/202210/FILE\\_202209300921264080.pdf.htm](https://www.nesdc.go.kr/files/result/202210/FILE_202209300921264080.pdf.htm) [<https://perma.cc/VC2F-UWJ8>].

125. *Assembly Speaker Discusses Inflation Reduction Act With U.S. Congressional Delegation*, YONHAP NEWS AGENCY (Sept. 5, 2022, 5:20 PM), <https://en.yna.co.kr/view/AEN20220905008300315> [<https://perma.cc/JLH5-FXUM>]; Byung-yeul Baek, *Korea Urges U.S. Congress to Revise Inflation Reduction Act*, KOREA TIMES (Dec. 9, 2022), [https://www.koreatimes.co.kr/www/tech/2022/12/419\\_341435.html](https://www.koreatimes.co.kr/www/tech/2022/12/419_341435.html) [<https://perma.cc/G7YV-Y38H>]; Seungyeon Kim, Ijaemyeong Mannan Goldeubeogeu Daesa "IRA Gwallyeon Hangukgieop Uryeo Inji" 이재명 만난 골드버그 대사 "IRA 관련 한국기업 우려 인지" [Ambassador Goldberg Meets Lee Jae-Myung "Aware Korean Companies' Concerns about the IRA"], KUKMIN ILBO (S. Kor.) (Nov. 1, 2022, 12:04 PM), <https://news.kmib.co.kr/article/view.asp?arcid=0017625891&code=61111111&cp=nv> [<https://perma.cc/RB3R-6MAB>].

126. Press Release, National Assembly of the Republic of Korea, Gimjinpyo Uijang, Nyuyoktaimjeu•CNN Deung Miguk Juyo Eollonsa Gijadan Jeopgyeon 김진표 의장, 뉴욕타임즈•CNN 등 미국 주요 언론사 기자단 접견 [Speaker Kim, Meets with Major U.S. Media, Including The New York Times and CNN] (Sept. 20, 2022), <https://www.assembly.go.kr/portal/bbs/B0000051/view.do?nttId=1906945&menuNo=600101> [<https://perma.cc/BG6H-HZNX>].

tary of State Blinken, Speaker Pelosi, and Chairman of the House Budget Committee John Yarmuth, similarly appealing to the history of bilateral alliance between the United States and South Korea and calling for an amendment or transition period.<sup>127</sup>

Just two weeks after Biden had signed the IRA into law, the National Assembly passed the “Resolution Calling for U.S. Tax Credit Support for Korean Automakers Grounded on the U.S.-Korea Free Trade Agreement.”<sup>128</sup> Passed with a 254-1 vote, the virtually unanimous support for the motion was another piece of evidence of a strong consensus that the IRA was a bipartisan, national crisis that could cripple the competitiveness of the Korean economy. To justify the legislature’s intervention, the National Assembly emphasized that “Given that, for the last ten years, Korea and United States reduced and abolished barriers to trade and investment through the U.S.-Korea Free Trade Agreement (KORUS FTA) and complied with WTO and other international commerce norms, it needs to be recognized that the Act in question is inconsistent with the KORUS FTA and WTO norms, including national treatment.”<sup>129</sup> Furthermore, the IRA is portrayed as a policy “inappropriate from the perspective of reciprocity” because it betrays the spirit of bilateral relations exemplified by the recent commitments made in the Indo-Pacific Economic Framework for Prosperity talks,<sup>130</sup> Biden and Yoon’s summit last May, and Korean automakers’ \$130 billion investment that led to the creation of 100,000 jobs in the United States for the past thirty years.<sup>131</sup> Expressing hopes for a favorable executive rulemaking, the resolution urges the United States to “proactively respond to ensure that Korean-made

127. Jihyeon Ha, Ijaemyeong, Baideune Seohan . . . IRA Han Jeongicha Chabyeol Johang Gaejeong Yocheong 이재명, 바이든에 서한...IRA 韓 전기차 차별 조항 개정 요청 [Lee Jae Myung, Letter to Biden . . . Requests Revisions to IRA’s Discriminatory Provisions for Korean Electric Vehicles], NEWSIS (S. Kor.) (Oct. 15, 2022, 11:14 AM), [https://newsis.com/view/?id=NISX20221015\\_0002049070&cID=10301&ID=10300](https://newsis.com/view/?id=NISX20221015_0002049070&cID=10301&ID=10300) [https://perma.cc/L4GW-BV7F].

128. Hanmi Jayumyeokhyeopjeong(FTA)e Gibanhan Migugui Hanguksan Jeongicha Sejejiwon Chokgu Gyeoruian [An amendment to the resolution (alternative) urging the United States to provide tax support for Korean electric vehicles based on the Korea-US Free Trade Agreement (FTA)], Act No. 2,117,083, Sept. 1, 2022 (S. Kor.) [hereinafter *IRA Motion*]; see also Minji Lee, *Assembly Passes Resolution Voicing Concerns Over U.S. Inflation Act*, YONHAP NEWS AGENCY (S. Kor.) (Sept. 1, 2022), <https://en.yna.co.kr/view/AEN20220901006200315> [https://perma.cc/XWY7-XFBQ].

129. *IRA Motion*, *supra* note 128, at 4.

130. *Indo-Pacific Economic Framework for Prosperity (IPEF)*, U.S. TRADE REPRESENTATIVE, <https://ustr.gov/trade-agreements/agreements-under-negotiation/indo-pacific-economic-framework-prosperity-ipef> [https://perma.cc/GLA6-422J].

131. *IRA Motion*, *supra* note 128, at 4–5.

electric vehicles are legally included in tax credit subject equal to North American electric vehicles, so our electric vehicles and relevant companies do not lose competitiveness in the U.S. market throughout the subsequent process of finalizing and implementing the specific contents of the Inflation Reduction Act.”<sup>132</sup> In sum, the motion utilized far more scathing language than those of the executive branch, corroborated Korea’s request for a mutually beneficial diplomatic breakthrough with practical economic concerns, history of bilateral trade relations, and international law that the IRA purportedly violates. Although the motion is nonbinding, the legislative action is a striking move because it is virtually unprecedented for the National Assembly to pass a resolution that targets a foreign statute and demands a specific form of remedy.

#### E. Post-Tour Controversy and Hearings

President Yoon’s tour quickly vaporized any remaining confidence that the Korean Democratic Party may have had in Yoon’s foreign policy competence. The Democratic Party members immediately characterized Yoon’s hot mic incident as a “slandorous diplomatic accident that seriously tarnished national dignity.”<sup>133</sup> Positive signs from the Biden Administration did little to assuage the legislature’s concern. On September 29, Vice President Harris visited Seoul and affirmed the importance of the strategic alliance between the United States and Korea, particularly in areas of technology partnership, climate change, and deterrence of North Korea’s latest missile provocations.<sup>134</sup> Harris affirmed that she, President Biden, and the Administration are not concerned about the hot mic incident and promised to review South Korea’s reservations about implementing the IRA in accordance with the plain text of the Act.<sup>135</sup> On October 4,

132. *Id.* at 5–6.

133. McCurry, *supra* note 116.

134. Press Release, White House, Readout of Vice President Harris’s Meeting with President Yoon of the Republic of Korea (Sept. 29, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/09/29/readout-of-vice-president-harriss-meeting-with-president-yoon-of-the-republic-of-korea> [https://perma.cc/ZR8Z-3JDG]; Lee Haye-ah, *Yoon Meets with U.S. Vice President Harris Amid N. Korea Threat, IRA Concerns*, YONHAP NEWS AGENCY (Sept. 29, 2022, 12:51 PM), <https://en.yna.co.kr/view/AEN20220929001051315> [https://perma.cc/Y3TU-G5R9].

135. Byungsoo Kang, Haeriseu “IRA Hanguk Uryeo Chaenggyeobol Geot . . . ‘Bisogeo Nollan’ Gaeuichi Ana IRA 한국 우려 챙겨볼 것... ‘내’속어 논란 개외치 않아요” [*Harris “Will Pay Attention to Korea’s Concerns about IRA . . . Does Not Mind ‘Profanity Controversy’*], KBS NEWS (S. Kor.) (Sept. 29, 2022, 21:28), <https://news.kbs.co.kr/news/view.do?ncd=5567886&ref=A> [https://perma.cc/EU39-R86U].

Biden also sent a letter to Yoon echoing his “willingness to continue frank and open-minded talks on the U.S. Inflation Reduction Act,” as described by Yonhap News.<sup>136</sup> At the G20 Finance Ministers and Central Bank Governor Meeting, Minister of Economy and Finance Choo Kyung-ho met with U.S. Secretary of the Treasury Janet Yellen and agreed that the United States and Korea will continue to engage in conversation about the EV provisions.<sup>137</sup>

Such optimistic news did not help Yoon win the trust of the Korean Democratic Party legislators. On September 29, the Democratic Party member Cho Jeong Shik reported that the South Korean Embassy to the United States had delivered a detailed report about the IRA to Biden’s office on the same day that Pelosi visited Seoul.<sup>138</sup> The news contradicted the Yoon Administration’s position that the IRA unexpectedly passed Congress and moved through the legislature too quickly for the government to analyze the impact of the Act and take appropriate action; more importantly, it raised a serious allegation that, if Yoon’s office reviewed the Embassy’s report in time, Yoon could have had met with Pelosi while the Speaker was visiting Seoul and conveyed South Korea’s grievances about the EV provisions before the Act’s passage. The report consequently unleashed a chain of hostile hearings in which the Democratic Party castigated the Foreign Ministry and President’s inept response and capability to monitor the U.S. political climate.<sup>139</sup> In an aberrant parliamentary inspection

136. IANS, *Biden Sends Letter to Yoon Expressing Willingness for Talks on IRA*, BUS. INSIDER: INDIA (Oct. 5, 2022, 2:10 PM), <https://www.businessinsider.in/international/news/biden-sends-letter-to-yoon-expressing-willingness-for-talks-on-ira/articleshow/94659633.cms> [https://perma.cc/DVM4-TFNC].

137. Yeji Hong, Chugyeongho-Yelleon Mijaemu ‘Kkamjjak’ Mannam . . . “IRA Gwallyeon Hyeobui Jisok” 추경호-옌런 美재부 ‘깜짝’ 만남...”IRA 관련 협의 지속” [Choo Kyung-ho—U.S. Treasury Yellen ‘Surprise’ Meeting . . . “Will Continue Talks about IRA,”] FIN. NEWS (S. Kor.) (Oct. 14, 2022, 10:30 AM), <https://www.fnnews.com/news/202210140707456312> [https://perma.cc/VWL9-BC59].

138. Jiyeon Lee, Yoon-Pelosi Tonghwa Jikjeon Daetongnyeongsire ‘IRA Haeksim Naeyong’ Bogodwaetda 가.펠로시 통화 직전 대통령실에 ‘IRA 핵심 내용’ 보고됐다 [‘IRA Core Information’ Reported Before Yoon-Pelosi Call], KBS NEWS (S. Kor.) (Sept. 29, 2022, 8:09 PM), <https://news.kbs.co.kr/news/view.do?ncd=5567561&ref=A> [https://perma.cc/U467-GUZB].

139. Donghyun Kim, Jumidaesagwan Gukgamseo Jeongicha Bojogeum Gwallyeon Mi Donghyang Paak Miheup Jilta 주미대사관 국감서 전기차 보조금 관련 美 동향 파악 미흡 질타 [Embassy in the U.S. Parliamentary Audit Censures Inept Efforts to Analyze U.S. Trends Pertaining to Electric Vehicle Tax Credit], YONHAP NEWS AGENCY (S. Kor.) (Oct. 13, 2022, 3:09 PM), <https://www.yna.co.kr/view/AKR20221013002800071?input=1195m> [https://perma.cc/9KME-45MT]; Juhong Han, Gukgamseo ‘Koteura IRA Maengtangbogo’ Jiltatbo . . . Ya, ‘Pyojeokgamsa’ Jijeokdo 국감서 ‘코트라 IRA 맹탕보고’ 질타...野, ‘표적감사’ 지적도 [At Parliamentary Audit ‘KOTRA Bland Reporting’ Rebuked . . . Opposition, Criticized for ‘Targeted Inspection’], YONHAP NEWS AGENCY (S. Kor.) (Oct. 14, 2022, 8:15 PM), <https://www.yna.co.kr/view/AKR20221014002800071?input=1195m> [https://perma.cc/9KME-45MT].



hearing held at the Washington, D.C. Embassy, the National Assembly members from both parties railed Korean Ambassador to the U.S. Cho Tae-yong for insufficient reporting and failure to track a landmark bill with large implications for Korea's national interest and questioned the use of \$58,000 of government funding to hire American lobbyists.<sup>140</sup> Acrimonious attacks continued in the Foreign Affairs and Unification Committee hearing, where the members accused the Yoon Administration of neglecting the U.S. Embassy's report even after it had become public news that the IRA would pass Congress.<sup>141</sup> The members also attacked Korea Trade-Investment Promotion Agency's (KOTRA) Washington, D.C. office for dispatching to Seoul a half-page report on the Schumer-Machin agreement which failed to include any information about the EV provisions after the text of the Act became available to the Senate.<sup>142</sup>

Partisan conflicts intensified once the National Assembly passed a motion calling for the dismissal of Foreign Minister Park Jin, a historical move marking only the seventh time in history that the legislature passed a resolution calling for a cabinet member to step down.<sup>143</sup> The resolution censured Minister Park for condoning "Pelosi-passing" and the "forty-eight second talk," thereby "voluntarily giving up an opportunity to carefully explain and persuade the government's position about Korean electric vehicles at a time when the passage of the U.S. Inflation Reduction Act was imminent," and demonstrating the "height of incapacity and irresponsibility by waiting until the Inflation Reduction Act passed and hastily looking to analyze the situation after its passage."<sup>144</sup> The motion was boycotted by every member of the People Power Party, which retaliated by introducing a no-confidence

[www.yna.co.kr/view/AKR20221014135551003?input=1195m](http://www.yna.co.kr/view/AKR20221014135551003?input=1195m) [<https://perma.cc/Q28K-YMFE>].

140. Kim, *supra* note 139.

141. Chulsoon Kim, Oetongwi Gukjeonggamsa . . . Yeo "Seohaepigyeok Jinsanggyumyeong" Ya "IRA Neukjang Daeung" 외통위 국정감사... 與 "서해피격 진상규명" 野 "IRA நட장 대응" [*Foreign Affairs and Unification Committee Parliamentary Audit . . . Ruling Party "Yellow Sea Shooting Truth Investigation" Opposition Party "IRA Late Response"*], YONHAP NEWS AGENCY (S. Kor.) (Oct. 25, 2022, 12:10 AM), <https://www.yna.co.kr/view/AKR20221024150851001?input=1195m> [<https://perma.cc/J3UW-3BMN>].

142. Han, *supra* note 139.

143. Sarah Kim, *DP Passes Motion for Dismissal of Foreign Minister*, KOREA JOONGANG DAILY (Sept. 29, 2022), <https://koreajoongangdaily.joins.com/2022/09/29/national/politics/Korea-Foreign-Minister-Park-Jin/20220929191712285.html> [<https://perma.cc/7MUT-TBCT>].

144. Kookmuwuiwon (Woekyobujangkwan Parkjin) Haeimkeoneuian [Motion Proposing for the Dismissal of Cabinet Member (Minister of Foreign Affairs Park Jin)] (S. Kor.), at 3 (Sept. 29, 2022).

resolution demanding that Speaker Kim step down, while Yoon defended the Foreign Minister as a “remarkably capable person” and ultimately ignored the resolution calling for Park’s dismissal.<sup>145</sup> To respond to critics, the cabinet members also cited a *Politico* article that called the IRA “Washington’s best-kept secret” and argued that the Act passed in an uncharacteristically short period of time such that not even Democratic senators were aware of the contents of the IRA before the Schumer-Manchin agreement.<sup>146</sup> The Ministries of Industry and Foreign Affairs also refuted critical press coverage and issued statements explaining that it would have had been inappropriate for Yoon to have raised the issue with Pelosi before the Act was presented to the Senate or House.<sup>147</sup>

#### F. Hyundai’s Response and the IRA Amendment Bill

Hyundai Motor Group—which acquired Kia during the Asian financial crisis—is the only South Korean automaker directly affected by the IRA and has effectively lobbied both the United States and Korean government to advocate for policy exceptions. In the third quarter of 2022, Hyundai and Kia together were the second most popular EV brands in the United States after Tesla, making up eight percent of the EV market share.<sup>148</sup> The final assembly requirement may have already hurt the company’s profitability after Hyundai and Kia’s

145. Sarah Kim, *Yoon Blows Off DP Motion to Dismiss Foreign Minister*, KOREA JOONGANG DAILY (Oct. 2, 2022), <https://koreajoongangdaily.joins.com/2022/10/02/national/politics/Korea-Yoon-Sukyeol-Foreign-Minister/20221002175105108.html> [<https://perma.cc/2A89-HDTJ>].

146. Everett & Levine, *supra* note 44; Kyungjun Park, Ya IRA Daeung Jiltae Gungmujeongsiljang “Dareun Nara Injisijeom Biseut” 野 IRA 대응 질타에 국무조정실장 “다른 나라 입지시점 비슷” [To Opposition Repudiation of IRA response, Minister of the Office for government Policy Coordination “Timeline for Awareness Similar to Other Countries”], YONHAP NEWS AGENCY (S. Kor.) (Oct. 4, 2022, 11:55 PM), <https://www.yna.co.kr/view/AKR20221004086951001?input=1195m> [<https://perma.cc/5ZPA-XJT4>].

147. Press Release, Ministry of Trade, Industry, and Energy (S. Kor.), IRA IRA Bogowa Daetongnyeong-Pellosi Uijang Tonghwaneun Gwangye Eopseum bogowa daetongnyeong-pellosi uijang tonghwaneun gwangye eopseum 보고와 대통령-펠로시 의장 통화는 관계 없음 [IRA Reporting and President-Speaker Pelosi Call is Irrelevant] (Sept. 29, 2022), [https://www.motie.go.kr/motie/ne/presse/press2/bbs/bbsView.do?bbs\\_seq\\_n=166112&bbs\\_cd\\_n=81&currentPage=1&search\\_key\\_n=title\\_v&cate\\_n=&dept\\_v=&search\\_val\\_v=IRA](https://www.motie.go.kr/motie/ne/presse/press2/bbs/bbsView.do?bbs_seq_n=166112&bbs_cd_n=81&currentPage=1&search_key_n=title_v&cate_n=&dept_v=&search_val_v=IRA) [<https://perma.cc/8NX7-GT48>]; Press Release, Ministry of Foreign Affairs (S. Kor.), Jeongbuneun Inpeulle Gamchukbeop Daeunge Chongnyeogeul Giuryeo Watseumnida 정부는 인플레이 감축법 대응에 총력을 기울여 왔습니다 [Government Has Remained Devoted to the IRA Response] (Oct. 3, 2022), [https://www.mofa.go.kr/www/brd/m\\_24815/view.do?seq=74&page=1](https://www.mofa.go.kr/www/brd/m_24815/view.do?seq=74&page=1) [<https://perma.cc/4B46-AXH2>].

148. Wayland, *supra* note 4.

U.S. sales reported a record high in August 2022.<sup>149</sup> When the final assembly requirement kicked in on August 16, however, none of the company's EVs were eligible for \$7,500 tax credit and Hyundai's sale of the popular Ioniq 5 units immediately plummeted from 2,853 in June to 1,306 in September; Kia's sale of EV6 also dropped from 1,840 in August to 1,440 in September.<sup>150</sup>

Before the IRA's passage, President of Hyundai Motor Group Kong Young-Woo wrote to U.S. Representative Buddy Carter—whose district includes Savannah, Georgia where the automaker's plant will be built—and highlighted concerns about the EV subsidy changes.<sup>151</sup> In response, Representative Carter defended Hyundai and South Korea's interests in an address to the House floor and remarked that “this bill's new EV tax credit discriminates against and excludes South Korea.”<sup>152</sup> Once the IRA was signed into law, Chairman of the Hyundai Motor Group Chung Eui-sun urgently flew to the United States and explored solutions with state representatives and corporate executives in Georgia and New York.<sup>153</sup> On October 14, Chairman Chung visited the United States again to attend the groundbreaking ceremony of the Savannah factory and celebrated with Georgia Governor Brian Kemp, U.S. Senators Raphael Warnock and Jon Ossoff, Representative Carter, and White House National Climate Adviser Ali Zaidi.<sup>154</sup> It is somewhat ironic that the White House issued a press

149. Jonggeun Choi, “Hyeondaecha-Gia, Miguk Panmae 8Wol Gijun ‘Yeokdaechoego’ . . .IRA Chunggyeokpa “Got Onda” 현대차.기아, 미국 판매 8월 기준 ‘역대최고’ . . .IRA 충격과 “끝 온다,” [Hyundai, Kia Motors, U.S. Sales for August ‘Record High’ . . . IRA Impact “Soon Coming”] FIN. NEWS (S. Kor.) (Sept. 2, 2022, 11:54 AM), <https://www.fnnews.com/news/202209021150417846> [https://perma.cc/PC5P-7MCD].

150. Da-sol Kim, *Hyundai, Kia EV Sales Drop After New US EV Subsidy Act*, KOREA HERALD (Oct. 4, 2022, 3:13 PM), <https://www.koreaherald.com/view.php?ud=20221004000641> [https://perma.cc/BGR2-37RB].

151. Natter et al., *supra* note 11.

152. Jungmin Lee, Hyeondaecha Deureool Jojaju Uiwon, “Jeongichabeop Sujongdwaeya . . . Hanguge Buriigeun Jalmotte” 현대차 들어올 조지아주 의원, “전기차법 수정돼야 . . . 한국에 불이익은 잘못” [U.S. Representative from Georgia where Hyundai Motors Will Go, “Electric Vehicles Law Should be Amended . . . Wrong to Provide Disadvantage to Korea,”] KBS NEWS (S. Kor.) (Sept. 2, 2022, 12:40 PM), <https://news.kbs.co.kr/news/view.do?ncd=5547888&ref=A> [https://perma.cc/8NR8-PX4U].

153. Hansin Park & Hyungkyu Kim, Inpeulle Gamchukbeop Daeunge Chongnyeok . . . Jeonguiseon, Sumgapatdeon Mi 2ju Chuljang 인플레이 감축법 대응에 총력 . . . 정의선, 숨가뺐던 2주 출장 [All-Out on IRA Response . . . Chung Eui-Sun, Hectic Two-Week Trip to U.S.], KOREA EC. DAILY (S. Kor.) (Sept. 4, 2022, 9:14 AM), <https://www.hankyung.com/economy/article/2022090497221> [https://perma.cc/Z7NR-QHAR].

154. David Shepardson, *Hyundai to Break Ground on \$5.5 Billion Georgia Plant This Month*, REUTERS (Oct. 14, 2022, 7:40 PM), <https://www.reuters.com/business/>

release praising the ceremony and underscored that “this plant was announced during [President Biden’s] trip to the Republic of Korea in May, and [he is] excited the groundbreaking is happening months ahead of schedule.”<sup>155</sup> Without addressing Hyundai’s reservation about the Act, the White House also took credit and attributed the company’s \$5 billion investment and creation of 8,000 jobs to the IRA and Biden administration’s economic plan to “rebuild our manufacturing and infrastructure here at home [that pays] off for the American people, this time in Georgia.”<sup>156</sup>

As noted above, Hyundai promptly submitted a comment to the Treasury that emphasized its “binding and irrevocable commitment” to the Georgia plant and asked the agency institute a transitional period or exemption for automakers that began manufacturing construction before the IRA’s enactment.<sup>157</sup> It is natural to assume that the automaker’s lobbying also played a pivotal role in Senator Warnock’s introduction of the Affordable Electric Vehicles for America Act that seeks to amend the IRA by creating a phase-in period for EV sourcing and manufacturing requirements.<sup>158</sup> Hyundai’s influence is evident here, since the Act would add the qualifying language, “in the case of any motor vehicle sold after December 31, 2025,” to the final assembly provision, matching the precise time frame by which Hyundai’s Savannah plant is expected to be completed.<sup>159</sup> Warnock also sent a letter urging Secretary of Treasury Yellen to “offer maximum flexibility for vehicle manufacturers and consumers to take full advantage of

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autos-transportation/hyundai-break-ground-55-billion-georgia-plant-this-month-2022-10-14 [https://perma.cc/LJF2-CKP50]; Lee Jongwon & Kim Donghyun, Hanmihyeomnyeogeuro Cheotsap Tteun Hyeondae Jeongichagongjang . . . “Hangugeun Silloehal Pateuneo” 한미 협력으로 첫삽 든 현대 전기차공장...“한국은 신뢰할 파트너”[Hyundai Electric Vehicles Factory Breaks Ground with Korea-U.S. Partnership . . . “Korea is a Trustworthy Partner”, YONHAP NEWS AGENCY (S. Kor.) (Oct. 26, 2022, 7:14 AM), <https://www.yna.co.kr/view/AKR20221026011400009>.

155. Press Release, White House, Statement by President Joe Biden on Hyundai Investments in Georgia (Oct. 25, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/25/statement-by-president-joe-biden-on-hyundai-investments-in-georgia> [https://perma.cc/7U4P-WSTZ].

156. *Id.*

157. Hyundai Motor Grp., *supra* note 53, at 2–3.

158. Press Release, U.S. Senator Raphael Warnock, Senator Reverend Warnock Introduces Bill to Ensure Georgia Car Buyers, Automakers Fully Benefit from Cost-Cutting Tax Credits (Sept. 29, 2022), <https://www.warnock.senate.gov/newsroom/press-releases/senator-reverend-warnock-introduces-bill-to-ensure-georgia-car-buyers-automakers-fully-benefit-from-cost-cutting-tax-credits> [https://perma.cc/98EK-UJ6P].

159. Affordable Electric Vehicles for American Act of 2022, S. 5020, 117th Cong. § 2 (2022).

the electric vehicle (EV) tax credits” and warned that burdensome regulations “could reduce competition within the EV market and punish the very manufacturers currently making large domestic investments in EV capacity—ultimately harming Georgia’s workers and consumers.”<sup>160</sup> In an interview with KBS, a Korean news outlet, Representative Carter echoed this sentiment and promised that an amendment of the IRA, “is not impossible . . . . It can be done, and it needs to be done.”<sup>161</sup> Similarly, Representative Andy Kim, a Korean American Congressman, reiterated that there is an understanding that the IRA is an area of concern within U.S. Congress and reassured the Korean press that his office is exploring appropriate solutions which include Warnock’s bill.<sup>162</sup>

At home, Hyundai continued to work closely with the South Korean government and support the lobbying efforts in Washington, D.C. In fact, according to the timeline presented by the Democratic Party to the National Assembly, it was not any government agency, but rather Hyundai, that first shared the text of the IRA after the Schumer-Manchin agreement and proactively asked for the government’s involvement the day after the IRA had passed Congress.<sup>163</sup> The auto giant also actively participated in the Industry Ministry’s IRA Private-Public Sector Response Taskforce, which also included semiconductor manufacturers such as LG Energy Solutions, SK Innovation, and Samsung SDI, and coordinated strategies to influence the Treasury’s rulemaking and notice for comments process.<sup>164</sup> Lastly, the company

160. Letter from Raphael Warnock, U.S. Senator, to Janet Yellen, U.S. Sec’y of Treasury (Sept. 23, 2022), <https://www.warnock.senate.gov/wp-content/uploads/2022/09/Letter-to-Sec-Yellen-re-IRA-EV-Tax-Credits-2022-09-231.pdf> [<https://perma.cc/3PB8-GEUM>].

161. Lee & Uiwon, *supra* note 152.

162. Nanyoung Kim, Hangukgye Aendi Gim “Mi IRA Uryeo Ihae . . . Bukwihyeop Useonsunwi An Millyeo” 美의회 IRA 우려 이해...北위협 우선순위 안 밀려 [Korean American Andy Kim “U.S. Congress Understands Concerns about IRA . . . North Korea Threats Remains Priority,”] NEWSIES (S. Kor.) (Sept. 30, 2022, 11:56:41 PM), [https://newsis.com/view/?id=NISX20220930\\_0002033150&cID=10101&pID=10100](https://newsis.com/view/?id=NISX20220930_0002033150&cID=10101&pID=10100) [<https://perma.cc/K8R2-XQ9R>].

163. Sinwoo Kang, IRA Neukjangdaeung Bipane . . . Yichangyang “Mi Beopgaejeong Wihae Noryeok” IRA நடவடிக்கை...이창양 “美 법개정 위해 노력” [To Criticism about Late Response to IRA . . . Lee Chang-Yang “U.S. Working to Amend The Law”], EDAILY (S. Kor.), Oct. 4, 2022, 7:37:07 AM), <https://www.edaily.co.kr/news/read?newsId=04027846632489640&mediaCodeNo=257&OutLnkChk=Y> [<https://perma.cc/P6EX-SZSL>].

164. Press Release, Ministry of Trade, Industry, and Energy (S. Kor.), Jeongbu-Gieop Hapdongeuro Mi IRA Seaekgongje Daeungbangan Mosaek 정부-기업 합동으로 美 IRA 세액공제 대응방안 모색 [Seeking Response to U.S. IRA Tax Credit Through Government-Companies Collaboration] (Oct. 11, 2022), [https://www.motie.go.kr/motie/ne/presse/press2/bbs/bbsView.do?bbs\\_seq\\_n=](https://www.motie.go.kr/motie/ne/presse/press2/bbs/bbsView.do?bbs_seq_n=)

leadership went on the record to lament the pernicious effect that the EV tax credit will have on its business model. For example, Chief Operating Officer Jose Munoz remarked that “it will be very, very astronomical if nothing happens, if nothing changes. The impact is huge. That’s why we’re taking actions through all the channels.”<sup>165</sup> In Seoul, Hyundai Motors President Kong Young-Woon thanked the National Assembly for passing the IRA resolution and testified that he expects that the EV provisions will significantly hurt the company’s car sales and competitiveness in the U.S. market if no exemption or transition period is provided.<sup>166</sup>

## V.

### THE U.S. RESPONSE TO OPPOSITION

On December 29, the Treasury and IRS issued a notice of intent to propose regulations for the new clean vehicle credit, but did not modify the definition of “final assembly” stipulated in the Act.<sup>167</sup> The result was a creation of separate regulatory guidance governing the commercial clean vehicle credit, under which commercial vehicles are not subjected to the final assembly or sourcing requirements, and the new clean vehicle credit, under which relevant vehicles must immediately meet the final assembly requirement to qualify for the EV subsidy. A separate release clarified that an EV qualifying for the commercial clean vehicle credit must be “acquired for use or lease by the taxpayer and not for resale.”<sup>168</sup> Furthermore, the Treasury published a white paper that adopted a broad statutory reading for the sourcing standards, and clarified that the critical minerals requirement can be fulfilled if fifty percent or more of the critical minerals are manufactured or assembled in the United States or in any country with

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166142&bbs\_cd\_n=81&currentPage=1&search\_key\_n=title\_v&cate\_n=&dept\_v=&search\_val\_v=IRA [https://perma.cc/9JSM-UMNS]; Hyungwook Kim, Mi IRA Sebu Hawigyujeong Maryeon Chaksu . . . Saneopbu “Myeonmil Daeung” 美 IRA 세부 하위규정 마련 착수... 산업부 “민원 대응” [U.S. Prepares Specific Rulemaking for IRA . . . Industry Ministry “Close Response,”] EDAILY (S. Kor.) (Oct. 11, 2022, 3:30:32), <https://www.edaily.co.kr/news/read?newsId=03253766632491936&mediaCodeNo=257&OutLnkChk=Y> [https://perma.cc/7FL7-MLS7]

165. Wayland, *supra* note 4.

166. Jaegun Seo, Gongyeongun Hyeondaecha Sajang “IRA Yuye Eopdamyeon. . . Tagyeok Sangdanghada” 공영운 현대차 사장 “IRA 유예 없다면... 타격 상당하다” [Kong Young-woon, Hyundai President “If No Moratorium on IRA . . . Considerable Damage”], BizFACT (S. Kor.) (Oct. 5, 2022, 6:00 AM), <http://news.tf.co.kr/read/economy/1969336.htm> [https://perma.cc/6LZ4-LXSN].

167. I.R.S. Notice 2023-1, 2023-3 I.R.B. 373.

168. I.R.S. FS-2022-42, at 9 (Dec. 2022), <https://www.irs.gov/pub/taxpros/fs-2022-42.pdf> [https://perma.cc/65S4-6U8U].

which the United States has a free trade agreement.<sup>169</sup> Accepting the global EV battery manufacturers' requests, the guidance confirmed that the constituent materials making up a battery component will not be subjected to the North American production requirement.<sup>170</sup> Unlike the commercial clean vehicles credit guidance, which took effect immediately, determinations about the critical minerals and battery components are not yet final, and the Treasury and IRS plan to issue an official guidance in March 2023.<sup>171</sup>

The commercial clean vehicles credit provides the sole opportunity for foreign automakers to receive the full tax credit for EVs without meeting the final assembly requirement. Consideration for foreign governments and automakers is reflected in the notice and supporting documents, which detail instructions and criteria for a valid lease agreement that would qualify for the tax credit.<sup>172</sup> The European Union issued a statement celebrating the commercial clean vehicle credit as “a win-win for both sides,” while Industry Minister Lee also praised the guidance for accepting the Korean government's policy ask.<sup>173</sup> Crediting the guidance to the Korean government's vigorous lobbying efforts, the Industry Ministry emphasized that Korea had repeatedly pressed the United States to issue a guidance for commercial vehicles as soon as possible and “presented our official statement that consolidated diverse opinions of the industry to the Treasury two times, held meetings with various U.S. agencies and representatives, and proactively reacted under the principle of minimizing the burden on our companies and maximizing benefit.”<sup>174</sup> Hyundai also welcomed the guidance as a move that reflects South Korea's interests and announced plans to increase the proportion of lease EV sales in the U.S. market.<sup>175</sup>

169. U.S. DEP'T OF TREASURY, ANTICIPATED DIRECTION OF FORTHCOMING PROPOSED GUIDANCE ON CRITICAL MINERAL AND BATTERY COMPONENT VALUE CALCULATIONS FOR THE NEW CLEAN VEHICLE CREDIT 5 (2022), <https://home.treasury.gov/system/files/136/30DWhite-Paper.pdf> [<https://perma.cc/K5VH-XSRH>].

170. *Id.* at 7.

171. *Id.* at 8; Section 30D New Clean Vehicle Credit, 88 Fed. Reg. 23370 (proposed Apr. 17, 2023) (to be codified at 26 C.F.R. pt. 1).

172. I.R.S. FS-2022-42, *supra* note 167, at 9–10.

173. MINISTRY OF TRADE, INDUS., & ENERGY (S. KOR.), MI JAEMUBU, IRA SANGE-OBYONGCHA SEAEKGONGJE GAIDEONSEU BALPYO 美 財 務 部, IRA 上 業 用 車 稅 額 公 報 發 表 [U.S. DEP'T OF TREAS., IRA COMMERCIAL VEHICLES TAX CREDIT GUIDANCE] (2022); Press Release, European Commission, EU Welcomes Access to U.S. Subsidy Scheme for Commercial Vehicles (Dec. 29, 2022), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_7869](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_7869) [<https://perma.cc/TV69-AJKG>].

174. MINISTRY OF TRADE, INDUSTRY, AND ENERGY, *supra* note 147.

175. *Id.*; Sangbum Kim, Sumtong Teuin Hyeondaecha . . . IRA “Riseu Jeongichado Bojogeum Junda” 슌퐁 트윈 현대차...IRA “리스 전기차도 보조금 준다” [*Hyundai*

Although the Biden administration made a significant accommodation to its closest trading allies, it would be incorrect to characterize the guidance as an emphatic “win-win” for the United States and international stakeholders. The guidance strictly provides tax credits to commercial vehicles “acquired for use or lease by the taxpayer and not for resale” so automakers would only benefit from EV sales made to leasing or rental companies.<sup>176</sup> As of the third quarter of 2022, lease vehicles make up only around eighteen percent of new vehicles sold in the United States, so it can be expected that many foreign automakers’ profitability and market share will still undergo a significant decline until their EVs production facilities in North America become functional. Furthermore, the Treasury refused to make any change to the definition of the final assembly to the dismay of foreign stakeholders that may have expected more dramatic measures such as exemptions or a transitional period. In fact, the guidance may have disappointed representatives in Seoul whose official ask for the Treasury was a three-year grace period extending until 2025.<sup>177</sup> Indeed, the IRA guidance is an underwhelming feat when compared to the Department of Commerce export controls regulations, which limit semiconductor sales to China, for which South Korea also successfully lobbied in 2022 and secured an exception for “facilities owned by multinationals [that are to] be decided on a case-by-case basis,” thereby minimizing the regulatory burden on their domestic manufacturers.<sup>178</sup>

Even within the United States, the IRA is far from a done deal. Castigating the Treasury’s implementation plan as a gross abuse of its interpretive authority that contravenes congressional intent, Manchin, the architect of the EV provisions, characterized the Treasury’s plan for the commercial and consumer EV tax credits as a move that

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*Motors Given Breathing Room . . . IRA “Provides Tax Credit to Lease Electric Vehicles”*, KYUNGHYANG SHINMUN (S. Kor.) (Dec. 30, 2022, 3:37 PM), <https://www.khan.co.kr/economy/auto/article/202212301130001> [<https://perma.cc/52L3-JFHN>].

176. I.R.S. FS-2022-42, *supra* note 167, at 9.

177. *S. Korea Sends Letter Explaining Stance on IRA to U.S.*, YONHAP NEWS AGENCY (Nov. 4, 2022, 3:51 PM), <https://en.yna.co.kr/view/AEN20221104007251320> [<https://perma.cc/5J8S-HA4Q>].

178. MINISTRY OF TRADE, INDUSTRY, AND ENERGY, *supra* note 147; Byung-yeul Baek, *US Suspends Export Control of Samsung, SK in China for 1 Year*, KOREA TIMES (Oct. 12, 2022, 5:47 P.M.), [https://www.koreatimes.co.kr/www/tech/2023/07/129\\_337768.html](https://www.koreatimes.co.kr/www/tech/2023/07/129_337768.html) [<https://perma.cc/2225-7AXT>]; Press Release, U.S. Dep’t of Com., Commerce Implements New Export Controls on Advanced Computing and Semiconductor Manufacturing Items to the People’s Republic of China (PRC) (Oct. 7, 2022), <https://www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3158-2022-10-07-bis-press-release-advanced-computing-and-semiconductor-manufacturing-controls-final/file> [<https://perma.cc/3YUQ-4N4G>].



“bends to the desires of the companies looking for loopholes” and demanded that the Administration “pause commercial and new consumer EV tax credits until they have issued the appropriate guidance.”<sup>179</sup> On January 26, 2023, Manchin introduced the American Vehicle Security Act, which would force the Treasury to implement the critical mineral and battery component requirements retroactively to January 1, 2023 and stated that “it is unacceptable that the U.S. Treasury has failed to issue updated guidance for the 30D electric vehicle tax credits and continues to make the full \$7,500 credits available without meeting all of the clear requirements included in the Inflation Reduction Act.”<sup>180</sup> The bill has no effect on the final assembly requirement, however, because the provision became effective after the date of enactment.<sup>181</sup> Interestingly, Manchin’s bill directly conflicts with Warnock’s bill, which, as discussed above, would institute a phase-in period. It remains to be seen which, if any, legislation wins support in the Senate.<sup>182</sup> To be sure, both bills may be inconsequential, since the Democrats have expanded their Senate majority to fifty-one seats and Manchin no longer holds the deciding vote for all legislative efforts of his party. Furthermore, Senators Ron Wyden and Stabenow categorically ruled out the possibility of amending the IRA’s EV provisions when French President Emmanuel Macron visited Washington, D.C. on November 30, 2022 and personally requested that the United States remove the IRA’s “Made in America” provisions.<sup>183</sup> Echoing her initial concern about the law before it had passed the Senate, Stabenow criticized the IRA’s original EV credits requirement “as written was unworkable and may lead to more auto jobs overseas than less” and blocked Manchin’s bill, which “would literally take away credits from people who are buying cars today.”<sup>184</sup> Yet continued dissent and congressional scrutiny from the Chairman

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179. Press Release, U.S. Senate Comm. on Energy & Nat. Res., *supra* note 13.

180. *See* S. 63, 118th Cong. § 2 (2023); Press Release, U.S. Senator Joe Manchin, Manchin Legislation Halts EV Tax Credits Until Treasury Issues Guidance in Line With IRA (Jan. 25, 2023), <https://www.manchin.senate.gov/newsroom/press-releases/manchin-legislation-halts-ev-tax-credits-until-treasury-issues-guidance-in-line-with-ira> [<https://perma.cc/W5T4-WCLT>].

181. Inflation Reduction Act § 13401, *supra* note 33, at 1961.

182. *See* S. 5020, *supra* note 159; S. 63, *supra* note 180.

183. Gavin Bade & Doug Palmer, *Congressional Democrats: Not a Chance of Re-opening Climate Law*, POLITICO (Nov. 30, 2022, 5:03 PM), <https://www.politico.com/news/2022/11/30/climate-law-subsidies-macron-00071379> [<https://perma.cc/7UWS-4RYU>].

184. Sen. Debbie Stabenow (@SenStabenow), TWITTER (Dec. 29, 2022, 4:20 PM), <https://twitter.com/SenStabenow/status/1608573670842331142> [<https://perma.cc/T2MR-KUQX>]; David Shepardson, *U.S. Senator Blocks Bid to Close EV Tax Window*, REUTERS (Jan. 26, 2023, 8:28 PM), <https://www.reuters.com/business/autos->

of the Senate Committee on Energy and Natural Resources can still pose a significant political burden for the Biden administration.

## VI. IMPLICATIONS

This Note has documented the importance of the EV tax credit to the U.S. allies and South Korea's seemingly relentless efforts to arrive at a political compromise about the final assembly requirement with the United States. But this begs the question: despite the near certainty of prevailing in the WTO dispute settlement bodies, why have South Korea and other countries refrained from filing a complaint against the IRA? Apart from the obvious concern of upsetting the historically significant alliance with the United States, the likely answer lies in the demise of the WTO AB that occurred as a result of the Trump Administration's decision to block AB members' appointments since 2019.<sup>185</sup> Four years later, the Biden administration has yet to make any appointment and, without a functional AB (which has the sole power to accept appeals and make binding decisions based on the panel decisions), the DSB mechanism today now closely follows what Professor Joset Pauwelyn ominously, but correctly, forecasted to be "appealing into the void."<sup>186</sup> Currently, member states can still file requests for consultations and the DSB can establish panels that can circulate final reports.<sup>187</sup> Without a functioning AB, however, the cases "remain in limbo and the underlying panel report cannot be adopted"; in turn, this allows "the losing party . . . [to] have a veto right against adoption, to be exercised by filing an appeal 'into the void.'"<sup>188</sup> While the AB still remains in a vacuum, the United States' frustration at the DSB has only intensified after WTO panels found in December 2022 that the U.S. Section 232 measures on steel and aluminum as well as origin labeling policies in *Certain Measures on Steel and Aluminum Products* and *US—Origin Marking* breach the GATT. In a fiery response, the USTR statement affirmed that "the United States strongly rejects the flawed interpretation in the World Trade Organization (WTO) Panel report" and "these WTO panel reports only reinforce the need to fundamentally reform the WTO dispute set-

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transportation/us-senator-blocks-bid-close-ev-tax-window-2023-01-27 [https://perma.cc/7MQ7-4TXT].

185. Hillman, *supra* note 16.

186. Joost Pauwelyn, *WTO Dispute Settlement Post 2019: What to Expect?*, 22 J. INT'L ECON. L. 297, 306 (2019).

187. *Id.* at 304.

188. *Id.*

tlement system.”<sup>189</sup> The USTR also openly stated that the United States has no plans to comply with the panel reports and that “we will not cede our judgment or decision-making over essential security matters to the WTO.”<sup>190</sup> At the 2023 WTO Dispute Settlement Body meeting, U.S. Ambassador María Pagán confirmed that the United States has no plans to appoint new AB members until the country’s grievances about the DSB are addressed.<sup>191</sup>

The United States’ critical position towards the WTO may have dissuaded Korea and the European Union from litigation because there is no longer a functional AB that can make a final, binding ruling. Also, the United States may choose not to comply even if a WTO panel finds that the IRA contravenes the GATT. Another crucial consideration is the expected timeline of a dispute resolution. It is no secret that the WTO dispute settlement is notoriously slow and usually takes years; according to a survey of 623 WTO cases, an average panel proceeding takes 17.9 months and, if appealed to the AB, the dispute consumes approximately 23.5 months in total.<sup>192</sup> In modern practice, a dispute takes far longer than the average, because the dataset included earlier cases in which the DSB decided cases at a significantly greater speed and largely complied with the statutory deadlines. In fact, under the deadlines stipulated in the WTO Dispute Settlement Understanding, a dispute must be decided within 12 months for a panel decision and 15-17 months for an AB decision; however, another study found that the average duration of a WTO dispute from consultations request to adoption takes “23.21 months for disputes that started between 1995-1999 and 28 months for those that started between 2007-2011.”<sup>193</sup> Moreover, the average duration of

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189. Press Release, U.S. Trade Representative, Statement from USTR Spokesperson Adam Hodge (Dec. 9, 2022), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/december/statement-ustr-spokesperson-adam-hodge> [<https://perma.cc/H2CW-UZUU>]; Press Release, U.S. Trade Representative, Statement from USTR Spokesperson Adam Hodge (Dec. 21, 2022), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/december/statement-ustr-spokesperson-adam-hodge-0> [<https://perma.cc/C5SD-RGLS>] [hereinafter Dec. 21 USTR Press Release].

190. Dec. 21 USTR Press Release, *supra* note 187.

191. Press Release, U.S. Trade Representative, Statements by the United States at the Meeting of the WTO Dispute Settlement Body (Jan. 27, 2023), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/january/statements-united-states-meeting-wto-dispute-settlement-body> [<https://perma.cc/G5M2-3QZA>].

192. Hoekman et al., *supra* note 16 (calculating the months under Table 14).

193. Arie Reich, *The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis* 22–23 (Eur. U. Inst. Dep’t L., Working Paper, 2017), [https://cadmus.eui.eu/bitstream/handle/1814/47045/LAW\\_2017\\_11.pdf](https://cadmus.eui.eu/bitstream/handle/1814/47045/LAW_2017_11.pdf) [<https://perma.cc/3MMN-SVEM>].

disputes submitted after 2011 increased to 33.83 months.<sup>194</sup> It is no surprise that the E.U. Commission Executive Vice-President and Commissioner for Competition Margrethe Vestager accused the IRA of violating WTO rules, but conceded that a WTO suit is “not the preferred option” for Europe because “a lot of good things can be said about the WTO process; fast is not one of them.”<sup>195</sup>

Based solely on these averages, even if South Korea had brought a WTO suit promptly in August 2022 immediately after the IRA’s passage, the panel would not have been expected to come to a decision until sometime in 2025. This estimated timeline is crucial, because Hyundai’s Georgia plant will also begin production in 2025 and the company would be able to qualify for the tax credit by the time the panel or AB would issue a decision. Another consideration is that the Korean automakers’ competitiveness in the U.S. EV market—which ranked third and fourth before October 2022 and together made up nine percent of total EV sales—will have already undergone an irreversible decline by 2025.<sup>196</sup> The decision to prioritize a political agreement over a WTO dispute therefore seems to reflect practical concerns about the large backlog and delay in receiving a WTO panel decision, with which the United States may not even ultimately comply. Such concerns presented by the IRA dispute pose serious challenges about the WTO DSB. Even with a seemingly iron-clad case, the lack of the AB and delay in proceedings have dissuaded members from utilizing the DSB and—inspired the European Union and South Korea—to openly acknowledge that a WTO suit is a final resort for dispute resolution. This trend may hint that, apart from “threat value” in utilizing a potential WTO challenge for increased leverage as South Korea, Japan, and the EU have practiced, the members may no longer perceive the DSB as an effective and speedy means of a trade dispute resolution. Since the prospects of the AB’s return to function or dramatic gains in expediting the proceedings seem bleak for now, the IRA controversy response therefore may signal a long-term change in which trade disputes are resolved through ad hoc political negotiations and lobbying within the U.S. domestic political process, while the WTO and DSB’s importance and legitimacy languish.

Outside of Geneva, the most pernicious effect of the IRA may be the potential erosion of free trade norms and partnership between the United States and trading allies, many of which already announced plans to implement similar protectionist measures designed to exclude

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194. *Id.* at 24.

195. Bounds, *supra* note 15.

196. Herh, *supra* note 10.

foreign companies from subsidies. For example, in what can only be seen as a move that parallels the IRA, South Korea announced plans to amend its own domestic EV subsidy rules and provide roughly \$2,000 (₩ 2.5 million) more for vehicles manufactured by automakers that directly operate service centers within the country.<sup>197</sup> Because only domestic automakers—Hyundai, Kia, Renault Korea Motors, GM Korea, and SsangYong Motor—manage service centers without delegating to dealers or intermediaries, the rule would de facto deprive all foreign EVs of an equal sum of subsidy and has already spurred protest and threats to litigate from imported auto brands.<sup>198</sup> The final rule promulgated by the Ministry of Environment accepted the proposal for a differential subsidy based on whether each automaker directly operates service centers in Korea and awards significantly more subsidy for Hyundai and Kia vehicles, many of which will receive the maximum tax credit of \$5,200 (₩ 6.8 million), than Tesla, GM, and Mercedes Benz, which will receive \$2,000 (₩ 2.6 million), \$4,900 (₩ 6.4 million), and nearly \$2,100 (₩ 2.7 million), respectively.<sup>199</sup>

Similarly, European Commission President Ursula von der Leyen highlighted the need to counter the “Buy American logic” and discriminatory subsidies embodied in the IRA and presented plans to launch a “European IRA” that would fund public investment and subsidize green energy transition within the bloc.<sup>200</sup> This plan is also championed by French President Emmanuel Macron, who plainly described the IRA as a “job killer” and called on Europe to respond by investing two percent of its GDP to fund a European Union-equivalent

197. Asa Kim, Jeongicha Bojogeu, Guksancha Neulligo Suipcha Kkangneunda 전기차 보조금, 국산차 늘리고 수입차 깎는다 [*Electric Vehicles Subsidy, Increased for Domestic Cars and Cut for Imported Cars*], CHOSUN ILBO (S. Kor.) (Dec. 30, 2022, 11:14 AM), [https://www.chosun.com/economy/auto/2022/12/30/HTG3OCBZCZG4HISW5Q67KUENUE/?utm\\_source=Naver&utm\\_medium=referral&utm\\_campaign=naver-news](https://www.chosun.com/economy/auto/2022/12/30/HTG3OCBZCZG4HISW5Q67KUENUE/?utm_source=Naver&utm_medium=referral&utm_campaign=naver-news) [https://perma.cc/YE5V-8GKF].

198. Taeho An, Mi IRA Daeung? Suip Jeongicha Jigyeong A/SSenteo Eop-seumyeon Bojogeu Kkangneunda 미 IRA 대응? 수입 전기차 직영 A/S센터 없으면 보조금 깎는다 [*Response to U.S. IRA? Subsidy Cut for Imported Automaker Without Directly-Operated A/S Center*], HANKYOREH (S. Kor.) (Dec. 27, 2022, 7:00 AM), <https://www.hani.co.kr/arti/economy/car/1073268.html> [https://perma.cc/ZF22-TK6K].

199. 2023 NYEON JADONGCHA BOGEUPSAEOP BOJOGUEUM EOPMUCHEORIJICHIM(AN) GONGGO [2023 ELECTRIC VEHICLES SUPPLY PROJECT TAX BUSINESS HANDLING GUIDELINES PROPOSAL NOTICE], amended by Act No. 2063-68 (Feb. 3, 2023) (S. Kor.).

200. Ursula von der Lyen, European Union President, Speech by President von der Leyen at the European Parliament Plenary on the Preparation of the European Council Meeting of 15 December 2022 (Dec. 14, 2022), [https://ec.europa.eu/commission/presscorner/detail/en/speech\\_22\\_7727](https://ec.europa.eu/commission/presscorner/detail/en/speech_22_7727) [https://perma.cc/Q827-VWY3].

of the IRA.<sup>201</sup> In fact, European leaders did not hide their distrust for the United States at the recent European Council meeting, where Belgium Prime Minister Alexander De Croo expressed support for the counter-IRA plan and openly warned against “competing against one another, while the United States would be running away with everything.”<sup>202</sup> Europe’s growing frustration towards the United States on trade policy is hardly a novel trend. Notably, the European Union accused the United States of “[plunging] the multilateral rules-based trading system into crisis” by blocking WTO AB appointments and instead partnered with China to institute the Multiparty Interim Appeal Arbitration Agreement (MPIA), an alternative dispute settlement mechanism.<sup>203</sup> U.S. allies’ serious considerations of instituting protectionist subsidy programs that parallel the IRA raises concerns about the potential proliferation of a subsidy war, protectionism, and increased tensions between trading partners.

#### CONCLUSION

The political dilemma for the Biden administration can be summarized as two-fold. First, the Senate Democrats relied on a closed-door meeting between Schumer and Manchin and passed the Act just two weeks after introduction. As the Yoon administration highlighted, this gave little time for not only foreign governments or auto industry stakeholders but also U.S. legislators, including Stabenow, to fully analyze the Act and voice their concerns about the EV provisions. The one-sentence final assembly provision therefore serves as a reflection of Manchin’s individual intent rather than a collective legislative product of any collective deliberation that fully considered how the IRA would change United States’ compliance with WTO norms, diplomatic standing, and international trade overnight. Raising serious

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201. *Macron Wants European Response to U.S. IRA to Amount to 2% of GDP*, REUTERS (Dec. 15, 2022, 6:11 PM), <https://www.reuters.com/markets/europe/macron-wants-european-response-us-ira-amount-2-gdp-2022-12-15/> [https://perma.cc/V4E6-F3EH]; Andrea Shalal & David Lawder, *Tax Credits for EU Electric Vehicles Dominate U.S. Trade Talks*, REUTERS (Dec. 5, 2022, 4:43 PM), <https://www.reuters.com/world/mondays-eu-us-trade-talks-overshadowed-by-tax-concerns-climate-measure-2022-12-05/> [https://perma.cc/J3J4-VVEC].

202. *Why EU leaders Are Upset over Biden’s Inflation Reduction Act*, FR. 24 (Dec. 16, 2022, 11:58 AM), <https://www.france24.com/en/europe/20221216-why-eu-leaders-are-upset-over-biden-s-inflation-reduction-act> [https://perma.cc/FC5A-SQAU].

203. Eur. Parl. Rsch. Serv., *International Trade Dispute Settlement: WTO Appellate Body Crisis and the Multiparty Interim Appeal Arrangement*, BRI (2021) 690521 (Apr. 14, 2021), [https://www.europarl.europa.eu/thinktank/en/document/EPRS\\_BRI\(2021\)690521](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2021)690521) [https://perma.cc/66SA-UJNX]; Statement, *Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU*, WTO Doc. JOB/DSB/1/Add.12 (adopted Apr. 30, 2020).

questions about democratic participation in the legislative process, Congress' reliance on an accelerated timeline and an exclusive negotiation process allowed the body to overlook the seemingly niche EV clauses—which were not even mentioned in the committee reports, but rather were hidden in an omnibus law and whose full implications on the automotive industry and U.S. foreign policy were not fully debated.<sup>204</sup> Second, the statutory language used in the final assembly clause leaves little room for interpretive discretion. Simply put, even if the Biden administration intended to fully accept the trading partners' demands and create an exemption or transition period through rulemaking, as Yellen maintained, an agency can merely “listen to [other countries'] concerns and see what was in the range of the feasible as we implement the rules” simply because the “legislation is what it is.”<sup>205</sup> The reality is that the Biden administration cannot rewrite a law with little room for ambiguity and implement guidance that contravenes the overt text and purpose of the statute. In this context, the Treasury's guidance can be construed as a maximalist compromise by which the Biden administration went as far beyond the text of the law as it could to create a separate commercial vehicle tax credit to assuage foreign governments and automakers.

The IRA's reception in South Korea also serves as a fascinating case study that intertwines U.S. administrative law, international trade law, diplomacy, and a foreign government's own policy process. The extensive list of Korean talking points and meetings with U.S. cabinet members provides a comprehensive outlook on how a foreign government lobbies and exerts influence over executive rulemaking. From Yoon to cabinet members of the industry and foreign affairs ministries, the South Korean government has seemingly pressured the U.S. government at every turn to institute a transitional period and made it a priority to draw attention to potential WTO and KORUS FTA violations. In addition, the Korean government mobilized key political allies, such as Warnock, the Congressional delegation from Georgia, and several governors and succeeded in persuading them to introduce an amendment to the IRA, demand favorable rulemaking provisions, and write letters urging Biden and Yellen to adopt a lenient statutory reading. The National Assembly even passed a virtually unanimous

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204. H.R. REP. NO. 117-130, at 4-5 (2021). The report does not make any explicit reference to EVs and merely makes a general claim that the IRA aims to “create a new, diverse work force focused on addressing climate change” and “provide comprehensive investments, including clean energy and transportation tax credits, to help us reduce our carbon footprint.”

205. Natter & Condon, *supra* note 6.

motion calling on the United States to amend the EV provisions while the Korean Democratic Party leadership directly protested the Act to USTR Tai, the Korean Ambassador, members of Congress, and the foreign press.<sup>206</sup> However, after Yoon's tour and allegations about the government's late response emerged, what little comity remained between the National Assembly and Yoon's office dissipated. The IRA now symbolizes a vitriolic, partisan crisis that led to a vote of no confidence for the Foreign Affairs Minister and challenged the ruling party's foreign policy competence.

Evaluating the merits of President Biden's Made in America policy or protectionist subsidy programs is outside the scope of this research. Nonetheless, U.S. policymakers must take note of such reactions with gravity. Instead of allowing the parties to come to the table and proactively reach an agreement through diplomatic talks, the IRA is far from a domestic law in scope. Rather, the IRA sets a unique precedent for foreign governments' efforts to resolve a trade dispute by reactively lobbying for favorable rulemaking within the U.S. political process. As U.S.-China tensions grow and trade measures increasingly advance national security interests, such ad hoc political agreements may be the new norm for U.S. allies' economic diplomacy for the foreseeable future.<sup>207</sup> In fact, once the final assembly requirement dispute was somewhat resolved, Trade Minister Ahn and South Korean government officials immediately returned to Washington, D.C. in March 2023 to lobby for a continued U.S. export controls exemption for Korean chipmakers and favorable Department of Commerce notice for the CHIPS for America funding eligibility.<sup>208</sup> Furthermore, regardless of whether the IRA can produce an economic bonanza for the United States, the Act has led trading partners to ask questions about the reliability of the United States as a trading ally and champion of free trade and WTO rules. More importantly, the IRA may result in a domino effect by which other countries retaliate against the United States by enacting similar laws that provide exclu-

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206. *IRA Motion*, *supra* note 128.

207. Gavin Bade & Brendan Bordelon, *Biden Issues New Rules to Cut Off Microchip Supply to China*, POLITICO (Oct. 7, 2022, 12:05 PM), <https://www.politico.com/news/2022/10/07/biden-issues-new-rules-to-cut-off-microchip-supply-to-china-00060948> [<https://perma.cc/C9WW-QKDV>].

208. Sangmi Cha, *South Korea Seeks US Assurances on Chipmakers' China Investment*, BLOOMBERG (Feb. 28, 2023, 5:17 AM), <https://www.bloomberg.com/news/articles/2023-02-28/south-korea-seeks-us-assurances-on-chipmakers-china-investment> [<https://perma.cc/LD24-RCGT>]; Jiyoung Sohn, *South Korea Says U.S. Chips Act Subsidies Have Too Many Requirements*, WALL ST. J. (Mar. 7, 2023, 9:54 PM), <https://www.wsj.com/articles/south-korea-says-u-s-chips-act-subsidies-have-too-many-requirements-825b3fe9> [<https://perma.cc/6VE8-MM9X>].



sive subsidies benefiting the domestic manufacturers and in turn further cripple the principles of nondiscrimination, MFN, and free trade. The United States cannot afford to alienate strategic partners like South Korea, the European Union, or Japan while hoping to contain China and persuade partners to join the Indo-Pacific Economic Framework for Prosperity (IPEF).<sup>209</sup> The reception of the EV provisions abroad should compel the United States to exercise further caution in enacting domestic laws capable of instigating trade conflict, or worse, retaliation from friends.

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209. U.S. TRADE REPRESENTATIVE, 2022 TRADE POL'Y AGENDA & 2021 ANN. REP. OF THE PRESIDENT OF THE U.S. ON THE TRADE AGREEMENTS PROGRAM, at 10.