Chinese EV tariffs revisited? A look back to find a path forward

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On June 24, 2024, the Government of Canada announced its intention to deliver a policy response to electric vehicle (EV) imports from China currently flooding global markets.

The move was in response to a growing concern regarding China's "state-directed policy of overcapacity that is undermining Canada's EV sector's ability to compete in domestic and global markets." The statement followed similar policy moves in the United States and European Union, both of which disclosed plans to significantly increase tariffs on Chinese EVs.

The government launched public consultations last July and proceeded to impose tariffs on Chinese EV shortly thereafter. China, for its part, did not waste time in launching retaliatory measures of its own.

The new government, facing multiple challenges with Canada's largest trading partner, is seeking to ease tensions and remove barriers to Canadian exports in other markets, and this could mean some form of *détente* with China.

When the consultations were launched last year, we encouraged affected – or potentially affected – businesses to consider participating in the process to ensure "an orderly treatment of the Chinese EV issue". For our part, and out of general concern for Canada's broader, more strategic, trade interests, we made a submission as well.

As the new government is revisiting the issue, it would be useful to share these thoughts. We hope that this time around Canadians could have a more rounded discussion about non-U.S. trade issues.

BLG's 2024 submission to the Government of Canada

I. Introduction

This submission is in response to the announcement on 24 June 2024 by the Deputy Prime Minister and Minister of Finance, and the Minister of International Trade, of the launch of consultations in respect of Chinese electric vehicle (EV) imports into Canada.

The announcement identified two concerns with EV imports into Canada: *state-supported excess capacity* and *data privacy*. The announcement further indicated possible options to address these concerns.

This submission concentrates on the *overcapacity issue* and, specifically, the trade aspects of the announcement. It makes three recommendations:

1. Trade and industrial policy concerns and measures should be treated in a separate and distinct path from data privacy issues.
2. The Government should harness the vast and deep expertise of its specialised institutions, to make sure that any measures do not unduly affect competition, productivity, and climate action.
3. The proposed measures permit quick action by the Government outside the framework of procedural protections of Canada's trade remedy mechanism. Although expedient, they give rise to multiple avoidable challenges. The Government should consider enlarging the options available to it.

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II. The issue

China's state-supported excess capacity is a longstanding[1] and multisectoral[2] global concern. Its impact is complex:

- Cheaper Chinese exports can mean lower prices for consumers and lower costs for intermediary producers. This may have a positive effect on the environment, as lower prices would mean more consumers would be able to afford electric vehicles.
- At the same time, state-supported excess capacity typically results in politically unacceptable and economically untenable distortions in production and the labour market in other producer countries. Job losses and market adjustments in turn drive domestic pressure for corrective – and potentially costly – trade or industrial policy measures.

Excess capacity – and resulting cheaper goods flooding export markets – distort markets in three ways:

1. producers lose domestic market share or profits, leading to job losses or investment cut-backs;
2. producers lose market share in *export* markets – leading to economic adjustment measures at home; and
3. indirectly, corrective measures taken in response further distort domestic and global markets.

The dynamic *institutional* and *political* impacts of these market and policy pressures are no less grave. There is some evidence that failure to adequately address labour adjustments can lead to destabilising populist movements.[3] In the same vein, the actual or perceived inability of the WTO framework to address underlying concerns has been one of the reasons for the breakdown of its dispute settlement mechanism.[4]

Valid as they are, these *trade* concerns should not, however, be confused with equally legitimate but fundamentally different interests in data privacy protection. For one, *data privacy* and *tariffs*[5] are not an easy match. For another, there is a risk – and, in this climate of active mis- and disinformation, a heightened one – that one or the other concern might be viewed as a mere afterthought.

> ***Recommendation****: conceptually and from a machinery of government perspective, the two issues should be bifurcated and addressed through different policy development mechanisms and policy measures.*

III. The consultation framework

It is right and proper that on an issue of such import, the Government consult citizens, the civil society and other stakeholders, affected businesses and unions, academics, think tanks, and other interested parties. A thirty-day consultation framework is not, however, optimal for addressing and developing sound policy for a complex international problem. Accordingly, these consultations should be viewed as only a first step – an important one, to be sure, but a feeder of policy rather than the determinant of one. There are two reasons for this.

First, within the vast apparatus of the government of Canada there are multiple *expert* instances and policy pathways both *designed for* and *capable of* undertaking in-depth analyses of the identified concerns, and making credible, and implementable, policy recommendations.

In respect of the impact of China's excess capacity on the domestic market:

- Canada has a robust, responsive, and effective trade remedy framework.[6] The framework captures not just subsidized goods, but also dumped goods (including goods that are dumped because they are subsidized), and can protect the Canadian domestic industry against import surges that cause or threaten to cause serious injury.
- The Canadian International Trade Tribunal,[7] a quasi-judicial tribunal with members and staff expert in subsidies and trade issues more generally, has the mandate,[8] to undertake an investigation "on any matter in relation to the economic, trade or commercial interests of Canada" referred to it by the Government.
- The Competition Bureau[9] may be tasked with undertaking an inquiry, "into the state of competition in a market or industry",[10] or to make representations[11] in respect of any measures the Government may be contemplating.

Second, whatever path Canada takes requires robust public *debate*. In this sense, a public inquiry is likely to be more productive because it would involve an engagement *between* experts, rather than a consultation in which submissions are made *to* the

government without taking account of statements and submissions that others have made.

In the light of the above, the results of these consultations should help guide additional *expert* analysis by instances of the government of Canada created for that purpose.

> ***Recommendation****: The consultations should help focus the questions and issues raised by Chinese excess capacity in EVs. At the same time, the Government should consider harnessing the vast and deep expertise in its specialised institutions, to make sure that any measures do not unduly affect competition, productivity, and climate action.*

IV. The possible measures

The Deputy Minister and Minister of Finance, and the Minister of International Trade, set out measures that may be imposed following the consultations.[12] These include:

- a surtax on Chinese-origin EVs under section 53 of the *Customs Tariff*;
- adjustments to the federal Incentives for Zero-Emission Vehicles (iZEV) program, which offers point-of-sale incentives for consumers who buy or lease eligible zero-emission vehicles; and
- increased foreign investment restrictions.

Each of the first two measures may address, at least in part, concerns arising from Chinese EV excess capacity in that they could disincentivize consumers from purchasing them. Each also has the potential of giving rise to additional concerns that will be discussed below.

It is not clear in what way increased restrictions on foreign investments would address EV imports into Canada.

A. Section 53 of the *Customs Tariff*

The Government may impose a "surtax" on Chinese-origin EVs to "respond" to:

> *acts, policies or practices of the government of a country that adversely affect, or lead directly or indirectly to adverse effects on, trade in goods or services of Canada […]*

As a preliminary matter, it may be observed that under Article 23.2(a) of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (DSU) under the WTO, a Member may not make a "determination" to the effect that "any objective of the covered agreements has been impeded, *except through recourse to dispute settlement in accordance with the rules and procedures of this Understanding*. …" As a country whose national wealth is highly dependent on exports, Canada can ill afford a dilution of this important multilateral discipline.

More important, the principal reason for reconsidering a s. 53 approach is a question of procedure. In particular, the absence of one.

Canada's trade remedy framework is not just effective and responsive; it is also procedurally sound. As noted above, *engagement* between stakeholders and affected interests is a signal feature of democratic policy debate about complex social and economic phenomena. In addition, the trade remedy framework has defined review and revision timeframes. It has multiple pathways for addressing economic concerns – and for removal of the measures. The measures are calibrated to address the specific harm found to exist. There are public interest[13] considerations that may be taken into account in the calculation and imposition of measures. The review mechanisms, concepts, and approaches are tested and tried. Finally, because of the procedural safeguards, any measures imposed will be protected against political pressures.

B. Federal incentive adjustments

Adjusting the federal incentive gives rise to a significant risk of category error: are the incentives consumer- and climate-centric measures, or are they instruments of trade and industrial policy? In pure consumer and climate terms, how is Chinese state-supported excess capacity different from the panoply of "green" subsidies granted by the United States and the European Union to *their* EV producers and exporters? How are the adjustments to be calculated? Is there not a risk of double counting if the measures are imposed in tandem with s. 53 surtaxes?

We note in passing that direct producer subsidies – for example, to counteract Chinese excess capacity – benefit from international legal protection under the "producer subsidy" provisions of the GATT, whereas *incentive* adjustments risk attracting concerns under both the national treatment *and* most-favoured nation principles of the same agreement.

> ***Recommendation****: The proposed measures permit quick action by the Government outside the framework of procedural protections of Canada's trade remedy mechanism. Although expedient, they give rise to multiple avoidable challenges. The Government should consider enlarging the options available to it.*

V. Conclusion

We welcome both the Government's initiative in moving to tackle Chinese state-supported excess capacity *and* in launching these consultations. The Government will likely receive submissions demanding "Action NOW"; the Government should resist "back of the napkin" solutions to persistent and large-scale problems of national industrial policy and multilateral trade law and institutions. In particular, Canada's existing trade, industrial, and competition policy framework is adequate to the task. To ensure robust analysis, non-political decision-making, and effective procedural safeguards, measures in response to the identified concerns should be developed within existing mechanisms.

Footnotes

[1] See for example the report of the United States Trade Representative to Congress on Chinese Compliance with the WTO, February 2019, see also the U.S. submission to the WTO, "China's Trade-Disruptive Economic Model", (WT/GC/W/745) July 16, 2018, both of which cite the Chinese government's own analysis of the problem in: "Guiding Opinions of the State Council on Resolving the Conflict of Serious Overcapacity", Art. 1 (State Council, Guo Fa [2013], No. 41, issued October 6, 2013).

The European Union Chamber of Commerce in China issued its own study of the phenomenon in 2016: "Overcapacity in China: An Impediment to the Party's Reform Agenda", February 22, 2016.

[2] These range from traditional industries such as steel and aluminium, to silicon wafers, batteries, and solar. See in particular, Rhodium Group, "Overcapacity at the Gate", March 26, 2024.

[3] See William A. Galston, "The Populist Moment" (2017) 28:2 J Democracy 21, at p. 25; Michael Glanzel, "'Ripped off': China, the American Populist Right, and Geoeconomic Statecraft" (2023) 30:1 UC Davis J Int'l L & Pol'y 31, at p. 61; Eric A. Posner, "Liberal Internationalism and the Populist Backlash" (2017) 49 Special Issue Ariz St LJ 795, at p. 813; Italo Colantone & Piero Stanig, "The Trade Origins of Economic Nationalism: Import Competition and Voting Behavior in Western Europe" (Oct 2018) 62:4 Am J P Sci 936.

[4] See, for example, U.S. – Countervailing Measures (Article 21.5) (DS437): U.S. Statement in the DSB Meeting of August 15, 2019 (WT/DSB/M/433); U.S. – Carbon Steel (DS436): U.S. Statement in the DSB Meeting of December 19, 2014 (WT/DSB/M/354); U.S. – Anti-Dumping and Countervailing Duties (DS379): U.S. Statement in the DSB Meeting of March 25, 2011 (WT/DSB/M/294); and the report of the United States Trade Representative to Congress on Chinese Compliance with the WTO, February 2019, *ibid*, p. 23.

[5] See "Canada's Potential Policy Response" in "Consultations on potential policy responses to unfair Chinese trade practices in electric vehicles", last modified July 2, 2024.

[6] *Special Import Measures Act*, RSC 1985, c S-15 (*SIMA*); *Special Import Measures Regulations*, SOR/84-927 (*SIMR*).

[7] As established by the *Canadian International Trade Tribunal Act*, RSC 1985, c 47 (*CITT*), s. 3(1); see also Canadian International Trade Tribunal.

[8] *CITT*, s. 18.

[9] As established by the *Competition Act*, RSC 1985, c C-34 (*Competition Act*), s. 7(1); see also Competition Bureau Canada.

[10] *Competition Act*, s. 10.1.

[11] *Competition Act*, s. 125.

[12] "Consultations on potential policy responses to unfair Chinese trade practices in electric vehicles", last modified July 2, 2024.

[13] See *SIMA*, s. 45; *SIMR*, s. 40.1.

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