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## UNITED STATES – CERTAIN TAX CREDITS UNDER THE INFLATION REDUCTION ACT

### REQUEST FOR CONSULTATIONS BY CHINA

The following communication, dated 26 March 2024, from the delegation of China to the delegation of the United States, is circulated to the Dispute Settlement Body in accordance with Article 4.4 of the DSU.

1. My authorities have instructed me to request consultations with the Government of the United States of America ("US") pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXIII of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), Article 8 of the *Agreement on Trade-Related Investment Measures* ("TRIMs Agreement"), and Articles 4 and 30 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement") with respect to certain subsidy measures adopted by the United States that are contingent upon the use of domestic over imported goods or that otherwise discriminate against goods of Chinese origin.

2. Part I of this request for consultations identifies the measures at issue. Part II identifies the legal basis of the complaint. Annex 1 contains a statement of available evidence as required by Article 4.2 of the SCM Agreement.

#### I. MEASURES AT ISSUE

3. On 16 August 2022, the Inflation Reduction Act, P.L. 117-169, 136 Stat. 1818 ("IRA") was signed into law. The IRA may be the largest single subsidy measure in modern economic history. Official estimates of the climate-related subsidies provided under the IRA place their value at \$393 billion. Other independent studies have estimated that the value of these subsidies exceeds \$1 trillion.

4. While the subsidies provided under the IRA are massive and far-reaching in their economic effects, this request for consultations concerns only certain subsidies provided under the IRA that are contingent, in one way or another, upon the use of domestic over imported goods or that otherwise discriminate against goods of Chinese origin. These are: (1) the Clean Vehicle Credit;<sup>1</sup> (2) the Investment Tax Credit for Energy Property;<sup>2</sup> (3) the Clean Electricity Investment Tax Credit;<sup>3</sup> (4) the Production Tax Credit for Electricity from Renewables;<sup>4</sup> and (5) the Clean Electricity Production Tax Credit.<sup>5</sup>

<sup>1</sup> Section 13401 of the IRA, codified at 26 U.S.C. 30D. The subsidy programmes enumerated herein sometimes go by different names. The names used in this request for consultations are taken from *Building a Clean Energy Economy: A Guidebook to the Inflation Reduction Act's Investments in Clean Energy and Climate Action* (The White House, January 2023) (version 2), available at <http://www.cleanenergy.gov>.

<sup>2</sup> Section 13102 of the IRA, codified at 26 U.S.C. 48.

<sup>3</sup> Section 13702 of the IRA, codified at 26 U.S.C. 48E.

<sup>4</sup> Section 13101 of the IRA, codified at 26 U.S.C. 45.

<sup>5</sup> Section 13701 of the IRA, codified at 26 U.S.C. 45Y. The United States has previously notified the subsidies identified in this request for consultations. See United States, New and Full Notification Pursuant to Article XVI:1 of the GATT 1994 and Article 25 of the Agreement on Subsidies and Countervailing Measures

5. China strongly supports national and international efforts to reduce and mitigate the effects of climate change, including through the use of clean energy subsidies provided in accordance with the WTO Agreement. International trade in clean energy products, including the inputs to those products, can accelerate and reduce the costs of the clean energy transition when undertaken in accordance with the WTO Agreement. Non-prohibited, non-discriminatory subsidies have a role to play in this transition.

6. However, subsidies that violate the WTO Agreement, including subsidies that are contingent upon the use of domestic over imported goods or that otherwise discriminate against imported goods, remain prohibited and threaten to undermine international cooperation on reducing and mitigating the effects of climate change. The subsidies at issue in this request for consultations are of this type. They are discriminatory, protectionist, and contrary to WTO rules. They do nothing to advance the shared interest that all Members have in addressing climate change and are to be condemned.

#### A. The Clean Vehicle Credit

7. Section 13401 of the IRA establishes the Clean Vehicle Credit for qualifying electric vehicles ("EVs"). To qualify for the Clean Vehicle Credit, final assembly of the qualifying vehicle must take place in North America.<sup>6</sup> The North American assembly requirement is a condition for obtaining either or both of the two components of the Clean Vehicle Credit: (1) the critical minerals component, worth \$3,750 per vehicle; and (2) the battery component, worth an additional \$3,750 per vehicle.

8. To qualify for the \$3,750 critical minerals component of the Clean Vehicle Credit, a percentage of the value of applicable critical minerals contained in the vehicle battery must (i) be extracted or processed in the United States; (ii) be extracted or processed in a country with which the United States has a free trade agreement; or (iii) have been recycled in North America. Applicable percentages increase from 40 percent prior to 2024 to 80 percent after 2026.<sup>7</sup> Qualifying critical minerals include, *inter alia*, aluminium, cobalt, lithium, nickel, and graphite.

9. In addition, after calendar year 2024, a clean vehicle will not qualify for the critical minerals component of the Clean Vehicle Credit if it contains any critical minerals that were "extracted, processed, or recycled by a foreign entity of concern".<sup>8</sup> A "foreign entity of concern", or "FEOC", is defined to include, *inter alia*, a foreign entity that is "owned by, controlled by, or subject to the jurisdiction or direction of a government of a foreign country that is a covered nation...".<sup>9</sup> A "covered nation" includes the People's Republic of China.<sup>10</sup>

10. To qualify for the \$3,750 battery component of the Clean Vehicle Credit, a certain percentage of the value of the battery components in an EV must be manufactured or assembled in North America. Applicable percentages increase from 50 percent prior to 2024 to 100 percent after 2028.<sup>11</sup> In addition, after 31 December 2023, a vehicle does not qualify for the battery component

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(G/SCM/N/401/USA) (10 November 2023), parts 3.15 (renewable energy production credit), 3.16 (energy investment credit), 3.25 (clean vehicle credit).

<sup>6</sup> 26 U.S.C. 30D(d)(1)(G). The U.S. Internal Revenue Service has defined "North America" for this purpose as consisting of the 50 states of the United States, the District of Columbia, Puerto Rico, Canada, and Mexico. See Internal Revenue Service, Fact Sheet: "IRS updates frequently asked questions related to new, previously owned and qualified commercial clean vehicle credits" (March 2023), FS-2023-08, available at <https://www.irs.gov/pub/taxpros/fs-2023-08.pdf>. "Final assembly" is defined under the IRA to mean:

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 permanently installed in or on the vehicle.

26 U.S.C. 30D(d)(5).

<sup>7</sup> 26 U.S.C. 30D(e).

<sup>8</sup> 26 U.S.C. 30D(d)(7)(A).

<sup>9</sup> *Id.*, referring to 42 U.S.C. 18741(a)(5) for the definition of a "foreign entity of concern".

<sup>10</sup> 10 U.S.C. 2533c(d)(2), indirectly incorporated by reference into the IRA, defines the term "covered nation" to mean the Democratic People's Republic of North Korea, the People's Republic of China, the Russian Federation, and the Islamic Republic of Iran.

<sup>11</sup> 26 U.S.C. 30D(e)(2).

of the credit if any "components" contained in its battery are "manufactured or assembled by a foreign entity of concern" as specified above.<sup>12</sup>

## **B. Renewable Energy Tax Credits**

11. The IRA extends and modifies certain pre-existing investment tax credits ("ITCs") and production tax credits ("PTCs") for renewable energy projects. The ITCs provide tax subsidies for investments in eligible renewable energy projects while the PTCs provide tax subsidies for power generated from eligible renewable energy sources. The modified ITC and PTC tax credits include bonus subsidy elements that are contingent upon the use of domestic over imported goods.

12. The IRA has two related investment tax credits for renewable energy projects. The first, the Investment Tax Credit for Energy Property, is codified at 26 U.S.C. 48 and is available for eligible renewable energy projects for which construction begins prior to 1 January 2025. The second investment tax credit available under the IRA, the Clean Electricity Investment Tax Credit, is codified at 26 U.S.C. 48E and is available for eligible renewable energy projects placed in service after 31 December 2024. The base tax credit under both programmes is six percent of the qualified investment in the energy property.

13. The IRA also has two related production tax credits for energy produced from eligible renewable energy sources. The first, the Production Tax Credit for Electricity from Renewables, is codified at 26 U.S.C. 45 and is available over a 10-year period for energy produced from projects that begin construction prior to 1 January 2025. The second, the Clean Electricity Production Tax Credit, is codified at 26 U.S.C. 45Y and is available over a 10-year period for energy produced from projects placed in service after 31 December 2024. The base credit available under both programmes is \$0.03/kW, inflation adjusted.

14. The two ITC programmes and the two PTC programmes (hereinafter referred to collectively as the "Renewable Energy Tax Credits") contain bonus subsidy elements that are contingent upon the use of domestic over imported goods. For the ITC programmes, the amount of the tax credit is increased by 10 percentage points if the domestic content requirements are satisfied.<sup>13</sup> For the PTC programmes, the amount of the tax credit is increased by 10 percent if the domestic content requirements are satisfied.<sup>14</sup>

15. The domestic content requirements for the four Renewable Energy Tax Credits are the same. Specifically, the eligible project must use 100 percent domestic steel and iron for construction materials (the "Steel and Iron Requirement"). In addition, a certain percentage of the components incorporated into an eligible project must be produced in the United States (the "Manufactured Products Requirement"). The percentage of incorporated components that must be produced in the United States varies over time and also in relation to the type of renewable energy project.

## **C. Summary of Measures at Issue**

16. Taking into account the foregoing, the measures at issue include, *inter alia*:

- The Inflation Reduction Act, P.L. 117-169, 136 Stat. 1818;
- Internal Revenue Service, Section 30D New Clean Vehicle Credit, Proposed Rule, 88 FR 23370 (17 April 2023);
- Internal Revenue Service, Section 30D Excluded Entities, Proposed Rule, 88 FR 84098 (4 December 2023);
- Department of Energy, Interpretation of Foreign Entity of Concern, Proposed Rule, 88 FR 84082 (4 December 2023);

<sup>12</sup> 26 U.S.C. 30D(d)(7)(B).

<sup>13</sup> 26 U.S.C. 48(a)(12); 26 U.S.C. 48E(a)(3)(B). The domestic content bonus is reduced to two percent if certain other conditions relating to wage and apprenticeship requirements are not satisfied.

<sup>14</sup> 26 U.S.C. 45(b)(9); 26 U.S.C. 45Y(g)(11).

- Internal Revenue Service, Definition of Energy Property and Rules Applicable to the Energy Credit, 88 FR 82188 (22 November 2023);
- Internal Revenue Service, Domestic Content Bonus Credit Guidance under Sections 45, 45Y, 48, and 48E (12 May 2023) (Notice 2023-38).

17. The measures at issue include any amendments, supplements, or extensions to the measures specified above, as well as any replacement or implementing measures. Without prejudice to the generality of the foregoing, the measures at issue include any proposed regulations, final regulations, frequently asked questions, or other forms of administrative interpretation or guidance relating to the Clean Vehicle Credit or the Renewable Energy Tax Credits.

## II. LEGAL BASIS OF THE COMPLAINT

18. China is concerned that the measures described above are inconsistent with the United States' obligations under multiple provisions of the covered agreements.

19. China considers that the Clean Vehicle Credit is inconsistent with the following provisions of the covered agreements:

- Article I:1 of the GATT 1994, because by conditioning eligibility for the Clean Vehicle Credit on the North American assembly requirement, the critical minerals requirement, and the battery requirement (whether these three requirements are viewed separately or in any combination), and also by restricting eligibility for the Clean Vehicle Credit in the case of vehicles incorporating critical minerals and battery components produced by so-called "foreign entities of concern", the United States does not accord to products of Chinese origin immediately and unconditionally the same advantages, favours, privileges, or immunities in respect of matters referred to in paragraph III:4 of the GATT 1994 that the United States accords to like products originating in the territory of other countries.
- Article III:4 of the GATT 1994, because by conditioning eligibility for the Clean Vehicle Credit on the North American assembly requirement, the critical minerals requirement, and the battery requirement (whether these three requirements are viewed separately or in any combination), and also by restricting eligibility for the Clean Vehicle Credit in the case of vehicles incorporating critical minerals and battery components produced by so-called "foreign entities of concern", the United States does not accord to products of Chinese origin treatment no less favourable than the treatment accorded to like products of national origin in respect of laws, regulations, and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of the affected products.
- Article 2.1 of the TRIMs Agreement, because the measures at issue appear to be investment measures related to trade in goods that are inconsistent with Article III:4 of the GATT 1994.
- Article 2.2 of the TRIMs Agreement, because the measures at issue appear to be investment measures related to trade in goods, compliance with which is necessary to obtain an advantage, and which require the purchase or use by an enterprise of products of U.S. origin or from any U.S. source, as provided for in paragraph 1(a) of the Annex to the TRIMs Agreement.
- Articles 3.1(b) and 3.2 of the SCM Agreement, because the Clean Vehicle Credit is a subsidy contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

20. China considers that the Renewable Energy Tax Credits are inconsistent with the following provisions of the covered agreements:

- Article III:4 of the GATT 1994, because by conditioning eligibility for bonus subsidy amounts on the use of U.S.-origin goods, the United States does not accord to products of Chinese origin treatment no less favourable than the treatment accorded to like products of national origin in respect of laws, regulations, and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of the affected products.

- Article 2.1 of the TRIMs Agreement, because the measures at issue appear to be investment measures related to trade in goods that are inconsistent with Article III:4 of the GATT 1994.
- Article 2.2 of the TRIMs Agreement, because the measures at issue appear to be investment measures related to trade in goods, compliance with which is necessary to obtain an advantage, and which require the purchase or use by an enterprise of products of U.S. origin or from any U.S. source, as provided for in paragraph 1(a) of the Annex to the TRIMs Agreement.
- Articles 3.1(b) and 3.2 of the SCM Agreement, because the bonus subsidy amounts available for the Renewable Energy Tax Credits are subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods.

21. In addition, and as a consequence of the foregoing, the measures at issue appear to nullify or impair benefits accruing to China, directly or indirectly, under the cited agreements.

22. China reserves the right to raise additional measures and claims regarding the matters identified herein during the course of consultations and in any future request for the establishment of a panel.

23. China looks forward to receiving the reply of the Government of the United States to this request and to setting a mutually convenient date for consultations.

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**Annex 1****Statement of Available Evidence Under Article 4.2 of the SCM Agreement**

For purposes of Article 4.2 of the SCM Agreement, China sets out below evidence available to it at this time regarding the existence and nature of the subsidies subject to this request for consultations. China reserves its right to supplement or alter this list in the future as required:

- The Inflation Reduction Act, P.L. 117-169, 136 Stat. 1818.
- Internal Revenue Service, Section 30D New Clean Vehicle Credit, Proposed Rule, 88 FR 23370 (17 April 2023).
- Department of the Treasury and Internal Revenue Service, Section 30D Excluded Entities, Proposed Rule, 88 FR 84098 (4 December 2023).
- Department of Energy, Interpretation of Foreign Entity of Concern, Proposed Rule, 88 FR 84082 (4 December 2023).
- Internal Revenue Service, Definition of Energy Property and Rules Applicable to the Energy Credit, 88 FR 82188 (22 November 2023).
- Internal Revenue Service, Domestic Content Bonus Credit Guidance under Sections 45, 45Y, 48, and 48E (12 May 2023) (Notice 2023-38).
- Buy America Requirements, 49 CFR Part 661.
- Infrastructure Investment and Jobs Act, P. L. 117-58, 135 Stat. 429.
- White House, "Clean Energy Tax Provisions in the Inflation Reduction Act" (21 September 2023).
- White House, "Inflation Reduction Act Guidebook" (January 2023).
- White House, "Fact Sheet: One Year In, President Biden's Inflation Reduction Act" (16 August 2023).
- White House, "President Joe Biden: Investing in America".
- White House, "Fact Sheet: President Biden's Economic Plan Drives America's Electric Vehicle Manufacturing Boom" (14 September 2022).
- White House, "Treasury, DOE Release Proposed Guidance to Strengthen Domestic Supply Chains for Batteries and Electric Vehicles, Ensure the U.S. Leads the Clean Vehicle Future" (1 December 2023).
- Senate Democrats, "2023 Has Been a Historic Year for American Manufacturing Thanks to Democrats' Inflation Reduction Act" (21 December 2023).
- U.S. Internal Revenue Service, Fact Sheet: "Frequently asked questions related to new, previously owned and qualified commercial clean vehicle credits" (December 2023), FS-2023-29. See *also* all previous updates to FAQs.
- U.S. Internal Revenue Service, "Notice 2022-49, Request for Comments on Certain Energy Generation Incentives" (5 October 2022).
- U.S. Internal Revenue Service, "Credits for New Electric Vehicles Purchased in 2022 or Before" (2022).

- U.S. Internal Revenue Service, "Credits and deductions under the Inflation Reduction Act of 2022" (2022).
- U.S. Internal Revenue Service, "Treasury, IRS provide guidance for those who manufacture new clean vehicles" (1 December 2023).
- U.S. Department of the Treasury, "Treasury Department Releases Guidance to Boost American Clean Energy Manufacturing" (12 May 2023).
- U.S. Department of the Treasury, "Fact Sheet: Treasury, IRS Open Public Comment on Implementing the Inflation Reduction Act's Clean Energy Tax Incentives".
- U.S. Department of the Treasury, "Treasury Releases Initial Information on Electric Vehicle Tax Credit Under Newly Enacted Inflation Reduction Act" (16 August 2022).
- U.S. Department of the Treasury, "Frequently Asked Questions on the Inflation Reduction Act's Initial Changes to the Electric Vehicle Tax Credit".
- U.S. Department of the Treasury, "Treasury Releases Proposed Guidance to Continue U.S. Manufacturing Boom in Batteries and Clean Vehicles, Strengthen Energy Security" (1 December 2023).
- U.S. Department of the Treasury and U.S. Internal Revenue Service, "Procedures for Manufacturers, Sellers of Clean Vehicles", Rev. Proc. 2022-42.
- U.S. Department of the Treasury and U.S. Internal Revenue Service, "Submission of Information to IRS by Qualified Manufacturers of Clean Vehicles, Previously-Owned Clean Vehicles, and Commercial Clean Vehicles", Rev. Proc. 2023-38.
- U.S. Department of Energy, "Federal Tax Credits for Plug-in Electric and Fuel Cell Electric Vehicles Purchased in 2023 or After" (2023).
- U.S. Department of Energy, "Electric Vehicles with Final Assembly in North America".
- U.S. Department of Energy, "Department of Energy Releases Proposed Interpretative Guidance on Foreign Entity of Concern for Public Comment" (1 December 2023).
- U.S. Environmental Protection Agency, "Summary of Inflation Reduction Act provisions related to renewable energy".
- U.S. Department of Transportation, Federal Transit Administration, "Categorization of Components of Renewable Energy Projects".
- U.S. Department of Transportation, National Highway Traffic Safety Administration, "VIN Decoder to Identify a Vehicle's Plant of Manufacture".
- Other instruments through which the United States implements and administers the measures at issue, including statements and presentations made by Government officials, forms, letters or other documents making requests, communicating decisions or imparting instructions addressed by U.S. governmental agencies involving the measures in issue.

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