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EUROPEAN UNION – DEFINITIVE COUNTERVAILING DUTIES ON NEW BATTERY ELECTRIC VEHICLES FROM CHINA

REQUEST FOR CONSULTATIONS BY CHINA

The following communication, dated 4 November 2024, from the delegation of China to the delegation of the European Union, is circulated to the Dispute Settlement Body in accordance with Article 4.4 of the DSU.

My authorities have instructed me to request consultations with the European Union ("EU") pursuant to Articles 1 and 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article 30 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement"), and Article XXIII of the General Agreement on Tariffs and Trade 1994 ("GATT 1994"), concerning the EU's imposition of countervailing duties on New Battery Electric Vehicles ("BEVs") from the People's Republic of China ("China").

The measures at issue are the definitive countervailing duties on BEVs from China, as well as the underlying investigation that led to the imposition of these measures (hereafter "countervailing measures"), which include, *inter alia*, the actions taken or omitted by the European Commission during the course of – or in relation to – the investigation. This request also covers any future action or measures that the EU may take in connection with these measures.

These countervailing measures include, but are not limited to, and are evidenced by the following instruments and/or documents:

- Commission Implementing Regulation (EU) 2024/2754 of 29 October 2024 imposing a definitive countervailing duty on imports of new battery electric vehicles designed for the transport of persons originating in the People's Republic of China ("Definitive Countervailing Regulation");

- Commission Implementing Regulation (EU) 2024/1866 of 3 July 2024 imposing a provisional countervailing duty on imports of new battery electric vehicles designed for the transport of persons originating in the People's Republic of China ("Provisional Countervailing Regulation"); and

- Notice of initiation of 4 October 2023 of an anti-subsidy proceeding concerning imports of new battery electric vehicles designed for the transport of persons originating in the People's Republic of China.

With respect to the countervailing measures, China is concerned that the following elements of the Definitive Countervailing Regulation, the Provisional Countervailing Regulation, the Notice of initiation and the investigation leading to the imposition of these measures, appear to be inconsistent with the SCM Agreement and the GATT 1994:

1. Substantive inconsistencies:

Alleged Preferential Financing

a. The EU's determination that the alleged preferential financing constituted a countervailable subsidy in particular, but not limited to:

- The EU's determination that financial institutions in China – including banks – are/acted as public bodies within the meaning of Article 1.1(a)(1) of the SCM Agreement;
- The EU's determination that financial institutions in China – including banks – acted as private bodies entrusted or directed by the Government of China within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement;
- The EU's determination of the existence of a financial contribution within the meaning of Article 1.1(a)(1) of the SCM Agreement;
- The EU's determination that the alleged preferential financing conferred a benefit on the Chinese BEV exporting producers and the EU's calculation of the amount of the alleged benefit by, *inter alia,* resorting to out-of-country benchmarks and using benchmarks that did not reflect the prevailing market conditions in China, contrary to Articles 1.1(b), 10, 14, 19.1, 19.3, 19.4, 21.1 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994;
- The EU's decision to countervail the alleged preferential financing without demonstrating specificity in accordance with Articles 1.2, 2.1 and 2.2 of the SCM Agreement on the basis of positive evidence, as required by Article 2.4 of the SCM Agreement;

Alleged Provision of Inputs at Less Than Adequate Remuneration ("LTAR")

b. The EU's determination that the alleged provision of inputs (batteries and lithium iron phosphate ("LFP")) at LTAR constituted a countervailable subsidy in particular, but not limited to:

- The EU's determination that input suppliers and industry associations in China are/acted as public bodies within the meaning of Article 1.1(a)(1) of the SCM Agreement;
- The EU's determination that input suppliers and industry associations in China acted as private bodies entrusted or directed by the Government of China within the meaning of Article 1.1(a)(1)(iv) of the SCM Agreement;
- The EU's determination of the existence of a financial contribution within the meaning of Article 1.1(a)(1) of the SCM Agreement;
- The EU's determination that the alleged provision of inputs (batteries and LFP) conferred a benefit on the Chinese BEV exporting producers, and the EU's calculation of the amount of the alleged benefit by, *inter alia*, resorting to out-of-country benchmarks and using benchmarks that did not reflect the prevailing market conditions for the goods in question in China, contrary to Articles 1.1(b), 10, 14, 19.1, 19.3, 19.4, 21.1 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994;
- The EU's decision to countervail the alleged provision of inputs (batteries and LFP) at LTAR without demonstrating specificity in accordance with Articles 1.2, 2.1 and 2.2 of the SCM Agreement on the basis of positive evidence, as required by Article 2.4 of the SCM Agreement;

Alleged Provision of Land-Use Rights ("LURs") at LTAR

c. The EU's determination that the alleged provision of LURs at LTAR constituted a countervailable subsidy in particular, but not limited to:

- The EU's determination that the alleged provision of LURs at LTAR resulted in a financial contribution within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement;

- The EU's determination that the alleged provision of LURs conferred a benefit on the Chinese BEV exporting producers, and the EU's calculation of the amount of the alleged benefit by using a benchmark which did not reflect the prevailing market conditions, contrary to Articles 1.1(b), 10, 14, 19.1, 19.3, 19.4, 21.1 and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994;

- The EU's decision to countervail the alleged provision of LURs at LTAR without demonstrating specificity in accordance with Articles 1.2, 2.1 and 2.2 of the SCM Agreement on the basis of positive evidence, as required by Article 2.4 of the SCM Agreement;

Fiscal Subsidy Policy for the Promotion and Application of New Energy Vehicles ("Fiscal Subsidy Policy")

d. The EU's determination that the Fiscal Subsidy Policy – which had expired at the start of the investigation period ("IP") – resulted in a countervailable subsidy in particular, but not limited to:

- The EU's determination of the existence of a financial contribution in the form of a direct transfer of funds within the meaning of Article 1.1(a)(1) of the SCM Agreement;

- The EU's determination of a benefit to the Chinese BEV exporting producers, as well as the EU's calculation of the amount of the alleged benefit, contrary to Articles 1.1(b), 10, 14, 19.1, 19.3, 19.4, 21.1, and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994;

- The EU's decision to countervail an alleged subsidy supposedly resulting from the Fiscal Subsidy Policy which had ceased to exist at the start of the IP, in violation of Articles 19.1, 19.3, 19.4, and 21.1 of the SCM Agreement and Article VI:3 of the GATT 1994;

Alleged Grants

e. The EU's determination that the alleged grants constituted a countervailable subsidy in particular, but not limited to:

- The EU's determination that the alleged grants amounted to a financial contribution within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement;

- The EU's determination that the alleged grants conferred a benefit on the Chinese BEV exporting producers, and the EU's calculation of the alleged benefit, contrary to Articles 1.1(b), 10, 14, 19.1, 19.3, 19.4, 21.1, and 32.1 of the SCM Agreement and Article VI:3 of the GATT 1994;

- The EU's decision to countervail the alleged grants without establishing specificity in accordance with Articles 1.2, 2.1 and 2.2 of the SCM Agreement on the basis of positive evidence, as required by Article 2.4 of the SCM Agreement;

Alleged Revenue Foregone

f. The EU's determination that the alleged revenue foregone, through the alleged tax exemption and tax reduction schemes, constituted a countervailable subsidy in particular, but not limited to:

- The EU's determination that the alleged tax exemption and tax reduction schemes resulted in a financial contribution within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement and/or constituted an export subsidy within the meaning of Article 3.1(a) of the SCM Agreement;

- The EU's determination that the alleged revenue foregone conferred a benefit on the Chinese BEV exporting producers, and the EU's calculation of the alleged benefit, contrary to Articles 1.1(b), 10, 14, 19.1, 19.3, 19.4, 21.1, and 32.1 of the SCM Agreement and Article VI:3 GATT 1994;

- The EU's decision to countervail the alleged revenue foregone without the demonstration of specificity within the meaning of Articles 1.2, 2.1, and 2.2 of the SCM Agreement on the basis of positive evidence, as required by Article 2.4 of the SCM Agreement;

Sampling of the Chinese BEV Exporting Producers

g. The EU's failure to establish the sample of the Chinese BEV exporting producers on the basis of a statistically valid sample, or on the basis of the largest percentage of the volume of the exports which could have been reasonably investigated,[1] and the non-inclusion of Tesla (Shanghai) Co. Ltd. in that sample which resulted in, *inter alia*, the EU's failure to analyze the volume and price effects of the allegedly subsidized imports on the basis of positive evidence and an objective examination, in violation of Article 15.1 of the SCM Agreement;

Domestic Industry

h. The EU's failure to define the domestic (EU) industry consistently with Article 16.1 of the SCM Agreement, *inter alia*, because the EU failed to exclude from the scope of the domestic industry, the domestic (EU) producers that were related to Chinese BEV producers and imported the allegedly subsidized product in significant volumes. The self-imports by these domestic (EU) producers constituted the majority of the EU imports of the allegedly subsidized products, and were nevertheless taken into account in the assessment of the alleged threat of injury;

Existence of a Threat of Injury and Causal Link

i. The EU's determination of a threat of injury to the domestic (EU) industry on account of the allegedly subsidized imports:

- The EU's consideration of the volume of the allegedly subsidized imports and their prices, and the effect of these imports on the prices in the domestic (EU) market for like products was not based on an objective examination of positive evidence and is inconsistent with Articles 15.1 and 15.2 of the SCM Agreement. The EU failed to, *inter alia*, exclude or separately consider the volume and price effects of the self-imports of the domestic (EU) industry;

[1] China considers that the sampling of the Chinese BEV exporting producers was inconsistent with the EU's obligation to select a sample of exporters or producers and to determine, among others, the alleged injury, either by using a statistically valid sample on the basis of the information available to the EU at the time of selecting the sample, or on the basis of the largest percentage of the volume of exports from China which could reasonably be investigated. China refers in this regard to Article 6.10 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ("ADA"). China notes that, pursuant to the *Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures*, disputes arising from anti-dumping and countervailing duty measures need to be resolved in a consistent manner.

undertake a segmented analysis of the volume and prices of the allegedly subsidized imports; ensure price comparability when examining the price effects of the allegedly subsidized imports on the domestic (EU) industry's prices; properly analyze alleged price undercutting and price suppression; and include the exports of Tesla (Shanghai) Co. Ltd. in the consideration of the price effects of the allegedly subsidized imports;

- The EU's failure to undertake an objective examination, on the basis of positive evidence, of the impact of the allegedly subsidized imports on the domestic (EU) industry, and to adequately consider all factors having a bearing on the state of the domestic industry, is inconsistent with Articles 15.1, 15.4, 15.7 and 15.8 of the SCM Agreement. Among others, there were errors and omissions in the EU's evaluation of the economic factors having a bearing on the state of the domestic (EU) industry; and the EU failed to establish that the allegedly subsidized imports were the explanatory force for the situation of the domestic industry. The EU's evaluation did not provide a proper basis for its determination that there was a threat of material injury to the domestic (EU) industry on account of the allegedly subsidized imports;

- The EU's determination of a threat of injury to the domestic (EU) industry was not based on positive evidence and an objective examination of facts, and is inconsistent with Articles 15.1, 15.2, 15.4, 15.7, and 15.8 of the SCM Agreement. The EU failed to, *inter alia*, undertake an objective examination of the factors listed in Article 15.7 of the SCM Agreement, and relied on "allegation, conjecture [and] remote possibility" that conflicted with the record evidence; establish that a change in circumstances that would create a situation in which the subsidy would cause injury was clearly foreseen and imminent; and establish that unless protective action is taken injury would materialize;

- The EU's failure to undertake an objective examination, based on positive evidence, of the causal link between the allegedly subsidized imports and the threat of injury to the domestic (EU) industry; and of other known factors, such as the lack of competitiveness and high production costs of the domestic (EU) industry, the impact of self-imports and intra-EU industry competition as well as the EU's failure to ensure that the threat of injury to the domestic (EU) industry caused by those other factors was not attributed to the allegedly subsidized imports is inconsistent with Articles 15.1, 15.5, 15.7 and 15.8 of the SCM Agreement.

2. Procedural inconsistencies:

a. The EU's failure to demonstrate the existence of special circumstances and sufficient evidence regarding the existence of alleged subsidization, injury and a causal link, to justify the *ex officio* initiation of the investigation, in violation of Articles 11.2, 11.3 and 11.6 of the SCM Agreement;

b. The EU's failure to hold good faith consultations with the Government of China before initiating the investigation, in violation of Articles 13.1 and 13.4 of the SCM Agreement;

c. The EU's expansion of the scope of the investigation (post-initiation) by, *inter alia*, the investigation of new alleged subsidies, contrary to Articles 10, 11.2, 11.3, 11.6, and 13.1 of the SCM Agreement;

d. The EU's expansion of the product scope of the investigation (post-initiation), contrary to Articles 10, 11.1, 11.2(ii), 12.1, 12.3, 15.1 and footnote 46 thereto of the SCM Agreement;

e. The EU's decision to require the Government of China to conduct a part of the EU's investigation on behalf of the EU (in particular, by requiring the Government of

China to discharge the responsibilities of notification and fact-finding), contrary to Articles 10 and 12 of the SCM Agreement;

f. The EU's decision to resort to facts available with respect to, *inter alia*, the Chinese BEV exporting producers, the Government of China, input suppliers, the industry associations and financial institutions among others, without any legal basis; and the EU's selection of facts that did not reasonably replace the allegedly missing information, in violation of Articles 12.1 and 12.7 of the SCM Agreement;

g. The EU's failure to provide all necessary information – that was not confidential – to the Chinese BEV exporting producers and the Government of China, in a timely fashion, which was relevant to the presentation of their cases, and as a result, to provide them ample opportunity to present evidence in writing, in violation of Articles 12.1, 12.1.2, 12.3 and 12.4 of the SCM Agreement;

h. The EU's failure to provide the Chinese BEV exporting producers and the Government of China ample opportunity for providing in writing all evidence they considered relevant, *inter alia*, by denying legitimate and well reasoned requests for deadline extensions, in violation of Articles 12.1, 12.1.1, 12.3, and 12.11 of the SCM Agreement;

i. The EU's grant of excessive confidentiality to the information and data of the domestic (EU) industry, in the absence of a determination of 'good cause', and the EU's failure to ensure the provision of sufficiently detailed non-confidential summaries of the allegedly confidential information by the domestic (EU) industry, in violation of Articles 12.4 and 12.4.1 of the SCM Agreement;

j. The EU's failure to ensure the accuracy of the information relied upon by it during the course of the investigation, as required by Article 12.5 of the SCM Agreement;

k. The EU's failure to inform the Government of China and all other interested parties of the essential facts under consideration, as required by Article 12.8 of the SCM Agreement;

l. The EU's failure to provide, during the investigation and in the public notice of the measures, in sufficient detail the findings and conclusions reached on all matters of fact and law considered material, all relevant information on the matters of fact and law and reasons which led to the imposition of the measures, and reasons for the acceptance or rejection of arguments and claims raised by interested parties and the Government of China, as required by Articles 22.3 and 22.5 of the SCM Agreement;

m. The EU's calculation of the duty rate for the non-sampled cooperating Chinese BEV exporting producers in violation of Articles 12.7, 19.1, 19.3, 19.4 and 21.1 of the SCM Agreement as well as Article VI:3 of the GATT 1994 as that duty rate was based on incorrectly calculated subsidy margins of the sampled Chinese BEV exporting producers and because the EU, *inter alia,* failed to take into account the subsidy margin of Tesla (Shanghai) Co. Ltd. for the purpose of the calculation and failed to exclude the portions of the subsidy margins based on varying degrees of facts available.

Accordingly, the EU's imposition of countervailing measures on the imports of BEVs from China also appears inconsistent with Article VI:3 of the GATT 1994 and Articles 10, 19, and 32.1 of the SCM Agreement. As a result of these above inconsistencies, the EU's measures also appear to nullify or impair the benefits accruing to China, directly or indirectly, under the covered agreements.

The present consultations request concerns the countervailing measures at issue and any amendments, re-opening or correction of such measures. China reserves the right to address additional measures and claims under other provisions of the covered agreements regarding the above matters during the consultations and in any subsequent request for the establishment of a panel.

China looks forward to receiving the EU's reply to this request and to finding a mutually convenient date and place for the consultations.