



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

REPORT OF THE PANEL

Addendum

This *addendum* contains Annexes A to C to the Report of the Panel to be found in documents WT/DS623/R.

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ANNEX A

WORKING PROCEDURES OF THE PANEL

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ANNEX A-1

WORKING PROCEDURES OF THE PANEL

Adopted on 20 January 2025

General

1. (1) In this proceeding, the Panel shall follow the relevant provisions of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). In addition, the following Working Procedures apply.

(2) The Panel reserves the right to modify these Working Procedures and adopt additional procedures as necessary, after consultation with the parties.

Confidentiality

2. (1) The deliberations of the Panel and the documents submitted to it shall be kept confidential. Members shall treat as confidential information submitted to the Panel that the submitting Member has designated as confidential.

(2) In accordance with the DSU, nothing in these Working Procedures shall preclude a party or third party from disclosing statements of its own positions to the public.

(3) If a party submits a confidential version of its written submissions to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submissions that could be disclosed to the public. A party should endeavour to promptly provide a non-confidential summary to any Member requesting it, and if possible within 10 days of receiving the request.

(4) Upon request, the Panel may adopt appropriate additional procedures for the treatment and handling of confidential information after consultation with the parties.

Submissions

3. (1) Before the first substantive meeting of the Panel with the parties, each party shall submit a written submission in which it presents the facts of the case and its arguments, in accordance with the timetable adopted by the Panel.

(2) Each party shall also submit to the Panel, before the second substantive meeting of the Panel with the parties, a written rebuttal, in accordance with the timetable adopted by the Panel.

(3) Each third party that chooses to make a written submission before the first substantive meeting of the Panel with the parties shall do so in accordance with the timetable adopted by the Panel.

(4) The Panel may invite the parties or third parties to make additional submissions during the proceeding, including with respect to requests for preliminary rulings in accordance with paragraph 4 below.

(5) Each party is encouraged to be succinct in its submissions in the interest of efficient dispute settlement.

Preliminary rulings

4. (1) If the United States considers that the Panel should make a ruling before the issuance of the Report that certain measures or claims in the panel request or the complainant's first

written submission are not properly before the Panel, the following procedure applies. Exceptions to this procedure shall be granted upon a showing of good cause.

- a. The United States shall submit any such request for a preliminary ruling at the earliest possible opportunity and in any event no later than in its first written submission to the Panel. China shall submit its response to the request before the first substantive meeting of the Panel, at a time to be determined by the Panel in light of the request.
- b. The Panel may issue a preliminary ruling on the issues raised before, during or after the first substantive meeting, or the Panel may defer any ruling until it issues its Report.
- c. If the Panel finds it appropriate to issue a preliminary ruling before the issuance of its Report, the Panel may provide reasons for the ruling at the time that the ruling is made, or subsequently in its Report.
- d. Any request for such a preliminary ruling by the respondent before the first meeting, and any subsequent submissions of the parties in relation thereto before the first meeting, shall be served on the third parties. The Panel may provide the third parties with an opportunity to provide comments on any such request, either in their written submission, as provided for in the timetable, or in a separate submission. Any preliminary ruling issued by the Panel before the first substantive meeting on whether certain measures or claims are properly before the Panel shall be shared with the third parties.

(2) This procedure is without prejudice to the parties' right to request other types of preliminary or procedural rulings during the proceeding, and to the procedures that the Panel may follow with respect to such requests.

Evidence

5. (1) Each party shall submit all evidence to the Panel no later than during the first substantive meeting, except evidence necessary for purposes of rebuttal, or evidence necessary for responses to questions or comments on responses provided by the other party. Additional exceptions may be granted upon a showing of good cause.

(2) If any new evidence has been admitted upon a showing of good cause, the Panel shall accord the other party an appropriate period of time to comment on the new evidence submitted.
6. (1) If the original language of an exhibit or portion thereof is not a WTO working language, the submitting party or third party shall simultaneously submit a translation of the exhibit or relevant portion into the WTO working language of the submission. The Panel may grant reasonable extensions of time for the translation of exhibits upon a showing of good cause.

(2) Any objection as to the accuracy of a translation should be raised promptly in writing, preferably no later than the next submission or meeting (whichever occurs earlier) following the submission that contains the translation in question. Any objection shall be accompanied by an explanation of the grounds for the objection and an alternative translation.
7. (1) To facilitate the maintenance of the record of the dispute and maximize the clarity of submissions, each party and third party shall sequentially number its exhibits throughout the course of the dispute, indicating the submitting Member and the number of each exhibit on its cover page. Exhibits submitted by China should be numbered CHN-1, CHN-2, etc. Exhibits submitted by the United States should be numbered USA-1, USA-2, etc. If the last exhibit in connection with a submission was numbered CHN-5, the first exhibit in connection with the next submission thus would be numbered CHN-6. If a party withdraws an exhibit or leaves one or more exhibits intentionally blank, it should indicate "exhibit withdrawn" or "exhibit intentionally left blank" on the cover page that contains the number of the exhibit concerned.

(2) Each party shall provide an updated list of exhibits (in Word or Excel format) together with each of its submissions, oral statements, and responses to questions.

(3) If a party submits a document that has already been submitted as an exhibit by the other party, it should explain why it is submitting that document again.

(4) If a party includes a hyperlink to the content of a website in a submission and intends that the cited content form part of the official record, the cited content of the website shall be provided in the form of an exhibit along with an indication of the date that it was accessed.

Editorial Guide

8. In order to facilitate the work of the Panel, each party and third party is invited to make its submissions in accordance with the Editorial Guide (which is available in the Help & Resources section of the Disputes Online Registry Application (DORA)).

Questions

9. The Panel may pose questions to the parties and third parties at any time, including:
- a. Before any meeting, the Panel may send written questions, or a list of topics it intends to pursue in questioning orally during a meeting. The Panel may ask different or additional questions at the meeting.
 - b. The Panel may put questions to the parties and third parties orally during a meeting, and in writing following the meeting, as provided for in paragraphs 15 and 21 below.

Substantive meetings

10. The Panel shall meet in closed session.
11. The parties and third parties shall be present at the meetings only when invited by the Panel to appear before it. As a general matter, the Panel intends to conduct such meetings in person but may provide for remote participation as appropriate.
12. (1) Each party has the right to determine the composition of its own delegation when meeting with the Panel.
- (2) Each party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and of the submissions of the parties and third parties.
13. Each party shall provide the list of members of its delegation who will attend the meeting no later than 5:00 p.m. (Geneva time) three working days before the first day of each meeting with the Panel.
14. A request by a party for interpretation from one WTO working language to another should be made to the Panel as early as possible, preferably at the organizational stage, to allow sufficient time to ensure availability of interpreters.
15. The first substantive meeting of the Panel with the parties shall be conducted as follows:
- a. The Panel shall invite China to make an opening statement to present its case first. Subsequently, the Panel shall invite the United States to present its opening statement. Before each party takes the floor, it shall provide the Panel and other participants at the meeting with a provisional written version of its statement. If interpretation is needed, each party shall provide additional copies for the interpreters before taking the floor.
 - b. Each party should limit the duration of its opening statement to not more than [75] minutes. If either party considers that it requires more time for its opening statement, it should inform the Panel and the other party at least seven working days before the

meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to the other party.

- c. After the conclusion of the opening statements, the Panel shall give each party the opportunity to make comments or ask the other party questions.
 - d. The Panel may subsequently pose questions to the parties.
 - e. Once the questioning has concluded, the Panel shall afford each party an opportunity to present a brief closing statement, with China presenting its statement first. Before each party takes the floor, it should provide the Panel and other participants at the meeting with a provisional written version of its closing statement, if available.
 - f. Following the meeting:
 - i. Each party shall submit a final written version of its opening statement as delivered no later than 5:00 p.m. (Geneva time) on the first working day following the meeting. At the same time, each party should also submit a final written version of any prepared closing statement that it delivered at the meeting of the Panel with the parties.
 - ii. Each party shall send in writing, within the timeframe confirmed by the Panel before the end of the meeting, any questions to the other party to which it wishes to receive a response in writing.
 - iii. The Panel shall send in writing, within the timeframe confirmed by the Panel before the end of the meeting, any questions to the parties to which it wishes to receive a response in writing.
 - iv. Each party shall respond in writing to the questions from the Panel, and to any questions posed by the other party, within the time-frame established by the Panel.
16. The second substantive meeting of the Panel with the parties shall be conducted in the same manner as the first substantive meeting with the Panel, except that the United States shall be given the opportunity to present its oral statement first. The party that presented its opening statement first shall present its closing statement first.

Third-party session

17. Each third party may present its views orally during a session of the first substantive meeting with the parties set aside for that purpose.
18. Each third party shall indicate to the Panel whether it intends to make an oral statement during the third-party session three weeks before this session.
19. (1) Each third party has the right to determine the composition of its own delegation when meeting with the Panel.
- (2) Each third party shall have the responsibility for all members of its delegation and shall ensure that each member of its delegation acts in accordance with the DSU and these Working Procedures, particularly with regard to the confidentiality of the proceeding and of the submissions of the parties and third parties.
- (3) Each third party shall provide the list of members of its delegation who will attend the third-party session no later than 5:00 p.m. (Geneva time) three working days before the third-party session.
20. To ensure the availability of interpreters, the third parties shall also indicate at least three weeks before the third-party session whether they intend to make their statement in a WTO working language other than English and whether they require interpretation from English to any other WTO working language.

21. The third-party session shall be conducted as follows:
- a. All parties and third parties may be present during the entirety of this session.
 - b. The Panel shall first hear the oral statements of the third parties, who shall speak in alphabetical order. Each third party making an oral statement at the third-party session shall provide the Panel and other participants at the session with a provisional written version of its statement before it takes the floor. If interpretation of a third party's oral statement is needed, that third party shall provide additional copies for the interpreters before taking the floor.
 - c. Each third party should limit the duration of its statement to 15 minutes. If a third party considers that it requires more time for its oral statement, it should inform the Panel and the parties at least seven working days before the meeting, together with an estimate of the expected duration of its statement. The Panel will accord equal time to all third parties for their statements.
 - d. After the third parties have made their statements, the parties shall be given the opportunity to pose questions to any third party for clarification on any matter raised in that third party's submission or statement.
 - e. The Panel may subsequently pose questions to any third party.
 - f. Following the third-party session:
 - i. Each third party shall submit the final written version of its oral statement as delivered, no later than 5:00 p.m. (Geneva time) on the first working day following the meeting.
 - ii. Each party may send in writing, within the timeframe to be confirmed by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.
 - iii. The Panel may send in writing, within the timeframe to be confirmed by the Panel before the end of the meeting, any questions to one or more third parties to which it wishes to receive a response in writing.
 - iv. Each third party choosing to do so shall respond in writing to written questions from the Panel or a party, within the timeframe established by the Panel.

Descriptive part and executive summaries

22. The description of the arguments of the parties and third parties in the descriptive part of the Panel Report shall consist of executive summaries provided by the parties and third parties, which shall be annexed as addenda to the Report. These executive summaries shall not in any way serve as a substitute for the submissions of the parties and third parties in the Panel's examination of the matter.
23. Each party shall submit one integrated executive summary. This integrated executive summary shall summarize the facts and arguments as presented to the Panel. The timing of the submission of the integrated executive summary shall be indicated in the timetable adopted by the Panel.
24. Each integrated executive summary shall not exceed 30 pages.
25. Each third party shall submit an integrated executive summary of its arguments as presented to the Panel. The executive summary to be provided by each third party shall not exceed six pages. If a third party wishes for one of its submissions which does not exceed six pages to serve as its executive summary, it shall so indicate. The timing of the submission of the integrated executive summary shall be indicated in the timetable adopted by the Panel.

Interim review

26. Following issuance of the Interim Report, each party may submit a written request to review precise aspects of the interim report and request a further meeting with the Panel, in accordance with the timetable adopted by the Panel. The right to request such a meeting shall be exercised no later than at the time the written request for review is submitted.
27. If no meeting is requested, each party may submit written comments on the other party's written request for review in accordance with the timetable adopted by the Panel. Such written comments shall be limited to the other party's written request for review.
28. If a meeting is requested, the Panel shall consult with the parties on the timing of the meeting and any further written comments.

Interim and Final Reports

29. The Interim Report, as well as the Final Report before its official circulation, shall be kept strictly confidential and shall not be disclosed.

Service of documents

30. The following procedures regarding service of documents apply to all documents submitted by parties and third parties during the proceeding:
 - a. Unless otherwise requested by the Panel, the Panel Secretary or the DS Registry, all communications with the Panel shall take place via the Disputes On-Line Registry Application (DORA) <https://dora.wto.org>. All submissions shall be uploaded to the Documents tab by 5:00 p.m. (Geneva time) on the due dates established by the Panel. The electronic version uploaded to DORA shall constitute the official version for the purposes of submission deadlines and the record of the dispute. Upload of a document to DORA shall constitute electronic service on the Panel, the other party, and the third parties. Parties and third parties should upload all submissions in the Documents tab, not as attachments to messages transmitted via the Messages tab.
 - b. The DS Registry is available to assist parties and third parties with DORA, including managing their DORA accounts and filing and downloading documents. The DS Registry is located in Room 2047 of the CWR building and is open from 9.30 a.m. to 12.30 p.m. and 2.30 p.m. to 5:00 p.m. The Registry can be reached at 022 739 5644 and via email at DSRegistry@wto.org. A DORA User Guide for Members is available in the Help & Resources section of DORA.
 - c. If a document is in a format that cannot be submitted electronically, then the party or third party shall complete the Notice of Manual Filing (available in the Help & Resources section of DORA) and upload that Notice to DORA by 5:00 p.m. on the due date established by the Panel. The party or third party shall bring the physical document to the DS Registry by 5:00 p.m. (Geneva time) the next working day along with the documents described in subparagraph e.
 - d. The parties and third parties should upload submissions in both Microsoft Word and PDF formats. To the extent possible, all documents in PDF format, including exhibits, should be searchable.
 - e. Each party and third party shall make an appointment with the DS Registry to file one paper copy of all documents it submits to the Panel, including the exhibits. The DS Registry shall stamp the documents with the date and time of the submission. If an exhibit is in a format that is impractical to submit as a paper copy, then the party may submit such exhibit in electronic format only. In this case, the cover page that contains the number of the exhibit concerned should indicate that the exhibit is only available in electronic format.

- f. The Panel shall provide the parties with the Draft Descriptive Part of the Report, the Interim Report and the Final Report, as well as all other documents or communications issued by the Panel during the proceeding, via DORA.
- g. If any party or third party is unable to meet a deadline set by the Panel because of technical difficulties in uploading any document to DORA that it cannot resolve with the assistance of the DS Registry, it shall submit the document(s) via email without delay and no later than by 6:00 p.m. on the due date. Any such email shall be addressed to the DS Registry, the Panel Secretary, the other party and, if appropriate, the third parties.
- h. In case any party or third party is unable to access a document submitted via DORA because of technical difficulties, it shall promptly, upon becoming aware of the problem, inform the DS Registry, the Panel Secretary, and the party or third party that submitted the document, of the problem. The party or third party that submitted the document(s) shall promptly provide an electronic version of the relevant document(s) to the affected party or third party by email, with a copy to the DS Registry and the Panel Secretary.

Correction of clerical errors in submissions

- 31. The Panel may grant leave to a party or third party to correct clerical errors in any of its submissions (including paragraph numbering and typographical mistakes). Any such request should identify the nature of the errors to be corrected and should be made promptly following the submission in question.
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ANNEX B

ARGUMENTS OF THE PARTIES

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ANNEX B-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CHINA

I. CHINA'S FIRST WRITTEN SUBMISSION

A. Introduction and Summary of Measures

1. This dispute concerns measures that violate the core obligations of non-discrimination that underpin the WTO Agreement and the rules-based trading system more broadly. By providing subsidies that favour the use of domestic over imported goods, and that discriminate against the goods of different Members based exclusively on their origin, the United States has violated the obligations of national and most-favoured nation treatment embodied in Articles III and I, respectively, of the General Agreement on Tariffs and Trade ("GATT") 1994. Through these measures, the United States has also violated Articles 2.1 and 2.2 of the Agreement on Trade-Related Investment Measures ("TRIMs Agreement"), and conferred subsidies that are expressly prohibited under Article 3 of the Agreement on Subsidies and Countervailing Measures ("SCM Agreement").

2. The subsidies at issue are conferred pursuant to the United States Inflation Reduction Act ("IRA"), signed into law on 16 August 2022.¹ The IRA directs nearly \$400 billion in federal funding to clean energy projects,² the vast majority of which is provided in the form of tax credits – the types of measures at issue in this dispute. A recent study reports that, since the IRA was enacted, the U.S. federal government has spent \$78.4 billion, "almost entirely in the form of tax credits (\$76.21 billion)".³

3. China has taken a selective approach in part due to its recognition that subsidies conferred consistent with WTO rules have an important role to play in promoting the clean energy transition. Non-discriminatory subsidies that promote consumer and industrial adoption of clean energy technologies, for example, can be an effective tool in the fight against climate change. However, the reasons that have led prior panels to find that domestic content subsidies violate the principles of non-discrimination set forth in the GATT 1994, and the reasons that led the Members to prohibit domestic content subsidies outright under Article 3 of the SCM Agreement, apply with equal force to domestic content subsidies conferred under the guise of addressing climate change.

1. Clean Vehicle Credit

4. The IRA establishes the Clean Vehicle Credit for battery-powered electric vehicles ("electric vehicles" or "EVs") under 26 U.S.C. § 30D.⁴ The Clean Vehicle Credit allows a taxpayer to claim a credit of \$7,500 per vehicle for the purchase of an eligible electric vehicle against federal income taxes otherwise due.⁵

5. The IRA makes eligibility for the full amount of this credit contingent on final assembly of the vehicle in North America, defined as "the territory of the United States, Canada, and Mexico" (the "North American Assembly Requirement").⁶ No tax credit attaches to the North American Assembly Requirement *per se*, but a failure to comply with that requirement renders an electric vehicle ineligible as a whole. If the North American Assembly Requirement is satisfied, a tax payer is eligible

¹ **Exh. CHN-4**, Public Law 117-169.

² **Exh. CHN-5**, White House, "Building a Clean Energy Economy: A Guidebook to the Inflation Reduction Act's Investments in Clean Energy and Climate Action" (Jan. 2023), p. 5.

³ **Exh. CHN-11**, Bermel et al, "Clean Investment Monitor: Tallying the Two-Year Impact of the Inflation Reduction Act" (7 August 2024), RHODIUM GROUP AND MIT CENTER FOR ENERGY AND ENVIRONMENTAL POLICY RESEARCH, p. 15.

⁴ The IRA also provides credits for previously owned clean vehicles and qualified commercial clean vehicles. See **Exh. CHN-17**, 26 U.S.C. § 25E and 26 U.S.C. § 45W. Neither of these provisions is at issue in this dispute.

⁵ **Exh. CHN-17**, 26 U.S.C. § 30D(b).

⁶ **Exh. CHN-17**, 26 U.S.C. § 30D(d)(1)(G) and (d)(5).

for two portions of the Clean Vehicle Credit (each of which provides a credit of \$3,750, together making up the full \$7,500 credit). These two portions are:

- a. compliance with a requirement that a percentage of the value of applicable critical minerals contained in the vehicle battery: (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) be recycled in North America (the "Critical Minerals Requirement").⁷ This percentage increases year over year.⁸ In addition, after calendar year 2024, a clean vehicle will not qualify for the critical minerals portion of the credit if it contains *any* critical minerals that were "extracted, processed, or recycled by a foreign entity of concern".⁹
- b. compliance with a requirement that a certain percentage of the value of the battery components in an electric vehicle be manufactured or assembled in North America (the "Battery Requirement").¹⁰ As with the Critical Minerals Requirement, the percentage of the value of the battery components that must be manufactured or assembled in North America increases over time.¹¹

6. Section 30D imposes certain restrictions on the extraction, processing, or recycling of applicable critical minerals, and the manufacturing or assembly of battery components contained in a clean vehicle battery, by a "foreign entity of concern" ("FEOC").¹² A FEOC under Section 30D has the same meaning as Section 40207(a)(5)(C) of the BIL,¹³ namely being "owned by, controlled by, or subject to the jurisdiction or direction of a government of a foreign country that is a covered nation."¹⁴ "Covered nation" is defined as including the People's Republic of China.¹⁵ The effect of the FEOC requirement is to disqualify vehicles from receiving the \$7,500 Clean Vehicle Credit if *any* part of the electric vehicle battery components or critical minerals is sourced from or processed in China.¹⁶

2. ITC/PTC Programmes

(a) ITC Programme

7. The ITC Programme reduces upfront investment costs for a project like a solar photovoltaic system or a battery storage project that is installed during the tax year. The IRA operates to both extend the application of existing credits for wind and solar projects (through 26 U.S.C. § 48), and to introduce new credits for qualifying energy properties (through 26 U.S.C. § 48E).

8. The revised Section 48 extended the incentives for energy property beginning construction before 1 January 2025,¹⁷ and confirmed that: (a) the applicable energy percentage for such property was reduced to a base credit amount of six percent;¹⁸ (b) this base credit is multiplied by five for

⁷ **Exh. CHN-17**, 26 U.S.C. § 30D(e)(1).

⁸ **Exh. CHN-17**, 26 U.S.C. § 30D(e)(1)(b); **Exh. CHN-24**, 26 CFR § 1.30D-3(a)(2). For vehicles placed into service before 1 January 2024: 40 percent; for vehicles placed into service during 2024: 50 percent; for vehicles placed into service during 2025: 60 percent; for vehicles placed into service during 2026: 70 percent; for vehicles placed into service after 31 December 2026: 80 percent.

⁹ **Exh. CHN-17**, 26 U.S.C. § 30D(d)(7)(A).

¹⁰ **Exh. CHN-17**, 26 U.S.C. § 30D(e)(2).

¹¹ **Exh. CHN-17**, 26 U.S.C. § 30D(e)(2)(B). For vehicles placed into service before 1 January 2024: 50 percent; for vehicles placed into service during 2024 and 2025: 60 percent; for vehicles placed into service during 2026: 70 percent; for vehicles placed into service during 2027: 80 percent; for vehicles placed into service during 2028: 90 percent; for vehicles placed into service after 31 December 2028: 100 percent.

¹² **Exh. CHN-17**, 26 U.S.C. § 30D(d)(7); **Exh. CHN-24**, 26 CFR § 1.30D-6.

¹³ **Exh. CHN-23**, U.S. Department of Energy, "Interpretation of Foreign Entity of Concern, Final Rule", 89 *Fed. Reg.* 37079 (6 May 2024), Part III, Section B.

¹⁴ **Exh. CHN-26**, 42 U.S.C § 18741(a)(5)(C).

¹⁵ **Exh. CHN-27**, 10 U.S.C. § 4872(d)(2)).

¹⁶ The United States has openly acknowledged that the Clean Vehicle Credit is designed to target China. See e.g. **Exh. CHN-15**, White House, "FACT SHEET: Biden-Harris Administration's Progress Creating a Future Made in America" (24 July 2024).

¹⁷ See **Exh. CHN-33**, U.S. Internal Revenue Service, "Definition of Energy Property and Rules Applicable to the Energy Credit, Proposed Rule", 88 *Fed. Reg.* 82188 (22 November 2023); **Exh. CHN-34**, U.S. Internal Revenue Service, "Definition of Energy Property and Rules Applicable to the Energy Credit, Final Rule" 89 *Fed. Reg.* 100598 (12 December 2024).

¹⁸ **Exh. CHN-17**, 26 U.S.C. § 48(a)(7). For all other energy property, the percentage is two percent. See *id.* § 48(a)(2)(A).

projects meeting prevailing wage and apprenticeship requirements;¹⁹ and (c) "bonus credits" became available, being a 10 percentage point increase for projects meeting certain domestic content requirements,²⁰ and a 10 percentage point increase for projects located in an energy community.²¹

9. Section 48E applies more broadly to clean energy projects than its predecessor, and provides credits for any electricity-generating technology that has zero or net-negative carbon emissions (as opposed to the credits being tied to specific technologies, as was the case under Section 48). Section 48E provides a base credit amount of six percent.²² It also includes a five-fold increase in credit for projects meeting prevailing wage and registered apprenticeship requirements,²³ as well as the same bonus rate structure of revised Section 48 to provide a 10 percentage point increase for projects meeting certain domestic content requirements,²⁴ and 10 percentage point increase for projects located in an energy community.²⁵

10. The ITC under Section 48E will begin to phase out for projects beginning construction in the first calendar year after the "applicable year", which is the later of: (a) 2032; or (b) the calendar year in which the Secretary determines that the annual GHG emissions from electricity generation are 75 percent lower than in 2022.²⁶ The maximum ITC value will last until 2033, then drop to 75 percent of the maximum in 2034, and to 50 percent of the maximum in 2035.²⁷

(b) PTC Programme

11. The PTC Programme generates tax credits per kilowatt-hour of energy produced for the first ten years of the project's operations. The IRA operates to both extend the application of existing credits for projects that began construction before 1 January 2025 (through 26 U.S.C. § 45), and to introduce new credits for electricity generated from renewable sources for facilities placed in service in 2025 and later (through 26 U.S.C. § 45Y).²⁸ As with the ITC Programme, the full value of the credits are contingent on fulfilling domestic content requirements.

12. The base PTC under Section 45 starts at 0.3 cents/kWh, depending on renewable energy type.²⁹ As with the ITC Programme, this base credit is multiplied by five when the qualified facility meets prevailing wage and apprenticeship requirements.³⁰ In addition, Section 45 provides for two

¹⁹ **Exh. CHN-17**, 26 U.S.C. § 48(a)(9)(B), (10)(A), and (11).

²⁰ **Exh. CHN-17**, 26 U.S.C. § 48(a)(11). See also **Exh. CHN-38**, U.S. Internal Revenue Service, "Domestic Content Bonus Credit Guidance under Sections 45, 45Y, 48, and 48E" (12 May 2023) (Notice 2023-38); **Exh. CHN-39**, U.S. Internal Revenue Service, "Domestic Content Bonus Credit Amounts under the Inflation Reduction Act of 2022: Expansion of Applicable Projects for Safe Harbor in Notice 2023-38 and New Elective Safe Harbor to Determine Cost Percentages for Adjusted Percentage Rule" (16 May 2024) (Notice 2024-41).

²¹ **Exh. CHN-17**, 26 U.S.C. § 48(a)(14). An "energy community" is a brownfield site or an area with reliance on coal, oil or natural gas extraction historically part of its economy coupled with high unemployment. See e.g. **Exh. CHN-17**, 26 U.S.C. § 45(b)(11)(B). Additional bonuses are also available for solar and wind facilities placed in service in connection with low-income communities (between 10 and 20 percentage points). **Exh. CHN-17**, 26 U.S.C. § 48(e).

²² **Exh. CHN-17**, 26 U.S.C. § 48E(a)(2)(A)(i). An alternative rate of 30 percent is applicable with respect to certain qualified facilities. **Exh. CHN-17**, 26 U.S.C. § 48E(a)(2)(A)(ii).

²³ **Exh. CHN-17**, 26 U.S.C. § 48E(d)(3) and (4).

²⁴ **Exh. CHN-17**, 26 U.S.C. § 48E(d)(5). See also **Exh. CHN-38**, U.S. Internal Revenue Service, "Domestic Content Bonus Credit Guidance under Sections 45, 45Y, 48, and 48E" (12 May 2023) (Notice 2023-38); **Exh. CHN-39**, U.S. Internal Revenue Service, "Domestic Content Bonus Credit Amounts under the Inflation Reduction Act of 2022: Expansion of Applicable Projects for Safe Harbor in Notice 2023-38 and New Elective Safe Harbor to Determine Cost Percentages for Adjusted Percentage Rule" (16 May 2024) (Notice 2024-41).

²⁵ **Exh. CHN-17**, 26 U.S.C. § 48E(a)(3). For both Sections 48 and 48E, factoring in the bonus credits meant that qualified facilities or energy storage technologies can receive up to a 50 percent credit from the base credit value of six percent. This could be increased to 70 percent for solar and wind facilities placed in service in connection with low-income communities (between 10 and 20 percentage points) under Section 48. **Exh. CHN-17**, 26 U.S.C. § 48(e). For Section 48E, additional bonuses are also available for solar and wind facilities placed in service in connection with low-income communities (between 10 and 20 percentage points). **Exh. CHN-17**, 26 U.S.C. § 48E(h).

²⁶ **Exh. CHN-17**, 26 U.S.C. § 48E(e)(3) (defined in 26 U.S.C. § 48Y(d)(3)).

²⁷ **Exh. CHN-17**, 26 U.S.C. § 48E(e)(2).

²⁸ **Exh. CHN-17**, 26 USC § 45Y.

²⁹ **Exh. CHN-17**, 26 U.S.C. § 45(a).

³⁰ **Exh. CHN-17**, 26 U.S.C. § 45(b)(6).

bonus credits for projects of any size: an increase of 10 percent in credit if the project meets certain domestic content requirements;³¹ and an increase of 10 percent if the facility is located in an "energy community".³²

13. Section 45Y is similar to Section 48E, and allows ten years of PTCs for any electric generation facility with a zero greenhouse emissions rate.³³ The base credit rate is 0.3 cents/kWh³⁴ for electricity generated from facilities generating electricity for which the GHG emissions rate is zero.³⁵ Section 45Y contains the same bonus structure as Section 45 with respect to prevailing wage and apprenticeship requirements,³⁶ domestic content requirements,³⁷ and "energy community" incentives.³⁸

14. The PTC under Section 45Y will begin to phase out for projects beginning construction in the first calendar year after the "applicable year", which is the later of: (a) 2032; or (b) the calendar year in which the Secretary determines that the annual GHG emissions from electricity generation are 75 percent lower than in 2022.³⁹ No PTCs are allowed for projects beginning construction in 2036 or later.⁴⁰

(c) Domestic Content Requirements for the ITC/PTC Programmes

15. As detailed above, both the ITC and the PTC Programmes include bonus tax credits for renewable energy projects and energy storage projects that meet certain domestic content requirements ("DCR Incentives"). These requirements make the availability of the full bonus credit amount contingent on the use of U.S.-made materials and components in clean energy projects.

16. The DCR Incentives apply "to any steel, iron, or Manufactured Product ... that is a component of an Applicable Project."⁴¹ In order to qualify for the DCR Incentives, the following criteria must be satisfied: (a) the project must use 100 percent domestic steel and iron for construction materials that are structural in nature ("Steel and Iron Requirement");⁴² and (b) projects that begin construction before 2025 must use at least 40 percent domestically manufactured products (increasing to 45 percent on 1 January 2025, 50 percent on 1 January 2026, and 55 percent on 1 January 2027) ("Manufactured Product Requirement").⁴³

(d) Application of the ITC/PTC Programmes

17. As a general matter, the ITC/PTC Programmes are federal income tax credits that are claimed as "general business credits" under 26 U.S.C. § 38.⁴⁴ The credits grouped under Section 38 can be applied against taxes otherwise imposed by Subtitle A, Chapter 1 of the Internal Revenue Code, entitled "normal taxes and surtaxes". The credits thus reduce the total federal income tax liability

³¹ **Exh. CHN-17**, 26 U.S.C. § 45(b)(9).

³² **Exh. CHN-17**, 26 U.S.C. § 45(b)(11).

³³ **Exh. CHN-17**, 26 U.S.C. § 45Y(b). The Secretary of the Treasury will annually publish a table that sets forth the greenhouse gas emissions rates for types or categories of facilities ("Annual Table"), which a taxpayer must use for purposes of Section 45Y. See **Exh. CHN-17**, 26 U.S.C. § 45Y(b)(2)(C)(i); **Exh. CHN-37**, U.S. Internal Revenue Service, "Section 45Y Clean Electricity Production Credit and Section 48E Clean Electricity Investment Credit" 90 *Fed. Reg.* 4006 (15 January 2025) (§ 1.45Y-5(g)).

³⁴ **Exh. CHN-17**, 26 U.S.C. § 45Y(a). Section 45Y(a)(2)(B) provides that the alternative amount of 1.5 cents applies in the case of any qualified facility with a maximum net output of less than 1 megawatt (as measured in alternating current), and subject to certain time periods and construction standards (including wage and apprenticeship requirements). Section 45Y(c)(1) provides for an inflation adjustment for both the base and alternative amounts.

³⁵ **Exh. CHN-17**, 26 U.S.C. § 45Y(a).

³⁶ **Exh. CHN-17**, 26 U.S.C. § 45Y(g)(9) and (10).

³⁷ **Exh. CHN-17**, 26 U.S.C. § 45Y(g)(11).

³⁸ **Exh. CHN-17**, 26 U.S.C. § 45Y(g)(7).

³⁹ **Exh. CHN-17**, 26 U.S.C. § 45Y(d)(3).

⁴⁰ **Exh. CHN-17**, 26 U.S.C. § 45Y(d)(2).

⁴¹ **Exh. CHN-38**, U.S. Internal Revenue Service, "Domestic Content Bonus Credit Guidance under Sections 45, 45Y, 48, and 48E" (12 May 2023) (Notice 2023-38), Section 2.02.

⁴² **Exh. CHN-17**, 26 U.S.C. §§ 45(b)(9)(B)(ii), 45Y(g)(11)(ii), 48(a)(12), 48E(d)(5).

⁴³ **Exh. CHN-17**, 26 U.S.C. §§ 45(b)(9)(B)(iii) and (C)(i), 45Y(g)(11)(iii) and (C)(i), 48(a)(12), 48E(d)(5). Note that for offshore wind projects, the base rate of the manufactured products is 20 percent, increasing to 27.5 percent on 1 January 2025, 35 percent on 1 January 2026, 45 percent on 1 January 2027, and 55 percent on 1 January 2028. **Exh. CHN-17**, 26 U.S.C. §§ 45(b)(9)(C), 45Y(g)(11)(C)(i).

⁴⁴ **Exh. CHN-17**, 26 U.S.C. § 38(b)(8), (39). See also *id.* (c)(4)(B)(x).

of a taxpayer. If the credit exceeds the tax liability, it cannot be refunded. Instead, unused credits can typically be carried back one year or forward up to 20 years to offset taxes in other years.⁴⁵

18. In addition, the IRA introduces two "monetization" options to obtain the benefits contained in the ITC/PTC Programmes: (a) the "direct pay" option, where applicable entities may elect to treat these tax credits as refundable payments of tax, and such entities are eligible to receive a direct payment from the IRS for any amount paid in excess of their tax liability for credits;⁴⁶ and (b) the "transfer" option, which allows eligible taxpayers that are not tax-exempt entities to transfer all or a portion of the ITC and PTC to an unrelated party for cash payment.⁴⁷

B. Claims Under the GATT 1994

1. The Challenged Measures Are Inconsistent with Article III:4 of the GATT 1994

(a) Application to the Clean Vehicle Credit

19. The Clean Vehicle Credit is inconsistent with Article III:4 of the GATT 1994. This inconsistency results from the North American Assembly Requirement, from the Critical Minerals Requirement, and from the Battery Requirement, whether these three requirements are viewed separately or in any combination.

20. The "likeness" of the relevant domestic and imported products may be presumed because all requirements discriminate exclusively on the basis of origin:

- North American Assembly Requirement: a vehicle assembled in the United States (or Canada or Mexico) is necessarily a vehicle of that origin.⁴⁸
- Critical Minerals Requirement: Section 30D requires an electric vehicle to contain a threshold percentage of critical minerals (i) extracted or processed in the United States; (ii) extracted or processed in a country with which the United States has a free trade agreement; or (iii) recycled in North America.
- Battery Requirement: Section 30D requires a threshold percentage of the battery components used in an electric vehicle to be manufactured or assembled in the United States (or Canada or Mexico). Battery components so manufactured or assembled are necessarily battery components of that origin.

21. All three requirements, whether viewed separately or in any combination, are requirements that an enterprise must fulfil to obtain an advantage from the government, namely the advantage of having its electric vehicle product qualify for either or both portions of the Clean Vehicle Credit. These requirements "affect the internal sale, offering for sale, purchase, ... distribution or use" of the relevant products – in this case, electric vehicles, the specified critical minerals, and the specified battery components – because these requirements create an incentive to sell, offer for sale, purchase, or use domestic over like imported products of these types.

22. All three requirements, whether viewed separately or in any combination, accord "less favourable treatment" to like imported products relative to the treatment accorded to qualifying domestic products. Each of the three requirements favours the use of domestic over imported products. It is immaterial that, in each case, there are means of obtaining the relevant advantage that do not require the use of U.S.-origin goods. Panels and the Appellate Body have consistently found that a measure accords less favourable treatment under Article III:4 when the use of domestic

⁴⁵ **Exh. CHN-17**, 26 U.S.C. § 39(a).

⁴⁶ **Exh. CHN-17**, 26 U.S.C. § 6417; **Exh. CHN-45**, 26 CFR § 1.6418-1. Non-taxable entities include, for example, state, local, and tribal governments, rural electric cooperatives, etc. See **Exh. CHN-17**, 26 U.S.C. § 6417(d)(1).

⁴⁷ **Exh. CHN-17**, 26 U.S.C. § 6418; **Exh. CHN-36**, U.S. Internal Revenue Service, "Transfer of Certain Credits, Final Rule", 89 *Fed. Reg.* 34770 (30 April 2024).

⁴⁸ **Exh. CHN-17**, 26 U.S.C. § 30D(d)(5).

over imported goods is at least one means of obtaining the relevant advantage, which is the case in respect of all three of the requirements at issue.⁴⁹

(b) Application to the ITC/PTC Programmes

23. The ITC/PTC Programmes offer additional tax credit subsidies for projects that satisfy certain domestic content requirements. To obtain these additional incentives, the project must use the specified proportions of U.S.-origin steel or iron (the Steel and Iron Requirement), as well as the specified proportions of other U.S.-origin manufactured products (the Manufactured Product Requirement).

24. The likeness of the affected products may be presumed because the DCR Incentives discriminate against imported products exclusively on the basis of origin. For both steel and iron products, as well as other manufactured products, the requirements for obtaining the DCR Incentives relate exclusively to whether the products in question are products of U.S. origin.

25. The DCR Incentives constitute "requirements" under Article III:4 because they are requirements that an enterprise must fulfil to obtain an advantage from the government, namely the advantage of obtaining the additional tax credits for using the specified proportions of domestic content in the subject project. These requirements "affect the internal sale, offering for sale, purchase, ... distribution or use" of the relevant products – in this case, iron or steel, or other manufactured products, used in the subject project – because these requirements create an incentive to sell, offer for sale, purchase, or use domestic over like imported products of these types.

26. The DCR Incentives accord "less favourable treatment" to like imported products relative to the treatment accorded to qualifying domestic products. Adopted DSB reports have consistently found "less favourable treatment" under Article III:4 in the case of tax incentives, subsidies, or other similar advantages that favour the use of domestic over imported products. That is exactly what the DCR Incentives do, both by design and in fact.⁵⁰

2 The Clean Vehicle Credit Is Inconsistent with Article I of the GATT 1994

27. It is well established that, in order to demonstrate that a measure is inconsistent with Article I:1, the complaining Member must establish four elements: (a) that the measure at issue falls within the scope of application of Article I:1; (b) that the imported products are "like" products within the meaning of Article I:1; (c) that the measure at issue confers an "advantage, favour, privilege, or immunity" on a product originating in the territory of any other country; and (d) that the advantage so accorded is not extended "immediately" and "unconditionally" to "like" products originating in the territory of all Members.⁵¹

28. China has already demonstrated above that the measures at issue fall within the scope of application of Article I:1 because these measures affect the "internal sale, offering for sale, purchase, transportation, distribution or use" of imported products within the meaning of Article III:4. China has further demonstrated that the relevant classes of imported and domestic products are "like"

⁴⁹ Although not necessary to establish less favourable treatment in this case, it is also worth noting that the United States clearly and expressly intends for the three requirements to advantage *domestic* U.S. manufacturers and producers of electric vehicles, critical minerals, and electric vehicle battery components. See e.g. **Exh. CHN-46**, U.S. Department of the Treasury, "U.S. Department of the Treasury Releases Final Rules to Lower Consumer Costs, Continue U.S. Manufacturing Boom in Batteries and Clean Vehicles, Strengthen Energy Security" (3 May 2024).

China notes as well that the violations of Article III:4 in this case cannot be justified under Article III:8(b) of the GATT 1994. Article III:8(b) is a potential justification for measures that violate Article III:4 and it is therefore incumbent upon the United States to raise and attempt to prove this defence, should it choose to do so. See Appellate Body Report, *Brazil – Taxation*, paras. 5.83 – 5.84. However, any such attempt in this case would fail, among other reasons because the Clean Vehicle Credit does not involve an expenditure of revenue by the government. *Id.*, para. 5.92.

⁵⁰ As with the Clean Vehicle Credit, and even though China does not bear this burden, China notes that the DCR Incentives cannot be justified under Article III:8(b) of the GATT 1994. Among other reasons, the DCR Incentives available under the ITC/PTC Programmes do not involve an expenditure of revenue by the government.

⁵¹ Appellate Body Report, *EC – Seal Products*, para. 5.86.

because the measures at issue discriminate against the class of imported products exclusively on the basis of origin.

(a) Application to the Clean Vehicle Credit

29. The Clean Vehicle Credit is inconsistent with Article I:1 of the GATT 1994. Fundamentally, this is because the measures at issue confer certain advantages to the goods of other Members, principally Canada and Mexico, that the United States does not extend immediately and unconditionally to the goods of all other Members, including China. In particular:

- Under the North American Assembly Requirement, electric vehicles assembled in Canada or Mexico satisfy this requirement and are therefore eligible to obtain either or both portions of the Clean Vehicle Credit, while electric vehicles assembled in the territories of other Members (including China) do not satisfy this requirement and therefore are not eligible.
- Under the Critical Minerals Requirement, critical minerals extracted or processed in a country with which the United States has an FTA, or critical minerals recycled or processed in either Canada or Mexico, may be used in the battery of an electric vehicle assembled in North America and thereby qualify the vehicle to obtain the Critical Minerals portion of the Clean Vehicle Credit. Critical minerals extracted, processed, or recycled in the territories of other Members (including China) may not be used to qualify an electric vehicle assembled in North America to obtain this portion of the credit.
- Under the Battery Requirement, battery components manufactured or assembled in Canada or Mexico may be used in the battery of an electric vehicle assembled in North America and thereby qualify the vehicle to obtain the Battery portion of the Clean Vehicle Credit. Battery components manufactured or assembled in other countries (including China) may not be used to qualify an electric vehicle assembled in North America to obtain this portion of the credit.

30. The fact that products of Canadian or Mexican origin (and, in the case of the Critical Minerals Requirement, goods of FTA partner origin) may be used to satisfy all three requirements for the Clean Vehicle Credit, while the products of other WTO Members may not, confers an "advantage", "favour", or "privilege" upon products of these origins. This is because products of these origins obtain a competitive advantage in the U.S. market vis-à-vis like products originating in the territories of other Members. All other things being equal, auto manufacturers, as well as their dealers, suppliers, and subcontractors, are more likely to produce and/or source the relevant goods (finished electric vehicles, critical minerals, and battery components) from within the territories of countries that will render an electric vehicle eligible for either or both portions of the Clean Vehicle Credit. This advantage creates more favourable competitive opportunities for products of the favoured origins relative to like products originating from within the territories of other Members.

31. The United States has not extended this advantage "immediately and unconditionally" to the products of other Members, including China. In fact, the United States has not extended this advantage to the products of other Members at all.

(b) Application to the FEOC Requirement

32. The Clean Vehicle Credit is also inconsistent with Article I:1 because of its exclusion of eligibility for certain products manufactured or assembled by so-called "foreign entities of concern". The United States has defined the term "foreign entity of concern" in a way that encompasses most, and potentially all, enterprises that are incorporated, headquartered, or carrying out relevant manufacturing or processing operations in China. As a result, all, or nearly all, critical minerals or battery components of Chinese origin may not be used to satisfy the Critical Minerals Requirement or the Battery Requirement of the Clean Vehicle Credit.

33. The fact that the United States allows critical minerals and battery components of other foreign origins to satisfy the Critical Minerals Requirement and the Battery Requirement, respectively, is an "advantage", "favour", or "privilege" that the United States confers upon products of those origins. All other things being equal, auto manufacturers, as well as their dealers, suppliers, and

subcontractors, are more likely to produce and/or source critical minerals and battery components from within the territories of countries that will render an electric vehicle eligible for either or both portions of the Clean Vehicle Credit. This advantage creates more favourable competitive opportunities for products of the favoured origins relative to like products originating from within the territory of China. The United States has not extended this advantage "immediately and unconditionally" to the products of China.

C. Claims Under the TRIMs Agreement

34. The Clean Vehicle Credit is a TRIM because the measure is (1) an "investment measure" (designed to incentivize the use and purchase of goods of domestic U.S. origin in the manufacture and assembly of batteries and battery components and to incentivise investments in domestic manufacturing facilities to assemble electric vehicles), that is (2) trade related (with each of its three requirements requiring the use or purchase of domestic products in order to receive the full credit). Each of the requirements – whether viewed separately or in combination – make receipt of the Clean Vehicle Credit contingent on the use of domestic over imported goods, and thus violating Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement.

35. The ITC/PTC Programmes are TRIMs because the measures are (1) "investment measures" (specifically designed to reduce upfront investment and production costs for qualified facilities in the United States), that are (2) trade related (because they make the use or purchase of domestic products (steel, iron, or manufactured products) a requirement to obtain the bonus tax credit amount). Receipt of the tax credits provided by the ITC/PTC Programmes is contingent on the use of domestic over imported goods, making compliance with the DCR Incentives necessary for the receipt of certain advantages, in violation of Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement.

D. Claims Under the SCM Agreement

1. Application to the Clean Vehicle Credit

36. The Clean Vehicle Credit is "revenue foregone" when the purchaser of the eligible electric vehicle opts to claim the credit on his or her own tax return, whether or not the purchaser has sufficient tax liability to claim the full amount of the credit. The Clean Vehicle Credit also results in a "direct transfer of funds" when the purchaser of the eligible electric vehicle opts to transfer the credit to an eligible entity and thereby receives the credit in the form of a reduction in the purchase price of the vehicle or any other form of cash rebate at the time of sale.

37. Regardless of the form in which the subsidy is provided, the Clean Vehicle Credit is prohibited under Article 3.1(b) of the SCM Agreement because it is contingent upon the use of domestic over imported goods.

- a. To obtain the critical minerals portion of the Clean Vehicle Credit, the electric vehicle must contain a threshold percentage of critical minerals: (i) extracted or processed in the United States; (ii) extracted or processed in a country with which the United States has a free trade agreement; or (iii) recycled in North America. Two of these three alternative conditions for obtaining the subsidy can be satisfied by using domestic over imported goods: by using critical minerals "extracted or processed in the United States" in the case of the first condition, or by using critical minerals recycled in the United States in the case of the third condition. In both cases, the relevant "use" of domestic over imported goods is the decision by the electric vehicle manufacturer or its suppliers or subcontractors to incorporate critical minerals of U.S. origin into the battery that is used to power the qualifying electric vehicle, or to use critical minerals of U.S. origin in the manufacture of that battery.
- b. To obtain the battery portion of the Clean Vehicle Credit, a threshold percentage of the battery components used in an electric vehicle must be manufactured or assembled in the United States, Canada, or Mexico. One of these three means of obtaining the subsidy – the use of battery components of U.S. origin – requires the use of domestic over imported goods. As in the case of the critical minerals portion of the Clean Vehicle Credit, the relevant "use" of domestic over imported goods is the decision by the electric vehicle manufacturer or its suppliers or subcontractors to incorporate battery components of U.S. origin into the battery that is used to power the qualifying electric vehicle.

38. It is immaterial to the analysis under Article 3.1(b) that there are means of obtaining both portions of the Clean Vehicle Credit that do not require the use of domestic over imported goods. Both portions of the Clean Vehicle Credit are prohibited under Article 3.1(b) to the extent that *one* means of obtaining the subsidy is the use of domestic over imported goods. It is likewise immaterial that the entity "using" the relevant goods (the auto manufacturer or its suppliers) is not the same as the entity receiving the subsidy in the first instance (the purchaser of the eligible electric vehicle). Nothing in Article 3.1(b) or elsewhere in the SCM Agreement requires the recipient of a subsidy, on the one hand, and the entity that must "use" domestic over imported goods as a condition for the conferral of the subsidy, on the other, to be the same person or entity.⁵²

39. For these reasons, the Clean Vehicle Credit is a prohibited subsidy under Article 3.1(b) of the SCM Agreement, and is automatically specific under Article 2.3.

2. Application to the ITC/PTC Programmes

40. The ITC/PTC Programmes result in revenue foregone to the U.S. government or involve a direct transfer of funds by the U.S. government.

- c. where the recipient elects to claim the ITC or PTC as a reduction in its federal tax liability, the ITC/PTC Programmes result in revenue foregone because there is a direct reduction in the amount of federal income taxes that the recipient would otherwise owe.⁵³ The "reason" for the challenged tax treatment relative to the baseline treatment is to incentivize the eligible types of clean energy investments and clean energy production, including the incentive to use domestic over imported goods through the additional "bonus" credits described above.
- d. where the eligible recipient elects to receive the credit in the form of a direct payment from the U.S. government (e.g. because the recipient is a tax-exempt entity), the ITC and PTC involve a "direct transfer of funds" within the meaning of Article 1.1(a)(1)(i).

41. These programmes are therefore "subsidies" within the meaning of Article 1.1 of the SCM Agreement. The benefit of the ITC/PTC Programmes is the amount of the revenue foregone in the first circumstance and the amount of the direct transfer of funds in the second circumstance. The resulting subsidy is specific *per se* under Article 2.3 of the SCM Agreement because the subsidy is a prohibited subsidy under Articles 3.1(b) and 3.2.

42. The ITC and PTC subsidies are prohibited under Article 3.1(b) of the SCM Agreement to the extent that the "bonus" amounts of subsidy available under these Programmes are contingent upon the use of domestic over imported goods. Specifically, eligibility for the "bonus" amounts of subsidy is contingent upon satisfying the Steel and Iron Requirement and the Manufactured Product Requirement, both of which require the entity claiming the credit, or its contractors, subcontractors, or suppliers, to use domestic over imported goods in the construction and operation of the qualifying clean energy project. The ITC/PTC Programmes are therefore prohibited subsidies under Article 3.1(b). Pursuant to Article 3.2 of the SCM Agreement, a Member shall neither grant nor maintain such a subsidy.

II. CHINA'S OPENING STATEMENT AT THE FIRST SUBSTANTIVE MEETING OF THE PANEL

A. Scope of the Claims

43. Most of China's claims as set forth in its panel request and developed in its first written submission are not in dispute. The United States' only response to China's claims on the merits is

⁵² Moreover, nothing in Article 1.1 of the SCM Agreement indicates that the benefit of a subsidy "cannot be 'received and enjoyed' by two or more distinct persons." Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 110.

⁵³ Note that, subject to certain rules, the ITC and PTC can be "carried back" (i.e. applied to prior tax years) or "carried forward" (i.e. applied to subsequent tax years in the event that the recipient has insufficient tax liability in any given year to claim the entire amount). See **Exh. CHN-17**, 26 U.S.C. § 39(a). Thus, except in what are likely to be very unusual cases, the entity claiming the ITC or PTC will obtain the entire amount of the credit, even if not in a single tax year in all cases.

its contention that the Clean Vehicle Credit is not a prohibited import substitution subsidy under Article 3.1 of the SCM Agreement.

44. The United States misapprehends Article 3.1(b) of the SCM Agreement. Article 3.1(b) provides that a subsidy is prohibited if it is "contingent, *whether solely or as one of several other conditions*, upon the use of domestic over imported goods." Prior adopted DSB reports have correctly interpreted this provision (and the identical language in Article 3.1(a) relating to export contingency) to mean that where *one* means of obtaining a subsidy is the use of domestic over imported goods, the subsidy is a prohibited subsidy under Article 3.1(b) to that extent. A contrary interpretation of Articles 3.1(a) and 3.1(b) would allow for obvious circumvention of these important prohibitions. There is overwhelming evidence that the purpose and intent of the North American Assembly Requirement, the Critical Minerals Requirement, and the Battery Requirement was to incentivize the manufacture of EVs and associated components *in the United States*. The notion that the requirements for the Clean Vehicle Credit could be satisfied using goods of entirely non-U.S. origin – a purely theoretical possibility – is remote and implausible.

B. The GATT 1994 Exceptions

45. The United States contends that its provision of subsidies that are expressly prohibited under Article 3.1(b) of the SCM Agreement can be justified by Article XX(a) of the GATT 1994, an exception provision contained in a different agreement. The United States' interpretation of the relevant legal provisions is mistaken and, if accepted, would dramatically disrupt the balance of rights and obligations contained in the SCM Agreement (and, by implication, the other Annex 1A agreements on trade in goods that do not expressly incorporate the GATT 1994 exceptions). There is no textual basis for this conclusion found within the SCM Agreement, and the context provided by the other Annex 1A agreements confirms that the GATT 1994 exceptions are available under the Annex 1A agreements only when expressly incorporated. Moreover, it would defeat the object and purpose of each Annex 1A agreement, including the SCM Agreement, to read into these agreements the exception provisions contained in the GATT 1994, a different agreement with its own balance of rights and obligations. Properly interpreted, the general exceptions available under Article XX of the GATT 1994 to justify measures inconsistent with *that* agreement are not available to justify violations of the SCM Agreement.

46. The undisputed violations of the GATT 1994 and TRIMs Agreement are not justified under Article XX(a) of the GATT 1994. The design, structure and operation of the GATT- and TRIMs-inconsistent provisions of the IRA reveal that these provisions have nothing to do with alleged "public morals" concerns about Chinese products. They have everything to do with protecting U.S. manufacturers of clean energy products from import competition – not just vis-à-vis imported Chinese products, but in effect products imported from the entire rest of the world.

47. Even if there were any legitimate "public morals" concerns at stake, providing subsidies with discriminatory domestic content requirements in violation of the GATT 1994 and the TRIMs Agreement, with the express goal of promoting domestic manufacturing, does not have a genuine relationship of means and ends with regulating the importation of products that embody a public morals concern.

III. CHINA'S RESPONSES TO QUESTIONS FROM THE PANEL AFTER THE FIRST SUBSTANTIVE MEETING

Excerpt from China's Response to Panel Question No. 11

48. ... The purpose of the first step under Article XX(a) and other Article XX subparagraphs is to determine whether the measure for which justification is sought is one that was taken for the purpose of addressing the interests protected by the relevant subparagraph (e.g. for the purpose of protecting public morals, in the case of Article XX(a)). This is fundamentally an inquiry into whether there is a relationship between the GATT-inconsistent measure and the protection of public morals, based on an objective examination of the measure's design, structure, and expected operation.⁵⁴ If a measure is not designed to address the interests protected by the relevant subparagraph of Article XX, based on an examination of these factors, then there is no need for the adjudicator to proceed

⁵⁴ See e.g. Appellate Body Report, *Colombia – Textiles*, para. 5.68; Panel Report, *Indonesia – Import Licensing Regimes*, para. 7.620.

to an assessment of whether the measure is "necessary" for that purpose (or whether it is one that "relates to" that purpose, in the case of certain Article XX subparagraphs). While there is some overlap between the design inquiry and the necessity inquiry in terms of the factors and evidence considered, they are not the same inquiry...

49. ... The inquiry is not whether a measure for which justification is sought under Article XX is theoretically "capable" of fulfilling the relevant objective. The inquiry is whether the measure was *in fact* designed for the purpose of fulfilling that objective, based on an examination of the measure's design, structure, expected operation, and any other relevant evidence bearing upon its purpose. This threshold inquiry is not a mere formality. It serves the important purpose of limiting more detailed analysis under Article XX to measures that were genuinely taken for the purpose of the identified subparagraph or subparagraphs.

Excerpt from China's Response to Panel Question No. 23

50. ...Article 3.1(b) prohibits "subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic *over* imported goods". The term "over", in this context, "refers to the use of domestic goods in preference to, or instead of, imported goods."⁵⁵ This interpretation is confirmed by the French and Spanish texts, which refer to the use of domestic goods *in preference* to imported goods ("de préférence à", "con preferencia a").

51. A subsidy that merely requires "the use of goods" without regard to their origin (what the United States refers to as the "use of goods on a most-favored-nation basis") would not entail the use of domestic goods "over", i.e. "in preference to", imported goods. Such a subsidy would not be contingent upon the use of domestic *over* imported goods and therefore would not be prohibited under Article 3.1(b).

52. The Clean Vehicle Credit is not such a subsidy. As China explained in its first written submission, the battery portion of the Clean Vehicle Credit can be obtained by using goods of U.S., Canadian, or Mexican origin. The critical minerals portion of the Clean Vehicle Credit can be obtained by using goods of U.S. origin or goods of FTA partner origin.⁵⁶ In both cases, the subsidy can be obtained by using goods of domestic U.S. origin "over" like goods imported from other countries. In other words, both the Battery Requirement and the Critical Minerals Requirement give preference to U.S.-origin goods over goods of other origins. Unlike the subsidy hypothesized by the United States, the subsidy is not obtained merely by "using goods" without regard to their origin...

IV. CHINA'S SECOND WRITTEN SUBMISSION

A. The United States Does Not Deny the Inconsistency of the Measures with Most of the Covered Agreements

1. The Clean Vehicle Credit Is a Prohibited Import Substitution Subsidy Under Article 3.1(b) of the SCM Agreement

53. The United States' only response to China's claim under Article 3.1(b) of the SCM Agreement in respect of the Clean Vehicle Credit is an interpretation of that provision which, if accepted, would render Article 3.1(b) meaningless.

54. The prior jurisprudence under Articles 3.1(a) and 3.1(b) confirms that where import substitution or exportation is a *de jure* means of obtaining a subsidy, the subsidy is prohibited to that extent. Where the use of domestic-origin goods is a *de jure* means of obtaining the subsidy, this condition establishes a preference for the use of domestic over imported goods and the subsidy is therefore prohibited under Article 3.1(b) to that extent. The Clean Vehicle Credit establishes such a condition, both through the Battery Requirement and the Critical Minerals Requirement, and it is therefore prohibited under Article 3.1(b) to that extent.⁵⁷

⁵⁵ Appellate Body Report, *US – Tax Incentives*, para. 5.11.

⁵⁶ This includes critical minerals recycled in North America, which could entail goods of Canadian or Mexican origin.

⁵⁷ In its response to Question 24 from the Panel, the United States misstates the nature of the Appellate Body's holding in *Brazil – Taxation*. Contrary to what the United States implies, the Appellate Body did not

2. The FEOC Requirements Violate Article III:4 of the GATT 1994 and Article 2 of the TRIMs Agreement

55. The FEOC exclusion is inconsistent with the obligation of national treatment under Article III:4 of the GATT 1994.

56. First, the "likeness" of the relevant domestic and imported products may be presumed because the FEOC exclusion discriminates exclusively on the basis of origin.⁵⁸ FEOC is defined to include – most relevantly, as is evident by the U.S. guidance on this issue⁵⁹ – entities "owned by, controlled by, or subject to the jurisdiction or direction of a government of" China, Russia, North Korea, and Iran.⁶⁰ Thus, origin is the only distinction that the FEOC exclusion draws between electric vehicles and vehicle components that satisfy the requirement and electric vehicles and vehicle components that do not satisfy the requirement.

57. Second, Section 30D(7) constitutes a "requirement" in the sense of Article III:4 because it stipulates requirements that an enterprise must fulfil to obtain an advantage from the government, namely the advantage of having its electric vehicle product qualify for the Clean Vehicle Credit.⁶¹ The FEOC exclusion operates as a requirement that "affect[s] the internal sale, offering for sale, purchase, ... distribution or use" of the relevant products – in this case, electric vehicles, the specified critical minerals, and the specified battery components – because the requirement creates an incentive to sell, offer for sale, purchase, or use domestic over like imported (excluded) products of these types.

58. Third, the FEOC exclusion accords "less favourable treatment" to like imported products relative to the treatment accorded to qualifying domestic products.⁶² Section 30D(7) disqualifies a clean vehicle from eligibility for tax credits if it contains battery components or critical minerals sourced from, or processed by, a FEOC. By excluding imported products from certain nations from receiving the incentives under the Clean Vehicle Credit, the FEOC exclusion modifies the conditions of competition to the detriment of imported products.

59. As a result, and in addition to the other elements comprising the Clean Vehicle Credit, the FEOC exclusion is inconsistent with Article III:4 of the GATT 1994.

60. The FEOC exclusion also qualifies as a trade-related investment measure under the TRIMs Agreement:⁶³ (i) it is an investment-related tax incentive because it was designed to incentivise the use and purchase of goods of domestic U.S. origin in the manufacture and assembly of batteries and battery components by tying access of the benefit to the ownership structure and sourcing practices of entities; and (ii) it is trade-related because it creates an incentive to use or purchase domestically sourced goods, particularly battery components and critical minerals, over imported alternatives, thereby affecting trade in goods and altering conditions of competition in the domestic market. The FEOC exclusion makes receipt of the Clean Vehicle Credit contingent on the use of domestic over imported goods. The Clean Vehicle Credit thus fulfils the requirements of paragraph 1(a) of the

reverse the holding of the panel in *Brazil – Taxation* that a subsidy is contingent upon the use of domestic over imported goods in the sense of Article 3.1(b) when the use of domestic over imported goods is one means of obtaining the subsidy. See e.g. Appellate Body Report, *Brazil – Taxation*, para. 5.236 (referring to the panel's interpretation of Article 3.1(b) as set forth in paragraphs 7.303-7.304 of the panel report), *id.* at para. 5.313 (same), *id.* at para. 5.329 (same).

⁵⁸ Panel Report, *China – Publications and Audiovisual Products*, para. 7.1446; Panel Report, *Brazil – Taxation*, para. 7.202; Appellate Body Report, *Argentina – Financial Services*, para. 6.36; Panel Report, *US – Poultry (China)*, para. 7.427.

⁵⁹ China notes that the United States has asserted that "China focuses on the third element of the definition, which covers 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 [as defined in U.S. defense procurement law]'. See United States' first written submission, para. 24. China's "focus" on this definition simply mirrors that of the United States in its interpretation of a FEOC for the specific purpose of the Clean Vehicle Credit. See **Exh. CHN-23**, U.S. Department of Energy, "Interpretation of Foreign Entity of Concern, Final Rule", 89 Fed. Reg. 37079 (6 May 2024), Part III, Section B.

⁶⁰ **Exh. CHN-26**, 42 U.S.C. § 18741(a)(5)(C); **Exh. CHN-27**, 10 U.S.C. § 4872(d)(2).

⁶¹ See Panel Report, *Brazil – Taxation*, para. 7.703. See also Panel Report, *India – Autos*, paras. 7.184-7.186; Panel Report, *Canada – Autos*, para. 10.73; Panel Report, *China – Auto Parts*, para. 7.240.

⁶² Appellate Body Report, *Korea – Various Measures on Beef*, para. 137; Appellate Body Report, *Thailand – Cigarettes*, para. 128.

⁶³ Panel Report, *Brazil – Taxation*, para. 7.40.

TRIMs Illustrative List, and is a TRIM.⁶⁴ The Clean Vehicle Credit is inconsistent with Article III:4 of the GATT 1994, and therefore is also inconsistent with Article 2.1 of the TRIMs Agreement.⁶⁵

B. The United States Has Failed to Meet its Burden of Proof Under Article XX(A) of the GATT 1994 in Respect of the Undisputed Violations of the GATT 1994 and the TRIMs Agreement

61. The United States does not contest the violations of Articles I and III of the GATT 1994 and Article 2 of the TRIMs Agreement. Instead, the United States seeks to justify these violations under Article XX(a) of the GATT 1994.

1. The United States Has Not Demonstrated that the Measures are Necessary to Protect its Alleged "Public Morals"

(a) The United States has failed to coherently identify which alleged "public morals" are addressed

62. The United States has used an array of different terms and formulations to identify which "public morals" the United States considers to be at stake.⁶⁶ This lack of precision and consistency is, in and of itself, a significant obstacle to the United States' ability to discharge its burden of proof under Article XX(a). It is not incumbent upon China (or the Panel) to isolate and identify the specific U.S. "public morals" that the United States is invoking in its attempted justification of the challenged measures, and then to determine whether these are, in fact, "public morals" of the United States.

63. As best as China can determine based on the United States' submissions to date, the overarching U.S. "public moral" that the United States claims to have identified as pertinent to its defence is an alleged public moral against "targeting" certain industrial sectors for "dominance".⁶⁷ The United States has also identified with at least some amount of consistency alleged U.S. public morals against "unfair competition" (the meaning of which remains unclear), "forced labor", "theft", and "coercion" (the meaning of which is also unclear).⁶⁸ China understands many of the other terms and phrases that the United States uses, such as "state-directed investment", "forced technology transfer", and "non-market excess capacity", to represent alleged *means* by which, or *respects* in which, certain asserted policies or practices in China run afoul of the alleged U.S. "public morals".⁶⁹ China further understands the alleged overarching "public moral" against "targeting" certain

⁶⁴ TRIMs Agreement, Article 2.2.

⁶⁵ Panel Report, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 7.117. See also Appellate Body Report, *Brazil – Taxation*, para. 5.79.

⁶⁶ At various times, the United States has referred under the heading of "public morals" to, *inter alia*, "targeting" certain industrial sectors for "dominance", "targeting and achieving predominant market shares and market power" in certain industrial sectors, "non-market policies and practices", "fair competition norms", "unfair competition", "non-market excess capacity", "government interference with or direction of commercial decision-making", "forced labor and unfair labor practices", "pervasive subsidization", "arbitrary regulations", "insufficient regulatory and market transparency", "forced technology transfer", "anti-competitive activities of state-owned or -controlled enterprises", "theft of trade secrets", "coercion", "monopolization", and "attempts at monopolization".

⁶⁷ See e.g. United States' response to Panel Question No. 8, para. 18 ("China's *targeting* of the clean vehicle and renewable energy sectors for dominance is contrary to public morals") (emphasis original); United States' response to Panel Question No. 9(a) ("The United States maintains a market-oriented economic system and pursues market-oriented policies and practices, which promote fair competition and specifically *prohibits targeting of global dominance* that China pursues.") (emphasis added).

⁶⁸ See e.g. United States' response to Panel Question No. 9(b) (identifying a series of alleged behaviours and policies in China as contrary to the U.S. public morals against "unfair competition, forced labor, theft, and coercion").

⁶⁹ See e.g. United States' response to Panel Question No. 9(b), para. 29 ("China's non-market policies and practices targeting the clean vehicle and renewable energy sectors for dominance, *including through the use of means* such as non-market excess capacity, state-directed investment, forced labor, forced technology transfer, and theft of trade secrets, are all contrary to U.S. public morals.") (emphasis added); United States' response to Panel Question No. 9(a), para. 20 ("... the United States also explains the relationship between each of China's non-market policies and practices *with the U.S. public morals against unfair competition, forced labor, theft, and coercion.*") (emphasis added). It is possible that the United States refers to these various means by which, or respects in which, certain asserted behaviours or policies in China run afoul of the alleged U.S. "public morals" as, collectively, "China's non-market policies and practices".

industrial sectors for "dominance" to represent a form, or species, of what the United States refers to as "unfair competition".⁷⁰

64. What the United States refers to as "targeting" certain industrial sectors for "dominance" appears to be no different than what is more commonly referred to as "industrial policy", i.e. government policies and practices designed to encourage the development, preservation, or enhanced competitiveness of particular industries or segments of the economy. It is not altogether clear what the United States means by "dominance", but the United States may refer to industrial policies where they are accompanied by an intention or aspiration to achieve or maintain a certain level of global market share, technological leadership, competitiveness, or other indicia of an industry's performance at the international level. In any event, the "targeting" of certain industries for "dominance" is not contrary to any U.S. "public moral", as the United States routinely directs U.S. government intervention in the market to develop, sustain, or enhance U.S. global dominance in certain industries and economic sectors, including energy, biofuels, technology, semiconductors, aerospace and pharmaceuticals.

65. Moreover, the United States has liberally used the term "unfair competition" without clearly defining what this term means and without providing evidence of the precise content of the asserted U.S. "public moral" against "unfair competition". At times, the United States appears to use the term "unfair competition" as a catch-all term to encompass the United States' various grievances toward China, real or imagined, while at other times the United States appears to use this term in its more traditional and limited sense to refer to laws concerning *competition*, such as antitrust and anti-monopoly laws. However, these laws are competition (antitrust) laws prohibiting, generally, monopolization, attempted monopolization, and similar anti-competitive restraints on trade. They do not prohibit every sort of behaviour that someone, somewhere, might consider to be "unfair".

66. With respect to "coercion", the United States has not provided a clear definition of what constitutes "coercion", or any evidence that there is a public moral in the United States against "coercion", however that term may be understood. At times the United States appears to use the term "coercion" interchangeably with "unfair competition".⁷¹ The only U.S. evidence that China has been able to identify that may give some independent meaning to the term "coercion" appears to relate to alleged "economic coercion" *by a state* in order to influence the policies or practices of *another state*.⁷² The United States engages in that sort of "economic coercion" all the time, for example through its pervasive use of economic sanctions against other countries, including through its control over the world's most widely-used reserve currency. Clearly, there is no U.S. "public moral" against "coercion" in that sense.

67. With respect to "forced labour", there is no question that forced labour is contrary to the public morals of China, the United States, and most other nations. China has ratified both the Forced Labour Convention, 1930 (No. 29) and the Abolition of Forced Labour Convention, 1957 (No. 105). The United States has ratified the latter but not the former. As a general matter, China observes that (i) what does or does not constitute forced labour may depend upon the facts of particular cases, and (ii) the parameters of what constitutes "forced labour", and therefore the relevant "public moral", may differ somewhat from one country to another. Members invoking Article XX(a) on the grounds that forced labour is contrary to their "public morals", as well as panels assessing such a defence, should therefore exercise special care in this area. This is especially the case given that a different exception under Article XX, Article XX(e), allows Members to adopt GATT-inconsistent measures "relating to the products of prison labour".

68. There is significant doubt as to whether the United States has sufficiently identified, substantiated, and proven the existence of relevant "public morals" of the United States (other than theft).

⁷⁰ See e.g. United States' response to Panel Question No. 9(c).

⁷¹ See e.g. United States' opening statement at the first substantive meeting, para. 43, fn. 55.

⁷² See **Exh. US-43**, "Joint Declaration Against Trade-Related Economic Coercion and Non-Market Policies and Practices (9 June 2023), para. 3.

- (b) The United States has failed to demonstrate that the measures were "designed" to address its alleged "public morals" concerns

69. The purpose of the design inquiry under Article XX(a) and other Article XX subparagraphs is to determine whether the measure for which justification is sought is one that was taken for the purpose of addressing the interests protected by the relevant subparagraph (e.g. for the purpose of protecting public morals, in the case of Article XX(a)). If a measure is not designed to address the interests protected by the relevant subparagraph of Article XX, based on an examination of these factors, there is no need for the adjudicator to proceed to an assessment of whether the measure is "necessary" for that purpose (or whether it is one that "relates to" that purpose, in the case of certain Article XX subparagraphs).⁷³

70. There are four fundamental failings that demonstrate that the Clean Vehicle Credit was not designed to address alleged "public morals" concerns:

- a. The Clean Vehicle Credit draws certain distinctions between countries with which the United States has a free trade agreement (or at least a certain type of free trade agreement) and countries with which it does not. The United States presents no evidence (either contemporaneous with the enactment of the IRA or otherwise) that the *content* of U.S. FTAs, and in particular the respects in which these FTAs allegedly protect U.S. public morals, had anything to do with the decision to discriminate between FTA and non-FTA countries. The United States' "FTA partner" story also fails to account for the significant heterogeneity among the FTAs that the United States maintains with other countries, as well as the fact that existing legal obligations between China and the United States are not meaningfully different than the obligations contained in the FTAs that the United States maintains with other countries.
- b. The United States' "FTA partner" story is further undermined by the fact that the United States has recently imposed additional tariffs of 25 percent on imports of automobile and certain automobile parts, including imports of these goods from U.S. FTA partners such as Canada and Mexico. It is hard to reconcile the United States' claim in this context of the present dispute that the Clean Vehicle Credit discriminates in favour of U.S. FTA partners because these countries supposedly share its "public morals" while, at the same time, imposing punitive tariffs on imports of automobiles and automobile parts from these same countries on the grounds that they pose a threat to U.S. national security.
- c. The existence of the FEOC exclusion, which advances what the United States *claims* to be the purpose of the broader discrimination inherent in the eligibility conditions for the credit. In fact, the FEOC exclusion advances this purpose much more directly and comprehensively. Yet the United States does *not* seek to justify the FEOC exclusion on the grounds of "public morals" under Article XX(a).⁷⁴ This inconsistency not only undermines the United States' assertion that the broader discrimination inherent in the eligibility conditions is designed to address a "public morals" concern, but undermines more generally the proposition that *anything* relating to the eligibility conditions for the Clean Vehicle Credit has something to do with "public morals".
- d. The availability of the full amount of an identical subsidy when the clean vehicle is leased instead of purchased, *entirely without regard to the origin of the vehicle's components and without regard to the FEOC exclusion*. This fact belies the United States' contention that the broader discrimination inherent in the Clean Vehicle Credit eligibility conditions for *purchased* vehicles was designed, or is "necessary", to protect the supposed U.S. "public morals" in respect of Chinese-origin products.

71. The United States faces equally insurmountable obstacles in attempting to demonstrate that the bonus credits available under the ITC/PTC Programmes were designed to address the United States' asserted "public morals" concerns with imported Chinese products.

⁷³ China's response to Panel Question No. 11, paras. 18-26.

⁷⁴ United States' response to Panel Question No. 7, para. 15. The United States seeks to justify the FEOC exclusion solely on the basis of Article XXI of the GATT 1994. *Id.*

72. The Panel asked the United States to explain how the GATT-inconsistent domestic content requirements for the bonus ITC/PTC incentives relate to the United States' asserted "public morals" concerns with imported Chinese products, including, among other things, (i) what the domestic content requirements for the ITC/PTC bonus incentives have to do with China's alleged "targeting" of the renewable energy sector for "dominance"; (ii) how the United States' "public morals" justification can be reconciled with the fact that a certain percentage of Chinese-origin components can be used even *within* the Manufactured Product Requirement; (iii) why the bonus incentives available under the ITC/PTC Programmes do not provide the same flexibilities for FTA partners as the Clean Vehicle Credit; and (iv) whether there is any evidence, including contemporaneous evidence, that the domestic content requirements for the ITC/PTC bonus incentives were adopted for the purpose of addressing the asserted "public morals" concerns relating to Chinese-origin products.

73. The United States' answers to these questions were unpersuasive. The United States presented no evidence, including no contemporaneous evidence, that the domestic content requirements for the ITC/PTC bonus incentives were taken in order to ensure that U.S. consumers do not "reward" China's supposed "non-market policies and practices", which the United States claims to have "infiltrated" global supply chains. Nowhere is this rationale to be found in any evidence put forward by the United States. This, alone, tells us that these GATT-inconsistent provisions were not designed for this alleged purpose.

74. The lack of any relationship between the domestic content requirements and the United States' "public morals" justification is further apparent from the design, structure, and expected operation of these provisions. It is important to recall, in this regard, that the domestic content requirements are requirements for obtaining the *bonus* amount of subsidy, not the base amount of subsidy. No domestic content requirements attach to the base amount of subsidy, and thus Chinese-origin components, including structural steel components, can be used for this purpose. Even as it relates to the bonus amount of the subsidies, a significant portion of Chinese-origin manufactured components (no less than 45 percent) can be used on an eligible project. While these facts do not obviate the impermissible discrimination, they do indicate that protecting the United States from the ways in which imported Chinese-origin products supposedly offend the United States' "public morals" was not the purpose of these provisions.

75. Finally, it is difficult to relate the impermissible domestic content requirements for the ITC/PTC bonus incentives to the United States' principal public morals concern about China allegedly "targeting" certain industries and sectors for "dominance". The United States has not alleged that China has "targeted" the steel industry for "dominance". The United States' allegations concerning Chinese steel appear to relate to alleged subsidization of the Chinese steel industry, not any targeting of that sector for "dominance". As China explained above, this is not a valid public morals concern. As for the Manufactured Product Requirement, that requirement concerns the origin of *any* manufactured product used in an eligible project, not only products that China has allegedly "targeted" for "dominance" or that allegedly offend the United States' "public morals" in some other respect. Thus, there is no evident relationship between the impermissible domestic content requirements for the ITC/PTC bonus incentives and the United States' "public morals" assertions.

- (c) The United States has failed to demonstrate that the measures contribute to its stated objectives to address "public morals" concerns

76. Prior adopted panel and Appellate Body reports have held that an assessment of the "necessity" of a measure under Article XX involves a process of "weighing and balancing" a series of factors, including the importance of the objective, the contribution of the measure to that objective, and the trade-restrictiveness of the measure.⁷⁵ For a measure to contribute to an objective, there must be a "genuine relationship of ends and means between the objective pursued and the measures at issue."⁷⁶ When the relational standard is one of *necessity*, that relationship of ends and means

⁷⁵ See e.g. Appellate Body Report, *EC – Seal Products*, para. 5.169; Appellate Body Report, *Brazil – Retreaded Tyres*, para. 182.

⁷⁶ Panel Report, *US – Tariff Measures (China)*, para. 7.159 (quoting Appellate Body Report, *Brazil – Retreaded Tyres*, para. 145).

must be "located significantly closer to the pole of 'indispensable' than to the opposite pole of simply 'making a contribution to'".⁷⁷

77. There is no question that the GATT-inconsistent provisions of the Clean Vehicle Credit and the ITC/PTC Programmes are trade-restrictive. In the case of the Clean Vehicle Credit, the discriminatory eligibility conditions create incentives for the purchase and use of products primarily originating in the United States, Canada, and Mexico (through the North American Assembly, Battery, and Critical Minerals Requirements). Additionally, the Clean Vehicle Credit favours countries with which the United States has a certain type of free trade agreement (through the Critical Minerals Requirement) as well as countries that are not designated as "FEOCs" (through the FEOC exclusion). The discriminatory aspects of the ITC/PTC Programmes create incentives for the purchase and use of products originating exclusively in the United States. The actual and potential trade-restrictiveness of these measures is material.

78. It is also hard to see how the United States could contend that the discriminatory eligibility conditions for the Clean Vehicle Credit make *any* contribution to *any* public morals objectives in respect of imported Chinese products. The discriminatory eligibility conditions for the Clean Vehicle Credit discriminate against imports from *most of the rest of the world*, not just imports from China. Even in respect of those countries whose products are advantaged by the discriminatory eligibility conditions (primarily Canada and Mexico), the United States' "FTA partner" story about how the existence and content of U.S. FTAs with these countries advance U.S. "public morals" objectives is unfounded. Moreover, while the United States has made vague allegations about how Chinese products that allegedly offend U.S. "public morals" have "infiltrated" other countries, thus necessitating the nearly worldwide scope of the discrimination, the fact remains that there is no *genuine* relationship of means and ends between the GATT-inconsistent features of the Clean Vehicle Credit and the pursuit of specific "public morals" concerns in respect of imported *Chinese* products. This is especially true in light of the FEOC exclusion, which *already has the effect* of barring Chinese-origin battery and critical minerals components from eligible clean vehicles, even if those components were imported from a country other than China or incorporated into a vehicle component in a country other than China.

79. Similar considerations apply to the contribution of the discriminatory elements of ITC/PTC Programmes to any valid "public morals" concern in respect of imported Chinese products. The fact that the discriminatory eligibility conditions for the bonus incentives apply to imports from anywhere in the world, not just China, demonstrates that there is no genuine relationship of means and ends between the GATT-inconsistent provisions and the pursuit of any alleged "public morals" concerns in respect of imported Chinese products. Moreover, the fact that these conditions apply only to the bonus incentives, and not the baseline incentives themselves, calls into question whether any theoretical contribution that these measures might make could even be considered material.

80. With regard to "forced labour", in the case of both the Clean Vehicle Credit and the ITC/PTC Programmes, it is hard to see what additional "contribution" the challenged provisions of the Clean Vehicle Credit and the ITC/PTC Programmes could possibly make to the United States alleged "public morals" concerns in this area given other measures that it maintains relating to this purported concern.⁷⁸ In any event, the United States has failed to demonstrate a genuine relationship of means and ends between the GATT-inconsistent provisions at issue (discriminatory eligibility conditions for the provision of subsidies) and the asserted public morals concern (preventing the importation of products that offend the United States' public morals against forced labour).⁷⁹

81. Finally, with regard to the United States' public moral against theft, the only evidence of "theft" that the United States has provided relating to any imported product that could even theoretically be affected by either the Clean Vehicle Credit or the ITC/PTC Programmes is evidence relating to the solar industry, accepting the veracity of that evidence at face value. Solar equipment has no relevance to the Clean Vehicle Credit and represents only one type of clean energy subsidized by the ITC/PTC Programmes. Even in the case of the ITC/PTC Programmes, however, the United States

⁷⁷ Appellate Body Report, *Korea – Various Measures on Beef*, para. 161.

⁷⁸ See **Exh. US-24**.

⁷⁹ For example, the United States has not shown how the GATT-inconsistent provisions of the Clean Vehicle Credit and the ITC/PTC Programmes exhibit a genuine relationship of means and ends with the objective of preventing the importation into the United States of products that offend the United States' public morals against forced labour.

has failed to demonstrate a genuine relationship of means and ends between the GATT-inconsistent features of these programmes (discriminatory domestic content requirements for obtaining certain bonus incentives) and the asserted public morals concern (preventing the importation of products that offend the United States' public morals against theft).⁸⁰

2. In Any Event, the Measures are Applied in a Manner that Constitutes Arbitrary or Unjustifiable Discrimination or a Disguised Restriction on International Trade

82. As demonstrated above, the measures at issue and the resulting discrimination are not rationally related to the United States' asserted "public morals" objectives, and there are important respects in which the United States has failed to explain how the measures do not result in arbitrary or unjustifiable discrimination between countries where the same conditions prevail. For example:

- a. The discrimination inherent in the Clean Vehicle Credit and the ITC/PTC Programmes is not directed specifically against products from China, but against products from most of the rest of the world (in the case of the Clean Vehicle Credit) and against products from the entire rest of the world (in the case of the ITC/PTC Programmes).
- b. With regard to the Clean Vehicle Credit, the United States has argued that the same conditions do not prevail with regard the United States' public morals concerns between those countries with which it has a certain type of trade agreement and those countries with which it does not. However, as China has demonstrated, there are numerous problems with this argument and the United States has made no effort to demonstrate that the conditions prevailing in the different countries whose products are discriminated against by the Clean Vehicle Credit are not "the same" in respect of the United States' asserted "public morals" concerns relative to those countries whose products are *not* discriminated against.

83. Thus, even if the Panel were to reach the chapeau to Article XX, it would need to find that the United States has failed to demonstrate that the measures for which justification is sought do not constitute arbitrary or unjustifiable discrimination between countries where the same conditions prevail.

84. The United States argues that the challenged measures do not constitute a disguised restriction on international trade because "the United States has not disguised the requirements that must be fulfilled to access the tax credits raised in this dispute."⁸¹ The United States misses the point. This element of the chapeau inquiry does not concern *transparency*. Rather, it concerns whether a GATT-inconsistent measure that has been provisionally justified under one or more of the subparagraphs of Article XX is applied, in practice, in a manner that constitutes a disguised restriction on international trade.

85. The challenged provisions of the IRA are not, on their face, a "disguised restriction on international trade". They are a perfectly apparent "restriction on international trade". It is only if the United States' invocation of "public morals" under Article XX(a) is provisionally credited – the only circumstance in which the chapeau becomes relevant – that there is "disguise" involved. For all the reasons that China has identified in connection with arbitrary or unjustifiable discrimination, the GATT-inconsistent features of the Clean Vehicle Credit and the ITC/PTC Programmes do not, in fact, bear a rational relationship to the pursuit of any "public morals" objectives. Moreover, as these features of the Clean Vehicle Credit and the ITC/PTC Programmes were clearly designed and intended to pursue a "Made in America" agenda. Thus, even if the measures were provisionally justified under Article XX(a), the Panel would still need to find that they have been applied in a manner that constitutes a disguised restriction on international trade.

⁸⁰ For example, the United States has not shown how the domestic content requirements for the bonus incentives available under the ITC/PTC Programmes exhibit a genuine relationship of means and ends with the goal of preventing the importation of specific products that the United States considers to be the result of "theft".

⁸¹ United States' first written submission, para. 134.

C. The United States' Interpretation of Article XXI(b) of the GATT 1994 Is Unfounded, and the United States Has Not Even Attempted to Sustain its Burden of Proof Thereunder

86. The United States takes the position that Article XXI(b) is self-judging, and therefore that the "sole finding that this Panel may make with respect to China's claims related to the FEOC exclusionary rule is to note the U.S. invocation of Article XXI(b)."⁸² This position is completely unfounded under accepted principles of treaty interpretation. Several WTO panels have now declined to reach this finding, including – most recently – the panel in *US – Origin Marking*.⁸³

87. Recognizing this, the United States has simply chosen to exhibit its first written submission in *US – Origin Marking* at **US-71** and incorporate the arguments contained therein "by reference".⁸⁴ In so doing, the United States has not substantiated any real interpretative error by the panel in that dispute; it just disagrees with the outcome of the analysis.⁸⁵ In these circumstances, China believes that the Panel can and should consider the findings of the panel in *US – Origin Marking* as persuasive and helpful.⁸⁶

88. The United States also takes the position that Article XXI "does not contain any requirement that a WTO Member invoking the essential security exception must justify its invocation."⁸⁷ The United States continues to assert that it is only required to invoke Article XXI(b), at which point its "burden" is discharged.⁸⁸ China is disappointed that the United States has continued to disclaim its burden of proof to make a *prima facie* case that one or more of the subparagraphs apply to the measures at issue.⁸⁹ As China has previously noted, unless and until the United States attempts to discharge this burden, China cannot, and therefore will not, specifically comment on the United States' purported invocation of Article XXI.

D. The GATT 1994 Exceptions Are Not Available Under the SCM Agreement

89. The United States has invoked Article XX(a) of the GATT 1994 to justify the fact that both the Clean Vehicle Credit and the ITC/PTC Programmes involve import substitution subsidies that are prohibited under Articles 3.1(b) and 3.2 of the SCM Agreement. The exceptions available under the GATT 1994 are not available in respect of violations of the SCM Agreement, which follows from: (i) the fact that the reference to "this Agreement" in Article XX of the GATT 1994 is indisputably a reference to the GATT 1994 and not to any other agreement; (ii) the context provided by the TRIMs Agreement, the Agreement on Import Licensing Procedures, and the Trade Facilitation Agreement, which reveal that the drafters of the Annex 1A agreements made clear choices about when to incorporate some or all of the GATT 1994 exceptions into the Annex 1A agreements and when not to do so; (iii) the fact that the SCM Agreement contains no such incorporation of any of the GATT 1994 exceptions; (iv) the fact that Article 3.1 of the SCM Agreement – the specific provision of the SCM Agreement at issue – contains an express cross-reference to the Agreement on Agriculture, another Annex 1A agreement, while providing no indication that the exceptions available under the GATT 1994 would apply to the prohibitions contained in Article 3.1; and (v) a proper consideration of the SCM Agreement's object and purpose, which reveals that the SCM Agreement contains its own balance of rights and obligations that does not include the availability of the exceptions provided under a different agreement.

90. Other than its reliance on general references to the GATT 1994 found within the SCM Agreement, which are unavailing, the United States' only textual argument is based on footnote 56 to Article 32.1. The United States misapprehends the meaning and purpose of this provision. Article 32.1 concerns the range of permissible actions that Members may take "against a subsidy". As a footnote to that provision, footnote 56 necessarily concerns the same subject matter. By stating that Article 32.1 is "not intended to preclude action" – i.e. action against a subsidy – "under other relevant provisions of GATT 1994, as appropriate", footnote 56 clarifies that Members may take

⁸² United States' first written submission, para. 46.

⁸³ Panel Report, *US – Origin Marking (Hong Kong, China)*, para. 7.185; Panel Report, *Russia – Traffic in Transit*, para. 7.101; Panel Report, *US – Steel and Aluminum (China)*, para. 7.128.

⁸⁴ United States' first written submission, fn. 89.

⁸⁵ United States' opening statement at the first substantive meeting, paras. 82-86.

⁸⁶ The United States acknowledges as such. See United States' opening statement at the first substantive meeting, para. 82.

⁸⁷ United States' first written submission, para. 49; United States' response to Panel Question No. 19.

⁸⁸ United States' response to Panel Question No. 18, para. 83.

⁸⁹ See United States' response to Panel Question No. 18.

actions against subsidy measures under other relevant provisions of the GATT 1994, as appropriate. China's claims against the Clean Vehicle Credit and the ITC/PTC Programmes under the GATT 1994 are a perfect example of the types of actions that this footnote was meant to preserve. The clarification that these types of "action[s] against" a subsidy measure remain available under the GATT 1994 does not imply, even remotely, the possibility for a responding Member to invoke the exception provisions of the GATT 1994 to attempt to justify a measure inconsistent with the SCM Agreement.

V. CHINA'S OPENING STATEMENT AT THE SECOND SUBSTANTIVE MEETING OF THE PANEL

91. This dispute is now in an unusual posture. The "One Big Beautiful Bill Act", which entered into force on July 4, has significantly modified the measures at issue. The act terminates the Clean Vehicle Credit for vehicles acquired after September 30 of this year. In addition, the act modifies the Section 45Y Production Tax Credit and the Section 48E Investment Tax Credit in material ways. Most significantly for the purposes of this dispute, the act terminates the ITC/PTC Programmes in respect of wind and solar projects – the renewable energy sectors in which Chinese companies have the strongest commercial presence worldwide – at the end of 2027, long before these tax credits were originally scheduled to expire under the IRA.

92. While the prospective repeal or modification of the challenged measures does not affect their inconsistency with the covered agreements, it does represent the final nail in the coffin for the United States' "public morals" defence under Article XX(a) of the GATT 1994. This was a justification that the United States invented for the purposes of this dispute, having nothing else to say about measures that are indisputably inconsistent with the identified provisions of the covered agreements.

93. The United States had failed to sustain its burden of proof in respect of Article XX(a), at multiple levels of the analysis, even before the OBBBA was enacted. With respect to the ITC/PTC Programmes in particular, the United States' invocation of "public morals" is incomprehensible in light of the design, structure, and operation of those measures.⁹⁰ The domestic content provisions of those Programmes are directed against the goods of *all* other Members, not just those of China. If the measures really were designed to protect the United States alleged "public morals" concerns against China, why would the United States need to exclude all other WTO Members as well?

94. In answer to the Panel's question on this point, the United States sought to evade scrutiny by arguing that because China is the complainant in this dispute, the Panel should focus its inquiries solely on China and not other Members.⁹¹ The United States' answer to this question is wholly unsatisfactory and serves to demonstrate that it is uncomfortably aware of the fundamental inconsistencies in its position. The United States' selective approach to the defence of its measures only further highlights its failure to demonstrate that the measure was designed to fulfil the "public morals" it now alleges.

VI. CHINA'S RESPONSES TO QUESTIONS FROM THE PANEL AFTER THE SECOND SUBSTANTIVE MEETING

Excerpt from China's Response to Panel Question No. 35

95. ... The fact that the parties and the Panel are – at this juncture of the dispute – still trying to ascertain exactly what "public morals" the United States is invoking is illustrative... It does not matter whether the United States considers "targeting" and "dominance" to be distinct "public morals".

96. Regardless of the taxonomy, the United States has centred its case around its position that – as a matter of "public morality" – it is opposed to "targeting" certain sectors or industries for "dominance".⁹² China demonstrated at length in its second written submission that the United States

⁹⁰ China's second written submission, paras. 116-121.

⁹¹ Panel Question Nos. 16 and 17.

⁹² See e.g. United States' first written submission, Part V.A(3); United States' second written submission, Part III.B(2).

routinely "targets" sectors or industries for "dominance",⁹³ using this language directly.⁹⁴ The United States has made no effort to rebut this evidence.

97. Moreover, to the extent that the United States uses the term "unfair competition" in its more traditional and limited sense to refer to laws concerning *competition*, such as antitrust and anti-monopoly laws, it has also failed to demonstrate that this is a U.S. "public moral". The United States points to, for example, U.S. laws against anticompetitive behavior, such as the Sherman Act and the Federal Trade Commission Act.⁹⁵ Both of these laws are competition (antitrust) laws prohibiting, generally, monopolization, attempted monopolization, and similar anti-competitive restraints on trade. But the United States' competition laws, like those of other countries, apply to *enterprises*, not countries as a whole. The United States has provided no evidence that there is a U.S. "public moral" against the United States or any other country possessing a significant percentage of global market share, through its domestic industries, in a particular industry or economic sector. The United States has no "public morals" against "targeting" certain sectors or industries for "dominance", or alleged "monopolization" by countries, regardless of how the United States classifies this behaviour within its schema of supposed "public morals".

Excerpt from China's Response to Panel Question No. 36

98. The first step under Article XX(a) and other Article XX subparagraphs is to determine whether the measure for which justification is sought is one that was taken for the purpose of addressing the interests protected by the relevant subparagraph (e.g. for the purpose of protecting public morals, in the case of Article XX(a)).⁹⁶ That is, the first step is to determine whether the measure is *designed* to protect the alleged public morals, before assessing whether the measure is *necessary* to protect those public morals....⁹⁷

99. ...[A]s the Appellate Body in *Colombia – Textiles* confirmed, the *design* and *necessity* steps are "conceptually distinct, yet related, aspects of the overall inquiry" under Article XX(a).⁹⁸ Nonetheless, and as China has explained, there is some overlap between the design inquiry and the necessity inquiry in terms of the factors and evidence considered. For example, the same fundamental flaws that undermine a conclusion that the challenged measures were *designed* to address public morals concerns in respect of imported Chinese products also prevent a conclusion (along with several other considerations) that these measures are *necessary* for that purpose.⁹⁹ The United States is therefore incorrect to suggest that assessment of the design of the measures at issue is an "inutile" exercise...

Excerpt from China's Response to Panel Question No. 39

100. If the Panel agrees that the subparagraphs of Article XXI(b) are objectively reviewable (consistent with the findings of panels in at least three other disputes¹⁰⁰), then there is no need for the Panel to proceed with an evaluation of whether the U.S. measures may be justified under Article XXI(b). Although the United States has referred to Article XXI(b)(iii) as an "example", it has failed to submit arguments and evidence to demonstrate its objective applicability to the present case.¹⁰¹

101. ... Even if the United States had attempted to fulfil the requirements under subparagraph (iii), the Panel would then need to turn to an analysis under the chapeau of Article XXI(b).¹⁰² Prior panels have concluded that although the invoking Member retains the discretion to determine the necessity of the measure at issue and to define for itself what it considers to be its "essential security interests", this does not mean that the invoking Member is free to label *any* interest an "essential

⁹³ See China's second written submission, paras. 55-75; China's opening statement at the second substantive meeting, paras. 12-14.

⁹⁴ See e.g. **Exh. CHN-74**, Executive Order 14213, "Establishing the National Energy Dominance Council" (14 February 2025), 90 *Fed. Reg.* 33.

⁹⁵ United States' first written submission, para. 69.

⁹⁶ See China's response to Panel Question No. 11; China's second written submission, paras. 79-121.

⁹⁷ See e.g. Appellate Body Report, *Colombia – Textiles*, paras. 5.67-5.68.

⁹⁸ Appellate Body Report, *Colombia – Textiles*, para. 5.76.

⁹⁹ See China's second written submission, paras. 122-134.

¹⁰⁰ See China's second written submission, Annex A, Part A; see also Panel Reports, *Russia – Traffic in Transit, US – Steel and Aluminium Products (China)*, and *US – Origin Marking (Hong Kong, China)*.

¹⁰¹ See United States' second written submission, para. 106.

¹⁰² See China's second written submission, Annex A, Part B.2.

security interest".¹⁰³ ... In the absence of such showings by the responding Member (as here), a panel would have no basis to determine whether the exception has been invoked in good faith, as is required under Article 26 of the Vienna Convention on the Law of Treaties.

VII. CHINA'S COMMENTS ON THE U.S. RESPONSES TO QUESTIONS FROM THE PANEL AFTER THE SECOND SUBSTANTIVE MEETING

Excerpt from China's Comments on Panel Question No. 39

102. The Clean Vehicle Credit was terminated effective 30 September 2025 as a result of the One Big Beautiful Bill Act (OBBBA). As this termination has now taken effect, China considers that it is no longer necessary for the Panel to make findings or recommendations in respect of this measure. China therefore withdraws its claims under Articles I:1 and III:4 of the GATT 1994, Articles 2.1 and 2.2 of the TRIMs Agreement, and Articles 3.1(b) and 3.2 of the SCM Agreement in respect of the Clean Vehicle Credit, and requests that the Panel decline to make findings or recommendations concerning these claims.¹⁰⁴

103. Because China has withdrawn its claims in this matter concerning the Clean Vehicle Credit, China will not comment on the United States' second answers as they pertain to this measure. China will limit its comments on the United States' second answers to issues concerning the ITC/PTC Programmes.

¹⁰³ Panel Report, *Russia – Traffic in Transit*, paras. 7.131, 7.133.

¹⁰⁴ See e.g. Panel Report, *China – Raw Materials*, para. 7.23.

ANNEX B-2**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE UNITED STATES****EXECUTIVE SUMMARY OF U.S. FIRST WRITTEN SUBMISSION****I. INTRODUCTION**

1. This dispute is fundamentally about fairness, namely the ability of the United States to respond to one Member's adoption of anti-competitive, non-market policies and dominance of sectors critical to all Members' economic futures. The United States adopted the measures at issue in this dispute, in relevant part, to address China's non-market policies and practices that have resulted in China's global dominance of the clean vehicle and renewable energy sectors, undermining fair competition for U.S. companies, U.S. workers, and the U.S. economy more broadly. China's global dominance deprives market-oriented businesses and their workers of commercial opportunities and lessens competition. China's dominance of the clean vehicle and renewable energy sectors also has increased economic security risks in the U.S. market by creating dependencies and vulnerabilities, and has reduced global supply chain resiliency.

2. The facts of China's non-market-oriented dominance of the clean vehicle and renewable energy sectors are almost too extreme to be believed. China's share of the global solar energy supply chain – that is, global polysilicon, ingot, and wafer production – soon will reach almost 95 percent. China dominates manufacturing capacity across all segments of the solar supply chain worldwide, with its share exceeding 80 percent in all stages (*i.e.*, polysilicon, ingots, wafers, cells, and modules). China produces approximately 60 percent of electric vehicles sold globally and approximately 80 percent of the batteries that power them. China also dominates the production and supply of many critical minerals that are key inputs for clean energy production. China's global production of graphite is at 77 percent, gallium is at 98 percent, germanium is at 68 percent, and tungsten is at 84 percent. By 2030, over 90 percent of battery-grade graphite and 77 percent of refined rare earths could come from China.

3. China has achieved that global dominance through pervasive non-market policies and practices that undermine fair competition and cause global distortions in the clean vehicle and renewable energy sectors. China's fundamentally unfair non-market policies and practices undermine support for an international trading system that permits such practices to escape discipline. Such policies and practices further undermine U.S. norms against theft and coercion, and U.S. norms of fair competition and respect for innovation, all of which are key aspects of U.S. culture. China's non-reciprocal and morally wrong behavior further threatens to undermine U.S. society's confidence in the effectiveness of the WTO if the international trading system creates the conditions for, fails to address, or even exacerbates a fundamentally uneven playing field. Accordingly, the measures at issue in this dispute are justified because they are measures "necessary to protect public morals" of the United States within the meaning of Article XX(a) of the *General Agreement on Tariffs and Trade 1994* (GATT 1994).

4. China also has challenged a provision of the Inflation Reduction Act of 2022 (IRA) that is expressly a matter of U.S. national security. The exclusion under the Internal Revenue Code (IRC) Section 30D Clean Vehicle Tax Credit from participation by a "foreign entity of concern" (FEOC) in the supply chain is expressly based on national security elements of legislation of the United States. As the WTO Agreement reflects, in Article XXI of the GATT 1994 and elsewhere, every WTO Member has the right – and we would say responsibility – to "tak[e] any action which it considers necessary for the protection of its own essential security interests." WTO Members did not relinquish this inherent right in joining the WTO, and WTO Members have not agreed to subject the exercise of this right to legal review. Therefore, U.S. invocation of Article XXI in relation to the FEOC exclusionary rule ends the WTO's review of that national security matter.

5. In short, it is hypocritical for China to target the U.S. measures in this dispute while failing to address its use of non-market policies and practices that have contributed to its global dominance of the clean vehicle and renewable energy sectors and are detrimental to all WTO Members. China's

approach has created an untenable situation for governments seeking to meet their legitimate policy objectives of promoting fair competition, fostering innovation, and enhancing supply chain security. China remains the biggest challenge to a fair, competitive, and mutually beneficial international trading system.

6. The United States respectfully requests that the Panel find that China has established no WTO-inconsistency in this dispute.

II. BACKGROUND

7. The IRA is a statute signed into law on August 16, 2022, creating or amending a number of tax credits concerning clean vehicle adoption and renewable energy production or investment.

8. The U.S. Department of the Treasury (Treasury) and the U.S. Internal Revenue Service (IRS), a component of Treasury, issued implementing guidance regarding the tax credits created or amended by the IRA. The implementing guidance sets forth requirements which taxpayers must comply with in claiming these credits.

9. China has challenged certain requirements for five tax credits in this dispute. Regarding the **Clean Vehicle Tax Credit**, the IRA made a number of amendments to **IRC Section 30D**, which was originally enacted in 2008. As amended by the IRA, Section 30D provides for a maximum \$7500 tax credit for new clean vehicles placed in service after August 16, 2022 through December 31, 2032. The availability and amount of the credit is determined based on the satisfaction of certain requirements. China has challenged the North American assembly requirement, the critical minerals sourcing requirement, the battery components sourcing requirement, and the FEOC exclusionary rule.

10. The North American assembly requirement is that, to meet the definition of a "new clean vehicle" and therefore to access any part of the \$7500 credit, final assembly of a motor vehicle must occur within North America. Pursuant to Treasury regulations, North America means the territory of the United States, Canada, and Mexico.

11. The critical minerals sourcing requirement is that, to access half of the maximum \$7500 credit amount (\$3750), an increasing percentage of the applicable critical minerals contained in the clean vehicle's battery must have been extracted or processed in the United States or in any country with which the United States has a free trade agreement in effect, or recycled in North America. The following countries have been identified as countries with which the United States has a free trade agreement in effect: Australia, Bahrain, Canada, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Japan, Jordan, South Korea, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, and Singapore. The list of countries is subject to revision based on application of the criteria established by regulations.

12. The battery components sourcing requirement is that, to access half of the maximum \$7500 credit amount (\$3750), an increasing percentage of the value of the clean vehicle's battery components must have been manufactured or assembled in North America.

13. The FEOC exclusionary rule excludes from eligibility for the \$7500 tax credit any clean vehicle that, beginning on January 1, 2024, contains any battery components manufactured or assembled by an FEOC and, beginning on January 1, 2025, contains any applicable critical minerals extracted, processed, or recycled by an FEOC. The term "foreign entity of concern" or "FEOC" is defined by cross-reference to the Infrastructure Investment and Jobs Act of 2021, which sets out a five-part definition as follows:

(5) Foreign entity of concern. The term "foreign entity of concern" means a foreign entity that is—

(A) designated as a foreign terrorist organization by the Secretary of State under section 219(a) of the Immigration and Nationality Act (8 U.S.C. 1189(a));

(B) included on the list of specially designated nationals and blocked persons maintained by the Office of Foreign Assets Control of the Department of the Treasury (commonly known as the SDN list);

(C) 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);

(D) alleged by the Attorney General to have been involved in activities for which a conviction was obtained under—

(i) chapter 37 of title 18, United States Code (commonly known as the "Espionage Act") [18 U.S.C. §§ 791 et seq.];

(ii) section 951 or 1030 of title 18, United States Code;

(iii) chapter 90 of title 18, United States Code (commonly known as the "Economic Espionage Act of 1996") [18 U.S.C. §§ 1831 et seq.];

(iv) the Arms Export Control Act (22 U.S.C. 2751 et seq.);

(v) section 224, 225, 226, 227, or 236 of the Atomic Energy Act of 1954 (42 U.S.C. 2274, 2275, 2276, 2277, and 2284);

(vi) the Export Control Reform Act of 2018 (50 U.S.C. 4801 et seq.); or

(vii) the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.); or

(E) determined by the Secretary of Energy, in consultation with the Secretary of Defense and the Director of National Intelligence, to be engaged in unauthorized conduct that is detrimental to the national security or foreign policy of the United States.

14. China focuses on the third element of the definition, which covers 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 [as defined in U.S. defense procurement law]". U.S. defense procurement law defines "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.

15. China also challenged aspects of four renewable energy investment and production tax credits: IRC Sections 48, 48E, 45, and 45Y (hereinafter "renewable energy ITC/PTCs"). The IRA generally modified and extended the existing IRC Section 45 and Section 48 tax credits for qualified facilities or energy projects that begin construction before January 1, 2025, and created new IRC Section 45Y and Section 48E as successor tax credits for qualified facilities or energy projects placed in service after December 31, 2024.

16. The renewable energy ITCs at IRC Section 48 and Section 48E incentivize renewable energy projects by providing tax credits that reduce upfront costs of investment in such facilities. Section 48 generally provides a tax credit for investment in renewable energy projects beginning construction before January 1, 2025. Eligible recipients include fuel cell, solar, geothermal, small wind, energy storage, biogas, microgrid controllers, and combined heat and power properties. Section 48E provides a technology-neutral tax credit for investment in facilities that generate clean electricity placed in service from January 1, 2025 (and available through the phase-out period described above). Eligible recipients are facilities that generate electricity with a greenhouse gas emissions rate that is not greater than zero and qualified energy storage technologies. For both Section 48 and Section 48E, the base credit amount generally is 6 percent of the qualified investment. The base credit amount generally is increased to 30 percent if separate requirements for prevailing wage and apprenticeship are met.

17. The renewable energy PTCs at IRC Section 45 and Section 45Y incentivize renewable electricity production by providing tax credits for qualified facilities for generally the first 10 years of operations. Section 45 provides a tax credit for production of electricity from renewable sources for projects

beginning construction before January 1, 2025. Eligible recipients include facilities generating electricity from wind, biomass, geothermal, solar, landfill and trash, hydropower, and marine and hydrokinetic renewable energy. Section 45Y provides a technology-neutral tax credit for production of clean electricity for facilities placed in service from January 1, 2025 (and available through the phase-out period described above). Eligible recipients are facilities generating electricity for which the greenhouse gas emissions rate is not greater than zero. For both Section 45 and Section 45Y, the base credit amount generally is 0.3 cents per kilowatt hour of electricity produced at a qualified facility, adjusted for inflation. The base credit amount generally is multiplied by 5 if separate requirements for prevailing wage and apprenticeship are met.

18. A domestic content bonus credit is available to increase the amount of the credit determined under the renewable energy ITC/PTCs, respectively. To access the bonus, a taxpayer must establish that a domestic content requirement is satisfied with respect to an applicable project by certifying that "any steel, iron, or manufactured product which is a component of [the applicable project] (upon completion of construction) was produced in the United States". For steel and iron, eligible projects must use 100 percent U.S.-produced steel and iron for construction materials; for manufactured products, a certain percentage of the total cost of components incorporated into an eligible product must be produced in the United States, depending on the construction timeline and type of project.

19. A taxpayer may only claim one of the renewable energy ITC/PTCs with respect to a qualified facility or energy property. For certain types of entities, such as tax-exempt organizations, to obtain the full benefit of the Sections 45, 45Y, 48, and 48E base credits, domestic content requirements must be met. However, in such cases, exceptions are available that allow for flexibility if domestic materials are not available or are too costly.

III. THE SECTION 30D CLEAN VEHICLE CREDIT IS NOT INCONSISTENT WITH ARTICLES 3.1(B) AND 3.2 OF THE SCM AGREEMENT

20. Article 3.1(b) prohibits subsidies that are "contingent" upon the use of domestic over imported goods. The relevant dictionary definition of "contingent" is "[c]onditional; dependent on, upon; [d]ependent for its existence on something else." The Appellate Body also has interpreted the term "contingent" to mean "conditional" or "dependent for its existence on something else", and reasoned that a subsidy would be "contingent" upon the use of domestic over imported goods "if the use of those goods were a condition, in the sense of a requirement, for receiving the subsidy". Article 3.2 of the SCM Agreement then provides that "[a] Member shall neither grant nor maintain subsidies referred to in paragraph 1."

21. Although the United States does not dispute that the Section 30D Clean Vehicle Tax Credit is a subsidy within the meaning of the SCM Agreement, China has failed to establish that the Section 30D Clean Vehicle Credit is inconsistent with Article 3.1(b) because the credit is not contingent on the use of domestic over imported goods. China's arguments concern two conditions (*i.e.*, requirements): the critical minerals sourcing requirement and the battery components sourcing requirement. Neither requirement is conditioned on the use of domestic over imported goods, and it is possible to satisfy both requirements by use of exclusively imported goods—that is, without the use of *any* U.S. domestic goods.

22. The critical minerals requirement is that, to access half of the maximum \$7500 credit amount (\$3750), a certain percentage of the value of the critical minerals contained in the clean vehicle's battery must have been (i) extracted or processed in the United States; (ii) extracted or processed in any country with which the United States has a free trade agreement in effect; or (iii) recycled in North America. Therefore, critical minerals extracted, processed, or recycled outside of the United States may be used to satisfy the critical minerals requirement.

23. The battery components sourcing requirement is that, to access half of the maximum \$7500 credit amount (\$3750), an increasing percentage of the value of the clean vehicle's battery components must have been manufactured or assembled in North America, *i.e.*, in the territory of the United States, Canada, or Mexico. A vehicle powered by a battery with components sourced from Canada or Mexico – and that otherwise contains no components sourced from the United States – can satisfy the battery components sourcing requirement. Therefore, the battery components sourcing requirement may be satisfied by use of components manufactured or assembled outside of the United States.

24. China's argument is essentially that a violation of Article 3.1(b) results where a condition *may* be satisfied by the use of domestic goods. That is, where a condition may be fulfilled through several options, China argues that there is a violation if an option for fulfillment is via use of domestic goods. This argument must be rejected as contrary to the text of Article 3.1(b). China's logic reads out of Article 3.1(b) that the subsidy must be "contingent" on the use of domestic "over" imported goods.

IV. THE FEOC EXCLUSIONARY RULE UNDER THE CLEAN VEHICLE CREDIT IS COVERED UNDER ARTICLE XXI(B) OF THE GATT 1994

25. With respect to China's claims related to the FEOC exclusionary rule, the United States invokes Article XXI(b) of the GATT 1994. Article XXI(b) is by its terms self-judging. The text establishes that each WTO Member retains the right to "take[] any action which it considers necessary for the protection of its own essential security interests." The self-judging nature of Article XXI(b) of GATT 1994 is established by that text ("which it considers"), in its context, and in the light of the treaty's object and purpose. This interpretation is confirmed by supplementary means of interpretation, including Uruguay Round negotiating history.

26. As the United States has previewed to the Dispute Settlement Body, the FEOC exclusionary rule for the Clean Vehicle Tax Credit is an issue of national security. The United States "considers" that the FEOC exclusionary rule is "an[] action ... necessary for the protection of [U.S.] essential security interests" pursuant to Article XXI(b). Accordingly, the Panel must limit its findings in this dispute with respect to the FEOC exclusionary rule to a recognition that the United States has invoked its essential security interests.

27. Article XXI does not contain any requirement that a WTO Member invoking the essential security exception must justify its invocation. Nonetheless, as additional background, the United States provides the following factual statement. Under the FEOC definition, there are five grounds on which a foreign entity may be considered an FEOC, with cross-references to other U.S. laws addressing security concerns. It is self-evident that identification and exclusion of the categories of actors described in the statute is a matter of national security for the United States.

V. THE MEASURES AT ISSUE ARE JUSTIFIED UNDER ARTICLE XX(A)

28. The measures at issue are justified because they are "necessary to protect public morals" within the meaning of Article XX(a) of the GATT 1994. As discussed below, China's non-market policies and practices have resulted in China's global dominance of the clean vehicle and renewable energy sectors, undermining fair competition for U.S. companies, U.S. workers, and the U.S. economy more broadly. China's global dominance and non-market policies deprive market-oriented businesses and their workers of commercial opportunities and lessen competition. China's dominance of clean vehicle and renewable energy sectors and non-market policies also have increased economic security risks in the U.S. market by creating dependencies and vulnerabilities, and has reduced global supply chain resiliency. The challenged U.S. measures are one response to China's non-market policies and global dominance, seeking to counteract those harms and restore fair competition.

29. Article XX(a) of the GATT 1994 provides in relevant part, "Nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures ... (a) necessary to protect public morals". A Member seeking to establish that a measure is justified under Article XX(a) of the GATT 1994 must demonstrate that the measure (1) protects public morals and (2) is "necessary" to achieve that objective. In addition, to satisfy the chapeau of Article XX, the measure (3) must not be applied in a manner that constitutes "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or a "disguised restriction on international trade".

A. The measures at issue "protect public morals" within the meaning of Article XX(a) of the GATT 1994

30. As explained below, the challenged measures are necessary to protect public morals of the United States within the meaning of Article XX(a).

1. Legal Framework

31. The ordinary meaning of the word "public" is defined as "[o]f or pertaining to the people as a whole; belonging to, affecting, or concerning the community or nation," whereas the ordinary meaning of "morals" is defined as "of or pertaining to the distinction between right and wrong." Therefore, the ordinary meaning of the term "public morals" refers to community or national standards of right and wrong. Accordingly, prior WTO panels have found that the term "public morals" refers to "standards of right and wrong conduct maintained by or on behalf of a community or nation". It follows that the public morals of each Member may vary "in their respective territories, according to their own systems and scales of values."

32. In practice, panels have found that a measure "protect[s] public morals" within the meaning of Article XX(a) to the extent the measure is designed to prevent conduct or outcomes deemed morally objectionable within a Member's territory. Relevant to this dispute, the panel in *US – Tariff Measures* found that the U.S. norms against theft, misappropriation and competition could be covered by the term "public morals" within the meaning of Article XX(a).

2. The measures at issue "protect public morals" of the United States within the meaning of Article XX(a)

33. China's non-market policies and practices that have resulted in China's global dominance of the clean vehicle and renewable energy sectors undermine U.S. "public morals" within the meaning of Article XX(a). That is, China's non-market and trade distorting behavior, including unfair competition, the use of forced labor, theft, and coercion, violates prevailing U.S. "standards of right and wrong," as reflected in U.S. civil and criminal laws, such as those on unfair competition, contracts and torts, patents, governmental takings of property, forced labor, cyber-hacking, and trade secret theft.

34. First, the United States has norms against unfair competition, as reflected in U.S. laws against anti-competitive behavior, such as the Sherman Act and the Federal Trade Commission Act. These statutes articulate standards of behavior that have maintained a highly competitive free market in the United States for more than a century. The first anti-competitive statute was the Sherman Act, which codified the fair competition moral underpinnings of the U.S. economy in 1890. The importance of the Sherman Act to the fundamental principles of the United States is summarized by the U.S. Supreme Court in *Northern Pacific Railway Co.*, "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade . . . while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."

35. Therefore, the United States does not simply view unfair competitive practices as merely a detriment to business and innovation. Ultimately, these practices are viewed as a threat to the "preservation of our democratic political and social institutions". Accordingly, certain violations of these laws, such as monopolization, are even criminalized.

36. Moreover, the United States maintains and enforces laws against the use of forced labor. The Thirteenth Amendment of the U.S. Constitution states, "[n]either slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." The United States criminalizes the use of forced labor, under the broader umbrella of human trafficking, through the Trafficking Victim's Protection Act of 2000, as amended. Further, the United States prohibits the importation of goods produced wholly or in part with forced labor under Section 307 of the Tariff Act of 1930. The United States has recently bolstered the enforcement of this prohibition through the Uyghur Forced Labor Prevention Act (UFLPA), which creates a rebuttable presumption that goods mined, produced, or manufactured wholly or in part in the Xinjiang Uyghur Autonomous Region of the People's Republic of China, or by an entity on the UFLPA entity list, are prohibited from importation under Section 307.

37. In addition, the act of "theft" is a criminal offense throughout the United States. U.S. laws also criminalize the specific acts of cyber-enabled theft, economic espionage, and the misappropriation of trade secrets (including though the act of "bribery" or "extortion"). While community standards of right and wrong can be derived from many sources, standards of right and wrong are clearly reflected in a jurisdiction's *criminal* law.

38. In other words, the United States imposes constraints on behavior based on national concepts of right and wrong to ensure market-oriented outcomes. U.S. law specifically does not permit the type of unreasonable, anti-competitive behavior to determine winners and losers in the marketplace that China champions.

a. Additional statements that demonstrate U.S. public morals relating to fair, market-oriented competition

39. The United States continues to reiterate the importance of these norms domestically, at the WTO and other fora, and in conjunction with allies and partners. In 2025, U.S. support for fair competition and trade has been reiterated in numerous executive orders and presidential memoranda. The President has ordered numerous actions to address unfair and unbalanced trade, and has condemned one-sided, anti-competitive policies and practices of foreign governments. The President's 2025 Trade Policy Agenda similarly observes that "technology and IP-intensive sectors are hardly the only ones that are threatened by China's non-market behavior" and promises that "USTR will look broadly at the bilateral relationship to identify, and respond to, additional unfair practices."

40. In addition to other trade-related Group of Seven (G7) activity, in 2024, the United States and other G7 partners took a number of steps to enhance cooperation on addressing non-market policies and practices and economic coercion. For instance, in July 2024, the United States and other G7 trade ministers issued a joint statement underscoring the need to address non-market policies and practices and promote economic resilience and economic security.

41. In July 2024, the United States and Japan engaged on non-market policies and practices. In March 2023, the United States and Japan agreed to address non-market policies and practices in the critical minerals sector. Similarly, in June 2023, Australia, Canada, Japan, New Zealand, the United Kingdom, and the United States endorsed a joint declaration against trade-related economic coercion and non-market policies and practices.

42. In September 2021, the United States and the EU recognized the concern of non-market policies and practices in stating that "[w]e stand together in continuing to protect our businesses, consumers, and workers from unfair trade practices, in particular those posed by non-market economies, that are undermining the world trading system".

43. Earlier, in October 2020, the United States, Brazil, and Japan issued a joint statement recognizing the importance of market-oriented conditions to the world trading system. That statement also expressed serious concerns with non-market policies and practices that had resulted in damage to the world trading system, and affirmed that market-oriented conditions are fundamental to a free, fair, and mutually advantageous world trading system, to ensure a level playing field for Members' enterprises for the benefit of their citizens.

44. In May 2018, the United States, Japan, and the European Union issued a joint statement confirming their shared objective to address non-market-oriented policies and practices that lead to severe overcapacity and create unfair competitive conditions for our workers and businesses.

45. As these U.S. statements and actions over the years make clear, the U.S. norms against unfair competition, forced labor, theft, and coercion are deeply held and enduring, and constitute public morals within the meaning of Article XX(a).

3. China's non-market policies and practices violate U.S. public morals

46. China's non-market policies and practices that have resulted in China's global dominance of the clean vehicle and renewable energy sectors offend U.S. standards of right and wrong. As discussed below, China has achieved global dominance of the clean vehicle and renewable energy sectors, undermining fair competition for U.S. companies, workers, and the U.S. economy generally. Both China's dominance of these sectors and the non-market policies it pursues violate U.S. public morals against unfair competition, forced labor, theft, and coercion.

47. For example, with respect to solar: China's share of the global solar energy supply chain – that is, global polysilicon, ingot, and wafer production – soon will reach almost 95 percent. China

dominates manufacturing capacity across all segments of the solar supply chain worldwide, with its share exceeding 80% in all stages. Global solar manufacturing capacity has grown by 2-3 times in the past five years, 90% of which occurred in China. Estimates are that China produces far more solar panel modules than the world is on track to use.

48. China also dominates electric vehicle supply chains: China produces approximately 60 percent of electric vehicles sold globally and approximately 80 percent of the batteries that power them. China also has a leading role in the upstream stages of the battery supply chain. China accounts for almost 90 percent of global installed cathode active material manufacturing capacity, over 97% of anode material manufacturing capacity, almost 100 percent of lithium-iron-phosphate production capacity, and more than 75 percent of global production of installed nickel manganese cobalt oxide. In 2023, China's cathode and anode active material installed manufacturing capacity was four and nine times greater than global EV cell demand in 2023.

49. China also dominates the production and supply of many critical minerals that are key inputs for clean energy production. According to the International Energy Agency (IEA), China's global production of graphite is at 77 percent, gallium is at 98 percent, germanium is at 68 percent, and tungsten is at 84 percent. The IEA projects that by 2030 over 90 percent of battery-grade graphite and 77% of refined rare earths could come from China.

50. It is also well documented that China has targeted the clean energy sectors for dominance. For instance, China's *Made in China 2025* industrial plan, introduced in 2015, makes clear China's ambitions to dominate the clean energy supply chain, both domestically and globally. The *Made in China 2025 Technology Greenbook* calls for the support of important solar applications and focus on energy-efficient and new-energy vehicles.

51. China has achieved this global dominance through pervasive non-market policies and practices that undermine fair competition. As explained below, those non-market policies in the clean vehicle and renewable energy sectors include: non-market excess capacity; government interference with or direction of commercial decision-making; forced labor and unfair labor practices; forced technology transfer, including cyber intrusions and cyber theft; arbitrary regulations; insufficient regulatory and market transparency; pervasive subsidization; and anti-competitive activities of state-owned or -controlled enterprises.

52. For example, with respect to the electric vehicle sector, China has used various types of non-market policies and practices to secure its dominant position in the electric vehicle sector. Central and sub-central government industrial plans in China have set quantitative targets for the automotive sector broadly and the electric vehicle sector specifically, including both dominant domestic market share targets and export volume targets as a share of total production that would mean securing significantly larger market shares abroad. China has engaged in massive and relentless subsidization of Chinese companies, including Chinese electric vehicle manufacturers, as well as forced or pressured technology transfer. China provides ad hoc preferences benefiting Chinese companies operating in the electric vehicle sector, such as easier and speedier regulatory approvals than are available to foreign companies.

53. China further uses state-directed investment to unfairly acquire U.S. technology, through means that are in contradiction with the Sherman Act's prohibition and criminalization of monopolization – or even attempts at monopolization – in any aspect of interstate trade or commerce. Monopolistic power is characterized by the ability to act independently of competition or market-based considerations. The Chinese government has implemented an investment policy that seeks to create dominance in specific sectors through non-market based funding and investment strategies. That is, Chinese economic entities are not subject to market disciplines in making investments for state-desired technologies through state-provided or state-directed financing.

54. Further, China's market share targets identified in its *Made in China 2025* industrial plan – which includes the clean energy sectors – demonstrate that China is using this state-directed investment to unfairly acquire U.S. technology in order to dominate not only the Chinese market, but also markets around the world. For Chinese companies to gain market share, they must displace foreign companies in existing markets and take new markets as they develop.

55. China also uses subsidies in the form of direct financial support to establish and promote non-market excess capacity in clean energy sectors. For instance, for solar, from 2000 to 2010, China reportedly invested \$50 billion into solar production facilities. Likewise, for electric vehicles, from 2009 to 2023, China provided over \$230.9 billion in government support to its EV sector.

56. Further, it is well known that severe and persistent excess capacity exists in China's clean energy sectors. This non-market excess capacity derives from China's targeting of sectors for dominance, its control of economic entities, artificial cost advantages through labor rights or wage suppression, severe government subsidies, and more. Once Chinese firms dominate the domestic market, they export to foreign markets at such low prices and in such quantities that foreign firms find it hard to compete with the unfair competition.

57. Forced labor is also used in the solar supply chains dependent on polysilicon from the Xinjiang Uyghur Autonomous Region. Nearly half of the world's polysilicon comes from the Xinjiang Uyghur Autonomous Region, a region of China where members of ethnic and religious minority groups are forced by the Chinese government to work against their will. China has arbitrarily detained more than one million Uyghurs and other mostly Muslim minorities, forcing them to work under guard and constant threats in mines and factories producing polysilicon.

58. China also uses technology transfer-related acts, policies, and practices, among other tools. For example, China imposes foreign ownership restrictions, such as joint venture requirements and foreign equity limitations, and various administrative review and licensing process, to require or pressure technology transfer from foreign companies. For example, in 2014, Norwegian-based REC Silicon was compelled to form a joint venture with and license its proprietary technology to a Chinese partner. REC Silicon held a 49% stake in the resulting Chinese joint venture and, in 2015, sold its core polysilicon manufacturing technology to the joint venture for USD 198 million in upfront payments. The company had been left with little option but to strike a deal and transfer its intellectual property to a Chinese company in an effort to stay in business. Likewise, for electric vehicles, "foreign producers still face difficulties in gaining a majority share of their joint ventures, buying out their Chinese partners, or establishing new wholly-owned subsidies in China".

59. It is also documented that China conducts and supports unauthorized intrusions into, and theft from, the computer networks of foreign companies to access their sensitive commercial information and trade secrets. For instance, in 2014, the Department of Justice indicted officers of 3PLA, a unit under China's People's Liberation Army, for cyber intrusions into the computer networks of six U.S. companies, including SolarWorld Americas, whose Passivated Emitter Rear Contact solar cell technology was stolen and then adopted by Chinese solar producers. In 2020, the U.S. Department of Justice (DOJ) indicted two individuals working with China's Ministry of State Security for carrying out state-sponsored intellectual property theft with a focus on high tech sectors, which included the solar sector. In 2022, a cybersecurity firm found that APT-41, a group that is linked to China's Ministry of State Security, carried out state-sponsored intellectual property theft with a focus on high tech sectors, which included solar module designs.

60. In other words, China—as a matter of state policy and practice—uses coercion and subterfuge to steal or otherwise improperly acquire intellectual property, trade secrets, technology, and confidential business information from U.S. companies with the aim of advantaging Chinese companies and achieving China's industrial policy goals.

4. The measures at issue protect U.S. public morals

61. As a result of China's dominance in the clean vehicle sector and clean energy supply chain, the United States enacted the measures at issue to reduce reliance on China, and enhance fair competition and market-oriented outcomes in the U.S. market. Further, the measures incentivize sourcing outside of China, given that China will soon have a 95 percent share in the global solar supply chain, and China produces approximately 60 percent of electric vehicles sold globally and approximately 80 percent of the batteries that power them.

62. For example, in a fact sheet released by the prior U.S. Administration concerning actions to protect U.S. manufacturers and workers from China's unfair trade practices, the domestic content bonus credit enacted by the IRA was listed as an action "to strengthen American solar manufacturing and protect businesses and workers from China's unfair trade actions". Similarly, the U.S.

Congressional Research Service observed, in examining the incentives for clean transportation enacted by the IRA, that the requirements of the Clean Vehicle Tax Credit "appear to support other efforts to reduce reliance on production and manufacturing activities in China".

63. The impact of the measures at issue are apparent. For the solar industry, from 2022 to 2023, the United States increased its installed battery cell manufacturing capacity by more than 45%. In 2024, module manufacturing capacity grew 190% in the United States. In the same year, cell manufacturing was reshored for the first time in five years as Suniva restarted production at its 1 GW factory in Georgia. Similarly, in January 2025, ES Foundry started a cell factory in South Carolina. In March 2025, Corning, Suniva, and Heliene announced that they would aim to produce the first solar module with polysilicon, wafers, and cells made in the United States. Both Hanwha Qcells and Silfab Solar are expected to start U.S. cell production in 2025.

64. Companies also have begun to explore new opportunities upstream in EV supply chains. For instance, in 2024, Tesla and several Korean battery makers met with Chilean government agencies regarding lithium supply, with the aim of supplying the U.S. market as a result of the tax credits from the IRA. Likewise, EV supply chains have been developing in Mexico as a result of access to financial support from the IRA.

65. EV investments have also begun in the United States. Automakers and battery manufacturers have collectively invested and promised to make substantial investments in U.S. cell and module manufacturing, with the potential to deliver an annual capacity of close to 1,200 gigawatt-hours before 2030. For instance, General Motors aims to have three total battery plants in the United States, and is building a new battery cell development center in Michigan. In 2025, 10 new plants will increase the U.S. battery manufacturing capacity to 421.5 gigawatt-hours annually, almost double the growth of the U.S. battery manufacturing capacity from 2024.

66. EV manufacturing capacity in the United States has also increased. It is projected that the United States will have a total EV manufacturing capacity of 5.8 million new light-, medium-, and heavy-duty EVs each year by 2027. For instance, General Motors is on track for the capacity to produce 1 million EVs annually by the end of 2025. Scout Motors (Volkswagen) started building an electric sports utility vehicle manufacturing plant in South Carolina.

67. Thus, fundamentally, the clean vehicle and renewable energy tax credits at issue have as their goal—and have resulted in—investments in the United States (and like-minded partners) to stand up alternative supply and supply chains to China. Such new capacity seeks to restore market-oriented conditions and competition within the United States, and would mean that U.S. consumers and the U.S. market are no longer rewarding China's non-market policies.

B. The measures at issue are "necessary" within the meaning of Article XX(a)

68. The ordinary meaning of "necessary" means "[t]hat which is indispensable, an essential, a requisite"; "[t]hat cannot be dispensed with or done without; requisite, essential, needful". Therefore, for Article XX(a), a measure must be indispensable, essential, or requisite to serve the objective—in this case, to protect public morals.

69. The Panel must evaluate whether the measures at issue are necessary within the meaning of Article XX(a) now, at a time when China has already achieved global dominance of the clean vehicle and renewable energy sectors, and in light of the importance of the U.S. morals against unfair competition, forced labor, theft and coercion. As the United States has learned through its experience with China's behavior in the solar, critical minerals, and other sectors, development of a secure and sustainable clean energy supply chain is required to effectively counter—and correct for—China's targeting and to restore conditions that reflect U.S. public morals.

70. China achieved global dominance of the clean vehicle and renewable energy sectors through pervasive non-market policies and practices that undermine fair competition. Over time, and without corrective action, market-oriented economies risk deepening integration with and dependencies upon China and its non-market policies and practices. This dynamic undermines efforts to create a "race to the top" that incentivizes high standards, and causes U.S. businesses, workers, and consumers to unwittingly or unwillingly reward anti-competitive and unfair behavior, forced labor

and labor rights violations, and forced technology transfer, including cybertheft and industrial espionage.

71. Given that China has already achieved global dominance in the clean vehicle and renewable energy sectors, the measures at issue in this dispute are necessary to uphold the U.S. morals of fair competition in the marketplace. Indeed, without corrective action, there is simply no way for market economies to hope to restore fair competition in their markets.

72. For example, by conditioning the availability of the domestic content bonus credit under the renewable energy ITC/PTCs on the use of certain amounts of domestic content, the tax credits incentivize the manufacturing of these products in the United States – a market-oriented economy, which pays market wages and in which companies must compete for business. Creating these incentives also helps expand production in the United States, which staves off dependencies upon non-market policies and practice-wielding governments. Other requirements of IRA clean energy tax credits, which may be fulfilled with production outside the United States, incentivize production in countries that are also more market-oriented—and helps preserve those countries' market orientation, and defends the United States against imports that are products of non-market practices or policies.

73. Accordingly, *the measures at issue pursue the vitally important objective of upholding U.S. norms that are threatened by China's non-market policies and practices.* The measures at issue also signal to businesses in the U.S. marketplace that China's policies will not be tolerated in the U.S. marketplace.

C. The measures at issue are not inconsistent with the chapeau of Article XX

74. A measure that is "necessary to protect public morals" within the meaning of Article XX(a) must not be applied in a manner that constitutes "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" or a "disguised restriction on international trade". The United States has not applied the measures at issue in a manner inconsistent with the chapeau of Article XX.

1. The United States has not applied the remaining measures at issue in a manner that constitutes "arbitrary or unjustifiable discrimination"

75. First, the United States has not applied the measures at issue in a manner that constitutes "arbitrary or unjustifiable discrimination between countries where the same conditions prevail." The ordinary meaning of the term "arbitrary" includes "capricious, unpredictable, [or] inconsistent" manner, while the ordinary meaning of "unjustifiable" may be understood as "[n]ot justifiable, indefensible." The word "discrimination" may be defined as "[t]he action or an act of discriminating or distinguishing; the fact or condition of being discriminated or distinguished; a distinction made." Definitions of "discriminate" include "[m]ake or recognize a distinction, esp. a fine one; provide or serve as a distinction; exercise discernment." Definitions of the word "conditions" include "[s]tate, or mode of being" or "[n]ature, character, quality; a characteristic, an attribute."

76. Based on these definitions, this text in Article XX of the GATT 1994 may be understood as prohibiting an exercise of discernment or distinction as between countries that have the same state, mode of being, or nature; and only when exercise of discernment or distinction is unpredictable or indefensible. Accordingly, relevant in this dispute is whether distinctions that the United States has exercised between itself and China in the measures at issue are between countries that have the same state, mode of being or nature; and whether those distinctions are unpredictable or indefensible.

a. The same conditions do not prevail in the United States and China

77. China has achieved global dominance of the clean vehicle and renewable energy sectors, through pervasive non-market policies and practices. The United States, by contrast, believes in—and has long had laws and other measures promoting—fair competition, as well as norms against forced labor, theft, and coercion which are reflected in U.S. civil and criminal laws. Unlike China, the United States does *not* target certain sectors for dominance and has laws such as the Sherman Act aiming to preserve economic liberty. Unlike China, the United States has *not* used pervasive

non-market policies and practices to achieve global dominance in numerous clean energy sectors; instead, the United States has enshrined in its Constitution a prohibition of forced labor and enacted criminal and civil laws against the use of forced labor. Thus, the same conditions do not prevail in the United States and China.

b. Discrimination between the United States and China in the application of the measures at issue is not arbitrary or unjustifiable

78. Nor are the "distinctions made" between the United States and China in the application of the measures at issue arbitrary or unjustifiable. Given the significant differences in the conditions that prevail in the United States and China, it is entirely logical for the United States to exercise discernment or distinction between itself and China in the application of the measures at issue. In fact, in light of China's non-market policies and dominance of the clean vehicle and renewable energy sectors, the measures at issue are simply a continuation of longstanding U.S. measures promoting fair competition and prohibiting forced labor, and an effort to counter—and correct for—China's behavior and restore market-oriented conditions. Were the United States not to distinguish itself from China, the measures would be incapable of achieving those goals and protecting U.S. public morals.

2. The United States has not applied the measures at issue in a manner that constitutes "a disguised restriction on international trade"

79. The measures at issue are not being applied in a manner that constitutes a "disguised restriction on international trade". The United States has taken no steps to conceal the requirements of the measures at issue. The text of the law is clear, and the United States has not disguised the requirements that must be fulfilled to access the tax credits raised in this dispute.

VI. THE EXCEPTIONS UNDER ARTICLES XX AND XXI OF THE GATT 1994 APPLY TO THE CLAIMS UNDER THE TRIMS AND SCM AGREEMENTS

80. It is—or should be—self-evident that WTO Members continue to have the authority under the WTO to take essential security measures and measures under the general exceptions for public policy reasons, such as protecting public morals, protecting life or health, countering use of prison labor, or conserving natural resources – just as they did under the GATT. For the avoidance of any doubt, the United States sets out the legal and textual basis for the applicability of the essential security and general exceptions to the TRIMs Agreement and SCM Agreement.

A. The ordinary meaning of the terms of the TRIMs and SCM Agreements establish that Article XX and XXI of the GATT 1994 apply to claims under those agreements

81. The ordinary meaning of the terms of the TRIMs and SCM Agreements establish that the exceptions under Articles XX and XXI of the GATT 1994 are applicable to the TRIMs and SCM Agreements.

1. The TRIMs Agreement contains multiple provisions of text linking the TRIMs Agreement with the GATT 1994 and its exceptions

82. The ordinary meaning of the terms of the TRIMs Agreement establishes that Articles XX and XXI of the GATT 1994 are available as defenses to claims under the TRIMs Agreement. Most notably, Article 3 of the TRIMs Agreement states that "[a]ll exceptions under GATT 1994, shall apply, as appropriate, to the provisions of this Agreement." Therefore, pursuant to Article 3 of the TRIMs Agreement, a Member may utilize any exception under the GATT 1994, as appropriate to the provisions of the TRIMs Agreement.

83. Even without regard to Article 3, the TRIMs Agreement contains twelve other references to the GATT 1994, that demonstrate Articles XX and XXI apply to the TRIMs Agreement. These twelve references include statements that the TRIMs Agreement terms should be understood "in such a manner as", "provided for", "in conformity with" provisions of the GATT 1994. For example, Articles 4 and 6 confirm that the GATT 1994 is applicable to measures subject to the TRIMs Agreement, and that the GATT is inextricably linked with the text of the TRIMs Agreement. The TRIMs Agreement

also contains more general references to the GATT 1994, including in Articles 6 and 8. These provisions demonstrate that the commitments and rights in the GATT 1994 apply with respect to TRIMs.

2. The SCM Agreement Contains Multiple Provisions of Text Linking It with the GATT 1994 and the Articles XX and XXI Exceptions

84. The SCM Agreement also includes numerous references to the GATT 1994, thus also establishing that Articles XX and XXI are available as defenses to claims under the SCM Agreement. Perhaps most notably, Article 32.1 states, "No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement". The Article is accompanied by footnote 56, which states, "This paragraph is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate."

85. Article 32.1 is an explicit textual link with the GATT exceptions in the SCM Agreement. Specifically, Article 32.1 of the SCM Agreement provides that no action against a subsidy can be taken "except in accordance with the provisions of GATT 1994, as interpreted by this Agreement." Action taken under Article XX or XXI of the GATT 1994 is "in accordance with the provisions of GATT 1994", and therefore, is taken pursuant to Article 32.1. Although Article 32.1 also contains the phrase, "as interpreted by this Agreement," footnote 56 confirms that the paragraph is *not intended to preclude action under other relevant provisions of the GATT 1994* (emphasis added). Therefore, Article 32.1 and footnote 56, read in conjunction, confirm that where an article is not interpreted by the SCM Agreement, the authority to take action under GATT provisions remain unchanged.

86. In addition, another way to consider the link is to look directly to footnote 56 to Article 32.1. The reference in footnote 56 to such "other relevant provisions of the GATT 1994" includes both Article XX and Article XXI. That is, although Article 32.1 makes clear that Members shall take no action against a subsidy except in accordance with those provisions of the GATT 1994 as interpreted by the SCM Agreement, footnote 56 states that actions under other relevant provisions of the GATT 1994 – such as Articles XX and XXI – that have not been interpreted by the SCM Agreement are not precluded from use.

87. The SCM Agreement also contains 24 other references to the GATT 1994. These 24 references include numerous statements that SCM Agreement terms should be understood "in the sense of", "in accordance with", "as provided for", "within the meaning of", or "for the purposes" of GATT 1994 Articles VI and XVI. The text therefore establishes that the SCM Agreement not only applies and interprets Articles VI and XVI of the GATT 1994, but also expands upon the GATT disciplines relating to the use of subsidies and countervailing duties. The references demonstrate that the SCM Agreement provides disciplines tied to the implementation of the GATT 1994, and has strong textual links with the GATT 1994.

B. The structure and context of the WTO Agreement establishes that Articles XX and XXI apply to the TRIMS and SCM Agreements

88. The structure of the WTO Agreement and the context it provides also establish that Articles XX and XXI(b) are defenses to claims under the SCM Agreement. The Marrakesh Agreement is an umbrella, establishing among other things that all of the agreements in its annexes are a single undertaking.

89. The core multilateral substantive obligations are contained in Annex 1. Relevant to this dispute, the public morals and essential security exceptions appear in each of Annexes 1A, 1B, and 1C. In particular, in Annex 1A, Article XX of the GATT 1994; in Annex 1B, Article XIV of the GATS; and in Annex 1C, Article 27.2 of the TRIPS Agreement.

90. The essential security exception also applies to each of Annexes 1A, 1B, and 1C. In particular, in Annex 1A, Article XXI of the GATT 1994; in Annex 1B, paragraph 1 of Article XIV bis of the GATS; and in Annex 1C, Article 73 of the TRIPS Agreement.

91. Within Annex 1A, the Multilateral Agreements on Trade in Goods, the first agreement listed is the GATT 1994, a successor to the GATT 1947. The GATT 1947/1994 contain the public morals and essential security exceptions in their respective equivalent of Articles XX and XXI. The remaining

agreements in Annex 1A (including the TRIMs and SCM Agreements) are the product of negotiations in the Uruguay Round, undertaken with the purpose of elaborating upon the disciplines in the GATT 1994 and related matters involving trade in goods.

92. The negotiators understood that the GATT 1947/1994 public morals and essential security exceptions apply to the new agreements on trade in goods contained in Annex 1A. The General Interpretative Note to Annex 1A supports the interpretation that the GATT 1994 general exceptions and essential security exception apply to the new trade-in-goods agreements. The note addresses possible conflicts between the GATT 1994 and the new agreements in Annex 1A; in doing so, the note confirms that the negotiators viewed the new agreements as addressing the same topics as the GATT 1994. Further, in providing that the new agreements prevail in the event of conflict, the drafters were reflecting the general rule that more specific provisions prevail over general provisions. Thus, the interpretive note confirms that the new trade-in-goods agreements were viewed as an elaboration upon the disciplines in the GATT 1994.

93. In addition, the interpretation that the GATT 1994 general exceptions and essential security exception apply throughout Annex 1A is fully consistent with the conflict rule set out in the interpretive note. In particular, none of the new trade-in-goods agreements contains a provision stating that the Article XX and Article XXI exceptions are inapplicable to the obligations under those agreements.

94. Past adjudicators have considered the structure of the WTO Agreement, and likewise considered the structure of a "single undertaking", in examining the relationship between Annex 1A agreements. Thus, how the legal structure serves as interpretative context depends on the interpretative issue at hand. Accordingly, it is helpful to examine the specific ties between the SCM Agreement and the GATT 1994, as well as the specific claims brought by China.

C. The claims in this dispute confirm the link between the GATT 1994 and the TRIMs and SCM Agreements

95. The claims in this dispute confirm the link between the GATT 1994 and the TRIMs and SCM Agreements. China argues that the United States has acted inconsistently with Articles 3.1(b) and 3.2 of the SCM Agreement, and Articles 2.1 and 2.2 of the TRIMs Agreement.

96. First, China alleges that the United States has acted inconsistently with Article 3.1(b) of the SCM Agreement. Article 3.1(b) prohibits subsidies that are contingent on the use of domestic content, and reiterates the principles set out within Article III of the GATT, regarding national treatment on internal taxation and regulation. The link between Article 3.1(b) of the SCM Agreement and Article III of the GATT 1994 is particularly clear in this dispute where China has alleged that the measures at issue are inconsistent with both Article III:4 of the GATT 1994 and Article 3.1(b) of the SCM Agreement.

97. China also alleges that the measures at issue are inconsistent with Article 3.2 of the SCM Agreement. Article 3.2 provides that, "[a] Member shall neither grant nor maintain subsidies referred to in paragraph 1." Article 3.1(a) prohibits export subsidies, including those illustrated in Annex 1. In Annex 1 of the SCM Agreement, Illustrative List of Export Subsidies, paragraph (I), the last paragraph of Annex 1, explicitly references Article XVI of the GATT 1994.

98. With respect to the TRIMs Agreement, China argues that the measures at issue are inconsistent with Articles 2.1 and 2.2 of the TRIMs Agreement. From the first half of Article 2.1 with the phrase "[w]ithout prejudice to other rights and obligations under GATT 1994", it is evident that the article is not intended to curtail the other rights that Members have under the GATT 1994, including Articles XX and XXI of the GATT 1994. For the second half of Article 2.1, China acknowledges the link between Article 2.1 of the TRIMs and the GATT 1994.

99. Next, China also alleges that the measures at issue are inconsistent with Article 2.2 of the TRIMs Agreement. Article 2.2 provides an illustrative list of TRIMs that are inconsistent with certain provisions of the GATT 1994. Moreover, China specifically cites to paragraph 1(a) of the Annex, which lists an example that is inconsistent with Article III:4 of the GATT 1994.

100. Further, the link between Articles 2.1 and 2.2 of the TRIMs Agreement and Article III of the GATT 1994 is particularly clear in this dispute where China has alleged that the measures at issue are inconsistent with both Article III:4 of the GATT 1994 and Articles 2.1 and 2.2 of the TRIMs Agreement. Therefore, the claims in this dispute confirm the link between the GATT 1994 and the TRIMs and SCM Agreements.

EXECUTIVE SUMMARY OF U.S. OPENING STATEMENT AT THE FIRST SUBSTANTIVE MEETING WITH THE PANEL

I. CHINA'S NON-MARKET POLICIES AND PRACTICES VIOLATE U.S. PUBLIC MORALS AND ARE JUSTIFIED UNDER ARTICLE XX(A) OF THE GATT 1994

101. China's non-market policies and practices include: targeting of sectors for dominance; non-market excess capacity; state-directed investment; forced labor; forced technology transfer; and theft of trade secrets. These non-market policies and practices of China violate the U.S. public morals against unfair competition, forced labor, theft, and coercion.

102. China's **targeting of the clean vehicle and renewable energy sectors for dominance** is contrary to the U.S. public morals against unfair competition, forced labor, theft, and coercion. The targeting of sectors for dominance does not occur in isolation. Rather, China's targeted sectors align with China's use of state-directed investment, forced labor, theft of trade secrets, and forced technology transfer to achieve dominance.

103. China's **non-market excess capacity** is contrary to the U.S. public morals against unfair competition, forced labor, theft, and coercion. Non-market excess capacity is deliberately created by China through investments and capacity expansion far in excess of what market-oriented actors, operating under market economy constraints would create.

104. China's use of **state-directed investment** is contrary to the U.S. public moral against unfair competition. China's investment policy seeks to create dominance in specific sectors through non-market based funding and investment strategies, including by subsidizing sectors with excess capacity, as well as unfairly acquiring U.S. technology. China also directs and encourages outbound investment by Chinese economic entities in areas it deems strategic.

105. China's **use of forced labor** is contrary to the U.S. public morals against unfair competition and forced labor. The use of polysilicon is a key component in the production of solar panels. Nearly half of the world's polysilicon comes from the Xinjiang Uyghur Autonomous Region, a region of China where members of ethnic and religious minority groups work against their will, under guard and constant threats, in mines and factories producing polysilicon. Likewise, in the clean vehicle sector, lithium is a key component for EV batteries – and several lithium-ion battery manufacturers that feed into the EV supply chain are located in the Xinjiang region, using forced labor.

106. China's use of **forced technology transfer** in the clean vehicle and renewable energy sectors is contrary to the U.S. public morals against unfair competition and coercion.

107. China also conducts and supports unauthorized intrusions into, and **theft** from, the computer networks of foreign companies to access their sensitive commercial information and trade secrets, in violation of the U.S. public morals against theft and unfair competition.

II. FEOC EXCLUSIONARY RULE UNDER THE CLEAN VEHICLE TAX CREDIT IS COVERED BY ARTICLE XXI(B) OF THE GATT 1994

108. In light of the self-judging nature of Article XXI(b), the sole finding that the Panel may make with respect to the FEOC exclusionary rule under the Clean Vehicle Tax Credit—consistent with its terms of reference and the DSU—is to note in the Panel's report that the United States has invoked its essential security interests. Although Article XXI(b) does not require an invoking Member to furnish reasons for its invocation, we point to publicly available information demonstrating the self-evident national security basis for the FEOC exclusion.

109. The five statutory grounds on which a foreign entity may be considered an FEOC are self-evidently matters of national security for the United States. China's challenge focuses on the third

FEOC ground, foreign entities "owned by, controlled by, or subject to the jurisdiction or direction of a government of a foreign country that is a covered nation." This definition of "covered nation" was incorporated into the FEOC provision from U.S. defense procurement law, which defines a "covered nation" to mean North Korea, China, Russia, and Iran, and characterizes these countries as "non-allied foreign nations." Numerous other U.S. instruments similarly identify these four nations as "foreign adversaries." The inclusion of China in lists of "non-allied" foreign nations and "foreign adversaries" make clear that China's inclusion is a matter of national security for the United States.

110. The United States is aware of recent WTO reports suggesting – erroneously – that panels have authority to review a responding party's invocation of Article XXI(b). The DSU does not assign precedential value to panel or appellate reports, though this Panel may take them into account in its own objective assessment to the extent the Panel finds them persuasive or helpful. Those reports are not persuasive, however, because they fail to interpret the ordinary meaning of the terms of Article XXI(b).

EXECUTIVE SUMMARY OF U.S. RESPONSES TO THE PANEL'S FIRST SET OF QUESTIONS

Excerpt from U.S. Response to Question 8

111. China's *targeting* of the clean vehicle and renewable energy sectors for dominance is contrary to U.S. public morals, and China's *achievement* of global dominance through the use of non-market policies and practices targeting these sectors demonstrates the necessity of the measures.

Excerpt from U.S. Response to Question 11

112. The United States emphasizes that the phrase "designed to" and "not incapable of" does not appear in the text of Article XX(a) of the GATT 1994. Rather, a panel must apply the text of a covered agreement as understood through application of customary rules of interpretation. Therefore, there is no requirement under Article XX(a) to show that a measure is "designed to" protect or "not incapable" of protecting public morals.

Excerpt from U.S. Response to Question 12.

113. The Clean Vehicle Tax Credit is "designed" to protect, and is "not incapable" of protecting, the U.S. public morals against unfair competition, as well as forced labor, theft, and coercion. For example, to qualify for the Clean Vehicle Tax Credit, final assembly must occur in North America and increasing percentages of the value of battery components to be manufactured or assembled in North America. Such requirements ensure that clean vehicles and their battery components are manufactured or assembled in the United States, Canada or Mexico – countries that are parties to the United States-Mexico-Canada Agreement (USMCA), a free trade agreement containing provisions to protect U.S. public morals. Specifically, USMCA contains, among other commitments, the strongest labor provisions in any trade agreement, including agreeing to eliminate all forms of forced labor and prohibiting the importation of goods from sources produced by forced labor, provisions that protect source code and algorithms and prohibit forced technology transfer, and the protection of trade secrets.

114. Likewise, a vehicle may qualify for part of the Clean Vehicle Tax Credit if it contains a battery with critical minerals extracted or processed in any country with which the United States has a free trade agreement in effect. U.S. free trade agreements protect U.S. public morals because they contain provisions that help maintain fair competition and discourage forced labor, theft, and coercion – such as provisions prohibiting anti-competitive conduct, reaffirming labor obligations, providing for the protection and enforcement of IP rights, and regulating state-owned enterprises.

115. Another such agreement is the United States-Japan Critical Minerals Agreement, which contains provisions demonstrating the contribution of such an agreement to achieving U.S. public morals. The objective of the agreement is "to strengthen and diversify critical minerals supply chains and promote the adoption of electric vehicle battery technologies by formalizing the shared commitment of the Parties to facilitate trade, promote fair competition and market-oriented conditions for trade in critical minerals, ensure robust labor and environment standards".

Excerpt from U.S. Response to Question 13

116. The Clean Vehicle Tax Credit incentivizes an alternative supply chain distinct from China – in the United States or in countries that have made commitments in free trade agreements with the United States that advance and align with U.S. public morals. Similarly, the renewable energy tax credits distinguish China by incentivizing market-oriented behavior. The domestic content bonus provision in the renewable energy tax credits protects U.S. public morals because steel manufacturers in the United States must comply with U.S. law, which reflect U.S. public morals against unfair competition, forced labor, theft, and coercion. Further, the renewable energy tax credits also contain a prevailing wage requirement that requires companies to pay laborers and mechanics wages that are sufficiently high. This requirement ensures that U.S. public morals are upheld, and ensures that China's non-market policies are not rewarded, including its use of forced labor in the renewable energy sector.

Excerpt from U.S. Response to Question 16

117. Domestic content bonus provisions reflect that (1) the steel market demands a different approach because of China's non-market excess capacity, and (2) manufacturers in the United States must comply with the U.S. laws that protect U.S. public morals. To recall, the IRA Investment and Production Tax bonus credit is additional to existing investment and production tax credits, and is available if (1) 100 percent of structural steel or iron is produced in the United States, or (2) a certain percentage (up to 55 percent in 2027) of manufacturing takes place within the United States.

118. Like other aspects of the measures at issue, these bonus credits protect U.S. public morals because they ensure that U.S. support – through tax credits – does not reward China's nonmarket policies and practices. Requiring manufacturing in the United States plays a significant role in protecting U.S. public morals because manufacturers in the United States must comply with the U.S. Constitution, the Sherman Act, the Federal Trade Commission Act, U.S. labor laws, and other laws that reflect U.S. public morals. With respect to steel and iron in particular (with iron being an input for steelmaking) these provisions' focus on production in the United States reflects the global steel excess capacity crisis, brought on by China's non-market policies and practices.

119. Although China's non-market policies and practices have affected a number of sectors, their effects on the global steel market are particularly profound. As the Global Forum on Steel Excess Capacity (GFSEC) has observed, distorted "steel production in countries like China benefits downstream sectors, such as electric vehicle manufacturing, providing these sectors a competitive edge in international markets." In this way distortions that start in the steel sector extend beyond the steel industry itself, posing long-term risks in other sectors.

120. Moreover, China's non-market policies and practices in the steel sector have affected the steel market globally, for example, through trade distortion and diversion, as well as through significant investments in steelmaking outside China by Chinese state-owned enterprises (SOEs). There is no doubt that China was the principal driver of this global crisis at the time this Panel was established (and remains so today). And despite significant efforts by the United States and others, including through domestic trade remedies measures, international dialogues, and coordinated actions, the problem persists and in fact is projected to worsen.

Excerpt from U.S. Response to Question 17

121. The measures at issue need not explicitly refer to public morals to be justifiable under Article XX(a), as is clear from the ordinary meaning of the terms of Article XX(a). The terms of Article XX(a) do not require that a measure was "taken" or "adopted" "in order to ensure" a particular result or pursuant to a particular aim.

122. There are longstanding and widespread concerns with China's nonmarket policies and practices shared across the U.S. government (and other governments) as well as the private sector and civil society, and such concerns were specifically before the U.S. Congress in the months leading up to the IRA's passage. As ultimately adopted, the U.S. Congress passed the IRA because it believed the Act would lessen U.S. reliance on China and promote U.S. energy security by ensuring that the United States and its allies were not left beholden to foreign entities that do not share our interests and values.

123. The FEOC exclusion from the Clean Vehicle Tax Credit is necessary, but not sufficient, to protect U.S. public morals. This provision excludes from eligibility for the Clean Vehicle Tax Credit any clean vehicle that contains certain components manufactured or assembled, or certain minerals extracted, processed, or recycled, by an entity that is "owned by, controlled by, or subject to the jurisdiction or direction of" China. The FEOC exclusion alone does not address the global distortions that China has caused, however, for example as it does not incentivize production in other countries that align with the U.S. public morals against unfair competition, forced labor, theft, and coercion.

EXECUTIVE SUMMARY OF U.S. SECOND WRITTEN SUBMISSION

I. THE MEASURES ARE JUSTIFIED UNDER ARTICLE XX(A)

A. The measures at issue are necessary to protect public morals

124. The United States has established that the measures at issue are necessary to protect U.S. public morals based on a totality of the circumstances.

125. First, the measures are apt to contribute to U.S. public morals by promoting U.S. and other investments, thereby reducing dependence on China. The measures are structured so as to avoid U.S. purchasers' rewarding China's non-market policies and practices that violate the U.S. public morals against unfair competition, forced labor, theft, and coercion.

126. Second, the United States has established the deeply held and enduring nature of the U.S. public morals against unfair competition, forced labor, theft, and coercion, therefore demonstrating the fundamental importance to the United States of ensuring that such public morals are upheld.

127. Third, the measures are taken in a context in which China has already achieved global dominance in the clean vehicle and renewable energy sectors, vividly demonstrating the necessity of such measures. China's domination and effective monopolization of the clean vehicle and renewable energy sectors globally has made it such that essentially all portions of the clean vehicle and renewable energy supply chains are now dependent on China. China has created an untenable situation for the United States and other Members. In both the U.S. first written submission and at the first panel meeting, the United States provided a set of datapoints concerning the startling nature of China's dominance in these sectors. China does not dispute this; nor can it.

128. China's weaponization of its global dominance in the clean vehicle and renewable energy sectors also demonstrates the necessity of the measures at issue and the importance of creating supply chains not dependent upon China. China has "increasingly threatened to weaponize their control of supply chains" and "have banned exports to the United States of gallium, [and] germanium" —important components for EVs. As recent as April 2025, China has also imposed export controls on seven critical rare earth metals, of which some are critical for the clean vehicle and renewable energy sectors. Accordingly, China has threatened and now has actually taken action to choke off the supply of critical minerals and supplies that are necessary for production in the clean vehicle and renewable energy sectors in other countries, including the United States.

129. Also, previous versions of the IRA tax credits challenged in this dispute have not been successful in protecting U.S. public morals, demonstrating the necessity of the measures at issue. Versions of the measures—without the challenged portions—existed prior to the IRA, yet, despite their existence, the United States was not able to maintain or develop capacity, and China was able to achieve global dominance, in the clean vehicle and renewable energy sectors.

130. Previous U.S. measures attempting to address the effects of global non-market excess capacity on the U.S. steel sector and U.S. manufacturing have likewise been unsuccessful in protecting U.S. public morals. For example, the United States has imposed tariffs and other measures on steel imports, and has participated in numerous international dialogues aimed at addressing global steel excess capacity. Despite these efforts, the problem of global steel excess capacity persists, and in fact is projected to worsen. The failure of these previous efforts demonstrates the necessity of the renewable energy tax credits and their domestic content bonus credit provisions.

131. The measures are also evidently necessary because *no country* has been able to maintain or restore its manufacturing capacity since China's monopolization of the clean vehicle and renewable energy sectors obtained through the use of non-market policies and practices targeting these sectors. The Panel must evaluate whether the measures at issue are necessary now, at the time of this WTO challenge, when China has already achieved global dominance of the clean vehicle and renewable energy sectors.

B. THE MEASURES ARE NOT INCONSISTENT WITH THE CHAPEAU

1. The measures at issue do not discriminate because the same conditions do not prevail between China and the United States

132. Relevant to this dispute is whether distinctions that the United States has drawn between *itself and China* in the measures at issue are between countries that have the same state, mode of being or nature; and whether those distinctions are unpredictable or indefensible.

133. China argues that the U.S. free trade agreement disciplines referenced by the United States are not materially different from the obligations that the United States and China have with each other in the Economic and Free Trade Agreement between the Government of the United States and the Government of the People's Republic of China ("Phase One Agreement"). China's arguments fail for numerous reasons.

134. The Phase One Agreement grew out of an investigation into certain acts, policies, and practices of China related to technology transfer, intellectual property, and innovation. Yet, technology and IP-intensive sectors are hardly the only ones that are threatened by China's non-market behavior. Indeed, in a 2024 report, the U.S. Trade Representative (USTR) observed:

It also remains unclear how faithfully and fairly China will actually enforce the changes to its laws and regulations. Meanwhile, other commitments that China made, such as in the area of technology transfer, are difficult to verify given the tactics that China takes to obscure its activities.

Notably, the Phase One Agreement did not address many of the U.S. concerns that the United States had been seeking to address in its negotiations with China. The reality is that the Phase One Agreement did not meaningfully address the more fundamental concerns that the United States has with China's state-led, non-market policies and practices and their harmful impact on the U.S. economy and U.S. workers and businesses. The unresolved issues included critical concerns in areas such as state-led industrial plans targeting industries for dominance, massive and pervasive subsidization, favorable regulatory support for domestic enterprises, state-owned enterprises, non-market excess capacity, state-sponsored theft of intellectual property, standards, cybersecurity, data localization requirements, restrictions on cross-border data transfers, competition law enforcement and regulatory transparency as well as certain issues in the areas of intellectual property, technology transfer and services market access that were not addressed in the Phase One Agreement. In furtherance of its industrial policy objectives, China's government has also limited market access for imported goods and services and restricted the ability of foreign manufacturers and services suppliers to do business in China.

135. Furthermore, as China is aware—China's lack of compliance with the Phase One Agreement is a serious concern to the United States, as China has failed to live up to its commitments in numerous areas, including the protection of intellectual property rights. In May 2024, USTR issued a report that found that China's unfair acts, policies and practices had continued and, in some cases, had worsened. Accordingly, China is mistaken when it attempts to equate the Phase One Agreement with a "free trade agreement" for purposes of the Clean Vehicle Tax Credit.

136. It is also deeply ironic that China's points to its Protocol of Accession to the WTO in attempting to establish that the same conditions prevail in China as in the United States. China's dominance of the clean vehicle and renewable energy sectors itself demonstrates the woeful insufficiency of that Protocol in restraining China's behavior.

137. Nor does China's domestic competition and anti-monopoly laws provide any meaningful assurances regarding the conditions that prevail in China. Contrary to China's assertions, U.S. companies have cited selective enforcement of the Anti-Monopoly Law against foreign companies seeking to do business in China as a major concern. They have highlighted in particular the comparatively limited enforcement of this law against China's own state-owned enterprises. IP rights holders have expressed concerns regarding China's enforcement of its anti-monopoly law, observing that it can be misused for the purpose of depressing the value of foreign-owned intellectual property in key technologies.

2. The measures at issue do not discriminate where the same conditions prevail

138. The United States also has not discriminated among partners with the "same conditions"—that is, the countries that have agreed to commitments aligned with U.S. public morals in a U.S. free trade agreement. China attempts to undermine the U.S. distinction between U.S. free trade agreement partners and non-free trade agreement countries by asserting that U.S. free trade agreements are heterogenous, and do not substantively expand on obligations that exists under WTO Agreements or other agreements.

139. As an initial matter, logically, it makes sense for free trade agreements to be heterogenous since they are commitments undertaken to address issues between two or more countries, and each country has individual trade concerns. And for purposes of this dispute, it is the *commonality* of provisions across U.S. free trade agreements that is important, namely provisions that discourage unfair competition, forced labor, theft, and coercion.

140. Contrary to China's assertions, U.S. free trade agreements build on the foundation of the WTO Agreement, and they have more comprehensive and stronger disciplines. Indeed, as China itself appears to recognize, the USMCA includes TRIPS-plus obligations relating to trade secrets, including, for example but not limited to, obligations relating to the protection of trade secrets. And even free trade agreement provisions that simply reiterate or incorporate provisions set forth in other agreements serve to reinforce those commitments and signal the value that free trade agreement partners place on those commitments.

II. THE FEOC EXCLUSION IS COVERED BY ARTICLE XXI(B)

141. China complains that the United States has not met a purported "burden of proof" for an invocation of Article XXI, but neither the DSU nor any other covered agreement uses that phrase, and—consistent with DSU Article 3.2—what is required of a Member exercising its right under Article XXI is set forth in the terms of Article XXI itself. China cites no support for its invented "burden of proof" for an invocation of Article XXI(b), and indeed China's complaints about the U.S. invocation of Article XXI(b) here appear contrary to its own previous assertions regarding Article XXI(b) as a third party in *Russia-Traffic in Transit*.

142. China also asserts—without support in the text of Article XXI(b)—that "the United States bears the burden of establishing that one more of the subparagraphs of Article XXI(b) is objectively applicable to the GATT-inconsistent measure for which justification is sought." Article XXI(b) does not require a Member invoking that provision to identify the subparagraph ending that Member may consider most relevant, and indeed nothing in the text of Article XXI(b) suggests that the subparagraphs are mutually exclusive.

143. In any event, the FEOC exclusionary rule is self-evidently a matter of national security and could be understood to relate to one or more subparagraphs of Article XXI(b). The IRA defines FEOC by cross-reference to the Infrastructure Investment and Jobs Act of 2021, which sets out a five-part definition. Perhaps acknowledging the self-evident national security basis for at least four parts of this definition, China has focused its arguments only on the third FEOC ground, foreign entities "owned by, controlled by, or subject to the jurisdiction or direction of a government of a foreign country that is a covered nation." The term "covered nation" was incorporated into the FEOC provision from U.S. defense procurement law, which defines a "covered nation" to mean North Korea, China, Russia, and Iran, and characterizes these countries as "non-allied foreign nations."

144. Numerous other instruments similarly identify China and these other nations as "foreign adversaries" or note that China poses a threat to the United States. Such statements—which date from before the IRA's passage to the present—further confirm the self-evident national security basis for the FEOC exclusion from the Clean Vehicle Tax Credit. That national security basis could be seen as implicating one or more of the subparagraphs, for example, Article XXI(b)(iii) as an action that a Member considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations.

EXECUTIVE SUMMARY OF U.S. OPENING STATEMENT AT THE SECOND SUBSTANTIVE MEETING WITH THE PANEL

I. INTRODUCTION

145. The Panel should examine the measures as they existed at the time of panel establishment. Although the challenged measures have now changed, this does not change the Panel's inquiry pursuant to the DSU to assess the existence of the measures at a time when China targeted and attained global dominance in the clean vehicle and renewable energy sectors.

146. Indeed, a Member may have many tools at its disposal. A Member can use one means or many means. One U.S. administration imposed antidumping and countervailing duties on solar cells and modules from China. The first Trump Administration imposed safeguards on solar cells and modules. The prior U.S. Administration chose to use the IRA as one means to address China's targeting and dominance of the clean vehicle and renewable energy sectors. The current Administration may choose other means or adopt other measures to protect U.S. public morals. But that Members may have various tools to address an issue over time does not undermine the use of tax credits at one point in time to defend societal values.

II. THE FEOC EXCLUSION IS COVERED BY ARTICLE XXI(B)

147. Article XXI(b) is self-judging by its terms. Notwithstanding the self-judging nature of Article XXI(b), from the beginning of this dispute the United States has made available information regarding the U.S. invocation of Article XXI. Perhaps acknowledging that Article XXI(b) is self-judging as interpreted in accordance with customary rules of interpretation of public international law, in arguing to the contrary China grasps for what it terms "accepted principles of treaty interpretation". China does not explain, however, what "principles" it is referring to, how they might have been "accepted," and how these principles compare with the customary rules of interpretation of public international law.

148. Perhaps acknowledging the lack of support for its position in the ordinary meaning of the terms of Article XXI(b) itself, China repeatedly points to *United States – Hong Kong Origin Marking*. That report is not persuasive, however, and this Panel should not repeat its errors, and instead should find that Article XXI(b), as interpreted according to the customary rules of interpretation of public international law, is self-judging; and accordingly, the sole finding that this Panel may make with respect to FEOC, consistent with its terms of reference under Article 7.1 of the DSU, is to note the U.S. invocation of Article XXI.

EXECUTIVE SUMMARY OF U.S. RESPONSES TO THE PANEL'S SECOND SET OF QUESTIONS

Excerpt from U.S. Response to Question 30

149. The United States and China appear to be in agreement that the One Big Beautiful Bill Act (OBBBA) does not impact the Panel's terms of reference under the DSU. The DSB established the Panel on September 23, 2024, and set the Panel's terms of reference to examine the matter referred by China to the DSB in its panel request. Therefore, the Panel must assess the measure as it existed at the time of the Panel's establishment.

150. The DSU does not grant a panel discretion to depart from its obligations under the DSU in the case of an expired or terminated measure. To the contrary, the DSU uses mandatory terms to set out the matter a panel is charged to examine, and the recommendation that follows a finding of WTO-inconsistency. Where a panel makes a finding of inconsistency, Article 19.1 of the DSU and,

in the case of a prohibited subsidy, Article 4.7 of the SCM Agreement, impose a mandatory obligation on the panel to also make a recommendation.

Excerpt from U.S. Response to Question 33

151. With respect to *evidence*, a panel is generally free to consult evidence arising *after* the date of panel establishment to the extent such evidence is pertinent in assessing the WTO-consistency of challenged measures *as of* the date of panel establishment when the panel's terms of reference were set. Therefore, the relevance of the evidence depends on whether that evidence sheds light on the legal situation that existed on the date of panel establishment.

Excerpt from U.S. Response to Question 37

152. The United States has demonstrated, and China has not denied, that China has attained global dominance in the renewable energy sector. The manufactured products requirement, which is a condition for receiving bonus tax credits under the investment and production tax credits at issue in this dispute, applies to the upstream products that become part of a renewable energy project. Manufactured products within the meaning of the investment and production tax bonus credits include, for example, photovoltaic trackers, photovoltaic modules, wind turbines, battery packs, and battery containers and housing. Each of these products can be part of a renewable energy project eligible for the investment and production tax bonus credits.

153. To the extent the Panel's question also relates to the steel content requirement for receiving bonus credits under the investment and production tax credits, the United States has demonstrated—and China has not denied—that China has achieved global dominance in the steel sector.

Excerpt from U.S. Response to Question 38

154. Requiring U.S. content for steel and iron or U.S. manufactured products in renewable energy projects in order to receive these bonus credits—as opposed to, for example, granting tax credits for clean vehicles that use critical minerals or battery components from countries with which the United States has a free trade agreement—reflects the particular circumstances of the steel and manufacturing sectors, which differ from those of the critical minerals or battery sectors.

155. With respect to critical minerals and batteries in the clean vehicle sector, the United States seeks to work with U.S. allies that have significant mining experience to counteract China's global dominance. In the steel sector, by contrast, the effects of China's non-market policies and practices have been longstanding and particularly profound, and have resulted in global distortions. China's non-market policies and practices have led to artificially low prices, lower imports into China, and higher exports from China. China's artificially low-priced steel exports lead to price arbitrage, as these exports displace production and suppress prices in third-country markets. And the effects of China's non-market policies and practices in the steel sector also affect iron (a key input for steel) and U.S. manufacturing (given follow-on effects in U.S. communities from the closure of steelmaking facilities).

156. For decades the United States has taken steps to counteract the effects of China's non-market policies and practices in the U.S. steel market. Unfortunately, other countries, including U.S. FTA partners, have failed to take similar steps, and their domestic steel markets remain significantly more susceptible to and distorted by China's practices than the U.S. steel market. In these circumstances, it is necessary to protect U.S. public morals by requiring the use of domestic steel and iron or U.S. manufacturing—that is, by relying on a market that is less distorted than other major markets, including U.S. FTA partners.

EXECUTIVE SUMMARY OF U.S. COMMENTS ON CHINA'S ANSWERS TO THE PANEL'S SECOND SET OF QUESTIONS

Excerpt from U.S. Comment on China's Response to Question 32

157. Under the hypothetical scenario that the Panel were to find the renewable energy tax credits to be inconsistent with Articles 3.1 and 3.2 of the SCM Agreement, the Panel should set a time period

that would allow for: (1) legislative action to withdraw those credits with consideration for the normal legislative calendar for making tax changes on a fiscal year basis; and (2) engagement between the parties with respect to withdrawal of the measure. The United States suggests a time period of one year from the date of adoption of the report by the DSB. Such a time period would be "without delay" under Article 4.7.

Excerpt from U.S. Comment on China's Response to Question 36

158. The United States observes that the panel in *US – Tariff Measures* stated that an analysis under Article XX(a) is a "holistic exercise," refraining from reaching any intermediate conclusion before completing the entire analysis under Article XX(a) to "guarantee[] that the nature and purpose of Article XX(a) are not frustrated." Accordingly, the Panel should proceed to an assessment of whether the measures are necessary to protect U.S. public morals, without a need to first reach an intermediate finding under the "design" step.

EXECUTIVE SUMMARY OF U.S. ADDITIONAL COMMENTS

Excerpt from U.S. Additional Comment to China's Comment on Question 30

159. The United States takes note of China's statement that it withdraws its claims against the Clean Vehicle Tax Credit, and considers that China has effectively withdrawn the matter relating to the Clean Vehicle Tax Credit from its panel request to the DSB. By withdrawing the entirety of its claims against the Clean Vehicle Tax Credit, China no longer has a "legal basis" or "complaint" against the Clean Vehicle Tax Credit, and there is no "matter" before the Panel with respect to the measure.

160. Accordingly, although China states that "it is no longer necessary for the Panel to make findings or recommendations," it is more correct to say that it is no longer permissible for the Panel to make findings or recommendations. The DSU does not permit the Panel to make findings or recommendations on a matter that is not before it. As China has withdrawn the matter with respect to the Clean Vehicle Tax Credit from the matter referred to the DSB, the Clean Vehicle Tax Credit is now excluded from the Panel's terms of reference.

ANNEX C**ARGUMENTS OF THE THIRD PARTIES**

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ANNEX C-1

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF ARGENTINA

1. Good morning Madame Chair and distinguished members of the Panel, Parties, Third Parties, and members of the Secretariat.
2. Argentina welcomes the opportunity to appear today before the Panel, exercise its right as a Third Party and thus, present its views on some of the issues raised by the Parties in this proceeding on *United States – Certain Tax Credits Under the Inflation Reduction Act*.
3. Argentina will not comment on the specificities of facts and evidence provided by the Parties. Instead, Argentina will highlight some issues that it considers relevant for both the present dispute and the WTO at large. These issues have been partly addressed, interpreted and reinterpreted over time in other disputes.
4. To begin with, Argentina considers appropriate to recall that Article 11 of the DSU establishes the applicable standard of review for a WTO panel in the task of analyzing a matter submitted to its consideration. This article mandates panels to conduct an objective assessment of the matters before them in accordance with the covered agreements. Hence, panels are expected to have a proactive role¹ and conduct an in-depth² and independent³ examination of the case presented by the Parties to ensure a proper assessment of the case in question.
5. In the present dispute, the Panel faces the challenging task of having to address some issues that are of the utmost relevance for the functioning of the WTO system. These issues encompass the operation and effectiveness of some of the exceptions in the GATT 1994, which were once agreed upon for granting Members flexibility in pursuance of their public policies under certain conditions and within particular contexts and objectives.
6. Argentina notes that the issues raised in the present dispute require the interpretation of Articles XX(a) (General exceptions) and XXI(b) (Security exceptions) of the GATT 1994. As usual in these cases, the question arising here is whether the exceptions invoked can plausibly justify the challenged measures if found inconsistent with the obligations identified by the complainant.
7. In relation to Article XX(a) of the GATT 1994, based on the analysis developed in previous cases,⁴ the Panel would be required to conduct an assessment that harmonizes the opening clause of the Article (*chapeau*) with the specific clause invoked as a defense for the measures supposedly "*necessary to protect public morals*". The notion of "public morals" has been considered in past disputes⁵ and adjudicators have recognized the fact that Members enjoy a degree of discretion in determining its scope.⁶ Also, it was explained that "public morals" (even "public order") "*can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values*"⁷ and that may entail "*economic concerns*" as well.⁸
8. Argentina recalls that according to how the defences of Article XX(a) were raised in the present case, the concept "public morals" seems to involve a dual dimension that include societal values such as some purported "*unfair competitive practices (...) [that] are view as a threat to the 'preservation of ... democratic political and social institutions'*"⁹ and other more closely linked to individual concerns such as the alleged opportunities for "*... businesses and workers*"¹⁰ and

¹ Appellate Body Report. U.S. – Large Civil Aircraft (2nd Complaint), para. 1144.

² Appellate Body Report. U.S. – Countervailing Measures (China), para. 4.188-4.189

³ Appellate Body Report, Argentina – Footwear (EC), para. 74.

⁴ Appellate Body Report, Brazil – Retreaded Tyres, para. 139.

⁵ For instance, EC – Seal Products (Norway), Colombia – Textiles, and U.S. – Gambling.

⁶ Panel Report, U.S. – Gambling, para. 6.461 –reasoning no further reversed or modified by the Appellate Body–.

⁷ Panel Report, U.S. – Gambling, para. 6.461.

⁸ Panel Report, U.S. – Tariff Measures, paras. 7.134-7.137.

⁹ U.S. FWS, para. 71.

¹⁰ U.S. FWS, para. 63.

"innovation".¹¹ The fact that some of the conducts and practices allegedly being targeted by the challenged measures may be characterized as offenses or criminal conducts under the relevant domestic legislation, such as "*forced labor, [intellectual property] theft, and coercion*"¹² should be carefully assessed and the Panel should determine if -and to what extent- that characterization could contribute to shedding light on the analysis called upon the Panel to undertake.

9. But the analysis does not stop there. If -as the defendant argues- the measures do in fact pursue the protection of "public morals", then the examination of whether they conform to the *chapeau* of Article XX should ensue in order to ensure that the measures do not provide a discriminatory treatment between similar products from different origins that may potentially breach or offend the same values, or a plain restriction on trade.

10. Another issue in relation to Article XX concerns the matter of whether it is applicable to other WTO agreements distinct from the GATT 1994. Argentina observes that while certain agreements such as TRIMS¹³ allude explicitly to the exceptions of the GATT 1994, the SCM Agreement does not. Then, it might be worth recalling that the Appellate Body in a previous dispute observed that : "[the] *relationship between the GATT 1994 and the other goods agreements in Annex 1A is complex and must be examined on a case-by-case basis*".¹⁴ This observation may be useful in the context of the present dispute.

11. Finally, another matter yet brought under the purview of the Panel is whether the security exception set forth in Article XXI (b) is being legitimately invoked and, in particular, if it can be interpreted as being "self-judging" and up to what extent and under which conditions. Despite this matter was already treated in the context of other disputes,¹⁵ the proper assessment of the exception set forth in Article XXI (b) of the GATT 1994 bears special interest in a global scenario marked by "*geopolitical tensions, (...) [where] there is increasing evidence of inward-looking and unilateral trade policy decisions creating uncertainty for the world economy*", according to the DG Annual Report published in Novembre 2024.¹⁶

12. Argentina notes that *national security* and *public morals* concerns are both heavily reliant on individual perceptions and assessments that are inextricably linked to and conditioned by -among other factors- idiosyncratic cultural and historical elements that even if resemblant to other's, are still singular to each Member. So, despite being different legal provisions with different legal structures, both Article XX(a) and XXI(b) share a strong dependence on essentially self-defined elements which may be unique to each Member.

13. Argentina thanks the Panel and the Parties for the attention given to the present submission, and hopes its views may be helpful and assist the Panel in its task. Argentina will gladly endeavour to respond any questions the Panel or the Parties may have.

¹¹ U.S. FWS, para. 71.

¹² U.S. FWS, para. 103.

¹³ Article 3, TRIMS Agreement

¹⁴ Appellate Body Report, *Brazil – Dessicated Coconut*, page. 14, para. 2. WT/DS22/AB/R

¹⁵ For instance, *Russia – Traffic in Transit and U.S. – Origin Marking* (Hong Kong, China)

¹⁶ WT/TPR/OV/27, Annual Report of the Director General (Mid-october 2023 to mid-October 2024), paras. 1 and 3.36. Available in <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/TPR/OV27.pdf&Open=True>

ANNEX C-2

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF BRAZIL

I. INTRODUCTION

1. Brazil appreciates the opportunity to present its views to the panel in United States — *Certain Tax Credits Under the Inflation Reduction Act* (DS623). The panel's resolution of the legal matters in this dispute and its interpretation of the relevant provisions of the WTO Agreement on Subsidies and Countervailing Measures (SCM Agreement) and the General Agreement on Tariffs and Trade (GATT 1994) are of particular importance to the preservation of the integrity and effectiveness of the multilateral rules governing the use of subsidies —especially in the context of the global green transition. Brazil considers that this case raises important systemic issues, and accordingly, its comments reflect a substantial legal interest in the outcome of these proceedings.

2. Brazil wishes to underscore the central importance of the SCM Agreement as a cornerstone of the multilateral trading system, guaranteeing a level playing field important in emerging sectors tied to climate goals. The recent proliferation of large-scale green subsidies—irrespective of their origin—has raised concerns due to their potentially severe trade-distorting effects. When such subsidies are tied to local content requirements and originate from major economies, they significantly reduce market access for producers from smaller and developing countries. This entrenches existing asymmetries in the global trading system and undermines the development-oriented spirit that underpins many WTO provisions.

3. Indeed, subsidies that are framed as climate-related may, paradoxically, undermine global climate action. When such subsidies distort trade and redirect production geographically, any emission reductions achieved domestically may be offset—or even reversed—by increased emissions elsewhere. In this sense, the global effectiveness of climate policy may be diminished, despite the environmental intentions underlying national programs. Addressing the climate crisis requires cooperative international action, rather than fragmented, unilateral approaches that generate adverse spillovers.

4. The climate change crisis must be addressed in conformity with both the trade and the climate change multilateral regimes. Members should not misuse provisions from one regime in order to evade responsibilities in the other. It is crucial to bring those two regimes closer together, but in a fashion that is compatible with the rules set out in each one of them.

5. In the present submission, Brazil would like to address some aspects concerning the interpretation of WTO legal provisions. Brazil will focus its comments on two main legal issues: (i) Brazil's view on the proper interpretation of prohibited import substitution subsidies under Articles 3.1(b) and 3.2 of the SCM Agreement and of Article III.4 of the GATT/1994; and (ii) the scope and interpretation of Articles XX and XXI of the GATT 1994.

II. ARTICLES 3.1(B) AND 3.2 OF THE SCM AGREEMENT AND ARTICLE III:4 OF THE GATT/1994

6. Brazil does not intend to address in detail the concepts of "financial contribution," "benefit," or measures bestowed "by a government or a public body", which define subsidies, as these elements have been extensively interpreted in prior disputes. While the Panel will inevitably need to assess them in the present case, Brazil, as a preliminary matter, will focus its submission on the application of Articles 3.1(b) and 3.2 of the SCM Agreement and Article III:4 of the GATT/1994

7. The SCM Agreement was designed to strike a careful balance: it allows Members to promote specific economic sectors through subsidization while simultaneously guarding against the adverse effects of such measures on fair competition and global trade flows. This balance must guide the interpretation of the SCM provisions and, in particular, the delineation of prohibited and actionable subsidies. A key distinguishing feature of these categories lies in the **criteria** attached to the granting of subsidies —especially in cases, such as the present dispute, where eligibility is

conditioned on the use of local rather than imported goods, thereby violating the WTO outright prohibitions on these kind of subsidies.

8. Article 3.1(b) of the SCM Agreement reflects a commitment to the principle of non-discrimination embodied in Article III of the GATT 1994, a cornerstone of the multilateral trading system. It prohibits subsidies contingent—whether solely or as one of several conditions—upon the use of domestic over imported goods. This prohibition aims to prevent measures from undermining competitive opportunities for foreign products.

9. It is important to recall that only two categories of subsidies are prohibited outright under the SCM Agreement, namely those subsidies that are conditioned on export performance or on import substitution. All other categories are permitted so long as the subsidy does not cause adverse effects within the meaning of Article 5 of the SCM Agreement, in which case it or the adverse effect must be withdrawn.

10. As the Appellate Body stated in *EC — Large Civil Aircraft*:

"Only those subsidies that are conditioned on export performance or on import substitution are prohibited per se under Article 3 of Part II of the SCM Agreement. In contrast, all other subsidies are allowed under the SCM Agreement, albeit a Member granting such subsidies should not cause, through the use of the subsidies, adverse effects within the meaning of Article 5 of Part III, in which case it must remove the adverse effects or must withdraw the subsidies themselves." (*EC — Large Civil Aircraft – DS316*)

11. The relevant provisions of the SCM Agreement read:

"3.1 Except as provided in the Agreement on Agriculture, the following subsidies, within the meaning of Article 1, shall be prohibited:

[...]

(b) subsidies contingent, whether solely or as one of several other conditions, upon the use of domestic over imported goods

3.2 A Member shall neither grant nor maintain subsidies referred to in paragraph 1."

12. Brazil believes that the subsidies under the Inflation Reduction Act, as challenged by China, are prohibited under Articles 3.1(b) and 3.2 of the SCM Agreement and Article III:4 of the GATT/1994.

13. The challenged measures under the IRA are expressly conditioned on the use of domestic, rather than imported, goods. They violate, therefore, Articles 3.1(b) and 3.2 of the SCM Agreement. In "*Brazil – taxation*", the Panel concluded that all import substitution subsidies violate Article III:4 of the GATT/1994:

"[T]here are reasons to believe that Article 3.1(b) codifies in the SCM Agreement the principle of non-discrimination already contained in Article III of the GATT 1994. This is demonstrated both by the GATT dispute *Italy – Agricultural Machinery* of 1958, and by the records of the SCM negotiations of the Uruguay Round. ... A harmonious reading of Article 3.1(b) of the SCM Agreement (which prohibits subsidies contingent upon the use of domestic over imported products) and Article III:4 of the GATT 1994 (which prohibits laws, regulations and requirements that discriminate against imported products, including local content requirements), read in light of paragraph 1(a) of the Annex to the TRIMs Agreement, indicates that a subsidy contingent on the use of domestic over imported products would be inconsistent with both Article 3.1(b) of the SCM Agreement and Article III:4 of the GATT 1994." (*Brazil – Taxation – DS472*)

14. Brazil believes, in light of this jurisprudence, that the challenged measures under the IRA, besides violating Articles 3.1(b) and 3.2 of the SCM Agreement, also infringe Article III:4 of the GATT/1994.

III. ARTICLES XX AND XXI OF THE GATT

15. Brazil considers that a central issue before the Panel is whether the exceptions enshrined in Articles XX and XXI of the GATT 1994 can operate as a defense against a violation of Article 3.1(b) of the SCM Agreement.

16. The relevant text of Article XX of the GATT provides:

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

17. Similarly, article XXI states that:

"**Nothing** in this **Agreement** shall be construed

(a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests; or

(b) **to prevent** any contracting party from taking any action which it considers necessary for the protection of its essential security interests

(i) relating to fissionable materials or the materials from which they are derived;

(ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(iii) **taken in time of** war or other emergency in international relations; or

(c) **to prevent** any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."

18. Brazil notes that the introductory clause — "**nothing in this Agreement...**" — suggests that Articles XX and XXI apply solely to measures inconsistent with the GATT itself. This raises the interpretative question that the Panel will be called upon to address: whether "this Agreement" should be read *strictu sensu* (strictly limited to the GATT) or *lato sensu* (broadly, in light of the single undertaking nature of the WTO Agreement and its annexes).

19. Brazil observes that, in other WTO agreements — such as GATS, TRIMS, and TRIPS — the general exceptions of Article XX or XXI are either directly incorporated or explicitly cross-referenced.

20. Article XIV of the GATS states that:

"Article XIV

General Exceptions

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

(a) necessary to protect public morals or to maintain public order;(5)

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

(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:

(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;

(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;

(iii) safety;

(d) inconsistent with Article XVII, provided that the difference in treatment is aimed at ensuring the equitable or effective⁽⁶⁾ imposition or collection of direct taxes in respect of services or service suppliers of other Members;

(e) inconsistent with Article II, provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Member is bound."

21. Article 3 of the TRIMS Agreement provides that:

"Article 3

Exceptions

All exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement."

22. Article 73 of the TRIPS reads:

"Article 73

Security Exceptions

Nothing in this Agreement shall be construed: (a) to require a Member to furnish any information the disclosure of which it considers contrary to its essential security interests; or (b) to prevent a Member from taking any action which it considers necessary for the protection of its essential security interests; (i) relating to fissionable materials or the materials from which they are derived; (ii) relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment; (iii) taken in time of war or other emergency in international relations; or (c) to prevent a Member from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security."

23. The SCM Agreement, by contrast, contains no such express reference to Articles XX or XXI. The provision most closely related is Article 32.1, which states:

"32.1 No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."

24. Brazil interprets Article 32.1 as a procedural limitation on how Members may respond to another Member's subsidies. In Brazil's view, this clause delineates the permissible legal avenues available to a *responding* Member—such as the imposition of countervailing duties or the initiation of dispute settlement proceedings—but does not confer *substantive* legal justifications to the *subsidizing* Member to defend otherwise prohibited subsidies. That is, Article 32.1 regulates the framework within which other Members may legally react to subsidies, rather than defining the scope of permissible subsidies or enabling the invocation of general exceptions such as those contained in Articles XX or XXI of the GATT 1994. Accordingly, Brazil considers that Article 32.1 does not operate

as a gateway for importing GATT exceptions into the SCM Agreement, particularly in relation to the *per se* prohibition of subsidies contingent upon the use of domestic over imported goods under Article 3.1(b).

25. In Brazil's view, it is textually evident that the general exceptions set forth in Articles XX and XXI of the GATT 1994 apply to agreements such as TRIMS, given their explicit incorporation of those provisions. By contrast, the applicability of these exceptions to the disciplines on prohibited subsidies under Article 3.1 of the SCM Agreement remains far less clear. This ambiguity stems from the absence of any express textual linkage in the SCM Agreement.

26. Brazil does not consider it necessary for the Panel to rule on the applicability of Articles XX and XXI of the GATT 1994 to the SCM Agreement in the present dispute, since the conditions for the application of these articles have clearly not been met by the responding party.

27. Brazil holds that the application of general exceptions and security exceptions is subject to strict discipline. The chapeau of Article XX itself limits the application of the exceptions to situations where the measure is not applied in a manner that constitutes "arbitrary or unjustifiable discrimination" or "a disguised restriction on international trade". The necessity test of Article XX further makes it very difficult to justify that the bestowal of subsidies prohibited under Article 3 of the SCM is truly essential.

28. Applying the necessity test under Article XX involves a multi-step analysis, which includes, according to numerous disputes: determining whether the measure is trade-restrictive; assessing the extent to which the measure contributes to the achievement of a legitimate objective; evaluating the risks of non-fulfilment of that objective; and considering whether alternative measures are reasonably available that are less restrictive while making an equivalent contribution.

29. Finally, under the chapeau of Article XX, even a measure provisionally justified under its subparagraphs must still be applied in a non-discriminatory manner. The Panel would then have to examine whether the design and application of the measure reveal any arbitrary or unjustifiable discrimination between countries where the same conditions prevail.

30. With respect to Article XXI, Brazil maintains a similar position as it does under Article XX. Should the Panel find that Article XXI exceptions may be invoked in this context, Brazil considers that the term "essential security interests" must be used in connection with circumstances involving genuine security concerns, such as threats to sovereignty, territorial integrity, or emergencies in international relations. The Panel in *Russia – Traffic in Transit*, for instance, clarified that Members have discretion to define their essential security interests, but that discretion is not unlimited. In light of this interpretation, it seems difficult to establish a credible nexus between the provision of a subsidy under article 3.1(b) and the protection of essential security interests within the meaning of Article XXI, particularly where the measures at issue pursue predominantly economic or industrial policy objectives related to green technologies. Environmental capability, while economically significant, is not commonly associated with the hard power dynamics that characterize hostility concerns in international relations.

IV. INTERPRETATION OF ARTICLE XX(A)

31. In the event that the Panel considers the application of Article XX in the present dispute, Brazil submits the following considerations, which underscore the significant legal and factual hurdles that render the application of Article XX(a) highly unlikely.

32. The concept of "public morals" has been addressed by WTO adjudicators in the past. Panels have consistently recognized that WTO Members enjoy a degree of discretion to determine the scope of "public morals" in accordance with their own societal systems and values. As stated in *US – Gambling (DS285)*, "public morals" denote "standards of right and wrong conduct maintained by or on behalf of a community or nation," and their content may vary across time, place, and context, including prevailing social, cultural, ethical and religious values.

33. This flexibility was reiterated in *EC – Seal Products*, where the Panel emphasized that Members are afforded discretion to define public morals but must demonstrate that the concern indeed exists in their society and that the measure in question addresses that concern:

"WTO Members are afforded a certain degree of discretion in defining the scope of 'public morals' with respect to various values prevailing in their societies at a given time.[...] [T]he question of whether a measure aims to address public morals relating to a particular concern in the society of a regulating Member requires [...] an assessment of two issues: first, whether the concern in question indeed exists in that society; and, second, whether such concern falls within the scope of 'public morals' as 'defined and applied' by a regulating Member 'in its territory, according to its own systems and scales of values'. (*EC – Seal Products – DS401*)

34. At the same time, this discretion is not unbounded. The WTO jurisprudence requires that for a Member to invoke Article XX(a), two cumulative conditions must be met: (i) the measure must be "designed" to protect public morals; and (ii) the measure must be "necessary" to achieve that objective. As clarified in *Colombia – Textiles*, a measure is "designed" to protect public morals if it is not incapable of doing so. This threshold requirement examines whether the measure has a genuine connection to the asserted moral concern. If this connection is lacking, there is no need to proceed with the "necessity" analysis. In *Colombia – Textiles*, the adjudicators also shed light on the need to carefully weighing and balancing (i) the importance of the societal interest at stake, (ii) the degree to which the measure contributes to achieving that interest, and (iii) the degree of trade restrictiveness of the measure, as follows:

"With respect to the analysis of the 'design' of the measure, the phrase 'to protect public morals' calls for an initial, threshold examination in order to determine whether there is a relationship between an otherwise GATT-inconsistent measure and the protection of public morals. If this initial, threshold examination reveals that the measure is incapable of protecting public morals, there is not a relationship between the measure and the protection of public morals that meets the requirements of the 'design' step. In this situation, further examination with regard to whether this measure is 'necessary' to protect such public morals would not be required. This is because there can be no justification under Article XX(a) for a measure that is not 'designed' to protect public morals. However, if the measure is not **incapable of protecting public morals**, this indicates the existence of a relationship between the measure and the protection of public morals. In this situation, further examination of whether the measure is 'necessary' is required under Article XX(a). In order to determine whether such a relationship exists, a panel must examine evidence regarding the **design** of the measure at issue, including its **content, structure, and expected operation**. We note that a measure may **expressly mention an objective** falling within the scope of 'public morals' in that society. However, an express reference to such objective may **not**, in and of itself, be **sufficient** to establish that the measure is 'designed' to protect public morals for purposes of substantiating the availability of the defence under Article XX(a). Conversely, a measure that does not expressly refer to a 'public moral' may nevertheless be found to have such a relationship with public morals following an assessment of the design of the measure at issue, including its content, structure, and expected operation. [...] [T]he assessment of the 'necessity' of a measure entails a more in-depth, holistic analysis of the relationship between the measure and the protection of public morals. The Appellate Body has explained that a necessity analysis involves a process of '**weighing and balancing**' a series of factors, including the importance of the societal interest or **value** at stake, **the contribution of the measure to the objective it pursues**, and **the trade restrictiveness of the measure**. In most cases, a comparison between the challenged measure and possible alternatives should subsequently be undertaken. [...] [A] measure making a limited contribution to protecting public morals may be justified under Article XX(a) in circumstances where the measure has only a very low trade-restrictive impact, taking into account the importance of the specific interest or value at stake; similarly, it may be that a measure making a significant contribution is not justified under Article XX(a) if that measure is highly trade restrictive." (*Colombia – Textiles – DS461*)

35. In *Brazil – Taxation*, the Panel noted that the public morals exception had previously been applied in disputes involving issues such as fraud, money laundering, underage or pathological gambling, animal welfare, and the dissemination of offensive cultural content. These cases involved clear and direct moral concerns widely shared within the regulating Member's society.

"Policies covered under the public morals exception in past disputes have addressed issues such as money laundering, organized crime, fraud, underage gambling, and pathological gambling; content review to prevent the dissemination of cultural goods with a

content that has a negative impact on a Member's public morals and public concerns related to seal welfare." (*Brazil – Taxation – DS472*)

36. In the present dispute, the provision of subsidies contingent upon the use of domestic inputs—does not appear to be genuinely designed to protect public morals in the sense of Article XX(a). The connection between economic concerns and the protection of "public morals" remains tenuous. The concern expressed by the United States relates to the alleged impact of non-market policies, particularly from China, on global market fairness. Nonetheless, the effectiveness of the measure in contributing to the stated public morals objective is questionable. Moreover, there is little evidence that the challenged subsidies would curtail forced labor, prevent intellectual property theft, or neutralize the broader effects of non-market practices abroad, as the United States intends. As such, the contribution of the measure to the asserted moral objective appears limited. Alternative, less trade-restrictive approaches—such as non-discriminatory subsidies, regulatory cooperation, or multilateral engagement—could be equally or more effective in addressing those concerns without distorting trade or generating spillover effects on third countries.

37. In *US – Tariff Measures*, the Panel highlighted the importance of interpreting Article XX(a) in line with the object and purpose of the WTO Agreement, including the commitment to eliminate discriminatory treatment in international trade. An overly broad or unsubstantiated application of Article XX(a) risks undermining this balance.

"[T]he context of Article XX(a) includes the third recital of the Preamble of the WTO Agreement, which refers to the desire of WTO Members to contribute to 'reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade and to the elimination of discriminatory treatment in international trade relations'. (*US – Tariff Measures – DS543*)

38. Finally, the language of the chapeau of Article XX—particularly the phrase "where the same conditions prevail"—plays a central role in assessing the consistency of the measure with WTO obligations. This clause requires that a measure not result in arbitrary or unjustifiable discrimination between countries where similar circumstances exist. In the present dispute, the measure imposed by the United States discriminates against a wide range of trading partners, including Brazil, despite the fact that these countries have not been found to engage in the alleged conduct that the measure purports to address—such as forced labor, intellectual property theft or non-market practices. By applying a sweeping restriction that differentiates among WTO Members without adequate justification and regardless of whether the same public morals concerns prevail, the measure gives rise to precisely the type of arbitrary discrimination that the chapeau seeks to prevent. This inconsistency contributes to significant trade distortions, penalizing countries that are not the target of the alleged moral concern.

39. Even assuming, for the sake of argument, that Article XX of the GATT 1994 could be invoked to justify measures otherwise inconsistent with the SCM Agreement – a systemic question that this Panel need not address in the present dispute – the measure at issue would nonetheless fail to satisfy the substantive requirements of Article XX(a). The responding party has not demonstrated that the subsidy measure is 'necessary' to protect public morals within the meaning of Article XX(a). The alleged moral objective lacks sufficient nexus with the discriminatory subsidy structure adopted. Furthermore, the responding party has failed to explore less trade-restrictive alternatives that could reasonably achieve the same purported moral objective. Additionally, the measure's application constitutes arbitrary and unjustifiable discrimination between countries where the same conditions prevail, and a disguised restriction on international trade, contrary to the chapeau of Article XX. Therefore, irrespective of the broader question of Article XX's applicability to the SCM Agreement, the Panel should find that the measure cannot be justified under Article XX(a).

V. CONCLUSION

40. Brazil submits that the challenged measures under the IRA constitute prohibited subsidies within the meaning of Article 3.1(b) of the SCM Agreement, as they are contingent upon the use of local over imported goods. Such measures are, by their nature, inherently trade-distortive and undermine the fundamental principle of non-discrimination enshrined in the WTO legal framework.

41. Brazil understands that the measures at issue are not justified under Articles XX or XXI of the GATT 1994, as they fail to meet the substantive requirements set forth therein, including the necessity test and the non-discrimination conditions set forth in its chapeau. Consequently, Brazil submits that it is unnecessary for the Panel to address the broader issue of whether Article 3 of the SCM Agreement may, in principle, be subject to exceptions under the GATT.

42. Brazil is concerned with the widespread use of prohibited subsidies, particularly in light of the systemic risks posed by the increasing use of large-scale industrial subsidies tied to local content. The proliferation of such measures, if overlooked, threatens to erode the level playing field and exacerbate asymmetries in global trade.

43. Brazil appreciates the opportunity to comment on the issues raised in in the present dispute and hopes that the views put forward in this submission will assist the Panel in examining the matter before it.

ANNEX C-3

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF CANADA

I. INTERPRETATION AND APPLICATION OF GATT ARTICLE XX(A)

1. To successfully justify a measure under one of the general exceptions set out in the paragraphs of Article XX of the GATT 1994, a responding Member must satisfy a two-tier test.¹ First, the responding Member must demonstrate that the measure is provisionally justified under one of the paragraphs in Article XX. Second, if a panel finds that the measure at issue is provisionally justified, the responding Member must demonstrate that the measure satisfies the requirements of the Article XX chapeau, specifically that the measure is not applied in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail or is a disguised restriction on international trade.²

2. A responding Member must demonstrate three elements to justify a measure as necessary to protect "public morals" under paragraph (a) of Article XX.³ First, it must show that the challenged measures concern a "public morals" objective within the meaning of paragraph (a) of Article XX. Second, it must show that the measures are "designed" to protect that "public morals" objective. Third, it must show that the measures are "necessary" to protect that "public morals" objective.⁴

3. The term "public morals" refers to standards of right and wrong conduct.⁵ What constitutes a "public moral" may vary from Member to Member, and the responding Member has scope to define and apply for itself such public morals concepts in accordance with its systems and scales of values, including how to characterize the public moral in a defence under paragraph (a) of Article XX.⁶ Thus, a panel's analysis should begin with assessing how the responding Member has characterized the "public morals" objective of the measures at issue.⁷

4. Canada shares the concerns expressed by the United States in this dispute with respect to "fundamental norms against forced labor, theft, and coercion" and "norms against unfair competition".⁸ Indeed, the panel in *US – Tariff Measures (China)* concluded that "norms against theft, misappropriation and unfair competition" could be covered by the term "public morals" within the meaning of paragraph (a) of Article XX.⁹

5. After identifying the "public morals" objective pursued by the measures at issue, the Panel must then consider the relationship between the objective and the measures. A measure is "designed" to protect the "public morals" objective if the measure is "not incapable" of protecting the public moral. This is a threshold step. While the assessment of the design of a measure is not as demanding as the assessment of the necessity of the measure,¹⁰ the assessment of the design should not be a mere formality.¹¹

6. To determine whether there is a genuine relationship between the challenged measures and the "public morals" objective identified, a panel may consider the text, legislative history, and objectives of the measures as well as evidence regarding the content, structure, and expected

¹ Appellate Body Report, *US – Gasoline*, p. 22. See also, Appellate Body Reports, *US – Shrimp*, paras. 118-123, and *Indonesia – Import Licensing Regimes*, paras. 5.94-5.99.

² Canada's third-party submission, para. 4.

³ Panel Report, *US – Tariff Measures (China)*, paras. 7.110 and 7.112.

⁴ Canada's third-party submission, para. 5.

⁵ Panel Reports, *Brazil – Taxation*, para. 7.520, *EC – Seal Products*, para. 7.380, *US – Gambling*, paras. 6.461-6.468, and Appellate Body Report, *Colombia – Textiles*, fn. 155.

⁶ Panel Reports, *US – Tariff Measures (China)*, paras. 7.116-7.117 and 7.131; *EC – Seal Products*, para. 7.409; *China – Publications and Audiovisual Products*, paras. 7.759 and 7.819; and *US – Gambling*, paras. 6.461.

⁷ Canada's third-party submission, para. 6.

⁸ United States first written submission, paras. 68-69. See also, paras. 62, 64, and 71.

⁹ Panel Report, *US – Tariff Measures (China)*, para. 7.140.

¹⁰ Appellate Body Report, *Colombia – Textiles*, para. 5.70.

¹¹ Canada's third-party submission, para. 10.

operation of the measures to determine whether the measures are "designed" to protect the public moral.¹²

II. ORDER OF THE PANEL'S ANALYSIS

7. In Canada's view, the Panel has discretion to begin its analysis with China's claims under the GATT 1994 before proceeding to the claims under the TRIMs Agreement and the SCM Agreement, in turn.¹³ Further, beginning the analysis with the GATT 1994 claims has the potential to result in a more efficient resolution of this dispute as it may render the question of the applicability of Article XX of the GATT 1994 to the SCM Agreement moot due to the specific arguments advanced by the disputing parties.

8. Given that the same measures are at issue in the GATT 1994 and SCM Agreement claims and the fact that the United States articulates a single defence under paragraph (a) of Article XX for the alleged violations, a finding as to whether the United States has demonstrated that its measures are justified under this exception made with respect to one of China's claims would appear to apply equally to the remaining claims. Thus, if the Panel begins its assessment with the GATT 1994 claims and determines that the conditions for justifying a measure under paragraph (a) of Article XX have not been met, the same conclusion would apply with regard to the United States' invocation of paragraph (a) of Article XX in response to the SCM Agreement claims, assuming Article XX is applicable to such claims. In such a scenario, the Panel could confine an assessment of the prohibited subsidy claims to a determination of whether China has established a violation under Article 3.1(b) of the SCM Agreement and, if so, conclude its analysis there in the light of its earlier finding on paragraph (a) of Article XX.

III. ASSESSING THE APPLICABILITY OF THE GATT 1994 EXCEPTIONS TO THE SCM AGREEMENT AND OTHER MULTILATERAL AGREEMENTS ON TRADE IN GOODS

9. The Panel should exercise caution in opining on the applicability of the GATT 1994 exceptions to other multilateral agreements on trade in goods as that determination requires a careful and thorough analysis where the agreement in question does not contain an explicit textual reference indicating that the exceptions apply¹⁴ – such as the reference included in Article 3 of the TRIMs agreement.¹⁵

10. When faced with this question, a panel's determination must be made on a case-by-case basis. The relationship between provisions of different agreements should be ascertained through scrutiny of the relevant provisions with due account being taken of the overall architecture of the WTO system, and any specific provisions that shed light on the relationship between the provisions of different instruments.¹⁶ In some instances, such an examination will lead to the conclusion that exceptions in one agreement may be invoked to justify a breach in another covered agreement but "[i]n other instances, such examination may lead to the opposite conclusion".¹⁷

11. If it is necessary for the Panel to make such a determination in this case, it should carefully review the text of the relevant agreements, and related provisions that shed light on their relationship, when considering whether the defences invoked by the United States are applicable to the specific obligations addressed in China's claims.

12. That said, to resolve this dispute, Canada considers that it is not necessary for the Panel to determine whether each of the exceptions invoked are applicable to the SCM Agreement given the arguments of the disputing parties. As noted above, depending on the order of analysis followed by the Panel and its determination of whether the conditions for justifying a measure under paragraph

¹² Appellate Body Report, *Colombia – Textiles*, paras. 5.80 and 5.69.

¹³ See for example, Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, paras. 5.5-5.6.1. Canada notes that it is well established that "[a] panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute." Consequently, a panel has "the discretion to address only those arguments it deems necessary to resolve a particular claim." See for example, Appellate Body Report, *EC – Poultry*, para. 135.

¹⁴ See, Canada's third-party submission, para. 12.

¹⁵ Article 3 of the TRIMs Agreement provides: "All exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement."

¹⁶ Appellate Body Reports, *China – Rare Earths*, para. 5.55.

¹⁷ Ibid, para. 5.56.

(a) of Article XX of the GATT 1994 have been satisfied, it may not be necessary for the Panel to determine whether this exception is applicable to a prohibited subsidy claim under the SCM Agreement.

13. Furthermore, it is not necessary for the Panel to determine whether the essential security exception under Article XXI of the GATT 1994 applies to the SCM Agreement because the United States has not invoked Article XXI to justify any potential violations of that agreement.¹⁸ Instead, the United States invokes the essential security exception only with regard to China's claims under Article I:1 of the GATT 1994.¹⁹

¹⁸ Similarly, there is no need for the Panel to determine the applicability of the GATT 1994 exceptions to any other WTO Agreement to resolve this dispute. See, Canada's third-party submission, para. 16 and fn. 24.

¹⁹ United States first written submission, para. 45 and China's first written submission, para. 122.

ANNEX C-4**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE EUROPEAN UNION****1. ORDER OF ANALYSIS**

1. The first point raised by the European Union relates to the order of analysis that we suggest the Panel should follow. The European Union suggested that the Panel should first examine China's claims and the United States' defences under the GATT. If the Panel concludes that China has established *prima facie* that the challenged measures are inconsistent with the United States' obligations under the GATT and that they are not justified by Article XX and/or Article XXI of the GATT, then the Panel would not need to examine further China's other claims and the corresponding defences raised by the United States.

2. ARTICLE XX(A) OF THE GATT

2. In relation to Article XX(a) of the GATT, the European Union suggested that the Panel should follow the classic analysis as is accepted to constitute a correct interpretation of that provision and which is also reflected in past reports of the Appellate Body. This means starting with the analysis of whether the values and interests put forward by the United States fall within the notion of "public morals".

3. On the notion of "public morals", the European Union noted that WTO Members are given some scope to define and apply the relevant concept, but that this discretion is not without limitations. Australia, as a Third Party, had expressed the same view in a previous dispute between the same main parties, which raised the same legal issue. The European Union expressed in its Third Party Written Submission the view that public morals do not encompass purely economic policy objectives.

4. Moving to the next step of the analysis, namely whether the challenged measures are designed to protect public morals, the European Union suggested that the Panel should analyse whether the challenged measures are "not incapable" of protecting public morals.

5. The European Union noted that the legal instruments implementing the measure do not need to mention expressly a public morals objective. The European Union also noted that it is not necessary to show that the challenged measures have actually already succeeded in achieving their aims. There are many reasons for which some measure may end up not having the effects that its "content, structure and expected operation" were designed to produce.

6. On to the step of the analysis which relates to the interpretation of the *chapeau* of Article XX: In relation to the question of whether the challenged measures discriminate between countries where the same conditions prevail, the European Union noted two points: First, that the challenged measures discriminate between, on the one hand, the United States, Mexico, Canada and the countries with which the United States has a free trade area agreement and, on the other hand, all other WTO Members. Second, that the United States does not argue that the conditions prevailing in those other countries (except China) are different from the conditions prevailing in the United States, Mexico and Canada. Therefore, the European Union invited the Panel to examine whether this discrimination constitutes discrimination between countries where the same conditions prevail in the sense of the *chapeau* of Article XX of the GATT.

3. ARTICLE XXI OF THE GATT

7. The first point raised by the European Union is that Article XXI of the GATT is not "self-judging". The European Union considers that panels have full jurisdiction to review whether the requirements in the subparagraphs of Article XXI(b) are met.

8. In relation to the interpretation of the conditions of Article XXI of the GATT, the European Union expressed the view that the Panel must assess whether the conditions of Article XXI(b)(iii)

are met basing its analysis on the interpretation of the term "emergency in international relations". The European Union referred to the Panel Reports in *Russia-Traffic in Transit* and in *US-Steel and aluminium products*, which clarify the circumstances that must exist for these conditions to be met.

9. In relation to the interpretation of the conditions in the *chapeau* of Article XXI of the GATT, the European Union noted that the discretion allowed to WTO Members in defining their "essential security interests" and in the selection of the measures that they consider "necessary" for the protection of these interests is not absolute. The WTO Member's actions are subject to the requirements of good faith and the measures taken must meet a minimum requirement of plausibility in relation to the proffered essential security interests.

4. ARTICLE 3.1(B) OF THE SCM AGREEMENT

10. The European Union suggested that the proper interpretation of Article 3.1(b) of the SCM Agreement is that the use of domestic over imported goods must be a necessary requirement to obtain the subsidy. The European Union draws support for this interpretation from the persuasive reasoning in the Appellate Body Report in *Canada-Autos*.

11. The European Union invited the Panel to examine whether the two requirements at issue to obtain the subsidy can be met also by using imported goods. If the Panel finds that this is indeed the case, then the Panel should reject China's claim under Article 3.1(b) of the SCM Agreement, because the use of domestic goods would not be a required condition for receiving the subsidy.

ANNEX C-5

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF INDONESIA

I. INTRODUCTION

1. Indonesia welcomes the opportunity to be heard and to present its views in the panel proceeding as a third party in the dispute *United States – Certain Tax Credits under the Inflation Reduction Act* (DS623) raised by China.
2. On 16 July 2024, China requested the establishment of a panel 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 origins.¹ On 23 September 2024, the Dispute Settlement Body (DSB) established a panel to examine the matters and Indonesia reserved its rights to become a third party pursuant to Article 10.2 of the Dispute Settlement Understanding (DSU).
3. In this submission, Indonesia does not take a specific position on the particular facts and legal arguments presented by the parties. Rather, Indonesia will focus on the procedural issues, that is the legal standard for the Panel's terms of reference under Article 7 of the DSU and to conduct an objective assessment in accordance with Article 11 of the DSU.

II. LEGAL STANDARD FOR THE PANEL TO CONDUCT AN OBJECTIVE ASSESSMENT PURSUANT TO ARTICLE 11 OF THE DSU

4. In this part, Indonesia would offer its point of view regarding the legal standard as stipulated in Article 11 of the DSU which constitutes "a panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements".
5. Indonesia recalls that the Panel, in addition to the provisions set out in Article 11 of the DSU, including but not limited to, should assessing the facts and legal claims presented by the parties, ensuring the relevant covered agreements applied correctly by the parties, and determining whether a member's measure consistent with its WTO commitments. Indonesia argues that these steps are important because of the complexity and systemic impacts of the measures at issue. In addition, Indonesia views that the Panel's assessment should be based on proper and adequate reasoning as well as due process in the panel proceeding.

[whether the Panel should make an objective assessment of the matter before it]

6. Indonesia examines that Article 11 of the DSU underlines the obligation of the Panel to conduct objective assessment of the matter before it, including the facts of the case. In *Indonesia – Import Licensing Regimes*, the Appellate Body highlighted the gravity of the allegation that a panel failed to make an "objective assessment of the matter before it" and stated that a claim under Article 11 should not merely a subsidiary argument. The Appellate Body stated that it has cautioned on several occasions, a claim that a panel has failed to conduct an 'objective assessment of the matter before it' under Article 11 of the DSU is 'a very serious allegation'.²
7. Accordingly, it is incumbent on a participant raising a claim under Article 11 to identify specific errors regarding the objectivity of the panel's assessment and to explain *why* the alleged error *meets* the standard of review under that provision.³ Indonesia submits that a claim under Article 11 must be substantiated with specific arguments, rather than put forth as a subsidiary argument. Furthermore, in *Mexico – Taxes on Soft Drinks*, the Appellate Body explained that

¹ China's request for the establishment of a panel in WT/DS623/3

² See Appellate Body Report, *Indonesia – Import Licensing Regime*, para 5.28

³ See Appellate Body Reports, *China – Rare Earths*, para. 5.178 and *EC – Fasteners (China)*, para. 442

Article 11 of the DSU states that panels *should* make an objective assessment of the matter before them. The Appellate Body has previously held that the word 'should' can be used not only 'to imply an exhortation, or to state a preference', but also 'to express a duty [or] obligation'.⁴

8. By applying the same logic, it is also Indonesia's view that the claims and arguments regarding the measures at issue under the GATT 1994, the TRIMS Agreement, and the SCM Agreement presented by the parties, both on the legal standard as well as the application of the measures to the covered agreements, should be substantiated to assist the Panel in the proceeding, as they have the obligation; that the Panel should make an objective assessment of the matter before it.

[the relation between the Panel's terms of reference and objective assessment of the Panel]

9. Turning to the relation between Article 7 and 11 of the DSU, at the outset Indonesia understands that the measures at issue fall within the Panel's terms of reference. Article 7.1 of the DSU constitutes Panels shall have the following terms of reference unless the parties to the dispute agree otherwise within 20 days from the establishment of the panel: "to examine, in the light of the relevant provisions in (name of the covered agreement(s) cited by the parties to the dispute), the matter referred to the DSB (name of party) in document ... and to make such findings and will assist the DSB in making the recommendations or in giving the rulings provided for in that/those agreement(s)."

10. Such an interpretive standard on terms of reference and objective assessment shall accord with jurisprudence. In *Russia – Railway Equipment*, the Appellate Body considered whether the Panel had conducted an assessment of a matter that was not before it. The Appellate Body considered the following legal standard: "Article 11 of the DSU provides that a panel should make an objective assessment of the 'matter' before it. The term 'matter' is referred to in Article 7 of the DSU. The Appellate Body has stated that '[t]he measures and the claims identified in the panel request constitute the 'matter referred to the DSB', which serves as a basis for the panel's terms of reference under Article 7.1 of the DSU. Article 11 of the DSU also refers to the 'matter' before the panel, and it requires a panel to make an objective assessment of that 'matter'."⁵

11. Indonesia notes that Article 7.1 of the DSU should be read in conjunction with Article 11 of the DSU in identifying claims and arguments raised by the parties. The Panel must thoroughly scrutinize the Clean Vehicle Credit and Renewable Energy Tax Credits measures before it, both in their design and in their operation, and identify their principal characteristic which entails identifying all relevant characteristics of the measures and recognizing which features are the most central to that measures themselves. On that note, Indonesia further observes, this approach will assist the Panel in making a clear and obvious determination on the measures at issue, which fulfilling the Panel's terms of reference and objective assessment under those provisions.

III. CONCLUSION

12. In the spirit of good faith on the proceeding in this dispute, Indonesia would like to extend our appreciation to the Panel and the Parties for the opportunity to present our views. Indonesia wishes that the views provided may assist the Panel in evaluating the claims and in Panel's assessment of the matter before it as well as in developing legal interpretations of the relevant provisions of the DSU and other relevant covered agreements.

13. Indonesia reserves its rights to make further comments at the oral hearing with the Panel and parties to the dispute.

⁴ See Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 51

⁵ See Appellate Body Report, *Russia – Railway Equipment*, para. 5.95

ANNEX C-6

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF JAPAN

I. QUESTION 1

To all third parties: In its third-party written submission, the European Union states that it "considers that the scope of application of the provisions relied upon by China supports the conclusion that the Panel should first examine China's claim under the GATT, followed by China's claim under the TRIMs Agreement and then by China's claim under the SCM Agreement." (para. 15) In this regard, the European Union suggests that "the Panel would need to proceed with the assessment of China's claims under the TRIMs Agreement and the SCM Agreement, as well as with the defences proffered by the United States in relation to these claims, only if the Panel concludes that the conditions for the application of Article XX(a) of the GATT have been met in relation to China's claims under the GATT" (para. 17). Please comment.

Japan's Response

1. Japan notes that the quoted statements of the European Union seem to involve two related but distinct principles: (a) the discretion of a panel and the Appellate Body to decide the order of their analysis in a particular dispute before them and (b) the general principle of judicial economy that a panel and the Appellate Body should focus on the issues necessary to resolve the dispute at hand without opining on other issues which would not contribute to resolving the dispute.

2. With these two principles in mind, Japan first notes that previous panels and the Appellate Body have consistently found that a panel and the Appellate Body should be given the discretion in constructing the order of their analysis based on their best judgment on what would be the most efficient order of analysis in resolving the dispute at hand. Notably, in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, a dispute involving claims under Article III:4 of the GATT 1994, Article 2.1 of the TRIMs Agreement, and Article 3.1(b) of the SCM Agreement—the same provisions China relies its claims on in this dispute—the Appellate Body stated "[u]ltimately, the decision in this case as to whether to commence the analysis with the claims under the SCM Agreement or those under the GATT 1994 and the TRIMs Agreement was within the Panel's margin of discretion."¹ Relatedly, the recent panels in *EU – Palm Oil (Indonesia)* and *EU and Certain Member States – Palm Oil (Malaysia)* found that "there is no mandatory order of analysis between the provisions of the GATT 1994 and the provisions of the SCM Agreement which are at issue in this dispute", namely Articles I:1 and III:2 of the GATT 1994 as well as Articles 5 and 6 of the SCM Agreement.² In light of this established view shared among the previous panels and the Appellate Body, Japan does not entirely support the statements of the European Union quoted in the Panel's Question 1 to the extent that they imply, or otherwise might lead to, limiting panels' discretion in constructing the order of their analysis for the purpose of resolving the dispute before them.

3. Japan, however, concurs with the European Union's view that the Panel is not required to decide on issues that are not necessary to be addressed to resolve this dispute. In this respect, Japan shares the view of the European Union in so far as it suggests, in a more general sense, that

¹ Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.8 (citing Appellate Body Report, *Canada – Wheat Exports and Grain Imports*, para. 126). In this case, while the Appellate Body noted a common practice to consider the claims first under the specialized covered agreements that deal specifically and in detail with the measure at issue (See e.g. Appellate Body Report, *EC – Bananas III*, para. 204), it ultimately rejected the complainants' request to consider the claims under the SCM Agreement first, since it was "not persuaded" that the SCM Agreement can be described as "regulating more 'specifically, and in detail,' the measures challenged in [that] dispute" (para. 5.6). In the same paragraph, the Appellate Body indicated that whether a covered agreement specifically addresses the issue was based on the specific nature of the claims in each case.

² Panel Reports, *EU – Palm Oil (Indonesia)*, para. 7.1118; *EU and Certain Member States – Palm Oil (Malaysia)*, para. 7.1110 (both panels were composed of the same panelists).

the Panel is not required to examine a particular issue if the assessment of the issue is unnecessary for the Panel to conclude whether China's claims establish that the disputed measures are inconsistent with the obligations assumed by the United States under the WTO Agreements. The Appellate Body has also adopted this approach in the previous disputes. After referring to the text of Article 11 of the DSU, the Appellate Body in *US—Wool Shirts and Blouses* held that "[n]othing in [Article 11 of the DSU] or in previous GATT practice requires a panel to examine all legal claims made by the complaining party" and that "[a] panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute".³ In *India—Patents (US)*, the Appellate Body further held that "a panel has the discretion to determine the claims it must address in order to resolve the dispute between the parties — provided that those claims are within the Panel's terms of reference."⁴

II. QUESTION 3

To all third parties: The written submissions and oral statements of several third parties might be taken as suggesting that if a panel finds that an asserted objective falls within the scope of "public morals" under Article XX(a), a panel should find that the measure was designed to fulfil that objective if it is "not incapable" of fulfilling that objective. Do you agree?

Japan's Response

4. As the United States elaborated in its First Written Submission, a measure can be justified under Article XX(a) only after completing the four-step analysis⁵: (i) the measure at issue must have a "public morals" objective within the meaning of Article XX(a); (ii) the measure at issue must be "designed to protect" the identified public morals objective; (iii) the measure at issue must be "necessary" to protect the public morals it has identified; and finally, (iv) the Respondent must show that it has implemented the measure at issue in a manner that conforms with the chapeau of Article XX. Japan recognizes that this Question 3 is related to the second step ((ii)).

5. With respect to the analysis of the "design" of the measures, Japan shares the view that a measure is found to be "designed" to fulfil an identified public morals objective within the context of analysis concerning Article XX(a) if there is a relationship between the measure and the public morals objective, and that such relationship exists when the measure is "not incapable of" protecting the objective.⁶ To ascertain whether the measure is "not incapable of" protecting the objective, "a panel must examine evidence regarding the design of the measure at issue, including its content, structure, and expected operation".⁷ What matters is whether the measure is reasonably related to the alleged public morals objective such that it is in theory able to address the public morals concern. If there is a relationship between the measure and the objective based on the assessment of the design of the measure, including its content, structure, and expected operation, the measure may be considered as designed to protect public morals. An express reference by the measure to the specific public morals objective is not determinative.⁸

6. This analysis concerning the design of a measures under Article XX(a) is a straightforward one, and, as the Appellate Body has noted, involves a "threshold examination" to determine whether there is a "relationship between an otherwise-GATT inconsistent measure and the protection of public morals".⁹ As the Appellate Body noted, the examination of the "design" of the measure is not a particularly demanding step in the analysis concerning Article XX(a).¹⁰ This is consistent with the similar approach to be followed under the first step ((i)) of the analysis – identification of a "public morals" objective of the challenged measure. The previous panels and the Appellate Body have

³ Appellate Body Report, *US — Wool Shirts and Blouses*, p. 18.

⁴ Appellate Body Report, *India—Patents (US)*, para. 87.

⁵ United States' first written submission, para. 61. See also e.g. Panel Report, *US – Tariff Measures (China)*, para. 7.110.

⁶ Appellate Body Report, *Colombia – Textiles*, para. 5.68; Panel Report, *US – Tariff Measures (China)*, para. 7.145.

⁷ Appellate Body Report, *Colombia – Textiles*, para. 5.69.

⁸ *Ibid.*

⁹ *Ibid.*, para. 5.68.

¹⁰ *Ibid.*, para. 5.70

properly declined to impose a universal standard of public morals. Rather, they have left it to each Member to define its own "public morals" for itself, affirming that the content and scope of public morals may vary from one Member to another, influenced by each Member's systems and scales of values.¹¹ Panels and the Appellate Body also acknowledged that the existence and content of the alleged public morals in the society of a particular Member may be reflected in different ways and that the evidence to demonstrate such concerns can be varied.¹² The identification of the relevant "public morals" itself is likely to be a straightforward exercise that does not impose a significant burden on the Member invoking the public morals exception.

7. The analysis concerning the "design" of a measure at the second step ((ii)), based on the public morals objective identified at the first step ((i)), functions as a step to decide whether a panel needs to delve into the third step ((iii)), *i.e.* the "necessity" test. When the threshold examination under step (ii) reveals that the measure is not incapable of protecting the identified public morals objective, a panel would proceed to the next step of its analysis concerning whether the measure at issue is "necessary" to protect the identified objective, which requires closer scrutiny of the measure itself, its contribution, its degree of trade restrictiveness, as well as other surrounding facts and, where appropriate, alleged potential alternatives to the measure at issue.¹³ Conversely, if the measure is found incapable of protecting the public morals objective, no further examination under this vigorous "necessity" test would be required. This process of the analysis concerning the "design" of the measures at the second step ((ii)) helps Members as well as panels and the Appellate Body to identify a measure that is unlikely to be justified under Article XX(a) without examining the measure in light of the "necessity" test, sparing considerable time and effort that would be required to complete the "necessity" analysis.

¹¹ Appellate Body Report, *EC — Seal Products*, para. 5.200; and Panel Reports, *China — Publications and Audiovisual Products*, para. 7.759 (citing Panel Report, *US — Gambling*, para. 6.461.) and para. 7.819; *US — Tariff Measures (China)*, para. 7.116.

¹² See Panel Reports, *Colombia — Textiles*, paras. 7.335 and 7.338; *US — Tariff Measures (China)*, paras. 7.127, 7.138-140. As regards the content of public morals, for example, Japan recalls the conclusion by the panel in *US — Tariff Measures (China)* that "norms against theft, misappropriation and unfair competition" could be covered by "public morals" within the meaning of Article XX(a). (Panel Report, *US — Tariff Measures (China)*, para. 7.140.) Japan also considers it essential for the Members to be able to take measures necessary to protect their legitimate public morals so long as such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade.

¹³ See, *e.g.* Appellate Body Report, *Colombia — Textiles*, para. 5.68.

ANNEX C-7

INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF NORWAY

I. INAPPLICABILITY OF ARTICLES XX AND XXI OF THE GATT 1994 TO THE SCM AGREEMENT

1. At the outset, it is important to recall that both Articles XX and XXI of the GATT 1994 offer potential justifications for violations of the GATT 1994 alone, as made clear by the words of the provisions, "[n]othing in *this* Agreement shall...".¹ On its face, they do not justify violations of an agreement other than the one referenced by the demonstrative "this", *i.e.*, the GATT 1994.

2. When Members intended a GATT 1994 exception to apply to another covered agreement, they included express language to that effect, as they did in the *TRIMS Agreement*, the *Import Licensing Agreement* and the *Trade Facilitation Agreement*.² However, no such language renders Articles XX and XXI of the GATT 1994 available as justifications for a violation of the *SCM Agreement*; the *SCM Agreement* contains no express reference to neither Article XX nor Article XXI of the GATT 1994.

3. The United States asserts that the *SCM Agreement* "includes numerous references to the GATT 1994", most notably in Article 32.1 of the *SCM Agreement* where it is stated: "No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement".³ However, as also pointed out by Brazil in their third party submission,⁴ taking an action against a subsidy of another Member is a different situation than the one at hand, where it is the United States who has adopted a national subsidy. In other words, Article 32.1 determines how Members may respond to another Member's subsidies, not the other way around.

4. The United States also asserts that, as the Marrakesh Agreement is an umbrella, Articles XX and XXI of the GATT 1994 apply to all the multilateral agreements on trade in goods listed in Annex 1 (including the *SCM Agreement*).⁵ If the US view were permitted, the words "this Agreement" in Articles XX and XXI would serve no purpose, and the explicit incorporation of the GATT 1994 exceptions in certain other goods agreements would be redundant.

II. INTERPRETATION OF ARTICLE XXI

5. The United States asserts that, properly interpreted, Article XXI is self-judging.⁶ Norway disagrees. While Norway accepts that Article XXI confers discretion on Members to protect their essential security interests, this discretion is not unlimited. In particular, properly interpreted, (i) the three subparagraphs set out objectively verifiable circumstances which a respondent must demonstrate; and (ii) the words "it considers" accord the respondent some, but not unlimited, discretion with respect to the choice of the "action" to which the *chapeau* refers. A Member invoking Article XXI(b) carries the burden to prove the elements of the defence in both the *chapeau* and, at least, one subparagraph. The panels in *Russia – Traffic in Transit*, *US – Steel and Aluminium Products* and *US – Origin Marking (Hong Kong, China)* all share Norway's view.⁷

a. Analysis under subparagraph (iii)

¹ Emphasis added.

² TRIMS Agreement, Article 3; Import Licensing Agreement, Article 1.10; Trade Facilitation Agreement, Article 24.7.

³ The United States' first written submission, para. 147.

⁴ Brazil's third party written submission, para. 24.

⁵ The United States' first written submission, para. 164.

⁶ The United States' first written submission, Section IV. A.

⁷ See Panel Report, *Russia – Traffic in Transit*, paras 7.102-7.103; Panel Report, *US – Steel and Aluminium Products (China)* para. 7.128; Panel Report, *US – Steel and Aluminium Products (Norway)* para. 7.116; Panel Report, *US – Steel and Aluminium Products (Switzerland)* para. 7.146; Panel Report, *US – Steel and Aluminium Products (Turkey)* para. 7.143; and Panel Report, *US – Origin Marking (Hong Kong, China)* para. 7.185.

6. The three subparagraphs under Article XXI(b) set out "objective fact[s]" that are "amenable to objective determination".⁸ In other words, the respondent must demonstrate with evidence, and the Panel must assess, the existence of the facts referenced in the subparagraphs in an objective manner. Specifically, under subparagraph (iii), the existence of a "war or other emergency in international relations" needs to be demonstrated objectively.

7. The United States argues that the self-judging nature of Article XXI(b) is established by the phrase "which it considers" in the *chapeau*, in its context, and in the light of the treaty's object and purpose.⁹ Furthermore, the United States argues that this interpretation is confirmed by the Uruguay Round negotiating history.¹⁰ As a result, United States asserts that the respondent is free to decide for itself if the requirements in one or more of the subparagraphs are met. The United States has not substantiated their interpretive assertion, but in a footnote they refer to the interpretive arguments put forth by the United States in their First Written Submission in *United States – Origin Marking (Hong Kong, China) (Panel) (US-71)*. In any event, the United States' interpretation is erroneous.

8. The verb "consider" qualifies the terms of the *chapeau*; it does not qualify any words in the three subparagraphs. This flows from an interpretation of the words of Article XXI(b), in line with the rules of English grammar, and in a manner that ensures consistency among the various language versions.

9. Properly interpreted, each of the three subparagraphs qualifies the word "action", and not the words "essential security interests". This follows from the text, context, object and purpose, and negotiating history of Article XXI(b).

10. In particular, the US view is irreconcilable with the Spanish version of the text, in which the term "relativas" (relating) can only qualify the word "medidas" ("action"); and, the *chapeau* / subparagraphs are broken by a comma.

11. The *Vienna Convention* requires that treaty terms be given their "ordinary meaning". There is nothing "ordinary" about a meaning premised on the United States' arguments that entail inconsistency and incoherence, which even the United States in their written submission in *US – Origin Marking (Hong Kong, China)* called "less in line with rules of grammar and conventions".¹¹ Instead of this strained interpretation, the ordinary meaning dictates that each of the subparagraphs modifies the same noun – "action" – which ensures interpretive consistency and coherence. The subparagraphs are not qualified by other words in the *chapeau*. When accounting for all the words in the text, the Spanish version confirms the English and French versions: the subparagraphs modify the noun "action".

12. The *chapeau* / subparagraph relationship has important implications for the Panel's approach under Article XXI(b). Specifically, as a consequence of the relationship, a Member's "action" under Article XXI(b) is subject to two sets of distinct and independent conditions:

(1) the "action" must "relate to" the specific circumstances set forth in subparagraph (i) or (ii), or be "taken in time of war or other emergency in international relations", under subparagraph (iii); and,

(2) it must be an "action" that the Member "considers necessary" for the protection of its essential security interests.

13. As a first step, therefore, a panel must make an objective assessment of whether the Member has demonstrated that the "action" meets the circumstances / situation in at least one of the subparagraphs. Textually, the phrase "which it considers" is not part of this step. Therefore, a

⁸ Panel Report, *Saudi Arabia – Protection of Intellectual Property Rights*, para. 7.244; Panel Report, *Russia – Traffic in Transit*, para. 7.712. See also the European Union's third party submission, paras 62-63.

⁹ The United States' first written submission, para. 47.

¹⁰ Ibid.

¹¹ See the United States' first written submission, para. 163, in *US – Origin Marking (Hong Kong, China)*.

Member's demonstration that it fulfils the conditions in the subparagraphs is not subject to a more forgiving standard of review flowing from the verb "consider" in the *chapeau*.

14. In light of these considerations, it should be clear that the assessment of whether the Member's action is taken in time of war or other emergency in international relations cannot be modified by the phrase "which it considers". Thus, there is no basis for arguing that the subparagraph is self-judging.

15. Norway also notes that the United States has not indicated which particular subparagraph they consider applicable as a justification of its measure, and as a consequence they have not presented the reasons why one of the particular subparagraphs would be applicable. It follows from the reasons stated that a Member cannot invoke Article XXI(b) without indicating the subparagraph which justifies the measure and without proving the elements of the defence pertaining to that subparagraph. If the US view were permitted, the subparagraphs would serve no purpose.

16. Further, what matters under subparagraph (iii) – which seems to be the relevant alternative the Panel should assess in this matter – is whether an emergency has, objectively, been shown to exist, on the facts. This is a matter for objective determination by the Panel.

b. Analysis under the *chapeau*

17. If the Panel finds that the requirements of subparagraph (iii) are met, the respondent must demonstrate, under the *chapeau*, that it "considers" the "action" "necessary for the protection of its essential security interests".

18. Although the words "which it considers", in the *chapeau*, establish a degree of deference, the standard of review is not *total deference*. Rather, as past panels have established, the terms of the *chapeau* require a respondent to substantiate a plausible basis in support of its consideration. Specifically, a respondent must:

First, articulate "its essential security interests", so as to allow a panel to assess whether the asserted "interests" rise to the level of "essential" "security" interests;¹²

Second, set out, with argument and evidence, a plausible basis on "which it considers" there to be a "clear and objective" relationship between the "action" and the protection of the articulated essential security interest, such that the measure is apt to make a "material contribution" to the objective at stake.¹³

19. By arguing that a panel must afford an invoking Member total deference without providing any explanation or evidence to support its argument, the United States deprives the terms of the *chapeau* of their meaning. The *chapeau* comprises a series of words and phrases, each of which must be given their own meaning, with each constraining a respondent's action. These are: "action", "which it considers", "necessary", "for the protection of" and "essential security interests". As Norway has explained, the treaty interpreter cannot interpret two of these words ("it considers") in a way that deprives the others of their meaning.

III. ORDER OF ANALYSIS

20. The United States argues that Article XXI does not contain any requirement that a Member invoking the essential security exception must justify its invocation because of the "self-judging nature of Article XXI(b)".¹⁴ Thus, in the United States' view, the Panel should make no other finding with respect to the "FEOC exclusionary rule" than "to note in the Panel's report that the United States has invoked its essential security interests".¹⁵ Norway disagrees with this view.

¹² Panel Report, Russia – Traffic in Transit, para. 7.131; Panel Report, Saudi Arabia – Protection of Intellectual Property Rights, para. 7.247.

¹³ Panel Report, Russia – Traffic in Transit, para. 7.139; Panel Report, Saudi Arabia – Protection of Intellectual Property Rights, para. 7.252.

¹⁴ The United States' first written submission, para. 52.

¹⁵ Ibid.

21. Article XXI(b) operates to justify certain GATT-inconsistent actions, using the same language as Article XX: "nothing in this Agreement shall be construed to prevent any Member from taking any action which...". Hence, Article XXI(b) is, just like Article XX, an affirmative defence to a violation of the GATT 1994. Under Article XX, panels and the Appellate Body have, without exception, addressed first whether the complainant has made out its claims of WTO-inconsistency; and second whether the respondent has made out its affirmative defence that the measures are justified. This is because an affirmative defence is only relevant where a panel has found a violation. If there is no violation, then the relevant exceptions provision has no operative role; there is nothing to justify in the first place. Logically, therefore, where a respondent invokes Article XXI(b), the panel should first confirm whether there is a violation; and second whether the violation is justified.

22. Moreover, it is well-accepted, from jurisprudence under Article XX of the GATT 1994, that it is the WTO-inconsistent aspect of the measure – and not the measure as a whole – which must be justified.¹⁶ Of course, a panel cannot identify the WTO-inconsistent aspects of a measure that would require justification, until it has addressed the claims. Hence, in our view, it is clear that the same reasoning must apply with respect to the other exceptions provisions applicable under the GATT 1994. By contrast, if a panel were obliged to address Article XXI(b) before addressing the claims, it would also have to assess whether the measures are justified in a vacuum, without yet having determined which aspects of the measures are WTO-inconsistent.¹⁷

¹⁶ Appellate Body Report, *US – Gasoline*, pp. 13-14; Appellate Body Report, *Thailand – Cigarettes*, para. 177; Appellate Body Reports, *EC – Seal Products*, para. 5.185.

¹⁷ In our view, the panel in *Russia – Traffic in Transit* erred by departing from the accepted order of analysis under "exceptions provisions" in the GATT 1994.

ANNEX C-8**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF THE RUSSIAN FEDERATION****I. INTRODUCTION**

1. The Russian Federation welcomes this opportunity to present its views as a third party to this dispute.
2. The Russian Federation considers that this dispute initiated by China raises certain important systemic legal issues, including those concerning the proper and consistent interpretation and application of Article XXI of the General Agreement on Tariffs and Trade 1994 (the GATT 1994).
3. The Russian Federation recognises the inherent right of the WTO Members to take any actions which they consider necessary for the protection of their essential security interests. Meanwhile, this right is not unfettered and is subject to review by the WTO panels.
4. In this submission, the Russian Federation will primarily focus on the proper legal analysis that should be applied by the Panel under Article XXI of the GATT 1994 and will not take any specific position on the measures at issue or on the particular facts and evidence presented by the parties.
5. The Russian Federation reserves the right to raise other issues at the third party hearing in this dispute before the Panel.

II. ARTICLE XXI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

6. The United States once again reiterated its erroneous position that national security exceptions under the GATT 1994 are totally "self-judging". This view has been previously rejected by multiple WTO panels, including by the panels in *Russia – Traffic in Transit* and in *United States – Origin Marking (Hong Kong)*.
7. The overall United States' interpretation of Article XXI(b) of the GATT 1994 is wrong and leads to redundancy and inutility of the whole provision. The United States' argument regarding the self-judging nature of the security exceptions in its entirety is legally flawed and must be rejected.
8. Even though the Panel is not bound by prior panels' decisions, given the objective of the dispute settlement system to provide security and predictability, Russia believes that the elaborated interpretation shall be considered by the Panel in this dispute.
9. Moreover, Russia is of a position that when invoking Article XXI(b) of the GATT 1994 the respondent is under obligation to identify a particular subparagraph. By ignoring this the United States have failed to meet its burden of proof to justify application of the said provision. The claimant and the Panel should not be left to guess whether the measures at issue are related to fissionable materials or to materials from which they are derived under subparagraph (i), to the traffic in arms, ammunition and implements of war, etc. under subparagraph (ii), or whether they are taken in time of war or other emergency in international relations under subparagraph (iii).
10. These two major points are dealt with in more detail below.
11. The United States insists that, because of the self-judging nature of Article XXI(b) of the GATT 1994 covering the chapeau and each of the subparagraphs of this provision, the Panel allegedly cannot review whether or not the measures at issue are in breach of the requirements thereof and must limit its findings solely to a recognition that the United States has invoked essential security exception.¹

¹ US First Written Submission, paras. 45 – 58.

12. The reading of Article XXI(b) of the GATT 1994 provided by the United States is incorrect and unreasonable, it leads to creation of the possibility for any Member to justify any violation of any provision of the WTO Agreements as soon as such Member merely declares the invocation of said Article, irrespectively of whether the measures were indeed designed, applied or intended to protect essential security interests of that Member in the circumstances specifically provided for therein.

13. Furthermore, it should be noted that, despite certain United States' allegations², the provisions of the DSU do not provide any legal basis for an exclusion of a measure, which was declared by a WTO Member as being taken under Article XXI of the GATT, from the examination and assessment of its WTO-inconsistency by the Panel in accordance with the rules and procedures of the DSU, including Article 11 of the DSU. Instead, the provisions of the DSU require WTO Members to bring their complaints on WTO-inconsistency of measures at issue to the WTO dispute settlement procedure for panel and the Appellate Body examination, assessment and rulings. Limiting itself to a simple recognition of the fact of Article XXI invocation will obviously contradict the Panel's task to objectively assess the measures before it and make the necessary rulings in that respect.

14. The GATT security exceptions do not offer a *carte blanche* to WTO Members. The right to adopt any measures a Member considers necessary for protection of its essential security interests is conditioned by the content of the subparagraphs of Article XXI(b) of the GATT 1994 and the good faith principle.

15. Russia believes that the ordinary meaning of the treaty terms of Article XXI(b) of the GATT 1994 gives full and unequivocal picture of the way how the Article's provisions shall be applied and interpreted. In particular, the provisions of Article XXI(b) of the GATT 1994 represent a combination of subjective (self-judging) and objective elements.

16. Article XXI(b) of the GATT 1994 is structured as follows. It starts with a chapeau ("nothing in this agreement shall be construed") followed by the list of actions that may not be prevented by the application of the GATT 1994. Article XXI(b) sets forth one of those actions that are covered by its introductory statement. This statement explains further that "nothing in this agreement shall be construed ... to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests".

17. The chapeau of this Article completely differs from a chapeau of any other exceptions, like Article XX of the GATT 1994. In the wording of the chapeau of Article XXI of the GATT 1994, there are no limiting conditions under which the measure applied shall fall. On the contrary, the chapeau provides that there could be no limitations in the Agreement for the specific purposes provided by that Article.

18. This chapeau of Article XXI(b) of the GATT 1994 firmly recognizes thereby a Member's right to adopt measures "it considers necessary for the protection of its essential security interests".

19. Therefore, the phrase "any action which it considers necessary for the protection of its essential security interests" leaves it within the sole discretion of a Member to determine what its essential security interests are and the ways and means of their protection. In this respect a Member's subjective assessment cannot be doubted or re-evaluated by any other party or judicial bodies as the measures in question are not ordinary trade measures regularly assessed by WTO panels.

20. Meanwhile, the Russian Federation also recalls that Article XXI(b) of the GATT 1994 does not consist only of the said introductory statement. In fact, the compliance with Article XXI(b) of the GATT 1994 is conditioned by three distinct settings (subparagraphs i-iii). These subparagraphs and the way they are formulated represent the objective elements that are susceptible to the Panel's review, as the phrase "which it considers" from the chapeau does not qualify the subparagraphs.

21. This reading was confirmed by the panel in *Russia – Traffic in Transit*, which made an extensive review of Article XXI(b) of the GATT 1994 and examined the extent to which it is of self-judging nature. The panel concluded that the self-judging nature of the chapeau of Article XXI(b) of the GATT 1994 resulting from the use of words "which it considers" cannot be extended to the

² Ibid, paras. 54 – 56.

subparagraphs thereof. The panel found that the rights provided for in Article XXI(b) of the GATT 1994 are limited by the content (circumstances) set out in the subparagraphs and that such circumstances, including their existence, can be objectively assessed by the panel.³

22. The panel further reasoned, *inter alia*, that the object and purpose of the GATT 1994 and the WTO Agreement support a mandate to objectively review the requirements of the subparagraphs of Article XXI(b) of the GATT 1994 and that it would be entirely contrary to security and predictability "to interpret Article XXI as an outright potestative condition, subjecting the existence of a Member's GATT and WTO obligations to a mere expression of the unilateral will of that Member".⁴

23. Moreover, the panel concluded that "the obligation of good faith requires the Members not use the exceptions in Article XXI of the GATT 1994 as a means to circumvent their obligations under the GATT 1994".⁵

24. The panel in *Russia – Traffic in Transit* clarified that the "essential security interests" being the category of interests narrower than simply "security interests" as "the quintessential functions of the state, namely, the protection of its territory and its population from external threats, and the maintenance of law and public order internally".⁶ Meanwhile, they will depend on the particular situation and perceptions of the state and can be expected to vary with changing circumstances.⁷ In order to ensure that there is no abuse in the application of good faith principle, the Member invoking Article XXI(b) of the GATT 1994 should articulate and the Panel should review that "the essential security interests [are articulated] sufficiently enough to demonstrate their veracity"⁸ and whether the measures at issue are so remote from, or unrelated to the provisions of the subparagraphs that it is implausible that the Member implemented the measures at issue for the protection of its essential security interests.⁹

25. Russia is of a position that such approach is in line with the object and purpose of the WTO Agreement, serves as a guarantee against possible abuses and at the same time does not prevent Members to exercise the right as the sovereigns to determine their essential security interests and the means of their protection. This alone allows panels to perform their task as provided for in Article 11 of the DSU, and not only to make an objective assessment of the matter before them, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, including Article XXI(b) of the GATT 1994, when said Article is invoked by a respondent but also to make such other findings that will assist the DSB in making recommendations and rulings provided for in the covered agreements.

26. Russia agrees with the conclusions of the panel in *Russia – Traffic in Transit* and reaffirms that the words "which it considers" provided for in the chapeau of Article XXI(b) of the GATT qualify the chapeau only, but not the subparagraphs. This interpretation is based on the text of the Article.

27. The term "which it considers" qualifies the action that can be taken under this provision (i.e., it must be considered to protect the Member's essential security interests). Such action is further conditioned by three distinct sets of circumstances enumerated (i)-(ii) connected with the chapeau through "relating to" and (iii) through "taken in time of".

28. In *Russia – Traffic in Transit* the panel explained that "[t]he phrase 'relating to', as used in Article XX(g) of the GATT 1994, has been interpreted by the Appellate Body to require a 'close and genuine relationship of ends and means' between the measure and the objective of the Member adopting the measure. This is an objective relationship between the ends and the means, subject to objective determination".¹⁰

³ Panel Report, *Russia – Traffic in Transit*, para. 7.82.

⁴ Ibid, paras. 7.78-7.79.

⁵ Ibid, para. 7.133.

⁶ Ibid, para. 7.130.

⁷ Ibid, para. 7.131.

⁸ Ibid, para. 7.134-7.139.

⁹ Ibid, paras. 7.138-7.145.

¹⁰ Ibid, para. 7.69.

29. Therefore, the words "relating to" in subparagraphs (i)-(ii) of Article XXI(b) of the GATT 1994 confirm that the content of the said subparagraphs ("ends") is connected with "actions" in the chapeau ("means").

30. The French and Spanish versions confirm that subparagraphs (i) to (iii) refer to actions and not to the essential security interests. A feminine "relativas" points out that it is linked to the word "medidas" and not "intereses". This is relevant for subparagraph (iii) as well – "aplicadas" and "appliquées" can refer only to "medidas" and "mesures".

31. Additionally, it should be noted that according to Article 33 (3) of the Vienna Convention, where treaties have been authenticated in two or more languages, "the terms of the treaty are presumed to have the same meaning in each authentic text". In discussing the draft text of this Article, the International Law Commission noted that such presumption "requires that every effort should be made to find the common meaning for the texts before preferring one to another".¹¹ Article XVI of the WTO Agreement provides that for the covered agreements the English, French and Spanish language each are authentic. The Appellate Body in *US – Softwood Lumber IV* confirmed that "the treaty interpreter should seek the meaning that gives effect, simultaneously, to all the terms of the treaty, as they are used in each authentic language".¹²

32. Therefore, in Russia's view, the meaning of the terms and provisions shall not vary depending the language version. The WTO dispute settlement system being a central element in providing security and predictability shall ensure the simultaneous meaning in each authentic language version. Thus, Russia believes that despite certain grammatical/structural differences, the terms and provisions contained in the three language versions shall be given the same meaning. Otherwise, different countries depending on the language preferred could be guided by different provisions and, therefore, apply security exceptions or any other provision of the WTO agreements in a different way. It is highly dubious that the drafters intended to create a significant distinction between identical texts in different languages.

33. Furthermore, since Article XXI of the GATT 1994 is an "exception" and an affirmative defense, the burden of proof is on the party that asserts such affirmative defense¹³ to establish the *prima facie* case of the applicability of the invoked provision to its measures at issue and of the WTO consistent application of the invoked exception. However, the United States failed to state a particular subparagraph of Article XXI(b) in justification of its measure and to provide supporting evidence and reasons why the specific circumstances under each of the subparagraphs of Article XXI(b) of the GATT 1994 apply to its measure.

34. The United States seems to have invoked only the chapeau of Article XXI(b) of the GATT 1994 without indicating which particular subparagraph out of the three applies and why. This position of the United States appears to be neglecting the fact that these subparagraphs constituting the objective elements under Article XXI(b) of the GATT 1994 exist.

35. Indeed, the reading of Article XXI(b) of the GATT 1994 proposed by the United States makes part of this Article, i.e., subparagraphs (i)-(iii), redundant and inutile. However, the drafters of the GATT 1994 have specifically added the three subparagraphs qualifying the introductory statement, which must not be regarded as effectively absent from the text.

36. Further, the United States asserts that Article XXI(a) anticipates the scope and application of Article XXI(b), and, therefore, "a Member need not provide any information—to a WTO panel or other Members—regarding its essential security measures or its underlying security interests".¹⁴ Russia disagrees.

37. Article XXI(a) and XXI(b) of the GATT 1994 are distinct. They are structured differently and separated by conjunction "or". A WTO Member may have recourse to any of the paragraphs set forth in Article XXI or may refer to several of them simultaneously. Moreover, it should be noted that Article XXI(a) is applicable to every provision of the agreement, for example, Article XX of the GATT.

¹¹ Yearbook of the International Law Commission (1966), Vol. II, p. 225.

¹² Appellate Body Report, *US – Softwood Lumber*, para.59.

¹³ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 14, 16.

¹⁴ US First Written Submission in *United States – Origin Marking (Hong Kong, China)*, para. 50. Exhibit US – 71.

However, it does not mean that the Member in this case is no longer under obligation to indicate specific circumstances contributing to adoption of the measure under general exceptions. Thus, Russia is of a position that each of these provisions shall be given its proper meaning independently of each other.

38. Having taken such stand, it seems that United States' position in this respect is that Article XXI(a) shields the invoking Member from meeting its burden under Article XXI(b) of the GATT 1994, *inter alia*, proving the existence of circumstances as embodied in subparagraphs. Such position cannot be accepted.

39. The Russian Federation recalls that "one aspect of ensuring that the proceedings are fairly conducted is that each party must be entitled to know the case that it has to make or to answer and must be afforded a fair and reasonable opportunity to do so".¹⁵ It follows that by failing to identify the specific subparagraph the United States failed to meet its burden of proof *per se*. Therefore, Russia believes that the Panel must acknowledge this failure and end its analysis by such an acknowledgement.

40. To conclude, Russia would like to briefly touch upon the United States' arguments connected to the negotiating history. Russia believes that pursuant to Article 32 of the Vienna Convention the Panel could be guided by supplementary means of interpretation to confirm the meaning resulting from the application of Article 31 of the VCLT, however, despite United States' beliefs, nothing in GATT/ITO negotiating history suggests that the GATT national security exceptions are totally self-judging, thus, are not subject to any review, and could be challenged only as non-violating obligations.

41. In *Russia – Traffic in Transit*, the panel examined the negotiating history of Article XXI of the GATT 1947, including draft texts and discussions, *inter alia*, those to which the United States refers in its interpretative arguments.¹⁶ The panel concluded that the negotiating history confirms that "the evaluation of whether the invoking Member has satisfied the requirements of the enumerated subparagraphs of Article XXI(b) made objectively rather than by the invoking Member itself".¹⁷ The panel stressed that "there is no basis for treating the invocation of Article XXI(b)(iii) of the GATT 1994 as an incantation that shields a challenged measure from all scrutiny".¹⁸ Russia agrees.

III. CONCLUSION

42. For the above reasons, the Russian Federation considers that:

- the United States has failed to meet its burden of proof in respect of the application of Article XXI of the GATT 1994;
- the United States' reading of Article XXI of the GATT 1994 as entirely self-judging provision is erroneous and must be fully rejected by the Panel;
- for the sake of consistency and predictability and taking into account persuasive character of prior panels' interpretation of Article XXI of the GATT 1994 the Panel shall be guided thereby.

¹⁵ Appellate Body Report, *US – Large Civil Aircraft* (2nd complaint), para. 1140. (emphasis added)

¹⁶ Exhibit US-71.

¹⁷ Panel Report, *Russia – Traffic in Transit*, para. 7.100.

¹⁸ *Ibid.*

ANNEX C-9**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF SINGAPORE****I. INTRODUCTION**

1. Singapore is participating in this case because it has a systemic interest in three important legal issues that have arisen, namely: (a) the interpretation of Article XXI(b) of the GATT 1994; (b) the interpretation of Article XX(a) of the GATT 1994; and (c) whether the General and Security Exceptions in the GATT 1994 apply to the TRIMs Agreement and the SCM Agreement. Singapore stresses that it is *not* commenting on the substantive merits of the case but will only address the three legal issues identified.

II. EXECUTIVE SUMMARY OF SINGAPORE'S THIRD PARTY ORAL STATEMENT**A. Interpretation of Article XXI(b) (Security Exceptions) of the GATT 1994**

2. As regards the interpretation of Article XXI(b) of the GATT 1994, Singapore has three points to highlight.

- a. First, the word "it" in the phrase "it considers necessary" refers to the "contracting party" invoking the exception. The analysis must therefore be from the standpoint of the Member invoking the exception and whether that Member considers the action to be necessary. This indicates that a Member is allowed to determine, with a significant degree of deference being given to its views, what action "it considers necessary" to protect "its essential security interests".
- b. Second, the assessment of threats to the essential security interests of a Member, and the necessary measures to be taken in response, involves judgment, and is dependent on the particular Member's context and circumstances.¹ In arriving at this judgment, every Member, as the guardian and protector of its own essential security interests, has to make determinations of the security threats it faces. Moreover, sometimes the Member has to do so under the most urgent circumstances, relying on information the disclosure of which may itself prejudice the security interests of the Member or other Members. Therefore, there is necessarily a degree of subjectivity in this exercise, and a diversity of assessments must be respected. Thus, it would be well within a Member's right to take a measure to protect its essential security interests even though other Members may take different measures in response to the same type of threat.
- c. Third, there are many areas in the WTO regime where some margin of appreciation is accepted, e.g. in the context of the Agreement on the Application of Sanitary and Phytosanitary Measures² and the necessity of a measure taken for the protection of health under the GATT 1994.³ None of these come anywhere close to being as explicit and definitive with respect to self-judgment as Article XXI(b). *A fortiori*, a higher level of deference, and a significant margin of appreciation, should be accorded to a Member's chosen level of protection, and its assessment of risk and of the necessity of the measures to be taken for the protection of its essential security interests.

3. That said, Article XXI(b) should not be read as giving a Member entirely unfettered discretion in invoking this exception. For this exception to be meaningful, a Member must act in accordance with the standard of good faith as set out in Article 26 of the Vienna Convention on the Law of Treaties⁴ and the general international law prohibition of the abuse of rights. Further, it is well accepted that a Member seeking to rely on an affirmative exception bears the burden of proof. The

¹ Panel Report, *Russia – Traffic in Transit*, para. 7.131.

² Appellate Body Report, *Australia – Salmon*, para. 199 (emphasis original).

³ Appellate Body Report, *EC – Asbestos*, para. 168.

⁴ Done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679; Panel Report, *Russia – Traffic in Transit*, paras. 7.132-7.134; Panel Report, *US – Origin Marking*, para. 7.255.

Member invoking Article XXI would have to articulate its reason(s) for doing so.⁵ In Singapore's view, the Member must minimally explain its course of action and invocation of Article XXI, bearing in mind the margin of appreciation to be accorded to Members on matters involving their essential security interests. The level of articulation required is fact and context specific and will be informed by the specific circumstances surrounding the invocation of Article XXI.⁶ Singapore also suggests that it will be informed by the underlying security and confidentiality considerations involved.

B. Interpretation of Article XX(a) (General Exceptions) of the GATT 1994

4. As regards the interpretation of Art XX(a) of the GATT 1994, previous WTO panels⁷ have taken a relatively broad approach in defining the concept of "public morals". "Public morals" has been interpreted as denoting "standards of right and wrong conduct maintained by or on behalf of a community or nation". Panels have also noted that its content "can vary in time and space, depending upon a range of factors, including prevailing social, cultural, ethical and religious values." The panels in *Colombia – Textiles* and *EC – Seal Products* noted that Members should be given scope to define and apply for themselves the concept of "public morals" in their respective territories, according to "various values prevailing in their societies at a given time".⁸ Singapore generally agrees with this analysis. It recognises the reality that Members must be afforded a certain degree of domestic policy space to define their own public morals objectives, having regard to their specific cultural, religious and other social contexts.

5. That said, this discretion is not without its limits. As the Appellate Body in *Colombia – Textiles* has stated, a measure must (a) be designed to protect public morals and (b) be necessary to protect such public morals for Article XX(a) to apply.⁹

6. On the issue of design, the Appellate Body in *Colombia – Textiles* has explained that the analysis of the design of a measure requires an examination as to whether there is a relationship between the measure and the protection of public morals. Specifically, the measure in question must not be incapable of protecting public morals.¹⁰ Such a determination requires examination of the "evidence regarding the design of the measure at issue, including its content, structure, and expected operation."¹¹

7. This determination should not focus on mere labels. The Appellate Body has clarified that an express reference to public morals is not dispositive of the fact that the measure was designed for that purpose. Conversely, the absence of such an explicit reference is not fatal if the evidence on the content, structure and other aspects of a measure objectively demonstrate that the measure was designed to protect public morals.¹²

8. On the requirement that the measure be necessary to protect public morals, this was summarised by the Appellate Body in *EC – Seal Products* as involving a process of weighing and balancing a series of factors including the importance of the objective, the contribution of the measure to that objective, and the trade-restrictiveness of the measure.¹³ This is a highly fact-specific assessment that must be performed holistically and can comprise both qualitative and quantitative analyses.

9. The Appellate Body in *Colombia – Textiles* indicated that:¹⁴

- a. the more vital or important the values that are reflected in the measure's objectives, the easier it would be to accept the measure as necessary;

⁵ Panel Report, *Russia – Traffic in Transit*, para. 7.134; Panel Report, *US – Origin Marking*, para. 7.255.

⁶ Panel Report, *Russia – Traffic in Transit*, para. 7.135.

⁷ Panel Report, *US – Gambling*, paras. 6.465 and 6.461; Panel Report, *China – Publications and Audiovisual Products*, para 7.759; Panel Report, *EC – Seal Products*, paras. 7.380 and 7.409.

⁸ Panel Report, *Colombia – Textiles*, paras. 7.301 (citing Panel Report, *EC – Seal Products*, paras. 7.380-7.381 and 7.409).

⁹ Appellate Body Report, *Colombia – Textiles*, para. 5.67.

¹⁰ Appellate Body Report, *Colombia – Textiles*, para. 5.68.

¹¹ Appellate Body Report, *Colombia – Textiles*, para. 5.69.

¹² Appellate Body Report, *Colombia – Textiles*, para. 5.69.

¹³ Appellate Body Report, *EC – Seal Products*, para. 5.169.

¹⁴ Appellate Body Report, *Colombia – Textiles*, paras. 5.71-5.73.

- b. the greater the contribution a measure makes to the objective pursued, the more likely it is to be characterised as necessary; and
- c. a measure with a relatively slight impact on imported products might be more easily considered as necessary than a measure with intense or broader restrictive effects.

10. A panel must also compare the challenged measure against alternative measures which could achieve the same level of protection while being less trade restrictive.¹⁵

11. Finally, in the event that a measure is found to be provisionally justified under paragraph (a) of Article XX, the measure still needs to comply with the conditions of the *chapeau* of Article XX, which are that the measure must not be applied in a manner that constitutes "arbitrary or unjustifiable discrimination" or a "disguised restriction on international trade".

C. Whether Articles XXI and XX(a) of the GATT 1994 Apply to the TRIMs Agreement and the SCM Agreement

12. On the applicability of Articles XX(a) and XXI of the GATT 1994 to the TRIMs Agreement and the SCM Agreement, Singapore notes that in determining the relationship between the provisions of different covered agreements, the Appellate Body has applied a standard "analytical approach". This requires an agreement-by-agreement analysis that starts with the text of the agreement in question and entails a thorough analysis of the relevant provisions. The lack of an express textual reference to another covered agreement is not dispositive.¹⁶ Instead, the Appellate Body has noted that the relationship between different covered agreements must be "ascertained through scrutiny of the provisions concerned, read in the light of their context and object and purpose, with due account being taken of the overall architecture of the WTO system as a single package of rights and obligations, and any specific provisions that govern or shed light on the relationship between the provisions of different instruments".¹⁷ In this regard, the panel in *Thailand – Cigarettes (Philippines)* (Article 21.5 – *Philippines*) held that the applicability of Article XX of the GATT 1994 to another covered agreement must be decided on the basis of a clear and sufficient textual link between provisions of the GATT 1994, especially Article XX, and the agreement to which Article XX allegedly applies.¹⁸

13. Applying that approach to the TRIMs Agreement, Singapore notes that Article 3 of the TRIMs Agreement provides that "all exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement." In Singapore's view, the presence of such language explicitly providing for the cross-application of all exceptions in the GATT 1994 is dispositive. It follows that the exceptions in Articles XX(a) and XXI of the GATT 1994 apply, *mutatis mutandis*, to the TRIMs Agreement. Singapore notes that this conclusion is consistent with the decisions of the Appellate Body in *China – Raw Materials*¹⁹ and the Panel in *India – Solar Cells*.²⁰

14. By contrast, the SCM Agreement does not contain explicit language providing for the cross-application of Articles XX and XXI of the GATT 1994. This is unlike Articles XXII and XXIII of the GATT 1994, which Article 30 of the SCM Agreement explicitly cross-applies to consultations and the settlement of disputes under the SCM Agreement. Further, while the SCM Agreement contains various other references to the GATT 1994, those references serve discrete purposes. For instance, Articles 5(b) and 11.2 of the SCM Agreement provide that various expressions bear the same meaning that they do in the GATT 1994, while Article 16.4 of the SCM Agreement refers to economic integration resulting from the formation of a customs union under Article XXIV:8(a) of the GATT 1994.

15. Singapore's view, therefore, is that the wholesale application of the exceptions in the GATT 1994 to the SCM Agreement is legally doubtful. Moreover, the Appellate Body has commented that the SCM Agreement "reflects a delicate balance between the Members that sought to impose more disciplines on the use of subsidies and those that sought to impose more disciplines on the

¹⁵ Appellate Body Report, *Colombia – Textiles*, paras. 5.74-5.75.

¹⁶ Appellate Body Report, *China – Rare Earths*, paras. 5.61 to 5.63.

¹⁷ Appellate Body Report, *China – Rare Earths*, para. 5.55.

¹⁸ Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – *Philippines*), para. 7.750.

¹⁹ Appellate Body Reports, *China – Raw Materials*, para. 303.

²⁰ Panel Report, *India – Solar Cells*, para. 7.188.

application of countervailing measures".²¹ This is expressed through, among other things, the structure of the SCM Agreement with its threefold categories of subsidies – prohibited, actionable, and non-actionable – each with its own legal regime, set of disciplines, and exceptions. Article 3.1 of the SCM Agreement prohibits any subsidies contingent upon export performance or the use of domestic over imported goods "[e]xcept as provided in the Agreement on Agriculture". The use of the exceptions in the GATT 1994 to rehabilitate subsidies prohibited under Article 3 of the SCM Agreement would constitute a departure from the "delicate balance"²² struck by the drafters in the SCM Agreement.

III. EXECUTIVE SUMMARY OF SINGAPORE'S RESPONSE TO PANEL QUESTIONS TO THIRD PARTIES AFTER FIRST SUBSTANTIVE MEETING

A. Response to Question 1 (paras. 15 and 17 of European Union's Third Party Written Statement)

16. The starting point is that the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. It serves to preserve the rights and obligations of Members under the covered agreements and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law.²³ The function of a WTO panel is to assist the DSB with the discharge of its responsibilities under the DSU and the covered agreements to administer the dispute settlement system.²⁴ To that end, a WTO panel is not bound to favour the most expedient approach or that suggested by one or more of the parties to the dispute but must instead adopt an analytical methodology or structure appropriate for resolution of the matters before them, and which enables them to make an objective assessment of the relevant matters and make such findings as will assist the DSB in making the recommendations or rulings provided for in the covered agreements.²⁵

17. The Panel in *Thailand – Cigarettes (Philippines)* (Article 21.5 – Philippines) has held that "where the responding party claims that the obligations in another covered agreement are subject to the general exceptions in Article XX of the GATT 1994, a panel should, in principle, rule on that issue regardless of whether the panel considers that the respondent has demonstrated that the challenged aspects of the measure at issue are justified under Article XX in the particular circumstances of the case" as the absence of a ruling "may leave the parties uncertain as to the regulatory scope that the respondent enjoys in implementing the recommendations and rulings of the DSB."²⁶

18. In *China – Publications and Audiovisual Products*, the Appellate Body held that the panel had erred in simply assuming that China was entitled to rely on Article XX(a) of the GATT 1994 as a defence to a violation of its Accession Protocol and then deciding that this defence was not available on the facts as China had not demonstrated the "necessity" of its measures within the meaning of Art XX(a). In the Appellate Body's view, "assuming *arguendo* that China can invoke Article XX(a) could be at odds with the objective of promoting security and predictability through dispute settlement, and may not assist in the resolution of this dispute, in particular because such an approach risks creating uncertainty with respect to China's implementation obligations."²⁷

19. Singapore notes that the Appellate Body has held that a panel is not required to examine all claims by the complaining party, and that a panel is entitled to exercise judicial economy by limiting its findings to those needed to assist the DSB in making recommendations or rulings on each dispute instead of deciding each and every claim made by the complaining party.²⁸ However, the Appellate Body has also held that to provide a partial resolution of the matter would be an exercise of false judicial economy. This may be so where a panel declines to rule on a claim that would have offered

²¹ Appellate Body, *US – Countervailing Duty Investigation on DRAMS*, para. 115.

²² Appellate Body, *US – Countervailing Duty Investigation on DRAMS*, para. 115.

²³ Article 3.2 of the DSU.

²⁴ Articles 2.1 and 11 of the DSU.

²⁵ Appellate Body Report, *China – Publications and Audiovisual Products*, para. 213.

²⁶ Panel Report, *Thailand – Cigarettes (Philippines)* (Article 21.5 – Philippines), para. 7.741 and footnote 1597.

²⁷ Appellate Body Report, *China – Publications and Audiovisual Products*, para. 215.

²⁸ Appellate Body Report, *US – Wool Shirts and Blouses*, p. 18-19.

a different remedy from the claim(s) in respect of which the panel had made findings, or by not making findings on claims that have a different scope and content.²⁹

20. The Appellate Body in *EC – Export Subsidies on Sugar* held that the Panel had erred in exercising judicial economy in *not* ruling on whether there had been a breach of Article 3 of the SCM Agreement on the basis that it had already found in favour of the claims brought under Articles 3 and 8 of the Agreement on Agriculture. The Appellate Body noted that in so doing, the panel had precluded the possibility of a remedy being available to the Complaining Parties pursuant to Article 4.7 of the SCM Agreement (namely, a recommendation that the subsidizing Member withdraw the prohibited subsidy without delay within a specified time-period), which is not a remedy available for breaches of the Agreement on Agriculture. This amounted to a failure to discharge its obligation under Article 11 of the DSU and constituted "false judicial economy and legal error".³⁰

21. Likewise, if the Panel declines to rule on the claims brought under the SCM Agreement in this case, it may fail to discharge its obligation under Article 11 of the DSU by failing to make "such other findings as will assist the [DSB] in making the recommendations or in giving the rulings provided for in the covered agreements," namely, a recommendation or ruling by the DSB pursuant to Article 4.7 of the SCM Agreement.

B. Response to Question 2 (Applicability of Art XX of the GATT 1994 to the SCM Agreement)

22. Singapore's response is set out at paragraphs 12, 14, and 15 above.

C. Response to Question 3 (Design Requirement Under Art XX(a) of the GATT 1994)

23. Singapore agrees that a measure may be said to be "designed" to protect a public morals objective if it is "not incapable" of protecting that public morals objective (see paragraphs 6 to 7 above). Singapore understands that the "design" step is an objective determination to be undertaken by the Panel based on the evidence and facts before it, and that it is not a particularly demanding step of the Article XX(a) analysis.

24. Having said that, for a measure to be justified under Art XX(a) of the GATT 1994, it also has to satisfy the "necessity" requirement – that is, the measure must be "necessary" for the attainment of the asserted public morals objective – and comply with the conditions of the *chapeau* of Article XX. Singapore's views on the "necessity" step of the analysis and the requirements of the *chapeau* are set out at paragraphs 8 to 11 above.

²⁹ Panel Report, *US – Origin Marking*, paras 7.363-7.364.

³⁰ Appellate Body Report, *European Communities – Export Subsidies on Sugar*, paras 329-335, especially para 335.

ANNEX C-10**INTEGRATED EXECUTIVE SUMMARY OF THE ARGUMENTS OF SWITZERLAND****A. INTERPRETATION OF ARTICLE XXI(b) OF THE GATT 1994**

1. With respect to China's claim that the exclusion under Section 30D of the Internal Revenue Code Clean Vehicle Credit from participation by a "foreign entity of concern" (FEOC), the so-called FEOC exclusionary rule, is inconsistent with Article I:1 of the GATT 1994, the United States invokes the security exception under Article XXI(b) of the GATT 1994.¹ The United States submits that Article XXI(b) of the GATT 1994 is self-judging and that this is established by the provision's text, by its context and by the object and purpose of the agreement. In the United States' view, supplementary means of interpretation also confirm the self-judging nature of Article XXI(b) of the GATT 1994.² Accordingly, the United States considers that the Panel should limit its findings to a recognition that the United States has invoked its essential security interests.³

2. Switzerland does not support this interpretation, as it has argued in other proceedings in which the interpretation of Article XXI(b) of the GATT 1994 has been examined⁴.

3. Switzerland submits that the correct interpretation of Article XXI(b) of the GATT 1994, on the basis of the ordinary meaning of its terms, taken in their context and in light of the object and purpose of the GATT 1994 and the WTO Agreement, clearly establishes that the WTO Member invoking Article XXI(b) of the GATT 1994 as a defence does not enjoy absolute discretion and a panel needs to review whether the conditions set out in that provision are satisfied. Panels have thoroughly examined this issue in previous disputes and have considered that Article XXI(b) of the GATT 1994 is not entirely self-judging.⁵

4. In this context, Switzerland would like to stress in particular that the object and purpose of the GATT 1994 and the WTO Agreement support the view that Article XXI(b) is subject to a panel's review.⁶ Indeed, the possibility to completely shield a measure from any scrutiny by merely invoking Article XXI(b) would be contrary to the security and predictability of the multilateral trading system established by the GATT 1994 and the WTO Agreements.⁷

5. Switzerland is of the view that recourse to supplementary means of interpretation, including the negotiating history, is not necessary, given that the interpretation based on the text of Article XXI(b) in its context and in light of the object and purpose of the GATT 1994 and the WTO Agreement is clear.⁸ In any event, supplementary means of interpretation, including the negotiating history, do not support the interpretation that Article XXI(b) is self-judging, as confirmed by panels in previous disputes.⁹

6. Therefore, as stated by the Panel in *US – Steel and Aluminium Products (Switzerland)*, "the entirety of Article XXI(b) of the GATT 1994 is to be given meaning and effect in a manner that

¹ United States' first written submission, para. 45.

² United States' first written submission, para. 47.

³ United States' first written submission, para. 48.

⁴ See Panel Report, *US – Origin Marking (Hong Kong, China)*, Annex C-9, para. 1, Integrated Executive Summary of the Arguments of Switzerland; Panel Report, *US – Steel and Aluminium Products (Switzerland)*, para. 7.125 ss; See also the arguments submitted by Switzerland as a third party in other proceedings relating to certain steel and aluminium products (Panel Report, *US – Steel and Aluminium Products (China)*, Annex C-10; Panel Report, *US – Steel and Aluminium Products (Norway)*, Annex C-9; Panel Report, *US – Steel and Aluminium Products (Türkiye)*, Annex C-10).

⁵ Panel Report, *Russia – Traffic in Transit*, para. 7.102; Panel Report, *US – Steel and Aluminium Products (Switzerland)*, para. 7.146; Panel Report, *US – Origin Marking (Hong Kong, China)*, para. 7.185.

⁶ Panel Report, *Russia – Traffic in Transit*, para. 7.79; Panel Report, *US – Steel and Aluminium Products (Switzerland)*, para. 7.142; Panel Report, *US – Origin Marking (Hong Kong, China)*, para. 7.150.

⁷ Panel Report, *Russia – Traffic in Transit*, para. 7.79.

⁸ Panel Report, *US – Origin Marking (Hong Kong, China)*, para. 7.162.

⁹ See Panel Report, *Russia – Traffic in Transit*, paras. 7.83-7.100; Panel Report, *US – Steel and Aluminium Products (Switzerland)*, para. 7.146; Panel Report, *US – Origin Marking (Hong Kong, China)*, para. 7.164 ss.

preserves the right and discretion of a Member to take action it considers necessary for the protection of its essential security interests under the conditions and circumstances described in subparagraphs (i) to (iii)", and a panel may thus assess the invocation by a Member of Article XXI(b) of the GATT 1994.¹⁰ Thus, while the security exception under Article XXI(b) of the GATT 1994 provides WTO Members with flexibility to take measures to protect their essential security interests, they must meet certain minimum legal requirements, compliance with which can be reviewed by a panel.

7. Switzerland considers that a responding party invoking a defence under Article XXI(b) of the GATT 1994 must identify the subparagraph under which it is raising its defence, so that the Panel is in a position to review whether the relevant conditions for the defence are satisfied.¹¹ Further, a responding party invoking Article XXI(b) bears the burden of proving that the conditions laid down in that provision are fulfilled.¹² This requires submitting evidence, presenting arguments and linking the evidence to the arguments raised.

B. WHETHER ARTICLE XX AND XXI OF THE GATT 1994 APPLY TO CLAIMS UNDER THE TRIMS AND THE SCM AGREEMENTS

8. Switzerland notes that it is not necessary for the Panel in this dispute to examine whether the security exception under Article XXI of the GATT 1994 is available as a defence to claims under the TRIMS and SCM Agreements. Indeed, the United States has invoked Article XXI(b) of the GATT 1994 as a defence only with respect to China's claims related to the FEOC exclusionary rule.¹³ While China alleges that the FEOC exclusionary rule is inconsistent with Article I:1 of the GATT 1994, it has made no claim with regard to the inconsistency of the FEOC exclusionary rule with the TRIMS or the SCM Agreement.¹⁴

9. With regard to the applicability of Article XX of the GATT 1994 to multilateral agreements on trade in goods in Annex 1A to the WTO Agreement other than the GATT 1994, Switzerland wishes to submit the following observations. The Appellate Body explained that whether that provision may be invoked to justify a breach of an obligation set out in another covered agreement requires a case-by-case analysis of the relationship between the relevant provisions.¹⁵ The Appellate Body noted that such examination will lead to the conclusion that exceptions in one covered agreement, such as Article XX of the GATT 1994, may be invoked to justify a breach of an obligation in another covered agreement, for instance where that other agreement contains an express language incorporating that provision.¹⁶

10. While the TRIMS Agreement, which provides in Article 3 that "[a]ll exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement", contains such express language, the SCM Agreement does not. The Appellate Body noted that, where there is no such express language, recourse to other interpretative elements will be necessary to determine the specific relationship among individual terms and provisions of the relevant agreements.¹⁷ The existence of such specific links must be assessed on a case-by-case basis, through a thorough analysis of the relevant provisions on the basis of the customary rules of treaty interpretation, as well as the circumstances of each dispute.¹⁸ Should the Panel consider necessary in this dispute to examine whether Article XX of the GATT 1994 is available as a defence to justify a violation of the SCM Agreement, Switzerland encourages the Panel to conduct such thorough, careful and comprehensive analysis.

¹⁰ Panel Report, US – Steel and Aluminium Products (Switzerland), para. 7.146.

¹¹ Panel Report, US – Origin Marking (Hong Kong, China), para. 7.259.

¹² See Panel Report, *Turkey – Textiles*, para. 9.57.

¹³ United States' first written submission, para. 45.

¹⁴ See Third Party Submission of Canada, para. 16.

¹⁵ Appellate Body Reports, *China – Rare Earths*, para. 5.55.

¹⁶ Appellate Body Reports, *China – Rare Earths*, para. 5.56.

¹⁷ Appellate Body Reports, *China – Rare Earths*, para. 5.56.

¹⁸ See Appellate Body Reports, *China – Rare Earths*, para. 5.57.