UNITED STATES – CERTAIN TAX CREDITS UNDER THE INFLATION REDUCTION ACT

(DS623)

RESPONSES OF THE UNITED STATES OF AMERICA TO THE PANEL'S QUESTIONS FOLLOWING THE FIRST SUBSTANTIVE MEETING OF THE PANEL WITH THE PARTIES

May 28, 2025

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Brazil – Taxation (Panel)	Panel Report, *Brazil – Certain Measures Concerning Taxation and Charges*, WT/DS472/R / WT/DS497/R / Corr. 1 and Add. 1, adopted 11 January 2019, as modified by Appellate Body Report, WT/DS472/AB/R / WT/DS497/AB/R and Add. 1
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Canada – Autos (AB)	Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000
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US-2	Washington Post, "How China pulled ahead to become the world leader in electric vehicles", March 3, 2025
US-3	U.S. Geological Survey, Mineral Commodities Summaries 2024, January 2024
US-4	U.S. Geological Survey, 2020-2021 Minerals Yearbook: China, May 2024
US-5	International Energy Agency, Global Critical Minerals Outlook 2024, May 2024
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US-10	Internal Revenue Service, Transfer of Clean Vehicle Credits Under Section 25E and Section 30D, Proposed Rule, 88 FR 70310 (October 10, 2023)
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US-50	China Daily, "'New three' paves way for high-quality growth," Feb. 21, 2024
US-51	Information Technology & Innovation Foundation, "The Impact of China's Production Surge on Innovation in the Global Solar Photovoltaics Industry," October 2020
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1 GENERAL LEGAL ISSUES

1.1 Scope of China's claims

Question 1. (Oral Question 1) To China: The Panel understands China to be challenging the following four individual eligibility conditions under the Clean Vehicle Tax Credit: (1) the North American Assembly Requirement; (2) the Battery Critical Minerals Requirement; (3) the Battery Components Requirement; and (4) the FEOC Requirement. The Panel notes that China appears to have clarified the precise scope of its claims in connection with these conditions in its first written submission. In this connection, is the Panel correct in its understanding that:

a. China's claims under the most-favoured-nation obligation in Article I:1 of the GATT 1994 are directed at eligibility conditions (1), (2), (3), and (4)?

b. China's claims under the national treatment obligation in Article III:4 of the GATT 1994 are directed only at eligibility conditions (1), (2), and (3), and no claim is being made under Article III:4 in respect of (4)? Insofar as China is pursuing its claim under Article III:4 in respect of (4), where is this claim developed in China's first written submission?

c. China's claims under the national treatment obligation in Articles 2.1 and 2.2 of the TRIMs Agreement are directed only at eligibility conditions (1), (2), and (3), and no claim is being made under Articles 2.1 and 2.2 of the TRIMs Agreement in respect of (4)? Insofar as China is pursuing its claims under the TRIMs Agreement in respect of (4), where is this claim developed in China's first written submission?

d. China's claims under the prohibited subsidies obligation in Articles 3.1(b) and 3.2 of the SCM Agreement are directed only at eligibility conditions (2) and (3), and no claim is being made under Articles 3.1(b) and 3.2 of the SCM Agreement in respect of eligibility conditions (1) and (4)?

Response:

1. This question is addressed to China.

Question 2. To China: In both its panel request and first written submission, China makes claims of violation under both Articles 2.1 and 2.2 of the TRIMs Agreement (See panel request, paragraphs 21 (c) and (d), and paragraph 22 (b) and (c); China's first written submission, paras. 129 and 173(iii)). Likewise, in its opening statement, China refers to the violations under Articles 2.1 and 2.2 of the TRIMs Agreement (para. 35). Does Article 2.2 of the TRIMs Agreement on its own set out an obligation that is susceptible to a finding of inconsistency by a panel?

Response:

2. This question is addressed to China.

1.2 Order of analysis

Question 3. (Oral Question 2) To both 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.

Response:

3. China has raised claims under Articles 3.1(b) and 3.2 of the SCM Agreement, Articles 2.1 and 2.2 of the TRIMs Agreement, and Articles I:1 and III:4 of the GATT 1994. The United States considers that the Panel may start with China's claims under the SCM Agreement as they are claims brought under a more specific agreement. Further, resolution of the claims under the SCM Agreement may also be in the interest of efficiency.

4. That is, there is partial overlap between the claims under Article III:4 of the GATT 1994, Article 2 of the TRIMs Agreement, and Article 3.1(b) of the SCM Agreement. These provisions all prohibit the use of local content requirements in certain circumstances, and address discriminatory conduct.[1]

5. Article III:4 of the GATT 1994 is broader than Article 2.1 of the TRIMs Agreement and Article 3.1(b) of the SCM Agreement. Specifically, Article III:4 of the GATT 1994 requires Members to accord treatment to imported products that is no less favorable than that accorded to like products of national origin with respect to "all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use". Article 2.1 of the TRIMs Agreement prohibits a Member from applying any investment measures related to trade in goods that are inconsistent with Article III of the GATT 1994. Article 2.2 of the TRIMs Agreement provides for an illustrative list for measures that are inconsistent with Article III:4 of the GATT 1994. With respect to the SCM Agreement, Article 3.1(b) likewise prohibits discriminatory treatment concerning imported goods, but more specifically prohibits subsidies contingent upon the use of domestic over imported goods – that is, a subset of potentially WTO-inconsistent discriminatory measures.

6. Therefore, in this dispute, a finding that a subsidy is contingent on the use of domestic over imported goods under Article 3.1(b) of the SCM Agreement could be relevant to the claim under

[1] *See Brazil – Taxation (Panel)*, paras. 7.47-7.49.

Article III:4 of the GATT 1994.[2] Further, a finding concerning Article III:4 of the GATT 1994 would be relevant to a finding concerning Articles 2.1 and 2.2 of the TRIMs Agreement.[3] Thus, a finding by the Panel concerning Articles 3.1(b) and 3.2 of the SCM Agreement could implicate the finding concerning Article III:4 of the GATT 1994, and in turn implicate the claim under Article 2.1 of the TRIMs Agreement, promoting both efficiency and an ability to fully address the claims at issue. At the same time, where a panel makes findings under the SCM Agreement with respect to a measure, this may obviate the need for further findings under the GATT 1994 with respect to that measure. Consistent with its terms of reference, a panel need only make such findings as are necessary to resolve the dispute and should refrain from making findings that serve merely an advisory purpose.

7. In contrast, if the Panel were to first begin its analysis under the GATT 1994, a finding under Article III:4 would not fully address the claims under the SCM Agreement concerning subsidies. That is, a finding under Article III:4 of the GATT 1994 would not necessarily address the issues under Article 3.1 of the SCM Agreement whether a subsidy exists and is contingent on the use of domestic over imported goods. The Panel would then need to still address the claims under the SCM Agreement.

8. Accordingly, the United States considers that the Panel may begin its analysis with the claims under the SCM Agreement to promote efficient resolution and fully address the claims at issue.

1.3 Temporal scope of the panel's assessment of the claims and defences

Question 4. To both parties: At paragraph 58 of its opening statement, the United States stated that, for purposes of the assessment under Article XX(a) of the GATT 1994, the "evaluation the Panel is called upon to make is as of the time of the panel's establishment by the DSB". The United States reiterated the same point in the context of its closing statement. Do the parties agree that, as a legal matter, the Panel's assessment of China's claims, and the Panel's assessment of the applicability of any exceptions invoked by the United States, must be based on an objective assessment of the facts as they existed at the time of the panel's establishment by the DSB?

Response:

9. Pursuant to the DSU, the Panel's assessment of China's claims, including the Panel's assessment of the applicability of the exceptions invoked by the United States, must be based on the situation that existed at the time of the Panel's establishment by the DSB. The DSB established the Panel on September 23, 2024,[4] and set the Panel's terms of reference to examine the matter referred by China to the DSB in its panel request.[5] That is, the relevant legal issue put

[2] *Brazil – Taxation (Panel)*, para. 7.45 ("A harmonious reading of Article 3.1(b) of the SCM Agreement . . . and Article III:4 of the GATT 1994 . . . , 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.").
[3] *Brazil – Taxation (Panel)*, para. 7.46.
[4] WT/DSB/M/493, para. 3.9.
[5] WT/DS623/3.

by China to the DSB is whether the United States was acting inconsistently with its WTO commitments as of that date, and not whether the United States had acted inconsistently in the past or would act inconsistently in the future.

10. Articles 7.1 and 6.2 of the DSU operate to define a panel's terms of reference. When the DSB establishes a panel, the panel's terms of reference under Article 7.1 are (unless the parties to the dispute agree otherwise) "[t]o examine, in the light of the relevant provisions [of the] covered agreements cited by the parties to the dispute, the matter referred to the DSB by [the complaining Party in its panel request] and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements."[6] In its panel request, a complaining party is asserting that the responding party is acting inconsistently with its WTO commitments; the matter is therefore the factual and legal situation existing as of the date the DSB considers the panel request.

11. Pursuant to Article 6.2 of the DSU, "the matter" referred to the DSB consists of "the specific measures at issue" and "a brief summary of the legal basis of the complaint" as set out in the panel request.[7] The term "specific measures at issue" makes clear that the measures cited in a panel request must be measures that are identifiable at the time of panel establishment. Thus, the claim is made with respect to a specific measure at that specific point in time.[8] By establishing a legal link between the panel request and the panel's terms of reference, DSU Article 7.1 tasks a panel with examining the measure and the claim as of the point in time when the DSB establishes the panel.

12. From the text of these DSU provisions, it follows that a panel is to examine the matter and facts as they existed on the date the panel was established. That is, the Panel must examine each specific measure and arguments regarding its WTO consistency as of a time when, as the facts adduced by the United States clearly establish, China has already achieved global dominance of the clean vehicle and renewable energy sectors.

2 GENERAL FACTUAL ISSUES

Question 5. **To China: In its first written submission, China stated that the measures at issue "effectively exclude" Chinese entities from participating in the United States electric vehicle market (para. 31). In its opening statement, China stated that the FEOC Requirement "effectively forecloses U.S. market access for Chinese clean vehicle products" (para. 38). In its opening statement, the United States responded that "the measures at issue do not – as China suggests – 'effectively exclude Chinese entities from participating in the U.S. electric vehicle market'" (para. 52). Please respond.**

[6] DSU, Art. 7.1.
[7] DSU, Art. 6.2.
[8] *EC – Selected Customs Matters (AB)*, para. 187 (finding that the panel's review of the consistency of the challenged measure with the covered agreements properly "focused on these legal instruments as they existed and were administered *at the time of establishment of the Panel*") (italics added); *id*., para. 259 (finding the panel had not erred in declining to consider three exhibits, which concerned a regulation enacted after panel establishment, because although they "might have arguably supported the view that uniform administration had been achieved by the time the Panel Report was issued, we fail to see how [they] showed uniform administration *at the time of the establishment of the Panel*") (italics added).

Response:

13. This question is addressed to China.

3 ARTICLE XX(A) – PUBLIC MORALS EXCEPTION

Question 6. (Oral Question 9) To China: With reference to the data points mentioned in paragraphs 3 to 5 of the United States' opening statement, please comment on the United States' allegation that China has attained "global dominance in the clean vehicle and renewable energy sectors" (para. 3).

Response:

14. This question is addressed to China. The United States notes, however, it is disappointed that China declined to engage on these facts during the first meeting of the Panel with the parties, denying the United States an opportunity to respond to any arguments China may make, and limiting the Panel's ability to consider these important issues.[9]

Question 7. To the United States: In its opening statement, the United States indicates at various points that "the measures at issue" are justified under Article XX(a) of the GATT 1994. The Panel understands China to be challenging the following four individual eligibility conditions under the Clean Vehicle Tax Credit: (1) the North American Assembly Requirement (2) the Battery Critical Minerals Requirement (3) the Battery Components Requirement (4) the FEOC Requirement. The Panel understands from the United States' first written submission that insofar as the Clean Vehicle Tax Credit is concerned, the United States is invoking Article XX(a) only in respect of (1), (2), and (3), and that the United States is invoking Article XXI only in respect of (4), i.e. the FEOC Requirement. Is this understanding correct?

Response:

15. As the United States detailed in its first written submission, the United States is invoking Article XXI of the GATT 1994 only with respect to (4) the FEOC requirement.[10] The United States invokes Article XX(a) of the GATT 1994 with respect to other three challenged portions of the Clean Vehicle Tax Credit – that is, (1) the North American Assembly requirement, (2) the Battery Critical Minerals requirement, and (3) the Battery Components requirement.

Question 8. (Oral Question 3) To the United States: At paragraph 1 of its first written submission, the United States submits that 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". Could the United States please clarify whether, in its view, China's "global dominance of the clean vehicle and renewable energy sectors" (para. 67) is in itself unfair and inconsistent with the United States' public morals under Article XX(a) of the

[9] U.S. Closing Statement at the First Panel Meeting, para. 4.
[10] U.S. First Written Submission, para. 45.

GATT 1994? Or is the United States' position that any such "global dominance" is only inconsistent with the United States' public morals insofar as it results from "non-market and trade distorting behavior, including unfair competition, the use of forced labor, theft, and coercion" (para. 67)?

Response:

16. As the United States has explained, 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.[11] U.S. law reflects that the marketplace should determine the winners and losers, and imposes constraints on behavior based on national concepts of right and wrong to ensure market-oriented outcomes.[12] U.S. law specifically does not permit the type of policies that China champions.[13]

17. China's global dominance in the clean vehicle and renewable energy sectors has been achieved through these non-market policies and practices.[14] And the fact that China has achieved global dominance in the clean vehicle and renewable energy sectors demonstrates the necessity of the measures at issue. That is, the measures at issue are necessary at a time when China has already achieved global dominance of the clean vehicle and renewable energy sectors, and in light of the importance demonstrated in U.S. law of the U.S. public moral against unfair competition, as well as against forced labor, theft, and coercion.[15]

18. Accordingly, 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.

Question 9. To the United States: With respect to the United States' arguments concerning the justification of the measures at issue under Article XX(a) of the GATT 1994:

a. At paragraph 1 of its opening statement, the United States submitted that China "has adopted anti-competitive and non-market policies and practices to secure global dominance in" certain sectors. Please provide further details about the United States' understanding of the terms "anti-competitive" and "non-market". Please also elaborate on the relationship between "anti-competitive and non-market" policies and practices and the United States' "public morals against unfair competition, forced labor, theft, and coercion" (United States' opening statement, para. 27).

[11] *See* U.S. First Written Submission, paras. 84-103; U.S. Opening Statement at the First Panel Meeting, paras. 36-45.
[12] U.S. First Written Submission, paras. 69-75.
[13] U.S. First Written Submission, paras. 69-75.
[14] U.S. First Written Submission, paras. 84-103; U.S. Opening Statement at First Panel Meeting, para. 2.
[15] U.S. Opening Statement at First Panel Meeting, para. 58.

Response:

19. As an initial matter, the term "non-market" may be used to describe policies that interfere with or displace market-oriented outcomes – that is, the results of fair competition in the marketplace between market-oriented actors operating at arm's-length under market economic conditions. In this sense, "anti-competitive" may be considered an aspect of "non-market" policies or conditions. 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.

20. China's "non-market" policies and practices in the clean vehicle and renewable energy sector include: targeting of sectors for dominance; non-market excess capacity; state-directed investment; forced labor; forced technology transfer; and theft of trade secrets.[16] Below, the United States explains how each of these policies and practices are non-market. Further, in response to the latter half of the question, 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.

21. As explained previously, China's targeting of the clean vehicle and renewable energy sectors for dominance is non-market because China sets quantitative targets for the clean vehicle and renewable energy sectors,[17] leading Chinese economic actors to overinvest, to displace foreign companies in existing markets, and to take new markets as they develop.[18] In effect, China's policy of global dominance is an effort towards monopolization. Indeed, as the Information Technology and Innovation Foundation observed, "[China's] entrenchment as the dominant photovoltaic manufacturer has corresponded with plummeting R&D intensity, patents, and new market entry in the United States".[19] Therefore, China's targeting of the clean vehicle and renewable energy sectors is contrary to the U.S. public moral against unfair competition, including as reflected in the U.S. prohibition and criminalization of monopolization – or even attempts at monopolization – in any aspect of interstate trade or commerce.[20]

22. China's excess capacity is non-market because the capacity created is in excess of what would have resulted under market-oriented conditions.[21] That is, in line with its targeting of sectors for dominance, China creates excess capacity through investments and capacity expansion far in excess of what market-oriented actors, operating under market economy

[16] U.S. Opening Statement at First Panel Meeting, para. 36.
[17] U.S. First Written Submission, paras. 89, 91, 93 (citing European Chamber of Commerce, *China Manufacturing 2025: Putting Industrial Policy Ahead of Market Forces* (2017), pp. 74-77 (US-53); CSIS, "Electric Shock: Interpreting China's Electric Vehicle Export Boom," Sept. 2023, p. 2 (US-54); U.S. Chamber of Commerce, Made in China 2025: Global Ambitions Built on Local Protections (2017), p. 13 (US-59)).
[18] U.S. Opening Statement at First Panel Meeting, para. 37. *See also* Rhodium Group, "Was Made in China 2025 Successful," May 5, 2025, p. 63 (US-103).
[19] U.S. First Written Submission, para. 119 (citing Information Technology & Innovation Foundation, "The Impact of China's Production Surge on Innovation in the Global Solar Photovoltaics Industry," Oct. 2020, p. 18 (US-51)).
[20] U.S. Opening Statement at First Panel Meeting, para. 41.
[21] *See* U.S. First Written Submission, paras. 89, 91, 93, 96; U.S. Opening Statement at First Panel Meeting, paras. 37-38. *See also* Rhodium Group, "Far From Normal: An Augmented Assessment of China's State Support", March 17, 2025 (US-83).

constraints, would create.[22] Non-market excess capacity discourages market-based investment and hinders market-oriented workers and businesses. Therefore, China's non-market excess capacity is also contrary to the U.S. public moral against unfair competition.

23. Further, China's targeting of the clean vehicle and renewable energy sectors for dominance and non-market excess capacity does not occur in isolation. Rather, China's targeting of sectors for dominance and non-market excess capacity is pursued and achieved through a variety of non-market means, such as use of state-directed investment, forced labor, forced technology transfer, and the theft of trade secrets.[23] Accordingly, China's targeting of sectors for dominance and non-market excess capacity are also contrary to the U.S. public morals, against unfair competition, forced labor, theft, and coercion, as reflected in U.S. law.[24]

24. China's state-directed investment is non-market because China's investment policy seeks to create dominance in the clean vehicle and renewable energy sectors through funding and investment strategies that are not market oriented, including by seeking to expand capacity in sectors in which China already has created massive excess capacity.[25] The absence of a market-basis for funding is evident, for example, in China's investment of an estimated $50 billion into solar production facilities between 2000 and 2010, despite China's recognition that overcapacity was occurring.[26] China's also directs and encourages outbound investment by Chinese economic entities to acquire foreign companies in areas the government deems strategic, including in the renewable energy sector.[27] Therefore, China's state-directed investment is contrary to the U.S. public moral against unfair competition, including as reflected in the U.S. prohibition and criminalization of monopolization – or even attempts at monopolization – in any aspect of interstate trade or commerce.[28]

25. China's use of forced labor in the processing of raw materials used in the clean vehicle and renewable energy sector is non-market because the use of unpaid or artificially cheap labor unfairly lowers the cost of production and deprives workers of fair, market-oriented compensation.[29] Forced labor is contrary to basic conceptions of human dignity and autonomy.[30] China's use of forced labor is contrary to the U.S. public morals against unfair competition and

[22] U.S. Opening Statement at First Panel Meeting, para. 38 (citing CSIS, "The Chinese EV Dilemma: Subsidized Yet Striking", June 28, 2024, p. 7 (US-55)).
[23] U.S. Opening Statement at First Panel Meeting, paras. 37-38.
[24] U.S. Opening Statement at First Panel Meeting, paras. 37-38.
[25] U.S. Opening Statement at First Panel Meeting, para. 39; OECD, Government Support in the Solar and Wind Value Chains, January 2025 (US-94).
[26] U.S. Opening Statement at First Panel Meeting, para. 39 (citing U.S. Department of Energy, Solar Photovoltaics: Supply Chain Deep Dive Assessment, Feb. 24, 2022 (US-61); China Daily, "Solar industry is reined in," Oct. 10, 2009 (US-97)).
[27] U.S. First Written Submission, paras. 92, 94; U.S. Opening Statement at First Panel Meeting, paras. 40-41.
[28] U.S. Opening Statement at First Panel Meeting, para. 41.
[29] *See* Sheffield Hallam University, "Driving Force: Automotive Supply Chains and Forced Labor in the Uyghur Region", Dec. 2022 (US-84); U.S. Department of Labor, "Traced to Forced Labor: Solar Supply Chains Dependent on Polysilicon from Xinjiang, 2020 (US-62).
[30] *See, e.g.,* U.S. Constitution, Thirteenth Amendment (US-21).

forced labor, including as reflected in U.S. criminal and civil laws against the use of forced labor.[31]

26. China's use of forced technology transfer is non-market because its imposes foreign ownership restrictions, such as joint venture requirements and foreign equity limitations, and various administrative review and licensing processes, to require or pressure technology transfer from foreign companies.[32] That is, companies are forced to transfer technology that would not have occurred under normal market conditions.[33] The use of forced technology transfer violates the U.S. public morals against unfair competition and coercion, as reflected in U.S. laws.[34]

27. China's theft of trade secrets from foreign companies is non-market because commercially valuable business information, including trade secrets, technical data, negotiating positions, and sensitive and propriety internal communication, would not be released to competitors under market-oriented conditions.[35] China's conduct and support of unauthorized intrusions into, and theft from, the computer networks of foreign companies is contrary to the U.S. public morals against unfair competition and theft, including as reflected in the U.S. laws against cyber theft, economic espionage, and the misappropriation of trade secrets.[36]

28. Accordingly, as detailed above, China's policies targeting the clean vehicle and renewable energy sectors for dominance, and in fact achieving dominance, are non-market, including through the means used to pursue and achieve that dominance. China's non-market policies and practices are contrary to the identified U.S. public morals.

b. With reference to paragraph 26 of the United States' opening statement, please clarify whether the United States' position is that the "targeting of sectors for dominance, non-market excess capacity [and] state-directed investment" is contrary to public morals in the United States in the same way as "forced labor; forced technology transfer, and theft of trade secrets" are contrary to US public morals.

Response:

29. Yes, the Panel's understanding is correct. The statement referenced in the question was made in paragraph 36 of the U.S. opening statement, where the United States explained that 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. Specifically,

[31] U.S. Opening Statement at First Panel Hearing, para. 42.
[32] U.S. First Written Submission, para. 98.
[33] *See* U.S. First Written Submission, para. 98.
[34] U.S. Opening Statement at First Panel Hearing, para. 43.
[35] U.S. First Written Submission, paras. 100-101.
[36] U.S. Opening Statement at First Panel Meeting, para. 44.

- 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.[37]

- China's non-market excess capacity in the clean vehicle and renewable energy sectors is contrary to the U.S. public morals against unfair competition, forced labor, theft, and coercion.[38]

- China's use of state-directed investment in the clean vehicle and renewable energy sectors is contrary to the U.S. public moral against unfair competition.[39]

- China's use of forced labor in the clean vehicle and renewable energy sectors is contrary to the U.S. public morals against unfair competition and forced labor.[40]

- 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.[41]

- China's theft of trade secrets in the clean vehicle and renewable energy sectors is contrary to the U.S. public morals against unfair competition and theft.[42]

30. Accordingly, as evident from the list above, each one of these non-market policies or practices in the clean vehicle and renewable energy sectors violates one or more of the identified U.S. public morals.

c. At paragraph 41 of its opening statement, China argues that the United States' first written submission "offers up an endless buffet of supposed 'public morals' objectives that the challenged measures are allegedly designed to address". Similarly, at paragraph 20 of its third-party submission, the European Union submits that there is a "large number and diverse nature of … interests to be protected that the United States puts forward". Please comment on these statements. Would the United States characterize the measures as pursuing one or multiple public morals objectives?

Response:

31. China has challenged certain aspects of the Clean Vehicle Tax Credit and the renewable energy tax credits as WTO-inconsistent because they exclude Chinese entities or content from qualifying for those tax credits, and the United States has responded by asserting that these measures are necessary to protect U.S. public morals. As detailed in the U.S. first written submission and oral statement, and above in response to subpart (b), the measures are necessary to protect U.S. public morals against unfair competition, as well as forced labor, theft, and coercion. That is, while China's targeting of the clean vehicle and renewable energy sectors for

[37] U.S. Opening Statement at First Panel Meeting, para. 37.
[38] U.S. Opening Statement at First Panel Meeting, para. 38.
[39] U.S. Opening Statement at First Panel Meeting, para. 39.
[40] U.S. Opening Statement at First Panel Meeting, para. 42.
[41] U.S. Opening Statement at First Panel Meeting, para. 43.
[42] U.S. Opening Statement at First Panel Meeting, para. 44.

dominance, and its achievement of that dominance, brings the protection of U.S. norms against unfair competition to the fore, the measures are necessary to protect multiple U.S. public morals because China's non-market policies or practices are contrary to one or more of the identified U.S. public morals. Notably, China does not deny that it engages in the non-market policies and practices that violate the U.S. public morals at issue here – nor can it – given the evidence that the United States has presented.[43]

Question 10. (Oral Question 4) To the United States: At paragraph 23 of the European Union's third-party submission, the European Union expresses the view that "a Member could not possibly justify as a matter of public morals measures that have as their primary objective replacing imported goods with domestic goods". The European Union goes on to state, at paragraph 26 of its third-party written submission, that it "agrees with the United States that practices such as forced labour, forced technology transfers or cyber theft may legitimately be regarded by a Member to as incompatible with its public morals within the meaning of 'public morals' in Article XX(a) of the GATT. On the other hand, the European Union considers that the mere existence of divergences as regards the economic principles prevailing in each Member, for example with regard to the role of the public sector, cannot be said to be morally objectionable conduct for the purpose of Article XX(a), which would allow other WTO Members to adopt trade-restrictive measures." How does the United States respond to these views?

Response:

32. The United States disagrees with the EU's position that the meaning of "public morals" cannot relate to economic principles. First, the ordinary meaning of the term "public morals" in Article XX(a) of the GATT 1994 does not suggest that there are limitations on a Member's community or national standards of right or wrong, and that public morals cannot (or must not) relate to issues of economic concern.[44] The EU's argument therefore has no basis in the text of Article XX(a) and would appear to simply be a projection of its own public morals. One Member cannot dictate what can or cannot be a public moral for another Member.

33. Second, the context provided by other paragraphs of Article XX affirmatively rebuts the view that the phrase "public morals" could be read to exclude any concerns that are "economic" in nature. Specifically, unlike certain other subparagraphs of Article XX, Article XX(a) does not include a proviso that could be understood to narrow the scope of the core operative text. For example, while Article XX(i) provides that Members may adopt measures "involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials", it is followed by the proviso "that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry."[45] The fact that Article XX(a) is unaccompanied

[43] *See* US. First Written Submission, paras. 89-103; U.S. Opening Statement at First Panel Meeting, paras. 8-9, 36-45.
[44] *See* U.S. First Written Submission, para. 65. *See also US – Tariff Measures (Panel)*, para. 7.131 (stating that Members have "scope to define and apply for themselves the concept of public morals in their respective territories, according to their own systems and scales of values, and the right to determine the level of protection that they consider appropriate.").
[45] GATT Article XX(i).

by any such analogous limiting or conditional language further supports the view that "public morals" cannot be read to exclude "economic concerns" as a potential public moral.

34. The EU also has not explained what it means by "purely economic objectives."[46] In any event, it is not clear how the Panel would distinguish what might be called "purely economic objectives" from, for example, social or societal objectives. Indeed, there can be overlap between economic and moral concerns; some types of conduct or behaviour would appear to be immoral precisely because of the economic harms that result from such conduct.

35. For example, when someone steals money from a bank, the bank and its customers suffer a harm that is "economic" in nature. The act that brings about this economic harm – namely the act of theft – also has a moral dimension, which the EU agrees is a public moral within the meaning of Article XX(a).[47] In this sense, it would be incongruous to say that the act of stealing money from a bank does not implicate "moral" concerns because it imposes harms that are economic in nature.

36. Another example is forced or prison labor. Members may adopt measures against forced or prison labor for reasons of morality (*e.g.*, because they object to slavery). Alternatively, or in addition, Members may adopt measures against forced or prison labor to protect principles of fair competition for their own economic actors (*e.g.*, workers and companies). Thus, there simply exists no bright line in Article XX(a) between "moral" concerns and "economic" concerns.[48]

37. For the foregoing reasons, the EU's argument that the term "public morals" cannot include economic concerns is neither supported by the text of Article XX, nor reflective of U.S. conceptions of its public morals, nor practical.

Question 11. <u>To both parties:</u> 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?

[46] EU's Third Party Submission, para. 23.
[47] EU's Third Party Submission, para. 26.
[48] *See also US – Tariff Measures (Panel)*, para. 7.137 ("[P]ublic morals objectives may frequently have inseparable economic aspects.").

Response:

38. At the outset, 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. While the phrase has appeared in prior dispute settlement reports, the DSU does not assign precedential value to Appellate Body or panel reports, or otherwise require a panel to apply the provisions of the covered agreements consistently with the adopted findings of prior reports.[49]

39. Rather, a panel must apply the text of a covered agreement as understood through application of customary rules of interpretation.[50] Accordingly, there is no requirement under Article XX(a) of the GATT 1994 to show that a measure is "designed to" protect or "not incapable" of protecting public morals.

40. To the extent that the Panel opts to analyze whether the U.S. measures are "designed to" or are "not incapable of" protecting public morals as part of its Article XX(a) analysis, as detailed in the U.S. response to Question 12, below, the measures at issue in this dispute are clearly "designed to" protect or "not incapable" of protecting public morals. Indeed, the evaluation of whether a measure is "designed to" protect or "not incapable of" protecting public morals is "not … particularly demanding."[51] Therefore, because this evaluation is not particularly demanding, it does not add materially to a panel's understanding of whether a measure is "necessary" to protect a Member's public morals.

Question 12. (Oral Question 5) To the United States: Please comment on China's argument at paragraph 38 of China's opening statement that the Clean Vehicle Credit is not "designed or intended to address any alleged 'public morals' concerns that the United States might have with certain Chinese products" given that "there is a different provision of the IRA … that effectively forecloses US market access for Chinese clean vehicle products", namely the FEOC Requirement.

[49] DSU, Article 3.9 ("The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.").
[50] DSU, Article 3.2 ("The Members recognize that [the dispute settlement system] 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.").
[51] *Colombia – Textiles (AB)*, para 5.70 ("We do not see the examination of the 'design' of the measure as a particularly demanding step of the Article XX(a) analysis.").

Response:

41. As an initial matter, the United States disagrees that certain provisions of the IRA effectively foreclose the U.S. market for Chinese clean vehicle products.[52] The Clean Vehicle Tax Credit is a domestic financial incentive for U.S. taxpayers. U.S. consumers may freely purchase any clean vehicle that they choose, including those with battery components manufactured or assembled in China. The measure is designed to ensure that U.S. support – through tax credits – does not reward China's non-market policies and practices, but instead incentivizes production in the United States and other countries that advance and align with U.S. public morals. That is, the Clean Vehicle Tax Credit is merely an incentive for the U.S. consumer to purchase a clean vehicle that is made in accordance with U.S. public morals.

42. Contrary to China's assertion, 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.[53] For example, to qualify for the Clean Vehicle Tax Credit, final assembly must occur in North America[54] and increasing percentages of the value of battery components to be manufactured or assembled in North America.[55] Such requirements demonstrate that the measure is designed to protect or not incapable of protecting U.S. public morals because the 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.

43. 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,[56] provisions that protect source code and algorithms and prohibit forced technology transfer,[57] and the protection of trade secrets.[58] Such provisions help ensure that, for example through the North American assembly requirement and the battery components sourcing requirement, the Clean Vehicle Tax Credit protects U.S. public morals against unfair competition, forced labor, theft, and coercion.

44. The critical minerals sourcing requirement likewise demonstrates that the Clean Vehicle Tax Credit is designed to protect, or not incapable of protecting, U.S. public morals. 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.[59] 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

[52] *See* U.S. Opening Statement at First Panel Meeting, para. 52.
[53] As detailed in the U.S. response to question 11, there is no requirement under Article XX(a) of the GATT 1994 to show that a measure is "designed to" protect or "not incapable" of protecting public morals. The United States provides this response to the extent the Panel opts to analyze the measure under either of these frameworks.
[54] U.S. First Written Submission, para. 20.
[55] U.S. First Written Submission, para. 22.
[56] U.S. Opening Statement at First Panel Meeting, para. 51 (citing USMCA, Arts. 23.3, 23.6 (US-87)).
[57] U.S. Opening Statement at First Panel Meeting, para. 51 (citing USMCA, Art. 19.16 (US-87)).
[58] U.S. Opening Statement at First Panel Meeting, para. 51 (citing USMCA, Art. 20.69 (US-87)).
[59] U.S. First Written Submission, para. 21.

provisions prohibiting anti-competitive conduct,[60] reaffirming labor obligations,[61] providing for the protection and enforcement of IP rights,[62] and regulating state-owned enterprises.[63]

45. As described above, the USMCA is an agreement that upholds these U.S. public morals. 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. Indeed, 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 . . . ."[64]

46. Contrary to China's assertion, the FEOC exclusion to the Clean Vehicle Tax Credit does *not* foreclose U.S. market access for Chinese clean vehicle products – it is merely a limitation on availability of a tax credit to incentivize production in the United States and other countries that align with U.S. public morals. Moreover, other portions of the Clean Vehicle Tax Credit – the North American assembly requirement, the critical minerals sourcing requirement, and the battery components sourcing requirement – demonstrate that the measure is designed to protect or not incapable of protecting the U.S. public morals against unfair competition, forced labor, theft, and coercion.

Question 13. (Oral Question 6) <u>To the United States:</u> With reference to paragraph 71 of the United States' opening statement, please explain, with reference to the text of the IRA, how, other than through the FEOC Requirement, the measures at issue "distinguish[]" between China and other Members.

<u>Response</u>:

47. Paragraph 71 of the U.S. opening statement was in response to the EU's argument, referenced in the preceding paragraph of the U.S. opening statement, which invited the Panel to examine whether discrimination occurs between the United States and Members other than China.[65] The United States disagrees; China is the Member that has brought the dispute against

[60] *See* U.S. Opening Statement at First Panel Meeting, para. 49 (citing United States-Mexico-Canada Agreement, Chapter 21 (US-87); United States-Korea Free Trade Agreement, Chapter 16 (US-88); United States-Singapore Free Trade Agreement, Chapter 12 (US-95); United States-Peru Free Trade Agreement, Chapter 13 (US-89)).
[61] *See* U.S. Opening Statement at First Panel Meeting, para. 49 (citing United States-Mexico-Canada Agreement, Chapter 23 (US-87); United States-Korea Free Trade Agreement, Chapter 19 (US-88); United States-Singapore Free Trade Agreement, Chapter 17 (US-95); United States-Peru Free Trade Agreement, Chapter 17 (US-89)).
[62] *See* U.S. Opening Statement at First Panel Meeting, para. 49 (citing United States-Mexico-Canada Agreement, Chapter 20 (US-87); United States-Korea Free Trade Agreement, Chapter 18 (US-88); United States-Singapore Free Trade Agreement, Chapter 16 (US-95); United States-Peru Free Trade Agreement, Chapter 16 (US-89)).
[63] *See* U.S. Opening Statement at First Panel Meeting, para. 49 (citing United States-Mexico-Canada Agreement, Chapter 22 (US-87); United States-Korea Free Trade Agreement, Chapter 16 (US-88); United States-Singapore Free Trade Agreement, Chapter 12 (US-95); United States-Peru Free Trade Agreement, Chapter 13 (US-89)).
[64] *See* U.S. Opening Statement at First Panel Meeting, para. 50 (citing Agreement Between the Government of the United States of America and the Government of Japan on Strengthening Critical Minerals Supply Chains (March 28, 2023), Article 1 (US-42)).
[65] U.S. Opening Statement at First Panel Meeting, para. 70.

the United States, not other Members. Accordingly, the Panel should focus its inquiry on whether the measures at issue present distinctions where the same conditions prevail between the United States and China.[66]

48. The United States has explained that the same conditions do not prevail between the United States and China – that is, China's global dominance of the clean vehicle and renewable energy sector, and China's non-market policies and practices, entirely distinguish China from the United States.[67] As detailed in the U.S. response to question 12, above, the measures at issue protect U.S. public morals against unfair competition, forced labor, theft, and coercion. That is, the North American assembly requirement, battery components sourcing requirement, and critical minerals sourcing requirement of the Clean Vehicle Tax Credit incentivize 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. The Clean Vehicle Tax Credit thus incentivizes market-oriented behavior and distinguishes China by ensuring that China's non-market policies are not rewarded.

49. Similarly, the renewable energy tax credits distinguish China by incentivizing market-oriented behavior. As detailed in the U.S. response to question 16, 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.[68] This requirement ensures that U.S. public morals against unfair competition and forced labor are upheld, and ensures that China's non-market policies are not rewarded, including its use of forced labor in the renewable energy sector.[69]

Question 14. (Oral Question 7) To China: At paragraph 72 of its opening statement, the United States argued that "[o]ther countries that are eligible to contribute to a qualified vehicle for purposes of the Clean Energy Vehicle Credit are partners that have agreed to commitments with the United States in a free trade agreement, including agreements with enforceable provisions aimed at ensuring labor rights, IP protections, and fair competition norms … Thus, the 'same conditions' do not prevail between those Members with which the United States has a free trade agreement and those with which it does not". Please comment.

Response:

50. This question is addressed to China.

Question 15. (Oral Question 8) To the United States: At paragraph 34 of its opening statement, the United States noted that it has "promoted [its] values", including in respect

[66] U.S. Opening Statement at First Panel Meeting, para. 70.
[67] U.S. First Written Submission, paras. 128-129; U.S. Opening Statement at First Panel Meeting, para. 71.
[68] U.S. Opening Statement at First Panel Meeting, para. 48 (citing 26 U.S.C. § 48(a)(9)(B), (10)(A), and (11), 26 U.S.C. § 48E(d)(3) and (4), 6 U.S.C. § 45(b)(6) and (7), 26 U.S.C. § 45Y(g)(9) and (10) (CHN-17)).
[69] U.S. First Written Submission, para. 97.

of "non-market policies and practices", through international cooperation, including in joint statements with the European Union, Brazil, and Japan. However, the Panel understands that vehicles assembled in those countries are precluded from accessing the Clean Vehicle Tax Credit because of the North American Assembly Requirement. Is the Panel's understanding correct?

Response:

51. The United States confirms that under the North American assembly requirement, final assembly of vehicles must occur in North America – that is, the United States, Canada, or Mexico – in order to qualify for the Clean Vehicle Tax Credit.[70] U.S. consumers may purchase vehicles assembled in other countries, including the European Union, Brazil, or Japan; however, those vehicles do not qualify for the Clean Vehicle Tax Credit. The North American assembly requirement is reflective of the fact that China has achieved global dominance in the clean vehicle sector.[71] Specifically:

- China produces approximately 60% of electric vehicles sold globally and approximately 80% of global EV batteries.[72]

- China also dominates in the upstream stages of the battery supply chain. China accounts for almost 90% of global installed cathode active material manufacturing capacity, over 97% of global anode material manufacturing capacity, almost 100% of lithium-iron-phosphate (LFP) production capacity, and more than 75% of the global production of installed nickel manganese cobalt oxide.[73]

- In 2023, China's cathode and anode active material installed manufacturing capacity massively exceeded global EV cell demand – by four times for cathode, and by nine times for anode.[74]

52. China's global dominance throughout the clean vehicle supply chain has allowed China's non-market policies and practices to infiltrate and influence market-oriented economies, including the United States. Therefore, by limiting the Clean Vehicle Tax Credit to vehicles with final assembly in North America, the measure incentivizes production in the United States and other countries that align with the U.S. public morals against unfair competition, forced labor, theft, and coercion.

53. Specifically, as discussed in the U.S. response to question 12, above, the United States, Canada, and Mexico are parties to the USMCA, which contains, among other commitments,

[70] U.S. First Written Submission, para. 20.
[71] U.S. First Written Submission, para. 87.
[72] U.S. First Written Submission, para. 87 (citing Washington Post, "How China pulled ahead to become the world leader in electric vehicles," March 3, 2025 (US-2)).
[73] U.S. First Written Submission, para. 87 (citing International Energy Agency, Global EV Outlook 2024, p. 80 (US-49)).
[74] U.S. First Written Submission, para. 87 (citing International Energy Agency, Global EV Outlook 2024, p. 81 (US-49)).

provisions that protect source code and algorithms and prohibit forced technology transfer[75] and the protection of trade secrets.[76] The USMCA also contains 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.[77] Such provisions help ensure that the North American assembly requirement protects U.S. public morals against unfair competition, forced labor, theft, and coercion.

54. The United States does not, as of yet, have such a comprehensive agreement with either Brazil, the European Union, or Japan. The United States has concluded a more limited Critical Minerals Agreement with Japan, and therefore has expanded eligibility for sourcing of processed critical minerals to Japan. However, no agreement with these countries exists that would limit the influence through these markets of China's global dominance in clean vehicles. In fact, China's exports of clean vehicles to these markets and its investments to manufacture in these markets has been expanding very rapidly.[78]

Question 16. (Oral Question 10) To the United States: The United States argues that the measures at issue are necessary to respond to China's alleged dominance in the clean vehicle and renewable energy sectors. How do the domestic content bonus credit provisions of the Investment and Production Tax Credits, which require the use of domestic content only, address that concern? In addressing this question, please also address the following sub-questions:

a. Insofar as the United States is arguing that these measures have the same rationale for purposes of justification under Article XX(a), why are the flexibilities provided for in respect of the geographical scope of the sourcing requirements of the Clean Vehicle Tax Credit (such as the eligibility of inputs from certain other countries for the relevant tax credits) not mirrored in the domestic content bonus credit provisions of the Investment and Production Tax Credits?

Response:

55. 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,[79] *or* (2) a certain percentage (up to 55 percent in 2027) of manufacturing takes place within the United States.[80]

[75] U.S. Opening Statement at First Panel Meeting, para. 51 (citing USMCA, Art. 19.16 (US-87)).
[76] U.S. Opening Statement at First Panel Meeting, para. 51 (citing USMCA, Art. 20.69 (US-87)).
[77] U.S. Opening Statement at First Panel Meeting, para. 51 (citing USMCA, Arts. 23.3, 23.6 (US-87)).
[78] International Energy Agency, Global EV Outlook 2024, pp. 18, 24, 93 (US-49).
[79] *See* 26 U.S.C. Section 45(b)(9)(B)(i), Section 45Y(g)(11)(B)(i), Section 48(a)(12)(B), and Section 48E(a)(3)(B) (CHN-4).
[80] *See* 26 U.S.C. Section 45(b)(9) and (b)(10), Section 45Y(g)(11) and (g)(12), Section 48(a)(12), and Section 48E(a)(3)(B) (CHN-4).

56. 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 non-market 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.[81] 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.

The effects of China's non-market policies and practices are particularly acute in the steel sector

57. 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) reported in March 2025, exports by steel firms in GFSEC countries recorded 5 percent lower growth per year than exports from other manufacturing industries, and closure of steel plants is evident across all types of production processes over the last decade.[82] Such findings illustrate the effects of China's non-market policies and practices on the global steel sector in particular.

58. Further, even when excess capacity in the steel sector is consumed domestically, it creates unfair competition internationally.[83] For example, as the 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."[84] In this way distortions that start in the steel sector extend beyond the steel industry itself, posing long-term risks in other sectors.[85]

The effects of China's non-market policies and practices in the steel sector are global

59. 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).[86]

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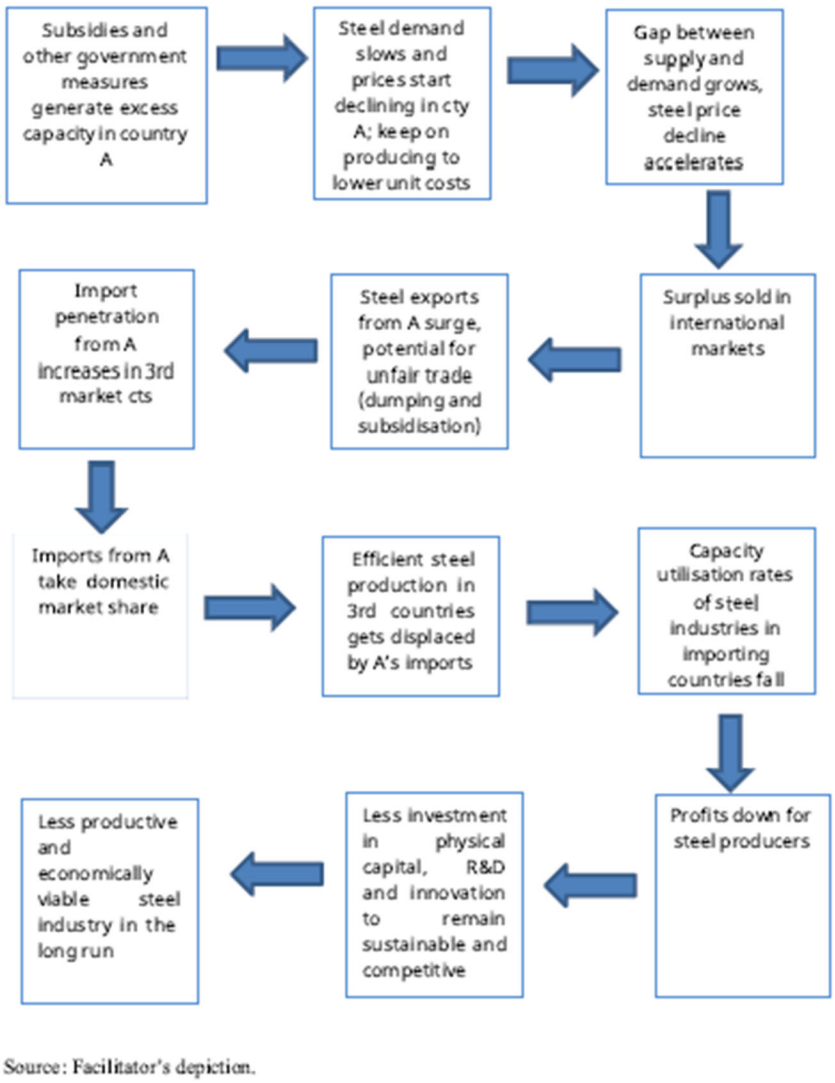
[81] *See, e.g.*, U.S. First Written Submission, paras. 69-75.
[82] Global Forum on Steel Excess Capacity, *Global excess capacity and employment in steel and downstream activities* (March 2025), pp. 15-16 (US-104).
[83] Global Forum on Steel Excess Capacity, *Global excess capacity and employment in steel and downstream activities* (March 2025), p. 6 (US-104).
[84] Global Forum on Steel Excess Capacity, *Global excess capacity and employment in steel and downstream activities* (March 2025), p. 6 (US-104).
[85] Global Forum on Steel Excess Capacity, *Global excess capacity and employment in steel and downstream activities* (March 2025), p. 6 (US-104).
[86] *See, e.g.*, Global Forum on Steel Excess Capacity, *Steel Exports, trade remedy actions and sources of excess capacity* (May 2024), paras. 8-10 (observing that the notion of excess capacity is inherently linked with market-distorting government interventions and other non-market factors, citing as an example the situation in China in the second half of the previous decade, and observing that China's steelmaking capacity is still alarmingly high, at 47

60. With respect to *trade distortion and diversion*, non-market excess capacity leads to artificially low prices, lower imports into China, and higher exports from China. These increased, and artificially low-price exports displace production and suppress prices in third-country markets. As a result, global markets are distorted, and market-oriented actors seek to export to less-distorted markets (price arbitrage). These cascading effects are illustrated in Figure 1 below, a simplified depiction of impacts of non-market excess capacity on third-country markets, prepared by the GFSEC:[87]

percent of the world's capacity) (US-85); Global Forum on Steel Excess Capacity, *Steel Exports, trade remedy actions and sources of excess capacity* (May 2024), paras. 11-13 (noting that significant investments in steelmaking capacity by Chinese companies outside China are generating non-market excess capacity) (US-85).

[87] *See* Global Forum on Steel Excess Capacity, *Impacts of global excess capacity on the health of the GFSEC steel industries* (March 2024), paras. 7-8 (US-86).

Figure 1. Simplified depiction of impacts of non-market excess capacity on third countries



Source: Facilitator's depiction.

61. With respect to *investments by Chinese SOEs outside China*, the GFSEC cautioned in May 2024 that recent moderation in the growth of steelmaking capacity within China "is being offset by investments abroad by Chinese companies, many being SOEs that tend to be heavily subsidized."[88] Furthermore, the GFSEC observed that these investments were "generating non-market excess capacity outside of its [China's] borders", and raised particular concerns about capacity growth in third countries and "the non-market nature of this growth, including inward investments by Chinese SOEs."[89] Thus, not only do China's non-market policies and practices

[88] Global Forum on Steel Excess Capacity, *Steel Exports, trade remedy actions and sources of excess capacity* (May 2024), para. 11 (US-85).
[89] Global Forum on Steel Excess Capacity, *Steel Exports, trade remedy actions and sources of excess capacity* (May 2024), paras. 11, 13 (US-85).

affect steel markets abroad through trade diversion and displacement from production in *China*, but also through investments in third-country capacity – which then itself may lead to further trade diversion and displacement.

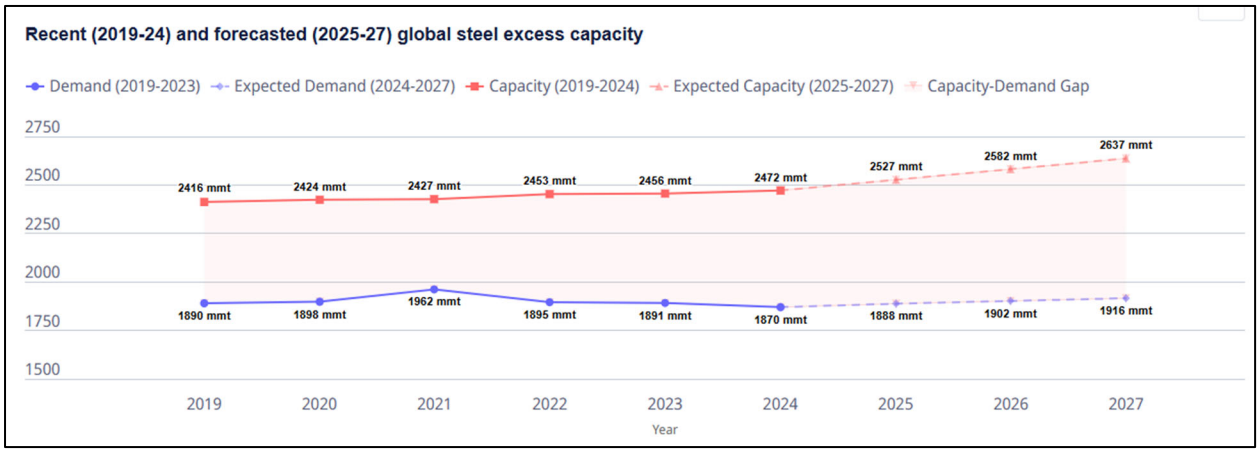
Global excess capacity in the steel sector driven by China continues as previous efforts to address it have failed

62. And 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). As the GFSEC has observed:

> Since the mid-2000s, excess capacity has grown rapidly, especially as China expanded its capacity six-fold between 2002 and 2013, from 191 MMT to 1 215 MMT. Global excess capacity peaked in 2016 at around 750 MMT—about 40 MMT more than the combined capacity of all GFSEC members—before stabilizing briefly. However, it has been rising again since 2021, with projections estimating it could reach 630 MMT by 2026.[90]

63. And despite significant efforts by the United States and others, including domestic trade remedies measures, international dialogues, and coordinated actions,[91] the problem persists and in fact is projected to worsen. As illustrated in Figure 2 below, the GFSEC's recent and forecasted global steel excess capacity predicts a widening divide between expected global demand and expected global capacity through 2027.[92]

Figure 2: Recent (2019-24) and forecasted (2025-27) global steel excess capacity



64. In sum, China's non-market policies and practices – which violate U.S. public morals – have come to infiltrate and influence steel production outside of China – for example in countries

[90] Global Forum on Steel Excess Capacity, *Global excess capacity and employment in steel and downstream activities* (March 2025), p. 9 (US-104).
[91] *See, e.g.*, Global Forum on Steel Excess Capacity, *Impacts of global excess capacity on the health of the GFSEC steel industries* (March 2024), para. 39 (US-86); Global Forum on Steel Excess Capacity, *Steel Exports, trade remedy actions and sources of excess capacity* (May 2024), paras. 34-35 (US-85).
[92] Global Forum on Steel Excess Capacity, key data (US-105).

that have been flooded by Chinese exports, and in countries where heavily-subsidized Chinese SOEs have made significant investments in steel production capacity

65. In these circumstances – that is, the circumstances of long-term global excess capacity driven principally by China but with significant infiltration of third-country steel markets and without a solution in sight – it is entirely appropriate[93] that receipt of investment tax credit and production tax credit bonus amounts would depend on use of 100 percent domestic steel and iron for structural steel – to ensure steel for such projects are not rewarding unfair competition, forced labor, forced technology transfer, and theft of trade secrets.

b. Is there anything that would exclude the steel or iron manufactured by a Chinese-owned or controlled entity located in the United States from qualifying for the domestic content bonus credit provisions under the Investment and Production Tax Credits? Similarly, is there anything that would exclude manufactured products produced by a Chinese-owned or controlled entity located in the United States from qualifying for the domestic content bonus credit provisions under the Investment and Production Tax Credits? If there is not, please explain how this is consistent with the United States' public morals concerns.

Response:

66. Chinese ownership or control would not necessarily disqualify a taxpayer from receiving the bonus credits under the Investment and Tax Production Credits at issue in this dispute so long as the U.S. content requirements were met. Any such Chinese-owned or-controlled entity located in the United States would be subject to U.S. laws that protect U.S. public morals however, and therefore prohibited from, for example, monopolization or attempts at monopolization under the Sherman Act, and bound by U.S. constitutional, criminal, and civil law provisions against forced labor, theft, and coercion. At present, the United States is unaware of any Chinese-owned or -controlled entity that produces steel in the United States.

c. Under the domestic content bonus credit provisions of the Investment and Production Tax Credits, a certain percentage of components of eligible projects must have been produced in the United States, meaning that a certain percentage of components can originate outside the United States, including China. Please explain how this is consistent with the United States' public morals concerns.

Response:

67. Similar to the U.S. response to question 16(b) – the fact that *some* content may originate outside the United States, including from China, does not render the measures at issue inconsistent with U.S. public morals concerns. The measures at issue create financial incentives for alternative supply and are structured so as to avoid U.S. purchasers rewarding China's non-market policies and practices that violate U.S. norms against unfair competition, forced labor, theft, and coercion. This point is borne out by, for example, the increasing percentages of the

[93] U.S. Opening Statement at the First Panel Meeting, para. 59 (discussing the ordinary meaning of the word "necessary").

total cost of manufactured products used in a project that must come from products that are produced (or deemed to be produced) in the United States.[94] The measures at issue are still "necessary to protect public morals" in that they are apt to promote investment and supply chains alternatives to China, and therefore protect U.S. public morals.

Question 17. To the United States: In the context of its oral responses to questions, the United States made reference to China "infiltrating" and "influencing" the supply chain outside of China. In its closing statement, China set forth its understanding that the US position is that the challenged provisions "must shut out most of the rest of the world – even its 'high standards' FTA partners, in the case of the ITC/PTC programmes – in order to address the United States' purported 'public morals' concerns" (para. 5).

a. Please provide further information, if possible contemporaneous with the enactment of the IRA, demonstrating that the challenged eligibility requirements for the Clean Vehicle Tax Credit, and not only the FEOC Requirement, were adopted in order to ensure that US consumers do not reward China's "non-market policies and practices" which have "infiltrated" relevant global supply chains.

b. Please provide further information, if possible contemporaneous with the enactment of the IRA, demonstrating that the scope of the domestic content bonus credit provisions of the Investment and Production Tax Credits were taken in order to ensure that US consumers do not reward China's "non-market policies and practices" which have "infiltrated" relevant global supply chains.

c. Why would the FEOC Requirement not be sufficient in and of itself to address the stated public morals objective pursued by the United States, given that the requirement extends to any 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", and would seemingly thus extend to production/extraction anywhere in the world?

Response:

68. The United States responds to subparts (a) to (c) of question 17 together. As an initial matter, 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). As the United States has explained, a measure is "necessary to protect public morals" within the meaning of Article XX(a) if it is requisite, appropriate, or required by circumstances to protect public morals.[95] 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. Accordingly,

[94] *See* China's First Written Submission, paras. 78-80.
[95] *See* U.S. Opening Statement at the First Panel Meeting, para. 59.

the presence or absence of references to public morals in the measures at issue does not determine whether the measures fall within the scope of Article XX(a).[96]

69. As explained below, there are longstanding and widespread concerns with China's non-market 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 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.

70. 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.

Longstanding and widespread concerns with China's non-market policies and practices and their distortion of global markets

71. Concerns with China's non-market policies and practices, and their effects in other markets, are longstanding and widespread. Already before the Panel are numerous reports and statements on these issues from various U.S. and non-U.S. government agencies,[97] U.S. and other civil society organizations,[98] and various international organizations or intergovernmental

[96] *US – Tariff Measures (Panel)*, para. 7.125 ("The Panel does not consider that for a measure to fall within the scope of the public morals exception of Article XX(a), the legal instruments implementing the measure must expressly mention a public morals objective.")

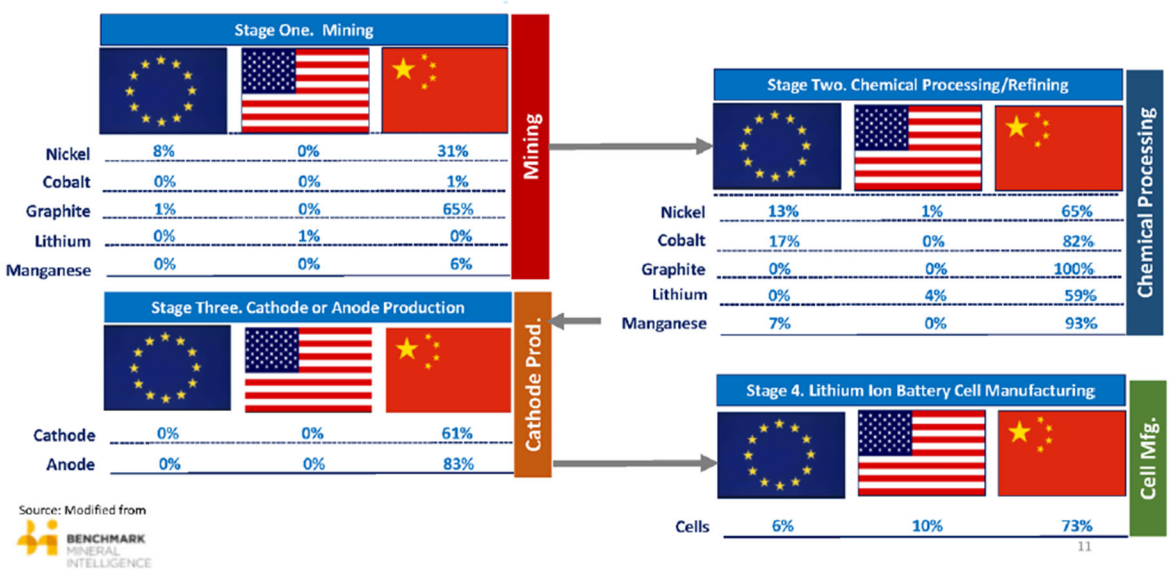
[97] *See, e.g.*, U.S. Department of Justice, "U.S. Charges Five Chinese Military Hackers for Cyber Espionage Against U.S. Corporations and a Labor Organization for Commercial Advantage," May 19, 2014 (US-66); Office of the U.S. Trade Representative, "Findings of the Investigation into China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act of 1974 ("Section 301 Report"), Mar. 22, 2018 (US-56); U.S. Department of Justice, "Two Chinese Hackers Working with the Ministry of State security charged with global computer intrusion campaign targeting intellectual property and confidential business information, including COVID-19 research," July 21, 2020 (US-74); U.S. Department of Labor, "Traced to Forced Labor: Solar Supply Chains Dependent on Polysilicon from Xinjiang, 2020 (US-62); U.S. Department of Energy, Solar Photovoltaics: Supply Chain Deep Dive Assessment, Feb. 24, 2022 (US-61); Office of the U.S. Trade Representative, "Four-Year Review of Actions Taken in the Section 301 Investigation: China's Acts, Policies, and Practice Related to Technology Transfer, Intellectual Property, and Innovation" ("Four-Year Review"), May 14, 2024 (US-64); European Commission, Commission Staff Working Document on Significant Distortions in the Economy of the People's Republic of China for the Purposes of Trade Defence Investigations, Oct. 4, 2024 (US-57); Office of the U.S. Trade Representative, "Adapting Trade Policy for Supply Chain Resilience: Responding to Today's Global Economic Challenges" ("Supply Chain Resilience Report"), January 2025 (US-70); The President's 2025 Trade Policy Agenda (US-35).

[98] *See, e.g.* , U.S. Chamber of Commerce, Made in China 2025: Global Ambitions Built on Local Protections (2017) (US-59); European Chamber of Commerce, "China Manufacturing 2025: Putting Industrial Policy Ahead of Market

forums.[99] These reports and statements document years long concerns with China's non-market policies and practices and their effects on the United States and other countries. China has not presented a defense against these reports and statements; nor can it.

72. Such concerns – specifically with respect to the clean vehicle and renewable energy sectors – were also directly before the U.S. Congress in the months leading up to the IRA's passage. During a March 2021 congressional hearing concerning the LIFT America Act (a bill also with EV and clean energy provisions), for example, former U.S. Secretary of Energy, Dr. Ernest Moniz testified regarding the "concentration in China of the processing needed[] for lithium-ion batteries" and presented Figure 3 below regarding the relative shares of the United States, the EU, and China for processing key metals and minerals needed for EV battery production.[100]

Figure 3: Select Processes for Key Metals and Minerals Needed for EV Battery Production: EU, US, and China Shares, 2019



Forces" (2017) (US-53); Rhodium Group, "How China's Overcapacity Holds Back Emerging Economies," June 13, 2024 (US-81); Rhodium Group, "Far From Normal: An Augmented Assessment of China's State Support," March 17, 2025 (US-83); Rhodium Group, "Ain't No Duty High Enough," April 29, 2024 (US-102); Rhodium Group, "Was Made in China 2025 Successful," May 5, 2025 (US-103); Sheffield Hallam University, "Driving Force: Automotive Supply Chains and Forced Labor in the Uyghur Region," Dec. 2022 (US-84); Council on Foreign Relations, "Is 'Made in China 2025' a Threat to Global Trade?" (2019) (US-52); European Council on Foreign Relations, "High-voltage trade: How Europe should fight the electric vehicle wars," December 15, 2023 (US-99).

[99] *See, e.g.*, Joint Statement on Trilateral Meeting of the Trade Ministers of the United States, Japan, and the European Union, Sept. 25, 2018 (US-44); Importance of Market-Oriented Conditions to the World Trading System, Statement from Brazil, Japan, and the United States, WT/GC/W/803/Rev.1, Oct. 2, 2020; U.S.-EU Trade and Technology Council Inaugural Joint Statement, Sept. 29, 2021 (US-77); G7 Leaders' Communique (2022) (US-38); G7 Trade Ministers' Statement (2024) (US-36); Global Forum on Steel Excess Capacity, *Steel Exports, trade remedy actions and sources of excess capacity* (May 2024) (US-85); Global Forum on Steel Excess Capacity, *Impacts of global excess capacity on the health of the GFSEC steel industries* (March 2024) (US-86); International Energy Agency, Global Critical Minerals Outlook 2024, May 2024 (US-5).

[100] Virtual Hearing before the Committee on Energy and Commerce, House of Representatives, LIFT America: Revitalizing Our Nation's Infrastructure and Economy, Serial No. 117-15 (March 22, 2021), pp. 21-22 (US-106).

73. In response to questions at that hearing, Secretary Moniz confirmed that "China dominates the processing of many . . . critical minerals" and suggested that "as a sane energy security issue, we need to work to diversify these sources of minerals and their processing."[101] Secretary Moniz observed that production of some critical minerals could be expanded in the United States, but that the United States would need to "work with our allies—Canada and Australia, for example—which have significant mining experience and active mining, so that we can have a balance, at least, against the Chinese processing dominance."[102] In an April 2021 hearing on a separate bill (also with provisions on EVs and clean energy), lawmakers specifically recalled Secretary Moniz's earlier testimony,[103] and documents entered into the record for that hearing included a Bloomberg article entitled "Secrecy and Abuse Claims Haunt China's Solar Factories in Xinjiang."[104]

74. Against the backdrop of such concerns, the U.S. Congress passed the Infrastructure Investment and Jobs Act – which contains the FEOC definition cross-referenced in the IRA Clean Vehicle Tax Credit – in November 2021.[105] Such concerns also animated the Build Back Better Act bill, introduced in September 2021 with provisions (like the IRA) to permit tax credits for purchase of EVs under certain circumstances, and to provide investment and production tax credits for certain clean energy.[106]

Passage of the Inflation Reduction Act

75. When the IRA moved forward in July 2022, U.S. lawmakers continued to express concerns regarding reliance on China. Specifically, Senators Schumer and Manchin touted the IRA's provisions on energy security and investment in domestic energy production,[107] and noted that the IRA would "[i]ncrease[] American energy security . . . with historic investments in American clean energy manufacturing to lessen our reliance on China."[108] When supporting the IRA, Senator Manchin and other lawmakers observed, for example, that the bill would "creat[e] jobs in North America while reducing our reliance on China,"[109] and "strengthen American energy

[101] Virtual Hearing before the Committee on Energy and Commerce, House of Representatives, LIFT America: Revitalizing Our Nation's Infrastructure and Economy, Serial No. 117-15 (March 22, 2021), p. 133 (US-106).
[102] Virtual Hearing before the Committee on Energy and Commerce, House of Representatives, LIFT America: Revitalizing Our Nation's Infrastructure and Economy, Serial No. 117-15 (March 22, 2021), p. 133 (US-106).
[103] Virtual Hearing before the Subcommittee on Environment and Climate Change of the Committee on Energy and Commerce, House of Representatives, Serial No. 117-21 (Apr. 15, 2021), pp. 62-63 (US-107).
[104] Virtual Hearing before the Subcommittee on Environment and Climate Change of the Committee on Energy and Commerce, House of Representatives, Serial No. 117-21 (Apr. 15, 2021), pp. 94-95 and 129-143 (US-107).
[105] Infrastructure Investment and Jobs Act (US-8).
[106] *See generally* Build Back Better Act proposal (excerpts) (US-108).
[107] Joint Statement from Leader Schumer and Senator Manchin Announcing Agreement to Add the Inflation Reduction Act of 2022 to the FY2022 Budget Reconciliation Bill and Vote in Senate Next Week (July 27, 2022) (US-109); Schumer Statement On Agreement with Senator Manchin to Add Climate Provisions to the FY2022 Budget Reconciliation Legislation and Vote in Senate Next Week (July 27, 2022) (US-110).
[108] Summary of the Energy Security and Climate Change Investments in the Inflation Reduction Act of 2022 (July 27, 2022) (US-111).
[109] Manchin's Inflation Reduction Act Will Lower Energy and Healthcare Costs, Increase Domestic Energy Production and Pay Down National Debt, Senate passes Inflation Reduction Act, now heads to the House of Representatives (Aug. 7, 2022) (US-112). *See also* Press Release, Rep. Adam Smith (Washington's 9th District), House Passes Inflation Reduction Act with Historic Investments to Address Climate Change (Aug. 9, 2022) (noting that the IRA's clean energy provisions would "reduce [U.S.] reliance on other countries") (US-113).

security."[110] In fact, the Chairman of the House Energy and Commerce Committee, before whom Secretary Moniz presented the testimony described above, also praised the IRA, particularly its clean energy provisions.[111]

76. Stakeholders and industry leaders offered similar observations on the IRA at the time of its passage, also touting its provisions incentivizing strong labor protections, allied production, and noting the IRA would avoid leaving the United States beholden to foreign entities that do not share our interests and values. For example:

- The IRA's "comprehensive approach, from market incentives for EVs to supporting mineral extraction and processing capacity and battery component production, will ensure that America and its allies will create a holistic ecosystem from mine to market that doesn't leave us beholden on foreign entities that do not share our interests and values."[112]

- The IRA "is a huge boost to the entire US EV supply chain from mining to battery manufacturing to recycling. The content requirements ensure that American workers at domestic mining and mineral processing facilities are part of the EV transition, and wisely includes our free trade partners like Canada, Australia and South Korea which will ensure adequate supplies for US manufacturing.[113]

- The "strong labor protections attached to the[] energy tax credits [in the IRA], the jobs this bill creates will be family-sustaining jobs with fair wages, quality healthcare, and benefits."[114]

- The "clean energy tax credits included in the bill would increase energy production at home and accelerate energy innovation abroad."[115]

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[110] Press Release, Rep. Shontel Brown (Ohio's 11th District), Rep. Brown Votes for Inflation Reduction Act to Lower Health Care Costs and Create Jobs for Ohioans (Aug. 14, 2022) (US-114); Press Release, Rep. Josh Harder (California's 9th District) Harder Statement on House Passage of the Inflation Reduction Act (Aug. 12, 2022) (US-115).

[111] Press Release, Congressman Pallone (New Jersey's 6th District) Praises House Passage of the Historic Climate & Health Care Provisions in the Inflation Reduction Act: Landmark Legislation Includes Climate & Health Care Provisions that Pallone Either Originally Authored or Advanced Through His Committee (Aug. 12, 2022) (US-116).

[112] United States Senate Committee on Energy & Natural Resources, U.S. Senator Joe Manchin, Chairman, *What They're Saying About the Inflation Reduction Act of 2022: Excerpted Statements from Stakeholders and Industry Leaders*, Statement of Abigail Seadler Wulf, Vice President and Director for Critical Minerals Strategy, Securing America's Energy Future (SAFE) (US-117).

[113] United States Senate Committee on Energy & Natural Resources, U.S. Senator Joe Manchin, Chairman, *What They're Saying About the Inflation Reduction Act of 2022: Excerpted Statements from Stakeholders and Industry Leaders*, Statement of Todd M. Malan, Chief External Affairs Officer and Head of Climate Strategy, Talon Metals (US-117).

[114] United States Senate Committee on Energy & Natural Resources, U.S. Senator Joe Manchin, Chairman, *What They're Saying About the Inflation Reduction Act of 2022: Excerpted Statements from Stakeholders and Industry Leaders*, Statement of Mark McManus, General President, United Association (US-117).

[115] United States Senate Committee on Energy & Natural Resources, U.S. Senator Joe Manchin, Chairman, *What They're Saying About the Inflation Reduction Act of 2022: Excerpted Statements from Stakeholders and Industry Leaders*, Statement of Bipartisan Policy Center (US-117).

- The IRA's "comprehensive minerals to markets approach for EVs" ensures that the United States does not become dependent on China by "prioritiz[ing] market incentives that will accelerate the EV market so the U.S. can compete globally while premising many of those incentives on domestic and allied production of critical minerals and battery components essential to EVs and our national defense."[116]

77. Accordingly, numerous statements contemporaneous with the IRA's passage support its link to U.S. public morals, noting in particular that the IRA would reduce U.S. reliance on China while supporting production in countries that share U.S. values and providing strong labor protections.

Following the IRA's passage, U.S. government officials continued to assert the measures would assist in countering China's dominance

78. Following the IRA's passage, Biden-Harris Administration officials continued to tout these themes. In November, 2022, for example, former Secretary of Commerce Gina Raimondo observed that "[a]s China's economy has grown in size and influence, so too has its commitment to using non-market trade and investment practices in ways that are forcing us to defend our businesses and workers – and those of our allies and partners."[117] Secretary Raimondo specifically pointed to the IRA among measures that would help realize the U.S. strategy of "bolstering our domestic capabilities and creating new ones to prevent China from undermining our national security and democratic values" and "partnering with our allies in new ways to advance our shared values and shape the strategic environment in which China operates."[118] Similarly, in November 2023, former Secretary of the Treasury Janet L. Yellen noted that the IRA's tax credits for clean energy manufacturing would bolster U.S. energy security by addressing the overconcentration of key clean energy supply chains "in part due to unfair non-market practices over the decades."[119]

79. Further, as discussed in the U.S. First Written Submission, a May 2024 fact sheet released by the Biden-Harris Administration observed that "China's government has used unfair, non-market practices" and that "China's forced technology transfers and intellectual property theft have contributed to its control of 70, 80, and even 90 percent of global production for the critical inputs necessary for our technologies, infrastructure, energy, and health care."[120] That fact sheet also listed IRA's domestic content bonus credit as an action "to strengthen American solar

[116] United States Senate Committee on Energy & Natural Resources, U.S. Senator Joe Manchin, Chairman, *What They're Saying About the Inflation Reduction Act of 2022: Excerpted Statements from Stakeholders and Industry Leaders*, Statement of Robbie Diamond, Founder and CEO, Securing America's Energy Future (SAFE) (US-117).
[117] U.S. Department of Commerce, Remarks by U.S. Secretary of Commerce Gina Raimondo on the U.S. Competitiveness and the China Challenge (Nov. 30, 2022) (US-118).
[118] U.S. Department of Commerce, Remarks by U.S. Secretary of Commerce Gina Raimondo on the U.S. Competitiveness and the China Challenge (Nov. 30, 2022) (US-118).
[119] U.S. Department of the Treasury, Remarks by Secretary of the Treasury Janet L. Yellen at Livent in Bessemer City, North Carolina (Nov. 2023) (US-119).
[120] Fact Sheet: Biden-Harris Administration Takes Action to Strengthen American Solar Manufacturing and Protect Manufacturers and Workers from China's Unfair Trade Practices, May 16, 2024 (US-68).

manufacturing and protect businesses and workers from China's unfair trade actions,"[121] and after noting that "China currently controls over 80 percent of certain segments of the EV battery supply chain," the fact sheet touts the IRA's manufacturing tax credits, noting that they "incentivize investment in battery and battery material production in the United States."

The FEOC exclusion from the Clean Vehicle Tax Credit is necessary but not sufficient to protect U.S. public morals

80. The FEOC exclusion is necessary to protect U. S. public morals because it prevents certain entities from directly benefitting from the Clean Vehicle Tax Credit. The FEOC excludes from eligibility for the Clean Vehicle Tax Credit any clean vehicle that contains any battery components manufactured or assembled by, or that contains any applicable critical minerals extracted, processed, or recycled by, among other things, an entity that is "owned by, controlled by, or subject to the jurisdiction or direction of" China. The FEOC exclusion alone is not sufficient to protect U.S. public morals, however, as it does not prevent indirect benefits from flowing to China due to the global nature of the market distortions it has caused, nor does the FEOC exclusion incentivize production in other countries that align with the U.S. public morals against unfair competition, forced labor, theft, and coercion.

81. In sum, although 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, numerous references contemporaneous to the IRA's passage link the measures at issue to the protection of U.S. public morals from China's non-market policies and practices. And while the FEOC exclusion is necessary to protect public morals, that provision alone is not sufficient to address the global nature of the distortions caused by China's non-market policies and practices.

4 ARTICLE XXI(B) – SECURITY EXCEPTION

Question 18. <u>To the United States:</u> With regard to the specification of a subparagraph of Article XXI(b):

a. (Oral Question 11) With reference to paragraph 51 of China's opening statement, please comment on China's due process concerns.

b. In its oral response to Oral Question 11, the United States recalled that in *Russia – Traffic in Transit*, the respondent argued that Article XXI was self-judging and put forward very general and indirect statements regarding that defence. The United States further recalled that the panel found, on the basis of these statements, that Russia had identified a situation that it considered to be a war or other emergency in international relations, proceeding to agree and finding that the conditions of Article XXI were met. Was the United States referring to that panel's approach for purposes of supporting the conclusion that the non-invocation of a particular subparagraph of Article XXI(b) does

[121] *See* U.S. First Written Submission, para. 107; Fact Sheet: Biden-Harris Administration Takes Action to Strengthen American Solar Manufacturing and Protect Manufacturers and Workers from China's Unfair Trade Practices, May 16, 2024 (US-68).

not give rise to any due process concern? Or was the United States' referring to that panel's approach for purposes of inviting this Panel to follow a similar approach?

Response:

82. The United States responds to subparts (a) and (b) of question 18 together. In paragraph 51 of its opening statement, China complains that the United States has "made no attempt" to "discharge" what China purports to be the requirements of Article XXI and China requests – without basis – that "[t]he Panel should therefore make clear to the United States that, if it intends to make any attempt to discharge its burden of proof under Article XXI as prior panel reports have interpreted this exception, it must do so no later than its second written submission so that the United States' attempted justification under that provision can be fully examined in connection with the second substantive meeting."[122]

83. As the United States has explained, Article XXI(b) is self-judging, and China's assertions regarding a "burden of proof" are ill-founded.[123] The term "burden of proof" is not a legal term reflected in the DSU or any other covered agreement. What is required of a Member exercising its right under Article XXI, under the customary rules of interpretation of public international law, is set forth in the terms of Article XXI itself—that the Member considers one or more of the circumstances set forth in Article XXI(b) to be present. What one may term the invoking Member's "burden" is discharged once the Member indicates, in the context of dispute settlement, that it has made such a determination.

84. Moreover, this request from China in this dispute is in stark contrast with the approach of the *Russia – Traffic in Transit* panel and China's own assertions in that dispute. The Panel should not allow China to distract it from the primary issue before it in this dispute – China's own non-market policies and practices that have resulted in its global dominance of the clean vehicle and renewable energy sectors, violating fundamental U.S. values.

85. In *Russia – Traffic in Transit*, Russia argued that Article XXI(b) was self-judging[124] and in its First Written Submission "formulat[ed] its invocation of Article XXI(b)(iii) in . . . general terms."[125] In its opening statement at the second panel meeting, Russia referred to a "hypothetical" situation that it explained was "in order not to introduce again some information that Russia cannot disclose."[126] Although Ukraine argued that it and the panel had been "left in

[122] China's Opening Statement at the First Panel Meeting, para. 51.
[123] *See* U.S. First Written Submission in *United States – Origin Marking (Hong Kong, China) (Panel)* (US-71).
[124] *See Russia - Traffic in Transit*, para. 7.27; *Russia - Traffic in Transit*, First Executive Summary of the Russian Federation, WT/DS512/R/Add/1, para. 47.
[125] *See Russia - Traffic in Transit*, para. 7.112. Russia "state[d]" that the measures at issue were introduced "in time of emergency in international relations and such measures are considered by the Russian Federation as actions necessary for the protection of essential security interests of the Russian Federation taken in time of emergency in international relations, as provided for in the GATT Article XXI." *Russia - Traffic in Transit*, Annex C-3, First Executive Summary of the Russian Federation, WT/DS512/R/Add/1, para. 35. Russia pointed to the "wording of the acts implementing the measures in question", which it characterized as "unambiguous" and stated that "[t]he basis for the imposition of such measures as well as the original circumstances that led to the imposition of such measures were publicly available and known to Ukraine." *Russia - Traffic in Transit*, Annex C-3, First Executive Summary of the Russian Federation, WT/DS512/R/Add/1, para. 36.
[126] *See Russia - Traffic in Transit*, paras. 7.114-7.115.

the dark" by Russia's assertions,[127] that panel regarded Russia's assertions "as sufficient, in the particular circumstances of this dispute, to clearly identify the situation to which Russia is referring" and was "satisfied" that this situation met the purported requirements of Article XXI(b)(iii).[128] For its part, China opined in its third party submission "that the Panel should keep extreme caution during the assessment by maintaining the delicate balance" between what it termed "abuse of Article XXI" and that "Member's rights to protect its essential security interests shall not be nullified or impaired, and Member's discretion relating to its own security issue, which is authorized by the covered agreement, shall not be prejudiced."[129]

86. Accordingly, China's call for a "full examination" of the U.S. invocation of Article XXI(b) is notably different from the *Russia – Traffic in Transit* panel's "satisfaction" that Russia's general and hypothetical assertions met the purported requirements of Article XXI(b). And China's assertions to this Panel are a notably different than its suggestion of "extreme caution" to the *Russia – Traffic in Transit* panel. As China is aware, the primary issue before the Panel in this dispute is China's own non-market policies and practices that have resulted in its global dominance of the clean vehicle and renewable energy sectors, violating fundamental U.S. values. China's assertions attempt to distract the Panel from this fundamental issue, and the Panel should decline China's invitation.

Question 19. <u>To both parties:</u> In their third-party statements, Norway (paragraph 17), the Russian Federation (paragraph 17), and Switzerland (paragraph 8) submit that a Member invoking Article XXI(b) must identify a specific subparagraph of that provision. Please comment.

<u>Response</u>:

87. The text of Article XXI(b) does not require the Member exercising its right under Article XXI(b) to identify the relevant subparagraph ending to that provision that an invoking Member may consider most relevant. Furthermore, nothing in the text of Article XXI(b) suggests that the subparagraphs are mutually exclusive. By invoking Article XXI(b), the Member is indicating that one or more of the subparagraphs is applicable. In the absence of language imposing a requirement to identify a subparagraph, no such obligation may be imposed on a Member through dispute settlement.

88. This understanding of the text of Article XXI(b) is supported by, among other things, the context provided by Article XXI(a).[130] Article XXI(a) states that "[n]othing in this Agreement shall be construed . . . to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interests." With this language, Article XXI(a) specifically provides that a Member need not provide any information—to a WTO panel or to other WTO Members— regarding essential security measures or the Member's underlying

[127] *See Russia - Traffic in Transit*, para. 7.113 and footnote 192.
[128] *See Russia - Traffic in Transit*, paras. 7.119-7.123.
[129] *See Russia - Traffic in Transit*, Annex D-4, Executive Summary of the Arguments of China, WT/DS512/R/Add/1, para. 9.
[130] *See* U.S. First Written Submission in *United States – Origin Marking (Hong Kong, China) (Panel)*, para. 30 (US-71).

security interests. This provision both recognizes the highly sensitive nature of a Member's essential security interests and reveals the deference the drafters intended to give to Members when exercising their rights under Article XXI. That a Member may not be required to disclose information it considers contrary to its interests supports the interpretation that Article XXI(b) does not require the Member exercising its right under Article XXI(b) to identify the relevant subparagraph ending to that provision that an invoking Member may consider most relevant.

89. The United States recalls the below statements by Norway, Russia, and Switzerland in response to previous invocations of Article XXI:

- "The representative of Norway said that his authorities were of the opinion that under the circumstances the EEC and its member States, together with Australia and Canada, in taking the measures referred to in document L/5319, did not act in contravention of the General Agreement. He stressed that it was the sincere hope of his Government that the efforts undertaken elsewhere would soon bring about a development which justified the discontinuation of those measures."[131]

- "The Russian Federation is of the view that Article XXI (a) and (b) of the GATT is of a self-judging nature. Each of the WTO Members individually and without any external involvement determines what its essential security interests are and how to protect them. Other reading of this Article will result in interference in internal and external affairs of a sovereign state."[132]

- "Switzerland recognized that Article XXI gave overriding weight to the judgement of the contracting parties invoking the Article. However, his delegation also considered that in light of the particular character of Article XXI, any contracting party intending to have recourse to it should take particular care to avoid any harmful erosion of the General Agreement and any deterioration of the climate of international economic co-operation."[133]

90. None of these prior statements by Norway, Russia, and Switzerland suggests that a Member invoking Article XXI(b) must identify a specific subparagraph of that provision. Nothing in the text of Article XXI has changed since Norway, Russia, and Switzerland made these statements.[134]

5 APPLICABILITY OF ARTICLE XX AND/OR XXI OF THE GATT 1994 TO THE SCM AGREEMENT

Question 20. <u>To the United States:</u> Several third parties have set forth their understanding that the applicability of Article XXI of the GATT 1994 to the SCM Agreement is moot in the circumstances of this case, based on their understanding that the

[131] GATT Council, Minutes of Meeting on May 7, 1982, p. 10, C/M/157 (June 22, 1982) (US-120).
[132] *Russia – Traffic in Transit*, WT/DS512/R/Add.1, Annex C-3, First Executive Summary of the Arguments of the Russian Federation, para. 47.
[133] GATT Council, Minutes of Meeting of May 29, 1985, p. 11, C/M/188 (June 28, 1985) (US-121).
[134] *See* U.S. First Written Submission in *United States – Origin Marking (Hong Kong, China) (Panel)*, paras. 107-135 (US-71).

United States' invocation of Article XXI is directed only to the FEOC Requirement, and based on their understanding that China's claim against the FEOC Requirement is limited to Article I:1 of the GATT 1994. Please comment.

Response:

91. China has challenged the Clean Vehicle Tax Credit under the GATT 1994, TRIMS Agreement and the SCM Agreement.[135] To the extent China argues that the FEOC exclusion of the Clean Vehicle Tax Credit is inconsistent with the SCM Agreement, the U.S. arguments concerning the applicability of Article XXI of the GATT 1994 to the SCM Agreement apply. In this regard, the United States observes that China's response to Question 1 will be relevant in providing clarity on this matter.

Question 21. To both parties: Does the negotiating history (whether from the Uruguay Round or earlier) shed any light on whether Article XX of the GATT 1994 is applicable to the SCM Agreement?

Response:

92. The ordinary meaning of the terms of the SCM Agreement, read in their context, including the overall structure and object and purpose of the WTO Agreement, establish that the exceptions under Articles XX and XXI of the GATT 1994 are applicable to the SCM Agreement.[136]

93. While not necessary in this dispute, the Panel may have recourse to supplementary means of interpretation, including the negotiating history of SCM Agreement. That negotiating history confirms the understanding that emerges from the ordinary meaning of the terms of the SCM Agreement, as described in the U.S. First Written Submission.

94. The SCM Agreement is the latest elaboration of subsidies disciplines that had their foundation with the General Agreement on Tariffs and Trade 1947 (GATT 1947). Those disciplines were first expanded upon in the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade – commonly called the Tokyo Round Subsidies Code.[137] As discussed below, in the Tokyo Round Subsidies Code, and later in the SCM Agreement, the drafters further developed the GATT 1947 / GATT 1994 disciplines at Articles VI, XVI, and XXIII, while maintaining the exceptions at Article XX and Article XXI of the GATT 1947 / GATT 1994.

Core Subsidies Disciplines in the GATT 1947

95. The GATT 1947 established the core subsidies disciplines that form the foundation of today's SCM Agreement – specifically Article VI (on countervailing duties), Article XVI (on subsidies in general and on export subsidies), and Article XXIII (on nullification or impairment

[135] Panel Request, WT/DS623/3, para. 21.
[136] U.S. First Written Submission, paras. 140-179.
[137] Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade, LT/TR/A/3 (1979) ("Tokyo Round Subsidies Code") (US-122).

of benefits under the GATT 1947). There is no dispute that the General Exceptions at Article XX and Security Exceptions at Article XXI apply to each of these disciplines.

96. Accordingly, the GATT 1947 established the baseline understanding that the General Exceptions and Security Exceptions necessarily apply to subsidies disciplines. This understanding has remained unchanged.

97. Neither the SCM Agreement nor the Tokyo Round Subsidies Code explicitly refers to GATT 1947 / GATT 1994 Article XX and Article XXI, apart from their corresponding provisions providing that 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, and their corresponding footnotes confirming, "This paragraph is not intended to preclude action under other relevant provisions of GATT 1994, where appropriate."[138] Given the baseline understanding established in the GATT 1947 that Article XX and Article XXI apply to subsidies disciplines, however, any further reference to GATT 1947 / GATT 1994 Article XX or Article XXI would have been superfluous.

Tokyo Round Negotiations

98. Already in its title, the Tokyo Round Subsidies Code reflects its link to the GATT 1947: "Agreement on the Interpretation and Application of Articles VI, XVI and XXIII of the [GATT 1947]". Its preamble further underscores the signatories' desire to "apply fully" and "interpret" those articles of the GATT 1947 and "to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation". Notably, however, that desire is "*only* with respect to subsidies and countervailing duties" (emphasis added).

99. The text that follows, similar to the SCM Agreement, is replete with links to the existing subsidies disciplines. Thus, the Subsidies Code was an interpretation and application of the subsidies disciplines already in the GATT 1947—*i.e.*, Articles VI, XVI, and XXIII. The Tokyo Round Subsidies Code interpreted and applied those provisions "only with respect to subsidies and countervailing measures", and did not purport to modify the rights or obligations set out in the GATT 1947, including the exceptions. Accordingly, citing or repeating those provisions beyond the reference in Article 19.1 and footnote 1 was unnecessary.

100. Tokyo Round negotiating history confirms that the drafters intended the Subsidies Code to flow from the disciplines of the GATT 1947 including the exceptions that conditioned those disciplines. That understanding was clear from the early stages of the negotiations, as "[m]any delegations stressed that any possible solution would have to be based on the existing provisions of the GATT and that there could be no formal amendment to the provisions of the General Agreement."[139] Similarly in October 1975, Canada opined that "any examination should start with the General Agreement proper, that is, that the existing rights of contracting parties under

[138] SCM Agreement Article 32.1 and footnote 56; Tokyo Round Subsides Code Article 19.1, footnote 1 (US-122).
[139] Multilateral Trade Negotiations, Group 3(b) – Export Subsidies and Countervailing Duties, Note by the Secretariat on the Meeting of May 1974, MTN/3B/19 (June 28 1974), p. 4 (US-123).

the Agreement should not be reduced."[140] Likewise, soon thereafter, Japan expressed the view that "negotiations in this field [subsidies and countervailing duties] should be conducted on the basis of the present GATT provisions," and referred to "building upon the past works by the GATT."[141]

101. As discussions proceeded, statements by contracting parties further confirmed that the Tokyo Round Subsidies Code would elaborate or build upon only certain provisions of the GATT 1947 – leaving other provisions unaffected. In a May 1976 submission, for example, the Nordic countries suggested that "solutions in the area of countervailing duties should be based on the present provisions of the General Agreement" and that "[a]lso in the field of subsidies solutions to be sought in the MTN should be based on the present provisions of the GATT, which can be supplemented by appropriate interpretive complementary notes or by a new code if this would prove to be useful."[142] In calling for "new rules", the United States likewise framed its views in terms of existing GATT 1947 provisions, and suggested that the code "should prohibit a wider range of practices than those presently banned under Article XVI" and identifying, for example the "fundamental problem" of "the failure to establish a consistent relationship between Articles VI and XVI."[143]

102. The "Outline of an Approach" circulated in December 1977 summarized the "agreement" on the general approach to "draw on the present GATT rules and procedures with a view to improving their effectiveness by way of elaborating some of their aspects."[144] That approach carried over into the text of the Tokyo Round Subsidies Code, from the first draft circulated by Canada to the final version.[145] Thus, as the negotiating history demonstrates, the Tokyo Round Subsidies Code elaborates only the subsidies disciplines set out in the GATT 1947, rather than to amend or replace those disciplines. The Tokyo Round Subsidies Code left unaffected other provisions of the GATT 1947, such as Article XX and Article XXI – and those provisions continued to apply unaffected.

Uruguay Round Negotiations

103. Negotiation of the SCM Agreement during the Uruguay Round similarly reflects an elaboration upon the core principles and objectives of the GATT 1947,[146] including the foundational exceptions reflected in Articles XX and XXI. In the Ministerial Declaration on the

[140] Group "Non-Tariff Measures", Sub-Group "Subsidies and Countervailing Duties", Addendum, p. 2, MTN/NTM/W/26/Add.1 (Oct. 31, 1975) (US-124).
[141] Group "Non-Tariff Measures", Sub-Group "Subsidies and Countervailing Duties", Addendum, pp. 1, 2, MTN/NTM/W/26/Add.2 (Nov. 10, 1975) (US-125).
[142] Group "Non-Tariff Measures", Sub-Group "Subsidies and Countervailing Duties", Nordic Countries, pp. 1-2, MTN/NTM/W/43/Add.2 (May 17, 1976) (US-126).
[143] Group "Non-Tariff Measures", Sub-Group "Subsidies and Countervailing Duties", United States, pp. 3-4, MTN/NTM/W/43/Add.6 (May 31, 1976) (US-127).
[144] Multilateral Trade Negotiations, Sub-Group "Subsidies/Countervailing Duties", Outline of an Approach (Circulated at the Request of Certain Delegations), p. 1, MTN/INF/13 (Dec. 23, 1977) (US-128).
[145] *See, e.g.*, Multilateral Trade Negotiations, Group "Non-Tariff Measures", Sub-Group "Subsidies and Countervailing Duties", Draft Code prepared by the Delegation of Canada, MTN/NTM/W/80 (Jan. 19, 1977) (US-129).
[146] *See* Ministerial Declaration on the Uruguay Round, p. 2/3, GATT/1396 (Sep. 25, 1986) (parties "determined also to preserve the basic principles and to further the objectives of the GATT") (US-130).

Uruguay Round, which launched the negotiations of the SCM Agreement, parties agreed that the negotiations would seek to "improve the multilateral trading system based on the principles and rules of the GATT."[147] Such principles and rules were foundational to the negotiation.

104. The parties expressly agreed that the GATT 1947 disciplines and exceptions would be addressed through negotiations *only to the extent necessary*. In other words, to the extent the contracting parties considered that the status quo application of certain exceptions to GATT 1947 disciplines was satisfactory, no further discussion was needed or had. The contracting parties stated: "Participants shall review existing GATT Articles, provisions and disciplines as requested by interested contracting parties, and, as appropriate, undertake negotiations."[148] Contracting parties with an interest in narrowing the application of the GATT 1947 exceptions from their well-recognized, comprehensive application had an opportunity to do so, and did not.

105. Throughout the negotiation of the SCM Agreement, the contracting parties never contemplated excluding application of the GATT 1947 exceptions to the subsidies disciplines. At the start of the Uruguay Round, the Secretariat circulated a note titled "Problems in the Area of Subsidies and Countervailing Measures," in which the Secretariat "list[ed] problems which have arisen in the operation of Articles VI and XVI of the General Agreement and the Agreement on Subsidies and Countervailing Measures."[149] The note contains a comprehensive list of concerns raised by parties on provisions from both the GATT 1947 and the Subsidies Code – for example the notification requirements under Article XVI:1 of the GATT 1947 and the special and differential treatment granted to developing countries under Article 14 of the Subsidies Code.

106. The document makes clear that the negotiators were considering the GATT 1947 provisions and the Tokyo Round Subsidies Code collectively – including the exceptions – and that no contracting party had identified the GATT 1947 exceptions as a "problem" to have arisen in the operation of the subsidies provisions.

107. The negotiators subsequently confirmed their desire to focus the negotiations on these and other "problem" areas – and not on the existing applicability of the GATT 1947 exceptions. After soliciting from contracting parties the issues proposed for negotiations, the Chair of the negotiation circulated a "checklist of issues for negotiations" that served as the framework for the negotiations that would lead to the SCM Agreement.[150] Again, this comprehensive document identifies issues from the GATT 1947 and the Tokyo Round Subsidies Code, including the issue of special and differential treatment in Article 14 of the Subsidies Code, but does not make any reference to the GATT 1947 exceptions – which apply to the GATT 1947 subsidies disciplines and, in turn, to the Tokyo Round Subsidies Code disciplines. The contracting parties did not consider it necessary to revisit this issue in the context of these negotiations. Instead, as that

[147] Ministerial Declaration on the Uruguay Round, p. 2/3, GATT/1396 (Sep. 25, 1986) (US-130).
[148] Ministerial Declaration on the Uruguay Round, p. 8, GATT/1396 (Sep. 25, 1986) (US-130).
[149] Negotiating Group on Subsidies and Countervailing Measures, Problems in the Area of Subsidies and Countervailing Measures, Note by the Secretariat, p. 1, MTN.GNG/NG10/W/3 (March 17, 1987) (US-131).
[150] Negotiating Group on Subsidies and Countervailing Measures, Checklist of Issues for Negotiations, Note by the Secretariat, Revision, MTN.GNG/NG10/W/9/Rev.3 (May 26, 1988) (US-132).

Checklist explicitly states, the "point of departure" for those discussions "should be the existing GATT rules, particularly the [Tokyo Round Subsidies] Code."[151]

108. The SCM Agreement reflects this understanding. The negotiators sought to further elaborate upon the existing subsidies disciplines, while preserving the foundational elements of the GATT 1947 disciplines and exceptions, except where expressly provided. Importantly, the SCM Agreement ultimately incorporated – at Article 32.1 and footnote 56 – Article 19 and footnote 1 of the Tokyo Round subsidies code which, read in conjunction, confirm that where an article is not interpreted by the SCM Agreement, the authority to take action under the GATT 1994 provisions remain unchanged.[152]

6 SCM AGREEMENT CLAIMS

6.1 Clean Vehicle Tax Credit

6.1.1 Subsidization

Question 22. To China: For purposes of determining the existence and form of the subsidy in the context of the Clean Vehicle Tax Credit:

a. Please specify, for each of the two structures that the Clean Vehicle Tax Credit can take (i.e. tax credit or transfer to the dealer for a payment), upon whom the "benefit" is conferred. If the relevant financial contribution is received by a party other than the one upon whom the benefit is conferred, is this relevant to the Panel's subsidization analysis under Article 1 of the SCM Agreement?

b. Can China please supply section 26 of the United States Code (USC) providing for "normal taxes and surtaxes", or at least the title page and table of contents of that section demonstrating that it deals with "normal taxes and surtaxes", as an exhibit?

c. China asserts in paragraph 33 of its first written submission that when the Clean Vehicle Tax Credit is structured as a non-transferable tax credit, it can reduce, but not exceed, the claimant's tax liability for that year. Is this ability to reduce, but not exceed, the tax liability explicitly stated in a statute, or is it implicit in the nature of a tax credit? The provision that China cites in this context does not appear to specify this information, i.e. 26 U.S.C. § 30D(c).

Response:

109. This question is addressed to China.

[151] Negotiating Group on Subsidies and Countervailing Measures, Checklist of Issues for Negotiations, Note by the Secretariat, Revision, p. 7, MTN.GNG/NG10/W/9/Rev.3 (May 26, 1988) (US-132).
[152] *See* U.S. First Written Submission, paras. 148-150.

6.1.2 "contingent on the use of domestic over imported goods"

Question 23. To China: Please respond to the United States' argument in paragraph 43 of its first written submission that China's interpretation of the phrase "whether solely or as one of several other conditions" in Article 3.1(b) of the SCM Agreement would produce unreasonable results, in particular that "a condition that may be satisfied by use of goods on a most-favored-nation basis would be inconsistent with Article 3.1(b) because one way to satisfy the condition would be to use domestic goods".

Response:

110. This question is addressed to China.

Question 24. To both parties: To what extent do the parties find support for their interpretations of the legal standard of "contingency" in Article 3.1(a) and (b) in prior panel and Appellate Body reports? Please answer this question taking into account in particular, but not limited to, the cited contingency analyses in the prior panel and Appellate Body reports in *Canada – Autos*, *US – Upland Cotton*, *US – FSC (Article 21.5 – EC)*, *Canada – Aircraft*, *Canada – Dairy*, and *Brazil – Taxation.* Are there any other reports that offer persuasive guidance in this context?

Response:

111. As the United States explained in the U.S. response to question 11, the DSU does not assign precedential value to Appellate Body or panel reports, or otherwise require a panel to apply the provisions of the covered agreements consistently with the adopted findings of prior reports.[153] Rather, a panel must apply the text of a covered agreement as understood through application of customary rules of interpretation. [154] A panel may choose to take prior reports into account in its own objective assessment, however, to the extent it finds them persuasive.

112. 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."[155]

113. To the extent the Panel opts to consider interpretations by past adjudicators, the United States makes the following observations. Both China and the United States agree that a subsidy would be considered "contingent" if the use of domestic goods were "a condition, in the sense of

[153] DSU, Article 3.9 ("The provisions of this Understanding are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the WTO Agreement or a covered agreement which is a Plurilateral Trade Agreement.").
[154] DSU, Article 3.2 ("The Members recognize that [the dispute settlement system] 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.").
[155] U.S. First Written Submission, para. 37 (citing *The New Shorter Oxford English Dictionary*, (4th edition) (1993), p. 494 (US-15)).

a requirement, for receiving the subsidy."[156] The United States has also explained that the Appellate Body in *US – Tax Incentives* and *Canada - Autos* interpreted the term "contingent" to mean "conditional" or "dependent for its existence on something else",[157] 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".[158]

114. The EU in its third party submission pointed to the Appellate Body reports in *Canada – Autos* and *Canada – Aircraft*, which stated that a measure would be inconsistent with Article 3.1(b) if "the use of domestic goods [was] a necessity and thus … required as a condition for eligibility" under the measure.[159] This "relationship of conditionality or dependence" lies at the "very heart" of the legal standard in Article 3.1(b) of the SCM Agreement.[160] The United States agrees.

115. The United States disagrees with China concerning the potential persuasiveness of the panel report in *Brazil – Taxation*. China relies upon the report to argue that a subsidy is a prohibited subsidy to the extent that one means of obtaining the subsidy is through the use of domestic over imported goods, even if there are alternative means of obtaining the subsidy.[161] China makes this assertion despite acknowledging that the finding that it relies upon was reversed by the Appellate Body on appeal.[162]

116. To the extent the Panel considers *Brazil – Taxation*, the United States observes that the Appellate Body report correctly reversed the panel's finding, which found an inconsistency with Article 3.1(b) on the basis that the measure at issue gave rise to the *possibility* of domestic production.[163] As the Appellate Body stated, "the relevant question in determining the existence of a contingency under Article 3.1(b) is 'where a *condition requiring* the use of domestic over imported goods can be discerned' from the measure."[164]

117. Ultimately, the United States observes that each prior dispute involved fact specific scenarios. Although the Panel may find some of the cited reports in the Panel's question may be persuasive, ultimately, the task before the Panel is not to determine whether this dispute has similar facts with other prior WTO disputes. Rather, the Panel's task is to the apply the text of Article 3.1(b) to the facts at hand.[165] As the United States details in the U.S. first written submission, China has failed to meet its burden.[166]

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[156] *Compare* China's First Written Submission, para. 149 *with* U.S. First Written Submission, para. 37 (quoting *US – Tax Incentives (AB)*, para. 5.7; *Canada – Autos (AB)*, para. 130).
[157] *US – Tax Incentives (AB)*, para. 5.7; *Canada – Autos (AB)*, para. 123.
[158] *US – Tax Incentives (AB)*, para. 5.7; *Canada – Autos (AB)*, para. 130.
[159] EU's Third Party Submission, para. 89 (citing *Canada – Autos (AB)*, para. 130).
[160] EU's Third Party Submission, para. 89 (*Canada – Aircraft (AB)*, para. 171; *Canada – Aircraft (Article 21.5 Brazil) (AB)*, para. 47).
[161] China's First Written Submission, para. 150.
[162] China's First Written Submission, para. 150 n .197.
[163] *Brazil – Taxation (AB)*, para. 5.278.
[164] *Brazil – Taxation (AB)*, para. 5.279 (italics original).
[165] DSU, Article 3.2.
[166] U.S. First Written Submission, para. 39-44. *See also* EU's Third Party Submission, para. 94.

6.2 Investment and Production Tax Credits

6.2.1 Subsidization

Question 25. **To China:** **The Panel understands from China's first written submission that there are three ways for the Investment and Production Tax Credits to be structured: (i) as a tax credit for the investing or producing entity (which China argues is a financial contribution in the form of revenue forgone otherwise due); (ii) as a direct payment from the government to certain investing and producing entities in lieu, and in the same amount, of the tax credit described in item (i) (which China argues is a financial contribution in the form of a direct transfer of funds); and (iii) the investing or producing entity can transfer the tax credit to a third party, and then the third party claims the tax credit, and can, but not must, pay the transferor some amount of cash (and *only* cash) for the credit.**

a. Is the above understanding correct? Please explain.

b. For the structure described in item (iii) in the chapeau to this question, what form does the "financial contribution" take in this instance, and between what entities does it occur?

c. For each of the structures that the Investment and Production Tax Credits can take, please explain what kinds of entities (e.g. tax-exempt, non-tax-exempt, partnerships, S corporations) can take advantage of each structure with specific citations to the relevant statutes and regulations. If there are special rules that apply to certain entities (including, but not limited to, partnerships and S corporations) please specify.

d. For each of the structures that the Investment and Production Tax Credits can take, please explain upon what entity the benefit is conferred. If the relevant financial contribution is received by a party other than the one upon whom the benefit is conferred, is this relevant to the panel's subsidization analysis under Article 1 of the SCM Agreement?

Response:

118. This question is addressed to China.

Question 26. **To China:** **Can China please provide the following statutes and regulations as exhibits? In providing these documents as exhibits, please feel free to comment on their relevance for this dispute, in China's view:**

a. 26 U.S.C. § 46. The Panel understands that this provision creates the link between the Investment Tax Credits and 26 U.S.C. § 38, thereby demonstrating that the credits are "general business credits", as China asserts;

b. 26 C.F.R. § 1.6418-2 through and including 26 C.F.R. § 1.6418-5. These are referenced in 26 C.F.R. § 1.6418-1(a) (Exhibit CHN-45) and appear pertinent to the understanding

of how the "transfer of eligible credits" occurs. Please also provide any analogous implementing regulations for 26 U.S.C. § 6417; and

c. 26 C.F.R. § 7701(a). China cites this provision in footnote 138 of its first written submission for the definition of a "taxpayer", but does not reference this as being included in any exhibit.

Response:

119. This question is addressed to China.

Question 27. To both parties: Can the parties please explain what is the "basis" within the meaning of 26 U.S.C. §§ 48E(b)(1)(A) and 48E(c)(1), and 26 U.S.C. § 48(a)(1)?

Response:

120. Sections 48 and 48E provide tax credits – an amount that the taxpayer can subtract from the tax owed – equal to a percentage of the investment in certain energy property. "Investment" is measured by reference to the "basis" – that is, the cost of the property as determined by the basis rules found in 26 U.S.C. §§ 263, 263A and 1012 – at the time the property is placed in service.

121. Under the basis rules, "basis" of a property is the cost of the property subject to certain adjustments.[167] For this purpose, the cost of the property generally is equal to the acquisition cost of the property, or the direct material and direct labor costs incurred to produce the property, increased by indirect or other costs that relate to the acquisition or production of the property.[168] A property's basis may also be subsequently increased after it has been placed in service by the amount of any expenditures that improve the property. A property's basis is decreased by deductions for depreciation over its defined recovery period for Federal income tax purposes.[169]

[167] 26 U.S.C. § 1012 (US-133).
[168] 26 U.S.C. § 263 (US-134); 26 U.S.C. § 263A (US-135).
[169] *See* 26 U.S.C. § 1016 (US-136).