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UNITED STATES – CERTAIN MEASURES RELATED TO RENEWABLE ENERGY

REQUEST FOR CONSULTATIONS BY CHINA

The following communication, dated 14 August 2018, from the delegation of China to the delegation of the United States, is circulated to the Dispute Settlement Body in accordance with Article 4.4 of the DSU.

1. My authorities have instructed me to request consultations with the Government of the United States of America ("US") pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), Article XXII of the *General Agreement on Tariffs and Trade 1994* ("GATT 1994"), Article 8 of the *Agreement on Trade-Related Investment Measures* ("TRIMs Agreement"), and Articles 4 and 30 of the *Agreement on Subsidies and Countervailing Measures* ("SCM Agreement"), with respect to certain measures adopted and maintained by the governments of certain U.S. states and municipalities in relation to subsidies and/or domestic content requirements in the energy sector.

2. This request identifies the measures at issue in Section I, and indicates the legal basis for China's complaint in Section II.

I. MEASURES AT ISSUE

A. The Renewable Energy Cost Recovery Incentive Payment Program ("RECIP") of the State of Washington

3. The RECIP is maintained under the legal authority of the Revised Code of Washington ("RCW") Chapters 82.16.110 through 82.16.180. The RECIP is further implemented through Washington Administrative Code ("WAC") Section 458-20-273.

4. Under Chapter 82.16.120 of the RCW, qualifying customers of light and power businesses are provided by their light and power business with investment cost recovery incentives for generating electricity from a customer-generated electricity renewable energy system. Similarly, Chapter 82.16.165 of the RCW authorizes qualifying customers to receive from relevant utilities an annual production incentive for each kilowatt-hour of electricity generated by a renewable energy system.

5. As specified in Chapter 82.16.120 and 82.16.165 of the RCW, the incentive rate increases in certain cases where the renewable energy system uses specified parts manufactured in the State of Washington. The incentive payment rate is then multiplied by the system's gross kilowatt-hours generated to determine the incentive payment. The light and power businesses and utilities that have provided incentive payments to qualifying customers are allowed a tax credit for the incentive payments made and various related fees, subject to certain specified limits.

B. The Self-Generation Incentive Program ("SGIP") of the State of California

6. The SGIP is maintained under the authority of Sections 360 - 380 of the California Public Utilities Code and the authority vested in the California Public Utilities Commission ("CPUC") by Article XII of the California Constitution and the California Public Utilities Code. The SGIP is further

implemented through the 2017 SGIP Handbook and a series of CPUC Decisions, including but not limited to CPUC Decision 17-04-017.

7. The SGIP provides financial incentives to users that install renewable energy distributed generation technologies that are installed to meet all or a portion of the electric energy needs of a facility. Pursuant to Section 379.6 of the Public Utilities Code, in administering the SGIP, an additional incentive is provided for the installation of eligible distributed generation resources manufactured in California.

C. The Solar Photovoltaic Incentive Program ("SIP") implemented by the Los Angeles Department of Water and Power ("LADWP")

8. The SIP is a performance-based incentive program maintained by the LADWP under the mandate of the California Solar Initiative established in California Public Utilities Code Section 2854. The SIP is administered through program guidelines issued by LADWP.¹

9. Under the SIP, the LADWP provides one-time incentives to its customers who purchase/lease and install solar photovoltaic systems. An additional incentive payment is provided to qualifying and approved photovoltaic equipment manufactured in the City of Los Angeles, termed as the Los Angeles Manufacturing Credit ("LAMC") pursuant to Section 8.1 of the LADWP guidelines.

D. The Renewable Energy Credits ("REC") requirements of the State of Michigan

10. The REC requirements are prescribed in the Clean and Renewable Energy and Energy Waste Reduction Act ("CREEWRA") of the State of Michigan as codified in Chapter 460 of Public Utilities of the Michigan Compiled Laws ("MCL"), and are implemented through orders of the Michigan Public Service Commission ("MPSC"). Renewable energy credits are collected, issued, and tracked by the Michigan Renewable energy Certification System, as provided in the Michigan Renewable Energy Certification System Operating Procedures.

11. Section 1039 of Chapter 460 of the MCL provides that one renewable energy credit shall be granted to an owner of a renewable energy system for each megawatt hour of electricity generated from the renewable energy system, subject to certain conditions. Section 1028 of Chapter 460 of the MCL requires Michigan electric providers to achieve a renewable energy credit portfolio that consists of a proportion of renewable energy credits that increases over time and reaches 15% by 2021. Michigan electric providers may meet this standard by generating electricity from renewable energy systems or through the purchase of renewable energy credits.

12. Pursuant to Section 1039 of Chapter 460 of the MCL, additional RECs known as "Michigan incentive renewable energy credits" are granted for electricity generated from a renewable energy system constructed using equipment made in the State of Michigan as determined by the Michigan Public Service Commission ("MPSC").

E. The Experimental Advanced Renewable Program ("EARP") proposed by Consumers Energy Company and approved by the Michigan Public Service Commission ("MPSC")

13. The EARP is administered by Consumers Energy, Michigan's largest utility provider pursuant to Section 460 of the CREEWRA identified in Part D above, as found in Chapter 460 of the MCL. The EARP was approved by the MPSC in its order in Case No. U-15805. Expansions and/or modifications of the EARP have been approved by subsequent orders issued by the MPSC.² The EARP is further incorporated in Section C10.3 of the Rate Book for Electric Service ("Rate Book") of Consumers Energy, versions of which have been approved by the MPSC in cases including but not limited to Case No. U-15805, U-16543, U-16581, U-17301, and U-17709.

¹ For example, see the Net Energy Metering and Solar Photovoltaic Incentive Program Guidelines dated 4 December 2015.

² The MPSC's approval of Consumers Energy's renewable energy plans establishing and expanding EARP occurred when CREEWRA's predecessor statute, the Clean, Renewable and Efficient Energy Act ("CREEA") was still in force. Pursuant to Section 460.1022 of CREEWRA, all renewable energy plans approved under CREEA and in force on the date CREEWRA came into effect (20 April 2017) remain in effect, subject to review and amendment within one year of the effective date of CREEWRA.

14. Under Section C10.3 of the Rate Book, a customer participating in the EARP is required to install and operate an eligible photovoltaic solar electricity generating system constructed using Michigan workforce labor or using equipment made in the State of Michigan. The customer must transmit all energy generated by eligible renewable energy equipment to Consumers Energy, which shall own and use RECs created therefrom. In return, Consumers Energy offers a fixed rate for electricity transmitted from the customer. In addition, customers providing electricity with a generating system constructed after October 1, 2011 that qualifies for both the Michigan Labor and Michigan Material requirements shall be awarded an extra incentive.

15. In addition to measures identified in sub-sections A through E above, this request for consultations also concerns any amendments, or related, successor, replacement, or implementing measures, as well as any closely connected, subsequent measures of the above mentioned programs providing subsidies and/or prescribing domestic content requirements in the energy sector.

II. LEGAL BASIS OF THE COMPLAINT

16. China considers that each of the measures at issue is inconsistent with the following provisions of the WTO covered agreements:

- Article III:4 of GATT 1994, because the measures at issue appear to embody laws, regulations and/or requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products which provide less favourable treatment to products imported into the U.S. than that accorded to like products originating in the U.S.;
- Article 2.1 of the TRIMs Agreement, because the measures at issue appear to be investment measures related to trade in goods that are inconsistent with Article III:4 of GATT 1994;
- Article 2.2 of the TRIMs Agreement, because the measures at issue appear to be investment measures related to trade in goods which are mandatory or enforceable under domestic law or under administrative rulings, and/or compliance with which is necessary to obtain an advantage, and which require the purchase or use by an enterprise of products of U.S. origin, as provided for in paragraph 1(a) of the Annex to the TRIMs Agreement;
- Articles 3.1(b) and 3.2 of the SCM Agreement because they appear to grant and maintain subsidies contingent upon the use of domestic over imported goods.

17. As a result of the foregoing, the measures at issue appear to nullify or impair the benefits accruing to China directly or indirectly under the above-mentioned WTO covered agreements.

18. In accordance with Article 4.2 of the SCM Agreement, China attaches to this request a list of evidence related to the measures at issue and presently available to China. China reserves its right to raise additional factual matters and/or legal claims during the course of the consultations and in any future request for panel proceedings.

19. China looks forward to receiving a reply to the present request from the U.S. and to setting a mutually acceptable date and venue for consultations.

Statement of Available Evidence

A. The Renewable Energy Cost Recovery Incentive Payment Program ("RECIP") of the State of Washington

1. Wash. Rev. Code §§ 82.16.110-180
2. *Engrossed Substitute Senate Bill 5939*, State of Washington, 65th Legislature (2017).
3. Wash. Admin. Code, § 458-20-273
4. *Revised Code of Washington*, Energy Independence Act, Chapter 19-285 RCW (2007).
5. *Washington Administrative Code*, Energy Independence, Chapter 194-37 WAC (2008).
6. *Washington Administrative Code*, Manufacturing, Processing for hire, fabricating, WAC 458-20-136 (2005).
7. *Washington State Register*, Emergency Rules, Rule Making Order – Department of Revenue, WSR 12-16-046 (July 27, 2012).
8. *Substitute Senate Bill 5101*, State of Washington, 59th Legislature (2005).
9. *Engrossed Substitute Senate Bill 6170*, State of Washington, 61st Legislature (2009).
10. *Engrossed Substitute Senate Bill 6658*, State of Washington, 61st Legislature (2010).
11. *Senate Bill 5526*, State of Washington, 62nd Legislature (2011).
12. *Engrossed Senate Bill 5128*, State of Washington, 65th Legislature (2017).
13. *Engrossed Second Substitute House Bill 1301*, Amending RCW 82.16.110, RCW 82.16.120, RCW 82.16.130 (2013).
14. Washington State Department of Revenue, *Renewable Energy System Cost Recovery- Annual Incentive Payment Application*, REV 41 0100e (2011).
15. Washington State Department of Revenue, *Community Solar Project Renewable Energy System Cost Recovery- Annual Incentive Payment Application*, REV 41 0111e (2015).
16. Washington State Department of Revenue, *Renewable Energy System Cost Recovery Certification*, 82.16 RCW, REV 41 0094 (2015).
17. Washington State Department of Revenue, *Community Solar Projects Renewable Energy System Cost Recovery Certification*, REV 41 0110 (2015).
18. Washington State Department of Revenue, *Special Notice, Solar Stirling Converter Manufactured in Washington Added to Renewable Energy Cost Recovery Incentive Payment Program* (August 30, 2011).
19. Washington State Department of Revenue, *Growth from Renewable Energy Cost Recovery Program* (October, 2016).
20. Washington State Department of Revenue, *Evaluation of Tax Incentives- Analysis of Renewable Energy System Program: Report to the Legislature* (December, 2009).
21. Washington State Department of Revenue, *Special Notice-Renewable Energy Cost Recovery Incentive Program-Modifications to Program* (May, 2010).
22. Washington State Department of Revenue, *Washington Manufacturers Equipment Approved for "Made in Washington" Renewable Energy Systems Cost Recovery Incentive Payments* (September 28, 2016).
23. U.S. Department of Energy, *Office of Scientific and Technical Information, 2011 Wind Technologies Market Report*, DOE/GO-102012-3472 (August, 2012).
24. Shoreline Community College Office of the President, *Notice of Intent addressed to Superintendent, Seattle City Light* (August 12, 2009).
25. Mason County PUD No. 1, *In-State Production Incentives for Renewable Energy Development Program Overview*, State Doc #1 (December, 2013).
26. American Council on Renewable Energy, *Renewable Energy in Washington* (September, 2014).

27. Washington State Department of Revenue, *Summary of 2009 Tax Legislations* (May, 2009).
28. U.S. Energy Information Administration, *State of Washington Electricity Profile* (2014).
29. U.S. Energy Information Administration, *State of Washington Electricity Profile* (2017).
30. U.S. Energy Information Administration, *State of Washington Energy Profile* (2015).
31. U.S. Energy Information Administration, *State of Washington Energy Profile* (2016).
32. U.S. Energy Information Administration, *State of Washington Renewable Electricity Profile* (2012).
33. Clark Public Utilities, *Steps for Participation in Washington State's Renewable Energy Production Incentive Program Production Metering Agreement*.
34. Washington State Department of Revenue, *Special Notice, Renewable Energy System Cost Recovery Program – Production Incentive* (September 23, 2009).

B. The Self-Generation Incentive Program ("SGIP") of the State of California

1. *State of California Public Utilities Code*, Division I, Part I, Chapter 2.3, Article 6.
2. *California Constitution*, Article XII Public Utilities.
3. *California Assembly Bill no. 970*, an Act to amend, *inter alia*, Section 372 of the Public Utilities Code (September 7, 2000).
4. *California Assembly Bill no. 2267*, an Act to amend, *inter alia*, Section 379.6 of the Public Utilities Code (September 28, 2008).
5. *Senate Bill no. 412*, an Act to amend, *inter alia*, Section 379.6 of the Public Utilities Code, relating to electricity, Chapter 182 (October 11, 2009).
6. *Senate Bill no. 861*, an Act to amend, *inter alia*, Sections 379.6 of the Public Utilities Code (June 20, 2014).
7. *California Assembly Bill no. 1478*, an Act to amend, *inter alia*, Section 379.6 of the Public Utilities Code (September 27, 2014).
8. *California Assembly Bill no. 1637*, an Act to amend, *inter alia*, Section 379.6 of the Public Utilities Code (September 26, 2016).
9. California Public Utilities Commission Decision 01-03-073, *Interim Opinion: Implementation of Public Utilities Code Section 399.15(b), Paragraphs 4-7; Load Control and Distributed Generation Initiatives* (March 27, 2001).
10. California Public Utility Commission Decision 08-11-044, *Decision Addressing Eligible Technologies under the Self-generation Incentive Program (SGIP) and modifying the process for evaluating SGIP Program change requests Decision on Advanced Storage Technologies* (November 21, 2008).
11. California Public Utility Commission Decision 11-09-015, *Decision Modifying the Self-Generation Incentive Program and Implementing Senate Bill 412* (September 8, 2011).
12. California Public Utility Commission Decision 11-12-030, *Decision Adopting SGIP Annual Budget for 2012, 2013 and 2014* (December 15, 2011).
13. California Public Utilities Commission Decision 14-12-033, *Decision Authorizing Pacific Gas and Electric Company, Southern California Edison Company, San Diego Gas & Edison Company, San Diego Gas & Electric Company, and Southern California Gas Company to Continue to Collect Funds for the Self Generation Incentive Program Pursuant to Public Utilities Code Section 379.6 as Amended by Senate Bill 861* (December 8, 2014).
14. California Public Utilities Commission Decision 15-12-027, *Decision Partially Suspending Disbursement Of 2016 Program Year Funds and Acceptance of New Applications for the Self-Generation Incentive Program* (December 17, 2015).
15. California Public Utilities Commission Decision 16-06-055, *Decision Revising the Self-Generation Incentive Program Pursuant to Senate Bill 861, Assembly Bill 1478, and Implementing Other Changes* (June 23, 2016).

16. California Public Utilities Commission Resolution E-4824, *Adoption of revised Self-Generation Incentive Program Rules pursuant to Decision (D.) 16-06-055* (February 9, 2017)
17. California Public Utility Commission Decision 17-04-017, *Decision Revising the Self-Generation Incentive Program Pursuant to Assembly Bill 1637 and Granting the Petition for Energy Industry Association* (April 6, 2017).
18. Advice Letter of Southern California Edison Company, Pacific Gas and Electric Company, Southern California Gas Company, and Center for Sustainable Development, *Revisions to the Self-Generation Incentive Program Handbook Pursuant to Resolution E-4824* (February 23, 2017)
19. Advice Letter of Southern California Edison Company, Pacific Gas and Electric Company, Southern California Gas Company, and Center for Sustainable Development, *Revisions to the Self-Generation Incentive Program Handbook Pursuant to D.17-04-017 Implementing Assembly Bill 1637 and Granting the Petition for Modification of D.16-06-055 by the California Solar Energy Industries Association* (May 17, 2017)
20. California Public Utility Commission Resolution E-4887, *Adoption of revised Self-Generation Incentive Program developer definition pursuant to Decision (D.) 16-06-055 and other revisions to the SGIP Handbook* (October 12, 2017)
21. California Public Utility Commission Decision 17-10-004, *Decision Establishing Equity Budget for Self-Generation Incentive Program* (October 13, 2017).
22. *Self-Generation Incentive Program Handbook*, 2016 (February 8, 2016).
23. *Self-Generation Incentive Program Handbook*, 2017 (February 23, 2017).
24. California Public Utilities Commission official website, *2016 Incentive Rates by Eligible Technologies under SGIP*.
25. California Public Utilities Commission, *Request for California Supplier status under SGIP Form*.
26. California Public Utilities Commission, *California Manufacturer Application Form*.
27. California Public Utilities Commission, *List of SGIP approved California Suppliers* (2016).
28. *Application Forms available on the website of Pacific Gas and Electric Company*, V.2 (2015).
29. *Application Forms available on the website of Southern California Gas Company, SGIP Incentive Claim Form*, V. 3 (2015).
30. *Application Forms available on the website of Centre for Sustainable Energy California, SGIP Incentive Claim Form*, V. 3 (2015).
31. *Application Forms available on the website of South California Edison, SGIP Incentive Claim Form*, V.3 (2015).
32. California Public Utilities Commission, *Self-Generation Incentive Program Modification Guideline* (PMG) (July 1, 2006).
33. California Public Utilities Commission, *2012 SGIP Impact Evaluation Program Outlook* (February, 2014).
34. California Public Utilities Commission official website, *History & Organizational Structure*.
35. Itron, *Final Report: 2014-2015 SGIP Impact Evaluation* (November 4, 2016).
36. American Council on Renewable Energy, *Renewable Energy in California* (September, 2014).
37. U.S. Energy Information Administration, *California State Electricity Profile* (2015).
38. U.S. Energy Information Administration, *California State Electricity Profile* (2017).
39. U.S. Energy Information Administration, *California Renewable Electricity Profile* (March, 2012).

C. Solar Photovoltaic Incentive Program ("SIP") implemented by the Los Angeles Department of Water and Power ("LADWP")

1. *Senate Bill 1*, Chapter 132- Electricity: Solar Energy: Net Metering (Approved 2006 and codified in *California Public Resources Code*, Sections 25780-25783 and *California Public Utilities Code*, Sections 2851-2854).
2. *California Assembly Bill no. 2227*, an Act to amend and renumber, *inter alia*, Section 2854 of California Public Utilities Code (September 27, 2012).
3. Los Angeles Department of Water and Power, *the Net Energy Metering and Solar Photovoltaic Incentive Program Guidelines* (December 4, 2015).
4. Los Angeles Department of Water and Power, *Solar Photovoltaic Incentive Program Guidelines* (January 1, 2017).
5. California Energy Commission, *Guidelines for California's Solar Electric Incentive Programs*, Fifth Edition (January, 2013).
6. *Los Angeles Department of Water and Power - Solar Incentive Program Info*, energy.gov.
7. Los Angeles Department of Water and Power, *Members of the Board of Water and Power Commissioners*.
8. Los Angeles Department of Water and Power, *Rules of the Board of Water and Power Commissioners*.
9. Los Angeles Department of Water and Power, *Customer Guide to using Powerclerk* (December 4, 2015).
10. Los Angeles Department of Water and Power, *LADWP Solar Incentive Program Calculator User Guide* (October, 2011).
11. Los Angeles Department of Water and Power, *PV Preliminary Review Information Sheet*, LADWP – PR (02-2013).
12. Los Angeles Department of Water and Power, *Solar Inspection Agreement*, LADWP – SA (09-2012).
13. Los Angeles Department of Water and Power, *Residential Disclosure Agreement*, LADWP – RD (09-2012) and a *Non-Residential Disclosure Agreement*, LADWP – ND (09-2012).
14. Los Angeles Department of Water and Power, *Request to Forward Reservation Payment*, LADWP – PF (04-2016).
15. Los Angeles Department of Water and Power, *Powerclerk User Account Request Form*, LADWP – (07-2013).
16. Los Angeles Department of Water and Power, *Solar Incentive Program Report* (April 2015).
17. California Public Utilities Commission Decision 06-01-024, *Interim Order Adopting Policies and Funding for the California Solar Initiative* (January 12, 2006)

D. The Renewable Energy Credits ("REC") requirements of the State of Michigan

1. Clean and Renewable Energy and Energy Waste Reduction Act, Mich. Comp. Laws §§460.1001-460.1099 (2017).
2. Mich. Comp. Laws § 460.1191 (2009).
3. Senate Bill 438, State of Michigan, the 98th Legislature (December 21, 2016)
4. Michigan Renewable Energy Certification System Operating Procedures.
5. Michigan Public Service Commission, *Temporary Order in Case No. U-15800* (December 4, 2008).
6. Michigan Public Service Commission, *Notice of Hearing Regarding the Promulgation of Administrative Rules Governing Renewable Energy Plans and Energy Optimization Plans Case No. U-15900* (April 27, 2010).
7. Michigan Public Service Commission, *Order in Case No. U-15900* (April 27, 2010)

E. The Experimental Advanced Renewable Program ("EARP") proposed by Consumers Energy Company and approved by the Michigan Public Service Commission ("MPSC")

1. M.P.S.C. No. 13 – Electric, Consumers Energy Company, *Rate Book for Electric Service*.
 2. Michigan Public Service Commission, *Order in Case No. U-15805, U-15889*, May 26, 2009.
 3. Michigan Public Service Commission, *Order in Case No. U-16543*, May 10, 2011.
 4. Michigan Public Service Commission, *Order in Case No. U-16543*, May 26, 2011.
 5. Michigan Public Service Commission, *Order in Case No. U-16543*, July 26, 2011.
 6. Michigan Public Service Commission, *Order in Case No. U-16581*, May 1, 2012.
 7. Michigan Public Service Commission, *Order in Case No. U-17301*, June 19, 2014.
 8. Michigan Public Service Commission, *Order in Case No. U-17709*, November 6, 2014.
 9. Michigan Public Service Commission, *Order in Case No. U-17301*, February, 2015.
 10. Michigan Public Service Commission, *Order in Case No. U-17752*, May 14, 2015.
 11. Michigan Public Service Commission, *Order in Case No. U-17771*, December 22, 2015.
 12. Michigan Public Service Commission, *Order in Case No. U-17792*, March 29, 2016.
 13. *Consumers Energy – Experimental Advanced Renewable Program Info*, energy.gov.
 14. Consumers Energy, *Corporate Overview*.
 15. Consumers Energy, *Experimental Advanced Renewable Program Brochure*.
 16. Consumers Energy, *Common questions concerning the Experimental Advanced Renewable Program*.
 17. Consumers Energy, *Experimental Advanced Renewable Program Non-Residential Application and Instructions*.
 18. Consumers Energy, *Experimental Advanced Renewable Program Residential Application and Instructions*.
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