APPLICATION FOR COUNTERVAILING DUTIES ON SILICON METAL FROM CHINA

CONSULTATIONS UNDER ARTICLE 13.1 OF THE WTO AGREEMENT ON SUBSIDIES AND COUNTERVAILING MEASURES

POSITION PAPER OF THE GOVERNMENT OF CHINA

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A INTRODUCTION

1 Under cover of a letter emailed to the Embassy of the People's Republic of China in Australia and dated 17 January 2014, the Anti-Dumping Commission ("the Commission") provided the Government of China ("GOC") with a partial copy of an *Application for the publication of dumping and/or countervailing duty notices - Silicon Metal Exported from The People's Republic of China* ("the Application").[1] The Application is dated 6 January 2014.

2 Under Article 13.1 of the *Subsidies and Countervailing Measures Agreement* ("the SCM Agreement"), the GOC has the right to consultations on the acceptance of an application for an investigation to determine the existence, degree and effect of any alleged subsidy, and before initiation of such an investigation.

3 Under Article 5.5 of the *Agreement on Implementation of Article VI of the*

[1] The section of the Application with questions that are intended to elicit details of manufacturers, exporters, importers and the alleged dumping were redacted from the version of the Application provided to the GOC. Furthermore, none of the "Non-Confidential Attachments" were provided to the GOC, regardless of their subject matter.

general Agreement on Tariffs and Trade 1994 ("the AD Agreement"), an investigating authority must notify the government of the exporting Member concerned after receipt of a properly documented application and before proceeding to initiate an investigation.

4 The GOC now presents its views on the Application and on how the Commission should now proceed in relation to the Application.

B INSUFFICIENT EVIDENCE OF ALLEGED SUBSIDIES TO JUSTIFY INITIATION

5 The GOC maintains that the "sufficient evidence" obligation of the SCM Agreement cannot be met in the case of the Application. The chapeau to Article 11.2 of the SCM Agreement is very clear:

> *An application under paragraph 1 shall include sufficient evidence of the existence of (a) a subsidy and, if possible, its amount, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement, and (c) a causal link between the subsidized imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph.*

6 Article 11.2(iii) expressly refers to the need for an application to *"contain such information as is reasonably available to the applicant... with regard to the existence, amount and nature of the subsidy in question"*. Under Article 11.3 of the *SCM Agreement*, Customs has an obligation to determine whether there is *"sufficient evidence"* to justify initiation of an investigation. This must involve an assessment of the accuracy and adequacy of the evidence furnished.

7 The Application names 33 subsidies that it alleges confer benefits on Chinese producers and/or exporters of silicon metal. The Application also alleges the existence of two *"less than adequate remuneration"* subsidies. Finally, the Application further alleges that producers and/or exporters of silicon metal received benefits from a further 12 subsides, which are said to have been further identified in *"Trade Measures Report 198"* [2] but which are not even

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[2] The GOC understands this to be a reference to *Dumping of Hot Rolled Plate Steel exported from the People's Republic of China, Republic of Indonesia, Japan, the Republic of Korea and Taiwan*

named in the Application itself.

8 With regard to the 33 named subsidies, the Application explains that they have been *"identified as conferring benefits to steel and aluminium exporters/producers"* in China in previous investigations undertaken by the Commission and/or by the Australian Customs and Border Protection Service ("Australian Customs"). The Application then goes on to make the claim that the same *"programs"* are also *"consider[ed]... to be available to Chinese producers of silicon metal"*. The Application attempts to supports this conclusion by referring to the findings of a recent investigation of the Canada Border Services Agency ("CBSA") in relation to certain silicon metal exported from China which the Application claims also identified the 33 named subsidies.

9 The GOC does not consider that the Application includes *"sufficient evidence"* of the existence of any of the alleged subsidies, as is required by Article 11.2 of the SCM Agreement. Effectively – almost literally - the Application simply tells the Commission to go and look through its previous reports, and through a report of another jurisdiction, and see what it can come up with.

10 Referring to findings from previous investigations undertaken by the Commission, and by Australian Customs (and also by a foreign agency, the Canadian Border Security Agency) in this way does not satisfy the clear requirements for initiation of a countervailing investigation under the SCM Agreement. The applicant has only provided two and a half pages of text to explain its allegations that there are 47 subsidies that exist in relation to silicon metal exporters and that therefore an investigation should be initiated.

11 In relation to the Australian investigations, although the products that have been investigated are mentioned (*aluminium* and *steel products*), no attempt has been made to identify the subsidies that are said to be applicable in this

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and Subsidisation of Hot Rolled Plate Steel Exported from the People's Republic of China (Report Number 198, 16 September 2013)

case to *silicon metal producers*. The applicant has just provided a list of alleged programs from other cases involving different products.

12 The Commission must review the evidence *"provided in the application"* in accordance with Article 11.3 of the *SCM Agreement*. An application must be complete as to the allegations that it makes about the facts and about the application of the law to those facts. It is the adequacy or otherwise of the evidence that an application contains that is the basis for the decision to initiate. A countervailing duty application cannot simply cross-reference other findings. In this case the applicant seems to hope that the investigating authority will work out for itself whether subsidies in relation to different products, considered in different investigations, over different time periods, could benefit the producers of the product under investigation. These are matters about which the applicant must satisfy the investigating authority to a level of sufficiency that justifies a decision to initiate an investigation. They are not matters to be left up to the invention of the investigating authority.

13 In any event, the Application's reliance on the findings of the CSBA to support the existence of the 33 named subsidies is highly mistaken and highly misleading. The CBSA's findings cannot be construed as supporting evidence for the contentions made in the Application at all. Contrary to the contentions made in the Application, not all of the 33 named subsidies are identified in the CBSA's *Statement of Reasons Concerning the Making of the Final Determinations with Respect to the Dumping and Subsidising of Certain Silicon Metal Originating in or Exported from the People's Republic of China* ("the Statement of Reasons").

14 Moreover, the GOC would also emphasise that the "identification" of the subsidies in the CSBA's Statement of Reasons is neither evidence of them nor a factual finding that they exist. Of the *"91 subsidies"* the Application claims were *"identified"* in the CSBA's Statement of Reasons, only six were found to have been received by the responding exporters. The 33 subsidies named in the Application do not include the six subsidies found to have been received by exporters in the CSBA's Statement of Reasons. The remaining 85 subsidies

identified in the CSBA's Statement of Reasons are categorised as *"other potentially actionable subsidy programs"*. In regard to this category the Statement of Reasons explains:

> *The following 85 programs were also included in the current investigation. Questions concerning these programs were included in the RFI sent to the GOC and to all known exporters of the goods in China. None of the exporters who provided responses to the RFI reported using these programs during the subsidy POI. Without a complete response to the subsidy RFI from the GOC and all known exporters, the CBSA does not have sufficient information to determine that any of these programs do not constitute actionable subsidies. In other words, the CBSA does not have sufficient information to determine that any of the following programs should be removed from the investigation for purposes of the final determination.*[3] [underlining supplied]

15 The gravamen of this point should be obvious. The CBSA did not have any evidence of the existence or the non-existence of these 85 *"potentially actionable subsidies"*. Therefore, contrary to the Application, the Statement of Reasons does not "find" that the subsidies exist and cannot be considered to be evidence, let alone sufficient evidence, of the existence of the 33 subsidies named in the Application.

16 In addition to these critical points, the GOC also notes that the Article 11.2 requirement that an application for countervailing measures include sufficient evidence of the existence of the alleged subsidy has been interpreted as requiring that the application include evidence of each of the elements of a subsidy: a financial contribution, a benefit and specificity.[4] The mere listing of subsidies that have been considered in different investigations clearly does not meet the requirement that the Application must address the required elements to sufficiently establish the existence of a subsidy for the purposes of initiation.

17 The Application is so unconcerned about the need to properly state its

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[3] *Statement of Reasons Concerning the Making of the Final Determinations with Respect to the Dumping and Subsidising of Certain Silicon Metal Originating in or Exported from the People's Republic of China*, page 47.

[4] *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States, Report of the Panel* (WTDS414/R), 15 June 2012, paragraphs 7.68 – 7.62.

allegations within the framework of Article 1.1 of the SCM Agreement that the words *"financial contribution"*, *"public body"* and *"specific"* are not even used in the Application.

18 Question C-1.1 of the Application requires:

> *supporting evidence [of subsidies] including details of:*
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> *(i) the nature and title of the subsidy;*
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> *(ii) the government agency responsible for administering the subsidy;*
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> *(iii) the recipients of the subsidy; and*
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> *(iv) the amount of the subsidy.*

19 The list provided by the applicant does not indicate the nature of the subsidies. In some cases a title given to a subsidy refers to a place, but no government agencies are mentioned. Recipients are not identified, and no subsidy amounts are mentioned at all. No doubt the application form was prepared by the Australian investigating authorities to elicit the kind of information that is required for sufficiency purposes. In the case of Question C-1.1, it is self-evident that the Application does not respond to the stated requirements.

20 The GOC further submits that there is no evidence in the Application to support the existence of the alleged *"coal at less than adequate remuneration"* and *"electricity at less than adequate remuneration"* subsidies.

21 The applicant's claim that a subsidy exists whereby coal is provided for less than adequate remuneration is said to be based on findings made in previous investigations by Australian Customs to that effect. However, the allegation that Australian Customs has found that coal was sold for less than adequate remuneration is false and misleading. There is no basis for this statement, and therefore it cannot be the case that any evidence has been offered for it.

22 The Application states:

> *In addition to the above previously identified subsidy programs that confer a benefit to producers/exporters of steel and aluminium products in China, the Customs and Border Protection investigations*

(refer Reports No. 193 and 198) identified coal sold at less than adequate remuneration in China. Coal is a raw material input into silicon metal production and was determined by CBSA as having been sold at less than adequate remuneration in the Canadian silicon metal investigation. Simcoa anticipates that this Program similarly provides a benefit to Chinese silicon producers.

23 Reports No 193 and 198 did not identify that *coal* was sold at less than adequate remuneration in China. The product under investigation in those investigations was *coking coal*, not coal. In those investigations, it was alleged that coking coal - a kind of coal used for steel production – was provided by public bodies to steel producers at less than adequate remuneration. Thus, we can see that the Application attempts to use a finding that *coking coal* was sold to *steel producers* in China at less than adequate remuneration as evidence of the proposition that *coal* is sold to *silicon producers* in China at less than adequate remuneration.[5] Clearly, neither of these things is evidence of the other, thus the Application cannot possibly contain sufficient evidence of this allegation.

24 The allegation that electricity is provided for less than adequate remuneration is also marred by a lack of evidence or relevance to Australia's implementation of the SCM Agreement. The provision of electricity in China has been investigated during the history of Australian anti-dumping and countervailing investigations on previous occasions. In every such case China's electricity system and the rates at which electricity is provided has been found to be legitimate. Electricity costs have not been "surrogated" in normal value determination and no "subsidies" have been identified. The Application does not meet an ordinary test of sufficiency, and it certainly does not meet the heightened test of sufficiency that the GOC would expect the Commission to apply taking into account that history.

25 The GOC also rejects the legal characterisation that is offered by the Application of how a State-invested enterprise might be considered to be capable of providing a subsidy, which in turn is the characterisation offered by

[5] The GOC rejects any finding that coking coal is provided by public bodies to Chinese steel producers at less than adequate remuneration.

the CBSA. The idea proffered in the Application that State-invested enterprises are *"meaningfully controlled"* by the GOC is incorrect. The idea that State-invested enterprises would provide a financial benefit within the meaning of Article 1.1(a)(1) of the SCM Agreement because they *"perform the government functions (of providing electricity at less than adequate remuneration)"* is a circular and self-serving argument which is without merit.

26 Turning now to the *"additional 12 Programs further identified"* in Report No 198, the failure to even expressly identify them in the Application is evidently and unquestionably a failure to provide sufficient evidence as to their existence.[6] A casual review of the names of some of those subsidies causes the GOC to question whether the applicant has paid any attention at all to the need to present a plausible case to the Commission. For example, Program 31 from Report No 198 is said to be *"Technique transformation grant for rolling machine"*. Surely the Commission is not going to accept that steel plate rolling machines are used in silicon metal facilities? Programs 36 and 41 are *"400 sintering desulfuration transformation fund"* and *"Grant of elimination of out dated capacity (350 blast furnace)"* – which again are terms relating to equipment used in steel production. The Application does not mention the relationship of these alleged subsidies to silicon metal production.

27 The GOC considers that the Application contains only simple assertion as to the existence of all of the subsidies that it alleges exist. Article 11.2 of the SCM Agreement expressly and definitively states that an Application based on simple assertion cannot meet the *"sufficient evidence"* threshold. Mere references to findings in different investigations do not constitute evidence in a different application involving necessarily different facts and circumstances. The evidence needs to be stated, explained, related to the product and the industry concerned, and matched to the definitional requirements of the SCM Agreement. This needs to be set out in the Application itself. The GOC finds that none of these things have been done. The Application provides no

[6] The GOC also notes that in Report 198, although a Chinese producer of plate steel – and not silicon metal - was found to have benefited from each of those subsidies, the resultant countervailing margin was only 2.6%.

discussion or evidence regarding the requisite financial contribution, benefit, specificity, recipients or amounts of the subsidies it claims to exist.

C COMMENTS WITH RESPECT TO THE ANTI-DUMPING APPLICATION

28 The GOC recognises that the Commission only intends to invite the GOC's response in line with Australia's obligations under the SCM Agreement. However, the letter received from the Commission and the Application attached to it have caused some confusion in relation to the anti-dumping aspects of the Application. The GOC believes that it is entitled to comment upon this in order to ensure that its position is clear, and at the same time to invite clarification from the Commission.

29 The Commission's letter states:

> *I am writing to notify you that the [Commission] has received a properly documented application requesting the publication of a dumping and countervailing duty notice in respect of exports of silicon metal exported to Australia from the People's Republic of China.* [underlining supplied]

30 The words underlined are the words used in Article 5.5 of the AD Agreement. They are the words which trigger the obligation to notify the government of the exporting Member that an application for the initiation of an investigation against its exporters has been received and is under consideration. That notification must be provided after receipt of a properly documented application and before proceeding to initiate an application.

31 The previous practice of the Australian investigating authorities when inviting consultations to take place has been to provide the GOC with a full copy of any application alleging both dumping and subsidisation that is said to be "properly documented". The Australian investigating authority has advised the GOC, when providing such applications to it, about its responsibility to decide whether or not to reject the application within 20 days of receipt of the application, or by a date which is specifically mentioned.

32 In this case, the Application alleges both dumping and subsidisation, and is

said to be properly documented, however a full copy has not been provided to the GOC. In view of the difference in the practice of the Australian investigating authority on this occasion, the GOC seeks clarification from the Commission. Unless the Commission no longer intends to provide the GOC with copies of a "properly documented" anti-dumping application before deciding whether or not to reject the application, the GOC must assume that the anti-dumping aspect of the Application in this case is not "properly documented".[7]

33 The GOC reminds the Commission of its implacable opposition to recent decisions that have considered that a *"particular market situation"* prevails in Chinese domestic markets for certain goods that have been the subject of Australian anti-dumping investigations. The GOC maintains that the methodologies adopted in arriving at those decisions are in breach of the AD Agreement and of Australia's implementation of that Agreement. The approach adopted in determining the normal value of steel and aluminium products from China in recent decisions is representative of a discriminatory "non-market economy" treatment of China and its exporters, That kind of treatment has no place and no basis under Australian law, especially since China's accession to the GATT 1994 and its listing in Schedule 1B to the Customs Regulations. The GOC continues to voice its strongest objection to the misuse of the anti-dumping trade remedy as constituted by the fabrication of surrogate cost information and its substitution for the costs actually incurred and actually recorded in the accounts of our producers and exporters.

34 Importantly, the GOC reminds the Commission that the Australian investigating authority has previously determined that Chinese domestic market prices and costs for silicon metal are appropriate for normal value purposes.[8]

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[7] Despite the GOC's assumption to the contrary, the GOC would be most concerned if the Commission has decided that it will not provide the GOC with copies of a "properly documented" anti-dumping application pursuant to its obligation to notify under Article 5.5 of the AD Agreement.

[8] *Certain Silicon from the People's Republic of China* (Trade Measures Report No 81, November 2004).

35 Given the severe evidentiary shortcomings the GOC has identified in the subsidisation aspects of the Application, the GOC would caution the Commission to also examine the evidence proffered in support of any related anti-dumping investigation very critically.

D CONCLUSION

36 The Application falls well short of the evidentiary standard which is required for initiation of a countervailing investigation. Article 11.2 is abundantly clear:

> *Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph.*

37 The Application does not contain sufficient evidence. The claims made are in the nature of simple assertion. They are improperly stated and unsubstantiated in material respects.

38 For all of these reasons, the GOC submits that the Application should be rejected by the Commission.