

# 中华人民共和国商务部

MINISTRY OF COMMERCE OF THE PEOPLE'S REPUBLIC OF CHINA  
2, DONG CHANG'AN STREET, BEIJING, CHINA 100731

Beijing, April 18, 2014

**Subject: Australian investigations of alleged dumping and subsidisation of silicon metal exported from the People's Republic of China – Government Questionnaire**

The Government of the People's Republic of China (the GOC) refers to the Government Questionnaire issued to it by the Australian Anti-dumping Commission, in relation to the Australian investigations of alleged dumping and subsidisation of silicon metal exported from the People's Republic of China. The GOC now would like to provide the following comments.

The GOC has openly participated in consultations under Article 13.1 of the WTO *Agreement on Subsidies and Countervailing Measures* ("the SCM Agreement") before the initiation. The written submissions from the GOC at the time are on the public record of this investigation.<sup>1</sup>

In this letter I wish to inform the Commission about:

- the GOC's response to the Government Questionnaire provided to us by the Commission and the proper standard for the Commission's evaluation of the matters at issue;
- the important recent endorsement by your Minister of WTO legal authority concerning the classification of "public bodies";
- previous evaluations of electricity utility pricing in China by the Australian investigating authorities; and
- our continuing concerns about the misuse of "particular market situation" and "competitive market costs" claims against Chinese exporters in normal value calculation.

## 1 The GOC's response to the Government Questionnaire

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<sup>1</sup> Position Paper of the Government of China dated January 28, 2014.

The GOC is responding to the Government Questionnaire in this case by explaining its views about the following issues. For those issues untouched, the GOC will also keep monitoring and evaluating the manner of consideration by the Commission, and the procedures by which that is done, to ensure that the cooperating Chinese exporters and producers are treated fairly.

The GOC notes the direct inquiries that have been made by the Commission in the Government Questionnaire. However, in this case the GOC's position is that individual exporters concerned who wish to participate in the investigation are well-placed to respond to your reasonable requirements, and that they can do so in their own interest. From the information available on the public record, there are four parties who do intend to participate.

The GOC holds the view that, whether or not the GOC responds directly to any specific question is only relevant to the information that the Commission will have before it, and not to the manner of evaluation of that evidence or to the standards of decision-making that must ultimately be applied. The requirements under the relevant WTO Agreements for positive evidence for any conclusions reached, for a proper establishment of the facts, and for an unbiased and objective examination of those facts, are not reduced by reason of the responding method of the GOC.

The WTO rules demonstrate an explicit concern about the use of information by investigating authorities from "secondary sources" which is not able to be substantiated. Information from secondary sources should only be used with special circumspection, and should be checked from other independent sources.<sup>2</sup>

In your letter dated April 16, 2014 which has been placed on the public record, the applicant's information is singled out as an appropriate source of evidence for decisions to be made. However we would expect that you would fairly consider the information provided by all interested parties, especially by the commercial exporters concerned, and would utilise the Commission's own understanding and research as well in making your own decisions or in formulating any recommendations to your Minister.

The GOC requests that the Commission properly fulfil all the necessary legal requirements in considering the ability and need for the imposition of either dumping or countervailing duties. In particular, the GOC is of the opinion that there is a serious problem concerning the sufficiency of the evidence presented by the applicant about the alleged subsidy programs in this case.

The applicant has not identified any specific subsidy program but just refer to previous investigations against different products, and even to findings from other countries' authorities. There is no evidence at all concerning the existence of subsidy programs and benefits enjoyed by concerned companies. It is outside the imagination of any reasonable member that the Commission could initiate investigations with such poor-quality applications. Furthermore, the Commission has its own jurisdiction, and must follow Australia's own laws and comply with Australia's WTO obligations independently. Australia is a sovereign nation and WTO Member. The Australian investigating authority cannot simply adopt Canadian legal conclusions - based

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<sup>2</sup> Australian law implements the WTO rules, and must comply with those rules. In this regard the GOC notes recent amendments to the *Customs Act* 1901 relating to the determination of countervailable subsidies in the case of non-cooperation by relevant entities. These appear to do no more than to reflect the existing WTO rules, and do not suggest that irrelevant facts or unreasonable assumptions could be adopted by the Commission in such cases.

on laws and practices which are adverse to Chinese exporters - as if they were facts for the purposes of an Australian investigation.

The GOC acknowledges that the Commission has the responsibility to determine whether subsidies have been received by exporters, and to make findings about them accordingly. In carrying out that responsibility, the Commission is asked to ensure that the requirements of positive evidence are met seriously and strictly.

## **2 State-invested enterprises are not “public bodies”**

The GOC notes the recent recognition by the Australian investigating authorities that the essential element required to establish whether an entity is to be considered as a “public body” for the purposes of Article 1.1(a)(1) of the SCM Agreement is whether it has power, authority and control over third persons. State-invested enterprises (“SIEs”) in China do not have such power, authority or control.

In the Anti-Dumping Review Panel (“the ADRP”) report, *Application for Review of a Decision by the Minister Whether to Publish a Dumping Duty Notice or a Countervailing Duty Notice (Zinc coated (galvanised) steel and aluminium zinc coated steel exported from China and certain other countries)*,<sup>3</sup> the ADRP ruled that State-invested enterprises could not be considered to be “public bodies”. In that case the entities under consideration were those operating in what the Commission broadly referred to as “the iron and steel industry”.

The ADRP report restated and affirmed the relevance of the three criteria enunciated by the WTO Appellate Body<sup>4</sup> as being the relevant tests for the determination of whether an entity can be considered as a “public body”, with the overriding proviso that the evidence said to address those criteria must go to establishing the essential element of lawful authority to regulate the conduct of other parties.

The Minister for Industry, represented by the Parliamentary Secretary for Industry, agreed with the ADRP’s recommendations, with the effect that the countervailing duties on exports of coated steel that relied upon the claim that SIEs were public bodies were withdrawn.

The GOC is pleased to see this endorsement of its consistent argumentation on this point. It is long overdue. The GOC also expresses its concern that the implications of this have not been reflected in the withdrawal of countervailing duties in other cases which also relied on the same mistaken assumptions about SIEs, not only in the iron and steel industry, but more widely.

The GOC would request the Commission to kindly reject the application for investigation against the fabled item of “electricity at less than adequate remuneration”.

## **3 Previous evaluations of electricity utility pricing**

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<sup>3</sup> <http://www.adreviewpanel.gov.au/site/documents/MOFCOM-GOCWEBAPPLICATIONNONCONFIDENTIAL-September.pdf>

<sup>4</sup> *United States - Definitive Anti-Dumping and Countervailing Duties on certain products from China* WT/DS379/AB/R (11 March 2011).

“Program 1” in the Government Questionnaire is referenced as “*electricity provided by government at less than adequate remuneration*”. Apart from the previous analysis concerning public bodies which also argued against the investigation of this program, the GOC would also draw attention to the following comments for the purposes of ensuring the Commission’s informed and objective decision-making.

Electricity markets and those who participate in them operate within detailed regulatory frameworks. The high degree of regulatory oversight is inevitable, because of the significance of energy and energy consumption, the utilisation of public resources in electricity generation, the huge costs of generation and distribution, and environmental and sustainability concerns. All WTO Members arrange for the provision of electricity and electricity services by major utilities that are variously either publicly owned or privatised, to some degree. Many industry participants self-generate their own energy, whether from renewable or non-renewable sources.

Claims by applicants in Australian investigations that electricity costs in China operate as subsidies or are unfair in some way have been raised before. They have not been substantiated. For example:

- (a) In *Termination of an Investigation report - Alleged dumping of sodium tripolyphosphate exported from the People’s Republic of China*<sup>3</sup> the Australian Customs found no evidence that anything other than standard industrial rates were paid for electricity. The GOC especially draws Customs attention to the following statement in that report:

*Customs understands that the Government determines electricity and rail freight prices in China. Each of the exporters visited by Customs claimed that it paid the standard industrial rates for electricity and rail freight... Customs has no evidence to suggest that this is not the case. Customs has also had regard to its findings in the sodium bicarbonate review where, in response to similar suggestions by Australian industry, Customs concluded that there was no evidence that electricity and rail freight rates available in China were sold at other than market conditions or were subsidised.*

- (b) The applicant involved in the investigation which culminated in *Report to the Minister No. 181 – Aluminium Road Wheels Exported From the People’s Republic of China*, claimed that electricity prices in China were lower than they might otherwise be “*due to the GOC’s control of prices*”, and that “*the impact of GOC control on electricity prices*” should be examined. In response to those claims, Australian Customs reported as follows:

*Customs and Border Protection verified electricity costs for all co-operating exporters and did not find any evidence that the price of electricity during the investigation period reflected anything other than competitive market prices.*

*While [the applicant] referred to a statement in Chalco’s Form 20-F for 2007 to the effect that aluminium producers were afforded low electricity rates by the GOC, that document also contains a statement that preferential rates ceased in 2008. [the applicant] also referred to other documents in the public arena that contain discussion about the influence of the GOC on electricity prices in China.*

<sup>3</sup> Report Number 121, 11 May 2007.

*These documents are dated 2009 or earlier and no evidence has been provided to establish these conditions existed during the investigation period.*

#### **4 “Particular market situation”**

The GOC is implacably opposed to the persistent misuse of the concepts of “particular market situation” and “competitive market costs” by the Australian side against Chinese exporters in normal value calculation.

The GOC maintains that this policy development and the manner of its implementation are in breach of Australia’s obligations towards other WTO members under the relevant WTO Agreements, and directly contradict Australia’s recognition of China’s full market economy status. These positions maintained by the GOC were echoed by other WTO members, such as EU and Italy, in the recent investigation into imports of prepared or preserved tomatoes exported from Italy.

In spite of the above positions, the GOC has still insistently answered the Commission’s questionnaire concerning “particular market situation” in previous cases, such as those against hot rolled plate steel, galvanised steel, aluminium zinc coated Steel, hollow structural sections, aluminium extrusions, and aluminium road wheels etc., with the aim to assist the Commission to understand the operation and characteristics of China’s economic system, so that it could make correct conclusions in its investigations. These practices have projected fully GOC’s cooperation and good will.

From now on, the GOC would not continue to answer questions concerning unprincipled allegations of “particular market situations”. Neither would the GOC continue to analyse the compliance of the Commission’s practice to WTO rules and Australia’s WTO obligations. All efforts that could be made by the GOC have already been made, and the Commission has been fully aware of GOC’s efforts. Further provision of information from the GOC or exchange of ideas between the GOC and the Commission in this regard will just be simple reiteration.

Now it’s the turn of the Australian side to make a determination whether to honour its international commitments, exhibit its good faith and take a mutual-respect position towards the Chinese side. It’s completely up to the Commission’s honest and lawful behaviour to decide whether to persist with an unjustified particular market situation practice in this case. The GOC would remind the Commission to kindly take WTO rules, Australia’s international obligations and China-Australia bilateral economic relationship into consideration.

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The GOC intends to continue following this matter closely in order to ensure that Chinese exporters are fairly treated and that our WTO rights are fully respected.

The GOC considers these comments to be non-confidential and would permit them to be placed on the public record of the investigation when the Commission thinks necessary to do so.