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30 March 2015

The Director
Operations 2
Anti-Dumping Commission
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Australian Capital Territory 2601

By email

Dear Director

Alleged dumping and subsidisation of silicon metal from China
Submission of the Government of China concerning SEF 237

A Introductory comments

We refer to the Statement of Essential Facts No. 237 and Preliminary Affirmative Determination No. 237 (collectively, "SEF 237") in relation to the alleged dumping and subsidisation of silicon metal exported from the People's Republic of China published by the Anti-Dumping Commission ("the Commission") on 23 February 2015.

This submission is lodged on behalf of the Government of China ("the GOC") in response to SEF 237. It deals with the topics set out below:

ABN 56 231 964 609

SEF 237 was the first official pronouncement by the Commission of its intended findings since initiation of this investigation over 417 days ago. In that context it seems to be both unreasonable and unfair to only allow interested parties, such as the GOC, a period of 20 days to comment. The GOC does not see this as being sufficient time to allow it to defend its interests in this matter.

Article 6.9 of the WTO Anti-Dumping Agreement[1] ("the AD Agreement") provides as follows:

> *The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests.*

The GOC notes the suggestion in SEF 237 that it was the fact that *"[t]he GOC did not provide a response to any of the questions related to the assessment of market situation"* that was the circumstance or a circumstance that led the Commission to *"rel[y] on evidence relied on by the CBSA in its inquiry, evidence provided by Simcoa in support of its claims and evidence gathered independently by the Commission"*.[2]

It is not the obligation of the GOC to respond to questions put to it by the Commission. If an interested party does not provide information that the Commission feels is necessary, then the AD Agreement provides that determinations, affirmative or negative, may be made on the basis of *"facts available"*. It is to be noted that it must be the facts that are available to the Commission that are to be used. This requires a proper assessment of what is or is not a relevant "fact", and for the findings subsequently made to be based on those facts.

The GOC adverted to this in its letter dated 21 April 2014:

> *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.*
>
> *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*

[1] *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*.

[2] As mentioned in D below, the GOC does not think that evidence was *"gathered independently by the Commission"*.

> *the Commission's own understanding and research as well in making your own decisions or in formulating any recommendations to your Minister.* [footnote omitted]

In *Mexico - Anti-Dumping Measures on Rice*, the WTO Appellate Body stated:

> *[T]he agency's discretion is not unlimited. First, the facts to be employed are expected to be the 'best information available'… . Secondly, when culling necessary information from secondary sources, the agency should ascertain for itself the reliability and accuracy of such information by checking it, where practicable, against information contained in other independent sources at its disposal, including material submitted by interested parties. Such an active approach is compelled by the obligation to treat data obtained from secondary sources 'with special circumspection.*[3]

As we point out below, in particular in D below, the GOC is of the view that the Commission has not complied - in making SEF 237 - with the important duties entrusted to investigating authorities when resort is had to "facts available".

B Previous findings concerning the silicon metal market in China

Very brief reference is made in SEF 237 to a previous (November 2004) Trade Measures Report concerning the alleged dumping of the same goods as those under consideration in this investigation, there referred to as "certain silicon". It is simply stated in SEF 237 that the Minister for Justice and Customs at the time *"accepted the ACBPS recommendations"*. SEF 237 does not mention what those recommendations were, in relation to the critical aspects of interest in relation to the dumping that was alleged at that time.

We think that the findings of that report deserve closer attention in that regard. The full passage proceeds as follows:

> *6.3 NORMAL VALUE*
>
> *Under the legislative provisions dealing with normal value assessment for exporters in countries that have economies in transition, a country has an economy in transition at a time if:*
>
> *(a) before the time, the Government of the country had a monopoly, or a substantial monopoly, of the trade of that country and determined, or substantially influenced, the domestic price of goods in that country; and*
>
> *(b) at the time, that Government does not:*
>
> *(i) have a monopoly, or a substantial monopoly, of the trade of that country; or*
>
> *(ii) determine, or substantially influence, the domestic price of goods in that country.*
>
> *On the basis of this definition, Customs is satisfied, for the purposes of this investigation, that the economy in transition provisions apply.*

[3] WT/DS295/AB/R (29 November 2005).

Normal values for exporters in countries that have an economy in transition are determined under s. 269TAC(5D) if market conditions do not prevail in that country in respect of the domestic selling price of like goods. Normal values are also determined under that provision if the exporters do not respond or do not adequately respond to the supplementary section of the exporters' questionnaire about whether the provisions of s. 269TAC(5D)(a) and (b) apply. Regulation 183 identifies the matters to which the Minister must have regard in determining whether these provisions apply.

In its assessment of whether market conditions do not prevail in respect of domestic selling prices of silicon in China, Customs had regard to all of the elements of Regulation 183.

In considering all of the elements of Regulation 183, Customs examined information provided by Simcoa, Datong, Dandong and the Chinese Ministry of Commerce.

Customs noted:

- *a silicon producer was state owned, but was controlled and managed as if it was a private company; and*
- *a silicon producer purchases its main utility (electricity) at a slightly lower rate than the prevailing industrial rate.*

However, Customs also found that:

- *producers of silicon made decisions about prices, costs, inputs, sales and investments in response to market signals and without significant interference by a government;*
- *significant production inputs for silicon are supplied at prices that substantially reflect conditions found in a market economy;*
- *the presence in the silicon market of an enterprise owned by a government did not prevent market conditions prevailing in that market;*
- *producers of silicon kept accounting records in accordance with the generally accepted accounting standards in China; and*
- *generally accepted accounting standards in China are substantially in line with International Accounting Standards.*

In an overall assessment of the elements of Regulation 183, Customs considers that there is no basis for concluding that market conditions do not prevail in China in respect of domestic sales of silicon.

In responding to the SEF, Simcoa did not agree with Customs findings in this respect, but presented no arguments that have not previously been addressed by Customs.

Simcoa also claimed that it is irrelevant to compare the price paid for electricity in China with the price paid by Simcoa. Customs disagrees because this is a valid means to assess whether significant production inputs are supplied at prices that do not substantially reflect conditions found in a market economy.

> *Customs notes that no one element of Regulation 183 is, of itself, determinative in assessing whether market conditions do not prevail, and that the comparison of electricity prices in Australia and China was only one issue examined for that purpose.*
>
> *Customs remains satisfied with its assessment of market conditions for silicon.*[4] [underlining supplied]

From the above, we note that ten years ago the Australian investigating authority found that market conditions prevailed in the Chinese market for silicon, and that despite the acknowledgement that *"a silicon producer purchase[d] its main utility (electricity) at a slightly lower rate than the prevailing industrial rate"* this did not justify a finding that market conditions did not prevail in China in relation to silicon metal. Slightly differential electricity pricing again applies in this case, yet on this occasion it is said by the Commission not to reasonably reflect competitive market costs.

The GOC also notes the comparison of electricity costs between China and Australia that was undertaken by the investigating authority at that time, and the defence of such a comparison as an indicator that inputs are supplied at prices that do not substantially reflect market conditions. There is no record in the SEF 237 of that same comparison being adopted in this case.

The GOC finds it to be inconceivable that the market conditions that were found to apply to the production and sale of silicon metal by the Commission's predecessor agency ten years ago can now be found not to apply. The development and liberalisation of China's markets has continued apace over the ensuing period. Market conditions are even more liberalised today than they were then.

C "Market situation" finding – incorrect legal test

The GOC reiterates its long-stated and consistent objection to the application of the "particular market situation" wording of Article 2.2 of the AD Agreement against its exporters based on nothing other than the GOC's governance of its environment and its policies and aspirations for its industrial development.

The Commission's "market situation" conclusion in SEF 237 is expressed as follows:

> *The Commission considers that the GOC has had substantial influence on the silicon metal market in China, and the evidence for this finding is set out in Non-confidential Appendix 1. The imposition of export taxes (although it is acknowledged this was removed at the end of the investigation period), no VAT refund for exports and export quotas would have served to depress and/or suppress already low domestic prices, which were brought about by over-supply. The provision of preferential rates for electricity, which represents around 50% of the cost to make silicon metal, offered further advantage to domestic producers to enable domestic prices to remain low.*

An analysis of the *"evidence for this finding"* – which the GOC maintains is not evidence sufficient for that finding at all – is contained in D below.

Article 2.2 of the AD Agreement provides as follows, in part:

> *When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit*

[4] http://www.adcommission.gov.au/notices-reports/final/documents/REP84.pdf, at pages 17-19.

> *a proper comparison, the margin of dumping shall be determined…* [footnote omitted] [underlining supplied]

The focus of Article 2.2's reference to a particular market situation in the exporting country is the comparison between the normal value in the market of the exporting country and the export price in the foreign market. The GOC maintains that there can be no comparatively different effect such as would cause there to be a comparative difference between a normal value and an export price if the factor does not affect the comparison.

A Chinese producer of silicon metal can choose to sell its silicon metal on the domestic market for the price available, or on the export market for the price available. The same costs apply to the Chinese producer's resources and materials whether the product is destined to be sold domestically or sold for export.

There is no analysis in SEF 237 of the silicon metal market conditions that would serve to differentiate the conditions applicable to the producer's decision to sell domestically or for export. Certainly there are different market conditions in domestic and export markets, but that is not the point. These differences are fundamental to comparative advantage and to trade taking place across country borders. If a seller can make a sale into either a domestic market or into an export market, it will decide which market to sell into on a commercial basis. It will become subject to the competitive conditions in the market in which it chooses to compete, and will seek profitability under those conditions.

The fact that a domestic market price might be lower than an export price is a reason to export. It is not, of itself, a reason for an investigating authority in a dumping investigation to choose to ignore the prices or costs that are relevant to the domestic sales, and to inflate those prices or costs and thereby secure a higher normal value for comparison with the export price.

That would be a perverse outcome, especially in the situation – as applies under the AD Agreement – of reliance on costs of production to work out the normal value for the goods concerned should there be a particular market situation.

Furthermore, if an export price is higher than a domestic sale price, but the domestic sales prices do not recover the production and selling costs of those sales, then the normal value will be those higher production and selling costs. Thus, the AD Agreement delivers its own corrective mechanism where the situation in a domestic market is such that the prices for the product are too low. Therefore, the concern expressed by the Commission – that *"already low domestic prices"* for silicon metal were *"depressed[ed] and/or suppress[ed]"* because of "*over-supply"* – is addressed by the normal operation of the AD Agreement.

With respect, the GOC maintains that, in the application of its "particular market situation" policy, the Commission:

- disregards Australia's acceptance of China's full market economy status;
- offends against its legislative obligation to treat China even-handedly for anti-dumping purposes, as an equal WTO Member; and
- ignores the dividing line between the AD Agreement on the one hand, and the *Subsidies and Countervailing Measures Agreement* on the other.

D "Market situation" finding – facts are not available

Non-confidential Appendix 1 is said to set out the findings of the Commission in its assessment of a "market situation" in relation to the silicon metal market in China. A major shortcoming of Appendix 1 – quite apart from the concerns expressed by the GOC in C above - is the lack of evidence that goes to the proposition that the GOC had substantial influence on the silicon market in China in the period of investigation.

So far as the GOC is aware, the Commission has relied solely, or almost solely, on a report of the Canadian Border Services Agency[5] based on:

- a different time period, in that the period of investigation of the CBSA investigation was 1 January 2012 to 31 December 2012;
- a different legal test, under a Section of the Canadian *Special Import Measures Act*; and
- discriminatory policies applied by that government against Chinese exporters purportedly under Article 15 of China's Accession Protocol.

The Commission is entitled to rely on secondary information such as the CBSA report if it is the 'best information available". The points above must mean that the CBSA report does not posit "facts available" for the purposes of this investigation. Those facts do not apply to the period of investigation, and are not the best information available. The Commission does not appear to have verified that report with independent information. This runs counter to the Commission's obligation under the AD Agreement to treat secondary sources with "special circumspection".

The CBSA's contention that *"domestic prices* [for silicon metal] *are substantially determined by the GOC"* is patently incorrect. The Commission ought to realise, from its historical case-by-case appreciation of anti-dumping investigations involving Chinese products, that the GOC does not determine or set the prices of anything other than a few very specific products and services.

The GOC wishes to highlight the more egregious shortcomings in what has been presented as "facts available" in Appendix 1:

1 This statement in connection with export taxes:

> *The imposition of export taxes (although it is acknowledged this was removed at the end of the investigation period), no VAT refund for exports and export quotas would have served to depress and/or suppress already low domestic prices, which were brought about by over-supply.*

is incorrect, in that there was no export tax in the investigation period. It was removed with effect from 1 January 2013, which was the start of the investigation period. Therefore it was not a fact impacting on the question of whether there was a market situation in the silicon market in China during the period of investigation, and cannot be relied upon for that purpose. This may be an inconvenient fact for the domestic industry, however it is the case and has been conceded by the Commission in SEF 237.

2 Appendix 1 also indicates that the Commission has chosen to rely on a *"WTO panel report"* to the effect that *"MOFCOM limited coal exports in 2011 and 2012, domestic price of coke*

[5] CBSA Statement of Reasons concerning the making of final determinations with respect to the dumping and subsidizing of certain silicon metal originating in or exported from the People's Republic of China, 4214-39 AD/1400, 4218-37 CVD/136, 5 November 2013.

controlled by GOC, coke subject to export controls, export tax of 40% on coke". We would point out that the years of 2011 and 2012 are of no relevance to an investigation period of 2013. Thus they cannot be facts on which reliance could be placed for the purposes of the Commission's findings. And in this investigation itself, the GOC advised the Commission, in its letter dated 27 May 2014, that there were no export quotas applicable to silicon metal.

3 General policy statements in the 12th Five Year Plan – when it is conceded that there is *"[n]o specific reference to silicon"* appear to have been used as evidence of regulatory interference in the affairs of the silicon metal industry. Appendix 1 seeks to support the suggestion that there is some interference – of a type that could be creative of a so-called market situation – by reference to:

(a) documentation which in every case predates the period of investigation, in some cases by a full three years;

(b) ambiguous and uncertain statements such as:

> *Limiting capacity expansion through land policies – silicon possibly/appears to be a prohibited project* [underlining supplied]

4 In reference to *"[g]overnment restrictions on use and supply of inputs"* Appendix 1 refers to nothing more than environmental measures which any government is entitled and should be entitled to introduce to protect the health and welfare of its people and the sustainability of its industries. If the Commission is propounding the view that governments in any part of the world cannot establish environmental approval processes for major projects which have a propensity to be polluting, and to be major consumers of energy sources, then the GOC rejects that view. In that regard we refer to and incorporate in this submission the following evidence (as was presented in the GOC's response to the Government Questionnaire in relation to the review of the measures applicable to aluminium road wheels) on the practice of governments in Australia when faced with similar project approval requests:

> *The GOC notes that major project approval processes are inevitably and commonly required for resource extraction, processing and industrial investment proposals in Australia. For example, the GOC refers to the following examples.*
>
> *1 Abbot Point coal terminal expansion:*[6]
>
> *The Federal Government has approved the creation of one of the world's largest coal ports near the Great Barrier Reef World Heritage Area, sparking outrage from conservationists and the Greens. Late yesterday, Environment Minister Greg Hunt gave the go-ahead to the Abbot Point coal terminal expansion at Bowen in north Queensland.*
>
> *…*
>
> *He says he has also advised the Queensland Government of new plans designed to protect the long-term future of the Great Barrier Reef.*
>
> *Millions of cubic metres of spoil must be dredged and dumped near the reef for the coal port to be constructed.*

[6] http://www.abc.net.au/news/2013-12-10/north-qld-coal-port-expansion-approved-with-strict-conditions/5147916 (11 December 2013)

Mr Hunt says he is imposing strict environmental conditions on the project.

…

"For Abbot Point, perhaps the most important condition is that any dredging would be limited to 1.3 million cubic metres of sediment a year."

"That is down from a 38 million cubic metre proposal under the previous government, so a radical decrease in what was going to be the case."

2 Carmichael coal mine:[7]

Adani's massive $16.5 billion Carmichael coal mine and rail project, north west of Clermont in Queensland's Galilee Basin, has just received the green light to begin construction after receiving Commonwealth approval from the federal Environment Minister, Greg Hunt today.

…

On making the announcement the Minister said the approval was subject to 36 strict conditions.

"The absolute strictest of conditions have been imposed to ensure the protection of the environment, with a specific focus on the protection of groundwater," the Minister said.

"These 36 conditions complement the conditions imposed by the Queensland Government, and will ensure the proponent meets the highest environmental standards and that all impacts, including cumulative impacts, are avoided, mitigated or offset."

3 BHP pilot ore processing plant at Olympic Dam[8]

BHP Billiton is taking a significant step towards a viable plan to expand the Olympic Dam mine in South Australia's Far North.

Buoyed by successful laboratory trials in Adelaide of a cost-effective way of processing the mine's complex ore body, BHP has applied to the Federal and State Governments to build a pilot processing plant at the Olympic Dam site.

This would be the next step in its assessment of the heap-leach processing of the lucrative ore which contains copper, uranium, gold and silver.

…

In an application to the Federal Government, BHP seeks approval for the pilot plant under environmental laws.

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7 http://www.miningreview.com.au/news/massive-carmichael-coal-mine-queensland-gets-federal-approval/ (28 July 2014)

8 http://www.adelaidenow.com.au/business/bhp-billiton-applies-for-approvals-to-build-pilot-plant-for-ore-processing-at-olympic-dam-in-south-australia/story-fni6uma6-1227004283184?nk=a5d47251de75309e35d7d3ee0797a55e (28 July 2014)

It says the environmental impact would be "very low to negligible" and wants federal clearance to proceed with conditions but without a major new assessment process.

4 Uranium mining in Western Australia:[9]

The Federal Government approval of Toro Energy's Wiluna Uranium Project, 30kms south of Wiluna in the Mid West region of the state has restarted some discussion on issues of public concern surrounding the industry.

…

Mining of any resource in Australia is governed by extremely rigorous environmental assessment and approval processes. Western Australia's uranium industry is no different. Before a company can explore or mine for uranium, it must demonstrate to state and federal agencies that it will manage the environment to the highest standard. Uranium mine operators in WA require a minimum of 12 state approvals and three national government approvals before mining can proceed.

…

A final commitment to develop this $269m project is expected to be made before the end of 2013 subject to uranium market conditions.

5 Browns Range hydrometallurgical processing plant:[10]

Northern Minerals has been conducting a series of continuous pilot scale testing of the Project's hydrometallurgical processing plant at ANSTO in New South Wales (NSW). The third and final five-day continuous pilot plant run was completed last month and achieved the best recovery results of the test work to date.

…

WA's Environmental Protection Authority (EPA) has advised that it considers that the Project can be managed to meet the EPA's environmental objectives subject to the EPA's recommended conditions being adopted. The EPA's report to the WA Minister for Environment (Minister) is currently open for a two week appeal period which closes on 1 September 2014. Following this appeal period the Minister will make the final decision.

Northern Minerals has also commenced preliminary planning and drafting work on the secondary approvals required for the proposed mining operation. These approvals will be considered by the relevant decision making authority following the Minister's determination, and will include:

- *Mining Proposal and Project Management Plan from the WA Department of Mines and Petroleum.*
- *Works Approval and Licences from the WA Department of Environment Regulation.*

[9] https://www.cmewa.com/policy-and-publications/annual-reports-special-publications/preview?path=Uranium%2BMining%2Bin%2BWestern%2BAustralia.pdf (April 2013)

[10] http://northernminerals.com.au/wp-content/uploads/2014/03/1408-26-More-Success-for-Browns-Range-Project.pdf (26 August 2014)

- *Licences to construct bores and take water from the WA Department of Water.* [11]

The GOC believes that the concerns that are validly expressed by the various Australian Governments in relation to the abovementioned projects are indistinguishable from those of the GOC in relation to China's extraction and processing industries. The implication inherent in the Commission's acceptance of GOC policies as being creative of a "market situation" is that governments have no role to play in – and should stay out of – environmental regulation, and that to do otherwise is either a prohibited action in international trade terms or at least an action that can have negative consequences for its exporters. The GOC does not accept this to be the case.

5 Lastly, the Commission relies on statements made at a 2010 silicon industry conference which are not illustrative of laws or regulations that would constitute market interferences in themselves, and which cannot be considered to be evidence of a market situation a full three years later. For example, how can an interest expressed by a meeting of industry representatives, attended by a government official, in setting up *"a unified standard for silicon products and production equipment"* be indicative of an unacceptable market situation in the Chinese silicon metal market? Stating the proposition is enough to demonstrate its ridiculous nature.

With respect, Appendix 1 – contrary to its heading - is not an *"assessment of market situation"* for the purposes of this investigation. It is a collection of observations and opinions about the development of the Chinese silicon metal industry and related industries that, ultimately, are all outdated and are all irrelevant for the stated purpose. That purpose is to determine whether, for AD Agreement purposes:

> *…because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison…*

or, whether for Australian legal purposes:

> *the situation in the market of the country of export is such that sales in that market are not suitable for use in determining a price under [Section 269TAC(1)]*

Specifically, the GOC's criticism of Appendix 1 is expressed in these contexts:

- the context of the correct legal test, in that the observations and opinions in Appendix 1 do not go to the proposition that domestic sales *do not permit a proper comparison* with export sales;

- the context of the adequacy of those observations and opinions for the purposes of being considered as "facts available" at all – because they are not demonstrably "facts";

- the context of the temporal relevance of those observations and opinions for the purposes of being considered as "facts available" that impact on the period of investigation – because they do not relate to that period; and

- the context of the substantive relevance of those observations and opinions for the purposes of being considered as "facts available" that could be creative of a market situation – because they only relate to environmental regulation and industry aspirations.

[11] See ADC 263, Aluminium Road Wheels Government Questionnaire, Part C2.3 (c), pages 40-43, http://www.adcommission.gov.au/cases/documents/021-Questionnaire-ForeignGovernment-GovernementofChina.pdf

Moreover, the GOC notes that the Commission's claim that it gathered evidence independently for the purposes of its finding is not borne out by the material set out in Appendix 1. Despite the 382 day period of the investigation so far, there is no independently gathered evidence referred to in SEF 237.

For all of these reasons, the GOC requests the Commission to recognise that there is no credible basis for any finding that a "market situation" exists in the Chinese silicon metal market such as would render sales in the Chinese domestic market in the period of investigation as not permitting a proper comparison with prices of the same product when exported to Australia.

E "Competitive market costs" – incorrect implementation of AD Agreement

The Commission has preliminarily determined:

> *…that electricity costs have been affected by preferential rates provided by SIE electricity providers for industries in the silicon manufacture sector, and hence do not reasonably reflect competitive market costs, and should be replaced by a competitive market substitute.*

Accordingly, the Commission has preliminarily determined that it is not required to use the financial records of the exporters to work out the costs of the exported goods, and instead has substituted a higher electricity cost into the calculation of the relevant normal values for those exporters.

The GOC objects to this finding on a number of grounds.

The first of these is that the relevant Regulation under which this has been effected is an incorrect implementation of the AD Agreement. Regulation 180(2) of the Customs Regulations provides as follows:

> *If:*
>
> *(a) an exporter or producer of like goods keeps records relating to the like goods; and*
>
> *(b) the records:*
>
> *(i) are in accordance with generally accepted accounting principles in the country of export; and*
>
> *(ii) <u>reasonably reflect competitive market costs associated with the production</u> or manufacture of like goods;*
>
> *the Minister must work out the amount by using the information set out in the records.* [underlining supplied]

It must be assumed that Regulation 180(2)(b)(ii) intends to implement Article 2.2.1.1 of the AD Agreement. That provision of the AD Agreement, says in relevant part:

> *For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country <u>and reasonably reflect the costs associated with the production and sale</u> of the product under consideration.* [underlining supplied]

There is a very significant difference between the meanings conveyed by Article 2.2.1.1 and Regulation 180(2)(b)(ii). The underlining highlights that difference. The GOC maintains that if an

exporter's records exactly reflect its costs then they cannot reflect those costs in a way which is anything other than reasonable. They are the costs associated with the exporter's production of the goods concerned. The wording *"reasonably reflect competitive market costs"* as has been superadded into Regulation 180(2) introduce a layer of inquiry which is not called-for and is not relevant to the determination of an exporter's costs under Article 2.2.1.1 of the AD Agreement.

The GOC has made its position in this regard abundantly clear in its submissions in numerous previous investigations conducted by the Australian investigating authorities, and now does so again.

F "Competitive market costs" – no evidence of uncompetitive costs

The simple fact that there is a differential cost does not mean that the lower cost is not reasonably reflective of competitive market costs. In SEF 237 the slight difference in electricity rates between the *"other large industry"* rate and the silicon metal industry rates has led to an *ipso facto* finding that the rates applicable to that category of industry that comprises silicon metal production are not competitive rates. There is no analysis or support for this proposition.

Indeed, it is clearly apparent that the Australian metals industry – of which the Australian applicant forms part - receives lower rates for its electricity usage than other industrial users.

In Western Australia, for example, customers that use more than 50MWh of electricity per annum are referred to as "contestable customers". Such customers seek supply competitively from different electricity providers. By reason of the competition for their bulk business, these customers are ultimately supplied electricity at lower prices than the otherwise specified government rate.

Synergy is an electricity retailer in the south-west interconnected system ("SWIS") of Western Australia, the area in which the applicant's manufacturing facility is located. From Synergy's website, we find maximum per unit KWh rates for *"Large Business Demand LV (S1)"* which are 39% less than the same rates for *"Synergy Business Plan (L1)"*. The L1 rate is said to be for *"schools, churches, shops, factories, office blocks, hotels, sporting complexes"* and others of that use intensity.[12]

The rates are as follows:[13]

Large Business Demand LV (S1)

Tariff Charges	11/07/2012	25/07/2013	27/03/2015
Minimum charge: $ per day	448.8706	448.8706	476.327
Demand charge: cents per day/kW max demand	114.0153	114.0153	120.9893
Power factor charge: cents per day	46.2044	46.2044	46.2044
Electricity Charges - cents per unit			
On Peak	18.6031	18.6815	17.3111
Off Peak	12.6106	12.6891	10.952

Source: Synergy Website as of the dates mentioned above

[12] This is a comparison of the cells marked in light brown shading. A comparison using the "off-peak" rate for "Large Business Demand LV (S1) is even more pronounced, with the large business rate being 61% lower.

[13] http://www.synergy.net.au/for_business/large_business/list_of_tariffs_meu.xhtml

Synergy Business Plan (L1)

Tariff Charges	11/07/2012	25/07/2013	27/03/2015
Supply charge: cents per day	39.4251	41.0021	42.8472
Electricity Charges - cents per unit			
First 1,650 units per day	28.1662	29.316	28.1603
More than 1,650 units per day	25.6357	26.6844	25.4102

Source: Synergy Website as of the dates mentioned above

The SEF states that a factor in the Commission's "market situation" conclusion was:

> *The provision of preferential rates for electricity, which represents around 50% of the cost to make silicon metal, [and which] offered further advantage to domestic producers to enable domestic prices to remain low.*[14]

Equally, regarding the *"competitive market cost"* assessment, the Commission states:

> *…the Commission's preliminary view is that electricity costs have been affected by preferential rates provided by SIE electricity providers for industries in the silicon manufacture sector, and hence do not reasonably reflect competitive market costs, and should be replaced by a competitive market substitute.*[15]

The Commission relied on the following observations for its finding that the rates for silicon metal producers were preferential:

- *Tariff rate for ferroalloy producers in Guizhou province around 2% lower than rate for other 'Large industry', which itself is around 29% lower than rate for 'Non-industrial and general industrial'*
- *Tariff rate for crystalline silicon production in Fujian province (in wet season) around 9% lower than rate for other 'Large industry', which itself is around 24% lower than rate for 'Non-industrial and general industrial'*[16]

The 39% difference between the rates offered by Synergy to *"large business demand users"* as compared to *"schools, churches, shops, factories, office blocks, hotels, sporting complexes"* is actually wider than the pricing differences that the Commission has identified in SEF 237 for Guizhou (31%) and Fujian (33%).

The GOC does not expect the Commission to be of the view that a "market situation" exists in the Australian market for silicon metal by reason of electricity being made available to Australia's only silicon metal producer at lower rates than are available to industry more generally. Nor does it expect the Commission to find that a "preferential" electricity rate charged in Australia to manufacturers like the applicant does not reasonably reflect competitive market costs. So why is it that the Commission has made directly contradictory findings in respect of the electricity rates paid by Chinese silicon metal manufacturers?

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14 SEF 237, page 24.
15 *Ibid*, page 26.
16 *Ibid*, page 53.

G "Competitive market costs" – maintaining separation from SCM Agreement

In its assessment of whether the electricity costs incurred by silicon metal producers *"reasonably reflect[ed] competitive market costs"*, the Commission records the following:

> *As part of its subsidy investigation (refer Non-confidential Appendix 2) the Commission determined that SIE electricity providers were public bodies as there is evidence of the exercise of meaningful control by the government in the provision of electricity and the regulation of prices. The regulation of prices includes the ability to set different tariff rates for different types of consumers.*

Article 32.1 of the SCM Agreement provides as follows:

> *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.*

Alleged subsidies are to be dealt with under the SCM Agreement and not the AD Agreement. The two Agreements have different rationales and address different situations. Whether a government in China has conferred a benefit on silicon metal producers in the provision of electricity, for the purposes of the SCM Agreement, is a matter that is to be dealt with under that Agreement, and not under the AD Agreement.

H Alleged subsidy – provision of electricity (Program 1)

Lastly, the GOC notes that in SEF 237 the Commission comes to the conclusion that a subsidy existed by reason of a financial contribution to silicon metal producers by public bodies in the form of the provision of electricity in a manner which conferred a benefit on them.

At this time the GOC makes no comment on the interpretation that the Commission now wishes to place on the expression *"public bodies"*. Instead, the GOC submits the following:

1 There does not seem to be much point in forming a view as to what "public bodies" might be in any given case when there is no set of facts to which that view can then be applied. SEF 237 does not describe the kinds of entities that the Commission has labelled as "public bodies", except to state that they were State-invested enterprises.

2 The fact that electricity generation and delivery in China takes place pursuant to policies and regulations of the GOC is insufficient to support the proposition that the entities that take part in that system are therefore public bodies.

3 Australia itself regulates its electricity system through the Australian Energy Regulator and price controls that are approved and enforced by various State governments. Electricity is a critical resource for the proper functioning of the economy and the communities that exist in that economy, thus one would always expect it to be a heavily regulated area so that the welfare and the commerce of any given country are safeguarded.

I Concluding remarks

The GOC believes that it adequately explained its lower level of participation in this investigation than in certain other investigations. The GOC cannot be expected to provide all the information that the Australian investigating authority - and every other investigating authority – requires, in every

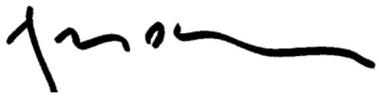
investigation which may arise. These matters are also able to be handled by the companies themselves, who are the primary parties in such investigations.

Ultimately, whether the GOC does or does not participate in the manner considered to be ideal by an investigating authority does not detract from the obligation of the authority to arrive at properly considered and justified findings based on proper evidence. Information that can accurately be described as “facts” that are available, and which support the legal propositions that must be established in order to impose either anti-dumping or countervailing measures on imported goods, must be identified and their effects and relevance to the legal tests need to be explained.

In this case the GOC submits that the findings and conclusions of SEF 237 fall short of those required evidentiary and decision-making standards.

The GOC requests the Commission to recognise that it does not have the evidence or the legal underpinning to impose measures on Chinese exporters of silicon metal using any or all of the mechanisms of a “market situation”, of “competitive market costs”, or of the provision of electricity by “public bodies” at “less than adequate remuneration”.

Yours sincerely



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