C-602-811
Investigation
Public Document
E&C/VIII/KJ/JA

February 27, 2018

MEMORANDUM TO: Christian Marsh
Deputy Assistant Secretary
for Enforcement and Compliance

FROM: James Maeder
Associate Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations
performing the duties of Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Silicon Metal from Australia: Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation

I. SUMMARY

The Department of Commerce (Commerce) determines that countervailable subsidies are being provided to a producer/exporter of silicon metal from Australia, as provided in section 705 of the Tariff Act of 1930, as amended (the Act). Below is the complete list of issues in this investigation for which we received comments from interested parties.

Issues

Comment 1: Provision of Electricity for Less Than Adequate Remuneration (LTAR)
Comment 2: Payments under the Demand Side Management (DSM) Scheme and Ancillary Service (Spinning Reserve) Scheme
Comment 3: Renewable Energy Target (RET) Program
Comment 4: Research and Development (R&D) Tax Incentive
Comment 5: Provision of Quartz for LTAR
Comment 6: State Agreement Loan and Grant
Comment 7: Calculation Errors in the Preliminary Determination

II. BACKGROUND

A. Case History

On August 14, 2017, Commerce published its *Preliminary Determination*.[1] The selected mandatory respondent in this investigation is Simcoa Operations Pty. Ltd. (Simcoa). In the *Preliminary Determination,* in accordance with section 705(a)(1) of the Act and 19 CFR 351.210(b)(4), we aligned the final countervailing duty determination with the final antidumping duty determination. Between September 20, 2017, and September 29, 2017, we conducted verification of the Government of Australia's (GOA) and Simcoa's questionnaire responses and released the verification reports in November 2017.[2]

On December 27, 2017, Commerce issued a Post-Preliminary Determination.[3] Interested parties timely submitted case briefs concerning case-specific issues on January 11, 2018.[4] The parties submitted rebuttal briefs on January 18, 2018.[5] Commerce held a public hearing limited to issues raised in the case and rebuttal briefs on February 9, 2018.

Commerce has exercised its discretion to toll all deadlines affected by the closure of the Federal Government from January 20 through 22, 2018. The revised deadline for the final determination of this investigation is February 27, 2018.[6]

For a summary of the product coverage comments and rebuttal responses submitted to the records of all concurrent silicon metal investigations, and accompanying discussion and analysis of all comments timely received, *see* the Final Scope Decision Memorandum, which is incorporated in and hereby adopted by this final determination.[7]

---

[1] *See Silicon Metal from Australia: Preliminary Affirmative Countervailing Duty Determination and Alignment of Final Determination with Final Antidumping Duty Determination,* 82 FR 37843 (August 14, 2017) (*Preliminary Determination*), and accompanying Preliminary Decision Memorandum (PDM).

[2] *See* Memorandum to the File, "Verification of the Questionnaire Responses of Simcoa Operations Pty. Ltd.," dated November 8, 2017 (Simcoa Verification Report); and Memorandum to the File, "Verification of the Questionnaire Responses of the Government of Australia," dated November 15, 2017 (GOA Verification Report).

[3] *See* Memorandum, "Decision Memorandum for the Post-Preliminary Analysis in the Countervailing Duty Investigation of Silicon Metal from Australia," dated December 27, 2017 (Post-Preliminary Determination).

[4] *See* letters from the GOA, "Government of Australia Case Brief" (GOA Case Brief), petitioner, "Silicon Metal from Australia; Countervailing Duty Investigation; Case Brief of Globe Specialty Metals, Inc." (Petitioner Case Brief), and Simcoa, "Silicon Metal from Australia: Case Brief of Simcoa" (Simcoa Case Brief), dated January 11, 2018.

[5] *See* letters from the GOA, "Government of Australia Rebuttal Brief (GOA Rebuttal Brief), petitioner, "Silicon Metal from Australia; Countervailing Duty Investigation; Rebuttal Brief of Globe Specialty Metals, Inc." (Petitioner Rebuttal Brief), and Simcoa, "Silicon Metal from Australia: Rebuttal Brief of Simcoa" (Simcoa Rebuttal Brief), dated January 18, 2018.

[6] *See* Memorandum for The Record from Christian Marsh, Deputy Assistant Secretary for Enforcement and Compliance, performing the non-exclusive functions and duties of the Assistant Secretary for Enforcement and Compliance, "Deadlines Affected by the Shutdown of the Federal Government" (Tolling Memorandum), dated January 23, 2018. All deadlines in this segment of the proceeding have been extended by 3 days.

[7] *See* Memorandum, "Silicon Metal from Australia, Brazil, Kazakhstan, and Norway: Final Scope Comments Decision Memorandum," dated February 27, 2018 (Final Scope Decision Memorandum).

B. Period of Investigation

The period of investigation (POI) is January 1, 2016, through December 31, 2016.

III. SUBSIDIES VALUATION

A. Allocation Period

Commerce made no changes to the allocation period, 14 years, or the allocation methodology used in the *Preliminary Determination*.[8]

B. Attribution of Subsidies

Commerce made no changes to the methodologies used in the *Preliminary Determination* for attributing subsidies.[9]

C. Denominators

During verification, Simcoa reported minor adjustments to its POI total sales of subject merchandise.[10] For the final determination, Commerce used these revised figures to calculate the countervailable subsidy rates for Simcoa.[11]

D. Loan Interest Rate Benchmarks and Discount Rates

Commerce made no changes to the loan interest rate benchmarks and discount rates used in the *Preliminary Determination.*[12]

IV. ANALYSIS OF PROGRAMS

A. Programs Determined to Be Countervailable

We made no changes to our *Preliminary Determination* with respect to the methodology used to calculate the subsidy rates for the following programs, except where noted below, and for the incorporation of revised denominators for Simcoa, where appropriate.[13] For descriptions, analyses, and calculation methodologies for these programs, see the *Preliminary Determination.* Except where noted below, no issues were raised regarding these programs in the parties' case briefs. The final program rates are as follows:

[8] *See Preliminary Determination*, and accompanying PDM at 4.
[9] *Id.* at 4-5; *see also* Comment 7, "Calculation Errors in the Preliminary Determination," below.
[10] *See* Simcoa Verification Report at 2.
[11] *See* Memorandum to the File, "Final Determination Calculations for Simcoa Operations Pty Ltd.," dated concurrently with this memorandum (Simcoa Final Calculation Memo).
[12] *See Preliminary Determination*, and accompanying PDM at 5.
[13] *See* Section III.C., above.

1. *Payments under the Demand Side Management Scheme*

As discussed in Comment 2, "Payments under the Demand Side Management (DSM) Scheme and Ancillary Service (Spinning Reserve) Scheme," Commerce made changes to its *Preliminary Determination* with regard to this program. The final subsidy rate for this program is 3.36 percent *ad valorem*.[14]

2. *Payments under the Ancillary Service (Spinning Reserve) Scheme*

As discussed in Comment 2, "Payments under the Demand Side Management (DSM) Scheme and Ancillary Service (Spinning Reserve) Scheme," Commerce made no changes to its *Preliminary Determination* with regard to this program. The final subsidy rate for this program continues to be 3.94 percent *ad valorem*.

3. *Renewable Energy Target (RET) Program*

As discussed in Comment 3, "Renewable Energy Target (RET) Program," Commerce made no changes to its *Preliminary Determination* with regard to this program. The final subsidy rate for this program continues to be 3.57 percent *ad valorem*.

4. *Research and Development (R&D) Tax Incentive*

As discussed in Comment 4, "Research and Development (R&D) Tax Incentive," Commerce made changes to its *Preliminary Determination* with regard to this program. The final subsidy rate for this program is 3.90 percent *ad valorem*.[15]

5. *State Agreement Loan and Grant*

As discussed in Comment 6, "State Agreement Loan and Grant," Commerce made no changes to its *Preliminary Determination* with regard to this program. The final subsidy rate for this program continues to be 0.01 percent *ad valorem*.

B. Programs Determined Not to Be Countervailable

1. *The Provision of Electricity for Less Than Adequate Remuneration*

As discussed in Comment 1, "Provision of Electricity for Less Than Adequate Remuneration (LTAR)," Commerce determined that there is no benefit provided by the Government of Western Australia (GOWA) to Simcoa under this program during the POI.

[14] *See* Simcoa Final Calculation Memo.
[15] *Id*.

2. *Provision of Quartz for Less Than Adequate Remuneration*

As discussed in Comment 5, "Provision of Quartz for LTAR," Commerce determined that there is no benefit provided by the GOWA to Simcoa under this program during the POI.

C. Program Determined Not to Be Used

Commerce made no changes to its *Preliminary Determination* that the Jobs and Competitiveness Program was not used by Simcoa or its cross-owned affiliates during the POI.[16]

V. ANALYSIS OF COMMENTS

Comment 1: Provision of Electricity for Less Than Adequate Remuneration

GOA's Comments

- In its Post-Preliminary Determination, Commerce incorrectly contends that the provision of electricity by Synergy to Simcoa through its Electricity Supply Agreement (ESA) is made for less than adequate remuneration (LTAR), and that this constitutes a financial contribution by a government or public body that confers a benefit.[17]
- The fact that Commerce acknowledges in the *Preliminary Determination* that the Synergy and Kleenheat ESAs differ regarding contract terms, price categories, time periods, market conditions, and structure of the electricity providers means that the Kleenheat ESA does not provide a meaningful benchmark for determining the prevailing market conditions for the electricity provided to Simcoa under the Synergy ESA.
- Commerce has not demonstrated that Synergy acted outside prevailing market conditions in establishing its ESA with Simcoa. As acknowledged in Commerce's decision memorandum, Synergy is required by law to act in accordance with prudent commercial principles, consistent with maximizing its long-term value. The pricing and contractual terms of its ESAs are determined on a commercial basis, independent of government, in accordance with the *Electricity Corporations Act 2005*.

Simcoa's Comments

- The provision of electricity by Synergy to Simcoa was not specific and was performed on commercial basis and in the ordinary course of business.[18]
- Synergy provided electricity to Simcoa on terms that were not more favorable than those extended to all contestable customers within the South West Interconnected System (SWIS). Contestable customers negotiate and enter into ESAs based on commercial considerations. Synergy sold electricity pursuant to individually negotiated ESAs to thousands of contestable customers and the pricing for all contestable customers, including Simcoa, was derived by analyzing electricity costs for supplying electricity to the particular customer and profit margin.[19]

[16] *Id.* at 16.
[17] *See* GOA Case Brief at 8 (citing Post-Preliminary Determination).
[18] *See* Simcoa Case Brief at 6.
[19] *Id.* at 7-8.

- The ESA negotiations between Simcoa and Synergy mirror the negotiability of the purchase price of sugarcane in *Sugar from Mexico* where although the Government of Mexico may have had a role in influencing the price, because the price was negotiated between the parties – not the Government of Mexico – Commerce concluded that the Government of Mexico could not dictate the negotiated price, and therefore no subsidy was provided.[20] At the same time when Simcoa and Synergy negotiated their ESA, Simcoa also negotiated with another private electricity retailer which had provided more favorable terms, but Simcoa ultimately decided to stay with Synergy because it offered greater stability and security of supply.
- Simcoa's electricity costs are consistent with electricity costs paid by other global silicon metal producers. Simcoa's electricity costs were the third highest out of eight global silicon metal producers, as reported by CRU International Ltd. (CRU), a cost data service provider. This data confirms that Simcoa paid more than adequate remuneration for electricity during the POI.[21]
- The provision of electricity conferred no benefit, and Commerce erroneously used the Kleenheat ESA price as a benchmark because adequacy of remuneration shall be determined in relation to "prevailing market conditions," including "price, quality, availability, marketability, transportations and other conditions of purchase," and the differences in these conditions were acknowledged by Commerce in its Post-Preliminary Determination which shows that the electricity prices in the two ESAs are not comparable.[22]
- Commerce unlawfully compared the Synergy ESA and the benchmark, Kleenheat ESA, which were signed during two non-contemporaneous periods. Substantial changes occurred in the SWIS during this period which impacted the electricity prices paid by Simcoa during the POI, *e.g.*, Wholesale Electricity Market Rules went into effect after the Synergy ESA, but before the Kleenheat ESA was negotiated.[23]
- Commerce failed to take into account a large difference in the amounts of electricity to be supplied pursuant to the two ESAs in its benefit calculations.[24]
- Commerce did not and must take into account certain other differences in contractual terms between the two ESAs.[25]
- Commerce should use as a benchmark the electricity price pursuant to the letter of intent negotiated with the private retailer at the time the Synergy ESA was negotiated.[26]
- Alternatively, Commerce should correct its benefit calculation to exclude Australia's goods and sales tax from the total electricity price paid to Kleenheat during the POI.[27]

Petitioner's Rebuttal

[20] *Id*. at 9-10 (citing *Notice of Affirmative Determination in the Countervailing Duty Investigation of Sugar from Mexico*, 80 FR 57337 (September 23, 2015), and accompanying IDM at Issue 5).
[21] *Id*. at 11.
[22] *Id*. at 8 (citing pursuant to 19 USC § 1677 (5)(e)(iv)).
[23] *Id*. at 12.
[24] *Id*. at 14-15.
[25] *Id*. at 15 (citing 19 CFR 351.511(a)(2)(i) and *Essar Steel Ltd. v. United States*, 678 F.3d. 1268, 1274 (Fed. Cir. 2012)).
[26] *Id.* at 13-14.
[27] *Id.* at 16.

- Commerce should reject the GOA's and Simcoa's arguments that the provision of electricity for LTAR was not specific and did not provide a benefit.
- Commerce's use of the electricity price paid by Simcoa to Kleenheat as a benchmark was appropriate.
- The ESA negotiations between Simcoa and Synergy do not mirror the negotiability of the purchase price of sugarcane in *Sugar from Mexico* because in that case the government-owned entities were the purchasers of the input, and in contrast, in this case the government-owned entity is the seller of the input so that it has the ultimate control over the price at which it sells electricity.[28]
- Estimated electricity prices paid by silicon metal producers in North America are not an appropriate benchmark because these prices do not represent any of the three benchmark tiers in Commerce's hierarchy of benchmarks.[29]
- Simcoa did not provide any evidence that the differences in the Kleenheat and Synergy ESAs actually affected the comparability of the electricity prices, and Commerce should continue using the electricity price in the Kleenheat ESA as a benchmark.[30]
- Commerce should reject Simcoa's proposition to use as a benchmark the electricity price from a privately negotiated offer to Synergy for a contract by a competing supplier because the proposed benchmark does not represent an actual transaction price, as normally used by Commerce.[31]
- Commerce should reject Simcoa's arguments that the provision of electricity by Synergy was not specific because: (1) considering the method according to which government entities established their prices is not an established criterion in Commerce's practice, and (2) GOA repeatedly refused to provide any data on electricity prices Synergy charged other contestable customers so that there is no evidence supporting the claim that Synergy did not treat Simcoa more favorably.[32]

Commerce's Position:

In the Post-Preliminary Determination, we found Synergy to be an "authority" as defined in section 771(5)(B) of the Act. As such, we preliminarily determined that Synergy provided a financial contribution to Simcoa by providing electricity for LTAR during the POI. We found that the provision of electricity at LTAR to Simcoa was *de facto* specific under section 771(5A)(D)(iii)(II) of the Act because Simcoa was the single largest customer when the ESA was negotiated with Western Power and was, therefore, a predominant recipient of the subsidy.[33] With respect to the determination of a benefit, we compared the price Simcoa paid for electricity to Synergy with the price it paid to Kleenheat, a wholly private entity. We thus used a "Tier 1" in-country benchmark under Commerce's adequate remuneration hierarchy pursuant to 19 CFR 351.511. On that basis, we preliminarily found that Simcoa received a benefit from the provision

[28] *See* Petitioner Case Brief at 3.
[29] *Id.* at 4.
[30] *Id.* at 6.
[31] *Id*.
[32] *Id.* at 7.
[33] *See* Memorandum, "Countervailing Duty Investigation of Silicon Metal from Australia: Verification of the Questionnaire Responses of the Government of Australia," dated November 15, 2017, at 11.

of electricity at LTAR of 8.87 per cent *ad valorem*. [34]

Determining the Appropriate Benchmark

Under 19 CFR 351.511(a)(2), Commerce determines whether a good or service is provided for LTAR by comparing, in order of preference: (i) the government price to a market-determined price for actual transactions within the country, such as prices from private parties (a "Tier 1" Benchmark); (ii) the government price to a world market price where it would be reasonable to conclude that such a world market price is available to consumers in the country in question (a "Tier 2" Benchmark); or (iii), if no world market price is available, by assessing whether the government price is consistent with market principles (a "Tier 3" Benchmark).

Although for the Post-Preliminary Determination we relied on a Tier 1 benchmark price to calculate the benefit, *i.e.*, the price Simcoa paid to Kleenheat for electricity, upon further analysis and review of the record evidence and the parties' comments, we agree with Simcoa and the GOA that the price Simcoa paid to Kleenheat is not appropriate as a Tier 1 Benchmark. Record evidence demonstrates that the Kleenheat and Western Power/Synergy ESAs were negotiated and concluded at different times. Record evidence also indicates that, in the time period separating the conclusion of the two ESAs, there were changes in the market conditions governing the sale and supply of electricity in the SWIS, and Western Australia's electricity market; these changes would have affected the conditions of sale for electricity suppliers and the extent to which prices from the differing time periods could be considered comparable for benchmarking purposes under the Act. For example, in December 2006, the Wholesale Electricity Market Rules (WEM) came into force which established the WEM.[35] Furthermore, at the time the contract was negotiated, Western Power had a completely different business structure as compared to Kleenheat, *i.e.*, it was a vertically-integrated electricity provider. Additionally, the electricity market was significantly liberalized and made more competitive during the time that elapsed between the signing of the Western Power/Synergy ESA and the Kleenheat ESA, thus further affecting the market structure and price negotiations occurring between suppliers and contestable customers.[36] Finally, the Kleenheat ESA reflects very different terms and conditions than the ESA Simcoa concluded with Western Power.[37] Accordingly, after further consideration of these record facts, we determine that the price for the supply of electricity negotiated under the Kleenheat ESA is not a suitable Tier 1 benchmark to conduct a benefit analysis. We also determine that there are no other appropriate Tier 1 benchmark prices on the record of this investigation.

Pursuant to 19 CFR 351.511(a)(2)(ii), Commerce will only use a Tier 2 Benchmark based on world market prices where it is reasonable to conclude that the good or service is actually available to the purchaser in the country under investigation. The *CVD Preamble* specifically

[34] *See* the Post-Preliminary Results Calculation Memorandum, dated December 27, 2017.
[35] *See* GOA's May 15, 2017 Initial Questionnaire Response (GOA IQR) at Exhibit GOA-46 and GOA Verification Report at GOA-VE-11.
[36] *See* GOA IQR at 9-11 and Simcoa IQR at 10; *see also* Simcoa's June 10, 2017 Supplemental Questionnaire Response at 2-5.
[37] *See* Simcoa IQR at 10 and Exhibits ELE-2A and ELE-2B.

states that electricity prices from other countries in the world market are normally not available to purchasers in the country under investigation, due to the unique nature of electricity.[38] The SWIS is an isolated network that does not import electricity from international suppliers.[39] Therefore, we determine that we cannot rely on Tier 2, world market prices as a benchmark for determining whether electricity is provided for LTAR.

Because there are no in-country prices or world market prices that satisfy the regulatory requirements, we determine that it is appropriate to rely on the final alternative in the benchmark hierarchy set forth under 19 CFR 351.511(a)(2)(iii) to determine whether the government price is consistent with market principles.[40] We have done so in this case by assessing whether the prices charged at the time Simcoa negotiated an ESA with Western Power were established in accordance with market principles through an analysis of factors such as the price-setting philosophy, or possible price discrimination in the rate making.[41]

The GOWA regulates electricity prices offered by Synergy to households and small businesses consuming up to 50 megawatt hours (MWh) of electricity per year. These customers are classified as "non-contestable" as they are unable to choose their retailer and must be supplied by Synergy at regulated rates.[42] "Contestable" customers (those consuming more than 50 MWh per year) include small-to-medium and large businesses; these consumers can negotiate the price

---

[38] *See Countervailing Duties; Final Rule*, 63 FR 65348 (November 25, 1998) (*CVD Preamble)* at 65377: "Paragraph (a)(2)(ii) provides that, if there are no useable market-determined prices stemming from *actual* transactions, we will turn to world market prices that *would be available* to the purchaser. We will consider whether the market conditions in the country are such that it is reasonable to conclude that the purchaser could obtain the good or service on the world market. For example, a European price for electricity normally would not be an acceptable comparison price for electricity provided by a Latin American government, because electricity from Europe in all likelihood would not be available to consumers in Latin America."

[39] *See* GOA Verification Report at 11.

[40] *See CVD Preamble*, 63 FR at 65378: "Paragraph (a)(2)(iii) provides that, in situations where the government is clearly the only source available to consumers in the country, we normally will assess whether the government price was established in accordance with market principles. Where the government is the sole provider of a good or service, and there are no world market prices available or accessible to the purchaser, we will assess whether the government price was set in accordance with market principles through an analysis of such factors as the government's price-setting philosophy, costs (including rates of return sufficient to ensure future operations), or possible price discrimination. We are not putting these factors in any hierarchy, and we may rely on one or more of these factors in any particular case. In our experience, these types of analyses may be necessary for such goods or services as electricity, land leases, or water, and the circumstances of each case vary widely. *See*, *e.g.*, *Final Affirmative Countervailing Duty Determinations: Pure Magnesium and Alloy Magnesium from Canada*, 57 FR 30946, 30954 (July 13, 1992) and *Final Affirmative Countervailing Duty Determination: Venezuelan Wire Rod*, 62 FR 55014, 55021-22 (October 22, 1997)."

[41] *See Final Affirmative Countervailing Duty Determinations: Pure Magnesium and Alloy Magnesium from Canada*, 57 FR 30946, 30954 (July 13, 1992) (*Magnesium from Canada*) ("As a general matter, the first step the Department takes in analyzing the potential preferential provision of electricity – assuming a finding of specificity – is to compare the price charged with the applicable rate on the power company's non-specific rate schedule. If the amount of electricity purchased by a company is so great that the rate schedule is not applicable, we will examine whether the price charged is consistent with the power company's standard pricing mechanism applicable to such companies. If the rate charged is consistent with the standard pricing mechanism and the company under investigation is, in all other respects, essentially treated no differently than other industries which purchase comparable amounts of electricity, we would probably not find a countervailable subsidy.").

[42] *See* GOA IQR at 13.

they pay for electricity with their chosen retailer on the open market. Customers with electricity consumption below 160 MWh per year retain access to regulated electricity prices.[43] Large-scale contestable customers (annual consumption of more than 160 MWh) are not eligible to access the regulated tariffs and are thus free to negotiate their electricity supply with any electricity retailer operating within the market.[44] Accordingly, Simcoa, as a large-scale contestable customer, was excluded from receiving regulated electricity rates in the SWIS, both at the time the Western Power (predecessor to Synergy) ESA was negotiated in 2005 and which was still in effect in the POI, and if they had negotiated a new ESA during the POI.

In this case, there is no information on the record to indicate that the GOWA promotes the production of silicon metal by providing electricity at LTAR or otherwise. The ESAs are bilateral negotiations between contestable customers and electricity retailers based on current market prices and subject to competition among retailers.[45] The pricing and contractual terms of Simcoa's ESA with Western Power/Synergy were determined on a commercial basis (based on cost and profit) and in the ordinary course of business, with the goal of maximizing long-term value.[46] At verification, Synergy officials explained that when establishing electricity rates for contestable customers, Synergy considers the cost of supply to its retail business unit (RBU), plus competition and market factors in general. The pricing for contestable customers such as Simcoa, who are not on a regulated tariff, is determined by the pricing team within Synergy's RBU. The RBU develops a cost buildup which determines the cost of energy, capacity, renewable energy credits, and network costs that will be incurred to provide the relevant supply to the customer. A component to recover the cost of providing electricity and an appropriate profit margin are added to the costs to arrive at a contract price offered to the customer. Furthermore, we have no information on the record indicating that Western Power did not conduct its ESA negotiations with Simcoa pursuant to the same negotiation process applied to other contestable customers. Record information thus indicates that the pricing of ESA by Western Power reflects the same considerations, including cost-recovery, appropriate profit, market conditions and competition, as well as the load profile of the customer. In addition, both Western Power and Synergy comply with all relevant provisions of the *Competition and Consumer Act 2010*, as well as its predecessor legislation, the *Trade Practices Act 1974*, which prohibit the misuse of market power when negotiating energy supply contracts with contestable customers such as Simcoa.

Moreover, at the same time that Simcoa negotiated and entered into the ESA with Western Power, it also negotiated a letter of intent with an entirely privately-owned and controlled company for the long-term purchase of electricity with more favorable financial terms than that of the ESA with Western Power/Synergy.[47] This fact further indicates that the Western Power-Synergy ESA negotiations were competitive. Although a contract with the private supplier would have offered more attractive financial terms, Simcoa signed a contract with Synergy due to other commercial considerations, principally the security and stability of supply offered by Synergy.

---

[43] *Id*.
[44] *See* GOA June 26, 2017, Supplemental Questionnaire Response at 4.
[45] *See* GOA IQR at 6.
[46] *Id*. at 28.
[47] *See* Simcoa's May 15, 2017 Initial Questionnaire Response (Simcoa IQR) at 19-20 and Exhibit ELE-11.

On the basis of the totality of the record facts and circumstances described above, we determine that the electricity prices charged by Western Power/Synergy, as reflected in its ESA with Simcoa, are set in accordance with market principles. We therefore determine that the electricity provided to Simcoa by Synergy did not confer a benefit during the POI. Thus, we are determining this program to be not countervailable.

We received comments from the interested parties on the issue of whether the provision of electricity is specific and provides a financial contribution. Because we determined that the provision of electricity for LTAR did not provide a benefit, the issues of specificity and financial contribution are moot.

Comment 2: Payments under the Demand Side Management (DSM) Scheme and Ancillary Service (Spinning Reserve) Scheme

GOA's Comments

- Taking into account the particular context of the energy market and the proper operation of the DSM and Spinning Reserve schemes, Commerce has not demonstrated that the payments to Simcoa, in exchange for the capacity it agrees to provide, constitute a financial contribution that confers a benefit within the meaning of the World Trade Organization (WTO) *Agreement on Subsidies and Countervailing Measures* (SCM Agreement).
- Commerce's preliminary finding that DSM and Spinning Reserve payments constitute a financial contribution that confers a benefit ignores the value of the capacity Simcoa provides in return for the payments.
- Commerce's finding also fails to account for the fact that Simcoa stood ready, was contracted through Curtailable Load Agreements (CLAs), and could have been called upon to reduce demand (including to reduce or cease production) at any time in 2016 in accordance with the terms and conditions of its contracts with its suppliers.[48]
- Commerce erroneously found that the Australian Energy Market Operator (AEMO) is a public entity, and that the Reserve Capacity Mechanism (RCM) arrangements (including DSM) are managed and funded by the GOWA.
- The AEMO is an independent national market institution that is neither government-owned nor government-funded and operates the Wholesale Electricity Market (WEM) in accordance with Western Australia's legislative framework.
- The AEMO operates on a non-profit, cost-recovery basis, and funds its operating costs through the fees paid by market participants.
- Contrary to the claims in the *Preliminary Determination*, when the market operator functions were transferred from the Independent Market Operator to AEMO in November 2015, the Minister for Energy's oversight responsibilities in approving the operational plan and budgets for the market operator were removed.
- With respect to Spinning Reserve, this is a standard energy market ancillary service similar to that in many other jurisdictions around the world. Spinning Reserves are

[48] A CLA with a DSM provider is expected to be called upon, on average, only once every ten years.

procured by the AEMO on a contestable basis and the GOWA is not directly involved in the process.

Simcoa's Comments on Ancillary Services

- Commerce incorrectly relied on allegations associated with DSM to claim that Ancillary Services do not have value, conflating two distinct, but complementary programs.[49] Commerce both incorrectly analyzed Ancillary Services and underestimated the value generated to the grid provided by Simcoa through this service.
- DSM and the related RCM ensure that the SWIS has sufficient installed generation capacity to meet peak load demand.
- In contrast, Ancillary Service is a commercial contingency service that is called upon in real time to manage the actual delivery of electricity through the SWIS (not the amount of power called upon by the system).
- Accordingly, the value attributable to DSM versus Ancillary Services has no correlation and, therefore, DSM values cannot be used to measure the value of Ancillary Services.
- The provision of Ancillary Services cannot be measured in the quantity of energy consumed or not consumed. The appropriate measure is the manner in which service providers contribute to the effective operation of the SWIS network.
- Commerce's claim in the *Preliminary Determination* that the full amount of the payments by the AEMO for the provision of Ancillary Services is countervailable is based on an incorrect determination that *reserve capacity* in Western Australia has no value. Simcoa incurs costs and loss of productivity in connection with its provision of ancillary services which cannot be readily anticipated or mitigated due to the real-time requests by the AEMO.
- Ancillary Services ensure a balance between the supply of electricity and corresponding demand, similar to the ancillary services investigated in *Bar from Turkey*, which Commerce found not countervailable.[50] Similar to the Turkish Electricity Transmission Corporation (TEIAS) in *Bar from Turkey*, the AEMO is charged with ensuring that the SWIS is balanced and that the system operates effectively. Also like TEIAS, the AEMO functions as an intermediary between electricity consumers and service providers. AEMO is not in the business of taking title or purchasing electricity, but rather facilitates the provision of an infrastructure service – Ancillary Services – basically acting as a settlement agent in the SWIS. There is no difference between the role TEIAS played in the Turkish electricity market and the role played by the AEMO in the SWIS.

Simcoa's Comments on DSM

- DSM payments from Kleenheat to Simcoa cannot be countervailed because Kleenheat is not an "authority," as defined in section 771(5)(B) of the Act, and Commerce has acknowledged that Kleenheat is a privately-owned and controlled company.[51]

[49] *See* Simcoa Case Brief at 27 (citing to the *Preliminary Determination*, and accompanying PDM at 9).
[50] *Id*. at 30 (citing *Steel Concrete Reinforcing Bar from the Republic of Turkey: Final Results and Partial Rescission of Countervailing Duty Administrative Review*; 2014, 82 FR 26907 (June 12, 2017), and Decision Memorandum at Comment 1 (*Bar from Turkey*)).
[51] *Id.* at 16.

- Commerce's reliance on finding of a "causal nexus" to characterize Kleenheat's payments to Simcoa as a financial contribution from the government was inappropriate in this case because the sale at issue was made through an entirely private party – Kleenheat. The case cited by Commerce in support of the "causal nexus" test is inapposite because it concerned a provision of a good directly from a Chinese company that was majority-owned by the Chinese government.[52]
- Commerce was required but failed to conduct a "pass-through" analysis required by *Delverde Sr. v. United States* in circumstances where the benefit is conferred on the respondent by a wholly private party at an arm's-length transaction.[53] A "pass-through" analysis would not show the existence of a benefit, and Commerce cannot conduct such analysis given the late date in this proceeding.[54] Therefore, Commerce should find that the DSM payments made by Kleenheat could not confer a benefit to Simcoa.[55]
- DSM is a service that should not be countervailed under both U.S. law and WTO rules. Thus, Simcoa could not have received a financial contribution for the provision of DSM services.[56] The concept of DSM was first introduced in the United States, and the Federal Energy Regulatory Commission of the United States has found that DSM is a service and observed that "{i}t is the policy of the United States that . . . unnecessary barriers to demand response participation in energy, capacity and ancillary *service* markets shall be eliminated."[57] Therefore, unnecessary barriers, such as countervailing similar provisions of DSM services from Australia, should be removed.
- Provision of DSM is a provision of a "general infrastructure" service which should not be countervailed because it does not constitute a "financial contribution," pursuant to U.S. laws and regulations and Article 1.1 of the SCM Agreement. 19 CFR 351.511(d) states that "general infrastructure" is an "infrastructure that is created for the broad societal welfare of a country, region, state, or municipality."[58] Among other things, DSM ensures infrastructure integrity of the grid, prevents generation outages, and balances generation and consumption in the isolated SWIS electricity market. Additionally, DSM is provided for the benefit of all members of the Australian public.[59]
- Commerce should not deviate from its practice of finding similar programs non-countervailable due to lack of specificity where the programs were neutrally

[52] *Id.* at 17-18 (citing *Beijing Tianhai Indus. Co. v. United States*, 52 F.Supp.3d 1351 (Ct. Int'l Trade 2015) (*Beijing Tianhai*)).
[53] *Id*. at 17 (citing *Delverde Sr. v. United States*, 202 F3d 1360 (Fed. Cir. 2000) and *Allegheny Ludhum Corp. v. United States*, 367 F3d 1339, 1347 (Fed. Cir. 2004)).
[54] *Id*. at 17-18.
[55] *Id.* at 19.
[56] *Id*. at 16.
[57] *Id*. at 21 (citing FERC Final Rule, *Demand Response Compensation in Organized Wholesale Energy Markets* (issued Mar. 15, 2011) at para. 9 & n.21)).
[58] *Id*. at 22 (citing *Notice of Final Affirmative Countervailing Duty Determination and Countervailing Duty Order; Carbon Steel Wire Rod from Saudi Arabia*, 51 FR 4206, 4210 (February 3, 1986)).
[59] *Id.* at 23.

administered.[60] In *CTL Plate 1999 from Korea* (litigated in *Bethlehem Steel*),[61] Commerce examined an almost identical Voluntary Curtailment Adjustment (VCA) program, and found that although iron and steel companies provided a large share of demand reduction services under the VCA and were accordingly compensated by the government, the monies paid by the Korean government were not "disproportionate" because the steel industry "would be expected to receive the greatest amount of benefit under the VCA program" due to the size of the industry in South Korea.[62]

- Commerce must correct certain errors in its preliminary benefit analysis for the provision of DSM services. In its *Preliminary Determination*, Commerce, relying on a GOWA report, claimed that the value of "incremental reserve capacity" in the SWIS was "close to zero"; however, Simcoa provides DSM services to manage *existing* supply in the SWIS – not incremental (*i.e.* additional) supply.[63] Therefore, the GOWA report is not relevant to the value of the DSM services Simcoa provides.
- Commerce should analyze and calculate any alleged benefit Simcoa received from Synergy by comparing it to actual transactions related to the provision of DSM between Simcoa and Kleenheat – a private party. Such comparison will show that Simcoa received substantially higher payments from the privately-owned and controlled Kleenheat than it received from Synergy.[64]

Petitioner's Rebuttal on DSM

- Commerce should reject the argument that DSM payments should not be countervailed because DSM is a general infrastructure service because (1) there is no evidence that Simcoa provided DSM services during the POI, (2) DSM cannot be a "fundamental component of Western Australia's electricity infrastructure," as claimed, because the GOWA has recognized that the economic value of capacity is essentially zero, and (3) the GOWA did not provide any form of infrastructure to Simcoa.
- Commerce's "causal nexus" analysis is appropriate because in *Beijing Tianhai*, similar to the present case and contrary to Simcoa's claims, state-owned producers sold goods to independent third-party trading companies, who in turn sold them to respondents.[65]
- Commerce properly determined that the AEMO is an "authority" because its "ownership structure comprises 60 percent government members," including the GOWA, its functions include the operation of the WEM in Western Australia in accordance with Western Australia's legislative framework, and in prior cases involving electricity subsidies, Commerce has determined that regulatory bodies such as the AEMO are "authorities."[66]

---

[60] *Id.* at 16 (citing *Notice of Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea*, 64 FR 73176, 73186 (December 29, 1999) (*Korea – CCL/CQSP*)).
[61] Citing *Bethlehem Steel Corp. v. United States*, 140 F.Supp.2d 1354, 1368-69 (Ct. Int'l Trade 2001) (*Bethlehem Steel*) and *Notice of Final Affirmative Countervailing Duty Determination: Certain Cut-to-Length Carbon-Quality Steel Plate from the Republic of Korea*, 64 FR 73176, 73186 (December 29, 1999) (*CTL Plate from Korea 1999*).
[62] *Id*. at 24 (citing *Bethlehem Steel*, 140 F.Supp.2d at 1368-69).
[63] *Id.* at 25
[64] *Id.* at 25-26.
[65] *See* Petitioner Case Brief at 11-12.
[66] *Id.* at 12-13 (citing *Supercalendered Paper from Canada: Final Affirmative Countervailing Duty Determination*, 80 FR 63535 (October 20, 2015), and accompanying IDM at 31-32)).

- Commerce should not rely on the per-unit price Kleenheat pays Simcoa for DSM as a benchmark to value the DSM payments Synergy pays Simcoa because, contrary to Simcoa's claims, what Kleenheat pays is not a market price, but is based on an administered "reserve capacity price" calculated annually by the AEMO pursuant to the WEM rules.[67]
- Commerce should reject Simcoa's claim that GOWA's analysis of the value of DSM is "inapposite" and "irrelevant," because the value of capacity is based on the cost of incremental supply.[68]
- Commerce should reject Simcoa's argument arising from the final determination in *CTL Plate from Korea 1999* because that determination has been superseded by recent determinations such as *CTL Plate from Korea 2016*[69] where a program similar to the DSM was found to be *de facto* specific because the actual recipients were limited in number.[70]

Commerce's Position:

As an initial matter, we continue to find that the AEMO is an "authority" under section 771(5)(B) of the Act. Although the GOA claims that when the functions of the Independent Market Operator were transferred to the AEMO, the Minister for Energy's oversight responsibilities with respect to operational plans and budget were removed, this factor alone is not dispositive.[71] Commerce generally determines whether an entity is an "authority" by an examination of whether the entity possesses, exercises or is vested with government authority.[72]

Because the AEMO is a "company limited by guarantee," meaning that it is a non-profit entity which has members instead of shareholders, we must determine whether the AEMO constitutes a public entity and therefore an "authority" in Western Australia as related to the RCM and ancillary services markets.[73] The AEMO's members are made up of various Australian government (60 percent) and industry participants (40 percent),[74] and they play an important role in the board of directors' appointment process.[75] The AEMO operates the WEM in accordance

[67] *See* Petitioner Case Brief at 12-13.
[68] *Id.* at 14.
[69] *Id*. at 15 (Citing *Certain Carbon and Alloy Steel Cut-to-Length Plate from the Republic of Korea: Preliminary Negative Countervailing Duty Determination and Alignment of Final Determination with Final Antidumping Duty Determination*, 81 FR 63168 (September 14, 2016), and accompanying IDM at 17-18 (*CTL Plate from Korea 2016*)).
[70] *Id*. at 15-16 (citing *Certain Carbon and Alloy Steel Cut-to-Length Plate from the Republic of Korea: Preliminary Negative Countervailing Duty Determination and Alignment of Final Determination with Final Antidumping Duty Determination*, 81 FR 63168 (September 14, 2016), and accompanying IDM at 17-18 (*CTL Plate from Korea*)).
[71] The GOA did not point to record evidence to support this assertion.
[72] *See, e.g.*, *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Preliminary Results of Countervailing Duty Administrative Review, and Rescission of Review, in Part; 2015,* 83 FR 1235(January 10, 2018), and the accompanying PDM, XI Analysis of Program, 1) Provision of Solar Grade Polysilicon for LTAR.
[73] *See* GOA IQR at 93.
[74] *Id.*; *see also* GOA Verification Report at 6.
[75] *See* GOA Verification Report at 6.

with Western Australia's legislative framework.[76] With respect to the DSM, the AEMO calculated the administered reserve capacity price based on a formula prescribed by the GOWA, and the Reserve Capacity Target, the total amount of capacity required in the SWIS, is also determined by the AEMO in accordance with the WEM rules.[77] With respect to Ancillary Services, the AEMO, in its system management capacity, procures ancillary services, while the Economic Regulatory Authority (ERA) regulates the overall cost of ancillary services.[78] All of these factors indicate that AEMO's authority is derived from the GOWA with respect to the RCM and procurement of ancillary services because the operation of the electricity market in Australia is a government function.

DSM Analysis

We also disagree with Simcoa that Commerce should have applied a "pass-through" analysis in lieu of the "causal nexus" test used in the *Preliminary Determination.* Simcoa's interpretation of the facts in *Beijing Tianhai* and *Delverde* are incorrect. Contrary to Simcoa's claims, and as noted by the petitioner, the fact pattern in *Delverde* concerned a privately-owned recipient of the subsidy which sold its assets to another privately-owned company; the issue was thus whether as a result of the sale of the assets the subsidy "passed through" to the purchasing entity.[79] Also, contrary to Simcoa's claims and as noted by the petitioner, in *Beijing Tianhai* where a "causal-nexus" analysis was required, an "authority" sold an input to third-party trading companies (not found to be "authorities") which subsequently sold the input to the respondent.[80] The fact pattern in this proceeding is different from *Delverde* and similar to *Beijing Tianhai*. Therefore, we continued to rely on the "causal-nexus" analysis used in the *Preliminary Determination.*

With respect to the Government of Australia and Simcoa's arguments regarding the value provided in return for the DSM payments, Commerce recognizes that generally having electricity production capacity in reserve (*i.e.*, reserve capacity) may provide economic value in certain circumstances. However, for the reasons outlined below, we continue to find that due to RCM market design failures, as recognized by the GOWA report, payments for DSM during the POI constituted grants and the full amount of the payments are thus countervailable.[81]

In the *Preliminary Determination* we relied on a statement in the GOWA report that the incremental value of reserve capacity is zero. Based on the information and argument provided by the GOA and Simcoa, we recognize that the value of the *last increment* of capacity is not

[76] *See* GOA IQR at 35-36, 90
[77] *Id.* at 7.
[78] *See* GOA IQR at 92 and 94.
[79] *See Beijing Tianhai* at 1364 ("in {*Delverde*} {} a privately-owned producer that had received subsidies from the Italian government, sold assets to another privately-owned producer") (citing *Delverde,* at 1362).
[80] *Id.* at 1362 ("Here, the Affiliated Producer, which Commerce found to be an authority, sold its steel tube to independent, third-party trading companies. These companies then subsequently sold the steel tube to BTIC and Tianjin Tianhai.").
[81] *See* "Silicon Metal from Australia, Brazil, Kazakhstan, and Norway; Antidumping and Countervailing Duty Petition," dated March 8, 2017, at Exhibit AU-CVD 6 (citing *Position Paper on Reforms to the Reserve Capacity Mechanism*, Public Utilities Office, Department of Finance, Government of Western Australia (December 3, 2015) (the GOWA report)); *see also* GOA Verification Report at 6-7.

dispositive of the marginal value of reserve capacity for *every increment*. Nonetheless, for these final results, we continue to find that it is appropriate to treat the DSM payments as grants, albeit based on a different analysis. First, the record evidence demonstrates that the DSM payments were calculated based on the costs of a generation capacity provider, which are virtually always higher than the costs associated with providing DSM capacity.[82] Second, DSM providers were least likely to be dispatched for electricity load curtailment because DSM providers are last to be dispatched.[83] Third, the reserve capacity price was not designed to be elastic enough to respond to substantial excess capacity supply in the market resulting from demand growth overestimation.[84] Fourth, the credits Simcoa received on its electricity bills were availability payments (*i.e.,* payments for having capacity in reserve), and Simcoa's loads were not actually curtailed during the POI.[85]

Finally, the 2015 GOWA report estimated 23 percent more capacity than required for the 2016-17 year and it indicated that the value of any reserve electricity capacity above 20 percent of the requirement was close to zero.[86] For the same 2016-17 year, the DSM capacity represented 10 percent of all capacity; the remaining capacity being generation capacity.[87] Therefore, because DSM providers are last to be dispatched and the entirety of the available DSM capacity falls within the 23 percent of capacity that went beyond system requirements, the GOWA made payments for DSM capacity that would be extremely unlikely to be dispatched.

We further determine that the GOA's and Simcoa's arguments that DSM constitutes general infrastructure are inapposite. As an initial matter, this argument contradicts the claim by the GOA that it is purchasing a service, which it argues does not constitute a financial contribution. Further, the GOWA is not providing DSM services in this case. Rather, the subsidy in question relates to the DSM payments the AEMO passed down to Simcoa through Synergy and Kleenheat. The GOA's and Simcoa's arguments with respect to DSM constituting a service is also inapposite because, as described in detail above, for this final determination we have determined that the financial contributions constitute grants, and the full amount of the DSM payments are therefore countervailable benefits.

With respect to arguments regarding whether the DSM payments are specific, we note that in *CTL Plate from Korea 1999* (litigated in *Bethlehem Steel*), Commerce's negative *de facto* specificity determination was based on an analysis of "disproportionate" and "predominant" use. The *de facto* specificity analysis Commerce conducted for the same program in *CTL Plate from Korea*, *2016,* however, was based on the use of the subsidy by a limited number of users, which reflects the specificity determination we conducted in the *Preliminary Determination* which was also made based on whether there was a limited number of users. In conducting our analysis of whether the program is *de facto* specific within the meaning of section 771(5A)(D)(iii) we followed the specificity test as set forth within the Statement of Administrative Action (SAA).

---

[82] *See* the GOWA report.
[83] *Id.* and GOA Verification Report at 6.
[84] *See* the GOWA report and GOA Verification Report at 7.
[85] *See* Simcoa Verification Report at 24-25.
[86] *See* the GOWA report at 7-8.
[87] *Id.*

The SAA states that "{t}he Administration intends to apply the specificity test in light of its original purpose, which is to function as an initial screening mechanism to winnow out only those foreign subsidies which truly are broadly available and widely used throughout an economy."[88] Therefore, in light of the SAA, the specificity provision in section 771(5A)(D)(iii)(I) of the Act is intended to capture those subsidies that are not broadly available and widely used throughout an economy. Furthermore, we took into account the number of recipients of the program based on the responses to our questionnaire which requested information on the number of program recipients for the year the program was used or approved and for the preceding three years.[89] Therefore, for these final results we continue to find that *de facto* specificity based on limited number of users is appropriate and consistent with Commerce practice.

Spinning Reserves Benefit Analysis

With respect to the payments for providing Spinning Reserves, we continue to find that the entire amount of these payments to Simcoa constitutes a grant because payments for Spinning Reserve were availability payments, and Simcoa did not actually curtail or lose any productivity during the POI due to this program.[90] First, we agree with Simcoa that the value of reserve capacity is not related to the value of ancillary services; therefore, for the final results, we are not relying on the GOWA report in our analysis of the payments made under the Spinning Reserves Scheme. Second, Simcoa argues that the appropriate measure for what it provided in return for the Spinning Reserve payments is the manner in which it provided Spinning Reserves. However, there is no information on the record to show that Simcoa did anything to provide Spinning Reserve, other than making itself available for such service. Thus, we continue to treat these payments as grants.

With respect to *Bar from Turkey*, the role of TEIAS (a state-owned enterprise) in the market was discussed in the context of the government's purchase of electricity for more than adequate remuneration (MTAR). TEIAS acted as a market clearing agent and did not take title to electricity purchased or sold by market participants. Consequently, Commerce found that TEIAS's functions could not include government purchases of electricity for MTAR because TEIAS did not set the price for electricity, was not permitted by Turkish law to accrue any loss or profit, but rather administered the system through which the market prices were determined. As related to ancillary services, Commerce found that TEIAS's purchasing of reserve electricity capacity in the ancillary services market did not constitute a purchase of electricity *by the government* because this obtainment was not done for commercial purposes, but for meeting the system needs on a real-time basis. The key difference in the financial contribution analysis in *Bar from Turkey* and the payments made by the AEMO for spinning reserves is the fact that the price for ancillary services (including spinning reserves) is regulated by the ERA of Western

[88] *See* Statement of Administrative Action (SAA) accompanying H.R. 5110, H.R. Doc. No. 316, 103d Cong., 2d Sess. 911, 929 (1994).
[89] We request this information because the SAA at 931-932 recognizes "that where a new subsidy program is recently introduced, it is unreasonable to expect the use of the subsidy will spread throughout the economy in question instantaneously."
[90] *See* Simcoa's June 20, 2017, Supplemental Questionnaire Response at 12.

Australia, so that the GOWA's functions in operating the market for ancillary services are more than mere settlement agent functions.

Comment 3: Renewable Energy Target (RET) Program

GOA's Comments

- Commerce's preliminary determination that the emissions-intensive trade-exposed (EITE) exemptions from the RET are *de jure* specific – on the basis that the benefit is limited to enterprises conducting 53 industrial EITE activities – is inconsistent with the relevant principles governing specificity with the World Trade Organization (WTO) *Agreement on Subsidies and Countervailing Measures* (SCM Agreement).
- Commerce failed to demonstrate that the EITE exemptions are specifically limited to certain *enterprises* or *industries*, and that the criteria and conditions granting the exemptions are not objective, automatic, strictly adhered to and verifiable.
- The primary legislation for this program, the *Renewable Energy (Electricity) Act 2000*, does not specify certain entities or industries as eligible for exemptions.
- Eligibility is automatic, the objective criteria and conditions for eligibility are strictly adhered to, and the criteria and conditions are clearly spelled out in the official policy documents accompanying the regulations, thus allowing for verification. Moreover, there is a process to allow new activities to be added to the EITE exemption list.
- Contrary to Commerce's preliminary determination, EITE exemptions are provided to entities that undertake a broad range of activities across the economy and are determined based on the thresholds of emissions-intensity and trade-exposure on an aggregate industry-wide basis – there is no discretion to target particular activities.
- Since the method and criteria used to establish eligible EITE activities has resulted in a broad range of manufacturing activities that are eligible for exemption, and the exemptions are not limited to, or targeted to, particular industries or activities, EITE exemptions cannot be considered *de facto* specific under the relevant WTO rules.[91]

Simcoa's Comments

- Except as discussed in Comment 7 "Calculation Errors in the Preliminary Determination," below, Simcoa does not separately address this program. Simcoa incorporates by reference the GOA's arguments with respect to this program.

Petitioner's Rebuttal

- Commerce should continue finding *de jure* specificity because "objective criteria or conditions" governing the eligibility must be neutral and not favor one enterprise or industry over another, and in this case the RET liability exemption program is not neutral and is targeted at emissions-intensive, trade exposed activities.[92]

[91] *See* GOA Case Brief at 5.
[92] *See* Petitioner's Case Brief at 19 (citing section 771(5A)(D)(ii)).

- Commerce, according to its practice, should not distinguish between a statute or implementing regulations when evaluating *de jure* specificity.[93]
- Commerce should reject the GOA's claims that the express limitation on access to the subsidy for the purposes of finding *de jure* specificity must be stated in terms of *enterprises* or *industries*. In many cases, Commerce found *de jure* specificity "based upon limitation of activities."[94]
- Alternatively, Commerce should find this program to be *de facto* specific because the 53 exempted industrial activities represent a small fraction of the industrial activities performed in Australia and are carried out by only the metals, minerals, paper, and chemical industries.

Commerce's Position:

For the reasons explained below, we continue to find that access to the subsidy, the RET program exemption certificates, was expressly limited by law to certain enterprises conducting 53 industrial EITE activities and that the subsidy was therefore *de jure* specific under section 771(5A)(D)(i) of the Act during the POI .[95]

As an initial matter, we agree with the petitioner that whether the express limitation on accessing the subsidy is imposed by a statute or an implementing regulation is not dispositive. As the petitioner correctly noted, in *Softwood Lumber from Canada*, Commerce found that the ACCA for Class 29 Assets program was *de jure* specific even though the express limitation was imposed by the Canadian Income Tax Regulation and not the governing statute.[96] Further, we disagree with the GOA that this subsidy program is not limited to certain enterprises. In fact, it is limited to enterprises engaging in the activities listed in the applicable GOA regulations.

Although the GOA claims that any limitations on accessing the subsidies established by the implementing regulations is conducted based on "objective criteria or conditions," we disagree. The criteria governing the eligibility on accessing the subsidy must be neutral and must not favor one enterprise or industry over another.[97] With respect to the RET program, the criteria used by the GOA are not neutral because the criteria favor enterprises or industries that conduct "emission-intensive" activities and are "trade-exposed" over industries or enterprises that do not conduct such activities and are not trade exposed which thus constitutes an explicit limitation on

[93] *See* Petitioner's Case Brief at 18 (citing *Certain Softwood Lumber Products from Canada: Final Affirmative Countervailing Duty Determination, and Final Negative Determination of Critical Circumstances*, 82 FR 51814 (November 8, 2017) (*Softwood Lumber from Canada*), and accompanying IDM at Comment 68).
[94] *Id*. at 18 (citing *Softwood Lumber from Canada,* and accompanying IDM at Comment 68 and *Certain Welded Carbon-Quality Steel Pipe from the United Arab Emirates: Final Affirmative Countervailing Duty Determination*, 77 FR 64465 (October 22, 2012), and accompanying IDM at Comment 1).
[95] *See* GOA's Initial Questionnaire Response at 61-62 and Attachment GOA-65 (*Renewable Energy (Electricity Amendment Regulations 2010 (No. 1)* at Schedule 6).
[96] *See Softwood Lumber from Canada*, and accompanying IDM at Comment 68; and *Preliminary Affirmative Countervailing Duty Determination, and Alignment of Final Determination with Final Antidumping Duty Determination*, 82 FR 19657 (April 28, 2017), and accompanying Preliminary Decision Memorandum at 72 and Appendix I.
[97] *See* section 771(5A)(D)(ii) of the Act. *See also Softwood Lumber from Canada*, and accompanying IDM at Comment 1.

access to the subsidy. Therefore, we continue to find that the issuance of RET exemption certificates is *de jure* specific under section 771(5A)(D)(i) of the Act.

Comment 4: Research and Development (R&D) Tax Incentive

GOA's Comments

- Commerce's preliminary determination that the R&D Tax Incentive is *de facto* specific is not supported by record evidence, and is inconsistent with the relevant factors establishing *de facto* specificity within the SCM Agreement.
- The R&D Tax Incentive is available to all companies of all sizes and in all industry sectors operating in Australia which undertake eligible R&D expenditure – including foreign companies that are resident in Australia for tax purposes.
- The R&D Tax Incentive contains rules to prevent normal business activities (such as production activities) from receiving R&D tax offsets.
- Eligibility is automatic where the criteria are met and the criteria are strictly applied, including through a verification process, which determines that registered companies comply with the R&D criteria.
- As acknowledged in the preliminary determination, a total of 9,945 companies from every sector of the Australian economy registered for the R&D Tax Incentive during the POI.
- Commerce's preliminary determination maintains that the R&D Tax Incentive is *de facto* specific on the basis that the number of companies that accessed the program represents only a small proportion of the total number of companies filing corporate tax returns during the POI.
- However, the total number of companies filing corporate tax returns during the POI includes a large range of companies which do not undertake any form of R&D activity, *e.g.*, retail outlets. Commerce's approach does not enable a meaningful comparison between eligible recipients (*i.e.*, companies that undertake eligible R&D expenditures) and actual recipients.

Simcoa's Comments

- Commerce verified that the R&D Tax Incentive is available to "all industries and all companies" that are incorporated in Australia, as well as companies incorporated overseas that are liable for tax payments in Australia.[98] The program is not specific (in law or in fact) to any particular enterprise, nor is there evidence that it has been disproportionately used by Simcoa during the POI.
- This program is clearly not *de jure* specific because the *Income Tax Assessment Act 1997* imposes no industry, geographic, or other limitations on entities ability to claim the R&D Tax Incentive, apart from trusts, non-incorporated entities, entities whose income is entirely exempt from income tax, and corporate limited partnerships.
- *De facto* specificity must be found on an enterprise or industry basis.[99] Commerce's *Preliminary Determination* assertion that specificity can be found because program recipients are limited in number is both unlawful and not credible. U.S. countervailable

[98] *See* Simcoa Case Brief at 32 (citing to the GOA Verification report at 4).
[99] *Id*. at 35 (citing to section 771(5A)(D)(iii) of the Act).

law does not permit *de facto* specificity to be determined on such an abstract and discretionary basis.

- In fiscal year 2014-15, almost 10,000 companies, representing each one of Australia's industry classification categories, including financial services, information technology, media, agriculture and healthcare, registered R&D activities with the GOA.
- The availability and use of this program is similar to the facts addressed by Commerce in *Wire Rod from Brazil*.[100] Commerce also determined that the steel sector was "not a predominant or disproportionate user of the program."[101]
- In the *Preliminary Determination*, Commerce erroneously used as a benefit the costs incurred in connection with Simcoa's R&D, rather than the offset received from the R&D Tax Incentive. Only a small portion of R&D expenditures constituted an actual benefit to Simcoa during the POI. If Commerce incorrectly countervails the R&D Tax Incentive in the final determination, the benefit calculation must be corrected.

Petitioner's Rebuttal

- Commerce should reject Simcoa's argument that it must assess whether enterprises or industries were predominant or disproportionate users of the subsidy. The final determination in *Wire Rod from Brazil*, cited by Simcoa, does not mention the number of recipients of the loans, nor does it contain any statements requiring the conduct of a "predominant" or "disproportionate" use analysis in lieu of looking at the number of users of the benefit.[102]
- The statute permits, and Commerce's practice has been, to find specificity based on a limited number of recipients of the subsidy.[103]
- Contrary to Simcoa's claims, there is no requirement in the statue to consider the manner in which the recipients of the subsidy are determined, and a subsidy can be *de facto* specific even if it is administered according to objective criteria.[104]
- Commerce should reject the GOA's argument that it is inappropriate to include in the total pool companies, such as retail outlets, which do not undertake any form of R&D, because in its questionnaire responses the GOA did not provide any information regarding the number of companies that do not perform R&D activities. In the absence of such information, Commerce appropriately determined that the actual number of companies benefitting from this program was small based on the total number of companies that filed tax returns in Australia during the POI.[105]
- Commerce properly calculated a subsidy rate using the entire amount Simcoa reported receiving. First, the letter cited by Simcoa indicates that the entire amount represents a

[100] *Id*. at 34 (citing to *Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination: Carbon and Certain Alloy Steel Wire Rod from Brazil*, 67 FR 55805 (August 30, 2002) and Issues and Decision Memorandum at 18 (*Wire Rod from Brazil*) (Commerce did not countervail the provision of certain loans because those loans were "widely available to all producers in Brazil.")).
[101] *Id*. at 18-19.
[102] *See* Petitioner Case Brief at 23-24.
[103] *Id*. at 24-25 (citing *Non-Oriented Electrical Steel from the Republic of Korea: Final Negative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*, 79 FR 61605 (October 14, 2014), and accompanying IDM at 39).
[104] *Id*. at 25 (citing section 771(5A)(D)(ii) and (iii) of the Act).
[105] *Id*. at 25.

tax offset for the R&D expenses rather than R&D expense themselves. Second, the record does not explain how the amount Simcoa claims to be the benefit was calculated.[106]

Commerce's Position:

As stated in the *Preliminary Determination,* income tax deductions provide a financial contribution under section 771(5)(D)(ii) of the Act in the form of foregone revenue that is otherwise due to a government. Pursuant to 19 CFR 351.509(a)(1), the benefit is the extent to which the taxes paid by the firms as a result of the program are less than the tax the firms would otherwise pay in the absence of the program.

In the *Preliminary Determination* we stated that the record demonstrates that the R&D Tax Incentive program is *de facto* specific because the actual recipients of the subsidy are limited in number (*i.e.*, less than 10,000 actual recipients out of approximately 1,000,000 potential recipients within the jurisdiction of the granting authority based on the number of tax filers). We examined and verified the number of companies that used this program and the number of corporations that filed tax returns.[107] Although the GOA argues that we should consider the number of companies which actually perform R&D activities in our analysis, we have no information on the record with regard to the number of companies that do not perform R&D activities, and the GOA did not provide this information. More importantly, the GOA has cited to no language in either section 771(5A)(D)(iii) of the Act or the SAA that would support the type of *de facto* specificity analysis that it is proposing. The GOA argues that Commerce's specificity analysis does not enable a meaningful comparison between eligible recipients (*i.e.*, companies that undertake eligible R&D expenditures) and actual recipients. The very fact that the GOA created a program with eligibility criteria that limited the number of actual program recipients on a factual basis is the reason for finding the program *de facto* specific within the meaning of section 771(5A)(D)(iii)(I).

The comparison of the available information (*i.e.*, actual recipients compared to corporate tax filers) indicates that less than one percent of companies filing corporate tax returns during the POI received benefits under this program. In conducting our analysis of whether the program is *de facto* specific within the meaning of section 771(5A)(D)(iii) we followed the specificity test as set forth within the SAA. The SAA states that "{t}he Administration intends to apply the specificity test in light of its original purpose, which is to function as an initial screening mechanism to winnow out only those foreign subsidies which truly are broadly available and widely used throughout an economy."[108] Therefore, in light of the SAA, the specificity provision in section 771(5A)(D)(iii)(I) of the Act is intended to capture those subsidies that are not broadly available and widely used throughout an economy. Furthermore, in our *de facto* specificity analysis, we took into account the number of recipients of the program based on the

[106] *Id*. at 26-27.
[107] *See* the GOA's July 18, 2017, Third Supplemental Questionnaire Response; and GOA Verification Report at 5 and Verification Exhibit GOA-VE-8.
[108] *See* Statement of Administrative Action (SAA) accompanying H.R. 5110, H.R. Doc. No. 316, 103d Cong., 2d Sess. 911, 929 (1994).

responses to our questionnaire which requested information on the number of program recipients for the year the program was used or approved and for the preceding three years.[109] A tax program that is used by less than one percent of tax filers is not one that is widely used throughout an economy.[110] Therefore, we continue to determine that this program is *de facto* specific under section 771(5A)(D)(iii)(I) of the Act

Regarding the benefit calculation, we agree with Simcoa that Commerce should make certain adjustments to the calculation. In the *Preliminary Determination* we erroneously used a tax offset amount from the original tax return filing instead of the final, amended return and countervailed the entire amount of the tax offset under this program; however, because R&D expenditures are considered to be a tax-deductible expense in the absence of this program, for the final results, we are calculating the benefit to Simcoa by taking the difference between how much taxes it would have paid, absent the program, and how much it did pay as a result of the program. Accordingly, we made certain adjustments to the benefit calculation for the final determination, in accordance with 19 CFR 351.525(b)(6)(iii), to obtain a countervailable subsidy for Simcoa of 3.90 percent *ad valorem.*[111] To the extent that Simcoa might be claiming that not all of the offset amount was actually utilized during the POI, we find that it is not supported by the record evidence.[112]

Comment 5: Provision of Quartz for Less Than Adequate Remuneration

Petitioner's Comments

- The Global Trade Atlas (GTA) data regarding world quartz and quartzite exports for the calendar year 2016, which Commerce placed on the record of this investigation, is the type of data Commerce uses to determine a "robust world market price" that "reflects the spectrum of conceivable prices available under market principles," consistent with Commerce's practice.[113]
- Contrary to Simcoa's assertion,[114] Commerce is not required to use as a benchmark prices for merchandise identical to that for which it is determining the adequacy of remuneration. Reviewing courts have held that it is sufficient for Commerce to use

[109] We request this information because the SAA at 931-932 recognizes "that where a new subsidy program is recently introduced, it is unreasonable to expect the use of the subsidy will spread throughout the economy in question instantaneously."
[110] *See Non-Oriented Electrical Steel from the Republic of Korea: Final Negative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*, 79 FR 61605 (October 14, 2014), and accompanying IDM at 11 and 13. *See also Welded Line Pipe from the Republic of Korea: Final Negative Countervailing Duty Determination*, 80 FR 61365 (October 13, 2015), and accompanying IDM at 36.
[111] *See* Simcoa Final Calculation Memo.
[112] *Id.*
[113] *See* Petitioner Case Brief at 4-5 (citing *Circular Welded Carbon Steel Pipes and Tubes from Turkey: Preliminary Results of Countervailing Duty Administrative Review and Preliminary Intent to Rescind in Part; Calendar Year 2013*, 80 FR 18809 (April 8, 2015) (*Pipes and Tubes from Turkey*), and accompanying PDM at 16).
[114] *See* Simcoa Letter, "Comments to the Department's Placement of Global Trade Atlas Data on Record," dated September 13, 2017 (Simcoa GTA Comments) at 3 ("the Department is required by law to make an apples-to-apples comparison. . . when utilizing a world market price. . .")

prices for merchandise that is comparable to the input it is seeking to value.[115] The CIT has upheld Commerce's use of GTA data based on the HTSUS subheading corresponding to the inputs consumed by a respondent.[116]

- Comparing the total per-unit quartz cost reported by Simcoa in 2016 (including transportation costs, without additional adjustments) to the weighted-average world market price for quartz and quartzite, based on the GTA export data for 2016 (exclusive of transportation costs), demonstrates that Simcoa received a benefit with respect to quartz.
- For the final determination, Commerce should use the transportation costs submitted by the petitioner to calculate a Tier 2 benchmark for quartz that includes transportation costs and import duties, consistent with Commerce practice.[117]
- To determine the benefit that Simcoa received for the provision of quartz at LTAR, Commerce should compare Simcoa's total per-unit 2016 quartz costs, including transportation expenses, to the weighted-average per-unit value for quartz and quartzite reflected in the GTA export data (including transportation costs and import duties).

GOA's Comments

- Commerce's preliminary determination that Simcoa paid LTAR for its quartz mining activity, and that this constitutes a countervailable subsidy, is not supported by the facts on the record.
- Simcoa paid a royalty of AUD1.17 per ton for the right to extract (silica) quartz, which is specified in the *Mining Regulations 1981*, and is applicable to all silica producers in Western Australia. The mining royalty rate for silica in Western Australia is comparable to other Australia jurisdictions.
- Because Simcoa does not receive any discount or concession from the specific silica royalty rate, it is not provided with a good by the GOWA that confers a benefit in the form of LTAR.
- The review of royalties in Western Australia (the Mineral Royalty Rate Analysis (MRRA Report)) on which Commerce based its findings, has no application in law and, therefore, no relevant application to Commerce's analysis. Accordingly, there is no basis for Commerce's determination that Simcoa's payment of the current prescribed royalty rate for silica constitutes a government financial contribution that confers a benefit.
- Even if Commerce established that the royalty rate Simcoa paid constituted a specific, countervailable subsidy, it must further demonstrate that it was passed through to the costs of production of silicon metal. To this end, the mining costs prior to the processing

[115] *See* Petitioner Case Brief at 5 (citing to *Beijing Tianhai Industry Co., Ltd. v. United States*, 52 F. Supp. 3d 1351, 1369 (CIT 2015) ("although Commerce must use benchmark prices for merchandise that is comparable to a respondent's purchases. . ., there is nothing that requires it to use prices for merchandise that are identical to a respondent's purchases")). *See also Archer Daniels Midland Co. v. United States*, 968 F. Supp. 2d 1269, 1278 (CIT 2014) ("Commerce . . . is required only to select benchmarks that are comparable, not identical."); *Essar Steel Ltd. v. United States,* 678 F. 3d 1268, 1273 (Fed. Cir. 2012).

[116] *Id*. at 6 (citing to *RZBC Group Shareholding Co., Ltd. v. United States*, no. 16-64, slip op. at 21-22 (CIT June 30, 2016) (*RZBC Group Shareholding*)).

[117] *Id*. at 8 (citing to *Pipes and Tubes from Turkey*, and accompanying PDM at 16).

of silica used by Simcoa represent only 0.5 percent of the total costs of production of silicon metal, with the vast majority of production costs accrued by subsequent value-added processing.

Simcoa's Comments

- Simcoa is one of several companies that purchase Western Australia minerals pursuant to a specific-rate royalty, thus contradicting Commerce's allegation that Simcoa is "the only recipient of the undervalued {quartz}."[118]
- The application of specific-rate royalties to an array of raw materials demonstrates that these royalty rates are not specific to a particular industry.[119] The current framework for applying royalty rates in Australia was implemented in 1981, prior to the development of the silicon metal industry and the existence of Simcoa.
- The MRRA Report is a discussion paper without legal meaning or evidentiary weight and is not an appropriate benchmark. The MRRA Report does not satisfy any of the tiers used by Commerce, and is nothing more than a recommendation to the GOWA in the context of possible reforms to its mineral royalty system.
- Simcoa's royalty payments to the GOWA during the POI did not confer a benefit. Before the POI and after the MRRA was published, Western Australia's specific-rate royalty for silicon metal was raised and was the second highest in Australia during the POI.
- The Minister for Mines and Petroleum stated that the royalty system in Western Australia has delivered a return to the community and provided industry with a predictable cost structure.
- With respect to a world market price, both Simcoa and the petitioner agree that the GTA data is not an appropriate benchmark for measuring the adequacy of remuneration for the high-purity quartz used by Simcoa in its silicon metal production. The GTA data corresponds to exports of quartzite sands and quartzite, which are not imported for silicon metal production.
- The average quartz prices reported by several global silicon metal producers are in all instances, except one, lower than Simcoa's quartz input prices during the POI. These data are relied on by 80 percent of market participants in North America and Europe as authoritative benchmarks for ferroalloy prices. Moreover, unlike the GTA data, the November 2016 CRU data pertains exclusively to quartz utilized in the production of silicon metal.
- Using the CRU data as a world market price benchmark is consistent with Commerce practice.[120] These data demonstrate that Simcoa received no benefit from the GOWA's quartz royalty rate.

---

[118] *See* Simcoa Case Brief at 40 (citing *Preliminary Determination*, and accompanying PDM at 13).
[119] *Id*. at 39 (citing *Bethlehem Steel* 140 F. Supp. 2d at 1369 where the U.S. Court of International Trade has explained that "{t}o impose countervailing duties. . . {where} no evidence is produced indicating that the benefit was industry specific, is anathema to the purpose of the countervailing duty laws.")
[120] *Id*. at 44 (citing *Certain Hot-Rolled Carbon Steel Flat Products from India: Final Results of Countervailing Duty Administrative Review*, 73 FR 40295 (July 14, 2008), and IDM at Comment 26 (*Hot-Rolled Carbon Steel Flat Products from India*); and *Citric Acid and Certain Citrate Salts: Final Results of Countervailing Duty*

- If Commerce continues to rely on the MRRA Report as the benchmark, it must account for: 1) Simcoa's extraction and processing costs incurred at the Moora mine site; and 2) Simcoa's payments made for low-purity quartz that would appropriately be subject to a lower royalty rate.

Petitioner's Rebuttal Comments

- Contrary to Simcoa's assertion,[121] the record shows that none of the other companies that Simcoa identifies as having purchased "Western Australia minerals pursuant to a specific-rate royalty" purchased quartz. Rather, the minerals involved were granite, marble, sandstone, and talc.[122]
- Simcoa is the only company that received high purity quartz for use in silicon metal production. Accordingly, Commerce correctly found in the *Preliminary Determination* that the provision of quartz to Simcoa for LTAR is *de facto* specific within the meaning of section 771(5A)(D)(iii)(I) of the Act, because the number of actual recipients of the subsidy is limited.
- The royalty rates in other jurisdictions do not constitute a proper benchmark under Commerce's hierarchy of benchmarks. First, royalty rates are not prices resulting from actual transactions. Second, the royalty rates at issue do not constitute world market prices. Finally, there is no basis to conclude that the royalty rates in other Australian jurisdictions are consistent with market principles.
- The MRRA Report constitutes a GOA-issued analysis of the Western Australian mineral royalty program that demonstrates that the GOA itself determined that the royalty rate for quartz used in silicon metal production by Simcoa does not provide "fair value" to the government.
- The petitioner disputes Simcoa's claim that it agrees that the GTA data are not an appropriate benchmark. The petitioner made clear that the GTA data are a proper basis for calculating a world market price benchmark for quartz.[123] Simcoa has not identified any valid reason that would disqualify the GTA export data from being used as the basis for calculating a world market price for quartz in this investigation.
- There is no record support for Simcoa's claim that the CRU data are market prices reported by silicon metal producers. The prices are estimates prepared by CRU. CRU reported a quartz "price" for Simcoa, even though Simcoa stated that it does not purchase any quartz from other suppliers during the POI.
- The CRU data are not world market prices, relating to silicon metal producers in only two countries (the United States and Canada), other than the information for Simcoa. The CRU data are incomplete and unsuitable for use in determining a world market price.

Administrative Review,79 FR 78799 (December 31, 2014) and Issues and Decision Memorandum at 19-20 (*Citric Acid from China*).

[121] *See* Petitioner Rebuttal Brief at 27 (citing Simcoa Case Brief at 39-40).

[122] *Id*. at 27 (citing to the GOA Second Supplemental New Subsidy Allegation Questionnaire Response, dated July 18, 2017, at 9).

[123] *See* Letter from Petitioner, "Silicon Metal from Australia; Countervailing Duty Investigation; Globe Specialty Metals Rebuttal to Simcoa and Government of Australia Comments Regarding World Prices for Quartz and Quartzite," dated September 18, 2017.

- Simcoa's reliance on Commerce precedent is misplaced.[124] In both *Hot-Rolled Carbon Steel Flat Products from India* and *Citric Acid from China*, the Department used actual prices. In *Citric Acid from China*, Commerce weight-averaged the CRU data and GTA export data. In the current investigation, not only do the CRU data not reflect prices and provide sufficient country coverage, there are no quantities to use for weight averaging.
- Simcoa's reliance on Commerce precedent in the 2002 investigation of *Softwood Lumber from Canada* is misplaced. Unlike that case, in the instant case Commerce did not use a market price benchmark under Tier 1 or Tier 2. Therefore, there is no basis for making adjustments to the comparison made in the preliminary determination if Commerce continues to base the benchmark on the MRRA Report.
- Contrary to the GOA's argument, there is no requirement that Commerce conduct any type of pass through analysis. Because quartz is a direct material input in the production of silicon metal, any benefit received by Simcoa with respect to the provision of quartz is directly passed through to the cost of production of silicon metal.

GOA's Rebuttal Comments

- There is enormous variability in the monthly value of quartz exports (ranging from $44 to $1,747,667 per ton), as well as little consistency with respect to prices within countries (*e.g.*, U.S. exports to the Bahamas range from $1,194.85 to $14,130 per ton). Quartz is used in a variety of applications and the vast spread in prices reflects the very different uses and quality of quartz of the traded product.
- Contrary to the petitioner's claim, the quartz mined by Simcoa and used in the production of silicon metal cannot be considered comparable to all the types of quartz within the GTA dataset. Most of the countries that record high prices for quartz are major exporters of precious metals and precious gemstones. It would not be commercially viable to produce silicon from such quartz. Therefore, it is not meaningful to compare the quartz mined by Simcoa to the higher value products captured by the GTA data.
- In the dataset provided for 2016, a significant number of records (5.3 percent) contain a value but no corresponding quantity, precluding the calculation of an average unit value for certain months. This omission indicates broader issues with respect to the reliability of the data.
- The *Preliminary Determination* and the petitioner's case brief fail to establish that either the GTA data or the MRRA Report constitute appropriate benchmarks for determining whether Simcoa paid LTAR for the quartz it mined. Commerce and the petitioner have failed to establish that any benefit was obtained by Simcoa within the meaning of the relevant WTO rules.

Simcoa's Rebuttal Comments

- In the absence of any specific legal or regulatory basis limiting the applicability of the specific-rate royalty to Simcoa, quartz, or silicon metal production, the specific-rate royalty cannot be *de jure* specific.

[124] *See* Petitioner Rebuttal Brief at 32 (citing to Simcoa Case Brief at 44-45).

- The petitioner incorrectly claims that the royalty for quartz is a *de facto* specific subsidy, relying exclusively on the fact that Simcoa is the only silicon metal producer in Australia. However, the same royalty rate is also applicable to twelve other minerals in Western Australia. Several companies from multiple industries pay the same specific-rate royalty for minerals extracted in Western Australia.
- Simcoa provided Commerce with raw material prices for quartz reported by silicon metal producers during the POI from a firm that Commerce has relied on previously for benchmark data. This is the only reliable record evidence that Commerce may rely on for assessing the adequacy of remuneration based on a world market price benchmark. Applying this benchmark demonstrates that no benefit was provided to Simcoa through the GOWA's mineral royalty rates.
- Simcoa has never argued that the merchandise to be relied on by Commerce as a benchmark must be identical to the merchandise allegedly provided to Simcoa for LTAR. Rather, the benchmark must be comparable, and the best information available.[125] Commerce "normally attempts to rely on data reflecting the narrowest category of product encompassing the input product, where possible."[126]
- The petitioner's arguments in favor of the GTA data are directly contradicted by their own arguments in favor of ensuring appropriate comparability in prior antidumping investigations of silicon metal from both Russia and China.[127,128] In both cases, the petitioner expressed concern with quartz prices for which technical specifications were not available, thereby precluding Commerce (according to the petitioner) from finding comparability. Commerce agreed with the petitioner, finding that the prices should be rejected in favor of other data demonstrating comparability with quartz used by the respondents.[129]
- The GTA data on the record correspond to exports of quartz sands, which are not comparable to the quartz used in Simcoa's silicon metal production. There is no information in the GTA data to distinguish between these quartz types or end uses. Accordingly, prices for quartz sands are inappropriate for use as a benchmark to measure the adequacy of remuneration for quartz utilized in silicon metal production.[130]

---

[125] *See* Simcoa Rebuttal Brief at 11 (citing to *RZBC Group Shareholding*).
[126] *Id*. at 8 (citing *Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Final Results of Countervailing Duty Administrative Review, and Partial Rescission of Countervailing Duty Administrative Review*; 2014, 82 FR 32678 (July 17, 2017) and Issues and Decision Memorandum at Comment 4).
[127] *Id*. at 8 (citing *Notice of Final Determination of Sales at Less Than Fair Value: Silicon Metal from the Russian Federation*, 68 FR 6885 (February 11, 2003) and Issues and Decision Memorandum (*Silicon Metal from Russia*) at Comment 2; and *Silicon Metal from the People's Republic of China: Notice of Final Results of 2005/2006 New Shipper Reviews*, 72 FR 58641 (October 16, 2007) and Issues and Decision Memorandum at Comment 4.)
[128] Although the petitioner's comments were made in the context of surrogate values to be employed in antidumping proceedings; the CIT has recognized that the principles of comparability apply to both surrogate values in AD investigations and benchmarks in CVD investigations. *See* Simcoa Rebuttal Brief at 8 (citing to *RZBC Group Shareholding Co., Ltd. v. U.S.*, 100 F. Supp. 3d 1288, 1307, 1312 (CIT 2015).
[129] *See* Simcoa Rebuttal Brief at 9 (citing *Silicon Metal from Russia* at Comment 2).
[130] *Id.* at 12 (citing *RZBC Group Shareholding Co., Ltd. v. United States*, Court No. 15-00022, Slip Op. 16-64, 7-10 (CIT 2016) observing that Commerce took due account of the specific type of coal utilized by respondents in the manufacture of citric acid and certain citrate salts).

- The different end uses for quartz reported in the GTA data are further evidenced by the extreme variability in reported prices, which range from AUS$44 to AUS$1,747,667 per ton. None of this quartz is being imported for metallurgical purposes, as evidenced by the aberrantly high prices compared to Simcoa's quartz prices.
- In *Silicon Metal from Russia,* Commerce rejected certain quartz prices offered by the petitioner based almost entirely on the prices being "aberrationally high."[131] Data that were offered (and rejected by Commerce) in *Silicon Metal from Russia* were actually less than the average price of quartz captured in the GTA data on the record in this investigation. The petitioner has not provided any evidence, law, or Commerce practice for why these discrepancies should be disregarded when selecting comparable pricing data for quartz.
- The petitioner cites to *RZBC Group Shareholding* for the proposition that data utilized for a world price benchmark are sufficiently comparable to the inputs at issue, based simply on the HTSUS classification, is not on point. Unlike that case, in the instant case, there is no means of isolating within the GTA data the quartz used in the production of silicon metal.
- If Commerce unlawfully countervails Simcoa's royalty payments, certain GOWA-mandated costs related to the extraction of quartz form the Moora mine must be taken into account in the benefit calculation.
- The petitioner's arguments concerning Simcoa's quartz by-product revenue are irrelevant to Commerce's analysis.
- The petitioner's assertion that Commerce must adjust Simcoa's manufacturing costs for quartz (because it does not reflect Simcoa's actual cost of production) is directly contradicted by record evidence. Commerce conducted a detailed verification of the evidence submitted by Simcoa and found no inconsistencies in Simcoa's data. Simcoa also submitted independently verified data covering the POI that are consistent with the data reported in Simcoa's questionnaire responses.[132]

Commerce's Position:

With regard to a benchmark for calculating the benefit, the data on the record include: 1) GTA export data for quartz; 2) average quartz prices for several global silicon metal producers reported by CRU; and 3) the quartz royalty rates set by the government in other Australian states. The GTA data contain prices for exports of products that are different than the quartz used by Simcoa for silicon metal production. For example, the data includes quartz used for kitchen countertops, which is larger and more uniform than the quartz used for silicon metal production, which is crushed and processed for insertion into silicon smelting furnaces. In addition, the GTA data includes "roughly trimmed blocks together with stone articles such as flagstones, monumental and building stone, slabs and tile."[133] Therefore, the prices for the GTA data include prices for much higher value products. We therefore determine that the GTA data are not comparable to the quartz provided by the GOWA and are thus not suitable for benchmark purposes. With respect to the MRRA Report, we note that the royalty rates in the report do not

[131] *Id.* at 14 (citing *Silicon Metal from Russia* I&D Memo at Comment 2).
[132] *Id*. at 10 (citing Simcoa GTA Comments at Exhibit GTA-5, Exhibit GTA-4, and Exhibit NSAQ-18 of Simcoa's June 27, 2017, questionnaire response).
[133] *See* Simcoa's August 25, 2017, Fourth Supplemental Questionnaire Response at 2.

reflect actual prices and there is no basis to conclude that the royalty rates for quartz established by other Australian jurisdictions are consistent with market principles. For these reasons we determine that the MRAA royalty rates are not suitable benchmarks to measure the adequacy of remuneration under this program.

For the final determination, we determine that the CRU data contain appropriate prices to use under a Tier 3 benchmark analysis. The CRU data contain prices for quartz that pertain exclusively to quartz utilized in the production of silicon metal, the subject merchandise. As such, these prices are comparable and contemporaneous market-based prices and thus suitable as benchmarks. Therefore, consistent with 19 CFR 351.511(a)(2)(iii) and Commerce practice, we relied on the CRU data to conduct a "Tier 3", cost-based analysis to determine whether the quartz mining royalty rates charged by the GOWA were consistent with market principles during the POI.[134] Under this analysis, we compared Simcoa's total per-unit 2016 quartz costs, including transportation expenses, to the average per-unit value reflected in the CRU data (including transportation costs). On this basis we determine that the quartz royalty rates charged by the GOWA during the POI are consistent with market principles and therefore did not confer a benefit to Simcoa. Thus, we are finding this program to be not countervailable.

Finally, because we are determining that no benefit was conferred to Simcoa during the POI, it is not necessary to further address Simcoa's comment regarding the need to conduct a pass-through analysis in the benefit calculation. Additionally, we received comments from the interested parties on the issue of whether the provision of quartz is specific and provides a financial contribution, however, because we determined that the provision of quartz for LTAR did not provide a benefit, the issues of specificity and financial contribution are moot.

Comment 6: State Agreement Loan and Grant

GOA's Comments

- There is no basis for Commerce's determination that the State Agreement Loan and Grant constituted a government financial contribution that conferred a benefit within the meaning of the SCM Agreement.[135] The loan and grant were fully discharged in 2009, seven years prior to the POI.
- Even if this program was relevant to Commerce's investigation, the net countervailable subsidy of 0.01 percent *ad valorem* should not be applied because it is *de minimis* under WTO rules.[136]

Petitioner's Comments:

The petitioner did not comment on this issue.

---

[134] *See e.g.*, *Coated Free Sheet Paper from Indonesia: Final Affirmative Countervailing Duty Determination*, 72 FR 60642 (October 25, 2007), and accompanying IDM at Comment 11. (Finding that there was no evidence on the record with respect to world market prices for standing timber, Commerce analyzed whether the government price was consistent with market principles and used export log prices from Malaysia as a starting point for determining the market-based stumpage benchmark.).
[135] *See* GOA Case Brief at 10.
[136] *Id.*

Commerce's Position:

In the *Preliminarily Determination* we stated that the grants provided by the GOWA under the State Agreement Loan and Grant program within the AUL (*i.e.*, from 2003-2009) constitute a financial contribution in the form of a direct transfer of funds from the government, and bestowed a benefit in the amount of the grants, within the meaning of sections 771(5)(D)(i) and 771(5)(E) of the Act. We also determined that a benefit exists under 19 CFR 351.504(a), equal to the amount of the grants. Finally, we determined that the program is *de jure* specific, in accordance with section 771(5A)(D)(i) of the Act, because the GOWA authorized and provided the assistance only to Simcoa.

With respect to the GOA's argument that the loan was fully discharged in 2009 (prior to the POI), because Simcoa did not receive these benefits on an on-going basis and the assistance was to be provided only up until July 1, 2009, we treated these subsidies as non-recurring grants. Therefore, in accordance with 19 CR 351.524(b), we allocated the benefits over the number of years corresponding to the AUL. Furthermore, we disagree with the GOA's assertion that the net countervailable subsidy of 0.01 percent *ad valorem* should not be applied because it is *de minimis* under WTO rules. The *de minimis* rule applies to the overall countervailing duty rate, as opposed to a rate for a specific program.[137] Accordingly, we continue to find that Simcoa received a net countervailable subsidy of 0.01 percent *ad valorem* under this program.

Comment 7: Calculation Errors in the Preliminary Determination

Simcoa's Comments

- When calculating the subsidy rates for several programs, Commerce used an incorrect denominator which excluded sales of micro-silica made by Simcoa affiliate Microsilica. Commerce is required to apply the sales denominator which most accurately reflects the benefit attributed to Simcoa and its affiliates during the POI.
- Commerce failed to treat the RET exemptions allocated to Simcoa as non-recurring grants. The *Preliminary Determination* demonstrates that such exemptions, if they are to be countervailed, should be considered non-recurring grants because Simcoa must apply "each year to the Clean Energy Regulator for an exemption from renewable energy liabilities"[138] and any benefit provided is tied to Simcoa's capital assets.[139]
- For the final determination, Commerce must recalculate the alleged benefits received by Simcoa pursuant to exemptions from the RET over the 14-year allocation period

[137] *See Countervailing Duty Investigation of Certain Biaxial Integral Geogrid Products from the People's Republic of China: Final Affirmative Determination and Final Determination of Critical Circumstances, in Part*, 82 FR 3282 (January 11, 2017), and accompanying IDM at Comment 12.
[138] *See* Simcoa Case Brief at 49 (citing to *Preliminary Determination*, and accompanying PDM at 10).
[139] *Id*. at 50.

established by Commerce for this investigation. Correcting for this error reduces Simcoa's rate by 1.70 percent *ad valorem*.

Petitioner's Rebuttal Comments

- Commerce should reject Simcoa's claim that discounts on electricity are in the list of non-recurring subsidies in Commerce's regulations because Commerce's regulations specify discounts on electricity to be normally treated as recurring.[140]
- Commerce has determined in the past that reductions in electricity costs under renewable energy programs provide recurring benefits.[141]
- None of the conditions required in Commerce's regulations to treat a subsidy, which is normally treated as recurring, as non-recurring exist in this case.[142] First, the RET exceptions Simcoa received during the POI were not exceptional. Second, although Simcoa must apply for the exemption certificate annually, the eligibility is automatic. Third, Simcoa has not provided any evidence that RET exemptions are tied to its capital assets.

Commerce's Position:

We disagree with Simcoa that an incorrect denominator was used to calculate the subsidy rates for several programs. For each of the countervailed programs, except for the R&D Tax Incentive, the Department stated in the *Preliminary Determination* its intention to use Simcoa's total sales during the POI in the denominator of the calculation.[143] With respect to the calculation for the R&D Tax Incentive program, we used the total sales of Simcoa's parent company, Silicon Metal Company of Australia, as the denominator because it was the recipient of the benefit. The reported recipient of the benefits under the countervailed programs, except for the R&D Tax Incentive, was Simcoa. Therefore, the Department used Simcoa's reported total sales of subject merchandise (as adjusted for verification corrections) as the denominator for benefits received by Simcoa, in accordance with 19 CFR 351.525(b)(6)(i), which states that "The Secretary will normally attribute a subsidy to the products produced by the corporation that received the subsidy." In this case, none of the reported subsidies were received by Simcoa's affiliate, Microsilica. Therefore, we find that it is not appropriate to include Microsilica's byproduct sales of microsilica in the total sales figure used in the denominator to calculate the subsidy rates for programs used by Simcoa.

We agree with the petitioner that discounts on electricity (*i.e.* RET liability exemptions) are generally treated as recurring subsidies pursuant to 19 CFR 351.524(c)(1). Similar to the program in *Certain Lumber from Canada*,[144] Simcoa received offsets for pass-through renewable energy project costs on its electricity bills, which lowered Simcoa's total electricity costs.

---

[140] *See* Petitioner Case Brief at 20 (citing 19 CFR 351.524(c)(1)).
[141] *Id*. at 20 (citing *Certain Lumber Product from Canada: Preliminary Affirmative Countervailing Duty Determination*, 82 FR 19657 (April 28, 2017) (*Certain Lumber from Canada*), and accompanying IDM at 80).
[142] *Id.* at 21 (citing 19 CFR 351.524(c)(2)).
[143] *See, e.g., Preliminary Determination* at 8 ("To calculate the benefit, we divided the amount of the payments… by Simcoa's total sales during the POI.").
[144] *See* "New Brunswick Tax and Other Revenue Foregone Programs," New Brunswick Large Industrial Energy Purchase Program," at 147.

However, because Simcoa argues that this program is non-recurring, we conducted an analysis pursuant to 19 CFR 351.524(c)(2) which requires us to consider:

(i) Whether the subsidy is exceptional in the sense that the recipient cannot expect to receive additional subsidies under the same program on ongoing basis from year to year;
(ii) Whether the subsidy required or received the government's express authorization or approval (*i.e.* receipt of benefits is not automatic), or
(iii) Whether the subsidy was provided for, or tied to, the capital structure or capital assets of the firm.

Simcoa does not argue, nor is there any information on the record indicating, that Simcoa cannot expect to receive benefits under this program on ongoing basis. To the contrary, the GOA in its responses stated that this program is not "exceptional."[145] With respect to the second factor, although Simcoa annually applies for the exemption certificate, which requires government approval, the approval process is of an automatic nature wherein the Australian Clean Energy Regulator must issue the certificate as long as the eligibility criteria (*i.e.,* trade exposure and emissions intensity) are met, and there is no evidence on the record which would indicate that Simcoa's emissions intensity or trade exposure might change year-to-year to an extent that would disqualify Simcoa from eligibility. As for the third factor, we agree with the petitioner that Simcoa did not provide any evidence that the provision of EITE exemptions were tied to Simcoa's capital assets, and the GOA stated that it is not tied to capital structure or capital assets of the recipient firms.[146] Therefore, we continue to find it appropriate to treat the benefits received under this program as recurring. Thus, in accordance with 351.524(a), we will allocate (expense) the benefit to the year in which it was received.

[145] *See* GOAIQR at 52.
[146] *Id*.

VI. RECOMMENDATION

We recommend approving all of the above positions and adjusting all related countervailable subsidy rates accordingly. If these Commerce positions are accepted, we will publish the final determination in the *Federal Register* and will notify the U.S. International Trade Commission of our determination.

☒	☐
Agree	Disagree

2/27/2018

X 

Signed by: CHRISTIAN MARSH
Christian Marsh
Deputy Assistant Secretary
for Enforcement and Compliance