COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No.: 54/LM/Jul04

In the large merger between:

Xstrata South Africa (Proprietary) Limited **Acquiring Firm**

And

Egalite (Proprietary) Limited and
International Carbon Holdings (Proprietary) Limited **Target Firms**

Reasons for Decision *[Non-confidential version]*

Conditional Approval

On 20 December 2004 the merger between Xstrata South Africa (Pty) Ltd and Egalite (Pty) Ltd and International Carbon Holdings (Pty) Ltd was approved subject to conditions contained in an order issued on the 20 December 2004. The reasons for this decision follow.

The Parties

The primary acquiring firm is Xstrata South Africa (Pty) Ltd ("Xstrata"), a wholly owned subsidiary of Xstrata (Sweiz) AG, a company registered in Switzerland, which in turn is owned by Xstrata Plc (UK). Although Xstrata controls a number of subsidiaries the only relevant subsidiary for purposes of this transaction is Char Technology (Pty) Ltd ("Chartech").

The primary target firms are Egalite Investments (Pty) Ltd ("Egalite") and International Carbon Holdings (Pty) Ltd ("ICH").

Egalite is an investment holding company that owns all the issued shares in African Fine Carbon (Pty) Ltd ("AFC"), which at the time of notification owned 50% of the issued shares in African Carbon Manufacturers (Pty) Ltd ("ACM"). Anker Coal and Mineral Holdings SA (Pty) Ltd held the remaining 50% of ACM. However, Anker has since indicated that it intends to sell its 50% shareholding in ACM to AFC. The parties requested that the Tribunal evaluate the merger transaction, as if Xstrata will acquire sole control over ACM.

ICH controls African Carbon Producers ("ACP"), which in turn owns 74% of the issued shares in African Carbon Union (Pty) Ltd ("ACU"). The Sindawonye Trust holds the remaining 26% of the issued shares in ACU.[1]

The Transaction

1 [confidential information]

Xstrata is acquiring the entire issued share capital of Egalite and ICH, and therefore direct control over the African Carbon Group. Since the activities of the four operating companies, namely, AFC, ACM, ACP and ACU essentially constitute a single business operation, for convenience, we will refer to the target firms collectively as "African Carbon".

Rationale for the Transaction

According to the merging parties, the commercial rationale for Xstrata wanting to purchase the shares in African Carbon is to ensure a consistent supply of high quality char. As will be explained below, Xstrata uses char as a reductant in its ferrochrome production operations. From African Carbon's perspective, its current shareholders want to sell their shares to recoup the investment they have made in the business. According to the parties, the owners recognize that in order for African Carbon to grow its business beyond its current position it requires stronger financial backing.

The Parties' Activities

The Xstrata group is involved in the mining and sale of coal, zinc, copper, chrome (ferrochrome) and vanadium. Xstrata operates as a fully integrated ferrochrome producer. It owns and operates five chrome ore mines as well as three metallurgical plants used to convert chrome ore into ferrochrome. Xstrata's subsidiary, Chartech produces gas coke, char and electrode paste. The by-products of the production of char and gas coke are tar, char fines and coke fines.

African Carbon is involved in the production of char and gas coke as well as their by-products, tar, coke fines and coal fines. African Carbon operates twenty-one (21) gas coke retorts[2] and is currently constructing four (4) new gas coke retorts. It also operates 5 chain grate furnaces (ACP), which produce char.

According to the Commission, "char" is virtually identical to "gas coke", the difference being only in the production process used to produce each of them. For this reason, in this decision, we will refer to them both as "char".

The Relevant Market

As mentioned above, Xstrata is acquiring a char producer. Xstrata, through Chartech, is also involved in the production of char. Furthermore, char is a key input in the production of ferrochrome and as such Xstrata, as a ferrochrome producer, consumes char. The transaction, therefore, has both a horizontal and vertical effect.

In terms of the horizontal effect of the transaction, there is an overlap in the markets for char production as well as in the markets for the by-products of the char production process. With regard to the overlap in the markets for the by-products of the char production, the parties produce very small amounts of these products and have very insignificant market shares. We do not have any concerns regarding these markets and will now turn to the char production market. The parties analysed the transaction on the assumption that the relevant upstream market is the market for char production.

2 African Carbon Manufacturers operates six (6) of these gas coke retorts, African Carbon Producers four (4), African Carbon Union six (6), and African Fine Carbon five (5).

The char production market

Char is used as a reductant in the metallurgical industry. A reductant is a substance that is used to reduce another substance in a chemical reaction with itself being oxidized in the process. In the South African ferroalloy industry, ferrochrome producers tend to use basically four different sources of carbon[3] to act as reductants in the reduction of metal oxide to metal, namely coke, char, anthracite and bituminous coal. These vary according to price and efficacy; the more effective a reductant, the more expensive. For technical reasons, the most effective reductant in the ferrochrome production process is coke, and most ferrochrome producers prefer using coke as a reductant. Indeed ferrochrome producers outside South Africa use coke almost exclusively for this purpose.

Locally, coke is supplied by Ispat Iscor Coke and Chemicals (IICC). However, ferrochrome producers insist that over the last few years there has not been enough coke supplied within SA to meet the demand of local ferrochrome production. This shortage is exacerbated by the increased demand for coke internationally, largely due to the increase growth in the Chinese steel industry. Therefore, due to the high cost of coke, ferrochrome producers (particularly South African ferrochrome producers) have in recent years, started experimenting with coke in combination with various other types of cheaper carbon sources (viz. bituminous coal, char and anthracite) to try and reduce the reductant cost component of their production process. The combination is such that coke contributes the highest proportion to costs, followed by char, anthracite and bituminous coal.[4] Coke (having a high carbon content and a lower volatile matter) is always used as a base reductant.

According to the Commission and the parties, bituminous coal and anthracite on their own, are not regarded as suitable alternatives to coke.[5] Char, however, can be used effectively in conjunction with coke or with a mixture of coke, bituminous coal and anthracite, and is therefore preferred by local ferrochrome producers. This has resulted in the South African ferrochrome industry today being as reliant on char as it is on coke.

Although, coke and char are to an extent regarded as substitutable[6], the price of coke is

3 Carbon (and more specifically, particular types of coal) is a suitable reductant for use in a pyro-metallurgical environment.

4 From the Commission's report and the other ferrochrome producers' submissions, it would seem that char constitutes between 6% and 8% of the total cost of production of ferrochrome.

5 The volatile content of bituminous coal is relatively high which necessitates that it is used together with coke and char (and possibly anthracite, depending on the quality of anthracite) when placed in a furnace. While, anthracite has a relatively lower volatile matter and lower ash content than bituminous coal, the quality of different anthracite deposits varies substantially. Only high quality anthracite can be used as a reductant in a pyro-metallurgical environment such as in ferrochrome production. Although anthracite is priced at a discount to coke, substitution of anthracite for coke is limited by the fact that, (1) high quality anthracite is not available in large enough amounts and (2) even if it were, metallurgically, anthracite and coke do not have the same chemical composition and respond differently, with different results when placed in a furnace.

6 According to the parties, coke substitution by char does not occur by producer preference – it is driven purely by economic or supply and demand considerations.

substantially higher than char; at least 50% higher.[7] The Commission's investigation revealed that the average price in 2003 was R1200 per tonne while in April 2004 it was R2200 and in May, R3000. In last few months price differential between coke and char rose by approx. 260%.[8] In July 2004 African Carbon priced its char at R695 per tonne.

In South Africa, there are three char producers, namely, Chartech, African Carbon and Rand Carbide.[9] Chartech supplies all of its production internally to Xstrata. From the Commission's investigation, it would appear that there is a difference in the char that African Carbon produces and "Rand Carbide char". Rand Carbide char is produced via the chain grate process while the African Carbon material is produced in a retort. The material produced via the chain grate method is not as suitable to ferrochrome production as that produced in a retort, as it is more prone to breaking down during transportation and use. African Carbon char is used as a replacement for "metallurgical coke", which is an extremely competent material with regards to its friability and it follows that if a ferrochrome producer replaces this coke, they would have to substitute it with material that is relatively competent.

A ferrochrome producer in its submission to the Commission, stated that after testing Rand Carbide's char, it concluded that it did not regard Rand Carbide char as an alternative to African Carbon char.[10] Another ferrochrome producer stated that Rand Carbide char is "not technically acceptable for use in [its] production processes due to its phosphorous and sulphur content and sizing specifications".[11] Based on the above, we accept that the char produced by Rand Carbide is not an adequate substitute for the char produced by African Carbon either.

Functionally therefore, char is not substitutable with other carbon sources and Rand Carbide char. For competition law purposes, char can therefore be regarded as an essential input into the ferrochrome production process. This is not disputed by the ferrochrome producers Furthermore, African Carbon is the only non-vertically integrated char producer from whom other South African competitors of Xstrata in the downstream market can source char. Therefore, we accept, for these purposes that the relevant product market is char production. The geographic market is not disputed.[12] We will now briefly consider the relevant downstream market.

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7 It is important to bear in mind that coke is a superior product to char and that this quality difference should be factored into the price differential. Given the difference in quality between coke and char, the parties believe that if the price of char were to increase significantly above R900 to (R1000 per tonne) customers would start using more coke in their furnaces instead of char.

8 The parties' believe that char has historically been priced too low and the longer-term equilibrium price of char is somewhat higher than the historical prices at about R850 to R900 per tonne.

9 Rand Carbide is also part of a vertically integrated firm and supplies all its output to its own downstream ferrosilicon production operation.

10 Page 618 of the record

11 At page 615 of the record "The phosphorous and sulphur content is too high and the sizing of the material is too small". This ferrochrome producer did in the past attempt to use Rand Carbide char, but unacceptable furnace stability problems were encountered and the initiative was discontinued.

12 According to the parties, the geographic market is national based on the fact that char customers in South Africa source nationally. Outside South Africa char is produced in Australia and Poland and; due to transport costs, it would not economically viable to import char from these countries if the price of char in South Africa were to increase substantially above the expected longer-term price level of R850 to R900 per tonne. Moreover, char is not a product that transports well over long distances, as it is brittle and is therefore inclined to crumble.

The production of Ferrochrome

Both the parties and the Commission define the relevant downstream market as the global market for the production and supply of ferrochrome, and for these purposes, we accept this definition. The Commission provided the following international market shares for ferrochrome, based on estimated output for 2003:

Table 1. Market shares in the Global Ferrochrome Production Market

Ferrochrome producer	**% Market share**
South Africa	
Xstrata	22.10
Samancor	20.06
Hernic	4.81
Assmang	4.41
ASA Metal	1.20
SA Chrome	3.81
Zimbabwe	5.21
India	7.52
Iran	0.34
Japan	0.78
Russia	0.80
Finland	5.29
Eastern Europe	0.40
Brazil	2.81
China	4.01
Kazakhstan	13.03
US	1.40
Sweden	2.00
Total[13]	**100.00**

From the table above, it is clear that South African ferrochrome producers account for more than half of the ferrochrome production, worldwide. Without having to come to any conclusion on the geographic market, it suffices that any question of accessibility to an essential input will have competition issues in the market for ferrochrome production.

Evaluating the merger

From the table below, it is evident that post merger, the merged entity will control the lion's share, of the char production market as well as enjoying the dominance in the downstream market for ferrochrome production.

Table 2. Market shares in the Char production market

Char Producer	**Market share**

13 According to the Commission's statistics, 0.02% market share is accounted for.

African Carbon	73%
Chartech	17%
Rand Carbide	10%

According to the merging parties, the vertically integrated Xstrata/African Carbon will not be in the position to successfully carry out an input foreclosure strategy post merger. [14] Despite the fact that the combined output of Chartech and African Carbon constitutes a relatively large share of the total output of char post merger, the merging parties submit that the transaction would not lead to a substantial lessening or prevention of competition due to *inter alia* the fact that Chartech supplies its entire output of char to its holding company Xstrata. The parties further submit that because Chartech's production did not constitute part of the relevant pre-merger market, it did not therefore, serve as a competitive constraint on the pricing and general market behaviour of African Carbon.

On the other hand, Samancor Chrome ("Samancor"), a ferrochrome producer competing with Xstrata, submits that, as a result of the merger, Xstrata would not only have the incentive and ability to reduce or stop supplies, but also the incentive and ability to materially raise the price of char to its South African competitors in the downstream market. Samancor raised these concerns with the Commission while it was investigating this merger. At the time Samancor and African Carbon were engaged in negotiations over a new long term contract and were experiencing difficulty in agreeing terms. When the merger was filed with the Tribunal Samancor applied to intervene in the proceedings. Subsequent to the intervention being allowed Samancor advised that it had concluded a a 4-year supply contract with African Carbon and no longer wished to intervene in the proceedings. Nevertheless, at our request Samancor was asked to send a representative to be present at a hearing held on the 15th December 2004. [15]

During the hearing, Samancor's representative, Mr. AP Venter was asked what Samancor's concerns were regarding the merger. Mr. Venter reiterated Samancor's concern that one of its direct competitors would as a result of the proposed transaction, control a key input material into Samancor's processes and as a result it was concerned that post merger, Xstrata would be in a position to manipulate the pricing of that input.[16]

The parties, however, in their competitiveness report, downplay the importance of char to the ferrochrome production process. They submit that char constitutes only about 7% of the total production cost of ferrochrome and even if the merged entity were to increase the price of its char by as much as 260% (the differential between the current price of char and the current price of coke), the production cost of Xstrata's downstream ferrochrome customers would increase by about 18%. Furthermore, the merging parties state that the other carbon sources, such as anthracite and coke are functionally at least partial substitutes (and in the case of coke a full substitute) for char.

14 At page 299 of the record

15 Samancor had initially applied to intervene in the merger proceedings. It later withdrew its intervention, after it had successfully concluded a 4-year supply contract with the target firm

16 At page 3-4 of the transcript of the hearing held on the 15th December 2004. According to Mr. Venter, the fact that Samancor had concluded the supply agreement for a period of 4 years enabled it to "…make sure that the pricing going forward [was]…to a degree agreed in terms of the pricing mechanism".

The internal documents submitted by the parties to the Commission, however, reveal the opposite; that Xstrata, itself realizes the importance of acquiring the target firms.

[confidential information]

None of the other ferrochrome producers actually regard char as an insignificant cost, nor do they regard any future increase in price to be trivial. One ferrochrome producer indicated that should African Carbon discontinue its supply contracts, it would have to import Char or a suitable alternative, as there are no other local suppliers of retort char. According to Assmang Chrome ("Assmang"), another ferrochrome producer, if it were excluded from utilizing locally produced char and was obliged to import Chinese gas coke (char) as a substitute,[17] Assmang claim that they would incur additional costs in the order of R34 million per year.

From the above, it is clear that locally, there are no other viable substitutes for char for customers of African Carbon. Therefore because of the shortage of char in the local market and the fact that imported char is more expensive than locally produced char, post merger, a dominant, vertically integrated supplier, viz. Xstrata, would control the market for the supply of char. Many of the South African ferrochrome producers were concerned that in the absence of any alternate suppliers of char, Xstrata would have the power to foreclose access by its South African competitors in the downstream market to an essential input, alternatively to materially raise its rivals' costs in obtaining such input, and hence reduce their ability to compete with Xstrata in such market. Based on the above, we accept that the likelihood of foreclosure is great, given the monopoly of a key input. We turn now to the question whether this likelihood can be deterred by the entry of a new firm into the char production market.

Barriers to entry

The next step in our analysis is to evaluate the barriers to entry into the char production market, and to examine to what extent new entrants would be encouraged to enter the market and thus constrain a possible exercise of any market power by the merged entity. The demand for alternative carbon products is very high at this stage due to the lack ofavailability and high price of coke and with the expected growth in the ferrochrome market, additional production capacity will be needed. The char production market is therefore ripe for entry.

In the US, the most important single factor indicating that the merger might not have anticompetitive effects, is easy entry into the relevant market or low barriers to entry The US

17 In its submissions to the Commission, Assmang stated that, reductants including char are important constituents of ferrochrome production, and there is no product that can be economically substituted completely for char when used as a reductant in such production.

Merger Guidelines present a relatively detailed and strict test for determining whether entry is "easy." The test embodies 3 essential elements namely, entry must be "timely," "likely," and "sufficient" to counteract or deter the potential anticompetitive effects of the merger.[18]

According to the merging parties entry into the upstream market (char production) is relatively easy and new entrants could enter in a reasonably short space of time. [19] Firstly, a potential entrant would need access to the necessary coal. [20] In addition to coal, a new entrant would have to construct a char production plant. The parties estimate that a plant with a production capacity of 2000 tons per month should cost in the region of R4 000 000 to R5 000 000 to construct. According to the parties, South African coal producers such as BHP Billiton, Anglo American and Kumba Resources are ideally placed to enter the market. Firstly they have access to the necessary bituminous coal and, secondly they have the financial muscle to finance the establishment of the necessary production infrastructure.

We accept that the requirements for entry into the char production market are firstly access to a suitable coal source and secondly, the capital expenditure required to construct a char production facility. The Commission's investigation revealed that:

- a Greenfield facility for char production can be established in approximately two years[21] and production capacity of about 250 000 tons per annum would cost between R16-180 million in today's terms for a greenfield capacity.
- Environmental standards have increased dramatically over the last few years, and this further increases the initial cost for a new entrants.
- A potential entrant will need the suitable coal resource[22] and according to the Commission, even though this is not in abundance, there are additional resources available

The Commission contacted Ispat Iscor Coke and Chemicals, which is also in the process of extending its coke production facility. According to the Commission, this should, theoretically, lead to an increase in the supply of coke, which would lead to a reduction in coke prices and subsequently exert downward pressure on char prices. The Commission also established that there were other potential entrants into the char production market.

Samancor was of the view that barriers to entry into the upstream market were high.[23] Samancor is however very seriously considering setting up its own char production facilities. According to Mr. Venter, General Manager of Procurement at Samancor, who gave oral

18 For a relatively detailed discussion of these requirements, *see* FTC v. Cardinal Health, Inc., 12 F. Supp.2d 34, 54-8 (D.D.C. 1998).

19 This contention is at least partially supported by Assmang's submission to the Commission regarding barriers to entry into the upstream market. "According to Assmang, while there are barriers to entry in char production, these barriers are not excessively high apart from the barrier relating to being able to access raw materials. In the case of char production, access to the raw material in the form of coal is the highest barrier to entry."

20 Char is produced by treating bituminous coal. Therefore it is important for any potential entrant into the char market to be able to access the necessary bituminous coal needed in the production process.

21 The Commission contacted Bateman Metals Ltd which is involved in the construction of *inter alia* char production facilities.

22 5 seam or Bank 5 coal

23 Samancor's intervention papers

testimony at the hearing the recently concluded supply contract, gave Samancor sufficient time to evaluate options of becoming self-sufficient in the production of char and/or gas coke by constructing its own production facilities.[24]. Mr. Venter stated that in the event that Samancor did set up a char production facility, it would initially primarily serve Samancor Chrome's requirements.

Samancor also informed the Tribunal that it had been approached by an Australian firm, which was considering setting up char production facilities. [25]

The merging parties, in the competitiveness report, stated that they were aware that Kumba Resources was also investigating options for establishing a new char production facility. The Commission contacted Kumba, who stated that they were in the process of completing a feasibility study and that they would be in a position to supply char to independent ferrochrome manufactures. Kumba indicated that it would take between 12 to 24 months to set up a char production facility and they would be in a position to ramp up production since they have the necessary coal supplies. We find it peculiar that Kumba had not, to date approached Samancor[26] considering that Samancor is the second largest ferrochrome producer in South Africa and therefore the next significant char customer.

In any event we are persuaded that entry into the char production is likely. This is based on *inter alia* the indications by Samancor that it is considering setting up its own char production facilities and the fact that the ferrochrome producers questioned by the Commission, revealed that they were looking for alternative sources of char. This already established customer base is substantial enough to attract new entry. Furthermore, as stated above, the Commission's investigation revealed that while the suitable coal resource is not in abundance, there are additional resources available and various industry players with access to both the resources and capital, to set up a char production facility. We know little else about the potential Australian entrant, other than the fact that it approached Samancor with plans of entering the market, and therefore cannot conclude on its (Australian firm) commitment to entry. However, we are satisfied that there does exist a likelihood of entry into the relevant market.

We now turn to whether entry would be timely, to deal with the supply concerns raised by the target firm's customers, who are also Xstrata's competitors in the downstream market. Different views were offered with regard to the period in which a potential entrant was likely to entry. These ranged from 2 years to 4 years. However, what was certain was that entry would not take place in the next year or so. In the end, we accepted, based on submissions by the parties, the Commission and Samancor that 3 years was a sufficient time period in which potential entrants would enter the market.

The Proposed Conditions

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24 At page 4-5 of the transcript.

25 At page 6 of the transcript.

26At page 6 of the transcript.

> CHAIRPERSON: *And do you know If other companies in South Africa might enter that* [char production] *market*

MR VENTER: *Not to my knowledge, no.*

CHAIRPERSON*: No-one has approached you.*

MR VENTER: *No.*

The Commission was of the opinion that, in the interim, the char supply agreements between the Target firm and other ferrochrome producers, needed to be protected. To this end, the Commission recommended a condition to the merger, which extended the notice period for the termination of the current char supply agreements in respect of the agreement between the target firm and Hernic Ferrochrome, which read:

"1. That there be amendment to Clause 3: *Date of Commencement and Duration* of the current char supply contract between African Carbon Producers (Pty) Ltd and Hernic Ferrochrome (Pty) Ltd to read as follows:

> 1.1 This agreement shall commence on the effective date and shall endure for an initial period of 3(three) years ("the initial term"). After the expiry of the initial term the agreement shall continue indefinitely until such time as any one of the parties gives 6 (six) months' written notice to the other party of the termination of the agreement, *provided that African Carbon Producers (Pty) Ltd and/or the merged entity shall not exercise this option earlier than 31 March 2007.*

The Commission concluded, based on the various submissions made to it by the ferrochrome producers, that in the short-term, customer foreclosure was highly probable, considering that post merger, Xstrata would have 83% of the char production market. The ferrochrome producers were largely concerned about the continuity in their char supply. However, the Commission's condition extended only to Hernic Ferrochrome. [27] Samancor requested the Tribunal to impose conditions that included the Commission's condition as well as one, which protected its contractual rights in terms of the newly concluded supply contract with the target firm. Samancor was of the view that as long as it was protected during its current contract with African Carbon it had sufficient time to evaluate its options and become self-sufficient in respect of its char supply.

Conclusion

We were of the view that given the extent of the merged entities' dominance in both the upstream and downstream market, the likelihood that foreclosure would result was great. We further accepted the customers' concerns as valid that there were no viable alternatives for char locally available and other substitutes were unacceptable. Were there to be a shortage in the supply of char to the ferrochrome industry, we have no doubt that the merged entity would supply themselves first in such a situation. An important deciding factor between prohibiting and approval was the likelihood of entry. We are persuaded that entry into the char production market is likely in the next 3 years.

Having decided that, we must now consider the two proposals with regard to the conditions. The problem with Commission's condition is that there is no basis for not protecting all customers. The problem with Samancor's condition is that it works to protect Samancor's interests only.

In light of the fact that other competitors of Xstrata had raised concerns regarding supply, we felt

27 According to the Commission, in drafting the condition it had consulted with the various ferrochrome producers. However, of the various producers contacted, only Hernic Ferrochrome undertook to accept the Commission's offer

that any condition we imposed, should protect and apply to all the target firm's customers who are competitors of Xstrata. The majority of the African Carbon's customers have supply contracts in place until at least the end of 2005. These contracts, we were informed, are of an evergreen nature, and as such continue in perpetuity, until either party gives notice of termination. Char constitutes a material component of the total production cost of ferrochrome in SA and if Xstrata were to discontinue supply to the ferrochrome producers, customer foreclosure would most likely result. Therefore, given the likelihood of entry in the next 3 years we were of the view that it was necessary to secure supply for a short term, that is until the ferrochrome producers have had the opportunity to find alternate sources of char and/or new entrants have set up char production facilities.

We asked the parties to draft a set of conditions, which would not only require the merged entity to comply with the supply agreement with Samancor for its duration, but also require the merged entity to comply with its supply agreements with the remaining ferrochrome producers other than Samancor and X-strata for a period of three years from the date that the merger is approved; a condition that would be binding on the merged entity as a whole irrespective of which firm in the group is the actual contracting party. The merging parties then proposed a set of conditions which satisfied the above principles, and we accepted the conditions as they sufficiently addressed our concerns regarding the short term security of the supply contracts between the target firm and the other ferrochrome producers. These conditions are attached to these reasons as Annexure A.

No public interest concerns have been raised in respect of the merger.

_____ **15 February 2005**

N. Manoim **Date**

Concurring: MTK. Moerane and M. Mokuena

For the Acquiring firm: D Rudman (Werksmans)
For the Target firms: B Serebro (H. R. Levine Attorneys.)
For Samancor: Advocate J Wilson instructed by J Meijer (Cliffe Dekker)
For the Commission: A Chetty (Mergers and Acquisitions) M Langa (Legal Services)

ANNEXURE A

COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No.: 54/LM/Jul04

In the large merger between:

Xstrata South Africa (Proprietary) Limited **Acquiring Firm**

and

Egalite (Proprietary) Limited and
International Carbon Holdings (Proprietary) Limited **Target Firms**

Order

Further to the recommendation of the Competition Commission in terms of section 14A(b), the Competition Tribunal orders that:

1. The merger between Xstrata South Africa (Proprietary) Limited and Egalite (Proprietary) Limited and International Carbon Holdings (Proprietary) Limited be approved in terms of section 16(2)(b), subject to the following conditions:

    1.1. Without prejudice to any rights of any of African Carbon Producers (Proprietary) Limited, African Carbon Manufacturers (Proprietary) Limited, African Carbon Union (Proprietary) Limited and African Fine Carbon (Proprietary) Limited (collectively "the Contracting Parties") pursuant to a breach of the following agreements by the purchasers (for the avoidance of doubt those referred to in 1.1.1 and 1.1.2) in terms of those agreements, each of the Contracting Parties shall comply with the provisions of –

        1.1.1. the supply agreement entered into between the Contracting Parties and Samancor Limited acting through its Chrome Division on 26 November 2004 ("the Samancor Supply Agreement"), for the contract period stipulated in clause 3 of the Samancor Supply Agreement; and

        1.1.2. the existing char and/or gas coke supply agreements between each of the Contracting Parties and any ferrochrome producer other than Samancor Limited, for a period of three years from the date on which the merger is approved.

2. In the event that, during the term of the conditions in above, the whole or part of the

business of any of the Contracting Parties is sold or transferred to a firm that forms part of the acquiring firm as defined in the Competition Act No. 89 of 1998 ("Acquiring Firm") and/or the rights and obligations of any of the Contracting Parties are assigned in whole or in part to an Acquiring Firm, then such Acquiring Firm to which the whole or part of the business of any such Contracting Party is transferred and/or the rights and obligations of such Contracting Party is assigned shall be bound by the conditions in above as if it were the relevant Contracting Party.

3. A Merger Clearance Certificate be issued in terms of Competition Tribunal rule 35(5)(a).

_____ **20 December 2004**

N. Manoim **Date**

Concurring: MTK. Moerane and M. Mokuena