

UNITED STATES INTERNATIONAL TRADE COMMISSION

**Investigations Nos. 303-TA-23, 731-TA-566-570,
and 731-TA-641 (Reconsideration)
and
Investigations Nos. 751-TA-21-27**

**FERROSILICON FROM BRAZIL, CHINA,
KAZAKHSTAN, RUSSIA, UKRAINE, AND VENEZUELA**

DETERMINATIONS

On the basis of the record¹ developed in these investigations, the United States International Trade Commission determines, upon reconsideration, that an industry in the United States is not materially injured or threatened with material injury, and the establishment of an industry in the United States is not materially retarded, by reason of imports from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela of ferrosilicon, provided for in subheadings 7202.21.10, 7202.21.50, 7202.21.75, 7202.21.90, and 7202.29.00 of the Harmonized Tariff Schedule of the United States, that have been found by the Department of Commerce to be subsidized by the Government of Venezuela and sold in the United States at less than fair value (LTFV).

The Commission's determinations in the reconsideration proceedings render the changed circumstances investigations that relate to the original determinations moot. Accordingly, the United States International Trade Commission hereby terminates investigations Nos. 751-TA-21-27 concerning ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela.

BACKGROUND

On April 24, 1998, the Commission received a request to review its affirmative determination as it applied to imports of ferrosilicon from Brazil (the request)² in light of changed circumstances, pursuant to section 751(b) of the Act. The request was filed by counsel on behalf of Associação Brasileira dos

¹ The record is defined in sec. 207.2(f) of the Commission's Rules of Practice and Procedure (19 CFR § 207.2(f)).

² The request concerned only imports from Brazil. However, as the alleged changed circumstances predominantly relate to the domestic industry, the Commission solicited comments on the possibility of self-initiating reviews of the outstanding orders on imports from China, Kazakhstan, Russia, Ukraine, and Venezuela.

Productores de Ferroligas e de Silicio Metalico (ABRAFE), Companhia Brasileira Carbureto de Calcio (CBCC), Companhia de Ferroligas de Bahia (FERBASA), Nova Era Silicon S/A, Italmagnesio S/A-Industria e Comercio, Rima Industrial S/A, and Companhia Ferroligas Minas Gerais (Minasligas).

Pursuant to section 207.45(b) of the Commission's Rules of Practice and Procedure,³ the Commission published a notice in the Federal Register on May 20, 1998,⁴ requesting comments as to whether the alleged changed circumstances warranted the institution of review investigations. The Commission received comments in support of the request from C.V.G. Venezolana de Ferrosilicio C.A. (Fesilven), a Venezuelan producer of ferrosilicon; General Motors Corp., a purchaser of ferrosilicon; and the Governments of Brazil and Kazakhstan. Comments in opposition to the request were received from counsel on behalf of AIMCOR, American Alloys, Inc., Elkem Metals Co., and SKW Metals & Alloys, Inc., U.S. producers of ferrosilicon. After reviewing these comments, the Commission determined on July 28, 1998, that certain of the alleged changed circumstances were sufficient to warrant review investigations.⁵ Among the issues that were briefed by the parties to the investigations was the fact that, between 1995 and 1997, two members of the domestic industry pleaded guilty to conspiring to fix prices of commodity ferrosilicon products during the periods of the Commission's original investigations, and a third member, and an officer of that member, were convicted of conspiring to fix prices of commodity ferrosilicon products during the periods of the Commission's original investigations.

On May 21, 1999, the Commission suspended investigations Nos. 751-TA-21-27, and instituted proceedings to reconsider its determinations in countervailing duty investigation No. 303-TA-23 (Final) concerning ferrosilicon from Venezuela and antidumping investigations Nos. 731-TA-566-570 and 731-TA-641 (Final) concerning ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela.⁶

³ 19 CFR 207.45(b).

⁴ 63 FR 27747.

⁵ See 63 FR 40314-15.

⁶ 64 FR 28212, May 25, 1999. Chairman Bragg dissenting.

VIEWS OF THE COMMISSION

I. INTRODUCTION

In 1993 and 1994, the Commission found that the domestic ferrosilicon industry was materially injured by reason of unfairly traded imports of ferrosilicon from six countries. In an effort to convince the Commission of the harm caused by low-priced imports, U.S. producers that participated in the investigations actively advocated that the U.S. ferrosilicon market was driven by unfettered price competition. However, in 1998, the Commission learned that three ferrosilicon producers, representing a significant majority of 1993 U.S. production, had been convicted of conspiring to fix domestic prices of commodity ferrosilicon from at least late-1989 to at least mid-1991. Two other domestic ferrosilicon producers were aware of the conspiracy.

The period of the conspiracy encompassed a substantial portion of the time period on which the Commission based its original determinations that imports were causing material injury to the domestic producers. A foundation of these determinations was the erroneous belief that the U.S. ferrosilicon market was competitive and price sensitive. The Commission's injury findings were based in substantial part on the fact that imports undersold the prices charged by U.S. ferrosilicon producers and captured sales from U.S. producers on the basis of lower prices. The Commission's statute and longstanding Commission precedent place the nature of price competition at the center of its injury analysis.

These actions by the domestic producers seriously undermined the integrity of the Commission's proceedings and compromised the deliberative process, and in a broader sense, constituted an abuse of the unfair trade laws we administer. Accordingly, we have taken the extraordinary step of reconsidering our previous material injury determinations. As explained below, in the absence of credible information from the domestic producers, we have taken adverse inferences and relied on other record information that is adverse to the domestic industry in making these determinations.

Based on the record,¹ we find that an industry in the United States is neither materially injured nor threatened with material injury by reason of imports of ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela that have been found by the Department of Commerce to be sold at less than fair value and imports of ferrosilicon that the Department of Commerce has found are subsidized by the Government of Venezuela.

II. BACKGROUND

The Commission conducted its original investigations concerning ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela in 1992 and 1993. In March 1993, the Commission determined that a domestic industry was materially injured by reason of dumped ferrosilicon imports from China, Kazakhstan, and Ukraine, and in June 1993, the Commission determined that a domestic industry was materially injured by reason of dumped and subsidized ferrosilicon imports from Venezuela and dumped ferrosilicon imports from Russia.² In January 1994, the Commission determined that a domestic industry was materially injured by reason of dumped ferrosilicon imports from Brazil.³

On April 24, 1998, the Commission received a request for a changed circumstances review of its affirmative determination with respect to imports of ferrosilicon from Brazil. The request was filed on behalf of Associacao Brasileira dos Produtores de Ferroligas e de Silicio Metalico (“ABRAFE”), a Brazilian trade association whose members are manufacturers of ferroalloys, and Companhia Brasileira Carbureto de Calcio-CBCC, Companhia de Ferroligas de Bahia-FERBASA, Nova Era Silicon S/A,

¹ The record contains information collected during the original investigations, the changed circumstances review and the reconsideration proceedings.

² Ferrosilicon from the People's Republic of China, Inv. No. 731-TA-566 (Final), USITC Pub. 2606 (March 1993); Ferrosilicon from Kazakhstan and Ukraine, Inv. Nos. 731-TA-566 and 569 (Final), USITC Pub. 2616 (March 1993); Ferrosilicon from Russia and Venezuela, Inv. Nos. 731-TA-568 and 570 (Final), USITC Pub. 2650 (June 1993).

³ Ferrosilicon from Brazil, Inv. No. 731-TA-641 (Final), USITC Pub. 2722 (Jan. 1994).

Italmagnesio S/A-Industria e Comercio, Rima Industrial S/A, and Companhia Ferroligas Minas Gerais-Minasligas, manufacturers of ferrosilicon. The request alleged that since the Commission's original investigation, a nationwide criminal ferrosilicon price-fixing conspiracy maintained by major U.S. ferrosilicon producers from as early as late 1989 to at least mid-1991 was uncovered and successfully prosecuted. The supporters of revocation argued that this conspiracy provides grounds to make a negative determination in a changed circumstances review.

On May 20, 1998, the Commission published notice in the *Federal Register* seeking comments on whether there were sufficient changed circumstances to warrant a review of the antidumping duty order covering ferrosilicon from Brazil. Because the alleged changed circumstances predominantly related to the domestic industry and were not limited to imports from Brazil, the Commission also requested comments on the possibility of the Commission self-initiating reviews of the outstanding orders on ferrosilicon from China, Kazakhstan, Russia, Ukraine, and Venezuela.

The Commission received two responses in support of the request, and one submission in opposition to the request. Comments in support of the request included those received from General Motors Corporation ("GM"), an importer and purchaser, and from C.V.G. Venezolana de Ferrosilicio C.A. ("Ferroven"), a Venezuelan producer of ferrosilicon. The Governments of Brazil and Kazakhstan also filed letters of support. Comments in opposition to the request were received from Applied Industrial Materials Corp., American Alloys, Inc., Elkem Metals Company and SKW Metals & Alloys, Inc., domestic manufacturers of ferrosilicon, and petitioners in the original investigations (collectively "domestic producers"). On July 21, 1998, the Commission instituted a changed circumstances review.⁴

During the changed circumstances review, the Commission received extensive information and argument regarding the price-fixing conspiracy and its implications for the Commission's determinations.

⁴ 63 Fed. Reg. 40314 (July 28, 1998).

After considering the information and argument, the Commission determined that reconsideration was a more appropriate procedure for review of the original determinations.⁵

Thus, on May 21, 1999, the Commission suspended the changed circumstances review and instituted a reconsideration of the original determinations. The Commission permitted the parties to submit comments limited to the issues of: (a) the price-fixing conspiracy, or other anticompetitive conduct relating to the original periods of investigation, and (b) any possible material misrepresentations or material omissions, by any entity that provided information or argument in the original investigations, concerning: (1) the conspiracy or other anticompetitive conduct or (2) any other matter.⁶

All of the petitions in the original ferrosilicon investigations were filed before January 1, 1995. Therefore, the Uruguay Round Agreements Act (“URAA”) was not applicable to the determinations on the original petitions.⁷ Consequently, the pre-URAA statute governs all substantive aspects of the Commission’s reconsideration.

III. AUTHORITY TO CONDUCT RECONSIDERATION PROCEEDINGS

The Commission has the authority to reconsider a determination when doing so is necessary to protect the integrity of its proceedings.⁸ In Alberta Gas, the Second Circuit applied to the Commission the universally accepted equitable rule that bodies acting in an adjudicative capacity have the inherent authority to reconsider their own decisions that are obtained by fraud.⁹ This power to reconsider stems from “the

⁵ Chairman Bragg dissenting. Chairman Bragg determined that the issues raised in this proceeding could be adequately addressed in the context of a changed circumstances review. Nevertheless, Chairman Bragg has proceeded to evaluate the merits of the instant reconsideration.

⁶ 64 Fed. Reg. 28212-13 (May 25, 1999).

⁷ See URAA, § 291(a) and (b); 19 U.S.C. § 1675(6)(C)(iii). All references to the statute in these determinations are to the statute as it existed prior to the URAA, unless otherwise indicated.

⁸ Alberta Gas Chemicals Ltd. v. Celanese Corp., 650 F.2d 9, 12-13 (2d Cir. 1981).

⁹ Alberta Gas, 650 F.2d at 12-13.

inherent power of any administrative agency to protect the integrity of its own proceedings.”¹⁰

Moreover, the court stated that “[i]t is hard to imagine a clearer case for exercising this inherent power [to reconsider] than when a fraud has been perpetrated on the tribunal in its initial proceeding.”¹¹ In

Alberta Gas, the court stated that when false testimony may have tainted a Commission determination:

The public interest in preventing perjury is obvious; and there is also a clear public interest in a correct determination of whether imports of methanol should be restricted, since the restriction will almost certainly affect the price American consumers pay for this product. These considerations far outweigh any interest in the finality of the Commission’s determination. . . .¹²

The case law demonstrates that tribunals should respond to misconduct that calls into question the integrity of their proceedings. Indeed, the public interest and equitable considerations justify action by a court or administrative agency to preclude a party culpable of serious misconduct from receiving relief, whether or not that relief might otherwise be merited.¹³

¹⁰ Alberta Gas, 650 F.2d at 12. See also Borlem S.A.-Empreedimentos Industriais v. United States, 913 F.2d 933, 941 (Fed. Cir. 1990) (noting the need for an agency to ensure the integrity of its own processes was clearly an important factor in Alberta Gas and that fraud may be more egregious than mere error).

¹¹ Alberta Gas, 650 F.2d at 13.

¹² Alberta Gas, 650 F.2d at 13.

¹³ We find several of these cases provide useful guidance in determining how to proceed in this reconsideration. In ABF Freight System, Inc. v. NLRB, 510 U.S. 317, 323 (1994), the Supreme Court indicated that the NLRB could have appropriately denied reinstatement to an employee because of his perjury, although the agency was not required to adopt a rule resulting in such a sanction. The Court stated that “[f]alse testimony in a formal proceeding is intolerable. We must neither reward nor condone such a flagrant affront to the truth-seeking function of adversary proceedings.” Id. at 323. In the leading “fraud on the court” case, Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 248 (1944), a patentee’s attorney drafted and had published in a journal an article under someone else’s name that extolled the virtues of a new process. The article helped convince the Patent and Trademark Office (PTO) to issue a patent, and the Third Circuit in turn relied on the article in upholding the patent’s validity. After finding that there had been fraud on the court, the Supreme Court invoked equitable principles to deny all relief rather than order a new trial. See also Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 818 (1945) (Parties have uncompromising duty to reveal to the PTO “all facts concerning possible fraud or inequitableness Only in that way can the Patent Office and the public escape from being classed among the ‘mute and helpless victims of deception and fraud.’”) (quoting Hazel-Atlas, 322 U.S. at 248). Similarly, in Packers Trading Co. v. CFTC, 972 F.2d 144, 148-49 (7th Cir. 1992), the court reversed the CFTC’s decision to grant reparations to a trader because of his unclean hands. The court stated that “properly applied, the [unclean hands] maxim is to prevent ‘a wrongdoer from enjoying the fruits of his

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The type of extraordinary circumstances that the Alberta Gas court found would warrant reconsideration of a Commission determination -- matters that strike at the heart of the integrity of the administrative process -- are also present here. Domestic producers were criminally convicted of an offense concerning an issue -- the establishment of prices for ferrosilicon -- that was a focal point of the original Commission investigations. In addition, domestic producers made material misrepresentations and omissions throughout the investigations relating to that key issue. This conduct is described in detail below. In such extraordinary circumstances, the Commission concludes that it is appropriate to reconsider the original determinations.

IV. MISCONDUCT IN THESE INVESTIGATIONS

A. Central Role of Price Analysis under the Statute

In antidumping and countervailing duty investigations, the Commission must determine whether the domestic industry producing the product that is most “like” the imported article under investigation is materially injured or threatened with material injury by reason of the imports under investigation. The Commission must evaluate three primary factors in making its determination: (i) the volume of the subject imports and their significance in the market, (ii) the effects of the subject imports on domestic prices, and (iii) the impact of the subject imports on the domestic industry.¹⁴ Specifically, the statute directs the Commission to examine the effect of subject imports on U.S. prices for the like product,¹⁵ evaluating whether there has been significant underselling by the subject imports as compared with the like product and whether the subject imports have had either significant price-depressing or price-suppressing effects on

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transgression,’ and the Court adds in some cases also to avert injury to the public.” Id. at 149 (quoting Precision Instrument, 324 U.S. at 815).

¹⁴ See 19 U.S.C. § 1677(7)(C)(i)-(iii) (1988).

¹⁵ 19 U.S.C. § 1677(7)(B)(i)(II) (1988).

the domestic price of the like product.¹⁶

Additionally, the statute directs the Commission to evaluate “factors affecting domestic prices” in examining the impact of subject imports on the domestic industry.¹⁷ Furthermore, in its examination of the impact of the subject imports “[t]he Commission shall examine all relevant economic factors . . . within the context of the business cycle and the conditions of competition that are distinctive to the affected industry.”¹⁸

Consequently, the Commission is statutorily required to collect extensive data concerning pricing in each investigation. Accordingly, the Commission’s questionnaires seek both empirical data on prices charged for domestically produced products and narrative information from market participants, including domestic producers, concerning the factors they use to establish prices. Additionally, because price is so central an issue in Commission antidumping and countervailing duty investigations, the testimony and written submissions that parties present to the Commission often focus extensively on pricing issues. Moreover, parties’ testimony and written submissions often concern the closely related issue of whether low-priced imports are responsible for any negative industry performance, or whether other factors such as the industry’s own mismanagement or other actions are responsible for any material injury, so that material injury is not “by reason of” subject imports.¹⁹

Indeed, in the course of the original investigations under reconsideration, the domestic producers submitted extensive information about their pricing practices in the ferrosilicon market. However, we now

¹⁶ 19 U.S.C. § 1677(7)(C)(ii) (1988).

¹⁷ 19 U.S.C. § 1677(7)(C)(iii)(II) (1988).

¹⁸ 19 U.S.C. § 1677(7)(C)(iii) (1988).

¹⁹ See S. Rep. No. 96-249, at 75 (1979) (“Of course, in examining the overall injury to a domestic industry, the ITC will consider information which indicates that harm is caused by factors other than the less-than-fair value imports.”).

know that much of the information they submitted was false, misleading, or incomplete and that they repeatedly omitted critical information pertaining to pricing and competition in the market. In short, as detailed below, domestic producers collectively conspired to fix prices, or were aware of the criminal price-fixing conspiracy while seeking relief before the Commission under the unfair trade laws.

B. A Substantial Majority of the Domestic Industry Conspired to Fix Prices and Other U.S. Producers Were Aware of the Conspiracy

Three domestic producers and one official of a domestic producer were convicted of participation in a conspiracy to fix prices of commodity ferrosilicon between 1989 and 1991. Elkem Metals Co. (“Elkem”) pled guilty on September 22, 1995 to conspiring to fix prices in the ferrosilicon market, a violation of Section 1 of the Sherman Act²⁰ and was fined \$1 million. On April 18, 1996, American Alloys, Inc. (“American Alloys”) also pled guilty to conspiring to fix prices in the ferrosilicon market and was fined \$100,000. On March 17, 1997, SKW Metals & Alloys, Inc. (“SKW”), and its Senior Vice President, Charles Zak, were convicted of conspiring to fix prices in the ferrosilicon market. SKW paid a fine of \$150,000 and Mr. Zak paid a fine of \$30,000.²¹ The three convicted conspirators (Elkem, American Alloys and SKW) accounted for a substantial majority -- *** percent -- of U.S. production in the first half of 1993.²²

Though Globe Metallurgical, Inc. (“Globe”) and Applied Industrial Materials Corp. (“AIMCOR”) were not tried for, or convicted of, participating in the conspiracy, there is compelling evidence that these producers were aware of it. Globe’s President, Arden Sims, attended several meetings outside Pittsburgh

²⁰ 15 U.S.C. § 1.

²¹ Department of Justice charging documents in each case referred to a conspiracy lasting from at least late 1989 to at least mid-1991. In addition, William Beard, President of American Alloys, testified that he attended price-fixing meetings up until some time in 1992, thus indicating that the conspiracy lasted even longer. GM Brief in Changed Circumstances Review, April 8, 1999, Exh. 83, Grand Jury Testimony of William Beard, Feb. 18-19, 1997, at 95.

²² Report in Ferrosilicon from Brazil and Egypt, Oct. 7, 1993, Fig. 4.

with Edward Boardwine, Vice President of Elkem, and William Beard of American Alloys.²³ Mr. Boardwine and Mr. Beard testified that these are the same meetings at which price-fixing discussions took place.²⁴ Charles Kopec, the then-new President of AIMCOR, met with Mr. Beard of American Alloys and Mr. Zak of SKW and was informed of a 42-cent floor price for ferrosilicon set by the conspirators.²⁵ The previous AIMCOR President, Donald Freas, testified that David Beistel of Elkem proposed pricing discussions.²⁶ Thus, domestic producers that accounted for *** percent of U.S. production²⁷ knew about or participated in the conspiracy in the ferrosilicon market.²⁸ As described below, neither the conspirators nor those with knowledge of the anticompetitive behavior disclosed the conspiracy's existence to the Commission. To the contrary, the domestic industry represented that the U.S. ferrosilicon industry was governed by intense price-based competition.

C. Ferrosilicon Producers Petitioned the Commission for Relief from Subject Imports, Alleging Harm from Low-Priced Imports over a Period that Overlapped Substantially with the Price-Fixing Conspiracy

In 1992 and 1993, the domestic industry alleged before the Commission that certain imports of ferrosilicon were causing material injury. Specifically, the first antidumping petition, which concerned

²³ GM Brief, June 23, 1999, Exh. E, Testimony of Arden Sims, in In re Industrial Silicon Antitrust Litigation, Civ. Act. No. 95-2104, April 22, 1999, Tr. at 103, 110-12, 115-16, 118-19, 135-36; Written Submission of Globe, June 23, 1999, Exh. H.

²⁴ GM Brief, June 23, 1999, Exh. D, United States v. SKW Metals and Alloys, CR-96-71S, Criminal Trial Tr. at 654-73, 673-75, 683-87, 731-4, 796-7, 826 (testimony of William Beard) ; GM Brief, June 23, 1999, Exh. D, United States v. SKW Metals and Alloys, CR-96-71S, Criminal Trial Tr. at 151-63, 210-11 (testimony of Edward Boardwine).

²⁵ GM Brief in Changed Circumstances Review, April 8, 1999, Exh. 25, Deposition of William Beard in In re Industrial Silicon Antitrust Litigation, at 79-83 (April 28, 1998).

²⁶ GM Brief, June 23, 1999, Exh. E, In re Industrial Silicon Antitrust Litigation, Civ. Act. No. 95-2104, May 6, 1999, Tr. at 218-19. Mr. Freas testified that he refused to discuss pricing.

²⁷ Report in Ferrosilicon from Brazil and Egypt, Oct. 7, 1993, Fig. 4 (indicating Elkem, SKW, American Alloys, Globe and AIMCOR accounted for *** percent of production).

²⁸ The only current domestic producer apparently unaware of the conspiracy was Keokuk Ferro-Sil, *** and has not appeared in this proceeding.

imports from China, Kazakhstan, Russia, Ukraine, and Venezuela, was filed on May 22, 1992. The second petition, concerning imports from Brazil and Egypt, was filed on January 12, 1993. The two petitions focused on the periods 1989-1991 and 1989-1992, respectively, in claiming harm to the domestic industry from imported ferrosilicon.²⁹ Thus, the domestic industry based its arguments and grounds for relief from subject imports on data covering the period when there was an active price-fixing conspiracy in the ferrosilicon market.³⁰ In its original determinations in those investigations, the Commission examined pricing and other data from the years 1989-1993, again overlapping significantly with the conspiracy period.

D. Ferrosilicon Producers Withheld Information about the Conspiracy from the Commission and Misled the Commission about Price Competition

The record before the Commission in the original investigations is replete with material misrepresentations and omissions stemming from the criminal price-fixing conspiracy. We provide examples of these misrepresentations and omissions below. However, we first describe what is among the most troubling aspects of this case: namely, that in many instances the very same industry individuals personally participated in or were knowledgeable of the conspiracy and provided information to the Commission that was inaccurate and misleading. For example, William Beard, President of American Alloys, and Arden Sims of Globe signed both petitions giving rise to the subject investigations and certified that the information in the petitions was complete and accurate. Charles Kopec of AIMCOR signed the January 12, 1993 petition concerning ferrosilicon from Brazil. Charles Zak certified that each of the

²⁹ See Antidumping and Countervailing Duty Petition in the Matter of Ferrosilicon from Argentina, Kazakhstan, China, Russia, Ukraine, and Venezuela, May 22, 1992, at 1-2, 92-105, 108-116 (focusing on 1989-1991); Antidumping Duty Petition in the Matter of Ferrosilicon from Brazil and Egypt, January 12, 1993, at 1-3, 37-49, 53-62 (focusing on 1989-1992).

³⁰ As noted above, the conspiracy continued from at least late 1989 until at least mid-1991 and may well have extended into 1992.

questionnaires submitted on behalf of SKW was complete and accurate.³¹

These same individuals were involved in or knew about the conspiracy, as described above. William Beard participated in multiple floor-price meetings. Charles Zak was individually convicted of participation in the conspiracy. Arden Sims attended price-fixing meetings. Beard and Zak met with Charles Kopec in the first half of 1992 to give him the floor price for the coming quarter.³²

In fact, William Beard served as the industry's lead witness and testified under oath in all investigations before the Commission, stating among other things that sales during the period examined were made through "competitive bidding."³³ Hence, Mr. Beard was active in the conspiracy at around the same time (first half of 1992) in which he first testified in the Commission's proceedings (June 1992).

The domestic industry's material misrepresentations and omissions commenced with the petitions filed in each investigation and extended to every aspect of the Commission's investigations, including sworn testimony, certified questionnaire responses, and other written submissions made to the Commission. The petitions that triggered the investigations contained statements such as the following, which, in light of the industry's price-fixing efforts, are at best highly misleading:

! "The mechanism for expanding sales in a 'down market' was simply to cut prices to whatever level necessary to undersell domestic and other import competition. The unfair imports exerted price leadership with the first sharp drop in prices during 1989. In response, U.S. producers cut prices in an attempt to maintain price competitiveness but found the unfair imports prices continued to fall even lower. . . . The unfair imports maintained significant margins of underselling below both U.S. producers and other imports throughout the 1989-91 period."³⁴

³¹ See SKW Producers' Questionnaire (Dec. 7, 1992).

³² GM Brief in Changed Circumstances Review, April 8, 1999, Exh. 25, Deposition of William Beard in In re Industrial Silicon Antitrust Litigation, at 79-83 (April 28, 1998).

³³ Testimony of William Beard, June 17, 1992, in Ferrosilicon from Argentina, Kazakhstan, China, Russia, Ukraine, and Venezuela, Inv. Nos. 303-TA-23, 731-TA-642, Conference Tr. at 19.

³⁴ Antidumping and Countervailing Duty Petition in the Matter of Ferrosilicon from Argentina, Kazakhstan, China, Russia, Ukraine, and Venezuela, May 22, 1992, at 115-16.

- ! “Competition in the market is based almost exclusively on price.”³⁵
- ! “The prices of the unfair imports dropped precipitously during the second half of 1989. U.S. producers’ average prices followed more slowly and did not fall as far.”³⁶
- ! “The availability of unfair imports at such low prices also gave ferrosilicon consumers the leverage to demand deep price concessions from U.S. producers across all of their sales. Therefore, even for the sales that the U.S. producers did make, such sales were at lower prices, which depressed U.S. producers’ revenues significantly.”³⁷

Thus, in the petitions the industry represented that the ferrosilicon market was competitive and price sensitive during the period covered by the conspiracy. The petitions create the impression that the domestic industry was competing in the market and responding to market forces in setting prices and obtaining sales when in fact the industry was actively collaborating in an attempt to restrain competition in order to set artificially high prices.

The misrepresentations and omissions appeared in sworn oral testimony before the Commission.

Mr. Beard’s presentation was particularly unconscionable:

- ! In January 1993 he testified that sales are made through “competitive bidding.” He also insisted that “fair competition” be returned to the marketplace so that his company would not be forced out of business.³⁸
- ! Again on September 14, 1993, Mr. Beard testified that “[e]arly in 1989, we began to see an increase in imports of ferrosilicon that were priced substantially lower than prevailing market price. Because ferrosilicon is a commodity product, the lower priced ferrosilicon had an immediate impact in the market.”³⁹
- ! Mr. Beard repeatedly complained of underselling by subject imports without revealing that

³⁵ Petition in Ferrosilicon from Argentina, Kazakhstan, China, Russia, Ukraine and Venezuela, May 22, 1992, at 118.

³⁶ Id. at 124.

³⁷ Id. at 116.

³⁸ Testimony of William Beard, January 22, 1993, in Ferrosilicon from China, Kazakhstan, Russia, and Ukraine, Inv. Nos. 303-TA-23, 731-TA-566, 731-TA-570, Tr. at 16, 22.

³⁹ Testimony of William Beard, September 14, 1993, Ferrosilicon from Brazil and Egypt, Inv. Nos. 731-TA-641-642, at 18.

domestic producers had set a floor price below which his company would not bid.⁴⁰

- ! He also stated that “[t]he bottom line is that price is a key issue in making a sale. . . . As importers offered ferrosilicon at lower prices, American Alloys had to try to match those prices in order to maintain business.”⁴¹

Other testimony on behalf of the domestic industry such as the following endorsed and purported to corroborate Mr. Beard’s and the industry’s misleading representations:

- ! “The issue is not that foreign product came to the United States, but that these are less than fairly traded foreign product, causing the price to come down. A reason to believe that the normal economic factors of supply and demand were not operative in 1989 and 1990 is that consumption, which led to the [earlier] price increase, did not abate in these two years. Rather, consumption was stable. It was an influx of the unfairly traded imports which expanded supply, which brought the price down. And it is the unfair nature of the import pricing that is the subject of the petition of the petitioners.”⁴²
- ! “[A]s Mr. Beard testified, there are other U.S. producers who would like the opportunity to compete for this business on a level playing field. . . . Market share is captured by price competition. In this context, market share growth of the former Soviet Republic imports can only be attributed to underselling.”⁴³

Thus, in this testimony the domestic industry spoke of competitive price-driven bidding and unfettered open competition in the market. The testimony on behalf of the industry cited import pricing as the reason that the normal factors of supply and demand were not operative during the period of the conspiracy. In fact, the normal supply and demand conditions were not operating because the industry was coordinating bids and attempting to set artificial prices.

Questionnaire responses certified to be complete and accurate in fact continued the pattern of

⁴⁰ Testimony of William Beard, June 17, 1992, in Ferrosilicon from Argentina, Kazakhstan, China, Russia, Ukraine, and Venezuela, Inv. Nos. 303-TA-23, 731-TA-642, at 21-22; Testimony of William Beard, September 14, 1993, Ferrosilicon from Brazil and Egypt, Inv. Nos. 731-TA-641-642, at 10.

⁴¹ Testimony of William Beard, September 14, 1993, Ferrosilicon from Brazil and Egypt, Inv. Nos. 731-TA-641-642, at 19.

⁴² Testimony of Kenneth Button, Economic Consulting Services, January 22, 1993, in Ferrosilicon from China, Kazakhstan, Russia, and Ukraine, Inv. Nos. 303-TA-23, 731-TA-566, 731-TA-570, Tr. at 56-57.

⁴³ Testimony of William D. Kramer, Esq., Baker & Botts, January 22, 1993, in Ferrosilicon from China, Kazakhstan, Russia and Ukraine, Inv. Nos. 303-TA-23, 731-TA-566, 731-TA-570, Tr. at 144-45.

deception.

- ! SKW and Elkem informed the Commission that ***.⁴⁴
- ! SKW stated that ***.⁴⁵
- ! The August 16, 1993 Elkem questionnaire response states: ***.⁴⁶
- ! The December 7, 1992 American Alloys questionnaire states that ***.⁴⁷
- ! When asked whether purchasers under requirements contracts prefer more than one supplier, American Alloys stated ***.⁴⁸

Testimony in the criminal investigation revealed that these statements by Elkem, American Alloys, and SKW were either false or highly misleading. For example, the President of SKW, Gregory Magness, testified that the companies discussed at meetings and over the phone what each company's bid would be for a particular customer so the bids could be coordinated.⁴⁹ David Beistel of Elkem testified that the conspirators discussed bids for specific customers.⁵⁰ Thus, the statements that bidders are *** were simply false. Statements that were not outright false were misleading because once again the statements painted the erroneous picture of a market in which the domestic producers participated on the basis of open competition. Indeed, from the evidence amassed during the price-fixing conspiracy cases, we now know why in fact the reported prices were not *** as Elkem stated.

⁴⁴ Producer Questionnaire of SKW, December 7, 1992, at 44; Producer Questionnaire of Elkem Metals, December 7, 1992, at 44.

⁴⁵ SKW Questionnaire, December 7, 1992, at 31.

⁴⁶ Elkem Questionnaire at 31.

⁴⁷ American Alloys Questionnaire, December 7, 1992, at 44.

⁴⁸ American Alloys Questionnaire at 44.

⁴⁹ GM Brief, June 23, 1999, Exh. F, Sworn Statement of Gregory Magness, December 27, 1995, at 12.

⁵⁰ GM Brief, June 23, 1999, Exh. D, United States v. SKW Metals and Alloys, CR-96-71S, Criminal Trial Tr. at 1148-49, 1217-18, Feb. 21, 1997 (testimony of David Beistel).

In addition to the false or misleading statements, the producers' questionnaire responses also omitted material information. For example, the producer questionnaires all sought information regarding underselling by the subject imports and sales and revenues lost by the domestic producers to subject imports. Truthful and complete responses would have revealed that any apparent underselling and lost revenues and sales may have reflected only the conspirators' unwillingness to bid at market prices. Questionnaire questions such as the following also should have elicited complete and accurate information concerning the domestic producers' pricing practices, including their attempts to set a floor price.

- ! "Please describe the quoting process for your contracts or agreements for ferrosilicon. Include factors considered in determining your initial quotes" ⁵¹
- ! "To avoid losing sales to competitors selling ferrosilicon imported from (the subject countries) during any of the (POI) did your firm - [r]educe prices . . . or [r]oll back announced price increases?" ⁵²
- ! "Did your firm lose sales of ferrosilicon to imports of these products (from the subject countries) during any of the (POI)?" ⁵³

Of course, none of the responses by the firms participating in or aware of the conspiracy revealed the actual conditions in the market. Indeed, SKW stated only that ***, ⁵⁴ that SKW reduced prices and

⁵¹ Question V.C.1 of the initial June 1992 ITC Producers' Questionnaire regarding Ferrosilicon from Argentina, Kazakhstan, China, Russia, Ukraine, and Venezuela, Inv. Nos. 303-TA-23 and 731-TA-565-570. The domestic producers attempt to justify the conspirators' failure to mention their price-fixing activities in response to this question on the grounds that the question was phrased in the present tense and was answered in 1992, by which time the conspiracy had concluded. Therefore, the producers maintain, the answer was technically correct. See Domestic Producers' Comments on Reconsideration at 50-51. The question did not ask, however, about pricing information at the present time. Instead, it expressly requested the producer to include "factors considered in determining your initial quotes and explain any trends in your quotes during the period January 1989 - March 1992" which encompassed the period of the conspiracy (emphasis added). Consequently, the domestic producers' contention that the Commission was furnished accurate information in response to this question is spurious.

⁵² China Question V-E; Brazil Question V-C.

⁵³ China Question V-F; Brazil Question V-D.

⁵⁴ This response was to a question concerning short-term requirement contracts which asked "how long prices are fixed."

rolled back announced increases due to subject imports, and that ***.⁵⁵ Similarly, when asked whether it had reduced prices to avoid losing sales to subject imports and whether it in fact lost sales to subject imports, Elkem ***.⁵⁶

Petitioners' written submissions subsequent to the petition perpetuated the material misrepresentations and omissions. Examples include the following.

- ! “[T]he domestic market for ferrosilicon is a commodity market in which competition among products of varying composition is based principally on price.”⁵⁷
- ! “As noted, with a commodity product such as ferrosilicon, underselling margins of a fraction of a cent can be very important in determining which supplier makes a sale.”⁵⁸
- ! “Consumers select ferrosilicon suppliers based on price and can easily shift between suppliers.”⁵⁹
- ! “[T]he low and falling prices of unfairly traded imports have seriously depressed the U.S. producers’ prices as the U.S. producers sought to meet the relentless import competition. This price depression has been a key source of the financial ruin suffered by the industry.”⁶⁰
- ! “The rapid increase in market penetration is the result of aggressive underselling, which shows no sign of abating.”⁶¹
- ! “U.S. producers lost sales volume to the low-priced imports. During the hearing, Mr. Beard described the losses that his company suffered by imported Brazilian material. He

⁵⁵ SKW Questionnaire at 44, 48-49.

⁵⁶ Elkem Questionnaire, August 16, 1993, at 39.

⁵⁷ Post-Conference Brief of Petitioners in Ferrosilicon from Argentina, Kazakhstan, China, Russia, Ukraine, and Venezuela, June 17, 1992, at 22.

⁵⁸ Id. at 31.

⁵⁹ Prehearing Brief of Petitioners in Ferrosilicon from Kazakhstan, the People’s Republic of China, Russia, Ukraine, and Venezuela, January 15, 1993, at 27-28.

⁶⁰ Id. at 52.

⁶¹ Id. at 62.

also described sales to two regular customers lost to low-priced Egyptian imports.”⁶²

The domestic producers strenuously maintain that none of their original written or oral submissions to the Commission, including the foregoing, was misleading. For example, the domestic producers go through Mr. Beard’s testimony sentence by sentence in an attempt to show that it was not inaccurate or misleading.⁶³ They claim that industry statements concerning increased import market share, underselling and lost sales were confirmed by the Commission’s own report.⁶⁴

These claims miss the point. The issue is not whether the Commission’s data show that import volume increased and that imports won sales based on prices that were lower than domestic prices. Rather, the issue is that the producers concealed, if not manipulated, a competitive issue relevant to the Commission’s evaluation of the meaning and significance of the observed market data. The statute directs the Commission to determine whether material injury to an industry is “by reason of” subject imports. The Commission considers all relevant information, including information indicating that injury is caused not by imports but by other factors.

When the U.S. ferrosilicon industry petitioned the Commission for import relief, the industry strenuously advocated that its members set prices solely by reference to competitive conditions when their collective contemporaneous actions and knowledge were directly to the contrary. The inescapable conclusion to be drawn from the foregoing and the entire record in this reconsideration proceeding is that the misrepresentations and omissions were widespread and pervasive. As demonstrated above, several domestic producers were convicted of participating in a criminal conspiracy during the periods examined by the Commission, while others were aware of the conspiracy. While foreign producers may have been

⁶² Posthearing Brief of Petitioners in Ferrosilicon from Brazil and Egypt, September 22, 1993, at 14.

⁶³ See Domestic Producers’ Reconsideration Comments at 40-45.

⁶⁴ Id.

actively competing in the ferrosilicon market on the basis of price and of course purchasers sought the lowest prices, the majority of the domestic industry was conspiring to set a floor price and coordinate bids. However, in order to restrict the flow of subject imports and further reduce the competition they faced in the market, the industry uniformly represented to the Commission that the U.S. ferrosilicon market was marked by fierce price-based competition.

Such a pervasive misimpression, created through misstatements and omissions before the Commission, affected central issues in the original investigations pertaining to the relevant conditions of competition in the domestic industry, pricing of the like product, and factors that affected pricing of the like product. By their actions and their omissions, the vast majority of the domestic industry significantly impeded the Commission's investigations. The only producer in operation at the time of the Commission's determinations that appears not to have participated in or been aware of the conspiracy is Keokuk Ferro-Sil ("Keokuk"). This company *** and did not participate in this reconsideration proceeding.⁶⁵ Consequently, we conclude that the appropriate response to the industry's actions is to employ the Commission's well-established authority with respect to adverse inferences, as the next section describes.

V. USE OF ADVERSE INFERENCES

The discussion in section IV of these Views demonstrates that American Alloys, Elkem, Globe, SKW, and AIMCOR each withheld or misrepresented essential information directly relevant to the Commission's statutory mandate: whether the domestic industry is materially injured by reason of subject imports. By such conduct, these producers significantly impeded, undermined, and compromised the

⁶⁵ The only other parties to the original investigations that arguably benefitted from the antidumping duty orders (Oil, Chemical & Atomic Workers International Union, which in January, 1999 merged with the United Paperworkers International Union to form PACE International Union, the United Automobile, Aerospace, & Agricultural Implement Workers of America International Union ("UAW"), and the United Steelworkers of America) had notice of the Commission's changed circumstances review and the reconsideration proceeding but did not participate in either. Four other small ferrosilicon producers (Alabama Silicon, Inc. Glenbrook Nickel, Northwest Alloys, Inc., and Silicon Metaltech, Inc.) were in operation during some of the original periods examined but have since exited the industry. See Report in Ferrosilicon from Brazil and Egypt, (Oct. 7, 1993) Fig. 4; Report in Ferrosilicon Changed Circumstances Review, 751-TA-21-27, (May 6, 1999) at I-11.

integrity of the Commission's investigations.

The Commission's governing statute provides that "whenever a party or any other person refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, [the Commission shall] use the best information otherwise available."⁶⁶ This provision enables the Commission and the Department of Commerce to avoid "rewarding the uncooperative and recalcitrant party for its failure to supply requested information,"⁶⁷ and recognizes that "the [agency] cannot be left merely to the largesse of the parties at their discretion to supply the [agency] with information. . . . Otherwise, alleged unfair traders would be able to control the amount of . . . duties by selectively providing the [agency] with information."⁶⁸ Application of the provision "fairly places the burden of production on the [party], which has in its possession the information capable of rebutting the agency's inference."⁶⁹

The cases further provide that the Commission may use the "best information available" provision to take adverse inferences against parties that do not cooperate in or that impede an investigation.⁷⁰ In Chung Ling, the court indicated that, when over 80 percent of domestic producers did not respond to the Commission's questionnaires, the Commission could take an adverse inference against the domestic industry that the information withheld would show no material injury by reason of the subject imports.⁷¹

⁶⁶ 19 U.S.C. § 1677e(c) (1988).

⁶⁷ Allied-Signal Aerospace Co. v. United States, 996 F.2d 1185, 1192 (Fed. Cir. 1993).

⁶⁸ Olympic Adhesives, Inc. v. United States, 899 F.2d 1565, 1571-72 (Fed. Cir. 1990) (citations omitted).

⁶⁹ Rhone Poulenc, Inc. v. United States, 899 F.2d 1185, 1190-91 (Fed. Cir. 1990).

⁷⁰ The Federal Circuit has stated that "a permissible interpretation of the [pre-URAA] best information statute allows the agency to make such a presumption" adverse to a non-cooperating party. Rhone Poulenc, 899 F.2d at 1190. The URAA subsequently codified the agencies' authority to take adverse inferences. See 19 U.S.C. § 1677e(b) (1995).

⁷¹ Chung Ling Co. v. United States, 805 F. Supp. 45, 48-50 (Ct. Int'l Trade 1992).

Additionally, the court directed the Commission to examine whether taking an adverse inference against the domestic industry was appropriate in light of evidence suggesting that a trade association had coached its members to provide information helpful to the association's case.⁷² In Alberta Pork, the court held that the Commission had the discretion to draw an adverse inference against the domestic industry based upon nonparticipation by its members.⁷³

Thus, our reviewing court has held that adverse inferences are appropriate when parties merely fail to cooperate with a Commission information request, or when they furnish suggestions to those completing questionnaires as to what information to provide the Commission. We find that adverse inferences are also appropriate here, where the domestic producers actively made misrepresentations and withheld material information central to the determinations under reconsideration.⁷⁴ In this respect, we emphasize that Commission antidumping and countervailing duty investigations do not feature the traditional mechanisms for challenging the credibility of those furnishing information that are available in judicial litigation. Commission procedures in antidumping and countervailing duty investigations do not involve interrogatories, depositions, or document requests by adverse parties. Additionally, cross-examination at Commission hearings is extremely limited. Consequently, the Commission -- and the parties before it -- must rely heavily on parties' certifications and representations that the information they present is accurate and complete. Parties that misrepresent the facts regarding critical issues and otherwise fail to provide

⁷² See id. at 51-52.

⁷³ Alberta Pork Producers Mktg. Bd. v. United States, 669 F. Supp. 445, 459 (Ct. Int'l Trade 1987).

⁷⁴ The Commission could not have avoided the circumstances giving rise to the adverse inference in these proceedings by exercising its subpoena authority. Cf. Alberta Pork, 669 F. Supp. at 459 (suggesting exercise of subpoena authority provides little reason for the Commission to take adverse inferences based on party refusal to respond to questionnaires). This case goes beyond a simple refusal to respond to an information request; instead it is one where the producers furnished information that they certified to be accurate and complete, but which actually omitted or mischaracterized important facts. Similarly, the Commission's verification authority, which provides the agency with the ability to assess the accuracy of empirical data it receives, would not have uncovered the type of mischaracterizations or omissions that were present in these proceedings.

accurate and complete information that forms the basis for our determinations subvert our investigative process. In such circumstances, it is entirely appropriate -- indeed, arguably we are obliged -- to exercise our authority to take adverse inferences as authorized by the statute.

In light of the material misrepresentations and omissions made by American Alloys, Elkem, SKW, Globe, and AIMCOR, we have determined not to rely on information these firms have submitted. Their misrepresentations and omissions concerning competition in the marketplace and the establishment of prices were pervasive, and were not limited to discrete transactions or periods of time. In such circumstances the Commission is not obliged to segregate the industry's more misleading representations and omissions from its less misleading ones. Indeed, it would be impossible as well as imprudent to engage in this type of exercise and analysis. We cannot conclude what, if any, of the representations made by the domestic producers on pricing and market conditions are sufficiently credible to rely on. Consequently, in our reconsideration determinations we have taken adverse inferences against these firms and used the facts otherwise available, as authorized by the statute and case law.

VI. DETERMINATION ON RECONSIDERATION

A. Like Product

To determine whether an industry in the United States is materially injured or is threatened with material injury by reason of the subject imports, the Commission must first define the "like product" and the "industry." Section 771(4)(A) of the Tariff Act of 1930 (the "Act") defines the relevant industry as "the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product . . ."⁷⁵ In turn, the statute defines "like product" as "a product which is like, or in the absence of like, most similar in

⁷⁵ 19 U.S.C. § 1677(4)(a) (1988).

characteristics and uses with, the article subject to an investigation. . . .”⁷⁶

Commerce defined the imported product subject to these investigations as:

ferrosilicon, a ferroalloy generally containing, by weight, not less than four percent iron, more than eight percent but not more than 96 percent silicon, not more than 10 percent chromium, not more than 30 percent manganese, not more than three percent phosphorous, less than 2.75 percent magnesium, and not more than 10 percent calcium or any other element.⁷⁷

In the original determinations concerning ferrosilicon imports from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela, the Commission found that all grades of ferrosilicon constituted one like product.⁷⁸ We find no grounds to reconsider the definition of the like product. We therefore adopt the Commission’s findings in the original determinations.

B. Domestic Industry

As to the definition of the domestic industry, we see no grounds to reconsider and therefore adopt the Commission’s findings in the original determinations: one domestic industry consisting of producers of all grades of ferrosilicon. In the original determinations, the Commission found that there were related parties, but did not exclude any producers from the domestic industry.⁷⁹ None of the parties has addressed

⁷⁶ 19 U.S.C. § 1677(10) (1988).

⁷⁷ See, e.g., Final Determination of Sales at Less Than Fair Value: Ferrosilicon from Brazil, 59 F.R. 732 (Jan. 6, 1994).

⁷⁸ Ferrosilicon from the People's Republic of China, Inv. No. 731-TA-566 (Final), USITC Pub. 2606 at 6-7 (March 1993); Ferrosilicon from Kazakhstan and Ukraine, Inv. Nos. 731-TA-566 and 569 (Final), USITC Pub. 2616 at 6-7 (March 1993); Ferrosilicon from Russia and Venezuela, Inv. Nos. 731-TA-568 and 570 (Final), USITC Pub. 2650 at 6-7 (June 1993); Ferrosilicon from Brazil, Inv. No. 731-TA-641 (Final), USITC Pub. 2722 at I-5-7 (Jan. 1994). Ferrosilicon is a ferroalloy used primarily as an alloying agent in the production of iron and steel. Report for Ferrosilicon from Brazil, Egypt, Kazakhstan, The People’s Republic of China, Russia, Ukraine, and Venezuela at I-6.

⁷⁹ Under pre-URAA law, “when some producers are related to the exporters or importers, or are themselves importers of the allegedly dumped or subsidized merchandise, the term ‘industry’ may be applied in appropriate circumstances by excluding such producers from those included in that industry.” 19 U.S.C. § 1677(4)(B) (1988). The Commission found that both Keokuk and Elkem were related parties for purposes of the investigations of Kazakhstan, Russia, Ukraine, and Venezuela based on marketing relationships with importers or producers of subject merchandise from those countries. The Commission found, however, that appropriate circumstances did not

(continued...)

related party issues upon reconsideration, and we do not revisit these issues.

C. Cumulation

In determining whether there is material injury by reason of the LTFV imports under the pre-URAA statutory framework, the Commission is required to assess cumulatively the volume and effect of imports from two or more countries subject to investigation if such imports “compete with each other and with like products of the domestic industry in the United States market.”⁸⁰ Cumulation is not required, however, when imports from a subject country are negligible and have no discernible adverse impact on the domestic industry.⁸¹

We see no reason to reconsider the original cumulation determinations. We therefore adopt the determinations of the majority or in some cases the plurality of the Commission in the original

⁷⁹ (...continued)

exist to exclude either firm from the industry. Ferrosilicon from Russia and Venezuela, USITC Pub. 2650 at 10; see also Ferrosilicon from People’s Republic of China, USITC Pub. 2606 at 7 n.23; Ferrosilicon from Kazakhstan and Ukraine, USITC Pub. 2616 at 7 n.22.

In its determination with respect to Brazil, the Commission found that *** was a related party but also declined to exclude it from the industry because information did not suggest that *** was being shielded from the adverse effect of the subject imports because of its related party status. Ferrosilicon from Brazil, USITC Pub. 2722 at I-8.

⁸⁰ 19 U.S.C. § 1677(7)(C)(iv)(I) (1988); Chaparral Steel Co. v. United States, 901 F.2d 1097 (Fed. Cir. 1990).

⁸¹ 19 U.S.C. § 1677(7)(C)(v) (1988). In assessing whether subject imports compete with each other and with the like product, the Commission generally has considered four factors: (1) the degree of fungibility between the imports from different countries and the like product, including consideration of specific customer requirements and other quality related questions; (2) the presence of sales or offers to sell in the same geographic markets of imports from different countries and the like product; (3) the existence of common or similar channels of distribution for imports from different countries and the like product; and (4) whether the imports from different countries are simultaneously present in the market. See Cast Iron Pipe Fittings from Brazil, Korea and Taiwan, Inv. Nos. 731-TA-278-80 (Final), USITC Pub. 1845 (May 1988), aff’d, Fundicao Tupy S.A. v. United States, 678 F. Supp. 898 (Ct. Int’l Trade 1988), aff’d, 859 F.2d 915 (Fed. Cir. 1988). While no single factor is determinative, and the list of factors is not exclusive, these factors are intended to provide the Commission with a framework for determining whether the imports compete with each other and with the like product. See, e.g., Wieland Werke, AG v. United States, 718 F. Supp. 50, 52 (Ct. Int’l Trade 1989). Only a “reasonable overlap” of competition is required. See, e.g., Granges Metallverken AB v. United States, 716 F. Supp. 17 (Ct. Int’l Trade 1989).

determinations.⁸²

D. No Material Injury by Reason of Subject Imports

In determining whether a domestic industry is materially injured by reason of subject imports, the Commission must consider the volume of the subject imports, their effect on prices for the like product, and their impact on domestic producers of the like product, but only in the context of U.S. production operations.⁸³ The statute defines “material injury” as “harm which is not inconsequential, immaterial, or unimportant.”⁸⁴ In assessing whether the domestic industry is materially injured by reason of dumped imports, we consider all relevant economic factors that bear on the state of the industry in the United States.⁸⁵ No single factor is dispositive and all relevant factors are considered “within the context of the business cycle and conditions of competition that are distinctive to the affected industry.”⁸⁶

Upon reconsideration, we have determined that the domestic ferrosilicon industry is not materially

⁸² For the determinations with respect to Kazakhstan, Ukraine and China, we cumulate subject imports from Argentina, Brazil, China, Egypt, Kazakhstan, Russia, Ukraine, and Venezuela. Ferrosilicon from the People's Republic of China, USITC Pub. 2606 at 22; Ferrosilicon from Kazakhstan and Ukraine, USITC Pub. 2616 at 16-19. Commissioner Crawford adopts the findings she made in the original determinations, in which she found subject imports from China to be negligible and did not cumulate them with imports from the other countries. She also did not cumulate imports from Egypt.

For the determinations with respect to Russia and Venezuela, we cumulate subject imports from Brazil, China, Egypt, Kazakhstan, Russia, Ukraine, and Venezuela. Ferrosilicon from Russia and Venezuela, USITC Pub 2650 at 16-19. Commissioner Crawford adopts the findings she made in the original determinations, in which she found subject imports from China to be negligible and did not cumulate them with imports from the other countries. She also did not cumulate subject imports from Egypt.

For the determination with respect to Brazil, the Commission does not cumulate any country's imports with Brazilian imports. Ferrosilicon from Brazil, USITC Pub. 2722 at I-11.

⁸³ 19 U.S.C. § 1677(7)(B)(i) (1988). The Commission “may consider such other economic factors as are relevant to the determination,” but shall “identify each [such] factor . . . and explain in full its relevance to the determination.” 19 U.S.C. § 1677(7)(B) (1988).

⁸⁴ 19 U.S.C. § 1677(7)(A) (1988).

⁸⁵ 19 U.S.C. § 1677(7)(C)(iii) (1988).

⁸⁶ 19 U.S.C. § 1677(7)(C)(iii) (1988).

injured by reason of subject imports. Our reconsideration analysis begins with a review of the original determinations.⁸⁷

An underlying premise of the Commission's analysis of price effects in its original determinations was that domestically produced ferrosilicon and the subject imports were close substitutes. The Commission found that buyers were knowledgeable of price trends. It concluded that these factors contributed to significant price competition among suppliers and that very small price differences could lead buyers to switch suppliers.⁸⁸

The Commission also cited four principal factors that affected market prices. First, the Commission found that there was pervasive underselling by the subject imports. Second, the Commission stated that the underselling occurred during a period when subject import market penetration increased. Third, the Commission noted that prices for domestically produced and imported ferrosilicon generally fell. Fourth, the Commission found that domestic producers lost sales to the subject imports due to their lower prices. Based on the foregoing, the Commission found that the subject imports had significant price-

⁸⁷ The Commission cumulated subject imports from different combinations of countries in each of its original determinations, and examined a slightly different period in its final determination concerning Brazil than in the other determinations. Nevertheless, the discussion of material injury by reason of imports in each of the determinations was essentially similar. This is illustrated by the portions of the determinations cited in the discussion below. See also, e.g., Ferrosilicon from Kazakhstan and Ukraine, USITC Pub. 2616 at 27 n.121 (Commissioners Brunsdale, Crawford, and Watson noted that while they cumulated different imports than did the plurality, their analysis was the same); Ferrosilicon from Brazil, USITC Pub. 2722 at I-12 n.55 (Commissioner Newquist noted that while he cumulated different imports than did the majority, his analysis was the same). Consequently, this determination will follow the format of the original determinations and provide a single general discussion pertaining to each of the combinations of cumulated subject imports applicable to the determinations for the various individual subject countries.

Because our determination of whether the domestic industry "is" materially injured by reason of subject imports references conditions at the time of the original determinations rather than conditions today, the discussion below is written in the past tense.

⁸⁸ Ferrosilicon from Kazakhstan and Ukraine, USITC Pub. 2616 at 28-29; Ferrosilicon from China, USITC Pub. 2606 at 25-26; Ferrosilicon from Russia and Venezuela, USITC Pub. 2650 at 33-34; Ferrosilicon from Brazil, USITC Pub. 2722 at I-13-14.

depressing effects on domestic prices.⁸⁹

Information gathered in this reconsideration completely undermined this pricing analysis. The Commission's emphasis on "the price-sensitive nature of competition among ferrosilicon suppliers,"⁹⁰ echoed testimony from the domestic industry that the ferrosilicon market was price sensitive and competitive, to the extent that extremely small differences in prices could lead to lost sales.⁹¹ The facts now demonstrate that this testimony was misleading because domestic ferrosilicon suppliers did not necessarily compete on price. Instead, several of the suppliers conspired to fix prices and established price minimums.

The erroneous nature of the original premise that competition among suppliers was based solely on price consequently undermines the Commission's central conclusions on price depression that flowed from that premise. The Commission's reliance on underselling as a basis for price effects cannot be sustained in light of the material misrepresentations and omissions. Because of the conspirators' efforts to establish price minimums, we cannot conclude that the competitive pressure from the subject imports was responsible for the underselling the Commission found to be significant. Rather, the domestic producers' own efforts to establish a floor price and thereby raise domestic prices above market levels undermine the significance of the observed underselling. Similarly, the domestic producers' conspiracy to maintain floor prices undermines the Commission's findings regarding the significance of sales and revenues lost by the

⁸⁹ Ferrosilicon from Kazakhstan and Ukraine, USITC Pub. 2616 at 30-31; Ferrosilicon from China, USITC Pub. 2606 at 26-27; Ferrosilicon from Russia and Venezuela, USITC Pub. 2650 at 35-36; Ferrosilicon from Brazil, USITC Pub. 2722 at I-15. The Brazil determination did not rely on lost sales.

⁹⁰ Ferrosilicon from Kazakhstan and Ukraine, USITC Pub. 2616 at 28; Ferrosilicon from China, USITC Pub. 2606 at 25; Ferrosilicon from Russia and Venezuela, USITC Pub. 2650 at 33; Ferrosilicon from Brazil, USITC Pub. 2722 at I-13.

⁹¹ Testimony of William Beard in Ferrosilicon from China, Kazakhstan, Russia, Ukraine, and Venezuela, Inv. Nos. 303-TA-23, 731-TA-566-570 (Final), Hearing Tr. at 22 (Jan. 22, 1993) ("Price is the key issue in making a sale. . . . Because it is a commodity product, ferrosilicon is extremely price sensitive. Price differences of less than a cent a pound of contained silicon can and do determine who gets a sale.")

domestic industry to lower-priced subject imports. Also, as explained below, the producers' efforts to establish a floor price at a level above import price levels undermines the significance of the increase in subject import volume and market share. Thus, the critical factors cited by the Commission in finding that the subject imports depressed market prices -- underselling, lost sales, and increased market share -- are no longer valid.

In this reconsideration, the domestic producers suggest that the Commission can confirm the validity of its original underselling analysis by making a hypothetical adjustment to its data (presumably to eliminate any possible effects of the conspiracy) or by considering data concerning producers or time periods that are unconnected with the conspiracy.⁹² We find this suggestion untenable for several reasons. First, the Commission must focus on the industry as a whole in its determination. Under the statute, that industry necessarily includes the conspirators that were responsible for a majority of domestic production.

Second, it is neither appropriate nor logical to speculate on the extent to which pricing behavior and patterns may have been different if the conspirators had not engaged in criminal conduct. In this respect, the domestic producers' arguments regarding the limited success and effect of the price-fixing conspiracy are unavailing.⁹³ For purposes of the Commission's analysis, the conspiracy is significant not because of the quantum of commerce affected, but because its existence negates a central condition of competition on which the Commission relied in its original determinations; namely, that the ferrosilicon market was one of strong price competition across the board.

Moreover, that the burden of proof in a criminal price-fixing action may have been satisfied with respect to only a limited number of transactions does not lead to the conclusion, suggested by the domestic producers, that prices in all remaining transactions were the result of marketplace competition. The

⁹² See Domestic Producers' Comments on Reconsideration at 58-60.

⁹³ See Domestic Producers' Comments on Reconsideration at 10-11.

conspirators were attempting to set artificial prices for a substantial portion of the periods examined. For the Commission's purpose it is not relevant whether and to what extent they achieved the floor price, but merely that their actions affected price competition in the marketplace. In an industry in which fractions of a penny per pound can cause purchasers to switch suppliers, any artificial raising of domestic prices vis-a-vis subject imports can substantially affect the market, whether or not the floor price was achieved.

Third, as previously discussed, the omissions and material misrepresentations in the original investigations were attributable not only to the firms convicted of the conspiracy, but to other domestic producers as well.⁹⁴ As demonstrated above, these misrepresentations pervaded the Commission's decision so thoroughly that isolating "non-tainted" transactions is not possible.

Instead, we take an adverse inference that the underselling and lost sales were a function of the domestic industry's own actions -- namely attempts to establish minimum prices.⁹⁵ Additionally, because we cannot rely on the information about pricing submitted by the domestic producers, we have examined the facts otherwise available. These facts indicate that a reason for the price depression was the business cycle for ferrosilicon. Ferrosilicon prices reached a peak in 1989 when demand was exceptionally high. Demand declined significantly from 1990 to 1991 due to a recession that reduced demand for the products

⁹⁴ As a result, we reject the domestic producers' contention that an appropriate method of analysis is to compare pricing data of those producers not convicted of criminal price-fixing conspiracy with those that were. See Domestic Producers' Comments on Reconsideration at 53-55 (price trends), 58-59 (underselling). It is also possible that other domestic producers' pricing was heavily influenced by the actions of the conspirators. The record indicates that prices were disseminated through industry publications. See Report for Ferrosilicon from Brazil, Egypt, Kazakhstan, The People's Republic of China, Russia, Ukraine, and Venezuela at I-47 n.55.

In any event, our conclusion in this reconsideration would be the same based solely on the conduct of the three companies convicted of price-fixing. These three companies accounted for over *** of U.S. ferrosilicon production in 1993.

⁹⁵ As previously stated, the producers against which we have taken adverse inferences accounted for *** percent of domestic production during the original periods examined. While in this reconsideration determination we have considered data furnished by the other industry participants, we determine that because the producers that misrepresented or omitted information constitute such a large percentage of total industry production, the adverse inferences substantially outweigh the data submitted by the other participants. We reiterate that Keokuk, the only domestic producer not participating in or aware of the conspiracy, *** in the original investigations and did not appear in these reconsideration proceedings.

in which ferrosilicon was used as an input; consequently, prices fell as well, although only to historically average levels.⁹⁶ Accordingly, we conclude that the underselling by the subject imports was not significant, the lost sales were not a function of the subject imports, and that the subject imports did not depress or suppress prices of the like product to a significant degree.

The Commission's characterization of subject import volumes in the original determinations was largely framed by its analysis of conditions of competition pertaining to pricing. The Commission found that the reason the increase in subject import volume was particularly significant was because of "the price-sensitive nature of competition among ferrosilicon suppliers." It then proceeded to cite the factors discussed above relative to the competitive nature of the ferrosilicon market.⁹⁷

As we have previously discussed, upon reconsideration we conclude that the subject imports did not have significant effects on domestic prices. Consequently, the basis for the Commission's original finding that the subject import volumes were significant because of their price effects does not exist.

To the contrary, in light of our finding upon reconsideration that the subject imports did not have significant price effects, we conclude that subject import volumes were not significant. Our adverse inference that the underselling and lost sales were a function of the domestic industry's own actions affects our analysis of subject import volumes as well. The conspirators' attempts to set prices at artificial levels enhanced the ability of subject imports sold at market prices to compete in the marketplace and thus undermined the significance of the increase in subject import volumes. Accordingly, and in light of the adverse inference we have taken, we conclude that the domestic industry's declines in market share were

⁹⁶ See EC-Q-025 at 8, 12-13 (March 9, 1993). In the original determinations the Commission found that this fact was not dispositive in light of other data in the record pertaining to the pricing of the like product. See, e.g., Ferrosilicon from Kazakhstan and Ukraine, USITC Pub. 2616 at 31-32. Because we have disregarded the data in the original record pertaining to domestic pricing, the conclusion in the original determination is no longer applicable.

⁹⁷ Ferrosilicon from Kazakhstan and Ukraine, USITC Pub. 2616 at 28-29; Ferrosilicon from China, USITC Pub. 2606 at 25-26; Ferrosilicon from Russia and Venezuela, USITC Pub. 2650 at 33-34; Ferrosilicon from Brazil, USITC Pub. 2722 at I-13-14.

not caused by subject imports and that neither the volume of subject imports nor any increase in that volume was significant.

The discussion of the impact of subject imports in the original determinations followed from the conclusions on subject import volume and price effects. The Commission found that, because of their significant volume and price effects, the subject imports had an adverse impact on the domestic industry, as indicated by declines in such factors as output, sales, market share, profits, return on investments, and capacity utilization.⁹⁸

As previously stated, the facts otherwise available indicate that U.S. demand for ferrosilicon was declining during the periods examined in the original investigations. Under such conditions, we would expect declines in domestic industry output, sales, and profitability. In any event, in these proceedings, we have determined that subject import volumes were not significant and did not have significant price effects. In light of these findings, we conclude that the declines in domestic industry indicators were not caused by the subject imports. Accordingly, we determine that the subject imports did not have an adverse impact on the domestic industry as of the time of the original determinations.

We consequently determine on reconsideration that the domestic ferrosilicon industry is not materially injured by reason of subject imports.

E. No Threat of Material Injury by Reason of Subject Imports

1. General Principles

We also determine that there is no threat of material injury to the domestic U.S. ferrosilicon industry by reason of the subject imports.⁹⁹ The Commission never reached the issue of threat in the

⁹⁸ Ferrosilicon from Kazakhstan and Ukraine, USITC Pub. 2616 at 33; Ferrosilicon from China, USITC Pub. 2606 at 28; Ferrosilicon from Russia and Venezuela, USITC Pub. 2650 at 37; Ferrosilicon from Brazil, USITC Pub. 2722 at I-16.

⁹⁹ Under the pre-URAA statute, the Commission was required to consider the following:

(continued...)

original determinations because it found material injury by reason of subject imports. Because we found no material injury by reason of the subject imports, we address the issue of whether subject imports threaten the domestic ferrosilicon industry with material injury. We have considered all the statutory factors that are relevant to these investigations.¹⁰⁰

⁹⁹ (...continued)

(I) if a subsidy is involved, such information as may be presented to it by the administering authority as to the nature of the subsidy (particularly as to whether the subsidy is an export subsidy inconsistent with the Agreement).

(II) any increase in production capacity or existing unused capacity in the exporting country likely to result in a significant increase in imports of the merchandise to the United States,

(III) any rapid increase in United States market penetration and the likelihood that the penetration will increase to an injurious level,

(IV) the probability that imports of the merchandise will enter the United States at prices that will have a depressing or suppressing effect on domestic prices of the merchandise,

(V) any substantial increase in inventories of the merchandise in the United States,

(VI) the presence of underutilized capacity for producing the merchandise in the exporting country,

(VII) any other demonstrable adverse trends that indicate probability that importation (or sale for importation) of the merchandise (whether or not it is actually being imported at the time) will be the cause of actual injury,

(VIII) the potential for product shifting if production facilities owned or controlled by the foreign manufacturers, which can be used to produce products subject to investigation(s) under section 1671 or 1673 of this title or to final orders under section 1671e or 1673e of this title, are also used to produce the merchandise under investigation,

(IX) in any investigation under this title which involves imports of both raw agricultural product (within the meaning of paragraph (4)(E)(iv) and any product processed from such raw agricultural product, the likelihood there will be increased imports, by reason of product shift, if there is an affirmative determination by the commission under 705(b)(1) or 735(b)(1) with respect to either the raw agricultural product or the processed agricultural product (but not both), and

(X) the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product.

19 U.S.C. § 1677(7)(F)(i) (1988).

In addition, the Commission must consider whether dumping findings or antidumping remedies in markets of foreign countries against the same class or kind of merchandise suggest a threat of material injury to the domestic industry. 19 U.S.C. § 1677(7)(F)(iii)(I) (1988).

¹⁰⁰ Factor (IX) is not applicable in these investigations because ferrosilicon is not an agricultural product.

The statute directs us to determine whether an industry in the United States is threatened with material injury by reason of imports “on the basis of evidence that the threat of material injury is real and that actual injury is imminent.” Our decision “may not be made on the basis of mere conjecture or supposition.”¹⁰¹

For the reasons discussed above, we have taken adverse inferences against the domestic industry as appropriate in our analysis of threat of material injury by reason of subject imports; in other circumstances, we have used the facts otherwise available.

2. Cumulation for Purposes of Threat Analysis

In determining whether a domestic industry is threatened with material injury by reason of imports from two or more countries, the Commission has the discretion to cumulate the volume and price effects of such imports if they meet the requirements for cumulation for present material injury.¹⁰² We have exercised our discretion to cumulate imports from the same subject countries for purposes of our threat of material injury analysis as we have for the present material injury analysis.¹⁰³ Accordingly, the following discussion applies to both cumulated subject imports (for the determinations on China, Kazakhstan, Russia, Ukraine, and Venezuela) and subject imports from Brazil (for the determination on Brazil).

3. Analysis of Statutory Threat Factors

Our threat of material injury analysis naturally proceeds from an assessment of the current condition of the industry. A determination of threat requires “a careful assessment of identifiable current

¹⁰¹ 19 U.S.C. § 1677(7)(F)(ii) (1988).

¹⁰² 19 U.S.C. § 1677(7)(F)(iv) (188).

¹⁰³ We note that the domestic producers’ misconduct would provide a sufficient basis for us to exercise our discretion not to cumulate the effect of the subject imports for our threat of material injury analysis. If we had exercised our discretion in this manner, it would not have affected our negative threat of material injury determination. In any event, the threat discussion in this particular proceeding is based on conditions of competition common to the subject countries.

trends and competitive conditions in the marketplace.”¹⁰⁴ Consequently, when there is neither current material injury by reason of subject imports nor a demonstrable indication that such injury is likely in the imminent future, a negative threat determination is warranted.

We find no likelihood that the U.S. market penetration of subject imports will increase to an injurious level in the imminent future. We did not find the current subject import volumes to be significant.¹⁰⁵ Nor do we find any indication that the market shares of subject imports are likely to rise to significant levels in the imminent future. Exports to the United States from most of the subject countries for which information was available were projected to decline in the imminent future.¹⁰⁶ Additionally, U.S.

¹⁰⁴ Calabrian Corp. v. USITC, 794 F. Supp. 377, 387-88 (Ct. Int’l Trade 1992), quoting H.R.Rep. No. 98-1156, at 174 (1984).

¹⁰⁵ Imports from each of the countries accounted for the following percentage of volume of domestic consumption of ferrosilicon during the respective periods of investigations: imports from China accounted for *** percent of domestic consumption of ferrosilicon in 1989, *** percent in 1990, and *** percent in 1991. Imports from China accounted for *** percent of domestic consumption of ferrosilicon in interim (Jan.-Sept.) 1992 compared with *** percent in interim 1991. Imports from Kazakhstan accounted for *** percent of domestic consumption of ferrosilicon in 1989, *** percent in 1990, and *** percent in 1991. Imports from Kazakhstan accounted for *** percent of domestic consumption of ferrosilicon in interim 1992 compared with *** percent in interim 1991. Imports from Russia accounted for *** percent of domestic consumption of ferrosilicon in 1989, *** percent in 1990, and *** percent in 1991. Imports from Russia accounted for *** percent of domestic consumption of ferrosilicon in interim 1992 compared with *** percent in interim 1991. Imports from Ukraine accounted for *** percent of domestic consumption of ferrosilicon in 1989, *** percent in 1990, and *** percent in 1991. Imports from Ukraine accounted for *** percent of domestic consumption of ferrosilicon in interim 1992 compared with *** percent in interim 1991. Imports of ferrosilicon from Venezuela accounted for *** percent of domestic consumption of ferrosilicon in 1989, *** percent in 1990, and *** percent of domestic consumption in 1991. Imports of ferrosilicon from Venezuela accounted for *** percent of domestic consumption of ferrosilicon in interim 1992 compared with *** percent in 1991. Report for Ferrosilicon from Brazil, Egypt, Kazakhstan, The People’s Republic of China, Russia, Ukraine, and Venezuela (hereinafter “Report”) at C-2, Table C-1. Imports from Brazil accounted for *** percent of the volume of domestic consumption of ferrosilicon in 1990, *** percent in 1991, *** percent in 1992, and *** percent in interim (Jan.- June) 1993 compared with *** percent in interim 1992. Report for Ferrosilicon from Brazil and Egypt (October 7, 1993) at C-3, Table C-1.

¹⁰⁶ Exports to the United States from Venezuela were *** short tons in 1991, but were projected to decline to *** short tons in 1993, and *** short tons in 1994. Report at I-65. Although no projections were available for Kazakhstan, Russia, and Ukraine, the record indicates that total exports from these countries declined overall during the periods examined. Report at I-62-64. In addition, witnesses testified at the hearing that imports from Kazakhstan were expected to decline, and Russian ferrosilicon capacity was then being consumed internally. Hearing Transcript at 124-126 (Jan. 22, 1993). Exports to the United States from Brazil were 70,180 short tons in 1992, but were expected to decline to 32,485 short tons in 1993, and expected to further decline to 26,500 short tons in 1994. Report on Ferrosilicon from Brazil and Egypt (Oct. 7, 1993) at 61, Table 17.

importers reported no orders of ferrosilicon from China, Kazakhstan, Russia, or Ukraine after September 30, 1992.¹⁰⁷ *** indicated that it had imported or arranged for importation of ferrosilicon from Brazil since June 30, 1993.¹⁰⁸

In addition, we do not find that there is any increase in production capacity or unused capacity in the subject countries likely to result in a significant increase of imports of ferrosilicon to the United States. The record indicates that overall production capacity generally was stable in the subject countries during the latter part of the respective periods examined.¹⁰⁹ Further, actual production levels were stable for several countries, or relatively high capacity utilization rates were reported.¹¹⁰ Although some countries reported declines in production and corresponding declines in capacity utilization, there is no evidence that these countries intend to increase exports to the United States in the imminent future. For example, Kazakhstan, Russia, and Ukraine reported overall declines in production and capacity utilization during the period examined. However, these same countries reported an overall decline in exports during the same period.¹¹¹ Finally, as discussed above, exports to the United States from many of the subject countries were projected to decline in the future, and there were few outstanding orders for ferrosilicon. Thus, we find no

¹⁰⁷ Report at I-57.

¹⁰⁸ AIOC, Pittsburgh, PA, imported *** of ferrosilicon from Brazil on July 29, 1993. Report on Ferrosilicon from Brazil and Egypt at 60 n.81.

¹⁰⁹ Kazakh, Russian, Ukrainian, and Venezuelan capacity was stable throughout the period examined, and ***. Report at I-62-65. Brazilian capacity increased from 1990 to 1992, but was projected to decline in 1994 to levels below those reported for 1991. Report on Ferrosilicon from Brazil and Egypt at Table 17, I-61. There were no reported data for China. The record reflects the fact that the main market for Chinese ferrosilicon is Japan. Report at I-60.

¹¹⁰ Brazilian production declined from 1990 to 1991, and then increased in 1992. Production was higher in interim 1993 compared with interim 1992. Brazilian production was projected to increase in 1993 and decline slightly in 1994. Report on Ferrosilicon from Egypt and Brazil at 61-63, Tables 17 and 18. Venezuelan production was *** during the period examined. It was ***. Venezuelan production was projected to *** in 1992 and *** in 1993. Report at I-65.

¹¹¹ Report at I-62-64.

basis to conclude that any unused capacity that exists in the subject countries will result in increased exports to the United States in the imminent future.

We have also considered whether there is a potential for product shifting. We note that there was a theoretical potential for product shifting from silicon metal to ferrosilicon in light of the antidumping orders imposed in 1991 on silicon metal from Brazil and China. Whether there was an actual capability of product shifting is unclear, in light of evidence of record indicating limited capability to shift production among domestic producers. Although petitioners indicated that the conversion of silicon metal facilities to produce ferrosilicon “is easily accomplished” because the same furnaces producing silicon metal can be converted to ferrosilicon “with minor modifications and modest capital outlays,” at the hearing petitioners stated that “only one producer has the capability of short-term conversion between silicon metal and ferrosilicon.”¹¹² Assuming *arguendo* an actual capability of product shifting, the silicon metal antidumping orders were put in place well before the conclusion of the periods examined, and thus any product shifting would have already occurred during these periods. In fact, the increases in production and imports from Brazil during the latter portion of the periods examined could be attributed in part to product shifting. However, we considered these increases in import volume in our material injury determination, but found them not to be significant.

U.S. inventories of the subject merchandise did increase during the latter portions of the periods examined.¹¹³ We note, however, that ***.¹¹⁴ This fact suggests that *** inventories are in part intended for

¹¹² Hearing Transcript at 88-89 (Jan. 22, 1993). We note, however, that the focus of this discussion was on conversion from ferrosilicon production, not the other way around, and the petition indicates that conversion from ferrosilicon production to silicon metal production requires the furnace to be relined, but that the reverse is not true.

¹¹³ Report at Table 17, I-56. U.S. importers’ end-of-period inventories from Brazil declined from 1990 to 1992, but increased 6.4 percent in the interim period. Report for Ferrosilicon from Brazil and Egypt at 58 and 59, Table 16.

¹¹⁴ Report at I-56-57.

other markets. In light of this fact and the other considerations discussed, we find that the existence of inventories, in and of itself, does not provide a sufficient basis for an affirmative threat determination.

Thus, based on declining projected subject exports to the United States, the virtual absence of orders for subject imported product, the stability of production capacity in subject countries, the practical barriers to product shifting, and the fact that a portion of subject import inventories are accounted for by the ***, we do not find that the likely imminent volume of subject merchandise will be significant or injurious.

In assessing the probability that imports of the merchandise will enter at prices that will have a depressing or suppressing effect on domestic prices of ferrosilicon, we have relied on our findings in our material injury analysis that subject imports had no present effects on prices.¹¹⁵ As discussed above, we did not find that subject imports had a significant price suppressing or depressing effect. We found that the underselling and lost sales were caused by the domestic industry's own actions -- namely attempts to establish minimum prices. Consequently, we found that the underselling, price depression, and lost sales observed during the original periods examined were not caused by the subject imports. We find no indication in the record that subject imports will have such an effect in the imminent future. Indeed, as discussed above, we do not find that the likely volume of subject imports will be significant in the imminent future. We conclude that the likely insignificant volume of subject imports will not have a significant depressing or suppressing effect on domestic prices of ferrosilicon in the imminent future.

The statute also instructs us to consider the existence and nature of any subsidies. The Department of Commerce found that Fesilven of Venezuela received preferential power rates and exports bonds, which together resulted in an estimated net subsidy of 22.08 percent ad valorem.¹¹⁶ Although export bonds appear

¹¹⁵ Timken Co. v. United States, 913 F. Supp. 580, 591-92 (Ct. Int'l Trade 1996).

¹¹⁶ 58 Fed. Reg. 27539, 27539-40 (May 10, 1993).

to be an “export subsidy,” the percentage attributable to the export bonds is only 1.69 percent *ad valorem*. Moreover, the export bond program was amended as of June 15, 1991 to cover only agricultural products.¹¹⁷ Thus, after that time there were no export subsidies for ferrosilicon. We do not find the overall subsidy to be significant because it is not an export subsidy, involves only one subject country, and because Venezuelan imports were projected to *** in the imminent future.

The statute further directs us to consider whether dumping findings or antidumping remedies in markets of foreign countries against the same class or kind of merchandise suggest a threat of material injury to the domestic industry. Following the European Community’s initiation of antidumping investigations concerning ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, Venezuela, and other non-subject countries, the European Community reached agreements with most of these countries to limit imports of ferrosilicon.¹¹⁸ We do not find the existence of these agreements or investigations to be a significant factor. As indicated above, we found no likelihood that the market share of the subject imports is likely to increase to an injurious level in the imminent future. Moreover, the agreements were reached as of May 1991, and any effect likely would have already been evidenced and taken into account in our material injury determination.

Finally, we do not find any other demonstrable adverse trends or actual and potential negative effects on the existing development and production efforts related to subject imports that would support an affirmative threat determination. We note that some domestic ferrosilicon producers asserted that they did not make ***.¹¹⁹ We do not find these claims to support a finding of threat of material injury in view of our findings above that: (1) any present negative effects were not by reason of subject imports, (2) there would

¹¹⁷ 58 Fed. Reg. at 27540.

¹¹⁸ Report for Ferrosilicon from Brazil and Egypt (Final) at 63-64.

¹¹⁹ Report at Appendix D.

not be any rapid increase in the market penetration of imports likely to result in a significant increase in imports of the merchandise to the United States, and (3) subject imports would not likely enter at prices that would have a depressing or suppressing effect on domestic prices of the merchandise.

CONCLUSION

For the foregoing reasons, we have determined on reconsideration that the domestic ferrosilicon industry is not materially injured or threatened with material injury by reason of subject imports from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela.

**ADDITIONAL VIEWS OF VICE CHAIRMAN MARCIA E. MILLER
AND COMMISSIONER CAROL T. CRAWFORD**

We join and fully support the Commission Opinion in these proceedings. However, we believe the Commission does not have to go so far as to base its decision on a reconsideration of the merits. Because the integrity of the Commission's original injury investigations has been seriously undermined, we think it would be appropriate to rescind the Commission's original affirmative determinations and issue negative determinations without reevaluating the merits. We offer these additional views because of the gravity of the issues presented.

I. The Commission Has the Authority to Protect the Integrity of Its Proceedings

The courts have long emphasized the paramount importance of preserving the integrity of legal proceedings, whether judicial or administrative. In various contexts, the courts have made clear that serious misconduct by parties that undermines the integrity of the proceedings should not be tolerated. In *ABF Freight System, Inc. v. NLRB*, 510 U.S. 317 (1994), the Supreme Court emphasized that: "False testimony in a formal proceeding is intolerable. We must neither reward nor condone such a "flagrant affront" to the truth-seeking function of adversary proceedings." *ABF*, 510 U.S. at 323 (citations omitted). In a concurring opinion, Justices Scalia and O'Connor criticized the NLRB for its "unseemly toleration of perjury in the course of adjudicative proceedings." *ABF*, 510 U.S. at 327. They emphasized that under the "unclean hands" doctrine, "[t]he principle that a perjurer should not be rewarded with a judgment -- even a judgment otherwise deserved -- where there is discretion to deny it, has a long and sensible tradition in the common law." *ABF*, 510 U.S. at 329.

With respect to the U.S. International Trade Commission, the Second Circuit has ruled that "[i]t is hard to imagine a clearer case" for exercising the Commission's "inherent power" to protect the integrity of its own proceedings than where it is alleged that the Commission relied on "erroneous factual

assumptions” that were “deliberately presented” by parties to the Commission’s investigation “to persuade the Commission to reach an incorrect conclusion.” *Alberta Gas Chemicals, Ltd. v. Celanese Corp.*, 650 F.2d 9, 12 and 13 (2nd Cir. 1981). See also *Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co.*, 327 U.S. 806, 815 (1945) (“Any willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause” to invoke “unclean hands” doctrine.) *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 250 (1944) (appellate court had the “duty and power to vacate its own judgment” of patent validity and infringement where the court had relied in part on a published article touting the novelty of a device, which ostensibly was written by a disinterested expert but in fact was prepared by officials of the company seeking the patent and its attorney); *Packers Trading Co. v. Commodity Futures Trading Com’n*, 972 F.2d 144, 150 (7th Cir. 1992) (applying “unclean hands” doctrine, court reversed decision of CFTC to award reparations to a trader who violated a trading ban imposed by the CFTC and made false statements in administrative proceedings regarding existence of the trading ban).

The courts have emphasized that the preservation of the integrity of proceedings takes on greater importance when public interests are at stake. See *Precision*, 327 U.S. at 815 (the doctrine of “unclean hands” “assumes even wider and more significant proportions” where a matter concerns the public interest, such as the enforcement of patent rights); *Hazel-Atlas*, 322 U.S. at 246 (“This matter does not concern only private parties. There are issues of great moment to the public in a patent suit.”); *Packers Trading*, 972 F.2d at 150 (false testimony in a Commodities Futures Trading Commission proceeding “affects the operations and integrity of the commodities exchange in which the public has substantial interest”).

There can be no doubt that there is a strong public interest in protecting the integrity of Commission injury investigations and ensuring accurate Commission determinations. In *Alberta Gas*, the Second Circuit stated that there is “a clear public interest in a correct determination of whether imports of methanol should be restricted, since the restrictions will almost certainly affect the price American

consumers pay for this product.” *Alberta Gas*, 650 F.2d at 13. More broadly, the Commission plays an important role in carrying out the international obligations of the United States pursuant to the World Trade Organization (WTO) Agreement on Antidumping and Agreement on Subsidies and Countervailing Measures, which contemplate fair and transparent investigations by national authorities.

The cases also demonstrate that tribunals have broad authority to fashion relief in response to misconduct that undermines the integrity of judicial or administrative proceedings. *ABF*, 510 U.S. at 323 (where former employee provided false testimony in administrative proceeding, NLRB “might have decided that such misconduct disqualified [former employee] from profiting from the proceeding, or it might even have adopted a flat rule precluding reinstatement when a former employee so testifies”); *Precision*, 324 U.S. at 819 (“equitable conduct impregnated [patent claimant’s] entire cause of action and justified dismissal by resort to the unclean hands doctrine”); *Hazel-Atlas*, 322 U.S. at 248 (equitable relief “has always been characterized by flexibility which enables it to meet new situations which demand equitable intervention, and to accord all the relief necessary to correct the particular injustices involved in these situations”); *Packers Trading*, 972 F.2d at 148-49 (unclean hands doctrine applicable in administrative proceedings and “gives wide range to the court’s use of discretion in refusing to aid the unclean litigant”). Moreover, such relief is extra-statutory in nature because it derives from a tribunal’s inherent authority. *Hazel-Atlas*, 322 U.S. at 248 (“Equitable relief against fraudulent judgments is not of statutory creation.”).

II. It Is Appropriate to Exercise this Inherent Authority in These Proceedings

We believe the unprecedented circumstances here merit invoking the Commission’s inherent authority to protect the integrity of our proceedings. The nature of the conduct -- a criminal conspiracy to fix prices -- goes to the heart of our statutory inquiry. The significance of the misconduct before this agency -- material misrepresentations and omissions regarding critical information -- seriously undermines

the integrity of our proceedings.

Three of the major domestic producers were engaged in a criminal price-fixing conspiracy during periods of time that substantially overlapped with the Commission's investigation period. These companies did more than conspire. All three of these companies actually sold ferrosilicon at fixed prices during the Commission's period of investigation.¹ Given the fundamental importance of domestic ferrosilicon prices to the Commission's analysis, this fact alone demonstrates that the record of the original injury investigations is tainted, and thus the integrity of those proceedings is undermined.

We reject the argument that the actual effects of the domestic producers' price fixing efforts on the Commission's record were *de minimis* because the conspiracy did not involve the entire industry and, according to the records of the criminal proceedings, was successful during limited periods.² In our view, it is the existence of this conduct during the Commission's period of investigation -- not its effects -- that undermined the integrity of our proceedings.³ Furthermore, it is impossible at this point to "unscramble the eggs" and quantify precisely the effect of these price-fixing efforts on the Commission's data.⁴ In these circumstances, the Commission need not conduct a re-investigation or reweigh the evidence on the merits, and thereby provide the wrongdoers a second opportunity to prevail.

¹ See *United States v. SKW Metals & Alloys, Inc.*, 96-CR-71S, Sentencing Hearing, Transcript of Proceedings (January 30, 1998), included in Domestic Producers' Rebuttal Comments on Reconsideration at Exhibit 2 (July 7, 1999); *United States v. Elkem Metals Co.*, 95-CR-154S, Elkem Plea Allocation (September 22, 1995), included in General Motors Corporation Comments on Reconsideration at Exhibit B (June 23, 1999); *United States v. American Alloys, Inc.*, 96-CR68S, American Alloys Plea Allocation (April 18, 1995), included in General Motors Corporation Comments on Reconsideration at Exhibit C (June 23, 1999).

² See Domestic Producers Comments on Reconsideration at 10-13 (June 23, 1999).

³ See *FCC v. WOKO, Inc.*, 329 U.S. 223, 227 (1946) ("The fact of concealment may be more significant than the facts concealed. The willingness to deceive a regulatory body may be disclosed by immaterial and useless deceptions as well as by material and persuasive ones.").

⁴ For example, there is simply no way to know to what extent the domestic producers' prices were higher than they otherwise would have been (even if they did not achieve the conspirators' "target" price) or to what extent the prices charged by the conspiring producers may have affected the prices charged by other domestic producers. We note, in this regard, that prices were rapidly disseminated in industry publications.

Before this agency, the domestic producers' misconduct took the form of material omissions and misstatements regarding the nature of price competition in the market. The acts, which are detailed in the Commission Opinion, pervade the entire record. In particular, the domestic producers that took part in or were aware of the price-fixing conspiracy failed to disclose the existence of the conspiracy to the Commission and, instead, misrepresented the nature of competition in the domestic market.⁵

As a result of the material omissions and misrepresentations of the major domestic producers, the Commission was materially misled to believe that domestic prices were determined on the basis of fair competition among suppliers when in fact competition was being restrained. Because evaluating prices goes to the heart of the statutory mandate, these actions before the Commission seriously undermined the integrity of the original investigations. Where the record is irreparably tainted and the integrity of the proceedings seriously undermined, the appropriate response is to deny the requested relief. *See AFB; Precision; Hazel-Atlas; and Packers Trading*. Such a response is consistent with the important public interests in this case.

Accordingly, pursuant to the Commission's broad authority to fashion remedies to protect the integrity of its proceedings, we would rescind the original affirmative determinations and issue negative determinations in each investigation.

⁵ For example, in response to a direct question asking each domestic producer to describe the factors considered in setting prices, none of the conspiring producers revealed that they had colluded with their competitors in setting prices. Rather, these producers responded to the effect that prices were driven by competitive market conditions. *See American Alloys Questionnaire Response*, June 5, 1992 at 38; *SKW Questionnaire Response*, June 5, 1992 at 38. The domestic producers now attempt to justify these responses on the ground that the question was written in the "present tense" and the conspiracy had ended before the companies provided their responses. *See Domestic Producers' Comments on Reconsideration* at 50-51 (June 23, 1999). This argument is inaccurate (*see Commission Opinion* at note 51).