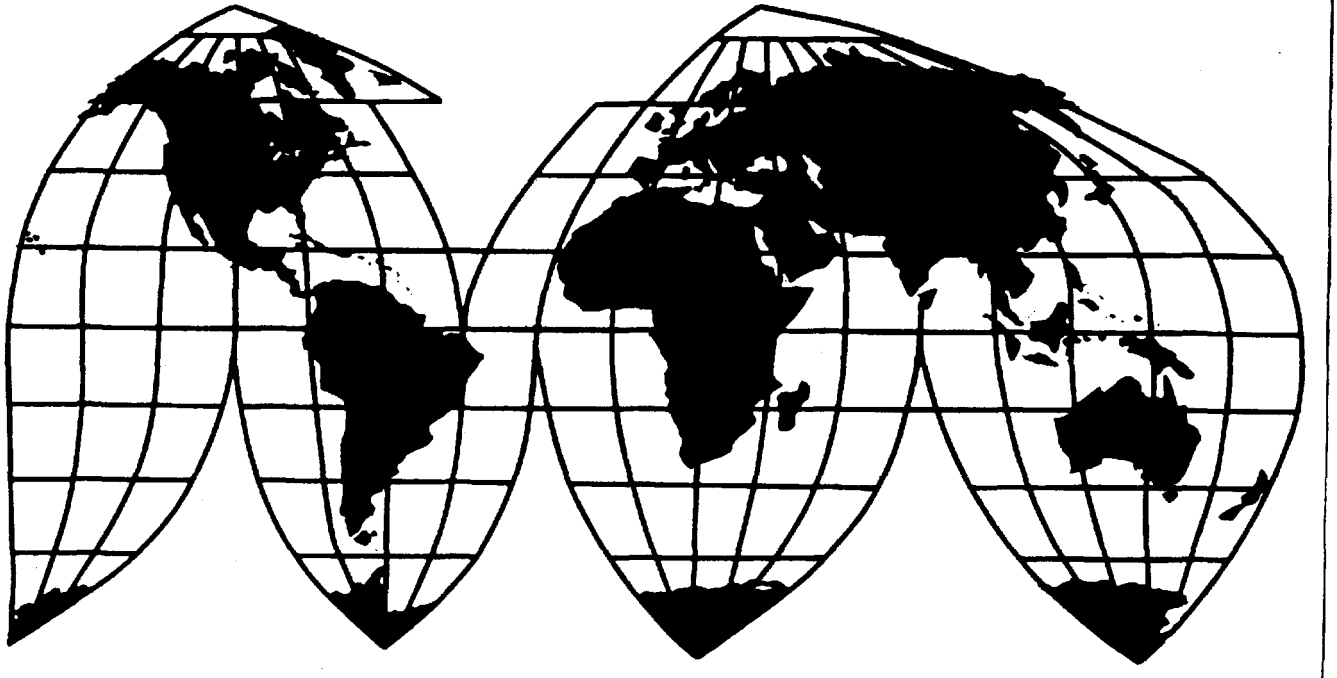
Ferrosilicon From Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela

Investigations Nos. 303-TA-23, 731-TA-566-570, and 731-TA-641
(Final) (Reconsideration) (Third Remand)

Publication 3765 **March 2005**

U.S. International Trade Commission



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Address all communications to
Secretary to the Commission
United States International Trade Commission
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VIEWS OF THE COMMISSION

I. INTRODUCTION

In August 1999, the Commission determined upon reconsideration that an industry in the United States was neither materially injured nor threatened with material injury by reason of imports of ferrosilicon from Venezuela found to be subsidized, and imports of ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela found to be sold at less than fair value (LTFV).[1] The Commission's determination was then appealed to the U.S. Court of International Trade (CIT), which remanded the matter to the Commission so it could conduct a hearing and other procedures.[2]

In its first remand opinion issued in September 2002, the Commission again made negative determinations.[3] Upon review, the CIT affirmed the Commission in part and remanded the matter to the Commission for further explanation concerning certain issues.[4]

In its second remand opinion, the Commission also made negative determinations.[5] On May 12, 2004, the Court remanded the matter again for further explanation.[6] On December 3, 2004, the Court

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[1] Ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela, Inv. Nos. 303-TA-23, 731-TA-566-570, 731-TA-641 (Reconsideration), USITC Pub. 3218 (Aug. 1999) ("1999 Reconsideration Opinion"). The Commission had originally made affirmative determinations in these investigations in 1993 and 1994. 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-567, 569 (Final), USITC Pub. 2616 (March 1993); Ferrosilicon from Russia and Venezuela, Inv. Nos. 731-TA-568, 570 (Final), USITC Pub. 2650 (June 1993); Ferrosilicon from Brazil, Inv. No. 731-TA-641 (Final), USITC Pub. 2722 (Jan. 1994).

[2] Elkem Metals Co. v. United States, 193 F. Supp.2d 1314 (Ct. Int'l Trade 2002) ("Elkem IV").

[3] Ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela, Inv. Nos. 303-TA-23, 731-TA-566-570, 731-TA-641 (Final)(Reconsideration)(Remand), USITC Pub. 3531 (Sept. 2002) ("2002 Remand Opinion").

[4] Elkem Metals Co. v. United States, 276 F. Supp.2d 1296 (Ct. Int'l Trade 2003) ("Elkem V").

[5] Ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela, Inv. Nos. 303-TA-23, 731-TA-566-570, 731-TA-641 (Final)(Reconsideration)(Second Remand), USITC Pub. 3627 (Sept. 2003) ("2003 Remand Opinion").

[6] Elkem Metals Co. v. United States, Slip op. 04-49 (Ct. Int'l Trade May 12, 2004) ("Elkem VI").

issued an opinion modifying and clarifying the order it issued on May 12, 2004 in certain respects.[7] We provide below the further explanation requested by the Court. We again determine that an industry in the United States was neither materially injured nor threatened with material injury by reason of subject imports of ferrosilicon.

II. BACKGROUND

The August 1999 Commission opinion provides a comprehensive background explaining the circumstances that led the Commission to institute reconsideration proceedings.[8] We incorporate by reference that discussion here.

Various domestic ferrosilicon producers subsequently filed suits at the CIT challenging the Commission's negative determinations on reconsideration. The CIT issued its first opinion on the merits in this matter on February 21, 2002. It concluded that the Commission had inherent authority to reconsider its original injury determinations, that reconsideration "is particularly appropriate where after-discovered fraud is alleged," and that the Commission instituted these proceedings in a timely manner.[9] It further concluded that the Commission acted inconsistently with its own regulations, and with the notice instituting the reconsideration proceedings, by not conducting a hearing specifically directed to the reconsideration proceedings.[10] The CIT consequently remanded the matter to the Commission for further proceedings. It did not, however, address the plaintiffs' claims concerning the merits of the Commission's opinion on reconsideration.[11]

Pursuant to the CIT's order, the Commission conducted remand proceedings in which it reopened

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[7] Elkem Metals Co. v. United States, Slip op. 04-152 (Ct. Int'l Trade Dec. 3, 2004) ("Elkem VII").

[8] 1999 Reconsideration Opinion, USITC Pub. 3218 at 4-6.

[9] Elkem IV, 193 F. Supp.2d at 1320-22.

[10] Elkem IV, 193 F. Supp.2d at 1324.

[11] See Elkem IV, 193 F. Supp.2d at 1319.

the record, conducted a hearing, and permitted the parties to submit several rounds of briefs. In September 2002 it reached negative determinations on remand. The grounds for these determinations were very similar to those articulated in the 1999 opinion, although the Commission modified the 1999 opinion in several respects.

Specifically, in the September 2002 remand opinion, the Commission concluded that the applicable statute authorized it to use best information available (BIA) and to take adverse inferences against domestic producers American Alloys, Inc. (American Alloys), CC Metals and Alloys, Inc. (CCMA), and Elkem Metals Co. (Elkem), because each of these firms impeded the Commission's investigations.[12] It also found, using BIA and adverse inferences, that domestic ferrosilicon prices throughout the original periods of investigation were affected by a price-fixing conspiracy in which American Alloys, CCMA, and Elkem (collectively "the conspirators") engaged during the original period of investigation.[13] It then found that the volume of subject imports was not significant, that the subject imports did not have significant price effects on the domestic industry, and that, because of the lack of volume and price effects, the subject imports had no significant impact on the domestic industry.[14]

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[12] 2002 Remand Opinion, USITC Pub. 3531 at 8-9. These proceedings are governed by the statute as it existed before the Uruguay Round Agreements Act (URAA) became effective. See id. at 9; 1999 Reconsideration Opinion, USITC Pub. 3218 at 6 & n.7. The pre-URAA statute stated that:

> In making [its] determinations under this title . . . the Commission shall, whenever a party or any other person refuses or is unable to provide information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation, use the best information otherwise available.

19 U.S.C. § 1677e(c)(1988).

[13] 2002 Remand Opinion, USITC Pub. 3531 at 9-15. Subsequent to the original Commission investigations, Elkem and American Alloys each pleaded guilty to criminal charges of conspiring to fix prices of commodity ferrosilicon from at least as early as late 1989 and continuing at least until mid-1991, a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. CCMA's predecessor firm, SKW Metals & Alloys, Inc. (SKW), and an SKW officer were convicted of violating Section 1 of the Sherman Act by conspiring to fix ferrosilicon prices.

[14] 2002 Remand Opinion, USITC Pub. 3531 at 16-18.

The CIT issued a second opinion in June 2003. It affirmed the Commission's findings that American Alloys, CCMA, and Elkem impeded the Commission investigations by failing to disclose information about the price-fixing conspiracy.[15] The Court stated that in light of the conspirators' material misrepresentations and omissions with respect to the information they furnished to the Commission concerning how they established prices during the original periods of investigation, "it is difficult to think of a situation where the use of the 'informal club' of BIA might be more warranted."[16] The Court also affirmed the Commission's conclusion, based on use of BIA, that the conspiracy affected prices charged by all domestic ferrosilicon producers during the period from October 1, 1989 through June 30, 1991.[17] This is the period for which there were judicial findings that the price-fixing conspiracy was in existence. Using the same terminology as did the CIT in Elkem V, we will call this period "the Conspiracy Period." The court affirmed the Commission's findings on price depression and suppression with respect to the entire original period of investigation,[18] and affirmed the Commission's findings on underselling with respect to the Conspiracy Period.[19] It determined that the Commission's use of an adverse inference to conclude that the conspiracy affected prices for those portions of the original period of investigation outside the Conspiracy Period was not supported by substantial evidence, and remanded the matter to the Commission for further proceedings.[20]

In its second remand opinion, the Commission concluded, using BIA, that "even if the conspiracy ceased to exist at the conclusion of the Conspiracy Period, it continued to affect prices charged by the

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[15] Elkem V, 276 F. Supp.2d at 1304-05.

[16] Elkem V, 276 F. Supp. 2d at 1305 (citation omitted).

[17] Elkem V, 276 F. Supp.2d at 1309-13.

[18] Elkem V, 276 F. Supp.2d at 1306-08.

[19] Elkem V, 276 F. Supp.2d at 1311.

[20] Elkem V, 276 F. Supp.2d at 1313-16.

domestic industry into the Subsequent Period."[21] It reaffirmed the findings it made in its 2002 determination concerning subject import volume and price effects, and the impact of subject imports on the domestic industry.[22]

In its May 2004 remand opinion, the Court determined that the Commission properly used the antidumping and countervailing duty laws, rather than antitrust laws, to evaluate the effects of the price-fixing conspiracy on U.S. prices for ferrosilicon for those portions of the original period of investigation outside the Conspiracy Period.[23] The Court also reaffirmed that the Commission properly concluded that "[t]he Conspirators' failure to reveal the price-fixing scheme hindered the proper analysis of the conditions of competition in the domestic ferrosilicon industry and any effects dumped and subsidized ferrosilicon imports may have had on domestic prices."[24] Consequently, the Commission's ability to use BIA was not limited to the Conspiracy Period, but encompassed the other portions of its original period of investigation as well.[25] The Court, however, found that the conclusions the Commission made concerning the effects of the conspiracy on domestic ferrosilicon prices during the Subsequent Period were not supported by substantial evidence, and consequently remanded them. The Commission subsequently filed a Motion for Reconsideration of portions of the CIT's May 2004 opinion. In its December 2004 opinion, the Court denied the motion but clarified some of the remand instructions it issued in May. It did not modify the scope of the remand.

The Commission instituted the instant proceedings after issuance of the May 2004 remand order.

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[21] 2003 Remand Opinion, USITC Pub. 3627 at 8. The "Subsequent Period" is the portion of the original period of investigation subsequent to July 1, 1991. The Commission found that the conspiracy did not affect prices for the portion of the original period of investigation preceding the Conspiracy Period. Id. at 8 n.47. This period will be referred to as the "Prior Period."

[22] 2003 Remand Opinion, USITC Pub. 3627 at 8-9.

[23] Elkem VI, Slip op. at 10-12.

[24] Elkem VI, Slip op. at 14-15.

[25] See Elkem VI, Slip op. at 13-15.

It provided the parties with the opportunity to submit comments on five issues relating to findings in the 2003 remand determination that the Court remanded in Elkem VI.[26] CCMA and Elkem were the sole parties to file comments.

III. RESPONSES TO INQUIRIES POSED BY THE COURT OF INTERNATIONAL TRADE

A. Applicable Legal Standard

In Elkem V, the Court remanded the proceedings "so that the ITC may set forth the evidentiary basis for the adverse inference that the price-fixing conspiracy affected prices throughout the entire Original POI."[27] In its 2003 remand determination, the Commission initially explained how it would attempt to set forth the evidentiary basis for any finding concerning whether the conspiracy affected U.S. ferrosilicon prices for those portions of the original period of investigation outside the Conspiracy Period. First, the Commission explained that "[t]he record in these proceedings does not contain accurate information from the conspirators concerning how they established ferrosilicon prices during *any* portion of the original periods of investigation."[28] It referred back to its findings in 1999 that the conspirators misled the Commission in the original injury investigations by providing false hearing testimony, inaccurate questionnaire responses, and misleading written submissions concerning how they established prices during the original period of investigation. The CIT had previously agreed, in particular, that "[n]o credible argument can be made that the ITC questionnaires were answered truthfully and responsively."[29] Consequently, the Commission stated that it would use BIA to ascertain how prices were established

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[26] 69 Fed. Reg. 36102 (June 28, 2004). The Commission did not solicit additional comments after issuance of the December 2004 opinion, since that opinion did not modify the scope of the remand directed in May.

[27] Elkem V, 276 F. Supp.2d at 1315.

[28] 2003 Remand Opinion, USITC Pub. 3627 at 4 (emphasis in original).

[29] Elkem V, 276 F. Supp.2d at 1304.

during the Subsequent Period.[30] [31]

Second, the Commission stated that the information available consisted of: (1) the finding, which the CIT had previously upheld, that the conspiracy was a significant condition of competition affecting pricing during the Conspiracy Period and (2) pricing information in the record. The Commission stated that it would compare prices between the Conspiracy Period and the Subsequent Period to ascertain whether pricing patterns changed.[32]

Nothing in the CIT's prior opinions calls this methodological approach into question. The CIT has twice upheld the Commission's authority to use BIA and take adverse inferences in this proceeding. It has observed that, pursuant to Federal Circuit precedent:

> Noncooperation by parties or other persons may . . . be penalized, at least in the eyes of those parties or persons, by the ITC's mandatory use of whatever other best information it may have available. In short, one may view the best information rule . . . as an investigative tool, which that agency may wield as an informal club over recalcitrant parties or persons whose failure to cooperate may work against their best interest.[33]

The Court found in Elkem V that the Commission was entitled to use BIA and take adverse inferences in this proceeding because:

> No credible argument can be made that the ITC questionnaires were answered truthfully and responsively. It is uncontested that the questionnaires distributed to the domestic producers requested information pertaining to the way in which domestic prices for ferrosilicon were determined. [Footnote omitted.] None of the Conspirators revealed the agreement to create a floor price in their questionnaire responses. Rather, "the

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[30] 2003 Remand Opinion, USITC Pub. 3627 at 4.

[31] Commissioner Lane and Commissioner Pearson did not participate in the prior Commission proceedings in this matter. As a result of their initial review of the record in these proceedings, they join several findings previously made by the Commission that the CIT has upheld. These include: (1) that the Commission has the authority to conduct reconsideration proceedings; (2) that the conspirators impeded the Commission investigations by failing to provide accurate information concerning how they established prices during any portion of the original period of investigation; and (3) that in such circumstances the use of BIA by the Commission is appropriate.

[32] 2003 Remand Opinion, USITC Pub. 3627 at 5.

[33] Elkem V, 276 F. Supp.2d at 1304, quoting Atlantic Sugar v. United States, 744 F.2d 1556, 1560 (Fed. Cir. 1984) (ellipses in original).

> Commission was told repeatedly that prices in the ferrosilicon market were established solely on the basis of marketplace competition." Remand Determination at 5. In light of the importance of the price effects element of the ITC's material injury analysis in the original investigations and "the price-sensitive nature of competition among ferrosilicon suppliers" the ITC found to exist in the original investigations, see Reconsideration Determination at 28 (internal quotation omitted), the ITC reasonably concluded that the failure of the Conspirators to divulge the existence of the price-fixing conspiracy "significantly impeded" its investigation within the meaning of 19 U.S.C. § 1677e(c). [Citations omitted.] Indeed, it is difficult to think of a situation where the use of the "informal club," [citation omitted] of BIA might be more warranted.[34]

Elkem VI contains a discussion indicating that the Commission's use of BIA was not required to be limited to the Conspiracy Period:

> The questionnaires distributed by the ITC requested information about the domestic producers' pricing decisions, which was directly relevant to the ITC's material injury determination. See Reconsideration Determination at 9 ("[B]ecause 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.") The Conspirators' failure to reveal the price-fixing scheme hindered the proper analysis of conditions of competition in the domestic ferrosilicon industry and any effects dumped and subsidized ferrosilicon imports may have had on domestic prices.[35]

Elkem V also elaborated on the legal standard applicable in these investigations for the Commission to take adverse inferences. It summarized the adverse inference rule as follows: "[W]hen a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to [that party]."[36] It quoted authority stating that a "lack of cooperation in responding to the questionnaires is a sound basis for drawing an adverse inference against the domestic industry."[37] It further stated that while the Commission has discretion in deciding whether or not to draw an adverse inference, its decision must be based upon a sound rationale, and it may not use

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[34] Elkem V, 276 F. Supp.2d at 1304-05.

[35] Elkem VI, Slip op. at 14-15.

[36] Elkem V, 276 F. Supp.2d at 1308 (bracketing in original; internal quotation omitted).

[37] Elkem V, 276 F. Supp. 2d at 1308, quoting Chung Ling Co. v. United States, 805 F. Supp. 45, 49 (Ct. Int'l Trade 1992).

the inference to reach a conclusion that appears to be at odds with known facts.[38]

B. Analysis of Facts Available

We again find that, given the nature of the facts available to the Commission, the approach of comparing pricing patterns during the Conspiracy Period with those during the Subsequent Period is a reasonable one.[39] In its Comments, Elkem itself has acknowledged that "the purpose of a price-fixing conspiracy is to charge higher prices than could otherwise be realized."[40] The CIT has sustained the Commission's finding that the conspiracy affected U.S. ferrosilicon prices during the Conspiracy Period. Thus, using Elkem's phrasing, during the Conspiracy Period, the domestic industry charged higher prices than it would have but for the conspiracy.

Elkem, in its Comments on Third Remand, contends in essence that the domestic industry established prices differently in the Subsequent Period than it did during the Conspiracy Period. It maintains that, absent evidence to the contrary, the Commission should presume that ferrosilicon prices during the Subsequent Period were established pursuant to marketplace forces because ferrosilicon is a commodity product sold by numerous suppliers pursuant to competitive bidding.[41]

We see no legal or factual basis to make the presumption requested by Elkem. As explained above, the Commission sought information from Elkem and the other conspirators in the original producers' questionnaires concerning factors affecting prices during the original period of investigation.

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[38] Elkem V, 276 F. Supp.2d at 1315. As we explain in section III.D. below, we have complied with the legal standards articulated by the CIT.

[39] Elkem VI did not suggest that the technique of comparing prices charged during the Conspiracy Period and the Subsequent Period to ascertain whether there were changes in pricing patterns was flawed. Instead, the CIT's criticism was focused on its belief that the Commission did not examine the entire Subsequent Period in its analysis and did not evaluate factors other than the conclusion of the conspiracy that might have affected prices. See Elkem VI, Slip op. at 17-19; Elkem VII, Slip op. at 6-7.

[40] Elkem Comments on Third Remand at 6 (July 12, 2004).

[41] Elkem Comments on Third Remand at 2. As used in this opinion, the phrases "marketplace forces" and "competitive marketplace conditions" encompass competition from dumped and/or subsidized subject imports.

Elkem and the other conspirators impeded the investigations by not presenting accurate or complete information in their responses. The CIT has agreed that "[n]o credible argument can be made that the ITC questionnaires were answered truthfully and responsively."[42] We accordingly start from the premise that the conspirators' questionnaire responses as to how they established prices during the original period of investigation were unreliable. Consequently, the Commission is entitled to use BIA.

A principal justification for the BIA rule is to avoid "rewarding the uncooperative and recalcitrant party for its failure to supply requested information."[43] Yet precisely what Elkem seeks is for the Commission to use a presumption that operates to the benefit of it and the other conspirators notwithstanding that the Commission's inability to obtain probative direct evidence on this point is the fault of the conspirators, not the Commission or other parties to the proceeding. Additionally, the BIA provision "fairly places the burden of production on the [party], which has in its possession the information capable of rebutting the inference."[44] During the course of these reconsideration proceedings, the Commission reopened the record and afforded the conspirators a full opportunity to present evidence as to what prices would have been during the original period of investigation had there been no conspiracy. The principal submission the conspirators made in this regard was an economic analysis by Dr. Joseph Kalt purporting to show that actual ferrosilicon prices the conspirators charged during the Conspiracy Period did not systematically exceed the prices the conspirators would have been expected to charge absent the conspiracy. We examined Dr. Kalt's analysis carefully and found that it lacked probative value for purposes of these proceedings.[45] The CIT sustained this finding.[46] When they had the

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[42] Elkem V, 276 F. Supp.2d at 1304.

[43] Allied-Signal Aerospace Co. v. United States, 996 F.2d 1185, 1992 (Fed. Cir. 1993).

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

[45] 2002 Remand Opinion, USITC Pub. 3531 at 11-13.

[46] Elkem V, 276 F. Supp.2d at 1311-13.

opportunity to do so, the conspirators provided no additional evidence to the Commission concerning how they determined prices during the Subsequent Period.

Elkem's argument that it is entitled to an evidentiary presumption in its favor unless the Commission can affirmatively disprove it subverts the policy on use of BIA that has been articulated by the CIT in this case, as well as our reviewing courts generally. If any inference in this proceeding is warranted, it is that the information the conspirators submitted in their questionnaire responses pertaining to how they established prices during the Subsequent Period is unreliable, and that unless the record shows a sufficiently significant change in pricing patterns that cannot be attributed to other conditions of competition, such as changes in demand, there is no other reliable information in the record on this issue.

Moreover, the factual premise behind Elkem's argument is faulty. Elkem appears to believe that a comparison of pricing patterns between the Conspiracy Period and Subsequent Period is not useful because "the conspiracy had very little effect on prices."[47] There is no probative information in the Commission record that supports this assertion. The only authority Elkem cites for this proposition is comments it submitted to the Commission during the second remand. The cited portions of these comments pertain to a court decision in criminal antitrust litigation involving another firm. The Commission has previously found that this court decision, as well as other material Elkem and other domestic producers submitted during the reconsideration proceedings to the Commission purporting to show that the conspiracy had little or no effect on prices during the Conspiracy Period, lacks probative value.[48] The CIT affirmed these Commission findings.[49]

Consequently, the presumption Elkem seeks the Commission to use is no more than a

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[47] Elkem Comments on Third Remand at 3.

[48] 2002 Remand Opinion, USITC Pub. 3531 at 10-13.

[49] Elkem V, 276 F. Supp.2d at 1311-13.

supposition. The CIT has stated that the Commission may not base BIA conclusions on "mere surmise."[50] This principle likewise would preclude us from accepting Elkem's presumption, even if its use were not diametrically contrary to the policies underlying the BIA provision.

We therefore examine the data in the record for the five quarters in the Subsequent Period for which we have comparable pricing data.[51] Data were collected for three separate products; consequently, there are six total quarterly observations for those portions of 1991 in the Subsequent Period, and nine quarterly comparisons for 1992.

In addition to instructing the Commission to consider pricing data for the entire Subsequent Period, the CIT directed the Commission to evaluate these prices in light of the relevant economic factors that existed in the marketplace during that period. One such factor is changes in demand. In our 2002 remand opinion, we noted that changes in ferrosilicon prices during the period of investigation largely paralleled changes in demand. U.S. apparent consumption of ferrosilicon declined sharply in 1991 and rose somewhat in 1992, and prices declined sharply through 1991 and showed some increases in 1992.[52] The CIT affirmed these findings.[53]

Another possible factor that could lead to a change in prices was a change in the conspirators'

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[50] Elkem VI, Slip op. at 33

[51] The pricing data to which we refer in this opinion were collected on a quarterly basis from January 1989 through September 1992. While some pricing data were collected for the fourth quarter of 1992 and the first two quarters of 1993 in the original investigations, it is not entirely comparable to the earlier data due to differing specifications and response coverage. We consequently have not relied on this latter data in our prior remand determinations, and do not do so here. See INV-Z-116 at III-1 n.1 (July 22, 2002).

[52] 2002 Remand Determination, USITC Pub. 3531 at 18.

[53] Elkem V, 276 F. Supp.2d at 1305-07. The information available indicates that the annual fluctuations may not have been consistent on a quarterly basis. Information in the record concerning quarterly steel production, which Elkem asserts may be used as a proxy for quarterly ferrosilicon demand (since a principal use of ferrosilicon is in production of steel), indicates that steel production declined sharply during the first two quarters of 1991, rose in the third quarter, and rose very slightly during the fourth quarter. During the first three quarters of 1992, steel production rose during two quarters and declined during one. Elkem Comments on Third Remand, ex. 1.

behavior at the conclusion of the Conspiracy Period. As previously discussed, other conditions being equal, assuming *arguendo* that the conspiracy ended at the end of the Conspiracy Period, and the conspirators thereafter established prices on a different basis – that is, *solely* on the basis of marketplace forces rather than on the basis of some combination (undisclosed to us) of marketplace forces and a conspiracy – we would expect prices to decline, given the absence of evidence that demand would have kept prices from declining.

On an overall basis, pricing patterns during the Subsequent Period were generally consistent with overall demand trends. For 1991, a year in which apparent consumption declined, the conspirators' prices during the fourth quarter of the year were lower than those during either the fourth quarter of 1990 or the second quarter of 1991 (the final Conspiracy Period quarter). During 1992, when apparent consumption rose, the conspirators' prices for two of the three pricing products were higher in the third quarter of 1992 (the final quarter for which we have data that may be compared with those for prior periods) than they were during the fourth quarter of 1991. Quarterly data are mixed.[54]

We cannot discern any significant deviations in the Subsequent Period prices from what one

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[54] Comparing successive quarters, the conspirators' prices rose during three of six quarterly observations during the 1991 portion of the Subsequent Period. The conspirators' prices rose during three of nine quarterly observations during the portions of 1992 for which usable pricing data are available. INV-Z-116, Tables III-1-3.

To the extent it is required by the CIT's opinion, we also examined the price movements of the individual conspirators. The data indicate that for the substantial majority (10 of 15) of quarterly observations during the Subsequent Period, the prices of each of the individual conspirators moved in the same direction (i.e., in a particular quarter, all conspirators' prices rose or all conspirators' prices fell). *See* Pricing Data Compiled from Producers' Questionnaires. This indicates that the aggregated data accurately represents the movements of the individual conspirators.

Consequently, Elkem's assertion that individual conspirators' prices "often move in opposite directions during the post-conspiracy period," Elkem Comments on Third Remand at 8, which is not based on an analysis of the quarterly data, is simply wrong. Elkem further argues that the individual conspirators' prices did not change to the same degree during the Subsequent Period. While it is true that there were some differentials in the magnitude of price declines among the conspirators during the Subsequent Period, these differentials were relatively modest for the majority of the products. By contrast, during the Conspiracy Period, for two of the three products, some conspirators' prices declined while others increased. See Pricing Data Compiled from Producers' Questionnaires. If anything, the pricing data pertaining to the individual conspirators show that their prices were more homogeneous during the Subsequent Period than during the Conspiracy Period.

would expect given generally declining demand, with some quarterly fluctuations, during 1991, and generally increasing demand, with some quarterly fluctuations, during 1992.[55] While the incidence of quarterly price increases during 1992 may be less than one would expect in light of demand trends, we observe that for two of the three pricing products, the conspirators' prices rose during the portion of 1992 for which we can make probative pricing comparisons.[56] Moreover, for the two products for which there are 1992 pricing observations concerning subject imports, the conspirators' prices were generally rising for products for which there were increasing quantities of subject imports.[57] This further supports the conclusion that subject imports were not driving movements in prices for the like product. In other words, the subject imports did not have significant price-depressing or -suppressing effects, a conclusion that the CIT has previously affirmed. Consequently, the available pricing data do not support a conclusion that prices during the Subsequent Period were substantially affected by the conclusion of the conspiracy.

Elkem itself acknowledges that, immediately after the conclusion of the Conspiracy Period, changes in the conspirators' prices can be explained by reference to changes in demand.[58] It does not argue and the record does not indicate that there were pricing changes during the remainder of the Subsequent Period caused by a factor other than changes in underlying demand conditions. If anything, Elkem's argument supports our finding that the pricing data for the Subsequent Period do not show any decline in prices that could be attributed to a change in the manner in which the conspirators established prices.[59]

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[55] The referenced annual demand data are those for apparent U.S. consumption of ferrosilicon. The quarterly data are the quarterly steel production data discussed above.

[56] INV-Z-116, Tables III-1-2.

[57] INV-Z-116, Tables III-1, 2, 4, 5.

[58] Elkem Comments on Third Remand at 3-5.

[59] In making this finding, we have followed the Court's instructions governing how we must conduct pricing comparisons between the Conspiracy Period and the Subsequent Period. See Elkem VII, Slip op. (continued...)

We have also examined the underselling data in the record, taking into account the CIT's instruction that we account for the entire Conspiracy Period and the entire Subsequent Period. The frequency of underselling by the subject imports was 80 percent (24 of 30 quarterly comparisons) for the entire Conspiracy Period and 74 percent during the entire Subsequent Period (17 of 23 quarterly comparisons).[60] Although the underselling frequency was slightly higher during the Conspiracy Period than during the Subsequent Period, we do not view this six percentage point differential as being especially significant. Certainly, the difference in underselling frequency between the Conspiracy Period and the Subsequent Period is far less than the difference in underselling frequency between either of these periods and the Prior Period.[61]

In Elkem VI, the Court criticized the Commission's use of the underselling data in the 2003 remand determination, and remarked, that "[t]he evidence cited to prove that the conspiracy affected prices during the Conspiracy Period, however, tends to support the proposition that the conspiracy did not

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[59] (...continued)
at 13. As explained above, we have assessed changes in U.S. apparent consumption and demand. We have also examined the entire portion of the Subsequent Period for which probative pricing data are available.

We do not, however, conclude that the conspiracy affected prices during the Subsequent Period. Nor do we purport to calculate what the "true market price" of ferrosilicon would have been during the Subsequent Period. As we explain below, the record does not contain information that would enable us to make such findings.

[60] INV-Z-116, Tables III-7a, III-7b, III-7c, III-8a, III-8b, III-8c, III-9a, III-9b. These percentages do not change whether subject imports are being compared against the prices of the conspirators or the prices of the domestic industry as a whole. As we explained in our prior opinions, our analysis is not an underselling analysis conducted pursuant to 19 U.S.C. § 1677(7)(C)(ii)(II) (1988). Rather, it is an analytical device we use to aid us in considering whether the available pricing data in the record show a change in pricing behavior between different portions of the original period of investigation. See 2002 Remand Opinion, USITC Pub. 3531 at 13 n.57.

[61] During the portion of the original period of investigation prior to the Conspiracy Period, the frequency of underselling was 36 percent (4 of 11 comparisons). INV-Z-116, Tables III-7a, III-7b, III-7c, III-8a, III-8b, III-8c, III-9a, III-9b. This contrast between the frequency of underselling during the Prior Period and during the Conspiracy Period provides support for the conclusion that the conspiracy affected prices during the Conspiracy Period, whether or not a similar contrast exists between the Conspiracy Period and the Subsequent Period. Cf. Elkem V, 276 F. Supp.2d at 1311.

affect prices during either the Prior Period or the Subsequent Period."[62] As we explain below, in this opinion we do not purport to examine whether the conspiracy actually affected prices charged during the Subsequent Period. Instead, we are ascertaining whether there are differences in the pricing data between the Conspiracy Period and the Subsequent Period unrelated to changes in demand which can be attributed to a change in how the conspirators determined prices. The CIT's statement, which is unelaborated, does not appear to us to address our present inquiry. Moreover, even if we were to view the underselling data as detracting evidence, we cannot conclude that the slight decline in underselling frequency, when viewed in conjunction with our evaluation of the other pricing data, supports a conclusion that there were material changes in the conspirators' pricing behavior in the Subsequent Period as compared to the Conspiracy Period unrelated to changes in demand.

Moreover, even assuming *arguendo* that the conspirators' pricing behavior did change fundamentally at some point in the Subsequent Period, we are unable to ascertain, on the basis of the current record, when such a change occurred. We reiterate a point that we have emphasized in our prior decisions: the conspirators have repeatedly argued that their pricing behavior never changed, because the conspiracy did not affect prices during the Conspiracy Period. Indeed, Elkem has continued to assert the latter argument in the current remand, although it has previously been rejected by both the Commission and the CIT. Moreover, Elkem has expressly asserted that changes in pricing immediately after the conclusion of the Conspiracy Period were due to demand factors unrelated to the conspiracy; such an assertion cannot be reconciled with the notion that a cessation of the conspiracy on July 1, 1991 independently caused a change in pricing patterns. Consequently, we cannot determine which, if any, portions of the pricing data for the Subsequent Period represent prices determined by solely competitive marketplace forces and on which we can rely with confidence for our pricing analysis.[63]

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[62] Elkem VI, Slip op. at 31. The Court did not expand upon this comment in Elkem VII.

[63] We note that in our analysis, we have not examined two types of data that we examined in our 2003 (continued...)

C. Other Questions Posed by the CIT

We emphasize that, to comply with the rulings of the CIT, our finding is limited in several respects. We initially reiterate our statement from the 2003 remand determination that "our finding is not a finding that the conspiracy lasted beyond the Conspiracy Period."[64]

Additionally, we do not make an affirmative conclusion that the conspiracy affected prices that domestic ferrosilicon producers charged during the Subsequent Period. Elkem VI, as clarified by Elkem VII, recommends that the Commission make several subsidiary findings if it desires such a conclusion to be sustained. These include a quantification of the difference between the prices the conspirators actually charged during the Subsequent Period and the prices the competitors would have charged had their prices

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[63] (...continued)
remand opinion. In 2003, we examined contracts in the ferrosilicon industry. This topic is discussed further below.

Additionally, our 2003 remand opinion compared prices charged by conspirators during the Subsequent Period with prices charged by other domestic ferrosilicon producers. In Elkem VI, the CIT rejected all conclusions the Commission reached in this respect, and instructed the Commission to revisit its finding. Elkem VI, Slip op. at 26-27. See also Elkem VII, Slip op. at 14-15 (clarifying instructions from Elkem VI).

On remand, we have revisited the issue of whether comparisons between prices charged by conspirators and other domestic ferrosilicon producers provide probative information concerning differences in pricing patterns between the Conspiracy Period and the Subsequent Period. We have determined that they do not.

In our 2002 remand opinion, we found that "[i]n light of the conspirators' dominant position in the domestic industry, it is reasonable that factors that affect their prices would affect prices of the industry as a whole, including the nonconspirators, during the conspiracy period." 2002 Remand Opinion, USITC Pub. 3531 at 14. This finding was not challenged in any of the proceedings before the CIT and served as a basis for the Commission's conclusion, upheld by the CIT, that the conspiracy affected prices charged by the entire domestic ferrosilicon industry during the Conspiracy Period.

The conspirators' dominant position in the domestic industry, however, continued into the Subsequent Period. Indeed, their share of total domestic production was higher in 1992 than it was during any of the three previous years. INV-Z-116, Table II-1. Thus, factors that affected the conspirators' prices would continue to affect the prices of other producers during the Subsequent Period. In light of our finding that the prices of the nonconspirators are affected by the prices of the conspirators, we do not believe ascertaining whether there are differences in pricing patterns between the conspirators and the nonconspirators is an analytically useful exercise.

[64] 2003 Remand Opinion, USITC Pub. 3627 at 7.

not been affected by the conspiracy,[65] and a calculation of what the "true market price" of ferrosilicon would have been in the Subsequent Period in the absence of effects from the conspiracy.[66] Elkem VI also contemplated that the Commission should calculate by reference to specific contracts how long-term contracts affected prices.[67]

In our Federal Register notice soliciting comments from the parties concerning the issues in this remand, we specifically asked the parties to identify and discuss any information in the record of these proceedings pertinent to quantifying any effects the conspiracy had on prices during the Subsequent Period. Neither Elkem nor CCMA identified any pertinent data apart from the pricing data in the questionnaire responses.[68] As previously stated, both the Commission and the CIT have found that the questionnaire responses did not provide reliable information on how prices were established. The questionnaire data reflect no more than what prices domestic ferrosilicon producers charged for specific

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[65] Elkem VII, Slip op. at 15-16.

[66] Elkem VII, Slip op. at 12-13.

[67] Elkem VI, Slip op. at 20-21.

[68] Elkem and CCMA identified no information in the record pertinent to the inquiry posed by the CIT concerning specific contract language, dates, and provisions. In fact the Commission did not collect and the record does not contain information concerning specific contracts. The information available concerning contracts derives from the staff report of the original investigations. Its accuracy has never been contested by any party. It indicates, based on producer and importer questionnaire responses which solicited general information concerning the nature of contracts, that during 1991 "long-term contracts (agreements to supply ferrosilicon for a period exceeding 6 months) accounted for 11 percent of sales of the domestic products. . . ." INV-Q-029 at I-74 n.66 (Feb. 17, 1993). The report further states that "[l]ong-term contracts typically run for 1 year, with prices generally fixed for the contract period. Due to the volatile nature of the ferrosilicon market, the prices specified in these contracts may sometimes be fixed for an initial 1-quarter period and then periodically adjusted during specified intervals during the rest of the contract period." Id. at I-76.

Consequently, the record indicates that in 1991 there were some long-term contracts in the ferrosilicon industry – albeit representing a minority of domestic production – that fixed prices for the duration of the contract. This does not mean that there were contracts that fixed prices through the duration of the Subsequent Period. It does mean, however, that during portions of the Subsequent Period, some ferrosilicon was being sold at prices established during the Conspiracy Period. The existence of these contracts further underscores why we cannot, on the basis of the information available, pinpoint either whether or when during the Subsequent Period prices charged by domestic ferrosilicon producers were established solely on the basis of marketplace conditions.

products at specific times. The data were collected to fulfill the Commission's statutory mandate to ascertain the effects of subject imports on prices charged by the domestic industry.[69] The data, taken by themselves, cannot be used to ascertain what prices would have been had conditions of competition within the domestic industry been different than they were.

Moreover, reopening the record once again to attempt to obtain further information to respond to the Court's recommended inquiries would have been inappropriate and unnecessary. As previously discussed, any gaps in the record are due to the conspirators' actions impeding the investigation. In addition, the Commission previously reopened the record during these reconsideration proceedings to give the conspirators a full opportunity to provide information as to what prices would have been during the original period of investigation had there been no conspiracy. The conspirators did not provide probative information on this issue. The CIT has repeatedly held that the Commission consequently is entitled to use BIA. In such circumstances, there is no basis for reopening the record once again.

Consequently, in this opinion we have not attempted to make an affirmative showing that the conspiracy affected prices during the Subsequent Period. To comply with the CIT's decision, our finding instead concentrates solely on what the record does *not* show – namely, that prices during the Subsequent Period were established in a different manner, i.e., solely pursuant to marketplace forces, than prices for the Conspiracy Period. Information pertinent to this inquiry was indisputably within the control of the conspirators, and the Commission requested such information in the original investigations and previously during these reconsideration proceedings. Because the conspirators did not provide it and instead impeded the investigation, the Commission is entitled to use BIA to reach a conclusion adverse to their interests.

D. Conclusion

In the original investigations, the Commission requested information concerning how domestic

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[69] 19 U.S.C. § 1677(7)(C)(ii) (1998).

producers established ferrosilicon prices. The conspirators impeded the investigations by failing to provide complete and accurate responses to the information requests. Because the questionnaire responses never revealed that there was a price-fixing conspiracy during the original period of investigation, these responses are unreliable, as the Commission and CIT have previously found. Consequently, we have been deprived of a primary source of information for our pricing analysis.[70] Pursuant to the law that the CIT has previously articulated in this matter, the Commission is entitled to use BIA to make conclusions on how the conspirators established prices. Using BIA, we have found that the prices charged by the conspirators during the Conspiracy Period and the Subsequent Period were not solely the result of marketplace competition and are therefore unreliable for purposes of our pricing analysis.

To comply with Federal Circuit precedent, we have ensured that this conclusion is not contrary to known facts. The information in the record does not demonstrate that there were material changes in pricing patterns between the Conspiracy Period and the Subsequent Period that could be attributed to the conspirators changing the manner in which they established prices.[71] Moreover, our examination of the pricing data also satisfies any requirements the CIT has imposed in these proceedings that the

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[70] We emphasize that, during the course of these reconsideration proceedings, the Commission gave the parties, including domestic producers, the opportunity to provide additional information, including pricing data, or to explain why it would be reasonable to use the data originally submitted. The principal submission Elkem and CCMA made in this regard was an economic analysis by Dr. Joseph P. Kalt purporting to show that the actual prices the conspirators charged during the Conspiracy Period did not systematically exceed those that the conspirators would have been expected to charge absent the conspiracy. The Commission examined Dr. Kalt's testimony and written analysis carefully and found that they lacked probative value for purposes of these proceedings. 2002 Remand Opinion, USITC Pub. 3531 at 11-13. The CIT affirmed this finding. Elkem V, 276 F. Supp.2d at 1311-13.

[71] We emphasize that neither the conspirators nor the CIT have identified any probative information in the record affirmatively demonstrating either that the prices the conspirators charged during the Subsequent Period were solely the result of marketplace forces or that the conspiracy had no effect on these prices.

Commission show an independent evidentiary basis for any conclusions based on BIA.[72]

IV. NO MATERIAL INJURY BY REASON OF SUBJECT IMPORTS

We reaffirm that, as of the time of the original determinations, the domestic ferrosilicon industry was not materially injured or threatened with material injury by reason of the subject imports.[73] [74] Prior to undertaking our analysis, we reiterate the following salient points from our prior opinions that the CIT has affirmed: the conspirators' questionnaire responses, insofar as they purport to provide information on considerations related to establishing prices, are unreliable; the economic analysis from Dr. Kalt previously introduced by Elkem and CCMA is not probative; the conspiracy was in effect for a major portion of the original period of investigation and affected domestic ferrosilicon prices during

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[72] We wish to express our concerns about the implications of such a requirement in Commission investigations. The Commission directs information requests to domestic producers, importers, and foreign producers, among others, and generally does not have available a set of "default" facts for use as an adverse inference. Therefore, absent conducting a separate investigation to obtain the missing data – something the BIA provision is intended to avoid – the Commission will not typically have ready reference to factual material that could provide independent evidentiary corroboration for use of an adverse inference. This problem is particularly acute when the missing information is normative or descriptive (i.e., how prices were established) rather than empirical (i.e., subject import volume). At least one decision that the CIT cited with approval multiple times in Elkem V has suggested that, in such circumstances, the Commission is authorized to take a generalized adverse inference. See Chung Ling, 805 F. Supp. at 48-50.

[73] Our definitions of like product and domestic industry, and our findings on cumulation, have not been at issue throughout the litigation before the CIT or during any subsequent remand proceedings. We reaffirm the findings we reached on these matters in our 1999 reconsideration opinion. 1999 Reconsideration Opinion, USITC Pub. 3218 at 24-27. Commissioner Lane and Commissioner Pearson, who in these proceedings reviewed the record for the first time, also adopt all findings from the 1999 reconsideration opinion that the Commission has reaffirmed in this opinion.

Threat of material injury was not an issue either in the CIT litigation or in this or our prior remand proceedings. The modified findings we are making in this opinion do not affect the threat analysis provided in the 1999 opinion. Consequently, as in our prior opinions, we again adopt the threat analysis used in the 1999 opinion. See 2003 Remand Opinion, USITC Pub. 3627 at 8 n.48; 2002 Remand Opinion, USITC Pub. 3531 at 16 n.72; 1999 Reconsideration Opinion, USITC Pub. 3218 at 33-41.

[74] Commissioner Miller again reaffirms her views, as stated in her Additional Views to the 1999 opinion and in the 2002 and 2003 opinions, that it was the existence of the conspiracy during the Commission's original periods of investigation – not its effects – that undermined the integrity of the Commission's proceedings. 2003 Remand Opinion, USITC Pub. 3627 at 8 n.49; 2002 Remand Opinion, USITC Pub. 3531 at 16 n.71; 1999 Reconsideration Opinion, USITC Pub. 3218 at 48.

the Conspiracy Period; the conspirators accounted for a majority of U.S. ferrosilicon production; the conspirators' pricing practices affected the non-conspirators' pricing practices; and the subject imports did not have any significant price-suppressing or -depressing effects.

As explained above, we have not made a finding for purposes of this remand opinion that the price-fixing conspiracy affected prices during the Subsequent Period. We declined to make such a finding, which we did make in our prior determinations, in an effort to comply with the CIT's decision in Elkem VI. Instead, we have found that the record does not establish that the conspirators changed their pricing patterns during the Subsequent Period; consequently, the record cannot support any conclusion on how prices were established during that period, including a conclusion that prices were solely the result of marketplace forces. In light of this new finding, we have made certain changes in our analysis of material injury by reason of subject imports.

A. Volume of Subject Imports

The record indicates that there were increases in subject import volume and market penetration during 1990 and 1992, but not 1991.[75]

The 1990 increase in subject import volume and market penetration occurred during the Conspiracy Period. We have previously found that the conspiracy affected the prices that domestic ferrosilicon producers charged during the Conspiracy Period and the CIT has upheld these findings. In light of this finding on the pertinent conditions of competition in the ferrosilicon market, we concluded in our 2002 and 2003 remand opinions that, because of the effects of the conspiracy, domestic producers were charging higher prices than market conditions warranted, providing opportunities for the subject

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[75] INV-Z-116, Table II-1. This conclusion is applicable for each set of country combinations we have cumulated. Id. Although volume data were also collected for the first half of 1993 (which show an increase in subject import volume and market penetration from Brazil and China, but not for the other subject countries or for the subject country combinations cumulated for purposes of the determinations for subject countries other than Brazil), we have given principal weight to the data through 1992. This is because, as explained above, the comparable pricing data series for these investigations ends in the third quarter of 1992. Moreover, the available 1993 data do not cover a full calendar year.

imports to increase their sales in the U.S. market.[76] This conclusion is still valid with respect to the Conspiracy Period, and explains why the 1990 increase in subject imports was not significant. Because the subject imports and the domestic like product were good substitutes, the increases in volume and market penetration of subject imports that occurred during the Conspiracy Period were the result of domestic production not being priced at marketplace levels.

The 1992 increase in subject import volume, by contrast, occurred during the Subsequent Period. Several considerations preclude us from finding that this increase, standing alone, is significant. First, while we have not made a finding that the conspiracy affected prices charged by domestic ferrosilicon producers during the Subsequent Period, we have concluded, based on BIA, that the record indicates no significant change in pricing patterns between the Conspiracy Period and the Subsequent Period. In light of this, the record cannot support a finding that the pricing data in the record for the Subsequent Period reflect prices determined exclusively pursuant to marketplace conditions. We therefore cannot find the requisite causal link between this increase in the subject imports and the declines in the condition of the domestic industry discussed below.

In this regard, we observe that the Commission's longstanding practice has been to use a period of investigation of at least three years duration in original antidumping investigations so it can fully assess the effects of the dumped imports. In these proceedings, a large portion of the data collected – including all data for 1990, and data for the first half of 1991 – concerned the Conspiracy Period. As the Commission has previously found, the Commission's ability to assess this data has been impaired by the conspirators' actions impeding the Commission investigation. The lack of reliable information for the Conspiracy Period, or for the full period of investigation that the Commission would typically examine, impairs our ability to assess the significance of changes, such as those in subject import volume, between the Conspiracy Period and the Subsequent Period. It is contrary to a principal policy behind the BIA

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[76] 2003 Remand Opinion, USITC Pub. 3627 at 9; 2002 Remand Opinion, USITC Pub. 3531 at 16-17.

provision – that parties who impede an investigation should not benefit thereby – to truncate our investigation period because of the conspirators' misconduct.

Moreover, in our prior determinations, we have emphasized that in the original investigations, the Commission found that competition among ferrosilicon suppliers was price sensitive.[77] Consequently, if the 1992 increase in subject import volume was significant, we would expect that it would result in adverse price effects to the domestic industry. As we explain below, however, the subject imports did not have significant price effects.[78] Consequently, we do not find subject import volume, notwithstanding the increases observed during the original period of investigation, to be significant.

B. Price Effects of Subject Imports

We reaffirm our finding in the 2002 opinion that the subject imports did not have significant price-depressing or price-suppressing effects.[79] The CIT upheld this finding in Elkem V.[80]

Elkem V also sustained the Commission's prior finding that underselling data from the Conspiracy Period are not probative.[81] As the Commission explained, "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 domestic industry to lower-priced subject imports."[82] This conclusion continues to be valid.

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[77] 2002 Remand Opinion, USITC Pub. 3531 at 16; 1999 Reconsideration Opinion, USITC Pub. 3218 at 28-29.

[78] Thus, as we explain further below, even if we were to assume arguendo that prices during the Subsequent Period were the result of competitive marketplace forces, our analysis would not change.

[79] 2002 Remand Opinion, USITC Pub. 3531 at 17-18.

[80] Elkem V, 276 F. Supp.2d at1305-07.

[81] Elkem V, 276 F. Supp.2d at 1311.

[82] 2002 Remand Opinion, USITC Pub. 3531 at 17, quoting 1999 Reconsideration Opinion, USITC
(continued...)

As we noted in our 2003 remand opinion, the available pricing data from the Prior Period show predominant overselling.[83] As we have stated above, we cannot conclude that the pricing data for the Subsequent Period reflect prices the domestic industry established exclusively pursuant to competitive marketplace conditions. Because there is no basis for finding that the domestic industry pricing data for the Subsequent Period reflect prices at market levels, we cannot find this data – or any other pricing data in the record – probative for an analysis of underselling during that period. We consequently lack a sufficient evidentiary basis to conclude that any underselling is significant.

We would make this same finding even if we were to assume arguendo that the pricing data for both the Prior Period and the Subsequent Period *did* reflect competitive marketplace conditions.[84] Under this hypothesis, usable underselling observations from the Prior Period and the Subsequent Period would still account for a minority of all price comparisons during the entire period for which we have consistently-generated pricing data.[85] The significance of this relatively small proportion of underselling is diminished further by the fact that ferrosilicon is a commodity product, for which we would ordinarily

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[82] (...continued)
Pub. 3218 at 29.

[83] 2003 Remand Opinion, USITC Pub. 3627 at 9.

[84] For the reasons stated above, we believe that such an assumption is entirely unsupported by the record before the Commission and is contrary to the policies behind the statutory provision concerning BIA. Nevertheless, in light of the fact that the CIT has already remanded this matter to the Commission three separate times, we have provided alternative findings to facilitate any further judicial review.

[85] With respect to those countries cumulated for purposes of the determinations with respect to subject imports from Russia and Venezuela, there were 64 quarterly pricing comparisons during the period through the third quarter of 1992 for which we have comparable pricing data, and at most 21 usable underselling observations. With respect to those countries cumulated for purposes of the determinations with respect to subject imports from China, Kazakhstan, and Ukraine, there were 75 quarterly pricing comparisons during the period for which we have comparable pricing data, and at most 25 usable underselling observations. With respect to the determination on subject imports from Brazil, there were 15 quarterly pricing comparisons during the period for which we have comparable pricing data, and at most five usable underselling observations. See INV-Z-116, Tables III-7-a, III-7-b, III-7-c, III-8-a, III-8-b, III-8-c, III-9-a, III-9-b; INV-Q-029 at I-86 (reporting absence of pricing data concerning imports from Egypt); Table E-3 (pricing data concerning imports from Argentina).

expect to see some degree of underselling of the domestically-produced product by products from other sources.[86] Consequently, in light of the pertinent conditions of competition, we would not find the underselling observed to be significant even assuming arguendo that the pricing data from the Subsequent Period were probative.

We consequently conclude that the subject imports did not have significant price effects.

C. Impact of Subject Imports on the Domestic Industry

The record indicates that measures of the domestic ferrosilicon industry's output, employment, and operating performance declined between 1989 and 1992.[87] The most severe declines in output and employment occurred in 1990 and 1991, and the most severe declines in financial performance occurred in 1990.[88]

Consequently, the overall declines in industry performance that occurred during the original period of investigation were largely a function of declines that occurred during the Conspiracy Period. For the reasons discussed above in our analysis of subject import volume and price effects, these declines cannot be attributed to the subject imports.

We have several additional observations with respect to the declines in industry performance observed during the Subsequent Period. First, we have previously found that, in the context of the entire period of investigation, the subject imports had no significant volume or price effects. In light of this, any

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[86] We would similarly expect to see some incidences of lost sales in such circumstances. In light of the fact that the subject imports did not have significant price-depressing or -suppressing effects, we cannot conclude that instances of confirmed lost sales and lost revenues during the Subsequent Period are sufficient in themselves to demonstrate significant price effects. As explained above, lost sales and lost revenue data from the Conspiracy Period are not probative. We have previously found that there were no lost sales or revenues allegations encompassing the Prior Period. 2003 Remand Opinion, USITC Pub. 3627 at 9 n.53.

[87] INV-Z-116 at II-5-6; see also INV-Q-029, Tables 10, 12; INV-Q-171 (Oct. 7, 1993), Tables 9, 11. As previously discussed, we have relied principally on data from 1989 to 1992. We note, however, that these indicators generally increased or improved in interim 1993 over interim 1992 levels.

[88] INV-Z-116 at II-5-6; see also INV-Q-029, Tables 10, 12; INV-Q-171, Tables 9, 11.

declines in domestic performance observed during the Subsequent Period cannot be attributed to the subject imports.

Second, even if the effects of the conspiracy on prices were limited to the Conspiracy Period, the conspiracy still affected the probative value of the data in the Commission record for all annual periods up to, and including, 1991.[89] Moreover, because of the conspirators' misconduct, the Commission does not have reliable information concerning how the domestic industry established prices during any portion of the original period of investigation. Because the 1991 data are not a probative baseline for competitive market conditions, and there is no reliable information in the record concerning what the CIT has acknowledged is a central condition of competition,[90] the record permits us to do no more than observe that domestic industry performance declined concurrently with increases in subject import volume. The record does not permit us to ascertain whether there is a causal link between the subject imports and the industry declines. Absent such a causal link, we are not authorized to make an affirmative determination of material injury by reason of subject imports.

Third, even if it were appropriate for us to examine the increase in subject import volume in 1992 in isolation, this increase is insufficient by itself to support a conclusion that the subject imports had a significant adverse impact on the domestic industry. We examined this increase, taking into account that 1992 was characterized by declines in domestic industry performance. A variance analysis that Commission staff performed for the original investigations, however, supports the conclusion that sales volume declines did not contribute to the domestic industry's declines in operating performance during 1992. Sales revenues did decline in 1992 because of lower sales quantities. The variance analysis, however, indicates that this decline was more than offset by volume-related reductions in cost of goods sold and sales, general, and administrative expenses. Thus, assuming (as is done for a variance

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[89] In its antidumping and countervailing duty investigations, including the instant proceedings, the Commission typically collects most data relating to the impact of subject imports on an annual basis.

[90] See Elkem VI, Slip op. at 14.

analysis) that prices could be held constant, because the costs associated with the lower quantity of sales declined by more than sales revenues did, the change in sales quantities in 1992 had an overall positive effect on the domestic industry's operating performance.[91] The variance analysis indicates that the decline in operating performance during 1992 was entirely related to changes in the industry's prices. The price declines, however, cannot be a function of the subject imports, which did not have significant price effects.

We consequently conclude that the subject imports did not have a significant adverse impact on the domestic ferrosilicon industry.

V. CONCLUSION

For the foregoing reasons, we have reached negative determinations in the third remand of these reconsideration proceedings.

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[91] See INV-Q-172 (Oct. 8, 1993). This is not surprising given that in 1992 the domestic industry was losing money on a per-unit basis on everything it produced. See, e.g., INV-Q-029 at I-46.

APPENDIX A

FEDERAL REGISTER NOTICE

INTERNATIONAL TRADE COMMISSION

[Investigation Nos. 303–TA–23, 731–TA–566–570, and 731–TA–641 (Final) (Reconsideration) (Third Remand)]

Ferrosilicon From Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela

AGENCY: International Trade Commission.

ACTION: Notice of remand proceedings.

SUMMARY: The United States International Trade Commission (Commission) hereby gives notice of the court-ordered remand of its reconsideration proceedings pertaining to 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.

DATES: *Effective Date:* June 22, 2004.

FOR FURTHER INFORMATION CONTACT: Christopher J. Cassise, Office of Investigations, telephone 202–708–5408, or Marc A. Bernstein, Office of General Counsel, telephone 202–205–3087, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*).

SUPPLEMENTARY INFORMATION:

Background

In August 1999 the Commission made negative determinations upon reconsideration in its antidumping and countervailing duty investigations concerning ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela. Ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela, Inv. Nos. 303–TA–23, 731–TA–566–570, 731–TA–641 (Final) (Reconsideration), USITC Pub. 3218 (Aug. 1999). The Commission's determinations were appealed to the U.S. Court of International Trade (CIT). On February 21, 2002, the CIT remanded the matter to the Commission for further proceedings. *Elkem Metals Co.* v. *United States,* 193 F. Supp. 2d 1314 (Ct. Int'l Trade 2002). On remand, the Commission conducted further proceedings. In September 2002 it reached negative determinations on remand. Ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela, Inv. Nos. 303–TA–23, 731–TA–566–570, and 731–TA–631 (Final) (Reconsideration) (Remand), USITC Pub. 3531 (Sept. 2002). On June 18, 2003, the CIT issued an opinion concerning the Commission's determinations on remand which affirmed the Commission in part and remanded in part for further proceedings. *Elkem Metals Co.* v. *United States,* 276 F. Supp. 2d 1296 (Ct. Int'l Trade 2003). In September 2003 the Commission reached negative determinations in the second remand proceeding. Ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela, Inv. Nos. 303-TA–23, 731–TA–566–570, and 731–TA–631 (Final) (Reconsideration) (Second Remand), USITC Pub. 3627 (Sept. 2003). On May 12, 2004, the CIT issued an opinion concerning the Commission's determinations on second remand which remanded the matter for further proceedings. *Elkem Metals Co.* v. *United States,* slip op. 04–49 (Ct. Int'l Trade May 12, 2004) ("2004 Elkem Slip Op.").

Written Submissions

The Commission is not reopening the record in the third remand proceeding for submission of new factual information. Pursuant to the prior decisions of the CIT, its determination will be based on best information available. See 2004 Elkem Slip Op. at 12–15.

The Commission will, however, permit the parties to file written submissions limited to the following issues:

(1) An identification and discussion of any information in the record pertinent to the inquiry concerning the "'true' market price" of ferrosilicon that the CIT directs the Commission to conduct. See Elkem 2004 Slip Op. at 18.

(2) An identification and discussion of any probative information in the record concerning quarterly fluctuations during the original period of investigation in U.S. demand and apparent consumption.

(3) An identification and discussion of any information in the record pertinent to the inquiry concerning specific contract language, dates, and provisions that the CIT directs the Commission to conduct. See 2004 Elkem Slip Op. at 21.

(4) A discussion of the information in the record concerning similarities and differences between prices charged by domestic ferrosilicon producers American Alloys, Elkem, and SKW, on the one hand, and other domestic ferrosilicon producers, on the other hand, during the portion of the original period of investigation subsequent to July 1, 1991.

(5) An identification and discussion of any probative information in the record concerning the inquiry concerning "baseline" prices that the CIT contemplates the Commission will conduct. See 2004 Elkem Slip Op. at 32.

This submission must be filed with the Commission no later than 14 days after publication of this notice in the **Federal Register**, shall not contain any new factual information, and shall not exceed 25 pages of textual material, double-spaced and single-sided, on stationery measuring 8½ x 11 inches.

The Commission has filed with the CIT a motion for reconsideration of portions of its May 12, 2004 slip opinion. It has also filed a motion to stay the CIT's order requiring a report of remand results pending disposition of the reconsideration motion. Should the CIT grant either of these motions before the due date for the submissions described above, the Commission will extend the deadline for filing of these submissions. Should the reconsideration motion be granted, the Commission may, if appropriate, modify the issues that may be discussed in these submissions.

All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain business proprietary information (BPI) must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 FR 68036 (Nov. 8, 2002).

In accordance with sections 201.16(c) and 207.3 of the Commission's rules, each document filed by a party to the investigations must be served on all other parties to the investigations (as identified by either the public or BPI service list), and a certificate of service must be timely filed. The Secretary will not accept a document for filing without a certificate of service.

Parties are also advised to consult the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR part 201), and part 207, subpart A (19 CFR part 207) for provisions of general applicability concerning written submissions to the Commission.

Participation in the Proceedings

Only those persons who were parties to the previous reconsideration proceedings (*i.e.*, persons listed on the Commission Secretary's service list)

may participate as parties in the third remand proceedings.

Authority: This action is taken under the authority of title VII of the Tariff Act of 1930 as amended.

Issued: June 22, 2004.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 04–14556 Filed 6–25–04; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

[Inv. No. 337–TA–493]

Certain Zero-Mercury-Added Alkaline Batteries, Parts Thereof, and Products Containing Same; Notice of Commission Decision Not To Review an Initial Determination Terminating the Investigation as to One Respondent on the Basis of a Settlement Agreement and Consent Order; Issuance of Consent Order

AGENCY: International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review the presiding administrative law judge's ("ALJ's") initial determination ("ID") (Order No. 134) terminating the above-captioned investigation as to respondent Dorcy International, Inc. ("Dorcy") on the basis of settlement agreement and a consent order.

FOR FURTHER INFORMATION CONTACT: Wayne Herrington, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone (202) 205–3090. Copies of the ALJ's ID and all other nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, SW., Washington, DC 20436, telephone 202–205–2000. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov.* Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202–205–1810.

SUPPLEMENTARY INFORMATION: The Commission instituted this investigation on June 2, 2003, based on a complaint filed by Energizer Holdings, Inc. and Eveready Battery Company, Inc., both of St. Louis, Missouri. 68 FR. 32771 (June 2, 2003). The complaint, as supplemented, alleged violations of section 337 of the Tariff Act of 1930 in the importation into the United States, the sale for importation, and the sale within the United States after importation of certain zero-mercury-added alkaline batteries, parts thereof, and products containing same by reason of infringement of claims 1–12 of U.S. Patent No. 5,464,709 ("the '709 patent"). The complaint and notice of investigation named 26 respondents, including respondent Dorcy, and were later amended to include an additional firm as a respondent. The investigation was terminated as to claims 8–12 of the '709 patent. Prior to the issuance of the subject ID, several other respondents had been terminated from the investigation for various reasons.

On May 20, 2004, complainants and respondent Dorcy filed a joint motion pursuant to Commission rules 210.21(b) and (c) to terminate the investigation as to Dorcy on the basis of a settlement agreement and a consent order. The Commission investigative attorney supported the motion. On June 2, 2004, the ALJ issued the subject ID terminating the investigation as to Dorcy on the basis of settlement agreement and a consent order. No petitions for review of the ID were filed.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), and in section 210.42 of the Commission's Rules of Practice and Procedure (19 CFR 210.42).

Issued: June 22, 2004.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 04–14557 Filed 6–25–04; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF LABOR

Employment and Training Administration

Proposed Information Collection Request Submitted for Public Comment and Recommendations; ETA–5130 Benefit Appeals Report

ACTION: Notice.

SUMMARY: The Department of Labor, as part of its continuing effort to reduce paperwork and respondent burden, conducts a preclearance consultation program to provide the general public and Federal agencies with an opportunity to comment on proposed and/or continuing collections of information in accordance with the Paperwork Reduction Act of 1995 [44 U.S.C. 3506(c)(2)(A)]. This program helps to ensure that requested data can be provided in the desired format, reporting burden (time and financial resources) is minimized, collection instruments are clearly understood, and the impact of collection requirements on respondents can be properly assessed.

DATES: Submit comments on or before August 27, 2004.

ADDRESSES: Send comments to Jack Bright, Office of Workforce Security, Employment and Training Administration, U.S. Department of Labor, Room S–4516, 200 Constitution Avenue, NW., Washington, DC 20210, telephone number (202) 693–3214 (this is not a toll-free number) or by e-mail: *bright.jack@dol.gov.*

FOR FURTHER INFORMATION CONTACT: Jack Bright, Office of Workforce Security, Employment and Training Administration, U.S. Department of Labor, Room S–4516, 200 Constitution Avenue, NW., Washington, DC 20210, telephone number (202) 693–3214 (this is not a toll-free number) or by e-mail: *bright.jack@dol.gov.*

SUPPLEMENTARY INFORMATION: I. *Background:* The ETA–5130, Benefit Appeals Report, contains information on the number of unemployment insurance appeals and the resultant decisions classified by program, appeals level, cases filed and disposed of (workflow), and decisions by level, appellant, and issue. The data on this report are used by the Department of Labor to monitor the benefit appeals process in the State Workforce Agencies (SWAs) and to develop any needed plans for remedial action. The data are also needed for workload forecasts and to determine administrative funding. If this information were not available, developing problems might not be discovered early enough to allow for timely solutions and avoidance of time consuming and costly corrective action.

II. *Desired Focus of Comments:* Currently, the Employment and Training Administration is soliciting comments concerning the proposed extension collection of the ETA–5130 Benefit Appeals Report. Comments are requested to:

- Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including