UNITED STATES INTERNATIONAL TRADE COMMISSION

FERROSILICON FROM BRAZIL, CHINA, KAZAKHSTAN, RUSSIA,
UKRAINE, AND VENEZUELA
Investigations Nos. 303-TA-23 and 731-TA-566-570 and 641 (Reconsideration) (Remand)

DETERMINATION AND VIEWS OF THE COMMISSION
(USITC Publication No. 3531, September 2002)

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.

On remand, we again make a negative determination. Except as otherwise stated below, the grounds for our determination on remand are the same as those articulated in the Commission's August 1999 opinion.[2] [3]

II. BACKGROUND

The August 1999 Commission opinion provides a comprehensive background explaining the

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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 The Commission had originally made affirmative determinations in these investigations in 1993 and 1994.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) ("China Final"); 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] Chairman Okun was not a member of the Commission in 1999 and consequently did not participate in the original reconsideration proceedings. She joins the Commission's negative determination on remand as a result of her initial review of the record in these proceedings.

[3] Commissioner Miller incorporates into this remand opinion her Additional Views from the 1999 opinion in their entirety. 1999 Reconsideration Opinion at 45-50.

circumstances that led the Commission to institute reconsideration proceedings.[4] 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. In the litigation, the plaintiffs raised three distinct sets of issues. First, certain plaintiffs contended that the Commission lacked the authority to conduct reconsideration proceedings, and that the proceedings the Commission instituted were untimely. Second, plaintiffs contended that the Commission did not follow proper procedures in its reconsideration proceedings. Third, they argued that the Commission's negative determination on reconsideration of material injury by reason of subject imports was not supported by substantial evidence and not in accordance with law.

The CIT's February 21, 2002, opinion resolved the first set of issues in the Commission's favor. It concluded that the Commission had inherent authority to reconsider its original injury determinations and that the Commission instituted reconsideration proceedings in a timely manner.[5]

The CIT resolved the second set of issues in favor of the plaintiffs. It 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.[6] The CIT concluded that the domestic producers were entitled not only to a hearing, but "to all of the other benefits" of the Commission's procedural regulations, which it indicated included adequate

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[4] 1999 Reconsideration Opinion at 4-6.

[5] Elkem Metals Co. v. United States, 193 F. Supp.2d 1314, 1319-23 (Ct. Int'l Trade 2002).

[6] The Commission incorporated into the record of the 1999 reconsideration proceedings transcripts from the hearings in the original investigations and the April 1999 hearing in the changed circumstances review that the Commission conducted immediately prior to instituting the reconsideration proceedings. The CIT found, however, that "[t]hese hearings . . . were not sufficient to fulfill the ITC's commitments." 193 F. Supp.2d at 1324.

notice, and the ability to file prehearing and posthearing briefs.[7] The CIT found that, because the Commission "failed to adhere to the procedures that it published as those that would govern its Reconsideration Proceedings," the proceedings were "conducted in a manner not in accordance with law."[8] The CIT subsequently issued an Order on March 18, 2002, remanding the matter to the Commission "for further proceedings providing all of the procedures contemplated by the opinion of this Court dated February 21, 2002, and including a hearing on all issues relevant to reconsideration of material injury and any allegations of misconduct."[9]

The CIT acknowledged in its opinion that the plaintiffs also raised substantive issues concerning the merits of the Commission's opinion on reconsideration. However, it stated that it need only address the procedural issues concerning the Commission's authority and procedures.[10] This is consistent with the excerpt from the March 18, 2002 order, quoted above, which directs the Commission to conduct additional procedures and to convene a hearing for the purpose of receiving additional evidence and argument.[11]

Pursuant to that order, the Commission instituted remand proceedings effective April 11, 2002.[12] During the remand proceedings the Commission has, consistent with the direction of the CIT, provided the parties with all pertinent benefits of the Commission's procedural regulations applicable to antidumping

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[7] The record in the 1999 reconsideration proceedings contained, among other submissions, opening and rebuttal comments the parties submitted in those proceedings, as well as prehearing and posthearing briefs the parties had filed in the 1999 changed circumstances review.

[8] 193 F. Supp.2d at 1324-25.

[9] Elkem Metals Co. v. United States, Consol. Ct. No. 99-10-00628, Order (Ct. Int'l Trade Mar. 18, 2002).

[10] 193 F. Supp.2d at 1319.

[11] The CIT indicated in its opinion that the Commission should consider any evidence presented during the remand proceedings as to the effect of the conspiracy on domestic ferrosilicon prices. 193 F. Supp.2d at 1325.

[12] 67 Fed. Reg. 18633 (April 16, 2002).

and countervailing duty investigations. It reopened the record and permitted the parties to submit new factual information on matters within the scope of the proceedings.[13] Prior to the hearing the Commission staff transmitted to the parties factual information concerning the subject matter of the investigations pursuant to Commission rule 207.22(a). The Commission permitted parties to the investigation to file prehearing briefs pursuant to Commission rule 207.23. It conducted a hearing on June 6, 2002. At this hearing, conducted pursuant to Commission rule 207.24, the parties presented additional arguments and testimony.[14] Subsequently, the parties filed posthearing briefs pursuant to section 207.25 of the Commission rules and final comments pursuant to section 207.30 of the Commission rules. Four of the five domestic producers that participated in the 1999 reconsideration proceedings – Elkem Metals Co. (Elkem), CC Metals and Alloys, Inc. (CCMA), Globe Metallurgical Inc. (Globe), and Applied Industrial Materials Corp. (AIMCOR) -- filed briefs, submitted new factual information, and participated in the Commission hearing.[15] The Commission additionally prepared and released to the parties under administrative protective order a final staff report pursuant to Commission rule 207.22(b).

III. MISCONDUCT IN THE ORIGINAL INVESTIGATIONS

The Commission's August 1999 opinion contains an extensive discussion explaining how certain

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[13] See 67 Fed. Reg. at 18633.

[14] The basis of the CIT's remand order, as discussed above, was that the Commission was required in the reconsideration proceedings to provide the parties the benefits of its published procedures in antidumping and countervailing duty investigations, including those governing hearings. The CIT did not require the Commission to engage in any particular procedure not described in its regulations. Consequently, the Commission denied the requests of certain parties seeking that it adopt procedures that did not conform to those described in Commission regulations. See Letter from Marilyn R. Abbott to George R. Kucik and William D. Kramer (May 10, 2002) (denying, inter alia, requests from domestic producer CC Metals and Alloys, Inc. that the Commission issue formal "charges" of misconduct against domestic producers and that it conduct a trial-type evidentiary hearing).

[15] The remaining domestic producer, American Alloys, Inc. (American Alloys) is now in liquidation and did not participate in these remand proceedings.

domestic ferrosilicon producers were culpable of material misrepresentations and omissions in the original ferrosilicon investigations the Commission conducted between 1992 and 1994. The Commission observed that "much of the information [the domestic producers] submitted was false, misleading, and incomplete, and . . . they repeatedly omitted critical information pertaining to pricing and competition in the market."[16]

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.[17] 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.[18]

The 1989-91 period was within the period examined in the Commission's original ferrosilicon investigations. Nevertheless, the Commission was never informed about the price-fixing conspiracy in the original investigations. Instead, contrary to fact, the Commission was told repeatedly that prices in the ferrosilicon market were established solely on the basis of marketplace competition. The 1999 opinion contains over six pages detailing specific instances in which domestic producers misled the Commission concerning pricing practices in the original investigation or failed to disclose material information about how prices were established.[19]

The Commission consequently found that American Alloys, Elkem, and SKW impeded the original Commission investigations by failing to disclose information concerning the price-fixing conspiracy

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[16] 1999 Reconsideration Opinion at 10.

[17] 15 U.S.C. § 1. See generally 1999 Reconsideration Opinion at 10.

[18] The Second Circuit, in affirming the convictions, found that evidence indicated a conspiracy existed between October 1, 1989 through June 30, 1991. United States v. SKW Metals & Alloys, Inc., 195 F.3d 83, 86-87 (2d Cir. 1999).

[19] 1999 Reconsideration Opinion at 13-19.

in which they were convicted or found guilty of participating. It also found that AIMCOR and Globe impeded the original Commission investigations because they were aware of the conspiracy but failed to disclose information about it.[20]

In these remand proceedings, we adopt all findings we made in the 1999 reconsideration opinion with respect to party misconduct, except for findings pertaining to AIMCOR and Globe, which we discuss below. During the remand proceedings, AIMCOR and Globe presented to the Commission additional evidence, and, in Globe's case, oral witness testimony, regarding these firms' respective lack of knowledge about the ferrosilicon price-fixing conspiracy at the time of the original investigations. We have considered all information in the record, including this new information, in making findings concerning these firms.[21] [22]

AIMCOR. As indicated in the Commission's 1999 opinion, there is some information in the record that could support a conclusion that AIMCOR knew about the price-fixing conspiracy. The record contains testimony from William Beard, who at the time of the original Commission investigations was president of American Alloys, that he attended a meeting at the Marriott Hotel near the Pittsburgh Airport some time after June 1992 with Charles Kopec, who was then president of AIMCOR, and Charles Zak of SKW. Mr. Beard testified that Mr. Zak had previously agreed that the floor price for ferrosilicon for

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[20] See 1999 Reconsideration Opinion at 10-11.

[21] By contrast, Elkem acknowledged that it misled the Commission during the original investigations. Tr. at 49 (Nields). American Alloys, as previously discussed, did not participate in the remand proceedings. While in the remand CCMA has disputed the Commission's finding that SKW was responsible for material misrepresentations and omissions, it submitted no new evidence with respect to this issue and its arguments provide no basis to modify or revisit the findings concerning SKW that the Commission made in the 1999 reconsideration opinion.

[22] Chairman Okun did not participate in the original reconsideration proceedings. Based on the reasons discussed below, she finds that there is insufficient evidence on this remand record to conclude that AIMCOR and Globe were culpable of material misrepresentations or omissions during the original Commission investigations.

the next quarter would be 42 cents and that Mr. Beard was supposed to "take the message to AIMCOR." Mr. Beard stated that when he did so, Mr. Kopec did not seem surprised and that "I think his comment was, 'Okay.' That's all I remember." Mr. Beard also testified that Mr. Kopec seemed to be familiar with the concept of a floor price.[23] Additionally, there was trial testimony in civil antitrust litigation from Donald Freas, Mr. Kopec's predecessor as AIMCOR president, that he had a "get-acquainted" meeting with David Beistel of Elkem some time in 1990 or 1991. Mr. Freas said, "I believe [Mr. Beistel's] words were what can we do, what should we do about pricing. Whereupon, I was shocked and said, we're not going to talk about that. Let's go to lunch. I, basically, ended the conversation."[24]

In the remand proceedings, AIMCOR submitted an affidavit of Mr. Kopec, who is no longer affiliated with the firm, in an effort to rebut the testimony of Mr. Beard. Mr. Kopec states that he never had any discussion or conversation with any competitor while at AIMCOR concerning floor prices and had no knowledge about any price-fixing conspiracy until Elkem made its guilty plea in 1995.[25] Mr. Kopec categorically states that Mr. Beard's grand jury testimony concerning the purported meeting between Messrs. Beard, Kopec, and Zak is false. Mr. Kopec states that, after review of his calendars and diaries, he does not believe he ever attended a meeting in which the only participants were himself, Mr. Beard, and Mr. Zak.[26]

The remand record therefore contains some information that would support a conclusion that

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[23] William Beard Deposition Tr. (submitted as Ex. 25 to General Motors Prehearing Changed Circumstances Brief (AR List 1, Doc. 162)) at 80-83 (Apr. 28, 1998).

[24] Donald Freas Trial Testimony (submitted as Ex. E to General Motors Reconsideration Comments (AR List 1, Doc. 302)) at 218-19 (May 6, 1999).

[25] AIMCOR Prehearing Brief, Kopec Aff., ¶¶ 3-5.

[26] AIMCOR Prehearing Brief, Kopec Aff., ¶¶ 6-9.

AIMCOR knew about the price-fixing conspiracy, and some material that would support a conclusion that it had no knowledge. We observe that much of the evidence that would support the conclusion that AIMCOR did have knowledge came from Mr. Beard, who also testified that AIMCOR did not send a representative to group meetings he attended.[27] Based on our review of all material in the record in these remand proceedings, we find that there is not a sufficient evidentiary basis to conclude that AIMCOR had knowledge of the price-fixing conspiracy. Consequently, we cannot find that AIMCOR was culpable of material misrepresentations or omissions during the original investigations.

Globe. As with AIMCOR, the record in these remand proceedings contains information that could support a conclusion that Globe was aware of the price-fixing conspiracy. Edward Boardwine, a former vice-president of Elkem, testified in the criminal trial of SKW that he attended a meeting at the Holiday Inn near the Pittsburgh airport in September or October of 1989 with Arden Sims, who was then and is currently president of Globe, and Messrs. Zak and Beard. Mr. Boardwine testified that, after a discussion of a recent importation of ferrosilicon from Russia, the participants considered the possibility of pursuing antidumping duties against the Russians. This was followed by a discussion of the state of the ferrosilicon business in North America. Subsequently, Mr. Boardwine testified, "[t]here was a discussion on possibilities of establishing a floor price." He also indicated that "almost everyone had a comment on the floor price," but that he could not remember specific comments by the individuals present.[28] In deposition testimony taken during civil antitrust litigation concerning the same meeting, Mr. Boardwine

[27] William Beard Grand Jury Testimony (submitted as Ex. D to AIMCOR Prehearing Brief) at 84 (May 19, 1995).

[28] Edward Boardwine Trial Testimony (submitted as Ex. D to General Motors Reconsideration Comments) at 151-63.

stated that Mr. Sims participated very little during the meeting.[29]

Mr. Beard testified in the criminal trial of SKW that he attended a meeting in the Pittsburgh Airport Holiday Inn on September 17, 1990 with Messrs. Boardwine, Zak, and Sims. He said that at the meeting Mr. Boardwine suggested 45 cents as an appropriate floor price. Subsequently, the participants agreed to a 43 cent floor price.[30]

Globe presented Mr. Sims as a witness in the Commission hearing in these remand proceedings. Mr. Sims testified that Globe did not participate in a price-fixing conspiracy, was not aware of any such conspiracy, and did not cut production based on any conspiracy.[31] Globe also has submitted in the remand proceedings the trial testimony and deposition testimony Mr. Sims gave in the Industrial Silicon Antitrust Litigation civil proceedings. At the trial, Mr. Sims testified that he attended a meeting on September 7, 1989, at the Holiday Inn near the Pittsburgh airport with Messrs. Beard and Boardwine. He stated that the only conversation at the meeting pertaining to ferrosilicon prices was that pricing was low and conditions were bad. He specifically denied either being asked or agreeing to set a floor price for ferrosilicon.[32] Mr. Sims also testified that the meeting was the only one he recalled having with Mr. Boardwine and that its principal purpose was to discuss a possible antidumping petition on silicon metal.[33] Mr. Sims additionally testified at trial that he attended a September 1990 meeting at the Pittsburgh Airport

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[29] Edward Boardwine Deposition Tr. (submitted in conjunction with Globe Posthearing Brief) at 39 (July 31, 1997).

[30] William Beard Trial Testimony (submitted as Ex. D to General Motors Reconsideration Comments) at 654-57, 661-71.

[31] Tr. at 38-39 (Sims).

[32] Arden Sims Trial Testimony (submitted in conjunction with Globe Posthearing Brief) at 125-28 (Oct. 29, 1998).

[33] Arden Sims Trial Testimony at 132, 186-87 (April 22, 1999).

Holiday Inn with Messrs. Zak, Beard, and others; the Elkem representative was not Mr. Boardwine, but a Mr. Sorli. He stated that the principal purpose of that meeting was to discuss the ongoing silicon metal antidumping investigation. Mr. Sims further testified that there was some discussion of a possible ferrosilicon antidumping action but no discussion of individual producers' ferrosilicon prices.[34]

Thus, Mr. Boardwine and Mr. Beard each identify Mr. Sims as being a participant at meetings where discussions took place on establishment of floor prices while Mr. Sims denies ever being aware of such discussions. The testimony of Mr. Boardwine and the testimony of Mr. Beard are inconsistent with regard to the individuals present at the various meetings.[35] Evaluating the mixed evidence in the record of these remand proceedings, we find that there is not a sufficient evidentiary basis to conclude that Globe was knowledgeable about the price-fixing conspiracy. Consequently, we cannot find that Globe was culpable of material misrepresentations or omissions during the original investigations.

Conclusion. While we have concluded that AIMCOR and Globe were not culpable of material misrepresentations or omissions during the original Commission investigations, we emphasize that they both were relatively small producers. The share of U.S. production represented by AIMCOR and Globe combined was *** percent during 1992, the final full year encompassed by the Commission's original periods of investigation, and never exceeded *** percent during any full year of the periods of investigation. By contrast, American Alloys, Elkem, and SKW collectively represented a significant majority of U.S. production throughout the original periods of investigation. These three firms had a combined share of *** percent of U.S. production in 1992, and their combined share was at least ***

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[34] Arden Sims Trial Testimony at 138-42 (Oct. 28, 1998); at 202-05 (Apr. 22, 1999).

[35] Specifically, Mr. Beard testified that Mr. Boardwine was present at the September 1990 meeting and proposed a particular floor price, but Mr. Boardwine testified that he did not recall meeting Mr. Sims any time during 1990. Edward Boardwine Deposition Tr. at 91, 258.

percent throughout the Commission's original period of investigation.[36]

Consequently, our finding on remand that AIMCOR and Globe did not make material misrepresentations or omissions during the original Commission investigations does not undercut the findings the Commission made in its 1999 opinion concerning either the pervasiveness or the significance of the misrepresentations and omissions that domestic ferrosilicon producers made during the original investigations. We emphasize in this respect that not a single misrepresentation of those detailed in section IV.D. of the Commission's 1999 reconsideration opinion was attributed solely to AIMCOR or Globe, individually or collectively. Additionally, as the Commission emphasized in its 1999 opinion, the main witness for the petitioners at the Commission hearings in the original hearings was William Beard, the president of American Alloys who attended numerous price-fixing meetings and was clearly knowledgeable about the price-fixing schemes to which his firm ultimately pled guilty. As detailed in the 1999 opinion, Mr. Beard repeatedly gave incomplete and misleading testimony to the Commission concerning the nature of price competition in the U.S. ferrosilicon market.[37]

The remand record thus supports the same central conclusion that the Commission made in 1999: that "the vast majority of the domestic industry significantly impeded the Commission's investigations" by making misstatements and omissions that "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."[38]

IV. USE OF BEST INFORMATION AVAILABLE AND ADVERSE INFERENCES

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[36] Confidential Report (CR) and Public Report (PR), Table II-1.

[37] 1999 Reconsideration Opinion at 14-16. Moreover, American Alloys, ***, was clearly aware of the misleading statements made in the petition and the briefs concerning the nature of price competition in the U.S. ferrosilicon market. See id. at 13-14, 18-19.

[38] 1999 Reconsideration Opinion at 20.

A. Statutory Framework

As stated in the 1999 opinion, these reconsideration proceedings, because they concern determinations on antidumping and countervailing duty petitions filed before January 1, 1995, are governed by the statute as it existed before the Uruguay Round Agreements Act (URAA) became effective.[39] 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.[40]

This provision authorizes the Commission to take adverse inferences against parties that do not cooperate in or that impede an investigation; the Commission did in fact take adverse inferences in the 1999 opinion.[41] The provision enables the Commission and the Department of Commerce to avoid "rewarding the uncooperative and recalcitrant party for its failure to supply requested information,"[42] and recognizes that "the [agency] cannot be left merely to the largesse of the parties at their discretion to supply the [agency] with information. . . ."[43] 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."[44]

B. Effect of the Conspiracy on Prices

In examining how to apply the "best information available" provision in these remand proceedings,

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[39] 1999 Reconsideration Opinion at 6 & n.7. Consequently, all references to the statute in this opinion are to the statute as it existed prior to the URAA, unless otherwise indicated.

[40] 19 U.S.C. § 1677e(c) (1988).

[41] 1999 Reconsideration Opinion at 21-22.

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

[43] Olympic Adhesives, Inc. v. United States, 899 F.2d 1565, 1571 (Fed. Cir. 1990).

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

we first examine the information in the record pertinent to prices charged during the original periods of investigation. The domestic producers argue with great vehemence that there is no indication that the pricing data that they provided in the original investigations did not represent the actual prices they charged in particular transactions.[45] This argument, however, overlooks that the statute does not direct the Commission to examine prices in the abstract. Instead, it directs the Commission to evaluate the "effects of imports of [subject] merchandise on the prices in the United States for like products."[46] Moreover, in ascertaining the impact of imports subject to investigation on the domestic industry, the Commission is directed to consider "factors affecting domestic prices."[47] Consequently, the Commission's role in an antidumping and countervailing duty investigation is not merely to tabulate pricing data. It is to ascertain the significance of that data in light of the conditions of competition that affect the industry that the Commission is investigating. In turn, ascertaining the significance of the pricing data enables the Commission to determine the effects of subject imports in the U.S. market.

It is undisputed that a central condition of competition pertinent to domestic pricing during the original periods of investigation – but never disclosed in the original investigations – was that a majority of the domestic industry was participating in a price-fixing conspiracy for a substantial portion of those periods. The charging documents which served as the basis for the guilty pleas of American Alloys and Elkem stated that each firm engaged in a conspiracy to fix prices of commodity ferrosilicon sold in the United States "[b]eginning at least as early as late 1989 and continuing at least until mid 1991."[48] As part

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[45] See, e.g., Elkem Prehearing Brief at 3-6, 8.

[46] 19 U.S.C. § 1677(7)(B)(i)(II) (1988).

[47] 19 U.S.C. § 1677(7)(C)(iii)(II) (1988).

[48] Domestic Producers' Rebuttal Comments on Reconsideration (AR List 1, Doc. 325), exs. 8, 9 (July 8, 1999).

of its proffer of proof of Elkem's guilt, the Government stated that "Elkem Metals Company and its co-conspirators quoted and charged prices consistent with the price fixing agreement to many of its customers."[49] According to the U.S. Court of Appeals opinion affirming SKW's criminal conviction, the conspiracy involved a number of meetings and telephone conversations between the conspirators throughout the period from 1989 to 1991.[50]

We believe that the existence of a price-fixing conspiracy is fundamentally incompatible with intense price competition. Firms that engage in regular meetings and telephone conversations in an attempt to establish price floors -- as did American Alloys, Elkem, and SKW here -- presumably do not do so in the expectation that their efforts will be futile. Instead, the regular meetings to establish price levels will presumably accomplish their intended objective of influencing the prices the participants charge. Even if the conspiracy does not fully satisfy its objectives, its existence is likely to have a significant influence on how the conspirators establish prices and other conditions of sale. In other words, market participants that conspire to fix prices are likely to behave differently than those that do not, because they will have a mutual interest in effecting at least partial success for the conspiracy. Thus, absent evidence in the record to the contrary, we would normally expect that when a price-fixing conspiracy exists, it will serve to have some effect on the prices that the conspirators have charged during the pendency of the conspiracy, as well as other conditions of competition relating to their sales transactions, and that it will

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[49] United States v. Elkem Metals Co., No. 95-CR-1545, Transcript of Proceedings at 41 (Sept. 22, 1995) (submitted as Ex. B to General Motors Reconsideration Comments). In response, Elkem's counsel indicated that "there is a factual basis for the allegations made by [the prosecutor] and that he would be able to sustain the case that he has described" and that Elkem did not dispute the Government's statement. Id. at 42. The Government made a substantially similar proffer with respect to American Alloys, which the company accepted without qualification. United States v. American Alloys, Inc., No. 96-CR-68S, Transcript of Proceedings at 44-45 (Apr. 18, 1995) (submitted as Ex. C to General Motors Reconsideration Comments).

[50] United States v. SKW Metals & Alloys, Inc., 195 F.3d 83, 86 (2d Cir. 1999).

prevent prices from being set by normal market forces.

We now examine the remand record to ascertain whether there is any evidence that would tend to establish that the price-fixing conspiracy that existed between 1989 and 1991 did not actually affect ferrosilicon prices. Elkem and CCMA claim that such evidence exists. They point to two types of material in the record: information concerning selected results of antitrust litigation and an affidavit submitted in these remand proceedings by their economic witness, Dr. Joseph P. Kalt.[51]

Based on the Commission's experience in observing pricing activities in many diverse industries in the over 1,000 antidumping and countervailing duty investigations that it has conducted since the current statutory scheme came into effect in 1979, we conclude that the results in the particular antitrust litigation matters, including findings with respect to the actual success of the conspiracy and any penalties imposed on the conspirators, to which Elkem and CCMA refer have little probative value in these Commission proceedings. As we have previously discussed, the inquiry concerning conditions of competition affecting prices for domestically-produced products is one statutorily charged to the Commission under the trade laws. The Commission has the prerogative – and the duty – to fulfill its responsibilities under these laws independently.[52] Moreover, CCMA and Elkem's arguments have largely focused on litigation results,

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[51] Dr. Kalt was the sole witness, other than counsel, who provided testimony on behalf of Elkem and CCMA. Elkem and CCMA, in contrast to Globe and AIMCOR, did not present during the remand proceedings either oral or written testimony from corporate officials who were responsible for making pricing decisions in their firms during the original periods of investigation.

[52] Even assuming *arguendo* that we were to consider ourselves limited by the results of the antitrust litigation, the record concerning these results now before the Commission does not establish that the price-fixing conspiracy had no or only a *de minimis* effect. Elkem cannot point to *any* civil or criminal litigation in which it went to trial exonerating it from liability with respect to the price-fixing. To the contrary, it paid ***, including $14.4 million in a class action proceeding, to settle civil antitrust actions in which it was a defendant. Elkem Posthearing Brief, Responses to Commission Questions at 6; Globe Posthearing Brief, app. at 4 n.5. CCMA has placed heavy emphasis on a ruling in SKW's criminal litigation that the conspiracy actually affected a volume of commerce only from February 14, 1991 through April 4, 1991, and from May 29, 1991 through June 30, 1991. United States v. SKW Metals & Alloys, Inc., No. 96-CR-

(continued...)

rather than on the particular facts that underlie these results, with the exception of Dr. Kalt's affidavit and testimony at the Commission hearing in the remand proceedings.[53]

In his affidavit and testimony, Dr. Kalt presented an economic analysis purporting to show that actual ferrosilicon prices charged by the conspirators during what he defined as the conspiracy period (October 1989 through June 1991) did not systematically exceed those that the conspirators would have been expected to charge absent the conspiracy. We have examined Dr. Kalt's analysis carefully and find that it lacks probative value for purposes of these proceedings.

A principal difficulty with Dr. Kalt's analysis is that it does not address cause and effect – in other words, what effects the pricing conspiracy had, particularly on factors essential to the Commission's analysis such as underselling, price levels, and subject import market penetration. Instead, the analysis merely measures correlation. Dr. Kalt's analysis posits that the conspiracy was not successful, because, among other reasons, the companies involved continued to operate unprofitably, but it does not address the

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[52] (...continued)
71S, Tr. of Status Conference at 9-10 (W.D.N.Y. May 8, 2000), aff'd without opinion, 2001 WL 273824 (2d Cir. March 20, 2001). Nevertheless, CCMA/SKW paid *** to settle civil litigation, including $6.95 million in the class action. CCMA Response to Commission Questions at 10-13. It is true that the settlements are not admissions of liability and that the litigation in which the settlements were reached involved both ferrosilicon and other products. Nevertheless, we believe that such large settlements undercut the arguments of CCMA and Elkem that the antitrust litigation results establish that the price-fixing conspiracy had no more than a negligible impact on ferrosilicon prices.

[53] In particular, litigation results attributable to a failure of a party to satisfy a burden of proof lack evidentiary value. In antidumping and countervailing duty investigations, there is no burden of proof on a party. See Chung Ling Co. v. United States, 805 F. Supp. 56, 63 (Ct. Int'l Trade 1992). Thus, we cannot agree with CCMA and Elkem that the district court finding in the SKW criminal litigation that the conspiracy was successful for only a limited period of time is probative with respect to these remand proceedings. The district court premised its finding on the government's failure to satisfy its burden of proving that the conspiracy was successful during other periods. United States v. SKW Metals and Alloys, Inc., Case No. 96-CR-71S, Tr. of Status Conference at 10 (W.D.N.Y. May 8, 2000), Decision and Order ¶ 8 (W.D.N.Y. May 17, 2000). Moreover, in the criminal case, the district court initially determined that the "successful" periods were those when the conspirators charged prices exceeding the floor prices to which they had agreed. As discussed below, the Commission's analysis requires a broader view of the effects of the conspiracy.

question central to our inquiry: the conspiracy's broader impact on the U.S. ferrosilicon market.[54]

Dr. Kalt developed a model based on ten factors he selected that purportedly explained virtually all of the variation in the conspirators' prices for the periods January 1986-September 1989 and July 1991-December 1993, the periods immediately preceding and following the conspiracy dates at issue in the criminal proceedings. He then used this model to estimate "fair market" prices during the conspiracy period and found that the prices estimated by his model did not significantly deviate from those the conspirators actually charged. But this is merely a finding that the same factors that correlated well with prices outside the conspiracy period also correlated well with prices during the conspiracy period. As noted by the Commission economic staff, the analysis does not model the effects of the conspiracy either on prices charged by the conspirators or on the competitive behavior of non-conspiring U.S. producers and U.S. importers of ferrosilicon. Moreover, Dr. Kalt's analysis assumed that the market conditions he measured operated independently of price fixing. In so doing, Dr. Kalt essentially assumed away one of the most pertinent analytical issues – whether the conspiracy actually affected market behavior, including subject import prices and the prices charged by nonconspiring domestic producers.

Additionally, Dr. Kalt did not purport to examine individual sales transactions in his analysis.[55]

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[54] In this regard, we reiterate that the Government's proffers of proof with respect to American Alloys and Elkem indicated that the co-conspirators actually quoted and charged prices consistent with the conspiracy agreement to many customers.

[55] See EC-Z-040 (July 25, 2002). The Commission economic staff's critique of Dr. Kalt's analysis was circulated to the parties pursuant to administrative protective order prior to the filing of final comments. The principal argument of the sole party to comment on the substance of the critique, Elkem, is that Dr. Kalt's analysis "has been found by the triers of fact to be valid and probative." Elkem Final Comments at 9. Elkem provides no citation for this assertion and none exists. The only "triers of fact" to which Dr. Kalt states in his affidavit he previously presented his analysis were the members of the jury in one of the civil antitrust cases which Elkem settled but which proceeded to trial against other defendants. See Elkem Prehearing Brief, ex. I at 2. But juries, unlike administrative agencies, do not state the precise factual basis for their conclusions or identify the evidence on which they relied.

Elkem's other comments are no more availing. Elkem states, for example, that Dr. Kalt has shown

(continued...)

This defect is particularly significant because an appreciable percentage of U.S. purchasers had requirements that could only be satisfied by the conspirators and *** U.S. producer.[56] Because of the many flaws in Dr. Kalt's analysis pertinent to the inquiry before the Commission, we cannot conclude that the analysis provides support for the conclusion that the conspiracy did not actually affect ferrosilicon prices.

On the other hand, there is information in the record that supports the conclusion that the conspiracy affected prices charged by the domestic industry. For the three conspirators, the frequency of underselling for the subject countries in these reconsideration proceedings was significantly higher during the conspiracy period than during the preceding or following period.[57] This is consistent with the theory

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[55] (...continued)
that imports played a larger role than price-fixing in establishing overall price levels and that prices were not "unusually high" during the conspiracy period. See Elkem Final Comments at 11-12. These criticisms do not address the crux of the economic staff's comments about the failure of Dr. Kalt's analysis to examine the causal relationship between the conspiracy and price levels or market behavior during the conspiracy period.

[56] The record indicates that between January 1989 and September 1992, about 17 percent of U.S. producers' sales were to purchasers that required statistical process control ("SPC") documentation from their suppliers in order to ensure the requisite quality of the ferrosilicon. See CR at III-4 n.8, III-5 n.11, PR at III-3 n.8, III-4 n.11 (the 17 percent figure is a weighted average derived from the cited data). Only the three conspirators and *** shipped SPC-documented ferrosilicon during the original POI. CR at III-7, PR at III-5. By contrast, U.S. importers reported that none of their sales of subject imports required them to supply SPC documentation; indeed, some foreign producers reported that they could not supply such documentation. CR at III-4 & n.9, PR at III-3 & n.9. As a result, the three conspirators did not face competition from subject imports in this large and growing segment of the market, and the absence of such competition would enhance the effectiveness of a price fixing conspiracy in this segment. The assumption underlying Dr. Kalt's analysis that the U.S. ferrosilicon market is homogeneous, and his consequent failure to examine individual sales transactions, overlooks this important condition of competition.

[57] For the three conspirators, the frequency of underselling based on delivered prices was 80 percent (24 of 30 comparisons) during the conspiracy period (the fourth quarter of 1989 through the second quarter of 1991) and 61.8 percent (21 of 34 comparisons) during the non-conspiracy period. Derived from CR and PR, Tables III-1-6, III-7-a-c, III-8-a-c, III-9-a-b. We emphasize that this analysis is not an underselling analysis conducted pursuant to 19 U.S.C. § 1677(7)(C)(ii)(II) (1988). Instead, our purpose is (continued...)

that the conspiracy would tend to inflate the conspirators' prices as compared to the fair market price that would otherwise have been established in the U.S. market during the time of the conspiracy. The frequency of underselling was also significantly higher during the conspiracy period for all domestic ferrosilicon producers, underscoring the dominance of the three conspirators in the domestic market during the original periods of investigation.[58]

Consequently, the record evidence supports the conclusion that the price-fixing conspiracy actually affected prices charged for domestically-produced ferrosilicon and prevented normal market forces from determining prices.

C. Finding Concerning Conditions of Competition Affecting Prices

In light of our analysis above, we find that a significant condition of competition affecting domestic ferrosilicon prices during the original periods of investigation was the price-fixing conspiracy.

We emphasize that the underlying premise of this finding is based on information in the record. As we explained above, the remand record supports the conclusion that the conspiracy affected prices charged by the conspirators during the period the conspiracy was effective. This conclusion is based on both the evidence of record, including that submitted by CCMA and Elkem, and neutral inferences that the Commission has developed in light of its long-standing expertise in evaluating conditions of competition affecting the establishment of prices.

In light of the conspirators' dominant position in the domestic industry, it is reasonable to conclude

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[57] (...continued)
to examine all available data in the record as to whether the price fixing conspiracy actually affected prices for domestically produced ferrosilicon, in response to the CIT opinion directing these remand proceedings.

[58] For the industry as a whole, the frequency of underselling based on delivered prices was also 80 percent (24 of 30 comparisons) during the conspiracy period (the fourth quarter of 1989 through the second quarter of 1991) and 61.8 percent (21 of 34 comparisons) during the non-conspiracy period. Derived from CR and PR, Tables III-1-6, III-7-a-c, III-8-a-c, III-9-a-b.

that factors that affected their prices would affect prices of the industry as a whole, including those of the nonconspirators, during the conspiracy period. The record in the original investigations indicates that producers frequently refer to published prices in responding to bid requests.[59] In turn, Metals Week price information was based ***.[60] Consequently, the larger producers, because they engaged in more transactions, would have a heavy influence on published price information, which in turn would influence prices charged by smaller producers. Indeed, at the hearing counsel for Globe acknowledged that because Globe stated in its original questionnaires that it relied on prices published in publications such as Metals Week in establishing its own prices for ferrosilicon, factors that affected prices for the largest producers could affect it as well.[61]

Our finding, however, concerns the entire original periods of investigation, not merely the conspiracy period, for the following reasons. First, we have taken an adverse inference that the conspiracy affected prices during those portions of the period of investigation where there has been no judicial finding that the conspiracy was in effect.[62] Analysis that would focus on periods when the

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[59] China Final, USITC Pub. 2606 at I-47 & n.55.

[60] EC-Z-040 at 4 n.8.

[61] Tr. at 84 (Dangel).

[62] We emphasize that the adverse inference we have taken concerns only the periods for which there are no judicial findings that the conspiracy was in existence. As stated above, the information in the record supports the conclusion that the conspiracy affected U.S. ferrosilicon prices during the period that the conspiracy was operating.

Use of this adverse inference in these remand proceedings is consistent with the CIT's opinion. The CIT acknowledged in its opinion that, while the parties had raised substantive issues concerning the merits of the Commission's opinion on reconsideration, it need only address arguments concerning the Commission's reconsideration authority and procedures. 193 F. Supp. 2d at 1319. Consequently, the CIT did not make any ruling governing the Commission's ability to take adverse inferences on remand. In fact, in instructing the Commission to consider on remand evidence presented by the parties, the CIT cited to 19 U.S.C. § 1677e (1988), the statutory provision providing the authority for the Commission to take adverse inferences. See 193 F. Supp.2d at 1325.

(continued...)

conspiracy may not have been in effect, or only on transactions involving nonconspirators, would merely serve to reward American Alloys, CCMA, and Elkem for making material misrepresentations and omissions which continue to pervade the current record.[63] This would contravene one of the principal policies behind permitting the Commission to take adverse inferences, which is to ensure that parties that do not provide requested information or impede an investigation do not benefit from their actions. As stated at length in the 1999 reconsideration opinion,[64] it is important that American Alloys, CCMA, and Elkem not benefit from their material misrepresentations and omissions that impeded the original investigations. We are mindful of the policies articulated in the 1999 reconsideration opinion that support preserving the integrity of Commission investigations.[65] We therefore conclude that it is appropriate for us to exercise our statutory authority to take an adverse inference based on information in the record

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[62] (...continued)

Additionally, we provide below a separate basis for our finding concerning the portions of the original periods of investigation for which there are no judicial findings that the conspiracy was operating.

[63] Elkem in particular argues that the reconsideration proceeding has served to remedy any defects in the record of the original investigation and that "[t]he information that was missing is now before the Commission." Elkem Prehearing Brief at 28. We do not agree with Elkem that these reconsideration proceedings have served to eliminate the taint in the record from the original proceedings.

Initially, we observe that, of the three conspirators, only Elkem has acknowledged that it was culpable of any misconduct during the original investigations. Elkem, however, only acknowledges that "it should have disclosed the agreement to set floor prices to the Commission." It maintains that during the original investigation "there were no Elkem misrepresentations to the Commission." Elkem Posthearing Brief at 9 n.33. Consequently, none of the conspirators have disavowed the statements during the original investigation that the Commission found to be misleading in 1999 reconsideration opinion, findings we have reaffirmed here. In light of this, we emphasize that American Alloys, CCMA, and Elkem have continued to impede the Commission investigation.

[64] See 1999 Reconsideration Opinion at 22-23.

[65] See 1999 Reconsideration Opinion at 23 ("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 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.").

concerning the conspiracy among American Alloys, CCMA/SKW, and Elkem. Additionally, given the predominance of the conspirators in the industry and the influence that their pricing practices had on those of smaller producers, we conclude that our finding concerning the effects of the conspiracy is applicable to the market as a whole, notwithstanding the lack of culpability of some relatively small firms such as AIMCOR and Globe.[66]

Additionally, we would make the same finding even if we did not have the statutory authority to take adverse inferences. The Commission has the discretion to establish an appropriate time frame for its investigations in antidumping and countervailing duty proceedings.[67] A substantial portion of the pertinent periods of investigation in these proceedings encompasses the period in which there are judicial findings concerning, or guilty pleas acknowledging, the existence of a price-fixing conspiracy; additionally, the guilty pleas of American Alloys and Elkem do not state that the conspiracy existed only from the fourth quarter of 1989 through the second quarter of 1991.[68] In any event, there is no basis to conclude that at some point in 1991 the ferrosilicon market transformed overnight from one characterized by price-fixing to one characterized by unfettered price competition. Consequently, if we were to weigh the evidence in the record concerning those portions of the period of investigation where the conspiracy was and was not judicially found to be operative, we would still conclude that a significant condition of competition affecting

[66] We have also taken into account the fact that some of the domestic producers who were not members of the conspiracy have shown a lack of interest in the imposition of duties. One such firm, Keokuk Ferro-Sil, *** and has not participated in the reconsideration proceedings. Another, Globe, has stated that it no longer supports the imposition of duties. Tr. at 102, 105 (Dangel).

[67] Steel Authority of India, Ltd. v. United States, 146 F. Supp.2d 900, 906-07 (Ct. Int'l Trade 2001); Metallverken Nederland, B.V. v. United States, 728 F. Supp. 730, 735 (Ct. Int'l Trade 1989).

[68] As stated above, the charging documents which serve as the basis for these pleas merely indicate that this period was the minimum duration of the conspiracy.

domestic prices during the original periods of investigation was the price-fixing conspiracy.[69]

V. DETERMINATION ON RECONSIDERATION

A. Overview

The only aspect of the Commission's 1999 determination on reconsideration which was at issue in either these remand proceedings or the preceding litigation before the CIT was the determination of no material injury by reason of subject imports. Consequently, we again adopt the definition of like product, definition of the domestic industry, and findings on cumulation that the Commission made in its 1999 reconsideration opinion.[70]

For the most part, we also reaffirm the findings and analysis underlying the 1999 determination of no material injury by reason of subject imports.[71] We write below to elaborate on some of our findings in light of the arguments that the domestic producers have asserted during these remand proceedings.[72]

B. No Material Injury by Reason of Subject Imports

In its 1999 opinion, the Commission first reviewed the original determinations. It noted that in the

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[69] We observe that such generalization is typical when the Commission identifies conditions of competition. Indeed, it is rare that every transaction with respect to a product under investigation will be characterized by the conditions of competition that the Commission identifies. Moreover, in this remand proceeding neither CCMA or Elkem argued that the Commission should distinguish between different portions of the period of investigation in making conclusions about factors affecting pricing. They argued that the same conditions were prevalent throughout the periods of investigation. We agree, although we disagree entirely with CCMA and Elkem as to how those conditions should be described.

[70] 1999 Reconsideration Opinion at 24-27. Chairman Okun, who was not a member of the Commission in 1999, also adopts all findings from the 1999 opinion that the Commission has reaffirmed in this opinion.

[71] Commissioner Miller also reaffirms her view, as stated in her 1999 Additional Views, that it was the existence of the conspiracy during the Commission's period of investigation – not its effects – that undermined the integrity of the Commission's proceedings. 1999 Reconsideration Opinion at 48.

[72] We do not revisit the issue of threat of material injury in light of the lack of any arguments in this remand proceeding on the issue of threat. We again adopt the analysis used in the 1999 opinion in finding no threat of material injury by reason of subject imports. 1999 Reconsideration Opinion at 33-41.

original determinations the Commission emphasized "'the price-sensitive nature of competition among ferrosilicon suppliers,' echo[ing] 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."[73] It concluded that this conclusion could not be sustained: "this testimony was misleading because domestic ferrosilicon suppliers did not necessarily compete on price. Instead, several of the suppliers conspired to fix prices and establish price minimums."[74] As stated above, we have found on remand that the price-fixing conspiracy was an important factor affecting the domestic industry's pricing practices during the original periods of investigation and that the conspiracy prevented normal market forces from determining prices. In other words, because of the conspiracy, prices charged by domestic producers were higher than they would have been otherwise. In light of this, we adopt the findings the Commission made in the 1999 reconsideration opinion concerning the inapplicability of the analysis of subject import volume and price effects in our original determinations. Below we supplement the analysis of the 1999 opinion on these issues based on the remand record.

That domestic producers were charging higher prices than market conditions warranted provided opportunities for the subject imports to increase their sales in the U.S. market. As the Commission found in the original investigations, domestic and imported ferrosilicon products are highly substitutable.[75] In these circumstances, purchasers would be expected to switch from domestic products sold at an artificially established and inflated price to imports sold at market prices. Consequently, the increasing volumes and market share of subject imports that occurred during the original periods of investigation is a

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[73] 1999 Reconsideration Opinion at 28-29 (footnote and citations omitted).

[74] 1999 Reconsideration Opinion at 29.

[75] China Final, USITC Pub. 2606 at 25.

natural consequence of the conspiracy.[76] Thus, in light of both the pertinent conditions of competition and our analysis below of price effects, we do not find the volume of subject imports to be significant.

We also cannot find the underselling observed during the original periods of investigation to be significant. As the Commission observed in the 1999 opinion:

> [b]ecause 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 [in the original investigations]. 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 domestic industry to lower-priced subject imports.[77]

In other words, the underselling and lost sales data in the record are not probative because they compare the subject imports with domestically-produced ferrosilicon priced at a level not reflecting competitive marketplace conditions. In light of our finding that the price-fixing conspiracy affected the prices charged for domestically produced ferrosilicon for the entire domestic industry throughout the original periods of investigation, we cannot find that there is a significant nexus between the subject imports and the observed underselling.[78]

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[76] We note that we do not (and need not) reach any conclusions on the effect of the price-fixing conspiracy on domestic sales volume, or on whether there was any agreement not to sell in order to raise or maintain prices. We observe that there is some evidence of differing sales volume trends among conspirators and nonconspirators. The domestic industry's loss of market share during the 1989-91 period of the conspiracy was attributable solely to the three conspirators and to small producers that ceased production in 1989. The share of U.S. apparent consumption represented by the remaining producers (AIMCOR, Alabama Silicon, Globe, and Keokuk) actually increased from *** percent in 1989 to 21.9 percent in 1991. CR and PR, Table II-1. These data tend to refute Dr. Kalt's assertion, Elkem Prehearing Brief, ex. I at 29-30, that the conspiracy could not have been responsible for drawing imports into the U.S. market, because if it had, nonconspiring U.S. producers would also have increased their supplies to the market.

[77] 1999 Reconsideration Opinion at 29.

[78] We note in this respect that it is not our responsibility to determine what prices would have been for (continued...)

Our analysis of price depression and suppression largely parallels the analysis in the 1999 opinion. As stated above, a central factor affecting domestic producers' prices during the original periods of investigation was the conspiracy. To the extent that prices were also affected by market forces, however, they reflected trends in demand, as explained in the 1999 opinion. During 1989, the beginning of the Commission's original periods of investigation, demand was high and prices were near a historic peak.[79] From 1989 to 1991, demand for steel in applications such as construction, automobiles, and appliances fell. Because ferrosilicon is used as an input in the production of steel, as demand for steel declined, demand for ferrosilicon also fell.[80] Indeed, U.S. apparent consumption of ferrosilicon declined by 5.1 percent from 1989 to 1990 and by 12.4 percent from 1990 to 1991. While apparent consumption did increase from 1991 to 1992, the 1992 apparent consumption quantity was still below that of 1989 or 1990.[81] In instances of falling demand, we would generally expect prices to decline. This is particularly true in light of the difficulty in modulating ferrosilicon production to reflect changes in demand. Ferrosilicon is produced in furnaces that must be continuously run and cannot easily and quickly be switched to or from production of other products.[82]

Consequently, the declines in ferrosilicon prices from 1989 to 1991 largely parallel changes in

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[78] (...continued)
U.S.-produced ferrosilicon had there been no price fixing-conspiracy and how such theoretical prices would have compared with whatever subject import prices would have been charged in the absence of a conspiracy, nor does the record contain any probative information with respect to these issues. We can only ascertain the significance of underselling with respect to prices actually charged. The effect of the conspiracy on these prices precludes us from finding any causal link between the subject imports and the observed underselling.

[79] China Final, USITC Pub. 2606 at I-56.

[80] China Final, USITC Pub. 2606 at I-13.

[81] CR and PR, Table II-1.

[82] EC-Q-025 at 22-23 (March 9, 1993).

demand; we observe that in 1992, when demand increased somewhat, there were also price increases for some domestically produced ferrosilicon products.[83] In light of the fact that domestic prices were a function of the conspiracy, demand trends, and the ferrosilicon production process, we cannot conclude that there is a significant nexus between the subject imports and any price suppression or depression experienced by the domestic industry.

In the 1999 opinion, we concluded that, absent volume or price effects, we could not find that the subject imports had a significant impact on the domestic industry.[84] We reaffirm that conclusion here.

The crux of the argument by the domestic producers in this proceeding is that, because subject import volumes were increasing, prices were declining, and the domestic ferrosilicon industry performed poorly during the original periods of investigation, the Commission is compelled to reach an affirmative determination, notwithstanding their material misrepresentations and omissions to the agency. This argument reflects a misunderstanding of the Commission's role under the trade laws. Our reviewing court, the Federal Circuit, has made clear that we cannot make an affirmative determination based upon the fact that "economic harm to a domestic industry occurred while LTFV imports are also on the market." Instead, the Commission must also make a showing of "causal -- not merely temporal -- connection between the LTFV goods and the material injury."[85] For the reasons explained above and in our 1999 opinion as adopted by reference here, the record does not show the requisite causal nexus

[83] CR and PR, Tables III-1, III-2, III-4.

[84] 1999 Reconsideration Opinion at 32-33.

[85] Gerald Metals, Inc. v. United States, 132 F.3d 716, 719-20 (Fed. Cir. 1997). While Gerald Metals was decided after the time of the Commission's original determinations, the statutory provisions it construes are those that were in effect as of the time of those determinations.

between the subject imports and any difficulties the domestic industry was experiencing.[86] This conclusion reflects our analysis in light of the pertinent conditions of competition, which include, but are by no means limited to, our finding that the prices charged by the domestic industry during the original periods of investigation were not a function of marketplace competition.

CONCLUSION

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

[86] When the record indicates that there is not the necessary causal nexus between the subject imports and any injury the domestic industry is experiencing, a negative determination is warranted. The Commission need not further demonstrate a causal link between the injury and some cause or causes other than the subject imports. See Altx, Inc. v. United States, 167 F. Supp.2d 1353, 1361-62 (Ct. Int'l Trade 2001).