Ferrosilicon From Russia and Venezuela

Investigations Nos. 303-TA-23 (Final) and
731-TA-568 and 570 (Final)

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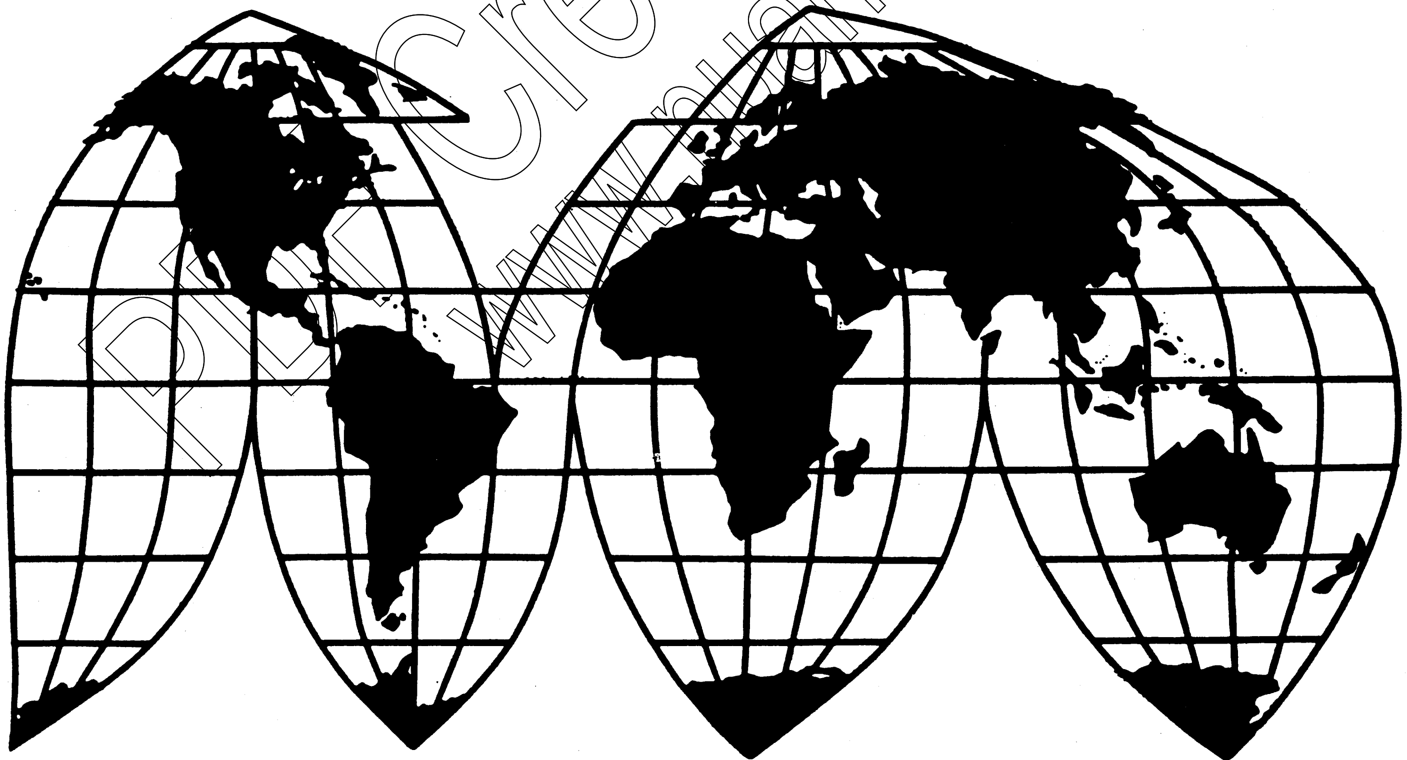

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UNITED STATES INTERNATIONAL TRADE COMMISSION

Investigations Nos. 303-TA-23 (Final)
731-TA-568 and 570 (Final)

FERROSILICON FROM RUSSIA AND VENEZUELA

Determinations

On the basis of the record[1] developed in the subject investigations, the Commission unanimously determines, pursuant to sections 303 and 735(b) of the Tariff Act of 1930 (19 U.S.C. §§ 1303 and 1673d(b)) (the Act), that an industry in the United States is materially injured by reason of subsidized imports from Venezuela and less-than-fair-value (LTFV) imports from Russia and Venezuela of ferrosilicon,[2] provided for in subheadings 7202.21.10, 7202.21.50, 7202.21.75, 7202.21.90, and 7202.29.00 of the Harmonized Tariff Schedule of the United States. The Commission also unanimously determines, pursuant to § 735(b)(4)(A) of the Act, that critical circumstances do not exist with respect to ferrosilicon imports from Russia; thus, the retroactive imposition of antidumping duties is not necessary.

Background

The Commission instituted these investigations effective December 21, 1993, following preliminary determinations by the Department of Commerce that imports of ferrosilicon were being subsidized by Venezuela and sold at LTFV from Russia and Venezuela within the meaning of sections 303 and 703(b) of the

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

[2] For purposes of these investigations, the subject product is ferrosilicon, a ferroalloy generally containing, by weight, not less than four percent iron, more than 8 percent but not more than 96 percent silicon, not more than 10 percent chromium, not more than 30 percent manganese, not more than three percent phosphorus, less than 2.75 percent magnesium, and not more than 10 percent calcium or any other element.

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Act (19 U.S.C. §§ 1303 and 1673b(b)). Notice of the institution of the Commission's investigations and of a public hearing to be held in connection therewith was given by posting copies of the notice in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notice in the Federal Register of December 29, 1992, (57 F.R. 61919). The hearing was held in Washington, DC, on January 22, 1993, and all persons who requested the opportunity were permitted to appear in person or by counsel.

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VIEWS OF THE COMMISSION

Based on the record in these investigations, we determine that an industry in the United States is materially injured [1] by reason of less than fair value ("LTFV") imports of ferrosilicon from Russia and Venezuela and by reason of subsidized imports from Venezuela. We further find that critical circumstances do not exist with respect to imports from Russia. [2]

I. LIKE PRODUCT AND DOMESTIC INDUSTRY

In this, as in other investigations under Title VII of the Tariff Act of 1930 (the "Act"), we must first define the "like product" and the "industry". Section 771(4)(A) of the Act defines the relevant industry as "the domestic producers as a whole of a like product, or those producers whose collective output of the like product constitutes a major proportion of the total domestic production of that product . . ." [3] In turn, the statute defines "like product" as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an

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1 Whether the establishment of an industry in the United States is materially retarded is not an issue in these investigations.

2 Chairman Newquist notes that virtually all of the issues discussed herein were fully explained and analyzed in the previous Ferrosilicon determinations and, accordingly, could here be incorporated and adopted by reference. For purposes of providing a review of those actions, Chairman Newquist joins in these views.

3 19 U.S.C. § 1677(4)(a).

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investigation. . ." [4] The Department of Commerce has defined the imported product subject to these investigations as:

> ferrosilicon, a ferroalloy containing, by weight, not less than four percent iron, more than eight percent but not more than 96 percent silicon, not more than 10 percent chromium, not more than 30 percent manganese, not more than three percent phosphorous, less than 2.75 percent magnesium, and not more than 10 percent calcium or any other element.[5]

Ferrosilicon is used primarily as an alloying agent in the production of iron and steel [6] and is sold in different grades. The principal characteristic defining the grades is the percentage of silicon present in the product as measured by contained weight; grades are referred to primarily by silicon percentage. Ferrosilicon grades are further defined by the percentages of minor elements present in the product, some of which are considered impurities and others of which are considered enhancements. [7]

Low-silicon-content ferrosilicon is defined as ferrosilicon containing by weight more than 8 percent but not more than 55 percent of silicon, and

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[4] 19 U.S.C. § 1677(10). The Commission applies the standard "like" and "most similar in characteristics and uses" on a case-by-case basis. The Commission generally considers a number of factors in analyzing like product issues including: (1) physical characteristics and uses; (2) interchangeability; (3) channels of distribution; (4) common manufacturing facilities and production employees; (5) customer or producer perceptions; and, where appropriate, (6) price. No single factor is dispositive, and the Commission may consider other factors it deems relevant based on the facts of a given investigation. The Commission looks for clear dividing lines between like products, and has found minor distinctions to be an insufficient basis for finding separate like products. Torrington Company v. United States, 747 F. Supp. 744, 748-749 (Ct. Int'l Trade 1990), aff'd 938 F.2d 1278 (1991).

[5] 58 F.R. 27522 (May 10, 1993); 58 F.R. 27539 (May 10, 1993); 58 F.R. 29192 (May 19, 1993).

[6] See the Commission's Report in Ferrosilicon from the People's Republic of China, Inv. No. 731-TA-567 (Final), USITC Pub. 2606 (February 1993) at I-6. The Commission's Report on these investigations (and on the previous investigations on ferrosilicon imports from Kazakhstan and Ukraine) incorporates by reference the Report in Ferrosilicon from the People's Republic of China (hereinafter referred to as the "Consolidated Report").

[7] Id.

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includes ferrosilicon 50 and silvery pig iron. High-silicon-content ferrosilicon contains by weight more than 55 percent but not more than 96 percent of silicon, and includes ferrosilicon 65 and ferrosilicon 75. The great majority of ferrosilicon manufactured in the United States and consumed by the iron and steel industries consists of standard grades of ferrosilicon 50 and ferrosilicon 75. [8]

Generally, ferrosilicon is available in "standard" grades and "specialty" grades. The standard ferrosilicon grades include "regular", "high-purity", "low-aluminum" and "foundry grade" material. [9] Specialty grades include ferrosilicon with specific percentages of supplemental minor elements that add desired properties to the ferrosilicon. By convention, specialty grades also refer to ferrosilicon that is neither ferrosilicon 50 nor ferrosilicon 75, such as ferrosilicon 65. [10] Ferrosilicon is also sold according to various size characteristics which affect the performance of the product.

The like product issue we address in these investigations is whether all grades of ferrosilicon should be included within one like product or whether there should be two like products, consisting of low-silicon-content ferrosilicon and high-silicon-content ferrosilicon. Respondent Minerais U.S., Inc. ("Minerais") in particular argued that ferrosilicon 50 and 75 are different products and should not be included within the same like product

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[8] Consolidated Report at I-5.
[9] Consolidated Report at I-6.
[10] Id.

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definition.[11] We find a single like product consisting of all grades of ferrosilicon based on the reasoning set forth below.

Few differences exist in the physical characteristics and end uses of the various grades of ferrosilicon. Iron and steel producers have the technical capability to use either grade of ferrosilicon in their production process.[12] Although switching between grades is not frequent once a particular grade is selected, some end-users have switched between ferrosilicon 50 and 75 when the price gap[13] between the two grades is wide enough and of long enough duration to justify the short-term costs of switching.[14] [15]

Channels of distribution also overlap. The largest end use markets are the steel and foundry industries, both of which purchase 50, 75, and other specific grades of ferrosilicon.[16] The same manufacturing facilities can be, and in some circumstances are, used to produce both grade 50 and grade 75 ferrosilicon.[17] Although there is evidence that it is preferable to use different furnaces for the production of ferrosilicon 50 and 75,[18] it is

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[11] See Posthearing Brief of Minerais at 2 and 3 in Ferrosilicon from Kazakhstan, the People's Republic of China, Russia, Ukraine and Venezuela, Invs. Nos. 731-TA-566-570 (Final).

[12] Consolidated Report at I-7.

[13] Prices for the various grades of ferrosilicon are based on the silicon content of the product. Consolidated Report at I-7.

[14] Consolidated Report at I-7; EC-Q-025 at 35. EC-Q-025 is incorporated by reference in EC-Q-057, the Commission's Economic Memorandum on Ferrosilicon from Russia and Venezuela, Invs. Nos. 303-TA-23, 731-TA-568 and 570 and (Final).

[15] In addition, although some end-users indicated that they would not or could not switch between ferrosilicon grades because of complexities of their production processes, material handling and inventory requirements, other ferrosilicon purchasers indicated that switching between the commodity grades of ferrosilicon 50 and 75 was possible. See EC-Q-025 at 35; Consolidated Report at I-7.

[16] Consolidated Report at I-22.

[17] Consolidated Report at I-8 and I-26.

[18] Consolidated Report at I-8.

possible to produce ferrosilicon 50 in a furnace designed for ferrosilicon 75, and more than one producer does so commercially.[19] There is also evidence that various grades of ferrosilicon are produced using the same employees.[20] Although perceptions of ferrosilicon 50 and 75 differ to some extent based on the different chemical properties of the grades, actual switching between the grades indicates that at least some producers and customers consider the goods to be interchangeable.[21]

Thus, there is no clear dividing line between high-silicon-content and low-silicon-content ferrosilicon. Accordingly, we find that the like product consists of all grades of ferrosilicon.[22] We further find that the domestic industry includes producers of all grades of ferrosilicon.

II. RELATED PARTIES

The related parties provision of the Act, 19 U.S.C. §1677(4)(B), provides for exclusion of certain domestic producers from the domestic industry for the purposes of an injury determination. Applying the provision involves two steps.[23] First, the Commission must determine whether the

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19 Consolidated Report at I-26.

20 Consolidated Report at I-7; EC-Q-025 at 23.

21 Consolidated Report at I-7; EC-Q-025 at 35.

22 We also note that the Commission generally has not found differing grades of a product to be separate like products. See e.g., Ferrosilicon from Kazakhstan and Ukraine, Invs. Nos. 731-TA-566 and 569 (Final), USITC Pub. 2616 (March 1993); Ferrosilicon from the People's Republic of China, USITC Pub. 2606 (February 1993); Ferrosilicon from Brazil and Egypt, Invs. Nos. 731-TA-641-642 (Preliminary), USITC Pub. 2605 (February 1993); Magnesium from Canada, Invs. Nos. 701-TA-309, 731-TA-528 (Final), USITC Pub. 2550 (July 1992); Potassium Hydroxide from Canada, Italy, and the United Kingdom, Invs. Nos. 731-TA-542-544 (Preliminary), USITC Pub. 2482 (February 1992); Silicon Metal from Brazil, Inv. No. 731-TA-471 (Final), USITC Pub. 2404 (July 1991); Silicon Metal from the People's Republic of China, Inv. No. 731-TA-472 (Final), USITC Pub. 2385 (June 1991).

23 See e.g., Certain Carbon Steel Butt-Weld Pipe Fittings from China and Thailand, Invs. Nos. 731-TA-520 and 521 (Final), USITC Pub. 2528 at 7 (June 1992).

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domestic producer is a "related party." Second, if a producer is a related party, the Commission may exclude such producer from the domestic industry in "appropriate circumstances." [24]

The statute defines related parties as producers who are "related to the exporters or importers, or are themselves importers of the allegedly subsidized or dumped merchandise." [25] Exclusion of a related party is within the Commission's discretion based upon the facts presented in each case. [26] The rationale underlying the related parties provision is the concern that domestic producers who either are related to foreign producers or exporters, or are themselves importers of the subject merchandise, may be in a position that shields them from any injury that might be caused by the imports. [27] Thus, including these parties within the domestic industry would distort the analysis of the condition of the domestic industry. [28] The factors the Commission has examined in its related party analysis include:

(1) the percentage of domestic production attributable to the importing producer;

(2) the reasons the U.S. producer has decided to import the product subject to investigation, i.e., whether the firm benefits from the LTFV sales or subsidies or whether the firm must import in order to enable it to continue production and compete in the U.S. market; and

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[24] Id.

[25] 19 U.S.C. § 1677(4)(B).

[26] See e.g., Torrington Co. v. United States, 790 F. Supp. 1161 (Ct. Int'l Trade 1989), aff'd without opinion 904 F.2d 46 (Fed. Cir. 1992); Empire Plow Co. v. United States, 675 F. Supp. 1348, 1352 (Ct. Int'l Trade 1987).

[27] See S. Rep. No. 249, 96th Cong., 1st Sess. at 83 (1979).

[28] See Sandvik AB v. United States, 721 F. Supp. at 1331-32 (related party appeared to benefit from the dumped imports); Certain Carbon Steel Butt-Weld Pipe Fittings from China and Thailand, Invs. Nos. 731-TA-520-521 (Final), USITC Pub. 2528 (June 1992).

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(3) the position of the related producer vis-a-vis the rest of the industry, i.e., whether inclusion or exclusion of the related party will skew the data for the rest of the industry. [29]

In addition, the Commission has considered other factors, such as the ratio of import shipments to U.S. production for each producer, the length of time that the producer has been engaged in domestic production, whether each company's books are kept separately from its "relations", and whether the primary interest of the related producers lies in domestic production or in importation. [30]

Although no party to these final investigations has argued that any U.S. producer is related to any Venezuelan or Russian producer or exporter, we have considered whether any domestic producer is related and, if so, whether appropriate circumstances exist to exclude it from the domestic industry. In our preliminary investigations, Ferrosilicon from Argentina, Kazakhstan, the People's Republic of China, Russia, Ukraine, and Venezuela, Invs. Nos. 303-TA-23, 731-TA-565-570 (Preliminary), USITC Pub. 2535 (July 1992), the Commission considered related parties issues with respect to two United States producers, Keokuk Ferro-Sil, Inc. ("Keokuk") and Elkem Metals Co. ("Elkem"). The Commission found in those preliminary investigations that both Keokuk and Elkem were related parties based in part on marketing relationships with Minerais (an importer of Russian, Kazakh and Ukrainian material) and Fesilven (an importer and producer of Venezuelan material), respectively. [31] The Commission concluded, however, that appropriate circumstances did not exist to exclude either firm from the domestic industry. The Commission received no

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[29] See Torrington Co. v. United States, 790 F. Supp. 1161 (Ct. Int'l Trade 1992)(affirming Commission's application of the related party provision).

[30] See Rock Salt from Canada, Inv. No. 731-TA-239 (Final), USITC Pub. 1798 (January 1986) at 12.

[31] See USITC Pub. 2535 at 10.

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additional evidence in the course of these final investigations or any of the other recent or concurrent ferrosilicon investigations that indicates that appropriate circumstances exist to exclude either of these two related parties from the domestic industry.[32] Accordingly, for the purposes of these investigations, we determine that no U.S. producer should be excluded from the domestic industry.

III. CONDITION OF THE DOMESTIC INDUSTRY

In determining whether the domestic industry is materially injured by the LTFV or subsidized imports, the statute directs us to consider "all relevant economic factors which have a bearing on the state of the industry in the United States."[33] These factors include production, consumption, shipments, inventories, capacity utilization, market share, employment, wages, productivity, financial performance, capital expenditures, and research and development.[34] No single factor is determinative, and the Commission considers all relevant factors "within the context of the business cycle and conditions of competition that are distinctive to the affected industry."[35]

The demand for ferrosilicon is directly tied to the steel and foundry industries.[36] Weak demand from the construction, automotive, and appliance sectors contributed to a decline in output in the steel industry from 1989 to 1991. Technological advances in the composition and production processes of

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[32] Further, in Ferrosilicon from Brazil and Egypt, USITC Pub. 2605, the Commission determined that appropriate circumstances did not exist to exclude one U.S. producer from the domestic industry based on a single importation of Brazilian material during the period of investigation. The Commission has received no additional information in the course of these final investigations that warrants reconsideration of this issue.

[33] 19 U.S.C. § 1677(7)(C)(iii).

[34] Id.

[35] Id.

[36] Consolidated Report at I-13.

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cast iron also have contributed to a decline in cast iron production.[37] Total U.S. consumption of ferrosilicon, measured in quantity, decreased by 13.0 percent from 1989 to 1991, but increased by 25.7 percent between January 1 - September 30, 1991 and January 1 - September 30, 1992 (the "interim periods").[38] In terms of value, total U.S. consumption fell by 31.9 percent from 1989 to 1991, but rose by 11.5 percent from interim 1991 to interim 1992.[39]

Generally, indicators of the condition of the domestic industry fell during the period of investigation. U.S. production of ferrosilicon decreased by 31.8 percent from 1989 to 1991, and declined by 12.1 percent between the interim periods.[40] Similarly, U.S. producers' total U.S. ferrosilicon shipments decreased steadily, by 23.8 percent from 1989 to 1991 and by 13.8 percent between the interim periods.[41] In terms of value, U.S. producers' domestic shipments decreased by 38.5 percent from 1989 to 1991 and by 17.8 percent between the interim periods.[42]

Average U.S. capacity also decreased from 318,332 silicon-content-short tons ("short tons") in 1989 to 300,918 short tons in 1991 and continued to decline to 217,194 short tons through interim 1992.[43] Average capacity utilization decreased from 85.1 percent in 1989 to 61.4 percent in 1991, and continued to decline from 62.8 percent in interim 1991 to 59.5 percent in interim 1992.[44]

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37 See Consolidated Report at I-13; see also EC-Q-025 at 13.
38 Consolidated Report at I-13.
39 Id.
40 Consolidated Report at I-23.
41 Consolidated Report at I-24, Table 6.
42 Id.
43 Consolidated Report at I-23, Table 5.
44 Id.

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The number of production and related workers producing ferrosilicon decreased by 36.7 percent from 1989 through 1991 and by 16.2 percent between the interim periods. The number of hours worked by production and related workers producing ferrosilicon also declined by 38.5 percent from 1989 to 1991, and continued to fall, by 20.8 percent, between the interim periods. Hourly total compensation paid to U.S. producers' production and related workers increased from $17.22 in 1989 to $17.98 in 1990 and then decreased to $17.75 in 1991. Hourly total compensation increased to $18.37 in interim 1992 compared with $17.85 in the corresponding period of 1991. Productivity of production and related workers increased by 5.8 percent from 1989 to 1991, and continued to rise, by 16.1 percent, between the interim periods.[45]

Domestic prices also declined during the period of investigation. The U.S. producers' average selling price for ferrosilicon 75 sold to U.S steel producers declined by 43.1 percent from the first quarter of 1989 to the first quarter of 1992. Prices of ferrosilicon 75 rose somewhat through September 1992, but remained 37.7 percent below the first quarter of 1989.[46] Similarly, the U.S. producers' average price of ferrosilicon 50 sold to U.S. steel producers fell by 29.3 percent from the first quarter of 1989 to the first quarter of 1992. Like ferrosilicon 75, prices of ferrosilicon 50 rose slightly through September 1992, but remained 24.8 percent below the first quarter of 1989.[47] U.S. producers' average price of ferrosilicon 50 sold to U.S. foundries followed a similar price trend.[48]

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[45] Consolidated Report at I-28, Table 10.
[46] Consolidated Report at I-56 -- I-57, Table 26.
[47] Id.
[48] Consolidated Report at I-57.

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Overall financial experience of domestic ferrosilicon producers also deteriorated during the period of investigation. For example, 1991 net sales value was less than two-thirds of the corresponding 1989 figure. Positive 1989 operating and net income became losses, and cash flow became negative in the remainder of the period of investigation. Financial results in most of these categories continued to decline between the interim periods. Finally, total capital expenditures decreased from $13.4 million in 1989 to $4.7 million in 1991 and increased only slightly from $3.5 million in interim 1991 to $3.6 million in interim 1992. [49] [50]

IV. **CUMULATION**

A. In General

In determining whether there is material injury by reason of the LTFV or subsidized imports, the Commission is required to cumulatively assess the volume and effect of imports from two or more countries subject to investigation if such imports are reasonably coincident with one another and "compete with each other and with like products of the domestic industry in the United States market." [51] Cumulation is not required, however, when imports from a subject country are negligible and have no discernible adverse impact on the domestic industry. [52]

In assessing whether imports compete with each other and with the domestic like product, the Commission generally has considered four factors:

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[49] Consolidated Report at I-34 -- I-35.

[50] Based on the declines in all indicators of the domestic industry's performance, including substantial declines in production, capacity utilization, employment, net sales, and a shift from net income to substantial net losses, Chairman Newquist and Commissioner Rohr find that the domestic ferrosilicon industry is experiencing material injury.

[51] 19 U.S.C. § 1677(7)(C)(iv)(I); Chaparral Steel Co. v. United States, 901 F.2d 1097 (Fed. Cir. 1990).

[52] 19 U.S.C. § 1677(7)(C)(v).

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(1) the degree of fungibility between the imports from different countries and the domestic like product, including consideration of specific customer requirements and other quality related questions;

(2) the presence of sales or offers to sell in the same geographic markets of imports from different countries and the domestic like product;

(3) the existence of common or similar channels of distribution for imports from different countries and the domestic like product; and

(4) whether the imports are simultaneously present in the market.[53]

While no single factor is determinative, and the list of factors is not exclusive, these factors are intended to provide the Commission with a framework for determining whether the imports compete with each other and with the domestic like product.[54] Only a "reasonable overlap" of competition is required.[55] Further, the Commission generally has cumulated imports even where there were alleged differences in quality between imports and domestic products, although considerations of quality differences are relevant to whether there is "reasonable overlap" of competition.[56]

In addition to ferrosilicon imports from Russia and Venezuela, imports from Brazil and Egypt are currently subject to investigation and are eligible

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[53] See Cast Iron Pipe Fittings from Brazil, Korea and Taiwan, Invs. Nos. 731-TA-278 through 280 (Final), USITC Pub. 1845 (May 1988), aff'd, Fundicao Tupy S.A. v. United States, 678 F. Supp. 898 (Ct. Int'l Trade 1988), aff'd, 859 F.2d 915 (Fed. Cir. 1988).

[54] See e.g., Wieland Werke, AG v. United States, 718 F. Supp. 50, 52 (Ct. Int'l Trade 1989).

[55] See e.g., Granges Metallverken AB v. United States, 716 F. Supp. 17 (Ct. Int'l Trade 1989).

[56] See e.g., Certain Flat-Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom, Invs. Nos. 701-TA- 319-354 and 731-TA-573-620 (Preliminary), USITC Pub. No. 2549 at 44-46 (August 1992); Silicon Metal from the People's Republic of China, Inv. No. 731-TA-472 (Final), USITC Pub. 2385 at 22-24 (June 1991).

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for cumulation if the statutory requirements are otherwise met.[57] The Commission also considered whether it is appropriate to cumulate the volume and price effects of imports from the People's Republic of China ("China" or the "PRC"), Kazakhstan and Ukraine entered prior to antidumping orders issued in those investigations with the volume and price effects of ferrosilicon imports subject to investigation.[58] If the statutory requirements for cumulation are otherwise met, the Commission may cumulate the volume and price effects of imports subject to an ongoing investigation with the volume and price effects of imports that entered the United States prior to issuance of a recent antidumping or countervailing duty order.[59] In its final determinations on imports from Kazakhstan and Ukraine, for example, the Commission cumulated the volume and price effects of ferrosilicon imports from China entered prior to an antidumping order issued less than one month previously with the volume and price effects of imports then subject to

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[57] See Sulfanilic Acid from the Republic of Hungary and India, Invs. Nos. 701-TA-318 (Preliminary) and Invs. Nos. 731-TA-560 and 561 (Preliminary), USITC Pub. 2526 (June 1992) at 14, n. 54; see also Cemex, S.A. v. United States, 790 F. Supp. 290 (Ct. Int'l Trade 1992). The Commission's preliminary investigations with respect to Brazil and Egypt were instituted on January 21, 1993, see 58 F.R. 5413 (January 21, 1993), and the Commission reached a preliminary finding of material injury by reason of allegedly LTFV imports on February 26, 1993.

[58] The Commission reached a final affirmative determination of material injury by reason of LTFV ferrosilicon imports from the People's Republic of China on February 23, 1993. See Ferrosilicon from the People's Republic of China, USITC Pub. 2606. The Commission similarly reached a final affirmative determination of material injury by reason of LTFV imports from Kazakhstan and Ukraine on March 16, 1993. See Ferrosilicon from Kazakhstan and Ukraine, USITC Pub. 2616.

[59] See e.g., Chaparral Steel v. United States, 901 F.2d 1097 (Fed. Cir. 1990); Industrial Nitrocellulose from Yugoslavia, Inv. No. 731-TA-445 (Final), USITC Pub. 2324 (October 1990). The Commission has cumulated imports subject to investigation with imports subject to antidumping orders in numerous other investigations. See e.g., Certain Stainless Steel Butt-Weld Pipes from Taiwan, Inv. No. 731-TA-564 (Final), USITC Pub. 2614 (June, 1993).

investigation.[60] The Commission considered such cumulation appropriate because the order on Chinese imports was so recent and because the investigations on ferrosilicon imports from China, Kazakhstan and Ukraine were commenced simultaneously and the Commission had one data set on all such investigations.[61]

Likewise, in the instant investigations, we determine that it is appropriate to cumulate the volume and price effects of imports from Russia, Venezuela, Brazil and Egypt with the volume and price effects of imports from China, Kazakhstan and Ukraine entered prior to antidumping orders in those investigations.[62] Investigations on imports from China, Kazakhstan, Russia, Ukraine, and Venezuela were instituted simultaneously and the Commission collected one set of data for all these investigations. The Commission has been required to make separate final determinations in the various ferrosilicon investigations solely as a result of postponements granted to various respondents by the Commerce Department.

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[60] Commissioners Brunsdale and Crawford did not cumulate imports from China with those from the other countries subject to investigation in making their determinations regarding imports of ferrosilicon from Kazakhstan and Ukraine. They found the levels of these imports to be negligible. See Dissenting Views of Commissioner Brunsdale and Commissioner Crawford in Ferrosilicon from the People's Republic of China, USITC Pub. 2606, at 29. For the same reasons, they decline to cumulate imports from China with other imports in the current investigations.

[61] See Ferrosilicon from Kazakhstan and Ukraine, USITC Pub. 2616 at 13.

[62] In the earlier ferrosilicon investigations, Vice Chairman Watson, Commissioner Brunsdale, and Commissioner Crawford declined to cumulate imports from Egypt with those from other countries subject to investigation, finding that imports from Egypt did not compete with imports from the other countries subject to investigation. See Concurring and Dissenting Views of Vice Chairman Watson, Commissioner Brunsdale, and Commissioner Crawford in Ferrosilicon from Brazil and Egypt, USITC Pub. 2605, at 33. For the same reasons, they decline to cumulate imports from Egypt with other imports in the current investigations.

The antidumping orders on imports from China, Kazakhstan and Ukraine are less than four months old and do not affect the industry data on the record. The Commission received no additional data from any party in the instant investigations; the condition of the industry as shown in the Commission's consolidated record of all the ferrosilicon investigations reflects the impact of imports from China, Kazakhstan and Ukraine that entered prior to the imposition of the antidumping orders in those investigations. Additionally, there were large inventories of ferrosilicon from China, Kazakhstan and Ukraine as of the end of the period of investigation relative to annual sales during the period of investigation [63] and certain long-term supply contracts between importers from some of these countries and domestic end-users. [64] Under these circumstances, it is likely that imports from these countries were still affecting the domestic market even after the relevant antidumping orders were issued. [65]

Furthermore, a decision not to cumulate in these investigations would undermine the purpose of cumulation in the Commission's analysis, which is to capture fully the simultaneous effects of unfairly traded imports from more than one country on the domestic industry. A decision not to cumulate, on the other hand, would require the Commission to conduct investigations in a piecemeal fashion and may encourage respondents to request postponement by Commerce of various investigations in order to obtain from the Commission a separate causation analysis on their imports. In these circumstances, we

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[63] See Consolidated Report at Table 2 and Table C-1.

[64] Consolidated Report at I-38.

[65] Although Chairman Newquist does not dispute the factual assertions made in this paragraph, they are not relevant to his determination to cumulate.

determine that cumulation with imports entered prior to recent orders is appropriate. [66] [67]

For the purposes of the instant investigations, Chairman Newquist, and Commissioners Rohr and Nuzum cumulated the volume and effect of imports from Brazil, China, Egypt, Kazakhstan, Russia, Ukraine and Venezuela. Vice Chairman Watson cumulated the volume and effect of imports from all countries except Egypt. [68] Commissioners Brunsdale and Crawford cumulated the volume and effect of imports from all countries except Egypt and China. [69] As

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[66] Commissioner Brunsdale and Commissioner Crawford do not join in this paragraph. Their decision on cumulation is based on how the facts of each particular investigation relate to the statutory cumulation requirements as interpreted by our reviewing courts (See, e.g., Mitsubishi Materials Corp. v. United States, Court Int'l Trade, Slip. Op. 93-62, April 27, 1993) and not on broader policy goals that supposedly underlie the cumulation requirement. In these investigations, they find that the inventories of imports from Kazakhstan and Ukraine were sufficiently great to justify cumulation three months after the issuance of orders covering imports from those countries. Commissioner Brunsdale also notes that even if she had not cumulated imports from Kazakhstan and Ukraine, she would have reached an affirmative determination in the current investigations.

[67] The original petition filed in these investigations covered ferrosilicon from Argentina as well as other countries discussed above and the Commission reached a preliminary affirmative determination in that investigation. See Ferrosilicon from Argentina, Kazakhstan, the People's Republic of China, Russia, Ukraine and Venezuela, USITC Pub. 2535. In the previous preliminary and final investigations on ferrosilicon imports, the Commission cumulated the volume and price effects of imports from Argentina with the volume and price effects of other imports subject to investigation and those entered prior to recent antidumping orders. On May 10, 1993, however, the Commerce Department issued a Final Determination of No Sales at Less than Fair Value on Ferrosilicon from Argentina. See 58 F.R. 27534 (May 10, 1993). As such, these imports are no longer subject to investigation and are not cumulated with other ferrosilicon imports as discussed above. The volume and market share of Argentine imports in comparison to other cumulated subject imports during the period of investigation are not significant enough in and of themselves to affect the Commission's analysis in these investigations.

[68] See Concurring and Dissenting Views of Vice Chairman Watson, Commissioner Brunsdale and Commissioner Crawford in Ferrosilicon from Brazil and Egypt, USITC Pub. 2605.

[69] See Concurring and Dissenting Views of Vice Chairman Watson, Commissioner Brunsdale, and Commissioner Crawford in Ferrosilicon from Brazil and Egypt, USITC Pub. 2605 and Dissenting Views of Commissioners Brunsdale and (continued...)

discussed below, there is a reasonable overlap of competition with respect to the imports and the domestic like product. Competition among all these products exists for the reasons stated in our previous determinations.[70] Further, we find imports from Brazil, Venezuela, and Kazakhstan do not meet the statutory criteria for exclusion under the negligible imports provision and we reaffirm our conclusions with respect to the other countries below.[71]

1. The Competition Requirement.

a. Ferrosilicon from Kazakhstan, Russia and Ukraine.

Minerais argued that there is no reasonable overlap in competition between ferrosilicon 50 and ferrosilicon 75. Petitioners, on the other hand, argued that virtually complete fungibility exists between the two grades, and that both grades are used primarily as alloying agents in steel and cast iron production. We find that there is a reasonable overlap in competition between imports from all countries of ferrosilicon 50 and ferrosilicon 75 and the domestic like product and do not find any basis for declining to cumulate imports from any country based on differences among the grades.[72]

Purchasers generally have the technical ability to use either grade, with some purchasers more readily able than others to use either grade.[73]

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[69](...continued) Crawford in Ferrosilicon from the People's Republic of China, USITC Pub. 2606.

[70] Consolidated Report at I-79 and Section III.A.1(a) infra. See also Ferrosilicon from China, USITC Pub. 2606 and Ferrosilicon from Kazakhstan and Ukraine, USITC Pub. 2616.

[71] Consolidated Report at I-67.

[72] See Hearing Tr. in Ferrosilicon from China, Kazakhstan, Russia, Ukraine and Venezuela, Invs. Nos. 303-TA-23 and 731-TA-566-570 (Final) at 133-34 ("Hearing Tr."); Minerais' Posthearing Brief at 6-7, 21; see also Petitioners' Prehearing Brief at 41.

[73] Consolidated Report at I-7. Indeed, one U.S. producer indicated that in the vast majority of cases ferrosilicon 50 and ferrosilicon 75 are substitutable and many end users request prices of both products when buying the standard grade. See Memorandum EC-Q-004 at 26.

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Further, some purchasers reported actual, albeit limited, switching between ferrosilicon 50 and ferrosilicon 75. [74] Finally, although Minerais argued that it alone imports ferrosilicon 50 into the United States, [75] evidence on the record shows that ferrosilicon 50 has been imported from other countries subject to investigation.

Minerais has also argued that Kazakh ferrosilicon does not compete with domestic and other imported sources because importers of Kazakh material are unable to provide SPC [76] quality standard documentation, which is required by a number of iron and steel producers. [77] In the preliminary investigation with respect to Kazakh imports, we acknowledged that "a significant portion" of Minerais' sales do not compete with the domestic industry, but concluded that there was sufficient competition to satisfy the "reasonable overlap" standard. [78] In these final investigations, although available data indicate that the subject imports were not able to supply SPC documentation, [79] data also indicate that only 23 percent of U.S. producers' sales to iron foundries and 14 percent of reported sales to steel producers required SPC documentation during the period of investigation. [80] While SPC documentation appears to be an increasing requirement, [81] imports were not thereby foreclosed from competing for most sales during the period of investigation. We thus do not

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[74] See EC-Q-025 at 35.

[75] See Hearing Tr. at 50; Minerais' Prehearing Brief at 21-22 ("All of the imports from Kazakhstan are FeSi 50, while all of the other imports are FeSi 75").

[76] "SPC" refers to Statistical Production Controls documentation used by the iron foundry and steel industry. Consolidated Report at I-75, n. 67.

[77] Minerais' Prehearing Brief at 23, n. 8.

[78] See USITC Pub. 2535 at 23.

[79] Consolidated Report at I-62.

[80] Consolidated Report at I-55, n. 90.

[81] Consolidated Report at I-55.

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find a basis for declining to cumulate subject imports from any country on these grounds.

Finally, Minerais also argued that it sells a large proportion of its imports from Kazakhstan, Russia and Ukraine to a single customer to which the domestic industry did not "seriously" attempt to market its product, and as such, it concludes that these imports do not compete with domestic products.[82] Despite such sales, the record shows that a significant amount of imports from these countries are sold to other customers which do compete with the domestic industry. [83]

b. Ferrosilicon from Venezuela.

Respondent CVG-Venezolana de Ferrosilicio, C.A. ("CVG") argued that the export marketing practices of China, Kazakhstan, Russia and the Ukraine are entirely different from Venezuelan exporters' practices and that exports from those countries do not compete with Venezuelan product because they do not have the same long-term commitment to the U.S. market. [84] We find CVG's arguments unpersuasive. The legislative history of the competition requirement of the cumulation provision indicates Congressional concern over "simultaneous unfair imports from different countries." While marketing of imports to be cumulated are to be "reasonably coincident," [85] there is no requirement of a long-standing commitment to the U.S. market. We accordingly find that any such differences in marketing practices do not negate an

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82 See Minerais' Posthearing Brief at 10.

83 Consolidated Report at I-23.

84 CVG contends that the "hit or run" export tactics of these countries reflect a lack of long-standing commitments to market their goods, and are simply short term efforts to "flood the market" to raise hard currency. See CVG's Prehearing Brief at 14-15.

85 See H.R. No. 1156, 98th Cong., 2nd Sess. 173 (1984); H.R. Rep. No. 725, 98th Cong., 2d Sess. 37 (1984).

otherwise reasonable overlap in competition.

c. Ferrosilicon from the PRC.

CVG has also argued that imports from the PRC are of inferior quality due to their high aluminum content, and are therefore unsuitable for the carbon steel and foundry industries.[86] CVG contended that imports from China are restricted for use only by certain stainless steel producers for whom aluminum content is not critical.[87] In the preliminary determination with respect to Chinese ferrosilicon, we found that a reasonable overlap of competition existed with respect to imports from the PRC because, "even if it is true that ferrosilicon from China is suitable only for the production of stainless steel, the production of stainless together with heat-resisting steels accounted for about 47 percent of the consumption of ferrosilicon in 1990."[88] We reaffirmed this finding in our final determination on Chinese ferrosilicon.[89] Finally, no party presented any additional information in these final investigations on ferrosilicon from Russia and Venezuela supporting a determination that Chinese ferrosilicon is of insufficient quality to compete with other imports and the domestic like product. Accordingly, we adopt the findings of our final investigation on Chinese imports for purposes of these investigations and find that cumulation is proper on competition grounds.

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86 CVG's Prehearing Brief at 13-14.

87 Id.

88 See USITC Pub. 2535 at 22-23 and n. 89.

89 See Ferrosilicon from the People's Republic of China, USITC Pub. 2602 at 14. Petitioners argued in that investigation that there was no evidence in the record to support CVG's assertion that ferrosilicon from the PRC contains unacceptably high levels of aluminum. Indeed, there was evidence on the record showing that at least one U.S. producer and one importer found little difference between the domestic and imported Chinese product. See Consolidated Report at I-50 -- I- 51.

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d. Ferrosilicon from Egypt.[90]

Respondents Egyptian Ferroalloy Company ("EFACO"), MG Ores & Alloys ("MG") and ACI Chemical, Inc. ("ACI") (collectively, the "Egyptian respondents") argued in the preliminary investigations on imports from Brazil and Egypt[91] that the allegedly LTFV imports from Egypt do not compete with the domestic like product or with other imports because they serve a narrow market niche that those products either do not serve or serve only to a limited extent.[92] With the exception of what they characterized as a "small parcel" of ferrosilicon 75, the Egyptian respondents indicated that the Egyptian product consisted of "waste (slag), by-product (fines) and off-specification (65%) product."[93]

Egyptian respondents further argued that these articles were sold through channels of distribution that differed from the normal channels of distribution in which the domestic products were sold. Rather than being sold directly to end-users, subject imports from Egypt were sold to "processors" who then sold the product to the steel and iron foundry industries. Furthermore, while arguing that sales of slag and fines were insignificant, the Egyptian respondents did concede that the domestic ferrosilicon industry also may sell slag and fines to processors, including processors that purchase Egyptian material.[94]

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90 Vice Chairman Watson and Commissioners Brunsdale and Crawford do not join in this section of the Views of the Commission. See Concurring and Dissenting Views of Vice Chairman Watson, Commissioner Brunsdale and Commissioner Crawford in Ferrosilicon from Brazil and Egypt, USITC Pub. 2605.

91 See USITC Pub. 2605 (February 1993).

92 Egyptian respondents' Postconference Brief at 2-9.

93 Egyptian respondents' Postconference Brief at 2-3 and n. 6.

94 Egyptian respondents' Postconference Brief at 6.

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Although mindful of some apparent differences between a large portion of the Egyptian merchandise, other imports, and the domestic like product, we determined in those preliminary investigations that there was a sufficiently reasonable overlap of competition between all such products to cumulate Egyptian imports with all other imports under investigation. First, with respect to channels of distribution, and specifically sales to processors rather than to end users, we noted that the imports from Egypt were not the only imports to require some additional processing (<u>i.e.</u>, screening). Some of the Brazilian, Kazakh, Russian, Ukrainian, and Venezuelan product also had to be screened.[95] The petitioners to those investigations also claimed that screening is done by U.S. producers, and "bagging" or "briquetting" of fines such as is performed on the imports from Egypt is also done for the U.S. product. Second, we noted that the limited amount of ferrosilicon 75 imported by Egyptian respondents appeared to be generally comparable to the domestic like product and to other imports of ferrosilicon 75.[96] Finally, we noted that some domestic producers do sell slag and fines,[97] and that there were imports, albeit limited, of slag from other countries during the period of investigation.[98] We adopt these findings for purposes of these final investigations.

2. <u>Negligible Imports Exception</u>.

We must next determine whether the negligible imports exception applies to any of the subject imports. In determining whether imports are negligible, the Commission shall consider all relevant economic factors including whether:

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95 Consolidated Report at I-50 -- I-52 and notes thereto, and at E-2, n. 2.
96 Consolidated Report at I-51.
97 Consolidated Report at I-18, n. 23.
98 <u>See</u> <u>e.g.</u>, EC-Q-025 at 40.

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(I) the volume and market share of the imports are negligible;

(II) sales transactions involving the imports are isolated and sporadic; and

(III) the domestic market for the like product is price sensitive by reason of the nature of the product, so that a small quantity of imports can result in price suppression or depression. [99]

In addition to the three enumerated statutory factors, the Commission has in the past considered additional factors, for example: whether imports have been increasing; [100] whether the domestic industry is "already suffering considerable injury and has long been battered by import price competition";[101] trends in market penetration; the degree of competition between the imported product and the domestic product; and any relationships of foreign producers to one another and to common importers.[102]

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[99] 19 U.S.C. § 1677(7)(C)(V). Chairman Newquist, Commissioner Rohr and Commissioner Nuzum note that both the House Ways and Means Committee Report and the Conference Committee Report stress that the Commission is to apply the exception sparingly and that it is not to be used to subvert the purpose and general application of the mandatory cumulation provision of the statute. See H.R. Rep. No. 40, Part 1, 100th Cong., 1st Sess. 130 at 131 (1987); H.R. Rep. No. 576, 100th Cong., 2d Sess. at 621. They note further that the House Ways and Means Committee Report emphasizes that whether imports are "negligible" may differ from industry to industry and for that reason the statute does not provide a specific numeric definition of negligibility. H.R. Rep. No. 40, Part 1, 100th Cong., 1st. Sess. 130 at 131 (1987). In addition, they note that the legislative history indicates this exception should be applied with "particular care in situations involving fungible products, where a small quantity of low-priced imports can have a very real effect on the market." Id.; see also H.R. Rep. 576, 100th Cong., 2d Sess. at 621 (April 20, 1988).

[100] See Coated Groundwood Paper from Austria, Belgium, Finland, France, Germany, Italy, the Netherlands, Sweden, and the United Kingdom, Invs. Nos. 731-TA-486 through 494 (Preliminary), USITC Pub. 2359 (February 1991) at 31.

[101] H.R. Rep. No. 40, Part 1, 100th Cong., 1st Sess. 130 at 131 (1987).

[102] See e.g., Certain Flat-Rolled Carbon Steel Products from Argentina, Australia, Austria, Belgium, Brazil, Canada, Finland, France, Germany, Italy, Japan, Korea, Mexico, the Netherlands, New Zealand, Poland, Romania, Spain, Sweden, Taiwan, and the United Kingdom, Invs. Nos. 701-TA-319 -- 354 (Preliminary) and Invs. Nos. 731-TA- 573-620 (Preliminary), USITC Pub. 2549 (August 1992) at 49 ("the Commission has considered upward trends in imports as a reason not to exercise its discretion to find imports are negligible. The Commission has also examined the degree of competition between the

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a. Ferrosilicon Imports from Russia and Ukraine.

In contrast to information presented in the preliminary investigations on imports from these countries, there is now evidence [103] on the record that there were imports of ferrosilicon from Russia and Ukraine during the period of investigation. [104] [105] Although imports from Russia and Ukraine, as a share

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[102](...continued)
imported product and the domestic product."); Certain Stainless Steel Butt-Weld Pipe Fittings from Korea and Taiwan, Invs. Nos. 731-TA-563 and 564 (Preliminary), USITC Pub. 2534 (July 1992) at 16, n. 61.

[103] Commissioner Nuzum notes that, in the preliminary investigations of the subject imports, the record concerning the existence of imports from Russia and Ukraine was not, in her view, sufficiently clear as to warrant a negative determination on the basis of negligibility. See Ferrosilicon from Argentina, Kazakhstan, the People's Republic of China, Russia, Ukraine, and Venezuela, Invs. Nos. 303-TA-23, 731-TA-565-570 (Preliminary), USITC Pub. 2535 (July 1992) at 24. In these final investigations, additional information has been gathered which does establish, in a clear and convincing manner, the existence of such imports during the period of investigation.

[104] Chairman Newquist and Commissioner Rohr note that the absence of sufficient information in the preliminary investigations concerning imports of ferrosilicon from Russia and Ukraine warranted an affirmative determination, thus permitting these investigations to continue. See USITC Pub. 2535 at 14-16 (noting that Russia and Ukraine are "major" ferrosilicon producers and that confidential information in the record supports allegations in the petition that there were imports from these countries during the period of the investigation); Id. at 24. ("we are unable to separately determine the level of imports which originate in each country"). Pursuant to the legal standard for preliminary determinations, the Commission is to reach a negative determination "only when (1) the record as a whole contains clear and convincing evidence that there is no material injury . . .; and (2) no likelihood exists that contrary evidence [i.e., evidence of injury] will arise in a final investigation." American Lamb v. United States, 785 F.2d 994, 1001 (Fed. Cir. 1986)(emphasis added).

[105] Vice Chairman Watson and Commissioners Brunsdale and Crawford disagree with the assertion of Chairman Newquist and Commissioner Rohr in the preceding footnote that the record in the preliminary investigations involving Russia and Ukraine warranted an affirmative finding of a reasonable indication of material injury by reason of imports from those countries. Information on Russian and Ukrainian imports was not, as Chairman Newquist and Commissioner Rohr say, absent from the record in the preliminary investigation. Rather, the information in the record indicated that there were no imports. (See Ferrosilicon from Argentina, Kazakhstan, the People's Republic of China, Russia, Ukraine, and Venezuela at I-13, Table 1.) Given the information in the record of the preliminary investigations, we found no reasonable indication of material injury by reason of allegedly dumped imports from these (continued...)

of consumption, each fluctuated at very low levels until 1992, such imports each increased substantially in interim 1992. [106] These levels lead us to conclude that imports from Russia and Ukraine are not negligible.

Minerais has also raised an issue relevant to considering whether imports are "isolated and sporadic." Minerais suggested that the Commission should examine import market share based on U.S. import shipments in the United States, and not imports as such, [107] because a substantial portion of Minerais' imports are held in inventory, and may be re-exported.[108] As discussed further below with respect to the volume of imports, we find that the statute requires the Commission to consider "imports", and not import shipments, [109] although the Commission may consider the degree to which

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[105](...continued)
two countries. (See Ferrosilicon from Argentina, Kazakhstan, the People's Republic of China, Russia, Ukraine, and Venezuela at 31-37 (Concurring and Dissenting Views of Vice Chairman Watson, Commissioner Brunsdale, and Commissioner Crawford).)

While subsequent evidence has shown that the information available at that time was incorrect, we do not believe the mere possibility that the available information may later be found to be incorrect is a sufficient reason to find in the affirmative in a preliminary investigation. If this were the standard, the Commission would be forced to vote in the affirmative in virtually every preliminary investigation. We also note that the U.S. Court of Appeals for the Federal Circuit stated, in the American Lamb opinion to which Chairman Newquist and Commissioner Rohr refer, that

> We are unable to join the [Court of International Trade] in its view that the statutory phrase "reasonable indication" means the same as a mere "possibility", or that it suggests "only the barest clues or signs needed to justify further inquiry." The statute calls for a reasonable indication of injury, not a reasonable need for further inquiry. (American Lamb, 785 F.2d at 1001).

[106] Consolidated Report at I-45, I-46.

[107] "Imports" are actual importations into the United States while "import shipments" are shipments of the imports within the United States. 19 U.S.C. § 1677(7)(C)(i) requires the Commission to consider imports rather than import shipments in evaluating the volume of subject imports.

[108] See Minerais' Prehearing Brief at 25-27; Minerais' Posthearing Brief, ex. 1 at 15-16.

[109] 19 U.S.C. 1677(7)(C)(i).

imports are held in inventory instead of being immediately sold as a factor in assessing the significance of the imports.[110] Even measuring import shipments, as opposed to imports, however, we find that ferrosilicon imports from Russia and Ukraine are not negligible.[111] [112]

b. Ferrosilicon Imports from China.[113]

For purposes of these investigations, we adopt our final finding in Ferrosilicon from the People's Republic of China that imports from China are not negligible.[114] The level of imports from China, although small at the beginning of the period of investigation, increased dramatically from 1989 to 1991 and also increased between interim periods.[115] Further, even relatively small amounts of imports may adversely affect an industry under severe stress when the like product is sold in a price sensitive market, as is the case here.[116] [117] We found it particularly relevant in that investigation that all four available price comparisons in those investigations showed underselling of the domestic product, with margins averaging 4.1 percent.[118]

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110 See Iwatsu Electric Co. v. United States, 758 F. Supp. 1506, 1513-14 (Ct. Int'l Trade 1991)(citing USX Corporation v. United States, 655 F. Supp. at 490); Wells Manufacturing co. v. United States, 677 F. Supp. 1239, 1240 (Ct. Int'l Trade 1987).

111 While less dramatic than the increase in imports, import shipments of Russian and Ukrainian product also increased during interim 1992.

112 Commissioner Brunsdale finds that, given the facts in the current case, the issue of Russian and Ukrainian negligibility should be resolved by examining imports and not shipments of imports. She therefore does not reach the issue of whether the data on import shipments do or do not indicate negligibility.

113 Commissioners Brunsdale and Crawford do not join in this section of the Views of the Commission. See Dissenting Views of Commissioners Brunsdale and Crawford in Ferrosilicon from the People's Republic of China, USITC Pub. 2606.

114 See USITC Pub. 2606 at 19.

115 Consolidated Report at I-43, I-46.

116 See e.g., H.R. Rep. 40, 100th Cong. 1st Sess. at 131. Furthermore, we also find the low and declining levels of capacity utilization to be relevant.

117 As explained more fully below, Vice Chairman Watson does not believe this to be a price sensitive market.

118 Consolidated Report at I-64.

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c. Ferrosilicon from Egypt[119]

For purposes of these investigations, we also adopt our preliminary finding that imports from Egypt are not negligible. Import levels of ferrosilicon from Egypt are higher than the levels the Commission has in the past considered to be negligible.[120] Further, the imports are not isolated and sporadic.[121] [122] While Egyptian products were imported in only 3 of 15 quarters during the period of investigation, Egyptian products are sold to processors who in turn resell these products in a form which competes more directly with the domestic like product over a longer period of time then is reflected by the initial importation or sale to the processor. Additionally, as with imports from the PRC, we find even small amounts of imports from Egypt to be significant in light of the price sensitive nature of the ferrosilicon market and the fact that the domestic industry is under severe stress.

We thus find that cumulation of all imports as set forth above is appropriate under the statutory framework.

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[119] Vice Chairman Watson and Commissioners Brunsdale and Crawford do not join in this section of the Views of the Commission. See Concurring and Dissenting Views of Vice Chairman Watson, Commissioner Brunsdale, and Commissioner Crawford in Ferrosilicon from Brazil and Egypt, USITC Pub. 2605.

[120] Consolidated Report at I-46 -- I-47. All imports of Egyptian material subject to investigation entered the U.S. in 1990 or in interim 1992. See also Consolidated Report at I-43 -- I-44.

[121] The statute directs us to examine whether sales transactions involving the subject imports are isolated. See 19 U.S.C. 1677(7)(C)(V)(II).

[122] Egyptian respondents argued that imports from Egypt should be considered negligible based on importations in only 3 out of the 15 quarters, different channels of distribution, lack of fungibility and the fact that the sales were spot transactions as opposed to long-term contracts. Egyptian Respondents' Postconference Brief at 11-15.

V. MATERIAL INJURY BY REASON OF LTFV AND SUBSIDIZED IMPORTS [123]

In its determination of whether the domestic injury is materially injured by reason of the subject imports, the statute directs the Commission to consider: [124]

> (I) the volume of imports of the merchandise which is the subject of the investigation;
>
> (II) the effect of imports of that merchandise on prices in the United States for like products; and
>
> (III) the impact of imports of such merchandise on domestic producers of like products, but only in the context of production operations in the United States.

In making this determination, the Commission may consider "such other economic factors as are relevant to the determination. . ." [125] However, the

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123 Vice Chairman Watson does not concur in the discussion as it applies to Egypt. Commissioners Brunsdale and Crawford do not concur in this discussion as it applies to Egypt and China.

124 See 19 U.S.C. § 1677(7)(B).

125 19 U.S.C. § 1677(7)(B)(ii).

Commission is not to weigh causes. [126] [127] [128] [129] Finally, the Commission is

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[126] See e.g., Citrosuco Paulista, S.A. v. United States, 704 F. Supp. 1075, 1101 (Ct. Int'l Trade 1988).

[127] Chairman Newquist, Commissioner Rohr, and Commissioner Nuzum note that the Commission need not determine that imports are "the principal, a substantial or a significant cause of material injury." S. Rep. No. 249, 96th Cong., 1st Sess. 57 and 74 (1979). Rather, a finding that imports are a cause of material injury is sufficient. See e.g., Metallverken Nederland, B.V. v. United States, 728 F. Supp. 730, 741 (Ct. Int'l Trade 1989); Citrosuco Paulista S.A. v. United States, 704 F. Supp. 1075, 1101 (Ct. Int'l Trade 1988).

[128] Vice Chairman Watson notes that the courts have interpreted the statutory requirement that the Commission consider whether there is material injury "by reason of" the subject imports in a number of different ways. Compare, e.g., United Engineering & Forging v. United States, 779 F. Supp. 1375, 1391 (Ct. Int'l Trade 1989)("rather it must determine whether unfairly-traded imports are contributing to such injury to the domestic industry. Such imports, therefore, need not be the only cause of harm to the domestic industry" (citations omitted)); Metallverken Nederland B.V. v. United States, 728 F. Supp. 730, 741 (Ct. Int'l Trade 1989)(affirming a determination by two Commissioners that "the imports were a cause of material injury"); USX Corporation v. United States, 682 F. Supp. 60, 67 (Ct. Int'l Trade 1988)("any causation analysis must have at its core, the issue of whether the imports at issue cause, in a non de minimis manner, the material injury to the industry . . .").

Accordingly, Vice Chairman Watson has decided to adhere to the standard provisions, which state that the Commission must satisfy itself that, in light of all the information presented, there is a "sufficient causal link between the less-than-fair-value imports and the requisite injury." S. Rep. No. 249, 96th Cong., 1st Sess. 75 (1979).

[129] Commissioners Brunsdale and Crawford note that the statute requires that the Commission determine whether a domestic industry is "materially injured by reason of" the LTFV imports. They find that the clear meaning of the statute is to require a determination on whether the domestic industry is materially injured by reason of LTFV imports, not by reason of LTFV imports among other things. Many, if not most, domestic industries are subject to injury from more than one economic factor. Of these factors, there may be more than one that independently is causing material injury to the domestic industry. It is assumed in the legislative history that the "ITC will consider information which indicates that harm is caused by factors other than the less-than-fair-value imports." S. Rep. No. 249 at 75. However, the legislative history makes it clear that the Commission is not to weigh or prioritize the factors that are independently causing material injury. Id. at 74; H.R. Rep. No. 317 at 47. The Commission is not to determine if the LTFV imports are "the principal, a substantial or a significant cause of material injury." S. Rep. No. 249 at 74. Rather it is to determine whether any injury "by reason of" the LTFV imports is material. That is, the Commission must determine if the subject imports are causing material injury to the domestic industry. "When determining the effect of imports on the domestic industry, the Commission

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directed to "evaluate all relevant factors . . . within the context of the . . . conditions of competition that are distinctive to the affected industry." [130]

The volume and market share of cumulated imports were significant and increasing over the period of investigation. Both increased from 1989 through 1991 and further increased substantially in interim 1992. [131] These import volume and market share increases were in contrast to the declining shipments and market share of domestic ferrosilicon producers which continued to decline even when consumption rose in 1992. [132] [133]

Minerais argued that we should examine market share based on import shipments because a substantial portion of Minerais' imports are held in inventory and may be re-exported and never sold in the United States. [134] The statute directs the Commission to consider the volume of imports rather than import shipments but also indicates that we are to consider whether the volume of imports is "significant." [135] Further, where the industry customarily

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[129](...continued)
must consider all relevant factors that can demonstrate if <u>unfairly traded imports are materially injuring the domestic industry</u>." S. Rep. No. 71, 100th Cong., 1st Sess. 116 (1987) (emphasis added).

[130] 19 U.S.C. § 1677(7)(C).

[131] Consolidated Report at I-44, I-45, Table C-1; EC-Q-025 at 8.

[132] Consolidated Report at I-24, Table C-1.

[133] Vice Chairman Watson, Commissioner Brunsdale and Commissioner Crawford note that while they did not cumulate imports from Egypt, and for Commissioners Brunsdale and Crawford, China, in making their determination, the trends in the imports from the other countries are the same as those discussed in the text.

[134] Minerais has contended in the course of these proceedings that it intends to re-export a portion of these inventories, and as such, its import shipments would be a more accurate indication of volume and import penetration in the domestic market. We are not persuaded by Minerais' arguments or its "intent".

[135] 19 U.S.C. § 1677(7)(C)(i); <u>Iwatsu Electric Co. v. United States</u>, 758 F. Supp. 1506, 1513-14 (Ct. Int'l Trade 1991).

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maintains large inventories, as appears to be the case here, [136] the Commission may adjust import penetration figures to account for inventories, particularly when a large initial shipment was used to establish an inventory. [137] Regardless of whether the Commission considers total imports and market share or import shipments and market share, however, we find the import volume to be significant. [138]

The increase in imports is especially significant due to the price sensitive nature of competition among ferrosilicon suppliers. [139] [140] [141]

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[136] See Consolidated Report at I-28 (while inventories declined, they represented 21 to 29 percent of domestic shipments); Tr. at 64 (Mr. Beard)("[W]e always have inventory on hand for customer demands."), at 65 (customers try to maintain zero inventory for themselves), and at 66 (Mr. Koestner) (greater burden on producers to maintain inventory).

[137] See Wells Manufacturing co. v. United States, 677 F. Supp. 1239, 1240 (Ct. Int'l Trade 1987).

[138] Consolidated Report at I-46.

[139] See Sodium Thiosulfate from the Federal Republic of Germany, the People's Republic of China, and the United Kingdom, Invs. Nos. 731-TA-465, 466 and 468 (Final), USITC Pub. 2358 (February 1991) at 16.

[140] Vice Chairman Watson notes that the market for ferrosilicon is not price sensitive and he does not join in the following lengthy discussion of the price depressing effects of the subject imports. Because of the historically unprecedented high level of prices in 1988 and 1989 and the decline in demand that has occurred since that time, he does not believe it is possible to determine from the record whether the price decline is due in part to the subject imports or whether it was solely the result of other economic factors. In 1990, 1991 and interim 1992, prices returned to levels consistent with the previous decade. Changes in the price of ferrosilicon do not lead to greater changes in the amount of ferrosilicon demanded. In common economic terms, demand for ferrosilicon is price inelastic; a lower price does not lead to increases in demand, nor a higher price to decreases in demand. Indeed, this was illustrated with striking clarity during the period of investigation. In 1989, as noted above, ferrosilicon prices were just below their all-time high but more was consumed than in 1991 when prices had returned to previous market levels. This is not surprising given that demand for ferrosilicon is derived from demand for iron and steel products, and more basically, that ferrosilicon inputs account for only 2% or less of the price of those finished products. See Consolidated Report at I-48.

[141] Commissioners Brunsdale and Crawford do not join the following lengthy discussion of the price depressing effects of the subject imports. They find that the unfairly traded imports of ferrosilicon have not had a price depressing effect. They do not believe the observed price declines and the (continued...)

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Domestic and imported ferrosilicon products are closely substitutable. In addition, suppliers and purchasers frequently refer to several publications as a general guide to price trends and price levels, [142] leading to clear price signaling in the U.S. market. [143] The information available about prevailing market prices is extensive and contributes to significant price competition among suppliers. Price differences of less than a penny per pound of contained silicon can lead purchasers to switch suppliers. [144]

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[141](...continued)
accompanying declines in price-cost margins establish that the imports have caused price depression. Ferrosilicon prices were at historically unprecedented high levels of prices in 1988 and 1989 and returned to levels consistent with prices in the previous decade in 1990, 1991 and interim 1992. This pattern of price changes, if not the exact observed magnitudes, can be explained by the decline in demand that has occurred since 1989 and would likely have occurred even in the absence of unfairly traded imports.

They agree that demand for ferrosilicon is not highly responsive to changes in prices and that the imports are substitutable for the domestic product. In some cases, these facts could contribute to price depression. However, in this case, they note that there was substantial excess capacity in the domestic industry after 1989. In 1991, capacity utilization was only 62.7 percent and in interim 1992 it fell to 59.5 percent. See Consolidated Report at I-24, Table 5. Furthermore, the ferrosilicon industry is competitive with ten domestic firms producing the product during at least part of the period of investigation. See Consolidated Report at I-19. In a competitive industry with substantial excess capacity, they expect the vast majority of the effect of dumped imports to be reflected primarily in reduced quantities of sales by the domestic industry, not in reduced prices. Given this set of circumstances, even if there were no dumping, they would expect competition among the domestic producers to keep prices from rising to any significant degree.

Commissioners Brunsdale and Crawford also do not rely on anecdotal evidence that competition from imports caused domestic producers to lose particular sales or forced them to reduce their prices on other sales in reaching their determinations.

[142] Consolidated Report at I-47, n. 55.

[143] See e.g., Coated Groundwood Paper from Austria, Belgium, Finland, France, Germany, Italy, the Netherlands, Sweden, and the United Kingdom, Invs. Nos. 731-TA-486 through 494 (Preliminary), USITC Pub. 2359 (February 1991) at 39.

[144] For example, prices are typically quoted to four digits past the decimal in dollars per pound of contained silicon. See e.g., Consolidated Report at I-74 -- I-78.

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Moreover, total domestic ferrosilicon demand is price inelastic. Changes in ferrosilicon prices have little effect on the quantities demanded by the iron and steel industries or on the total cost of iron and steel production. There are few substitutes for ferrosilicon in iron and steel production,[145] and the cost of ferrosilicon as an input is relatively small compared to the total cost of the finished product.[146] Hence, an increase in the volume of unfairly low-priced imports, which causes declining U.S. prices, comes at the expense of U.S. producers' domestic sales instead of increasing the quantities of ferrosilicon demanded.

In evaluating the effect of the subject imports on prices, the Commission considers whether there has been significant price underselling by imports and whether the imports suppress or depress prices to a significant degree.[147] We find that the subject imports significantly depressed domestic prices.

A number of factors indicate the price depressing effect of the subject imports on domestic prices.[148] First, there was significant underselling, both in terms of frequency and absolute price differences. When considering all countries under investigation, 45 of a total of 64 price comparisons showed underselling by subject imports.[149] Second, this underselling

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145 Consolidated Report at I-10. Those that generally exist either cost more, introduce undesired elements, or both.
146 Consolidated Report at I-48, EC-Q-025 at 46 - 47. See also Iwatsu, 758 F. Supp. at 1514.
147 19 U.S.C. § 1677(7)(C)(ii).
148 See Iwatsu Electric Co. v. United States, 758 F. Supp. 1506, 1514, 1515 (Ct. Int'l Trade 1991). See also CEMEX S.A. v. United States, 790 F. Supp. 290, 298, n. 12 (holding that the Commission may rely on incomplete price information in cumulatively assessing the price effects of imports subject to investigation when imports subject to preliminary investigations are cumulated with imports subject to final investigations).
149 Consolidated Report at I-62.

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occurred in conjunction with increasing market penetration by the cumulated imports at a time of declining market share of the U.S. industry.[150] Third, the U.S. selling price of the domestic and subject imported ferrosilicon generally fell during the period of investigation,[151] and import prices declined at somewhat higher rates than domestic prices during this same period.[152] [153] Fourth, domestic producers lost sales to the subject imports due to the lower prices of the imports.[154]

We have evaluated arguments that the decline in U.S. ferrosilicon prices during the period of investigation is due to the operation of the business cycle rather than the effects of the subject imports.[155] While ferrosilicon prices in 1988-89 were at record high levels and current prices are arguably more similar to prices that existed prior to that unprecedented peak, we nevertheless find that imports contributed to price depression in the domestic ferrosilicon industry to a significant degree. We note in particular that although total unit costs have decreased somewhat during the period of investigation,[156] the cost of goods sold as a share of net sales increased.[157] This indicates that pricing has not been at sufficient levels to allow the

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150 See Iwatsu, 758 F. Supp. at 1514 (evidence of price depression corroborated by both lost sales data (including data on underselling) and other data which indicated that the purchasing decision was price sensitive); see also Metallverken Nederland, 728 F. Supp. 730, 745.

151 EC-Q-025 at 10.

152 Id.

153 See Iwatsu 758 F. Supp. 1506, 1514 (prices of the subject imports well below domestic prices is evidence of price depression).

154 See Consolidated Report at I-75 -- I-78 (providing evidence of lost sales); see also Consolidated Report at I-48 (noting that domestic producers and importers reported that they would consider lowering their price for the next bid request if the prior sale had been awarded to a competitor).

155 CVG's Prehearing Brief at 7-8.

156 Consolidated Report at I-31, I-33.

157 Consolidated Report at I-32.

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industry to recover costs at the same rate as earlier in the period of investigation.

Finally, we find that the significant volume and price effects of the subject imports have had an adverse impact on the domestic producers of like products.[158] First, domestic producers experienced actual declines in output, sales, market share, profits, return on investments, and capacity utilization during the period of investigation.[159] Second, several domestic producers ceased or decreased production during the period of investigation because of generally poor market conditions and their ability to purchase imported ferrosilicon more cheaply than they could produce it themselves.[160] There have also been negative effects on the domestic industry's cash flow, inventories, employment, wages, growth, ability to raise capital, research and development and investment.[161] Third, as previously discussed, we find that the subject imports have contributed to price depression in the domestic industry, through significantly increasing market share and by significant underselling of the domestic like product.

V. CRITICAL CIRCUMSTANCES

The Department of Commerce found that critical circumstances exist with respect to imports from Russia.[162] When Commerce makes an affirmative determination with respect to critical circumstances, the Commission is required to determine, for each domestic industry for which it makes an

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158 While Commissioners Brunsdale and Crawford do not find that the LTFV and subsidized imports significantly depressed domestic prices, they find that the effects of the volume of the LTFV and subsidized imports were sufficient to constitute material injury.

159 See Section on Conditions of Domestic Industry infra.

160 See Consolidated Report at I-19 -- I-21.

161 Id.

162 58 F.R. 29192 (May 19, 1993).

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affirmative injury determination, "whether retroactive imposition of antidumping duties on the merchandise appears necessary to prevent recurrence of material injury that was caused by massive imports of the merchandise over a relatively short period of time." [163] An affirmative critical circumstances determination is a finding that, absent retroactive application of the antidumping order, the surge of imports that occurred after the case was filed, but within the 90-day period prior to notice of suspension of liquidation, will prolong or cause a recurrence of material injury to the domestic industry. [164] The purpose of the provision is to provide relief from effects of the massive imports and to deter importers from attempting to circumvent the dumping laws by making massive shipments immediately after the filing of an antidumping petition. [165]

In this case, the petition was filed on May 22, 1992 and the Department of Commerce suspended liquidation on December 29, 1992, retroactive to September 30, 1992. [166] Thus, retroactive duties would only be imposed on imports entering the United States after September 30, 1992. The record in these investigations shows that, in 1992, there was only one importation from Russia and that importation occurred in May. [167] There were no other imports from Russia through the end of the Commission's period of investigation (September 30, 1992) or thereafter through December 30, 1992. Further, U.S. importers reported no orders of ferrosilicon from Russia during the period in

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[163] 19 U.S.C. § 1673d(b)(4)(A)(i).

[164] 19 U.S.C. § 1673d(c)(4).

[165] See H.R. Rep. No. 317, 96th Cong., 1st Sess. 63 (1979).

[166] See 58 F.R. 29192 (May 19, 1993).

[167] Imports totaled 793 silicon-content short tons in May 1992. See Consolidated Report at F-2, Table F-1. Because Commerce Department Official Import Statistics do not reveal the exact date of entry of these imports, it is not possible to ascertain whether these imports entered prior to or after the filing of the petition on May 22, 1992.

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which retroactive duties could be imposed.[168] These factors support the conclusion that the import surge ceased prior to the time such imports could be included in any retroactive application of duties under a critical circumstances finding.[169]

Given the evidence of no imports of ferrosilicon from Russia during the 90-day period for which retroactive duties could be assessed, we determine that retroactive imposition of antidumping duties on the merchandise is not necessary to prevent recurrence of material injury. We thus make negative determinations with respect to critical circumstances on imports from Russia.

CONCLUSION

For all the reasons set forth above, we determine that the domestic industry producing all grades of ferrosilicon is materially injured by reason of LTFV imports of ferrosilicon from Russia and Venezuela and by reason of subsidized imports from Venezuela.

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[168] See Consolidated Report at I-39.
[169] Petitioners argued that Minerais intended to evade antidumping duties by sharply increasing imports and warehousing them. However, to the extent that the importations entered the United States prior to the filing of the petition, or prior to the 90-day period during which retroactive antidumping duties would be applied, these imports are not relevant to our statutorily required critical circumstances analysis.

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INFORMATION OBTAINED IN THE INVESTIGATIONS

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INTRODUCTION

On May 22, 1992, petitions were filed with the U.S. International Trade Commission and the U.S. Department of Commerce alleging that imports of ferrosilicon[1] from Venezuela were being subsidized by the Government of Venezuela[2] and that imports of ferrosilicon from Argentina, China, Kazakhstan, Russia, Ukraine, and Venezuela were being sold in the United States at less than fair value (LTFV), and that an industry in the United States was materially injured and/or threatened with material injury by reason of such imports.[3] Accordingly, the Commission instituted the following investigations:

Countervailing duty investigation:
No. 303-TA-23 (Preliminary) concerning Venezuela
Antidumping investigations:
No. 731-TA-565 (Preliminary) concerning Argentina
No. 731-TA-566 (Preliminary) concerning Kazakhstan
No. 731-TA-567 (Preliminary) concerning China
No. 731-TA-568 (Preliminary) concerning Russia
No. 731-TA-569 (Preliminary) concerning Ukraine
No. 731-TA-570 (Preliminary) concerning Venezuela

On July 6, 1992, the Commission determined that there was a reasonable indication of material injury by reason of the subject imports and Commerce continued its investigations concerning subsidies and sales at LTFV.

Subsequently, Commerce made preliminary determinations that imports of ferrosilicon are being subsidized by the Government of Venezuela (57 F.R. 38482, August 25, 1992) and that such imports from Kazakhstan, China, Russia, Ukraine, and Venezuela are being, or are likely to be, sold in the United

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[1] For purposes of these investigations, the subject product is ferrosilicon, a ferroalloy generally containing, by weight, not less than 4 percent iron, more than 8 percent but not more than 96 percent silicon, not more than 10 percent chromium, not more than 30 percent manganese, not more than 3 percent phosphorus, less than 2.75 percent magnesium, and not more than 10 percent calcium or any other element. Ferrosilicon is classified in subheadings 7202.21.10, 7202.21.50, 7202.21.75, 7202.21.90, and 7202.29.00 of the Harmonized Tariff Schedule of the United States (HTS).

[2] Venezuela is not a signatory of the General Agreement on Tariffs and Trade (GATT) subsidies code and thus is not "under the Agreement" pursuant to sec. 701(b) of the Tariff Act of 1930 (19 U.S.C. § 1671(b)). However, Venezuela has been accorded an injury investigation under sec. 303 of the act for those articles that are free of duty (whether under the GSP or under HTS subheading 7202.29.00).

[3] The petitions were filed by AIMCOR, Pittsburgh, PA; Alabama Silicon, Inc., Bessemer, AL; American Alloys, Inc., Pittsburgh, PA; Globe Metallurgical, Inc., Cleveland, OH; Silicon Metaltech, Inc., Seattle, WA; Oil, Chemical & Atomic Workers Union (local 389); United Autoworkers of America Union (locals 523 and 12646); and United Steelworkers of America Union (locals 2528, 3081, and 5171).

States at LTFV (57 F.R. 52759, November 5, 1992; 57 F.R. 61876, December 29, 1992). Accordingly, the Commission instituted countervailing duty investigation No. 303-TA-23 (Final) (concerning Venezuela) and antidumping investigations Nos. 731-TA-566-570 (Final) (concerning Kazakhstan, China, Russia, Ukraine, and Venezuela, respectively).[4] On January 21, 1993, Commerce made a final affirmative LTFV determination concerning imports from China and, accordingly, the Commission was required to make a final injury determination within 45 days, or by March 4, 1993. That determination was affirmative (Ferrosilicon from the People's Republic of China, USITC Publication 2606, March 1993). Commerce made final affirmative LTFV determinations concerning imports from Kazakhstan and Ukraine on March 3, 1993, and accordingly, the Commission made its final injury determinations on March 23, 1993. The determinations were both affirmative (Ferrosilicon from Kazakhstan and Ukraine, USITC Publication 2616, March 1993). Commerce made its final subsidy/LTFV determinations concerning Russia and Venezuela on May 19 and May 10, 1993, respectively.[5]

This report contains only information related specifically to Commerce's final LTFV determinations concerning imports of ferrosilicon from Russia and Venezuela. All other data collected in the investigations is contained in the Commission's report on China. The Commission voted on the investigations on June 10, 1993, and transmitted its determinations to Commerce on June 16, 1993.

THE NATURE AND EXTENT OF SUBSIDIES AND SALES AT LTFV[6]

Russia

On May 19, 1993, the Commission received notice from Commerce of its affirmative determination of sales at LTFV of ferrosilicon from Russia. Because the respondents were unable to produce the information requested in a timely manner, Commerce determined to use best information available in their calculation of the dumping margin. As alleged in the petition, Commerce

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[4] In the investigation concerning Argentina (No. 731-TA-565), Commerce determined that imports of ferrosilicon from that country are not being, and are not likely to be, sold in the United States at LTFV (58 F.R. 27534, May 10, 1993).

[5] In a related matter, petitions were filed with the Commission and Commerce on January 12, 1993, by counsel on behalf of the same companies and unions mentioned above, alleging that an industry in the United States is materially injured or threatened with material injury by reason of imports of ferrosilicon from Brazil and Egypt that are allegedly being sold in the United States at LTFV. Accordingly, the Commission instituted investigations Nos. 731-TA-641-642 (Preliminary) and, on February 26, 1993, transmitted its affirmative preliminary determinations in these investigations to Commerce (Ferrosilicon from Brazil and Egypt, USITC Publication 2605, February 1993). Commerce is scheduled to make its preliminary LTFV determinations in these investigations on June 21, 1993.

[6] Copies of Commerce's Federal Register notices are presented in appendix A.

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determined margins to be 104.18 percent. Commerce also found that critical circumstances exist for such imports. A finding of critical circumstances means that suspension of liquidation will apply to all entries of ferrosilicon from Russia that are entered, or withdrawn from warehouse, for consumption on or after September 30, 1992.

Venezuela

Effective May 10, 1993, Commerce determined that Fesilven, presently Venezuela's only ferrosilicon producer, received benefits which constituted bounties or grants within the meaning of section 303 of the Tariff Act of 1930. Commerce found that Fesilven received preferential power rates and export bonds, which resulted in an estimated net subsidy of 22.08 percent *ad valorem*.

On the basis of comparisons of U.S. price and foreign market value, Commerce determined on May 10, 1993, that imports of ferrosilicon from Venezuela are being, or are likely to be, sold in the United States at LTFV. Using price-to-constructed value comparisons and price-to-price comparisons, Commerce determined the dumping margin to be 9.55 percent *ad valorem*.

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APPENDIX A

FEDERAL REGISTER NOTICES OF THE U.S. DEPARTMENT OF COMMERCE

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[A-307-807]

Final Determination of Sales at Less Than Fair Value: Ferrosilicon From Venezuela

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice.

EFFECTIVE DATE: May 10, 1993.

FOR FURTHER INFORMATION CONTACT: Shawn Thompson, Office of Antidumping Investigations, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482-1776.

Final Determination

We determine that ferrosilicon from Venezuela is being, or is likely to be, sold in the United States at less than fair value, as provided in section 735 of the Tariff Act of 1930, as amended (the Act). The estimated margins are shown in the "Suspension of Liquidation" section of this notice.

Case History

Since the publication of our affirmative preliminary determination on December 29, 1992, (57 FR 61879) the following events have occurred.

On January 4, 1993, we issued a supplemental cost questionnaire to the respondent in this investigation, CVG Venezolana de Ferrosilicio C.A. (CVG-FESILVEN). We received the responses to this questionnaire on January 19 and January 21, 1993.

On January 8, 1993, we received a request for a public hearing from the petitioners in this case (AIMCOR; Alabama Silicon, Inc.; American Alloys, Inc.; Globe Metallurgical, Inc.; Silicon Metaltech, Inc.; United Autoworkers of America Local 523; United Steelworkers of America Locals 2528, 5171, 3081, and 12646; and Oil Chemical and Atomic Workers Local 389).

On January 13, 1993, CVG-FESILVEN requested a postponement of the final determination. We granted this request, and on February 2, 1993, we postponed the final determination until not later than May 3, 1993 (58 FR 11586, Feb. 26, 1993).

From February 1 through February 5, 1993, we conducted verification in Venezuela of CVG-FESILVEN's

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responses to the Department's questionnaires.

Both petitioners and respondent filed case briefs on March 30, 1993, and rebuttal briefs on April 6, 1993. A public hearing was held on April 12, 1993.

In addition, on December 8, 1992, CVG-FESILVEN requested that the Department investigate whether certain of the petitioners in this investigation (AIMCOR; Alabama Silicon, Inc.; American Alloys, Inc.; Globe Metallurgical, Inc.; and Silicon Metaltech, Inc.) have standing to file the petition on "behalf of" the U.S. ferrosilicon industry. We have determined that such an investigation is not warranted. For further discussion of this topic, see the "Standing" section of this notice.

Scope of Investigation

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

Ferrosilicon is a ferroalloy produced by combining silicon and iron through smelting in a submerged-arc furnace. Ferrosilicon is used primarily as an alloying agent in the production of steel and cast iron. It is also used in the steel industry as a deoxidizer and a reducing agent, and by cast iron producers as an inoculant.

Ferrosilicon is differentiated by size and by grade. The sizes express the maximum and minimum dimensions of the lumps of ferrosilicon found in a given shipment. Ferrosilicon grades are defined by the percentages by weight of contained silicon and other minor elements. Ferrosilicon is most commonly sold to the iron and steel industries in standard grades of 75 percent and 50 percent ferrosilicon.

Calcium silicon, ferrocalcium silicon, and magnesium ferrosilicon are specifically excluded from the scope of this investigation. Calcium silicon is an alloy containing, by weight, not more than five percent iron, 60 to 65 percent silicon and 28 to 32 percent calcium. Ferrocalcium silicon is a ferroalloy containing, by weight, not less than four percent iron, 60 to 65 percent silicon, and more than 10 percent calcium. Magnesium ferrosilicon is a ferroalloy containing, by weight, not less than four percent iron, not more than 55 percent silicon, and not less than 2.75 percent magnesium.

Ferrosilicon is classifiable under the following subheadings of the Harmonized Tariff Schedule of the United States (HTSUS): 7202.21.1000, 7202.21.5000, 7202.21.7500, 7202.21.9000, 7202.29.0010, and 7202.29.0050. The HTSUS subheadings are provided for convenience and customs purposes. Our written description of the scope of this investigation is dispositive.

Standing

On December 8, 1992, CVG-FESILVEN requested that the Department investigate whether certain of the petitioners in this investigation have standing to file the petition on "behalf of" the U.S. ferrosilicon industry. In this request, CVG-FESILVEN stated that one U.S. producer has affirmatively opposed this proceeding. This statement was incorrect, because we only received a standing challenge from a domestic producer in three of the companion antidumping investigations involving ferrosilicon (i.e., from Kazakhstan, Russia, and Ukraine). Those investigations are, however, separate and distinct from this proceeding.

In issues regarding standing, the Department does not require a petitioner to establish affirmatively that it has the support of a majority of the domestic industry. This approach has been upheld by both the Court of Appeals for the Federal Circuit and the Court of International Trade. (See *Suramerica de Aleaciones Laminada C.A.* v. *United States*, 966 F.2d 660, 666–67 (Fed. Cir. 1992); and *Mineba Company, Ltd.* v. *United States*, Fed. Cir. Slip Op. 92-1289 (January 26, 1993).) Rather, the Department accepts a petitioner's representation that it is filing on behalf of the domestic industry unless the petitioner's standing is challenged by a domestic producer who is able to demonstrate otherwise. (See, e.g., 3.5 Inch Microdisks and Coated Media Thereof From Japan, 54 FR 6433 (Feb. 10, 1989).) Accordingly, because no domestic producer challenged petitioners' standing in this specific proceeding, we determined that no investigation as to whether petitioners have standing to file on behalf of the domestic ferrosilicon industry was necessary.

Period of Investigation

The period of investigation (POI) is December 1, 1991, through May 31, 1992.

Such or Similar Comparisons

We have determined that the product covered by this investigation comprises a single category of "such or similar" merchandise. We made similar merchandise comparisons on the basis of: (1) Silicon content range, (2) grade, and (3) sieve size, as described in Appendix V of the questionnaire.

Fair Value Comparisons

To determine whether sales of ferrosilicon from Venezuela to the United States were made at less than fair value, we compared the United States price (USP) to the foreign market value (FMV), as specified in the "United States Price" and "Foreign Market Value" sections of this notice.

United States Price

We based USP on purchase price, in accordance with section 772(b) of the Act, because the subject merchandise was sold to unrelated purchasers in the United States prior to importation and because exporter's sales price methodology was not otherwise indicated.

After correcting the data used in our calculations for errors and omissions found at verification, we calculated purchase price based on packed F.O.B. prices to unrelated customers. We increased USP by the amount of a price addition claimed by respondent on certain transactions. In accordance with section 772(d)(2)(A) of the Act, we made deductions, where appropriate, for foreign inland freight and pier rental charges.

In accordance with section 772(d)(1)(B) of the Act, respondent requested an addition to USP for the amount of duty drawback claimed by respondent from the Venezuelan government. We disallowed this adjustment, because not only did respondent not show that it actually received drawback on the exports in question, but it also failed to demonstrate that it had a reasonable expectation of ever receiving the drawback amounts claimed. (See Comment 3 in the "Interested Party Comments" section of this notice.)

Foreign Market Value

In order determine whether there were sufficient sales of ferrosilicon in the home market to serve as a viable basis for calculating FMV, we compared the volume of home market sales of ferrosilicon to the volume of third country sales of the same product, in accordance with section 773(a)(1)(B) of the Act. CVG-FESILVEN had a viable home market with respect to sales of ferrosilicon during the POI.

As stated in our preliminary determination, the Department initiated an investigation to determine whether CVG-FESILVEN made home market sales at less than their cost of production (COP).

If over 90 percent of respondent's sales of a given product type were at prices above the COP, we did not disregard any below-cost sales because we determined that the below-cost sales were not made in substantial quantities. If between ten and 90 percent of the sales of a given product type were made at prices below the COP, and such sales were made over an extended period of time, we discarded only the below-cost sales. Where we found that more than 90 percent of respondent's sales were at prices below the COP, and such sales were over an extended period of time, we disregarded all sales for that product type and calculated FMV based on constructed value (CV). Insufficient evidence was presented to indicate that below-COP prices would permit recovery of all costs within a reasonable period of time in the normal course of trade. (See Comment 24.)

In order to determine that below-cost sales were made over an extended period of time, we performed the following analysis on a product-specific basis: (1) If a respondent sold a product in only one month of the POI and there were sales in that month below the COP, or (2) if a respondent sold a product during two months or more of the POI and there were sales below the COP during two or more of those months, then below-cost sales were considered to have been made over an extended period of time.

Respondent requested that the Department not apply the above test to determine whether below-cost sales had been made in substantial quantities. (See Comment 25.) Respondent further requested that, in the event that the Department found it appropriate to exclude below-cost sales, the Department should calculate FMV based on the prices of the next most similar model before resorting to CV. (See Comment 26.) However, as both of these requests require departures from the Department's standard methodology, we have denied them.

In order to determine whether home market prices were below the COP, we calculated the COP based on the sum of the respondent's cost of materials, fabrication, and general expenses. We corrected the COP and CV data reported for errors and omissions found at verification. We relied on the submitted COP and CV data, except in the following instances where the costs were not appropriately quantified or valued:

1. We used best information available (BIA) to determine the cost for electrode paste used in both COP and CV because respondent was unable to substantiate the reported cost at verification. (See Comment 19.)

2. Although respondent and its related parties are members of a related group of businesses in Venezuela (known as the "CVG Group"), respondent failed to allocate any of the selling, general and administrative expenses (SG&A) incurred by the parent company of the group (CVG) to its related parties. As BIA for these costs, we used the amount of fees designed to cover CVG's administrative costs which these companies paid to the parent. Because the related electricity supplier, EDELCA, failed to report these fees, we increased its costs to account for them, based on our findings at verification. (See Comment 11.)

3. Respondent also did not include an allocated portion of CVG's SG&A in its own SG&A expenses. Accordingly, as with the related parties, we used the amount of the fee paid to CVG as BIA. However, because respondent paid no fees during five months of the POI, we also had to use BIA to determine the amount of these fees. As BIA for each month in which respondent paid no fee, we used the amount of the fee reported for the one remaining month of the POI. (See Comment 11.)

4. We increased respondent's SG&A expenses for certain expenses recorded in its books under the account "Expenses Related to Previous Years," because respondent was unable to demonstrate adequately that these expenses did not relate to the POI. (See Comment 14.)

5. We used BIA to determine an amount for respondent's 1992 year-end adjustment to the inventory value of spare parts. As BIA, we applied a certain percentage to the respondent's 1992 cost of manufacture (COM), based on the percentage that this adjustment represented in 1991. (See Comment 15.)

6. We excluded freight expenses from the cost of iron ore supplied by FERROMINERA, a related party, based on our findings at verification. (See Comment 22.)

7. We adjusted the retirement bonus reported by FERROMINERA, based on our findings at verification.

8. We adjusted the costs reported for EDELCA to account for losses made during the transmission of electricity to its customers.

9. As its production cost for December 1991, EDELCA reported its 1991 average monthly cost. In order to express this as a per unit cost, however, EDELCA divided the 1991 average by the actual output of electricity in December 1991. Accordingly, we also revised EDELCA's per unit cost reported for December 1991 by dividing its 1991 average monthly cost by its average monthly output for 1991, in order to more accurately reflect the actual per unit cost incurred.

10. We determined that the transfer prices paid to EDELCA were not at arm's length. Accordingly, for CV purposes, we used the average price charged by EDELCA to its unrelated customers located in the same region as respondent. (See Comment 10.)

11. Respondent based its reported financial expenses and interest income on data recorded in its accounting system during the POI. Moreover, respondent reduced the expenses reported to take into account the anticipated results of a renegotiation of the terms of certain of its debts. We recalculated these expenses based on data taken from respondent's most recent annual financial statement (in this case for 1991). (See Comments 16 and 17.) We then reduced these expenses by the ratio of trade accounts receivable to total assets, in order to avoid double-counting certain imputed interest expenses included in CV (for CV only).

In accordance with section 773(e)(1)(B)(i) of the Act, we included in CV the greater of respondent's reported general expenses, adjusted as detailed above, or the statutory minimum of ten percent of COM. For profit, we used the statutory minimum of eight percent of total COM and general expenses because actual profit on home market sales was less than eight percent. See section 773(e)(1)(B)(ii) of the Act.

In cases where we made price-to-CV comparisons, we made circumstance-of-sale adjustments, where appropriate, for bank charges and credit expenses. Respondent calculated U.S. credit expenses based on the period between invoicing and payment by the customer. We recalculated U.S. credit expenses based on the period between shipment from the factory and payment.

In cases where we made price-to price-comparisons, we adjusted the home market data reported for errors and omissions found at verification. We then calculated FMV based on packed F.O.T. (free on truck) prices to unrelated customers in the home market. We excluded sales to related customers, pursuant to 19 CFR 353.45, as respondent failed to demonstrate that the prices paid by those customers were comparable to the prices paid by unrelated customers. Pursuant to 19

CFR 353.56(a)(2), we made circumstance-of-sale adjustments, where appropriate, for differences in credit expenses and bank charges. We also deducted home market packing costs and added U.S. packing costs, in accordance with section 773(a)(1) of the Act.

Currency Conversion

Because certified exchange rates from the Federal Reserve were unavailable, we made currency conversions based on the official monthly exchange rates in effect on the dates of the U.S. sales as certified by the International Monetary Fund.

Verification

As provided in section 776(b) of the Act, we verified information provided by respondent by using standard verification procedures, including the examination of relevant sales and financial records, and selection of original source documentation containing relevant information.

Interested Party Comments

Comment 1

Petitioners argue that the Department cannot rely on respondent's home market sales listing in order to determine FMV because respondent used an incorrect date of sale methodology. According to petitioners, the Department found at verification that a number of home market sales were made pursuant to "open" orders which do not set an amount or number of shipments, but merely indicate a price and a maximum quantity. Therefore, petitioners state that, respondent improperly reported its home market sales pool because the date of the "open" order is not the correct date of sale. As such, petitioners argue that the Department should either reject respondent's home market sales listing or obtain and verify additional data.

Respondent maintains that its home market sales listing is reliable. According to respondent, it reported as the date of sale the date on which the material terms of the transaction were established. Respondent states that, although a customer may not have required the full quantity of merchandise specified in the purchase order, this fact does not invalidate the date of sale that respondent reported (and the Department verified) for merchandise shipped in accordance with the purchase order.

DOC Position

We agree with petitioners that respondent improperly reported home market date of sale. Based on the information before us, we find that the appropriate date is date of shipment, because this is the date on which the material terms of the transaction (i.e., quantity and price) are fixed.

We disagree, however, that this error is significant enough to warrant rejection of respondent's entire home market sales listing. When the Department follows its normal practice of calculating period-average FMVs, home market date of sale is used only to determine the pool of sales which comprise the FMVs. Therefore, the question is to what extent do we believe that the pool of sales reported is unrepresentative of the company's pricing practices during the POI? To answer this question, we looked at the home market sales listing. Of the transactions included, we found that only a small number was shipped outside the period. Therefore, the vast majority of the home market sales reported were properly included in the database. We also found that the company accurately reported the prices and quantities for these sales.

We note that by using an incorrect date of sale methodology, respondent failed to report its shipments made pursuant to purchase orders issued prior to the POI. Nonetheless, in this case we find that this reason is not compelling enough to reject the home market sales listing. We have no reason to believe that lack of this data skews the results of this investigation to respondent's advantage. On the contrary, to the extent that prices increased in the home market during the POI, as petitioners allege, using the sales data reported would actually be to respondent's detriment because we would be excluding lower priced sales made at the beginning of the POI and including higher priced ones at the end. (Petitioners' allegation is addressed in Comment 2, below.) Consequently, we are using the home market sales data reported by respondent for purposes of the final determination.

Finally, we note that petitioners' argument that the Department should collect additional data is unworkable in this case. Given the statutory time frame under which the Department is required to conduct this investigation, we would be unable to accept petitioners' solution and still meet the deadline for the final determination set out under the law. In any event, we have determined that collection of additional data is unnecessary in this case because we find that the use of the reported data is reasonable.

Comment 2

Petitioners argue that the Department should compare only contemporaneous home market and U.S. sales in making price-to-price comparisons. According to petitioners, under the statute the Department is required to ensure that the calculation of an average (such as a weighted-average FMV) yields a result that is representative of the transactions under investigation. Petitioners argue that using a period-average of home market prices in this case does not result in a representative number, because both price fluctuations and home market price increases occurred during the POI. As support for their position, petitioners cite Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from France; et al.; Final Results of Antidumping Duty Administrative Reviews, 57 FR 28360, (June 24, 1992) ("AFBs"), where the Department stated that it uses annual weighted-average FMVs only when a firm's pricing practices are stable over time.

Respondent argues that the Department should continue to follow its administrative practice for fair value investigations of calculating a period average FMV for each control number. According to respondent, the Department's legal obligation in an investigation is to determine only whether the subject merchandise is being, or is likely to be, sold in the United States at less than fair value; however, in an administrative review, the statute requires more precision due to the fact that the results of the review determine specific liquidation rates for individual entries. Therefore, respondent contends that petitioners' reference to AFBs is inapposite. Finally, respondent notes that, in conducting investigations, the Department frequently encounters situations where U.S. and home market prices fluctuate over time in response to changing market conditions. Therefore, the fact that prices fluctuated during the POI in this investigation does not provide a compelling reason for the Department to deviate from its practice of calculating period FMVs.

DOC Position

We disagree with petitioners. The purpose of an investigation is to determine if there have been sales at less than fair value and to calculate an estimated antidumping duty deposit rate. We consider period weighted-average FMVs to be representative of home market selling practices, and, hence, of fair value for purposes of

calculating an antidumping duty deposit rate.

It is common for prices to fluctuate in accordance with market activity in a given period. Such fluctuations do not necessarily render the weighted-average FMV unrepresentative of home market selling practices during the period.

Given the time constraints in an antidumping duty investigation, the Department will depart from its normal practice of calculating period average FMVs and use averages covering a smaller time period when the issue is raised by a party to a proceeding and that party provides credible evidence that the period averages are not representative of home market pricing practices in the POI. (See, e.g., Final Determination of Sales at Less than Fair Value: Dynamic Random Access Memory Semiconductors of One Megabit and above From the Republic of Korea, 58 FR 15476 (March 23, 1993) ("DRAMs").) For example, the party could show that there is a significant time-price correlation for the sales base and that significant price variances between the POI weighted-averages or the other-period averages exist.

Specifically in this case, although petitioners have raised this issue, they have failed to show a correlation between time and price for a significant portion of the home market sales base or have not explicitly shown there is a significant variation from the mean for the price of any product. Accordingly, we have continued to use our standard practice of comparing weighted-average FMVs to individual U.S. prices for purposes of the final determination.

Comment 3

Respondent maintains that the Department erred in its preliminary determination by disallowing its claim for duty drawback, even though, by its own admission, respondent has not yet received duty drawback on any sale and it is unlikely that it ever will.

Respondent bases its argument on the premise that the Department should consider certain commercial considerations which it claims were valid at the time that it set its prices to the United States. Specifically, respondent argues that not only did it expect to receive duty drawback on export sales at the time that it set its U.S. prices, but also it considered this factor when negotiating with U.S. customers. Respondent claims that, had it known that duty drawback would not be available, it would have refused the sale or negotiated a higher price. Consequently, respondent argues it should not be penalized because the commercial circumstances underlying the sale (i.e., the drawback program) changed after the transaction was consummated.

Moreover, respondent argues that the Department verified that it filed for duty drawback after its U.S. shipments were made. Respondent implies, therefore, that this serves as proof that it believed the program to be viable at the time that it set its prices.

Petitioners state that respondent is ineligible under section 772(d)(1)(B) of the Act for a duty drawback adjustment. This provision states that a company is allowed a claim only for the "amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States." Petitioners note that respondent failed to show that it actually received duty drawback and, further, failed to demonstrate it had a reasonable expectation of ever receiving the amounts claimed. Accordingly, petitioners contend that, consistent with its practice and with the plain language of the statute, the Department should continue to disallow this adjustment for the final determination.

DOC Position

We agree with petitioners. According to section 772(d)(1)(B) of the Act, in order to qualify for duty drawback, a company must show that either it actually received a rebate of import duties or the government did not collect duties on its imports by reason of subsequent exports to the United States. In this case, respondent has admitted not only that it did not actually receive a refund of any import duties from the government of Venezuela, but also that it paid no import duties on any input (and therefore these duties could not be "not collected by reason of subsequent exports"). Accordingly, we find that respondent is ineligible for duty drawback under section 772(d)(1)(B).

We disagree with respondent that we should allow an adjustment based upon its belief or expectation. The measurement of less than fair value sales must be based on actual, measurable events. Indeed, the statute clearly lays out the conditions that must be met in order to qualify for an adjustment. Consequently, we have continued to disallow respondent's claim for duty drawback for purposes of the final determination.

Comment 4

At verification the Department found that respondent incorrectly calculated the interest rate used in the calculation of U.S. credit expense. Accordingly, petitioners contend that the Department should recalculate U.S. credit expense using BIA for this interest rate. As BIA, petitioners state that the Department should use the highest rate found for any loan examined at verification.

Respondent agrees that it misreported its U.S. interest rate. However, according to respondent, the rate that it reported was higher than the correct rate. Therefore, respondent contends that the Department should use the rate that it originally reported as BIA.

DOC Position

We agree with respondent and have accepted the rate initially reported, as BIA. At verification, our review of the relevant documentation revealed that the reported rate was higher than the rate paid during the POI. It would have been appropriate to use the more adverse number suggested by petitioners only if we had found that CVG-FESILVEN was uncooperative or that the mistake was intentional. However, the error in question appears to have been inadvertent and was not in the company's favor. Moreover, respondent has cooperated fully in this investigation. Accordingly, we have used the rate reported for purposes of the final determination.

Comment 5

According to petitioners, the Department found at verification that CVG-FESILVEN reported its home market prices net of the price charged for packing. Therefore, petitioners contend that the Department should increase these home market sales prices by the amount of profit realized on sales of packing materials.

DOC Position

In our calculations, we included the price of packing materials invoiced by respondent to its customer as part of the gross price. Following our normal methodology, we then deducted the cost of these materials from the gross price, thereby including the profit realized on the sale of packing materials in the net price. Nonetheless, because we found at verification that CVG-FESILVEN correctly included the price of packing materials in the gross unit prices reported in its home market sales listing for all but one sale during the POI, the adjustment requested by petitioners is not necessary for the majority of home market sales. For the one sale in question, however, we added to the gross price the price of packing materials shown on the customer invoice, before deducting the cost of these materials.

Comment 6

Respondent claims that the Department's postponement of the preliminary determination in this investigation was unlawful. For this reason, respondent maintains that (1) petitioners' allegation that respondent made home market sales at prices below cost was untimely and (2) the resulting COP investigation is invalid. Respondent further contends that the Department has the ability to remedy this procedural error by rescinding the initiation of the COP investigation and returning respondent's cost data.

Specifically, respondent alleges that petitioners' request that the Department postpone the preliminary determination did not comport with the statute, legislative history, or the Department's regulations regarding the specific limitations on the authority to postpone preliminary determinations. According to respondent, the Department has the authority to postpone a preliminary determination only (1) very infrequently so as not to avoid the clear and reasonable deadlines required by the law, (2) upon a showing of good cause, and (3) in the absence of compelling reasons to deny the request.

According to respondent, not only did petitioners not show good cause for the postponement, but the Department ignored respondent's compelling reasons to deny the request: That respondent was entitled to a prompt completion of the investigation to minimize commercial uncertainty attendant to the investigation; that postponing the preliminary determination negated respondent's procedural right not to be subject to a COP investigation; and that the postponement would not further the Department's investigation.

Petitioners state that respondent's argument regarding the postponement ignores the Department's established standard for granting postponements requested by petitioners. Moreover, they assert that respondent's argument confuses the two independent statutory provisions for postponement of preliminary determinations (sections 733(c)(1)(A) and 733(c)(1)(B) of the Act, which deal with requests by petitioners and extraordinarily complicated investigations, respectively). According to petitioners, only section 733(c)(1)(A), the section on which the Department relied for the postponement, applies. Petitioners note that under this section the burden is on respondent to show compelling cause to deny a petitioner's request. In this case, petitioners submit that respondent's reasons were not compelling. Petitioners conclude that, because the Department properly postponed the preliminary determination, their COP allegation was timely and the resulting cost investigation was legal.

DOC Position

We agree with petitioners. Section 353.15(c) of the Department's regulations (19 CFR 353.15(c)) reads as follows:

> If the petitioner, not later than 25 days before the scheduled date for the Secretary's preliminary determination, requests a postponement and states the reason for the request, the Secretary will postpone the preliminary determination to not later than 210 days after the date of filing of the petition, unless the Secretary finds compelling reasons to deny the request.

See section 733(c)(1) of the Act.

Because petitioners' request for a postponement was timely under sections 733(c)(1)(A) and 19 CFR 353.15(c), and because we determined that respondent's reasons for denying the request were not sufficiently compelling, our postponement conformed to the requirements set out in the Act. Consequently, because the postponement of the preliminary determination was lawful, we determine that petitioners' COP allegation was timely. Accordingly, we have not rescinded the COP investigation, nor have we returned respondent's data.

Comment 7

Petitioners argue that the Department should increase respondent's reported depreciation, using BIA, because respondent incompletely reported the depreciation expenses recognized in its accounting system during the POI. Petitioners note the following: Under Venezuelan Generally Accepted Accounting Principles (GAAP) in effect during (and before) the POI, Venezuelan companies were required to record depreciation expense based on the historical cost of their fixed assets. However, in deviation from Venezuelan GAAP and prior to the POI, respondent revalued its fixed assets and began recording depreciation based on this higher amount. After the POI, respondent reconsidered this decision and reversed the depreciation taken on the revalued portion of the assets. In its questionnaire response, respondent reported depreciation based on historical cost. Petitioners contend that respondent should be required to report the depreciation that it actually recognized in its books and records during the POI (i.e., the amount based upon the value of its revalued assets). According to petitioners, this amount more accurately reflects respondent's true costs of operation. Moreover, petitioners state that the Department has the authority to reject use of a country's GAAP if they do not reasonably reflect the costs incurred by a company.

Petitioners seem to imply that respondent reversed its method of calculating depreciation solely for the purpose of reducing the production costs reported to the Department. In addition, petitioners state that there is no evidence on the record to indicate that respondent reversed the revaluation of the assets themselves, but only that it reversed the depreciation expense related to those assets.

In order to calculate the additional expense, petitioners suggest a BIA amount based on the amount of revaluation-related depreciation reported in the cost deficiency response.

Respondent contends that it correctly based its depreciation expenses on historical costs, in accordance with both Venezuelan and U.S. GAAP. According to respondent, this method is also consistent with both the legislative history of the antidumping law and Department practice. In support of this premise, respondent cites Final Results of Antidumping Duty Administrative Review: Stainless Steel Hollow Products from Sweden, 57 FR 21389, (May 20, 1992), where the Department accepted depreciation expenses based on historical cost, even though the respondent recorded depreciation in its own accounting system based on replacement costs.

Finally, respondent states that the historical cost reflects the actual cost that the company incurred when it purchased its assets. Consequently, respondent contends that using historical costs to calculate depreciation creates no distortion in the costs used for the final determination.

DOC Position

We agree with respondent that depreciation in this case should be based on CVG–FESILVEN's historical asset cost. It is the Department's practice to follow GAAP used in the home country of the respondent, unless it is shown that the foreign GAAP materially differs from U.S. GAAP and that the difference distorts the respondent company's actual production costs. (See, e.g., Final Determination of Sales at Less Than Fair Value: New Minivans from Japan, 57 FR 21937 (May 26, 1992) ("Minivans"), Final Determination of Sales at Less Than Fair Value: Stainless Steel Hollow Products from Sweden, 52 FR 37810 (Oct. 9, 1987).) Therefore, because respondent calculated depreciation in accordance with Venezuelan GAAP in effect during the

POI and because there is no indication that determined that this calculation is distortive, we have accepted it for purposes of the final determination.

Comment 8

Petitioners argue that, because respondent incurred expenses during the POI related to the modernization of two of its furnaces, the Department should include depreciation expenses related to this project in its calculation of COP. Petitioners argue that the existing furnaces were used in production during the POI; therefore, they state that any capital improvements to either furnace would have been related to production of subject merchandise during the POI. Accordingly, petitioners state that respondent's failure to report depreciation on these assets is not in accordance with GAAP, under which the costs related to the modernization of respondent's furnaces would be recognized as soon as the improvements may be used.

Respondent claims that its treatment of modernization expenses comports with GAAP. Respondent claims that only certain storage facilities were completed and used by the company during the POI and that it reported the depreciation expense related to those facilities in its questionnaire response. Thus, respondent states that it properly included in the depreciation calculation only those assets used during the POI.

DOC Position

We agree with respondent. Under GAAP, a company is not required to recognize depreciation expense on an asset until the company begins to use that asset in its production. At verification, we confirmed that the only assets related to respondant's modernization and expansion project used during the POI were the storage facilities noted above. Moreover, we confirmed that respondent reported depreciation expense related to these facilities in its cost response. Therefore, we find that respondent properly reported its depreciation expenses related to the project and determine that no additional adjustment is necessary.

Comment 9

According to petitioners, the Department should depart from its general practice of using related-party production costs in the calculation of respondent's COP, and instead use the reported transfer prices, or BIA as applicable, for those costs. Petitioners base this contention on the fact that both respondent and its related parties are members of a business group, consisting of a number of companies having the same parent (Corporacion Venezolana de Guayana (CVG)), additional intertwined ownership, and mutual business dealings. Petitioners state that construction of a COP for each of CVG–FESILVEN's five related suppliers would require the Department to track through COPs for a number of other companies and that this would involve an endless series of circular calculations. Petitioners imply that CVG–FESILVEN has not appropriately tracked its related-supplier costs through this system. Moreover, petitioners maintain that CVG–FESILVEN has inconsistently and inadequately allocated CVG's costs to each of the five companies (and to itself). (See Comment 11, below.)

As BIA, petitioners contend in general that the Department should use the higher of the transfer prices reported or the price information contained in the record for unrelated parties.

Respondent contends that Department precedent requires the calculation of its COP using related-party costs. According to respondent, the Department uses costs in its analysis in order to eliminate intracorporate profits that might be earned on transfer prices. Further, respondent states that it provided detailed COPs for all of its related suppliers (except CONACAL, a minor supplier of limestone), and that the Department successfully verified the costs reported by three of these companies.

DOC Position

We disagree with petitioners that it is appropriate to reject the related-party costs reported in this investigation. The Department's normal practice is to accept related supplier costs based, in part, upon transfer prices between the supplier and its related companies. In past cases, the Department has departed from this practice by investigating the transfer prices and COPs of the related party's related supplier, as petitioners imply is called for here, but we have done so only when petitioners have supplied timely, credible evidence that such an approach was warranted. (See, e.g., Minivans) We note that if petitioners in this investigation wanted the Department to further investigate the potential upstream transfers that they allege are occurring, they should have raised the issue earlier in the proceeding than in their case brief.

Moreover, to the extent that we observed that CVG–FESILVEN's related suppliers purchase inputs used in their own production from CVG group members, we noted that the transfer prices were higher than the costs reported for the group member. For example, we noted at verification that FERROMINERA (CVG–FESILVEN's related iron ore supplier) purchases energy from EDELCA (the related electricity company) at a price higher than EDELCA's reported production costs. Therefore, to the extent that FERROMINERA included the transfer price for energy in its reported costs, its COP is higher than it would have been had it reported EDELCA's costs.

Accordingly, we find that it would be inappropriate to reject respondent's related-party costs. Consequently, we have used them for purposes of the final determination.

Comment 10

According to petitioners, respondent bears the burden of showing that the transfer prices paid to related parties are at arm's length for purposes of calculating CV. Petitioners state that respondent failed to meet its burden for all of its related suppliers.

Specifically, petitioners question the validity of the methodology offered by respondent to demonstrate the arm's length nature of purchases from four of the five related party suppliers (i.e., FERROMINERA, CONACAL, PROFORCA (a supplier of woodchips) and SIDOR (a supplier of electrode paste). According to petitioners, a comparison of two (or more) selected invoices is not sufficient; rather, petitioners contend that CVG–FESILVEN should have provided a detailed analysis, comparable to the type required to determine whether sales to a related party are at arm's length (e.g., accounting for differences in credit terms and direct selling expenses), especially since related parties in this case apparently are not required to pay for goods or services within any set time period.

Moreover, regarding the remaining related supplier, EDELCA, petitioners state that, not only did the Department find at verification that EDELCA charges higher rates to unrelated parties, but also the transfer price charged to CVG–FESILVEN was preliminarily found to be preferential in the companion countervailing duty (CVD) case. Therefore, petitioners assert that these prices also are not at arm's length.

Accordingly, petitioners argue that the Department should reject the transfer prices reported because CVG–FESILVEN failed to demonstrate that they were at arm's length. Rather, petitioners state that the Department should use BIA to determine the appropriate price and that it should use this price in both COP and CV.

Petitioners propose the following alternatives to use as BIA: (1) FERROMINERA—the transfer price on the invoice used in CVG–FESILVEN's arm's-length comparison; (2) PROFORCA—the average price paid to an unrelated woodchip supplier; (3) EDELCA—the average rate charged to unrelated customers; and (4) SIDOR—complete BIA (see Comment 19).

Respondent contends in general that its arm's-length test was sufficient and that, applying this test, it adequately demonstrated that the transfer prices that it paid were comparable to market prices. Specifically regarding EDELCA, respondent states that not only is the rate that it pays very close to the rates charged to two of EDELCA's unrelated customers, but also that its rate for the first six months of 1992 is higher than the average rate charged to other customers in the same general region during the same period. Moreover, respondent notes that the preferential rates found in the CVD case were based on an analysis of 1991 rates, not the rates in effect during the POI in this investigation, and that it is contesting the Department's decision for final determination in that case.

DOC Position

In general, in determining whether related party supplier transactions are at arm's length, the Department accepts a comparison of gross invoice prices, absent a compelling reason not to do so. (See, e.g., Final Determination of Sales at Less Than Fair Value: Certain Granite Products from Italy, 53 FR 27187 (July 19, 1988).) In this case, we find that the data provided by respondent to demonstrate that its transfer prices reflected market value was sufficient.

Accordingly, regarding FERROMINERA and PROFORCA, because (1) the prices paid by respondent to FERROMINERA and PROFORCA were at or above the prices either charged by these companies to unrelated customers or paid by respondent to an unrelated party, and (2) there is no evidence on the record of this investigation that leads us to believe that the terms of sale between these related parties are materially different from the terms of sale to unrelated parties, we have determined that they were at arm's length. Consequently, we have used these prices in our calculation of CV.

Regarding EDELCA, however, because the price paid by respondent during December 1991 through May 1992 was lower than the price charged by EDELCA to its unrelated customers in the same region and the same period, not at arm's length. Accordingly, in our CV calculation, we used the average price charged by EDELCA to its unrelated customers in the same region during the POI.

Finally, regarding SIDOR, we found that this company was unable to substantiate its reported costs at verification. Therefore, as BIA, we have determined that the transfer price reported for electrode paste was not at arm's length. Accordingly, we have used the same cost for electrode paste in both COP and CV. (See Comment 19.)

We recognize that our arm's length test for supplier transactions differs from the test performed to determine whether sales transactions are at arms-length. However, the arm's length nature of related supplier transactions generally has less of an impact on the results of an investigation than that of related party sales transactions for the simple reason that related supplier prices are used only in the calculation of CV and then generally only for a small number of inputs. Therefore, it is the Department's position that the additional administrative burden created by performing the same test is not justified in every cost investigation.

Moreover, to perform the same test, the Department would be required to collect the same type of data (i.e., on credit periods, direct selling expenses, etc.) related to both the related and unrelated party supplier transactions. While this data is already part of the record for sales transactions, it is not part of the information routinely solicited in a cost investigation. Therefore, without specifically requesting this data in cost cases, the Department does not have the same ability to perform a similar analysis. This is not to say, however, that the Department will never solicit this data or perform a more detailed test; when we have reason to believe that a comparison of gross prices is inadequate early enough in an investigation to request additional data from the respondent, we will do so. In this case, however, petitioners have raised this issue too late in the proceeding for us to request supplemental data or to perform a different analysis. Accordingly, we have used the data already available to us to make the company-specific determinations noted above.

Comment 11

Petitioners contend that the costs reported for both respondent and its related-party suppliers are understated because respondent failed to allocate general, and administrative expenses (SG&A) incurred by CVG.

Petitioners maintain that it was inappropriate for respondent to report the fees paid to CVG as a surrogate for allocating CVG's actual costs. Petitioners reason that use of this method implies that the services provided by CVG are proportional to the income of CVG Group members and that group members do not benefit from CVG's services if they are not profitable in any given year. Petitioners note that respondent did not report any fee for 1992 because it did not make an operating profit in that year. Moreover, petitioners note that respondent failed to report this fee altogether for certain of its related suppliers (e.g., EDELCA and PROFORCA).

Respondent contends that use of the fee provides an acceptable allocation methodology. According to respondent, all of its dealings with CVG are on an arm's-length basis; therefore, the fee provides a sufficient distribution of CVG's costs. Moreover, it states that the total fees that CVG receives from its subsidiaries significantly exceed CVG's total operating expenses. Therefore, according to respondent, CVG's costs have been completely allocated to its subsidiaries. Finally, respondent maintains that, while any given company's profits may vary from period to period, over the long term the fee that the company pays will more than cover its share of CVG's costs.

Respondent contends that, if the Department disagrees with its argument that the company pays its fair share of the fees over the long term, it should use the amount of the fee that respondent paid in December 1991 as BIA for each of the five months of the POI for which it reported no cost. It also states that the Department should increase SG&A for its energy supplier, EDELCA, by the actual amount of the fees that EDELCA paid during the POI, because it inadvertently omitted reporting these expenses.

DOC Position

We agree with petitioners that CVG's SG&A costs should have been allocated to all members of the CVG Group, regardless of profitability. Because we have neither the financial statements of all of the group members nor a consolidated group financial statement, we have no way to allocate CVG's actual SG&A to the respondent and its related suppliers. However, because the fees paid to CVG allowed it to more than recover its costs (both in 1991 and 1992), we have used them, as BIA.

Regarding CVG–FESILVEN, even [illegible]

1992 (and therefore was not required to pay a fee to CVG), under Department practice it still should have reported an allocated portion of CVG's SG&A for the five months of the POI that fell in 1992. Consequently, we have used BIA to determine an amount for each of these five months. As BIA, we used the amount of the fee that respondent paid in December 1991.

Regarding EDELCA, we increased EDELCA's costs by the amount of the fee found at verification. Regarding PROFORCA, however, we did not add an amount to the cost of the woodchips produced by this company because the woodchips are produced as a by-product of PROFORCA's normal production process. Because the Department's practice regarding by-products is to examine only incremental costs (and because a parent company's SG&A is not an incremental cost), we made no adjustment to the costs reported to account for PROFORCA's proportional share of CVG's SG&A. (See Comment 20.)

Comment 12

Petitioners contend that the financing expenses reported for both respondent and its related-party suppliers are understated because respondent failed to allocate a portion of CVG's financing expenses to these companies. According to petitioners, the Department has a well-established practice of calculating financing expenses based on the borrowing experience of the consolidated group of companies. Because CVG has the power to determine the capital structure of each of its subsidiaries, petitioners contend that it is necessary to use the consolidated expenses of the CVG Group in each company's COP calculation.

Respondent argues that it properly reported its financing expenses because (1) it obtains no financing through CVG, and, accordingly, it received no benefit from any financing that CVG has received and (2) the fee that it and the other subsidiaries pay covers the CVG's full operational costs, including CVG's total financing costs. Therefore, respondent states that to include both the CVG fee and an additional amount for CVG's financing costs would result in the Department's double-counting these expenses.

DOC Position

According to CVG's financial statements, the fees that it collects from its subsidiaries is sufficient to cover both its SG&A and financing costs. Because we have included the amount of the fees paid by respondent and its related parties during the POI in our calculations, we find that including an additional amount for financing expenses would result in our double-counting of these costs. Accordingly, we determine that no additional adjustment is necessary for purposes of the final determination.

Comment 13

Petitioners contend that respondent either deducted excessive amounts of movement expenses from its reported SG&A costs or understated the movement expenses reported in its U.S. sales listing. According to petitioners, large discrepancies exist between the two amounts. Therefore, petitioners maintain that the Department should either disallow the adjustment to COP or increase U.S. movement expenses accordingly.

Respondent argues that no inconsistency exists. According to respondent, the movement expenses reported as a reduction to SG&A are larger than those reported in the U.S. sales listing because they also relate to third country and pre-POI shipments, as well as to U.S. sales during the POI. Moreover, respondent notes that the reduction to SG&A expenses also includes packing materials and sales commissions paid on third country sales. Thus, respondent maintains that it correctly reported both its reduction to SG&A and its U.S. movement expenses.

DOC Position

We agree with respondent. At verification, we examined both the reduction to SG&A noted above and U.S. movement expenses. Because we found that they had been properly reported, we have accepted them for purposes of the final determination.

Comment 14

Petitioners contend that the Department should increase respondent's SG&A expenses for certain expenses recorded in its books during the POI under an account entitled "Expenses Related to Previous Years." According to petitioners, at verification respondent was unable to demonstrate adequately that these expenses did not relate to the POI.

DOC Position

We agree. At verification, we found that certain of these expenses did, in fact, relate to the POI. Consequently, because respondent was unable to support its exclusion of these expenses, we have increased the reported SG&A expenses by their full amount.

Comment 15

At verification, the Department noted that respondent did not report an amount for a 1992 year-end adjustment to the inventory value of spare parts, as it had for 1991. Petitioners contend that, because CVG–FESILVEN was unable to estimate this expense for the remaining five months of the POI at verification, the Department should use BIA to determine it. As BIA, they state that the Department should the use amount reported for December 1991, multiplied by five.

DOC Position

We agree that CVG–FESILVEN improperly did not estimate the amount of this adjustment related to 1992. Throughout the investigation, the Department requested that respondent provide estimations for all year end adjustments made at the end of 1992. Accordingly, we used BIA to determine the appropriate amount for this adjustment. As BIA, however, we determined the percentage of the respondent's December COM represented by the adjustment, and then applied this percentage to the COM of the remaining five months of the POI. We did not use petitioners' methodology because the use of a percentage of COM is reasonably adverse and respondent, overall, has cooperated in this investigation.

Comment 16

Petitioners contend that the Department should disallow, either in whole or in part, the interest income claimed by respondent as an offset to interest expenses during the POI. According to petitioners, respondent reported only a subset of its interest expenses (i.e., the company did not report interest associated with an expansion and modernization project); therefore, petitioners contend that it would be inappropriate to offset this subset of expenses with the full amount of interest income. Rather, at a minimum, petitioners propose that the Department disallow the amount of the income which should have been offset against the expansion and modernization project interest.

Moreover, petitioners note that the Department found at verification that some of the interest income claimed in December 1991 related to interest earned prior to the POI. Therefore, petitioners contend that there is a basis for completely disallowing the offset.

Respondent concedes that the Department should reduce its December income to account for pre-period interest earnings; however, it argues that

the Department should allow the remainder of the offset, in accordance with the Department's past practice. Specifically, respondent states that the Department's practice is to offset interest income from operations against interest expense from operations. Respondent notes that, under GAAP, capitalized interest expense is not a current (i.e., operating) expense, and, as such, properly does not form part of the expenses against which short-term interest income should be offset. Therefore, because the interest expense associated with its expansion and modernization project was capitalized, it followed the Department's practice. Accordingly, respondent maintains that the Department should allow the offset.

DOC Position

We disagree with petitioners. It is the Department's practice to offset current interest expense with short-term interest income. Accordingly, not only would it be inappropriate to offset short-term interest income against both current and capitalized interest expenses, but it would also be against the Department's practice to do so.

Regarding petitioners' other argument (on the December 1991 portion of the offset), the Department calculates net financial expenses using data from respondent's most recently completed fiscal year (in this case, 1991) since we determine that interest expense and revenue are not fully accounted for until year-end adjustments are made. Therefore, because we do not base our offset calculation on expenses or income recorded in the POI, this argument is not relevant.

Comment 17

Petitioners argue that the Department should use the actual amount of interest recorded in respondent's books during the POI in the calculation of COP and CV. According to petitioners, respondent impermissibly reduced these expenses based on its belief that the actual interest that the company will pay once its payments are resumed will be a lower rate than the amount accrued, due to the fact that the Venezuelan government is in the process of renegotiating the interest rate applicable to the company's long-term debt. (Service of this debt was suspended at the beginning of the renegotiation process.) Consequently, in accordance with the Department's general practice of using actual costs, the Department should reject any adjustment of accrued interest expense to account for the proposed results of the renegotiations.

Respondent argues that it properly reported its interest expenses because (1) the expenses reported reflect the rate that is most likely to apply once the negotiations are concluded, and (2) they overstate of the company's actual costs during the POI. On this last point, respondent notes that it actually paid no interest during the POI, and therefore it incurred no actual costs.

DOC Position

We agree with petitioners. In accordance with the Department's practice, we have used the actual expenses reflected in the company's books for purposes of the final determination.

Comment 18

According to petitioners, EDELCA has not reported a fully allocated COP. Specifically, petitioners provide two arguments: First, EDELCA reported in the companion CVD investigation that it is in the process of imposing rapid rate increases on its customers in order to allow it to recover its long-term average incremental costs. According to petitioners, therefore, if the 1992 transfer prices are designed to cover EDELCA's long-term costs, then these transfer prices should be approximately the same amount as (or at least be no less than) EDELCA's fully allocated COP. However, petitioners note that the COP calculated is, in fact, less than the average transfer price reported.

Second, petitioners state that EDELCA's reported COP cannot be reconciled with either its own financial statements or EDELCA's public statements. Specifically, petitioners state that EDELCA did not fully report the depreciation expenses reflected on its financial statements. In addition, petitioners cite a newspaper article which asserts that EDELCA's costs are significantly different than those reported to the Department.

As BIA, petitioners contend that the Department should use the average rate charged to EDELCA's unrelated customers. Petitioners maintain that this methodology is appropriate because the transfer prices between EDELCA and respondent are not at arm's-length.

Respondent contends that the Department's practice is to require companies to report their average costs during the POI, not their marginal or incremental costs. According to respondent, because EDELCA has done this, the Department should accept these costs.

Respondent states that rate increases referenced by petitioners are part of EDELCA's long-term policy of phasing in higher rates. According to respondent, EDELCA is currently building an additional generating facility; therefore, its rate increases are designed to allow its customers to adjust to the higher rates which will be necessary in the future in order for EDELCA to cover the costs of constructing this new facility. Respondent notes that, under GAAP, EDELCA is not required to recognize the costs associated with this future facility until it goes on line in 1995.

Moreover, respondent states that EDELCA's verified cost data are consistent with its financial statements. Respondent notes that the depreciation referenced by petitioners was distributed among several cost categories; therefore, because petitioners compared depreciation reported for one category to the total amount shown on the financial statements, their contention that this expense was understated was in error.

Finally, regarding the newspaper article cited by petitioners, respondent questions its legitimacy because petitioners fail to cite not only the source of the article, but also the time period to which the article refers. Nonetheless, respondent maintains that the data in the article also are not inconsistent with the costs reported to the Department. Respondent notes that the expenses referenced by the article include both expenses related to current operations and capital investment activities. According to respondent, it properly excluded investment-related costs because they were capitalized by EDELCA and were not recognized as expenses during the POI.

DOC Position

We agree with CVG–FESILVEN. In antidumping duty investigations, the Department's policy is to require respondents to report their average costs during the POI, not their marginal costs. This policy is in accordance with GAAP, which does not require companies to recognize capitalized costs related to investments until the investments are used in the companies' production. By requiring respondent to report EDELCA's long-term average incremental costs, the Department would be departing from its practice and from GAAP. Therefore, because we found at verification that, with the exception of the fees paid to CVG, EDELCA had completely reported its average production costs during the POI (including depreciation), we have accepted these costs for purposes of the final determination.

Comment 19

Petitioners contend that the Department should reject the COP reported by respondent's related party supplier of electrode paste (SIDOR) because this company was unable to substantiate its costs at verification. Accordingly, petitioners contend that the Department should use BIA for the COP of this input. As BIA, petitioners maintain that the Department should use either the cost provided in their below-cost allegation or the highest reported price charged by SIDOR to its unrelated customers for electrode paste.

Respondent agrees that SIDOR was unable to substantiate its cost data at verification. As BIA, respondent contends that the Department should use SIDOR's highest price to unrelated customers.

DOC Position

We agree that SIDOR's costs failed verification and have therefore used BIA to determine these costs. As BIA, we have used the highest price charged by SIDOR to any of its unrelated customers. This number is more appropriate than the cost for electrode paste provided in the below-cost allegation because CVG–FESILVEN has cooperated fully in this investigation.

In addition, because the BIA number is higher than the transfer price, we determine that the transfer price is not at arm's length. Accordingly, we have used the BIA amount in both our COP and CV calculations.

Comment 20

Petitioners contend that respondent underreported the costs provided by its related party supplier of woodchips (PROFORCA). According to petitioners, although PROFORCA produces woodchips as a by-product during the production of its main product, lumber, the company still incurs certain costs associated with the woodchips themselves (e.g., collecting the woodchips and moving them to a silo for storage, depreciation on the silo, etc.). Because respondent did not report these costs, petitioners contend that the Department must use BIA to determine them. As BIA, they state that the Department should use the average price that respondent paid to its unrelated woodchip supplier, PROMASO.

Respondent disagrees. According to respondent, PROFORCA demonstrated during verification that woodchips are a waste product that the company routinely hauls away to a local landfill. Since the sale of woodchips eliminates the need for PROFORCA to haul the waste material away, PROFORCA saves money by selling woodchips. Therefore, respondent maintains that the transportation-only cost that PROFORCA reported is conservative, because this material actually has a negative cost for the company.

DOC Position

In determining the cost that should be reported for by-products, generally incremental costs incurred to produce or sell the product are the only costs considered because by-products are products which result from the manufacturing of the primary product and have little residual value. Therefore, we have used PROFORCA's costs as reported (i.e., only the costs associated with transportation to CVG–FESILVEN's factory) because this is the only incremental cost that PROFORCA incurs.

Comment 21

Petitioners contend that the Department should reject the costs supplied by FERROMINERA because they were improperly based on the cost of goods sold (COGS) during the POI, rather than the cost of goods produced.

CVG–FESILVEN maintains that it reported FERROMINERA's COP, not COGS. However, it contends that, even if it had reported FERROMINERA's COGS, these costs would not have been distortive because FERROMINERA's inventory level was small and declined during the POI; therefore, inventory would have had little impact on the reported cost data even if such data were based on COGS. Moreover, CVG–FESILVEN notes that the Department has found COGS to be an appropriate source for cost data in other cases.

DOC Position

After reviewing FERROMINERA's financial statements, as well as the data reported, we believe that FERROMINERA's data were based on COGS. However, we agree with respondent that the Department has found COGS to be an appropriate source for cost data in the past. Moreover, in this case, given FERROMINERA's small inventory level, we do not believe that use of COGS results in distortion of the margin analysis performed for the final determination. Accordingly, we have accepted the data reported.

Comment 22

According to the cost verification report, respondent double-counted freight costs when reporting FERROMINERA's production cost for iron ore, because it included (1) delivery costs incurred outside the POI as part of FERROMINERA's costs, and (2) the costs associated with picking up the iron ore itself as part of its own SG&A.

Petitioners disagree that these costs were double-counted. Rather, petitioners contend that these expenses may have been excluded completely because the weighted-average price reported for iron ore in respondent's COP does not include freight costs. Further, petitioners imply that freight expenses on purchases are not reported as part of respondent's SG&A, because they state that it is unclear that respondent's adjustment to SG&A for movement expenses relates only to sales (as opposed to purchases of materials).

DOC Position

We disagree. At verification, we found that during the POI respondent used its own trucks to transport its purchases of iron ore to its factory. We also verified that these types of transportation costs not only were reported as part of respondent's SG&A, but also that they did not form part of the reduction to SG&A for movement expenses.

The discrepancy arose because, after the POI, FERROMINERA began delivering the merchandise using an outside delivery service. In its questionnaire response, respondent misreported the amount paid to the delivery company as part of the cost of production of iron ore. Consequently, because we found that respondent incorrectly reported freight costs that it did not incur during the POI, we have reduced the costs reported for iron ore accordingly.

Comment 23

According to CVG–FESILVEN, the company experienced unusual production problems during the POI which resulted in abnormally high costs that distort its COP. Therefore, respondent requests that the Department "normalize" its POI costs by using its reported production costs, adjusted for pre-period efficiency rates. As precedent for its request, respondent cites Oil Country Tubular Goods From Canada: Final Determination of Sales at Less Than Fair Value, 51 FR 15029 (April 22, 1986) ("OCTG"), where yield rates were normalized to reflect "learning curve" efficiencies that the company had achieved.

Petitioners contend that CVG–FESILVEN does not qualify for the use of "normalized" costs under Department precedent because (1) it has provided insufficient evidence to warrant their use and (2) respondent's difficulties during the POI were equivalent to a normal business occurrence. Moreover, petitioners state

that the Department generally only normalizes costs in a start-up situation, which is not the case here.

DOC Position

We agree with petitioners. By their very nature, a company's costs are a function of its operating efficiency rates. Under the Department's practice, the Department generally relies on actual costs incurred (and operating efficiencies achieved) during the POI when calculating COP. In past cases where the Department has departed from this practice, it has been to exclude certain costs either that the Department considers to be extraordinary in nature or, like in OCTG, that the Department determines do not relate solely to production during the POI (e.g., costs incurred in start-up cost situations). Because we do not consider the costs in question (See Concurrence Memorandum prepared for the Final Determination dated May 4, 1993.) to have been unusual in nature for a manufacturing concern or to be equivalent to start-up costs, we have not accepted respondent's proposed adjustment.

Comment 24

According to respondent, the Department should not exclude any of its sales found to be below-cost because the company's home market prices permit the recovery of all costs within a reasonable period of time in the normal course of trade. Respondent bases its conclusion that the company is recovering costs on a review of its financial statements, as well as on the Department's findings at verification. In the event that the Department finds that these data are inconclusive, respondent urges the Department to consider the POI to be an unreliable period on which to judge the company's ability to recover its costs, due to the fact that the company experienced abnormal production difficulties during the period. Therefore, respondent contends that the Department should place more weight on historical data in its analysis.

Petitioners disagree that the Department should disregard below-cost sales. According to petitioners, the burden is on respondent to prove that it has recovered its costs. In support of this contention, petitioners cite a recent decision issued by the Court of International Trade (CIT) (*Koyo Seiko Co. v. United States*, CIT, Slip. Op. 93–3 (January 8, 1993) *("Koyo Seiko")*, where the court agreed that the Department has the authority to place the burden of proof on respondent. Petitioners maintain that in this case CVG–FESILVEN has not met its burden.

Petitioners provide the following evidence that respondent will not be able to recover its costs: In 1990 and 1991 CVG–FESILVEN's net sales were not sufficient to cover its costs and in 1991 the company was not able to pay preferred dividends because of inadequate profits. In addition, CVG–FESILVEN is in the middle of a large expansion and modernization project which it is unable to complete by its own admission due to cash flow problems.

DOC Position

We agree with petitioners. The burden of demonstrating that a company will be able to recover its costs over a reasonable period of time is on the respondent. (See *Koyo Seiko*.) In this case, we find that respondent has not met that burden.

The Department has developed the practice of comparing a respondent's fully-allocated average actual COP with home market selling prices for purposes of determining that sales are below cost. If those prices are below the COP, we determine that respondent is not able to fully recover its costs within a reasonable period of time. If a respondent can demonstrate adequately that this determination is unreasonable, then we would reconsider our position.

In this case, however, CVG–FESILVEN did not sufficiently demonstrate that it would recover its costs on its below-cost sales made during the POI. We find that a simple analysis of financial statement profitability is inadequate in this instance, because these statements do not unambiguously show that respondent will be able to recover its costs on its home market below-cost sales. Moreover, we note that respondent's reliance on verification findings as proof of its POI profitability is misplaced, because respondent misinterpreted a statement in the cost verification report. (See Cost Verification Report dated March 9, 1993 on page 24.)

Accordingly, we find that CVG–FESILVEN presented insufficient evidence that it would be able to recover its costs over a reasonable period of time. Consequently, we have not included in our analysis below-cost sales which were made in substantial quantities over an extended period of time.

Comment 25

Respondent claims that, when considering its home market database as a whole, it did not make below-cost sales in substantial quantities during the POI. According to respondent, the Department should perform the substantial quantities test on a such or similar category basis, rather than a product-specific basis. In addition, respondent argues that the Department should also include sales to related and unrelated parties in its test, because it generates revenue to both categories of customers.

In support of its argument, respondent cites the final determination in Final Determination of Sales At Less Than Fair Value: Gray Portland Cement and Clinker from Mexico, 55 FR 29244 (July 18, 1990) ("Mexican Cement"), where the Department rejected a COP allegation because it covered only one product representing a small percentage of sales in a such or similar category.

DOC Position

We disagree. Since the decision in Mexican Cement, the Department has changed its practice. In determining whether below cost sales were made in substantial quantities, the Department's current policy is to perform its analysis on a model-specific basis, rather than a such or similar or a class or kind basis. (See, e.g., DRAMs; Final Determination of Sales at Less Than Fair Value: Circular Welded Non-Alloy Steel Pipes from the Republic of Korea, 57 FR 42942 (Sept. 17, 1992) ("Korean Pipe").)

We believe that this policy is in accordance with the intent of section 773(b) of the Act, which sets forth the circumstances under which the Department has the authority to disregard below-cost sales. Because the purpose of this provision is to avoid basing FMV on prices below cost, we believe that this interpretation is accurate since it focuses on the prices actually used for FMV. FMV itself is based on a model-specific comparison, that of the most similar model, rather than on an aggregate comparison of all models in the such or similar category. Therefore, in price-to-price comparisons, the prices of models that are not used in the comparison are irrelevant to the determination of FMV. Similarly, in the cost test, the fact that models not used for comparison are priced above or below cost is irrelevant to determining if the prices to be used for FMV are above or below cost.

Consequently, we have performed the cost test in this investigation on a model-specific basis, in accordance with the Department's policy.

Regarding respondent's request that we perform the cost test using both related and unrelated party sales transactions, we have determined that either using or excluding the related party transactions in question would not

change the results of the test. Accordingly, this issue is moot.

Comment 26

Respondent states that if the Department applies the COP test to individual types of ferrosilicon, it should not automatically resort to CV if it finds insufficient above-cost sales of certain sizes or grades of product. Rather, it should calculate FMV using Venezuelan sales of the next size or grade of ferrosilicon. Respondent cites Koyo Seiko, which stated that the Department must use all potential home market similar merchandise and avoid whenever possible the use of CV. Respondent also cites Final Determination of Sales at Not Less Than Fair Value: Tubes for Tires, Other than for Bicycles, from the Republic of Korea, 49 FR 26780 (June 29, 1984) ("Tubes for Tires"), where the Department determined that if, within a particular size category, insufficient home market sales were made at prices above the cost of production, it would use prices for the next most similar home market merchandise made at or above the COP for comparison purposes.

DOC Position

We disagree. Since the determination in Tubes for Tires, the Department has changed its policy with regard to this issue. (See, e.g., Korean Pipe and AFBs.)

According to section 773(b):

> Whenever sales are disregarded by virtue of having been made at less than the cost of production and the remaining sales, made at not less than the cost of production, are determined to be inadequate as a basis for the determination of foreign market value under subsection (a) of this section, the administering authority shall employ the constructed value of the merchandise to determine its foreign market value.

Therefore, the issue that respondent has raised is, when the sales of a given model cannot be used, whether the Department should use the next most similar model, in order to follow the price preference specified in section 773(a), or go directly to CV as indicated in 773(b).

Prior to determining FMV under section 773(a), the Department must first select the most similar merchandise. Section 771(16) of the Act defines such or similar merchandise and provides a hierarchy of preferences for determining which merchandise sold in the foreign market is most similar to the merchandise sold in the United States. Section 771(16) also expresses a preference for the use of identical over similar merchandise, stating categorically that such or similar merchandise is the merchandise that falls into the first hierarchical category in which comparisons can be made. The cost test is not conducted until after the most similar model match is found under section 771(16).

Section 771(16) requires us to descend through successive levels of the hierarchy until sales of such or similar merchandise are found. However, it does not condition the determination of such or similar on any basis other than similarity of the merchandise. In particular, section 771(16) directs the Department only to use "the first of the following categories * * *" and not to use the next category when the first match is below cost. If this were not the case, the cost test would inappropriately become part of the basis for determining what constitutes such or similar merchandise, which is clearly not the purpose of the cost test. Therefore, because section 771(16) specifies the determination of such or similar merchandise on the similarity of the merchandise only and not on whether the most similar model is sold above cost, section 771(16) directs us to the use of CV when the most similar model is sold below cost.

Moreover, the use of CV lessens the burden on the Department of calculating the dumping margin. If the next most similar match is used, it would require the Department, after rejecting the below cost model, to conduct successive searches of home market sales for the next most similar model until all similar models have been exhausted. This process would have to be followed in all cases in which less than 90 percent of the home market sales were sold below cost.

For the reasons noted above, therefore, we followed our current practice and based FMV on CV for below cost sales, rather than searching for the next most similar home market model.

Continuation of Suspension of Liquidation

We are directing the Customs Service to continue to suspend liquidation of all entries of ferrosilicon from Venezuela that are entered, or withdrawn from warehouse, for consumption on or after December 29, 1992, the date of publication of our affirmative preliminary determination in the Federal Register. The Customs Service shall require a cash deposit or the posting of a bond equal to the estimated amount by which the FMV of the merchandise subject to this investigation exceeds the USP, as shown below. This suspension of liquidation will remain in effect until further notice. The weighted-average dumping margins are as follows:

Manufacturer/producer/exporter	Weighted-average margin percentage
CVG–Venezolana de Ferrosilicio C.A.	9.55
All Others	9.55

ITC Notification

In accordance with section 735(d) of the Act, we have notified the ITC of our determination.

Notification to Interested Parties

This notice also serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 353.34(d). Failure to comply is a violation of the APO.

This determination is published pursuant to section 735(d) of the Act and 19 CFR 353.20(a)(4).

Dated: May 3, 1993.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. 93–11010 Filed 5–7–93; 8:45 am]

BILLING CODE 3510-DS-P

[C-307-808]

Final Affirmative Countervailing Duty Determination: Ferrosilicon From Venezuela; and Countervailing Duty Order for Certain Ferrosilicon From Venezuela

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

ACTION: Notice.

EFFECTIVE DATE: May 10, 1993.

FOR FURTHER INFORMATION CONTACT: Paulo F. Mendes, Office of Countervailing Investigations, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482-5050.

Final Determination

The Department determines that benefits which constitute bounties or grants within the meaning of the countervailing duty (CVD) law are being provided to manufacturers, producers, or exporters in Venezuela of ferrosilicon.

For information on the estimated net bounties or grants, please see the "Suspension of Liquidation" section of this notice.

Case History

Since the publication of the preliminary determination (57 FR 38482, August 25, 1992), the following events have occurred.

We conducted verification from September 22 through 29, 1992. On September 18, 1992, in accordance with section 705(a)(1) of the Tariff Act of 1930, as amended ("the Act"), we aligned the final determination in this investigation with the final determination in the companion antidumping (AD) duty investigation of the subject merchandise.

The parties submitted case and rebuttal briefs on November 17 and November 24, 1992, respectively. A public hearing was not requested. On February 26, 1993, we postponed the final CVD and AD determinations until

Scope of Investigation

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

Ferrosilicon is a ferroalloy produced by combining silicon and iron through smelting in a submerged-arc furnace. Ferrosilicon is used primarily as an alloying agent in the production of steel and cast iron. It is also used in the steel industry as a deoxidizer and a reducing agent, and by cast iron producers as an inoculant.

Ferrosilicon is differentiated by size and by grade. The sizes express the maximum and minimum dimensions of the lumps of ferrosilicon found in a given shipment. Ferrosilicon grades are defined by the percentages by weight of contained silicon and other minor elements. Ferrosilicon is most commonly sold to the iron and steel industries in standard grades of 75 percent and 50 percent ferrosilicon.

Calcium silicon, ferrocalcium silicon, and magnesium ferrosilicon are specifically excluded from the scope of this investigation. Calcium silicon is an alloy containing, by weight, not more than five percent iron, 60 to 65 percent silicon and 28 to 32 percent calcium. Ferrocalcium silicon is a ferroalloy containing, by weight, not less than four percent iron, 60 to 65 percent silicon, and more than 10 percent calcium. Magnesium ferrosilicon is a ferroalloy containing, by weight, not less than four percent iron, not more than 55 percent silicon, and not less than 2.75 percent magnesium.

Ferrosilicon is classifiable under the following subheadings of the Harmonized Tariff Schedule of the United States (HTSUS): 7202.21.1000, 7202.21.5000, 7202.21.7500, 7202.21.9000, 7202.29.0010, and 7202.29.0050. The HTSUS subheadings are provided for convenience and customs purposes. Our written description of the scope of this investigation is dispositive.

Analysis of Programs

For purposes of this final determination, the period for which we are measuring bounties or grants (the period of investigation—POI) is calendar year 1991.

In determining the benefits received below, we used the following calculation methodology. We first calculated the *ad valorem* benefit received by C.V.G. Venezolana de Ferrosilicio C.A. (FESILVEN) for each program. The benefits for all programs were then summed to arrive at FESILVEN's total bounty or grant rate, which, because FESILVEN is the only respondent company in this investigation, serves as the country-wide rate.

Based upon our analysis of the petition, responses to our questionnaires, verification, and written comments from the interested parties, we determine the following:

I. Programs Determined to Confer Bounties or Grants

We determine that bounties or grants are being provided to manufacturers, producers, or exporters in Venezuela of ferrosilicon as follows:

A. Preferential Power Rates

The petitioners allege that C.V.G. Electrificación del Caroní C.A. (EDELCA), a government-owned hydroelectric power company, charges preferential electricity rates to FESILVEN.

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

We verified that EDELCA did not have a rate schedule for its large industrial customers, nor did it follow any consistent policy in setting these rates. Instead, EDELCA negotiated individual electricity contracts with its large industrial customers without

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Because EDELCA does not have a rate schedule or a consistent methodology for setting rates to these customers, it was necessary to examine alternative measures to determine whether EDELCA was providing electricity to FESILVEN at preferential rates. Because EDELCA is owned by the Government of Venezuela (GOV) and the GOV directly regulates electricity rates charged by other utilities in Venezuela, we have concluded that it is appropriate to consider electricity rates outside of EDELCA's service area as possible benchmarks.

In regulating the rates of other utilities, the GOV establishes tariff rate schedules which specify rates/rate formulas for different classes of customers, including customers which consume comparable amounts of electricity to FESILVEN. We have chosen as our benchmark the lowest rate set in accordance with an established rate schedule for a customer of FESILVEN's size. According to the practice articulated in Magnesium, this rate would be non-preferential.

Because we were not provided with the GOV rate schedule for 1991, the period of investigation, we adjusted the rate for large industrial consumers shown in the 1992 tariff rate schedule, as best information available. The adjustment was calculated using EDELCA's average rate increase between 1991 and 1992.

The resulting benchmark rate is higher than the average 1991 rates EDELCA charged FESILVEN. Moreover, FESILVEN is the only company to receive this rate. Therefore, we determine that the GOV, through EDELCA, is providing electricity to a specific enterprise at preferential rates.

To calculate the benefit, we first multiplied FESILVEN's total electricity consumption during the POI by the adjusted electricity rate derived from the 1992 tariff schedule. From that, we subtracted the amount FESILVEN was charged for electricity during the POI. The difference was divided by FESILVEN's total sales.

During verification we also learned that the terms on which FESILVEN pays its electricity bills provide a separate benefit. This issue is not discussed in this notice due its proprietary nature; however, a complete analysis of this issue is included in the proprietary concurrence memorandum dated April 29, 1993, which is part of the official record for this investigation.

Taking into account both the preferential rate received by FESILVEN and the beneficial payment terms, we calculated an estimated bounty or grant of 22.08 percent *ad valorem*.

B. Export Bond Program

This program was designed to provide partial compensation for the requirement that exporters convert foreign currency export earnings to bolivars at an official rate significantly lower than the free market rate. The value of the export bond is based on a percentage of the FOB value of the product exported.

Consistent with prior investigations (see, e.g., Final Affirmative Countervailing Duty Determination: Certain Electrical Conductor Aluminum Redraw Rod from Venezuela, 53 FR 24763 (June 30, 1988)), we determine that the export bond program is countervailable. Because the only information on the record related to this program was gathered from the company's financial statements, to calculate the benefit for the POI, we divided the bolivar amount of bonds shown on FESILVEN's 1991 financial statements by the company's total export sales. On this basis, we calculated estimated net bounty or grant to be 1.69 percent *ad valorem*.

We verified that the export bond program was amended as of June 15, 1991, to cover only agricultural products. Therefore, consistent with our policy of taking into account any measurable program-wide changes that occur before the preliminary determination, we are adjusting the duty deposit rate to reflect that exports of the subject merchandise have ceased to benefit from this program. (See, e.g., Final Affirmative Countervailing Duty Determination and Countervailing Duty Order: Circular Welded Non-Alloy Steel Pipe from Venezuela, 57 FR 42,964 (September 7, 1992); § 355.50 of the Department's Proposed Regulations.) Therefore, the duty deposit rate for this program is zero for all manufacturers, producers, and exporters in Venezuela of ferrosilicon.

II. Program Determined Not To Be Countervailable

GOV's Restructure of Debt

The petitioners alleged that the GOV assumed a portion of FESILVEN's debt in 1986, and the remaining portion in 1990.

After several devaluations of the Bolivar during the 1980's, several companies experienced difficulties in meeting their foreign financial obligations. Thus, the GOV decided to consolidate and restructure the foreign loans of all of these companies. During the restructuring process, the GOV (1) renegotiated the repayment terms of the foreign debt; (2) made payments on behalf of the affected companies, and (3) informed the companies that they would have to repay the GOV.

We verified that the GOV rather than assuming FESILVEN's foreign debt, simply restructured it. The company's financial records reflect that FESILVEN continues to carry the debt. Further, at verification, we examined the debt restructuring of a number of companies across a broad array of industries (e.g., banking, tourism, telecommunications, aluminum, electricity, transportation, etc.) and confirmed that each company's debt was restructured on identical terms.

Accordingly, because the GOV action was not specific to a group of industries, we determine the program to be not countervailable.

III. Programs Determined Not To Be Used

A. Sales Tax Exemption

We verified that, during the POI, FESILVEN made its sales tax payments in accordance with requirements of the local municipality.

B. Preferential Short-Term Financing—FINEXPO

We verified that FESILVEN had no outstanding FINEXPO loans during the POI.

C. GOV Grants

We verified that FESILVEN did not receive any grants.

Comments

All written comments submitted by the interested parties in this investigation which have not been previously addressed in this notice are addressed below.

Comment 1

Petitioners argue that the Department did not use the proper benchmark to calculate the power rate subsidy received by FESILVEN in the preliminary determination and that, consequently, the Department understated the magnitude of the subsidy received by FESILVEN. Petitioners contend that the benchmark rate used by the Department in the preliminary determination based on EDELCA's rates is inappropriate because EDELCA's rates are significantly lower than the rates charged similar industrial customers by other Venezuelan electricity companies.

Respondents argue that electricity rates charged by electricity companies outside Ciudad Guayana are not appropriate benchmarks because they reflect transmission and distribution costs which are not included in the rates EDELCA charges the customers located

in Ciudad Guayana. Further, respondents argue that these rates should not be used because they are set by government mandate and do not reflect the interaction between supply and demand.

DOC Position: We do not agree with petitioners that lower electricity rates in Ciudad Guayana, the area serviced by EDELCA, necessarily mean that those rates are preferential. Instead, as explained in section I.A. of this notice, we have looked first to determine whether EDELCA's rate to FESILVEN is taken from a rate schedule or otherwise set in accordance with a generally applied policy for setting rates. It is only because: (1) EDELCA's rates are not set in this manner, and (2) the GOV owns EDELCA and sets rates for other utilities in Venezuela, that we considered rates outside of Ciudad Guayana.

With respect to respondents' argument, differing transmission costs may affect the rates charged in different areas of Venezuela. However, no specific information was provided to demonstrate that the different rates resulted from transmission costs. Thus, we had no basis to reject the rates outside Ciudad Guayana as a possible benchmark, nor were we able to adjust for any differences caused by differing transmission costs.

Regarding respondents' claim that prices charged outside Ciudad Guayana are regulated, we do not agree that this should preclude us from using those prices. Under the Department's practice as set forth in § 355.44(f) of the Department's Proposed Regulations (54 FR 23366, 23380 (May 31, 1989)), the preferred benchmark for measuring preference will normally be the nonselective price the government charges to the same or other users of the good or service within the same political jurisdiction.

Comment 2

Respondents state that because EDELCA's rates are being adjusted to reflect its long-term marginal costs and, therefore, have increased substantially, the Department should consider the 1992 rate increase as a program-wide change.

Petitioners state that a program-wide change cannot be limited to individual firms, and further that individually negotiated power rate increases do not constitute a program-wide change.

DOC Position: While FESILVEN did pay a higher rate for electricity in 1992, we agree with petitioners that a rate increase for an individual company or individually negotiated increases with a number of companies does not represent a program-wide change. Moreover, without any statutory or regulatory requirements for rate increases, the changes may only be temporary.

Comment 3

Petitioners argue that EDELCA provides electricity free of charge to FESILVEN by repeatedly relieving FESILVEN from its obligation to pay its electricity bills. In support of this claim, petitioners submit that according to EDELCA's 1986 Annual Report, EDELCA "charged off" receivables in 1985 in connection with FESILVEN's accumulated energy bills. In addition, petitioners claim that EDELCA canceled FESILVEN's unpaid electricity bills in return for shares in 1989 and 1991.

Respondents state that FESILVEN pays EDELCA through direct payments and by issuing shares in the company to EDELCA. Furthermore, respondents state that because FESILVEN has been profitable in recent years, and because it is an important customer of EDELCA, EDELCA acted as a reasonable investor fostering its own commercial interests.

DOC Position: We verified that FESILVEN has made direct payments to EDELCA and has converted a portion of its accounts payable to EDELCA into equity. Where payment was in the form of shares, we viewed the transaction as an equity investment by the GOV in FESILVEN. With respect to the FESILVEN stock received by EDELCA in 1989, we have determined that petitioners provided insufficient evidence to support their claim that FESILVEN was unequityworthy. See memorandum dated June 9, 1992, which is part of the public record for this investigation. With respect to the 1991 transaction, FESILVEN's financial situation was no different than it was in 1989. Therefore, we have concluded that the 1991 equity investment was consistent with commercial considerations.

Comment 4

Petitioners argue that the Department should have initiated an investigation of what they allege to be a general interest rate subsidy. Petitioners contend that their allegation, based on a comparison of FESILVEN's reported financial expenses, FESILVEN's plant expansion debt and the Venezuelan discount rate, provides sufficient information for the Department to countervail the interest rate subsidy received by FESILVEN.

Respondents object by stating that FESILVEN's debt cannot be estimated by multiplying the end-of-year debt by an interest rate because most of FESILVEN's debt is denominated in foreign currencies, which FESILVEN revalues on a monthly basis to reflect exchange rate fluctuations. Additionally, rather than being recorded in the company's income statement, interest payments related to FESILVEN's expansion plan were capitalized because the expansion has not yet been completed.

DOC Position: Petitioners have provided no information to show that FESILVEN received subsidized loans under any program operated directly or indirectly by the GOV. Moreover, during the course of this case we did not find anything that would lead us to believe that the company benefitted from such a program. Therefore, we have no basis to believe that subsidized loans are being specifically provided within the meaning of section 771(5) of the Act and, hence, no basis to investigate FESILVEN's borrowing activity.

Comment 5

Petitioners argue that the Department should have initiated an investigation of FESILVEN's equityworthiness in 1989 and countervailed the equity infusion it received in that year because the infusion was made on terms inconsistent with commercial considerations.

Respondents argue that FESILVEN was a consistently profitable company in the years preceding and subsequent to 1989, despite serious economic turmoil in Venezuela since the late 1980's and the cyclical nature of the ferrosilicon industry.

DOC Position: As stated in response to comment 3, petitioners provided no reasonable basis to believe or suspect that FESILVEN was unequityworthy in 1989.

Comment 6

Petitioners submit that in August 1991, the Venezuelan Investment Fund (FIV) transferred all its shares in FESILVEN, including an allotment which had been purchased only nineteen months earlier, to Corporación Venezolana Guayana (CVG) for less than 8 percent of their par value. Petitioners argue that the extensive relationship between CVG and FESILVEN requires the Department to treat them as a single entity and view CVG's purchase of these shares as a redemption by FESILVEN. Because the shares were redeemed at a fraction of their par value, the difference between the par value and the redemption value is a subsidy to FESILVEN. In addition, petitioners argue that the transfer of the shares to CVG resulted in a cancellation of FESILVEN's dividend obligation on these shares and that the Department should countervail this dividend subsidy.

Respondents argue that FESILVEN's legal responsibilities regarding the payment of dividends and other shareholders rights remain in effect regardless of who owns the shares. Consequently, FIV's sale confers no subsidy to FESILVEN.

DOC Position: We have continued to treat CVG as a separate entity from FESILVEN. While CVG does have extensive control over FESILVEN, FESILVEN has other shareholders. Moreover, CVG is merely a holding company with ownership interest in other companies producing other products. Therefore, we do not see an identity of interests sufficient to warrant treating CVG and FESILVEN as a single company. Given this, we have not viewed CVG's purchase of shares in FESILVEN from FIV as a redemption of shares.

Finally, there is no evidence on the record to support petitioners' argument that this transfer canceled FESILVEN's dividend obligation.

Comment 7

Petitioners argue that the Department should treat the 1991 equity infusion received by FESILVEN as a grant because the stock issued in exchange for the capital infusions, class "E" common shares, was worthless. Petitioners submit that no reasonable investor would take on the risk associated with the class "E" common shares because the stock will probably pay no dividends, and because restrictions on the sale of the stock further reduce the potential for a return on investment.

Respondents submit that class "E" shares entitle their holders to the same dividends that the holders of common stock receive.

DOC Position: While the class "E" shares do not entitle their holders to the same level of return as other shares, holders of class "E" shares have voting rights and are eligible for dividends. Therefore, our conclusion that the 1991 equity investments were consistent with commercial considerations would extend to the class "E" shares.

Verification

In accordance with section 776(b) of the Act, we verified the information used in making our final determination. We followed standard verification procedures, including meeting with government and company officials, examination of relevant accounting records, and examination of original source documents. Our verification results are outlined in detail in the public versions of the verification reports, which are on file in the Central Records Unit (room B-099) of the Main Commerce Building.

Suspension of Liquidation

In accordance with section 705(c) of the Act, we are directing the U.S. Customs Service to continue to suspend liquidation of entries of ferrosilicon from Venezuela which are entered or withdrawn from warehouse for consumption on or after the date of publication of this notice in the Federal Register, and require a cash deposit or bond for the nondutiable merchandise. In addition, this notice constitutes the countervailing duty order on the dutiable merchandise, in accordance with section 706(a) of the Act. Accordingly, we are directing the U.S. Customs Service to require a cash deposit for this merchandise. The estimated countervailing duties are as follows:

Company	Ad valorem rate (percent)
FESILVEN	22.08
Country-wide rate	22.08

ITC Notification

In accordance with section 705(d) of the Act we will notify the ITC of our determination. In addition, we are making available to the ITC all nonprivileged and nonproprietary information relating to this investigation. We will allow the ITC access to all privileged and business proprietary information in our files provided the ITC confirms that it will not disclose such information, either publicly or under an administrative protective order, without the written consent of the Deputy Assistant Secretary for Investigations, Import Administration.

On August 31, 1990, Venezuela became a contracting party to the General Agreement on Tariffs and Trade (GATT). Since qualification as a "country under the Agreement" under section 701(b)(3) requires a finding that the GATT does not apply between the United States and the country from which the subject merchandise is imported, Venezuela is no longer eligible for treatment as a "country under the Agreement" within the meaning of section 701(b)(3). However, because Venezuela is a GATT contracting party, and merchandise within the scope of the petition which is imported under HTSUS subheadings 7202.21.1000, 7202.21.5000, 7202.29.0010, and 7202.29.0050 is nondutiable, the ITC is required to determine whether, pursuant to section 303(a)(2), imports of this nondutiable merchandise from Venezuela materially injure, or threaten material injury to, a U.S. industry. The remaining HTSUS items, as described in the "Scope of Investigation" section of this notice, are dutiable. Accordingly, we are issuing an order with respect to this merchandise. Therefore, for these items, the ITC is not required to determine whether, pursuant to section 303(a)(2), imports from Venezuela of these products materially injure, or threaten material injury to, a U.S. industry.

If the ITC determines that material injury, or the threat of material injury, does not exist for the above referenced nondutiable merchandise, the proceedings will be terminated with respect to the nondutiable merchandise, and all estimated duties deposited or securities posted as a result of the suspension of liquidation will be refunded or canceled. If, however, the ITC determines that such injury does exist, we will issue a countervailing duty order, directing Customs officers to assess countervailing duties on entries of ferrosilicon from Venezuela entered, or withdrawn from warehouse, for consumption, as described in the "Suspension of Liquidation" section of this notice.

Return or Destruction of Proprietary Information

This notice serves as the only reminder to parties subject to APO of their responsibility concerning the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 355.34(d). Failure to comply is a violation of the APO.

This determination is published pursuant to section 705(d) of the Act (19 U.S.C. 1671d(d)) and 19 CFR 355.20(a)(4).

Dated: May 3, 1993.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. 93-11009 Filed 5-7-93; 8:45 am]

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International Trade Administration

[A-821-804]

Notice of Final Determination of Sales at Less Than Fair Value: Ferrosilicon From the Russian Federation

AGENCY: Import Administration, International Trade Administration, Department of Commerce.

EFFECTIVE DATE: May 19, 1993.

FOR FURTHER INFORMATION CONTACT: Kimberly Hardin, Office of Antidumping Investigations, Import Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, NW., Washington, DC 20230; telephone (202) 482-0371.

Final Determination

The Department of Commerce ("the Department") determines that ferrosilicon from the Russian Federation is being, or is likely to be, sold in the United States at less than fair value, as provided in section 735 of the Tariff Act of 1930, as amended ("the Act") (19 U.S.C. 1673d). The Department also determines that critical circumstances exist with respect to imports of ferrosilicon from the Russian Federation. The estimated margins are shown in the "Suspension of Liquidation" section of this notice.

Case History

Since the publication of our affirmative preliminary determination on December 29, 1992 (57 FR 61876), the following events have occurred.

On December 24, 1992 (58 FR 79, January 4, 1993), we preliminarily found affirmative critical circumstances with respect to imports of ferrosilicon from the Russian Federation. Accordingly, we instructed the Customs Service to suspend liquidation of all entries of ferrosilicon from the Russian

Federation from September 30, 1992, a date 90 days prior to the date of publication of the notice of preliminary determination in the **Federal Register**.

On January 8, 1993, we received a letter stating that petitioners do not request a hearing in this investigation nor in the recently completed investigations of ferrosilicon from Kazakhstan and Ukraine unless another interested party submits such a request. As we did not receive such a request on behalf of any other interested party in the Russian investigation, no hearing was held.

On March 1, 1993, we received a request from the Government of the Russian Federation to extend the deadline for the final determination in order to allow the Department sufficient time to consider additional information on the record of the investigation. On March 3, 1993, we received a letter from petitioners opposing the extension request filed on behalf of the Government of the Russian Federation. On March 3, 1993, we postponed the final determination, in accordance with 19 CFR 353.20(b), until not later than May 13, 1993 (58 FR 13050, March 9, 1993).

On March 29, 1993, we received a draft suspension agreement, submitted on behalf of exporters of ferrosilicon from the Russian Federation. However, no mutually acceptable agreement was reached by the initialing deadline of April 13, 1993.

Period of Investigation

The period of investigation (POI) is December 1, 1991, through May 31, 1992.

Scope of Investigation

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

Ferrosilicon is a ferroalloy produced by combining silicon and iron through smelting in a submerged-arc furnace. Ferrosilicon is used primarily as an alloying agent in the production of steel and cast iron. It is also used in the steel industry as a deoxidizer and a reducing agent, and by cast iron producers as an inoculant.

Ferrosilicon is differentiated by size and by grade. The sizes express the maximum and minimum dimensions of the lumps of ferrosilicon found in a given shipment. Ferrosilicon grades are defined by the percentages by weight of contained silicon and other minor elements. Ferrosilicon is most commonly sold to the iron and steel industries in standard grades of 75 percent and 50 percent ferrosilicon.

Calcium silicon, ferrocalcium silicon, and magnesium ferrosilicon are specifically excluded from the scope of these investigations. Calcium silicon is an alloy containing, by weight, not more than five percent iron, 60 to 65 percent silicon and 28 to 32 percent calcium. Ferrocalcium silicon is a ferroalloy containing, by weight, not less than four percent iron, 60 to 65 percent silicon, and more than 10 percent calcium. Magnesium ferrosilicon is a ferroalloy containing, by weight, not less than four percent iron, not more than 55 percent silicon, and not less than 2.75 percent magnesium.

Ferrosilicon is classifiable under the following subheadings of the *Harmonized Tariff Schedule of the United States* (HTSUS): 7202.21.1000, 7202.21.5000, 7202.21.7500, 7202.21.9000, 7202.29.0010, and 7202.29.0050. The HTSUS subheadings are provided for convenience and customs purposes. Our written description of the scope of this investigation is dispositive.

Class or Kind Allegation

We received a request from Societe Anonyme des Minerais and Minerais U.S. Inc. (Minerais), a Luxembourg corporation engaged in the marketing and distribution of ferro-alloys, ores and metals, and its U.S. subsidiary, that the Department identify two separate classes or kinds of merchandise: (1) Ferrosilicon with a silicon content of 55 percent silicon or less (FeSi 50) and (2) ferrosilicon containing more than 55 percent silicon (FeSi 75). Minerais alleged that if two classes or kinds of merchandise were identified, petitioners would not have standing with respect to low silicon content ferrosilicon. Petitioners submitted comments in opposition to Minerais' request. For the reasons set forth in our response to Interested Party Comment 2 in the *Final Determinations of Sales at Less Than Fair Value: Ferrosilicon from Kazakhstan and Ukraine (Final Determination: Ferrosilicon from Kazakhstan)* (58 FR 13050, March 9, 1993), we have determined that the merchandise subject to this investigation constitutes one class or kind of merchandise.

Best Information Available

We have determined, in accordance with section 776(c) of the Act, that the use of best information available (BIA) is appropriate for sales of the subject merchandise in the Russian Federation investigation. In deciding to use BIA, section 776(c) provides that the Department may take into account whether the respondent was able to produce information requested in a timely manner and in the form required. As detailed below, exporters of ferrosilicon from the Russian Federation did not adequately respond to the Department's requests for information.

The Russian Federation is a non-market economy (NME) country in accordance with section 773(c) of the Act. Therefore, we require that the Government of the Russian Federation provide information to the Department on behalf of all producers and exporters within the Russian Federation.

As detailed in the preliminary determination, the Department made numerous attempts to obtain questionnaire responses from the Government of the Russian Federation. We have granted every possible extension of time to give the Government of the Russian Federation sufficient opportunity to provide the information requested. We solicited factors of production information both as part of the original questionnaire (section D) and in a cost of production (COP) questionnaire. We did not receive factors of production information from any party in the Russian Federation.

Consequently, because the information requested was not provided we based our determination in this investigation on BIA. As BIA, we used the highest margin listed in the notice of initiation for this investigation, which was based on the petition.

Minerais

As detailed in the preliminary determination, Minerais entered questionnaire responses onto the record of the Russian investigation. Minerais' responses, however, were originally submitted in the recently completed investigation of ferrosilicon from Kazakhstan. Minerais purchased ferrosilicon from Promsyrioimport, the primary exporter of the subject merchandise from the former Soviet Union to the United States during the period of investigation, then exported the merchandise to its U.S. affiliate. Minerais claimed that because it acted as an independent reseller in an intermediate country, foreign market value (FMV) should be based on Minerais' sales in third-country markets, not on a factors of production analysis. Minerais claims that it should be treated as the respondent in the Russian investigation and that the failure of the

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