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

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

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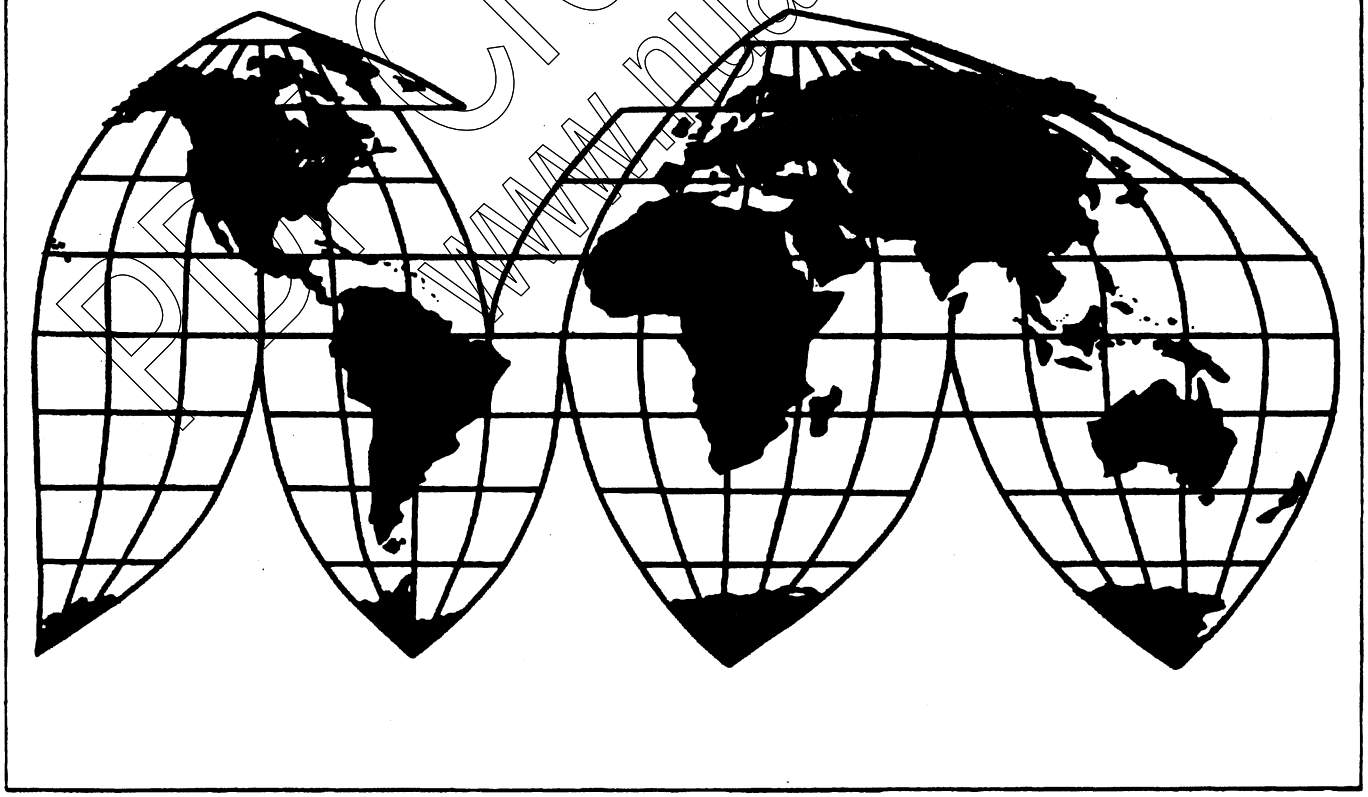

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Note.--Information that would reveal confidential operations of individual concerns may not be published and therefore has been deleted from this report. Such deletions are indicated by asterisks.

VIEWS OF THE COMMISSION

I. INTRODUCTION

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

In its first remand opinion issued in September 2002, the Commission again made negative determinations.[2] Upon review, the CIT affirmed the Commission in part and remanded the matter to the Commission for further explanation concerning certain issues. We provide the requested explanation below. We conclude, as we did in our 2002 opinion, that the volume, price effects, and impact of the subject imports were not significant during the original periods of investigation. Accordingly, in this remand, we again make negative determinations.[3]

II. BACKGROUND

The August 1999 Commission opinion provides a comprehensive background explaining the circumstances that led the Commission to institute reconsideration proceedings.[4] We incorporate by reference that discussion here.

Various domestic ferrosilicon producers subsequently filed suits at the CIT challenging the Commission's negative determinations on reconsideration. The CIT issued its first opinion on the merits in this matter on February 21, 2002. It concluded that the Commission had inherent authority to reconsider its original injury determinations, that reconsideration "is particularly appropriate where after-discovered fraud is alleged," and that the Commission instituted these proceedings in a timely manner.[5] It further concluded that the Commission acted inconsistently with its own regulations, and with the notice instituting the reconsideration proceedings, by not conducting a hearing specifically directed to the reconsideration proceedings.[6] The CIT consequently remanded the matter to the Commission for further proceedings. It did not, however, address the plaintiffs' claims concerning the merits of the

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[1] Ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela, Inv. Nos. 303-TA-23, 731-TA-566-570, 731-TA-641 (Reconsideration), USITC Pub. 3218 (Aug. 1999) ("1999 Reconsideration Opinion"). The Commission had originally made affirmative determinations in these investigations in 1993 and 1994. Ferrosilicon from the People's Republic of China, Inv. No. 731-TA-566 (Final), USITC Pub. 2606 (March 1993); Ferrosilicon from Kazakhstan and Ukraine, Inv. Nos. 731-TA-567, 569 (Final), USITC Pub. 2616 (March 1993); Ferrosilicon from Russia and Venezuela, Inv. Nos. 731-TA-568, 570 (Final), USITC Pub. 2650 (June 1993); Ferrosilicon from Brazil, Inv. No. 731-TA-641 (Final), USITC Pub. 2722 (Jan. 1994).

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

[3] Commissioner Lane was not a member of the Commission at the time of the vote in these remand proceedings. She consequently did not participate in the proceedings.

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

[5] Elkem Metals Co. v. United States, 193 F. Supp.2d 1314, 1320-22 (Ct. Int'l Trade 2002) ("Elkem I").

[6] Elkem I, 193 F. Supp.2d at 1324.

Commission's opinion on reconsideration.[7]

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

Specifically, in the September 2002 remand opinion, the Commission:

- concluded that the applicable statute authorized it to use best information available (BIA) and to take adverse inferences against domestic producers American Alloys, Inc. (American Alloys), CC Metals and Alloys, Inc. (CCMA), and Elkem Metals Co. (Elkem), because each of these firms impeded the Commission's investigations;[8]
- found, using BIA and adverse inferences, that domestic ferrosilicon prices throughout the original periods of investigation were affected by a price-fixing conspiracy in which American Alloys, CCMA, and Elkem (collectively "the conspirators") engaged during the original periods of investigation.[9]
- found that the volume of subject imports was not significant in light of the pertinent conditions of competition and the lack of price effects.[10]
- found that the subject imports did not have significant effects on domestic prices. The Commission concluded that the underselling and lost sales data in the record were not probative because they compared the subject imports with domestically-produced ferrosilicon priced at a level not reflecting competitive marketplace conditions. It also concluded that the subject imports did not have any significant price-depressing or -suppressing effects. To the extent that prices for domestically produced ferrosilicon were affected by market forces, changes in prices reflected changes in market demand and the nature of the ferrosilicon production process rather than the subject imports.[11]
- found that, because of the lack of volume and price effects, the subject imports had no significant impact on the domestic industry.[12]

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[7] See Elkem I, 193 F. Supp.2d at 1319.

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

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

19 U.S.C. § 1677e(c)(1988).

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

[10] 2002 Remand Opinion, USITC Pub. 3531 at 16-17.

[11] 2002 Remand Opinion, USITC Pub. 3531 at 17-18.

[12] 2002 Remand Opinion, USITC Pub. 3531 at 18.

The CIT issued a second opinion in June 2003.[13] It affirmed the Commission in several respects. It concluded that the Commission used proper procedures in the remand proceeding.[14] It affirmed the Commission's findings that American Alloys, CCMA, and Elkem impeded the Commission investigations by failing to disclose information about the price-fixing conspiracy in which they were engaged from at least as early as late 1989 and continuing at least until mid-1991.[15] The Court stated that in light of the conspirators' material misrepresentations and omissions with respect to the information they furnished to the Commission concerning how they established prices during the original periods of investigation, "it is difficult to think of a situation where the use of the 'informal club' of BIA might be more warranted."[16] The Court also affirmed the Commission's conclusion, based on use of BIA, that the conspiracy affected prices charged by all domestic ferrosilicon producers during the period from October 1, 1989 through June 30, 1991.[17] This is the period for which there were judicial findings that the price-fixing conspiracy was in existence. Using the same terminology as did the CIT in Elkem II, we will call this period "the Conspiracy Period." The court affirmed the Commission's findings on price depression and suppression with respect to the entire original periods of investigation,[18] and affirmed the Commission's findings on underselling with respect to the Conspiracy Period.[19]

The Court, however, remanded for further consideration the Commission's finding that the conspiracy affected prices charged by domestic ferrosilicon producers for those portions of the original periods of investigation outside the Conspiracy Period. It stated that this finding was based on an adverse inference for which the Commission had not identified a sufficient evidentiary basis. It therefore instructed the Commission on remand to "set forth the evidentiary basis for [any] adverse inference that the price-fixing conspiracy affected prices throughout the entire Original POI."[20]

The Commission accordingly instituted remand proceedings on July 14, 2003.[21] While the Commission did not reopen the record, it did permit the parties to submit written comments. CCMA, Elkem, Applied Industrial Materials Corp. (AIMCOR), a domestic producer of ferrosilicon, and ABRAFE Respondents, exporters and producers of subject merchandise from Brazil, each submitted comments.

III. EFFECT OF THE CONSPIRACY ON PRICES OUTSIDE THE CONSPIRACY PERIOD

A. The Analysis Contemplated by the CIT in *Elkem II*

We now address the issue that is the subject of this remand: whether the conspiracy had an effect on prices charged by domestic ferrosilicon producers outside the Conspiracy Period. Our discussion below will concentrate on the portions of the original periods of investigation subsequent to July 1, 1991, which we will call the "Subsequent Period." Additionally, we will refer to the first three quarters of 1989 as "the Prior Period."

We found in the 2002 remand determination that the conspirators collectively represented a

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[13] Elkem Metals Co. v. United States, slip op. 03-66 (Ct. Int'l Trade June 18, 2003) ("Elkem II").

[14] Elkem II, slip op. at 8 & n.5.

[15] Elkem II, slip op. at 12-14.

[16] Elkem II, slip op. at 14 (citation omitted).

[17] Elkem II, slip op. at 21-30.

[18] Elkem II, slip op. at 16-19.

[19] Elkem II, slip op. at 25.

[20] Elkem II, slip op. at 34.

[21] 68 Fed. Reg. 43163 (July 21, 2003).

significant majority of U.S. production throughout the original periods of investigation.[22] In light of their dominant position in the domestic industry, the factors that affected their prices would also affect the industry as a whole, including those domestic ferrosilicon producers that did not participate in the conspiracy.[23] These findings were not challenged before the CIT.

The record in these proceedings does not contain accurate information from the conspirators concerning how they established ferrosilicon prices during *any* portion of the original periods of investigation. In the 2002 opinion, the Commission reaffirmed with respect to the conspirators "over six pages [of findings in the 1999 reconsideration opinion] detailing specific instances in which domestic producers misled the Commission concerning pricing practices in the original investigation or failed to disclose material information about how prices were established."[24] These included false hearing testimony, inaccurate questionnaire responses, and misleading written submissions.[25]

The CIT affirmed these findings in Elkem II. It specifically discussed the conspirators' responses to questions the Commission asked in the Producers' Questionnaire in the original investigations asking each producer to describe the manner in which it established prices and to identify circumstances in which it reduced prices or rolled back announced price increases.[26] The Court found that "[n]o credible argument can be made that the ITC questionnaires were answered truthfully and responsively."[27]

Thus the descriptive information that the conspirators furnished to the Commission concerning how they established prices during any part of the original periods of investigation lacks any probative value. It is important to emphasize, as did the Commission in its 1999 opinion, that the questions that the CIT has found the conspirators did not answer truthfully "were not limited to discrete transactions or periods of time."[28] The questions encompassed the entire original periods of investigation. Consequently, the responses which the CIT has found to be untruthful and nonresponsive have no validity for any portion of these periods. The considerations that led the CIT to conclude that "[t]here is little doubt that the use of BIA was warranted under the circumstances presented here,"[29] support use of BIA to ascertain how prices were established during the Subsequent Period as well as during the Conspiracy Period.[30]

In the 2002 remand opinion, the Commission used BIA to take an adverse inference that the conspiracy affected prices during the Subsequent Period and the Prior Period. As previously stated, the Court in Elkem II found that the Commission had not adequately justified use of such an inference and

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[22] 2002 Remand Opinion, USITC Pub. 3531 at 8.

[23] 2002 Remand Opinion, USITC Pub. 3531 at 14.

[24] 2002 Remand Opinion, USITC Pub. 3531 at 5. See also id. at 8-9. In the 2002 opinion, the Commission concluded that AIMCOR and Globe Metallurgical Inc. were not culpable of material misrepresentations or omissions. Id. at 8. That finding was not challenged before the CIT and need not be revisited by us here.

[25] See 1999 Reconsideration Opinion, USITC Pub. 3218 at 14-20.

[26] Elkem II, slip op. at 9-10.

[27] Elkem II, slip op. at 12.

[28] 1999 Reconsideration Opinion, USITC Pub. 3218 at 25.

[29] Elkem II. slip op. at 12.

[30] We emphasize that, although the conspirators could have introduced during either the 1999 reconsideration proceedings or the 2002 remand proceedings material indicating that any effects of the conspiracy were limited to the Conspiracy Period, they did not do so. Instead, they contended that the conspiracy never had any material effect on prices, a proposition that the CIT has concluded the Commission appropriately rejected in the 2002 opinion. Cf. 2002 Remand Opinion, USITC Pub. 3531 at 15 n.69 (observing that the domestic producers had argued that "the same conditions [of competition affecting pricing] were prevalent throughout the periods of investigation").

that the Commission should have provided an evidentiary basis for its inference, but failed to do so.[31]

The limits on the Commission's ability to take adverse inferences are articulated in Federal Circuit precedent. The Federal Circuit has indicated that the Commission and the Department of Commerce (Commerce) cannot take an adverse inference that is demonstrably incorrect.[32] We have found no information in the record that demonstrates the adverse inference we took in the 2002 opinion, insofar as it concerns portions of the original periods of investigation outside the Conspiracy Period, is incorrect.

The Court may have understood the underselling analysis the Commission undertook in the 2002 opinion to be tantamount to a finding that the conspiracy could not have affected prices for domestically produced ferrosilicon outside the Conspiracy Period. A careful examination of the analysis indicates, however, that it does not support any general conclusion concerning factors affecting pricing outside the Conspiracy Period. In the underselling analysis, the Commission demonstrated that the incidence of underselling for both the conspirators and domestic ferrosilicon producers as a whole was significantly higher during the Conspiracy Period than during those portions of the original periods of investigation outside the Conspiracy Period. The Commission used this analysis to conclude that the prices both the conspirators and the domestic ferrosilicon industry charged during the Conspiracy Period were higher than they would have been absent the conspiracy.[33] The Commission thus found that prices the domestic industry charged *vis a vis* the subject imports were inflated during the Conspiracy Period relative to other portions of the original periods of investigation. While the analysis could also support an inference that the effects of the conspiracy on prices were greatest during the Conspiracy Period, it does not necessarily follow from this that the conspiracy had no effects during other periods. To make such a conclusion, the Commission would first need to have quantified the effects the conspiracy had on prices. The Commission was not required by either the statute or Elkem I to engage in such an exercise, and it did not attempt to do so.[34] Consequently, there was no basis for it to conclude in the 2002 opinion that the effects of the conspiracy were limited to the Conspiracy Period. Nor did it separately consider or discuss either the Subsequent Period or the Prior Period. Consequently, the underselling analysis was not intended to, and cannot, serve as the basis for a conclusion that prices the domestic ferrosilicon industry charged outside the Conspiracy Period were the result of market forces.

In view of the Elkem II Court's direction to provide an evidentiary basis for any finding concerning the prices charged by domestic ferrosilicon producers outside the Conspiracy Period, we consider the two sources of information in the record that provide the appropriate evidentiary basis. The first source is our finding, which the Court has upheld, that the conspiracy was a significant condition of competition affecting prices during the Conspiracy Period. The second source is the pricing information in the record. We compare the prices that domestic ferrosilicon producers charged during the latter portion of the Conspiracy Period with the those charged during the Subsequent Period. Such a comparison enables us to examine whether prices for the Subsequent Period solely reflected market forces and represent the prices the producers would have charged during the Subsequent Period in the

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[31] See Elkem II, slip op. at 32-33.

[32] See D&L Supply Co. v. United States, 113 F.3d 1220, 1223 (Fed. Cir. 1997) (under pre-URAA law, "[i]nformation that has conclusively been determined to be inaccurate" may not be used as BIA); F.lli. De Cecco di Filippo Fara S. Martino S.p.A. v. United States, 216 F.3d 1027, 1032-33 (Fed. Cir. 2000) (under post-URAA law, Commerce may not use "thoroughly discredited" information as adverse facts available).

[33] 2002 Remand Opinion, USITC Pub. 3531 at 13 & n.57.

[34] See 2002 Remand Opinion, USITC Pub. 3531 at 17 n.78.

absence of any price-fixing scheme during the Conspiracy Period.[35]

B. Examination of Pricing Data from the Subsequent Period

We consequently have examined the pertinent pricing data from the report compiled by the Commission staff for the remand proceedings.[36] Based on this examination, we conclude that there are no significant differences in pricing patterns between the latter part of the Conspiracy Period and the Subsequent Period.

The data indicate that there were no sudden shifts in domestic ferrosilicon producers' pricing patterns immediately after the conclusion of the Conspiracy Period. Indeed, in the third quarter of 1991 (the quarter immediately following the last quarter of the Conspiracy Period), prices charged by both the conspirators and the domestic industry as a whole were higher than those of the immediately preceding quarter.[37] By contrast, if the effects of the conspiracy on prices were limited solely to the Conspiracy Period, one would expect an immediate decline from prices established by a conspiracy, which would be at inflated levels relative to a "true" market price, to prices established by marketplace considerations.

The manner in which ferrosilicon sales were made in the U.S. market during the original periods of investigation helps explain the absence of sudden price shifts. Most product sold by U.S. ferrosilicon producers was sold pursuant to quarterly or semiannual contracts. Additionally, some ferrosilicon was sold pursuant to one-year contracts (although, in these contracts, the price was not necessarily fixed for the entire year).[38] In light of the existence of such contracts, even if there were dramatic shifts in producers' pricing behavior – something the record indicates did not happen -- the effects on the market would not be immediate.

The pricing data further indicate no significant shift in the conspirators' pricing patterns with respect to other domestic producers in the period following the Conspiracy Period. In several instances, when prices declined, the conspirators reduced prices less than other domestic producers that were not

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[35] We observe that none of the domestic ferrosilicon producers that filed comments in these second remand proceedings have attempted to engage in such an examination, although the ABRAFE Respondents did. CCMA contends that the Commission's underselling analysis in the 2002 opinion is tantamount to a finding that the conspiracy could not have affected prices outside the Conspiracy Period. For the reasons stated above, CCMA misunderstands the underselling analysis.

AIMCOR and Elkem rely principally on rulings in the criminal proceeding involving SKW that the conspiracy had only limited success during the Conspiracy Period. They reason that if the conspiracy could not have affected prices throughout most of the Conspiracy Period, it could not have affected prices during the other portions of the period of investigation.

During the 2002 remand proceedings the domestic producers also relied on rulings in the SKW case in an effort to show that the conspiracy did not affect prices during the Conspiracy Period. The Commission concluded that "the results in the particular antitrust litigation matters, including findings with respect to the actual success of the conspiracy. . . have little probative value in these Commission proceedings." The Commission emphasized that it was engaging in a distinct inquiry under the antidumping and countervailing duty laws and that it had the duty and prerogative to conduct that inquiry independently. 2002 Remand Opinion, USITC Pub. 3531 at 11. The CIT sustained this conclusion. Elkem II, slip op. at 29-30. Consequently, Elkem and AIMCOR's current arguments rely on a premise – that the conspiracy did not affect prices during the Conspiracy Period – that the Commission has already rejected, in a portion of the 2002 opinion affirmed by the CIT. We find the argument no more persuasive here.

[36] The confidential report (CR) is Memorandum INV-Z-116 (July 22, 2002). The public report (PR) is found in USITC Pub. 3531.

[37] CR/PR, Tables III-1-3.

[38] CR at III-2 n.5, PR at III-2 n.5.

members of the conspiracy. In other instances, the conspirators maintained prices that were higher than the prices of the other producers. Whatever the conspirators' individual motives in setting these prices, the fact that they frequently maintained higher prices or failed to match domestic competitors' price declines in the Subsequent Period militates against any finding that the conspirators' prices in the Subsequent Period reflected solely marketplace conditions.

These patterns exist for each of the products for which the Commission collected data in the original investigations. For product 1 sold to steel producers, when f.o.b. prices declined between the third quarter of 1991 and the first quarter of 1992, ***. When f.o.b. prices increased during the subsequent quarter, ***.[39] For product 2 sold to steel producers, the conspirators' weighted f.o.b. prices were *** than the weighted-average f.o.b. prices for all U.S. producers for four of the five quarters after the Conspiracy Period. For the three quarters immediately following the conclusion of the Conspiracy Period, the conspirators' f.o.b. prices were *** than either those for *** or those for the remaining U.S. producers.[40] For product 2 sold to iron foundries, during the period between the third quarter of 1991 and the second quarter of 1992, when both the conspirators' and the non-conspirators' f.o.b. prices ***.[41]

We have also examined the underselling data in the record and find that they do not detract from our conclusion that domestic ferrosilicon producers' prices in the Subsequent Period did not reflect competitive marketplace conditions. The subject imports undersold the domestically produced product in 5 of 8 comparisons during the last two quarters of the Conspiracy Period and 7 of 9 comparisons during the first two quarters of the Subsequent Period.[42] Thus, there was not any significant difference in the incidence of underselling between these two periods.[43]

C. Conclusion

The pricing data support, and do not detract from, our conclusion that prices charged by both the conspirators and the domestic industry as a whole during the Subsequent Period were not the result of competitive marketplace conditions.

We emphasize our finding is not a finding that the conspiracy lasted beyond the Conspiracy Period. The CIT ruled in Elkem II that there is not a basis in the Commission record to permit the agency to "construct a conspiracy" beyond the Conspiracy Period.[44] We have never found, in either our 1999 or 2002 opinions, or in these Views on remand, that the conspiracy lasted beyond the Conspiracy Period.

The applicable statute, however, directs the Commission to consider, among other things, "factors affecting domestic prices."[45] Whether prices charged by the domestic industry are established based on competitive marketplace conditions, or on other factors, is clearly pertinent to this inquiry. As stated above, the conspirators' misconduct prevented the Commission from obtaining any reliable information concerning how they established prices during any portion of the original periods of

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[39] CR/PR, Table III-1. Between the third quarter of 1991 and the first quarter of 1992, ***. Id. In the second quarter of 1992, ***. Id.

[40] CR/PR, Table III-2.

[41] CR/PR, Table III-3. Between the third quarter of 1991 and the second quarter of 1992, the conspirators' prices per ton ***. Id. By contrast, during this period the prices per ton for all reporting U.S. producers declined ***. Id.

[42] CR/PR, Tables III-7a, III-7b, III-7c, III-8a, III-8b, III-8c. These figures are the same whether the prices for the domestically produced product are those for all domestic producers or those for the conspirators only.

[43] By contrast, the underselling data indicate that there is a significant difference between the early portion of the Conspiracy Period and the first three quarters of 1989. The available information thus does not support a finding that prices were established in the same manner during the Prior Period as during the Conspiracy Period.

[44] Elkem II, slip op. at 34.

[45] 19 U.S.C. § 1677(7)(C)(iii)(II) (1988).

investigation, requiring the Commission to use BIA. The best information available encompasses pricing data which indicate no significant changes in pricing patterns from the Conspiracy Period to the Subsequent Period. Consequently, we conclude that in the Conspiracy Period, as in the Subsequent Period, the prices charged by the domestic industry were not the result of competitive marketplace forces. Use of BIA to make such a conclusion is fully consistent with both the statute and Elkem II.

We further observe that concluding that the conspiracy did not exist beyond the Conspiracy Period does not require us to conclude that the conspiracy did not have any further effects on prices. The case law indicates that activity in restraint of trade in violation of the Sherman Act may have continuing effects after its cessation.[46] Thus, even if the conspiracy was no longer in operation, it still could have continued to affect prices during the Subsequent Period.

Moreover, the pertinent question in these proceedings is not whether we would conclude, on a complete record, that the conspiracy had continuing effects. The record is not complete because the conspirators impeded the investigation by failing to provide full and accurate information requested by the Commission on how they established prices during the original periods of investigation. Consequently, the Commission must use BIA, which does not indicate that prices during the Subsequent Period reflected competitive marketplace conditions. In turn, this supports a finding that, even if the conspiracy ceased to exist at the conclusion of the Conspiracy Period, it continued to affect prices charged by the domestic industry into the Subsequent Period.

In our 2002 determination, we found that a significant condition of competition affecting domestic ferrosilicon prices throughout the original periods of investigation was the price fixing conspiracy. For the reasons stated above, we have modified this finding to comply with the CIT's instructions in Elkem II. We now find that a significant condition of competition was that the price-fixing conspiracy had effects on prices charged by U.S. ferrosilicon producers during the Conspiracy Period and the Subsequent Period.[47]

IV. NO MATERIAL INJURY BY REASON OF SUBJECT IMPORTS

For purposes of this remand proceeding, we reaffirm the findings we made in part V. of the 2002 remand opinion, in which we concluded that the domestic ferrosilicon industry was not materially injured by reason of the subject imports.[48] [49] In this section, we explain briefly why these findings are still valid in light of our modified finding concerning the periods during which the conspiracy affected prices charged by U.S. ferrosilicon producers.

In our 2002 opinion, we found that the volume of subject imports was not significant because of the pertinent conditions of competition and the lack of price effects. With respect to conditions of

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[46] See ES Development, Inc. v. RWM Enterprises, Inc., 939 F.2d 547, 557 (8th Cir. 1991); Wilk v. American Medical Ass'n, 895 F.2d 352, 369 (7th Cir. 1990).

CCMA argues that such a finding would be inconsistent with findings made in the criminal antitrust litigation involving SKW. As previously discussed, we previously concluded that we are not bound by findings in the criminal antitrust litigation, and the CIT has upheld this conclusion.

[47] This finding differs from our finding in the 2002 opinion inasmuch as it does not encompass the Prior Period.

[48] Threat of material injury was not an issue in the 2002 remand proceedings and also is not an issue in these proceedings. For the reasons stated in the 2002 opinion, we again adopt the analysis used in the 1999 opinion finding no threat of material injury by reason of subject imports. 2002 Remand Opinion, USITC Pub. 3531 at 16 n.72; see 1999 Reconsideration Opinion, USITC Pub. 3218 at 33-41.

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

competition, we found that, because of the effects of the conspiracy, domestic producers were charging higher prices than market conditions warranted, providing opportunities for the subject imports to increase their sales in the U.S. market.[50]

This finding is still appropriate. For the Conspiracy Period and the Subsequent Period, we have found that pricing for the domestically-produced product was not the result of normal marketplace conditions. As we stated in the 2002 opinion, because the subject imports and the like product were good substitutes, the increases in volume and market share of subject imports that occurred during the original periods of investigation were the result of the domestically produced product not being priced at marketplace levels. We observe that, because of the manner in which the Commission collects data, the first period for which the record permits us to observe changes in import volume and market penetration is from 1989 to 1990. This reflects changes that occurred during calendar year 1990, which is entirely within the Conspiracy Period.[51] Consequently, our modified finding concerning the portion of the original periods of investigation during which the conspiracy affected prices does not require us to change our analysis on how conditions of competition affected subject import volume. We explain below why we continue to find that the subject imports had no significant price effects. Consequently, we reaffirm our prior finding that the volume of subject imports was not significant.

We also reaffirm our prior findings concerning the price effects of subject imports. Our finding in the 2002 opinion that the subject imports did not have significant price-depressing or -suppressing effects was affirmed by the CIT in Elkem II and need not be revisited here. We found that the underselling and lost sales data in the record were not probative because "they compare the subject imports with domestically-produced ferrosilicon priced at a level not reflecting competitive marketplace conditions."[52] For the reasons stated above, this statement continues to be true with respect to the Conspiracy Period (for which the CIT has affirmed the underselling analysis) and the Subsequent Period. Thus, for the Conspiracy Period and the Subsequent Period, we reaffirm that we do not find a significant nexus between the subject imports and the observed underselling. The available pricing data for the Prior Period do not detract from this conclusion, because they show predominant overselling.[53] Consequently, we again conclude that underselling was not significant for the original periods of investigation.

Absent volume or price effects, we reaffirm our prior conclusion that the subject imports did not have a significant impact on the domestic industry.[54] As we explained in our 2002 opinion, "the record does not show the requisite causal nexus between the subject imports and any difficulties the domestic industry was experiencing."[55]

CONCLUSION

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

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[50] 2002 Remand Opinion, USITC Pub. 3531 at 16-17.

[51] In other words, because the first three quarters of 1989 were the first three quarters of the original periods of investigation, they were part of the initial year for recording subject import volume and market penetration. The record would not indicate how subject import volume changed prior to the initial year of the period of investigation.

[52] 2002 Remand Opinion, USITC Pub. 3531 at 17.

[53] The subject imports oversold domestically produced ferrosilicon in 7 of 11 comparisons during the first three quarters of 1989. CR/PR, Tables III-7a, III-7c, III-8a, III-8c, III-9a. Additionally, there were no confirmed lost sales allegations encompassing the first three quarters of 1989. INV-Q-029 at I-116-127, INV-Q-171 at 90-93.

[54] 2002 Remand Opinion, USITC Pub. 3531 at 18; see also 1999 Reconsideration Opinion, USITC Pub. 3218 at 32-33.

[55] 2002 Remand Opinion, USITC Pub. 3531 at 18.

APPENDIX A

FEDERAL REGISTER NOTICE

ceramic station post insulators from Japan are being sold in the United States at less than fair value within the meaning of section 733 of the Act (19 U.S.C. 1673b). The investigation was requested in a petition filed on December 31, 2002, by Lapp Insulator Company LLC, Le Roy, NY; Newell Porcelain Co., Inc., Newell, WV; Victor Insulators, Inc., Victor, NY; and the IUE–CWA, AFL–CIO, Washington, DC.

Participation in the investigation and public service list.—Persons, including industrial users of the subject merchandise and, if the merchandise is sold at the retail level, representative consumer organizations, wishing to participate in the final phase of this investigation as parties must file an entry of appearance with the Secretary to the Commission, as provided in section 201.11 of the Commission's rules, no later than 21 days prior to the hearing date specified in this notice. A party that filed a notice of appearance during the preliminary phase of the investigation need not file an additional notice of appearance during this final phase. The Secretary will maintain a public service list containing the names and addresses of all persons, or their representatives, who are parties to the investigation.

Limited disclosure of business proprietary information (BPI) under an administrative protective order (APO) and BPI service list.—Pursuant to section 207.7(a) of the Commission's rules, the Secretary will make BPI gathered in the final phase of this investigation available to authorized applicants under the APO issued in the investigation, provided that the application is made no later than 21 days prior to the hearing date specified in this notice. Authorized applicants must represent interested parties, as defined by 19 U.S.C. 1677(9), who are parties to the investigation. A party granted access to BPI in the preliminary phase of the investigation need not reapply for such access. A separate service list will be maintained by the Secretary for those parties authorized to receive BPI under the APO.

Staff report.—The prehearing staff report in the final phase of this investigation will be placed in the nonpublic record on October 16, 2003, and a public version will be issued thereafter, pursuant to section 207.22 of the Commission's rules.

Hearing.—The Commission will hold a hearing in connection with the final phase of this investigation beginning at 9:30 a.m. on October 30, 2003, at the U.S. International Trade Commission Building. Requests to appear at the hearing should be filed in writing with the Secretary to the Commission on or before October 21, 2003. A nonparty who has testimony that may aid the Commission's deliberations may request permission to present a short statement at the hearing. All parties and nonparties desiring to appear at the hearing and make oral presentations should attend a prehearing conference to be held at 9:30 a.m. on October 24, 2003, at the U.S. International Trade Commission Building. Oral testimony and written materials to be submitted at the public hearing are governed by sections 201.6(b)(2), 201.13(f), and 207.24 of the Commission's rules. Parties must submit any request to present a portion of their hearing testimony *in camera* no later than 7 days prior to the date of the hearing.

Written submissions.—Each party who is an interested party shall submit a prehearing brief to the Commission. Prehearing briefs must conform with the provisions of section 207.23 of the Commission's rules; the deadline for filing is October 23, 2003. Parties may also file written testimony in connection with their presentation at the hearing, as provided in section 207.24 of the Commission's rules, and posthearing briefs, which must conform with the provisions of section 207.25 of the Commission's rules. The deadline for filing posthearing briefs is November 6, 2003; witness testimony must be filed no later than three days before the hearing. In addition, any person who has not entered an appearance as a party to the investigation may submit a written statement of information pertinent to the subject of the investigation on or before November 6, 2003. On November 24, 2003, the Commission will make available to parties all information on which they have not had an opportunity to comment. Parties may submit final comments on this information on or before November 26, 2003, but such final comments must not contain new factual information and must otherwise comply with section 207.30 of the Commission's rules. All written submissions must conform with the provisions of section 201.8 of the Commission's rules; any submissions that contain BPI must also conform with the requirements of sections 201.6, 207.3, and 207.7 of the Commission's rules. The Commission's rules do not authorize filing of submissions with the Secretary by facsimile or electronic means, except to the extent permitted by section 201.8 of the Commission's rules, as amended, 67 FR 68036 (November 8, 2002).

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

Authority: This investigation is being conducted under authority of title VII of the Tariff Act of 1930; this notice is published pursuant to section 207.21 of the Commission's rules.

Issued: July 15, 2003.

By order of the Commission.

Marilyn R. Abbott,

Secretary to the Commission.

[FR Doc. 03–18348 Filed 7–18–03; 8:45 am]

BILLING CODE 7020–02–P

INTERNATIONAL TRADE COMMISSION

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

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

AGENCY: United States International Trade Commission.

ACTION: Notice and scheduling of remand proceedings.

SUMMARY: The United States International Trade Commission (Commission) hereby gives notice of the court-ordered remand of its reconsideration proceedings pertaining to countervailing duty Investigation No. 303–TA–23 (Final) concerning ferrosilicon from Venezuela, and antidumping Investigation Nos. 731–TA–566–570 and 731–TA–641 (Final) concerning ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela.

EFFECTIVE DATE: July 14, 2003.

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

SUPPLEMENTARY INFORMATION:

Background

In August 1999 the Commission made negative determinations upon reconsideration in its antidumping and countervailing duty investigations concerning ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela. Ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela, Inv. Nos. 303–TA–23, 731–TA–566–570, 731–TA–641 (Final) (Reconsideration), USITC Pub. 3218 (Aug. 1999). The Commission's determinations were appealed to the U.S. Court of International Trade (CIT). On February 21, 2002, the CIT remanded the matter to the Commission for further proceedings. *Elkem Metals Co.* v. *United States,* 193 F. Supp.2d 1314 (Ct. Int'l Trade 2002). On remand, the Commission conducted further proceedings. In September 2002 it reached negative determinations on remand. Ferrosilicon from Brazil, China, Kazakhstan, Russia, Ukraine, and Venezuela, Inv. Nos. 303–TA–23, 731–TA–566–570, and 731–TA–631 (Final) (Reconsideration) (Remand), USITC Pub. 3531 (Sept. 2002). On March 18, 2003, the CIT issued an opinion concerning the Commission's determinations on remand which affirmed the Commission in part and remanded in part for further proceedings. *Elkem Metals Co.* v. *United States,* slip op. 03–66 (Ct. Int'l Trade June 18, 2003) ("Elkem II").

Written Submissions

The Commission is not reopening the record in the second remand proceeding for submission of new factual information. It will, however, permit the parties to file a written submission addressed to the determination the Commission should reach in its second remand determination in light of Elkem II. Parties should state the factual and legal bases for their position. This submission must be filed with the Commission no later than 14 days after publication of this notice in the **Federal Register**, shall not contain any new factual information, and shall not exceed 20 pages of textual material, double-spaced and single-sided, on stationery measuring 8½ x 11 inches.

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

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

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

Participation in the Proceedings

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

Public Vote

The Commission will vote on the remand determinations at a public meeting scheduled to be held on Monday, August 18, 2003. The meeting is tentatively scheduled for 11 a.m.

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

Issued: July 15, 2003.

By order of the Commission.

Marilyn R. Abbott,

Secretary.

[FR Doc. 03–18426 Filed 7–18–03; 8:45 am]

BILLING CODE 7020–02–P

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Importer of Controlled Substances; Notice of Registration

By Notice dated March 21, 2003 and published in the **Federal Register** on April 9, 2003, (68 FR 17403), Boehringer Ingelheim Chemicals, Inc., 2820 N. Normandy Drive, Petersburg, Virginia 23805, made application by renewal to the Drug Enforcement Administration (DEA) to be registered as an importer of Phenylacetone (8501), a basic class of controlled substances listed in Schedule II.

The firm plans to import Phenylacetone for bulk manufacture of amphetamine.

No comments or objections have been received. DEA has considered the factors in Title 21, United States Code, section 823(a) and determined that the registration of Boehringer Ingelheim Chemicals, Inc. to import the listed controlled substances is consistent with the public interest and with United States obligations under international treaties, conventions, or protocols in effect on May 1, 1971, at this time. DEA has investigated Boehringer Ingelheim Chemicals, Inc. on a regular basis to ensure that the company's continued registration is consistent with the public interest. This investigation included inspection and testing of the company's physical security systems, verification of the company's compliance with state and local laws, and a review of the company's background and history. Therefore, pursuant to section 1008(a) of the Controlled Substances Import and Export Act and in accordance with Title 21, Code of Federal Regulations, section 1301.34, the above firm is granted registration as an importer of the basic classes of controlled substances listed above.

Dated: July 2, 2003.

Laura M. Nagel,

Deputy Assistant Administrator, Office of Diversion Control, Drug Enforcement Administration.

[FR Doc. 03–18477 Filed 7–18–03; 8:45 am]

BILLING CODE 4410–09–M

DEPARTMENT OF JUSTICE

Drug Enforcement Administration

Manufacturer of Controlled Substances; Notice of Registration

By Notice dated March 14, 2003, and published in the **Federal Register** on April 2, 2003, (68 FR 16088), Cedarburg Pharmaceuticals, LLC, 870 Badget Circle, Grafton, Wisconsin 53204, made application by letter to the Drug Enforcement Administration to be registered as a bulk manufacturer of dihydromorphine (9145), a basic class of controlled substance listed in Schedule I.

The firm plans to use this substance in the conversion process to produce a Schedule II controlled substance, hydromorphone.

No comments or objections have been received. DEA has considered the factors in Title 21, United States Code, section 823(a) and determined that the registration of Cedarburg Pharmaceuticals, LLC, to manufacture the listed controlled substances is consistent with the public interest at this time. DEA has investigated