

FERROSILICON FROM KAZAKHSTAN AND UKRAINE

Determinations of the Commission
in Investigations Nos. 731-TA-566
and 569 (Preliminary) Under the
Tariff Act of 1930, Together With
the Information Obtained in the
Investigations

USITC PUBLICATION 2616

MARCH 1993

**United States International Trade Commission
Washington, DC 20436**



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UNITED STATES INTERNATIONAL TRADE COMMISSION

WASHINGTON, D.C. 20436

ERRATA

The subtitle of Publication #2616, *Ferrosilicon from Kazakhstan and Ukraine*, should read "Determinations of the Commission in Investigations Nos. 731-TA-566 and 569 (Final) Under the Tariff Act of 1930, Together With the Information Obtained in the Investigations." These investigations were final, not preliminary.

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UNITED STATES INTERNATIONAL TRADE COMMISSION

Investigations Nos. 731-TA-566 and 569 (Final)

FERROSILICON FROM KAZAKHSTAN AND UKRAINE

Determinations

On the basis of the record¹ developed in the subject investigations, the Commission determines, pursuant to section 735(b) of the Tariff Act of 1930 (19 U.S.C. § 1673d(b)) (the Act), that an industry in the United States is materially injured by reason of imports from Kazakhstan and Ukraine of ferrosilicon, provided for in subheadings 7202.21.10, 7202.21.50, 7202.21.75, 7202.21.90, and 7202.29.00 of the Harmonized Tariff Schedule of the United States, that have been found by the Department of Commerce to be sold in the United States at less than fair value (LTFV). 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 Kazakhstan and Ukraine; thus, the retroactive imposition of antidumping duties is not necessary.

Background

The Commission instituted these investigations effective December 22, 1992, following preliminary determinations by the Department of Commerce that imports of ferrosilicon from Kazakhstan and Ukraine were being sold at LTFV within the meaning of section 733(b) of the Act (19 U.S.C. § 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.

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

VIEWS OF THE COMMISSION

Based on the record in these investigations, we determine that an industry in the United States is materially injured¹ by reason of less than fair value ("LTFV") imports of ferrosilicon from Kazakhstan and Ukraine. We further find that critical circumstances do not exist with respect to imports from either country.

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 . . ." ² 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 investigation. . ." ³

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

² 19 U.S.C. § 1677(4)(a).

³ 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).

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.⁴

Ferrosilicon is used primarily as an alloying agent in the production of iron and steel⁵ 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.⁶

Low-silicon-content ferrosilicon is defined as ferrosilicon containing by weight more than 8 percent but not more than 55 percent of silicon, and 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 75.⁷

⁴ 58 F.R. 13050 (March 9, 1993).

⁵ 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 in these investigations incorporates by reference the Report in Ferrosilicon from the People's Republic of China (hereinafter referred to as the "Consolidated Report").

⁶ Id.

⁷ Consolidated Report at I-5.

Generally, ferrosilicon is available in "standard" grades and "specialty" grades. The standard ferrosilicon grades include "regular", "high-purity", "low-aluminum" and "foundry grade" material.⁸ 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 65.⁹ 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 definition.¹⁰ 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.¹¹ Although switching between grades is not frequent once a particular grade is selected, some end-users have switched between

⁸ Consolidated Report at I-6.

⁹ Id.

¹⁰ 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).

¹¹ Consolidated Report at I-7.

ferrosilicon 50 and 75 when the price gap ¹² between the two grades is wide enough and of long enough duration to justify the short-term costs of switching. ^{13 14}

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. ¹⁵ The same manufacturing facilities can be, and in some circumstances are, used to produce both grade 50 and grade 75 ferrosilicon. ¹⁶ Although there is evidence that it is preferable to use different furnaces for the production of ferrosilicon 50 and 75, ¹⁷ it is possible to produce ferrosilicon 50 in a furnace designed for ferrosilicon 75, and more than one producer does so commercially. ¹⁸ There is also evidence that various grades of ferrosilicon are produced using the same employees. ¹⁹ 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. ²⁰

Thus, there is no clear dividing line between high-silicon-content and low-silicon-content ferrosilicon. Accordingly, we find that the like product

¹² Prices for the various grades of ferrosilicon are based on the silicon content of the product. Consolidated Report at I-7.

¹³ Consolidated Report at I-7; EC-Q-025 at 35.

¹⁴ 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.

¹⁵ Consolidated Report at I-22.

¹⁶ Consolidated Report at I-8 and I-26.

¹⁷ Consolidated Report at I-8.

¹⁸ Consolidated Report at I-26.

¹⁹ Consolidated Report at I-7; EC-Q-025 at 23.

²⁰ Consolidated Report at I-7; EC-Q-025 at 35.

consists of all grades of ferrosilicon.²¹ We further find that the domestic industry²² includes producers of all grades of ferrosilicon.

²¹ 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 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).

²² We find that the domestic industry consists of all U.S. producers of ferrosilicon. Although no party to these final investigations has argued that any U.S. producer is related to any Ukrainian or Kazakhstan producer or exporter, we have considered whether any domestic producer is related to any producer or exporter in the countries currently subject to investigation and, if so, whether appropriate circumstances exist to exclude them from the domestic industry under the provisions of 19 U.S.C § 1677(4)(B).

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 whether Keokuk Ferro-Sil, Inc. ("Keokuk") or Elkem Metals Co. ("Elkem") were related parties in those investigations, and if so, whether appropriate circumstances existed to exclude either firm from the domestic industry. Of particular relevance here, the Commission found in those preliminary investigations that Keokuk is a related party because it has an exclusive marketing relationship with Minerails, which is currently the sole importer of ferrosilicon from Kazakhstan. See, USITC Pub. 2535 at 10. The Commission also determined that Elkem was a related party. The Commission concluded, however, that appropriate circumstances did not exist to exclude either firm from the domestic industry. The Commission received no additional evidence in the course of these final investigations or any of the other concurrent investigations that indicates that appropriate circumstances exist to exclude either of these two related parties from the domestic industry.

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 also has received no additional information in the course of these final investigations that warrants reconsideration of this issue.

Accordingly, we determine that no U.S. producer should be excluded from the domestic industry.

II. CONDITION OF THE DOMESTIC INDUSTRY

In determining whether the domestic industry is materially injured by the LTFV 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." ²³ These factors include production, consumption, shipments, inventories, capacity utilization, market share, employment, wages, productivity, financial performance, capital expenditures, and research and development. ²⁴ 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." ²⁵

The demand for ferrosilicon is directly tied to the steel and foundry industries. ²⁶ 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 cast iron also have contributed to a decline in cast iron production. ²⁷ 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"). ²⁸ 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. ²⁹

²³ 19 U.S.C. § 1677(7)(C)(iii).

²⁴ Id.

²⁵ Id.

²⁶ Consolidated Report at I-13.

²⁷ See, Consolidated Report at I-13; see also, EC-Q-025 at 13.

²⁸ Consolidated Report at I-13.

²⁹ Id.

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.³⁰ 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.³¹ 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.³²

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 1992.³³ 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 1992.³⁴

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

³⁰ Consolidated Report at I-23.

³¹ Consolidated Report at I-24, Table 6.

³² Id.

³³ Consolidated Report at I-23, Table 5.

³⁴ Id.

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. ³⁵

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. ³⁶

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. ³⁷ U.S. producers' average price of ferrosilicon 50 sold to U.S. foundries followed a similar price trend. ³⁸

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. ³⁹ ⁴⁰

³⁵ Consolidated Report at I-28, Table 10.

³⁶ Consolidated Report at I-56 -- I-57, Table 26.

³⁷ Id.

³⁸ Consolidated Report at I-57.

³⁹ Consolidated Report at I-34 -- I-35.

III. 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."⁴¹ Cumulation is not required, however, when imports from a subject country are negligible and have no discernible adverse impact on the domestic industry.⁴²

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

- (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.⁴³

⁴⁰(...continued)

⁴⁰ 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.

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

⁴² 19 U.S.C. § 1677(7)(C)(v).

⁴³ 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).

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. ⁴⁴ Only a "reasonable overlap" of competition is required. ⁴⁵ 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. ⁴⁶ In addition to ferrosilicon imports from Kazakhstan and Ukraine, imports from Argentina, ⁴⁷ Brazil, Egypt, Russia, and Venezuela are all subject to investigation and can be cumulated. The Commission reached a final affirmative determination of material injury by reason of LTFV ferrosilicon imports from the People's Republic of China ("China" or the "PRC") on February 23, 1993. The subsequent antidumping order imposed by the Commerce Department is so recent that it is

⁴⁴ See, e.g., Wieland Werke, AG v. United States, 718 F. Supp. 50, 52 (Ct. Int'l Trade 1989).

⁴⁵ See, e.g., Granges Metallverken AB v. United States, 716 F. Supp. 17 (Ct. Int'l Trade 1989).

⁴⁶ 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).

⁴⁷ Although imports from Argentina were the subject of a negative preliminary determination by the Commerce Department, 57 F.R. 61874 (December 29, 1992), they remain subject to investigation. See, United Engineering & Forging v. United States, 779 F. Supp. 1375, 1392-93 (Ct. Int'l Trade 1991), affirming, Certain Forged Steel Crankshafts from the Federal Republic of Germany and the United Kingdom, Invs. Nos. 731-TA-351 and 353 (Final), USITC Pub. 2014 (September 1987) at 14.

still appropriate to consider imports from China for purposes of cumulation under the present investigations. ^{48 49}

For purposes of the instant investigations, Chairman Newquist, and Commissioners Rohr and Nuzum cumulated the volume and effect of imports from all countries set forth above. Vice Chairman Watson cumulated the volume and effect of imports from all countries except Egypt. ⁵⁰ Commissioners Brunsdale and Crawford cumulated the volume and effect of imports from all countries except Egypt and China. ⁵¹ There is no issue concerning a reasonable overlap

⁴⁸ See, Ferrosilicon from the People's Republic of China, USITC Pub. 2606; see also, 58 FR 13448 (March 11, 1993). We note that the Commission's preliminary investigations of imports from Argentina, Kazakhstan, the People's Republic of China, Russia, Ukraine and Venezuela were instituted simultaneously on the basis of the same petition, and were concluded on the same date. See, USITC Pub. 2535; see also, 57 FR 23244 (June 2, 1992). The Commission's final investigations have different termination dates because Commerce extended its deadlines for issuing final determinations with respect to imports from the six countries in question. The Commission's preliminary investigations with respect to Brazil and Egypt were instituted on January 21, 1993; see also, 58 FR 5413 (January 21, 1993). 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 (noting imports subject to an ongoing final investigation "are eligible for cumulation" with those subject to preliminary investigations "if the statutory requirements are otherwise met."); see also, Cemex, S.A. v. United States, 790 F. Supp. 290 (Ct. Int'l Trade 1992).

⁴⁹ The Commission has cumulated imports subject to investigation with imports subject to antidumping orders in numerous other investigations. See, e.g., Gray Portland Cement and Cement Clinker From Japan, Inv. No. 731-TA-461 (Final), USITC Pub. 2376 (April 1991); Butt Weld Pipe Fittings From Japan, Inv. No. 731-TA-309 (Final), USITC Pub. 1943 (January 1987); Certain Brass Sheet and Strip From France, Italy, Sweden, and West Germany, Invs. Nos. 701-TA-270 and 731-TA-313-317 (Final), USITC Pub. 1951 (February 1987); Tapered Roller Bearings and Parts Thereof, and Certain Housing Incorporating Tapered Rollers From Italy and Yugoslavia, Invs. Nos. 731-TA-342 and 346 (Final), USITC Pub. 1999 (August 1987).

⁵⁰ See, Concurring and Dissenting Views of Vice Chairman Watson, Commissioner Brunsdale and Commissioner Crawford in Ferrosilicon from Brazil and Egypt, USITC Pub. 2605.

⁵¹ 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 Crawford in Ferrosilicon from the People's Republic of China, USITC Pub. 2606.

of competition with respect to imports from Brazil, other subject imports, and the domestic like product. Competition among all these products exists.⁵² There is further no issue that imports from Brazil, Venezuela, or Kazakhstan are negligible.⁵³ We address below other issues relevant to cumulation of imports from Brazil, Egypt, Kazakhstan, the People's Republic of China, Ukraine and Venezuela.

1. The Competition Requirement.

a. Ferrosilicon from Kazakhstan, Russia and Ukraine.

Respondent 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 between the grades.⁵⁴

Purchasers generally have the technical ability to use either grade, with some producers more readily able than others to use either grade.⁵⁵ Further, some purchasers reported actual, albeit limited, switching between

⁵² Consolidated Report at I-79 and Section III.A.1(a) infra.

⁵³ Consolidated Report at I-67.

⁵⁴ 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.

⁵⁵ 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.

ferrosilicon 50 and ferrosilicon 75.⁵⁶ Finally, although Minerails argued that it alone imports ferrosilicon 50 into the United States,⁵⁷ evidence on the record shows that ferrosilicon 50 has been imported from other countries subject to investigation.

Respondent Minerails has also argued that Kazakh ferrosilicon does not compete with domestic and other imported sources because importers of Kazakh material are unable to provide SPC⁵⁸ quality standard documentation, which is required by a number of iron and steel producers.⁵⁹ In the preliminary investigation with respect to Kazakh imports, we acknowledged that "a significant portion" of Minerails' sales do not compete with the domestic industry, but concluded that there was sufficient competition to satisfy the "reasonable overlap" standard.⁶⁰ In these final investigations, although available data indicate that the subject imports were not able to supply SPC documentation,⁶¹ 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.⁶² While SPC documentation appears to be an increasing requirement,⁶³ imports were not thereby foreclosed from competing for most sales during the period of investigation. We thus do not find a basis for declining to cumulate subject imports from any country on these grounds.

⁵⁶ See, EC-Q-025 at 35.

⁵⁷ See, Hearing Tr. at 50; Minerails' Prehearing Brief at 21-22 ("All of the imports from Kazakhstan are FeSi 50, while all of the other imports are FeSi 75").

⁵⁸ "SPC" refers to Statistical Production Controls documentation used by the iron foundry and steel industry. Consolidated Report at I-75, n. 67.

⁵⁹ Minerails' Prehearing Brief at 23, n. 8.

⁶⁰ See, USITC Pub. 2535 at 23.

⁶¹ Consolidated Report at I-62.

⁶² Consolidated Report at I-55, n. 90.

⁶³ Consolidated Report at I-55.

Finally, Respondent Minerails 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.⁶⁴ 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.⁶⁵

b. Ferrosilicon from the PRC.

Respondent CVG-Venezolana de Ferrosilicio, C.A. ("CVG") 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.⁶⁶ CVG contended that Chinese imports are restricted for use only by certain stainless steel producers for whom aluminum content is not critical.⁶⁷ In the preliminary determination with respect to Chinese imports, 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."⁶⁸ We reaffirmed this finding in our final determination on Chinese imports.⁶⁹

⁶⁴ See, Minerails' Posthearing Brief at 10.

⁶⁵ Consolidated Report at I-23.

⁶⁶ CVG's Prehearing Brief at 13-14.

⁶⁷ Id.

⁶⁸ See, USITC Pub. 2535 at 22-23 and n. 89.

⁶⁹ 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

(continued...)

Finally, no party presented any additional information in these final investigations on ferrosilicon from Ukraine and Kazakhstan 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.

c. Ferrosilicon from Venezuela.

Respondent CVG has also 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 domestic market.⁷⁰ 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,"⁷¹ 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 otherwise reasonable overlap in competition.

⁶⁹(...continued)

difference between the domestic and imported Chinese product. See, Consolidated Report at I-50 -- I- 51.

⁷⁰ 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.

⁷¹ See, H.R. No. 1156, 98th Cong., 2nd Sess. 173 (1984); H.R. Rep. No. 725, 98th Cong., 2d Sess. 37 (1984).

d. Ferrosilicon from Egypt. ⁷²

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 ⁷³ 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. ⁷⁴ 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." ⁷⁵

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, Egyptian subject imports 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. ⁷⁶

⁷² 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.

⁷³ See, USITC Pub. 2605 (February 1993).

⁷⁴ Egyptian respondents' Postconference Brief at 2-9.

⁷⁵ Egyptian respondents' Postconference Brief at 2-3 and n. 6.

⁷⁶ Egyptian respondents' Postconference Brief at 6.

Although mindful of some apparent differences between a large portion of the Egyptian imports, 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 Egyptian imports were not the only imports to require some additional processing (i.e., screening). Some of the Argentine, Brazilian, Kazakh, Russian, Ukrainian, and Venezuelan product also had to be screened. ⁷⁷ 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 Egyptian imports 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. ⁷⁸ Finally, we noted that some domestic producers do sell slag and fines, ⁷⁹ and that there were imports, albeit limited, of slag from other countries during the period of investigation. ⁸⁰ We adopt these findings for purposes of these final investigations.

2. Negligible Imports Exception.

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:

⁷⁷ Consolidated Report at I-50 -- I-52 and notes thereto, and at E-2, n. 2.

⁷⁸ Consolidated Report at I-51.

⁷⁹ Consolidated Report at I-18, n. 23.

⁸⁰ See, e.g., EC-Q-025 at 40.

- (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.⁸¹

In addition to the three enumerated statutory factors, the Commission has in the past considered additional factors, for example: whether imports have been increasing;⁸² whether the domestic industry is "already suffering considerable injury and has long been battered by import price competition";⁸³ 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.⁸⁴

⁸¹ 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. 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, 100th Cong., 1st. Sess. 130 (Part I, 1987) at 131. 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).

⁸² 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.

⁸³ H.R. Rep. No. 40, Part 1, 100th Cong., 1st Sess. 131 (1987).

⁸⁴ 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

(continued...)

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 ⁸⁵ on the record that there were imports of ferrosilicon from Russia and Ukraine during the period of investigation. ⁸⁶ ⁸⁷ Although imports from Russia and Ukraine, as a share of

⁸⁴(...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.

⁸⁵ 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.

⁸⁶ 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).

⁸⁷ 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 Kazakhstan and Ukraine warranted an affirmative finding of a reasonable indication of material injury by reason of imports from those countries. Information on Kazakh 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
(continued...)

consumption, each fluctuated at very low levels until 1992, such imports each increased substantially in interim 1992.⁸⁸ These levels lead us to conclude that imports from Russia and Ukraine are not negligible.

Respondent 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 imports⁸⁹ as such, because a substantial portion of Minerais' imports are held in inventory, and may be re-exported.⁹⁰ 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,⁹¹ although the Commission may consider the degree to which imports

⁸⁷(...continued)

from these 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).

⁸⁸ Consolidated Report at I-45, I-46,

⁸⁹ "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.

⁹⁰ See, Minerais' Prehearing Brief at 25-27; Minerais' Posthearing Brief, ex. 1 at 15-16.

⁹¹ 19 U.S.C. 1677(7)(C)(i).

are held in inventory instead of being immediately sold as a factor in assessing the significance of the imports.⁹² Even measuring import shipments, as opposed to imports, however, we find that ferrosilicon imports from Russia and Ukraine are not negligible.^{93 94}

b. Ferrosilicon Imports from China.⁹⁵

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.⁹⁶ 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.⁹⁷ 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.^{98 99} 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.¹⁰⁰

⁹² 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).

⁹³ While less dramatic than the increase in imports, import shipments of Russian and Ukrainian product also increased during interim 1992.

⁹⁴ 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.

⁹⁵ 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.

⁹⁶ See, USITC Pub. 2606 at 19.

⁹⁷ Consolidated Report at I-43, I-46.

⁹⁸ 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.

⁹⁹ As explained more fully below, Vice Chairman Watson does not believe this to be a price sensitive market.

¹⁰⁰ Consolidated Report at I-64.

c. Ferrosilicon Imports from Argentina. ¹⁰¹

For purposes of these investigations, the Commission adopts its preliminary finding that imports from Argentina are not negligible. ¹⁰² There were imports from Argentina in all periods of the investigation except the first three quarters of 1992. ¹⁰³ ¹⁰⁴ Shipments of Argentine product were made in every period, including interim 1992. ¹⁰⁵ Information on the record demonstrates that the level of imports throughout the period of investigation exceeds the level which the Commission has generally considered to be negligible in the past, and that imports increased from 1990 to 1991. ¹⁰⁶

d. Ferrosilicon from Egypt ¹⁰⁷

For purposes of these investigations, we also adopt our preliminary finding that Egyptian imports are not negligible. Egyptian import levels are higher than the levels the Commission has in the past considered to be negligible. ¹⁰⁸ Further, Egyptian imports are not isolated and sporadic. ¹⁰⁹

¹¹⁰ While Egyptian products were imported in only 3 of 15 quarters during the

¹⁰¹ See, n. 46, supra.

¹⁰² See, USITC Pub. 2535 at 24.

¹⁰³ Consolidated Report at I-46.

¹⁰⁴ The Commission generally evaluates negligibility based on the entire period of investigation. See, e.g. Certain Telephone Systems and Subassemblies Thereof from Japan and Taiwan, Invs. Nos. 731-TA-426 and 428 at 32 (November 1989).

¹⁰⁵ Consolidated Report at I-46.

¹⁰⁶ Consolidated Report at I-44.

¹⁰⁷ 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.

¹⁰⁸ 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.

¹⁰⁹ 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).

¹¹⁰ Egyptian respondents argued that imports from Egypt should be considered negligible based on importations in only 3 out the 15 quarters, different

(continued...)

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 than 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.

IV. MATERIAL INJURY BY REASON OF LTFV IMPORTS ¹¹¹

In its determination of whether the domestic injury is materially injured by reason of the subject imports, the statute directs the Commission to consider: ¹¹²

(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. . ." ¹¹³ However, the

¹¹⁰(...continued)

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.

¹¹¹ 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.

¹¹² See, 19 U.S.C. § 1677(7)(B).

¹¹³ 19 U.S.C. § 1677(7)(B)(ii).

Commission is not to weigh causes. ^{114 115 116 117} Finally, the Commission is

¹¹⁴ See, e.g., Citrosuco Paulista, S.A. v. United States, 704 F. Supp. 1075, 1101 (Ct. Int'l Trade 1988).

¹¹⁵ 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).

¹¹⁶ 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).

¹¹⁷ 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." ¹¹⁸

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. ¹¹⁹ 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. ^{120 121}

Respondent Minerails argued that we should examine market share based on import shipments because a substantial portion of Minerails' imports are held in inventory and may be re-exported and never sold in the United States. ¹²² 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 are "significant." ¹²³ Further, where the industry

¹¹⁷(...continued)

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

¹¹⁸ 19 U.S.C. § 1677(7)(C).

¹¹⁹ Consolidated Report at I-44, I-45, Table C-1; EC-Q-025 at 8.

¹²⁰ Consolidated Report at I-24, Table C-1.

¹²¹ 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.

¹²² Minerails 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 Minerails' arguments or its "intent".

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

customarily maintains large inventories, as appears to be the case here,¹²⁴ the Commission may adjust import penetration figures to account for inventories, particularly when a large initial shipment was used to establish an inventory.¹²⁵ 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.¹²⁶

The increase in imports is especially significant due to the price sensitive nature of competition among ferrosilicon suppliers.^{127 128 129}

¹²⁴ 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).

¹²⁵ See, Wells Manufacturing co. v. United States, 677 F. Supp. 1239, 1240 (Ct. Int'l Trade 1987).

¹²⁶ Consolidated Report at I-46.

¹²⁷ 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.

¹²⁸ 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.

¹²⁹ 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...)

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,¹³⁰ leading to clear price signaling in the U.S. market.¹³¹ 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.¹³²

¹²⁹(...continued)

accompanying declines in price-cost margins establish that the imports have caused price depression. Ferrosilicon prices were at historically unprecedented high level 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.

¹³⁰ Consolidated Report at I-47, n. 55.

¹³¹ 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.

¹³² 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.

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,¹³³ and the cost of ferrosilicon as an input is relatively small compared to the total cost of the finished product.¹³⁴ 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.¹³⁵ 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.¹³⁶ First, there was significant underselling, both in terms of frequency and absolute price differences. When considering all countries under investigation, 52 of a total of 75 price comparisons showed underselling by subject imports.¹³⁷ Second, this underselling

¹³³ Consolidated Report at I-10. Those that generally exist either cost more, introduce undesired elements, or both.

¹³⁴ Consolidated Report at I-48, EC-Q-025 at 46 - 47. See also, Iwatsu, 758 F. Supp. at 1514.

¹³⁵ 19 U.S.C. § 1677(7)(C)(ii).

¹³⁶ 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).

¹³⁷ Consolidated Report at I-62, E-4.

occurred in conjunction with increasing market penetration by the cumulated imports at a time of declining market share of the U.S. industry.¹³⁸ Third, the U.S. selling price of the domestic and subject imported ferrosilicon generally fell during the period of investigation,¹³⁹ and import prices declined at somewhat higher rates than domestic prices during this same period.^{140 141} Fourth, domestic producers lost sales to the subject imports due to the lower prices of the imports.¹⁴²

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.¹⁴³ 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,¹⁴⁴ the cost of goods sold as a share of net sales increased.¹⁴⁵ This indicates that pricing has not been at sufficient levels to allow the

¹³⁸ 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.

¹³⁹ EC-Q-025 at 10.

¹⁴⁰ Id.

¹⁴¹ See, Iwatsu 758 F. Supp. 1506, 1514 (prices of the subject imports well below domestic prices is evidence of price depression).

¹⁴² 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).

¹⁴³ CVG's Prehearing Brief at 7-8.

¹⁴⁴ Consolidated Report at I-31, I-33.

¹⁴⁵ Consolidated Report at I-32.

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.¹⁴⁶ First, domestic producers experienced actual declines in output, sales, market share, profits, return on investments, and capacity utilization during the period of investigation.¹⁴⁷ 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.¹⁴⁸ 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.¹⁴⁹ 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 exists with respect to imports from Kazakhstan and Ukraine.¹⁵⁰ 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 affirmative injury determination, "whether retroactive imposition of

¹⁴⁶ While Commissioners Brunsdale and Crawford do not find that the LTFV imports significantly depressed domestic prices, they find that the effects of the volume of the LTFV imports were sufficient to constitute material injury.

¹⁴⁷ See, Section on Conditions of Domestic Industry infra.

¹⁴⁸ See, Consolidated Report at I-19 -- I-21.

¹⁴⁹ Id.

¹⁵⁰ 58 Fed. Reg. 13050 (Mar. 9, 1993).

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." ¹⁵¹ 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 suspension of liquidation, will prolong or cause a recurrence of material injury to the domestic industry. ¹⁵² 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. ¹⁵³

In this case, the petition was filed on May 22, 1992 and the Department of Commerce suspended liquidation on December 29, 1992. ¹⁵⁴ Thus, retroactive duties would only be imposed on imports entering the United States after September 30, 1992. The record in these investigations shows that the only ferrosilicon imported after May 1992 was a comparatively modest shipment from Kazakhstan in June, 1992. ¹⁵⁵ No imports were reported for Ukraine after May, 1992 and no imports were reported from any of the former Soviet Republics from July through December, 1992. ¹⁵⁶ Further, U.S. importers reported no orders of ferrosilicon from these countries for the period after September 30, 1992, the end of our period of investigation and the beginning of the period during

¹⁵¹ 19 U.S.C. § 1673d(b)(4)(A)(i).

¹⁵² 19 U.S.C. § 1673d(c)(4).

¹⁵³ See H.R. Rep. No. 317, 96th Cong., 1st Sess. 63 (1979).

¹⁵⁴ Commerce Final Determinations, at p. 2.

¹⁵⁵ Imports totaled 3,003 silicon-content short tons in June 1992, a relatively small percentage relative to calendar year 1991 shipments of imports from Kazakhstan or to 1991 U.S. shipments. Compare, Consolidated Report, Table F-1 with Consolidated Report Table 2.

¹⁵⁶ See, Consolidated Report, Table F-1.

which retroactive duties could be imposed.¹⁵⁷ 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.¹⁵⁸

Given the evidence of no imports of ferrosilicon from Kazakhstan or Ukraine 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 for both countries.

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 Ukraine and Kazakhstan.

¹⁵⁷ See, Consolidated Report at I-39.

¹⁵⁸ 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.

INFORMATION OBTAINED IN THE INVESTIGATIONS

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 ferrosilicon¹ from Venezuela were being subsidized by the Government of Venezuela² 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

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). However, because of extensions granted by Commerce, it did not make its final LTFV determinations concerning Kazakhstan and Ukraine until March 3, 1993, and will not make its final subsidy/LTFV determinations concerning Argentina, Russia, and Venezuela until May 3, May 13, and May 3, 1993, respectively.⁵

This report contains only information related specifically to Commerce's final LTFV determinations concerning imports of ferrosilicon from Kazakhstan and Ukraine. All other data collected in the investigations is contained in the Commission's report on China. The Commission voted on the investigations on March 16, 1993, and transmitted its determinations to Commerce on March 23.

U.S. TARIFF TREATMENT

The U.S. Tariff Treatment section in the report on China indicated that Kazakhstan was subject to the Column 2 rates of duty since it was not entitled to MFN treatment. On February 26, 1993, MFN treatment was extended to Kazakhstan.

THE NATURE AND EXTENT OF SALES AT LTFV

On March 3, 1993, the Commission received notice from Commerce of its affirmative determination of sales at less than fair value of ferrosilicon from Kazakhstan and Ukraine. Because the respondents were unable to produce the information requested in a timely manner, Commerce determined to use best

⁴ In the investigation concerning Argentina (No. 731-TA-565), Commerce preliminarily determined that imports of ferrosilicon from that country are not being, and are not likely to be, sold in the United States at LTFV (57 F.R. 61874, December 29, 1992).

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.

information available in their calculation of the dumping margin. As alleged in the petition, Commerce determined margins to be 104.18 percent for both countries. 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 Kazakhstan or Ukraine that are entered, or withdrawn from warehouse, for consumption on or after September 30, 1992. A copy of Commerce's Federal Register notice is presented in appendix A.

APPENDIX A

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

EFFECTIVE DATE: March 9, 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 Determinations and
Postponement of Final Determination**

The Department of Commerce ("the Department") determines that ferrosilicon from Kazakhstan and Ukraine 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 Kazakhstan and Ukraine. The estimated margins are shown in the "Suspension of Liquidation" section of this notice.

The Department is postponing the deadline for the final determination in the investigation of ferrosilicon from the Russian Federation until May 13, 1993.

Case History

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

On December 24, 1992 (57 FR 79, January 4, 1993), we preliminarily found affirmative critical circumstances with respect to imports of ferrosilicon from Kazakhstan, the Russian Federation, and Ukraine. Accordingly, we instructed the Customs Service to suspend liquidation of all entries of ferrosilicon from Kazakhstan, the Russian Federation, and Ukraine from September 30, 1992, a date 90 days prior to the date of publication of the notice of preliminary determinations in the Federal Register.

On January 8, 1993, we received a letter stating that petitioners do not request a hearing in these investigations unless another interested party submits such a request. On January 8, 1993, we received a request on behalf of Minerais U.S. Inc., an interested party to the investigation involving Kazakhstan and Russia, for a public hearing in the Kazakh investigation.

We received case and rebuttal briefs from petitioners and Minerais on February 5, and February 12, 1993, respectively.

On February 12, 1993, we received a letter from Minerais withdrawing its request for a public hearing. As petitioner's request for a hearing was conditional upon another party

International Trade Administration
[A-834-804, A-821-804, A-823-804]

Final Determinations of Sales at Less Than Fair Value: Ferrosilicon From Kazakhstan and Ukraine; and Postponement of Final Determination; Ferrosilicon From the Russian Federation

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

requesting a hearing, no public 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 the investigation involving the Russian Federation 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. See Postponement section of this notice.

Period of Investigation

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

Scope of Investigations

The product covered by these investigations 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 these investigations is dispositive.

Class or Kind Allegation

We received a request from Minerais 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. We determined that the merchandise subject to this investigation constitutes one class or kind of merchandise. See *Comment 2*.

Postponement

On March 1, 1993, we received a request from the Government of the Russian Federation to postpone the final determination of the investigation of ferrosilicon from the Russian Federation pursuant to 19 CFR 353.20(b), in order to allow the Department sufficient time to consider additional information on the record of this 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.

In accordance with 19 CFR 353.20(b), the Department will postpone the final determination upon receipt of such a request from a producer or reseller of a significant portion of the merchandise unless we find compelling reasons to deny the request. Although petitioners objected to the reason given for the postponement request, we find that petitioners' objections do not provide compelling reasons to deny the request. Accordingly, we are postponing the date of the final determination of the investigation of ferrosilicon from the Russian Federation until May 13, 1993, which is 135 days from the date of publication of the preliminary determination in the Federal Register.

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 Kazakh and Ukraine investigations. 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 Kazakhstan and Ukraine did not adequately respond to the Department's requests for information.

We determine that Kazakhstan and Ukraine are non-market economy (NME) countries in accordance with section 773(c) of the Act for purposes of these investigations. Therefore, we require that the Governments of Kazakhstan and Ukraine provide information to the Department on behalf of all producers and exporters within each of these countries.

Kazakhstan

As detailed in the preliminary determination, the Department made numerous attempts to obtain questionnaire responses from the Government Kazakhstan. We have granted every possible extension of time to give the Government of Kazakhstan sufficient time to provide the information requested. The information we received is inadequate on its face in that it was not certified by Ermak (the producer), Promsyrimport (the trading company) or the Government of Kazakhstan. The response was sent to the Department of Shearman and Sterling, counsel for Minerais, apparently at Minerais' request. Moreover, we never received a complete response to sections A, C and D, of the questionnaire.

Consequently, because the Government of Kazakhstan did not produce the information requested, 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.

Ukraine

As detailed in the preliminary determination, the Department made numerous attempts to obtain adequate questionnaire responses from the Government of Ukraine but was unable to obtain anything more than an inadequate response to the Antidumping Survey which requested summary data on sales to the United States during the POI. We have granted every possible extension of time to give the Government of Ukraine sufficient time to produce the information

requested in all sections of our questionnaire. 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 Ukraine. Nor did we receive a response to any section of the original questionnaire.

Consequently, because the Government of Ukraine did not produce the information requested, 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 determinations, Minerais submitted timely questionnaire responses in the Kazakh investigation and also entered those responses onto the record of the Russian investigation. Minerais purchased ferrosilicon from Promsyrimport, the primary exporter of the subject merchandise from Kazakhstan 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 Kazakh investigation and that the failure of the Government of Kazakhstan to respond to requests for information should not affect the analysis of Minerais' sales.

We determine that Minerais does not qualify as a reseller under section 773(f) of the Act, and hence, is not a respondent in this case. We have received insufficient information about the production, sales, and export of ferrosilicon in Kazakhstan. In particular, we received no information regarding whether producers had knowledge of destination. Therefore, Minerais cannot be considered either an intermediate country reseller or a "trading company" for purposes of calculating less than fair value (LTFV) margins for exports from Kazakhstan to the United States. See Comment 4.

Fair Value Comparisons

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

United States Price

We based USP on BIA, which was information supplied by petitioners. Petitioners based their estimate of USP on the average U.S. f.o.b. import value of ferrosilicon from the former Union of Soviet Socialist Republics (U.S.S.R.) for the period September 1991 to February 1992. The available import statistics did not differentiate imports from the former republics of the U.S.S.R.

Ferrosilicon is sold through the same centralized exporting company. All ferrosilicon exported from Kazakhstan and Ukraine is priced for export by Promsyrimport. Thus, the Customs value shown for imports from these countries reflects the prices actually paid for ferrosilicon sold for exportation. Petitioners made no adjustments to the estimated USP because they stated that they were unable to obtain information regarding foreign transportation costs.

Foreign Market Value

We based FMV on BIA, which was information provided by the petitioner. Petitioners contend that the FMV of Kazakh- and Ukrainian-produced imports subject to this investigation must be determined in accordance with section 773(c) of the Act, which concerns NME countries. In accordance with section 771(18)(C) of the Act, any determination that a foreign country has at one time been considered an NME shall remain in effect until revoked. This presumption covers the geographic area of the former U.S.S.R., each part of which retains the previous NME status of the former U.S.S.R. Therefore, Kazakhstan and Ukraine will continue to be treated as NMEs until this presumption is overcome (see Preliminary Determinations of Sales at Less Than Fair Value: Uranium from Kazakhstan, Kyrgyzstan, Russia, Tajikistan, Ukraine and Uzbekistan, 57 FR 23380 (June 3, 1992)) (final determinations have not been reached in these investigations because they have been suspended based upon suspension agreements).

Petitioners calculated FMV on the basis of the valuation of the factors of production for AIMCOR, a U.S. producer of ferrosilicon. In valuing the factors of production, petitioners used Mexico as a surrogate country. For purposes of the initiation, we accepted Mexico as having a comparable economy and being a significant producer of comparable merchandise, pursuant to section 773(c)(4) of the Act.

Petitioners used AIMCOR's factors for raw material and processing material inputs, electricity, and labor. The raw

material, energy and labor factors for producing ferrosilicon are based on AIMCOR's actual experience from October 1990 through September 1991. Overhead expenses are expressed as a percentage of the cost of manufacture as experienced by AIMCOR.

Petitioners based labor and electricity values on 1990 wage rates and 1991 energy rates in Mexico. Petitioners based the value of raw material costs for steel scrap, quartzite, coke, bituminous coal and charcoal on 1991 f.a.s. export values from the United States to Mexico. Petitioners added an amount for foreign inland freight expense to Mexico for these raw materials. Petitioners based the value of raw material costs of electrode paste on a delivered import price from Brazil to Mexico. Petitioners based raw material costs for diesel oil, woodchips, water and other processing materials on its own average costs from October 1990 through September 1991.

Pursuant to section 773(e) of the Act, petitioners added the statutory minima of 10 percent for general expenses and eight percent for profit, and an amount for shipment preparation.

Critical Circumstances

Petitioners alleged that critical circumstances exist with respect to imports of ferrosilicon from Kazakhstan and Ukraine. Section 735(a)(3) of the Act provides that critical circumstances exist when:

(A) (i) There is a history of dumping in the United States or elsewhere of the class or kind of merchandise which is the subject of the investigation, or

(ii) The person by whom, or for whose account, the merchandise was imported knew or should have known that the exporter was selling the merchandise which is the subject of the investigation at less than its fair value, and

(B) There have been massive imports of the class or kind of merchandise which is the subject of the investigation over a relatively short period.

Regarding criterion (A)(i), above, we normally consider whether there has been an antidumping order in the United States or elsewhere on the subject merchandise in determining whether there is a history of dumping. Regarding criterion (A)(ii) above, we normally consider margins of 25 percent or more in the case of purchase price, and 15 percent or more in the case of exporter sales price, comparisons sufficient to impute knowledge of dumping. Since the dumping margins for all exporters of ferrosilicon from Kazakhstan and Ukraine, are in excess of 25 percent, we can impute knowledge under section 735(a)(3)(A)(ii) of the Act.

Pursuant to 19 CFR 353.16(f), we generally consider the following factors in determining whether imports have been massive over a short period of time: (1) The volume and value of the imports; (2) seasonal trends (if applicable); and (3) the share of domestic consumption accounted for by imports.

Regarding criterion (B) above, because we did not receive adequate questionnaire responses from any party in Kazakhstan or Ukraine, we determine that imports were massive over a relatively short period of time based on BIA. Accordingly, we determine that critical circumstances exist in these investigations.

Standing Allegation

We received a letter from Keokuk Ferro-Sil, Inc. (Keokuk), an Iowa-producer of 50 percent ferrosilicon, stating opposition to the antidumping investigations of ferrosilicon from Kazakhstan and Ukraine. We have considered all of the information provided, and the written comments filed by, Keokuk, petitioners and Mineraiis. We have determined that Keokuk has provided insufficient evidence to demonstrate that petitioners are not filing on behalf of the domestic industry. For further discussion, see Comment 1.

Interested Party Comments

Comment 1

Petitioners claim that because producer petitioners account for an absolute majority of both production and shipments and union petitioners represent workers at production facilities that account for a majority of ferrosilicon produced in the United States, they unquestionably have standing to file these petitions. Petitioners state that the opponent of the petition, Keokuk, should not be considered part of the domestic industry for the purposes of standing because it is related to Mineraiis. Petitioners state that Keokuk's close financial and marketing relationship with Mineraiis demonstrates that its interests run counter to the imposition of antidumping duties.

Mineraiis argues that since Keokuk, the largest U.S. producer of FeSi 50, opposed the petition, and that the two next largest producers of FeSi 50 (Elkem Metals and SKW) are not among the petitioners, the petition was not brought "on behalf of" the majority of U.S. industry producing FeSi 50. Mineraiis alleges that in order to satisfy the standing requirement of the antidumping statute, petitioners must

demonstrate that the petition is supported by the majority of the domestic industry, which is defined as domestic producers who account for a majority of production. Mineraiis states that while union members may qualify as an "interested party" under the statute they are not domestic producers and therefore do not constitute part of the "domestic industry." Mineraiis concludes that whether or not labor unions support the petition has no bearing on the question of standing.

Mineraiis also argues that there is no evidence in the record of this case to support petitioners' assertion that it is related to Keokuk. Mineraiis states that one of its divisions acted as the worldwide marketing agent for Keokuk and that Mineraiis pre-financed Keokuk's sales in exchange for a security interest in Keokuk's inventories. However, Mineraiis states that there is no evidence to suggest that Mineraiis has any capital, corporate, or ownership interest in Keokuk, or any ability to exert control over that company.

DOC Position

We agree with petitioners. Based on the information on the record we determine that Keokuk only accounts for approximately 20 percent of the production of FeSi 50 and does not produce any FeSi 75. Thus, Keokuk has not demonstrated that petitioners do not represent the majority of domestic producers. Accordingly, we find Keokuk's standing challenge to be without merit. A petitioner is not required to establish affirmatively that it has the support of a majority of the domestic industry. *Suramerica de Aleaciones Laminada C.A. v. United States*, 986 F.2d 660, 666-67 (Fed. Cir. 1992); *Minebea Company, Ltd. v. United States*, Court of Appeals, Fed. Cir. Slip. Op. 92-1289 (January 26, 1993).

As petitioners have standing, we do not need to address the question of whether Keokuk is related to Mineraiis.

Comment 2

Mineraiis claims that the merchandise under investigation constitutes two separate classes or kinds of ferrosilicon: Low-silicon content and high-silicon content ferrosilicon. Mineraiis claims the division is justified because of the "substantial physical, commercial, and cost differences between the two basic ferrosilicon products, FeSi 50 and FeSi 75." Mineraiis cites to (1) criteria utilized by the Customs Service, (2) the testimony of a technical expert, and (3) the criteria set forth in *Diversified Products v. United States*, 6 CIT 155, 572 F. Supp. 883 (1983) ("*Diversified Products*"), to support this claim.

Mineraiis argues that the fact that there are different HTSUS numbers for FeSi 50 and FeSi 75 supports a finding of two separate classes or kinds of merchandise.

Mineraiis argues that the expert testimony of one of the world's leading experts on the metallurgy of steel alloys explains that the different metallurgical properties and physical characteristics of FeSi 50 and FeSi 75 render the product suitable for different uses and customers specifically desire one product or the other. Thus, his opinion supports a finding that regarding physical characteristics, end use, and customer expectations, FeSi 50 and FeSi 75 are two classes or kinds of merchandise. Moreover, petitioners' assertion that certain characteristics are commercially insignificant in most applications is without support in the record.

Further, regarding the end uses of the product, Mineraiis asserts that the physical differences between 50 and 75 percent ferrosilicon have significant commercial consequences that lead customers to use one or the other depending on their production needs. Mineraiis states that FeSi 50 and FeSi 75 have different uses in the production of steel and iron.

Regarding customer expectations, Mineraiis states that insofar as the different characteristics of FeSi 50 and FeSi 75 make them appropriate for different uses, customers have different expectations for the two products.

Regarding channels of trade, Mineraiis claims that FeSi 50 and FeSi 75 differ substantially. FeSi 50 is subject to hazardous product regulation and, accordingly, is restricted in the way it can be shipped. FeSi 75, on the other hand, is not subject to such regulations.

Finally, regarding cost, Mineraiis outlines numerous differences in production processes between FeSi 50 and FeSi 75 which it claims result in different costs.

Accordingly, Mineraiis concludes that these products cannot fairly be considered a single "class or kind" of merchandise.

Petitioners claim that ferrosilicon constitutes a single class or kind of merchandise. Petitioners also examine the *Diversified Products* criteria in support of their argument.

Regarding physical characteristics, (citing Final Determination of Sales at Less Than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, 54 FR 18992 (May 3, 1989)) ("*AFB's from the FRG*"), petitioners note that the key question is not any physical difference

between the various products themselves, but whether the physical differences are so material as to alter the essential nature of the product, and therefore, rise to the level of class or kind distinctions. Petitioners claim that the differences are not so material and, accordingly, ferrosilicon constitutes a single class or kind of merchandise. Petitioners state that the physical characteristics of all grades of ferrosilicon are more similar than they are different, as is demonstrated by the fact that ferrosilicon of all grades is used for the same purposes.

Regarding uses of the product, petitioners state that Minerals relies heavily on the testimony of a ferronickel producer, whose testimony cannot support Minerals' assertions with respect to the uses of ferrosilicon in the steel industry. Because the vast majority of ferrosilicon is sold to the iron and steel industries for applications for which either grade can be used, the purported limitations on the use of 75 percent ferrosilicon in the manufacture of ferronickel are marginally relevant, at best, according to petitioners.

Regarding customer expectations, petitioners respond that the fact that some customers prefer one grade over another in some applications does not require a finding of two or more classes of merchandise. Petitioners argue that the characteristics which may make one grade more or less attractive to some buyers do not rise to the level of distinguishing characteristics. Petitioners state that customers' expectations of the various grade are largely the same, reflecting the fact that customers are purchasing silicon units.

Regarding channels of trade, petitioners claim that the various grades move through similar and common channels of trade. Petitioner argues that Minerals' comments regarding the fact that FeSi 50 is subject to hazardous product regulation when shipped by water, is irrelevant—the fact that one product is subject to different shipping regulations does not justify creating two classes or kinds of merchandise.

Regarding the manner of display or advertising, petitioners state that given that the manner of advertising is the same for both FeSi 50 and FeSi 75 percent ferrosilicon, this criterion supports a finding of one class or kind of merchandise.

Lastly, regarding cost, petitioners state that there is no appreciable difference in the unit cost of producing FeSi 50 and FeSi 75 percent and, accordingly, Minerals' argument again does not support the creation of two separate classes or kinds of merchandise.

DOC Position

In past cases where the Department has been called upon to determine the number of classes or kinds of merchandise under investigation, we have based our analysis on the criteria set forth by the Court of International Trade in *Diversified Products*. According to *Diversified Products*, the Department may rely upon the following factors in determining whether products belong to the same class or kind of merchandise: (1) The general physical characteristics of the merchandise; (2) the ultimate use of the merchandise; (3) the expectations of the ultimate purchaser; (4) the channels of trade in which the product is sold; and (5) the manner in which the product is advertised and displayed. (See AFB's from the PRG).

Minerals has not demonstrated that the differences it outlined constitute a clear dividing line between FeSi 50 and FeSi 75. While we acknowledge that there are numerous differences between FeSi 50 and FeSi 75 in terms of the *Diversified Products* criteria, we nonetheless agree with petitioners that these differences are not so material as to merit a finding of two classes or kinds of merchandise.

Regarding general physical characteristics and ultimate use of the merchandise, we note that FeSi 50 and FeSi 75 are similar in that they are used in many of the same applications requiring FeSi. The fact that certain applications are purportedly better served by FeSi 50 or FeSi 75 does not demonstrate they are different classes or kinds. Rather, FeSi 50 and FeSi 75 are different grades of the same product. In other similar cases, we have found different grades of the same product to be of the same class or kind. See, e.g., *Final Determination of Sales at Less than Fair Value: Sulfamic Acid from the People's Republic of China*, (57 FR 29705, July 6, 1992). Moreover, as petitioners have pointed out, the most important physical characteristic of ferrosilicon is that it contains silicon and at least four percent iron which both FeSi 50 and FeSi 75 have. Thus, general physical characteristics and ultimate use do not support a finding of two separate classes or kinds.

Regarding customer expectations, we agree with Minerals that these are based primarily on the physical differences.

Some customers with specific applications may purchase FeSi 50 or FeSi 75 to meet their applications. However, as petitioners have pointed out, the majority of ferrosilicon is purchased by iron and steel producers for which either grade is useable.

Moreover, the fact that ferrosilicon is often priced in terms of dollars per kilogram of contained silicon indicates that purchasers are buying units of silicon content. Thus, FeSi 50 and FeSi 75 are largely fungible. Accordingly, customer expectations do not support a finding of two separate classes or kinds.

Regarding channels of trade in which the product is sold, we disagree with Minerals. While Minerals has shown that there are differences in the method of distribution, which involves movement of goods, between FeSi 50 and FeSi 75, Minerals has not shown that these differences result in different channels of trade, which involves the sale of goods.

Regarding the manner of advertising and display, Minerals does not specifically address this topic while petitioners claim that FeSi 50 and FeSi 75 are advertised in the same manner. As no further information has been provided, we have no basis on which to find whether this criterion supports a claim of one or two classes or kinds.

Finally, regarding cost, although not a criterion of *Diversified Products* but addressed by both parties, Minerals has argued that there are differences in production processes between FeSi 50 and FeSi 75. They have not argued, however, or demonstrated that the actual costs are different. Thus, their argument is unsupported.

When taken as a whole, the *Diversified Products* criteria do not support a finding that FeSi 50 and FeSi 75 are two classes or kinds of merchandise. Accordingly, we find FeSi 50 and FeSi 75 to be of the same class or kind.

Finally, although not part of our analysis of the *Diversified Products* criterion, as Minerals has acknowledged, Customs classifications are not binding on the Department for purposes of class or kind distinctions under the antidumping law. Moreover, Commerce routinely finds merchandise with different HTSUS numbers to be within the same class or kind.

Comment 3

Petitioners claim that the Department properly based its preliminary dumping determinations for all exporters and manufacturers on BIA because the governments of those NME countries did not adequately respond to the Department's information requests. Petitioners maintain that the Department must rely on the petition as BIA regardless of Minerals' submission of questionnaire responses in the Kazakh investigation.

Minerals claims to have shown that questionnaire responses from the

Governments of Kazakhstan and Ukraine were unnecessary in these investigations as Minerais is an independent reseller of ferrosilicon from those countries, and thus, Minerais' sales should be used to determine whether, and by what margin, the material was sold at less than fair value in the United States. Accordingly, Minerais claims that USP and FMV should be based not on BIA, but on Minerais' U.S. and third-country sales.

DOC Position

We agree with petitioners. See "Foreign Market Value" and "United States Price" sections of this notice and Comment 4.

Comment 4

Petitioners argue that Minerais does not meet the criteria to qualify as an independent reseller in an intermediate country under section 773(f) of the Act.

Regarding the requirement that the reseller purchase from the manufacturer, petitioners claim that Minerais has stated that all of the Kazakh- and Ukrainian-produced ferrosilicon it resold in the United States during the POI was directly purchased from Promsyrimport, not from the manufacturer or producer as required by section 773(f)(1) of the Act.

Regarding knowledge of destination, petitioners assert that the Department must use BIA on this issue because the governments of Kazakhstan and Ukraine did not adequately respond in these investigations. Since Minerais cannot certify that the producers did not know the ultimate destination of the merchandise, the Department may adversely assume that the producers knew that Minerais was re-exporting some of their ferrosilicon to the United States. Thus, section 773(f)(2) of the Act has also not been met.

Regarding entry into the commerce of the intermediate country, according to petitioners, the pattern of sale and distribution of ferrosilicon exported to the United States constitutes transshipment through Finland, rather than entry into the commerce of Finland, as required by section 773(f)(4) of the Act. Accordingly, petitioners state that Minerais has not satisfied the criteria of section 773(f).

Minerais argues that USP must be based on Minerais' price to the U.S. customer and FMV must be based on Minerais' home market or third country sales. Minerais argues that the Department's "trading house" rule dictates that if the reseller's supplier did not know the merchandise was destined for the United States, then the reseller's U.S. and home market, or, if

appropriate, third country, sales must be used for LTFV comparisons. Minerais argues that the only difference section 773(f) of the Act makes is whether Finland or Kazakhstan is used as Minerais' home market. Thus, even if the Department determines that Minerais does not qualify under section 773(f), which it believes it has, the Department should use Kazakhstan as Minerais' home market. Minerais asserts that it is irrelevant whether Finland or Kazakhstan is used as neither are viable and hence third country sales must be used.

Minerais claims that it is an independent reseller of ferrosilicon from Kazakhstan and Ukraine. Minerais cites decisions of the Customs Service to show that even though ferrosilicon was shipped from a bonded warehouse in Finland, it nonetheless has achieved "entry into the commerce" of that country for purposes of section 773(f)(4).

Minerais states because Minerais itself did not know the ultimate destination at the time of purchase from Kazakhstan and Ukraine, there is no way the suppliers could have known the ultimate destination at the time of their sales to Minerais. The fact that this information was not certified is irrelevant, according to Minerais. What Minerais has certified is that the ultimate destination of each lot of ferrosilicon exported from the former Soviet Union to Finland was decided only after the material was stored in the warehouse in Finland. Minerais states that this fact obviates the necessity of any certification from the producers on this issue.

DOC Position

We agree with petitioner. We determine that Minerais does not qualify as a reseller under section 773(f), and hence, is not an independent respondent in this case. We have received insufficient information about the production, sale, and export of ferrosilicon in Kazakhstan. In particular, we received no information regarding whether producers had knowledge of destination. Therefore, Minerais cannot be considered either an intermediate country reseller or a "trading company" for purposes of calculating LTFV margins for exports from Kazakhstan to the United States.

Comment 5

Petitioners argue that even if Minerais qualified as an independent reseller in an intermediate country, FMV could not be based on its below COP sales to Japan.

Minerais argues that the Department did not have a reasonable basis for suspecting that Minerais' third-country sales were made at below COP because petitioner's allegation was untimely and should not have been considered; in the alternative, Minerais argues it was inadequate to justify a COP investigation, in that petitioners' allegation did not make an adjustment for known differences in production costs between petitioners' costs and those of the Kazakh producer.

DOC Position

As detailed in the preliminary determination, we determined that the COP investigations and comments thereon are irrelevant, and a COP investigation is therefore unnecessary.

Comment 6

Petitioners state that the Department properly found critical circumstances in these investigations as Minerais has imported massive amounts of ferrosilicon in an attempt to evade antidumping duties.

DOC Position

We agree with petitioners. See "Critical Circumstances" section of this notice.

Comment 7

Minerais states that if the Department accepts Minerais' argument that U.S. price and FMV should be based on Minerais' sales as an independent reseller, rather than BIA, then the Department should reexamine its determination on critical circumstances.

DOC Position

As we have not accepted Minerais' argument that it qualifies as an independent reseller, this point is moot.

Continuation of Suspension of Liquidation

In accordance with section 735(c)(4)(A) of the Act, we are directing the Customs Service to continue to suspend liquidation of all entries of ferrosilicon from Kazakhstan, the Russian Federation, and Ukraine, as defined in the "Scope of Investigations" section of this notice, that are entered, or withdrawn from warehouse, for consumption on or after September 30, 1992, which is 90 days prior to December 29, 1992, the date of publication of the preliminary determinations. The Customs Service shall require a cash deposit or posting of a bond equal to the amount by which the foreign market value of the subject merchandise exceeds the United States price as shown below for Kazakhstan

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and Ukraine. For the Russian Federation, the Customs Service shall continue to suspend liquidation of all entries of ferrosilicon at the rate published in the preliminary determination. The suspension of liquidation will remain in effect until further notice. The weighted-average dumping margins are as follows:

Manufacturer/pro- ducer/exporter	Weighted- average margin	Critical cir- cum- stances
All manufactur- ers/producers/ exporters.	104.18%	Yes.

ITC Notification

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

Notification to Interested Parties

This notice also serves as the only reminder to parties subject to administrative protective order (APO) in the Kazakh and Ukraine investigations of their responsibility covering 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 (19 U.S.C. 1673d(d)) and 19 CFR 353.20(a)(4) and 353.20(b)(2).

Dated: March 3, 1993.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. 93-5386 Filed 3-8-93; 8:45 am]

BILLING CODE 3510-06-M