SULFUR DYES FROM INDIA

Determination of the Commission in Investigation No. 731-TA-550 (Final) Under the Tariff Act of 1930, Together With the Information Obtained in the Investigation

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UNITED STATES INTERNATIONAL TRADE COMMISSION

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C O N T E N T S

UNITED STATES INTERNATIONAL TRADE COMMISSION

Investigation No. 731-TA-550 (Final)

SULFUR DYES FROM INDIA

Determination

On the basis of the record[1] developed in the subject investigation, 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 not materially injured or threatened with material injury, and the establishment of an industry in the United States is not materially retarded, by reason of imports from India of sulfur dyes, including sulfur vat dyes,[2] provided for in subheadings 3204.15, 3204.19.30, 3204.19.40, and 3204.19.50 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).

Background

The Commission instituted this investigation effective October 23, 1992, following a preliminary determination by the Department of Commerce that imports of sulfur dyes, including sulfur vat dyes, from India were being sold

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

[2] Sulfur dyes are synthetic organic coloring matter containing sulfur. Sulfur dyes are obtained by high temperature sulfurization of organic material containing hydroxy, nitro, or amino groups, or by reaction of sulfur or alkaline sulfide with aromatic hydrocarbons. For purposes of this investigation, sulfur dyes include, but are not limited to, sulfur vat dyes with the following color index numbers: Vat Blue 42, 43, 44, 45, 47, 49, and 50 and Reduced Vat Blue 42 and 43. Sulfur vat dyes also have the properties described above. All forms of sulfur dyes are covered, including the reduced (leuco) or oxidized state, presscake, paste, powder, concentrate, or so-called "pre-reduced, liquid ready-to-dye" forms.

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 investigation 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 November 12, 1992 (57 F.R. 53779). The hearing was held in Washington, DC, on January 13, 1993, and all persons who requested the opportunity were permitted to appear in person or by counsel.

VIEWS OF VICE CHAIRMAN WATSON AND
COMMISSIONERS CRAWFORD AND ROHR[1] [2]

Based on the information obtained in this final investigation, we determine that an industry in the United States is not materially injured or threatened with material injury by reason of less than fair value (LTFV) imports of sulfur dyes from India.[3]

I. LIKE PRODUCT

On the issue of like product, we incorporate by reference our like product discussion in Sulfur Dyes from China and the United Kingdom.[4] We find there to be a single like product consisting of all sulfur dyes.

II. DOMESTIC INDUSTRY[5]

Section 771(4)(A) of the Tariff Act of 1930 defines domestic 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.[6]

In determining the scope of the domestic industry in this final investigation we must consider whether the two U.S. finishers of sulfur dyes, C.H. Patrick and Southern Dye, should be included within the domestic industry

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[1] See Concurring Views of Commissioner Brunsdale.

[2] Chairman Newquist and Commissioner Nuzum also reach a negative determination but do so for the reasons set forth in their separate views. See Separate Views of Chairman Newquist and Commissioner Nuzum.

[3] Material retardation of a domestic industry by reason of the subject imports is not an issue in this investigation, and therefore will not be discussed further.

[4] See Inv. Nos. 731-TA-548 and 551 (Final), USITC Pub. 2602 (February 1993) at 3-8.

[5] Commissioner Crawford finds that the domestic industry includes domestic finishers of the imported product. She does not join in this discussion of domestic industry and incorporates by reference her domestic industry discussion in Sulfur Dyes from China and the United Kingdom, Additional Views of Commissioner Carol T. Crawford.

[6] 19 U.S.C. § 1677(4)(A).

as "producers" of the like product. Petitioner argues that the Commission should not consider domestic finishers to be a part of the domestic industry because they import and merely further process the subject dyes.[7] Petitioner asserts that when C.H. Patrick and Southern Dye mix imported unreduced and partially reduced C.I. sulfur dyes with water and reduction chemicals to obtain the fully reduced C.I. leuco form and standardize them to a particular shade and cast, they are merely performing a minor finishing operation.[8] This minor finishing operation is a task that textile producers performed in the past and continue to perform in other parts of the world.[9] Thus they argue that the primary interests of C.H. Patrick and Southern Dye lie in importation rather than in domestic production.

C.H. Patrick and Southern Dye, as well as respondent James Robinson, argue that U.S. finishers are engaged in sufficient production-related activity to be considered "producers". Southern Dye additionally argues that it should be included within the domestic industry because it manufactures a product that is distinct from the intermediate product it imports.[10]

In deciding whether a firm qualifies as a domestic producer, we have examined such factors as: (1) the extent and source of a firm's capital investment; (2) the technical expertise involved in U.S. production activity; (3) the value added to the product in the United States; (4) employment levels; (5) the quantities and types of parts sourced in the United States; and any other costs and activities in the United States leading to production

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[7] Tr. at 70.
[8] Tr. at 29.
[9] Tr. at 22.
[10] Posthearing Brief of Southern Dye at 8-9.

of the like product, including where production decisions are made.[11] We emphasize that no single factor -- including value added -- is determinative and that value added information becomes more meaningful when other production activity indicia are taken into account.[12] We also have stated that we will consider any other factors we deem relevant in light of the specific facts of any investigation.[13]

Since the preliminary investigations, additional evidence has been gathered which causes us to re-consider our earlier determination that finishers are part of the domestic industry. Finishing operations involve the mixing of chemicals in reactor vessels. There is considerable disagreement among the parties as to the amount of technical expertise and sophistication of technology required in finishing. Petitioner argues that solubilization of sulfur dye is not a sophisticated process and notes that before Sandoz introduced its "ready-to-use" leuco sulfur dyes, U.S. textile manufacturers purchased unreduced dyes and performed the reducing operations themselves.[14] Respondents, on the other hand, contend that the finishing operation is complex and requires specialized equipment and skilled personnel. Respondents point out that none of their customers, many of whom are large technically sophisticated textile mills, chose to finish sulfur dyes themselves because

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[11] Dry Film, Inv. No. 731-TA-622 (Preliminary), USITC Pub. 2555 (August 1992) at 14; DRAMS, Inv. No. 731-TA-556 (Preliminary), USITC Pub. 2519 (June 1992) at 11-12.

[12] See, e.g., Dry Film Photoresist from Japan, Inv. No. 731-TA-622 (Preliminary), USITC Pub. 2555 (August 1992); Color Television Receivers from the Republic of Korea and Taiwan, Inv. Nos. 731-TA-134 and 135 (Final), USITC Pub. 1514 (May 1984) at 7, 8.

[13] Dry Film Photoresist from Japan, Inv. No. 731-TA-622 (Preliminary), USITC Pub. 2555 (August 1992); Erasable Programmable Read Only Memories from Japan, Inv. No. 731-TA-288 (Final), USITC Pub. 1927 (December 1986).

[14] Petitioner's Prehearing Brief at 3; Petitioner's Posthearing Brief at 10.

such finishing is not a simple procedure.[15]

Responses to purchaser questionnaires confirm that several end-users do not have the necessary equipment and personnel to perform finishing operations, and that to do so would require significant investment. Some end-users, however, indicated that they would not require any new equipment to perform their own finishing operations.[16] Further, it is not clear whether some end-users simply find it more convenient to purchase sulfur dyes in ready-to-use form, or whether they actually could not perform any finishing operations because of the level of technological sophistication required.

As we noted in our preliminary determinations, the level of capital investment by C.H. Patrick is significant.[17] Capital investment by itself, however, is not necessarily dispositive of an entity's status as a domestic producer.[18] With respect to employment levels, we note that C.H. Patrick and Southern Dye's toll producer employs a relatively small number of production related workers, particularly when compared to Sandoz.

Finally, there is additional evidence that raises questions about the amount and significance of the value added by finishers to the subject imports. It now appears that a large portion of the subject imports are not "unreduced" sulfur dyes, but are "semi-reduced", and, therefore, may not require as much processing as we believed in the preliminary investigations.[19]

With respect to the value added, when all of the finishers' costs are included, the amount of value added by C.H. Patrick and Southern Dye is as

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[15] Posthearing Brief of C.H. Patrick at 4.
[16] Report at I-7, n.15.
[17] Report at I-33.
[18] See, e.g., Dry Film Photoresist from Japan, Inv. No. 731-TA-622 (Preliminary), USITC Pub. 2555 (August 1992).
[19] Report at I-14 to I-15.

high or higher than the levels we have found sufficient to constitute domestic production in other investigations.[20] We note that one U.S. importer reported that it adds a cost to the price of its imports to cover certain procedures and expenses, including laboratory costs for quality control, amortization of expensive laboratory equipment, and warehousing and trucking.[21] The amount of value added by this importer's operations was actually greater than that added by the operations performed by C.H. Patrick on its imports, yet the importer never considered itself to be a domestic producer. However, this importer does not perform any actual reduction of sulfur dyes, as do C.H. Patrick and Southern Dye.

In this case, we believe it is appropriate and helpful to separately examine the actual "conversion" costs from the operations performed by C.H. Patrick on the subject imports which reduce the sulfur dyes into their ready-to-use, leuco form, apart from selling, general and administrative expenses. The latter SG & A expenses may include costs that would be incurred by any importer and thus may not reflect domestic production activity, as seen in the case of the importer discussed above. Moreover, the amount of value added by raw materials, direct labor, and factory overhead was smaller than what C.H. Patrick originally contended. In addition, we note that the value added by Southern Dye's toll production is somewhat misleading. A moderate amount of conversion costs can give a significant percentage of value added because the base on which the percentage is calculated is relatively small.[22]

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[20] Report at I-69 to I-70. See, e.g., Dynamic Random Access Memories of One Megabit and Above from the Republic of Korea, Inv. No. 731-TA-556 (Preliminary), USITC Pub. 2519 (June 1992) at 10-12.

[21] Memorandum INV-Q-027 at 3. C.H. Patrick initially had included several of these same procedures in its calculation of its domestic production value added.

[22] Report at I-33.

In short, the evidence indicates that for this particular process (i.e., finishing operations), calculating a precise or even approximate percentage of value added is problematic. Depending upon the approach taken, it may be overstated or understated.

In light of the additional evidence gathered during this final investigation, we find on balance that C.H. Patrick and Southern Dye are not domestic producers of sulfur dyes.[23]

III. CONDITION OF THE DOMESTIC INDUSTRY

In determining whether there is material injury to a domestic industry by reason of the LTFV imports, we are directed to consider "all relevant economic factors that have a bearing on the state of the industry in the United States . . . ."[24] These include production, consumption, shipments, inventories, capacity utilization, market share, employment, wages, productivity, financial performance, capital expenditures, and research and development.[25] No single factor is determinative, and we consider all relevant factors "within the context of the business cycle and conditions of competition that are distinctive to the affected industry."[26]

We note that the consumption of sulfur dyes is driven largely by the demand for certain textiles (primarily cotton fabric) and particularly black denim, which has increased significantly in popularity in recent years.[27] Demand for sulfur dyes increased by approximately 32 percent between 1989 and

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[23] We note that had we included C.H. Patrick in the domestic industry, we would have excluded it as a related party. Southern Dye is not a related party in this investigation because it does not import sulfur dyes from India.

[24] 19 U.S.C. § 1677(7)(C)(iii).

[25] Id.

[26] Id.

[27] Report at I-46. There was testimony at the Commission's hearing that the market for black denim has grown from approximately 10 percent of the total denim market to approximately 30 percent today. Tr. at 92-93.

1991.[28]

The increased popularity of black denim has led to the introduction of new sulfur dye products developed to meet the needs of the fashion industry. Both Sandoz and C.H. Patrick have engaged in research and development efforts to develop sulfur dyes and dye pretreatments that create a "stone washed" or "distressed" look and have marketed their dyes extensively, but C.H. Patrick appears to have captured a larger share of the high fashion niche market for black denim than has Sandoz.[29] Evidence on the record suggests that Sandoz has not always been at the forefront of innovation with respect to new sulfur dye products.[30] Demand for sulfur dyes for use in dyeing leather has also increased in recent years.[31]

A second recent development affecting the industry was the introduction by Southern Dye of an environmentally safer "free sulfur free" dye. All of the dyes sold by Southern Dye are of the environmentally safer variety. This innovation by Southern Dye was followed by Sandoz's introduction of a new line of dyes that produce less free sulfur during its application.[32] One of the two new product lines introduced by Sandoz over the period of investigation is its Sandozol RDT which is designed to reduce the amounts of certain pollutants

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[28] Report at Table 24.

[29] Report at I-46 to I-48. Sales of sulfur dyes are generally made through direct contacts between sales representatives of the dye companies and purchasing agents at the textile mills. However, when a company develops new dyes or pretreatments that create novel effects, the marketing staff of the dye company may produce sample fabrics that display these effects and contact designers and garment manufacturers rather than the textile mill. If a designer is interested in the new product, the dye producer can create what is known as a "pull-through" sale, whereby the garment manufacturer places an order with the textile company specifying both the fabric and the new dye. Report at I-49.

[30] End User Submissions; Tr. at 16-17.

[31] Report at I-46.

[32] Report at I-48.

released during application of the dyes to textiles.[33]

A third development in the sulfur dyes market is the introduction by Sandoz and C.H. Patrick of lower priced black dyes that are substantially similar to dyes already on the market. In 1989, Sandoz began offering its "Deniblack 4G" as a lower priced alternative to its existing Sulfur Black 4GCF for use on denim.[34] In 1990, C.H. Patrick introduced its less expensive dye known as "Denim Black 2000."[35] In spite of the introduction of these lower priced products, however, some large customers are unwilling to change dye suppliers because they do not want to risk altering the appearance of their products in ways that might make them less marketable to obtain small savings in the cost of dyestuffs.[36]

Apparent domestic consumption of sulfur dyes increased between 1989 and 1991 and was higher in January to September of 1992 than in the corresponding period in 1991.[37] [38] Sandoz's production and U.S. shipments also increased in both quantity and value over the three year period of investigation and were higher in January to September of 1992 than in the corresponding period in 1991.[39] Sandoz's production capacity increased between 1989 and 1991 then remained constant between January to September of 1991 and January to September of 1992.[40] Sandoz's rate of capacity utilization decreased

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[33] Report at I-48.
[34] Report at I-48.
[35] Report at Figure 6.
[36] Report at I-48. We note that the cost of the dye generally accounts for a very small percentage of the cost of the finished product.
[37] Report at Table 24.
[38] Commissioner Crawford notes that although she defines the domestic industry to include domestic finishers, the general description of the financial and operating performance of the domestic industry discussed here does not differ significantly under her domestic industry definition.
[39] Report at Table 4 and Table 5.
[40] Report at Table 4.

moderately between 1989 and 1991, but was higher in January to September of 1992 than in the corresponding period of 1991.[41]

The unit value of Sandoz's U.S. shipments increased between 1989 and 1991 and was higher in January to September of 1992 than in the corresponding period in 1991.[42] In addition, Sandoz's end-of-period inventories of finished sulfur dyes decreased between 1989 and 1991, but were moderately higher in January to September of 1992 than in the corresponding period in 1991. The ratio of such inventories to total shipments also decreased between 1989 and 1991, and was slightly higher in the first nine months of 1992 than in the first nine months of 1991.[43]

The average number of U.S. production and related workers producing sulfur dyes for Sandoz decreased between 1989 and 1991, as Sandoz's productivity (measured in pounds produced per hours worked) increased. The number of production and related workers employed by Sandoz was higher in January to September 1992 than in the corresponding period of 1991 and its productivity was higher in January to September 1992 than in the corresponding period in 1991. The number of hours worked decreased between 1989 and 1991, but was higher in January to September of 1992 than in the corresponding period of 1991. Wages paid to production workers decreased over the three year period, but were higher for the period of January to September of 1992 than for the corresponding period in 1991. Average hourly wages paid increased between 1989 and 1991 and were higher in January to September 1992. Finally, Sandoz's unit labor costs decreased between 1989 and 1991 but were higher in the first nine months of 1992 than in the corresponding period in

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[41] Report at Table 4.
[42] Report at Table 5.
[43] Report at Table 7.

1991.[44]

Sandoz's net sales increased over the three year period of investigation, and were higher for the period January to September 1992 than for the corresponding period in 1991. In spite of this increase, its operating income decreased throughout the three year period of investigation, as did operating income as a percentage of net sales. Sandoz's operating income as a percent of its net sales, however, was higher for the period January to September 1992 than for the corresponding period in 1991.[45]

The decrease in Sandoz's operating income in spite of an increase in net sales appears to be the result of a number of factors unrelated to the subject imports including, among other things, an increase in sales of Sandoz's lower priced Deniblack dye at the expense of its higher priced sulfur black dye and increases in its operating costs.[46] [47]

IV. CUMULATION

In determining whether there is material injury by reason of LTFV imports, the Commission is required to assess cumulatively 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

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[44] Report at Table 8.
[45] Report at I-29.
[46] See Report at I-65 and I-66.
[47] Commissioner Rohr finds that the domestic industry is not currently experiencing material injury. He bases this determination on Sandoz's strong participation in the growing sulfur dye market as evidenced by its solid increases in production, shipments, capacity, productivity and net sales and notes that, though Sandoz did experience decreased operating income and income margins between 1989 and 1991, both of these indicators rebounded significantly in the first nine months of 1992. Accordingly, he does not join in sections IV and V of this opinion on cumulation and causation.

market."[48] Cumulation is not required, however, when imports from a subject country are negligible and have no discernible adverse impact on the domestic industry.[49]

In this final investigation, we must consider whether to cumulate imports of sulfur dyes from India with imports from China and the United Kingdom. Imports from China and the United Kingdom are no longer technically "subject to investigation" because we previously reached negative final determinations with respect to those imports. Nonetheless, if the statutory requirements for cumulation are otherwise met, the Commission may, at its discretion, cumulate imports subject to an ongoing investigation with imports that entered the United States prior to the issuance of recent antidumping or countervailing duty orders.[50]

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[48] 19 U.S.C. § 1677(7)(C)(iv)(I); Chaparral Steel Co. v. United States, 901 F.2d 1097 (Fed. Cir. 1990).

[49] 19 U.S.C. § 1677(7)(C)(v). In determining whether imports are negligible, the statute directs the Commission to consider all relevant economic factors including whether: (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. Id.

[50] See, e.g., Welded Stainless Steel Pipe from Malaysia, Inv. No. 731-TA-644 (Preliminary), USITC Pub. 2620 (April 1993) at 15-16; Gray Portland Cement and Cement Clinker from Japan, Inv. No. 731-TA-461 (Final), USITC Pub. 2376 (April 1991) at 30; Forged Steel Crankshafts from Brazil, Inv. No. 701-TA-282 (Final), USITC Pub. 2038 (November 1987)at 7; Tapered Roller Bearings and Parts Thereof, and Certain Housings Incorporating Tapered Rollers from Italy and Yugoslavia, Inv. Nos. 731-TA-342 and 346 (Final), USITC Pub. 1999 (August 1987) at 16. As noted in Gray Portland Cement and Cement Clinker from Japan:

> The issue in such cases is whether the final order is sufficiently "recent" that the unfairly traded imports which resulted in imposition of the order are continuing to have an effect on the domestic industry, or whether the order is sufficiently removed in time that LTFV imports entered prior to date of the order no longer have a continuing injurious impact on the domestic industry.

USITC Pub. 2376 at 30. See also H.R. Rep. No. 40, 100th Cong., 1st Sess. 130 (1986).

In exercising our discretion, we consider whether the final order is sufficiently "recent" that the unfairly traded imports which resulted in imposition of the order are continuing to have an effect on the domestic industry, or whether the order is sufficiently removed in time that LTFV imports entered prior to the date of the order no longer have a continuing injurious impact on the domestic industry.[51] [52]

For the reasons set forth in our negative determinations in Sulfur Dyes from China and the United Kingdom, we find that such imports could not be having a continuing injurious effect on the domestic industry. Accordingly, we decline to exercise our discretion to cumulate imports from China and the United Kingdom with imports from India.

V. NO MATERIAL INJURY BY REASON OF LTFV IMPORTS

In determining whether the domestic industry is materially injured by reason of the imports under investigation, the statute directs the Commission to consider:

> (I) the volume of imports of the merchandise which is the subject of the investigation;
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> (II) the effect of imports of that merchandise on prices in the

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[51] Chaparral Steel v. United States, 901 F.2d 1097 (Fed. Cir. 1990); Industrial Nitrocellulose from Yugoslavia, Inv. No. 731-TA-445 (Final), USITC Pub. 2324 (October 1990). The Commission has cumulated imports subject to investigation with imports subject to antidumping orders in numerous other investigations. See, e.g. Gray Portland Cement and Cement Clinker from Japan, Inv. No. 731-TA-461 (Final), USITC Pub. 2376 (April 1991)(Mexican imports subject to an August 1990 order were cumulated with Japanese imports); and Tapered Roller Bearings from Italy and Yugoslavia, Inv. Nos. 731-TA-342-346 (Final), USITC Pub. 1999 (August 1987)(cumulatively assessed with imports subject to a June 1987 final order against Hungary, the People's Republic of China, and Romania).

[52] Whether the Commission may look at whether imports are having a continuing effect on the domestic industry is called into question by the recent opinion of the Court of International Trade in Chr. Bjelland Seafoods A/C v. United States, Slip Op. 92-196, Ct. No. 91-05-00364 (CIT 1992). The Commission has appealed that decision and does not follow it in this case.

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 within the United States.[53]

In making this determination, the Commission may consider "such other economic factors as are relevant to the determination . . . ."[54] However, the Commission is not to weigh causes.[55] [56]

In determining whether there is material injury by reason of the LTFV imports, the statute directs the Commission to consider "whether the volume of imports of the merchandise, or any increase in that volume, either in absolute terms or relative to production or consumption in the United States, is significant."[57] In calculating trends for such indicators as total domestic consumption and other trends relating to volume, it has been necessary to convert data regarding the quantity of subject imports into estimates of the equivalent weight of the finished dyes.[58] This process necessarily introduced some degree of uncertainty into the quantity figures because raw material characteristics vary from factory to factory depending on the characteristics and age of the raw materials.[59]

In our final determinations regarding sulfur dyes from China and the United Kingdom, we found that the volume of cumulated imports from China,

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[53] 19 U.S.C. § 1677(7)(B)(i).
[54] 19 U.S.C. § 1677(7)(B)(ii).
[55] See, e.g., Citrosuco Paulista, S.A. v. United States, 704 F. Supp. 1075, 1101 (CIT 1988).
[56] Views on the proper standard of causation of Vice-Chairman Watson and of Commissioners Crawford and Brunsdale are set out in Certain Helical Spring Lockwashers from the People's Republic of China and Taiwan, Inv. No. 731-TA-624 and 625 (Preliminary), USITC Pub. 2565 at 21, notes 99 and 100 (October 1992).
[57] 19 U.S.C. § 1677(7)(C)(i).
[58] Report at I-97.
[59] Report at I-97, n.109.

India, and the United Kingdom was not significant in light of certain nonprice factors in the market.[60] We therefore do not find the volume of subject imports from India, which are less than 10 percent by both quantity and value of total imports from all three countries, to be significant.[61] [62] In addition, we note that over the period of investigation, imports from India decreased by quantity both absolutely and in terms of market share,[63] while the volume of cumulated imports increased.[64]

In evaluating the effect of LTFV imports on prices, the Commission considers whether there has been significant price underselling of imports and whether the imports suppress or depress prices to a significant degree.[65] For the reasons discussed in our determination regarding imports of sulfur dyes from China and the United Kingdom, we conclude that domestic prices have not been depressed or suppressed to a significant degree by the LTFV imports from India.

In assessing the impact of LTFV imports on the domestic industry we consider, among other relevant factors, U.S. consumption, production, shipments, capacity utilization, employment, wages, financial performance, capital investment, and research and development expenses.[66] In this

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[60] Sulfur Dyes from China and the United Kingdom, Inv. Nos. 731-TA-548 and 551 (Final), USITC Pub. 2602 (February 1993) at 25.

[61] Report at Table 23.

[62] In calculating the volume of imports from India, we included imports of subject sulfur dyes found by Commerce to be transshipped from India through Europe. See Final Determination of Sales at Less Than Fair Value: Sulfur Dyes, Including Sulfur Vat Dyes from India, 58 Fed. Reg. 11835-11842 (March 1, 1993).

[63] Report at Table 24.

[64] Report at Table G-1. The market share of Indian imports increased, however, in January to September of 1992 by 118 percent over the corresponding period in 1991. Id.

[65] 19 U.S.C. § 1677(7)(C)(ii).

[66] See 19 U.S.C. § 1677(7)(C)(iii).

investigation, as in the United Kingdom and Chinese investigations, due to the lack of significant volume or price effects of the imports, we do not find a sufficient impact by the LTFV imports from India on the industry to warrant an affirmative determination.

Based on our analysis of the financial condition of the domestic industry and the nonprice factors discussed in our final determinations regarding China and the United Kingdom, which we incorporate by reference, we find a lack of causal nexus between any injury the industry may be suffering and the LTFV imports. While Sandoz experienced a decrease in its net sales and share of apparent U.S. consumption in 1990, its net sales and market share increased in 1991 and both were higher in the first nine months of 1992 than in the first nine months of 1991.[67] Further, Sandoz's net sales in terms of volume increased throughout the entire period of investigation.[68] We conclude, therefore, that the domestic sulfur dyes industry is not materially injured by reason of LTFV imports from India.

VI. NO THREAT OF MATERIAL INJURY BY REASON OF LTFV IMPORTS

A. Cumulation

In analyzing whether unfair imports threaten to cause material injury to a domestic industry, the Commission is not required, but has the discretion, to cumulate the price and volume effects of imports from two or more countries if such imports compete with each other and with the like products of the domestic industry in the United States market, and are subject to

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[67] Report at Table 24 and I-61. As noted above, Sandoz's operating income decreased between 1990 and 1991 but was higher in the first nine months of 1992 than in the first nine months of 1991. Report at I-61.

[68] The discrepancy between the volume and value of Sandoz's net sales between 1989 and 1990 may reflect the introduction of its lower priced Deniblack.

investigation.[69] [70] For the reasons cited in our discussion of cumulation for material injury, we do not cumulate the price and volume effects of sulfur dyes from China and the United Kingdom with the price and volume effects of subject imports from India.

B. Analysis of Threat of Material Injury By Reason of Unfair Imports

Section 771(7)(F) of the Tariff Act of 1930 directs the Commission to determine whether a U.S. industry is threatened with material injury by reason of LTFV imports "on the basis of evidence that the threat of material injury is real and that actual injury is imminent."[71] The statute identifies ten specific factors to be considered[72] and we have considered all of the factors

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[69] Metallverken Nederland B.V. v. United States, 728 F. Supp. 730, 741-42 (CIT 1989); Asocoflores, 704 F. Supp. 1068, 1072 (CIT 1988).

[70] Commissioner Rohr notes that, in his view, "formal" cumulation is inappropriate in the context of threat analysis but that in appropriate circumstances he will consider the presence of other unfairly traded imports as an other discernible adverse trend affecting the domestic industry. See Section 771(7)(F)(i)(VII). He agrees with his colleagues that, in view of the Commission's negative determinations with regard to China and the United Kingdom, these imports cannot be viewed as unfairly traded and that it would be inappropriate to consider them as another demonstrable adverse trend in this investigation.

[71] 19 U.S.C. § 1677(7)(F)(ii). While an analysis of the statutory threat factors necessarily involves projection of future events, our determination is not made based on supposition, speculation or conjecture, but on the statutory directive of real and imminent injury. See, e.g., S. Rep. No. 249, 96th Cong., 1st Sess. 88-89 (1979); Hannibal Industries Inc. v. United States, 712 F. Supp. 332, 338 (CIT 1989).

[72] The factors are:

> (I) If a subsidy is involved, such information as may be presented to it by the administering authority as to the nature of the subsidy (particularly as to whether the subsidy is an export subsidy inconsistent with the Agreement),
>
> (II) any increase in production capacity or existing unused capacity in the exporting country likely to result in a significant increase in imports of the merchandise to the United States,
>
> (III) any rapid increase in United States market penetration and the likelihood that the penetration will increase to an injurious level,
>
> (IV) the probability that imports of the merchandise will

(continued...)

relevant to the particular facts of this investigation. These include data regarding foreign production capacity, market penetration, price suppression or depression, inventories of the subject merchandise, underutilized production capacity in the exporting countries, and the actual or potential negative effects on the domestic industry's existing development and production efforts.[73] [74] The presence or absence of any single threat factor

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[72] (...continued)
enter the United States at prices that will have a depressing or suppressing effect on domestic prices of the merchandise,

(V) any substantial increase in inventories of the merchandise in the United States,

(VI) the presence of underutilized capacity for producing the merchandise in the exporting country,

(VII) any other demonstrable adverse trends that indicate the probability that the importation (or sale for importation) of the merchandise (whether or not it is actually being imported at the time) will be the cause of actual injury,

(VIII) the potential for product-shifting if production facilities owned or controlled by the foreign manufacturers, which can be used to produce products subject to investigation(s) under section 1671 or 1673 of this title or to final orders under section 1671e of this title, are also used to produce the merchandise under investigation,

(IX) in any investigation under this subtitle which involves imports of both a raw agricultural product (within the meaning of paragraph (4)(E)(iv)) and any product processed from such raw agricultural product, the likelihood that there will be increased imports, by reason of product shifting, if there is an affirmative determination by the Commission under section 1673d(b)(1) of this title with respect to either the raw agricultural product or the processed agricultural product (but not both).

(X) the actual and potential negative effects on the existing development and production efforts of the domestic industry, including efforts to develop a derivative or more advanced version of the like product.

19 U.S.C. § 1677(7)(F)(i).

[73] Three of the statutory factors are not relevant to the facts of this investigation and therefore will not be discussed further. These are factors regarding (I) subsidies, (VIII) potential product shifting, and (IX) raw and processed agricultural products.

[74] The Commission must also consider whether dumping findings or antidumping remedies in markets of foreign countries against the same class of merchandise suggest a threat of material injury to the domestic industry. 19 U.S.C. § 1677(7)(F)(iii)(I). We have not received any evidence that there are (continued...)

is not necessarily dispositive.[75]

In this final investigation, we find that the domestic industry is not threatened with material injury by reason of LTFV imports from India.

We do not find any excess or underutilized capacity in India that is likely to result in a significant increase in exports to the United States. We note that the Indian imports require further processing in the United States by U.S. importers before they can be marketed. This limitation creates a bottleneck in which the capacity of the U.S. importers to process the imports effectively limits the volume of imports. We note that the largest importer of the subject dyes, C.H. Patrick, is currently operating at close to full capacity and has no plans to increase its imports.[76] There also is no credible evidence on the record that indicates that this finisher has the ability to increase its capacity to import and finish sulfur dyes in the near future. Because the "bottleneck" effect limits the amount of imports that enter the U.S. market, it is unlikely that any excess capacity in India will result in a significant increase in exports to the United States.

Because there are only two manufacturers of the subject sulfur dyes from India who export to the United States, capacity figures for India are business proprietary. We note, however, that the market share of Indian exports is small[77] and that there are several constraints on the capacity of the Indian sulfur dye industry, including shortages of chemical intermediates such as

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[74] (...continued)
any dumping findings or remedies in any other country involving sulfur dyes from India.

[75] See e.g., Rhone Poulenc, S.A. v. United States, 592 F. Supp., 1324 n.18 (CIT 1984).

[76] Report at Table 4.

[77] Report at Table 24.

DNCB and the need to upgrade its technology in various areas.[78]

With respect to any rapid increase in United States market penetration and the likelihood that the penetration will increase to an injurious level, we again find that due to the importing "bottleneck," it is unlikely that an increase in imports from India will increase to an injurious level. Moreover, the volume of imports from India decreased over the period of investigation.[79]

We also find no probability that imports from India of the subject merchandise will enter the United States at prices that will have a depressing or suppressing effect on domestic prices of the merchandise[80] for the reasons given in our discussion of material injury by reason of the subject imports.

With respect to "any substantial increase in inventories of the merchandise in the United States,"[81] inventories of imports from India by quantity increased between 1989 and 1990, then decreased from 1990 to 1991 and decreased further in the first nine months of 1992 as compared with the first nine months of 1991. As a ratio to imports, inventories of imports from India increased between 1989 and 1991, but were lower in January to September 1992 than in the corresponding period in 1991.[82]

We also find that any existing or potential effects on existing development and production efforts of the domestic industry are not sufficient to warrant a threat finding. While petitioner alleged that the LTFV imports have affected its plans for the future, we note that existing funding for capital expenditures and research and development suggest that the industry is not threatened with material injury by reason of imports of sulfur dyes from

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[78] Report at I-88.
[79] Report at Table 24.
[80] 19 U.S.C. § 1677(7)(F)(i)(IV).
[81] 19 U.S.C. § 1677(7)(F)(i)(V).
[82] Report at Table 19.

India.[83]

Finally, we find no other demonstrable trends or evidence in the record that would support a finding of threat of material injury by reason of subject imports from India.

CONCLUSION

For all of the foregoing reasons, we find that the domestic industry producing sulfur dyes is neither materially injured nor threatened with material injury by reason of LTFV imports of sulfur dyes from India.

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[83] Report at Appendix J; I-75.

SEPARATE VIEWS OF CHAIRMAN NEWQUIST AND COMMISSIONER NUZUM

Although we concur with the majority of our colleagues that the domestic sulfur dye industry is not materially injured or threatened with material injury by reason of less-than-fair-value imports of sulfur dyes from India, we disagree with the method by which the majority reaches this conclusion. As discussed below, we believe it is appropriate to cumulate sulfur dye imports from India with those from China and the United Kingdom. For this reason, we set forth these separate views.

I. LIKE PRODUCT

We incorporate and adopt by reference the Commission's determination in Sulfur Dyes from China and the United Kingdom that the like product consists of both leuco and solubilized sulfur dyes.[1]

II. DOMESTIC INDUSTRY

As he did in the China and United Kingdom final investigations, Chairman Newquist finds that C.H. Patrick and Southern Dye, the domestic "finishers," are not part of the domestic sulfur dye industry. Commissioner Nuzum concurs with Chairman Newquist on this issue for the reasons he set forth in

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[1] Sulfur Dyes from China and the United Kingdom, Invs. Nos. 731-TA-549 and 551 (Final), USITC Pub. 2602 (February 1993) at 3-8 (hereinafter "USITC Pub. 2602").

the China and United Kingdom final investigations.[2]

III. CONDITION OF THE DOMESTIC INDUSTRY

We also incorporate and adopt by reference the Commission's discussion of the condition of the domestic industry in Sulfur Dyes from China and the United Kingdom.[3]

IV. CUMULATION

Unlike our colleagues, we believe that, for purposes of this final investigation, imports from India should be cumulated with those from China and the United Kingdom ("U.K.").

As brief background, we note that on April 10, 1992, Petitioners filed a single antidumping petition naming all three countries -- India, China and the U.K. -- as Respondents[4]. After its preliminary investigation, the Commission determined that there was a reasonable indication that the domestic industry was materially injured or threatened with material injury by reason of imports of sulfur dyes from all three countries.[5] All three

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[2] USITC Pub. 2602 at 8-14, n.49.

[3] USITC Pub. 2602 at 16-21.

[4] 57 Fed. Reg. 19600 (May 7, 1992).

[5] Sulfur Dyes from China, India, and the United Kingdom, Invs. Nos. 731-TA-548, 550 and 551 (Preliminary), USITC Pub. 2514 (May 1992). At the request of the Petitioner, Commerce postponed its preliminary determination concerning imports from India; the affirmative determination followed the affirmative preliminary determinations for China and the United Kingdom by approximately thirty days. 57 Fed. Reg. 48503 (October 26, 1992).

Respondent countries then requested that Commerce postpone final determinations in all three investigations. Commerce granted all three requests and set two deadlines for reaching final determinations in the three investigations: United Kingdom, December 31, 1992; and India and China, February 1, 1993. Based upon this schedule, the Commission held a hearing on January 13, 1993, regarding all three final investigations. After the Commission's hearing but prior to its final determinations in the three investigations, Commerce granted yet another request by the Indian Respondent to postpone its final determination -- until February 19,1993.[6] This second postponement thus forced the Commission to complete its final investigations in a "piecemeal" fashion.[7] Insofar as we are aware, this administrative fragmentation of the Commission's investigative process now presents the Commission with a case of first impression on the question of cumulation. Our departure from the majority on this issue necessitates these separate views.

In the final investigations of sulfur dyes from China and the United Kingdom, the Commission majority, as required by the

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[6] 58 Fed. Reg. 6212 (January 27, 1993).

[7] Pursuant to our governing statute, the Commission is to make its final determination not later than 45 days after Commerce's final determination. 19 U.S.C. § 1673d(b)(2)(B). Thus, with respect to the United Kingdom, the Commission was required to make a final determination by February 14, 1993, five days before Commerce completed its final investigation of imports from India. Thus, the Commission could not issue one determination for all three investigations.

relevant statute for material injury determinations,[8] cumulated those imports with imports from India.[9] [10] In this final investigation, however, the majority asserts that cumulation for purposes of a material injury determination is discretionary and, as such, chooses not to exercise this discretion.[11] Apparently, this approach is based upon the belief that imports from China and the U.K. are technically no longer subject to investigation, even though all were subject to the same petition and final determinations concerning imports from China and the U.K. were reached just eight weeks ago. While we agree that declining to cumulate may be appropriate in some circumstances, i.e., where there is more than one petition covering the same like product or the time lapse between determinations is significantly greater than eight weeks, these circumstances are not present here. Accordingly, and for the additional reasons discussed below, we believe that cumulation for purposes of the present material injury determination in this final investigation is the more sound approach.

First, the Commission determined in the final China and U.K. investigations that the statutory requirements for mandatory

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[8] 19 U.S.C. § 1677(7)(c)(4)(I).

[9] USITC Pub. 2602 at 21-23.

[10] Although discretionary, the Commission also cumulated these imports for its negative threat of material injury determination as well.

[11] Similarly, the majority also does not cumulate for purposes of its threat of material injury determination.

cumulation were met.[12] Aside from the Commission's negative determinations there, nothing in the record of this investigation has changed. At the time of those determinations, the Commission found that imports of sulfur dyes from all three countries competed with each other and the domestic product; the same continues to hold true in this final investigation.

Second, although we concede that the statute does not technically mandate cumulation here, neither does the statute prohibit cumulation. The courts have recognized the Commission's discretionary authority to cumulate the effects of imports from more than one country named in the same petition. The underlying policy rationale for cumulation is to enable the Commission's analysis to capture fully the simultaneous effects that unfairly traded imports from more than one country have on the domestic industry. In this particular investigation, we are presented with the same petition, product and period of investigation as in the China and United Kingdom final investigations. Cumulation makes as much sense now as it did when the Commission issued its final determinations with respect to China and the United Kingdom.

The Commission majority relies on the intervening negative injury determinations with respect to China and the U.K. as the basis for not cumulating those imports with the imports from

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[12] USITC Pub. 2602 at 21-23.

India.[13] This set of investigations is very different from one in which Commerce issues a final negative determination with respect to imports from one country, but reaches affirmative dumping determinations on others. In those particular circumstances, it clearly would be contrary to the cumulation policy to cumulate "fairly traded" imports with other "unfairly traded" imports. Here, however, where the only reason the Commission is voting separately on India is because of an administrative decision by Commerce to postpone its final determination, we believe the sounder policy is to exercise our discretion to cumulate all imports in investigations arising from the same petition.

Third, we do not believe that Congress intended for our administration of the governing statute to permit a party separate or special bites at the apple -- exactly the result obtained by the majority's determination. By their decision not to cumulate, our colleagues, whether intended or not, have provided the Indian Respondent with this bite, i.e., a non-cumulated causation analysis.

We also fear that the majority's failure to cumulate in the circumstances of this investigation sends a signal to future parties, particularly respondents, that a cumulative causation analysis may be avoided by requesting Commerce to postpone its final determination for one or more, but not all, countries

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[13] See pgs. 12-14, supra.

subject to investigations.[14]

Further, while we are not suggesting that Commerce's decision to grant the Indian Respondent's two requests for postponement was inappropriate, the impact of Commerce's action on the Commission's investigatory process cannot be overlooked. Fragmentation of injury determinations arising from a single petition burdens the investigatory processes, impedes final resolution, undermines predictability and increases costs for the government and parties alike.[15]

Finally, the Commission should not have to take another look at the same record in this final investigation and write yet another set of views. In the final investigations of sulfur dyes from China and the U.K., our analysis of whether LTFV imports were a cause of material injury to the domestic industry was on a cumulated basis. Because our colleagues choose not to cumulate in this final investigation, they must proceed to do a new and different causation analysis.[16] Where, as here, there has been absolutely no change in the record and the Commission has already

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[14] Of course, we recognize that the decision to postpone the final dumping determination is left to Commerce's discretion. 19 U.S.C. § 1673(a)(2). Nevertheless, deciding not to cumulate imports in these circumstances could encourage requests for postponement that might otherwise not have been made.

[15] Chairman Newquist notes that it appears that the Petitioner is in the process of appealing the Commission's negative determinations in the China and U.K. final investigations. Should Petitioner choose to appeal this negative determination as well, it will now be forced to contend with two separate majority analyses, not to mention increased litigation expenses.

[16] Compare, pgs. 14-18, supra and USITC Pub. 2602 at 23-35.

determined that cumulated imports, including imports from India, are not a cause of material injury or threat of material injury to the domestic industry, we believe the better decision is to do the same analysis for present material injury.

V. NO MATERIAL INJURY BY REASON OF LTFV IMPORTS

We incorporate and adopt by reference the Commission's determination in the China and U.K. final investigations that the domestic industry is not materially injured by reason of LTFV imports of sulfur dye from India, China and the United Kingdom.[17]

VI. NO THREAT OF MATERIAL INJURY BY REASON OF LTFV IMPORTS

Chairman Newquist also incorporates and adopts by reference the Commission's determination in the China and U.K. final investigations that the domestic industry is not threatened with material injury by reason of the cumulative impact of LTFV imports of sulfur dye from India, China and the United Kingdom.[18] In analyzing threat of material injury, Commissioner Nuzum has elected not to cumulate the imports from India with those from China and the United Kingdom. She concurs with the majority's views that the domestic industry is not threatened with material injury by reason of LTFV imports from India.[19]

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[17] USITC Pub. 2602 at 23-30.

[18] USITC Pub. 2602 at 30-35.

[19] See pgs. 18-22, supra.

VII. CONCLUSION

For the foregoing reasons, we determine that the domestic industry is not materially injured or threatened with material injury by reason of less-than-fair-value imports of sulfur dye from India.

CONCURRING VIEWS OF COMMISSIONER ANNE BRUNSDALE
Sulfur Dyes from India

Inv. No. 731-TA-550 (Final)

Most of my analysis of this investigation can be gleaned from my opinion in Sulfur Dyes from China and the United Kingdom, Invs. Nos. 731-TA-548 and 551 (Final), USITC Pub. 2602. I incorporate by reference my analysis of like product and domestic industry from my opinion in those investigations, and adopt my colleagues' analysis of threat in their opinion in this investigation. I write separately only to describe the consequences that the Commission's negative determinations in those investigations have on my analysis of present material injury in this investigation. And those consequences stem from their effect on cumulation.

Cumulation in material injury investigations comes in three varieties, two mandatory and one discretionary. First, we must cumulate when the literal terms of 19 USC Section 1677(7)(C)(iv) are met. That section requires cumulation if there are (a) imports from two or more countries (b) of like products (c) subject to investigation (d) if such imports compete with each other and (e) with like products of the domestic industry (f) in the United States market. These terms are not met in this investigation, because the U.K. and Chinese imports were no longer "subject to investigation" at the time the Commission voted.

The second type of mandatory cumulation is what might be called Bingham & Taylor cumulation, after a leading Federal Circuit case, Bingham & Taylor Div., Va. Industries v. U.S., 815 F.2d 1482 (Fed. Cir. 1987). In that case, both the CIT and the Federal Circuit held that the Commission must cumulate the effects of imports subject to both antidumping and countervailing duty investigations from the same or different countries, even though the Commission itself did not want to do so, and the language of Section 1677(7)(C)(iv) was concededly "unclear on its face". Id. at 1485.[1] This investigation does not involve "cross-cumulation" at all; Bingham & Taylor does not apply.

The third type of cumulation is discretionary. It is based on Section 1677(7)(C)(iii)'s admonition that the Commission consider relevant economic factors in the context of the "conditions of competition that are distinctive to the affected industry;" and (possibly) Section 1677(7)(B)(ii)'s permission to

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[1] The Federal Circuit justified this unusual failure to defer to an administrative agency's interpretation of the statute it administers by reasoning that (1) a contrary reading "would lead to absurd and mischievous results and thwart Congress' purpose;" (2) deference is owed an agency's interpretation of its statute only "where the interpretation is both consistent and longstanding;" and (3) the Commission's interpretation ran "counter to the objective of the cumulation provision as revealed in its legislative history." Id. at 1487. The Commission has never challenged this ruling. It may wish to do so in a future case in light of the increasing skepticism with which courts now approach legislative history and the increasing deference they now grant agencies' interpretation of ambiguous law. One might also question whether it is necessarily "absurd and mischievous" to try to isolate the effects of dumping from the effects of subsidization and offset only those effects that by themselves cause material injury.

"consider such other economic factors as are relevant to the determination . . . ."[2]

In the case at hand, I am strongly disinclined to exercise whatever discretion I have to cumulate the effects of Indian imports with the effects of imports that have already been found not to be causing material injury to a domestic industry, just as I would not cumulate the effects of Indian imports with the effects of imports that might have been found to be fairly traded. Determinations of material injury require, in my view, a comparison of industry as it is with the way it would be if the effects of the dumping were eliminated by the imposition of an antidumping duty. Since imports from China and the U.K. will not, as a result of the Commission's previous negative determinations, be subject to an antidumping duty, I do not feel that their effects should be cumulated with the effects of the imports from India.

Without cumulation, it is perfectly obvious that we have to make a negative determination. In the case of the solubilized dye industry, I made a negative determination after cumulating. The only relevant factor that has changed since then is the

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[2] I regard the question of whether discretionary cumulation exists as an open one in light of the Federal Circuit's warning that "the legislative history [i.e., of the mandatory cumulation provision] shows, further, that Congress wanted . . . to establish a general, uniform rule to end the Commission's prior variations," Bingham & Taylor, 815 F.2d at 1487, and the enactment of a provision that expressly grants discretion to cumulate in some circumstances (and thus, perhaps, impliedly prohibits it in others), see 19 USC § 1677(7)(F)(iv).

dumping margins for imports from India, and on average they are lower. It follows that imports from India are not materially injuring the domestic solubilized dye industry.

In the case of the concentrated dye industry, I made an affirmative determination after cumulating. But that determination was based largely on the effects of the Chinese imports, which had a substantial share of the market, and enormous dumping margins. In contrast, the average Indian dumping margin is less than 9 percent and the Indian market share is tiny. Even if I assumed that Indian imports were perfectly substitutable with the U.S. product, I would not find that their dumping is materially injuring the domestic concentrated dye industry.

INFORMATION OBTAINED IN THE INVESTIGATION

INTRODUCTION

On October 23, 1992, Commerce notified the Commission of its prelimiary determination, with notice subsequently published in the Federal Register (57 F.R. 48502, October 26, 1992), that imports of sulfur dyes (including sulfur vat dyes)[1] from India are being, or are likely to be, sold in the United States at LTFV. Accordingly, effective October 23, 1992, the Commission instituted and established a schedule for the final antidumping investigation (Inv. No. 731-TA-550 (Final)) under the applicable provisions of the Tariff Act of 1930 to determine whether an industry in the United States is materially injured or is threatened with material injury, or the establishment of an industry in the United States is materially retarded, by reason of imports of such merchandise (57 F.R. 53779, November 12, 1992).

Notice of the institution of the Commission's final investigation, and of the public hearing to be held therewith, was given by posting copies of the notices in the Office of the Secretary, U.S. International Trade Commission, Washington, DC, and by publishing the notices in the Federal Register.[2] The hearing was held in Washington, DC, on January 13, 1993.

On January 25, 1993, Commerce notified the Commission of the postponement of its final determination in the antidumping duty investigation of sulfur dyes, including sulfur vat dyes, from India. On February 25, 1993, Commerce notified the Commission of its final determination, with notice subsequently published in the Federal Register (57 F.R. 11835, March 1, 1993), that imports of sulfur dyes (including sulfur vat dyes) from India are being, or are likely to be, sold in the United States at LTFV. Accordingly, under its revised schedule (57 F.R. 13281, March 10, 1993), the Commission voted on this investigation on March 31, 1993, and transmitted its determination to Commerce on April 12, 1993.

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[1] Sulfur dyes are synthetic organic coloring matter containing sulfur. Sulfur dyes are obtained by high-temperature sulfurization of organic material containing hydroxy, nitro, or amino groups or by reaction of sulfur and/or alkaline sulfide with aromatic hydrocarbons. For the purposes of these investigations, sulfur dyes include, but are not limited to, sulfur vat dyes with the following color index numbers: Vat Blue 42, 43, 44, 45, 46, 47, 49, and 50 and Reduced Vat Blue 42 and 43. Sulfur vat dyes also have the properties described above. All forms of sulfur dyes are covered, including the reduced (leuco) or oxidized state, presscake, paste, powder, concentrate, or so-called "pre-reduced, liquid ready-to-dye" forms. The sulfur dyes subject to these investigations are classifiable under subheadings 3204.15.10, 3204.15.20, 3204.15.30, 3204.15.35, 3204.15.40, 3204.15.50, 3204.19.30, 3204.19.40 and 3204.19.50 of the Harmonized Tariff Schedule of the United States (HTS).

[2] Copies of the Commission's and Commerce's cited Federal Register notices are presented in app. A.

Background

This investigation results from a petition filed by counsel on behalf of Sandoz Chemicals Corp. (Sandoz), Charlotte, NC, on April 10, 1992. The petition alleged that an industry in the United States is being materially injured and is threatened with further material injury by reason of imports of sulfur dyes (including sulfur vat dyes) from China, Hong Kong, India, and the United Kingdom that are alleged to be sold in the United States at LTFV. In response to that petition the Commission instituted antidumping investigations Nos. 731-TA-548, 549, 550, and 551 (Preliminary). Subsequently, Commerce did not initiate an antidumping duty investigation concerning imports of sulfur dyes from Hong Kong, and the Commission accordingly amended its institution notice to discontinue its antidumping investigation concerning Hong Kong (Inv. No. 731-TA-549).

As a result of its final investigations, the Commission determined that an industry in the United States is not materially injured or threatened with material injury, and the establishment of an industry in the United States is not materially retarded, by reason of imports from China and the United Kingdom of sulfur dyes, including sulfur vat dyes (57 F.R. 11246, February 24, 1993).

Report Format

This brief report is designed for use in conjunction with the Commission's report entitled Sulfur Dyes from China and the United Kingdom (USITC Publication 2602, February 1993), and provides information on the nature and extent of sales at LTFV as found by Commerce in its final determination. All other information relevant to this investigation with respect to the products, the U.S. industry, consideration of material injury, consideration of the threat of material injury, and consideration of the causal relationship between imports of the subject products and material injury, is presented in the aforementioned report.

THE NATURE AND EXTENT OF SALES AT LTFV

The following tabulation provides dumping margins as determined by Commerce for each of the manufacturers/exporters of the subject sulfur dyes in India (in percent):[3]

Company	Margins	Critical circumstances
Atul Products Ltd.....	2.75[1]	No[2]
Hain from Atul Products Ltd..	5.49[3]	No[2]
Hickson & Dadajee Ltd.....	17.55[4]	No[2]
All others.....	8.59	No[2]

Footnotes presented on next page.

[3] Commerce's period of investigation was Nov. 1, 1991, through Apr. 30, 1992.

--Footnotes for tabulation on previous page.

[1] For sales by Atul directly from India to the United States, United States Prices (USPs) were based on purchase prices calculated from c.i.f. prices to unrelated customers, with adjustments for foreign inland freight, foreign brokerage and handling, ocean freight, and marine insurance; Central Excise Tax and Sales Tax that would have been collected if the merchandise had not been exported; and import duty that was rebated or not collected by reason of exportation. FMV was based on packed ex-factory prices charged to unrelated customers in the home market.

[2] Because the dumping margins for Atul, Hain, and Hickson and Dadajee were each less than 25 percent, Commerce could not impute knowledge of dumping, and therefore determined that there is no reasonable basis to believe or suspect that critical circumstances exist with respect to the imports of the subject sulfur dyes from India.

[3] For Hain, a European reseller of Atul's merchandise, USPs were based on purchase prices calculated from c.i.f. prices to unrelated customers, with adjustments as noted for Atul (footnote 1). Because Hain had no sales in India and no sales to third countries, FMV was based on constructed value which relied on cost information reported by Atul.

[4] Hickson & Dadajee did not wish to participate in the Commerce proceedings and was assigned a dumping rate calculated from BIA as contained in the petition.

APPENDIX A

FEDERAL REGISTER NOTICES

[Investigation No. 731-TA-550 (Final)]

Sulfur Dyes from India

AGENCY: United States International Trade Commission.

ACTION: Revised schedule for the subject investigation.

FOR FURTHER INFORMATION CONTACT: Diane J. Mazur (202-205-3184), Office of Investigations, U.S. International Trade Commission, 500 E Street SW., Washington, DC 20436. Hearing-impaired persons can obtain information on this matter by contacting the Commission's TDD terminal on 202-205-1810. Persons with mobility impairments who will need special assistance in gaining access to the Commission should contact the Office of the Secretary at 202-205-2000.

SUPPLEMENTARY INFORMATION: On October 23, 1992, the Commission instituted the subject investigation and established a schedule for its conduct (57 FR 53779). Subsequently, the Department of Commerce extended the date for its final determination in the investigation from January 4, 1993, to February 19, 1993. The Commission, therefore, is revising its schedule in the investigation to conform with Commerce's final schedule.

The Commission's new schedule for the subject investigation is as follows: A supplemental brief addressing only the final antidumping duty determination of the Department of Commerce is due no later than March 25, 1993. The brief may not exceed five (5) pages in length.

For further information concerning this investigation, see the Commission's notice of institution cited above and the Commission's Rules of Practice and Procedure, part 201, subparts A through E (19 CFR 201), and part 207, subparts A and C (19 CFR part 207).

Authority: This investigation is being conducted under authority of the Tariff Act of 1930, title VII. This notice is published pursuant to § 207.20 of the Commission's rules.

Issued: March 4, 1993.

By order of the Commission.

Paul R. Bardos,

Acting Secretary.

[FR Doc. 93-5464 Filed 3-9-93; 8:45 am]

BILLING CODE 7020-02-M

[A-533-805]

Notice of Final Determination of Sales at Less Than Fair Value: Sulfur Dyes, Including Sulfur Vat Dyes, From India

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

EFFECTIVE DATE: March 1, 1993.

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

Final Determination

The Department of Commerce ("the Department") determines that sulfur dyes, including sulfur vat dyes, from India are being, or are 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 do not exist. The estimated margins are shown in the "Suspension of Liquidation" section of this notice.

Case History

Since our affirmative preliminary determination on October 19, 1992 (57 FR 48502, October 26, 1992), the following events have occurred.

On October 29, 1992, petitioner, Sandoz Chemical Corporation, submitted comments regarding the cost of production ("COP") response submitted by Atul Products Limited, respondent in this investigation. On October 30, 1992, we issued a COP deficiency letter to Atul.

On October 30, 1992, respondent requested that we postpone the final determination until February 1, 1993. On November 20, 1992, we postponed the final determination until February 1, 1993. The postponement notice was published in the **Federal Register** on December 7, 1992 (57 FR 57730).

On November 9, 1992, respondent submitted its COP deficiency response. On November 9, 1992, respondent also resubmitted its U.S. sales listing because upon review of the preliminary determination margin calculations Atul discovered that it had omitted a shipment to the United States. On December 2, 1992, respondent resubmitted clearer copies of its computer printouts. On December 10, 1992, respondent submitted diskettes containing the November 9, 1992, U.S. sales listing.

From November 16 through November 20, 1992, the Department conducted verification in Valsad, India of the questionnaire responses submitted by respondent. On December 21 and 22, 1992, the Department conducted verification in Switzerland of the questionnaire response submitted by Hain, Limited ("Hain"), a European reseller of dyes.

On December 3, 1992, we received a letter from Hickson and Dadajee,

Limited objecting to the rate assigned to it in the preliminary determination.

On December 23, 1992, respondent again requested that the Department postpone the final determination until February 19, 1993. On January 19, 1993, we postponed the final determination until February 19, 1993. The postponement notice was published in the Federal Register on January 27, 1993 (58 FR 6212).

On January 25, 1993, petitioner and respondent submitted case briefs. On January 27, 1993, petitioner and respondent submitted rebuttal briefs. A public hearing was held on January 28, 1993. On February 1, 1993, at the request of the Department, respondent submitted a supplemental case brief regarding the reseller's response. On February 4, 1993, petitioner submitted its rebuttal brief to respondent's supplemental case brief.

Period of Investigation

The period of investigation ("POI") is November 1, 1991, through April 31, 1992.

Scope of Investigation

The merchandise subject to this investigation is sulfur dyes, including sulfur vat dyes. Sulfur dyes are synthetic, organic, coloring matter containing sulfur. Sulfur dyes are obtained by high temperature sulfurization of organic material containing hydroxy, nitro or amino groups, or by reaction of sulfur and/or alkaline sulfide with aromatic hydrocarbons. For purposes of this investigation, sulfur dyes include, but are not limited to, sulfur vat dyes with the following color index numbers: Vat Blue 42, 43, 44, 45, 46, 47, 49, and 50 and Reduced Vat Blue 42 and 43. Sulfur vat dyes also have the properties described above. All forms of sulfur dyes are covered, including the reduced (leuco) or oxidized state, presscake, paste, powder, concentrate, or so-called "pre-reduced, liquid ready-to-dye" forms. The sulfur dyes subject to this investigation are classifiable under subheadings 3204.15.10, 3204.15.20, 3204.15.30, 3204.15.35, 3204.15.40, 3204.15.50, 3204.19.30, 3204.19.40 and 3204.19.50 of the Harmonized Tariff Schedule of the United States (HTSUS). The HTSUS subheadings are provided for convenience and customs purposes. Our written description of the scope of this investigation is dispositive.

Such or Similar Comparisons

We have determined for purposes of the final determination that the products covered by this investigation comprise a single category of "such or similar" merchandise. Where there were no sales of identical merchandise in the home market to compare to U.S. sales, we made similar merchandise comparisons on the basis of: (1) Category (*i.e.*, conventional or vat); (2) color; (3) color index number; (4) type; (5) form; and (6) strength. We made adjustments for differences in the physical characteristics of the merchandise, in accordance with section 773(a)(4)(C) of the Act.

Transshipment

At the time of the preliminary determination, we had not received sufficient data to analyze possible transshipments of subject merchandise from Atul, through Europe, to the United States. Since the preliminary determination, we have received further information and have conducted vertification of the European reseller, Hain. Based on information submitted to the Department and information obtained at verification, we determine that some of the subject merchandise produced by Atul is being transshipped through Europe to the United States. *See* February 19, 1993 Acting Deputy Assistant Secretary memorandum decision. We have calculated a separate rate for these shipments. *See* "Foreign Market Value" and "United States Price" sections of this notice. *See* also *Comment 2.*

Fair Value Comparisons

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

United States Price

Atul's Sales

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

We calculated purchase price based on packed c.i.f. prices to unrelated customers. We made deductions, where appropriate, for foreign inland freight, foreign brokerage and handling, ocean freight, and marine insurance.

In accordance with section 772(d)(1)(C) of the Act, we added to the USP the amount of the Central Excise Tax and Sales tax that would have been collected if the merchandise had not been exported.

Finally, in accordance with section 772(d)(1)(B) of the Act, we made an addition to USP for an import duty which was rebated or not collected by reason of exportation.

Transshipped Sales

For Hain, a European reseller of Atul's merchandise, we also based USP on purchase price, in accordance with section 772(b) of the Act, because the subject merchandise was sold by the reseller to unrelated purchasers in the United States prior to importation and because exporter's sales price methodology was otherwise indicated.

We calculated purchase price based on Hain's packed c.i.f. prices to unrelated customers and made the same type of adjustments as we did for Atul. We made deductions, where appropriate, for foreign brokerage and handling, ocean freight, and marine insurance.

Foreign Market Value

Atul's Sales

In order to determine whether there were sufficient sales of sulfur dyes, including sulfur vat dyes, in the home market to serve as a viable basis for calculating FMV for Atul, we compared the volume of home market sales of sulfur dyes, including sulfur vat dyes, to the volume of third country sales of the same products, in accordance with section 773(a)(1)(B) of the Act. Based on this comparison, we determine that Atul had a viable home market with respect to sales of sulfur dyes, including sulfur vat dyes, during the POI.

Petitioner alleged that Atul was selling in the home market at prices below the COP. Based on petitioner's allegation, we initiated a COP investigation, and requested data on the production costs of Atul. Atul's cost data were not submitted in time to be considered for the preliminary determination. However, Atul's submitted cost data were examined at verification and have been analyzed for purposes of our final determination.

To calculate COP, except as noted below, we relied on information reported by respondent. We calculated COP based on the sum of respondent's cost of materials, fabrication, general expenses, and packing. We recalculated respondent's reported labor costs based on information noted at verification. *See Comment 5.*

We compared Atul's prices for home market sales of comparison merchandise to the COPs of those sales. We found that 100 percent of these sales were at

prices above the COP. Accordingly, we used those sales for FMV. *See Comment 4.*

In accordance with 19 CFR 353.58, we compared U.S. sales to home market sales made at the same level of trade.

We calculated FMV based on packed ex-factory prices charged to unrelated customers in the home market. We deducted discounts where appropriate. We deducted home market packing costs and added U.S. packing costs, in accordance with section 773(a)(1) of the Act.

Pursuant to 19 CFR 353.56, we made circumstance-of-sale adjustments, where appropriate, for differences in credit expenses. We recalculated home market and U.S. credit expenses using as the credit period the time between the date of shipment and date of payment and the interest rate in effect during the POI, as reported in Atul's response. We calculated home market credit expense on gross price less discounts. We recalculated home market credit expense, using the average credit period, on those sales for which payment had not been received as of the filing of the August 18 deficiency response. We did not deduct the cash discount from these sales because the calculated average credit days for these sales exceeded the credit terms allowing a cash discount. We deducted the advertising expense from the home market sales price.

We did not deduct the claimed warehousing expense from Atul's home market gross unit price as a direct selling expense. We normally treat pre-sale warehousing expense for merchandise which has been placed in general inventory for sale to any party as an indirect selling expense. Atul has not adequately shown that this warehousing expense is directly related to the sales subject to investigation.

We made an upward adjustment to the tax-exclusive home market prices for the taxes we computed for the USP. Further, we made an adjustment for physical differences in the merchandise, where appropriate, in accordance with 19 CFR 353.57.

Finally, in accordance with 19 CFR 353.56(b)(1), we deducted commissions from the home market prices and added U.S. indirect selling expenses to home market prices capped by the amount of home market commissions.

Transshipped Sales

For sales of merchandise from India through Europe to the United States, Hain had no sales in India, and no sales to third countries to use as the basis for FMV under section 773(a)(1) of the Act. Therefore, in accordance with section 773(a)(2) of the Act, we used constructed value (CV) as the basis for EMV.

Because Atul, not Hain, produced the subject merchandise, we relied on the cost information reported by Atul. *See Comment 2.*

We calculated CV based on the sum of Atul's cost of materials, fabrication, general expenses, profit, and packing. We recalculated respondent's reported labor costs based on information noted at verification. *See Comment 5.* Atul's actual general expenses and profits were less than the statutory minima of 10 percent and eight percent, respectively. Therefore, in accordance with section 773(e)(1)(B) of the Act, we have used the statutory minima.

Best Information Available

As noted in the preliminary determination, Hickson and Dadajee informed the U.S. consulate in Bombay that they did not desire to participate in this investigation. Therefore, in accordance with section 776(c) of the Act, we used the best information available (BIA) when calculating the rate for Hickson and Dadajee.

In determining what rate to use as BIA, the Department follows a two-tiered methodology, whereby the Department may assign lower rates for those respondents who cooperated in an investigation, but higher rates based on more adverse assumptions for those respondents who did not cooperate. *See, e.g., Final Determination of Sales at Less Than Fair Value: Aspheric Ophthalmoscopy Lenses from Japan*, 57 FR 6703, 6704 (February 27, 1992). According to the Department's two-tiered BIA methodology outlined in the *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, Italy, Japan, Romania, Sweden, Thailand, and the United Kingdom*, 54 FR 18992, 19033 (May 3, 1989), when a company refuses to provide the information requested in the form required, or otherwise significantly impedes the Department's investigation, it is appropriate for the Department to assign to that company the higher of 1) the margin alleged in the petition, or 2) the highest calculated rate of any respondent in the investigation. The dumping margin calculated for Atul was lower than the Department's recalculated petition rate of 17.55 percent which was used for purposes of initiation. Therefore, as BIA, the dumping margin assigned to Hickson and Dadajee is 17.55 percent.

Currency Conversion

We made currency conversions based on the official exchange rates in effect on the dates of the U.S. sales as certified by the Federal Reserve Bank.

Verification

Pursuant to section 776(b) of the Act, we verified information used in reaching our final determination. We used standard verification procedures, including examination of relevant accounting records and original source documents provided by respondents.

Critical Circumstances

Petitioner alleged that "critical circumstances" existed with respect to imports of sulfur dyes, including sulfur vat dyes, from India. Section 735(a)(3) of the Act provides that critical circumstances exist when we determine that there is a reasonable basis to believe or suspect that:

(A)(i) There is a history of dumping in the United States or elsewhere of the class or kind or 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 criteria (A)(i), above, we normally look for the existence of outstanding dumping orders on sulfur dyes, including sulfur vat dyes, from India, to establish a history of dumping. However, none have been found in this case.

Regarding criterion (A)(ii) above, we normally consider margins of 25 percent or more in the case of purchase price comparisons, and 15 percent or more in the case of exporter sales price comparisons, sufficient to impute knowledge of dumping under this section. Because the dumping margins for Atul, Hain, and Hickson and Dadajee are each less than 25 percent, we cannot impute knowledge under section 735(a)(3)(A)(ii) of the Act for these companies. Because we cannot impute knowledge of dumping, we need not examine whether there have been massive imports over a relatively short period. Therefore, in accordance with section 735(a)(3) of the Act, we determine that, for Atul, Hain, and Hickson and Dadajee, there is no reasonable basis to believe or suspect that critical circumstances exist with respect to imports of the subject merchandise from India.

With respect to firms covered by the "All Other" rate, because the dumping margin is insufficient to impute knowledge of dumping, we do not need to determine whether imports of sulfur dyes, including sulfur vat dyes, have been massive over a relatively short period. Accordingly, we determine that there is no reasonable basis to believe or suspect that critical circumstances exist for those firms.

Interested Party Comments

Comment 1

Petitioner asserts that, in accordance with the Court of International Trade's ("CIT") decision in *Daewoo Electronics Co.* v. *United States*, 712 F. Supp. 931 (CIT 1989) ("*Daewoo*"), the Department must determine the amount of indirect taxes that were actually passed on by Atul in its home market sales (measure tax incidence).

Petitioner also argues that the Department's adjustment to FMV to account for central excise duties and sales taxes was incorrect. The Department improperly added the amount that it calculated would have been collected on U.S. sales, rather than the taxes actually paid in the home market. This amounted to an improper circumstance-of-sale ("COS") adjustment. Petitioner maintains that there is no basis for such a COS adjustment, as the home market invoice price includes taxes. Thus, the gross price should include only the taxes actually paid on home market sales. This FMV is appropriately compared with a USP, properly increased by the indirect taxes foregone upon exportation. Alternatively, petitioner suggests that the Department not make any adjustment to USP or FMV for indirect taxes.

Petitioner notes that Atul claimed that certain excise taxes were increased and an adjustment to USP should be made based upon the increased tax rate. Petitioner contends that any increase in the tax rate by the Indian Government not collected from home market customers cannot be considered for the determination of the USP adjustment.

Respondent agrees with the Department's treatment of indirect taxes in this case. Even though the taxes may be an addition to the home market price, they are included in the price charged by Atul and, thus, the customers bear the taxes. Respondent argues that the statute requires an adjustment to USP and states that all tax rates incurred by Atul are those which it reported to the Department in its questionnaire responses.

DOC Position

We do not agree that the statutory language, limiting the amount of adjustment to the amount of tax "added to or included in the price" of subject merchandise sold in the Indian home market, requires the Department to measure the home market tax incidence. The CIT's decision in Daewoo currently is being appealed to the Court of Appeals for the Federal Circuit. Based on the records reviewed, we are satisfied that the tax was added to the price on the home market sales.

We also disagree with petitioners that there is no basis for a COS adjustment to FMV for differences in indirect taxes. We do a COS adjustment in order to neutralize the effect of the *ad valorem* tax rate, relying on the Department's broad statutory authority to make adjustments for such differences in the COS. As stated in *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from France, et al.*, 57 FR 28,360, 28,419 (1992), "because all home market sales were reported net of VAT, we added the same [indirect tax] amount to FMV as calculated for U.S. price. This methodology leads to the same result as if we had calculated the actual home market tax and then performed a COS adjustment to FMV to eliminate the difference between the tax in each market."

Regarding the increase in the tax rate, the actual rates applicable to POI sales were examined at verification and are reflected in the calculations.

Comment 2

The statute sets up a dichotomy between transshipped sales and intermediate country sales to the United States. In the latter case, the intermediate country is treated as the country of export for FMV purposes. Petitioner maintains that Atul's sales to European customers, which ultimately sell the merchandise to the United States, are merely transshipments. According to petitioner, these third country sales cannot be considered "intermediate country sales" pursuant to section 773(f) of the Act and, therefore, FMV must be based on Atul's home market sales prices and USP on Atul's export sales prices to the reseller in the third country. Petitioner argues that only under specifically defined conditions may such third country sales be considered intermediate country sales and the sales do not meet those conditions.

Petitioner argues that section 773(f)(2) of the Act requires that the manufacturer or producer be unaware of the country to which the reseller intends to export the merchandise from the home market. The term "country" is defined in section 771(3) of the Act as a "foreign country"—not the United States. Petitioner claims that Atul is aware of the exportation to the intermediate country, and the alleged reseller, Hain, does not export the merchandise to a foreign country. Thus, the second criterion of the statute is not met.

Furthermore, petitioner argues that the resold merchandise does not meet the fourth criterion, *i.e.*, of section 773(f)(4) of the Act, that the merchandise "enter the commerce of [the intermediate] country." Petitioner contends that the term "enters the commerce" requires that the merchandise under consideration be sold or offered for sale for consumption in the intermediate country. Petitioner claims that no evidence has been presented which would support a finding that the merchandise has entered the commerce of an intermediate country, in fact, the merchandise exported from India arrives in a free trade zone and is "transshipped" to the United States.

Petitioner also alleges that Atul's sales to the European transshipper were below the COP. Furthermore, petitioner submits that a transshipper's price to the United States cannot form the basis of USP where the transshipper does not meet the criteria of an intermediate country "reseller" under section 773(f) of the Act.

Petitioner suggests that even if the Department determines that Hain is a reseller, USP must be based on Atul's price for export since Atul was aware of the ultimate destination of the merchandise. Petitioner argues that because (1) Atul has knowingly attempted to conceal the country of origin of its exports through the use of neutral packing, (2) the importer was aware of the identity of the producer, and (3) the merchandise is exported to a duty-free bonded warehouse for shipment out of the third country to the United States, the Department should impute knowledge of the ultimate destination of merchandise to Atul. In addition, petitioner suggests that in view of Atul's failure to disclose the third of these facts, the Department should resort to BIA regarding the third country transshipments.

Respondent states that it did not know at the time of sale the ultimate destination of merchandise sold to the European resellers. Its third country sales are not "mere transshipments," but *bona fide* third country sales, and should not be considered in the fair value determination. Respondent states

that while it sold sulfur black concentrate through a reseller to Hain, it has repeatedly certified that it did not know, or have any reason to know, the ultimate disposition of the merchandise. Respondent asserts that nothing at the India or Hain verification contradicted this.

Respondent claims that it had never even heard of the U.S. importer, C.H. Patrick, until this investigation and, similarly, C.H. Patrick stated it only learned of the Indian source of its merchandise because it had to respond to inquiries from the International Trade Commission (ITC). Respondent states that (1) petitioner has acknowledged a worldwide market for unreduced sulfur dye concentrate, (2) Atul's concentrate could be used globally without being reduced by solubilizers, and (3) the third party reseller in the intermediate country distributes dyestuffs worldwide. Accordingly, there is no reason why Atul would have known the ultimate destination of its third country sales of concentrate, and the requirement of section 773(f)(2) of the Act is met.

Respondent argues that, if its third country sales of concentrate are included in the Department's analysis, the FMV must be based on sales in the intermediate country. Pursuant to section 773(f)(1) of the Act, respondent submits that the verification report recognizes that the consignee, Hain, is, for all intents and purposes, buying from the producer, not an intermediary reseller who essentially functions, and is characterized in the verification report, as a selling agent.

Respondent states that the criterion of section 773(f)(4) is also satisfied. Its European sales enter the commerce of the third country and, even though such sales enter a free trade zone, there remains a "contingency of diversion" out of the zone into that country.

Respondent concludes that it is Hain, not the respondent, which is responsible for the sale of the sulfur black concentrate to the United States and which sets the price to the U.S. customer. Thus, respondent states that it would be entirely appropriate for Hain to be considered a reseller for purposes of section 773(f) of the Act.

Respondent submits that even if Atul's sales form the basis of FMV, Hain's sales should form the basis for USP as Atul did not know the ultimate destination of the goods sold to the transshipper.

DOC Position

We agree with petitioner that these sales do not qualify for consideration under section 773(f) of the Act. As discussed above, the European reseller, Hain, who purchases from a reseller in a country other than India, does not purchase the merchandise from the manufacturer and hence, fails to meet the requirement of section 773(f)(1) of the Act.

Also, the merchandise does not enter the commerce of the intermediate country and hence fails to meet the requirements of section 773(f)(4) of the Act.

Verification showed that all of Atul's exports of the subject merchandise to Hain, the European reseller, were transshipped through Belgium to the United States. We did not find that any of the merchandise sold to Hain entered the commerce of Belgium. The fact that Hain imports the merchandise into a duty-free zone in Belgium, from which there remains a "contingency of diversion" into Belgium, is not sufficient evidence that this merchandise entered the commerce of Belgium. In a recent case, *Preliminary Determination of Sales at Less Than Fair Value: Ferrosilicon from Kazakhstan* 58 FR 79 (January 4, 1993), we relied partially on the fact that merchandise entered a bonded warehouse as evidence that the merchandise did not enter the commerce of a third country. We agree with petitioner that storage in a duty-free bonded warehouse in Belgium is *prima facie* evidence that the merchandise did not enter the commerce of an intermediate country.

Although these sales do not qualify as sales from an intermediate country pursuant to section 773(f) of the Act, they nevertheless are subject to this investigation because they involve the subject merchandise produced in India and, ultimately, imported into the United States. We must determine whether these sales were made at less than fair value (LTFV). To do so, we have treated the European reseller the same way we would treat a reseller in the home market. The fact that the reseller is located in another country does not fundamentally change the nature of the transactions for purposes of LTFV comparisons.

We used the European reseller's prices to the United States as USP, as we would for a reseller located in India, in accordance with section 772(b) of the Act. The European reseller had no sales in India, nor sales to third countries as defined in section 773(a)(1)(B) of the Act, to use as the basis for FMV under section 773(a)(1) of the Act. Accordingly, we used CV as the basis for FMV in accordance with section 773(a)(2) of the Act.

As CV, we used the cost of manufacture reported by Atul because Atul, not Hain, produced the subject merchandise. We also added the general expenses and profit of Atul as directed by section 773(e)(1)(B) of the Act. However, because these were both less than the statutory minima of 10 and eight percent, respectively, we used the statutory minima.

Comment 3

If the Department determines that the USP for the transshipped merchandise should be based upon Hain's price to its U.S. customer, petitioner asserts that the sales information submitted by Hain cannot be used as a basis for USP because Hain failed to serve the responses upon petitioner as required by the regulations. Petitioner states that this has resulted in it being effectively prevented from participating in the intermediate country investigation. Petitioner states that the transshipper should be treated like any other respondent, *i.e.*, if the transshipper fails to provide information in accordance with the regulations and fails to serve the information on petitioner in accordance with the regulations, the sales information must be treated as a non-response for the purposes of determining USP and FMV. Petitioner claims that the information can only be used to determine Atul's relationship with the transshipper.

Petitioner also argues that the Department should resort to BIA for the sales from Atul through Hain because the company failed verification. Petitioner asserts that the Hain verification report cites various discrepancies and Hain's inability to reconcile submitted data with the company's finance statements. Petitioner notes a discrepancy in the verfication report with respect to movement charges on which petitioner cannot comment as it was not served with the Department's deficiency letter. Finally, with respect to indirect selling expenses, petitioner states that Hain was unable to provide source documents that could be tied to the audited 1991 financial statement.

Respondent submits that any alleged verification or service deficiencies on the part of the European reseller should have no impact on the margin analysis for respondent because the European reseller is an unrelated customer of respondent. Therefore, Atul's sales to the transshipper should have no impact on the calculation of Atul's margin.

DOC Position

We disagree with petitioner. The submissions by Hain have been served

on petitioner and petitioner was provided an opportunity to submit case and rebuttal comments on the submissions. The discrepancies noted in the Hain verification report are minor and we have followed our normal practice of correcting these. Morever, we agree with respondents that any deficiencies found in the European reseller verification should not affect Atul's margin because we have determined that there is no relationship between the firms.

Comment 4

Petitioner submits that its COP allegation was made within the 45 days prior to the preliminary determination and, therefore, there is no basis for the Department rejecting the allegation.

Respondent claims, however, that the COP investigation should not have been initiated because petitioners allegation was untimely. Respondent states that its responses prior to August 3, 1992, the deadline for filing a COP allegation based on the original date for the preliminary determination, contained all the data necessary for petitioner to formulate the same COP allegation made on August 20, 1992. Respondent alleges that as part of an attempt to salvage its tardy allegations, petitioner filed a request for a 30 day postponement of the preliminary determination simultaneously with its COP allegation. In fact, the COP allegations were used by petitioner as a partial justification for postponement, even though the time for the COP allegations would have lapsed but for the postponement. Respondent submits that such circular reasoning cannot be applied in this case when petitioner possessed all of the COP information it would later use and elected not to file an earlier request for the extension for COP allegations specifically provided in the regulations.

Finally, respondent states that the verification mandates a finding that the subject merchandise was sold in the home market at prices above COP. Respondent submits that when the price realized by Atul, inclusive of the returnable packing charge and the finance charge billed by Atul (which is a separate, additional invoice line item over and above the price), is compared with the COP as calculated pursuant to the Department's methodology under 19 CFR 353.51(c), the only conclusion which may be drawn is that there are no sales below cost. Respondent also states that the record is devoid of any evidence in support of finding that sales below cost (1) have been made over any extended period and in substantial quantities; and (2) are not at prices which permit recovery of all costs within a reasonable period in the normal course of trade.

Respondent also requests that the Department allow it to file comments on the results of any COP investigation. Not doing so would mean that Atul's first and only recourse to make its position known on the COP results would be in a judicial forum.

DOC Position

Regarding the timeliness of petitioner's COP allegation, we disagree with respondent. In the *Notice of Postponement of Preliminary Antidumping Duty Determination: Sulfur Dyes, Including Sulfur Vat Dyes, from India* (57 FR 41125, September 9, 1992), we indicated that petitioner made a timely request for a thirty day postponement of the Department's preliminary determination and we postponed the preliminary determination accordingly. Because the preliminary determination was postponed, petitioner's allegation was timely in accordance with 19 CFR 353.31(c)(1)(i).

The respondent's comment with respect to whether the record contains sufficient evidence to support a finding of below cost sales is moot. We found all home market sales above the COP.

Regarding returnable packing, we disagree with respondent. During verification there was a discussion concerning this issue and Atul claimed that the drums used in packing these products were said to be returnable. However, review of the inventory records and Atul's customer-specific receivable accounts revealed no evidence to indicate that any packing drums were returned during fiscal year 1991. Moreover, there is no evidence on the record that any revenue from returnable packing exists, or affects the prices of the merchandise sold in India.

Finally, regarding pre-final determination disclosure, it is our normal practice to disclose the results of the COP investigation simultaneously with the final determination. Petitioner in this case, as in many cases, needed to wait until respondents questionnaire responses were filed before making a COP allegation. Thus, we were unable to complete our COP investigation prior to the preliminary determination in this case. The sequence of events almost always allows insufficient time for parties to comment prior to the final determination, something that cannot be avoided given the statutory deadlines and requirements. Therefore, we were unable to solicit comments from respondent on the COP results prior to the final determination.

Comment 5

Petitioner claims that Atul has understated the direct labor portion of its COP. Also, petitioner states that total fiscal 1991 salary and welfare expenses were understated due to Atul's failure to properly include the costs actually incurred as the result of a labor settlement agreement. Petitioner submits that these costs, although paid in Atul's 1992 fiscal year, constitute part of its actual 1991 labor costs. Petitioner also states that in addition to increasing Atul's 1991 salary and welfare expense, the Department must also increase Atul's salary and welfare expenses of all internally supplied inputs used to produce the covered products.

Respondent disagrees with any retroactive application to 1991 production of payroll expense incurred pursuant to a labor settlement reached after fiscal year 1992. Respondent claims that although the labor settlement was retroactive to 1991, the additional salary and welfare benefits were actually paid and recorded in the 1992 fiscal year.

DOC Position

We agree with petitioner. The COP verification revealed that total payroll expense was greater in one exhibit than the salary and welfare expenses reported in another exhibit. Discussions revealed that the difference was due to an anticipated labor settlement in fiscal year 1991. Atul officials had thought that the settlement would increase their actual salary and welfare costs in fiscal 1991, however, since the settlement was not reached until after fiscal year 1991, Atul included only the salary and welfare costs actually incurred in fiscal year 1991 in their 1991 audited financial statements and questionnaire response. We found that the agreement was retroactive to January 1, 1991, and, subsequently, Atul disclosed all payments made under the agreement that were relevant to its 1991 fiscal year. Thus, Atul did actually incur additional salary and welfare benefits relevant to 1991 fiscal year production although they were paid in fiscal year 1992. Accordingly, we have increased the salary and welfare expenses reported for the subject merchandise and the salary and welfare expense of all internally supplied inputs used to produce the subject merchandise.

Comment 6

Petitioner states that Atul's cost for the single most expensive purchased input is substantially below Indian market price and may reflect related-party transactions between Atul and two

of its suppliers. Petitioner suggests that if the Department finds that Atul is sourcing this primary raw material input from a related party at prices below market, than pursuant to section 773(e)(2) of the Act, the Department should disregard such prices and value this input using BIA.

Respondent argues that petitioner's claims that Atul's costs for the input are below Indian market price, or reflect related party transactions are unfounded speculation.

DOC Position

We agree with respondent. There is no information on the record, nor was any uncovered at verificaton, showing that Atul was sourcing the raw material from a related party at below-market prices. Accordingly, we have not disregarded the price for this input.

Comment 7

Petitioner submits that the revised COP for the home market comparison product is significantly higher than Atul's reported home market sales price. Petitioner suggests that Atul's profit is indicative of sales below COP. Petitioner alleges that FMV must be based upon constructed value, calculated in accordance with petitioner's suggested adjustments.

DOC Position

We disagree with petitioner. *See* the *Foreign Market Value* section.

Comment 8

Petitioner states that Atul has no basis for requesting the Department to disregard the "air shipment" sale. Petitioner states that, as Atul itself admits, the sale to the United States was in the ordinary course of trade and transportation arrangements were changed because of a delay in an earlier shipment by Atul to its U.S. customer. Petitioner alleges that the delay in the previous shipment to its U.S. customer was occasioned by and within the complete control of Atul. Thus, petitioner argues that should Atul's U.S. customer be dissatisfied with the product for any particular reason, Atul could rebate or refund part of the purchase price. Petitioner asserts that, in such a situation, the Department would not ignore the rebate in calculating USP.

Respondent states that the Department should exclude the "air shipment" sale because that sale is not representative of Atul's selling practices in the U.S. market and would result in an unfair comparison. Moreover, the air shipment was the only U.S. sale for which a dumping margin was found. Respondent states that due to the exigencies surrounding this shipment, it was obliged to take the extraordinary step of breaking up a pre-existing order for a full container load and to immediately ship the designated quantity to its U.S. customer by air. Atul claims that all of its other U.S. sales during the POI were by ocean carrier, which is the usual method of shipment for this class of merchandise. Respondent notes that air freight costs for this shipment were ten times that of the average, or even the highest, ocean freight charge reported. The foreign brokerage charge was 90 times the average, and 80 times the highest, foreign brokerage charge incurred on Atul's other U.S. sales.

Respondent claims that the Department has the discretion to exclude U.S. sales from the comparison with FMV where such sales are unrepresentative of the seller's U.S. sales behavior and would result in an unfair comparison. Respondent notes that 19 CFR 353.42(b)(1) gives the Department discretion not to examine every sales transaction of a respondent during the POI.

Respondent states that if the Department does not exclude the air shipment, it should substitute the average ocean freight and foreign brokerage charges incurred on Atul's other U.S. sales for the air freight and foreign brokerage charges incurred on the air shipment. Alternatively, respondent suggests that the highest ocean freight and brokerage charges be applied to the air shipment.

DOC Position

We agree with petitioner and have included the air shipment in the fair value comparison. We disagree with the respondent that we should substitute average charges from other transactions in preference to the actual expense incurred for this sale.

Comment 9

Respondent argues that the Department improperly treated Atul's U.S. sales that were made above fair value as merely being at fair value and that the negative margins for Atul's sales should be included in the Department's calculation of the weighted-average dumping margin. Respondent asserts that all U.S. sales involved were the same merchandise and were sold at the same price. Respondent claims that the margin on the loan less than fair value sale can be directly traced to a non-price factor, the aberrationally high freight charges.

DOC Position

We disagree with respondent. For purposes of making LTFV determinations under the Act, we do not consider negative margins in our calculations. Thus, in accordance with 19 CFR 353.2(f)(2), we have calculated the weighted-average dumping margin by "* * * dividing the aggregated dumping margins by the aggregated United States prices."

Comment 10

Respondent states that the Department erred by offsetting the deduction for home market commissions with U.S. indirect selling expenses. Respondent claims that the offset is improper as it completely eliminates a direct selling expense in the form of home market commissions through an adjustment to FMV for indirect U.S. selling expenses. Respondent states that such as offset to FMV for indirect selling expenses may properly be applied only in situations where U.S. price is based on exporter's sales price. Respondent claims that it is well-settled that COS adjustments are limited to direct selling expenses, *e.g.*, commissions. Respondent submits that the Department's "special rule" goes on to provide for adjustments for other selling expenses (*i.e.*, indirect selling expenses) where an adjustment is made for commissions in one market only, up to the amount of the commissions or "other" selling expenses, whichever is less. 19 CFR 353.56(b)(1). However, respondent claims that application of the special rule is improper in this investigation involving purchase price comparisons. First, respondent states that the Department's action completely eliminates the deduction of a direct selling expense which is required pursuant to section 773(a)(4)(B) of the Act. Second, respondent alleges that the Department's offset is accomplished by means which run afoul of the statute; neither the antidumping statute nor judicial decisions authorize adjustment to FMV for indirect selling expenses in a purchase price-to-FMV margin comparison. Rather, respondent assets, the antidumping statute expressly limits those cases where an adjustment may be made for indirect selling expenses to ESP situations.

DOC Position

We disagree with respondent and have deducted commissions from the home market prices and added U.S. indirect selling expenses to the home market price capped by the amount of home market commissions in accordance with section 19 CFR

353.56(b)(1). We disagree with respondent that the statute and regulations limit the application of the "special rule" to exporter's sales price comparisons. On the contrary, section 773(a)(4) of the Act in general, and 19 CFR 353.56(b)(1) specifically, give the Department authority to make these adjustments.

Comment 11

Respondent states that because the reported international freight charges were overstated (*i.e.*, calcuated on the basis of net, rather than gross, weight), the Department should recalculate USP to take into account the correct charges.

Respondent submits that, with the exception of the air shipment, the Department should apply the verified foreign brokerage amount for all of Atul's U.S. sales as the amounts reported exceeded the actual charges.

DOC Position

We agree with respondent and have used the actual freight and foreign brokerage charges noted in the verification report.

Comment 12

Respondent claims that the Department verified two separate ways to arrive at per unit U.S. inventory carrying costs, both of which confirmed that the amount reported was significantly overstated. Respondent submits that the method reviewed as part of the COP verification is more accurate as it is the actual year-end figure taken directly from Atul's year-end audited financial statements. Respondent states that the Department should adopt the method reviewed in the context of the COP verification.

DOC Position

We disagree with respondent. While the exhibit from the cost verification report noted by respondent does contain a figure for inventory carrying cost, this figure was not specifically examined during the cost verification. As such, we have used the figure verified during the course of the sales verification.

Comment 13

Although respondent reported a uniform cash discount taken against total invoice value for all home market sales, the Department verified that the rate varied according to the date of payment by Atul's customer. Respondent claims that the Department should apply the verified rates in the final determination.

DOC Position

We agree with respondent and have used the discount applicable to each sale in accordance with payment terms.

Comment 14

Respondent asserts that the Department's preliminary determination computer program failed to note that the state sales tax varied from 4.0 to 4.8 percent. Accordingly, respondent suggests that in the final determination, the Department should modify the computer program so that the 4.8 percent sales tax rate is applied in connection with all home market sales within Gujarat state.

DOC Position

We have adjusted the program to account for the actual tax rate applicable to sales according to the customer's location.

Continuation of Suspension of Liquidation

In accordance with section 733(d) of the Act, we are directing the Customs Service to continue to suspend liquidation of all entries of sulfur dyes, including sulfur vat dyes, from India, as defined in the "Scope of Investigation" section of this notice, that are entered, or withdrawn from warehouse, for consumption on or after the date of publication of this notice in the Federal Register. 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. The suspension of liquidation will remain in effect until further notice. The weighted-average dumping margins are as follows:

Manufacturer/producer/exporter	Weighted-average margin (percent)	Critical circumstances
Atul Products Limited	2.75	No.
Hickson and Dadajee, Limited.	17.55	No.
Hain from Atul Products Limited.	5.49	No.
All Others	8.59	No.

ITC Notification

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

Notification to Interested Parties

This notice also serves as the only reminder to parties subject to administrative protective order (APO) of their responsibility covering the return or destruction of proprietary information disclosed under APO in accordance with 19 CFR 353.35(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. 1673(d)) and 19 CFR 353.20.

Dated: February 19, 1993.

Joseph A. Spetrini,

Acting Assistant Secretary for Import Administration.

[FR Doc. 93-4561 Filed 2-26-93; 8:45 am]

BILLING CODE 3510-DS-M

[Investigations Nos. 731–TA–548 and 551 (Final)]

Sulfur Dyes From China and the United Kingdom

Determinations

On the basis of the record [1] 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 not materially injured or threatened with material injury, and the establishment of an industry in the United States is not materially retarded, [2] by reason of imports from China and the United Kingdom of sulfur dyes, including sulfur vat dyes, [3] provided for in

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

[2] Commissioner Brunsdale found two like products consisting of intermediate dyestuffs and finished dyes, voting in the affirmative with respect to intermediate dyestuffs from both countries, and negative with respect to finished dyes from both countries.

[3] Sulfur dyes are synthetic organic coloring matter containing sulfur. Sulfur dyes are obtained by high temperature sulfurization of organic material containing hydroxy, nitro, or amino groups, or by reaction of sulfur or alkaline sulfide with aromatic hydrocarbons. For purposes of these investigations, sulfur dyes include, but are not limited to, sulfur vat dyes with the following color index numbers: Vat Blue 42, 43, 44, 45, 47, 48, and 50 and Reduced Vat Blue 42 and 43. Sulfur vat dyes also have the properties described above. All forms of sulfur dyes are covered, including the reduced (leuco) or

subheadings 3204.15, 3204.19.30, 3204.19.40, and 3204.19.50 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).

Background

The Commission instituted these investigations effective September 21, 1993, following preliminary determinations by the Department of Commerce that imports of sulfur dyes, including sulfur vat dyes, from China and the United Kingdom 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 October 7, 1992 (57 FR 46195). The hearing was held in Washington, DC, on January 13, 1993, and all persons who requested the opportunity were permitted to appear in person or by counsel.

The Commission transmitted its determinations in these investigations to the Secretary of Commerce on February 18, 1993. The views of the Commission are contained in USITC Publication 2602 (February 1993), entitled "Sulfur Dyes from China and the United Kingdom: Determinations of the Commission in Investigations Nos. 731–TA–548 and 551 (Final) Under the Tariff Act of 1930, Together With the Information Obtained in the Investigations."

Issued: February 19, 1993.

By order of the Commission.

Paul R. Bardos,

Acting Secretary.

[FR Doc. 93–4280 Filed 2–23–93; 8:45 am]

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oxidized state, presscake, paste, powder, concentrate, or so-called "pre-reduced, liquid ready-to-dye" forms.