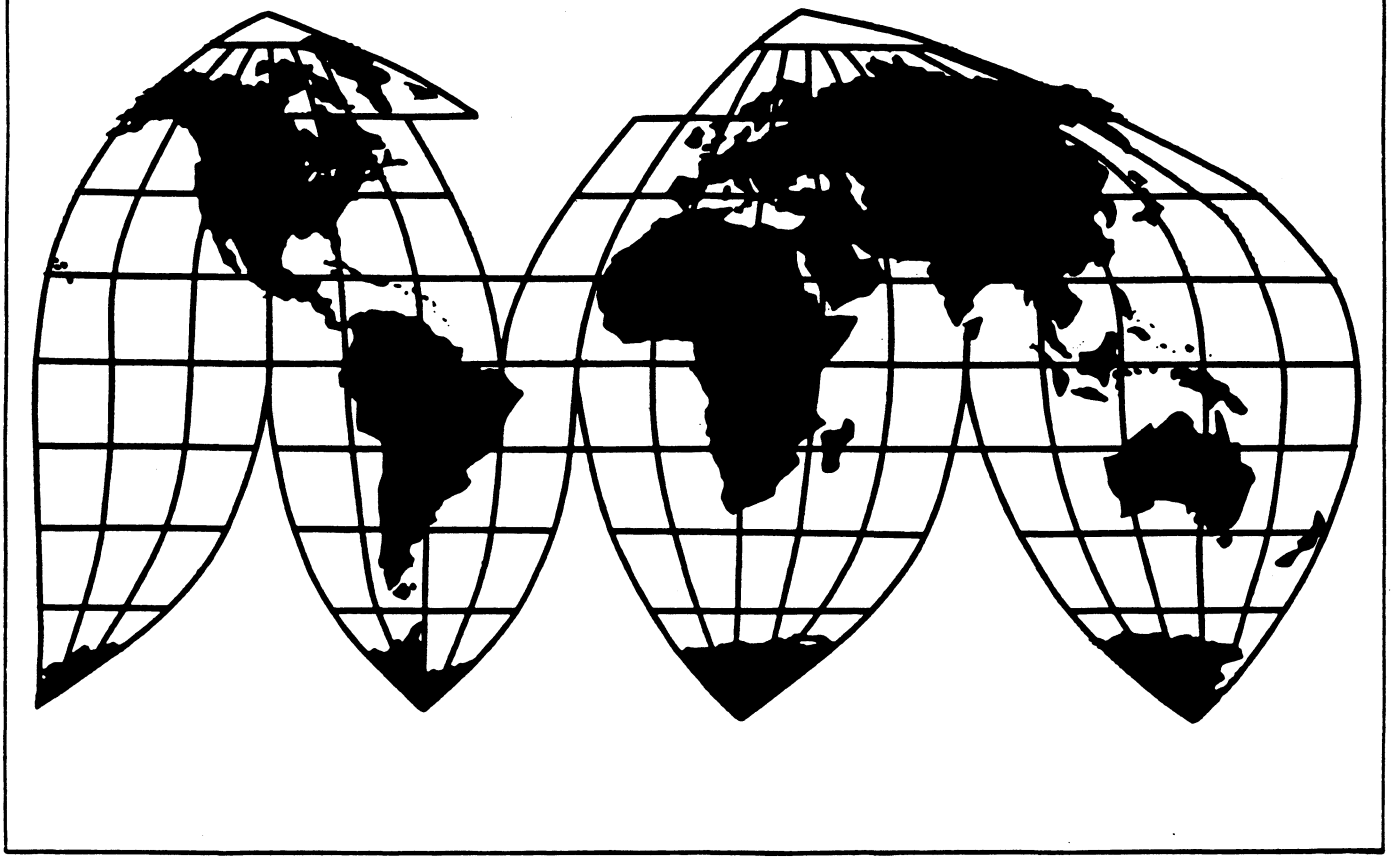
Disposable Lighters from the People's Republic of China

Investigation No. 731-TA-700 (Final)

Publication 2896 **June 1995**

U.S. International Trade Commission



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U.S. International Trade Commission

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PART I

DETERMINATION AND VIEWS OF THE COMMISSION

UNITED STATES INTERNATIONAL TRADE COMMISSION

Investigation No. 731-TA-700 (Final)

DISPOSABLE LIGHTERS FROM THE PEOPLE'S REPUBLIC OF CHINA

Determination

On the basis of the record[1] developed in the subject investigation, the Commission determines,[2] 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 the People's Republic of China of disposable pocket lighters, provided for in subheadings 9613.10.00 and 9613.20.00 of the Harmonized Tariff Schedule of the United States, that have been found by the Department of Commerce to be sold in the United States at less than fair value (LTFV).

Background

The Commission instituted this investigation effective December 13, 1994, following a preliminary determination by the Department of Commerce that imports of disposable pocket lighters from the People's Republic of China 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 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 February 1, 1995 (60 F.R. 6289). The hearing was held in Washington, DC, on March 21, 1995, and all persons who requested the opportunity were permitted to appear in person or by counsel.

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

[2] Commissioners Rohr and Newquist dissenting.

VIEWS OF THE COMMISSION

Based on the record in this final investigation, we determine that the industry in the United States producing disposable lighters is neither materially injured, nor threatened with material injury, by reason of imports from the People's Republic of China ("China") that are sold in the United States at less than fair value ("LTFV").[1] [2]

The rationale for our determination is substantially the same as that set forth in our views in our recent determination regarding LTFV imports of disposable lighters from Thailand,[3] which are incorporated by reference.[4] The Commission's determination in a Title VII investigation is based upon the record in that specific investigation. In this instance, except as noted below, the record in this investigation is virtually identical to the record for the Thailand determination, in which the Commission thoroughly discussed all relevant issues. Indeed, the only significant factual differences between the investigations are the reduction in the volume of subject imports from China due to the exclusion by the Department of Commerce ("Commerce") of two Chinese exporters from its affirmative final determination, and the final weighted-average dumping margins.[5] The parties' additional submissions in this investigation have not raised new issues. Accordingly, we do not repeat our earlier analysis in detail.

I. LIKE PRODUCT AND DOMESTIC INDUSTRY

A. In General

In determining whether an industry in the United States is materially injured or threatened with material injury by reason of the subject imports, the Commission first defines the "like product" and the "industry." Section 771(4)(A) of the Tariff Act of 1930, as amended (the "Act"), defines the relevant 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 turn, the statute defines "like product" as "a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation."[7] The Commission's decision regarding the appropriate like product or products is essentially a

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[1] Commissioners Rohr and Newquist determine that a threat to the domestic industry exists by reason of the subject imports. See their dissenting views.

[2] The petition seeking initiation of this investigation was filed prior to the effective date of the Uruguay Round Agreements Act. This investigation thus remains subject to the substantive and procedural rules of the pre-existing law. See Pub. L. 103-465, 108 Stat. 4809 (1994), at § 291.

Whether the establishment of an industry in the United States is materially retarded is not an issue in this investigation.

[3] Disposable Lighters from Thailand, Inv. No. 731-TA-701 (Final), USITC Pub. 2876 (Apr. 1995).

[4] Commissioner Bragg cumulated subject imports from China and Thailand in making her no present injury determination in the Thailand investigation, but declined to do so for the purpose of analyzing the threat of imports of disposable lighters from Thailand.

[5] See 60 Fed. Reg. 22,359, 22,370 (May 5, 1995) (exclusion of China National Overseas Trading Corporation and Gao Yao (HK) Hua Fa Industrial Company Ltd. by virtue of finding of zero percent dumping margin). See also Letter from John M. Gurley to The Honorable Ronald H. Brown (May 1, 1995).

[6] 19 U.S.C. § 1677(4)(A).

[7] 19 U.S.C. § 1677(10).

factual determination, and the Commission has applied the statutory standard of "like" or "most similar in characteristics and uses" on a case-by-case basis.[8] No single factor is dispositive, and the Commission may consider factors it deems relevant based upon the facts of a particular investigation. The Commission looks for "clear dividing lines among possible like products" and disregards minor variations.[9]

B. Like Product Issues

The imported articles subject to this investigation are:

> disposable pocket lighters . . . , whether or not refillable, whose fuel is butane, isobutane, propane, or other liquefied hydrocarbon, or a mixture containing any of these, whose vapor pressure at 75 degrees fahrenheit (24 degrees Celsius) exceeds a gauge pressure of 15 pounds per square inch.[10]

In our preliminary investigations and in our recent final determination with respect to the investigation involving disposable lighters from Thailand, we found one like product, consisting of standard and child-resistant disposable lighters; we did not include refillable non-disposable lighters.[11] There is no new evidence that would warrant altering our determination in this final investigation. We thus determine that there is a single like product, consisting of all disposable lighters.

C. Domestic Industry

Based upon the definition of the like product, the domestic industry consists of the sole domestic producer of standard and child-resistant disposable lighters, i.e. petitioner BIC Corporation ("BIC").[12]

II. CONDITION OF THE DOMESTIC INDUSTRY

In assessing whether the domestic industry is materially injured or threatened with material injury by reason of LTFV imports, we consider all relevant economic factors that bear on the state of the industry in the United States.[13] These factors include output, sales, inventories, capacity utilization, market share, employment, wages, productivity, profits, cash flow, return on investment, ability to raise capital, and research and development. No single

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[8] See Torrington Co. v. United States, 747 F. Supp. 744, 749 n.3 (Ct. Int'l Trade 1990), aff'd, 938 F.2d 1278 (Fed. Cir. 1991).

[9] Torrington Co. v. United States, 747 F. Supp. at 748-49.

[10] 60 Fed. Reg. 22,359 (May 5, 1995).

[11] Disposable Lighters from Thailand, USITC Pub. 2876, at I-6 - I-8; Disposable Lighters from the People's Republic of China and Thailand, Inv. Nos. 303-TA-25 & 731-TA-700-701 (Preliminary), USITC Pub. 2792 (June 1994), at I-7 - I-10.

[12] Because there is only one domestic producer, most quantitative information pertaining to the domestic industry may not be discussed in a public opinion. We have been granted permission by petitioner to discuss in the public opinion general trends pertaining to the domestic industry.

[13] 29 U.S.C. § 1677(7)(C)(iii).

factor is dispositive and all relevant factors are considered "within the context of the business cycle and conditions of competition that are distinctive to the affected industry."[14]

Our analysis of the condition of the domestic industry is provided in full detail in Disposable Lighters from Thailand.[15] Our views concerning the conditions of competition in this investigation are the same, with the most important condition of competition being the Consumer Product Safety Commission ("CPSC") ban on the manufacture or importation of standard lighters after July 12, 1994. The record evidence relating to the condition of the domestic industry also remains the same in this investigation as in the Thailand investigation. Consequently, we adopt in full our discussion of the condition of the domestic industry, including the conditions of competition, as set forth in our opinion in the Thailand investigation.[16]

III. CUMULATION

In this investigation we have not cumulated imports of disposable lighters from China with imports from Thailand.[17] [18] Although BIC filed the petition underlying this investigation simultaneously with the petition in Disposable Lighters from Thailand, imports from Thailand are no longer "subject to investigation" as of vote day for this investigation because of the Commission's negative determination with respect to Thai imports.[19]

IV. NO MATERIAL INJURY BY REASON OF LTFV IMPORTS

In final antidumping duty investigations, the Commission determines whether an industry in the United States is materially injured by reason of imports subject to investigation that Commerce has determined to be sold at LTFV.[20] In making this determination, the Commission must consider the volume of imports, their effect on prices for the like product, and their impact on domestic producers of the like product, but only in the context of U.S. production operations.[21] Although the Commission may consider

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[14] 19 U.S.C. § 1677(7)(C)(iii).

[15] USITC Pub. 2876, at I-9 - I-11.

[16] Commissioners Rohr and Newquist find that, although the domestic industry is not currently experiencing material injury, it is threatened with injury. Therefore they do not join the remainder of this opinion. See their dissenting views, infra.

[17] Generally, in determining whether there is material injury by reason of the 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 "compete with each other and with like products of the domestic industry in the United States market." 19 U.S.C. § 1677(7)(C)(iv)(I).

[18] Vice Chairman Nuzum analyzed the effects of the LTFV imports on a non-cumulated and on a cumulated basis. She finds the record supports a negative determination regardless of the approach used with respect to cumulation. For her cumulated analysis, see Additional Views of Vice Chairman Janet A. Nuzum.

[19] See 19 U.S.C. § 1677(7)(C)(iv)(I); Chaparral Steel Co. v. United States, 901 F.2d 1097, 1104-05 (Fed. Cir. 1990) (to be cumulated under the mandatory cumulation provision, imports must be subject to investigation as of vote day).

[20] 19 U.S.C. § 1673d(b).

[21] 19 U.S.C. § 1677(7)(B)(i). The Commission "may consider such other economic factors as are relevant to the determination" but shall "identify each [such] factor . . . and explain in full its relevance to the determination." 19 U.S.C. § 1677(7)(B).

alternative causes of injury to the domestic industry other than the LTFV imports, it is not to weigh causes.[22] [23] [24]

Based on the data available in this investigation, we find that the domestic industry is not materially injured by reason of LTFV imports from China.

A. The Volume of Subject Imports

The volume of subject imports increased between 1992 and 1994, and they were at substantial levels throughout this period.[25] However, the volume must be considered in light of the increased levels of consumption.[26] Although BIC's share of the U.S. market declined by quantity from 1992 to 1994, the decline was very small.[27] Moreover, when measured by value, domestic market share actually increased from 1992 to 1994.[28] Finally, the market share of non-LTFV imports declined steadily from 1992 to 1994, and to a much greater

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[22] See, e.g., Citrosuco Paulista, S.A. v. United States, 704 F. Supp. 1075, 1101 (Ct. Int'l Trade 1988). Alternative causes may include the following: the volume and prices of imports sold at fair value, contraction in demand or changes in patterns of consumption, trade, restrictive practices of and competition between the foreign and domestic producers, developments in technology, and the export performance and productivity of the domestic industry. S. Rep. No. 249, 96th Cong., 1st Sess. 74 (1979). Similar language is contained in the House Report. H.R. Rep. No. 317, 96th Cong., 1st Sess. 47 (1979).

[23] For Chairman Watson's interpretation of the statutory requirement regarding causation, see Certain Calcium Aluminate Cement and Cement Clinker from France, Inv. No. 731-TA-645 (Final), USITC Pub. 2772, at I-14 n.68 (May 1994).

[24] Commissioner Crawford notes that the statute requires the Commission to determine whether a domestic industry is "materially injured by reason of" the LTFV imports. She finds that the clear meaning of the statute is to require a determination of whether the domestic industry is materially injured by reason of LTFV imports, not by reason of LTFV imports among other things. Many, if not most, domestic industries are subject to injury from more than one economic factor. Of these factors, there may be more than one that independently is causing material injury to the domestic industry. It is assumed in the legislative history that the "ITC will consider information which indicates that harm is caused by factors other than the less-than-fair-value imports." S. Rep. No. 249, at 75. However, the legislative history makes it clear that the Commission is not to weigh or prioritize the factors that are independently causing material injury. Id. at 74; H.R. Rep. No. 317, at 46-47. The Commission is not to determine if the LTFV imports are "the principal, a substantial or a significant cause of material injury." S. Rep. No. 249, at 74. Rather, it is to determine whether any injury "by reason of" the LTFV imports is material. That is, the Commission must determine if the subject imports are causing material injury to the domestic industry. "When determining the effect of imports on the domestic industry, the Commission must consider all relevant factors that can demonstrate if unfairly traded imports are materially injuring the domestic industry." S. Rep. No. 71, 100th Cong., 1st Sess. 116 (1987) (emphasis added).

[25] U.S. imports of subject lighters increased from ***. Table A-3, CR II at A-7, PR II at A-3.

In terms of value, subject imports increased from ***. Table A-3, CR II at A-7, PR II at A-3.

These figures are also reflected in the subject imports' market share, the quantity of which increased from ***. Table A-3, CR II at A-7, PR II at A-3.

[26] See Table 1, CR I at I-16, PR I at II-10, Table D-7, CR I at D-13, PR I at II-D-4.

[27] Table 28, CR I at I-72 - I-73, PR I at II-26, Table D-7, CR I at D-13, PR I at D-4.

[28] Table 28, CR I at I-72 - I-73, PR I at II-26, Table D-7, CR I at D-13, PR I at D-4.

degree than domestic market share, suggesting that the subject imports are primarily displacing non-LTFV imports rather than the domestic product.[29]

As a consequence of the imposition of the CPSC ban on standard lighters, subject imports from China lost market share between the first and second halves of 1994 while the domestic industry experienced a gain.[30] BIC's share of the quantity of the market increased by *** percentage points, and the value of its market share increased by *** percentage points during this period. At the same time, the quantity share of subject imports declined by *** percentage points and the value share declined by *** percentage points.[31]

As discussed in the condition of the domestic industry section of our Thailand opinion, brand name disposable lighters such as BIC's are concentrated in the high end of the market, while lower-quality, private label lighters, such as the subject imports, are concentrated in the low end of the market.[32] The volume of subject imports increased as the size of the low end of the market increased. We are not persuaded that low-end subject import lighters are displacing domestic brand name lighters. We conclude, therefore, that the foregoing factors reduce the significance of the volume and market share of subject imports.

As discussed above, we are precluded from cumulating imports from Thailand and China because of our negative determination with respect to Thailand.[33] In addition, in its final determination Commerce reduced to zero the weighted-average dumping margins for two companies for which larger margins had been found in its preliminary determination.[34] Therefore, these two companies' disposable lighters are now excluded from our data for subject imports. As a result, the volumes and market shares of LTFV subject imports from China are significantly lower than they were when we made our determination in the Thailand investigation.[35] This further strengthens our finding that the volume of LTFV imports of disposable lighters from China is not significant. We found cumulated imports from China and Thailand were not significant in our recent determination in Disposable Lighters from Thailand. It would be anomalous to conclude that the smaller volume of subject imports from China alone are significant in these circumstances.[36]

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[29] Table 28, CR I at I-72, PR I at II-26.

[30] Table A-3, CR II at A-7, PR II at A-3.

[31] Table 28, CR I at I-72 - I-73, PR I at II-26; Table A-3, CR II at A-7, PR II at A-3. In terms of quantity, BIC's share of domestic consumption rose from *** percent in the last half. The subject imports, however, lost market share: they experienced a decrease from *** percent. The value of BIC's market share increased from *** percent during this period, while the value of the subject imports' market share decreased from *** percent. Table 28, CR I at I-72 - I-73, PR I at II-26; Table A-3, CR II at A-7, PR II at A-3.

[32] USITC Pub. 2876, at I-9.

[33] Vice Chairman Nuzum does not join in this statement.

[34] In its preliminary determination, Commerce found a dumping margin of 37.48 percent for China National Overseas Trading Corporation, and a de minimis margin of 0.10 for Gao Yao (HK) Hua Fa Industrial Co., Ltd. 59 Fed. Reg. 64,191, 64,195 (Dec. 13, 1994).

[35] For example, in terms of quantity, shipments of cumulated imports ranged from *** lighters in 1992 to *** in 1994. Table 1, CR I at I-16, PR I at II-10, Table D-7, CR I at D-13, PR I at D-4. In contrast, shipments of subject Chinese imports increased from only *** lighters in 1992 to *** in 1994. Table A-3, CR II at A-7, PR II at A-3. The market share of cumulated imports was *** in 1992 and increased to *** in 1994, Table 28, CR I at I-72, PR I at II-26, while the comparable figures for subject imports from China are *** in 1992, increasing to *** in 1994. Table A-3, CR II at A-7, PR II at A-3.

[36] See Disposable Lighters from Thailand, USITC Pub. 2876, at I-14 - I-15 for our in-depth analysis of the effect of the volume of cumulated Thai and Chinese imports on the domestic industry.

B. The Effect of Subject Imports on Domestic Prices

In evaluating the effect of LTFV imports on domestic prices, the Commission considers whether there has been significant price underselling by subject imports and whether the imports depress prices to a significant degree or prevent price increases that otherwise would have occurred, to a significant degree.[37] Although we have not evaluated the price effects of the subject imports on a cumulated basis as we did in the Thailand investigation, the data, which were presented for each country separately, have not changed since that investigation. The pricing trends for the Chinese imports are comparable to the pricing trends for the cumulated Chinese and Thai imports.[38] We found the cumulated subject imports had no significant adverse price effects. Similarly, the price effects of subject imports from China alone are not significant for the reasons stated in the Thailand determination.[39] As we did in the Thai investigation, we discount the underselling by the Chinese product because of the brand name recognition for the domestic product, as well as the reputation for quality and safety that are attributable to the high-end domestic product, and otherwise find no significant adverse price effects resulting from the subject imports from China.[40] [41]

C. Impact on the Domestic Industry

We find that there has been no significant adverse impact on the domestic industry by the subject imports. In our determination in the Thailand investigation, we found no significant adverse impact resulting from cumulated Chinese and Thai imports. We decline to find that the smaller volume of subject imports from China alone had such an impact here.[42] [43]

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[37] 19 U.S.C. § 1677(7)(C)(ii).

[38] See Tables 29-32, CR I at I-92 - I-95, PR I at II-33.

[39] See CR II at I-5 - I-6 n.6; PR II at II-5 n.6.

[40] For a thorough discussion of our analysis of the effects of the prices of the subject imports on the domestic industry, see Disposable Lighters from Thailand, USITC Pub. 2876, at I-15 - I-17.

[41] In the Thailand investigation, Commissioner Crawford found that subject imports did not have significant price effects on domestic prices. She found that there would have been no shift in demand towards domestic lighters if subject imports had been sold at higher, fairly traded prices. See Disposable Lighters from Thailand, USITC Pub. 2876, at I-16 n.99. In this investigation, the final Chinese margins are lower than the margins used in the Thailand investigation. Accordingly, if Chinese imports had been priced fairly, their prices would have risen by a lesser amount than in the Thailand investigation. Thus, it is even less likely that demand would have shifted to domestic lighters if Chinese imports had been priced fairly. With no shift in demand towards domestic lighters, the domestic industry would not have been able to increase its prices.

[42] For our complete analysis of the impact on the domestic industry of the subject imports, see Disposable Lighters from Thailand, USITC Pub. 2876, at I-17 - I-19.

[43] As Commissioner Crawford noted earlier, at the lower, final dumping margins for Chinese imports, it is even less likely that demand would have shifted to domestic lighters if Chinese imports had been priced fairly. With no shift in demand towards domestic lighters, the domestic industry would not have been able to increase significantly either its prices or the quantity sold. Consequently, the domestic industry would not have increased its revenues significantly, and thus would not have been materially better off if Chinese imports had been priced fairly.

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

A. Cumulation

In assessing whether a domestic industry is threatened with material injury by reason of imports from two or more countries, the Commission has discretion to cumulate the volume and price effects of such imports if they compete with each other and the domestic like product.[44] However, as explained above, we do not cumulate subject imports from China with imports from Thailand, because the latter are no longer "subject to investigation" as of vote day for this investigation.[45] Notwithstanding this fact, we would reach the same result had we cumulated subject imports from China with lighter imports from Thailand.[46]

B. No Threat of Material Injury

Section 771(7)(F) of the Act directs the Commission to determine whether a U.S. industry is threatened with material injury by reason of imports "on the basis of evidence that the threat of material injury is real and actual injury is imminent." The Commission is not to make such a determination "on the basis of mere conjecture or supposition."[47]

We have considered all the statutory factors that are relevant to this investigation.[48] The presence or absence of evidence concerning any single factor is not dispositive.[49] For the following reasons, we do not find that there is a threat of material injury to the domestic industry by reason of the subject imports.

The capacity of producers in China to manufacture all subject disposable lighters, including both standard and child-resistant lighters, is substantial.[50] Due to the CPSC regulation, however, all imports of disposable lighters in the future must be child-resistant.

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[44] 19 U.S.C. § 1677(7)(F)(iv).

[45] Vice Chairman Nuzum does not join this sentence. See her additional views.

[46] For the purpose of making her threat determination in the Thailand investigation, Commissioner Bragg did not cumulate imports of disposable lighters from China and Thailand. Because disposable lighter imports from Thailand are no longer subject to investigation, Commissioner Bragg finds that cumulation is not an issue in assessing the threat of material injury posed by subject imports from China in this investigation. For a more detailed explanation of her reasoning for not cumulating disposable lighter imports from China and Thailand in the earlier investigation, see her additional views. USITC Pub. 2876, at I-25.

[47] 19 U.S.C. § 1677(7)(F)(ii). An affirmative threat determination must be based upon "positive evidence tending to show an intention to increase the levels of importation." Metallwerken Nederland B.V. v. United States, 744 F. Supp. 281, 287 (Ct. Int'l Trade 1990), citing American Spring Wire Corp. v. United States, 590 F. Supp. 1273, 1280 (Ct. Int'l Trade 1984), aff'd, 760 F.2d 249 (Fed. Cir. 1985).

[48] 19 U.S.C. § 1677(7)(F)(i)(I)-(X). In addition, the Commission must consider whether dumping findings or antidumping remedies in markets of foreign countries against the same class or kind of merchandise suggest a threat of material injury to the domestic industry. 19 U.S.C. § 1677(7)(F)(iii)(I). Factor I is not relevant because no subsidy is involved. Factor VIII is not applicable as none of the foreign producers' disposable lighters facilities is used to produce other products subject to final antidumping or countervailing duty orders. Because this investigation does not involve an agricultural product, Factor IX is not applicable.

[49] See, e.g., Rhone Poulenc, S.A. v. United States, 592 F. Supp. 1318, 1324 n.18 (Ct. Int'l Trade 1984).

[50] Table C-3, CR II at C-4, PR II at C-3.

Therefore, only the existing and future Chinese capacity to produce child-resistant lighters could support any threat of material injury to the domestic industry.

In 1994, the reported capacity of Chinese manufacturers to produce child-resistant disposable lighters was only *** percent of the capacity to produce subject standard and child-resistant lighters.[51] Similarly, the projected increase in the capacity of Chinese manufacturers to produce child-resistant lighters for 1995 represents only approximately *** percent of the capacity to produce all subject lighters in that year.[52] The 1995 projected capacity to produce child-resistant lighters represents only *** percent of total subject imports in 1994.[53] Thus, even if all child-resistant lighter capacity is used to produce products shipped to the United States, fewer lighters could be shipped in terms of volume than when China was shipping both standard and child-resistant lighters. Subject import volume, therefore, will likely decrease in the immediate future. Consequently, any increase in production capacity or existing unused capacity will not result in any increase, much less a significant increase, in subject imports. Moreover, we declined to find the somewhat greater cumulated capacity of Chinese and Thai producers sufficient to warrant an affirmative threat finding in the Thailand investigation.[54] [55]

BIC contends that Chinese producers can and will easily convert their standard lighter capacity to child-resistant lighter capacity in order to increase their shipments of child-resistant lighters to the United States.[56] Accordingly, we also considered whether the overall Chinese capacity to produce disposable lighters constitutes evidence of a threat of material injury. We conclude it does not.

First, Chinese producers had substantial and increasing capacity throughout the entire period of investigation.[57] Yet, that capacity did not result in shipments of disposable lighters in injurious volumes to the United States.[58] Therefore, even if Chinese producers were to increase their capacity to produce child-resistant lighters, we are not persuaded that these increases are likely to result in increases in subject imports to injurious levels. Certainly, there is no evidence that all capacity to produce disposable lighters in China is likely to be dedicated to the production of child-resistant lighters.[59] [60]

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[51] Compare Table C-2, CR II at C-3, PR II at C-3, with Table C-3, PR II at C-4, PR II at C-3.

[52] Compare Table C-2, CR II at C-3, PR II at C-3, with Table C-3, CR II at C-4, PR II at C-3.

[53] Tables A-3, C-2, CR II at A-7, C-3, PR II at A-3, C-3.

[54] See Disposable Lighters from Thailand, USITC Pub. 2876, at I-20 - I-23.

[55] Commissioner Bragg does not join this sentence.

[56] BIC's Prehearing Brief at 50-53, BIC's Posthearing Brief at 12-3 - 12-6.

[57] Table C-3, CR II at C-4, PR II at C-3.

[58] See Table C-3, CR II at C-4, PR II at C-3.

[59] We have received no evidence, since our Thailand determination, that any additional Chinese producers have exported child-resistant lighters that meet the CPSC's requirements. Moreover, even though the figures regarding China's capacity to produce child-resistant disposable lighters constitute incomplete data, they are the best evidence available. These data do indicate that estimated quantities of child-resistant lighters imported in 1994 exceed the Chinese capacity to manufacture these lighters. Compare Table A-2, CR II at A-5, PR II at A-3, with Table C-2, CR II at C-3, PR II at C-3. Petitioner seeks to extrapolate these data to show that Chinese exporters are already capable of exporting more lighters to the United States than are shown in the Commission's foreign producers' questionnaires. Petitioner's Supplemental Brief at 2-3. However, we do not have evidence showing that Chinese producers are converting enough of their standard lighter capacity to produce and export child-resistant lighters in volumes that would match or exceed the volumes of their exports to the United States of all disposable lighters during the period examined. Compare Table C-2, CR II at C-3, PR II at C-3, with Table A-3, CR II at A-7, PR II at A-3.

Second, Chinese producers also sell disposable lighters to other markets, some of which account for larger shares of their respective export shipments than do their exports to the United States.[61] We have found no evidence that indicates Chinese producers are preparing to abandon those other markets, which consume standard lighters, in order to ship more child-resistant lighters to the United States. Thus, it would be speculative to conclude that this would occur. Therefore, we find that the information concerning capacity and capacity utilization in China does not constitute evidence that any threat of material injury is real or that actual injury is imminent.

Although the subject imports' market share increased substantially from 1992 to 1994, there was a sizable decrease between the first and second halves of 1994.[62] Subject import volumes followed the same trend, but with a larger decrease between the first and second halves of 1994.[63] However, in 1994, *** percent of subject imports were standard disposable lighters.[64] To the extent any rapid increase in market penetration occurred due to imports of standard lighters, the CPSC regulation directly limits any future increase in market penetration. The prohibition on imports of standard lighters imposed by the CPSC ban makes it unlikely that the Chinese subject imports' market penetration will rise to an injurious level.[65]

Argentina's and the European Union's ("EU's") dumping findings against disposable lighters from China do not establish that any threat of material injury is real.[66] There is evidence on the record that standard, not child-resistant, lighters are the predominant component of shipments of these lighters to Argentina and the EU.[67] To divert these lighters

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[60] (...continued)
[60] Commissioner Crawford does not join this paragraph. In her view, the capacity to produce child-resistant lighters is the only capacity that is commercially relevant to the U.S. market. She finds that the time and costs required to design child-resistant lighters, obtain CPSC approval, obtain patents and avoid patent infringement, and convert production facilities and equipment from standard lighters to child-resistant lighters represent significant barriers to increasing Chinese capacity to produce child-resistant lighters. For this reason, she finds that it is unlikely that a significant amount of capacity to produce standard lighters in China will be converted to producing child-resistant lighters.

[61] See Table C-3, CR II at C-4, PR II at C-3.

[62] Table A-3, CR II at A-7, PR II at A-3.

[63] Table A-3, CR II at A-7, PR II at A-3. In contrast, the market share held by non-subject imports was substantial throughout the period, and declined only slightly between Jan.-June 1994 and July-Dec. 1994. Table A-3, CR II at A-7, PR II at A-3.

[64] Tables A-1, A-3, CR II at A-3, A-7, PR II at A-3.

[65] We note that by quantity, the market penetration of subject child-resistant lighter imports from China increased from *** percent in 1993 to *** percent in 1994. By value, market penetration increased from *** percent in 1993 to *** percent in 1994. Between the first and second halves of 1994, Chinese market penetration increased by quantity from *** percent to *** percent, and by value from *** percent to *** percent. Table A-2, CR II at A-5, PR II at A-3. However, the 1994 market shares may be a poor indicator of future market shares given the transition from standard to child-resistant lighters that occurred in that year. In addition, this increase in market penetration is mitigated by the fact that the record indicates that Chinese producers are presently utilizing their full practical capacity to manufacture child-resistant lighters. See discussion of capacity, supra.

Because the domestic industry can no longer produce standard lighters, it is reasonable to expect that much of its reported 1994 capacity for standard lighters will be converted to the production of child-resistant lighters in the near future. There is no evidence on the record that this capacity will not be converted to such production. Given such conversion, the Chinese market share should fall considerably as the domestic producer's shipments and, hence, market share increase.

[66] See CR I at I-59 n.68, PR I at II-23 n.68.

[67] CR I at I-59 n.68, PR I at II-23 n.68.

to the U.S. market, the facilities used to manufacture standard lighters would have to be converted to the manufacture of child-resistant lighters. As discussed above, it would be speculative to conclude that such conversion will occur in the immediate future when other important markets, including the home market, exist for standard lighters manufactured in China.[68] In addition to converting their manufacturing facilities, the importers of Chinese products would be required to certify that their imports of disposable lighters comply with the requirements of the CPSC safety standard. There is no evidence in the record that either conversion or certification is imminent. For the same reasons, we see no effects flowing from the increased antidumping duty margin for imports into the EU of disposable lighters from China.[69] Consequently, we conclude that those dumping findings do not suggest a threat of material injury to the disposable lighters industry in the United States.

Child-resistant lighters comprise *** percent of current importer inventories of subject lighters.[70] While inventories are not small,[71] we do not find that this factor alone is sufficient to constitute a threat of material injury to the domestic industry that is real, especially in view of the fact that the inventories of Chinese imports are a fraction of the cumulated Thai and Chinese imports upon which we rested our earlier negative determination,[72] [73] and because it appears that these inventories were accumulated while BIC and the importers were depleting their inventories of standard lighters.[74]

As discussed earlier, the record did not indicate that subject imports had significant adverse effects on domestic prices.[75] We find no evidence of changes in market conditions or other factors that indicate subject imports are likely to enter at prices that will have depressing or suppressing effects on domestic prices in the imminent future.

We find no adverse trends indicating that the threat of material injury to the domestic industry from the subject imports is real and that actual injury is imminent. The industry's operating income margin on operations producing child-resistant lighters improved from a *** loss in the first half of 1994 to a period high in the second half of 1994.[76] Considering

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[68] See Gao Yao's Posthearing Brief at 9; see also Table 23, CR I at I-63, PR I at II-24. In 1994, Chinese exports of all lighters to the United States were approximately one-half of exports to all other markets, and the projected figure for 1995 is less than one-third of the exports to all other markets. Moreover, home market shipments surpassed exports to the United States in July-Dec. 1994, and are expected to do the same in 1995 and 1996. Table 23, CR I at I-63, PR I at II-24.

[69] We note that the EU determined to increase the antidumping duty margin for China from 16.9 to 80.3 percent in April 1995. CR I at I-59 n.68, PR I at II-23 n.68.

[70] Tables A-2 - A-3, CR II at A-5 - A-7, PR II at A-3.

[71] Tables A-1 - A-3, CR II at A-3 - A-7, PR II at A-3.

[72] See Table 18, CR I at I-57, PR I at II-23.

[73] Because she did not cumulate subject disposable lighter imports from Thailand and China in reaching her decision as to Thailand, Commissioner Bragg does not join the portion of this sentence that refers to those cumulated imports.

[74] See Table 4, CR I at I-30, PR I at II-14, Table 18, CR I at I-57, PR I at II-23.

[75] See text, supra, and Disposable Lighters from Thailand, USITC Pub. 2876, at I-15 - I-17.

[76] Table A-6, CR I at A-12, PR I at A-3. At the same that operating income for the period reached a peak, the Chinese market share for child-resistant lighters increased, by quantity, from *** percent to a period high of *** percent. Table A-2, CR II at A-5, PR II at A-3.

that only child-resistant lighters may now be produced in or imported into the United States, the record indicates that BIC is well-positioned to compete in this market.[77] [78]

Moreover, the domestic industry's capital expenditures increased between 1992 to 1994 and remain high, and research and development expenses continue to climb.[79] Thus, there are no potential negative effects on development and production efforts.

For all the reasons stated above, we find that the domestic industry is not threatened with material injury by reason of subject imports from China.

CONCLUSION

In light of the foregoing, we determine that the domestic industry is not materially injured or threatened with material injury by reason of LTFV imports of disposable lighters from China.

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[77] We note that the value of BIC's net sales on child-resistant lighters increased from *** in 1992 to *** in 1994. Table 13, CR I at I-48, PR I at II-20. An examination of the financial data also shows that BIC appears to be better positioned to compete towards the end of the period as the per unit cost of goods sold decreased from *** in 1992 to *** in 1994, and unit selling, general and administrative expenses decreased from *** in 1992 to *** in 1994. Table 13, CR I at I-48, PR I at II-20. The conversion from the production of standard to child-resistant lighters appears to be the reason for BIC's unusually high per unit costs at the beginning of the period. The per unit cost of child-resistant lighters declined as production and sales increased. Table 13, CR I at I-48, PR I at II-20, Table 2, CR I at I-25, PR I at II-13.

[78] Commissioner Crawford does not join this discussion. She does not rely on period-to-period comparisons of financial performance or the abstract state of the industry (e.g., "well-positioned") in her analysis.

[79] Tables 16 & 17, CR I at I-52, PR I at II-20 - II-21.

ADDITIONAL VIEWS OF VICE CHAIRMAN JANET A. NUZUM

Disposable Lighters from the People's Republic of China

Inv. No. 731-TA-700 (Final)

Like the majority of my colleagues, I make a negative determination in this investigation. I do not find that a domestic industry is materially injured or threatened with material injury by reason of less than fair value ("LTFV") imports of disposable lighters from the People's Republic of China. As discussed in the majority opinion, I find the record supports a negative determination when the subject imports from China are assessed on a non-cumulated basis.

Unlike my colleagues, however, I also analyzed the effects of the subject imports from China on a cumulated basis, in conjunction with the LTFV imports from Thailand. These additional views set forth the reasons why I believe that cumulation is justified, as well as the results of my cumulated analysis.

Cumulation

Pursuant to a single petition filed by BIC, antidumping investigations of disposable lighters from China and from Thailand were concurrently initiated on May 9, 1994.[80] The Commission made affirmative preliminary injury determinations on the same day, based on the same records, with respect to imports from both countries.[81] Due to a decision by the Commerce Department to postpone its schedule for the investigation involving imports from China,[82] however, the two investigations subsequently proceeded on a staggered basis. The Commission consequently was required to make its final injury determination on the subject imports from Thailand prior to this determination on subject imports from China, notwithstanding the simultaneous petitions, identical periods examined, and concurrent records.

Less than two months ago, I joined a majority of my colleagues in making a negative determination in Disposable Lighters from Thailand.[83] In that investigation, I cumulated the subject imports from China and Thailand when assessing both present material injury and threat of material injury. As a result of that negative determination, the antidumping investigation of imports of disposable lighters from Thailand was terminated. Technically, therefore, those imports are not at this point in time "subject to investigation" -- one of the triggers for the mandatory cumulation provision of the governing statute. On this basis, the majority of my colleagues decline in this investigation to cumulate imports from China with imports from Thailand.

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[80] See 59 Fed. Reg. 25502-03 (May 16, 1994). BIC's petition alleged that disposable lighters from Thailand were subsidized as well as dumped, however, the Department of Commerce subsequently made a negative subsidy determination and terminated the countervailing duty investigation. See 59 Fed. Reg. 40525 (Aug. 9, 1994); 60 Fed. Reg. 13961 (Mar. 8, 1995).

[81] See Disposable Lighters from the People's Republic of China and Thailand, Invs. Nos. 303-TA-25, 731-TA-700 and -701 (Preliminary) USITC Pub. 2792 (June 1994).

[82] The Department of Commerce postponed the preliminary antidumping determination for China on September 20, 1994 (59 Fed. Reg. 48284). Commerce made its final affirmative dumping determinations for Thailand on March 8, 1995 (60 Fed. Reg. 14263 (Mar. 16, 1995)) and for China on April 27, 1995 (60 Fed. Reg. 22359 (May 5, 1995)).

[83] Inv. No. 731-TA-701 (Final) USITC Pub. 2876 (April 1995).

Although I concur that cumulation is not mandatory in this instant investigation, I also note that the Commission has discretionary authority to cumulate imports in a pending investigation with unfairly traded imports that recently entered the United States.[84] On the basis of this discretionary authority, and in light of the fact that the two investigations involving imports from Thailand and from China were initiated simultaneously on the basis of the same petition, I believe cumulation in the instant investigation is justified.[85]

In Sulfur Dyes from India, I, along with then-Chairman Newquist, explained why cumulation may be appropriate in these circumstances.[86] Among other reasons, not cumulating could "send a signal to future . . . 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 subject to investigation."[87] In other words, the policy objective of authorizing relief against the simultaneous effects of unfairly traded imports from more than one source may be undermined merely by procedural decisions about investigatory work schedules. I do not believe that Congress intended to allow such an anomaly to occur.

I further note that the recently enacted Uruguay Round Agreements Act ("URAA") includes an amendment to address the question of cumulation in staggered investigations arising from the same petition. As amended by the URAA, new section 771(7)(G)(iii) of the Tariff Act of 1930 provides: "In each final determination in which it cumulatively assesses the volume and effect of imports . . ., the Commission shall make its determinations based on the record compiled in the first investigation in which it makes a final determination [taking into account the final antidumping and countervailing duty determinations and the parties' comments thereon]."[88] The effective date of this new provision is such that it does not, as a matter of law, apply to the investigation now before us. Nevertheless, it is worth noting that my approach here and in Sulfur Dyes from India is consistent with this new statutory provision governing cumulation in staggered investigations.

No Present Material Injury By Reason of Subject Imports

The record in this investigation is virtually identical to the record in Disposable Lighters from Thailand. The only factual changes since that negative determination on Thailand are the reduction in the volumes of subject imports from China (due to zero dumping margins found by the Department of Commerce for two Chinese companies) and

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[84] See, e.g., Certain Forged Steel Crankshafts from Brazil, Inv. No. 701-TA-282 (Final), USITC Pub. 2038 (Nov. 1987) at 6-9; Tapered Roller Bearings and Parts Thereof, and Certain Housings Incorporating Tapered Rollers from Italy and Yugoslavia, Invs. Nos. 731-TA-342 and 346, (Final) USITC Pub. 1999 (Nov. 1987) at 15-17.

[85] I note that the Department of Commerce made an affirmative final determination of sales at less than fair value for the disposable lighter imports from Thailand; thus the imports from Thailand were unfairly traded imports. The termination of the investigation was a consequence rather of the Commission's determination that those imports were not causing or threatening to cause material injury.

[86] See Sulfur Dyes from India, Inv. No. 731-TA-550 (Final) USITC Pub. 2619 (April 1993), Separate Views of Chairman Newquist and Commissioner Nuzum, at 24-30.

[87] Id. at 28-29.

[88] Uruguay Round Agreements Act, Pub. L. 103-465, §222(e) 108 Stat. 4809, 4873-74 (1994).

changes in the size of the dumping margins for other Chinese companies.[89] These additional facts do not, however, change my analysis of the record; to the contrary, these facts only provide further support to a negative determination. Consequently, the analysis of present material injury set forth in Disposable Lighters from Thailand applies here as well, and I hereby incorporate and adopt that discussion by reference.[90]

As noted earlier, the volume of subject imports from China is smaller now than at the time of our determination in the Thai investigation because the Department of Commerce made negative LTFV determinations for two Chinese companies.[91] The cumulated volume of LTFV imports from China and Thailand is therefore also smaller here.[92] I previously found that, although the volumes and market shares of LTFV imports were at substantial levels, several factors discounted the significance of those volumes.[93] For purposes of this instant determination, I find that the smaller volume of cumulated LTFV imports is even less significant than the corresponding volume was in the Thailand investigation.

With respect to price effects, the record on price trends and on price comparisons is the same here as in Disposable Lighters from Thailand. I find no evidence that the smaller volume of cumulated LTFV imports now identified depress or suppress domestic prices to a significant degree. Consequently, I similarly find no significant adverse price effects.

Finally, the record with respect to the indicators of the domestic industry's performance during the period examined is exactly the same here as in Disposable Lighters from Thailand. Here, the volumes of cumulated LTFV imports are smaller, and the trends in those volumes, as well as the pricing information, are the same. Thus, there is even less evidence now that LTFV imports are having an adverse impact on the domestic industry. Accordingly, I conclude that the domestic industry is not materially injured by reason of LTFV imports from Thailand and China.

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[89] In its preliminary LTFV determination, the Department of Commerce found more than de minimis LTFV margins for four Chinese companies: China National Overseas Trading Corp. (37.48%); Cli-Claque (7.03%); Guangdong Light Industrial Products Import and Export Corp. (35.08%) and PolyCity Industrial, Ltd. (63.09%). Gao Yao received a de minimis margin of 0.10%. See 59 Fed. Reg. 64191, 64195 (Dec. 13, 1994). In its final LTFV determination, Commerce calculated zero dumping margins for China National Overseas Trading Corp. and Gao Yao. The margins for the other three companies all changed, but remained above de minimis levels. See 60 Fed. Reg. 22359, 22370 (May 5, 1995). The "all others" margin was 197.85% in both the preliminary and final LTFV determinations.

[90] Inv. No. 731-TA-701 (Final) USITC Pub. 2876 (April 1995) at I-13 -- I-19.

[91] See 60 Fed. Reg. 22359, 22370 (May 5, 1995) (zero dumping margins for China National Overseas Trading Corp. and Gao Yao (HK) Hua Fa Industrial Co., Ltd.).

[92] Compare Table 27, CR I at I-66, PR I at II-26 and Table A-3, CR II at A-7, PR II at A-3 (imports of disposable pocket lighters from China and Thailand by quantity). Cumulated LTFV imports for 1994 are more than 10% lower now than they were when the Commission made its determination on Thailand.

[93] These factors included: the concentration of the low-cost LTFV lighters in the low end of the market and the domestic brand name lighters in the high end of the market; the loss of market share by the cumulated LTFV imports between the first and second halves of 1994, following the imposition of the Consumer Product Safety Commission ban on standard lighters; and the fact that the domestic industry's market share increased in terms of value from 1992 to 1994. See Disposable Lighters from Thailand, Inv. No. 731-TA-701 (Final), USITC Pub. 2876 (April 1995) at I-14, I-15.

No Threat of Material Injury By Reason of LTFV Imports

For the same reasons that I cumulated the LTFV imports from China with the LTFV imports from Thailand for purposes of analyzing present injury, I also cumulated them to analyze threat of material injury.[94]

As a consequence of the Commerce Department's finding of zero margins for two Chinese companies, our data concerning the Chinese industry's disposable lighter capacity, production, exports and related data were revised to exclude those two companies.[95] Excluding these two companies results in a large decline in the figures for Chinese capacity, production, inventories, shipments and exports of disposable lighters.[96] It also results in a sharp decline in the projected capacity, production, and exports to the United States of child-resistant disposable lighters.[97] Thus, the record before us now provides even less evidence that cumulated LTFV imports pose a threat of material injury than the record before us at the time of our determination on imports from Thailand. I incorporate and adopt by reference the discussion of threat of material injury set forth in the majority opinion in Disposable Lighters from Thailand.[98]

In its supplemental brief, BIC continues to argue that Chinese producers are converting their capacity for standard lighters to child-resistant lighters.[99] BIC offers no evidence to support this argument, however. As discussed above, projected Chinese capacity, production and exports of child-resistant lighters are lower following the exclusion of China National Overseas Trading Corp. and Gao Yao from the data, than the projections in our determination on Thailand. There also is no evidence that additional Chinese companies have either applied for or received CPSC certification for their child-resistant lighters since our vote on Thailand. Consequently, I determine that the domestic industry is not threatened with material injury by reason of subject imports sold at LTFV.

Conclusion

For the foregoing reasons, I conclude the domestic industry producing disposable lighters is neither materially injured nor threatened with material injury by reason of LTFV imports from China.

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[94] See discussion supra at I-17-18; USITC Pub. 2876 at I-19-20.

[95] CR II at I-6; PR II at II-5.

[96] Compare Table 23, CR I at I-63, PR I at II-24 and Table C-3, CR II at C-4, PR II at C-3.

[97] Compare Table 20, CR I at I-61, PR I at II-24 and Table C-2, CR II at C-3, PR II at C-3.

[98] USITC Pub. 2876 at I-19 - I-23.

[99] See BIC's Supplemental Br. at 3.

DISSENTING VIEWS OF COMMISSIONER DAVID B. ROHR
FINDING THREAT OF MATERIAL INJURY
Inv. No. 731-TA-700 (Final)

I set forth these separate views because I determine that the domestic industry in this investigation is threatened with material injury by reason of imports of disposable lighters from the People's Republic of China ("PRC" or "China") that are sold in the United States at less than fair value ("LTFV"). I concur in the views of my colleagues about the proper definition of the like product and the domestic industry. Additionally, I concur with my colleagues' description of the condition of the industry.

Section 771(7) of the Tariff Act of 1930 directs the Commission to determine whether a U.S. industry is threatened with material injury by reason of imports "on the basis of evidence that the threat of material injury is real and that actual injury is imminent. The Commission cannot base such a determination on mere conjecture or supposition."[100]

A. Vulnerability

While I conclude that the industry is not currently experiencing material injury, the evidence suggests a vulnerability to the adverse effects of imports of disposable lighters from the PRC. Although consumption increased in 1992-1994 and selling, general and administrative ("SG&A") expenses decreased over the period of investigation, the petitioner, BIC Corporation, experienced a decline in operating income in 1993-1994, resulting in an operating loss in July-December 1994. Furthermore, gross profit decreased over the period of investigation, net sales decreased in 1993-1994 and in the interim period (January-June 1994 and July-December 1994), and domestic market share declined steadily in 1992-1994. Finally, production decreased in 1993-1994 and in the interim period, and capacity decreased over the entire period of investigation.[101]

B. Statutory Factors to be Considered in Determining Threat

The Commission must consider, in addition to other relevant economic factors, the following statutory factors in its threat analysis:

> (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;
>
> (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 enter the United States at prices that will have a depressing or suppressing effect on domestic prices;

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[100] 19 U.S.C. § 1677(7)(F)(ii).

[101] Staff Report I at Tables 1, 2, 7, & 28. The Staff Report relied on during the Thailand investigation is cited as Report I. I refer to the Staff Report compiled in the China investigation, after the Commission reached its decision in the Thailand investigation, as Report II.

(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 or 1673e 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 1671d(b)(1) or 1673d(b)(1) of this title with respect to either the raw agricultural product or the processed agricultural product (but not both); and

(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.[102]

The presence or absence of any single threat factor is not necessarily dispositive.[103] In addition, the Commission must 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.[104]

C. Threat of Material Injury by Reason of the LTFV Imports from the PRC

All seven of the relevant statutory factors support a finding that the U.S. industry is threatened with material injury by reason of imports of disposable lighters from the PRC. Since the importation of standard disposable lighters has been banned by the Consumer Product Safety Commission ("CPSC"), I consider the data for child resistant disposable lighters to be most relevant in assessing the threat posed to the domestic industry by subject Chinese imports.

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[102] 19 U.S.C. § 1677(7)(F)(i)(I)-(X) Factor I is not relevant because no subsidy is involved. Factor VIII is not applicable as none of the foreign producers' disposable lighters facilities is used to produce other products subject to final antidumping or countervailing duty orders. Because this investigation does not involve an agricultural product, Factor IX is not applicable.

[103] See, e.g., Rhone Poulenc, S.A. v. United States, 592 F. Supp. 1318, 1324 n.18 (Ct. Int'l Trade 1984).

[104] 19 U.S.C. § 1677(7)(F)(iii)(I).

The production capacity for child resistant disposable lighters in China has increased markedly over the period of investigation, from *** in 1992 and 1993 to *** million units in 1994, and is projected to further increase to *** million units in 1995. Capacity utilization was at *** percent in 1994 and is projected to increase to *** percent in 1995.[105] In 1994, *** percent of the *** million standard disposable lighters produced in China were exported to the United States.[106] With the CPSC ban in effect, the PRC could shift this excess capacity to production of child resistant disposable lighters.

I find that this excess capacity is likely to result in a significant increase in U.S. imports of child resistant disposable lighters from the PRC. First, in July-December 1994, China exported over *** million child resistant disposable lighters to the United States, a product that they did not produce prior to 1994. Second, the United States is the PRC's primary export market, accounting for *** to *** percent of the PRC's shipments of standard disposable lighters during 1992-1994, and for *** percent of the PRC's child resistant disposable lighters exports during the same period. Finally, the Chinese producers have also demonstrated their ability to rapidly increase production and exports of subject disposable lighters to the United States.[107]

Market penetration of the child resistant disposable lighters from the PRC increased from *** percent in 1993 to *** percent in 1994. There was also a marked increase in market share in the interim period from *** percent during January-June 1994 to *** percent during July-December 1994.[108]

In assessing the threat posed by the subject Chinese industry, I considered U.S. importers' inventories of both standard and child resistant disposable lighters, and the Chinese producer's child resistant disposable lighters held in inventory in China to be relevant. I did not consider the inventories of standard disposable lighters in China to be relevant since the CPSC prohibits such imports. Although importers' combined ending inventories of standard and child resistant disposable lighters were *** million units at year-end 1994, up from *** million units in 1992 and *** million units in 1993, in January-June 1994 such imports from the PRC reached *** million units. Inventories of child resistant disposable lighters in China were *** thousand units in 1994.[109] I find these inventory levels to be significant.

In July-September 1994, the margin of underselling of distributor sales of Chinese child resistant disposable lighters was *** percent.[110] The net delivered average price to distributors for Chinese child resistant disposable lighters was *** cents per unit in third quarter 1993, compared with BIC's net delivered average price of *** cents per unit during the same quarter.[111] I therefore find that there is a probability that imports of the subject merchandise will have a depressing or suppressing effect on domestic prices.

In assessing the threat posed to the domestic industry by imports from Thailand, I considered the unfairly traded imports from China as another demonstrable adverse trend. Because the Commission reached a negative determination in the Thai investigation, and

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[105] Report II at Table C-2.

[106] Report II at Table C-1.

[107] Report II at Tables C-1 & C-2.

[108] Report II at Table A-2. While foreign industry data *** production or capacity to produce child resistant disposable lighters in the PRC prior to 1994, import data suggest small U.S. imports of such lighters in 1993.

[109] Report II at Tables A-3 & C-2.

[110] Report I at Table 33.

[111] Report I at Table 30.

because this investigation is governed by pre-Uruguay Round Agreements Act legislation, I find that I cannot legally consider Thai imports in this investigation.[112]

In light of the evidence that imports of the subject disposable lighters from the PRC are likely to increase in the imminent future, that market share of the subject imports is likely to increase, that inventories are significant, that subject imports are likely to have a depressing or suppressing effect on prices, that there is a significant presence of unfairly traded imports in the market, and that the domestic industry is vulnerable, I conclude that the threat of material injury by reason of the imports of disposable lighters from the PRC is real and that actual injury is imminent.[113]

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[112] See Disposable Lighters from Thailand, Inv. No. 731-TA-701 (Final), USITC Pub. 2876 (April 1995), at I-5 & I-32.

[113] In accordance with 19 U.S.C. § 1673d(b)(4)(B), I must make an additional finding as to whether material injury by reason of LTFV imports would have been found but for any suspension of liquidation of entries of such imports. In my view, there is not sufficient evidence on the record to conclude that during the period between the suspension of liquidation and my final determination imports would have increased and the condition of the industry would have continued to deteriorate to the extent that I would have found present injury. Therefore, I make a negative determination that "but for" suspension of liquidation, the domestic industry would have been materially injured by reason of subject imports.

Furthermore, since I have determined that the industry is not currently experiencing material injury, in accordance with 19 U.S.C. § 1673d(b)(4)(A) I find that critical circumstances do not exist with respect to imports from the PRC.

SEPARATE AND DISSENTING VIEWS OF COMMISSIONER NEWQUIST

Unlike my colleagues, in this investigation I determine that the domestic industry is threatened with material injury by reason of unfairly traded imports from China.[114] I join the majority's discussion of like product, domestic industry, and incorporate by reference my discussion of the condition of the domestic industry as set forth in my dissenting views in Disposable Lighters from Thailand.[115] Furthermore, as discussed in detail below, I feel it is appropriate to cumulate imports of disposable lighters from China with those from Thailand. I therefore begin my views with a discussion of this latter subject.

I. CUMULATION

In my view, for purposes of this final investigation, imports from China should be cumulated with those from Thailand, notwithstanding the earlier negative determination reached by a majority of my colleagues regarding imports from Thailand.[116]

As a preliminary matter, I more fully explain the administrative history of this investigation. The preliminary investigations of disposable lighters from Thailand and China were simultaneously instituted by the Commission on May 9, 1994. However, the respondents subsequently applied for, and received, postponements of preliminary (China) and final (China and Thailand) LTFV determinations by the Commerce Department. The effect of these three postponements required the Commission to vote separately on the two final investigations.

In the final investigation of disposable lighters from Thailand, the Commission majority, as required by the relevant statute for present material injury assessment,[117] cumulated those imports with imports from China.[118] [119] In this final investigation, however, the majority declines to cumulate imports from the two countries.[120] Apparently, this approach is based upon the belief that imports from Thailand are technically no longer subject to investigation, even though imports from both countries were the subject of the

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[114] In the final investigation, the Department of Commerce ("Commerce") made an affirmative determination that critical circumstances exist with respect to certain exporters of disposable lighters from China. 60 Fed. Reg. 22,363, 22,367. As I have made a final affirmative threat of material injury determination with regard to imports from China, I am not required to make an additional critical circumstances determination. See, e.g., Silicon Carbide from the People's Republic of China, Inv. No. 731-TA-651 (Final), USITC Pub. 2779 (June 1994), at I-5 n.3.

[115] Disposable Lighters from Thailand, Inv. No. 731-TA-701 (Final), USITC Pub. 2876 (April 1995), at I-33 and I-34.

[116] My decision in this investigation to cumulate imports from both countries for a threat of injury analysis incorporates the same cumulation analysis I employed in the Disposable Lighters from Thailand decision. I therefore incorporate by reference herein my discussion in that case. See USITC Pub. 2876 at I-34.

[117] 19 U.S.C. § 1677(7)(c)(iv)(I).

[118] USITC Pub. 2876 at I-11 - I-13.

[119] Although discretionary, the Commission also cumulated these imports for its negative threat of material injury determination as well. Id. at I-19 - I-20.

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

same petition.[121] While I 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 where imports from one of the subject countries are found to be negligible,[122] these circumstances are not present here. Accordingly, and for the additional reasons discussed below, I believe that cumulation for purposes of the threat determination in this final investigation is the more sound approach.

First, the Commission determined in the final Thailand investigation that the statutory requirements for mandatory cumulation were met.[123] Aside from the Commission's negative determination there, nothing in the record of this investigation relevant to a cumulative analysis has changed. In that determination, the Commission found that imports of disposable lighters from both countries competed with each other and the domestic product; the same continues to hold true in this final investigation.

Second, although I 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.[124] 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, the Commission is presented with the same petition, product and period of investigation as in the Thailand final investigation. Cumulation makes as much sense now as it did when the Commission issued its final determination with respect to Thailand.

The Commission majority apparently relies on the intervening negative injury determination with respect to Thailand as the basis for not cumulating those imports with the imports from China. 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 it appears that the only reason the Commission is voting separately on China is because of an administrative decision by Commerce to postpone its final determination, I believe the sounder policy is to exercise consistently and predictably our discretion to cumulate all imports in investigations arising from the same petition.

Further, while I am not suggesting that Commerce's decision to grant the Chinese Respondents' 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 process,

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[121] Commission practice is to exclude a Commissioner from reviewing those portions of the majority opinion with which that Commissioner dissents. While I am wholly supportive of this practice, in this instance I only have access to the majority's discussion of like product, domestic industry, and condition of the industry. Therefore I can only speculate as to the basis for the majority's decision not to cumulate imports from Thailand with imports from China in this final investigation.

[122] See Certain Cased Pencils from the People's Republic of China, Inv. No. 731-TA-669 (Final), USITC Pub. 2837 (December 1994) at I-12.

[123] USITC Pub. 2876 at I-11 - I-13.

[124] See, e.g., Kern-Liebers USA, Inc. v. United States, Consol. Ct., No. 93-09-00552, slip. op. at 38 (Jan. 27, 1995).

impedes final resolution, undermines predictability and increases costs for the government and parties alike.[125]

Finally, I 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 subject to investigations.[126]

For these reasons, Congress, in enacting the Uruguay Round Agreements Act, modified the cumulation provisions of Title VII to provide that the Commission cumulate imports from countries as to which investigations are filed or self-initiated on the same day.[127] In so doing, Congress emphasized that this measure "eliminates the incentive in multi-country investigations for respondents to seek extensions of individual Commerce determinations just to avoid cumulation."[128] While this provision does not apply to the instant investigation, I note that it does codify my own cumulation analysis for staggered investigations based on the same petition as set forth in prior decisions.[129]

II. THREAT OF MATERIAL INJURY

For the same reasons that supported my affirmative threat determination in Disposable Lighters from Thailand, I make the same finding in this investigation, notwithstanding Commerce's finding of de minimis dumping margins for two Chinese producers.

In view of the fact that an exhaustive analysis of the statutory threat factors relevant to this case would be redundant given my decision in the Thailand investigation, I will limit my discussion of the relevant data and incorporate by reference my more detailed analysis as set forth in that prior investigation.[130] In the investigation regarding Thailand, the data pertaining to the cumulated imports from Thailand and China so overwhelmingly reflected a domestic industry threatened with material injury that I fail to understand how an opposite conclusion could have been reached. As I have again cumulated imports from Thailand and China in this investigation, my analysis remains unchanged.

In this final investigation regarding imports from China, Commerce calculated zero dumping margins for two of the Chinese exporters identified in the preliminary investigation, China National Overseas Trading Corporation and Gao Yao (HK) Hua Fa Industrial Co.,

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[125] I further note that it appears that the Petitioner is in the process of appealing the Commission's negative determination in the Thailand final investigation. Should Petitioner choose to appeal this negative determination as well, it will now be forced to contend with two separate majority analyses, involving virtually the same record, not to mention the possibility of increased litigation expenses.

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

[127] Section 771(7)(G) of the Tariff Act of 1930, as amended by the Uruguay Round Agreements Act. 19 U.S.C. §1677(7)(G)(i).

[128] Statement of Administrative Action at 848.

[129] See, Sulfur Dyes from India, Inv. No. 731-TA-550 (Final), USITC Pub. 2619 (April 1993) at 24-30.

[130] Disposable Lighters from Thailand, Inv. No. 731-TA-701 (Final), USITC Pub. 2876 (April 1995) at I-35 - I-37.

Ltd.[131] However, in its petition the Petitioner identified over fifty firms in China that produced and/or exported disposable lighters to the United States.[132] While the data in this investigation have been slightly altered due to Commerce's zero margin calculations as to the two Chinese producers, I still find each of the statutory threat factors satisfied by the corresponding data.[133] In fact, in my view, it is rare to find such a clear case of an industry threatened with material injury because of dumped imports.

In light of the foregoing, I find that the domestic industry producing disposable lighters is threatened with material injury by reason of subject imports from China and that the threat of injury is real and imminent.[134]

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[131] Commerce Final Determination of Sales at Less than Fair Value, 60 Fed. Reg. 22,359, 22,370 (May 5, 1995).

[132] Exhibit Six to the Petition. See discussion in Disposable Lighters from Thailand, Inv. No. 731-TA-701 (Final), USITC Pub. 2876 (April 1995) at II-24.

[133] I also note that the exclusion of the two Chinese producers in this investigation would not have affected my determination in the prior investigation regarding Thailand.

[134] As I have made a final affirmative threat of material injury determination with regard to imports from China, the statute requires that I make an additional finding indicating whether I would have found present material injury "but for" the suspension of liquidation of the subject imports pursuant to the preliminary affirmative determination. In this investigation, suspension of liquidation occurred on December 13th, 1994. I find that the domestic industry would not have been materially injured by imports from China absent the suspension of liquidation.

PART II

INFORMATION OBTAINED IN THE INVESTIGATION

INTRODUCTION

This investigation results from a petition filed by BIC Corporation (BIC), Milford, CT, on May 9, 1994, alleging that an industry in the United States is materially injured and threatened with material injury by reason of less than fair value (LTFV) imports of disposable lighters[1] from the People's Republic of China (China) and LTFV and subsidized imports of disposable lighters from Thailand.[2] Information relating to the background of the investigations is provided below.

Date	*Action*
May 9, 1994	Petition filed with Commerce and the Commission; institution of Commission preliminary investigations
May 31, 1994	Commerce's notice of initiation
June 23, 1994	Commission's preliminary affirmative determinations
August 9, 1994	Commerce's preliminary negative countervailing duty determination for Thailand (59 F.R. 40525)[3]
September 20, 1994	Commerce's postponement of preliminary antidumping duty determination for China (59 F.R. 48284)
October 24, 1994	Commerce's preliminary LTFV determination for Thailand (59 F.R. 53414); institution of Commission final investigation for Thailand (59 F.R. 55853, November 9, 1994)
November 16, 1994	Commerce's postponement of final LTFV determination for Thailand (59 F.R. 59210); revised schedule for Commission's investigation for Thailand (59 F.R. 66973, December 28, 1994)
December 13, 1994	Commerce's preliminary LTFV determination for China (59 F.R. 64191)
January 4, 1995	Commerce's preliminary determination of critical circumstances for China (60 F.R. 436)
January 31, 1995	Commerce's postponement of final LTFV determination for China (60 F.R. 5899); institution of Commission final investigation (60 F.R. 6289, February 1, 1995)
February 9, 1995	Commission's revised schedule for hearing and related dates (60 F.R. 8733, February 15, 1995)
February 16, 1995	Commerce's amendment to preliminary LTFV determination for China (60 F.R. 9008)
March 3, 1995	Commerce's preliminary negative determination of critical circumstances for Thailand (60 F.R. 13956, March 15, 1995)

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[1] For purposes of this investigation, disposable lighters are disposable pocket lighters, whether or not refillable, whose fuel is butane, isobutane, propane, or other liquified hydrocarbon, or a mixture containing any of these, whose vapor pressure at 75°F (24°C) exceeds a gauge pressure of 15 pounds per square inch. Disposable lighters are provided for in subheadings 9613.10.00 (nonrefillable) and 9613.20.00 (refillable) of the *Harmonized Tariff Schedule of the United States* (*HTS*) with most-favored-nation tariff rates of 9.6 and 9 percent ad valorem, respectively, applicable to imports from the People's Republic of China and Thailand. Imports from Thailand are eligible for duty-free entry under the Generalized System of Preferences.

[2] A summary of the data collected in the investigations is presented in app. A.

[3] On September 13, 1994, Commerce published a notice that aligned the due date for the final countervailing duty determination with the date of the final antidumping duty determination for Thailand (59 F.R. 46961).

March 8, 1995	Commerce's final negative countervailing duty determination for Thailand (60 F.R. 13961, March 15, 1995); Commerce's final affirmative LTFV determination[4] and final negative critical circumstances determination for Thailand (60 F.R. 14263, March 16, 1995)
March 21, 1995	Commission determination to conduct a portion of the hearing *in camera* for China and Thailand (60 F.R. 14961)
April 13, 1995	Commission's vote on Thailand
April 21, 1995	Commission final negative determination transmitted to Commerce for Thailand (60 F.R. 21007, April 28, 1995)
April 27, 1995	Commerce's final affirmative LTFV determination for China (60 F.R. 22359, May 5, 1995)[5]
June 2, 1995	Commission's vote on China
June 12, 1995	Commission final negative determination transmitted to Commerce for China

REPORT FORMAT

This report is designed to be used in connection with the staff report on disposable lighters from the People's Republic of China and Thailand (INV-S-039), which was transmitted to the Commission on April 6, 1995, and with USITC publication 2876, *Disposable Lighters from Thailand*, April 1995. Those reports included all information relevant to the investigation regarding imports of disposable pocket lighters from China, with the exception of the final Commerce LTFV determination, parties' supplemental briefs relating to Commerce's final LTFV determination on China, and recompilations of data to assist the Commission in its determination with respect to disposable pocket lighters from China.

The summary tables of appendix A separate the data for China National Overseas Trading Corp. (China National) and Gao Yao (HK) Hua Fa Industrial Co., Ltd. (Gao Yao), firms for which Commerce found zero LTFV margins, from the import data for all other firms. Import data for

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[4] Commerce calculated final LTFV margins to be as follows: Thai Merry Co., Ltd. (Thai Merry) and all others, 25.04 percent.

[5] A copy of Commerce's notice is presented in app. B. Commerce calculated final LTFV margins to be as follows: China National Overseas Trading Corp. (China National), 0.00 percent (subject to the firm's public disclosure of its supplier(s)); Cli-Claque Co., Ltd. (Cli-Claque), 6.15 percent; Gao Yao (HK) Hua Fa Industrial Co., Ltd., 0.00 percent; Guangdong Light Industrial Products Import and Export Corp., 27.91 percent; PolyCity Industrial, Ltd. (PolyCity), 5.50 percent; and all others, 197.85 percent. In a letter dated May 1, 1995 (Commerce's public record), counsel to China National disclosed that Tianjin Jin Yi Lighter Co., Ltd., was the manufacturer of disposable pocket lighters sold by China National in the United States. On June 1, 1995, Commerce notified the Commission that Commerce had amended its final LTFV determination and that the new margins are: Cli-Claque, 0.55 percent; and PolyCity, 5.49 percent. The margin percentages for all other companies remained unchanged.

Commerce's notice stated that "windproof refillable lighters, as described in memoranda to Barbara R. Stafford, dated December 5, 1994, and April 25, 1995, are excluded from the scope of this investigation." According to those memoranda, windproof lighters mix the fuel with air internally by built-in suction bores. The mixture is ignited internally by a spark from an electric piezo and burned inside an internal burner cylinder. A catalyzer coil at the outlet at the top of the cylinder is heated to extremely high temperatures, which creates an uninterrupted igniting device for the continuously ejected mixture of combustible gas and air which reignites if blown out by wind. The metal outer casing of the lighter gives it a more substantial feel when compared to the typical disposable lighters, as does the feature of a hinged cover that can be opened and closed. Disposable lighters tend to be of simpler design, and tend to use less expensive materials.

China National and Gao Yao are based on export data reported by those firms in response to the Commission's request for foreign industry data and are designated "nonsubject" imports from China.[6]

Appendix C presents data on the industry in China producing disposable pocket lighters, excluding such data for China National and Gao Yao.

Commerce made affirmative critical circumstances determinations for China National, Cli-Claque Co., Ltd. (Cli-Claque), and all other Chinese manufacturers, producers, and exporters of disposable lighters except Gao Yao, Guangdong Light Industrial Products Import and Export Corp. (Guangdong), and PolyCity Industrial, Ltd. (PolyCity). Therefore, each counsel representing a Chinese exporter with a separate LTFV rate was requested to provide monthly exports of disposable pocket lighters for July 1993-December 1994 to the United States by those firms. This information was requested to assist the Commission in making its critical circumstances determination. The data received in response to the requests are presented in appendix D and are summarized in the following tabulation (in thousands of lighters):

Date	Exports to the United States by Gao Yao, Guangdong, China National,[1] and PolyCity	Estimated imports of disposable lighters subject to critical circumstances[2]	Total imports[3]
1993:			
July	***	***	14,422
Aug	***	***	16,855
Sept	***	***	15,907
Oct	***	***	11,534
Nov	***	***	15,743
Dec	***	***	15,250
1994:			
Jan	***	***	15,154
Feb	***	***	8,181
Mar	***	***	19,123
Apr	***	***	18,516
May	***	***	32,295
June	***	***	57,822
July	***	***	54,923
Aug	***	***	5,624
Sept	***	***	7,869
Oct	***	***	4,387
Nov	***	***	6,476
Dec	***	***	7,923

[1] China National is included in this group because of its zero LTFV margin.

[2] Calculated by subtracting Chinese exports by Gao Yao, Guangdong, China National, and PolyCity from total U.S. imports of disposable pocket lighters from China. The dates of exports from China will not necessarily coincide with U.S. imports on a monthly basis and can result in negative numbers (e.g., Oct. 1994).

[3] Compiled from official statistics of the U.S. Department of Commerce.

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[6] A review of the importers' questionnaires disclosed that, of the responding firms, only *** reported imports of "nonsubject" disposable lighters from China (i.e., imports of standard nonrefillable disposable lighters from ***). *** inventories of nonsubject imports from China are presented in app. A, tables A-1 and A-3. *** data on purchase prices were not used in the staff report of April 6, 1995; consequently, there is no change in the price data.

APPENDIX A

SUMMARY TABLES

Table A-1
Standard disposable pocket lighters: Summary data concerning the U.S. market, 1992-94, Jan.-June 1994, and July-Dec. 1994

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Table A-2
Child resistant disposable pocket lighters: Summary data concerning the U.S. market, 1992-94, Jan.-June 1994, and July-Dec. 1994

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Table A-3
Disposable pocket lighters: Summary data concerning the U.S. market, 1992-94, Jan.-June 1994, and July-Dec. 1994

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APPENDIX B

FEDERAL REGISTER NOTICES

International Trade Administration

[A-570-834]

Notice of Final Determination of Sales at Less Than Fair Value: Disposable Pocket Lighters From the People's Republic of China

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

EFFECTIVE DATE: May 5, 1995.

FOR FURTHER INFORMATION CONTACT: Julie Anne Osgood or Todd Hansen, Office of Countervailing Investigations, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: (202) 482-0167 or (202) 482-1276, respectively.

Final Determination

We determine that disposable pocket lighters from the People's Republic of China ("PRC") are being, or are likely to be, sold in the United States at less than fair value ("LTFV"), as provided in section 735 of the Tariff Act of 1930, as amended ("the Act"). The estimated margins are shown in the "Continuation of Suspension of Liquidation" section of this notice. The U.S. Department of Commerce ("the Department") also determines that critical circumstances exist for all exporters except Gao Yao (HK) Hua Fa Industrial Company Ltd. ("Gao Yao"), Guangdong Light Industrial Products Import & Export Corporation ("GLIP") and PolyCity Industrial Limited ("PolyCity").

Applicable Statute and Regulations

Unless otherwise indicated, all citations to the statute and to the Department's regulations are references to the provisions as they existed on December 31, 1994.

Case History

Since the preliminary determination on December 5, 1994, (*Notice of Preliminary Determination of Sales at Less Than Fair Value: Disposable Pocket Lighters from the People's Republic of China*, 59 FR 64191 (December 13, 1994)), the following events have occurred:

On December 23, 1994, we issued our preliminary determination of critical circumstances with respect to the subject merchandise (60 FR 436, January 4, 1995).

On December 9 and December 19, 1994, Cli-Claque Company Limited ("Cli-Claque"), China National Overseas Trading Corporation ("COTCO"), Gao Yao and GLIP, requested a postponement of the final determination, pursuant to 19 CFR 353.20. Accordingly, on January 20, 1995, the deadline for the final determination was extended to April 27, 1995 (60 FR 5899, January 31, 1995).

From February 28 through March 17, 1995, we verified the responses of the exporters and producers of disposable lighters.

Petitioner and respondents filed case briefs on April 6, 10, 11, and 12, and rebuttal briefs on April 13 and 14, 1995. A public hearing was held on April 17, 1995.

Scope of Investigation

The products covered by this investigation are disposable pocket lighters ("lighters"), whether or not refillable, whose fuel is butane, isobutane, propane, or other liquefied hydrocarbon, or a mixture containing any of these, whose vapor pressure at 75 degrees fahrenheit (24 degrees Celsius) exceeds a gauge pressure of 15 pounds per square inch. Non-refillable pocket lighters are imported under subheading 9613.10.0000 of the Harmonized Tariff Schedule of the United States ("HTSUS"). Refillable, disposable pocket lighters would be imported under subheading 9613.20.0000. Although the HTSUS subheadings are provided for convenience and Customs purposes, our written description of the scope of this proceeding is dispositive.

Certain windproof refillable lighters, as described in memoranda to Barbara R. Stafford, dated December 5, 1994, and April 25, 1995, are excluded from the scope of this investigation. Also, excluded from the scope of this investigation are electric lighters (as described in the April 25, 1995 memo) which use two AA batteries to heat a coil for purposes of igniting smoking materials, rather than using butane, isobutane, propane, or other liquefied hydrocarbon to fuel a flame for purposes of igniting smoking materials.

Period of Investigation

The period of investigation ("POI") is December 1, 1993 through May 31, 1994.

Non-market Economy Status

The PRC has been treated as a non-market economy country ("NME") in past antidumping investigations (see, *e.g., Final Determination of Sales at Less Than Fair Value: Saccharin from the People's Republic of China*, 59 FR 58818 (November 15, 1994) ("*Saccharin*"). No information has been provided in this proceeding that would lead us to overturn our former determinations. Therefore, in accordance with section

771(18)(c) of the Act, we are continuing to treat the PRC as an NME for purposes of this investigation.

Separate Rates

All five of the responding companies in this investigation have requested separate antidumping duty rates. In cases involving NMEs, the Department's policy is to assign a separate rate only when an exporter can demonstrate the absence of both *de jure* and *de facto* governmental control over export activities.

In this case, two of the five respondents, PolyCity and Cli-Claque, are Hong Kong companies that are involved in joint ventures in the PRC that manufacture disposable lighters. Since PolyCity and Cli-Claque are located outside the PRC, the PRC government does not have jurisdiction over them. Moreover, the PRC government does not have any ownership interest in these exporters and, therefore, it cannot exercise control through ownership of these companies. On this basis, we determine that there is no need to apply our separate rates analysis to these two companies and that PolyCity and Cli-Claque are entitled to individual rates.

In contrast to PolyCity and Cli-Claque, Gao Yao is a 50/50 joint venture between a Chinese company, owned "by all the people," and a Hong Kong company. The joint venture owns both the production and export facilities used to manufacture and export the disposable lighters it sells to the United States. Given the direct PRC ownership in Gao Yao's export operations, we have determined that it is appropriate to apply our separate rates analysis to this company.

Of the remaining companies, COTCO and GLIP indicated that they were owned "by all the people" during the POI. As stated in the *Final Determination of Sales at Less than Fair Value: Silicon Carbide from the PRC*, 59 FR 22585 (May 2, 1994) ("Silicon Carbide"), "ownership of a company by all the people does not require the application of a single rate." Accordingly, COTCO and GLIP are eligible for consideration for a separate rate under our criteria.

Although GLIP was owned during the POI by "all the people," after the POI it became a shareholding company whose shares are held by a variety of investors. GLIP received approval to become a shareholding company in March 1994, but issued shares after the POI. A portion of the company's shares representing the initial investment in the company are held in trust by the State Asset Management Bureau ("SAMB"). However, the record of the investigation indicates that the SAMB has entrusted voting rights of its shares to the management of the company. In past cases involving similar circumstances, we found that the granting of a separate rate to the responding exporters was not precluded. (See, *e.g.*, *Final Determination of Sales at Less Than Fair Value: Certain Cased Pencils from the People's Republic of China*, 59 FR 55625 (November 8, 1994), and *Final Determination of Sales at Less than Fair Value: Certain Paper Clips from the People's Republic of China*, 59 FR 511680 (October 7, 1994).) As stated above, we have applied our separate rates analysis to GLIP.

To establish whether a firm is entitled to a separate rate, the Department analyzes each exporting entity under a test arising out of the *Final Determination of Sales at Less Than Fair Value: Sparklers from the PRC*, 56 FR 20588 (May 6, 1991) ("*Sparklers*") and amplified in *Silicon Carbide*. Under the separate rates criteria, the Department assigns separate rates only where respondents can demonstrate the absence of both *de jure* and *de facto* governmental control over export activities.

1. Absence of de Jure [1] Control

The respondents submitted a number of documents to demonstrate absence of *de jure* control, including two PRC laws indicating that the responsibility for managing enterprises owned by "all the people" is with the enterprises themselves and not with the government. These are the "Law of the People's Republic of China on Industrial Enterprises Owned by the Whole People," adopted on April 13, 1988 ("1988 Law"); and the "Regulations for Transformation of Operational Mechanism of State-Owned Industrial Enterprises," approved on August 23, 1992 ("1992 Regulations"). Respondents' submission also included the "Temporary Provisions for Administration of Export Commodities," approved on December 21, 1992 ("Export Provisions"). In April 1994, the State Council enacted the "Emergent Notice of Changes in Issuing Authority for Export Licenses Regarding Public Quota Bidding for Certain Commodities" (Quota Measures).

The 1988 Law and 1992 Regulations shifted control of companies owned "by all the people" from the government to the enterprises themselves. The 1988 Law provides that enterprises owned by "all the people" shall make their own management decisions, be responsible for their own profits and losses, choose their own suppliers and purchase their own goods and materials. The 1988 Law contains other provisions which indicate that enterprises have management independence from the government. The 1992 Regulations provide that these same enterprises can, for example, set their own prices (Article IX); make their own production decisions (Article XI); use their own retained foreign exchange (Article XII); allocate profits (Article II); sell their own products without government interference (Article X); make their own investment decisions (Article XIII); dispose of their own assets (Article XV); and hire and fire employees without government approval (Article XVII). The Export Provisions indicate those products that may be subject to direct government control. Lighters do not appear on the Export Provisions list nor on the Quota Measures list and are not, therefore, subject to export constraints.

Since GLIP was initially a company owned by "all the people," the laws cited above establish that the government devolved control over such companies. The only additional law that is pertinent to the *de jure* analysis of GLIP as a share company is the *Company Law* (effective July 1, 1994). While GLIP indicated that it is now organized consistent with the *Company Law*, the law did not enter into force until two months after the POI. In any event, this law does not alter the government's *de jure* devolution of control that occurred when the company was owned "by all the people." Therefore, we have determined that GLIP is not subject to *de jure* control.

Consistent with *Silicon Carbide*, we determine that the existence of these laws demonstrates that COTCO, GLIP, and Gao Yao are not subject to *de jure* central government control with respect to export sales and pricing decisions. However, there is some evidence that the provisions of the above-cited laws and regulations have not been implemented uniformly among different sectors and/or jurisdictions in the PRC (*see* "PRC Government Findings on Enterprise Autonomy," in Foreign Broadcast Information Service-China-93-133 (July 14, 1993)). Therefore, the Department has determined that a *de facto* analysis is critical to determine whether COTCO, Gao Yao and GLIP are

[1] Evidence supporting, though not requiring, a finding of *de jure* absence of central control includes: (1) an absence of restrictive stipulations associated with an individual exporter's business and export licenses; (2) any legislative enactments decentralizing control of companies; or (3) any other formal measure by the government decentralizing control of companies.

subject to governmental control over export sales and pricing decisions.

2. Absence of *de Facto* Control

The Department typically considers four factors in evaluating whether a respondent is subject to *de facto* government control of its export functions: (1) whether the export prices are set by, or subject to the approval of, a governmental authority; (2) whether the respondent has authority to negotiate and sign contracts and other agreements; (3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and (4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses (*see Silicon Carbide*).

During the verification proceedings, Department officials viewed evidence in the form of sales documents, company correspondence, and bank statements, and confirmed through inquiries of company representatives and officials from the China Chamber of Commerce for Machinery and Electronic Products Import & Export ("CCCME"), that COTCO, GLIP, and Gao Yao:

- Maintain their own bank accounts, including foreign exchange accounts;
- Are not restricted in their access to their bank accounts;
- Make independent business decisions, based on market conditions;
- Set their own prices independently and that the prices are not subject to review by government authorities;
- Are not subject to foreign exchange targets set by either the central or provincial governments; and
- Have the ability to sell, transfer, or acquire assets.

Exporter-Specific Information

Gao Yao

- Is a Sino-Hong Kong 50–50 joint venture whose Chinese participant is a company owned by "all the people";
- Maintains a bank account in Hong Kong where all monies received from Gao Yao's foreign sales are deposited;
- Has management that is selected by the board of directors, without any governmental interference;
- Divides its profits evenly between the joint venture partners according to ownership participation; and
- Retains a general manager who is a Hong Kong resident.

GLIP

- Is owned by "all the people" during the POI, but became a shareholding company in July 1994;
- Has management that is selected by its board of directors;
- Selection and continued employment of management is not subject to government approval;
- May issue additional shares through the company's board of directors with the approval of shareholders; and
- Government contact was limited to the issuance of GLIP's shareholding license and a general notice pertaining to penalties for illegal exporting.

COTCO

- Is owned by "all the people";
- Has managers that are hired following public notices of vacancy, screening, and hiring negotiations; and
- Has management that is evaluated by the employees of the company. The selection and promotion of management are not subject to any governmental entity's review or approval.

Based on the record evidence as verified, we find that there is a *de facto* absence of governmental control of export functions of each of the three companies. Consequently, COTCO, Gao Yao and GLIP have been granted separate rates in our final determination.

Surrogate Country

Section 773(c)(4) of the Act requires that the Department value the NME producers' factors of production, to the extent possible, in one or more market economy countries that are (1) at a level of economic development comparable to that of the NME country, and (2) significant producers of comparable merchandise. The Department has determined that Indonesia is the most suitable surrogate for purposes of this investigation. Based on available statistical information, Indonesia is at a level of economic development comparable to that of the PRC, and is a significant producer of lighters (*see*, memorandum to the file from Todd Hansen, dated December 5, Surrogate Country Selection and memorandum from David Mueller to Susan Kuhbach, dated September 8, 1994, Lighters from the People's Republic of China and Surrogate Country Selection.)

Fair Value Comparisons

To determine whether sales of lighters from the PRC to the United States by respondents 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

For all respondents, we based USP on purchase price, in accordance with section 772(b) of the Act, because lighters were sold directly to unrelated parties in the United States prior to importation into the United States and because exporters sales price methodology was not otherwise indicated.

We calculated purchase price based on packed, FOB foreign port prices for unrelated purchasers in the United States and packed, CIF prices, where appropriate. We made deductions for discounts, foreign inland freight, containerization, loading, port handling expenses, ocean freight and marine insurance, as indicated. When these services were purchased from a market economy supplier and paid for in a market economy currency, we used the actual cost. Otherwise, these charges were valued in the surrogate country. In addition, we have relied upon a price quote provided by an unrelated Hong Kong company to value freight in those instances where Cli-Claque used a related trucking company for the delivery of finished lighters.

At the request of the Department, on March 22 and 23, 1995, PolyCity and Cli-Claque submitted revised U.S. sales and factors of production information to reflect minor changes due to errors noted at verification. In addition, PolyCity revised: the U.S. sales listing to include additional sales that had been inadvertently omitted (*see* Comment 8); foreign inland freight to include additional charges incurred at the border; marine insurance and foreign brokerage and handling to reflect costs incurred on a value basis rather than a per piece basis; and ocean freight to reflect additional charges on certain invoices and payment in Hong Kong dollars rather than U.S. dollars. Cli-Claque's submission included small number of additional sales which had been inadvertently omitted and revisions to foreign inland freight figures on deliveries of finished lighters and purchases of inputs. Pursuant to findings at verification, minor revisions were made to COTCO's sales price. For Gao Yao, we adjusted USP for port handling charges that had been paid in a market economy currency to a Hong Kong company.

Foreign Market Value

In accordance with section 773(c) of the Act, we calculated FMV based on factors of production reported by the factories in the PRC which produced the subject merchandise for the five responding exporters. The factors used

to produce lighters include materials, labor, and energy. To calculate FMV, the reported factor quantities were multiplied by the appropriate surrogate values from Indonesia for those inputs purchased domestically from PRC suppliers. Where inputs were imported from market economy countries and paid in a market economy currency, we used the actual costs incurred by the producers to value these factors (see, *e.g. Final Determination of Sales at Less Than Fair Value: Oscillating Ceiling Fans from the People's Republic of China*, 56 FR 55271, October 25, 1991). We adjusted these input prices to make them delivered prices. We then added amounts for overhead, general expenses and profit, the cost of containers and coverings, and other expenses incident to placing the merchandise in condition packed and ready for shipment to the United States.

In addition, we have made the following changes to our preliminary calculations:

- For PolyCity, we valued certain inputs purchased from market-economy sources with market-economy currency using invoices dated outside the POI. For inputs that were not purchased from market-economy sources with market-economy currency, we used surrogate values (*see* Comment 11).
- For Cli-Claque, we calculated foreign inland freight based on verified distances for packing materials and finished lighters. In addition, we have relied upon a price quote provided by an unrelated Hong Kong company to value freight in those instances where Cli-Claque used a related trucking company for the delivery of imported inputs. We have adjusted direct labor hours to reflect verified information. Finally, to value the packing trays which were made by a factory located in the PRC with imported inputs, we have used surrogate values.
- For GLIP, we adjusted labor hours, butane usage, electricity usage, certain lighter parts and packing materials to reflect verified information. Also, we adjusted the prices paid to market economy suppliers based on verified information.
- For Gao Yao, we used surrogate values for inputs that we verified were purchased from PRC suppliers, but had originally been reported as purchased from market economy suppliers. We adjusted waste and electricity figures to reflect verified information. In addition, certain consumption figures were changed from a per kilogram basis to a per-piece basis. Finally, the weights of certain lighter parts were changed due to findings at verification.
- For COTCO, we adjusted labor hours and consumption of certain raw materials to reflect verified information. We also adjusted the weights of certain lighter parts and packing materials based on verified information.

In determining the surrogate price to be used for valuing the remaining factors of production, we selected, when available, publicly available published information ("public information") from Indonesia.

With the exception of butane, we used the Indonesian import prices taken from the *Indonesian Foreign Trade Statistical Bulletin—Imports*, December 1993 and April 1994 to value material inputs. Based on discussions with U.S. Customs officials (*see* Memorandum to the File from Todd Hansen, dated April 26, 1995, Appropriate HAS Numbers), we have changed certain surrogate values to more accurately reflect the cost of the input used.

For butane, the quantity imported into Indonesia was insignificant. Therefore, for those PRC producers that did not import butane from market economy sources, we relied on Indonesian export statistics, as reported in the *Indonesian Foreign Trade Statistical Bulletin—Exports*, December 1993 and April 1994.

We used Indonesian transportation rates taken from a September 18, 1991, U.S. State Department cable from the U.S. Embassy in Indonesia to value inland freight between the source of the factor and the disposable lighter factory.

To value electricity, we used the public information from the Electric Utilities Data Book for Asian and Pacific Region (January 1993) published by the Asian Development Bank. To value labor amounts, we have used figures for skilled and unskilled labor obtained from *Doing Business in Indonesia* (1991) and the International Labor Office's *1994 Special Supplement to the Bulletin of Labor Statistics*. We have determined that these figure more accurately represent hourly wage rates paid in Indonesia than the rate provided in the Department of Labor's "Foreign Labor Trends," which was the rate used in the preliminary determination.

We adjusted the factor values, when necessary, to the POI using wholesale price indices ("WPIs") published by the International Monetary Fund ("IMF").

Because we were unable to locate appropriate information on factory overhead in Indonesia, we relied upon data published by the Reserve Bank of India pertaining to Manufacturing—metals, chemicals, and products thereof. Because this figure includes indirect expenses and water, we have not calculated separate costs for these inputs.

For general expense percentages, we also used the Reserve Bank of India data. For profit, we used the statutory minimum of eight percent of materials, labor, factory overhead, and general expenses. We could not obtain Indonesian values for either general expenses or profit. The Indian profit rate was less than the statutory minimum of eight percent.

We added packing based on Indonesian values obtained from the *Indonesian Foreign Trade Statistical Bulletin—Imports*, December 1993 and April 1994.

Best Information Available (BIA)

In this investigation, some PRC exporters failed to respond to our questionnaire. We have determined that those exporters should receive rates based on BIA. In addition, because we presume all exporters to be centrally controlled, absent verified information to the contrary, in accordance with section 776(c) of the Act, we have assigned a margin based on BIA to all exporters who have not demonstrated their independence from central control. This determination is consistent with our use of a BIA-based "PRC-Wide" rate in other recent investigations (see *e.g., Saccharin*).

In determining what to use as BIA, the Department follows a two-tiered methodology, whereby the Department normally assigns less adverse margins to those respondents that cooperated in an investigation and more adverse margins for those respondents that did not cooperate in an investigation. As outlined in the *Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany; Final Results of Antidumping Administrative Review* (56 FR 31692, 31704–05, July 11, 1991), 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 (a) the highest margin alleged in the petition, (b) the highest calculated rate of any respondent in the investigation, or (c) the margin from the preliminary determination for that firm.

We consider all PRC exporters that did not respond, or otherwise did not participate in the investigation, to be uncooperative and are assigning to them the highest margin based on information submitted in an amendment to the petition.

Critical Circumstances

In our notice of *Preliminary Determination of Critical*

Circumstances: Disposable Pocket Lighters from the People's Republic of China, 60 FR 436 (January 4, 1995), we found that critical circumstances exist with respect to imports of disposable lighters from COTCO and Cli-Claque.

Pursuant to section 733(e)(1) of the Act and 19 CFR 353.16, we based our determination for COTCO on a finding of (1) an imputed knowledge of dumping to the importers because the estimated dumping margins were in excess of 25 percent, and (2) massive imports of disposable lighters over a relatively short period, based on an analysis of respondent's shipment data. Because Cli-Claque did not submit shipment information for the preliminary critical circumstances determination, we determined, as best information available, that critical circumstances exist. Cli-Claque submitted the requested information on January 6, 1995. For non-respondent exporters, we determined that critical circumstances do exist.

Respondents' shipment information has now been verified. The Department affirms the analysis as explained in its preliminary finding with respect to PolyCity, Gao Yao, GLIP and COTCO. Accordingly, we determine that critical circumstances do not exist with respect to imports of disposable lighters from PolyCity, Gao Yao, and GLIP and do exist with respect to COTCO and all non-responding exporters. With respect to Cli-Claque, we also determine that critical circumstances do exist (*see* Comment 13).

Verification

As provided in section 776(b) of the Act, we verified the information submitted by respondents for use in our final determination. We used standard verification procedures, including examination of relevant accounting and production records, and original source documents provided by respondents. Our verification results are outlined in detail in the public version of the verification report, available in Room B-099 of the Main Commerce Building, 14th and Constitution, Washington DC 20230.

Interested Party Comments

General Issues

Comment 1: Separate Rates

Petitioner argues that an exporter should not receive a separate rate unless the producer supplying the exporter can demonstrate that it is also independent of central government control. The fact that an exporter is independent from central government control provides no guarantee that the producer or producers supplying it are also free of government control. Since respondents have not overcome the presumption that their Chinese disposable lighter producers are government controlled, and the exporters merely serve as middlemen for the sale of lighters to the U.S., the exporters should be assigned the "PRC-Wide" rate.

Petitioner questions whether the Department originally intended to apply the separate rates analysis only to exporters. Petitioner points to the *Final Determination of Sales at Less than Fair Value: Sparklers from the People's Republic of China* (56 FR 20588, May 6, 1991) (*Sparklers*), where the Department enumerated separate rates for "producer/exporter" combinations. However, in recent cases, such as *Final Determination of Sales at Less Than Fair Value: Coumarin from the People's Republic of China* (59 FR 66899, December 28, 1994) (*Coumarin*), the Department has indicated that it is intentionally restricting its analysis of freedom from government control solely to exporters. Petitioner argues that under this policy, the Department could find itself in the position of certifying that an exporter is independent and, therefore, can be assigned a separate rate, while the exporter is purchasing from a producer who would not be allowed a separate rate because of government control. Petitioner does not believe that this is what the Department intended when it enunciated its separate rates analysis in *Sparklers*. Petitioner also questions why the market oriented industry ("MOI") test looks at the producer and not the exporter, while the separate rates test does the opposite.

Gao Yao, GLIP, and COTCO argue that the independence of their suppliers is not relevant to the Department's determination of whether Gao Yao, GLIP, and COTCO should receive separate rates. The Department has sought, received, and verified information concerning the independence of Chinese exporters. Gao Yao, GLIP, and COTCO argue that examining the suppliers is irrelevant and conflicts with well-established Department policy.

Both PolyCity and Cli-Claque argue that they are independent Hong Kong companies, and the Chinese government does not own and cannot control PolyCity's or Cli-Claque's activities. Therefore, they are entitled to separate rates.

DOC Position

The separate rates policy reflects the Department's concern that the Chinese government may interfere in the export activities of companies selling to the United States and manipulate these companies' export prices. Where an exporter is able to demonstrate that its export activities are not controlled by the government, then the Department will recognize that independence by awarding the exporter a separate rate (*see, e.g., Saccharin*).

Petitioner's argument that trading companies are merely middlemen suggests that the Chinese government manipulates the price of exports to the United States (1) by controlling the price between the factory and the trading company, or (2) by controlling the exporter's price to the United States through the producer. With respect to the first concern, the manufacturer's price to the exporter does not play any role in the Department's calculation. U.S. price is based on the exporter's (usually a trading company's) price to the United States and FMV is based on the producer's factors of production. Therefore, potential government control of prices between the producers and exporters is irrelevant. Moreover, where the producer is not the exporter, we have determined there is no evidence that the producer is involved in the export activities of the exporter.

Because the exporter/trading company sets the export price, it is appropriate to focus the separate rates analysis on the exporter. In contrast, the purpose of the MOI test is to determine whether foreign market value can be determined using prices or costs in the NME. Thus, the test focuses on government control of the domestic industry, rather than on export activities. Thus, petitioner's attempt to draw a parallel between a separate rates analysis and an MOI analysis is misplaced.

Comment 2: "Tied" Antidumping Duty Rates for Exporter/Supplier

Petitioner argues that where the Department issues a separate rate to an exporter, that rate should be applied to the producer/exporter combination that gave rise to the rate. Consequently, if the exporter later purchases from another producer, the "PRC-Wide" rate should apply. Such "tied" rates would prevent producers from channeling merchandise out of the PRC through the exporter with the lowest rate.

Petitioner agrees with the Department's decision to tie Gao Yao and its manufacturer when it assigned them a zero margin in the preliminary determination, making any other manufacturers shipping through Gao Yao subject to the "PRC-Wide" rate. However, petitioner contends that the Department has refused to recognize

that other exporters have been given a free hand to export disposable lighters from any producer in China to the United States at the rate applicable to that exporter. Consequently, producers will sell through exporters with low rates, thereby avoiding the higher rates found in this investigation, particularly the "PRC–Wide" rate. Because of the distinction made for zero margins, petitioner argues that it is more beneficial for an exporter to have a small positive margin than to have a zero margin, as an exporter with a small positive margin may export for any producer at that small margin. Therefore, petitioner requests that the Department issue antidumping duty rates for exporter/producer combinations.

Gao Yao, GLIP, and COTCO state that petitioner's conclusion regarding the channeling of all exports through the exporter with the lowest dumping margin is erroneous. In the past, trading companies which export to the United States have received individual rates irrespective of their suppliers. COTCO and GLIP state that it is appropriate for Gao Yao to receive a "tied" rate for merchandise sold and manufactured by Gao Yao, because Gao Yao is a manufacturer who exports, not a trading company. COTCO and GLIP state that, as trading companies, they should not receive a "tied" rate even if they receive a zero margin. Gao Yao, GLIP, and COTCO argue that even if a new factory made shipments of goods to the United States through an exporter with a lower dumping rate, the subsequent antidumping review would require a factors analysis of the supplying factory.

Cli-Claque maintains that it is an independent Hong Kong company that competes with all other lighter manufacturers. It has no incentive or desire to help its competitors ship to the United States. Moreover, if Cli-Claque shipped other companies' lighters to the United States, Cli-Claque would risk losing its low dumping margin in subsequent reviews.

DOC Position:

We have determined that the pairing of exporters and producers for calculating antidumping rates is inappropriate under the circumstances discussed above. Recent Department practice has been to assign rates only to exporters except in the case of producer/exporter combinations that have been found not to be dumping. (See *e.g., Pencils, Saccharin, Coumarin,* and *Final Antidumping Duty Determination: Certain Cased Pencils from the People's Republic of China,* 59 FR 55625, November 8, 1994, where the Department assigned a zero rate to a producer/exporter for purposes of exclusion from the order, but the remaining rates were assigned to exporters only.) Where a producer/exporter combination is found not to be dumping, it is appropriate to publish a rate that applies to that producer/exporter combination because they are excluded from the order and, therefore, future administrative reviews. However, all other exporters remain subject to the order and administrative reviews. Hence, contrary to petitioner's assertion, those exporters have no incentive to export the output of producers that might yield a high FMV unless they adjust their U.S. prices accordingly. If they fail to do so, an administrative review would result in an assessment of additional duties, with interest, and a higher cash deposit rate for future entries.

Comment 3: Overhead and Energy

COTCO, Gao Yao and GLIP argue that the cable from the U.S. Embassy in Jakarta, relied upon by the Department in its preliminary determination, does not state if indirect labor and electricity are included in overhead. Since this is unclear, COTCO, Gao Yao and GLIP argue that the Department should assume, as it has in past cases, that indirect labor and electricity are included in factory overhead. (*See Sebacic Acid from the People's Republic of China,* (59 FR 28053, 28060, May 31, 1994) and *Shop Towels of Cotton from the People's Republic of China* (56 FR 4040, 4042 , February 1, 1991).) COTCO, Gao Yao and GLIP also state that the activities of the indirect laborers are not directly related to production and would normally be included in overhead.

PolyCity states that the standard cost accounting treatment throughout the world for electricity and other utilities is to include these items in factory overhead. According to PolyCity, the Department double-counted these items when it separately included values for them in addition to calculating a factory overhead rate.

Petitioner acknowledges that the factory overhead rate in the U.S. Embassy cable does not make clear whether indirect labor is included. However, since COTCO, Gao Yao and GLIP argue that there is very little indirect labor involved in lighter production, petitioner states that there would be little, if any, double counting if indirect labor were valued separately.

DOC Position

For this final determination, we are using information from the *Reserve Bank of India Bulletin,* ("RBIB") December 1993 to value factory overhead. We were unable to obtain an overhead rate for light manufacturing plants in Indonesia. Therefore, we turned to India, where a manufacturing overhead rate was available. We have determined that this overhead figure represents the best overhead figure for the industry in question because it is industry specific.

In determining what items should be valued separately from factory overhead, we examined the costs included in the particular overhead rate being used. Since the RBIB factory overhead rate does not include indirect labor and energy, we are assigning separate values for these items, notwithstanding respondents' arguments about standard cost accounting practices.

Comment 4: Date of Sale

Petitioner argues that the date of sale should be the date of Cli-Claque's and PolyCity's facsimile confirmation, not the date of invoice. Petitioner contends that Cli-Claque and PolyCity negotiate price, quantity, and estimated delivery date by phone and confirm these terms by facsimile. However, these companies reported the date of invoice as the date of sale. Because of a drastic increase in imports during June and the first half of July, petitioner is particularly concerned about any sales confirmed in the POI, but not invoiced in the POI.

PolyCity and Cli-Claque state that the Department chose the date of sale based on our normal methodology and that they correctly complied with its request.

DOC Position

At verification, we confirmed that the appropriate date of sale was the date PolyCity and Cli-Claque issued the invoice which accompanied the shipping documentation. We noted that changes in delivery terms and quantity did occur between the facsimile confirmation and the date of invoice. Although the verification report stated that the facsimile was a "confirmation" facsimile, that statement was not meant to imply that all the terms of sale were agreed upon and could not change. The facsimile, as verified, is merely an acknowledgement that a sales transactions will occur between the company and its customer.

Generally speaking, the Department will consider the date of sale to be the date on which all substantive terms of the sale are agreed upon by the parties. This normally includes the price and quantity. If the terms of sales agreement or contract permit the revision of prices up to the date of invoice, shipment, or

the purchase order, then it is the Department's practice to base the date of sale on the shipment date, invoice date, or the purchase order date, depending upon which date the revisions are made. Thus, we accept the date of sale as verified.

Comment 5: Non-market Economy Currency

PolyCity and petitioners have advanced arguments regarding the valuation of certain inputs purchased from market economy suppliers, that cannot be addressed in this notice because of their proprietary nature. These comments are addressed in a separate memorandum to the file.

Comment 6: Appropriate BIA Rate

Petitioner maintains that the Department should use the highest rate (*i.e.*, 346.55 percent) alleged in the petition as the "PRC-Wide" rate. Petitioner calculated the FMV used in this margin calculation based on a combination of Indian input values and its own costs. Petitioner states that because the Department believed that it relied too heavily on its own costs and that India may not be the most appropriate surrogate country, the Department requested that petitioner recalculate FMV based on the price of lighters exported from the Philippines. (The Philippines is a known producer of disposable lighters and, in prior cases, the Philippines had been determined to be at a level of economic development comparable to the PRC.) The estimated dumping margin using the Philippine export data is 197.85 percent. Petitioner argues that, although it submitted additional information requested by the Department (offered as an alternative set of documents to supplement the exhibits in the original petition), the margin calculated in the original petition has not been discredited.

DOC Position

We are continuing to use the rate based on Philippine export data. We believe this rate is appropriate because: (1) The original petition rate relies too heavily on petitioner's own costs; (2) we initiated the case on the basis of the Philippine export data; and (3) India is not a significant producer of lighters.

Company Specific Issues

PolyCity Industrial Limited

Comment 7: BIA

Petitioner argues that the Department should use BIA in determining the antidumping duty margin for PolyCity because, due to the numerous corrections submitted to the Department since the preliminary determination and the errors discovered at verification, the reliability of PolyCity's data is called into question. In particular, petitioner notes: (1) Every sale examined at verification required revision; (2) foreign inland freight, ocean freight, and marine insurance were misreported; (3) PolyCity used an unusual sales process; and (4) PolyCity's method of documenting input purchases lacked consistency. Petitioner contends that PolyCity had more than adequate time to correct these errors in the numerous submissions PolyCity filed between the preliminary determination and verification. Petitioner argues that these facts, along with the inaccuracies uncovered at verification, make PolyCity's data unreliable. Therefore, the Department should use uncooperative BIA in calculating PolyCity's margin.

If the Department does not use total uncooperative BIA, petitioner then argues that the Department should use partial BIA for these costs. Petitioner contends that since PolyCity failed to report certain additional charges for foreign inland freight, reported ocean freight in the wrong currency, and miscalculated marine insurance, using BIA values for these factors is appropriate.

PolyCity maintains that accepting petitioner's allegations would run counter to the Department's practice and regulations. PolyCity states that all of its submissions and corrections have been timely filed. The verification at PolyCity was routine, and the Department treated it routinely. The Department typically makes corrections and adjustments at verification. The corrections discovered at verification were merely errors, not hidden or misrepresented information. In addition, PolyCity maintains that it erred in favor of the petitioner, rounding numbers up on most observations. To use BIA in this situation would be a radical departure from the Department's rules and practice. Hence, the Department should use PolyCity's verified information.

DOC Position

We agree with respondent that the final determination should be based on PolyCity's verified data. The items described by petitioner are minor changes that were corrected for this final determination. Omissions from the response were inadvertent and corrected information was verified. We are satisfied that the record is now complete and accurate regarding this company's sales of subject merchandise during the POI.

Comment 8: New Sales

Petitioner states that the three new invoices discovered at verification should be included in the margin calculations and should be assigned the highest BIA rate. Since these sales were not reported in a timely manner, petitioner argues that the Department should assign a unit margin for each of these sales based on BIA. Due to the numerous errors found at verification, petitioner recommends using the uncooperative BIA rate. For one sale, which was added to PolyCity's sales listing after the preliminary determination, petitioner recommends using the cooperative BIA rate.

PolyCity states that three sales were inadvertently excluded from the sales listing but that they have now been included. Therefore, BIA for these sales is unwarranted. The one sale petitioner alleges was added to PolyCity's sales listing after the preliminary determination was, in fact, included in the first sales listing and every listing since. Therefore, it should not be treated differently than the other sales that have been reported.

DOC Position

We determine that the omissions described above were inadvertent and the corrected information was verified. The new sales represent a small percentage of total sales during the POI and, at verification, were not hidden or misrepresented. Further, we are satisfied that the record is now complete and accurate as to this company's sales during the POI of subject merchandise. Accordingly, the reported information, as corrected based on verification, is the appropriate basis for this LTFV determination for PolyCity.

Comment 9: Untimely Submissions

Petitioner argues that changes and additions to PolyCity's data which were submitted on February 21, 1995, should be rejected as untimely filed with the Department.

PolyCity states that this submission was timely filed in accordance to instructions given by Department officials. PolyCity argues, however, that petitioner's comment should not have been included in the brief filed on April 10, 1995, since only comments on verification reports were to be filed. Accordingly, PolyCity argues that this comment cannot be included in the record.

DOC Position

We agree with respondent, in part. Respondent's submissions were timely filed, in accordance with our instructions. However, we disagree with

respondent that petitioner's comments should have been rejected. Due to miscommunication between the Department and the parties in this case, parties were unclear where to report company-specific issues that were not verification issues. Therefore, we have determined that this argument was properly included in this brief and have allowed it to remain in the record of this investigation.

Comment 10: Use Actual Labor Rates

Respondent argues that the Department should use the actual wage rates paid by PolyCity to its Chinese workers. In the past, the Department has used actual costs for certain factors of production, if these costs represent accurate, market-based values. Since the workers of PolyCity freely negotiate their wages without interference from the central government (*e.g.* unemployed workers wait at the factory gate to interview for open positions,) respondent believes that there is no basis for the use of surrogate values.

If the Department rejects the use of PolyCity's wage rates, respondent asks that we use the average of the wages on the record for unskilled factory0 workers in Indonesia. The rate used by the Department in its preliminary determination based on locally engaged U.S. Embassy personnel in Indonesia is not a valid surrogate for the cost of unskilled factor labor in China.

DOC Position

As stated above, we have determined that the PRC is a non-market economy country for purposes of this determination. Moreover, there has been no claim and we have not found that available information would permit us to determine FMV under the market economy provisions of the antidumping duty law (*see* section 773(c)(1)(b) of the Act). Hence, we are basing FMV on the Chinese factors of production values in a surrogate country.

PolyCity points to *Lasko Metal Prods., Inc.* v. *United States* 810 F. Sup. 314 (CIT 1992) *aff'd* 43 F.3d 1442 (Fed. Cir. 1994) to support the proposition that the Department can use respondent's actual costs when those costs represent accurate market-economy values. However, *Lasko* addresses Department's practice of using respondent's actual costs in narrow circumstances—*i.e.*, where the input is purchased from a market economy country and paid for in a market economy currency. We do not use values within the non-market economy.

Moreover, in the one case cited by PolyCity (*Final Determination of Sales at Less Than Fair Value: Chrome Plated Lug Nuts From the People's Republic of China*, 56 FR 46153, 46154, September 10, 1991), the Department was investigating an MOI claim, not a claim that labor was market oriented. In addition, the Department did not find that wages in the PRC were market determined. To the contrary, we stated," * * * we have concluded that respondent has not overcome the presumption of state control with respect to labor and that the PRC wage rate should not be used for purposes of the factors of production analysis."

Comment 11: Manufactured Parts vs. Purchased Parts

In cases where PolyCity both purchases a part and produces the same part from imported raw materials, it argues that the price it pays for the purchased part should not be used to value this input. Instead, the Department should construct a value using the factors needed to produce the part.

PolyCity contends that valuing the part using the price paid for the finished part would overstate the amount of labor and overhead allocated to PolyCity's other activities. This is because PolyCity's labor and overhead figures include labor and overhead to produce these parts, and the Department does not have the necessary information to back out these amounts. Alternatively, if the Department does not accept PolyCity's proposal to use solely a constructed value, then it should value the parts on a weight-average basis between the purchased and the manufactured parts.

DOC Position

We disagree with respondent that we should use the factors methodology for all of the parts consumed during the POI. Contrary to PolyCity's assertion, to use the factors methodology for all parts consumed during the POI would understate the labor and overhead because it would not include additional labor and overhead needed to produce those parts. Thus, we have only applied the factors methodology for inputs actually produced by PolyCity.

For the portion of the parts used which PolyCity purchases from market economy suppliers in a market economy currency, we valued the part using an invoice price outside the POI. While our first preference would be an invoice price during the POI, in this investigation we are accepting actual, pre-POI prices paid to a market economy producer in market economy currency because such prices, although outside the POI, are the best available information on the value of these inputs and are more accurate than surrogate values. In many instances, the Department uses surrogate values that are from pre-POI time periods and are generally further removed from the POI than the pre-POI market economy prices. Using pre-POI market economy prices that the producer actually paid is consistent with that practice.

Comment 12: Jakarta vs. Non-Jakarta Rates

PolyCity maintains that the Department should use a non-Jakarta wage rate in valuing labor. It states that wage rates in Jakarta are not an appropriate surrogate for wages in Chinese factories because Chinese lighter factories are located in small, provincial towns, not major cities like Jakarta. Moreover, PolyCity states that not one of the Indonesian lighter factories is located in Jakarta.

DOC Position

We disagree that we are required "to customize" factor values to reflect the conditions of certain PRC respondents. We have used ILO data pertaining to Indonesian wage rates to value the labor input for all PRC producers. This data reflects an Indonesian-wide average, not the wage rate in Jakarta.

Cli-Claque Company Limited

Comment 13: Electronic Lighters

Cli-Claque claims that its flat, refillable electronic lighter, referred to as a card lighter, is not disposable and should not be included within the scope of the investigation. In contrast to flint lighters, this Cli-Claque lighter uses a piezo electronic lighting mechanism. Further, because of its unique flat shape, the lighter must be produced from a more costly, higher grade of plastic.

With respect to channels of distribution, Cli-Claque sell these lighters at wholesale to tobacco and other companies for use as promotional items. Because these lighters are considerably more costly to produce, Cli-Claque states that it could not sell them at retail in competition with ordinary flint lighters.

Throughout the investigation, petitioner has maintained that the existence of an electric lighting mechanism alone should not be a determining factor in deciding whether a lighter is or is not disposable. Petitioner cites examples of disposable lighters that use the piezo electric ignition mechanism. Regarding ultimate use of the lighter, petitioner maintains that it is the same as the flint lighter—to light various tobacco products. Regarding channels of distribution, petitioner states that Cli-Claque's

lighters could compete at retail with flint lighters, if the manufacturer imprinted designer wraps or logos to entice customers to pay a somewhat higher price.

DOC Position

Although Cli-Claque's card lighters are not currently sold at retail but are sold at wholesale to tobacco and other companies as promotional items, these lighters are not the only type of lighters to be sold to companies as promotional items. The standard, disposable butane lighter is also sold to companies as a promotional item. Thus, the card lighters are not unique in their use as promotional items, because standard, disposable lighters clearly serve this purpose as well.

Also, the existence of a piezo electric ignition mechanism is not decisive. Several brands of disposable lighter employ the piezo mechanism rather than the more common flint ignition system. The fact that a lighter is refillable is also not controlling, as indicated in the scope of this investigation, which recognizes that a disposable lighter may be refillable or non-refillable.

Further, card lighters come in both refillable and non-refillable versions. The lighters are identical in every respect with the exception of the refill valve on the refillable lighter. Both lighters feature the more expensive plastic and the piezo electric lighting mechanism. The addition of a refill value to the card lighter is insufficient to warrant reclassifying it as a non-disposable lighter. Therefore, disposable lighters with refill valves clearly fall within the scope of the investigation.

Comment 14: Critical Circumstances

Cli-Claque argues that critical circumstances do not exist. Cli-Claque maintains that the increase in July 1994 is due to a shipment to a U.S. customer to meet the July 12, 1994 deadline. This deadline, established by the Consumer Products Safety Commission's ("CPSC"). The CPSC barred the import of disposable lighters that did not meet more stringent safety requirements after July 1994. Thus, Cli-Claque argues that this shipment did not result from the filing of the antidumping petition, but from U.S. regulatory requirements imposed by CPSC.

Cli-Claque argues that, with respect to the history of dumping, although the Council of European Communities found dumping of gas-fueled, non-refillable pocket flint lighters, the margin in the case of China was only 16.90 percent, well below the Department's 25 percent threshold. In addition, according to Cli-Claque, the European determination did not cover piezo-electric lighters, but only flint lighters. Since piezo-electric lighters represent a significant percentage of the lighters exported to the United States by Cli-Claque, the Department should not impute knowledge of dumping to Cli-Claque. Moreover, Cli-Claque maintains that the Department cannot impute knowledge of dumping to Cli-Claque's importers since the Department found a dumping margin of only 7.03 percent. The Department's practice has been to impute such knowledge only where it finds a preliminary margin equal to or greater than 25 percent.

Petitioner argues that although the European determination only covers flint lighters, the Department has preliminarily determined that electronic lighters are in the same class or kind of merchandise as flint lighters. In addition, petitioner argues that, as noted in the verification report, Cli-Claque used the date of sale, rather than the shipment date, for reporting monthly shipments. According to petitioner, this incorrect reporting understates the massiveness of imports by shifting shipments from the post-petition filing period to the pre-petition filing period. Finally, petitioner argues that although Cli-Claque claims that the increase in July 1994 was due to a shipment to a customer to meet the July 12, 1994 deadline established by the CPSC, the Department has repeatedly held that the statute and regulations make no mention of weighing other factors or examining alternative causes as to the reason for increased imports.

Petitioner also argues that the Department should continue to find that critical circumstances exist with respect to imports of lighters from Cli-Claque. Petitioner maintains that the first prong of the statutory requirement for critical circumstances, *i.e.*, knowledge of dumping, is fulfilled. Petitioner states that disposable lighters from the PRC have been found to be dumped in both the European Union and Argentina. In 1991, the European Commission (EC) imposed antidumping duties on gas-fueled, non-refillable pocket flint lighters originating in China. The fact that the margin on lighters from China was only 16.9 percent is irrelevant for this prong of the knowledge test. According to petitioner, the Department requires a 25 percent margin on imports only when the Department is imputing knowledge of dumping under the second alternative criteria for knowledge of dumping, not when the Department is inquiring whether there is a history of dumping in the United States or elsewhere under the first alternative criteria for knowledge of dumping.

DOC Position

We disagree with petitioner that a history of dumping exists with respect to disposable lighters. We do not require the scope of our proceeding to match exactly the scope of the foreign proceeding. Since the lighters examined by the EC are subject to this investigation, we find that there is a history of dumping with respect to the class or kind of merchandise as a whole and, by extension, with respect to Cli-Claque. We have established a history of dumping with respect to Cli-Claque and we agree with petitioner that in evaluating this criterion, the size of the margin found by the EC is irrelevant. Because there is a history of dumping, we are not required to consider whether the importer knew or should have known that the exporter was selling the subject merchandise at less than fair value.

We have also considered whether imports of the merchandise have been massive over a relatively short period of time in accordance with 19 CFR 353.16(f) and (g). Based on verified information on shipments by Cli-Claque, we find that imports have been massive over a relatively short period of time, even when taking into account the increase in volume in advance of the July 1994 deadline for importing non-childproof lighters. (For a more detailed analysis, see the proprietary Calculation Memorandum for this final determination.) Therefore, we find that critical circumstances exist with respect to imports on behalf of Cli-Claque because a history of dumping exists and because imports have been massive over a relatively short period of time.

Comment 15: Defective Lighters

Cli-Claque argues that there is no need to adjust total production figures to account for defective lighters, as petitioner maintains, since the production figures used in the factor of production calculations are already net of defective lighters sold to customers in the PRC which were later returned to Cli-Claque.

DOC Position

We agree with petitioners and have made an adjustment to the cost of manufacture to account for the defective lighters sold which were later returned to Cli-Claque.

Comment 16: Water and Diesel

Petitioner argues that the Department should not include water and diesel in overhead, but should calculate values

for these inputs separately, using surrogate values. Petitioner maintains that the diesel fuel used to power the generators is a direct factor of production in producing lighters, and not, as in some other cases, an incidental expense. As a direct factor of production, diesel fuel should be included as a separate factor of production and not included as a part of factory overhead.

Cli-Claque argues that water should be treated as an overhead item. With regard to diesel fuel, Cli-Claque has submitted the total kilowatt hours of electricity used because electricity is the direct input used in the production process. Cli-Claque asserts that if the Department were to also include diesel fuel used to produce electricity as a factor of production, it would be double-counting the cost of electricity.

DOC Position

We agree with respondents that water should be included in factory overhead and, therefore, should not be valued separately. Because it is normal practice to include such cost in factory overhead, and the RBIB data did not indicate to the contrary, we find it reasonable to presume that water is included in the overhead value we used (*See Saccharin*).

We also agree with Cli-Claque that, for those companies that generate electricity using diesel-powered generators, inclusion of diesel fuel and electricity as separate factors of production would result in double-counting. Since diesel fuel is the factor actually used by these companies, we have used the diesel fuel input in our calculation of FMV, where possible. However, for some companies this was not possible and, instead, we valued the electrical output of the generators as the best available information.

Comment 17: Labor Hours

Petitioner argues that the Department should adjust labor hours used to make the electronic lighter caps because, at verification, the Department noted differences for the total number of hours worked by unskilled labor in the metal workshop.

Cli-Claque maintains that no adjustment should be made to its labor calculations for the metal workshop and that petitioner's comment on this point is based on a misreading of the verification report. According to Cli-Claque, as stated in the verification report, the labor hours per month for the metal workshop were calculated by multiplying the number of days per month a machine was in operation by the average labor hours worked per day. The difference, cited by petitioner, was not a discrepancy between the data reported and the figure verified but the difference between the skilled and unskilled hours worked per day in the metal workshop.

DOC Position

We agree with respondent. Our discussion in the verification report was to note only the difference in the number of hours worked between skilled and unskilled workers in the metal workshop. We did not note any discrepancies in the information we reviewed.

Comment 18: Electroplating

Petitioner argues that the Department should assign appropriate surrogate values for electroplating as best information available since electroplating was done by a non-market economy source. In addition, petitioner argues that Cli-Claque likely incurred transportation charges for shipping lighter caps for electroplating. Therefore, surrogate values for these transportation charges should also be included.

Respondent argues that electroplating merely adds a finish to caps produced by Cli-Claque. The Department reviewed the invoice provided by the subcontractor at verification and found that the charges were insignificant.

DOC Position

Based on information reviewed at verification, we agree with respondent that electroplating was an insignificant cost, and would be included in the surrogate overhead value. We disagree with petitioner's characterization of the Department's practice, *i.e.*, if a material is used in the production process, it should be included in the direct materials calculation. As stated in *Saccharin*, it is standard practice to classify certain inputs as variable overhead. Electroplating is infrequently used in the production process, is small in value relative to the total cost of manufacturing the product and, hence, would be included in the surrogate country overhead value. Therefore, we have not valued it separately.

Gao (HK) Hua Fa Industrial Co. Ltd.(Gao Yao)

Comment 19: Market Economy Inputs Originally Reported in Renminbi (RMB)

Petitioner states that the Department should use surrogate values for all inputs Gao Yao reported to the Department in Renminbi (RMB), but actually purchased in Hong Kong dollars. Petitioner argues that Gao Yao incorrectly reported purchases based on Gao Yao's calculation of the exchange rate.

Gao Yao argues that certain accounting records are maintained in RMB but this should not be grounds for using surrogate values. Gao Yao states that the discrepancy caused by its calculation of the exchange rate had a negligible effect on import prices, and the Department should use market economy prices for material inputs purchased from market economy suppliers.

DOC Position

When a respondent purchases imports from a market economy and pays in a market economy currency, the Department prefers using the actual price of that input rather than a surrogate value, (see, e.g., *Final Determinations of Sales at Less Than Fair Value: Oscillating Fans and Ceiling Fans from the PRC*, (56 FR 55271, 55275, October 25, 1991), upheld *Lasko Metal Products* v. U.S. 810 F. Sup. 314, *Aff'd*, 43 F. 3rd 1142 (Fed. Cir. 1994)). For purposes of our final determination we have used actual, verified prices for those inputs which were purchased by Gao Yao from a market economy supplier and paid for in market economy currencies.

Comment 20: Natural Gas

Petitioner argues that the Department should include natural gas in its calculation of Gao Yao's FMV since it reported that it uses natural gas.

Gao Yao states that the reference in its response to "natural gas" was incorrect. The input in question was butane—a factor which was separately reported. According to Gao Yao, the Department verified that it did not use natural gas as an energy source.

DOC Position

We agree with respondent. At verification, we determined no natural gas was being used in the production process.

Comment 21: Port Handling Charges and Rejected Lighters

Petitioner also asserts that the Department should adjust Gao Yao's production information to reflect lighters which failed internal quality control inspection.

DOC Position

We agree with petitioner. We have adjusted our calculation of FMV to account for lighters which were unsaleable.

Guangdong Light Industrial Products Import and Export Corporation (GLIP)

Comment 22: Governmental Ownership and Independence

Petitioner states that GLIP should not be granted a separate rate because a portion of the company's shares are held by a governmental entity. Petitioner argues that, while no evidence of governmental interference was found during verification, the fact remains that shares of the company are held by the government and, since GLIP only transformed to a shareholding company shortly after the POI, circumstances may change inciting the State Asset Management Bureau to take actions which interfere in the company's operations.

Petitioner states further that not enough is known about the level of governmental control exerted over GLIP during the POI, when the company was still owned by "all the people." Accordingly, petitioner argues that GLIP should not be granted a separate rate in this investigation and should be assigned the "PRC-Wide rate."

DOC Position

During verification, the Department examined all correspondence files pertaining to the period prior to the POI, the POI, and the period after the POI. We also examined bank records during the POI and found no evidence of government control over the company activities. In addition, based on discussions with GLIP officials, described in detail in our verification report, that GLIP's management has not changed since the company's transformation from a company owned by "all the people" to a company owned by shareholders. It is not the Department's practice to deny eligibility for a separate rate based on speculation that a government might someday try to influence a company's operations. If this did occur, a future administrative review would analyze such government influence in its determination of whether to grant a separate rate for this company. Currently, based on our *de facto* analysis of governmental control over the company's export activities, we conclude that GLIP is independent of government control. (*See* Separate Rates discussion).

Comment 23: Cost Factors Should be Adjusted for Variances

Petitioner states that the Department should adjust the standard usage amounts for materials and labor when calculating FMV for the lighters sold by GLIP to account for variances from standard observed at verification. Petitioner additionally states that since warehouse withdrawal tickets are the only method for establishing variances for material usage, the Department should use these tickets to calculate variances for material usage.

DOC Position

We have adjusted labor figures to account for variances observed during verification for purposes of our final determination. We have based material usage on reported amounts, however, because the variances calculated using warehouse tickets appeared to be largely influenced by the amount of raw materials in work-in-process. Since the producer of lighters did not maintain records of raw materials inventory in work-in-process, it is not possible to calculate actual consumption.

Comment 24: Butane Consumption

Petitioner states that the Department should use gross consumption figures for butane in calculating GLIP's FMV for purposes of its final determination.

DOC Position

We agree with petitioner, and have made this adjustment for purposes of our final determination with respect to GLIP. Factory officials stated at the beginning of verification that they had inadvertently reported the net amount of butane in the final product in the company's response to the Department's antidumping questionnaire rather than the gross amount of butane used in producing the lighters. We verified the correct amounts and have used them in this determination.

China National Overseas Trading Corporation (COTCO)

Comment 25: Foreign Exchange Controls

Petitioner argues that COTCO should not be granted a separate rate because the company is subject to foreign currency controls which are indicative of a lack of independence from the central government. Petitioner states that in *Sparklers*, the Department stated that for an exporter to be granted a separate rate the company must (1) set its own export prices, and (2) be allowed to keep the proceeds from its sales. Petitioner cites to the Department's verification report, where management states that COTCO must ask permission to refund foreign currency on returned merchandise. Petitioner contends this statement is indicative of a lack of control over earnings and, consequently, a lack of independence.

Respondent argues that there is ample evidence of COTCO's independence from government control. Respondent adds that Department officials verified that there were no returns or refunds for any subject merchandise during the POI.

DOC Position

Although COTCO must receive permission to purchase foreign currency, during verification we viewed evidence that COTCO regularly purchases foreign exchange to pay for imported merchandise. We saw no evidence of returned merchandise; the statement by COTCO officials concerning returned merchandise was in response to a hypothetical question from Department officials. The PRC's complex system of foreign exchange controls is not *per se* evidence of governmental control (*see, e.g., Coumarin*). The body of evidence gathered at verification indicates that COTCO retains control over its earnings, both foreign and domestic.

Comment 26: Affiliated Companies

Petitioner states that the companies which are affiliated with COTCO did not cooperate in this investigation and it should be assumed that they had unreported lighter sales to U.S. customers during the POI. Accordingly, petitioner argues, COTCO should not be granted a separate rate, and should be assigned the "PRC-Wide" rate as punitive BIA.

Respondent states that COTCO included information for all lighter sales to U.S. customers in its response and that during verification Department officials requested information to confirm that all sales had been reported. Respondent argues that a separate rate based on its verified response is appropriate in the Department's final determination.

DOC Position

We agree with respondent. At verification, consistent with normal verification practices, we verified that no COTCO affiliate, except for the one under investigation, sold the subject merchandise during the POI. COTCO officials cooperated with Department verifiers to the best of their ability and we are satisfied that our tests of the completeness of COTCO's response demonstrates that all sales of subject merchandise have been included.

Comment 27: Shipment After POI

Petitioner states that a shipment made by COTCO after the POI and for which there was no sales contract should be assumed to have been a sale during the POI and should be included in the company's sales listing.

Respondent states that all sales made during the POI were included in the data submitted to the Department, and that sales made after the POI should not be included in the Department's antidumping duty rate calculation.

DOC Position

We agree with respondent. We saw no evidence during verification that the sale relating to the shipment in question was made during the POI. During verification, we viewed another example of a sale by COTCO where a contract was not generated prior to shipment of the merchandise. Given the date of shipment, the invoice date, and based on statements by COTCO officials, we believe the sale should not be included in COTCO's sales data for the POI.

Continuation of Suspension of Liquidation

For Gao Yao, we calculated a zero margin. Consistent with *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cased Pencils from the People's Republic of China* (59 FR 55625, November 8, 1994), merchandise that is sold by Gao Yao but manufactured by other producers will not receive the zero margin. Instead, such entries will be subject to the "PRC-wide" margin.

In accordance with sections 733(d)(1) and 735(c)(4)(B) of the Act, we are directing the Customs Service to continue to suspend liquidation of all entries of disposable pocket lighters from the PRC, 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 estimated amount by which the FMV exceeds the USP as shown below. These suspension of liquidation instructions will remain in effect until further notice. The weighted-average dumping margins are as follows:

Manufacturer/producer/exporter	Weighted-average margin percentage	Critical circumstances
China National Overseas Trading Corporation*.	0	Affirmative.
Cli-Claque Company Ltd.	6.15	Affirmative.
Gao Yao (HK) Hua Fa Industrial Co., Ltd.	0	Negative.
Guangdong Light Industrial Products Import and Export Corporation.	27.91	Negative.
PolyCity Industrial, Ltd.	5.50	Negative.
PRC-Wide	197.85	Affirmative.

*This company has not disclosed for the public record the identity of its supplier or suppliers in the PRC. Upon public disclosure of this information to the Department, we will notify the Customs Service that sales through certain supply channels have an LTFV margin of zero and thus an exclusion from any order resulting from this investigation. Until and unless such disclosure is made, all entries will be subject to the "PRC-wide" deposit rate.

ITC Notification

In accordance with section 735(d) of the Act, we have notified the International Trade Commission (ITC) of our determination. As our final determination is affirmative, the ITC will determine whether these imports are causing material injury, or threat of material injury, to the industry in the United States, within 45 days. If the ITC determines that material injury, or threat of material injury, does not exist, the proceeding will be terminated and all securities posted will be refunded or cancelled. If the ITC determines that such injury does exist, the Department will issue an antidumping duty order directing Customs officials to assess antidumping duties on all imports of the subject merchandise entered, or withdrawn from warehouse, for consumption on or after the effective date of the suspension of liquidation.

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

Dated: April 27, 1995.

Susan G. Esserman,

Assistant Secretary for Import Administration.

[FR Doc. 95–11161 Filed 5–4–95; 8:45 am]

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APPENDIX C

FOREIGN INDUSTRY TABLES

Table C-1
Standard disposable pocket lighters: China (excluding China National and Gao Yao) capacity, production, inventories, capacity utilization, and shipments, 1992-94, July-Dec. 1993, July-Dec. 1994, and projected 1995-96

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Table C-2
Child resistant disposable pocket lighters: China (excluding China National and Gao Yao) capacity, production, inventories, capacity utilization, and shipments, 1992-94, July-Dec. 1993, July-Dec. 1994, and projected 1995-96

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Table C-3
Disposable pocket lighters: China (excluding China National and Gao Yao) capacity, production, inventories, capacity utilization, and shipments, 1992-94, July-Dec. 1993, July-Dec. 1994, and projected 1995-96

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APPENDIX D

MONTHLY IMPORT DATA

Table D-1
Disposable lighters from China: Monthly shipment data by certain Chinese firms and U.S. monthly imports, July 1993-Dec. 1994

(1,000 units)

Period	Gao Yao	Guang-dong	China National	Poly-City	Sub-total	All other[1]	U.S. imports
1993:							
July	***	***	***	***	***	***	14,422
Aug	***	***	***	***	***	***	16,855
Sept	***	***	***	***	***	***	15,907
Oct	***	***	***	***	***	***	11,534
Nov	***	***	***	***	***	***	15,743
Dec	***	***	***	***	***	***	15,250
1994:							
Jan	***	***	***	***	***	***	15,154
Feb	***	***	***	***	***	***	8,181
Mar	***	***	***	***	***	***	19,123
Apr	***	***	***	***	***	***	18,516
May	***	***	***	***	***	***	32,295
June	***	***	***	***	***	***	57,822
July	***	***	***	***	***	***	54,923
Aug	***	***	***	***	***	***	5,624
Sept	***	***	***	***	***	***	7,869
Oct	***	***	***	***	***	***	4,387
Nov	***	***	***	***	***	***	6,476
Dec	***	***	***	***	***	***	7,923

[1] Computed by subtracting Chinese monthly export shipments of disposable pocket lighters reported by Gao Yao, Guangdong, China National, and PolyCity from total U.S. imports of pockets lighters under *Harmonized Tariff Schedule of the United States* items 9613.10 and 9613.20. The dates of exports from China will not necessarily coincide with U.S. imports on a monthly basis and can result in negative numbers (e.g., Oct. 1994).

Note.--Because of rounding, figures may not add to totals shown.

Source: Company-specific data provided in response to U.S. International Trade Commission request. U.S. imports compiled from official statistics of the U.S. Department of Commerce.