DEPARTMENT OF COMMERCE

International Trade Administration

[A–588–840]

Notice of Final Determination of Sales at Less Than Fair Value: Engineered Process Gas Turbo-Compressor Systems, Whether Assembled or Unassembled, and Whether Complete or Incomplete, from Japan

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

EFFECTIVE DATE: May 5, 1997.

FOR FURTHER INFORMATION CONTACT: Louis Apple, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue, N.W., Washington, D.C. 20230; telephone: (202) 482–1769, respectively.

THE APPLICABLE STATUTE: Unless otherwise indicated, all citations to the Tariff Act of 1930, as amended (''the Act''), are references to the provisions effective January 1, 1995, the effective date of the amendments made to the Act by the Uruguay Round Agreements Act (''URAA''). In addition, unless otherwise indicated, all citations to the Department's regulations are to the current regulations, as amended by the interim regulations, published in the **Federal Register** on May 11, 1995 (60 FR 25130).

FINAL DETERMINATION: We determine that engineered process gas turbo-compressor systems (''EPGTS''), whether assembled or unassembled, and whether complete or incomplete, from Japan 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 Act.

Case History

Since the preliminary determination in this investigation (Notice of Preliminary Determination and Postponement of Final Determination: Engineered Process Gas Turbo-Compressor Systems, Whether Assembled or Unassembled, and Whether Complete or Incomplete from Japan (61 FR 65013, December 10, 1996) (''Preliminary Determination'')), the following events have occurred.

In January 1997, respondents Mitsubishi Heavy Industries, Ltd. (''MHI'') and Mitsubishi Corporation (''MC'') submitted supplemental questionnaire responses to the Department.

In February 1997, we verified the questionnaire responses of MHI and MC in Tokyo and Hiroshima, Japan, and Houston, Texas. On March 10 and 11, 1997, the Department issued its reports on verification findings.

On February 18, 1997, per the Department's instructions in the preliminary determination, MHI, MC, and the petitioner, Dresser-Rand Company, submitted comments on the issue of ''affiliation.'' On February 21 and 24, 1997, MC and MHI, respectively, requested the Department to strike certain portions of the petitioner's submission on affiliation because it allegedly contained untimely new factual information. After reviewing the petitioner's submission, the Department determined on March 13, 1997, that certain information presented therein constituted new factual information, untimely filed, under section 353.31(a)(1)(i) of the Department's regulations, and informed the petitioner that unless otherwise discussed in the Department's verification reports, the information at issue would not be considered for purposes of the final determination.

On February 28, 1997, per the Department's instructions in the preliminary determination, the petitioner and MHI submitted comments on the scope of the investigation, and suspension of liquidation instructions.

The petitioner, MHI, and MC submitted case briefs on March 18, 1997, and rebuttal briefs on March 24, 1997. The Department held a public hearing for this investigation on April 1, 1997.

Scope of Investigation

The products covered by this investigation are turbo-compressor systems (*i.e.*, one or more ''assemblies'' or ''trains'') which are comprised of various configurations of process gas compressors, drivers (*i.e.*, steam turbines or motor-gear systems designed to drive such compressors), and auxiliary control systems and lubrication systems for use with such compressors and compressor drivers, whether assembled or unassembled, and whether complete or incomplete. One or more of these turbo-compressor assemblies or trains, may be combined. The systems covered are only those used in the petrochemical and fertilizer industries, in the production of ethylene, propylene, ammonia, urea, methanol, refinery and other petrochemical products. This investigation does not encompass turbo-compressor systems incorporating gas turbine drivers, which are typically used in pipeline transmission, injection, gas processing, and liquid natural gas service.

The scope of this investigation excludes spare parts that are sold separately from a contract for an EPGTS. Parts or components imported for the revamp or repair of an existing EPGTS, or otherwise not included in the original contract of sale for the EPGTS of which they are intended to be a part, are expressly excluded from the scope.

Compressors are machines used to increase the pressure of a gas or vapor, or mixture of gases and vapors. Compressors are commonly classified as reciprocating, rotary, jet, centrifugal, or axial (classified by the mechanical means of compressing the fluid), or as positive-displacement or dynamic-type (classified by the manner in which the mechanical elements act on the fluid to be compressed). Subject compressors include only centrifugal compressors engineered for process gas compression, *e.g.*, ammonia, urea, methanol, propylene, or ethylene service.

Turbines are classified (1) As steam or gas; (2) by mechanical arrangement as single-casing, multiple shaft, or tandem-compound (more than one casing with a single shaft); (3) by flow direction (axial or radial); (4) by steam cycle, whether condensing, non-condensing, automatic extraction, or reheat; and (5) by number of exhaust flows of a condensing unit. Steam and gas turbines are used in various applications. Only steam turbines dedicated for a turbo-compressor system are subject to this investigation.

A motor and gear box may be used as a compressor driver in lieu of a steam turbine. A control system is used to monitor and control the operation of a turbo-compressor system. A lubrication system is engineered to support a subject compressor and steam turbine (or motor/gear box).

A typical EPGTS consists of one or more compressors driven by a turbine (or in some cases a motor drive). A compressor is usually installed on a base plate and the drive is installed on a separate base plate. The turbine (or motor drive) base plate will typically also include any governing or safety systems, couplings, and a gearbox, if any. The lube and oil seal systems for the turbine and compressor(s) are usually mounted on a separate base plate.

The scope of this investigation covers both assembled and unassembled EPGTS from Japan. Because of their large size, EPGTS and their constituent parts are typically shipped partially assembled (or unassembled) to their destination where they are assembled and/or completed prior to their commissioning.

The scope of this investigation also covers ''complete and incomplete'' EPGTS from Japan. A ''complete'' EPGTS covered by the scope consists of all of the components of an EPGTS (*i.e.*, process gas compressor(s), driver(s), auxiliary control system(s) and lubrication system(s)) and their constituent parts, which are imported from Japan in assembled or unassembled form, individually or in combination, pursuant to a contract for a complete EPGTS in the United States. An ''incomplete'' EPGTS covered by the scope of this investigation consists of parts of an EPGTS imported from Japan pursuant to a contract for a complete EPGTS in the United States, which taken altogether, constitute at least 50 percent of the cost of manufacture of the complete EPGTS of which they are a part. (*See Comment 1* of the ''Interested Party Comments'' section of this notice for discussion on the definition of ''incomplete EPGTS'' covered by the scope of this investigation and the methodology the Department will use to calculate the cost of manufacture.)

EPGTS imported from Japan as an assembly or train (*i.e.*, including turbines, compressors, motor and gear boxes, control systems and lubrication systems, and auxiliary equipment) may be classified under Harmonized Tariff Schedule of the United States (''HTSUS'') subheading 8414.80.2015, which provides for centrifugal and axial compressors. The Customs Service may view the combination of turbine driver and compressor as ''more than'' a compressor and, as a result, classify the combination under HTSUS subheading 8419.60.5000.

Compressors for use in EPGTS, if imported separately, may also be classified under HTSUS subheading 8414.80.2015. Parts for such compressors, including rotors or impellers and housing, are classified under HTSUS subheading 8414.90.4045 and 8414.90.4055.

Steam turbines for use in EPGTS, if imported separately, may be classified under the following HTSUS subheadings: 8406.81.1020 (steam turbines, other than marine turbines, stationary, condensing type, of an output exceeding 40 MW); 8406.82.1010 (steam turbines, other than marine turbines, stationary, condensing type, exceeding 7,460 Kw); 8406.82.1020 (steam turbines, other than marine turbines, stationary, condensing type, exceeding 7,460 Kw, but not exceeding 40 MW); 8406.82.1050 (steam turbines, other than marine turbines, stationary, other than condensing type, not exceeding 7,460 Kw); 8406.82.1070 (steam turbines, other than marine turbines, stationary, other than condensing type, exceeding 7,460 Kw, but not exceeding 40 MW). Parts for such turbines are classified under HTSUS subheading 8406.90.2000 through 8406.90.4580.

Control and other auxiliary systems may be classified under HTSUS 9032.89.6030 (''automatic regulating or controlling instruments and apparatus: complete process control systems'').

Motor and gear box entries may be classified under HTSUS subheading 8501.53.4080, 8501.53.6000, 8501.53.8040, or 8501.53.8060. Gear speed changers used to match the speed of an electric motor to the shaft speed of a driven compressor, would be classified under HTSUS subheading 8483.40.5010.

Lubrication systems may be classified under HTSUS subheading 8414.90.4075.

Although the HTSUS subheadings are provided for convenience and customs purposes, our written description of the scope of this investigation is dispositive.

Period of Investigation (''POI'')

The POI is April 1, 1995 through May 31, 1996.

Product Comparisons

Although the home market was viable, in accordance with section 773 of the Act, we based normal value (''NV'') on constructed value (''CV'') because we determined that the merchandise sold in the home market during the POI was not sufficiently similar to that sold in the United States to permit proper price-to-price comparisons.

Fair Value Comparisons

To determine whether MHI's sales of EPGTS to the United States were made at LTFV, we compared constructed export price (''CEP'') to NV, as described in the ''Constructed Export Price'' and ''Normal Value'' sections of this notice.

Constructed Export Price

Pursuant to section 772 of the Act, the basis for the fair value comparison is the price at which the merchandise is first sold to an unaffiliated purchaser in the United States or for export to the United States. MHI reported its sale to MC, a Japanese trading company, as an export price (''EP'') sale on the grounds that MC is an unaffiliated purchaser and, at the time of sale, MHI knew that the merchandise was intended for export to the United States. However, based on our examination of the sales documentation provided by MHI and MC and our findings at verification, which demonstrate that MC and its U.S. subsidiary, Mitsubishi International Corporation (''MIC''), acted as MHI's selling agents in the U.S. transaction under investigation, we have determined for purposes of this final determination that the proper basis for the fair value comparison is the sale by MHI, through MC/MIC, to the U.S. customer. Because MHI made this transaction through agents acting on its behalf and thus subject to its control, we determined that MHI and MC/MIC are affiliated within the meaning of section 771(33) of the Act. Because the function of MC/MIC, as U.S. sales agents, is beyond that of a ''processor of sales-related documentation'' and a ''communications link'' with the unaffiliated U.S. customer, we determined that the use of CEP is appropriate in the final determination of this case (*see* Final Determination of Sales at Less Than Fair Value: Large Newspaper Printing Presses and Components Thereof, Whether Assembled or Unassembled, from Germany, 61 FR 38166, 38175–76 (July 23, 1996) (''LNPPs from Germany'')). (*See Comment 2* in the ''Interested Party Comments'' section of this notice for discussion of principal-agency relationship between MHI and MC/MIC.)

In accordance with sections 772(b) and (c) of the Act, we calculated CEP based on a packed, FOB Japanese port, duty paid price, inclusive of spare parts, to an unaffiliated customer in the United States through a Japanese trading company affiliated by virtue of an agency relationship with the Japanese producer. We excluded from this price any post-POI price amendments, in accordance with our standard practice. (*See LNPPs from Germany* 61 FR at 38181–2). We made a deduction from the starting price for MIC's cost of the non-subject parts which were included in the U.S. sale. (*See Comment 5* of the ''Interested Party Comments'' section of this notice.)

We also made further deductions from CEP pursuant to section 772(c) and (d) of the Act based on the same methodology used in the preliminary determination with the following exceptions:

1. We deducted the product liability expense which was reported in the respondent's January 27, 1997, U.S. sales listing.

2. We deducted performance testing cost as a direct selling expense. We reclassified the reported performance testing cost from a manufacturing cost to a direct selling expense based on verification findings which demonstrated that this type of test was optional and only undertaken at the specific request of the customer in the

contract governing the sale. (*See* March 11, 1997, Report on the Verification in Tokyo, Japan and Houston, Texas of Mitsubishi Heavy Industries, Ltd. (''MHI'') and Mitsubishi Heavy Industries America (''MHIA'') (''MHI Sales Verification Report'') at 31.)

3. We also deducted indirect selling expenses incurred by MHI that related to economic activity in the United States, including certain selling expenses incurred in Japan on the U.S. sale. (*See Comment 6* in the ''Interested Party Comments'' section of this notice.) (*See* also April 24, 1997, Memorandum to the File Re: Office of Accounting Constructed Value and Constructed Export Price Adjustments for Final Determination)(''Calculation Memorandum'').)

4. We also deducted U.S. import duties as well as selling expenses incurred by MC/MIC (see Comment 5 of the ''Interested Party Comment'' section of this notice).

Normal Value

For the reasons outlined in the ''Product Comparisons'' section of this notice, we based NV on CV.

In accordance with section 773(e)(1) of the Act, we calculated CV based on the sum of MHI's cost of materials, fabrication, selling, general, and administrative expenses (''SG&A''), and profit, plus U.S. packing costs.

We based CV on the same methodology used in the preliminary determination with the following exceptions:

1. We increased cost of manufacture (''COM'') to include the inventory loss related to the U.S. sale.

2. We recalculated the home market direct and indirect selling expense rates based on only the home market sales made in the ordinary course of trade. (*See Comment 6* in the ''Interested Party Comments'' section of this notice.)

3. We recalculated CV profit based on only the home market sales made in the ordinary course of trade.

4. We increased the COM of not only the U.S. sale, but also that of the home market sales, to account for the excess of affiliated suppliers' COP over the transfer price charged to MHI. (*See Comment 16* in the ''Interested Party Comments'' section of this notice.)

Price to CV Comparisons

In comparing CEP to CV, we deducted from CV the weighted-average home market direct selling expenses, including imputed credit and installation-related expenses, pursuant to section 773(a)(8) of the Act. (*See Comment 10* in the ''Interested Party Comments'' section of this notice.)

Currency Conversion

We made currency conversions into U.S. dollars based on the rate applicable on the date of the U.S. sale due to a sustained movement in the exchange rate, as calculated by the Department using the methodology outlined in Policy Bulletin 96–1: Currency Conversions, 61 FR 9434 (March 8, 1996) (''Policy Bulletin 96–1'').

Section 773A(a) of the Act directs the Department to use a daily exchange rate in order to convert foreign currencies into U.S. dollars, unless the daily rate involves a fluctuation. It is the Department's practice to find that a fluctuation exists when the daily exchange rate differs from the benchmark rate by 2.25 percent. The benchmark is defined as the rolling average of rates for the past eight weeks. When we determine a fluctuation existed, we substitute the benchmark for the daily rate, in accordance with established practice. Further, section 773A(b) directs the Department to allow a 60-day adjustment period when a currency has undergone a sustained movement. A sustained movement has occurred when the weekly average of actual daily rates exceeds the weekly average of benchmark rates by more than five percent for eight consecutive weeks. (For an explanation of this methodology, *see Policy Bulletin 96–1.*) Such an adjustment period is required only when a foreign currency is appreciating against the U.S. dollar. The use of such an adjustment period was warranted in this case because the Japanese yen underwent a sustained movement. (*See Comment 15* of the ''Interested Party Comments'' section of this notice.)

Verification

As provided in section 782(i) of the Act, we verified the information submitted by MHI and MC for use in our final determination. We used standard verification procedures, including examination of relevant accounting and sales/production records and original source documents provided by respondents.

Interested Party Comments

Comment 1: Scope of Investigation.

The scope of this investigation covers EPGTS used in the petrochemical and fertilizer industries, whether assembled or unassembled, and whether complete or incomplete. (See Initiation of Antidumping Investigation of Sales at Less Than Fair Value: EPGTS, Whether Assembled or Unassembled, and Whether Complete or Incomplete, from Japan (61 FR 28164, June 4, 1996)(''Initiation'').)

Since the initiation of this investigation, the petitioner and MHI have debated two scope-related issues: (1) The definition of ''incomplete'' EPGTS, and (2) the end uses of the EPGTS covered by the scope. For purposes of the preliminary determination, we clarified the scope of this investigation to include, among other things: (1) EPGTS used in the production of refinery products, and (2) ''incomplete'' EPGTS if the EPGTS parts (otherwise referred to as ''components'' or ''subcomponents'') imported from Japan pursuant to a contract for a complete EPGTS in the United States, taken altogether, constitute at least 50 percent of the cost of manufacture of the complete EPGTS of which they are a part. (*See* Preliminary Determination at 65015.) Both of these issues, the parties' comments, and the Department's position are summarized below. For a complete discussion and analysis of these issues, *see* April 24, 1997, Memorandum to Jeffrey Bialos, Principal Deputy Assistant Secretary for Import Administration, from The Team Re: Scope Issues (''April 24, 1997, Scope Decision Memorandum'').

1. Definition of Incomplete EPGTS

The petitioner asserts that the intent of the petition was to cover turbo-compressor ''systems'' engineered (custom made) for a particular plant process, and typically sold as a single unit at a single negotiated price, whether complete *or* incomplete. According to the petitioner, the intent of the petition was to include incomplete EPGTS and incomplete components if sold as part of a complete EPGTS. In order to define a subject incomplete EPGTS for purposes of the final determination, the petitioner argues that the Department should combine a ''cost-based'' test with an ''essential components'' test. Specifically, the petitioner maintains that the Department should amend its preliminary scope language to indicate that imports of EPGTS compressors, steam turbines, or any collection of components from Japan accounting for at least 50 percent of the total cost of manufacture of the EPGTS are subject merchandise. In the petitioner's opinion, this two-pronged approach is simple to administer, avoids circumvention and is consistent with the intent of the petition and the record throughout this investigation.

The petitioner believes that many of the problems identified by the Department in the final determination of LNPPs from Germany and Japan which discouraged the Department from pursuing an ''essence'' test and

encouraged it to pursue a ''cost-based'' test (*e.g.*, the difficulty in identifying the ''essence'' of a LNPP, given the great number of parts and subcomponents; the insignificant portion of total value of the LNPP represented by many of the critical elements identified by the petitioner) are not present in this case. According to the petitioner, there are four major components (*i.e.*, compressor, driver (steam turbine or motor/gear), control system, and lubrication system); however, the compressor and turbine are the heart of the turbo-compressor system both in terms of both function and manufacturing cost.[1] The petitioner cites several cases where the Department applied essence criteria to define the scope of the investigation where, as here, the essential components were readily identifiable and dedicated for use in the complete product.

On the other hand, if the design and engineering of the turbo-compressor system takes place in Japan, but the compressor is subcontracted to another country, the petitioner maintains that it is appropriate to invoke the 50 percent cost-based test to determine whether the incomplete EPGTS should be covered by the scope of the investigation. This would also address the situation where an incomplete compressor is imported, to be assembled after importation with other components, or where the foreign manufacturer produces and supplies nearly an entire turbo-compressor system, but neither the compressors nor the steam turbines are complete upon importation. Because individual components do not constitute an incomplete EPGTS unless they are used to fulfill an EPGTS contract, the petitioner notes that if the Japanese producer is supplying only individual components to be included in a system manufactured by a U.S. or third country supplier, the system will not be of Japanese origin and the components will not be covered.

According to the petitioner, the purpose for establishing a two-part test is to avoid, whenever possible, the complexity of a cost-based test and to remove any incentive for a foreign manufacturer to circumvent the ''essence'' test by shipping its compressors or steam turbines in incomplete form. The petitioner notes further that its proposed two-prong approach places no undue burden on the importer to determine whether the components imported from Japan are essential components or account for 50 percent of the cost of manufacture of a system, and prevents the suspension of liquidation of non-scope merchandise unless the foreign producer and U.S. importer do not comply in a timely manner with the Department's certification requirements.

The petitioner also requests that the Department further define the calculation methodology to be applied in the performance of the cost-based test, asserting that all design and engineering costs, overhead, testing costs, installation costs, and other manufacturing expenses incurred in Japan with respect to the complete EPGTS (including the costs of any production assists provided by the Japanese manufacturer to U.S. or third country subcontractors) should be included in the Japan content portion of the cost-based test. Accordingly, the petitioner requests that the certification provided to Customs in the case of merchandise alleged to be outside the scope of any order in this case be amended to include such costs explicitly.

Lastly, while the petitioner acknowledges that the Department's industry support determination was based on the producers of complete turbo-compressor systems, the petitioner asserts that the producers of complete EPGTS also produce incomplete EPGTS, and there is no evidence that there are producers of incomplete EPGTS, including compressors and turbines, in the United States other than those that the Department considered in its industry support determination. The petitioner also claims that complete and incomplete systems constitute a single like product, and hence, support of only producers of complete systems in the Department's industry support analysis is adequate. The petitioner further maintains that it is irrelevant whether supporters of the petition produced incomplete EPGTS, so long as they accounted for an adequate percentage of production of the domestic like product, which includes both complete and incomplete systems.

MHI argues that only complete systems are covered by the scope of this investigation because only complete systems were subject to the Department's industry support determination made prior to initiation, and that determination cannot be revisited. MHI asserts that the Department identified the domestic like product to be a complete system and based its determination of industry support on the conclusion that the petition was filed on behalf of the domestic industry. To the extent that the Department finds that its industry support determination covered something other than complete systems, MHI argues that, at a minimum, the Department should not define a subject incomplete EPGTS in terms of individual components, as suggested by the petitioner's proposed ''essential components'' test, because this would unlawfully expand the scope of the proceeding to include merchandise (*i.e.*, compressors and steam turbines) for which the Department did not make a determination of industry support.

Further, MHI objects to the Department's use of a cost-based approach to define ''incomplete EPGTS'' for which liquidation would be suspended and, instead, proposes the adoption of a ''merchandise-based'' approach whereby an incomplete system would be defined as two or more system components, at least one of which is a compressor and all of which are made in Japan. In MHI's opinion, the use of a cost-based approach is inappropriate and unworkable because: (1) It does not ensure that the order will cover only the merchandise produced by a domestic industry for which the Department made its determination of industry support; (2) it fails to identify subject merchandise in terms of facts known at the time of importation; (3) there is uncertainty with respect to the final cost of manufacture and the types of expenses that should be included when calculating the final cost of manufacture of the complete system; and (4) it is unlikely that the Japanese producer will have available at the time of importation enough information about the final cost of the system to allow it to complete the requisite certification, particularly if the Japanese producer is providing only a portion of a system which will be assembled or completed with non-subject equipment produced by unaffiliated non-Japanese manufacturers. In addition, MHI contends that even though a cash deposit would not be required for EPGTS entries accompanied by a certification that they constitute less than 50 percent of the cost of manufacture of the complete system, the Department unlawfully has directed Customs to suspend liquidation of allegedly non-subject merchandise pending its determination of the final cost of the system. According to MHI, duties may be imposed only on subject merchandise, and the Department does not avoid this issue by waiving the cash deposit requirement for merchandise certified to be outside the scope of the order.

[1] According to the petitioner, the compressor and turbine together account for 80–90 percent of the total system cost.

For these reasons, MHI asserts that the Department must adopt the above-described ''merchandise-based'' definition of a subject incomplete EPGTS for which liquidation would be suspended. In MHI's view, its approach is more consistent with the Department's methodology in past cases where essence criteria were used to define incomplete merchandise covered by the scope. Also, MHI maintains that a merchandise-based definition eliminates the problems inherent in both the Department's and the petitioner's suggested definition of an ''incomplete'' system. Under MHI's definition, single components would fall outside the scope, eliminating the possibility that the scope could violate the Department's industry support determination. Further, it would allow foreign manufacturers, U.S. importers, the Department, and the Customs Service to determine at the time of importation whether an entry is subject to the order and, thus, remove unnecessary administrative burdens on all parties.

In addition, MHI contends that the petitioner's concern about circumvention (which, in MHI's opinion, is not a valid concern in this case) does not justify the cost-based test which would unlawfully expand the scope of the investigation. Citing various past cases, MHI points out that the Department has consistently rejected scope expansions based on speculative allegations of circumvention and relied on the circumvention provisions of the antidumping law to provide relief even for petitioners who have direct evidence of circumvention.

DOC Position

We disagree with both the petitioner and respondent. In our Preliminary Determination, we explained that because of their large physical size, EPGTS are typically imported into the United States in either partially assembled or disassembled form, perhaps in multiple shipments over an extended period of time, and may require the addition and integration of non-subject parts prior to, or during, the installation process in the United States. Consequently, we stated that we were concerned that because of the great number of parts involved, there is the potential that the Customs Service may inadvertently liquidate entries of subject merchandise based on its lack of completeness at the time of importation. Therefore, for suspension of liquidation purposes, we preliminarily decided to use the cost-based test described above to determine what constitutes a subject incomplete EPGTS. We noted that this approach has been used in past cases with similar fact patterns. (See, e.g., LNPPs from Germany and Japan, 61 FR 38166, 38139, July 23, 1996).

In order to determine whether the imported merchandise constitutes a subject incomplete EPGTS through the performance of the cost-based test, we stated in our preliminary determination that we would have to wait until all of the parts comprising an EPGTS are imported and the complete EPGTS is produced. Thus, we suspended liquidation of all importations of EPGTS parts from Japan at the preliminary cash deposit/bond rate unless a certification was provided by the foreign manufacturer/exporter that the parts to be imported, when taken altogether, constitute less than 50 percent of the cost of manufacture of the complete EPGTS of which they are a part.

For entries accompanied by the appropriate certification, we directed the Customs Service to suspend liquidation at a zero deposit/bond rate. We also required parties to provide to the Department in advance of the entry with a copy of this certification along with the following information which would be subject to the Department's review and verification at a later date, if necessary: (1) The number of the sales contract pursuant to which the parts are imported, (2) a description of the parts included in the entry, (3) the actual cost of the imported parts, (4) the most recent cost estimate for the complete EPGTS and historical variance between estimated and actual costs, (5) a schedule of parts shipments to be made pursuant to the particular EPGTS contract, if more than one shipment is relevant, and (6) a schedule of EPGTS production completion in the United States. (See Preliminary Determination, 61 FR at 65018; and January 23, 1997, Letter from Louis Apple to James Cannon *et al.* re: Clarification of Preliminary Suspension of Liquidation Instructions * * * (''January 23, 1997, Suspension of Liquidation Instructions Clarification Letter.'')

The scope of this investigation unambiguously covers EPGTS, whether assembled or unassembled, and whether complete or incomplete. As stated above, because of their large physical size, EPGTS are typically imported into the United States in either partially assembled or disassembled form, perhaps in multiple shipments over an extended period of time, and may require the addition and integration of non-subject parts prior to, or during, the installation process in the United States. Given this fact, the Department, in its pre-initiation analysis, included ''incomplete'' EPGTS within the scope of the investigation to avoid creating loopholes for enforcement (including those arising from differing degrees of completeness of the imported merchandise) should an order result from this investigation. (See October 8, 1996, Memorandum to Jeffrey Bialos, Principal Deputy Assistant Secretary from The Team Re: Scope.) We were, and still are, concerned that because of the great number of parts involved, the Customs Service may inadvertently liquidate entries of subject merchandise based on a lack of completeness at the time of importation. The inclusion of the term ''incomplete'' in the scope, however, raised the issue of how to define the minimum level of incompleteness on which the Customs Service should suspend liquidation in order to maintain the effectiveness of any order that may be issued. For purposes of the preliminary determination, we defined this minimum level to be 50 percent of the cost of manufacture of the complete EPGTS. This approach has been used in past cases with similarly complex merchandise and importation processes (see LNPPs from Germany and Japan).

Further, contrary to MHI's suggestions, we note that from the Department's standpoint, it is not, and never has been, the individual components or subcomponents of the system per se that are at issue, but the combination of these components or subcomponents (*i.e.*, the extent of an ''incomplete system'') imported pursuant to a contract for a complete EPGTS in the United States that would constitute covered merchandise whether by cost, essence, or some other approach (*i.e.*, the sum of importations pursuant to a contract for a highly engineered and integrated turbo-compressor system, not the individual importations of the components or subcomponents, themselves.)

In formulating our decision for purposes of the final determination, we made the following observations. First, the intent of the petition was to include incomplete EPGTS. (*See, e.g.*, petition at 6 * * *'' [T]his petition encompasses turbo-compressor systems, * * * whether assembled or unassembled and whether complete or incomplete at the time of entry'' (emphasis added).) In this regard, we note our authority to clarify the scope of an investigation, in general, and in a manner which reflects the intent of the petition, in particular. (See, e.g., LNPPs from Germany 61 FR at 38169 (July 23, 1996); *Minebea Co., Ltd.* v. *United States*, 782 F. Supp. 117, 120 (CIT 1992) (the Department uses its ''broad discretion to define and clarify the scope of an antidumping

investigation in a manner which reflects the intent of the petition'').)

Second, incomplete EPGTS have been covered by the scope of this investigation since our initiation. (See Initiation at 28165 * * * ''The scope of this investigation includes incomplete and unassembled systems.''); and Preliminary Determination at 65013, 65015).)

Third, our industry support determination did not preclude us from considering less than complete systems in the scope of the investigation. Our industry support determination was based on the domestic like product which was defined as complete systems, including individual components/subcomponents and combinations of components/subcomponents to the extent they are designed and dedicated to a specific system typically designed to contract specifications. (See Initiation, 61 FR at 28164.) This follows from the fact that specific components per se are not covered by the scope of the investigation unless they are included in the contract for the initial system designed and dedicated for use in the complete system. Therefore, a showing of industry support by U.S. manufacturers of components or subcomponents who do not manufacture or sell complete systems was not necessary. We note further that our definition of like product with respect to our industry support determination is consistent with the International Trade Commission's definition of like product in its preliminary injury determination.[2] (See USITC Publication 2976 (July 1996) at 8–10.)

In order to determine the level of industry support for the petition, the Department contacted five U.S. companies identified by the petitioner as producers of EPGTS, including Dresser-Rand Company, and requested that they provide production data on the number of compressor casings, (*i.e.*, compressor shells which, by definition, are not complete systems), and the number and value of complete systems produced. Based on the information we received from these producers and that contained in the petition, we concluded that the producers who supported the petition accounted for more than 50 percent of the total production of the domestic like product. (See Initiation; May 28, 1996, Memorandum from Mary Jenkins and Howard Smith to The File Re: Industry Support; and May 28, 1997, Initiation Checklist.) We note that there is no evidence on the record indicating that there were U.S. producers of the like product other than the five producers contacted by the Department that should have been considered in its pre-initiation industry support analysis.

Fourth, while both the petitioner and MHI seem to agree that as a practical matter, an incomplete EPGTS must include a compressor (as it is the most critical component which typically accounts for over 50 percent of the manufacturing cost of a complete EPGTS) we do not believe that this 50 percent threshold is reached in a situation where only a compressor is imported pursuant to a contract for a multi-train EPGTS system which includes multiple compressors, turbines, and other components.

Further, there are other difficulties inherent in accepting either the petitioner's or MHI's approach. Because of the large number of parts involved, the disassembly inherent in the importation process, and the potential for multiple shipments, an ''essence'' approach is difficult to administer by Customs without a comprehensive list of parts (identified at the most minimal level of disassembly realistically possible) comprising the essential complete component(s), which has not been provided by the petitioner or respondent. While the petitioner defines certain parts of a compressor and turbine in its attempt to define ''incomplete compressors and turbines'' covered by the scope in the petition,[3] the parts identified do not represent such a comprehensive list. Also, respondent's approach does not resolve the question of whether the critical component(s) would constitute subject merchandise if it were incomplete in some minor way.

In addition, we note that MHI's definition of ''incomplete,'' which must include at least a complete compressor, restricts the scope much further than the petition, the Department's initiation, and preliminary determination. It would also allow an exporter to circumvent any order resulting from this investigation, simply by subcontracting the manufacture of the system compressor to another country.

In sum, we believe that the approach pursued in the preliminary determination is reasonable, predictable, administrable, and consistent with our industry support determination. Under this approach, an imported incomplete system is covered by the scope of this investigation to the extent that its parts (imported pursuant to a contract for an EPGTS) comprise a certain minimum percentage of the cost of manufacture of the complete system. In response to MHI's argument that we would not know at the time of importation whether the imported incomplete merchandise was subject to duty, we acknowledge that in order to perform the cost-based test, we will have to wait until all of the parts/components comprising the system are imported and the complete system is produced, and that we will suspend liquidation on all imported EPGTS parts in the meantime. However, in the case of multiple shipments of components and component parts, the necessity for all shipments to be completed before the Department could determine whether or not the imported merchandise was subject to any order that may be issued in this case would also be relevant to the essence approach, in that the identification of the critical component(s) could only take place after all importations have been made.

Further, by suspending liquidation at a zero cash deposit rate if the Japanese producer/exporter provides the appropriate certification and the requisite data substantiating the certification that the cost of the imported parts satisfies the 50 percent test, we believe that the importer would be relieved of the financial burden of posting cash deposits which would otherwise be required and not reimbursed until such time as the Department was able to make a determination as to whether the imported parts constituted subject merchandise (*i.e.*, after the EPGTS is completed in the United States). At the same time, this approach provides sufficient safeguards to protect U.S. firms from potentially dumped subject merchandise.

With respect to the respondent's concern that the Japanese producer may not know the final costs of the system so as to be able to certify accurately that the cost of the parts comprising the incomplete system is less than 50 percent of the cost of manufacture of the

[2] The ITC found preliminarily that complete and incomplete systems are part of the same domestic like product based on application of its semi-finished products analysis. The ITC stated that: (1) there is no independent use for an incomplete system other than to be assembled into a specific and complete system and, therefore, an incomplete system is dedicated for use in that EPGTS system; (2) incomplete and complete systems share many of the same characteristics and functions; and (3) there does not appear to be an established price for incomplete systems because complete systems are manufactured pursuant to a contract; thus, there are no independent sales or markets). *See* USITC Publication 2976 (July 1996) at 8–10.

[3] The petitioner defines incomplete compressors and turbines for purposes of the petition as follows: ''An incomplete compressor * * * consists of either half of the casing * * * or the casing and end-caps * * * or * * * the rotor, whether or not mounted * * *.'' ''An ''incomplete'' steam turbine * * * includes (1) either half of the turbine casing, whether or not mounted on a platform; or (2) the turbine rotor, whether or not mounted in the casing.'' *See* petition at 7 and 9.

complete system if he is providing only a portion of the complete system, we note that if an affiliate is supplying the additional parts to complete the system pursuant to a contract in the United States, we would naturally require that the Japanese producer/exporter provide, with the assistance of its affiliate, the actual final costs of the complete system. If an unaffiliated party is involved in the completion of the system in the United States, we would require that the Japanese producer/exporter include in its cost calculation the estimated or actual price for the parts supplied by the unaffiliated party. If the Japanese producer were supplying only individual components outside of a contract for a complete system (*i.e.*, not ''pursuant to a contract for a complete EPGTS''), then its merchandise would *not* be covered by the scope of the investigation and the issue is moot.

Therefore, for purposes of the final determination, we continue to define ''incomplete'' EPGTS covered by the scope as we did in our preliminary determination. Further, we appreciate the parties' concerns over the methodology to be used to calculate the cost of manufacture of the incomplete system in order to administer the cost-based test. Consequently, we have determined that it is appropriate to calculate this cost of manufacture inclusive of all costs incurred by the producer in Japan, including design and engineering, materials, overhead, quality control testing, and other manufacturing costs such as engineering assists provided to U.S. or third country subcontractors. In addition, we intend to issue suspension of liquidation instructions pursuant to the final determination similar to those issued in connection with the preliminary determination with some modification. Specifically, we will modify these instructions, as follows: (1) To suspend liquidation of EPGTS parts at a zero cash deposit/bond rate if the interested party (*i.e.*, the Japanese producer/exporter or U.S. importer) provides the requisite data substantiating its claim that the cost of the imported EPGTS parts satisfies the 50 percent test within the context of a scope inquiry proceeding; (2) to require that the requisite data substantiating the interested party's claim, followed by an appropriate certification, be provided to the Department instead of to the Customs Service; (3) to include the cost calculation methodology described above; (4) to require the provision of certain additional information; and (5) to require that if the foreign producer/exporter finds that the costs reported to the Department were understated and that the cost of manufacture of the imported elements will be over 50 percent of the cost of manufacture of the EPGTS of which they are a part, that the party inform the Department immediately. *See* ''Suspension of Liquidation'' section of this notice for details.

2. EPGTS Used in the Production of Refinery Products

MHI argues that the Department unlawfully expanded the scope of the investigation after initiation to include EPGTS used in the production of refinery and other petrochemical (downstream) products because this expansion included products outside the Department's determination of industry support which cannot be revisited after the initiation phase of an investigation. MHI contends that the record strongly suggests that the Department's industry support determination was made only with respect to the production of EPGTS used in the production of five specific chemicals listed in the petition: ethylene, propylene, ammonia, urea or methanol.

The petitioner contends that the Department properly clarified the scope of the investigation to include EPGTS for use in the production of refinery and other petrochemical products. The petitioner asserts that the petition was intended to cover all EPGTS, not only the five end uses specified in the notice of initiation. The petitioner also asserts that the Department's scope clarification does not conflict with the Department's industry support determination because the producers consulted by the Department in its industry support determination constitute the universe of EPGTS suppliers, including EPGTS used in the production of refinery and other petrochemical products.

DOC Position

We disagree with MHI for the reasons already outlined in our October 8, 1996, decision memorandum on this topic. In that memorandum, we stated that the petition was intended to cover EPGTS used to produce refinery products, as well as the other end uses already specified in the notice of initiation. It was never the Department's intention to revise the scope to exclude merchandise which the petition intended to cover. Rather, in an attempt to draft a clear and concise scope definition, the Department altered the original scope language in the petition, inadvertently limiting the end uses of the subject merchandise beyond what was intended by the petition. We noted that the Department has the discretion to clarify the scope at any time during the investigation in general, and in a manner which reflects the intent of the petition, in particular. (See, e.g., LNPPs from Germany, 61 FR at 38169; and Minebea Co., Ltd. v. United States.)

Accordingly, we clarified the scope to include EPGTS used in the production of refinery products. We noted that this clarification did not conflict with our industry support determination prior to the initiation of this investigation. Our industry support determination related to the production of EPGTS systems used generally in the petrochemical and fertilizer industries, without distinction based on the type of application within these industries (*e.g.*, refinery, ethylene, etc.). (*See* October 8, 1996 Memorandum to Jeffrey Bialos from the Team Re: Scope.) Moreover, there is no evidence on the record to indicate that there were U.S. producers of EPGTS used in the manufacture of refinery products other than those contacted by the Department in its industry support determination that should have been considered in the Department's analysis. As stated in our May 28, 1996 Initiation Checklist, ''* * * we contacted all known producers and asked them to provide production data * * *.'' (See also Initiation, 61 FR at 28164.)

Therefore, for purposes of the final determination, we find no reason to depart from our original decision to clarify the scope of the investigation to include EPGTS used in the production of refinery products.

Comment 2: Agency vs. Reseller.

Throughout this investigation, the petitioner and MHI have argued over whether EP or CEP methodology should be used to establish the basis for the U.S. starting price. In this case, MHI sold subject merchandise to MC (a Japanese trading company) which, in turn, sold merchandise to the U.S. customer through MIC (MC's U.S. subsidiary). MHI reported its sale to MC as an EP transaction on the grounds that MC is allegedly an unaffiliated reseller and, at the time of sale, MHI knew that the merchandise was intended for export to the United States (*i.e.*, the ''trading company'' rule). In our preliminary determination in this investigation, we determined that MC and MIC were acting as MHI's selling agents, not as independent resellers, in the transaction under investigation. This determination was made based on our preliminary examination of the sales documentation provided by MHI, which showed that MHI played an integral role in the U.S. sale. Accordingly, we determined preliminarily that the

proper basis for the fair value comparison was the sale by MHI, through MC/MIC, to the U.S. customer. Because MHI made this transaction through a U.S. agent which was acting on its behalf, we preliminarily determined that the use of CEP, rather than EP, was appropriate. (See Preliminary Determination, 61 FR at 65013.)

The petitioner, MHI, and MC submitted extensive comments in their case and rebuttal briefs on this topic for purposes of the final determination. These comments and the Department's position are summarized below. For a complete discussion and analysis, see April 24, 1997, Memorandum to Jeffrey Bialos, Principal Deputy Assistant Secretary for Import Administration, from The Team Re: Whether MC and its U.S. Subsidiary, MIC, Acted as Agents of MHI or Independent Resellers in the U.S. Sale Made to (the U.S. Customer), and the Consequences of this Finding in Determining the Appropriate Basis for U.S. Price (''April 24, 1997, Agency Decision Memorandum'').

The petitioner argues that the Department should continue to treat the U.S. sale as a CEP sale in the final determination on the grounds that MC/MIC and MHI are ''affiliated persons'' under section 771(33)(G) of the Act because in the negotiation and sale of MHI's EPGTS to the U.S. customer, MC and MIC acted as sales agents.[4] The petitioner states that the record evidence, augmented by verification findings, establishes that MHI was integrally involved throughout the sales negotiation process and that MC/MIC acted as agents for the producer, not as independent purchasers/resellers. The petitioner points to various facts on the record which reveal that MHI effectively controlled the price and all other material terms of sale which were ultimately agreed upon with the U.S. customer such as: (1) There were both direct and indirect communications between MHI and the U.S. customer throughout the transaction; (2) there were no significant differences between MIC's bid proposals to the U.S. customer for the subject merchandise which were ultimately accepted by the U.S. customer and those prepared by MHI for MC/MIC; (3) inquiries from the U.S. customer on the cost impact of proposed specification changes, both in the pre-and post-sale period, were relayed by MIC directly to MHI and MHI issued cost impact reports to the U.S. customer via MIC, except in one case in which MHI dealt directly with the customer; and (4) MC and MIC do not possess the necessary technical capacity or expertise regarding cost, price, production/delivery schedules and post-sale servicing to negotiate the U.S. sale.

Further, the petitioner asserts that both under pre- and post-URAA antidumping law and practice, MC and MIC would be considered affiliated parties as MHI's agents, and thus their sales would warrant CEP treatment. In addition, the petitioner notes that the ''trading company'' rule does not apply to transactions between affiliated parties or between agents and principals, such as the transaction at issue in this case.

MHI argues that the Department's decision to treat MHI's U.S. sale as a CEP sale in the preliminary determination based on its finding that MC/MIC acted as MHI's U.S. selling agents, contradicts the statute, Department practice, and the facts of this investigation. MHI contends that the Department's preliminary analysis was flawed for several reasons. First, MHI maintains that MHI's/MC's relationship fails to meet the criteria for establishing an agency relationship and the record establishes that MC was a purchaser of MHI's merchandise. While MHI admits that some of the facts on the record may show that MHI and MC acted cooperatively in making the U.S. sale, MHI asserts that this cooperation does not diminish the fact that MHI and MC were still independent companies, each seeking to maximize its own profit, and does not provide a basis for determining that an agency relationship existed. Citing Restatement (Second) of Agency section 12–14 (1957) (''Restatement''), MHI asserts that a principal/agency relationship is characterized by three criteria, all of which must be met in order for an agency relationship to exist, but none of which are met in this case: (1) The agent must have authority to alter the principal's legal relationship to third parties; (2) the agent must have a fiduciary duty to the principal or must act primarily for the benefit of the principal; and (3) the principal must have the right to control the conduct of the agent with respect to matters entrusted to him. Among other things, MHI points out that the pre- and post-contract correspondence reviewed by the Department confirms that, especially as to commercial matters, the U.S. customer dealt almost exclusively with MIC; no documents on the record establish that MC bound or was able to bind MHI to the U.S. customer or to any other third party. MHI points to other facts on the record to demonstrate that MHI and MC acted as independent companies, each operating on its own behalf and not controlling the other.

Further, MHI explains that if the factors enumerated in section 14J of the Restatement (which assist in distinguishing an agent from a reseller) are applied to the facts of this case, it reveals that MC was a purchaser and reseller of MHI's merchandise. MHI points out: (1) The sales documentation on the record demonstrates that only MIC had direct communication with the customer on commercial matters prior to and after sale, and MHI was involved in post-sale logistical and technical negotiations with the U.S. customer; (2) the sales documentation submitted by MHI established that title and risk of loss was transferred from MHI to MC; (3) MC's scope of supply to the U.S. customer differed from MHI's scope of supply to MC; (4) MC had the right to retain the difference between what it paid to MHI and the revenue it received from the U.S. customer; (5) MC had the right to deal with the goods of persons other than MHI, as evidenced by examples of head-to-head competition between the two companies in sales of subject and non-subject merchandise during the POI; and (6) while MHI's identity was disclosed to the U.S. customer because of the custom-built nature of the goods and the fact that the manufacturers are specified in the customer's request for quotation, MIC dealt directly with the U.S. customer in its own name, and not on MHI's behalf.

Second, MHI contends that the rejection of prices between unaffiliated parties for purposes of calculating CEP contradicts the language and the logic of the Act. MHI asserts that the Department has no legal authority to reject the sale price between two unaffiliated parties and to resort to CEP methodology, even if it finds an agency relationship based on cooperative marketing. MHI explains that under pre-URAA law (section 771(13) of the Act), the Department was permitted to collapse a principal and its agent for purposes of determining U.S. price. According to MHI, the URAA (section 771(33) of the Act, as explained in the Statement of Administrative Action (SAA) at 153) repealed this provision and replaced it with the requirement that prices may be rejected only between affiliated parties. MHI argues that in order for the Department to make a determination of affiliation, it must find that ''control,'' as defined under section 771(33) of the Act, exists outside

[4] The petitioner also argues that MHI and MC/MIC are otherwise affiliated within the meaning of section 771(33)(F) of the Act. That is, even assuming MC and MIC did not act as agents for MHI, the petitioner maintains that the overall corporate relationship between the companies, including equity ownership, common directors, and numerous other ties establish that MC and MIC were, in effect, controlled by MHI.

and independent of the transaction under investigation. According to MHI, ''control'' must be interpreted as the ability to force another party to act against its own economic interests.

Third, MHI asserts that the Department's departure in its preliminary determination from the ''trading company'' rule without explanation was improper. MHI states that under normal practice, the Department will treat a respondent's sale to a trading company as a U.S. sale if the foreign manufacturer knows at the time of sale that the merchandise is destined for the United States. While MHI reported its U.S. sale in line with this settled practice, MHI asserts that the Department rejected it without explanation.

Fourth, MHI argues that the U.S. sale meets the requirements of an EP sale in accordance with section 772(a) of the Act and the Department's proposed regulations (19 CFR 351.401). MHI contends that its U.S. sale is an EP sale because: (1) MHI sold the merchandise to MC prior to exportation; no inventorying was required or performed; and (2) MHI's U.S. economic activity for this sale was *de minimis* and its U.S. affiliate, MHIA, at most functioned as a communications link with MHI's head office and Hiroshima plant on technical issues. Because MHI's U.S. sale has none of the characteristics of a CEP sale, MHI concludes that it should be treated as an EP sale.

Finally, MHI maintains that the existence of an agency relationship does not convert a sale to CEP that would otherwise be classified as an EP transaction. MHI argues that nothing in the Act or the Department's proposed regulations support the conclusion that the involvement of an unaffiliated party (even if characterized as an agent) itself, warrants CEP methodology. MHI points out that considering a sale between a principal and end user through an unaffiliated selling agent as a CEP transaction ignores the purpose for distinguishing EP and CEP transactions and results in distortive antidumping analysis. MHI explains that the adjustments to CEP which are not relevant to EP exist to eliminate distortions caused by selling functions and associated profits accruing to the manufacturer by reason of sales activities in the United States. In this case, however, MHI asserts that no U.S. activities or profits accrue to the manufacturer where it does not operate in the United States. Since the sale between the manufacturer and the end user is an arm's-length border price, albeit negotiated through the agent, no purpose is served by treating the transaction as CEP merely based on the agent's involvement. Nothing in the nature of the agency relationship suggests that the agent's commission from the manufacturer would not be at arm's length. MHI states further that under CEP analysis, the agent's commission would not be treated as a circumstance of sale adjustment, but as affiliated party activity that must be deducted, with profit, from CEP to ''construct'' an EP.

According to MHI, if the Department utilizes CEP methodology for this sale, in effect, it would mandate that commissions *per se* cannot be made at arm's length and would fail to recognize a fundamental distinction between affiliation and agency, namely that agents may be either affiliated or unaffiliated with their principals. According to MHI, this distinction is reflected in the different definitions of control that exist in common law with respect to agents and the antidumping statute's treatment of affiliation. MHI explains that in common law, a principal's ''control'' over an agent focuses on manifestations of consent between the parties; thus, the agent remains free to engage in arm's-length negotiations with the principal over its compensation and other terms of the agency. MHI explains further that, in contrast, the scope of ''control'' as it relates to affiliated parties under the Act extends to the very terms of the parties' relationship and whether or not the controlling party can induce the controlled party to accept economic terms that the controlled party would not otherwise accept. MHI points out that in this latter context the Act requires the Department to disregard the price (or commission) established between the parties because that price is assumed not to be at arm's length. Where, however, the principal has no control over the terms of agency the agent accepts, no reason exists for the Department to disregard that commission. Thus, without other indicia of affiliation, MHI contends that applying a CEP methodology to a principal/agent relationship, thereby equating agency with affiliation, violates the intent of the EP/CEP distinction and distorts the antidumping analysis. Accordingly, MHI argues that a sale by a principal through an unaffiliated selling agent to an unaffiliated U.S. end user should be treated as an arm's-length EP transaction where the commission accrued by the agent is accounted for as a circumstance of sales adjustment.

Like MHI, MC contends that MC and MIC acted as resellers and not as sales agents for MHI in the U.S. transaction at issue because: (1) The required characteristics of an agency relationship are not fulfilled, and (2) the parties' commercial behavior, sales documentation and internal accounting records are consistent with a purchase/resale relationship. According to MC, the price between MHI and MC is the relevant U.S. price (pursuant to the ''trading company'' rule) because MHI knew that the ultimate destination of the merchandise was the United States and MHI and MC are unaffiliated parties.

Specifically, MC asserts that under U.S. law, an agency relationship has several required characteristics which are not present in the transaction under investigation. For example, it cannot exist without an explicit agreement from the principal authorizing the agent to act on his behalf in a specified context, and explicit consent by the agent to act on the principal's behalf and only at the principal's direction; and the agent does not act independently, pursuing his own economic interests, but rather is acting exclusively to promote the interests of the principal. According to MC, in a typical sales agent relationship, the agent's job is to locate potential customers for the principal. The principal makes all commercial decisions and takes whatever profits accrued from the transaction. The agent is compensated based on the principal/agent agreement. By contrast, resellers, while they must cooperate with the seller to conduct business, they are independent in their actions, take on more initiative and responsibility, and bear more risk in the transaction than an agent does. Specifically, resellers (1) Take title to the goods, (2) carry the risk of loss, and (3) are compensated based on the spread or mark-up that they can achieve independently on a resale. Based on the behavior of the parties in the transaction and the documentation on the record, MC maintains that MC and MIC acted as independent resellers in the U.S. sale at issue. MC points out that if MC and MIC had been acting as sales agents in the transaction at issue, MHI would have: (1) Asked MIC or MC to solicit possible customers for MHI; (2) negotiated all commercial terms and entered into the contract with the customer; and (3) received the profit from the transaction, while MC/MIC would have merely received a commission pursuant to the agency agreement. According to MC, the record demonstrates that the sale at issue did not occur in this manner.

Moreover, MC states that the legal documentation and internal accounting records of the transaction at issue likewise confirm that MC/MIC acted as

independent purchasers and resellers. MC asserts that the legal documentation shows that MC and MIC each took title to the MHI turbo-compressor equipment, bore the risk of loss and were fully responsible for the further completion of the sale at issue. MC also asserts that MC's and MIC's internal accounting records reflect purchase and sale transactions, show that the price received from the resale customer is higher than the price paid by MC/MIC to its supplier, and do not report any commission.

Finally, like MHI, MC disagrees with the petitioner's argument that the alleged agency relationship between MHI and MC is grounds for a finding of affiliation. MC maintains that by its nature, a transaction-specific agency relationship could not rise to the level of permanence, significance, and control necessary to support a finding of affiliation that is suggested by the Department's proposed regulations.

DOC Position

We agree with the petitioner. We determine that a principal and agent in a sales transaction, even if unrelated in a broader corporate sense, are ''affiliated'' within the meaning of section 771(33) of the Act. For the purpose of determining U.S. price, the pre-URAA law (section 771(13)) included an explicit reference to principal-agent relationships in the definition of ''exporter'' and, in practice, sales agents and their principals were deemed affiliated for the purpose of calculating U.S. price. (See, e.g., Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol from South Africa, 60 FR 22550 (May 8, 1995) (''Furfuryl Alcohol from South Africa''); Electrolytic Manganese Dioxide from Japan: Final Results of Antidumping Administrative Review, 58 FR 28551 (May 14, 1993) (''Electrolytic Manganese Dioxide from Japan'').) In the URAA, Congress repealed this provision and replaced it with the new definition of ''affiliated persons'' in section 771(33) of the Act. While there is no explicit reference to agents in new section 771(33), we nevertheless interpret the new definition to include agents for several reasons. First, the legislative history is clear that Congress intended to expand, not limit, the definition of ''affiliated persons'' beyond that which existed under the pre-URAA law. Second, the new law defines an affiliated party to include ''any person who controls any other person'' or ''any person which is legally or operationally in a position to exercise restraint or direction over another person.'' Thus, this definition covers principal-agent relationships because, by definition, a principal controls its agent. The agent may act only to the extent its actions are consistent with the authority granted by the principal. Thus, control of the principal over its agent is the hallmark of an agency relationship. (See Restatement, section 14.)

While we agree that an agent may negotiate at arm's length the terms of an agency agreement, we disagree with MHI that this leads to the conclusion that there is no control within the meaning of section 771(33). With respect to activities undertaken pursuant to the agency (*e.g.*, the sale of merchandise), the principal unquestionably controls the agent. Further, the very narrow definition of control proffered by MHI (*i.e.*, the ability to force another party to act against its own economic interests) is inconsistent with the Act. The Act defines control as the ability, legally or operationally, to direct or restrain the acts of another. It is irrelevant whether that control is exercised to the benefit or detriment of the controlled party.

In light of this interpretation, we believe that, contrary to the respondents' assertions, the ''trading company'' rule does not apply in cases where, as here, an agency relationship exists. This rule provides that when a foreign producer sells subject merchandise to an *unaffiliated* trading company in the home market with knowledge that the merchandise will be sold for exportation to the United States, the producer's price to the unaffiliated trading company (and thus EP) is the appropriate basis for U.S. price. (See Forged Steel Crankshafts from Japan, 52 FR 36984, October 2, 1987.) In a case where the trading company acts as the foreign producer's selling agent, however, the foreign producer and trading company would be considered *affiliated* by virtue of their principal-agent relationship. The trading company rule has been rejected in past cases with similar factual patterns where an agency relationship exists between the producer and trading company. (See Color Television Receivers, Except for Video Monitors, from Taiwan, 53 FR 49706, 49711, December 9, 1988.)

Based on our analysis of the facts of record, we find that MC/MIC were acting as agents on MHI's behalf in the U.S. sale at issue. The analysis of whether a relationship constitutes an agency is case-specific and can be quite complex; there is no bright line test. For example, although agency relationships are frequently established by a written contract, this is not essential. Under general principles of agency, the focus of the analysis is whether it is agreed that the agent is to act primarily for the benefit of the principal, not for itself. (*See* Restatement, sections 1 cmt.b. and 26 cmt.a. *See also* sections 14J and 14K.)

The Department has examined allegations of an agency relationship in only a few cases and has focused on a range of criteria including: (1) The foreign producer's role in negotiating price and other terms of sale; (2) the extent of the foreign producer's interaction with the U.S. customer; (3) whether the agent/reseller maintains inventory; (4) whether the agent/reseller takes title to the merchandise and bears the risk of loss; and (5) whether the agent/reseller further processes or otherwise adds value to the merchandise. *See, e.g.*, Furfuryl Alcohol from South Africa, 60 FR 22550; Electrolytic Manganese Dioxide from Japan, 58 FR 28551.

In this case, based on an examination of these and other pertinent criteria outlined in the April 24, 1997, Agency Decision Memorandum, we found that an agency relationship existed between MHI and MC/MIC in the sales transaction at issue. In particular, we note that the record evidence demonstrates that MHI effectively controlled the price, among other terms of sale, in the transaction with the U.S. customer. The evidence also shows that MHI conducted some marketing of its product to the U.S. customer in the pre-sale period, and that its identity was disclosed throughout the sales documentation governing the sale in a manner indicative of a principal-agent relationship. In addition, MC/MIC did not maintain inventory of, or further process, the subject merchandise. Although MC/MIC took title to the merchandise and bore the risk of loss, and that most of MHI's contact with the customer during the pre-sale period was indirect and limited to technical matters, we believe that based on the totality of the circumstances, that MC/MIC was under MHI's control in the transaction at issue and, therefore, an agency relationship existed.

Therefore, we determine that MHI and MC/MIC are ''affiliated'' within the meaning of section 771(33) of the Act by virtue of their principal-agent relationship, not on the basis of the broader corporate relationship between the parties. Having determined that the parties are affiliated, we then considered whether the EP or CEP methodology was appropriate. Based on the extensive role of MC/MIC in the U.S. sales process, we have used CEP methodology in the final determination.

Comment 3: Corporate Affiliation under Sections 771(33)(F) and (G) of the Act.

The petitioner contends that MHI and MC/MIC are affiliated within the meaning of section 771(33)(F) of the Act. The petitioner contends further that because of their interlocking corporate relationship, MHI and MC are legally or operationally in a position to exercise restraint or direction over the other, and that the record contains sufficient evidence of common control between the two companies. The petitioner urges the Department to evaluate the indicia of control (*i.e.*, corporate grouping, joint venture agreement, debt financing, close-supply relationship) described in the SAA cumulatively within the context of control by a corporate group.

Further, the petitioner believes, contrary to respondents, that ''control'' within the meaning of section 771(33) of the Act, does not require that one party has the power to coerce another to act against its own interest and that this power extends beyond a particular transaction. The petitioner states that no statutory principle embodies this requirement. The petitioner believes that ''control'' within a particular transaction is particularly important in cases, such as the instant one, where there are few individual transactions and a producer may have strong influence over the ultimate purchaser by virtue of longstanding relationships.

MHI maintains that MHI and MC do not satisfy the requirements for ''control'' specified in sections 771(33)(F) and (G) of the Act and, therefore, should not be treated as affiliated parties in the Department's final antidumping analysis. MHI believes that to justify a finding of control, the Department must: (1) Be able to identify the controlling party and the controlled party; (2) examine MHI's and MC's corporate relationship outside the confines of a specific transaction; and (3) find evidence of the ability to exercise economic coercion where one party can force the other party to act against its own interest. MHI asserts that it is unlawful and illogical to conclude, as the petitioner does, that affiliated parties exercise mutual control, or that control can be diffused among a group of companies, the membership of which is not defined legally. According to MHI, the Department must determine that MHI controls MC, or MC controls MHI, or some identifiable third party controls them both. Moreover, MHI states further that this determination must be made in light of business and economic reality, suggesting that the control relationship must be significant and not easily replaced.

Further, MHI maintains that its analysis of the facts in this investigation shows that MHI and MC did not have the ability to exercise restraint or direction under the control indicia enumerated in the SAA.

Like MHI, MC claims that MC and MHI do not qualify as ''affiliated'' persons under section 771(33) of the Act based on an analysis of their relationship in terms of each of the control indicia enumerated in the SAA. MC asserts that the affiliation issue was already examined in the final determination of LNPPS from Japan (61 FR 38156–38157) where the Department ruled that the potential indicators of control between MHI and MC taken individually were an insufficient basis of finding control, and that the record facts with respect to MC's/MHI's relationship and their relationship with third parties have not changed so as to warrant a reversal of that decision.

MC also repeats many of the same arguments and similar facts stated by MHI regarding the issue.

DOC Position

The Department invited comments on this issue in its preliminary determination and evaluated the relevant facts in this case in the context of the control standard set forth in section 771(33) of the Act and the SAA. (*See* April 24, 1997, Memorandum to Jeffrey P. Bialos, Principal Deputy Assistant Secretary for Import Administration, from Louis Apple Re: Summary of Evidence on the Record of the Investigation Regarding Potential Affiliation of MHI and MC.) In the facts and circumstances of this case, however, we have determined that the Department does not need to render a determination on this issue because we have already found an agency relationship to exist and, on that basis, have found the parties to be affiliated pursuant to section 771(33) of the Act. Accordingly, as noted in *Comment 2* above, the Department used CEP methodology for this sale and has deducted the U.S. import duties and actual selling expenses incurred by MC/MIC pursuant to our practice set forth in Furfuryl Alcohol from South Africa.

Comment 4: Level of Trade (''LOT'')/CEP Offset.

The petitioner contends that MHI should not receive either a LOT adjustment or a CEP offset because it did not establish that its U.S. transaction with MC/MIC is at a different LOT from its home market sales. According to the petitioner, the record does not demonstrate that there are any quantitative or qualitative differences between MHI's home market and U.S. selling functions. The petitioner believes that, given the technical complexity of the subject merchandise and the importance of customer specifications to each sale, the same set of selling functions (*e.g.*, bid preparation, warranty, and installation supervision) were performed by MHI for its EPGTS sales in both the home market and the United States. In support of this argument, the petitioner cites to the Notice of Proposed Rulemaking and Request for Public Comment explaining section 351.412(c)(2) of the Department's proposed regulations, which states: ''where the selling functions and activities are substantially the same, however, sales normally will be considered to have been made at the same level of trade.''

MHI contends that if the Department determines that CEP is the appropriate basis for United States price, and collapses the activities of MHI with those of MC/MIC, the Department should grant MHI a CEP offset. MHI contends that it qualifies for a CEP offset because: (1) Its CV is at a different LOT from its U.S. sale; (2) no data exist to examine the price comparability between different home market LOTs; and (3) the U.S. sale occurs at a less advanced stage of distribution than its home market sales. In the alternative, MHI asks the Department to base the calculation of SG&A and profit for CV upon the home market sale to the trading company (*i.e.*, MC), because that sale is allegedly at a LOT that is comparable to its U.S. sale.

MHI asserts that its home market sales include certain selling functions not found in its sale to MC/MIC (*e.g.*, initial customer contact, sales support operations, and delivery), and that its home market sales occur at a more advanced stage of distribution than its sale to MC/MIC. Citing Aramid Fiber Formed of Poly Para-Phenylene Terephthalamide from the Netherlands, 61 FR 51406, 51409 (1996), among other cases, MHI argues that because the adjustments to CEP under section 772(d) of the Act will create a LOT that is at a less advanced stage of distribution than MHI's LOT in the home market. Accordingly, MHI maintains that the Department should calculate a LOT adjustment to MHI's CV in the form of a CEP offset, if it does not base CV selling expenses and profit exclusively on MHI's home market sale to a trading company.

DOC Position

We agree with the petitioner. In accordance with section 773(a)(1)(B)(i) of the Act and the SAA accompanying the URAA, H.R. Doc. No. 316, 103d Cong., 2d Sess. at 829–831 (1994), to the extent practicable, the Department will calculate NV based on sales at the same

LOT as the U.S. sale(s). When the Department is unable to find sale(s) in the comparison market at the same LOT as the U.S. sale(s), the Department may compare sales in the United States to foreign market sales at a different LOT. Pasta from Italy, 61 FR at 30330–30331. The LOT of NV is that of the starting-price sales in the home market. When NV is based on CV, the LOT is that of the sales from which we derive SG&A and profit.

For both EP and CEP, the relevant transaction for LOT is the sale from the exporter to the importer. While the starting price for CEP is that of a subsequent resale to an unaffiliated buyer, the construction of the EP results in a price that would have been charged if the importer had not been affiliated. We calculate the CEP by removing from the first resale to an independent U.S. customer the expenses specified in section 772(d) of the Act and the profit associated with these expenses. These expenses represent activities undertaken by, or on behalf of, the affiliated importer and, as such, they tend to occur after the transaction between the exporter and importer for which we construct CEP. Because the expenses deducted under section 772(d) of the Act represent selling activities in the United States, the deduction of these expenses normally yields a different LOT for the CEP than for the later resale (which we use for the starting price). Movement charges, duties, and taxes deducted under section 772(c) do not represent activities of the affiliated importer, and we do not remove them to obtain the CEP LOT.

In order to determine whether foreign market sales are at a different LOT than U.S. sales, the Department examines whether the foreign market sales have been made at different stages in the marketing process, or the equivalent, than the U.S. sales. The marketing process in both markets begins with goods being sold by the producer and extends to the sale to the final user, regardless of whether the final user is an individual consumer or an industrial user. The chain of distribution between the producer and the final user may have many or few links, and the respondent's sales occur somewhere along this chain. In the United States this is generally to an importer, whether independent or affiliated. We review and compare the distribution systems in the foreign market and the United States, including selling functions, class of customer, and the extent and level of selling expenses for each claimed LOT. Customer categories or descriptions (such as trading company or end-user) are useful in identifying different LOTs, but are insufficient to establish that there is a difference in the LOT without substantiation. An analysis of the chain of distribution and of the selling functions substantiates or invalidates claimed customer classification levels. If the claimed customer levels are different, the selling functions performed in selling to each level should also be different. Conversely, if customer levels are nominally the same, the selling functions performed should also be the same. Different stages of marketing necessarily involve differences in selling functions, but differences in selling functions (even substantial ones) are not alone sufficient to establish a difference in the LOT. A different LOT is characterized by purchasers at different places in the chain of distribution and sellers performing qualitatively or quantitatively different functions in selling to them.

When sales in the U.S. and foreign market cannot be compared at the same LOT, an adjustment to NV may be appropriate. Section 773(a)(7)(A) provides that, after making all appropriate adjustments to EP or CEP and NV, the Department will adjust NV to account for differences in these prices that are demonstrated to be attributable to differences in the LOT of the comparison sales in the foreign market.

With respect to the CEP offset, the statute also permits an adjustment to NV if it is compared to U.S. sales at a different LOT, provided the NV is more remote from the factory than the CEP sales, and we are unable to determine whether the difference in LOT between CEP and NV affects the comparability of their prices.

This latter situation can occur where there is no foreign market LOT equivalent to the U.S. sales level, or where there is an equivalent foreign market level, but the data are insufficient to support a conclusion on price effect. Where different functions at different LOTs are established under section 773(a)(7)(A)(i), but the data available do not form an appropriate basis for determining a LOT adjustment under section 773(a)(7)(A)(ii), the Department will make a CEP offset adjustment under section 773(a)(7)(B), which is the lower of: (1) The indirect selling expenses on the foreign market sale; or (2) indirect selling expenses deducted from the CEP starting price under section 772(d)(1)(D).

In applying these principles to the facts in this case, we began by removing from the CEP starting price the expenses specified in section 772(d) of the Act and the profit associated with these expenses. These expenses represent activities undertaken by, or on behalf of, MC/MIC in connection with the first sale to an unaffiliated customer in the United States. In this regard, we identified: direct and indirect selling expenses incurred by MIC for initial customer contacts, sales negotiations, communications, and shipping logistics in the United States to the unaffiliated customer; installation-related expenses incurred by MHI in the United States following shipment of the subject merchandise to the unaffiliated U.S. customer; and, indirect selling expenses incurred by MHIA relating to U.S. office maintenance and technical support.

Next, we sought to compare the distribution systems used by MHI for its U.S. and home market sales, including selling functions, class of customer, and the extent and level of selling expenses for each claimed LOT. In reviewing the selling functions performed by MHI for both the U.S. and home market sales transactions, we considered all types of selling activities, both claimed and unclaimed, that had been performed. As noted above, it is the Department's preference to examine selling functions on both a qualitative and quantitative basis. While MHI and MC provided information on the nature of the varying selling functions performed for the sales transactions in both the U.S. and home markets, respondents did not provide the Department with data quantifying these selling activities. Further, at verification, such information could not be derived from records and accounting systems maintained by respondents in the ordinary course of business.

When we examined the CEP transaction between MHI and MC/MIC, we identified the following selling functions performed by MHI: sales negotiation and bid preparation; maintenance of sales office; technical specification development and monitoring; parts procurement activities; shipping arrangements; performance testing; and warranty extension. When we reviewed MHI's home market sales during the POI, we did not consider the one sale found to be outside the ordinary course of trade (*i.e.*, below the cost of production). Instead, we focused upon the two remaining sales which were nominally made at different customer levels—that is, trading company and end-user. However, when we analyzed the selling functions at both levels, we found that they were basically the same. Specifically, MHI performed the following selling functions in connection with both home market sales: initial customer contact; sales negotiation and bid preparation; maintenance of sales offices; technical

specification development and monitoring; parts procurement activities; shipping arrangements; and warranty extension. The only selling function that might have been different between the two sales was installation activity. However, we have treated the expense relating to installation activity as a direct selling expense for which we have made a circumstances of sale adjustment pursuant to section 353.56(a) of our regulations. (*See* Memorandum to Case File, April 24, 1997.)

As a result of this analysis, we have determined that an examination of MHI's selling functions in the home market does not validate the claimed customer classification levels. Therefore, we have determined that MHI's home market sales in the ordinary course of trade are not made at different LOTs, and we have based our calculation of SG&A and profit for CV upon these sales. (*See* ''Constructed Value'' section of this notice for more details.)

Finally, we compared the LOT of the CEP sale to the LOT of CV. Here, again, we found no significant difference. Indeed, with only two exceptions, MHI did perform the same selling functions on its home market sales that it did on its CEP transaction with MC/MIC. These functions, as noted above, included: sales negotiation and bid preparation; maintenance of sales office; technical specification development and monitoring; parts procurement activities; shipping arrangements; and warranty extension. The only exceptions concern (1) Initial customer contact and (2) performance testing. As explained above, initial customer contact for the CEP sale was performed by, or on behalf of, MC/MIC. Therefore, this expense (and the profit associated with it) was deducted from the CEP starting price pursuant to section 772(d) of the Act. In connection with its home market sales, while MHI claimed to have performed initial customer contact functions, the Department was unable to verify the accuracy of this claim.

With respect to performance testing conducted for the CEP transaction, the expense relating to this selling function is insignificant when compared to the total sales value of the CEP transaction (*see* Memorandum to the Case File, dated April 24, 1997). This difference in selling function between the U.S. and home markets is, therefore, not significant for purposes of our LOT analysis.

In conclusion, our analysis of the record evidence regarding the distribution systems in the foreign market and the United States (including selling functions, class of customer, and the extent and level of selling expenses for each claimed LOT) does not reveal sufficient differences to justify either a LOT adjustment or a CEP offset. Although there appear to be differences associated with customer categories, these differences are not borne out by an analysis of the selling functions for the home market and CEP sale, which are largely the same. *See Gray Portland Cement and Clinker from Mexico,* 62 FR 17148, 17155–58 (1997).

Comment 5: MC's/MIC's Expenses and Value of Non-Subject Parts.

The petitioner argues that all actual expenses incurred by MC/MIC in the U.S. transaction which were not deducted in the preliminary determination should be deducted in the final determination in accordance with section 772 (c) and (d) of the Act. These expenses include U.S. Customs duties paid by MIC and selling expenses incurred by MC/MIC which are associated with U.S. economic activity. In addition, the petitioner maintains that the Department should continue to deduct the value of non-subject parts from the CEP starting price based on the amount ultimately charged to the U.S. customer, rather than MIC's actual costs because there is no evidence that the former amount was not at arm's length.

MHI argues that the petitioner's suggested adjustments to U.S. price should be rejected because: (1) CEP methodology is not warranted in this case for the reasons it explained in *Comment 2* above; and (2) by using the MHI-to-MC price as the basis for starting price and thus applying EP methodology, the Department would substantively accommodate the adjustments proposed by the petitioner. MHI points out that all of MC's/MIC's expenses for the U.S. sale are included in the difference between the MHI's price to MC and MIC's price to the U.S. customer.

DOC Position

We agree with the petitioner, in part. Based on our decision in *Comment 3* above, we have deducted from CEP all actual expenses incurred by MC/MIC in the transaction, including U.S. import duties, selling expenses associated with U.S. economic activity, and MIC's cost of non-subject parts from the CEP starting price.

Comment 6: U.S. Indirect Selling Expenses Incurred in Country of Manufacture.

The petitioner contends that certain items that were reported as part of MHI's indirect selling expenses were actually directly related with US sales activities and as such should be deducted from CEP. The petitioner identifies those items as pre-bid meetings, travel, and salesman visits. Because the nature of the subject merchandise in this investigation requires technical design to the customer's specifications, the petitioner asserts that the above-noted selling expenses incurred by MHI were necessarily attributable to the commercial activity in the United States and, therefore, should be deducted accordingly. To support this assertion, the petitioner cites Pasta from Italy, 61 FR at 30352. In the absence of information sufficient to identify these expenses as direct expenses, the petitioner argues that the Department should reduce CEP by MHI's corporate indirect selling expense rate, or at a minimum, deduct all of the Japanese indirect selling expenses reported by MHI.

In contrast, MHI asserts that, first, it is improper for the petitioner to base its argument on the assumption that CEP methodology is warranted in this case. Further, MHI asserts that it is the Department's practice to deduct from CEP only those U.S. selling expenses actually incurred in the United States. In support of this assertion, MHI cites to the Department's decisions in Calcium Aluminate Flux from France, 61 FR 40396, 40397 (August 2, 1996) (''Flux from France''), and Certain Internal-Combustion Industrial Forklift Trucks from Japan, 62 FR 5592 (February 6, 1997) (''Forklift Trucks from Japan''). According to MHI, there is no evidence on the record in this investigation which connects MHI's reported indirect selling expenses with U.S. economic activity.

DOC Position

We agree with petitioner that certain of the indirect selling expenses incurred by MHI for the U.S. sale are associated with economic activity that occurred in the United States. Specifically, during verification, we identified certain pre-bid expenses, including travel expenses, that are appropriately included in our deduction of CEP expenses. We have accounted for these expenses in our final CEP calculations. (See Calculation Memorandum.)

Comment 7: Other Unclaimed Expenses.

The petitioner argues that certain other direct selling expenses allegedly related to shipment logistics should be deducted on the grounds that they are necessarily attributable to U.S. economic activity.

MHI disagrees. It contends that the Department verified that the expenses at issue either were not incurred or were

properly reported as part of cost of production for the U.S. sale. Therefore, MHI asserts that no deduction to CEP for these expenses is warranted.

DOC Position

We disagree with the petitioner. As MHI correctly points out, we verified that the expenses at issue either were not incurred or were properly reported as part of cost of production for the U.S. sale. (*See* March 11, 1997 MHI Verification Report at 32.) Therefore, we have not made any adjustments to CEP for the alleged direct selling expenses.

Comment 8: Mitsubishi Heavy Industries America (MHIA Houston) Selling Expenses.

The petitioner asserts that MHI improperly allocated MHIA Houston's reported selling expenses over both U.S. and non-U.S. sales, thereby understating the selling expenses incurred by MHIA Houston for the U.S. sale. The petitioner argues that MHIA Houston's selling expenses should be allocated over total U.S. sales of turbo-machinery given that a significant portion of MHIA expenses were allocated to such sales and MHIA's small size effectively precludes it from servicing sales in non-U.S. markets. Therefore, the petitioner requests that the Department reject MHI's allocation formula and allocate MHIA Houston's selling expenses over U.S. sales only.

MHI disagrees, arguing that the Department verified that MHIA Houston was involved in sales to countries other than the United States. According to MHI, while the market for turbo-machinery is worldwide, Houston is a major center for turbo-compressor manufacturers and plant contractors. Therefore, it is not unusual for meetings to take place in Houston for sales of turbo-machinery to both U.S. and non-U.S. markets. Based on these factors, MHI asserts that its allocation methodology for MHIA Houston's selling expenses is reasonable and accurate, and should be accepted for the final determination.

DOC Position

We agree with MHI. At verification, we reviewed documentation showing that MHIA was involved in technical support activities relevant to both U.S. and non-U.S. sales. We also verified the accuracy and completeness of the indirect selling amount reported by MHI. (*See* March 11, 1997 MHI Verification Report at 30.) Therefore, we have deducted MHIA's indirect selling expenses.

Comment 9: U.S. Credit Expense.

A. General Calculation Methodology

The petitioner asserts that the Department should reject the portion of MHI's claimed U.S. credit expense which reflects credit income for payment received prior to shipment (*i.e.,* progress payment) and, for purposes of the final determination, calculate credit expense equal to the corporate interest rate multiplied by the final payment amounts times the number of days between shipment and payment, divided by the number of days in the calendar year (*i.e.,* 365). According to the petitioner, the progress payments on which MHI's reported credit income is based are improperly characterized by MHI as a negative credit expense; rather, these payments are a form of working capital financing. Further, citing Cellular Mobile Telephones and Subassemblies from Japan, 50 FR 45,447, 45,455 (October 31, 1995), the petitioner argues that the Department does not include progress payments received in its calculation without evidence of interest revenue resulting from these payments. The petitioner notes that only if the Department considers the cost to MHI of financing EPGTS as work-in-process during the period between the dates of sale and shipment should the Department offset that cost with the interest income imputed for progress payments.

MHI and MC request that the Department continue to calculate MHI's credit expense for the U.S. sale inclusive of the pre-shipment credit income at issue. According to MHI, the inclusion of imputed credit benefit for payments received prior to shipment and imputed credit expense for payments received after shipment reflect MHI's total cost of extending credit to its U.S. customer. MHI asserts that if the Department were to calculate credit as the petitioner suggests, it would result in a credit expense adjustment that fails to fairly measure MHI's opportunity cost of extending credit to the U.S. versus home market customers. MHI explains that, in this instance, the payment terms for the U.S. sale require the U.S. customer to make advance payments (or progress payments) prior to the shipment of merchandise while payment terms for home market sales do not require pre-shipment or progress payments. According to MHI, failure to include both payments received before and after shipment of merchandise would ignore the payment terms specific to the U.S. sale. Additionally, MHI points out that the petitioner fails to recognize that MHI's cost of financing production is comparable for both its U.S. and home market sales. Because MHI incurs its production costs for both U.S. and home market sales in yen, MHI asserts that the imputed cost of financing these sales would be comparable. Thus, MHI maintains that the calculation methodology adopted by the Department in the preliminary determination, but for the short-term interest rate used (*see* Comment 9(B) below), correctly measures MHI's opportunity cost of extending credit on behalf of its U.S. sale.

MC also disagrees with the petitioner, arguing that the Department considers production costs in its credit expense analysis only when the terms of sale call for the payment of significant capital outlays (up-front) prior to production and shipment, which did not happen in the case of the U.S. sale. Further, MC takes issue with the petitioner's argument that a credit income adjustment is allowed only if interest revenues on pre-shipment payments were obtained, maintaining that imputed credit expense amounts are calculated regardless of the presence or absence of actual borrowings.

DOC Position

We agree with respondents and have calculated U.S. imputed credit expenses inclusive of the credit income at issue in the final determination.

The intent of making a circumstances of sale adjustment for imputed credit expenses incurred in the U.S. and comparison markets is to adjust for differences in the payment terms extended to customers in the two different markets. In this case, ignoring the imputed credit income in the calculation of U.S. credit expense would result in a credit expense adjustment which would fail to accurately measure MHI's opportunity cost of extending credit to U.S. versus home market customers. We note that the Department has calculated credit using both pre- and post-shipment payments in past cases involving large, customized equipment with relatively long production periods. (See Mechanical Transfer Presses from Japan: Final Results of Administrative Review, 61 FR 52,910, 52,914 (1996).) In certain other past cases such as LNPPS from Japan, the Department has determined it to be appropriate to offset production financing costs with progress payments, as suggested by the petitioner, because there were multiple progress payments relevant to sales in both the U.S. and comparison market and an unusually long production period associated with the subject merchandise. In this case, however, only one progress payment

was made for a relatively small portion of the total contract price, the production period was not unusually long (*i.e.*, approximately one year), and no progress payments are applicable to MHI's home market sales made during the POI.

Therefore, we have determined that there is no need to use an alternative calculation methodology which would offset credit income associated with progress payments with production financing costs or one that would exclude credit income altogether from the calculation.

B. Short-term Interest Rate

MHI argues that in calculating imputed credit expenses for the U.S. sale the Department should use the actual cost of the short-term borrowing reported by MHI. MHI maintains that the Department's decision in the preliminary determination to use a dollar-denominated short-term interest rate appears to be an automatic application of matching the currency of the interest rate used to the currency of the sale. According to MHI, this approach does not conform with economic rationale in this case where most of MHI's short-term debt was denominated in yen. In support of recalculating U.S. credit expense using the interest rate based on yen-denominated borrowings, MHI cites to (1) *LMI–La Metalli Industriale, S.p.A. v. United States*, 912 F.2d. 455 (Fed. Cir. 1990) (*LMI*) in favor of using the interest rate for imputed credit calculations that is in accordance with ''commercial'' reality, and (2) *United Engineering & Forging v. United States*, 779 F. Supp. 1375 (Ct. Int'l Trade 1991), *aff'd*, 996 F.2d. 1236 (Fed. Cir. 1993) (United Engineering) in favor of using the lowest rate at which the respondent has borrowed or to which respondent has access. Therefore, MHI requests that the Department use the lowest interest rate to which the respondent would have access, *i.e.*, the reported yen-denominated interest rate, in calculating the imputed U.S. credit expense in the final determination.

Further, MHI takes issue with the Department's reliance on the rationale outlined in LNPPs from Japan for using a dollar-denominated short-term interest rate in the preliminary determination of this case. MHI asserts that the Department's reasoning for the use of such a rate captures the value of the credit to the customer, rather than the cost to the seller of extending credit, which is contrary to the calculation of the LTFV margin which is made from the seller's perspective. Specifically, MHI states that if the Department is attempting to measure the value of the theoretical loan from the seller to the buyer during the period between shipment and payment from the buyer's perspective, then the interest rate used should be the rate in which the receivable is denominated. However, because the antidumping law seeks to calculate a dumping margin based on the seller's expenses, MHI maintains that the rate in which the receivable is denominated is irrelevant. Instead, MHI argues that the Department must calculate the cost of this theoretical loan from the seller's perspective. To do so, MHI contends that the Department must examine MHI's actual cost of capital, which in this case is denominated in yen.

The petitioner argues that the Department correctly applied a U.S. dollar-denominated interest rate to compute MHI's imputed credit expense on the U.S. sale. The petitioner asserts that the *LMI* decision on which MHI relies was based on whether the chosen interest rate comports with ''usual and reasonable commercial behavior.'' Therefore, the petitioner argues that it is necessary to consider the circumstances as a whole and not merely conclude that the lowest interest rate should be used. According to the petitioner, the circumstances in this investigation are as follows: (1) The foreign producer has borrowings in U.S. dollars; (2) the U.S. sale is in U.S. dollars; and (3) over one year elapses between the date of shipment and the date of payment. Based on these conditions, the petitioner finds it reasonable to use a U.S. dollar-denominated rate for purposes of calculating U.S. credit expense. In support of its argument, the petitioner cites LNPPs from Japan.

DOC Position

We agree with the petitioner and have calculated U.S. credit expense based on the U.S. dollar-denominated interest rate in the final determination. As noted in the final determination of LNPPs from Japan (61 FR 38160), when sales are made in, and future payments are expected in, a given currency, the measure of a company's extension of credit should generally be based on an interest rate tied to the currency in which its receivables are denominated, as the seller is effectively lending to its purchaser in that currency. (See also Final Determination of Sales at Less Than Fair Value: Oil Country Tubular Goods from Austria, 60 FR 33551, 33555 (June 28, 1995).) Indeed, in the present case, the Department verified that MHI had U.S.-denominated short-term borrowings, the existence of which indicates the ability and preparedness of MHI to support its EPGTS activities which result in U.S. dollar-denominated revenues by borrowing in U.S. dollars. Consequently, the Department's approach is consistent with *LMI*. Further, contrary to respondent's suggestion, such an approach does not capture the value of the credit extended to the customer instead of the cost of extending credit to the seller. Rather, the cost calculated is the cost to MHI, matching its dollar-denominated borrowing rate to its dollar-denominated receivables. Whether or not this also reflects the value to the buyer is irrelevant. Therefore, there is no basis to depart from the Department's well-established practice.

Comment 10: Circumstances of Sale Adjustment for Home Market Credit Expenses.

MHI argues that in the preliminary determination, the Department failed to make a circumstances of sale adjustment for home market imputed credit expenses. Specifically, MHI asserts that the Department reduced the CEP by the amount of imputed credit expenses related to MHI's U.S. sale, but did not make a corresponding adjustment for home market credit expenses by subtracting the reported home market credit expense from CV. MHI asserts that CV profit includes all items in the home market price that are not otherwise included in CV. MHI reasons that since imputed credit expense is included in the home market price, it is included in the calculation of CV through a combination of interest expense and home market profit. Therefore, MHI contends that in order to ensure a fair value comparison, the home market credit expense should be subtracted from CV as a circumstance of sale adjustment. MHI cites LNPPS from Japan to support its contention.

The petitioner contends that no such circumstances of sale adjustment is appropriate when NV is based on CV. Citing LNPPS from Japan, the petitioner also argues that because imputed credit is, by its nature, not an actual expense that would be included in the calculation of CV in accordance with section 773(2)(A) of the Act, there is no basis for an adjustment to CV for this imputed expense.

DOC Position

We agree with MHI. While we would not add an amount for imputed credit expenses in the calculation of CV pursuant to section 773(e)(2)(A) of the Act, such expenses are reflected in the calculation of CV profit and interest expense. Under the URAA, for CV, the statute provides that SG&A be based on actual amounts incurred by the exporter

for production and sale of the foreign like product (*see* section 773(e) of the Act). After calculating CV in accordance with the statute, we have, in essence, a NV. Consistent with section 773(a)(8) of the Act, adjustments to NV are appropriate when CV is the basis for NV.

The Department uses imputed credit expenses to measure the effect of specific respondent selling practices in the United States and the comparison market. Therefore, we have deducted from CV home market imputed credit expenses as a circumstances-of-sale adjustment in the calculation of NV. (See Antifriction Bearings (Other Than Tapered Roller Bearings) from France et al.; Final Results of Antidumping Duty Administrative Reviews, 62 FR 2081, 2119–2120 (January 15, 1997).) Specifically, we deducted an amount for home market imputed credit expense based on a ratio of imputed credit expenses incurred on home market sales made in the ordinary course of trade to corresponding sales revenue.

Comment 11: Currency Conversion.

The petitioner contends that the exchange rate used in the preliminary margin calculation was erroneously a ''sustained movement rate'' and not the official exchange rate in effect on the date of the U.S. sale as stated in the Department's preliminary determination notice. According to the petitioner, the Department should not automatically apply the ''mechanical formula,'' as outlined in the Department's Policy Bulletin 96–1: Currency Conversions (61 FR 9434, March 8, 1996) (''Policy Bulletin 96–1''), which results in the sustained movement rate in this case, because the sustained movement rate is not suited for cases where sales are few and sporadic. Rather, according to the petitioner, it is better suited for continuous sales of commodities from a price list or based on periodic price negotiations. In this investigation, the petitioner notes that the subject merchandise is not sold continuously from a price list or annual supply contracts; EPGTS are sold one at a time, and only few sales are made in any given period. Under these circumstances, the petitioner asserts that the parties involved in the transaction of such merchandise are aware of the exchange rates, the currency used in the transaction, and the prospect of hedging in order to reduce the risk of changes in the exchange rate between the date of sale and date of shipment. Therefore, the petitioner urges the Department to revise the currency conversion formula accordingly to reflect the actual exchange rate in effect on the date of the U.S. sale in the final determination.

MHI disagrees with the petitioner, arguing that the petitioner's description of the Department's currency conversion methodology is limited to the Department's method for identifying exchange rate fluctuations. In the case of sustained movement, MHI states that the Department allows at least 60 days for exporters to adjust their prices. Further, MHI notes that neither the Act, the SAA, the legislative history, nor Policy Bulletin 96–1, limits the sustained movement rule to scenarios with high volume sales or numerous transactions.

DOC Position

We agree with MHI, and made all currency conversions into U.S. dollars using the sustained movement rate which resulted from the methodology described in Policy Bulletin 96–1. As explained below, we do not believe that the facts in this case warrant departure from this methodology. We note that the sustained movement rate was also appropriately used in the Department's preliminary calculations, but the Department incorrectly described it as the official exchange rate in effect on the date of the U.S. sale in its notice of preliminary determination.

Section 773(A) of the Act provides that the Department will convert foreign currencies on the date of the U.S. sale, subject to certain exceptions. Those exceptions require the Department to ignore ''fluctuations'' in the exchange rate and to provide respondent(s) in an investigation at least 60 days to adjust prices after a ''sustained movement'' in the exchange rate. Because neither the Act, the Antidumping Agreement (Agreement on Implementation of Article VI, GATT 1994) nor the Department's proposed regulations provide detail on defining fluctuations or sustained movements, we designed the exchange rate model described in Policy Bulletin 96–1 in order to: 1) Implement the statutory requirements in a timely fashion; 2) ensure that all exporters, when they set their U.S. prices and whether under order or not, can know with certainty the daily exchange rate the Department will use in a dumping analysis; and 3) capture the model in simple computer code to reduce administrative burdens in monitoring exchange rates. Having used this model for at least one year, it remains our intention now to evaluate it based on our experience and public comments that we have received. However, we will continue to use the current model until our evaluation is complete.

The model classifies each daily rate as ''normal'' or ''fluctuating'' based on a ''benchmark'' rate. The benchmark is a moving average of the actual daily exchange rates for the eight consecutive weeks immediately prior to the date of the actual daily exchange rate to be classified. Whenever the actual daily rate varies from the benchmark rate by more than two-and-a-quarter percent, the actual daily rate is classified as fluctuating. If within two-and-a-quarter percent, the actual daily rate is classified as normal. Actual daily rates classified as normal are the official exchange rate for that day. However, when an actual daily rate is classified as fluctuating, the benchmark rate is the official rate for that day.

Whenever the weekly average of actual daily rates exceeds the weekly average of benchmark rates by more than five percent for eight consecutive weeks (the recognition period), the model classifies the exchange rate change as a sustained movement. During the eight week recognition period, the model continues to classify each daily rate as normal or fluctuating and to substitute the benchmark rate for the actual daily rate when the daily rate is fluctuating.

When a sustained movement is identified in the Department's exchange rate model, increasing the value of a foreign currency in relation to the dollar, as in the instant case, respondents under an investigation are given 60 calendar days to correct their prices in order to mitigate against distortions to the Department's antidumping analysis that may be caused by sustained movement in the exchange rate. The 60-day grace period is meant to apply to all respondents in a variety of industries, irrespective of the volume or number of their transactions in any given period. This 60-day grace period begins on the first day after the recognition period. During that period, the official rate in effect on the last day of the recognition period will be the official rate in investigations.

In this case, the actual date of the U.S. sale fell within the 60-day adjustment period previously described. On April 26, 1995, all of the Department's criteria for a sustained movement were met, and the Department found that a sustained movement had occurred. As a result, all official exchange rates between April 26, 1995, and June 26, 1995, including the rate on the date of the U.S. sale, were held at the April 26, 1995, rate.

We have no basis on which to depart from our current methodology. Further, the petitioner's suggestion that the model should differentiate the exchange rate used based on a respondent's

volume or number of transactions necessarily implies that the Department would be required to develop an exchange rate model on a case-specific basis. We do not agree that this would be appropriate. In addition, it would unnecessarily increase administrative burdens on the Department and on parties interested in monitoring the exchange rates used by the Department in its antidumping analysis.

Comment 12: Treatment of the Home Market Sale Made at a Below-Cost Price.

MHI contends that section 773(b)(1) of the Act does not permit the Department to conduct a sales-below-cost investigation solely to recalculate CV profit. MHI asserts that such an investigation may be pursued only as a mechanism to reject below-cost home or third country market sales as the basis for a price comparison. MHI allows that while the CV profit calculation may be considered to be part of the ''determination of NV,'' section 773(b)(1) of the Act requires the rejection of below-cost sales before the Department can resort to CV. Moreover, according to MHI, the discussion of NV at section 773(b)(1) of the Act addresses only home and third country market sales, and not CV. Because the Department based its antidumping analysis on CV and not on HM prices, MHI maintains that it was inappropriate for the Department to conduct a sales-below-cost investigation.

Petitioner urges the Department to follow the methodology that it used in the preliminary determination of this case and exclude from the CV profit computation all HM sales made by MHI at below-cost prices. Petitioner asserts that nothing in the statute, SAA, or agency practice suggests that the Department may use below-cost sales as the basis for CV profit. According to petitioner, section 773(a)(4) of the Act establishes CV as a type of NV. In computing CV, the statute directs the Department to include an amount for profit based on the actual amounts realized by the producer in connection with home market sales of the foreign like product. Petitioner notes that where home market sales were made at below-cost prices, section 773(b)(1) of the Act provides that the Department exclude such sales from its determination of NV. Thus, petitioner concludes that because CV is a type of NV and the profit from home market sales is a factor in computing CV, the exclusion of below-cost sales under section 773(b)(1) must apply to home market sales used as the basis for CV profit in the Department's antidumping analysis. Petitioner adds that, under MHI's interpretation of the statute, the Department would be precluded from determining whether home market sales (and the profits from such sales) were made within the ordinary course of trade in all cases where such sales are not sufficiently similar to U.S. sales to allow for a price-based NV.

DOC Position

We agree with the petitioner that the Department has the authority to conduct a sales-below-cost investigation regardless of whether the HM prices are used as the basis for a price-based NV or solely for the CV profit calculation. At the beginning of this case, we determined that each EPGTS sold in the home and U.S. markets during the POI was manufactured to custom specifications for a unique application and, thus, would be too dissimilar to permit a price-to-price comparison between the subject merchandise sold in the United States and the foreign like product sold in Japan. Therefore, we determined that the NV should be based on CV in accordance with section 773(a)(4) of the Act.

Section 773(e)(2)(A) of the Act directs the Department to include in CV an amount for profits earned from sales of the foreign like product in the ordinary course of trade and for consumption in the foreign country. The Act also states, at section 771(15), that below-cost sales made within an extended period of time and in substantial quantities are considered outside the ordinary course of trade. Therefore, in cases where the petitioner provides the Department with reasonable grounds to believe or suspect that the foreign like product forming the basis for CV profit was sold at below-cost prices, we will conduct a cost investigation and will exclude those sales determined to be outside the ordinary course of trade.

Comment 13: Reasonable grounds to believe or suspect that home market sales were made at below-cost prices.

MHI argues that the Department lacked reasonable grounds to believe or suspect that sales were made at prices below their cost of production prior to initiating its sales below-cost investigation. MHI contends that the Department was mistaken in its characterization of MHI's post-cost allegation adjustments as new factual information. MHI insists that its November 22, 1996 rebuttal simply proved that petitioner's analysis was incorrect and that the data used by MHI in the rebuttal was, or could be, supported by reference to its previously submitted questionnaire responses. MHI asserts that it is incumbent upon the Department to specifically and precisely identify the new factual information in MHI's rebuttal. MHI claims that the Department's position that MHI submitted new factual information regarding the aggregate profitability of its HM sales is far to vague for a reviewing court to determine whether the Department correctly applied its own policy.

Petitioner claims that despite MHI's November 22, 1996 rebuttal of petitioner's below-cost sales allegation, the Department had reasonable grounds to suspect a below-cost sale had been made in the HM. Petitioner states that in its rebuttal, MHI maintained that petitioner had committed a ''simple methodological error'' in its sales-below-cost allegation. Petitioner argues that MHI's rebuttal, rather than establishing that petitioner committed a methodological error, reveals that MHI reallocated production costs among the HM contracts in such a manner that each HM sale was shown to have been made at a profit. Further, petitioner asserts that MHI's subsequent January 1, 1997 reallocation of production costs and concession that the sale in question was below cost, refutes any argument that the Department's rejection of the below-cost sale was unreasonable.

DOC Position

We disagree with MHI. The information provided by petitioner in its sales-below-cost allegation provided reasonable grounds for us to believe or suspect that MHI had sold the foreign like product at a price that was less than the company's cost of production. Moreover, contrary to MHI's claims, the data provided in its November 22, 1996 rebuttal comments constituted new factual information which we do not consider in making our determination to initiate a sales-below-cost investigation. Although the aggregate profitability of all home market sales (reported in the third column of figures of Attachment 1 of MHI's November 22, 1996, rebuttal) had been submitted in MHI's November 12, 1996, submission, the revised aggregate profitability of only home market sales 1 and 2 (reported in the third column of figures of Attachment 1 of MHI's November 22, 1996, rebuttal) included cost adjustments, resulting in revised profits. The data in this column represents new information which was not previously on the record.

Import Administration Policy Bulletin 94.1 sets forth the Department's practice with respect to new factual information submitted by respondents subsequent to the filing of a cost allegation by petitioners or other interested parties. The Bulletin states that the Department disregards any new information regarding the actual costs of production

where such information is used to rebut portions of an allegation. As noted in the Policy Bulletin, the Department's purpose in reviewing the sufficiency of an allegation is not to determine if sales were in fact made at below-cost prices. Instead, the Department must decide whether, based on the information available to the petitioner at the time of the allegation, there is sufficient reason to believe that below-cost sales exist.

Comment 14: Home market sales made outside the ordinary course of trade.

Petitioner claims that the SAA is clear that below-cost sales are outside the ordinary course of trade for purposes of calculating profit for CV. Petitioner cites the SAA and Section 773(e)(2)(A) of the Act as establishing that:

(1) CV profit is to be calculated based on sales in the ordinary course of trade;

(2) The Department may ignore sales that it disregards as a basis for NV, such as below-cost sales; and

(3) Unlike current practice, in most cases, the Department would use profitable sales as the basis for calculating CV profit.

Petitioner argues that section 771(15) of the revised act defines the ordinary course of trade to exclude below-cost HM sales disregarded under section 773(b)(1) and therefore below-cost sales rejected under section 773(b)(1) will also be rejected as a basis for profits. Petitioner maintains that the statute places the burden on MHI to establish that any below-cost sales are ordinary and should not be rejected. Petitioner asserts that therefore, it is clear that the HM below-cost sale in this case should be considered to be outside the ordinary course of trade and excluded from the CV profit computation.

In the alternative, MHI argues that even if one of its HM sales was properly found to be below cost, that does not mean this sale should be ''automatically'' excluded from the calculation of CV. Citing *FAG U.K.* v. *United States,* 945 F. Supp. 260 (CIT 1996) and a series of other cases, MHI argues that the burden is on petitioner to show that this below-cost sale was ''outside the ordinary course of trade'' within the meaning of section 771(15) of the Act. This burden, MHI asserts, has not been met and, therefore, all HM sales should be included in the calculation of CV.

MHI also relies upon the SAA. According to MHI, the SAA's reference to profitable sales providing the basis ''in most cases'' for the calculation of profit in CV ''implicitly recognizes that there are situations in which unprofitable sales will also be included in the calculation.''

DOC Position

For the most part, we disagree with MHI. As we state above in response to comment 1, section 773(e)(2)(A) of the Act provides that the calculation of profit in CV shall be based upon ''the actual amounts incurred and realized by the specific exporter or producer * * * in connection with the production and sale of a foreign like product, in the ordinary course of trade, for consumption in the foreign country'' (emphasis added). Section 771(15) of the Act further states that sales made below their cost of production within the meaning of section 773(b)(1) of the Act are not within the ''ordinary course of trade.'' The cases cited by MHI, including *FAG U.K.* v. *United States,* were decided under the pre-URAA version of the statute. That statutory language, unlike the current language, did ''not limit the meaning of 'ordinary course of trade' to sales made above cost.'' 945 F. Supp at 269.

We also cannot agree with MHI's reading of the SAA. At page 169, the SAA states, in part:

> Commerce will base amounts for SG&A expenses and profit only on amounts incurred and realized in connection with sales *in the ordinary course of trade* of the particular merchandise in question (foreign like product). Commerce may ignore sales that it disregards as a basis for normal value, *such as those disregarded because they are made at below-cost prices* (emphasis added).

It is clear from the record of this case that MHI made a sale in the HM at a price that was below the cost of production, within an extended period of time, and in substantial quantities (*i.e.,* outside the ordinary course of trade). Accordingly, we believe that section 773(e)(2)(A) of the Act supports our decision to exclude this sale from the CV profit computation. Because section 773(e)(2)(A) and its interpretation in the SAA indicate that CV profit should be calculated based on sales in the ordinary course of trade and that in most cases the Department should use profitable sales as the basis for calculating CV profit, it is our opinion that the party claiming that below-cost sales should not be considered outside the ordinary course of trade should generally bear the burden of proving such an assertion.

Comment 15: Valuation of Inputs Purchased From Affiliated Parties.

Petitioner contends that the valuation of affiliated party purchases should reflect arm's length values, including usual profits earned on arm's length transactions. Petitioner asserts that the Department has adjusted MHI's reported costs of inputs purchased from affiliated parties under the ''transactions disregarded'' clause of section 773(f)(2) of the revised act, rather than the ''major inputs'' clause of section 773(f)(3), which MHI assumes to be our basis for the adjustment. Petitioner argues that because the ''transactions disregarded'' clause of Section 773(f)(2) states that the reported costs should ''fairly reflect the amount usually reflected'', the Department should add a reasonable profit to the affiliated supplier's total cost in order to reflect an arm's length price. Petitioner claims that because MHI did not purchase comparable services from an unaffiliated supplier, and the affiliated supplier did not sell comparable services to an unaffiliated purchaser, the Department must determine an appropriate amount ''based on the information available as to what the amount would have been if the transaction was between persons who are not affiliated'' per section 773(f)(2). Petitioner asserts that the Department should apply the profit earned by the affiliated party on its sales to MHI pertaining to MHI's third country sales, as reported in an earlier section B submission.

MHI maintains that the Department should not add profit to the inputs received from affiliated parties. MHI contends that although under the ''transactions disregarded'' and ''major input'' rules, the Department is authorized to adjust transfer prices to reflect market price or COP, neither of the rules allow the Department to construct a market price. MHI asserts that the Department's options are to substitute other market prices or COP for the transfer prices.

MHI also claims that charging profit on its affiliated supplier purchases would conflict with the purpose of the statute by unfairly inflating MHI's costs. MHI argues that because the affiliated supplier in question is a wholly owned subsidiary of MHI's, by adjusting these inputs to reflect their COP, the Department effectively treats them as if MHI had produced them internally. MHI maintains that petitioner's argument that the Department should add to the affiliated party's COP, the profit that would have been earned by an unaffiliated supplier had it provided the services to MHI would be distortive. Further, MHI claims that petitioner has failed to demonstrate that the profit rate that the affiliated supplier earned, not on sales to an unaffiliated party, but rather on other sales to MHI, fairly reflects the amount usually reflected in sales of merchandise under consideration in the market under consideration'', as required by section 773(f)(2).

DOC Position

Under the transactions disregarded rule of section 773(f)(2) of the Act, we requested MHI to submit the transfer prices for a selected sample of inputs that it purchased from affiliated suppliers for use in manufacturing the subject merchandise. In addition, we asked MHI to provide the arm's length prices charged by those affiliates to unaffiliated purchasers for the identical input or the arm's length prices charged by unaffiliated suppliers for sales of the identical input to MHI. Because MHI claimed that there were no such arm's length transactions between unaffiliated parties, the company submitted the transfer prices for its purchases from affiliated suppliers and the affiliated suppliers' corresponding COPs. For those inputs obtained from affiliated suppliers, we compared the transfer price paid by MHI to the affiliates' cost of producing the input. In one instance, we found that the cost of the input was greater than the transfer price between MHI and the affiliated supplier. For this transaction, because there were no comparable transactions of similar inputs between unaffiliated parties on which to base a value for inputs, we followed our practice of using the affiliated supplier's cost of production for that input as the information available as to what the amount would have been if the transaction had occurred between unaffiliated parties (See Antifriction Bearings (other than Tapered Roller Bearings) from France et. al.; Final Results of Antidumping Duty Administrative Reviews, 62 FR 2081, 2115 (January 15, 1997).) We disagree with petitioner that the profit earned on the services provided by the affiliate in connection with MHI's third country sales is representative of the services furnished in connection with the U.S. sale. Notwithstanding the fact that the transaction occurred between the same parties (*i.e.*, MHI and its affiliated supplier), in this case, the input in question consists of services performed by an affiliate. The nature of these services and the unique character of the EPGTS products for which they were performed give us no reason to believe that the services were in any way similar or comparable to one another.

Comment 16: Affiliated Party Input Adjustment.

MHI states that the Department erred by adjusting the transfer prices of not only the major inputs purchased from affiliated suppliers, but also the minor inputs. MHI claims that because the Department has not established that these minor inputs were purchased at below-cost prices, the transfer prices of the minor inputs should not be adjusted.

MHI contends that if the Department chooses to adjust MHI's U.S. sale for all affiliated party purchases (*i.e.*, major and minor inputs), it should make a corresponding adjustment for HM sales.

Petitioner claims that there is no statutory or rational basis for a parallel affiliated party purchases adjustment to HM production costs for purposes of calculating CV profit. Petitioner states that section 773(e)(2) of the revised act indicates that ''actual'' HM profit earned in the ordinary course of trade should be included in the CV calculation. Petitioner argues that actual HM profits should not be reduced to the extent that the foreign producer's inputs were purchased from affiliated parties at non-arm's-length transfer prices. Petitioner also argues that although sections 773(f)(2) and (3) of the revised act expressly provide for affiliated party cost adjustments for CV calculations, section 773(b)(3), which pertains to COP for HM price comparisons, contains no provision for such adjustments.

DOC Position

As noted above, we adjusted MHI's reported cost of inputs purchased from affiliates under the transactions disregarded rule per section 773(f)(2) of the Act. This section relates to all inputs obtained from affiliates, not just major inputs. Accordingly, we applied the calculated affiliated party adjustment to all inputs obtained from affiliates.

We agree with MHI that the affiliated party adjustment applied to CV should also be applied to the submitted cost of producing the HM sales. Section 773(f) of the Act identifies special rules for the calculation of COP and CV, one of which is the transactions disregarded rule. Since the statute does not direct the Department to treat affiliated party transactions differently for COP and CV, we applied the same affiliated party adjustment to both CV and COP.

Comment 17: Calculation of the G&A Rate.

Petitioner urges the Department to revise its preliminary calculation of MHI's G&A expenses to include all of the G&A expenses incurred by the company at each of its various corporate levels. Petitioner believes that the G&A expense rate used by the Department to compute COP and CV in its preliminary determination failed to include the administrative expenses of MHI's Hiroshima Machinery Works (''HMW''), the facility that produced the subject merchandise, as well as allocable portions of G&A expenses associated with other organizational levels within the company. As evidence of this problem, petitioner points to MHI's internal financial statements which report amounts for ''general'' and ''internal G&A'' that petitioner claims were not allocated to the subject merchandise under MHI's normal accounting system and, likewise, were excluded from COP and CV under the company's submission methodology.

MHI argues that it fully accounted for all G&A expenses in the submitted COP and CV figures and that petitioner simply fails to understand the company's normal internal accounting system and its financial reporting methods. MHI claims that adjusting the G&A expense rate as petitioner proposes would result in double-counting both G&A and selling expenses. MHI notes the fact that the Department verified the company's G&A expense calculation and found that all such expenses had been properly included in the MHI's reported COP and CV figures.

DOC Position

We agree with MHI that it properly accounted for all G&A expenses in the reported COP and CV amounts. Under the company's normal accounting system, both G&A and selling expenses are combined and allocated to EPGTS job orders through a factory overhead burden rate. The SG&A amounts to be allocated are reflected in the ''general'' and ''internal G&A'' figures in the company's internal financial statements. Because the Department requires respondents to report separately the selling expenses incurred for the merchandise, MHI segregated these expenses for the HMW before allocating G&A expenses to each EPGTS as manufacturing overhead following its normal accounting methodology. Thus, as noted by MHI, basing the G&A expense rate on amounts from the company's internal financial statements would result in double-counting expenses already accounted for as part of either selling expenses or manufacturing overhead. We reviewed MHI's G&A expense calculation as part of our verification of the company's COP and CV submission and found that the reported costs reflected an appropriate amount of G&A expenses incurred by the company at each of its organizational levels.

Continuation of Suspension of Liquidation

In accordance with section 735(c) of the Act, we are directing the Customs Service to continue to suspend liquidation of all entries of EPGTS from Japan, as defined in the ''Scope of Investigation'' section of this notice, that are entered, or withdrawn from

warehouse for consumption, on or after December 10, 1996, the date of publication of our preliminary determination in the **Federal Register**. We are also directing the Customs Service to suspend liquidation of all entries of parts of EPGTS imported pursuant to a contract for a complete EPGTS in the United States that are entered, or withdrawn from warehouse for consumption, on or after December 10, 1996. For these entries, the Customs Service will require a cash deposit or posting of a bond equal to the estimated amount by which the normal value exceeds the constructed export price as shown below. The suspension of liquidation with respect to EPGTS parts will remain in effect provided that the sum of such entries represents at least 50 percent of the cost of manufacture of the complete EPGTS of which they are part. This determination will be made only after all entries of parts imported pursuant to an EPGTS contract are made and the complete EPGTS pursuant to that contract is produced, unless a request for a scope inquiry is made by an interested party at least 75 calendar days prior to the intended date of entry of the EPGTS parts in which the interested party claims that the parts to be imported, when taken altogether, constitute less than 50 percent of the cost of manufacture of the complete EPGTS of which they are a part. Upon receiving such a request, the Department will initiate a scope inquiry and instruct the Customs Service to suspend liquidation at a zero cash deposit rate/bond rate (depending on which rate, if any, is effective at that time) if the party can establish to the Department's satisfaction, through the submission of the requisite information specified below, that the sum of the EPGTS parts to be imported pursuant to a particular EPGTS contract represents less than 50 percent of the cost of manufacture of the complete EPGTS of which they are a part.

In such a review, we will require that the foreign producer/exporter submit to the Department, where applicable and available, the following information and documentation substantiating its claim that all of the parts to be imported into the United States from Japan pursuant to a particular EPGTS contract constitute less than 50 percent of the cost of manufacture of the complete EPGTS of which they are a part and, thus, are not subject merchandise: (1) The EPGTS sales contract (and any amendments) pursuant to which the parts are imported; (2) a diagram of the complete EPGTS; (3) a description of the parts included in the entry(ies); (4) the actual or estimated cost of the imported parts (depending on what is available prior to the time of importation of the parts into the United States); (5) the most recent cost estimate of the complete EPGTS, and data on historical variances between estimated and actual costs of production of the EPGTS; (6) a financial statement for the business unit that produces EPGTS; (7) a schedule of parts shipments to be made pursuant to a particular EPGTS contract, if more than one shipment is relevant; and (8) a schedule of EPGTS production completion in the United States. The foreign producer/exporter will also be required to serve the submitted materials upon counsel for the petitioner on the earlier of: (i) The same day they are filed with the Department, if an applicable Administrative Protective Order (''APO'') is outstanding, or (ii) within one day of the issuance of an applicable APO. Public versions of such materials will be served upon counsel for the petitioner in accordance with section 353.31 of the Department's regulations. The petitioner will have 15 calendar days from the date of receipt of such documents for review and the filing of comments. If, after providing this information to the Department, the foreign producer/exporter finds that the costs reported to the Department were understated and that the cost of manufacture of the imported parts will be over 50 percent of the cost of manufacture of the EPGTS of which they are a part, we will require that the party inform the Department immediately. After the expiration of the 15-day comment period, the Department will conduct its review of the submitted documentation and will, to the extent practicable, make an expedited preliminary ruling as to whether the merchandise falls outside of the scope. If the Department determines preliminarily that such merchandise is outside of the scope, for all such entries made pursuant to the same EPGTS contract, the Department will instruct the Customs Service to suspend liquidation at a zero deposit/bond rate.

Pursuant to the Department's preliminary ruling, the U.S. importer will be able to declare a zero rate for the imported merchandise at issue. Upon entry of the merchandise into the U.S. Customs territory, the U.S. importer and/or foreign manufacturer/exporter will be required to submit an appropriate certification to the Department concerning the contents of the entry. An appropriate certification should read as follows:

I [Name and Title], hereby certify that the cost of the engineered process gas turbo-compressor system parts from Japan contained in entry summary number(s) _____ pursuant to contract number _____, including the cost of design and engineering incurred by, and any assists provided by, the manufacturer or producer with respect to the engineered process gas turbo-compressor system, constitutes less than 50 percent of the cost of manufacture of the complete engineered process gas turbo-compressor system of which they are a part.

The Department will make a final scope ruling within the context of an administrative review, if requested by interested parties. Verification of the submitted information will occur within the context of such review, when appropriate. If the Department finds in its final ruling that the imported merchandise falls below the 50 percent threshold, then the Department will instruct the Customs Service to liquidate the entries at issue without regard to antidumping duties. Conversely, if the Department finds that the imported merchandise falls within the scope (*i.e.*, because the actual total cost of the parts imported pursuant to a contract for a complete EPGTS is 50 percent or more of the cost of manufacture of the complete EPGTS of which they are a part), then the U.S. importer will be subject to the assessment of antidumping duties on the imported parts, together with any applicable interest from the date of entry of such parts, at the rate determined in the administrative review.

With respect to entries of EPGTS spare and replacement/repair parts from Japan, we will instruct the Customs Service not to suspend liquidation of these entries if they are not included in the original contract of sale for the EPGTS of which they are intended to be a part.

In addition, in order to ensure that our suspension of liquidation instructions are not so broad as to cover merchandise imported for non-subject uses, foreign producers/exporters shall be required to provide certification that the imported merchandise would not be used to fulfill an EPGTS contract. An appropriate certification should read as follows:

I, [Name and Title], hereby certify that this entry/shipment does not contain merchandise that is imported from Japan pursuant to a contract for an engineered process gas turbo-compressor system and is, therefore, not subject to antidumping duties.

We will also request that the interested parties register with the Customs Service the EPGTS contract numbers pursuant to which subject merchandise is imported. These suspension of liquidation instructions will remain in effect until further notice.

The weighted-average dumping margins are as follows:

Exporter/Manufacturer	Weighted-average margin percentage
Mitsubishi Heavy Industries, Ltd. (MHI)	41.72
All-Others	41.72

International Trade Commission (''ITC'') Notification

In accordance with section 735(d) of the Act, we have notified the ITC of our determination. As our final determination is affirmative, the ITC will determine, within 45 days, whether these imports are causing material injury, or threat of material injury, to an industry in the United States. 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 canceled. 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.

Dated: April 24, 1997.

Robert S. LaRussa,

Acting Assistant Secretary for Import Administration.

[FR Doc. 97–11384 Filed 5–2–97; 8:45 am]

BILLING CODE 3510–DS–P

DEPARTMENT OF COMMERCE

International Trade Administration

[A–201–802]

Gray Portland Cement and Clinker From Mexico: Amended Final Results of Antidumping Duty Administrative Review

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

EFFECTIVE DATE: May 5, 1997.

FOR FURTHER INFORMATION CONTACT: Nithya Nagarajan or Dorothy Woster, Import Administration, International Trade Administration, U.S. Department of Commerce, 14th Street and Constitution Avenue NW, Washington, D.C. 20230; telephone: (202) 482–3793.

Scope of the Review

The products covered by this review include gray portland cement and clinker. Gray portland cement is a hydraulic cement and the primary component of concrete. Clinker, an intermediate material product produced when manufacturing cement, has no use other than being ground into finished cement. Gray portland cement is currently classifiable under the Harmonized Tariff Schedule (HTS) item number 2523.29 and cement clinker is currently classifiable under HTS item number 2523.10. Gray portland cement has also been entered under HTS item number 2523.90 as ''other hydraulic cements.'' The HTS subheadings are provided for convenience and U.S. Customs Service purposes only. Our written description of the scope of the order remains dispositive.

Amendment of Final Results

On April 9, 1997, the Department of Commerce (the Department) published the final results of the administrative review of the antidumping duty order on Gray Portland Cement and Clinker from Mexico (62 FR 17148). This review covered CEMEX S.A de C.V (CEMEX), and its affiliate, Cementos de Chihuahua (CDC), manufacturers/exporters of the subject merchandise to the United States. The period of review (POR) is August 1, 1994 through July 31, 1995.

On April 8, 1997, and April 17, 1997, counsel for the respondent, CEMEX, filed allegations of clerical errors with regard to these final results. On April 18, 1997, counsel for CDC filed allegations of clerical errors with regard to these final results. On April 9, 1997, counsel for petitioners, the Southern Tier Cement Committee, filed a submission agreeing with CEMEX's allegation submitted April 8, 1997; petitioners' submission also contained additional allegations of clerical errors with regard to these final results. On April 10, 1997, CEMEX filed a submission agreeing that the Department should correct the errors noted by petitioners' April 9, 1996 letter. The allegations and rebuttal comments of both parties were filed in a timely fashion. The Department, upon review of the allegations and comments, agrees with respondent and petitioners and is hereby issuing an amended final, based on the corrections of these ministerial errors.

First, respondent CEMEX contended that the Department made an arithmetic error when it converted the value of sales to the United States reported in short tons into metric tons. Respondent alleged that the Department should have divided net price for the product sold in the United States by the short ton/metric ton conversion coefficient rather than multiplying by the coefficient.

Petitioners did not object to respondent's allegation. Petitioners noted, however, that the correct conversion factor is .907194 metric tons per short ton, and that this conversion factor should be incorporated into the Department's amended final results. Respondent did not object to petitioners' allegation, and the Department has used the conversion factor of .907194 metric tons per short ton in the amended final results.

Second, CEMEX alleged that the Department overstated the constructed export price (CEP) profit rate by continuing to use further manufactured sales in the calculation of CEP profit without making any adjustment for those U.S. expenses associated with further manufacturing. CEMEX suggested that the Department correct this inadvertent error by dividing total U.S. expenses and revenue in the CEP profit calculation by the percentage which CEP sales comprise of total U.S. CEP and further manufactured sales. Petitioners have not objected in principle to CEMEX's allegation, however, they have objected to CEMEX's proposed methodology for calculating CEP profit. Petitioners have provided an alternative suggestion which adjusts total U.S. movement expenses (USMOVEH) and total U.S. indirect selling expenses (INDEXPU) to account for those expenses associated with the further manufactured sales.

In the final results of this review, the Department determined that the value added of U.S. further manufactured sales of concrete substantially exceeded the value added of the subject merchandise. The weighted-average CEP for non-further manufactured CEP sales was substituted as the CEP for U.S. further manufactured sales. The Department agrees with CEMEX that the Department overstated the CEP profit rate in the final results by continuing to use further manufactured sales in the calculation of CEP profit without making any adjustment for those U.S. expenses associated with further manufacturing. The Department agrees with CEMEX and petitioners' that this is a ministerial error and has corrected this error for the amended final results by including expenses associated with all CEP sales in the calculation of CEP profit based on petitioners' suggested calculation.

Third, CEMEX claims that the Department erred in excluding home market Type II transactions and sales failing the arm's length test from the