

**PUBLIC VERSION**

**UNITED STATES INTERNATIONAL TRADE COMMISSION  
Washington, D.C.**

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**In the Matter of**

**CERTAIN VARIABLE SPEED WIND  
TURBINES AND COMPONENTS THEREOF**

**Inv. No. 337-TA-641**

**RECOMMENDED DETERMINATION  
ON REMEDY AND BONDING  
Administrative Law Judge Carl C. Charneski**

Pursuant to the notice of investigation, 73 Fed. Reg. 16910 (2008), this is the Recommended Determination in the matter of *Certain Variable Speed Wind Turbines and Components Thereof*, United States International Trade Commission Investigation No. 337-TA-641. See 19 C.F.R. § 210.42(a)(1)(ii).

For the reasons stated herein, it is recommended that a limited exclusion order issue. It is not recommended that a cease and desist order issue as to any respondent. Additionally, it is recommended that if the Commission issues an exclusion order as a result of this investigation, the Presidential review period bond should be set at 100% (one hundred percent) of the entered value of any covered product.

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## **I. Procedural Background**

The Commission's Rules provide that subsequent to an initial determination on the question of violation of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), the Administrative Law Judge shall issue a recommended determination ("RD") containing findings of fact and recommendations concerning: (1) the appropriate remedy in the event that the Commission finds a violation of section 337, and (2) the amount of bond to be posted by respondents during Presidential review of Commission action under section 337(j). *See* 19 C.F.R. § 210.42(a)(1)(ii).

On August 7, 2009, the undersigned issued the initial determination ("ID") in this investigation, finding that a violation of section 337 has occurred in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain variable speed wind turbines or components thereof.

The notice of investigation named as the complainant General Electric Company ("GE") of Fairfield, Connecticut. 73 Fed. Reg. 16910 (2008). The following companies were named as the respondents: Mitsubishi Heavy Industries, Ltd. ("MHI") of Tokyo, Japan; Mitsubishi Heavy Industries America, Inc. ("MHIA") of New York, New York; and Mitsubishi Power Systems Americas, Inc. ("MPSA") of Lake Mary, Florida (collectively, "Mitsubishi" or "Mitsubishi respondents"). *Id.* The Commission Investigative Staff ("Staff") of the Commission's Office of Unfair Import Investigations is also a party in this investigation. *Id.*

## **II. Remedy**

### **A. Summary Of The Parties' Arguments**

GE argues that "upon a finding of violation, the proper remedy is a limited exclusion

order barring Respondents from importing the Mitsubishi Wind Turbines, [

] GE also requests a cease and desist order against MPSA. *Id.* at 99.

It is further argued that the importation bond for the Presidential review period should be set at 100% of a product's entered value. *Id.* at 99-100. GE argues that the Mitsubishi respondents' bond proposal is based on a mean licensing fee, without a showing that it would be reasonable to apply such a calculation in the present circumstances. *See* GE Reply at 50.

The Mitsubishi respondents do not address the question of a limited exclusion order. They argue that a cease and desist order is not appropriate because GE did not request a cease and desist order in its prehearing statement (and in no case should such an order prevent MHI from providing turbines that have already been imported with replacement parts, servicing and repairs). They also argue that Commission precedent would allow the importation bond to be set according to the rate of a "reasonable royalty,"[

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The Staff argues that if a violation of section 337 is found, a limited exclusion order should issue, and should apply to the infringing products of MHI and MPSA. It is argued that under Commission precedent, the limited exclusion order should apply to affiliated companies, parents, subsidiaries or other related business entities, and their successors and assigns, and thus would include MHIA inasmuch as it is wholly owned by MHI and wholly owns MPSA. *See*

Staff Br. at 79.

With respect to a cease and desist order, the Staff notes that GE did not address the issue in its prehearing statement. Further, it is argued that there is insufficient evidence of a “commercially significant” inventory required for the issuance of such an order, and thus GE has not established that it is warranted. *See Id.*; Staff Reply at 21-22.

Finally, with respect to bond, the Staff argues that the licenses related to the asserted patents “have a number of markedly different conditions, including number of patents licensed, lump sum payments, settlement concessions, cross-licensing, and varying per unit running royalty rates.” Staff Br. at 80-81. Thus, it is argued that “the record lacks sufficient information to conclude anything but the 100% entered value would be appropriate.” *See Id.* at 81.

#### **B. Limited Exclusion Order**

The Commission has broad discretion in selecting the form, scope, and extent of the remedy in a section 337 proceeding. *Viscofan, S.A. v. United States Int’l Trade Comm’n*, 787 F.2d 544, 548 (Fed. Cir. 1986). A limited exclusion order directed to respondents’ infringing products is among the remedies that the Commission may impose. *See* 19 U.S.C. § 1337(d).

As indicated in the ID, MHI and MPSA have stipulated that they have sold for importation, imported and, or, sold after importation into the United States, the accused Mitsubishi turbines. *See* ID at 15. Consequently, if a violation of section 337 is found, a limited exclusion order should issue that is directed at MHI and MPSA.

As found in the ID, however, GE has not argued or demonstrated that MHIA has directly imported or sold an accused product; nor has GE advanced a legal theory under which the actions of MHIA’s subsidiary, MPSA, would be chargeable to the parent company. MHIA was not

found in violation of section 337. *See* ID at 16. Nevertheless, a limited exclusion order normally includes named respondents and their affiliated companies, parents, subsidiaries, or other related business entities, and their successors or assigns. *See, e.g., Certain Automotive Measuring Devices, Products Containing Same, and Bezels for Such Devices*, Inv. No. 337-TA-494, Limited Exclusion Order (Jan. 24, 2005); *Certain Variable Speed Wind Turbines*, Inv. No. 337-TA-376, Order (Aug. 30, 1996). It is undisputed that MHIA is wholly owned by MHI, and that it wholly owns MPSA. *See* Resp. to Compl., ¶¶ 12, 14. Thus, for any limited exclusion order naming MHI and, or, MPSA to have real effect it must also cover importations and sales of accused products by MHIA. Otherwise an evasion of any limited exclusion order is possible [ ]

### **C. Cease And Desist Order**

Section 337 provides that in addition to, or in lieu of, the issuance of an exclusion order, the Commission may issue a cease and desist order as a remedy for violation of section 337. *See* 19 U.S.C. § 1337(f)(1). The Commission generally issues a cease and desist order directed to a domestic respondent when there is a “commercially significant” amount of infringing, imported product in the United States that could be sold so as to undercut the remedy provided by an exclusion order. *See Certain Crystalline Cefadroxil Monohydrate*, Inv. No. 337-TA-293, USITC Pub. No. 2391, Comm’n Op. on Remedy, the Public Interest and Bonding at 37-42 (June 1991); *Certain Condensers, Parts Thereof and Products Containing Same, Including Air Conditioners for Automobiles*, Inv. No. 337-TA-334, Comm’n Op. at 26-28 (Aug. 27, 1997).

GE requests that a cease and desist order issue against MPSA. GE Br. at 99. This

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<sup>1</sup> [

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request for a cease and desist order, however, was not raised by GE in its prehearing statement. *See* GE Prehr'g Statement at vii, 212-15. Instead, it was raised for the first time in complainant's post-hearing brief. Indeed, there the cease and desist order issue is addressed very briefly,<sup>2</sup> and not at all in complainant's reply brief. Thus, the issue of whether a cease and desist order should issue here was untimely raised, and the request must be rejected. *See* Order No. 2, Ground Rule 4d (issues to be addressed at hearing to be set forth in prehearing statement).

Accordingly, the issuance of a cease and desist order is not recommended.

#### **D. Bond**

The Administrative Law Judge and the Commission must determine the amount of bond to be required of a respondent, pursuant to section 337(j)(3), during the 60-day Presidential review period following the issuance of permanent relief, in the event that the Commission determines to issue a remedy. The purpose of the bond is to protect the complainant from any injury. 19 C.F.R. § 210.42(a)(1)(ii), § 210.50(a)(3).

When reliable price information is available, the Commission has often set the bond by eliminating the differential between the domestic product and the imported, infringing product. *See Certain Microsphere Adhesives, Processes for Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, Comm'n Op. a 24 (1995). In other cases, the Commission has turned to alternative approaches, especially when the level of a reasonable royalty rate could be ascertained. *See Certain Integrated Circuit*

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<sup>2</sup> In any event, little evidence was adduced at the hearing that would be relevant to the issue of a cease and desist order. [ ] Thus, even if properly raised, there would be insufficient evidence upon which to grant relief.

*Telecommunication Chips and Products Containing Same, Including Dialing Apparatus*, Inv. No. 337-TA-337, Comm'n Op. at 41-43 (1995). A 100 percent bond has been required when no effective alternative existed. *See Certain Flash Memory Circuits and Products Containing Same*, Inv. No. 337-TA-382, USITC Pub. No. 3046, Comm'n Op. at 26-27 (July 1997) (a 100% bond imposed when price comparison was not practical because the parties sold products at different levels of commerce, and the proposed royalty rate appeared to be *de minimis* and without adequate support in the record).

In this case, no party relies on price information with respect to the issue of bond. In addition, there is inadequate evidence to permit an alternate method of bond calculation, such as the calculation of a reasonable royalty rate. The Mitsubishi respondents have calculated the midpoint dollar amount of the royalties required by various GE licenses. *See Mitsubishi Reply* at 50. However, it has not been established that the licenses used in the calculation are comparable to the extent that the midpoint accurately represents a reasonable royalty rate.

Consequently, it is recommended that a 100% bond be required of respondents during the Presidential review period.

### **III. Conclusions And Recommended Determination**


In accordance with the discussion of the issues contained herein, it is the RECOMMENDED DETERMINATION of the undersigned that in the event the Commission determines that respondents have committed a violation of section 337, the Commission should issue a limited order. In addition, if the Commission imposes a remedy that prohibits importation, in order to import subject products during the Presidential review period, respondents should be required to post a bond of 100% of the entered value of the imported

products.

The Secretary shall serve a confidential version of this RD upon counsel who are signatories to the Protective Order issued in this investigation (Order No. 1), and upon the Commission investigative attorney.

To expedite service of the public version, counsel for each party shall file by no later than August 28, 2009, a copy of this RD with those sections considered by the party to be confidential bracketed in red, or if confidential treatment is not requested for any portion of this RD, a statement to that effect.

SO ORDERED.

  
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Carl C. Charneski  
Administrative Law Judge

Issued: August 21, 2009


**CERTAIN VARIABLE SPEED WIND TURBINES AND COMPONENTS THEREOF**  
**INV. NO. 337-TA-641**

**PUBLIC CERTIFICATE OF SERVICE**

I, Marilyn R. Abbott, hereby certify that the attached **RECOMMENDED DETERMINATION** has been served upon the Commission Investigative Attorney, Erin D. Joffre, Esq., and the following parties as indicated, on

**OCT 21 2009**

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