Public Document

Thai I-Mei Frozen Foods Co., Ltd. v. United States
Consol. Court No. 05-00197 Slip Op. 08-86 (CIT August 26, 2008)
Consol. Court No. 05-00197 Slip Op. 09-6 (CIT January 21, 2009)

FINAL RESULTS OF REDETERMINATION

PURSUANT TO COURT REMAND

A. SUMMARY

The Department of Commerce (the "Department") has prepared these final results of redetermination pursuant to the remand order from the U.S. Court of International Trade ("Court") in Thai I-Mei Frozen Foods Co., Ltd. v. United States, Consol. Court No. 05-00197, Slip Op. 08-86 (CIT Aug. 26, 2008) ("Thai I-Mei II") and Thai I-Mei Frozen Foods Co., Ltd. v. United States, Consol. Court No. 05-00197, Slip Op. 09-6 (CIT Jan. 21, 2009) ("Thai I-Mei III"). In its remand order Thai I-Mei II, the Court directed the Department to revise the calculation of constructed value ("CV") profit by relying on a profit rate which is reasonable, accurate, and determined in accordance with law. The Court further ordered the Department to justify its selection of this rate. In Thai I-Mei III, the Court allowed the Department additional time to file its remand results and directed the Department to accept the entirety of a submission filed by Thai I-Mei Frozen Foods Co., Ltd. (Thai I-Mei) on October 30, 2008, which had been previously rejected by the Department because it contained untimely filed factual information.

As part of its Thai I-Mei II remand order, the Court permitted the Department to reopen the administrative record to obtain additional profit information. In accordance with the Court's instructions, we solicited additional sources of CV profit data from interested parties to this proceeding. In response to this request, the Ad Hoc Shrimp Trade Action Committee ("the petitioner") provided 2003 financial data from 86 companies which are members of the Thailand

Frozen Food Association ("TFFA"). Both the petitioner and Thai I-Mei provided various suggestions on how to recalculate Thai I-Mei's CV profit rate. We analyzed the profit data existing on the administrative record, as well as the new information provided by both parties. While we respectfully disagree that use of any of this data is preferable to or more reasonable than the methodology we used in the final determination and which we further explained in the first remand redetermination, we nonetheless recalculated Thai I-Mei's dumping margin using the methodology the Court has stated it would accept as reasonable.

The Department issued its draft remand results to Thai I-Mei on February 18, 2009. On February 25, 2009, we received comments on the draft remand results. These comments are addressed in section "D. Comments on Draft Remand Results" below.

For purposes of this final results of redetermination, we find that the data selected — the weighted-average of Andaman Seafood Co., Ltd.'s, Chanthaburi Seafoods Co., Ltd.'s, and Thailand Fishery Cold Storage Public Co., Ltd.'s (collectively "Rubicon") and Union Frozen Products Co., Ltd.'s ("UFP") net profit on their Canadian sales of the foreign like product both inside and outside the ordinary course of trade — is an appropriate proxy because the Court found it to be a reasonable alternative, and because the proposed alternatives by the parties were found to be unacceptable by the Department in this remand redetermination, as discussed further below. This data serves the objective of achieving accuracy in calculating Thai I-Mei's dumping margin because the Court has said that it is a reasonable method to use.

B. BACKGROUND

On December 23, 2004, the Department published its final determination in the less-than-fair-value ("LTFV") investigation on frozen warmwater shrimp from Thailand. Notice of Final Determination of Sales at Less Than Fair Value and Negative Final Determination of Critical Circumstances: Certain Frozen and Canned Warmwater Shrimp from Thailand, 69 FR 76918 (Dec. 23, 2004) ("Thai Shrimp Final"), *as amended by,* Notice of Amended Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Certain Frozen Warmwater Shrimp from Thailand, 70 FR 5145 (Feb. 1, 2005) ("Thai Shrimp Amended Final"). The antidumping duty order in this proceeding was published in the Federal Register on February 1, 2005. Thai Shrimp Amended Final. The period of investigation ("POI") covered the period October 1, 2002, to September 30, 2003.

Thai I-Mei challenged the Department's amended final determination. After a full briefing of all the issues, on March 12, 2007, the Court remanded to the Department its final determination upholding the use of CV but requiring further explanation related to the calculation of CV profit for Thai I-Mei. Thai I-Mei Frozen Foods Co., Ltd. v. United States, Consol. Court No. 05-00197, Slip Op. 07-35 (CIT Mar. 12, 2007) ("Thai I-Mei I"). In its remand order, the Court directed the Department to reconsider its decision to exclude from Thai I-Mei's CV profit rate calculation third country sales made by Rubicon and UFP that were determined by the Department to be outside the ordinary course of trade. As part of this reconsideration, the Court directed the Department to either recalculate Thai I-Mei's CV profit rate by including in the calculation the data derived from third country sales of Rubicon and UFP that occurred outside the ordinary course of trade or justify why the Department's existing

calculation was supported by substantial record evidence and was otherwise in accordance with law. Thai I-Mei I, at 44.

On June 11, 2007, the Department issued the Final Results of Redetermination Pursuant to Court Remand ("Remand Redetermination"), in which we provided an additional explanation as to why the existing CV profit calculation was reasonable, supported by substantial evidence and in accordance with law. However, on August 26, 2008, the Court again remanded this issue to the Department, stating, "The court concludes that Commerce's Remand Redetermination does not comply with the court's remand instructions because the constructed value profit rate for Thai I-Mei was not determined according to a 'reasonable method' as required by the governing statute." Thai I-Mei II, at 2.

Specifically, in its second remand order, the Court directed the Department to:

- Calculate and incorporate into a redetermination of the Thai Shrimp Amended Final, a CV profit rate for Thai I-Mei that is determined according to a method that differs from the one used in the Remand Redetermination, that is a "reasonable method" as required by clause (iii) of section 773(e)(2)(B) of the Act, that is in accordance with law, and that complies fully with the Court's Opinion and Order;

- Include an explanation of why its chosen method of recalculating the CV profit rate is reasonable and serves the objective of achieving accuracy in the determination of a dumping margin for Thai I-Mei; and

- Identify the findings of fact upon which it relies for its recalculation of the CV profit rate and rely only on findings of fact that are supported by substantial evidence on the record.

Thai I-Mei II, at 34.

In ordering the above actions, the Court did not confine the Department to the use of data from the third country sales of Rubicon and UFP, but instead permitted it to use other data for this purpose should it conclude that it is reasonable under clause (iii) to do so. Moreover, the

Court also permitted the Department to reopen the administrative record to obtain additional profit data, as necessary.

In accordance with the Court's remand instructions, on September 30, 2008, we reopened the administrative record and solicited alternative profit information from interested parties in this proceeding to be submitted by October 14, 2008.[1] In response to this request, on October 20, 2008, the petitioner provided new information which included 2003 financial data for 86 companies which are members of the TFFA. Also, in the petitioner's October 20, 2008, submission, the petitioner provided several proposals on how to use the existing or updated profit data to calculate a revised profit rate. On October 20, 2008, Thai I-Mei also provided several proposals on how to use the existing profit data to calculate a revised profit rate. In this submission, Thai I-Mei further argued that the Department should apply the CV profit cap as required under section 773(e)(2)(B)(iii) of the Tariff Act of 1930, as amended ("The Act"), in calculating Thai I-Mei's CV profit, and provided financial data obtained from Business OnLine Co. ("BOL") for 47 Thai seafood companies during fiscal year 2004-2005 ("BOL 1 data") to use for this purpose. According to Thai I-Mei, both the BOL 1 data and the TFFA data it submitted in the LTFV investigation were appropriate sources for the profit cap.

On October 30, 2008, Thai I-Mei commented on the petitioner's October 20, 2008, submission and provided new profit cap information. Thai I-Mei's new profit cap information consisted of financial data it obtained from BOL for sales made by 83 Thai seafood companies of merchandise in the same general category as frozen warmwater shrimp (e.g., frozen fish), generally occurring during fiscal year 2003 (" BOL 2 data"). The Department rejected the new

[1] We note that this deadline was later extended by the Department until October 20, 2008.

BOL data on the grounds that it was untimely filed factual information. Nonetheless, the Department allowed Thai I-Mei to resubmit the portion of its October 30, 2008, submission that contained rebuttal comments on the petitioner's submission. On November 10, 2008, the petitioner and Thai I-Mei commented on each other's submissions, in the time permitted by the Department.

In response to the government's request for an extension to file the remand results with the Court, on January 21, 2009, the Court ordered that Thai I-Mei may re-file its submission originally filed on October 30, 2008, with the Department and that the Department should accept this submission in its entirety including Thai I-Mei's new profit cap information. Thai I-Mei III, at 7. The Court also granted the government's request for an extension of time for filing the results of its remand redetermination until March 20, 2009. On January 23, 2009, Thai I-Mei re-filed the response it originally submitted on October 30, 2008.

We have now analyzed the information on the record of this investigation, including information existing at the time of the final determination and the new information provided by the petitioner and Thai I-Mei. As discussed further below, we have revised the calculation of CV profit for Thai I-Mei, as required by the Court's order in Thai I-Mei II, and we have explained why this revised calculation complies with the Court's orders.

C. ANALYSIS

1. Profit Data on the Administrative Record

Section 773(e)(2)(B) of the Act sets forth three alternative methodologies for calculating selling, general, and administrative expenses and profit when determining constructed value. In the Thai Shrimp Final, the Department calculated Thai I-Mei's CV profit using the

weighted-average profit rate of Rubicon and UFP in accordance with section 773(e)(2)(B)(iii) of the Act (i.e., the third alternative), which allows the Department to use any other reasonable method as long as the result was not greater than the amount realized by exporters or producers "in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise" (i.e., the profit "cap"). Thai Shrimp Final at Comment 14. In its remand order, the Court held that this CV profit rate was not determined according to a "reasonable method" as required by the governing statute. Thai I-Mei II, at 32. Thus, the Court directed the Department to: 1) re-determine a CV profit rate for Thai I-Mei that "differs from the one used in the Remand Redetermination and the Amended Final Determination, that is a 'reasonable method'" and that is in accordance with law; and 2) explain why the chosen rate is both reasonable and serves the objective of achieving accuracy in the determination of a dumping margin for Thai I-Mei. Id. at 34.

In response to the Court's directive, the Department compiled a list of sources of available profit data. These are discussed in turn below.

- Sales and Cost Data Reported by Rubicon and UFP: As noted above, two respondents in the LTFV investigation, Rubicon and UFP, submitted complete sales and cost information related to their third country sales to Canada. While the Court has prohibited the Department from relying exclusively on sales in the ordinary course of trade made by these companies when determining Thai I-Mei's profit rate, it has not prohibited the Department from considering these sales and cost databases in another form. Specifically, the Court stated:

> {a}s the court concluded in *Thai I-Mei I*, plaintiff has not established its right to have its constructed value profit rate determined according to data other

> than the data pertaining to the sales of the other two respondents in Canada. Therefore, Commerce is not required to use an entirely different set of data when recalculating a constructed value profit rate for Thai I-Mei.

Thai I-Mei II, at 33 (citation omitted).

- General Industry Data: In the LTFV investigation, Thai I-Mei submitted publicly available profit information compiled from the financial statements of selected member companies of the TFFA. The Department found that the use of this information was less reasonable than the third country sales data submitted by Rubicon and UFP, and the Court upheld this finding in Thai I-Mei I. Thai Shrimp Final at Comment 14; Thai I-Mei I, at 34. In its October 20, 2008, submission, the petitioner submitted updated TFFA information for the same companies.

2. Interested Party Comments

a. Thai I-Mei's Proposed Profit Alternatives

On October 20, 2008, Thai I-Mei responded to the Department's request for additional profit information. In this submission, Thai I-Mei stated that it had not sold foreign like product to unaffiliated customers in either the home market or third countries during the POI or the preceding five years, nor had it sold products in the same general category of merchandise in these markets during this six-year period. Nonetheless, Thai I-Mei proposed four alternatives for calculating its profit rate using the existing profit data on the record. These include the following:

- Using the Weighted-Average of Rubicon's and UFP's Profit Rates: Under this methodology, Thai I-Mei advocates basing its profit rate on all third country sales made by Rubicon and UFP, including sales made both in and outside the ordinary course of

trade. Thai I-Mei claims that the Department has already found this data source reasonable under section 773(e)(2)(B)(iii) of the Act. Further, Thai I-Mei asserts that there is no reason to believe that it would have sold foreign like product at below cost prices even if it had made sales in a comparison market, and it would be unreasonable to increase Thai I-Mei's CV profit rate simply because the other respondents made below-cost sales.

- Using Rubicon's and UFP's 2003 Financial Statements: Thai I-Mei asserts that it is common Department practice to rely on other respondents' financial statements to calculate CV profit. Moreover, Thai I-Mei notes that the Department has already found that Rubicon and UFP have similar business operations to, and sell similar products as, Thai I-Mei. Further, Thai I-Mei points out that these financial statements are not only contemporaneous with the POI, but they also contain significant sales in Thailand and various third country markets. Thus, Thai I-Mei contends that it would be reasonable to assume that, if Thai I-Mei had a comparison market, its profit rate would be comparable to the profit rate reflected on these financial statements.
- Using Profit Data from Selected Members of the TFFA: During the LTFV investigation, Thai I-Mei submitted data derived from the financial statements of 60 members of the TFFA. Thai I-Mei asserts that it would be reasonable to base its profit rate on this data, given that it is the only data already on the administrative record evidencing the profit rates experienced by Thai producers of shrimp and seafood products on sales in Thailand. Thai I-Mei claims that this information relates to TFFA members whose business operations and products were similar to its own, is representative of the

larger Thai shrimp and seafood industry, and is sufficiently contemporaneous with the POI. Finally, Thai I-Mei maintains that use of this data source ensures that the characteristics of any one company do not distort the resulting CV profit rate.

- Relying on Thai I-Mei's Own 2003 Financial Statements: Thai I-Mei notes that the administrative record also contains Thai I-Mei's own financial statements, which cover the company's fiscal year ending July 31, 2003. Thai I-Mei contends that these financial statements form a reasonable source of CV profit because they are contemporaneous with the majority of the POI, have been audited and verified by the Department, relate to sales of subject merchandise, and are specific to Thai I-Mei. While Thai I-Mei acknowledges that these financial statements predominately reflect sales to the United States, it argues that there would be no reason to believe that Thai I-Mei would have had a higher profit rate in Thailand, had the company sold merchandise there.

Thai I-Mei contends that, regardless of which of the above alternatives the Department chooses, it should test the selected rate against a profit cap, as required under section 773(e)(2)(B)(iii) of the Act. According to Thai I-Mei, the TFFA data noted above is an appropriate source for the profit cap, either as acceptable in its own right or as "facts available." Thai I-Mei also provided information which it had submitted in the subsequent 2004-2006 administrative review period for the Department to use in computing this cap, as well as additional data submitted on January 23, 2009. As noted above, this information consisted of financial data obtained from BOL for either sales made by 47 Thai seafood companies of merchandise in the same general category as frozen warmwater shrimp (e.g., frozen fish),

generally occurring during fiscal year 2004-2005 (the BOL 1 data), and sales made by 83 Thai seafood companies during fiscal year 2003 (the BOL 2 data).

b. The Petitioner's Rebuttal of Thai I-Mei's Proposed Alternatives

The petitioner maintains that none of Thai I-Mei's proposed methodologies for calculating its CV profit rate is reasonable. According to the petitioner, including all of Rubicon's and UFP's sales in the calculation of CV profit would yield an inaccurate margin because these companies sold many products that Thai I-Mei did not. Additionally, while the data in these companies' financial statements pertains to sales in all markets (including sales to the United States which are under investigation by the Department as being dumped), the Department calculates CV profit based solely on sales in the comparison market. Similarly, the petitioner notes that Thai I-Mei's 2003 financial statements reflect solely sales made to the United States, and the petitioner contends that using this data would be "utterly illogical, prejudicial" and "inherently unreasonable."

Regarding the TFFA data, the petitioner maintains that this data is useable only if the Department includes data taken from another Thai shrimp producer, Thai Union Frozen Products Public Co. ("Thai Union") (see the petitioner's proposal, below). According to the petitioner, Thai I-Mei's exclusion of Thai Union's information demonstrates that Thai I-Mei manipulated the TFFA data in order to guarantee a favorable outcome, and thus the Department may not rely on it as submitted.

Finally, the petitioner contends that the Department should reject Thai I-Mei's arguments relating to the profit cap, given that the Court expressly noted in both of its remand decisions that Thai I-Mei had failed to exhaust administrative remedies with respect to that issue.

Nonetheless, the petitioner maintains that neither source of profit cap data has merit, in light of the fact that the TFFA data submitted in the LTFV investigation was "cherry picked," while the BOL 1 data submitted in October 2008 was related to companies which were dissimilar to Thai I-Mei and not contemporaneous to the POI.

c. Petitioner's Proposed Profit Alternatives

On October 20, 2008, the petitioner also responded to the Department's request for additional profit information. In this submission, the petitioner provided several alternative CV profit calculation methodologies which could be employed by the Department for purposes of this remand. In developing these alternatives, the petitioner notes that it weighed the following factors, consistent with the Department's practice in this area: 1) the similarity of the potential company's business operations and products to Thai I-Mei's; 2) the extent to which the possible profit data reflected sales in the United States and/or the home market; 3) the contemporaneity of the data; and 4) the similarity of the customer base.

Specifically, the petitioner's proposals are as follows:

- Calculate the Profit Rate Using a Subset of Rubicon's and UFP's Third Country Sales: According to the petitioner, the Department should recalculate Thai I-Mei's profit rate using sales of merchandise which are either "virtually identical" to Thai I-Mei's merchandise sold in the United States in terms of physical characteristics or sales of merchandise sold in the same form (e.g., individually quick frozen (or "IQF"), block, etc.). The petitioner asserts that the methodology would yield a more accurate proxy for Thai I-Mei's products than would a profit rate based on all products sold by these two companies.

- Calculate the Weighted-Average of the Profit Made by Rubicon's U.S. Subsidiary and UFP on Their Sales in Canada: According to the petitioner, this methodology is reasonable because it includes all sales made by Rubicon, and thus it more closely mimics Thai I-Mei's own profit experience.
- Base the Profit Rate on Modified TFFA Data: In its October 20, 2008, submission, the petitioner provided 2003 information for 86 of the 95 companies that were members of the TFFA which were listed as producing frozen shrimp and shrimp products. This information includes Thai Union, a company which Thai I-Mei excluded on the grounds that Thai Union sold food products other than shrimp. Consistent with Thai I-Mei's methodology when presenting the original TFFA data, the petitioner excluded producers: 1) with sales accounting for less than 80 percent of their revenues; 2) having less than 40 employees not designated by the TFFA as packers; 3) which exported only to the United States; or 4) did not have shrimp listed as a main product in the TFFA directory. According to the petitioner, use of this data permits the Department to employ a methodology that is contemporaneous with the POI and is broadly representative of the profit experience of virtually all Thai companies involved in the sale of shrimp during that time period.

d. Thai I-Mei's Rebuttal of the Petitioner's Alternatives

Thai I-Mei contends that none of the petitioner's suggested CV profit methodologies is appropriate, nor would use of any of these alternatives constitute a reasonable method for calculating CV profit under section 773(e)(2)(B)(iii) of the Act. According to Thai I-Mei, the petitioner's approach of basing CV profit on a subset of Rubicon's and UFP's third country data

is both arbitrary and inconsistent with the Department's practice. Moreover, Thai I-Mei asserts that this methodology does not accurately reflect the profit that Thai I-Mei might have experienced, had it actually sold foreign like product in its home market, because Thai I-Mei may have sold entirely different products in Thailand than it sold to the United States or than Rubicon and UFP sold in Canada. Thai I-Mei also disagrees with the petitioner's argument that the Department should base CV profit, in part, on Rubicon's constructed export price (CEP) profit rate because this profit rate is based on U.S. sales data.

Regarding the TFFA data, Thai I-Mei contends that the petitioner's revised version of this data is unreasonable and unreliable. According to Thai I-Mei, this data is skewed by the inclusion of profit data for Thai Union, which Thai I-Mei contends is aberrant. Except for a few outliers like Thai Union, which Thai I-Mei asserts are inadequate proxies for its own profit experience, Thai I-Mei asserts that even the petitioner's submission demonstrates that Thai shrimp companies experienced very low profit rates during the POI.

3. Analysis

We have carefully considered the data sources available for recalculating Thai I-Mei's CV profit rate. We continue to find that all of these sources are significantly flawed in at least one material aspect. While we find that none of the proposed profit alternatives is reasonable when considered in isolation, as discussed below, we determine that using the weighted average of Rubicon's and UFP's profit on their Canadian-market sales, which includes sales both in and outside the ordinary course of trade, is an alternative that the Court has said it will accept. We have therefore used this data in making our redetermination on remand.

Our analysis of each data source is provided in turn below.

a. Rubicon's and UFP's Third Country Sales

During the POI, neither Rubicon nor UFP had a viable home market for frozen warmwater shrimp. Therefore, the Department based Rubicon's and UFP's normal value on sales by these companies to their largest third country market, Canada. Based on properly-filed allegations that these companies sold the foreign like product in the third country market at prices below the cost of production during the POI, the Department conducted cost investigations for both companies. During the course of the cost investigations, we found that both companies sold substantial quantities of the foreign-like-product at below-cost prices in Canada.

As noted above, Thai I-Mei also did not have a viable home market during the POI, nor did it have any viable third country markets for the foreign like product. Similarly, Thai I-Mei did not sell products within the same general category as the foreign like product in Thailand during the POI. Therefore, in accordance with our practice, we based normal value for Thai I-Mei on CV. As part of CV, we included the weighted-average profit experienced by Rubicon and UFP on their Canadian-market sales of the foreign like product made in the ordinary course of trade, pursuant to section 773(e)(2)(B)(iii) of the Act. Thai Shrimp Final at Comment 14.

The Court has found that the Department's profit methodology for Thai I-Mei, which it used in both the Amended Final Determination and the Remand Redetermination, was not reasonable. The Court's opinion in Thai I-Mei II at 18 states:

> The court, therefore, cannot agree that it is reasonable under the statute for the Department, when applying alternative (iii), "to mimic Congress's expressed preference that sales outside the ordinary course of trade be excluded."

We respectfully disagree with the Court that our use of this data was not reasonable. In its opinion, the Court presented the following rationale as one of the findings underpinning this conclusion:

> Commerce has not identified data showing that the 9.67% profit rate estimate is reasonably related to Thai I-Mei's profit experience. Thai I-Mei's circumstances, according to Commerce's own findings and determinations, were different from those of each of the other two investigated respondents. This is demonstrated by, *inter alia*, Thai I-Mei's amended final margin of 5.29%, which was considerably lower than those Commerce determined for the companies in the Rubicon Group (5.91%) and for UFP (6.82%).

Thai I-Mei II, at 28.

Despite our fundamental disagreement with the Court that the CV profit methodology which we used for Thai I-Mei was unreasonable, we have complied with the Court's instructions and we have recalculated Thai I-Mei's CV profit using a method which is different from the one that we used in the Amended Final Determination and the Remand Redetermination. We have considered Rubicon's and UFP's Canadian-market sales made both in and outside the ordinary course of trade for calculating CV profit for these remand results. This methodology was one of the two options that the Court ordered us to follow in Thai I-Mei I, where the Court ordered that:

> …Commerce, in preparing a remand determination, either shall recalculate Thai I-Mei's constructed value profit rate by including in the calculation the data derived from third country sales of Rubicon Group and the Union Frozen Products Co., Ltd. that occurred outside of the ordinary course of trade or, alternatively, shall provide in the remand determination a justification that addresses the objections discussed in this Opinion and Order and that sets forth reasons sufficient to support a conclusion that a calculation of the constructed value profit rate that excludes the data derived from sales of Rubicon Group and the Union Frozen Products Co., Ltd. occurring outside of the ordinary course of trade is supported by substantial evidence on the record and is otherwise in accordance with law….

Thai I-Mei I, at 44.

Therefore, it is a methodology which the Court will find to be reasonable, in accordance with the statute, and thus it will serve the objective of achieving accuracy in determining Thai I-Mei's dumping margin.

b. TFFA Data

In the original LTFV investigation, Thai I-Mei submitted profit data derived from the income statements of 60 members of the TFFA. We rejected the use of this data in our final determination because, among other things, it was based in large part on sales to the United States, the use of which is contrary to the Department's practice. Specifically, we stated in the Thai Shrimp Final:

> We find that Thai I-Mei's proposed method for calculating the CV profit is not preferable for the following reasons. First, Thai I-Mei did not provide information demonstrating that the business operations and product mix of the 60 companies it used in its profit calculation were more similar to its own than that of the Rubicon Group and UFP. Second, Thai I-Mei's method included sales to the United States, contrary to the Department's practice. Last, Thai I-Mei's method is less contemporaneous with the POI than the Department's method and Thai I-Mei did not provide any information to demonstrate that the customer bases of the surrogate companies are similar to its own customer base.

Thai Shrimp Final at Comment 14.

The Court upheld our rejection of this data in Thai I-Mei I, stating:

> The data plaintiff presented, however, when compared to the data pertaining to the third country sales of Rubicon Group and Union Frozen Products, were not superior in any material respect and, in several respects, were inferior. . . Commerce's choice of the Rubicon Group and Union Frozen Products data over the TFFA data was based on findings that were supported by substantial evidence on the record.

Thai I-Mei I, at 33-34.

While the petitioner has provided more contemporaneous — and in the petitioner's eyes arguably better — data in its October 20, 2008, submission, we find that this data continues to suffer from many of the same defects noted above. Specifically, this data was taken from the same companies included in the profit "pool" provided by Thai I-Mei, and thus there is no information on the record demonstrating that the business operations and product mix of the 86 companies it used in its profit calculation were more similar to Thai I-Mei's than that of Rubicon and UFP or Thai I-Mei's itself. Moreover, this data continues to reflect significant sales to the United States, and it is not necessarily representative of the profit experience of these companies on their sales in Thailand or to third countries. Finally, as was the case with the original data, the Department has no information demonstrating that the customer bases of the surrogate companies are similar to Thai I-Mei's own customer base. For these reasons, we have not relied on the TFFA data submitted by the petitioner in this remand redetermination.

c. Additional Sources Proposed by Thai I-Mei and the Petitioner

We find that each of Thai I-Mei's and the petitioner's proposed sources of data for Thai I-Mei's CV profit rate is not appropriate, for the reasons set forth below.

- Using Rubicon's and UFP's 2003 Financial Statements: We find that using this data would be inappropriate because both Rubicon's and UFP's financial statements include sales to the United States. As we noted in the Thai Shrimp Final, "The Department's practice is to base its calculation of CV profit on sales to a comparison market, not the United States. Because the Department typically compares U.S. sales to a normal value based on sales in the home market or third country, the Department does not

normally construct a normal value based on financial data that contains exclusively or predominantly U.S. sales." Thai Shrimp Final at Comment 14.

- Using Profit Data from Selected Members of the TFFA: For the reasons set forth above, at item 3.b., we find that using the TFFA data to calculate Thai I-Mei's CV profit would be inappropriate.

- Relying on Thai I-Mei's Own 2003 Financial Statements: We find that using this data would be inappropriate for the same reason that we rejected using Rubicon's and UFP's audited financial statements, above (i.e., because Thai I-Mei's sales during this period largely consisted of sales to the United States). Thai Shrimp Final at Comment 14.

- Calculate the Profit Rate Using a Subset of Rubicon's and UFP's Third Country Sales: The Department addressed CV profit calculation methodologies similar to those proposed by the petitioner in Antidumping Duties; Countervailing Duties: Final Rule, 62 FR 27296, 27359 (May 19, 1997), where we stated:

> …{S}ome of the commenters recommended that the regulations provide for the calculation of SG&A and profit on the basis of different product groupings, and that such groupings be limited to those models of the foreign like products capable of comparison to each model of the subject merchandise. Other commenters suggested an even narrower, model-specific basis for computing SG&A and profit; i.e., when the Department disregards all home market sales of a particular model of the foreign like product, it would select the next most similar model as the basis for computing SG&A and profit. The Department recognizes that there are other methods available for computing SG&A and profit for CV under section 773(e)(2)(A) of the Act, including those suggested by the commenters. We continue to believe, however, that an aggregate calculation that encompasses all foreign like products under consideration for normal value represents a reasonable interpretation of the statute. This approach is consistent with the Department's method of computing SG&A and profit under the pre-URAA version of the statute, and, while the URAA revised certain aspects of the SG&A and profit calculation, we

> do not believe that Congress intended to change this particular aspect of our practice.

Therefore, we find that using a subset of Rubicon's and UFP's data to calculate CV profit for Thai I-Mei would be inappropriate.

- Calculate the Weighted-Average of the Profit Made by Rubicon's U.S. Subsidiary and UFP on Their Sales to Canada: The petitioner's proposal would calculate CV profit for Thai I-Mei by combining the CEP profit rate calculated for Rubicon with the CV profit rate calculated for UFP (because UFP did not make CEP sales during the POI). We find that this approach is inappropriate because Rubicon's CEP profit rate is based on its sales to the United States. Thai Shrimp Final at Comment 14.
- Base the Profit Rate on Modified TFFA Data: For the reasons set forth above, at item 3.b., we find that using the TFFA data in any form to calculate Thai I-Mei's CV profit would be inappropriate.

Based upon the analysis above, we have used the weighted average profit of Rubicon's and UFP's Canadian-market sales made both in and outside the ordinary course of trade as the basis for Thai I-Mei's CV profit under section 773(e)(2)(B)(iii) of the Act. Further, because the Court has found that the selected method is reasonable, it complies with the Court's order of achieving accuracy in the determination of a dumping margin for Thai I-Mei.

4. The Profit Cap

Section 773(e)(2)(B)(iii) of the Act directs the Department to determine CV profit using any reasonable method as long as the result is not greater than the amount realized by exporters or producers "in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of products as the subject merchandise" (i.e., the profit cap).

In our final determination, we were unable to calculate the profit cap because there was no evidence on the record that would permit us to do so. Thai Shrimp Final at Comment 14.

In Thai I-Mei I, the Court held that Thai I-Mei had failed to exhaust its administrative remedies with respect to the calculation of the profit cap, and thus it declined to hear Thai I-Mei's objections to this calculation. Specifically, the Court stated:

> Because plaintiff did not raise the profit cap issue before the agency, Commerce was not put on timely notice of plaintiff's objection. Had plaintiff raised the issue according to the procedures Commerce has established for doing so, Commerce may have conducted the investigation differently. In an antidumping case, where "'Congress has prescribed a clear, step-by-step process for a claimant to follow, . . . the failure to do so precludes [the claimant] from obtaining review of that issue in the Court of International Trade.'" *Id.* (quoting *JCM. Ltd. v. United States*, 210 F.3d 1357, 1359 (Fed. Cir. 2000)).

Thai I-Mei I, at 37; Thai I-Mei II, at 13, footnote 2.

Because the Court has already ruled on this issue, and it was not part of the Court's remand order, we have not addressed Thai I-Mei's profit cap comments here.

D. COMMENTS ON DRAFT REMAND RESULTS

On February 25, 2009, Thai I-Mei submitted comments on our draft remand results of redetermination. These comments are addressed below.

Comment1: The Draft Results Are Reasonable and the Department's Conclusion Should Be Repeated In the Final Results

Thai I-Mei agrees with the Department's recalculation of its CV profit rate based on all of the third country sales made by the other respondents, Rubicon and UFP, in the LTFV investigation. According to Thai I-Mei, the CV profit methodology employed in the draft results is a "reasonable method" under section 773(2)(2)(B)(iii) of the Act and the Court has indicated that it

would accept this methodology as reasonable. Thai I-Mei states that the Department's draft results are in accordance with the law and the CV profit calculation methodology employed in the draft results serves the objective of achieving an accurate dumping margin. Finally, according to Thai I-Mei, the methodology used by the Department in the draft results is based on findings of fact previously made by the Department.

Department Position:

Although we respectfully disagree with the Court that our CV profit methodology for Thai I-Mei in the Amended Final Determination and the Remand Redetermination was not in accordance with the law and was not reasonable, we determined that using the weighted average of Rubicon's and UFP's profit on their Canadian-market sales, which includes sales both in and outside the ordinary course of trade, is an appropriate alternative based on the Court's reasoning and because the alternatives proposed by the parties were found to be unacceptable by the Department in this remand redetermination. We note that this methodology was one of the two options that the Court indicated it would accept in Thai I-Mei I.

Comment 2: The Petitioner's Submitted Data Sources Are Inappropriate and Would Not Provide Reasonable CV Profit Rates

Thai I-Mei agrees with the Department's conclusion that the data submitted by the petitioner on October 20, 2008, could not be the basis for a reasonable CV profit calculation under section 773(e)(2)(B)(iii) of the Act. According to Thai I-Mei, the Department correctly rejected the petitioner's suggested data sources for the reasons set forth in the draft remand results.

Department Position:

For the reasons set forth above in sections C.3.b and C.3.c of the remand redetermination, we continue to find that the petitioner's proposed data sources for Thai I-Mei's CV profit rate are not appropriate under section 773(e)(2)(B)(iii) of the Act.

Comment 3: Thai I-Mei's Submitted Data Sources Could Also Form the Bases for Reasonable CV Profit Rates

Thai I-Mei disagrees with the Department's conclusion that the other data sources Thai I-Mei submitted are significantly flawed. Thai I-Mei argues that, while it does not advocate substituting any data sources provided by Thai I-Mei for the one employed in the draft results, Thai I-Mei objects to the Department's conclusion that the data sources provided by Thai I-Mei are unreasonable as a CV profit calculation methodology.

Department Position:

We disagree with Thai I-Mei that Thai I-Mei's submitted data sources could form the bases for reasonable CV profit rates. As stated in section C.3.c of the remand redetermination, using Rubicon's, UFP's, and Thai I-Mei's fiscal year 2003 financial statements would be inappropriate because these financial statements all include significant sales to the United States. As we noted in the Thai Shrimp Final, "{t}he Department's practice is to base its calculation of CV profit on sales to a comparison market, not the United States. Because the Department typically compares U.S. sales to a normal value based on sales in the home market or third country, the Department does not normally construct a normal value based on financial data that contains exclusively or predominantly U.S. sales." Thai Shrimp Final at Comment 14.

Moreover, as stated in section C.3.b of the remand redetermination, using profit data from the TFFA would also be inappropriate. We rejected the use of this data in our final determination because, among other things, it was based in large part on sales to the United States, the use of which is contrary to the Department's practice. Thai Shrimp Final at Comment 14. Furthermore, the Court upheld our rejection of the TFFA data in Thai I-Mei I. Thai I-Mei I at 33-34. Consequently, for the reasons set forth above, we continue to find that Thai I-Mei's proposed data sources for its CV profit rate are not appropriate under section 773(e)(2)(B)(iii) of the Act.

Comment 4: The Department Erred in Not Calculating a Profit Cap in the Draft Results

Thai I-Mei argues that the Department should calculate a CV profit cap for purposes of this remand redetermination. Thai I-Mei asserts that, while the Department cites Thai I-Mei I to support the conclusion that Thai I-Mei did not exhaust its administrative remedies in this proceeding (and, thus, the profit cap was not part of the Court's remand order) this reason is insufficient for not calculating the CV profit cap for Thai I-Mei. Thai I-Mei claims that the Court did not intend for the Department to ignore the CV profit cap issue in these remand results.

Thai I-Mei argues that the Department had sufficient time to collect and analyze the profit cap data in this remand without having the Court order it to do so. Thai I-Mei asserts that, because the Department asked for "any other information" to calculate Thai I-Mei's profit, it is reasonable for the Department to calculate the profit cap. Thai I-Mei cites Gleason Indus. Prods., Inc. v. United States, 556 F. Supp. 2d 1344, 1346 n2 (CIT 2008) and claims that in a similar context involving a voluntary remand, the Court stated that "{t}he exhaustion doctrine was rendered moot when this Court granted Commerce's voluntary remand request." Thai

I-Mei contends that the same principle should apply here given that the Department voluntarily reopened the record on remand.

Thai I-Mei further argues that the Department's claim that the profit cap was not part of the Court's remand order is insufficient justification for ignoring the issue. Thai I-Mei asserts that the profit cap is an implicit and legally-required component of "any other reasonable method" under section 773(e)(2)(B)(iii) of the Act and the fact that the remand order does not explicitly mention the profit cap is irrelevant.

Department Position:

In Thai I-Mei I, the Court found that the methodology of calculating Thai I-Mei's CV profit rate based on the third country sales made by the other respondents, Rubicon and UFP, in the investigation was reasonable under section 773(e)(2)(B)(iii) of the Act. Thai I-Mei I at 27-34. Also in Thai I-Mei I, the Court declined to hear Thai I-Mei's objections to this calculation because Thai I-Mei failed to exhaust its administrative remedies with respect to the calculation of the profit cap. Thai I-Mei I at 34-39. Thus, the only applicable remand order from the Court related to the exclusion of sales that were outside of the ordinary course of trade from Thai I-Mei's CV profit calculation under section 773(e)(2)(B)(iii) of the Act, and not to the profit cap. In Thai I-Mei I, the Court specifically stated that:

> "Plaintiff did not place data on the record under which a profit cap or a facts available profit cap could have been calculated. The record also reveals that plaintiff, during the investigation by Commerce, did not raise the general issue of whether calculation of a profit cap or a facts available profit cap was required or appropriate. Nor did plaintiff raise this issue in the brief supporting the Rule 56.2 motion that is before the court."

Thai I-Mei I at 36. Consequently, in Thai I-Mei I, the Court held that Thai I-Mei failed to exhaust its administrative remedies with respect to the calculation of the profit cap and declined

to hear Thai I-Mei's objections to this calculation. Also, the Court stated in Thai I-Mei I that waiver of the exhaustion principle is not appropriate in this case. Thai I-Mei I at 37. In Thai I-Mei II, the Court explicitly stated again that plaintiff failed to exhaust its administrative remedies with respect to the profit cap calculation in the amended final determination. Due to this failure, the Court held that the plaintiff could not challenge in Thai I-Mei I the inaction by Commerce and, accordingly, could not avail itself of the protection of the profit cap. Thai I-Mei II at 13, footnote 2. Thus, we disagree with Thai I-Mei's argument that the Court intended for the Department to address the CV profit cap issue in this remand proceeding.

Moreover, we find that Thai I-Mei's reliance on Gleason Indus. Prods., Inc. v. United States is misplaced. In contrast to Thai I-Mei's claim, the facts in Gleason Indus. Prods., Inc. v. United States are different from the facts in this case. Specifically, in that case, the remand was a voluntary remand requested by the Department to ascertain whether certain products were within the scope of an antidumping duty order. The Department reopened the record to obtain information about these products because it could not make a determination without the additional information. Unlike here, in Gleason Indus. Prods., Inc. v. United States, the Court never explicitly ruled that the interested party failed to exhaust its administrative remedy, and (also unlike here) the Department sought voluntarily to address an issue not raised in the underlying administrative proceeding.

Furthermore, it is well-established that the scope of a remand order includes only the issue remanded. Geneva Steel v. United States, 937 F. Supp. 946 (CIT 1996); Independent Radionic Workers of America v. United States, 19 CIT 375 (1995). In this case, the issue of the profit cap was not remanded. In fact, the Court found twice that Thai I-Mei had failed to exhaust its

administrative remedies on this point in Thai I-Mei I, and Thai I-Mei II. Thus, it is not within the scope of this remand for the Department to consider the profit cap issue.

Comment 5: If the Department Calculates a De Minimis Margin in the Final Results, the Department Should State That the Order Will Be Revoked in Part as to Thai I-Mei

Thai I-Mei argues that if the Department calculates a de minimis dumping margin for Thai I-Mei in the final results, the Department must issue an amended final determination finding that Thai I-Mei did not make sales at less than fair value during the POI, and as a consequence, the Department exclude Thai I-Mei from the anti-dumping duty order, lift suspension of liquidation, release all bonds/securities, and refund all cash deposits.

Department Position:

In this remand redetermination, Thai I-Mei's revised antidumping duty margin is de minimis. Accordingly, we will issue an amended final determination that would exclude Thai I-Mei from the antidumping duty order on frozen warmwater shrimp from Thailand upon a final and conclusive court decision in this case affirming these final results of redetermination on remand.

E. CONCLUSION

The Department hereby complies with the remand order as directed by the Court in Thai I-Mei I and assigns a final dumping margin of 1.88 percent to Thai I-Mei. Upon a final and conclusive court decision, we will publish an amended final determination to that effect.

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John M. Andersen
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

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Date