Atar, S.r.l. v. United States
Court No. 07-86 Slip Op. 09-53 (CIT June 5, 2009)
Court No. 07-86 Slip Op. 10-43 (CIT April 20, 2010)
Court No. 07-86 Slip Op. 11-111 (CIT September 7, 2011)

FINAL RESULTS OF THIRD REDETERMINATION

PURSUANT TO COURT REMAND

A. SUMMARY

The Department of Commerce (the "Department") has prepared these final results of redetermination ("Third Remand Redetermination") pursuant to the remand order from the U.S. Court of International Trade ("Court" or "CIT") in Atar, S.r.l. v. United States, Court No. 07-86, Slip Op. 11-111 (CIT September 7, 2011) ("Atar III"). In its remand order, the Court directed the Department to file a remand redetermination that "complied with {section 773(e)(2)(B)(iii) of the Tariff Act of 1930, as amended ("the Act")} and related statutory provisions in all respects, that specifically incorporates a lawfully-determined profit cap, and that is in accordance with all directives and conclusions set forth" in the Court's opinion. See Atar III at 20.

The Department issued its draft remand results to interested parties on November 7, 2011. On November 11, 2011, and November 14, 2011, we received comments on the draft remand results from the petitioners[1] and the respondent, Atar S.r.l. ("Atar"), respectively. These comments are addressed in section "D. Comments on Draft Remand Results" below.

Pursuant to the Court's remand order in Atar III, the Department has revised the calculation of Atar's constructed value ("CV") profit rate, the profit cap, and Atar's CV Indirect Selling Expenses ("ISEs"), as explained below.

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[1] American Italian Pasta Company, Dakota Growers Pasta Company, and New World Pasta Company (collectively, "the petitioners").

B. BACKGROUND

Much of the background leading to Atar III is discussed in the Department's Final Results of Redetermination, filed with the Court on July 19, 2010 ("Second Remand Redetermination"). Nevertheless, we provide a brief summary here as well as updates since the filing of the Second Remand Redetermination.

On February 14, 2007, the Department published its final results of the ninth administrative review of the antidumping duty order on certain pasta from Italy. See Notice of Final Results of the Ninth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy, 72 FR 7011 (February 14, 2007) ("Final Results"), and accompanying Issues and Decision Memorandum ("Decision Memorandum"). The period covered by the review is July 1, 2004, through June 30, 2005.

Atar challenged the Department's Final Results. After a full briefing of all the issues, on June 5, 2009, the Court upheld the Department's Final Results, except with respect to its calculation of Atar's CV ISE and profit rates. The Department had calculated Atar's CV ISE and profit rates using the weighted-average profit and indirect selling expense rates from sales of foreign like product sold in the home market in the ordinary course of trade (e.g., above-cost sales) by the six respondents from the prior administrative review (the eighth administrative review). See Decision Memorandum at Comment 2; see also Notice of Final Results of Eighth Administrative Review of the Antidumping Duty Order on Certain Pasta From Italy and Determination to Revoke in Part, 70 FR 71464 (November 29, 2005) ("Eighth Administrative Review"). The Court remanded the Final Results, directing the Department to reconsider and redetermine, as necessary, its calculations for Atar's CV ISE and profit rate and its exclusion

from those calculations of the data from home market sales of the six respondents in the Eighth Administrative Review that occurred outside the ordinary course of trade, and explain why the remand redetermination satisfied the reasonable method requirement of section 773(e)(2)(B)(iii) of the Act. See Atar S.r.l. v. United States, 637 F. Supp. 2d 1068, 1092-1093 (CIT 2009) ("Atar I").

On September 3, 2009, the Department filed its first remand redetermination with the CIT, recalculating CV profit and ISE using a weighted average of the sales data from two of the six respondents in the prior review because only those two respondents had earned a profit when the Department included sales made outside the ordinary course of trade in the profit calculation. See Results of Redetermination Pursuant To Court Remand (September 3, 2009) ("First Remand Redetermination"). On April 20, 2010, the Court again remanded the case to the Department, holding that the Department had not complied with the profit cap requirement contained in section 773(e)(2)(B)(iii) of the Act. See Atar, S.r.l. v. United States, 703 F. Supp. 2d 1359, 1370 (CIT 2010) ("Atar II"). The Court directed the Department to reconsider and redetermine CV profit for Atar in a way that satisfies both the profit cap and reasonable method requirements of section 773(e)(2)(B)(iii) of the Act. See id.

On July 19, 2010, the Department filed its second remand redetermination with the CIT. In that remand, under respectful protest, the Department recalculated the profit cap using data from the home market sales made both within and outside the ordinary course of trade by the only two profitable respondents in the Eighth Administrative Review. See Second Remand Redetermination at 6. The profit rate calculated in the First Remand Redetermination did not exceed the profit cap calculated in the Second Remand Redetermination. Therefore, where the

profit rate did not exceed the profit cap and the profit rate satisfied the reasonableness requirement of section 773(e)(2)(B)(iii) of the Act, the Department continued to apply the profit rate it had calculated in the First Remand Redetermination. See Second Remand Redetermination at 7. Also, the CV ISE rate remained the same, as recalculated in the First Remand Redetermination.

The Court of Appeals for the Federal Circuit (the "Federal Circuit") subsequently issued a decision in Thai-I-Mei Frozen Foods Co., Ltd. v. United States, 616 F.3d 1300 (Fed. Cir. 2010) ("Thai-I-Mei"), upholding the Department's exclusion of sales made outside the ordinary course of trade in determining CV profit pursuant to the third alternative. On September 7, 2011, the Court again remanded this case to the Department. See Atar III. The Court held that the Second Remand Redetermination did not satisfy the profit cap requirement contained in section 773(e)(2)(B)(iii) of the Act. The Court found the Department's construction of the statute to be unreasonable because, according to the Court, only a "strained reading" of the statute could restrict the profit cap calculation to data from respondents that experienced a profit over a significant period of time. See Atar III at 12-13. Additionally, the Court held that the profit cap calculation was not supported by the record because the Department's calculation ignored data from home market sales "that were material and probative of the general conditions in the home market of Italy affecting the profitability of domestic pasta producers operating there." See Atar III at 14. The Court therefore directed the Department to submit a redetermination that complies with section 773(e)(2)(B)(iii) of the Act and specifically incorporates a lawfully-determined profit cap that is in accordance with all directives and conclusions set forth in its opinion.

C. ANALYSIS

1. Constructed Value Profit

The CIT stated that, "the remand the Court is ordering does not preclude Commerce from redetermining CV profit by a method that relies only on above-cost sales, provided Commerce subjects its result to a lawful profit cap." See Atar III at 4. Therefore, for these results of redetermination, the Department is recalculating the CV profit rate pursuant to the third alternative using the method the Department used in the Final Results, which relied only on above-cost sales. Specifically, to recalculate Atar's CV profit, the Department is using data from the sales of subject merchandise made in the home country and in the ordinary course of trade by the six respondents from the Eighth Administrative Review.

This decision is consistent with Thai-I-Mei. In Thai-I-Mei, the Federal Circuit stated, "Commerce reasonably determined that in this case, where such data were readily available, and indeed, had been used for the other two respondents, it was reasonable to make its determination {of CV profit} excluding sales outside the ordinary course of trade." See 616 F.3d at 1309. As in Thai-I-Mei, in the instant administrative review, data were available for and were used by the Department to exclude sales made outside the ordinary course of trade from its profit rate calculations for the six respondents in the Eighth Administrative Review. See, e.g., Atar III at 17 ("{i}n this case, the availability of data is a factor as it was in Thai-I-Mei . . . ."). However, the CIT distinguished Atar on the grounds that the Department did not exclude from its CV profit rate calculations sales made outside the ordinary course of trade to "achieve consistency with other respondents" in the same review, Atar III at 18, as was the case in Thai-I-Mei. Also, the

CIT stated that in Atar the Department had not determined to exclude sales made outside the ordinary course of trade based on other specific circumstances. See id. Nevertheless, the CIT "consider{ed} that Commerce, on remand, may be able to explain adequately why a CV profit amount that is redetermined by a method excluding non-ordinary-course sales satisfies the "reasonable method" requirement of clause (iii)." See Atar III at 19.

As discussed in the preamble to the regulations, when calculating CV profit under section 773(e)(2)(B)(iii) of the Act, depending on the circumstances and the availability of data, there may be instances in which the Department would consider it necessary to exclude certain home market sales that are made outside the ordinary course of trade. See Antidumping Duties; Countervailing Duties, 62 FR 27296, 27359 (May 19, 1997) ("Preamble"). In this case, the data necessary to allow the Department to disregard those sales of subject merchandise that the six respondents from the Eighth Administrative Review made outside the ordinary course of trade are readily available. Specifically, to calculate the profits of each of the respondents in the Eighth Administrative Review, we performed a complete analysis to determine whether, and which, home market sales were made outside the ordinary course of trade. See Memorandum from LaVonne Clark to The File, dated July 31, 2006, concerning the "Final Results Calculation from the Eighth Administrative Review."

As to the circumstances, we find that the exclusion of sales made outside the ordinary course of trade is appropriate in this case in order to maintain consistency with the actual profit determinations for the six respondents from the prior administrative review. In this case, where the Department is using the actual profit rates it calculated for the respondents in the Eighth Administrative Review, it is important that we use the profit data of the six respondents in the

same way we used those data for the respondents in their administrative proceeding. To do otherwise would unfairly treat Atar in a more favorable way by including sales made at losses in Atar's CV profit calculation while excluding such sales from the actual profit calculation of the six respondents on whom Atar's rate is based. Further, while the Department is unable to use the profit determined for the only other respondent in this review pursuant to section 773(e)(B)(ii) of the Act because to do so would reveal business proprietary information, the profit rate calculated for that company was calculated by relying only on sales made in the ordinary course of trade. See Notice of Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review: Ninth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy, 71 FR 45017, 45021 (August 8, 2006), unchanged in Final Results. Thus, disregarding such sales for Atar is consistent with the methodology applied to the other company in this review, and does not place Atar in a more favorable position vis-à-vis its competitor examined in this review, simply based on the CV profit calculated pursuant to the antidumping law. Furthermore, the statute contemplates that, when using "actual amounts incurred and realized" for profits in connection with the production and sale of foreign like product, as the Department is doing here, the Department will use amounts connected to sales in the ordinary course of trade. See sections 773(e)(2)(A) and (B)(ii) of the Act. Consequently, we believe that the methodology used in this final remand redetermination constitutes a "reasonable method" for calculating CV profit under section 773(e)(2)(B)(iii) of the Act. Accordingly, for these remand results, we recalculated Atar's "any-other-reasonable-method" CV profit rate based on the weighted-average of the profit rates calculated for each of the six respondents in the Eighth Administrative Review, which excluded

those sales that were made outside the ordinary course of trade. See Memorandum from Dennis McClure to The File, dated November 7, 2011, regarding "Revised Calculation for Third Remand Redetermination of the Ninth Antidumping Duty Administrative Review of Certain Pasta from Italy" ("Calculation Memo").

2. Profit Cap

In the Second Remand Redetermination, the Department recalculated the profit cap from the Final Results using the weighted-average profit rate derived from the sales data from home market sales of foreign like product by the two respondents in the Eighth Administrative Review that earned a profit, based on data from their sales that were both inside and outside the ordinary course of trade. In its review of the Department's calculation of the profit cap in the Second Remand Redetermination, the CIT stated that "Commerce . . . erred to whatever extent it based its exclusion of the data of the four non-profitable eighth-review respondents on a statutory construction under which it lacked the discretion to do otherwise." See Atar III at 13. Also, the Court stated that the Department's profit cap calculation "ignored home-market sales data that were material and probative of the general conditions in the home market of Italy affecting the profitability of domestic producers operating there." See id. at 14. According to the Court, where the Department's profit cap calculation reflected "to a large extent, the profit experience of only one Italian exporter/producer and ignore{d} entirely the eighth-review data of four home-market exporter/producers" the Department's profit cap calculation did not reflect the amount of profit normally realized by exporters and producers on home market sales of merchandise in the same general category of products as subject merchandise. See id. at 15 and 19.

The statute caps the amount of CV profit to be calculated under section 773(e)(2)(B)(iii) of the Act at the "amount normally 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 . . . ." The Department does not have data on the record of this review that reflects as broad a category of merchandise as described in the statute, i.e., merchandise "in the same general category" as subject merchandise. Rather, the Department has data from a subset of the broader category, i.e., foreign like product. Accordingly, consistent with both the CV profit calculation, and consistent with the CIT's remand order and its "directives and conclusions", Atar III at 20, the Department is recalculating the profit cap using the reported home market sales for the six respondents from the Eighth Administrative Review.[2] As this is based on sales of the foreign like product, this merchandise is necessarily within the same general category of subject merchandise. See Calculation Memo.

In the Final Results, the Department also calculated Atar's profit cap using the home market sales for the six respondents from the Eighth Administrative Review. In doing so, we excluded from our profit cap calculation those sales that were determined to be outside the ordinary course of trade. As in this remand, the CV profit that we used for the Final Results was consistent with the methodology used to calculate the actual profit for each of those six companies in that review, in that it was based only on sales made in the ordinary course of trade. We believe that the very specific nature of the "reasonable method" used here, namely using an average of the actual profit rates calculated in accordance with the statute for the sales of foreign like product for companies under review, results in a profit rate that inherently does not "exceed

[2] See Viraj Group, Ltd. v. United States, 343 F.3d 1371 (Fed. Cir. 2003).

the amount normally 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." Accordingly, the Department would normally consider the profit cap in these circumstances to be no less than the amount of profit actually calculated under the statute for the companies under review, which would have included only sales made in the ordinary course of trade.[3]

However, for purposes of this remand only, and under respectful protest,[4] we have calculated a profit cap that is less than the average amount of profit actually calculated for the six respondents in the Eight Administrative Review, in order to comply with the Court's order. We have calculated the profit cap in this manner because we interpret the Court's order as requiring the Department to calculate the profit cap using data from sales of subject merchandise that were made both within and outside the ordinary course of trade by all six of the Eighth Administrative Review respondents. Because we excluded sales made outside the ordinary course of trade, the Court rejected our profit cap from the Final Results, which was based on the sales of subject merchandise that the six respondents from the Eighth Administrative Review made in the ordinary course of trade. See Atar II at 1365. Also, in Atar III, the CIT confirmed that the profit cap from the Final Results would not satisfy the Court's remand order. See Atar III at 19. The Court stated that "below-cost sales were a significant feature of the home market conditions affecting the marketing of pasta in Italy." See id. The Court continued, "a determination is not supported by substantial evidence if it disregards record data that is

[3] As demonstrated above, the Preamble indicates that there may be circumstances in which it is appropriate to exclude from a CV profit calculation sales made outside the ordinary course of trade. See Preamble at 27359.
[4] See Viraj.

probative of the general conditions in the home market affecting profitability of domestic pasta producers who operate in that market." See id. Therefore, for purposes of this final remand redetermination we have included data from all of the respondents from the Eighth Administrative Review and have included their above- and below-cost sales of subject merchandise in our calculation. See Calculation Memo.

3. Constructed Value Indirect Selling Expenses

Because the Department has recalculated CV profit using data from all six of the respondents from the Eighth Administrative Review, the Department likewise is recalculating CV ISE using data from all six of the respondents from the Eighth Administrative Review. As the Department previously explained, the ISE rate would bear no relationship to the profit ratios used to calculate Atar's CV profit unless the Department used data from the same companies to calculate both CV profit and ISE. See First Remand Redetermination at 10. The Department also explained that a company's profit amount is a function of its total expenses and, therefore, is intrinsically tied to the other financial ratios for that company. See id. Accordingly, because the Department recalculated Atar's CV profit rate using the weighted-average of the profit rates calculated for each of the six respondents in the Eighth Administrative Review, for purposes of this final remand redetermination the Department likewise recalculated Atar's CV ISE rate using the weighted-average of the ISE rates calculated for each of the six respondents in the Eighth Administrative Review. See Calculation Memo.

D. COMMENTS ON DRAFT REMAND RESULTS

On November 11, 2011, and November 14, 2011, the petitioners and Atar, respectively, submitted comments on our draft remand results of redetermination. These comments are addressed below.

Comment 1: The Department's Calculation of the Profit Cap is Inconsistent with Its Calculation of CV Profit

Although the petitioners agree with the CV profit calculation, they disagree with the calculation used for the profit cap. The petitioners agree with the Department's cite to Thai-I-Mei that supports the decision in this remand to calculate profit in the same way it had for the six respondents from the Eighth Administrative Review, whose data the Department used to calculate the CV profit rate for Atar, which maintains consistency with the Department's profit calculations for the six respondents from the Eighth Administrative Review.

However, the petitioners argue that the Department undermines this consistency when it uses all sales in the database (below-cost and above-cost) to calculate a profit cap that is less than the average amount of profit actually calculated for the six respondents from the Eighth Administrative Review. Furthermore, the petitioners point to the results of the decision from Thai-I-Mei where the Federal Circuit states, ". . . availability of data plays a large role in how Commerce is to make its determination generally and with respect to whether sales outside the ordinary course of trade are excluded." See Thai-I-Mei, 616 F.3d at 1308.

The petitioners further note that the Court in Atar III stated that below-cost sales are a normal condition of competition affecting the marketing of pasta in Italy, and the statute is silent as to the exclusion of below-cost sales depending on the type of data on record. See sections

773(e)(2)(A) and (B) of the Act. The petitioners contend that in Thai-I-Mei, the Federal Circuit noted that the Department did not mechanically include or exclude below cost sales when calculating CV profit under the third alternative ("any reasonable method") of the statute. See Thai-I-Mei, 616 F.3d at 1308. Furthermore, the petitioners point out that there was sufficient data to enable the Department to exclude below-cost sales and the Department found that the exclusion of below-cost sales was appropriate for the purpose of "consistency with its determination" for other respondents. See id.

The petitioners state that in this case the Department excluded below-cost sales from CV profit to maintain consistency with the actual profit determinations from the Eighth Administrative Review. See Draft Remand at 6. Moreover, the petitioners explain that the Department used the profit data as calculated for each respondent in the Eighth Administrative Review, in order not to treat Atar in a more favorable way than the respondents whose data the Department used to calculate Atar's profit rate by including sales at losses in Atar's CV profit calculation. See id.

Therefore, the petitioners assert that by including below-cost sales in the profit cap there is more favorable treatment for Atar which is inconsistent with the respondents from the Eighth Administrative Review. The petitioners contend that including below-cost sales would undermine Thai-I-Mei and always result in a profit cap lower than the CV profit. Furthermore, the petitioners argue that the profit cap has normally been co-extensive with the CV profit calculated under Alternative 3, and in the draft remand redetermination the normal correlation is upset and effectively nullifies the decision in Thai-I-Mei.

The Department's Position:

The profit cap determined in this Third Remand Redetermination adheres to the Court's order to submit a profit cap that "is in accordance with all directives and conclusions set forth" in the Court's decision. See Slip op. at 20 and 13-16, 18-19.

Comment 2: The Department's Constructed Value Profit, Constructed Value Indirect Selling Expenses, and Profit Cap Calculations Do not Properly Reflect the Experience of the Typical Company

Atar argues that the method for calculating the profit and profit cap does not conform with the profit cap and reasonable method requirements of section 773(e)(2)(B)(iii) of the Act as ordered by the Court. More specifically, Atar contends that the weighted-average of the profits and ISEs from the Eighth Administrative Review does not properly reflect the amount "normally realized" by exporters and producers.

Atar supports its argument by referring to the Court's September 9, 2011, opinion. Specifically, Atar notes that the court stated "[o]ne of those respondents {whose data the Department used to calculate Atar's profit rate} was atypical in that it earned a substantial profit and accounted for practically all of the quantities in the home-market database obtained from {the Eighth Administrative Review}." Atar's Comments at 2 (quoting Atar III at 14). Furthermore, Atar points to the Court's statement the "{t}he calculated profit cap { } {sic} reflects, to a large extent, the profit experience of only one Italian exporter/producer . . . ." See id. (quoting Atar III at 15).

Atar contends that the data from a single, allegedly atypical respondent is given "inordinate weight" and, therefore, the profit cap substantially reflects the profit experience of a

single producer. Atar concludes that the Department should calculate an average rate of the typical respondents. Atar contends that this will address the problem identified by the court in its remand.

The Department's Position:

We disagree with Atar. Weight-averaging the profit and ISE rates from the six respondents in the Eighth Administrative Review is consistent with the statute. Section 773(e)(2)(B)(ii) of the Act states that the Department may calculate CV profit and selling expenses based on "the *weighted average* of the actual amounts incurred and realized by exporters or producers that are subject to the investigation or review. . . 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). While the Department is unable to use the profit or ISE amounts determined for the only other respondent subject to this review pursuant to section 773(e)(2)(B)(ii) of the Act because to do so would reveal business proprietary information, the statute contemplates that, when using "actual amounts incurred and realized" for profits or indirect selling expenses in connection with the production and sale of foreign like product, as the Department is doing here, the Department will calculate a weighted average of the profit realized and the selling expenses incurred by the producers or exporters that are subject to the review. This provision does not require the Department to analyze whether the actual amounts incurred and realized by any given respondent were atypical. Thus, taking guidance from section 773(e)(2)(B)(ii) of the Act, pursuant to section 773(e)(2)(B)(iii) of the Act, the Department weight averaged the profits and ISEs, respectively, of the exporters or producers from the Eighth Administrative Review. The difference between the methodology the

Department applied to calculate CV profit in this case, pursuant to section 773(e)(2)(B)(iii) of the Act, and the methodology articulated in section 773(e)(2)(B)(ii) of the Act, is that in this case the profits and ISEs were based on the data of the respondents from the immediately preceding review, not this review. If the six respondents from the Eighth Administrative Review had been respondents in this ninth administrative review, the statute would explicitly permit the Department to weight-average their profit or ISE amounts to calculate a CV profit rate or CV ISE rate, respectively, for Atar. Accordingly, weight-averaging the data from all the respondents subject to review is contemplated by the statute as a reasonable methodology for calculating CV profit and ISEs.[5]

Atar does not demonstrate why the difference of one administrative review should render weight-averaging the profit of all of the respondents an unreasonable methodology. Further, weight averaging the profits of exporters or producers in calculating CV profit under alternative (iii) avoids revealing business proprietary information that can occur when using a simple average of two company's data, and therefore maintains a consistent approach regardless of the number of companies whose data the Department uses to calculate CV profit. Consequently, the methodology used in this final remand redetermination constitutes a "reasonable method" for calculating CV profit under section 773(e)(2)(B)(iii) of the Act. Accordingly, for these remand results, we recalculated Atar's "any-other-reasonable-method" CV profit rate based on the

[5] Weight-averaging is provided for in numerous sections of the statute. For example, in addition to the weight-averaging methodology for calculating CV profit articulated in section 773(e)(2)(B)(ii) of the Act, the antidumping duty statute instructs the Department to use weight-averaging when determining the all others antidumping duty rate. See section 735(c)(5)(A) of the Act (instructing the Department to calculate the all-others rate based on the weighted-average dumping margins of producers and exporters that are individually examined.) See also section 777A(d)(2) of the Act (contemplating the weight-averaging of sales of the foreign like product in calculating margins in administrative reviews).

weighted-average of the profit rates, and CV ISE rate based on the weighted-average of the ISE rates, calculated for each of the six respondents in the Eighth Administrative Review.

Further, the statute caps the amount of CV profit at the "amount normally 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." See section 773(e)(2)(B)(iii) of the Act. The Act does not dictate a specific method of calculating the profit cap, nor does it direct the Department to analyze other factors that are potentially associated with the amount normally realized by exporters or producers in determining the profit cap. When using weight-averaging to determine the profit cap in this case, weighting is based on the volume of sales made by all companies whose data is being used in the CV profit cap calculation. Therefore, this calculation provides the amount of profits that were actually realized on sales of subject merchandise examined in the Eighth Administrative Review. The Department reasonably interprets the statute to allow the amount of profits that were actually realized on sales of subject merchandise to equal "the amount normally realized by exporters or producers. . .in connection with the sale" in the home market of merchandise that is in the same general category as subject merchandise. See section 773(e)(2)(B)(iii) of the Act. Atar argues that the Department should calculate the profit cap based on the "average rate of the typical respondents." See Atar comments at 3. Apparently, Atar seeks for the Department to exclude from its profit cap calculation the profit experience of the company with the greatest sales volume because that company is allegedly "atypical." However, as demonstrated above, the Department's profit cap calculation comports with the statute because it is the amount normally realized on sales of subject merchandise. Excluding the profit experience of the company with

the greatest sales volume would result in something other than the amount normally realized, because it would not account for the amount of profit actually realized on one respondent's sales of subject merchandise during the prior review period. The fact that one company differs from another in the amount of profit or the volume of sales does not by itself make a company atypical.[6] Rather, that company's amount of profit contributes to the amount normally realized in a given market.

Additionally, the profit cap calculation in this Third Remand Redetermination relies on data from a subset of the broader "general category of products as the subject merchandise" (i.e., sales of the foreign like product by the six respondents from the directly preceding review) and, as such, is based on sales of the foreign like product that is necessarily within the same general category of subject merchandise. The six respondents from the Eighth Administrative Review are all producers of the foreign like product, operated under normal conditions, and there are no known unusual circumstances surrounding their operations or sales in the Italian market (e.g., there was no particular market situation and each respondent made home market sales). See Notice of Preliminary Results, Partial Rescission of Antidumping Duty Administrative Review and Revocation of the Antidumping Duty Order in Part: Eighth Administrative Review of the Antidumping Duty Order on Certain Pasta from Italy, 70 FR 42303, 42306 (July 22, 2005) ("Eighth Administrative Review Preliminary Results") (stating that all six respondents in the Eighth Administrative Review had viable home markets), unchanged in Eighth Administrative

[6] Although this does not factor into our analysis for whether weight averaging the data of the respondents from the Eighth Administrative Review is appropriate, we note that the profit experience of the largest company is not atypical given that its profit rate is in the range of profit rates experienced by the eighth review respondents when the profit rates are calculated according to the method we normally use to calculate profit and approved for purposes of calculating CV profit in Thai-I-Mei. See Memorandum from LaVonne Clark to Neal Halper, dated July 31, 2006, concerning the "Cost of Production and Constructed Value Calculation Adjustments for the Preliminary Results" at Attachment I, which is attached to the Calculation Memo.

Review. During the Eighth Administrative Review, the Department did not exclude any of their Italian sales from the normal value calculation with the exception of those sales disregarded as being below cost under section 773(b)(1) of the Act. See Eighth Administrative Review Preliminary Results at 42307 (stating that the Department excluded below-cost sales of the six respondents in the Eighth Administrative Review), unchanged in Eighth Administrative Review. As such, it is reasonable to conclude that all six respondent's sales represent the profit normally realized on sales of the foreign like product in the market under consideration. Having an overall profit, when including all sales, even those not made in the ordinary course of trade, that is higher than each of the other five respondents is not a good reason to conclude that a company's profits on sales of the foreign like product in Italy do not reflect the amount normally realized on such sales.

Further, as noted above, using a weighted average calculation of the profits of all six producers is consistent with the statutory preference in (ii), and with our normal practice under (iii). In nearly every case involving averaging numbers, a different outcome will result depending on whether you use a simple or weighted average approach. Following a consistent approach avoids results-oriented arguments and treatment. The weighted average approach takes into account the proportionate volume each producer's home market sales represent in relation to the total sales, in determining the profit for the market under consideration. It is not unreasonable to give weight to the volume of sales as opposed to number of producers, in determining an average profit rate for the market under consideration.

Consequently, the profit cap methodology used in this final remand redetermination, with

the exceptions noted above,[7] constitutes profits normally realized by exporters and producers within the same general category of subject merchandise under section 773(e)(2)(B)(iii) of the Act Accordingly, as described in detail above, for purposes of this final remand redetermination we have continued to weight-average data from all of the respondents from the Eighth Administrative Review and have included their above- and below-cost sales of subject merchandise in our calculation of the profit cap.

E. CONCLUSION

In conclusion, because this Court held that the Department's methodology of excluding sales made outside the ordinary course of trade and excluding the non profitable companies from its profit cap calculation was unlawful, for these final remand results the Department recalculated Atar's profit cap using home market sales data from all the respondents in the Eighth Administrative Review after including sales both inside and outside the ordinary course of trade. The Department also recalculated Atar's profit rate using sales data from all respondents in the Eighth Administrative Review and disregarding data from sales that were made outside the ordinary course of trade. A comparison of the profit rate and the profit cap demonstrates that the profit rate calculated by the Department in this final remand redetermination exceeds the profit cap that we have recalculated under protest. See Calculation Memo. Therefore, we are applying the profit cap as Atar's CV profit. Additionally, we have recalculated Atar's ISE, basing its ISE rate on the data of all six of the respondents from the Eighth Administrative

[7] As noted above in calculating the profit cap we excluded sales made outside the ordinary course of trade because the Court rejected our profit cap from the Final Results, which was based on the sales of subject merchandise that the six respondents from the Eighth Administrative Review made in the ordinary course of trade.

Review. With these changes, taking into consideration interested party comments, Atar's antidumping duty margin changes to 11.76 percent.

Christian Marsh
Acting Assistant Secretary
for Import Administration

12/5/11
(Date)