

**Public Document**

Thai I-Mei Frozen Food Co., Ltd. v. United States  
Court No. 05-00197 (CIT March 12, 2007)

**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 (the Court) in Thai I-Mei Frozen Food Co., Ltd. v. United States, Court No. 05-00197 (March 12, 2007) (Thai I-Mei v. United States). The Court directed the Department to reconsider its decision to exclude from the calculation of Thai I-Mei Frozen Food Co., Ltd.’s (“Thai I-Mei”) constructed value (“CV”) profit rate third-country sales made by Andaman Seafood Co., Ltd., Chanthaburi Seafoods Co., Ltd., and Thailand Fishery Cold Storage Public Co., Ltd. (collectively “the Rubicon Group”) and Union Frozen Products Co., Ltd.’s (“UFP”) that were 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 the Rubicon Group and UFP that occurred outside the ordinary course of trade or, alternatively, provide in the remand determination a justification that: 1) addresses the objections discussed in the opinion and order; and, 2) sets forth reasons sufficient to support a conclusion that a calculation of the CV profit rate that excluded the data derived from sales of the Rubicon Group and UFP occurring outside the ordinary course of trade was supported by substantial evidence on the record and was otherwise in accordance with law.

In accordance with the Court’s instructions, we have provided additional explanation on

this issue demonstrating that the Department's decision to exclude sales outside the ordinary course of trade from the calculation of Thai I-Mei's CV profit rate in the final determination was based on the specific facts of this case and was in accordance with section 773(e)(2)(B)(iii) of the Tariff Act of 1930, as amended ("the Act").

The Department issued its draft remand results to Thai I-Mei on May 8, 2007. On May 15, 2007, we received comments on these draft results from Thai I-Mei. These comments are addressed below.

## **B. Background**

On March 12, 2007, the Court remanded to the Department its final determination in the less-than-fair-value investigation of certain frozen warmwater shrimp from Thailand. See Thai I-Mei, Slip Op. 07-35; 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 (December 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 (February 1, 2005) ("Thai Shrimp Amended Final") and accompanying Issues and Decision Memorandum ("Decision Memorandum"). The antidumping duty order in this proceeding was published in the Federal Register on February 1, 2005. See Thai Shrimp Amended Final. The period of investigation ("POI") covers the period October 1, 2002, to September 30, 2003.

In its remand order, the Court directed the Department to:

- reconsider its decision to exclude from the calculation of Thai I-Mei's CV profit rate the data derived from the Rubicon Group's and UFP's third-country sales that were made

- outside the ordinary course of trade; and
- either recalculate Thai I-Mei’s CV profit rate by including in the calculation the data derived from third-country sales of the Rubicon Group and UFP that occurred outside the ordinary course of trade or, alternatively, provide a justification that addressed the objections discussed in the opinion and order and that sets forth reasons sufficient to support a conclusion that a calculation of the CV profit rate that excluded the data derived from sales of the Rubicon Group and UFP occurring outside the ordinary course of trade was supported by substantial evidence on the record and was otherwise in accordance with law.

Pursuant to the Court’s remand instructions, we have analyzed the information on the record of this investigation. As discussed further below, we have provided additional explanation and evidence as required by the Court’s order.

### C. Analysis

In the final determination, the Department calculated Thai I-Mei’s CV profit using the weighted-average profit rate of the Rubicon Group 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 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”). See Thai Shrimp Final at Comment 14. In its remand order, the Court pointed to the Department’s preamble at Antidumping Duties; Countervailing Duties; final rule, 62 FR 27359 (May 19, 1997) (“Final Rule”) and stated that the Department did not identify the specific factual

information and circumstances that supported its decision to exclude sales outside the ordinary course of trade when calculating CV profit in its Thai Shrimp Final. See Thai I-Mei v. United States, Slip Op. 07-35, at 40-41. Thus, 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, alternatively, . . . 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 CV profit rate that excludes the data derived from sales of Rubicon and UFP occurring outside of the ordinary course of trade is supported by substantial evidence on the record and is otherwise in accordance with law.

See Thai I-Mei v. United States, Slip Op. 07-35, at 44.

In response to the Court's directive, the Department explains below the specific circumstances and factual information that support its decision to exclude sales outside the ordinary course of trade (*i.e.*, sales made in substantial quantities at prices below cost of production) from the calculation of Thai I-Mei's CV profit rate in the final determination.

According to section 773(e)(2)(B)(iii) of the Act, constructed value includes:

the amounts incurred and realized for selling, general, and administrative expenses, and for profits, based on any other reasonable method, except that the amount allowed for profit may not exceed the amount normally realized by exporters or producers (other than the exporter or producer described in clause(i)) in connection with the sale, for consumption in the foreign country, of merchandise that is in the same general category of product as the subject merchandise.

The Department recognizes that the preamble to its regulations states that:

with respect to the other alternative profit methods authorized by section 773(e)(2)(B), the Department believes that the absence of any ordinary course of trade restrictions under the first alternative is a clear indication that the Department normally should calculate profit under this method on the basis of all home market sales, without regard to whether such sales were made at below-cost prices. However, the same cannot be said of the

third alternative method, which provides for the use of “any other reasonable method” in determining CV profit. The SAA at 841 makes it clear that, given the absence of any comparable standard under the prior statute, it would be inappropriate to establish methods and benchmarks for applying this alternative. Thus, 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 outside the ordinary course of trade in order to compute a reasonable measure of profit for CV under the third alternative method.

See Final Rule, 62 FR at 27359. As explained more fully below, Thai I-Mei’s case presents one of the instances which was contemplated in the preamble where the Department “would consider it necessary to exclude certain . . . sales<sup>1</sup> that are outside the ordinary course of trade in order to compute a reasonable measure of profit for CV under the third alternative method.”<sup>2</sup>

As an initial matter, we note that, because there is a statutorily preferred method for calculating CV profit (*i.e.*, section 773(e)(2)(A) of the Act), the Department can only choose an alternative method when, as in this case, actual amounts incurred by the respondent are not available. Thus, in considering what constituted a reasonable method under alternative (iii), the Department looked to a methodology that mimics the preferred method which includes only

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<sup>1</sup> While this section of the preamble makes reference only to home market sales made outside the ordinary course of trade, the same theory applies to the exclusion of third-country sales which were made outside the ordinary course of trade.

<sup>2</sup> In many instances, the Department has had to rely upon companies’ financial statements as the basis for CV profit pursuant to alternative (iii), and financial statements most likely include below-cost sales. See, e.g., Notice of Final Results and Rescission in Part of Antidumping Duty Administrative Review; Oil Country Tubular Goods, Other Than Drill Pipe, From Argentina, 68 FR 13262 (March 19, 2003), at Comment 1; Shop Towels from Bangladesh; Final Results of Antidumping Duty Administrative Review, 61 FR 55957, 55961-62 (October 30, 1996) (Shop Towels from Bangladesh). Just as with alternative (i), there is no way under alternative (iii) to ensure that the Department will have the record information to determine which sales of which models of the relevant product were made outside the ordinary course of trade in all cases. For this reason, there is no ordinary course of trade language in alternative (iii); it would be administratively infeasible to require the Department to use only sales in the ordinary course of trade in cases where sufficient record information is not available.

those sales made in the ordinary course of trade. In other words, through the preferred method in section 773(e)(2)(A) of the Act, Congress expressed its preference that CV profit be based upon sales made in the ordinary course of trade. When we cannot apply the preferred method and must rely upon one of the alternative methods, it is reasonable to attempt to mimic Congress's expressed preference that sales outside the ordinary course of trade be excluded.<sup>3</sup> In the present case, the Department had data available from the other respondents which permitted it to calculate Thai I-Mei's profit rate in a manner consistent with the preferred method. The preamble specifically mentions that the availability of data is a factor to consider when Commerce determines whether to exclude sales outside the ordinary course of trade under alternative (iii). See Final Rule, 62 FR at 27359.

The preamble also states that the "circumstances" are the other factor to consider when the Department determines whether to exclude sales outside the ordinary course of trade under alternative (iii). The Court found that the Thai Shrimp Final did not adequately explain what record evidence constituted appropriate "circumstances," within the meaning of the preamble. Thai I-Mei v. United States, Slip Op. 07-35, at 41. We find that the record demonstrates that the

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<sup>3</sup> In this regard, it is important to note that the lack of "ordinary course of trade" language in alternatives (i) and (iii) does not negate the fact that there is a statutory preference for excluding sales outside the ordinary course of trade. There is no "ordinary course of trade" language in alternative (i) because, under that provision, CV profit is based upon sales of merchandise in the same general category of products as the subject merchandise. The Department will not have sale-specific data on merchandise in the same general category as the subject merchandise because such merchandise is not subject to the investigation or review. Indeed, the Statement of Administrative Action ("SAA") recognizes that under alternative (i), profit figures will come from independent sources such as financial reports, which do not delve into the same sale-specific detail as the Department's questionnaires. See SAA at 840. Thus, it would be impossible for the Department to exclude sales outside the ordinary course of trade when those sales are of merchandise in the same general category as the subject merchandise. For this reason, there is no "ordinary course of trade" language in alternative (i). The same rationale applies to alternative (iii). See footnote 2.

circumstances of this investigation were appropriate for excluding sales outside the ordinary course of trade under alternative (iii). These circumstances are as follows. First, the record demonstrates that in calculating CV for the Rubicon Group and UFP, we excluded sales outside the ordinary course of trade. See Amended Final Margin Calculations for the Rubicon Group and UFP, January 26, 2005, proprietary documents 155 and 156, respectively. We verified the cost and sales data for the Rubicon Group and UFP and these verified data formed the basis for our determination that these companies made sales outside the ordinary course of trade. See cost of production verification reports for the Rubicon Group and UFP, October 19, and October 6, 2004, public documents 421 and 412, respectively. See also sales verification reports for the Rubicon Group and UFP, October 5, and October 7, 2004, public documents 410 and 413, respectively. Moreover, the record indicates that the Rubicon Group, UFP, and Thai I-Mei all were producers and exporters of frozen warmwater shrimp (i.e., subject merchandise). See Thai I-Mei Section A QR at A-2, March 29, 2004, public document 144; UFP Section A QR at 2, March 29, 2004, public document 145; Rubicon Group Section A QR at 1-2, April 1, 2004, public document 146. This is a circumstance distinct from some other alternative (iii) cases, where we have relied on surrogate profit rates from sales of merchandise in the same general category as the subject merchandise. See Shop Towels From Bangladesh. Further, the Rubicon Group, UFP, and Thai I-Mei all made sales of frozen warmwater shrimp during the same time period. We are constructing a profit rate for Thai I-Mei based upon the surrogate data of the other two companies. Because these two companies are contemporaneous Thai producers of subject merchandise, and we verified their data, it is reasonable to construct Thai I-Mei's profit rate based upon the experience of those companies. It is reasonable to extrapolate from their

experience when constructing a profit rate for Thai I-Mei.

Again, in other alternative (iii) cases with different circumstances, we have based CV profit on data that likely included sales outside the ordinary course of trade. See, e.g., Notice of Final Determination of Sales at Not Less Than Fair Value: Certain Color Television Receivers From Malaysia, 69 FR 20592 (April 16, 2004) at Comment 26 (where the Department used profit data from a company that produced speaker systems and printed circuit boards for the CV for a television producer). But when there are circumstances as in the present case, we have excluded sales outside the ordinary course of trade under alternative (iii). For example, in Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Fresh Atlantic Salmon From Chile, 63 FR 2664, 2669 (January 16, 1998) (unchanged in final, 63 FR 31411), we based CV profit for one respondent on the profits of other respondents' third country sales in the ordinary course of trade. As we noted in the final determination in that case, this methodology was reasonable because it was not based on sales of merchandise other than fresh Atlantic salmon and was not based on sales outside the POI. See 63 FR at 31435.

The record demonstrates that CV calculations were necessary for the Department to calculate accurate margins for both the Rubicon Group and UFP because, for certain products sold in the United States, there were no contemporaneous sales of comparable merchandise in the companies' comparison markets. See Amended Final Margin Calculations for the Rubicon Group and UFP, January 26, 2005, proprietary documents 155 and 156, respectively. In accordance with the preferred method promulgated in section 773(e)(2)(A) of the Act, the Department calculated the CV profit rates for these companies using each respondent's

respective comparison market sales which were made in the ordinary course of trade (*i.e.*, excluding sales outside the ordinary course of trade). The Department then used the same profit rates to calculate Thai I-Mei's CV profit rate. Under these circumstances, it was appropriate for the Department to exclude the Rubicon Group's and UFP's sales made outside the ordinary course of trade from Thai I-Mei's CV profit calculation in order to apply a consistent CV profit calculation methodology across all three respondents and to derive a CV profit which closely replicates the preferred method. The fact that we seek to replicate the statutorily preferred method as closely as possible does not contradict the case-by-case approach contemplated in the preamble. In some cases, we will be able to replicate the preferred method more closely than in other cases. The SAA and preamble preserve this flexibility.

If the Department were to include the Rubicon Group's and UFP's losses from their below-cost sales in calculating Thai I-Mei's CV profit, the Department would be applying an inconsistent CV profit calculation methodology for the respondents within the same segment of the proceeding using exactly the same data. Given that the record establishes that all three companies were producers/exporters of subject merchandise which made sales during the same time period, it is reasonable to use the same methodology for them. Had the Department included the Rubicon Group's and UFP's sales which were made outside the ordinary course of trade in recalculating their profit as a proxy for Thai I-Mei, this would result in Thai I-Mei's CV profit rate being less than the CV profit rates calculated for the Rubicon Group and UFP. Given these facts, the methodology the Department used in the final determination, which resulted in the consistent treatment among all respondents, was reasonable. Moreover, it was consistent with the case-by-case approach contemplated by the SAA and preamble. Under the

circumstances of this case, which included sales data from other producers/exporters of frozen warmwater shrimp during a contemporaneous time period, it is reasonable to exclude sales outside the ordinary course of trade when constructing Thai I-Mei's profit, just as we did for the Rubicon Group and UFP. Not all cases falling under alternative (iii) will have similar circumstances.

In summary, the Department's decision in its final determination was not only reasonable but also in accordance with section 773(e)(2)(B)(iii) of the Act based on the specific case facts and the evidence on the record. Therefore, for these remand results the Department did not recalculate Thai I-Mei's CV profit rate and continues to exclude sales outside the ordinary course of trade from Thai I-Mei's CV profit rate calculation.

#### **D. Comments from Interested Parties**

On May 15, 2007, Thai I-Mei submitted comments on our draft redetermination issued on May 8, 2007. These comments are addressed below.

**Comment 1: Whether The Department Should Use the Same CV Profit Calculation for Different Respondents Under Different Statutory Provisions**

Thai I-Mei contends that since its CV profit rate is calculated under a different statutory provision from that of the Rubicon Group and UFP, the Department does not need to use the same CV profit rate calculation methodology it used for the other respondents. Thai I-Mei further asserts that the Department inappropriately applied the "ordinary course of trade restriction" contained in section 773(e)(2)(A) of the Act to section 773(e)(2)(B)(iii) of the Act when it stated that Thai I-Mei's CV profit calculation under section 773(e)(2)(B)(iii) of the Act must exclude sales outside of the ordinary course of trade because the Rubicon Group's and UFP's CV profit calculations under section 773(e)(2)(A) of the Act excluded these sales. Thai I-

Mei asserts that the Court disagreed with this action when it held that one may not read into one alternative a restriction that only appears in another alternative in interpreting the CV profit statute. See Thai I-Mei v. United States, Slip Op. 07-35, at 17. Similarly, Thai I-Mei contends that the Court's ruling here is consistent with previous CIT rulings. Specifically, Thai I-Mei cites Floral Trade Council v. United States, 41 F. Supp. 2d 319, 328 (CIT 1999) (Floral Trade Council), where the Court noted that, while section 773(e)(2)(A) of the Act and alternative (ii) both limited the profit calculation to sales in the ordinary course of trade, alternatives (i) and (iii) contain no such restriction.<sup>4</sup> Thus, Thai I- Mei asserts that the Department's position that section 773(e)(2)(B)(iii) of the Act should be interpreted in a manner consistent with section 773(e)(2)(A) of the Act contradicts the Court's position in Floral Trade Council.

Furthermore, Thai I-Mei cites United States v. Fiorillo, 186 F. 3d 1136, 1148 (9<sup>th</sup> Fed.Cir. 1999) (where the Court stated that "Congress does not use different language in different provisions to accomplish the same result") to contend that sameness should not be mistaken for consistency. Thai I-Mei claims that the use of different methodologies is not necessarily inconsistent, even if they were based on the same underlying data, if the statutory provisions are different.

Department's Position:

We agree that the Department is not required to use the same CV profit rate calculation methodology for the Rubicon Group, UFP, and Thai I-Mei. However, after examining the facts on the record of this particular case, we find that it is appropriate to use the same methodology

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<sup>4</sup> In Floral Trade Council, the Court stated that "{i}t is well established that where Congress has included specific language in one section of a statute but has omitted it from another, related section of the same Act, it is generally presumed that Congress intended the omission."

for all three respondents. As stated above, the Department used the weighted-average profit rate of the Rubicon Group and UFP to calculate Thai I-Mei's CV profit rate under section 773(e)(2)(B)(iii) of the Act (i.e., any other reasonable method). Given that we are using the exact same data from the other respondents in the same proceeding to calculate the CV profit rate for Thai I-Mei, we find it reasonable to use their information in the same way when calculating Thai I-Mei's CV profit rate.

Furthermore, contrary to Thai I-Mei's argument, the Department never stated that section 773(e)(2)(B)(iii) of the Act stands for the proposition that the Department must exclude sales outside the ordinary course of trade. Instead, our position is that section 773(e)(2)(B)(iii) of the Act gives us the discretion of whether or not to exclude such sales. The SAA at page 841 specifically states that "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 outside the ordinary course of trade in order to compute a reasonable measure of profit for CV under the third alternative method." The circumstances in this investigation were that the Rubicon Group, UFP, and Thai I-Mei are all producers and exporters of frozen warmwater shrimp with sales during the same time period. See Decision Memorandum at 45. See also Thai I-Mei Section A QR at A-2, March 29, 2004, public document 144; UFP Section A QR at 2, March 29, 2004, public document 145; Rubicon Group Section A QR at 1-2, April 1, 2004, public document 146. As such, excluding sales outside the ordinary course of trade from Thai I-Mei's CV profit calculation was not only reasonable but also in accordance with section 773(e)(2)(B)(iii) of the Act and the SAA.

Finally, we disagree with Thai I-Mei that our decision here conflicts with either prior CIT

rulings or with the Court’s opinion in this specific case. We disagree that our decision is inconsistent with Floral Trade Council. In Floral Trade Council, the issue was whether the Department’s rejection of a profit cap was in accordance with law. Floral Trade Council, 41 F. Supp. 2d at 328. This issue hinged on the Department’s contention that alternative (iii) required a positive amount for profit. Id. The Court found that it did not, relying on the absence of “ordinary course of trade” language in alternative (iii). Thus, the Court stated: “That Congress specifically required the sales for the preferred methodology and alternative (ii) to be profitable, but did not require alternative (iii) sales to be profitable, undermines Commerce’s conclusion that the amount allowed for profit in alternative (iii) must be positive.” Id. at 329. In the present case, we do not find that CV profit under alternative (iii) must be positive. Nevertheless, under alternative (iii), the Department can exclude below-cost sales. The Court in Floral Trade Council did not hold that we cannot exclude such sales.

We agree that when Congress uses different language in different statutory sections, that difference must have a meaning. See Floral Trade Council, 41 F. Supp. 2d at 329. In the context of alternative (iii), this means that the Department either may include or exclude sales outside the ordinary course of trade, while in alternative (ii), it must exclude such sales. The omission of ordinary course of trade language from section 773(e)(2)(B)(iii) of the Act while being included in sections 773(e)(2)(A) and (B)(ii) does not mean outside the ordinary course of trade sales must be included in all circumstances under section 773(e)(2)(B)(iii). As noted above, the SAA at page 841 notes that there may be instances where it is appropriate to exclude outside the ordinary course of trade sales.

Comment 2: Whether Use of the Same CV Profit Rate for All Three Respondents is Required by Law

Thai I-Mei argues that the Act does not require the same CV profit calculation methodology be used for all respondents in a proceeding, even if the CV profit rate is calculated using the same data. Thai I-Mei asserts that the Department has not demonstrated why it would be unfair for Thai I-Mei's CV profit rate to be lower than those of the other respondents.

According to Thai I-Mei, while it is true that Thai I-Mei's CV profit rate would be lower when compared with the profit rates of the Rubicon Group and UFP if sales outside of the ordinary course of trade were included, this in and of itself does not establish unfairness to any party. Thai I-Mei argues that, unlike the Rubicon Group and UFP, there has been no allegation or finding that it sold products below cost in a home or third-country market. Thus, Thai I-Mei contends, there is no reason for the Department to necessarily treat each company in an identical manner because the companies' factual circumstances were not identical.

Thai I-Mei also argues that the Department's draft redetermination did not consider data unique to the particular case and address the case-by-case determination as directed by the Court.<sup>5</sup> Thai I-Mei asserts that the Department's draft redetermination only dealt with the CV profit calculation for the Rubicon Group and UFP instead of providing additional analysis or explanation relating to the propriety of the CV profit calculation for Thai I-Mei. According to Thai I-Mei, the factual situations concerning Thai I-Mei and the other respondents are different. Thai I-Mei states that, unlike the Rubicon Group and UFP, where CV was used in only limited number of instances, the Department had to use CV for all of Thai I-Mei's sales. Thai I-Mei

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<sup>5</sup> Thai I-Mei cites Decision Memorandum at Comment 14 and Thai I-Mei v. United States, Slip Op 07-35, at 40.

contends that applying a “fair and consistent CV profit calculation methodology across all three respondents” is not an adequate, fact-specific explanation for Thai I-Mei’s CV profit calculation because CV is itself not used consistently among the three respondents. Thus, Thai I-Mei asserts that the Department’s draft redetermination is inconsistent with the Court’s direction.

Finally, Thai I-Mei objects to the Department’s decision to base its CV profit calculation on whether the outcome is “fair.” According to Thai I-Mei, when calculating a dumping margin, the Department is bound to follow the law. The Department, Thai I-Mei contends, does not sit as a court in equity, and should not make decisions based on an abstract concept like fairness that vary based on each party’s perspective and cannot be supported by substantial evidence.

**Department’s Position:**

While the Department agrees that the Act does not require the same CV profit calculation methodology to be used for all respondents in the proceeding, this is not the issue. The Department finds that, in this instance, it is appropriate to use the same methodology for all three respondents in order to apply a consistent methodology based on the circumstances of this case.

We also disagree with Thai I-Mei that the Department’s draft redetermination did not consider data unique to the particular case and address the case-by-case determination as directed by the Court. The Department has articulated the specific circumstances surrounding this case throughout its redetermination and explained why it was appropriate to exclude sales outside the ordinary course of trade in calculating Thai I-Mei’s CV profit rate. Furthermore, contrary to Thai I-Mei’s claim, CV is consistently used among all three respondents in this proceeding. The Act and regulations state that the Department will use CV as the basis for normal value where: 1) neither the home market nor a third-country market is viable, 2) sales below the cost of production

are disregarded, 3) sales outside the ordinary course of trade or sales the prices of which are otherwise unrepresentative are disregarded, 4) sales used to establish a fictitious market are disregarded, 5) no contemporaneous sales of comparable merchandise are available, or 6) other circumstances exist which lead the Department to determine that home market or third-country prices are inappropriate. See section 773 of the Act; 19 CFR 351.405(a). Although the number of sales for which CV had to be used for each respondent's margin calculation differed depending on the circumstances of each individual respondent, CV was used for the Rubicon Group, UFP, and Thai I-Mei based on the above regulation. Thus, the number of sales for which CV was used in each respondent's margin calculation was not a relevant factor in determining whether to exclude sales outside the ordinary course of trade in calculating Thai I-Mei's CV profit. Rather, the relevant fact is that CV was used in the margin calculations for each of the respondents in this proceeding.

Furthermore, Thai I-Mei's argument that the Department should not disregard below-cost sales for Thai I-Mei because there was no cost allegation for Thai I-Mei is off point. We are not using Thai I-Mei's comparison market prices for determining CV profit, as none exist. As such, it is not Thai I-Mei's prices we are disregarding as being below cost, it is the prices of the Rubican Group and UFP.

Finally, contrary to Thai I-Mei's claim, the CV profit methodology we relied upon was in accordance with the law. Specifically, the CV profit methodology used was in accordance with section 773(e)(2)(B)(iii) of the Act (i.e., any other reasonable method). Under the circumstances of this case, it is reasonable to exclude sales outside the ordinary course of trade when constructing Thai I-Mei's profit rate.

Comment 3: Whether the Department’s Use of the Preferred Method for Calculating CV Profit

*Is Permitted by The Court in This Case*

Thai I-Mei argues that the Court has rejected the Department’s argument that the CV profit calculation methodology used for Thai I-Mei mimics the preferred method which includes only those sales made in the ordinary course of trade. According to Thai I-Mei, because this argument was raised and rejected by the Court, it is inadequate support for the Department’s determination. See Thai I-Mei v. United States, Slip Op. 07-35, at 41.

Department Position:

In its opinion, the Court stated:

Commerce included in the Decision Memorandum the conclusory statement that “including only the sales made in the ordinary course of trade is consistent with the Department’s preferred methodology of calculating profit.” *Id.* at 46. This statement is not consistent with the policy announced in the preamble to its own regulations, which contemplates a case-by-case approach. See Final Rule, 62 Fed. Reg. at 27,358-59.

See Thai I-Mei v. United States, Slip Op. 07-35, at 41.

We disagree with Thai I-Mei that this language stands for the proposition that the Department may not adopt a profit calculation methodology which “mimics the preferred method.” Rather, the Court simply held that our justification for relying on such a methodology was not adequate because we did not explain the circumstances that made it appropriate to exclude sales outside the ordinary course of trade, and held that we could not rely on a “vague policy preference.” Thai I-Mei v. United States, Slip Op. 07-35, at 42-43. As a result, the Court explicitly directed the Department to:

“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”

See Thai I-Mei v. United States, Slip Op. 07-35, at 44.

In this final redetermination, the Department has clearly explained and demonstrated the specific facts and the unique circumstances surrounding this case. See the “Analysis” Section, above. Again, the circumstances in this case are different than ones on which we based CV profit, for example, financial statements, which only include aggregate profit figures and most likely include sales outside the ordinary course of trade. The circumstances here are that the surrogate companies are producers/exporters of subject merchandise, making sales during the same period of time. The surrogate data are from sales of frozen warmwater shrimp, not from sales in the same general category. It is reasonable, under such circumstances, to extrapolate from the experience of the Rubicon Group and UFP when constructing a profit for Thai I-Mei. Given the additional explanation provided in this redetermination, we have fully complied with the Court’s directive in this case.

Finally, no party to this proceeding disputes that the Department is only able to calculate CV profit for Thai I-Mei using section 773(e)(2)(B)(iii) of the Act, a “reasonable method.” In assessing the reasonableness of the method used by the Department for calculating Thai I-Mei’s CV profit, it is relevant that the “reasonable method” used replicates the preferred method outlined in section 773(e)(2)(A) of the Act, and that this was the same method used for the other respondents in the same proceeding in calculating their respective CVs. Per the Court’s findings, we are not relying on a vague policy preference, but on the facts of this case and on a methodology that replicates as closely as possible the statute’s preference for sales in the ordinary course of trade.

Comment 4: Whether The Reasonableness of the Department’s CV Profit Methodology Can Be Determined by Reference to Section 773(e)(2)(B)(ii) of the Act

Thai I-Mei also asserts that the reasonableness of the Department’s CV profit method cannot be determined by reference to section 773(e)(2)(B)(ii) of the Act. Thai I-Mei contends that section 773(e)(2)(B)(ii) of the Act is a different statutory CV profit provision that could not have been applied to Thai I-Mei and that one may not read into one alternative a restriction that only appears in another. According to Thai I-Mei, the fact that the “outside the ordinary course of trade” language was included in section 773(e)(2)(B)(ii) of the Act but excluded from alternative (iii) means that Congress intended these provisions to be different.<sup>6</sup>

Department’s Position:

As a general matter, we agree that the two alternatives are intended to be different. But this does not mean that the absence of “ordinary course of trade” language in alternative (iii) demonstrates that Congress intended us to include such sales in developing a reasonable method. To clarify, our position is that excluding sales outside the ordinary course of trade is reasonable under the circumstances of this case, as described above.

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<sup>6</sup>Thai I-Mei cited Floral Trade Council, 41 F. Supp 2d at 329 (presuming that if Congress intended to incorporate language in a statutory section that it has done in related sections, it would have done so expressly).

**E. Conclusion**

The Department hereby complies with the remand order as directed by the Court in Thai I-Mei v. United States.

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David M. Spooner  
Assistant Secretary  
for Import Administration

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(Date)