Public Document

Fuyao Glass Industry Group Co. v. United States
Slip Op. 05-6 (CIT January 25, 2005)

FINAL RESULTS OF REDETERMINATION PURSUANT TO COURT REMAND

SUMMARY

The Department of Commerce ("the Department") has prepared these final results of redetermination pursuant to the remand order of the Court of International Trade ("CIT") in Fuyao Glass Industry Group Co., Ltd. v. United States, Consol. Court No. 02-00282, 2005 Ct. Int'l Trade Lexis 29, Slip Op. 2005-6 (CIT January 25, 2005) ("Fuyao Glass II"). The Court remanded the Department's findings with regard to subsidized inputs, water valuation and the Department's profit calculation. In accordance with the Court's instructions, we have re-examined the record evidence. The Department has not changed its conclusions with respect to water valuation or its profit calculation, but has provided further explanation of its decision. With regard to the valuation of float glass inputs, the Department respectfully disagrees with the Court's conclusions; however, the Department has changed its decision to comply with the Court's order. The Department's reasoning for these decisions is set forth below.

BACKGROUND

On February 12, 2002, the Department published the Final Determination of Sales at Less Than Fair Value: Certain Automotive Replacement Glass Windshields From the People's Republic of China, 67 Fed. Reg. 6482 (February 12, 2002) ("Final Determination"), and accompanying Issues and Decisions Memorandum ("Decision Memo") covering the period of

investigation ("POI"), July 1, 2000, through December 31, 2000. On March 15, 2002, the Department published its Amended Final Determination of Sales at Less Than Fair Value: Certain Automotive Replacement Glass Windshields From the People's Republic of China, 67 Fed. Reg. 11670 (March 15, 2002) ("Amended Final Determination"). This investigation involved Fuyao Glass Industry Group Co., Ltd. ("Fuyao"), Xinyi Automotive Glass Co., Ltd. ("Xinyi"), Greenville Glass Industries, Inc., Shenzhen Benxun Automotive Glass Co., Ltd., Wuhan Yaohua Pilkington Safety Glass Co., Ltd., Changchun Pilkington Safety Glass Co., Ltd., TCG International, Inc., and Guilin Pilkington Safety Glass Co., Ltd. (collectively "Plaintiffs" or "Respondents"), and PPG Industries, Inc., Safelite Glass Corporation, and Viracon/Curvlite, a subsidiary of Apogee Enterprises, Inc. (collectively "Defendant-intervenors" or "Petitioners"). Plaintiffs Fuyao and Xinyi contested various aspects of the Final Determination.

On December 18, 2003, the Court issued its opinion with regard to the issues raised by Plaintiffs. Fuyao Glass Industry Group Co., Ltd. v. United States, 2003 Ct. Int'l Trade Lexis 171; Slip Op. 2003-169 (December 18, 2003) ("Fuyao Glass I"). In its decision, the Court remanded to the Department five issues of the Final Determination for reconsideration. Specifically, the Court remanded the Department's decisions concerning valuation of certain float glass inputs, valuation of water, profit calculation, valuation of certain direct inputs, and calculation of the selling, general and administrative expenses ("SG&A") ratio. On March 17, 2004, the Department issued its Final Results of Redetermination pursuant to the Court's order ("First Remand Results"). In the First Remand Results, the Department concluded that record evidence supported its findings with respect to four of the five remanded issues, and provided further explanation for its conclusions. For the fifth remanded issue, which addressed the

inclusion of traded goods in the SG&A expenses, the Department recalculated the SG&A ratio in accordance with the Court's instruction.

On January 25, 2005, the Court issued its opinion on the First Remand Results, remanding three issues to the Department for further consideration, as follows:

(1) With respect to the Department's decision to use a surrogate value for float glass instead of the purchase prices paid by Respondents, the Court ordered the Department to either concur with its decision regarding market-economy purchases of float glass or, if the Department continues to believe or suspect that these prices were subsidized, re-open the record to provide, if possible, additional evidence to support its conclusion that the prices Fuyao paid to its suppliers were subsidized. See Fuyao Glass II, 2005 Ct. Int'l Trade Lexis at 25.

(2) With respect to the Department's finding that water should be valued separately as a factor of production, and not indirectly as factory overhead, the Court directed the Department to "value water as a part of factory overhead or, if it continues to find that water should be valued as a separate factor of production, explain, with specificity, why doing so does not contravene its determinations in Brake Drums and Brake Rotors, Certain Malleable Iron Pipe Fittings, Bicycles, Saccharin, and Sebacic Acid." Fuyao Glass II, 2005 Ct. Int'l Trade Lexis at 43.

(3) With respect to the Department's determination to use the financial data of the only surrogate company with a positive profit to calculate the profit ratio, the Court instructed, "should Commerce continue to rely on section 1677b(e) only for its definition of profit, while disregarding the statute's other directives concerning profit, it may not merely rely upon the notion that it is not required to conform to the market economy statute; rather, it must explain

why that methodology is reasonable in an NME context." See Fuyao Glass II, 2005 Ct. Int'l Trade Lexis at 54.

On April 1, 2005, the Department released its draft results pursuant to the CIT's remand order ("Draft Results") to Respondents and Petitioners. On April 8, 2005, the Department received comments on the Draft Results from Respondents and Petitioners. The Department has addressed Respondents' and Petitioners' comments below.

Issue 1: Subsidized Inputs

Summary

In its remand to the Department, the Court concluded that the record does not contain specific and objective evidence to support a reason to believe or suspect that prices paid to suppliers of float glass were subsidized. The Court instructed that the Department may either "concur with the Court's conclusion, or if it continues to find that it has reason to believe or suspect that these prices were subsidized, it must re-open the record to provide . . . additional evidence to support its conclusion . . ." The Department has complied with the Court's instructions and has recalculated the Plaintiffs'[1] normal value using the purchase prices paid by Plaintiffs to the market-economy suppliers. For the reasons set forth below, however, the Department has respectfully done so under protest.

[1] See Memorandum for the File: Analysis for the Redetermination Pursuant to the Second Remand of Automotive Replacement Glass ("ARG") Windshields from the People's Republic of China: Fuyao Glass Industry Group Co., Ltd. ("Fuyao"), April 1, 2005 ("Second Remand Analysis Memo: Fuyao"); Memorandum for the File: Analysis for the Redetermination Pursuant to the Second Remand of Automotive Replacement Glass ("ARG") Windshields from the People's Republic of China: Xinyi Automobile Glass (Shenzhen) Co., Ltd. ("Xinyi"), April 1, 2005 ("Second Remand Analysis Memo: Fuyao"). Although the Court's remand only directs us to apply our results to Fuyao, we find that these Remand Results are equally applicable to Xinyi, and will thus apply our results to both Respondents. See Fuyao Glass I, fn 11.

Background

In the Final Determination, the Department found particular and objective evidence that Thailand, Indonesia, and Korea maintained broadly available, non-industry-specific export subsidies, which provided a basis for the Department to have reason to believe or suspect that the prices of inputs from Thailand, Indonesia, and Korea may have been subsidized. See Decision Memo at Comments 1-3. Specifically, the Department relied on the particular and objective evidence of previous countervailing duty ("CVD") investigations and reviews, in addition to numerous other sources of information, that were generally available at the time to support its conclusion that the market-economy purchase prices in this case were likely to be distorted by broadly available, non-industry-specific export subsidies.

In Fuyao Glass I, the Court ordered the Department to provide specific and objective evidence to support its conclusion that it had reason to believe or suspect that float glass inputs were subsidized. See Fuyao Glass I, 2003 Ct. Int'l Trade Lexis at 37. The Court further found that the Department, because it stated that it had reason to believe or suspect that prices "are" subsidized in its Final Determination, held itself to a higher standard than contemplated by the legislative history, and that it, in order to support its conclusion regarding subsidization of inputs, needed to point to evidence to satisfy this more exact standard. Id. at 30, footnote 16.

In its First Remand Results, the Department explained that, by its inadvertent use of the word "are," the Department had not intended to employ a different standard than that set forth in the legislative history. First Remand Results at 7. Rather, the Department explained that it viewed the proper focus to be whether the Department has a "reason to believe or suspect," which establishes a lower threshold than what is required to support a firm conclusion. The

Department stated that it did not intend, in its choice of language, to alter a standard set forth in the legislative history. Id. at 8.

In its First Remand Results, the Department provided further explanation of the evidence on the record, demonstrating that recent Department CVD investigations and reviews support the Department's decision that it had reason to believe or suspect prices may have been subsidized. The Department explained that it was reasonable for it to infer that the float glass prices of the suppliers from Thailand, Indonesia, and Korea may have been subsidized because the subsidy programs in question were available to all companies that exported, regardless of product or industry. See First Remand Results at 13.

In its second remand instructions, the Court first concluded that, by stating that it had reason to believe or suspect prices "are" subsidized, the Department established a practice of holding itself to a higher standard than that set forth in the legislative history, and thus found "no reason to change its discussion in Fuyao I." Fuyao Glass II, 2005 Ct. Int'l Trade Lexis at 7-11. The Court further instructed the Department to either concur with its conclusion to use market-economy purchase prices or, if the Department "continues to find that it has reason to believe or suspect" that the market-economy input purchase prices "were subsidized," then the Department "must re-open the record to provide, if possible, additional evidence to support its conclusion that the prices Fuyao paid to its suppliers were subsidized." Fuyao Glass II, 2005 Ct. Int'l Trade Lexis at 25.

Discussion

The "Reason to Believe or Suspect" Standard

On remand, the Court reaffirmed its conclusion that by stating that prices "are" subsidized rather than "may be" subsidized, the Department established a higher standard than contemplated in the legislative history. Fuyao Glass II, 2005 Ct. Int'l Trade Lexis at 10. To the extent there has been confusion over the standard employed by the Department in determining whether there is reason to believe or suspect that prices may be subsidized, the Department reiterates that, regardless of whether it has used "are" or "may be," the Department's focus has always been on whether there is a "reason to believe or suspect" that prices for inputs from these countries may be subsidized, which denotes a lower threshold than actual evidence that prices paid for the inputs in question were subsidized prices. See Al Tech Specialty Steel Corp. v. United States, 575 F. Supp. 1277, 1280 (1983) (reasonable grounds to believe or suspect means the existence of some particularized and objective evidence in light of the totality of circumstances facing the decision maker at the time of the decision - the process does not deal with hard certainties, but with probabilities understood by those versed in the field); see also The Humane Society of the United States v. Clinton, 44 F. Supp. 2d 260, 274 (1999), aff'd 236 F.3d 1320 (Fed. Cir. 2001) (concluding that belief, not knowledge, is sufficient to satisfy the reason to believe standard found in the High Seas Driftnet Fisheries Enforcement Act).

Regardless of whether the Department uses "are" or "may be," it consistently looks to whether it has "reason to believe or suspect," and disregards such prices when there is evidence to support its belief or suspicion that market-economy suppliers of inputs might benefit from subsidies. See, e.g., Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from

the People's Republic of China: Final Results of 2001-2002 Administrative Review and Partial Rescission of Review, 68 Fed. Reg. 70488 (December 18, 2003), and accompanying Issues and Decisions Memorandum at Comment 1 (the Department disregarded market-economy prices because it had reason to believe or suspect prices were subsidized, but did not find subsidies in fact); Notice of Final Determination of Sales at Less Than Fair Value: Certain Ball Bearings and Parts Thereof From the People's Republic of China, 68 Fed. Reg. 10685 (March 6, 2003), and accompanying Issues and Decisions Memorandum at Comment 1 (the Department concluded that, based on the record evidence, it had "reason to believe or suspect that prices . . . are subsidized," and based its analysis on whether the evidence supported a "reason to believe" rather than a finding of subsidies in fact); Heavy Forged Hand Tools, Finished or Unfinished, With or Without Handles, From the People's Republic of China: Final Results of Antidumping Duty Administrative Review of the Order on Bars and Wedges, 68 Fed. Reg. 53347 (September 10, 2003), and accompanying Issues and Decisions Memorandum at Comment 2 (the Department disregarded market-economy inputs from Thailand, Indonesia, Korea and India because it had reason to believe or suspect market-economy suppliers benefitted from broadly available export subsidies). Because the Department's focus has always been on whether it has sufficient information to support its reason to believe or suspect, it has not adopted a different standard by its use of the word "are" in some instances.

Moreover, both the legislative history and prior court decisions affirm that the level of evidence needed to support the Department's reason to believe or suspect is less than what is necessary to show that subsidies were in fact paid. The Department has explained that Congress never contemplated requiring the Department to conduct a formal investigation or inquiry "to

ensure that such prices are not . . . subsidized, but rather intend[ed] that Commerce base its decision on information generally available to it at the time." First Remand Results at 7-9; see also Omnibus Trade and Competitiveness Act of 1988, Conference Report to Accompany H.R.3., H. Report No. 578, 100th Cong. 2nd Sess., at 590-91 (emphasis added) ("Conference Report"). Additionally, in other decisions, the CIT has held that an actual finding of subsidies in fact is not required to support the Department's reason to believe or suspect that prices are or may be subsidized. See, e.g., Luoyang Bearing Corp. v. United States, 347 F. Supp. 2d 1326, 1341-1342 (May 18, 2004). Thus, the Department's use of the word "are" in this instance does not indicate it found subsidies in fact because the Department only concluded that it had a "reason to believe or suspect" that subsidies were provided on the exportation of these products.

As explained in our First Remand Results, the use of the word "are" in this case was inadvertent, and was never intended to establish a new standard beyond what is required by the legislative history. See First Remand Results at 7-9. To avoid further confusion about the Department's intended standard, the Department, when referring to its decision in this case, will use the word "may."

The Department's Conclusion is Supported By Substantial Evidence

On remand, the Court found that, in order for the Department to justify a finding with respect to subsidization, the Department must demonstrate by "specific and objective evidence that (1) subsidies of the industry in question existed in the supplier countries during the period of investigation ('POI'); (2) the supplier in question is a member of the subsidized industry or otherwise could have taken advantage of any available subsidies; and (3) it would have been unnatural for a supplier not to have taken advantage of such subsidies." Fuyao Glass II, 2005 Ct.

Int'l Trade Lexis at 15. The Court further concluded that the Department has not met its three-prong test with respect to inputs from Indonesia and Korea because it did not show that subsidies were available to either all exporters or to the float glass industry. Fuyao Glass II, 2005 Ct. Int'l Trade Lexis at 15.

While the Department does not necessarily agree that it needs to meet this three-prong test set forth by the Court in order to conclude that prices paid for inputs should be disregarded because there is reason to believe or suspect these prices may be subsidized, we find that the record evidence satisfies all three criteria set forth by the Court.

The Court suggests that the record evidence does not satisfy the first prong of its three-part test because there is no specific evidence to show these broadly available subsidies were available to either all exporters or to float glass suppliers. See Fuyao Glass II, 2005 Ct. Int'l Trade Lexis at 15, citing Fuyao Glass I. In meeting the first prong of the Court's test, however, the Department has provided substantial evidence to support its reason to believe that all exporters in Thailand, Indonesia, and Korea may benefit from broadly available export subsidies. Moreover, the Department should not be required to demonstrate that subsidies are available specifically to the float glass industry because the subsidies in question are broadly available export subsidies, related to all industries that export. Because the benefits accrued from the subsidies are contingent on export performance, and are available to any company that exports, the "industry in question" is the *export* industry, of which float glass exporters are plainly a part.

The Department demonstrated in its First Remand Results that the evidence on the record supports its determination that such broadly available export subsidies are available to all exporters in Thailand, Indonesia, and Korea. Specifically, in our First Remand Results, the

Department cited numerous CVD determinations, WTO reports, USTR National Trade Estimate Reports on Foreign Trade Barriers, and other record evidence which supports the Department's determination that the export subsidies in question were broadly available, on a non-industry-specific, non-product specific basis, and were available to any company engaged in export activities. See First Remand Results at 11-13, 29-33.

In this case, the Department found that it had reason to believe or suspect that prices may be subsidized because export subsidy programs were maintained by the governments of Thailand, Indonesia, and Korea, and were offered to domestic companies engaged in foreign trade. See Decision Memo at Comments 1-3. The broadly available export subsidies found in the instant case are no different from those in the bearings cases. See China National Machinery v. United States, 293 F. Supp. 2d 1334, 1337-39 (CIT 2003) (the Department's conclusion to disregard market-economy prices is reasonable because it demonstrated the supplier may have benefitted from a generally available, non-industry-specific subsidy by virtue of having engaged in foreign trade); Luoyang Bearing Factory v. United States, 288 F. Supp. 2d 1369, 1373-74 (CIT 2003) (the Department established an adequate, rebuttable presumption of subsidies because it had information that subsidies were generally available on a non-product specific basis, and thus made a logical inference that it had reason to believe or suspect the inputs in question may have been subsidized); Peer Bearing Company v. United States, 298 F. Supp. 2d 1328, 1336-37 (CIT 2003) (upholding the Department's decision to disregard market-economy prices because, although subsidies were not available on a company-specific basis, the information showed subsidies were generally available in the exporting market-economy country). In all of these

cases, the Department inferred that the suppliers in question may have benefitted from subsidies that were generally available to exporters in the supplier countries.

The basis for the Department's decision to disregard prices has consistently been whether it has reason to believe or suspect prices may be distorted by broadly available, non-industry-specific export subsidies, and not whether there is a specific link to the input in question. To require the Department to find such specific information to support its conclusion, when such information is not already available in the public realm, goes beyond the legislative intent that the Department base its finding on information that is generally available, and would be tantamount to requiring a formal investigation. See Conference Report at 590-91.

In this instance, the Department has met the first prong of the Court's test by demonstrating that there are export subsidies available to any company that exports from Thailand, Indonesia, and Korea. Because Plaintiffs' suppliers are located in these countries and engage in foreign trade, and because export subsidies are generally available in these countries, it is reasonable for the Department to conclude that such subsidies were available to exporters of float glass in Thailand, Indonesia, and Korea during the POI.

With regard to the second prong of the Court's test, the Department reiterates that the "subsidized industry" in this instance is the "export industry" or any company that engages in foreign trade in the form of exports. Because Plaintiffs' suppliers in Thailand, Indonesia, and Korea all export, it is reasonable to conclude that they are members of the "subsidized industry," thus meeting the second prong. The Department has further demonstrated that, because such subsidies were generally available to any exporter, Plaintiffs' suppliers could have taken advantage of these subsidies by virtue of the fact they engage in foreign trade and export.

Finally, the third prong requires the Department to show that it would have been unnatural for a supplier not to have taken advantage of such subsidies. Because the Department has found that such subsidies are available to anyone who exports from Thailand, Indonesia, and Korea, it is reasonable for the Department to presume that, due to the competitive nature of the marketplace, and as a matter of common sense, it would be unnatural for companies to leave money on the table. See Fuyao Glass II, 2005 Ct. Int'l Trade Lexis at 24. Accordingly, the third prong of the Court's test is met.

The Department's Decision on Remand

The Court has provided the Department with two distinct options in this case. Specifically, the Department may either "concur with the court's conclusion" that the Department has not provided specific and objective evidence to support a reason to believe or suspect that the prices Plaintiffs paid to their suppliers were subsidized, or it may "re-open the record to provide . . . additional evidence to support its conclusion . . ." See Fuyao Glass II, 2005 Ct. Int'l Trade Lexis at 25.

For the reasons set forth above, the Department maintains that it has sufficiently demonstrated that non-industry-specific export subsidies are broadly available in Thailand, Indonesia, and Korea and that its decision to disregard certain market-economy input prices from these three countries is supported by substantial evidence on the record. Because we find that additional evidence is not needed to support our conclusion, the Department has not re-opened the record to seek additional information that would either tie the generally available export subsidies specifically to the float glass industry or further demonstrate that such subsidies are

available to all exporters. To do so would be tantamount to conducting a formal investigation on subsidies to the float glass industry, which exceeds the parameters reflected in the legislative history. See Conference Report at 590-91.

Because the legislative history explains that Congress intended for the Department to base its decision on the information generally available, and not conduct a formal investigation, the Department has complied with the only remaining alternative. Although the Department disagrees that it is more accurate to employ the actual input prices in this instance[2], we have done so in order to comply with the Court's order, although we respectfully do so under protest. Therefore, for purposes of this remand, for inputs from Indonesia and Korea, we will use actual input prices that Plaintiffs paid to their market-economy suppliers. See Second Remand Analysis Memo: Fuyao; Second Remand Analysis Memo: Xinyi. Because the Court affirmed our finding that inputs from Thailand may have been subsidized, we will continue to treat purchases of inputs from Thailand as subsidized and to use surrogate values for such inputs. See Fuyao Glass II, 2005 Ct. Int'l Trade Lexis at 24.

Comment 1: Subsidized Inputs

Respondent Fuyao's Comment: Fuyao alleges that the Department erred when it implemented its decision to use Fuyao's market-economy purchases from Indonesia and South Korea. Fuyao stated that the Department incorrectly valued the glass consumed to produce solar windshields with the price for solar float glass. Citing the Memorandum to the File from Stephen Bailey:

[2] The Department believes that it is more accurate to value these inputs using surrogate values for float glass because there is sufficient record evidence to support a reason to believe or suspect that inputs from Thailand, Indonesia, and Korea may be distorted by subsidies.

Analysis for the Amended Final Determination of Automotive Replacement Glass Windshields from the PRC for Fuyao Glass Industry Group Co., Ltd. (March 6, 2002), Pub. Doc. No. 306, Prop. Doc. No. 131, Fuyao stated that the Department has acknowledged that Fuyao's solar windshields consist of one pane of solar glass and one pane of colored glass, and that the value that should be assigned to the glass consumption for solar windshields is the average of the price for solar glass and the price for colored glass. Fuyao asserts that the Department erred by using solely the price for solar glass rather than the average of the solar glass price and the colored glass price to value the glass consumed to produce solar windshields.

Respondent Xinyi's Comment: Xinyi states that it agrees with Department's conclusion that the Department lacked specific and objective evidence that Indonesia and Korean float glass industries were subsidized.

Petitioners' Comment: Petitioners agree with the Department that the explicit language provided by the legislative history does not require the Department to conduct a formal investigation to support its conclusion of whether the Department had reason to believe or suspect that market economy prices paid by Xinyi and Fuyao for inputs may have been subsidized. Petitioners, however, disagree that the Department was necessarily limited to concurring with the Court's conclusion regarding the subsidization of the prices. Rather than concurring with the Court, Petitioners argue that the Department should have attempted to provide the Court with additional analysis explaining its basis for finding a reason to believe or suspect the prices may have been subsidized, since the Department did not change its reasoning, and continues to find that there is

substantial evidence on the record to support its determination. Citing SKF v. United States, 316 F.Supp.2d 1322 (CIT 2004), Petitioners argue that the Department would have been justified and it would have been consistent with the Department's practice to have provided the Court with additional information because it appears that the Court has some uncertainty as to how to reconcile the record in this case with the Department's prior practice and other court decisions regarding specificity for finding a reason to believe or suspect the prices may have been subsidized.

Petitioners agree with the Department that the use of "are" instead of "may" does not alter the reason to believe or suspect standard set forth by Congress. Petitioners argue that the Court's reasoning that a federal agency is free to apply a different standard than that provided by Congress embarks on a dangerous slippery slope, regardless of whether the Department applies the standard consistently. Petitioners contend that, if the Department is allowed to apply a higher evidentiary standard than that provided by Congress, then Petitioners' ability to obtain relief is adversely affected. Petitioners agree with the Department's argument that the proper focus is on whether there is "a reason to believe or suspect" prices may be subsidized, not whether the prices were "in fact" subsidized. Petitioners also contend that the Department has not provided notice, nor announced, in this case or any other, that it intended to hold itself to a higher standard than that envisioned by the legislative history. Petitioners argue that to require a greater degree of certainty would require a formal investigation. Such a standard, Petitioners argue, is contrary to the legislative history and may prove impossible, because the Department does not have subpoena power to compel producers or governments in countries not subject to the investigation

to provide subsidy information (citing S. Rep. 100-71, 100th Cong., 1st Sess. (June 12, 1987) at 108).

With regard to whether the record lacks particularized and specific evidence to find "a reason to believe or suspect" that prices from Indonesia and Korea may be subsidized, Petitioners argue that the Court failed to acknowledge or address prior court decisions and Department precedent that evidenced broadly available, non-specific export subsidies were sufficient to satisfy the reason to believe or suspect standard. For example, Petitioners argue that the controlling consideration applied by the court in China National Machinery Co. v. United States, 293 F. Supp.2d 1334, 1337-39 (CIT 2003) ("CMC II"), was whether the suppliers may have benefitted from broadly available, non-industry-specific export subsidies. Id. at 1339. Petitioners also explain that the evidence in CMC II was not specific to the steel input or the steel supplier(s) at issue, further reinforcing the fact that the court's affirmation of the remand was primarily based on the fact the subsidies were "contingent on the company's export performance and not otherwise restricted."

Petitioners concur with the Department's characterization that the "industry" in question is the "export industry." As such, the suppliers in Indonesia and Korea are export-oriented. There is extensive evidence on the availability of non-specific export subsides, which leads to the logical conclusion that such suppliers may take advantage of such programs. Petitioners also argue that further specificity regarding which type of industries or companies could take advantage of the subsidies, which the Court seems to require, is not necessary because the general export subsidy is as available to a float glass exporter as it is to a steel exporter or any other exporter. Additionally, Petitioners state that the numerous CVD investigations and

administrative reviews on the record in this case cover a broad range of industries and producers of twenty-four different product categories that benefitted from the same generally available non-industry-specific export subsidy. Petitioners contend that additional specificity is superfluous, given the nature of non-specific, broadly available export subsidy programs.

Petitioners further observed that "it appears the Court may have difficulty reconciling the nature of the evidence presented with respect to whether prices in Thailand may be subsidized with that concerning float glass prices in Indonesia and Korea." Petitioners' Comments at 6, (April 8, 2005). The Court determined that the Department provided sufficient evidence regarding the regional promotion of subsidies in Thailand. Petitioners explain, however, that the subsidies found in Thailand are distinct from the subsidies offered to the Korean and Indonesian exporters. Petitioners explain that some specificity was relevant for the Thai program because of the regional nature of the subsidization program. In contrast, however, Petitioners argue that the subsidies in Korea and Indonesia are export subsidies that are not specific to a particular region, industry, or product, but are available to all companies that export, as demonstrated by numerous CVD determinations, WTO notifications, and USTR Reports. Petitioners state that the distinction between the export subsidies of Korea and Indonesia, and other subsidies is significant because it appears that the Court used the Thailand BOI report as a benchmark, even though the broadly available non-specific export subsidy programs in Korea and Indonesia provide an equally sufficient and compelling basis for a reason to believe or suspect that the prices of the exported float glass may have been subsidized.

Petitioners also request that the Department address the Court's concern regarding the contemporaneity of the evidence supporting its reason to believe or suspect that prices paid by

Xinyi and Fuyao may be subsidized. With regard to contemporaneity, Petitioners state that the Department was guided by the legislative intent associated with the provision at issue, and relied on information generally available to it at the time of the determination. Short of a formal investigation, which is not required, the CVD investigations and administrative reviews, along with the WTO Notifications and USTR Reports provided relatively recent evidence regarding the subsidy programs at issue, and there was no evidence to demonstrate that the record evidence relied upon was obsolete.

Department's Position: The Department agrees with Fuyao that it erred in only using the value for solar float glass to value Fuyao's consumption of glass to produce solar windshields. During the investigation, the Department determined that Fuyao's solar windshields consist of one pane of solar glass and one pane of colored glass, and that the value that should be assigned to the glass consumption for solar windshields is the average of the prices for solar glass and for colored glass. See Memorandum to the File from Stephen Bailey: Analysis for the Amended Final Determination of Automotive Replacement Glass Windshields from the PRC for Fuyao Glass Industry Group Co., Ltd. (March 6, 2002), Pub. Doc. No. 306, Prop. Doc. No. 131. Therefore, the Department has valued Fuyao's glass consumed to produce solar windshields using the average of the price for solar glass and the price for colored glass. See Memorandum for the File: Final Analysis for the Redetermination Pursuant to the Second Remand of Automotive Replacement Glass ("ARG") Windshields from the People's Republic of China: Fuyao Glass Industry Group Co., Ltd. ("Fuyao"), June 9, 2005 ("Second Remand - Final Analysis Memo: Fuyao").

The Department disagrees with Xinyi's statement that the Department concluded that it lacked specific and objective evidence that Indonesian and Korean float glass industries were subsidized, and finds that Xinyi misstates the Department's position. Although the Department complied with the Court's instruction, it has done so under protest, and not because the Department agrees that its decision was not supported by substantial evidence.

The Department also disagrees with Petitioners that it was given the third option of providing additional analysis explaining its basis for finding a reason to believe or suspect the prices may have been subsidized. The Court provided the Department with only two options. Specifically, the Court instructed that the Department may either "concur with the Court's conclusion, or if it continues to find that it has reason to believe or suspect that these prices were subsidized, it must re-open the record to provide . . . additional evidence to support its conclusion . . .." See Fuyao Glass II, 2005 Ct. Int'l Trade Lexis at 25. Although the Department agrees with Petitioners that the record contains particular and objective evidence from the numerous CVD determinations, WTO Notifications and USTR Reports to support a reason to believe or suspect that the prices of inputs from Thailand, Indonesia, and Korea may have been subsidized and that case law cited above further supports the Department's decision, the Court did not provide the Department with a third option of providing further explanation to support its decision. Because re-opening the record to find more specific information would be tantamount to conducting a formal investigation, which is plainly not required, the Department has complied with the only remaining remand instruction.

The Department agrees with Petitioners that it would not be appropriate for the Department to require a higher evidentiary standard than that intended by the Congress and

reflected in the legislative history, and further agrees that it has never implemented or provided any notice of such an enhanced requirement. Additionally, the Department also agrees that requiring further specificity about which types of industries or companies could take advantage of subsidies, which the Court seems to require, is not necessary to satisfy the Department's statutory obligations. Because particular and objective evidence on the record supports a finding that the generally available non-specific export subsidies were equally available to float glass exporters as they were to steel exporters or any exporters, the Department agrees with Petitioners that it has demonstrated with particular and objective evidence that Xinyi's and Fuyao's float glass suppliers may have availed themselves of the generally available non-specific export subsidies because the subsidies were contingent on the company's (i.e., the float glass suppliers to Xinyi and Fuyao) export performance and not otherwise restricted. Thus, the Department agrees with Petitioners that there is particular and objective record evidence that the suppliers in Indonesia and Korea are export-oriented, and that there is extensive evidence of the availability of non-specific export subsidies. This leads to the logical conclusion that such suppliers may take advantage of such programs because suppliers engaged in foreign trade will "not leave money on the table." Fuyao Glass II, 2005 Ct. Int'l Trade Lexis at 10.

Additionally, the Department agrees that the Thai regional subsidization programs, for which evidence of specificity was provided, are distinct from the generally available non-specific export subsidies offered in Korea and Indonesia. Because the Thai subsidies are directed at the development of specific regions, the information generally available about these subsidies is likely to contain reference to specific industries. Conversely, information that is generally available regarding broad export subsidies is less likely to contain references to specific

industries, particularly a small, distinct industry such as float glass, because such subsidies are made available to any company that exports, and are not directed to any specific industry. The Department also agrees with Petitioners that any comparison of the specificity of the particular and objective evidence found for the Thai subsidies with that of the export subsidies would be contrary to the legislative intent that the Department be able to disregard prices based on the information that was generally available to it.

The Department also agrees with Petitioners that, short of a formal investigation, which was not contemplated by Congress, the record evidence of the numerous CVD determinations, WTO notifications, and USTR Reports supports the Department's basis for its reason to believe or suspect the Korean and Indonesian float glass producers may have been subsidized because this information was contemporaneous and generally available at the time of the investigation.

Issue 2: Valuation of Water

Summary

In its second remand instructions, the Court directed the Department to demonstrate that its decision to value water as a separate factor of production did not contravene the its determinations in Brake Drums and Brake Rotors,[3] Certain Malleable Pipe Fittings,[4] Bicycles,[5]

[3]Notice of Final Determinations of Sales at Less Than Fair Value: Brake Drums and Brake Rotors From the People's Republic of China, 62 Fed. Reg. 9160 (February 28, 1997) ("Brake Drums and Brake Rotors").

[4]Final Determination of Sales at Less Than Fair Value and Critical Circumstances: Certain Malleable Iron Pipe Fittings From the People's Republic of China, 68 Fed. Reg. 61395 (October 28, 2003) ("Certain Malleable Pipe Fittings"), and accompanying Issues and Decisions Memorandum.

[5]Notice of Final Determination of Sales at Less Than Fair Value: Bicycles from the People's Republic of China, 61 Fed. Reg. 19026 (April 30, 1996) ("Bicycles").

Saccharin,[6] and Sebacic Acid.[7] For the reasons set forth below, the Department has concluded that valuing water as a separate factor of production does not contravene the Department's determinations in these cases and, that the Department's decision to value water separately in this case is supported by substantial evidence on the record.

Background

In our Final Determination, we concluded that water was a significant input in the production of subject merchandise, and accordingly, assigned a separate surrogate value to water. See Decision Memo at Comment 25. The Department determined that water was not included in the factory overhead ratio used in the investigation because the overhead was valued using only the line items "depreciation," "repairs and maintenance" and "stores and spare parts" from the surrogate company's financial statement, and it was unlikely that water would be included in any of these categories. See Factors of Production Valuation Memorandum for the Preliminary Determination of Sales at Less than Fair Value: Automotive Replacement Glass Windshields from the People's Republic of China, September 10, 2001, Attachment 6, Pub. Doc. No. 202, Prop. Doc. No. 84 ("Factor Valuation Memorandum"); see also First Remand Results at 39.

In its first remand to the Department, the Court directed the Department to show why its decision to value water as a separate factor of production does not result in double-counting. See Fuyao Glass I, 2003 Ct. Int'l Trade Lexis at 42-43. The Court held that, while it is reasonable

---

[6]Notice of Final Determination of Sales at Less Than Fair Value: Saccharin from the People's Republic of China, 59 Fed. Reg. 58818 (November 15, 1994) ("Saccharin").

[7]Sebacic Acid From the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 65 Fed. Reg. 49537 (August 14, 2000) ("Sebacic Acid"), and accompanying Issues and Decisions Memorandum.

that water would not be included in "depreciation" and "repairs," it was not reasonable for the Department to conclude that water would not be included in "stores and spare parts." Id. The Court indicated that it seemed reasonable that water might be included in the line item "stores and spare parts" because: (1) the amount allocated to "stores and spare parts" is sufficiently large to accommodate water and (2) "stores and spare parts" is the only element of factory overhead that could arguably include water. Id. The Court directed the Department to demonstrate that its decision to value water separately does not result in double-counting. Id.

In its First Remand Results the Department explained that its decision to value water separately did not result in double-counting because water was a direct input in the production of subject merchandise and would thus not be accounted for in factory overhead. The Department further explained that the value recorded in the line item "stores and spare parts" in the surrogate financial statement was not large enough to contain such a significant input as water as it is used in the production of automotive replacement glass. See First Remand Results at 44-45.

In Fuyao Glass II, the Court concluded that the Department "has failed to adequately explain why water should be valued as a separate factor of production, when the Saint Gobain financial statement appears to contain all of the costs associated with the production of the Windshields." Fuyao Glass II, 2005 Ct. Int'l Trade Lexis at 43.[8] The Court further instructed that "{b}ecause the water at issue is used for cleaning purposes, and is not incorporated into the finished product or specially treated, to include it as a separate factor of production would violate Commerce's own past practice." Fuyao Glass II, 2005 Ct. Int'l Trade Lexis at 43. Further, the

[8]Saint Gobain Sekurit India Limited ("Saint Gobain") is an Indian producer of ARG windshields that was used a s surrogate company for calculating financial ratios.

Court held that the Department did not "justify its conclusion that 'there would be no room in {the} 9% {indigenous stores and spare parts} figure to accommodate . . . such a significant input of water." Id. at 42. The Court has now directed the Department to specifically explain why valuing water as a separate factor of production does not contravene the Department's past determinations in Brake Drums and Brake Rotors, Certain Malleable Pipe Fittings, Bicycles, Saccharin, and Sebacic Acid, or "to value water as a part of factory overhead." Id. at 43.

Discussion

For the reasons set forth below, the Department has concluded that its decision to value water as a separate factor of production in this case is reasonable and in accordance with law. As explained below, there is substantial evidence on the record to support the Department's finding that water is not captured in factory overhead and, therefore, not double-counted. In accordance with the Court's instructions, the Department has fully explained how its decision to value water separately, as a direct input, in this instance is consistent with our past practice.

The Decision to Value Water Separately is Reasonable and in Accordance With Law

The determination of whether it is appropriate to value water separately is made by the Department on a case-by-case basis in accordance with 19 U.S.C. § 1677b(c)(1). See Sebacic Acid, 65 Fed. Reg. at 49537, Issues and Decisions Memorandum at Comment 3. Unlike many other potential factors of production, water is commonly used in many factories for purposes incidental to the production process, regardless of whether it is an input. This makes it particularly difficult to construct a bright-line test for determining whether water should be

valued in factory overhead or as a separate factor of production. In different circumstances, different criteria may be determinative.[9]

Usually, the Department will value water directly and not in factory overhead when water is used for more than incidental purposes, is required for a particular segment of the production process, or appears to be a significant input in the production process. See Freshwater Crawfish Tailmeat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Reviews, and Final Partial Recision of Antidumping Duty Administrative Review, 66 Fed. Reg. 20634 (April 24, 2001) ("Crawfish"), and accompanying Issues and Decisions Memorandum at Comment 7; Pacific Giant, Inc. v. United States, 223 F. Supp. 2d 1336, 1346 (CIT 2002) ("Pacific Giant") (upholding as reasonable the Department's decision to value water as a separate factor of production where the Department found that water use was more than incidental, and could not determine whether the cost of water was included in factory overhead); Glycine from the People's Republic of China: Final Results of New Shipper Administrative Review, 66 Fed. Reg. 8383 (January 31, 2001) ("Glycine"), and accompanying

[9] See, e.g. Certain Helical Spring Lock Washers from the People's Republic of China; Final Results of Antidumping Duty Administrative Review, 62 Fed. Reg. 61794 (November 19, 1997) at Comment 13; Glycine from the People's Republic of China: Final Results of New Shipper Administrative Review, 66 Fed. Reg. 8383 (January 31, 2001), and accompanying Issues and Decisions Memorandum at Comment 3; Freshwater Crawfish Tailmeat from the People's Republic of China; Notice of Final Results of Antidumping Duty Administrative Reviews, and Final Partial Recision of Antidumping Duty Administrative Review, 66 Fed. Reg. 20634 (April 24, 2001), and accompanying Issues and Decisions Memorandum at Comment 7 (valuing water directly because water is required for particular segment of the production process); Notice of Final Determination of Sales at Less Than Fair Value: Bulk Aspirin From the People's Republic of China, 63 Fed. Reg. 33805 (May 25, 2000), and accompanying Issues and Decisions Memorandum at Comment 7; Synthetic Indigo From the People's Republic of China; Notice of Final Determination of Sales at Less Than Fair Value, 65 Fed. Reg. 25706 (May 3, 2000), and accompanying Issues and Decisions Memorandum at Comment 9 (surrogate financial statements list water as separate line item); Notice of Final Determination of Sales at Less Than Fair Value; Honey From the People's Republic of China , 65 Fed. Reg. 50608 (October 4, 2001), and accompanying Issues and Decisions Memorandum at Comment 12 (water reported as a direct manufacturing expense); Notice of Final Determination of Sales at Less Than Fair Value: Urea Ammonium Nitrate Solutions from Belarus, 68 Fed. Reg. 9055 (February 27, 2003), and accompanying Issues and Decisions Memorandum at Comment 3 (water used as an energy source).

Issues and Decisions Memorandum at Comment 3; Bicycles, 61 Fed. Reg. at 19040; and Certain Malleable Pipe Fittings Issues and Decisions Memorandum at Comment 11. When a company consumes a large amount of water in the production process, the water consumed would not be captured in factory overhead because most companies would not value a significant, direct input in factory overhead.

Although the Department makes its decisions based on the individual facts of each case, the Department consistently considers whether the water consumed is used for incidental purposes or is significant to the production process in every case. See Pacific Giant, 223 F. Supp. 2d at 1346; see also Certain Helical Spring Lock Washers from the People's Republic of China; Final Results of Antidumping Duty Administrative Review, 62 Fed. Reg. 61794 (November 19, 1997) at Comment 13. Where water is used only for purposes that are not part of the production process but instead represent standard workplace chores such as cleaning the floors or machinery, for plumbing purposes, for drinking water for the employees, etc., it is properly considered by the Department as factory overhead incurred by most factories. See Saccharin, 59 Fed. Reg. at 58824. However, where water is used for more than these incidental workplace activities, and is a significant input into either the product itself or the production process, the Department will usually find that the amount of water used in production is too large to be accounted for in a company's factory overhead. Moreover, the Department is more likely to value water separately when water is a direct input in the production process, because factory overhead does not typically capture direct inputs. Therefore, when water is a direct input and used in significant quantities during the production process, it is the Department's normal practice to value it as a separate factor of production, just as it would for any other input. See

Crawfish, 66 Fed. Reg. at 20634, Issues and Decisions Memorandum at Comment 7; see also Pacific Giant, 223 F. Supp. 2d at 1346.

In the instant case, in determining whether to value water separately, the Department examined the same criteria that it looks to in all of its cases. First, the Department learned at verification that, for Respondent companies, water is a significant factor in the production of windshields and, in fact, that it is required for a particular segment of the production process. See Decision Memo at Comment 25. Water is vital to the production process as a lubricant used while cutting the float glass, and is used in large amounts to wash the glass after cutting to ensure that it is free of debris, and to clean the glass prior to the "sandwiching" of the PVB between the panes of glass. See id. The Department concluded that the way in which water is used in the production of windshields is not consistent with valuing water as a component of factory overhead. See id. This is not "incidental" use of water and the "cleaning" the Department referred to in its Final Determination is not the incidental cleaning of the factory floor that is characteristic of the use of water valued as factory overhead. Cf. Bicycles, 61 Fed. Reg. at 19040 (contrasting significant inputs which should be valued separately with "miscellaneous or occasionally used materials, i.e., cleaning supplies which might normally be included in {overhead}").

Furthermore, we observed at verification that Fuyao treated water as a factor of production, and even separated water used for production from that used for overhead purposes in the "corporate headquarters." See Verification of Sales and Factors of Fuyao Glass Industry Group, Ltd. ("FYG") in the Antidumping Duty Investigation of Automotive Replacement Glass

Windshields from the People's Republic of China (December 19, 2001), Pub. Doc. No. 254, Prop. Doc. No. 106. ("FYG Verification Report"), at 33. Specifically, at verification:

> FYG explained that there are water meters in each factory. FYG explained that after subtracting the amount of water used at the factories, FYG counts the remaining as water used for the corporate headquarters. FYG explained that it added up the water usage for factories 3 and 5 during the POI and used this total water usage amount as the basis for its factor value.

Id.

Therefore, consistent with past practice which distinguished between water used for purposes incidental to the production process and water used as a significant input in the production process, the Department found it proper to value water as a separate factor of production. See Decision Memo at Comment 25.

The Department's Decision to Value Water Separately is Consistent With Prior Decisions

In Fuyao Glass II, the Court expressed doubt that the Department's determination was in keeping with its past practice. Specifically, the Court "discerned several criteria that Commerce uses in determining whether a given material should be included as a part of factory overhead..." Fuyao Glass II, 2005 Ct. Int'l Trade Lexis at 22-23. First, the Court looked to the criterion of "physical incorporation," and instructed that "Commerce must consider whether the material is physically incorporated into the final product, since materials that are not physically incorporated into a final product are considered to be 'indirect' materials that are valued as part of factory overhead." Id. at 23. While it is true that physical incorporation is one element that the Department considers when determining whether to value water as a separate factor of production, it is not an absolute, bright-line test. When an input is physically incorporated into the actual product, it is an essential element of production, and it is highly likely that the input is

not valued in factory overhead. Therefore, frequently the Department will look to whether water is physically incorporated into the product in determining whether to value it separately. It does not necessarily follow, as demonstrated by the case precedent discussed below, that it is never appropriate to value water separately just because water is not physically incorporated into the product. This is particularly true when water is a significant, required part of the production process. See Pacific Giant, 223 F. Supp. 2d at 1346.

The Court correctly observes that, in Brake Drums and Brake Rotors, the Department determined that several molding materials were included in factory overhead primarily because these materials were not physically incorporated into the subject merchandise. See Fuyao Glass II, 2005 Ct. Int'l Trade Lexis at 23. However, physical incorporation was not the sole basis for this determination. The Department valued these molding materials in overhead because "these inputs are not incorporated into the final product and are also categorized as 'stores and spare parts consumed' in Indian accounting standards." See Brake Drums and Brake Rotors, 62 Fed. Reg. at 9169 (emphasis added). Significantly, there were several other materials in Brake Drums and Brake Rotors that were not physically incorporated into the subject merchandise but were still valued directly. For instance, the Department determined that limestone, although not physically incorporated, is still "a direct material which is consumed during the smelting process as flux." Id. The fact that the Department valued this input directly even though it was not physically incorporated illustrates that physical incorporation into the product is not always the determinative factor in deciding whether to value inputs directly. In the instant case, the Department applied a similar analysis in determining how to value water. Water, like the limestone in Brake Drums and Brake Rotors, was valued directly in this case because it was

consumed in the production process in significant amounts, as evidenced by the fact that Respondents reported monthly consumption amounts of water, and did not report that the water was recycled for repeated use. See FYG Verification Report at 33. In addition, in this case the Department determined that, unlike the molding materials in Brake Drums and Brake Rotors, water was not the type of material typically valued in any of the components that comprised factory overhead and thus needed to be valued separately.

In Certain Malleable Pipe Fittings, physical incorporation was also an element considered by the Department in its decision not to value certain molding inputs as separate factors of production. See Certain Malleable Pipe Fittings, 68 Fed. Reg. at 61395, Issues and Decisions Memorandum at Comment 11. However, a complete reading of the Department's conclusion in Certain Malleable Pipe Fittings shows that its decision to value these materials in overhead was not solely based on the lack of physical incorporation. The Department also considered whether the inputs were reusable, and whether their cost was captured in overhead expenses. See id. In the same case, the Department did not value steel balls separately, using the same criteria, stating "steel balls used in the tumbling process should be treated as variable factory overhead expense, because they are not physically incorporated in the subject merchandise, are reusable, and are included as overhead expenses under 'stores and spares consumed' in Indian financial statements." Id.

In Certain Malleable Pipe Fittings, incorporation of inputs into the product was only one element of the Department's decision not to value inputs separately. The Department also considered the fact that the inputs in question were "recycled" and "reusable" rather than consumed, and most importantly, the Department was confident that these inputs were

identifiable as expenses that are typically, according to Indian accounting principles, included in overhead. Id., citing Sebacic Acid, 65 Fed. Reg. at 49537, Issues and Decisions Memorandum at Comment 3 (stating that where the Department concludes that water is valued in overhead, it will not value water separately). Unlike the steel balls in Certain Malleable Pipe Fittings, the water used in the production of float glass is consumed rather than reused or recycled and the Department has no confidence that the amount of water consumed in the production of float glass is captured in the surrogate company's factory overhead.

In Bicycles, the Department again cited "incorporation into the product" as one justification for considering an input to be a direct material, but incorporation was not characterized as an essential or the definitive requirement for an input to be considered a direct material. See Bicycles, 61 Fed. Reg. at 19040. In Bicycles, the Department valued certain chemical inputs as separate components of normal value because the inputs were significant to the manufacturing process, and not the type of incidental materials that would normally be valued in factory overhead. Therefore, we determined that no double-counting occurred by valuing the inputs separately. See Bicycles, 61 Fed. Reg. at 19040. This is consistent with our determination in the instant case, where we determined that because water was a significant factor in the production of windshields and is required for a particular segment of the Respondents' production, rather than incidental to the production process, it is reasonable to conclude that such a significant input would not be accounted for in overhead. Therefore, as in Bicycles, we were confident in this case that valuing water as a direct input would not result in double-counting. See Decision Memo at Comment 25.

The Department's decisions in Brake Drums and Brake Rotors, Certain Malleable Pipe Fittings, and Bicycles demonstrate that physical incorporation is one criterion that the Department examines in deciding whether it is appropriate to value an input as a separate factor of production, but it is not the only consideration, and it is not a requirement for separate valuation. Although physical incorporation of a material usually results in separate valuation or a finding that an input is not adequately captured in factory overhead, lack of physical incorporation does not by itself preclude separate valuation, as evidenced by the previously cited cases. Thus, the Department's decision to value water separately in this case does not contradict its decisions in these prior cases, or its normal practice.

The Department further disagrees that its determination in the instant case contravenes its determinations in Saccharin and Sebacic Acid. The Department acknowledges that, in Saccharin, only distilled water was valued separately. Although distilled water was not physically incorporated into the product, the Department found it appropriate to value it separately because distilled water was required for a particular segment of the production process. See Saccharin, 59 Fed. Reg. at 58824. The regular water in Saccharin was not valued separately because, unlike the production water in the instant case, it was not a significant input consumed in the production process. In Saccharin, the use of regular water was incidental to the production process, whereas the use of distilled water was significant to the production process, and thus the Department valued distilled water separately. Moreover, the distilled water was separately purchased and shipped to Respondents, and therefore could be separated from water included in factory overhead. Other than the fact that, in Saccharin, the significant input was distilled water rather than regular water, the facts are the same as in the instant case. Thus, the Department's

determination in the instant case does not contravene the determination in Saccharin. The Department will normally value water in overhead unless the Department determines that water is used for more than incidental purposes, is required for a particular segment of the production process, or appears to be a significant input in the production process. See Crawfish, 66 Fed. Reg. at 20634, Issues and Decisions Memorandum at Comment 7.

In Sebacic Acid the Department made clear that its decision to value water in overhead was based on the use of the Federal Reserve Bank of India (FRBI) data: "[b]ecause we concluded that water was included in the FRBI overhead data, we did not value it separately." Sebacic Acid, 68 Fed. Reg. at 49537, Issues and Decisions Memorandum at Comment 3; see also Certain Malleable Pipe Fittings, 68 Fed. Reg. at 61395, Issues and Decisions Memorandum at Comment 11. The Department has reached no such conclusion in the instant case and, in fact, maintains that water is not accounted for in the overhead in this case because the surrogate's overhead consists solely of the line-items "depreciation," "repairs and maintenance" and "stores and spare parts" from the surrogate company's financial statement, and it is unlikely that water would be included in any of these categories. See Factor Valuation Memorandum at Attachment 6. Nor have Respondents put forth any positive evidence to indicate why a significant input like water, which Respondents purchase from a utility company on a daily running basis, would be recorded in "stores and spare parts."

The Court cites Sebacic Acid for the rule that, where the Department could not separate the cost of water from the factory overhead expense, it relied on "normal accounting practice" and presumed that the cost of water was included in the factory overhead expense. See Fuyao II at 24-25. In Sebacic Acid, however, the Department concluded that water was included in the

FRBI overhead data, whereas in the instant case, the Department found that the cost of water is not captured in factory overhead. See Sebacic Acid, 68 Fed. Reg. at 49537, Issues and Decisions Memorandum at Comment 3. Not valuing water separately in this instance would result in not accounting for a significant input into the production of the subject merchandise.

The Department's decision in Crawfish is an example of a case in which the Department has valued water separately. See Fuyao Glass II, 2005 Ct. Int'l Trade Lexis at 40. The decision in Crawfish is factually similar to the instant case. In Crawfish, the Department decided to value water as a direct factor because it found that a particular segment of the production process involving cleaning and boiling the crawfish required significant quantities of water, that this use of water was clearly different from the incidental use of water commonly found in factories, and that no party put forth evidence to show that water is included elsewhere. See Crawfish, 66 Fed. Reg. at 20634, Issues and Decisions Memorandum at Comment 7. Similarly, in the instant case we found at verification that water is used in significant quantities in particular segments of the production process to cut the glass and clean it prior to "sandwiching," and this use is clearly different from incidental use. Furthermore, there is no evidence on the record that water is included in components of the surrogate company's factory overhead.

The Department's decision to value water as a separate factor of production is based on the fact that water is a significant input consumed during the production process and it is not captured in the financial statement of the surrogate company. This reasoning is completely consistent with the Department's past decisions. The Department's practice may appear inconsistent in that, at times we value water separately and at other times we do not. However, as the discussion of the cases above reveals, we weigh the same criteria but each case presents

different material inputs, different production processes, and different sources for surrogate values. This fact underscores the necessity that the Department determine how to account for water and other materials on a case-by-case basis. A careful analysis of each case reveals that our decision to value water as a separate factor of production in this case is consistent with the cases identified by the Court and the Department's practice.

Water is not Captured in Factory Overhead

The Court found that "Commerce has provided no evidence tending to justify its conclusion that '{t}here would be no room in this 9% [indigenous stores and spare parts] figure to accommodate ... such a significant input as water.'" Fuyao Glass II, 2005 Ct. Int'l Trade Lexis at 42-43. For the following reasons, the Department respectfully disagrees with this conclusion.

In Fuyao Glass I, the Court held that, while it is reasonable that water would not be included in the first two elements that the Department used to calculate factory overhead, "depreciation" and "repairs," it was not reasonable for the Department to conclude that water would not be included in the third element, "stores and spare parts." See Fuyao Glass I, 2003 Ct. Int'l Trade Lexis at 43. The Court cited two reasons for this conclusion: (1) the line item "stores and spare parts," at 26% of total factory overhead, is sufficiently large to accommodate water, and (2) the line item "stores and spare parts" is the only line item that could arguably include water. See id.

In its First Remand Results, the Department addressed this concern by explaining that the portion of Saint Gobain's financial statements allocated to "stores and spare parts" that could reasonably be determined to include water is, in fact, only 9% of factory overhead. We explained that:

> We made this determination based on the fact that in St. Gobain's financial statement the line item "stores and spare parts" is subdivided into "imported" and "indigenous" "stores and spare parts." See Saint Gobain Sekurit India Limited Annual Report: April - December 2000 at 18. We find that the water, used as described in the production process, would not be imported, but rather is indigenous. The "indigenous" subcategory of "stores and spare parts" accounts for only 36.42% of the total of "stores and spare parts," while "imported" "stores and spare parts" make up the other 63.58% of the total of "stores and spare parts." Id. Thus, while the whole line item of "stores and spare parts" comprises 26% of factory overhead, the amount allocated to "stores and spare parts" that could reasonably be determined to hold water (i.e, "indigenous stores and spare parts") is only 36.42% of that 26%, or 9% of factory overhead.

First Remand Results at 44. The Department respectfully submits that if the premise for the Court's conclusion that it is reasonable that water is included in "stores and spare parts" is that "stores and spare parts" is sufficiently large at 26% of total factory overhead to "accommodate a significant input such as water," then the demonstration that the portion of "stores and spare parts" that can reasonably include water is in fact only 9% is a persuasive refutation of that premise from the original remand.

In its second remand to the Department, the Court states that the Department has put forth no evidence to justify its conclusion that this 9% figure is too small to accommodate water. See Fuyao Glass II, 2005 Ct. Int'l Trade Lexis at 41-42. The Department respectfully disagrees.

Pursuant to the first remand by the Court, the Department estimated the amount of water used by Saint Gobain by using a ratio of the amount of water used, per windshield, by one of the Respondents in this investigation. See Memo to the File from Eugene Degnan: Calculation of the Value of Water used by Saint Gobain (March 17, 2004), Pub. Doc. No. 9, Prop. Doc. No. 6 (Remand Results Index). The Department multiplied this ratio by the total number of windshields produced by Saint Gobain, as reflected in its financial statement, to arrive at the total

amount of water that Saint Gobain would need in order to produce the amount that it did using production processes similar to those of Respondents. Id. The Department then valued this amount in rupees and demonstrated that this amount is 25% larger than the amount reported in Saint Gobain's financial statements under "indigenous stores and spare parts" (i.e., 25% larger than the 9% of factory overhead represented by "indigenous stores and spare parts"). Id.

Further, the Department put forth evidence of the type of materials that are typically found in the category of "stores and spare parts," items such as "filter screens, flux covering, drill bits and similar items ..." (Brake Drums and Brake Rotors, 62 Fed. Reg. at 53196-97); "equipment and machinery used in the production process," such as "tools, grinding wheels, and spare parts" for the equipment and machinery (Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Final Results and Partial Termination of Antidumping Administrative Review, 62 Fed. Reg. 6173 (February 11, 1997), at Comment 11), and noted that if water were accounted for in "stores and spare parts," there would be no room left for the value of these types of items which are properly valued in this category. See First Remand Results at 43 and 52. For these reasons, the Department continues to maintain that the record supports its conclusion that the amount of water used in production is not included in Saint Gobain's factory overhead.

Water is not Double-Counted

The Court also expressed concern that water might be double-counted because the Department has failed to show where water is valued in the surrogate financial statement despite the fact that they appear to account for all the production costs of windshields. See Fuyao Glass II, 2005 Ct. Int'l Trade Lexis at 31, 32, and 43.

While the surrogate financial statement may contain all of the production costs of the *surrogate's* windshields, this does not mean that the financial statement contains all of the costs incurred in the production of *Respondents'* windshields. The Department cannot know precisely how closely the surrogate statement mirrors the production experience of Respondents. While the Department observed at verification that Respondents use significant amounts of water purchased from utility companies to produce their windshields, the Department does not know, and cannot know, how the surrogate uses water. In light of this fact, there are many explanations of why water might not be found in a specific line item in Saint Gobain's financial statement. Saint Gobain may not purchase water at all. It is well documented by the Department that many producers obtain their water for production purposes from wells, rivers or other bodies of water on their property and, in such cases, the cost of water is reflected in another line item (e.g., energy consumption). See, e.g., Saccharin, 59 Fed. Reg. at 58823; Notice of Final Determination of Sales at Less Than Fair Value: Urea Ammonium Nitrate Solutions from Belarus, 68 Fed. Reg. 9055 (February 27, 2003), and accompanying Issues and Decisions Memorandum at Comment 3. This is certainly more plausible than the theory that Saint Gobain accounted for water in the unlikely category of "stores and spare parts," a contention for which no party has submitted any evidence.

There are other reasons as well. Saint Gobain may have a very different production process and may not use water in the significant amounts in which Respondents use it. Saint Gobain may have included the cost of water under "consumption of raw materials." Saint Gobain lists only two raw materials under this heading: Glass and PVB film. Since it is clear that more than these two raw materials are used in the production of the merchandise, it is

entirely plausible that other raw materials, including water, may be subsumed under this category. See Fuyao Glass II, 2005 Ct. Int'l Trade Lexis at 50 (finding it reasonable in this case for the Department to assume that Saint Gobain accounted for additional unlisted raw materials under the line item "raw materials consumed").

Finally, it is not necessary to show where water is accounted for in order to demonstrate that water is not double-counted in this case, because the Department valued overhead using only the items "depreciation," "repairs" and "stores and spare parts." Therefore, in order to show that water is not double-counted, it is only necessary to show that it is not included in any of these three categories. The Department respectfully submits that it has presented substantial evidence that "stores and spare parts" does not capture the input of water. The Department has explained that this line item is not large enough to contain water in the amount consumed by Respondents, that the types of materials properly accounted for in this line item would not include water, and that the use of water by Respondents is not consistent with valuing water in this line item.

The Department submits that valuing water separately is supported by substantial evidence, is reasonable and is in accordance with the law. First, the Department has demonstrated that water is a significant input in the production of the subject merchandise. Second, the Department has illustrated that water was not accounted for in Saint Gobain's financial statement (i.e., factory overhead). Third, the Department has demonstrated that it has not double-counted water in its calculations. Finally, the Department has explained why its decision to value water separately is in accordance with its past practice.

Comment 2: Valuation of Water

Petitioners' Argument: Petitioners argue that the Department's decision to value water as a direct input, and therefore as a separate factor of production, is reasonable and supported by substantial evidence.

Respondent Fuyao's Argument: Fuyao argues that the Department's explanation for continuing to value water as a material input does not comply with the Court's instruction directing the Department to explain why valuing water as a separate factor of production does not contravene the Department's determinations in Brake Drums and Brake Rotors, Certain Malleable Pipe Fittings, Bicycles, Saccharin, and Sebacic Acid.

Fuyao argues that the Department's determination that water is not captured in the surrogate financial statement contradicts the Court's finding that the surrogate financial statement "appears to contain all of the elements associated with the production of the Windshields." See Fuyao Glass II, 2005 Ct. Int'l Trade Lexix at 26. Fuyao argues that the Department offers no facts or reasoning to support its conclusion that water is not captured in the surrogate financial statement. Fuyao claims that the Department's explanation as to why its decision to value water directly does not conflict with the cited prior cases is unpersuasive, and further argues that its discussion of these prior cases does not provide a complete and accurate analysis of the underlying facts of each case.

Fuyao argues that the Department did not provide factual support for its explanation that the surrogate financial statement may not contain all costs incurred by Respondents because the surrogate company may have a different production process. Fuyao contends that this

explanation directly contradicts the Department's other conclusion that water is a significant input, and the Department's assertion that the value of water needed to make the windshields is too large to be included in the "stores and spare parts" category of the surrogate financial statement. Furthermore, Fuyao contends that, if the surrogate company did not pay for water, then according to Rhodia, which holds that the purpose of the surrogate methodology is to construct the product's normal value as it would have been if the NME country were a market-economy country, Respondents should not have a value assigned for water either. See Rhodia Inc. v. United States, 185 F. Supp. 1343, 1355 (CIT, 2001) ("Rhodia").

Fuyao argues that the Departments explanation that the cost of water may be included in raw materials is contradicted by the fact that water is not listed in raw materials in the financial statement.

Respondent Xinyi's Argument: Xinyi argues that the Department has ignored the Court's instructions, and has not based its conclusions regarding water on record evidence. Xinyi contends that the Department's determination regarding water in this case remains inconsistent with its past practice. Xinyi contends that the Department's past practice acknowledged that Indian accounting practices treat all materials that are not physically incorporated into the finished product as an overhead item. Xinyi argues that the Department's conclusions should be based on this Indian accounting practice, not on observations of other PRC respondents in unrelated cases or on conjecture. Xinyi cites Brake Drums and Brake Rotors, where the Department stated that "{a}ccording to the {Indian} Compendium of Statements and Standards, in order for a material to be considered as part of factory overhead, it must 'assist the

manufacturing process, but . . . not enter physically into the consumption of the finished product." Xinyi contends that this is proof that the Department has recognized that, under Indian accounting principles, materials not incorporated into the finished product are included in factory overhead.

Xinyi argues that the Department has cited no Indian accounting practices that would suggest that materials that do not physically enter into the composition of the finished product should not be valued in factory overhead. Xinyi argues that the Department should base its conclusions regarding the valuation of items exclusively on this accounting principle, and not "speculate" how Respondent companies value particular items.

Department's Position: The Department has fully addressed the Court's remand instructions by explaining how its determination to value water as a direct input in the present case does not conflict with its prior decisions in other cases. The Department also addressed the Court's concerns that valuing water separately may result in double-counting by explaining why, based on the record evidence, it is unlikely that water would be valued in the factory overhead as it was calculated in this investigation, i.e., using only the categories of depreciation, repairs and maintenance, and stores and spare parts.

The Department disagrees with Fuyao that the Department's statement that water is not captured, i.e., not listed as a separate line-item, in the surrogate company's financial statement, "runs contrary" to any finding by the Court. Furthermore, regarding Fuyao's contention that the Department offers no facts or reasoning to support this statement, the fact that the surrogate

company's financial statement does not capture water as a separate line-item is evident on the face of the document and requires no proof.

The Department disagrees with Fuyao's contention that it did not effectively and thoroughly demonstrate why its decision in the instant case does not contradict its prior cases cited by the Court. In the Draft Results, the Department specifically addressed the facts of each of the cases cited by the Court (see *Discussion* section above), and Fuyao's conclusory remark that the Department's analysis is not "complete and accurate" is baseless. Despite the opportunity to present comments on the Department's analysis, Fuyao has put forth absolutely no facts, analysis or argument to support this contention.

Fuyao's contention that the Department has no factual support for its premise that the surrogate financial statement may not contain all costs incurred by respondents because the surrogate company may have a different production process, is without merit. The proposition that the surrogate company "may" have a different production process does not require "factual proof." No party to this case has examined the surrogate company's production process, and it is therefore self-evident that we cannot know exactly the process by which the surrogate company produces its merchandise.

The Department disagrees with Fuyao's claim that the Department's acknowledgment that it cannot know the precise production process of the surrogate company contradicts the Department's finding that water is a significant input in the production process of Respondents. The record does not contain detailed information on the precise production process of the surrogate company, and the Department was not able to obtain such information. The

Department knows that water is a significant input in the production process of Respondents, however, because the Department verified the production process of Respondents.

Nor, as Fuyao claims, does this acknowledgment contradict the Department's conclusion that the value of water would be too great to be accounted for in the "stores and spare parts" line-item in the surrogate financial statement. That conclusion was the result of a distinct analysis that was clearly based on the premise that the surrogate company was "using production processes similar to those of the respondents." See Draft Second Remand Results at 29. Because we cannot know the production process of the surrogate company, the Department has analyzed the issue of where water is accounted for based both on the premise that water was used by the surrogate company in a fashion similar to that in which it was used by Respondents, and on the alternate premise that water was not used in a fashion similar to Respondents. Fuyao's argument clearly mixes the conclusion from the first analysis with the premise of the second.

Fuyao's reliance on Rhodia as support for its argument that the Department should not value water at all for Respondents because the Indian surrogate may not have paid for water is without merit. The purpose of the surrogate methodology is to construct the product's normal value as it would have been if the NME country were a market economy country. Rhodia, 185 F.Supp. at 1355. The purpose is therefore to construct normal value for Respondents' products by assigning market-economy values to the inputs used in the production and the overhead of Respondents. See 19 U.S.C. § 1667(c). This does not mean, as Fuyao erroneously contends, that the Department should construct the normal value for Respondents by assigning the values of the inputs used in the production process of the surrogate company. The methodology proposed by

Fuyao is contrary to the statute and would simply result in calculating a normal value for the surrogate company, rather than for Respondents.

Finally, Fuyao's criticism, that the Department's argument for water being included in raw materials is contradicted by the fact that it is not listed in raw materials in the surrogate company's financial statement, is also unfounded. The Department has explained that, because the surrogate company lists only two materials under the line-item "raw materials consumed," and because it is evident that more than two raw materials are used in the production of windshields, it is possible that the raw material "water" could be subsumed under this line-item. Moreover, the Department notes that this Court has found it reasonable that inputs might be included under "raw materials" without being listed separately under that category. See Fuyao Glass II, 2005 Ct. Int'l Trade Lexis at 31 (where the Court "finds it reasonable for Commerce to conclude that Saint Gobain, like Atul, accounted for these raw materials {i.e., unaccounted-for raw materials} at issue elsewhere, under 'raw materials consumed'").

Xinyi writes that the Department based its conclusions regarding water on its "unique experience," rather than record evidence. Xinyi does not provide a citation for this quote, and therefore the Department does not know to what, specifically, Xinyi is referring. The Department notes that this phrase is not found in the Department's response in the Draft Second Remand Results. The Department has always based its determination in this case, as in all cases, on the record evidence. In this determination, the Department relied on its methodologies, practices and precedents developed over years during many investigations and reviews and employed by the Department to draw reasoned conclusions based on the record evidence. This is the type of experience that executive agencies employ in carrying out their statutory mandates,

and to which courts regularly give deference. See e.g., Nation Ford Chemical Co. v. United States, 166 F.3d 1373, 1377 (Fed. Cir. 1999).

The Department disagrees with Xinyi's argument which suggests the following: because Indian accounting standards state that "in order for a material to be considered as part of factory overhead, it must 'assist the manufacturing process, but ... not enter physically into the consumption of the finished product,'" this leads to the conclusion that "materials that are not incorporated in the finished product are included in factory overhead." Put more concisely, Xinyi's argument is: if a material is in overhead, then it is not incorporated; therefore, if a material is not incorporated, it is in overhead. Xinyi's conclusion does not follow from its premise. As we have explained at length, although lack of physical incorporation is necessary for a material to be included in factory overhead, it is entirely possible for a material not to be physically incorporated yet still not be included in factory overhead.

The Indian accounting principle quoted by Xinyi recognizes this very fact. The Indian accounting principle cited by Xinyi clearly states that "in order for a material to be *considered* as part of factory overhead" it must assist in the manufacturing process and not be physically incorporated into the finished product. See Xinyi Comments at 4 (emphasis added). It is clear from the phrase "in order to be considered" that assisting in the manufacturing process and lack of physical incorporation are merely necessary conditions to be considered for valuation in overhead. However, they are not sufficient in themselves, as there are materials that can assist in the manufacturing process and are not physically incorporated yet are not valued in factory overhead.

In fact, the Department has put forth at least nine examples of instances where materials that assisted in the manufacturing process and were not incorporated into the product were nevertheless not valued in overhead. See Draft Second Remand Results at 25 fn 7, 29, 31, 32, 34.

For the aforementioned reasons, the Department maintains that it has complied with the Court's remand instructions and has explained why its determination to value water as a direct input in the instant investigation does not contradict its determinations in prior cases. As the Department has stated, under the Department's surrogate methodology, where a material is not broken out as a specific line-item in the surrogate financial statement it is sometimes impossible for any party to say with absolute certainty how that material was accounted for, or whether it was valued at all. However, the Department has explained the many ways it has evaluated the evidence that is available on the record to come to the conclusion that water would not be accounted for in the narrowly constructed overhead value used by the Department in this investigation. The Department has shown why each of Respondents' criticisms of the Department's methodology is invalid. Furthermore, the Department notes that neither respondent has put forth a single valid affirmative argument based on record evidence to justify the contention that water would be accounted for in the line-item "stores and spare parts."

Issue 3: Profit Ratio

Summary

The Court has directed that if the Department is to "continue to rely on section 1677b(e) only for its definition of profit, while disregarding the statute's other directives concerning profit,

it may not merely rely upon the notion that it is not required to conform to the market economy statute; rather, it must explain why that methodology is reasonable in an NME context." See Fuyao Glass II, 2005 Ct. Int'l Trade Lexis at 54. The Department continues to maintain that its decision to use the only surrogate company with a positive profit is reasonable and in accordance with law. As instructed by the Court, the Department has provided additional explanation as to how its chosen methodology is both reasonable within an NME context, and consistent with the entire statute.

Background

In its Final Determination, the Department based the surrogate profit ratio on the financial statement of Asahi Indian Safety Glass, Ltd. ("Asahi"), rather than on Saint Gobain's financial statement, because Saint Gobain did not have a positive profit. The Department's decision to use the financial information of the only surrogate company with positive profits was guided by Congress' directive in the Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R.Rep. No. 103-826(I), at 839-40 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4175 ("SAA") and based on its own practice in NME cases. See Final Determination, and Decision Memo at Comment 21.

In its first remand to the Department, the Court concluded that the Department's decision to include only positive amounts in its calculations was reasonable. See Fuyao Glass I, 2003 Ct. Int'l Trade Lexis at 56. However, the Court questioned whether the Department's methodology fully considered

> the direction in section § 1677b(e)(2)(B)(iii), that the constructed value of imported merchandise "shall be a sum equal to 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 products as the subject merchandise....

See Fuyao Glass I, 2003 Ct. Int'l Trade Lexis at 58-59.

In its First Remand Results, the Department first explained that section 1677b(c) of the statute controls the calculation of surrogate profit in NME cases, and that section 1677b(e) only applies for purposes of calculating constructed value in market-economy cases. First Remand Results at 74. The Department further maintained that the profit methodology applied in an NME context is also consistent with the constructed value portion of the statute. First Remand Results at 75. In particular, the Department explained that, when section 1677b(e)(2)(B)(iii) is applied in a market-economy context, the Department will only consider positive profits when determining whether the amount for profit exceeds "the amount normally realized by other exporters and producers." In order to address the Court's concerns, however, the Department has provided a more detailed explanation of why using the only surrogate company with a positive profit is reasonable in an NME context, and is consistent with section 1677b(e)(2)(B)(iii) of the statute.

Discussion

The Department's decision to use the only surrogate company with a positive profit was reasonable and in accordance with law. When the Department calculates a surrogate profit rate in NME cases, it fulfills the requirement of section 1677b(c)(1) to include an amount for profit in the calculation of normal value. When the Department calculates profit for constructed value in

market-economy cases, it fulfills the requirement of 1677b(e) to include an amount for profit in the calculation of constructed value. Common to both of these scenarios is that the statute provides that the Department will include an amount for profit.

The requirement that the U.S. sale of subject merchandise be compared to a normal value which contains a profit element is one that permeates all of section 1677b. 19 U.S.C. § 1677b. In market-economy cases, if the respondent's sale in the home market is below the cost of production, then the Department will construct a value that includes an element of profit. In NME cases, the Department relies on the best available information to identify surrogate companies that are similar to the respondents for the purposes of accounting for overhead, SG&A, and profit. Just as in a market-economy case, the Department will include an element of profit in the calculation of normal value in order to determine whether the U.S. sale of subject merchandise is being made at prices which are at less than fair value.

When calculating profit in NME cases, the Department seeks a surrogate profit ratio that represents the profit experience of the respondent companies, assuming that they are selling at prices that cover their cost of production and a reasonable profit. In this case, the 8.42% profit of Asahi is a reasonable amount for surrogate profit because it represents the actual profit experience of a surrogate company in the surrogate country. It is an amount actually realized by a surrogate company and the record does not contain any evidence demonstrating that the profit experience of Asahi is abnormal.

Normally, companies seek to earn a profit from their operations. Accordingly, when the Department looks to the surrogate country to find a reliable amount for surrogate profit, the Department only considers positive profits because the losses of some companies do not

represent the experience of normal, healthy companies. The Department does not consider the losses of Saint Gobain and Atul Glass Industries Limited ("Atul") to be a normal or reliable basis for surrogate profit for Respondents because neither company sold at prices which covered, let alone exceeded, its cost of production. The experience of Atul and Saint Gobain cannot be considered to represent a measure of profit because profits are positive figures. See Fuyao Glass I, 2003 Ct. Int'l Trade Lexis at 34. Losses do not represent profits "normally realized" because losses are not profits.

The use of the only surrogate company with a profit in this NME case is also consistent with the practice and rules followed by the Department in market-economy cases. By deciding to use the only surrogate company with a positive profit, the Department did not disregard section 1677b(e). On the contrary, the Department's methodology in the NME context is fully consistent with how the Department would calculate profit under section 1677b(e) of the statute because the Department does not consider zero or negative "profits" when determining the profit that is "normally realized by other exporters and producers" pursuant to 19 U.S.C. § 1677b(e)(2)(B)(iii).

In market-economy cases, the statute requires the Department to calculate a constructed value pursuant to section 1677b(e) when a normal value cannot be determined pursuant to section 1677b(a)(1)(B)(i). See 19 U.S.C. § 1677b(a)(4). Normal value can only be determined pursuant to section 1677b(a)(1)(B) if the sale price of the foreign like product is "in the ordinary course of trade" (i.e., the sale price is above the cost of production). Thus, the very reason for resorting to constructed value is to include a profit element when the respondent in question had no profitable home market sales to compare to the U.S. export price or constructed export price.

Section 1677b(e) instructs that the constructed value shall be an amount equal to the sum of the cost of materials, fabricating and processing, and amounts for SG&A, and profit. Section 1677b(e)(2)(B) provides three alternatives for calculating SG&A and profit when actual data from the specific respondent is not available. In further explanation, the SAA provides,

> Section 1677b(e)(2)(B) establishes alternative methods for calculating amounts for SG&A expenses and profit in those instances where the method described in section 1677b(e)(2)(A) cannot be used, either because there are no home market sales of the foreign like product or because all such sales are at below-cost prices. These methods are: (1) actual amounts incurred or realized by the same producer on home market sales of the same general category of products; (2) the weighted-average of actual amounts incurred or realized by other investigated companies on home market sales in the ordinary course of trade (i.e., profitable sales) of the foreign like product; or (3) any other reasonable method, provided that the amount for profit does not exceed the profit normally realized by other companies on home market sales of the same general category of products (the so-called profit cap).

SAA at page 170 (emphasis added).

In its remands to the Department, the Court has expressed concern that using the only surrogate with a positive profit conflicts with the third alternative, which instructs that "the amount allowed for profit may not exceed the amount normally realized by exporters or producers..." 19 U.S.C. § 1677b(e)(2)(B)(iii); see also Fuyao Glass I, 2003 Ct. Int'l Trade Lexis at 58-59; see also Fuyao Glass II, 2005 Ct. Int'l Trade Lexis at 54. Under sections 1677b(e)(2)(B)(i)-(ii), the Department has the option of basing the amount for profit on either the profit from the respondent's sales of merchandise that are in the same general category of products as the subject merchandise, or the weighted-average profit of other producers that are subject to the investigation or review provided that the sales are in the ordinary course of trade. When the Department is calculating constructed value pursuant to section 1677b(e)(2)(B)(iii),

however, it is usually because the respondent(s) did not have any home-market or third-country sales that were made in the ordinary course of trade (i.e., above the cost of production). See SAA at 170-171. Yet, even when the record does not contain any profitable comparison sales on which to base an amount for profit, the statute directs the Department to calculate an amount for profit, using any other reasonable method, so long as the amount allowed for profit does not exceed the amount normally realized by exporters or producers.

When the Department calculates profit under section 1677b(e)(2)(B)(iii), it may look to other producers to determine an "amount normally realized," but it only looks to producers with positive profits. Considering zero or negative profits as "amounts normally realized" would undermine the entire purpose of resorting to constructed value when there are no home-market sales above cost. If losses on those below-cost sales can be considered profits that are "normally realized," then there is no reason to resort to constructed value. The Department could simply use the below-cost sale as the comparison sale if that were the case. However, the statute does not permit the Department to compare the U.S. price to a normal value that is below the cost of production. See Fuyao Glass I, 2003 Ct. Int'l Trade Lexis at 34-35 (agreeing with the reasoning in Rhodia Inc. v. United States, 240 F. Supp. 2d 1247, 1254, that sales made below cost may be disregarded when calculating profit). For this reason, zero or negative "profits" are not considered when determining the "amount normally realized" or the so-called profit cap. The below-cost sales of respondents in market-economy cases cannot be used for the profit amount when calculating constructed value, and similarly the losses of surrogate companies in an NME case cannot be used when calculating an amount for surrogate profit.

In some instances, the Department will use a zero amount for profit, but it will only do so where there are *no* positive profits realized by any of the producers in the industry. See Floral Trade Council v. United States, 41 F. Supp. 2d 319, 326-32 (CIT 1999). Nevertheless, this is but one exception to the requirement that normal value must include a positive amount for profit. In Floral Trade, the profit amount for constructed value was zero because virtually all comparison sales of all respondents were below cost. In other words, because all of the respondents sold at a loss, the amount of profit normally realized by the producers in that industry was zero. That is not the case here. In this case, the record shows that one of the Indian surrogate companies, Asahi, actually realized a profit of 8.42%.

Moreover, even in market-economy cases, when the Department lacks information to calculate a profit cap, or an amount normally realized, it will still include an amount for profit, as explained in the SAA,

> that where, due to the absence of data, Commerce cannot determine amounts for profit under alternatives (1) and (2) or a "profit cap" under alternative (3), it might have to apply alternative (3) on the basis of "the facts available." This ensures that Commerce can use alternative (3) when it cannot calculate the profit normally realized by other companies on sales of the same general category of products. In such a situation, the Administration intends that Commerce will not make an adverse inference in applying the facts available, unless the company in question withheld information requested by Commerce.

SAA at 171. In numerous market-economy cases, the Department is not able to calculate a profit cap and relies on section 1677b(e)(2)(B)(iii) on the basis of facts available. For example, in Sulfanilic Acid from Portugal, the Department stated,

> the profit cap cannot be calculated in the instant case because, as we noted above, we do not have information allowing us to calculate the amount normally realized by exporters or producers (other than respondent) in connection with the sale, for consumption in the foreign country, of the merchandise in the same general

> category. Therefore, we are applying option (iii) based on facts available (i.e., without quantifying a profit cap). See SAA at 841.

Notice of Final Determination of Sales at Less Than Fair Value in Sulfanilic Acid from Portugal, 67 Fed. Reg. 60219 (September 25, 2002), and accompanying Issues and Decisions Memorandum at Comment 5. Therefore, in some market-economy cases, the Department applies an amount for profit under section 1677b(e)(2)(B)(iii) without comparing the amount to an "amount normally realized." As explained in the SAA, this option ensures that the Department can calculate an amount for profit under section 1677b(e)(2)(B)(iii) when it does not have information to determine the profit normally realized by other exporters and producers. See SAA at 171. When applied on the basis of facts available, the only limitation on the Department's application of this section is that it cannot make adverse inferences when choosing the facts available. Id.

For these reasons, the Department's decision to use Asahi's profit of 8.42% as the surrogate profit rate in this case is reasonable and in accordance with law. The Department's methodology in the NME context is fully consistent with the way in which the Department calculates profit under section 1677b(e) of the statute, because the Department does not consider negative amounts when determining the profit amounts normally realized by other producers and exporters when applying section 1677b(e)(2)(B)(iii) of the statute.

Comment 3: Profit Ratio

Petitioners' Argument: Petitioners agree with the Department's arguments in the Draft Results and state that the Department's position is reasonable and supported by substantial evidence.

Respondent Fuyao's Argument: Fuyao argues that the Department did not comply with the Court's directive to explain how the methodology to calculate profit under section 1677b(c) complies with section 1677b(e)(2)(B)(iii). Fuyao argues that a profit calculation that averaged the profit experiences of Saint Gobain, Asahi, and Atul would provide a positive amount for profit that would comport with the requirements of both sections 1677b(c) and 1677b(e)(2)(B)(iii).

Respondent Xinyi's Argument: Xinyi argues that the Department's surrogate profit calculation remains contrary to law. Xinyi argues that the profit experience of Saint Gobain, Asahi, and Atul represent the amount normally realized by Indian glass producers. Xinyi argues that the Department's use of Asahi's profit alone results in an abnormal surrogate profit rate because the Indian glass industry as a whole was not able to reach the level of profitability reached by Asahi.

Xinyi argues that section 1677b(e)(2)(B)(iii) requires the Department to compare the amount for profit to amounts normally realized by exporters and producers, not the amount realized by normal, healthy companies. Xinyi argues that the statute requires an objective assessment of the experience of exporters as a whole, and not of the experience of a limited segment of exporters whose experience differs significantly from the others. Xinyi argues that the Department should include zero profit for Saint Gobain and Atul in the surrogate profit calculation so that it is more representative of the Indian glass industry as a whole.

Further, Xinyi argues that, if the Department considers Saint Gobain "normal enough" for the purposes of calculating the surrogate overhead ratio and the surrogate SG&A ratio, then Saint Gobain cannot be considered abnormal for the purposes of calculating the surrogate profit ratio.

Xinyi argues that, had Saint Gobain experienced lower overhead and SG&A expenses, it would have shown a profit. In addition, Xinyi argues that, by attributing the loss-generating overhead and SG&A of Saint Gobain to Respondents and not attributing its profit level to them, the Department has double-counted the "unhealthy" experience of Saint Gobain.

Department Position: The Department agrees with Petitioners. The Court has directed that, if the Department is to "continue to rely on section 1677b(e) only for its definition of profit, ..., it must explain why that methodology is reasonable in an NME context." See Fuyao Glass II, 2005 Ct. Int'l Trade Lexis at 54. In the Draft Results, the Department addressed the Court's concern by explaining how the Department applies section 1677b(e) in a market-economy context and how its NME methodology is consistent with section 1677b(e). The comments made by Xinyi and Fuyao do not relate to the Court's instruction. Nevertheless, the Department's response to Xinyi's and Fuyao's comments further demonstrates that its methodology for calculating surrogate profit in NME cases is fully consistent with section 1677b(e).

The Department disagrees with Xinyi's argument that the use of Asahi's profit alone results in an abnormal surrogate profit rate because the Indian glass industry as a whole was not able to reach the level of profitability reached by Asahi. First, Xinyi does not explain how this assertion is relevant to the discussion of how the Department's NME profit methodology is consistent with section 1677b(e). Second, Xinyi's assertion is purely speculative considering that the record does not contain any information on the profitability of the Indian glass industry as a whole. The record of the investigation contained the financial statements of three potential surrogate companies. These three financial statements cannot be construed to represent the

Indian glass industry as a whole. The record is devoid of any evidence that demonstrates Asahi's experience compared to that of the Indian glass industry is aberrational.

Additionally, the Department disagrees with Xinyi's contention that section 1677b(e)(2)(B)(iii) requires the Department to assess the experience of producers and exporters as a whole. Section 1677b(e)(2)(B)(iii) does not limit the method for calculating profit to amounts normally realized by producers and exporters "as a whole," or "on average." Xinyi's contention ignores the fact that section 1677b(e)(2)(B)(iii) permits the use of "any reasonable method" to account for profit and that it is under section 1677b(e)(2)(B)(ii) that the Department uses "the weighted average of the actual amounts incurred and realized by exporters or producers" to account for profit.

Xinyi and Fuyao both contend that the Department should average the profit of Asahi with zero profits from Saint Gobain and Atul. This suggestion reflects the averaging method for calculating profit described in section 1677b(e)(2)(B)(ii), which is not the section the Department was instructed to address. See Fuyao Glass I, 2003 Ct. Int'l Trade Lexis at 59; Fuyao Glass II, 2005 Ct. Int'l Trade Lexis at 53-54. When profit cannot be determined under section 1677b(e)(2)(A), constructed value profit may be based on the average profit of other producers and exporters for sales in the ordinary course of trade (i.e., sales above the cost of production). This suggests that the Department's determination to exclude the experience of Saint Gobain and Atul from the calculation of surrogate profit is reasonable and not inconsistent with section 1677b(e)(2)(B)(ii), because their sales, overall, were made below the cost of production. Furthermore, the averaging of the losses of the Saint Gobain and Atul with the profit of Asahi would be contrary to the Department's practice of including only positive figures in its profit

calculation, which has been affirmed by the court. See Rhodia Inc. v. United States, 240 F. Supp. 2d 1247, 1254 (CIT 2002).

Also, the Department disagrees with Xinyi's claim that, if the Department uses Saint Gobain's amounts for factory overhead and SG&A, then it must consider Saint Gobain's losses or else it will double-count the "unhealthy" experience of Saint Gobain when applying the surrogate financial ratios. Again, Xinyi does not explain how this assertion is relevant to the discussion of how the Department's NME profit methodology is consistent with section 1677b(e). Nevertheless, the Department is not double-counting the "unhealthy" experience of Saint Gobain by using its factory overhead and SG&A, but not using its losses. Each of the surrogate financial ratios is based on different line-items which may or may not be reliable surrogates depending on the circumstance. Although factory overhead and SG&A do impact a company's costs, these expenses are distinct from a company's sales. A company could have normal, or even low, factory overhead and SG&A expenses and still experience a loss. Similarly, a potential surrogate company may have reasonable factory overhead expenses, but its SG&A expenses may be unusable as a surrogate because the company had highly unusual expenses (e.g., unusually large financial expenses). Thus, the Department's determination to use Saint Gobain's factory overhead and SG&A expenses, but not its losses, is reasonable.

For these reasons, the Department's decision to use Asahi's profit of 8.42% as the surrogate profit rate in this case is reasonable and in accordance with law. The Department's methodology in the NME context is fully consistent with the way in which the Department calculates profit under section 1677b(e) of the statute, because the Department does not consider

negative amounts when determining the profit amounts normally realized by other producers and exporters when applying section 1677b(e)(2)(B)(iii) of the statute.

RESULTS OF REDETERMINATION

We have recalculated the dumping margin for Fuyao and Xinyi based upon the change set forth above. Accordingly, for these final results, the weighted-average margins for Fuyao and Xinyi for the period July 1, 2000, through December 31, 2000, are 0.0%, and 0.0%, respectively.

These final results pursuant to remand are being issued in accordance with the order of the Court in Fuyao Glass II.

_____
Joseph A. Spetrini
Acting Assistant Secretary
for Import Administration

_____
Date