

Albemarle Corp., and Ningxia Huahui Activated Carbon Co., Ltd. v. United States, and Calgon Carbon (Tianjin) Co., Ltd., Calgon Carbon Corp., and Norit Americas Inc.

Consol. Court No. 11-00451, Slip Op. 13-106 (CIT August 15, 2013).

FINAL RESULTS OF REDETERMINATION
PURSUANT TO COURT REMAND

A. SUMMARY

The Department of Commerce (“the Department”) has prepared these final results of redetermination pursuant to the remand order of the Court of International Trade (“CIT” or “Court”) in Albemarle Corp. et al. v. United States et al., Consol. Court No. 11-00451, Slip Op. 13-106 (August 15, 2013) (“Remand Opinion and Order”). These final remand results concern Certain Activated Carbon from the People’s Republic of China: Final Results and Partial Rescission of Third Antidumping Duty Administrative Review, 76 FR 67142 (October 31, 2011) (“AR3 Final Results”), and the accompanying Issues and Decision Memorandum (“IDM”). The CIT remanded the following four aspects of the AR3 Final Results: (1) the surrogate value (“SV”) for Calgon Carbon (Tianjin) Co., Ltd.’s (“CCT”) carbonized material; (2) the SVs for CCT’s coal and fine by-products; (3) the method used to calculate the rate assigned to Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd. (“GHC”) and its affiliate Beijing Pacific Activated Carbon Products Co., Ltd. (“BPAC”) (together, “Cherishmet”),¹ as well as Shanxi DMD Corporation (“Shanxi DMD”); and (4) the use of a per-unit, instead of ad valorem, assessment rate for Shanxi DMD.²

As set forth in detail below, pursuant to the CIT’s Remand Opinion and Order, we have taken the following action in these final results: (1) for purposes of calculating the SV for CCT’s

¹ The Department found GHC and BPAC to be affiliated and a single entity in First Administrative Review of Certain Activated Carbon from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review, 74 FR 57995, 57998 (November 10, 2009).

² See Remand Opinion and Order at 27-28.

carbonized material, we placed on the record an expert study regarding the similarities between coconut shell charcoal and coal-based carbonized materials, provided an opportunity for interested parties to comment on this study, and explained why we regard the study as supporting our selection of Indian Harmonized Tariff Schedule (“HTS”) number 4402.00.10 “Coconut Shell Charcoal” as the best available information for this input; (2) we revised the SVs for CCT’s coal and fines by-products; (3) under protest,³ we reconsidered the rate (i.e., the separate rate) assigned to GHC, BPAC, and Shanxi DMD; and (4) we found the issue of assigning Shanxi DMD a per-unit assessment and cash deposit rate moot as a result of assigning zero dumping margins to Shanxi DMD. Consequently, the Department has revised the remand components of the margin calculations. Specifically, the Department has changed the SVs for CCT’s coal and fines by-products and has applied these changes to the margin calculated for CCT.⁴

On November 29, 2013, the Department released its Draft Remand Results to interested parties. Calgon Carbon Corporation and Cabot Norit Americas Inc. (together, “Petitioners”), Albemarle/Huahui, CCT, GHC, BPAC, and Ningxia Guanghua Activated Carbon Co., Ltd. (“GH”) filed comments on December 9, 2013.⁵ The Department has addressed these comments below after discussing our analysis of the remanded issues.

³ See Viraj Grp., Ltd. v. United States, 343 F.3d 1371, 1376 (Fed. Cir. 2003) (“Viraj”).

⁴ See “Memorandum to the File, through Catherine Bertrand, Program Manager, Enforcement and Compliance, Office V, from Bob Palmer, Case Analyst, Enforcement and Compliance, Office V, re: Remand Redetermination Analysis Memorandum for Calgon Carbon (Tianjin) Co., Ltd. in the Antidumping Duty Review of Certain Activated Carbon from the People’s Republic of China, dated November 29, 2013” (“CCT Remand Memo”).

⁵ See Letter from Petitioners, dated December 9, 2013; Letter from CCT, dated December 9, 2013; Letter from GHC, BPAC, and GH, dated December 9, 2013; and Letter from Albemarle/Huahui, dated December 9, 2013.

B. REMANDED ISSUES

1. SV for CCT's Carbonized Materials

Background

In AR3 Preliminary Results, the Department valued carbonized materials used by CCT with publicly available prices from Global Trade Atlas (“GTA”) data under Indian HTS number 2704.00.90 “Other Cokes of Coal.”⁶ In AR3 Final Results, the Department valued carbonized materials used by CCT with publicly available prices from GTA data under Indian HTS number 4402.00.10 “Coconut Shell Charcoal” because the Department had determined that coconut shell charcoal contained properties similar to those found in the coal-based carbonized materials used by the respondents.⁷

In litigation, Albemarle Corp. (“Albemarle”) and Shanxi DMD claim that the Department’s SV for carbonized material cannot be sustained because there is no evidence on the record to support a finding that the determination was based on the best available information. The Court agreed, stating during oral argument that the record appeared to lack the evidence on which the Department relied to determine the SV for carbonized materials.⁸ The Department subsequently requested a voluntary remand to place this information on the record, accept comments from interested parties, and address comments in remand.⁹ The CIT ultimately granted that request and remanded the AR3 Final Results with instructions to reconsider the SV for carbonized materials.¹⁰

⁶ See Certain Activated Carbon From the People’s Republic of China: Preliminary Results of the Third Antidumping Duty Administrative Review, and Preliminary Rescission in Part, 76 FR 23978 (April 29, 2011) (“AR3 Preliminary Results”) and accompanying Decision Memorandum at Exhibit 1.

⁷ See AR3 Final Results, and accompanying IDM at Comment 4b.

⁸ See Remand Opinion and Order at 10.

⁹ Id.

¹⁰ Id. at 28.

Comments from Interested Parties Prior to Draft Redetermination

After the CIT issued the Remand Opinion and Order, the Department placed on the record the Expert Report that it relied upon in the AR3 Final Results to determine which of the record sources constituted the best available information for purposes of the SV for carbonized materials.¹¹ At that time, the Department also provided interested parties an opportunity to comment on the Expert Report.¹²

On September 10, 2013, the Department received comments on the Expert Report from Albemarle and Ningxia Huahui Activated Carbon Co., Ltd. (“Huahui”) (collectively, “Albemarle/Huahui”).¹³ Albemarle/Huahui argues that the Department should not use HTS number 4402.00.10 “Coconut Shell Charcoal” to value CCT’s carbonized material input. Specifically, Albemarle/Huahui asserts that, even with the addition to the record of the Expert Report, there is still no evidence to support the Department’s conclusion that HTS number 4402.00.10 “Coconut Shell Charcoal” is the appropriate source with which to value CCT’s carbonized material input because CCT did not provide any information to support the contention that “Coconut Shell Charcoal” is the best available information to value its carbonized material input during the underlying proceeding, nor did it advocate for such a change. Further, Albemarle/Huahui contend that the Department would be fully supported in concluding that CCT waived its right to the coconut shell charcoal SV and that CCT’s failure to

¹¹ See “Memorandum to the File, from Bob Palmer, Senior International Trade Analyst, Office 9, Import Administration, re: Certain Activated Carbon from the People’s Republic of China, Placing Document on the Record of the Third Administrative Review,” dated September 3, 2013 and attached “Similarities and Differences of Coal Based Carbonized Materials, Coconut Shell Based Charcoal and Low Ash Metallurgical Coke,” by Lee S. Rigsby, President, Vanguard Solutions, Inc. (July 17, 2009) (“Expert Report”).

¹² Id.

¹³ See Letter from Albemarle/Huahui titled “Administrative Review of the Antidumping Duty Order on Certain Activated Carbon from the People’s Republic of China: Comments on the Use of New Record Information to Value CCT’s Carbonized Materials,” dated September 10, 2013.

argue for the change is an admission that its specific input was properly valued in AR3 Preliminary Results.

No other interested parties commented on the Expert Report. Moreover, no interested party placed any other factual information related to carbonized material on the record.

Analysis

In accordance with the Remand Opinion and Order, and for the reasons set forth below, the Department continues to find Indian HTS 4402.00.10 “Coconut Shell Charcoal” is the best available information to value CCT’s coal-based carbonized materials.

In a non-market economy proceeding, such as in this case, section 773(c)(1) of the Tariff Act of 1930, as amended (“the Act”), instructs the Department to value the factors of production (“FOPs”) based upon the best available information from a market-economy country or countries that the Department considers appropriate. When considering what constitutes the best available information, the Department considers several criteria, including whether the SV data are contemporaneous, publicly available, tax and duty exclusive, represent a broad market average, and specific to the input.¹⁴ The Department’s preference is to satisfy the breadth of the aforementioned selection criteria.¹⁵ Moreover, it is the Department’s practice to carefully consider the available evidence in light of the particular facts of each industry when undertaking its analysis of valuing the FOPs.¹⁶ The Department must weigh the available information with

¹⁴ See, e.g., Notice of Final Determination of Sales at Less Than Fair Value and Affirmative Critical Circumstances, In Part: Certain Lined Paper Products From the People’s Republic of China, 71 FR 53079 (September 8, 2006), and accompanying IDM at Comment 3.

¹⁵ See, e.g., Administrative Review of Certain Frozen Warmwater Shrimp from the People’s Republic of China: Final Results and Partial Rescission of Antidumping Duty Administrative Review, 76 FR 51940, 51943 (August 19, 2011), and accompanying IDM at Comment 2.

¹⁶ See Certain Preserved Mushrooms from the People’s Republic of China: Final Results and Final Partial Rescission of the Sixth Administrative Review, 71 FR 40477 (July 17, 2006) (“Mushrooms”), and accompanying IDM at Comment 1; see also Freshwater Crawfish Tail Meat from the People’s Republic of China: Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Rescission of Antidumping Duty Administrative Review, 67 FR 19546 (April 22, 2002), and accompanying IDM at Comment 2.

respect to each input value and make a product-specific and case-specific decision as to what constitutes the “best” available SV for each input.¹⁷

The record contains two potential sources that may be used to value CCT’s carbonized material: (1) GTA import data under Indian HTS number 2704.00.90, “Other Cokes of Coal”; and (2) GTA import data under Indian HTS 4402.00.10, “Coconut Shell Charcoal.” We examine each source in turn.

After reconsidering the available information on the record, the Department continues to find that Indian HTS 4402.00.10 “Coconut Shell Charcoal” constitutes the best available information on the record to value coal-based carbonized materials because it is most specific to the input used by CCT. In the underlying administrative review, CCT reported that its suppliers used the raw materials of coal and tar to produce carbonized material or that its suppliers purchased coal-based carbonized materials.¹⁸ The Expert Report indicates that coconut shell charcoal shares similar properties with carbonized material and that those similar properties are essential in the production of activated carbon.¹⁹ Specifically, the Expert Report found that coal-based carbonized materials, similar to those used in the production of subject merchandise, and coconut shell charcoal are similar in porosity and adsorption,²⁰ both of which are properties essential in the production of activated carbon.²¹ Thus, because (1) CCT reported that its suppliers either used or consumed coal-based carbonized materials and (2) the Expert Report

¹⁷ See, e.g., Mushrooms, and accompanying IDM at Comment 1.

¹⁸ See CCT’s Section C and D Questionnaire Response, dated November 23, 2010, at Attachment D-2, page 12; Attachment D-6, page 11; Attachment D-7, page 12; and Attachment D-8, page 12. Jacobi Carbons AB (“Jacobi”), the other mandatory respondent in the third administrative review, made similar representations. See Jacobi’s Section C and D Questionnaire Response, dated September 13, 2010, at Section D Questionnaire Response for Ningxia Guanghua Activated Carbon Co, Ltd., at page D-5 and Section D Questionnaire Response for Ningxia Huahui Activated Carbon Co., Ltd., at page 11.

¹⁹ See Expert Report at 3-7.

²⁰ According to the Expert Report, “[p]orosity and absorption are required for the conversion of carbon to activated carbon.” Id. In particular, “[p]orosity is necessary as it is a measure of internal surface area, which is the functional area that provides opportunity for adsorption to take place,” while “[a]dsorption is a measure of how efficiently the carbon removes undesirable gases or liquids from desirable gas or liquid streams.” Id.

²¹ Id. at 5-7.

states that coal-based carbonized materials and coconut shell charcoal share similar essential properties, it is reasonable for the Department to rely upon the coconut shell charcoal data under Indian HTS 4402.00.10 as specific to the input used by CCT.²²

In contrast, the data under Indian HTS number 2704.00.90, “Other Cokes of Coal,” is not specific to the carbonized materials used by CCT. The Expert Report states that, unlike coconut shell charcoal, coke has no volume activity available for adsorption and low porosity.²³ As noted above, the Expert Report found these characteristics to be essential in the production of activated carbon. Thus, coke cannot be used in the production of coal-based carbonized materials or activated carbon because the process for manufacturing coke renders it useless for the purpose of activated carbon production.²⁴ Accordingly, because (1) CCT reported that its suppliers either used or consumed coal-based carbonized materials and (2) the Expert Report states that coke does not share similar essential properties with coal-based carbonized materials and activated carbon, we find that using Indian HTS number 2704.00.90, “Other Cokes of Coal” does not represent the best available information to value CCT’s carbonized material input.

Turning to the comments raised by Albemarle/Huahui, the Department finds them unpersuasive. Contrary to Albemarle/Huahui’s assertion, the record in fact includes evidence that CCT used coal-based carbonized materials.²⁵ Moreover, although CCT did not argue for the change or place any information on the record advocating for such a change, the Department

²² Moreover, the data under Indian HTS 4402.00.10 satisfy the remaining SV criteria. In particular, the data are contemporaneous with the period of review. See Memorandum to the File, through Catherine Bertrand, Program Manager, Office 9, from Bob Palmer, Case Analyst, Office 9 re: “Third Administrative Review of Certain Activated Carbon from the People’s Republic of China: Surrogate Values for the Final Results,” dated October 25, 2011 (“Final SV Memo”) at Attachment 3. The Department also has previously found that data from GTA, such as that on the record for the input at issue, are publicly-available, represent a broad market average, and are tax and duty exclusive. See, e.g., Certain Preserved Mushrooms from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review, 77 FR 55808 (September 11, 2012), and accompanying IDM at Comment 3. None of the interested parties challenge these findings.

²³ See Expert Report at 4-7.

²⁴ Id.

²⁵ See CCT’s Section C and D Questionnaire Response, dated November 23, 2010, at Attachment D-2, page 12; Attachment D-6, page 11; Attachment D-7, page 12; and Attachment D-8, page 12.

nevertheless has a statutory obligation to use the best available information when selecting SVs to calculate normal value (“NV”).²⁶

Thus, the Department determines that Indian HTS number 4402.00.10 “Coconut Shell Charcoal” results in a better, input-specific price for coal-based carbonized materials. Therefore, the Department will continue to use Indian HTS number 4402.00.10 “Coconut Shell Charcoal” to calculate the SV for CCT’s carbonized material input.

2. SVs for CCT’s Coal and Fines By-Products

Background

In AR3 Final Results, the Department valued CCT’s carbonized materials with publicly available prices from GTA data under Indian HTS number 4402.00.10 “Coconut Shell Charcoal” (with a value of 3,796.54 Rupees/Metric Ton (“Rs/MT”)) and valued CCT’s coal and fines by-products generated during the production of carbonized materials using two GTA sources – import data under Indian HTS number 2701.19.90 “Other Coal W/N Pulvrsd But Ntagldmrtd” (with a value of 4,860.88 Rs/MT) and Indian HTS number 2714.10 “Bituminous Or Oil Shale And Tar Sands” (with a value of 11,319.90 Rs/MT), respectively.²⁷

In litigation, Albemarle argued that the SVs assigned to by-products are unreasonable because they exceed the value assigned to their main input, carbonized material. To correct this error, Albemarle argues that the Department should revert to Indian HTS number 2704.00.90 “Other Cokes of Coal” to correct this error. The Department requested a voluntary remand to re-determine the SVs used for these by-products. The Court granted that request and remanded the

²⁶ Section 773(c)(1) of the Act.

²⁷ See Final SV Memo at Exhibit 1; see also “Memorandum to the File, through Catherine Bertrand, Program Manager, Office 9, from Katie Marksberry, International Trade Specialist, Office 9, re: Third Administrative Review of Certain Activated Carbon from the People’s Republic of China: Surrogate Values for the Preliminary Results,” dated April 22, 2010 at Attachment 3.

AR3 Final Results with instructions that the Department must re-determine the SVs it applied to CCT's coal and fines by-products.²⁸

Analysis

In response to the Remand Opinion and Order, the Department has revised the SVs used for CCT's reported coal and fines by-products in the AR3 Final Results. For the reasons set forth below, the Department finds that the SVs for the by-products should be capped at the SV for their main input, carbonized material.

As stated above, section 773(c)(1) of the Act directs the Department to use the best available information when valuing a respondent's FOPs. However, in this final remand redetermination, the issue is not whether the underlying Indian HTS categories used by the Department to value these by-products are the best available information, but rather whether the values derived from the sources used – Indian HTS number 2701.19.90 “Other Coal W/N Pulvrsd But Ntagldmrtd” (with a value of 4,860.88 Rs/MT) and Indian HTS number 2714.10 “Bituminous Or Oil Shale And Tar Sands” (with a value of 11,319.90 Rs/MT) – are reasonable.²⁹ The Department finds that they are not.

The Department has, in certain circumstances, capped the SV for a by-product at the SV for the main input of that by-product when the SV of the by-product exceeded the SV of the main input and the evidence indicated that a higher value for the by-product than the main input was not warranted.³⁰ In the underlying review, CCT reported that some of its suppliers produced carbonized material using as the main input a pre-carbonized, coal-based product produced by

²⁸ See Remand Opinion and Order at 28.

²⁹ Id., at 13-14.

³⁰ See, e.g., Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results and Partial Rescission of the Seventh Antidumping Duty Administrative Review, 77 FR 15039 (March 14, 2012), and accompanying IDM at Comment II.B.3; see also Final Determination Pursuant To The Remand Order From The U.S. Court of International Trade In Paslode Division of Illinois Tool Works, Inc. v. United States, Ct. No. 9712-02161 (January 15, 1999).

Datong Carbon Corporation.³¹ CCT reported further that its coal and fines by-products are produced during the course of producing carbonized material and are by-products of carbonized material production.³² CCT did not report that the by-products undergo any further manufacturing or any other treatment, such that higher values than that of the main input may be considered reasonable SVs. Thus, nothing on the record indicates that the SVs for these by-products should exceed the SV for the main input.

In AR3 Final Results, the Department inadvertently did not cap the SV for coal and fines by-products when it determined to use a different SV for the main input, as would have been appropriate under these circumstances. Therefore, the Department will continue to use Indian HTS number 2701.19.90 “Other Coal W/N Pulvrsd But Ntagldmrtd” and Indian HTS number 2714.10 “Bituminous Or Oil Shale And Tar Sands” to calculate SVs for CCT’s coal and fines by-products, but, in accordance with the Department’s practice, will cap the values derived from those HTS categories at the value derived from the Indian HTS number 4402.00.10 “Coconut Shell Charcoal” – 3,796.54 Rs/MT.

In light of these revisions, the Department has recalculated CCT’s weighted-average dumping margin. The resulting calculation continues to yield a de minimis weighted-average dumping margin for CCT (i.e., \$0.004/kilogram (“kg”)).

3. GHC, BPAC, and Shanxi DMD’s Separate Rate

Background

In AR3 Final Results, the Department calculated zero and de minimis weighted-average dumping margins for Jacobi and CCT, respectively.³³ For the companies not selected for

³¹ See CCT’s Section C and D Questionnaire Response, dated November 23, 2010 at Attachment D-2, page 14.

³² See, e.g., id.

³³ See AR3 Final Results, 76 FR at 67145.

individual examination (i.e., separate rate companies) such as GHC, BPAC, and Shanxi DMD, the Department calculated rates of \$0.28/kg and \$0.44/kg.³⁴

In AR3 Final Results, the Department explained that the statute and the Department's regulations do not directly address the establishment of a rate to be applied to companies not selected for individual examination where the Department has limited its examination in an administrative review pursuant to section 777A(c)(2) of the Act.³⁵ We further stated that in cases involving limited selection based on exporters accounting for the largest volumes of trade, the Department's practice has been to weight-average the rates for the selected companies, excluding zero and de minimis rates and rates based entirely on adverse facts available ("AFA"), in the most recently completed segment of the proceeding.³⁶ The Department further explained that if any such non-selected company had its own calculated rate that is contemporaneous with or more recent than such prior determined rates, the Department has applied such individual rate to the non-selected company in the review in question.³⁷

The Department determined that using an average of the margins – other than those that were zero, de minimis or based on total facts available – calculated in the most recent period was a reasonable method for determining the dumping margin for companies not individually examined in this review.³⁸ As a result, consistent with the Department's methodology, the

³⁴ Id.

³⁵ Id. and accompanying IDM at Comment 1.

³⁶ Id. (citing Certain Frozen Warmwater Shrimp From the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 76 FR 56158 (September 12, 2011)).

³⁷ Id. (citing Certain Fish Fillets from the Socialist Republic of Vietnam: Notice of Preliminary Results of the New Shipper Review and Fourth Antidumping Duty Administrative Review and Partial Rescission of the Fourth Administrative Review, 73 FR 52015 (September 8, 2008) (changed in final results as final calculated rate for mandatory respondent was above de minimis, which remained unchanged in the amended final results); Certain Frozen Warmwater Shrimp from the Socialist Republic of Vietnam: Final Results and Final Partial Rescission of Antidumping Duty Administrative Review, 74 FR 47191, 47195 (September 15, 2009), and accompanying IDM at Comment 16).

³⁸ Id. (citing Certain Activated Carbon From the People's Republic of China: Final Results and Partial Rescission of Second Antidumping Duty Administrative Review, 75 FR 70208, 70209 (November 17, 2010) ("AR2 Final Results")).

Department assigned GHC, BPAC, and Shanxi DMD a separate rate of \$0.28/kg, which is the margin calculated for separate rate respondents in the previous administrative review, because these respondents did not have their own prior or concurrently calculated margin.³⁹

In litigation, GHC, BPAC, and Shanxi DMD challenged the Department's methodology, claiming that it was inconsistent with the statute and otherwise unsupported by substantial evidence.

In its Remand Opinion and Order, the Court found the Department's use of the \$0.28/kg rate "arbitrary" and not reflective of "commercial reality" because it "was not based on data pertaining to any pricing behavior that occurred in the third POR. Nor was it based on any data pertaining to these respondents; instead {E&C} reverted to a margin it determined in *another review* for *other* respondents."⁴⁰ The Court also stated that, because the Department selected Jacobi and CCT as mandatory respondents based on their status as the largest exporters of subject merchandise, "the de minimis margins {calculated for them} must be considered more representative of industry-wide pricing behavior during the POR than the \$0.28/kg calculation from the previous review"⁴¹ The Court also rejected the Department's argument that nothing on the record indicates that the separate rate respondents engaged in pricing behavior similar to the mandatory respondents, finding that the state of the record stems from the Department's decision to examine only two respondents, not from the separate rate respondents' failure to submit evidence.⁴² The Court ordered the Department to reconsider the method of determining the margins for GHC, BPAC, and Shanxi DMD.⁴³

³⁹ Id.

⁴⁰ See Remand Opinion and Order at 18-19.

⁴¹ Id. at 19.

⁴² Id. at 20-21.

⁴³ Id. at 28.

Analysis

The Department respectfully disagrees with the Court’s holdings in this Remand Opinion and Order. However, under protest,⁴⁴ the Department has averaged the zero and de minimis rates calculated for Jacobi and CCT in this administrative review and assigned the resulting zero dumping margin to GHC, BPAC, and Shanxi DMD. In assigning GHC, BPAC, and Shanxi DMD zero dumping margins, we follow the Court’s logic, under protest, to its natural conclusion – because Jacobi and CCT’s margins are “more representative of industry-wide pricing behavior during the POR” and “more contemporaneous” than the non-POR margins relied upon in AR3 Final Results, applying the Jacobi and CCT’s margins to GHC, BPAC, and Shanxi DMD will achieve a “more representative” result than would relying upon non-POR margins.

4. Shanxi DMD’s Assessment and Cash Deposit Rates

Background

In litigation, Shanxi DMD contested the Department’s assignment of per-unit assessment and cash deposit rates to its entries in AR3 Final Results. The Department’s decision to use per-unit rates in AR3 Final Results stemmed in part from findings made in the immediately-preceding review. Specifically, in AR2 Final Results, the Department began assessing rates on a per-unit basis because we found that Jacobi, a mandatory respondent in that review, had entered values that were below the ultimate net unit price.⁴⁵ Additionally, we stated that we would assign per-unit rates to all companies because it would be burdensome to concurrently assign per unit and ad valorem rates on a company-specific basis.⁴⁶ Further, we stated that the use of per-unit rates would not negatively impact companies because the total duties due would not change;

⁴⁴ See Viraj, 343 F.3d at 1376.

⁴⁵ See AR2 Final Results, 75 FR 70208, and accompanying IDM at Comment 3.

⁴⁶ Id.

rather they would only be allocated over quantity instead of over entered value.⁴⁷ In AR3 Final Results, we continued to use per-unit rates and supported our position using the same rationale articulated in AR2 Final Results.⁴⁸

In its Remand Opinion and Order, the Court agreed with Shanxi DMD and instructed the Department to reconsider its decision to assign per-unit assessment and cash deposit rates to Shanxi DMD. Specifically, the Court ordered the Department to reconsider assigning rates to Shanxi DMD on a per-unit basis because (1) the decision was based on a finding of duty absorption that pertained to a different company and data from a different review; (2) the record evidence does not support finding that Shanxi DMD's importers "will not, under any circumstances, pay higher deposits and not be assessed higher duties than would occur under an ad valorem rate;" and (3) there is no evidence that determining Shanxi DMD's rate on an ad valorem basis would impose a "significant burden."⁴⁹

Analysis

As explained above, the Department is assigning, under protest, a zero dumping margin to Shanxi DMD. Consequently, because the Department intends to instruct U.S. Customs and Border Protection ("CBP") to liquidate entries of subject merchandise without regard to duties, the issue of assigning Shanxi DMD per-unit assessment and cash deposit rates is moot.⁵⁰

However, the Department respectfully notes that a few facts warrant clarification. As an initial matter, while the Department made a finding of duty absorption with respect to Jacobi in

⁴⁷ Id.

⁴⁸ See AR3 Final Results, and accompanying IDM at Comment 2.

⁴⁹ See Remand Opinion and Order at 23-27.

⁵⁰ See section 751(a)(2)(c) of the Act (explaining that the final results of an administrative review shall be the basis for the assessment of antidumping duties and collection of cash deposits); 19 CFR 351.106(c)(2) (explaining that the Department will instruct U.S. Customs and Border Protection ("CBP") "to liquidate without regard to antidumping duties all entries of subject merchandise during the relevant period of review made by any person for which {the Department} calculates an assessment rate . . . that is less than 0.5 percent ad valorem, or the equivalent specific rate.").

AR2 Final Results, we did not include duty absorption as a reason for the per-unit methodology in AR2 Final Results or in AR3 Final Results.⁵¹ Rather, as explained above, the Department based its analysis on the fact that, in AR2 Final Results, Jacobi undervalued its imports.

Undervaluing occurs when the CBP entered value of the subject merchandise is substantially less than the net unit price, whereas duty absorption occurs when an affiliated importer absorbs duties that the unaffiliated purchaser should pay on the subject merchandise. When entries of subject merchandise are systematically undervalued, as were Jacobi's in AR2 Final Results, this can result in the under-collection of duties by CBP if the Department were to issue cash deposit instructions on an ad valorem basis.⁵² In contrast, duty absorption occurs where the importer of record pays the antidumping duties and absorbs them as a cost of doing business, as opposed to passing the duties along to the unaffiliated customer.⁵³

In short, the Department's determination to apply per-unit assessment and cash deposit rates in the underlying review was based on the undervaluation of entries, rather than a finding of duty absorption.⁵⁴

⁵¹ See AR2 Final Results, 75 FR 70208, and accompanying IDM at Comment 3; see also AR3 Final Results, and accompanying IDM at Comment 2.

⁵² See Honey from the People's Republic of China: Final Results and Final Rescission in Part of Antidumping Duty Administrative Review, 70 FR 38873, 38880 (July 6, 2005), and accompanying IDM at Comment 7; Freshwater Crawfish Tail Meat from the People's Republic of China: Notice of Final Results of Antidumping Duty Administrative Review, and Final Partial Rescission of Antidumping Duty Administrative Review, 67 FR 19546, 19549 (April 22, 2002); Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof From France, Germany, Italy, Japan, Sweden, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews and Revocation of Orders in Part, 66 FR 36551, 36554 (July 12, 2001); and Fresh Garlic from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 70 FR 34082, 34086 (June 13, 2005).

⁵³ See Certain Activated Carbon From the People's Republic of China: Notice of Preliminary Results of the Second Antidumping Duty Administrative Review, and Preliminary Rescission in Part, 75 FR 26927, 26930 (May 13, 2010), unchanged in Carbon AR2 75 FR 70208, 70210; see also, e.g., Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan: Preliminary Results of Antidumping Duty Administrative Review and Notice of Intent to Rescind in Part, 70 FR 39735, 39737 (July 11, 2005); unchanged in Notice of Final Results and Final Rescission in Part of Antidumping Duty Administrative Review: Certain Stainless Steel Butt-Weld Pipe Fittings From Taiwan, 70 FR 73727 (December 13, 2005).

⁵⁴ Moreover, we respectfully disagree, under protest, that the Department must satisfy the heightened threshold articulated by the Court in Remand Opinion and Order before it can apply per unit assessment and cash deposit rates to entities under review. See Viraj, 343 F.3d at 1376.

C. SUMMARY AND ANALYSIS OF LITIGANTS' COMMENTS ON DRAFT REMAND RESULTS

Petitioners, Albemarle/Huahui, GHC, BPAC, and GH commented on the Department's decision to assign, under protest, zero dumping margins to GHC, BPAC, and Shanxi DMD. Albemarle/Huahui and CCT commented on the appropriate SVs for CCT's carbonized materials and for CCT's coal and fines by-products. No other interested parties filed comments on the Draft Remand Results.

As explained below, we continue to reach the same conclusions that we reached in the Draft Remand Results. We address each of the interested parties' comments and provide our analysis in turn.

Issue 1: GHC, BPAC, Shanxi DMD, and Huahui's Separate Rate

Petitioners' Comments

- The Department should defend the \$0.28/kg SR assigned to GHC, BPAC, and Shanxi DMD because there is no evidence on the record that supports assigning zero dumping margins to these companies. Specifically, there is no record evidence which demonstrates that these companies share any of the same product mix, prices, sales expenses, or FOPs which resulted in zero dumping margins for the mandatory respondents. While CBP entry data for these companies is on the record, that information reflects the volume of subject merchandise exported by those companies to the United States during the POR; it does not contain information on the prices obtained for those shipments or even the entered value of those shipments.
- The CIT's assumptions that the zero dumping margins calculated for the mandatory respondents "are 'more representative of industry-wide pricing behavior during the POR'" and that these margins are "reflective of commercial realities" are unsupported. And, in

any event, the CIT stops short of requiring the Department to assign a zero margin to GHC, BPAC, and Shanxi DMD.

- Because the evidence on the record does not support assigning zero margins to GHC, BPAC, or Shanxi DMD, the Department should require Shanxi DMD and GHC to submit either (1) Section C responses (i.e., information on those companies' U.S. sales) or (2) quantity and value responses (i.e., the quantity and value of their sales of subject merchandise in the United States during the POR). The first option would permit the Department to evaluate whether the margins calculated for the mandatory respondents are representative of the sales reported by the separate rate respondents – both with respect to the physical characteristics of the merchandise sold in the United States, as well as the associating prices. The second option would allow the Department to draw general conclusions about the average value of subject sales, though it would prevent the Department from comparing sales of products with the most similar characteristics.
- If the Department believes that the dumping margins assigned to GHC, BPAC, and Shanxi DMD in the AR3 Final Results were correct, it should request that this issue be certified for appeal to the Court of Appeals for the Federal Circuit (“Federal Circuit”).
- The Department should specifically address the \$0.44/kg rate assigned to Huahui.

GHC, BPAC, and GH's Comments

- The Department should eliminate the “under protest” language from the final remand redetermination and confirm the calculated margins of the mandatory respondents are representative of industry-wide pricing behavior and are contemporaneous.

Albemarle/Huahui Comments

- While the draft remand does not conflict with the Court’s order, the Court left the option open to the Department to reconsider Huahui’s rate. The Department did not do so and failed to provide any explanation for that decision. Albemarle/Huahui reserve comment on Huahui’s rate until the final remand redetermination is filed with the Court.

Department’s Position: Pursuant to section 735(c)(5)(B) of the Act, we continue to find, in light of the Court’s opinion, that assigning GHC, BPAC, and Shanxi DMD zero dumping margins is a reasonable method for calculating the rate for exporters not individually investigated. Moreover, pursuant to that same provision, we continue to find that assigning Huahui a dumping margin of \$0.44/kg is reasonable.

When calculating dumping margins, generally, the Department determines individual margins for each known exporter or producer pursuant to section 777A(c)(1) of the Act. However, “[i]f it is not practicable” to calculate individual dumping margins for all exporters or producers due to the large number of such exporters or producers, the Department may examine a reasonable number of respondents pursuant to section 777A(c)(2) of the Act. The statute “is silent as to the method for establishing the rate for non-selected respondents.”⁵⁵ Thus, the Department possesses broad discretion to select any reasonable methodology.⁵⁶

When calculating separate rates, the Department generally relies upon section 735(c)(5) of the Act, which provides the methodology for calculating the “all-others” rate in market economy antidumping investigations.⁵⁷ This provision directs the Department to calculate the all-others rate by averaging the margins calculated for exporters and producers individually

⁵⁵ See Longkou Haimeng Mach. Co. v. United States, 581 F. Supp. 2d 1344, 1359 (Ct. Int’l Trade 2008) (“Longkou”); accord Coal. for Pres. of Am. Brake Drum & Rotor Aftermkt. Mfrs. v. United States, 44 F. Supp. 2d 229, 250 (Ct. Int’l Trade 1999)

⁵⁶ See United States v. Eurodif S.A., 555 U.S. 305, 316 (2009).

⁵⁷ See Longkou, 581 F. Supp. 2d at 1354.

investigated, “excluding any zero and de minimis margins” and any margins based entirely upon facts available.⁵⁸ The statute further provides that if the rates for the individually investigated companies “are zero or de minimis margins, or are determined entirely” upon facts available, then the Department “may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated”⁵⁹

With respect to the separate rate assigned to GHC, BPAC, and Shanxi DMD, the Department continues to find, under protest, that it is appropriate to assign these companies a zero dumping margin as “any reasonable method.” In this remand redetermination, the Department continues to calculate zero and de minimis margins for the two mandatory respondents – CCT and Jacobi. As the CIT explained, the mandatory respondents’ margins are “more representative of industry-wide pricing behavior during the POR” and “more contemporaneous” than the non-POR margins relied upon in AR3 Final Results, such that applying the mandatory respondents’ margins to GHC, BPAC, and Shanxi DMD will achieve a “more representative” result than would relying upon non-POR margins. Moreover, the contemporaneity of the mandatory respondents’ dumping margins – the only margins calculated during this POR – demonstrates that these margins reasonably reflect potential dumping margins for companies not individually investigated (without a company-specific rate calculated in the immediately preceding review) during the same time. Contrary to Petitioners’ argument, this is the basis for the Court’s finding that the zero dumping margins calculated for the mandatory respondents “are ‘more representative of industry-wide pricing behavior during the POR’” and that these margins are “reflect{ive} {of} commercial realities.” Notably, Petitioners have not demonstrated that the mandatory respondents’ zero dumping margins are unrepresentative of

⁵⁸ See section 735(c)(5)(A) of the Act.

⁵⁹ See section 735(c)(5)(B) of the Act.

pricing behavior during the POR. Therefore, in light of the Court's opinion, the Department continues to assign GHC, BPAC, and Shanxi DMD zero dumping margins under protest.

While we agree with Petitioners that the Department appropriately assigned GHC, BPAC, and Shanxi DMD a dumping margin of \$0.28/kg in the AR3 Final Results, the Court already has rejected our previous determination as unreasonable. Specifically, the Court has rejected our findings that dumping margins from the immediately-preceding review reasonably reflected the potential dumping margins of GHC, BPAC, and Shanxi DMD in this review because the record did not contain any evidence on whether those companies' pricing behavior mirrored that of the mandatory respondents in this review.⁶⁰ Instead, the Court made substantive assessments that the margins calculated for the mandatory respondents in the instant review are "more representative of industry-wide pricing behavior during the POR" and, therefore, more appropriately reflect "commercial realities prevailing in the pertinent POR."⁶¹ Thus, in light of these specific, substantive assessments, we disagree with Petitioners that the CIT has left us other options to pursue on remand.

Additionally, we agree with Petitioners' remark that there is no record evidence which demonstrates that these companies share any of the same product mix, prices, sales expenses, or FOPs which resulted in zero dumping margins for the mandatory respondents.⁶² However, the

⁶⁰ See Remand Opinion and Order at 18-23.

⁶¹ Id. at 19.

⁶² Petitioners correctly note that the record contains only CBP entry data for these companies and that this information reflects the volume of subject merchandise exported by those companies to the United States during the POR; it does not contain information on the prices obtained for those shipments or even the entered value of those shipments. See Memorandum to the File, from Katie Marksberry, International Trade Specialist, Office 9, Import Administration, re: Customs Data of U.S. Imports of Certain Activated Carbon, dated May 28, 2010, at Attachment I.

Department made these findings in the AR3 Final Results,⁶³ and the CIT did not find them relevant to the separate rate calculation.⁶⁴

The Department disagrees with Petitioners that we should require GHC, BPAC, and Shanxi DMD to submit responses to Section C of the Department's non-market economy questionnaire or quantity and value responses in order to obtain pricing data. The Department has previously stated that we do not have the resources to individually review more than two respondents.⁶⁵ While obtaining pricing information from GHC, BPAC, and Shanxi DMD would provide information on U.S. sales, obtaining this information would consume resources which we previously stated we do not have. Notably, Petitioners' suggested approaches were not ordered by the Court. Therefore, we will not obtain Section C responses or quantity and value information from GHC, BPAC, and Shanxi DMD.

With respect to Petitioners' argument that the Department should request that this issue be certified for appeal to the Federal Circuit, we decline to take such action at this time. Once the CIT has entered judgment in this litigation, we will consider whether to appeal the issue.

Additionally, we disagree with GHC, BPAC, and GH's argument that we should remove the "under protest" language from our remand redetermination. As an initial matter, the Department may protest when ordered to make a remand redetermination.⁶⁶ In this litigation, we continue to disagree with the Court's holding in the Remand Opinion and Order and, consequently, have conducted this remand redetermination under protest.

⁶³ See AR3 Final Results and accompanying IDM at 5-6.

⁶⁴ See Remand Opinion and Order at 18-23.

⁶⁵ See Memorandum to James Doyle, Director, Office 9, Import Administration, from Jamie Blair-Walker and Kabir Archuleta, International Trade Analysts, Office 9, re: "Antidumping Duty Administrative Review of Certain Activated Carbon from the People's Republic of China: Selection of Respondents for Individual Review," dated July 21, 2010, at 2-6; see also Memorandum to James Doyle, Director, Office 9, Import Administration, through Catherine Bertrand, Program Manager, Office 9, from Katie Marksberry, International Trade Analyst, re: "Antidumping Duty Administrative Review of Certain Activated Carbon from the People's Republic of China: Selection of Additional Mandatory Respondent," dated September 29, 2010, at 2-5.

⁶⁶ See, e.g., Viraj, 343 F.3d 1371.

With regard to the dumping margin assigned to Huahui, the Court provided us with the discretion to decline to address Huahui's margin. We decline to reconsider Huahui's dumping margin and continue to find that, for the reasons provided in the IDM and the Government's response in opposition to the summary judgment motions, the margin assigned to Huahui is reasonably reflective of potential dumping margins during the POR, especially given that (1) the margin is specific to Huahui and temporally proximate to the third administrative review (i.e., separated at most by twelve months) and (2) zero or de minimis dumping margins had never previously been calculated for mandatory respondents during the course of the subject antidumping duty order. However, for purposes of clarity, we note we are not changing the \$0.44/kg dumping margin assigned to Huahui in the AR3 Final Results in this final remand redetermination.

Issue 2: SV for CCT's Carbonized Materials

Albemarle/Huahui

- Albemarle/Huahui reiterate their previous arguments made on September 10, 2013, and contend that the Department erred in using GTA import data under Indian HTS 4402.00.10, "Coconut Shell Charcoal," to calculate the SV for CCT's carbonized material because CCT did not object to the use of GTA import data under Indian HTS number 2704.00.90, "Other Cokes of Coal," after the preliminary result of the underlying review.

CCT's Comments

- No interested party in this remand proceeding disputed the validity of the Expert Report and its core findings that coconut shell charcoal has characteristics of "absorption" and "volume activity" that are similar to that of coal-based carbonized materials.

- It is irrelevant that CCT did not ask the Department to value this input using a different data source after the preliminary results of the underlying review; rather, the Department has a statutory duty to use the best available information when selecting SVs to calculate NV.
- The record shows that CCT's suppliers used coal-based carbonized materials to produce subject merchandise during the POR; thus, the Indian import data on coconut shell charcoal is the best available information to value this input.

Department's Position: The Department continues to find that GTA import data under Indian HTS 4402.00.10, "Coconut Shell Charcoal," is the best available information to value CCT's carbonized material.

In the Court's Remand Opinion and Order, the Court granted the Department's voluntary remand request to place the Expert Report on the record, to accept comments on that report, and to reconsider the SV for CCT's coal-based carbonized materials.⁶⁷ We have complied with the Court's Remand Opinion and Order and accepted and addressed comments on this issue from Albemarle/Huahui on the Expert Report, as well as on the Draft Remand Results. Notably, Albemarle/Huahui's comments remain unchanged from those submitted on the Expert Report, and we addressed them fully in the Draft Remand Results.

As noted by CCT, no interested party has disputed the validity of the Expert Report or its core findings, summarized above. Moreover, no interested party has contested our finding above that the import data under Indian HTS 4402.00.10, "Coconut Shell Charcoal," is specific to the input used by CCT. Finally, as explained above, it is of no moment that CCT did not ask the Department to value this input using different data after the preliminary results of the review; rather, the Department has a statutory obligation to use the best available information when

⁶⁷ See Remand Opinion and Order at 10.

selecting SVs to calculate NV.⁶⁸ Therefore, we continue to find, based on evidence on the record, that GTA import data under Indian HTS 4402.00.10, “Coconut Shell Charcoal,” is the best available information to value CCT’s coal-based carbonized materials.

Issue 3: SVs for CCT’s Coal and Fines By-Products

CCT’s Comments

- CCT does not contest the results of the draft remand redetermination

Albemarle/Huahui’s Comments

- Albemarle/Huahui concurs with the Department’s methodology used in the draft remand results.

No other interested party commented on this issue.

Department’s Position: Because no interested party contests the Department’s draft remand results on this issue, for the reasons provided above, we continue to cap the SVs for CCT’s by-products at the SV for their main input, carbonized material, consistent with the Department’s practice under similar factual scenarios.

Issue 4: Shanxi DMD’s Per-Unit Assessment and Cash Deposit Rates

No interested party commented on this issue.

Department’s Position: Because no interested party contests the Department’s draft remand results on this issue, we continue to find this issue is moot because the Department is assigning, under protest, a zero dumping margin to Shanxi DMD.⁶⁹

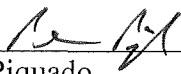
⁶⁸ See Section 773(c)(1) of the Act.

⁶⁹ See, e.g., *Roses, Inc. et al. v. United States*, 774 F. Supp. 1376, 1381-82 (CIT 1991) (upholding the Department’s decision not to address issue on remand after finding it moot as a result of other decisions made during remand redetermination).

RESULTS OF REDETERMINATION

We have implemented all changes discussed above. First, we continue to determine that GTA import data under Indian HTS 4402.00.10, "Coconut Shell Charcoal," constitutes the best available information to value CCT's carbonized material. Second, we continue to find that, consistent with the Department's practice, it is appropriate to cap the SVs for CCT's by-products at the SV for their main input, carbonized material. As a result of this final remand redetermination, we continue to calculate a de minimis weighted-average dumping margin for CCT and Jacobi.

Turning to the last two remanded issues, we continue to assign GHC, BPAC, and Shanxi DMD, under protest, weighted-average dumping margins of zero. Finally, we continue to find that the issue of assigning Shanxi DMD a per-unit assessment is moot in light of that company's revised weighted-average dumping margin of zero.



Paul Piquado
Assistant Secretary
for Enforcement and Compliance

9 JANUARY 2014

Date