

Albemarle Corp. et al. v. United States

Consol. Court No. 11-00451, Slip Op. 16-84 (CIT September 7, 2016).

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”) in Albemarle Corp. et al. v. United States, Consol. Court No. 11-00451, Slip Op. 16-84 (CIT September 7, 2016) (“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”). On remand, the CIT ordered the Department to assign Ningxia Huahui Activated Carbon Company, Ltd. (“Huahui”) a dumping margin that is in accordance with the holding of the United States Court of Appeals for the Federal Circuit (“Federal Circuit”) in Albemarle Corp. & Subsidiaries v. United States, 821 F.3d 1345 (Fed. Cir. 2016) (“Albemarle III”).<sup>1</sup>

As set forth in detail below, pursuant to the CIT’s Remand Opinion and Order, we have redetermined a margin for Huahui in accordance with the holding of the Federal Circuit in Albemarle III. Consequently, the Department is utilizing the de minimis margins of the individually examined respondents in the third administrative review and is assigning Huahui the resulting weighted-average dumping margin of zero.

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<sup>1</sup> See Remand Opinion and Order at 6.

On September 22, 2016, the Department released its draft remand results of redetermination to all interested parties.<sup>2</sup> We invited interested parties to comment on the draft remand results by September 29, 2016. On September 29, 2016, the Department received comments from Albemarle Corporation and Huahui (collectively, “Albemarle/Huahui”) concurring with the draft remand results assigning Huahui a zero antidumping margin.<sup>3</sup> No other interested parties submitted comments. Therefore, these final remand results are unchanged from the draft remand results.

## **B. REMANDED ISSUE**

### **Huahui’s Separate Rate**

#### **Background**

In the AR3 Final Results, the Department calculated zero and de minimis weighted-average dumping margins for the individually examined respondents, Jacobi Carbons AB (“Jacobi”) and Calgon Carbon (Tianjin) Co., Ltd. (“CCT”) (collectively, “individually examined respondents”), respectively.<sup>4</sup> To determine margins for non-selected exporters that demonstrated their independence from the Chinese government (i.e., separate rate respondents), the Department used as guidance the statutory framework for establishing the all-others rate in investigations of market economy products.<sup>5</sup>

Pursuant to that framework, section 735(c)(5)(A) of the Tariff Act of 1930, as amended (“the Act”), directs the Department as a general rule to establish the all-others rate by averaging the estimated margins calculated for exporters and producers individually investigated,

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<sup>2</sup> See Letter to All Interested Parties, re: “Draft Remand Determination in the Antidumping Duty Administrative Review of Certain Activated Carbon from the People’s Republic of China; 4/1/09-3/31/10,” dated September 22, 2016.

<sup>3</sup> See Letter from Albemarle/Huahui, re: “Activated Carbon from the People’s Republic of China: Comments on Draft Redetermination,” dated September 29, 2016.

<sup>4</sup> See AR3 Final Results, 76 FR at 67145.

<sup>5</sup> Id. and accompanying Issues and Decision Memorandum at 4.

“excluding any zero and de minimis margins” and any margins based entirely upon facts available. The exception to the general rule provides that, if the rates for the individually investigated companies “are zero or de minimis margins, or are determined entirely” upon facts available, the Department “may use any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated.”<sup>6</sup> Under one method contemplated by the exception, the Department averages “the estimated weighted average dumping margins determined for the exporters and producers individually investigated.”<sup>7</sup> The Statement of Administrative Action accompanying the Uruguay Round Agreements Act (“SAA”) explains that this constitutes the “expected method” in such cases, provided that “volume data is available,” that it remains “feasible” to do so, and that the resulting rate would “be reasonably reflective of potential dumping margins.”<sup>8</sup>

In the AR 3 Final Results, the Department determined that averaging Jacobi’s and CCT’s de minimis rates to establish separate rates for non-selected exporters would not be reasonably reflective of potential dumping margins during the period of review.<sup>9</sup> Instead, the Department used two rates established in the immediately-preceding, second administrative review to establish rates for separate rate respondents.<sup>10</sup> In particular, the Department assigned Huahui the \$0.44/kg dumping margin it had assigned Huahui as an individually-examined respondent in the second administrative review, and assigned all other separate rate respondents a dumping margin of \$0.28/kg, which was the margin the Department had assigned to separate rate respondents in the second administrative review.<sup>11</sup>

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<sup>6</sup> See section 735(c)(5)(B) of the Act.

<sup>7</sup> Id.

<sup>8</sup> See H.R. Doc. No. 103-316, at 873 (1994), reprinted in 1994 U.S.C.C.A.N. 4040, 4201.

<sup>9</sup> See AR3 Final Results and accompanying Issues and Decision Memorandum at 5.

<sup>10</sup> Id. at 67145 and accompanying Issues and Decision Memorandum at 7.

<sup>11</sup> Id. at 67145 and accompanying Issues and Decision Memorandum at 2-7.

Certain separate rate respondents challenged the Department's separate rate calculations in the CIT.<sup>12</sup> In Albemarle I, the CIT remanded and ordered the Department to reconsider its assignment of the \$0.28/kg dumping margin to the separate rate respondents; Ningxia Guanghua Cherishmet Activated Carbon Co., Ltd. ("GHC") and its affiliate Beijing Pacific Activated Carbon Products Co., Ltd. ("BPAC") (together, "Cherishmet"),<sup>13</sup> as well as Shanxi DMD Corporation ("Shanxi DMD").<sup>14</sup> The CIT held that the methodology applied to determine rates for Cherishmet and Shanxi DMD was "arbitrary" because it "was not based on data pertaining to any pricing behavior that occurred in the third {period of review}, and instead related to "a margin it determined in *another* review for *other* respondents."<sup>15</sup> The CIT held that, because Commerce selected Jacobi and CCT for individual examination 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 {period of review} than the \$0.28/kg calculation from the previous review . . . ."<sup>16</sup> Pending a remand redetermination by the Department, the CIT reserved any decision on whether the \$0.44/kg dumping margin assigned to Huahui was permissible.<sup>17</sup>

Responding to the CIT's order, the Department, under protest, averaged the de minimis margins assigned to the individually examined respondents in the third administrative review and assigned a dumping margin of zero to Cherishmet and Shanxi DMD.<sup>18</sup> The Department also declined to reconsider Huahui's dumping margin and continued to assign the previous rate of

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<sup>12</sup> Albemarle Corp. v. United States, 931 F. Supp. 2d 1280 (CIT 2013) ("Albemarle I").

<sup>13</sup> 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).

<sup>14</sup> See Albemarle I, 931 F. Supp. 2d at 1296-97.

<sup>15</sup> Id. at 1291 (emphasis in original).

<sup>16</sup> Id. at 1292.

<sup>17</sup> Id. at 1293.

<sup>18</sup> See Final Results of Redetermination Pursuant to Court Remand, Albemarle Corp. v. United States, Consol. Ct. No. 11-00451 at 13 (January 9, 2014).

\$0.44/kg.<sup>19</sup> In Albemarle II, the CIT sustained the Department’s redetermination and assignment of the zero dumping margins to Cherishmet and Shanxi DMD, as well as the Department’s assignment of a \$0.44/kg dumping margin to Huahui.<sup>20</sup> With respect to Huahui, the Court found that it was not unreasonable for the Department to choose “specificity to Huahui over contemporaneity.”<sup>21</sup>

On appeal, the Federal Circuit in Albemarle III affirmed the CIT’s judgment sustaining the final results of the Department’s remand redetermination with respect to Cherishmet and Shanxi DMD, but reversed the judgment as to the \$0.44/kg dumping margin assigned to Huahui.<sup>22</sup> The Federal Circuit found that, given Huahui’s history of dumping in the immediately preceding review, the Department had substantial evidence to support a determination that averaging the de minimis rates assigned to Jacobi and CCT may not reasonably reflect Huahui’s potential dumping margin during the period of review.<sup>23</sup> Although the Federal Circuit held that the Department was entitled to use “other reasonable methods” in assigning a rate to Huahui, the Federal Circuit found that the chosen method of carrying forward Huahui’s data from the second administrative review was unreasonable.<sup>24</sup>

The Federal Circuit explained that its conclusion was guided by the statute’s manifest preference for contemporaneity in periodic administrative reviews, the purpose of which is to reassess dumping margins previously calculated in light of newly-obtained data.<sup>25</sup> In those circumstances, the Federal Circuit found that “{t}here is no basis to simply assume that the

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<sup>19</sup> Id. at 22.

<sup>20</sup> Albemarle Corp. v. United States, 27 F. Supp. 3d 1336, 1352 (CIT 2014) (“Albemarle II”).

<sup>21</sup> Id. at 1348-49.

<sup>22</sup> Albemarle Corp. & Subsidiaries v. United States, 821 F.3d 1345 (Fed. Cir. 2016).

<sup>23</sup> Id. at 1355.

<sup>24</sup> Id. at 1355-56.

<sup>25</sup> Id. at 1356.

underlying facts or calculated dumping margins remain the same from period to period.”<sup>26</sup> The Federal Circuit found that although there are at least two circumstances where use of data from a prior period would be reasonable, none of those circumstances applied to Huahui in the proceeding subject to this remand redetermination.<sup>27</sup>

The Federal Circuit also rejected the Department’s contentions that Huahui’s history of dumping justified reassignment of its previously-calculated rate, finding that this was not “in itself . . . sufficient to demonstrate that Huahui’s dumping continued, let alone that it continued at the same rate.”<sup>28</sup> The Federal Circuit also rejected the Department’s reliance on the absence of evidence specific to Huahui’s pricing during the period of review, finding that it was unreasonable for the Department “to choose to limit its review to the two largest volume exporters, refuse to collect additional data from Huahui, and then draw inferences adverse to Huahui based on the lack of data available in the record.”<sup>29</sup>

The Federal Circuit concluded that “Commerce could not on this record utilize data from the previous review,” and that “rather, Commerce, having declined to collect additional information, was required to follow the ‘expected method’ of utilizing the de minimis margins of the individually examined respondents from the contemporaneous period.”<sup>30</sup> The Federal Circuit remanded the case to the CIT to issue appropriate instructions to the Department on the question of the dumping margin to be assigned to Huahui.<sup>31</sup> On remand, the CIT has ordered the Department to submit a remand redetermination in which it assigns to Huahui a dumping margin in accordance with the Federal Circuit holding in Albemarle III.<sup>32</sup>

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<sup>26</sup> Id.

<sup>27</sup> Id. at 1357.

<sup>28</sup> Id. at 1358.

<sup>29</sup> Id.

<sup>30</sup> Id. at 1359.

<sup>31</sup> Id.; see also Remand Opinion and Order at 5-6.

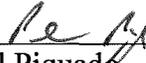
<sup>32</sup> See Remand Opinion and Order at 6.

## Analysis

Pursuant to the CIT's order, and following the Federal Circuit's reasoning that we "follow the 'expected method' of utilizing the de minimis margins of the individually examined respondents from the contemporaneous period,"<sup>33</sup> the Department utilized the de minimis margins of the individually examined respondents from the third administrative review. Accordingly, the Department has averaged the zero and de minimis rates calculated for Jacobi and CCT in the third administrative review and assigned the resulting zero dumping margin to Huahui.

## C. FINAL RESULTS OF REDETERMINATION

We have implemented the change discussed above. As a result of this remand redetermination, for the third administrative review we are assigning Huahui a weighted-average dumping margin of zero.

  
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Paul Piquado  
Assistant Secretary  
for Enforcement and Compliance

12 OCTOBER 2016  
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Date

<sup>33</sup> See Albemarle III, 821 F.3d at 1359.