Globe Metallurgical Inc. v. United States
Court No. 08-00290; CIT December 18, 2009

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 U.S. Court of International Trade (the "Court") in *Globe Metallurgical Inc. v. United States*, Court No. 08-00290 (CIT December 18, 2009) ("*Remand Order*"). The Court's *Remand Order* was issued with regard to *Final Results and Final Partial Rescission of Antidumping Duty Administrative Review: Silicon Metal From the People's Republic of China*, 73 FR 46587 (August 11, 2008) ("*Final Results*") and accompanying Issues and Decision Memorandum ("Issues and Decision Memorandum").

The Court remanded the Department's determination to rescind the 2006/2007 administrative review of the antidumping duty order covering silicon metal from the People's Republic of China (the "Silicon Metal Review") with respect to Ferro-Alliages et Mineraux Inc. ("Ferro Alliages") for reconsideration consistent with the Remand Order. *See Remand Order* at 13.

On March 1, 2010, the Department released its *Draft Remand Results* further explaining the Department's decision to rescind the Silicon Metal Review with respect to Ferro-Alliages. On March 16, 2010, the Department received comments on the *Draft Remand Results* from Globe Metallurgical, Inc. ("petitioner").

Based on the comments received from petitioner, and consistent with the Court's instructions, we have reconsidered and clarified the Department's determination to rescind the Silicon Metal Review with respect to Ferro-Alliages. In responding to the Court's Order and

reassessing the record evidence, we find that the Department's practice and the administrative record of the Silicon Metal Review support the rescission of the review with respect to Ferro-Alliages.

RESCISSION OF REVIEW WITH RESPECT TO FERRO-ALLIAGES

Background

On July 2, 2007, petitioner requested an administrative review of Ferro-Alliages' sales of silicon metal for the period of review ("POR") June 1, 2006 through May 31, 2007. *See* Silicon Metal from the People's Republic of China: Request for 2006-2007 Administrative Review, dated July 2, 2007. On August 6, 2007, the Department initiated the Silicon Metal Review with respect to Ferro-Alliages. *See Notice of Initiation of the Administrative Review of the Antidumping Duty Order on Silicon Metal From the People's Republic of China*, 72 FR 43597 (August 6, 2007). On September 14, 2007, after initiation, petitioner submitted a letter to the Department explaining that it was requesting this administrative review of several Canadian companies, including Ferro-Alliages, based on its suspicion that these Canadian companies were transshipping Chinese-origin merchandise through Canada into the United States. Petitioner claimed that there was only one Canadian producer of silicon metal, and provided import statistics regarding imports of Chinese silicon metal into Canada. Petitioner also requested in this letter that the Department place U.S. Customs and Border Protection ("CBP") data on the record of the review for U.S. imports of silicon metal from Canada. *See* Silicon Metal From the People's Republic of China; Request That the Department Obtain Information Regarding Entries During the 2006-07 Review Period of Silicon Metal Identified as Originating in Canada and the PRC, dated September 14, 2007 ("Entry Information Request").

On September 25, 2007, in response to the Department's quantity and value ("Q&V") questionnaire, Ferro-Alliages reported to the Department that it had no sales of Chinese-origin subject merchandise during the POR, selling instead only Canadian-origin silicon metal, and Ferro-Alliages' response to the Department's Q&V questionnaire was placed on the record on November 8, 2007. *See* Memorandum to The File from Kristina Horgan, Senior International Trade Analyst, Regarding Antidumping Duty Administrative Review of Silicon Metal from the People's Republic of China: Placing Q&V Responses on the Record, dated November 8, 2007, at Attachment VI. To corroborate Ferro-Alliages' assertion that it had no shipments of subject merchandise during the POR, the Department reviewed data from CBP for shipments of silicon metal during the POR, and found no evidence of entries of subject merchandise by Ferro-Alliages during the POR. The Department placed this CBP data on the record on November 28, 2007. *See* Memorandum From Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, Regarding 2006/2007 Antidumping Duty Administrative Review of Silicon Metal from the People's Republic of China: Responses to Quantity and Value Questionnaire, dated November 28, 2007, at Attachment III ("Responses to Q&V"); *see also Silicon Metal from the People's Republic of China: Preliminary Results and Preliminary Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 12378, 12379 (March 7, 2008) ("*Preliminary Results*"). The Department also sent instructions to CBP requesting notification of any entries of subject merchandise by Ferro-Alliages during the POR, and CBP did not notify the Department of any entries of subject merchandise by Ferro-Alliages. *See* Responses to Q&V at 1.

On November 13, 2007, petitioner submitted Port Import/Export Reporting Service ("PIERS") data regarding Ferro-Alliages' imports of Chinese silicon metal into Canada, and asserted that, based on this information as well as overall imports of Chinese silicon metal into Canada, and petitioner's claim that Ferro-Alliages was not a producer of silicon metal, Ferro-Alliages was potentially transshipping Chinese-origin silicon metal through Canada into the United States. *See* Silicon Metal From the People's Republic of China; 2006-07 Administrative Review; Comments on the Response of Ferro-Alliages et Mineraux Inc., Chemical & Alloy Inc., and Crown All Corporation to the Quantity and Value Questionnaire, dated November 13, 2007, at 1-2 and Exhibits 2-4 ("No Shipment Comments").

On February 20, 2008, petitioner reiterated its request that the Department further investigate Ferro-Alliages' exports of silicon metal to the United States based on the same information presented in petitioner's No Shipment Comments and petitioner's analysis of the CBP data. *See* Silicon Metal From the People's Republic of China; 2006-07 Administrative Review; Withdrawal of Requests for Review of 13 Companies; and Request That the Department Obtain More Information From Ferro-Alliages et Mineraux, dated February 20, 2008, at 1-2 ("Withdrawal of Requests for Review"). Nevertheless, as Ferro-Alliages had stated that it made no shipments of subject merchandise during the POR and CBP data contained no evidence of entries of subject merchandise during the POR by Ferro-Alliages, in the *Preliminary Results*, the Department preliminarily rescinded the Silicon Metal Review with respect to Ferro-Alliages. *See Preliminary Results*, 73 FR at 12379.

On April 8, 2008, petitioner filed its case brief. Petitioner reiterated its assertions regarding Ferro-Alliages' import and export activities during the POR. *See* Silicon Metal From

the People's Republic of China; 2006-07 Administrative Review; Case Brief of Globe Metallurgical Inc., dated April 8, 2008, at 2-5 ("Globe Case Brief"). Additionally, petitioner argued that the Department has a statutory mandate to adequately investigate its transshipment claim in the context of the administrative review. *See* Globe Case Brief at 5-10. Petitioner also argued that the Department conducted such an investigation in *Tissue Paper*. *See* Globe Case Brief at 10-12, citing *Certain Tissue Paper from the People's Republic of China: Preliminary Results and Preliminary Rescission, In Part, of Antidumping Duty Administrative Review*, 72 FR 17477 (April 9, 2007) (*"Tissue Paper"*) and accompanying Issues and Decision Memorandum ("*Tissue Paper* Issues and Decision Memorandum"). Pursuant to petitioner's request, the Department conducted a closed hearing regarding the Silicon Metal Review, in which petitioner reiterated the facts and arguments presented in its case brief. *See* Transcript of Closed Hearing in the Matter of: The Administrative Review of the Antidumping Duty Order on Silicon Metal From the People's Republic of China, dated June 12, 2008 ("Closed Hearing Transcript"). Finally, petitioner attempted to place additional factual information on the record of the administrative review subsequent to the filing of case briefs, but that information was rejected as untimely filed. *See* Letter from James C. Doyle, Director, Office 9, to Clifford E. Stephens, Jr., counsel for petitioner, Regarding 2006-2007 Administrative Review of Silicon Metal from the People's Republic of China, dated June 2, 2008.

In the *Final Results*, the Department stated that it would not investigate further petitioner's transshipment claims, as the CBP data indicated that Ferro-Alliages made no shipments of Chinese-origin silicon metal to the United States during the POR. Moreover, the Department stated that a scope or circumvention inquiry, not an administrative review, was the

proper venue to investigate petitioner's allegations. *See Final Results*. Expanding on these statements, the Department explained that the Department disagreed with petitioner's contention that the Department has a statutory obligation to investigate all transshipment allegations within the context of an administrative review. The Department also noted that, as each case is unique, the investigation of transshipment claims in *Tissue Paper* does not necessitate that an identical investigation be undertaken in each case where transshipment allegations are made. Finally, the Department stated that it considered Ferro-Alliages' no shipments claim to be corroborated by the CBP data, and no other evidence that Ferro-Alliages exported PRC-origin silicon metal to the United States existed on the record of the review. *See* Issues and Decision Memorandum at Comment 1.

Petitioner brought the instant action challenging the Department's determination not to investigate further its claims regarding Ferro-Alliages. Pursuant to 19 USC 1675(a) ("section 1675(a)"), petitioner argued that the Department did not fulfill its statutory obligation to determine the antidumping margin for all entries during the administrative review period. Petitioner reasoned that section 1675(a) mandates that the Department investigate transshipment allegations in the context of an administrative review. Petitioner also argued that the instant case is similar to *Tissue Paper*, and that the Department should undertake the same investigative steps in this case that it undertook in *Tissue Paper*. *See Remand Order* at 8-12.

The Court rejected petitioner's claim that section 1675(a) obligates the Department to investigate transshipment claims in the context of an administrative review. *Id.* at 8-9. The Court acknowledged further that administrative reviews may not be an ideal venue to investigate transshipment claims, given that, for example, administrative reviews are governed by statutory

deadlines. *Id.* at 10. However, the Court found that the Department had failed to explain why, in the instant case, the Department did not investigate petitioner's claims with the same vigor as in *Tissue Paper*. The Court remanded for further consideration the Department's decision not to further investigate petitioner's transshipment allegations with respect to Ferro-Alliages. *See id.* at 13. On March 1, 2010, the Department released its *Draft Remand*. On March 16, 2010, petitioner submitted comments on the *Draft Remand*, which are summarized below.

In accordance with the Court's instructions, and after careful examination of the record and comments received from petitioner, the Department explained further its decision to rescind the review with respect to Ferro-Alliages in the *Draft Remand Results*. *See Draft Remand Results* at 7-15. The Department clarified that it does not intend to follow *Tissue Paper* for several reasons, including certain reasons identified in the *Remand Order*, such as the time constraints imposed by administrative reviews. The Department explained in the *Draft Remand* that its experience in *Tissue Paper* demonstrates that administrative reviews are an inadequate venue to investigate country-of-origin claims. The Department declines to follow *Tissue Paper* here because the Department does not intend to establish a practice of investigating circumvention/transshipment claims in administrative reviews. *See Draft Remand Results* at 12-13, citing *Tissue Paper* and accompanying Issues and Decision Memorandum.

Moreover, upon reexamination of the record, we have determined the Department's statement in the *Final Results* that no evidence existed on the record of the review with respect to circumvention/transshipment to be in error. We acknowledge that petitioner had placed some evidence on the record to support its allegations with respect to Ferro-Alliages. However, after further examination of our practice and statutory authority and framework, we find that the issue

of whether, and how, to address allegations that subject merchandise has been exported to the United States through a third-country is primarily a procedural question. In that regard, the Department has concluded that the proper venue and procedural framework to conduct inquiries regarding transshipment involving third-country processing are those providing for scope and circumvention inquiries, as further discussed below.

Analysis

As explained in the preceding *Background*, the Department's decision not to pursue petitioner's transshipment allegation within the context of the administrative review was based on Ferro-Alliages' certification that it made no shipments of subject merchandise during the POR and confirmation of this certification from CBP data, and the Department's view that the proper venue for review of petitioner's allegation involving third country processing is a scope or circumvention inquiry. Here, the Department maintains that a scope or circumvention inquiry is the proper venue for such allegations.

The Department's scope and circumvention procedures provide the best venue for the Department to investigate country-of-origin claims involving third-country processing because scope and circumvention proceedings have prospective application, whereas administrative reviews are retrospective. Retrospective reviews are an inappropriate means of investigating such claims because, as in the instant case, there are no suspended entries upon which the Department can order the assessment of antidumping duties. Specifically, because Ferro-Alliages informed CBP that the country-of-origin of the silicon metal it sold in the United States was Canada, these entries were not subjected to antidumping duty cash deposits and were liquidated by CBP upon entry into the United States. As Ferro-Alliages' shipments of silicon

metal to the United States were never suspended, no suspended entries exist for which the Department could review and impose antidumping duties.

However, scope and circumvention inquiries are necessarily prospective. According to the Department's regulations, the Department may instruct CBP to suspend liquidation of entries pursuant to an affirmative scope or circumvention ruling from the initiation date of the scope or circumvention inquiry. *See* 19 CFR 351.225(l)(2) and (3). These entries would then be reviewed and liquidated during the appropriate period of review. *See* 19 CFR 351.225(l)(4). Therefore, because Ferro-Alliages' exports of silicon metal to the United States were identified as Canadian origin and were not suspended for review during the Silicon Metal Review, the Department's regulations and procedures indicate that that most appropriate venue to address petitioner's allegations regarding third country processing is a scope or circumvention inquiry.

Additionally, the Department's regulations regarding scope and circumvention inquiries cover instances where there is a question as to the country-of-origin of the merchandise based upon processing activities that take place in a third country. The introduction to 19 CFR 351.225 indicates that "a domestic interested party may allege that changes to an imported product or the place where the imported product is assembled constitutes circumvention under section 781 of the Act." *See* 19 CFR 351.225(a). In addition, 19 CFR 351.225(h) allows for "imported merchandise completed or assembled in a foreign country other than the country to which the order applies" to be included in the scope of an antidumping duty order. *See* 19 CFR 351.225(h). By linking the Department's authority to investigate country-of-origin claims to whether a third-country party conducted some type of work on the merchandise before it is exported to the

United States, the Department's regulations set forth a manageable framework for the Department to investigate country-of-origin claims involving such activity.

The Department's approach is consistent with the Court's statement in the *Remand Order* that the statutory deadlines governing administrative reviews may necessitate reliance upon a more flexible mechanism to investigate country-of-origin claims. As the Court noted, "[a]scertaining whether entries may fall within the scope of an antidumping duty order is a task that may not be completed within the various deadlines required for an administrative review." *See Remand Order* at 10. The Department concurs with the Court that the statutory timeline for administrative reviews presents a barrier to investigating country-of-origin claims in administrative reviews.

Investigating country-of-origin issues involving third-country processing in the context of the administrative review process would postpone the normal work associated with an administrative review to such an extent that it would become even more challenging for the Department to satisfy the statutory time limits for administrative reviews – for example, the Department has a maximum of 365 days to complete all the work necessary to issue our preliminary results. In contrast with the statutory scheme governing administrative reviews, the timeline for scope and circumvention inquiries may be extended and, accordingly, provides the Department with the necessary flexibility to thoroughly investigate country-of-origin issues involving third country processing and determine the appropriate course of action with regard to a party's activities. *See* 19 USC 1677j(f).

The administrative record demonstrates that petitioner recognizes the Department's position that such country-of-origin claims would be better pursued in scope or circumvention

inquiries. In fact, after meeting with Department officials, petitioner withdrew its request for review of Jiangxi Gangyuan Silicon Industry Company, Ltd., MPM Silicones, LLC, and GE Silicones (Canada) (also known as Momentive Performance Materials Canada ULC), citing Department statements that "there are Department procedures other than administrative reviews that address alleged circumvention activities. In view of these statements, . . . Globe hereby withdraws its requests for review of Jiangxi Gangyuan, MPM Silicones, and GE/MPM Canada." *See* Withdrawal of Requests for Review at 4-5. In the case of these respondents, as with Ferro-Alliages, petitioner cited alleged transshipment of Chinese-origin silicon metal through Canada as the basis for its request for administrative review. *See* Silicon Metal From the People's Republic of China; 2006-07 Administrative Review; Request That the Department Investigate and Verify the Disposition of the Chemical-Grade Silicon Metal That Jiangxi Gangyuan Shipped to GE/MPM in Canada During the Period of Review, dated October 3, 2007.

Moreover, the Department notes that, after the conclusion of the Silicon Metal Review, petitioner filed a scope request regarding Ferro-Alliages' exports to the United States of products which may be subject to the antidumping duty order. Pursuant to these allegations and supporting evidence not present on the record of the instant administrative review, the Department initiated a formal scope inquiry in the matter. *See, e.g., Notice of Scope Rulings*, 74 FR 49859 (September 29, 2009) (listing the Silicon Metal Scope among pending inquiries). To date, the Department has issued questionnaires to Ferro-Alliages and received and analyzed responses to these questionnaires. The Department has also received and analyzed numerous comments from petitioner over the course of this scope inquiry. Though the Court rejected the scope inquiry as a basis to find the instant case moot, the Department respectfully notes that the

scope review remains relevant to the instant case, as it demonstrates that the Department's actions are consistent with its statements that scope or circumvention inquiries are the proper venue for country-of-origin claims involving third country processing. *See Remand Order* at 8 (discussing the effect of the Department's scope review).

On December 28, 2009, petitioner requested that the Department place the record of the scope inquiry on the remand record (*See* Silicon Metal From the People's Republic of China; Remand; 2006-07 Administrative Review, dated December 28, 2009). The Department declines to grant this request. As explained above, the Department has clarified that it does not view administrative reviews as the proper forum for country-of-origin claims, and moving the record of the scope review onto the remand record would undermine this determination. Moreover, because the Department is currently evaluating whether Ferro-Alliages is exporting Chinese silicon metal to the United States which has been further processed in Canada and thus may be subject to the order in the context of the scope inquiry, it is unnecessary to place these documents on the record of the Silicon Metal Review. Petitioner's claims regarding third country processing are being thoroughly investigated in the scope inquiry and petitioner suffers no disadvantage as a result of the Department's determination not to add the record of the scope review to the remand record.

With regard to *Tissue Paper*, where the Department pursued an allegation of transshipment in the context of an administrative review, the Department's experience in *Tissue Paper* demonstrates that administrative reviews do not provide a viable venue for such country-of-origin inquiries. The factual context surrounding the transshipment claim raised in *Tissue Paper*, and the Department's efforts to investigate that claim, are relevant here. The

transshipment claim raised in *Tissue Paper* was brought by the *Tissue Paper* petitioner, Seaman Paper Company of Massachusetts, Inc. ("Seaman"). Seaman claimed that a respondent, the Sansico Group ("Sansico"), had transshipped Chinese-origin tissue paper through Indonesia to circumvent the antidumping duty order on tissue paper from the PRC. However, the Department preliminarily rescinded the administrative review with respect to Sansico, pursuant to Sansico's claim that it made no shipments of subject merchandise during the *Tissue Paper* review period. The Department noted that Sansico's claim was supported by CBP data, as in the instant case. *See Certain Tissue Paper from the People's Republic of China: Preliminary Results and Preliminary Rescission, In Part, of Antidumping Duty Administrative Review*, 72 FR 17477, 17480 (Apr. 9, 2007).

Seaman's transshipment allegation centered on sales to Sansico by one of Sansico's suppliers, "supplier A," who was not affiliated with Sansico. According to Seaman, "supplier A" imported Chinese-origin tissue paper into Indonesia for sale to Sansico, which was then sold to the United States. "Supplier A" refused to allow the Department to verify its books and records in the course of the Department's verification of Sansico. *See Tissue Paper* Issues and Decision Memorandum at Comment 3. The Department's inability to pursue such allegations regarding parties who are not interested parties under the statute highlights the impracticality and ineffectiveness of attempting to investigate such claims through the administrative review process.

As a result, the Department determines that *Tissue Paper* does not set forth a manageable approach to investigating country-of-origin issues, based upon all the reasons listed above. Our experience in *Tissue Paper* further reinforced that the time constraints of an administrative

review hinder the Department's ability to effectively investigate transshipment claims. The *Tissue Paper* petitioner placed a large amount of evidence on the record of the administrative review in support of its transshipment allegation, including detailed technical information regarding product characteristics and manufacturing processes. *See Tissue Paper* Issues and Decision Memorandum at Comment 3. The time and resources necessary to evaluate and verify such information, in addition to parties' responses and comments upon the regular questionnaires that the Department issues in the court of an administrative review, creates an overwhelming burden in administrative reviews, where the Department's statutory time constraints are always of concern. There were also no suspended entries of subject merchandise upon which to assess antidumping duties on in *Tissue Paper*, and petitioner's claims should have been pursued in a scope or circumvention inquiry, if third country processing was involved, or may have been beyond the Department's authority if the allegations involved mislabeled country-of-origin declarations to CBP. Furthermore, the Department's regulations under 19 CFR 351.225, cited above, clearly indicate that the optimal venue for addressing country of origin issues involving third country processing is a scope or circumvention inquiry. In sum, the Department recognizes here that *Tissue Paper* does not establish a viable practice for the Department to examine such claims.

As noted earlier, the issue here is primarily a procedural matter. Nonetheless, the Department acknowledges that evidence was placed on the record on the review. Petitioner placed on the record information regarding Ferro-Alliages' lines of business and import and export activity, as well as general statistics regarding importation of Chinese silicon metal into Canada. *See* No Shipment Comments at 1-2 and Exhibits 2-3, Withdrawal of Requests for

Review at 1-2 and Exhibits 2-3, Globe Case Brief at 2-5, and Closed Hearing Transcript. Our statement, therefore, in the *Final Results* that no evidence existed to support petitioner's allegations was in error. However, for all the reasons outlined above, our decision not to pursue petitioner's claims of transshipment within the context of an administrative review was correct and in accordance with our statutory and regulatory framework.

Also, as noted earlier, we emphasize that the Department's statutory authority to investigate circumvention of an order is limited to circumstances where some further processing is performed on the product in the third country before exportation to the United States, such that for purposes of AD/CVD law, the country of origin of the final product is unclear. *See* 19 USC 1677j. As explained above, the Department's regulations allow the Department to assess antidumping duties on "imported merchandise completed or assembled in a foreign country other than the country to which the order applies." *See* 19 CFR 351.225(h). Allegations that concern transshipment, without any further processing of subject merchandise in a third country are better addressed under CBP's authority to impose monetary penalties pursuant to fraud, gross negligence, and negligence. *See* 19 USC 1592. Without reaching the question of whether petitioner's allegations present a viable matter for CBP's inquiry, the Department notes that its authority to investigate such country-of-origin claims is not as expansive as the authority granted to CBP.

Petitioner's Comments:

Petitioner's comments on the above analysis generally focused upon three issues: (1) the Department's explanation of its authority to investigate transshipment claims and its practice with respect to such claims; (2) the Department's alleged failure to make a factual determination regarding the country-of-origin of Ferro-Alliages' merchandise and the Department's determination not to move the scope review record onto the instant record; and (3) the Department's finding that petitioner is not disadvantaged by the Department's determination to pursue petitioner's allegations in a scope review rather an administrative review.

1. Petitioner's comments regarding the Department's authority and past practice

First, with respect to the Department's explanation of its authority to investigate transshipment, petitioner argues that the Department misconstrued the nature of its allegation regarding Ferro-Alliages' activities. Petitioner contends that it alleged that Chinese-origin silicon metal was transshipped through Canada to the United States during the POR, and that the Department's references to third-country processing inaccurately portray petitioner's claim and the Department's finding in the *Final Results*. Petitioner asserts that its allegations do not include a claim that Ferro-Alliages is further processing merchandise in Canada prior to exportation to the United States. *See* Silicon Metal From the People's Republic of China; 2006-2007 Administrative Review; Remand; Comments on the Draft Remand Determination ("Petitioner Comments") at 12-13. Petitioner asserts that it is inconsistent for the Department to state that the Silicon Metal Review must be rescinded because petitioner should have requested a scope or circumvention inquiry and, at the same time, that it may not have the authority to

investigate transshipment claims in the absence of further processing. *See* Petitioner Comments at 16-17.

With respect to the Department's explanation of its practice, petitioner argues that scope and circumvention inquiries have not been used to investigate transshipment allegations such as the one it has raised in the Silicon Metal Review. Rather, petitioner claims, the Department's scope and circumvention inquiry regulations specifically pertain to analyses where there is uncertainty whether a product falls under an antidumping duty order due to some further processing performed in a third country, and the Department's regulations reflect this. Petitioner claims that it has reviewed the Department's scope and circumvention inquiries and that its review failed to reveal an instance where the Department investigated transshipment of merchandise that has not been further processed in the third country. *See* Petitioner Comments at 13-14.

In contrast with the Department's practice in scope and circumvention reviews, petitioner contends that the Department has examined transshipment in the absence of allegations of further processing in administrative reviews and the courts have held that the Department has the authority to perform whatever investigation is necessary to carry out its administrative responsibilities.[1] *See* Petitioner Comments at 16-17. According to petitioner, the Department has taken steps to investigate transshipment claims in investigations and administrative reviews.[2]

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[1] *See* Petitioner Comments at 17, *citing NTN Bearing Corporation of America v. United States*, 186 F. Supp. 2d 1257, 1328 (CIT 2002) ("*NTN*"); *Rhone-Poulenc, Inc. v. United States*, 927 F. Supp. 451, 456-57 (CIT 1996) ("*Rhone Poulenc*"); and *Bomont Industries v. United States*, 718 F. Supp. 958 (CIT 1989) ("*Bomont*").

[2] *See* Petitioner Comments at 9-12, *citing Tissue Paper; Oil Country Tubular Goods From Mexico: Rescission of Antidumping Duty Administrative Review*, 66 FR 26830 (May 15, 2001) ("*OCTG from Mexico*"); *Notice of Final Determination of Sales at Less Than Fair Value: Expandable Polystyrene Resins from the Republic of Korea*, 65 FR 69284 (November 16, 2000) ("*EPS from Korea*") and accompanying Issues and Decision Memorandum at Comment 1; *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of the 2007-08 Administrative Review of the Antidumping Duty Order*, 75 FR 844 (January 6,

Petitioner maintains that the Department has included transshipped sales in its analysis in past cases.[3] As the Department has investigated transshipment previously and included these sales in its analysis, petitioner contends that the Department has a responsibility to determine a dumping margin on all entries of subject merchandise during the POR. Petitioner maintains that the Department may not rescind a review unless it determines that a respondent had no entries of subject merchandise during the POR, and that, in the instant case, the Department has not made a factual finding that Ferro-Alliages made no shipments of subject merchandise during the POR, and if the Department did, that finding would be unsupported by substantial evidence on the record. *See* Petitioner Comments at 18-19.

Department's Position:

With respect to the Department's authority to investigate transshipment claims and its administrative practice, the Department acknowledges that it previously misunderstood petitioner's allegations. Until receipt of petitioner's March 16, 2010, comments on the *Draft Remand*, the Department understood petitioner's allegations to reflect concerns that Ferro-Alliages was further processing Chinese-origin silicon metal in Canada prior to exportation to the United States. This understanding was informed by petitioner's submissions regarding Ferro-Alliages' business activities ("crushing, screening, blending, drying, stocking, packaging,

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2010) ("*TRBs from the PRC*") and accompanying Issues and Decision Memorandum at Comment 1; *Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China*, 71 FR 29303 (May 22, 2006) ("*Diamond Sawblades from PRC*"); *Final Determination of Sales at Less Than Fair Value: Certain Artist Canvas from the People's Republic of China*, 71 FR 16116 (March 30, 2006) ("*Artist Canvas from PRC*") and accompanying Issues and Decision Memorandum at Comment 1; *Notice of Final Determination of Sales at Less Than Fair Value: Wax and Wax/Resin Thermal Transfer Ribbon from France*, 69 FR 10674 (March 8, 2004) ("*Ribbon from France*"); *Notice of Final Determination of Sales at Less Than Fair Value: Wax and Wax/Resin Thermal Transfer Ribbon from the Republic of Korea*, 69 FR 17645 (April 5, 2004) ("*Ribbon from Korea*").

[3] *See* Petitioner Comments at 9, *citing Tissue Paper* and accompanying Issues and Decision Memorandum at Comment 6, and *Photo Albums and Filler Pages From the Republic of Korea,* 54 FR 13399 (April 3, 1989) ("*Photo Albums*") at Comment 1.

and selling various ferroalloy and mineral products") and questions that petitioner requested the Department ask Ferro-Alliages (*i.e.*, "3. Please state whether your company commingles its inventory silicon metal purchased from different suppliers. Also please describe the method by which your company records and tracks inventory from different suppliers and on what basis your company is able to determine the supplier of the silicon metal sold."). *See* No Shipment Comments at 2 and Exhibit 1. Based upon petitioner's March 16, 2010, comments, however, petitioner has clarified that it is alleging that Ferro-Alliages has not properly identified the country-of-origin of its U.S. sales, but petitioner is not alleging that the merchandise was subject to any processing in Canada. Given this, the Department maintains, as stated above and in the *Draft Remand*, that the Department does not possess the authority to investigate claims regarding transshipment with no further processing in the third country.

The Department's authority to investigate whether merchandise that enters the United States from a country other than the country that is covered by the order, such as merchandise that is exported to the United States from Canada but may be subject to an antidumping duty order covering merchandise from China, is limited. Specifically, the Department's authority to address such scenarios is constrained by the requirement that there must be some processing taking place in the third-country (*i.e.*, Canada) for the Department to determine whether the merchandise is subject to the order. The governing statute expressly links the Department's authority to the question of whether there is third-country processing taking place. For example, 19 USC 1677j, which concerns the Department's authority to prevent the circumvention of AD/CVD orders through the importation of merchandise completed or assembled in other foreign countries, sets forth that the Department must examine processing of the merchandise in

the third-country. *See* 19 USC 1677j(b)(1). Indeed, the overall approach of 19 USC 1677j instructs the Department to evaluate third-country processing in its analyses. *See generally* 19 USC 1677j.

The Department's analysis is consistent with this statutory instruction. As explained above and in the *Draft Remand*, the Department's regulations regarding scope and circumvention inquiries specifically note that scope and circumvention inquiries may be used to determine whether merchandise further manufactured in a third country properly falls under the scope of an antidumping duty order. *See Analysis* section above and *Draft Remand* at 8-9. Thus, as stated above, allegations that concern transshipment, without any further processing of subject merchandise in a third country are better addressed under CBP's authority to impose monetary penalties pursuant to fraud, gross negligence, and negligence. *See* 19 USC 1592. Indeed, the Department's lack of authority to investigate transshipment claims in the absence of further processing is supported by petitioner's analysis. Specifically, the Department agrees with petitioner that scope and circumvention inquiries have not been used to investigate cases where subject merchandise was transshipped through a third country with no further processing completed in the third country. However, the Department disagrees with petitioner's claim that, in administrative reviews and investigations, the Department has taken steps to investigate transshipment allegations that do not involve allegations of third-country processing. In the cases cited by petitioner, the Department's analysis is firmly rooted in whether there has been any 'substantial transformation' of the merchandise such that its status under the order is in question. *See Photo Albums* at Comment 1; *TRBs from the PRC* at Comment 1; *Diamond*

Sawblades from the PRC at Comment 4; *Artist Canvas from the PRC* at Comment 1; *Ribbon from France,* 63 FR at 10675-77; *Ribbon from Korea*, 69 FR at 17647-48.

However, the Department acknowledges that the Department has undertaken some steps to ensure that a respondent's sales database is complete or that its no shipments certification is accurate, as we did in other cases cited by petitioner. The extent of these investigations is typically very limited and the facts surrounding these cases differ from those in the Silicon Metal Review. For example, in *OCTG from Mexico*, after petitioner produced information showing that Tubos de Acero de Mexico S.A. ("TAMSA") had imports of subject merchandise during the POR, the Department contacted TAMSA, who claimed that all of its entries of subject merchandise were made on a Temporary Importation Bond ("TIB") basis, and it had no knowledge of whether its customers entered merchandise into the United States, and, therefore it had no reviewable entries for the Department's purposes. The Department confirmed these claims as well as information regarding entries made by TAMSA's customers with CBP, and found TAMSA's no shipments certification to be corroborated. *See OCTG from Mexico.* The steps taken by the Department in *OCTG from Mexico* were simple confirmations of information presented by a respondent light of contradictory information presented by petitioner, akin to confirming Ferro-Alliages "no shipments certification" through reviewing CBP data and querying CBP as to whether it had knowledge of any shipments of subject merchandise by Ferro-Alliages.

In *EPS from Korea*, the Department declined to undertake an extensive investigation of petitioner's allegations that expandable polystyrene resins were being transshipped through Mexico. After receipt of petitioners' allegation of transshipment, the Department reviewed CBP

data, as it did in the Silicon Metal Review, and conducted normal verification procedures, such as completeness tests, in order to determine whether respondents' U.S. sales databases were complete. Finding no evidence of transshipment through these normal procedures, the Department declined to undertake further investigation itself and, instead, referred the matter to CBP for further investigation. *See EPS from Korea* and accompanying Issues and Decision Memorandum at Comment 1.

Similarly, petitioner indicates that the Department regularly investigates whether sales entered the United States through third countries in order to ensure all sales are included in the Department's analysis, and references *Tissue Paper,* where the Department applied adverse facts available to a POR sale of subject merchandise that was not reported to the Department by the respondent. Again, however, in contrast to the instant case, that sale was discovered during a normal verification procedure, and nothing indicates that the respondent attempted to hide this sale by transshipping it through a third country and falsifying the country of origin. Rather, the respondent argued that the fact the sale was shipped through a third country was what led it to *inadvertently* omit the sale from its U.S. sales database. *See Tissue Paper* and accompanying Issues and Decision Memorandum at Comment 6.

With respect to petitioner's claim that the courts have held that the Department has "the authority (and the duty) to perform the investigation necessary to carry out its statutory responsibilities" and, thus, the Department must undertake an investigation of its transshipment claims in the administrative review, this argument fails to acknowledge the Court's statement in the *Remand Order* that the statute does not instruct the Department regarding which proceeding should be used to investigate transshipment claims. *See* Petitioner Comments at 17; *Remand*

Order at 9. The authorities cited by petitioner in support of its argument do not contradict the Court's finding and, moreover, none of the case cited are binding. *See* Petitioner Comments at 17 n.79, *citing NTN*, 186 F. Supp. 2d 1257, 1328 (CIT 2002) (affirming the Department's acceptance of respondents' billing and rebate adjustments as reported); *Rhone-Poulenc, Inc.*, 927 F. Supp. 451, 456-57 (CIT 1996) (holding that the Department's valuation of a by-product was insufficient); *Bomont*, 718 F. Supp. 958 (CIT 1989).

Petitioner contends, for example, that *Bomont* is directly on-point and teaches that this Court has previously remanded a case to Commerce to investigate transshipment allegations. However, in the government's Motion to Dismiss this matter, the government explained that *Bomont* is distinguishable. *See* Motion to Dismiss, Doc. No. 25 (filed April 28, 2009), at 18. Specifically, in *Bomont*, the court remanded an antidumping duty investigation to Commerce to verify transshipment allegations raised in the petition. *Bomont*, 718 F. Supp. at 964. Thus, Bomont involved an initial investigation, not an administrative review. This is relevant because, at the time of *Bomont* investigation, the relevant statute required the Department to verify all information relied upon in making a final determination. *Id.* at 964 ("At the time of the proceedings below, 19 U.S.C. § 1677e(a) required the ITA to 'verify all information relied upon in making . . . a final determination in an investigation'"). In contrast, Commerce has discretion regarding verification in the context of an administrative review such as this case. *See* 19 C.F.R. § 351.307.

2. *Petitioner's comments regarding the Department's factual determination of the country-of-origin of Ferro-Alliages' merchandise and the Department's determination not to move the scope review record to the instant record*

Petitioner asserts that the Department has failed to make a factual determination, supported by substantial evidence, regarding the country-of-origin of Ferro-Alliages' merchandise. With respect to the Department's determination not to move the record of the scope review to the instant record, petitioner states that the Department has access to the necessary information to determine whether Ferro-Alliages exported subject merchandise to the United States during the POR in the information present on the record of the ongoing scope inquiry regarding Ferro-Alliages' exports of silicon metal to the United States, which petitioner requests again that the Department place on the record of the Silicon Metal Review. Petitioner argues that the Department has the authority to conduct a scope inquiry in conjunction with an administrative review, and should do so in this case. If the Department does not have the necessary information to make a factual determination regarding whether Ferro-Alliages exported subject merchandise to the United States during the POR, petitioner states that the Department should reopen the record of the Silicon Metal Review. *See* Petitioner Comments at 2-8, 7-9 and 18-19.

Department's Position:

With regard to petitioner's contention that the Department must make a factual finding regarding whether Ferro-Alliages exported subject merchandise to the United States during the POR, the Department has already determined that Ferro-Alliages made no shipments of subject merchandise during the POR. As noted above and in the *Draft Remand*, the Department undertook its normal investigatory procedures over the course of the administrative review,

including reviewing CBP data and querying CBP, and the CBP data confirmed Ferro-Alliages claim that it made no shipments of subject merchandise. *See Background* and *Analysis* sections above, and *Draft Remand* at 4, 5-6, 7, and 14. As the Department has maintained throughout this case, under its normal practice, Ferro-Alliages' no-shipment certification and CBP's confirmation of its accuracy provide sufficient evidence for the Department to reach the conclusion that Ferro-Alliages did not export subject merchandise to the United States for purposes of the administrative review. Moreover, the Department emphasizes that the Court's remand instruction does not require that the Department undertake the exhaustive investigation of Ferro-Alliages activities requested by petitioner in the context of the administrative review. *See Remand Order* at 8-9. Finally, the Department reiterates that the primary issue here is a procedural one and maintains that the proper venue to address concerns regarding further processing of subject merchandise in a third country is a scope or circumvention inquiry. *See Analysis* section above and *Draft Remand* at 8-14.

3. *Petitioner's comments regarding the differences between the relief provided by scope and administrative reviews*

Petitioner contends that scope and circumvention inquiries do not provide the same relief as administrative reviews. Petitioner argues that scope reviews do not provide for the assessment of duties on entries of subject merchandise during the POR and determine the estimated duty to be deposited on future entries of subject merchandise. Petitioner claims that scope and circumvention inquiries do not have the legal consequences of an administrative review, nor do scope and circumvention inquiries have the statutory time limits of administrative reviews, making their use futile in addressing unfairly traded transshipped merchandise. *See* Petitioner Comments at 14-15.

Department's Position:

The Department acknowledges petitioner's claim that scope and circumvention inquiries have different procedures and provide different relief than administrative reviews, but the difference between these two functions does not undermine the Department's determination the scope and circumvention inquiries are the proper venue for allegations of third country processing of subject merchandise. As noted above and in the *Draft Remand*, prospective scope inquiries are most appropriate to a situation where no suspended entries exist for the Department to assess duties on and a determination must be made as to whether the further-processed merchandise falls under the scope of the antidumping duty order. *See Analysis* section above and *Draft Remand* at 8-9.

Finally, the Department acknowledges that the Department's regulations provide that the Department may conduct a scope inquiry in conjunction with an administrative review at its discretion. *See* 19 CFR 351.225(f)(6). However, the Department disagrees with petitioner's claim that the Department's determination not to move the scope review record onto the remand record is "inconsistent" with its regulations. *See* Petitioner Comments at 9. The regulation is expressly discretionary ("the Secretary may conduct the scope inquiry in conjunction with the review") and the Department has provided ample explanation as to why it is not necessary or practicable to conduct the scope review in conjunction with the instant review.

CONCLUSION

Pursuant to the Court's *Remand Order*, the Department has explained that an administrative review is not the proper venue to pursue transshipment allegations because administrative reviews are retrospective inquiries that do not encompass merchandise not subject to the

antidumping duty order during the review period, and the time constraints of administrative reviews inhibit the Department's ability to conduct a thorough investigation of transshipment allegations. Rather, where circumstances allow the Department to investigate transshipment allegations, *i.e.*, in instances involving third country processing of subject merchandise, the most appropriate venue for these inquiries is a scope or circumvention inquiry. Additionally, the Department continues to find that the rescission of the review with respect to Ferro-Alliages was supported by substantial evidence and the Department's statutory authority. Based on the analysis of the record evidence in the Silicon Metal Review and petitioner's comments, the Department continues to determine that it would not be appropriate to undertake an exhaustive investigation of petitioner's transshipment allegations with respect to Ferro-Alliages in the context of the Silicon Metal Review.

Ronald K. Lorentzen
Deputy Assistant Secretary
for Import Administration

April 8, 2010
Date