

MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

FROM: John M. Andersen
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Final Analysis Memorandum for the Minor Alterations Anti-Circumvention Inquiry of the Antidumping Duty Order on Folding Metal Tables and Chairs from the People's Republic of China

SUMMARY

We have analyzed the case and rebuttal briefs of interested parties in the anti-circumvention inquiry of the antidumping duty order on folding metal tables and chairs ("FMTCs") from the People's Republic of China ("PRC"). The tables subject to this anti-circumvention inquiry are distinguishable from banquet tables, which are not subject to the order because, but for the cross-bars located near the table top that connect the legs, enabling the legs to fold in sets, the tables subject to this inquiry otherwise meet the description of merchandise subject to the FMTCs order. As a result of our analysis, we determine that imports from the PRC of folding metal tables with legs connected by cross-bars, so that the legs fold in sets, and otherwise meeting the description of in-scope merchandise, are within the class or kind of merchandise subject to the order on FMTCs from the PRC. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is the complete list of the issues for which we received comments and rebuttal comments by parties:

- Comment 1: Whether the Department Should Terminate the Anti-Circumvention Inquiry
- Comment 2: Whether Folding Metal Tables with Cross-Bars Are Expressly Excluded from the Scope
- Comment 3: Whether Folding Metal Tables with Cross-Bars Are Significantly Different from the In-Scope Merchandise
- Comment 4: Whether Folding Metal Tables with Cross-Bars Represent a Significant Improvement over Folding Metal Tables with Independently Folding Legs
- Comment 5: Whether to Deny Feili's Partial Revocation Request

BACKGROUND

On October 27, 2008, the Department of Commerce (“Department”) published its affirmative preliminary determination of circumvention.¹ On November 26, 2007, Meco Corporation (“Meco”), the petitioner in the underlying investigation, Cosco Home and Office Products (“Cosco”),² an importer of subject merchandise, and Lifetime Products, Inc. and Lifetime (Xiamen) Plastic Products Ltd. (collectively, “Lifetime”), a PRC producer/exporter of folding metal tables, submitted case briefs. On January 12, 2009, Feili Furniture Development Limited Quanzhou City, Feili Furniture Development Co., Ltd., Feili Group (Fujian) Co., Ltd., and Feili (Fujian) Co., Ltd. (collectively “Feili”), a PRC producer/exporter of folding metal tables, submitted rebuttal comments. On January 16, 2009, Meco, Cosco, Lifetime, and New-Tec Integration (Xiamen) Co., Ltd. and New-Tec Integration Co., Ltd. (collectively “New-Tec”), a PRC producer/exporter of folding metal tables, submitted rebuttal comments.

FINAL DETERMINATION

In accordance with section 781(c) of the Tariff Act of 1930, as amended (“Act”), based on the information submitted by interested parties and the analysis below, we recommend that the Department continue to find that folding metal tables with legs that are connected by cross-bars and otherwise meeting the description of in-scope merchandise are circumventing the FMTCs order.³ *See also* 19 CFR 351.225(i).

In the case of an allegation of a “minor alteration” claim under section 781(c) of the Act, it is the Department’s practice to look at the five factors listed in the Senate Finance Committee report to determine if circumvention exists in a particular case.⁴ The list of criteria in the Senate Finance Committee report is not exhaustive, nor does the statute list any specific criteria that the

¹ *See Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order on Folding Metal Tables and Chairs from the People’s Republic of China*, 73 FR 63684 (October 27, 2008) (“*Preliminary Determination*”), and Preliminary Analysis Memorandum for the Minor Alterations Anti-Circumvention Inquiry of the Antidumping Duty Order on Folding Metal Tables and Chairs from the People’s Republic of China (“*Preliminary Analysis Memo*”) (October 20, 2008).

² Cosco submitted a revised case brief on January 7, 2009, with all untimely submitted new factual information, as well as all references and arguments based thereupon, redacted.

³ In its Case Brief, (at 4, fn 3), Meco renewed its request that the Department find that FMTs with cross-bars constitute later-developed merchandise, as well as a minor alteration to in-scope merchandise. However, because we are finding circumvention pursuant to Section 781(c) of the Act and 19 CFR 351.225(i), there is no need to consider whether they also constitute later-developed merchandise under Section 781(d) of the Act.

⁴ *See Omnibus Trade Act of 1987, Report of the Senate Finance Committee, S. Rep. No. 71, 100th Cong., 1st Sess., at 100 (1987) (“Senate Finance Committee Report”),* which explained that in circumvention inquiries regarding minor alterations, the Department “should consider such criteria as the overall physical characteristics of the merchandise, the expectations of the ultimate users, the use of the merchandise, the channels of marketing and the cost of any modification relative to the total value of the imported products.”

Department must review in an anti-circumvention inquiry.⁵ Because each anti-circumvention inquiry is highly dependent on the facts on the record, and must be analyzed in light of those specific facts, the Department has historically analyzed several additional criteria to determine if circumvention of the order is taking place.⁶

For this final determination, we continue to rely on the criteria that we considered in making our preliminary determination. For instance, in response to claims that the folding mechanism was already an established, well-known technology, the “timing of development” and “timing of the entries during the period of inquiry” are relevant considerations in this anti-circumvention inquiry. We also find that “the manner in which the product is advertised and displayed,” “input of customers in design phase,” and “advantages/disadvantages of the minor alteration” are relevant in that they speak to the question of whether the product truly represents a minor alteration, or whether the modification is such that the table is not subject to the order.

As explained in more detail below, we determine that the folding metal tables with cross-bars at issue in this case are not expressly excluded from the order. There are no significant differences in the expectations of the ultimate users, uses of the merchandise, and channels of marketing between folding metal tables with and without cross-bars. There are also no differences in the manner in which the folding metal tables with cross-bars are advertised or displayed compared with folding metal tables without cross-bars. Furthermore, these folding metal tables with cross-bars, produced in the PRC and exported to the United States, did not exist prior to the issuance of the FMTCs order, and producers acknowledged that the cost of adding cross-bars to tables in the course of production is negligible.

Meco requests that the Department require exporters of FMTs with cross-bars to report the quantity and value of these products, so that the Department can evaluate the nature and extent of circumvention that has occurred. Because we find these tables to be circumventing the order, we will require respondents to report sales and factors of production for these products in the context of an administrative review, as we do for all other in-scope products. The Department will add language regarding this determination to the scope of the order and will include these products in future administrative reviews. Where there is an ongoing review, the Department will determine whether it is practical to require that respondents report these sales, or whether the Department will consider sales of this product on a non-adverse facts available basis, in accordance with 19 CFR 351.225(1)(4).

⁵ See section 781(c) of the Act. See also Senate Finance Committee Report, at 100.

⁶ See *Preliminary Determination*, 73 FR at 63685 (citing, e.g., *Preliminary Determination of Circumvention of Antidumping Order; Cut-to-Length Carbon Steel Plate from Canada*, 65 FR 64926, 64929 - 31 (October 31, 2000)).

DISCUSSION OF THE ISSUES

Comment 1: Whether the Department Should Terminate the Anti-Circumvention Inquiry

Cosco and Lifetime argue that the Department should terminate the instant inquiry because they claim that Mecos no longer produces FMTs in the United States but, rather, imports FMTs from Shichang. According to Cosco and Lifetime, the Department should conclude, therefore, that Mecos lacks standing to request the anti-circumvention ruling citing *Industrial Belts and Components and Parts Thereof, Whether Cured or Uncured, From Japan; Termination of Circumvention Inquiry of Antidumping Duty Order*, 59 FR 23693 (May 6, 1994) (“*Industrial Belts from Japan*”).

Mecos argues that there is no record evidence supporting Cosco’s and Lifetime’s claim that Mecos no longer produces subject merchandise in the United States, and that the record is closed for the submission of additional evidence, thus making this argument untimely. Mecos further states that Cosco and Lifetime have not alleged that Mecos does not produce folding metal chairs. Mecos notes that five-piece sets, consisting of four chairs and a table, are subject merchandise. Therefore, Mecos contends, if folding metal tables (“FMTs”) with cross-bars are found to be dumped and become part of a five-piece set consisting of four chairs and a table, Mecos’s sales of domestically produced folding metal chairs would be affected. Also, Mecos argues that folding metal tables and chairs have been considered a single like product and Mecos’s cessation of FMT production is immaterial.

Department’s Position:

Pursuant to 19 CFR 351.225(c)(1): “Any interested party may apply for a ruling as to whether a particular product is within the scope of an order or a suspended investigation.” According to section 771(9)(C) of the Act, the term “interested party” is defined as “. . . a manufacturer, producer, or wholesaler in the United States of a domestic like product . . .” Therefore, pursuant to the statute and the Department’s regulations, Mecos has standing to request this anti-circumvention inquiry.

Mecos was the petitioner in the original less than fair value investigation of this proceeding.⁷ In this circumvention inquiry, Cosco and Lifetime attempted to submit untimely new information in its case brief regarding Mecos’s status as a producer of the domestic like product, or more specifically, as a producer of FMTs; this information was submitted after the deadline for submission of new factual information. The Department rejected this new information as untimely on January 5, 2009.⁸ Consequently, there is no information on the record of this proceeding to support Cosco and Lifetime’s contention that Mecos no longer produces FMTs.

⁷ See *Notice of Final Determination of Sales at Less Than Fair Value: Folding Metal Tables and Chairs from the People’s Republic of China*, 67 FR 20090 (April 24, 2002).

⁸ See January 5, 2009, Letter from the Department to Cosco.

Furthermore, even assuming *arguendo* that Mecos no longer produces FMTs, there is no allegation or record evidence to suggest that Mecos no longer produces other domestic like products such as folding metal chairs, the production of which continues to qualify the company as a producer of the domestic like product. Accordingly, the Department has determined that it will not consider Cosco's and Lifetime's unsupported assertions and, consequently, finds insufficient grounds to terminate this circumvention inquiry. Furthermore, even if Mecos stopped domestic production and imported subject merchandise, as Cosco and Lifetime claim, Mecos would continue to qualify as an interested party under section 771(9)(A) of the Act as an importer of the subject merchandise. Moreover, we disagree with Cosco and Lifetime that *Industrial Belts from Japan* is relevant. In *Industrial Belts from Japan*, the company requesting the anti-circumvention inquiry was never a producer of industrial belts and, as a result, the Department terminated the inquiry because the company did not have standing as a domestic producer of the like product to file the request that gave rise to the inquiry.⁹ However, as stated above, there is no evidence to support Cosco's and Lifetime's untimely assertions that Mecos is no longer a producer of the domestic like product.

Finally, we find that Mecos's reference to prior circumvention inquiries in *Color Television Receivers* and *Hot-Rolled Lead and Bismuth Steel* is not relevant to this discussion.¹⁰ According to Mecos, the Department determined in those cases that a showing of industry support is necessary for initiation of an investigation, but that no such requirement exists for initiation of a circumvention inquiry. Mecos argues further that the statute prohibits reconsideration of the issue of industry support at any stage of a proceeding beyond initiation of the original investigation. While we agree that no showing of industry support, pursuant to section 732(c)(4) of the Act, is necessary for the Department to initiate an anti-circumvention inquiry, the issue raised by Cosco and Lifetime is not whether Mecos filed its inquiry on behalf of the domestic industry, but whether it has standing to file the request as an interested party. As explained above, Mecos qualifies as an interested party. Therefore, the Department has determined not to terminate this anti-circumvention proceeding.

Comment 2: Whether Folding Metal Tables with Cross-Bars Are Expressly Excluded from the Scope

Cosco and Lifetime argue that in the preliminary determination, the Department erroneously concluded that the FMTs with cross-bars were not expressly excluded from the antidumping duty order. According to Cosco and Lifetime, the plain reading of the scope language demonstrates that FMTs with legs that fold as a set are expressly excluded from the scope of the order. Cosco and Lifetime maintain that the Department misinterpreted that scope language by finding that the "folding as a set" exclusionary feature was only relevant to distinguish the excluded banquet

⁹ See *Industrial Belts from Japan*, 59 FR at 23694.

¹⁰ See *Color Television Receivers from Korea: Initiation of Anticircumvention Inquiry on Antidumping Order*, 61 FR 1339, 1342 (January 19, 1996) ("*Color Television Receivers*"); and *Initiation of Anticircumvention Inquiry on Antidumping and Countervailing Duty Orders on Hot-Rolled Lead and Bismuth Carbon Steel Products from the United Kingdom and Germany*, 62 FR 34213, 34215 (June 25, 1997) ("*Hot-Rolled Lead and Bismuth Steel*").

tables from the subject tables. Cosco and Lifetime argue that the Department erroneously ignored the scope language of FMTs not “folding as a set” in the general description of the subject FMTs. Cosco and Lifetime claim that if Mecos intended to exclude banquet tables, it would not have repeated the language regarding legs “folding as a set” twice. Cosco and Lifetime state that this language was included twice for a reason: in relation to FMTs, in general, and banquet tables, in particular.

Cosco and Lifetime further argue that the Courts have held that Department cannot view a particular phrase of the scope language in isolation, nor can it change the scope of the order as a result of misinterpretation.¹¹ According to Cosco and Lifetime, because the scope of the order expressly excludes FMTs with legs that fold as a set, it also excludes FMTs with cross-bars. Cosco and Lifetime state that the Department has made clear that it cannot expand the scope of an order to include products that are specifically excluded, even as part of a circumvention proceeding,¹² but that a product may be brought within the scope of an order where it had not been specifically excluded.¹³

Cosco and Lifetime state that *Wheatland Tube* held “that minor alteration inquiries are inappropriate where the antidumping duty order expressly excludes the allegedly altered product.”¹⁴ Cosco and Lifetime maintain that the scope of the order excludes tables with cross-bars, as they do not fold independently from one another but, instead, fold as a set and, thus, cannot be added to the scope through an anti-circumvention proceeding.

Cosco and Lifetime argue that the scope of the antidumping duty order explicitly and unambiguously excluded tables with legs that fold “as a set.” Cosco and Lifetime argue that *Wheatland Tube* has facts similar to this case, where the court held “that minor alteration inquiries are inappropriate where the antidumping order expressly excludes the allegedly altered product.”¹⁵ According to Cosco and Lifetime, because the scope of the order explicitly excludes

¹¹ Cosco Case Brief, at 6 – 7, and Lifetime Case Brief, at 4 – 5, (citing *Allegheny Bradford Corp. v. United States*, 28 CIT 830, 844, 342 F. Supp. 2d 1172, 1184 (CIT 2004) (“*Allegheny Bradford*”); *Eckstrom Industries, Inc. v. United States*, 161 F.3d 1365, 1370 (Fed. Cir. 1998) (“*Eckstrom Industries*”); and *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1089 (Fed. Cir. 2002) (“*Duferco Steel*”).

¹² Cosco Case Brief, at 8 – 9 (footnote 4), and Lifetime Case Brief, at 6 – 7 (footnote 4), (citing *Final Determination of Sales at Less than fair Value: Certain Internal-combustion, Industrial Forklift Trucks from Japan*, 53 FR 12552 (April 15, 1988); and *Notice of Final Determination of Sales at Less Than Fair Value: Certain Cold-Rolled Carbon Steel Flat Products From Argentina*, 58 FR 37062, 37068 (July 9, 1993)).

¹³ Cosco Case Brief, at 8, and Lifetime Case Brief, at 6 – 7, (citing *Final Determination of Circumvention of the Antidumping Order: Cut-to-Length Carbon Steel Plate from Canada*, 66 FR 7617, 7618 (January 24, 2001) (citing *Nippon Steel Corporation v. United States*, 219 F.3d 1348 (July 26, 2000) (“*Nippon Steel*”).

¹⁴ Lifetime Case Brief, at 7, Cosco Case Brief, at 9, citing *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1370 (November 23, 1998) (“*Wheatland Tube*”).

¹⁵ Lifetime Case Brief, at 7, Cosco Case Brief at 9, citing *Wheatland Tube*, 161 F.3d., at 1370.

FMTs with legs that fold “as a set,” they cannot be added to the scope through an anti-circumvention proceeding.

Cosco and Lifetime argue that the scope language concerning whether legs fold as a set appears twice for a reason. Cosco and Lifetime maintain that the language was included once in reference to tables in general, and once in relation to banquet tables, and that the Department erred in the preliminary determination when it concluded that the language was intended to apply only to banquet tables. Cosco and Lifetime cite several Court rulings in support of their claim that the Department cannot interpret the scope language so as to include products already excluded from the scope. For instance, they cite *Allegheny Bradford*, 342 F. Supp. 2d at 1184, where the Court said that a particular phrase within the scope language cannot be viewed as “an aberration that inadvertently found its way into the {scope language}.” Cosco and Lifetime submit that the courts have held that the Department “cannot interpret an antidumping order so as to change the scope of that order, nor can Commerce interpret an order in a manner contrary to its terms.”¹⁶ In addition, according to Cosco and Lifetime, the Courts have held that “scope orders may be interpreted as including subject merchandise only if they contain language that specifically includes the subject merchandise or may be reasonably interpreted to include it.”¹⁷

Cosco and Lifetime further argue that the International Trade Commission’s (“ITC”) injury determination was based on the folding mechanism of the table legs and Meco intended to exclude all tables that have legs that fold as a set. According to Cosco and Lifetime, the ITC did not find that tables with legs that folded as a set were a cause of injury to the domestic industry.

Finally, Cosco and Lifetime contend that any revision to this scope would create significant enforcement issues because the folding mechanism created a bright-line test for the in-scope merchandise. Cosco and Lifetime argue that Cosco has rectangular FMTs that have a folding mechanism near the top of the table and the difference between these FMTs and banquet tables is not distinguishable. Cosco and Lifetime conclude that under this scenario its rectangular tables with cross-bars would have been included in the scope of the order if they had legs that folded independently. Therefore, according to Cosco and Lifetime, the Department’s preliminary determination should be reversed to properly distinguish between the subject FMTs and banquet tables.

According to Feili, FMTs with cross-bars existed prior to the order because Meco defined the scope to include FMTs with legs that fold independently. Thus, Feili asserts, tables with cross-bars cannot be considered to be a subsequent development, nor can they be considered to be products with minor alterations subject to an affirmative circumvention determination. Feili submits that the facts of the instant inquiry are similar to the facts in which the Court held that “[t]he statute is unambiguous and applies only to merchandise arguably within the scope of the antidumping duty order which is altered to be outside the order, the minor alterations provision

¹⁶ Lifetime Case Brief at 4, Cosco Case Brief at 6, citing *Eckstrom Industries*, 254 F.3d at 1072 (quoting *Wheatland Tube*, 161 F.3d at 1370).

¹⁷ Lifetime Case Brief at 5, Cosco Case Brief at 7, citing *Duferco Steel*, 296 F.3d at 1089.

does not apply to the present case.”¹⁸ Feili argues that because the scope of the order excludes tables with legs that mechanically fold independently of one another, and not as a set, and because FMTs with cross-bars were known products at the time of the issuance of the order, an affirmative final circumvention determination is legally impermissible in light of the CIT’s ruling cited by Feili.

New-Tec argues that the Department does not have the authority to include FMTs with cross-bars as they have been expressly excluded from the scope of the order. According to New-Tec, the scope of the order has described subject FMTs as having “legs that mechanically fold independently of one another, and not as a set.” Additionally, New-Tec states that the exclusion of banquet tables and lawn furniture indicates that FMTs with cross-bars were not intended to be within the scope of the order. New-Tec maintains that banquet tables are contrasted with subject FMTs as having one set of legs that is composed of two individual legs that are affixed together by one or more cross braces using welds or fastening hardware. New-Tec claims that the language used to describe banquet tables and in-scope FMTs suggests that the folding mechanism is a defining factor for both in-scope and excluded FMTs.

Meco argues that it did not expressly exclude FMTs with cross-bars from the scope definition in its petition. Meco further states that it considered the “independently folding leg mechanism” to be a distinguishing feature of the folding metal tables that it included within the scope of the petition, but only because FMTs with cross-bars located near the top of the table did not exist at the time Meco filed its petition, nor did they exist at the time the Department issued its antidumping duty order. Additionally, Meco claims that the subsequent development of this product suggests an effort to circumvent the order through a minor alteration. According to Meco, the Department’s order expressly excluded dual-purpose pipes in *Wheatland Tube*, because petitioners informed the Department and the ITC that they did not intend to cover either of the dual-purpose pipes from the order that included standard pipes. Meco also asserts that these pipes existed at the time of the order and, thus, petitioners expressly excluded them from the scope of the petition in that case. According to Meco, the facts in the FMTs anti-circumvention inquiry are different because FMTs with cross-bars did not exist at the time of the petition. Citing *Wheatland Tube*, Meco asserts that the Court has expressly held that Department has the discretion in a minor-alterations inquiry to determine that a product that does not literally fall within the scope definition may, nevertheless, be found within the scope because it has been only minimally altered from in-scope merchandise:

In essence, section 1677(j)(c)(2) includes within the scope of an antidumping duty order products that are so insignificantly changed from a product covered that they should be considered within the scope of the order even though the alterations remove them from the order’s literal scope.¹⁹

Meco states that FMTs with cross-bars fall within that category.

¹⁸ Feili’s January 12, 2009, Rebuttal Brief at 9, citing *Wheatland Tube v. United States*, 21 CIT 808, 824-6, 973 F. Supp. at 162-4.

¹⁹ *Wheatland Tube*, 161 F.3d at 1371.

According to Meco, in *Nippon Steel*, the Federal Circuit found that the Department appropriately exercised its discretion to conduct a minor-alteration inquiry under the anti-circumvention provisions and distinguished *Nippon Steel* from *Wheatland Tube*, which involved a scope inquiry rather than a minor alterations inquiry. Meco contends that the Federal Circuit found that the conduct of a minor alteration inquiry was appropriate in *Nippon Steel* because *Wheatland Tube* involved products “well known when the order was issued” and, therefore, *Wheatland Tube* “cannot be read as barring Commerce from conducting an inquiry to determine whether the addition of a small amount of boron constituted a minor alteration that still left the product subject to the order.”²⁰ Meco argues that the situation in the instant inquiry is identical to that in *Nippon Steel*, and unlike that in *Wheatland Tube*, in that FMTs with cross-bars were not “well known when the order was issued.”²¹

Meco also argues that the ITC did not premise its injury determination for FMTs solely on the presence or absence of independently folding legs. Meco states that it provided eight different physical characteristics that distinguish excluded banquet tables from the subject FMTs.²² Additionally, Meco asserts that it characterized the leg structure of a banquet tables as “difficult to put one’s legs under the table in order to pull up a chair when seated at either end.”²³ Meco claims that the leg mechanisms in the FMTs with cross-bars are designed to put the cross-bars near the top of the tables in order not to obstruct a person from sitting on the two sides of the table where the cross-bars are located. In this regard, according to Meco, the FMTs with cross-bars are similar to subject FMTs. Meco states that the ITC found that banquet tables were not generally interchangeable with subject FMTs because of the physical characteristics, channels of distribution, customer and producer perception, and prices.

Meco states that the Department has legal authority to find that respondents have engaged in circumvention of the antidumping duty order and that FMTs with cross-bars constitute a minor alteration to in-scope merchandise, because they did not exist when Meco filed the petition.²⁴ For this reason, Meco maintains, the Department and Meco defined an in-scope FMT as a table that contained a mechanism that allowed each leg to independently fold and lock in place.

Meco claims that all of the cases cited by Cosco and Lifetime are irrelevant because they only discuss products that existed at the time the petition was filed and they do not discuss the minor alterations provision of the anti-circumvention law. Finally, Meco argues that there will be no difficulty in identifying FMTs with cross-bars at the time of importation because, with the

²⁰ Meco’s Rebuttal Brief at 9, citing *Nippon Steel*, 219 F.3d at 1356.

²¹ Meco’s Rebuttal Brief at 9.

²² Meco’s Rebuttal Brief, at Exhibit 1.

²³ Meco’s Rebuttal Brief, at Exhibit 1 (quoting Meco’s Pre-Hearing Brief before the ITC at 9 (April 18, 2002)).

²⁴ Meco Case Brief, at 3 – 4, (citing *Wheatland Tube*, 161 F.3d at 1370-71; *Nippon Steel*, 219 F.3d 1348; 19 CFR 351.225(i); and Section 781 of the Act).

exception of the cross-bars located at the top of the tables allowing the legs to fold in sets, these FMTs would possess the same characteristics as the subject FMTs.

Department's Position:

In *Wheatland Tube*, the Federal Circuit held that the Department could not, through a scope inquiry, include a product that had been expressly excluded from the scope of an order.²⁵ However, as we stated in the preliminary determination, the order expressly excludes banquet tables, and the scope language discussing legs folding as a set was included to distinguish banquet tables from in-scope merchandise.²⁶ The exclusionary language of the scope reads as follows:

Specifically excluded from the scope of the order regarding folding metal tables are . . . {b}anquet tables. A banquet table is a rectangular table with a plastic or laminated wood table top approximately 28" to 36" wide by 48" to 96" long and with a set of folding legs at each end of the table. One set of legs is composed of two individual legs that are affixed together by one or more cross-braces using welds or fastening hardware. In contrast, folding metal tables have legs that mechanically fold independently of one another, and not as a set.²⁷

We have determined that the folding metal tables with cross-bars at issue in this inquiry are not expressly excluded from the order. The order expressly excluded banquet tables. Further, the scope language describes the excluded tables in detail, and clearly creates a distinction between the excluded banquet tables from folding metal tables covered by the order. The scope language discussing legs folding as a set was included to distinguish banquet tables from in-scope merchandise. No party has argued that the folding metal tables with cross-bars that are the subject of this inquiry are banquet tables. Instead, Cosco and Lifetime attempt to use language relating to the banquet tables exclusion to create another exclusion for FMTs with cross-bars.

The instant inquiry is further distinguishable from *Wheatland Tube* for the following reasons. First, the Federal Circuit explained that the statement in *Wheatland Tube* that the minor alterations provision does not apply to products unequivocally excluded from the order in the first place “was made in determining the propriety of Commerce’s conducting a scope rather than a minor alterations inquiry.”²⁸ The Federal Circuit in *Nippon Steel* explained that in *Wheatland Tube*, “it did not hold that {the Department} had no authority to conduct a minor alterations inquiry.”²⁹ In addition, the Federal Circuit explained that *Wheatland Tube* involved a

²⁵ See *Wheatland Tube*, 161 F.3d at 1371 (finding that a minor alterations inquiry was unnecessary because the scope specifically excluded triple-certified pipe).

²⁶ See Preliminary Analysis Memo at 8.

²⁷ See *Preliminary Determination*, 73 FR at 63684.

²⁸ See *Nippon Steel*, 219 F. 3d at 1356.

²⁹ See *id.*

scope inquiry related to products, “which were well known when the order was issued, and not . . . a product produced by making allegedly insignificant alterations to an existing product.”³⁰ These distinctions from *Wheatland Tube* made by the Federal Circuit in *Nippon Steel* apply to this anti-circumvention inquiry.

The scope language does not expressly exclude FMTs with cross-bars because, at the time of the order, the FMTs with cross-bars that are subject to this inquiry did not exist.³¹ While the scope language explains that “folding metal tables have legs that mechanically fold independently of one another,” this is not an exclusion of tables with legs that fold as a set. Rather, it describes the subject tables known to exist at the time of the issuance of the order, as a way of contrasting them from the banquet tables that are excluded.

Although FMTs with cross-bars were not expressly excluded from the scope of the order, because they were not known to exist at the time, they were also not specifically included within the scope of the order. Section 781(c) of the Act addresses situations – such as the instant inquiry – where the scope of an order will include a product “altered in form or appearance in minor respects” such that, but for the minor alteration, the product would otherwise be included within the scope. The Federal Circuit in *Wheatland Tube* explained that:

In essence, section 1677(j)(c) {section 781(c) of the Act} includes within the scope of an antidumping duty order products that are so insignificantly changed from a product covered that they should be considered within the scope of the order even though the alterations remove them from the order’s literal scope.³²

Further, the Federal Circuit found in *Nippon Steel* that, in initiating the minor alterations inquiry, the Department was performing a function given it by Congress, *i.e.*, “to determine whether an antidumping duty order has been circumvented by making minor alterations in the form of the product otherwise subject to the order.”³³ The Federal Circuit also stated in *Nippon Steel* that a minor alterations inquiry is appropriate when considering “whether alterations in a product took it outside the scope of the order,” and when the inquiry involves “a product produced by making allegedly insignificant alterations to an existing product.”³⁴ We find this to be relevant to the instant inquiry because, but for the cross-bars located near the table top that connect the legs, enabling the legs to fold in sets, the tables subject to this inquiry otherwise meet the description

³⁰ *See id.*

³¹ *See, e.g.*, New-Tec’s December 22, 2006 Response (“NTQR”), at Exhibit 18; Feili’s December 22, 2006 Response, at 8; and Shichang’s December 22, 2006 Response, at Exhibit 18.

³² *See Wheatland Tube*, 161 F.3d at 1371 (citations omitted).

³³ *See Nippon Steel*, 219 F.3d at 1354.

³⁴ *See Nippon Steel*, 219 F.3d at 1356.

of merchandise subject to the FMTCs order. Consequently, as we have explained,³⁵ we find that the addition of the cross-bar constitutes a minor alteration, consistent with section 781(c) of the Act.

Cosco and Lifetime argue that the Federal Circuit, in *Duferco Steel*, has held that “scope orders may be interpreted as including subject merchandise only if they contain language that specifically includes subject merchandise or may be reasonably interpreted to include it.”³⁶ According to Cosco and Lifetime, the scope language of the FMTCs order fails to meet either requirement and, in fact, contains language that expressly excludes tables with legs that fold as a set, such as those that are subject to this inquiry. Cosco’s and Lifetime’s reference to *Duferco Steel* is not relevant, because it did not involve a minor alterations inquiry but, rather, involved the Department’s ability to interpret the scope language. The purpose of an anti-circumvention inquiry, in contrast, is to determine whether a product that is outside the scope should be included within the scope because it was altered in form or appearance in minor respects.³⁷

Cosco and Lifetime cite several court rulings in support of their claim that the Department cannot interpret the scope language so as to include products already excluded from the scope.³⁸ For instance, Cosco and Lifetime suggest that where *Allegheny Bradford* stated that a particular phrase contained in the scope language cannot be considered an aberration that inadvertently found its way into the order, the description of folding metal tables having legs that fold independently must represent an integral part of the scope of the FMTCs order. Similarly, Cosco and Lifetime claim that *Eckstrom Industries* stated that the Department cannot interpret an antidumping order so as to change the scope of that order, nor can the Department interpret an order in a manner contrary to the terms of the order. First, the Department has not disregarded the scope’s language that describes folding metal tables as having legs that fold independently. On the contrary, we consider that language to be a determinative criterion towards finding certain tables within the scope. In addition, we find that the tables at issue (*i.e.*, FMTs which otherwise match the scope of the order but might be “removed from the order’s literal scope,” as a result of having a cross-bar that allows the legs to fold as a set), did not exist at the time the order went into effect.³⁹ As a result, the Department initiated a minor-alterations inquiry. Further, we find that Cosco’s and Lifetime’s reliance on these cases is inapposite because they did not involve minor alterations inquiries but, instead, involved the Department’s ability to interpret the scope language. In this respect, those cases differed from both the instant inquiry and from *Nippon Steel*, which involve minor alterations inquiries. According to 19 CFR

³⁵ See *Preliminary Determination*, 73 FR 63684.

³⁶ See *Duferco Steel*, 296 F.3d at 1089.

³⁷ See 19 CFR 351.225(i).

³⁸ Cosco’s Case Brief, at 6 - 7, and Lifetime’s Case Brief, at 4 - 5, (citing *Allegheny Bradford*, 28 CIT at 844, 342 F. Supp. 2d at 1172; *Eckstrom Industries*, 254 F.3d 1068, 1072; and *Duferco Steel*, 296 F.3d 1087, 1089).

³⁹ See *Wheatland Tube*, 161 F. 3d at 1371.

351.225(i), the Department “may include within the scope of an antidumping . . . duty order articles altered in form or appearance in minor respects,” such as is the case here.

In considering the matter of folding metal tables with cross-bars, we do not agree with Feili’s assertion that these tables existed prior to the order because Mecos defined the scope to include FMTs with legs that fold independently. On the contrary, the scope language that described subject merchandise as having legs that mechanically fold independently of one another described the FMTs that existed at the time and was repeated as part of the banquet tables exclusion language for the purpose of distinguishing subject tables from one characteristic of banquet tables. Record evidence demonstrates that no Chinese producers made FMTs with cross-bars at the time of the order. Specifically, Feili, New-Tec, Lifetime, and Shichang all stated that they did not produce or sell these tables with cross-bars before the FMTCs order.⁴⁰ Thus, we find that no producer that responded to the Department’s questionnaire claimed that it produced the merchandise that is the subject of this inquiry before the issuance of the FMTCs order. Consequently, the Department determines that FMTs with cross-bars were not expressly excluded from the order by the language at issue because that language was included as a way to distinguish banquet tables from in-scope merchandise.

New-Tec also claims that the technology enabling legs to fold as a set existed long before the 2002 antidumping duty order, as evidenced by the description of banquet tables that are excluded from the order. New-Tec suggests that, had Mecos intended to exclude only banquet tables, and not all tables with legs connected by a cross-bar, it would not have been necessary to describe subject tables as having legs that fold independently. However, the fact that the technology existed prior to the issuance of the order, but that it was applied only to banquet tables and not to subject tables, is precisely why the exclusion of banquet tables included the distinction that banquet tables’ legs “are affixed together by one or more cross-braces.”⁴¹ The scope language draws a clear distinction between banquet tables and subject tables: “In contrast, folding metal tables have legs that mechanically fold independently of one another, and not as a set.”⁴² Drawing such a distinction between banquet tables and subject tables is further evidence that subject tables were not equipped with cross-bars at the time of the petition and investigation; else, legs affixed with cross-bars would not be a distinguishing factor between banquet tables and subject tables, and would be of no use in differentiating between them. New-Tec provided a list of the tables it produces that included the date of development for each table.⁴³ This evidence submitted by New-Tec attests to the fact that the FMTs subject to this inquiry were altered with the addition of the cross-bar after the imposition of the order. Feili also reported that it developed its folding metal tables with cross-bars after the issuance of the FMTCs order.⁴⁴

⁴⁰ See NTQR, at Exhibit 18; Feili’s December 22, 2006, Response, at 8; and Shichang’s December 22, 2006, Response, at Exhibit 18.

⁴¹ See *Preliminary Determination*, 73 FR at 63684.

⁴² See *id.*

⁴³ See NTQR, at Exhibit 18.

⁴⁴ See Feili’s December 22, 2006, Response, at 8.

Shichang also provided a list of the tables it produces that included the date of development for each table.⁴⁵ Each of these dates was again after the issuance of the FMTCs order.⁴⁶

To support its claim that its FMTs with cross-bars can be used interchangeably with the excluded banquet tables, New-Tec argues that the Department had found New-Tec's FMTs with cross-bars to be produced and sold as banquet tables, in spite of the fact that the table tops are not within the dimensions described in the order for banquet tables. However, this is not a reflection of the Department's finding, but merely a summary of one of New-Tec's narrative submissions: "New-Tec states that some of its tables with legs connected by cross-bars are not unequivocally excluded from the scope (*e.g.*, tables produced and sold as 'banquet tables,' but whose table tops are not within the dimensions for banquet tables)."⁴⁷ The Department made no finding regarding the production or sale of FMTs with cross-bars as banquet tables. This is because there is neither evidence to support New-Tec's claim that it produced these tables as banquet tables, nor evidence that either New-Tec or its customer sold these tables as banquet tables. (There is no evidence on the record of New-Tec's advertising any of its products.) On the contrary, as discussed further below in Comment 4, record evidence indicates that FMTs with cross-bars are sold in exactly the same manner as FMTs without cross-bars.

We further disagree with Cosco's and Lifetime's claim that the ITC's injury determination was specifically limited to tables whose legs folded independently and not as a set. As explained elsewhere, the tables subject to this inquiry did not exist at the time of the investigation. Consequently, the ITC's injury determination was based on an investigation of the folding metal tables that existed at the time of the investigation. We found that, but for the minor alteration consisting of the addition of a cross-bar, the tables subject to this inquiry would be covered by the scope. Therefore, the ITC's injury determination is relevant to these tables. Furthermore, while banquet tables were excluded from the scope of the order, the folding mechanism was not the only distinguishing characteristic. There were eight differentiating physical characteristics listed in the *ITC Final Report* that distinguish the excluded banquet tables and, as a result, the ITC found a clear dividing line between folding metal tables (*i.e.*, the domestic like product) and banquet tables based on multiple characteristics, including: length, weight, table top composition, load capacity, and steel tubing gauge.⁴⁸ Most of these characteristics are also listed in the description of the banquet tables excluded from the scope of the order. Therefore, in making its injury determination, the ITC excluded only banquet tables with those characteristics from the investigation. Moreover, for minor alterations anti-circumvention determinations,

⁴⁵ See Shichang's December 22, 2006, Response, at Exhibit 18.

⁴⁶ We also point out that record evidence indicates an overwhelming shift in production away from folding metal tables without cross-bars to folding metal tables with cross-bars, indicating that these latter products did not exist at the time of the order, but were the result of minor alterations to FMTs.

⁴⁷ See Preliminary Analysis Memo, at 9, (citing NTQR, at 3).

⁴⁸ See *ITC Final Determination for Folding Metal Tables and Chairs from the People's Republic of China*, USITC Pub. 3515, Inv. No. 731-TA-932 (June 2002), at 6-9 ("*ITC Final Report*").

section 781(e) of the Act does not require that the Department seek the ITC's advice as to whether a significant injury issue is presented by the proposed inclusion of the products within the scope.

With respect to Cosco's and Lifetime's suggestion that any revision to the scope would create significant enforcement issues, we note as an initial matter that the purpose of this inquiry is not to revise the scope, but to determine whether the addition of the cross-bars constitutes a minor alteration from a product covered by the scope such that they should be considered within the scope of the order. Further, given that the tables subject to this inquiry are clearly distinguishable from the excluded banquet tables, there is no reason to believe that there will be any enforcement issues related to an affirmative finding of circumvention.

Comment 3: Whether Folding Metal Tables with Cross-Bars Are Significantly Different from the In-Scope Merchandise

Cosco argues that FMTs with cross-bars were designed and developed to add strength, stability, and versatility and, thus, represent a significant improvement over FMTs with independently folding legs. According to Cosco, the addition of the cross-bar technology was the result of the company's effort to improve its product lines and meet customer demands.⁴⁹ Cosco maintains that additional testing requirements show that FMTs with cross-bars were required to meet more stringent strength and stability requirements than tables with independently folding legs.⁵⁰

New-Tec claims that its FMTs with cross-bars are significantly different from in-scope merchandise because they are manufactured from its new product line of vacuum molding, referred to as extruded plastic ("EP") products. According to New Tec, these products contain an anti-rusting feature, thus making the product suitable for both indoor and outdoor use. New-Tec submits that the scope of the order excluded lawn furniture as furniture mainly for outdoor use; therefore, New-Tec concludes, its line of extruded plastic products, including FMTs with cross-bars, should be considered out of the scope of the order because they are suitable for outdoor use.

Alternatively, New-Tec states that if the Department finds that FMTs with cross-bars are not excluded from the order, New-Tec's FMTs with cross-bars constitute more than a minor alteration of traditional FMTs without cross-bars. New-Tec argues that it does not sell any FMTs with one cross-bar but, rather, it claims to sell FMTs with multiple cross-bars which, it argues, constitute more than a minor alteration to the traditional FMTs. New-Tec contends that FMTs with multiple cross-bars are significantly different from the FMTs with no, or only one, cross-bar, because its multiple cross-bar technology represents a more sophisticated technology, and contains "additional parts that serve as a cross brace to lock the folding parts."⁵¹ New-Tec

⁴⁹ Cosco's December 21, 2006, Questionnaire Response, at 23.

⁵⁰ Cosco Case Brief, at 16 (citing NTQR at Exhibit 20).

⁵¹ New-Tec's Rebuttal Brief at 8 (quoting NTQR, at 4).

maintains that this significant difference is evidenced by the technology and production, which results in better strength and stability of the FMTs with multiple cross-bars. New-Tec contends that these patented folding mechanisms distinguish its products from other companies' folding metal tables with cross-bars.

New-Tec also argues that there was no explanation in the Department's preliminary determination of circumvention as to why the additional case-specific criteria considered by the Department, (*i.e.*, timing of development, timing of the entries during the period of inquiry, the manner in which the product is advertised and displayed, input of customers in design phase, and advantages/disadvantages of the minor alteration), were justified in this inquiry. New-Tec asserts that the Senate Finance Committee Report outlines the criteria to be applied in a circumvention inquiry where the level of alteration is at issue, and that the test to be applied should be objective. New Tec claims that there was no explanation or justification given by the Department as to the applicability of the tests applied in this inquiry. New-Tec states that its FMTs with cross-bars are used as banquet tables without meeting the dimensions of the banquet tabletops, and its EP series products are dual purpose, referring to their indoor and outdoor use. Finally, New-Tec claims that the cost of modification is different between its FMTs with and without cross-bars, due largely to increased research and development costs and new investments on equipment and facilities, which also serve to differentiate New Tec's products from those of other PRC producers.

According to Meco, none of the respondents submitted documentary evidence to support that FMTs with cross-bars have any of the alleged commercial advantages over FMTs without cross-bars; including strength, stability, efficiency, etc. Meco further argues that none of the respondents advocated potential pricing and production advantages of the FMTs with cross-bars.⁵² Meco alleges that production and export patterns establish that circumvention has occurred. Meco asserts that the Department's preliminary affirmative determination applies to all Chinese producers because since the issuance of the order Chinese exports to the United States of FMTs with cross-bars have increased significantly.

Department's Position:

The purpose of this inquiry is to determine whether folding metal tables with legs that are connected by cross-bars and otherwise meeting the description of in-scope merchandise are circumventing the FMTCs order. The Department preliminarily determined that the addition of cross-bars near the top of the tables constitutes a minor alteration to the subject FMTs. The record supports our continued finding that FMTs with cross-bars are not significantly different from FMTs with no cross-bars. For instance, Feili and New-Tec acknowledged that they produce and sell to the United States certain tables that meet the description of merchandise within the scope of the FMTCs order except for the existence of cross-bars near the table top.⁵³

⁵² Meco cites NTQR at 14; Preliminary Analysis Memo at 21.

⁵³ See Verification of the Minor Alterations Response of Feili in the Anti-circumvention Inquiry, at 2 (August 13, 2007) ("Feili Verification Report"); and Verification of the Minor Alterations Response of New-Tec in the Anti-circumvention Inquiry, at 3 (August 13, 2007) ("New-Tec Verification Report").

With respect to New-Tec's and Cosco's argument regarding the strength testing reports of these tables, as we stated in our preliminary determination, these strength tests do not provide test results showing that they tested the tables to a failure point.⁵⁴ The test results merely show that tables without cross-bars performed as well as the tables with cross-bars within the respective limits to which they were tested.⁵⁵ Thus, we continue to find that the test results do not indicate that the addition of cross-bars improved the strength or stability of folding metal tables.

New-Tec claims that the dual-purpose FMTs with cross-bars are further distinguishable from indoor-only FMTs because, unlike indoor-use FMTs, they function equally well outdoors without fear of rusting. New-Tec suggests that this feature qualifies its FMTs with cross-bars as lawn furniture, which is excluded from the scope of the order. Despite these claims, New-Tec does not advertise these tables as being suitable for outdoor use. New-Tec's product brochure contains pictures of many products, but none of folding metal tables subject to the order, and none of the tables subject to this inquiry.⁵⁶ In fact, New-Tec reported that it "did not incur any marketing and advertising expenses" for either folding metal tables with cross-bars or those without cross-bars,⁵⁷ indicating that it does not promote FMTs with cross-bars as being significantly different from FMTs without cross-bars. In any event, New-Tec's arguments regarding the suitability of outdoor use of its products are not relevant to the instant inquiry. This inquiry only addresses whether folding metal tables with legs that are connected by cross-bars and otherwise meeting the description of in-scope merchandise are circumventing the FMTCs order.

We disagree with New-Tec's claim that, even if the Department finds that FMTs with cross-bars are not expressly excluded from the scope, it should find that New-Tec's FMTs with cross-bars constitute more than a minor alteration to the traditional FMTs. In making this claim, New-Tec emphasizes its production of FMTs with multiple cross-bars as having significant advantages over FMTs with no, or one, cross-bar. However, New-Tec's attempts to distinguish its tables from other folding metal tables with cross-bars are not supported by record evidence. New Tec provided photos of tables with no cross-bar, a single cross-bar, and multiple cross-bars.⁵⁸ The legs on the tables with multiple cross-bars are connected by two cross-bars, which form a locking mechanism. New-Tec asserts that its patented designs for this locking mechanism distinguish New-Tec's tables from other folding metal tables; however, despite claiming that this mechanism is more than a "minor" alteration, because it requires additional parts to create the locking feature, New-Tec acknowledges that the "additional parts {do} not necessarily add great

⁵⁴ See Preliminary Analysis Memo, at 23.

⁵⁵ See *id.*

⁵⁶ See NTQR, at Exhibit 3.

⁵⁷ See NTQR, at 16.

⁵⁸ See NTQR, at Exhibit 4.

cost or increase the selling price of New-Tec’s folding metal tables,”⁵⁹ Notwithstanding New-Tec’s arguments, the inquiry is not limited to tables with a single cross-bar.⁶⁰

New-Tec argues that the Department did not provide any explanation regarding its selection of case-specific criteria that it applied in addition to the Senate Report Criteria in making its preliminary determination. As we stated in our preliminary determination:

In the case of an allegation of a “minor alteration” claim under section 781(c) of the Act, it is the Department’s practice to look at the five factors listed in the Senate Finance Committee report to determine if circumvention exists in a particular case. Each anti-circumvention review is highly dependent on the facts on the record, and must be analyzed in light of those specific facts. Thus, in anti-circumvention cases we have historically analyzed several additional criteria to determine if circumvention of the order is taking place.⁶¹

The list of criteria in the Senate Finance Committee report is not exhaustive, nor does the statute list any specific criteria that the Department must review in an anti-circumvention inquiry.⁶² Because each anti-circumvention inquiry is highly dependent on the facts on the record, the Department has historically analyzed several additional criteria to determine if circumvention of the order is taking place.⁶³ Therefore, Congress has given the Department authority to determine the relevant criteria to review in a given case.⁶⁴ Thus, for this final determination, we continue to rely on the criteria that we considered in making our preliminary determination. Notwithstanding New-Tec’s arguments, we find the additional criteria relevant in determining whether FMTs with cross-bars constitute articles that have been altered in form or appearance in minor respects and, thus, are subject to the order. For instance, because New-Tec claims that the folding mechanism was already an established, well-known technology, the “timing of

⁵⁹ See NTQR, at 4.

⁶⁰ See “Folding Metal Tables and Chairs from the People’s Republic of China: Initiation of Anti-Circumvention Inquiry” (June 1, 2006) (“Anti-Circumvention Initiation”) (the Department initiated an anti-circumvention inquiry “to determine whether exports to the United States of folding metal tables affixed with crossbars that enable the legs to fold in pairs are circumventing the antidumping duty order on folding metal tables and chairs from the PRC.”)

⁶¹ See *Preliminary Determination*, 73 FR at 63685 (citing, e.g., *Preliminary Determination of Circumvention of Antidumping Order; Cut-to-Length Carbon Steel Plate from Canada*, 65 FR 64926, 64929 - 31 (October 31, 2000)).

⁶² See section 781(c) of the Act. See also Senate Finance Committee Report, at 100.

⁶³ See, e.g., *Preliminary Determination of Circumvention of Antidumping Order; Cut-to-Length Carbon Steel Plate from Canada*, 65 FR 64926, 64929 (October 31, 2000) (unchanged in final results, 66 FR 7617, 7618 (January 24, 2001)), where the Department considered the following additional criteria: “(i) the circumstances under which the subject products entered the United States, (ii) the timing of these entries during the circumvention review period, and (iii) the total quantity of the merchandise entered during this period.” See also *Brass Sheet and Strip from Germany; Negative Preliminary Determination of Circumvention of Antidumping Duty Order*, 55 FR 32655 (August 10, 1990).

⁶⁴ See *Chevron, U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984).

development” and “timing of the entries during the period of inquiry” are relevant considerations in this anti-circumvention inquiry.

We also find that “the manner in which the product is advertised and displayed,” “input of customers in design phase,” and “advantages/disadvantages of the minor alteration” are relevant in that they speak to the question of whether the product truly represents a minor alteration, or whether the modification is such that the table is not subject to the order. In other words, finding no difference in the manner in which FMTs with cross-bars are advertised and displayed, no customer input in the design phase, and no significant advantages of the alteration, supports the finding that the tables are insignificantly changed as a result of the minor alteration.

New-Tec’s discussion of the cost of modification references New-Tec’s research and development (“R&D”) expenses and new investments related to the production of FMTs with cross-bars. However, New-Tec’s argument is contradicted by its own submission. For instance, in arguing about the high level of R&D expenses related to the production of FMTs with cross-bars, New-Tec indicated the level of R&D expenses that it reported as being related to non-table products. Its R&D for non-table products represented a preponderance of New-Tec’s reported R&D expenditure for fiscal year 2004.⁶⁵ Second, when discussing additional costs associated with the production of FMTs with cross-bars, New-Tec explained that it “is unable to quantify the difference in labor and overhead costs as its accounting system does not track a proper base for labor and overhead allocation.”⁶⁶ Thus, New-Tec was unable to demonstrate any significant additional labor and overhead costs for its FMTs with cross-bars. Consequently, we find that record evidence does not support New-Tec’s claim that it incurred significant costs in modifying its folding metal tables to include cross-bars.

Finally, we disagree with New-Tec’s contention that the Department should make its determination on a company-specific basis. The basis for this argument is New-Tec’s assertion that its tables are significantly different than FMTs with one, or no, cross-bars, because the legs of its tables are connected by multiple cross-bars. However, regardless of the specifics of how each respondent’s table folds, the Department’s determination covers FMTs with cross-bars, as defined above.

Comment 4: Whether Folding Metal Tables with Cross-Bars Represent a Significant Improvement over Folding Metal Tables with Independently Folding Legs

Cosco argues that FMTs with cross-bars feature major structural differences from other tables that have independently folding legs and, thus, the addition of the cross-bars does not constitute a minor alteration, as defined by section 781(c) of the Act. Cosco argues that all producers and exporters had stated in their questionnaire responses that FMTs with cross-bars are stronger,

⁶⁵ See NTQR, at 10 and Exhibit 14.

⁶⁶ See *Id.* at 17.

more stable, and easier to fold.⁶⁷ Cosco further argues that the addition of the cross-bars, even near the top, represented a significant improvement to the tables subject to this inquiry. Cosco maintains that New-Tec's testing requirements show that the tables with cross-bars were required to meet more stringent strength and stability requirements than tables with independently folding legs.

Additionally, Cosco argues that FMTs with cross-bars were designed to meet general consumer interest in newer, innovative products. Cosco states that the producers were not responsible for marketing the products; therefore, the Department erred in its preliminary finding that their questionnaire responses did not necessarily differentiate between FMTs with and without cross-bars. Cosco maintains that it is Cosco, not the producers, who advertises these tables differently, as easier to use, having more seating capacity and sturdier than traditional tables.

Meco argues that it agrees with the Department's preliminary determination that there is no documentary evidence to support Cosco's claim that FMTs with cross-bars contain commercial advantages of over traditional FMTs. Finally, Meco argues that Cosco did not point out any use of an FMT with cross-bars for which a traditional FMT is not suitable.

Department's Position:

The Department continues to find that that the addition of cross-bars near the table top provided no significant improvement over tables without cross-bars. As explained in the preliminary determination, given that the cross-bars are in a location that minimizes any added benefit that is gained from the addition of the cross-bars, we determined that the producers did not add the cross-bars primarily in order to gain additional strength or stability.⁶⁸ We further explained that some of the purported advantages attributed to cross-bars, *i.e.*, elimination of pinch points and quicker folding time, have not been documented either as problems to begin with, or as having been resolved with the addition of cross-bars.⁶⁹ Moreover, we noted that, not only are these supposed advantages not used in promoting the addition of the cross-bars, but Cosco's, as well as other companies', advertisements for folding metal tables do not indicate that a cross-bar exists, let alone that it represents an advantage over tables without cross-bars.⁷⁰

Cosco's reference to the respondents' questionnaire responses reflects the parties' narrative responses without citing to any evidence to demonstrate that FMTs with cross-bars provide more strength and stability to these products compared to traditional FMTs. We have already addressed in Comment 3, above, Cosco's argument regarding the testing requirements, where we explained that the test results merely showed that tables without cross-bars performed as well as

⁶⁷ Cosco Case Brief, at 14 (citing NTQR, at 23; Shichang's Questionnaire Response, at 23; and Feili's Questionnaire Response, at 23).

⁶⁸ See Preliminary Analysis Memo, at 24.

⁶⁹ See *id.*

⁷⁰ See *id.*

the tables with cross-bars within the respective limits to which they were tested. Therefore, the test results do not demonstrate that the addition of cross-bars improved the strength or stability of folding metal tables. Accordingly, we determine that evidence on the record does not support Cosco's claim that FMTs with cross-bars were designed and developed to add strength, stability, and versatility to FMTs subject to the order.

Further, Cosco claims that the record evidence demonstrates that Cosco markets and advertises FMTs with cross-bars differently than traditional FMTs,⁷¹ but Cosco does not cite to any record evidence to substantiate its claim, other than stating that New-Tec and Feili are not the parties responsible for advertising and marketing. With respect to this issue, we found in the preliminary determination that “{n}o PRC exporter or producer claims that it differentiates between folding metal tables with and without cross-bars with respect to marketing or advertising.”⁷² However, we wish to clarify that in the preliminary determination we also considered the manner in which the products were advertised and displayed by the distributors, who are the customers of the PRC exporters.⁷³ It is appropriate to consider the manner in which these products are displayed by the customer, because the customer's customer is the ultimate end user of the product.

We continue to find that there is no evidence that any party advertizes FMTs with cross-bars as a significant improvement over FMTs without cross-bars. Therefore, Cosco's claim that it markets and advertises FMTs with cross-bars differently than traditional FMTs is belied by contradictory record evidence. For example, Cosco, in its December 21, 2006 submission, stated that the tables it imports to the United States that are subject to this inquiry are the Endura tables 14-134 and 14-149. However, Cosco also submitted pictures that indicate Endura tables 14-134 and 14-149 do not have legs connected by cross-bars.⁷⁴ Cosco's website advertises the Endura tables 14-134 and 14-149 (the tables that it claims have been redesigned to include cross-bars) with pictures that indicate the Endura tables are folding metal tables without cross-bars,⁷⁵ and the narrative descriptions make no reference to whether the Endura tables have cross-bars.⁷⁶ Cosco also issued a press release announcing the Endura folding metal tables, but this press release does not note the existence of cross-bars in its list of improvements that the Endura tables contain.⁷⁷ Furthermore, Samsonite's website also contains pictures advertising Endura folding metal tables, with no mention of whether the Endura tables have legs connected by cross-bars.⁷⁸

⁷¹ See Cosco's Case Brief, at 19 (January 7, 2009).

⁷² See Preliminary Analysis Memo, at 19.

⁷³ See Preliminary Analysis Memo, at 18-19.

⁷⁴ See Cosco's December 21, 2006, Submission, at Exhibit 1.

⁷⁵ See Cosco's December 21, 2006, Submission, at 1, 2, 3, and 4 and Exhibit 1; Preliminary Analysis Memo, at Exhibit 3.

⁷⁶ See Preliminary Analysis Memo, at Exhibit 3.

⁷⁷ See *id.*, at Exhibit 5.

⁷⁸ See *id.*, Exhibit 6.

The record contains a list of tables with legs connected by cross-bars identical to the tables subject to the scope of the order except for the addition of cross-bars placed near the table top, identified by product codes 14-619-CHB, 14-349, and 14-551.⁷⁹ The record further shows product codes 14-619-CHB, 14-349, and 14-551 advertised on the Cosco website with photographs that indicate that they do not have legs connected by cross-bars.⁸⁰ Ace Hardware's website also advertises 14-619-NAT, with a picture that indicates that it has legs that are not connected by cross-bars.⁸¹ Additionally, Amazon's website provides photographs of table 14-619-CHB that indicate that it does not have legs connected by cross-bars.⁸² Based on our review of these companies' websites, we conclude that the record does not support Cosco's claims that it markets and advertises FMTs with cross-bars differently than traditional FMTs. On the contrary, there is no evidence that any companies' advertizing differentiates between FMTs with cross-bars and FMTs without cross-bars. However, Cosco argues that the Department failed to adequately weigh its world-wide advertizing of FMTs with and without cross-bars. In the preliminary determination we explained:

While Cosco stated that tables with cross-bars were marketed worldwide within the Endura line family of products, it failed to address how this is different than the way in which tables without cross-bars are marketed, or how any activities it uses to sell tables with cross-bars are distinct from activities used to sell tables without cross-bars. On the contrary, as Exhibit 8 of this memorandum demonstrates, Cosco's tables are sold through the same channels, regardless of whether or not they have a cross-bar.⁸³

We find no evidence on the record to support Cosco's claim that FMTs with cross-bars were designed to meet general consumer interest in newer, innovative products. Specifically, no party has submitted any evidence of customer requests for FMTs with cross-bars, nor even of customer requests for tables that are stronger, more stable, easier to fold, or have no pinch points, all reasons claimed by Cosco. Notwithstanding the fact that there is no record evidence supporting customer requests for such allegedly improved table designs, the record also shows an absence of any party advertising the cross-bars as an improvement. Therefore, we find no evidence to support the claim that FMTs with cross-bars represent a significant improvement over FMTs with independently folding legs.

⁷⁹ *See id.*, at 18.

⁸⁰ *See id.*, at Exhibit 8.

⁸¹ *See id.*, at Exhibit 9.

⁸² *See id.*, at Exhibit 10.

⁸³ *See id.*, at 18.

Comment 5: Whether to Deny Feili's Revocation Request

Meco contends that the Department should deny Feili's revocation request. According to Meco, the Department's scope inquiry and revocation regulations contemplate that the existence and outcome of anti-circumvention investigations will be considered in administrative reviews.⁸⁴ Meco states that based on the export patterns documented in the Preliminary Analysis Memo, it can be inferred that Feili engaged in circumvention and, therefore, the Department should not reward Feili with the benefit of revocation. Meco asserts that before considering Feili's revocation request, the Department should first document that Feili has not dumped in-scope merchandise, including FMTs with cross-bars, during three consecutive review periods.

Feili argues that the Department should disregard Meco's comments on Feili's request for revocation because parties' comments should be limited to the preliminary results. According to Feili, the current proceeding is separate from the revocation consideration in the administrative review. Feili argues that it meets the Department's three-prong revocation test pursuant to 19 CFR 351.222(e). Feili further argues that because it received a *de minimis* margin in every review, there is no reason to believe that Feili would make sales below normal value on the FMTs with cross-bars, if they were treated as in-scope merchandise. Finally, Feili notes that in accordance with 19 CFR 351.225(l)(4), if the Department issues a final scope ruling more than 90 days after the initiation of a review, the Department "may consider sales of the product for purposes of the review on the basis of non-adverse facts available; however, Feili submits that not revoking the antidumping duty order with respect to Feili is tantamount to the application of adverse facts available.

Department's Position:

Decisions on whether or not to revoke an order are made in the context of the administrative review for which a request for revocation was properly made, pursuant to 19 CFR 351.222. The Department addressed this issue in the final results of the 2006-2007 administrative review, denying Feili's request for revocation because the Department determined that, if Feili has been circumventing the order, the Department might reasonably conclude that Feili's successive periods of *de minimis* margins are not truly indicative of its behavior towards to the U.S. market.⁸⁵ Because the Department granted Feili's request for deferral of the 2007-2008 review,⁸⁶ the Department will analyze Feili's sales of FMTs with cross-bars in that review in order to determine whether Feili meets the criteria for revocation.

⁸⁴ Meco's Case Brief, at 12, (citing *Final Results of Antidumping Duty Administrative Reviews and Determination not to Revoke in Part: Certain Corrosion-Resistant Carbon Steel Flat Products and Cut-to-Length Plate from Canada*, 66 FR 3543 (January 16, 2001) ("CTL Plate from Canada")).

⁸⁵ See *Folding Metal Tables and Chairs from the People's Republic of China: Final Results of the Antidumping Duty Administrative Review*, 74 FR 3560 (January 21, 2009), and accompanying Issues and Decision Memorandum, at Comment 3B.

⁸⁶ See *Initiation of Antidumping and Countervailing Duty Administrative Reviews, Request for Revocation in Part, and Deferral of Administrative Review*, 73 FR 44220, 44221 (July 30, 2008).

RECOMMENDATION

We recommend that, pursuant to section 781(c) of the Act and 19 CFR 351.225, the Department issue a final affirmative circumvention determination that folding metal tables with legs that are connected by cross-bars and otherwise meeting the description of in-scope merchandise are circumventing the antidumping duty order on FMTCs from the PRC.

Agree

Disagree

Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

Date