

UNITED STATES COURT OF INTERNATIONAL TRADE

FEILI GROUP (FUJIAN) CO.,
LTD., FEILI FURNITURE
DEVELOPMENT LIMITED QUANZHOU
CITY

Plaintiffs,

and

COSCO HOME AND OFFICE
PRODUCTS

Plaintiff-
Intervenor

v.

UNITED STATES,

Defendant,

and

MECO CORPORATION,

Defendant-
Intervenor.

Before: Richard W. Goldberg,
Senior Judge

Court No. 09-00068

OPINION

[Commerce's final antidumping duty administrative review
determination is sustained.]

Dated: September 23, 2010

Trade Pacific, PLLC (Robert George Gosselink and Jonathan
Michael Freed) for Plaintiffs Feili Group (Fujian) Co., Ltd. and
Feili Furniture Development Limited Quanzhou City.

Kelley Drye & Warren, LLP (Mary Tuck Staley) for Plaintiff-Intervenor Cosco Home and Office Products.

Tony West, Assistant Attorney General; Jeanne E. Davidson, Director, Reginald T. Blades, Jr., Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (L. Misha Preheim and Carrie Anna Dunsmore); Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (Brian Soiset), Of Counsel, for Defendant United States.

Akin, Gump, Strauss, Hauer & Feld LLP (Warren E. Connelly) for Defendant-Intervenor Mecor Corporation.

GOLDBERG, Senior Judge: Plaintiffs Feili Group (Fujian) Co., Ltd. and Feili Furniture Development Limited Quanzhou City (collectively "Feili") and Plaintiff-Intervenor Cosco Home and Office Products¹ challenge the final results of the underlying fifth administrative review issued by the Department of Commerce ("Commerce" or "the Department") in Folding Metal Tables and Chairs from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 74 Fed. Reg. 3,560 (Dep't Commerce Jan. 21, 2009) ("Final Results").

I. STATEMENT OF THE FACTS

The antidumping duty order on imports of folding metal tables and chairs from the People's Republic of China was first

¹ During the underlying administrative review period, Cosco Home and Office Products imported certain metal folding chairs and tables from Plaintiffs. As Plaintiff-Intervenor, Cosco chose not to file a separate brief addressing Feili's Rule 56.2 motion. By letter, it expressed support for the arguments advanced by Feili. Letter from Kelley Drye & Warren in Response to June 23, 2009 Scheduling Order, Docket No. 37 (Aug. 7, 2009).

issued in June 2002. Antidumping Duty Order: Folding Metal Tables and Chairs from the People's Republic of China, 67 Fed. Reg. 43,277 (Dep't Commerce June 27, 2002) ("Antidumping Duty Order"). Three consecutive subsequent antidumping duty administrative reviews found that Feili was not dumping or was dumping at de minimis levels. Folding Metal Tables and Chairs from the People's Republic of China: Final Results of Antidumping Duty Administrative Review, 71 Fed. Reg. 2,905 (Dep't Commerce Jan. 18, 2006) (second administrative review); 71 Fed. Reg. 71,509 (Dep't Commerce Dec. 11, 2006) (third administrative review); 72 Fed. Reg. 71,355 (Dep't Commerce Dec. 17, 2007) (fourth administrative review).

Pursuant to Commerce's issuance of an opportunity to request an administrative review, Feili requested review of its sales of subject merchandise for the period from June 1, 2006 through May 31, 2007 in the fifth administrative review. Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation: Opportunity To Request Administrative Review, 72 Fed. Reg. 30,542 (Dep't Commerce June 1, 2007). Feili's request for an administrative review included a request for revocation of the Antidumping Duty Order. Letter from Trade Pacific PLLC to the Assistant Secretary for Import Administration, Admin. R. Pub. Doc. 4 (June 29, 2007).

On July 14, 2008, Commerce issued its preliminary results for the period of the underlying review, calculating a de minimis dumping margin for Feili's sales, and indicating its intent to revoke the order. Folding Metal Tables and Chairs from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review and Intent to Revoke in Part, 73 Fed. Reg. 40,285 (Dep't Commerce July 14, 2008) (preliminary results). Commerce preliminarily found that Feili had satisfied the regulatory requirements for revocation detailed at 19 C.F.R. § 351.222(b)(2). Id. at 40,292. The intention to revoke was based, in part, on Commerce's preliminary determination that Feili had demonstrated three consecutive years of sales at not less than normal value, one of the three regulatory requirements for revocation. Id. Commerce also preliminarily determined that the continued application of the order to Feili was not otherwise necessary to offset dumping, another regulatory requirement under 19 C.F.R. § 351.222(b)(2). Id.

At the same time Commerce was conducting the underlying administrative review, Commerce was conducting an anti-circumvention inquiry (also referred to as a "scope inquiry"). On October 31, 2005, prior to the start of the third administrative review, domestic producer and Defendant-Intervenor Mecor Corporation ("Mecor") requested that Commerce

review the scope of the antidumping order to determine whether imports of certain folding metal tables with cross-bars were circumventing the Antidumping Duty Order. Affirmative Preliminary Determination of Circumvention of the Antidumping Duty Order on Folding Metal Tables and Chairs from the People's Republic of China, 73 Fed. Reg. 63,684 (Dep't Commerce Oct. 27, 2008) (preliminary determination) ("Affirmative Preliminary Determination of Circumvention"). On June 1, 2006, coinciding with the first day of the fifth administrative review period, Commerce initiated a formal scope inquiry relating to minor alterations with respect to folding metal tables and chairs. Id., see generally Tariff Act of 1930, § 781(c), 19 U.S.C. § 1677j(c) (2006).²

The order defined folding metal tables as having "legs that mechanically fold independently of one another, and not as a set." Antidumping Duty Order, 67 Fed. Reg. at 43,278. Commerce preliminarily determined that the folding metal tables with cross-bars at issue in the scope inquiry ("cross-bar tables") "are not expressly excluded from the order" and are within the class or kind of merchandise subject to the Antidumping Duty Order. Affirmative Preliminary Determination of Circumvention, 73 Fed. Reg. at 63,685-86. Commerce concluded

² Further citations to the Tariff Act of 1930 are to the relevant portions of Title 19 of the U.S. Code, 2006 edition.

that there were no "significant differences in expectations of the ultimate users, uses of the merchandise, and channels of marketing between folding metal tables with and without cross-bars" and that "the cost of adding cross-bars to tables in the course of production is negligible." Id. at 63,686. Commerce issued its preliminary determination that certain cross-bar tables were circumventing the duty order on October 27, 2008. Id. at 63,684. This affirmative preliminary finding of circumvention was made after the issuance of the preliminary determination to revoke the order, but prior to the issuance of Commerce's Final Results in the underlying administrative review, which included Commerce's final revocation determination. In accordance with section 351.225(1)(2) of Commerce's regulations, Commerce directed U.S. Customs and Border Protection ("Customs") to suspend liquidation of the subject cross-bar tables entered, or withdrawn from warehouse, for consumption on or after June 1, 2006, the date of the initiation of the scope inquiry. Id. at 63,684; see generally 19 C.F.R. 351.225(1)(2).

In light of the Affirmative Preliminary Determination of Circumvention, Commerce placed the public Federal Register notice and the accompanying public version of the analysis memorandum from the scope inquiry into the record of the underlying administrative review. Memo from Analyst to File:

Opportunity to Comment on Affirmative Preliminary Determination of Circumvention, Admin. R. Pub. Doc. 130, (Nov. 12, 2008).

Commerce requested that parties comment on the relevance of these scope inquiry findings to the revocation of the order in the underlying administrative review.³ Id.

In the Final Results, issued on January 21, 2009, Commerce reversed its preliminary determination and denied Feili's request for revocation in part in light of Commerce's then pending scope inquiry. Final Results, 74 Fed. Reg. at 3,562. On May 6, 2009, Commerce issued a final ruling in the scope inquiry sustaining its preliminary determination that the cross-bars tables at issue are within the class or kind of merchandise subject to the Antidumping Duty Order. Affirmative Final Determination of Circumvention of the Antidumping Duty Order on Folding Metal Tables and Chairs from the People's Republic of China, 74 Fed. Reg. 20,920 (Dep't Commerce May 6, 2009) (final determination) ("Affirmative Final Determination of Circumvention"). In the Affirmative Final Determination of Circumvention, Commerce explained that while it normally instructs Customs to continue the suspension of liquidation that

³ Upon Commerce's invitation, two parties chose to comment. Plaintiff-Intervenor Cosco submitted comments. Letter from Kelley Drye to the Secretary of Commerce, Admin. R. Pub. Doc. 131, (Nov. 24, 2008). Defendant-Intervenor Meco also responded. Letter from Akin Gump to the Secretary of Commerce, Admin. R. Pub. Doc. 132, (Nov. 24, 2008).

was already instructed in an affirmative preliminary determination of circumvention, doing so in the instant inquiry would include merchandise that entered during a completed review period, i.e. the underlying fifth administrative review. Id. at 20,922. Therefore, Commerce ordered Customs to suspend liquidation of entries as of June 1, 2007,⁴ the first day of the only pending administrative review period of the duty order at the time. Id.

In contesting the Final Results, Feili argues that Commerce misapplied the regulatory criteria guiding revocation detailed at 19 C.F.R. § 351.222(b). Feili claims that Commerce improperly considered the preliminary results of the anti-circumvention inquiry and the pending anti-circumvention inquiry when making the revocation decision. Feili argues that: (1) the anti-circumvention inquiry was irrelevant to the revocation determination; (2) it met the regulatory requirement of three years of no or de minimis dumping "on its face"; (3) there was no positive evidence on the record to indicate that continuation of the order was otherwise necessary to offset dumping; (4)

⁴ The reference to July 1, 2007 rather than June 1, 2007 in the Federal Register notice is presumed to be a typographical error. See Affirmative Final Determination of Circumvention, 74 Fed. Reg. at 20,922. The instruction issued to Customs identified the liquidation suspension date as June 1, 2007. See Customs Message No. 9148202, A-570-868 (May 28, 2009) available at <http://addcvd.cbp.gov/index.asp?docID=9148202&qu=a570868&vw=detail> (last visited Sept. 22, 2010).

Commerce employed an incorrect legal standard in reaching its revocation determination; and (5) Commerce acted unreasonably and unfairly in the timing and duration of the anti-circumvention inquiry and in its failure to conduct the inquiry in conjunction with the antidumping review. Accordingly, Feili asserts that Commerce's determination to deny revocation in part in the Final Results must be reversed.

For the reasons explained below, the Plaintiffs' arguments fail. Commerce's determination in the Final Results is supported by substantial evidence and is in accordance with law.

II. JURISDICTION AND STANDARD OF REVIEW

The Court has jurisdiction pursuant to 28 U.S.C. § 1581(c) (2006).

This Court holds as unlawful agency determinations that are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i) (2006). "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consol. Edison Co. v. NLRB, 305 U.S. 197, 229, 59 S. Ct. 206, 83 L. Ed. 126 (1938). Substantial evidence is measured by the record as a whole, "including whatever fairly detracts from the substantiality of the evidence." Atl. Sugar, Ltd. v. United

States, 744 F.2d 1556, 1562 (Fed. Cir. 1984). Substantial evidence "is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Consolo v. Fed. Maritime Comm'n, 383 U.S. 607, 620, 86 S. Ct. 1018, 16 L. Ed. 2d 131 (1966). The Court need only find evidence "which could reasonably lead" to the conclusion drawn by Commerce, thus making it a "rational decision." Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927, 933 (Fed. Cir. 1984).

In analyzing an agency's construction of a statute, the Court must first determine whether Congress has spoken directly on the issue. Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). If the statute is silent on the issue or if the Court determines that the statute is ambiguous, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." Id. at 843. Deference is given to the agency's reasonable interpretation. Id. at 844; Corus Staal BV v. Dep't of Commerce, 395 F.3d 1343, 1346 (Fed. Cir. 2005).

III. DISCUSSION

Commerce considers three regulatory criteria in determining whether to revoke an antidumping duty order in part:

1) whether the exporter or producer has sold the merchandise at not less than normal value for a period of at least three consecutive years; 2) whether the exporter or producer agrees in writing to immediate reinstatement of the order if Commerce later concludes that the subject merchandise was sold at less than normal value; and 3) whether the continued application of the order is otherwise necessary to offset dumping. 19 C.F.R. § 351.222(b)(2)(i). Based upon these criteria, if Commerce determines that the order is no longer warranted, Commerce "will revoke the order as to those producers or exporters." 19 C.F.R. § 351.222(b)(2)(ii).

In light of its then pending anti-circumvention investigation and the affirmative preliminary finding of circumvention, Commerce found that Feili did not satisfy the first and third regulatory requirements for revocation under 19 C.F.R. § 351.222(b)(2)(i).⁵ Final Results, 74 Fed. Reg. at 3,562 and accompanying Issues and Decision Memorandum, A-570-868 (Jan. 12, 2009), Admin. R. Pub. Doc. 140, cmt. 3B, available at <http://ia.ita.doc.gov/frn/summary/PRC/E9-1106-1.pdf> (last

⁵ Commerce stated that "until the Department can be satisfied that Feili's sales of circumventing merchandise are not dumped, we cannot determine whether Feili has satisfied two of the three requirements for revocation, i.e., that Feili has not dumped for at least three consecutive years and that the continued application of the antidumping duty order is not otherwise necessary to offset dumping." Decision Memorandum, cmt. 3B at 12.

visited Sept. 22, 2010) ("Decision Memorandum"). Accordingly, Commerce did not revoke the antidumping order with respect to Feili. Final Results, 74 Fed. Reg. at 3,562.

Feili claims that Commerce's determination not to revoke the duty order was not based on substantial evidence and not in accordance with the law.

A. Commerce's determination that Feili did not satisfy the threshold requirement for revocation is based on substantial evidence and in accordance with law.

The first requirement for revocation, referred to as the "threshold" requirement, examines a party's past behavior to determine whether the party covered by the order has established three consecutive years of no dumping. See 19 C.F.R. 351.222(b)(2)(i)(A); Amended Regulation Concerning the Revocation of Antidumping and Countervailing Duty Orders, 64 Fed. Reg. 51,236, 51,238 (Sept. 22, 1999) (final rule) ("Amended Revocation Regulation").⁶

In assessing Feili's revocation request, Commerce determined that "the issue of whether Feili is engaged in circumventing the antidumping duty order is relevant to whether Feili has satisfied the criteria for revocation under 19 C.F.R. § 351.222." Decision Memorandum, cmt. 3B at 11. Feili contends

⁶ In the Amended Revocation Regulation, Commerce explains in further detail the amended final rule concerning the revocation of antidumping duty orders, responds to comments received during the rulemaking process, and discusses changes from earlier versions of the rule.

that Commerce's scope inquiry is irrelevant to determining whether Feili has satisfied the criteria for revocation, reasoning that a scope inquiry is not intended to determine the existence of dumping. However, the issue is not whether the specific purpose of a scope inquiry is to determine whether merchandise is being sold at less than fair value. Rather, the issue is whether the scope inquiry properly bears on the regulatory requirements for revocation.

Commerce's scope inquiry relates to the accuracy of Feili's prior dumping margin calculations. In a scope inquiry concerning minor alterations of merchandise, Commerce determines whether or not the merchandise at issue is within the class or kind of merchandise subject to an antidumping duty order. 19 U.S.C. § 1677j(c) (2006); 19 C.F.R. § 351.225(i); see also Affirmative Preliminary Determination, 73 Fed. Reg. at 63,685. An affirmative finding of circumvention indicates that merchandise subject to the scope of the order, in this case cross-bar tables, was not included in the calculation of previous dumping margins, thereby indicating that such margin calculations did not reflect all subject merchandise being sold in the United States. Accordingly, circumvention of an order relates to Commerce's determination as to whether a party has not dumped all merchandise covered by the order for three

consecutive years and satisfied the threshold requirement for revocation under 19 C.F.R. § 351.222(b)(2)(i).

In this case, the affirmative preliminary finding of circumvention, at a minimum, called into question the accuracy of Feili's prior dumping margins because merchandise preliminarily determined to be within the scope of the order was not included in the calculation of those margins. Given the relevance of the then pending scope inquiry and the affirmative preliminary finding of circumvention on the accuracy and reliability of Feili's prior margin calculations, Commerce lawfully considered Feili's possible circumvention of the order in determining whether Feili satisfied the threshold requirement for revocation. See, e.g., Samsung Elecs. Co. v. United States, 20 CIT 1306, 1311, 946 F. Supp. 5, 10-11 (1996) (finding it "unreasonable to order revocation remand results earlier than the completion of the related anti-circumvention and changed circumstances reviews" despite four years of de minimis margin calculations).

Feili maintains that, even if the scope inquiry were relevant to the revocation decision, it could only be relevant with respect to the fifth administrative review since the second, third, and fourth reviews covered merchandise that entered U.S. Customs territory before Commerce initiated the

scope inquiry.⁷ Feili further asserts that the de minimis calculation in the Final Results of the fifth period of review ("POR") is undisturbed by the scope inquiry because Commerce did not collect antidumping duties on cross bar-tables until after the fifth POR. See Affirmative Final Determination of Circumvention, 74 Fed. Reg. at 20,922 (instructing Customs to continue to suspend liquidation for entries made on or after July 1, 2007). Therefore, Feili contends that the scope inquiry is irrelevant to all four consecutive administrative reviews wherein Commerce found de minimis or zero dumping margins.⁸

⁷ If Commerce issues a final determination in a scope inquiry that the product in question is included within the scope of the order, "any suspension of liquidation under paragraph (1)(1) or (1)(2) of this section will continue. Where there has been no suspension of liquidation, [Commerce] will instruct the Customs Service to suspend liquidation . . . for each unliquidated entry of the product entered, or withdrawn from warehouse, for consumption on or after the date of initiation of the scope inquiry." 19 C.F.R. § 351.225(1)(3); see also Target Corp. v. United States, 626 F. Supp. 2d 1285, 1300 (CIT 2009) ("The liquidation of merchandise subject to an affirmative anticircumvention determination is suspended as of the date of initiation of the anticircumvention proceeding.").

⁸ Although Feili first requested revocation during the fourth administrative review, based upon its claim of three years of no dumping during the second, third, and fourth administrative reviews, Commerce determined that Feili did not timely request revocation in accordance with section 351.222 of the Department's regulations or provide the required certifications with that request. See unpublished Issues and Decision Memorandum, A-570-868 (Dec. 7, 2007), available at <http://ia.ita.doc.gov/frn/summary/PRC/E7-24366-1.pdf> (last visited Sept. 17, 2010) (accompanying the final results of the fourth review). Feili acknowledges that it did not timely request revocation in the anniversary month of the order immediately preceding the start of the fourth review.

Feili's claim wrongly equates the non-collection of antidumping duties with a finding of no dumping of all subject merchandise during the fifth POR. Generally, with a final affirmative finding of circumvention, Commerce instructs Customs to continue to suspend liquidation that was already instructed in the affirmative preliminary determination of circumvention. 19 C.F.R. § 351.225(1)(3); see also Affirmative Final Determination of Circumvention 74 Fed. Reg. at 20,922. However, in this case, Commerce reasoned that doing so would include merchandise that entered during a completed review period, i.e., the fifth POR. Affirmative Final Determination of Circumvention, 74 Fed. Reg. at 20,922. Therefore, Commerce moved the suspension of liquidation date for cross-bar tables from June 1, 2006 to June 1, 2007, "the first day of the only pending administrative review period of this order." Id. at 20,922.

Commerce moved the suspension of liquidation date because it reasoned that it is Commerce's practice to apply the results of an anti-circumvention determination only to entries made after the last completed review period, not because it had determined that Feili had not dumped cross-bar tables during the fifth POR. See id. Commerce's decision to move the date of suspension does not undermine the relevance of the scope inquiry, initiated on the same day as the first day of the fifth

POR, to the dumping margin calculation in the Final Results of that review. Furthermore, the mere fact that Feili did not pay antidumping duties on cross-bar tables during the fifth POR does not demonstrate that Feili did not sell those tables at less than fair value nor does it indicate that the margin calculation for the fifth POR covered all subject merchandise.

Feili's claim that the de minimis dumping margins over four consecutive reviews satisfy the threshold requirement for revocation on its face is also unconvincing. Even if Commerce normally relies upon the dumping margins calculated in previous administrative reviews to determine whether a party has established three years of no dumping, Commerce will engage in a "thorough analysis of all relevant information" in determining whether to revoke an antidumping duty order. See Amended Revocation Regulation, 64 Fed. Reg. at 51,238.

In this case, the de minimis dumping margin in the fifth POR did not include cross bar tables that Commerce already preliminarily determined were subject to the antidumping duty order. See Affirmative Preliminary Determination of Circumvention, 73 Fed. Reg. at 63,684. Accordingly, Commerce determined that Feili's margin calculation during the fifth POR may not reflect all subject merchandise sold by Feili during the review period. As Commerce explained, "if the Department makes an affirmative final determination of circumvention, until the

Department can be satisfied that Feili's sales of circumventing merchandise are not dumped, we cannot determine whether Feili . . . has not dumped for at least three consecutive years."

Decision Memorandum, cmt. 3B at 12. Since there was no record information regarding Feili's U.S. prices or its factors of production for cross-bar tables when Commerce issued the Final Results, Commerce was unable to determine whether Feili sold such tables at normal value during the fifth POR. Id. at 13.⁹ Commerce, therefore, reasonably determined that Feili failed to show it had not dumped all subject merchandise produced during the underlying review. See id.

Commerce's resulting determination that Feili failed to satisfy the threshold requirement for revocation is not based on speculation that Feili engaged in dumping during the fifth POR, as Feili alleges. Feili points out that the record does not contain any evidence that Feili sold cross-bar tables at less than normal value, and, accordingly, there is no record evidence that the overall dumping margin for Feili would have been above de minimis levels had cross-bar tables been included in the calculation. This argument misses the mark because Commerce did not presume Feili dumped cross-bar tables. Rather,

⁹ As will be addressed later in the opinion, Commerce was not required to obtain information on cross-bar tables and determine if they were sold at not less than normal value during the fifth POR prior to issuing the Final Results and denying the request for revocation.

Commerce explained that it lacked the necessary information to calculate the dumping margin for cross-bar tables when it issued the Final Results, and, as such, was "not in a position to determine whether circumventing merchandise has been sold at less than normal value during [the fifth POR]." Id. at 11.

In Carbon Steel from Canada, Commerce similarly declined to revoke an antidumping order, finding that a pending scope inquiry prevented Commerce from determining whether the criteria for revocation had been satisfied. See Certain Corrosion-Resistant Steel Flat Products and Cut-to-Length Carbon Steel Plate from Canada, 66 Fed. Reg. 3,543 (Dep't Commerce Jan. 16, 2001) (final results and determination not to revoke in part) ("Carbon Steel from Canada"), and accompanying Issues and Decision Memorandum, A-122/822/823, ARP 8-98 (Jan. 16, 2001), cmt. 1 for Gerdau MRM Steel Co. ("MRM"), available at <http://ia.ita.doc.gov/frn/summary/canada/01-1224-1.txt> (last visited Sept. 14, 2010) ("Carbon Steel Decision Memorandum"). As in this case, the party requesting revocation had zero dumping margins for three years. Nevertheless, Commerce concluded that it was unable to determine whether merchandise within the scope of the order was being sold in the United States at less than normal value until the completion of the related scope inquiry. Carbon Steel Decision Memorandum at cmt. 1 for MRM.

In sum, Commerce lawfully considered the pending scope inquiry and the affirmative finding of circumvention in assessing whether Feili established the absence of dumping for three years, the threshold requirement for revocation. Commerce's determination that Feili did not satisfy the threshold requirement under 19 C.F.R. § 351.222(b)(2)(i) is supported by substantial evidence.

B. Commerce's determination that the continued application of the order is otherwise necessary to offset dumping is based on substantial evidence and in accordance with law.

Commerce's lawful determination that Feili failed to satisfy the threshold requirement for revocation provides a substantial evidentiary basis for Commerce to decline to revoke the antidumping order. Commerce's determination that Feili failed to satisfy the third regulatory requirement for revocation under 19 C.F.R. § 351.222(b)(2)(i) also is based on substantial evidence and in accordance with law

The third requirement for revocation, "whether the continued application of the antidumping duty order is otherwise necessary to offset dumping," examines a party's future behavior. See 19 C.F.R. § 351.222(b)(2)(i)(C); Amended Revocation Regulation, 64 Fed. Reg. at 51,237-39. Where there is an absence of dumping for three years, Commerce ordinarily presumes that the order is not necessary to offset future

dumping. Amended Revocation Regulation, 64 Fed. Reg. at 51,238; see Decision Memorandum, cmt. 3A at 8. This presumption, however, may be rebutted by positive evidence of the continued necessity of the order. Amended Revocation Regulation, 64 Fed. Reg. at 51,238.

Feili alleges that Commerce's revocation determination is not in accordance with law because Commerce employed the incorrect "not likely" legal standard rather than the amended rule's "necessary" standard which requires positive record evidence that the order is necessary to offset future dumping. This argument is unconvincing.

In 1999, Commerce amended its regulations for revoking an antidumping duty order contained in 19 C.F.R. § 351.222(b). Amended Revocation Regulation, 64 Fed. Reg. at 51,236. The amended regulation changed the language from "the Secretary may revoke an antidumping order . . ." to read "[t]he Secretary will revoke the antidumping duty order." Compare 19 C.F.R. § 351.222(b)(2) (current through April 1, 1999), with 19 C.F.R. § 351.222(b)(2)(ii). In addition, the amended regulation removed the "not likely" standard under which Commerce determines if "it is not likely that [the exporters or producers covered by the order] will in the future sell the subject merchandise at less than normal value . . ." 19 C.F.R. § 351.222(b)(2)(ii) (current through April 1, 1999). Instead, the amended

regulation provides that Commerce will consider "whether the continued application of the antidumping duty order is otherwise necessary to offset dumping. 19 C.F.R. § 351.222(b)(2)(i)(C); Amended Revocation Regulation, 64 Fed. Reg. at 51,237 (emphasis added). Thus, the amended regulation changed the "not likely" standard and "clarifies that Commerce must make an affirmative finding of necessity" to retain an antidumping duty order. Amended Revocation Regulation, 64 Fed. Reg. at 51,239.

Feili's claim that Commerce employed the incorrect "not likely" standard relies on selective language in the Decision Memorandum in which Commerce found that it is not possible "to determine that Feili would likely not sell such merchandise at less than fair value in the future." See Decision Memorandum, cmt. 3B at 11. However, the amended regulation's "necessary" standard does not preclude Commerce from considering the likelihood that Feili would dump cross-bar tables in the future. See Amended Revocation Regulation, 64 Fed. Reg. at 51,239 ("Evidence relating to the likelihood of future dumping will still be considered under the revised regulation because such evidence relates to the necessity of the order."). Furthermore, Commerce ultimately determined that, based upon the record, it could not determine that Feili satisfied the regulatory requirement that "the continued application of the antidumping duty order is not otherwise

necessary to offset dumping," the precise language of the third criterion of the amended regulation. See id., cmt. 3B at 12; see generally 19 C.F.R. § 351.222(b)(2)(i)(C). Commerce clearly concluded that the "otherwise necessary" requirement of the amended regulation was not satisfied.

To further buttress its claim that Commerce applied the wrong legal standard, Feili cites to the portion of the Decision Memorandum in which Commerce asserts that this Court has "confirmed that 19 C.F.R. § 351.222(b)(2) permits the Department to revoke the order in part if the three-part revocation test is satisfied, but it does not mandate revocation." Decision Memorandum, cmt. 3B at 12 (citing Hyundai Elec. Co., Ltd. v. United States, 23 CIT 302, 308, 53 F. Supp. 2d 1334, 1340 (May 19, 1999)). Feili asserts that Commerce misconstrued its own regulation because, under the amended regulation, revocation is required by law if the three criteria for revocation are satisfied.

Feili correctly points out that, under the amended regulation, Commerce "will revoke the order" if it determines, based upon the three criteria, that the order is no longer warranted. 19 C.F.R. § 351.222(b)(2)(ii) (emphasis added). The Hyundai case, cited by Commerce in the Decision Memorandum, refers to this Court's analysis of a previous version of the regulation under which Commerce "may revoke" an order if the

criteria are satisfied.¹⁰ See Hyundai, 23 CIT at 308, 53 F. Supp. 2d at 1340. Nevertheless, Commerce did not deny Feili's request for revocation based on a determination that it has discretion to deny the request for revocation despite Feili's satisfaction of the three regulatory requirements. Rather, Commerce clearly found that Feili failed to satisfy two of the requirements for revocation. Decision Memorandum, cmt. 3B at 12.

Moreover, changing the term "may" to "will" in the amended regulations did not remove Commerce's significant discretion in determining whether a party satisfies the criteria for revocation. In particular, "[t]he 'necessary' standard represents the full spectrum of circumstances under which the Department could maintain an order." Amended Revocation Regulation, 64 Fed. Reg. at 51,239. Commerce has discretion to consider all relevant evidence, including "trends in prices and

¹⁰ In Hyundai, this Court was analyzing a previous version of Commerce's regulations relating to revocation of an antidumping duty order, 19 C.F.R. § 353.25(a), the precursor to 19 C.F.R. § 351.222(b). Despite the Hyundai Court's reference to the "may revoke" language of the previous regulation in effect at the time, the Court did not focus on whether Commerce properly denied revocation even though Hyundai had satisfied the regulatory requirements for revocation. Commerce had denied revocation because it determined that Hyundai did not satisfy all of the regulatory criteria for revocation; the revocation determination was not based on an exercise of its discretion even though Hyundai had satisfied the regulatory criteria. This Court upheld Commerce's determination that Hyundai did not satisfy the "not likely" criterion for revocation as based on substantial evidence. Hyundai, 53 F. Supp. 2d at 1346-53.

costs, currency movements, and other market and economic factors that may be relevant to the likelihood of future dumping." Id. at 51,238.

Under the comprehensive nature of the "necessary" standard, Commerce properly considered Feili's possible circumvention of the order in assessing whether Feili satisfied the third requirement for revocation. As previously discussed, the pending scope inquiry relates to the accuracy of Feili's prior margin calculations. Consequently, the inquiry relates to whether past margin calculations are predictive of future behavior, and, specifically, the likelihood that Feili will sell cross-bar tables at less than normal value in the future. This Court has recognized that "predicting future behavior is not an easy task" and that determining the likelihood of future dumping "necessarily involves an exercise of discretion and judgment." Tatung Co. v. United States, 18 CIT 1137, 1144 (1994). Even if "ordinarily, past behavior would constitute substantial evidence of expected future behavior," id., this Court has stated that "it is entirely reasonable for the Department to consider a company's commercial behavior under the existing antidumping order, and any attempts to evade that antidumping order" in the context of a revocation analysis. Carpenter Tech. Corp. v. United States, 31 CIT ___, Slip Op. 07-18, 474 F. Supp. 2d. 1347, 1350, (2007). If Feili circumvented the order, it "may

lead Commerce to conclude that Feili's successive periods of zero margins are not truly indicative of its behavior towards the U.S. market." Decision Memorandum, cmt. 3B at 11-12; see, e.g., Carbon Steel Decision Memorandum" at cmt. 1 for MRM (where Commerce similarly reasons that if it found that the party requesting revocation had circumvented the order, then Commerce might reasonably conclude that the successive periods of zero dumping margins "are not truly indicative of its behavior towards the U.S. market."). Given Commerce's discretion to "weigh all of the evidence on the record", including evidence relating to the likelihood of future dumping, it was reasonable for Commerce to consider the ramifications of the related anti-circumvention inquiry in determining whether the continued imposition of the order was otherwise necessary to offset dumping. See Amended Revocation Regulation , 64 Fed. Reg. at 51,238.

Even assuming three consecutive years of no dumping, which, in this case, was called into question by the preliminary finding that Feili circumvented the order, the absence of dumping "is not conclusive in all cases." Id. at 51,239. Commerce can retain an antidumping duty order "if there is positive evidence on the record indicating the continued necessity of such order to offset dumping." Id. Feili argues that there is no positive evidence on the record to indicate

that continuation of the order was otherwise necessary to offset dumping because Commerce did not present any record evidence that Feili's cross-bar tables were sold at dumped prices or would likely be sold at dumped prices in the future. Without evidence to the contrary, Feili asserts that Commerce must presume the duty order is not necessary to offset dumping.

Feili misconstrues the "necessary" standard by maintaining that Commerce must have positive evidence that Feili was dumping or likely to dump in the future in order to retain the order. However, the regulations require positive evidence that the order is "otherwise necessary." Id. at 51,238-39. The issue, therefore, is whether the pending scope inquiry and the affirmative finding of circumvention are positive evidence sufficient for Commerce to conclude that the continued imposition of the order is otherwise necessary to offset dumping. See id. at 51,239 ("the Department can only retain an antidumping . . . duty order if there is positive evidence on the record indicating the continued necessity of such order to offset dumping").

As discussed earlier, when Commerce issued the Final Results denying the request for revocation, Commerce lacked the information necessary to calculate the dumping margins of cross-bar tables. Accordingly, Commerce could not determine that Feili had not dumped such merchandise during the fifth POR nor

could it conclude that Feili would not dump cross-bar tables in the future. As Commerce explained, an affirmative finding of circumvention would make it impossible "to determine that Feili would likely not sell such merchandise at less than fair value in the future" until it calculates Feili's margin including entries of circumventing merchandise. Decision Memorandum, cmt. 3B at 11.

Despite Feili's claim otherwise, Commerce did not presume that Feili failed to satisfy the third criterion for revocation. "Each revocation determination must be based upon substantial, positive evidence." Amended Revocation Regulation, 64 Fed. Reg. at 51,238. Given the preliminary finding of circumvention, Commerce reasonably determined that Feili's dumping margins in the underlying and previous reviews did not provide a substantial basis to conclude that the order was not "otherwise necessary." In other words, Commerce concluded that its then pending scope inquiry and the affirmative preliminary determination of circumvention, provided substantial, positive record evidence that the continued imposition of the order was otherwise necessary until Commerce had the opportunity to determine if the subject cross-bar tables were circumventing the order, and, if so, collect and analyze the information necessary to determine whether those tables had been dumped. Commerce's determination that Feili did not satisfy the third criterion for

revocation was based on a reasonable exercise of its discretion under the "necessary" standard and is supported by substantial evidence.

C. The administrative review and the timing of the scope inquiry were conducted in accordance with law.

Feili also challenges as unreasonable Commerce's timing in conducting the scope inquiry and Commerce's decision not to calculate a dumping margin for the subject cross-bar tables prior to issuing the final results of the underlying review.

Commerce noted that it had insufficient time to calculate margins for Feili's cross-bar tables in the underlying review because the statute required Commerce to complete the review no later than January 10, 2009, approximately eleven weeks after the issuance of the preliminary results in the scope inquiry. See 19 U.S.C. § 1675(a)(3)(A) (2006); Decision Memorandum, cmt. 3B at 13. Feili claims that the record did not contain the requisite information to calculate or estimate dumping margins for cross-bar tables because Commerce failed to complete the scope inquiry in a timely manner and because Commerce failed to coordinate the timing of the administrative review and the scope inquiry in a just manner. As support, Feili maintains that Commerce did not request such information from Feili and further asserts that Commerce took deliberate

actions to prevent such information from entering the administrative record. Accordingly, Feili argues that Commerce's failure to administer the underlying review and the separate scope inquiry in a just manner was unreasonable and not in accordance with law.

Feili's challenges to the extended length and the particular timing of the scope inquiry are most appropriately raised in a challenge to the Affirmative Final Determination of Circumvention. However, as explained above, the Affirmative Preliminary Determination of Circumvention was a valid consideration in the underlying Final Results revocation analysis. Therefore, an evaluation of the scope inquiry timing is not inappropriate. Regardless, Feili's arguments with respect to this issue are readily dismissed.

Within 45 days of receipt of an application for a scope ruling, Commerce will initiate a scope inquiry. 19 C.F.R. § 351.225(c)(2). Here, Commerce received the request for a scope ruling on October 31, 2005, and initiated the scope inquiry on June 1, 2006, approximately seven months later. Affirmative Preliminary Determination of Circumvention, 73 Fed. Reg. at 63,684. Normally, Commerce will issue circumvention rulings within 300 days of the initiation of the inquiry. 19 C.F.R. § 351.225(f)(5). In this case, Commerce issued its final ruling on May 6, 2009, almost three years after the scope

inquiry was initiated. Although Commerce did take an extraordinary amount of time to complete the scope inquiry, Commerce is only committed to the 300-day time frame "to the maximum extent practicable." See 19 U.S.C. § 1677j(f) (2006). Therefore, even had Commerce maintained the 45-day time frame on the initiation of the scope inquiry, it was not mandated by statute or regulation to complete the inquiry within 300 days. In addition, "unless expressly precluded by statute," Commerce may "for good cause, extend any time limit established by this part." 19 C.F.R. § 351.302(b). Although the scope inquiry was conducted on a very extended timeline, the time frame was not contrary to law.

Feili also takes issue with the fact that Commerce could have conducted the scope inquiry in conjunction with the administrative review under 19 C.F.R. § 351.225(f)(6), but opted not to do so. There is no obligation for Commerce to administer the two proceedings jointly. "When an administrative review . . . is in progress at the time the Secretary provides notice of a scope inquiry . . . , the Secretary may conduct the scope inquiry in conjunction with that review." 19 C.F.R. § 351.225(f)(6) (emphasis added). Here, Commerce chose to conduct the two proceedings separately, although parties were allowed to comment on the relevance of the pending scope inquiry to Feili's revocation request in the underlying administrative review. See

Memo from Analyst to File: Opportunity to Comment on Affirmative Preliminary Determination of Circumvention, Admin. R. Pub. Doc. 130 (Nov. 12, 2008). Commerce appropriately exercised its discretion in this regard.

Additionally, during the pendency of an administrative review, Commerce has the authority to request information concerning merchandise that is the subject of a scope inquiry. 19 C.F.R. § 351.225(1)(4). Feili insists that because Commerce factored the absence or presence of dumping into its revocation determination, Commerce should have been proactive in soliciting information from Feili regarding the cross-bar tables at issue in the scope inquiry based on "basic principles of fairness." See, e.g., Hontex Enterprises v. United States, 27 CIT 272, 280 248 F. Supp. 2d 1323, 1330 (2003) (stating that this Court must ensure that the administrative process was fundamentally fair). According to Feili, Commerce did not ask for the relevant information with which it could calculate or estimate the absence of dumping on folding tables with cross-bars, and, in fact, deliberately worked to prevent such information from entering the record of the administrative review by rejecting Mecos's initial case brief that contained references to the verification report from the scope inquiry and Feili's responses in the inquiry. See Commerce Letter to Petitioner, Admin. R. Pub. Doc. 101, (Sept. 29, 2008). In addition, discussion of

certain issues from the scope inquiry was not permitted at the public hearing for the administrative review. See Hearing Transcript from In the Matter of: Administrative Review of the Antidumping Duty Order on Folding Metal Tables and Chairs from the People's Republic of China, Admin. R. Pub. Doc. 128, at pp. 8-9, 15-16 (Nov. 6, 2008). Feili states that Commerce could have obtained information for its dumping analysis from the record of the scope inquiry. Feili concludes that this conduct was not in accordance with the regulations and is contrary to law.

It is important to note that there was no final determination of circumvention during the pendency of the underlying administrative review. The preliminary finding of circumvention only occurred approximately eleven weeks prior to the statutorily imposed deadline for the final determination in this review. The time remaining for Commerce's decision was limited. Significantly, there is no statutory or regulatory requirement that Commerce recalculate dumping margins to include merchandise preliminarily determined to be circumventing the antidumping duty order. Although Feili may have preferred such recalculation prior to issuing the Final Results, Commerce was not required to include this information in its administrative review, and, in turn, incorporate it into its revocation analysis.

Moreover, Feili could have offered information on cross-bar tables voluntarily; it did not. It was aware that the related scope inquiry was under way, and that the results of the inquiry could conceivably affect an administrative review. In anticipation of the possibility that Commerce would find the cross-bar tables to be within the scope of the antidumping duty order, Feili could have offered the relevant information for this merchandise. Earlier in the administrative review, Meco had requested that Commerce calculate or estimate antidumping margins for the cross-bar tables in its comments on Feili's questionnaire response. See Letter from Akin Gump to the Secretary of Commerce, Admin. R. Pub. Doc. 38 at 2 (Oct. 30, 2007); Letter from Akin Gump to the Secretary of Commerce, Admin. R. Con. Doc. 21 at 2-3 (July 31, 2008). Feili could have concurred with this request at the time; it chose not to do so.

On a logical level, it is incongruous for Commerce to make an affirmative preliminary determination of circumvention in the scope inquiry, and later conclude in the underlying review that the Antidumping Duty Order is revocable with respect to Feili. It was reasonable for Commerce to defer granting a revocation request until it was able to fully consider the possible dumping implications of newly-included merchandise subject to the antidumping duty order. Feili may request revocation of the order again in the future.

In sum, Commerce was not required to request information regarding the cross-bar tables in the underlying review because it had not yet determined that such merchandise was covered by the antidumping duty order and did not act contrary to law.

IV. CONCLUSION

In light of the related pending anti-circumvention inquiry, and the preliminary finding of circumvention, Commerce reasonably determined that Feili did not satisfy the requirements for revocation under 19 C.F.R. § 351.222(b)(2)(i). Commerce's determination to deny the revocation request is supported by positive, substantial evidence and is in accordance with law.

For the foregoing reasons, Feili's motion for judgment upon the agency record is denied and judgment is entered in favor of the United States.

/s/ Richard W. Goldberg
Richard W. Goldberg
Senior Judge

Dated: September 23, 2010
New York, New York