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MEMORANDUM TO: David M. Spooner
Assistant Secretary
for Import Administration

FROM: Stephen J. Claeys
Deputy Assistant Secretary
for Import Administration

SUBJECT: Issues and Decision Memorandum for the Final Results in the
2003/2004 Administrative Review of Porcelain-on-Steel Cooking
Ware from the People's Republic of China

SUMMARY

We have analyzed the case brief and the rebuttal brief of interested parties in the 2003/2004 administrative review of porcelain-on-steel cooking ware from the People's Republic of China ("PRC"). As a result of our analysis, we have made no changes to the preliminary results. See Porcelain-on-Steel Cooking Ware from the People's Republic of China: Notice of Preliminary Results of Antidumping Duty Administrative Review, 70 FR 76027 (December 22, 2005) (Preliminary Results). We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this Issues and Decision Memorandum. Below is a complete list of issues for which we have received comments:

Issues

Comment 1: Separate Rate

Comment 2: Application of Total Adverse Facts Available

Background

We published the Preliminary Results of the 2003/2004 administrative review in the Federal Register on December 22, 2005, and invited comments from interested parties. The period of review ("POR") is December 1, 2003, through November 30, 2004. In the Preliminary Results, the Department of Commerce ("the Department") found that the only respondent for which a review was requested, Shanghai Watex Metal Products Co., Ltd. ("Watex"), had not demonstrated its eligibility for a separate rate. The Department further found that Watex had failed to cooperate to the best of its ability and applied total adverse facts available ("AFA"). On January 17, 2006, we received a case brief from Watex. On January 19, 2006, we received a request for removal of Watex's untimely new factual information from the record by petitioner,

Columbian Home Products, LCC (“Columbian”). On January 20, 2006, we sent Watex a letter rejecting its previous case brief because it contained untimely new factual information. See Memorandum to the File From Scot Fullerton: Porcelain-on-Steel Cooking Ware from the People’s Republic of China: Revision of Watex Case Brief, dated January 24, 2006. On January 24, 2006, Watex resubmitted its case brief without the new factual information. See Porcelain-on-Steel Cooking Ware from the People’s Republic of China: Shanghai Watex Metal Products Co. Ltd.’s Revised Case Brief, dated January 24, 2006 (“Watex Case Brief”). On January 25, 2006, we received petitioner’s rebuttal brief. See Pcelain-on-Steel Cooking Ware from the People’s Republic of China: Petitioner’s Rebuttal Brief, dated January 25, 2006 (“Petitioner’s Rebuttal Brief”). On February 7, 2006, we held a public hearing in this review.

Based on the comments summarized below, we have made no revisions for the final results.

General Issues

Comment 1: Separate Rate

Watex argues that the issues the Department discovered at verification do not rise to the level of denying Watex a separate rate. Specifically, these issues include the revised capital verification report that did not contain a PRC government chop and attached bank vouchers, the fact that the company that an investor used to invest Watex’s initial capital was not established until 2002 (three years after the formation of Watex), the unsigned articles of association and joint venture agreement forming Watex, and the failure to disclose an affiliate.

Watex argues that the Department’s denial of a separate, company-specific rate is “too harsh” because the findings “{r}evele only the actions of an inexperienced and unsophisticated respondent...rather than one who willfully tried to conceal material information.” See Watex Case Brief at 2. In addition, Watex contends that it has been fully cooperative during this proceeding, providing all requested information to the best of its abilities in a timely manner, and that the errors made during verification do not affect any issues regarding the Department’s separate rates analysis.

Watex states that, at verification, it presented the Department with a revised capital verification report and explained the reason for the revision. Watex argues that no evidence on the record indicates that its revised capital verification report is inaccurate. It argues further that by taking the position that the revised capital verification report was unverifiable, the Department penalized Watex for submitting the correct capital verification report. Regarding the capital verification report’s lack of a government chop and bank vouchers, Watex states that “[t]he fact that the Department is accustomed to seeing certain typical markings or certain attachments to the capital verification report does not render Watex’s documents to be invalid or fraudulent,” and that these issues do not affect the fact that Watex’s capital verification report was reviewed and found to be proper by the PRC inspection bureau. See id. at 4. Further, Watex states that the capital verification report was audited and prepared by an independent accounting firm, and this firm did not require specific bank vouchers from Watex.

During verification, the Department noted that one of Watex's corporate owners was not in existence at the time that Watex was formally incorporated. Watex argues that even though this company was not formed until after Watex was incorporated, this did not prevent Watex from obtaining a business license from the Chinese authorities. In addition, Watex argues the fact that this company was not formed until after Watex does not undermine evidence on the record that Watex was owned by private entities and not controlled by the PRC government during the POR. Watex states that although it was unable to provide the Department with signed copies of its articles of association and joint venture agreement, the fact that Watex does not maintain signed versions of these documents does not negate its existence or its reported corporate ownership.

Watex also argues that the Department's findings at verification do not affect Watex's day-to-day operations or the essential fact that Watex is privately owned and operates free of government control as evidenced by the valid business license and Watex's audited financial statements. Watex contends that the capital verification report, the articles of association, and the articles of incorporation of investors are documents used to obtain a business license. Watex contends that the business license is the document that establishes and defines a business. Watex asserts that the local licensing bureau found these documents to be in order and issued a business license, and asserts that the Department found Watex's business license to be valid and effective.

Petitioner argues that Watex is required to affirmatively demonstrate that its shareholders, or other affiliates that are in a position to exert control over its operations, and Watex itself is not subject to government control. Petitioner argues that by providing unverifiable information, particularly with regard to an unreported affiliate, Watex failed to meet its burden of establishing absence of government control.

Department's Position:

We disagree with Watex's argument that the errors discovered at verification do not affect the separate rates analysis. As discussed further below, we find that the application of facts available is warranted pursuant to sections 776(a)(A) and (C) of the Tariff Act of 1930, as amended ("the Act"). Because we determine that Watex failed to demonstrate its eligibility for a separate rate, we find that Watex is presumed to be part of the PRC entity. Further, pursuant to section 776(a)(2)(D) of the Act, we find it appropriate to apply facts available to Watex for purposes of the final results of this review, as Watex provided information to the Department that could not be verified. Because the Department could not verify the information submitted by Watex regarding its formation and ownership, that information cannot serve as the basis for the Department's determination regarding Watex's eligibility for a separate rate.

Section 776(a)(2) of the Act provides that, if an interested party: (A) withholds information that has been requested by the Department; (B) fails to provide such information in a timely manner or in the form or manner requested subject to sections 782(c)(1) and (e) of the Act; (C) significantly impedes a proceeding under the antidumping statute; or (D) provides such information but the information cannot be verified, the Department shall, subject to section

782(d) of the Act, use facts otherwise available in reaching the applicable determination.

In determining whether a company is entitled to a separate, company-specific margin, the company must affirmatively demonstrate that it operates free of government control. See Notice of Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China, 56 FR 20,588 (May 6, 1991) ("Sparklers from PRC"); Notice of Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China, 59 FR 22,585 (May 2, 1994); Sigma Corp. v. United States, 117 F.3d 1401, 1405-06 (Fed. Cir. 1997). Because of deficiencies in Watex's responses and information discovered at verification, listed below, the Department was unable to verify information concerning Watex's formation and business operation, and, therefore, Watex has failed to demonstrate that it: (1) sets its own export prices independent of the government and without the approval of a government authority; (2) has authority to negotiate and sign contracts, and other agreements; (3) has autonomy from the government in making decisions regarding the selection of its management; and (4) retains the proceeds of its export sales and makes independent decisions regarding disposition of profits or financing of losses. See Sparklers from the PRC. Therefore, as facts available pursuant to sections 776(a)(2)(A), (C), and (D), and because, as discussed below, Watex failed to satisfy its burden of demonstrating it operates free of government control, we continue to find that Watex should properly be considered part of the PRC entity and be subject to the PRC-wide rate.

The Department noted several issues with regard to the validity of Watex's corporate formation documents. First, at verification, Watex submitted a capital verification report that was different from the one submitted in its questionnaire responses, but did not mention this fact in Watex's minor corrections submitted at the start of verification or when the revised capital verification report was presented to the verifiers for review. See Antidumping Duty Administrative Review of Porcelain-on-Steel Cooking Ware from the People's Republic of China (A-570-506): Verification report for Shanghai Watex Metal Products Co., Ltd. at 2, dated December 12, 2005 ("Watex Verification Report"). Only when the verifiers brought to the attention of Watex officials the difference between the two capital verification reports did Watex offer the explanation that the revised capital verification report was created because of an error in the original version.

Second, neither capital verification report contained bank vouchers or the official government chop from the inspection bureau. The bank vouchers are necessary to prove the source of capital used to establish Watex and the official government chop assures third parties that they are viewing the original capital verification report approved by the government inspection bureau in granting the company's business license. The Department compared Watex Garden's, an affiliate of Watex, capital verification report to that of Watex, which was filed in the same district of the PRC as Watex. Watex Garden's capital verification report had all of the required bank vouchers and the official government chop from the Industrial Inspection Bureau that were missing from Watex's capital verification reports. See id. at 9. When asked why the two differed, Watex officials stated that the documents in Watex's capital verification report were the only documents requested by the accountants who prepared the report for submission to the PRC

Industrial Inspection Bureau. See id. After viewing Watex Garden's capital verification report and because both of Watex's capital verification reports lacked deposit receipts and/or bank vouchers, we asked Watex officials if they had any other documentation to demonstrate the identity of the owners of Watex, to which Watex officials stated, "no." See id. Consequently, the Department was unable to a) ascertain whether the capital verification report was the report approved by the PRC Industrial Inspection Bureau, and b) ascertain the owners of Watex. Consequently, these documents could not establish Watex's independence from the PRC government.

Third, Watex was not able to produce signed and dated versions of either its articles of association or joint venture agreement. These two documents should have been signed by representatives of Watex's two owners. Further, the Department compared Watex Garden's articles of association to that of Watex. Watex Garden's articles of association were stamped, signed and dated by its owners. See id. at Verification Exhibit 2. Finally, one of Watex's reported owners was not in existence until three years after Watex was formed. When asked, Watex officials stated that the owner of that affiliate requested that the money be in the name of the affiliate, rather than his actual name. However, no documentation was presented to the Department to support this assertion.

The Department cannot agree with Watex's assertion that questions relating to its corporate formation documents are irrelevant to the separate rates analysis because these formation documents were used to secure a valid business license. The Department reviews a company's corporate formation documents and its corporate structure to confirm the source, amount, and date of a company's initial capitalization and to determine who, in fact, owns and controls the company. If the Department cannot verify a company's corporate structure documents or its formation, it cannot verify the true owners and/or who has control over day-to-day operations. The fact that Watex possessed a valid business license does not prove absence of PRC government control.

Finally, and paramount to the issue of separate rates, Watex did not disclose the existence of an affiliate despite the Department's numerous requests both in its questionnaires and at verification to identify any affiliates of Watex, Watex Garden, and Ping An, as well as the affiliates of those companies' owners. Because Watex chose not to disclose the existence of this affiliate, and it was not discovered until the middle of Watex's one-week verification, the Department was not able to fully question and consider this affiliate's relationship with the PRC government through written questions and at verification. Had Watex disclosed this affiliate earlier in this proceeding, the Department would have had time to ask questions regarding its relationship with the PRC government and to possibly schedule extra time to verify the responses relating to this affiliate. In fact, it is fundamental that the Department be presented with all of the details of a respondent's corporate structure to adequately determine whether the entity qualifies for a separate rate. Moreover, at no point in the administrative review, prior to or at the outset of verification, did Watex notify the Department of the existence of any inaccuracies in information it reported to the Department regarding its affiliates, or seek guidance on the applicable reporting requirements, as contemplated in section 782(c)(1) of the Act.

As demonstrated above and in the Department's Preliminary Application of Adverse Facts Available to Shanghai Watex Metal Products Co., Ltd. memo dated December 15, 2005 ("Watex AFA Memo"), Watex provided information that could not be verified concerning the company's corporate formation or its corporate structure. Moreover, Watex withheld information requested by the Department and significantly impeded the proceeding by not providing accurate or complete responses to the Department's questions regarding the identity of the respondent's affiliates. Therefore, pursuant to sections 776(a)(2)(A), (C), and (D) of the Act, as facts available, we find that Watex did not affirmatively demonstrate that it operates free of government control. Watex has not met its burden in demonstrating that it is eligible for a separate, company-specific rate. See Sparklers from PRC.

Comment 2: Application of Total Adverse Facts Available

Watex concedes that company officials made a mistake in not disclosing the existence of an affiliated company to Department officials. See Watex Case Brief at 8. However, Watex argues that the actions of company officials suggest that the mistake was due to inexperience. See id. Further, once the information became known to the Department, Watex acted to the best of its ability by obtaining as much of the requested corporate records of the aforementioned affiliate. See id.

Watex states that the Court of International Trade has recognized that even the most diligent respondent will make mistakes and Watex had no incentive to conceal the existence of the affiliate. See Nippon Steel Corp. v. United States, 146 F. Supp. 2d 835, 841, n.10 (Ct. Int'l Trade 2001). Watex argues that to the extent that the affiliate did not sell or produce subject merchandise, collapsing it with Watex would not impact this case.

Petitioner argues that Watex's contention that its actions were due to "inexperience and misunderstanding" is not credible because Watex has been represented throughout both this administrative review and the 2004 rescinded new shipper review by expert trade counsel, and was represented by three individuals from two law firms at verification. See Petitioner's Rebuttal Brief at 1-2. Further, petitioner notes that Watex provided no explanation for why it did not respond truthfully to the Department's request for information regarding all other affiliates of Watex or its owners. Petitioner also contends that because the scope of the affiliate's business license implies that the company may engage in the production of subject merchandise, Watex's failure to disclose this information is "damaging to the overall completeness and credibility of its questionnaire response," therefore making Watex's questionnaire response both materially incomplete and unreliable as the basis upon which to calculate a dumping margin. See Petitioner's Rebuttal Brief at 3.

Petitioner disagrees with Watex's suggestions that its failure to report its affiliation should be excused because Watex did not intend, and had no incentive, to conceal this information. Petitioner states that the Department may use an adverse inference when selecting among the facts available if the Department determines that the party "failed to cooperate by not acting to the best of its ability to comply with a request for information," see Section 776(b) of the Act.

Petitioner also notes that the Department must first decide “what the party was able to do” and then determine whether or not the party acted in accordance with its ability. See Krupp Thyssen Nirosta GmbH v. United States, 24 CIT 666 (2000). Petitioner states that in this case, Watex was clearly able to report its relationship with the aforementioned affiliate and did not use its “best efforts” to do so.

Finally, petitioner argues that Watex concedes that it failed verification on a number of additional points given the company’s inability to explain certain factual discrepancies. These discrepancies include the date on which Watex stopped using another company’s sales office, the actual address on Watex’s brochure that was covered with a different address in Watex’s response, and the fact that the address on all of Watex’s letterhead in 2004 and 2005 contained this other company’s address.

Department’s Position:

Facts Available

We agree with petitioner that Watex’s contention that its actions were due to “inexperience and misunderstanding” is not credible. Watex was represented by experienced trade counsel throughout this proceeding and its answers to the Department’s detailed questionnaires proves Watex had no misunderstanding about the significance of cooperating fully in this antidumping review. For the reasons outlined below, pursuant to sections 776(a)(2)(A), (C), and (D) of the Act, we find it appropriate to apply facts available to Watex for purposes of these final results of the review. Watex withheld information that was specifically requested by the Department and significantly impeded the proceeding by not providing accurate or complete responses to the Department’s questions regarding the identity of the respondent’s affiliates. Additionally, because information discovered at verification directly contradicted Watex’s questionnaire responses, the Department was unable to verify the statements in Watex’s questionnaire responses that it had no affiliates other than Watex Garden and Ping An.

As detailed in the Department’s Watex AFA Memo, over the course of the administrative review, Watex withheld information that was specifically requested by the Department regarding the identity of affiliates of the respondent, Watex, the POR producer, Ping An, as well as its affiliate Watex Garden. Watex also withheld information in its responses to the Department’s very specific questions regarding any ownership interests in other companies that were held by each of the owners of Watex, Ping An and Watex Garden. Watex continued to withhold information from the Department at verification, as the Department asked on three separate occasions whether one specific manager of Watex maintained any ownership interests in any other companies, aside from the companies previously reported. See Watex Verification Report at 20. The Department learned of the existence of the unreported affiliate, not from Watex officials, but by discovering the company’s business license during verification.

The Department requests information regarding affiliates of a respondent in order to determine whether the affiliates are involved in the sale or production of subject merchandise and whether

the significant potential for manipulation of price, production, or export decisions exists. This information is essential to the Department's determination of whether to treat the respondent and its affiliate(s) as a single entity for purposes of the antidumping duty proceeding. See Hontex Enterprises v. United States, 342 F. Supp. 2d 1225, 1230-34 (CIT 2004); see also section 351.401(f) of the Department's regulations. The existence of and identity of affiliates is also critical to the Department's separate rates analysis as explained in response to Comment 1 above.

Throughout this review, the Department asked several questions concerning the affiliates of Watex, Watex Garden, and Watex's producer, Ping An, as well as the affiliates of those companies' owners. Specifically, we requested Watex to identify, on several occasions, each affiliate of Watex, Watex Garden, Ping An, and any ownership interests by any of Watex, Watex Garden, or Ping An's managers, which included both owners of the undisclosed affiliate. Giving complete answers to any of the above questions would have disclosed this affiliate of Watex. At no time did Watex disclose information relating to the existence of this affiliate, which Watex was clearly able to do. To the contrary, Watex continuously stated that it had no affiliates other than the ones it previously disclosed throughout the Department's six questionnaires.

Watex also argues that the existence of this affiliate does not affect this case because it does not sell or produce subject merchandise. As stated in the Department's Watex AFA Memo, we cannot rely solely on Watex's unsupported and unverified statement that this affiliate was not involved in the production or sale of subject merchandise as that statement was only made after the Department discovered the existence of this unreported affiliate at verification. The limited evidence provided to the Department regarding this affiliate's business activities, in fact, suggests that Watex's claims are incorrect. See Watex Verification Report at 23; and Watex AFA Memo at 10 for further discussion. Given Watex's failure to disclose the identity of the affiliate, the Department cannot be certain that it has been presented with complete sales and/or factors of production data with which to calculate a margin.

We also agree with petitioners that Watex's failure to disclose the information relating to this affiliate is damaging to the overall completeness and credibility of its questionnaire response, making its submissions both materially incomplete and unreliable. As stated in the Preliminary Results, Watex significantly impeded the proceeding by not providing accurate and complete responses to the Department's questions regarding the identity of its affiliates. These discrepancies evidence a pattern of misreporting information to the Department. Taken in totality with the other unresolved issues in this proceeding, namely Watex's corporate structure and formation, they draw into question the accuracy and completeness of Watex's responses. Thus, we find that the Department must resort to the use of facts available pursuant to sections 776(a)(2)(A), (C), and (D) of the Act.

Use of Adverse Inferences

In selecting from among the facts otherwise available, pursuant to section 776(b) of the Act, an adverse inference is warranted when the Department has determined that a respondent has

“failed to cooperate by not acting to the best of its ability to comply with a request for information.” Section 776(b) of the Act states that if the Department “finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority or the Commission, the administering authority or the Commission . . . , in reaching the applicable determination under this title, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.” See also Statement of Administrative Action (“SAA”) accompanying the URAA, H.R. Rep. No. 103-316 at 870 (1994).

Adverse inferences are appropriate “to ensure that the party does not obtain a more favorable result by failing to cooperate than if it had cooperated fully.” See SAA at 870; Mannesmannrohren-Werke AG v. United States, 77 F. Supp. 2d 1302 (CIT 1999). The Court of Appeals for the Federal Circuit (“Federal Circuit”), in Nippon Steel Corporation v. United States, 337 F. 3d 1373, 1382 (Fed. Cir. 2003) (“Nippon”), provided an explanation of the “failure to act to the best of its ability” standard, stating that the ordinary meaning of “best” means “one’s maximum effort,” and that the statutory mandate that a respondent act to the “best of its ability” requires the respondent to do the maximum it is able to do. Id. The Federal Circuit acknowledged, however, that while there is no willfulness requirement, “deliberate concealment or inaccurate reporting” would certainly be sufficient to find that a respondent did not act to the best of its ability, although it indicated that inadequate responses to agency inquiries “would suffice” as well. Id. Compliance with the “best of the ability” standard is determined by assessing whether a respondent has put forth its maximum effort to provide the Department with full and complete answers to all inquiries in an investigation. Id. The Federal Circuit further noted that while the standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping. Id.

We disagree with Watex that it acted to the best of its ability in this review. We continue to find that, within the meaning of section 776(b) of the Act, Watex failed to cooperate by not acting to the best of its ability to comply with the Department’s requests for information, and that the application of AFA is warranted.

The Department finds that Watex failed to cooperate to the best of its ability because it failed repeatedly to respond accurately to the Department’s questions on such basic information as the identity of its affiliates, and because it provided conflicting documentation regarding the investors in Watex, a question that remains unresolved. Moreover, Watex continued to provide inaccurate information to the Department immediately after the Department discovered the company’s business license, such as the identity of all true owners of the affiliate. See Watex Verification Report at 22. Watex could have complied with the Department’s request to respond accurately to the Department’s original questionnaire, repeated requests for supplemental information, and questions asked at verification. Moreover, at no point in the administrative review, prior to or at the outset of verification, did Watex notify the Department of the existence of any inaccuracies in information it reported to the Department regarding its affiliates, or seek guidance on the applicable reporting requirements, as contemplated in section 782(c)(1) of the

Act. Watex also conceded in the public hearing for this review that it not only withheld information in this proceeding, but that it could provide no justification for its failures. While discussing the affiliated company, counsel stated, “{w}e fully concede that information should have been disclosed, should have been in our questionnaire responses and so forth. {We} can’t explain or {we} can’t justify why that wasn’t done.” See International Trade Administration, Public Hearing, In the Matter of: Porcelain-on-Steel Cooking Ware from the People’s Republic of China (A-570-506), at 17. In sum, despite the Department’s detailed and very specific questionnaires and questions asked at verification, Watex gave insufficient attention to its statutory duty to reply accurately and completely to requests for factual information regarding its affiliates, or to provide the Department with accurate and reliable corporate formation documentation. For all of the aforementioned reasons, the Department finds that Watex failed to cooperate to the best of its ability, pursuant to section 776(b) of the Act. Therefore, we recommend continuing to apply total AFA to Watex for purposes of these final results.

RECOMMENDATION:

Based on our analysis of the comments received, we recommend making no changes to the preliminary results and applying total AFA to respondent Watex for the final results of this administrative review. If accepted, we will publish the final results of the review in the Federal Register.

AGREE _____ DISAGREE _____

David M. Spooner
Assistant Secretary
for Import Administration

Date