

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 2005-2006
Administrative Review of the Antidumping Duty Order on Honey
from Argentina: Final Results of Antidumping Duty
Administrative Review

Summary

We have analyzed the case and rebuttal briefs of the interested parties in the 2005-2006 administrative review of the antidumping duty order on honey from Argentina (A-357-812). As a result of our analysis, we have made changes to the margin calculation as discussed below. 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 comment from parties:

Asociación de Cooperativas Argentinas

- Comment 1. Reclassification of ACA's Reported Testing and Homogenization Expenses
- Comment 2. Date of Sale and Selection of the United Kingdom as the Third-Country Market
- Comment 3. Whether Sales to the United Kingdom Are Representative
- Comment 4. Issues Related to the Cost of Production

Seylinco, S.A.

- Comment 5. Revocation

Background

On December 28, 2007, we published the preliminary results of the 2005-2006 administrative review of honey from Argentina. See Honey from Argentina; Preliminary Results of Antidumping Duty Administrative Review and Intent Not to Revoke in Part, 72 FR 73758 (December 28, 2007) (Preliminary Results). This review covers five companies. We selected two mandatory respondents, Asociación de Cooperativas Argentinas (ACA) and Seylinco, S.A. (Seylinco), both of which exported honey from Argentina to the United States during the period

December 1, 2005, to November 30, 2006. In response to the Preliminary Results, the American Honey Producers Association and the Sioux Honey Association (collectively, petitioners), ACA, and Seylinco submitted case briefs on January 28, 2008. Petitioners and ACA filed rebuttal briefs on February 4, 2008.

Discussion of the Issues

Comment 1. Reclassification of ACA's Reported Testing and Homogenization Expenses

ACA argues the Department of Commerce (the Department) erroneously classified expenses related to sampling the honey and testing the honey for contaminants as indirect selling expenses (ISEs). ACA explains that for its European and Canadian customers, it tests the honey for specific antibiotics and other residues pursuant to the requirements outlined in the contracts with these customers. Conversely, ACA contends, its U.S. customers do not require such testing. ACA asserts that in previous administrative reviews the Department did not treat its reported testing expenses as direct selling expenses because occasionally honey that had been tested for contaminants was sold in the United States. However, ACA maintains it changed the way it tracks testing expenses in its accounting system and thus it modified the way it reported these expenses to the Department in the instant period of review (POR). ACA argues it was able to link specific testing expenses to individual sales and therefore it reported the expenses related to the testing that was performed on the lot(s) of honey included in each specific U.S. or third-country market sale as direct selling expenses.¹ Just as the Court of Appeals for the Federal Circuit (the Federal Circuit) found that direct selling expenses are those “which vary with the quantity sold,” ACA asserts its testing expenses relate directly to the sales to customers which require testing services. See ACA’s Case Brief at 3, quoting Zenith Electronics Corporation v. United States (Zenith), 77 F.3d 426, 431 (Fed. Cir. 1996). Referring to Torrington Company v. United States, 82 F.3d 1039, 1050 (Fed. Cir. 1996), ACA claims expenses related to a particular sale are direct selling expenses. Since its testing expenses can be tied directly to a particular sale by lot number, ACA contends the Department must treat its testing expenses as direct selling expenses.

In addition, ACA states it is not clear how the Department calculated the ISEs used in the preliminary results. ACA argues ISEs must be allocated over all sales, but it appears the Department allocated testing expenses over U.S. sales only. ACA maintains the Department must allocate testing expenses over all sales if it continues to treat testing expenses as ISEs for the final results.

¹ ACA notes that while it reported testing related to specific U.S. sales as direct selling expenses, this testing had actually been performed at the request of a non-U.S. customer, not the U.S. customer.

Finally, ACA contends the Department mistakenly treated its reported homogenization expenses as production costs. ACA asserts its sales contracts with U.K. customers require homogenization as well as testing after homogenization to confirm the accuracy of the original test results (*i.e.*, to ensure the homogenization process did not spread contaminants from one or two drums throughout the entire lot). In contrast, ACA maintains, its U.S. customers do not require such services. ACA argues it does not homogenize honey in the ordinary course of business, but only does so to comply with the requirements on a specific sales contract; therefore, ACA claims, homogenization expenses directly relate to the sales made pursuant to that contract. ACA contends it would never homogenize honey but for its customers' requirements and that it has never shipped homogenized honey to a customer not requiring homogenization. ACA asserts homogenization does not alter the nature of the honey and that this process is performed only to mix the drums of honey in a lot to confirm the results of the original tests for antibiotic contamination were correct. ACA urges the Department to treat homogenization expenses as direct selling expenses just like its testing expenses, because both types of expenses arise from the quality assurance programs ACA carries out to ensure its customers' requirements are fulfilled.

Petitioners note the Department has classified sampling and testing expenses as ISEs in every segment of this proceeding. Petitioners argue that not only does ACA test all of the honey sold to export markets other than the United States for antibiotics, but in fact ACA also tests honey that is sold to the United States. See Petitioners' Rebuttal Brief at 2-3, citing ACA's Case Brief at 2 and ACA's May 22, 2007, section C questionnaire response at C-40. Petitioners claim testing expenses are indirect in nature because they are incurred whether or not the sale is made to a specific market. Petitioners maintain the Department arrived at the same conclusion when it examined this issue with respect to ACA in the 2003-2004 administrative review of honey from Argentina. See Petitioners' Rebuttal Brief at 3, citing Honey from Argentina: Final Results, Partial Rescission of Antidumping Duty Administrative Review and Determination Not to Revoke in Part, 71 FR 26333 (May 4, 2006) (POR3 Final Results) and accompanying Issues and Decision Memorandum at Comment 2. Petitioners assert there have been no material changes in facts since the 2003-2004 administrative review.

Noting ACA's claim that it altered the way it tracks testing expenses in its accounting system and thus modified the way it reported these expenses to the Department, petitioners contend a different way of tracking these expenses does not alter the underlying nature of ACA's testing expenses. Petitioners assert "{t}esting still occurs at the same time, under the same circumstances and in the same manner as before." See Petitioners' Rebuttal Brief at 4. Petitioners state the market to which honey is sold is still not established until testing has occurred and thus testing expenses are indirect and do not bear a direct relationship to a particular sale. Petitioners aver this is clear from the fact that honey is tested pursuant to European standards but then sold to the United States where such testing is not required. As a result, petitioners argue, ACA's testing expenses should continue to be classified as ISEs as in the preliminary results and all past segments of this proceeding.

With respect to the allocation of ISEs, petitioners state that while they concur that such expenses should be allocated over all relevant sales, the Department noted in the preliminary results that

such expenses ultimately were not used in the margin calculation. See Petitioners' Rebuttal Brief at 4, citing "Analysis Memorandum for the Preliminary Results of the Antidumping Duty Review of Honey from Argentina (A-357-812) for Asociación de Cooperativas Argentinas," dated December 19, 2007 (Preliminary Results Memorandum) at 4. Therefore, petitioners maintain, it appears no revisions are needed for the final results.

Finally, with respect to homogenization expenses, petitioners state the record shows ACA incurs homogenization expenses on all sales of honey to the United Kingdom, citing ACA's May 22, 2007, section B questionnaire response (BQR) at B-45. Contrary to ACA's claim, petitioners contend all honey sold to the United Kingdom is homogenized in the ordinary course of business. Petitioners argue that homogenization alters the physical characteristics of the honey by diluting impurities to a suitable level. Since, petitioners contend, homogenization is not a step in the testing process, but rather a step in producing honey that meets the customer's requirements, homogenization costs must continue to be treated as production costs for the final results.

Department's Position: We disagree with ACA that expenses related to sampling and testing of the honey should be considered direct selling expenses. The Department's regulations at section 351.410(c) state direct selling expenses are those "that result from, and bear a direct relationship to, the particular sale in question." We have reviewed the chronology of the testing and ultimate sale by ACA and find that ACA's testing expenses do not necessarily result from, and relate directly to, the particular sale at issue.

Prior to purchasing honey from a supplier, ACA tests the honey for nitrofurans and only purchases the honey if it is free of nitrofurans residues. Once ACA purchases the honey, it samples the honey in order to determine its color and other characteristics. ACA then forms a lot by color and assigns a unique number to that lot. Next, ACA assigns the lot to a specific contract based on the color of the honey. If the lot is assigned to a U.S. contract, the honey can be shipped to the United States at this point since contracts with U.S. customers do not require further testing and analysis. If the lot is assigned to a contract with a customer in the United Kingdom, ACA then performs all of the tests required by the specific contract. These include tests for contaminants such as streptomycin, tetracycline, sulfanomides, tylosin, nitrofurans, chloramphenicol, and hydroxymethylfurfural (HMF). If the honey meets all of the quality standards stipulated on the contract, ACA sends the honey to be homogenized and then tests the honey again based on the post-homogenization requirements in the specific U.K. contract. If the honey continues to meet the requirements on the contract, ACA will then ship the honey to the U.K. customer. However, if the honey fails any of the tests specified in the U.K. contract, the honey is sold to a customer whose contractual requirements would accept the results. See, e.g., ACA's BQR at B-7 to B-8 and ACA's September 19, 2007, section A supplemental questionnaire response (ASQR) at Exhibit 17; see also ACA's October 31, 2007, section B and C supplemental questionnaire response (BCSQR) at 13.

During the POR, ACA recorded all testing (with the exception of the initial testing for nitrofurans) in such a manner that permitted ACA to link these tests to the specific lot number of the honey on which each test was performed. See, e.g., ACA's December 5, 2007, section A, B,

and C supplemental questionnaire response (ABCSQR) at Attachment 10. As a result, ACA was able to report, for each invoice, the testing expenses attributable to each lot included in that sale. See, e.g., ACA's BCSQR at Attachment 11 and ACA's ABCSQR at Attachment 9. Thus, for each U.K. sale, ACA reported the pre-homogenization testing expenses attributable to each lot of honey making up that sale in the fields DIRSELT3, DIRSELT4 and DIRSELT4B and the post-homogenization testing expenses attributable to each lot of honey making up that sale in the fields DIRSELT7 and DIRSELT8. If, upon testing, honey assigned to a U.K. contract was found to be unsuitable for sale to the United Kingdom and thus was sold to the United States, ACA reported the pre-homogenization testing expenses attributable to each lot of honey making up the U.S. sale in the fields DIRSELU4, DIRSELU5, and DIRSELU6.²

While ACA's tracking system during the instant POR enabled ACA to report the specific testing expenses attributable to the lots of honey included in each sale, the fact remains that merchandise originally intended for the United Kingdom was sold in another market (e.g., the United States) when that honey did not meet the quality standards outlined in the contract with the U.K. customer. That ACA used a different tracking system in the instant POR or that ACA assigned the lot of honey to a particular market/customer before testing does not change the fact that the testing expenses were incurred whether or not the sale was made to a specific market. As the Department noted in POR3 Final Results and accompanying Issues and Decision Memorandum at Comment 2,

Indirect selling expenses are incurred whether or not a particular sale is made, while direct selling expenses are expenses which can vary from sale to sale, and result from and bear a direct relationship to the particular sale in question. During this and the previous administrative reviews, we found that honey which does not meet the specific testing standards may be shipped to other markets.

ACA cites Zenith in support of its position that testing expenses should be considered direct selling expenses, claiming its testing expenses relate directly to the sales to customers which require testing services. However, as indicated above at footnote 1, ACA itself acknowledges that the testing expenses reported on U.S. sales had actually been performed at the request of a non-U.S. customer. Thus, while the testing expenses can be tied to particular lots making up each sale, ACA's testing expenses do not always relate to a particular sale because they are not always attributable to the customer and market requiring these services. As petitioners point out, the testing expenses are incurred regardless of whether the honey is sold to a specific market and the market to which honey is sold is really not established until after testing has occurred, even though ACA assigns lots of honey to specific markets prior to testing. The Federal Circuit has found that expenses not related to a particular sale are indirect selling expenses. See Torrington Company v. United States, 68 F.3d 1347, 1353 (Fed. Cir. 1995) (Torrington I). Thus, in keeping

² ACA has indicated there are no cases in which homogenized honey has been sold to a market other than the market for which the honey was originally designated. See ACA's December 5, 2007, ABCSQR at 16. Thus, in instances when honey did not meet the U.K. contractual standards and it was sold in the United States, the honey was determined to be unsuitable prior to homogenization.

with prior segments of this proceeding and the Federal Circuit's decision in Torrington I, we are continuing to classify ACA's pre- and post-homogenization testing expenses as indirect selling expenses for these final results.

As for the allocation of testing expenses, we disagree with ACA that any sort of reallocation must be performed. ACA reported all of its testing expenses on an invoice-specific basis; thus, no allocation was involved. In calculating net price for the preliminary results, we simply did not include ACA's testing expenses in the direct selling expense variables (CMDSELL in the comparison market and USDIRECTU in the U.S. market) and instead included them in the relevant indirect selling expense variables (CMISELL in the U.K. market and XPTISELU in the U.S. market). We did not allocate testing expenses over U.S. sales only, as ACA alleges. Further, as petitioners point out, since all of ACA's U.S. sales are export price sales, home market and U.S. indirect selling expenses are not considered in the calculation of the dumping margin. For these reasons, no reallocation of ACA's testing expenses is necessary for the final results.

Finally, we agree with petitioners that homogenization expenses should be considered part of the cost of production (COP). Although the homogenization process is performed at the insistence of only certain customers, it is a processing stage that alters the purity, consistency and appearance of the honey. Homogenization is a process in which the honey is blended to disperse any contaminants that are present in order to ensure the production of a product which results in acceptable levels of quality. Homogenized honey is a higher quality product distinguishable from non-homogenized honey and is the result of a manufacturing process beyond the production of honey in its non-homogenized state. Further, in a past segment of this proceeding, we found it appropriate to include in the COP costs incurred to blend honey. See Honey from Argentina: Final Results of New Shipper Review, 72 FR 19177 (April 17, 2007) (2004-2005 New Shipper Review of Honey from Argentina). Thus, we are continuing to classify ACA's homogenization expenses as a production cost for these final results. Consequently, as discussed in Comment 4 of this memorandum, for these final results we have revised the COP calculated for ACA in the preliminary results by adding ACA's homogenization costs to the COP. For more information, see Comment 4 below.

Comment 2. Date of Sale and Selection of the United Kingdom as the Third-Country Market

Since the Department found ACA's home market was not viable for purposes of calculating normal value (NV) in the preliminary results, petitioners assert the Department must base NV on sales prices to ACA's most appropriate third-country market. Petitioners state the Department's regulations and practice express a preference for using the country to which the exporter shipped the largest quantity of subject merchandise, assuming that quantity is at least five percent of the exporter's sales volume to the United States. Noting ACA reported the United Kingdom as its largest third-country market during the POR in the instant review, petitioners contend the United Kingdom is the largest third-country market only if shipment date is used as the date of sale. Petitioners argue that when the "correct" date of sale, contract date, is used, the United Kingdom is not the largest third-country market.

Petitioners maintain 19 CFR 351.401 specifies invoice date will normally serve as the date of sale but that the Department may select a different date if that date better reflects the date on which the exporter or producer set the essential terms of sale. Petitioners state neither they nor ACA have argued the Department should use invoice date as the date of sale for ACA's U.K. sales. While ACA pressed the Department to use shipment date as date of sale and the Department did so for the preliminary results, petitioners assert they have advocated using contract date as the date of sale for ACA's third-country market sales throughout the instant review. Petitioners claim the record evidence demonstrates they are correct.

Petitioners argue that if there are no changes to the material terms of sale between contract date and shipment date, as is the case here, date of contract is the appropriate date of sale. Petitioners contend even ACA has stated, "Upon examination of its POR contracts ACA determined that during the POR there were no significant changes to the price, quantity, quality or color terms in either US or UK contracts...". See Petitioners' Case Brief at 6, citing ACA's October 11, 2007, letter at 2 (petitioners' emphasis). Since ACA admitted there were no significant changes to the essential terms of sale, petitioners assert the Department's use of shipment date as the date of sale seems very peculiar.

Petitioners note the Department indicated in the preliminary results that it examined the date of sale issue thoroughly in the original investigation of honey from Argentina with respect to ACA and determined that changes to the material terms of sale did and do occur between contract and shipment date. *Id.*, citing the Preliminary Results, 72 FR at 73761. Petitioners then quote a memorandum to which the Department attached the narrative portion of a letter submitted by ACA on March 14, 2001 (*i.e.*, during the original investigation) as an example of "the types of changes that can occur between contract date and the time of shipment." *Id.*, citing the Memorandum to the File from Deborah Scott, "Certain Documents from Past Segments of Proceeding Relevant to Asociación de Cooperativas Argentinas in the Current Administrative Review of Honey from Argentina (A-357-812)," dated December 19, 2007 (December 19, 2007 Memorandum to the File) (petitioners' emphasis). Petitioners claim the March 14, 2001, letter contains an unsupported narrative of changes between contract date and shipment date and is the only evidence identified by the Department in support of the statement in the Preliminary Results that it fully examined the date of sale issue in the original investigation. Petitioners maintain ACA's March 14, 2001, letter does not support the Department's determination to use shipment date instead of contract date in the instant review. Specifically, petitioners contend there is nothing in the March 14, 2001, letter, or on the record of the current review implying the letter would apply to contracts and shipments made during the instant review.

Petitioners state the Department also cited to its use of shipment date in prior administrative reviews as support for using shipment date in the instant POR. See Petitioners' Case Brief at 7, citing the Preliminary Results, 72 FR at 73761. Petitioners note ACA has only participated in two of the four completed administrative reviews of the antidumping duty order on honey from Argentina. Petitioners hold that the Department's use of shipment date in previous segments of this proceeding cannot be the sole justification for using shipment date as date of sale in the instant review. Petitioners argue they never contested the use of shipment date in the original investigation or in previous administrative reviews and thus, the records of those prior

proceedings were not fully developed with respect to the suitability of using shipment date as the date of sale for ACA. Petitioners further assert the contracts and resulting shipments subject to the current review had not yet occurred during those earlier segments of the proceeding and therefore could not have been examined during that time.

Petitioners argue the Department cannot rely on the date of sale used in a prior segment of the proceeding if the record of the instant review does not justify that choice, especially when petitioners have disputed the use of such a date. Although the Department should aim to be consistent between reviews, petitioners assert the Department should not sacrifice accuracy for consistency. Petitioners maintain the Department must determine the appropriate date of sale in each POR based on the facts on the record of each review, citing Antidumping Duties; Countervailing Duties; Final Rule, 62 FR 27296, 27349 (May 19, 1997) (Final Rule). Based on the language in the Final Rule, petitioners claim the Department anticipated the basis for an exporter's date of sale could and often would change from one POR to the next. Petitioners contend the Department has determined it is not confined to the date of sale methodology used in prior segments of the proceeding and that each segment of the proceeding must be analyzed based on its own facts, citing Notice of Final Results of Antidumping Duty Administrative Review: Steel Concrete Reinforcing Bars from Latvia, 71 FR 7016 (February 10, 2006) (Rebar from Latvia) and accompanying Issues and Decision Memorandum at Comment 2.

Petitioners reiterate the record contains no evidence to support the Department's statement that there were changes to the essential terms of sale between contract date and shipment date. See Petitioners' Case Brief at 9, citing the Preliminary Results Memorandum at 3. Referring to proprietary data regarding ACA's U.K. sales contracts in ACA's October 11, 2007, letter at Attachment 1, petitioners argue the only change to the sales contracts described therein by ACA essentially did not amount to a change, and ACA admits as much. Petitioners maintain that whatever this potential change was, it did not have any effect on the essential terms of the sales contract, such as price or quantity.

In addition, petitioners claim the record shows contract date is the correct date of sale for product comparisons because the prices memorialized in the contract reflect market prices at the time of contract. If the time between contract and shipment differs greatly between markets, petitioners contend, then prices established in different months will be compared with one another and distort the dumping margin. Petitioners refer to certain proprietary data regarding ACA's U.S. and U.K. sales contracts in ACA's October 11, 2007, letter at Attachment 1, claiming these data show why using the wrong date of sale can be very distortive. For one example, petitioners argue that using shipment date results in averaging sales together that were actually made and priced differently, namely eight months apart. See Petitioners' Case Brief at 10 and 11.

Further, petitioners assert the record shows ACA likely manipulated the selection of the third-country market in the instant review "based on its confidence that the Department would repeat the same date of sale choice in this review." Id. at 12. Petitioners contend such manipulation can happen only when the Department relies on the same date of sale methodology review after review, despite the facts on the record of the instant review. Citing certain proprietary data related to U.K. sales contracts, petitioners infer that ACA manipulated the choice of a third-

country market by relying on the Department to favor consistency over accuracy. Id. at 12 and 13, citing ACA's October 11, 2007, letter at Attachment 1 and ACA's ABCSQR at Attachment 7 (U.K. sales listing). This, petitioners claim, provides a powerful reason for not deeming the United Kingdom to be the best comparison market.

In summary, petitioners argue the record shows contract date is the most suitable date of sale in the instant review for the following reasons: invoice date is not available as shipment date historically precedes invoicing; the contract establishes all of the material terms of sale; ACA acknowledges there were no changes between contract date and the time of invoice; contract date directly relates to the prevailing market conditions when the price eventually paid by the customer was set; and the use of shipment date as date of sale rewards ACA for manipulating the dumping margin.

Petitioners then argue the Department has the discretion to use contract date as the date of sale in the current review, even though it has not used contract date in prior reviews, as it did in Rebar from Latvia. Petitioners contend the Court of International Trade (CIT) has determined the Department may change its methodology as long as it provides a reasonable explanation for the change and does not do so arbitrarily, citing Asociación Colombiana de Exportadores v. United States, 6 F.Supp 2d 865, 879-880 (CIT 1998). Petitioners cite USEC Inc. v. United States, 498 F.Supp. 2d 1337, 1348 (CIT 2007), where the CIT upheld the Department's use of date of contract as the date of sale because the Department had given a rational explanation for doing so. The CIT has criticized changes in methodology between reviews, petitioners assert, primarily in cases in which the facts did not change from review to review and the record showed the respondent had adjusted its pricing patterns to account for the Department's practice. See Petitioners' Case Brief at 13-14, citing Shikoku Chemicals Corp. v. United States, 795 F.Supp. 417, 420-422 (CIT 1992). According to petitioners, the CIT has upheld methodological changes from review to review where the facts support such changes and the respondents cannot show "detrimental reliance on the old policy in setting their prices." See Petitioners' Case Brief at 14, citing Sinopec Sichuan Vinylon Works v. United States, 366 F.Supp. 2d 1339, 1347-1348 (CIT 2005).

Petitioners argue there is nothing on the record to show ACA's pricing practices were based on its reliance on the date of sale methodology from prior reviews, despite ACA's claim that it had relied on the previous methodology in preparing for this review. See Petitioners' Case Brief at 14-15, citing ACA's October 11, 2007, letter at 3. In addition, petitioners assert it is reasonable to use the date of contract as the date of sale for ACA's U.S. and third-country markets because the record demonstrates date of contract is the date on which the material terms of sale are set and there were no changes between contract date and the time of the actual sale. Petitioners contend using date of contract would be consistent with the Department's date of sale regulation, which centers on selecting the earliest date on which all material terms of sale are set. Petitioners maintain ACA itself has conceded this methodology would be reasonable. See Petitioners' Case Brief at 14, citing ACA's October 11, 2007, letter at 2.

Next, petitioners provide a summary of the quantity and value of ACA's POR sales measured on both a contract date and shipment date basis. See Petitioners' Case Brief at 15-16, citing

business proprietary data in ACA's April 25, 2007, section A questionnaire response (AQR) at Exhibit 1 and ACA's September 19, 2007, ASQR at Exhibit 2. Petitioners contend these data show another of ACA's reported third-country markets is the largest third-country market based on date of contract. Therefore, petitioners argue the Department should find this other market (hereinafter, the alternate market) to be the proper third-country market and require ACA to report its sales to the alternate market.

Although ACA has commented it is too late in the POR to change the date of sale, petitioners maintain the Final Rule recognizes there is a limit on the Department's ability to decide date of sale issues at the outset of an investigation or review. See Petitioners' Case Brief at 16, citing ACA's October 11, 2007, letter at 2 and the Final Rule, 62 FR at 27349-27350. Petitioners aver ACA's sales to the alternate market are not so numerous that ACA could not report those data for the final results. Petitioners argue they timely raised the date of sale issue in their first set of comments to the Department and continued to submit comments throughout the course of this review. Petitioners state the Department requested further information from ACA regarding date of sale and that the additional information submitted by ACA in turn has supported petitioners' position. Citing Rebar from Latvia and the accompanying Issues and Decision Memorandum at Comment 2, petitioners note the Department did not make a decision on the date of sale issue in that case until the preliminary results, and found this was fair because parties had the opportunity to comment on the preliminary results. Petitioners contend it would not be unfair to reconsider the choice of third-country market at this juncture since the final results of this review may be extended. Thus, petitioners urge the Department to obtain information regarding the alternate market's sales immediately and provide interested parties with the chance to comment before the final results.

In response, ACA states petitioners have not introduced any new arguments that would warrant changing the Department's date of sale determination. ACA maintains petitioners' argument that the date of contract must be used because there were no substantial changes to the sales terms between contract date and the time of the actual shipment overlooks the Department's regulations, the case history and the Department's thorough analysis in this review, as well as previous segments of this proceeding. ACA asserts the Department should continue to rely on shipment date for the final results for several reasons.

First, ACA contends, 19 CFR 351.401(i) and the Department's Antidumping Manual both indicate invoice date is the presumptive date of sale. ACA asserts the Antidumping Manual states "the date of sale will normally be the date of the invoice, as recorded in the exporter's or producer's records kept in the ordinary course of business...". See ACA's Rebuttal Brief at 2, quoting the Antidumping Manual at Chapter 8. ACA maintains the logic behind the preference for using invoice date is clear, as invoices are recorded in an exporter's accounting records and reflect the final, unchangeable agreement between two parties with respect to price, quantity, and pertinent product characteristics. Thus, ACA claims, invoice date is both easier for the respondent to report and the Department to verify. Contrary to petitioners' arguments, ACA contends, "the Department is seeking sales terms that are not changeable, not merely terms that have not changed." See ACA's Rebuttal Brief at 2. In instances where sales terms have the potential to change between contract and invoice date, ACA holds the Department's regulations

indicate a clear preference for invoice date. ACA notes that while it has reported shipment date as the date of sale, its shipment date and invoice date are generally the same and therefore the same regulatory preference applies.

Second, ACA argues the Department has used shipment date in every segment of this proceeding in which ACA has participated – the original investigation and the first, second, and third administrative reviews. ACA asserts the Department thoroughly considered the date of sale issue in the investigation, when the Department asked ACA to report every sales term that was modified after a contract was signed. Based on this information, ACA maintains the Department found that changes to the material terms of sale between contract and sale date rendered the latter date the more appropriate date of sale. See ACA’s Rebuttal Brief at 3, citing the December 19, 2007, Memorandum to the File. ACA claims its selling process, including the use of short-term contracts, has not changed since the investigation. ACA contends that while the changes between contract and invoice date were minimal during the instant review, shipment date is still the more appropriate date of sale because changes to the material terms of sale can and do occur between contract and shipment/invoice date.

Third, ACA argues it relied on the Department’s prior date of sale determinations in preparing for the instant review and should not be subject to arbitrary changes after the POR has ended. ACA asserts that on one hand, petitioners claim the date of sale methodology may be changed because ACA did not rely on it, while on the other hand petitioners claim ACA did rely on the methodology so it could manipulate its sales to obtain a lower dumping margin. ACA holds that in order for a respondent to manipulate its sales, it would need to rely on a methodology. ACA insists it did not improperly manipulate its sales. However, ACA contends, “it did rely on the Department’s methodology when it engaged in perfectly legal monitoring of its selling expenses, sales and pricing.” See ACA Rebuttal Brief at 4.

Fourth, ACA asserts, petitioners disregard changes that actually occurred between the contract date and shipment date. ACA claims petitioners state there were changes to the color of the honey sold in the U.K. market but reject these changes as inconsequential. ACA argues the petitioners have previously stated the color of the honey is an important commercial distinction that should be used to determine sales matches. Id., citing Honey from Argentina: Final Results of Antidumping Duty Administrative Review, 69 FR 30283 (May 27, 2004) (POR1 Final Results) and accompanying Issues and Decision Memorandum at Comment 15. ACA contends the Department has also made determinations that support this finding, citing Rebar from Latvia and accompanying Issues and Decision Memorandum at Comment 2. ACA notes in Rebar from Latvia the Department chose a date of sale that occurred after the final price and quantity were set because there were modifications to other essential terms of sale (i.e., the product mix). ACA asserts that of the four U.S. sales which had changes to the sales terms between contract and shipment date, two had changes to the color originally specified on the contract. See ACA’s Rebuttal Brief at 5, citing its October 11, 2007, letter. Therefore, ACA avers, the record corroborates the Department’s statement in the preliminary results that changes to the type of honey sold occurred between the contract date and shipment date. See ACA’s Rebuttal Brief at 5, citing the Preliminary Results Memorandum at 3.

Finally, ACA argues the Department established date of shipment as the appropriate date of sale because petitioners did not raise the date of sale issue in a timely manner. ACA cites the Antidumping Manual at Chapter 8, which instructs that date of sale issues must be determined during the early stages of a proceeding. ACA also refers to the Final Rule, which states that the Department must inform respondents at an early stage of the proceeding as to sales that must be reported. See ACA's Rebuttal Brief at 5-6, citing the Final Rule, 62 FR at 27356. ACA states it submitted its section A questionnaire response on April 25, 2007, and its section B and C questionnaire responses on May 22, 2007. ACA contends the proper time for either petitioners or the Department to raise questions about whether date of shipment was the appropriate date of sale was between April 25, 2007 and May 22, 2007. Rather, ACA holds, petitioners did not bring up the date of sale issue until more than six weeks after ACA submitted its section B and C questionnaire responses and the Department did not request additional information regarding date of sale until September 2007. ACA claims petitioners submitted untimely comments regarding date of sale to try to increase ACA's dumping margin by selecting a third-country market with higher average unit values (AUVs).

Department's Position: We disagree with petitioners that contract date is the appropriate date of sale for ACA's POR sales. The Department's regulations establish the date of sale as the date on which the material terms of sale (e.g., price and quantity) are set. Specifically, 19 CFR 351.401(i) states:

In identifying the date of sale of the subject merchandise or the foreign like product, the Secretary will normally use the date of invoice, as recorded in the exporter or producer's records kept in the ordinary course of business. However, the Secretary may use a date other than the date of invoice if the Secretary is satisfied that a different date better reflects the date on which the exporter or producer establishes the material terms of sale.

In the preamble to the Department's regulations, the Department explains the exception to using invoice date as the presumptive date of sale, as follows:

If the Department is presented with satisfactory evidence that the material terms of sale are finally established on a date other than the date of invoice, the Department will use that alternative date as the date of sale. For example, in situations involving large custom-made merchandise in which the parties engage in formal negotiation and contracting procedures, the Department usually will use a date other than the date of invoice. However, the Department emphasizes that in these situations, the terms of sale must be firmly established and not merely proposed. A preliminary agreement on terms, even if reduced to writing, in an industry where renegotiation is common does not provide any reliable indication that the terms are truly "established" in the minds of the buyer and seller. This holds even if, for a particular sale, the terms were not renegotiated.

See Final Rule, 62 FR at 27349.

In the instant review, ACA sold honey pursuant to short-term contracts negotiated with customers in the United States and third-country markets. See ACA's AQR at A-20. According to ACA, after a contract is negotiated, "there may be changes in the color and quantity as well as to the terms of shipment, and occasionally changes to price." Id. at A-21. As noted in the preliminary results, we found that during the POR there were actual changes between contract date and shipment date with respect to the type of honey sold to the customer and therefore we determined shipment date was the appropriate date of sale for ACA's sales in the U.S. and comparison markets. See Preliminary Results, 72 FR at 73761. In particular, for one U.S. contract which called for honey with a maximum color of 50 mm,³ ACA shipped two full container loads (FCLs) with a color of max 65 mm.^{4,5} See, e.g., ACA's BCSQR at 3. Additionally, upon examining the contracts in ACA's questionnaire and supplemental responses and comparing these to the actual sales data ACA submitted, we identified another instance in which the color shipped and invoiced to the customer differed from that specified on the contract.⁶

The Department has interpreted "material terms of sale" to include price and quantity. It has also indicated that the terms to examine in selecting the date of sale are those which directly affect the calculation of the dumping margin. For example, we have determined that the product mix based on the Department's product matching criteria also constituted a material term of sale. See, e.g., Notice of Final Results of Antidumping Duty Administrative Review: Steel Concrete Reinforcing Bars from Latvia, 71 FR 74900 (December 13, 2006) and accompanying Issues and Decision Memorandum at Comment 2. In this proceeding, we find color, or grade, which is one of the Department's product matching criteria, constitutes an essential term of sale. Because the record of the instant review shows there were changes to the color of the honey between the contract and shipment date, we find that date of shipment best represents the date of sale in this case. We note that shipment date preceded invoice date for ACA's sales, and therefore the material terms of sale were set as of shipment date.

As ACA concedes, changes between the contract date and shipment date were minimal during the POR. However, even if the record showed there were no changes between contract date and shipment date in this POR, this would not automatically mean that contract date would be considered the appropriate date of sale. The relevant question in this case, as in any date of sale determination, is whether the material terms of sale were subject to change as of contract date, not whether the terms actually changed after contract date in a given POR, and whether actual changes have occurred historically. We look for the date when the terms of sale are established and final— that is, no longer subject to change. Moreover, the CIT has held that the Department has the discretion over when to use invoice date, or an alternative date, as date of sale. In

³ ACA relies on the Pfund scale, a standard measure in the honey industry, to indicate the color of honey.

⁴ We note that for purposes of the Department's product matching criteria, honey with a color of 50 mm is classified as grade "B" and honey with a color of 65 mm is classified as grade "C."

⁵ ACA also indicated that for this same contract, it shipped two FCLs with a color of max 34 mm instead of max 50 mm. However, given that the contract specified a maximum of 50 mm, we do not consider this a "change" for purposes of our analysis.

⁶ Due to the proprietary nature of this information, it cannot be disclosed in this memorandum. See the Final Analysis Memorandum from Deborah Scott to the File, dated April 28, 2008.

particular, the CIT has stated, “even if the material terms of sale are not subject to change, Commerce has the authority to nonetheless use the invoice date as the date of sale; discretion in this instance means that Commerce may use a date of sale other than invoice date, but it is not required to do so.” See Hornos Electricos de Venezuela, S.A. (HEVENSA) v. United States, 285 F. Supp. 2d 1353, 1367.

In examining the appropriate date of sale, the Department has the discretion to consider determinations made in prior segments of a proceeding. In Certain Steel Concrete Reinforcing Bars From Turkey; Final Results of Antidumping Duty Administrative Review and New Shipper Review and Determination To Revoke in Part, 72 FR 62630 (November 6, 2007) (Rebar from Turkey), the Department found that contract date did not best reflect the date on which certain respondents’ essential terms of sale were set within the meaning of 19 CFR 351.401(i). In that case, the Department stated, “{t}his finding is made after many years of experience in dealing with these respondents and is based on our determination in the previous administrative review that the material terms of sale were changeable after the contract date for these respondents.” See Rebar from Turkey and accompanying Issues and Decision Memorandum at Comment 2. The Department further declared, “{w}hile we agree with these respondents that each review is a separate segment, the Department is not precluded from taking into account past determinations in those segments. Indeed, the Department has a well-established practice of relying on findings made in prior segments of a particular proceeding.” Id.

As noted in the preliminary results, during the original investigation of honey from Argentina, we thoroughly examined the date of sale issue for ACA and found that changes to the essential terms of sale did and do occur between the contract date and the time of the actual shipment. See Preliminary Results, 72 FR at 73761. Thus, during the investigation we used date of shipment as the date of sale for ACA. Subsequently, in each administrative review of honey from Argentina in which ACA has participated, namely the 2001-2002 (POR1), 2002-2003 (POR2) and 2003-2004 (POR3) reviews, we also used the date of shipment as date of sale. In each of these administrative reviews, we found date of shipment was the appropriate date of sale either because there were actual changes to the material terms of sale between contract date and shipment date or because there was the potential for changes to occur between contract and shipment date.

Typically, the Department does not change its date of sale methodology for a given respondent unless it finds that a prior date of sale determination was made erroneously, or the respondent changed its business practices. Throughout the course of this proceeding, because actual changes to the essential terms of sale occurred between the contract date and shipment date, or the potential for such changes existed, we have no reason to believe that our findings in the original investigation and previous administrative reviews with respect to date of sale for ACA were made in error. Further, ACA has not reported any changes in its selling practices with respect to honey between the previous administrative review and the current POR that would affect our selection of date of shipment as the date of sale. As a result, we find no reason to change the date of sale determination made for ACA.

Regarding the consideration of past date-of-sale determinations, the Department has previously stated the following:

{T}o avoid manipulation or double-counting or omitting sales, the Department must be particularly cautious about changing a long-standing date-of-sale determination ... The date of sale determination should not be changed from review to review without evidence of changes in a company's business or marketing practices. This is because changes to the material terms of sale between contract date and invoice date found in prior periods tend to indicate that such terms were subject to change in the current POR, even if, in fact, they did not change. Nothing submitted by respondent suggests there was a change in their approach to selling, third-country customers, market, or any other aspects of their standard business practices, which appear to routinely allow for changes to the material terms of sale, as established in the sales contract, during the time period between contract date and invoice date.

See Oil Country Tubular Goods From Korea; Final Results of Antidumping Duty Administrative Review, 65 FR 13364 (March 13, 2000), and accompanying Issues and Decision Memorandum at Comment 1.

Moreover, we disagree with petitioners that the amount of time between ACA's contract and shipment dates is relevant to our date of sale determination. As noted above, the preamble to the Department's regulations states "{i}f the Department is presented with satisfactory evidence that the material terms of sale are finally established on a date other than the date of invoice, the Department will use that alternative date as the date of sale." See Final Rule, 62 FR at 27349. In this case, we are not satisfied that the material terms of sale were established at a date prior to the shipment date because ACA's sales contracts are subject to change. In fact, as noted above, there were changes to the color of the honey between the contract date and shipment date during the POR and thus, contract date is not an appropriate date to consider as date of sale regardless of the lag time between these two dates. We are satisfied that the material terms of sale were established at shipment date because shipment date preceded invoice date, and the terms did not change after shipment date.

Finally, contrary to petitioners' suggestion, we find the record contains no evidence that ACA manipulated the selection of the third-country market for the instant POR. As noted above, the record shows there were actual changes to the material terms of sale between contract date and shipment date. Furthermore, as there was the potential for changes to the essential terms of sale to occur between contract date and shipment date, both during the POR and in previous segments of this proceeding, it is appropriate to use shipment date as the date of sale in the current POR.

For the foregoing reasons, we determine date of shipment best reflects the date on which the essential sales terms of price, quantity, and color are established. Therefore, for these final results, we continue to find that date of shipment is the appropriate date of sale for the instant POR. As such, since we are not using date of contract as the date of sale for these final results,

and the U.K. is the largest third-country market based on shipment date as the date of sale, we find it is unnecessary to collect sales data for ACA's other third-country markets.

Comment 3. Whether Sales to the United Kingdom Are Representative

Petitioners contend that, even if the Department finds the United Kingdom is the largest third-country market based on shipment date as the date of sale, a determination still must be made regarding the most appropriate third-country market. Petitioners state section 773(a)(1)(B)(ii) of the Tariff Act of 1930, as amended (the Tariff Act) provides that an exporter's third-country market sales prices can be used to calculate NV only if those prices are representative of the exporter's sales to the United States and its other major markets. Petitioners then cite 19 CFR 351.404(e), which states the Department will choose a third-country market based on the similarity of the foreign like product to the subject merchandise shipped to the United States, the volume of sales exported to the third country, and other factors. Petitioners argue the criterion "other factors" allows the Department to investigate the representativeness of prices as instructed by the statute.

Petitioners claim that while the Department typically selects a third-country market on the basis of the largest sale volume, the Department must consider all of the criteria set forth in the regulations, particularly when it is alleged that prices in one market are not representative. Citing sales volume and value information for Argentina, Canada, France, the United Kingdom, and the United States, petitioners argue that while the largest quantity sold outside the United States was to the United Kingdom, all three of ACA's reported third-country markets - Canada, France, and the United Kingdom - may be the appropriate third-country market. See Petitioners' Case Brief at 19, citing ACA's AQR at Exhibit 1. Since all three markets are viable and a particular market situation has not been alleged for any of those markets, petitioners assert the Department must determine under the statute whether prices to those three markets are representative.

Petitioners state that because ACA has not provided actual sales data for Canada and France, they calculated AUVs using the data presented in ACA's AQR at Exhibit 1. Based on a comparison of the AUVs of U.K. sales to the AUVs of U.S. and other third-country market sales, petitioners contend the United Kingdom was an outlier market during the POR. Petitioners argue the AUVs of the U.K. sales are not in line with ACA's claims that honey sold in Europe has greater contamination standards and higher warranty costs, or ACA's claims that honey sold in the United Kingdom requires extensive testing and homogenization. See Petitioners' Case Brief at 20, citing ACA's AQR at A-18, A-25 and A-26. Petitioners assert ACA has engineered its U.K. sales prices in order to guarantee no dumping would be found. Petitioners maintain the record does not affirm the Department's statement in the Preliminary Results that price differences among ACA's third country-markets do not "'support petitioners' assertion that prices to the United Kingdom are not representative.'" Id. at 21, quoting the Preliminary Results, 72 FR at 73762.

Even if the U.K. prices are found to be representative, petitioners aver ACA's sales to the United Kingdom do not appear to be the most similar to ACA's exports of subject merchandise to the

United States. In addition to similarity in terms of model match characteristics, petitioners argue the Department should focus on other relevant factors, including the product mix sold in each market, product quality, and channels of distribution. See Petitioners' Case Brief at 21, referring to Certain Frozen Warmwater Shrimp from Ecuador: Final Results of Antidumping Duty Administrative Review, 72 FR 52070 (September 12, 2007) and petitioners' November 15, 2007 letter at Exhibit 1 (Questionnaire to Promarisco S.A.).

Since color is the most important product matching characteristic for honey, petitioners claim it is vital to select a third-country market with a similar product mix so that most or all U.S. sales have a matching comparison market sale. Citing certain business proprietary data in ACA's October 11, 2007, letter at Attachment 1, petitioners assert a specific percentage of U.S. sales do not match to a sale of the same color in the United Kingdom. Petitioners contend the record does not support the Department's finding in the Preliminary Results that U.K. sales have more product matches to U.S. sales than do sales in ACA's other two largest third-country markets. Petitioners state that although they have repeatedly urged the Department to collect data regarding ACA's other two largest third-country markets, to date the Department has not requested these data. Without information regarding the color of the honey shipped to the other third-country markets in the same months as the U.S. sales, petitioners maintain the Department cannot establish sales to the United Kingdom provided the best matches to U.S. sales. See Petitioners' Case Brief at 22 and 23.

Petitioners assert that even if the record showed the United Kingdom had the best matches to U.S. sales in terms of color, a complete sales database of a certain one of ACA's other third-country markets would likely show that market to be more similar to the U.S. market in other ways. Petitioners argue all of ACA's U.K. sales consisted of homogenized honey while none of the honey sold in the United States was homogenized. Thus, petitioners assert, a third-country market to which ACA sold some non-homogenized honey would be a better comparison market for the U.S. market. Id. at 23 and 24. In addition, petitioners maintain the honey sold to one of ACA's other third-country markets was more similar to ACA's U.S. sales in terms of quality standards and testing. Id. at 23 and 25. Since homogenization and testing represent significant expenses that ACA incurs on its U.K. sales but not on its U.S. sales, petitioners contend a comparison between U.K. and U.S. sales is not the most appropriate.⁷ Moreover, petitioners argue the AUVs of sales to other third-country markets are more in line with the AUVs reported for the United States than are the AUVs of the United Kingdom, which demonstrates these other third-country markets would be more similar in terms of product characteristics and sales timing. Id. at 25. Lastly, petitioners refer to "numerous anomalies" with the U.K. sales that cannot be summarized here due to their business proprietary nature. Id. at 20, footnote 3, and 23.

In summary, petitioners contend the United Kingdom is not the appropriate third-country market in the instant review. Rather, petitioners maintain, a certain one⁸ of ACA's other third-country

⁷ Petitioners also assert that since homogenization can change the color of the honey when different colors are mixed together, the homogenization process is one that can alter the matching of products. Id. at 24, footnote 6.

⁸ ACA's third-country market at issue is considered business proprietary information. See ACA's October 11, 2007, letter at Attachment 1.

markets is a more appropriate comparison market based on information on the record, the statute, the regulations, and the Department's practice. Thus, petitioners urge the Department to require ACA to submit a complete sales database for a certain one of ACA's other third-country markets in order to conduct an analysis of the most suitable third-country comparison market.

ACA responds that petitioners are basically arguing the Department must choose another comparison market because ACA's U.K. sales prices do not generate a dumping margin. ACA contends there is no basis for the Department to depart from its history of using the largest third-country market in this case. First, ACA asserts that issues pertaining to particular market situations and representative prices, like date of sale, must be raised early in a proceeding. See ACA's Rebuttal Brief at 6 and 7, citing the Final Rule, 62 FR at 27356. ACA states it provided quantity and value data for its three largest third-country markets in its April 25, 2007, section A questionnaire response. ACA argues the appropriate time to raise concerns about viability and differences in AUVs among the three markets would have been immediately after ACA submitted its section A response. ACA maintains, however, that neither petitioners nor the Department questioned the representativeness of ACA's U.K. prices at that time. ACA contends petitioners did not comment on the representativeness of its U.K. prices until almost two months after ACA submitted its May 22, 2007, section B and C questionnaire responses. ACA states the Department, in turn, did not issue a supplemental questionnaire for section A until August 2007 and a supplemental questionnaire for sections B and C until September 2007.

Next, ACA argues, even if the representativeness issue had been raised in a timely manner, petitioners do not cite to any evidence that ACA's U.K. prices are not representative within the meaning of section 773(a)(1)(B)(ii) of the Tariff Act. ACA claims low AUVs alone are not sufficient to find prices are not representative. ACA also maintains that since honey prices may vary according to color, in a market such as Canada where customers purchase a limited number of colors, the availability of those colors as well as other market forces could result in higher prices. Therefore, ACA contends, not only is the United Kingdom the largest third-country market, it is also the market with the best matches to ACA's U.S. sales in terms of color. Finally, ACA claims petitioners' arguments regarding differences in product testing and homogenization are invalid and that neither of these factors should have a bearing on which market is an appropriate comparison market. ACA maintains neither testing nor homogenization is among the Department's product characteristics for honey. ACA states in the investigation it argued the Department should select France as the third-country comparison market rather than Germany because at that time German customers required testing that was not required in France or the United States. ACA contends it also requested that the Department regard the level of contamination (i.e., suitable for export to Germany or not suitable for export to Germany) as a product characteristic. ACA states the Department denied its claims and chose Germany as the comparison market in spite of different levels of contamination and different testing protocols. As for homogenization, ACA maintains this is the same type of process as testing for contaminants in that it does not alter the physical characteristics of the honey. Since the Department has refused to make contamination testing requirements or contamination level model match characteristics, ACA asserts the Department should not overturn its decision now. ACA argues it has relied upon prior Department determinations and the Department may not

alter its product characteristics after the close of the POR in order to “cherry pick” a third-country market with higher AUVs.

Department’s Position: We disagree with petitioners that ACA’s sales prices to the United Kingdom are not representative. In calculating NV, the statute directs the Department to determine which country will serve as a viable market and provide a proper comparison to calculate an accurate dumping margin. Section 773(a)(1)(B)(ii) of the Tariff Act provides that NV be based on prices at which the foreign like product is sold (or offered for sale) for consumption in a country other than the exporting country or the United States, if: (I) such price is representative; (II) the aggregate quantity (or, if quantity is not appropriate, value) of the foreign like product sold by the exporter or producer in such other country is five percent or more of the aggregate quantity (or value) of the subject merchandise sold in the United States or for export into the United States; and (III) the administering authority does not determine that a “particular market situation” in such other country prevents a proper comparison with the export price or constructed export price. The Department’s regulations at section 351.404(c)(2) further provide that the Department may decline to calculate NV in a particular market if it is established that: (1) in the case of either the exporting country or third country, a particular market situation exists; or (2) in the case of a third country only, the prices are not representative.

As petitioners point out, ACA’s three largest third-country markets are all viable, and a particular market situation has not been alleged for any of these three markets. Petitioners allege that ACA’s sales to the United Kingdom were not made at representative prices.

Because the term “representative” has not been defined in the statute or regulations, the Department has the discretion to develop reasonable interpretations of this term. The preamble to the Department’s regulations states the party claiming that sales are not representative has the burden of demonstrating there is a reasonable basis for so believing. See Final Rule, 62 FR at 27357. In the instant review, we do not find that petitioners have established there is a reasonable basis to believe ACA’s prices to the United Kingdom are not representative. Petitioners have pointed to the AUV of ACA’s U.K. prices as evidence that those prices are not representative. However, we find that low AUVs alone are not sufficient to prove that prices were unrepresentative. Furthermore, we note we have used the United Kingdom as ACA’s third-country market in prior administrative reviews, namely, the 2001-2002 and 2002-2003 administrative reviews. See POR1 Final Results and Honey from Argentina: Final Results of Antidumping Duty Administrative Review, 70 FR 19926 (April 15, 2005), respectively. Thus, we have found sales to the United Kingdom to be representative in prior reviews. In addition, as noted in the Preliminary Results, in response to petitioners’ allegation that ACA sold the foreign-like product at prices below the COP, the Department initiated a sales-below-cost investigation of ACA. See Preliminary Results, 72 FR at 73762. The results of our cost test showed that no sales had been made below cost during the POR. Id. at 73763 and Preliminary Results Memorandum at 2. For these final results, we continue to find that none of ACA’s sales were made below cost during the POR. Since all of ACA’s sales in the United Kingdom were made at prices above the COP, we find that all of ACA’s U.K. sales were made in the ordinary course of trade. Lastly, we note the anomalies of a business proprietary nature that petitioners note in their case brief are not sufficient to establish that ACA’s U.K. sales are not representative.

With respect to product similarity, we disagree with petitioners that ACA's U.K. sales do not appear to be the most similar to ACA's exports of subject merchandise to the United States. Petitioners assert in their case brief that a certain percentage of ACA's U.S. sales do not match to a sale of the same color in the United Kingdom, based on the information presented in ACA's October 11, 2007, letter at Attachment 1. However, because petitioners based this aspect of their analysis on ACA's October 11, 2007, letter rather than ACA's actual U.K. sales database, two problems arise. First, the information reported in Attachment 1 of ACA's October 11, 2007, letter is for invoices with a contract date within the 12-month POR, whereas ACA's U.K. sales database contains data for sales with a shipment date within the extended POR. In other words, ACA's October 11, 2007, letter does not reflect the full universe of sales used in our analysis and the full universe of U.K. sales does provide color matches to ACA's U.S. sales. Second, ACA's contracts indicate a maximum color of the honey on the Pfund scale. It appears that ACA, in assembling the information presented in its October 11, 2007, letter, either provided information regarding the color listed on the contract or the color listed on the purchase order submitted by the customer. These data do not always reflect the actual color of the honey that was shipped and invoiced and thus reported in ACA's U.K. sales database because in some cases, a color different from that shown on the contract (*i.e.*, a color less than the maximum) was actually shipped and invoiced.⁹ In other words, the actual colors shipped were different from those on the contract and listed in ACA's October 11, 2007, letter, and the actual colors shipped provided matches to the certain percentage of ACA's U.S. sales that petitioners claimed had no matches.

Moreover, we disagree with petitioners that sales to ACA's other third-country markets might be more similar to ACA's U.S. sales on the basis of homogenization and product testing. We note that neither homogenization nor product testing are among the physical characteristics included in the Department's model match criteria. In this proceeding, we consider the following physical characteristics: type of honey, grade/color, and the honey's form. Thus, we have not considered products sold in the United States to be more similar to comparison market sales based on the product testing and whether or not the honey was homogenized. Similarly, the anomalies of a business proprietary nature that petitioners note in their case brief are not factors that we should consider in the context of product similarity, as these factors are not part of the physical characteristics included in the Department's model match criteria.

Accordingly, we continue to find that ACA's U.K. sales are representative and provide the greatest similarity to ACA's U.S. sales. Therefore, for these final results we have continued to use ACA's U.K. sales for purposes of calculating NV and have not required ACA to submit a sales database for any of its other third-country markets.

Comment 4. Issues Related to the Cost of Production

⁹ We did not note these differences as changes to the color of the honey in Comment 2 for purposes of our date of sale analysis because we do not consider honey with a color that is less than the maximum to constitute a change for purposes of that analysis.

Petitioners note that for purposes of determining whether comparison market sales were made below the COP, the Department calculated an average COP based on adjusted beekeeper cost data. Petitioners state the average COP was calculated on a per-kilogram basis while comparison market prices were reported on a per-metric ton basis. Therefore, for the final results petitioners urge the Department to convert the average COP from kilograms to metric tons prior to comparing it to comparison market sales.

Petitioners also note the Department indicated in the Preliminary Results it was classifying homogenization expenses, which ACA reported as direct selling expenses, as production costs. Thus, petitioners contend ACA's reported homogenization expenses (*i.e.*, fields DIRSELT11, DIRSELT12, and DIRSELT13) must be added to the COP. Since the Department did not add these expenses to the COP for the preliminary results, petitioners assert the Department must do so for the final results.

ACA agrees with petitioners that the COP and sales prices must be compared using the same quantity of measure. However, ACA asserts it does not believe the Department made the error alleged by petitioners.

With respect to homogenization expenses, ACA argues it does not concur with the Department's decision to treat these expenses as production costs. Nevertheless, ACA contends if the Department continues to classify homogenization expenses as production costs, it would be improper to add the reported expense fields to beekeeper costs. ACA maintains it only homogenized some honey at the request of customers and therefore it computed homogenization expenses by allocating processing expenses only over those sales consisting of homogenized honey. ACA asserts that if the Department decides to include these costs in the reported COP, the proper way to calculate the amount to include would be to allocate the homogenization expenses over all of ACA's honey purchases during the period.

Department's Position: We agree with petitioners that we did not convert the average COP from a per-kilogram to a per-metric ton basis for the preliminary results. Thus, we have performed this conversion for the final results.

In addition, we agree with petitioners that ACA's reported homogenization costs should be included in the COP. In the instant case, the beekeepers have reported a single per-unit cost of honey because there are no distinguishable cost differences in the cost of honey for these beekeepers based on the established product characteristics (*i.e.*, type, grade or color, and form). As noted above in Comment 1, we determined that homogenization is a production process, and expenses incurred at this stage of production should be included in the cost of manufacture. However, homogenization itself is not a product characteristic. As such, the expenses incurred for homogenization have to be included in the total cost for the single reported unit cost. Because not all honey was homogenized by ACA, in order to determine the per-unit cost of the homogenization process, we allocated the total cost of homogenization over the total quantity of honey purchased from the beekeepers. If the Department simply added ACA's reported homogenization expenses to the COP, as suggested by the petitioners, it would overstate the reported per-unit cost because the reported expenses are only allocated to the products that were

homogenized, not all products produced as is reflected in the single reported per-unit cost. Because we did not include homogenization costs in the COP for the preliminary results, we have done so for the final results. For information regarding this calculation, see Memorandum to Neal M. Halper, through Taija A. Slaughter, from Ernest Gziryan and James Balog: Cost of Production and Constructed Value Calculation Adjustments for the Final Results – Asociación de Cooperativas Argentinas’ Beekeeper Respondents (April 28, 2008).

Comment 5: Revocation

Seylinco contends it has met the criteria for revocation in the instant review and therefore should be revoked from the antidumping duty order. Specifically, Seylinco claims it is eligible for revocation because it did not sell at less than normal value in four consecutive PORs: POR2, POR3, 2004-2005 (POR4) and the instant review. Seylinco states it also sold subject merchandise in commercial quantities by having sold at least one container load of honey (equivalent to approximately 20,000 kilograms) in each of these PORs. See Seylinco’s Case Brief at 2. Seylinco states the Department allows revocation under 19 CFR 351.222(e)(1)(ii) on the basis of selling subject merchandise in commercial quantities in at least three PORs. Citing the preamble to the Department’s regulations, Seylinco notes the history of 19 CFR 351.222 indicates “it is reasonable to presume that if subject merchandise, shipped in commercial quantities, is being dumped or subsidized, domestic interested parties will react by requesting an administrative review to ensure that duties are assessed and that cash deposits are revised upward from zero.” See Seylinco’s Case Brief at 7 and 8, citing Final Rule, 62 FR at 27326. Seylinco argues petitioners concede that honey is typically exported in drums by full container loads and that in requesting a review of Seylinco for each of the three periods at issue (*i.e.*, POR3, POR4 and the instant review), petitioners are essentially acknowledging one container is also a commercial quantity. See Seylinco’s Case Brief at 7. Acknowledging the Department’s findings in POR4 that Seylinco’s sales made in POR3 were not a “commercial quantity,” Seylinco maintains POR3 coincided with a dramatic decline in the production of Argentine honey that had implications for its traditional export markets. See Seylinco’s Case Brief at 3.

Seylinco argues that, contrary to the preamble to the Department’s Proposed Regulations, which states, “{i}n deciding commercial quantities, the Department will consider natural disasters and other unusual occurrences which might affect the potential for production or exportation,” the Department failed to consider, as a natural disaster, the contamination that occurred during POR3 and its effects on Seylinco. See Seylinco’s Case Brief at 8, citing the Preamble to Antidumping Duties; Countervailing Duties, 61 FR 7308, 7320 (February 27, 1996) (Preamble to Proposed Regulation). Seylinco contends that throughout POR2 and POR3 it experienced several related events equivalent to a “natural disaster” and other “unusual occurrences” which accounted for the relative decline in sales during both of these periods. First, Seylinco attests there was a widely-reported contamination scare with respect to Argentine honey which was caused by naturally-occurring bacteria and that such contamination falls within the definition of a natural disaster for the honey industry. As a result of the contamination scare, Seylinco argues its German customers demanded mandatory laboratory testing of honey which absorbed much of the company’s capital and led to construction of Seylinco’s own testing laboratory. Seylinco maintains these circumstances were “unusual occurrences” and deems it unreasonable that the

Department compared Seylinco's POR3 sales to its POR1 sales in its POR4 analysis on revocation. Seylinco insists that in the context of such "unusual occurrences" its POR3 sales activity was, in fact, "normal." See Seylinco's Case Brief at 9. Also, Seylinco explains that as a small Argentine exporter, it was affected more profoundly by the contamination scare than were larger exporters. See Seylinco's Case Brief at 9. Given the demands by its customers for heightened surveillance for contamination, Seylinco contests it was satisfying contract requirements in the German market and did not have sufficient honey to ship greater quantities to the United States during that period. Rather, Seylinco argues with an antidumping duty deposit rate of zero for Seylinco's shipments to the United States, the antidumping duty order had nothing to do with whether Seylinco sold one, or more than one, container to the United States during POR3. Instead, Seylinco states its U.S. sales increased in POR4 due to Seylinco's growing reputation for quality and reliability, and as a result of completed construction of the laboratory which consequently freed capital for the investment in honey acquisition. See Seylinco's Case Brief at 10. For these reasons, Seylinco urges the Department to give greater consideration to Seylinco's sales volumes in POR4 and the instant review in concluding whether or not to revoke Seylinco from the antidumping duty order.

Further, Seylinco maintains the Department's preliminary determination not to revoke Seylinco is not supported by the record and is in violation of Seylinco's rights under Article 11 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (WTO Antidumping Agreement) in the Uruguay Round Agreements. Seylinco cites Article 11.1, which states "an antidumping duty shall remain in force only as long as, and to the extent necessary to counteract dumping which is causing injury." Seylinco adds that Article 11.2 states "the authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive antidumping duty, upon request by any interested party which submits positive information substantiating the need for the review." See Seylinco's Case Brief at 6. Moreover, Seylinco argues it has proven to engage in fair trade during the three PORs at issue, and notes only one positive antidumping margin has resulted for any respondent throughout those three review periods. Seylinco states it already competes against major Argentine exporters at zero deposit rates and asserts it is not dumping. Claiming it has engaged in fair trade in the past three review periods, Seylinco requests the Department honor Article 11 of the WTO Antidumping Agreement and revoke the antidumping duty order with respect to Seylinco for these final results.

Petitioners counter Seylinco's claims and insist Seylinco has not met the requirements for revocation because it has not sold honey in commercial quantities in each of the three most recent reviews (i.e., POR3, POR4 and the instant review). Petitioners argue the Department reached the same conclusion not to revoke Seylinco from the order in Honey from Argentina: Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke in Part, 72 FR 25245 (May 4, 2007) (POR4 Final Results) based on the same facts and analysis. Petitioners point out the Department is currently defending its POR4 Final Results and its position not to revoke Seylinco before the CIT and urge the Department to reach the same conclusion for these final results. See Petitioners' Case Brief at 6, referencing Seylinco S.A. v. United States, Ct. No. 07-00200. Petitioners contend Seylinco's sales volumes speak for

themselves and that the sale of a single container (*i.e.*, in POR3) is not a commercial quantity in the context of this request for revocation. Citing Shandong Huarong Machinery Co. v. United States, Slip Op. 07-169 (CIT 2007) (Shandong Huarong) at 17 and 18 (where “abnormally small” sales during the period did not provide Commerce with “a reasonable basis to conclude that dumping would not ensue upon revocation”), petitioners argue a single container represents only a few percentage points of Seylinco’s normal commercial operations for honey. See Petitioners’ Rebuttal Brief at 6. Petitioners also rebut Seylinco’s claims and maintain they have not withdrawn requests for review of Seylinco for at least two reasons. First, petitioners believe that if the order is revoked as to Seylinco, it will continue or resume dumping as determined in the Department’s sunset review of this order. See Petitioners’ Rebuttal Brief at 7, referencing Honey from Argentina and the People’s Republic of China; Final Results of the Expedited Five-Year (Sunset) Reviews of Antidumping Duty Orders, 72 FR 10150 (March 7, 2007). Second, petitioners maintain Seylinco itself requested a review in each of the preceding and current review periods and did not withdraw its review requests, which means it would have been pointless for petitioners to withdraw their review request of Seylinco because such action would not have terminated the review.

Petitioners maintain the Department has acted in accordance with Article 11 of the WTO Antidumping Agreement in allowing Seylinco an opportunity to demonstrate there was no need for continuation of this order during the recent sunset review. According to petitioners, such opportunity satisfied any rights Seylinco may have been due under Article 11, yet Seylinco made no efforts to file comments, challenge or appeal the decision reached in the sunset review. See Petitioners’ Rebuttal Brief at 8 and 9. Petitioners assert the Department’s regulations are consistent with Article 11, noting that a demonstration that no dumping has occurred is not sufficient in itself to warrant revocation pursuant to 19 CFR 351.222(e)(1). Rather, petitioners argue a lack of dumping must occur in the context of sales that are consistently and sufficiently large (*i.e.*, in commercial quantities) for the Department to determine whether or not dumping will recur. See Petitioners’ Rebuttal Brief at 8. Also, petitioners state Articles 11.1 and 11.2 provide no guidance with respect to commercial quantities and maintain the Department adhered to Article 11.2 by conducting a review of the continuing need for the antidumping duty order. With respect to Article 11.1, petitioners claim the Department did not find it evident that the order is not necessary to counteract dumping by Seylinco because the volume of sales against which the lack of dumping has been measured was, in fact, deemed too small. See Petitioners’ Rebuttal Brief at 8 and 9.

Petitioners note that under 19 CFR 351.222(b)(2)(i) the Department must consider whether the continued application of the antidumping duty order is necessary to offset dumping. In establishing this, petitioners argue the respondent must demonstrate it participated meaningfully in the market in each of the relevant years which, as codified in 19 CFR 351.222(d)(1), requires that the exporter have sold in commercial quantities in each of the requisite years. See Petitioners’ Rebuttal Brief at 10. Again referencing Shandong Huarong, petitioners argue the Department has interpreted “commercial quantities” to mean a quantity which is not “abnormally small.” Although the Department’s regulations do not define “abnormally small,” petitioners note a standard has been developed on a case-by-case basis. In POR4, petitioners state, the Department established a methodology for analyzing whether or not Seylinco’s sales have been

made in commercial quantities. Petitioners note that because Seylinco started exporting honey after the period of investigation (POI), the Department compared Seylinco's shipments to the average commercial shipments of Argentine producers reviewed during the POI as an indication of the commercial practice of the industry prior to the order. Additionally, petitioners note, in POR4 the Department compared Seylinco's POR1 (2001-2002) shipment levels, in which the Department found Seylinco made sales at less than NV, to Seylinco's shipments to the United States for the three review periods at issue. Petitioners highlight the Department's analysis for POR4 Final Results which showed Seylinco's U.S. sales volumes during POR3 to be small in comparison to the overall quantities of Argentine honey shipped to the United States, and thus proved uncharacteristic of the industry as a whole. Petitioners also insist that the Department appropriately determined Seylinco's sales during POR3 were not made in commercial quantities in relation to its own shipment history (i.e., POR1). Petitioners argue Seylinco's low sales volumes during POR3 enabled Seylinco to control the dumping margin which would be difficult to sustain over multiple sales for a long period of time. Therefore, petitioners assert the small volumes of honey shipped by Seylinco during POR3 were not "normal commercial quantities" and cannot provide the Department any assurances Seylinco would not resume dumping were it revoked. See Petitioners' Rebuttal Brief at 14 and 15.

Petitioners state the market situation described by Seylinco was not a "natural disaster" that should change the Department's analysis, and maintain the contamination scare affected all Argentine producers equally. Therefore, petitioners insist the impact would have existed across all exporters to the United States. See Petitioners' Rebuttal Brief at 16. However, petitioners point out the POR4 Final Results revealed that over the course of the past five years the honey industry's lowest recorded level of exports to the United States was in POR2, while Seylinco's lowest export volumes to the United States were during POR3. Petitioners argue Seylinco provided no evidence in the instant review to refute these findings. See Petitioners' Rebuttal Brief at 17. Similarly, petitioners state the Department determined in POR4 that Seylinco's construction of its testing laboratory did not qualify as an "unusual occurrence" as Seylinco's sales to other markets during POR3 had not diminished to the same degree as its sales to the United States. In fact, petitioners contend, the POR4 Final Results found Seylinco's sales to some third-country markets even increased during the period. See Petitioners' Rebuttal Brief at 17. Moreover, petitioners assert Seylinco's argument that because it focused on the needs of German customers its U.S. sales in POR3 were unusually small is essentially an admission by Seylinco that the single sale it made to the United States in POR3 was not based on normal commercial considerations for the U.S. market.

In conclusion, petitioners argue that merely obtaining zero margins for consecutive review periods does not entitle Seylinco to revocation. Rather, petitioners maintain the fact that margins have been low or eliminated over the course of the order is not unusual and merely proves the order's efficacy with respect to Argentine exporters. Petitioners insist that absent the order, dumping by Argentine producers would resume or continue, as further demonstrated by the sunset review.

Department's Position: We find no evidence to warrant altering our findings in the Preliminary Results and determine not to revoke Seylinco from the order. As discussed in the Preliminary

Results, the Department found zero dumping margins for Seylinco in POR3, POR4 as well as for the current administrative review. See POR3 Final Results and POR4 Final Results. Although we find Seylinco has demonstrated at least three consecutive years of sales at not less than NV, we disagree with Seylinco's claim that its sales to the United States were made in commercial quantities during the three relevant review periods (i.e., POR3, POR4 and current administrative review) as required under 19 CFR 351.222(d)(1) and 351.222(e)(1)(ii). In the POR4 Final Results we determined that pursuant to 19 CFR 351.222(d)(1), Seylinco did not ship in commercial quantities during POR3.

On November 9, 2007, we placed on the record of this proceeding our POR4 analysis denying Seylinco's request for revocation. See "Request by Seylinco S.A. (Seylinco) for Revocation in the Antidumping Duty Administrative Review of Honey from Argentina" (2004-2005 Revocation Memorandum). Because Seylinco's first exports of honey to the United States were made after the imposition of the dumping order, we considered in POR4 that a suitable benchmark in determining commercial quantities within the context of "normal commercial practice" was to analyze Seylinco's own pattern of shipments, as well as that of the overall Argentine honey industry. See 2004-2005 Revocation Memorandum at 3 through 5. Our POR4 analysis revealed that Seylinco's shipments made during POR3 were uncharacteristic of usual commercial activity because they were significantly lower in comparison to both its own shipment history, specifically, its shipments during POR1, as well as the Argentine honey industry as a whole. We therefore determined Seylinco's sales in POR3 did not qualify as commercial quantities. See 2004-2005 Revocation Memorandum; see also POR4 Final Results and accompanying Issues and Decision Memorandum at Comment 2. As POR3 constitutes one of the reviews cited by Seylinco during the instant review in support of its request for revocation under 19 CFR 351.222(b), we again conclude that Seylinco is not eligible for revocation from the order.

We also disagree with Seylinco's claims that the contamination scare with respect to Argentine honey and Seylinco's purported cash-flow difficulties throughout POR2 and POR3 can be considered "natural disasters" or "unusual occurrences" because Seylinco presented no evidence on the record substantiating these claims. The POR4 Final Results addressed these same assertions and concluded that Seylinco's sales pattern did not reflect a natural disaster for the honey business, because a disaster would have had a similar impact among all Argentine exporters. Also, we found Seylinco's decision to make improvements to its infrastructure a deliberate and conscious business choice, and as such we did not consider it unusual within the meaning of the Preamble to the Proposed Regulation. See POR4 Final Results and accompanying Issues and Decision Memorandum at Comment 2. We determine Seylinco's company-specific circumstances therefore do not adequately explain the sharp decline of its shipments to the United States and find POR3 provides no basis to make a revocation determination. As such, Seylinco fails to meet the requirements of 19 CFR 351.222(d)(1) and 19 CFR 351.222(e)(1)(ii).

Finally, we disagree with Seylinco's contention that not revoking the order with respect to Seylinco is inconsistent with Article 11 of the Antidumping Agreement. Our decision is consistent with the Tariff Act and our regulations, which are consistent with the Antidumping

Agreement. Moreover, Article 11.1 merely states that antidumping duties shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury. It leaves to the discretion of the investigating authority the decision of how long, and to what extent it is necessary, to keep the duties in force to counteract dumping. Article 11.2 merely provides that the Department shall review the continued need for the duties upon request by an interested party. Seylinco made such a request, and consistent with Article 11.2, we have conducted such a review. Accordingly, for all the above reasons we are not revoking the order with respect to Seylinco, consistent with the POR4 Final Results, the Tariff Act, our regulations and our international obligations.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the positions set forth above and adjusting the margin calculations accordingly. If these recommendations are accepted, we will publish the final results of the review and the final weighted-average dumping margins in the Federal Register.

AGREE _____ DISAGREE _____

David M. Spooner
Assistant Secretary
for Import Administration

Date