

June 29, 2009

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

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

SUBJECT: Issues and Decision Memorandum for the Final Results of the
2006-2007 Administrative Review of the Antidumping Duty Order
on Honey from Argentina

Summary

We have analyzed the case and rebuttal briefs of the interested parties in the 2006-2007 administrative review of the antidumping duty order on honey from Argentina. As a result of our analysis and as discussed below, we have not made any changes to the margins calculated for any respondents. 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:

- Comment 1: Revocation of the Order with Respect to Seylinco, S.A. (Seylinco)
- Comment 2: Patagonik S.A.’s (Patagonik’s) Proposed Change to Reported Honey Color
- Comment 3: Use of Facts Available for Patagonik
- Comment 4: Treatment of Patagonik’s U.K Warranty Expense
- Comment 5: Treatment of Asociación de Cooperativas Argentinas’ (ACA’s) Testing Expenses
- Comment 6: Appropriate Margin to Assign to Compañía Inversora Platense S.A. (CIPSA)

Background

This review covers four companies. We selected three mandatory respondents, ACA, Patagonik, and Seylinco, all of which exported honey from Argentina to the United States during the period December 1, 2006 to November 30, 2007. The fourth company subject to this review, CIPSA, was not selected as a mandatory respondent. On December 30, 2008, we published the preliminary results of the 2006-2007 administrative review of honey from Argentina. See Honey from Argentina: Preliminary Results of Antidumping Duty Administrative Review and Intent to Revoke Order in Part, 73 FR 79802 (December 30, 2008) (Preliminary Results). On January 23,

2009, the Department of Commerce (the Department) informed respondents and the American Honey Producers Association and the Sioux Honey Association (collectively, petitioners) that it was postponing the briefing schedule for this administrative review due to the complexity and unresolved nature of certain issues. On March 12, 2009, the Department published a notice extending the time limit for the final results of this review until June 29, 2009. See Honey from Argentina: Extension of Time Limit for Final Results of Antidumping Duty Administrative Review, 74 FR 10724 (March 12, 2009). On March 30, 2009, the Department notified interested parties that the deadlines to submit case and rebuttal briefs were April 8, 2009, and April 13, 2009, respectively. On April 1, 2009, the Department further extended the deadline to submit rebuttal briefs until April 20, 2009.

Petitioners, ACA, CIPSA, Patagonik, and Seylinco submitted case briefs on April 8, 2009. Petitioners, Patagonik, and Seylinco filed rebuttal briefs on April 20, 2009. In addition, Seylinco filed comments on petitioners' rebuttal brief on April 21, 2009.

Discussion of the Issues

Comment 1: Revocation of the Order with Respect to Seylinco

For these final results, Seylinco urges the Department to uphold its preliminary determination to revoke Seylinco from the order. Seylinco asserts it has met the criteria for revocation because: (1) it did not sell at less than normal value in the last five consecutive periods of review (PORs); (2) it sold subject merchandise in commercial quantities in accordance with 19 CFR 351.222(e)(1)(ii); and (3) it agrees to reinstatement of the antidumping duty order if the Department were to find in the future that Seylinco sold honey at less than fair value. See Seylinco's Case Brief, dated April 8, 2009 (Seylinco's Case Brief), at 2. In particular, Seylinco contends it has obtained zero margins for the following five consecutive administrative reviews: 2002-2003, 2003-2004, 2004-2005, 2005-2006 and the instant review. With respect to commercial quantities, Seylinco asserts that its U.S. sales for the 2004-2005, 2005-2006 and instant PORs (i.e., those under consideration for purposes of revocation) are consistent with the Department's criteria for revocation. Specifically, Seylinco refers to the Department's determination in the 2004-2005 administrative review not to revoke where it established a measurement for commercial quantities with respect to Seylinco. Concerning its revocation request for the instant review, Seylinco maintains it has sold the minimum number of container loads necessary to satisfy the commercial quantities requirement for revocation. For instance, Seylinco asserts it sold well in excess of four containers of subject merchandise during the 2004-2005, 2005-2006 and current administrative reviews.¹ Id. Seylinco adds the shipment levels for those periods also reflected its participation in the 2001-2002 administrative review when it first entered the U.S. market. Id. at 5. Seylinco claims that while it is reasonable to compare Seylinco's sales in the past three reviews to its sales in the 2001-2002 period of review (POR), it is not proper to compare its sales to those of the respondents in the original period of investigation (POI). Seylinco argues that because the Argentine honey industry is dominated by several large companies and cooperatives, the volumes sold by such companies should not be held as a standard for revocation, as most mid-and small-size companies cannot attain similar

¹ Seylinco states a full container contains roughly 60 drums of honey weighing approximately 20,000 kg. in total. See Seylinco's Case Brief at 2.

quantities. Consequently, Seylinco states that if those larger exporters set the bar for revocation, only the largest exporters could ever earn revocation. Id. at 6. Citing Certain Polyester Staple Fiber From Korea: Preliminary Results of Antidumping Duty Administrative Review, Partial Rescission of Review and Preliminary Notice of Intent To Revoke, In Part, 69 FR 32497, 32498 (June 10, 2004); unchanged in Certain Polyester Staple Fiber From Korea: Final Results of Antidumping Duty Administrative Review and Final Determination To Revoke the Order in Part, 69 FR 61341, 61342 (October 18, 2004), Seylinco states the Department has revoked other antidumping duty orders for smaller exporters whose market share was modest. See Seylinco's Case Brief at 6.

Given this, Seylinco argues there is no evidence to suggest revocation of the order with respect to Seylinco is not warranted. Seylinco asserts the antidumping duty order neither limited its exports to the United States for the five reviews since the 2001-2002 administrative review, nor did its market share rise under the order. Id. at 7. Moreover, even if it were revoked from the order, Seylinco contends it is unable to increase shipment levels largely because it lacks the amount of capital necessary to purchase any higher volumes of honey from suppliers. As explained at verification and through its financial statements, Seylinco insists its capitalization position restricts the volumes it can sell as the company does not have the collateral to finance larger purchases of honey. Id. at 7 and 8.

Petitioners insist the Department should not revoke the antidumping duty order with respect to Seylinco because it has not met all of the qualifications required for revocation. Referring to 19 CFR 351.222(b)(3), petitioners note the Department "normally will revoke an order in part . . . only with respect to subject merchandise produced or supplied by those companies that supplied the exporter during the time period that formed the basis for the revocation."² Accordingly, petitioners argue that revocation for non-producing exporters must be made applicable only to the exporter and the specific suppliers which produced the subject merchandise during the three PORs at issue. See Petitioners' Case Brief, dated April 8, 2009 (Petitioners' Case Brief), at 7. According to petitioners, because Seylinco's request for revocation was made on behalf of itself only, and did not include certification of its producers, the revocation request is deficient. As a result, Seylinco does not meet the requirements of revocation set forth under 19 CFR 351.222(e). Id.

Petitioners also argue Seylinco did not ship in commercial quantities in each of the three relevant PORs required for revocation. In particular, petitioners assert Seylinco's sales during the instant review are not representative of commercial quantities when measured by the Argentine honey industry and Seylinco's own normal commercial activity. While petitioners acknowledge Seylinco did not have shipments during the POI, they contend the Department's use of the 2001-2002 POR as a base period in the preliminary results is not a reliable indicator of Seylinco's propensity to dump if unconstrained by the antidumping duty order. Id. at 8. Also, petitioners maintain Seylinco's 2001-2002 shipments reflect an unreasonably small base from which to predict Seylinco's future behavior and, consequently, Seylinco's sales for the instant POR cannot be deemed comparable to its 2001-2002 levels. Id. at 9. Rather, petitioners insist the baseline

² Petitioners originally cited 19 CFR 351.222(e)(b)(3) which does not exist. See Petitioners' Case Brief at 1. Petitioners later cite the correct regulation, 19 CFR 351.222(b)(3), which we have used throughout this discussion. See Petitioners' Case Brief at 13.

quantity should be large enough to demonstrate sales are consistent with industry practice in the country at issue. Id. at 9. However, when using POI sales as a baseline, petitioners contend Seylinco's shipment levels in the current POR should also be considered too small and are not representative of the Argentine honey industry as a whole. Consequently, petitioners argue Seylinco's export quantity in the instant review provides no evidence it will not dump in the future and revocation should be denied. Id. at 10 and 11.

In addition, petitioners state two reasons why continued application of the antidumping duty order is otherwise necessary. First, petitioners insist there is a regulatory basis to continue the order, arguing that 19 CFR 351.222(b)(3) upholds the integrity of an order where an exporter is not also the producer. Id. at 12. Without enforcing this provision, petitioners argue, exporters who are not producers could act as a funnel for all dumped merchandise. For instance, petitioners suggest nothing precludes a non-producing honey exporter who is revoked from an order from purchasing honey from all suppliers found to have dumped merchandise in the past. Id. at 13. Petitioners argue if Seylinco is revoked from the order there will be no means to determine the source of any future honey it exports and whether or not Seylinco is acting as a funnel for dumped honey. Id. Petitioners state 19 CFR 351.222(b)(3) will also be unenforceable by U.S. Customs and Border Protection, since entry documentation identifies only the exporter and not the honey producers. Second, petitioners attest the Department has already determined in Honey from Argentina and the People's Republic of China; Final Results of Expedited Five-Year ("Sunset") Reviews of Antidumping Duty Orders, 72 FR 10150, 10151 (March 7, 2007) that were the order to be revoked, dumping would likely recur at an average rate of 35.76 percent for all Argentine producers. Id. at 14. Petitioners insist these findings apply to Seylinco, adding this decision was not appealed by any party. Petitioners argue the potential of future dumping is even greater given Seylinco is a non-producing exporter. Id. at 15. However, petitioners state if the Department decides to revoke the order with respect to Seylinco, it must do so in accordance with 19 CFR 351.222(b)(3) and limit the revocation only to those suppliers from whom Seylinco purchased honey during the three PORs being considered for its request for revocation. Id.

In rebuttal, Seylinco objects to petitioners' arguments and maintain no new facts have been presented to deny it revocation for these final results. Seylinco insists "19 CFR 351.222(e)(b)(3)" does not exist and argues petitioners' claim should therefore be rejected. See Seylinco's Rebuttal Brief, dated April 20, 2009 (Seylinco's Rebuttal Brief), at 1 and 2. Rather, Seylinco contends 19 CFR 351.222(e)(1) requires that the "exporter or producer certify that the person sold at not less than normal value; and that in the future the person will not sell the merchandise at less than normal value; and that in each of the years forming the basis for the request that person sold in commercial quantities." Id. at 2 (emphasis added by Seylinco). Further, as Seylinco is both the exporter and the seller of subject merchandise, its honey producers (beekeepers) are uninvolved in the selling process and would be unable to certify information over which they have no control or responsibility. Id. at 2 and 4. Seylinco argues even if the Department accepts petitioners' argument it should still be rejected under the doctrine of laches or equitable estoppel.³ Seylinco objects to petitioners' allegation that its request for

³ Seylinco provided the following explanation and definitions of these terms: the "Doctrine of Laches" is based upon the maxim that equity aids the vigilant and not those who slumber on their rights. It is defined as neglect to assert right or claim which taken together with lapse of time and other circumstances causing prejudice to adverse party, operates as bar in court of equity." See Seylinco's Rebuttal Brief at 2, footnote 1, citing Black's Law

revocation is deficient and urges the Department not hold Seylinco accountable for a technical requirement previously unidentified within the course of the administrative review. Seylinco states its request for revocation and the accompanying certifications were filed along with its review request in December 2007 and no concerns were raised until after the preliminary determination. Citing Bowe-Passat v. United States, 17 CIT 335, 343 and Jinfu Trading Co., Ltd. v. United States, 2007 (CIT) LEXIS 106 at *27-28, Seylinco states petitioners claim is “merely a game of ‘gotcha.’” Id. at 3 and 4.

Seylinco also objects to petitioners’ suggestion that revocation should be limited to Seylinco’s honey suppliers for the 2004-2005, 2005-2006 and 2006-2007 PORs (i.e., the years under consideration for revocation). Id. at 5. Seylinco points out that its revocation request was not specific to certain suppliers and the Department’s preliminary determination did not address restricting revocation to select suppliers. Referring to 19 CFR 351.222(b)(3), Seylinco maintains the Department has the discretion not to limit revocation in part to suppliers of the exporter. Id. Seylinco insists the Department did so appropriately in its preliminary determination.⁴ Id. Rather, Seylinco states that because it has sold honey at fair value and above cost throughout five consecutive reviews, the Department can conclude Seylinco is monitoring U.S. prices to ensure its honey continues to be sold at fair value and above cost. Id. Also, Seylinco declares that enforcing revocation for a list of suppliers who are not in a position to individually control prices in the United States or third countries will be more complicated than merely applying it to Seylinco. Id. at 6.

Turning to commercial quantity, Seylinco insists it made sales in commercial quantities in each of the PORs under consideration for revocation. Acknowledging the standard for commercial quantities in the context of revocation is determined on a case-by-case basis, Seylinco avers it relied upon the Department’s precedent as set for Seylinco in the most recent reviews of this case. Id. For example, Seylinco asserts the Department’s determination in the 2004-2005 administrative review established four containers as a suitable benchmark for measuring a commercial quantity and contends it sold well in excess of four containers during each of the relevant PORs. Seylinco states the Department also determined sales in the three PORs constituted commercial quantities in comparison to its sales in the 2001-2002 POR when Seylinco first entered the market. Seylinco claims the Department likewise found the sales in the relevant PORs to be significant, and thus comparable to the sales of other exporters. Id. at 7. Seylinco reiterates it is not Department policy to set the bar for revocation at the level of larger exporters as this would disqualify many medium-and small-scale producers and exporters. Moreover, Seylinco asserts the antidumping laws emphasize that each exporter (or producer) who sets the export price ultimately controls whether the subject merchandise sold to the United States is at less or greater than normal value. Id. Seylinco insists it merits revocation because it has a proven history of setting export prices above cost and at greater than normal value. Id.

Dictionary at 787 (5th Ed. 1979). Equitable estoppel is defined as “The Doctrine by which a person may be precluded by his act or conduct, or silence when it is his duty to speak, from asserting a right which he otherwise would have had.” Id. at 3, footnote 2, citing Black’s Law Dictionary, op. cit., at 483.

⁴ Seylinco cited 19 CFR 351.222(b)(C)(3) does not exist. See Seylinco’s Rebuttal Brief at 5. Rather, we have corrected the citation to 19 CFR 351.222(b)(3).

Seylinco insists it has met all the criteria for revocation and no compelling reason exists to deny it revocation from the order. *Id.* at 8. Seylinco argues petitioners' suggestion of a "funnel" effect whereby Seylinco would become a conduit for other exporters' honey sales is baseless. First, Seylinco suggests that if the Department were to accept petitioners' demand to limit revocation to its suppliers in the 2004-2005, 2005-2006 and 2006-2007 reviews, only those limited suppliers could possibly benefit from revocation. *Id.* More broadly, Seylinco also argues there would be no advantage to suppliers to seek out a revoked exporter where, as here, "virtually every major exporter in Argentina already has a zero antidumping duty margin or a de minimis margin – and has been operating with virtually no antidumping duty deposit requirement for the better part of a decade." *Id.* at 9. In addition, Seylinco claims there is no evidence it has ever gained suppliers or exported merchandise of other exporters in any of the past six reviews. Seylinco further points out that petitioners' funnel argument does not hold because of the way in which the Argentine honey industry is structured. *Id.* In particular, as a significant number of beekeepers are formally within the cooperative ACA, Seylinco states it cannot afford to purchase large volumes from other large beekeepers. *Id.* Seylinco also maintains enforcing revocation of Seylinco would be no more difficult to administer than many other antidumping duty cases and that Seylinco will continue to keep thorough records in order to assist CBP in establishing the identity of its suppliers. *Id.* at 10. Seylinco adds it must maintain detailed records in order to comply with the United States Bioterrorism Act which requires Seylinco to be able to track the origin of all honey entries. Finally, Seylinco objects to petitioners' reliance on the five-year sunset review of this order as relevant to its request for revocation in the instant review. Seylinco asserts the Department's statutory, regulatory and policy considerations are completely different when considering revocation of an order in its entirety, as in a five-year sunset review, as opposed to revocation of an order in part. *Id.* at 11.

In rebuttal, petitioners reiterate much of their case brief with respect to why the Department should not revoke the order with respect to Seylinco. Petitioners contend Seylinco is still ineligible for revocation because: (1) as a non-producing exporter, it has not provided appropriate certifications on behalf of both itself and the producers; (2) it has not shown that it made shipments in commercial quantities in each of the PORs subject to its revocation request; and (3) it has not demonstrated that maintenance of the order is not otherwise necessary to prevent future dumping. *See* Petitioners' Rebuttal Brief, dated April 20, 2009 (Petitioners' Rebuttal Brief), at 6. Petitioners explain that merely having sold honey "in excess of four containers" and making shipments at levels above that of the 2001-2002 administrative review does not prove Seylinco participated meaningfully in the U.S. market. Petitioners state it is improper for the Department to rely on Seylinco's 2001-2002 sales as a baseline in determining whether or not its shipments in the 2004-2005, 2005-2006 and 2006-2007 PORs were made in commercial quantities. *Id.* at 7 and 8. Rather, petitioners argue the Department should establish a specific threshold by which to consider commercial quantities in order to avoid establishing too low a baseline to be a valid measure of commercial reasonableness. *Id.* at 8. Petitioners distinguish that while the quantity in the instant review is sufficiently large to be bona fide and can serve as the basis for calculating a dumping margin, it does not necessarily follow that the quantity is significant for determining Seylinco's propensity to dump in the future if the order is removed. *Id.* at 9. Petitioners also dispute Seylinco's claim that it is a "small" exporter and should not be compared to larger industry participants. Rather, petitioners point out Seylinco's sale volumes in the 2005-2006 POR demonstrate a capacity for operating on a much larger scale

than it had in other PORs, specifically the instant review. In fact, petitioners suggest Seylinco's sales in the current POR and its sales in every other POR aside from the 2005-2006 POR are therefore unrepresentative of both the Argentine honey industry and that of Seylinco's own capabilities. Id. at 10.

Moreover, petitioners emphasize the order against Seylinco is necessary and that 19 CFR 351.222(b)(3) should be enforced to prevent Seylinco from becoming a funnel for Argentine honey producers attempting to evade antidumping liability. Id. at 11. Petitioners explain that unlike in manufacturing, for example, where a product can be traced to particular factories, the honey industry is made up of hundreds of producers and many exporters. Consequently, petitioners insist revocation of an individual exporter in an industry dominated by non-producing exporters is not practicable because there would be no means to determine the source of honey exported in the future. Petitioners assert this confirms the importance of limiting revocation to Seylinco's specific suppliers. Id. at 11 and 12. Further, petitioners argue Seylinco presented untimely new factual information with respect to its ability to finance its purchases which should not be considered for the final results. Petitioners contend the information from the Department's verification report cited by Seylinco did not reveal any limitations that could prevent it from increasing exports in the future. In particular, petitioners aver that Seylinco's borrowings in the past do not predict how much the company can borrow in the future. Id. at 12. Petitioners add that if Seylinco were in a position of being unconstrained by the antidumping duty order it could attract even more producers from whom to purchase honey for export. Id. Finally, petitioners highlight the statute and regulations merely state the Department "may" revoke the order and that based on all information there is strong evidence that revocation is not justified in this case. Id. at 13.

On April 21, 2009, Seylinco provided a supplement to its rebuttal brief objecting to petitioners' claims of untimely new factual information. See Seylinco's Rebuttal Brief, Opposition to Petitioners' New Fact Allegation, dated April 21, 2009 at 1. Contrary to petitioners' allegation, Seylinco asserts it had not included new information in its case brief and that it accurately cited to specific pages of record documents, including its audited financial statements. Id. Seylinco maintains petitioners' interpretation of its year-to-year capitalization should not be confused with whether the facts are on the record. Id. at 2.

Department's Position: We are not persuaded by petitioners' arguments to change our findings in the Preliminary Results and therefore for these final results we are revoking the order with respect to Seylinco's exports of subject merchandise to the United States. As discussed in the Preliminary Results and the memorandum to Richard Weible, "Request by Seylinco for Revocation in the Antidumping Duty Administrative Review of Honey from Argentina," dated December 19, 2008 (Preliminary Results Revocation Memorandum), the Department may revoke, in whole or in part, an antidumping duty order upon completion of a review under section 751 of the Act. See Preliminary Results Revocation Memorandum at 2. While Congress has not specified the procedures the Department must follow in revoking an order, the Department has developed a procedure for revocation that is described in 19 CFR 351.222. This regulation requires, inter alia, that an exporter or producer may request in writing that the Department revoke an order with regard to that person if the person submits the request with the following:

(1) the person's certification that the person sold the subject merchandise at not less than normal value in the current review period and that the person will not sell subject merchandise at less than normal value in the future;

(2) the person's certification that the person sold commercial quantities of the subject merchandise to the United States in each of the three years forming the basis of the request; and

(3) an agreement to reinstatement of the order if the Department concludes subsequent to the revocation that the person sold subject merchandise at less than normal value.

See 19 CFR 351.222(e)(1). On December 31, 2007, Seylinco satisfied the filing requirements of 19 CFR 351.222(e)(1) by submitting its request for review accompanied by its certifications for revocation.

Upon receipt of such a request, the Department will then consider:

(1) whether the exporter or producer in question has sold subject merchandise at not less than normal value for a period of at least three consecutive years;

(2) whether the exporter or producer has agreed in writing to its immediate reinstatement in the order, as long as any exporter or producer is subject to the order, if the Department concludes that the person, subsequent to the revocation, sold the subject merchandise at less than normal value; and

(3) whether the continued application of the antidumping order is otherwise necessary to offset dumping.

See 19 CFR 351.222(b)(2)(i).

Seylinco has met the requirements of 19 CFR 351.222, i.e., it had zero or de minimis dumping margins for its last three administrative reviews, it sold in commercial quantities in each of these years, and it submitted the requisite certifications.

We disagree with petitioners that under 19 CFR 351.222(b)(3), the Department should either deny Seylinco revocation altogether or limit the revocation to certain producer/exporter combinations. Section 351.222(b)(3) of the Department's regulations states, "in the case of an exporter that is not the producer of subject merchandise, the Secretary normally will revoke an order in part under paragraph (b)(2) of this section only with respect to subject merchandise produced or supplied by those companies that supplied the exporter during the time period that formed the basis for the revocation." See 19 CFR 351.222(b)(3) (emphasis added). We note that where there is a single producer or supplier, the Department has limited a revocation in part to exports by a non-producing exporter to only that merchandise supplied by the relevant supplier of subject merchandise. See Sebacic Acid from the People's Republic of China: Final Results of Antidumping Duty Administrative Review and Determination To Revoke in Part, 67 FR 69719 (November 19, 2002). However, the use of the word "normally" in 19 CFR 351.222(b)(3)

indicates that under appropriate circumstances the Department has discretion in how it implements revocation for a non-producing exporter. The Department may treat non-producing exporters on a case-by-case basis where large numbers of producers are involved. For instance, in establishing cash deposit rates in situations involving a non-producing exporter (exporter/producer combination rates), the preamble to the Department's regulations states "it may not be practicable to establish combination rates when there are a large number of producers, such as in certain agricultural cases. The Department will make such exceptions to combination rates on a case-by-case basis." See Antidumping Duties; Countervailing Duties, 62 FR 27296, 27303 (May 19, 1997).

Given the nature of the Argentine honey industry and the unique circumstances of this case, we believe it is appropriate to grant a revocation in this case without limiting the revocation to certain producer/exporter combinations. Specifically, the Argentine honey industry comprises between 18,000 and 20,000 producers, making it impracticable to establish revocation for specific combinations of exporters and producers in this case. See "Antidumping and Countervailing Duty Petition; Honey from Argentina and the People's Republic of China" (Petition) at 13 and 20.⁵ As a non-producing exporter of subject merchandise, Seylinco purchased honey from hundreds of different suppliers (i.e., beekeepers and middlemen) during the period under consideration. See Seylinco's April 22, 2008 Section A Questionnaire Response at Exhibit 11. Accordingly, we have not applied combination deposit rates in any administrative review of this antidumping duty order. The same logic holds here. Because Seylinco is a non-producing exporter with a significant number of suppliers, it is impracticable to limit revocation to those producers from whom it purchased honey during the three years at issue.

Section 772(a) of the Tariff Act of 1930, as amended (the Act) is also relevant to the revocation question here. Section 772(a) of the Act states export price is the "price at which the subject merchandise is first sold (or agreed to be sold) before the date of importation. . . to an unaffiliated purchaser in the United States or to an unaffiliated purchaser for exportation to the United States . . ." See section 772(a) of the Act. Accordingly, we have interpreted section 772(a) of the Act to mean that the first party in the chain of distribution with knowledge that its sales of subject merchandise are made for exportation to the United States, either directly to a U.S. purchaser or through a reseller, is the appropriate party subject to an administrative review. See, e.g., Honey from Argentina: Rescission of Antidumping Duty New Shipper Review, 70 FR 72294 (December 2, 2005) and accompanying Issues and Decision Memorandum at Comment 1. Concerning the Argentine honey industry, the export trading companies are the first party in the chain of distribution that have knowledge of the ultimate destination of the honey and are the ones responsible for setting prices for U.S. sales and third country sales. See Petition at 15. For example, as Seylinco reported, its suppliers do not have prior knowledge of the honey's intended market and the destination is only decided after it is delivered by the suppliers to the port warehouses. See Seylinco's section A questionnaire response, dated April 22, 2008 at A-28. As Seylinco is the first party with knowledge of the merchandise's U.S. destination it has been the

⁵ On June 29, 2009, the Department placed portions of the Petition used to initiate the less-than-fair-value antidumping and countervailing duty investigation of honey from Argentina and the People's Republic of China on the record of this review. See Memorandum to the File, "Honey from Argentina; Antidumping and Countervailing Duty Petition," dated June 29, 2009.

relevant party for review as to all of its exports to the United States; the many producers supplying Seylinco do not play a role in determining the ultimate destination of the honey. This commercial practice is common to the Argentine honey industry, and is not unique to Seylinco. With respect to petitioners' concern that Seylinco could act as a funnel for dumped merchandise by other exporters, we note such other exporters would have knowledge of the U.S. destination at the time they supplied honey to Seylinco and thus those sales would not be covered by the revocation and would be subject to review themselves. Only exports by Seylinco in which Seylinco is the first party with knowledge of the U.S. destination of the merchandise are covered by the revocation.

We note the determination to revoke a non-producing exporter is, of necessity, highly dependent on the facts of each given respondent, and must be examined carefully on a case-by-case basis. We also recognize, consistent with section 351.222(b)(3) of our regulations, the potential for evasion of existing antidumping duty orders in the event a revoked exporter acts as a channel for other exporters' U.S. sales of subject merchandise. However, based on the unique circumstances surrounding this case, including the extremely fragmented nature of the Argentine honey industry, and our ability, via the knowledge test, to identify in the course of a review the appropriate party making the first sale to the United States of subject merchandise, we believe that revocation for Seylinco's exports, not linked to particular producer combinations, is appropriate. In other cases, such as cases involving non-market economies, the Department will carefully consider whether the absence of such linkages may encourage the evasion of the order.

Next, based on our examination of the sales data submitted by Seylinco, we find Seylinco sold the subject merchandise in the United States in commercial quantities in each of the consecutive years cited by Seylinco to support its request for revocation. See Preliminary Results Revocation Memorandum at 1, 7 and 8. Our determination as to whether or not sales volumes are made in commercial quantities is also made on a case-by-case basis dependent upon the unique facts of each proceeding. The Department notes it generally uses the POI (i.e., pre-order shipment levels) as a benchmark for a company's normal commercial behavior; however, given Seylinco's first exports of honey to the United States were made after the imposition of the dumping order, we have considered an alternative benchmark. For this proceeding we have taken into account the relative size of Seylinco and analyzed Seylinco's own pattern of shipments, as well as that of the overall Argentine honey industry in determining commercial quantities within the context of "normal commercial practice." This is consistent with our benchmark used in the 2004-2005 administrative review where we determined Seylinco had not made sales in commercial quantities during all of the three administrative review periods at issue. See Preliminary Results Revocation Memorandum at 4; see also Honey from Argentina: Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke In Part, 72 FR 25245 (May 4, 2007) (2004-2005 Final Results) and accompanying Issues and Decision Memorandum at Comment 2.

We further disagree with petitioners that Seylinco's experience is not representative of the Argentine honey industry. For example, Seylinco's shipments in the 2005-2006 administrative review reflected the general trend of the Argentina honey industry which realized its highest export levels to the United States from 2001 through 2007 (i.e., the 2001-2002 administrative review through the 2006-2007 administrative review). According to Seylinco, the Argentine

honey industry experienced a bumper crop in 2005 and this enabled Seylinco, as well as the industry as a whole, to increase its U.S. sales volume during the 2005-2006 administrative review. See Memorandum to the File, “Verification of the Sales Response of Seylinco in the Antidumping Review of Honey from Argentina,” dated December 10, 2008, at 4. Meanwhile, Seylinco contends its shipments in the 2006-2007 POR revealed both a leveling off of honey production and the effects of a drought which had plagued Argentina in 2007. Id. As such, we find Seylinco’s sales in the 2005-2006 POR signify normal commercial practice of the Argentine honey industry. Also, in contrast to petitioners’ claim, we deem Seylinco’s shipment levels in the 2004-2005 and 2006-2007 administrative reviews never dropped to the point of being inconsiderable with respect to Seylinco’s own shipment levels in the 2001-2002 POR. Additionally, Seylinco’s sales in the 2004-2005 and 2006-2007 PORs were made as multiple shipments, as opposed to Seylinco’s single shipment made in the 2003-2004 POR which we determined was not a commercial quantity. See 2004-2005 Final Results and accompanying Issues and Decision Memorandum at Comment 2. Consequently, we determine Seylinco has participated meaningfully in the U.S. market during the past three years both with respect to its own normal commercial activity as well as the industry as a whole. Petitioners have presented no new evidence that would cause us to change our opinion on this matter; therefore, we conclude Seylinco sold merchandise in commercial quantities during the relevant PORs.

Finally, with respect to denying revocation of an otherwise-qualifying respondent, the Department’s regulations and prior practice mandate it must find substantial, positive evidence that the continued application of the order is necessary to offset dumping. See Notice of Final Results of Antidumping Duty Administrative Review, Final Determination to Revoke the Order in Part, and Partial Rescission of Antidumping Duty Administrative Review: Fresh Atlantic Salmon from Chile, 68 FR 6878 (February 11, 2003) and accompanying Issues and Decision Memorandum at Comment 1. While we agree with Seylinco that its capitalization position is not untimely new information, we have not considered this argument for these final results. A company’s capitalization is not relevant in deciding whether to revoke the company from an antidumping duty order. We also agree with Seylinco that Department findings in five-year (sunset) reviews of antidumping duty orders are not relevant to determining revocation in part. The Department’s sunset reviews examine whether revocation of an antidumping or countervailing duty order, as a whole, would be likely to lead to a continuation or recurrence of dumping or a countervailable subsidy. See section 752(c)(3) of the Act and Procedures for Conducting Five-Year (Sunset) Reviews of Antidumping and Countervailing Duty Orders, 63 FR 13516 (March 20, 1998) and 70 FR 62061 (October 28, 2005); see also Policies Regarding the Conduct of Five-year (“Sunset”) Reviews of Antidumping and Countervailing Duty Orders; Policy Bulletin, 63 FR 18871 (April 16, 1998).

We find no record evidence to suggest Seylinco will alter its commercial practices following revocation and become a channel for dumped sales of honey. Accordingly, we determine that application of the antidumping duty order to Seylinco is no longer warranted because: (1) as noted above, the company had zero or de minimis margins for a period of at least three consecutive years; (2) Seylinco has agreed to immediate reinstatement of the order if the Department finds that it has resumed making sales at less than normal value; and (3) the continued application of the order is not otherwise necessary to offset dumping. We note that should the Department find that Seylinco has resumed selling honey at less than normal value, we will take appropriate action in accordance with the Act and the Department’s regulations.

Comment 2: Patagonik's Proposed Change to Reported Honey Color

On February 9, 2009, Patagonik submitted what it termed a minor correction to its section B response. Claiming the information was not new, and that the information it was submitting was similar to a minor correction that would be identified at the outset of a verification, Patagonik argued that because of a clerical error in the typing of one invoice, the color of the honey actually shipped was different from the color of the honey specified on the invoice. Patagonik urged the Department to use this “corrected” information because it is, in Patagonik’s eyes, the most accurate information available.

Petitioners argue the Department should “not permit Patagonik to change its reported color honey grades based on belatedly reported and conflicting data.” See Petitioners’ Case Brief at 1. Petitioners recite their understanding of the facts surrounding Patagonik’s grade reporting, and note the Department asked Patagonik to report honey grade/color using an A through D letter scale corresponding to the color of the honey.

Patagonik then, according to petitioners, assigned these grades based on commonly-used “Pfund scale” numbers. The “Pfund scale” is a test used by the honey industry to compare and grade the colors of honey. Furthermore, petitioners assert the entire basis for Patagonik’s sales selection and reporting in both markets was based on this system of reporting. Petitioners state Patagonik also provided sample documentation for certain sales with its section A questionnaire response indicating that the color reported in Patagonik’s sales response matched the color actually ordered by and shipped to the customer.

According to petitioners, the Department relied on this information for matching sales in the two markets in reaching the preliminary results of the review. The Department calculated an antidumping duty assessment rate for Patagonik based on this information. Petitioners assert it was only after Patagonik received an above-de minimis margin in the Preliminary Results, and after the record had closed for submission of information not specifically requested by the Department, that Patagonik proffered a single correction to the record that it deemed to be “minor.” See Petitioners’ Case Brief at 16. According to petitioners, making the single change as suggested by Patagonik would result in a de minimis margin and, thus, a zero antidumping duty liability.

Petitioners claim that with respect to the so-called minor correction urged by Patagonik, the invoice, bill of lading and export license all show the color of the honey purchased and shipped to be consistent with the customer’s order. Petitioners note Patagonik admits that it sometimes ships lighter colored honey to fill an order for darker honey if there is a shortage of the darker honey. Petitioners also note Patagonik typically lists the nominal color as ordered on the invoice. See Patagonik’s March 23, 2009 Supplemental Questionnaire Response (Patagonik’s March 23, 2009 SQR) at 5. Petitioners also point out that Patagonik insisted, “the ordered and invoiced color is the relevant color for reporting and matching purposes.” Id. at 6.

Petitioners note that it was only after additional inquiry by the Department that Patagonik revealed numerous additional discrepancies in its reporting of both letter grade and Pfund scale.

See Petitioners' Case Brief at 17-18, citing Patagonik's March 23, 2009 SQR at Exhibit B-54 (Revised Color Test and Invoices Correlation Table).

Petitioners insist Patagonik must not to be permitted to use conflicting documents to selectively change the product matching to achieve a more favorable result. According to petitioners, the record demonstrates that Patagonik's initial attempted correction to the grade of one sale on February 9, 2009 was not the result of a comprehensive review of the accuracy of its sales listings, as claimed by Patagonik, but instead, a targeted correction that, if accepted, would change the matching results in a way favorable to Patagonik. Petitioners claim that when pressed by the Department to document its reporting of the grade characteristics for all sales and explain apparent discrepancies, numerous additional discrepancies and inconsistencies were exposed. According to petitioners, even Patagonik's summary of its color test records shows numerous instances where the reported grade in its U.K. and U.S. sales listings did not match the actual average grade based on the test results. Petitioners point out as, the Department itself noted, there are even more cases where the actual and reported grades were different for at least some of the honey within a given shipment. See, e.g., Patagonik's March 23, 2009 SQR at 10-11, which discusses one particular invoice.

Petitioners assert there is further evidence of discrepancies revealed in the supporting documentation submitted at various times in this proceeding, much of which is proprietary in nature. While petitioners concede "not all examples suggest incorrect grade coding," petitioners allege such discrepancies reflect systemically discrepant record-keeping that undermines the reliability of Patagonik's entire sales reporting. See Petitioners' Case Brief at 19.

Petitioners allege "Patagonik admits that its records are often inconsistent as a matter of policy. Patagonik's invoices and packing lists reflect only the color the customer ordered, but not necessarily the actual color of the merchandise." Id., citing Patagonik's March 23, 2009 SQR at 4. Petitioners contend that "{t}o fill an order for product that is 50mm on the Pfund scale (and thus grade "B") Patagonik 'might have to ship a 33 or 34mm lot, if that is what is available at the time of export.'" See Petitioners' Case Brief at 19-20, quoting Patagonik's March 23, 2009 SQR at 5. Petitioners also refer to Patagonik's statement that "the invoice will always show the honey sold in such a case as 50mm, which is what the order called for." See Petitioners' Case Brief at 20, quoting Patagonik's March 23, 2009 SQR at 5. In other words, according to petitioners, even though the actual grade shipped was "A", Patagonik's policy would dictate reporting the grade in its sales listing as "B." See Petitioners' Case Brief at 20.

Petitioners allege that because Patagonik acknowledges that "the ordered and invoiced color is the relevant color for reporting and matching purposes," the order and invoice should serve as the basis for the sales listing and model matching. Id., quoting Patagonik's March 23, 2009 SQR at 5. Petitioners assert that "given this late reporting and the conflicting data, there is no reason to alter the original color coding when the important shipment and government documents and the invoice were the basis for the original reporting." See Petitioners' Case Brief at 20. Petitioners argue it is clear that the reported grade based on the grade ordered is often not Patagonik's actual grade based on the grade tested and shipped. Petitioners allege pricing questions, which are proprietary in nature, and conflicting documentation produced late in the proceeding mean the Department must view the new documentation with caution. According to

petitioners, if the Department does not reject the questionnaire responses in their entirety, it “should not give Patagonik the benefit of a selective revision at the 11th hour when the Department does not have the ability to make wholesale changes to Patagonik's responses and verify the results.” Id. at 21.

Petitioners argue the new information placed on the record after the Preliminary Results conflicts with other documents on the record and does not require the Department to alter its preliminary results to give weight to the new information. According to petitioners, the Department’s determination must be based on substantial evidence, which is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Id., citing Suramerica de Aleaciones Laminadas C.A. v. United States, 44 F.3d 978, 985 (Fed. Cir. 1994) (quoting Consolidated Edison Co. v. NLRB, 305 U.S. 197, 229 (1938)). Petitioners then state “{T}he substantiality of evidence must take into account whatever in the record fairly detracts from its weight.” Id. (quoting Universal Camera Corp. v. NLRB, 340 U.S. 474, 488 (1951)). According to petitioners, such detracting evidence includes “contradictory evidence or evidence from which conflicting inferences could be drawn.” Id. at 21-22 (quoting Universal Camera Corp., 340 U.S. at 487). Finally, petitioners contend, “{t}he agency's decision must be ‘rational.’” See Petitioners’ Case Brief at 22, citing Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927, 933 (Matsushita) (Fed. Cir. 1984).

According to petitioners, “given the admitted systematic discrepancies between the ordering and invoicing practices of Patagonik and its customers on the one hand and its testing records on the other hand, the Department should continue to rely on the record on which the Department bases all product matching decisions - the invoice and on the records submitted to the government of Argentina upon exportation.” See Petitioners’ Case Brief at 22. In so doing, petitioners assert, the Department will be fulfilling the “agency's task to evaluate and assign weight to the evidence before it.” Id., citing United States Steel Group v. United States, 96 F.3d 1352, 1356-57 (Fed. Cir. 1996).

Finally, with respect to the grading issue, petitioners claim “Patagonik must do more than simply point to contradictory evidence in the record to change the preliminary results. ‘{T}he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence.’” Id. Petitioners conclude that the evidence before the Department “could be open to multiple interpretations, its argument does not require, or even allow, reversal.” See Petitioners’ Case Brief at 22, citing Mitsubishi Heavy Indus., Ltd. v. United States, 275 F.3d 1056, 1062 (Fed. Cir. 2001) (citing Matsushita, 750 F.2d at 933). Thus, according to petitioners, “final results that are consistent with the preliminary results would be supported by substantial evidence despite the existence of some conflicting records.” See Petitioners’ Case Brief at 22.

In its rebuttal brief, Patagonik states that it reported its product characteristics properly and accurately. See Patagonik’s Rebuttal Brief, dated April 20, 2009 (Patagonik’s Rebuttal Brief), at 5. Patagonik claims petitioners misunderstand the use of the Pfund scale to measure color in commercial practice. Patagonik points out that the instructions for reporting product characteristics contained in the Department’s questionnaire do not mention Pfund readings at all, nor do the instructions specify or require the reporting of color in the millimeter scale used in

Pfund readings. Rather, Patagonik claims it used the Pfund scale to determine the proper color codes as the color codes used in the questionnaire are based on U.S. standards, not those used in Argentina.

Patagonik believes it has “reported the color which the customer ordered, and which the customer paid for, and which Patagonik shipped and invoiced, exactly as shown on Patagonik’s commercial records.” Id. at 7.

Patagonik dismisses petitioners’ objections to its explanation that sometimes a customer who has specified a certain Pfund grade will receive drums which, if tested individually, will prove to be a higher or lower grade than the honey specified on the invoice. Patagonik responds that the invoice will always reflect the Pfund grade ordered. Patagonik claims there are tolerances in commercial practice to which the parties have agreed. According to Patagonik, the customer will accept the shipment if the difference in the Pfund levels between what is shipped and what is invoiced falls within these tolerances. Patagonik argues that if the variance is beyond what is acceptable to the customer, the customer always has the right to reject the containers, or make a warranty claim.

Patagonik insists it sells quality honey, and that it always intends to ship according to the agreed color specifications. So in most cases, Patagonik believes any color variance will fall within the agreed tolerance. Even if there is a discrepancy that results in a quality claim, Patagonik claims the invoice is never retroactively modified, as it is a commercial document that reflects the commercial transaction, including the agreed color. If there were an unacceptable color discrepancy, Patagonik maintains the price would be adjusted after the fact by means of a credit note which would be reported under the applicable warranty field in its section B and C responses.

Patagonik’s practice is in their eyes similar to the practice of all Argentine exporters. Patagonik avers this was fully examined and explained during the new shipper review of Patagonik at verification, and that if the Department had verified Patagonik in the instant review, it could have been explained with equal clarity.

Patagonik claims that its reporting of color has been consistent and accurate, as it has always reported the color of the product as ordered by the customer, invoiced to the customer, and shown on the shipping documentation. Patagonik rejects the petitioners’ claim that Patagonik’s record-keeping is chronically inaccurate.

Patagonik next addresses petitioners’ argument that Patagonik should have reported color using test certificates instead of invoices. Patagonik claims if it were to do so it would have been ignoring the data shown on its commercial sales documentation, and basing its color reporting on internal testing. Patagonik asserts this would be contrary to normal commercial practice and would require a change in the Department’s usual reporting preferences, which would likely be rejected by the Department. Patagonik believes it correctly reported color characteristics from its invoices, consistent with the Department’s established preference.

Patagonik next claims the appropriate source of product characteristics information is the

commercial invoice issued in the ordinary course of business, rather than internal test certificates. Patagonik contends it could, “had the Department so specified, have reported the final test color of each drum at the time of shipment, in place of the invoiced color that it did in fact report.” *Id.* at 10. Patagonik believes such an approach would have been inaccurate, much more onerous to report, and quite difficult to verify. Patagonik also says it would have been wrong, as the Department’s longstanding practice has been to use the invoiced grade or specification as the source of product specification and matching criteria. Patagonik states the Department has consistently rejected attempts to use mill tests to define the product characteristics in contradiction to the invoice. Patagonik reasons the commercial invoice is the financial document that all the parties agree best reflects the terms of their transaction. Patagonik claims that relying on mill test certificates or other documents risks confusion and inconsistency as the invoice and the tests do not always agree exactly as to product specifications.

Patagonik believes in many industries, parties use “nominal” specifications to identify the products to be sold, and the nominal specification or sales agreement may reflect tolerances that allow deviation within stated limits from the stated “nominal” specifications. Patagonik asserts that nominal, contractual specifications are always to be preferred over the possibly inconsistent -- even if more precise -- internal test values.

In support of its argument Patagonik cites Stainless Steel Plate in Coils from Belgium: Final Results of Antidumping Duty Administrative Review, 70 FR 72789 (December 7, 2005) (Stainless Steel Plate Belgium). Patagonik argues in that case the respondent insisted the mill test was more precise and thus should be preferred as the source of the product characteristics to be reported. However, Patagonik states, the Department disagreed and rejected the attempt to rely on the inconsistent (although more accurate) test results where these differed from the sales documents. See Patagonik’s Rebuttal Brief at 12, citing Stainless Steel Plate Belgium and accompanying Issues and Decision Memorandum at Comment 8.

Patagonik claims it invoices its products using a nominal product description (a Pfund value) that may sometimes differ from the color that is actually shipped as measured by the Pfund scales of individual drums of honey. It goes on to argue that just as in the Stainless Steel Plate Belgium case, the Department should rely on the color specification as ordered, invoiced, shipped and accepted by the customer, rather than the results of individual samples as tested.

Patagonik disputes the characterization by petitioners that the differences between nominal and actual honey colors are a result of discrepant recordkeeping. Patagonik believes its records are “completely accurate and reliable.” See Patagonik’s Rebuttal Brief at 13. Patagonik claims it is not shipping products without regard to the ordered color but is meeting the color requirements of the customers. Patagonik insists the most reliable and verifiable source of the color coding, under the Department’s practice, is the invoiced color, rather than the color as recorded in test documents.

Patagonik also disputes the assertions by petitioners that the dumping system can be manipulated by selling one product but shipping a different product. It asserts the commercial reality is that the product delivered must comply with the order and the invoice or the customer can and will

reject the container or demand compensation.

Normal variances that are commercially acceptable to the customer, Patagonik insists, are accepted in the ordinary course of business, without resulting in a revised invoice or new product description. Even if there were an unacceptable discrepancy between the tested color and the invoiced color, Patagonik maintains the invoice would not be changed but, rather, there would be a quality claim and possible price adjustment. In such situations, the product continues to be reported as invoiced by Patagonik, as in its view, the relevant price terms are those reflected on the invoice.

Patagonik argues that its post-preliminary correction was submitted to ensure the margin calculation is made with the most accurate information. Patagonik insists the mistyped invoice should be corrected to reflect the customer's order, the packing list and the actual color of the honey and that this information "had nothing to do with test certificates." *Id.* at 16. Patagonik believes the Department should correct the error in the invoice since the record evidence "shows that the corrected data {are} accurate." *Id.* at 17. Patagonik cites to the customer's order date to explain differences in pricing between sales to the same customer, and insists the customer ordered and paid for the honey color specified in Patagonik's post-preliminary correction. Thus, Patagonik renews its request that the Department make the correction "so that the margin can be as accurate as possible." *Id.* at 20.

Although Patagonik believes in the integrity of its invoice-based color reporting, Patagonik asserts that making corrections to its sales data based on test results, as advocated by petitioners, would actually reduce the preliminary dumping margin; therefore, Patagonik is inclined to support petitioners' request. Patagonik also suggests discounting color entirely in the model matching would result in a similar decline in the margin. Patagonik therefore argues that its reporting of the product characteristics was conservative and reasonable.

Department's Position: The Department has given full consideration to Patagonik's post-preliminary comments despite the fact that such issues were first raised in a submission filed after publication of the Preliminary Results. While the Department continues to have some concerns about the reporting methodology utilized by Patagonik, after a careful evaluation of the evidence on the record of this proceeding, the Department determines not to alter its Preliminary Results calculations.

The evidence on the record of the testing of honey color and its correlation to the color on the invoice does appear in some instances contradictory. There are several instances in which the color recorded on the invoice is not identical to the color of honey that was actually shipped, based on the test results provided. In some instances, a higher quality of honey was used to fill the order and in some cases, while the average of several lots shipped may have met the requirements of the order, each individual lot may have registered a different color. Given the nature of the industry, however, we have determined the color as recorded on the invoice is the most reliable information on which to base the required reporting methodology. The overall reliability of Patagonik's invoices is reinforced by Argentina's required exportation documentation. The records submitted to the government of Argentina upon exportation must match the invoice and bill of lading or the shipment would be rejected by the Customs computer

system. See Patagonik's March 4, 2009 Supplemental Questionnaire Response (Patagonik's March 4, 2009 SQR) at 2. As such, despite the existence of some apparent inconsistencies, it is clear from the invoice and official governmental documentation that the preponderance of evidence supports using the invoice color to conduct our sales matching.

This conclusion is based on Patagonik's own statements. Patagonik throughout the proceeding has repeatedly emphasized the invoice as the document in which the material terms were set and the key document in the sales process. For example, Patagonik stated "orders are not part of the financial accounts of a company, and thus are not audited, cannot be tied to the financial statements, and sometimes cannot be readily tracked to the actual eventual sale." See Patagonik's July 24, 2008 Section A, B and C Supplemental Questionnaire Response (Patagonik's July 24, 2008 ABCSQR) at B1-3. Moreover, Patagonik went on to say "mistakes or mis-statements made in order documents, whether by the customer in making the order, or the seller in recording the order, often are not formally corrected, because the order itself is of no fiscal import. Orders guide the parties' performance, but it is the actual performance that the company must record directly." Id. Such statements clearly indicate that the order was not a reliable document upon which to base actual performance.

Patagonik also states it "correctly reported color characteristics from its invoices, consistent with the Department's established preference." See Patagonik's Rebuttal Brief at 10. Patagonik further argues that "the Department's longstanding practice favors the invoiced grade or specification as the source of product specification and matching criteria." Id. at 10-11. Patagonik reiterates "the invoice is the financial and commercial document that the parties agree reflects the terms of their transaction. Going behind that document to mill test certificates or other documents risks confusion and inconsistency." Id. at 11. Patagonik concludes "the most reliable and verifiable source of the color coding, in Patagonik's view, and under the Department's practice, is the invoiced color, rather than the test color." Id. at 13. Finally, Patagonik categorically states "Patagonik accurately reported its color data, derived from its commercial invoices, a verifiable and reasonable source." Id. at 26. Thus, on numerous occasions, in both its questionnaire responses and its rebuttal brief, Patagonik stresses the invoice is the governing document when it comes to the terms of sale, including the specification of the color being sold.

Patagonik, however, argues that in the case of one invoice, it made a clerical error and the Department should rely on the color specified in the order for model match characteristics in this one instance only. However, there is no evidence on the record of this segment of the proceeding showing the customer in this particular case raised the issue of the color being mistakenly transcribed on the invoice in question or of Patagonik acknowledging such an error prior to its post-preliminary comments. Indeed, in response to the Department's question as to "why the customer did not ask for and Patagonik did not provide a correction to the invoice when the invoice is the binding document for all sales...", Patagonik asserted "the customer did not ask for a correction of the invoice" and that the error was "an inconsequential typing error." See Patagonik's March 4, 2009 SQR at 1. Patagonik reaffirmed the importance of the invoice in its rebuttal brief when it stated "of course, the invoice will always reflect the Pfund grade ordered. If the variance is within the commercial tolerance the parties have agreed to, the customer will accept the shipment without question. If instead the customer finds the variance to

be beyond an acceptable tolerance, the customer may reject the containers, or demand compensation in the form of a quality claim.” Patagonik went on to say “yet even in that unusual event, the invoice is never retroactively modified. The invoice is a commercial document that reflects the commercial transaction, including the agreed color. If there is an unacceptable color discrepancy, the price is adjusted after the fact by means of a credit note.” See Patagonik’s Rebuttal Brief at 8.

Patagonik urges the Department to defer to the order information to support its conclusions that there were errors in one invoice. Yet, Patagonik also argued strongly in the context of establishing the correct date of sale that the invoice is “the financial and commercial document that the parties agree reflects the terms of their transaction.” See Patagonik’s Rebuttal Brief at 11. In other words, and as indicated above, Patagonik has throughout this proceeding stressed the lack of reliability or finality of a customer’s incoming order.

The Department agrees with Patagonik that it should not arbitrarily change the preference of relying on the invoice date as the date on which the terms of sale (including honey color) are set. It is for that very reason the Department defined the universe of U.S. and third-country sales for the POR by invoice, and not order date. Given the lack of supporting documentation for the alleged error, the absence of any requested correction by the customer, and Patagonik’s numerous statements on the record regarding the importance of the invoice, we determine that the invoice as originally reported to the Department is the most reliable source document for the relevant sales information. Therefore, we have not made the change requested by Patagonik to the color of the one observation at issue.

Comment 3: Use of Facts Available for Patagonik

Petitioners argue the Department has sufficient cause to apply adverse facts available to Patagonik's entire response since the record shows that “Patagonik's reporting of product grade has been chronically inaccurate and based on a flawed methodology.” See Petitioners’ Case Brief at 22. Petitioners cite to previous cases where the Department has decided that failure to accurately report product characteristics is grounds for an adverse inference. See Petitioners’ Case Brief at 23, citing Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from Thailand, 73 FR 33396 (June 12, 2008) and accompanying Issues and Decision Memorandum at Comment 1 (Thai Steel). Petitioners highlight the potential that exists for manipulation of the product matching which could undermine the integrity of the margin calculation. Petitioners insist Patagonik must not be allowed to use a “flexible” reporting scheme in which the antidumping analysis could be manipulated by using nominal grades on an invoice that might be deemed acceptable to the customer as long as that grade is not “worse” than the grade actually shipped to the customer.

Petitioners cite to sections 776(a)(2)(A), (C) and (D) of the Act, which provide that the Department shall, subject to section 782(d), use the facts otherwise available in reaching its decision if the respondent, among other things, (1) withholds information requested by the Department; (2) significantly impedes a proceeding; or (3) provides information that cannot be verified. In this case, petitioners believe, the application of facts available is deserved on all

three counts.

Petitioners also cite to Patagonik's failure to provide information about the alleged differences in the invoiced and shipped grade of honey for the single transaction until after the preliminary results were disclosed, and when a request for verification by petitioners was too late. In so doing, petitioners allege "Patagonik should have been found to have withheld information, to have significantly impeded the investigation and to have prevented verification." See Petitioners' Case Brief at 23. Petitioners argue that providing misleading information is grounds for both the application of facts available and the use of adverse inferences. See Petitioners' Case Brief at 23-24, citing Shanghai Taoen Intern. Trading Co., Ltd. v. United States, 360 F. Supp. 2d 1339, 1345 (CIT 2005).

Despite being under no obligation to do so, petitioners argue, the Department gave Patagonik three chances to explain the discrepancy between the invoiced and shipped grade of the honey. According to petitioners, the record is still left with "a discrepancy between the various sources of data that is still unresolved." See Petitioners' Case Brief at 24.

Petitioners argue the Department is permitted to apply total adverse facts available under section 776(b) of the Act whenever an interested party has failed to cooperate to the best of its ability to comply with a request for information. Petitioners note the Federal Circuit has interpreted the language in section 776(b) of the Act to require a respondent to demonstrate that it has "put forth its maximum efforts to investigate and obtain the requested information from its records." See Petitioners' Case Brief at 24, citing Nippon Steel Corp. v. United States, 337 F.3d 1373, 1383 (Fed. Cir. 2003). Petitioners believe Patagonik cannot be said to have put forth its maximum efforts when, during the course of its multiple questionnaire responses, it never mentioned or discussed any discrepancy in the product matching data reported and it never explained the difference between its invoicing and sales practices and its record keeping practices with respect to product testing. According to petitioners, the Department is left with no means by which to reconcile these conflicting data given Patagonik's behavior. Thus, in petitioners view, application of total adverse facts available is warranted under section 776(b) of the Act. See Petitioners' Case Brief at 24.

Petitioners cite to the provisions of section 782(e) of the Act, and argue that Patagonik has not met all of the criteria that would preclude the Department from rejecting information. Petitioners believe the conflicts in the data render them so incomplete that they cannot be deemed to be reliable, demonstrating that Patagonik clearly has not acted to the best of its ability. Thus, in petitioners' view, the effect of the errors in Patagonik's records and questionnaire response is to compromise the integrity and reliability of the most basic of functions in the antidumping margin calculation - the matching of identical or similar products. See Petitioners' Case Brief at 25.

Moreover, petitioners conclude the above-mentioned factors, when combined with irreconcilably conflicting data, warrant the use of total adverse facts available. Petitioners urge the Department to apply an adverse inference to Patagonik, either by "rejecting its response in its entirety or, at a minimum, selecting as normal value for each U.S. sale the highest contemporaneous price reported in the comparison market." Id.

Patagonik responds that it reported its color characteristics accurately and in good faith, and otherwise participated in the review to the best of its ability. Patagonik cites to a previous review in which the petitioners similarly objected to the color reporting of a respondent, Seylinco, and similarly demanded that the Department reject Seylinco's responses based on color "discrepancies" and apply adverse facts available. Patagonik argues that despite the petitioners' assertions that the respondent had refused to cooperate and obstructed the review, the Department rejected the petitioners' calls for adverse facts available. See Patagonik's Rebuttal Brief at 24, citing 2004-2005 Final Results and accompanying Issues and Decision Memorandum at Comment 1. Instead, Patagonik asserts, the Department declined to invoke any facts available sanctions, much less total adverse inferences as requested by the petitioners. Id.

Patagonik argues that in the case cited by petitioners, Thai Steel, the respondent claimed it had correctly reported certain characteristics but at verification the Department discovered that in fact the respondent had ignored the Department's instructions and coded all of its products with the same characteristic code. In fact, Patagonik argues that in Thai Steel the Department applied only partial facts available in the case which had only a slight effect on the overall margin. See Patagonik's Rebuttal Brief at 25-26, citing Thai Steel.

Patagonik contends the Thai Steel respondent's situation "is not at all like Patagonik's. Patagonik accurately reported its color data, derived from its commercial invoices, a verifiable and reasonable source." See Patagonik's Rebuttal Brief at 26. Patagonik contends that "if the Department had requested Patagonik to have reported its color based on test certificates rather than invoices, it would have done so – indeed, as soon as that information was requested, Patagonik immediately provided that information." See Patagonik's Rebuttal Brief at 26-27, citing Patagonik's March 4, 2009 SQR at Exhibits B-46 and B-47 and Patagonik's March 23, 2009 SQR at Exhibits B-54, B-55, B-58 and B-67. Thus, Patagonik argues, "a case making the obvious point that willfully withholding, misrepresenting or falsely reporting product data might justify facts available is not apposite in the present review." See Patagonik's Rebuttal Brief at 27.

Patagonik concludes the Department should therefore "derive a calculated antidumping rate for Patagonik from its reported data, including its reported color data." Patagonik continues, suggesting "even if the Department decides that it prefers test certificate color, it can still calculate a margin, by modifying the color data to reflect the color test data that Patagonik has placed on the record, as compiled by the petitioners in their brief." Id. Furthermore, Patagonik claims even if the Department determines "Patagonik should have reported test certificate based color instead of invoice-based color, the impact is minimal and proves Patagonik's good faith." Id. Finally, Patagonik believes the Department "has sufficient data on the record to calculate an accurate margin for the final results." Id. at 29.

Department's Position: We disagree with petitioners that application of adverse facts available is warranted for Patagonik. We find that Patagonik did not withhold requested information, did not significantly impede the proceeding, and did not provide information that could not be verified. Moreover, Patagonik did not fail to act to the best of its ability. Although the Department has some concerns with the reporting methodology utilized by Patagonik, we find the information submitted by Patagonik reliable for purposes of the margin calculation. Thus,

for the final results of this review, the Department deems it appropriate to use the color of the honey specified on the invoice in this segment of the proceeding.

Upon bringing the alleged clerical error to the Department's attention, the Department sought to determine whether it was appropriate to make the correction for the sale at issue through a supplemental questionnaire. Patagonik's response to that supplemental questionnaire did raise more questions regarding Patagonik's color reporting and therefore the Department issued a second supplemental questionnaire. In responding to both supplemental questionnaires, however, we find that Patagonik made a good faith effort to do so and as such did not withhold information requested by the Department. While questions remain regarding Patagonik's color reporting, we note the Department has not previously insisted on the level and specificity of testing data as we have demanded in this case. Furthermore, in attempting to respond to the Department's supplemental questionnaires in a forthright manner, we find that Patagonik has not significantly impeded the proceeding or provided information that was unverifiable. In addition, we find that Patagonik acted to the best of its ability in responding to the Department's requests for a voluminous amount of information. As such, the Department has decided that in this case, the resort to facts available or adverse facts available is not warranted.

For the reasons discussed in Comment 2 above, the Department will continue to use Patagonik's reported color based on the colors identified on the invoice, as the preponderance of evidence in this segment indicates this is the most reliable source document on the record of the proceeding. However because questions regarding Patagonik's reporting of color were raised after the preliminary results, the Department intends to examine further Patagonik's color reporting and the different sources to document honey color in any future review. Model match criteria are a key component of the margin calculation, and parties must ensure that the sales observations reported are accurate.

Comment 4: Treatment of Patagonik's U.K Warranty Expense

In its Preliminary Results the Department reclassified Patagonik's reported warranty claims as ISEs because Patagonik was unable to demonstrate that such expenses arose from actual warranty claims. Patagonik asserts it reported a cost for credit notes paid in response to customer quality claims. See Patagonik's Case Brief, dated April 8, 2009, at 2. Patagonik claims this was the same approach Patagonik took in the previous review and cites to the verification report from that review to support its contention that nothing has changed from the prior segment with respect to the way Patagonik reported such expenses.

Patagonik argues that when a quality complaint from a customer results in a warranty claim being paid, a direct expense has been incurred. Patagonik asserts in its questionnaire responses that although in some cases Patagonik may believe the honey was not, in fact, tainted in any way, Patagonik nonetheless incurred an actual, audited, verifiable expense as a result of a quality claim. Patagonik claims the Department is "twist[ing] out of context" the company's assertions that it never ships defective or substandard honey to justify its reclassification of these expenses as indirect in nature. See Patagonik's Case Brief at 4. Patagonik also suggests the Department is not being evenhanded in its treatment of warranty expenses and asserts the Department has developed different standards for examining warranty expenses for normal value as opposed to

U.S. price. “It is,” Patagonik avers, “unthinkable that the Department would accept that {a dispute over the validity of a quality claim} as an {sic} reason for discarding the U.S. warranty expense.” *Id.* at 5. Yet, Patagonik continues, because in this case the claim for an adjustment to normal value would decrease the margin, the Department now posits a new standard whereby the claim must not only have been paid to the customer, but the seller, Patagonik, must have been in complete agreement with the customer’s complaint. *Id.*

Arguing in the alternative, Patagonik notes that as characterized by the preliminary results, Patagonik’s warranty payments to its customers in the United Kingdom were actually more in the nature of a post-sales discount or price adjustment. Patagonik states it would not object to such a characterization since these expenses would then be deducted directly from the gross unit price in the derivation of normal value in the final results.

Petitioners state the Department was correct not to treat the claimed expense as a direct selling expense in this review. *See* Petitioners’ Rebuttal Brief at 19. Petitioners argue that Patagonik presented no evidence that the reported expenses at issue arose out of actual claims for warranty based on the shipment of defective merchandise. Furthermore, petitioners assert, “any finding in a previous segment as to warranty expenses in that proceeding would have been based on different facts and is therefore not germane to the Department’s decision in this review.” *Id.* at 20. Petitioners note Patagonik’s references to the verification report from the prior review which is not on the record of this proceeding, and insist such information cannot be taken into account in this proceeding.

Moreover, petitioners argue Patagonik did not report the expense on a sale-specific basis, but instead allocated it across all of its U.K. sales. Petitioners conclude therefore that because this expense is not reported for or related to a specific sale, it is properly treated as an ISE according to 19 CFR 351.410(c).

Department’s Position: As a preliminary matter, the Department disagrees with Patagonik’s argument that the Department is not evenhanded in its approach to warranty expenses. The fact is that Patagonik only reported warranty expenses in the third country market; in the absence of any claim of warranty expenses in the U.S. market, Patagonik’s allegation of unequal treatment is without foundation. The evidence on the record of this proceeding shows Patagonik did not believe there were any quality issues with the honey it supplied and that “if Patagonik has paid a claim, it was always to appease the customer and, not because any impurities were found.” *See* Patagonik’s July 24, 2008 ABCSQR at C1-8. The Department had previously asked Patagonik to provide supporting documentation showing the nature and terms of the warranties provided during the POR as well as a copy of any warranty agreement in effect during the POR. Patagonik said no such warranty agreements existed and Patagonik failed to provide any supporting documentation showing the nature and terms of the warranties provided during the POR. *Id.* at B1-12.

In a later supplemental questionnaire, Patagonik was asked to “provide documentary evidence for all warranty claims including, but not limited to, all correspondence, notes, and e-mails between Patagonik and its customers concerning warranties made in the U.K. market during the POR.” Patagonik was also asked “to explain why these are legitimate warranty claims when it

appears from the narrative that there was never such a basis for a warranty claim and that such claims were paid to appease customers rather than because of any impurities with the merchandise.” See Patagonik’s October 20, 2008 Section A, B and C Supplemental Questionnaire Response at A2-14.

In response, Patagonik provided testing documentation which indicate there was nothing at all wrong with the honey. Patagonik asserted that warranty claims may, nevertheless, arise, offering as an example that differences in the testing equipment used by Patagonik and its customer may results in different test results. See Patagonik’s Case Brief at 3. Patagonik states in such cases the honey is retested by Patagonik, though such tests rarely reveal a quality problem. Patagonik believes that even if it disagrees with the customer’s claim for a quality problem, “for commercial reasons, in order to maintain a good relationship with the customers, such disputed claims are often settled by the payment of quality claims.” See Patagonik’s October 20, 2008 Section A, B and C Supplemental Questionnaire Response at A2-14.

However, although claimed as a warranty expense, Patagonik has not placed any information on the record of this segment of the proceeding that shows such expenses to be legitimate warranty expenses. The Department will not accept such expenses as warranty claims when there is no evidence on the record of the proceeding that shows there were any issues with the quality of the honey. Furthermore, the Department has given Patagonik several opportunities to justify its claimed warranty expense, and Patagonik has been unable to do so. The Department also concurs with petitioners that that the verification report cited by Patagonik in its rebuttal brief has not been placed on the record of this segment of the proceeding and the information contained in that report cannot therefore be taken into account in this proceeding.

Patagonik proposes an alternative approach, arguing that such expenses could be classified as post-sale discounts granted to its U.K. customers. Although petitioners indicated in their rebuttal brief that Patagonik failed in its questionnaire responses to properly classify such expenses as post-sale price adjustments, the Department finds that the credit notes issued represent actual price adjustments recorded in Patagonik’s books. As a result, the Department has determined to treat these adjustments as post-sale price adjustments granted by Patagonik in order to maintain good customer relations. The Department explains its methodology of allocating the reported amounts in its final analysis memorandum for Patagonik.

Comment 5: Treatment of ACA’s Testing Expenses

ACA argues the Department erroneously classified expenses related to sampling and testing honey for contaminants as indirect selling expenses (ISEs). ACA asserts its European and Canadian customers require that specific tests be performed on the honey for contamination with antibiotics and other residues and that ACA provide copies of the test reports with the sales documentation. ACA claims its U.K. customers also require that honey be homogenized after testing to guarantee any contaminants are distributed evenly and that further testing be performed after homogenization to ensure the homogenized honey conforms to their quality standards. ACA contends its U.S. customers do not have any of these requirements.

ACA maintains it generally incurs testing expenses only if it has an open contract with a customer requiring such testing prior to closing the sales contract. 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, dated April 8, 2009 (ACA’s Case Brief), at 3, quoting Zenith Electronics Corporation v. United States (Zenith), 77 F.3d 426, 431 (Fed. Cir. 1996). Since all testing is performed pursuant to the customers’ contractual requirements, ACA claims the related expenses can be directly tied to individual sales using the lot number. As a result, ACA argues, it reported testing expenses as direct selling expenses for those sales on which it incurred testing expenses. 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. Therefore, ACA contends the Department must treat its testing and analysis expenses, as well as homogenization expenses, as direct selling expenses.

Petitioners argue ACA tests the honey that is sold to the United States in addition to the honey sold to other export markets. See Petitioners’ Rebuttal Brief at 4, citing ACA’s Case Brief at 2, ACA’s May 28, 2008 Section B Questionnaire Response (ACA’s BQR) at B-41, and ACA’s May 28, 2008 Section C Questionnaire Response (ACA’s CQR) at C-37. Petitioners assert 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 and 2005-2006 administrative reviews of honey from Argentina. See Petitioners’ Rebuttal Brief at 4-5, 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) (2003-2004 Final Results) and accompanying Issues and Decision Memorandum at Comment 2 and Honey from Argentina: Final Results of Antidumping Duty Administrative Review and Determination Not to Revoke in Part, 73 FR 24220 (May 2, 2008) (2005-2006 Final Results) and accompanying Issues and Decision Memorandum at Comment 1. In each case, petitioners state the Department determined that because honey that is tested and found to be unsuitable for the European market may be sold to the United States, testing is not sales-specific even if ACA is able to allot a specific testing cost to a specific sale. Petitioners contend there have not been any material changes in facts in the instant review and ACA has not made any new arguments. Further, petitioners argue, ACA did not appeal the 2003-2004 Final Results or the 2005-2006 Final Results. Therefore, petitioners urge the Department to continue to classify sampling and testing expenses as ISEs just as it has done in every other segment of this proceeding.

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 19 CFR 351.410(c) state direct selling expenses are those “that result from, and bear a direct relationship to, the particular sale in question.” ACA claims its testing expenses relate directly to the sales to the customers requiring those testing services and that it is able to tie the testing expenses directly to individual sales using the lot number. While the record shows ACA (or a third party, at ACA’s behest) performs testing based on each customer’s requirements and the tests performed on the honey shipped on each invoice can be tied to test certificates using the lot number, ACA has not reported the testing expenses specific to each sale in its database. Rather, ACA grouped together all of the expenses incurred to perform such customer-required testing

during the POR and allocated the total amount over the total quantity shipped during the POR. See ACA's BQR at B-35-41; ACA's CQR at C-35-37; ACA's August 19, 2008 Section B and C Supplemental Questionnaire Response at 12 and Attachments B-8 and B-19; ACA's October 23, 2008 Section A, B and C Supplemental Questionnaire Response (ACA's ABCSQR) at 14; and ACA's December 3, 2008 Section A, B and C Supplemental Questionnaire Response at 6-7.

Further, and more importantly, information on the record of this proceeding establishes that ACA's testing expenses do not necessarily result from, and relate directly to, individual sales. An examination of the chronology of the testing and ultimate sale by ACA makes this clear. After ACA purchases the honey from its suppliers, it samples the honey to determine its color and other characteristics. ACA then forms a lot of approximately 60 drums 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 another export market, ACA performs all of the tests required by that contract. If the honey does not meet the quality standards stipulated on that contract, ACA sells the honey to another customer in a market with lesser or no testing requirements, such as the United States. However, if the honey satisfies the customer's requirements, ACA then ships the honey. Alternatively, if the customer requires homogenization, ACA homogenizes the honey, performs post-homogenization testing based on the contractual requirements, and then ships the honey. See, e.g., the narrative description under PRODCODT in ACA's BQR⁶ and the flowchart in ACA's August 19, 2008 Section A Supplemental Questionnaire Response (ACA's ASQR) at Attachment A-23.

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 those testing services. However, as indicated above, if the tested honey does not meet the customer's specifications, then ACA will ship the honey to a customer in another market. Even though ACA may assign a particular lot of honey to a U.K. customer, for instance, ACA will sell that honey in another market, such as the United States, if that honey does not meet the quality standards outlined in the contract with the U.K. customer. Also, the record demonstrates ACA may ship honey originally intended for a customer in one market to a customer in another market for reasons not related to quality. For example, during the POR ACA diverted honey originally assigned to a German customer to a U.K. customer because ACA needed to load the U.K. shipment urgently. In that case, the German customer had required the honey be tested for phenol but the U.K. customer ultimately receiving the honey had not required testing for that contaminant. See ACA's ABCSQR at 2-3 and ACA ASQR at Attachments A-11 and A-22. In other words, ACA sometimes incurs testing expenses whether or not the honey is ultimately sold to a specific market or customer; thus, the market to which honey is sold is not really 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 ISEs. See Torrington Company v. United States, 68 F.3d 1347, 1353 (Fed. Cir. 1995) (Torrington I). As the Department has stated previously,

⁶ In a portion of the ACA BQR, the page numbers were omitted.

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.

See 2003-2004 Final Results and accompanying Issues and Decision Memorandum at Comment 2. Therefore, consistent with the Department's determinations in past segments of this proceeding and the Federal Circuit's decision in Torrington I, we have made no changes from the preliminary results and have continued to treat all of ACA's reported customer-required testing expenses as ISEs. See 2005-2006 Final Results and accompanying Issues and Decision Memorandum at Comment 1; see also 2003-2004 Final Results and accompanying Issues and Decision Memorandum at Comment 2 and Honey From Argentina: Final Results of Antidumping Duty Administrative Review, 69 FR 30283 (May 27, 2004) (2001-2002 Final Results) and accompanying Issues and Decision Memorandum at Comment 7, as corrected, Honey From Argentina: Corrected Final Results of Antidumping Duty Administrative Review, 69 FR 59187 (October 4, 2004). We note that in the preliminary results, we recalculated ACA's reported expenses to include the customer-required testing expenses performed by third-party laboratories with the customer-required testing expenses performed by ACA. For more information, see Preliminary Results, 73 FR at 79802, 79808 and "Analysis Memorandum for the Preliminary Results of the 2006-2007 Administrative Review of the Antidumping Duty Order on Honey from Argentina for Asociación de Cooperativas Argentinas," dated December 19, 2008, at 4-5.

Finally, with respect to ACA's claim that its homogenization expenses also should be treated as direct selling expenses, in the past the Department has found these expenses should not be classified as selling expenses since they are part of the production cost. See 2005-2006 Final Results and accompanying Issues and Decision Memorandum at Comment 1. In fact, in the instant review ACA reported these expenses as part of the variable cost of manufacturing and not as a selling expense. Thus, as in the preliminary results, we have not treated ACA's homogenization expenses as selling expenses for these final results.

Comment 6: Appropriate Margin to Assign to CIPSA

CIPSA states that in the preliminary results, the Department assigned it the non-de minimis margin calculated for a single respondent, Patagonik. For the final results, CIPSA argues the Department should weight average the three reviewed respondents' dumping margins, including zero or de minimis margins, and apply that average to CIPSA.

CIPSA claims a party subject to an antidumping duty order has the right to an annual administrative review. Citing section 751(a)(1) of the Act, CIPSA maintains there are no stated exceptions to the requirement that the Department conduct an administrative review of every company for which a review request has been received. CIPSA contends the statute further stipulates the Department "shall . . . review and determine . . . the amount of any antidumping duty" without limitation. See CIPSA's Case Brief, dated April 8, 2009 (CIPSA's Case Brief), at

2, citing section 751 (a)(1)(B) of the Act (emphasis added by CIPSA). CIPSA claims this statutory requirement is consistent with the World Trade Organization (WTO) Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (AD Agreement), which requires that the Department “shall, as a rule, determine an individual margin of dumping for each known exporter or producer.” See CIPSA’s Case Brief at 2, citing the AD Agreement at para. 6.10.

While there are no exceptions to the statutory requirement that each requesting respondent be reviewed, CIPSA claims in recent years the Department has developed the practice of choosing a subset of respondents for active review. CIPSA asserts this practice has been “justified by analogy to the explicit permission for such sampling in original investigations.” See CIPSA’s Case Brief at 3. CIPSA argues this practice began in the context of Chinese cases where reviewing hundreds of potential respondents would not be feasible, citing as an example Wooden Bedroom Furniture from the People’s Republic of China: Preliminary Results of Antidumping Duty Administrative Review, Preliminary Results of New Shipper Reviews and Notice of Partial Rescission, 72 FR 6201, 6202 (February 9, 2007) (Bedroom Furniture from the PRC). CIPSA contends the circumstances in Bedroom Furniture from the PRC differ immensely from the instant case, in which the Department determined it would review three of the four potential respondents. In leaving only CIPSA unreviewed, CIPSA maintains the Department has violated the requirement of the AD Agreement that a respondent may be denied its own calculated rate only when “the number of exporters . . . involved is so large as to make such a determination impracticable.” See CIPSA’s Case Brief at 3-4, citing the AD Agreement at para. 6.10. Thus, under the statute and AD Agreement, CIPSA argues it is entitled to a calculated margin based on its own sales.

Absent its own calculated margin, CIPSA asserts the Department must employ a methodology that is likely to approximate the actual rate it would have received had the Department computed a margin based on CIPSA’s own data. CIPSA argues the Department must carefully choose the rate it assigns to CIPSA and not mindlessly adopt a simple formula, such as the formula used to derive the all-others rate in investigations. Citing section 735(c)(5) of the Act, CIPSA states the all-others rate usually excludes de minimis, zero, and non-calculated “punitive” margins from the average margin applied to non-reviewed companies in investigations. CIPSA maintains the Department is not required to use that formula in administrative reviews since section 735(c)(5) of the Act clearly applies only to investigations. Instead, CIPSA asserts, the Department has the discretion to use “any reasonable method to establish the estimated all-others rate for exporters and producers not individually investigated” when the normal investigation methodology for determining the all-others rate is inappropriate. See CIPSA’s Case Brief at 5, citing 735(c)(5)(B) of the Act (emphasis added by CIPSA). CIPSA argues a reasonable methodology would be to include zero and de minimis margins in the estimated weighted-average margin.

CIPSA believes there is a blatant difference between the all-others rate in investigations and the average margin applied to non-reviewed companies in an administrative review. CIPSA contends the all-others rate determined in an investigation is temporary and can be disputed and modified in an administrative review. However, since the average margin assigned in an administrative review is not subject to further adjustment or review, CIPSA argues it is vital that the Department select the most precise, objective, and reasonable rate available.

CIPSA asserts zero and punitive margins are excluded from the all-others rate in investigations to prevent the all-others rate from being based on anomalous data. However, in the instant review, CIPSA contends it is the non-de minimis margin that is uncharacteristic for three reasons. First, CIPSA argues, since the imposition of the antidumping duty order on honey from Argentina the Department has reviewed numerous companies and has calculated zero margins in nearly every case. CIPSA contends the one exception is the 2.95 percent margin the Department calculated for ACA in the 2003-2004 administrative review, and maintains that margin was unusual since ACA has received a zero margin in every other review in which it has participated. Based on the case history, CIPSA claims it likely would have demonstrated a zero margin if it had been selected for review. Second, CIPSA avers, the Department has calculated a zero margin for the vast quantity of exports in the instant review. CIPSA argues the record shows the total quantity exported by ACA and Seylinco, which both received zero margins, is much larger than the quantity exported by Patagonik. CIPSA asserts one must also account for the quantity of honey entered at zero cash deposit rates by other exporters that are not being reviewed. As a result, CIPSA contends the quantity that may receive a non-de minimis margin is such a minute percentage of total exports of honey to the United States that it is statistically insignificant. Third, CIPSA maintains, the probability that its sales pattern will track the pattern of almost all other companies in the history of this case is even more evident in the context of an administrative review. CIPSA claims it did not unintentionally enter the U.S. market but instead carefully planned its business strategy with a complete awareness of the dumping law. Thus, CIPSA contends it has taken measures to make sure that it priced its single POR sale at above fair value and states that it requested the review itself in order to show its actual margin of dumping, which it believes is zero.

CIPSA asserts it should not be penalized because the Department could review only three respondents and not four in this review. CIPSA claims its actual margin reasonably can be anticipated to approximate the margin for the majority of exports and contends that assigning it the anomalous rate of one company would be arbitrary, unwarranted, and an abuse of the Department's discretion.

Petitioners contend the Department correctly determined CIPSA's dumping margin in the preliminary results. Under section 777A(c)(2) of the Act, petitioners claim the Department may limit the number of respondents it reviews when confronted with a large number of respondents and therefore the Department had the discretion not to select CIPSA in this review. Petitioners quote Torrington Co. v. United States, 68 F.3d 1347, 1351 (Fed. Cir. 1995), wherein the Federal Circuit stated that "agencies with statutory enforcement responsibilities enjoy broad discretion in allocating investigative and enforcement resources." Petitioners maintain section 777A(c)(2) of the Act does not define the word "large" and therefore the Department has broad discretion to interpret this term consistent with the statute, citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 842 (1984). Petitioners assert the Department has characterized "large" as a number greater than the resources it has to carry out a review. See Petitioners' Rebuttal Brief, citing Memorandum to Stephen J. Claeys, "Antidumping Duty Administrative Review of the Antidumping Duty Order on Honey from Argentina," dated March 20, 2008 (Respondent Selection Memorandum), at 3-4. Petitioners argue the number of respondents that is "large" will vary based on the administrative constraints faced by the Department in each

segment of a proceeding; in the instant review the Department's limited resources required it to restrict the number of respondents it could review. See Petitioners' Rebuttal Brief at 15, citing the Respondent Selection Memorandum at 4. Petitioners contend CIPSA provided no argument to suggest the Department's decision was not supported by substantial evidence.

In addition, petitioners aver CIPSA has provided no statutory support or Department precedent for its claim that since it had a right to a review as a mandatory respondent, the Department had an obligation to use an alternate methodology to apply a margin that would reasonably approximate CIPSA's own rate. Petitioners state the Court of International Trade (CIT) has rebuffed similar arguments made by non-reviewed respondents, citing Laizhou Auto Brake Equip. Co. v. United States, Slip Op. 08-71 (CIT June 26, 2008). Petitioners contend that in Laizhou, the CIT rejected the respondents' argument that the assigned margin did not represent the actual level of dumping, finding the respondents sought a standard that would require the Department to review every respondent that claimed to have filed complete sales and production data even if the Department decided to limit the number of respondents. See Petitioners' Rebuttal Brief at 16, citing Laizhou at 30 and 32-33.

Petitioners argue section 735(c)(5)(A) sets forth the methodology for assigning margins to unreviewed respondents and assert the Department has consistently applied this methodology, citing Honey From the People's Republic of China: Preliminary Results and Partial Rescission of Antidumping Duty Administrative Review, 73 FR 2890, 2893 (January 16, 2008), unchanged in Honey from the People's Republic of China: Final Results and Rescission In Part, of Aligned Antidumping Duty Administrative Review and New Shipper Review, 73 FR 42321 (July 21, 2008). Thus, petitioners contend the Department applied a margin to CIPSA based on a reasonable interpretation of the statute and there is no legal basis for altering this methodology for the final results.

Regarding CIPSA's claim that the Department had the authority to apply "any reasonable method" under 735(c)(5)(B) to assign a margin to CIPSA, petitioners argue this statutory provision is not relevant because not all of the reviewed respondents in the instant review received zero or de minimis margins. Petitioners assert CIPSA provided no support for its claim that it would be reasonable to include zero or de minimis margins in the average. As for CIPSA's argument that it should receive a zero margin based on the history of the other Argentine exporters, petitioners respond the Department has never reviewed CIPSA so there is nothing on the record or in the history of CIPSA's own behavior to warrant a zero margin. Petitioners argue CIPSA's situation is more akin to the all others rate for all unreviewed companies of 30.24 percent. Petitioners also refute the argument that CIPSA's margin is based on a statistically insignificant export quantity. Since Patagonik's export volume was large enough for the Department to review and to calculate a margin, petitioners assert this was not a "statistically insignificant" quantity on which to base a margin. Moreover, petitioners disagree with CIPSA's assertion that it carefully entered the U.S. market and can be expected to have taken measures to avoid dumping. Petitioners maintain nothing on the record suggests this is a reasonable assumption and the fact that the Department often calculates positive margins for respondents in administrative reviews makes such an assumption completely groundless. Finally, petitioners claim CIPSA's argument that since it requested a review it likely would have received a zero margin is pure speculation and fails based on the fact that respondents in

administrative reviews often receive positive margins. Based on CIPSA's shipment quantity, petitioners assert a more reasonable assumption is that CIPSA anticipated it would not be reviewed and would receive a zero margin based on the behavior of the other respondents. Since the Department has never reviewed CIPSA before, petitioners maintain CIPSA could have failed verification or had major deficiencies in its response. If CIPSA had been reviewed, petitioners argue there is a greater possibility that it would have received a margin higher than 0.72 percent (*i.e.*, Patagonik's margin in the preliminary results) than a zero margin.

In conclusion, petitioners contend it is completely reasonable for the Department to assign CIPSA a margin in line with the Department's stated practice in effect at the time CIPSA requested a review. Petitioners argue it would be arbitrary and unfair to make any change in that practice now simply because CIPSA dislikes the outcome.

Department's Position: Section 777A(c)(1) of the Act directs the Department to calculate individual weighted-average dumping margins for each known exporter and producer of the subject merchandise. However, where it is not practicable to examine all known exporters and producers of subject merchandise because of the large number of such companies, section 777A(c)(2) of the Act permits the Department to limit its examination to either (1) a sample of exporters, producers, or types of products that is statistically valid based on the information available at the time of selection; or (2) exporters and producers accounting for the largest volume of subject merchandise from the exporting country that can be reasonably examined. In the instant review, the Department faced resource constraints and therefore limited its examination to the Argentine exporters/producers accounting for the largest volume of subject merchandise that could be reasonably examined. *See* Respondent Selection Memorandum at 3-4. Consequently, the Department selected the four largest exporters/producers for which a review had been requested, noting these four companies represented a significant percentage of the total export volume of Argentine honey. *Id.* at 5. The Department stated it would apply the weighted-average margins of these four companies to the remaining company subject to this review but not chosen for individual examination (*i.e.*, CIPSA). *Id.*

Contrary to CIPSA's argument, the Department's respondent-selection practice did not arise in the context of Chinese cases with hundreds of potential respondents. Rather, as noted above, when the large number of exporters or producers makes it impracticable for the Department to examine all such companies, the Department has had a longstanding practice of exercising its discretion to limit the number of respondents individually examined. *See, e.g., Floral Trade Council v. United States*, 775 F.Supp. 1492 (CIT 1991). In the instant review, resource constraints prevented us from examining every respondent which requested a review. Thus, the Department selected the largest four exporters/producers of subject merchandise which collectively accounted for the preponderance of Argentine honey exported to the United States during the POR. While this review ultimately was rescinded for one of the four respondents selected for review,⁷ at no point after the partial rescission did CIPSA argue that it should be selected as a mandatory respondent. Furthermore, prior to its case brief, CIPSA did not raise any objections to the methodology the Department stated it would use in assigning a margin to CIPSA.

⁷ *See Honey from Argentina: Notice of Partial Rescission of Antidumping Duty Administrative Review*, 73 FR 33975 (June 16, 2008).

We note the statute and the Department's regulations do not directly address the establishment of a rate to be applied to individual companies not selected for examination where the Department limited its examination in an administrative review pursuant to section 777A(c)(2) of the Act. Generally, we have looked to section 735(c)(5) of the Act, which provides instructions for calculating the all-others rate in an investigation, for guidance when calculating the rate for respondents we did not examine in an administrative review. Section 735(c)(5)(A) of the Act instructs that we are not to calculate an all-others rate using any zero or de minimis margins or any margins based on total facts available. Thus, in cases involving limited selection based on exporters accounting for the largest volume of trade, the Department's practice has been to weight-average the margins for the selected companies, excluding zero and de minimis rates and rates based entirely on adverse facts available. In rare exceptions where the margins for all mandatory respondents are zero, de minimis or based entirely on facts available, the statute provides that the Department will use a "reasonable method" for assigning the rate to non-selected respondents. See section 735(c)(5)(B) of the Act. One method that section 735(c)(5)(B) of the Act contemplates as a possibility is "averaging the estimated weighted average dumping margins determined for the exporters and producers individually investigated." The Department has affirmed the selection of a "reasonable method" to use when the margins of the mandatory respondents are zero, de minimis, and/or based on total facts available "must be made on a case-by-case basis and would depend on the facts of the case." See Brake Rotors From the People's Republic of China: Final Results of 2006-2007 Administrative and New Shipper Reviews and Partial Rescission of 2006-2007 Administrative Review, 73 FR 32678 (June 10, 2008) and accompanying Issues and Decision Memorandum at Comment 1.

In the instant review, we calculated margins for three respondents: ACA, Patagonik, and Seylinco. In the preliminary results, we calculated zero percent margins for both ACA and Seylinco and a margin of 0.72 percent for Patagonik. Patagonik's margin has changed to 0.77 percent for the final results. Using section 735(c)(5)(A) of the Act as guidance, we will exclude zero margins from the average margin applied to CIPSA. Since the sole remaining margin for Patagonik is not zero, de minimis, or based entirely on facts available, we applied Patagonik's margin to CIPSA in the preliminary results, and continue to do so for the final results. The existence of a non-de minimis margin here makes it unnecessary for us to use section 735(c)(5)(B) of the Act as guidance to utilize a "reasonable method" to determine the appropriate margin to apply to CIPSA. The methodology we have used in the instant case is in keeping with past determinations. For example, in the 2005-2006 administrative review of stainless steel bar from India, the Department selected as mandatory respondents the two exporters accounting for the largest quantity and value of exports to the United States during the POR. As in this case, the Department excluded the de minimis margin calculated for one of the two respondents, assigning the margin calculated for the other respondent to the companies not selected for individual examination. See Notice of Final Results and Final Partial Rescission of Antidumping Duty Administrative Review: Stainless Steel Bar from India, 72 FR 51595, 51597 (September 10, 2007).

Finally, we disagree with each of CIPSA's arguments that the non-de minimis margin calculated for Patagonik in this review is anomalous. First, we note that CIPSA is incorrect in stating the Department has only calculated one non-zero margin in the administrative reviews of honey

from Argentina. In addition to the 2.95 percent margin calculated for ACA in the 2003-2004 administrative review, the Department also calculated above-de minimis margins for Nexco S.A. and Seylinco in the 2001-2002 administrative review. See 2001-2002 Final Results, as corrected, Honey From Argentina: Corrected Final Results of Antidumping Duty Administrative Review, 69 FR 59187 (October 4, 2004). Also, in the 2002-2003 administrative review, the Department assigned a margin based on total adverse facts available to respondent Nutrin S.A. See Honey from Argentina: Final Results of Antidumping Duty Administrative Review, 70 FR 19926 (April 15, 2005). Second, we find CIPSA's argument that the quantity of exports on which CIPSA's margin is based is "statistically insignificant" to be unpersuasive. As petitioners point out, Patagonik's export volume was large enough for the Department to review and to compute a margin. Third, as for CIPSA's claim that it can be assumed CIPSA took measures to avoid dumping or that its record is in line with the other respondents' histories, the Department has no evidence on the record regarding CIPSA's actual experience nor has the Department ever reviewed CIPSA. As a result, the Department is unable to place any reliance on these assumptions, as they are unsupported by any evidence of record.

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 _____

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

Date